IN THE SUPREME COURT OF THE STATE OF NEVADA

SOPHIA MONTANEZ,

Appellant,

vs.

SPARKS FAMILY HOSPITAL, INC., A DELAWARE CORPORATION DOING BUSINESS AS NORTHERN NEVADA MEDICAL CENTER,

Respondents.

No. 81312

APPEAL
from the Second Judicial District Court, Washoe County
The Honorable CONNIE J. STEINHEIMER, District Judge
District Court Case No. CV19-01977

JOINT APPENDIX
VOLUME I
Pages 1-71

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Attorney for Appellant

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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.

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

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

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

12. As a direct result of the foreign substance left in Plaintiff's body, 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.

SECOND CLAIM FOR RELIEF

Premises Liability

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

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

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

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.

///

///

///

///

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
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SOPHIA MONTANEZ,

Plaintiff,

vs.

Case No. CV19-01977
Dept. No. 4

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

Defendants.
_____/

PROOF OF SERVICE OF SUMMONS AND COMPLAINT ON DEFENDANT SPARKS FAMILY HOSPITAL, INC., A Delaware corporation doing business as NORTHERN NEVADA MEDICAL CENTER

Code: 4085

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SOPHIA MONTANEZ,

Plaintiff / Petitioner / Joint Petitioner,

Case. No. CV19-01977

vs.

SPARKS FAMILY HOSPITAL, INC., a Delaware corp. dba NORTHERN NEVADA MEDICAL CENTER, and DOES 1-15

Dept. No. 4

Defendant / Respondent / Joint Petitioner.

/

SUMMONS

TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 21 DAYS. READ THE INFORMATION BELOW VERY CAREFULLY.

A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that document (see complaint or petition). When service is by publication, add a brief statement of the object of the action.

The object of this action is: _____.

1. If you intend to defend this lawsuit, you must do the following within 21 days after service of this summons, exclusive of the day of service:
   a. File with the Clerk of the Court, whose address is shown below, **a formal written answer** to the complaint or petition, along with the appropriate filing fees, in accordance with the rules of the Court, and;
   b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address is shown below.
2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the complaint or petition.

Dated this 15th day of October, 2019.

Issued on behalf of Plaintiff(s):

Name: Bradley Paul Elley, Esq.
Address: 120 Country Club Dr., Ste. 5
Incline Village, NV 89451
Phone Number: (775) 831-8800
Email: brad@bpelleylaw.com

JACQUELINE BRYANT
CLERK OF THE COURT
By: _____
Deputy Clerk
Second Judicial District Court
75 Court Street
Reno, Nevada 89501

CODE 1067

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WASHOE

Sophia Montanez,
Plaintiff(s),
VS.
Sparks Family Hospital, Inc., dba Northern Nevada Medical Center,
Defendant(s),

CASE NO: **CV19-01977**

DECLARATION OF SERVICE

STATE OF NEVADA
COUNTY OF WASHOE ss.:

ROBERT JAMES CLARK, being duly sworn says: That at all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to nor interested in the proceedings in which this Affidavit is made.

That Affiant received copy(ies) of the **SUMMONS; COMPLAINT;** On 12/30/2019 and served the same on 12/30/2019 at 3:00 PM by delivery and leaving a copy with:

Kris Osborne - Administrative Assistant, pursuant to NRS 14.020 as a person of suitable age and discretion, of the office of Corporation Service Company, registered agent for Defendant Sparks Family Hospital, Inc., a Delaware corp. dba Northern Nevada Medical Center, at the registered address of:

112 N Curry St, Carson City, NV 89703-4934

A description of Kris Osborne is as follows

Gender	Color of Skin/Race	Hair	Age	Height	Weight
Female	White	Blond	41-45	5'1 - 5'6	141-160 Lbs

Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

Affiant does hereby affirm under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.
Executed on: 12/30/2019
by ROBERT JAMES CLARK
Registration: R -060170

No notary is required per NRS 53.045

X _____

ROBERT JAMES CLARK
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SECOND JUDICIAL DISTRICT COURT,
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding SUMMONS, filed in District Court Case No. CV19-01977.

[X] Does not contain the social security number of any person.

- OR -

[ ] Contains the social security number of a person as required by:.

_____ A specific state or federal law, to wit:

_____
(State specific state or federal law)

- or -

_____ For the administration of a public program

- or-

_____ For an application for a federal or state grant.

- or -

_____ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: January 6, 2020

/s/ Elizabeth Lintner
Elizabeth Lintner
Law Office of Bradley Paul Elley, Esq.
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SOPHIA MONTANEZ, Plaintiff, vs. SPARKS FAMILY HOSPITAL, INC., A Delaware Corporation doing business as NORTHERN NEVADA MEDICAL CENTER and DOES 1-15 Defendants.	**CASE NO.: CV19-01977** **DEPT NO.: 4** **DEFENDANT'S MOTION TO DISMISS**

Sparks Family Hospital Inc. (hereinafter "Defendant") by and through its counsel of record, John H. Cotton, Esq. and Adam Schneider, Esq., of the law firm JOHN H. COTTON & ASSOCIATES, LTD. hereby files the instant Motion to Dismiss. This Motion is based upon the following Memorandum of Points and Authorities and all pleadings and papers on file herein.

Dated this 17th day of January 2020.

JOHN H. COTTON & ASSOCIATES, LTD.

/s/ Adam Schneider
JOHN H. COTTON, ESQ.
ADAM SCHNEIDER, ESQ.
Attorneys for Defendant

John H. Cotton & Associates
7900 W. Sahara, Suite 200
Las Vegas, NV 89117

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

"On or about October 10, 2018, Plaintiff underwent a surgical procedure on her right eye at the Northern Nevada Medical Center." (Plaintiff's Complaint at ¶ 5.)

"The portion of the Northern Nevada Medical Center where Plaintiff underwent her procedure was newly constructed and/or re-designed." (Plaintiff's Complaint at ¶ 6.)

"Upon information and belief, during the procedure, a foreign substance was left in Plaintiff's body, including but not necessarily limited to a bacterium known as pseudomonas aeruginosa." (Plaintiff's Complaint at ¶ 9.)

"As a direct result of the foreign substance left in Plaintiff's body, Plaintiff has been damaged, including but not necessarily limited to Plaintiff being infected with pseudomonas aeruginosa and being now permanently and irreversibly blind in her right eye." (Plaintiff's Complaint at ¶ 10.)

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

"Defendant owed a duty to Plaintiff to maintain its premises, in a safe and careful manner that would not result in infection and blindness to Plaintiff." (Plaintiff's Complaint at ¶ 14.)

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

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.

(Plaintiff's Complaint at ¶ 15.)

On October 10, 2019, Plaintiff filed her Complaint. It does not attach or reference any expert affidavit pursuant to NRS 41A.071. It contains causes of action for: 1) "Medical Malpractice Under Nev. Rev. Stat. 41A.100(1)A: The "Foreign Substance" Exception"; and 2) "Premises Liability." (See generally Plaintiff's Complaint.)

