

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

SOPHIA MONTANEZ,
Appellant,

vs.

SPARKS FAMILY HOSPITAL, INC., A
Delaware corporation doing business as
NORTHERN NEVADA MEDICAL CENTER

No. 81312

Electronically Filed
Jul 06 2020 04:28 p.m.

DOCKETING Elizabeth N. Brown
CIVIL APPEALS Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Second Department 4
County Washoe Judge The Honorable . Connie J. Steinheime
District Ct. Case No. CV19-01977

2. Attorney filing this docketing statement:

Attorney Bradley Paul Elley Telephone (775) 831-8800
Firm Bradley Paul Elley, Attorney at Law
Address 120 Country Club Drive, Suite 5, Incline Village, NV 89451

Client(s) SOPHIA MONTANEZ, Appellant.

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney John Cotton Telephone (702) 832-5909
Firm JOHN H. COTTON & ASSOCIATES, LTD.
Address
7900 W. Sahara Avenue, Suite 200
Las Vegas, NV 89117

Client(s) Respondent SPARKS FAMILY HOSPITAL

Attorney Adam Schneider Telephone (702) 832-5909
Firm JOHN H. COTTON & ASSOCIATES, LTD.
Address 7900 W. Sahara Avenue, Suite 200
Las Vegas, NV 89117

Client(s) Respondent SPARKS FAMILY HOSPITAL

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input checked="" type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input checked="" type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

8. Nature of the action. Briefly describe the nature of the action and the result below:

This medical malpractice personal injury action arises from the permanent blinding of Plaintiff's good right eye during surgery at the defendant hospital caused by unsanitary conditions causing a foreign bacterial substance to infect and destroy the vision in such eye. There are two claims for relief against Defendant as the owner of the licensed hospital where the surgery was performed, including: negligence-medical malpractice and premises liability. Several other patients were also infected from the same bacteria.

The trial court granted Defendant's Motion for Order Dismissing the Complaint, per NRCPP Rule 12(b)(5)-Failure to State a Claim Upon Which Relief Can be Granted.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1. The District Court failed to strictly construe the unambiguous language of the medical malpractice statutes to exclude from the NRS 41A.100 "foreign substance" definition the alleged bacterial infection complication from eye surgery.
2. The District Court failed to apply the doctrine of res ipsa loquitur to an alleged outbreak of bacteriological infections in a hospital infecting several patients and blinding the Appellant-patient's good eye during eye surgery.
3. Impermissible and contrary findings were made to the complaint's factual allegations.
4. The trial court erred by failing to apply general premises liability laws to the hospital despite its status as a health care provider.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

There has never been a court interpretation of whether res ipsa loquitor applies to a hospital's bacterial infection outbreak and the definition of "foreign substance" as used in the medical malpractice statutes, NRS 41A100(a). Additionally, there has never been a court determination of the application of premises liability general negligence to a commercial hospital facility premises.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

Please refer to the previous response to Item 12 hereof. The pain and suffering damages component alone caused by the infliction of blindness to Plaintiff-Appellant's good eye, already having been legally blind in the other eye should be sufficient. Being in her 30s and gainfully employed as a nurse with a newborn infant requiring child care makes this economic damages component in the several million dollar range. All of the foregoing renders the retention by the Nevada Supreme Court appropriate per NRAP Rule 17(a)(11) and (12).

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? N/A.

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from May 8, 2020.

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

N/A.

17. Date written notice of entry of judgment or order was served May 11, 2020.

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed June 9, 2020.

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A.

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a).

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input type="checkbox"/> Other (specify) _____ | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The NRCP 12(b)(5) motion order was granted without leave to amend with no further action contemplated. An order granting an NRCP 12(b)(5) Motion to Dismiss without leave to amend results in judgment on the merits, *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 400 P.2d 621 (1965).

The order disposed of all issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs. Therefore the order constitutes a final judgment, *Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345301 P.3d 850, 851 (2013).

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff-Appellant SOPHIA MONTANEZ.

Defendant-Respondent SPARKS FAMILY HOSPITAL, INC., A Delaware corporation doing business as NORTHERN NEVADA MEDICAL CENTER.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

There are two claims for relief for negligence including medical malpractice and premises liability.

