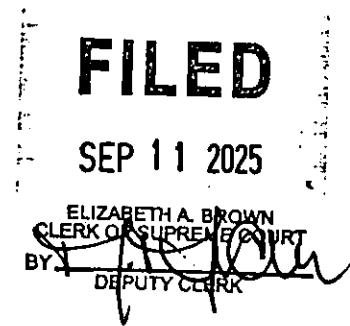


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PHILLIP CHARLES AUGHT, JR.,
INDIVIDUALLY AND AS FATHER
AND NEXT OF KIN FOR HIS MINOR
CHILD C.D.A.,
Appellant,
vs.
COMMONSPIRIT HEALTH, D/B/A
DIGNITY HEALTH - ST. ROSE
DOMINICAN HOSPITAL; DIGNITY
HEALTH MEDICAL GROUP NEVADA,
LLC D/B/A DIGNITY HEALTH - ST.
ROSE DOMINICAN HOSPITAL;
SEVEN HILLS HOSPITAL, LLC D/B/A
SEVEN HILLS BEHAVIORAL HEALTH
HOSPITAL; DIGNITY HEALTH - ST.
ROSE DOMINICAN HOSPITAL; AND
LYNDSEY VAN DER LAAN A/K/A
LYNDSEY KARI VANDERLAAN, M.D.,
Respondents.

No. 89348-COA



ORDER OF AFFIRMANCE

Phillip Charles Aught, Jr., appeals from a district court order granting a motion to dismiss in a tort action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Aught initiated a civil action against respondents, Commonspirit Health d/b/a Dignity Health - St. Rose Dominican Hospital; Dignity Health Medical Group Nevada, LLC d/b/a Dignity Health - St. Rose Dominican Hospital; Seven Hills Hospital, LLC d/b/a Seven Hills Behavioral Health Hospital; Dignity Health – St. Rose Dominican Hospital; and Lyndsey Van Der Laan a/k/a Lyndsey Kari Vanderlaan, M.D. (collectively respondents), who were involved in the treatment of his son

following a suicide attempt. The complaint alleged that on June 16, 2023, Aught's son was transported to St. Rose Dominican Hospital. The complaint asserted respondents failed to complete the necessary legal documentation for a mental health hold, resulting in unlawful detention and substantial emotional and physical trauma to Aught's son. Specifically, the complaint asserted that Aught's son should have been assessed upon admission to the hospital with the completion of a Minor Mental Health Crisis Packet. The complaint then alleged that Aught's son was falsely imprisoned and transferred to Seven Hills Behavioral Health Hospital. While Aught's son was at Seven Hills Behavioral Health Hospital, he purportedly sustained injuries because staff failed to supervise him. Aught asserted claims for professional negligence-res ipsa loquitur, false imprisonment, and intentional infliction of emotional distress. Aught failed, however, to include a medical expert affidavit. The next day, Aught filed an amended complaint, but again did not include an expert medical affidavit of merit. Respondents filed respective motions to dismiss and joinders, asserting that Aught's complaint arose out of professional negligence and required an expert affidavit, that the res ipsa loquitur exception to the expert medical affidavit requirement did not apply, and that his complaint failed to meet the requisite elements for false imprisonment and intentional infliction of emotional distress claims.

Aught moved to waive the expert medical affidavit requirement, arguing it is unconstitutional and violates his due process and equal protection rights. He also opposed the motions to dismiss. Aught also moved to amend his complaint for a second time to add a claim for negligence per se. Respondents filed oppositions to the motion to amend, asserting that a failure to comply with NRS 41A.071's affidavit requirement

mandated dismissal without leave to amend. After a hearing, the district court dismissed Aught's action with prejudice and denied his motion to amend, construing Aught's claims as sounding in professional negligence. The court found that Aught acknowledged the complaint was legally deficient by moving for a waiver of the affidavit requirement and conceding the same during the hearing, and that NRS 41A.071 mandated dismissal of the action. The district court further found that Aught could not amend his complaint to cure the deficiency. To the extent Aught challenged the constitutionality of the affidavit requirement, the court was not persuaded by this argument and dismissed the action with prejudice and further noted that none of the NRS 41A.100 res ipsa loquitor exceptions to the affidavit requirement applied. This appeal followed.

On appeal, Aught challenges the dismissal of his complaint. Aught asserts that he has since obtained an expert medical affidavit. He also notes that he asserted before the district court that NRS 41A.071's expert medical affidavit requirement is unconstitutional. Furthermore, Aught argues that he filed an amended complaint shortly before the court hearing to add a claim for negligence per se, which does not require an expert medical affidavit. Conversely, respondents assert in their answering briefs that the case was properly dismissed as Aught failed to attach an expert medical affidavit, Aught's allegations did not fall under any of the NRS 41A.100 res ipsa loquitor statutory exceptions, and his complaint only sounded in professional negligence. They also assert that the affidavit requirement is not unconstitutional.