II.

STANDARD FOR MOTION TO DISMISS

Dismissal for failure to state a claim is appropriate when it appears beyond a doubt that the plaintiff could prove no set of facts which, if true, would entitle him to relief. Buzz Stew, LLC v. City of Las Vegas, 124 Nev. Adv. Rep. 21, 181 P. 3d. 670, 672 (2008).

To survive a motion to dismiss for failure to state a claim, the complaint must set forth factual allegations sufficient to establish each element necessary to recover under some actionable legal theory. See NRCP 12(b); see also Hampe v. Foote, 118 Nev. 405, 408, 47 P. 3d 438, 439 (2002) (although factual allegations in the complaint are regarded as true for the purposes of a motion to dismiss, a [d]ismissal is proper where the allegations are insufficient to establish the elements of a claim for relief).

III.

LAW & ARGUMENT

A. Plaintiff's NRS 41A.100(1)(a) cause of action must be dismissed

This is an alleged professional negligence action requiring an expert affidavit, and not a

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factual scenario where the expert affidavit requirement can be avoided.

Under NRS 41A.071, "a medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio." Washoe Med. Ctr. v. Second Judicial Dist. Court, 122 Nev. 1298, 1304, 148 P.3d790, 794 (2006).

Expert testimony is necessary in a medical malpractice case "unless the propriety of the treatment, or the lack of it, is a matter of common knowledge of laymen." Fernandez v. Admirand, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992) (specifically referencing NRS 41A.100(1) for such proposition).

NRS 41A.100 clearly states that an expert affidavit is not required if any one of only five codified factual scenarios are pled, e.g., "one of which being that an object was left in the body following surgery." Peck v. Zipf, 133 Nev. ____, 407 P.3d 775 (2017).

NRS 41A.100(1)(a), the subsection which Plaintiff relies upon to avoid the expert affidavit requirement,[1] states in full- "A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery." NRS 41A.100(1)(a).

Emphasis is placed on the phrase "unintentionally left within the body." It is axiomatic that the Legislature contemplated that if the healthcare provider did not place the foreign substance within the body during surgery, then it cannot be said that the healthcare provider *unintentionally left* the foreign substance within the body following surgery. See NRS 41A.100(1)(a).

Typical examples of such a foreign substance as contemplated within the statute would

[1] "Wise course of action in all malpractice cases would be for plaintiffs to provide affidavits even when they do not intend to rely on expert testimony at trial." Szydel v. Markman, 121 Nev. 453, 117 P.3d 200 (2005).

be that of a needle. Szydel v. Markman, 121 Nev. 453, 117 P.3d 200 (2005) (unintentional retention of a surgical needle).

Other examples would be a surgical sponge or scalpel. Farley v. Meadows, 185 W. Va. 48, 50, 404 S.E.2d 537, 539 (1991) (res ipsa loquitur doctrine applying with a surgical sponge or scalpel because the "only inference that can be drawn is that the foreign object was left in the chest from surgery.") See also Vinciguerra v. Jameson, 208 A.D.2d 1136, 617 N.Y.S.2d 942 (1994) (hemoclips (small metallic devices used to control bleeding during surgery) not deemed a statutory foreign objects for purposes of statute of limitations tolling); Ericson v. Palleshi, 23 A.D.3d 608, 610 (2005) (spiral tacks retained in patient's abdomen during surgery not deemed a statutory foreign objects for purposes of statute of limitations tolling); Newman v. Keuhnelian, 248 A.D.2d 258, 670 N.Y.S.2d 431 (1998) (piece of a catheter left in the body undetected not deemed a statutory foreign object for purposes of statute of limitations tolling when the catheter itself was purposefully implanted to temporarily remain in the body).

Nowhere in the case law does it allow for bacteria or any other microscopic organisms to be deemed a "foreign substance" as contemplated in NRS 41A.100(1) or any other similar statutory scheme. See, e.g., Smith v. Curran, 28 Colo.App. 358, 472 P.2d 769, 770-772 (res ipsa loquitur not applicable merely because an infection develops after surgery); Montana Deaconess Hospital v. Gratton 169 Mont. 185, 545 P.2d 670, 673 (1976) (same); Pink v. Slater, 131 Cal.App.2d 816, 818, 281 P.2d 272 (1955) (same regarding infection after plastic surgery); McCall v. St. Joseph's Hospital, 184 Neb. 1, 165 N.W.2d 85, 88-89 (1969) (same regarding staphylococcus infection after surgery for herniated disc); Schofield v. Idaho Falls Latter Day Saints Hosp., 90 Idaho 186, 409 P.2d 107, 109 (1965) (same regarding eye infection after operation to remove cataract; Harmon v. Rust, 420 S.W.2d 563, 564 (1967) (same regarding infection following skin grafts for burns); Contreras v. St. Luke's Hospital, 78 Cal. App. 3d 919,

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144 Cal. Rptr. 647 (1978) (same regarding infection subsequent to a knee surgery).

Later-occurring New York case law is further instructive:

> In determining whether an object which remains in the patient constitutes a "foreign object," the courts should consider the nature of the materials implanted in a patient, as well as their intended function. Objects such as surgical clamps, scalpels, and sponges are introduced into the patient's body to serve a temporary medical function for the duration of the surgery, but are normally intended to be removed after the procedure's completion. Clearly, when such objects are left behind, no assessment of the medical professional's expert judgment or discretion in failing to remove them is necessary to establish negligence.
> . . .
> Moreover, plaintiff's claim is more accurately characterized as a challenge to defendant Moront's medical judgment and treatment — i.e., his placement of the suture — and not as one predicated on defendant's failure to remove medical material that should have been extracted at the close of the operation.

Rockefeller v. Moront, 81 N.Y.2d 560, 565, 618 N.E.2d 119 (1993); see also LaBarbera v. New York Eye and Ear Infirmary, 91 N.Y.2d 207 (1998).

In LaBarbera, a stent was purposefully retained in the patient's nose following nasal reconstruction surgery and not deemed as a statutory foreign object for purposes of statute of limitations tolling when not removed after a follow-up surgery. The New York appellate court reasoned:

> the key feature [of what constitutes a retained foreign object] is the uncontroverted protocol of insertion as part of a continuing treatment modality. Thus, it may be an "object," but it is not "foreign" and not "left behind" in any medical or legal senses.

Id. at 209.

It is evident that bacteria, as an organism, are not the kind of foreign substances which allow for avoiding the NRS 41A.071 expert affidavit requirement.

