

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICTORIA D. GOMEZ,  
Appellant/Cross-Respondent,

vs.

STACIE L. RIVERS, M.D.,  
INDIVIDUALLY AND AS A PHYSICIAN  
LICENSED IN THE STATE OF  
NEVADA; AND STACIE L. RIVERS,  
M.D., LTD., A NEVADA  
CORPORATION,  
Respondents/Cross-Appellants.

No. 46923

**FILED**

JAN 15 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal and cross-appeal from a district court amended judgment on a jury verdict in a medical malpractice action. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

For purposes of simplicity, we address the arguments raised in respondent/cross-appellant Stacie Rivers cross-appeal before addressing the punitive damages issue raised by appellant/cross-respondent Victoria Gomez. The parties are familiar with the facts and we do not recount them except as necessary to our disposition.

Rivers arguments on cross-appeal

Rivers raises three arguments in her cross-appeal. First, she contends that the district court abused its discretion in admitting the deposition testimony of several medical experts. Second, Rivers asserts that the district court abused its discretion in instructing the jury on presumed negligence pursuant to NRS 41A.100, Nevada's medical res ipsa loquitur statute. Third, Rivers argues that Gomez presented insufficient evidence to support the jury's award of future damages. We agree with Rivers that certain deposition testimony should have been excluded and

that the evidence does not support the jury's award of future damages. On the other hand, we disagree that the district court improperly instructed the jury under NRS 41A.100.

Deposition testimony

Dr. Rivers contends that the district court abused its discretion by admitting the expert deposition testimony of three physician witnesses. Specifically, Rivers argues that none of the witnesses stated their testimony to a reasonable degree of medical probability as required by this court's recent decision in Moriscato v. Sav-On Drug Stores, Inc.<sup>1</sup> Although Dr. Rivers argument is valid with respect to two of the witnesses in question, we conclude that reversal is unnecessary because there is sufficient evidence to support the verdict even in the absence of the challenged testimony.<sup>2</sup>

We review “[a] district court’s decision to admit expert testimony . . . for an abuse of discretion.”<sup>3</sup> In Moriscato, we made clear that “medical expert testimony regarding standard of care and causation must be stated to a reasonable degree of medical probability.”<sup>4</sup> Thus, where a medical expert characterizes his or her opinion on causation as “more likely than not” true, but never renders that opinion to a reasonable

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<sup>1</sup>121 Nev. 153, 111 P.3d 1112 (2005).

<sup>2</sup>See Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989) (“We will not overturn the jury's verdict if it is supported by substantial evidence, unless, from all the evidence presented, the verdict was clearly wrong.”).

<sup>3</sup>Moriscato, 121 Nev. at 157, 111 P.3d at 1115.

<sup>4</sup>Id. at 158, 111 P.3d at 1116.

degree of medical probability, the district court abuses its discretion in failing to strike the testimony.<sup>5</sup>

In this case, Rivers contends that the deposition testimony of Drs. James Tappan, David Anaise, and David Schenkar, which Gomez's counsel read into evidence at trial, does not satisfy the Moriscato standard. Having reviewed the record, we agree that Drs. Tappan and Anaise failed to state any of their opinions at trial to a reasonable degree of medical probability. Thus, the district court abused its discretion in allowing Gomez to read their testimony into the record. The same is not true, however, with respect to Dr. Schenkar. Unlike Drs. Tappan and Anaise, Dr. Schenkar testified "to a reasonable degree of medical certainty" that Dr. Rivers (1) had a "lack of dexterity," (2) suffered from "physical limitations," and (3) had a "lack of performance" at the time of the hysterectomy. He then testified that Rivers physical limitations had an affect on the outcome of surgery. Although this last statement was not couched in terms of "medical probability," we conclude that Dr. Schenkar's other testimony satisfies the Moriscato requirement.

