**IN THE COURT OF APPEALS OF THE STATE OF NEVADA**

MARILEE BROWN, MARILOU BROWN GREGORY J. BROWN (FOR BEVERLY M. BROWN'S FAMILY),

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 McALLISTER, M.D.

Respondents.

**Case No. 81434-COA**

Dist. Ct. Case No. CV20-00822



APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; THE HONORABLE KATHLEEN DRAKULICH, DISTRICT JUDGE

# RESPONDENT MARK McALLISTER, M.D.'S ANSWERING BRIEF

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## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of respondent's stock: None.

2. Names of all law firms whose attorneys have appeared for respondent Mark McAllister, M.D., (including proceedings in the district court) who are expected to appear in this court:

LEMONS GRUNDY & EISENBERG

3. If using a pseudonym, the litigant's true name: None.

DATED: October 14, 2021

*/s/ Alice Campos Mercado*

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## JURISDICTIONAL STATEMENT

This is an appeal from an order dismissing appellants' complaint for medical malpractice/professional negligence for failure to comply with NRS 41A.071. The dismissal order disposed of all claims and all parties and is thus a final judgment pursuant to NRAP 3A(b)(1). Notice of entry of the final order was served on June 10, 2020. Appellants filed a timely Notice of Appeal on June 26, 2020, in accordance with NRAP 4(a)(1). This court has jurisdiction under NRAP 3A(b)(1).

## ROUTING STATEMENT

This is an appeal from an order of dismissal pursuant to NRS 41A.071. This appeal does not raise a principal issue of first impression, as similar issues have previously been addressed by Nevada's appellate courts, including the constitutionality of NRS 41A.071, which appellants raise for the first time in the opening brief. *See, e.g., Peck v. Zipf,* 133 Nev. 890, 407 P.3d 775 (2017).

Accordingly, this appeal was properly transferred to the Court of Appeals and the issues in this case are properly heard and decided by that court.

## I.

## STATEMENT OF ISSUES

1. The district court properly dismissed this professional negligence action because the complaint was not supported by an expert affidavit as required by NRS 41A.071.

2. The constitutionality of NRS 41A.071 has previously been upheld by the Nevada Supreme Court.

## II.

## STATEMENT OF THE CASE[1]

On March 3, 2020, plaintiffs/appellants Marilee Brown and Marilou Brown[2] filed a complaint for medical negligence against Respondent Mark McAllister, M.D. and other health care providers. The action is based upon medical treatment rendered to Beverly Brown in or around December 2018 and February 2019. *R.App. 1, 3-4.* The complaint did not include an expert affidavit as required by NRS 41A.071.

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[1] The Court permitted, but did not require, the parties to cite the Record on Appeal transmitted by the district court clerk. For ease of reference, a single-volume Respondents' Joint Appendix will be submitted on behalf of all respondents. This brief will cite to the appendix as "*R.App*." followed by the page number. The Record on Appeal ("ROA") will be cited if a document is mentioned but not contained in the appendix. Appellant's Opening Brief will be cited as "*AOB*."

[2] On May 26, 2020, the district court granted the Browns' request to add Gregory Brown as a party. *R.App. 180-81.* The appellants will be referred to collectively as "the Browns."

Accordingly, on April 3, 2020, Dr. McAllister filed a motion to dismiss for failure to comply with NRS 41A.071. *R.App. 26.* Prior thereto, on March 26, 2020, a motion to dismiss had been filed on behalf of Respondents St. Mary's Regional Medical Center, Tammy Evans and Prem Reddy, M.D. (hereafter, "the Hospital Defendants"). *R.App. 18.*

On April 13, 2020, appellants filed one opposition to the defendants' motions to dismiss. *R.App. 31*. Dr. McAllister filed his reply on April 16, 2020. *R.App. 68.* The Hospital Defendants filed their reply on April 20, 2020. *R.App. 75.*

On April 28, 2020, appellants filed a "Request for Hearing," which purported to refute the positions of the defendants, including Dr. McAllister. *R.App. 111*. On the same day, Dr. McAllister filed a motion to strike the purported "Request for Hearing" because it was effectively an unauthorized surreply. *R.App. 120-21*. On May 6, 2020, appellants filed an opposition to Dr. McAllister's motion to strike (titled "Opposition to Defendant McAllister's Dismissal Motion"). *R.App. 139.*

On June 8, 2020, the district court entered an Order Granting Motion to Dismiss Plaintiffs' Complaint for Failure to Comply with NRS 41A.071, which dismissed the entire action. *R.App. 200-08*. Notice of entry of the order granting defendants' motions to dismiss was served on June 10, 2020. *R.App. 210-11.* The Notice of Appeal was filed on June 26, 2020. *R.App. 223.*

## III.

## STATEMENT OF FACTS

This Answering Brief will set forth the facts salient to the issues that pertain to Dr. McAllister, who is separately represented.

### A. The Parties

Plaintiffs/Appellants Marilee, Marilou and Gregory Brown are the adult children of decedent Beverly M. Brown ("Mrs. Brown"), who was a patient at St. Mary's Regional Medical Center. *R.App. 1-2, 180-81*.

Respondent Mark McAllister, M.D., a diagnostic radiologist, rendered medical care to Mrs. Brown during her hospitalization at St. Mary's. *R.App. 2-3.*

The other respondents in this appeal are described as St. Mary's Regional Medical Center; Tami Evans (Director of Medical Services/Risk Management); Prem Reddy, M.D.; Tanzeel Islam, M.D. (hospitalist); and Sridevi Challapalli, M.D. (cardiologist). *R.App. 2*.

### B. Medical Facts

According to the complaint, the patient, Beverly Brown, had chronic medical conditions, including cardiovascular disease. *R.App. 6:13-14.* She was admitted to St. Mary's Regional Medical Center from December 12 through December 14, 2018, for her cardiovascular condition and low oxygen level. *R.App. 3:7, 7:13.* According to the complaint, Mrs. Brown's lungs were "aspired," in the course of which her

blood-thinning medication was withheld by the "hospitalist" and "interventional radiologist" without consulting Mrs. Brown's cardiologist. *R.App. 7:13-16.*

The complaint alleges that Mrs. Brown was again hospitalized at St. Mary's from February 20 through February 28, 2019. *R.App. 3:7, 8:1-3.* The complaint again alleges that the "hospitalist" and the "interventional radiologist" removed Mrs. Brown from lifesaving medication that impacted her health without first consulting with her cardiologist. *R.App. 3:8-9.* The complaint also alleges that on or about February 21, 2019, the "Interventional Radiologist's pulmonary procedure error result[e]d in the Hospitalist's continued removal of patient's necessary life saving medication." *R.App. 3:12-13.* Under the heading "ISSUE AT HAND FOR MEDICAL NEGLIGENCE/MALPRACTICE," the complaint further alleges that the February hospitalization was lengthened "as a result of a radiological pulmonary procedure error." *R.App. 8:6-7.* Continuing, the complaint alleges that Mrs. Brown experienced buildup of plural fluid in her lungs that could no longer be removed "due to the Interventional Radiologist's error." *R.App. 3:13-14.*

In a letter from St. Mary's addressing the Browns' concerns, the hospital more clearly describes the medical treatment and decisions asserted by the Browns. The withholding of medication in December involved withholding of Eliquis, a blood thinner, "to allow for a thoracentesis to drain the fluid accumulating in her lungs," which was replaced with Lovenox, a "shorter acting blood thinner." *R.App. 61.* The

"pulmonary error" alleged by the Browns reportedly referred to the puncturing of Mrs. Brown's lung during the thoracentesis procedure, which is a risk associated with the procedure. *R.App. 61 (attachment 3 to Plaintiffs' Opposition); R.App. 8:16-19.* Mrs. Brown was discharged from St. Mary's hospital on February 28, 2019.