The trial court entered an order granting Defendant's Motion for Order Dismissing the Complaint, per NRCP Rule 12(b)(5) on May 8, 2020.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

SOPHIA MONTANEZ

Name of appellant

Bradley Paul Elley, Esq.

Name of counsel of record

July 6, 2020

Date

s/Bradley Paul Elley, Esq.

Signature of counsel of record

Nevada, Washoe County

State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 6th day of July, 2020, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

JOHN H. COTTON, Esq.

ADAM SCHNEIDER, Esq.

JOHN H. COTTON & ASSOCIATES, LTD.

7900 W. Sahara Avenue, Suite 200

Las Vegas, Nevada 89117

MARGARET M. CROWLEY

CROWLEY MEDIATION CENTER

121 Washington Street

Reno, NV 89503

Attorneys for Defendant-Respondent
SPARKS FAMILY HOSPITAL, INC.

Settlement Judge Appointed herein

Dated this 6th day of July, 2020

/s/ Elizabeth Lintner

Signature

CODE: \$1425
BRADLEY PAUL ELLEY, ESQ.
Nevada State Bar #658
120 Country Club Drive, Suite 5
Incline Village, NV 89451
Telephone: (775) 831-8800
Attorney for Plaintiff Sophia Montanez

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SOPHIA MONTANEZ,

Plaintiff,

vs.

Case No.

Dept. No.

SPARKS FAMILY HOSPITAL, INC., A
Delaware corporation doing business as
NORTHERN NEVADA MEDICAL CENTER,
and DOES 1-15

Defendants.

COMPLAINT

COMES NOW Plaintiff, Sophia Montanez, and for her cause of action against Defendant,
Sparks Family Hospital, Inc., d/b/a the Northern Nevada Medical Center (hereinafter also referred to
as "Defendant") states:

1. Plaintiff, Sophia Montanez, is an individual who is, and has at all relevant times been,
a resident of Washoe County, Nevada.

2. Upon information and belief, at all times mentioned herein Defendant Sparks Family
Hospital, Inc., d/b/a Northern Nevada Medical Center was and is a Nevada corporation with its
principal place of business located in Washoe County, Nevada, and has maintained "Northern

Nevada Medical Center” as a fictitious business name for which it has at all times mentioned herein done business within the City of Sparks, Nevada.

3. The true names and capacities of the defendants named herein as DOES 1-15 are unknown to Plaintiff. Upon information and belief, each of said Doe defendants is in some manner legally responsible for the acts complained of herein. Plaintiff will pray for leave to amend the complaint to substitute the true for fictitious names upon ascertainment of same.

4. Upon information and belief, Defendant at all times mentioned herein has owned, operated, maintained, possessed, and exclusively controlled the facility commonly known as the Northern Nevada Medical Center in Sparks, Nevada.

5. On or about October 10, 2018, Plaintiff underwent a surgical procedure on her right eye at the Northern Nevada Medical Center.

6. The portion of the Northern Nevada Medical Center where Plaintiff underwent her procedure was newly constructed and/or re-designed.

7. Upon information and belief, during or about the same week as Plaintiff's procedure at the Northern Nevada Medical Center, three other persons developed infections immediately after procedures undergone in the same newly constructed and/or designed portion of the Northern Nevada Medical Center.

FIRST CLAIM FOR RELIEF

Medical Malpractice Under Nev. Rev. Stat. 41A.100(1)A: The “Foreign Substance” Exception

8. Plaintiff re-states, re-alleges, and incorporates by reference as if fully set forth herein the allegations of Paragraphs 1 – 7 hereof.

1 9. Upon information and belief, during the procedure, a foreign substance was left in
2 Plaintiff's body, including but not necessarily limited to a bacterium known as pseudomonas
3 aeruginosa.

4
5 10. As a direct result of the foreign substance left in Plaintiff's body, Plaintiff has been
6 damaged, including but not necessarily limited to Plaintiff being infected with pseudomonas
7 aeruginosa and being now permanently and irreversibly blind in her right eye.

