

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.

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Case No. 81434-COA

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

**RESPONDENTS ST. MARY'S REGIONAL MEDICAL
CENTER, TAMMY EVANS, PREM REDDY, M.D., TANZEEL ISLAM,
M.D., AND SRIDEVI CHALLAPALLI, M.D.'S ANSWERING BRIEF**

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NRAP 26.1 DISCLOSURE

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 in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock:

St. Mary's Regional Medical Center is a wholly owned company. It is not a publicly traded company.

Prime Healthcare Services, Inc. is the parent company and sole member of Prime Healthcare Services – Reno, LLC dba Saint Mary's Regional Medical Center.

Tammy Evans (erroneously named as Tami Evans), Prem Reddy, M.D., Tanzeel Islma, M.D., and Sridevi Challapalli, M.D. are individuals.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

HALL PRANGLE & SCHOONVELD, LLC

If litigant is using a pseudonym, the litigant's true name: N/A

DATED this 15th day of October, 2021.

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By:/s/ Michael E. Prangle

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over Plaintiffs’ appeal pursuant to NRAP 3A(b)(1) governing appeals as of right following a final judgment of a district court in a civil case. On June 8, 2020, the district court entered an order granting Defendants-Respondents Saint Mary’s Regional Medical Center, Tammy Evans (erroneously named as Tami Evans), Prem Reddy, M.D., Tanzeel Islam, M.D. and Sri Challapalli, M.D.’s (collectively “Saint Mary’s”) Motion to Dismiss Plaintiffs’ Complaint for failure to comply with NRS 41A.071. (AA. V3, 328-33)¹. This order dismissed the case in its entirety, including Plaintiffs’ claims against co-defendant Dr. Mark McAllister. (*Id.*). Notice of entry of the district court’s order was filed on June 10, 2020. (AA. V3, 341-53).

On June 26, 2020, Plaintiffs filed a notice of appeal seeking review of the district court’s June 10, 2020 Order. (AA, V3, 357-58). The notice of appeal was signed by nonlawyers Gregory J. Brown, Marilee Brown, and Marilou Brown, and appears to seek review only of the dismissal of their individual claims and not that portion of the district court’s June 8, 2020 order dismissing the claims brought on behalf of “Beverly M. Brown’s family[] with Legal Power of Attorney as representatives [+ Heirs] of Beverly Brown.” (*Id.*). To the extent that Plaintiffs’ notice of appeal seeks review of the dismissal of any claims that had been asserted

¹ “AA, V_, _)” refers to Appellants’ Appendix.

in a representative capacity, that portion of the notice of appeal was the product of unauthorized practice of law, and thus was incapable of vesting jurisdiction in this Court over those claims. *See Salman v. Newell*, 110 Nev. 1333, 1335-36, 885 P.2d 607, 608 (1994) (“no rule or statute permits a [nonlawyer] to represent any other person. . . or any other entity in the district court or in this court”); *Guerin v. Guerin*, 116 Nev. 210, 214, 993 P.2d 1256, 1258 (2000) (Court lacked jurisdiction to consider notice of appeal filed by non-attorney on behalf of other person/entity because non-attorney’s filing of notice of appeal constituted the unauthorized practice of law, and rendered it invalid). Accordingly, the Court should find that while it has jurisdiction over the individual Plaintiffs’ claims, it does not have jurisdiction to consider the dismissal of any claims brought on behalf of Beverly Brown or “Beverly M. Brown’s family[] with Legal Power of Attorney as representatives [+ Heirs] of Beverly Brown.”

ROUTING STATEMENT

This appeal challenges an order of the district court granting a motion to dismiss a professional negligence complaint pursuant to NRS 41A.071. Plaintiffs’ Brief raises several issues challenging the constitutionality of NRS 41A.071 for the first time on appeal and therefore asserts – despite its previous transfer to the Court of Appeals on December 31, 2020 – that this appeal is presumptively retained by the Nevada Supreme Court under NRAP 17(a)(11) and (13). Since Plaintiffs’ Brief does

not raise any issues of first impression, of statewide importance, or upon which there is an inconsistency in the published decisions within or between the Court of Appeals and/or the Supreme Court, the Saint Mary's Defendants submit that this appeal was properly transferred to the Court of Appeals and should remain with this Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should this Court review Plaintiffs' constitutional challenges to NRS 41A.071 when they are being raised for the first time on appeal and ignore this Court's controlling precedent previously rejecting the same and/or substantially similar arguments?

2. Does NRS 41A.071 violate the separation of powers doctrine when it does not unduly interfere with or impinge upon the judiciary's inherent authority to procedurally manage litigation but instead furthers Nevada's notice-pleading standard?

3. Does NRS 41A.071 violate Plaintiffs' due process or equal protection guarantees when Plaintiffs are not members of a suspect class; there is no fundamental right to medical malpractice damages; the affidavit requirement applies equally to all medical malpractice plaintiffs regardless of their financial status; and the affidavit requirement is rationally related to a legitimate governmental interest?

4. Did the district court err in dismissing Plaintiffs' Complaint pursuant to NRS 41A.071 when all of the allegations contained therein, including the allegation that the Saint Mary's Defendants failed to "expedite the medial documentation in this case" to another provider, involve the exercise of medical judgment and fall squarely within the scope of a professional negligence claim?

