IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARRYL LLOYD WHITE,
Appellant,
vs.
MEGHAN LYNN WARD, M.D.; JOHN DOE WARD, HUSBAND AND WIFE, IN THEIR INDIVIDUAL AND CORPORATE CAPACITITES, AND THEIR MARITAL COMMUNITY; MICHELLE DOE, MEDICAL ASSISTANT, IN HER INDIVIDUAL AND CORPORATE CAPACITY; ANTHONY SLONIM, M.D., DR. PH, PRESIDENT AND CHIEF EXECUTIVE OFFICER, RENOWN HEALTH; JANE DOE SLONIM, HUSBAND AND WIFE, IN THEIR INDIVIDUAL AND CORPORATE CAPACITIES, THEIR MARITAL COMMUNITY; RENOWN SOUTH MEADOWS MEDICAL CENTER; AND MERCK & CO., INC.,[1]
Respondents.

No. 80554-COA

FILED
JUL 23 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Darryl Lloyd White appeals from a final judgment in a tort action. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

During the underlying proceeding, White alleged that respondent Meghan Lynn Ward, M.D., prescribed him Methylpred and a Proventil inhaler to treat his bronchitis and chronic obstructive pulmonary disease. When White later exhausted the Methylpred prescription and

[1]We direct the clerk of the court to add Merck & Co., Inc., as a respondent on the caption for this case so that it conforms to the caption on this order.

began using the Proventil inhaler more frequently than prescribed to relieve his symptoms, he called and left a message with Ward's office to inform her of the situation and obtain a refill of the Methylpred prescription. Two days later, White left a similar message with Ward's office, but did not receive a call back until the next day, when he was informed that he had an appointment with Ward the following day. Shortly before the appointment, White experienced an extreme respiratory event after exhausting the doses in his Proventil inhaler, which did not include a dose indicator to show the number of doses that remained in its dispenser.

Relying on the allegations concerning Ward's office's handling of his telephonic requests, White brought separate claims for negligence against Ward and her medical assistant, respondent Michelle Doe (Michelle). Additionally, White brought a claim against Anthony Slonim, M.D., who is the Chief Executive Officer of respondent Renown South Meadows Medical Center (Renown), alleging that he failed to adequately train and supervise Renown's employees in the proper procedure for returning telephone calls from patients with critical medical needs. Based on the foregoing, Ward also asserted a vicarious liability claim against Renown (Ward, Michelle, Slonim, and Renown are referred to collectively as the medical respondents).[2] Lastly, with respect to his allegation that the

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[2]White filed both an original and amended complaint in the underlying proceeding. Because White's claims against the medical respondents sounded in professional negligence for the reasons discussed below and he did not file a medical expert affidavit to support them, they were void *ab initio* and could not be amended. *See* NRS 41A.071 (providing that when a professional negligence claim is filed in the district court, the plaintiff must submit a medical expert affidavit to support the allegations underlying the claim); *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (explaining that "[b]ecause a complaint that does not comply with NRS 41A.071 is void ab initio, it does not legally exist and thus it cannot be amended"). Thus, with respect to the

Proventil inhaler lacked a dose indicator, White brought claims for strict products liability and negligence against the manufacturer of the Proventil inhaler, respondent Merck & Co., Inc. (Merck).[3]

The medical respondents moved to dismiss White's claims against them, arguing that they sounded in professional negligence and are time-barred under NRS 41A.097(2), which, as relevant here, provides that a claim for professional negligence against a provider of health care "may not be commenced more than . . . [one] year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury." Over White's opposition, the district court granted the medical respondents' motion. And although White moved for reconsideration, the district court denied that motion.

Merck separately moved to dismiss the strict products liability and negligence claims that White asserted against it under NRCP 12(b)(5). With respect to White's strict products liability claim, Merck specifically argued that White failed to allege the necessary elements of his claim, and that regardless, the claim failed because White used the inhaler in a manner that was not reasonably foreseeable by using the inhaler more

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medical respondents, we are only concerned with White's claims as they were presented in his original complaint. Aside from the claims against the medical respondents discussed above, White also asserted a claim styled as "professional negligence" against Ward. But because White does not challenge the dismissal of this claim, it is not discussed in this order.

