IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHANIE KERNS, INDIVIDUALLY, AS HEIR TO WARNER KERNS AND PERSONAL REPRESENTATIVE OF THE ESTATE OF WARNER SCOTT KERNS, AND ON BEHALF OF KYLE KERNS, A MINOR,
Appellant,
vs.
PATTY HOPPE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WALTER J. HOPPE, D.O., NOT INDIVIDUALLY; DAVID ARMITAGE, P.A.-C., AN INDIVIDUAL; DESERT TRAILS MEDICAL, INC., A NEVADA CORPORATION; WAL-MART STORES, INC., A DELAWARE CORPORATION; ANN WATKINS F/K/A ANN FOLEY, AN INDIVIDUAL; LISA SPINK, AN INDIVIDUAL; AND JUDY STINSON, AN INDIVIDUAL,
Respondents.

No. 55615

FILED

AUG 0 1 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER GRANTING REHEARING IN PART AND DENYING REHEARING IN PART

This case returns to this panel on respondents' petition for partial rehearing. We deny the petition to the extent it seeks to reargue whether appellant presented sufficient evidence that the Medical Defendants' supplying multiple doses of methadone to a suspected addict caused, or could have caused, Walter Scott Kerns's overdose and death. NRAP 40(1)(1) ("[m]atters presented in the briefs and oral arguments may not be reargued in the petition for rehearing"). However, the petition led us to reexamine our discussion of implied assumption of the risk and to conclude that it relied on implied primary assumption of the risk, when it

should have relied on implied secondary assumption of the risk. Thus, we grant rehearing on that issue to clarify our prior order on this point.

Primary implied assumption of risk

Primary implied assumption of the risk does not apply to the situation where a patient is engaged in drug-seeking behavior, receives a prescription for narcotics from a prescriber not acting within his or her standard of care, and later dies from drug overdose. See Spar v. Cha, 907 N.E.2d 974, 982 (Ind. 2009) (recognizing that primary implied assumption of the risk "has little legitimate application in the medical malpractice context" because a patient is entitled to expect that medical services be rendered in accordance with the standard of care); see also Storm v. NSL Rockland Place, LLC, 898 A.2d 874, 884-85 (Del. Super. Ct. 2005) (noting that a primary implied assumption of the risk defense generally does not apply in the healthcare context as it would require a patient to consent to allow a healthcare provider to exercise less than ordinary care in the provision of services); Morrison v. MacNamara, 407 A.2d 555, 568 (D.C. 1979) (noting that "because of the doctor's ability to understand and interpret medical matters, the doctor generally owes a greater duty to his patient than the patient owes to himself"). While we acknowledge that there are risks that arise from seeking and taking prescription medication from multiple physicians, the physician-patient relationship is not one in which the patient can agree that the physician has no duty to the patient. See id.; see also Turner v. Mandalay Sports Entm't, 124 Nev. 213, 220, 180 P.3d 1172, 1177 (2008). Thus, a primary implied assumption of the risk defense is not available in the healthcare setting, since a complete bar to a patient's recovery under this doctrine is inconsistent with Nevada's medical negligence statutes and regulations governing medical professionals and controlled substance prescriptions.

Kerns cites to Argus v. Scheppegrell, 472 So. 2d 573, 574 (La. 1985), for the assertion that "[t]he patient's conduct cannot be, at the same time, both the foreseen risk which imposes the duty on the physician and the defense which totally excuses the physician's breach of that very duty." The Louisiana Supreme Court concluded that "when the rule of law which gave rise to a duty was specifically designed to protect the victim against the risk of his own negligence, recovery should not be absolutely barred for the injury or death which the rule of law was designed to prevent." Id. at 577. While we recognize that there are factual differences in this case and in Argus, we agree with these underlying principles. Drug-seeking behavior by a patient cannot relieve a physician from a duty to act reasonably given a suspected addiction. To decide otherwise would render meaningless a physician's statutory obligations. See NRS 639.23507; see also 21 C.F.R. § 1306.07(a); NAC 453.430; NAC 630.230(1)(k). Thus, primary implied assumption of the risk has no application in this setting and it does not relieve the respondents in this case from liability for any negligence on their part.