STATEMENT OF THE CASE

This appeal arises from an action filed on March 3, 2020 by "Marilee Brown, Marilou Brown (*and for Beverly M. Brown's family*), with Legal Power of Attorney as representatives [and heirs] of Beverly Brown," and later Gregory J. Brown², against the Saint Mary's Defendants and Dr. Mark McAllister to recover damages arising out of the March 5, 2019 death of Beverly M. Brown. Plaintiffs' complaint generally alleged that Ms. Brown's death was the result of negligent medical treatment she received in December 2018 and February 2019 from Defendants at Saint Mary's Medical Center. More specifically, citing NRS Chapters 41 (including specifically 41.085 and 41.130), 41A and NRS 11.310, Plaintiffs alleged

"that Defendants did commit Medical Negligent actions to include Medicinal, Treatment, Judgment, protocol, Etc. Errors, against the Plaintiffs which led to the Wrongful Suffering and Death of their Mother, patient Beverly Morris (M.) Brown; to include but not limited to the fact that Defendants did commit Medical Negligent Actions, Errors that lead to the Detrimental Health, Suffering and Wrongful Death of their mother, patient Beverly (M.) Brown; And to include

² On May 26, 2020, the district court granted Plaintiffs' request to add Gregory J. Brown as a party plaintiff. (AA, V3, 277-79).

Breach of Duty, Medical Negligence/Malpractice, Causation of Human, Financial, Other Loss in these proceedings; Significant Emotional, Financial Distress; Et Al, to the Plaintiffs and their family, Subject to the jurisdiction of this Court.” (AA, V2, 2) (emphasis in original).

Plaintiffs’ complaint did not include an attached affidavit of merit signed by a medical expert pursuant to NRS 41A.071.

On March 26, 2020, the Saint Mary’s Defendants filed a motion to dismiss Plaintiffs’ Complaint, arguing that the complaint was void *ab initio*, could not be amended, and should be dismissed because the allegations contained therein sounded in professional negligence and Plaintiffs failed to file an NRS 41A.071 expert affidavit in support of their claims. (AA, V2, 24-31). Defendant Dr. McAllister subsequently filed a motion to dismiss of his own, also asserting that Plaintiffs’ complaint should be dismissed because it failed to comply with NRS 41A.071. (AA, V2, 38-42). In their responses, Plaintiffs argued, *inter alia*, that their complaint was comprised of both professional and ordinary negligence claims; that they should be given leave to file an amended complaint; that the limitations period should be tolled to allow them time to obtain an expert affidavit; and that the court has the discretion to deny Defendants’ motion. (AA, V2, 46-77; V3, 213-17).

On June 8, 2020, the district court granted the Saint Mary’s Defendants’ motion, finding 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.” (AA, V3, 33). The court further held that contrary to Plaintiffs’ claims, the factual allegations they describe as involving ordinary, “non-medical” negligence (including Plaintiffs’ allegations concerning a “(1) failure to follow protocol; (2) lack of communication; (3) age/other discrimination/jeopardy to the elderly; (4) negligence jeopardizing patients/other safety related to infectious persons; and (5) failure to expedite medical documentation that jeopardized this patient’s case)” were all “inextricably tied to a claim for professional negligence and Plaintiffs cannot now claim otherwise for the sole purpose of remedying a violation of NRS 41A.071.” *Id.*

More specifically, the district court explained that in addition to there being no separate claims for relief pled in the Complaint related to the purported non-medical claims, (AA, V3, 335), the protocol Plaintiffs claim was not followed was “rooted in professional negligence” because it related to the amount and type of medication administered to Ms. Brown. (AA, V3, 334). Likewise, the plain language of Plaintiffs’ complaint alleging a “lack of communication” was specifically directed to “communications between providers and patients/patients’ families so as to ensure the improvement of quality care, healthcare Improvement and less Medical Medicinal, Judgment mistakes/error,” and thus was also rooted in professional negligence. *Id.* With respect to Plaintiffs’ claim of “age discrimination/jeopardy to the elderly,” the district court held that the complaint

made no such claim and there is no factual explanation or legal support for Plaintiffs' allegation of "jeopardy to the elderly." *Id.*

Furthermore, this district court found that any negligence claim based on exposure to an infected patient as alleged by Plaintiffs involves the exercise of medical judgment and thus also "falls squarely within the scope of a professional negligence claim." *Id.* Lastly, with respect to Plaintiffs' claim that the Defendants failed to "expedite the medial documentation in this case," the district court concluded, citing *Jones v. Wilkin*, 111 Nev. 1335, 1338, 905 P.2d 166, 168 (1995), that the Nevada Supreme Court has already held that "allegations of negligent maintenance of medical records are properly characterized as medical malpractice." Accordingly, the district court concluded that contrary to their assertions, Plaintiffs' Complaint only asserted a claim or claims for professional negligence and as such they were required to comply with NRS 41A.071. (AA, V3, 335-36). And since they admittedly failed to attach a medical expert affidavit supporting their claims, their complaint was void *ab initio* and had to be dismissed. *Id.* Plaintiffs now appeal. (AA, V3, 357-58).

