IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE ESTATE OF JOSEPHINE RUTH STEPHENSON, A DECEASED MINOR, BY AND THROUGH HER NATURAL MOTHER AND GUARDIAN JERRI TALLEY AND HER NATURAL FATHER AND GUARDIAN, JEREMY GLENN STEPHENSON; JERRI TALLEY, AND JEREMY GLENN STEPHENSON, INDIVIDUALLY,
Appellants,
vs.
NOEL SHORE HARRISON, M.D., INDIVIDUALLY; SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND WOMEN'S SPECIALTY CARE, LLP, A NEVADA LIMITED LIABILITY LIMITED PARTNERSHIP,
Respondents.

No. 68189

FILED

DEC 30 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court grant of summary judgment in favor of defendants in a medical malpractice action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Following a lengthy labor and delivery process, Appellant Jerri Talley tragically gave birth to a deceased infant, Josephine Stephenson. Appellants later filed a medical malpractice action, the district court granted summary judgment in favor of respondents, and this appeal followed. The central issue on appeal is whether the district court

erred by finding that the appellants failed to establish the necessary causation element of a prima facie medical malpractice suit.[1]

To maintain a medical malpractice action, a plaintiff must prove: 1) the medical provider's conduct departed from the accepted standard of medical care or practice; 2) the medical provider's conduct was both the actual and proximate cause of the plaintiff's injury; and 3) the plaintiff suffered damages. *Mitchell v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 131 Nev. ___, ___, 359 P.3d 1096, 1103 (2015), reh'g denied (July 23, 2015); *see also Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Additionally, the plaintiff must offer evidence of the duty, breach, and causation elements through expert medical testimony. NRS 41A.100.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* Further, we note that "courts are generally reluctant to grant summary judgment" in negligence cases. *Harrington v. Syufy Enters.*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997).

On appeal, the parties do not dispute whether Dr. Pine's expert testimony established evidence of duty or breach; instead, the parties dispute whether Dr. Pine offered evidence of causation—but causation of what?

Appellants (collectively, the Stephensons) argue they established a causal link between the respondent's (collectively, Sunrise)

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[1]We do not recount the facts except as necessary to our disposition.

negligence—not placing an FSE as soon as possible—and the injury, which they assert is Josephine's intrapartum death, *even if Josephine would have still died postpartum*. In contrast, the respondents argue that Dr. Pine failed to establish a causal link between the breach and the injury, which they assert is Josephine's death.

Here, the district court did not err by determining the Stephensons failed to establish the respondents caused Josephine's death because Dr. Pine's expert affidavit does not establish a link between the alleged breach of duty—not placing an FSE as soon as possible—and Josephine's death from an infection. Further, at his deposition, any time Dr. Pine was asked to connect the failure to place the FSE as soon as possible to Josephine's death, he would qualify his statements by saying he was not an expert in infections or could not testify regarding whether Josephine would have ultimately overcome the infection because he was not a pediatrician. Thus, Dr. Pine's testimony, taken in the light most favorable to the Stephensons, does not establish that the alleged negligence caused Josephine's death.

Nonetheless, the district court erred in granting summary judgment to Sunrise because Josephine's death was not the only injury the Stephensons claimed in their complaint. In their pleading and oppositions to summary judgment, they emphasized they were seeking damages stemming from an intrapartum death, resulting in a stillbirth rather than a live birth. The Stephensons reiterated this argument at the summary judgment hearing, stating: "[w]e do know that this intrapartum death occurred which required Ms. Talley to basically wait in the hospital overnight and ultimately give, through natural means, childbirth to her stillborn child."

