IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOUGLAS NORBERG,
Appellant,
vs.
NEVADA CENTER FOR DERMATOLOGY; ASHLEY VAZEEN; AND DR. BILLIE CASSE,
Respondents.

No. 82083-COA

FILED

JUL 16 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Douglas Norberg appeals from a district court order dismissing a complaint in a tort action. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Norberg filed a complaint against respondents Nevada Center for Dermatology (NCD),[1] Ashley Vazeen, and Dr. Billie Casse, asserting claims for intrusion upon seclusion and violation of NRS 449A.112. In relevant part, Norberg alleged that Vazeen, a nurse practitioner employed by NCD, intentionally invaded his privacy by allowing her medical assistant and Dr. Casse to observe while she conducted a full-body examination of Norberg's skin. Norberg alleged that Vazeen did not obtain his consent or inform him of the reason for the two other women's presence, that they were not directly involved with his care, and that their presence caused him "to

[1]There are no allegations in the complaint specifically pertaining to NCD beyond the fact that it employed the other two respondents, but Norberg contends that NCD is liable for their conduct under the doctrine of respondeat superior. In light of our disposition, we need not address this issue.

start having a sexual response," which resulted in "humiliation, embarrassment, pain and anguish."

Respondents moved to dismiss Norberg's complaint on grounds that his claims actually sounded in medical malpractice and that he failed to file his complaint with the requisite expert affidavit or within the relevant one-year limitations period. They also argued that Norberg failed to state a claim for intrusion upon seclusion, that NRS 449A.112 does not provide a private right of action, and that, even if it does, Norberg nevertheless failed to state a claim for its violation. The district court agreed on all counts and, over Norberg's opposition, dismissed the complaint with prejudice and without leave to amend. This appeal followed.

As a preliminary matter, we note that the district court, in reaching its decision, considered documents related to Norberg's visit to NCD that the parties attached to their respective motion and opposition, which the court concluded it was entitled to do without treating the motion as one for summary judgment on grounds that "(1) the complaint refer[red] to the document[s]; (2) the document[s] [were] central to the plaintiff's claim; and (3) no party question[ed] the authenticity of the document[s]." *Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015) (internal quotation marks omitted) (providing that a court may consider documents not attached to the complaint when ruling on a motion to dismiss—without treating it as a motion for summary judgment—if the documents satisfy these requirements); *see* NRCP 12(d) ("If, on a motion under Rule 12(b)(5) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). Although Norberg does not challenge the district court's decision on this point, we nevertheless note that Norberg's

complaint did not actually refer to or rely on any of these documents. Rather, the complaint referenced the events of the visit itself, and we are not persuaded that the holding in *Baxter*, which primarily concerned documents incorporated into pleadings by reference, *id.*, applies to the circumstances at issue here. Accordingly, in resolving this appeal, we treat the district court's order as having granted summary judgment in favor of respondents. *See* NRCP 12(d); *Witherow v. State, Bd. of Parole Comm'rs*, 123 Nev. 305, 307-08, 167 P.3d 408, 409 (2007) ("[I]f the district court considers matters outside of the pleadings, this court reviews the dismissal order as though it were an order granting summary judgment.").

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine disputes of fact. *Id.* at 731, 121 P.3d at 1030-31.

On appeal, Norberg contends that his claims did not sound in medical malpractice, that he stated viable claims for intrusion upon seclusion and violation of NRS 449A.112, and that, alternatively, he should have been granted leave to amend his complaint. Because we conclude that Norberg's claim for intrusion upon seclusion—even assuming it is not entirely dependent upon allegations of medical malpractice—fails as a matter of law, we address that issue first.

To recover for invasion of privacy based on intrusion upon seclusion, the plaintiff must show: "1) an intentional intrusion (physical or otherwise); 2) on the solitude or seclusion of another; 3) that would be highly offensive to a reasonable person." *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630, 895 P.2d 1269, 1279 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). The plaintiff must demonstrate that he "had an actual expectation of seclusion or solitude and that that expectation was objectively reasonable." *Id.* at 631, 895 P.2d at 1279. With respect to the offensiveness element, "[w]hile what is 'highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion." *Id.* at 634, 895 P.2d at 1281 (internal quotation marks omitted). In making such a determination, the court should consider "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which [s]he intrudes, and the expectations of those whose privacy is invaded." *Id.* at 634, 895 P.2d at 1282 (internal quotation marks omitted).

