IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHLEY MARTY, BY AND THROUGH HER GUARDIAN AD LITEM, KIM JAMES MARTY; AND ESTATE OF CHRISTAL ANN WILLIAMS,
Appellants,
vs.
KERRY MALIN, P.A.; GEORGES TANNOURY, M.D.; AND GEORGES TANNOURY, MD, PC D/B/A SPECIALTY MEDICAL CENTER,
Respondents.

No. 57133

FILED

JUL 31 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a medical negligence action. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Summary judgment is appropriate when there is no genuine issue of material fact, and thus, the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). To avoid summary judgment once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth by affidavit or otherwise specific facts demonstrating the existence of a genuine issue of material fact for trial. NRCP 56(e); Wood, 121 Nev. at 731, 121 P.3d at 1030-31. When reviewing a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Wood, 121 Nev. at 729, 121 P.3d at 1029. This court reviews an order granting summary judgment de novo. Id.

Having considered the parties' arguments and reviewed the record on appeal, we conclude that the district court erred in granting summary judgment in favor of respondents. The assumption of risk doctrine was applied incorrectly in this instance. Primary implied assumption of risk "arises when 'the plaintiff impliedly assumes those risks that are inherent in a particular activity.'" Turner v. Mandalay Sports Entm't, 124 Nev. 213, 220, 180 P.3d 1172, 1177 (2008) (quoting Davenport v. Cotton Hope Plantation, 508 S.E.2d 565, 570 (S.C. 1998)). It has also been described as "resulting from a relationship that a plaintiff voluntarily accepts involving a lack of duty in the defendant and known risks which the plaintiff impliedly assumes." Mizushima v. Sunset Ranch, 103 Nev. 259, 262, 737 P.2d 1158, 1160 (1987), overruled in part by Turner, 124 Nev. at 221, 180 P.3d at 1177. This situation has been most recognized where the plaintiff is a spectator or a participant in sporting events. See Turner, 124 Nev. 213, 180 P.3d 1172 (spectator at a baseball game); Fortier v. Los Rios Community College, 52 Cal. Rptr. 2d 812 (Ct. App. 1996) (student injured in football class); Swagger v. City of Crystal, 379 N.W.2d 183 (Minn. Ct. App. 1985) (spectator at a softball game).

In the matter before us, primary implied assumption of risk does not apply. A physician has a duty to render reasonable care that is expressly set forth in Nevada law. See NRS 41A.009; Fernandez v. Admirand, 108 Nev. 963, 968-69, 843 P.2d 354, 358 (1992). While there are risks that arise from engaging in drug-seeking behavior, the physician–patient relationship is not one where because of inherent risks, the patient has agreed that the physician no longer owes her a duty of care. Turner, 124 Nev. at 220, 180 P.3d at 1177; 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"). It was therefore error to enter summary judgment in this matter on the basis of primary implied assumption of risk.

That leaves for consideration secondary implied assumption of the risk. Secondary implied assumption of the risk "is characterized by the voluntary encountering of a known risk created by a defendant's negligence." Mizushima, 103 Nev. at 262, 737 P.2d at 1160; 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, 508 S.E.2d at 571); 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" (internal 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.

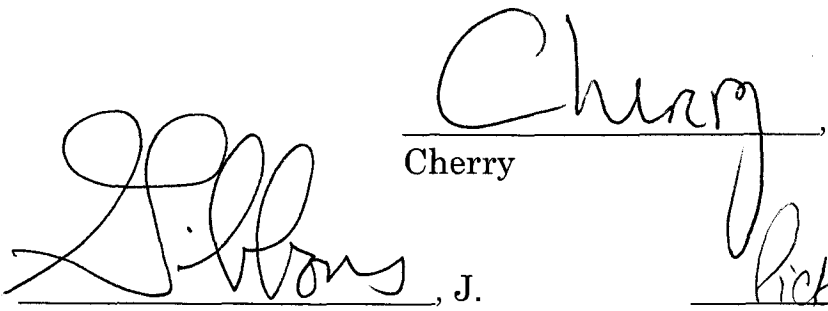
In Turner, this court overruled Mizushima "to the extent that it held that the primary implied assumption of risk doctrine was abolished by our comparative negligence statute." Turner, 124 Nev. at 221, 180 P.3d at 1177. This court in Turner, however, noted that although "primary implied assumption of 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.

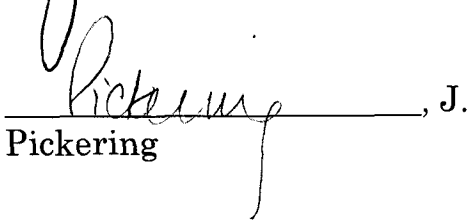
For these reasons, we

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



_____, C.J.
Cherry

_____, J.
Gibbons



_____, J.
Pickering

cc: Hon. Robert W. Lane, District Judge
James J. Jimmerson, Settlement Judge
Stovall & Associates
John H. Cotton & Associates, Ltd.
Nye County Clerk