The district court does not address this claim in its order, instead focusing on whether the Stephensons offered proof of causation of death from an infection and a loss of chance of surviving the infection. But taken in the light most favorable to the Stephensons, Dr. Pine's expert testimony fairly implies a causal link between the alleged breach and the injury of experiencing of a stillbirth instead of a live birth. Because a jury certainly could have awarded at least some damages for this discrete injury, the Stephensons established a prima facie medical malpractice case for this claim and the grant of summary judgment in favor of Sunrise on all claims was improper. *See Prabhu v. Levine*, 112 Nev. at 1543, 930 P.2d at 107 (establishing the elements for medical malpractice); NRS 41A.100 (requiring expert testimony to prove duty, breach, and causation in a medical malpractice action); and *Harrington v. Syufy Enterprises*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997) (noting that summary judgment is proper only if the plaintiff cannot recover as a matter of law).[2]

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[2]The concurring opinion proposes that we determine "whether Nevada law recognizes wrongful death based upon a stillbirth." I agree that this is an open question, but I do not agree that it has been raised in this appeal. While the Nevada Supreme Court has already recognized that the surviving relatives of a deceased infant may assert such a cause of action arising out of the emotional impact of the stillbirth upon them, *White v Yup*, 85 Nev. 527, 458 P.2d 617 (1969), no Nevada court has yet decided whether the deceased infant (more precisely, her estate) can assert such a claim on her own behalf. The concurrence suggests that this issue must be answered by us now in this case because the baby's estate asserted such a claim in the Complaint. But not everything asserted in a plaintiff's Complaint is necessarily at issue in a subsequent motion seeking summary judgment. Quite to the contrary, summary judgment motions can be limited to addressing only some issues while leaving other questions for another day or another motion; under NRCP 56 motions are framed by the relief that the motion seeks and do not automatically

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Accordingly, we

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

_____, J.
Tao

GIBBONS, C.J., concurring:

I concur with the majority opinion, and I write separately only to provide clarification to the parties and the district court. As I find that the appellants each sought separate damages, based on separate claims, each claim should be addressed separately, to avoid any possible confusion.

The facts underlying this case are unsettling but they need to be detailed to fully appreciate the situation. On June 18, 2012, shortly before 4:30 in the afternoon, appellant Jerri Talley arrived at Sunrise

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encompass everything that has ever been said at any time by anyone during the entire litigation. Here, the respondents' summary judgment motion never asked the district court to dismiss the action based upon the existence or non-existence of such a claim in the law. The issue has simply never been raised by any party either below or on appeal, and neither party has ever been given notice that we intended to address the matter ourselves, or any opportunity to brief or argue it. I do not agree that we should reach to address this issue entirely *sua sponte*, especially when the issue represents an unresolved question of first impression in Nevada.

Hospital via ambulance. Jerri, who was then 22 years old and morbidly obese, was vomiting and experiencing flu-like symptoms with lower abdominal pain. Jerri was also 40-41 weeks pregnant (9 months) and, the nursing staff noted, might be in labor. The nursing staff observed that Jerri had an elevated white blood cell count, had received no prenatal care, admitted to using marijuana to self-treat nausea during the pregnancy, and, due to her obesity and movement,[3] it was extremely difficult to monitor the baby's heartbeat. These factors, and others, may have resulted in Jerri enduring a high risk pregnancy and delivery.

At 6:18 p.m., nursing staff conducted a physical examination which revealed Jerri's cervix was approximately one centimeter dilated. Immediately, nursing staff had difficulty monitoring the baby's heartbeat because of Jerri's girth, and her failure or inability to cooperate. Despite this difficulty, the nurses were able to confirm the baby's heart was beating at 140 beats per minute ("bpm"). Approximately an hour later, at 7:15 p.m., respondent Dr. Noel Harrison was first notified of Jerri's situation. As Jerri did not appear to be in active labor, and the cause of her distress was unclear, Dr. Harrison ordered her admitted for observation. At 7:50 p.m., Dr. Harrison ordered an ultrasound to rule out gallstones as a possible cause of Jerri's distress.

The ultrasound ordered by Dr. Harrison was not performed until approximately 10:50 p.m. Moreover, between 7:50 p.m. and 10:50 p.m., the nursing staff continued to rely on an external monitor, despite its ineffectiveness, to monitor the baby's heart rate. During this three hour

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[3]Due to Jerri's weight, the nursing staff had a difficult time placing the external monitor. Further, Jerri stated due to her pain she could not lie down, which caused the external monitor to fall off.

period, nursing staff were only able to obtain the baby's heart rate twice. Each time, the fetal heart trace revealed a heart rate of 140 bpm, but each time the nurse noted that the findings were "sketchy." Other than these two brief traces, the baby was essentially left unmonitored.

