10-11-2007

Summary of Martinez v. Maruszczak, 123 Nev. Adv. Op. No. 43

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Nevada Law Journal

Martinez v. Maruszczak, 123 Nev. Adv. Op. No. 43 (October 11, 2007)[1]

TORT LAW – STATE EMPLOYEE SOVEREIGN IMMUNITY

Summary

Appeal from a declaratory judgment in a medical malpractice case.

Disposition/Outcome

The Nevada Supreme Court reversed the district court's declaratory judgment against Dr. Martinez.

Factual and Procedural History

Robert Maruszczak died of accidental injuries at University Medical Center ("UMC") in Las Vegas while under the care of appellant, John Martinez, M.D. Dr. Martinez was a contract employee of the University of Nevada, School of Medicine ("UNSOM"). As a condition of his employment with UNSOM, Dr. Martinez agreed to join UNSOM's nonprofit medical practice plan entity, University of Nevada, School of Medicine Multispecialty Group Practice, Inc. ("MedAssociates").

MedAssociates coordinates and performs administrative services for its member physicians. MedAssociates not only manages the employment of its support staff, but also the employment of MedAssociates' member physicians and nurse practitioners. According to Dr. Martinez's agreement with MedAssociates, he could not provide private patient care outside the scope of his services with MedAssociates without the written approval of his direct supervisor, the UNSOM department chairman.

Mr. Maruszczak's heirs and his estate filed wrongful death claims for medical malpractice against Dr. Martinez. At trial, by stipulation, the district court converted the matter to an action for declaratory relief. The district court then resolved questions of whether and the extent to which Dr. Martinez was immunized from liability under NRS Chapter 41, which sets forth the conditions under which the State of Nevada waives sovereign immunity for itself, its political subdivisions and agencies, certain contractors, and public employees.

The district court ultimately issued a judgment declaring that Dr. Martinez was not entitled to the benefits of sovereign immunity. In particular, the court concluded (1) that Dr. Martinez's treatment of Mr. Maruszczak was a nongovernmental function performed on behalf of MedAssociates, a revenue-generating entity separate from UNSOM; and (2) that, regardless, "proprietary" activities of government, such as the practice of medicine, do not enjoy sovereign immunity protections, qualified or otherwise, as a matter of law.

Dr. Martinez appealed.

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[1] By Alissa Macomber

Discussion

In NRS Chapter 41, the Nevada Legislature has, with some exceptions, waived Nevada's sovereign immunity from liability.[2] Under this waiver, the State's liability for damages in tort actions is limited to $50,000 per claim.[3] One exception to the general waiver of immunity is set forth in NRS 41.032(2), which provides that the State and its employees are immune from liability for actions stemming from the exercise of discretionary functions or the performance of discretionary duties.

Dr. Martinez claims that, as a public employee performing discretionary functions in treating Mr. Maruszczak, within the scope of his public duties, he is completely immune from the estate's suit. Absent immunity, Dr. Martinez claims that his liability for damages is "capped" under NRS 41.035(1) at $50,000.

The estate asserts that the practice of medicine is not a governmental function protected by notions of sovereign immunity and that, in any event, Dr. Martinez was not a state employee because of his affiliation with MedAssociates and therefore is not entitled to sovereign immunity protection or the statutory damages cap. In the alternative, the estate argues that the capped damages for negligently performed public endeavors that compete with the private sector violates constitutional notions of due process and equal protection.

The Practice of Medicine is a Governmental Function

The estate argues that medical treatment is governed by distinct obligations discrete to the doctor-patient relationship and that governmental immunity does not apply. The estate seeks the Court to embrace a line of cases represented by *Keenan v. Plouffe*,[4] in which the Georgia Supreme Court determined that a state-employed physician was not entitled to official immunity because he was not acting in the course of his "official duties" in his treatment of a patient. The *Keenan* court concluded that the physician's obligations to his patient were independent of his official state duties,[5] and that the physician was subject to the common-law duty to treat his patient with reasonable care and skill.[6]

The line of cases represented by *Keenan*,[7] does not comport with the public policy behind Nevada's statutory qualified immunity, and these cases are not persuasive for six reasons. The six reasons are as follows:

