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## Szymborski v. Spring Mtn. Treatment Ctr., 133 Nev. Adv. Op. 80 (Oct. 26, 2017)

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## HEALTH LAW: MEDICAL MALPRACTICE

### **Summary**

The Court determined medical malpractice, and subsequent adherence to NRS 41A.071, involves a medical diagnosis, treatment, or judgment, and when the standards of care pertaining to the medical issue require explanation to the jury from a medical expert at trial. Therefore, Szymborski's claims for negligence, malpractice, gross negligence, negligence per se, and negligent hiring, training, and supervision state claims for relief which were not based on a medical treatment or judgment and should not have been dismissed for failure to attach the NRS 41A.071<sup>2</sup> affidavit.

### **Background**

#### I.

Appellant Lee Szymborski's son, Sean Szymborski, was admitted to Spring Mountain Treatment Center for care and treatment due to self-inflicted wounds. Licensed social workers initiated discharge planning, but also delegated some tasks to a Masters of Arts (MA). While admitted to the hospital, there was documentation which indicated: Szymborski directed a case manager not to release Sean to Szymborski's home upon discharge and that the case manager would help find alternative housing, Sean did not want to live with his father, and that Sean experienced negative reactions when talking about his father about returning to his home.

When Sean was released from the hospital, an MA met with him to confirm where he was to live. Sean was vague about where he would stay but did state he intended to first stop at Szymborski's home to pick up his debit card. Both the MA and case manager never verified Sean's alternative housing and told Sean they would only give him enough money for a taxi to take him to Szymborski's home.

Upon arriving at Szymborski's home, Sean caused \$20,000 in property damage. Szymborski subsequently filed a complaint with the State of Nevada Department of Health and Human Services—Division of Public and Behavioral Health (Division), asserting four claims against Spring Mountain, CEO Daryl Dubroca, and various social workers and MAs. The Division investigated the complaint and credited Szymborski's claims, finding that Spring Mountain committed multiple violations of Discharge Planning (NAC 449.332): (1) negligence, (2)

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<sup>1</sup> By Paloma Guerrero.

<sup>2</sup> 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:

1. Supports the allegations contained in the action;
2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;
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.

professional negligence, (3) malpractice, (4) gross negligence, (5) negligence per se, and (6) negligent hiring, supervision, and training.

The district court granted Spring Mountain's motion to dismiss because Szyborski failed to attach an expert medical affidavit pursuant to NRS 41A.071. District court determined the claims to be for medical malpractice, given Spring Mountain's status as a hospital. Szyborski appeals.

## **Discussion**

### **II.**

#### **A.**

Spring Mountain's status as a hospital does not shield it against forms of tort liability other than medical malpractice. "[A] health-care based corporation's status as a medical facility cannot shield it from other forms of tort liability when it acts outside the scope of medicine."<sup>3</sup> In *Deboer v. Senior Bridges of Sparks Family Hosp., Inc.*, the district court classified the patient's claim as medical malpractice in error because the claim "was not related to medical diagnosis, judgment, or treatment."<sup>4</sup> Here, like in *Deboer*, the district court misclassified Szyborski's claims as medical malpractice, simply because Spring Mountain is a health-care corporation. It is possible for actions of staff in a hospital to be outside the scope of medicine.

#### **B.**

To test for a claim of medical malpractice, the court must determine whether Szyborski's claims involve medical diagnosis, judgment, or treatment or are based on Spring Mountain's performance of nonmedical services. The alleged negligence must substantially relate to a medical diagnosis, treatment and involve the exercise of medical judgment.<sup>5</sup> However, if the level of reasonableness of an agent's actions can be evaluated by jurors on the grounds of their common knowledge and experience, then the claim can be based on ordinary negligence.<sup>6</sup>

#### **C.**

Courts must look to the "substantial point or essence" of each claim to test for medical malpractice or ordinary negligence.<sup>7</sup> Medical malpractice claims must be filed with an NRS 41A.071 medical expert affidavit. However, ordinary negligence claims can proceed without this requirement. Therefore, it is important to determine if Szyborski's claims are indeed claims of medical malpractice or ordinary negligence.

### **III.**

#### **A.**

Szyborski's first claim for negligence allege a set of duties and facts for ordinary negligence and therefore should not have been dismissed because of a lack of an NRS 41A.071 medical expert affidavit. The essence of this claim of negligence rests on Spring Mountain's non-

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<sup>3</sup> *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. at 411–12, 282P.3d at 731–32.

<sup>4</sup> *Id.* at 408, 282P.3d at 731–32.

<sup>5</sup> *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636,640 (Tenn.2003). *Papa v. Brunswick Gen. Hosp.*, 517 N.Y.S.2d 762, 763 (App. Div. 1987).

<sup>6</sup> *Bryant v. Oakpoint Villa Nursing Centre*, 684 N.W.2d 864, 872 (Mich. 2004).

<sup>7</sup> *Estate of French*, 333 S.W.3d at 557 (citing *Black's Law Dictionary* 770 (9th ed. 2009)); *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972).

medical actions: discharging Sean in a taxi with only enough money to arrive at his father's location and failing to inform Szymborski. Because this claim does not involve medical judgment, treatment, or diagnosis, it does not require medical expert testimony at trial.

B.

Szymborski's second claim for professional negligence was properly dismissed for failure to attach an NRS 41A.071 medical expert affidavit. Szymborski's alleges that Spring Mountain had a duty to employ medical staff who were adequately trained and possessed a degree of skill of similar competent medical personnel. These allegations, however, do not contend how professionals involved in the nonmedical aspects of Sean's discharge will require discharge. What Szymborski alleges would require medical expert testimony to determine the standard of care and thus, a failure to attach an NRS 41A.071 warranted proper dismissal.

C.

Szymborski's third claim for malpractice, gross negligence, and negligence per se are not grounded in medical malpractice and therefore do not require an NRS 41A.071 medical expert affidavit. Szymborski claims that the social worker committed malpractice by discharging Sean to Szymborski's home when the social worker was aware of Sean's negative disposition towards his father, the father's request that Sean not be discharged to his home, and Sean's plan to stay in a different location. As nonmedical actions, Szymborski's allegations involve only regulatory violations and not a medical diagnosis, treatment, or judgment.

D.

Szymborski's final claim for negligent hiring, supervision, and training are not grounded in medical malpractice and therefore do not require an NRS 41A.071 medical expert affidavit. Szymborski's claim involves the actions of social workers, case managers, and MA's in their failure to find Sean suitable accommodations and transportation after being discharged. Szymborski alleged Spring Mountain owed a duty to hire, train, and/or supervise competent medical and staff personnel and they breached this duty. Thus, since this claim does not involve medical judgment, treatment, or diagnosis, but a breach of duty in the hiring, supervision, and training, then it does not need to meet the requirements of NRS 41A.071.

**Conclusion**

**IV.**

A claim may be classified as a medical malpractice claim only if its essence involves a medical diagnosis, treatment, or judgment, and the standards of care pertaining to the medical issue require a medical expert to explain the issue to the jury. Here, Szymborski's claims for negligence, malpractice, gross negligence, negligence per se, and negligent hiring, training, and supervision are not based on medical treatment or judgment. Those claims should not have been dismissed for failure to attach the medical expert affidavit. Szymborski's claim for professional negligence against Spring Mountain, however, is based on medical malpractice and was properly dismissed for failure to attach a medical expert affidavit.

HARDESTY, J., concurring in part and dissenting in part:

Disagreeing only with the holding of Szymborski's claim for malpractice, gross negligence, and negligence per se in Szymborski's third claim, Justice Hardesty explained that since the decision regarding Sean's discharge involve medical judgment or treatment, and the claim naturally involves breach of that judgment or treatment then it is grounded in medical malpractice.