At 10:50 p.m., the ultrasound confirmed that the baby's heart rate was 140 bpm. Dr. Harrison performed a cervical check and discovered that Jerri was four centimeters dilated. He ordered that Jerri be admitted to Labor and Delivery and have internal monitors placed as soon as possible, so the fetal heart rate could be accurately monitored. Nevertheless, nursing staff continued to rely upon the ineffective external monitor for the next hour. During this time staff could not obtain fetal heart tracings.

Jerri was not admitted to Labor and Delivery until shortly before midnight, one hour after Dr. Harrison ordered her admitted and internal monitors placed. At 12:10 a.m., a nurse ruptured Jerri's membrane and internal fetal scalp electrodes (the "FSE") were finally placed on the baby. The nurse observed only a faint heartbeat, but it was believed the heartbeat reading was likely interference from Jerri's own heartbeat, and the baby's heartbeat could not be reliably detected. The nurse also noted the presence of thick meconium which suggested fetal distress. At 12:20 a.m., the FSE was removed and replaced. At 12:25 a.m., the nurse notified Dr. Harrison that FSE monitoring failed to locate fetal heart tones. Dr. Harrison performed a second ultrasound at 12:36 a.m. and could not locate a fetal heart tone. At 12:52 a.m., an ultrasound technician performed a final ultrasound and confirmed the baby had died. As a heart rate was detected at 10:50 p.m., the baby likely died while Jerri

was waiting to be admitted to Labor and Delivery. At 1:14 a.m., Jerri received an epidural, and Pitocin to induce labor.

Jerri delivered baby Josephine, a stillborn daughter, around 9:30 a.m. on June 19, 2012. An autopsy later suggested that Josephine died from an ascending bacterial infection that was present up to two days prior to delivery. A subsequent evaluation, conducted by Sunrise Hospital's pathologist shortly after Josephine's stillbirth, postulated that the infection was the likely cause of death, but also identified evidence of fetal distress, including meconium, gram positive rods in the bronchi and numerous intra-alveolar anucleate squamous cells.

Jerri and Josephine's father, Jeremy Stephenson, individually and on behalf of Josephine's estate (collectively "the Stephensons") filed suit alleging medical malpractice, nursing malpractice, vicarious liability, and negligent hiring, training, or supervision in Josephine's death. Collectively, the Stephensons sought medical expenses in excess of ten thousand dollars. Individually, the Estate of Josephine sought damages for pain, suffering, and loss of enjoyment of life in excess of ten thousand dollars. Finally, Jerri and Jeremy sought damages for their own pain, suffering, and anguish in excess of ten thousand dollars.

In support of their complaint, the Stephensons attached the affidavit of Dr. Stephen Pine, an obstetrician and gynecologist who practices as a laborist in Los Angeles, California. Dr. Pine asserted in the affidavit that Jerri was a high risk patient and it was mandatory that the baby's fetal heart rate be regularly monitored. Dr. Pine further opined in his affidavit that Dr. Harrison breached the minimally acceptable standard of care by failing to place an FSE earlier, and as a result of this failure, Josephine *died during labor*. Dr. Pine concluded, to a reasonable

degree of medical certainty, that respondents' negligence resulted in the *intrapartum* death of Josephine.

During his deposition, Dr. Pine maintained that Dr. Harrison breached the standard of care by failing to conduct FSE monitoring sooner. Regarding the infection, Dr. Pine stated that because he was not a pediatrician, he could not offer an opinion on Josephine's chance of surviving the infection had she been born alive. Although Dr. Pine testified that the nurses may have had "a shot" at treating the infection had Josephine been born alive, he could not state what chance, if any, Josephine had of surviving the infection. Turning to the stillbirth, Dr. Pine stated that Jerri had a high risk pregnancy and, therefore, internal monitoring of the baby was required at the outset of care. Further, Dr. Pine testified that had Josephine been monitored internally, as the standard of care required, the fetal distress would have been detected as early as 6:20 p.m., alerting Dr. Harrison to the fact that an emergency caesarean section needed to be performed. Lastly, Dr. Pine stated to a relative degree of medical certainty that had the standard of care been adhered to, Josephine would have at least been born alive.

