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

DAVID ALVAREZ VENTURA,

Appellant,

vs.

JOHN H. GANSER, M.D., LIC #9279; GOMEZ KOZAR; AND MCELREATH AND SMITH, A PROFESSIONAL CORPORATION,

Respondents.
_____/

Sup. Ct. Case No. 81850
Case No. CV20-00866
Dept. 8

RECORD ON APPEAL

VOLUME 2 OF 3

DOCUMENTS

APPELLANT
David Alvarez Ventura #80079
High Desert State Prison
PO Box 650
Indian Springs, NV 89070

RESPONDENT
Edward J. Lemons Esq. SBN 699
Alice Campos Mercado, Esq. SBN 4555
Lemons, Grundy & Eisenberg
6005 Plumas Street, Third Floor
Reno, Nevada 89519
Attorneys for John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith

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DISTRICT CASE NO: CV20-00866
DAVID ALVAREZ VENTURA vs JOHN H. GANSER, M.D. ET AL
DATE: MARCH 5, 2021

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DAVID ALVAREZ VENTURA vs JOHN H. GANSER, M.D. ET AL
DATE: MARCH 5, 2021

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID ALVAREZ VENTURA, Plaintiff, vs. JOHN H. GANSER, M.D. LIC #9279 GOMEZ, KOZAR, MCELREATH AND SMITH, A Professional Corporation, Defendants.	Case No.: A-20-809397-C Dept. No.: II **ORDER CHANGING VENUE** Date of Hearing: May 18, 2020 (Chambers Hearing)

The Court, having read and considered the timely-filed Demand and Motion for Change of Venue of Defendants JOHN H. GANSER, M.D. and GOMEZ, KOZAR, MCELREATH AND SMITH, and no opposition thereto having been filed by Plaintiff DAVID VENTURA, the Court finds that the proper venue of the above-entitled action is the Second Judicial District in Washoe County, Nevada, where all defendants reside and do business, and where the events underlying this action, including the medical treatment at issue, occurred. NRS 13.040, NRS 13.050 and EDCR 2.20.

Accordingly, good cause appearing,

IT IS HEREBY ORDERED that the unopposed Demand and Motion for Change of Venue of Defendants JOHN H. GANSER, M.D. and GOMEZ, KOZAR, MCELREATH AND SMITH, DBA WESTERN SURGICAL GROUP, is hereby GRANTED.

IT IS FURTHER ORDERED that this action shall be transferred to the Second Judicial District Court in and for Washoe County, which is the proper venue of the above-entitled action. The Clerk of the Court is directed to transfer

SO ORDERED.

DATED: May 22, 2020

District Judge
BMT A-20-809397-C

Submitted by:
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Suite 300
Reno, Nevada 89519
(775) 786-6868

By: _____
Edward J. Lemons (Bar #699)
Alice Campos Mercado (Bar #4555)

Attorneys for Defendants

FILED
Electronically
CV20-00866
2020-06-05 11:09:24 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7910941 : bblough

EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd Fl.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

CERTIFICATION OF COPY

STEVEN D. GRIERSON, Clerk of the Court Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the complete court record. In the action entitled:

David Alvarez Ventura

vs. Case No. **A-20-809397-C**

John H. Ganser, M.D. Lic # 9279; Gomez, Kozar, McElreath and Smith

now on file and of record in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, the 29 day of May 2020.

STEVEN D. GRIERSON, CLERK of the COURT

By: Heather Ungermann
Heather Ungermann, Deputy

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-20-809397-C

David Ventura, Plaintiff(s)	§	Location:	**Department 2**
vs.	§	Judicial Officer:	**Scotti, Richard F.**
John Ganser, M.D., Defendant(s)	§	Filed on:	**01/13/2020**
	§	Cross-Reference Case Number:	**A809397**

CASE INFORMATION

Case Type: **Other Civil Matters**

Case Status: **01/13/2020 Open**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	A-20-809397-C
Court	Department 2
Date Assigned	01/13/2020
Judicial Officer	Scotti, Richard F.

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**Ventura, David Alvarez**	**Pro Se**
Defendant	**Ganser, John H, M.D.**	**Lemons, Edward J.** *Retained* 7757866868(W)
	Gomez Kozar McElreath and Smith	**Lemons, Edward J.** *Retained* 7757866868(W)
	Gomez, Kozar Removed: 04/15/2020 Data Entry Error	
	Mcelreath and Smith Removed: 04/15/2020 Data Entry Error	

DATE — EVENTS & ORDERS OF THE COURT — INDEX

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01/13/2020 Inmate Filed - Complaint
Party: Plaintiff Ventura, David Alvarez

01/13/2020 Application to Proceed in Forma Pauperis

01/29/2020 Order to Proceed In Forma Pauperis
Order to Proceed In Forma Pauperis

03/20/2020 Initial Appearance Fee Disclosure
Filed By: Defendant Ganser, John H, M.D.; Defendant Gomez, Kozar; Defendant Mcelreath and Smith
Initial Appearance Fee Disclosure

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-20-809397-C

03/20/2020	Motion for Change of Venue Filed By: Defendant Ganser, John H, M.D.; Defendant Gomez, Kozar; Defendant Mcelreath and Smith *Demand and Motion for Change of Venue; Declaration of John H. Ganser, MD*
03/20/2020	Consent to Service By Electronic Means Filed By: Defendant Ganser, John H, M.D.; Defendant Gomez, Kozar; Defendant Mcelreath and Smith *Consent to Service By Electronic Means Through E-Filing Program*
03/20/2020	Clerk's Notice of Nonconforming Document *Clerk's Notice of Nonconforming Document*
03/24/2020	Declaration *Declaration of Service*
03/24/2020	Declaration *Declaration of Service*
04/13/2020	Errata Filed By: Defendant Ganser, John H, M.D.; Defendant Gomez, Kozar; Defendant Mcelreath and Smith; Defendant Gomez Kozar McElreath and Smith *Errata to Demand and Motion for Change of Venue; Declaration of John H. Ganser, MD*
04/15/2020	Clerk's Notice of Hearing *Notice of Hearing*
05/01/2020	Filing Fee Remittance Filed By: Defendant Ganser, John H, M.D.; Defendant Gomez Kozar McElreath and Smith *Filing Fee Remittance*
05/15/2020	Motion Filed By: Plaintiff Ventura, David Alvarez *Plaintiff's Motion for Order of Production of His Person for May 18,2020 Hearing*
05/28/2020	Order for Change of Venue *Order Changing Venue*

HEARINGS

05/18/2020	**Motion for Change of Venue** (3:00 AM) (Judicial Officer: Scotti, Richard F.) *Demand and Motion for Change of Venue; Declaration of John H. Ganser, MD* Granted; Journal Entry Details: *The Court GRANTS the Demand and Motion for Change of Venue as unopposed, pursuant to EDCR 2.20. Defendants to prepare and submit the proposed Order. CLERK'S NOTE: A copy of this Minute Order was electronically served to all registered parties by the Courtroom Clerk, Elizabeth Vargas via Odyssey Efile and Serve. //ev 5/20/20;*

DATE	FINANCIAL INFORMATION	
	Defendant Ganser, John H, M.D.	
	Total Charges	253.00
	Total Payments and Credits	253.00
	Balance Due as of 5/29/2020	**0.00**

EIGHTH JUDICIAL DISTRICT COURT
CASE SUMMARY
CASE NO. A-20-809397-C

APPL

DAVID ALVAREZ VENTURA II 80079
NAME

H.D.S.P P.O.Box 650
ADDRESS

INDIAN SPRINGS NV. 89070.
CITY, STATE, ZIP CODE

PLAINTIFF
TELEPHONE

IN PROPER PERSON

Clark DISTRICT COURT
COUNTY, NEVADA

DAVID ALVAREZ VENTURA,

Plaintiff,
vs.
JOHN H. GANSER ET AL
Defendant

Case No.: A-20-809397-C
Dept. No.: II

ORDER TO PROCEED IN FORMA PAUPERIS
(Filing Fees/Service Only)

Upon consideration of DAVID A VENTURA's Application to Proceed in Forma Pauperis and it appearing that there is not sufficient income, property, or resources with which to maintain the action and good cause appearing therefore:

IT IS HEREBY ORDERED,

1. That DAVID A VENTURA, shall be permitted to proceed In Forma Pauperis with this action as permitted by NRS 12.015.

2. That DAVID A VENTURA shall proceed without the prepayment costs or fees or the necessity of giving security, and the Clerk of the Court may file or issue any necessary writ, pleading or paper without charge.

3. That the Sheriff or other appropriate officer within this State shall make personal service of any necessary writ, pleading or paper without charge.

4. That if the Plaintiff, David A. Ventura, prevails in this action, the Court shall enter an Order pursuant to NRS 12.015 requiring the opposing party to pay into the court, within five (5) days, the costs which would have been incurred by the prevailing party, and those costs must then be paid as provided by law.

~~**IT IS HEREBY ORDERD** that _____'s request to waive fees and costs is **DENIED** for the following reason:~~ WS

A. _____ The Party is not indigent.

B. _____ Other: _____

DATED this 28 day of January, 2026

WS

DISTRICT COURT JUDGE

Respectfully submitted by:

Signature

DAVID ALVAREZ VENTURA.
PRINT NAME

H.D.S.P. P.O.box 650.
ADDRESS

INDIAN SPRINGS NV. 89070.
CITY, STATE, ZIP CODE

PLAINTIFF
~~TELEPHONE~~

IN PROPER PERSON

CERTIFICATE OF SERVICE BY MAILING

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 7th day of JANUARY, 2020 I mailed a true and correct copy of the foregoing, "Application to Proceed In Forma Pauperis" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clerk of the Court
Eighth Judicial Dist. Ct.
200 Lewis Ave, 3rd Floor
Las Vegas, NV 89155-1160

CC:FILE

DATED: this 7 day of JANUARY, 2020

DAVID ALVAREZ VENTURA # 80079
/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

CIVIL COMPLAINT
(Title of Document)

filed in District Court Case number _____

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

_____ 12-31-19
Signature Date
#80079

DAVID ALVAREZ VENTURA
Print Name

PLAINTIFF PRO-SE
Title

V2. 11

DAVID ALVAREZ VENTURA.
#80079. H.D.S.P.
INDIAN SPRINGS. NV. 89070
JANUARY 21. 2020.

CLERK OF THE COURT.
EIGHT JUDICIAL DISTRICT CT.
200 LEWIS AVE. 3RD FLOOR.
LAS VEGAS NV. 89155

CLERK:

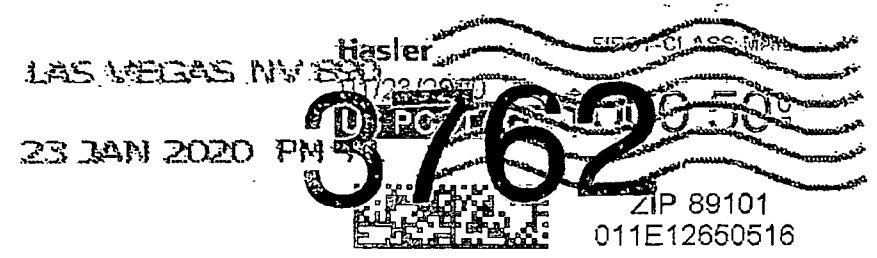
I MAILED A CIVIL COMPLAINT TO THE COURT.
ON 1-7-2020. HAS IT BEEN FILED YET,
AND IF NOT COULD I GET STATUS REPORT
ON THE CASE AND/OR CASE NUNBER.

THANK YOU.

PLAINTIFF

V2. 12

DAVID ALVAREZ VENTURA. # 80079.
H.D.S.P. P.O. BOX 650.
INDIAN SPRINGS NV. 89070.

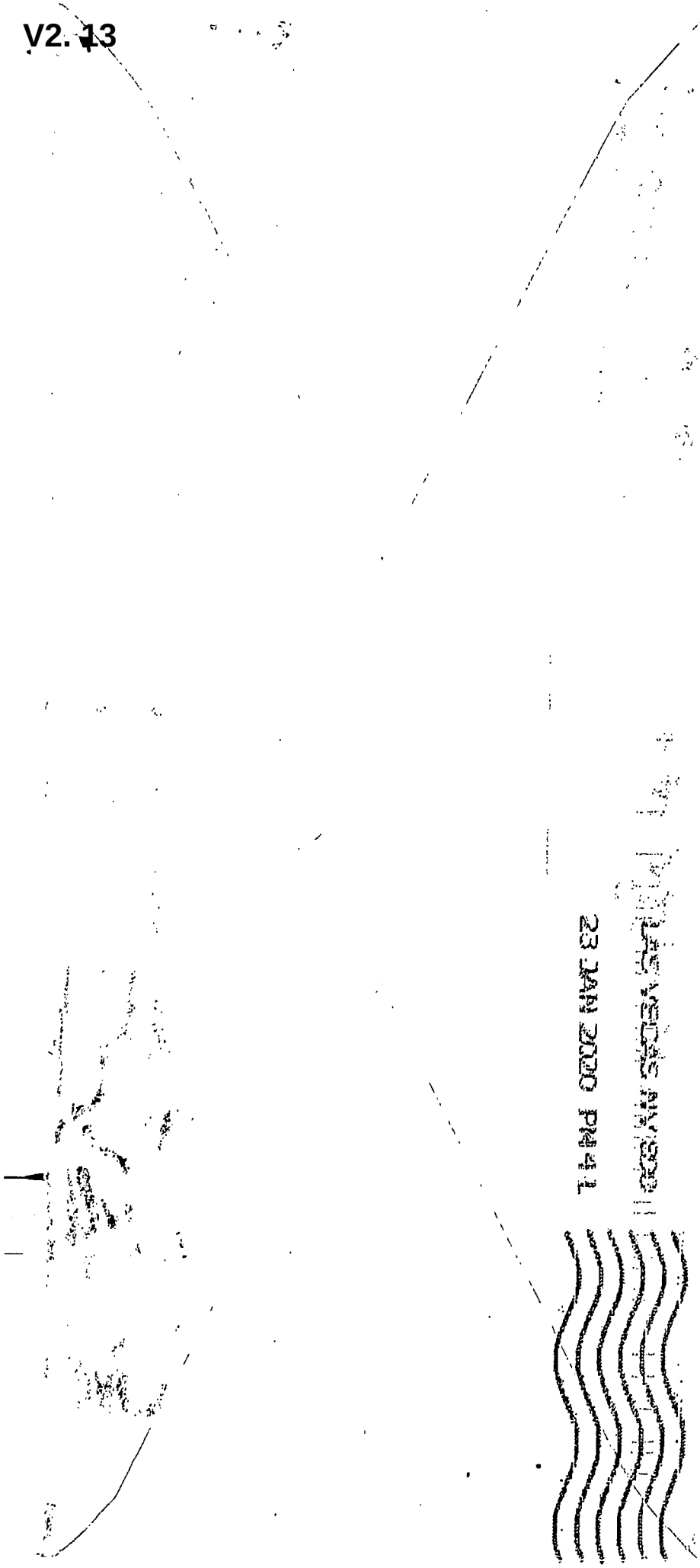


CLERK OF THE COURT.
EIGHT JUDICIAL DISTRICT. CT.
200 LEWIS AVE.
3RD FLOOR.
LAS VEGAS NV. 89155.

V2. 12

LEGAL MAIL
CONFIDENTIAL

89101-630000


23 JAN 2020 PM 4 1

V2. 14

MR GRIERSON FEBRUARY 17-2020

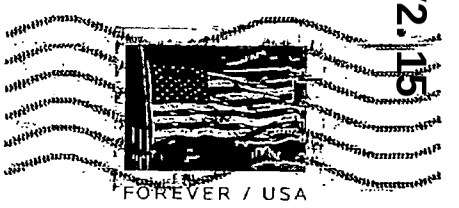
CLERK. GREETINGS ENCLOSED ARE THE SUMMONS PLEASE FILE AND RETURN THEM IMMEDIATELY TO ALLOW ME TO EFFECT SERVICE IMMEDIATELY.

THANK YOU

DAVID ALVAREZ VENTURA.

D. ALVAREZ-VENTURA #80079
HDSP
P.O. BOX 650
INDIAN SPRINGS, NV, 89070

LAS VEGAS NV 890
18 FEB 2020 PM 3 L



MR. GRIERSON.
CLERK OF THE COURT
8TH JUDICIAL DISTRICT COURT
200 LEWIS AVENUE, 3RD FLOOR
LAS VEGAS, NV, 89155

LEGAL MAIL

89101-630000

V2.15

V2.15

EIGHTH JUDICIAL DISTRICT COURT
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE
LAS VEGAS NV 89155

RETURN SERVICE REQUESTED

DAVID ALVAREZ VENTURA #80079
PO BOX 650
INDIAN SPRINGS, NV 89070-0650

A809397

IAFD
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868; (775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279 **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: A-20-809397-C Dept. No.: II **INITIAL APPEARANCE FEE DISCLOSURE** Date of Hearing: _____ Time of Hearing: _____

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above-entitled action below:

John Ganser, M.D.	$270.00
Gomez, Kozar, McElreath and Smith	$ 30.00
TOTAL REMITTED:	$300.00

/././

/././

/././

/././

/././

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

AFFIRMATION

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 26th day of March, 2020.

LEMONS, GRUNDY & EISENBERG

By: _____
EDWARD J. LEMONS
ALICE CAMPOS MERCADO, ESQ.
Attorneys for Defendants

. . . . .

. . . . .

. . . . .

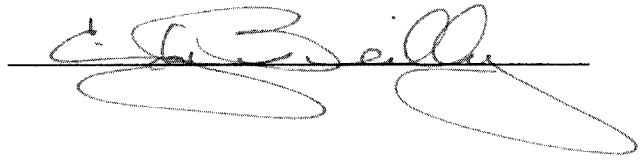
LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2, I hereby certify that on March 20, 2020, I did cause to be served a true and correct copy of ***Defendants' Initial Appearance Fee Disclosure*** in the above-referenced matter, on the following:

David Alvarez Ventura
#80079
P.O. Box 650
Indian Springs, Nevada 89070

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.



LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

MCOV
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868; (775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279 **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: A-20-809397-C Dept. No.: II **DEMAND AND MOTION FOR CHANGE OF VENUE; DECLARATION OF JOHN H. GANSER, M.D.** Date of Hearing: _____ Time of Hearing: _____

Defendants JOHN H. GANSER, M.D. and GOMEZ, KOZAR, MCELREATH AND SMITH, through their counsel, LEMONS, GRUNDY & EISENBERG, hereby demand that the venue of the above-entitled action be changed from the Eighth Judicial District in Clark County to the Second Judicial District in Washoe County, Nevada, on the grounds that the Defendants reside and do business in Washoe County, and the events underlying this action occurred in Washoe County.

This motion is made pursuant to NRS 13.040 and NRS 13.050 and is based upon the following Points and Authorities, upon the exhibit hereto, the Declaration of John H. Ganser, M.D., upon the pleadings on file herein, and any argument of counsel the court may consider at the hearing of this motion.

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

NOTICE OF MOTION

PLEASE TAKE NOTICE that the within *Demand and Motion for Change of Venue* will come on for hearing before the above-entitled Court on _____, 2020, at _____ o'clock __.m., or as soon thereafter as the matter may be heard, in Department II of the above-entitled court, located at 200 Lewis Avenue, Las Vegas, Nevada 89155.

DATED this 20th day of March, 2020

LEMONS, GRUNDY & EISENBERG

By: _____
EDWARD J. LEMONS, ESQ.
ALICE CAMPOS MERCADO, ESQ.
Attorneys for Defendants

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

The first page of the "Civil Complaint" reflects that plaintiff, David Alvarez Ventura, is an inmate at High Desert State Prison ("HDSP") in Indian Springs, Nevada, appearing in proper person.

According to the complaint, plaintiff underwent surgery on October 24, 2016. The surgery was allegedly performed by Dr. Ganser of Gomez, Kozar, McElreath and Smith, dba Western Surgical Group, at Renown Regional Medical Center in Reno. *Complaint, p. 2, ¶3; p. 8, ¶16; Complaint Exhibit 2.* Dr. Ganser is a resident of Washoe County. The principal place of business of Dr. Ganser's professional corporation -- Gomez, Kozar, McElreath and Smith, dba Western Surgical Group – is in Reno, Washoe County, Nevada. *See Declaration of John H. Ganser, M.D. See also Printout from the Nevada Secretary of State, attached as Exhibit 1.*

The treatment which is the subject of this action was rendered in Washoe County. *See Complaint Exh. 2.* As shown herein, the defendants are both residents of Washoe County. Therefore, this action was required to be filed in the Second Judicial District Court for the County of Washoe. Instead, plaintiff filed this action in the Eighth Judicial District Court in Las Vegas, Clark County, Nevada. Further, Dr. Ganser and Gomez, Kozar, McElreath and Smith, dba Western Surgical Group were served with process on March 13, 2020. Thus, their answer or other responsive pleading is due on April 3, 2020.

Because this case was not filed in the proper county and the time to answer has not yet expired, defendants submit this demand and motion requesting that the venue of this action be changed from the Eighth Judicial District in Las Vegas to the Second Judicial District in Washoe County.

///

///

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

II. LEGAL ANALYSIS

The proper venue of an action is governed by NRS Chapter 13. NRS 13.040 provides that an action shall be tried in the county where the defendants, or any one of them, reside at the commencement of the action. Further, NRS 13.050(1) provides:

> If the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, **unless the defendant before the time for answering expires demand in writing that the trial be had in the proper county**, and the place of trial be thereupon changed by consent of the parties, or by order of the court, as provided in this action. [Emphasis added.]

As shown above, both defendants named in plaintiff's complaint are residents of Washoe County. *See Declaration of John Ganser.* Further, the medical treatment at issue was rendered at Renown Regional Medical Center in Reno, Washoe County. *See Complaint Exhibit 2.* Moreover, the time to answer the Complaint has not yet expired. Therefore, defendants hereby respectfully demand that venue be changed from the Eighth Judicial District Court to the Second Judicial District Court in Washoe County.

When a defendant has made a proper and timely demand for change of venue on the grounds that the county designated in the complaint is not the proper county, the change of venue is mandatory and not within the discretion of the district court. *See Western Pacific Railroad v. Krom,* 102 Nev. 40, 714 P.2d 182 (1986) (if a demand for change of venue is filed in a timely manner and no defendants reside in the county in which the action is filed, and that county is not otherwise a proper venue, then removal is mandatory).

In addition to a timely demand, the court may, on motion by a party, change the place of trial when the county designated in the complaint is not the proper county or when the convenience of the witnesses and the ends of justice would be promoted by the change. NRS 13.050(2)(a) and (c).

//

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

The ends of justice would also be served by a change of venue because no part of this case touches Las Vegas. Consequently, the residents of Clark County and the Eighth Judicial District Court should not be required to expend their taxpayer dollars, time and limited judicial resources, respectively, in adjudicating a case that involves residents of Washoe County, where the entirety of plaintiff's cause of action arose. *See Lyon County v. Washoe Medical Center, Inc.*, 104 Nev. 765, 768, 766 P.2d 902, 904 (1988) ("important public interests such as avoiding the costs to taxpayers of defending actions in other communities, maintaining actions where relevant official records are kept, and reducing forum shopping" militated in favor of a change of venue). For this additional reason, venue must be changed to Washoe County.

III. CONCLUSION

Venue is not proper in Clark County because none of the Defendants are located or reside in Clark County; both are residents of Washoe County. Further, none of the events underlying this action, namely, the medical treatment at issue, occurred in Clark County. The underlying events occurred in Washoe County. Therefore, Defendants JOHN H. GANSER, M.D. and GOMEZ, KOZAR, MCELREATH AND SMITH, DBA WESTERN SURGICAL GROUP, respectfully request that their motion for change of venue be granted and that this case be transferred to the Second Judicial District Court in and for Washoe County.

AFFIRMATION

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 30th day of March, 2020.

LEMONS, GRUNDY & EISENBERG

By: _____
EDWARD J. LEMONS
ALICE CAMPOS MERCADO, ESQ.
Attorneys for Defendants

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

DECLARATION OF JOHN H. GANSER, M.D.

I, JOHN H. GANSER, M.D.., make the following declaration in support of the Demand and Motion to Change Venue in the above-entitled action.

1. I have personal knowledge of the statements contained herein and am competent to testify as to such matters if called upon to do so. As to those matters stated on information and belief, I believe them to be true.

2. I, along with my medical practice and my professional corporation, have been named as defendants in the action filed by David Alvarez Ventura. I was served with the Summons and Complaint on March 13, 2020, as was GOMEZ, KOZAR, MCELREATH AND SMITH, DBA WESTERN SURGICAL GROUP, a Professional Corporation.

3. I am a resident of Washoe County, Nevada, and was a resident at the time of the events alleged in the complaint. GOMEZ, KOZAR, MCELREATH AND SMITH, also known as Western Surgical Group, is located in Reno, Nevada, where I practice medicine. I do not, and did not at the time I rendered treatment to Mr. Ventura in 2016, practice medicine in Clark County, Nevada. Attached as Exhibit 1 is a printout from the Nevada Secretary of State, which shows the principal place of business of GOMEZ, KOZAR, MCELREATH AND SMITH as 75 Pringle Way, Reno, Nevada.

4. As reflected in Exhibit 2 to Plaintiff's Complaint, which is a copy of a page from Mr. Ventura's medical chart for treatment rendered on October 24, 2016, the procedure underlying this action was performed at Renown Regional Medical Center in Reno, Nevada. I am informed and believe and thereon state that at the time of the subject surgery, Mr. Ventura was a resident of Reno, Nevada.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 19 day of March, 2020, at Reno, Nevada.

John H. Ganser, M.D.

NO NOTARY REQUIRED PER NRS 53.045.

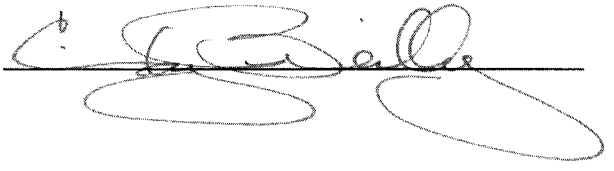
LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2, I hereby certify that on March 20, 2020, I did cause to be served a true and correct copy of Defendants' ***Demand and Motion for Change of Venue; Declaration of John H. Ganser, MD,*** in the above-referenced matter, on the following:

David Alvarez Ventura
#80079
P.O. Box 650
Indian Springs, Nevada 89070

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.



LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

EXHIBIT 1

to

DEFENDANTS' DEMAND AND MOTION FOR CHANGE OF VENUE; DECLARATION OF JOHN H. GANSER, M.D.

In the case of

Ventura v. Ganser, et al.

District Court Case No. A-20-809397-C

EXHIBIT 1

ENTITY INFORMATION

ENTITY INFORMATION

Entity Name:

GOMEZ, KOZAR, MCELREATH AND SMITH PROFESSIONAL CORPORATION

Entity Number:

C8332-1995

Entity Type:

Domestic Professional Corporation (89)

Entity Status:

Active

Formation Date:

05/18/1995

NV Business ID:

NV19951085229

Termination Date:

Perpetual

Annual Report Due Date:

5/31/2020

REGISTERED AGENT INFORMATION

Name of Individual or Legal Entity:

HAROLD KENNEDY MD

Status:

Active

CRA Agent Entity Type:

Registered Agent Type:

Non-Commercial Registered Agent

NV Business ID:

Office or Position:

Jurisdiction:

Street Address:

75 PRINGLE WAY STE 1002, RENO, NV, 89502-1475, USA

Mailing Address:

Individual with Authority to Act:

Fictitious Website or Domain Name:

CONS
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868; (775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279 **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: A-20-809397-C Dept. No.: II **CONSENT TO SERVICE BY ELECTRONIC MEANS THROUGH E-FILING PROGRAM**

The undersigned hereby consents to service of documents by electronic means through the Court's e-filing program on behalf of the following parties: Defendant, John H. Ganser, M.D. and Defendant Gomez, Kozar, McElreath and Smith.

Documents served by electronic means must be transmitted to the following persons at their e-mail addresses: Edward J. Lemons, Esq., ejl@lge.net and Alice Mercado, Esq. acm@lge.net.

It is my understanding that the attachments may be transmitted to the program in any format and will be converted to a PDF file before service is affected.

