

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TONEY E. LOPEZ,
Appellant,
vs.
JOSEPH V. CANDELA, M.D.,
Respondent.

No. 79590-COA

FILED

OCT 05 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Toney E. Lopez appeals from a district court order dismissing his complaint for failing to include a medical expert affidavit in a professional negligence action. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Dr. Joseph V. Candela performed a penile implant removal surgery on Lopez. Following the surgery, Lopez experienced pain and discovered that he had a urine-soaked incision just under the penis in his upper scrotum. Lopez alleges the unsanitary incision was the result of Dr. Candela's failure to insert a catheter as indicated in the Physician's Surgical Procedure Disclosure Form (the Disclosure Form).¹ Lopez was discharged from the hospital despite being in pain.

When Lopez returned to the hospital the following day, a nurse inserted a catheter and provided him a prescription for pain pills. However, Lopez could not fill the prescription because Dr. Candela never signed it, despite Lopez's alleged repeated requests. Lopez returned to Dr. Candela's office eight days later to have the catheter removed. Once the catheter was

¹The Disclosure Form was attached to Lopez's complaint. It is a presurgical form that details the diagnosis and recommended surgical procedures so that the patient can give or withhold consent.

removed, the nurse purportedly asked Dr. Candela to examine the incision as it appeared infected, but Dr. Candela did not see Lopez.

Lopez was still experiencing pain the following day. He went to the emergency room and the medical staff inserted a catheter. He returned to the same emergency room the next day and learned that he had a bladder infection. Lopez alleges that Dr. Candela did not contact Lopez for follow-up care until the doctor mailed Lopez a letter six months after the surgery. The letter, written by Dr. Candela, indicates that Lopez decided not to return to Dr. Candela for follow-up care and recommends that Lopez receive follow-up care with another urologist.

Lopez filed his complaint pro se, alleging that as a result of the surgery and lack of postoperative care, he has suffered loss of sensation in his penis, difficulty urinating, emotional and physical distress, and loss of consortium with his wife. Further, he claimed that Dr. Candela was negligent for failing to adhere to the protocol described in the Disclosure Form and for failing to provide appropriate aftercare. The Disclosure Form details the surgical procedure and states that a catheter is placed into the urethra during the surgery. The Disclosure Form does not provide information about postoperative care.

Dr. Candela moved to dismiss Lopez's complaint for failing to attach an affidavit from a medical expert. In Lopez's opposition, he argued that his complaint should not be dismissed based on a technicality and that he could not get another doctor to see him. The district court conducted a hearing and granted the motion to dismiss, concluding that Lopez's claims

were for professional negligence and pursuant to NRS 41A.071,² a medical expert affidavit was required. Because no affidavit was provided with the complaint, the case was dismissed without prejudice.

On appeal, Lopez contends that (1) Dr. Candela's failure to adhere to the protocol described in the Disclosure Form constitutes ordinary negligence, (2) Dr. Candela's failure to follow up with him or see him after surgery constitutes ordinary negligence, and (3) the district court did not undertake any analysis to determine whether his claims sounded in professional negligence.³ We conclude that all three of Lopez's arguments are unpersuasive and the judgment of the district court should be affirmed.

This court reviews questions of law de novo. *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010). If appellant fails to raise an argument below, this court may review the issue for plain error. *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) ("The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established."). An error is "plain" if "the error is so unmistakable

²NRS 41A.071 states in relevant part, "[i]f 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 . . . submitted by a medical expert . . ." (Emphasis added.)

³Lopez did not make these arguments in his opposition to the motion to dismiss. The hearing transcript was not provided in the record so we cannot assess what was argued at the hearing. See *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision."). While arguments that are raised for the first time on appeal are waived, *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), this court may consider the arguments under plain error review.

that it reveals itself by a casual inspection of the record.” *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973).

If a complaint establishes claims for professional negligence and is not supported by an affidavit from a medical expert, the district court is required to dismiss the complaint without prejudice under NRS 41A.071. Because Lopez failed to submit a medical expert affidavit with his complaint, the dispositive issue on appeal is whether Lopez alleged claims for ordinary negligence or for professional negligence.

“The distinction between professional and ordinary negligence can be subtle, and [a court must] look to the ‘gravamen or substantial point or essence’ of each claim to make the necessary determination.” *Estate of Curtis v. S. Las Vegas Med. Inv’rs, LLC*, 136 Nev., Adv. Op. 39, 466 P.3d 1263, 1267 (2020) (quoting *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642-43, 403 P.3d 1280, 1285 (2017)). “Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for [professional negligence].” *Szymborski*, 133 Nev. at 642, 403 P.3d at 1284. “[I]f the jury can only evaluate the plaintiff’s claims after presentation of the standards of care by a medical expert, then it is a [professional negligence] claim.” *Id.* “If, on the other hand, the reasonableness of the health care provider’s actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence.” *Id.* This is referred to as a common knowledge exception to the medical affidavit requirement.

To apply the common knowledge exception outlined in *Szymborski*,

[a] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or [professional negligence]: (1) whether the claim pertains to an action that occurred within

the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience.

Estate of Curtis, 136 Nev., Adv. Op. 39, 466 P.3d at 1268 (second alteration in original) (quoting *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 684 N.W.2d 864, 871 (Mich. 2004)). “If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern [professional negligence] actions.” *Id.* (alteration in original) (quoting *Bryant*, 684 N.W.2d at 871).

