

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARILEE BROWN; MARILOU BROWN; AND 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.; AND SRIDEVI CHALLAPALLI, M.D.; AND MARK MCCALLISTER, M.D.,  
Respondents.

No. 81434-COA

**FILED**

APR 20 2022

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Marilee Brown, Marilou Brown, and Gregory J. Brown (the Browns) appeal from a district court order dismissing a complaint for professional negligence related to the death of their mother Beverly Brown. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

We briefly summarize the facts relevant to this appeal. Beverly had chronic cardiovascular disease. In December 2018, she was hospitalized at St. Mary's Regional Medical Center (St. Mary's) for low oxygen levels. In preparation for a lung aspiration procedure, hospital staff allegedly discontinued Beverly's previously prescribed medications without first consulting her primary cardiologist. The procedure was successful, and Beverly was subsequently discharged in stable condition.

In February 2019, Beverly was again admitted to St. Mary's because of low oxygen levels. Her hospital stay was allegedly prolonged when

Beverly sustained a pulmonary injury during another lung aspiration procedure. Once again, in preparation for the procedure, Beverly's previously prescribed medications were discontinued. At some point during this hospitalization, Beverly was transferred to a bed in a room with a seriously ill patient who allegedly had infectious pneumonia. The Browns contend that as a result of Beverly's exposure to the infectious patient and/or her recent pulmonary injury, Beverly developed pneumonia. The Browns also allege that the St. Mary's staff failed to properly manage her prescribed medications following the lung aspiration procedure. Beverly was eventually discharged from St. Mary's in a weakened condition.

Three days after her discharge, Beverly suffered a stroke and was admitted to Renown Regional Medical Center (Renown). Beverly's condition initially improved but then declined, requiring intubation. The Browns allege that the attending physician at Renown confirmed that Beverly had infectious pneumonia only after he was able to review Beverly's hospital records from St. Mary's. The Browns allege that St. Mary's negligent delay in transferring Beverly's hospital records to Renown contributed to her physical decline and death.

Following Beverly's passing, the Browns filed a complaint alleging claims against St. Mary's and other medical providers (respondents) but failed to attach an expert affidavit to their complaint. Respondents moved to dismiss the complaint without prejudice based on the Browns' failure to comply with NRS 41A.071 and attach an expert affidavit in support of their claims.<sup>1</sup> The district court ultimately dismissed the Browns'

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<sup>1</sup>NRS 41A.071 provides the following:

complaint for failure to comply with NRS 41A.071, finding that the Browns' claims arose out of professional negligence and, therefore, an affidavit of a medical expert was required to support their claims pursuant to NRS 41A.071.<sup>2</sup>

On appeal, the Browns primarily challenge the district court's dismissal of their complaint on constitutional grounds. They assert that NRS

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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.

<sup>2</sup>We note that the Browns, respondents, and the district court use the terms "professional negligence" and "medical malpractice" interchangeably, although they are distinguishable. See *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 802, 358 P.3d 234, 241 (2015) ("[W]hile the definition of medical malpractice is narrower in scope, the definition of professional negligence encompasses almost all of the medical malpractice definition."). Nevertheless, a complaint sounding in either professional negligence or medical malpractice requires an expert affidavit pursuant to NRS 41A.071. *Szyborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 645, 403 P.3d 1280, 1286 (2017) (noting that medical malpractice claims require a medical expert affidavit pursuant to NRS 41A.071).

41A.071 violates the separation of powers doctrine in the Nevada Constitution, Nev. Const. art. III, § 1, as well as due process and equal protection rights guaranteed by the Nevada and United States Constitutions, U.S. Const. amend. XIV; Nev. Const. art. I, § 8; *id.* art. IV, § 21. Further, the Browns assert that the district court erred in dismissing one of their claims—that St. Mary’s negligently delayed in forwarding Beverly’s hospital records to Renown—because this claim sounds in ordinary negligence, rather than professional negligence, and thus an expert affidavit was not required under NRS 41A.071.<sup>3</sup> Conversely, respondents argue that NRS 41A.071 does not violate the Nevada or United States Constitutions and claim that the Browns ignored or failed to acknowledge controlling Nevada authority that previously addressed their constitutional objections. Further, respondents argue that the district court properly characterized the Browns’ claim related to the alleged delay in transferring the hospital records as an act of medical malpractice subject to the affidavit requirement of NRS 41A.071.

We first address the Browns’ constitutional arguments. The Browns argue that “NRS 41A.071’s 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.” We disagree. “We review the constitutionality of statutes *de novo*.” *Taylor v. Colon*, 136 Nev. 434, 436, 482 P.3d 1212, 1215 (2020). “Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is

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<sup>3</sup>This court requested supplemental briefing on the issue of which claims the Browns were asserting constituted ordinary negligence so as to not require an expert affidavit, and the Browns confirmed that they are asserting that only one of their claims—the delay by St. Mary’s in forwarding Beverly’s hospital records—sounds in ordinary negligence.



unconstitutional.” *Id.* (quoting *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 237-38 (2015)). “In order to meet that burden, the challenger must make a clear showing of invalidity.” *Tam*, 131 Nev. at 796, 358 P.3d at 238 (internal quotation marks omitted). “A procedural statute that conflicts with a preexisting procedural rule is of no effect, and the rule supersedes the statute and controls so as not to interfere with the judiciary’s inherent authority to procedurally manage litigation.” *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1305 n.29, 148 P.3d 790, 795 n.29 (2006) (citation and internal quotation marks omitted).

The Browns’ contention that NRS 41A.071 encroaches on the judiciary’s authority to promulgate rules is controverted by existing authority. *See id.* Moreover, the Browns’ contention that NRS 41A.071 creates a heightened pleading requirement in conflict with NRCP 8 and NRCP 9 is unfounded. *See Zohar v. Zbiegien*, 130 Nev. 733, 739, 334 P.3d 402, 406 (2014) (concluding that in medical malpractice suits the complaint and the NRS 41A.071 affidavit should be read together when determining whether the expert affidavit meets the requirements of NRS 41A.071, and that such a reading “furthers the purposes of our notice-pleading standard, and comports with Nevada’s Rules of Civil Procedure”).

NRS 41A.071’s purpose, which “is to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion,” *Washoe Med.*, 122 Nev. at 1304, 148 P.3d at 794 (internal quotation marks omitted), is consistent with the purpose of NRCP 8,<sup>4</sup> which is to require a party to set forth sufficient

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<sup>4</sup>NRS 41A.071 also does not conflict with the special pleading standards set forth in NRCP 9. Although NRCP 9 includes different pleading standards for special matters, these special matters do not include the

facts to demonstrate the necessary elements of a claim for relief so as to make apparent to a defending party the nature of the claim and the relief sought, *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995). As discussed in *Zohar*, NRS 41A.071 and Nevada's notice pleading standard serve a common purpose, which is to notify a defendant of the claim against the defendant made in good faith.<sup>5</sup> 130 Nev. at 739, 334 P.3d at 406. Thus, based on the foregoing, the Browns fail to show that enforcing the affidavit requirement violates the separation of powers doctrine.

Next, the Browns argue that the district court's dismissal of their complaint pursuant to NRS 41A.071 violated their due process rights by (1) requiring an expert affidavit before claimants have the chance to partake in discovery, and (2) creating an unreasonable monetary barrier to indigent claimants. However, the Browns' arguments are unpersuasive as they overlook existing Nevada authority.

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pleading requirements for medical malpractice claims. Further, the Browns fail to articulate how exactly NRS 41A.071 conflicts with NRCP 9, nor do the Browns cite to authority standing for the proposition that NRS 41A.071 conflicts with NRCP 9. Therefore, we decline to address this matter further. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that it is the parties' "responsibility to cogently argue, and present relevant authority, in support of" their arguments).

<sup>5</sup>To the extent that the Browns cite to *Wimley v. Reid*, 991 So. 2d 135, 138 (Miss. 2008), to support their assertion that NRS 41A.071 conflicts with NRCP 8(e)—providing that "pleadings must be construed so as to do justice"—this assertion conflicts with *Baxter v. Dignity Health*, 131 Nev. 759, 765-66, 357 P.3d 927, 931 (2015), wherein the Nevada Supreme Court noted that requiring both a complaint and an expert affidavit in a medical malpractice case to comport with NRCP 8(e)—formerly NRCP 8(f)—serves the public policy behind NRS 41A.071.

First, discovery is not required for an expert to render a standard of care opinion. *See Peck v. Zipf*, 133 Nev. 890, 899, 407 P.3d 775, 782-83 (2017) (citing *Gill v. Russo*, 39 S.W.3d 717, 718-19 (Tex. App. 2001)) (upholding the expert affidavit requirement despite prisoner-plaintiff's argument that he was unable to interview physicians or obtain reports in filing the claim). Rather, NRS 41A.071 requires that the expert's affidavit support the allegations contained in the action, identify the parties by name or describe by conduct each alleged negligent healthcare provider, and set forth factually specific acts of alleged negligence by each defendant. Thus, the requirements of NRS 41A.071 can be achieved without ever engaging in formal discovery mechanisms. Specifically, expert opinions can be based on relevant medical records, which claimants are able to obtain before a lawsuit is filed.

