

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.

Electronically Filed
Jan 13 2022 11:11 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.: 81434 - COA

APPELLANTS' SUPPLEMENTAL BRIEF

Don Springmeyer, Esq. (#1021)
KEMP JONES, LLP
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
d.springmeyer@kempjones.com
Attorneys for Appellants

TABLE OF AUTHORITIES

Cases

<i>Bryant v. Oakpointe Villa Nursing Ctr., Inc.</i> , 471 Mich. 411, 684 N.W.2d 864 (Mich. 2004)	4
<i>DeBoer v. Sr. Bridges of Sparks Fam. Hosp.</i> , 128 Nev. 406, 282 P.3d 727 (2012)..	2
<i>Est. of Curtis v. S. Las Vegas Med. Invs., LLC</i> , 136 Nev. 350, 466 P.3d 1263 (2020)	2, 3, 4
<i>Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court</i> , 132 Nev. Adv. Op. 53, 376 P.3d 167 (2016)	2
<i>Szymborski v. Spring Mtn. Treatment Center</i> , 133 Nev. 638, 403 P.3d 1280 (2017)	1, 2, 4

Statutes

NRS 41A.071	1, 2, 3
-------------------	---------

Pursuant to the Court’s December 23, 2021 Order, Appellants submit this brief in response to the following direction from the Court: clarify which claims they assert constitute ordinary negligence claims that do not require an expert medical affidavit, along with supporting argument and authority for this position as to each claim identified.

The following claim from Appellants’ complaint sounds in ordinary negligence and therefore does not require an expert medical affidavit: St. Mary’s hospital staff failed to forward critical documents to Renown Regional Medical Center. *See* ROA 2:5.

As discussed in the Appellants’ opening and reply briefs, claims that sound in ordinary, as opposed to professional, negligence do not require an expert witness affidavit. NRS 41A.071, by its express terms, requires an expert witness affidavit only for *professional negligence* claims, and therefore such an affidavit is not required pursuant to NRS 41A.071 for claims of *ordinary negligence*.

In order to determine whether a claim sounds in “professional negligence,” courts must evaluate whether the claim “involve[s] medical diagnosis, judgment, or treatment, or [is] based on [the] performance of nonmedical services.” *Szymborski v. Spring Mtn. Treatment Center*, 133 Nev. 638, 641, 403 P.3d 1280, 1284 (2017). Thus, if the alleged breach involves “medical judgment, diagnosis, or treatment,” it

is likely a claim for medical malpractice. *Id.* at 642. So “if the jury can *only* evaluate the plaintiffs claim after presentation of the standards of care by a medical expert,” then it is a medical negligence claim. *Id.* (emphasis added) (citing *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev., Adv. Op. 53, 376 P.3d 167, 172 (2016)).

Conversely, if “the reasonableness of the health care provider’s actions can be evaluated by jurors on the basis of their *common knowledge and experience*, then the claim is likely based in ordinary negligence.” *Szymborski* at 642 (emphasis added). 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. *Id.* at 642–43 (citing *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 409, 282 P.3d 727, 730 (2012)).

Recently, this Court recognized the ‘common knowledge’ exception to the affidavit statute. *See Est. of Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. 350, 466 P.3d 1263 (2020). There, the Court stated that jurors do not need a medical expert opinion as required under NRS 41A.071 to decide whether a nurse was negligent when she gave a patient what turned out to be a fatal dosage of morphine that was supposed to go to a different patient. *Id.* at 357. The nurse’s action required no specialized judgment, and could be attributed to simple, i.e. *ordinary*, negligence—she simply gave the patient the wrong drug in the wrong dosage

because she had negligently mixed up the prescriptions. *Est. of Curtis* at 357. Therefore, this Court determined that the allegation regarding the negligent morphine distribution did not raise any question of medical judgment beyond the realm of common knowledge, and the nurse used no professional judgment in administering the morphine. *Id.*

In contrast, in the same case, this Court concluded that the plaintiff's allegation that the nursing home staff's decisions related to monitoring the patient (including the decision not to transfer the patient to the hospital and not to monitor the patient for a certain period of time after administering morphine) required some degree of professional judgment or skill, and, therefore, that was a claim for professional negligence and required medical expert affidavit under NRS 41A.071. *Id.* at 358. The Court reasoned a lay juror could not properly evaluate the failure-to-monitor allegations by relying merely on common knowledge and experience. *Id.* Instead, the juror would have to make judgment calls on what constitutes proper supervision for a patient who was incorrectly administered morphine, whether the defendants took adequate remedial measures upon realizing the mistake, and whether hospital staff should have transferred the patient to a hospital for further intervention and/or monitoring. *Id.*

Furthermore, this Court explained that:

[A] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or [professional negligence]: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern [professional negligence] actions.

Est. of Curtis at 357 (quoting *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 471 Mich. 411, 684 N.W.2d 864, 871 (Mich. 2004)). Here, Appellants allege that the hospital staff was negligent in failing to forward critical documents to Renown Regional Medical Center, the hospital Ms. Brown was admitted to upon the stroke caused by her negligent care at St. Mary's. This delay resulted in Renown lacking critical patient medical history and, therefore, hindered Renown's ability to provide Ms. Brown with proper treatment shortly before her death.

Respondents' obligation to forward critical medical documents does not raise any questions of medical judgment beyond the realm of common knowledge or experience—either the documents are forwarded to the treating hospital or they are not. The Respondents' obligation to simply send documents requires no professional judgment; it is 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. *See Szymborski* at 642 (recognizing that being able to evaluate a claim

based on common knowledge and experience means “the claim is likely based in ordinary negligence”).

Dated January 13, 2022.

Respectfully submitted,

KEMP JONES, LLP

/s/ Don Springmeyer
Don Springmeyer, Esq. (#1021)
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Attorneys for Appellants

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 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 January 13, 2022.

KEMP JONES, LLP

/s/ Don Springmeyer
Don Springmeyer, Esq. (#1021)
3800 Howard Hughes Pkwy, 17th Floor
Las Vegas, Nevada 89169
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on January 13, 2022, a true and correct copy of the foregoing **APPELLANT’S SUPPLEMENTAL 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 13th day of January, 2022.

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