[3]Although White asserted a separate claim for punitive damages against all of the respondents, "punitive damages is a remedy, not a cause of action." *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 313, 468 P.3d 862, 881 (2020). However, because we reverse and remand the dismissal of White's claims against Merck for the reasons discussed below, we clarify that if he can establish that Merck acted with oppression, fraud, or malice, then he may be able to recover punitive damages. *See id.* (explaining the same).

frequently than prescribed and by failing to seek immediate medical attention when it did not relieve his symptoms at the recommended dosage. And based on that foreseeability argument, Merck asserted that White could not establish the duty and proximate cause elements of his negligence claim and that dismissal of the claim was therefore required. Over White's opposition, the district court agreed with these points and granted Merck's motion to dismiss. This appeal followed.

We review district court orders granting an NRCP 12(b)(5) motion to dismiss de novo, accepting all factual allegations in the plaintiff's complaint as true and drawing all inferences in the plaintiff's favor. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). 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.* at 228, 181 P.3d at 672. When the allegations in the plaintiff's complaint indicate that the statute of limitations has run, dismissal is appropriate. *In re AMERCO Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011).

White's claims against the medical respondents

With respect to White's claims against the medical respondents, he does not dispute that the medical respondents are each providers of health care for purposes of NRS 41A.097(2). *See* NRS 41A.017 (setting forth NRS Chapter 41A's definition of the term "[p]rovider of health care"). Nor does he dispute that his claims against the medical respondents are subject to dismissal based on NRS 41A.097(2)'s one-year limitation period if they are professional negligence claims. Consequently, the only question before this court with respect to these claims is whether they sound in professional or ordinary negligence.

Since "[t]he distinction between professional and ordinary negligence can be subtle, [this 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. 350, 354, 466 P.3d 1263, 1267 (2020) (internal quotation marks omitted). "Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for [professional negligence]." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017). "[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.* at 642, 403 P.3d at 1285.

Beginning with White's negligence claims against Ward, the gravamen of the claims is that, in an effort to extract fees for a medical appointment from him, Ward failed to respond to his refill requests in a reasonable time despite her knowledge of his medical history. Hence, White essentially alleged that Ward intentionally disregarded his medical needs for financial gain. Given this allegation, to prevail on his claims, White would need to demonstrate that Ward should have handled his telephonic requests differently based on his medical history and the information he reported when he made those requests, which is a question of medical judgment.[4] *See Lucas v. Awaad*, 830 N.W.2d 141, 151 (Mich. Ct. App. 2013) (considering an allegation that a doctor intentionally misdiagnosed a patient for financial gain, and concluding that it sounded in professional negligence because a medical judgment would need to be made as to

[4]Consequently, even if White is correct that Ward's alleged financial motivations prevented her from exercising any medical judgment, we are not persuaded that his claim against her sounded in ordinary negligence.

whether a misdiagnosis occurred); *see also Estate of Curtis*, 136 Nev. at 358, 466 P.3d at 1269-70 (holding that a failure-to-monitor claim involved medical judgment, reasoning that resolution of the claim would require the jury to determine how the patient should have been monitored and the sufficiency of a nursing home's actions with respect to the patient).

And because this question is beyond the common knowledge and experience of jurors, expert testimony will be needed to resolve it.[5] *See Lucas*, 830 N.W.2d at 151 (stating that expert testimony is needed to evaluate an intentional misdiagnosis claim); *Estate of Curtis*, 136 Nev. at 358, 466 P.3d at 1269-70 (doing the same with respect to a failure-to-monitor claim). Thus, because the gravamen of White's claim against Ward involves medical judgment and requires expert testimony, we conclude that the district court did not err in determining that the claim sounds in professional negligence. *See Estate of Curtis*, 136 Nev. at 354, 466 P.3d at 1267; *Szymborski*, 133 Nev. at 642, 403 P.3d at 1284-85; *see also Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

Nevertheless, White contends that the district court should have permitted his claims against the remaining medical respondents to proceed, and for support, he quotes *Szymborski* for the proposition that "[a professional negligence] statute will not apply to claims for negligent supervision, hiring, or training where the underlying facts of the case do not fall within the definition of [professional negligence]", 133 Nev. at 647, 403

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[5]In an effort to demonstrate that jurors will not need expert testimony to evaluate his claims, White cites to NRS 41A.100(1), which provides that although expert testimony is generally required to prove breach and causation in professional negligence actions, such testimony is not required if the plaintiff establishes the existence of one or more enumerated factual predicates. But White did not allege facts that implicate any of NRS 41A.100(1)'s factual predicates, much less present evidence to establish their existence. Thus, this argument does not provide a basis for relief.

P.3d at 1288. But White does not offer any explanation as to why the facts of his claims do not fall within the definition of professional negligence, and we therefore decline to address the issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that the appellate courts need not consider claims unsupported by cogent argument or relevant authority). Given the foregoing, the district court did not err by dismissing White's negligence and vicarious liability claims against the medical respondents pursuant to NRS 41A.097(2), and we affirm that decision.[6] *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672; *see also In re AMERCO*, 127 Nev. at 228, 252 P.3d at 703.