STATEMENT OF FACTS

The following "facts" are taken from Plaintiffs' Complaint and other documents submitted by the parties in support of their motions to dismiss, Plaintiffs' oppositions to same, and Defendants' replies in support of their respective motions.

Beverly Brown Is Admitted To Saint Mary's Medical Center For Treatment.

In December 2018, Beverly Brown was suffering from cardiovascular disease, “Afib”, and associated illnesses. (AA, V2, 6). As a result of these issues, she was ultimately referred to Saint Mary’s emergency room for care and treatment. *Id.* Once hospitalized, medical professionals put Ms. Brown on IV heparin medication and “could not remove this medication despite the vascular surgeon agreeing Beverly was best treated at UC Davis.” *Id.* At some point thereafter, Ms. Brown’s IV heparin drip required medical transport instead of family transport to UC Davis but, due to “a limited number of patients allowed at UC Davis via medical transport,” there was “over a week delay in travel and longer for interventional treatment” of Ms. Brown’s condition. *Id.* During this period, Ms. Brown’s condition deteriorated dramatically. *Id.* Plaintiff alleged that Saint Mary’s “did NOT treat Beverly M. Brown for her cardiovascular condition except for IV Heparin pending transport to UC Davis hospital for treatment.” *Id.*

Ms. Brown Is Transported To UC Davis For Further Treatment.

Ms. Brown was ultimately transferred to UC Davis for treatment where medical staff advised her daughters “that they would NOT be able to do any vascular treatment to further save” Ms. Brown’s infected foot/leg and that it instead required amputation. *Id.* at 7. Plaintiffs’ Complaint alleged that her amputation was caused

by “St. Mary’s actions noted above by the Wound Care Center poor treatment decisions.” *Id.*

Ms. Brown Is Readmitted To Saint Mary’s.

In February 2019, Ms. Brown was readmitted to Saint Mary’s due to low oxygen levels. *Id.* at 8. The attending ER physician spoke with Ms. Brown’s family and began advising them about advance directives, resuscitation, and end of life issues. *Id.* Despite Ms. Brown’s deteriorating condition, Plaintiffs’ alleged she was not seen by her cardiologist. *Id.* It was only until Ms. Brown’s family insisted on it that she was seen by a cardiologist specialist. *Id.* Furthermore, during this same time, Plaintiffs’ Complaint alleged that her hospitalization was prolonged due to “a radiological procedural error” wherein the interventional radiologist injured Ms. Brown’s lung during a lung aspiration procedure. *Id.* Despite this injury, Plaintiffs alleged that she was not seen by a pulmonologist and that one was not contacted “per hospital protocol” until her family once again insisted that she be seen by an appropriate physician. *Id.*

Ultimately, as a result of this conduct Plaintiffs alleged that Ms. Brown developed pneumonia. *Id.* Even though Ms. Brown had developed pneumonia, Plaintiffs alleged that she was still paired in a room with a patient with a serious infectious disease/condition and that this exacerbated her illness. *Id.* at 9-10. After

a few more days in the hospital, Plaintiffs alleged that Ms. Brown was discharged home on February 28, 2019 without adequate medication against “protocol.” *Id.*

**Ms. Brown Suffers A Stroke And Is Admitted
To Renown Regional Medical Center.**

On March 3, 2019, Ms. Brown suffered a stroke at her home. *Id.* at 11. She was subsequently admitted to Renown Regional Medical Center where she underwent a procedure to treat her stroke. *Id.* at 11. Following the procedure, her condition continued to deteriorate. *Id.* Plaintiffs’ family subsequently received a call from one of Ms. Brown’s physicians advising that they get to the hospital because she had just coded and needed to be intubated. *Id.* At or about that time, Plaintiffs alleged that there was a delay in the delivery of certain medical records that had been requested from Saint Mary’s to Ms. Brown’s physicians at Renown and that this delayed his ability to provide treatment. *Id.* Ultimately, Ms. Brown passed away on March 5, 2019. *Id.* at 12.

**Plaintiffs Request and Receive Copies of
Ms. Brown’s Medical Records.**

After April 2019, Plaintiff requested and received copies of Ms. Brown’s medical records from Saint Mary’s. *Id.* at 14. After reviewing the medical records, Plaintiffs alleged that they attempted to discuss Ms. Brown’s care with hospital representatives. *Id.* Plaintiff ultimately contacted Saint Mary’s Risk Management Department in January 2020 and were advised that an internal investigation would

be conducted. *Id.* at 14, 47, 74. Throughout February 2020, while the hospital conducted its investigation, Plaintiffs consulted with “local counsel” who advised them that any action for medical malpractice “had to be filed in Court within one year” of Ms. Brown’s death. *Id.* at 14. At or about the same time, Plaintiffs investigated whether there were any alternative dispute resolution programs, including mediation or arbitration proceedings, that could be available to them through the court system. *Id.* at 14. Ultimately, Plaintiffs were advised by a court clerk that no such programs could be accessed by them unless a formal civil complaint had been filed. *Id.* On March 3, 2020, Saint Mary’s Risk Management Department provided Plaintiffs with correspondence detailing the results of their investigation into the issues Plaintiffs’ raised concerning Ms. Brown’s care and treatment in December 2018 and February 2019. *Id.* at 76-77.