(1) NRS Chapter 41 applies to all state employees, and concluding that employees of our state-funded universities are not entitled to immunity from tort liability would be contrary to the statutory scheme's purpose;

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[2] NEV. REV. STAT. § 41.031 (2000).
[3] NEV. REV. STAT. § 41.035 (2000); *see also* County of Clark v. Upchurch, 961 P.2d 754, 761 (1998).
[4] 482 S.E.2d 253 (Ga. 1997).
[5] *Id.*; *see also* Kiersch v. Ogena, 595 N.E.2d 296, 701 (Ill. App. Ct. 1992).
[6] *Keenan*, 482 S.E.2d at 257.
[7] *Keenan*, 482 S.E.2d 253.

(2) the need to ensure that publicly employed persons adhere to minimum standards of care is not limited to the medical profession;
(3) stripping state-employed physicians of their qualified immunity will not somehow ensure that they will exercise appropriate care in the treatment of their patients;
(4) there is no showing that publicly employed physicians are, as a group, substandard professional operatives;
(5) the fact that state-employed physicians may treat private paying patients does not undermine the need for public hospitals to generate income to offset the costs of providing large-scale indigent medical care; and
(6) the Court's adoption of the *Keenan* approach would mark a return to a standard for governmental immunity—the governmental-proprietary distinction—that the Court long ago rejected.

Therefore, government doctors fall within the scope of NRS Chapter 41's provisions. The Court turns it attention to the scope of Chapter 41's immunity protections by analyzing (1) whether the actor in question was a state employee or agent, and, if so, (2) whether the employee's acts fall within a statutory exception to the general waiver of sovereign immunity.[8]

Dr. Martinez is a State Employee

The estate contends that Dr. Martinez does not enjoy sovereign immunity as state employee because he acted on behalf of MedAssociates, rather than UNSOM when he treated Mr. Maruszczak. However, because Dr. Martinez was a paid employee of a state agency, UNSOM, he was a state employee. In *Gallegos v. S. Nev. Mem'l*,[9] the Nevada District Court held the liability cap under NRS 41.035 extended to any hospital employee who participated in the plaintiffs' treatment.

Like the doctors eligible for partial immunity in *Gallegos*,[10] Dr. Martinez is a state employee for purposes of NRS Chapter 41 when he treated Mr. Maruszczak. His participation in UNSOM's clinical administrative component, MedAssociates, was a condition of his state employment; he could not provide medical services outside of his scope of services with MedAssociates without written approval from his department chairman at UNSOM; and, while MedAssociates managed the employment of its support staff, UNSOM managed the employment of MedAssociates' member physicians and nurse practitioners. Indeed, UNSOM was responsible for compensating Dr. Martinez and for conferring other employment benefits.

Therefore, the district court's determination that Dr. Martinez was not a state employee entitled to the protections of sovereign immunity is reversed. The Court turns it attention to whether Dr. Martinez's acts fall within the discretionary-function exception to the state's waiver of sovereign immunity.

[8] *See* NEV. REV. STAT. §§ 41.032 - .03365 (2000).
[9] 575 F. Supp. 824 (D. Nev. 1983).
[10] *Id.*

Dr. Martinez's Acts Do Not Fall Within the Discretionary-Function Exception

NRS 41.032(2) provides complete immunity from claims based on a state employee's exercise or performance of a discretionary function or duty. The Nevada Supreme Court has created two separate tests for determining whether the discretionary-function exception applies, which result in inconsistent conclusions.

Under the first test, the planning-versus-operational test, immunity was available to protect policy decisions, made at the planning level of a project or government endeavor; however, decisions made in the course of operating the project or endeavor were deemed operational and not immune.[11]

Under the second test, the discretionary-versus-ministerial test, an officer's decisions or acts were immune if they were made using personal deliberation, decision, or judgment; however, ministerial decisions "amounting only to obedience to orders, or the performance of a duty in which the officer is left not choice of his own," were not immune.[12]

Because NRS 41.032(2) mirrors the Federal Tort Claims Act ("FTCA"), the Court looks to federal decisions to aid in formulating a workable test for analyzing claims of immunity under NRS 41.032(2).[13] The United States Supreme Court set forth a two-part test in *Berkovitz v. U.S.*,[14] and *U.S. v. Gaubert*,[15] called the *Berkovitz-Gaubert* test. Under this test, the discretionary-act immunity applies if the decision (1) involves an element of individual judgment or choice,[16] and (2) is based on considerations of social, economic, or political policy.[17] The Court adopts this test and further clarifies that decisions at all levels of government, including frequent or routine decisions, may be protected by discretionary-act immunity, if the decisions require analysis of governmental policy concerns.

