

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**

Electronically Filed  
Jun 01 2021 10:35 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**JOINT APPENDIX**

Signed: June 1, 2021



NEAL S. KROKOSKY (SBN 14799C)  
CAESARS ENTERPRISE SERVICES, LLC  
One Caesars Palace Drive  
Las Vegas, NV 89109  
Telephone: (702) 407-6499  
Email: [nkrokosky@caesars.com](mailto:nkrokosky@caesars.com)  
*ATTORNEY FOR APPELLANT*

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## **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25(c)(1)(B) and NRAP 25(c)(1)(E), on June 1, 2021, the undersigned mailed and electronically filed (through the Supreme Court of Nevada's eFlex system) the attached Joint Appendix, thereby providing a copy to the following individuals:

Edward J. Lemons  
Alice Campos Mercado  
Lemons, Grundy & Eisenberg  
6005 Plumas Street, Third Floor  
Reno, Nevada 89519

A handwritten signature in black ink, appearing to read 'Neal S. Krokosky', written over a horizontal line.

Neal S. Krokosky  
Nevada Bar No. 14799C



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01/13/2020 11:37 AM

David Alvarez Ventura  
#80079

P.O. Box 650

Indian Spgs., NV 89070

Plaintiff in Pro se

*Andrew J. Smith*  
CLERK OF THE COURT

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.

Dept. No

A-20-809397-C

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 corporation, doing business as

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CLERK OF THE COURT

JAN 14 2020

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

2) That plaintiff was reasonably diligent 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, P.A., Circulator: Julie A. Bloos, R.N., Relief circulator: ~~may~~ Margorie 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 metal 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 source of his pain.

7. On 11-30-18 Dr. Leon Jackson M.D., NNCL issued a report that discovered a foreign body; a linear metal object that inside Ventura's body but states "This seems unlikely to be related to the patient's 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(1) 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. *W. nvl v. Sunrise Hosp. & med. ctr.*, 128 Nev 246 (2012). see previous arguments. Thus the doctrine of *Res Ipsa Loquitur* applies as the aforementioned defendants actions, error or omission upon which this action is based was concealed 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, whether 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 performed 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 provider's negligence, *Massey v. Litton*, 98 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.

### Court 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 anticipate 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 negligent manner with deliberate indifference 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 indifference to Plaintiff's 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.

**CERTIFICATE 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 4103.22 Test 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 #80079  
/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 89119-3188

Patient: VENTURA ALVAREZ, DAVID  
MRN DSH5741981  
FIN DSH0000031308208  
DOB/Sex 8/5/1979 / Male  
Patient Room DSH PEOP, PEOP, 13

Admit 3/28/2019  
Disch 3/28/2019 Disch Time 11:25 PDT  
Attending Caravella, Peter A MD  
Copy To n/a

### Operative Record

DOCUMENT NAME  
SERVICE DATE/TIME  
RESULT STATUS  
PERFORM INFORMATION  
SIGN INFORMATION

Operative Reports  
3/28/2019 09:56 PDT  
Auth (Verified)  
Caravella, Peter A MD (3/28/2019 09:57 PDT)  
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 cross table 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-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

Print Date/Time 3/28/2019 22:25 PDT

Report Request ID 350331718

Page 1 of 1

Plaintiff  
Exhibit  
D

Plaintiff's Exhibit 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  
CPt. Name: RVCEDARKEY, THIRTEEN (MRN:4398625) --  
2016102680255104114

Pa

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

**CONFIDENTIAL**  
**DO NOT PHOTO COPY**  
**MEDICAL RECORDS**  
Humboldt General Hospital  
Winnemucca, NV 89445



V2. 72

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  
W

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

Master  
01/09/2020  
US POSTAGE \$005.19

ZIP 89101  
011E12650516

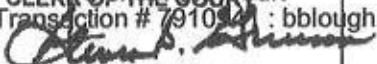


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Clerk, 8th Judicial Dist. Court  
200 Lewis Ave., 3rd Floor  
Las Vegas, NV 89155-1160

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1 **MCOV**

2 EDWARD J. LEMONS, BAR NO. 699  
3 ALICE CAMPOS MERCADO, BAR NO. 4555  
4 **LEMONS, GRUNDY & EISENBERG**  
5 6005 Plumas Street, Third Floor  
6 Reno, Nevada 89519  
7 (775) 786-6868; (775) 786-9716 (fax)  
8 ejl@lge.net; acm@lge.net

9 *Attorneys for Defendants*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 **DAVID ALVAREZ VENTURA,**

13 Plaintiff,

14 vs.

15 **JOHN H. GANSER, M.D. LIC #9279**  
16 **GOMEZ, KOZAR, McELREATH AND SMITH,**  
17 **A Professional Corporation,**

18 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: \_\_\_\_\_

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

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

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 30<sup>th</sup> day of March, 2020

LEMONS, GRUNDY & EISENBERG

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

*Attorneys for Defendants*

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.

///

///

1 **II. LEGAL ANALYSIS**

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

6 If the county designated for that purpose in the complaint be not the  
 7 proper county, the action may, notwithstanding, be tried therein,  
 8 **unless the defendant before the time for answering expires**  
 9 **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.]

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

17 When a defendant has made a proper and timely demand for change of  
 18 venue on the grounds that the county designated in the complaint is not the  
 19 proper county, the change of venue is mandatory and not within the discretion of  
 20 the district court. See *Western Pacific Railroad v. Krom*, 102 Nev. 40, 714 P.2d  
 21 182 (1986) (if a demand for change of venue is filed in a timely manner and no  
 22 defendants reside in the county in which the action is filed, and that county is not  
 23 otherwise a proper venue, then removal is mandatory).

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

28 //

1 The ends of justice would also be served by a change of venue because no  
 2 part of this case touches Las Vegas. Consequently, the residents of Clark County  
 3 and the Eighth Judicial District Court should not be required to expend their  
 4 taxpayer dollars, time and limited judicial resources, respectively, in adjudicating a  
 5 case that involves residents of Washoe County, where the entirety of plaintiff's  
 6 cause of action arose. See *Lyon County v. Washoe Medical Center, Inc.*,  
 7 104 Nev. 765, 768, 766 P.2d 902, 904 (1988) ("important public interests such as  
 8 avoiding the costs to taxpayers of defending actions in other communities,  
 9 maintaining actions where relevant official records are kept, and reducing forum  
 10 shopping" militated in favor of a change of venue). For this additional reason,  
 11 venue must be changed to Washoe County.

### 12 III. CONCLUSION


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

### 21 AFFIRMATION

22 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the  
 23 preceding document does not contain the Social Security number of any person.

24 DATED this 20<sup>th</sup> day of March, 2020.

25 LEMONS, GRUNDY & EISENBERG

26  
 27 By:   
 28 EDWARD J. LEMONS  
 ALICE CAMPOS MERCADO, ESQ.  
 Attorneys for Defendants



**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.

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.



**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

**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:**

FILED  
Electronically  
CV20-00866  
2020-06-05 11:09:24 AM  
Jacqueline B. Bart  
Clerk of the Court  
Transaction # 791097 bblough  
APR 11 2020  
CLERK OF COURT

**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: 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, 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

FILED  
Electronically  
CV20-00866  
2020-06-05 11:09:24 AM  
Jacqueline Bryant  
Clerk of the Court  
Transaction # 7910341 bblough

FILED  
MAR 24 2020  
CLERK OF COURT

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

David Alvarez Ventura  
PLAINTIFF

Dated: 3/13/2020

 $V_S$ 

Civil File Number: 20002384

John H Ganser, MD, Gomez, Kozar, McCreath and  
Smith, A Professional Corporation  
DEFENDANT

CASE No.: A20809397C

## DECLARATION OF SERVICE

STATE OF NEVADA }  
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

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)  
eil@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,

Case No.: CV20-00866

Dept. No.: 8

vs.

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

**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;

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

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

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

8 **III. CONCLUSION**

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

14 **AFFIRMATION**

15 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the  
16 preceding document does not contain the Social Security number of any person.

17 DATED this 8<sup>th</sup> day of June, 2020.

18 **LEMONS, GRUNDY & EISENBERG**  
19 *Attorneys for Defendants*

20 By:   
21 EDWARD J. LEMONS  
22 ALICE CAMPOS MERCADO, ESQ.  
23  
24  
25  
26  
27  
28

**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.



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 EVANS  
 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,

CIVIL ACTION NUMBER

CV-20-00866

PLAINTIFF,

DEPARTMENT NO. 8

VS.

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

PLAINTIFF'S MOTION SEEKING  
 THAT COURT DEFER CONSIDERA-  
 TION OF DEFENDANTS MOTION  
 TO DISMISS PENDING RESTORA-  
 TION OF NORMAL PRISON OPERA-  
 TIONS.

DEFENDANTS.

