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Summary of Zohar v. Zbiegien, 130 Nev. Adv. Op. 74

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STATUTORY INTERPRETATION: NRS 41A.071

Summary

The Court determined that an expert affidavit attached to a medical malpractice complaint, which otherwise properly supports the allegations of medical malpractice contained in the complaint but does not identify all the defendants by name and refers to them only as staff of the medical facility, may still comply with the requirements of NRS 41A.071² “if it is clear that the defendants and the court received sufficient notice of the nature and basis of the medical malpractice claims.” In order to make this determination, courts should read a medical malpractice complaint and the plaintiff’s expert affidavit together.

Background

Petitioners, Zohar (minor) and his mother, filed a medical malpractice action against defendants, Zbiegien, M.D., Lovera, R.N., and various EmCare entities, arising out of the defendant’s allegedly negligent care in treating Zohar’s injured finger. The care resulted in Zohar receiving a partial amputation of his finger.

Pursuant to NRS 41A.071, the Zohars attached an expert affidavit from Dr. Bentley which stated that the medical staff at Summerlin Hospital, “including but not limited to the responsible physician or physicians, nurse or nurses, and/or ancillary emergency department staff” breached the standard of care when tending to Zohar’s finger. While Dr. Bentley’s affidavit provided a summary of Zohar’s treatment and described the records that were the basis of his opinions, it did not identify Zbiegien, Lovera, or the EmCare entities by name.

The defendants filed motions to dismiss, claiming Dr. Bentley’s affidavit did not comply with NRS 41A.071 because it did not specifically name them as negligent parties. The Zohars opposed the motions, and requested to amend their complaint and expert affidavit. The district court granted the defendant’s motions to dismiss and denied the Zohars’ motion to amend, reasoning that the Zohars knew the defendant’s identities at the time the complaint and affidavit were filed. The Zohars appealed.

Discussion

The district court erred in determining that the Zohars’ expert affidavit was inadequate to support the allegations of medical malpractice.

The Court reviewed NRS 41A.071 de novo. The parties disagreed about the level of detail required in an expert’s affidavit by NRS 41A.071 in order to adequately “support” a plaintiff’s allegations. Looking at the language in NRS 41.071, the Court concluded that the

¹ By Scott Lundy

² NEV. REV. STAT. § 41A.071 (2013) (“If an action for medical malpractice or dental malpractice is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice.”).

term “support” is ambiguous because it may be interpreted as requiring merely some level of support for the facts within the complaint, or it may be interpreted as requiring that the expert’s affidavit corroborate every fact within the complaint, including the defendant’s identities. Thus, the Court looked at the statute’s legislative history.

The legislative history showed that NRS 41A.071 was enacted to deter frivolous claims of medical malpractice while respecting the injured party’s right to pursue just compensation for his or her injuries. It did not reveal, however, the precise level of specificity that an expert affidavit must include in order to “support” the allegations in a medical malpractice claim. Accordingly, the Court went about interpreting NRS 41A.071 in a way that conforms to reason and public policy, while balancing the interests of both doctors and injured patients.

The Zohars argued that when read together, the affidavit and complaint made it clear that Dr. Bentley was referring specifically to the defendants. Furthermore, the Zohars argued that by reading Dr. Bentley’s affidavit together with the complaint, all defendants received sufficient notice of the medical malpractice claims against them. Defendants argued that the affidavit did not comply with NRS 41.071 because it failed to attribute negligent acts to them by name.

The Court concluded that, “courts should read the complaint and the plaintiff’s NRS 41A.071 expert affidavit together when determining whether the expert affidavit meets the requirements of NRS 41A.071.” The purpose of a complaint is to give fair notice to the opposing party³, while the purpose of the expert affidavit is to enable trial courts to determine whether the medical malpractice claim is meritorious. As such, the holding ensures only frivolous cases are being dismissed, furthers the notice-pleading standard, and complies with Nevada’s Rules of Civil Procedure.

The Court refused to adopt a strict interpretation of NRS 41A.071 as advocated by the defendant’s because parties were yet to conduct formal discovery. Therefore, such a “harsh” interpretation would deny future litigants the opportunity to press forward with their case when available records do not identify the negligent actor(s) by name. The Court also indicated that a majority of other states that require a similar expert affidavit do not require that the affidavit independently establish a claim of medical malpractice against each independent defendant.

Here, the district court erred by not reading Dr. Bentley’s affidavit together with the Zohars’ complaint to determine whether the affidavit satisfied NRS 41A.071. When read together, the Court concluded the Zohars’ complaint was not frivolous, and that the defendants were on sufficient notice. Thus, the district court had sufficient information to determine the merits of the case.

Conclusion

The Court held that “courts should read a medical malpractice complaint and the plaintiff’s NRS 41A.071 expert affidavit together when determining whether the affidavit satisfies the requirements of NRS 41A.071.” An expert affidavit that does not specifically name allegedly negligent defendants may still comply with NRS 41A.071 so long as it is clear that the defendants and the court received sufficient notice of the nature and basis of the claims. Accordingly, the Court granted the petitioner’s request and reversed the district court’s order of dismissal and remanded the case for further proceedings consistent with the opinion.

³ Breliant v. Preferred Equities Corp., 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) (Purpose of a complaint is to “give fair notice of the nature and basis of a legally sufficient claim and the relief requested.”).