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Summary of Szydel v. Markman, 121 Nev. Adv. Op. 47

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***Szydel v. Markman*, 121 Nev. Adv. Op. 47 (Aug. 11, 2005)¹**

CIVIL LAW – MEDICAL MALPRACTICE

Summary

Appellant Szydel brought a medical malpractice claim against Dr. Markman after he left a surgical needle inside her breast following a surgical procedure. Szydel and her husband filed a malpractice claim in district court and Dr. Markman moved to dismiss because the complaint was not accompanied by a medical expert's affidavit, as required by statute. Szydel claimed that her action was filed under Nevada's *res ipsa loquitur* statute and thus did not require a medical expert's affidavit.

Disposition/Outcome

The Nevada Supreme Court found that NRS 41A.071's expert affidavit requirement does not apply when the malpractice action is based solely on Nevada's *res ipsa loquitur* statute, NRS 41A.100.

Factual and Procedural History

On June 22, 2001, respondent Dr. Markman performed a mastopexy operation, or breast lift, on appellant Szydel. During the surgery, Dr. Markman left a surgical needle inside Szydel's right breast. At the time of Szydel's surgery, a Nevada statute required that medical malpractice claims be submitted to a medical-legal screening panel before proceeding in district court. In June 2002, the Nevada Legislature eliminated the prescreening requirement and required instead that medical malpractice actions be accompanied by an expert's affidavit. The changes were not effective until October 1, 2002, and claimants who filed a claim before the effective date could choose to opt out of the new legislative enactment and continue under prescreening statutes.

On September 27, 2002, Szydel filed a complaint with the medical-legal screening panel and elected to continue with the panel. Szydel's complaint was dismissed without prejudice due to a deficiency, which she never corrected. On June 6, 2003, Szydel and her husband filed a malpractice claim in district court and Dr. Markman moved to dismiss for failure to comply with NRS 41A.071, which requires that malpractice actions be accompanied by a medical expert's affidavit. Szydel opposed Dr. Markman's motion and argued that NRS 41A.071 was inapplicable to her complaint because this was a retained foreign object case under Nevada's *res ipsa loquitur* statute and therefore does not require expert testimony at trial.

The district court dismissed Szydel's claim without prejudice for her failure to obtain an expert's affidavit pursuant to NRS 41A.071 and Szydel now appeals.

¹ By Hagar Labouz

Discussion

The Nevada Supreme Court examined the plain language of the conflicting statutes² and found that NRS 41A.100(1)(a) specifically states that expert testimony is not required in instances where a foreign object is unintentionally left in the patient's body following surgery.³ A conflict is present because NRS 41A.071 requires dismissal whenever the expert affidavit requirement is not met.⁴ The Court states that enforcing NRS 41A.071's expert affidavit requirement in a res ipsa case would do little to advance NRS 41A.071's goal of identifying meritless malpractice lawsuits at an early stage. Further, requiring an expert affidavit in a res ipsa case is unnecessary because the factual situations presented in NRS 41A.100 are those where the negligence can be shown without expert medical testimony. In cases such as this, where a foreign substance is found in the patient's body, it would be unreasonable to require a plaintiff to obtain an expert affidavit when expert testimony is not necessary for the plaintiff to succeed.⁵ Thus, when a plaintiff files a claim that relies on the res ipsa loquitur doctrine, it is not subject to the expert affidavit requirement of NRS 41A.071.

Dissent Opinion

(Hardesty, J.) The dissent claims that the majority incorrectly compares NRS 41A.071, which is jurisdictional in nature, with NRS 41A.100, which is a rule of evidence. The two statutes differ in that NRS 41A.071 is intended to prevent frivolous lawsuits and ensure that medical malpractice cases are filed in good faith, while NRS 41A.100 is a rule of evidence creating a rebuttable presumption that a defendant is negligent in medical malpractice cases.

NRS 41A.071 is clear and unambiguous and provides that "the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit."⁶ While retained foreign object cases may often demonstrate the existence of medical malpractice, that is not always the case. Thus, if the affidavit requirement of NRS 41A.071 is not satisfied, the case should be dismissed.

Conclusion

The expert affidavit requirement in NRS 41A.071 does not apply to a res ipsa loquitur case under NRS 41A.100(1) because an expert affidavit is unnecessary in factual situations named under NRS 41A.100, where medical negligence is presumed. The district court's order dismissing the complaint is reversed and this case is remanded to the district court for further proceedings.

² State v. Quinn, 117 Nev. 709, 713 (2001); Cleghorn v. Hess, 109 Nev. 544, 588 (1993).

³ NEV. REV. STAT. 41A.100(1)(a) (2004).

⁴ NEV. REV. STAT. 41A.071 (2004).

⁵ Palanque v. Lambert-Wooley, 774 A.2d 501, 506 (N.J. 2001)

⁶ NEV. REV. STAT. 41A.071 (2004).