

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARILEE BROWN, MARILOU BROWN
GREGORY J. BROWN (FOR BEVERLY M.
BROWN'S FAMILY),

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 McALLISTER, M.D.

Respondents.

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APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE;
THE HONORABLE KATHLEEN DRAKULICH, DISTRICT JUDGE

**RESPONDENT MARK McALLISTER, M.D.'S
SUPPLEMENTAL ANSWERING BRIEF**

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is an appeal from an order dismissing appellants' complaint for medical malpractice/professional negligence for failure to comply with NRS 41A.071. At issue is whether any of the plaintiffs' claims are exempt from the requirements of NRS 41A.071 because they sound in ordinary negligence rather than professional negligence.

On December 23, 2021, following the completion of briefing, this Court issued an Order Directing Supplemental Briefing, seeking clarification as to which claims appellants asserted were for "ordinary negligence" for which no expert medical affidavit is required. Specifically, appellants were directed to file a supplemental brief "clarifying which claims they assert constitute 'ordinary negligence' claims that do not require an expert medical affidavit." *See Order Directing Supplemental Briefing, p. 1.*

Appellants filed their Supplemental Brief on January 13, 2022. In it, they represent that only one aspect of the claims asserted in the complaint constitutes "ordinary negligence," which they identified as follows: "St. Mary's hospital staff failed to forward critical documents to Renown Regional Medical Center." *Appellants' Supplemental. Brief, p. 1.*

Appellants’ argument cannot be reconciled with the Complaint, which only contains a single claim for “medical negligence.” *See R.App. 14-16*. Even if the prolix allegations in the complaint were construed as asserting multiple claims, the sole purported claim of “ordinary negligence” asserted by appellants does not salvage their action against Dr. McAllister, whose treatment as an interventional radiologist is challenged in this action. *R.App. 3:8-14, 8:6-7*. As shown in Dr. McAllister’s Answering Brief, the allegation that “St. Mary’s hospital staff failed to forward critical documents to Renown Regional Medical Center” is not directed at Dr. McAllister. *See McAllister RAB 22*.

Lastly, even the assertion that St. Mary’s delayed in transmitting medical records to another hospital falls within the ambit of NRS 41A.071. This is true because appellants allege that the delay affected medical treatment and caused injury, implicating the standard of care and causation, which cannot be proved without expert testimony.

II.

ARGUMENT

A. Notwithstanding the Prolix Allegations, the Sole Claim in the Complaint is for Professional Negligence, Requiring Compliance with NRS 41A.071

On appeal, appellants contend that the complaint asserts a claim for “ordinary negligence,” which did not require compliance with NRS 41A.071. *Appellants’ Supplemental Brief, p. 1*. In truth, the complaint does not assert multiple claims.

Despite its verbosity, the complaint asserts a single claim for medical negligence.

R.App. 14-16. As the district court expressly found, the complaint did not plead separate claims for relief related to non-medical claims:

To the extent Plaintiffs are now contending that claims for ordinary negligence were pled, they have failed to set forth the necessary elements of those claims and/or factual allegations sufficient to support those claims denying Defendants “adequate notice of the nature of the claim and the relief sought” in violation of *Hay*.

R.App. 207, quoting from Hay v. Hay, 100 Nev. 196, 678 P.2d 672 (1984).

As the district court properly observed, the headings throughout the complaint largely referenced “medical malpractice,” “medical negligence” or both, but none related to “ordinary negligence.” *R.App. 207.*

Additionally, the complaint is devoid of any allegations that the plaintiffs were excused from complying with NRS 41A.071 as to any portion of the complaint because they were asserting a claim for “ordinary negligence.” *R.App. 1-17.* The absence of a claim for ordinary negligence is especially true as to Dr. McAllister, whom plaintiffs accuse of committing errors in rendering medical services as an interventional radiologist. *R.App. 3:8-14, R.App. 8:6-7.*

Based on the four corners of the complaint, it cannot reasonably be construed as asserting anything other than a claim for professional negligence, especially as to Dr. McAllister.

B. Appellants were Required to Comply with NRS 41A.071 as to their Claim Against Dr. McAllister Because their Purported Claim of “Ordinary Negligence” is not Asserted Against Dr. McAllister

Assuming, *arguendo*, that the complaint can reasonably be construed as including a separate claim for “ordinary negligence,” the only such claim is not against Dr. McAllister. As reflected in the Opening Brief and in Appellants’ Supplemental Brief, the only allegation that “sounds in ordinary negligence” is the allegation that “St. Mary’s hospital staff failed to forward critical documents to Renown Regional Medical Center.” *Appellants’ Supplemental Brief*, p. 1. Appellants’ Opening Brief reflects that this “claim” is premised on the allegation that St. Mary’s failed to fax documentation to Renown Regional Medical Center during Ms. Brown’s March 2019 hospitalization. *AOB* 26.

In his Answering Brief, Dr. McAllister demonstrated that he was not “hospital staff” and was not alleged to have been involved in the transmittal of St. Mary’s medical records to Renown. *McAllister RAB* 22. Appellants did not dispute Dr. McAllister’s argument or even respond to it. *See Appellants’ Amended Reply Brief*, pp. 4-5. In fact, appellants effectively conceded that this “claim” of ordinary negligence was not directed to Dr. McAllister. Appellants assert:

“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.” *Appellants’ Amended Reply Brief*, p. 5 (*emphasis added*).

Appellants’ quoted argument establishes that the purported “ordinary negligence” claim is not asserted against Dr. McAllister. Appellants’ concession is buttressed by the assertion in Appellants’ Supplemental Brief that “St. Mary’s hospital staff failed to forward critical documents to Renown Regional Medical Center.” *Appellants’ Supplemental Brief*, p. 1.

