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Mark Hesiak
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Recommended Citation

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***Fierle v. Perez*, 125 Nev. Adv. Op. No. 36 (Nov 19, 2009)¹**

**MEDICAL MALPRACTICE, PROFESSIONAL NEGLIGENCE AND NRS 41A.071'S
EXPERT AFFIDAVIT REQUIREMENT**

Summary

An appeal from the First Judicial District Court's dismissal of medical malpractice and professional negligence claims against a physician, his professional medical corporation and several staff members for failure to attach an expert affidavit to their initial complaint.

Disposition/Outcome

District court's judgment affirmed with regards to claims that required an affidavit, reversed and remanded with regards to claim that qualified under *res ipsa loquitur* exceptions.

Facts and Procedural History

Patricia Fierle ("Fierle") was diagnosed in July 2005 with breast cancer and subsequently underwent a mastectomy. To facilitate ongoing chemotherapy, a catheter was inserted into her chest, the tip of which was meant to terminate in her subclavian vein. Chemotherapy drugs were to be injected into the vein through this catheter.

After the surgery, Fierle became a patient of Dr. Perez and his staff, including Melissa Mitchell ("Mitchell"), a registered nurse, and nurse practitioners Charmaine Cruet and Linda Lesperance. On Fierle's third visit to Dr. Perez' office, Mitchell administered chemotherapy. However, rather than infusing into the catheter, the medication infused into her tissue. This caused a subcutaneous burn known as an "extravasation." According to Fierle, her complaints of discomfort at the time were not met with any treatment or attention.

The next day, after one of Dr. Perez' nurses noticed redness and swelling on Fierle's chest, she was referred to a radiologist. His tests revealed that the tip of the catheter was not in the vein, but coiled in her tissue. She then sought treatment from another doctor who referred her to Dr. Miercort. His opinion was that "negligent extravasation" had occurred and he referred her to U.C. Davis Medical Center. There, she was diagnosed with "severe extravasation of chemotherapy over the right shoulder and subclavian region."

Mr. and Mrs. Fierle filed a complaint in district court on September 14, 2006. They claimed Mitchell was negligent in her administration of chemotherapy, Dr. Perez, Cruet and Lesperance were negligent in their training of Mitchell, loss of consortium and "Willful Failure to Provide Treatment and Constructive Fraud" against Dr. Perez and his professional medical corporation Jorge Perez M.D., Ltd. They later amended their complaint to include an affidavit from Dr. Miercort.

Dr. Perez, Jorge Perez M.D., Ltd., and Mitchell moved for dismissal of the Fierles' complaint, citing failure to include an expert affidavit with the original complaint as required by

¹ By Mark Hesiak

NRS 41A.071.² They also moved to strike the amended complaint, relying on Nevada precedent that said a complaint filed under NRS 41A.071 without the expert affidavit is void *ab initio* and shall be dismissed.³ These motions were joined by Cruet and Lesperance. The district court granted both motions, finding that the complaints did not qualify for NRS 41A.100(1)(c)'s *res ipsa loquitor* exception. The Fierles' motions under NRCP 52(b), 59(e) and 60(b) were also later denied. This appeal followed.

Discussion

Standard of Review

The district court's dismissal was based on its interpretation of statutes. The Nevada Supreme Court reviews a district court's statutory interpretation *de novo*.⁴

NRS 41A.071 applies to professional medical corporations

Under NRS 41A.071, an action for medical or dental malpractice must be accompanied by an affidavit from a medical expert who practices a type of medicine similar to that which forms the basis of the malpractice claim.⁵ NRS 41A.009 contains the following definition for medical malpractice: "the failure of a physician, hospital or employee of a hospital, in rendering services, to use reasonable care, skill or knowledge ordinarily used under similar circumstances."⁶ The appellants argued that no affidavit is required under these statutes in a suit against a professional medical corporation.

While the definition of medical malpractice does not explicitly include professional medical corporations, the Court held that NRS 41A.071 requires expert affidavits be attached to any non *res ipsa loquitor* malpractice claim against such a corporation. "Professional Corporation" is defined in NRS Chapter 89, and under NRS 89.060 and 89.220, no statute can alter the personal liability of a physician in a medical malpractice claim.⁷ Harmonizing Chapters 41A and 89, the Court determined that the affidavit requirement applies to claims against professional medical corporations as well as physicians.

NRS 41A.071 applies to professional negligence claims

The Fierles' also argued that the definition of medical malpractice only covers claims against Dr. Perez'. Therefore, the claims against the other respondents would be for professional negligence and would not require an affidavit as 41A.071 only addresses malpractice claims. The Court looked to resolve the ambiguity by looking to the intent of the initiatives passed in 2004 as NRS 41A.015 and 41A.017, which provided protections for professional negligence for providers of health care.

² NEV. REV. STAT § 41A.017 (2007).

³ Washoe Med. Ctr. v. Dist. Court, 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006).