The undersigned also acknowledges that this Court does not require service by electronic means unless the serving party elects to do so.

///

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

AFFIRMATION

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 30th day of March, 2020.

LEMONS, GRUNDY & EISENBERG

By: _____
EDWARD J. LEMONS
ALICE CAMPOS MERCADO, ESQ.

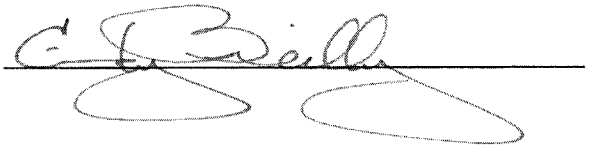
LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2, I hereby certify that on March 20, 2020, I did cause to be served a true and correct copy of a ***Consent to Service by Electronic Means*** in the above-referenced matter, on the following:

David Alvarez Ventura
#80079
P.O. Box 650
Indian Springs, Nevada 89070

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.



LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

CNND

DISTRICT COURT
CLARK COUNTY, NEVADA

David Ventura, Plaintiff(s)	A-20-809397-C
vs.	Department 2
John Ganser, M.D., Defendant(s)	

CLERK'S NOTICE OF NONCONFORMING DOCUMENT

Pursuant to Rule 8(b)(2) of the Nevada Electronic Filing and Conversion Rules, notice is hereby provided that the following electronically filed document does not conform to the applicable filing requirements:

Title of Nonconforming Document:	Demand and Motion for Change of Venue; Declaration of John H. Ganser, M.D.
Party Submitting Document for Filing:	Defendants John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith
Date and Time Submitted for Electronic Filing:	03/20/2020 at 10:41 AM

Reason for Nonconformity Determination:

☐ The document filed to commence an action is not a complaint, petition, application, or other document that initiates a civil action. *See* Rule 3 of the Nevada Rules of Civil Procedure. In accordance with Administrative Order 19-5, the submitted document is stricken from the record, this case has been closed and designated as filed in error, and any submitted filing fee has been returned to the filing party.

☐ The document initiated a new civil action and the case type designation does not match the cause of action identified in the document.

☐ The document initiated a new civil action and a cover sheet was not submitted as required by NRS 3.275.

☐ The submitted document initiated a new civil action and was made up of multiple documents submitted together.

☐ The case caption and/or case number on the document does not match the case caption and/or case number of the case that it was filed into.

☐ The document was not signed by the submitting party or counsel for said party.

☐ The document filed was a court order that did not contain the signature of a judicial officer. In accordance with Administrative Order 19-5, the submitted order has been furnished to the department to which this case is assigned.

☒ Motion does not have a hearing designation per Rule 2.20(b). Motions must include designation "Hearing Requested" or "Hearing Not Requested" in the caption of the first page directly below the Case and Department Number.

Pursuant to Rule 8(b)(2) of the Nevada Electronic Filing and Conversion Rules, a nonconforming document may be cured by submitting a conforming document. All documents submitted for this purpose must use filing code "**Conforming Filing – CONFILE**." Court filing fees will not be assessed for submitting the conforming document. Processing and convenience fees may still apply.

****SPECIAL NOTE**** Pursuant to Administrative Order 20-01, requests for Remote Appearance can be made through the court's website at **www.clarkcountycourts.us/virtual**, including instructions on how to connect to Remote Appearance by mobile/tablet and computer.

Dated this: 20th day of March, 2020

By: /s/ Chaunte Pleasant
Deputy District Court Clerk

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2020, I concurrently filed and served a copy of the foregoing Clerk's Notice of Nonconforming Document, on the party that submitted the nonconforming document, via the Eighth Judicial District Court's Electronic Filing and Service System.

By: /s/ Chaunte Pleasant
Deputy District Court Clerk

IN THE DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

David Alvarez Ventura PLAINTIFF	)	Dated: 3/13/2020
Vs	)	Civil File Number: 20002384
John H Ganser, MD, Gomez, Kozar, Mcelreath and Smith, A Professional Corporation DEFENDANT	)	CASE No.: A20809397C

DECLARATION OF SERVICE

STATE OF NEVADA }
} **ss:**
COUNTY OF WASHOE }

D. Scott #4849, being first duly sworn, deposes and says: That affiant is a citizen of the United States, over 18 years of age, not a party to the within entered action, and that in the County of Washoe, State of Nevada, personally served the described documents upon:

Sub-served: **Gomez, Kozar, Mcelreath, and Smith a Professional Corporation by serving Ashley Conder, Human Resources**

Location: **75 Pringle Way Ste 1002 Reno, NV 89502**

Date: **3/13/2020** **Time:** **10:00 AM**

The document(s) served were: SUMMONS CIVIL AND CIVIL COMPLAINT, EXHBIT 1 (1 PAGE), EXHIBIT 2 (1 PAGE), EXHIBIT 3 (1 PAGE), EXHIBIT 4 (2 PAGES)

I declare under penalty of perjury under the law provided of the State of Nevada that the foregoing is true and correct. No notary is required per NRS 53.045.

DARIN BALAAM, SHERIFF

By:
Sheriff's Authorized Agent

District Court Clark County
200 Lewis Avenue
3rd Floor
Las Vegas, NV 89155-1160

IN THE DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

David Alvarez Ventura PLAINTIFF	)	Dated: 3/13/2020
	)	Civil File Number: 20002384
Vs	)	
John H Ganser, MD, Gomez, Kozar, Mcelreath and Smith, A Professional Corporation DEFENDANT	)	CASE No.: A20809397C

DECLARATION OF SERVICE

STATE OF NEVADA }
} **ss:**
COUNTY OF WASHOE }

D. Scott #4849, being first duly sworn, deposes and says: That affiant is a citizen of the United States, over 18 years of age, not a party to the within entered action, and that in the County of Washoe, State of Nevada, personally served the described documents upon:

Sub-served: **John H Ganser, MD by serving Ashley Conder, Human Resources**

Location: **POE--Western Surgical Group 75 Pringle Way STE 1002 Reno, NV 89502**

Date: **3/13/2020** **Time:** **10:00 AM**

The document(s) served were: SUMMONS CIVIL AND CIVIL COMPLAINT, EXHIBIT 1 (1 PAGE), EXHIBIT 2 (1 PAGE), EXHIBIT 3 (1 PAGE), EXHIBIT 4 (2 PAGES)

I declare under penalty of perjury under the law provided of the State of Nevada that the foregoing is true and correct. No notary is required per NRS 53.045.

DARIN BALAAM, SHERIFF

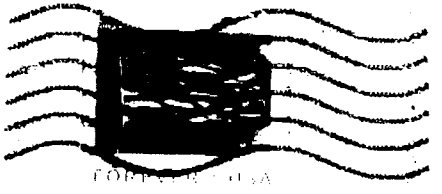
By:
Sheriff's Authorized Agent

District Court Clark County
200 Lewis Avenue
3rd Floor
Las Vegas, NV 89155-1160

V2. 39

DAVID ALVAREZ VENTURA #80079
H.D.S.P.
P.O.BOX 650
INDIAN SPRINGS
NV.
89070.

LAS VEGAS NV 890
23 MAR 2020 PM 4 L



CLERK OF THE COURT.
MR STEVEN GRIERSON
200 LEWIS AVE.
3RD FLOOR
LAS VEGAS NV. 89155

UNIT 22
MAR 22 2020
HIGH DESERT STATE PRISON

LEGAL MAIL

89101-680000

V2. 39

CONFILE
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868; (775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279 **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: A-20-809397-C Dept. No.: II **ERRATA TO DEMAND AND MOTION FOR CHANGE OF VENUE; DECLARATION OF JOHN H. GANSER, M.D.** **HEARING REQUESTED – CHAMBERS**

Defendants JOHN H. GANSER, M.D. and GOMEZ, KOZAR, MCELREATH AND SMITH, through their counsel, LEMONS, GRUNDY & EISENBERG, hereby file an Errata to their Demand and Motion for Change of Venue; Declaration of John H. Ganser, M.D. This Errata is being filed pursuant to the Clerk's Notice of Nonconforming Document filed March 20, 2020. Due to the restrictions of the COVID–19 isolation laws, we were not aware of this nonconformance notice until April 13, 2020.

DATED this 13th day of April, 2020

LEMONS, GRUNDY & EISENBERG

By: _____
EDWARD J. LEMONS, ESQ.
ALICE CAMPOS MERCADO, ESQ.
Attorneys for Defendants

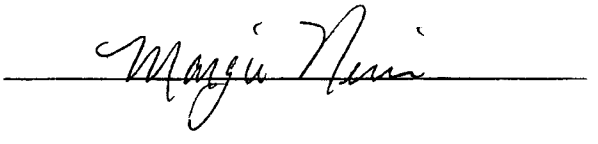
LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

CERTIFICATE OF SERVICE

Pursuant to Administrative Order 14-2, I hereby certify that on April 13, 2020, I did cause to be served a true and correct copy of Errata to Demand and Motion for Change of Venue; Declaration of John H. Ganser, M.D., in the above-referenced matter, on the following:

David Alvarez Ventura
#80079
P.O. Box 650
Indian Springs, Nevada 89070

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.



LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

Electronically Filed
4/15/2020 2:49 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

David Ventura, Plaintiff(s) vs. John Ganser, M.D., Defendant(s)	Case No.: A-20-809397-C Department 2

NOTICE OF HEARING

Please be advised that the Demand and Motion for Change of Venue; Declaration of John H. Ganser, MD in the above-entitled matter is set for hearing as follows:

Date: May 18, 2020

Time: Chambers

Location: RJC Courtroom 03B
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Salevao Asifoa
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Salevao Asifoa
Deputy Clerk of the Court

EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT
CIVIL DIVISION
REGIONAL JUSTICE CENTER
200 LEWIS AVE.
LAS VEGAS, NEVADA 89101

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

Filing Fee Remittance

This form may be used to submit outstanding filing fees to the Eighth Judicial District Court via the Odyssey File & Serve system. By using this method to submit fees you acknowledge that all processing/convenience fees and E-File fees will be assessed in addition to the filing fee(s) as part of this filing transaction.

To submit this form, use filing code **Filing Fee Remittance - FFR (CIV)** and select the applicable fee(s) in the Optional Services section of the envelope.

Case Number:	A-20-809397-C	
Party Responsible for Fees:	John H. Ganser, M.D.	
Related Filing:	**DATE OF FILING** 3/20/2020	**FILING DESCRIPTION** Defendant's Motion for Change of Venue

Required-filing fees for the above entitled action are submitted as indicated below: *(Please check the applicable boxes and indicate the quantities below).*

	Fee Schedule	Fee Amount
☐	01 Civil Complaint	$270.00
☐	01BC Business Court Complaint	$1,530.00
☐	01C Statutory Lien	$299.00
☐	01CD Constr Defect Complaint	$520.00
☐	01FM Foreclosure Mediation Petition	$275.00
☐	01TBC Transfer to Business Court (after civil action)	$1,260.00
☐	01TPC Third Party Complaint	$135.00
☐	03 Civil Confession of Judgment	$28.00

☐	04A Appeals JC/Muni Court	$47.00
☐	04B Civil Notice of Appeal	$24.00
■	05A Civil Answer/Appear	$223.00
☐	05BC Business Court Answer/Appear	$1,483.00
☐	05CD Construction Defect Answer/Appear	$473.00
☐	05FM Foreclosure Mediation Answer/Appear	$250.00
■	05G Answer Additional Party	$30.00
☐	07A Transfer from another District Court	$270.00
☐	41Civil Writ	$10.00
☐	42 Civil Motion Summary Judg/Joinder	$200.00
☐	43 Civil Motion Certify/Decertify Class	$349.00
☐	44 Civil Motion Partial Summary Judg	$200.00
☐	Civil Peremptory Challenge of Judge	$450.00

☐	01G Complaint Additional Party Enter additional party names in the spaces below. Please complete additional form if adding more than 10 parties.	$30.00 *(per party)*	Quantity: _____	$ _____
	1			
	2			
	3			
	4			
	5			
	6			
	7			
	8			
	9			
	10			

TOTAL PAID: $ 253.00

27

DAVID ALVAREZ VENTURA
NDOC NO. 80079
HIGH DESERT STATE PRISON
POST OFFICE BOX 650
INDIAN SPRINGS, NV,
89070

PLAINTIFF IN PRO SE

DISTRICT COURT
CLARK COUNTY, NEVADA

DAVID VENTURA, PLAINTIFF, VS. JOHN GANSER, MD, ET.AL., DEFENDANTS.	CIVIL ACTION NUMBER A-20-809397-C PLAINTIFF'S MOTION FOR ORDER OF PRODUCTION OF HIS PERSON FOR MAY 18, 2020 HEARING.

PLAINTIFF PROCEEDS AS A INCARCERATED PRO SE LITIGANT WITH THE INSTANT ACTION. PREVIOUSLY DEFENDANTS FILED A MOTION AND DEMAND TO CHANGE VENUE TO RENO NEVADA IN THE SECOND JUDICIAL DISTRICT. BY ELECTRONIC ORDER FILED ON APRIL 15, 2020 THIS COURT NOTICED PLAINTIFF OF A SLATED HEARING SCHEDULED TO CONVENE MAY 18, 2020.

AS PLAINTIFF IS IN THE CUSTODY OF THE NDOC AND SEEKS TO BE PRESENT AT THE HEARING TO ADVOCATE HIS INTERESTS IN THIS MATTER HE SEEKS THAT THE COURT ORDER HIS PRODUCTION FOR APPEARANCE AT SAID HEARING.

IN ACCORDANCE THIS MOTION IS RESPECTFULLY SUBMITTED.

RESPECTFULLY SUBMITTED,

DATE: APRIL 28, 2020

BY: _____
(DAVID ALVAREZ VENTURA)
PLAINTIFF IN PRO SE

CERTIFICATE OF SERVICE BY MAIL

I, DAVID VENTURA A, hereby certify pursuant to N.R.C.P. 5(b), that on this 28 day of the month of APRIL, of the year 2020, I mailed a true and correct copy of the foregoing PLAINTIFFS MOTION FOR ORDER OF PRODUCTION OF HIS PERSON FOR MAY 18, 2020 HEARING addressed to:

Name	Name	Name
CLERK OF THE COURT		
EIGHT JUDICIAL DISTRICT COURT. 200 LEWIS AVE 3RD FLOOR LV. NV. 89155		
Address	Address	Address

(X) _____
Signature

DAVID ALVAREZ VENTURA #80079
H.D.S.P. P.O. BOX 650.
INDIAN SPRINGS NV.
89070.

HIGH DESERT STATE PRISON
LAS VEGAS NV 890
APR 29 2020
29 APR 2020 PM 4 L
UNIT 11

FOREVER / USA

STEVEN D. GRIERSON
CLERK OF THE COURT
EIGHT JUDICIAL DISTRICT COURT
200 LEWIS AVE.
3RD FLOOR.
LAS VEGAS NV. 89155

89101-630000

V2. 47

V2. 47

A-20-809397-C

FILED
Electronically
CV20-00866
2020-06-05 11:09:24 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7910941 : bblough

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Civil Matters | COURT MINUTES | May 18, 2020

A-20-809397-C David Ventura, Plaintiff(s)
vs.
John Ganser, M.D., Defendant(s)

May 18, 2020 **3:00 AM** **Motion for Change of Venue**

HEARD BY: Scotti, Richard F. **COURTROOM:** RJC Courtroom 03B

COURT CLERK: Elizabeth Vargas

PARTIES PRESENT: Minute Order- No parties present.

JOURNAL ENTRIES

- The Court GRANTS the Demand and Motion for Change of Venue as unopposed, pursuant to EDCR 2.20. Defendants to prepare and submit the proposed Order.

CLERK'S NOTE: A copy of this Minute Order was electronically served to all registered parties by the Courtroom Clerk, Elizabeth Vargas via Odyssey Efile and Serve. //ev 5/20/20

F I L E D
Electronically
CV20-00866
2020-06-05 11:10:24 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7910946

CODE 1312

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID VENTURA,

Plaintiff,

vs.

JOHN H. GANSER M.D., and GOMEZ, KOZAR, McELREATH, & SMITH, A PROFESSIONAL CORPORATION,

Defendant(s).
_____/

Case No: CV20-00866

Dept. No: 8

CASE ASSIGNMENT NOTIFICATION

I hereby certify the above-entitled case has been filed in the Second Judicial District Court pursuant to an Order For Change of Venue from an action arising out of the EIGHTH Judicial District Court, CLARK County, case number A-20-809397-C .

Dated June 5, 2020.

JACQUELINE BRYANT
Clerk of the Court

By /S/ BBLOUGH
Deputy Clerk

CERTIFICATE OF SERVICE

Case No. **CV20-00866**

I certify that I am an employee of the Second Judicial District Court; that on June 5, 2020, I electronically filed the Case Assignment Notification with the clerk of the Court System which will send a notice of electronic filing to the following:

ALICE CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

Pursuant to NRCP 5 (b), I certify that I am an employee of the Second Judicial District Court, and that on June 5, 2020, I deposited in the Washoe County mailing system for postage and mailing with the U.S. Postal Service in Reno, Nevada, a true copy of the attached document, addressed to:

DAVID ALVAREZ VENTURA, #80079
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89070

The undersigned does hereby affirm that pursuant to NRS 239B.030 and NRS 603A.040, the preceding document does not contain the personal information of any person.

Dated June 5, 2020.

/S/ BBLOUGH

Deputy Clerk

F I L E D
Electronically
CV20-00866
2020-06-05 11:11:34 AM
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Clerk of the Court
Transaction # 7910948

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-06-05 11:11:33.663.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-06-05 11:11:33.685.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

–

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	06-05-2020:11:10:24
Clerk Accepted:	06-05-2020:11:11:04
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Case Assignment Notification
Filed By:	Deputy Clerk BBlough

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

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If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

F I L E D
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CV20-00866
2020-06-05 11:12:10 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7910951

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-06-05 11:12:07.489.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-06-05 11:12:07.514.

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PROOF OF SERVICE OF ELECTRONIC FILING

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	06-05-2020:11:09:24
Clerk Accepted:	06-05-2020:11:11:38
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Change of Venue - Accepting Certified Copy of Docket Mtn Proceed Forma Pauperis Ord Granting Letters ... Letters ... Initial Appear. Fee Disclosure Demand for Change of Venue Consent Notice Declaration Declaration Errata Other ... Mtn Ord to Show Cause Other ...
Filed By:	Deputy Clerk BBlough

You may review this filing by clicking on the following link to take you to your cases.

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If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

David Alvarez Ventura
#80079
P.O. Box 650
Indian Spgs., NV 89070
Plaintiff in Pro se

DISTRICT COURT
CLARK COUNTY, NEVADA
x x x

David Alvarez Ventura, Plaintiff, v. John H. Ganser, M.D. Lic # 9279 Gomez, Kozar, Mcelreath and Smith A Professional Corporation, Defendants.	Case No. A-20-809397-C Dept. No II CIVIL COMPLAINT NRS 41.0322 Tort Action

1) Comes Now, David Alvarez Ventura and alleges that, presently resides at, 22010 Cold creek Rd, PO Box 650, Indian Spgs, NV 89070, a prisoner #80079, was injured by M.D. John H. Ganser, and a company that is named. Gomez, Kozar, Mcelreath and Smith a professional corperation, doing business as

western Surgical Group. That defendants injured plaintiff by leaving surgical instruments within him that caused extreame pain and sutter.ng, additional surgery was needed to remove part of the instrument to relieve some pain, and additional scarring.

2) That plaintiff was reasonably dilligent in seeking the source of his pain but that a surgical instrument that Dr. Ganser had left in him and then concealed this fact that through any act, error or omission and which this action is based and which is known or through the use of reasonable diligence should have been known to the provider of health care, caused injury by professional negligence by the provider of health care, to the plaintiff.

ARGUMENT With Points and Authorities

3) On 10-24-16, Surgeon John H. Ganser, M.D., along with surgical staff: Curtis J. Smith, PA., Circulater: Julie A. Bloos, R.N, Relief circulater: ~~Mary~~ Marjorie Rowson, R.N. performed laparoscopic surgery on David Alvarez Ventura (herein after Ventura). During this surgery the above named defendants left a foreign metal object in Ventura's body.

this foreign metel object that was left in Ventura's body during surgery was removed by Dr. Peter A. Caravella during a later surgery on 3-28-19. Plaintiff's Exhibit 1.

4) That defendants knew or through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action. Massey v. Litton, 99 Nev. 723 (1983)

5) Ventura was reasonably diligent but due to Dr. Gansert's statement of the procedures used during surgery that there were no complications (see Plaintiff's Exhibit 2) on 10-24-16. Plaintiff states this is an act of concealment by Dr. Ganser.

6) On 9-15-17 A radiology report by Dr. Kim Adamson was done and the findings were "unremarkable." This was performed because Ventura complained about abdominal pain, but the findings lead plaintiff in the "Dark" about any cause of his pain. Plaintiff's Exhibit 3.

Ventura was reasonably diligent but failed to discover the scoorse of his pain.

7. On 11-30-18 Dr. Leon Jackson M.D., NNCC issued a report that discoverd a foreign body; a linear metel object that inside ventura's body but states "This seems unlikely to be related to the patients history of previous esophageal surgery." This report further obscured the cause of Ventura's injury as left in ventura's body by Dr. ~~Ganser~~ Ganser and his surgical team. Plaintiff's Exhibit 4.

8. NRS 89.060(1) provides that "No statute can limit the liability of a professional entity or association in which the member has personally participated and that we (the Supreme Ct. of Nevada) is required to conclude that provisions of NRS chapter 41A must be read to include professional medical corporations. ~~Fierle~~ Fierle v. Perez, 125 Nev. 728 (Nov. 19, 2009).

9. NRS 41A.097(3) and 41A.097(2) are read in tandem, a Plaintiff must satisfy the following two-pronged

test in order to establish that 41A.097(2)'s one year discovery period should be tolled: That a defendant intentionally withheld information, and(2) that this withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit under NRS 41A.071. Winn v. Sunrise Hosp. & med. Ctr., 128 Nev 246 (2012). See previous argument. Thus the doctrin of Res Ipsa Loquitur applies as the afore mentioned defendants actions, error or ommission upon which this action is based was consealed from plaintiff.

10) The statute of limitations begins to run when the patient has before him facts which would put a reasonable person on inquiry notice of his possible cause of action, wheather or not it has occurred to the particular patient to seek further medical advice; the focus is on the patient's knowledge of or access to facts rather than on his discovery of legal Theories. Massey v. Litton, 99 Nev. 723 (1983). Facts were not known until surgery was preformed by Dr. Caravella on 3-28-19. Therefore that should be

The date that the statute of limitations begins to run.

11) The discovery of legal injury may be either actual or presumptive, but it must be both the fact of damage suffered and ~~that~~ the realization that the cause was the health care providers' negligence, Massey v. Litton, 99 Nev. 723 (1983). The cause was not known until the surgery performed by Dr. Caravella on 3-28-19 when it appeared to be a hypodermic needle in contradiction to Dr. Jackson's Report Dated 11-30-18. Plaintiff knew this on 3-28-19.

This action is therefore timely.

Count One, Medical Malpractice

12) Dr. John H. Ganser, M.D on 10-24-16 failed to use reasonable care, skill or knowledge ordinarily used under similar circumstances.

13) Dr. Ganser departed from the accepted standard of medical care or practice, and that ~~the~~ conduct was both the actual and proximate cause of Plaintiff's harm, and that plaintiff suffered pain, scarring, and additional surgeries.

14) That Dr. Ganser was under a duty to use reasonable care and he failed in his duty and that he is responsible for all reasonably probable causes to which the negligent surgery can be reasonably attributed.

15) Dr. Ganser left foreign metal object in Ventura's body that he knew or through the use of reasonable diligence, should have known would cause ventura to suffer additional harm and he

was deliberately indifferent to being responsible for causing additional harm to Ventura.

Count Two, Medical Malpractice

16) Defendants, Gomez, Kozar, Mcelreath and Smith, a professional Corporation, doing business as western Surgical Group, did on 10-24-16 failed in their duty to antisipate or guard against injury to plaintiff by failing to use reasonable care to supervise the conduct of Dr. Ganser and make sure all surgical instruments were accounted for during and after Ventura's surgery. This resulted in the actual and reasonable probable causes to which plaintiff's injuries, pain, suffering, and additional surgery was needed.

17) These defendants acted in a neglegent manner with deleberate indeference in that they knew, or through reasonable diligence should have known would cause ventura to suffer additional harm.

Request For Relief

18) Plaintiff request compensatory damages of 50,000 dollars per defendant per count. Pain, Suffering, scarring.

19) Plaintiff request compensatory damages of the cost of Additional surgery to correct Negligence caused by defendants.

20) Plaintiff request punitive damages caused by deliberate indeference to Plaintiffs health, pain, and suffering to the amount of 100,000 dollars per defendant.

~~Verification~~

21) Plaintiff request an award of cost and fees related to this action. Not to Exceed 350.000 dollars

Verification.

22) I declare under penalty of perjury under the laws of the state of Nevada that the foregoing is true and Correct.

Richard Weddle #85306
(name of person who prepared or helped prepare this Document)

Signature of Plaintiff
Date: 1-7-2020.

CERTFICATE OF SERVICE BY MAILING

I, David Alvarez Ventura, hereby certify, pursuant to NRCP 5(b), that on this 7 day of JANUARY, 2020 I mailed a true and correct copy of the foregoing, "Civil Complaint, NRS 41.0322 Tort Action"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

Clerk of the Court
~~200 Lewis Ave, 3rd Floor~~
Eighth Judicial Dist. Ct.
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155-1160

CC:FILE

DATED: this 7 day of JANUARY, 2020

David Alvarez Ventura #90079
/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

Plaintiff's Exhibit 1

Desert Springs Hospital Medical Ctr.

Operative Record

3-28-19

DSH- Desert Springs Hospital Medical Center
2075 E Flamingo Rd
Las Vegas, NV 89119-5188

Patient	VENTURA ALVAREZ, DAVID	Admit	3/28/2019		
MRN	DSH5741991	Disch	3/28/2019	Disch Time	11:25 PDT
FIN	DSH0000031308208	Attending	Caravella,Peter A MD		
DOB/Sex	8/5/1979 / Male	Copy To	n/a		
Patient Room	DSH PEOP, PEOP, 13				

Operative Record

DOCUMENT NAME	Operative Reports
SERVICE DATE/TIME	3/28/2019 09:56 PDT
RESULT STATUS	Auth (Verified)
PERFORM INFORMATION	Caravella,Peter A MD (3/28/2019 09:57 PDT)
SIGN INFORMATION	Caravella,Peter A MD (3/28/2019 09:57 PDT)

Indication for Surgery
Is a 39-year-old gentleman has a foreign body apparently in his upper abdomen

Preoperative Diagnosis
Left hip foreign body

Postoperative Diagnosis
Same

Operation
Iliac crest exploration and removal of partial foreign body

Surgeon(s)
Caravella, Peter A MD (Surgeon)

Anesthesia Type and Anesthesiologist

Liang DO, Henry (Anesthesiologist of Record)

Estimated Blood Loss
5

Specimen(s)
Partial foreign body

Technique
She was brought the operating placed in supine position and fluoroscopy and we did it while he is awake we did not see anything in the upper abdomen are hiatus region went down to the lower abdomen identified what appeared to be straight metallic object in his left hip area near the anterior superior iliac spine we did a crosstable lateral made an incision after marking both dimensions and dissect down the dermis and subcutaneous and through muscular layers and on the inner aspect of the iliac crest we identified a metallic foreign body we grabbed and pulled on it and got about 2 cm of the foreign body out we re-x-rayed we identified that there was some still remaining We cross stapled it and determine with minimal palpation that was left in the bone and could not be removed safely at this point we then irrigated seen aspirated dry close soft tissue with 2-0 Vicryl and the skin was stapled there were no complications thank you

Electronically Signed By Caravella Peter
On 03/28/2019 09:57 PDT

Transcription

Plaintiff Exhibit D

Plaintiff's Exhibt 2

OP Report authenticated by John H. Ganser, M.D at 10-24-16

Operative (continued)

OR Surgeon by John H Ganser, M.D. at 10/24/2016 9:30 AM (continued)

PreOp Diagnosis: Achalasia

PostOp Diagnosis: Same

Procedure(s):
ROBOTIC HELLER ESOPHAGOMYOTOMY, ANTERIOR FUNDOPLICATION

Surgeon(s):
John H Ganser, M.D.