8 11. Such foreign substances being so left and such infection and blindness so resulting,
9 would not ordinarily occur in the absence of negligence, was caused by the Northern Nevada Medical
10 Center which is in Defendant's exclusive control, and was not due to any voluntary action or
11 contribution on Plaintiff's part.

12
13 12. As a direct result of the foreign substance left in Plaintiff's body, Plaintiff has
14 undergone – and will suffer in the future – pain, discomfort, blindness, expenses, lost employment,
15 mental and emotional harm, and loss of enjoyment of life.

16 17 18 **SECOND CLAIM FOR RELIEF**

19 **Premises Liability**

20
21 13. Plaintiff re-states, re-alleges, and incorporates by reference as if fully set forth herein
22 the allegations of Paragraphs 1 – 7 hereof.

23 14. Defendant owed a duty to Plaintiff to maintain its premises, in a safe and careful
24 manner that would not result in infection and blindness to Plaintiff.

25 15. Defendant and its personnel acting in the scope and course of their employment with
26 Defendant acted unreasonably, carelessly, reckless, and negligently, and breached such duty, in one
27 or more of the following respects:
28

- a. Being aware of the dangerous condition of the premises it either knew or by the exercise of reasonable care should have known
- b. failing to take reasonable steps and care to alleviate and to prevent foreign substances, including bacteria that can (and did) cause blindness, from being left in Plaintiff's body.
- c. Failing to warn Plaintiff as an invitee of the premises of the dangerous condition of the premises.

16. As a direct and proximate result of such unreasonable, careless, reckless, and negligent conduct and breach of duty, Plaintiff was infected with pseudomonas aeruginosa and left permanently and irreversibly blind in her right eye.

17. As a direct result of such unreasonable, careless, reckless, and negligent conduct and breach of duty, Plaintiff has undergone – and will suffer in the future – pain, discomfort, blindness, expenses, lost employment, mental and emotional harm, and loss of enjoyment of life.

Wherefore, Plaintiff pray for relief as follows:

1. For damages in excess of \$15,000.00;
2. For costs of suit incurred herein;
3. For reasonable attorneys' fees;
4. For such other and further relief as the court deems proper in the premises.

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document, **does not** contain the social security number of any person.

Dated: October 10, 2019.

/s/ Bradley Paul Elley
BRADLEY PAUL ELLEY, ESQ.
Nevada Bar No. 658
120 Country Club Drive, Suite 5
Incline Village, NV 89451
Telephone: (775) 831-8800
brad@bpelleylaw.com
Attorney for Plaintiff

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**
8

9 SOPHIA MONTANEZ,

10 Plaintiff

11 vs.

12 SPARKS FAMILY HOSPITAL, INC., a Delaware
13 Corporation doing business as NORTHERN
14 NEVADA MEDICAL CENTER and DOES 1-15,

15 Defendants.

CASE NO.: CV19-01977

DEPT. NO.: 4

16 **ORDER GRANTING SPARKS FAMILY HOSPITAL, INC.'S MOTION TO DISMISS**
17

18 On October 10, 2019, Plaintiff SOPHIA MONTANEZ (hereinafter, "MONTANEZ"), by
19 and through her attorney, Bradley Paul Elley, Esq., filed a *Complaint* against Defendant, SPARKS
20 FAMILY HOSPITAL, INC., a Delaware corporation doing business as NORTHERN NEVADA
21 MEDICAL CENTER (hereinafter, "NNMC").

22 On January 17, 2020, NNMC, by and through its counsel, John C. Cotton, Esq. and Adam
23 Schneider, Esq., filed *Defendant's Motion to Dismiss*. On February 24, 2020, MONTANEZ filed
24 her *Opposition to Defendant's Motion to Dismiss*. On March 9, 2020, NNMC filed *Defendant's*
25 *Reply Re: Motion to Dismiss*. The same day, NNMC submitted the matter for the Court's
26 consideration.

