

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ALVAREZ VENTURA,  
Appellant,  
vs.  
JOHN H. GANSER, M.D. LIC #9279;  
GOMEZ KOZAR; AND MCELREATH  
AND SMITH, A PROFESSIONAL  
CORPORATION,  
Respondents.

No. 81850

FILED

DEC 03 2020

SUZANNE A. BROWN  
CLERK OF SUPREME COURT  
BY: *[Signature]*  
DEPUTY CLERK

*ORDER REGARDING PRO BONO COUNSEL*

This is a pro se appeal from a district court order granting a motion to dismiss without prejudice. Having considered the documents transmitted by the district court, this court has determined that the appointment of pro bono counsel to represent appellant would assist this court in reviewing this appeal. By this order, the court expresses no opinion as to the merits of this appeal.

Pro bono counsel is an attorney who provides legal services without charge for the benefit of the public good. The appointment of pro bono counsel provides attorneys with an opportunity to volunteer legal services in furtherance of their professional responsibility and, at the same time, allows financially eligible litigants access to quality legal representation without cost. Counsel will be appointed for purposes of this appeal only and will participate in oral argument. Currently, the Pro Bono Committee of the Appellate Litigation Section of the State Bar of Nevada (Pro Bono Committee), in conjunction with the Legal Aid Center of Southern Nevada, has developed a pro bono appellate program to assist the public

and this court. This case is hereby referred to the program established by the Pro Bono Committee to evaluate whether appellant can benefit from the program.

Accordingly, the clerk of this court shall transmit a copy of this order and the attached case summary and district court order to the Legal Aid Center of Southern Nevada for financial eligibility screening. If appellant qualifies and does not object to pro bono counsel, the Legal Aid Center in cooperation with the Pro Bono Committee shall locate a volunteer attorney from the program to represent appellant. Once an attorney is located, the attorney shall file a notice of appearance in this court within 60 days from the date of this order. Briefing and oral argument will be scheduled thereafter. Alternatively, if appellant is not financially eligible or objects to pro bono representation, or if a volunteer attorney cannot be located, the Legal Aid Center of Southern Nevada shall notify this court in writing within 60 days from the date of this order. In such case, oral argument will not be held. The deadlines for filing documents in this appeal shall be suspended pending further order of this court.

It is so ORDERED.

Pickering, C.J.

cc: David Alvarez Ventura  
Lemons, Grundy & Eisenberg  
Legal Aid Center of Southern Nevada, Barbara E. Buckley,  
Executive Director  
Anne R. Traum, Coordinator, Appellate Litigation Section,  
Pro Bono Committee, State Bar of Nevada  
Kelly Dove

*Docket No. 81850*

*Ventura v. Ganser*

This matter arises from a surgical procedure performed by respondents on October 24, 2016, which allegedly resulted in surgical instruments being left in appellant's body. Appellant brought a medical malpractice complaint. Defendants moved to dismiss the case based on NRS 41A.071, arguing that appellant failed to include an affidavit by a medical expert that supported the allegations contained in the action. Appellant argued that his claim fell under the *res ipsa loquitor* exception to NRS 41A.100(1)(a). The court found that his allegations were unsupported by the evidence and therefore insufficient to meet the exception. The district court granted the motion to dismiss without prejudice and appellant appeals that decision pro se.

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

DAVID ALVAREZ VENTURA,

Plaintiff,

vs.

Case No. CV20-00866

Dept. No. 8

JOHN H. GANSER, M.D. LIC #9279,  
GOMEZ, KOZAR, MCELREATH AND  
SMITH, A Professional Corporation,

Defendants.

**ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE**

Before the Court is *Defendants John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith's Motion to Dismiss* ("Motion to Dismiss") filed by Defendants, JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, MCELREATH AND SMITH (collectively, "Defendants") on June 8, 2020. Plaintiff, DAVID ALVAREZ VENTURA filed an opposition on August 5, 2020, to which Defendants replied on August 13, 2020.

Having reviewed the pleadings and the relevant authorities, the Court **GRANTS** Defendants' *Motion to Dismiss*.

**BACKGROUND**

According to the record, the instant matter arises from a surgical procedure performed by Defendants on or about October 24, 2016, in which Defendants allegedly left surgical instruments in Plaintiff's body. Plaintiff brought an action for medical malpractice in the Eighth

1 Judicial District Court. Defendants moved for a change of venue, and the action was reassigned  
2 to the Second Judicial District. Subsequently, Defendants filed its *Motion to Dismiss* for failure  
3 to provide a medical expert's affidavit pursuant to NRS 41A.071.