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 NRPC P. 12(B) PURPORTEDLY DUE TO PLAINTIFF'S FAILURE TO COMPLY 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.



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 CRIPPLING 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:   
(DAVID ALVAREZ VENTURA)  
PLAINTIFF IN PRO SE

80079

PROOF OF SERVICE BY MAIL  
CV-20-00866

I, DAVID ALVAREZ VENTURA, HEREBY DECLARE THAT:


ON JUNE 15, 2020, I SERVED THE FOLLOWING:

PLAINTIFF'S MOTION SEEKING THAT COURT DEFER CONSIDERA-  
TION OF DEFENDANTS MOTION TO DISMISS PENDING RESTORA-  
TION 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. LEMON'S  
ATTORNEY AT LAW  
6005 PLUMAS STREET  
THIRD FLOOR  
RENO, NV, 89519

I DECLARE UNDER PENALTY OF PERJURY THAT THE FORE-  
GOING IS TRUE AND CORRECT.

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

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](mailto:ejl@lge.net); [acm@lge.net](mailto: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,

Case No.: CV20-00866

Dept. No.: 8

vs.

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

**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



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

### 7 MEMORANDUM OF POINTS AND AUTHORITIES

#### 8 I. INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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

27 ///

28 ///

## 1 II. LEGAL ANALYSIS

2 Dr. Ganser's motion to dismiss is based on a long-standing statutory  
3 mandate, embodied in NRS 41A.071, which has been interpreted by the Nevada  
4 Supreme Court to apply to incarcerated plaintiffs. See *Peck v. Zipf*, 133 Nev. --  
5 407 P.3d 775 (2017), a copy of which is attached hereto as Exhibit 1 for plaintiff's  
6 convenient reference. The controlling statute was quoted verbatim in Dr. Ganser's  
7 motion, so there is no need for plaintiff to access the prison law library to know  
8 what the statute required of him and to explain why he did not comply with the  
9 statute. Therefore, plaintiff's attempt to delay the adjudication of this matter based  
10 on the COVID-19 pandemic is unavailing.

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

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

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

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

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

9 **III. CONCLUSION**

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

14 **AFFIRMATION**

15 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the  
16 preceding document does not contain the Social Security number of any person.

17 DATED this 29<sup>th</sup> day of June, 2020.

18 **LEMONS, GRUNDY & EISENBERG**  
19 *Attorneys for Defendants*

20  
21 By:   
22 EDWARD J. LEMONS, ESQ.  
23 ALICE CAMPOS MERCADO, ESQ.  
24  
25  
26  
27  
28

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

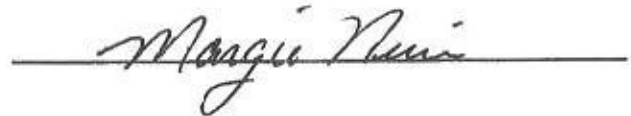
☐ **BY PERSONAL SERVICE:** in an envelope to be hand delivered this date;

☐ **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.



**EXHIBIT INDEX**

*Ventura v. Ganser*

CV20-00866

<b><u>Exhibit</u></b>	<b><u>Description</u></b>	<b><u>Page(s)</u></b>
1	Copy of <i>Peck v. Zipf</i> , 133 Nev. -- 407 P.3d 775 (2017)	9

**EXHIBIT 1**

**EXHIBIT 1**

Peck v. Zipf, 407 P.3d 775 (2017)

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:

<sup>[1]</sup> 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;

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

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

<sup>[4]</sup> expert affidavit requirement did not violate equal protection or due process.

Affirmed.

West Headnotes (19)

<sup>[1]</sup> **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

<sup>[2]</sup> **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

<sup>[3]</sup> **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

<sup>[4]</sup> **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



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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**  
 ⇨Superfluosity

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

Peck v. Zipf, 407 P.3d 775 (2017)

**[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.

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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(1)(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

<sup>[11]</sup> <sup>[12]</sup> <sup>[13]</sup> 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

<sup>[14]</sup> <sup>[15]</sup> 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. Marknan*, 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.<sup>1</sup> 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).

<sup>1</sup> 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.

<sup>16</sup>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*

<sup>17</sup>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. Egtegar*, 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.

<sup>181</sup> <sup>191</sup>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.

<sup>101</sup> <sup>111</sup> <sup>121</sup>“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*

<sup>131</sup> <sup>141</sup> <sup>151</sup>“[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.

<sup>161</sup>“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).

<sup>171</sup>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.

<sup>118</sup>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.

