6-27-2024

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Limprasert v. PAM Specialty Hosp. of Las Vegas, LLC, 140 Nev. Adv. Op. 45 (June 27, 2024)[1]

THE RIGHT MEDICINE? NEVADA SUPREME COURT REVERSES *CURTIS'* "COMMON KNOWLEDGE" EXCEPTION FOR A MORE MECHANICAL APPLICATION OF NRS 41A.071'S AFFIDAVIT REQUIREMENT. FURTHER, THE COURT BROADENED THE MANNER IN WHICH AFFIDAVITS FOR PROFESSIONAL NEGLIGENCE COMPLAINTS ARE BROUGHT BEFORE THE COURT.

Summary

NRS 41A dictates Nevada's statutory scheme for professional negligence, or "medical malpractice" claims. Over the past decade, the Nevada Supreme Court's professional negligence jurisprudence has maintained a generally textualist approach to NRS 41A's mechanical workings. That changed four years ago with the Court's decision in *Estate of Curtis v. S. Las Vegas Medical Investors, LLC*, 136 Nev. 350, 466 P.3d 1263 (2020)[2] and the creation of a "common knowledge" exception negating the need for medical affidavits under NRS 41A.071.[3] Absent common knowledge, or the statute's other exceptions found in NRS 41A.100, a professional negligence complaint *must* be paired with an affidavit by a medical professional in order to overcome a motion to dismiss.[4] In the instant case, the Court reappraised and subsequently overruled the "common knowledge" exception in *Curtis* due to its deviation from the Nevada Legislature's intent behind the affidavit requirement. Instead of the opaque *Curtis* standard delineating professional vs. ordinary negligence, *Limprasert* refocuses a district court's analysis to whether the plaintiff is harmed by "a provider of health care rendering services in the course of a professional relationship."[5] Further, the Court ruled that NRS 41.071's affidavit requirement can be satisfied "by reference in the complaint and was executed before the complaint was filed."[6] Finally, because Limprasert fulfilled the affidavit requirement under the *Baxter v. Dignity Health* standard,[7] the district court erred in dismissing the complaint for nonadherence to NRS 41.071.

Background

In 2020, Appellant Somsak Limprasert was diagnosed with "COVID-19 and acute hypoxic respiratory failure, among other illnesses."[8] He first received care at an acute care hospital before being transferred to Respondent, PAM Specialty Hospital of Las Vegas, LLC ("PAM") for "rehabilitation and treatment."[9] His stay at PAM was "approximately one month" in duration, and over the course of treatment he was bedridden.[10] Meaning, Limprasert could not stand without help from PAM's medical professionals. Even more, Limprasert asserted that PAM's medical professionals "were aware that [he] was unable to stand without being supported."[11] Then, on

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[1] By Keegan Davis, Executive Managing Editor – NLJ Vol. 25.
[2] Estate of Curtis v. S. Las Vegas Med. Invs., LLC, 136 Nev. 350, 466 P.3d 1263 (2020).
[3] *Curtis*, 136 Nev. at 354, 466 P.3d at 1267.
[4] NRS 41A.071 (2015).
[5] Limprasert v. PAM Specialty Hosp., 140 Nev. Adv. Op. 45, at *2 (2024).
[6] *Id.*
[7] Baxter v. Dignity Health, 131 Nev. 759, 357 P.3d 927 (2015).
[8] *Limprasert*, 140 Nev. Adv. Op. 45, at *2.
[9] *Id.* at *3.
[10] *Id.*
[11] *Id.*

August 3, 2020, PAM employees lifted Limprasert out of bed. Once upright, the employees "let go of him," causing a weakened Limprasert to fall and suffer injuries.[12]

"Limprasert filed a complaint against PAM on August 3, 2021"[13] – one year after the injury and pursuant to NRS 41A.097(2) – alleging ordinary negligence, abuse of the vulnerable, and professional negligence claims.[14] Prior to filing the complaint, Limprasert consulted a physician to review his complaint. In preparation for a professional negligence action the physician executed a declaration under NRS 41A.071 supporting the merits of Limprasert's assertions against PAM.[15] It would come to pass that the physician's declaration was not filed with the August 3, 2021 complaint, meaning the complaint was incomplete at NRS 41A.071's one-year statutory buzzer.[16] Limprasert quickly remedied this by "fil[ing] an erratum to his complaint with… [the] declaration attached."[17] PAM quickly filed a motion to dismiss the complaint on statutory grounds. The district court[18] accepted PAM's motion to dismiss upon determining (1) "Limprasert's claims sound in professional negligence" and (2) "Limprasert filed his Complaint without the supporting declaration of an expert witness," and the erratum was untimely.[19] Limprasert appealed the district court's dismissal before the Nevada Court of Appeals.

Last year, the Court of Appeals reversed the district court's ruling because the "alleged facts…could entitle him to relief under ordinary negligence principles."[20] It is evident that the Court's analysis was spurred by *Curtis*' common knowledge exception. For instance, the Court held in its order of reversal that "[s]ince a medical decision had allegedly already been made regarding fall precautions, a layperson could use their common knowledge and experience to evaluate PAM's ordinary negligence in unexpectedly letting go of a patient without the presentation of medical expert testimony."[21] The Court of Appeals prescribed a *Curtis* analysis to the district court on remand because a jury of laypersons could likely infer ordinary negligence by the staff's actions that caused Limprasert injury.[22]

In response to the Court of Appeal's reversal, PAM petitioned the Nevada Supreme Court "for judicial review."[23] On June 27, 2024, the Court issued its unanimous (7-0) opinion authored by Justice Stiglich affirming the Court of Appeals' reversal, but for different reasons:

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at *4 (*see also*, Limprasert v. PAM Specialty Hosp. of Las Vegas, LLC, 2022 WL 20637258 (Nev. Dist. Ct. Apr. 5, 2022)).
[19] *Id.*
[20] *Id.* (*see also*, Limprasert v. PAM Specialty Hosp. of Las Vegas, LLC, 531 P.3d 604, 2023 WL 4246132 (Nev. Ct. App. 2023) (unpublished)).
[21] *Limprasert*, 531 P.3d 604, at *3.
[22] *Id.*
[23] *Limprasert*, 140 Nev. Adv. Op. 45, at *4.

Discussion

The Court reviewed this action on a motion to dismiss standard. Accordingly, the applicable standard of review is "de novo."[24] Under *Buzz Stew*, the Court deems "all factual allegations in [the plaintiff's] complaint as true and draw all inferences in [the plaintiff's] favor."[25] Further, the Court "review[s] a 'district court's decision to dismiss [a] complaint for failing to comply with NRS 41A.071 de novo.'"[26] Limprasert argued before the Court that either "his claims sound in ordinary negligence" or "if his claims sound in professional negligence… he satisfied the affidavit requirement."[27] The Court agreed with district court's finding that Limprasert's claim sounded in professional negligence; but the Court's analysis differed in finding Limprasert "satisfied the affidavit requirement" through his erratum and complaint.[28]

Whether Limprasert's Claims Are for Ordinary or Professional Negligence.

First, the Supreme Court delved into its past jurisprudence on professional negligence and its adoption of the common knowledge exception in *Curtis*. NRS 41A.015 defines professional negligence as "the failure of a provider of health care, *in rendering services*, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care."[29] Reading the statute unambiguously, one can infer that this encompasses "claim[s] arising from services rendered within the course of the relationship between a patient and a health care provider."[30] But not all negligence at a doctor's office or hospital sounds in professional negligence. In *DeBoer v. Senior Bridges of Sparks Family Hospital*, for instance, the Court cut an important distinction by holding a medical facility to "general negligence standards of reasonableness when it 'act[ed] outside the scope of medicine.'"[31] *Szymborski v. Spring Mountain Treatment Ctr.* took a similar tone as the Court "determined the gravamen of the [Plaintiff's] claim was that the treatment center breached… nonmedical functions" hence breaching an "ordinary duty of care."[32] The Court's focus on "gravamen," or "substantial point or essence of a claim" turned on whether the act was done in the administration of medical care.[33] If the Court determined it was not, a professional negligence claim could not prevail.

Curtis was the outlier case to emerge in this sect of the law.[34] In *Curtis*, a nurse accidently administered a lethal dose of morphine to a patient, eventually resulting in death.[35] From this fact pattern, the Court adopted a two-part test created by the Michigan Supreme Court in *Bryant v.*

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[24] *Id.* (internal citation omitted).
[25] *Id.* (citing Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008)).
[26] *Id.* (citing Yafchak v. S. Las Vegas Med. Invs., LLC, 138 Nev. Adv. Op. 70, 519 P.3d 37, 40 (2022)).
[27] *Id.* at *5.
[28] *Id.*
[29] *Id.* (citing NRS 41A.015 (2015) (emphasis added by Court)).
[30] *Id.*
[31] *Id.* at *6 (citing DeBoer v. Senior Bridges of Sparks Fam. Hosp., Inc., 128 Nev. 406, 411, 282 P.3d 727, 731 (2012)).
[32] *Id.* (citing Szymborski v. Spring Mountain Treatment Ctr., 133 Nev. 638, 644, 403 P.3d 1280, 1286 (2017)).
[33] *Gravamen*, BLACK'S LAW DICTIONARY (12th ed. 2024).
[34] *Supra* note 2.
[35] *Curtis*, 136 Nev. at 351, 466 P.3d at 1265.

