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Recommended Citation

Mott, Joseph, "Summary of Webb v. Clark County School District, 125 Nev. Adv. Op. No. 47" (2009).
Nevada Supreme Court Summaries. 352.
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Webb v. Clark County School District, 125 Nev. Adv. Op. No. 47 (Oct. 8, 2009)¹

Tort Law – Affirmative Defenses and Recovery of Medical Expenses

Summary

Appeal from Eighth Judicial District Court ruling that (1) the Paul D. Coverdell Teacher Protection Act of 2001 (Coverdell Act) is an affirmative defense and (2) expenses for psychological services rendered by an unlicensed person are recoverable.

Disposition

In addressing the first issue, the Court reversed the District Court's ruling that the Coverdell Act is not an affirmative defense and held that the Coverdell Act defense is waived if not affirmatively pleaded. In addressing the second issue, the Court reversed the District Court's damages award for psychological services and held that expenses for psychological services rendered by an unlicensed person are not recoverable.

Factual and Procedural History

Eric Webb (Webb) is a student at Mannion Middle School where Roger Phillips (Phillips) is a teacher for the Clark County School District (CCSD). While attempting to exit the school, Phillips claims he was pushed into the edge of an open door by Webb who pushed another student into Phillips. Phillips claims that when he saw that Webb was responsible, he placed his hand on Webb's chest, told Webb that pushing was dangerous, removed Webb's hand from the other student, and escorted Webb to the Dean's office. Webb claims that Phillips "pushed on [Webb's] chest, and choked him for what felt like thirty seconds", and that Phillips then grabbed Webb "by the nipple and took him to the Dean's office."

The following day, Webb visited his family practitioner and began receiving treatment from a physical therapist, and emotional and psychological treatment from David Hopper (Hopper) who was not a licensed psychologist. Hopper's bill totaled \$5,700.

Webb later filed suit against CCSD and Phillips in district court alleging negligence. CCSD and Phillips answered jointly presenting several affirmative defenses, but did not plead the Coverdell Act. The case went to arbitration where the arbitrator rejected Webb's allegations of choking, but found Phillips liable for the other injuries to Webb resulting from Phillips touching. The arbitrator awarded Webb past medical expenses for treatment by the family practitioner and physical therapist, but not for treatment by Hopper. The arbitrator stated that Hopper was not qualified to perform the services he provided to Webb. The award for Webb totaled \$18,250 for physical and emotional/psychological harm, and \$9,776.98 for costs and interest.

Shortly thereafter, CCSD and Phillips filed for a trial de novo. CCSD and Phillips submitted a motion for judgment as a matter of law alleging immunity from negligence based on the Coverdell Act, which immunizes teachers from liability when they take reasonable actions to

¹ By Joseph Mott

maintain an appropriate educational environment. Despite Webb's objection that the Coverdell Act defense must be affirmatively pleaded, the district court accepted CCSD's and Phillip's documents, and later found in favor of Webb. The district court found that the Coverdell Act applied, but that Phillips' actions fell outside its protections. The district court awarded Webb \$6,570 for past medical expenses, \$5,700 for expenses incurred with Hopper, and an additional \$15,000 in general damages.

CCSD and Phillips appealed the judgment, and Webb filed a cross-appeal challenging the district court's conclusion that the Coverdell Act is not an affirmative defense.

Discussion

The Coverdell Act as an Affirmative Defense

Webb's Standing to Appeal

The Court held that Webb lacked standing to appeal the Coverdell Act issue because Webb is not an "aggrieved party" entitled to appeal under Nevada Rule of Appellate Procedure (NRAP) 3(A)(a).² The Court relied on a previous holding that a party is aggrieved if "either a personal right or a right of property is adversely and substantially affected by a district court's ruling."³ Additionally, the court noted that "aggrieved" means a "substantial grievance"⁴ which includes "the imposition of some injustice, or illegal obligation or burden, by a court, upon a party, or the denial to him of some equitable or legal right."⁵ The Court stated that Webb was not an aggrieved party because the district court awarded him \$27, 270 in damages, and therefore, he was not denied any equitable or legal rights. Thus his appeal was dismissed. However, because CCSD and Phillips alleged that the Coverdell Act afforded them immunity, the Court nevertheless considered the issue of whether the Coverdell Act is an affirmative defense.

Standard of Review

The Court reviewed the affirmative defense issue de novo. The Court previously indicated that the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure (NRCP)⁶, and thus, de novo review is appropriate when considering a challenge to a district court's determination that a defense need not be affirmatively pleaded.

Failure to Timely Raise the Coverdell Act as an Affirmative Defense

The Court ruled that the Coverdell Act is an affirmative defense that is waived if not pleaded affirmatively. The Court cited *Clark County Sch. Dist. v. Richardson Constr.*, where the Court stated that "[a]llegations must be pleaded as affirmative defenses if they raise 'new facts and arguments that, if true, will defeat the plaintiff's...claim, even if all allegations in the

² NEV. R. APP. P. 3(A)(a).

