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Summary of Sadler v. PacifiCare of Nevada, Inc., 130 Nev. Adv. Op. 98

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TORT LAW: NEGLIGENCE

Summary

The Court determined (1) when stating a claim for a negligence action in which medical monitoring is sought as a remedy, a plaintiff may satisfy the injury requirement by alleging that additional medical monitoring is reasonably required beyond the standard recommendations.

Background

Jack and Susan Sadler, on behalf of themselves and a proposed class of similarly situated individuals, (“Appellants”), filed a complaint in the district court against PacifiCare of Nevada, Inc., (“Respondent”), a health maintenance organization, asserting claims of negligence and negligence per se. Appellants claimed Respondent failed to perform its duty to establish and implement a quality assurance program to oversee the medical providers within its network. Specifically, Appellants alleged Respondent’s failure to provide oversight allowed certain providers to use unsafe injection practices, leading Appellants to be exposed to and/or placed at risk of contracting blood-borne diseases, requiring subsequent medical monitoring. As relief for their negligence claims, Appellants sought to establish a court-supervised medical monitoring program at Respondent’s expense.

Respondent moved for judgment on the pleadings, arguing that Appellant’s complaint failed to state a negligence claim as it did not state an “actual injury,” such as testing positive for a blood-borne illness. Appellants opposed the motion, arguing that a sufficient tort claim injury does not need to be an actual or physical injury. Appellants asserted Respondent’s negligence caused a legal injury, the need for medical monitoring, which was sufficient to support negligence claims. The district court granted judgment in favor of Respondent, holding that Appellants’ claims were based on a risk of exposure and were insufficient to allege an injury. This appeal followed.

Discussion

Medical Monitoring

In determining whether medical monitoring is a remedy for negligence, this appeal presents a question of first impression. This court previously considered medical monitoring in *Badillo v. American Brands, Inc.*² The *Badillo* court concluded there is no common law cause of action for medical monitoring in Nevada, but did not determine if medical monitoring is a viable remedy to a tort claim.³

¹ By Hayley Miller.

² 117 Nev. 34, 16 P.3d 435 (2001). Plaintiffs sought a judgment requiring defendant tobacco companies to pay for plaintiffs’ ongoing medical monitoring for tobacco-related diseases. *Id.* at 38, 16 P.3d at 438.

³ *Id.* at 41-44, 16 P.3d at 440-41.

Negligence

The Court focuses only on the third element of a negligence claim, injury.⁴ The district court's order and the parties' arguments in this case are limited to the sufficient pleading of a negligence injury. The remaining elements of the negligence claims are left for consideration by the district court on remand.⁵

Injury generally

Appellants argue they have alleged an injury based on actual exposure to infected blood through exposure to other patients' blood and/or risk of exposure to blood-borne diseases. Alternatively, Appellants argue that regardless of exposure, Respondent still caused injury by creating Appellants' need for ongoing medical monitoring. Conversely, Respondent argues Appellants must allege a present physical injury, such as contracting an illness.

The Court first considered the economic loss doctrine, and held Appellants have suffered more than purely economic losses.⁶ The Appellants' exposure and increased risk are noneconomic detrimental changes in circumstances that Appellants would not have experienced but for the negligence of Respondent.

The Court next considered if tort law requires the underlying injury to be physical. In Nevada, physical injury may be required to establish certain torts.⁷ However, as no authority specifically requires a party to allege a physical injury to state a negligence claim, the court looked to other courts for guidance.

Physical injury in the context of medical monitoring

Although several courts have determined medical monitoring is insufficient to constitute a present injury for a negligence claim, the Court did not take such a restricted view.⁸ The Restatement (Second) of Torts § 7(1) (1965) broadly defines an injury as "the invasion of any legally protected interest of another," as well as separately defines "harm" and "physical harm." The differing definitions indicate that injury is generally not limited to physical injury.

In accordance with the Restatement, a number of courts have determined the costs of medical monitoring may be recovered as either an independent claim or as a tort remedy.⁹ These cases hold that an individual has an interest in avoiding expensive diagnostic examinations like

⁴ The four elements of a negligence claim are duty, breach, causation of injury, and damages. *DeBoer v. Senior Bridges of Sparks Family Hosp.*, 128 ____ , ____ , 282 P.3d 727, 732 (2012).