"We review a district court order granting a motion to dismiss de novo." *Zohar v. Zbiegien*, 130 Nev. 733, 736, 334 P.3d 402, 404 (2014). In adjudicating a motion to dismiss, all factual allegations in the complaint

are deemed as true and all inferences are drawn in the plaintiff's favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A "complaint should be dismissed only if it appears beyond a doubt that [the plaintiffs] could prove no set of facts, which, if true, would entitle [them] to relief." *Id.* Under NRS 41A.071, a professional negligence action requires a supporting affidavit from a medical expert. *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). We also review a "district court's decision to dismiss [a] complaint for failing to comply with NRS 41A.071 de novo." *Yafchak v. S. Las Vegas Med. Inv., LLC*, 138 Nev. 729, 731, 519 P.3d 37, 40 (2022).

Professional negligence is "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. To determine how to characterize a claim, this court looks to the gravamen of each claim "rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 643, 403 P.3d 1280, 1285 (2017). Consequently, "[a]llegations of [a] breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for [professional negligence]." *Id.* at 642, 403 P.3d at 1284.

Here, Aught challenges the district court's dismissal of his professional negligence action, despite acknowledging that he failed to file an expert medical affidavit with his complaint, and he raises no specific argument to suggest that his complaint did not constitute a professional negligence action. As set forth above, NRS 41A.071 requires a supporting expert medical affidavit for professional negligence claims. *See Peck v. Zipf*,

133 Nev. 890, 892, 407 P.3d 775, 778 (2017) (stating that a complaint asserting professional negligence claims without a supporting medical affidavit is void ab initio). Although Aught asserts he has since obtained an expert medical affidavit, we are unpersuaded by this argument. When an action is filed against a provider of health care for professional negligence without an adequate expert medical affidavit as required by NRS 41A.071, the complaint is void ab initio and cannot be amended to cure the deficiency, such that the professional negligence claim must be dismissed. *See Washoe Med. Ctr*, 122 Nev. at 1300, 148 P.3d at 792. Moreover, to the extent Aught argues that NRS 41A.071's expert medical affidavit requirement is unconstitutional, he does not explain how NRS 41A.071 violated any of his recognized constitutional rights. *See Peck*, 133 Nev. at 895, 407 P.3d at 780 (explaining that "[t]he right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right"); *see also Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider arguments on appeal that are not cogently argued).

Furthermore, while Aught argues that he filed an amended complaint shortly before the district court hearing to add a claim for negligence per se, which does not require an expert medical affidavit, *see Ashwood v. Clark Cnty.*, 113 Nev. 80, 86, 930 P.2d 740, 743-44 (1997) (providing that a plaintiff may establish negligence per se if the defendant violated a statute intended to protect a class of persons to which the plaintiff belongs and the injury is of the kind the statute was intended to protect), his amended complaint did not identify any specific statute that was allegedly violated, *see, e.g., Vandermeer v. City of Henderson*, No. 53280, 2009 WL 3195296, at *1 (Nev. Sep. 9, 2009) (Order of Affirmance) (affirming

summary judgment on a negligence per se claim since “appellant failed to set forth which statutory provision supported a negligence per se claim”).

Moreover, Aught does not otherwise offer any explanation as to how the negligence per se claim was distinguishable from a professional negligence claim, such that an expert medical affidavit was not required. *See Szymborski*, 133 Nev. at 642, 403 P.3d at 1284 (“Allegations of [a] breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for [professional negligence].”); *see also Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Based on the reasoning set forth above, we conclude that the district court properly dismissed Aught’s complaint due to his failure to comply with NRS 41A.071’s expert medical affidavit requirement.


Furthermore, Aught argues that the district court improperly dismissed the action with prejudice. Notably, dismissal on the basis that a complaint did not comply with the expert medical affidavit requirement must be made “without prejudice.” NRS 41A.071. Accordingly, because Aught failed to attach an expert medical affidavit, the complaint was void ab initio and should have been dismissed without prejudice. *Id.*; *Washoe Med. Ctr.*, 122 Nev. at 1300, 148 P.3d at 792.

Nevertheless, such error was harmless. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (explaining that, to establish an error is not harmless and reversal is warranted, “the movant must show that the error affects the party’s substantial rights so that, but for the alleged error, a different result might reasonably have been reached”). The events alleged here occurred when Aught’s son was transported to St. Rose Dominican Hospital on June 16, 2023, and received treatment from respondents for approximately one week, and Aught initiated the action

with the filing of his complaint on May 13, 2024. Per NRS 41A.097(2), “an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of the injury or 1 year after the plaintiff discovers or through use of reasonable diligence should have discovered the injury, whichever occurs first” for claims before October 1, 2023. Given that the statute of limitations on Aught’s claims have expired, the dismissal without prejudice operated as one with prejudice. *See Wheble v. Eighth Jud. Dist. Ct.*, 128 Nev. 119, 123, 272 P.3d 134, 137 (2012) (“Where medical malpractice claims have been dismissed for failure to comply with the affidavit requirement of NRS 41A.071, NRS 11.500(1) cannot be used to refile the same claims beyond the statute of limitations”). Thus, we discern no basis for relief in this regard.

Therefore, we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

¹Insofar as Aught raises other arguments that are not specifically addressed in this order, we have considered the same and conclude they do not present a basis for relief

cc: Hon. Kathleen E. Delaney, District Judge
Phillip Charles Aught, Jr.
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Hutchison & Steffen, LLC/Las Vegas
Eighth District Court Clerk