⁴ Beazer Homes Nevada, Inc. v. Dist. Court, 120 Nev.575, 579, 97 P.3d 1132, 1135 (2004); Keife v. Logan, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

⁵ NEV. REV. STAT § 41A.017 (2007).

⁶ *Id.* § 41A.009 (2007).

⁷ *Id.* §§ 89.060, 89.220 (2007).

First, the Court noted that the definition of professional negligence in the statute is basically the same as medical malpractice. The intent of the statute was to give other providers of health care the same protection doctors received from the legislature in 2002.⁸ The Court also reasoned that a malpractice claim against a doctor is the same as a professional negligence claim. To make one of these claims subject to the affidavit requirement and not the other would defeat the intent of the legislature and the citizens of Nevada. It would provide a way around the requirement by calling a claim professional negligence instead of malpractice. Therefore, NRS 41A.071's affidavit requirement extends to non-*res ipsa loquitor* professional negligence claims against providers of health care, whether doctors, nurses or nurse practitioners.

Claims based on res ipsa loquitor are not subject to the affidavit requirement

NRS 41A.100 provides *res ipsa loquitor* exceptions to the affidavit requirement in malpractice or professional negligence claims.⁹ The Court found its recent decision in *Szydel v. Markman* conclusive on the issue at hand.¹⁰ In *Szydel*, the court concluded that the expert affidavit requirement does not apply when the malpractice action is based solely on the *res ipsa loquitor* doctrine.¹¹ The *Szydel* court further concluded that when a plaintiff files a *res ipsa loquitor* claim in conjunction with other medical malpractice claims that are not based upon the *res ipsa loquitor* doctrine, those other claims are still subject to the expert affidavit requirements of NRS 41A.071.¹²

Here, the negligent extravasation claim would fall under one of the listed exceptions. If a "provider of health care" causes a patient to suffer "an unintended burn caused by heat, radiation or chemicals... in the course of medical care," or any of the other exceptions listed in the statute, no expert testimony or affidavit is required to establish negligence.¹³ Therefore, the Court allowed the claim against Mitchell to continue as she administered the medication.

A claim amended to include an affidavit will not relate back to the initial filing even if some of the claims do not require the affidavit

The appellants next argued that because some of their initial complaint did not require an affidavit, the amended filing could relate back and cure the initial deficiency. Here, the court followed precedent and determined that all claims under NRS 41A.071 that do not include an affidavit are void *ab initio*, and must be dismissed.¹⁴ The Court applied this rule even to situations where some claims survive because of lack of an affidavit requirement.

Conclusion

The Court concluded that, because under NRS Chapter 89, the establishment of a professional entity cannot alter the personal liability of a participant, NRS 41A.071's affidavit

⁸ See 2004 General Election Sample Ballot, p. 12.

⁹ NEV. REV. STAT § 41A.100(1)(c) (2007).

¹⁰ *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200 (2005).

¹¹ *Id.* at 454, 117 P.3d at 201.

¹² *Id.* at 460, 117 P.3d at 205.

¹³ NEV. REV. STAT § 41A.100(1)(c) (2007); see also *Szydel*, 121 Nev. at 454, 117 P.3d at 201.

¹⁴ *Washoe Med. Ctr.*, 122 Nev. at 1300, 148 P.3d at 792.

requirement applies to claims against professional medical corporations as well as individuals. The Court further concluded that the requirement extends to professional negligence claims against all providers of health care, nurse practitioners, nurses and doctors alike. However, the Court concluded that any claim that falls under the *res ipsa loquitor* exceptions listed in NRS 41A.100 may be filed without an affidavit as no expert testimony is needed to establish negligence. Finally, the Court concluded that a complaint filed containing some claims subject to the affidavit requirement and some that do not fall under 41A.071 cannot be cured by filing an amended complaint that includes the affidavits. Thus, all claims subject to NRS 41A.071 that are filed without the affidavits are void *ab initio* and must be dismissed. In accordance with these conclusions, the Court reversed in part and affirmed in part the district court's order and remanded the case for further proceedings consistent with the opinion.

Concurrence in Part, Dissent in Part (Pickering, J.)

Justice Pickering agreed with the result the majority reached, but not with its reasoning. While medical malpractice is encompassed in the term "professional negligence," the opposite is not true. As the amendments in 2004 did not change the words "medical malpractice" in 41A.071 to "professional negligence," the requirement should not be extended to claims of professional negligence. However, in this case, Justice Pickering found the injection to be a part of the rendering of medical services by a physician as defined in the malpractice statute, regardless of the fact that it was a nurse who physically gave the drugs. Therefore, this action would be one for medical malpractice and require an affidavit.

Justice Pickering also believes that both the nurse and the physician with the duty to supervise are subject to the *res ipsa loquitor* exception. The injection was given by the nurse under the doctor's supervision, and therefore the remand should be for Dr. Perez and Mitchell for the negligent extravasation.