White's claims against Merck

Turning to White's claims against Merck, he contends that he stated a claim for strict products liability based on the lack of a dose indicator on the Proventil inhaler. To state a claim for strict products liability, a plaintiff must allege "that: 1) the product had a defect which rendered it unreasonably dangerous, 2) the defect existed at the time the product left the manufacturer, and 3) the defect caused the plaintiff's injury." *Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 214, 826 P.2d 570, 571 (1992).

The district court concluded that White failed to allege facts sufficient to establish the first element of his strict products liability claim

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[6]We recognize that the district court was also required to dismiss these claims based on White's failure to submit a medical expert affidavit to support them when he filed his original complaint. *See* NRS 41A.071 (requiring the district court to dismiss professional negligence claims that are filed without a supporting medical expert affidavit); *Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794. But NRS 41A.071 only authorizes a dismissal without prejudice, and because White did not bring his claims against the medical respondents' within NRS 41A.097(2)'s one-year limitations period, the district court properly relied on NRS 41A.097(2) to dismiss the claims with prejudice since they were time-barred.

because he did not allege that the Proventil inhaler differed from Merck's intended result or its other apparently identical products, or otherwise allege that the inhaler's warning label was insufficient. Under Nevada law, however, a product may contain a defect that renders it unreasonably dangerous if it lacks adequate safety features or if a safer design is feasible. *Ford Motor Co. v. Trejo*, 133 Nev. 520, 525, 402 P.3d 649, 653 (2017) (identifying design defects as a theory of strict products liability recognized in Nevada); *Fyssakis*, 108 Nev. at 214, 826 P.2d at 572 (explaining that a plaintiff may establish that a product is defective by showing that it "lacked adequate safety features or that a safer alternative design was feasible at the time of manufacture"). The same is true of a product that does not "include a warning that adequately communicates the dangers that may result from its use or foreseeable misuse." *Fyssakis*, 108 Nev. at 214, 826 P.2d at 571-72.

Here, White alleged that Merck failed to include a dose indicator on the Proventil inhaler, that Merck did not include a dose indicator even though the technology to do so exists, and that the inhaler was unreasonably dangerous without a dose indicator since it could not alert users as to the number of doses remaining in its dispenser. These allegations gave fair notice that White would seek to prove that the Proventil inhaler was unreasonably dangerous because it lacked a safety feature/descriptive warning, and the allegations were therefore sufficient to state the first element of a strict products liability claim under either a design defect or failure to warn theory. *See Caplaco One, Inc. v. Amerex Corp.*, 435 F. Supp. 1116, 1119 (E.D. Mo. 1977) (addressing whether the manufacture of a fire extinguisher included adequate warnings of the need to recharge the fire extinguisher following a short discharge, and describing a pressure gauge on the fire extinguisher as a "descriptive warning" that "g[ave] a clear and adequate warning of [its] condition"); *see also W. States*

Constr. v. Michoff, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) ("Nevada is a notice-pleading state" and as a result, its "courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party." (internal quotation marks omitted)). Moreover, because White alleged that this defect existed at the time it left Merck's control, he also stated the second element of a strict products liability claim.

As to the third element of a strict products liability claim, White alleged that the Proventil inhaler was the proximate cause of his respiratory event insofar as the inhaler's lack of a dose indicator allowed him to be caught off-guard when he exhausted the medication in its dispenser. The district court essentially determined, however, that the proximate cause element of White's strict products liability claim failed because the allegations in his complaint demonstrated that he misused the inhaler in a manner that was not reasonably foreseeable to Merck. *See Van Duzer v. Shoshone Coca Cola Bottling Co.*, 103 Nev. 383, 385, 741 P.2d 811, 813 (1987) (explaining that, in strict products liability actions, a manufacturer is not "liabl[e] for an injury resulting from an abnormal or unintended use of [its] product"); *but see Robinson v. G.G.C., Inc.*, 107 Nev. 135, 138, 808 P.2d 522, 524 (1991) (providing that a manufacturer may still be liable for a foreseeable misuse of its product notwithstanding an adequate warning).