We agree with the district court that Norberg's claim for intrusion upon seclusion fails as a matter of law. First, under the circumstances presented here, we question the extent to which respondents intentionally intruded upon Norberg in such a way as to contravene a reasonable expectation of privacy. *Compare id.* at 635, 895 P.2d at 1282 (identifying "a hospital room" as a "place traditionally associated with a legitimate expectation of privacy"), *with Sanchez-Scott v. Alza Pharm.*, 103 Cal. Rptr. 2d 410, 418 (Ct. App. 2001) (recognizing that a "patient knows

and expects that [medical personnel] enter and leave [medical spaces] in accordance with the medical needs of the patient"). Regardless, considering the circumstances in light of the *PETA* factors, the alleged intrusion does not rise to the level of offensiveness required for liability to attach. *See PETA*, 111 Nev. at 634, 895 P.2d at 1282; Restatement (Second) of Torts § 652B cmt. d (Am. Law Inst. 1977) ("There is . . . no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object.").

Considering the degree of intrusion, *PETA*, 111 Nev. at 634, 895 P.2d at 1282, we agree with Norberg that the type of examination conducted here—where a patient is disrobed—exposes what is normally a private space. *See* Restatement (Second) of Torts § 652B cmt. c ("Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze . . . ."). But we must consider the sensitivity of the situation in tandem with the overarching context, including respondents' conduct, motives, and objectives, the setting, and Norberg's expectations. *PETA*, 111 Nev. at 634, 895 P.2d at 1282. And the undisputed context here was that Norberg had returned to NCD following an initial examination by Vazeen—for which the medical assistant had been present and acted as a scribe—that Norberg believed was inadequate. Because of this, Vazeen conducted a second examination with the medical assistant again serving as a scribe, and she brought in Dr. Casse to supervise, which Norberg concedes was reasonable

in light of the alleged inadequacy of the first exam.[2] Moreover, Norberg conceded below that he was expecting the medical assistant to be present at the second exam, that he was aware of NCD's policy of having such a party present, and that he implicitly consented to the same by showing up for the second exam.

Perhaps most importantly, although Norberg summarily contends that neither the medical assistant nor Dr. Casse were directly involved in his care, the record reveals no other purpose for their presence and shows that they were, in fact, acting in furtherance of his treatment, and Norberg does not point to any evidence or even allege that respondents acted with any motive or purpose beyond that limited scope. *See id.* at 635, 895 P.2d at 1282 (providing that "[m]any courts, and Professor Prosser, have found the inquiry into motive or purpose to be dispositive of th[e] [offensiveness] element of the tort," and acknowledging that a doctor's conduct may be intrusive where she is "not seeking to further the patient's treatment"). In the absence of any motive or purpose for intruding upon Norberg's privacy in an objectionable manner—even assuming that he is

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[2]Despite acknowledging the reasonableness of supervision by Dr. Casse in light of the circumstances, Norberg contends that the doctor was not actually supervising Vazeen and was instead merely watching her conduct the examination. But Norberg fails to cogently argue this distinction, as a commonly understood meaning of the word "supervise" is to merely "oversee." *Supervise*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/supervise (last visited July 13, 2021); *see Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that the appellate courts need not consider claims unsupported by cogent argument). And it does not follow that a supervising physician is not truly supervising until she intervenes, as one may readily imagine a scenario in which the supervisee conducts herself appropriately, thereby obviating the need for intervention.

correct that Dr. Casse observed the examination without his consent—Norberg cannot show that the conduct complained of rose to the requisite level of offensiveness. *See id.* Accordingly, Norberg failed to demonstrate a genuine dispute of material fact as to his claim for intrusion upon seclusion, and the district court appropriately granted summary judgment in favor of respondents on that claim. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