On March 3, 2019, Mrs. Brown was transported to Renown Regional Medical Center. The complaint alleges that during Mrs. Brown's hospitalization at Renown, "St. Mary's Hospital failed to timely fax vital documentation requested by Renown for assisting in the care and treatment of patient." *R.App. 5:7-8.* Continuing, the complaint alleges that this "delinquency" of not faxing records in a timely manner "impact[ed] vital care and treatment and contributed to patient's death on 3/5/19." *R.App. 5:8-9.* These allegations are now the sole basis underlying appellants' argument that an expert affidavit was not required. *See AOB 26.*

The Browns attribute Mrs. Brown's death to the medical decisions and errors alleged in the complaint. *R.App. 4-5, 12 (¶2), 13:12-14.*

## C. Procedural Facts

### *1. The Complaint*

On March 3, 2020, the Browns filed a "Civil Complaint" against the Hospital Defendants and Dr. McAllister, the "interventional radiologist." *R.App. 1, 2:22-26.* Although the Browns subsequently attempted to recast their allegations under non-

medical theories to avoid the application of NRS 41A.071, the complaint reveals that this is an action for medical malpractice.

Specifically, the complaint alleges that plaintiffs consulted with counsel and were advised that a "medical malpractice case" had to be filed within the one-year statute of limitations. *R.App. 14:9-10.* Further, the complaint's "Statement of Facts" begins with the title "Main Medical Malpractice Information Summary." *R.App. 3.* And the sole cause of action plainly alleges medical malpractice. *R.App. 14.*

The complaint alleges that the defendants committed "medical negligent actions to include medicinal, treatment, judgment," which they allege resulted in the suffering and wrongful death of Mrs. Brown. *R.App. 2:5-7 and 14:26 to 15-3.* Further demonstrating that their claim was for medical malpractice based on medical treatment and judgment, the complaint alleges that "Defendants did commit Medical Negligent Actions," specifically including "Medical Negligence/Malpractice." *R.App. 2:8-10 and 15:8-10.* The complaint further alleges that "as a result of the Medical Negligence and Malpractice Actions by Defendants," the plaintiffs seek judgment against the defendants. *R.App. 15:22-25.*

The complaint was filed without the expert affidavit required by NRS 41A.071, which the Browns have acknowledged. *R.App. 35.*

### *2. Defendants' Motions to Dismiss under NRS 41A.071*

On March 26, 2020, the Hospital Defendants filed a Motion to Dismiss for Failure to Comply with NRS 41A.071. *R.App. 18.* That motion demonstrated that the claims asserted in the complaint arose from allegations of medical malpractice relating to the care and treatment rendered to Beverly Brown. *R.App. 20-21.* It also showed that the complaint did not involve non-medical services. *R.App. 22.* The Hospital Defendants asserted that because the allegations sounded in professional negligence, an expert affidavit was required by NRS 41A.071, and because the complaint did not include an affidavit, the complaint was void ab initio, requiring its dismissal. *R.App. 22-24, citing Washoe Medical Center v. Second Judicial Dist. Court*, 122 Nev. 1298, 148 P.3d 790 (2006).

On April 3, 2020, also on the authority of *Washoe Medical Center,* Defendant Mark McAllister, M.D.'s Motion to Dismiss was filed. *R.App. 26.* Dismissal was also sought for failure to comply with NRS 41A.071. *R.App. 26-29.* In his motion, Dr. McAllister showed the allegations against him were for medical malpractice related to care and treatment he provided to plaintiffs' decedent in December 2018 and February 2019, and that the allegations were not supported by an expert affidavit. *R.App. 27, 29.* Citing to *Washoe Medical Center*, Dr. McAllister's motion showed that dismissal was mandatory because the complaint did not comply with NRS 41A.071. *R.App. 27-29.*

### *3. Plaintiffs' Opposition to Defendants' Motions to Dismiss*

On April 13, 2020, the Browns submitted a single 24-page opposition (exclusive of exhibits), responding to both defense motions to dismiss. *R.App. 31*. In their collective opposition, plaintiffs included a request for "Amendment/ Clarification to Their Civil Complaint." *R.App. 31-54.* The Browns' opposition did not dispute that a medical expert affidavit was not included with the complaint. Nor did they argue that an affidavit was not required or that the affidavit requirement NRS 41A.071 was unconstitutional. Instead, they acknowledged that they could not secure a medical expert and asked the district court to extend the time for them to obtain a medical expert affidavit. *R.App. 33:4-5, 35*.

In addition, and evidently recognizing their need for an expert affidavit, the Browns sought to circumvent NRS 41A.071 by asking the district court for permission to amend the complaint to add "non-medical claims" that were "nexused" to the medical claims. *R.App. 35:18, 39:5-17, 40:3*. Significantly, none of the purported "non-medical claims" the Browns sought to add appeared to implicate Dr. McAllister. *R.App. 39:5-17, 40:3; see also AOB 26*. In fact, other than in the caption, the Browns' lengthy opposition did not mention Dr. McAllister. *R.App. 31-53.* Despite the prolix opposition brief, it was devoid of any facts or law that allowed their medical negligence action to proceed as against Dr. McAllister. The same is true of Appellants' Opening Brief. *See AOB 3-5, 24-26.*

### *4. Defendants' Replies in Support of Motions to Dismiss*

Dr. McAllister filed his reply to plaintiffs' opposition on April 16, 2020. *R.App. 68.* The reply pointed out that in the entirety of their opposition, plaintiffs did not demonstrate compliance with NRS 41A.071, or that they were excused from doing so as to Dr. McAllister. *R.App. 69-70.* Dr. McAllister showed that plaintiffs' assertions that the complaint included "non-medical claims" as a means to avoid the application of NRS 41A.071 were refuted by the very allegations in the complaint, which alleged medical errors by the defendants. *R.App. 70-71.* Because plaintiffs' allegations of medical negligence/malpractice would require expert proof, which they lacked, their purported "non-medical claims" sounded in professional negligence and required compliance with NRS 41A.071. *R.App. 70-71.*

Dr. McAllister's reply also showed that instead of demonstrating compliance with NRS 41A.071, the Browns argued the merits of their claim and asked the district court for relief that was not permitted under Nevada law, including extending the time to obtain an expert and to amend the complaint. *R.App. 72.* Based on the record before the district court, Dr. McAllister reiterated that the complaint must be dismissed for failure to comply with NRS 41A.071. *R.App. 73.*

On April 20, 2020, the Hospital Defendants filed their Reply in Support of Motion to Dismiss. *R.App. 75.* Like Dr. McAllister, the Hospital Defendants argued that plaintiffs' allegations charged the health care providers with negligence in

connection with the medical services rendered to Mrs. Brown, thus requiring compliance with NRS 41A.071. *See R.App. 77-80.*

### *5. The District Court's Order Dismissing the Complaint*

On June 8, 2020, the district court entered an Order Granting Motion to Dismiss Plaintiffs' Complaint for Failure to Comply with NRS 41A.071. *R.App. 200-208*. The district court addressed the legal standards for motions to dismiss and the requirements of NRS 41A.071. *R.App. 201-202.* The district court then identified the definition of professional negligence and noted that a claim for injuries resulting from negligent medical treatment sounds in medical malpractice. *R.App. 202, citing Szymborski v. Spring Mountain Treatment Center,* 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017).

