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Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct., 132 Nev. Adv. Op. 53 (Jul. 28, 2016)

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Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct., 132 Nev. Adv. Op. 53 (Jul. 28, 2016)[1]

MEDICAL MALPRACTICE: EXPERT AFFIDAVIT

Summary

The Court determined that allegations raising the scope of informed consent rather than the absence of consent to a medical procedure, even when pleaded as a battery action, constitute medical malpractice claims, and are subject to the NRS 41A.071 requirement for a medical expert affidavit.

Background

Barrett had an intrauterine device (IUD) surgically implanted by Dr. McIntyre at Humboldt General Hospital. One year later, Barrett learned the IUD was not approved by the Federal Drug Administration (FDA) because it had shipped from Finland to a Canadian pharmacy rather than directly to the United States. The device was otherwise identical to FDA-approved IUDs. Barrett filed a complaint alleging negligence and battery. The complaint was without a supporting medical expert affidavit.

McIntyre and Humboldt moved to dismiss Barrett's complaint based on NRS 41A.071's requirement that an expert affidavit be filed with medical malpractice actions. The district court granted the motion to dismiss negligence claim, but denied the motion as to the battery claim, raising doubt whether Barrett's battery claim required the affidavit. Dr. McIntyre and Humboldt then petitioned the Supreme Court for a writ of mandamus directing the district court to dismiss Barrett's battery complaint under NRS 41A.071.

Discussion

Because Barrett generally consented and the scope of informed consent is implicated, the battery claim is actually a malpractice claim. NRS 41A.071 applies, and the medical expert affidavit is required.

Expert affidavit requirement in medical malpractice claims

NRS 41A.071 states that the district court shall dismiss a medical malpractice action without prejudice if filed without an affidavit.[2] First, the Court examined whether informed consent issues generally constitute medical malpractice, such that NRS 41A.071 requires a medical expert affidavit to be filed with the complaint. Then the Court considered whether a battery claim can be maintained when the claim arises out of a lack of consent.

Issues of informed consent typically constitute medical malpractice claims

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[2] The Court noted that the Legislature amended NRS 41A.071 during the 2015 legislative session and this opinion related to the 2002 version of the statute in effect at the time real party in interest filed her complaint.

NRS Chapter 41A governs medical malpractice actions in Nevada and NRS 41A.110 establishes when informed consent is conclusively given by a patient. The professional medical standard imparts a duty upon physicians to "disclose information that a reasonable practitioner in the same field of practice would disclose… [and] must be determined by expert testimony regarding the custom and practice of the particular field of medical practice."[3] Nevada follows the general rule in the United States that "a claim under the informed consent doctrine must be pled as a tort action for negligence, rather than as one for battery or assault."[4]

Informed consent claims usually require a medical expert affidavit, but claims that a treatment or procedure completely lacked patient consent do not

The Court previously suggested that a battery claim may not exist when a question of informed consent is presented,[5] but recognized here that if consent to a procedure is completely lacking, then requiring a medical expert affidavit is less justified. A question of informed consent is present when "the patient gives permission to perform one type of treatment and the doctor performs another."[6] The distinction between informed consent and battery claims is that in informed consent cases a physician may show that the omitted disclosure was not required within his medical community; battery cases must merely prove failure to give informed consent and a mere touching absent consent (no expert opinion regarding the standard of care required).[7] Battery claims, therefore, arise when plaintiffs claim not to have consented at all, no medical expert affidavit required. Accordingly, where general consent is provided for and obtained under NRS 41A.110 for a particular procedure, questions of whether the scope of that consent was exceeded require a medical expert affidavit.[8]

Barrett's complaint

Barrett's battery complaint does not allege a complete lack of consent. Her general consent to the procedure, but not a non-FDA approved IUD, requires an expert's opinion regarding the standard of care and the scope of consent.[9] Barrett's battery claim is actually a medical malpractice claim governed by Chapter 41A.

Conclusion

The Court granted McIntyre's and Humboldt's petition for extraordinary relief as to Barrett's battery claim and directed the clerk of the court to issue a writ of mandamus instructing the district court to set aside its earlier order, and grant McIntyre's and Humboldt's motion to dismiss in its entirety.

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[3] Smith v. Cotter, 107 Nev. 267, 272, 810 P.2d 1204, 1207 (1991).
[4] Mole v. Jutton, 846 A.2d 1035, 1042 (Md. 2004).
[5] Bronneke v. Rutherford, 120 Nev. 230, 234-35, 89 P.3d 40, 43 (2004).
[6] Cobbs v. Grant, 502 P.2d 1, 8 (Cal. 1972); *See also* Shuler v. Garrett, 743 F.3d 170, 173 (6th Cir. 2014) ("the threshold question in an informed consent case is whether the patient's lack of information negated her consent, the question in a medical battery case is much simpler: did the patient consent at all?").
[7] *Cobbs*, 502 P.2d at 8; *See also Bronneke*, 120 Nev. at 238, 89 P.3d at 45-46.
[8] *See Cobbs*, 502 P.2d at 8.
[9] *See* Brzoska v. Olson, 668 A.2d 1355, 1366 (Del. 1995) ("A patient's consent is not vitiated, however, when the patient is touched in exactly the way he or she consented.").