**Plaintiffs File Complaint; Complaint Dismissed
For Failing To Comply With NRS 41A.071.**

On March 3, 2020, Plaintiffs “Marilee Brown, Marilou Brown (*and for Beverly M. Brown’s family*), with Legal Power of Attorney as representatives [and heirs] of Beverly Brown,” and later Gregory J. Brown, filed a complaint against the Saint Mary’s Defendants and Dr. Mark McAllister to recover damages arising out of the March 5, 2019 death of Beverly M. Brown. Plaintiffs’ complaint generally alleged that Ms. Brown’s death was the result of negligent medical treatment she received in December 2018 and February 2019 from Defendants at Saint Mary’s

Medical Center. (AA, V2, 1-17). Plaintiffs' Complaint was not accompanied by a medical expert affidavit supporting their claims pursuant to NRS 41A.071.

Defendants subsequently each filed a motion to dismiss Plaintiffs' Complaint for failing to comply with NRS 41A.071. (AA, V2, 24-31, 38-42). After full briefing by the parties, the district court granted Defendants' Motions. After reviewing Plaintiffs' Complaint, the district court concluded that it only asserted a claim or claims for professional negligence and as such Plaintiffs were required to comply with NRS 41A.071. (AA, V3, 335-36). And since they admittedly failed to attach a medical expert affidavit supporting their claims, their complaint was void *ab initio* and had to be dismissed. *Id.* This appeal followed.

SUMMARY OF THE ARGUMENT

The district court's order dismissing Plaintiffs' Complaint for failing to comply with NRS 41A.071 should be affirmed. While this Court can choose to consider Plaintiffs' constitutional challenges to NRS 41A.071 even though they are being raised for the first time on appeal, it should decline to do so because Plaintiffs' Brief fails to acknowledge, much less distinguish or otherwise identify and explain any error in this or the Nevada Supreme Court's analysis in its prior controlling decisions wherein the same and/or substantially similar constitutional challenges were previously rejected. Indeed, by failing to address these prior decisions in their opening brief, Plaintiffs have both failed to meet their burden of making "a clear

showing of invalidity,” and deprived Defendants of the opportunity to address those arguments, ensuring that they go unrebutted when presumably raised for the first time in their reply. Accordingly, Plaintiffs’ failure to raise these arguments in the district court and their failure to acknowledge and address prior controlling authority in their Opening Brief on appeal more than justifies this Court declining to address these arguments.

But even if this Court chooses to do so, none of these arguments have any merit. Indeed, the legislature’s enactment of NRS 41A.071 does not violate the separation of powers because 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. Rather, NRS 41A.071 furthers Nevada’s notice-pleading standard and comports with Nevada Rules of Procedure because it does not add a heightened pleading requirement but instead only requires a plaintiff to do that which they are already required to do under existing procedural rules, *i.e.*, demonstrate that they are entitled to the relief sought. *See* NRCP 8(a)(2). Moreover, even with the affidavit requirement, district courts retain their discretion to evaluate professional negligence complaints including, where appropriate, to allow plaintiffs to amend those complaints filed with a disputed affidavit. Thus, NRS 41A.071 is fully consistent with well-recognized notions of separation of legislative and judicial powers.

Nor does NRS 41A.071 violate Plaintiffs' right to due process or equal protection. As the Nevada Supreme Court has previously found, "although an indigent has a right of reasonable access to courts, the right of access is not unrestricted." *Peck v. Zipf*, 133 Nev. 890, 898, 407 P.3d 775, 782 (2017). To the extent that NRS 41A.071 imposes a monetary barrier on plaintiffs seeking to filing suit, that monetary barrier applies to anyone filing a medical malpractice suit for damages and neither the incarcerated nor indigent are excused compliance with court rules. *Id.* Moreover, because Plaintiffs do not belong to a suspect class, NRS 41A.071 need only meet the rational basis test, which the Nevada Supreme Court has previous concluded it does. *Id.* Accordingly, Plaintiffs' due process or equal protection arguments are without merit.

Plaintiffs' argument that remand is still required even if NRS 41A.071 passes constitutional muster is equally without merit. Plaintiffs tacitly if not explicitly acknowledge that all of their claims against the Saint Mary's defendants (except their allegation concerning an alleged failure to timely transmit certain medical records to a subsequent provider) all sound in professional negligence and thus required an NRS 41A.071 affidavit. While they refuse to similarly acknowledge that their remaining claim based on an alleged failure to properly expedite the transfer of certain medical records is also properly characterized as medical malpractice, their refusal is futile. Indeed, as the Nevada Supreme Court has already found, a claim

alleged negligence in the maintenance of medical records is properly characterized as a professional negligence claim. This conclusion is further supported by the fact that any decision concerning the transfer of certain medical records necessarily involves the exercise of professional medical judgment because it requires the provider receiving the request to make a determination concerning the urgency of the request; to identify the requested/responsive documents necessary for diagnosis or treatment; and to ensure compliance with any associated hospital procedures/professional standards for disclosing confidential medical information.

Accordingly, for these reasons and those that follow, the district court's order dismissing Plaintiffs' complaint should be affirmed because all of Plaintiffs' allegations sounded in professional negligence and they failed to comply with NRS 41A.071.

