

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES V. LOVETT, M.D.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
VALORIE J. VEGA, DISTRICT JUDGE,
Respondents,
and
SHERRY MARTINEZ,
Real Party in Interest.

No. 47424

FILED

JUN 16 2006

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

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order that denied petitioner's summary judgment motion. In his petition, James V. Lovett, M.D., requests that this court issue a writ directing the district court to vacate its order denying his summary judgment motion, and enter summary judgment in his favor.

A writ of mandamus is available to compel the performance of an act that the law requires, or to control an arbitrary or capricious exercise of discretion.¹ Mandamus is an extraordinary remedy, generally unavailable if the petitioner has a plain, speedy, and adequate legal remedy, such as an appeal from a final judgment.² Accordingly, this court

¹See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

²NRS 34.170; Pan v. Dist. Ct., 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) (stating that an appeal is an adequate legal remedy, precluding writ relief).

will not exercise its discretion³ to consider a writ petition challenging a district court order that denied a motion for summary judgment, unless petitioner demonstrates that no disputed factual issues exist and, pursuant to clear authority, the district court was obligated to enter summary judgment, or that considering the petition would serve judicial economy interests and is necessary to clarify an important legal issue.⁴

Here, Dr. Lovett asserts that writ relief is warranted because the district court's order denying him summary judgment ignored "the total absence of disputed issues of material fact." He also asserts that the order was contrary to this court's clear authority rejecting the argument that a surgeon may be held liable for a foreign object left in a patient's body on the theory that the surgeon is the "captain of the ship" in the operating room.⁵ Although Dr. Lovett recognizes that real party in interest, Sherry Martinez, "allege[d] that [Dr. Lovett] should be [held] liable for leaving a surgical sponge inside of her abdomen," Dr. Lovett also

³See Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (stating that the issuance of a writ of mandamus is purely discretionary with this court).

⁴See Smith v. District Court, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).

⁵Dr. Lovett cites Nichter v. Edmiston, 81 Nev. 606, 610, 407 P.2d 721, 723-24 (1965), for this proposition. In Nichter, however, this court concluded that the district court properly rejected the plaintiff's requested jury instruction because it would have imputed, as a matter of law, liability on a surgeon for a nurse's preoperative application of a disinfectant that turned out to be flammable, and it could not be said that, "as a matter of law . . . this was the type of act requiring special supervision and control by the surgeon in charge." Id. at 611, 407 P.2d at 724 (internal quotations omitted). Nichter does not address any "captain of the ship" theory regarding foreign objects that have been left within a patient's body following surgery.

contends that Martinez failed to “identify any particular breach of any medical standard of care” and that, “[i]ndeed, [Martinez] does not even assert that Dr. Lovett did anything wrong.”

Contrary to Dr. Lovett’s assertions, an allegation that a surgeon left a surgical sponge inside of a patient’s abdomen sufficiently raises an issue with regard to an alleged breach of the accepted medical standard of care.⁶ Further, while Dr. Lovett contends that Martinez’s only theory of liability against him is a legal opinion, improperly offered by her medical expert, who stated that a surgeon, as “captain of the ship,” is ultimately responsible for what is placed in and removed from a patient’s abdomen, Martinez’s expert appears to have explained the accepted medical, not legal, standard of care regarding a surgeon’s duties to search for foreign objects after surgery, and to share responsibility in accounting for sponges. Accordingly, factual issues concerning whether Dr. Lovett departed from the accepted standard of medical care remain disputed.⁷


Because Dr. Lovett has an adequate legal remedy available in the form of an appeal from any adverse final judgment, and because he has not demonstrated that this matter fits within any exception to our


⁶See NRS 41A.100(1)(a) (providing that, when a foreign substance is unintentionally left within a patient’s body following surgery, negligence, *i.e.*, a breach of the accepted medical standard of care, is presumed); Szydel v. Markman, 121 Nev. __, __, 117 P.3d 200, 204 (2005).

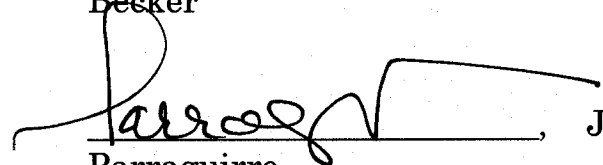
⁷See Wood v. Safeway, Inc., 121 Nev. __, 121 P.3d 1026 (2005); see also Van Cleave v. Kietz-Mill Minit Mart, 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981) (recognizing that questions regarding negligence generally present factual questions for the jury to resolve).

general policy regarding consideration of writ petitions denying summary judgment,⁸ we

ORDER the petition DENIED.⁹


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

cc: Hon. Valorie Vega, District Judge
Lewis Brisbois Bisgaard & Smith, LLP
Spilotro & Kulla
Clark County Clerk

⁸Smith, 113 Nev. at 1345, 950 P.2d at 281. We reject Dr. Lovett's argument that considering this petition is necessary to clarify the "vitality and scope of the 'captain of the ship' doctrine."

⁹See NRAP 21(b); Smith, 107 Nev. 674, 818 P.2d 849.