

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARILEE BROWN; MARILOU
BROWN; AND GREGORY J.
BROWN;

Appellants,

vs.

ST. MARY'S REGIONAL MEDICAL
CENTER; TAMMY EVANS
(ERRONEOUSLY NAMED AS TAMI
EVANS); PREM REDDY, M.D.;
TANZEEL ISLAM, M.D.; SRIDEVI
CHALLAPALLI, M.D.; AND MARK
MCCALLISTER, M.D.,

Respondents.

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Case No.: 81434 - COA

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record for Appellants Marilee Brown, Marilou Brown, and Gregory Brown (“Appellants”) certifies that there are no persons or entities as described in NRAP 26.1(a), that must be disclosed. This representation is made in order for the judges of this court to evaluate possible disqualifications or recusals.

Appellants are individual nongovernmental parties.

The law firm whose partners or associates are expected to appear for Appellants is Kemp Jones, LLP.

DATED this 16th day of August, 2021.

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JURISDICTIONAL STATEMENT

This is an appeal from the Second Judicial District Court's Order Granting Motion to Dismiss Plaintiffs' Complaint for Failure to Comply with NRS 41A.071. Notice of Entry of the final judgment was served on June 10, 2020. Appellants timely filed a Notice of Appeal on June 26, 2020, as required by NRAP 4(a)(1). *See* ROA 3:341, 3:357.¹ This Court has jurisdiction pursuant to NRAP 3A(b)(1).

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court under NRAP 17(a)(13) because it addresses an issue of first impression involving the United States and Nevada constitutions. This appeal is further presumptively retained by the Supreme Court under NRAP 17(a)(14) because it raises as a principal issue of a question of statewide public importance regarding the constitutionality of NRS 41A.071's expert affidavit requirement.

ISSUES PRESENTED

1. Does NRS 41A.071's expert affidavit requirement violate the separation of powers doctrine?
2. Does NRS 41A.071's expert affidavit requirement deny Appellants open access to the courts?

¹ Citations to the Record on Appeal will use the format "ROA 3:357" to signify Volume 3, page 357.

3. Do any of Appellants' allegations sound in ordinary negligence such that they are not subject to NRS 41A.071's expert affidavit requirement?

STATEMENT OF THE CASE

Beverly Morris Brown (hereinafter "Brown") died on March 5, 2019, as a result of improper medical treatment she received in December 2018 and February 2019 as a patient and in the care of Respondents St. Mary's Regional Medical Center, Tammy Evans (a/k/a Tami Evans), Prem Reddy, M.D., Tanzeel Islam, M.D., Sridevi Challapalli, M.D., and Mark McCallister, M.D. ("Respondents").

After her untimely death, Brown's children (Appellants herein) tried numerous times to speak with Respondents regarding the improper treatment and lack of communication that caused their mother's death, to no avail. A family friend informed Appellant Marilee Brown (daughter of the deceased) that the statute of limitations was about to run on her mother's claim if she did not file an action. Accordingly, Appellant Marilee Brown hastily prepared a *pro se* complaint, wholly unaware of NRS 41A.071's affidavit requirement, merely to preserve her mother's claims. The Complaint largely alleges that the negligent actions of Respondents resulted in Brown's death.

The Respondents moved to dismiss the case on the basis that it did not comply with NRS 41A.071's expert affidavit requirement. The district court granted the

motion and the Brown family appealed on their mother's behalf. The Respondents again moved to dismiss the case for various reasons and the Supreme Court recommended the case to the pro bono program.

Appellants request that this Court hold that the onerous expert affidavit requirement of NRS 41A.071 is unconstitutional, at least as applied to them as indigent *pro se* litigants, as these onerous requirements encroach upon the judiciary's authority to make the rules and procedures for the courts, and because the expert affidavit requirement denies indigent claimants access to the courts. This Court would not be the first to make that holding. However, even if the Court chooses to uphold the statute's preclusive effect on some of the Respondents' claims, there are some claims that sound in ordinary negligence and were, therefore, never subject to NRS 41A.071's affidavit requirement, in which case the Court should reverse and remand this case to the district court for further proceedings on the claims that sound in ordinary negligence.