Because Dr. Schenkar's testimony was admissible, we conclude that it is unnecessary to reverse the jury's verdict in this case. Instead, we conclude that Dr. Schenkar's testimony, when combined with the testimony of Dr. Barbara Levy, was sufficient to support the jury's verdict.<sup>6</sup>

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<sup>5</sup>Id. at 159 (noting that such testimony fails "to meet the admissibility standard" and is "speculative").

<sup>6</sup>Bally's Employees' Credit Union, 105 Nev. at 555-56, 779 P.2d at 957.

### Instruction on presumed negligence

Rivers contends that the district court abused its discretion in providing a jury instruction based on NRS 41A.100(1)(d), which establishes a rebuttable presumption of negligence when a medical patient suffers an injury to a part of the body not directly involved in the course of treatment. Gomez counters that the instruction was proper because Gomez's injured ureter was not directly involved in her hysterectomy.

"[A] party is entitled to jury instructions on every theory of her case that is supported by the evidence."<sup>7</sup> Accordingly, this court reviews "a district court's decision to give a particular instruction for an abuse of discretion or judicial error."<sup>8</sup> In the past, we have recognized that "all a plaintiff need do to warrant an instruction under the statutory medical malpractice res ipsa loquitur rule [i.e., NRS 41A.100] is present some evidence of the existence of one or more of the factual predicates enumerated in the statute [such as subsection (1)(d)]."<sup>9</sup> In Born v. Eisenman, we applied this standard and concluded that injury to a ureter during surgery to remove the uterus and ovaries (as occurred in Gomez's case) satisfies the factual predicate necessary for the admission of the res ipsa loquitur instruction, and that, under such circumstances, "the district court [is] obligated to give the instruction."<sup>10</sup> Because this case deals with

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<sup>7</sup>Johnson v. Egtedar, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996).

<sup>8</sup>Banks v. Sunrise Hospital, 120 Nev. 822, 832, 102 P.3d 52, 59 (2004).

<sup>9</sup>Egtedar, 112 Nev. at 434, 915 P.2d at 274.

<sup>10</sup>114 Nev. 854, 859, 962 P.2d 1227, 1231 (1998).

a similar injury and surgery as existed in Born, we conclude that the district court did not abuse its discretion in giving the res ipsa loquitur instruction.<sup>11</sup>

#### Future medical expenses

Dr. Rivers contends that Gomez presented insufficient evidence to support the jury's award of \$50,000 for future medical expenses. This award was apparently based on Gomez's allegations at trial that she would incur certain future medical expenses as a result of complications following her hysterectomy, including additional treatment for depression and kidney problems.

A plaintiff may only recover those future medical expenses that are "reasonably necessary."<sup>12</sup> In this case, Gomez offered evidence on two theories in support of her claim for future medical expenses: a need for (1) future psychological treatment and (2) possible kidney surgery stemming from the injuries she suffered during her hysterectomy. With respect to future psychological treatment, Gomez testified that she had no plans to receive additional psychological or psychiatric treatment. Because Gomez stated that she did not plan to obtain psychological care, we conclude that the evidence does not support an award for future psychological expenses.

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<sup>11</sup>Id. Although Born only analyzed NRS 41A.100(1)(e), the court contemplated both (1)(d) and (1)(e) in reaching its general decision that the "res ipsa loquitur instruction" applied. Id.

<sup>12</sup>Quintero v. McDonald, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000).

Separately, we conclude that substantial evidence does not support the jury's award of \$50,000 for future medical expenses based on Gomez's possible kidney problems. None of the doctors at trial testified that future kidney treatment was probable. Instead, they testified that such kidney problems were a "possibility" or "may or may not be clinically manifest." In our view, this testimony is distinguishable from testimony that treatment is "reasonably necessary."<sup>13</sup> Accordingly, we reverse the district court's judgment on the jury's award of future medical damages.