ARGUMENT

I. Standard of Review.

The district court's order granting Defendants' NRCP 12(b)(5) motion to dismiss on the ground that the complaint failed to comply with NRS 41A.071 is reviewed de novo. *Washoe Medical Center v. Second Judicial District Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792-93 (2006), holding that a complaint filed without the requisite medical expert affidavit is void ab initio and therefore the defect cannot be cured by amendment after the statute of limitations has expired. Likewise,

questions of law, including questions of constitutional interpretation and statutory construction, are also reviewed de novo. *Peck*, 133 Nev. at 892, 407 P.3d at 778.

II. NRS 41A.071 Does Not Violate The United States Or Nevada Constitutions.

A. Plaintiffs’ Constitutional Challenges To NRS 41A.071 Do Not Warrant Appellate Review.

It is well established that issues not raised in the district court are “deemed to have been waived and will not be considered on appeal.” *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52-53, 623 P.2d 981, 983-84 (1981). While this Court may still address constitutional arguments raised for the first time on appeal, *see Matter of Colman Family Revocable Living Trust*, 136 Nev. 112, 113 n.2, 460 P.3d 452, 454 n.2 (2020), citing *Mason v. Cuisenaire*, 122 Nev. 43, 48 n.7 (2006) (recognizing that the Court may, but is not required to, address constitutional arguments raised for the first time on appeal), it should decline to do so here because they have not been adequately briefed.

Statutes are presumed to be valid and in order to show that a statute is unconstitutional, the challenger bears the burden of making “a clear showing of invalidity.” *Peck*, 133 Nev. at 895, 407 P.3d at 780 (citation omitted). While citing cases from other jurisdictions in support of their constitutional arguments – including cases whose reasoning has previously rejected, *see e.g., Peck*, 133 Nev. at 897, 407 P.3d at 781, and *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006) –

Plaintiffs have failed to acknowledge, much less distinguish or identify and explain any error in the controlling decisions from the Nevada Supreme Court, *e.g.*, *Borger v. Eighth Judicial Dist. Court ex rel. County of Clark*, 120 Nev. 1021, 1029-30, 102 P.3d 600, 606 (2004), *Washoe*, 122 Nev. at 1305 n.29, 148 P.3d at 795 n.29, *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 798, 358 P.3d 234, 239 (2015) and *Peck*, 133 Nev. at 895-99, 407 P.2d at 780-83, wherein the same or substantially similar constitutional arguments were previously rejected. By failing to do so, Plaintiffs have both failed to carry their burden of making “a clear showing of invalidity” and deprived Defendants of the opportunity to address those arguments, ensuring that they go un rebutted when presumably raised for the first time in their reply.

Accordingly, this Court should decline to consider their constitutional challenges to NRS 41A.071.

B. NRS 41A.071 Does Not Conflict With Nevada’s Pleading Standards Or Violate The Separation Of Powers Doctrine.

Under the separation of powers doctrine, the Legislature “may not enact a procedural statute the conflicts with a pre-existing procedural rule.” *Washoe*, 122 Nev. at 1305 n.29, 148 P.3d at 795 n.29. “A procedural statute that conflicts with a preexisting procedural rule is of no effect, and ‘the rule supersedes the statute and controls’ so as not to interfere with the judiciary’s inherent authority to procedurally manage litigation.” *Id.* (citations omitted). However, a legislatively-created procedural rule that “does not interfere with procedure to a point of disruption or

attempted abrogation of an existing court rule,” *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988), is “consistent with well-recognized notions of separation of legislative and judicial powers” and does not offend the United States or Nevada Constitutions. *Borger*, 120 Nev. at 1029, 102 P.3d at 606.

Relying on cases from other jurisdictions while ignoring controlling decisions from this Court, Plaintiffs assert that NRS 41A.071 violates the separation of powers doctrine because it creates a heightened pleading requirement, “conflicts with Nevada’s notice pleading standard, and therefore, encroaches on the judiciary’s authority to promulgate court rules and procedures.” (Pl. Br. at 7). These assertions – that NRS 41A.071 creates a heightened pleading requirement, “conflicts” with Nevada’s pleading standard, and that it violates the separation of powers – have all already been rejected by the Nevada Supreme Court.

Indeed, in *Zohar v. Zbiegien*, 130 Nev. 733, 739, 334 P.3d 402, 406 (2014), the Nevada Supreme Court found that NRS 41A.071 *further*s, rather than conflicts, with the purposes of Nevada’s notice-pleading standard. Specifically, the Court stated:

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.

Thus, the Court concluded, an NRS 41A.071 affidavit of merit “ensures that our courts are dismissing only frivolous cases, *furtheres the purposes of our notice-pleading standard, and comports with Nevada’s Rules of Civil Procedure.*” *Id.* (emphasis added).

Likewise, in *Borger*, 120 Nev. at 1029, 102 P.3d at 606, the Nevada Supreme Court addressed the question of whether NRS 41A.071 mandated dismissal for a complete failure to comply with the statute, and if so, whether that requirement violated the separation of powers. Even though it concluded that the statute does require dismissal for a complete failure to file an affidavit of merit, the Court nonetheless found no violation of the separation of powers because NRS 41A.071 “does not improperly restrict the discretion of district courts in the procedural management of litigation.” *Id.* The Court explained:

“This interpretation is consistent with the underlying purpose of the measure, which is to ensure that such actions be brought in good faith based upon competent expert opinion. In this, the statute clearly works against frivolous lawsuits filed with some vague hope that a favorable expert opinion might eventually surface. *To this extent, NRS 41A.071 does not unduly impinge upon the inherent power of the judiciary to economically and fairly manage litigation.*” *Id.* (emphasis added).

