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William Nathan Baxter v. Dignity Health, et al, 131 Nev. Adv. Op. 76 (September 24, 2015)

Andrea Orwoll

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Recommended Citation

Orwoll, Andrea, "William Nathan Baxter v. Dignity Health, et al, 131 Nev. Adv. Op. 76 (September 24, 2015)" (2015). *Nevada Supreme Court Summaries*. 908.

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CIVIL PROCEDURE : PLEADING REQUIREMENTS

Summary

The Court considered an appeal from a district court order dismissing a medical malpractice complaint. The Court held that because NRS § 41A.071 creates threshold requirements for bringing medical malpractice suits, it must be construed consistently with the liberal pleading requirements. The Court reversed and remanded.

Background

Appellant filed a medical malpractice suit and, the next day, the medical expert's declaration as required under NRS § 41A.071. Together, the documents were served on the defendant. But the district court dismissed the complaint because the plaintiff had not physically attached the two documents and filed them together. Appellant challenged the dismissal.

Discussion

In deciding whether the district court should have dismissed the case under NRS § 41A.071, the Court relied on the intention of the statute—which is “to curb baseless malpractice litigation.”² The statute requires a sworn affidavit or a declaration from a medical expert made under penalty of perjury to accompany a medical malpractice complaint.³ It does not explicitly require such an affidavit to be physically attached to the complaint. But, the district court “shall dismiss the action . . . if the action is filed without an affidavit.”⁴ The Court has previously found tension between this statutory requirement and the liberal pleading requirements of the Nevada Rules of Civil Procedure.⁵ In addressing the tension, the Court has historically construed NRS § 41A.071 liberally, to be consistent with the NRCP and allow litigants their day in court.

Here, the question was whether the Appellant's complaint and the declaration “should be read together as sufficient to survive a motion to dismiss.”⁶ In a motion to dismiss, courts focus on the allegations, but need not confine their analysis to the four corners of the complaint. A court may consider unattached evidence if the complaint refers to it, the unattached evidence is central, and the parties agree upon its authenticity. NRCP 10(c) considers exhibits to be part of the pleading. Under this NRCP rule, the Court indicated that preexisting affidavits which are 1.) incorporated by reference in a complaint, 2.) filed and served with the complaint, and 3.) uncontested in their authenticity, may be considered “as part of the pleadings in evaluating a motion to dismiss.”⁷

¹ By Andrea Orwoll.

² *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76 at 2 (Sep. 24, 2015).

³ *Id.*

⁴ NEV. REV. STAT. § 41A.071 (2014) (emphasis omitted).

⁵ *Baxter*, 131 Nev. Adv. Op at 5.

⁶ *Id.* at 8.

⁷ *Id.* at 9.

Before appellant filed any document, he consulted an expert specialist to review his medical records and the complaint. This expert signed a declaration under penalty of perjury which specified that it would be attached to the complaint. The complaint stipulated that “at or about the time of the filing of [the] Complaint,” the Appellant would file the declaration.⁸ In addition to being incorporated by reference into the complaint, the declaration was in fact physically filed, a mere 20 hours after the complaint. Thus, the Appellant supported his complaint as required under NRS § 41A.071, both referencing the declaration in the body of the complaint (and vice versa) and physically filing the declaration. He satisfied both the statute’s procedural guidelines and its intention in bringing the malpractice suit in good faith. The separate physical filing did not negatively affect the respondents. Thus, in interpreting NRS § 41A.071 consistently with the Nevada Rules of Civil Procedure, the district court should have considered the declaration in deciding the motion to dismiss.

Conclusion

In considering a motion to dismiss a medical malpractice suit, a court should consider the complaint in conjunction with the expert affidavit or declaration required under NRS § 41A.071 not only if said document is physically attached to the complaint, but also if it is referenced in, and filed and served with, the complaint.

⁸ *Id.* at 3.