³ Las Vegas Police Prot. Ass'n v. Dist. Court, 122 Nev. 230, 239-40, 130 P.3d 182, 189 (2006) (citations omitted) (quoting Valley Bank of Nev. v. Ginsburg, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994)).

⁴ Esmeralda County v. Wildes, 36 Nev. 526, 535, 137 P. 400, 402 (1913).

⁵ Las Vegas Police Prot. Ass'n, 122 Nev. At 240, 130 P.2d at 189 (quoting Esmeralda County, 36 Nev. At 535, 137 P. at 402).

⁶ See *Moseley v. Dist. Court*, 124 Nev. ___, ___ & n. 20, 188P.3d 1136, 1142 & n. 20 (2008) (concluding that the "interplay and interpretation of NRCP 25 and NRCP 6 are issues of law that we review de novo").

complaint are true.”⁷ The Court reasoned that the Coverdell Act is an affirmative defense in this case because it is a new argument that, if true, would defeat Webb’s claim, and that because CCSD and Phillips failed to assert the Coverdell Act in their answer, they waived the defense.

CCSD and Philips Liability

The Court went on to hold that despite the district court’s incorrect ruling regarding the affirmative defense issue, it ruled correctly regarding CCSD’s and Phillips’ liability. The Court then affirmed the district court’s award of damages for physical therapy and family practitioner visits stating that substantial evidence supports the district court’s finding that Phillips’ contact with Webb was excessive and unreasonable and that no medical evidence was presented disputing Webb’s claims.

Psychological Services Rendered by an Unlicensed Person

Standard of Review

The Court reviews this issue de novo because determining whether damages are legally recoverable is a question of law.⁸

Applicability of the Status of Hopper’s License

The Court rejected Webb’s argument that the status of Hopper’s license is inapplicable because he has a drug and alcohol counseling license by stating that Nevada Revised Statute (NRS) § 641.029 does not permit drug and alcohol abuse counselors to practice psychology without a psychology license.⁹ The Court additionally cited other Nevada statutes that expressly state that drug and alcohol abuse counseling does not include psychological practice.¹⁰

Recovery of Fees for Services Rendered by an Unlicensed Person

In addressing this issue, the Court relied on the Arizona Court of Appeals case *Sanfilippo v. State Farm Mut. Auto. Ins. Co.*, where the Arizona Court of Appeals held that insurance companies are not obligated to pay for physical therapy services rendered by unlicensed persons because of the public interest involved in licensing physical therapists, because the legislature specifically intended to set forth licensing requirements, and because there are dangers associated with the practice of physical therapy.^{11, 12} The Court explained that the Nevada legislature intended to prevent laypeople from practicing psychology when enacting legislation dealing with psychology.¹³ The Court also reasoned that public policy is furthered by mandated licensing in the medical field, and that as a result, it would be contrary to public policy to allow recovery of fees paid to unlicensed individuals for psychological services. By applying the

⁷ 123 Nev. 382, 393, 168 P.3d 87, 94 (2007) (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003)).

⁸ See *Vredenburg v. Sedgwick CMS*, 124 Nev. ___, ___, 188 P.3d 1084, 1088 (2008).

⁹ NEV. REV. STAT. § 641.029 (2007).

¹⁰ See *Id.* §§ 641C.065(2)(a)-(b), 641.390(1)-(2).

¹¹ 535 P.2d 38, 40 (Ariz. Ct. App. 1975), *abrogated by statute as stated in State Farm Mut. Auto. Ins. Co. v. Ariz. Bd. of Chiropractic Exam’rs*, 931 P.2d 426 (Ariz. Ct. App. 1996).

¹² The Court noted that although Arizona law has changed, effectively reversing the *Sanfilippo* ruling, the *Sanfilippo* rationale is still applicable to the present case.

¹³ See NEV. REV. STAT. ch. 641 (2007).

Sanfilippo case and Nevada statutory law, the Court ruled that expenses for psychological services rendered by an unlicensed person are not recoverable, and reversed the district courts award of damages for Hopper's services.

Conclusion

Because allowing the Coverdell Act defense would raise a new argument that, if true, would defeat Webb's claim, the Court concluded that the Coverdell Act is an affirmative defense. Accordingly, the Court held that because CCSD and Phillips failed to affirmatively plead the Coverdell Act, they waived the defense. Additionally, because of the inherent dangers associated with the practice of psychology, the direct addressing of psychology by the legislature, and public policy implications, the Court held that recovery of fees paid for psychological services rendered by an unlicensed person are not recoverable. As a result, the Court reversed the district court's ruling, and held that fees Webb paid to Hopper are not recoverable because Hopper was not a licensed psychologist.