Oakpointe Villa Nursing Ctr.[36] The test asks: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience."[37] Under *Curtis* (and *Bryant*), if the answer to both questions is "yes," then the action is subject to a professional negligence action. Armed with its test, the Court determined the *Curtis* fact pattern was not a professional negligence matter because "the nurses act of administering the morphine prescribed for someone else involved no 'questions of medical judgment' and the nurse 'used no professional judgment in administering the morphine.'"[38] From *Curits'* the Court reasoned certain medical actions were so obviously negligent that an expert need not testify, and with it exempting the affidavit requirement under NRS 41A.071.[39] *Curtis* effectively broadened the professional negligence threshold by allowing plaintiffs to argue common knowledge beyond the enumerated res ipsa loquitur exceptions found in NRS 41A.100 as means to assert a claim without an affidavit.[40]

Because *Limprasert* granted the Court an opportunity to review its prior holding,[41] the Justices evaluated the effect of *Curtis'* holding on courts below whose Judges grappled with the common knowledge exception.[42] The Court used this case to find the professional negligence common knowledge exception "'unworkable or… badly reasoned,'"[43] and accordingly overruled it.[44] The Court held that the only viable exception to NRS 41A.071's affidavit requirement was found under NRS 41A.100.[45] Therefore, the common knowledge exception is decidedly no longer common practice.

With the common knowledge exception overruled, the Court next turned to Limprasert. In reviewing Limprasert's complaint, the Justices found "his claims sound in professional negligence"[46] solely on the fact "the claim involve[d] a provider of health care rendering service in a way that cause[d] injury."[47] This was demonstrated by PAM's deviation from "reasonable policies and procedures" that "Limprasert relied on" given his known bedridden status.[48] The analysis need not go further as the Court surmised the reason for Limprasert's fall was a combination of poor lifting protocol, given his weakened condition as a patient, and the hospital's intent to change Limprasert's sheets while he stood.[49] Based on the Court's analysis of the factors

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[36] *Limprasert*, 140 Nev. Adv. Op. 45, at *6-7 (citing Bryant v. Oakpointe Villa Nursing Ctr., Inc., 471 Mich. 411, 684 N.W.2d 864 (Mich. 2004)).
[37] *Id.* at *7 (citing *Curtis*, 136 Nev. at 356, 466 P.3d at 1268).
[38] *Id.* (citing *Curtis*, 136 Nev. at 357, 466 P.3d at 1269).
[39] *Id.*
[40] *Id.* at *7-8.
[41] *Id.* at *8 (citing Miller v. Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (discussing the doctrine of stare decisis)).
[42] *Id.* ("*Curtis* has proven unworkable, creating conflicts with Nevada statutes and caselaw…").
[43] *Id.* (citing State v. Lloyd, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)).
[44] *Id.* at *9.
[45] *Id.* at *8 ("… the common law res ipsa loquitur doctrine does not apply in professional negligence cases except in the limited instances specified in NRS 41A.100.").
[46] *Id.* at *9.
[47] *Id.*
[48] *Id.*
[49] *Id.*

explicitly pled in Limprasert's complaint, it determined this matter sounded in professional negligence.[50]

Whether Limprasert's Claims Required an Affidavit.