Second, NRS 41A.071 does not violate due process principles by creating an unreasonable monetary barrier to access to the courts. *See id.* at 897-98, 407 P.3d at 781-82 (holding indigent and prisoner plaintiffs' access to the courts remain reasonably unfettered by the requirements of NRS 41A.071). "[A]lthough an indigent has a right of reasonable access to the courts, the right of access is not unrestricted." *Id.* at 898, 899, 407 P.3d at 781-82, 783 (quoting *Barnes v. Eighth Judicial Dist. Court*, 103 Nev. 679, 682, 748 P.2d 483, 486 (1987)) (concluding "that NRS 41A.071 . . . does not violate equal protection or due process"). "[I]ndigent or incarcerated individuals are not precluded from obtaining an expert opinion solely on the basis of their indigence or incarceration." *Id.* at 898, 407 P.3d at 782; *Andrew v. Coster*, No. 70836, 2017 WL 6597159, at \*2 (Nev. Dec. 22, 2017) (Order of Affirmance) (holding that a claimant's "status as an inmate or indigent person [did] not excuse his failure to attach the requisite affidavit to his



complaint” and that the NRS 41A.071 affidavit requirement does not violate equal protection or due process rights). In light of existing Nevada authority, the Browns fail to meet their burden in challenging NRS 41A.071 based on due process principles.

Nevertheless, the Browns assert that the affidavit requirement of NRS 41A.071 denies them the fundamental right of access to the courts. Therefore, the Browns contend that this court must engage in a strict scrutiny review and in doing so must invalidate NRS 41A.071. Again, the Browns’ argument disregards controlling Nevada law. *See Peck*, 133 Nev. at 895, 899, 407 P.3d at 780, 783 (noting that “[t]he right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right” and thus concluding “NRS 41A.071 is rationally related to a legitimate governmental interest and does not violate equal protection or due process requirements” (internal citation and quotation marks omitted)). Thus, the Browns again fail to meet their burden in demonstrating that compliance with NRS 41A.071 violates due process because it allegedly infringes on a fundamental right.

Finally, we address the one claim—the delay in timely transferring the hospital records—that the Browns argue sounds in ordinary negligence and, therefore, does not require an expert affidavit pursuant to NRS 41A.071.<sup>6</sup> “This court rigorously reviews de novo a district court order

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<sup>6</sup>We note that Dr. Mark McCallister, M.D., the “interventional radiologist” who apparently performed Beverly’s lung aspiration procedure, was represented by his own counsel and not counsel for St. Mary’s. Dr. McCallister submitted individual appellate briefs. During oral argument, his counsel focused on refuting the Browns’ constitutional contentions. At oral argument, the Browns conceded that Dr. McCallister was not involved in transferring the hospital records from St. Mary’s to Renown, and



granting an NRC P 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 640, 403 P.3d 1280, 1283 (2017) (quoting *DeBoer v. Senior Bridges of Sparks Family Hosp., Inc.*, 128 Nev. 406, 409, 282 P.3d 727, 730 (2012)). However, "under NRS 41A.071, a complaint filed without a supporting medical expert affidavit is void ab initio and must be dismissed." *Washoe Med.*, 122 Nev. at 1300, 148 P.3d at 792.

Nevada broadly defines professional negligence as "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015; see *Jones v. Wilkin*, 111 Nev. 1335, 1338, 905 P.2d 166, 168 (1995) (noting that that plaintiff's claims against numerous physicians for negligent maintenance of medical records was "properly characterized as medical malpractice" and therefore dismissed); see also *Johnson v. Incline Vill. Gen. Improvement Dist.*, 5 F. Supp. 2d 1113, 1115 (D. Nev. 1998). But under ordinary "negligence standards, medical facilities have a duty to exercise reasonable care to avoid foreseeable harm when they furnish nonmedical services." *Szymborski*, 133 Nev. at 641, 403 P.3d at 1284 (quoting *DeBoer*, 128 Nev. at 412, 282 P.3d at 732).