<sup>119</sup>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



DAVID ALVAREZ VENTURA  
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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 DEFEN-  
DANTS 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 DEFENDANT'S 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 PECK V. ZIFE, 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 GANER 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

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, 89519I DECLARE UNDER PENALTY OF PERJURY THAT THE FORE-  
GOING IS TRUE AND CORRECT.BY: ~~DAVID ALVAREZ VENTURA~~ #80079  
(DAVID ALVAREZ VENTURA)  
DECLARANT / 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.

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").*<sup>1</sup>

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.

///

<sup>1</sup> 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.*<sup>2</sup> Under the framework adopted in

<sup>2</sup> 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*,<sup>3</sup> 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.

<sup>3</sup> The Court notes that the 4-factor framework adopted in *Moseley* was applied in an NRC 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.<sup>4</sup> 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**<sup>5</sup> 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

<sup>4</sup> 133 Nev. 890, 892, 407 P.3d 775, 778 (2017).

<sup>5</sup> 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:



Judicial Assistant



DAVID ALVAREZ VENTURA  
NDCC 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 DIS-  
MISS.

PLAINTIFF PROCEEDS WITH THE INSTANT ACTION IN PRO SE. HE IS A STATE PRISONER CONFINED AT THE HIGH DESERT STATE PRISON ("HDS") 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 COMPLY 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 PECK V. ZIFE, 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 HERETO 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 FORTH COME 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. ZIFE 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 PECK 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 41A.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 PECK'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, PECK 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 RENO REGIONAL MEDICAL CENTER WITH A DIAGNOSIS OF ACHALASIA (EXHIBIT 'A', P. 2). THE OPERATIVE PROCEDURE ENSUING HIS ADMISSION WAS DESCRIBED AS AN "ASSISTED ROBOTIC HELIX 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 ANESTHESIA AND RESULTED IN SUTURES -- PROCEDURES NOT REQUIRED LESS ALONE WARRANTED IN INSTANCES LIKE PECK IN GENERAL IV APPLICATIONS (EX 'A', PP. 1 AND 4).

THIS CASE IS CLEARLY DISTINGUISHABLE FROM PECK 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.

MORE OVER, PLAINTIFF DOES NOT LIKE PECK COMPLAINT OF A FOREIGN BODY'S TRAVEL 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 TODAY. (SEE EXHIBIT 1 OF COMPLAINT).

AS THE NEVADA SUPREME COURT HELD, NRS 541A.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. MARK-MAN, 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 REQUESTED 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: [Signature]  
(DAVID ALVAREZ VENTURA)  
PLAINTIFF IN PRO SE

# EXHIBIT “A”



Rvcedar Thirteen (MR # 1006625) Printed by: Tasha Roberts, R.N. [JLGR] at 10/26/2016 9:13 AM

 Draft: Not Electronically Signed.

Curtis J. Smith, P.A. Physician Assistant Unsigned Transcription

Discharge Summary 10/26/2016 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 Tegaderm. 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

*M. Smith*

**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  
Rvcedarkey, Thirteen

Sex  
Male

**Admission Information**

Attending Provider  
John H Ganser, M.D.  
Discharge Date

Admitting Provider  
John H Ganser, M.D.  
Hospital Service  
SURGICAL

Admission Type  
Elective  
Auth/Cert Status  
Incomplete

Admission Date/Time  
10/24/16 0625  
Service Area  
RENOWN HEALTH

Unit  
GEN SURGERY TAHOE 4TH

Room/Bed  
T426/00

Admission Status  
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.  
Filed: 10/26/2016 7:15 AM  
Editor: Curtis J Smith, P.A. (Physician Assistant)  
Cosigner: (none)  
Dictation Time: 10/25/2016 3:31 PM

Service: (none)  
Note Time: 10/25/2016 3:31 PM  
Trans ID: NES909556  
Trans Time: 10/25/2016 5:49 PM

Author Type: Physician Assistant  
Status: Unsigned Transcription  
Cosign Required: Yes  
Trans Status: Unavailable  
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

*Handwritten signature*

## 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 FUNDOPLICATIONSurgeon(s):  
John H Ganser, M.D.Anesthesiologist/Type of Anesthesia:  
Anesthesiologist: Tobey B Gansert, M.D./GeneralSurgical 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.

