IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TARA KERN, INDIVIDUALLY,
Appellant,
vs.
AIDA F. CAPPIELLO, D.D.S., PLLC D/B/A SEDATION & IMPLANT DENTISTRY; AIDA FLAVIA CAPPIELLO, D.D.S., AN INDIVIDUAL; AND THOMAS R. GONZALES, D.D.S., AN INDIVIDUAL,
Respondents.

No. 89165-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Tara Kern appeals from a district court order granting a motion to dismiss a civil complaint in a professional negligence action. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.

Tara Kern filed a complaint alleging professional negligence, breach of contract, and other claims related to dental services she received from respondents Thomas R. Gonzales, D.D.S., Aida Flavia Cappiello, D.D.S., and Sedation & Implant Dentistry (Sedation). According to the complaint, Kern contracted with Dr. Gonzales of Sedation to replace her

existing bridgework with functional and aesthetically appropriate Zirconia brand dental implants, for which she alleged she paid $24,000. On September 29, 2022, Dr. Gonzales removed Kern's existing lower bridge and placed temporary 3D printed abutments and temporary dental work. This was the last time Kern saw Dr. Gonzales. Kern described this work as ill-fitting and unsightly. She was told that this work was temporary and would be replaced with better fitting and more attractive "pieces" at her appointment six weeks later. She asserted that the respondents never informed her that temporary pieces would be used nor did she consent to their use.

At her next appointment, on October 18, Dr. Cappiello removed and replaced her lower abutments and installed "some sort of temporary appliance" which Kern described as unsightly, ill-fitting, misaligned, and painful. This appliance broke quickly. Over nine visits between November and December 2022, Dr. Cappiello placed "numerous temporary appliances" which Kern found unsatisfactory in their "occlusion, aesthetics, tooth placement, function and pain." At some point during these visits, Kern learned that Dr. Gonzales had sold the practice to Dr. Cappiello and he would not complete her work.

Kern alleged that she then consulted another dental lab to create wax models for her permanent implants. She presented the wax models to respondents but they were unable to duplicate the mold with their

equipment. Kern then requested a full refund, which respondents refused (the pleadings below indicate they refunded her $2000 once she advised she did not want to continue treatment). Kern then contracted for $25,000 with another dentist to complete the work "once it became clear that Cappiello was not capable or qualified to fix her implants." Kern alleged that she never received the Zirconia implants she contracted respondents to install.

In addition to her claim of professional negligence, Kern alleged that respondents breached their contract to implant cosmetically appropriate dental implants, breached the covenant of good faith and fair dealing, were unjustly enriched, engaged in consumer fraud and negligent marketing, breached their warranty, and that she was entitled to relief under a claim of strict products liability. Kern also attached to the complaint an affidavit of merit drafted by Phillip Devore, D.D.S.

Drs. Gonzales and Cappiello thereafter moved to dismiss asserting that Kern's claims sounded in professional negligence and that the affidavit of merit did not comply with the requirements set forth in NRS 41A.071. Drs. Gonzalez and Cappiello asserted that Kern's remaining claims were deficiently pleaded. Sedation joined Dr. Cappiello's motion to dismiss. Sedation also filed its own, separate motion to dismiss asserting that the affidavit of merit did not mention Sedation or attribute any negligent actions to it. Kern opposed Drs. Gonzales and Cappiello's motions to dismiss, and Sedation's joinder with her opposition to Cappiello's motion,

but she did not separately oppose Sedation's motion to dismiss or otherwise respond to the arguments therein.

After a hearing, the district court granted the motions to dismiss. The court found that the allegations and claims in the complaint arose out of Kern's medical care and treatment and thus sounded in professional negligence. The court found the affidavit of merit insufficient under NRS 41A.071 because Dr. Devore did not aver he reviewed Kern's medical records and therefore the court dismissed the professional negligence claims based on a deficient affidavit of merit. In addition, the court found that Kern's remaining claims were subsumed into the professional negligence claim and dismissed them pursuant to NRS 41A.071 as well. The district court also concluded that the remaining claims failed to state claims upon which relief could be granted. This appeal followed.

On appeal, Kern initially argues that the district court erred in concluding that the affidavit of merit was insufficient pursuant to NRS 41A.071. She argues that, contrary to the court's conclusion, NRS 41A.071 does not mandate that the affiant review certain medical records to support the opinion. Further, Kern contends that even if the expert was required to review Kern's medical records, the record showed that Dr. Devore in fact reviewed them.

We 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. 729, 731, 519 P.3d 37, 40 (2022); *see also Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). 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*, 124 Nev. at 228, 181 P.3d at 672. Dismissal is only appropriate "if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* Under NRS 41A.071, a professional negligence complaint requires a supporting affidavit of merit from a medical expert. *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006); *see* NRS 41A.071.