Secondary implied assumption of risk

Secondary implied assumption of the risk "is characterized by the voluntary encountering of a known risk created by a defendant's negligence." Mizushima v. Sunset Ranch, 103 Nev. 259, 262, 737 P.2d 1158, 1160 (1987); see also Turner, 124 Nev. at 220 n.22, 180 P.3d at 1177 n.22 (recognizing that secondary implied assumption of the risk "arises where 'the plaintiff knowingly encounters a risk created by the defendant's negligence'" (quoting Davenport v. Cotton Hope Plantation, 508 S.E.2d 565, 571 (S.C. 1998)); Sierra Pacific v. Anderson, 77 Nev. 68, 71, 358 P.2d 892, 894 (1961) ("Assumption of risk, as a defense, is founded on the theory of consent, with two main requirements: (1) voluntary exposure to

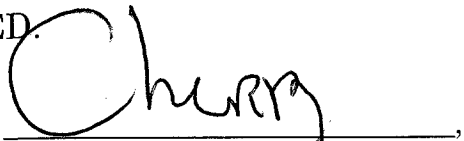
danger, and (2) actual knowledge of the risk assumed" (quotation omitted)). Secondary implied assumption of the risk "is asserted only after the plaintiff establishes a prima facie case of negligence against the defendant," and may involve reasonable or unreasonable conduct by the plaintiff. Davenport, 508 S.E.2d at 571. With secondary implied assumption of the risk, the defendant still has a duty to the plaintiff, but the plaintiff's negligent conduct may outweigh the defendant's. Secondary implied assumption of the risk does not bar recovery by the plaintiff, unless the plaintiff's degree of fault is greater than the negligence of the defendant. See Mizushima, 103 Nev. at 265-66, 737 P.2d at 1161-62 (holding that it is for a jury to conclude whether plaintiff's conduct was more culpable than that of defendant in contributing to her injuries). The plaintiff's actual knowledge of the risks assumed is required. Sierra Pacific, 77 Nev. at 71-72, 358 P.2d at 894. "Knowledge or lack of it on the part of the person against whom the [assumption of risk] defense is raised is a factual matter for the jury to pass upon." Id. at 73, 358 P.2d at 895.

In Turner, this court overruled Mizushima "to the extent that it held that the primary implied assumption of risk doctrine was abolished by our comparative negligence statute." Turner, 124 Nev. at 221, 180 P.3d at 1177. This court in Turner, however, noted that although "primary implied assumption of risk remains a discrete and complete defense quite apart from comparative negligence," secondary implied assumption of the risk is a "question of comparative negligence." Id. at 221 n.27, 1177 n.27 (quotations omitted). The jury is responsible for the comparative negligence analysis as a question of fact. Id. at 221 n.30, 1177 n.30; see NRS 41.141 (explaining that in cases of comparative negligence, the judge

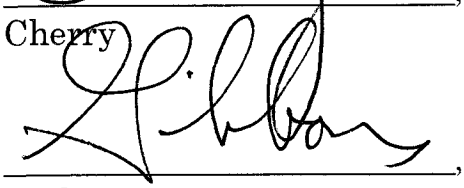
shall instruct the jury on the plaintiff's ability to recover based on comparative fault).

Secondary implied assumption of the risk, or comparative fault analysis, appropriately applies here with regard to whether, by allegedly engaging in drug-seeking behavior, the decedent voluntarily encountered any negligence established on respondents' part in prescribing narcotics to the decedent. The analysis for secondary implied assumption of the risk, being akin to comparative negligence, requires a factual determination that must be decided by a jury. Sierra Pacific, 77 Nev. at 73, 358 P.2d at 894-95; see also Mizushima, 103 Nev. at 265-66, 737 P.2d at 1162. Thus, on remand, the decedent's actual knowledge of the risks must be established, and in any future jury trial, the jury must determine whether he was negligent in violating Nevada law regarding prescription narcotics and his controlled substances contract and, if so, whether his negligence outweighs any negligence of respondents. Accordingly, while the decedent knowingly acquired numerous medications in the weeks prior to his death, issues of material fact remain as to whether he was fully apprised of the risks of injury or death by respondents. Thus, we conclude that the district court erred in granting summary judgment on this issue.

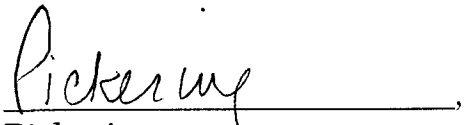
It is so ORDERED.



_____, C.J.
Cherry



_____, J.
Gibbons



_____, J.
Pickering

cc: Hon. Robert W. Lane, District Judge
Jesse M. Sbaih & Associates, Ltd.
Phillips, Spallas & Angstadt, LLC
Cotton, Driggs, Walch, Holley, Woloson & Thompson/Las Vegas
Nye County Clerk