The Browns' claim of professional negligence or medical malpractice necessarily includes the allegations that Beverly's pneumonia diagnosis made at St. Mary's was not timely communicated to Renown

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therefore, the Browns were not alleging any claim for ordinary negligence against him, but only against St. Mary's.

because of the delay in transferring Beverly's hospital records. We agree with the respondents that the district court properly found this claim to be one of professional negligence requiring an expert affidavit. In making its finding, the district court relied in part on the fact that the Browns characterized their records claim as one of "[m]edical [n]egligence" in their complaint. *See id.* at 642-43, 403 P.3d at 1285 ("[A]n inartful complaint will likely use terms that invoke both [ordinary and professional negligence] causes of action, particularly where . . . the plaintiff is proceeding pro se in district court."). In their complaint, the Browns also placed the delayed forwarding claim under a section titled, "MAIN MEDICAL NEGLIGENCE SUMMARY INFORMATION." In the Browns' "CLAIMS FOR RELIEF" section, they twice assert that the alleged damages to Beverly were caused by "medical negligence and malpractice." Additionally, the Browns' specifically worded claim regarding the delay in forwarding Beverly's medical records focused on St. Mary's *diagnosis* of Beverly's pneumonia.

Moreover, claims involving medical records typically sound in medical malpractice rather than ordinary negligence. *See Jones*, 111 Nev. at 1338 & n.5, 905 P.2d at 168 & n.5 (holding that a claim alleging negligent maintenance of medical records sounded in medical malpractice as the allegations necessarily involved "the failure of a physician . . . to use the reasonable care, skill or knowledge ordinarily used under similar circumstances"); *Johnson*, 5 F. Supp. 2d at 1115 (clarifying that "*Jones* makes clear that the scope of 'medical malpractice' extends beyond the immediate provision of care, and encompasses even something as far removed from the immediate context of the doctor-patient relationship as the negligent maintenance of medical records and a misrepresentation resulting therefrom"); *see also Ogden v. Gallagher*, 591 A.2d 215, 221-222 (Del. 1991)

(stating that a physician’s “mechanical forwarding of records” to another healthcare provider was based on the physician’s compliance with the applicable medical standard of care); *Sessoms v. Bay Reg’l Med. Ctr.*, No. 260516, 2006 WL 2422559, at \*6 (Mich. Ct. App. Aug. 22, 2006) (providing that “staff’s duties relative to patient discharge, record transfer, response to record requests, and its duty to forward life-threatening test results, *all* allegations concern aspects of medical judgment that are beyond the common knowledge or experience of a juror”); *Favor v. W.L. Gore Assocs., Inc.*, No. 2:13-cv-655, 2013 WL 4855196, at \*4 (S.D. Ohio Sept. 11, 2013) (finding that a claim of negligent maintenance of medical records, even if cognizable, arose out of “the medical diagnosis, care, or treatment of Plaintiff,” and as such “is part and parcel of the medical malpractice claim”). Thus, any alleged delay by St. Mary’s in notifying Renown of Beverly’s pneumonia diagnosis stemmed from professional negligence or malpractice and required an expert affidavit.<sup>7</sup> *Szymborski*, 133 Nev. at 641, 403 P.3d at 1284 (stating that

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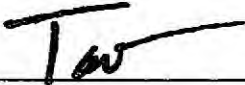
<sup>7</sup>We note that St. Mary’s may be held liable for medical malpractice through the conduct of its employees and, as such, an affidavit would necessarily have been required to address how the hospital employees breached the applicable standard of care thereby causing or contributing to Beverly’s injuries. In cases involving medical malpractice, the Nevada Supreme Court has held that a hospital may be vicariously liable for the conduct of its staff. *See McCrosky v. Carson Tahoe Reg’l Med. Ctr.*, 133 Nev. 930, 934, 408 P.3d 149, 153 (2017) (“The general rule of vicarious liability is that an employer is liable for the negligence of its employee . . . .”); *see also Oehler v. Humana Inc.*, 105 Nev. 348, 350, 775 P.2d 1271, 1272 (1989) (quoting *Moore v. Board of Trustees*, 88 Nev. 207, 212, 495 P.2d 605, 608 (1972) (“[H]ospitals and their governing bodies may be held liable for injuries resulting from imprudent or careless supervision of members of their medical staffs.”)).

medical malpractice “claims involve medical diagnosis, judgment, or treatment”). Therefore, we conclude that the district court did not err by granting respondents’ motion to dismiss.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Kathleen M. Drakulich, District Judge  
Kemp Jones, LLP  
Lemons, Grundy & Eisenberg  
Hall Prangle & Schoonveld, LLC/Las Vegas  
Hall Prangle & Schoonveld/Reno  
Legal Aid Center of Southern Nevada, Barbara E. Buckley, Executive  
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