Based on this testimony and other evidence, Dr. Harrison and Women's Specialty Care moved for summary judgment, arguing the Stephensons failed to establish causation because the cause of death was an infection, which was present before Jerri was admitted. Sunrise Hospital also moved for summary judgment and moved to join Dr. Harrison's motion for summary judgment. The Stephensons opposed the motions, arguing the wrongful death claim was based upon Josephine's stillbirth, which Dr. Pine stated was caused by respondents' negligence, and the infection was not a causation issue, but an issue of damages.

In Sunrise Hospital's reply to plaintiffs' opposition to the motion for summary judgment, the loss-of-chance doctrine was raised for the first time in this case. Respondents asserted that the distinction between a live birth and a stillbirth was a loss-of-chance argument, and that appellants had still failed to demonstrate that the alleged negligence, and not the infection, was the cause of death. The Stephensons argued, before this court and before the district court, that the defendants' negligence caused Josephine's stillbirth and deprived Jerri of the opportunity to give birth to a living daughter. But the district court, apparently believing the complaint did not raise these contentions, addressed only the loss-of-chance argument regarding whether the infection was the cause of death, and if respondents' conduct reduced a substantial chance of surviving the infection. The district court then granted the motions.

The Estate of Josephine's loss-of-chance claim based upon the infection

I concur with both the majority and dissenting opinions which conclude that Dr. Pine's testimony failed to create a genuine issue of material fact and summary judgment was properly granted on this claim. Dr. Pine agreed that an infection was the likely cause of death and that he was not qualified to opine on Josephine's chance of surviving the infection had she been born alive nor did he testify that respondents' conduct caused the fatal infection. I write separately to emphasize that this testimony fails to create a genuine issue of material fact under either the traditional requirement for causation or the loss-of-chance doctrine. *See Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1, 5-6, 805 P.2d 589, 591-92 (1991) (To establish causation under loss-of-chance the Stephensons had to "present evidence tending to show, to a reasonable medical probability

that some negligent act or omission by health care providers reduced a substantial chance of survival given appropriate medical care.").

The Stephensons' wrongful death claim based upon the stillbirth[4]

During oral arguments before this court, respondents argued that this court should hold that as a matter of law, a plaintiff cannot recover when there is uncontested evidence that the baby would have died even had she been born alive. I write separately to reject this argument as respondents ask this court to weigh catastrophic outcomes and hold that as a matter of law, a stillbirth is preferable to allowing a parent to experience the birth of a child, when that child will subsequently die.

As noted in the majority, the district court failed to address the wrongful death claim based upon the stillbirth. The district court apparently believed that the Stephensons had not adequately pled the issue in their complaint. However, a review of the complaint demonstrates that this was an error. In the complaint, the Stephensons

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[4]Our dissenting colleague suggests that appellants have waived this argument, failed to cogently argue this point or provide relevant authority, and by addressing this argument we have exceeded the limits set upon this court's judicial power. While I agree that appellants' argument could have been more substantial, I find the issue was sufficiently argued before both the district court and this court. Appellants argued before the district court, "[t]his case is not about what Josephine's life expectancy might or might not have been had she been born alive; it is about her intrapartum death[.]" Before this court, appellants repeat the argument that but for respondents' negligence, Josephine would have been born alive, and Jerri would have been spared the trauma of delivering a stillborn child. Thus, appellants have consistently argued a theory of the case based upon Josephine's stillbirth, and the resulting trauma. I therefore respectfully disagree with my colleague as I believe appellants sufficiently argued this point both before the district court and before this court.

alleged that as a result of respondents' negligence, Josephine died *during labor* and sought damages *for the failure to ensure a live birth.* As I read it, appellants argue that respondents wrongfully caused Josephine's death, because absent their negligence, Josephine would have at least been born alive. Therefore, to determine if summary judgment was properly granted, I believe that it must be determined whether Nevada law recognizes wrongful death based upon a stillbirth, when the infant suffers from an apparently fatal condition. I conclude that it does and therefore I concur with the majority opinion that summary judgment was improperly granted.

