IN THE SUPREME COURT OF THE STATE OF NEVADA

MARGARET L. SCHMUTZ; JIMMY SCHMUTZ; GARY SCHMUTZ; SHERRI L. MCCOIG; VALERIE WATKINS; AND THE ESTATE OF CLARK P. SCHMUTZ,
Appellants,
vs.
MICHAEL S. BRADFORD, M.D.; ROSS SEIBEL, M.D.; AND SOUTHWEST MEDICAL ASSOCIATES, INC.,
Respondents.

No. 58612

FILED

DEC 19 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court summary judgment in a medical malpractice action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

This case arises out of the failure to act on information that showed possible metastatic disease in decedent Clark P. Schmutz's spine. Schmutz was referred to respondent Michael Bradford, M.D., an orthopedic surgeon, for an orthopedic consultation after X-rays revealed multilevel degenerative disease of the spine and an aged fracture of the pelvis. Dr. Bradford diagnosed Schmutz with a pelvic fracture and spinal stenosis and ordered an MRI. The radiologist's report on the MRI indicated possible metastatic disease and recommended a follow-up bone scan for further evaluation. Dr. Bradford did not inform Schmutz of the possible metastatic disease, but instead treated Schmutz with pain medication and referred him to respondent Ross Siebel, M.D., an anesthesiologist, for pain management injections. Schmutz was treated for back pain for four months. During this time, Schmutz lost 40 pounds and was in severe pain. Schmutz died just six days after a subsequent

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doctor read the MRI report, saw the potential metastatic disease, and sent Schmutz to an oncologist who diagnosed him with bone cancer.

Appellants filed a medical malpractice suit against respondents Dr. Bradford, Dr. Siebel, and Southwest Medical Associates, Inc. (SMA). They alleged claims for wrongful death, negligent infliction of emotional distress, loss of consortium, and gross negligence. Attached to the complaint, appellants provided affidavits from Joseph Knotz, M.D., a family practice physician, and Robert Fink, M.D., a neurological spine surgery specialist. Dr. Knotz opined that, to a reasonable degree of medical probability, Dr. Bradford and Dr. Seibel breached the standard of care in failing to note the possibility of metastatic disease. Dr. Knotz further opined that Dr. Bradford and Dr. Seibel's negligence delayed diagnosis of Schmutz's cancer, a delay that was directly responsible for Schmutz's increased morbidity and suffering and probably contributed to his death. Dr. Fink stated that his opinion, to a reasonable degree of medical probability, was that Dr. Bradford and Dr. Seibel breached the standard of care by failing to review the MRI and failing to notify Schmutz of the possible metastatic cancer. He opined that the delay in diagnosis caused by respondents resulted in Schmutz's unnecessary pain and suffering.

Appellants later filed an amended complaint to correct deficiencies in their initial expert affidavits. Appellants attached an additional affidavit from Jason Brajer, M.D. to their amended complaint. Dr. Brajer, a certified anesthesiologist working in pain management, stated that his opinion, to a reasonable degree of medical probability, was that Dr. Bradford and Dr. Seibel breached the standard of care when they failed to note the radiologist's comment concerning the possibility of metastatic disease, proximately causing Schmutz's death. It was his opinion that their failure to note the possibility of metastatic disease

caused a delay in diagnosis that was responsible for Schmutz's increased morbidity and suffering and contributed to Schmutz's death.

Respondents then moved for summary judgment based on a lack of causation, because all three of appellants' medical experts stated that they would defer to an oncologist regarding Schmutz's possible outcome if his cancer had been treated without delay. The district court granted summary judgment in favor of respondents, explaining that appellants failed to provide evidence of proximate causation on the wrongful death claim. The court further indicated that the loss of consortium claims failed as they were not supported by a wrongful death claim and were speculative.

On appeal, appellants assert that the district court erred in (1) holding that the medical negligence claim failed, (2) granting summary judgment because appellants presented genuine issues of material fact as to causation on the wrongful death claim, and (3) determining that Schmutz's family lacked standing to bring loss of consortium claims.[1] We conclude that while the district court properly granted summary judgment on the wrongful death claim, it erred in dismissing the medical negligence claim and the derivative loss of consortium claims.

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[1]Appellants also assert that the res ipsa loquitur statute, NRS 41A.100, should have precluded summary judgment on all claims as causation should have been presumed. While appellants raised the statute below, they failed to argue the res ipsa loquitur exception. Because appellants' res ipsa loquitur argument is a new theory, this argument is not properly before this court on appeal. *Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) ("Parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." (internal quotations omitted)).

Standard of review

We review a district court's order granting summary judgment de novo, without deference to the findings of the lower court. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. ___, ___, 262 P.3d 705, 714 (2011). Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). "[W]hen 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 v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Pleading wrongful death and medical negligence in the alternative

Appellants contend that the district court should not have extinguished the medical negligence claim along with the wrongful death claim. They assert that they pleaded the wrongful death and medical negligence claims in the alternative to avoid being forced to make an untenable election of remedies prior to trial. In response, Dr. Siebel and SMA argue that in Nevada, the wrongful death cause of action subsumes all others, and accordingly, the district court properly granted summary judgment with respect to those claims. They assert that allowing appellants to pursue both claims would result in double recovery and statutory contradictions.

