IN THE SUPREME COURT OF THE STATE OF NEVADA

DR. JAMES D. CARPENTER,
Appellant,
vs.
JOSEPH SHALEV, M.D.,
Respondent.

No. 51470

FILED

SEP 28 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Appellant Dr. James D. Carpenter was sued by a patient, Israel Bari, after Dr. Carpenter performed several surgeries on Bari's right eye. Bari's complaint against Dr. Carpenter was accompanied by a sworn affidavit given by respondent Dr. Joseph Shalev.

Dr. Carpenter then brought a defamation suit against Dr. Shalev based on alleged false factual statements made by Dr. Shalev in his affidavit. Dr. Shalev filed a motion to dismiss Dr. Carpenter's complaint pursuant to NRCP 12(b)(5). After a hearing, the district court granted Dr. Shalev's motion, finding that the statements made in his affidavit were privileged. The district court also awarded Dr. Shalev attorney fees and costs.[1]

On appeal, Dr. Carpenter argues that the district court: (1) erred in granting Dr. Shalev's motion to dismiss, (2) failed to make

[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

adequate findings of fact and conclusions of law in its order granting Dr. Shalev's motion to dismiss, and (3) abused its discretion in awarding Dr. Shalev attorney fees and costs. We conclude that all of Dr. Carpenter's arguments are without merit, and thus, we affirm the judgment of the district court.

Dr. Carpenter's motion to dismiss

Dr. Carpenter argues that the district court erred in dismissing his complaint against Dr. Shalev for defamation and in finding that Dr. Shalev's sworn affidavit in support of Bari's complaint was privileged pursuant to NRS 41A.071. We disagree.

Standard of review

> A district court order granting an NRCP 12(b)(5) motion to dismiss is subject to rigorous appellate review. Similar to the trial court, this court accepts the plaintiffs' factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claim asserted. In reviewing the district court's dismissal order, every reasonable inference is drawn in the plaintiffs' favor.

Sanchez v. Wal-Mart Stores, 125 Nev. ___, ___, 221 P.3d 1276, 1280 (2009) (citations omitted). This court reviews de novo a district court's order granting a motion to dismiss and the order will not be upheld "'unless it appears beyond a doubt that the plaintiff could prove no set of facts . . . [that] would entitle him [or her] to relief.'" Vacation Village v. Hitachi America, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) (third alteration in original) (quoting Edgar v. Wagner, 101 Nev. 226, 228 699 P.2d 110, 112 (1985)); see Sanchez, 125 Nev. at ___, 221 P.3d at 1280.

NRS 41A.071 mandates that all complaints for medical malpractice be accompanied by an expert affidavit, and specifically states that:

> If an action for medical malpractice or dental malpractice is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit, supporting the allegations contained in the action, 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 malpractice.

This court has interpreted this statute to mean "that a medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio, meaning it is of no force and effect." Washoe Med. Ctr. v. Dist. Ct., 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006).

In Circus Circus Hotels v. Witherspoon, this court addressed a similar situation regarding the statements of an employer against an employee who had been accused of embezzlement. 99 Nev. 56, 59-60, 657 P.2d 101, 103-04 (1983). This court concluded that the employer's statements were absolutely privileged and recognized the long-standing common law rule that "communications uttered or published in the course of judicial proceedings are absolutely privileged." Id. at 60, 657 P.2d at 104. This court further explained this rule when it held that such a communication need not be strictly relevant to any issue involved, but "only need be 'in some way pertinent to the subject of controversy.'" Fink v. Oshins, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) (quoting Circus Circus, 99 Nev. at 60, 657 P.2d at 104).

We conclude that Dr. Carpenter's argument is without merit because Dr. Shalev's affidavit was given in the course of litigation, was

pertinent to the subject of the controversy between Dr. Carpenter and Bari, and was required to be filed with Bari's complaint pursuant to NRS 41A.071. Thus, Dr. Shalev's affidavit was absolutely privileged. Allowing expert witnesses in medical malpractice cases to be exposed to liability for the statements they make in expert affidavits would be counter to the spirit of NRS 41A.071. It would also be counter to specific public policy concerns stated by this court in the context of extending an absolute privilege to expert witnesses in other contexts. See Circus Circus, 99 Nev. at, 61, 657 P.2d at 104 (stating that "[t]he policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements.") As such, we conclude that the district court did not err in granting Dr. Shalev's motion to dismiss the complaint because his affidavit was covered by an absolute privilege.