27 This case arises out of an October 2018 surgical procedure, that MONTANEZ alleges
28 resulted in her being infected with pseudomonas aeruginosa, and as a result is now permanently
and irreversibly blind in her right eye. MONTANEZ underwent the surgical procedure in a portion
of the NNMC that was newly constructed and/or re-designed. MONTANEZ alleges that during

1 or about the same week as her procedure, three other persons developed infections immediately
2 following procedures in the same newly constructed and/or designed portion of the NNMC.

3 NNMC's motion seeks dismissal of both claims for relief asserted in MONTANEZ's
4 Complaint, (1) medical malpractice under NRS 41A.100(1)(a) based upon the "foreign substance"
5 exception, and (2) premises liability.

6 Pursuant to NRCP 12(b)(5), a claim may be dismissed for failure to state a claim upon
7 which relief can be granted. "A complaint will not be dismissed for failure to state a claim 'unless
8 it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the
9 trier of fact, would entitle him to relief.'" Breliant v. Preferred Equities Corp., 109 Nev. 842, 858
10 (1993) (citations omitted). Factual "[a]llegations in the complaint must be accepted as true." See
11 Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228 (2008); Capital Mortgage Holding v.
12 Hahn, 101 Nev. 314, 315 (1985). In deciding a Motion to Dismiss pursuant to NRCP 12(b)(5),
13 the Court "must construe the pleading liberally and draw every fair intendment in favor of the
14 [non-moving party]." Vacation Village, Inc. v. Hitachi America, Ltd., 110 Nev. 481,484 (1994)
15 (citations omitted). A pleading party "must set forth sufficient facts to establish all necessary
16 elements of a claim" against the opposing party. Hay v. Hay, 100 Nev. 196, 198 (1984) (citing
17 Johnson v. Travelers Ins. Co., 89 Nev. 467, 472 (1973)). "The test to determine whether the
18 allegations of a cause of action are sufficient to assert a claim for relief is whether the allegations
19 give fair notice of the nature and basis of the claim and the relief requested." Ravera v. City of
20 Reno, 100 Nev. 68, 70 (1984).

21 First, the Court will consider MONTANEZ's first claim for relief, medical malpractice
22 under NRS 41A.100(1)(a): The "foreign substance" exception. NNMC argues that the Court
23 should dismiss MONTANEZ first claim for relief because the Complaint does not attach or
24 reference any expert affidavit pursuant to NRS 41A.071. "If an action for professional negligence
25 is filed . . . , the district court shall dismiss the action, without prejudice, if the action is filed without
26 an affidavit that . . . [s]upports the allegations contained in the action." *NRS 41A.071*. Under NRS
27 41A.071, "a medical malpractice complaint filed without a supporting medical expert affidavit is
28 void ab initio." Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. County

1 of Washoe, 122 Nev. 1298, 1300 (2006). The purpose of NRS 41A.071 “is to lower costs, reduce
2 frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon
3 competent expert medical opinion.” *Id.* at 1304. “[T]he general rule [is] that expert testimony
4 must be used to establish medical malpractice, unless the propriety of the treatment, or the lack of
5 it, is a matter of common knowledge of laymen.” Fernandez v. Admirand, 108 Nev. 963, 969
6 (1992).

7 MONTANEZ argues that the statute’s plain language should govern. “[W]hen the
8 language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is
9 no room for construction, and the courts are not permitted to search for its meaning beyond the
10 statute itself.” Sarfo v. Bd. of Med. Examiners, 134 Nev. 709, 714 (2018) (quoting Dykema v. Del
11 Webb Communities, Inc., 132 Nev. 823, 826 (2016). In “reading the statute as a whole, NRS
12 41A.100 clearly states that an affidavit is not required in any one or more of the following
13 circumstances..., and those enumerated *res ipsa loquitur* exceptions are listed in subsections (1)(a)-
14 (e), one of which being that an object was left in the body following surgery.” Peck v. Zipf, 133
15 Nev. 890, 894 (2017) (internal quotes omitted).