The district court proceeded to discuss the parties' substantive arguments. The district court analyzed the arguments advanced by the Hospital Defendants, followed by an analysis of the plaintiffs' arguments. *R.App. 203-205*. The court correctly summarized the complaint's allegations, noting that the complaint repeatedly alleged that the defendants committed "Medical Negligent Actions, to include Medicinal, Treatment, Judgment, protocol, Etc [sic] errors." *R.App. 205.* The district court also noted that "all of the allegations contained in the Complaint directly involve medical judgment, diagnosis, or treatment that Mrs. Brown allegedly received or should have received, which the Nevada Supreme Court has held means the claim sounds in

professional negligence." *R.App. 205, citing Szymborski.* Based on its review of the complaint, the district court noted that, contrary to plaintiffs' assertions, there were no factual allegations in the complaint that were non-medical and each of their allegations were inextricably tied to a claim of professional negligence. *R.App. 205-06.* The district court's order provided a detailed analysis of the purported "non-medical claims." *R.App. 206.*

Specifically addressing the Browns' claims of "lack of communication" (which the Browns contend was a non-medical claim that implicated Dr. McAllister), the district court found that "the only usage of the word 'communication' in the Complaint deals with 'the communication between providers and patients/ patients' families so as to ensure the improvement of quality care, healthcare improvement and less Medical Medicinal, Judgment mistakes/error that lead to the deteriorating medical condition, suffering and preventable death of patients as what happened in this case . . . ." *R.App. 206, quoting complaint at 16:26-17:2.* The district court thus found that the failure of communication alleged in the complaint was "rooted in professional negligence," and did not "form an independent basis for an ordinary negligence claim, such that an expert affidavit would not be required in this case." *R.App. 206.*

The only other "non-medical claim" salient to this appeal (as it is the only one analyzed in Appellants' Opening Brief) is premised on the Browns' allegations that

St. Mary's failed to fax documentation to Renown Regional Medical Center during Mrs. Brown's March 2019 hospitalization. Addressing plaintiffs' arguments on that issue, the district court wrote:

> As for the failure to expedite medical documentation in this case, the Nevada Supreme Court has held "allegations of negligent maintenance of medical records are properly characterized as medical malpractice." *Jones [v. Wilkin],* 111 Nev. [1335] at 1338 [95 P.2d 166, 168 (1995)]. Failure to expedite the medical documents is pertinent to the diagnosis and treatment of Ms. Brown and therefore does not state a claim for ordinary negligence. *Szymborski,* 133 Nev. at 642.

*R.App. 206 (bracketed citation added).*

The district court also found that the complaint did not plead separate claims for relief related to the purported non-medical claims. It observed that the headings throughout the complaint largely referenced "medical malpractice," "medical negligence" or both, but none related to "ordinary negligence." *R.App. 207.*

Accordingly, the district court found that the complaint stated a claim for professional negligence to which NRS 41A.071 applied, and that plaintiffs admitted the complaint did not contain a medical expert affidavit. *R.App. 207.* It reasoned:

> As noted above, the Nevada Supreme Court has held that "a complaint filed without a supporting medical affidavit is void ab initio and must be dismissed. Because a void complaint does not legally exist, it cannot be amended . . . and an NRS 41A.071 defect cannot be cured through amendment" as well as pointing out that the word "shall" is NRS 41A.071 "is mandatory and does not denote judicial discretion."

*R.App. 207, quoting Washoe Medical Center,* 122 Nev. at 1301-02, 1303.

Having found that the complaint was void ab initio pursuant to NRS 41A.071, the district court's order granted the Hospital Defendants' Motion to Dismiss and dismissed the case. *R.App. 208.* Although the district court did not expressly address Dr. McAllister's separate motion to dismiss, which was pending at the time the dismissal order was issued, the district court dismissed the entire case, "to include all motions that are pending or have been submitted to this Court." *Id.* Notice of entry of the order was served on June 8, 2020. *R.App. 210-11*.

## IV.

## SUMMARY OF ARGUMENT

This appeal presents yet another attempt by professional negligence plaintiffs and their attorneys to eviscerate the protections afforded by NRS 41A.071 to health care providers in medical negligence cases. In the court below, the self-represented plaintiffs sought to circumvent the application of NRS 41A.071 by arguing they had asserted non-medical claims even though their complaint showed otherwise. In this appeal, their attorney seeks to eradicate NRS 41A.071 altogether by arguing for the first time on appeal that the statute is unconstitutional. Appellants' constitutional arguments are not new nor are they meritorious, as established by Nevada case law.

This professional negligence action was properly dismissed without prejudice and without leave to amend on the authority of NRS 41A.071 and *Washoe Medical Center* and its progeny. The Browns' belated attempt to assert non-medical claims

to avoid the affidavit requirement of NRS 41A.071 was correctly rejected by the district court. The district court's finding was supported by the facts before it, which included the allegations in the complaint. The Browns' own pleading demonstrated that their sole claim was for medical negligence based on the medical treatment rendered to Mrs. Brown. Therefore, the district court correctly found that the complaint was subject to the requirements of NRS 41A.071. And because the Browns admittedly failed to comply with NRS 41A.071, dismissal was mandated without leave to amend, based on the authority of *Washoe Medical Center*.

Appellant's Opening Brief has not demonstrated error in the district court's factual findings or legal analysis. The only challenge to the district court's order is to the finding that the alleged delay in transmitting the St. Mary's records to Renown sounded in professional negligence and thus required compliance with NRS 41A.071. Yet, the opening brief does not analyze the district court's finding or the law on which its determination is based. *AOB 24-26.* Even if this issue had been properly analyzed, reversal is not warranted as to Dr. McAllister because the allegation of delayed transmission of records is not asserted against Dr. McAllister.

Unable to find error in the district court's analysis, appellants resort to specious constitutional challenges to NRS 41A.071, including separation of powers, due process and equal protection challenges. The same or similar arguments have previously been addressed and rejected by the Nevada Supreme Court.

The district court's rulings are in conformity with established Nevada precedent regarding the application of NRS 41A.071 in professional negligence cases. Therefore, the Order Granting Motion to Dismiss for Failure to Comply with NRS 41A.071 may properly be affirmed.

## V.

## ARGUMENT

### A. STANDARDS OF REVIEW

The court reviews de novo a district court order granting an NRCP 12(b)(5) motion to dismiss, "accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief." *Szymborski,*133 Nev. at 640, 403 P.3d at 1283, citing *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.,* 128 Nev. 406, 409, 282 P.3d 727, 730 (2012) (internal quotation marks omitted). "[W]hether a claim sounds in medical malpractice or negligence is a legal question." *Turner v. Renown Regional Medical Center,* 2020 WL 1972790, *1, Docket Nos. 77312, 77841 (Nev., April 23, 2020) (unpublished disposition) (citations omitted).

The court also employs de novo review of "questions of constitutional interpretation and statutory construction." *Peck,* 133 Nev. at 892, 407 P.3d at 778.

The court reviews the denial of leave to amend for an abuse of discretion. *Anderson v. Mandalay Corp.*, 131 Nev. 825, 832, 358 P.3d 242, 247 (2015).

## B. THE DISTRICT COURT PROPERLY DISMISSED THE ACTION FOR LACK OF AN EXPERT AFFIDAVIT

The bulk of Appellants' Opening Brief consists of a multi-faceted constitutional challenge to NRS 41A.071, contending that the statute is unconstitutional because it violates separation of powers and the equal protection and due process clauses of the United States and Nevada constitutions. Appellants then proceed to argue that the "common knowledge" exception to NRS 41A.071 applies – an argument that was not raised below – without demonstrating error in the district court's determination that the complaint did not comply with NRS 41A.071. As the application of NRS 41A.071 is central to this appeal, this brief will begin by analyzing the propriety of the district court's order, after which it will address each of appellants' constitutional challenges.

### 1. Standards Applicable to Motion to Dismiss Under NRCP 12(b)(5)

"A complaint should only be dismissed for failure to state a claim if 'it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.'" *Szymborski*, 133 Nev. at 641, 403 P.3d at 1283, quoting *DeBoer*, 128 Nev. at 410, 282 P.3d at 730. "In contrast, NRS 41A.071 provides that '[i]f an action for medical malpractice . . . is filed in the district court, the court shall dismiss the action, without prejudice, if the action is filed without a[ ] [medical expert affidavit.'"

*Szymborski*, 133 Nev. at 641, 403 P.3d at 1283 (alterations in original; citation and footnote omitted).

**2. Plaintiffs were Required to Comply with NRS 41A.071's Affidavit Requirement to Support their Medical Negligence Action**

NRS 41A.071 provides:

> If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that:
>
> 1. Supports the allegations contained in the action;
>
> 2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;
>
> 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
>
> 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

The statute requires a district court to dismiss a professional negligence complaint if it lacks an expert affidavit. As noted by the district court, and contrary to the Browns' argument below, the word "shall" in NRS 41A.071 "'is mandatory and does not denote judicial discretion.'" *R.App. 207, citing Washoe Medical Center*, 122 Nev. at 1303, 148 P.3d at 793; *compare R.App. 33 (arguing that "shall" is not mandatory)*. A complaint filed without an expert affidavit is void and cannot be amended to cure the dereliction. *Id.* at 1304, 148 P.3d at 794.

