

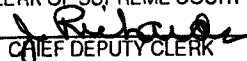
IN THE SUPREME COURT OF THE STATE OF NEVADA

RITO FAVELA,
Appellant,
vs.
KEVIN RAYLS, M.D.,
Respondent.

No. 42457

FILED

NOV 08 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order dismissing a medical malpractice action. Eighth Judicial District Court, Clark County; David Wall, Judge.

On September 30, 2002, appellant Rito Favela filed a medical malpractice complaint with the Medical and Dental Screening Panel (MDSP) against his surgeon, respondent Kevin Rayls, M.D. Attached to Favela's complaint was an affidavit from a medical expert, supporting Favela's malpractice claims. Effective October 1, 2002, the medical malpractice statutes, codified at NRS Chapter 41A, were amended to eliminate the MDSP for future medical claims. Because Favela filed his MDSP complaint before the amendments went into effect, however, he had the option of proceeding through the MDSP process, and he elected to do so. In June 2003, the MDSP returned a finding that it was "unable to reach a decision on the issue of medical malpractice by . . . Dr. Rayls."

Favela then filed a malpractice complaint against Dr. Rayls in the district court, without attaching a supporting expert affidavit. Dr. Rayls moved to dismiss Favela's complaint for failure to comply with NRS 41A.071's affidavit requirement, which became effective with the

amendments on October 1, 2002. The statute's affidavit requirement was applicable, Dr. Rayls argued, because Favela filed his medical malpractice complaint in the district court in July 2003, after NRS 41A.071 became effective.

Favela opposed the motion, arguing that the NRS 41A.071's affidavit requirements did not apply to his case because he had filed his action with the MDSP before NRS 41A.071's enactment, and he had elected to maintain his action with the MDSP after the enactment. Nevertheless, the district court granted Dr. Rayls' motion and dismissed without prejudice Favela's action pursuant to NRCP 12(b)(5) and NRS 41A.071. Favela appeals.

The current medical malpractice legislation was passed during 2002's special legislative session, and went into effect on October 1, 2002.¹ Before October 1, 2002, a plaintiff was required to file a complaint with the MDSP and receive an MDSP determination before filing any action in the district court.² The amendments to NRS Chapter 41A allow a plaintiff who had filed a complaint with the MDSP before October 1, 2002, and who had not received a MDSP determination, to elect to proceed under the repealed statutory scheme, or to have no further action taken by the MDSP and to instead file an action in the district court. The amendments also repealed the screening panel requirement for future claims, and replaced it with an expert affidavit requirement. Thus, a plaintiff filing a medical malpractice complaint in the district court after October 1, 2002, is required, under NRS 41A.071, to submit with the complaint an expert

¹2002 Nev. Stat. Spec. Sess., ch. 3.

²NRS 41A.016(1) (repealed 2002).

affidavit supporting the complaint's allegations. And a district court must dismiss, without prejudice, a malpractice complaint filed without an expert's affidavit.³

During the 2002 special legislative session, it was explained that, when the claimant had already filed a case with the MDSP, but the MDSP had not rendered a decision before the new statutory scheme became effective, the claimant would have to decide whether to "opt out" or to go forward with the case before the MDSP.⁴ And if the claimant decided to proceed with the MDSP through completion, the parties would then have thirty days to file any appeal from the MDSP's decision with the district court and proceed under the pre-October 2002 law, under which no affidavit was required.⁵

Here, Favela filed his complaint and expert's affidavit with the MDSP before NRS 41A.071's effective date, and he elected to proceed under the repealed system. When the MDSP was unable to reach a decision on Favela's malpractice claim, Favela, in accordance with former NRS 41A.056, pursued his action in the district court. Since, in enacting the new medical malpractice statutes, the legislature determined that, in cases where a claimant wished to maintain his case with the MDSP, the


³Id.

⁴Minutes of the Meeting of the Assembly Committee on Medical Malpractice Issues, 18th Special Session (2002) (statement of Bill Bradley, Nevada Trial Lawyers' Association, July 30, 2002).

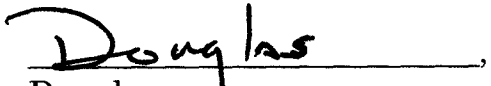
⁵Id.; see also NRS Ch. 41A Reviser's Notes (providing that, if a claimant elects to have a determination made by the MDSP, "the provisions of [former] NRS 41A.003 to 41A.069, inclusive, shall be deemed to continue to apply to the claim and to any subsequent action filed in the district court") (emphasis added).

former statutory scheme would apply,⁶ and Favela opted to complete his MDSP case and then proceed to the district court under the pre-October 2002 statutes, he was not required to file a medical expert affidavit with his district court "complaint."⁷ Accordingly, we reverse the order of the district court and remand this matter for proceedings consistent with this order.

It is so ORDERED.


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. David Wall, District Judge
Rito Favela
Lewis Brisbois Bisgaard & Smith, LLP
Clark County Clerk

⁶See NRS 41A Reviser's Notes.

⁷The MDSP's purpose was to prevent the filing of frivolous lawsuits. And although NRS 41A.071's expert affidavit requirements are designed to account for the MDSP's abolishment, Favela maintained his MDSP case through completion and, therefore, it would be duplicative to require him to comply with both the MDSP requirements and NRS 41A.071's affidavit requirements.