16 Here, MONTANEZ argues that no affidavit is required because her case falls under the
17 foreign substance exception of NRS 41A.100(1)(a). “A foreign substance [is one] other than
18 medication or a prosthetic device [that] was unintentionally left within the body of a patient
19 following surgery.” *NRS 41A.100(1)(a)*. MONTANEZ argues that during her surgery, a foreign
20 substance was unintentionally left in her body, specifically a bacterium known as *pseudomonas*
21 *aeruginosa*. MONTANEZ argues that since the statute explicitly lists only two types of foreign
22 substances that are not included in its scope, neither of which applies here, the foreign substance
23 exception should apply.

24 NNMC argues that bacteria, as an organism, are not the kind of foreign substances which
25 allow for avoiding the NRS 41A.071 expert affidavit requirement. NNMC claims that the
26 Legislature intended the phrase “unintentionally left within the body” to refer not to bacterium,
27 but to substances health care providers would have used during surgery, such as needles, surgical
28 sponges, or a scalpel, and therefore, if unintentionally left within the body following surgery, it

1 would be malpractice which would not require expert testimony to prove. While Nevada case law
2 has not specifically excluded bacteria or other microscopic organisms from being deemed a foreign
3 substance, other jurisdictions have. The Court finds the statute is ambiguous as to what qualifies
4 as a foreign substance, even though there are two exceptions enumerated in NRS 41A.100(1)(a).

5 NNMC argues that since this is an alleged professional negligence action, it requires an
6 expert affidavit. NNMC argues the infection could have come from other sources outside of the
7 health provider's control, and therefore requires expert testimony to show that NNMC is at fault.
8 Furthermore, NNMC argues that this is not a factual scenario where the expert affidavit
9 requirement can be avoided. The Court agrees. The circumstances surrounding this case will
10 require expert testimony, as a layperson could not be expected to find malpractice in this case the
11 same way they would in a case where a sponge or scalpel was unintentionally left behind.

12 Under NRS 41A.071, "a medical malpractice complaint filed without a supporting medical
13 expert affidavit is void ab initio." Washoe Med. Ctr., 122 Nev. at 1300. "[V]oid ab initio mean[s]
14 that the complaint has no force and effect, does not legally exist, and thus it cannot be amended."
15 Id. at 1304. "Therefore, NRCP 15(a)'s amendment provisions, whether allowing amendment as a
16 matter of course or leave to amend, are inapplicable. A complaint that does not comply with NRS
17 41A.071 is void and must be dismissed; no amendment is permitted." Id. at 1304. Therefore, the
18 Court grants NNMC's motion to dismiss MONTANEZ's first claim for relief, without prejudice.

19 Second, the Court will consider MONTANEZ's second claim for relief, premises liability.
20 To establish a negligence claim resting on premises liability, the following elements are required:
21 (1) an owner or occupant of lands or buildings, (2) knew, or in the exercise of reasonable care
22 should have known, (3) of a dangerous and unsafe condition and (4) who invites others to enter
23 upon the property, (5) but failed to warn them of the danger, where the peril is hidden, latent, or
24 concealed or the invitees are without knowledge thereof. Twardowski v. Westward Ho Motels,
25 Inc., 86 Nev. 784, 787 (1970). "A landowner or possessor must exercise ordinary care and
26 prudence to render the premises reasonably safe for the visit of a person invited on his premises
27 for business purposes." Id. at 787 (internal quotations omitted).

28 MONTANEZ also argues that res ipsa loquitur applies to her second claim. Res ipsa

loquitur applies when (1) it is an event which ordinarily does not occur in the absence of someone's negligence, (2) is caused by an agency or instrumentality within the exclusive control of the defendant, and (3) is not due to any voluntary action or contribution on the part of the plaintiff. Woosley v. State Farm Ins. Co., 117 Nev. 182, 187 (2001). To invoke this doctrine in Nevada, the plaintiff must also show that "the defendant [had] superior knowledge of or be in a better position to explain the accident." Id. at 189.