B. Plaintiff's premises liability cause of action must be dismissed

1. Plaintiff's Complaint sounds in professional negligence

It is the gravamen of the Complaint which controls what the alleged tort sounds in; and not the creativity of the Plaintiff's attorney. Courts are to look to "the nature of the grievance to

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determine the character of the action, not the form of the pleadings." Egan v. Chambers, 129 Nev. 239, 299 P.3d 364, 366 n. 2 (2013). See also Hartford Ins. Group v. Statewide Appliances, Inc., 87 Nev. 195, 198-99, 484 P.2d 569, 571 (1971) (holding where the aggrieved party sought "recovery for a breach of an agreement to sell, but instead claims recovery for damages to property" that the Court will look "to the real purpose of the complaint."); see also Noland Health Servs. v. Wright, 971 So. 2d 681 (2008) ("It is the substance of the action, rather than the form, that is the touchstone for determining whether an action is actually one alleging medical malpractice.")

Professional negligence is "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. A "provider of health care" is further defined to specifically include "a licensed hospital . . . and its employees." NRS 41A.017.

This is a professional negligence action involving the standard of care for operating room sterilization and infection prevention, and not generic premises liability of a parking lot or grocery store aisle. Plaintiff's characterization of the facts to assert her cause of action for premises liability begs the question what kind of analysis should trial courts utilize to classify something as a medical malpractice action versus some other kind of tort:

> A claim is grounded in medical malpractice and must adhere to NRS 41A.071 where the facts underlying the claim involve medical diagnosis, treatment, or judgment and the standards of care pertaining to the medical issue require explanation to the jury from a medical expert at trial.
>
> 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.

Szymborski v. Spring Mountain Treatment Center, 133 Nev. 638, 403 P.3d 1280 (2017).

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Below are but a few examples of Nevada case law where other Plaintiffs have attempted to characterize a medical malpractice tort as something else to no avail:

Johnson v. Incline Village Gen. Improvement Dist., 5 F. Supp. 2d 1113 (D. Nev. 1998).

An employee sued an employer for disability discrimination after the employee's physician opined the employee was not able to perform the essential functions of the job. Id. at 1114. When deposed, the physician changed his mind that day that the employee could perform the job. Id. The employer sued the employee's physician for "negligent misrepresentation" for the allegedly negligent diagnosis of the employee's physical condition and his communication of that to the employer. Id. at 1113-1114.

The U.S. District Court of Nevada reasoned that even if the employer and the physician did not establish a doctor-patient relationship, the physician's actions constituted "rendering services" within the meaning of the operative medical malpractice statute at that time. Id. at 1115. The Court went onto expand the definition of medical malpractice, and held that "the scope of 'medical malpractice' extends beyond the immediate provision of care, and encompasses even something as far removed from the immediate context of the doctor-patient relationship as the negligent maintenance of medical records and a misrepresentation resulting therefrom." (emphasis added) Id. at 1115.

Zhang v. Barnes, 382 P.3d 878 (Nev. 2016) (unpublished disposition filed September 12, 2016).

In the context of a negligent hiring/training/supervision claim concurrent with a professional negligence claim, the Nevada Supreme Court held- "In cases such as this, when a [non-malpractice] claim is based upon the underlying negligent medical treatment, the liability is coextensive. [The non-malpractice cause of action] cannot be used as a channel to allege

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professional negligence against a provider of health care to avoid the statutory caps on such actions. . . .") Id. at 22-23; see also Humphrey v. State, 70 Fed. Appx. 915 (9th Cir. 2003) (holding that negligent supervision claims, as a general matter, are within the scope of medical malpractice because they involve the rendering of medical services); see also Colorado Environments v. Valley Grading, 105 Nev. 464, 471-72, 779 P.2d 80, 84 (1989) (disapproving of double recovery for the same injury).

Truck Insurance Exchange v. Tetzlaff, 683 F. Supp. 223 (D. Nev. 1988)

This case rejected the argument that a case for indemnity against a physician was not subject to the Medical Malpractice Act because it was delineated as a claim for indemnity and not malpractice, and holding "although this is an indemnity action, the asserted liability is clearly grounded on an alleged medical malpractice. Id. at 226.

Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct., 132 Nev. _____, 376 P.3d 167 (2016)

The Nevada Supreme Court concluded that the scope of informed consent to a medical procedure rather than the absence of consent to it, even when pleaded as a battery action, constituted medical malpractice claims requiring a medical expert affidavit.

Brown v. Mt Grant General Hospital, 2013 WL 4523488 * 6 (D. Nev. 2013)

Plaintiff sued multiple healthcare providers for state law claims including NRS 41.1395 elder abuse stemming from Plaintiff's hospitalization, development of bedsores, infection, and resultant surgeries. Defendants filed a Motion to Dismiss arguing the "elder abuse claim is improvidently pleaded as an end-run around Nevada's medical malpractice limitations."

Judge Hicks of the U.S. District Court of Nevada granted the Motion to Dismiss the elder abuse cause of action, and in doing so: 1) held that "the elder abuse statute was not intended as a remedy for torts that sound in medical malpractice"; and 2) acknowledged "the Nevada Supreme Court has signaled a disapproval of artful pleading for the purposes of evading the medical malpractice limitations."

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2. Summary of Nevada case law applied to Plaintiff's Complaint

The above discussed cases, along with close examination of the actual allegations underlying the Complaint, support the conclusion that NRS 41A must govern the instant case. The only operative factual allegation in the Complaint is that Defendant failed to keep a safe and sterile premises to avoid a post-operative infection. Wood v. Safeway, Inc., 121 Nev. 724, 730, 121 P.3d 1026, 1030 (2005) (noting that the substantive law defines the operative, material facts as those which could affect the outcome of the case).

This supposed failure by Defendant constitutes an "omission" squarely within the purview of NRS 41A, thus requiring an expert affidavit. See NRS 41A.097(2)(c) (codifying that lawsuits for professional negligence must be filed within the statute of limitations "from error or omission in practice by the provider of health care.")

Defendant's maintenance of its operating rooms for purposes of sterilization and infection prevention is clearly a medical function. Indeed, such measures are governed by statute and require persons with special training beyond that of a common layperson's knowledge to understand. See, e.g., NRS 439.865 (codifying healthcare facilities must develop an infection control program to prevent and control infections), NRS 439.873 (healthcare facilities requiring designation of and requisite qualifications for an infection control officer).

IV.

CONCLUSION

Plaintiff's Complaint must be dismissed.

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

Dated this 17th day of January 2020.

JOHN H. COTTON & ASSOCIATES, LTD.

By: */s/ Adam Schneider*
John H. Cotton, Esq.
Nevada Bar Number 5268
Adam A. Schneider, Esq.
Nevada Bar Number 10216
7900 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January 2020, I served the foregoing **DEFENDANT'S MOTION TO DISMISS** by electronic service through the Clerk of the Court using the Wiznet Electronic Service system upon all parties with an email address on record as follows:

BRADLEY PAUL ELLEY, ESQ.
120 Country Club Lane, Suite 5
Incline Village, NV 89451
Attorneys for Plaintiff

/s/ Gemini Yii
Employee of John H. Cotton & Associates

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CODE: 2645
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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. CV19-01977
Dept. No. 4

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

Defendants.
_____/

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COMES NOW Plaintiff, Sophia Montanez, ("Ms. Montanez") by and through her attorney of record, Bradley Paul Elley, Esq., and hereby opposes Defendant's Motion to Dismiss filed by Defendant Sparks Family Hospital, Inc. operating the Northern Nevada Medical Center ("NNMC") on January 17, 2020.

