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MEDICAL MALPRACTICE: AN AFFIDAVIT OF SUPPORT MUST SPECIFY THE ACTS OF NEGLIGENCE OR EXPRESS AN OPINION ABOUT THE BREACHED STANDARD OF CARE; A FOREIGN SUBSTANCE DURING A PROCEDURE OTHER THAN SURGERY DOES NOT RISE TO RES IPSA LOQUITUR.

Summary

NRS 41A.071 provides that any action for professional negligence shall be dismissed if it is filed without an affidavit which supports the allegations. A Nurse is not categorically barred from providing an affidavit for a professional negligence action against a physician. But the affidavit must specify the acts of negligence of each respondent and how each action breached a standard of care to a reasonable degree of medical certainty.

Moreover, NRS 41A.100 provides an exception to the affidavit requirement when foreign objects are left in a body during surgery. Gauze which are left in a wound as part of post-operative care are not foreign objects left during surgery for the purposes of the statute.

Background

Appellant Monk underwent tumor removal surgery at University Medical Center (hereinafter, “UMC”). Respondents were three medical doctors who allegedly participated in Appellant’s post-operative care. A wound which resulted from the surgery became infected. As part of post-operative care, orders were given to pack the wound with gauze and to place a wound vac on it. Months later, it was discovered that the gauze had not been removed which caused ongoing pain and infection. Ultimately, Appellant passed away some months after the gauze were removed.

Appellant’s Estate Respondents for medical malpractice. In support of her complaint, Appellant attached a declaration by Nurse Jamescia Hambrick alongside the Nurse’s curriculum vitae (hereinafter, “CV”). Respondents moved for dismissal by arguing that Nurse Hambrick was not qualified to opine to a physician’s standard of care and that her declaration failed to identify alleged negligence and failed to state her opinions to a reasonable degree of medical probability.

The district court granted the motion to dismiss by finding that Nurse Hambrick has not practiced as a physician, and that she does not have the qualifications necessary under NRS 41A.071.

Discussion

Appellant argues that it was an error to conclude that the claims against Respondent cannot be supported by a Nurse and that Nurse Hambrick’s declaration satisfies NRS 41A.071.² Alternatively, Appellant argues that the alleged facts fall under the Res Ipsa Loquitur exception to the affidavit requirement.

¹ By Alexander C. Provan.

² NEV. REV. STAT. 41A.071(1) (2015).

A declaration of support in medical malpractice claims must specify the acts of negligence or express opinion as to the medical standard of care breached.

The Court concludes that Appellant’s first argument regarding the sufficiency of Nurse Hambrick’s declaration lacks merit. NRS 41A.071(1) provides that any action for professional negligence shall be dismissed if it is filed without an affidavit which supports the allegations.³ NRS 41A.071(2) requires the affiant to have practiced in a substantially similar area to the type of practice alleged as negligent.⁴ And NRS 41A.071(3)-(4) require that the affidavit describes the conduct alleged as negligent and attributes said conduct to a specific defendant.⁵

The Court begins by clarifying that they are not categorically barring nurses from providing affidavits against physicians in medical malpractice claims. Rather, the Court is clarifying the information that must be contained within said affidavit.

Here, Nurse Hambrick’s affidavit recites Appellant’s surgical and post-surgical histories and broadly states that the standard of care is it prevent infections in immuno-compromised patients, prevent surgical site infections, and place such patients in isolation. The affidavit does not identify the specific roles played by each Respondent. And the affidavit lacks the any opinion as to how or whether each respondent breached a standard of care to a reasonable degree of medical probability. The affidavit merely states, “[i]t is my opinion stated to a reasonable degree of nursing certainty and/or probability that the University Medical Center, Las Vegas and its nursing and physical therapy staff . . . breached the nursing standing of care . . . [by] failing to prevent infection [and] . . . failing to remove gauze.”⁶

The Court concludes that the affidavit does not sufficiently specific the acts of negligence as to each respondent or express an opinion as to the medical standard of care the respondent breached. As a result, the affidavit does not allow the court to measure whether Nurse Hambrick has substantially similar expertise to provide the affidavit. Therefore, the affidavit and complaint do not satisfy the requirements of NRS 41A.071 as to Respondents.

Res Ipsa Loquitur has been replaced by NRS 41A.100, and the Statute only applies to foreign objects left in the body during surgery.

The Court concludes that Appellant’s second argument regarding Res Ipsa Loquitur also lacks merit. NRS 41A.100(1)(a) creates a rebuttable presumption of negligence in medical malpractice claims when a foreign substance is left in a patient during surgery.⁷ The Court clarifies that caselaw dictates that the Res Ipsa Loquitur doctrine has been replaced by NRS 41A.100,⁸ and that the Statutory exception does not apply when a foreign object was left in a body during any procedure other than surgery.⁹ Here, the gauze were left within Appellant’s body

³ NEV. REV. STAT. 41A.071(1) (2015).

⁴ NEV. REV. STAT. 41A.071(2) (2015).

⁵ NEV. REV. STAT. 41A.071(3)-(4) (2015).

⁶ Monk v. Ching, M.D., 139 Nev. Adv. Op. 18, 4 (2023).

⁷ NEV. REV. STAT. 41A.100(1)(a) (2015).

⁸ Born v. Eisenman, 114 Nev. 854, 859 (1998).

⁹ Peck v. Zipf, 113 Nev. 890, 894-95 (2017).

as part of post-operative wound care. Because the gauze were left during a procedure other than surgery, NRS 41A.100(1)(a) does not create the rebuttable presumption which exempts Appellant's claims from the affidavit requirement.

Conclusion

A Nurse is not categorically barred from providing an affidavit for a professional negligence action against a physician. But the affidavit must specify the acts of negligence of each respondent and how each action breached a standard of care to a reasonable degree of medical certainty. Moreover, Gauze which are left in a wound as part of post-operative care are not foreign objects left during surgery for the purposes NRS 41A.100. Here, Appellant's utilized a Nurse's affidavit to support the contention that multiple physicians acted negligently, but the affidavit failed to specify how or whether the physicians breached a standard of care. Moreover, the gauze being left post-surgery prevent the affidavit exception from triggering. Thus, the Court affirmed the district court's decision.