The common knowledge exception “is extremely narrow and only applies in rare situations.” *Id.* In *Estate of Curtis*, the supreme court concluded that a nurse’s mistaken administration of another patient’s prescribed morphine did not present a question of medical judgment beyond the realm of common knowledge or experience. *Id.* at 1269. While administering morphine is a medical treatment, no professional judgment was required by the nurse—the prescriptions were simply mixed up. *Id.* But in the same case, the supreme court also concluded that the medical staff’s failure to monitor that same patient was a matter of professional negligence because the decisions to monitor and administer additional medications involved some degree of professional judgment or skill that jurors could not properly evaluate using merely their common knowledge and experience. *Id.* at 1269-70.

First, Lopez argues that Dr. Candela’s failure to adhere to the Disclosure Form constitutes ordinary negligence. Lopez argues that his injuries stem from Dr. Candela’s failure to insert a catheter, despite the Disclosure Form representing that a catheter would be inserted during the surgery. The decision of whether or not to insert a catheter during such a procedure is indicative of professional negligence because it involves

medical treatment and medical judgment. *See Szymborski*, 133 Nev. at 642, 403 P.3d at 1284. Consequently, this is a professional negligence claim unless jurors could effectively evaluate Dr. Candela's decisions using only their common knowledge and experience. *See Estate of Curtis*, 136 Nev., Adv. Op. 39, 466 P.3d at 1268.

Lopez argues that jurors could do so because the Disclosure Form explicitly states that a catheter will be inserted during the surgery. The nature of the Disclosure Form, however, is not self-evident as authoritative. The form merely contains a description of the surgical procedures involved so that the patient can make an informed decision whether to consent to the surgery, but it does not provide the standard of care for all such surgeries. Without the aid of medical expert testimony, jurors would be forced to determine the proper procedures for such a surgery, the standard of care, and whether Dr. Candela could have deviated from those procedures listed in the Disclosure Form. Such issues cannot be properly evaluated without the testimony of a medical expert.

Therefore, this claim raises questions of professional or medical judgment beyond the realm of common knowledge and experience. Additionally, the claim pertains to actions that occurred within the course of the professional relationship. With both prongs answered in the affirmative, the common knowledge exception does not apply. *Id.* Thus, Lopez's claim that Dr. Candela failed to adhere to the Disclosure Form is subject to NRS 41A.071's medical affidavit requirement, and error has not been established as to this issue, plain or otherwise.

Second, Lopez argues that Dr. Candela's failure to follow up with him or see him after surgery constitutes ordinary negligence. This claim is very similar to the failure-to-monitor allegation in *Estate of Curtis* that the supreme court concluded was based in professional negligence.

Estate of Curtis, 136 Nev., Adv. Op. 39, 466 P.3d at 1270. The court concluded that the facility's decision to not monitor the patient who was mistakenly administered morphine required some degree of professional judgment that jurors could not properly evaluate using merely their common knowledge and experience. *Id.* at 1269-70. Here, Lopez is similarly arguing that Dr. Candela's failure to follow up with him postoperation is ordinary negligence.⁴ However, the decision to communicate with or see a patient after surgery, or determine what follow-up care is required, is indicative of professional negligence because it likely involves medical diagnosis, treatment, or judgment as to whether such a meeting would be necessary. *See Szymborski*, 133 Nev. at 642, 403 P.3d at 1284.

Similar to the failure-to-monitor allegation in *Estate of Curtis*, jurors could not merely rely on their common knowledge and experience to decide when a doctor must schedule a postoperation follow-up appointment and personally meet with the patient, and whether Dr. Candela should have done so after hearing Lopez's claims of discomfort.⁵ *See Estate of Curtis*, 136 Nev., Adv. Op. 39, 466 P.3d at 1269-70. Therefore, this issue raises

⁴The decision in *Estate of Curtis* was filed on July 9, 2020. Briefing in this case was completed on June 10, 2020, and we recognize that Lopez could not have addressed the *Estate of Curtis* holding in his briefing, but it was addressed during the oral argument.

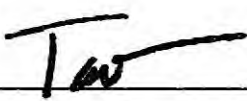
⁵Similarly, Dr. Candela's failure to sign the prescription for pain pills also involves medical treatment or judgment. While Lopez argued during oral argument that signing the prescription was a specific act that could be evaluated by a juror's common knowledge and experience, a doctor's authorization of a prescription involves the doctor's judgment about the kind of treatment that is necessary for a patient. Therefore, the common-knowledge exception would still not apply.

questions of professional or medical judgment beyond the realm of common knowledge and experience. Additionally, the claim pertains to actions that occurred within the course of the professional relationship. With both prongs answered in the affirmative, the common-knowledge exception therefore does not apply. *Id.* at 1268. Thus, Lopez's claim that Dr. Candela failed to follow up with him or see him after the surgery is subject to NRS 41A.071's affidavit requirement, and error has not been established as to this issue, plain or otherwise.⁶

Therefore, we conclude that the district court properly determined that Lopez's claims sounded in professional negligence. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Richard Scotti, District Judge
Robison, Sharp, Sullivan & Brust
McBride Hall
Barbara Buckley
Snell & Wilmer/Kelly H. Dove
Anne R. Traum
Eighth District Court Clerk

⁶Lastly, Lopez alleges that the district court did not undertake any analysis to determine whether his claims sounded in professional negligence. A review of the district court's order shows otherwise. Moreover, Lopez did not include the transcript of the hearing in the record on appeal and we presume the transcript supports the district court's decision. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 135.