Anesthesiologist/Type of Anesthesia:
Anesthesiologist: Tobey B Gansert, M.D./General

Surgical Staff:
Assistant: Curtis J Smith, P.A.
Circulator: Julie A Bloos, R.N.
Relief Circulator: Marjorie Rowson, R.N.
Scrub Person: Julie L. Hansen

Specimen: 0

Estimated Blood Loss: 0

Findings: 0

Complications: 0

10/24/2016 9:31 AM John H Ganser

OP Report authenticated by John H Ganser, M.D. at 10/24/2016 1:28 PM

Author: John H Ganser, M.D.	Service: SURGICAL	Author Type: Physician
Filed: 10/24/2016 1:28 PM	Note Time: 10/24/2016 9:36 AM	Status: Signed
Editor: John H Ganser, M.D. (Physician)		Trans ID: NES908719
Trans Status: Available	Dictation Time: 10/24/2016 9:36 AM	Trans Time: 10/24/2016 9:57 AM
Trans Doc Type: OP Report		

DATE OF SERVICE: 10/24/2016

PREOPERATIVE DIAGNOSIS: Achalasia.

Plaintiff Exhibit C

Plaintiff's Exhibit 3

Radiology Report Dr. Adamson
9-15-17

HUMBOLDT GENERAL HOSPITAL
118 E. HASKELL STREET
WINNEMUCCA, NV 89445

PATIENT: VENTURA, ALVAREZ D. GB is OK

D.O.B.: 08/05/1979
M.R.#: 145704
PATIENT#: 501160
TYPE: Outpatient

PHYSICIAN: KIM ADAMSON
EXAMINATION: US ABDOMEN COMPLETE

RADIOLOGY REPORT

DATE OF SERVICE: 09/15/2017 11:05
STATUS: Final

History: Right upper quadrant pain.

Findings: The gallbladder is well-visualized with no evidence of stones or wall thickening. There is no evidence of biliary dilatation with the common duct measuring 3 mm. Portal venous blood flow appears to be towards the liver. The hepatic veins are patent. No focal abnormality of the liver is evident. The pancreas is unremarkable. The spleen measures 13 cm.

The right kidney measures 10.5 cm and the left 11.2 cm. There appears to be a 1 cm cyst in the right kidney. No specific abnormality of the aorta or inferior vena cava is demonstrated.

Impression: Unremarkable ultrasound of the abdomen.

D: 09/15/2017 11:10

Legally authenticated by JACKSON LEON 2017-09-15 11:26:24

Plaintiff's Exhibit 4

Report By Dr Jackson, NNCC, 11-30-18

VENTURA-ALVAREZ, DAVID, 8/5/1979: CR\SR (Bilateral Hip J.) from 11/30/2018

Patient:	DAVID VENTURA-ALVAREZ (male, *1979-08-05, #80079)
Study:	Bilateral Hip J. (#118113007812)
Manufacturer:	IMAGE Information Systems
Completion Flag:	COMPLETE
Verification Flag:	VERIFIED
Verifying Observers:	2018-11-30 13:43:50 - Leon Jackson MD, NNCC
Content Date/Time:	2018-11-30 13:43:50

Report

Observation Context: Observer – Leon Jackson MD

Technique:
Exam: Pelvis 4 views.

Observation:
History: Foreign body.

Findings: Reference is made to the report of a previous study of 11/25/2018. A linear metallic foreign body is again identified projecting over the left iliac crest. On the current study it appears to measure about 4.4 cm, compared to about 5 cm on the previous study. This probably simply represents a difference in magnification or possibly the angle. This foreign body projects over the left iliac crest on all 4 images which include incremental rotation of the pelvis from AP to lateral. The tapered point appears to extend into the iliac crest while the wider more lateral end appears to extend outside of the iliac crest into the soft tissues of the abdominal wall. It is unlikely that the tip extends into the peritoneal cavity, although CT evaluation may clarify this. This does not appear to represent a hypodermic needle. This seems unlikely to be related to the patient's history of previous esophageal surgery. The pelvis and hips otherwise appear to be intact. The bowel gas pattern is unremarkable.

Summary:
Impression: A linear foreign body appears to involve the left iliac crest as discussed above.

11/30/18

David Alvarez Ventura #80079
PO Box 650 / HDSP
Indian Spgs., NV 89070

Hasler
01/09/2020
US POSTAGE $005.19⁰
ZIP 89101
011E10650516

NON
MACHINABLE MAIL
PLEASE HAND CANCEL

Clerk, 8th Judicial Dist. Court
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155-1160

3762

V2. 74

V2. 74

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CV20-00866
2020-06-05 11:36:37 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7911031

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-06-05 11:36:35.818.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-06-05 11:36:35.848.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	06-05-2020:11:34:49
Clerk Accepted:	06-05-2020:11:36:04
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Complaint - Civil
Filed By:	Deputy Clerk BBlough

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ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

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DAVID VENTURA

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2020-06-08 03:50:25 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7914383 : kjones

2610
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868
(775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

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

-o0o-

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279 **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: CV20-00866 Dept. No.: 8

NOTICE OF TRANSFER OF VENUE AND CASE ASSIGNMENT NOTIFICATION

Defendants JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, MCELREATH AND SMITH, by and through their attorneys EDWARD J. LEMONS, ESQ., ALICE CAMPOS MERCADO, ESQ. and LEMONS, GRUNDY & EISENBERG, hereby give notice that the above-captioned matter has been transferred to the Second Judicial District Court in Washoe County, Nevada, and has been given case number CV20-00866 and assigned to the Honorable Barry Breslow in Department No. 8.

///

///

///

///

AFFIRMATION

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 8th day of June, 2020.

LEMONS, GRUNDY & EISENBERG
Attorneys for Defendants

By: _____
EDWARD J. LEMONS
ALICE CAMPOS MERCADO, ESQ.

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 6005 Plumas Street, Third Floor, Reno, NV 89519, and I am employed by LEMONS, GRUNDY & EISENBERG in the City of Reno and County of Washoe where this service occurs

On June 08, 2020, following the ordinary business practice, I caused to be served to the addressee(s) listed below, a true copy of the foregoing document(s) and described as ***Defendants John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith's Notice of Transfer of Venue and Case Assignment Notification.***

__✓__ **BY MAIL**: in an envelope with postage thereon fully prepaid to be placed in the U.S. Mail at Reno, Nevada;

David Alvarez Ventura, #80079
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070

_____ **BY PERSONAL SERVICE**: in an envelope to be hand delivered this date;

_____ **BY OVERNIGHT DELIVERY**: in an envelope to be delivered to an overnight delivery carrier with delivery fees provided for;

_____ **BY FACSIMILE**: by transmitting by facsimile to the respective fax telephone phone number(s).

_____ **BY USING THE COURT'S EFS** which electronically served the following individual(s):

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

FILED
Electronically
CV20-00866
2020-06-08 03:51:46 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7914393 : kjones

2315
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868
(775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

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

-o0o-

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279 **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: CV20-00866 Dept. No.: 8

DEFENDANTS JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, MCELREATH AND SMITH'S MOTION TO DISMISS

Defendants JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, MCELREATH AND SMITH, by and through their attorneys EDWARD J. LEMONS, ESQ., ALICE CAMPOS MERCADO, ESQ. and LEMONS, GRUNDY & EISENBERG, hereby move this court for an order dismissing Plaintiff's Complaint because the Complaint is not accompanied by a medical expert's affidavit and thus fails to comply with NRS 41A.071.

This motion is made pursuant to NRCP 12(b)(5) and NRS 41A.071, and is based upon the attached points and authorities, the Complaint, the papers and pleadings on file in this action, and upon such other matters as the court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

Plaintiff filed this medical malpractice action on January 13, 2020. The action is based on allegations of medical malpractice related to care and treatment provided to David Alvarez Ventura on or about October 24, 2016 by Defendant John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith.

Although Plaintiff's Complaint purports to allege a claim for medical malpractice, it is unaccompanied by a medical expert's affidavit, as mandated by NRS 41A.071. and must be dismissed without prejudice and without leave to amend.

II. LEGAL ANALYSIS

A. DISMISSAL IS MANDATORY BECAUSE THE COMPLAINT DOES NOT COMPLY WITH NRS 41A.071

Under Nevada law, a motion to dismiss is the proper procedural vehicle by which to challenge a complaint that fails to satisfy the statutory filing prerequisites in a medical/dental malpractice action. *Washoe Medical Center v. District Court,* 122 Nev. 1298, 148 P.3d 790 (2006) (court affirmed dismissal of medical malpractice action without leave to amend where complaint was not filed with a medical expert's affidavit as required by NRS 41A.071). Because Plaintiff has failed to comply with this mandatory, pre-filing statute, his Complaint must be dismissed without prejudice and without leave to amend.

Actions for professional negligence are governed by NRS 41A.071. The statute provides as follows:

> If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that:
>
> 1. Supports the allegations contained in the action;

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> 2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;
> 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
> 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

NRS 41A.071 (as amended and adopted May 21, 2015).

NRS 41A.071 applies to claims for professional negligence, which is defined as "the failure of a provider of health care, in rendering services to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015.

The statutory affidavit requirement is absolutely mandatory. *Washoe Medical Center*, 122 Nev. at 1303-04, 148 P.3d at 793. The purpose of this statute is to lower costs, reduce frivolous lawsuits, and to ensure that professional malpractice actions are filed in good faith based upon competent expert opinions. *Washoe Medical Center*, 122 Nev. at 1304, 148 P.3d at 794; *Borger v. District Court*, 120 Nev. 1021, 1023, 102 P.3d 600, 602 (2004); *Zohar v. Zbiegien*, 130 Nev. --, 334 P.3d 402, 405 (2014). A complaint filed without an expert affidavit is void and cannot be amended to cure the dereliction. *Washoe Medical Center*, 122 Nev. at 1304, 148 P.3d at 794.

Here, Plaintiff has asserted claims of medical malpractice against Dr. Ganser and Gomez, Kozar, McElreath and Smith in connection with treatment provided to David Alvarez Ventura. The complaint contains lists of various allegations comprising the medical negligence claim. To the extent that these various listings might be seen as an attempt to state other causes of action, it must be noted that the overall object of the action, and of the Complaint, is

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medical malpractice and thus requires an expert affidavit. *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017).

Although the Complaint challenges the rendition of medical care, it is unaccompanied by an expert affidavit which addresses the merits of the purported malpractice claim against Dr. Ganser and Gomez, Kozar, McElreath and Smith. Therefore, Plaintiff's Complaint is void *ab initio* and must be dismissed without prejudice and without leave to amend.

III. CONCLUSION

NRS 41A.071 requires a medical expert's affidavit "supporting the allegations contained in the action." Here, Plaintiff's Complaint lacks an expert affidavit. Because the Complaint fails to comply with NRS 41A.071, the law requires that it be dismissed as to Dr. Ganser and Gomez, Kozar, McElreath and Smith, without leave to amend.

AFFIRMATION

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 8th day of June, 2020.

LEMONS, GRUNDY & EISENBERG
Attorneys for Defendants

By: _____
EDWARD J. LEMONS
ALICE CAMPOS MERCADO, ESQ.

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 6005 Plumas Street, Third Floor, Reno, NV 89519, and I am employed by LEMONS, GRUNDY & EISENBERG in the City of Reno and County of Washoe where this service occurs

On June 08, 2020, following the ordinary business practice, I caused to be served to the addressee(s) listed below, a true copy of the foregoing document(s) and described as ***Defendants John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith's Motion to Dismiss.***

__✓__ **BY MAIL**: in an envelope with postage thereon fully prepaid to be placed in the U.S. Mail at Reno, Nevada;

David Alvarez Ventura, #80079
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070

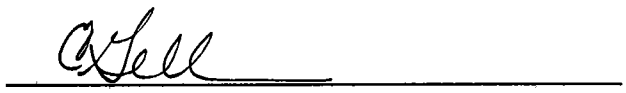
_____ **BY PERSONAL SERVICE**: in an envelope to be hand delivered this date;

_____ **BY OVERNIGHT DELIVERY**: in an envelope to be delivered to an overnight delivery carrier with delivery fees provided for;

_____ **BY FACSIMILE**: by transmitting by facsimile to the respective fax telephone phone number(s).

_____ **BY USING THE COURT'S EFS** which electronically served the following individual(s):

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.



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2020-06-08 04:16:18 PM
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Transaction # 7914545

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EDWARD LEMONS, ESQ.	- Notification received on 2020-06-08 16:16:18.027.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-06-08 16:16:18.05.

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	06-08-2020:15:50:25
Clerk Accepted:	06-08-2020:16:15:48
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Notice
Filed By:	Edward J. Lemons

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The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

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CV20-00866
2020-06-08 04:25:20 PM
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EDWARD LEMONS, ESQ.	- Notification received on 2020-06-08 16:25:18.573.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-06-08 16:25:18.607.

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Judge:

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Official File Stamp:	06-08-2020:15:51:46
Clerk Accepted:	06-08-2020:16:24:44
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Mtn to Dismiss
Filed By:	Edward J. Lemons

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EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

FILED

DAVID ALVAREZ VENTURA
NDOC NO. 80079
HIGH DESERT STATE PRISON
22010 COLD CREEK ROAD
POST OFFICE BOX 650
INDIAN SPRINGS, NV,
89070

2020 JUN 22 AM 8:48

JACQUELINE BRYANT
CLERK OF THE COURT
BY

PLAINTIFF IN PRO SE

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

DAVID ALVAREZ VENTURA, PLAINTIFF, VS. JOHN H. GANSER, MD., ET. AL., DEFENDANTS.	CIVIL ACTION NUMBER CV-20-00866 DEPARTMENT NO. 8 PLAINTIFF'S MOTION SEEKING THAT COURT DEFER CONSIDERATION OF DEFENDANTS MOTION TO DISMISS PENDING RESTORATION OF NORMAL PRISON OPERATIONS.

PLAINTIFF PROCEEDS PRO SE WITH THIS ACTION AS A STATE PRISONER CONFINED WITHIN THE NDOC AT ITS HIGH DESERT STATE PRISON. THIS ACTION WAS INITIALLY FILED IN EIGHTH JUDICIAL DISTRICT COURT CASE NO. A-20-809397-C ON JANUARY 13, 2020. FOLLOWING SERVICE OF PROCESS UPON DEFENDANTS, DEFENDANTS MADE AN APPEARANCE IN THIS ACTION MOTIONING FOR CHANGE OF VENUE TO THIS COURT WHICH WENT UNOPPOSED BY PLAINTIFF AND WAS SUBSEQUENTLY GRANTED.

THE CASE WAS SUBSEQUENTLY TRANSFERRED TO THIS COURT AND A CASE ASSIGNMENT NOTIFICATION WAS FILED AND SERVED JUNE 05, 2020. DEFENDANTS SERVED PLAINTIFF NOTICE OF TRANSFER OF VENUE ON JUNE 08, 2020 WHICH WAS ACCOMPANIED WITH A MOTION ATTACKING THE PLEADINGS MOVING FOR DISMISSAL UNDER NRCP R. 12(B) PURPORTEDLY DUE TO PLAINTIFF'S FAILURE TO COMPORT WITH CONDITIONS PRECEDENT IMPOSED BY NRS § 41A.071 IN OBTAINING AND ACCOMPANYING HIS INITIAL FILING OF THE COMPLAINT WITH A MEDICAL EXPERT'S AFFIDAVIT. PLAINTIFF'S OPPOSITIONS TO DISMISSAL REMAIN PENDING.

V2. 89

TODAY IS A DIFFERENT WORLD IN EXISTENCE THAN THAT IN WHICH WE OBSERVED JANUARY 13, 2020 WHEN PLAINTIFF INITIATED THIS ACTION. PARTICULARLY, DUE TO THE COVID-19 PANDEMIC THE WORLD HAS COME TO A SCREECHING HALT. SUCH HAS RESULTED IN NATIONAL STATE OF EMERGENCY DECLARATIONS WHICH HAS LOCALLY SINCE MARCH 11, 2020 ADVERSELY AFFECTED PLAINTIFF AS A CONFINED PRISONER WHO IS IN FULL RELIANCE ON HIS FACILITY LAW LIBRARY FOR THE ABILITY TO CONTINUE EXECUTING AND EFFECTIVELY PROSECUTING THIS ACTION. PARTICULARLY, SINCE MARCH 11, 2020 DUE TO THE COVID-19 PANDEMIC HIS FACILITY OPERATIONS HAVE BEEN COMPLETELY MODIFIED TO SUCH CRIPPLING EXTENT THAT HE HAS NOT BEEN PROVIDED ANY PHYSICAL ACCESS TO THE FACILITY LAW LIBRARY SINCE MARCH 11, 2020.

COGNIZANT OF HIS STANDARD OPPOSITION OPPORTUNITY OF 20-30 DAYS BY IN WHICH TO OPPOSE DEFENDANTS RECENT MOTION FOR DISMISSAL, PLAINTIFF CONVEYS THAT HE IS CRIPPLED BY THE ADVERSE IMPACTS BEING EXPERIENCED BY THE COVID-19 PANDEMIC WHICH RENDERS HIM FULLY INCAPABLE OF CONDUCTING ESSENTIAL LEGAL RESEARCH BY IN WHICH TO EVEN BEGAN TO DRAFT HIS OPPOSITIONS TO DEFENDANTS RECENT MOTION FOR DISMISSAL.

SAID FACTORS AND IMPEDIMENTS ARE IN NO WAY ATTRIBUTABLE TO PLAINTIFF AND SHOULD NOT SERVE AS THE BASIS IN AND UPON WHICH DEFENDANTS ARE PERMITTED TO GAIN UNFAIR ADVANTAGE OVER PLAINTIFF AS STRATEGIC LEVERAGE WHILE HE EXPERIENCES THE RIPPLING AFFECTS OF THE COVID-19 PANDEMIC.

IN LIGHT OF SAID EXTERNAL FACTORS NOT SUBJECT TO PLAINTIFF'S CONTROL, HE MOTIONS THIS COURT TO DEFER ANY CONSIDERATION OF DEFENDANTS MOTION TO DISMISS UNTIL SUCH TIME THAT NORMAL FACILITY OPERATIONS RESUME AND PLAINTIFF IS CAPABLE OF CONDUCTING PROPER RESEARCH TO ADEQUATELY RESPOND AND REPRESENT HIS INTERESTS IN THIS ACTION. ANY DIFFERENT RESULT WOULD RENDER AN UNJUST ADJUDICATION OF THIS ACTION AND ARRIVE TO A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

BASED UPON THE FOREGOING BASIS PLAINTIFF RESPECTFULLY URGES THE COURT TO REFRAIN FROM ENGAGING IN ANY CONSIDERATION OF DEFENDANTS MOTION TO DISMISS UNTIL PRISON OPERATIONS RETURN TO NORMAL.

IN ACCORDANCE THIS MOTION IS RESPECTFULLY SUBMITTED.

RESPECTFULLY SUBMITTED,

DATED: JUNE 15, 2020

BY: [signature] 80079
(DAVID ALVAREZ VENTURA)
PLAINTIFF IN PRO SE

PROOF OF SERVICE BY MAIL
CV-20-00886

I, DAVID ALVAREZ VENTURA, HEREBY DECLARE THAT:

ON JUNE 15, 2020, I SERVED THE FOLLOWING:

PLAINTIFF'S MOTION SEEKING THAT COURT DEFER CONSIDERATION OF DEFENDANTS MOTION TO DISMISS PENDING RESTORATION OF NORMAL PRISON OPERATIONS

ON THE BELOW LISTED PARTIES BY PLACING SAID DOCUMENTS INTO A PRE-PAID FIRST CLASS ENVELOPE AND DEPOSITING SAID CONTENTS INTO THE U.S. MAIL IN THE CITY OF INDIAN SPRINGS, COUNTY OF CLARK, ADDRESSED AS FOLLOWS:

EDWARD J. LEMONS
ATTORNEY AT LAW
6005 PLUMAS STREET
THIRD FLOOR
RENO, NV, 89519

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

BY: [signature] #80079
(DAVID ALVAREZ VENTURA)
DECLARANT/PLAINTIFF
IN PRO SE

FILED
Electronically
CV20-00866
2020-06-29 04:30:38 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7948011 : nmason

2650
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868
(775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

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

-o0o-

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279 **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: CV20-00866 Dept. No.: 8

DEFENDANTS JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, MCELREATH AND SMITH'S OPPOSITION TO PLAINTIFF'S MOTION SEEKING THAT THE COURT DEFER CONSIDERATION OF DEFENDANT'S MOTION TO DISMISS PENDING RESTORATION OF NORMAL PRISON OPERATIONS

Defendants JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, MCELREATH AND SMITH (collectively, "DR. GANSER"), by and through their attorneys LEMONS, GRUNDY & EISENBERG, submit the following points and authorities in opposition to pro per plaintiff DAVID VENTURA's *"Motion Seeking that Court Defer Consideration of Defendant's Motion to Dismiss Pending Restoration of Normal Prison Operations*," served on or about June 15, 2020.

Defense counsel would not typically object to a reasonable extension for an opposing party to file a response to defendant's motion; however, plaintiff's

request is unreasonable because he seeks an indefinite extension of time to respond to Dr. Ganser's motion until such time as "prison operations" are restored. As there is absolutely no indication when that may be, and in light of the narrow issue raised by Dr. Ganser's motion to dismiss of which plaintiff was, or should have been aware before he filed this action, Dr. Ganser hereby opposes plaintiff's motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff filed this medical malpractice action on January 13, 2020, in the Eighth Judicial District Court. Although this action is based on allegations of medical malpractice related to care and treatment provided to plaintiff, the complaint was filed without an expert affidavit as required by NRS 41A.071, rendering the complaint void *ab initio* under *Washoe Medical Center v. District Court,* 122 Nev. 1298, 148 P.3d 790 (2006).

Consequently, Dr. Ganser moved for a change of venue to the Second Judicial District and, upon transfer to this judicial district, he moved to dismiss the complaint for failure to comply with NRS 41A.071. *See Motion to Dismiss filed June 8, 2020.* Plaintiff's opposition was due on June 22, 2020. Instead of filing a timely opposition to Dr. Ganser's motion to dismiss, plaintiff made a motion to ask this court to defer the adjudication of this matter indefinitely, claiming that he is "crippled" by the impact the COVID-19 pandemic has had on him because he cannot access the prison law library and conduct research to oppose Dr. Ganser's motion.

Plaintiff's request must be denied as it unreasonably delays the adjudication of this matter to some unknown time in the future, leaving this action to remain pending against Dr. Ganser indefinitely, to his prejudice and detriment.

///

///

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II. LEGAL ANALYSIS

Dr. Ganser's motion to dismiss is based on a long-standing statutory mandate, embodied in NRS 41A.071, which has been interpreted by the Nevada Supreme Court to apply to incarcerated plaintiffs. *See Peck v. Zipf,* 133 Nev. -- 407 P.3d 775 (2017), a copy of which is attached hereto as Exhibit 1 for plaintiff's convenient reference. The controlling statute was quoted verbatim in Dr. Ganser's motion, so there is no need for plaintiff to access the prison law library to know what the statute required of him and to explain why he did not comply with the statute. Therefore, plaintiff's attempt to delay the adjudication of this matter based on the COVID-19 pandemic is unavailing.

Further, the circumstances were not completely out of his control. Plaintiff filed this action in January of 2020 – before the declaration of the COVID-19 global pandemic and before businesses and governmental agencies, including the Department of Corrections were affected. Thus, plaintiff could have, and should have, known at that time of the filing requirements for his action. Plaintiff's reliance on the pandemic to excuse his failure to respond to Dr. Ganser's motion to dismiss and to seek to delay it indefinitely is misplaced.

In addition, even if it is accepted that plaintiff cannot access the prison law library, there is nothing in his motion which suggests that he cannot ask for and obtain copies of the statute and case law he thinks he may need from Department of Corrections personnel by written request or "kite."

Dr. Ganser recognizes that the court may, in its discretion shorten or enlarge the time by which an act must be performed. Such discretion may be exercised in furtherance of the purpose underlying the Nevada Rules of Civil Procedure, to wit: "[T]o secure the just, *speedy,* and inexpensive determination of every action and proceeding." *See* NRCP 1 (emphasis added). Plaintiff's motion to defer consideration of Dr. Ganser's motion to dismiss until such unknown time as "normal prison operations" are restored defeats the purpose of NRCP 1 and is

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prejudicial to Dr. Ganser. This is true because the mere pendency of this action must be reported to the Nevada Board of Medical Examiners, and must be reported in applications for credentialing and for insurance.

Thus, although Dr. Ganser would not have objected to a brief extension to allow plaintiff to respond to his motion to dismiss, he strenuously objects to an open-ended extension with no end in sight. It is grossly unfair to Dr. Ganser to allow this action, which was undisputedly filed without an expert affidavit in violation of NRS 41A.071, to remain pending for the indefinite future.

III. CONCLUSION

Accordingly, Defendant John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith respectfully request that Plaintiff's *"Motion Seeking that Court Defer Consideration of Defendant's Motion to Dismiss Pending Restoration of Normal Prison Operations*," be denied.

AFFIRMATION

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 29th day of June, 2020.

LEMONS, GRUNDY & EISENBERG
Attorneys for Defendants

By: _____
EDWARD J. LEMONS, ESQ.
ALICE CAMPOS MERCADO, ESQ.

LEMONS, GRUNDY & EISENBERG
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RENO, NV 89519
(775) 786-6868

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 6005 Plumas Street, Third Floor, Reno, NV 89519, and I am employed by LEMONS, GRUNDY & EISENBERG in the City of Reno and County of Washoe where this service occurs

On June 29, 2020, following the ordinary business practice, I caused to be served to the addressee(s) listed below, a true copy of the foregoing document(s) and described as ***Defendants John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith's Opposition to Plaintiff's Motion Seeking that the Court Defer Consideration of Defendant's Motion to Dismiss Pending Restoration of Normal Prison Operations***

__✓__ **BY MAIL**: in an envelope with postage thereon fully prepaid to be placed in the U.S. Mail at Reno, Nevada;

David Alvarez Ventura, #80079
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070

_____ **BY PERSONAL SERVICE**: in an envelope to be hand delivered this date;

_____ **BY OVERNIGHT DELIVERY**: in an envelope to be delivered to an overnight delivery carrier with delivery fees provided for;

_____ **BY FACSIMILE**: by transmitting by facsimile to the respective fax telephone phone number(s).

_____ **BY USING THE COURT'S EFS** which electronically served the following individual(s):

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

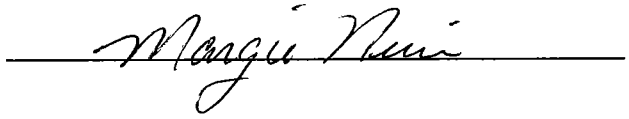

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EXHIBIT INDEX

Ventura v. Ganser

CV20-00866

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EXHIBIT 1

EXHIBIT 1

407 P.3d 775
Supreme Court of Nevada.

Frank Milford PECK, Appellant,
v.
David R. ZIPF, M.D.; and Michael D. Barnum, M.D., Respondents.

No. 68664
|
FILED DECEMBER 28, 2017

Synopsis

Background: Patient who was incarcerated at time of medical treatment filed complaint for medical malpractice, based on assertion that defendants physicians left needle in his hand. The Eighth Judicial District Court, Clark County, David B. Barker, J., granted physicians' motion for judgment on pleadings for patient's failure to file medical expert affidavit in support of complaint. Patient appealed.

Holdings: The Supreme Court, Hardesty, J., held that:

[1] as matter of first impression, insertion of intravenous (IV) needle was not "surgery," within meaning of statutory res ipsa loquitur exception to requirement that patient file expert medical affidavit in support of claim for medical malpractice when foreign object other than medication or prosthetic device is unintentionally left inside patient's body following surgery;

[2] patient could not rely on common law res ipsa loquitur exceptions to avoid expert report requirement;

[3] statutory expert affidavit requirement was subject to rational basis review, for purposes of due process and equal protection analysis;

[4] expert affidavit requirement did not violate equal protection or due process.

