IN THE SUPREME COURT OF THE STATE OF NEVADA

BARBARA CONLIN, INDIVIDUALLY,
Appellant,
vs.
SOUTHWEST MEDICAL ASSOCIATES, INC., A FOREIGN CORPORATION,
Respondent.

No. 84205

FILED

APR 27 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting summary judgment in a negligence action. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Appellant Barbara Conlin sued respondent Southwest Medical Associates, Inc. (Southwest), after suffering a fall during a medical appointment at a Southwest facility in 2019. After administering a medical test to Conlin on an electrically raised examination table, a Southwest employee told Conlin, then 84-years-old, that she was free to leave without lowering the table or offering Conlin assistance. Conlin attempted to descend on her own, but fell to the ground and broke her foot. Conlin subsequently sued Southwest for her injuries, alleging negligence under a theory of premises liability.

The district court granted summary judgment to Southwest, finding that the claim sounded in professional, rather than ordinary, negligence, and Conlin failed to provide a medical expert affidavit as required by NRS 41A.071(2). Conlin now appeals the district court's order.

"Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no genuine issue [of] material fact

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[exists] and that the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotation marks omitted). Applying the de novo review appropriate to appeals from orders granting summary judgment, *see id.*, we reverse and remand. We conclude that Conlin's claim sounds in ordinary, rather than professional negligence and, thus, NRS 41A.071 does not apply. Under this court's holding in *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 350, 466 P.3d 1263 (2020), a jury can evaluate the reasonableness of Southwest's actions based on their common knowledge and experience, even if the gravamen of Conlin's claim involves medical judgment, diagnosis, or treatment.

The district court erred in finding that Conlin's claim sounds in professional negligence

On appeal, Conlin argues that her claim sounds in ordinary negligence, and not in professional negligence subject to NRS 41A.071's affidavit requirement. Conlin asserts that Southwest's employee committed non-medical error, requiring no professional judgment or skill, by instructing Conlin to descend from the table without offering her assistance.

NRS 41A.015 defines "[p]rofessional negligence" as "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.071(2) provides that "[i]f an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit" from a medical expert.

This court has affirmed that providers of health care may be held liable under principles of ordinary negligence when performing

nonmedical services, in addition to professional negligence when providing medical services. *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 641, 403 P.3d 1280, 1284 (2017). A claim lies in professional negligence if it alleges a "breach of duty involving medical judgment, diagnosis, or treatment" or "the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert." *Id.* at 642, 403 P.3d at 1284. A "claim is likely based in ordinary negligence" if "the reasonableness of the health care provider's actions can be evaluated by jurors on the basis of their *common knowledge and experience*." *Id.* at 642, 403 P.3d at 1285 (emphasis added). Courts "must look to the *gravamen or substantial point or essence* of each claim rather than [the] form" in which it is pleaded, to determine the type of negligence in which a claim lies. *Id.* at 643, 403 P.3d at 1285 (emphasis added) (internal quotation marks omitted).

In *Curtis*, this court recognized that there are "foreseeable situations where the negligence alleged involves a medical diagnosis, judgment, or treatment but the jury is capable of evaluating the reasonableness of the health care provider's actions using common knowledge and experience." 136 Nev. at 354, 466 P.3d at 1267. On this basis, *Curtis* clarified "that an affidavit may not be required if the alleged negligence does not require expert testimony to evaluate." *Id.* at 354-55, 466 P.3d at 1267. Accordingly, the court determined that the appellant estate's allegation that a nurse mistakenly administered the decedent morphine sounded in ordinary negligence because, although involving medical treatment, it "[did] not raise any questions of medical judgment beyond the realm of common knowledge or experience." *Id.* at 357, 466 P.3d at 1269. By contrast, the court concluded that appellant's claim for failure

to monitor the decedent after administering the morphine sounded in professional negligence, because it involved decisions requiring some degree of professional judgment or skill. *Id.* at 358, 466 P.3d at 1269-70.

Here, quoting and applying *Curtis* and *Szymborski*, the district court concluded that the "gravamen" of Conlin's complaint was that Southwest "failed to monitor" her. Because *Curtis* involved a failure-to-monitor claim which the court determined sounded in professional negligence, the district court inferred that Conlin's claim also sounded in professional negligence. And because Conlin failed to provide an expert affidavit, the court awarded summary judgment to Southwest.

