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Montanez v. Sparks Family Hosp., Inc. 137 Nev. Adv. Op. 77 (Dec. 9, 2021)

Anne-Greyson Long

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Medical Malpractice: NRS 41A.100 Unambiguous and When Medical Facilities Fall Under Medical Malpractice

Summary

NRS 41A.100 provides for an exemption from the medical expert affidavit requirement when "[a] foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery."² The exception is provided to relieve a plaintiff of the burden and expense of obtaining an expert witness in cases where negligence can be shown based on common knowledge. The Nevada Supreme Court affirmed the district court's dismissal of a medical malpractice and premises liability claim finding that that NRS 41A.100 is not ambiguous, and bacteria is not a "foreign substance" under the statute. The court also found that the case involved medical malpractice rather than negligence therefore both claims should have had a medical expert affidavit filed with the complaint.

Opinion

NRS 41A.071 allows for the district court to dismiss an action for professional negligence provided the action is filed without the necessary affidavit from a medical expert.³ However, NRS 41A.100(1)(a) lays out an exemption from the medical expert affidavit requirement when a foreign object (excluding medication or a prosthetic device) was unintentionally left in a patient's body following surgery.⁴ Here, the court finds that a foreign object does not include bacteria as Montanez argued and was therefore subject to the medical expert affidavit requirement. Because Montanez did not file a medical expert affidavit with her malpractice claim nor liability claim this court upheld the dismissal of her action. Additionally, the court concluded that Montanez's premises liability claim sounds in medical malpractice and were also subject to the affidavit requirement and void ab initio.

Facts and Procedural History

After Sophia Montanez had surgery on her right eye at Northern Nevada Medical Center (NNMC) in 2018, it became infected, leaving her permanently blind in that eye. Montanez claimed that NNMC was liable for medical malpractice and for a premises liability claim. Because Montanez failed to file a medical expert affidavit with her complaint, NNMC filed a motion to dismiss the complaint. Montanez argued that the affidavit was not required because the bacteria that caused her blindness was considered a foreign object under the statute and thus exempt from the affidavit requirement. Under Montanez's liability claim, she argued that the damage to her eye could have been caused by the failure to have a clean hospital/facility rather than a mistake that was medical in nature. Montanez argues that without proper discovery she would have no way to determine if the bacteria had entered her eye through professional

¹ Anne-Greyson Long.

² NEV. REV. STAT. § 41A.100(1)(a) (2014).

³ *Id.*

⁴ *Id.*

negligence or an unclean facility. The district court granted NNMC's motion to dismiss, finding that despite the ambiguity of NRS 41A.100(1)(a) Montanez's claim was not exempt from the affidavit requirement.

Discussion

Standard of review

The Court reviewed the district court's order granting a motion to dismiss Montanez's complaint under a rigorous, de novo standard of review.⁵ A complaint that only states a claim should be dismissed if the plaintiff is unable to prove any facts that would entitle the plaintiff to relief.⁶

Bacteria is not a foreign substance under NRS 41A.100(1)(a)

The Court found that the district court erred in concluding that the statute was ambiguous because it is clear that "foreign substance" refers to something purposefully implanted or used in surgery that was left in the body unintentionally. Bacteria fails into neither category.

Montanez's premises liability claim sounds in medical malpractice and therefore required an expert affidavit to be actionable

Additionally, the court found that Montanez's premises liability claims sound in medical malpractice and requires an expert affidavit to be actionable. Because there was a physician-patient relationship a duty to the plaintiff was triggered. The breach of duty gives rise to an action sounding in medical malpractice rather than simple negligence.⁷ The court points out several distinctions between medical malpractice and negligence. The court looks to the gravamen or substantial point or essence of each claim rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence. While Montanez claims that her injury could be linked to NNMC's failure to maintain a clean facility separate from any medical malpractice, the court finds the contrary. The court claims that the level of cleanliness that a medical provider must maintain is inherently linked to the provision of medical treatment.⁸ The court concludes that gravamen of the premises liability claim sounds in medical malpractice and not common negligence and therefore is also subject to the requirement of a medical expert affidavit

Conclusion

The Nevada Supreme Court upheld the district court's dismissal of both Montanez's claims for failure to submit a medical expert affidavit with her complaint.

⁵ Slade v. Caesars Entm't Corp., 132 Nev. 374, 379, 373 P.3d 74, 78 (2016).

⁶ Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

⁷ Papa v. Brunswick Gen. Hosp., 132 A.D.2d 601, 603 (N.Y. App. Div. 1987).

⁸ NEV. REV. STAT. § 439,865 (2014).