Limprasert's professional negligence claim soundly established, the Court discussed whether an affidavit was required. The Court began with a legislative analysis into NRS 41A.071[51] establishing "the general rule… that any professional negligence action filed without a supporting affidavit must be dismissed."[52] The Nevada Legislature devised NRS 41A.071 to be a rigid statute rooted in public policy's desire to scrutinize professional negligence actions.[53] The Court looked to NRS 41A.100 as an example of this: by having five enumerated exceptions under the statute, the Legislature meant for these to be the *only* reasons an affidavit would not be required, rather than inviting debate in the ambiguities (that candidly do not exist).[54] The Court reviewed past cases where NRS 41A.100 was successfully employed.[55] Further, earlier jurisprudence also adequately defined the limits of eligibility for NRS 41A.100 exception: *Peck v. Zipf*[56] held that an IV left in a patient after surgery was not grounds for professional negligence "because it was not the result of surgery;"[57] and *Montanez v. Sparks Fam. Hosp., Inc.* held that bacteria was not a foreign substance and therefore fell outside of the statute.[58] In deducing that Limprasert has not asserted a res ipsa loquitur statutory exception under NRS 41A.100, in tandem with the overruled common knowledge exception, the Court found Limprasert subject to the affidavit requirement under NRS 41A.071.[59]

Whether Limprasert Satisfied the Affidavit Requirements for a Professional Negligence Claim.

Combining the preceding sections, Limprasert established a viable professional negligence claim, and needed to fulfil the affidavit requirement. The Justices next discussed whether the delayed affidavit was fatal to his claim. In holding no,[60] the Court reviewed its decision in *Baxter v. Dignity Health*[61] to determine what Limprasert's complaint would have been without his physician's expertise and counsel. It is important to begin the affidavit analysis with why it actually exists: "to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion."[62] In reviewing *Baxter*, the Court held that "when reviewing a complaint on a motion to dismiss, '[a] court may also consider unattached evidence on which the complaint necessarily relies if: (1) complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the

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[50] *Id.*
[51] *Id.* at *10.
[52] *Id.*
[53] *Id.* at *10-11. ("[T]he narrow and few exceptions to the affidavit requirement… reflect its policy choice.").
[54] *Id.* at *11 (citing NRS 41A.100(1)(a-e) (2015)).
[55] *Id.* at *12 (citing Szydel v. Markman, 121 Nev. 453, 117 P.3d 200 (2005) (holding "no affidavit was needed when a needle was left inside a patient's breast during a bilateral mastopexy or breast lift surgery." *Id.* at *12)).
[56] Peck v. Zipf, 133 Nev. 890, 891, 894, 407 P.3d 775, 777, 779 (2017)
[57] *Limprasert*, 140 Nev. Adv. Op. 45, at *12
[58] *Id.*at *12-13 (citing Montanez v. Sparks Fam. Hosp., Inc., 137 Nev. 742, 744, 499 P.3d 1189, 1192 (2021)).
[59] *Id.* at *14.
[60] As in, the affidavit was valid and the claim could continue.
[61] Baxter v. Dignity Health, 131 Nev. 759, 357 P.3d 927 (2015).
[62] *Limprasert*, 140 Nev. Adv. Op. 45, at *14-15 (citing Washoe Med. Ctr. v. Second Jud. Dist. Ct., 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006)).

authenticity of the document.'"[63] The record reflected (1) explicit mention of Limprasert's physician's affidavit in the complaint,[64] (2) the complaint's "alternate theory of liability" made under penalty of perjury,[65] and (3) PAM's attorney's acceptance of Limprasert's representations despite the delayed affidavit.[66] Therefore, the facts specific to Limprasert's case nudged his affidavit over the line to be accepted.

Conclusion

In ruling for Limprasert, the Supreme Court restored NRS 41A.071's mechanical rigidity as prescribed by the Legislature. In reversing *Curtis'* common knowledge exception, the Court recognized that its well-intended analysis had the unintended effect of blurring the line between ordinary and professional negligence in a manner that contravened legislative intent. In *Limprasert's* wake, what precisely constitutes professional negligence is better fleshed out. This clarity is best exemplified by the enumerated statutory exceptions to a medical affidavit under NRS 41A.100, restoring predictability to the statute's application. Further, the Court's broadening of how district courts review affidavit filings under *Baxter* ensures the statutory intent behind NRS 41A.071 is maintained while offering a greater semblance of flexibility.

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[63] *Id.* at *15 (citing *Baxter*, 131 Nev. at 746, 357 P.3d at 930 (internal quotations omitted)).

[64] *Id.* at *16 ("Limprasert asserted in his complaint '[t]hat the facts and circumstances of this case have been reviewed by a medical doctor…'").

[65] *Id.* at *17 ("We conclude the declaration was central to Limprasert's alternative theory of liability of professional negligence…").

[66] *Id.* at *16-17 ("PAM's attorney, however, said she was 'comfortable accepting [Limprasert's attorney's]… representation because I'm familiar with him and I find him to be very trustworthy… [although] it is not… proof positive of the matter asserted.'").