Introduction

Ms. Montanez bases her opposition on the following Memorandum of Points and Authorities, and on all pleadings and papers on file herein.

Memorandum of Points and Authorities

I. Statement of Facts

Defendant NNMC correctly quotes certain portions of the Complaint filed herein on October , 2019, a true and correct copy of which has been attached hereto as Exhibit 1. Also pertinent, though,are the following additional allegations appearing in the Complaint:

"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." (Complaint, □ 7)

The Complaint states two counts. Count I asserts, "Medical Malpractice Under Nev. Rev. Stat. 41A.100(1)A: The 'Foreign Substance' Exception" (Complaint, p. 2). Count II asserts, "Premises Liability". (Complaint, p. 3)

II. Standard for Motion to Dismiss

While NNMC correctly notes two applicable standards, the Nevada Supreme Court has also declared that on a motion to dismiss, all inferences are to be drawn in favor of the complaint and against the requested dismissal. *Neville v. Eighth Judicial Dist. Court of Nev.*, 133 Nev. Adv. Rep. 95, 406 P.3d 499, 501-02 (Nev. 2017). ("When a court considers a motion to dismiss under NRCP 12(b)(5), all alleged facts in the complaint are presumed true and all inferences are drawn in favor of the complaint. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Thus, dismissing a complaint is appropriate 'only if it appears beyond a doubt that [the

plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.' *Id.* at 228, 181 P.3d at 672.")

III. Law and Argument

1. The "Foreign Substance" Exception Under NRS 41A.100(1)(A)

The statutory exception to the affidavit requirement states that to meet its terms, a plaintiff need plead only that during surgery, a "foreign substance" was unintentionally left in their body. NRS 41A.100(A)(1). Ms. Montanez pleads precisely that. She underwent surgery (Complaint, □ 5), and that during that surgery, "a foreign substance" was left in her body, including, "the bacterium known as pseudomonas aeruginosa." (Complaint, □ 9)

A statute's plain language governs; unless found to be ambiguous, there is no search for underlying statutory intent or construction. *Sarfo v. State*, 134 Nev. Adv. Op. 35, 429 P.3d 650 (Nev. 2018). ("When the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Id.*, citing *Dykema v. Del Webb Cmtys., Inc.*, 385 P.3d 977, 979 [2016]). The statute, NRS 41A.100(A)(1), is unambiguous. In fact, NNMC's Motion does not actually anywhere even argue ambiguity, and for good reason: There is nothing ambiguous about the phrase, "foreign substance", or the phrase, "unintentionally left." So, under Nevada law there is, "no search for its meaning beyond the statute itself." *Sarfo*, supra. Rather, courts simply give full effect to the plain and ordinary meaning of the statute's words. *Premsrirut v. Republic Silver State Disposal, Inc.*, 449 P.3d 475 (Nev. 2019).

More, the Motion nowhere argues that the bacterium known as pseudomonas aeruginosa is not "foreign" or a "substance." Instead, in fact, NNMC argues that bacteria such as pseudomonas

aeruginosa "are not the *kind* of foreign substances" covered by the statute. [1] (Motion, p. 6 [emphasis added]) This argument stems from NNMC's basic assertion about what it believes, "the Legislature contemplated" (Motion, p. 4). But no such "contemplation" is relevant when the statute's plain language applies. *Sarfo,* and *Premsrirut*, supra.

In fact, the statute's plain language goes on to show that it did not simply exempt all foreign substances without a thought given to how that phrase might be over-applied to substances not intended to be excepted. This is because the statute expressly refers to any, "foreign substance *other than medication or a prosthetic device*" that was unintentionally left in a patient's body. 41A.100(1)(A) (emphasis added). So, to the extent the statute "contemplates" that only certain "kinds of foreign substances" are excepted, it actually does explicitly list only two types of foreign substances that are not included in its scope, neither of which applies here. If the statute were supposed to exempt additional types of foreign substances from its scope, beyond those enumerated two types, then it would have said so; it did not, and therefore, the statute cannot be read so as to apply to additional unenumerated types of foreign substances. *Flores v. Las Vegas-Clark Cty. Library Dist.*, 134 Nev. Adv. Op. 101, 432 P.3d 173, 177 (Nev. 2018), and *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (re-affirming that a statute's listing of specific items excludes the possibility of additional items being included ["expressio unius exclusio alterius"]).

Rather than pointing to any case from Nevada or elsewhere that specifically says a bacterium is *not* a "foreign substance" – and there is none that Plaintiff's research has found – NNMC merely lists cases (nearly all from foreign states) that found other things to be foreign substances. (Motion, pp. 4-5) And naturally, Plaintiff readily concedes that all those other things referred to in those cases

[1] NNMC thereby effectively concedes the bacterium is a, "foreign substance"; it merely asserts that the statute applies only to certain kinds of foreign substances, and that this bacterium is not one of them.

would also be foreign substances. None of that means, of course, that the bacterium known as pseudomonas aeruginosa is not also a foreign substance. And in actuality, those many cases from other states interpret statutes construing the phrase, "foreign object,", not "substance." (Motion, p. 5) This is noteworthy because apparently the Nevada Legislature could well have chosen a word such as, "object" – as many legislatures in all the other cited states did – and yet instead chose the word, "substance", instead. The former word, "object", certainly connotes something more mechanical or human-made, while the latter, "substance", connotes inclusion of something more chemical/biological. It appears from NNMC's cited authorities at least that Nevada's statute is *sui generis* and its reliance on such foreign authorities is inapposite.

NNMC also suggests that the statute's exception requires not only that a foreign substance be "unintentionally left" in a plaintiff's body, but also that the foreign substance *be intentionally placed there first, and then* "unintentionally left." (Motion, p. 4) The statute contains no such requirement, which fully disposes of that argument. NRS 41A.100(1)(A). More, though, the position does not stand up to sheer logic. One may "leave" something in a place unintentionally without having necessarily first placed it there intentionally, as would be the case in the question, "Who left this spilt milk on the floor?"

The Complaint alleges that a foreign substance was unintentionally left in Ms. Montanez, by NNMC, during her surgery. That is precisely what the statute calls for. If this straightforward, literal application of the statute's plain language seems in the least bit draconian or beyond what NNMC thinks might have been intended, it may help to recall that the statute grants NNMC and other health providers dramatic protections beyond what the common law had provided. Under Nevada common law, no affidavit at the time of filing a medical malpractice claim was required at all, especially for a res ipsa claim of any stripe. The statute changed that, and provided extraordinary protections to

certain defendants, and to the detriment of plaintiffs. *Peck v. Zipf*, 133 Nev. Adv. Op. 108, 407 P.3d 775, 779 (Nev. 2017) (NRS 41A.100 fundamentally changes the common law applicable to res ipsa actions in medical malpractice cases).[2] Statutes may be enacted to change and even wholly replace the common law to carve out special benefits for health care providers, but such legislation, in derogation of the common law (and itself rather draconian and harsh toward injured persons, one might observe), must be strictly construed. *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc.*, 132 Nev. Adv. Op. 49, 366 P.3d 1105, 1112 (Nev. 2016).