Affirmed.

West Headnotes (19)

[1] **Pleading**
⚭Judgment on Pleadings

The district court may grant a motion for judgment on the pleadings when material facts are not in dispute and the movant is entitled to judgment as a matter of law.

Cases that cite this headnote

[2] **Pleading**
⚭Well pleaded facts, admission of
Pleading
⚭Scope of inquiry; questions to be determined

On a motion for judgment on the pleadings, the court accepts the factual allegations in the complaint as true and draws all inferences in favor of the nonmoving party.

Cases that cite this headnote

[3] **Appeal and Error**
⚭Constitutional law

Questions of law, including questions of constitutional interpretation and statutory construction, are reviewed de novo.

Cases that cite this headnote

[4] **Health**
⚭Sanctions for failing to file affidavits; dismissal with or without prejudice

Insertion of intravenous (IV) needle was not "surgery," within meaning of statutory res ipsa loquitur exception to requirement that patient file expert medical affidavit in support of claim for medical malpractice when foreign object other than medication or prosthetic device is

unintentionally left inside patient's body following surgery, and thus, patient's failure to file expert affidavit with complaint rendered complaint for medical malpractice, based on claim that physicians left needle inside hand, void ab initio; surgery defined in dictionary as "that branch of medical science which treats of mechanical or operative measures for healing diseases, deformities, disorders, or injuries," regulation pertaining to operation and licensing of surgical centers defined "surgery" as "treatment of a human being by operative methods," and insertion of IV was not "operative measure." Nev. Rev. St. §§ 41A.071, 41A.100(1)(a).

Cases that cite this headnote

[5] **Health**
⇨Affidavits of merit or meritorious defense; expert affidavits
Health
⇨Sanctions for failing to file affidavits; dismissal with or without prejudice

A medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio; however, a medical expert's affidavit is not required if the claim falls into one of the enumerated statutory res ipsa loquitur exceptions. Nev. Rev. St. § 41A.100(1).

Cases that cite this headnote

[6] **Statutes**
⇨Plain language; plain, ordinary, common, or literal meaning

Where a statute's plain language is clear, the court will not look beyond the plain language when construing the statute.

Cases that cite this headnote

[7] **Health**
⇨Affidavits of merit or meritorious defense; expert affidavits

Statutory res ipsa loquitur exceptions to requirement that patient attach expert medical affidavit in support of complaint for medical malpractice codified and superseded common law exceptions, and thus, patient could not rely on common law exceptions to avoid expert report requirement. Nev. Rev. St. §§ 41A.071, 41A.100(1).

Cases that cite this headnote

[8] **Statutes**
⇨Superfluousness

Courts will avoid construing statutes so that any provision or clause is rendered meaningless.

Cases that cite this headnote

[9] **Statutes**
⇨Common or Civil Law

When there is a fair repugnance between the common law and a statute, both cannot be carried into effect.

Cases that cite this headnote

[10] **Constitutional Law**
⇨Presumptions and Construction as to Constitutionality
Constitutional Law
⇨Burden of Proof

Statutes are presumed to be constitutionally valid, and the challenger bears the burden of showing that a statute is unconstitutional.

Cases that cite this headnote

[11] **Constitutional Law**
⚖Clearly, positively, or unmistakably unconstitutional

In order to meet the burden of proving that a statute is unconstitutional, the challenger must make a clear showing of invalidity.

Cases that cite this headnote

[12] **Constitutional Law**
⚖Statutes and other written regulations and rules

When a challenged law does not implicate a suspect class or fundamental right, it will be upheld as in accordance with equal protection as long as it is rationally related to a legitimate government interest. U.S. Const. Amend. 14; Nev. Const. art. 1, § 8.

Cases that cite this headnote

[13] **Constitutional Law**
⚖Medical malpractice
Constitutional Law
⚖Professional malpractice
Health
⚖Validity

Statute providing that "medical malpractice complaint filed without supporting medical expert affidavit is void ab initio" did not implicate fundamental right or involve suspect class, and thus, statute comported with due process and equal protection if it was rationally related to legitimate government purpose. U.S. Const. Amend. 14; Nev. Const. art. 1, § 8; Nev. Rev. St. § 41A.071.

Cases that cite this headnote

[14] **Constitutional Law**
⚖Medical malpractice

The right of medical malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right, for the purposes of equal protection analysis. U.S. Const. Amend. 14; Nev. Const. art. 1, § 8.

Cases that cite this headnote

[15] **Constitutional Law**
⚖Statutes and other written regulations and rules

While the legislative history of a statute is helpful to understanding the purpose of enacting the statute, the court is not limited to the reasons expressed by the Legislature, in determining whether the statute is rationally related to a legitimate government purpose, for the purposes of due process and equal protection analysis; rather, if any rational basis exists, or can be hypothesized, then the statute is constitutional. U.S. Const. Amend. 14; Nev. Const. art. 1, § 8.

Cases that cite this headnote

[16] **Health**
⚖Sanctions for failing to file affidavits; dismissal with or without prejudice

The statute providing that a "medical malpractice complaint filed without supporting medical expert affidavit is void ab initio" was intended to deter baseless medical malpractice litigation, fast track medical malpractice cases, and encourage doctors to practice in Nevada while also respecting the injured plaintiff's right to litigate his or her case and receive full compensation for his or her injuries. Nev. Rev. St. § 41A.071.

Cases that cite this headnote

[17] **Health**
Sanctions for failing to file affidavits; dismissal with or without prejudice

The lack of a medical expert affidavit in support of a complaint for medical malpractice requires dismissal of the complaint. Nev. Rev. St. § 41A.071.

Cases that cite this headnote

[18] **Constitutional Law**
Medical malpractice
Constitutional Law
Professional malpractice
Health
Validity

Statute providing that "medical malpractice complaint filed without supporting medical expert affidavit is void ab initio" did not violate equal protection or due process, despite inmate patient's assertions that statute created unconstitutional distinction between medical malpractice plaintiffs and other negligence plaintiffs, prevented indigent plaintiffs from accessing courts, and prevented inmates from prosecuting medical malpractice claims; statute was rationally related to State's legitimate interest in managing medical malpractice insurance crisis in Nevada, it applied to all medical malpractice patients, not just indigent or inmate patients, lack of affidavit did not necessarily preclude indigent patient's access to courts, and patient was in fact able to secure affidavit after filing complaint, thus demonstrating that his incarceration and indigence did not prevent him from obtaining affidavit. U.S. Const. Amend. 14; Nev. Const. art. 1, § 8; Nev. Rev. St. § 41A.071(1).

Cases that cite this headnote

[19] **Prisons**
Access to Courts and Public Officials
Prisons
Right of action; restrictions

Prisoners have a constitutional right of access to the courts; however, this right does not include unfettered access to pursue all civil actions.

Cases that cite this headnote

*777 Appeal from a district court judgment on the pleadings in a medical malpractice action. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Attorneys and Law Firms

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McCormick, Barstow, Sheppard, Wayte & Carruth, LLP, and Jill M. Chase and Dylan P. Todd, Las Vegas, for Respondent David R. Zipf, M.D.

BEFORE HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, HARDESTY, J.:

NRS 41A.071 provides that a district court must dismiss a plaintiff's medical malpractice complaint if it is not accompanied by an expert affidavit. However, under NRS 41A.100(1), a plaintiff need not attach an expert affidavit for a res ipsa loquitur claim. In this appeal, we consider whether either statutory res ipsa loquitur or the common knowledge res ipsa loquitur doctrine provides an exception to the expert affidavit requirement for suit. We also must determine whether NRS 41A.071 is unconstitutional under the Equal Protection Clause or Due Process Clause, facially, or as applied to inmates or indigent persons.

We reiterate that the enumerated res ipsa loquitur exceptions in NRS 41A.100 supersede the common knowledge res ipsa loquitur doctrine. Because appellant's complaint failed to show that any object left in his body was the result of "surgery," the appellant's complaint did not satisfy the elements for the statutory exception of res ipsa loquitur. Thus, appellant's complaint was properly dismissed for lack of an expert affidavit. We further conclude that NRS 41A.071 does not violate equal protection or due process.

FACTS AND PROCEDURAL HISTORY

Appellant Frank **Peck** is, and has at all relevant times been, incarcerated at High Desert State Prison in Indian Springs. In December 2013, **Peck** was admitted to Valley Hospital. While at the hospital, **Peck** was under the care of respondents, Dr. David R. **Zipf** and Dr. Michael D. Barnum. In his complaint against the two doctors, **Peck** claimed that after his release from the hospital, he discovered a foreign object under the skin of his left hand.

In particular, **Peck** alleged one cause of action for medical malpractice claiming that Dr. **Zipf** and Dr. Barnum left a needle in his hand. In his complaint, **Peck** cited NRS 41A.100(1)(a) and *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992), in which we referenced NRS 41A.100(1) and recognized that expert testimony may not be necessary in medical malpractice cases where the alleged wrongdoing "is a matter of common knowledge of laymen." While **Peck** referenced the res ipsa loquitur doctrine, he did not claim that he had surgery. Doctors **Zipf** and Barnum moved for judgment on the pleadings, and the district court granted their motion, concluding that **Peck's** complaint did not meet the requirements of NRS 41A.100(l)(a), and thus, his failure to attach an affidavit of a medical expert to his complaint under NRS 41A.071 was fatal.

*778 *DISCUSSION*

On appeal, Peck argues that the district court erred in dismissing his complaint for lack of an affidavit because his complaint did not require an affidavit under NRS 41A.100(1)(a). Peck further contends that even if he did not meet the requirements for a statutory res ipsa loquitur cause of action, his claim falls under the common knowledge res ipsa loquitur doctrine at common law. Peck also argues that the affidavit requirement in NRS 41A.071 violates his equal protection rights and deprives him of due process. We disagree with Peck's contentions and affirm the district court.

Standard of review

[1] [2] [3]The district court may grant a motion for judgment on the pleadings "when material facts are not in dispute and the movant is entitled to judgment as a matter of law." *Bonicamp v. Vazquez*, 120 Nev. 377, 379, 91 P.3d 584, 585 (2004). A judgment on the pleadings is reviewed in the same manner as a dismissal under NRCP 12(b)(5). *See Sadler v. PacifiCare of Nev., Inc.*, —— Nev. ——, 340 P.3d 1264, 1266 (2014). Thus, this court accepts the factual allegations in the complaint as true and draws all inferences in favor of the nonmoving party. *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008) (stating the standard of review for a motion to dismiss pursuant to NRCP 12(b)(5)). "[Q]uestions of law, including questions of constitutional interpretation and statutory construction," are reviewed de novo. *Lawrence v. Clark Cty.*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011).

NRS 41A.071's affidavit requirement applies to Peck's complaint

[4] [5]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.3d 790, 794 (2006). However, a medical expert's affidavit is not required if the claim falls into one of the enumerated res ipsa loquitur exceptions under NRS 41A.100(1). *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005). Peck did not submit an affidavit to the district court with his complaint. Thus, his complaint is "void ab initio" unless it falls into one of the enumerated exceptions to the affidavit requirement. *Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794; *see also* NRS 41A.100(1); *Szydel,* 121 Nev. at 459, 117 P.3d at 204.

NRS 41A.100(1)(a) provides that medical expert evidence is not required when "[a] foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following *surgery.*" In his complaint, Peck alleged that a foreign object was left in his left hand and that relief was warranted under NRS 41A.100(1)(a); however, he did not describe the medical procedure he had or allege that the object was left in his body following a surgery. At oral argument, counsel for **Peck** argued that the insertion of an intravenous (IV)

needle constitutes surgery or, alternatively, discovery was necessary to determine whether a surgery was taking place at the time the foreign object was allegedly left in **Peck's** hand.[1] On the other hand, counsel for Dr. **Zipf** argued that the insertion of an IV needle does not constitute surgery, and thus, **Peck** did not allege a cause of action under ***779** NRS 41A.100(1)(a). The word "surgery" is not defined in NRS 41A.100 or otherwise in NRS Chapter 41A. *See generally* NRS 41A.003–.120. Thus, we must determine what the word "surgery" means in NRS 41A.100(1)(a).

1 In *Baxter v. Dignity Health*, —— Nev. ——, 357 P.3d 927, 928, 931 (2015), we held that a complaint was not void for lack of a physically attached medical expert affidavit where that affidavit was filed the day after the complaint, and the complaint incorporated by reference the pre-existing affidavit. At no time did Peck inform the district court that he had obtained an affidavit, nor did Peck incorporate by reference a medical expert affidavit in his complaint. Rather, Peck filed in this court a medical expert affidavit from a radiologist technician in which the radiologist technician only stated that the foreign object in Peck's hand may not appear on an x-ray. Unlike the factual circumstances that led to our holding in *Baxter*, Peck obtained this affidavit after the district court dismissed Peck's complaint and while he was pursuing this appeal. We note that Peck included his medical records with his opposition to the motion for judgment on the pleadings. The medical records indicate that Peck had a lumbar puncture, which demonstrated that he had viral meningitis. While in the hospital, Peck "went into an acute respiratory failure, requiring intubation and mechanical ventilation." Peck never argued that these medical procedures were "operative measures" or constituted "surgery" as required under NRS 41A.100.

[6]This court reviews issues of statutory construction de novo. *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009). Where a statute's plain language is clear, this court will not look beyond the plain language. *Id.* However, where a term in a statute is not defined, this court will look to its plain and ordinary meaning. *Jones v. Nev., State Bd. of Med. Exam'rs*, —— Nev. ——, 342 P.3d 50, 52 (2015). *Black's Law Dictionary* defines "surgery" as "that branch of medical science which treats of mechanical or operative measures for healing diseases, deformities, disorders, or injuries." *Surgery, Black's Law Dictionary* (6th ed. 1990). NAC 449.9743, a regulation pertaining to the operation and licensing of surgical centers, defines "surgery" as "the treatment of a human being by operative methods." These definitions support Doctors Zipf and Barnum's contention that the word "surgery" in NRS 41A.100(1)(a) does not include the insertion of an IV needle because that is not an "operative measure." Thus, Peck's medical malpractice claim required a medical expert's affidavit. *See Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794.

Peck argues that NRS 41A.100(1) can be read separately from subsection (a) so that an allegation of surgery is not required. However, 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. Moreover, Peck specifically identified this exception in NRS 41A.100(1)(a) in his complaint and did not reference any of the other enumerated exceptions. Accordingly, NRS 41A.100 requires that an expert affidavit be filed with Peck's complaint.

NRS 41A.100 codified and replaced the common law res ipsa loquitur doctrine

[7]Peck argues that a medical expert affidavit was not required under the common law res ipsa loquitur doctrine, and thus, the district court erred in dismissing his complaint. At oral argument, counsel for Peck argued that Peck stated a claim for common law res ipsa loquitur because he cited *Fernandez v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992), which Peck's counsel argued is the case that created the common law res ipsa loquitur doctrine. However, while we stated in *Fernandez* that 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," we specifically referenced NRS 41A.100(1) for this assertion. 108 Nev. at 969, 843 P.2d at 358. Further, we have held that, in drafting NRS 41A.100(1), the Legislature specifically codified the res ipsa loquitur doctrine and determined that in those specific enumerated circumstances, a medical affidavit is not required. *Johnson v. Egtedar*, 112 Nev. 428, 433, 915 P.2d 271, 274 (1996) ("We believe the [L]egislature intended NRS 41A.100 to replace, rather than supplement, the classic res ipsa loquitur formulation in medical malpractice cases where it is factually applicable."); *see also Szydel*, 121 Nev. at 459–60, 117 P.3d at 204–05 (stating that any res ipsa claim filed without an expert affidavit must meet the prima facie requirements for a res ipsa loquitur case as set forth in NRS 41A.100(1)(a)–(e)); *Born v. Eisenman*, 114 Nev. 854, 859, 962 P.2d 1227, 1230 (1998) ("[T]he more traditional res ipsa loquitur doctrine has been replaced by NRS 41A.100."). Had the Legislature intended to allow medical malpractice claims to be filed without an expert affidavit in circumstances where a foreign object was left

in the body during a procedure other than surgery, the Legislature would have codified those situations.

[8] [9]Moreover, we "avoid construing statutes so that any provision or clause is rendered meaningless." *In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000). Interpreting NRS 41A.100(1) as merely supplementing the common law and ***780** allowing claims where a foreign object is left in the body in a procedure other than surgery would render NRS 41A.100(1)(a) meaningless. Therefore, "there is a fair repugnance between the common law and the statute, and both cannot be carried into effect." *W. Indies, Inc. v. First Nat'l Bank of Nev.*, 67 Nev. 13, 32, 214 P.2d 144, 153 (1950) (internal quotation marks omitted).

NRS 41A.071 does not violate equal protection or due process

Peck argues that the medical expert affidavit requirement violates the Equal Protection and Due Process Clauses of the Nevada and federal Constitutions. Specifically, in his opening brief, Peck argues that NRS 41A.071 (1) "creates an unconstitutional distinction between medical malpractice plaintiffs and other negligence plaintiffs," (2) unconstitutionally prevents indigent plaintiffs from accessing the courts, and (3) unconstitutionally prevents inmates from prosecuting medical malpractice claims. Doctors Zipf and Barnum disagree.

[10] [11] [12]"Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity." *Tam v. Eighth Judicial Dist. Court*, —— Nev. ——, 358 P.3d 234, 237–38 (2015) (internal quotation marks omitted). "When the law ... does not implicate a suspect class or fundamental right, it will be upheld as long as it is rationally related to a legitimate government interest." *Zamora v. Price*, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009).

No unconstitutional distinction exists

[13] [14] [15]"[T]he right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right." *Tam*, 358 P.3d at 239 (alteration in original) (quoting *Barrett v. Baird*, 111 Nev. 1496, 1507, 908 P.2d 689, 697 (1995), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008)). Nor does Peck argue that a suspect class is implicated. Thus, NRS 41A.071 "need only be rationally related to a legitimate governmental purpose" to withstand a challenge based on equal protection or due process. *Id.*; *see also Arata v. Faubion*, 123 Nev. 153, 159, 161 P.3d 244, 248 (2007). "While the legislative history is helpful to understanding the purpose of enacting the statute, this court is not limited to the reasons expressed by the Legislature; rather, if any rational basis exists, or can be hypothesized, then the statute is constitutional." *Tam*, 358 P.3d at 239 n.5.

[16]"NRS 41A.071 was enacted in 2002 as part of a special legislative session that was called to address a medical malpractice insurance crisis in Nevada." *Zohar v. Zbiegien*, —— Nev. ——, 334 P.3d 402, 405 (2014). Doctors were concerned that insurance providers were quoting medical malpractice insurance premiums at drastically increasing rates. *Id.* By enacting NRS Chapter 41A, the Legislature intended "to deter baseless medical malpractice litigation, fast track medical malpractice cases, and encourage doctors to practice in Nevada while also respecting the injured plaintiff[']s right to litigate his or her case and receive full compensation for his or her injuries." *Id.* at 405–06.

A previous version of NRS Chapter 41A required that medical malpractice complaints be heard by a screening panel prior to being filed in the district court, and the panel's findings were admissible in the district court proceedings. *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1023, 102 P.3d 600, 602 (2004). In *Barrett v. Baird*, we determined that the screening panel provision was "rationally related to a legitimate governmental interest and [did] not violate equal protection." 111 Nev. at 1510–11, 908 P.2d at 699. The governmental interests related to the screening panel provision were "to minimize frivolous suits against doctors, to encourage settlement, and to lower the cost of malpractice premiums and health care." *Id.* at 1508, 908 P.2d at 697 (internal quotation marks omitted).

[17]The Legislature replaced the screening panel provision with the medical expert affidavit requirement. *Borger*, 120 Nev. at 1026, 102 P.3d at 604 ("[T]he expert affidavit requirements of NRS 41A.071 are designed to account for the abolition of the screening ***781** panels and to ensure that parties file malpractice cases in good faith, *i.e.*, to prevent the filing of frivolous lawsuits."). The Legislature's intent in requiring medical expert affidavits was to "lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion." *Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794 (internal quotation marks omitted). "According to NRS 41A.071's legislative history, the requirement that a complaint be filed with a medical expert affidavit was designed to

streamline and expedite medical malpractice cases and lower overall costs, and the Legislature was concerned with strengthening the requirements for expert witnesses." *Id.* Under the former screening panel provision, the plaintiff could still proceed to trial if the panel concluded that the medical provider was not negligent. *See Borger*, 120 Nev. at 1023, 102 P.3d at 602. Under the medical expert affidavit requirement, however, the lack of an affidavit requires dismissal of the complaint. *See Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794.

[18]We conclude that this change does not impact our analysis under rational basis. As our prior decisions in *Barrett, Washoe Medical Center,* and *Zohar* establish, the Legislature's regulation of Nevada's health care system through the medical expert affidavit requirement in NRS 41A.071 is rationally related to the legitimate governmental interest of managing what was considered a "medical malpractice insurance crisis in Nevada." *Zohar*, 334 P.3d at 405.

Peck urges this court to adopt the analysis of *Zeier v. Zimmer, Inc.*, 152 P.3d 861, 868 (Okla. 2006), in which the Supreme Court of Oklahoma held unconstitutional a similar affidavit requirement because the statute distinguished between medical malpractice plaintiffs and other negligence plaintiffs. However, the court invalidated the statute based on a unique provision of the Oklahoma Constitution that prohibits "special laws regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts." *Id.* at 868–69. Moreover, Peck does not argue that medical malpractice plaintiffs are a suspect class or that there is a fundamental right to medical malpractice damages. *See Barrett,* 111 Nev. at 1509, 908 P.2d at 698. Accordingly, we are not persuaded by *Zeier.*

Court access remains reasonably unfettered

Peck relies on our decision in *Barnes v. Eighth Judicial District Court,* 103 Nev. 679, 748 P.2d 483 (1987), for the proposition that NRS 41A.071 is overbroad and unconstitutionally restricts an indigent or incarcerated person's access to the courts by imposing a monetary barrier. In *Barnes,* three inmates attempted to file complaints against their attorneys for legal malpractice. 103 Nev. at 680, 748 P.2d at 484. The inmates filed motions under NRS 12.015(1), which allowed indigent plaintiffs to proceed without paying court costs, but the district court "denied the motions to proceed in forma pauperis because they were not supported by the affidavit of an attorney stating that the complaints had merit as required by NRS 12.015(1)." *Id.* at 680, 748 P.2d at 485. The purpose of the attorney affidavit requirement was "to spare the state the expense of financing frivolous lawsuits filed by indigent persons." *Id.* at 684, 748 P.2d at 487. We determined that the statute also may have worked "to screen out meritorious actions that would otherwise be filed by persons who [could not] afford, or [were] otherwise precluded from obtaining, the required certificate of an attorney." *Id.* We further explained that "the classification scheme created by the statute [was] arbitrary and irrational" and "too broad in its sweep." *Id.* Thus, we determined that "by conditioning the waiver of filing fees on an indigent's ability to obtain the certificate of an attorney that the indigent's cause of action or defense has merit, NRS 12.015 violates the equal protection guarantees contained in the Nevada and United States Constitutions." *Id.*

Barnes is distinguishable from Peck's case because NRS 41A.071 requires a medical expert affidavit for medical malpractice suits filed by anyone—not just indigent or incarcerated persons—whereas NRS 12.015 only required an affidavit for indigent plaintiffs. Moreover, "although an indigent has a right ***782** of reasonable access to the courts, the right of access is not unrestricted." *Id.* at 682, 748 P.2d at 486. While an affidavit is required to pursue medical malpractice claims, the lack of an affidavit does not preclude indigent plaintiffs specifically from accessing the courts in general. Thus, NRS 41A.071 does not create a classification scheme that violates equal protection.

Inmates are not unconstitutionally precluded from pursuing medical malpractice claims

Peck also argues that the affidavit requirement is unconstitutional under *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). In that case, the Supreme Court determined that the imposition of court costs to indigent plaintiffs seeking divorces violated equal protection. However, the Court concluded that because of the importance of the "marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Boddie*, 401 U.S. at 374, 91 S.Ct. 780. Here, medical malpractice damages do not share the same hierarchy in value in our society as marriage does, and indigent or incarcerated individuals are not precluded from obtaining an expert opinion solely on the basis of their indigence or incarceration. Moreover, the state is not imposing a court cost or fee under NRS 41A.071. Accordingly, Peck's reliance on *Boddie* is misplaced.

[19]Peck further relies on *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), for the notion that prisoners have a constitutional right of access to the courts. We agree and have held the same. *See Miller v. Evans*, 108 Nev. 372, 374, 832 P.2d 786, 787 (1992). However, this right does not include unfettered access to pursue all civil actions. In *Lewis v. Casey,* the Supreme Court clarified *Bounds* and explained that the right of access to the courts requires providing resources "that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." 518 U.S. 343, 355, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). Moreover, inmates are not a suspect class, and there is no fundamental right to medical malpractice damages. *See Glauner v. Miller*, 184 F.3d 1053, 1054 (9th Cir. 1999) (noting that inmates are not a suspect class); *Tam*, 358 P.3d at 239 (determining that there is no fundamental right to medical malpractice damages). Thus, NRS 41A.071 need only meet rational basis, which we conclude it does.

Other jurisdictions with expert affidavit requirements in medical malpractice actions agree that inmates and indigent plaintiffs are not excused from the affidavit requirements. *See Perry v. Stanley*, 83 S.W.3d 819, 825 (Tex. App. 2002) (holding that the requirement to file a medical affidavit with a complaint can properly be applied to inmates because they bear the burden of proof at trial, which requires expert testimony); *Gill v. Russo*, 39 S.W.3d 717, 718–19 (Tex. App. 2001) (holding that a statute requiring an expert report to be filed within 180 days of an inmate's filing of a medical malpractice suit did not violate the open courts provision of the Texas Constitution, despite the inmate's arguments that he could not interview physicians from prison and did not have enough money to obtain the reports); *see also O'Hanrahan v. Moore*, 731 So.2d 95, 96–97 (Fla. Dist. Ct. App. 1999) (rejecting a prisoner's request to declare unconstitutional a pre-suit requirement for a medical expert opinion to initiate his medical malpractice action); *Ledger v. Ohio Dep't of Rehab. & Corr.*, 80 Ohio App.3d 435, 609 N.E.2d 590, 593–95 (1992) (holding that an inmate's medical malpractice action was properly dismissed with prejudice for failure to meet that state's statutory affidavit requirement). Notably, Peck was able to obtain a medical expert affidavit after submitting his complaint, which demonstrates that his indigence and incarceration did not prevent him from acquiring the requisite documents needed for a medical malpractice claim.

***783** Accordingly, we conclude that NRS 41A.071 is rationally related to a legitimate governmental interest and does not violate equal protection or due process requirements.

CONCLUSION

Based on the foregoing, we affirm the district court's order granting Doctors **Zipf's** and Barnum's motion for judgment on the pleadings because **Peck** failed to include a medical expert affidavit with his medical malpractice complaint.

We concur:

Parraguirre, J.

Stiglich, J.

All Citations

407 P.3d 775

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

-o0o-

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279, **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: CV20-00866 Dept. No.: 8

REQUEST FOR SUBMISSION

IT IS HEREBY REQUESTED that *Defendants JOHN H. GANSER, M.D., AND GOMEZ, KOZAR, MCELREATH AND SMITH'S Motion to Dismiss*, filed in the above-captioned matter on June 8, 2020, be submitted to the Court for decision.

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 10th day of July, 2020

LEMONS, GRUNDY & EISENBERG
Attorneys for Defendants

By: _____
ALICE CAMPOS MERCADO

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 6005 Plumas Street, Third Floor, Reno, NV 89519, and I am employed by LEMONS, GRUNDY & EISENBERG in the City of Reno and County of Washoe where this service occurs

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_____ **BY USING THE COURT'S EFS** which electronically served the following individual(s):

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Margie Nunn

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

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CV20-00866
2020-07-10 12:14:20 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7965146

3860
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868
(775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

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

-o0o-

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279, **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: CV20-00866 Dept. No.: 8

REQUEST FOR SUBMISSION

IT IS HEREBY REQUESTED that *Plaintiff's Motion Seeking that Court Defer Consideration of Defendants' Motion to Dismiss Pending Restoration of Normal Prison Operations*, filed in the above-captioned matter on June 22, 2020, be submitted to the Court for decision.