Pt. Name: RVCEDARKEY, THIRTEEN (MRN:4396625) --

J.App.072

Pa



**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.

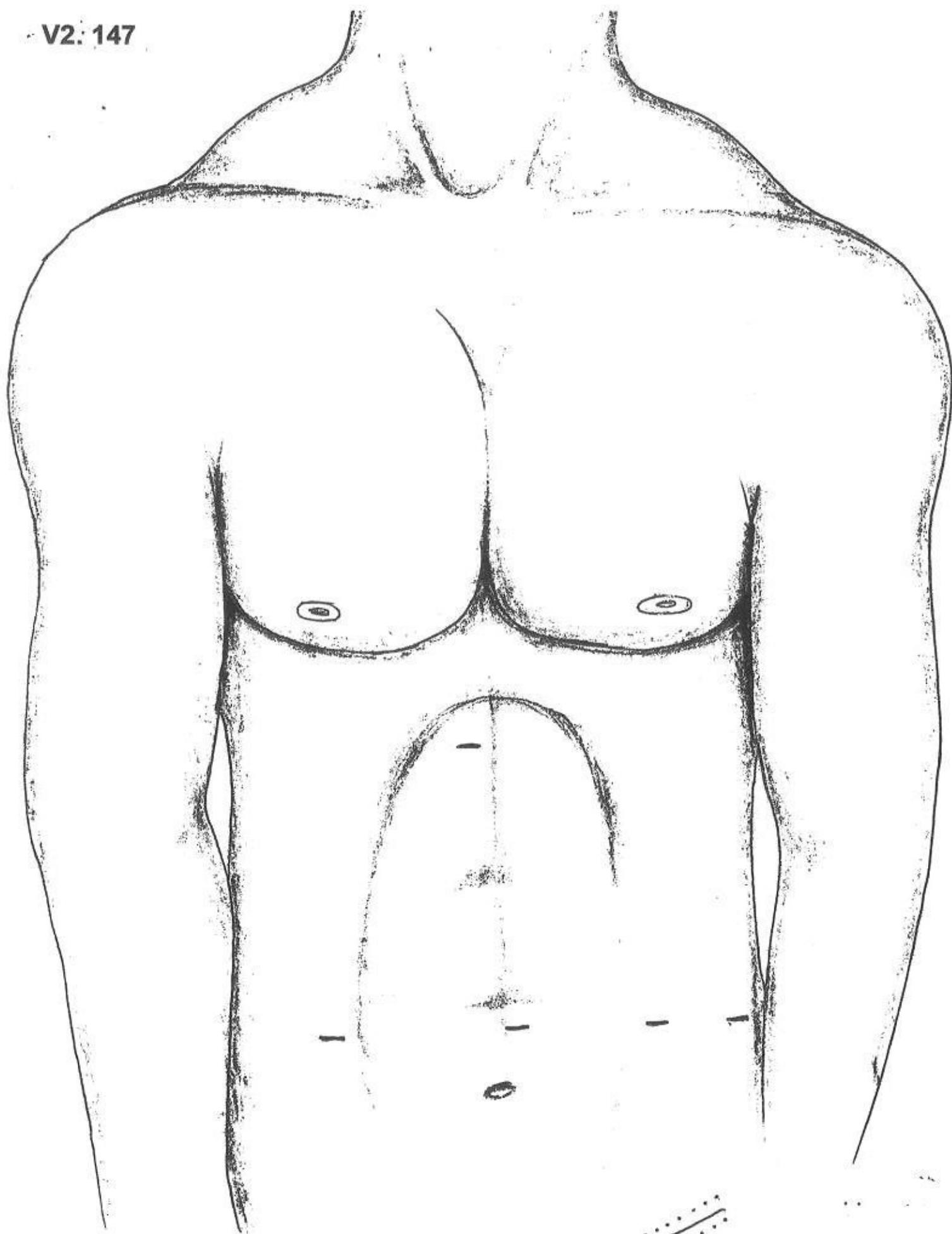
ANESTHESIA: General.

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



Hip Bone J.App.074

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]  
Signature

02-08-2020  
Date

DAVID ALVAREZ VENTURA  
Print Name

PLAINTIFF IN PRO SE  
Title

**CERTIFICATE OF SERVICE BY MAILING**

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 02  
day of AUGUST, 2020 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

1 **3795**

2 EDWARD J. LEMONS, BAR No. 699  
3 ALICE CAMPOS MERCADO, BAR No. 4555  
4 **LEMONS, GRUNDY & EISENBERG**  
5 6005 Plumas Street, Third Floor  
6 Reno, Nevada 89519  
7 (775) 786-6868  
8 (775) 786-9716 (fax)  
9 [eil@lge.net](mailto:eil@lge.net); [acm@lge.net](mailto:acm@lge.net)

6 *Attorneys for Defendants*

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

9 -o0o-

10 DAVID ALVAREZ VENTURA,

11 Plaintiff,

12 vs.

13 JOHN H. GANSER, M.D., ET AL.,

14 Defendants.

Case No. CV20-00866

Dept. No. 8

15  
16 **DEFENDANTS JOHN H. GANSER, M.D. AND GOMEZ, KOZAR, McELREATH**  
17 **AND SMITH'S REPLY TO PLAINTIFF'S OPPOSITION TO**  
18 **DEFENDANTS' MOTION TO DISMISS**

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

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. PROCEDURAL BACKGROUND**

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

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

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

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

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

## 22 II. FACTS UNDERLYING THIS ACTION AND SUMMARY OF ARGUMENT

23 According to the Complaint plaintiff allegedly underwent surgery on October 24,  
24 2016, at Renown Regional Medical Center, which was performed by Dr. Ganzer.  
25 *Complaint*, p. 2, ¶3, p. 8, ¶16. The word "allegedly" is used because the operative report  
26 attached to plaintiff's Complaint for the procedure performed by Dr. Ganzer identifies a  
27 patient other than plaintiff. *See partial Operative Report of Dr. Ganzer's October 24,*  
28 *2016 surgery, referred to as Exhibit 2 on page 3 of the Complaint, but marked as*



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

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

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

18 In light of the foregoing facts, which are part of the Complaint, Nevada law  
 19 required plaintiff to attach a supporting expert affidavit to his Complaint in compliance  
 20 with the affidavit requirement of NRS 41A.071. Plaintiff cannot excuse his non-  
 21 compliance by making a conclusory and unsupported allegation that "surgical  
 22 instruments" were left in his body during the 2016 surgery, especially when the exhibits  
 23

24  
 25 <sup>1</sup> Plaintiff's opposition includes additional records and a diagram of unknown  
 26 origin not included with his Complaint. Those documents may not be considered in  
 27 opposition to defendants' motion to dismiss because plaintiff cannot defeat a motion to  
 28 dismiss by asserting new allegations in his opposition. See *Broam v. Bogan*, 320 F.3d  
 1023, 1026 n. 2 (9<sup>th</sup> 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).

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

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

9 **III. LEGAL ANALYSIS**

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

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

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

28 ///



**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.*

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

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

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

1 cure defects in her complaint by including the necessary allegations in her opposition  
2 brief."). The allegations that form the basis of a plaintiff's claim for relief must be set out  
3 in its pleading. *See*, NRCP 8(a). When a defendant files a motion to dismiss, it calls into  
4 question whether the allegations in the complaint assert a claim for relief.  
5 NRCP 12(b)(5). To resolve the question, the court looks to the challenged pleading to  
6 examine its allegations. *See, e.g., Edgar v. Wagner*, 101 Nev. 226, 227, 699 P.2d 110,  
7 111 (1985) ("[the court's] task is to determine whether the challenged pleading sets forth  
8 allegations sufficient to make out the elements of a right to relief.") (emphasis added).

9 It is because the focus of the examination is the complaint that a plaintiff cannot  
10 survive a motion to dismiss by making new or alternate allegations in opposition to the  
11 motion to dismiss. *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1. (9<sup>th</sup> Cir.  
12 1998). Here, based on the Complaint and its attachments, the allegations fall fatally short  
13 of showing that the statutory *res ipsa loquitur* doctrine of NRS 41A.100(1)(a) applies in  
14 this case to excuse plaintiff's failure to comply with NRS 41A.071.

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

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

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

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

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



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

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

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

12 Claims against health care providers for negligent supervision require compliance  
13 with NRS 41A.071. The Nevada Supreme Court recently reiterated that direct liability  
14 claims for negligent hiring or supervision do not excuse compliance with NRS 41A.071.  
15 *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. Adv. Op. 39, 2020  
16 WL 3885614 (July 9, 2020). "[N]egligent hiring, training and supervision claims cannot be  
17 used to circumvent NRS Chapter 41A's requirements governing professional negligence  
18 lawsuits when the allegations supporting the claim sound in professional negligence." *Id.*,  
19 136 Nev. Adv. Op. 39 at 7, 2020 WL 3885614 at \*3.

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

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

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

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

### 12 III. CONCLUSION

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

### 20 AFFIRMATION

21 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the  
22 preceding document does not contain the Social Security number of any person.

