IN THE SUPREME COURT OF THE STATE OF NEVADA

VIRGINIA HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA;
UNIVERSITY AND COMMUNITY
COLLEGE SYSTEM OF NEVADA; AND
CONNIE CARPENTER,
Respondents.

No. 48872

FILED

JUN 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court summary judgment in a tort and contract action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Virginia Hernandez was a Nevada State College nursing program student. After improperly administering medication to a clinic patient and receiving failing grades in her final semester of the program, Hernandez sued respondents, the University and Community College System of Nevada ("University System")[1] and Nevada State College's Director of Nursing, Connie Carpenter, for negligent supervision, breach of contract, and tortious breach of the implied covenant of good faith and fair dealing.

Subsequently, Hernandez was allowed to take remedial courses, but she failed an examination and did not return to school. Thereafter, respondents moved to dismiss her still-pending complaint for

[1]The University System is now known as the Nevada System of Higher Education.

failure to state a claim or for summary judgment. After discovery and a hearing, the district court granted respondents' motion, determining that respondents' actions in evaluating Hernandez's clinical performance and assigning grades were discretionary matters subject to immunity under NRS Chapter 41. Additionally, the district court concluded that Hernandez failed to exhaust her administrative remedies by appealing her grades and to state a claim or support with admissible facts her claims for negligent supervision, breach of contract, and tortious breach of the implied duty of good faith and fair dealing. Hernandez has appealed.

If, like here, in resolving a motion to dismiss, matters outside the pleadings are presented to and not excluded by the district court, the motion is treated as one for summary judgment.[2] On appeal, we review summary judgment orders de novo.[3] Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law.[4] The pleadings and other proof must be construed in a light most favorable to the non-moving party,[5] but once the movant has properly supported the summary judgment motion, the non-moving party may not rest upon general allegations and conclusions and must instead set forth specific facts demonstrating the

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[2]NRCP 12(b)(5); Schneider v. Continental Assurance Co., 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994).

[3]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[4]Id.

[5]Id.

existence of a genuine issue of material fact for trial.[6] With respect to decisions on academic matters, an educational institution is entitled to great deference.[7]

Having reviewed the parties' briefs and appendices, we conclude that the district court did not err in granting respondents' motion for summary judgment.

Failure to Exhaust Administrative Remedies:

As a threshold matter, Hernandez admittedly failed to administratively challenge her failing grades, as provided for in the student handbook. It is well-settled that the failure to exhaust administrative remedies precludes suing on that matter in the district

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[6]Id. at 731, 121 P.3d at 1030-31; NRCP 56(e); Cuzze v. University & Community College System of Nevada, 123 Nev. ___, ___, 172 P.3d 131, 134 (2007).

[7]See, e.g., University of Nevada, Reno v. Stacey, 116 Nev. 428, 433, 997 P.2d 812, 815 (2000) (reiterating "the long-standing precedent recognizing that faculty appointment at the university level is an area poorly suited for judicial supervision, and thus one where judicial restraint must be exercised"); see also Regents of University of Michigan v. Ewing, 474 U.S. 214, 225-28 (1985) (concluding that a university medical student was properly dismissed from the program due to academic deficiencies); Bd. of Curators of University of Mo. v. Horowitz, 435 U.S. 78, 96 n.6 (1978, J. Powell, concurring) (recognizing that "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation" in a case that upheld a medical student's dismissal); Southwell v. University of Incarnate Word, 974 S.W.2d 351 (Tex. Ct. App. 1998) (concluding that summary judgment was appropriately granted against nursing student because she failed a required clinical course and subsequent practicum).

court.[8] Although Hernandez now claims, on appeal, that her interpretation of the handbook led her to believe that it would be futile to administratively appeal her grades, she did not make that argument below and thus is deemed to have waived it.[9] Accordingly, to the extent that Hernandez's claims are based on her failing grade, the district court properly granted summary judgment for her failure to exhaust administrative remedies. In any event, to the extent that Hernandez's claims were not based on her grades, summary judgment was proper based on her failure to demonstrate genuine issues of material facts, as explained below.[10]

Negligent Supervision:

With respect to Hernandez's negligent supervision claim, an employer has a duty to use reasonable care in training and supervising its employees to ensure that those employees are fit for their positions.[11] On appeal, Hernandez argues that she adequately stated a claim alleging that the University System failed to properly train and supervise its director and staff, who then caused her harm by more closely scrutinizing her work

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[8]First Am. Title Co. v. State of Nevada, 91 Nev. 804, 806, 543 P.2d 1344, 1345 (1975).

