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de Becker v. UHS of Delaware, Inc., 140 Nev. Adv. Op. 58 (Sept. 19, 2024)

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Recommended Citation

Hamilton, Hailey, "de Becker v. UHS of Delaware, Inc., 140 Nev. Adv. Op. 58 (Sept. 19, 2024)" (2024).
Nevada Supreme Court Summaries. 1718.
<https://scholars.law.unlv.edu/nvscs/1718>

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IN PROFESSIONAL NEGLIGENCE CLAIMS, INSUFFICIENT EXPERT AFFIDAVITS UNDER NRS 41A.071 REQUIRES DISMISSAL OF THE CLAIM. THE PREP ACT BARS CLAIMS WHERE THE ALLEGATION IS CAUSED BY A NAMED COUNTERMEASURE.

Summary

When a negligence claim alleges providers of health care were negligent when rendering services in a professional relationship, the proper claim is of professional negligence requiring an expert affidavit under NRS 41A.071. As pertaining to informed consent, a claim only constitutes battery if a plaintiff claims not to have consented at all to the treatment or procedure. Where a plaintiff consented to a particular treatment or procedure, and a question arises regarding whether the scope of that consent was exceeded, an expert medical affidavit is necessary under NRS 41A.071. The Supreme Court of Nevada clarified that when an accompanying expert declaration fails to satisfy the statutory requirements under NRS 41A.071 by failing to properly identify the defendant and specifically allege the negligent acts of that defendant, the complaint may not be amended and must be dismissed. Where the Public Readiness and Emergency Preparedness Act (“PREP Act”) is invoked, a professional negligence claim will be statutorily barred under 42 U.S.C. § 247d-6d if an allegation is caused by a named countermeasure. The Court correspondingly affirmed the District Court’s dismissal of the complaint.

Background

Hal de Becker contracted COVID-19 in 2021 and his personal physician began administering ivermectin to him. Subsequently, Hal was admitted to respondent Desert Springs Hospital Medical Center, under the care of Dr. Khuong T. Lam and Dr. Shfali Bhandari, to ensure that he received constant medical attention if his symptoms were to worsen. Dr. Lam and Dr. Bhandari assumed the role of attending physician between May 9 and May 12, 2021 to oversee Hal’s treatment. Doctors and hospital administrators at Desert Springs abruptly stopped Hal’s ivermectin treatment. Instead, the attending doctors treated Hal with remdesivir—without consent from Hal, Hal’s family, or Hal’s personal physician. The de Beckers alleged that Hal’s condition deteriorated when ivermectin treatment was abruptly interrupted, and within hours of being discharged by the hospital, Hal died.

The de Beckers sued, alleging claims of negligence, professional negligence, and wrongful death seeking punitive damages. The de Beckers sued Dr. Lam, Dr. Bhandari, and Desert Springs. The complaint included an expert declaration made under penalty of perjury in lieu of an NRS 41A.071 affidavit. The expert concluded that the physicians violated the doctrine of informed consent, that the physicians’ decisions fell below the standard of care, and that the physicians’ and hospital’s failure to meet standards of care resulted in Hal’s death.

Respondents moved to dismiss. The district court dismissed the de Beckers’ claims against Dr. Lam and Dr. Bhandari and found that the PREP Act barred the claims concerning the use of remdesivir rather than ivermectin to treat Hal. The district court additionally found that even if the claims were not barred by the PREP Act, the expert medical affidavit was insufficient because it was not specific. The district court dismissed the claims against Desert Springs also with a similar finding. The de Beckers appealed.

¹ By Hailey Hamilton.

Discussion

The Supreme Court of Nevada reviews a district court order granting a motion to dismiss de novo. A district court's decision to dismiss a complaint for failing to comply with NRS 41A.071² is also reviewed de novo. Finally, issues of statutory construction are reviewed de novo, and if the statute is clear on its face, the court will not look beyond its plain language.