Under the *Berkovitz-Gaubert* test, Dr. Martinez is not entitled to discretionary-function immunity. While a physician's diagnostic and treatment decisions involve judgment and choice, thus satisfying the tests first criterion, those decisions generally do not include policy considerations, as required by the test's second criterion.[18] Dr. Martinez did not engage in policy-making decisions in his treatment of Mr. Maruszczak and is therefore not entitled to immunity from suit under NRS 41.032(2).[19]

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[11] State v. Silva, 478 P.2d 591, 593 (Nev. 1970).
[12] Ortega v. Reyna, 953 P.2d 18, 23 (Nev. 1998); Maturi v. Las Vegas Metro. Police Dep't, 871 P.2d 932, 934 (Nev. 1994); Parker v. Mineral County, 729 P.2d 491, 493 (Nev. 1986).
[13] *See* 28 U.S.C. § 2680(a) (2000); *see also* Scott v. Dep't of Commerce, 763 P.2d 341, 343 (1988); Harrigan v. City of Reno, 475 P.2d 94, 95 (Nev. 1970); State v. Webster, 504 P.2d 1316, 1319 (Nev. 1972).
[14] 486 U.S. 531, 536-37 (1988).
[15] 499 U.S. 315, 322 (1991).
[16] *Berkovitz*, 486 U.S. at 536.
[17] *Gaubert*, 499 U.S. 315, 322-23, 325 (1991).
[18] *See* Sigman v. U.S., 217 F.3d 785, 795 (9th Cir. 2000); Fang v. U.S., 140 F.3d 1238, 1241-42 (9th Cir. 1998); Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 350 (Cal. 1976); Terwilliger v. Hennepin County, 561 N.W.2d 909, 913 (Minn. 1997).
[19] *See, e.g.*, Lather v. Beadle County, 879 F.2d 365, 367 (8th Cir. 1989); Collazo v. U.S., 850 F.2d 1, 2 (1st Cir. 1988); *see also* Goodman v. City of Le Claire, 587 N.W.2d 232, 238 (Iowa 1998).

While Dr. Martinez is not entitled to discretionary-function immunity, his status as a state employee entitles him to the statutory cap on tort damages set forth in NRS 41.035(1). The Court next addresses the constitutional challenges to the NRS 41.035(1) cap provision.

NRS 41.035(1) is Constitutional

The statutory cap on tort damages set forth in NRS 41.035(1) does not violate the equal protection clause and the substantive due process clause and is therefore constitutional. In *State v. Silva*,[20] the Court held that the damage cap as an amount, rather than as a percentage, did not unconstitutionally differentiate between similarly situated claimants in violation of the equal protection clause because equal treatment with regard to damages was unachievable. Furthermore, in *Arnesano v. State, Dep. Transp.*,[21] the Court rejected the substantive due process challenge because the statutory cap furthered the legitimate state interest in protecting the state treasury. The Court holds that protecting the state treasury remains a legitimate state interest, thus providing a rational basis for capping damages at $50,000 for allegedly negligent acts committed within the scope of state employment.

Conclusion

The practice of medicine is a state function. Dr. Martinez is a state employee. Therefore, his actions fell within the scope of NRS Chapter 41 when he treated Mr. Maruszczak. However, Dr. Martinez is not immune from liability, under NRS 41.032(2), because the discretionary-act exception does not apply under the *Berkovitz-Gaubert* test. Any damage award against Dr. Martinez is limited to $50,000 by NRS 41.035(1), given his status as a state employee.

[20] *Silva*, 478 P.2d 591.
[21] 942 P.2d 139, 142 (Nev. 1997).