STATEMENT OF FACTS

I. Factual Background

Beverly Brown ("Brown") had chronic medical conditions of cardiovascular disease. *See e.g.* ROA 2:6 (discussion of Brown's existing cardiac conditions). In December 2018, Brown was hospitalized at Saint Mary's Regional Medical Center ("St. Mary's") for a cardiovascular condition. ROA 2:3, 2:6–7. While at St. Mary's,

doctors removed Brown from her lifesaving medications for a procedure without consulting with her primary cardiologist, even though the doctor was in the same building. ROA 2:7. Brown 's cardiologist would have advised against this and kept her on these medications unless necessary if he had been consulted. ROA 2:7.

On or about February 20, 2019, Brown was again admitted to St. Mary's for low oxygen levels. ROA 2:8. The original 2018 procedure and removal of medication resulted in a building of fluid in Brown's lungs that could no longer be removed by procedure. ROA 2:8. Brown's second hospitalization lasted eight days due to a procedural error that was further complicated by taking Brown off lifesaving medication. ROA 2:8. During this time, Brown's family asked multiple times if St. Mary's was still administering Brown's life-saving medications and staff assured her family she was. ROA 2:8. The family only learned Brown was, in fact, not being administered her medications when they received the discharge information. ROA 2:8.

While at St. Mary's, Brown's condition became dire. Despite late specialist intervention at the demand of the family, detrimental damage was done. ROA 2:8. Additionally, Brown now had pneumonia and they placed her in a room with a seriously infected patient, which only exacerbated the condition. ROA 2:8, 2:10. However, Brown was still discharged on February 28, 2019 leaving only with oxygen. ROA 2:10.

Within three days of discharge, Brown suffered a stroke caused by cranial blockage, usually prevented by the medication Brown's family had begged doctors to keep her on. ROA 2:10–11. She was admitted to Renown Regional Medical Center ("Renown"). ROA 2:11. While at Renown, St. Mary's failed to timely fax vital documentation requested by Renown for assisting in care and treatment of Brown. ROA 2:11. After being intubated, Brown passed away on March 5, 2019. ROA 2:12.

From April 2019 to the filing of lawsuit, Brown's family attempted to address issues with St Mary's to which they, at first, received no response. ROA 2:14. During this time, St. Mary's refused to return phone calls; nor would they discuss matters when the family physically went to the hospital. ROA 2:5. Eventually, Brown's family was referred to the Risk Management department. ROA 2:14. This time the department stated it would investigate the matter and respond within 45 days. *Id.* Finally, the Appellants were notified that no ADR programs could be accessed unless a formal civil complaint was filed. ROA 2:14. At the same time, the Appellants learned that the statute of limitations was about to run on Brown's claim if they did not file a legal action. Thus, Brown's family had no choice but to file this civil action in order to engage the court and utilize other programs to facilitate resolution of this matter.

II. Procedural Background

Based upon the history set forth above, Respondent Marilee Brown hastily prepared a complaint, wholly unaware of NRS 41A.071's affidavit requirement, merely to preserve her family's legal rights in light of impending running of the statute of limitations for their claims. ROA 2:1–17.

The Respondents moved to dismiss the Complaint on the basis that it did not comply with NRA 41A.071's expert affidavit requirement. ROA 2:34. The district court granted the motion and the Brown family appealed on their mother's behalf. ROA 3:328, 3:357. The Respondents again moved to dismiss the case for various reasons and the Supreme Court recommended the case to the pro bono program.

SUMMARY OF THE ARGUMENT

The Appellants challenge the constitutionality of NRS 41A.071's medical expert affidavit requirement in medical malpractice cases, in particular as applied to an indigent *pro se* plaintiff. The requirement violates the separation of powers, as it interferes with the judiciary's obligation to set its own procedural rules. The requirement places unreasonable barriers to the guaranteed access to the courts. Even if this Court disagrees that the statute is unconstitutional, the Appellants are entitled to relief because at least one of their claims sounds in ordinary negligence, not professional negligence that would require an accompanying medical expert affidavit.