Nevada recognizes that a cause of action exists for the wrongful death of a viable fetus. *White v. Yup*, 85 Nev. 527, 538, 458 P.2d 617, 623 (1969) ("[W]e hold that a cause of action does exist for the wrongful death of an unborn 8-months-old viable fetus[.]"). In *White* the supreme court considered the arguments in support of and in opposition to recognizing a cause of action for negligently caused stillbirths. *Id.* at 535-37, 458 P.2d at 622-23. As an example, the supreme court reasoned that if a cause of action for stillbirths did not exist, a doctor could act negligently in delivering a baby and be immune from a lawsuit as long as the baby died before birth. *Id.* at 536, 458 P.2d at 622. The supreme court went on to observe that "[t]he death of a minor child is a deep emotional wounding." *Id.* at 537, 458 P.2d at 623 (citation omitted). It followed that "[i]t is no less a loss to the survivors where, as here, the child died *before* birth." *Id.* at 538, 458 P.2d at 624 (emphasis added). Ultimately, the court followed the modern authorities which held that "[w]here negligent acts produce a stillbirth and a right of action is denied, an incongruous result is produced." *Id.* at 536, 458 P.2d at 622-23. Regarding the

difficulty in calculating damages, the supreme court concluded that the "argument that damages would be difficult [to] prove does not go to the validity of a cause of action." *Id.* at 538, 458 P.2d at 623. Accordingly, Nevada recognizes that a cause of action exists when a negligent act results in the stillbirth of a viable fetus.[5]

In *Greco v. United States*, the Nevada Supreme Court was asked to recognize a cause of action known as "wrongful life." 111 Nev. 405, 408-09, 893 P.2d 345, 347 (1995). The appellant in *Greco* brought the claim on behalf of her son, who was born severely deformed. *Id.* at 408, 893 P.2d at 347. The mother argued that had the doctors properly diagnosed the fetal deformities, she would have terminated her pregnancy, and her son would not be forced to go through life with severe deformities. *Id.* The supreme court responded that "[i]mplicit in this argument is the assumption that the child would be better off had he never been born. These kinds of judgments are very difficult, if not impossible, to make." *Id.* at 409, 893 P.2d at 347. To recognize a claim for wrongful life would require the court to "weigh the harms suffered by virtue of the child's having been born with severe handicaps against 'the utter void of nonexistence[.]'" *Id.* at 409, 893 P.2d at 347 (quoting *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967)). Instead, the supreme court followed the New York Court of Appeals, which held that

> [w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to

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[5]*See also Castro v. Melchor*, 366 P.3d 1058, 1066 n.8 (Haw. Ct. App. 2016) (collecting cases and observing that 41 states and the District of Columbia allow recovery for wrongful death when a viable fetus is stillborn while only 6 states prohibit recovery).

> the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.

Id. at 409, 893 P.2d at 348 (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978)). Accordingly, the Nevada Supreme Court found that it is not the role of the courts to determine that some people would have been better off to have never been born and refused to recognize a claim for "wrongful life." *Id.* at 408, 893 P.2d at 347.

Respondents contend here that the infection is the dispositive issue, while the Stephensons argue that because the injury they seek to recover for is the stillbirth, the infection serves only to limit an award of damages. Respondents' argument that this court should bar recovery as a matter of law would require us to hold that remaining in the "utter void of nonexistence" is preferable to allowing a parent to experience the birth of a child, even though that child will subsequently die. *See id.* at 409, 893 P.2d at 341 (quoting *Gleitman*, 227 A.2d at 692).[6] Based upon my reading of *White* and *Greco*, I believe respondents' argument must be rejected.

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[6]Respondents made a related argument before the district court. In the reply to plaintiff's opposition to summary judgment, Dr. Harrison argued that "it is disingenuous for Plaintiffs to suggest they are seeking damages for missing out on the opportunity of experiencing a live birth even though it was inevitable that Josephine Stephenson would ultimately succumb to her fatal infection." Dr. Harrison failed to provide any caselaw supporting his claim. I note that the vast majority of states allow recovery for the wrongful death. *See supra* note 3. Furthermore, as noted by the supreme court, the loss of a child is a deep emotional wound that afflicts equally those who lose a child before birth. *See White*, 85 Nev. at 537-38, 458 P.2d at 623-24.

