IN THE SUPREME COURT OF THE STATE OF NEVADA

LEE E. SZYMBORSKI,

Appellant,

vs.

SPRING MOUNTAIN TREATMENT CENTER; AND DARRYL DUBROCA, IN HIS OFFICIAL CAPACITY,

Respondents.

Supreme Court No. 66398
District Court Case No. A700178

On Appeal from the Eighth Judicial District Court, State of Nevada

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following is a person as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant's counsel, Garman Turner Gordon LLP, is a professional corporation organized under the laws of the State of Nevada.

Dated this 21ST day of December, 2015.

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I. INTRODUCTION

While counsel hopes that he has more clearly articulated the claims than Mr. Szymborski was able to do in *proper person*, the Respondents continue to characterize the case as purely one alleging medical malpractice. The strategy makes sense. After all, without a statutory affidavit pursuant to NRS 41A.071, deciding this action is solely a medical malpractice case makes the matter simple, as no affidavit was attached to the Complaint. Yet this superficial analysis betrays the mandate, cited by Respondents themselves, that "it is the nature of the grievance rather than the form of the pleadings that determines the character of the action." *State Farm Mut. Auto Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972), See, Respondents Spring Mountain Treatment Center and Darryl Dubroca's Answering Brief ("Respondents' Brief") at 15.

To use Respondents' word, the gravamen of the Complaint is that Lee Szymborski suffered property damage and emotional distress as a result of the Defendants' negligence (or gross negligence) in releasing his son into the community and specifically to Mr. Szymborski's home. The negligence is not that of a nurse or physician but of a licensed social worker, and the "master of arts" working under that person, carrying out the mechanics of a discharge into the community; as well as the negligent hiring, supervision, and/or training of one or both. These may be instances of "professional negligence" but not of medical

malpractice and a medical expert could not opine on them in any event.[1] Moreover, the negligent acts in this case are not disputed. Indeed, Respondents acknowledge that Lee Szymborski's complaints to the State of Nevada Department of Health and Human Services – Health Division were "substantiated with deficiencies cited." See Respondents' Brief at 8.

Nor can Respondents argue in good faith, as they attempt to do, that they did not owe a duty, because damage to Lee Szymborski was unforeseeable. The District Court did not dismiss the action because the damages were unforeseeable. Moreover, the undisputed facts would support a finding that harm was, in fact, reasonably foreseeable. Sean Szymborski was admitted to Spring Mountain Treatment Center with multiple self-inflicted wounds from a sharp object. See Respondents' Brief at 5. He was diagnosed with "unspecified psycosis." Appellant 3 ¶ 11 a. The Respondent's Brief acknowledges that the day before his release, Sean noted he "had much trepidations about going back to his father's home," and that he "was restless when talking about the father." Respondent's Brief at 6. In fact, on the very morning of discharge, Respondents' notes reflected that "Sean did not want return to his father's home due to 'on-going conflict'." See Respondents' Brief at 6. Moreover, Sean was "vague" about his new address despite a requirement he have one. Id. Yet, the Licensed Social Worker, and the Master of

[1] As noted by this court in *Egan v. Chambers*, 129 Nev. Adv. Op. 25, 299 P.3d 364 (2013), the requirement of an affidavit under NRS 41A.071 did not apply to "professional negligence" claims.

Arts, at Spring Mountain Treatment Center sent Sean to his father's house, with just enough cab fare to get him to that location, and no more. See Id.

The gravamen of this action is garden variety negligence (in fact gross negligence) and the absolute failure to exercise due care in planning and execution of a plan by social workers, not medical personnel, causing harm to someone other than a patient. The First, Third, and Fourth Claims for Relief properly allege this other kind of claim. Even the Second Claim for Relief, despite Plaintiff's references, is not a medical malpractice claim but includes a claim of "professional negligence" directed at the actions of planning for a patient's discharge, the execution of that plan, and damages to a member of the public – in this case the patient's father. Dismissal of these claims by the District Court was erroneous and must be reversed.

II. LEGAL ARGUMENT

Lee Szymborski's claims are based solely on the negligence of one or more social workers (named as Doe Defendants), and on the facility's (Mr. Dubroca's) negligent hiring, training, and supervision of those non-medical professionals. The action does not attack a physician's decision to discharge a patient, but the carrying out of a plan for an release into the community of a mental patient, which was handled by the social workers (both licensed and unlicensed) in a negligent, or grossly negligent manner, including negligence per se in light of NAC 449.332.

The Department of Health and Human Services found, as Respondents acknowledge, the Mr. Szymborski's complaints were "substantiated with deficeinies cited." See Respondent's Brief at 8. Yet, the Defendants were successful in convincing the District Court that these garden variety acts of negligence, gross negligence, and negligence per se, causing damage to a non-patient, constituted "medical malpractice." The main problem, however, is that the release of Sean into the community, and to his father's home specifically, carried with it not only a duty of care in rendering services to Sean, but a general duty of reasonable care to the community and to his father specifically.

A. The Case is Based Upon Negligence, Gross Negligence, Negligence Per Se, and Negligent Hiring, Supervision and Training

The unrefuted evidence in the record shows that the social workers at Spring Mountain Treatment Center were negligent. Despite strong indications that Sean Szymborski should not return to his father's home, social worker put him in a cab and sent him to his father's home with just enough money for the ride there. State regulation NAC 449.332, requires planning in advance of a patient's physical discharge from a mental facility. Appellant 2 ¶ 6; Appellant 4 ¶ 14; Appellant 12-21. This includes consideration of the capacity for self-care, the possibility of returning the patient to his previous setting, or making another appropriate placement after discharge. Planning here was undertaken by licensed social

workers, but some or all tasks were delegated to "masters of arts," or "MA's." The requirements of the regulation, however, were not met, nor was the duty of reasonable care. Appellant 6 ¶ 27; Appellant 8 ¶ 36; Appellant 12-21. Those failures appear clearly in the record, in the form of the Health Division's investigation and findings. The Respondents' own brief acknowledges these failures and the Division's conclusions. See e.g. Respondents' Brief at 8.

Sean, admitted with self-inflicted wounds and diagnosed with undefined psychosis, was discharged with no money and put into a taxi to Lee Szymborski's home, essentially dumped at a place of known conflict and "trepidation." Although Mr. Szymborski had vacillated on the issue of Sean returning to his house, the Licensed Social Worker admitted to Health Division investigators that she had not spoken directly with the senior Mr. Szymborski and had delegated the job to an unlicensed, and apparently unsupervised MA. Appellants 4 ¶ 11 i.; Appellant 14.

The Respondents' Brief does not address any of these facts but asserts simply that these people work for a hospital, that their actions fall within the definition of "medical malpractice" of NRS 41A.009, and, therefore, that they cannot be sued without an affidavit from a medical expert, per NRS 41A.071. This argument was seemingly accepted by the District Court in conclusory fashion, but the court should have looked at the legal theories more closely. See, *Smith v. Ben Bennett*, 35 Cal.Rptr. 3d 612,615 (Ct. App. 2005.) In this case, no physician, nurse,

or even the facility, is accused of failing to deliver proper care to a patient. The allegation is *inter alia* that social workers, and their subordinates, failed to exercise due case in preparing and executing a plan to release a patient into the community, and to Plaintiff's home in particular. Those people owed a duty of reasonable care to the community, and to Mr. Szymborski, to execute the plan in a non-negligent way. Their failure to do so was not a medical one and cannot be addressed by a medical expert. Moreover, no other kind of expert would appear to meet requirements of NRS 41A.071.

In the decision on the Motion for Reconsideration, the District Court said that "Mr. Szyborski's claims are based upon allegations of medical malpractice" without any kind of analysis of how the claims, including negligent hiring, supervision, and training, could be so construed, particularly in light of Lee Szymborski not being a patient, and despite his having claims for property damage. Appellant 224-230. Appellant does not dispute that the social workers were employees of Spring Treatment Center, or that the facility qualifies as a hospital under NRS 41A. He does maintain, however, that his claims are not and cannot be for medical malpractice, because he was not a patient receiving services at the hospital. Only Sean Szymborski can bring such a claim. Despite some superfluous language of his Complaint, Lee Szymborski only claims damages to his property and mental state based on garden variety breaches of the duty of reasonable care

owed to him. Respondents sent Sean to directly Lee's Szymborski's home, without calling him, and knowing far more about Sean's mental state than Lee knew. Sean destroyed the home. This was not medical malpractice but it was negligence, even gross negligence.

B. Respondents Owed a Duty of Reasonable Care to Appellant

Respondents argues that they owed no duty to Lee Szymborski, and that his son's actions were not, in any case, foreseeable to the Respondents. As acknowledged by the Respondents, however, the District Court did not make those specific findings. See Respondents' Brief at 21.

To further this argument, Respondents cite to cases dealing with a duty to control the dangerous conduct of another. See Respondents' Brief at 22, citing *Lee v. GNLV Corp.* 117 Nev. 291, 295, 22 P.3d 209 (2001); *Mangeris v. Gordon* 94 Nev. 400, 580 P.2d 481 (1978). The comparisons, however, are inapposite.

First, unlike the cited cases, the duty owed in this case was not necessarily to control Sean's dangerous conduct, but a broader duty of reasonable care. Respondents did not simply usher Sean out the front door of the Spring Mountain Treatment Center and fail to control his next move, they specifically paid for him to go to Mr. Symborski's home; a known place of trepidation for Sean, a place he was not to live according to the discharge plan, a place where they knew Sean had not been wanted. Second, even if the claim was that Respondents had a specific

duty to control Sean's conduct, Respondents were acutely aware of the special relationship that existed between him and his son Sean. Indeed the facility's notes expressly reflect a special relationship and known conflicts.

Respondents also argue that Sean's actions were not foreseeable, citing *Mangeris*. In the *Mangeris* case, the Court held that the plaintiff widow had not alleged sufficient facts to establish a duty on the part of a massage parlor to warn her decedent husband against a threat to his life, because it was not reasonably foreseeable that the parlor's patrons would murder her husband "at a remote time and distant location." *Id*. at Nev. 403. Unlike the assailants in *Mangeris*, however, the idea that Sean Szymborski, a mental patient with self-inflicted wounds and a known conflict with his father, a patient for whom the discharge plan specifically provided he not live with his father, would cause physical, or emotional, or property damage at his father's home, was entirely foreseeable to these social workers tasked with carrying out Sean's release into the community. Sean's actions were neither remote nor distant. The particular harm is not the issue – it might foreseeably have been physical instead. At minimum the foreseeability of these actions would be a question for the trier of fact.

III. CONCLUSION

For the reasons, and based upon the arguments, stated above:

1. The District Court erred by dismissing the Complaint on the grounds that

the claims are solely for medical malpractice and that no supporting expert affidavit was provided. That decision should be reversed and the case remanded.

2. In addition, the District erred by denying the Motion for Reconsideration, Or in the Alternative, Motion to Set Aside, and that decision should be reversed.

Dated this 21ST day of December, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Time New Roman 14 point font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,720 words.

I further certify that I have read this appellate opening brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the

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. . .

requirements of the Nevada Rules of Appellate Procedure.

Dated this 21ST day of December, 2015.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Garman Turner Gordon LLP hereby certifies that on the 21ST day of December, 2015, she served a copy of **Appellant's Reply Brief** through the Nevada Supreme Court electronic filing system to:

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