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### Summary of Mitchell v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 63076 (Apr. 30 2015)

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EVIDENCE: PRIVILEGE

**Summary**

Original petition for a writ of mandamus directing the district court to sustain the privileges asserted by a defendant doctor in a medical malpractice case to his personal counseling and treatment records was granted and denied in part. The court determined 1) Mitchell's family and marital therapy records were privileged 2) Mitchell's doctor-patient records were subject to NRS 49.245(3) patient-litigation exception, but 3) the doctor-patient records should have been reviewed *in camera* by the district court before discovery.

**Background**

Seven-year-old Alec Bunting, the real party in interest, experienced heart problems following a tonsillectomy performed by Dr. Mitchell, necessitating the use of a pacemaker. Bunting's guardian at litem Stella Ravella sued Mitchell for medical malpractice and Mitchell's employer for negligent hiring and supervision. Ravella's complaint alleges Mitchell mis-administered anesthesia during surgery due to drug addiction, and Mitchell's employer should have known of his addiction and prevented him from performing surgeries. Mitchell maintains he never performed surgeries under the influence of drugs, but three months after the tonsillectomy Mitchell was arrested and convicted for domestic violence under the influence of drugs and for driving under the influence. In depositions, Mitchell revealed he pursued marriage counseling and substance abuse treatment by two different doctors.

Ravella alleges that Mitchell was under the influence of drugs when he operated on Bunting and that Mitchell's employer should have known of his addition. In order to prove her allegations, Ravella subpoenaed Mitchell's counseling and substance abuse treatment records. Mitchell objected on the grounds of doctor-patient privilege and family-therapist-client privileges.

Although extraordinary writs to review discovery orders are generally not available,<sup>2</sup> the Court found it appropriate here because the repercussions of direct disclosure of privileged information are not easily addressed by an appeal.<sup>3</sup> The Court found the present case presented an unsettled and important issue of statutory privilege law, and sought to clarify the law when it is the plaintiff who puts the defendant's physical or mental condition at issue, and the defendant asserts privilege.

**Discussion**

The court analyzed two different issues of statutory privilege: NRS 49.225 and NRS 49.247. The legal question of whether these confidential communications lost their

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<sup>1</sup> By Stacy Newman.

<sup>2</sup> Clark Cnty. Liquor & Gaming, Licensing Bd. v. Clark, 102 Nev. 654 (1986).

<sup>3</sup> Wardleigh v. Second Jud. Dist. Ct., 111 Nev. 345 (1995).

privileged status when Mitchell's drug addiction became relevant the to the claims is reviewed de novo.<sup>4</sup>

### *The Doctor-Patient Privilege*

A patient who voluntarily puts his or her mental or physical condition at issue in a lawsuit typically loses any doctor-patient privilege about that condition, as they are considered to have waived the privilege by raising the issue.<sup>5</sup> Many states, including Nevada, codified this at-issue waiver doctrine into a patient-litigant statutory exception.<sup>6</sup> Mitchell argues neither the at-issue waiver doctrine nor the statutory patient-litigant exception applies unless it is the patient his or herself who puts the physical or mental condition at issue.<sup>7</sup> In other words, Mitchell argues that denying Ravella's allegations about his physical or mental condition is not voluntarily putting those conditions at issue, and thus the at-issue waiver doctrine and patient-litigant exception is inappropriate.

The court agrees the at-issue waiver doctrine is inappropriate in the present case, but finds Nevada's statutory patient-litigation exception still applies to Mitchell's doctor-patient communications. The Court holds a plain reading of NRS 49.245(3) does not support a requirement that the patient must be the one to place his or her condition at issue for the exception to terminate the privilege, and the exception applies regardless of who raised the issue that triggered it.

Furthermore, the Court found that under NRS 49.015, the Court is obligated to constrain any non-constitutional privileges to those that the Legislature authorizes. The sparse legislative history suggests Mitchell's interpretation of the statutory patient-litigant exception was expressly rejected in favor of an exception that would apply regardless of who raised the issue. The legislature adopted the patient-litigant Model Rule of Evidence but struck language that would be most favorable to Mitchell's argument, suggesting that the Legislature did not want to limit the exception to claims the patient initiated.