MONTANEZ claims that NNMC owed her a duty to maintain its premises in a safe and careful manner that would not result in infection and blindness. MONTANEZ claims that NNMC and its personnel acting in the scope and course of their employment, acted unreasonably, carelessly, recklessly, and negligently, when it breached such duty. MONTANEZ argues NNMC breached its duty in one or more of the following respects: (a) it either knew or by the exercise of reasonable care should have known of the dangerous condition of the premises; (b) failing to take reasonable steps and care to alleviate and to prevent foreign substances, including bacteria from being left in MONTANEZ's body; and/or (3) failing to warn MONTANEZ as an invitee of the premises of the dangerous condition of the premises. MONTANEZ claims as a direct and proximate result of NNMC's conduct and breach of duty, MONTANEZ was infected and left permanently and irreversibly blind in her right eye. In addition, MONTANEZ claims she has incurred damages in excess of \$15,000, for pain, discomfort, blindness, expenses, lost employment, mental and emotional harm, and loss of enjoyment of life.

NNMC argues that MONTANEZ's premises liability claim must be dismissed because the gravamen of the Complaint sounds in professional negligence, rather than generic premises liability. "When the duty owing to the plaintiff by the defendant arises from the physician-patient relationship or is substantially related to medical [judgement, diagnosis, or] treatment, the breach thereof gives rise to an action sounding in medical malpractice as opposed to simple negligence." Szymborski v. Spring Mountain Treatment Ctr., 133 Nev. 638, 642 (2017) (citation omitted). "The distinction between medical malpractice and negligence may be subtle in some cases, and parties may incorrectly invoke language that designates a claim as either medical malpractice or ordinary negligence, when the opposite is in fact true." Id. at 642. Where plaintiffs have attempted to

1 characterize a medical malpractice tort as something else, Nevada courts have consistently looked
2 to “the nature of the grievance to determine the character of the action, not the form of the
3 pleadings.” Egan v. Chambers, 129 Nev. 239, 241, fn. 2 (2013). “[M]edical malpractice claims
4 that fail to comply with NRS 41A.071 must be severed and dismissed, while allowing the claims
5 for ordinary negligence to proceed.” Szymborski, 133 Nev. at 643. The question before the Court
6 is not the validity, sufficiency, or merit of MONTANEZ’s claims. Instead, the issue is whether
7 the claims are for medical malpractice, requiring dismissal under NRS 41A.071, or for ordinary
8 negligence or another tort.

9 Professional negligence is “the failure of a provider of health care, in rendering services,
10 to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by
11 similarly trained and experienced providers of health care.” *NRS 41A.015* (internal quotes
12 omitted). A provider of health care includes “a physician licensed pursuant to chapter 630 or 633
13 of NRS, . . . a licensed hospital, clinic, surgery center . . . and its employees.” *NRS 41A.017*. “A
14 claim is grounded in medical malpractice and must adhere to NRS 41A.071 where the facts
15 underlying the claim involve medical diagnosis, treatment, or judgment and the standards of care
16 pertaining to the medical issue require explanation to the jury from a medical expert at trial.”
17 Szymborski v. Spring Mountain Treatment Ctr., 133 Nev. 638, 648 (2017). By extension, if the
18 jury can only evaluate the plaintiff’s claims after presentation of the standards of care by a medical
19 expert, then it is a medical malpractice claim. *Id.* at 642.

20 MONTANEZ argues that although it is possible for four different people to be injured in
21 the same way during the same week due to malpractice, MONTANEZ contends her injury may
22 well have been caused, in full or in part, by nothing particularly medical in nature. MONTANEZ
23 argues its possible her injury was caused simply by the failure of a business owner to have a clean
24 building. If the premises were unsanitary, MONTANEZ claims a more appropriate expert to
25 testify would be a janitor, rather than a physician. MONTANEZ claims there is no such expert,
26 while NNMC argues an infectious disease physician would have been an appropriate expert.

27 NNMC argues the standard of care for operating room sterilization and infection
28 prevention is different from that required for generic premises liability of a parking lot or grocery

1 store aisle. NNMC argues that maintenance of its operating rooms require persons with special
2 training and knowledge beyond that of a common layperson, as is codified in NRS 439.865, which
3 requires healthcare facilities to develop an infection control program to prevent and control
4 infections, and NRS 439.873, which governs healthcare facilities in requiring designation of and
5 requisite qualifications for an infection control officer. NNMC contends that the only operative
6 factual allegation in the Complaint is that Defendant failed to keep a safe and sterile premise to
7 avoid a post-operative infection. NNMC argues that this supposed failure constitutes an
8 “omission” squarely within the purview of NRS 41A, requiring an expert affidavit, as sterilization
9 of operating rooms is a medical function, not merely janitorial. *NRS 41A.100*. Injury incurred by
10 a person “from error or omission in practice by the provider of healthcare,” resulting in lawsuits
11 for professional negligence must be filed within the statute of limitations. *NRS 41A.097(2)(c)*.