4 On July 31, 2020, the Court granted Plaintiff's request for an extension of time, giving  
5 Plaintiff 45 days to file an opposition to Defendants' *Motion to Dismiss*. Plaintiff timely filed his  
6 opposition on August 5, 2020.

### 7 LEGAL STANDARD

8 Pursuant to NRCP 12(b)(5), a claim may be dismissed for failure to state a claim upon  
9 which relief can be granted. When ruling on a motion to dismiss, the Court's task is to determine  
10 whether or not the challenged pleading sets forth allegations sufficient to make out the elements  
11 of a right to relief." *Edgar v. Wagner*, 101 Nev. 226, 227 (1985).<sup>1</sup> Further, the Court must accept  
12 the allegations in the complaint as true and "construe the pleadings liberally and draw every fair  
13 intendment in favor of the plaintiff." *Capital Mortg. Holding v. Hahn*, 101 Nev. 314, 314 (1985);  
14 *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 (2008). The Court need not  
15 blindly accept conclusory allegations, unwarranted factual deductions, or unreasonable  
16 inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the  
17 Court required to accept as true allegations contradicted by the exhibits attached to the  
18 complaint. *Id.*

### 19 DISCUSSION

20 Defendants rely on NRS 41A.071 to argue that Plaintiff's failure to include an affidavit  
21 by a medical expert warrants dismissal the claim. NRS 41A.071 provides that a district court  
22 shall dismiss a medical malpractice action, without prejudice, "if the action is filed without an  
23 affidavit that ... [s]upports the allegations contained in the action." NRS. 41A.071.

24 In his opposition, Plaintiff asserts that he is exempt from the affidavit requirement  
25 because his claim falls under the *res ipsa loquitor* exception of NRS 41A.100(1)(a). The relevant  
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27  
28 <sup>1</sup> 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 Inc. Co.*, 89 Nev. 467, 472 (1973)).



1 *res ipsa loquitor* exception applies in cases where “[a] foreign substance other than medication  
2 or a prosthetic device was unintentionally left within the body of a patient following surgery[.]”  
3 NRS 41A.100(1). Particularity, Plaintiff argues that the surgical instruments left within his body  
4 falls within NRS 41A.100(1)(a), which exempts him from the expert affidavit requirement.

5 The *res ipsa loquitor* exception requires “some evidence” of one of the factual predicates  
6 enumerated in NRS 41A.100(1). *Johnson v. Egtedar*, 112 Nev. 428, 433-34 (1996). Although the  
7 Court does not consider matters outside the pleadings when ruling a motion to dismiss,  
8 Plaintiff’s pleadings fail to logically support a viable claim under the *res ipsa loquitor* exception.  
9 For instance, Plaintiff alleges that a surgical instrument was left in his body by during a surgery  
10 performed by Defendant’s on October 24, 2016. Plaintiff further alleges that an ultrasound  
11 performed on September 15, 2017, failed to identify the instrument. A subsequent ultrasound,  
12 conducted on November 30, 2018, identified the surgical instrument for the first time. However,  
13 the radiology report of ultrasound states that “[it] seems unlikely to be related to the patient[’]s  
14 history of previous esophageal surgery [referring the October 24, 2016 surgery].” These  
15 contradictions suggest Plaintiff’s allegations are unsupported and insufficient to meet the *res*  
16 *ipsa loquitor* exception. Unable to meet the *res ipsa loquitor* exception, Plaintiff is subject to the  
17 affidavit requirement.<sup>2</sup> Having not provided the required affidavit, this Court must dismiss  
18 Plaintiff’s complaint without prejudice. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122  
19 Nev. 1298, 1304 (2006).<sup>3</sup>  
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25 <sup>2</sup> The Court concludes *Jaramillo v. Ramos*, 136 Nev. Adv. Op. 17 (2020) does not compel a different result. Here,  
26 unlike *Jaramillo*, Plaintiff has not pled “facts entitling [him] to NRS 41A.100(1)(a)’s *res ipsa loquitor* theory of  
negligence.” That case is, therefore, readily distinguishable.