ARGUMENT

I. Standard of Review

This Court “rigorously review orders granting NRCP 12(b)(5) motions to dismiss, presuming all alleged facts in the complaint to be true and drawing all inferences in favor of the plaintiff.” *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008). Dismissing a complaint is appropriate “only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.” *Id.* at 228, 181 P.3d at 672. This Court reviews legal conclusions of the trial court *de novo*. *Id.*

II. The District Court’s Application of NRS 41A.071 Violates the Separation of Powers

NRS 41A.071’s expert affidavit requirement impermissibly violates the separation of powers doctrine because it conflicts with Nevada’s notice pleading standard and, therefore, encroaches on the judiciary’s authority to promulgate court rules and procedures.

The Nevada State Constitution contains a formal separation of powers clause, stating that:

The powers of the Government of the State of Nevada shall be divided into three separate departments, — the Legislative, — the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any

functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nev. Const. Art. 3, § 1(1). And “the judiciary has the inherent power to govern its own procedures” so long as they do not violate the constitution or “abridge, enlarge or modify any substantive right.” *State v. Conner*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983). Although the legislature can enact legislation that impacts the courts, “the legislature may not enact a procedural statute that conflicts with a pre-procedural rule, without violating the doctrine of separation of powers.” *Id.* Thus, where the legislature’s rule conflicts with existing procedural rules, the existing judicial procedural rule supersedes the legislative rule rendering it invalid. *Id.* The United States Supreme Court has even stated:

This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital... namely, to preclude a commingling of these essentially different powers of government in the same hands.... If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows ... that each department should be kept completely independent of the others.

Wimley v. Reid, 991 So. 2d 135, 137-38 (Miss. 2008) (citing *O’Donoghue v. United States*, 289 U.S. 516 (1933)).

Additionally, NRS 41A.071 is in conflict with Nevada Rules of Civil Procedure 8 and 9 because it establishes an additional pleading requirement on medical malpractice claimants, not otherwise required by other tort claimants. NRS 41A.071 provides that a complaint alleging medical malpractice must be filed with

“an affidavit, supporting the allegations contained in the action, submitted by a medical expert who practices ... in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.” NRS 41A.071 is “a preliminary procedural rule” that essentially creates a heightened pleading standard for only medical malpractice claimants that conflicts with the Nevada Rules of Civil Procedure. *Zohar v. Zbiegin*, 334 P.3d 402, 406 (Nev. 2014) (quoting *Borger v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 120 Nev. 1021, 1027, 102 P.3d 600, 605 (2004)).

For example, NRCP 8(a) states that a pleading shall contain “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks.” There is nothing in NRCP 8 that makes any mention of an expert affidavit requirement for what are otherwise only required to be notice pleadings; to the contrary, NRCP 8(e) states “[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.”

NRCP 9 governs the pleading of special matters. NRCP 9(b) expressly defines under what circumstances a plaintiff will be required to meet a heightened pleading standard. These circumstances include “fraud, mistake, condition of the mind.” *Id.* Even Rule 9’s heightened pleading standard does not require an affidavit or certificate of merit. This is because the purpose of the heightened pleading

requirement was to ensure that plaintiffs alleging fraud do so with enough particularity to put defendants on notice of the claims against them. *See Risinger v. SOC LLC*, 936 F. Supp. 2d 1235, 1241 (D. Nev. 2013); Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Taken together, NRS 41A.071 conflicts with NRCP 8, as it places an additional pleading requirement on medical malpractice claimants that is not otherwise required by this Court. And it is not the legislatures' role to create procedural rules for this Court.

When it enacted NRS 41A.071, the Nevada Legislature impermissibly altered Nevada's long-standing legal history as a “notice-pleading state,” to a merit-based pleading standard when alleging professional negligence. *W. States Const., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Black's Law Dictionary defines “notice” as “1. To give legal notice to or of. 2. To realize or give attention to.” *NOTICE*, Black's Law Dictionary (10th ed. 2014). Black's Law Dictionary defines “meritorious” as “deserving of esteem or reward 2. (Of a case, etc.) worthy of legal victory; having enough legal value to prevail in a dispute.” *MERITORIOUS*, Black's Law Dictionary (10th ed. 2014). Therefore, the standard created by NRS 41A.071 requires claimants to not only plead with specificity and particularity, putting the defendants on notice of the alleged conduct, but also to prove to the court that they

can likely prevail prior to obtaining discovery. In other words, the plaintiffs must be able to prove their case before ever gaining access to the courts.