23 DATED this 15<sup>th</sup> day of August, 2020.

24 LEMONS, GRUNDY & EISENBERG  
25 Attorneys for Defendants

26 By: 

27 EDWARD J. LEMONS, ESQ.  
28 ALICE CAMPOS MERCADO, ESQ.

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. Ganer, 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

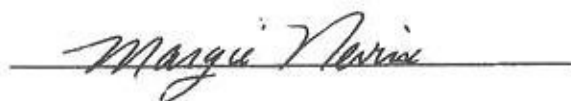
**BY PERSONAL SERVICE:** in an envelope to be hand delivered this date;

**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.





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 CAPITALIZE 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 ANONYMOUSLY ADMITTED UNDER THE PSEUDONYM "RYCEDARKEY, THIRTEEN (MPN: 4396625)-- 2016102680255104114."

IN ACCORDANCE THIS NOTICE OF ERRATA IS RESPECTIVELY SUBMITTED.

RESPECTFULLY SUBMITTED,

DATED: AUGUST 23, 2020

BY: David Alvarez Ventura #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 EXCATA

(Title of Document)

filed in District Court Case No. C.V.-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.

David Alvarez Ventura

(Signature)

8-23-2020

(Date)

DAVID ALVAREZ VENTURA

PLAINTIFF IN PRO SE

**CERTIFICATE 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, "PLAINTIFFS  
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  
PLAINTIFFS/In Propria Personam  
Post Office box 650 [HDSP]  
Indian Springs, Nevada 89018  
IN FORMA PAUPERIS:

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOEDAVID 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).<sup>1</sup> 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

<sup>1</sup> A pleading party "must set forth sufficient facts to establish all necessary elements of a claim" against the opposing party. *Hay. v. Hay*, 100 Nev. 196, 198 (1984) (citing *Johnson v. Travelers Inc. Co.*, 89 Nev. 467, 472 (1973)).

*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. Egtegar*, 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.<sup>2</sup> 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).<sup>3</sup>

<sup>2</sup> 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.

<sup>3</sup> “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.<sup>4</sup>

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.")<sup>5</sup>

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

<sup>4</sup> 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 *Brelant v. Preferred Equities Corp.*, 109 Nev. 842, 847 (1993); *Schmidt v. Washoe Cty.*, 123 Nev. 128, 133 (2007).

<sup>5</sup> 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

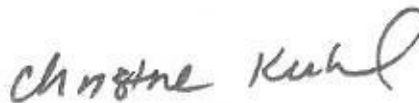
CERTIFICATE OF SERVICE

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.



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Judicial Assistant

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 4<sup>th</sup> 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 4<sup>th</sup> 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



Judicial Assistant

2540  
EDWARD J. LEMONS, ESQ.  
Bar No. 699  
eij@lge.net  
ALICE CAMPOS MERCADO, ESQ.  
Bar No. 4555  
acm@lge.net  
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 8<sup>th</sup> day of September, 2020.

LEMONS, GRUNDY & EISENBERG  
*Attorneys for Defendants*

By:   
EDWARD J. LEMONS  
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 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.



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

DAVID ALVAREZ VENTURA,

Plaintiff,

vs.

Case No. CV20-00866

Dept. No. 8

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

Defendants.

**ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE**

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

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

**BACKGROUND**

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



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

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

### 7 LEGAL STANDARD

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

### 19 DISCUSSION

20 Defendants rely on NRS 41A.071 to argue that Plaintiff's failure to include an affidavit  
 21 by a medical expert warrants dismissal the claim. NRS 41A.071 provides that a district court  
 22 shall dismiss a medical malpractice action, without prejudice, "if the action is filed without an  
 23 affidavit that ... [s]upports the allegations contained in the action." NRS. 41A.071.  
 24

25 In his opposition, Plaintiff asserts that he is exempt from the affidavit requirement  
 26 because his claim falls under the *res ipsa loquitur* exception of NRS 41A.100(1)(a). The relevant  
 27

28 <sup>1</sup> A pleading party "must set forth sufficient facts to establish all necessary elements of a claim" against the opposing party. *Hay v. Hay*, 100 Nev. 196, 198 (1984) (citing *Johnson v. Travelers Inc. Co.*, 89 Nev. 467, 472 (1973)).