See also Washoe, 122 Nev. at 1305 n.29, 148 P.3d at 795, n.29, finding no conflict between NRS 41A.071 and NRCP 15(a) so as to give rise to a violation of the separation of powers doctrine because “[t]he 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.*”

For these same reasons, NRS 41A.071 does not improperly create a heightened pleading requirement, “interfere” or “unduly impinge” on Nevada’s notice pleading standard, or otherwise “conflict” with NRCP 8 or 9. Indeed, consistent with the Nevada Supreme Court’s holding in *Zohar*, NRS 41A.071 is entirely consistent with NRCP 8’s pre-suit due diligence requirements, *i.e.*, that the complaint shall contain “(1) a short and plain statement of the claim *showing that the pleader is entitled to relief.*” See NRCP 8(a)(2). While a medical malpractice plaintiff need not “prove” their case at the pleading stage under NRS 41A.071, they must still demonstrate that their claim is not frivolous. Thus, NRS 41A.071 does not require a medical malpractice plaintiff to do anything they are not already required to do under NRCP 8(a)(2) and Nevada law. See NRS 41A.100(1); *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 345, 358-59 (1992) (unless propriety of medical treatment within common knowledge of laymen, expert testimony is required to establish a medical malpractice claim); *Washoe*, 122 Nev. at 1304, 148 P.3d at 794, *citing* Minutes of the Meeting of the Assembly Comm. on Medical Malpractice Issues, 18th Special Session (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).

Likewise, NRS 41A.071 does not conflict with NRCP 9 which involves, *inter alia*, a party demonstrating their legal capacity/authority to sue and/or sue on behalf of another; the legal existence of a party; the specificity required when pleading a cause of action involving a claim of fraud, mistake, conditions of the mind, conditions precedent; and the specificity required when seeking special damages. *See* NRCP 9. NRS 41A.071 does not implicate, much less abridge, abrogate, or otherwise conflict with any of NRCP 9’s requirements.

Moreover, consistent with the Nevada Supreme Court’s holdings in *Borger* and *Washoe*, the requirement of filing an affidavit of merit does not infringe on or interfere with the court inherent authority to determine whether a complaint states a claim upon which relief can be obtained. Rather, courts still retain the power to evaluate the complaints and determine whether they meet NRCP 8(a) pleading threshold of stating a claim upon which the plaintiff(s) is entitled to relief. Accordingly, NRS 41A.071 “is consistent with well-recognized notions of separation of legislative and judicial powers,” and thus does not violate the United States or Nevada Constitutions. *Borger*, 120 Nev. at 1030, 102 P.3d at 606.

C. NRS 41A.071 Does Not Violate Due Process Or Equal Protection Requirements.

Again citing cases from other jurisdictions while ignoring controlling decisions from Nevada's Courts, Plaintiffs assert that NRS 41A.071 violates the due process and equal protection clauses of the United States and Nevada Constitutions because it creates a "higher pleading standard;" requires medical malpractice claimants to conduct "pre-suit" discovery; treats medical malpractice claimants differently than all other tort plaintiffs; and establishes an unconstitutional monetary barrier that ultimately deprives litigants, including the indigent, of their access to the courts. All of these arguments, however, have already been repeatedly by Nevada Courts, including its Supreme Court.

Indeed, in *Peck*, 133 Nev. at 895-99, 407 P. 3d 780-83, the plaintiff similarly argued that NRS 41A.071 violated equal protection and due process principles because it creates an unconstitutional distinction between medical malpractice plaintiffs and other negligence plaintiffs; unconstitutionally imposes a monetary barrier on the filing of a malpractice claim and thus prevents indigent or incarcerated plaintiffs from accessing the courts; and otherwise unconstitutionally prevents the indigent and inmates from prosecuting medical malpractice claims. *Id.* at 895, 897-98, 780-83.

In rejecting these arguments, the Nevada Supreme Court explained that "[t]he right of malpractice plaintiffs to sue for damages caused by medical professionals

does not involve a fundamental constitutional right.” *Id.*; *see also Tam*, 131 Nev. at 798, 358 P.3d at 239 (citation omitted). And since the plaintiff – like Plaintiffs here – did not argue that a suspect class was implicated, strict scrutiny did not apply and “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.* Looking to the legislative history behind NRS 41A.071’s enactment to determine if a rational basis exists, the Court found that it was enacted in response to a “medical malpractice insurance crisis” and was designed to “deter baseless medical malpractice litigation, fast track medical malpractice cases, and encourage doctors to practice in Nevada while also respecting the injured plaintiff[’]s right to litigate his or her case.” *Peck*, 133 Nev. at 896, 407 P.3d at 780. (citation omitted) Thus, the Court concluded that NRS 41A.071 satisfied the rational basis test because it was “rationally related to the legitimate governmental interest of managing what was considered a ‘medical malpractice insurance crisis in Nevada.’” *Id.* at 897, 781. (citation omitted)