Despite the foregoing, Norberg contends that respondents still should have obtained his express consent and/or explained the reasons for both the medical assistant and Dr. Casse's presence, and he further contends that neither woman's presence during the examination was necessary and that they were not actually providing him medical care. But these arguments concern the scope of Norberg's consent to the skin examination, as well as the standard of care for medical providers conducting such procedures, which are issues of medical malpractice requiring supportive expert testimony.[3] *See* NRS 41A.071 (requiring the district court to dismiss an action for medical malpractice without prejudice if it is filed without the requisite expert affidavit); *Humboldt Gen. Hosp. v.*

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[3]To the extent Norberg contends that these are matters of common knowledge and experience, *see Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev., Adv. Op. 39, 466 P.3d 1263, 1268 (2020) (holding that there is an "extremely narrow" and "rare" exception to the expert-affidavit requirement in situations of obvious negligence not involving professional judgment), we disagree. The alleged conduct at issue in this case was not so obviously deficient as to remove it entirely from the bounds of professional judgment. *See id.* And Norberg's argument on this point is belied by his own briefing both below and on appeal, which is rife with references to outside materials, anecdotes, and medical authorities evidencing what he believes to be the appropriate standard of care in the medical profession under circumstances like those at issue here.

Sixth Judicial Dist. Court, 132 Nev. 544, 550-51, 376 P.3d 167, 172 (2016) (providing that, "where general consent is provided for a particular treatment or procedure, and a question arises regarding whether the scope of that consent was exceeded, an expert medical affidavit is necessary");[4] *see also Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017) (providing that "[a]llegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice," as expert testimony is required to determine the reasonableness of the providers' actions in such cases).

Accordingly, to the extent the district court determined that Norberg's claim for intrusion upon seclusion—at least in part—sounded in medical malpractice, we affirm summary judgment on that claim on grounds that Norberg failed to file his complaint with the requisite expert affidavit. *See* NRS 41A.071; *Szymborski*, 133 Nev. at 643, 403 P.3d at 1285 ("Our case law declares that a medical malpractice claim filed without an expert affidavit is void *ab initio*." (internal quotation marks omitted)); *see*

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[4]Citing *Humboldt*, Norberg contends that he did not provide any consent at all for the medical assistant or Dr. Casse to be present and that his claim therefore does not implicate medical malpractice. *See* 132 Nev. at 550, 376 P.3d at 172 ("[W]here a plaintiff claims not to have consented *at all* to the treatment or procedure performed by a physician or hospital, we conclude that such an allegation constitutes a battery claim and thus does not invoke NRS 41A.071's medical expert affidavit requirement." (emphasis added)). But the *Humboldt* court was referring to situations where no consent is given for the specific "treatment or procedure performed," not situations like those at issue here where a patient gives consent for the treatment or procedure itself, but not for each individual involved in administering it. *Id.* And Norberg does not allege any lack of consent to the skin examination itself; rather, he challenges the scope of the consent he provided for that procedure, which is a matter requiring an expert affidavit. *See id.* at 550-51, 376 P.3d at 172.

also Estate of Curtis, 136 Nev., Adv. Op. 39, 466 P.3d at 1270 (affirming summary judgment where the plaintiffs failed to file the complaint with the requisite expert affidavit). Likewise, because Norberg concedes on appeal that he failed to file his claim within the requisite one-year limitations period for medical malpractice, we affirm summary judgment on statute-of-limitations grounds. *See* NRS 41A.097(2) (providing that a plaintiff must file a claim for medical malpractice within three years from the date of injury or one year from the date he discovered the injury, whichever occurs first).

Turning to Norberg's claim for violation of NRS 449A.112—a statute that does not specifically set forth a remedy for its violation—he concedes on appeal that he is unaware of any authority in support of the notion that the statute provides a private right of action, and the only authority addressing this issue that we found in our own research summarily concluded it does not. *See Yates v. NaphCare*, No. 2:12-cv-01865-JCM-VCF, 2013 WL 4519349, at *2 (D. Nev. Aug. 23, 2013) (concluding that the identical prior version of the statute, then codified as NRS 449.720, "create[d] no private right of action"). And our supreme court has generally held that "when no clear statutory language authorizes a private right of action, one may be implied [only] if the Legislature so intended." *Neville v. Eighth Judicial Dist. Court*, 133 Nev. 777, 781, 406 P.3d 499, 502-03 (2017) ("Without legislative intent to create a private judicial remedy, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." (internal quotation marks omitted)). But the only argument Norberg advances on appeal in support of recognizing a private right of action under the statute is that if this court declines to do so, there will be no remedy for