1 *res ipsa loquitor* exception applies in cases where “[a] foreign substance other than medication  
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5 The *res ipsa loquitor* exception requires “some evidence” of one of the factual predicates  
6 enumerated in NRS 41A.100(1). *Johnson v. Egtedar*, 112 Nev. 428, 433-34 (1996). Although the  
7 Court does not consider matters outside the pleadings when ruling a motion to dismiss,  
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15 contradictions suggest Plaintiff’s allegations are unsupported and insufficient to meet the *res*  
16 *ipsa loquitor* exception. Unable to meet the *res ipsa loquitor* exception, Plaintiff is subject to the  
17 affidavit requirement.<sup>2</sup> Having not provided the required affidavit, this Court must dismiss  
18 Plaintiff’s complaint without prejudice. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122  
19 Nev. 1298, 1304 (2006).<sup>3</sup>  
20  
21  
22  
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25 <sup>2</sup> The Court concludes *Jaramillo v. Ramos*, 136 Nev. Adv. Op. 17 (2020) does not compel a different result. Here,  
26 unlike *Jaramillo*, Plaintiff has not pled “facts entitling [him] to NRS 41A.100(1)(a)’s *res ipsa loquitor* theory of  
negligence.” That case is, therefore, readily distinguishable.

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

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

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

14  
15 The Court further finds that no viable amendment would relieve Plaintiff from the  
16 affidavit requirement. Plaintiff reaches his allegations through the unreasonable inference that  
17 Defendants' malpractice is responsible for the presence of the instrument which; (1) was  
18 removed from an entirely different area of Plaintiff's body than Defendants' operated on; (2)  
19 failed to appear on an ultrasound performed a year after the surgery; (3) the ultrasound that first  
20 identified the instrument occurred two years after the alleged malpractice, and one year after the  
21 first ultrasound which failed to identify the instrument; and (4) the report of the second  
22 ultrasound states that the presence of the instrument is unlikely related to the surgery performed  
23 by Defendants. Because of this unreasonable inference to reach the allegations, the Court finds  
24

25 <sup>4</sup> The Court may consider exhibits attached to the pleading and incorporated by reference when ruling on a motion to  
26 dismiss without transposing the motion into a motion for summary judgment. *See Breliant v. Preferred Equities*  
*Corp.*, 109 Nev. 842, 847 (1993); *Schmidt v. Washoe Cty.*, 123 Nev. 128, 133 (2007).

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

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

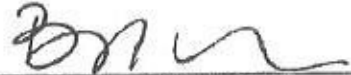
3 In sum, the inconsistencies in Plaintiff's allegations fail to invoke NRS 41A.100(1)'s  
4 medical expert affidavit exception and overcome Defendants' *Motion to Dismiss*. Moreover,  
5 adherence to Nevada Supreme Court precedent, the Court finds the Plaintiff is not entitled to  
6 leave to amend.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

8 **CONCLUSION**

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

12 **IT IS SO ORDERED.**

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

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15   
16 **BARRY L. BRESLOW**  
17 District Judge  
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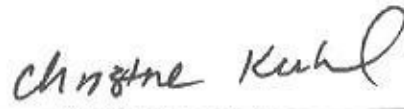
CERTIFICATE OF SERVICE

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.



Judicial Assistant

FILED

SEP 24 2020

JACQUELINE BRYANT, CLERK

By: [Signature]  
DEPUTY CLERK

DAVID ALVAREZ VENTURA  
 NDCC 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,

CIVIL ACTION NUMBER  
 CV-20-00866

DEPT NO. 8

VS.

PLAINTIFF'S NOTICE OF APPEAL  
 PURSUANT TO NEAP RULE 4

JOHN H. GANSEF, MD.,  
 ET AL.,

DEFENDANTS.

PLAINTIFF DAVID ALVAREZ VENTURA HEREBY NOTICES  
 ALL PARTIES OF RECORD OF HIS INTENT OF PURSUING APPELL-  
 ATE 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 RESPECT-  
 FULLY SUBMITTED.

RESPECTFULLY SUBMITTED,

DATED SEPTEMBER 21, 2020

BY:

[Signature]  
 (DAVID ALVAREZ VENTURA) 80079,  
 PLAINTIFF/ APPELLANT  
 IN PRO SE



**CERTIFICATE OF SERVICE BY MAILING**

I, DAVID ALVAREZ VENTURA, hereby certify, pursuant to NRCP 5(b), that on this 21  
day of SEPTEMBER, 2020, I mailed a true and correct copy of the foregoing, "PLAINTIFF  
NOTICE OF APPEAL PURSUANT TO NRP RUBEN"  
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 SEPTEMBER 2020

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