The Browns admitted, and the district court found, that "the Complaint does not contain a medical expert affidavit." *R.App. 207; see also R.App. 33:3-6.* The complaint did not include a claim for "ordinary negligence," or assert that the plaintiffs were excused from complying NRS 41A.071. Instead, the Browns asked for additional time to obtain an expert affidavit, arguing that "shall" is permissive and that the district court had discretion to give them time to obtain a medical expert's affidavit. *R.App. 33:3-6; 35:1-2.* The Browns have evidently abandoned that argument on appeal and now claim that their complaint falls within the "common knowledge" exception to the affidavit requirement. *See AOB 24-26.*

Based on the unambiguous statutory language and controlling Nevada case law, it cannot reasonably be argued that the district court erred in dismissing the action for failure to comply with NRS 41A.071. Lacking a basis for doing so, appellants seek to avoid the application of NRS 41A.071 by contending that the complaint asserted a claim for ordinary negligence and was within the "common knowledge" exception to the affidavit requirement. *AOB 24, 26.* Appellants' arguments do not salvage their claim, especially as to Dr. McAllister.

Initially, the Browns have not shown that the district court erred in finding that their complaint was for medical negligence and required compliance with NRS 41A.071. Appellants' entire argument on this issue fails to even mention the district court's order or its reasoning. *See AOB 24-26.* The Browns' silence in this

regard may be because the complaint explicitly challenges the medical care rendered by Dr. McAllister and the other health care providers, whom they accuse of "medical negligence" or "medical malpractice." *See, e.g., R.App. 2, 3, 8, 9, 10, 12, 14-16.*

As specifically addressed in the district court's order, the complaint alleged that "Defendants did commit Medical Negligent actions, to include Medicinal, Treatment, Judgment, protocol, Etc [sic] errors against the Plaintiffs which led to the Wrongful Suffering and Death of their mother . . . ." *R.App. 205.* The district court noted that this language or substantially similar language was "repeated three times in this section of the Complaint." *R.App. 205, citing page 14 of the complaint; see also R.App 207.* The district court also noted that "all of the allegations contained in the Complaint directly involve medical judgment, diagnosis, or treatment that Ms. Brown allegedly received or should have received, which the Nevada Supreme Court has held means the claim sounds in professional negligence." *R.App. 205.*The district court's analysis is in conformity with *Szymborski,* which the district court repeatedly cited in its order. *See, e.g., R.App. 205-06.*

In *Szymborski,* the Nevada Supreme Court explained the differences between medical versus non-medical claims:

> Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice. [Citations omitted.] By extension, if the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert, then it is a medical malpractice claim. [Citations omitted.] 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. [Citation omitted.]

*Szymborski*, 133 Nev. at 641-42, 403 P.3d at 1284, citing, *inter alia*, *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev. 544, 376 P.3d 167 (2016).

The district court applied *Szymborski* to the purported "non-medical claims" of failing to follow protocol, lack of communication, age discrimination/jeopardy to the elderly, negligence in jeopardizing other's safety by exposing them to infectious persons, and failure to expedite the transmission of medical records. *R.App. 205*. The district court proceeded to thoroughly analyze each of the purported "non-medical claims," finding that they were based on allegations of professional negligence and thus required compliance with NRS 41A.071. *Id. at 206-07*. Based on the allegations in their complaint and the repeated references to "medical malpractice," and "medical negligence" the district court found appellants' efforts to advance "non-medical claims" unavailing to salvage their incurably defective complaint or to excuse compliance with NRS 41A.071. *R.App. 206-07*.

Appellants' Opening Brief does not address, much less demonstrate error in, the district court's analysis or its findings. Instead, appellants cursorily argue that "some" of the Browns' allegations sound in ordinary negligence and do not require compliance with NRS 41A.071. *AOB 24-26*. The only "non-medical claim" referenced in appellants' brief is based on the assertion that "the hospital staff" was

negligent in failing to forward records to Renown Regional Medical Center. They contend that this allegation falls within the "common knowledge" exception to the affidavit requirement. *AOB 26.*

Appellants' argument does not demonstrate reversible error, especially as to Dr. McAllister, who is not "hospital staff" and is not alleged to have been involved in the transmittal of St. Mary's records.[3] *R.App. 5:7-8.* The issue regarding the transmittal of medical records arose in March of 2019, when Mrs. Brown was hospitalized at Renown. *R.App. 40:8 (¶5)*. There is no allegation or suggestion in the complaint, the opposition or even in the opening brief that Dr. McAllister was Mrs. Brown's treating physician at that time, or that he had any involvement in receiving, or responding to, a request for medical records. *R.App. 5:7-9 (complaint); R.App. 40:8 (opposition); AOB 26.*[4]

Nor does Appellants' Opening Brief address the district court's finding that the alleged failure to expedite the medical documentation is properly characterized

[3] The complaint alleges: "St. Mary's Hospital failed to timely fax vital documentation requested by Renown for assisting in the care and treatment of patient." *R.App. 5:7-8.* The complaint further alleges that the alleged delay "impact[ed] vital care and treatment and contributed to patient's death on 3/5/19." *R.App. 5:8-9.*

[4] Indeed, on this point appellants' argument lacks any citations to the record in violation of NRAP 28(e)(1), and thus need not be considered. *See Allianz Ins. Co. v. Gagnon,* 109 Nev. 990, 997, 860 P.2d 720 (1993) (court need not consider contentions unaccompanied by citations to the record).

as medical malpractice, and that the failure to expedite medical documents is pertinent to the diagnosis and treatment of Mrs. Brown and therefore is not a claim for ordinary negligence. *R.App. 206.* The opening brief does not even address the case law on which the district court relied in reaching its conclusion, namely, *Jones v. Wilkin,* 111 Nev. 1335, 1338, 95 P.2d 166, 168 (1995). Therefore, this court may decline to consider appellants' argument. *See Edwards v. Emperor's Garden Restaurant,* 122 Nev. 317, 330, n.38, 130 P.3d 1280, 1288 n.8 (2006) (if an appellant neglects to fulfil his or her responsibility to cogently argue and present relevant authority in support of his or her appellant concerns, this court will not consider the claims).

Should the court nevertheless consider this argument, it may summarily reject it because, as pointed out in the district court's order, the complaint does not assert a separate claim for ordinary negligence or any claim other than medical malpractice. *See R.App. 207.* As noted by the district court:

> To the extent Plaintiffs are now contending that claims for ordinary negligence were pled, they have failed to set forth the necessary elements of those claims and/or factual allegations sufficient to support those claims denying Defendants "adequate notice of the nature of the claim and the relief sought" in violation of *Hay*.

*R.App. 207, quoting from Hay v. Hay,* 100 Nev. 196, 678 P.2d 672 (1984). Appellants' Opening Brief does not address the district court's findings on this point, thus waiving the issue. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161

n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."); *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (the court will not consider argument that are not cogently argued and supported by relevant authority).

Because the allegations of failing to expeditiously fax medical records to Renown is only asserted against St. Mary's, Dr. McAllister will defer to the Hospital Defendants for further analysis on this issue. Suffice it to say, that appellants have not demonstrated the applicability of their sole argument to Dr. McAllister, nor have they demonstrated error in the district court's ruling.

The only purported "non-medical" allegation that the Browns asserted against "the interventional radiologist" (Dr. McAllister) was for the alleged "lack of communication" with Mrs. Brown's cardiologist. *See R.App. 3, 141:18-24.* As to the "lack of communication" allegations, the district court found that the allegations sounded in professional negligence. Specifically, the district court found:

> [T]he only usage of the word "communication" in the Complaint deals with "the communication between providers and patients/patients' families so as to ensure the improvement of quality care, healthcare improvement and less Medical Medicinal, Judgment mistakes/error that lead [sic] to the deteriorating medical condition, suffering and preventable death of patients as what happened in this case . . . ."

