

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEPHANIE PRIEST, INDIVIDUALLY
AND AS THE SPECIAL
ADMINISTRATOR OF THE ESTATE
OF JOSEPHINE HOLWICK,
Appellants,
vs.
EMPRES HEALTHCARE
MANAGEMENT, LLC, A
WASHINGTON LIMITED LIABILITY
COMPANY, D/B/A PAHRUMP HEALTH
AND REHABILITATION; PAHRUMP
HEALTHCARE, LLC, A NEVADA
LIMITED LIABILITY COMPANY; AND
JANIE HEFNER, LPN,
Respondents.

No. 86798-COA

DEC 24 2024

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Stephanie Priest appeals from a district court order granting a motion to dismiss. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Priest initiated a civil action individually and as the special administrator of the decedent's estate against respondents Empres Healthcare Management, LLC d/b/a Pahrump Health and Rehabilitation; Pahrump Healthcare, LLC; and Janie Hefner, LPN (collectively respondents) on July 22, 2022. The complaint alleged that Priest's mother, 93-year-old Josephine Holwick, was admitted to Pahrump Health and Rehabilitation, a skilled nursing facility, on October 21, 2019. Priest alleged that Holwick had 15 falls over the next ten months while she was at the facility. The complaint asserted that, during the time Holwick was under

the care of the facility, respondents failed to adequately staff the facility, failed to oversee care, failed to educate personnel, failed to prevent injuries, failed to provide proper nutrition, and failed to tend to Holwick's wounds. The complaint further alleged that, on August 24, 2020, respondent Hefner found Holwick on the floor near the side of her bed with a cut on her forehead, both eyes swollen, and bruising in the left eye area. Holwick was diagnosed with a hematoma. On September 14, Holwick passed away, purportedly never recovering from the head trauma she sustained. In the complaint, Priest asserted claims for negligence, wrongful death, and elder abuse. Specifically, Priest claimed that respondents were negligent in failing to properly administer care to Holwick, failing to oversee the care, failing to implement reasonable fall precautions, and failing to reasonably monitor Holwick. Additionally, Priest asserted that respondents caused harm to an individual over the age of 60 and caused Holwick's death.

Respondents filed a motion to dismiss Priest's complaint, arguing that all the claims asserted in the complaint sounded in professional negligence. Thus, respondents argued that an expert medical affidavit was required in support of the professional negligence claims pursuant to NRS 41A.071. Respondents further argued that the complaint did not allege sufficient facts to support the claims set forth therein. Priest filed an opposition to the motion to dismiss, arguing that the claims were within the common knowledge sufficient to determine negligence, citing to *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 350, 466 P.3d 1263 (2020). Priest also asserted that, because skilled nursing facilities are not listed as health care providers as defined in NRS 41A.017,

the claims against respondents could not be subject to NRS 41A.071's expert medical affidavit requirement.

After a hearing, the district court granted the motion to dismiss. The court found that the complaint alleged that the failure to monitor, failure to provide nursing care, failure to supervise staff members responsible for medical treatment, and failure to implement fall precautions ultimately lead to Holwick's death. The court further found that all of the claims were "based on the same operative facts as the underlying professional negligence," and that "[n]o allegations remain that do not involve medical diagnosis, judgment or treatment." Thus, the court found that the alleged negligence implicated medical treatment and fell within the definition of professional negligence under NRS 41A. The court further found that the claims against Pahrump Health and Rehabilitation were premised on vicarious liability for alleged negligence in relation to the care and treatment provided to Holwick leading to the alleged falls and death. As such, the court found that Priest's claims required a medical expert affidavit in compliance with NRS 41A.071. Because the complaint was not only filed without an expert affidavit, but also filed beyond the statute of limitations for professional negligence actions, the court dismissed the case with prejudice.¹

¹For an injury or wrongful death that is alleged to have occurred on or after October 1, 2002, but before October 1, 2023, a plaintiff must file their professional negligence claim within one year after the plaintiff discovers or should have discovered the legal injury. NRS 41A.097(2). Recent amendments to NRS 41A.097 extended the statute of limitations for professional negligence claims to two years after the plaintiff discovers or should have discovered the injury, but only for claims arising on or after

Subsequently, Priest filed a motion for reconsideration, arguing that the district court erred in determining that Pahrump Health and Rehabilitation was a provider of health care, erred in not applying the common knowledge exception, and erred in concluding that the claim of elder abuse was a claim for professional negligence. In opposition, respondents argued that Priest did not demonstrate that the court's ruling was clearly erroneous, and therefore reconsideration was improper. The court denied the motion for reconsideration, concluding that Priest failed to demonstrate that the court's ruling on the motion to dismiss was clearly erroneous. This appeal followed.