NRS 41A.071 provides that an affidavit of merit must "[s]upport[ ] the allegations" in the complaint; be "submitted by a medical expert who practices or has practiced" in the field that is the subject of the alleged negligence; "[i]dentif[y] by name, or describe[ ] by conduct, each provider of health care who is alleged to be negligent;" and "[s]et[ ] forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms." The statutory text does not address what information medical experts must consider in reaching their opinions. *See* NRS 41A.071.

In *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014), the Nevada Supreme Court observed that the legislative history of NRS 41A.071 "does not reveal the precise level of specificity that an expert affidavit must include in order to 'support' the allegations." *Id.* at 738, 334 P.3d at 406. Accordingly, the supreme court determined the statute must be construed "in a manner that conforms to reason and public policy and thus continues to balance the interests of both the doctors and the injured patients." *Id.* The supreme court rejected the notion that the affidavit must "independently state every fact required to demonstrate a cause of action for medical malpractice." *Id.* at 739, 334 P.3d at 406; *see Engelson v. Dignity Health*, 139 Nev. 578, 593, 542 P.3d 430, 444 (Ct. App. 2023) (relying on *Zohar* in holding that "an affidavit of merit can adequately support a complaint's allegations of professional negligence when it opines as to the professional standard of care and the breach of that standard of care"). Moreover, appellate decisions construing NRS 41A.071 have been hesitant to impose additional requirements beyond those stated in the statutory text. *See, e.g., Zohar*, 130 Nev. at 739, 334 P.3d at 406 (rejecting interpretation of "support" that would require an affidavit to "independently state every fact required to demonstrate a cause of action for medical malpractice"); *Engelson*, 139 Nev. at 593-95, 542 P.3d at 444-45 (rejecting interpretation of NRS 41A.071 that would require an affidavit to address causation).

We conclude that the district court erred in finding that the affidavit of merit was insufficient to support the professional negligence allegations. The affidavit was submitted by a dentist who is familiar with the standard of care for dentists, including those who perform implant placement surgery. *See* NRS 41A.071(2). The affidavit identifies Drs. Gonzales and Cappiello by name and describes the conduct of each that was alleged to be negligent. *See* NRS 41A.071(3), (4). Although NRS 41A.071 does not require Dr. Devore to have reviewed Kern's medical records, Kern asserted in her opposition to the motion to dismiss below that Dr. Devore did in fact review the records.[1] Accordingly, accepting all of Kern's factual allegations as true and drawing all inferences in Kern's favor, *see Buzz Stew, LLC*, 124 Nev. at 228, 181 P.3d at 672, we reverse the district court to the extent that it dismissed claims alleging professional negligence with respect to Drs. Gonzales and Cappiello.

---

[1]While Dr. Devore did not expressly state that he reviewed the medical records in the affidavit, Kern's counsel averred that he did conduct such a review in Kern's opposition to the motion to dismiss. Neither Dr. Gonzales nor Dr. Cappiello objected to the counsel's affidavit or asked that it be disregarded. Accordingly, they forfeited any challenge to 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, unless it goes to the jurisdiction of that court, is deemed to have been [forfeited] and will not be considered on appeal.").

However, the district court did not err in granting the motion to dismiss with regard to Sedation. Sedation joined Dr. Cappiello's motion to dismiss and filed its own motion to dismiss asserting that Dr. Devore's affidavit does not identify Sedation or attribute any negligent actions to it. *See* NRS 41A.071(3), (4). Although Kern opposed the arguments that Sedation joined, Kern did not oppose Sedation's individual motion to dismiss or address its arguments that Dr. Devore's affidavit did not identify Sedation or attribute any actions to it. *See* EDCR 2.20(e) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same."); *see also Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 278 & n.15, 182 P.3d 764, 768 & n.15 (2008) (reviewing a district court decision to grant a motion pursuant to EDCR 2.20(b) (now EDCR 2.20(e)) for an abuse of discretion). Kern does not challenge, in her opening brief to this court, the dismissal of her complaint as to Sedation based on her failure to respond to its individual motion to dismiss; accordingly, she has forfeited any argument as to these grounds for dismissal. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised in an opening brief are deemed forfeited). Therefore, we affirm the dismissal as to Sedation.

Next, Kern challenges the dismissal of her breach of contract and unjust enrichment claims. We have reviewed the record before this court and determine that to the extent Kern challenged the services rendered from within the course of a relationship between a patient and healthcare provider and relate to a "breach of duty involving medical judgment, diagnosis, or treatment," those claims sound in professional negligence. *See Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017); *see Limprasert v. PAM Specialty Hosp. of Las Vegas LLC*, 140 Nev., Adv. Op. 45, 550 P.3d 825, 829 (2024). But, as explained previously, the district court erred in dismissing Kern's professional negligence allegations for failure to comply with NRS 41A.071.