NRS 41A.071 is by definition procedural, and not substantive. For example, the Washington Supreme Court held that the state's affidavit statute is procedural because it addresses how to file a claim to enforce a right provided by law. *See e.g. Hiatt v. S. Health Facilities, Inc.*, 68 Ohio St.3d 236, 238, 626 N.E.2d 71 (Ohio 1994) ("Since the conflict involves the form and content of the complaint to initiate a medical malpractice case, it is a procedural matter."). NRS 41A.071 does not address the primary rights of either party; it deals only with the procedures to bring before the judiciary a dispute concerning those rights. Therefore, it is a procedural law and will not prevail over the conflicting court rules.

While it is understandable that some cases may necessitate a heightened pleading standard, such rules should be left to the discretion of the judiciary. For example, the Arkansas Supreme Court found that the affidavit requirement of their medical malpractice statute was unconstitutional for this exact reason, finding the affidavit requirement conflicted with Rule 3 of the Arkansas Rules of Civil Procedure. *Summerville v. Thrower*, 369 Ark 231, 239, 253 S.W.3d 415, 420 (2007). There, the affidavit requirement required an expert affidavit to be filed within 30 days after the Complaint is filed. The decision noted that Ark. Statue Ann. § 16-144-209 was enacted and was justified "in the Emergency Clause on the basis that lower

medical-malpractice insurance costs will follow.” *Summerville* at 420. Therefore, the Arkansas Supreme Court concluded the statute was a procedural rule; and, accordingly, it fell within the domain of the court rules. *Id.* Ultimately, the Arkansas Supreme Court held the law was directly in conflict with the Arkansas Court Rule 3 Commencement of Action because it conflicted with Ark. R. Civ. P. 11(b) allowing for a safe harbor for a plaintiff to correct any deficiencies in their Complaint. *Id.* at 420–22.

Likewise, the Supreme Court of Mississippi held that a statute containing a requirement that a complaint be accompanied by a certificate or waiver was a procedural law. *Wimley v. Reid*, 991 So.2d 135, 135 (Miss. 2008). Therefore, the Supreme Court of Mississippi deemed the statute unconstitutional as the legislature must “refrain from promulgating procedural statutes which require dismissal of a complaint, and particularly a complaint filed in full compliance with the Mississippi Rules of Civil Procedure.” *Id.* at 138. The Mississippi Court reasoned that “a complaint, otherwise properly filed, may not be dismissed, and need not be amended, simply because the plaintiff failed to attach a certificate or waiver.” *Id.* Thus, the Mississippi certificate statute conflicted with Rule 8 of Mississippi's rules of civil procedure which requires “a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled.... Rule 8(e) provides that averments in the complaint be

‘simple, concise, and direct,’ and that ‘[n]o technical forms of pleading... are required.’ *Id.* at 138–39. The Supreme Court of Mississippi even stated that the statutory requirement was totally inconsistent with Mississippi’s Rule 8(f) requirement that “pleadings shall be so construed as to do substantial justice.” *Id.* at 138.

In addition, the Washington Supreme Court held the “[m]edical malpractice claims are fundamentally negligence claims, rooted in the common law tradition and are thus not exempt from the rules of civil procedure.” *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wash. 2d 974, 982, 216 P.3d 374, 378 (2009). The *Putman* court went on to hold that Washington’s expert affidavit requirement conflicted with Rules 8 and 11 of that state’s Superior Court Civil Rules in violation of the separation of powers and invalidated the statute as unconstitutional. *Id.* The Washington Supreme Court emphasized that the statute violated the separation of powers because it conflicted with the Rule 8 “regarding pleading requirements and thereby encroaches on the judiciary’s power to set court rules.” *Id.* at 377. The Washington Supreme Court even acknowledged that the Washington State Constitution does not contain a formal separation of powers clause, like Nevada’s State Constitution does; yet, the Court declared the “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” *Id.*