The Court rejected the out of state court cases Mitchell used to bolster his argument and compared Nevada's patient-litigant exception statute to those of Texas and Utah, states with the most similar statutory language. The Court uses Texas and Utah's statutes to show that allowing any litigant to initiate the claims or defenses which trigger the exception does not reduce the privilege to the point of absurdity because the condition must be more than "merely relevant" to a claim or defense.<sup>8</sup> The Court also refuted Mitchell's claims that such an interpretation of NRS 49.245(3) is unfair, and declined to read in a limitation not stated.

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<sup>4</sup> Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 69 (2014).

<sup>5</sup> Kenneth S. Broun et. al., McCormick on Evidence § 103, at 641 (7th ed. 2013).

<sup>6</sup> NEV. REV. STAT. § 49.245(3)

<sup>7</sup> Mitchell cites in this appeal for the first time NEV. REV. STAT. § 458.280, which provides that records created at an alcoholism and substance abuse treatment center and confidential and "must not be disclosed without consent of the patient." The Court finds that because Mitchell did not make this argument during trial it is therefore waived.

<sup>8</sup> *Mitchell*, 131 Nev. Adv. Op at 12; *see also* R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994).

### *Element of a Claim or Defense*

Although the Court found the patient-litigant exception applies regardless of who raises it, the exception only applies if the condition of the patient is an element of a claim or defense in the proceeding. The Court defined an element as “part of a claim that must be proved for the claim to succeed,”<sup>9</sup> and that for a condition to be “part of” that element, the patient’s condition must a fact “to which the substantive law assigns significance.”<sup>10</sup>

Under this test, the Court found that allegations of Mitchell’s drug addiction was not an element of Ravella’s malpractice claim against him. Drug addiction was relevant only as an explanation of *why* Mitchell fell below a standard of care – not whether or not the care actually fell below the standard in the first place.<sup>11</sup> Thus, while Mitchell’s drug addiction is relevant to Ravella’s malpractice claim, it cannot be considered an element of the claim.

However, the Court found that Mitchell’s drug addiction was an element of Ravella’s negligent hiring and supervision claims because that claim requires Ravella prove that the clinic knew or should have known that Mitchell was unfit to perform surgeries.<sup>12</sup>

### *In Camera Review*

The Court recognizes that application of patient-litigant exceptions on behalf of someone else “demands close scrutiny,”<sup>13</sup> and a non-patient must demonstrate to a “reasonable certainty” that the records sought contain evidence material to the claim or defense asserted for the district court to proceed with an *in camera* review of them.<sup>14</sup> Even though Mitchell’s arrest record and admissions in depositions were sufficient for Ravella to charge that Mitchell may have been under the influence during the surgery in question, the district court should have reviewed the records *in camera* before making them discoverable.

### *Family Therapist-Client Privilege*

The Court found no basis existed to overcome the family therapist-client privilege in NRS 49.247 because neither Mitchell nor his wife put their counseling session at issue and the client-litigant exception for this privilege is much narrower than the patient-litigant exception.<sup>15</sup>

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<sup>9</sup> *Blacks Law Dictionary* 559 (8th ed. 2004).

<sup>10</sup> *RK. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994).

<sup>11</sup> In his concurrence, Justice Douglas disagrees that Mitchell’s addiction does not constitute an element and should have served as an independent basis to allow the records to be discoverable, with or without the negligent supervision or hiring claim.

<sup>12</sup> *See Hosey v. Presbyterian Church (U.S.A.)*, 160 F.R.D. 161 (D. Kan. 1995).

<sup>13</sup> *Mitchell*, 131 Nev. Adv. Op at 16.

<sup>14</sup> Cf. *Worthern*, 222 P.3d at 1149-50.

<sup>15</sup> NEV. REV. STAT. §49.247 states the client-litigant exception only applies when the actual treatment is at issue.

## **Conclusion**

As far as the medical records relating to the substance abuse treatment, the court conditionally granted the writ of mandamus and directed the district court to review Mitchell's doctor-patient records *in camera*. The district court was also directed to rescind its order rejecting the claims of family therapist-client privilege and keep those records confidential.