

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARGARET FONG,
Appellant,
vs.
BRUCE E. FARRINGER, JR., M.D.;
AND SIERRA WOMEN'S HEALTH,
Respondents.

No. 43923

FILED

JAN 19 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order dismissing appellant's complaint for failing to comply with NRS 41A.071. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

After finding that appellant had a pelvic mass, respondents rendered medical services, including a total hysterectomy. Following the surgery, appellant filed a complaint alleging that she did not consent to a total hysterectomy and asserting the following claims: (1) breach of contract and unjust enrichment, (2) bad faith, fraud, and misrepresentation resulting in detrimental reliance, (3) intentional battery, (4) negligent and/or intentional infliction of emotional distress, (5) civil rights violations, and (6) medical malpractice due to lack of informed consent. All of appellant's claims were based on the manner in which respondents rendered medical treatment to her. Respondents filed a motion to dismiss, arguing that appellant's complaint was legally deficient for failing to comply with NRS 41A.071's supporting medical expert affidavit requirement.

Appellant opposed the motion, arguing that she could not obtain a medical expert's affidavit until after all of the depositions were taken, which would reveal that respondents had failed to explain to her

the procedure that was performed or alternative methods of treatment. She further argued that five of her six claims were not grounded in malpractice, but rather, alleged intentional torts. The district court granted respondents' motion, finding that, because appellant had failed to file a medical expert affidavit with her complaint, dismissal without prejudice was required. The court found that appellant could not avoid NRS 41A.071's requirements by framing her malpractice claims under different causes of action.

On appeal, appellant concedes that the district court did not err by dismissing her claims under NRS 41A.071, and instead asserts that NRS 41A.071 was applied unconstitutionally in her case because it abridged her right to due process and inadvertently denied her right to self-determination and informed consent, and violated her rights under the Patient's Bill of Rights. Appellant contends that medical expertise is irrelevant to her allegations, arguing that, when failure to inform a patient is so apparent that a layman may recognize it, expert testimony is unnecessary.¹ Finally, she asserts that her complaint contained matters that fall under contract law and, therefore, NRS 41A.071 is inoperative.

Under NRS 41A.071, the district court is required to dismiss without prejudice a medical malpractice action filed without a medical expert's affidavit, to support the allegations contained in the complaint. Generally, under NRS 41A.100(1), in order for liability to be imposed in a

¹Although appellant also suggests that she is unable to find a medical expert in Reno to complete the affidavit, there is no requirement – with regard to board certified specialists – that the expert testimony must come from a practitioner in the same locality. See Orcutt v. Miller, 95 Nev. 408, 595 P.2d 1191 (1979).

medical malpractice action, expert medical testimony supporting the claim must be presented to demonstrate a deviation from the accepted standard of care and to prove causation.² Thus, NRS 41A.071 is a threshold requirement that must be satisfied at the time the complaint is filed, and NRS 41A.100 is an evidentiary requirement to be satisfied at trial.³

NRS 41A.100(1) enumerates five exceptions – known as the *res ipsa loquitur* doctrine – to the general provision that expert testimony is required to prove negligence in a medical malpractice action. With a *res ipsa loquitur* claim, the jury is permitted to infer negligence without expert testimony when, for example, a foreign object is left in the patient's body following surgery, or a surgical procedure was performed on the wrong body part.⁴ In Szydel v. Markman, we resolved the conflict between the *res ipsa loquitur* doctrine codified in NRS 41A.100(1)(a)-(e), and NRS 41A.071's medical expert affidavit requirement by holding that, because expert testimony is not required in a *res ipsa* case, a medical expert's affidavit is likewise unnecessary as a requirement to filing such a claim.⁵

No such conflict exists here. In cases alleging a lack of informed consent, the claimant must provide expert testimony in order to

²See Brown v. Capanna, 105 Nev. 665, 782 P.2d 1299 (1989).

³See Borger v. Dist. Ct., 120 Nev. ___, 102 P.3d 600 (2004); Szydel v. Markman, 121 Nev. ___, 117 P.3d 200 (2005).

⁴See NRS 41A.100(1)(a)-(e) (listing the five circumstances under which *res ipsa loquitur* applies).

⁵121 Nev. at ___, 117 P.3d at 204.

demonstrate negligence.⁶ Appellant's claims are grounded in a lack of informed consent, an allegation that does not fall under the *res ipsa loquitor* doctrine and, thus, she is required to comply with the expert affidavit requirements set forth under NRS 41A.071. Although appellant cites a Kentucky case for the proposition that expert testimony is not required when lack of informed consent is apparent, that is not the rule in Nevada.

Although appellant asserts that many of her claims are not grounded in medical malpractice, the record demonstrates otherwise. Appellant's entire complaint stems from respondents' alleged failure to render medical services in a manner consistent with a reasonable standard of care.⁷ Such claims fall under the definition of medical malpractice and, in the absence of *res ipsa loquitor*, are subject to the medical expert affidavit requirement.⁸

Finally, because she raises the issue for the first time on appeal, we need not address appellant's constitutional challenge to NRS 41A.071.⁹ Nevertheless, NRS 41A.071 is designed to prevent plaintiffs from filing frivolous lawsuits, and a substantially similar statutory

⁶See id. at ___, 117 P.3d at 205; see also, Brown, 105 Nev. at 669, 782 P.2d at 1302 (noting that, under NRS 41A.100(1), "a plaintiff must show lack of informed consent through expert medical testimony").


⁷See NRS 41A.009 (defining medical malpractice).

⁸Szydel, 121 Nev. at ___, 117 P.3d at 205.

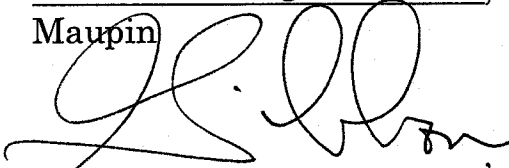
⁹Hampe v. Foote, 118 Nev. 405, 409 n. 10, 47 P.3d 438, 440 n. 10 (2002).

scheme has already withstood constitutional scrutiny in this court.¹⁰ Accordingly, because appellant's medical malpractice complaint was not filed with the required medical expert affidavit, the district court properly dismissed without prejudice appellant's complaint. Thus, we

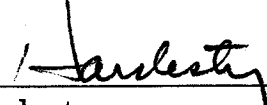
ORDER the judgment of the district court AFFIRMED.¹¹



Maupin J.



Gibbons J.



Hardesty J.

cc: Hon. Steven R. Kosach, District Judge
Margaret Fong
Lemons Grundy & Eisenberg
Washoe District Court Clerk

¹⁰See Barrett v. Baird, 111 Nev. 1496, 908 P.2d 689 (1995) (concluding that NRS 41A.009 and former NRS 41A.016 did not violate constitutional equal protection and due process requirements because they were rationally related to the legitimate interest of protecting physicians and hospitals from higher insurance rates and frivolous lawsuits).

¹¹Although appellant was not granted leave to file papers in proper person, see NRAP 46(b), we have considered the proper person documents received from her. Additionally, in response to respondents' demand for a cost bond, appellant promptly submitted documentation demonstrating that she satisfied the cost bond requirement. Accordingly, no further action need be taken with regard to respondents' demand.