

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ALLEN SMITH,  
Appellant,  
vs.  
JOSEPH P. BRANDL, M.D.,  
Respondent.

No. 46133

**FILED**

**MAR 27 2006**

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

This is a proper person appeal from a district court order denying appellant's motion for appointment of counsel and dismissing without prejudice appellant's complaint for failing to comply with NRS 41A.071. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Following his open heart surgery, appellant filed a medical malpractice action, alleging that he did not consent to the surgery. Appellant also filed a motion seeking appointment of counsel, which the court denied, finding that appellant was not entitled to appointed counsel for a civil negligence cause of action. Upon respondent's motion, the district court also dismissed without prejudice appellant's complaint, concluding that, because appellant had failed to file a medical expert affidavit with his complaint, and none of the exceptions listed under NRS 41A.100(1)(a)-(e) applied, dismissal without prejudice was required.

On appeal, appellant asserts that the district court rushed to dismiss his case without allowing him the opportunity to fully develop his argument or amend his complaint. He argues that expert testimony is not required in an informed consent case and, regardless, the consent form that he signed did not conform to NRS 41A.110's requirements. Appellant contends that, because a surgical procedure was erroneously performed on his lung, negligence is presumed under NRS 41A.100(1)(e), and, therefore, a medical expert affidavit is not required. Finally, appellant maintains

06-06360

that the district court abused its discretion by denying his motion for appointed counsel.

Under NRS 41A.071, the district court is required to dismiss without prejudice a medical malpractice action filed without a medical expert's affidavit, to support the allegations contained in the complaint. There are five exceptions—various forms of the *res ipsa loquitur* doctrine—to the general provision that expert testimony is required to prove negligence in a medical malpractice action.<sup>1</sup> With a *res ipsa loquitur* claim, the jury is permitted to infer negligence without expert testimony when, for example, a surgical procedure was performed on the wrong body part.<sup>2</sup>

In cases alleging a lack of informed consent, the claimant must provide expert testimony in order to demonstrate negligence.<sup>3</sup> Here, appellant's claims are grounded in a lack of informed consent, an allegation that does not fall under the *res ipsa loquitur* doctrine, and thus, he is required to comply with the expert affidavit requirements set forth under NRS 41A.071. And, although appellant asserts that he also stated a claim under NRS 41A.100(1)(e) because respondent operated on the wrong

---

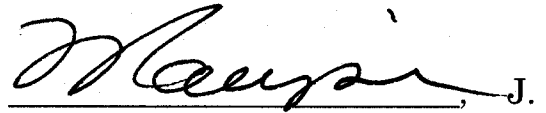
<sup>1</sup>See NRS 41A.100(1)(a)-(e).

<sup>2</sup>See *id.* (listing the five circumstances under which *res ipsa loquitur* applies); see also *Szydel v. Markman* 121 Nev. \_\_\_, \_\_\_, 117 P.3d 200, 204 (2005) (resolving the conflict between the *res ipsa loquitur* doctrine and NRS 41A.071 by holding that, because expert testimony is not required in a *res ipsa* case, a medical expert's affidavit is likewise unnecessary as a requirement to filing such a claim).

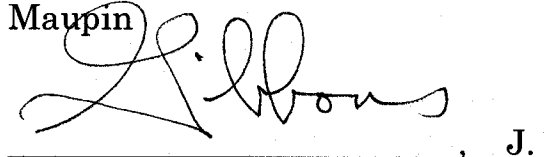
<sup>3</sup>See *Szydel*, 121 Nev. at \_\_\_, 117 P.3d at 205; see also *Brown v. Capanna*, 105 Nev. 665, 669, 782 P.2d 1299, 1302 (1989) (stating that "a plaintiff must show lack of informed consent through expert medical testimony").

body part, the record does not support this assertion.<sup>4</sup> Thus, because appellant's medical malpractice complaint was not filed with the required medical expert affidavit, the district court properly dismissed without prejudice appellant's complaint.<sup>5</sup> Accordingly, we

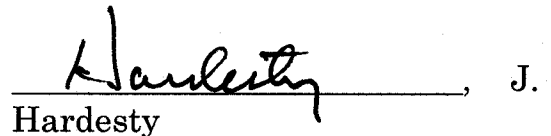
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

---

<sup>4</sup>Appellant alleged that his lung was punctured when respondent placed a drainage tube in appellant's chest cavity following open heart surgery. Thus, under NRS 41A.100(e), respondent properly performed a surgical procedure on the correct organ, *i.e.*, the heart and, assuming appellant's lung was injured during a post-operative drainage procedure, that injury would have occurred during the course of treatment to a part of the body proximate to the heart, making NRS 41A.100(d) inoperative here.

<sup>5</sup>Because, in accordance with NRS 41A.071, the district court's order dismissed *without prejudice* appellant's complaint, appellant's argument that the district court did not afford him the opportunity to develop his argument or amend his complaint is without merit.

Equally unavailing is appellant's argument that the district court abused its discretion by denying appellant's motion for appointed counsel. There is no right to counsel in a civil case. *Cf.* NRS 171.188; NRS 178.397 (providing that indigent defendants charged with a criminal offense are entitled to a court appointed attorney).

cc: Hon. Brent T. Adams, District Judge  
John Allen Smith  
Lemons Grundy & Eisenberg  
Washoe District Court Clerk