*R.App. 206, quoting complaint at 16:26-17:2; see also R.App. 6:8-10.* The district court thus found that the failure of communication alleged in the complaint was "rooted in professional negligence," and did not "form an independent basis for an

ordinary negligence claim, such that an expert affidavit would not be required in this case."[5] *R.App. 206.*

Appellants' Opening Brief does not address the district court's finding on this point. *See AOB 24-26.* Thus, appellants have waived any challenge to the district court's finding on this issue. *See Powell,* 127 Nev. at 161 n.3, 252 P.3d at 672 n.3 ("Issues not raised in an appellant's opening brief are deemed waived."); *Edwards,* 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38 (the court declined to consider appellant's argument regarding the district court's dismissal of his claims where the appellant neglected to address it in his brief).

Should this court nevertheless consider this issue, Dr. McAllister submits that the district court correctly concluded that the purported "non-medical" allegation of "lack of communication" was rooted in professional negligence and therefore required compliance with NRS 41A.071. *R.App. 206.* The district court's determination is supported by *Szymborski, supra,* because the gravamen of the complaint is for medical malpractice, as shown above.

[5] The district court reached a similar conclusion regarding the allegations that protocols were not followed. It reasoned that an evaluation of whether the medical professionals followed established protocols "necessarily requires expert testimony to explain the standard of care." Continuing, the district court wrote: "The protocol Plaintiffs' claim was not followed related to the amount and type of medication administered to Ms. Brown which is rooted in professional negligence, as the Complaint contends that the physicians prescribed the medication." *R.App. 206, citing Complaint at 3:22-27 (R.App. 3:22-27).* Appellants do not address this finding, either. *See AOB 24-26.*

Additionally, the district court's determination is in accord with *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 350, 466 P.3d 1263 (2020). That case instructs:

> "[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.*, at 356, 466 P.3d at 1269 (alterations in original), quoting *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 684 N.W.2d 864, 871 (Mich. 2004).

The district court, guided by controlling Nevada precedent, applied the framework from *Estate of Curtis* and *Szymborski* to this case and properly concluded that this is an action for professional negligence governed by NRS Chapter 41A.

First, this claim pertains to an action that occurred within the course of a professional relationship. This is evident from the complaint, which alleges that "the interventional radiologist" erred in performing a pulmonary procedure and failed to consult with the patient's cardiologist. *See, e.g., R.App. 3.*

Second, the complaint challenges Dr. McAllister's medical treatment, medical decisions, and medical judgment. The complaint is critical of Dr. McAllister for allegedly committing a "pulmonary procedure error" and allegedly failing to make

collaborative medical decisions with the patient's cardiologist regarding her medications and in rendering treatment. *R.App. 3, see also R.App. 141:18-24.* Because these allegations allege a breach of duty involving medical judgment, diagnosis or treatment, they sound in professional negligence. *See Szymborski, supra.* As the district court correctly found, communication among patients and providers is rooted in professional negligence. *R.App. 206.* Certainly, whether the standard of care required Dr. McAllister to communicate or collaborate with other health care providers requires specialized knowledge and is not within the common knowledge of jurors. Expert testimony is required. *See Estate of Curtis,* 136 Nev. at 356, 466 P.3d at 1269.

Manifestly, despite the labels plaintiffs belatedly sought to use to recast their medical malpractice claim, the complaint undeniably asserts a professional negligence action, for which plaintiffs must establish a breach of the standard of care through expert testimony. *See* NRS 41A.100. As such, the Browns were required to comply with NRS 41A.071. The applicability of NRS 41A.071 does not depend on the label the plaintiff has placed on a claim, but on the nature of the claim. *See, e.g., Humboldt Gen. Hosp., supra,* where the plaintiff sought to avoid the affidavit requirement by alleging the intentional tort of battery by a health care provider. In rejecting the argument, the court looked at the nature of the allegations not at the

"battery" label placed on the claim, and held that an expert affidavit was required to support the claim. *Id.*, 132 Nev. at 550, 376 P.3d at 172.

The same is true here. The Browns are seeking damages based upon their criticism of several health care providers based on medical treatment, diagnoses, judgment and decisions they made in connection with the treatment rendered to the patient, Beverly Brown. Notwithstanding the arguments the Browns asserted in opposition to the defense motions to dismiss, the allegations in the complaint must be reviewed not only by the words used but by the gravamen of the action. *Szymborski*, 133 Nev. at 642-43, 403 P.3d at 1285 ("The distinction between professional and ordinary negligence can be subtle;" the court looks "to the gravamen or substantial point or essence of each claim rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence.") (citations and internal quotation marks omitted).

Throughout their complaint, the Browns use the terms "Medical Malpractice" and "Medical Negligence," and they allege that the treatment by the "interventional radiologist" (Dr. McAllister) amounted to medical malpractice. *See, e.g., R.App. 2,3, 7:14, 8, 9-10, 12-13.* The complaint did not include individual claims for ordinary negligence or any other tort -- which did not go unnoticed by the district court. *See R.App.14-15 and R.App. 207.* Although the Browns referenced a purported lack of communication, the gravamen or substantial essence of their complaint alleges

medical negligence in how Dr. McAllister rendered his medical services, to include an alleged lack of communication with Mrs. Brown's cardiologist. *R.App. 7:14, 9:18 and 13:4-5.* These allegations require evaluation of the standard of care applicable to interventional radiologists and whether Dr. McAllister conformed to that standard of care, which will require expert testimony. *See* NRS 41A.100.

In summary on this point, appellants' assertion that the complaint includes a claim of "ordinary negligence" is a blatant attempt to avoid the mandates of NRS 41A.071. Plaintiffs should not be allowed to do so because the continued pursuit of this action under the guise of specious theories without expert support defeats the elaborate statutory scheme applicable to medical negligence cases. Plaintiffs' use of the term "non-medical claim" was an apparent afterthought to avoid compliance with NRS 41A.071. Such tactics result in potentially frivolous actions that clog the dockets of Nevada courts by alleging common law claims against medical professionals. Such a result is contrary to established Nevada law and defeats the salutary purpose of NRS 41A.071.

Because the gravamen of the Browns' claims against Dr. McAllister involve medical judgment, decisions and treatment *and* require expert testimony, the district court correctly concluded that the Browns' allegations were rooted in professional negligence. Consequently, the district court did not err in dismissing the complaint

for failure to comply with NRS 41A.071. The district court's order should, therefore, be affirmed.

### C. APPELLANTS' CONSTITUTIONAL ARGUMENTS ARE UNMERITORIOUS BECAUSE NRS 41A.071 HAS BEEN UPHELD AS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

Appellants cannot demonstrate error in the district court's application of NRS 41A.071, so they resort to attacking its validity. Appellants challenge the constitutionality of NRS 41A.071 on grounds that it violates separation of powers, due process/access to courts and equal protection. Conspicuously absent from Appellants' Opening Brief, however, is any discussion of the relevant legal standards for such challenges or of the controlling Nevada cases that have previously upheld the constitutionality of NRS 41A.071.

#### 1. Appellants Fail to Meet the Standards for Challenging the Constitutionality of NRS 41A.071

Constitutional challenges to NRS Chapter 41A have been made, and rejected, in the past. *See, e.g., Peck v. Zipf,* 133 Nev. 890, 407 P.3d 775 (2017) (challenging the constitutionality of NRS 41A.071); *Tam v. Eighth Judicial Dist. Court,* 131 Nev. 792, 358 P.3d 234 (2015) (challenging the constitutionality of NRS 41A.035); *see also Barrett v. Baird,* 111 Nev. 1496, 1507, 908 P.2d 689 (1995), *overruled on other grounds by Lioce v. Cohen,* 124 Nev. 1, 174 P.3d 970 (2008) (challenging the

constitutionality of the former screening panel statute that was replaced with NRS 41A.071). Such challenges have been reviewed using the rational basis test. *See, e.g.*, *Peck*, 133 Nev. at 895, 407 P.3d at 780 ("NRS 41A.071 need only be rationally related to a legitimate governmental purpose to withstand a challenge based on equal protection or due process.") (internal quotation marks and citation omitted); *Barrett*, 111 Nev. at 1507, 908 P.2d at 697 (the right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right).