Like Nevada's Rule 8, Rule 8 of the Washington Rules of Civil Procedure “requires only ‘a short and plain statement of the claim’ and a demand for relief in order to file a lawsuit.” *Putman* at 379. Rule 11 of the Washington Rules of Civil procedure states that a complaint “need not, but may be, verified or accompanied by affidavit.” Wash. Super. Ct. Civ. R. 11. Though less specific, Washington's Rule 11 is similar to NRCP 8(e), which states that “[n]o technical forms of pleading or motions are required.” Because Washington's medical malpractice statute created an additional pleading requirement for medical malpractice claimants, the Washington Supreme Court found that the statute conflicted with the pre-existing rules of civil procedure. As such, the Washington Supreme Court correctly held that the statute violated the premise behind separation of powers, and the Nevada Supreme Court should come to the same conclusion.

This argument, that this type of procedural rule is for the judiciary, not the legislature, to make, is furthered by the fact that several states have implemented the affidavit of merit requirement through the judiciary, rather than through the legislature. *See e.g.* Tex. Civil Practices & Remedies Code Ann. § 74-351; Ohio R. Civ. P. 10; Pa. R. Civ. P. 1042.3; N.Y. Civil Practice & Rules Law § 3012-a; Md. Courts & Judicial Proceedings Code Ann. § 3-2A-04. Alternatively, several states have implemented a similar, but less burdensome requirement that the attorney may certify through affidavit that he has reviewed the records, consulted an expert, and

can assure the court that the claim has merit. Colo. Rev. Stat. § 13-20-602; Conn. Gen. Stat. § 52-190a; Miss. Code Ann. § 11-1-58; Vt. Stat. Ann. tit. 12, § 1042; Va. Code § 8.01-20.1. These less burdensome requirements alleviate concerns as to whether professional negligence claims have merit, while not encroaching on the powers of the judiciary. *Washoe Med. Center v. Second Jud. Dist. Crt.*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (quoting Minutes of the Meeting of the Assembly Comm. on Medical Malpractice Issues, 18th Special Sess. (Nev., July 30, 2002) (“The Nevada Trial Lawyers Association ‘believed there needed to be a deterrent from cases being filed in order to get a quick settlement,’ and that the affidavit requirement would protect against this by ensuring that medical records would be reviewed by an expert before a case was filed.”)).

NRS 41A.071 encroaches upon the powers granted to judiciary by the Nevada Constitution by imposing a stricter, more burdensome procedural standard on professional negligence claimants, stripping the court of discretion in evaluating professional negligence complaints. *State v. Conner*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983) (“The judiciary has the inherent power to govern its own procedures” so long as they do not violate the constitution or “abridge, enlarge or modify any substantive right...The legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers.”). Because NRCP 8(e) states “[n]o technical forms of pleading

or motions are required,” and the rules do not carve out a separate standard for professional negligence claims, NRS 41A.071's affidavit requirement conflicts with the Nevada Rules of Civil Procedure violating the separation of powers clause of the Nevada Constitution. *Id.*; *see also* Nev. Const. art. III, § 1. NRCP 8(e) should, therefore, supersede NRS 41A.071 rendering it invalid.

III. The District Court’s Dismissal Violates Respondents’ Right to Due Process

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). This right of access to courts “includes the right of discovery authorized by the civil rules.”

The United States Supreme Court has consistently upheld the notion that there is a “fundamental constitutional right of access to courts.” *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). Nevada has also made a fundamental constitutional commitment to guaranteeing that disputes may be resolved in courts: “The right of trial by Jury shall be secured to all and remain inviolate forever.” Nev. Const. Art. I, § 3. The Nevada Supreme Court has continuously held that it is the duty of the judicial body under the Nevada Constitution to “preserve the right of

citizens to access to the courts, whether indigent or not.” *Sullivan v. Eighth Judicial Dist. Court*, 111 Nev. 1367, 1371, 904 P.2d 1039, 1041 (1995).

A. NRS 41A.071 Violates Due Process Because It Bars Access to the Courts Unless Plaintiffs to Engage in Discovery-Like Activity as a Prerequisite to Filing a Complaint.