[9]Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

[10]See Gupta v. New Britain General Hospital, 687 A.2d 111, 119–20 (Conn. 1996) (affirming summary judgment in favor of a hospital that dismissed a physician from a residency program for his poor performance).

[11]Hall v. SSF, Inc., 112 Nev. 1384, 1393, 930 P.2d 94, 99 (1996).

during the remediation process.[12] But an educational institution is entitled to great deference regarding its decisions on academic matters,[13] and here, Hernandez failed to explain how close scrutiny by the director or her instructor during the remediation course and examination demonstrated a breach of the University System's duty that led to compensable harm.[14]

Breach of Contract:

Based on her enrollment as a student and her tuition payment, Hernandez claimed that the University System breached a

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[12]Hernandez alternatively argues that she was not supervised closely enough during her clinical experience when she admittedly administered the wrong medication to a patient. Her clinical performance, alone, however, did not cause her to fail the nursing program, as Hernandez was given another opportunity to demonstrate her proficiency when she was provided, free of charge, with individualized instruction for the remediation course and an opportunity to take a remedial examination. Hernandez agreed that she was not entitled to receive a passing grade without demonstrating her proficiency, and it was ultimately her failure to pass the remedial examination and to return to school that resulted in her being removed from the program. Consequently, we find no merit to her argument that any inadequate supervision during the clinical program supports a claim for negligent supervision.

[13]See n.7 supra.

[14]See Turner v. Mandalay Sports Entm't, 124 Nev. ___, ___, 180 P.3d 1172, 1175 (2008) (requiring a plaintiff alleging negligence to establish an existing duty of care, breach, legal causation, and damages); Canada v. Boyd Group, Inc., 809 F. Supp. 771, 782-83 (D. Nev. 1992) (noting that summary judgment is proper when there are insufficient facts alleged to describe what the respondents did or did not do that amounted to negligent supervision).

written contractual relationship with her by engaging in a pattern of conduct to ensure that she would not complete her remediation program. Hernandez, however, failed to provide the alleged written contract or to establish that her mere enrollment as a student constituted a contract entitling her to succeed in her courses. Moreover, Hernandez failed to show issues of fact regarding how respondents breached the alleged contract, as she admits that the University System provided education services and instruction and that she was not entitled to receive a passing grade in every course. Even if the student handbook constituted the contract, Hernandez failed to meet its requirements to achieve at least a "C" grade to pass. Thus, Hernandez failed to introduce facts establishing that an enforceable contract existed or that respondents breached its terms.[15]

Breach of Implied Covenant of Good Faith and Fair Dealing:

"[A]n action in tort for breach of the [implied] covenant [of good faith and fair dealing] arises only 'in rare and exceptional cases' when there is a special relationship between the victim and tortfeasor."[16] In this case, Hernandez provided no argument regarding and no evidence

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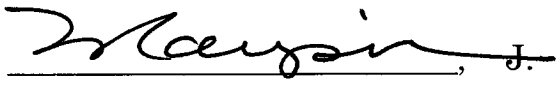
[15]See Faigel v. Fairfield University, 815 A.2d 140 (Conn. App. Ct. 2003) (rejecting a dismissed nursing student's claim against a university for breach of contract).

[16]Insurance Co. of the West v. Gibson Tile, 122 Nev. 455, ___, 134 P.3d 698, 702-03 (2006) (quoting K Mart Corp. v. Ponsock, 103 Nev. 39, 49, 732 P.2d 1364, 1370 (1987)).

of a special relationship between respondents and her,[17] which would give rise to a tortious breach claim.

Therefore, based on the undisputed facts and lack of evidence or law to substantiate Hernandez's claims, the district court properly granted summary judgment.[18] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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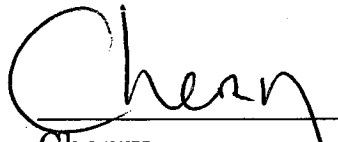

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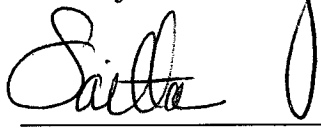

_____, J.
Saitta

cc: Hon. Michelle Leavitt, District Judge
Eugene Osko, Settlement Judge
Kirk T. Kennedy
Kwasi Nyamekye, Assoc. General Counsel
Bart J. Patterson, Assoc. General Counsel
Eighth District Court Clerk

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[17]Id.

[18]In light of these conclusions, we do not reach the issue of whether the district court properly decided that respondents were entitled to discretionary immunity under NRS 41.032(2).