A statute challenged on constitutional grounds, "is to be construed in favor of the legislative power." *Cramer v. Peavy*, 116 Nev. 575, 582, 3 P.3d 665, 670 (2000). In upholding the validity of NRS 41A.071, the Nevada Supreme Court reiterated: "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." *Peck*, 133 Nev. at 895, 407 P.3d at 780 (citation and internal quotation marks omitted). It is not necessary for the party defending the statute "to demonstrate evidence in the record which would provide a reasonable basis for the amendment. The existence of facts which would support the legislative judgment is presumed." *Allen v. State Publ. Empl. Ret. Bd.*, 100 Nev. 130,134, 676 P.2d 792, 795 (1984). In order for the challenger to meet its burden of showing that a statute is unconstitutional, "the challenger must make a clear showing of invalidity." *Peck*, 133 Nev. at 895, 407 P.3d at 780. The appellants in this case have

failed to make such a showing under any of the constitutional doctrines they have advanced.

### 2. NRS 41A.071 does not Violate Separation of Powers

Without addressing the standard of review or the proper level of constitutional scrutiny, appellants argue that NRS 41A.071's expert affidavit requirement violates the separation of powers doctrine because it conflicts with the notice pleading standard of NRCP 8 and thus "encroaches on the judiciary's authority to promulgate court rules and procedures." *AOB 7.* Citing to *Zohar v. Zbiegin*, 130 Nev. 733, 334 P.3d 402, 406 (2014) and referencing *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1027, 102 P.3d 600, 605 (2004), appellants contend that NRS 41A.071 is a "preliminary procedural rule" that "essentially creates a heightened pleading standard" for medical malpractice claimants "that conflicts with the Nevada Rules of Procedure." *AOB 9.* Relying on its theory that NRS 41A.071 creates a "heightened pleading standard," appellants proceed to argue that the purported creation of this "heightened pleading standard" conflicts with NRCP 8's notice-pleading standard and thus impermissibly encroaches on the judiciary's rule-making authority in violation of the separation of powers doctrine. *See AOB 7-9.*

Appellants' argument is fatally flawed for several reasons, not the least of which it misconstrues *Zohar* and *Borger*, and it ignores Nevada law which has addressed similar challenges to NRS 41A.071.

Under the separation of powers doctrine, the Legislature "may not enact a procedural statute that conflicts with a pre-existing procedural rule." *Washoe Medical Center,* 122 Nev. at 1305 n.29, 148 P.3d at 795 n.29 (citations and internal quotation marks omitted). A procedural statute that conflicts with a preexisting procedural rule is of no effect; "the rule supersedes the statute and controls" so as not to interfere with the judiciary's inherent authority to procedurally manage litigation. *Id.* (citations and internal quotation marks omitted).

Importantly, the statute at issue in *Washoe Medical Center* was NRS 41A.071. In that case, the plaintiffs argued that interpreting NRS 41A.071 as not permitting amendment would abrogate NRCP 15(a) and thus violate the separation of powers doctrine "by unduly impinging on the judiciary's authority to economically and fairly manage litigation." *Washoe Medical Center,* 122 Nev. at 1305 n.29, 148 P.3d at 795 n.29. The court disagreed, reasoning that the requirement to file an expert affidavit "does not infringe on or interfere with the judiciary's inherent authority to procedurally manage litigation." *Id.*

Appellants' citation to *Zohar* and *Borger* does not salvage their separation of powers argument. While *Zohar* does state that NRS 41A.071 is a "preliminary procedural rule," neither *Zohar* nor *Borger* create, or mention, a "heightened pleading requirement" as appellants contend. *See Zohar,* 130 Nev. at 739, 334 P.3d at 406; *Borger,* 102 Nev. at 1028, 102 P.3d at 605.

The *Borger* court addressed separation of powers in discussing NRS 41A.071. Rather than find it constitutionally infirm, the court noted that NRS 41A.071 "clearly works against frivolous lawsuits filed with some vague hope that a favorable expert opinion might eventually surface," and "[t]o this extent, NRS 41A.071 does not unduly impinge upon the inherent power of the judiciary to economically and fairly manage its litigation." *Id.,* 120 Nev. at 1029, 102 P.3d at 606.

Rather than conflicting with NRCP 8's notice-pleading requirement as appellants contend, the Nevada Supreme Court has determined that the purpose behind NRS 41A.071 (to dismiss/deter frivolous cases) "furthers the purpose of our notice-pleading standard and comports with Nevada's Rules of Civil Procedure." *Zohar,* 130 Nev. at 739, 334 P.3d at 406. Referencing *Borger,* the court noted that the affidavit requirement "is a preliminary procedural rule *subject to the notice-pleading standard . . . .*" *Id., citing Borger,* 120 Nev. at 1028, 102 P.3d at 605 (emphasis added).

NRS 41A.071 does not impose a "heightened" pleading standard or encroach on the judiciary's rule-making power. Rather, NRS 41A.071 is consistent with the notice-pleading standards of NRCP 8. As stated by the Nevada Supreme Court:

> Given that the purpose of a complaint is to "give fair notice of the nature and basis of a legally sufficient claim and the relief requested," *Breliant v. Preferred Equities Corp*., 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993), and the purpose of the expert affidavit is to further enable the trial court to determine whether the medical malpractice claims within the complaint have merit, both policy considerations are served when

> the sufficiency of the affidavit is determined by reading it in conjunction with the complaint.

*Zohar*, 130 Nev. at 739, 334 P.3d at 406.

Evidently, appellants did not look beyond a word or two in either *Zohar* or *Borger,* choosing instead to rely on inapplicable cases from other jurisdictions that addressed "heightened pleading standards." *See* AOB 11-12. Had they looked to Nevada cases on the subject of NRS 41A.071, appellants would have been aware of Nevada's pronouncements and, more specifically, they would have known that the requirement to file an expert affidavit with a medical malpractice complaint does not infringe on or interfere with the judiciary's inherent authority to procedurally manage litigation or encroach on its rule-making authority.

Also incorrect is appellants' assertion, NRS 41A.071 requires medical malpractice plaintiffs to "prove" that they can "likely prevail prior to obtaining discovery." *AOB 11.* Actually, the purpose of the statute is "to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based on competent expert opinion." *Washoe Medical Center,* 122 Nev. at 1304, 148 P.3d at 794; *Borger,* 120 Nev. at 1029, 102 P.3d at 606. As noted above, the statute's purpose is consistent with Nevada's notice-pleading requirements and is thus in accord with the judiciary's rule-making authority.

Accordingly, NRS 41A.071 does not conflict with NRCP 8, and there is no separation of powers violation.

### 3. NRS 41A.071 does not Violate Due Process or Otherwise Unconstitutionally Limit Access to the Courts

Appellants next challenge the constitutionality of NRS 41A.071 by contending that the dismissal of their complaint violates due process by barring access to the courts unless they "engage in a discovery-like activity as a prerequisite to filing a complaint." *AOB 16-17.* Appellants elaborate that NRS 41A.071 is a "significant obstacle" to access to the courts because it requires a medical malpractice plaintiff to retain an expert to render an opinion without the benefit of discovery, thus "constitutionally" requiring medical malpractice plaintiffs to "meet a higher pleading standard" than "other tort plaintiffs." *AOB 17.*

Appellants' argument appears to be at once a due process and an equal protection argument. Neither have any merit and both are contrary to existing Nevada law.

Initially, appellants' argument is flawed because discovery is *not* required in order for an expert witness to render a standard of care opinion. An expert must simply review the patient's medical records (to which a malpractice plaintiff has virtually immediate access). *See Washoe Medical Center,* 122 Nev. at 1304, 148 P.3d at 794, *citing* Minutes of the Meeting of the Assembly Comm. on Medical Malpractice Issues, 18th Special Sess. (Nev., July 30, 2002) (statement of Bill Bradley, Nevada Trial Lawyers Association) (the affidavit requirement protects

against filing cases to get a quick settlement "by ensuring that medical records would be reviewed by an expert" before the case is filed).

