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Peck v. Zipf, 133 Nev. Adv. Op. 108 (Dec. 28, 2017)

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TORT LAW: MEDICAL MALPRACTICE

Summary

Under NRS 41A.071, a plaintiff's malpractice claim must be dismissed if the claim is not accompanied by an expert affidavit, but NRS 41A.100(1) states that the expert affidavit need not be submitted if the medical malpractice claim is argued under the *res ipsa loquitur* doctrine. Because the appellant failed to prove that the instrument left in his body was the result of surgery, the claim was properly dismissed in that the claim did not satisfy the elements to permit the statutory exception of the *res ipsa loquitur* doctrine. Likewise, NRS 41A.071 does not violate the Equal Protection or Due Process Clauses as applied to inmates or indigent people.

Background

Frank Peck, an inmate at High Desert State Prison in Indian Springs, was admitted at Valley Hospital in December 2013 under the care of Dr. David R. Zipf and Dr. Michael D. Barnum. Following his release, Peck claimed that he discovered a foreign object under the skin of his left hand, alleging that the doctors left a needle in his hand. Peck cited NRS 41A.100(1)(a) which states that expert testimony may not be needed in medical malpractice claims if the alleged harm "is a matter of common knowledge of laymen".² Peck, though, failed to argue that he indeed did have surgery. Thus, the district court granted summary judgment as Peck did not satisfy the requirements to invoke NRS 41A.100(1). Because he did not satisfy the requirements to invoke the *res ipsa* exception to the medical affidavit requirement and failed to include the medical affidavit with his malpractice claim, the claim was properly dismissed under NRS 41A.071.

Discussion

On appeal, Peck contends that the expert affidavit was not necessary under NRS 41A.100(1)(a). Furthermore, he argues that NRS 41A.071 is unconstitutional in that it violates his equal protection and due process rights. Ultimately, the court disagreed with Peck's contentions and affirmed the district court's decision.

Standard of Review

The district court may grant summary judgment "when material facts are not in dispute and the movant is entitled to judgment as a matter of law".³ Thus, this court will accept the factual allegations in the complaint as true and view them in a light most favorable to nonmoving party.⁴ The district court's dismissal will be reviewed *de novo*.

¹ By Jeff Chronister.

² *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992).

³ *Bonicamp v. Vazquez*, 120 Nev. 377, 379, 91 P.3d 584, 585 (2004).

⁴ *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008).

NRS 41A.071's affidavit requirement applies to Peck's complaint

NRS 41A.071 requires that a medical malpractice claim be accompanied by an expert affidavit and if the claim does not include it, the claim shall be rendered invalid. However, the expert affidavit requirement can be superseded if the claim falls under one of the enumerated res ipsa loquitur exceptions recognized in NRS 41A.100(1). Peck did not include an expert affidavit in his claim, and the claim will thus be rendered void unless it falls into one of the exceptions.

NRS 41A.100(1)(a) states that the expert affidavit is unnecessary if a "foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery". However, he failed to discuss the medical procedure or allege that the instrument left in his body occurred as a result of a surgery. NRS 41A.100(1)(a) does not define surgery. Since the statute did not define surgery, the court considered the plain and ordinary meaning of a word to reach the conclusion.⁵ Black's Law Dictionary defines surgery as "that branch of medical science which treats of mechanical or operative measures for healing diseases, deformities, disorders, or injuries".⁶ NAC 449.9743 defines "surgery" as "the treatment of a human being by operative methods". The court held that the intravenous needle is not an "operative method", and Peck's claim did not satisfy the NRS 41A.100(1)(a) res ipsa loquitur exception.

NRS 41A.100 codified and replaced the common law res ipsa loquitur doctrine

Peck also contended that the expert affidavit is unnecessary under the common law res ipsa loquitur doctrine. However, the Nevada Legislature codified the res ipsa loquitur doctrine and determined that an expert affidavit is necessary except for in the instance of one of the enumerated exceptions of NRS 41A.100(1)(a)-(e). The Nevada codification intended to replace the common law res ipsa loquitur doctrine rather than merely supplement it.⁷ The language of the statute is clear that NRS 41A.100(1)(a)-(e) refer to res ipsa loquitur exceptions in surgery, not other procedures. Allowing the common law res ipsa loquitur doctrine to supersede the codified NRS 41A.100(1)(a) would take the bite out of the statute and render it meaningless. The court denied this argument and affirmed the district court's use of the statute rather than the common law doctrine.

NRS 41A.071 does not violate equal protection or due process

Peck argued that the expert affidavit requirement is in violation to his equal protection and due process rights, citing that NRS 41A.071 1) creates an unfair distinction between medical malpractice plaintiffs and regular negligence plaintiffs, 2) prevents indigent people from having the opportunity to pursue their claims, and 3) makes it more difficult for inmates to prosecute medical malpractice claims. Statutes, though, are presumptively valid and a plaintiff who challenges a statute must shoulder the burden of proof and demonstrate the invalidity.⁸ When the law does not implicate either a suspect class or a fundamental right, then the statute need only be rationally related to a legitimate government interest.⁹

⁵ Jones v. Nev., State Bd. of Med. Exam'rs, 131 Nev. Adv. Op. 4, 342 P.3d 50, 52 (2015).

⁶ *Surgery*, BLACK'S LAW DICTIONARY (6th ed. 1990).

⁷ Johnson v. Egteadar, 112 Nev. 428, 433, 915 P.2d 271, 274 (1996).

⁸ Tam v. Eighth Judicial Dist. Court, 131 Nev. Adv. Op. 80, 358 P.3d 234, 237-38 (2015).

⁹ Zamora v. Price, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009).

No unconstitutional distinction exists

The right to pursue medical malpractice claims is not supported as a fundamental right.¹⁰ Likewise, Peck failed to argue that a suspect class is implicated because of NRS 41A.071. Since the law does not implicate either a suspect class or a fundamental right, then the statute need only survive the rational basis review. NRS 41A.071 aimed to deter frivolous malpractice suits, settling upon the statute to weigh the right of the plaintiff to litigate harms while incentivizing doctors to practice here in Nevada by lowering malpractice insurance premiums. Thus, the affidavits were supported by the legitimate government interest in protecting doctors against the malpractice crisis.

Court access remains reasonably unfettered

Peck cited *Barnes v. Eighth Judicial District Court*,¹¹ where the district court denied three indigent plaintiffs their NRS 12.015(1) motion to proceed with litigation without paying attorney fees because they did not have attorney affidavits to prove the complaints had merit. The statute specifically prevented indigent people from bringing a claim before the court without an attorney affidavit to show the case had merit. The current case is distinguishable in that NRS 41A.071 requires all medical malpractice claims to include an expert affidavit, not just the indigent or inmate populations. Likewise, the right to access the judicial process is available but not unfettered, and requiring an expert affidavit does not unfairly hinder the indigent. Thus, NRS 41A.071 does not unreasonably create a suspect class.

Inmates are not unconstitutionally precluded from pursuing medical malpractice claims

Peck also cited *Boddie v. Connecticut*¹² where the Supreme Court determined that the imposition of court costs upon indigent plaintiffs seeking divorce violated their equal protection rights. Medical malpractice claims do not carry the same societal importance as marriage. Furthermore, Peck cited *Bounds v. Smith*¹³ because there, the Supreme Court held that inmates have a constitutional right of access to the courts. That right does not include an unfettered access to civil lawsuits within the judicial system. Instead, inmates possess a right to resources that will help them fight their criminal sentences and to challenge the conditions of their imprisonment.¹⁴ Ultimately, prisoners are not a suspect class and there is no fundamental right to medical malpractice damages. For these reasons, the expert affidavit requirement is rationally-related to a legitimate government interest and does not violate the Equal Protection Clause.

Conclusion

The court affirmed the district court's holding and upheld summary judgment on behalf of Dr. Zipf and Dr. Barnum because Peck failed to include an expert affidavit in his claim, and his claim was insufficient to constitute the res ipsa loquitur exception to the expert affidavit requirement.

¹⁰ Tam, 131 Nev. Adv. Op. 80, 358 P.3d at 239.

¹¹ 103 Nev. 679, 748 P.2d 483 (1987).

¹² 401 U.S. 371 (1971).

¹³ 430 U.S. 817 (1977).

¹⁴ Lewis v. Casey, 518 U.S. 343, 355 (1996).