Gomez's appeal: punitive damages

Gomez argues that the district court erred in refusing to give a jury instruction on her claim for punitive damages. Generally, this court will only reverse the district court's decision to give a particular instruction for an abuse of discretion or judicial error.<sup>14</sup> Therefore, the district court has discretion to determine whether to provide a jury instruction on punitive damages.<sup>15</sup> In fact, this court recently reiterated that "[t]he district court has discretion to determine whether the defendant's conduct merits punitive damages as a matter of law."<sup>16</sup> In this case, however, the punitive damages issue technically arises from the district court's grant of Rivers motion for judgment as a matter of law

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<sup>13</sup>See id.

<sup>14</sup>Banks v. Sunrise Hospital, 120 Nev. 822, 832, 102 P.3d 52, 59 (2004).

<sup>15</sup>See Wickliffe v. Fletcher Jones of Las Vegas, 99 Nev. 353, 356-57, 661 P.2d 1295, 1296-98 (1983) (reversing district court's refusal to give jury instruction on punitive damages).

<sup>16</sup>Bongiovi v. Sullivan, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006).

under NRCPC 50(a). Accordingly, a proper analysis of this issue “is based on the standard for granting a motion for involuntary dismissal under former NRCPC 41(b).”<sup>17</sup> In applying this standard, “the district court must view the evidence and all inferences in favor of the nonmoving party. To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party.”<sup>18</sup> On appeal, “[t]his court applies the same standard . . . [as] is used by the district court.”<sup>19</sup>

Under NRS 42.005, punitive damages are available “where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied.”<sup>20</sup> Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”<sup>21</sup> We conclude that the evidence

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<sup>17</sup>Nelson v. Heer, 123 Nev. \_\_\_, \_\_\_, 163 P.3d 420, 424 (2007).

<sup>18</sup>Id.

<sup>19</sup>Id.

<sup>20</sup>As used in NRS 42.005, fraud means “an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person”; express or implied malice means “conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others”; and oppression means “despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.” NRS 42.001(2)-(4). NRS 42.001(1) defines “conscious disregard” as “the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.”

<sup>21</sup>Black’s Law Dictionary 250 (2d. pocket ed. 2001).

supporting Gomez's punitive damages claim in this case does not rise to this level.

With respect to Gomez's contention that Dr. Rivers knew of and should have disclosed her hand-related medical problems, there is little direct evidence to support the argument that Dr. Rivers was actually suffering from hand weakness on or before the day of Gomez's surgery. In fact, the evidence that Gomez cites in support of her claim that Dr. Rivers acted with malice or oppression in this regard is mostly speculative. Although the evidence created a factual dispute as to whether Rivers had a hand-related medical condition on the day of the hysterectomy, and whether Rivers was negligent in operating on Gomez under the circumstances, we conclude that there was no clear and convincing evidence of fraud, malice, or oppression.

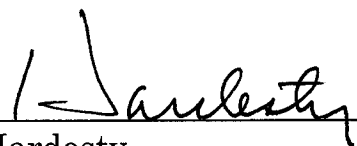
We reach the same conclusion with respect to Dr. Rivers alleged performance of an "unwarranted" hysterectomy and her failure to reveal her plan to close her medical practice. While the record supports a finding of negligence on these points, the evidence does not clearly and convincingly establish fraud, malice, or oppression.

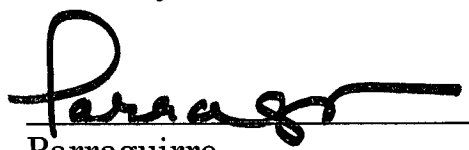
### Conclusion

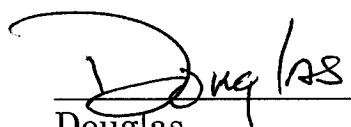
Because the evidence produced at trial does not support the jury's \$50,000 award for future medical expenses, we reverse that portion of the district court's judgment. In all other respects, however, we conclude that the district court did not err. Accordingly, we



ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Sally L. Loehrer, District Judge  
Stephen E. Haberfeld, Settlement Judge  
Burris, Thomas & Springberg  
Alverson Taylor Mortensen & Sanders  
Eighth District Court Clerk