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 10th day of July, 2020

LEMONS, GRUNDY & EISENBERG
Attorneys for Defendants

By: _____
ALICE CAMPOS MERCADO

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 6005 Plumas Street, Third Floor, Reno, NV 89519, and I am employed by LEMONS, GRUNDY & EISENBERG in the City of Reno and County of Washoe where this service occurs

On July 10, 2020, following the ordinary business practice, I caused to be served to the addressee(s) listed below, a true copy of the foregoing document(s) and described as ***Request for Submission***

✓ **BY MAIL**: in an envelope with postage thereon fully prepaid to be placed in the U.S. Mail at Reno, Nevada;

David Alvarez Ventura, #80079
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070

_____ **BY PERSONAL SERVICE**: in an envelope to be hand delivered this date;

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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Margie Nunis

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

V2. 113

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CV20-00866
2020-07-10 12:15:05 PM
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Transaction # 7965143

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Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-07-10 12:15:02.964.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-07-10 12:15:02.989.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	07-10-2020:12:13:14
Clerk Accepted:	07-10-2020:12:14:32
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Request for Submission
Filed By:	Alice Campos Mercado

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EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

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DAVID VENTURA

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CV20-00866
2020-07-10 12:16:18 PM
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Transaction # 7965150

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EDWARD LEMONS, ESQ.	- Notification received on 2020-07-10 12:16:16.129.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-07-10 12:16:16.246.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	07-10-2020:12:14:20
Clerk Accepted:	07-10-2020:12:15:43
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Request for Submission
Filed By:	Alice Campos Mercado

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EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

Code: 3860
Name: DAVID ALVAREZ VENTURA #80079
Address: P.O. BOX 650
INDIAN SPRINGS, NV. 89070
Telephone: N/A
Email: N/A
Self-Represented Litigant

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID ALVAREZ VENTURA,
Plaintiff / Petitioner,

Case No. CV-20-00866

Dept. No. 8

vs.

JOHN H. GANSER, MD., ET. AL.,
Defendant / Respondent.
/

REQUEST FOR SUBMISSION OF MOTION

I request that the Motion to Proceed Informa Pauperis, which was filed on 06/22/2020 (Date filed) and all other documents filed herein be submitted to the Court for decision.

This document does not contain the personal information of any person as defined by NRS 603A.040.

I declare, under penalty of perjury under the law of the State of Nevada, that the foregoing is true and correct.

Date: 7-7-2020

Your Signature: [signature]

Print Your Name: DAVID ALVAREZ VENTURA

F I L E D
Electronically
CV20-00866
2020-07-10 04:16:47 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7965932

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-07-10 16:16:45.761.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-07-10 16:16:45.786.

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	07-10-2020:16:15:43
Clerk Accepted:	07-10-2020:16:16:15
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Request for Submission
Filed By:	Deputy Clerk BBlough

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The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

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Transaction # 7975008 : bblough

DAVID ALVAREZ VENTURA
NDOC NO. 80079
HIGH DESERT STATE PRISON
POST OFFICE BOX 650
INDIAN SPRINGS, NV,
89070

PLAINTIFF IN PRO SE

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

DAVID ALVAREZ VENTURA, PLAINTIFF, VS. JOHN H. GANSER, MD., ET. AL., DEFENDANTS.	CIVIL ACTION NUMBER CV-20-00866 DEPARTMENT NO. 8 PLAINTIFF'S REPLY TO DEFENDANTS OPPOSITION AND REQUEST FOR CONVERSION OF JUNE 22, 2020 MOTION TO REQUEST FOR EXTENSION OF TIME AND FOR COURT ORDER.

ON JANUARY 13, 2020 PLAINTIFF FILED THIS ACTION IN THE EIGHTH JUDICIAL DISTRICT IN CASE NO. A-20-809397-C. THE SUMMONSES ISSUED FEBRUARY 25, 2020 AND ON MARCH 13, 2020 SERVICE WAS EFFECTED UPON DEFENDANTS. ACCORDINGLY, ON MARCH 20, 2020 THEY MADE APPEARANCE IN EIGHTH JUDICIAL DISTRICT AND PER NRS §§ 13.040 AND 13.050 MADE DEMAND AND MOTION FOR CHANGE OF VENUE TO THIS COURT. HEARING NO OPPOSITION FROM PLAINTIFF, THE EIGHTH JUDICIAL DISTRICT GRANTED THE MOTION ISSUING ORDERS CHANGING VENUE ON MAY 22, 2020. DEFENDANTS SUBSEQUENTLY SERVED NOTICE OF ENTRY OF ORDER ON PLAINTIFF ON MAY 29, 2020.

SUBSEQUENT TO THE CASE TRANSFER ON JUNE 05, 2020 THE CLERK OF THIS COURT SERVED PLAINTIFF A "CASE ASSIGNMENT NOTIFICATION." THIS WAS FOLLOWED BY DEFENDANTS NOTICE OF TRANSFER OF VENUE AND CASE ASSIGNMENT NOTIFICATION SERVED UPON PLAINTIFF ON JUNE 08, 2020. THIS NOTICE WAS ACCOMPANIED WITH A RULE 12(B) MOTION IN WHICH DEFENDANTS COUNSEL MOVES THIS COURT PURPORTEDLY DUE TO PLAINTIFF'S FAILURE TO COMPORT WITH CONDITIONS PRECEDENT TO FILING AS IMPOSED BY NRS § 41A.071 ARGUING THAT PLAINTIFF'S COMPLAINT IS VOID AB INITIO AND MUST BE DISMISSED WITHOUT PREJUDICE OR LEAVE TO AMEND.

CITING THE ADVERSE IMPACT OF THE COVID-19 PANDEMIC ON STATE PRISON OPERATIONS AND DIMINISHED FACILITY LIBRARY ACCESS TO RESEARCH PREPARATORY TO COMPOSING AN ADEQUATE OPPOSITION TO DEFENDANT'S DISMISSAL PLEADING, PLAINTIFF ON JUNE 15, 2020 FILED MOTION SEEKING THAT THE COURT DEFER CONSIDERATION OF DEFENDANTS DISMISSAL PLEADING UNTIL SUCH TIME AS NORMAL FACILITY OPERATIONS RESUME AND HE IS ABLE TO PERFECT HIS OPPOSITIONS. DEFENDANTS OPPOSED SAID MOTION ON JUNE 29, 2020. THIS REPLY FOLLOWS.

ATTACHED AS EXHIBIT 1 TO DEFENDANTS OPPOSITIONS IS OUR STATE SUPREME COURT'S HOLDING IN BEOK V. ZIPE, 407 P.3D 775 (2017) WHICH STANDS IN STARK CONTRAST TO AND SELF-DEFEATS THE ARGUMENT UPON WHICH COUNSEL PROFFERS THIS COURT URGING DISMISSAL. CONSIDERING SUCH, PLAINTIFF ANNOUNCES A STRATEGIC CHANGE OF HEART AND MOVES THE COURT TO GRANT HIM A REASONABLE AMOUNT OF TIME OF 45 DAYS BY IN WHICH TO OBTAIN THE RELEVANT MEDICAL RECORDS ESSENTIAL FOR TREATING HIS RECORD AND OPPOSING DEFENDANTS FRIVOLOUS MOTION TO DISMISS. TO THE EXTENT THAT DEFENDANTS ARE DISGRUNTLED WITH A 45 DAY EXTENSION, ALTERNATIVELY, PLAINTIFF SEEKS THAT THE COURT ISSUE ORDERS DIRECTING COUNSEL FOR DEFENDANTS TO PRODUCE THE COMPLETE MEDICAL FILE TO PLAINTIFF WITHIN A TIME SET BY THE COURT AND FILE A NOTICE OF COMPLIANCE. PLAINTIFF HAS ATTACHED AND SERVED A HIPAA DISCLOSURE FORM AUTHORIZING THE RELEASE TO HIS PERSON. THEREAFTER, PLAINTIFF WOULD SEEK 2 WEEKS FROM HIS RECEIPT OF THE FILE TO COMPLETE, FILE AND SERVE HIS OPPOSITIONS.

WHILE DEFENDANTS COUNSEL AND BANSER COMPEL EXPEDIENT RESOLUTION OF THIS ACTION FOR THE SAKE OF HIS REPUTATION AND TO OFFSET HIS OBLIGATION OF REPORTING THIS ACTION TO THE NEVADA BOARD OF MEDICAL EXAMINERS, HE MUSTERS THE AUDACITY TO WHIM IN THE COURT'S EAR OF PURPORTED DISCOMFORT AND PREJUDICE ENVISIONED TO BE CAUSED BY ANY DELAY CITING NEV. R. CIV. PROC. RULE 1'S "SPEEDY AND INEXPENSIVE RESOLUTION" CLAUSES. HOWEVER, THIS WHIM IS CLEARLY OUTWEIGHED BY RULE 1'S MOST IMPERATIVE "JUST RESOLUTION" CLAUSE AND IS BY FAR LESS SIGNIFICANT THAN THE DEGREE OF DISCOMFORT, SUFFERING AND PREJUDICE PLAINTIFF INCURRED AS A RESULT OF DEFENDANTS CONDUCTS THAT LIE AT THE VERY HEART OF THIS MATTER.

ON SAID BASIS PLAINTIFF MOVES THIS COURT TO CONVERT HIS MOTION TO ONE FOR AN EXTENSION AND COURT ORDER CONSISTENT WITH THIS REPLY AND ISSUE THE SOUGHT ORDERS.

IN ACCORDANCE THIS REPLY IS RESPECTFULLY SUBMITTED.

RESPECTFULLY SUBMITTED,

DATED: JULY 12, 2020

BY: _____
(DAVID ALVAREZ VENTURA)
PLAINTIFF IN PRO SE

V2. 122

PROOF OF SERVICE BY MAIL
CV-20-00866

I, DAVID ALVAREZ VENTURA, HEREBY DECLARE THAT:

ON July 12 OF, 2020, I SERVED THE FOLLOWING:

ON THE BELOW LISTED PARTIES BY PLACING SAID DOCUMENTS INTO A PRE-PAID FIRST CLASS ENVELOPE AND DEPOSITING SAID CONTENTS INTO THE U.S. MAIL IN THE CITY OF INDIAN SPRINGS, COUNTY OF CLARK, ADDRESSED AS FOLLOWS:

EDWARD J. LEMONS
ATTORNEY AT LAW
6005 PLUMAS STREET
THIRD FLOOR
RENO, NV, 89519

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

BY: [signature] #80079
(DAVID ALVAREZ VENTURA)
DECLARANT / PLAINTIFF
IN PRO SE

F I L E D
Electronically
CV20-00866
2020-07-16 03:41:31 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7975114

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Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-07-16 15:41:31.111.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-07-16 15:41:31.134.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	07-16-2020:15:25:07
Clerk Accepted:	07-16-2020:15:41:02
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Reply to/in Opposition
Filed By:	Deputy Clerk BBlough

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EDWARD J. LEMONS, ESQ. for JOHN H. GANSER et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

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CV20-00866
2020-07-31 04:51:39 PM
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Clerk of the Court
Transaction # 7998178

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,

Defendant.
_____/

ORDER GRANTING PLAINTIFF'S REQUEST FOR EXTENSION OF TIME AND HOLDING IN ABEYANCE DEFENDANT'S MOTION TO DISMISS AND MOTION TO DEFER CONSIDERATION OF NORMAL PRISON OPERATIONS

The Court is in receipt of *Defendants John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith's Motion to Dismiss* ("Motion to Dismiss") filed on June 8, 2020, by Defendants JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, MCELREATH AND SMITH (collectively, "Defendants"). The matter was submitted to the Court on July 10, 2020.

The Court is also in receipt of *Plaintiff's Motion Seeking That Court Defer Consideration of Defendant's Motion to Dismiss Pending Restoration of Normal Prison Operations* ("Motion to Defer") filed June 22, 2020 by Plaintiff DAVID ALVAREZ VENTURA ("Ventura"). Defendants filed an *Opposition* on June 29, 2020. The matter was submitted to the Court on July 10, 2020. Thereafter, on July 16, 2020, Ventura filed a *Plaintiff's Reply to Defendants*

Opposition and Request for Conversion of June 22, 2020 Motion to Request for Extension of Time and For Court Order ("Reply").[1]

This Court, having considered all papers and pleading filed herein, **GRANTS** Plaintiff's *Reply* and holds in abeyance Defendants' *Motion to Dismiss* and Plaintiff's *Motion to Defer*. The Court finds as follows:

BACKGROUND

According to the record, the Court is aware of the following facts:

The instant dispute arises from a medical malpractice action filed on January 13, 2020. *Def.'s Mot,* 2:3. The action is based on allegations of medical malpractice related to a laparoscopic surgery allegedly performed by Dr. Ganser on or about October 24, 2016. *Compl., 2.* Defendants' *Motion to Dismiss* argues that the Complaint failed to comply with NRS 41A.071 due to the lack of a medical expert's affidavit. *Def.'s Mot.,* 1:20-24. Ventura frames his *Motion to Defer* and *Reply* around the theory that he is unable to adequately defend his case and needs more time. Moreover, he asserts Defendants' cited case is actually self-defeating. *Reply*., at 2. The Court now addresses the parties' latest filings.

LEGAL STANDARD

Under WDCR 12, a responding party must file an answering points and authorities within 10 days of receiving service of a motion. WDCR 12(2); D.C.R. 13(3). However, even in light of such deadlines, parties may move for an extension of time. *See* WDCR 11. Pursuant to NRCP 6(b)(1)(B), "the court may, for good cause, extend the time: with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or on motion made after the time has expired if the party failed to act because of excusable neglect." NRCP 6(b)(1)(B)(i)-(ii). NRCP 6(b) applies to most acts required by the rules of civil procedure unless they are specifically excluded. *See* NRCP 6(b)(2). Because Ventura failed to respond to the *Motion to Dismiss* within the requisite time period, the extension of time requested in his *Reply* must meet the requirements of NRCP 6.

/ / /

[1] The Court construes Plaintiff's *Reply* as a Request for Extension of Time.

DISCUSSION

A. Good Cause

In his *Motion to Defer*, Ventura claims that COVID-19 has restricted his physical access to the prison law library since March 11, 2020, and he is thus prohibited from conducting necessary legal research. *Pl.'s Mot.*, 2. Thus, he initially requests the Court defer consideration of the *Motion to Dismiss* until prison operations fully resume and he can adequately respond to Defendants' *Motion*. *Id.* However, Defendants argue that while they would not typically object to a reasonable extension of time, such a request is unreasonable because it seeks an indefinite extension. *Def.'s Mot.*, 1:27-2:2. They point out that the Complaint was filed before the COVID-19 pandemic and suggests Ventura may obtain legal research through either Defendants' filings or perhaps a kite to Department of Corrections personnel. *Def.'s Mot.*, 3:6-21. Announcing a strategic change of heart, Ventura's *Reply* amends his *Motion to Defer* and requests the Court grant him a 45-day extension. *Reply*, 2.

Due to the impact COVID-19 has had on Ventura's access to vital legal resources, the Court finds sufficient good cause exists to grant him a 45-day extension to file an opposition to the *Motion to Dismiss*.

B. Excusable Neglect

The Court also finds Ventura has demonstrated that his failure to timely file a request for extension of time was due to excusable neglect. While excusable neglect has been defined in other contexts, such as under NRCP 60(b), the Nevada Supreme Court has not defined it under NRCP 6. *Moseley v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 124 Nev. 654, 665, 188 P.3d 1136, 1144 (2008). Thus, the *Moseley* court looked to federal case law dealing with excusable neglect to consider guidelines under NRCP 6. *Id.*[2] Under the framework adopted in

[2] *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (recognizing that "federal decisions involving the Federal Rules of Procedure provide persuasive authority when this court examines its rules").

Moseley,[3] excusable neglect is demonstrated where the party requesting relief has (1) acted in good faith, (2) exercised due diligence, (3) there was a reasonable basis for noncompliance, and (4) the nonmoving party will not suffer prejudice. *Id*.

Good Faith

The Court finds Ventura acted in good faith. He reasonably relied on access to the prison's law library to bring his lawsuit, and this access has been restricted since March 11, 2020, several months before the *Motion to Dismiss* was filed. *Pl.'s Mot.*, 2. The Court rejects Defendants' notion that Ventura could prepare his opposition by relying on the statutes and cases cited by Defendants. *Def.'s Mot.*, 3:6-9.

Due Diligence

Ventura has also somewhat showed due diligence by putting forth his best efforts despite the impact of the COVID-19 pandemic. That is, while Ventura was unable to access the library, he did file a *Motion* informing the Court of his inability to oppose the *Motion to Dismiss*, albeit filed untimely. In addition, Ventura also apparently read the case Defendants cited in their *Opposition* as indicated by his considerably brief assessment. *See Reply*, 2. Questions do remain, however, as to whether Ventura has exercised complete due diligence considering Defendants did provide suggestions as to steps Ventura could make to oppose the *Motion to Dismiss*.

Reasonable Basis

Moreover, Ventura has provided a fairly reasonable basis for non-compliance with applicable rules as the delay is attributable to COVID-19, a cause not within Ventura's control. In addition, the Court cannot reasonably require Ventura, a pro se litigant, to anticipate Defendants' counterarguments or a future restriction on his access to the prison's law library due to a global pandemic.

Prejudice

Finally, a 45-day extension is not likely to greatly prejudice Defendants beyond that which always exists when a party does not receive the benefit of an opponent's missed deadline.

[3] The Court notes that the 4-factor framework adopted in *Moseley* was applied in an NRCP 25(a)(1) context. However, these factors are not that dissimilar to those stated under federal rule 6(b), *see Moseley* at 655, thus the Court nonetheless assesses the *Moseley* factors.

Moreover, the Court recognizes the potential for further argument as *Peck v. Zipf*, cited by parties, mentions "enumerated res ipsa loquitur exceptions" to the expert affidavit requirement of NRS 41A.071.[4] Because this argument remains marginally unexplored, the Court finds that its decision to grant Ventura an additional 45-days to file his opposition is consistent with NRCP 6 and the Nevada Supreme Court's long recognized and "basic underlying policy to have each case decided upon its merits." *In re Estate of Black*, 132 Nev. 73, 77-78, 367 P.3d 416, 419 (2016) (citing *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963)).

Accordingly, in the aggregate, the factors support the Court's finding of excusable neglect. Thus, pursuant to case law, NRCP 6 and WDCR 11, the Court determines that a 45-day extension is a reasonable request.

CONCLUSION

Accordingly, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's *Reply to Defendant's Opposition* is **GRANTED**[5] and the Court holds in abeyance the Defendants' *Motion to Dismiss* and Plaintiff's *Motion to Defer*. Plaintiff shall have 45-days from the date of this order to file an opposition to the *Motion to Dismiss*. Thereafter, Defendants shall have 15 days to file a reply and submit it to the Court.

IT IS SO ORDERED.

DATED this 31 day of July, 2020.

BARRY L. BRESLOW
District Judge

[4] 133 Nev. 890, 892, 407 P.3d 775, 778 (2017).

[5] The Court is only granting a 45-day extension of time and declines to address the underlying merits of the Motions filed and any other issues presented, including those raised in the *Reply*.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 31 day of July, 2020, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Christine Kuhl

Judicial Assistant

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Electronically
CV20-00866
2020-07-31 04:52:44 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7998186

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-07-31 16:52:43.675.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-07-31 16:52:43.717.

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	07-31-2020:16:51:39
Clerk Accepted:	07-31-2020:16:52:12
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Ord Addressing Motions
Filed By:	Judicial Asst. CKuhl

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EDWARD J. LEMONS, ESQ. for JOHN H. GANSER et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

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CV20-00866
2020-08-03 04:05:45 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8000973

CODE 3860

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. CV-20-00866

JOHN H. GANSER, MD., ET. AL.,

Dept. No. 8

Defendant.

/

REQUEST FOR SUBMISSION OF MOTION

It is requested that the motion for PLAINTIFF'S REPLY TO DEFENDANTS OPPOSITION, which was filed on the 16TH day of JULY, 2020, in the above-entitled matter be submitted to the Court for decision.

The undersigned certifies that a copy of this request has been mailed to all counsel of record.

DATED this 30 day of JULY, 2020.

DAVID ALVAREZ VENTURA

CERTFICATE OF SERVICE BY MAILING

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 30 day of JULY, 2020 I mailed a true and correct copy of the foregoing, "REQUEST FOR SUBMISSION OF REPLY TO DEFENDANTS OPPOSITION" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

CLERK OF THE COURT.
SECOND JUDICIAL DISTRICT COURT.
75 COURT STREET.
RENO NV 89501

CC:FILE

DATED: this 30 day of JULY, 2020.

DAVID ALVAREZ VENTURA # 80079
PLAINTIFF /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

F I L E D
Electronically
CV20-00866
2020-08-03 04:06:54 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8000976

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-08-03 16:06:53.521.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-08-03 16:06:53.548.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	08-03-2020:16:05:45
Clerk Accepted:	08-03-2020:16:06:25
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Request for Submission
Filed By:	Deputy Clerk BBlough

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for JOHN H. GANSER et al

EDWARD J. LEMONS, ESQ. for JOHN H. GANSER et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

FILED
Electronically
CV20-00866
2020-08-05 02:28:06 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8005022 : bblough

DAVID ALVAREZ VENTURA
NDOC NO. 80079
HIGH DESERT STATE PRISON
POST OFFICE BOX 650
INDIAN SPRINGS, NV.
89070

PLAINTIFF IN PRO SE

SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WASHOE

DAVID ALVAREZ VENTURA, PLAINTIFF, VS. JOHN H. GANSER, MD., ET. AL., DEFENDANTS.	CIVIL ACTION NUMBER CV-20-00866 DEPT. NO.: 8 PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS.

PLAINTIFF PROCEEDS WITH THE INSTANT ACTION IN PRO SE. HE IS A STATE PRISONER CONFINED AT THE HIGH DESERT STATE PRISON ("HDSP") IN INDIAN SPRINGS, NEVADA. INITIALLY FILED IN 8TH JUDICIAL DISTRICT COURT CASE NUMBER A-20-809397-C, THIS CASE WAS SUBSEQUENTLY TRANSFERRED TO THIS COURT FOLLOWING SERVICE OF PROCESS UPON AND APPEARANCE OF DEFENDANTS. UPON CASE ASSIGNMENT IN THIS COURT AND ON JUNE 08, 2020 DEFENDANTS FILED A MOTION WITH THIS COURT SEEKING DISMISSAL OF THE PLEADINGS PURPORTEDLY DUE TO PLAINTIFF'S FAILURE TO COMPORT WITH THE CONDITION PRECEDENT TO FILING AS REQUIRED UNDER NRS § 41A.071 IN OBTAINING AND ACCOMPANYING UPON FILING, HIS COMPLAINT WITH A SUPPORTING MEDICAL EXPERT'S AFFIDAVIT.

BY JUNE 22, 2020 PLAINTIFF'S OPPOSITIONS REMAINED OUTSTANDING WHEREUPON HE FILED A MOTION SEEKING THAT THE COURT DEFER CONSIDERATION OF DEFENDANTS' MOTION FOR DISMISSAL PENDING RESTORATION OF NORMAL PRISON OPERATIONS. ON JUNE 29, 2020 DEFENDANTS ENTERED THEIR OPPOSITIONS THERETO IN WHICH AT EXHIBIT '1' THEREIN THEY APPENDED BECK V. ZIRE, 407 P.3D 775 (2017). PLAINTIFF REPLIED. ON JULY 10, 2020 DEFENDANTS FILED REQUEST FOR SUBMISSION OF THEIR JUNE 08, 2020 DISMISSAL PLEADING ABSENT PLAINTIFF'S FORMAL OPPORTUNITY TO ENTER ANY OPPOSITION THERETO.

AT THE OUTSET OF THESE OPPOSITIONS PLAINTIFF EXPRESSLY OBJECTS TO DEFENDANTS JULY 10, 2020 REQUEST FOR SUBMISSION ABSENT THE COURT'S CONSIDERATION OF THE INSTANT OPPOSITIONS. SECONDLY, PLAINTIFF MAKES THE INSTANT OPPOSITIONS BASED EXCLUSIVELY ON EXHIBIT '1' OF DEFENDANTS OPPOSITIONS OF JUNE 29, 2020, WITHOUT BENEFIT OF LIBRARY ACCESS AND CONDITIONED ON THE RECORDS ATTACHED HERTO AS EXHIBIT 'A' AND THOSE BEING ORDERED BY VIRTUE OF SUBPOENA DUCES TECUM WHICH ALL SUPPORT THE BASIS OF THESE OPPOSITIONS.

ACCORDINGLY, PLAINTIFF SUBMITS THE FOLLOWING OPPOSITIONS TO DEFENDANTS DISMISSAL APPLICATION.

I. STANDARD OF REVIEW

THE JUDGMENT OF THIS COURT MAY FORTHCOME GRANTING A MOTION ON THE PLEADINGS WHEN MATERIAL FACTS ARE NOT IN DISPUTE AND THE MOVANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW. BONICAMP V. VASQUEZ, 120 NEV. 377, 379 (2004). A JUDGMENT ON THE PLEADINGS IS REVIEWED IN THE SAME MANNER AS A DISMISSAL UNDER NEV. R. CIV. PROC. R. 12(B)(5). SADLER V. PACIFICARE OF NEV., INC., 340 P.3D 1264, 1266 (2014). THUS, A REVIEWING COURT WILL ACCEPT THE FACTUAL ALLEGATIONS AS TRUE AND DRAW ALL REASONABLE INFERENCES IN FAVOR OF PLAINTIFF AS THE NONMOVING PARTY RESOLVING ALL DOUBT IN HIS FAVOR. BUZZ STEW, LLC V. CITY OF LAS VEGAS, 124 NEV. 224, 227-28 (2008).

II. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT ON THE PLEADINGS AS PLAINTIFF'S CAUSE OF ACTION CLEARLY FALLS WITHIN NRS §§ 41A.071 AND 41A.100(1)(A)'S RES IPSA LOQUITUR EXEMPTION.

THE FACTS AS ALLEGED IN PLAINTIFF'S VERIFIED TRANSFERRED COMPLAINT CLEARLY ALLEGE FACTS, WHICH IF PROVEN TRUE, ENTITLE PLAINTIFF TO RELIEF UNDER APPLICABLE LAW AND THE AMBIT OF RES IPSA LOQUITUR EXEMPTIONS CODIFIED AT NRS §§ 41A.071 AND 41A.100(1)(A).

DEFENDANTS RELIANCE ON PECK V. ZIPF IS BOTH MISPLACED AND CLEARLY DISTINGUISHABLE FROM THE INSTANT CASE.

IN PECK, PLAINTIFF, ALSO A HDSP PRISONER, BROUGHT AN ACTION FOR MEDICAL MALPRACTICE AGAINST A PHYSICIAN FOR LEAVING A NEEDLE IN HIS PERSON AS THE RESULT OF A INTRAVENOUS (IV) PROCEDURE ARGUING THAT NRS § 41A.071 RES IPSA LOQUITUR'S EXCEPTION APPLIED ON THE BASIS THAT INSERTION OF A IV NEEDLE CONSTITUTED "SURGERY" WITHIN THE MEANING OF STATUTORY RES IPSA LOQUITUR'S EXEMPTION SO AS TO MAKE IT UNNECESSARY TO COMPORT WITH NRS § 41A.071'S EXPERT AFFIDAVIT REQUIREMENT.