By its plain language the statute requires only that the foreign substance be left in a plaintiff's body, and that the leaving be unintentional. Unless NNMC is arguing it *intentionally* left the bacterium in Ms. Montanez (in which case the tort of battery would apply, and the Court need not concern itself with the statutory exception), its argument would add a requirement to the statutory exception that the statute's plain language simply does not include. Ms. Montanez therefore respectfully request the Court to deny the Motion to Dismiss as to Count I.

2. Premises Liability

"In Nevada, proprietors owe their invitees a duty to use reasonable care to keep the premises in a reasonably safe condition for use." *Hammerstein v. Jean Dev. W.*, 111 Nev. 1471, 1475-76, 907 P.2d 975, 977 (1995). The elements of a negligence claim resting on premises liability are: 1) a landowner/occupier of real property, 2) knew or in the exercise of reasonable care should have known, 3) of a dangerous or unsafe condition existing on the property, and 4) failed to adequately warn of the danger. *Twardowski v. Westward Ho Motels*, 86 Nev. 784, 476 P.2d 946, 947-48 (Nev. 1970). An important corollary is that, "the owner or occupier of land has a duty to an invitee

[2] NNMC cites to *Zipf*, which applied the plain and unambiguous words of the statute's "surgery" requirement in denying a claim that was not pleaded to have arisen out of a surgery. Here, Ms. Montanez alleges such surgery. (Complaint, ¶ 5)

to inspect the premises to discover dangerous conditions not known to him and to 'take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use.'" *Id*. (quoting, Prosser, Handbook of The Law of Torts 402 [3d Ed. 1964]).

Res ipsa loquitur applies to 1) an event which ordinarily does not occur in the absence of someone's negligence; (2) caused by an agency or instrumentality within the exclusive control of the defendant; and (3) not due to any voluntary action or contribution on the part of the plaintiff. *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 188-89, 18 P.3d 317, 321 (2001). To invoke the doctrine, it is also required that the defendant to have superior knowledge regarding, or be in a better position to explain, than the plaintiff. *Id*.

Count II posits that Plaintiff's injury may well have been caused, in full or in part, by nothing peculiarly medical in nature. Rather, Count II rests on the possibility that Plaintiff's blindness was caused simply by the failure of a business owner to have a clean building: a failure to mop the floors, for instance, or to wipe off a dirty surface. Here, the allegation of Paragraph 7 becomes important: three different other people were so injured in the same place during the same week. (Complaint, ¶ 7). It is very possible, to say the least, that the same doctor or nurses – none of whom, the Court will note, Plaintiff has made any claim against – did not commit the same act of professional negligence solely causing the same type of injury four different times in the same week. Rather, Count II hypothesizes simply that the premises themselves were at least partially responsible, having been left in an unsanitary condition.[3] To this point, the most appropriate expert to testify would far more likely be a janitor than a physician.

[3] While NNMC's implied compliment is appreciated (Motion, p. 6), it takes no special "creativity" to consider that, if four different people get sick in the same building open for business – hospital or otherwise – during the same week, then perhaps the cause may simply have been that the business location was not clean, as opposed to malpractice on any particular professional's fault.

Both premises liability claims and medical malpractice are sub-species of negligence. *Hammerstein*, supra. Due to the fact that NNMC completely controls the locus, and the impossibility without discovery to determine more than what has already been alleged, Ms. Montanez cannot know with certainty whether the pseudomonas aeruginosa she now has was due to professional negligence of some kind, or due simply to a business-owner's failure to keep their building clean (or, perhaps, both). Thus, both sub-species of negligence are properly pleaded. This is not some creative, backdoor way of pleading malpractice Rather, it is pleaded in the alternative that medical malpractice had nothing to do with the injury and that it was instead caused by a proprietor's failure to keep their building clean in violation of their duty to their invitees, three others of whom seem to have been victims of that same breach duty.

In this regard, it is worth noting that the medical malpractice statutory scheme that NNMC argues should apply to this claim requires not only professional's affidavit (absent the statutory exceptions), but also that the professional be, "a provider of health care 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 negligence." NRS 41A.100(2). But of course, there is no medical doctor who specializes in cleaning real property. To the extent the infection was caused by basic uncleanliness or other unsafe condition to the real property itself, there would be no, "professional", except perhaps a professional janitor, who would practice in an appropriate field.

NNMC correctly notes that hospitals have statutory requirements as to infection control programs, and which therefore would remove, NNMC's suggestion must be, the cleanliness of hospitals from the realm of ordinary care and into that of professional (mal)practice. (Motion, p. 10) But such requirements are hardly unique to health care providers or other professionals. Many types of businesses, involving professionals and otherwise, have statutory requirements relating to the

cleanliness of their premises to avoid illnesses to invitees. See, e.g., NRS 447.045 and 447.100 (requiring hotels and especially bathrooms to be kept in a clean and sanitary condition, and for hotels to fumigate rooms under certain circumstances to control the spread of infections).

To the extent, by the way, that Ms. Montanez' injury may have been caused or contributed to by simple uncleanliness, NNMC's reference to NRS 439.865 and 439.873 actually points up an additional reason why Count II's Premises Liability claim is proper here: Uncleanliness in violation of either of the statutes, including any of the regulatory measures adopted under them, would be negligence per se, not calling for any particular evidence (much less a physician's affidavit asserting a breach of some professional standard of care) in order to make a prima facie case. *Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 643, 98 P.3d 678, 680 (2004). Due to the res ipsa nature of this case, of course, Ms. Montanez does not know of the facts that would prove or dis-prove such a statutory violation. But, as stated at this Memorandum's beginning section on the applicable standards, dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Neville v. Eighth Judicial Dist. Court of Nev.*, 133 Nev. Adv. Op. 95, 406 P.3d 499, 501-02 (Nev. 2017).

Where Plaintiff is now effectively blind, and three others have mysteriously developed infections in the same business location during the same week with absolutely no explanation offered by the owner of the business, a premises liability, especially under a res ipsa loquitur theory, is especially appropriate.

IV. Conclusion

For all the foregoing reasons, NNMC's Motion should be denied and overruled.

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: February 24, 2020.

/s/ Bradley Paul Elley
BRADLEY PAUL ELLEY, ESQ.
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PROOF OF SERVICE

In accordance with the provisions of N.R.C.P. 5(b), I hereby certify that I am an employee of Bradley Paul Elley, Attorney at Law, and that on February 24, 2020, I electronically filed a true and correct copy of the **OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** with the Clerk of the Court by using the ECF system which served the following parties electronically:

JOHN H. COTTON, Esq.
ADAM SCHNEIDER, Esq.
JOHN H. COTTON & ASSOCIATES, LTD.
7900 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117

Attorneys for Defendants
Sparks Family Hospital Inc., dba
Northern Nevada Medical Center

Executed on February 24, 2020, at Incline Village, Nevada.