We disagree with the district court. First, the district court misinterpreted *Curtis* to hold that *any* failure-to-monitor claim sounds in professional negligence. Rather, the *Curtis* court specifically held *that defendant's* alleged failure to monitor Curtis following *her* morphine injection sounded in professional negligence. 136 Nev. at 358, 466 P.3d at 1269-70. Here, the facts are vastly different from *Curtis*. Conlin was administered a routine medical test, rather than a potentially lethal drug injection. This test concluded by the time Conlin attempted to descend the table. Southwest has presented no compelling evidence that its subsequent failure to assist Conlin in getting down from the table required the degree of professional judgment or skill described in *Curtis*.[1] Thus, even if Conlin alleged a failure-to-monitor claim, the district court erred in concluding that this finding alone indicated professional negligence under *Curtis*.

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[1]Curtis's allegations required the factfinder to evaluate the defendant's decisions to contact a physician to prescribe Narcan to counteract Curtis's morphine dose, to refrain from transferring Curtis to the hospital, and to place Curtis on a monitoring order but not check her vitals overnight. *See Curtis*, 136 Nev. at 358, 466 P.3d at 1269-70.

Second, we are not persuaded by Southwest's argument that the "gravamen" of Conlin's claim involves medical judgment, diagnosis, or treatment. Southwest cites two cases in which courts found medical providers' failure to help hospital patients descend from tables or beds to sound in professional negligence—*Turner v. Renown Regional Medical Center*, Nos. 77312 & 77841, 2020 WL 1972790 (Nev. Apr. 23, 2020) (Order of Affirmance), and *Bardo v. Liss*, 614 S.E.2d 101 (Ga. Ct. App. 2005). But those cases involved patients requiring assistance *based on specific medical conditions*—a designated high-fall-risk patient in *Turner*, 2020 WL 1972790, at *1-2, and a patient in late-term pregnancy with a history of epilepsy in *Bardo*, 614 S.E.2d at 104. Southwest claims that, similar to those cases, assessment of whether Conlin "required assistance based on her specific needs and medical conditions involved medical judgment, diagnosis, or treatment." But Southwest has not described any specific need or medical condition of Conlin's that would demand judgment or skill beyond common knowledge. Southwest's vague allusion to Conlin's "specific needs as a result of her age and health condition" fall short. We are not persuaded that merely helping an octogenarian patient move around a hospital requires judgment and skill beyond common knowledge.

Finally, the simple fact that Conlin's "claim arises out of a provider-patient relationship and is substantially related to medical treatment" does not necessarily signify professional negligence. Southwest's argument to this point neglects the fundamental tenet of *Curtis*—that a claim may arise out of a provider-patient relationship, and involve medical diagnosis, judgment, or treatment, but a jury may still be capable of evaluating the provider's actions based on their own common

knowledge.[2] *Curtis*, 136 Nev. at 354-56, 466 P.3d at 1267-68. We agree with Conlin that a lay person would be entirely capable of evaluating whether Southwest's employee was negligent in telling Conlin that she could get off the table and get dressed without lowering the table or offering the elderly patient assistance. Thus, even though Conlin's claim arises out of a patient-provider relationship, and even assuming that Conlin's claim raises questions of medical judgment—which we do not believe it does, we find that the common-knowledge exception as explained in *Curtis* applies and that the claim sounds in ordinary negligence.

We agree with Conlin that the district court erred in finding that her claim sounded in professional negligence and required an affidavit in compliance with NRS 41A.071. To the extent that the essence of Conlin's claim pertains to medical judgment, diagnosis, or treatment, a jury would still be able to evaluate Southwest's alleged negligence based on common knowledge and experience. Accordingly, we

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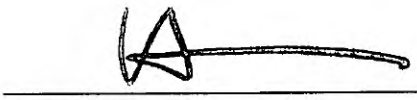
[2]In *Curtis*, this court held that

> "a court must ask *two fundamental questions* in determining whether a claim sounds in ordinary negligence or [professional negligence]: (1) whether the claim *pertains to an action that occurred within the course of a professional relationship*; *and* (2) whether the claim *raises questions of medical judgment beyond the realm of common knowledge and experience.* If *both* these questions *are answered in the affirmative*, the action is subject to the procedural and substantive requirements that govern [professional negligence] actions."

136 Nev. at 356, 466 P.3d at 1268 (alterations in original) (emphases added) (quoting *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 684 N.W.2d 864, 871 (Mich. 2004)).

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



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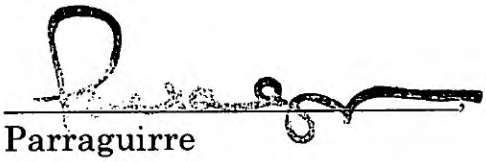

_____, J.
Parraguirre

cc: Hon. Jessica K. Peterson, District Judge
John Walter Boyer, Settlement Judge
Angulo Law Group, LLC
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk