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Taylor v. Brill [State of Nevada], 139 Nev. Adv. Rep. 56 (Dec. 21, 2023)

Makai Zuniga

Taylor v. Brill [State of Nevada], 139 Nev. Adv. Rep. 56 (Dec. 21, 2023)[1]

PRESENTING EVIDENCE CONCERNING INFORMED CONSENT/ASSUMPTION OF RISK IN MEDICAL MALPRACTICE CLAIMS.

Summary

Firstly, the Court in this case considered whether defendants to a medical malpractice action may present evidence concerning the plaintiff's informed consent or assumption of the risk when the plaintiff does not raise a claim based on lack of informed consent. Furthermore, it held that assumption-of-the-risk evidence can be relevant in instances where a plaintiff's consent to the procedure is challenged, but neither the defense nor evidence of informed consent is admissible in a medical malpractice action, where the plaintiff's consent is uncontested. Secondly, the Court considered whether a plaintiff must use expert testimony to show that the medical damages they seek are reasonable and customary, finding that expert testimony is not required when other evidence shows reasonableness. Thus, informed consent evidence is inadmissible and an assumption-of-the-risk defense is improper in professional negligence suits when the plaintiff does not challenge consent.

Background

The plaintiff, Kimberly Taylor, had a surgery performed by defendant Dr. Keith Brill, during which Dr. Brill perforated Taylor's uterus and bowel. Plaintiff reported increasing pain after the procedure and went to an emergency room by ambulance two times. During the plaintiff's second trip, the attending doctor stated her symptoms were consistent with an uncontrolled bowel perforation and performed an emergency surgery to correct a three-centimeter perforation. Plaintiff then filed a medical malpractice claim against Dr. Brill, alleging that he had breached the standard of care by perforating her internal organs during the hysterectomy. The plaintiff also alleged that Dr. Brill went on with her procedure despite observing her perforation, did not diagnose it or inform the post-care unit to treat her injury, and failed to notify her of the injury she endured.

Plaintiff's action proceeded to a jury trial and before trial she moved to exclude any references to known risks or complications, as well as documents relating to her informed consent and enlightening her to the risks of the surgery. The lower court ruled that Dr. Brill could introduce evidence of Taylor's knowledge of the potential risks and associations, but not her informed consent form. After which, the jury would find for Dr. Brill and denied relief to all of Taylor's claims. Thus, Plaintiff appealed her judgment given in the district court.

Discussion

Evidentiary decisions

The Court proclaimed that it would review the lower court's decision to admit or exclude evidence for an abuse of discretion and will not alter a decision "absent a showing of palpable abuse."[2] Despite this, when an evidentiary ruling rests on a question of law, the Court will review de novo, and will do so in *Taylor.*

Informed consent and assumption of the risk

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[2] *Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 764-65, 312 P.3d 503, 507 (2013).

Plaintiff challenged the lower court's acceptance of evidence showing her knowledge of the risks and potential complications of her procedure. Plaintiff asserted that the evidence is irrelevant because she did not assert that she was not informed of the risks associated with the surgery, or that Defendant failed to obtain her consent. The Court stated that informed consent evidence "does not make it more or less probable that the physician was negligent in. performing [the surgery] in the post-consent timeframe" and is therefore inadmissible to determine whether a medical professional breached the standard of care.[3]

Evidence of a medical procedures risks must fall within the purview of NRS 41A.100(1), which requires that divergence from the standard of care and medical causation—are shown by evidence that consists of "expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred." Thus, courts must decide on a case-by-case basis whether the disputed evidence should be inadmissible because of its potential to confuse the jury would substantially outweigh its probative value

Special damages

Taylor sought special damages for the emergency medical procedure she underwent following her injury from the surgery performed by Defendant. To qualify for special damages, Plaintiff had to show that the bills she was assigned were reasonable and necessary.[4] Plaintiff's expert, Dr. Berke, testified that the procedures Plaintiff received were reasonable and necessary and were required to repair the perforations from Dr. Brill's surgical procedure. To which, the district court deemed the evidence Taylor sought to admit in support of her special damages claim to be inadmissible. The lower court rested its finding that testimony about the reasonable and customary nature of medical billing was beyond the knowledge of the average person and necessitated an expert. Because Taylor had no expert testify that the bills for the medical services she received were usual, customary, or reasonable, the district court deemed them inadmissible. Thus, The Court would find that he district court abused its discretion in excluding this evidence,[5] which affected Plaintiff's substantial rights, as it prevented her from winning a case to receive damages.

Insurance write-downs

The district court admitted evidence against Plaintiff relating to two lower-cost items of medical billing. Plaintiff challenged the lower court's decision to allow Defendant to show evidence of insurance write-downs to defend against her damages claim. The lower court's decision was based on its interpretation of NRS 42.021(1), which revoked the common law collateral source doctrine by creating an exception for evidence of collateral source payments in medical malpractice actions. Interpreting this statute narrowly, the Court ruled that the district court was wrong in finding that the statute permitted the admission of insurance write-downs.[6]

Closing arguments

Lastly, Plaintiff asserted that the lower court incorrectly limited her closing arguments. Taylor attempted to make a closing argument "that the jury with its verdict should 'send a message'

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[3] *Brady v. Urbas*, 631 Pa. 329, 111 A.3d 1155, 1162 (Pa. 2015).
[4] *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 266, 396 P.3d 783, 788 (2017).
[5] See *Yeghiazarian*, 129 Nev. at 764-65, 312 P.3d at 507.
[6] *See Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158-59, 347 P.3d 1038, 1040 (2015).

to Defendants that safety is important, that [Dr. Brill] must answer for the injury he caused to his patient, and that he cannot be careless toward his patient, etc." In denying this statement, the district court stated that Plaintiff "shall not be permitted to use the phrase 'send a message[ ]'. . . in closing argument." However, Plaintiff's argument was not inappropriate because it was based on the evidence in the case, instead of "implor[ing] the jury to disregard the evidence."[7] Asking the jury to send a message is not prohibited "so long as the attorney is not asking the jury to ignore the evidence."[8] Therefore the district court erred in limiting Taylor's closing argument.

Conclusion

Informed consent evidence is inadmissible, and an assumption-of-the-risk defense is incorrect, in professional negligence suits when the plaintiff does not dispute consent. Second, expert testimony is not required to demonstrate the reasonableness of the amount of billing for special damages. Lastly, evidence of insurance write-downs is not included within the evidence NRS 42.021(1) makes admissible. The case was reversed and remanded for further proceedings in line with the opinion, which includes a new trial.

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[7] *Capanna*, 134 Nev. at 890-91, 432 P.3d at 731.
[8] *Id.* (quoting *Pizarro-Ortega*, 133 Nev. at 269, 396 13.3d at 790).