

APPENDIX A

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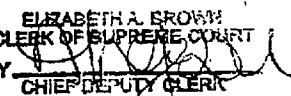
IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHEY L. ANDREW,
Appellant,
vs.
SHARON COSTER; NEVADA
DEPARTMENT OF CORRECTIONS;
AND THE STATE OF NEVADA,
Respondents.

No. 70836

FILED

DEC 22 2017

ELIZABETH A. GROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a motion to dismiss in a medical malpractice action. First Judicial District Court, Carson City; James E. Wilson, Judge.

Having considered the record and briefs on appeal, we affirm the judgment of the district court.¹ Appellant Richey L. Andrew is, and has at all relevant times been, incarcerated in the Northern Nevada Correctional Center. Andrew underwent surgery for prostate cancer, and, at some point around the time of surgery, he had a catheter inserted. In Andrew's complaint, he claimed that respondent Sharon Coster, a nurse, negligently and prematurely removed his catheter in direct opposition to the doctor's instructions.

¹Although Andrew alleged in his motion for waiver of an affidavit that NRS 41A.071 violates his First and Fifth Amendment rights and again stated in his docketing statement on appeal that NRS 41A.071 violates his First Amendment right, he waived these issues by not addressing them in his appellate briefs. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

This alleged medical malpractice, not following the doctor's orders, does not fall into one of the enumerated exceptions in NRS 41A.100(1), and thus, under NRS 41A.071, required a medical expert affidavit. Accordingly, we conclude the district court properly dismissed Andrew's complaint, as his claims were based on professional negligence, his claims did not involve *res ipsa loquitur*, and he failed to submit the statutorily required medical expert affidavit with his complaint. NRS 41A.071 (setting forth the expert affidavit requirement for medical malpractice claims); NRS 41A.100(1) (enumerating exceptions to the affidavit requirement—known as the *res ipsa loquitur* doctrine); *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005) (holding that NRS 41A.071's expert affidavit requirement does not apply if the claim falls into one of the enumerated *res ipsa loquitur* exceptions under NRS 41A.100(1)).

Andrew contends that he did not need to attach a medical expert affidavit to his complaint under the common law *res ipsa loquitur* doctrine because NRS 41A.100(1) did not replace the common law. The Legislature's codification of the *res ipsa loquitur* exceptions, however, replaced the common law. *See Johnson v. Egtdar*, 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 Peck v. Valley Hosp. Med. Ctr.*, 133 Nev., Adv. Op. ___, ___ P.3d ___ (2017). Alternatively, Andrew requests this court to adopt a new exception to the medical expert affidavit requirement for situations where nurses do not follow the directions of their supervising doctors. This issue involves policy questions that are more appropriately decided by the Legislature, and we thus decline his request to adopt such an exception. *See Renown Health*,

Inc. v. Vanderford, 126 Nev. 221, 225, 235 P.3d 614, 616 (2010) ("This court may refuse to decide an issue if it involves policy questions better left to the Legislature.")

Additionally, Andrew's status as an inmate or indigent person does not excuse his failure to attach the requisite affidavit to his complaint, nor does the affidavit requirement violate his equal protection or due process rights. *See Peck*, 133 Nev., Adv. Op. ___, ___ P.3d at ___.

Finally, Andrew argues that the district court incorrectly dismissed his complaint because it did not address his Eighth Amendment claim. In his complaint, Andrew claimed that Coster improperly removed his catheter "in a negligent and/or deliberate indifferent manner." Although deliberate indifference is a term of art associated with an Eighth Amendment claim, a reviewing court reviews allegations in a complaint not only by the words used but by the gravamen of the action. *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972). Andrew titled his complaint "Civil Action Medical Malpractice Negligence," and he alleged that Coster's conduct was negligent and amounted to medical malpractice. Although Andrew referenced deliberate indifference and his right to be free from cruel and unusual punishment, the essence of his complaint alleges medical malpractice negligence in how Coster removed his catheter, and thus, was properly dismissed for lack of an expert affidavit. *See Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). Additionally, a claim of negligence in treating a medical condition is not sufficient to state a claim for deliberate

indifference under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

cc: Hon. James E. Wilson, District Judge
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.
Attorney General/Carson City
Attorney General/Las Vegas
Carson City Clerk

APPENDIX B

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7 Affirmation pursuant to NRS 239B.030
The undersigned affirms that this
8 document does not contain the
personal information of any person
9

10 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
11 **IN AND FOR CARSON CITY**

12 RICHEY L. ANDREW,

13 Plaintiff,

14 vs.

15 STATE OF NEVADA, et al.,

16 Defendants.

Case No. 16 TRT 00010 1B

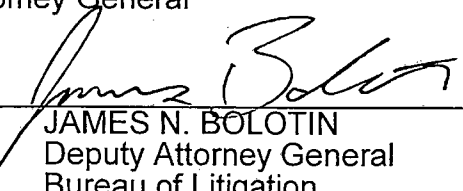
Dept. No. II

17 **NOTICE OF ENTRY OF ORDER**

18 PLEASE TAKE NOTICE that on June 29, 2016, the above-referenced court entered an
19 Order Granting Defendants' Motion to Dismiss. A copy of said order is attached hereto as
20 Exhibit 1.

