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Rives, M.D. v. Farris, 138 Nev. Adv. Op. 17 (Mar. 31, 2022)

Alix Goldstein

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Medical Malpractice Evidence Issues

Summary

In an opinion drafted by Justice Cadish, the court reversed a district court award of six million dollars. In this medical malpractice case, the district court abused its discretion by admitting evidence of another medical malpractice case involving the appellant, Barry James Rives, M.D. The other case was not relevant, and its probative value is outweighed by its prejudicial effect. But respondents argue that appellants waived their right to a new trial because they did not move for a new trial in district court. But the jurisdiction rules do not require this. Therefore, the Court reverses the district court's judgment, vacates the award of attorneys' fees and costs, and remands for a new trial.

Background

The respondent, Titina Farris, went to appellant Barry James Rives, M.D. to repair a hernia. James conducted two surgeries on Farris. During the second surgery, James noticed that a piece of mesh from the first surgery was stuck in Farris's colon. He freed the mesh and stapled close the holes left in the colon. After multiple CT scans, another doctor saw a leak in the colon, and Farris was diagnosed with sepsis. Although the other doctor attempted to correct this, Farris's sepsis continued, and she eventually developed drop foot in both her feet. She was now unable to walk unassisted. Farris, together with her husband, filed this medical malpractice lawsuit against Rives and Laparoscopic Surgery of Nevada LCC alleging Rives acted below the standard of care and Laparoscopic Surgery of Nevada was vicariously liable.

¹ By Alix Goldstein.

Before Farris's surgery, another patient of Rives, Vickie Center, sued Rives for malpractice during her hernia surgery. Although both matters were unrelated, the same defense firm represented both patients. In Center's case, Rives responded to an interrogatory to provide information about other lawsuits that he was involved in. He received the same interrogatory question in the *Farris* case. In the *Farris* case, Rives copied the same response he submitted in the *Center* case without including the *Center* case in the list.

When Rives was deposed in the *Farris* case, he again did not mention the *Center* case. But because defense counsel was representing Center as well, they interjected with questions about the *Center* case. Rives and defense counsel then discussed the *Center* case with respondents. Before trial, respondents moved for sanctions, arguing that Rives intentionally withheld information about the *Center* case and that respondents had little time to investigate the matter. Rives responded, arguing the omission was an accident and that it was not admissible because it was irrelevant, unduly prejudicial, misleading to the jury, and improper character evidence.

The district court held an evidentiary hearing and Rives testified that his counsel prepared the interrogatories and did not read them. The court allowed respondents to introduce the *Center* case at trial. Respondents mentioned the *Center* case at trial over 180 times, and the jury found Rives negligent and awarded attorneys' fees and costs. The court reduced the jury's award for total damages from roughly \$13,600,00 to \$350,000 per NRS 41A.035. The appellants appeal from the judgment and attorneys' fees and costs and respondents cross-appealed contesting the application of NRS 41A.035.

Discussion

Appellants did not waive their right to seek reversal and remand for a new trial on appeal by not filing a motion for a new trial in district court

Appellants argue that the district court erred when it admitted evidence of the *Center* case. This is cause for a reversal and remand for a new trial. Respondents contend that appellants had to move for a new trial in district court. Because they failed to do so, they have now waived that right. But the Court disagrees.

The Court has not addressed the issue of whether a party must both object to trial rulings and move for a new trial to preserve their ability to request a new trial on appeal. But the plain language of Nevada's NRAP 3A(a) rule and the preserved error rule convince the Court that these things are not required in order to preserve a party's ability to request a new trial on appeal.

First, NRAP 3A(a) states that a "party who is aggrieved by an appealable judgment or order may appeal from that judgment, with or without first moving for a new trial."² This rule expressly states that moving for a new trial is thus not required. And second, to preserve an issue for appeal, it is well-known that a timely objection is sufficient.³ The cases respondents present as support are either inapposite, distinguishable, or factually dissimilar. Therefore, the Court finds it was not required for appellants to move for a new trial as a prerequisite to preserve a claim of error for appellate review.

The district court abused its discretion by allowing evidence of the Center malpractice case, and the error is not harmless

Appellants assert that the district court erred in allowing evidence of the *Center* case at trial because it was irrelevant; a prior medical malpractice case does not influence the facts of the

² NEV. R. APP. P. 3A(a).

³ See *Thomas v. Hardwick*, 126 Nev. 142, 155, 231 P.3d 1111, 1120 (2010); *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988); NEV. REV. STAT. § 47.040(1)(a).

current case. Even if the *Center* case was relevant, they argue that its probative value is outweighed by its prejudicial effect. Respondents argue that the case is relevant because it establishes foreseeable harm. The Court agrees with appellants.

Rives' actions in a prior medical malpractice case does not make it more or less probable he acted in the same way in this case. So, respondent's alleged foreseeability issue is inapplicable (apart from establishing a standard of care through experts). Even if the evidence of the *Center* case was relevant, there would still be an issue of unfair prejudice because it was mentioned so often during trial. Although the *Center* case has similar facts, it stems from a different patient and a different surgery. Admitting this evidence can only confuse the jury.

Regarding respondent's request for sanctions for appellant's intentional concealment of the *Center* case, respondents acknowledge the *Center* case is useful to prove propensity. However, Nevada law prohibits propensity evidence.⁴ Respondents also argue that the *Center* case can concern bias, but they fail to explain this argument. They also argue the *Center* case should be admitted as modus operandi evidence, but modus operandi evidence is very narrow and often applied in criminal cases. The Court discounts the argument that the *Center* case is admissible to show knowledge as well. Respondent's mention of the *Center* case over 180 times at trial was not harmless. There was no probative value; it only confused the jury and likely lead to propensity conclusions.

Conclusion

The court held that it is not required to move for a new trial as a prerequisite to preserve a claim of error for appellate review. A party need only raise a timely objection. Additionally, evidence of another medical malpractice case is not relevant to a current medical malpractice case

⁴ NEV. REV. STAT. § 48.045(a); This case does not apply to the exception of this rule that allows propensity evidence of sexual offenses. NEV. REV. STAT. § 48.045(3).

and risks drawing propensity conclusions and confusing the jury. Here, the district court abused its discretion by admitting the Center case, and it was not a harmless error. The Court reverses the district court's judgment, vacates the award of attorneys' fees and costs, and remands for a new trial.