The de Beckers' claims allege professional negligence

The de Beckers argued that their claims were ordinary negligence claims, based on the fact that jurors should not need expert testimony to decide whether the health care providers failed to communicate with Hal's representatives, or whether the health care providers were negligent to give Hal a treatment he did not consent to. The Court rejected this argument. To distinguish between professional negligence and ordinary negligence, the Court looks to whether the claim pertains to an action that occurred within the course of a professional relationship. If the claim does pertain to an action that occurred within the course of a professional relationship, it is a professional negligence claim and therefore requires an expert declaration under NRS 41A.071³.

The allegations against Dr. Lam, Dr. Bhandari, and Desert Springs are that: (1) they are providers of healthcare; (2) they failed to obtain informed consent from Hal; (3) they failed to communicate with Hal and his family; and (4) they allowed media narratives to dictate which drugs they used to treat Hal. Thus, these allegations are that the providers of health care were negligent when rendering services within a professional relationship. Accordingly, the de Beckers' claims allege professional negligence, not ordinary negligence. Because they are claims of professional negligence, and none of the five res ipsa loquitur exceptions enumerated in NRS 41A.100⁴ apply, the claims require an expert affidavit.

The de Beckers' consent claim also requires an expert affidavit

The de Beckers argued that the informed consent claim constituted a battery. The Court rejected this argument, relying on its decision in *Humboldt General Hospital v. Sixth Judicial District Court* to conclude that the de Beckers' consent claim is a claim for professional negligence requiring an expert affidavit.⁵ The Court draws a distinction between a situation where consent to treatment or a procedure is completely lacking, which constitutes a battery claim, and a situation where general consent is provided for a particular treatment or procedure, and a question arises regarding whether the scope of that consent was exceeded, in which case, an expert medical affidavit is necessary.

The Court concluded that the de Beckers' claim is not a battery claim because his consent to treatment was not completely lacking. The Court recognized that Hal consented to receive COVID-19 treatment from the doctors and Desert Springs by being admitted to receive medical attention. Even so, Hal did not consent to the administration of remdesivir. Therefore, the Court found that the de Beckers' claim is about whether the scope of Hal's consent was exceeded, and an expert affidavit is required.

² NEV. REV. STAT. § 41A.071.

³ NEV. REV. STAT. § 41A.071.

⁴ NEV. REV. STAT. § 41A.100.

⁵ *Humboldt Gen. Hosp. v. Sixth Jud. Dist. Ct.*, 132 Nev. 544, 376 P.3d 167 (2016) (where the plaintiff had consented to an intrauterine device (IUD) procedure but alleged that she had not consented to receive an IUD that lacked FDA approval, the Court concluded that the plaintiff did need to provide an expert affidavit).

The sufficiency of the expert declaration pursuant to NRS 41A.071

The de Beckers argued that the expert declaration they provided was in compliance with the requirements of NRS 41A.071 as to each Respondent. The Court determined that under NRS 41A.071⁶, the expert declaration was sufficient as to the hospital, but insufficient as to the two individual doctors. NRS 41A.071 provides: “If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that: . . . 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.”⁷

The Court relied on its rule from *Zohar v. Zbiegien*⁸ stating that the district court should read a medical malpractice complaint and affidavit of merit together when determining whether the affidavit meets the requirements of NRS 41A.071. Specifically pertaining to NRS 41A.071(4)⁹, the Court evaluates whether allegations relating to the standard of care and a breach of that standard are present. The Court used three prior cases with similar facts to reach the conclusion, including *Monk v. Ching*.¹⁰

The declaration is insufficient as to the doctors

The de Beckers argued that their NRS 41A.071 expert medical declaration was sufficient, but the Court disagreed. The Court found that although the complaint and expert declaration was compliant with NRS 41A.071(3)¹¹ by identifying each of the two doctors by name, there were no acts of alleged negligence specifically as to either doctor, and therefore the declaration does not meet the requirements of NRS 41A.071(4). The only specific mention of Dr. Lam in the documents was that he was the attending physician who oversaw and was responsible for Hal’s treatment on each of the days between May 9 and May 12. The documents do not describe any of Dr. Lam’s actions specifically. The only mention of Dr. Bhandari in the documents was that he served in the role of attending physician who oversaw and was responsible for Hal’s treatment on May 11, and there were no other mentions of Dr. Bhandari’s actions. The Court found that with no allegations relating to the specific acts of negligence by either doctor individually, the expert declaration does not satisfy NRS 41A.071(4)¹² as to the claims against the two doctors.

