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### Est. of Curtis v. S. Las Vegas Med. Inv'rs, 136 Nev. Adv. Op. 39 (July 9, 2020)

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TORT LAW: NEGLIGENCE, PROFESSIONAL NEGLIGENCE, COMMON KNOWLEDGE  
EXCEPTION TO MEDICAL EXPERT AFFIDAVIT REQUIREMENT

**Summary**

The Court applied the common knowledge exception to the expert affidavit requirement for an ordinary negligence claim that appeared to sound in professional negligence. The Court determined that a claim predicated upon ordinary negligence—such that a lay juror would not require medical expert testimony to evaluate—is excused from NRS 41A.071's medical expert affidavit requirement.<sup>2</sup> Here, an act such as administering medicine to the wrong patient is ordinary negligence rather than professional negligence.

The Court affirmed the expert testimony requirement for allegations that challenged the health care provider's medical judgment. Here, allegations of failing to monitor a patient sounded in professional negligence and required expert testimony to evaluate. Therefore, this allegation was not excused from the medical expert affidavit requirement.

**Background**

Nurse Dawson, a licensed nurse working for Life Care Center of South Las Vegas ("LCC") accidentally administered morphine, prescribed to another patient, to decedent, Ms. Curtis. At the direction of a physician, Nurse Dawson administered Narcan to Curtis to counteract the morphine. LCC monitored Curtis until 5pm that day. Curtis was found unresponsive at 11am the next day. Curtis passed away three days later due to morphine intoxication.

Curtis's Estate ("The Estate") sued LCC alleging that its mismanagement caused Nurse Dawson to administer the wrong medication and fail to monitor or treat Curtis, leading to Curtis's death.

The district court granted LCC's motion for summary judgment finding the gravamen of the allegations sounded in professional negligence and required an expert affidavit to be filed along with the complaint per NRS 41A.071.<sup>3</sup>

**Discussion**

In Nevada, professional negligence is the failure of a health care provider, such as a nurse, to use reasonable care, skill, or knowledge used by like professionals in similar situations on the job.<sup>4</sup> The court is required to dismiss a claim without a supporting medical affidavit for professional negligence against a health care provider.<sup>5</sup> The purpose of the requirement is for economic efficiency and to reduce suits lacking merit or a competent, good faith basis.

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<sup>1</sup> By Allison Mann

<sup>2</sup> NEV. REV. STAT. § 41A.071 (2020).

<sup>3</sup> *Id.*

<sup>4</sup> NEV. REV. STAT. § 41A.015 (2020).

<sup>5</sup> NEV. REV. STAT. § 41A.071 (2020).

*Direct liability claims against a nursing home facility do not excuse compliance with NRS 41A.071's affidavit requirement*

The Estate argued a supporting medical expert affidavit was not required for their particular allegations because the Estate alleged only ordinary negligence claims against LCC. The Estate argued LCC's managerial decisions were the direct cause of Curtis's death, and not professional negligence on the part of Nurse Dawson.

The Court disagreed with the Estate's arguments. The Court stated that where the facts of an ordinary negligent hiring, supervision, or training claim are necessarily linked to professional negligence, then that ordinary negligence claim should be categorized as vicarious liability and not a separate tort. The Court emphasized ordinary negligence claims shall not be used to evade the supporting medical affidavit requirements of professional negligence claims when such claims clearly sound in professional negligence.

The Estate's claims were necessarily connected to the underlying professional negligence and was therefore required to accompany the claim with a supporting medical affidavit.

*Whether the allegations in the complaint sound in ordinary negligence or professional negligence*

A claim sounds in professional negligence if it involves "medical diagnosis, judgment, or treatment."<sup>6</sup> If a jury requires a medical expert to explain the appropriate standards of care to evaluate a claim, then the claim is one of professional negligence. However, if jurors are able to use common knowledge to evaluate the nonmedical services provided by a healthcare worker, then the claim is likely ordinary negligence.

The Court recognized the common knowledge exception's narrow applicability to professional negligence claims not involving professional judgment. The common knowledge exception applies in situations where negligence is obvious to a lay juror without expert testimony. Such a claim will not be subject to Nevada's expert affidavit requirement.

The Estate's complaint against LCC was based on two underlying allegations: (1) Nurse Dawson administered the wrong medication to Curtis and (2) LCC did not thereafter appropriately monitor or care for Curtis. The Court concluded that the first allegation sounded in ordinary negligence while the latter was professional negligence.

*Nurse Dawson administering morphine to Curtis is a matter of ordinary negligence*

The threshold issue was whether Nurse Dawson's negligence in administering the wrong medication to Curtis constituted professional negligence and therefore triggered the expert affidavit requirement. The Court concluded Nurse Dawson was not required to use her professional judgment when she administered the wrong medication.

Even though administering medicine constituted medical treatment, the prescribing physician was the one who used professional judgment to ascertain what medication Curtis required. The claim that Nurse Dawson administered the wrong medication to Curtis required no expert testimony to evaluate and was therefore ordinary negligence.

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<sup>6</sup> See *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641, 403 P.3d 1280, 1284 (2017).

The Court reversed the district court's dismissal of the Estate's ordinary negligence claim based upon the Nurse's administration of the wrong medication to Curtis because the Court found this claim was not subject to the expert affidavit requirement.

*LCC's failure to monitor Curtis is a matter of professional negligence*

Another issue was whether the allegation that the facility failed to monitor Curtis was a professional negligence allegation. The Court concluded that it was.

The allegations could not be evaluated by a lay juror based merely on common knowledge. The allegations of failure to properly monitor Curtis entailed decisions requiring professional judgment. Here, expert testimony was vital to aid the jurors in evaluating the decision to prescribe Narcan, LCC's decision not to transfer Curtis to the hospital, and the decision of how and when to monitor Curtis after the accidental morphine administration.

Because the allegations were a matter of professional negligence, the Court affirmed summary judgment by the district court concerning the failure-to-monitor allegation.

*Res ipsa loquitur does not relieve the Estate of its duty to file an expert affidavit*

The Estate's alternative argument claimed their allegations fell within the *res ipsa loquitur* exception to the expert affidavit requirement. The *res ipsa loquitur* exception at issue applies where, during treatment, a part of the body not involved in the treatment was injured.<sup>7</sup>

The Estate's claim however did not fit within the exception because Curtis did not suffer injury to a distinct part of the body not addressed in the treatment. Here, the treatment in and of itself was the injury. The doctrine of *res ipsa loquitur* did not apply.

**Conclusion**

Accidental administration of medicine to the wrong patient was ordinary negligence, readily apparent to a lay juror without expert testimony. Under the common knowledge exception, readily apparent, ordinary negligence claims were not subject to a medical expert affidavit requirement. Therefore, the district court erred in granting summary judgment on this allegation and the Court reversed in part.

A medical affidavit was required under NRS 41A.071 where allegations challenge a health care provider's professional judgment. The district court correctly granted summary judgment as to the professional negligence allegation and the Court affirmed in part. The matter was remanded to the district court for further proceedings.

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<sup>7</sup> NEV. REV. STAT. § 41A.100(1)(d) (2020).