THE PEEK COURT, AS A MATTER OF FIRST IMPRESSION, CONCLUDED THAT INSERTION OF A IV WAS NOT "SURGERY" WITHIN THE MEANING OF STATUTORY RES IPSA LOQUITUR'S EXCEPTION UNDER APPLICABLE LAW. THE COURT JUDICIALLY ACKNOWLEDGED THAT "SURGERY", AS DEFINED BY RES IPSA LOQUITUR STATUTORY EXCEPTIONS, ENCOMPASSES "TREATMENT OF A HUMAN BEING BY OPERATIVE METHODS" AND OBSERVED THE "OPERATIVE MEASURE" EXCEPTION UNDER NRS §§ 41A.071 AND 41.A 100(1)(A) IN APPROPRIATE INSTANCES SUCH AS THOSE PRESENTED BY THE INSTANT CASE. IT FURTHER RATIFIED A COMPLAINT'S VOID AB INITIO'S STATUS IF FILED WITHOUT THE REQUISITE PRE-FILING EXPERT AFFIDAVIT UNLESS OTHERWISE NOT REQUIRED UNDER RES IPSA LOQUITUR'S EXEMPTIONS

DEFENDANTS ATTEMPT TO REPACKAGE AND CONVERT PEEK'S HOLDING TO FIT THEIR PROPOSITION THAT IT SUPPORTS "DR. GANSER'S MOTION TO DISMISS . . . BASED ON A 'LONG-STANDING' STATUTORY MANDATE EMBODIED IN NRS § 41A.071, WHICH HAS BEEN INTERPRETED BY THE NEVADA SUPREME COURT TO 'APPLY TO INCARCERATED PLAINTIFFS'." WHILE 41A.071 APPLIES TO, AMONG OTHER PARTIES - PRISONERS, PEEK DID NOT CONCLUDE IT APPLIED EXCLUSIVELY TO PRISONERS AS SUGGESTED BY DEFENDANTS.

AS TAKEN FROM THE BODY OF THE VERIFIED COMPLAINT AND OPERATIVE RECORDS THAT DETAIL THE DISPUTED PROCEDURE, ON OCTOBER 24, 2016 AT 0625 HOURS PLAINTIFF WAS ADMITTED TO RENOWN REGIONAL MEDICAL CENTER WITH A DIAGNOSIS OF ACHALASTA (EXHIBIT 'A', P.2). THE OPERATIVE PROCEDURE ENSUING HIS ADMISSION WAS DESCRIBED AS AN "ASSISTED ROBOTIC HELLER ESOPHAGOMYOTOMY WITH ANTERIOR FUNDOPLICATION, PERFORMED BY DR. GANSER ON 10/24/2016" (EX 'A', P.2) AND RESULTED IN 5 INCISIONS TO PLAINTIFF'S ABDOMEN REGION AS DEPICTED ON THE DIAGRAM CONTAINED AT PAGE 5 OF EXHIBIT 'A' HERETO. THROUGHOUT THE PASSAGES OF THE RESULTING MEDICAL RECORDS DEFENDANTS AND THEIR ENTITY CONSISTENTLY REFERENCE THE PROCEDURE PERFORMED TO BE A "SURGERY" WHICH ACTUALLY WARRANTED ANESTESIA AND RESULTED IN SUTURES -- PROCEDURES NOT REQUIRED LESS ALONE WARRANTED IN INSTANCES LIKE PEEK IN GENERAL IV APPLICATIONS (EX 'A', PP. 1 AND 4).

THIS CASE IS CLEARLY DISTINGUISHABLE FROM PEEK AS THE INJURIES, SUFFERING, SCARRING AND PAINS INCURRED BY PLAINTIFF WERE NOT THE RESULT OF A SIMPLE IV APPLICATION BUT RATHER A MORE INTRUSIVE SURGICAL PROCEDURE IN WHICH FOREIGN SUBSTANCE(S) WERE ABANDONED AND LEFT WITHIN HIS PERSON AS IDENTIFIED IN STATUTORY RES IPSA LOQUITUR EXEMPTIONS TO PRE-FILING EXPERT AFFIDAVITS.

MOREOVER, PLAINTIFF DOES NOT LIKE PECK COMPLAIN OF A FOREIGN BODY'S TRIVIAL SUPERFICIAL LODGING UNDER HIS SKIN. RATHER, THE BASIS OF HIS INJURY, SUFFERING AND PAINS ARE FAR MORE GREATER AND PROFOUND. AS REFLECTED BY AND MADE APPARENT BY THE VERIFIED COMPLAINT, PLAINTIFF'S INJURIES WERE FAR MORE SERIOUS. INDEED, THE FOREIGN BODY NEGLIGENTLY ABANDONED IN HIS PERSON DURING THE COURSE OF SURGICAL PROCEDURES BY DEFENDANTS HAD IN FACT BEGUN TO FUSE INTO PLAINTIFF'S BONE MATTER RENDERING ITS COMPLETE REMOVAL THROUGH SURGICAL INTERVENTION NOT PRACTICABLE AND UNSAFE. ALTHOUGH SOME OF THE FOREIGN BODY'S PIECES WERE EXTRACTABLE FROM THE LEFT HIP REGION AS DEPICTED ON THE DIAGRAM CONTAINED AT PAGE 5 OF EXHIBIT 'A' HERETO RESULTING IN A SERIOUS SURGICAL SCAR, REMNANTS OF THE METALLIC SUBSTANCE REMAINS IN PLAINTIFF'S PERSON TODATE. (SEE EXHIBIT 1 OF COMPLAINT).

AS THE NEVADA SUPREME COURT HELD, NRS § 41A.071 HAS NOT ARRIVED TO INFLEXIBLE DOGMA AND INSTANCES WERE PERCEIVABLE TO ARISE IN WHICH THE RES IPSA LOQUITUR DOCTRINE WOULD BE APPLICABLE AND APPROPRIATE SUCH AS WHEN "... A FOREIGN SUBSTANCE IS FOUND IN THE PATIENT'S BODY FOLLOWING SURGERY, NRS 41A.100(1)(A)..." SZYDEL V. MARKMAN, 121 NEV. 453 (2005). ID. AT 460.

THE SOLE 2 CLAIMS OF PLAINTIFF'S COMPLAINT FALL UNDER RES IPSA LOQUITUR'S EXEMPTIONS. HIS COMPLAINT DOES NOT CONTAIN ANY OTHER PIECEMEAL CLAIMS WHICH MAY BE REQUIRED TO BE FILED WITH THE REQUISITE PRE-FILING EXPERT AFFIDAVIT.

III. CONCLUSION

GIVEN THE ABOVE, MATERIAL FACTS ARE IN DISPUTE AND DEFENDANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW. FOR THE FOREGOING REASONS DEFENDANTS MOTION FOR DISMISSAL ON THE PLEADINGS SHOULD BE DENIED IN ITS ENTIRETY.

IN ACCORDANCE THIS SET OF OPPOSITIONS ARE RESPECTFULLY SUBMITTED.

RESPECTFULLY SUBMITTED,

DATED: 02-08-2020

BY: _____
(DAVID ALVAREZ VENTURA)
PLAINTIFF IN PRO SE

EXHIBIT "A"

Draft: Not Electronically Signed.

Curtis J Smith, P.A.	Physician Assistant	Unsigned Transcription	Discharge Summaries	10/25/2016 3:31 PM

DATE OF ADMISSION: 10/24/2016

DATE OF DISCHARGE: 10/26/2016 (anticipated).

ADMITTING DIAGNOSIS: Achalasia.

DISCHARGE DIAGNOSIS: Achalasia.

OPERATION PERFORMED: Da Vinci assisted robotic Heller esophagomyotomy with anterior fundoplication, performed by Dr. Ganser on 10/24/2016.

INDICATIONS: The patient is a 36-year-old incarcerated male who has had progressive dysphagia over the last 3 years. Extensive outpatient workup revealed achalasia. After an involved preoperative education and informed consent process, the patient was brought to the operating room for the aforementioned procedure.

HOSPITAL COURSE: After the procedure, the patient went to the general surgical unit in stable condition. At the time of this dictation, patient's vital signs are stable and he is afebrile. He is tolerating clear liquids well without dysphagia, regurgitation, or reflux. He is ambulatory. His abdomen is soft and his wounds are clear.

DISPOSITION: Patient will be discharged in the morning and returned to the correctional facility.

DISCHARGE INSTRUCTIONS: He is counseled extensively regarding diet, activity, wound care, and home medications. He is okay to shower over the Tegaderms. These dressings should be removed on postoperative day #4. Once they were removed, he can continue to shower. The wounds should be able to tolerate the shower water without difficulty. He could be up ad lib; however, he should not lift more than 15-20 pounds for the next 3-4 weeks. He should continue a full liquid diet for the next week. He should be on a soft and/or pureed type diet for an additional 2 weeks thereafter. He should not resume a regular solid foods for at least 3-4 weeks. He will likely require liquid analgesic to be taken orally for the next 3-4 days. I have written a prescription for this and that his pain should be controlled with either liquid Tylenol or Advil. He could crush Tylenol or Advil to a paste or liquid type of consistency for this first week or two as he continues to heal. He should follow up with Dr. Ganser for a wound check and diet progression recommendation sometime in the next 7-10 days.

DISCHARGE MEDICATIONS: Hydrocodone elixir 7.5 mg/325 mg/15 mL, dispensed quantity 200 mL, sig is for 10-20 mL p.o. q. 4 hours p.r.n. pain.

CURTIS J. SMITH, PA-C

CJS / NTS

RENOWN REGIONAL MEDICAL CENTE
1155 MILL STREE
RENO NV 89502-157
Transfer Repo

Rvcedarkey, Thirteen #4396625
Admission Info: **Observation-Outpatient (Adm: 10/24/16)**
Billing Number: **10288927**

Description: **37 y.o. M**
Primary Service: **SURGICAL**
Unit Info: **141**

Patient Information

Patient Name	Sex
Rvcedarkey, Thirteen	Male

Admission Information

Attending Provider	Admitting Provider	Admission Type	Admission Date/Time
John H Ganser, M.D.	John H Ganser, M.D.	Elective	10/24/16 0625
Discharge Date	Hospital Service	Auth/Cert Status	Service Area
	SURGICAL	Incomplete	RENOWN HEALTH
Unit	Room/Bed		Admission Status
GEN SURGERY TAHOE 4TH	T426/00		Admission (Confirmed)

Reviewed on: **10/25/2**

Allergies as of 10/26/2016
No Known Allergies

Discharge Summary

Discharge Summaries filed by Curtis J Smith, P.A. at 10/26/2016 7:15 AM / Draft: Not Electronically Signed

Author: Curtis J Smith, P.A.	Service: (none)	Author Type: Physician Assistant
Filed: 10/26/2016 7:15 AM	Note Time: 10/25/2016 3:31 PM	Status: Unsigned Transcription
Editor: Curtis J Smith, P.A. (Physician Assistant)		Cosign Required: Yes
Cosigner: (none)	Trans ID: NES909556	Trans Status: Unavailable
Dictation Time: 10/25/2016 3:31 PM	Trans Time: 10/25/2016 5:49 PM	Trans Doc Type: Discharge Summary

DATE OF ADMISSION: 10/24/2016

DATE OF DISCHARGE: 10/26/2016 (anticipated).

ADMITTING DIAGNOSIS: Achalasia.

DISCHARGE DIAGNOSIS: Achalasia.

OPERATION PERFORMED: Da Vinci assisted robotic Heller esophagomyotomy with anterior fundoplication, performed by Dr. Ganser on 10/24/2016.

INDICATIONS: The patient is a 36-year-old incarcerated male who has had progressive dysphagia over the last 3 years. Extensive outpatient workup revealed achalasia. After an involved preoperative education and informed consent process, the patient was brought to the operating room for the aforementioned procedure.

HOSPITAL COURSE: After the procedure, the patient went to the general surgical unit in stable condition. At the time of this dictation, patient's vital signs are stable and he is afebrile. He is tolerating clear liquids well without dysphagia, regurgitation, or reflux. He is ambulatory. His

RENOWN REGIONAL MEDICAL CENTE
1155 MILL STREI
RENO NV 89502-15
Transfer Rep

Operative (continued)

OR Surgeon by John H Ganser, M.D. at 10/24/2016 9:30 AM (continued)

PreOp Diagnosis: Achalasia

PostOp Diagnosis: Same

Procedure(s):
ROBOTIC HELLER ESOPHAGOMYOTOMY, ANTERIOR FUNDOPLICATION

Surgeon(s):
John H Ganser, M.D.

Anesthesiologist/Type of Anesthesia:
Anesthesiologist: Tobey B Gansert, M.D./General

Surgical Staff:
Assistant: Curtis J Smith, P.A.
Circulator: Julie A Bloos, R.N.
Relief Circulator: Marjorie Rowson, R.N.
Scrub Person: Julie L. Hansen

Specimen: 0

Estimated Blood Loss: 0

Findings: 0

Complications: 0

10/24/2016 9:31 AM John H Ganser

OP Report authenticated by John H Ganser, M.D. at 10/24/2016 1:28 PM

Author: John H Ganser, M.D.	Service: SURGICAL	Author Type: Physician
Filed: 10/24/2016 1:28 PM	Note Time: 10/24/2016 9:36 AM	Status: Signed
Editor: John H Ganser, M.D. (Physician)		Trans ID: NES908719
Trans Status: Available	Dictation Time: 10/24/2016 9:36 AM	Trans Time: 10/24/2016 9:57 AM
Trans Doc Type: OP Report		

DATE OF SERVICE: 10/24/2016

PREOPERATIVE DIAGNOSIS: Achalasia.

RENOWN REGIONAL MEDICAL CENTE
1155 MILL STREE
RENO NV 89502-15
Transfer Rep

Operative (continued)

OP Report authenticated by John H Ganser, M.D. at 10/24/2016 1:28 PM (continued)

POSTOPERATIVE DIAGNOSIS: Achalasia.

PROCEDURE PERFORMED: Da Vinci robotic Heller esophagomyotomy with anterior fundoplication.

SURGEON: John Ganser, MD

ASSISTANT: Curtis Smith, PA-C.

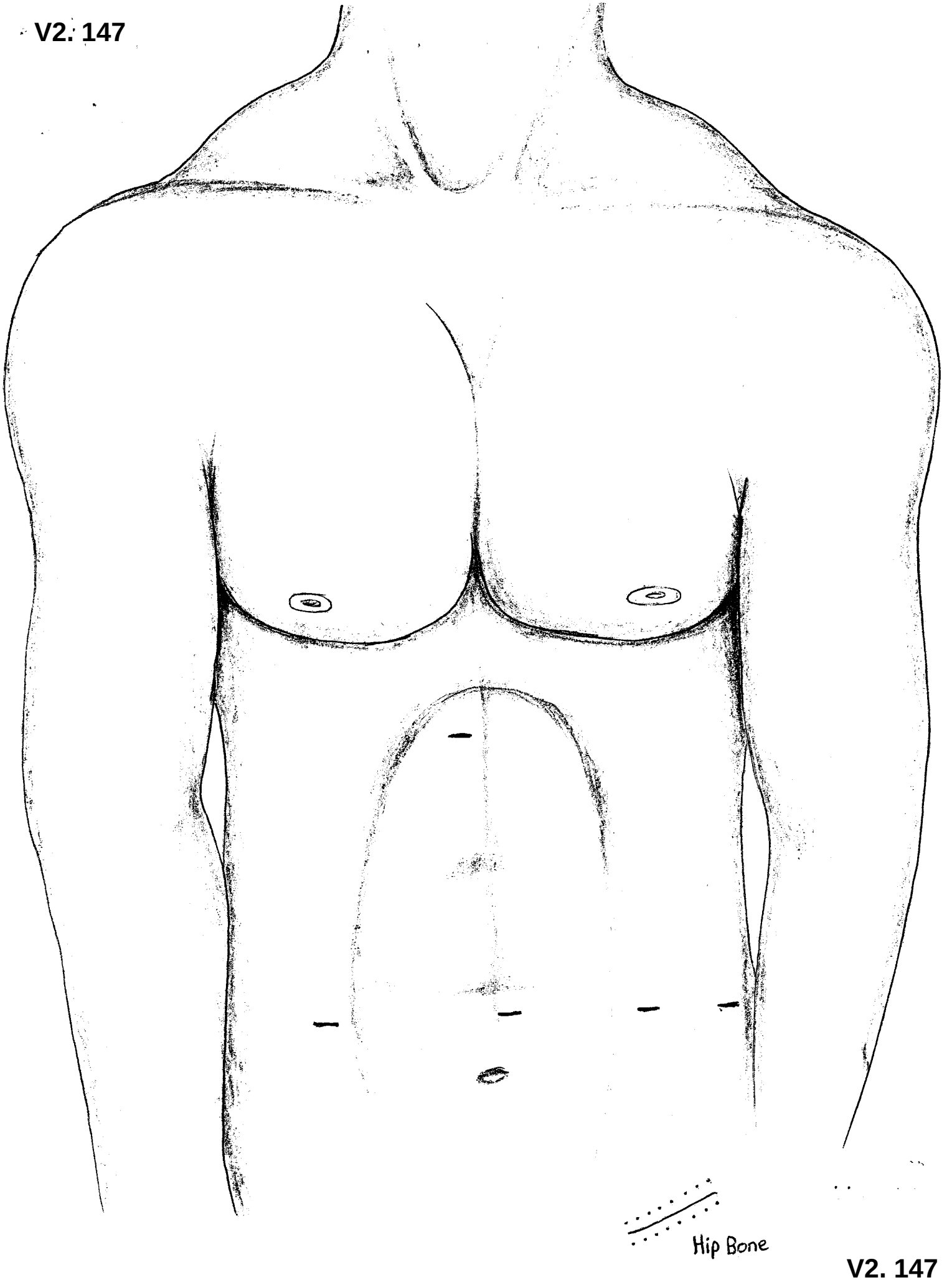
ANESTHESIA: General.

ANESTHESIOLOGIST: Tobey B Gansert, MD

INDICATIONS: Patient is a 36-year-old male who has had progressive dysphagia over the last 3 years. Extensive outpatient workup revealing achalasia. Risks, benefits, and alternatives to da Vinci robotic Heller myotomy and fundoplication were outlined in detail. Questions answered and wished to proceed.

DESCRIPTION OF PROCEDURE: The patient was identified and general anesthetic administered. His abdomen was prepped and draped in the usual sterile fashion. Local anesthesia of 0.5% Marcaine with epinephrine was injected prior to making skin incision. The abdomen was insufflated through a Veress needle and 3 robotic trocars and 11 mm trocar was placed across her upper abdomen. Nathanson liver retractor was passed through a small subxiphoid incision, used to elevate the lateral segment of the liver. The patient was placed in reverse Trendelenburg position. The da Vinci Xi robot docked. Instruments were inserted. Inspection of the hiatus showed a small anterior hiatal hernia. Dissection begun by dividing the gastrohepatic ligament using the hook cautery and the hiatal hernia was dissected out anteriorly and posterior attachments left intact. There did not appear to be any significant herniation of stomach near the chest, just with a weakness in the hiatus. The vagus nerve was identified and dissected off the anterior wall of the esophagus with fat pad rotated off the esophagus as well. Starting about 5 cm down on the stomach, the plane was created between the musculature and the mucosa. A curved monopolar scissors used to create myotomy. There was a cluster of blood vessels from the upper stomach. These were left intact. These were in the submucosal plane. The muscle was then divided through the gastroesophageal junction in about 8-10 cm up to the esophagus towards the musculature. The musculature was spinning out nicely. Hemostasis was assured and the area irrigated. The anterior fundoplication was then carried out. Starting on the left side, sutures were placed between the stomach lateral to the myotomy and to the musculature on the left lateral aspect. The uppermost suture incorporated the hiatus in the anterolateral aspects. The fundus was then rotated over the top of the myotomy and secured to the muscle wall in the right side of the myotomy with the uppermost suture incorporating the _____ as well. An anterior suture was placed to help take any tension off the wrap. Hemostasis was assured.

V2. 147



V2. 147

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding OPPOSITIONS

TO DEFENDANTS MOTION TO DISMISS
(Title of Document)

filed in District Court Case number CV-20-00866

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

(X) Signature

02-08-2020
Date

DAVID ALVAREZ VENTURA
Print Name

PLAINTIFF IN PRO SE
Title

CERTFICATE OF SERVICE BY MAILING

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 02 day of AUGUST, 2020 I mailed a true and correct copy of the foregoing, "PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION TO DISMISS" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

CLERK OF THE COURT
SECOND JUDICIAL DISTRICT
COURT.
75 COURT STREET.
RENO NV 89501

CC:FILE

DATED: this 02 day of AUGUST, 2020

DAVID ALVAREZ VENTURA # 80079
PLAINTIFF /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

FILED
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CV20-00866
2020-08-05 02:28:06 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8005022 : bblough

CODE 3860

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. CV-20-00866

JOHN H. GANSER, MD., ET. AL.,

Dept. No. 8

Defendant.

/

REQUEST FOR SUBMISSION OF MOTION

It is requested that the motion for PLAINTIFFS OPPOSITION TO DEFENDANTS MOTION TO DISMISS, which was filed on the 02 day of AUGUST, 2020, in the above-entitled matter be submitted to the Court for decision.

The undersigned certifies that a copy of this request has been mailed to all counsel of record.

DATED this 02 day of AUGUST, 2020.

(X)

(DAVID ALVAREZ VENTURA)
PLAINTIFF IN PRO SE

CERTFICATE OF SERVICE BY MAILING

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 02 day of August, 2020 I mailed a true and correct copy of the foregoing, "REQUEST FOR SUBMISSION OF MOTION" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

CLERK OF THE COURT
SECOND JUDICIAL DISTRICT
COURT FILING OFFICE
75 COURT STREET
RENO NV. 89501

CC:FILE

DATED: this 02 day of August, 2020

DAVID ALVAREZ VENTURA # 80079
PLAINTIFF /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

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CV20-00866
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Clerk of the Court
Transaction # 8005066

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Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-08-05 14:33:29.263.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-08-05 14:33:29.288.

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PROOF OF SERVICE OF ELECTRONIC FILING

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	08-05-2020:14:28:06
Clerk Accepted:	08-05-2020:14:32:57
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Opposition to Mtn Request for Submission
Filed By:	Deputy Clerk BBlough

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The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

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DAVID VENTURA

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2020-08-13 04:21:02 PM
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Clerk of the Court
Transaction # 8018753 : csulezic

3795
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868
(775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

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

-o0o-

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D., ET AL.,** Defendants.	Case No. CV20-00866 Dept. No. 8

DEFENDANTS JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, MCELREATH AND SMITH'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, MCELREATH and SMITH (collectively, "DR. GANSER"), through their attorneys LEMONS, GRUNDY & EISENBERG, submit the following points and authorities in reply to plaintiff DAVID VENTURA's Opposition to Defendants' Motion to Dismiss, which he erroneously served with a Request for Submission on August 2, 2020.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL BACKGROUND

Plaintiff filed this professional medical negligence action on January 13, 2020, in the Eighth Judicial District Court. Dr. Ganser successfully moved for a change of venue to the Second Judicial District. Upon transfer to this judicial district, defendants moved to dismiss the Complaint for failure to comply with NRS 41A.071 because, although this

action alleges medical malpractice, the Complaint was filed without an expert affidavit. Thus, the Complaint is void *ab initio* under *Washoe Medical Center v. District Court,* 122 Nev. 1298, 148 P.3d 790 (2006). *See Motion to Dismiss filed June 8, 2020.*

Rather than file a timely opposition to defendants' motion to dismiss, plaintiff made a motion asking this Court to defer the adjudication of this matter indefinitely because of the impact the COVID-19 pandemic allegedly had on his ability to respond to Dr. Ganser's motion. Defendants opposed plaintiff's motion because it effectively sought an open-ended extension to respond to Dr. Ganser's motion to dismiss.

On July 31, 2020, this Court granted plaintiff's revised request for an extension of time, giving plaintiff 45 days from the date of its order to file an opposition to defendants' motion to dismiss, and giving defendants 15 days thereafter to file a reply to plaintiff's opposition. *See Order Granting Plaintiff's Request for Extension of Time and Holding in Abeyance Defendant's Motion to Dismiss and Motion to Defer Consideration of Normal Prison Operations,* filed July 31, 2020.

Two days later, on August 2, 2020, plaintiff served his opposition to defendants' motion to dismiss, which he filed on August 5, 2020, along with an erroneously filed Request for Submission of Motion. Dr. Ganser submits the following reply points and authorities urging the Court to grant his motion to dismiss because plaintiff has failed to comply with the mandates of NRS 41A.071, and he has not shown he is entitled to rely on the doctrine of *res ipsa loquitur* to circumvent compliance with NRS 41A.071 under the circumstances of this case.

II. FACTS UNDERLYING THIS ACTION AND SUMMARY OF ARGUMENT

According to the Complaint plaintiff allegedly underwent surgery on October 24, 2016, at Renown Regional Medical Center, which was performed by Dr. Ganser. *Complaint, p. 2, ¶3, p. 8, ¶16.* The word "allegedly" is used because the operative report attached to plaintiff's Complaint for the procedure performed by Dr. Ganser identifies a patient other than plaintiff. *See partial Operative Report of Dr. Ganser's October 24, 2016 surgery, referred to as Exhibit 2 on page 3 of the Complaint, but marked as*

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"Plaintiff Exhibit C" on the document; see also Exhibit A to Plaintiff's Opposition to Defendants' Motion to Dismiss, which lists a patient other than Mr. Ventura.

Plaintiff proceeds to allege that after the surgery Dr. Ganser purportedly performed on him, "surgical instruments" were left behind, relying on records attached to his Complaint. *See Complaint, p. 2.* The records attached to his Complaint, however, do not support his allegation. In fact, they refute his allegation that "surgical instruments" were retained in his body as a result of the 2016 surgery.

For example, an ultrasound of plaintiff's abdomen that was performed on September 15, 2017 to address right upper quadrant pain was found to be "unremarkable," *i.e.*, it showed no abnormality. *See Exhibit 3 to plaintiff's Complaint.* Plaintiff's Complaint also cites to and attaches a report of an imaging study of the hips taken on November 30, 2018—two years post-surgery. The study shows a "linear foreign body" around the left iliac crest (hip bone); however, it was *not* attributed to the 2016 surgery. Specifically, the 2018 study states that the foreign body "does **not** appear to represent a hypodermic needle" and "seems **unlikely** to be related to the patient's history of previous esophageal surgery." *See Exhibit 4 to plaintiff's Complaint; emphasis added.*[1]

In light of the foregoing facts, which are part of the Complaint, Nevada law required plaintiff to attach a supporting expert affidavit to his Complaint in compliance with the affidavit requirement of NRS 41A.071. Plaintiff cannot excuse his non-compliance by making a conclusory and unsupported allegation that "surgical instruments" were left in his body during the 2016 surgery, especially when the exhibits

[1] Plaintiff's opposition includes additional records and a diagram of unknown origin not included with his Complaint. Those documents may not be considered in opposition to defendants' motion to dismiss because plaintiff cannot defeat a motion to dismiss by asserting new allegations in his opposition. *See Broam v. Bogan,* 320 F.3d 1023, 1026 n. 2 (9th Cir. 2003) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.") (citation omitted) (emphasis in original).

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attached to his Complaint contradict his unsupported assertions. For this reason alone, Dr. Ganser's motion should be granted.

Moreover, plaintiff's *res ipsa loquitur* theory is not even arguably applicable to Dr. Ganser's medical practice, Western Surgical Group, against whom plaintiff has alleged negligent supervision, but for which he has failed to provide a supporting medical expert affidavit or any basis for applying *res ipsa loquitur. See Complaint, p. 8.* Thus, plaintiff's claim against Western Surgical Group must be dismissed for failing to comply with NRS 41A.071.

III. LEGAL ANALYSIS

A. The standard of review on which plaintiff relies does not salvage his Complaint, which is void ab initio

Plaintiff's opposition begins by asserting that defendants are not entitled to judgment on the pleadings; however, defendants did not make a motion for judgment on the pleadings. They moved to dismiss under NRCP 12(b)(5) for failure to state a claim upon which relief may be granted. The opposition does not address the legal standards for motions to dismiss for failure to comply with NRS 41A.071, as set forth in *Washoe Medical Center* and its progeny. Indeed, plaintiff's opposition does not even mention this controlling case law, which provides that a motion to dismiss is the proper procedural vehicle by which to challenge a complaint that fails to satisfy the statutory filing prerequisites in a professional negligence action, as pointed out in defendants' motion.

In light of *Washoe Medical Center* and because this is a medical negligence case, plaintiff's reliance on the general standard of review as set forth in *Buzz Stew, LLC v. City of Las Vegas,* 124 Nev. 224, 181 P.3d 670 (2008) is misplaced. Even applying the general standard of review, however, plaintiff's Complaint must be dismissed. Because no expert affidavit supports his Complaint and the statutory *res ipsa* exception does not apply, it is beyond doubt that plaintiff is not entitled to the relief he seeks in this action, as will be discussed more fully below.