Based upon the record before this Court and in the district court, there is no “ordinary negligence” claim against Dr. McAllister and the medical malpractice claim was unsupported by an expert affidavit as required by NRS 41A.071. Therefore, this professional negligence action was properly dismissed without prejudice and without leave to amend as to Dr. McAllister under NRS 41A.071 and *Washoe Medical Center v. District Court*, 122 Nev. 1298, 148 P.3d 790 (2006).

C. The Allegations of Delayed Transmittal of Records Required Compliance with NRS 41A.071 Based on the Allegation that the Delay Affected Treatment and Caused Death

Appellants contend that their allegation of delayed transmission of medical records sounds in ordinary negligence and is within the “common knowledge” exception to the affidavit requirement. *Appellants’ Supplemental Brief*; see also *AOB* 24, 26. Appellants’ argument is flawed because they omit critical portions of their allegations and, thus, their analysis is incomplete.

Addressing plaintiffs' arguments on that issue, the district court wrote:

As for the failure to expedite medical documentation in this case, the Nevada Supreme Court has held "allegations of negligent maintenance of medical records are properly characterized as medical malpractice." *Jones [v. Wilkin]*, 111 Nev. [1335] at 1338 [95 P.2d 166, 168 (1995)]. **Failure to expedite the medical documents is pertinent to the diagnosis and treatment of Ms. Brown** and therefore does not state a claim for ordinary negligence. *Szymborski*, 133 Nev. at 642.

R.App. 206 (bracketed citation and bold print added).

Appellants have not demonstrated error in the district court's factual findings or its legal analysis. Nor can they because they alleged that the delay in transmitting medical records "hindered Renown's ability to provide Ms. Brown with proper treatment shortly before her death." *Appellants' Supplemental Brief*, p. 4; AOB 26.

Whether there was a delay in transmitting medical records and, more importantly, whether the alleged delay affected medical treatment and caused damages, are not within the common knowledge of a lay person. These issues implicate the standard of care regarding the timeliness of treatment and medical decision-making, and causation. Standard of care and causation are essential elements of a professional negligence claim. *See Orcutt v. Miller*, 95 Nev. 408, 411-412, 595 P.2d 1191, 1193 (1979) (identifying the elements of a medical malpractice claim). Standard of care and causation must be established by expert testimony to a reasonable degree of medical probability. *See* NRS 41A.100(1); *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157-58, 111 P.3d 1112, 1116 (2005) ("medical

expert testimony regarding standard of care and causation must be stated to a reasonable degree of medical probability” in order to impose liability on a health care provider).

Here, whether medical treatment was affected by a delay in getting records and thus caused or contributed to the patient’s death requires specialized knowledge that is not within the common knowledge of jurors. *See Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 350, 356, 466 P.3d 1263, 1269 (2020). “[I]f the jury can only evaluate the plaintiff’s claims after presentation of the standards of care by a medical expert, then it is a medical malpractice claim. *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017), *citing, inter alia, Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev. 544, 376 P.3d 167 (2016).

In sum, throughout their complaint, the Browns use the terms “Medical Malpractice” and “Medical Negligence,” and they allege that the treatment by the “interventional radiologist” (Dr. McAllister) amounted to medical malpractice. *See, e.g., R.App. 2, 3, 7:14, 8, 9-10, 12-13*. The complaint did not include individual claims for ordinary negligence or any other tort -- which did not go unnoticed by the district court. *See R.App. 14-15 and R.App. 207*. Based on the allegations in their complaint and the repeated references to “medical malpractice,” and “medical negligence,” the district court correctly concluded that all of the allegations

contained in the complaint directly involve medical judgment, diagnosis, and/or the medical treatment Ms. Brown received or should have received, which means that the claim sounds in professional negligence. *See R.App. 205-06*. The district court's order of dismissal without prejudice was in accord with NRS 41A.071 and the controlling Nevada law cited above and in Respondents' Answering Briefs.

Because the allegations of failing to expeditiously fax medical records to Renown is only asserted against St. Mary's, Dr. McAllister will defer to the St. Mary's Respondents for further analysis on this issue. Suffice it to say, that appellants have not shown they asserted a claim for "ordinary negligence" or that that their purported claim applies to Dr. McAllister. Nor have they demonstrated error in the district court's findings and conclusions.

III.

CONCLUSION

The gravamen of appellants' claims against Dr. McAllister involve medical judgment, decisions and treatment and thus required expert testimony. Therefore, the district court correctly concluded that the complaint allegations were rooted in professional negligence. Consequently, the district court did not err in dismissing the complaint for failure to comply with NRS 41A.071. Rather, the district court's dismissal of this action was in conformity with established Nevada precedent

regarding the application of NRS 41A.071 in professional negligence cases. Appellants have failed to demonstrate otherwise, particularly as to Dr. McAllister.

Accordingly, respondent MARK MCALLISTER, M.D. respectfully requests that the district court's Order Granting Motion to Dismiss Plaintiffs' Complaint for Failure to Comply with NRS 41A.071 be affirmed in its entirety.

Respectfully submitted this 3rd day of February, 2022

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CERTIFICATE OF COMPLIANCE

1. 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 typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14 point Times New Roman type style.

2. 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, and contains 1,803 words.

3. I further 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. I also 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 appropriate references to 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 requirements of the Nevada Rules of Appellate Procedure.

DATED: February 3, 2022

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CERTIFICATE OF SERVICE

I hereby certify that the within *Respondent Mark McAllister, M.D.'s Supplemental Answering Brief* was filed electronically with the Nevada Supreme Court on this date. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Don Springmeyer
Michael Prangle

Dated: February 3, 2022

/s/ Margie Nevin
Margie Nevin