12 The Court must deny a motion to dismiss, unless it appears beyond a doubt that the plaintiff
13 could prove no set of facts which, if accepted by the trier of fact, would entitle him to relief. While
14 the allegations give fair notice of the nature and basis of the claim and the relief requested, the
15 legal theory of premises liability is misplaced. The Court finds that the gravamen of the claim is
16 medical malpractice, not premises liability. Complaints may not be artfully plead for the purpose
17 of evading the limitations and restrictions placed on medical malpractice cases. Therefore, the
18 Court finds MONTANEZ’s second claim for relief must be dismissed as it is improvidently
19 pleaded.

20 Based upon the foregoing and good cause appearing,

21 IT IS HEREBY ORDERED that Sparks Family Hospital, Inc.’s Motion to Dismiss is
22 GRANTED.

23 DATED this 8 day of May, 2020.

24 
25 DISTRICT JUDGE
26
27
28

CERTIFICATE OF SERVICE

CASE NO. CV19-01977

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 8 day of MAY, 2020, I filed the **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

 Personal delivery to the following: [NONE]

XX **Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.**

BRADLEY PAUL ELLEY, ESQ. for SOPHIA MONTANEZ

JOHN H. COTTON, ESQ. for SPARKS FAMILY HOSPITAL INC., dba NORTHERN NEVADA MEDICAL CENTER

ADAM SCHNEIDER, ESQ. for SPARKS FAMILY HOSPITAL INC., dba NORTHERN NEVADA MEDICAL CENTER

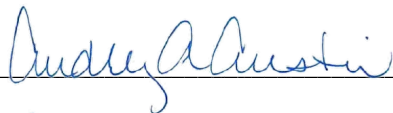
 Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – [NONE]

 Federal Express or other overnight delivery service [NONE]

DATED this 8 day of MAY, 2020.



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15 *Northern Nevada Medical Center*

16 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
17 **IN AND FOR THE COUNTY OF WASHOE**

18 SOPHIA MONTANEZ,

19 Plaintiff,

20 vs.

21 SPARKS FAMILY HOSPITAL, INC., a Delaware
22 Corporation doing business as NORTHERN
23 NEVADA MEDICAL CENTER and DOES 1-15,

24 Defendants.

CASE NO.: CV19-01977

DEPT NO.: 4

NOTICE OF ENTRY OF ORDER

25 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

26 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that an Order Granting
27 Sparks Family Hospital, Inc.'s Motion to Dismiss was entered in the above entitled matter on the
28 8TH day of May, 2020, a copy of which is attached hereto.

PURSUANT TO NRS 239B.030, THE UNDERSIGNED DOES HEREBY AFFIRM
THAT THE PRECEDING DOCUMENT DOES NOT CONTAIN THE SOCIAL SECURITY
NUMBER OF ANY PERSON.

1 Dated this 11TH day of May 2020.

2 JOHN H. COTTON & ASSOCIATES, LTD.

3 By: /s/ Adam Schneider

4 John H. Cotton, Esq.

5 Nevada Bar Number 5268

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10 *Attorneys for Defendant*

11 *Sparks Family Hospital Inc., dba*

12 *Northern Nevada Medical Center*

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on this 11TH day of May 2020, I served the foregoing **NOTICE OF**
15 **ENTRY OF ORDER** by electronic service through the Clerk of the Court using the Wiznet
16 Electronic Service system upon all parties with an email address on record as follows:

17 BRADLEY PAUL ELLEY, ESQ.
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21 /s/ Gemini Yii

22 Employee of John H. Cotton & Associates
23
24
25
26
27
28