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Jaramillo v. Ramos, 136 Nev. Adv. Op. 17 (Apr. 2, 2020)

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SUMMARY JUDGMENT – RES IPSA LOQUITUR

Summary

The Court found a plaintiff is not required to provide expert testimony to survive a defendant’s summary judgment motion when the plaintiff is relying on the res ipsa loquitur statute’s prima facie case of negligence. Rather, plaintiff must only establish facts that entitle it to a rebuttable presumption of negligence under Nevada’s res ipsa loquitur statute.² Whether a defendant can rebut the presumption through their own expert testimony or evidence is a question of fact for the jury.

Background

Maria Jaramillo (“Maria”) underwent a mammogram that showed a mass in her breast had grown since a previous exam. Dr. Ramos subsequently performed a wire localization in which she inserted a wire into Maria’s breast and removed the mass. In a follow-up appointment, Maria learned she still had a wire fragment in her breast and had it surgically removed. Maria later died of unrelated causes.

Rosaiset Jaramillo (“Jaramillo”), special administrator of Maria Jaramillo’s estate, sued Dr. Ramos for medical malpractice under Nevada’s res ipsa loquitur statute, NRS 41A.100. Jaramillo’s complaint asserted Dr. Ramos breached the professional standard of care when she unintentionally left the wire in Maria’s breast. The complaint was not supported by a medical expert affidavit because Jaramillo relied on the statute’s language that says expert testimony is “not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that...[a] foreign substance...was unintentionally left within the body of a patient following surgery.”³

In her answer, Dr. Ramos attached a declaration from her expert witness Dr. Andrew Cramer, that opined the wire left in Maria’s breast could occur without negligence. Jaramillo did not retain an expert to refute Dr. Ramos’ assertions, and Dr. Ramos moved for summary judgment. The district court granted summary judgment because Dr. Cramer’s declaration rebutted the statute’s presumption of negligence and Jaramillo had not retained an expert to refute the expert’s assertions.

Discussion

The Court reviewed the district court’s grant of summary judgment de novo. The Court would have to find no genuine issue of material fact for summary judgment to be appropriate as a matter of law.

NRS 41A.100 generally provides that a plaintiff must present expert testimony or other medical materials in a medical malpractice case in order to establish negligence.⁴ However, there

¹ By Jose Tafoya.

² NEV. REV. STAT. § 41A.100.

³ *Id.*

⁴ *See id.*

are five exceptions to this requirement that instead entitle the plaintiff to a rebuttable presumption of negligence. Jaramillo's reliance on NRS 41A.100(1)(a) regarding "foreign substance . . . unintentionally left within the body of a patient following surgery" is one of the five exceptions that creates a rebuttable presumption of negligence. Jaramillo included facts in her complaint regarding the wire left in Maria's breast that would entitle her to Nevada's *res ipsa loquitur* theory of negligence.

The district court interpreted NRS 41A.100 and Nevada caselaw incorrectly by concluding that Jaramillo was required to submit her own expert testimony to survive summary judgment. The only evidence needed to raise the rebuttable presumption of negligence is "some evidence of the existence of one or more of the factual predicates enumerated in [NRS 41A.100(1)(a)-(e)]."⁵ The Court stated it would be unreasonable to require expert testimony to survive summary judgment because expert testimony is not necessary for the plaintiff to succeed at trial. Therefore, NRS 41A.100(1) relieves a plaintiff's requirement of presenting expert testimony at summary judgment.

The Court then turned to the question of whether Jaramillo presented sufficient evidence that the facts giving rise to the presumption of negligence existed. The Court concluded she did. Jaramillo had included an ultrasound and mammogram following the wire localization procedure that showed the wire remained in Maria's breast. Dr. Ramos did not dispute this evidence, and Jaramillo therefore met her burden to show under NRS 41A.100(1)(a) that a foreign substance was left in Maria's body following the surgery in order for a rebuttable presumption to occur.

Dr. Ramos' expert declaration that a wire could be left without negligence merely created a factual question regarding the existence of negligence for a jury to consider, and did not entitle her to summary judgment. Furthermore, the expert declaration did not shift the burden of proof back to Jaramillo. The Legislature has determined that evidence that satisfies one of the five circumstances enumerated in NRS 41A.100(a)-(e) can be enough to show the tort was caused by negligence even without expert testimony. A reasonable trier of fact could therefore find for Jaramillo even without expert testimony.

The Court clarified however that this holding does not preclude summary judgment in all *res ipsa* cases brought under NRS 41A.100(1). The Court's example of a case where summary judgment may be appropriate is one in which the defendant presents evidence that disputes the existence of the facts that gave rise to the presumption of negligence. If a defendant such as Dr. Ramos showed that there was no foreign object in the body following the surgery, and such evidence left no genuine issue whether the presumption applied, the defendant would be entitled to summary judgment. Similarly, a defendant could also demonstrate that the plaintiff failed to present evidence that would give rise to the presumption, and if the plaintiff failed to respond with sufficient evidence, the defendant would again be entitled to summary judgment. Both of these potential methods to get summary judgment are absent in this case, and a genuine issue of material fact still exists.

Conclusion

The Court reversed the district court's grant of summary judgment and remanded the case. Jaramillo had presented enough evidence to satisfy one of the five enumerated circumstances that give rise to a rebuttable presumption of negligence. The declaration of Dr. Ramos' expert did not entitle her to summary judgment or force Jaramillo to retain her own expert in order to survive summary judgment.

⁵ Johnson v. Egtedar, 915 P.2d 271, 274 (1994).