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Summary of Mountain View Hospital v. Dist. Ct., 128 Nev. Adv. Op. No. 17

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Mountain View Hospital v. Dist. Ct., 128 Nev. Adv. Op. No. 17 (Apr. 5, 2012).[1]

CIVIL PROCEDURE – EXTRAORDINARY WRITS

Summary

The Court considered petitions for a writ of mandamus or prohibition challenging the district court's denial of a motion to dismiss a medical malpractice action for the plaintiffs' failure to comply with NRS 41A.071.

Disposition/Outcome

The Court granted a writ of mandamus to the petitioners, Mountain View, and ordered the district court to conduct an evidentiary hearing to determine whether the plaintiffs in the case satisfied the requirements of NRS 41A.071.

Factual and Procedural History

Real parties in interest, Laura and Edward Rehfeldt, filed a complaint for medical malpractice, which included a claim alleging that Laura contracted Methicillin-resistant Staphylococcus (MRSA) and went into septic shock after undergoing elective back surgery at Mountain View Hospital. The Rehfeldts claimed that the petitioners, Mountain View Hospital, Jason E. Garber, M.D., and Jason E. Garber, M.D., Ltd. (collectively Mountain View) committed medical malpractice by failing to provide a clean and sterile hospital environment and failing to properly care for Laura because she tested negative for MRSA before the surgery, but tested positive for the disease post-surgery.

The Rehfeldts offered Dr. Bernard T. McNamara's opinion letter supporting their claim and an attached "California All-Purpose Acknowledgment" form along with their complaint. Neither the opinion letter, nor the acknowledgement form indicated that Dr. McNamara's statements were made under oath, were true and correct, or that they were made under penalty of perjury. Although the acknowledgment was prepared and signed by a California notary public, Dr. McNamara signed only his letter.

The petitioners filed a motion to dismiss the Rehfeldt's complaint arguing that NRS 41A.071 required a supporting medical expert affidavit to be attached to a medical malpractice complaint, which was not satisfied by Dr. McNamara's opinion letter. The district court denied the petitioners' motion without discussion of the statute's affidavit requirement.

After the case was reassigned to a different department, Mountain View filed another motion to dismiss reasserting the NRS 41A.071 argument. The district court again denied the motion stating that Dr. McNamara's letter was the "equivalent of an affidavit." Mountain View filed this petition for a writ of mandamus or prohibition.

Discussion

[1] By Kendra Kisling

Generally, courts only grant extraordinary writ relief in cases "where there is not a plain, speedy, and adequate remedy" at law.[2] However, whether a court grants this relief is entirely within the court's discretion.[3] Additionally, courts generally do not entertain a writ petition that challenges the court's motion to dismiss denial, except where "the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law."[4]

The Court considered these writs because the petition presented an issue of first impression in Nevada and involved an unsettled and potentially significant question of law regarding NRS 41A.071's affidavit requirement for medical malpractice causes of action.

NRS 41A.071's Affidavit Requirement

NRS 41A.071 requires Nevada courts to dismiss medical malpractice actions filed without an accompanying affidavit.[5] Litigants may satisfy this requirement by submitting either a sworn affidavit or an unsworn declaration made under penalty of perjury.[6] First, a litigant using an affidavit to fulfill this requirement typically includes a jurat with the affidavit made under oath to prove this fact.[7] Second, a litigant using an unsworn declaration made under penalty of perjury must have the declarant sign the statement and include the following statement in the declaration, "I declare under penalty of perjury that the foregoing is true and correct."[8]

Dr. McNamara's opinion letter and notary acknowledgement did not include a traditional jurat. Other jurisdictions have held that although a jurat is evidence that an oath was properly administered, the absence of a jurat is not conclusive.[9] These courts held that plaintiffs may use outside evidence or evidence from another source, also known as *aliunde*, to fulfill the requirements normally filled with a jurat.[10] The Nevada Supreme Court agreed with these courts and held that if a litigant challenges the validity of a medical expert's statement for lack of jurat in a medical malpractice complaint, then the plaintiff may use other evidence to show that the expert's statements "were made under oath or constitute an unsworn declaration made under penalty of perjury."[11]

The Rehfeldt's compliance with NRS 41A.071

The Rehfeldts claimed that Dr. McNamara's letter and accompanying acknowledgement was a sworn statement in compliance with NRS 41A.071 because it "(a) is a written declaration made voluntarily; (b) it was confirmed by oath; and (c) it was made before a person having

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[2] NEV. REV. STAT. § 34.170; NEV. REV. STAT. § 34.330.
[3] Walters v. Dist. Ct., 127 Nev. ___, ___, 263 P.3d 231, 233 (2011).
[4] Buckwalter v. Dist. Ct., 126 Nev. ___, ___, 234 P.3d 920, 921 (2010).
[5] NEV. REV. STAT. § 41A.071.
[6] NEV. REV. STAT. § 53.045; *Buckwater*, 126 Nev. at ___, 234 P.3d at 922.
[7] A jurat is a "declaration by a notarial officer that the signer of a document signed the document in the presence of the notarial officer and swore to or affirmed that the statements in the document are true." NEV. REV. STAT. § 240.0035.
[8] NEV. REV. STAT. § 53.045(1).
[9] *See* Am. Home Life Ins. Co. v. Heide, 433 P.2d 454, 458 (Kan. 1967); King v. State, 320 S.W.2d 677, 678 (Tex. Crim. App. 1959).
[10] *Heide*, 433 P.2d at 458.
[11] Mountain View Hosp. v. Dist. Ct., 128 Nev. Ad. Op. No. 17, at 8 (April 5, 2012).

authority to administer such an oath."[12] Under NRS 240.002, an acknowledgement is defined as "a declaration by a person that he or she has executed an instrument for the purposes stated therein."[13] Therefore, an acknowledgement does not necessarily validate the truth of the statement or that it was made under penalty of perjury.

The notary signed Dr. McNamara's acknowledgement form to confirm that Dr. McNamara was the person who made the statement, but the notary's signature did not confirm the truth of Dr. McNamara's statement, nor that it was made under penalty of perjury. Thus, the Rehfeldt's submission lacks a proper jurat. Accordingly, the Court held that the notary acknowledgement did not satisfy NRS 41A.071. The Court also held, however, that upon remand, the Rehfeldts were permitted to submit additional evidence showing that Dr. McNamara "appeared before the notary public and swore under oath that the statements contained in the letter were true and correct."[14]

Conclusion

The Court granted Mountain View's petition for extraordinary relief in part by directing the clerk of court to issue a writ of mandamus instructing the district court to conduct an evidentiary hearing to determine if the Rehfeldts can prove that Dr. McNamara swore under oath that the statements in his opinion letter were true and correct. The Rehfeldt's claim for medical malpractice must be dismissed if the district court determines that the Rehfeldts did not comply with the affidavit requirement of NRS 41A.071.

[12] *Id.* at 9.
[13] NEV. REV. STAT. § 240.002.
[14] *Mountain View Hosp.*, 128 Nev. Ad. Op. No. 17, at 10.