The certificate of merit requirement of NRS 41A.071 is a significant obstacle to a medical malpractice claimant’s access to the courts. The statute ultimately requires such plaintiffs to retain an expert witness who must form an opinion on a fact in issue without the benefit of any discovery. This is made obvious from the stated intent of the legislature in passing NRS 41A.071: to ensure that medical malpractice claims were “meritorious.” *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). Therefore, NRS 41A.071 unconstitutionally requires medical malpractice claimants to meet a higher pleading standard than all other tort plaintiffs by requiring proof of the merits of their case prior to the benefit of court-sanctioned discovery.

This is constitutionally problematic because discovery is often crucial to plaintiffs’ tort claims. Nevada discovery rules permit the parties to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence,

description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” NRCP 26. The Ninth Circuit has explained that “[a]t the pleading stage without the benefit of discovery, the facts may be largely in the exclusive possession of Defendants.” *In re GlenFed, Inc. Sec. Litig.*, 11 F.3d 843, 848 (9th Cir. 1993) (amended Dec. 22, 1993, opinion vacated on reh'g, 42 F.3d 1541 (9th Cir. 1994)).

For this reason, NRS 41A.071’s imposition of a pre-litigation expert witness opinion places an arbitrary barrier to medical malpractice claimants’ access to the court by ignoring the crucial role that discovery plays in complex medical malpractice tort claims. Furthermore, an expert witness in the normal course of litigation often may need to review hospital and other medical records in the possession of adverse parties in order to form an opinion on the appropriate standard of care, whether that standard was met, and which defendant bore responsibility for discharging those obligations. However, a plaintiff obviously would not have access to that information without the benefit of the discovery process; and without such evidence, an expert's affidavit could be insufficient, essentially rendering it useless.

For example, the Washington Supreme Court struck down an affidavit requirement similar to NRS 41A.071, reasoning that:

Requiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. Obtaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed. Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts. It is the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people.

Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wash. 2d 974, 979, 216 P.3d 374, 377 (2009).

Despite the constitutional right of access to the courts, and in particular for indigent parties, in enacting NRS 41A.071, the Nevada legislature has effectively inverted the proper and customary litigation process to effectively require medical malpractice plaintiffs to retain an expert witness who must form an opinion on an ultimate fact issue without any benefit of discovery. NRS 41A.071, therefore, presents a constitutionally impermissible barrier to the right of access to the courts, by denying medical malpractice plaintiffs the opportunity to discover facts that are a prerequisite to obtaining a certificate of merit.

**B. NRS 41A.071 Violates the Constitutional Right of Access to the Courts
by Creating an Unreasonable Monetary Barrier.**

NRS 41A.071 also violates the fundamental right of access to courts by imposing overly burdensome additional costs on plaintiffs bringing medical

malpractice claims. The costs and fees of expert witnesses in general can be distressing. Additionally, acquiring expert affidavits is extremely time-consuming and costly, and plaintiffs typically must bear the significant expense and burden of obtaining complete medical records and arranging for an expert to review them. *See, e.g., Zeier v. Zimmer, Inc.*, 2006 Okla. 98, 152 P.3d 861, 873 (2006) (estimating the additional cost between \$500 to \$5,000 and in one instance \$12,000, creating “an unconstitutional monetary barrier to the access to courts” and declaring Oklahoma's certificate requirement unconstitutional).

Accordingly, the Supreme Court of Oklahoma struck down the state's affidavit requirement and reasoned that:

[T]he additional certification costs have produced a substantial and disproportionate reduction in the number of claims filed by low-income plaintiffs. The affidavit of merit provisions front-load litigation costs.... They also prevent meritorious medical malpractice actions from being filed. The affidavits of merit requirement obligates plaintiffs to engage in extensive pre-trial discovery to obtain the facts necessary for an expert to render an opinion resulting in most medical malpractice causes being settled out of court during discovery.

Id. The United States Supreme Court has also recognized that unreasonable monetary barriers to the fundamental right of access to the courts are unconstitutional. *See Metzler v. Lecraw*, 402 U.S. 936 (1971). There, the Court ruled that denying indigent defendants' access to the courts for not being able to pay court

filing fees was an unconstitutional monetary barrier that infringed on indigent civil claimants' rights to access the court.