Having satisfied rational basis review, the Court further found contrary to the non-Nevada cases cited in Plaintiffs’ Brief (Pl. Br. at 19, 20), *see e.g., Putman v. Wenatchee Valley Med. Ctr., P.S.*, ze 216 P.3d 374, 377 (2009) and *Zeier*, 152 P.3d

at 873³, that the statute did not offend principles of due process or equal protection by denying medical malpractice claimants’ access to the courts because NRS 41A.071 “requires a medical expert affidavit for medical malpractice suits filed by *anyone* – not just indigent or incarcerated persons. . . .” *Peck*, 133 Nev. at 898, 407 P.3d at 781 (emphasis added). Moreover, “although an indigent has a right of reasonable access to the courts, the right of access is not unrestricted. While an affidavit is required to pursue medical malpractice claims, the lack of an affidavit does not preclude indigent plaintiffs specifically from accessing the courts in general.” *Id.* at 898, 781-82 (citation omitted) and cases cited therein; *see also Andrew v. Coster*, No. 70836, 408 P.3d 559 (Nev. December 22, 2017) (unpublished disposition) (NRS 41A.071 affidavit requirement does not violate equal protection or due process guarantees; status as inmate or indigent person does not excuse compliance with court rules). Thus, contrary to Plaintiffs’ assertions, NRS 41A.071

³ Plaintiff also cites *Estate of Mary Standing Bull Curtis*, 15 IBIA 213, 1987 WL 119780 (Dept. of Int. Board of Indian Appeals, June 12, 1987) in support of the assertion that “NRS 41A.071 often requires plaintiffs to hire expert witnesses where none might otherwise be required” and that knowing when that is the case can be “[a] difficult task for indigent claimants.” (Pl. Br. at 21). But that is precisely the reason why expert affidavits are necessary. With the exception of conduct falling within one of the enumerated factual predicates under NRS 41A.100(1) for a *res ipsa loquitur* claim or the common knowledge exception, all other claims asserting medical malpractice necessarily involve standards and medical concepts outside the general knowledge of lay people. Thus, assistance from a qualified medical expert is necessary in those instances to “spare the state the expense of financing frivolous lawsuits filed by indigent persons.” *Barnes v. Eighth Jud. Dist. Ct.*, 103 Nev. 679, 684, 748 P.2d 483, 487 (1987).

does not create a classification scheme that violates equal protection. *Peck*, 133 Nev. at 898, 407 P. 3d at 781.

Accordingly, for all these reasons, NRS 41A.071 does not violate equal protection or due process requirements.

III. All Of Plaintiffs Allegations Sound In Professional Negligence.

The district court properly dismissed Plaintiffs' Complaint against the Saint Mary's Defendants because all of the allegations contained therein fell squarely within an action for professional negligence and thus required compliance NRS 41A.071 by attaching an affidavit of a qualified medical expert supporting those allegations.

In Nevada, "professional negligence" is broadly defined as "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015.⁴ This definition of "professional negligence" is expansive and includes more than simply medical malpractice. *See Zhang v. Barnes*, 132 Nev. 1049, ¶ 5, 382 P.3d 878 (Nev. September 12, 2016) (unpublished disposition) ("This court has interpreted the term 'professional negligence' broadly, concluding that it encompasses the term 'medical

⁴ A "provider of health care" includes, in pertinent part, physician assistants. *See* NRS 41A.017.

malpractice.’”) (quoting *Tam v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 80, 358 P.3d 234, 242 (2015)). “Given this broad definition, a case-by-case approach is appropriate to determine whether a professional negligence statute applies to claims grounded on legal theories besides [medical] malpractice.” *Id.*

To determine whether a cause of action sounds in “professional negligence,” the Court must evaluate whether the claim involves medical judgment, diagnosis, or treatment. *Estate of Curtis v. South Las Vegas Med. Inv’rs, LLC*, 136 Nev. 350, 354, 466 P.3d 1263, 1267 (2020). “If the alleged breach involves ‘medical judgment, diagnosis, or treatment,’ it is likely a claim for medical malpractice.” *Id.* (quoting *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017)) (“Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice.”); *see also Jones*, 111 Nev. at 1338, 905 P.2d at 168 (holding that “allegations of negligence maintenance of medical records are properly characterized as medical malpractice”). “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.* “‘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.* (quoting *Szymborski*, 133 Nev. at 642, 403 P.3d at 1285).

In conducting this evaluation, the Court should look to the gravamen of the claim to determine the character of the action, not the form of the pleadings. *Estate of Curtis*, 136 Nev. at 353, 466 P.3d at 1266 (“In determining whether such a claim sounds in ordinary or professional negligence, we ‘must look to the gravamen or substantial point or essence of each claim rather than its form.’”) (citation omitted); *Szymborski*, 133 Nev. at 643, 403 P.3d at 1285 (“Therefore, we must look 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.”) (quoting *Estate of French v. Stratford House*, 333 S.W.3d 546, 557 (2011) (citing Black’s Law Dictionary 770 (9th ed. 2009))); *see also Lewis v. Renown Regional Medical Center*, 134 Nev. 973, 432 P.3d 201 (2018); *Andrew v. Coster*, No. 70836, 408 P.3d 559 (Nev. December 22, 2017) (unpublished disposition), cert. denied, 138 S. Ct. 2634, 201 L. Ed. 2d 1037 (2018).