/s/ Elizabeth Lintner

INDEX OF EXHIBITS

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Case No. CV19-01977

Exhibit No.	Description	No. of pages
1	Complaint filed 10/10/2019	5

EXHIBIT 1

EXHIBIT 1

CODE: $1425
BRADLEY PAUL ELLEY, ESQ.
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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.

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

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

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

12. As a direct result of the foreign substance left in Plaintiff's body, 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.

SECOND CLAIM FOR RELIEF

Premises Liability

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

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

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

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

SOPHIA MONTANEZ, Plaintiff, vs. SPARKS FAMILY HOSPITAL, INC., A Delaware Corporation doing business as NORTHERN NEVADA MEDICAL CENTER and DOES 1-15 Defendants.	**CASE NO.: CV19-01977** **DEPT NO.: 4** **DEFENDANT'S REPLY RE: MOTION TO DISMISS**

Sparks Family Hospital Inc. (hereinafter "Defendant") by and through its counsel of record, the law firm JOHN H. COTTON & ASSOCIATES, LTD. hereby files the instant Reply. This Reply is based upon the following Memorandum of Points and Authorities and all pleadings and papers on file herein.

Dated this 9th day of March 2020.

JOHN H. COTTON & ASSOCIATES, LTD.

/s/ Adam Schneider
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

Defendant provided a Statement of Facts in its Motion and refers this Court to the same in the interests of concision as if fully stated herein.

II.

LAW & ARGUMENT

A. Plaintiff's professional negligence cause of action without an expert affidavit is void ab initio and must be dismissed

Plaintiff argues that Defendant "merely lists cases (nearly from all foreign states) that found other things to be foreign substances" other than bacterium. (Op. at 4:22-25) (parenthesis in original).

But that is a gross misreading of Defendant's Motion. Defendant's previously provided list of cases regards infections *caused by bacteria*, of which courts across the country over the course of decades have held cannot be the subject of a res ipsa loquitur (RIL) theory.[1]

Plaintiff's unwillingness to read any Defendants' cited case authority and address them in her Opposition will be her undoing. Defendant will address each in turn to leave no doubt to both Plaintiff and this Court that bacteria is not a foreign substance as contemplated in NRS 41A.100(1) for Plaintiffs to avoid complying with the expert affidavit requirements of NRS 41A.071.

[1] Rejection of bacteria as a RIL theory is not unique to professional negligence cases. See Goodwin v. Misticos, 42 So.2d 397 (1949). In Goodwin, Plaintiff sued for negligence under common law res ipsa loquitur theory due to being diagnosed with "ptomaine poising" after eating Defendant's food. Merriam-Webster defines ptomaine poisoning as "any of various organic bases which are formed by the action of putrefactive *bacteria* on nitrogenous matter and some of which are poisonous." (emphasis added). The trial court granted Defendant a directed verdict in favor of Defendant, recognizing that the doctrine of res ipsa loquitur does not pertain to germs or bacteria in food. Id.

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1. Smith v. Curran, 28 Colo.App. 358, 472 P.2d 769 (1970)

In Smith, the Colorado Court of Appeals sustained a directed verdict where appellant attempted to argue RIL due to post-operative bacteria.

The facts involved that the appellant post-operatively was diagnosed with staphylococcus (i.e. a gram-positive *bacteria*), resulting in osteomyelitis (i.e. a bone infection), resulting in permanent damage to appellant's leg. Here, Plaintiff likewise post-operatively was diagnosed with pseudomonas aeruginosa (i.e. a gram-negative bacteria), resulting in an eye infection, resulting in permanent damage to her eye.

The Smith Court recognized that "[t]he evidence in this case showed not only a bad result, but also that infection occurred in the area of the operation." Here, Plaintiff likewise asserts her infection occurred due to her operation.

In rejecting the appellant's arguments that RIL applied, the Smith Court noted:

> the mere fact that a patient develops an infection in the area under treatment does not raise a presumption or inference of negligence on the part of the attending physician. The mere presence of infection following an operation is not prima facie evidence of negligence.

Id.

The Smith Court instead held it was incumbent upon the appellant to have produced a qualified expert to establish medical negligence because "the cause of an infection or its source are matters within the field of medical experts."

This Court's reasoning to grant Defendant's Motion should be no different.

2. Montana Deaconess Hospital v. Gratton 169 Mont. 185, 545 P.2d 670 (1976)

In Gratton, the Montana Supreme Court held the trial court's granting of Summary Judgment was proper where appellant attempted to argue res ipsa loquitur (RIL) due to post-operative bacteria.

The facts involved the appellant post-operatively was diagnosed with a staph infection and the presence of a pseudomonas organism (i.e. a gram-negative *bacteria*) resulting in permanent damage to appellant's right arm.

In rejecting appellant's argument that RIL applies, the Gratton Court held that RIL "is not applicable in a malpractice action from the mere fact that an infection developed in the area of treatment. 162 A.L.R. 1265, 1284; 82 A.LR.2d 1262, 1298."

This Court's reasoning to grant Defendant's Motion should be no different.

3. McCall v. St. Joseph's Hospital, 184 Neb. 1, 165 N.W.2d 85, 88-89 (1969)

In McCall, the Nebraska Supreme Court affirmed the trial court's granting of Summary Judgment where appellant attempted to argue res ipsa loquitur (RIL) due to post-operative bacteria.

The facts involved the appellant post-operatively was diagnosed with staphylococcus auerus (i.e. a gram-positive *bacteria*) at the site of surgery, resulting in extensive injuries and disability as an alleged result of the infection.

In rejecting appellant's arguments that RIL applied, the McCall Court explained:

> It seems obvious that an infection at the surgical site would not be "so palpably negligent" that it would require negligence to be inferred as a matter of law. . . Neither authority nor reason will sustain any proposition that negligence can reasonably be inferred from the fact that an infection originated at the site of a surgical wound. To permit a jury to infer negligence would be to expose every doctor and dentist to the charge of negligence every time an infection originated at the site of a wound. We note the complete absence of any expert testimony or any offer of proof in this record to the effect that a staphylococcus infection would automatically lead to an inference of negligence by the people in control of the operation or the treatment of the patient. We come to the conclusion that there is no merit to this contention.

Id. at 88-89.

This Court's reasoning to grant Defendant's Motion should be no different.

4. Schofield v. Idaho Falls Latter Day Saints Hosp., 90 Idaho 186, 409 P.2d 107 (1965)

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In Schofield, the Idaho Supreme Court affirmed the trial's court directed verdict where appellant attempted to argue res ipsa loquitur (RIL) due to a post-operative infection after a cataracts surgery case.

