

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MHD ADNAN HOMSI, AN
INDIVIDUAL,
Appellant,
vs.

THE HEIGHTS OF SUMMERLIN, LLC,
A FOREIGN LIMITED LIABILITY
COMPANY; AND BQ OPERATIONS
HOLDINGS, LLC, A FOREIGN
LIMITED LIABILITY COMPANY,
Respondents.

No. 85162-COA

FILED

JUN 28 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Mhd Adnan Homsı appeals from a district court order dismissing a tort action pursuant to NRCP 12(b)(5) for failure to file a medical expert affidavit of merit as required by NRS 41A.071. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Homsı sued respondents The Heights of Summerlin, LLC and BQ Operations Holdings, LLC (collectively referred to as the Heights), for ordinary negligence and other related claims.¹ He did not allege any claims for professional negligence, nor did he attach a medical expert affidavit as required by NRS 41A.071. In his complaint, Homsı generally alleged that within hours of being admitted to the Heights' facility, he was left alone with no fall precautions in place and subsequently fell. Homsı additionally alleged that the Heights "knew or should have known that [he] was a fall risk," that the Heights "failed to provide adequate fall protection to [] Homsı" and that its "failure to provide adequate fall protection fell below

¹We do not recount the facts except as necessary to our disposition.

the reasonable and accepted standard of care in the Clark County, Nevada community.”

The district court granted the Heights’ motion to dismiss Homsí’s complaint with prejudice², finding that his claims sounded in professional negligence, as opposed to ordinary negligence, and that because Homsí failed to support his claims with a medical expert affidavit as required by NRS 41A.071, dismissal under NRCP 12(b)(5) was appropriate.³ The district court also denied Homsí’s request for leave to amend his complaint to make further allegations to support his claim for ordinary negligence. This appeal followed.

On appeal, Homsí contends the district court erred in dismissing his complaint because his claims sounded in ordinary negligence and not professional negligence because he satisfied the common knowledge exception to the requirements of NRS 41A.071. Specifically, Homsí argues that the Heights knew or should have known that fall precautions were required for a patient admitted to its facility. And a jury based on its common knowledge and experience could find the Heights’ failure to enact any fall precautions whatsoever would render it liable under an ordinary negligence theory without the need of a medical expert opinion. Additionally, Homsí argues that the district court erred in denying his

²We recognize, however, that the district court did not have the benefit of the opinion in *Yafchak v. S. Las Vegas Med. Invs., LLC*, 138 Nev., Adv. Op. 70, 519 P.3d 37 (2022) prior to granting the Heights’ motion to dismiss.

³We agree with the district court that if Homsí’s claims were solely based on allegations of professional negligence, they should have been dismissed for failure to comply with NRS 41A.071, as well as the failure to file those claims within the applicable statute of limitations.

request for leave to amend his complaint to make further allegations to support his ordinary negligence claim.

Standard of review

This court reviews a district court order dismissing a complaint pursuant to NRCP 12(b)(5) de novo. *Porchia v. City of Las Vegas*, 138 Nev., Adv. Op. 4, 504 P.3d 515, 518 (2022). Similarly, this court reviews 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. Invs., LLC*, 138 Nev., Adv. Op. 70, 519 P.3d 37, 40 (2022). This court will only affirm a district court's order to dismiss "if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [him] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Further, "when a defendant moves to dismiss a plaintiff's complaint for failure to comply with NRS 41A.071, the burden is on the defendant to demonstrate the plaintiff's allegations arise under NRS Chapter 41A." *Yafchak*, 138 Nev., Adv. 70, 519 P.3d at 40. When reviewing a motion to dismiss, "this court will recognize all factual allegations in [the plaintiff's] complaint as true and draw all inferences in [his] favor." *Buzz Stew, LLC*, 124 Nev. at 228, 181 P.3d at 672.

The district court erred in dismissing Homsi's complaint pursuant to NRCP 12(b)(5)

"The distinction between professional and ordinary negligence can be subtle, and [a 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) (quoting *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642-43, 403 P.3d 1280, 1285 (2017)). "Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a

claim is for [professional negligence].” *Szymborski*, 133 Nev. at 642, 403 P.3d at 1284. “[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. This is referred to as a common knowledge exception to the medical affidavit requirement.

To apply the common knowledge exception,

[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.

Estate of Curtis, 136 Nev. at 356, 466 P.3d at 1268 (second alteration in original) (quoting *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 684 N.W.2d 864, 871 (Mich. 2004)). “If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern [professional negligence] actions.” *Id.* (alteration in original) (quoting *Bryant*, 684 N.W.2d at 871). However, we note that the common knowledge exception “is extremely narrow and only applies in rare situations.” *Id.* Following the *Estate of Curtis* decision, the supreme court and this court have determined in various unpublished dispositions whether certain allegations sounded in ordinary negligence or professional negligence. *See most notably Conlin v. Southwest Med. Assocs., Inc.*, No. 84205, 2023 WL 3142540 (Nev. April 27, 2023) (Order of Reversal and

Remand) (determining that a woman that fell off a raised examination table at the conclusion of her medical appointment was an allegation that sounded in ordinary negligence because the court was “not persuaded that merely helping an octogenarian patient move around a hospital requires judgment and skill beyond common knowledge”).

In this case, Homsí filed a complaint against the Heights and alleged a cause of action for ordinary negligence and other derivative claims. Homsí made various allegations, including that the Heights’ failure to implement any fall precautions, even though the Heights *knew* that Homsí was at risk for falling based on his compromised condition upon transfer, sounded in ordinary negligence under the common knowledge exception.

Because this court accepts Homsí’s factual allegations as true and draws all inferences in his favor, Homsí’s allegations support that the Heights’ employees knew Homsí was a compromised patient upon transfer from the hospital, and therefore a fall risk, and did not implement any fall precautions. *See Buzz Stew, LLC*, 124 Nev. at 228, 181 P.3d at 672. Thus, Homsí maintains that a layperson could use their common knowledge and experience to evaluate whether the Heights was negligent in failing to implement any fall precautions without the presentation of medical expert testimony. *See Szymborski*, 133 Nev. at 642, 403 P.3d at 1284-85. Thus, because there are some facts that could state a claim for relief under a theory of ordinary negligence—the Heights allegedly knew he was a fall risk and did not provide any fall precautions—we reverse the district court’s order.⁴


⁴In light of our disposition, we necessarily reverse the district court’s order denying Homsí’s request to amend his complaint.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁵


_____, C.J.
Gibbons


_____, J.
Westbrook


_____, Sr.J.
Silver

cc: Hon. Jessica K. Peterson, District Judge
Paul M. Haire, Settlement Judge
Clear Counsel Law Group
Messner Reeves LLP
Eighth District Court Clerk

⁵Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.