In this case, Plaintiffs’ Complaint included several allegations against the Saint Mary’s Defendants, including, *inter alia*, that they failed “to follow protocol” in certain treatment/medication decisions; that they were negligent in their communications with and between Ms. Brown’s medical providers and her family; that they “jeopardized” Ms. Brown’s health by placing her in a room with an “infectious patient”; and that they failed to timely respond to requests for certain medical records by her treaters at Renown Regional Medical Center. (AA, V2, 11,

12). While Plaintiffs previously asserted that all of these allegations sounded in ordinary negligence and thus no NRS 41A.071 affidavit was required, Plaintiffs now only assert that their allegations concerning the transmission of Ms. Brown's medical records sounded in ordinary negligence, and thus only partial dismissal was required.

Much like their arguments challenging the constitutionality of NRS 41A.071, Plaintiffs again ignore contrary, controlling precedent from the Nevada Supreme Court addressing this issue. In *Jones, supra*⁵, plaintiff filed a complaint against several health care professionals after she was subject to criminal investigation for allegedly failing to inform her physicians that she was receiving prescription pain medication from other sources when seeking new prescriptions. *Jones*, 111 Nev. at 1336, 905 P.2d at 167. In her complaint, plaintiff alleged that her physicians were "negligent in maintaining medical records" and that they provided false information to the Nevada Department of Investigation resulting in the NDOI filing criminal charges against her. *Id.* While the Court found that most of her claims sounded in ordinary negligence, and thus did not require compliance with NRS 41A.071's predecessor screening panel statute (NRS 41A.016), it concluded that her

⁵ See also *Johnson v. Incline Village Gen. Imp. Dist.*, 5 F. Supp. 2d 1113, 1115 (D. Nev. 1998) ("[t]he scope of 'medical malpractice extends beyond the immediate provision of care, and encompasses even something as far removed from the immediate context of doctor-patient relationship as the negligent maintenance of medical records and a misrepresentation resulting therefrom.'")

“allegations of negligent maintenance of medical records are properly characterized as medical malpractice” and affirmed the dismissal of those claims. *Id.* at 1338, 168.

Plaintiffs’ allegations against the Saint Mary’s defendants fall squarely within the same category of conduct, *i.e.*, medical record maintenance, at issue in *Jones*. Indeed, the gravamen of Plaintiffs’ allegation is that the Saint Mary’s Defendants did not appreciate the urgency of the provider’s alleged need for her medical records, including their relevance to his/her ability to accurately diagnosis and treat Ms. Brown at Renown Regional Medical Center. But whether Saint Mary’s appreciated such urgency necessarily requires medical knowledge beyond that possessed by a lay jury because it involves a determination, based on medical judgment, as to the appropriateness and the urgency within which to make any response.

Moreover, contrary to Plaintiffs’ assertion (Pl. Br. at 26), the transmission of a patient’s confidential medical records from one provider to another is not “simply an obligation to follow common procedures” but instead requires the knowledge required to appropriately identify and select the responsive documents, and to ensure compliance with numerous and complicated state and federal regulations, *e.g.*, HIPAA, and hospital policies and procedures designed to protect patient privacy rights that are all also well beyond the common knowledge and experience of a lay jury. Accordingly, Plaintiffs’ allegations concerning an alleged unreasonable delay in the transmission of her medical records to an outside care provider does not fall

within “the realm of common knowledge and experience,”⁶ but can only be evaluated “after presentation of the standards of care by a medical expert.” Thus, such a claim required compliance with NRS 41A.071. And since Plaintiffs failed to attach an affidavit from a medical expert supporting those allegations, they were properly dismissed under NRS 41A.071.

CONCLUSION

For the foregoing reasons, Defendants-Respondents Saint Mary’s Regional Medical Center, Tammy Evans (erroneously named as Tami Evans), Prem Reddy, M.D., Tanzeel Islam, M.D. and Sri Challapalli, M.D.’s respectfully request that this Court affirm the district court’s order granting their motion to dismiss and dismissing Plaintiffs’ Complaint with prejudice pursuant to NRS 41A.071 and 41A.097.

Dated this 15th day of October, 2021.

⁶ For the first time on appeal, Plaintiffs assert that Saint Mary’s alleged failure to expedite the transfer of medical records to Ms. Brown’s care providers at Renown Regional Medical Center falls within the “common knowledge” exception to NRS 41A.071. Since this argument was not raised in the district court, this Court should find that it has been waived. *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983 (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”)

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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.

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 7,125 words.

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 15, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 15th day of October, 2021, a true and correct copy of the foregoing ***Respondents St. Mary’s Regional Medical Center, Tammy Evans, Prem Reddy, M.D., Tanzeel Islam, M.D. and Sridevi Challapalli, M.D.’s Answering Brief*** was electronically filed with the Clerk of the Court of Appeals for Nevada Supreme Court by using the Nevada Supreme Court’s E-filing system (E-Flex). Below participants in the case who are registered with E-flex as users will be served by the E-Flex system.

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