The declaration was sufficient as to the hospital

The de Beckers alleged that Desert Springs failed to obtain Hal’s or his surrogate’s informed consent. The Court agreed with the de Beckers that the allegations pertaining to Desert

⁶ NEV. REV. STAT. § 41A.071.

⁷ NEV. REV. STAT. § 41A.071.

⁸ *Zohar v. Zbiegien*, 130 Nev. 733, 334 P.3d 402 (2014).

⁹ NEV. REV. STAT. § 41A.071(4).

¹⁰ *See Monk v. Ching*, 531 P.3d 600 (Nev. 2023) (finding that NRS 41A.071 was not satisfied when neither the complaint nor the affidavit adequately identified the specific roles played by each individual respondent or identified the relevant standards of care or whether each respondent breached that standard to a reasonable degree of medical probability); *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 527 P.3d 622 (Nev. 2023) (finding that dismissal of a complaint was correct when the plaintiff and her experts “failed to state in simple, concise, and direct terms how the hospital was separately negligent from its providers”); *Soong v. Eighth Judicial Dist. Court*, 137 Nev. 966, 490 P.3d 119 (2021) (finding that dismissal was correct when the plaintiff’s declarations were defective because there were not specific details about who actually positioned the patient for surgery).

¹¹ NEV. REV. STAT. § 41A.071(3).

¹² NEV. REV. STAT. § 41A.071(4).

Springs hospital did satisfy the requirements of NRS 41A.071 and therefore, the declaration was sufficient. Although the expert declaration did not name Desert Springs and simply referenced “the hospital,” the declaration needs to be read in conjunction with the complaint, and therefore it was clear that the allegations refer to the only hospital involved in the case—Desert Springs. Thus, NRS 41A.071(3) was met by identifying the respondent specifically. In order to satisfy the requirements of NRS 41A.071(4), the de Beckers specifically alleged that Desert Springs breached its standard of care by not ensuring that its staff obtained Hal’s or his surrogate’s informed consent. That allegation was specific enough to satisfy the statutory requirements of an expert declaration.

The district court did not err by dismissing the complaint as to the doctors

The de Beckers argued that after a finding of insufficiency of the expert declaration pursuant to NRS 41A.071, that they should have been able to amend the complaint and add more details. The Court disagreed, and clarified some confusing language in two of its prior cases on the proper remedy to a deficient supporting affidavit in a professional negligence claim. In 2004, the Court decided *Borger v. Eighth Judicial District Court*, in which a district court’s order of dismissal was vacated.¹³ The section from *Borger* that is at issue here states that because NRS 41A.071 does not explicitly prohibit amendments, a district court “may grant leave to amend malpractice complaints . . . where justice so requires.”¹⁴ However, in *Washoe Medical Center v. Second Judicial District Court*, decided two years after *Borger*, the Court held that when an action is filed against a provider of health care for professional negligence without a sufficient supporting affidavit as required by NRS 41A.071, the complaint cannot be amended to cure the deficiency and the professional negligence claim must be dismissed.¹⁵

Here, the Court clarified that *Washoe Medical Center* controls, and the language in *Borger* was dictum because *Borger* was decided on other grounds. The Court held explicitly that when an accompanying expert affidavit fails to satisfy NRS 41A.071, a complaint alleging a professional negligence may not be amended, but must be dismissed as to that claim.

Because of this rule, and because the expert declaration here is deficient as to Dr. Lam and Dr. Bhandari, in this case, dismissing the complaint as to the doctors was appropriate. The Court did find, however, that the motion to dismiss as to Desert Springs was impermissibly granted because the declaration was sufficient as to the hospital.