⁵ Because the issue on appeal concerns only whether the Appellants' sufficiently alleged an injury, the court did not distinguish between the negligence and negligence per se claims.

⁶ The economic loss doctrine prevents recovery on an unintentional tort claim for "purely economic losses." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 73, 206 P.3d 81, 86 (2009).

⁷ See *Chowdhry v. NLVH Inc.*, 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993) (requiring physical injury to state a claim for Intentional Infliction of Emotional Distress).

⁸ These cases characterize medical monitoring claims as seeking compensation for the threat of future harm or for increased risk of harm. See *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 184 (Or, 2008); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 5 (Miss. 2007); *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001).

⁹ See e.g., *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Ayers v. Twp. Of Jackson*, 525 A.2d 287 (N.J. 1987).

avoiding a physical injury, and an invasion of that interest should be compensated.¹⁰ Further, allowing for medical monitoring recovery supports several important public policy considerations, such as deterring irresponsible handling of toxic chemicals, reducing costs by preventing or mitigating future illness, and promoting justice by requiring the responsible party to pay.¹¹

After consideration of these authorities, the Court recognized a plaintiff “may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present physical injury.” Although medical monitoring may involve economic loss, it is accompanied by noneconomic loss including unwillingly enduring unsafe injections, increases in risk of contracting latent diseases, and the need for extra medical testing. The Court also noted the previously mentioned policy reasons in allowing for recovery.

The Court did not agree with Respondent’s argument that a need for medical testing creates a broad legal injury that would invite superfluous litigation. To sustain a negligence claim a plaintiff will still be required to plead and prove the remaining elements, specifically that the defendant actually caused the need for medical testing through a breach of duty, and that the breach resulted in damages.¹²

The Sadlers’ Complaint

Appellants’ complaint sufficiently alleges an injury to state a negligence claim. Appellants asserted an injury of exposure to and/or risk of contracting blood-borne diseases. Alternatively, Appellants contend that the allegations regarding their exposure and a need for medical testing is a sufficient injury. Respondent claims an allegation of actual exposure is the minimum necessary to state a negligence claim and Appellants have failed to do so.

By using “and/or” Appellants failed to connect any particular plaintiff to the allegation of exposure.¹³ Thus, Appellants have not alleged actual exposure to a blood-borne disease. However, actual exposure is not required. In some medical monitoring cases the event creating the need for testing is a physical action creating a medical concern.¹⁴ Therefore, the relevant inquiry for medical monitoring is “whether the negligent act of the defendant caused the plaintiff to have a medical need to undergo medical monitoring.”

Although Appellants may not have alleged actual exposure to contaminated blood, they have alleged exposure to unsafe injection practices causing a need to undergo medical monitoring. This is an injury, as this exposure has caused medical testing unnecessary but for Respondent’s purported negligence. To require a specific exposure to a contaminant would unnecessarily limit recovery for medical monitoring.

¹⁰ *Friends For All Children*, 746 F.2d at 825.

¹¹ *Potter*, 863 P.2d at 824.

¹² Given the early stage of the district court action and the Court’s treatment of medical monitoring as a remedy instead of a cause of action, the Court declined to identify specific factors that a plaintiff must demonstrate to establish entitlement to medical monitoring as a remedy.

¹³ *Gregory v. Dillard’s Inc.*, 565 F.3d 464, 473 n.9 (8th Cir. 2009).

¹⁴ *Friends For All Children*, 746 F.2d at 819 (holding the need for medical monitoring was caused by “an explosive decompression and loss of oxygen.”)

Conclusion

Appellants have adequately alleged an injury in the form of exposure to unsafe injection practices resulting in a need for ongoing medical monitoring to detect any latent diseases that may result from those unsafe practices. The district court erred by granting Respondent's summary judgment based on the necessity of Appellants to allege a physical injury. The Court reversed the judgment on the pleadings and remanded the matter to the district court for further proceedings consistent with this opinion.

No physical injury needed to state negligence claim seeking medical monitoring remedy.