Next, relying solely on non-Nevada cases, appellants argue that NRS 41A.071 creates an "arbitrary barrier" to medical malpractice claimants' access to the courts. *AOB 18.* This argument is not only wrong, but it also disregards the pronouncements on this very issue by Nevada's courts. Indeed, the Nevada Supreme Court has rejected due process/access to court challenges to NRS 41A.071 and its predecessor statute on multiple occasions.

Before the enactment of NRS 41A.071, the Medical Malpractice Act included a statute that established medical-legal screening panels. The Legislature replaced the screening panel provision with the expert affidavit requirement. *Peck*, 133 Nev. at 896, 407 P.3d at 780. The predecessor to NRS 41A.071 was also challenged on constitutional grounds in *Baird*.

Like this case, *Baird* presented a multi-faceted constitutional challenge to the medical-legal screening panel statute on equal protection, due process and right-to-jury grounds. Employing the rational basis test, the Nevada Supreme Court rejected each challenge. Acknowledging the principle of deference to the legislature, it declined "to disturb or question carefully crafted legislation which balances various concerns to arrive at a structure that will fairly benefit all the parties to a medical malpractice suit." *Baird*, 111 Nev. at 1508, 908 P.2d at 697. Those concerns included

reducing the cost of malpractice premiums and health care. *Id.* Employing a rational basis analysis, the court rejected the equal protection and due process challenges, including the claim that the statute impeded their right of access to the court. *Baird*, 111 Nev. at 1507-09, 908 P.2d at 697-99.

The legislative history reflects that the legislature not only had a rational basis for enacting the statutes in the Medical Malpractice Act, including the one at issue here, but it also had substantial and legitimate governmental interests in doing so. This is illustrated in *Tam* and later in *Peck,* where this court discussed the legislative concerns that underlie NRS Chapter 41A, including NRS 41A.071.

*Tam v. Eighth Judicial Dist. Court* was a medical malpractice case that challenged the constitutionality of the non-economic damages cap of NRS 41A.035 on grounds that it violated the right to trial by jury because it took the determination of damages away from the jury, and that it violated equal protection rights. 131 Nev. at 796, 798, 358 P.3d at 237, 238-39. The court rejected both arguments. Regarding the right to a jury trial, the court stated that for a statute to violate the right to trial by jury, a statute must make the right "practically unavailable." *Tam,* 131 Nev. at 796-97, 358 P.3d at 238, citing *Barrett,* 111 Nev. at 1502, 908 P.2d at 694. The court held that the cap on non-economic damages did not interfere with the jury's factual findings on damages because the cap only takes effect after the jury has made

its determination and thus does not implicate the right to a jury trial. *Id.* 131 Nev. at 797, 358 P.3d at 238.

Nevada's malpractice statutes were again challenged in *Peck*, where the plaintiff, an indigent inmate, argued that NRS 41A.071 violated due process by limiting his access to the courts. As appellants have done in this case, the plaintiff in *Peck,* relied on *Bounds v. Smith*, 430 U.S. 817 (1977) "for the notion that prisoners have a constitutional right of access to the courts." 133 Nev. at 898, 407 P.3d at 782; *compare AOB 16.* While the court agreed with the general proposition, it noted that the right of access to the courts "does not include unfettered access to pursue all civil actions." *Id.*

Certainly, if indigent inmates do not have unfettered access to pursue all civil actions, neither do pro se plaintiffs, whether indigent or not. Absent a legally recognized exception, NRS 41A.071 applies to *pro se* indigent litigants. *See, Peck,* 133 Nev. at 896-97, 407 P.3d at 781-82.

Appellants' access-to-courts argument also relies on another case that was rejected by the *Peck* court. Appellants rely on *Zeier v. Zimmer, Inc.,* 152 P.3d 861, 873 (Okla. 2006) to support their argument NRS 41A.071 violates the right of access to courts by requiring medical malpractice plaintiffs to incur the expense of obtaining their medical records and having an expert review them. *AOB 21.*

Appellants' reliance on *Zeier* is misplaced because its rationale was rejected by the court in *Peck.*

In *Peck*, the plaintiff urged the court to adopt the analysis of *Zeier*, which held a similar affidavit statute was unconstitutional because it distinguished between medical malpractice plaintiffs and other negligence plaintiffs. In declining to adopt *Zeier* and finding it unpersuasive, the Nevada Supreme Court reasoned that *Zeier* involved a statute that was based on "a unique provision of the Oklahoma Constitution" that prohibited "special laws regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings, or inquiry before the courts." *Peck*, 133 Nev. at 897, 407 P.3d at 781 (internal quotation marks omitted).

Here, the Browns have not identified any similar Nevada laws which would render NRS 41A.071 constitutionally infirm. Thus, *Zeier* is inapplicable and, as noted above, was determined in *Peck* to be unpersuasive in constitutionally challenging NRS 41A.071.

Also unpersuasive is appellants' argument that NRS 41A.071's affidavit requirement imposes an unreasonable monetary barrier to the fundamental right of access to the courts. *AOB, 20, citing Metzler v. Lecraw,* 402 U.S. 936 (1971), an opinion denying a writ of certiorari. Appellants' reliance on *Metzler* is misplaced. The *Metzler* opinion discussed restricted access to civil courts by requiring indigents to pay filing fees. Among the cases referenced in *Metzler* was *Boddie v. Connecticut*,

401 U.S. 371 (1971), which held that a Connecticut law could not constitutionally deny indigents access to its divorce courts for being unable to pay the small filing fee and service of process fee.

Neither *Metzler* nor *Boddie* bear any resemblance to this case. To state the obvious, NRS 41A.071 does not require a filing fee. *See Peck,* 133 Nev. at 898, 407 P.3d at 782 ("the state is not imposing a court cost or fee under NRS 41A.071"). And, contrary to appellants' assertion, plaintiffs are not required to hire expert witnesses where they are not required. *AOB 21.* This is not only evident in NRS 41A.100(1)(a)-(e) (the statutory *res ipsa loquitur* statute), it is also reflected in cases like *Szymborski* and *Estate of Curtis,* discussed herein. Plaintiffs' indigency does not prevent them from reading and understanding these principles, as appellants' brief seems to suggest. *AOB 21.*

As importantly, *Boddie* is distinguishable and inapposite, as discussed in *Peck.* The plaintiff in *Peck,* like appellants here, argued that the affidavit requirement was unconstitutional under *Boddie,* which determined that the imposition of court costs to indigent plaintiffs seeking divorces violated due process and equal protection. The Court's rationale was based on the importance of the marriage relationship in "society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship," because of which due process prohibited a state from denying access to the courts to individuals

who sought a dissolution of their marriages solely because of their inability to pay. *Peck*, 133 Nev. at 898, 407 P.3d at 782, discussing *Boddie*, 401 U.S. at 374. The Nevada Supreme Court distinguished *Boddie* and its applicability to NRS 41A.071:

> Here, medical malpractice damages do not share the same hierarchy in value in our society as marriage does, and indigent or incarcerated individuals are not precluded from obtaining an expert opinion solely on the basis of their indigency or incarceration. Moreover, the state is not imposing a court cost or fee under NRS 41A.071. Accordingly, Peck's reliance on *Boddie* is misplaced.

*Peck*, 133 Nev. at 898, 407 P.3d at 782.

The same is true in this case. Here, the Browns seek to file a civil action for damages based on allegations of medical malpractice. They have failed to demonstrate any reason why they should be allowed to proceed without complying with NRS 41A.071. Notwithstanding their abstract arguments, Appellants' Opening Brief has not cited a single reference to the Record on Appeal which even suggests that the Browns could not pay for an expert review of Mrs. Brown's medical records. The Browns did not assert poverty as a bar to obtaining an expert. Instead, they asked for more time to obtain an expert, without any mention that they were financially unable to do so. *R.App. 33:5, 35:16.*

As importantly, appellants have not even attempted to address, much less distinguish, controlling Nevada authority, including *Peck*, which unambiguously held that NRS 41A.071 did not violate due process or unreasonably restrict access to the courts, as shown above.

