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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 06/12/2012  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

ISAAC GOLTSMAN, an individual, ) 1 CA-CV 11-0329  
)  
Plaintiff/Appellant, ) DEPARTMENT B  
)  
)  
v. ) **MEMORANDUM DECISION**  
)  
STEVEN T. SWAGER, DMD; REED H. ) (Not for Publication -  
DAY, DMD, ) Rule 28, Arizona Rules  
) of Civil Appellate  
Defendants/Appellees. ) Procedure)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-033905

The Honorable Eileen S. Willett, Judge

**AFFIRMED**

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Isaak Goltsman, Pro Per Phoenix  
Plaintiff/Appellant

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Attorneys for Defendant/Appellee Steven T. Swager

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Attorneys for Defendant/Appellee Reed H. Day

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**T H O M P S O N**, Judge

¶1 Appellant Isaak Goltsman appeals the trial court's order dismissing his medical malpractice complaint against Dr. Steven T. Swager and Dr. Reed H. Day pursuant to Arizona Rule of Civil Procedure (Rule) 12(b)(6). For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

¶2 In February 2009, Swager performed a root canal on Goltsman's number 27 tooth. Shortly thereafter, Goltsman complained of pain in his tooth. After trying a series of pain medications, Swager concluded that the number 29 tooth needed to be removed. Another dentist removed the tooth, but Goltsman's pain persisted. Through the following months, Goltsman went through a series of treatments with other physicians for pain and numbness in his lower lip and chin. In December, Goltsman sent Swager a "Notification of Dental Malpractice Claim." Swager sent a letter in response denying any malpractice, stating that his treatment was proper and suggesting that the pain was coming from the number 28 tooth, which he said also needed a root canal. Goltsman instead sought treatment from Day, who had successfully treated him in 1994 for pain in his

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<sup>1</sup> When reviewing the trial court's dismissal order, we accept the facts alleged in the complaint as true, and we view those facts in the light most favorable to Goltsman as the non-prevailing party. See *Johnson v. McDonald*, 197 Ariz. 155, 157, ¶ 2, 3 P.3d 1075, 1077 (App. 1999).

lip and chin. Day concluded that Goltsman needed apicoectomies of the numbers 27 and 28 teeth. Day performed an apicoectomy on Goltsman's number 27 tooth, but the procedure did not help. Rather than finish treatment with Day, Goltsman requested that Day refer him to an oral surgeon that could "destroy" the nerve. Because Day was the only doctor in Arizona who performed this type of surgery, Day referred Goltsman to a physician in San Francisco.<sup>2</sup>

¶13 Goltsman filed this medical malpractice claim in December 2010. Pursuant to Rule 12(b)(6), Swager moved to dismiss for failure to comply with Rule 8(a) and Arizona Revised Statutes (A.R.S.) section 12-2603. Day also filed a motion to dismiss for failure to state a claim and a motion for more definite statement. Goltsman did not respond to the motion for more definite statement, and although he did file motions to amend, which the court granted, he did not take those opportunities to amend the substance of his claim.

¶14 Following oral argument, the trial court granted the motions to dismiss. The court found that Goltsman had failed to state a claim upon which relief could be granted, he failed to meet his burden of proof as set forth in A.R.S. § 12-563, and he failed to comply with the preliminary expert affidavit

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<sup>2</sup> It is unclear from the record whether Goltsman completed the treatment recommended by Day.

requirement under A.R.S. § 12-2603. The court also found Goltsman in violation of Rules 8(a)(2) and (e)(1), 10(b), and 12(e).

¶5 Goltsman timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. § 12-2101(A)(1) (Supp. 2011).

#### DISCUSSION

¶6 We review de novo an order dismissing a complaint for failure to state a claim. *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 402, ¶ 8, 142 P.3d 708, 710 (App. 2006). "In reviewing the trial court's decision . . . , we assume as true the facts alleged in the complaint and affirm the dismissal only if, as a matter of law, the plaintiff would not be entitled to relief on any interpretation of those facts." *Doe ex rel. Doe v. State*, 200 Ariz. 174, 175, ¶ 2, 24 P.3d 1269, 1270 (2001).

¶7 Arizona Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 does not permit a court "to speculate about hypothetical facts that might entitle the plaintiff to relief." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 420, ¶ 14, 189 P.3d 344, 347 (2008) (citation omitted). Medical malpractice is established by showing a breach of the relevant standard of care and that the breach caused the plaintiff's injuries. A.R.S. § 12-563; see

*Seisinger v. Siebel*, 220 Ariz. 85, 94, ¶ 32, 203 P.3d 483, 492 (2009). The standard of care in a medical malpractice case is "that degree of care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs . . . ." A.R.S. § 12-563(1). The failure of the health care provider to follow the accepted standard of care must be the proximate cause of the plaintiff's injury. A.R.S. § 12-563(2). In reviewing the complaint, we find that Goltsman failed to state a claim upon which relief can be granted.

¶8 We first address Goltsman's allegations against Day. The complaint overall is difficult to follow, but the assertions against Day are even harder to decipher. Goltsman sought out Day's services a year after his pain commenced and after he had been unsuccessfully treated by several other physicians. The only alleged injury from Day's treatment we can glean from the complaint is that the apicoectomy performed on Goltsman's number 27 tooth did not relieve his pain. However, unsuccessful medical treatment is not necessarily synonymous with medical malpractice. Goltsman's complaint does not describe the applicable standard of care, how Day allegedly breached that standard of care, or how the alleged breach caused him injury. The trial court granted Goltsman an opportunity to be more definite by amending his complaint, but he failed to do so.

Even on appeal, Goltsman continues to make the same inadequate statements. We recognize that as a pro per litigant Goltsman may have difficulty understanding and complying with the rules. However, a party appearing without a lawyer is entitled to no more consideration than a party represented by counsel and is held to the same standards as an attorney. *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 16, 17 P.3d 790, 793 (App. 2000).

¶19 We next turn to Goltsman's contentions against Swager. Goltsman asserts that because his pain started after Swager performed the root canal that Swager "provided unprofessional treatment." Goltsman does not specify how Swager failed to exercise the care, skill or learning expected of a reasonable, prudent endodontist as required by § 12-563, or how Swager's treatment was the proximate cause of the injury. Goltsman failed to cure these deficiencies when given the opportunity. Consequently, we conclude the trial court properly dismissed Goltsman's complaint.

**CONCLUSION**

¶10 Based on the foregoing, we affirm the judgment of the trial court. Swager and Day are entitled to an award of costs upon compliance with Arizona Rule of Civil Appellate Procedure 21(a).

/s/  
JON W. THOMPSON, Judge

CONCURRING:

/s/  
Diane M. Johnsen, Presiding Judge

/s/  
Donn Kessler, Judge