On appeal, Priest argues that the district court (1) erred in dismissing the negligence, wrongful death, and elder abuse claims, which stated facts as to Holwick's repeated falls, the respondents' failure to train and supervise staff and a failure to implement fall precautions, as issues of professional negligence subject to the expert affidavit requirement; (2) erred in determining that an expert affidavit was required as skilled nursing facilities are not listed as "providers of health care" in NRS 41A.017; and (3) erred in dismissing the claim for elder abuse and in determining that this claim was derivative of a claim for professional negligence.

October 1, 2023, rendering the post-amendment limitations period inapplicable here. *See* NRS 41A.097(2)-(3) (2023). Because we resolve this matter based on Priest's failure to provide the expert affidavit required for professional negligence actions, we need not reach the district court's alternative determination that the complaint was untimely filed beyond the applicable statute of limitations period.

Conversely, respondents argue that, because the allegations connected to all the claims sound in professional negligence, those claims are subject to the requirements of NRS Chapter 41A, including the requirement to file an expert affidavit attached to the complaint. Respondents further argue that Pahrump Health and Rehabilitation is not exempt from NRS 41A.017 because the alleged management failures here pertained to the same staff who allegedly engaged in professional negligence toward the decedent in failing to reasonably prevent her August 24, 2020, fall. Additionally, respondents argue that dismissal was appropriate as to the elder abuse and wrongful death claims because the complaint in this case demonstrates that these claims sounded in professional negligence as they arose from the same set of facts and theories of fault giving rise to the negligence claim.

Shortly after filing the answering brief, respondents filed a notice of supplemental authority regarding the Nevada Supreme Court's recent opinion abrogating the common knowledge exception. *See Limprasert v. PAM Specialty Hosp. of Las Vegas LLC*, 140 Nev., Adv. Op. 45, 550 P.3d 825, 835 (2024). In her reply brief, Priest acknowledged that, in light of *Limprasert*, dismissal of the negligence claim against respondent Hefner was warranted. But Priest argues that the negligence claims against the other respondents were improperly dismissed as the claims for negligence were not tied to claims for professional negligence. Priest further asserts that the elder abuse claim was not a claim related to medical treatment and, thus, the elder abuse claim was improperly dismissed as to all the respondents.

Because Priest has conceded that the dismissal of the negligence claim against Hefner was warranted, we affirm the dismissal of that claim as to Hefner. We therefore turn to address the remaining arguments on appeal.

“We review a district court order granting a motion to dismiss *de novo*.” *Zohar v. Zbiegien*, 130 Nev. 733, 736, 334 P.3d 402, 404 (2014). In adjudicating a motion to dismiss, all factual allegations in the complaint are deemed as true and all inferences are drawn in the plaintiff’s favor. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A “complaint should be dismissed only if it appears beyond a doubt that [the plaintiffs] could prove no set of facts, which, if true, would entitle [them] to relief.” *Id.* Under NRS 41A.071, a professional negligence action requires a supporting affidavit from a medical expert. *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). We also review a “district court’s decision to dismiss [a] complaint for failing to comply with NRS 41A.071 *de novo*.” *Yafchak v. S. Las Vegas Med. Inv., LLC*, 138 Nev., Adv. Op. 70, 519 P.3d 37, 40 (2022).

Professional negligence is “the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care.” NRS 41A.015. To determine how to characterize a claim, this court looks to the gravamen of each claim “rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence.” *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 643, 403 P.3d 1280, 1285 (2017). Consequently, “[a]llegations of [a] breach of duty involving medical judgment, diagnosis, or treatment

indicate that a claim is for [professional negligence].” *Id.* at 642, 403 P.3d at 1284.

Here, Priest argues that the negligence claims against the remaining respondents are exempt from the NRS 41A.071 expert affidavit requirement because the allegations that Pahrump Health and Rehabilitation was negligent in failing to administratively implement fall protocols and failing to competently hire, train and supervise employees sound in ordinary negligence. However, we are not persuaded by this argument, as the gravamen of the complaint asserts facts reflecting that Pahrump Health and Rehabilitation staff were allegedly negligent in providing medical care to Holwick such that they sound in professional negligence. *See Szymborski*, 133 Nev. at 642, 403 P.3d at 1284 (“Allegations of [a] breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for [professional negligence].”).