At bottom, appellants have failed to show that NRS 41A.071 violates due process or unreasonably restricts access to the courts. Certainly, their access was not restricted in this case, as reflected by their ability to file a complaint, multiple responses to defendants' motions to dismiss, and this appeal. For all of these reasons, the Browns' due process arguments should be summarily rejected in accordance with *Peck.*

**4. NRS 41A.071 does not Violate Equal Protection Based on the Classification of Plaintiffs**

Lastly, appellants contends that NRS 41A.071 violates the equal protection clauses of the United States and Nevada Constitutions because it discriminates based upon classifications of plaintiffs. They argue that NRS 41A.071 "singles out potential tort victims" who are "victims of medical negligence" resulting in an "undue financial barrier on access to the courts" in violation of the Equal Protection Clauses of the United States and Nevada Constitutions." *AOB 22.* Apparently misconstruing *Baird, supra,* appellants assert that the strict scrutiny standard is to be applied to their equal protection challenge. *AOB 23.* Appellants are wrong.

The level of scrutiny for a constitutional challenge to NRS 41A.071, whether on due process or equal protection grounds, is the rational basis standard. *See, e.g.*, *Peck*, 133 Nev. at 895, 407 P.3d at 780 ("NRS 41A.071 need only be rationally related to a legitimate governmental purpose to withstand a challenge based on equal

protection or due process.") (internal quotation marks and citation omitted); *Baird*, 111 Nev. at 1507, 908 P.2d at 697 (the right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right); *Tam*, 131 Nev. at 798, 358 P.3d at 239 (same, citing *Baird)*.

Because appellants' equal protection analysis is founded on the wrong standard (strict scrutiny), their entire argument crumbles. Under controlling Nevada law, the classification of plaintiffs does not violate equal protection. That very contention was rejected in *Baird*, where the plaintiff argued that "there was no rational reason that the victims of medical negligence by physicians and hospitals be subjected to the burdens of the panel when injured patients of other health care providers were not." *Baird*, 111 Nev. at 1509, 908 P.2d at 698.

In rejecting the equal protection challenge, the court explained that where no fundamental right or suspect classification is implicated, "the court scrutinize[s] the challenged legislation for foundational support containing an ingredient of rational basis." *Id., citing Allen*, 100 Nev. at 136, 676 P.2d at 795-96 (alteration in original). The court elaborated that it "will not overturn legislation unless the treatment of different groups 'is so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the legislature's actions were irrational.' [citation omitted]. 'If any state of facts may reasonably be conceived to justify [the

legislation], a statutory discrimination will not be set aside.'" *Baird*, 111 Nev. at 1509-10, 908 P.2d at 698-99 (citations omitted).

There, as in this case, the reason for the statute was to address the "enormous hikes" in malpractice insurance premiums. The legislature's intent was to enact tort reform legislation to control the spiraling malpractice costs that were driving doctors from Nevada. Quoting the California Supreme Court, the *Baird* court stated that "'the equal protection clause does not prohibit a legislature from implementing a reform measure 'one step at a time' … or prevent it 'from striking the evil where it is felt most.'" *Baird*, 111 Nev. at 1510, 908 P.2d at 699 (citation omitted). That is precisely what the Nevada Legislature did in 2002, and again in 2004 when the Medical Malpractice Act was amended following the passage of the "Keep our Doctors in Nevada" (KODIN) initiative. *Washoe Medical Center*, 122 Nev. at 1304, 148 P.3d at 794.

That the medical malpractice statutes do not violate equal protection was reiterated in *Tam*, where the court concluded that NRS 41A.035 did not violate equal protection because the imposition of a cap on non-economic damages in medical malpractice actions is rationally related to the legitimate governmental interests of ensure the availability of adequate and affordable health care to Nevada's citizens. *Tam*, 131 Nev. at 799, 358 P.3d at 239.

In *Peck*, decided in 2017, the Nevada Supreme Court again employed the rational basis test in rejecting a constitutional challenge to NRS 41A.071 on equal protection grounds. In *Peck*, the plaintiff was an indigent inmate. As here, the plaintiff argued that the medical expert affidavit requirement violated the Equal Protection Clause by creating "unconstitutional distinctions between medical malpractice plaintiffs and other negligence plaintiffs." 133 Nev. at 895, 407 P.3d at 780. In rejecting the plaintiff's challenge, the court reiterated that the rational basis test applied, and that "NRS 41A.071 need only be rationally related to a legitimate governmental purpose to withstand a challenge based on equal protection or due process." *Id.*, (citations and internal quotation marks omitted). The court proceeded to describe the purpose underlying the enactment of NRS 41A.071 and concluded that the medical expert affidavit requirement of NRS 41A.071 was rationally related to the legitimate governmental interest of managing the medical malpractice insurance crisis that existed in Nevada at the time of the statute's enactment. *Peck*, 133 Nev. at 896-97, 407 P.3d at 781.

To the extent appellants suggest that equal protection is violated when a case involves "indigent" citizens, they are mistaken. Appellants' pro se or indigent status does not exempt them from complying with NRS 41.071's requirements. *See Peck* 133 Nev. at 898, 407 P.3d at 781 (stating that expert affidavit requirement applies to incarcerated persons); *cf. Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 659, 428

P.3d 255, 258-59 (2018) (noting that procedural rules cannot be applied differently to pro se litigants), *holding modified on other grounds by Willard v. Berry-Hinckley Indus*., 136 Nev. 467, 471 n.6, 469 P.3d 176, 180 n.6 (2020).

Manifestly, appellants have failed to meet their formidable burden of demonstrating the invalidity of NRS 41A.071 on equal protection grounds. As no fundamental right or suspect classes are implicated by NRS 41A.071, the statute is valid as rationally related to a legitimate state interest. On the authority of existing and controlling Nevada law, appellants' equal protection challenge may be summarily rejected.

In conclusion, appellants' constitutional arguments have been presented to, and rejected by, the highest court in Nevada. Appellants' Opening Brief does not offer any arguments that have not already been disposed of in the published opinions and unpublished dispositions of Nevada's appellate courts. In accordance with Nevada precedent, each of appellants' constitutional arguments may properly be rejected.

## VI.

## CONCLUSION

The Browns seek to pursue a medical malpractice action without complying with the NRS 41A.071's affidavit requirement. In the district court, they tried to circumvent NRS 41A.071 by contending they had asserted "non-medical claims"

when they clearly had not. On appeal, they seek to avoid the application of NRS 41A.071 by attacking its constitutionality and contending that they asserted a claim for ordinary negligence that fell within the common knowledge exception to the affidavit requirement. They did not. None of appellants' arguments are tenable, and all of their constitutional arguments have previously been rejected by Nevada's appellate courts. Despite their efforts, appellants have not refuted that their complaint is for professional medical negligence against health care providers based on medical treatment, judgment, diagnoses, and decisions made in the course of treating Beverly Brown. The district court correctly determined that an expert affidavit was required, that the Browns failed to comply with NRS 41A.071, and that dismissal was required by law. Appellants have not demonstrated otherwise.

Accordingly, respondent MARK MCALLISTER, M.D. respectfully request this court to affirm the district court's Order Granting Motion to Dismiss Plaintiffs' Complaint for Failure to Comply with NRS 41A.071.

Respectfully submitted this 14th day of October, 2021

*/s/ Alice Campos Mercado*

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 11,477 words.

3. I further 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. I also certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that 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: October 14, 2021

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## CERTIFICATE OF SERVICE

I hereby certify that the within ***Respondent McAllister's Answering Brief*** and ***Respondents' Joint Appendix*** were filed electronically with the Nevada Supreme Court on this date. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Don Springmeyer
Michael Prangle

Dated: October 14, 2021

*/s/ Margie Nevin*
Margie Nevin