

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE ESTATE OF GLENN M.
WINCHESTER,
Appellant,

vs.

VALLEY HEALTH SYSTEM, LLC,
D/B/A VALLEY HOSPITAL MEDICAL
CENTER,

Respondent.

REBEKAH ARCHULETA, AS LAWFUL
HEIR OF GLENN M. WINCHESTER,
DECEASED,

Appellant,

vs.

VALLEY HEALTH SYSTEM, LLC,
D/B/A VALLEY HOSPITAL MEDICAL
CENTER,

Respondent.

No. 41418

FILED

DEC 28 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

No. 41419

ORDER OF AFFIRMANCE

These are consolidated appeals from district court orders dismissing medical malpractice actions. Eighth Judicial District Court, Clark County; Ronald D. Parraguirre, Judge.

Vera Winchester passed away in August 2000, leaving an equal share of her sizeable estate to her three brothers, Glenn, Albert, and Grant. To inherit their share of Vera's estate, the brothers had to survive Vera by thirty days. The day after Vera passed away, Glenn was admitted to respondent Valley Hospital Medical Center with pancreatitis. Twenty-two days after Vera's death, Albert and Grant authorized Valley Hospital to terminate Glenn's life support. Under NRS 449.626, family members, in order of priority, may authorize withdrawal of life support, and adult children have priority over the patient's siblings. Although Glenn had six adult children, Valley Hospital never contacted the children to obtain their

consent to terminate life support and, instead, allowed Albert and Grant to make the decision. Glenn passed away the day after life support was removed, twenty-three days after Vera's death.

In December 2001, Glenn's adult daughter, Rebekah Archuleta, filed an action, on behalf of Glenn's estate, against Valley Hospital. In January 2002, the district court dismissed the complaint against Valley Hospital, determining that the action against Valley Hospital was for medical negligence and had to first be submitted to the Medical-Legal Screening Panel. Rebekah then filed the Estate's complaint with the Panel and also filed an action on her own behalf as Glenn's lawful heir.

In October 2002, under the newly-adopted medical malpractice fast-track statutes, Rebekah opted out of the Panel in both actions and filed a complaint in district court on her behalf and amended the Estate's complaint to allege an action against Valley Hospital. However, Rebekah failed to include a supporting expert affidavit with the complaints, as required under NRS 41A.071. Valley Hospital moved to dismiss Rebekah's and the Estate's complaints for failure to comply with NRS 41A.071, and Rebekah counter-moved to amend the complaints to include the required affidavit. The district court denied Rebekah's and the Estate's motions for leave to amend, and dismissed the complaints.

Rebekah and the Estate appeal, arguing that NRS 41A.071 does not apply because the cases are not medical malpractice actions, and that Rebekah and the Estate should have been granted leave to amend to comply with NRS 41A.071. We conclude that Rebekah's and the Estate's arguments are without merit and that the district court did not err by denying the motions for leave to amend and dismissing the complaints.

NRS 41A.071's applicability

Rebekah and the Estate argue that their cases were not subject to NRS 41A.071 because they were not medical malpractice actions, and their decision to file with the Panel was based on the district court's erroneous determination in January 2002 that the Estate's action was for medical malpractice and subject to the Panel's screening. We conclude that the Estate is judicially estopped from raising this issue, and that, since Rebekah never raised this issue below, she has not preserved the issue for appeal.

Judicial estoppel is designed to protect the judiciary's integrity.¹ A party is judicially estopped when it intentionally takes an inconsistent position in "an attempt to obtain an unfair advantage."²

Although not all of these elements are always necessary, the doctrine generally applies when "when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was unsuccessful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."³

The Estate originally argued, although unsuccessfully, that its action was not a medical malpractice action. However, in January 2002,

¹Mainor v. Nault, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004).

²Id.

³Id. (quoting Furia v. Helm, 4 Cal. Rptr. 3d 357, 368 (Ct. App. 2003)).

after the district court dismissed the Estate's complaint as subject to the Panel, the Estate did not challenge that order. Instead, the Estate proceeded to the Panel, treating its case as if it were a medical malpractice case. The Estate then used the newly-adopted 2002 medical malpractice statutes to opt out of the Panel and bring its action in district court. And, in opposing Valley Hospital's motion to dismiss for failure to comply with NRS 41A.071, the Estate argued that its case should not be dismissed because its complaint properly alleged medical malpractice. The Estate argued,

Plaintiff's Complaint does allege the necessary elements to assert an action against the Defendants for medical negligence. Although an Affidavit was not attached to the Complaint when it was filed with the court, this does not mean it is without merit. In fact, there is an Affidavit from an expert that states, within a reasonable degree of medical probability, that the Defendants' negligent actions fell below the standard of care and were the cause of Mr. Winchester's death.

Thus, in the district court, the Estate treated its action as a medical malpractice action. However, on appeal, the Estate contends that it is not subject to NRS 41A.071 because its case is not a medical malpractice case. This argument is inconsistent from the position the Estate took below and is advanced in an attempt to obtain the unfair advantage of avoiding the consequences of the Estate's failure to comply with NRS 41A.071. Accordingly, after balancing the judicial estoppel factors, we conclude that the Estate is judicially estopped from arguing on appeal that its case is not a medical malpractice action.

Regarding Rebekah, she never filed her complaint in the district court and, instead, filed directly in the Panel. Although she asserts that this decision was based on the district court's determination

in the Estate's case, Rebekah was not a party to that action and that determination did not apply to her. She did not otherwise raise this issue below, and we conclude that she has not preserved the issue for appeal. Therefore, we conclude that the Estate's and Rebekah's actions were subject to NRS 41A.071.

Leave to amend

We review an order granting a motion to dismiss for an abuse of discretion.⁴ However, the district court's decisions here involve statutory construction, which is an issue of law that we review de novo.⁵ Under NRS 41A.071, a medical malpractice complaint filed in the district court shall be dismissed without prejudice unless it is filed with a supporting medical expert affidavit. We recently held that, under this statute, a medical malpractice complaint filed without the required medical expert affidavit is void and amendment cannot be used to cure the NRS 41A.071 defect.⁶ Therefore, we conclude that the district court correctly denied Rebekah's and the Estate's motions to amend and granted Valley Hospital's motion to dismiss.⁷ Accordingly, we

⁴Abreu v. Gilmer, 115 Nev. 308, 312-13, 985 P.2d 746, 749 (1999).

⁵Beazer Homes Nevada, Inc. v. Dist. Ct., 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004).

⁶Washoe Medical Ctr. v. Dist. Ct. (Barker), 122 Nev. ___, ___, ___ P.3d ___, ___ (Nev. Adv. Op. 110 2006); see also Borger v. Dist. Ct., 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004) (concluding in dictum that leave to amend may not be granted to cure the lack of an expert affidavit).

⁷We have considered Rebekah's and the Estate's other arguments and conclude that they are without merit.

ORDER the judgment of the district court AFFIRMED.⁸

Rose, C.J.
Rose

Becker, J.
Becker

Maupin, J.
Maupin

Gibbons, J.
Gibbons

Douglas, J.
Douglas

Hardesty, J.
Hardesty

cc: Eighth Judicial District Court Dept. 3, District Judge
Cotkin, Collins, & Ginsburg
Howard Meier & Fine
Tina M. Walls
Clark County Clerk

⁸The Honorable Ron Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.