its violation. He thus fails to meaningfully address the overarching question of whether the Nevada Legislature intended to create a private right of action under NRS 449A.112 or the factors that guide this court in making such a determination: "(1) whether the plaintiffs are of the class for whose special benefit the statute was enacted; (2) whether the legislative history indicates any intention to create or deny a private remedy; and (3) whether implying such a remedy is consistent with the underlying purposes of the legislative scheme." *Neville*, 133 Nev. at 781, 406 P.3d at 502-03 (alteration and internal quotation marks omitted). Accordingly, we need not reach this issue.[5] *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Insofar as Norberg relies on NRS 449A.112(1)(a) (providing that patients have the right to "[r]eceive considerate and respectful care), and 449A.112(2) ("The patient must consent to the presence of any person who is not directly involved with the patient's care during any examination,

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[5]To the extent Norberg relies on the New York case of *Chanko v. American Broadcasting Companies, Inc.*, in arguing that this court should allow him to proceed with his statutory claim, we note that the Court of Appeals in that case allowed the plaintiffs to proceed with their claim for breach of physician-patient confidentiality, a privilege created by statute. *See* 49 N.E.3d 1171, 1173-77 (N.Y. 2016) (providing that such a claim involves "disclosure of . . . confidential information to a person not connected with the patient's medical treatment"). But Norberg conceded below that respondents did not disclose any confidential information to third parties and that he was not suing under such a theory. And he fails to explain how the analysis set forth in *Chanko*—a New York decision interpreting New York law—sheds any light on the question of whether our legislature intended to provide a private right of action under NRS 449A.112. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

consultation or treatment."), as establishing a duty of care under a theory of either negligence per se or garden-variety negligence, the claim still falls short; we are not persuaded that such theories escape the heightened procedural requirements applicable to claims for medical malpractice.[6] *See Szymborski*, 133 Nev. at 646-47, 403 P.3d at 1287-88 (evaluating whether a particular regulatory provision "invoke[d] medical judgment" sufficient to implicate medical malpractice under a theory of negligence per se); *Smith v. Cotter*, 107 Nev. 267, 271-74, 810 P.2d 1204, 1207-08 (1991) (analyzing whether the plaintiff presented sufficient expert testimony at trial to demonstrate that the defendant doctor committed medical malpractice by violating NRS 449.710, a patients' rights provision akin to NRS 449A.112 that was likewise later recodified in NRS Chapter 449A). We therefore affirm summary judgment on this claim for the same reasons discussed above. *See* NRS 41A.071, .097(2).

Finally, Norberg argues in the alternative that he should have been permitted to amend his complaint to add the medical assistant as a defendant. Specifically, he claims that she is not a medical professional and that adding her would therefore allow him to circumvent Nevada's medical malpractice statutes. But it does not appear from the record that Norberg raised this issue or otherwise requested this relief below, and he has

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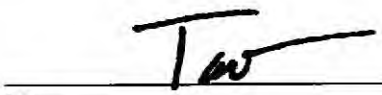
[6]Although it is arguable that what constitutes "considerate and respectful care" under NRS 449A.112(1)(a) might in some cases fall within the common-knowledge exception to the expert-affidavit requirement, *see Estate of Curtis*, 136 Nev., Adv. Op. 39, 466 P.3d at 1268, we note that what is "considerate" or "respectful" in the unique context of medical practice may often diverge from the common understanding of those terms among laymen. And here, as above, we are not persuaded that respondents' alleged conduct was so obviously inconsiderate or disrespectful as to obviate the need for an expert perspective. *See id.*

therefore waived it. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal."); *cf. Woodstock v. Whitaker*, 62 Nev. 224, 230, 146 P.2d 779, 781 (1944) ("[N]ot having requested the court for permission to amend, the appellant will be deemed to have elected to stand on his [pleading] as originally filed.").

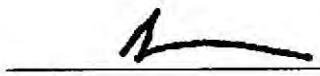
Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.[7]

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Egan K. Walker, District Judge
Douglas Norberg
Lemons, Grundy & Eisenberg
Washoe District Court Clerk

[7]Insofar as Norberg raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.