This issue turns on whether NRS 41.085 and NRS 41.100 are mutually exclusive. Nevada's wrongful death statute, NRS 41.085, allows a decedent's heirs and personal representatives to maintain an action for damages if the decedent's death is caused by the wrongful act or neglect of another. The survival of action statute, NRS 41.100, provides that "no cause of action is lost by reason of the death of any person, but may be

maintained by or against the person's executor or administrator." NRS 41.100(1). We conclude that, by their plain language, NRS 41.085 and NRS 41.100 are not mutually exclusive, and claims under Nevada's survival of action statute are separate and distinct from wrongful death claims. Appellants therefore should have been permitted to plead both claims in the alternative. *See Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes." (internal quotations omitted)).[2]

The negligence claim

Appellants further contend that they set forth a cognizable prima facie case for medical negligence based on the failure of respondents to act on the possible metastatic disease that the MRI revealed, causing a delay in treatment and unnecessary pain and suffering, surgical treatments, and medical bills. Appellants argue that in addition to the lack of opportunity for palliative care, Schmutz was also denied advance notice to put his affairs in order. Respondents argue that the medical negligence claim fails because appellants failed to demonstrate causation.

We conclude that appellants met the threshold to overcome summary judgment on their negligence claim as to Dr. Bradford but not as to Dr. Seibel and SMA. Negligence requires a showing of a duty of care,

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[2]Respondents assert that *Alsenz ex rel. Estate of Alexander v. Clark Cnty. Sch. Dist.*, 109 Nev. 1062, 1066-67, 864 P.2d 285, 287-88 (1993), stands for the proposition that NRS 41.100 cannot create an additional cause of action for the decedent's personal representative when wrongful death is asserted as it would result in double recovery. However, *Alsenz* is limited to the issue of whether a wrongful death claim may be asserted under NRS 41.100 instead of the wrongful death statute, NRS 41.085. 109 Nev. at 1066-67, 864 P.2d at 287-88.

breach of that duty, legal causation, and damages. *See Turner v. Mandalay Sports Entm't*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008).

The affidavits sufficiently established the existence of issues of material fact as to Dr. Bradford's alleged negligence. The expert witness testimony revealed issues of material fact regarding breach of the duty of care. Appellants also demonstrated an issue of material fact as to causation, providing expert testimony that Schmutz's damages were caused by respondents' failure to notify Schmutz of the possible metastatic disease, delaying the appropriate assessment and treatment of the cancer. As to damages, appellants presented evidence of unnecessary physical and emotional pain and suffering, loss of consortium, and a shortened lifespan. Accordingly, appellants demonstrated issues of material fact as to the negligence claim such that the claim should have defeated summary judgment.

Conversely, summary judgment was properly granted as to Dr. Seibel and SMA because Schmutz was only referred to him for pain management after the MRI had been ordered and reviewed. Dr. Seibel, accordingly, only owed Schmutz a duty of care as to the pain management treatment. Thus, the district court appropriately dismissed the medical negligence claim against Dr. Seibel and SMA.

The wrongful death claim

Appellants argue that they presented issues of material fact as to proximate causation because their medical experts stated that the delay in diagnosis caused harm to Schmutz and was a contributing factor to his death. We disagree. The wrongful death statute, NRS 41.085, provides that heirs and personal representatives may maintain actions for wrongful death when the death "is caused by the wrongful act or neglect of another." NRS 41.085(2). While appellants' medical experts were permitted to testify as to causation even though they were not oncologists,

appellants failed to present sufficient causation testimony when all three of their experts stated that they would defer to an oncologist as to the cause of death. *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 158, 111 P.3d 1112, 1116 (2005) (requiring expert testimony, stated to a reasonable degree of medical probability, to support a showing of causation); *see also Staccato v. Valley Hosp.*, 123 Nev. 526, 530-31, 170 P.3d 503, 506 (2007) ("There is no requirement that the expert medical witness be from the same specialty as the defendant; the issue is simply one of the witness'[s] actual knowledge." (alteration in original) (internal quotations omitted)). Because of the absence of causation evidence, the district court did not err in granting summary judgment for the wrongful death claims. *Thomas ex rel. Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970) (stating that summary judgment on negligence and proximate cause is proper when the plaintiff cannot recover as a matter of law).

Loss of consortium claims

Appellants contend that the derivative loss of consortium claims should have been maintained with the medical negligence claims because appellants presented genuine issues of material fact as to the loss of consortium claims.

We have determined that loss of consortium claims are not exclusively derivative of wrongful death claims, they also may be supported by negligence actions. *See Cervantes v. Health Plan of Nev., Inc.*, 127 Nev. ___, ___ n.9, 263 P.3d 261, 268 n.9 (2011); *Turner*, 124 Nev. at 221-22, 180 P.3d at 1178. However, children cannot recover for loss of parental consortium in negligence actions. *Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 1044, 921 P.2d 933, 936-37 (1996) (Young, J., concurring), *overruled on other grounds by General Motors Corp. v. Eighth Judicial Dist. Court*, 122 Nev. 466, 473, 134 P.3d 111, 116 (2006). Because the

Legislature has not seen fit to allow these claims, the children's loss of consortium claims were properly dismissed. Nonetheless, because the negligence claims were improperly dismissed, Schmutz's estate and spouse may have a claim for loss of consortium. *See* NRS 41.100(3).

The district court also dismissed the loss of consortium claims as being too speculative. We disagree and conclude that genuine issues existed concerning the loss of consortium claims when Schmutz's spouse stated that the pain injections resulted in Schmutz's loss of mobility, extreme pain, and loss of his will to live. Additionally, evidence was presented that cancer patients get very high doses of pain medication, creating a genuine issue as to whether Schmutz, and by extension his spouse, would have suffered as much had he been properly treated. We therefore reverse the district court's dismissal of the loss of consortium claims.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[3]

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

[3]All other arguments on appeal lack merit.

cc: Hon. Valerie Adair, District Judge
Stephen E. Haberfeld, Settlement Judge
Stovall & Associates
Cotton, Driggs, Walch, Holley, Woloson & Thompson/Las Vegas
Hutchison & Steffen, LLC
Eighth District Court Clerk