

1 **III. LEGAL STANDARD**

2 **A. Review of the Magistrate Judge’s Recommendation**

3 This Court “may accept, reject, or modify, in whole or in part, the findings or
4 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a party
5 timely objects to a magistrate judge’s report and recommendation, then the Court is
6 required to “make a *de novo* determination of those portions of the [report and
7 recommendation] to which objection is made.” *Id.* The Court’s review is thus *de novo*
8 because Sun filed an Objection (ECF No. 6).

9 **IV. DISCUSSION**

10 Following a *de novo* review of the R&R and other records in this case, the Court
11 finds good cause to accept and adopt Judge Baldwin’s R&R in full.

12 Judge Baldwin recommends that the Complaint be dismissed because (1) it is
13 unclear as to whether Sun is seeking to represent an unnamed third-party, (2) the Court
14 lacks subject matter jurisdiction over this action, and (3) Nevada law—NRS § 41A.071—
15 requires medical malpractice/professional negligence claims be filed with a supporting
16 medical expert affidavit. (ECF No. 5 at 4-6.) Because § 41A.071 proves to be dispositive,
17 the Court declines to address Sun’s remaining objections to Judge Baldwin’s R&R and will
18 only address § 41A.071 below.

19 In the Objection, Sun states that before filing the Complaint, Sun had “consulted
20 with a licensed medical professional(s) . . . regarding the events[] that took place at the
21 hospital and are the base for actually filing this claim.” (ECF No. 6 at 2.) Sun further states
22 that she “[w]ill provide an Affidavit of Merit.” (ECF No. 6 at 2.) While the Court recognizes
23 *pro se* litigant are generally afforded leave to amend a complaint, the Court nevertheless
24 dismisses this action without leave to amend pursuant to Nevada law, NRS § 41A.071.

25 Sun’s claim of medical malpractice negligence sounds in state law and thus NRS §
26 41A.071 applies. *See Pacheco v. Soon Kim*, Case No. 3:14-cv-00124-MMD, 2014 WL
27 5460869 at *3 (D. Nev. Oct. 27, 2014) (“Medical malpractice is a state-law claim.”). Section
28 41A.071 expressly provides that “[i]f an action for professional negligence is filed in the

1 district court, the district court shall dismiss the action, without prejudice, if the action is
2 filed without [a supporting] affidavit” from a medical expert. The Nevada Supreme Court
3 has stated that the purpose of § 41A.071 was “to lower costs, reduce frivolous lawsuits,
4 and ensure that medical malpractice actions are filed in good faith based upon competent
5 expert medical opinion.” *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 148 P.3d 790, 794
6 (Nev. 2006) (quoting *Szydel v. Markman*, 117 P.3d 200, 204 (Nev. 2005)). When a medical
7 malpractice complaint is filed without a supporting medical expert affidavit, it is “void ab
8 inito, meaning it is of no force and effect.” *Id.* As such, “a complaint defective under NRS
9 [§] 41A.071 is void and cannot be amended.” *Id.*

10 Here, Sun brings this action against Defendants for medical malpractice
11 negligence. (ECF No. 1-1 at 4.) She alleges that the doctors and staff at Renown
12 performed an unnecessary colonoscopy and multiple medical procedures without consent
13 that led to serious complications. (*Id.*) Sun further alleges that Defendants failed to
14 properly care for a “high risk person,” respiratory therapists were incapable and careless,
15 and that they did not respond when called during hypoxia events that led to respiratory
16 stress. (*Id.*) Based on these allegations, and assuming the Court has jurisdiction over
17 Sun’s state-law claim,¹ the Court finds that Defendants’ actions are not a matter of
18 “ordinary negligence” in the medical context. *See Est. of Curtis v. S. Las Vegas Med.*
19 *Inv’rs, LLC*, 466 P.3d 1263, 1267-70 (Nev. 2020) (discussing when a claim sounds in
20 ordinary or professional negligence, and thus whether medical expert affidavit is required).
21 Rather, Sun’s claim raises questions of medical judgment beyond the realm of common
22 knowledge, therefore, Defendants’ alleged actions constitute “professional negligence”
23 triggering NRS § 41A.071’s affidavit requirement. *See id.* Because Sun failed to file a

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25 ¹Sun brought this action under diversity jurisdiction, 28 U.S.C. § 1332. (ECF No. 1-
26 1.) Federal courts are courts of limited jurisdiction. Under § 1332, federal courts may hear
27 cases in which a citizen of one State sues a citizen of another State or nation and the
28 amount at stake is more than \$75,000. The Court notes that in the Complaint, Sun states
that she is a citizen of Nevada, and that Defendants are either citizens of, reside in, or
incorporated in, the State of Nevada. (*Id.* at 1-3.) Conversely, in the Objection, Sun states
that she is “a resident of New York State and temporary living in Nevada.” (ECF No. 6 at
5.) However, it is clear from the Complaint that complete diversity does not exist in this
action as required by § 1332.

1 supporting medical expert affidavit with the Complaint, her claim is void and must therefore
2 be dismissed without leave to amend, by operation of law. *See Washoe Med. Ctr.* 148
3 P.3d at 793-94. Accordingly, Sun's Motion is denied as moot.

4 In light of Sun's *pro se* status, the Court notes that the dismissal of this action does
5 not prohibit Sun from filing a new complaint. Although the dismissal of this action is based
6 on failure to comply with NRS § 41A.071, the Court further notes that Judge Baldwin's
7 R&R recommends dismissal based on additional deficiencies in the Complaint. (See ECF
8 No. 5 at 3-6.) Those deficiencies should not be overlooked when filing a new complaint
9 merely because this order does not address them directly.

10 **V. CONCLUSION**

11 It is therefore ordered that Plaintiff Fuchsia Sun's Objection (ECF No. 6) is
12 overruled.

13 It is further ordered that the Report and Recommendation of Magistrate Judge Carla
14 L. Baldwin (ECF No. 5) is accepted and adopted in full.

15 It is further ordered that Sun's applications to proceed *in forma pauperis* (ECF Nos.
16 1, 4) are granted.


17 The Clerk of Court is directed to file Sun's Complaint (ECF No. 1-1).

18 It is further ordered that Sun's Complaint (ECF No. 1-1) is dismissed without leave
19 to amend. Dismissal is based on failure to comply with NRS § 41A.071.

20 It is further ordered that Sun's motion to extend time to file an affidavit of merit (ECF
21 No. 7) is denied as moot.

22 The Clerk of Court is directed to enter judgment accordingly and close this case.

23 DATED THIS 17th Day of November 2021.

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27 _____
MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE