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Cummings v. Barber, 136 Nev. Adv. Op. 18 (April 2, 2020)

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RES IPSA LOQUITUR AND FAILURE TO REMOVE FROM PATIENT’S BODY FOREIGN
OBJECTS LEFT BEHIND DURING PRIOR SURGERY

Summary

In an opinion drafted by Justice Cadish, the Nevada Supreme Court considered whether a *res ipsa loquitur* statute, NRS 41A.100(1)(a), applies where a surgeon fails to remove a foreign object that was implanted and left inside a patient’s body during a *previous* surgery.² The Court concluded that the statute can apply in cases where the sole purpose of the surgery at-issue is to remove medical devices and hardware implanted during a previous surgery.

Background

This case arose out of a medical malpractice allegation against Dr. Annabel E. Barber, who did not remove surgical clips and wire fragments from the body of the plaintiff patient, Melissa Cummings, in 2014 during surgery. Cummings sued the doctor and the hospital, University Medical Center (UMC), for medical malpractice, alleging that they breached their professional standard of care. When Cummings filed her complaint, she did not attach a medical expert affidavit because she relied on NRS 41A.100(1)(a), which does not require medical expert testimony because of the “rebuttable presumption that the personal injury or death was caused by negligence . . . where evidence is presented that . . . [a] foreign substance . . . was unintentionally left within the body of a patient following surgery.”³

Dr. Barber provided an expert report along with her answer. The expert explained that the objects left in Cummings’ stomach were not surgical clips, but were actually wire fragments, and the expert said leaving them in Cummings’ body was not negligent. Cummings did not retain an expert to counter Dr. Barber’s expert’s testimony, and Dr. Barber and UMC moved for summary judgment. Dr. Barber contended that she intentionally left the material in Cummings’ body because removal would have been too risky. Dr. Barber argued that Cummings could not establish the facts giving rise to NRS 41A.100(1)’s presumption of negligence and thus needed to provide expert testimony.⁴

The district court granted summary judgment in Dr. Barber and UMC’s favor. The district court concluded that NRS 41A.100(1) did not apply as a matter of law, because the surgeon failed to remove an object that had been left in the patient’s body during a previous surgery.⁵ The district court concluded that Cummings needed to present an expert’s testimony to establish negligence. Because the district court concluded that NRS 41A.100(1) did not apply as a matter of law, the district court did not address whether Dr. Barber’s failure to remove the objects was intentional.⁶

¹ By Alexis Taitel.

² NEV. REV. STAT. 41A.100(1)(a).

³ *Id.*

⁴ NEV. REV. STAT. 41A.100(1).

⁵ *Id.*

⁶ *Id.*

Discussion

Statutory interpretation

Most cases involving foreign objects left in a patient's body arise when a patient discovers that an object was left in his or her body during the present surgery, not a previous one. Here, the objects left in Cummings' body during the second surgery were initially inserted into her body during her first surgery, making the case different than most that would typically implicate NRS 41A.100(1).⁷ Because of this distinction, the Court had to engage in statutory interpretation to determine whether NRS 41A.100(1) applies in cases when the foreign object was left in the patient's body during one surgery and then subsequently not removed during a second surgery.⁸

The Court first looked at the plain meaning of the statute.⁹ The Court discussed the Legislature's intent behind the statute, which was to relieve plaintiffs of the burden and expense of retaining expert witnesses when negligence can be shown through common sense (*res ipsa loquitur*).¹⁰ Based on the plain meaning and legislative intent of the statute, the Court concluded that the district court interpreted the statute too narrowly, excluding surgeries where foreign objects were left in the patient's body after having been inserted during a previous surgery. The Court particularly emphasized that the district court's interpretation would preclude the application of NRS 41A.100(1) in cases like Cummings', where the entire purpose of the second surgery is to remove hardware that had been inserted during the first surgery.¹¹

The Court declined to adopt the broad interpretation that Cummings advocated. Cummings urged the Court to interpret NRS 41A.100(1) to include *any* prior surgery, even when the purpose of the later surgery was not to remove a previously implanted device.¹² The Court concluded that this interpretation would lead to an absurd result, because it could open medical professionals to liability for surgeries that occurred long ago by other surgeons in unrelated circumstances. Thus, the Court declined to hold that a surgeon has an affirmative duty to discover foreign objects left behind by different surgeons in unrelated surgeries. The Court concluded that a jury could, based on common knowledge alone, find that Dr. Barber's failure to remove the hardware constituted negligence under NRS 41A.100(1).¹³

Summary judgment

The Court next addressed whether Cummings presented sufficient evidence to survive summary judgment. The Court concluded that Dr. Barber did not conclusively negate the statutory presumption of negligence or show a lack of evidence for the presumption to apply.¹⁴ The Court also concluded that Cummings was not required to provide expert testimony to survive summary judgment. The Court recently concluded that such evidence is not required at trial, so it would be unreasonable for it to be required at the summary judgment stage.¹⁵

⁷ *Id.*

⁸ *Id.*

⁹ *Kay v. Nunez*, 146 P.3d 801, 804–05 (2006).

¹⁰ *See Johnson v. Egtedar*, 915 P.2d 271, 274 (1996); *see also Szydel v. Markman*, 117 P.3d 200, 204 (2005).

¹¹ NEV. REV. STAT. 41A.100(1).

¹² *Id.*

¹³ *Id.*

¹⁴ *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 172 P.3d 131, 134 (2007).

¹⁵ *See Jaramillo v. Ramos*, 136 Nev., Adv. Op. 17, ___ P.3d ___, ___ (April 2, 2020).

Conclusion

The Court concluded that under NRS 41A.100(1), plaintiffs are not required to present expert testimony in cases where objects were left in a plaintiff's body during one surgery and were subsequently not removed during a related surgery.¹⁶ The Court reversed the district court, concluding that a genuine issue of material fact exists on the issue of negligence, and remanded for further proceedings.

¹⁶ NEV. REV. STAT. 41A.100(1).