The procedural facts involved the appellant's Complaint asserting RIL in a professional negligence matter, which the respondent moved to strike, and the trial court granted. Here, Plaintiff's Complaint likewise contains RIL allegations in the professional negligence matter and Defendant has likewise moved to dismiss such an RIL theory.

In rejecting appellant's argument that RIL applied, the Schofield Court held that the record in the case did not warrant the application of RIL, and reasoned:

> There are exceptions to the general rule which permit the plaintiff in a malpractice case to invoke the doctrine of res ipsa loquitur. Among these are cases in which the surgeon has left a foreign object, such as a sponge or surgical instrument, within the body of the patient.
> . . .
> . . . the doctrine must be limited to those cases where the layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. Where such facts are absent, expert medical evidence is required to prove negligence. The record in this case does not warrant application of the doctrine of res ipsa loquitur.

Id.

This Court's reasoning to grant Defendant's Motion should be no different.

5. Contreras v. St. Luke's Hosp., 78 Cal. App. 3d 919, 144 Cal. Rptr. 647 (1978)

In Contreras, the California Court of Appeals held the trial court did not err in granting the healthcare providers' Motions for Nonsuit where appellant attempted to argue RIL due to post-operative bacteria.

The facts involved the appellant post-operatively was diagnosed with gram-positive *bacteria* from the site of the surgery resulting in damages. Id. at 929. The specific species of *bacteria* causing the infection was a rare type of "enterococci." Id. at 931.

In rejecting appellant's argument that RIL applied, the Contreras Court held:

> it is not a matter of common knowledge that an infection subsequent to an operation of the type involved here is more likely than not the result of negligence by the surgeon or the hospital, and, in the absence of expert testimony on the matter we cannot properly hold that there is such a probability.

Id. at 931.

The Contreras Court further reasoned that because the type of bacteria was so rare, "it would be even more difficult to reach a conclusion that [the infection's] cause or late discovery, if true, was probably the result of negligence by defendants." Id. at 931-932.

This Court's reasoning to grant Defendant's Motion should be no different.

C. Plaintiff's arguments for professional negligence NRS 41A.100 RIL discredit her arguments for concurrent premises liability

Plaintiff has placed herself on double-edged sword. The more she advocates that RIL in a NRS 41A professional negligence setting applies, the more she *axiomatically* precludes this matter being a premises liability action.

Indeed, Plaintiff argues she "cannot know with certainty whether the pseudomonas aeruginosa she now has was due to professional negligence of some kind, or due simply to a business-owner's failure to keep their building clean (or, perhaps, both)." (Op. at 8:2-7.)

But this is not an accurate statement. She could have done so with, e.g., an infectious disease physician, but she did not bother to do so. Nor can she credibly make such an argument to this Court because doing so would *necessarily* preclude her argument that an expert affidavit is unnecessary.

1. Plaintiff does not challenge the concept that the standard of care for infection control in a licensed operating room is the rendering of NRS 41A medical services

Plaintiff does not challenge the applicability of Szymborski v. Spring Mountain Treatment Center, 133 Nev. 638, 403 P.3d 1280 (2017) as extensively discussed in Defendant's

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Motion. See also Dolorfino v. Univ. Med. Ctr. of S. Nev., 450 P.3d 391 (2019) (unpublished decision holding trial courts should closely examine each claim and "where the jury requires a medical expert's guidance on the professional standard of care" then NRS 41A's affidavit requirement applies).

All parties can agree that NRS 41A does not apply to a claim against a hospital for its performance of "nonmedical services" and "acts outside of the scope of medicine." Szymborski, 403 P.3d at 1284. But where "the facts underlying the claim involve medical diagnosis, treatment, or judgment and the standards of care pertaining to the medical issue require explanation to the jury from a medical expert at trial" (id. at 1288) or the claim "involves allegations of medical duties and would require medical expert testimony to assist the jury in determining the standard of care" (id. at 1288) then the action is a professional negligence claim subject to NRS 41A.

Undoubtedly here, how a licensed healthcare facility maintains and disinfects an operating room for purposes of bacterial infection control during the course of a surgery is clearly a medical service, within the scope of medicine, and the rendering of healthcare services. It matters not how Plaintiff chooses to name the cause of action. Instead, it is the gravamen of the Complaint which controls; here being the rendering of medical services during the course of a surgery performed by a licensed physician in a licensed healthcare facility.

2. Other tangential causes of actions would be similarly dismissed

The above rationale holds true under Nevada law had Plaintiff decided to assert otherwise tangential causes of action stemming from the rendering of healthcare. See, e.g., Hoopes v. Hammargen, 102 Nev. 425, 431-432, 725 P.2d 238 (1986) (holding a breach of fiduciary duty claim against a physician for an improper sexual motive was "grounded upon professional malpractice."; see also Neade v. Portes, 193 Ill. 2d 433, 440-445, 739 N.E. 2d 496 (2000)

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(holding that a breach of fiduciary duty claim against a physician for the physician's refusal to authorize an angiogram because of financial incentives was still a medical malpractice claim requiring expert testimony); see also Pegram v. Herdrich, 530 U.S. 211 235 (2000) (affirming dismissal of breach of fiduciary duty claim where an HMO physician due to financial incentives required plaintiff to wait eight days to receive services would still "boil down" to a malpractice claim despite the financial motivation for the physician's conduct).

The above is made relevant when Plaintiff argues that a professional janitor is the kind of person needed to opine about the cleanliness of real property. (Op.at 8:13-22.) But Plaintiff misses the point. Her surgery took place in a certified operating room in a Nevada-licensed healthcare facility, and not in, e.g., a publically accessible parking lot, hallway, cafeteria, or bathroom.

4. Plaintiff's review of Hammerstein v. Jean Dev. W. is patently false

Plaintiff inexplicably cites to Hammerstein v. Jean Dev. W., 111 Nev. 1471, 907 P.2d 975 (1995) for the proposition that "Both premises liability claims and medical malpractice are sub-species of negligence. *Hammerstein*, supra." (Op. at 8:1-2) (italic font in original).

But a plain reading of Hammerstein reveals "medical malpractice" is never mentioned, nor is "sub-species." Hammerstein instead deals with the allegation that a hotel's fire alarm system was producing too many false alarms and thereby could injure somebody during the evacuation of one of those false alarms as what occurred with the appellant. Appellant alleged causes of action for "standard negligence," strict liability, "a higher duty to recognize and prevent unreasonable risks of harm to patrons," and res ipsa loquitur.

The Hammerstein Court agreed with the trial court's decision to grant Summary Judgment on all causes of actions, (id. at footnote 1) except that "standard negligence" cause of action presented an issue of material fact regarding the reasonableness of timely repairing the

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faulty alarm system or not. The case has nothing to do with medical malpractice contrary to what Plaintiff has bafflingly told this Court.

It is evident that Hammerstein has no bearing in case, other than to the benefit of the Defendant of yet another instance where a RIL cause of action was dismissed.

IV.