The district court's findings of fact and conclusions of law

Dr. Carpenter argues that the district court failed to make adequate findings of fact and conclusions of law in its order granting Dr. Shalev's motion to dismiss. Dr. Carpenter contends that this failure frustrates the appellate process and, thus, the district court's order must be reversed. Dr. Carpenter specifically contends that the district court's order violates NRCP 52(a) in that the district court's order fails to make findings sufficient to indicate the factual basis for its ultimate conclusion. We disagree.

NRCP 52(a) deals with the findings of fact and conclusions of law a district court must provide when rendering a decision. In almost all situations, the rule requires the district court to make specific findings of fact and conclusions of law. However, when ruling on a motion to dismiss

pursuant to NRCP 12, NRCP 52(a) states that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule."[2] NRCP 52(a) also states that "[i]t will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court."

We conclude that Dr. Carpenter's argument is without merit as NRCP 52(a) does not require the district court to make specific findings of fact when ruling on a motion to dismiss under NRCP 12(b) and because the district court properly stated its conclusion of law on the record during the hearing on April 21, 2008, pursuant to NRCP 52(a).[3] As such, the district court's failure to make specific findings of fact was not an error. Therefore, we must conclude that Dr. Carpenter's argument fails as a matter of law.

Attorney fees

Dr. Carpenter argues that the district court abused its discretion in awarding Dr. Shalev attorney fees. Dr. Carpenter contends that because Dr. Shalev published false statements of fact against him, the district court abused its discretion in finding that his complaint was brought without reasonable grounds or to harass. We disagree.

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[2]NRCP 52(c) deals with judgments on partial findings and is not relevant here.

[3]Specifically, the district court stated "[a]nd the motion to dismiss is granted; okay? And I will find that it's absolutely privileged."

Standard of review

"The decision whether to award attorney's fees is within the sound discretion of the [district] court." Bergmann v. Boyce, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993) (citing County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982)). This court will not disturb a district court's award of attorney fees on appeal absent a manifest abuse of discretion. Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994) (citing Blanchard Constr. Co., 98 Nev. at 492, 653 P.2d at 1220).

NRS 18.010(2), which deals with an award of attorney fees to a prevailing party, states in pertinent part:

> In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:
>
> . . . .
>
> (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations.

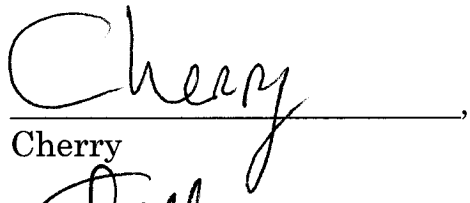
"Although a district court has discretion to award attorney fees as a sanction, there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass." Rivero v. Rivero, 125 Nev. ___, ___, 216 P.3d 213, 234 (2009). Further, this court has held that a district court abuses its discretion when it fails

to provide an explanation in an order awarding attorney fees and costs in the form of making specific findings of fact. Id.

We conclude that the district court did not abuse its discretion in awarding Dr. Shalev attorney fees. Under a liberal construction of NRS 18.010(2)(b), the district court awarded Dr. Shalev attorney fees on the record at a hearing of April 21, 2008, on the basis that Dr. Carpenter's complaint was meritless and brought unreasonably. At the April 21, 2008, hearing, the district court found that Carpenter's case had no basis and dismissed it. Thus, the district court properly exercised its discretion in awarding Dr. Shalev attorney fees. As such, we affirm the district court's order awarding attorney fees to Dr. Shalev as the district court properly stated its reasoning on the record.

In light of the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.



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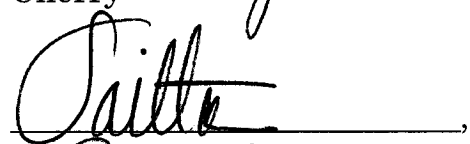

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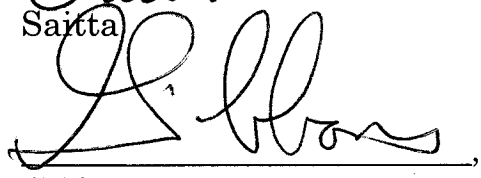

_____, J.
Gibbons

cc: Hon. Mark R. Denton, District Judge
Jay Earl Smith, Settlement Judge
Cuthbert E.A. Mack
Shook & Stone, Chtd.
Eighth District Court Clerk