27 <sup>3</sup> “The Legislature’s choice of the words ‘shall dismiss’ instead of ‘subject to dismissal’ indicates that the  
28 Legislature intended that the court have no discretion with respect to dismissal and that a complaint filed without an  
expert affidavit would be void and must be automatically dismissed.” *Washoe Med. Ctr. v. Second Judicial Dist.*  
*Court*, 122 Nev. 1298, 1304 (2006).

1 Furthermore, even in the light most favorable to Plaintiff, the complaint and exhibits'  
2 contradictions render Plaintiff's allegations as mere conclusory and based on unreasonable  
3 inferences.<sup>4</sup>

4 The Court finds that Plaintiff is not entitled to leave to amend. Generally, "when a  
5 complaint that can be amended to state a claim for relief, leave to amend, rather than dismissal,  
6 is the preferred remedy." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22 (2003). "However, leave  
7 to amend should not be granted if the proposed amendment would be futile." *Halcrow, Inc. v.*  
8 *Eighth Judicial Dist. Court of the State*, 129 Nev. 394, 398 (2013) (citing *Allum v. Valley Bank*  
9 *of Nev.*, 109 Nev. 280, 287 (1993)). "A proposed amendment may be deemed futile if the  
10 plaintiff seeks to amend the complaint in order to plead an impermissible claim." *Id.* Here,  
11 Plaintiff may not amend his complaint under *Washoe Med. Ctr. v. Second Judicial Dist. Court*,  
12 122 Nev. 1298, 1304 (2006). ("A complaint that does not comply with NRS 41A.071 is void and  
13 must be dismissed; no amendment is permitted.")<sup>5</sup>

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15 The Court further finds that no viable amendment would relieve Plaintiff from the  
16 affidavit requirement. Plaintiff reaches his allegations through the unreasonable inference that  
17 Defendants' malpractice is responsible for the presence of the instrument which; (1) was  
18 removed from an entirely different area of Plaintiff's body than Defendants' operated on; (2)  
19 failed to appear on an ultrasound performed a year after the surgery; (3) the ultrasound that first  
20 identified the instrument occurred two years after the alleged malpractice, and one year after the  
21 first ultrasound which failed to identify the instrument; and (4) the report of the second  
22 ultrasound states that the presence of the instrument is unlikely related to the surgery performed  
23 by Defendants. Because of this unreasonable inference to reach the allegations, the Court finds  
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25 <sup>4</sup> The Court may consider exhibits attached to the pleading and incorporated by reference when ruling on a motion to  
26 dismiss without transposing the motion into a motion for summary judgment. See *Breliant v. Preferred Equities*  
*Corp.*, 109 Nev. 842, 847 (1993); *Schmidt v. Washoe Cty.*, 123 Nev. 128, 133 (2007).

27 <sup>5</sup> The Nevada Supreme Court reasons that when a complaint does not comply with NRS 41A.071, the complaint "is  
28 void ab initio, it does not legally exist and thus it cannot be amended. Therefore, NRCP 15(a)'s amendment  
provisions, whether allowing amendment as a matter of course or leave to amend, are inapplicable." *Washoe Med.*  
*Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304 (2006).

1 that any attempt to amend the complaint to demonstrate that an affidavit is not required would  
2 be futile.

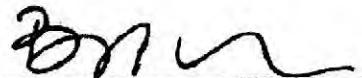
3 In sum, the inconsistencies in Plaintiff's allegations fail to invoke NRS 41A.100(1)'s  
4 medical expert affidavit exception and overcome Defendants' *Motion to Dismiss*. Moreover,  
5 adherence to Nevada Supreme Court precedent, the Court finds the Plaintiff is not entitled to  
6 leave to amend. The Court further exercises its discretion to find that an amendment  
7 demonstrating why there is not a need for an affidavit would be futile.

8 **CONCLUSION**

9 Based on the foregoing, and good cause appearing, the Court **GRANTS** Defendants'  
10 *Motion to Dismiss* without prejudice. This case is therefore **DISMISSED WITHOUT**  
11 **PREJUDICE**.

12 **IT IS SO ORDERED.**

13 **DATED** this 4 day of September, 2020.

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16 **BARRY L. BRESLOW**  
17 District Judge  
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David A. Ventura  
Edward J. Lemons, Esq.  
Alice Campos Mercado, Esq.

## Judicial Assistant