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4-25-2013

### Summary of Egan v. Chambers, 129 Nev. Adv. Op. 25

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*Nevada Law Journal*

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#### Recommended Citation

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## PROFESSIONAL NEGLIGENCE

### **Summary**

The Court reexamined whether NRS 41A.071's affidavit-of-merit requirement applies to claims for professional negligence, which it had answered only a few years ago in *Fierle v. Perez*.<sup>2</sup>

### **Disposition/Outcome**

The plain and unambiguous language of NRS 41A.071 indicates that professional negligence actions are not subject to its affidavit-of-merit requirement, which applies only to medical or dental malpractice actions.

### **Factual and Procedural History**

In 2007, respondent Gary Chambers, a doctor of podiatric medicine who was employed by respondent Southwest Medical Associates (SMA), Inc., performed several surgical procedures on appellant Tammy Egan's left foot. After complaints by Egan and several follow-up visits, Chambers discovered gangrene in Egan's foot and referred her to another podiatrist, who performed three other surgeries, including the amputation of her left great toe and part of her left foot. Following the procedures, the podiatrist concluded that she would be permanently disabled and unable to return to her job as a waitress.

In July 2008, Egan filed a district court complaint for professional negligence against Chambers and SMA. Because podiatrists are not considered "physicians" under NRS Chapter 41A for medical malpractice claim purposes, Egan filed the complaint without a supporting NRS 41A.071 affidavit of merit. While Egan's case was pending before the district court, this court issued its decision in *Fierle* concluding that an affidavit of merit is required under NRS 41A.071 for both medical malpractice and professional negligence complaints, including when such claims are asserted against a professional medical corporation. Relying on *Fierle*, Chambers and SMA moved to dismiss Egan's complaint in February 2010. The district court granted the motion and dismissed Egan's complaint without prejudice in July 2010. At that point, Egan was unable to file a new complaint because the statute of limitations for her claims had expired.

### **Discussion**

Justice Cherry wrote the unanimous opinion of the Court sitting en banc.

When a statute is clear on its face, the Court will not look beyond the statute's plain language.<sup>3</sup> NRS 41A.071 provides that the district court shall dismiss, without prejudice, actions

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<sup>1</sup> By Oscar Peralta.

<sup>2</sup> 125 Nev. 728, 219 P.3d 906 (2009).

<sup>3</sup> *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. \_\_\_, \_\_\_, 272 P.3d 134, 136 (2012).

for "medical malpractice or dental malpractice" filed without an affidavit of merit.<sup>4</sup> The plain language of NRS 41A.071 makes no mention of professional negligence. NRS 41A.071 refers expressly to "medical malpractice," which in turn is defined as pertaining to physicians, hospitals, and hospital employees.<sup>5</sup> "Physician" is defined as a person licensed under NRS Chapters 630 or 633.<sup>6</sup> Podiatrists are not licensed pursuant to NRS Chapters 630 or 633; rather, they are licensed pursuant to NRS Chapter 635.<sup>7</sup> Thus, NRS 41A.071 does not, by its plain terms, apply to Egan's claims against her podiatrist.<sup>8</sup>

The Court stated that while stare decisis plays a critical role in its jurisprudence,<sup>9</sup> its reading of NRS 41A.071 reveals no statutory ambiguity as previously suggested in *Fierle*. The Court recognized that its prior decision conflated "medical malpractice" with "professional negligence" when it read NRS 41A.071 to apply to all professional negligence claims. To the Court, applying *Fierle* to professional negligence claims would be substantially inequitable and contrary to the plain language of the statute, and so it overruled, in part, its holding in that case and clarified that NRS 41A.071 only applies to medical malpractice or dental malpractice actions, not professional negligence actions.<sup>10</sup> Therefore, the Court ruled that Egan's professional negligence action against Chambers and SMA must proceed on the merits.

## **Conclusion**

Under the plain language of NRS 41A.071, professional negligence actions are not subject to the statute's affidavit-of-merit requirement. To the extent that the decision in *Fierle* conflicts with this holding, it is overruled.

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<sup>4</sup> NEV. REV. STAT. § 41A.071 (2011).

<sup>5</sup> NEV. REV. STAT. § 41A.009 (2011).

<sup>6</sup> NEV. REV. STAT. § 41A.013 (2011).

<sup>7</sup> See NEV. REV. STAT. § 635.050 (2011).

<sup>8</sup> See *Morrow v. Eighth Judicial Dist. Court*, 129 Nev. \_\_\_, \_\_\_, 294 P.3d 411, 414 (2013) ("[I]n the face of that plain language, we cannot come to another construction.").

<sup>9</sup> *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 653, 173 P.3d 734, 743 (2007).

<sup>10</sup> *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (when governing decisions prove to be "unworkable or are badly reasoned," they should be overruled).