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B. Plaintiff's Complaint fails to show that he is entitled to rely on the statutory res ipsa exception to NRS 41A.071

Plaintiff effectively acknowledges that his Complaint does not comply with the expert affidavit requirement of NRS 41A.071. As he cannot comply with the statute, plaintiff asserts that the *res ipsa loquitur* exception to the affidavit requirement applies in his case, citing NRS 41A.100(1)(a) and *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005). Plaintiff is mistaken.

NRS 41A.100 replaced the common law doctrine of *res ipsa loquitur* in medical malpractice cases. Under that doctrine, a rebuttable presumption of medical malpractice applies when the plaintiff has provided some evidence of one of the factual predicates enumerated in NRS 41A.100(1). *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 832, 102 P.3d 52, 59 (2004), citing *Johnson v. Egtedar*, 112 Nev. 428, 433-34, 915 P.2d 273-74 (1996). Although plaintiff cites to NRS 41A.100(1)(a), plaintiff's Complaint lacks insufficient facts to establish the factual predicates of NRS 41A.100(1)(a).

Specifically, plaintiff seeks to circumvent the mandates of NRS 41A.071 by invoking the statutory *res ipsa loquitur* doctrine codified in NRS 41A.100(1)(a), contending in his opposing papers that a foreign object was left in his body after the 2016 surgery. Although the Complaint mentions the *res ipsa* doctrine in connection with plaintiff's attempt to avoid the bar of the statute of limitations, there are no facts in the Complaint that implicate the *res ipsa loquitur* doctrine, especially as to Western Surgical Group. To the contrary, the very documents cited in, and attached to, his Complaint belie the argument in plaintiff's opposition.

For example, on page 3 of the Complaint, plaintiff acknowledges that a radiology report dated September 15, 2017 – nearly one year after the subject surgery – was "unremarkable." *Complaint, p. 3, ¶6.* In other words, a year after the surgery, an ultrasound of the abdomen showed no indication that a foreign object was in plaintiff's body after the October 24, 2016 surgery performed by Dr. Ganser. *See Complaint Exhibit 3.*

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The Complaint also establishes that a foreign object was not seen on imaging studies until more than two years after the surgery performed by Dr. Ganser. Notably, the object was observed in an area (left hip) that was not even part of the robotic esophageal surgery performed in 2016. *Complaint, p. 4, ¶7.* That the foreign object observed in the imaging was unrelated to Dr. Ganser's 2016 surgery is expressly noted in the imaging report, as acknowledged in plaintiff's Complaint. *Id.; see also Exhibit 4 to Complaint.* The report states that the foreign object is likely *not* a hypodermic needle and, most importantly, it states: "**This seems unlikely to be related to the patient's history of previous esophageal surgery**." *Complaint, p. 4, ¶7, citing Exhibit 4 to Complaint (emphasis added).* Manifestly, plaintiff's own Complaint dispels the notion that an expert affidavit was not required because the facts establish one of the factual predicates of NRS 41A.100(1)(a)-(e).

Indeed, plaintiff evidently did not believe that to be the case when he filed his Complaint. Although he now argues that he did not need an expert affidavit because the *res ipsa* doctrine applied, the Complaint does not allege that an expert affidavit is unnecessary because of the exceptions enumerated in NRS 41A.100. Rather, plaintiff's Complaint alleged that the *res ipsa loquitur* doctrine applied to toll the statute of limitations because he was allegedly hindered in procuring the expert affidavit required by NRS 41A.071. *See Complaint, p. 5, ¶9.*

It is only in his opposition to defendants' motion to dismiss for failure to comply with NRS 41A.071 that plaintiff advances a new contention that he is exempt from the affidavit requirement of NRS 41A.071 because of the foreign substance exception in NRS 41A.100(1)(a). Plaintiff cannot, however, defeat a motion to dismiss by asserting new allegations in his opposition papers and adding documents thereto. *See Broam v. Bogan,* 320 F.3d 1023, 1026 n. 2 (9th Cir. 2003) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss."); *Wilson v. Holder,* 7 F.Supp.3d 1104, 1122-23 (D. Nev. 2014) ("Plaintiff cannot attempt to

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cure defects in her complaint by including the necessary allegations in her opposition brief."). The allegations that form the basis of a plaintiff's claim for relief must be set out in its pleading. *See*, NRCP 8(a). When a defendant files a motion to dismiss, it calls into question whether the allegations in the complaint assert a claim for relief. NRCP 12(b)(5). To resolve the question, the court looks to the challenged pleading to examine its allegations. *See, e.g., Edgar v. Wagner,* 101 Nev. 226, 227, 699 P.2d 110, 111 (1985) ("[the court's] task is to determine whether the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief.") (emphasis added).

It is because the focus of the examination is the complaint that a plaintiff cannot survive a motion to dismiss by making new or alternate allegations in opposition to the motion to dismiss. *Schneider v. Cal. Dep't of Corr.,* 151 F.3d 1194, 1197 n.1. (9th Cir. 1998). Here, based on the Complaint and its attachments, the allegations fall fatally short of showing that the statutory *res ipsa loquitur* doctrine of NRS 41A.100(1)(a) applies in this case to excuse plaintiff's failure to comply with NRS 41A.071.

While it is true that a court considering a motion to dismiss generally accepts all allegations as true and draws all reasonable inferences in favor of the non-moving party, in order to state a claim the complaint must still contain a "short and plain statement of the claim *showing that the pleader is entitled to relief."* NRCP 8(a)(2) (emphasis added). Plaintiff's Complaint falls short of this standard because it lacks allegations sufficient to show he is entitled to relief under NRS 41A.100(1)(a)'s *res ipsa loquitur* theory of negligence. In fact, the Complaint and the medical records attached to it refute that a foreign object was left in plaintiff's body during the 2016 surgery, and instead indicate that the foreign object observed in the 2018 imaging study was unrelated to the 2016 surgery. *See Complaint Exhs. 3 and 4.* Because plaintiff's own Complaint refutes the existence of the facts giving rise to the presumption in NRS 41A.100(1)(a), plaintiff has not shown that he is entitled to invoke NRS 41A.100(1)(a). Thus, he cannot avoid compliance with the expert affidavit mandate of NRS 41A.07 through the application of NRS 41A.100(1)(a)'s *res ipsa* doctrine.

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In plaintiff's continued attempt to avoid the application of NRS 41A.071, he goes to great lengths to distinguish the facts in his case from the facts in *Peck v. Zipf,* 133 Nev. 890, 407 P.3d 775 (2017), which he erroneously contends defendants rely on. *Opposition, pp. 2-4.* Contrary to plaintiff's assertion, defendants are not relying on *Peck* for dismissal. Nor did they cite *Peck* in their motion; rather, defendants cited *Peck* in response to plaintiff's motion to defer consideration of defendants' motion to show that NRS 41A.071 applies to incarcerated plaintiffs, such as the plaintiff in this case. Thus, plaintiff's entire analysis in which he seeks to distinguish the facts in *Peck* from the facts in this case is largely irrelevant.

Plaintiff's opposition concludes by citing *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005). The basis of plaintiff's reliance on *Szydel* is unclear as the facts in that case are distinguishable from this case. *Szydel* involved a patient in whom a surgical needle had been left after surgery. Because the facts of *Szydel* implicated subsection (a) of NRS 41A.100(1), the court held that an expert's affidavit was not required. Notably, the court also instructed that "any res ipsa claim filed without an expert affidavit must, when challenged by the defendant in a pretrial or trial motion, meet the prima facie requirements for a res ipsa loquitur case." 121 Nev. at 460, 117 P.3d at 205. In addition, "the plaintiff must present facts and evidence that show the existence of one or more of the situations enumerated in NRS 41A.100(1)(a)-(e)." *Id.*

In this case, plaintiff has not alleged any facts to meet the *prima facie* requirements of any provision of the *res ipsa loquitur* statute. In stark contrast to *Szydel,* plaintiff has not alleged facts in his Complaint which implicate NRS 41A.100(1)(a). In fact, as shown above, Exhibit 4 to plaintiff's Complaint states that the foreign object observed in the November 2018 imaging study "does not appear to represent a hypodermic needle" and that the foreign object was not likely related to the 2016 surgery.

In light of the facts and the law before the Court, defendants submit that plaintiff's Complaint fails to state a claim for professional negligence against Dr. Ganser and Western Surgical Group. Because he has inexcusably failed to comply with the

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mandates of NRS 41A.071, his Complaint must be dismissed as required by NRS 41A.071.

C. Plaintiff's negligent supervision claim against Western Surgical Group is a claim for which an expert affidavit is required

The *res ipsa* doctrine applies even less to plaintiff's second "count" against Gomez, Kozar, McElreath & Smith, dba Western Surgical Group, for allegedly failing to supervise Dr. Ganser during the 2016 surgery and for allegedly failing to "make sure all surgical instruments were accounted for during and after Ventura's surgery." *Complaint, p. 8.* No affidavit supports these allegations, in violation of NRS 41A.071. Further, there is no indication in plaintiff's Complaint that NRS 41A.100(1)(a) applies to this claim to excuse his failure to comply with NRS 41A.071 as to Western Surgical.

Claims against health care providers for negligent supervision require compliance with NRS 41A.071. The Nevada Supreme Court recently reiterated that direct liability claims for negligent hiring or supervision do not excuse compliance with NRS 41A.071. *Estate of Curtis v. South Las Vegas Medical Investors, LLC,* 136 Nev. Adv. Op. 39, 2020 WL 3885614 (July 9, 2020). "[N]egligent hiring, training and supervision claims cannot be used to circumvent NRS Chapter 41A's requirements governing professional negligence lawsuits when the allegations supporting the claim sound in professional negligence." *Id.,* 136 Nev. Adv. Op. 39 at 7, 2020 WL 3885614 at *3.

Here, Western Surgical Group is unquestionably a provider of health care. *See* NRS 41A.017 ("Provider of health care" includes "physicians' professional corporation or group practice"). Plaintiff's Complaint alleges that Western Surgical Group was negligent in its supervision of Dr. Ganser and in counting surgical instruments (which is not a function of a medical group in any event). These are allegations of professional negligence. The reasonableness of Western Surgical Group's actions as alleged by plaintiff will thus require expert proof. *See* NRS 41A.100(1).

Plaintiff's medical negligence claim against Dr. Ganser is inextricably linked to his negligent supervision claim against Western Surgical Group. *See Complaint, pp. 7-8.*

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Therefore, plaintiff's negligent supervision claim against Western Surgical is effectively a vicarious liability claim, which requires compliance with NRS 41A.071. *See Estate of Curtis, supra.* Because no expert affidavit was included with plaintiff's Complaint, plaintiff's claim against Western Surgical Group must also be dismissed.

In short, plaintiff's medical malpractice action is not, and cannot be, based on the statutory *res ipsa loquitur* doctrine, especially as to Western Surgical Group. Therefore, plaintiff was required to comply with NRS 41A.071 and attach a medical expert affidavit to his Complaint to support the allegations in his Complaint. He did not do so. Nor did he plead allegations sufficient to implicate the statutory *res ipsa loquitur* doctrine. Accordingly, pursuant to *Washoe Medical Center, supra*, plaintiff's non-compliance with NRS 41A.071 mandates dismissal of his Complaint without leave to amend.

III. CONCLUSION

Plaintiff's opposition has failed to demonstrate that his claim is exempt from the mandates of NRS 41A.071 based on the *res ipsa loquitur* doctrine in codified in NRS 41A.100(1). Therefore, plaintiff was required to comply with NRS 41A.071. Because he did not do so, Nevada law requires that this action be dismissed without leave to amend. Accordingly, Defendants John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith, dba Western Surgical Group, respectfully request that their Motion to Dismiss for failure to comply with NRS 41A.071 be granted in its entirety.

AFFIRMATION

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 13th day of August, 2020.

LEMONS, GRUNDY & EISENBERG
Attorneys for Defendants

By: _____
EDWARD J. LEMONS, ESQ.
ALICE CAMPOS MERCADO, ESQ.

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CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 6005 Plumas Street, Third Floor, Reno, NV 89519, and I am employed by LEMONS, GRUNDY & EISENBERG in the City of Reno and County of Washoe where this service occurs

On August 13, 2020, following the ordinary business practice, I caused to be served to the addressee(s) listed below, a true copy of the foregoing document(s) and described as ***Defendants John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith's Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss***

✓ **BY MAIL**: in an envelope with postage thereon fully prepaid to be placed in the U.S. Mail at Reno, Nevada;

David Alvarez Ventura, #80079
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070

_____ **BY PERSONAL SERVICE**: in an envelope to be hand delivered this date;

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_____ **BY USING THE COURT'S EFS** which electronically served the following individual(s):

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Margie Norris

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EDWARD J. LEMONS, BAR NO. 699
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

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DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279, **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: CV20-00866 Dept. No.: 8

REQUEST FOR SUBMISSION

IT IS HEREBY REQUESTED that *Defendants JOHN H. GANSER, M.D., AND GOMEZ, KOZAR, MCELREATH AND SMITH'S Motion to Dismiss*, filed in the above-captioned matter on June 8, 2020, be submitted to the Court for decision.

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 13th[th] day of August, 2020

LEMONS, GRUNDY & EISENBERG
Attorneys for Defendants

By: _____
ALICE CAMPOS MERCADO

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 6005 Plumas Street, Third Floor, Reno, NV 89519, and I am employed by LEMONS, GRUNDY & EISENBERG in the City of Reno and County of Washoe where this service occurs

On August 13, 2020, following the ordinary business practice, I caused to be served to the addressees) listed below, a true copy of the foregoing document(s) and described as ***Request for Submission***

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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Maggie Davis

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Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID ALVAREZ VENTURA, Plaintiff, v. JOHN H. GANSER, M.D. LIC #9279, GOMEZ, KOZAR, MCELREATH AND SMITH, A Professional Corporation, Defendant.	Case No.: CV20-00866 Dept. No.: 8

ORDER

The Court is in receipt of Plaintiff DAVID ALVAREZ VENTURA's ("Plaintiff") *Request for Submission* of his Motion to Proceed Informa Pauperis filed July 10, 2020. In his *Request for Submission*, Plaintiff asserts the Motion to Proceed Informa Pauperis was filed on June 22, 2020.

A review of the record reveals Plaintiff did not file a Motion to Proceed Informa Pauperis on June 22, 2020. However, Plaintiff did file a *Motion Seeking that Court Defer Consideration of Defendants Motion to Dismiss Pending Restoration of Normal Prison Operations* on June 22, 2020. In fact, further review of Plaintiffs record reveals that an *Order from a Prior Court Granting IFP filed on January 19, 2020* was filed in this Court on June 5, 2020.

As such, this Court finds Plaintiffs *Request for Submission* of his Motion to Proceed Informa Pauperis to be moot.

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THEREFORE, and good cause appearing, DAVID ALVAREZ VENTURA's *Request for Submission* of his Motion to Proceed Informa Pauperis is MOOT.

IT IS SO ORDERED.

DATED this 17th day of August, 2020.

DISTRICT JUDGE

V2. 170

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 17th day of August, 2020, I deposited for mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

[NONE]

Further, I certify that on the 17th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court electronic filing system, which will send notice of electronic filing to the following:

EDWARD LEMONS, ESQ. for JOHN H. GANSER et al
ALICE CAMPOS MERCADO, ESQ. for JOHN H. GANSER et al

Judicial Assistant

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Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
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Filed By:	Judicial Asst. BWard

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The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

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Transaction # 8023070

2540
EDWARD J. LEMONS, BAR NO. 699
ALICE CAMPOS MERCADO, BAR NO. 4555
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
(775) 786-6868
(775) 786-9716 (fax)
ejl@lge.net; acm@lge.net

Attorneys for Defendants

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

-o0o-

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279 **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: CV20-00866 Dept. No.: 8

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on August 17, 2020, the court entered its *Order* that David Alvarez Ventura's *Request for Submission* of his Motion to Proceed Informa Pauperis is moot. A copy of said order is attached hereto as Exhibit 1.

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AFFIRMATION

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 August, 2020.

LEMONS, GRUNDY & EISENBERG
Attorneys for Defendants

By: _____
EDWARD J. LEMONS
ALICE CAMPOS MERCADO

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 6005 Plumas Street, Third Floor, Reno, NV 89519, and I am employed by LEMONS, GRUNDY & EISENBERG in the City of Reno and County of Washoe where this service occurs

On August 17, 2020, following the ordinary business practice, I caused to be served to the addressee(s) listed below, a true copy of the foregoing document(s) and described as ***Notice of Entry of Order***

✓ **BY MAIL**: in an envelope with postage thereon fully prepaid to be placed in the U.S. Mail at Reno, Nevada;

David Alvarez Ventura, #80079
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070

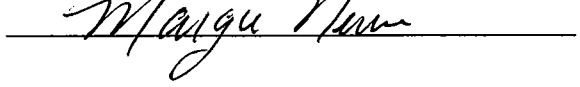
_____ **BY PERSONAL SERVICE**: in an envelope to be hand delivered this date;

_____ **BY OVERNIGHT DELIVERY**: in an envelope to be delivered to an overnight delivery carrier with delivery fees provided for;

_____ **BY FACSIMILE**: by transmitting by facsimile to the respective fax telephone phone number(s).

_____ **BY USING THE COURT'S EFS** which electronically served the following individual(s):

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.



LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

Exhibit List

Exhibit	Description	Page(s)
1	Order, filed August 17, 2020	3

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

F I L E D
Electronically
CV20-00866
2020-08-17 03:56:56 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8023070

EXHIBIT 1

EXHIBIT 1

FILED
Electronically
CV20-00866
2020-08-17 11:06:36 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 8021739

Code: 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID ALVAREZ VENTURA,

Plaintiff,

v.

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

Defendant.

Case No.: CV20-00866

Dept. No.: 8

ORDER

The Court is in receipt of Plaintiff DAVID ALVAREZ VENTURA's ("Plaintiff") *Request for Submission* of his Motion to Proceed Informa Pauperis filed July 10, 2020. In his *Request for Submission*, Plaintiff asserts the Motion to Proceed Informa Pauperis was filed on June 22, 2020.

A review of the record reveals Plaintiff did not file a Motion to Proceed Informa Pauperis on June 22, 2020. However, Plaintiff did file a *Motion Seeking that Court Defer Consideration of Defendants Motion to Dismiss Pending Restoration of Normal Prison Operations* on June 22, 2020. In fact, further review of Plaintiffs record reveals that an *Order from a Prior Court Granting IFP filed on January 19, 2020* was filed in this Court on June 5, 2020.

As such, this Court finds Plaintiffs *Request for Submission* of his Motion to Proceed Informa Pauperis to be moot.

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V2. 179

THEREFORE, and good cause appearing, DAVID ALVAREZ VENTURA's *Request for Submission* of his Motion to Proceed Informa Pauperis is MOOT.

IT IS SO ORDERED.

DATED this 17th day of August, 2020.

DISTRICT JUDGE

V2. 180

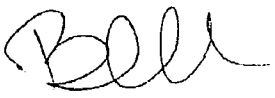
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 17th day of August, 2020, I deposited for mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

[NONE]

Further, I certify that on the 17th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court electronic filing system, which will send notice of electronic filing to the following:

EDWARD LEMONS, ESQ. for JOHN H. GANSER et al
ALICE CAMPOS MERCADO, ESQ. for JOHN H. GANSER et al



Judicial Assistant

F I L E D
Electronically
CV20-00866
2020-08-17 04:00:13 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8023088

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-08-17 16:00:11.955.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-08-17 16:00:12.202.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

–

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	08-17-2020:15:56:56
Clerk Accepted:	08-17-2020:15:59:17
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Notice of Entry of Ord - **Continuation
Filed By:	Alice Campos Mercado

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

–

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

EDWARD J. LEMONS, ESQ. for JOHN H. GANSER et al

ALICE G. CAMPOS MERCADO, ESQ. for JOHN H. GANSER et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

FILED
Electronically
CV20-00866
2020-08-26 03:31:12 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8039043 : bblough

DAVID ALVAREZ VENTURA
NDOC NO. 80079
HIGH DESERT STATE PRISON
POST OFFICE BOX 650
INDIAN SPRINGS, NV,
89070

PLAINTIFF IN 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. JOHN H. GANSER, M.D., ET. AL., DEFENDANTS.	CIVIL ACTION NUMBER CV-20-00866 DEPT NO. 8 PLAINTIFF'S NOTICE OF ERRATA

PLAINTIFF PREVIOUSLY FILED HIS OPPOSITIONS TO DEFENDANTS MOTION TO DISMISS CURRENTLY PENDING BEFORE THE COURT. ON AUGUST 13, 2020 FILED AND SERVED THEIR REPLY THERETO CALLING PLAINTIFF'S ATTENTION TO, AND ATTEMPTING TO CAPITOLIZE OFF OF, ERROR IN DRAFTING HIS OPPOSITIONS IN WHICH HE INADVERTENTLY OMITTED A CRUCIAL FACT ESSENTIAL TO DETERMINATION AND RESOLUTION OF THE PENDING MOTION TO DISMISS.

FOR CLARIFICATION, DUE TO SECURITY CONCERNS AND TO ACCOMMODATE SECURITY OBJECTIVES, ON OCTOBER 24, 2016 UPON ADMISSION TO THE CLINICAL SETTING IN WHICH THE NEGLIGENT ACTIONS OF DEFENDANTS OCCURED, PLAINTIFF WAS ANNONYMOUSLY ADMITTED UNDER THE PSEUDONYM "RVCEDARKEY, THIRTEEN (MRN: 4396625)-- "20161026802551041114".

IN ACCORDANCE THIS NOTICE OF ERRATA IS RESPECTIVELY SUBMITTED.

RESPECTFULLY SUBMITTED,

DATED: AUGUST 23, 2020

BY: [signature] #80079
(DAVID ALVAREZ VENTURA)
PLAINTIFF IN PRO SE

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding PLAINTIFF'S NOTICE OF ERRATA
(Title of Document)

filed in District Court Case No. CV-20-00866

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-OR-

B. For the administration of a public program or for an application for a federal or state grant.

_____

_____ 8-23-2020
(Signature) (Date)

DAVID ALVAREZ VENTURA
PLAINTIFF IN PRO SE

CERTFICATE OF SERVICE BY MAILING

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 23 day of August, 2020 I mailed a true and correct copy of the foregoing, "PLAINTIFF'S NOTICE OF ERRATA."

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

CLERK OF THE COURT
SECOND JUDICIAL DISTRICT COURT
75 COURT STREET
RENO NV. 89501

CC:FILE

DATED: this 23 day of August, 2020

DAVID ALVAREZ VENTURA #80079
PLAINTIFF'S/In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

FILED
Electronically
CV20-00866
2020-08-26 03:31:12 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8039043 : bblough

CODE 3860

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. CV-20-00866

JOHN H. GANSER, MD., ET. AL.,

Dept. No. 8

Defendant.
/

REQUEST FOR SUBMISSION OF MOTION

It is requested that the motion for PLAINTIFF'S NOTICE OF ERRATA, which was filed on the 23 day of August, 2020, in the above-entitled matter be submitted to the Court for decision.

The undersigned certifies that a copy of this request has been mailed to all counsel of record.

DATED this 23 day of August, 2020.

(DAVID ALVAREZ VENTURA)
PLAINTIFF IN PRO SE

JUD 506 (Rev 8/99)

CERTFICATE OF SERVICE BY MAILING

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 23 day of AUGUST, 2020 I mailed a true and correct copy of the foregoing, "PLAINTIFF'S NOTICE OF ERRATA (REQUEST FOR SUBMISSION OF MOTION)" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

CLERK OF THE COURT
SECOND JUDICIAL DISTRICT
COURT FILING OFFICE
75 COURT STREET
RENO, NV 89501

CC:FILE

DATED: this 23 day of AUGUST, 2020

DAVID ALVAREZ VENTURA # 80079
PLAINTIFF /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

F I L E D
Electronically
CV20-00866
2020-08-26 03:34:33 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8039061

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-08-26 15:34:31.654.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-08-26 15:34:31.679.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

–

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	08-26-2020:15:31:12
Clerk Accepted:	08-26-2020:15:34:03
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Notice Request for Submission
Filed By:	Deputy Clerk BBlough

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

–

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

F I L E D
Electronically
CV20-00866
2020-09-04 02:37:41 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8054784

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

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

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

LEGAL STANDARD

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

DISCUSSION

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

In his opposition, Plaintiff asserts that he is exempt from the affidavit requirement because his claim falls under the *res ipsa loquitor* exception of NRS 41A.100(1)(a). The relevant

[1] 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)).

res ipsa loquitor exception applies in cases where "[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). Particularity, Plaintiff argues that the surgical instruments left within his body falls within NRS 41A.1001(1)(a), which exempts him from the expert affidavit requirement.

The *res ipsa loquitor* exception requires "*some evidence*" of one of the factual predicates enumerated in NRS 41A.100(1). *Johnson v. Egtedar,* 112 Nev. 428, 433-34 (1996). Although the Court does not consider matters outside the pleadings when ruling a motion to dismiss, Plaintiff's pleadings fail to logically support a viable claim under the *res ipsa loquitor* exception. For instance, Plaintiff alleges that a surgical instrument was left in his body by during a surgery performed by Defendant's on October 24, 2016. Plaintiff further alleges that an ultrasound performed on September 15, 2017, failed to identify the instrument. A subsequent ultrasound, conducted on November 30, 2018, identified the surgical instrument for the first time. However, the radiology report of ultrasound states that "[it] seems unlikely to be related to the patient[']s history of previous esophageal surgery [referring the October 24, 2016 surgery]." These contradictions suggest Plaintiff's allegations are unsupported and insufficient to meet the *res ipsa loquitor* exception. Unable to meet the *res ipsa loquitor* exception, Plaintiff is subject to the affidavit requirement.[2] Having not provided the required affidavit, this Court must dismiss Plaintiff's complaint without prejudice. *Washoe Med. Ctr. v. Second Judicial Dist. Court,* 122 Nev. 1298, 1304 (2006).[3]

[2] The Court concludes *Jaramillo v. Ramos*, 136 Nev. Adv. Op. 17 (2020) does not compel a different result. Here, 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.

[3] "The Legislature's choice of the words 'shall dismiss' instead of 'subject to dismissal' indicates that the 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).

Furthermore, even in the light most favorable to Plaintiff, the complaint and exhibits' contradictions render Plaintiff's allegations as mere conclusory and based on unreasonable inferences.[4]

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

The Court further finds that no viable amendment would relieve Plaintiff from the affidavit requirement. Plaintiff reaches his allegations through the unreasonable inference that Defendants' malpractice is responsible for the presence of the instrument which; (1) was removed from an entirely different area of Plaintiff's body than Defendants' operated on; (2) failed to appear on an ultrasound performed a year after the surgery; (3) the ultrasound that first identified the instrument occurred two years after the alleged malpractice, and one year after the first ultrasound which failed to identify the instrument; and (4) the report of the second ultrasound states that the presence of the instrument is unlikely related to the surgery performed by Defendants. Because of this unreasonable inference to reach the allegations, the Court finds

[4] The Court may consider exhibits attached to the pleading and incorporated by reference when ruling on a motion to 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).*

[5] The Nevada Supreme Court reasons that when a complaint does not comply with NRS 41A.071, the complaint "is 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).

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

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

CONCLUSION

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

IT IS SO ORDERED.

DATED this 4 day of September, 2020.

BARRY L. BRESLOW
District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 4 day of September, 2020, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

David A. Ventura

Edward J. Lemons, Esq.

Alice Campos Mercado, Esq.

Christine Kuhl

Judicial Assistant

F I L E D
Electronically
CV20-00866
2020-09-04 02:38:50 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8054789

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-09-04 14:38:49.996.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-09-04 14:38:50.023.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	09-04-2020:14:37:41
Clerk Accepted:	09-04-2020:14:38:18
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Ord Granting Mtn
Filed By:	Judicial Asst. CKuhl

You may review this filing by clicking on the following link to take you to your cases.

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The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

FILED
Electronically
CV20-00866
2020-09-04 03:06:34 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8054866

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.
_____/

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 4th day of September, 2020, I electronically filed ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following: Edward J. Lemons, Esq. and Alice Campos Mercado, Esq.

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 4th day of August, 2020 I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE addressed to:

DAVID ALVAREZ VENTURA
INMATE NO. 80079
PO BOX 650
INDIAN SPRINGS, NV 89070

Christine Kuhl
_____
Judicial Assistant

F I L E D
Electronically
CV20-00866
2020-09-04 03:07:37 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8054869

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-09-04 15:07:36.928.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-09-04 15:07:36.953.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	09-04-2020:15:06:34
Clerk Accepted:	09-04-2020:15:07:06
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Certificate of Service
Filed By:	Judicial Asst. CKuhl

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

FILED
Electronically
CV20-00866
2020-09-08 12:10:30 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8056378

2540
EDWARD J. LEMONS, ESQ.
Bar No. 699
ejl@lge.net
ALICE CAMPOS MERCADO, ESQ.
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LEMONS, GRUNDY & EISENBERG
6005 Plumas Street
Third Floor
Reno, Nevada 89519
(775) 786-6868

Attorneys for Defendants

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

-o0o-

DAVID ALVAREZ VENTURA, Plaintiff, vs. **JOHN H. GANSER, M.D.** LIC #9279 **GOMEZ, KOZAR, MCELREATH AND SMITH,** A Professional Corporation, Defendants.	Case No.: CV20-00866 Dept. No.: 8

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on September 4, 2020, the court entered its *Order Granting Defendants' Motion to Dismiss* the above-entitled matter. A copy of said *Order* is attached hereto.

. . . . .

. . . . .

. . . . .

. . . . .

. . . . .

AFFIRMATION

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 8th day of September, 2020.

LEMONS, GRUNDY & EISENBERG
Attorneys for Defendants

By: _____
EDWARD J. LEMONS
ALICE CAMPOS MERCADO

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

CERTIFICATE OF SERVICE

I am a citizen of the United States. My business address is 6005 Plumas Street, Third Floor, Reno, NV 89519, and I am employed by LEMONS, GRUNDY & EISENBERG in the City of Reno and County of Washoe where this service occurs

On September 08, 2020, following the ordinary business practice, I caused to be served to the addressee(s) listed below, a true copy of the foregoing document(s) and described as ***Notice of Entry of Order.***

✓ **BY MAIL**: in an envelope with postage thereon fully prepaid to be placed in the U.S. Mail at Reno, Nevada;

David Alvarez Ventura, #80079
HIGH DESERT STATE PRISON
P.O. Box 650
Indian Springs, Nevada 89070

____ **BY PERSONAL SERVICE**: in an envelope to be hand delivered this date;

____ **BY OVERNIGHT DELIVERY**: in an envelope to be delivered to an overnight delivery carrier with delivery fees provided for;

____ **BY FACSIMILE**: by transmitting by facsimile to the respective fax telephone phone number(s).

____ **BY USING THE COURT'S EFS** which electronically served the following individual(s):

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

LEMONS, GRUNDY & EISENBERG
6005 PLUMAS ST.
THIRD FLOOR
RENO, NV 89519
(775) 786-6868

V2. 204

FILED
Electronically
CV20-00866
2020-09-04 02:37:41 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8054784

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

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

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

LEGAL STANDARD

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

DISCUSSION

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

In his opposition, Plaintiff asserts that he is exempt from the affidavit requirement because his claim falls under the *res ipsa loquitor* exception of NRS 41A.100(1)(a). The relevant

[1] 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)).

res ipsa loquitor exception applies in cases where "[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). Particularity, Plaintiff argues that the surgical instruments left within his body falls within NRS 41A.1001(1)(a), which exempts him from the expert affidavit requirement.

The *res ipsa loquitor* exception requires "*some evidence*" of one of the factual predicates enumerated in NRS 41A.100(1). *Johnson v. Egtedar,* 112 Nev. 428, 433-34 (1996). Although the Court does not consider matters outside the pleadings when ruling a motion to dismiss, Plaintiff's pleadings fail to logically support a viable claim under the *res ipsa loquitor* exception. For instance, Plaintiff alleges that a surgical instrument was left in his body by during a surgery performed by Defendant's on October 24, 2016. Plaintiff further alleges that an ultrasound performed on September 15, 2017, failed to identify the instrument. A subsequent ultrasound, conducted on November 30, 2018, identified the surgical instrument for the first time. However, the radiology report of ultrasound states that "[it] seems unlikely to be related to the patient[']s history of previous esophageal surgery [referring the October 24, 2016 surgery]." These contradictions suggest Plaintiff's allegations are unsupported and insufficient to meet the *res ipsa loquitor* exception. Unable to meet the *res ipsa loquitor* exception, Plaintiff is subject to the affidavit requirement.[2] Having not provided the required affidavit, this Court must dismiss Plaintiff's complaint without prejudice. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304 (2006).[3]

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[2] The Court concludes *Jaramillo v. Ramos*, 136 Nev. Adv. Op. 17 (2020) does not compel a different result. Here, 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.

[3] "The Legislature's choice of the words 'shall dismiss' instead of 'subject to dismissal' indicates that the 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).

Furthermore, even in the light most favorable to Plaintiff, the complaint and exhibits' contradictions render Plaintiff's allegations as mere conclusory and based on unreasonable inferences.[4]

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

The Court further finds that no viable amendment would relieve Plaintiff from the affidavit requirement. Plaintiff reaches his allegations through the unreasonable inference that Defendants' malpractice is responsible for the presence of the instrument which; (1) was removed from an entirely different area of Plaintiff's body than Defendants' operated on; (2) failed to appear on an ultrasound performed a year after the surgery; (3) the ultrasound that first identified the instrument occurred two years after the alleged malpractice, and one year after the first ultrasound which failed to identify the instrument; and (4) the report of the second ultrasound states that the presence of the instrument is unlikely related to the surgery performed by Defendants. Because of this unreasonable inference to reach the allegations, the Court finds

---

[4] The Court may consider exhibits attached to the pleading and incorporated by reference when ruling on a motion to 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).*

[5] The Nevada Supreme Court reasons that when a complaint does not comply with NRS 41A.071, the complaint "is 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).

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

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

CONCLUSION

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

IT IS SO ORDERED.

DATED this 4 day of September, 2020.

BARRY L. BRESLOW
District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 4 day of September, 2020, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

David A. Ventura

Edward J. Lemons, Esq.

Alice Campos Mercado, Esq.

Christine Kuhl

Judicial Assistant

F I L E D
Electronically
CV20-00866
2020-09-08 12:13:01 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8056381

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-09-08 12:13:00.212.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-09-08 12:13:00.237.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

–

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	09-08-2020:12:10:30
Clerk Accepted:	09-08-2020:12:12:30
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Notice of Entry of Ord
Filed By:	Edward J. Lemons

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

–

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

FILED

SEP 24 2020

JACQUELINE BRYANT, CLERK
By: DEPUTY CLERK

DAVID ALVAREZ VENTURA
NDOC NO. 80079
HIGH DESERT STATE PRISON
POST OFFICE BOX 650
INDIAN SPRINGS, NV,
89070

PLAINTIFF IN PRO SE

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE

DAVID ALVAREZ VENTURA, PLAINTIFF, VS. JOHN H. GANSER, MD., ET. AL., DEFENDANTS.	CIVIL ACTION NUMBER CV-20-00866 DEPT NO. 8 PLAINTIFF'S NOTICE OF APPEAL PURSUANT TO NRAP RULE 4

PLAINTIFF DAVID ALVAREZ VENTURA HEREBY NOTICES ALL PARTIES OF RECORD OF HIS INTENT OF PURSUING APPELLATE REVIEW OF THE COURT'S SEPTEMBER 04, 2020 ORDER DISPOSING OF THIS ACTION.

THE INSTANT NOTICE IS PROVIDED PURSUANT TO NEVADA RULES OF APPELLATE PROCEDURE, RULE 4.

IN ACCORDANCE THE INSTANT NOTICE IS RESPECTFULLY SUBMITTED.

RESPECTFULLY SUBMITTED,

DATED: SEPTEMBER 21, 2020

BY: (DAVID ALVAREZ VENTURA) 80079
PLAINTIFF / APPELLANT
IN PRO SE

CERTFICATE OF SERVICE BY MAILING

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 21 day of SEPTEMBER, 20__, I mailed a true and correct copy of the foregoing, "PLAINTIFF NOTICE OF APPEAL PURSUANT TO NRAP RULE 4" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

CLERK OF THE COURT
SECOND JUDICIAL DISTRICT
COURT. FILING OFFICE
75 COURT STREET.
RENO NV. 89501.

CC:FILE

DATED: this 21 day of SEPTENGER 2020

DAVID ALVAREZ VENTURA. # 80079
PLAINTIFF /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

FILED

SEP 24 2020

JACQUELINE BRYANT, CLERK
By: DEPUTY CLERK

CODE 3860

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. CV-20-00866

JOHN H. GANSER, MD., ET. AL.,

Dept. No. 8

Defendant.

/

REQUEST FOR SUBMISSION OF MOTION

It is requested that the motion for NOTICE OF APPEAL PURSUANT TO NRAP RULE 4

, which was filed on the 21 day of SEPTEMBER, 20 20, in the above-entitled matter be submitted to the Court for decision.

The undersigned certifies that a copy of this request has been mailed to all counsel of record.

DATED this 21 day of SEPTEMBER, 20 20.

(DAVID ALVAREZ VENTURA) 80079
PLAINTIFF IN PRO SE

JUD 506 (Rev 8/99)

CERTFICATE OF SERVICE BY MAILING

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 21 day of SEPTEMBER, 20__, I mailed a true and correct copy of the foregoing, "PLAINTIFF NOTICE OF APPEAL PURSUANT TO NRAP RULE 4" by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid, addressed as follows:

CLERK OF THE COURT
SECOND JUDICIAL DISTRICT
COURT. FILING OFFICE
75 COURT STREET.
RENO NV. 89501.

CC:FILE

DATED: this 21 day of SEPTENGER 2020

DAVID ALVAREZ VENTURA. # 80079
PLAINTIFF /In Propria Personam
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018
IN FORMA PAUPERIS

F I L E D
Electronically
CV20-00866
2020-09-24 02:41:51 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8084655

Code 4132

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID ALVAREZ VENTURA,

Plaintiff,

vs.

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

Defendants.

_____/

Case No. CV20-00866

Dept. No. 8

NOTICE OF APPEAL DEFICIENCY

TO: Clerk of the Court, Nevada Supreme Court,
and All Parties or their Respective Counsel Of Record:

On September 24th, 2020, Plaintiff, David A. Ventura, filed a Notice of Appeal with the Court. Plaintiff failed to include the Twenty-Four Dollar ($24.00) Notice of Appeal filing fee, the Five Hundred Dollar ($500.00) District Court appeal bond, and the Two Hundred Fifty Dollar ($250.00) Supreme Court filing fee.

Pursuant to NRAP 3(a)(3), on September 24th, 2020, the Notice of Appeal was filed with the Nevada Supreme Court. By copy of this notice David Ventura will be notified by mail of the deficiency.

Dated this 24th day of September, 2020.

Jacqueline Bryant
Clerk of the Court
By: /s/YViloria
YViloria
Deputy Clerk

CERTIFICATE OF SERVICE

CASE NO. CV20-00866

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County Of Washoe; that on the 24th day of September, 2020, I electronically filed the Notice of Appeal Deficiency with the Clerk of the Court by using the ECF system.

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

Electronically filed with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:
ALICE CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

Deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada:

David A. Ventura #80079
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

/s/YViloria
YViloria
Deputy Clerk

F I L E D
Electronically
CV20-00866
2020-09-24 02:41:51 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8084655

Code 1310

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID ALVAREZ VENTURA,

Plaintiff,

vs.

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

Defendants.

Case No. CV20-00866

Dept. No. 8

_____/

CASE APPEAL STATEMENT

This case appeal statement is filed pursuant to NRAP 3(f).

1. Appellant is David Alvarez Ventura.
2. This appeal is from an order entered by the Honorable Judge Barry L. Breslow.
3. Appellant is representing himself in Proper Person on appeal, the Appellant's address is:
   David Alvarez Ventura #80079
   High Desert State Prison
   P.O. Box 650
   Indian Springs, Nevada 89070
4. Respondents are John H. Ganser, M.D. and Gomez, Kozar, McElreath and Smith.

   Respondents were represented in District Court by:

   Edward J. Lemons, Esq. SBN 699
   Alice Campos Mercado, Esq. SBN 4555
   Lemons, Grundy & Eisenberg
   6005 Plumas Street, Third Floor
   Reno, Nevada 89519

5. Respondent's attorney is not licensed to practice law in Nevada: n/a
6. Appellant is not represented by retained counsel in District Court.
7. Appellant is not represented by retained counsel on appeal.
8. Appellant was not granted leave to proceed in forma pauperis in the District Court.
9. Proceeding commenced by the filing of a Civil Complaint filed previously in Eighth Judicial District Court, Clark County, NV on January 13th, 2020. The change of venue to Second Judicial District Court, Washoe County, NV was filed June 5th, 2020 .
10. This is a civil proceeding and the Appellant is appealing the Order Granting Motion to Dismiss Without Prejudice filed September 4th, 2020.
11. The case has not been the subject of a previous appeals to the Supreme Court.
12. This case does not involve child custody or visitation.
13. It is unknown if the case involves the possibility of a settlement.

Dated this 24th day of September, 2020.

Jacqueline Bryant
Clerk of the Court
By: /s/ YViloria
YViloria
Deputy Clerk

F I L E D
Electronically
CV20-00866
2020-09-24 02:41:51 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8084655

Code 1350

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

DAVID ALVAREZ VENTURA, **Case No. CV20-00866**

Plaintiff, **Dept. No. 8**

vs.

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

Defendants.
_____/

CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 24th day of September, 2020, I electronically filed the Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court.

Dated this 24th day of September, 2020.

Jacqueline Bryant
Clerk of the Court
By /s/YViloria
YViloria
Deputy Clerk

F I L E D
Electronically
CV20-00866
2020-09-24 02:42:57 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8084659

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-09-24 14:42:56.18.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-09-24 14:42:56.203.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

–

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	09-24-2020:14:41:51
Clerk Accepted:	09-24-2020:14:42:25
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	District Ct Deficiency Notice Case Appeal Statement Certificate of Clerk
Filed By:	Deputy Clerk YViloria

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

–

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

FILED
Electronically
CV20-00866
2020-09-30 01:38:43 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8093290

IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

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

Supreme Court No. 81850
District Court Case No. CV2000866

RECEIPT FOR DOCUMENTS

TO: David Alvarez Ventura
Lemons, Grundy & Eisenberg \ Alice Campos Mercado, Edward J. Lemons
Jacqueline Bryant, Washoe District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

09/28/2020 Filing Fee due for Appeal. (SC)

09/28/2020 Filed Notice of Appeal/Proper Person. Appeal docketed in the Supreme Court this day. (SC)

DATE: September 28, 2020

Elizabeth A. Brown, Clerk of Court
lh

F I L E D
Electronically
CV20-00866
2020-09-30 01:39:47 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8093295

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-09-30 13:39:46.588.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-09-30 13:39:46.611.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

–

A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	09-30-2020:13:38:43
Clerk Accepted:	09-30-2020:13:39:17
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Supreme Court Receipt for Doc
Filed By:	Deputy Clerk YViloria

You may review this filing by clicking on the following link to take you to your cases.

This notice was automatically generated by the courts auto-notification system.

–

If service is not required for this document (e.g., Minutes), please disregard the below language.

The following people were served electronically:

ALICE G. CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

DAVID VENTURA

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

OCT 15 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER REGARDING FILING FEE

This pro se appeal was docketed in this court on September 28, 2020. On that same day, this court issued a notice directing appellant to pay the required filing fee or demonstrate compliance with NRAP 24 within ten days. On October 14, 2020, appellant filed a motion for leave to proceed in forma pauperis.

NRAP 24(a) provides that a request for in forma pauperis status must first be presented to the district court. If the district court grants the request, an appellant may proceed in this court without prepayment of fees or costs. If the district court denies the request, it must state in writing the reasons for its decision. A motion for leave to proceed in forma pauperis may then be filed in this court within 30 days after notice of the district court's decision is served. *See* NRAP 24(a)(5)(A). Under NRAP 24(a), an appellant may not seek in forma pauperis status from this court before the matter has been finally resolved by the district court.

Accordingly, appellant's motion for leave to proceed in forma pauperis is denied without prejudice. Appellant must first seek leave to proceed in forma pauperis in the district court following the procedures

outlined in NRAP 24. If an application to proceed in forma pauperis has already been filed in the district court of which this court is unaware, the district court shall, within 30 days of the date of this order, provide this court a certified copy of its order ruling on the application.

Appellant is cautioned that failure either to properly seek leave to proceed in forma pauperis in the district court or to pay the filing fee within 30 days will result in the dismissal of this appeal.

It is so ORDERED.

CLERK OF THE SUPREME COURT
ELIZABETH A. BROWN

BY: 

cc: David Alvarez Ventura
Lemons, Grundy & Eisenberg
Washoe District Court Clerk

F I L E D
Electronically
CV20-00866
2020-10-19 02:38:11 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8122509

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-10-19 14:38:10.687.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-10-19 14:38:10.71.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	10-19-2020:14:37:05
Clerk Accepted:	10-19-2020:14:37:39
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Supreme Court Order
Filed By:	Deputy Clerk YViloria

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EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

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DAVID VENTURA

FILED
Electronically
CV20-00866
2020-10-26 04:16:21 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8134249

CODE 3860

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID ALVAREZ VENTURA,

Plaintiff,

vs.

D.C. Case No. CV-20-00866 (N.S.C. No. 81650)

JOHN H. GANSER, MD., ET. AL.,

Dept. No. 8

Defendant.
/

REQUEST FOR SUBMISSION OF MOTION

It is requested that the motion for APPLICATION TO PROCEED INFORMA PAUPERIS / ORDER TO PROCEED INFORMA PAUPERIS FOR APPEAL, which was filed on the 22 day of OCTOBER, 2020, in the above-entitled matter be submitted to the Court for decision.

The undersigned certifies that a copy of this request has been mailed to all counsel of record.

DATED this 22 day of OCTOBER, 2020.

(DAVID ALVAREZ VENTURA)
~~PLAINTIFF~~ IN PRO SE
APPELLANT.

JUD 506 (Rev 8/99)

INDEX OF EXHIBITS

Exhibit Number ______ Number of Pages ______

Exhibit Description ____

Exhibit Number ______ Number of Pages ______

Exhibit Description ____

Exhibit Number ______ Number of Pages ______

Exhibit Description ____

Exhibit Number ______ Number of Pages ______

Exhibit Description ____

Exhibit Number ______ Number of Pages ______

Exhibit Description ____

Exhibit Number ______ Number of Pages ______

Exhibit Description ____

Exhibit Number ______ Number of Pages ______

Exhibit Description ____

Exhibit Number ______ Number of Pages ______

Exhibit Description ____

Exhibit Number ______ Number of Pages ______

Exhibit Description ____

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CV20-00866
2020-10-26 04:16:21 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8134249

Exhibit Cover Page

EXHIBIT NUMBER _____

APPL

DAVID ALVAREZ VENTURA #80079
NAME

H.D.S.P. P.O. BOX 650.
ADDRESS

INDIAN SPRINGS NV. 89070.
CITY, STATE, ZIP CODE

~~PLAINTIFF~~ APPELLANT
~~TELEPHONE~~

IN PROPER PERSON

DISTRICT COURT
WASHOE COUNTY, NEVADA

DAVID ALVAREZ VENTURA.

Plaintiff,

vs.

JOHN H. GANSER ET AL

Defendant

Dept. Case No.: CV-20-00866 (NSC No 81850)

Dept. No.: 8

ORDER TO PROCEED IN FORMA PAUPERIS
(Filing Fees/Service Only)

Upon consideration of DAVID A VENTURA's Application to Proceed in Forma Pauperis and it appearing that there is not sufficient income, property, or resources with which to maintain the action and good cause appearing therefore:

IT IS HEREBY ORDERED,

1. That ~~PLAINTIFF~~ DAVID A. VENTURA, shall be permitted to proceed In Forma Pauperis with this action as permitted by NRS 12.015.

2. That DAVID A. VENTURA shall proceed without the prepayment costs or fees or the necessity of giving security, and the Clerk of the Court may file or issue any necessary writ, pleading or paper without charge.

3. That the Sheriff or other appropriate officer within this State shall make personal service of any necessary writ, pleading or paper without charge.

4. That if the APPELLANT, DAVID A. VENTURA, prevails in this action, the Court shall enter an Order pursuant to NRS 12.015 requiring the opposing party to pay into the court, within five (5) days, the costs which would have been incurred by the prevailing party, and those costs must then be paid as provided by law.

IT IS HEREBY ORDERD that _____ 's request to waive fees and costs is **DENIED** for the following reason:

A. _____ The Party is not indigent.

B. _____ Other: _____

_____

DATED this _____ day of _____, 20___.

_____
DISTRICT COURT JUDGE

Respectfully submitted by:

_____
Signature

DAVID ALVAREZ VENTURA.
PRINT NAME

H.D.S.P. P.O. BOX 650.
ADDRESS

INDIAN SPRING NV. 89070.
CITY, STATE, ZIP CODE

APPELLANT IN PRO SE
TELEPHONE

IN PROPER PERSON

F I L E D
Electronically
CV20-00866
2020-10-26 04:18:13 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8134258

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-10-26 16:18:11.166.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-10-26 16:18:11.236.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	10-26-2020:16:16:21
Clerk Accepted:	10-26-2020:16:17:39
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Mtn Proceed Forma Pauperis Request for Submission - **Continuation
Filed By:	Deputy Clerk BBlough

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EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

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DAVID VENTURA

FILED
Electronically
CV20-00866
2020-11-10 09:40:14 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 8155376

Code: 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID ALVAREZ VENTURA, Appellant, vs. JOHN H. GANSER, M.D. LIC #9279; GOMEZ KOZAR; AND MCELREATH AND SMITH, A PROFESSIONAL CORPORATION, Respondents.	Case No.: CV20-00866 Dept. No.: 8

ORDER GRANTING APPLICATION TO PROCEED INFORMA PAUPERIS

The Court is in receipt of Nevada Supreme Court *Order Regarding Filing Fee* filed October 15, 2020. The Court is further in receipt of Appellant DAVID ALVAREZ VENTURA's *Application to Proceed Informa Pauperis* filed October 26, 2020. Upon review, this Court finds that pursuant to NRS 12.015 and Nevada Supreme Court Order ADKT No. 411, Defendant's *Application to Proceed Informa Pauperis* is sufficient to grant forma pauperis status at this time.

THEREFORE, pursuant to NRS 12.015, Appellant DAVID ALVAREZ VENTURA's *Application to Proceed Informa Pauperis* is **GRANTED**.

/ / /

/ / /

/ / /

/ / /

IT IS HEREBY ORDERED that the Court allow the Appellant to proceed without payment of fees or security thereof;

IT IS HEREBY FURTHER ORDERED that the Clerk of the Court shall file and process all pleadings necessary in the prosecution of this action without fees;

IT IS HEREBY FURTHER ORDERED that the Sheriff make personal service of any necessary pleadings or papers for the Appellant in this action without charge.

DATED: this 10th day of November, 2020.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 10th day of November, 2020, I deposited for mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

David Ventura, #80079
HDSP
P.O. Box 650
Indian Springs, NV 89070

Further, I certify that on the 10th day of November, 2020, I electronically filed the foregoing with the Clerk of the Court electronic filing system, which will send notice of electronic filing to the following:

ALICE CAMPOS MERCADO, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al
EDWARD LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

Judicial Assistant

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CV20-00866
2020-11-10 09:41:28 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 8155380

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-11-10 09:41:26.962.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-11-10 09:41:27.178.

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	11-10-2020:09:40:14
Clerk Accepted:	11-10-2020:09:40:58
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Ord Grant in Forma Pauperis
Filed By:	Judicial Asst. BWard

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DAVID VENTURA

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CV20-00866
2020-11-10 11:24:22 AM
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Transaction # 8155779

Code 1350

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID ALVAREZ VENTURA,

Appellant,

Vs,

JOHN H. GANSER, M.D. LIC #9279; GOMEZ KOZAR; AND MCELREATH AND SMITH, A PROFESSIONAL CORPORATION,

Respondents.
_____/

Case No. CV20-00866

Dept. No. 8

SCN: 81850

CERTIFICATE OF CLERK AND TRANSMITTAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe. On the 10th day of November, 2020, I electronically filed to the Supreme Court the Order Granting Application to Proceed Informa Pauperis filed November 10th, 2020 . The Order is transmitted pursuant to the Supreme Court's Order Regarding Filing Fee filed October 15th, 2020.

I further certify that the transmitted record is a copy of the original pleadings on file with the Second Judicial District Court.

Dated this 10th day of November, 2020.

Jacqueline Bryant
Clerk of the Court

By /s/YViloria
YViloria
Deputy Clerk

F I L E D
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CV20-00866
2020-11-10 11:25:28 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 8155784

Return Of NEF

Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2020-11-10 11:25:27.701.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2020-11-10 11:25:27.724.

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A filing has been submitted to the court RE: CV20-00866

Judge:

HONORABLE BARRY L. BRESLOW

Official File Stamp:	11-10-2020:11:24:22
Clerk Accepted:	11-10-2020:11:25:01
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Certificate of Clerk
Filed By:	Deputy Clerk YViloria

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EDWARD J. LEMONS, ESQ. for GOMEZ, KOZAR, MCELREATH & SMITH, A PROFESSIONAL CORP et al

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DAVID VENTURA

V2. 246

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

ORDER DIRECTING TRANSMISSION OF RECORD AND REINSTATING BRIEFING

This court has reviewed the documents on file in this appeal and concludes that review of the complete record is warranted. NRAP 10(a)(1). Accordingly, within 30 days from the date of this order, the clerk of the district court shall transmit to the clerk of this court a certified copy of the trial court record in District Court Case No. CV20-00866. *See* NRAP 11(a)(2) (providing that the complete "record shall contain each and every paper, pleading and other document filed, or submitted for filing, in the district court," as well as "any previously prepared transcripts of the proceedings in the district court"). The record shall not include any exhibits filed in the district court. NRAP 11(a)(1).

This court referred this matter to the Pro Bono Committee of the State Bar of Nevada's Appellate Litigation Section for the selection of pro bono counsel to represent appellant in this appeal. Appellant is eligible and has not filed an objection to the appointment. Attorney Neal S. Krokosky has now filed a notice of appearance as appellant's pro bono

counsel. Accordingly, this court sets forth the following schedule for the requesting of transcripts and briefing in this appeal.

Appellant shall have 14 days from the date of this order to determine the transcripts necessary for a review of this appeal and to file either a transcript request form or a certification that no transcripts are requested under NRAP 9(a). As appellant is now a client of a program for legal aid, *see* NRS 12.015(1)(b), appellant's counsel is directed to follow NRS 12.015(3) for obtaining any necessary transcripts at county expense. Appellant shall have 90 days from the date of this order to file and serve the opening brief. *See* NRAP 28; NRAP 30; NRAP 31(a)(1). Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1). Because the trial court record has been ordered in this appeal, the parties are permitted, but not required, to cite to that record in lieu of filing joint or separate appendices with their briefs. *Compare* NRAP 10(a) (governing transmission of trial court record), *with* NRAP 30 (setting forth requirements for appendices). Although this matter will be scheduled for oral argument upon completion of briefing, counsel may notify this court in writing if counsel believes that oral argument is undesirable or unnecessary.

It is so ORDERED.

_____, C.J.

cc: Neal Krokosky
Lemons, Grundy & Eisenberg
Washoe District Court Clerk

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Electronically
CV20-00866
2021-03-04 02:36:14 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8326041

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Recipients

EDWARD LEMONS, ESQ.	- Notification received on 2021-03-04 14:36:13.515.
ALICE CAMPOS MERCADO, ESQ.	- Notification received on 2021-03-04 14:36:13.539.

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Official File Stamp:	03-04-2021:14:35:01
Clerk Accepted:	03-04-2021:14:35:39
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID VENTURA VS. JOHN GANSER, M.D. ET AL (D8)
Document(s) Submitted:	Supreme Ct Order Directing
Filed By:	Deputy Clerk YViloria

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