In addition, NRS 41A.071 often requires plaintiffs to hire expert witnesses where none might otherwise be required. For example, claimants often do not need an expert to explain that a nurse should not have given the patient the wrong drug. *See e.g. Estate of Mary Standing Bull Curtis*, 15 IBIA 213, 1987 WL 119780 (Dept. of Int. Board of Indian Appeals, June 12, 1987). However, plaintiffs will not necessarily know or understand that. This statute requires those plaintiffs to make a judgment call and forego the expert, potentially to their detriment, or hire an expert needlessly. A difficult task for indigent claimants.

The medical malpractice affidavit requirement ultimately precludes Nevada residents from accessing the courts for adjudication of their claims because the statute allows for dismissal of legitimately injured plaintiffs' claims based solely on procedural and monetary, rather than substantive, grounds. Such non-substantive dismissal of otherwise meritorious claims does not have the effect reducing the problems associated with meritless malpractice litigation as the legislature intended. The expenses related to fulfilling the affidavit requirement prior to filing the action can, and as in this case, in fact do, easily act as a bar to a lawsuit by a limited-income plaintiff. Furthermore, the expert affidavit requirement often creates duplicate expenditures, especially if the expert becomes unavailable for trial and another must

be retained, or if more than one expert is needed to establish both the standard of care at issue and the breach of that standard. As such, NRS 41A.071 puts an unconstitutional monetary barrier that infringes on plaintiffs' rights to access the courts, and this Court should correct that manifest injustice by ruling that NRS 41A.071 is unconstitutional.

C. NRS 41A.071 Violates the Equal Protection Clause of the United States and Nevada Constitutions.

NRS 41A.071 also creates a monetary barrier to access the court system, and then applies that barrier only to a specific subclass of potential tort victims: those who are the victims of medical negligence. This statute specifically singles out tort plaintiffs who are victims of medical negligence. The result is a law that creates an unconstitutional and undue financial barrier on access to the courts, in violation of the Equal Protection Clauses of the United States and Nevada Constitutions.

The Fourteenth Amendment of the United States Constitution forbids an enactment that "den[ies]... any person... equal protection of the laws." U.S. Const., Amend. XIV, § 1. The Nevada Constitution requires that all laws be "general and of uniform operation throughout the State." Nev. Const. Art. IV, § 21. "The standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard." *Barrett v. Baird*, 111 Nev. 1496,

150, 908 P.2d 689, 698 (1995) (overruled on other grounds by *Lioce v. Cohe* 124 Nev. 1, 174 P.3d 970 (2008)). “The strict scrutiny standard is applied to equal protection claims involving fundamental rights.” *Gaines v. State*, 116 Nev. 359, 998 P.2d 166 (2000). “Under the strict scrutiny approach, legislation should be sustained only if it is narrowly tailored and necessary to advance a compelling state interest.” *Id.* NRS 41A.071 does not pass the constitutional strict scrutiny test.

This Court has repeatedly recognized that it is the duty of the judicial body under the Nevada Constitution to “preserve the right of citizens to access to the courts, whether indigent or not.” *Sullivan*, 904 P.2d 1039 at 1041. NRS 41A.071 prevents the exercise of this right by placing a significant economic cost on a medical malpractice claimant seeking redress for wrongful injury. It is clear that NRS 41A.071 infringes upon the fundamental right of access to the courts, thus warranting the application of strict scrutiny.

The Nevada legislature intended for NRS 41A.071 to “lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion.” *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005). However, these purposes do not satisfy a “compelling” governmental interest, and NRS 41A.071 is not necessary to further that interest. Moreover, the law is not narrowly tailored to achieve that objective with the least intrusion upon fundamental rights.

Accordingly, a North Carolina court recognized that:

[w]hile doctors may have a legitimate interest in reducing the number of frivolous malpractice actions filed against them, their interest does not outweigh the State's interest in having these disputes resolved in a court of law. The means by which this resolution is accomplished is by lawsuits. [If those lawsuits are barred, the] end result would be the limitation of free access to the courts.

Petrou v. Hale, 43 N.C. App. 655, 260 S.E.2d 130, 135 (1979).