CONCLUSION

The gravamen of Plaintiff's Complaint is of professional negligence. The legal predicate for Plaintiff to file such a Complaint in Nevada is to attach an expert affidavit. She failed to do so, and instead has gambled that the foreign substance exception in NRS 41A.100(1) applies. As the above stated case law shows, bacteria is not a foreign substance for purposes of NRS 41A.100.

Plaintiff next, in the alternative as she admits, claims her Complaint is one of premises liability. Here, based upon pages three through six of her own Opposition, this is a professional negligence case.

Plaintiff's Complaint must be dismissed.

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

Dated this 9th day of March 2020.

JOHN H. COTTON & ASSOCIATES, LTD.

By: */s/ Adam Schneider*
John H. Cotton, Esq.
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Adam A. Schneider, Esq.
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Attorneys for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March 2020, I served the foregoing **DEFENDANT'S REPLY RE: MOTION TO DISMISS** by electronic service through the Clerk of the Court using the Wiznet Electronic Service system upon all parties with an email address on record as follows:

BRADLEY PAUL ELLEY, ESQ.
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Attorneys for Plaintiff

/s/ Gemini Yii
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Attorneys for Defendants
Sparks Family Hospital Inc., dba
Northern Nevada Medical Center

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SOPHIA MONTANEZ, Plaintiff, vs. SPARKS FAMILY HOSPITAL, INC., A Delaware Corporation doing business as NORTHERN NEVADA MEDICAL CENTER and DOES 1-15 Defendants.	**CASE NO.: CV19-01977** **DEPT NO.: 4**

REQUEST FOR SUBMISSION

It is hereby requested that Defendant Sparks Family Hospital, Inc., d/b/a/ Northern Nevada Medical Center's Motion to Dismiss, filed on January 17, 2020, be submitted to the Court for consideration and determination.

A true copy of this request has been served on all counsel and parties.

…

…

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

Dated this 9th day of March 2020.

JOHN H. COTTON & ASSOCIATES, LTD.

By: */s/ Adam Schneider*
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CERTIFICATE OF SERVICE

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2020-05-08 05:15:49 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7869323

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SOPHIA MONTANEZ, Plaintiff vs. SPARKS FAMILY HOSPITAL, INC., a Delaware Corporation doing business as NORTHERN NEVADA MEDICAL CENTER and DOES 1-15, Defendants.	CASE NO.: CV19-01977 DEPT. NO.: 4

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

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

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

This case arises out of an October 2018 surgical procedure, that MONTANEZ alleges 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Professional negligence is "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* (internal quotes omitted). A provider of health care includes "a physician licensed pursuant to chapter 630 or 633 of NRS, . . . a licensed hospital, clinic, surgery center . . . and its employees." *NRS 41A.017*. "A claim is grounded in medical malpractice and must adhere to NRS 41A.071 where the facts underlying the claim involve medical diagnosis, treatment, or judgment and the standards of care pertaining to the medical issue require explanation to the jury from a medical expert at trial." Szymborski v. Spring Mountain Treatment Ctr., 133 Nev. 638, 648 (2017). 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. Id. at 642.

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

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

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

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

Based upon the foregoing and good cause appearing,

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

DATED this 8 day of May, 2020.

Connie J. Steinheimer

DISTRICT JUDGE

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

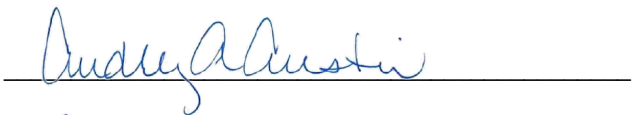
_____**Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]**

_____**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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Attorneys for Defendant
Sparks Family Hospital Inc., dba
Northern Nevada Medical Center

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SOPHIA MONTANEZ,

Plaintiff,

vs.

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

Defendants.

CASE NO.: CV19-01977

DEPT NO.: 4

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that an Order Granting Sparks Family Hospital, Inc.'s Motion to Dismiss was entered in the above entitled matter on the 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.

John H. Cotton & Associates, Ltd.
7900 West Sahara, Suite 200
Las Vegas, Nevada 89117

Dated this 11TH day of May 2020.

JOHN H. COTTON & ASSOCIATES, LTD.

By: /s/ Adam Schneider
John H. Cotton, Esq.
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Adam A. Schneider, Esq.
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Attorneys for Defendant
Sparks Family Hospital Inc., dba
Northern Nevada Medical Center

CERTIFICATE OF SERVICE

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

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FILED
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Jacqueline Bryant
Clerk of the Court
Transaction # 7869323

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SOPHIA MONTANEZ, Plaintiff vs. SPARKS FAMILY HOSPITAL, INC., a Delaware Corporation doing business as NORTHERN NEVADA MEDICAL CENTER and DOES 1-15, Defendants.	CASE NO.: CV19-01977 DEPT. NO.: 4

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

This case arises out of an October 2018 surgical procedure, that MONTANEZ alleges 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Professional negligence is "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* (internal quotes omitted). A provider of health care includes "a physician licensed pursuant to chapter 630 or 633 of NRS, . . . a licensed hospital, clinic, surgery center . . . and its employees." *NRS 41A.017*. "A claim is grounded in medical malpractice and must adhere to NRS 41A.071 where the facts underlying the claim involve medical diagnosis, treatment, or judgment and the standards of care pertaining to the medical issue require explanation to the jury from a medical expert at trial." Szymborski v. Spring Mountain Treatment Ctr., 133 Nev. 638, 648 (2017). 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. Id. at 642.

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

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

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

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

Based upon the foregoing and good cause appearing,

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

DATED this 8 day of May, 2020.

Connie J. Steinheimer
DISTRICT JUDGE

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

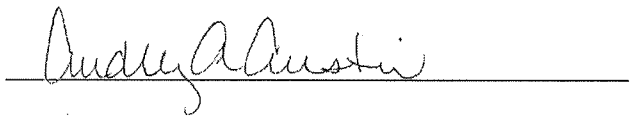
_____**Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]**

_____**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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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SOPHIA MONTANEZ,

Plaintiff,

vs.

Case No. CV19-01977
Dept. No. 4

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

Defendants.
_____/

NOTICE OF APPEAL

Notice is hereby given that Sophia Montanez, Plaintiff above named, hereby appeal to the Supreme Court of Nevada from the "ORDER GRANTING SPARKS FAMILY HOSPITAL, INC.'S MOTION TO DISMISS" entered in this action on the 8th day of May, 2020.

Dated: June 9, 2020.

/s/ Bradley Paul Elley
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PROOF OF SERVICE

In accordance with the provisions of N.R.C.P. 5(b), I hereby certify that I am an employee of Bradley Paul Elley, Attorney at Law, and that on June 9, 2020, I electronically filed a true and correct copy of the **NOTICE OF APPEAL** with the Clerk of the Court by using the ECF system which served the following parties electronically:

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Executed on June 9, 2020, at Incline Village, Nevada.

/s/ Elizabeth Lintner