To the extent Priest argues that skilled nursing facilities are not governed by NRS Chapter 41A, “[s]killed nursing facilities may be covered under NRS Chapter 41A when a complaint alleges liability against the facility based on the professional negligence of its nurses.” *Engelson v. Dignity Health*, 139 Nev., Adv. Op. 58, 542 P.3d 430, 446 (Ct. App. 2023) (emphasis omitted). Thus, Pahrump Health and Rehabilitation, as a skilled nursing facility and Hefner’s employer, is covered by NRS Chapter 41A as the complaint asserted that Hefner was negligent in providing medical care to Holwick. *See Yafchak*, 138 Nev., Adv. Op. 70, 519 P.3d at 40 (explaining that skilled nursing facilities may be covered under NRS Chapter 41A when the complaint alleges liability against their nurses who are providers of health care under the definition in NRS 41A.017). And to the extent Priest

asserts that her complaint alleged negligent actions by Pahrump Health and Rehabilitation that were independent of Hefner's actions, all of the individuals that were otherwise identified in the facts of the complaint were also nurses who are providers of health care employed by Pahrump Health and Rehabilitation. Thus, the analysis in *Engelson* and *Yafchak* likewise applies under these circumstances.

To that end, "where a complaint asserts direct liability against an employer for negligent hiring, training, and supervision, the complaint against the employer may be subject to the affidavit requirement if the underlying tortfeasor employee's negligence constitutes professional negligence." *Yafchak*, 138 Nev., Adv. Op. 70, 519 P.3d at 40. Here, the negligence claim in the complaint specifically avers that respondents were negligent in the "hiring, training and supervision of their employees, contractors, staff and independent contractors, in caring for residents, including to prevent [Holwick] from sustaining injuries in their facility." The nature of Priest's negligence claim is that, when rendering services within a professional relationship, staff at Pahrump Health and Rehabilitation were negligent in providing medical care for Holwick and preventing her from sustaining injuries. Thus, the gravamen of these allegations relates to a "breach of duty involving medical judgment, diagnosis, or treatment," such that the allegations sounded in professional negligence. *See Szymborski*, 133 Nev. at 642, 403 P.3d at 1284.

Based on the reasoning set forth above, we conclude that the district court properly dismissed Priest's professional negligence claims due to Priest's failure to comply with NRS 41A.071's expert affidavit requirement. And because Priest's wrongful death claims were based on

the same set of facts and theories of fault giving rise to the negligence claims, the gravamen of this claim also sounded in professional negligence, and thus, the district court likewise properly dismissed this claim for failure to provide the required expert affidavit. *See Szymborski*, 133 Nev. at 643, 403 P.3d at 1285.

Turning to Priest's claim for elder abuse, NRS 41.1395 allows for an action to be brought on behalf of an elder or vulnerable person for an injury that they suffered because of abuse, neglect, or exploitation. Although elder abuse and professional negligence claims are separate legal claims, the facts supporting these claims are often similar, and thus, the supreme court has clarified that, when "determining whether the gravamen of a claim sounds in professional negligence or elder abuse, courts must give particular consideration to the underlying facts and how they are alleged in the complaint." *Yafchak*, 138 Nev., Adv. Op. 70, 519 P.3d at 40.

Here, the record does not support an elder abuse claim where the complaint's allegations as to the claim labelled "elder abuse" were grounded in medical negligence, rather than in willful abuse or the failure to provide a service. *See* NRS 41.1395(4)(a) (defining abuse) and (4)(c) (defining neglect). Specifically, the complaint does not allege any facts suggesting that respondents willfully or intentionally abused Holwick, but rather asserts that respondents negligently caused Holwick "to be hurt and injured in her health, strength and well-being, which subsequently resulted in her falling and sustaining a subdural hematoma." Thus, what was alleged under the elder abuse claim is that respondents negligently cared for Holwick resulting in her fall. As noted above, the gravamen of a claim is one for professional negligence where it involves a "breach of duty

involving medical judgment, diagnosis, or treatment.” *Szymborski*, 133 Nev. at 642, 403 P.3d at 1284; *see also, e.g., Lewis v. Renown Reg'l Med. Ctr.*, No. 74300, 2018 WL 6721372, at *2 (Nev. Dec. 18, 2018) (Order of Affirmance) (concluding that an elder abuse claim under NRS 41.1495 sounded in professional negligence where it involved alleged failures to monitor a patient). As a result, the district court properly dismissed Priest’s elder abuse claim, which was actually a claim for professional negligence, due to Priest’s failure to comply with NRS 41A.071’s affidavit requirement.

Under these circumstances, we conclude that the district court properly dismissed Priest’s complaint due to her failure to comply with NRS 41A.071’s medical affidavit requirement.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.²


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

²To the extent Priest raises other arguments that are not specifically addressed in this order, we have considered the same and conclude they do not present a basis for relief.

cc: Hon. Kimberly A. Wanker, District Judge
Hon. Stephen E. Haberfeld, Settlement Judge
Bighorn Law/Las Vegas
Hutchison & Steffen, LLC/Las Vegas
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