Nevada clearly has a superseding and fundamental interest in resolving legal disputes in courts of law, and that interest is coupled with the constitutional guarantee of access to the courts. Additionally, as previously stated, there are other states that have implemented statutes much less restrictive than NRS 41A.071, often permitting limited discovery, or having an attorney certify that the case has merit. Colo. Rev. Stat. § 13-20-602; Conn. Gen. Stat. § 52-190a; Miss. Code Ann. § 11-1-58; Vt. Stat. Ann. tit. 12, § 1042; Va. Code § 8.01-20.1. Thus, NRS 41A.071 fails the strict scrutiny test, and should be rendered unconstitutional.

IV. Even If This Court Upholds NRS 41A.071, It Should Remand the Ordinary Negligence Claims to the District Court.

A. Some of the Respondents' Allegations Sound in Ordinary Negligence and Do Not Require Compliance With NRS 41A.071.

While an action for *professional negligence* requires an expert witness affidavit in compliance with NRS 41A.071 such an affidavit is not required for claims of *ordinary negligence*. In order to determine whether a claim sounds in “professional negligence,” courts must evaluate whether the claim “involve[s]

medical diagnosis, judgment, or treatment, or [is] based on [the] performance of nonmedical services.” *Szymborski v. Spring Mtn. Treatment Center*, 133 Nev. 638, 641, 403 P.3d 1280, 1284 (2017). If the alleged breach involves “medical judgment, diagnosis, or treatment,” it is likely a claim for medical malpractice. *Id.* at 642. Thus, “if the jury can *only* evaluate the plaintiffs claim after presentation of the standards of care by a medical expert, then it is a [professional negligence] claim.” *Id.* (emphasis added). “If, on the other hand, the reasonableness of the health care provider’s actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence.” *Id.* at 642, 403 P.3d at 1285. The distinction between professional and ordinary negligence can be subtle, and the court must look to the “gravamen or substantial point or essence” of each claim to make the necessary determination. *Id.* at 642-43, 403 P.3d at 1285 (internal quotation marks omitted).

Recently, this Court recognized the common knowledge exception to the affidavit statute. *See Estate of Mary Curtis*, 136 Nev. 350, 466 P.3d 1263 (2020). There, this Court explained that a “court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or [professional negligence]: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both

these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern [professional negligence] actions.” *Id.* (quoting *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 471 Mich. 411, 684 N.W.2d 864, 871 (Mich. 2004)).

Here, Appellants allege that the hospital staff was in negligent in failing to forward critical documents to Renown Regional Medical Center, the hospital Brown was admitted to upon the stroke caused by her negligent care at St. Mary’s. This delay resulted in Renown’s treatment suffering from a lack of critical patient medical history and, therefore, hindered Renown’s ability to provide her with proper treatment shortly before her death.

Appellants’ allegation that Respondents were negligent in failing to forward critical medical documents did not raise any questions of medical judgment beyond the realm of common knowledge or experience. The Respondents’ obligation to simply send documents requires no professional judgment, it is simply an obligation to follow common procedure. In reviewing Appellants’ claim related to the failure to send patient medical history, any lay juror could evaluate Respondents’ negligence based on the juror’s own common knowledge and experience. *See Szymborski* at 642, 403 P.3d at 1285 (recognizing that being able to evaluate a claim based on common knowledge and experience means “the claim is likely based in ordinary negligence”).

Accordingly, Appellants request that this Court reverse the district court's decision as to their claims to the extent they sound in ordinary, and not professional, negligence.

V. Conclusion

For the reasons set forth above, Appellants request that this Court reverse the district court's order dismissing their claims.

Dated this 16th day of August, 2021.

Respectfully submitted,

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(3), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the Record on Appeal where the matter relied on is to be found. I certify that this brief complies with NRAP 32(a)(4)–(6) because it contains 6,158 words. I understand I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of August, 2021.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on August 16, 2021, a true and correct copy of the foregoing **APPELLANT’S OPENING BRIEF** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court’s E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the E-Flex system.

Dated this 16th day of August, 2021.

By: /s/ Pamela Montgomery
An employee of Kemp Jones, LLP