21 DATED this 5th day of July 2016.

22 ADAM PAUL LAXALT
Attorney General

23 By: 
24

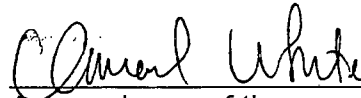
JAMES N. BOLOTIN
Deputy Attorney General
Bureau of Litigation
Public Safety Division

25
26 *Attorneys for Defendants*
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 5th day of July, 2016, I caused to be deposited for mailing, a true and correct copy of the foregoing, **NOTICE OF ENTRY OF ORDER**, to the following:

Richey L. Andrew #75578
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702



An employee of the
Office of the Attorney General

REC'D & FILED

2016 JUN 29 AM 11:08

SUSAN MERRIWETHER

CLERK

BY G. WINDER

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

RICHEY L. ANDREW,

Plaintiff,

vs.

SHARON COSTER, NEVADA DEPT. OF
CORRECTIONS, STATE OF NEVADA (real
party in interest)

Defendants.

Case No. 16 TRT 00010 1B

Dept. No. II

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before this Court is Defendants' Motion to Dismiss for Lack of Viable Medical Affidavit.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL HISTORY

Richey L. Andrew, ("Plaintiff") is an inmate incarcerated in the Nevada Department of Corrections (NDOC) and is currently housed at Northern Nevada Correctional Center (NNCC) in Carson City, Nevada. Plaintiff filed his state tort law medical malpractice Complaint on March 9, 2016.

II. COURT'S ANALYSIS

In an action for medical malpractice in the district court, NRS 41A.071 unambiguously requires that:

"the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action, 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 malpractice."

NRS 41A.071 (emphasis added).

1 "[T]he NRS 41A.071 affidavit requirement is a preliminary procedural rule subject to the
2 notice-pleading standard, and thus, it must be 'liberally construed . . . in a manner that is
3 consistent with [the Supreme Court's] NRCP 12 jurisprudence." *Zohar v. Zbiegien*, 130 Nev.
4 ___, ___, 334 P.3d 402, 406 (2014).

5 "The plain language of NRS 41A.071 makes no mention of professional negligence.
6 NRS 41A.071 refers expressly to 'medical malpractice,' which in turn is defined as pertaining
7 to physicians,¹ hospitals,² and hospital employees." *Egan v. Chambers*, 129 Nev. ___, ___,
8 299 P.3d 364 (2013) (quoting NRS 41A.009).

9 "A medical malpractice complaint filed without a supporting medical expert affidavit is
10 void *ab initio*, meaning it is of no force and effect. Because a complaint that does not comply
11 with NRS 41A.071 is void *ab initio*, it does not legally exist . . ." *Wheble v. Eight Judicial Dist.*
12 *Court*, 128 Nev. ___, ___, 272 P.3d 134, 137 (2012) (citing *Washoe Medical Center v. Dist.*
13 *Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (footnote omitted)). In other words,
14 the presence of a proper affidavit confers jurisdiction on the Court to hear a medical
15 malpractice case. See *Szydel v. Markman*, 121 Nev. 453, 461, 117 P.3d 200, 205 (2005)
16 (Hardesty, J., *dissenting*). Thus, this Court lacks jurisdiction to hear Plaintiffs case and must
17 dismiss it.

18 **III. ORDER**

19 The COURT FINDS that Plaintiff intended to file an action for medical malpractice, and
20 knew about the requirements of NRS 41A.071, as evidenced by his attached, self-attested
21 "Affidavit" wherein he explains why he did not include the required affidavit.

22 The COURT FINDS that Plaintiff failed to adhere to the plain language of NRS
23 41A.071, by filing an action for medical malpractice in the district court without an affidavit
24 from a medical expert supporting the allegations contained in the action.

25 ¹ Cf. NRS 41A.013 ("Physician" means a person licensed pursuant to chapter 630[, "Physicians,
26 Physician Assistants, Medical Assistants, Perfusionists and Practitioners of Respiratory Care,"] or 633[,
27 "Osteopathic Medicine,"] of NRS.).

28 ² Cf. NRS 449.012 ("Hospital" means an establishment for the diagnosis, care and treatment of human
illness, including care available 24 hours each day from persons licensed to practice professional nursing who
are under the direction of a physician, services of a medical laboratory and medical, radiological, dietary and
pharmaceutical services.).

1 The COURT FINDS that due to the missing affidavit, Plaintiff's Complaint is void *ab*
2 *initio* pursuant to NRS 41A.071, and with no legal claims remaining therein, subject to
3 dismissal.

4 This Court having considered the papers and pleading on file herein,
5 IT IS HEREBY ORDERED that Plaintiff's Complaint is DISMISSED WITHOUT PREJUDICE

6 DATED this 27 day of June 2016.

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8 HONORABLE JUDGE Wilson
9 First Judicial District of Nevada

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20 SUBMITTED BY:
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