However, Kern also included within her allegations of breach of contract and unjust enrichment that she had an agreement with respondents to install cosmetically appropriate dental implants and that she paid $24,000 for a particular set of implants, which respondents did not deliver. After review of the complaint, we determine that the district court should not have granted dismissal of these claims at this early stage of the proceedings.

Nevada is a "notice-pleading" jurisdiction, *see* NRCP 8(a), and a complaint need only set forth a short and plain statement with sufficient facts to demonstrate the necessary elements of a claim for relief so that the opposing party "has adequate notice of the nature of the claim and relief

sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); *see also Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 308-09, 468 P.3d 862, 878-79 (Ct. App. 2020) (discussing Nevada's liberal notice pleading standard). "[W]e liberally construe pleadings to place matters into issue which are fairly noticed to an adverse party." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) (internal quotation marks omitted). That said, courts must analyze "a claim according to its substance, rather than its label." *Otak Nev., LLC v. Eighth Jud. Dist. Ct.*, 129 Nev. 799, 809, 312 P.3d 491, 498-99 (2013); *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972) (explaining that the appellate courts look to the nature of grievance rather than the form of the pleadings when determining the character of the action).

In her complaint, Kern alleged that she had a valid contract with respondents wherein she paid them $24,000 to implant custom "cosmetically appropriate" dental implants.[2] She alleged a breach in that she was instead provided with grotesque and painful temporary appliances and "never received the [Z]irconia teeth she paid for." Moreover, Kern

[2]In her response to Gonzales' motion to dismiss below, Kern insisted that "she contracted for a positive outcome." We agree that this type of breach of contract claim would be subsumed in Kern's professional negligence claim, but any money deposited for the implants themselves, if the implants were paid for and never delivered, could constitute a general breach of contract claim under notice pleading.

acknowledged in her complaint that after multiple visits Dr. Cappiello had not yet delivered the permanent implants. We observe that these allegations encompass claims that the respondents did not deliver goods pursuant to a contract or otherwise retained Kern's funds "under circumstances that would be inequitable" for them to do so. *Korte Constr. Co. v. State on Relation of Bd. of Regents of Nev. Sys. of Higher Educ.*, 137 Nev. 378, 381, 492 P.3d 540, 543 (2021) ("Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof."); *see Iliescu v. Reg'l Transp. Comm'n of Washoe Cnty.*, 138 Nev. 741, 746, 522 P.3d 453, 458 (Ct. App. 2022) ("To prevail on a claim for breach of contract, the plaintiff must establish (1) the existence of a valid contract, (2) that the plaintiff performed, (3) that the defendant breached, and (4) that the breach caused the plaintiff damages."); *cf. Limprasert*, 140 Nev., Adv. Op. 45, 550 P.3d at 829; *Szymborski*, 133 Nev. at 642, 403 P.3d at 1284.

Thus, the district court erred in concluding that these claims were entirely subsumed under the professional negligence claims or otherwise failed to allege facts which if proven, would entitle Kern to relief. *See Buzz Stew, LLC*, 124 Nev. at 228, 181 P.3d at 672; *see Szekeres v. Robinson*, 102 Nev. 93, 98, 715 P.2d 1076, 1079 (1986) (recognizing that a

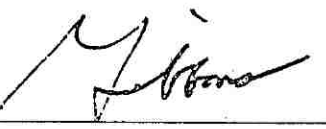
patient may have a contractual remedy where a physician fails to do what that physician promised to do). As a result, we reverse the district court's dismissal of her breach of contract claim and unjust enrichment claims against Drs. Gonzales and Cappiello and remand this matter for further proceedings as to these claims.

Lastly, we address Kern's remaining claims. To the extent Kern asserts the district court erred in dismissing the claims of strict products liability, consumer fraud and negligent marketing, and breach of warranty, she does not provide cogent argument as to why she believes the district court erroneously dismissed these claims. As a result, Kern has forfeited any argument related to the same. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that appellate courts need not consider issues that are not supported by cogent argument).

Further, the district court also dismissed Kern's claim that respondents breached the covenant of good faith and fair dealing because Kern did not oppose respondents' arguments below. *See* EDCR 2.20(e). Kern does not challenge the dismissal of her breach of good faith and fair dealing claim in her opening brief on appeal; thus, we need not address it further. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[3]

_____, C.J.
Bulla



_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Veronica Barisich, District Judge
Michelle L. Morgando, Settlement Judge
Bighorn Law/Las Vegas
Quintairos, Prieto, Wood & Boyer, P.A.
John H. Cotton & Associates, Ltd.
Chapman Law
Eighth District Court Clerk

---

[3]In addition, we note that Kern identified the order denying a motion to disqualify the district court judge in her notice of appeal as a decision she challenged in this matter. However, Kern does not present cogent argument concerning that decision. As a result, we decline to consider any arguments related to the same. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3.