

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARILEE BROWN; MARILOU
BROWN; AND GREGORY J.
BROWN;

Appellants,

vs.

ST. MARY'S REGIONAL MEDICAL
CENTER; TAMMY EVANS
(ERRONEOUSLY NAMED AS TAMI
EVANS); PREM REDDY, M.D.;
TANZEEL ISLAM, M.D.; SRIDEVI
CHALLAPALLI, M.D.; AND MARK
MCCALLISTER, M.D.,

Respondents.

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Case No.: 81434 - COA

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The District Court's Application of NRS 41A.071 Violates the Separation of Powers

NRS 41A.071's expert affidavit requirement impermissibly violates the separation of powers doctrine because it conflicts with Nevada's notice pleading standard and, therefore, encroaches on the judiciary's authority to promulgate court rules and procedures. NRS 41A.071 is in conflict with Nevada Rules of Civil Procedure 8 and 9 because it establishes an additional pleading requirement on medical malpractice claimants, not otherwise required by other tort claimants.

NRS 41A.071 is by definition procedural, and not substantive. NRS 41A.071 is "a preliminary procedural rule" that essentially creates a heightened pleading standard for only medical malpractice claimants that conflicts with the Nevada Rules of Civil Procedure. *Zohar v. Zbiegien*, 334 P.3d 402, 406 (Nev. 2014) (quoting *Borger v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 120 Nev. 1021, 1027, 102 P.3d 600, 605 (2004)).

II. The District Court's Dismissal Violates Respondents' Right to Due Process

NRS 41A.071 violates due process because it bars access to the courts unless plaintiffs engage in discovery-like activity as a prerequisite to filing a complaint. Ultimately, NRS 41A.071 unconstitutionally requires medical malpractice claimants to meet a higher pleading standard than all other tort plaintiffs by requiring proof of the merits of their case prior to the benefit of court-sanctioned discovery.

In their answering briefs, Respondents argue that the purpose of the statute is “to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based on competent expert opinion.” *Washoe Med. Ctr. v. Second Jud. Dist. Ct. of State of Nev. ex rel. Cty. of Washoe*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006); *Borger*, 120 Nev. at 1029, 102 P.3d at 606. But Respondents do not argue that the underlying complaint herein is frivolous or that it was filed in bad faith; and there was no such factual finding by the district court.

That is why Appellants are asking the Court to evaluate whether the statute, in fact, furthers this goal. Instead of lowering costs and reducing frivolous lawsuits, as demonstrated in Appellants' opening brief, the statute is actually blocking indigent plaintiffs' access to the courts. Here, it is completely reasonable that Appellants' case continue to the discovery process. However, this statute instead restricts the “fundamental constitutional right of access to courts.” *Bounds v. Smith*,

430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). The statute ultimately requires plaintiffs with medical malpractice claims to retain an expert witness who must form an opinion on a fact in issue without the benefit of any discovery.

Respondents argue that the statute does not violate Appellants' right to due process because an expert must "simply" review the patient's medical records. McAllister's Ans. Br. at 36. Yet, if forming an opinion requires hiring an expert, it cannot be described as "simple." The whole point of requiring an expert is to elucidate complicated matters.

Furthermore, Respondents claim that a plaintiff would have "virtually immediate access" to medical records that an expert would need to examine in order to make an informed opinion. McAllister's Ans. Br. at 36. However, this is not always true. Often, as demonstrated by the facts of this case, there is a need for health care workers to be interviewed and procedural manuals to be reviewed before a medical provider will release medical records. But, nonetheless, NRS 41A.071 effectively requires medical malpractice plaintiffs to retain an expert witness who must form an opinion on solely plaintiff owned medical records and without any benefit of discovery.

Furthermore, requiring complex discovery in the form of an expert witness opinion before filing a case is overly burdensome, particularly here where it was

never argued that the Appellants' claims are frivolous or not in good faith. Thus, NRS 41A.071 presents a constitutionally impermissible barrier to the right of access to the courts, by denying medical malpractice plaintiffs the opportunity to discover facts that are a prerequisite to obtaining a certificate of merit.

III. Even If This Court Upholds NRS 41A.071, It Should Remand the Ordinary Negligence Claims to the District Court Because Some of the Respondents' Allegations Sound in Ordinary Negligence and Do Not Require Compliance With NRS 41A.071

Appellants' maintain the allegation that Respondents were negligent in failing to forward critical medical documents that did not raise any questions of medical judgment beyond the realm of common knowledge or experience. Therefore, this allegation falls within the "common knowledge" exception to the medical malpractice expert affidavit requirement. Respondents concede that the distinction between professional and ordinary negligence can be subtle, and the court must look to the "gravamen or substantial point or essence" of each claim to make the necessary determination. *See Szymborski v. Spring Mtn. Treatment Center*, 133 Nev. 638, 642-43, 403 P.3d 1280, 1285 (2017) (internal quotation marks omitted).

The Respondents' obligation to merely send documents requires no professional judgement, it is simply an obligation to follow common procedure. In reviewing Appellants' claim related to the failure to send patient medical history,

any lay juror could evaluate Respondents' negligence based on the juror's own common knowledge and experience. *Szymborski* at 642, 403 P.3d at 1285 (recognizing that being able to evaluate a claim based on common knowledge and experience means "the claim is likely based in ordinary negligence").

As the St. Mary's Respondents explain, "professional negligence" is broadly defined as the failure "in rendering services" to use "reasonable care, skill or knowledge." St. Mary's Ans. Br. at 25 (quoting NRS 41A0.15). There is simply no specialized or heightened *professional* care, skill or knowledge necessary for simply providing medical records to the treating hospital. The failure to provide such medical records within in a reasonable time is ordinary—not professional—negligence. No medical judgment is needed, it is simply an administrative matter of providing documents upon request.

Respondents rely on *Jones v. Wilkin*, 111 Nev. 1335, 1338, 905 P.2d 166 (1995), to argue that negligent "maintenance" of medical records is properly characterized as medical malpractice. But here, the issue is not *maintenance* of Decedent Brown's medical records, it is the negligent failure to *produce* such records. Appellants claim is not about the content of Brown's medical records, it is about the failure to timely deliver them to the treating hospital.

No specialized knowledge on the part of the trier of fact is necessary to determine whether the St. Mary's Respondents negligently failed to provide Decedent Brown's medical records to Renown within a reasonable time, and that failure is therefore ordinary, not professional, negligence.

IV. Conclusion

For the reasons set forth above, Appellants request that this Court reverse the district court's order dismissing their claims.

Dated this 29th day of November, 2021.

Respectfully submitted,

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(3), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the Record on Appeal where the matter relied on is to be found. I certify that this brief complies with NRAP 32(a)(4)–(6) because it contains 1,115 words. I understand I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of November, 2021.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on November 29, 2021, a true and correct copy of the foregoing **APPELLANT’S REPLY BRIEF** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court’s E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the E-Flex system.

Dated this 29th day of November, 2021.

By: /s/ Pamela Montgomery
An employee of Kemp Jones, LLP