The PREP Act bars the de Beckers’ surviving claim against Desert Springs

The de Beckers argued that the federal PREP Act does not bar their claims because Hal’s death was independent from him being administered remdesivir. The Court disagreed. The Court found that although the expert declaration was sufficient as to the hospital, this claim is barred by the PREP Act.

The PREP Act, originally enacted in 2005, allows the Health and Human Services Secretary “to limit legal liability for losses relating to the administration of medical countermeasures” during a public health emergency.¹⁶ When PREP Act immunity is in place, it preempts state law claims. The section relevant to this case provides that “a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss

¹³ *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 102 P.3d 600 (2004).

¹⁴ *Id.* at 1029, 606.

¹⁵ *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 148 P.3d 790 (2006).

¹⁶ *Cannon v. Watermark Ret. Cmtys., Inc.*, 45 F.4th 137, 139 (D.C. Cir. 2022).

caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure” following a triggering declaration as to that countermeasure.¹⁷ The Court emphasized that the immunity is limited to claims that have a causal relationship with the administration.¹⁸

In 2020, the Secretary provided a Declaration related to COVID-19 that “Administration of a Covered Countermeasure means physical provision of the countermeasure to recipients.”¹⁹ The Declaration specified that “administration” included “physical provision of a countermeasure to a recipient, such as a vaccination or handing drugs to patients.”²⁰ The Court acknowledged that Desert Springs was a covered person under the Act, that the loss suffered was Hal’s death, that remdesivir was physically provided to Hal, and that remdesivir was a covered countermeasure under the Act. The question before the Court was whether the de Beckers’ claim for Hal’s death was caused by, arose out of, related to, or resulted from Desert Springs administering him remdesivir.

To determine the answer, the Court turned to its own prior precedent and analyses done by the United States Supreme Court.²¹ The words “caused by” denote actual cause, creating a “but for” relationship. The Court used the plain language meaning of the phrase “caused by” and elected to not look beyond that. Thus, the Court looked to answer whether the de Beckers’ claim that Hal’s death was caused by Desert Springs’ failure to obtain informed consent for remdesivir treatment is related to its administration of remdesivir. The Court held that yes, the claim that the death was caused by the failure to obtain informed consent, was related to the hospital’s administration of remdesivir. Because the failure to obtain informed consent to administer the remdesivir has a direct connection with the administration of remdesivir, the Court concluded the claim is barred by the PREP Act. Accordingly, dismissal of the claim was proper.

The Court looked to other jurisdictions to justify its holding, and to illustrate that other jurisdictions have held that failing to obtain informed consent to use a covered countermeasure is a claim barred by the PREP Act.²²

Conclusion

The Court affirmed the dismissal of the complaint. The Court held that “a professional negligence claim must be dismissed when NRS 41A.071²³ requires a supporting affidavit but one is not provided or the affidavit provided is insufficient.” The complaint cannot be amended to cure the deficiency but must be dismissed as to the professional negligence claims. Under the PREP Act, a professional negligence claim will be preempted if an allegation is caused by a named countermeasure.

¹⁷ 42 U.S.C. § 247d-6d(a)(1).

¹⁸ 42 U.S.C. § 247d-6d(a)(2)(B).

¹⁹ 85 Fed. Reg. 15198-01 (Mar. 17, 2020).

²⁰ *Id.*

²¹ See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031 (1992); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380 (1985); *Burrage v. United States*, 571 U.S. 204, 134 S. Ct. 881 (2014).

²² See *M.T. v. Walmart Stores, Inc.*, 528 P.3d 1067 (2023), review denied (Aug. 25, 2023); *Baghikian v. Providence Health & Services*, CV 23-9082-JFW(JPRX), 2024 WL 487769 (C.D. Cal. Feb. 6, 2024); *Parker v. St. Lawrence Cnty. Pub. Health Dept.*, 954 N.Y.S.2d 259 (2012).

²³ NEV. REV. STAT. § 41A.071.