White contends that the district court's determination in this regard was improper in the context of Merck's NRCP 12(b)(5) motion. Initially, the facts alleged in White's complaint establish that he misused the Proventil inhaler—specifically, they indicate that despite the instructions on the inhaler's warning label, White used it more than recommended and failed to seek immediate medical attention when the

inhaler did not provide him relief at the recommended dosage.[7] But whether this misuse was foreseeable to Merck is a question of fact, *see Lee v. GNLV Corp.*, 117 Nev. 291, 296, 22 P.3d 209, 212 (2001) (explaining that foreseeability is usually a question of fact for the jury), and nothing in White's complaint negates the possibility that it was foreseeable to Merck that the Proventil inhaler would be used in the manner that White did here in spite of its warning label. *See Robinson*, 107 Nev. at 138, 808 P.2d at 524; *see also Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Moreover, nothing in White's complaint negates the possibility that his respiratory event was proximately caused by the inhaler's lack of a dose indicator, as White alleged, rather than his misuse of the inhaler. *See Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672; *Lee*, 117 Nev. at 296, 22 P.3d at 212 (explaining that proximate cause is usually a question of fact for the jury); *see also Andrews v. Harley Davidson, Inc.*, 106 Nev. 533, 537, 796 P.2d 1092, 1095 (1990) (discussing misuse in terms of proximate cause). If the lack of a dose indicator on the Proventil inhaler was the proximate cause of White's respiratory event, then he may recover in a strict products liability action. *Fyssakis*, 108 Nev. at 214, 826 P.2d at 571. By contrast, if White's respiratory event resulted from his allegedly unforeseeable misuse of the inhaler, which is a possibility given the allegations in White's complaint, then Merck's liability is precluded. *See Van Duzer*, 103 Nev. at 385, 741

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[7]We are not persuaded by White's assertion that he complied with the inhaler's warning label by immediately seeking a refill of his Methylpred prescription from Ward when he began using the Proventil inhaler more than recommended. Indeed, in making this assertion, Ward concedes that he used the inhaler excessively despite its warning label. Moreover, while White contacted Ward's office to obtain a refill of his Methylpred prescription, he was unable to speak with anyone at Ward's office and continued using the inhaler excessively for several days until he suffered an extreme respiratory event and was hospitalized.

P.2d at 813. But the question raised by Merck's NRCP 12(b)(5) motion was whether White could prove "any set of facts that, if true, would entitle [him] to relief and not whether there is a set of facts that would not provide [him] relief." *See Szymborski*, 133 Nev. at 644, 403 P.3d at 1286. Because this case is in the pleading stage, such that no evidence has been presented to establish either scenario, the district court prematurely determined that the proximate cause element of White's strict products liability claim failed. Consequently, we conclude that the district court erred by dismissing the claim. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

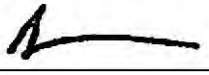
Lastly, we turn to White's challenge to the dismissal of his negligence claim against Merck, which was based on his allegation that Merck had a duty to install a dose indicator on the Proventil inhaler that it breached, thereby causing his respiratory event. As with White's strict products liability claim, the district court dismissed White's negligence claim based on his misuse of the Proventil inhaler, reasoning that it was the proximate cause of his respiratory event and rendered the same unforeseeable to Merck, such that White could not establish the duty element of the claim. *See Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 464, 168 P.3d 1055, 1065 (2007) (explaining that, under an ordinary negligence standard, a defendant has a "duty to exercise reasonable care to avoid foreseeable harm" to the person to whom the duty is owed). For the same reasons as discussed above in the context of White's strict products liability claim, this decision was premature. And because the allegations in White's complaint are sufficient to state a claim for negligent products liability, we conclude the district court erred by dismissing the claim. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672; *see also Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009) (setting forth the elements of a negligence claim). Thus, given the foregoing, we

reverse the district court's order dismissing White's claims against Merck and remand this matter for further proceedings consistent with this order.[8]

It is so ORDERED.[9]

_____, C.J.
Gibbons

_____, J.
Tao



_____, J.
Bulla

cc: Hon. Lynne K. Simons, District Judge
Darryl Lloyd White
Hall Prangle & Schoonveld, LLC/Las Vegas
Washoe District Court Clerk

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[8]While this court generally will not grant a pro se appellant relief without providing respondents an opportunity to file an answering brief, NRAP 46A(c), an answering brief would be futile here. Indeed, below, White essentially alleged that the Proventil inhaler was defective due to a missing safety feature that was needed to provide a warning to consumers, yet Merck's underlying arguments failed to directly address whether White could establish that the inhaler was defective based on such a design defect/failure to warn theory. Moreover, an answering brief would likewise be futile since the district court prematurely reached the questions of foreseeability and proximate cause as discussed above.

[9]Having reviewed White's remaining arguments, we conclude that they either do not provide a basis for relief or need not be reached given our disposition of this appeal.