In *White*, the supreme could held that a viable fetus could maintain a cause of action for wrongful death.[7] Further, the example in *White* of a doctor causing a stillbirth is on point in this case, as Dr. Pine testified to a reasonable degree of medical certainty, that had the requisite standard of care been followed, Josephine would not have been stillborn. Additionally, in *Greco* the supreme court refused to engage in the balancing act that respondents request this court employ. As the supreme court previously recognized, it is not the role of courts to weigh an impaired life to nonexistence. Therefore, I believe that despite Josephine's apparently fatal infection, a cause of action exists under existing Nevada law based upon her stillbirth. Accordingly, summary judgment was improperly granted.

As the district court failed to address the stillbirth issue, I believe that this court must provide guidance for, not only the district court, but also the parties. Further, the complaint sought separate damages for each plaintiff, and I feel it is necessary to address which appellant has standing to seek damages, in order to provide maximum

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[7]At oral argument before this court, respondents asserted that no evidence had been introduced to show Josephine was viable. I note that it was respondents who bore the initial burden of demonstrating that Josephine was not viable and they failed to do so. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) ("The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact."). Further, the record reveals that Jerri was full-term at 40-41 weeks when admitted to the hospital and Josephine weighed over nine pounds at delivery. Furthermore, Josephine's autopsy states that the fetus did not display any abnormalities or deformities. Taking the evidence in a light most favorable to the appellants, I find respondents' argument that Josephine was not viable is unpersuasive.

clarity on remand. I conclude that the issues of standing and damages are resolved by the express language of NRS 41.085(4) and (5).

"[W]hen a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Fry*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). NRS 41.085(2) provides that in a wrongful death claim, "the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death." The heirs of the decedent may seek damages for "the person's grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the *decedent*." NRS 41.085(4) (emphasis added). However, an estate may recover special damages, such as medical or funeral expenses, but cannot recover for the *decedent's* pain and suffering. NRS 41.085(5)(a),(b). Therefore, the heirs may recover for their own pain and suffering, as well as the decedent's pain and suffering. However, an estate may recover only special damages, including the medical expenses.

Based on the plain language of the statute, both Josephine's heirs and her estate may bring a claim based upon her alleged wrongful death.[8] Should a jury agree with appellants' arguments, Josephine's parents, Jerri and Jeremy, may recover for their own pain and suffering caused by the ordeal, as well as any pain or suffering Josephine may have

[8]Dr. Harrison's assertion that it is disingenuous for appellants to seek damages based upon Josephine's wrongful death is therefore rejected as the application of NRS 41.085(4) and (5) clearly rebuts his contention. *See supra* note 4.

experienced. However, the Estate of Josephine may only recover any medical expenses and other special damages.[9]

Jerri and Jeremy's lost chance of experiencing a live birth

I now turn to Jerri and Jeremy's individual claims for relief that because of respondents' negligence, both lost the chance to experience a live birth and Jerri was instead forced to deliver a stillborn baby. I concur with the majority, which holds that the appellants have a viable claim under the traditional medical malpractice theory. I write separately because on appeal, and belatedly before the district court, the parties argued the claim under the loss-of-chance theory. Therefore, I write separately to address the parties' arguments concerning the application of loss-of-chance.

Loss-of-chance is appropriately invoked when due to negligence, a plaintiff loses the opportunity to engage in a medical procedure and more extensive pain, suffering, or medical treatment occurs. *See Greco*, 111 Nev. 405, 409-12, 893 P.2d 345, 348-49. In *Greco*, the appellant alleged that had her doctor informed her that her fetus would be severely disabled, she would have opted to terminate the pregnancy. *Id.* at 410, 893 P.2d at 348. Therefore, the appellant claimed she was denied the chance to terminate her pregnancy, which resulted in her giving birth to a severely deformed child. *Id.* The supreme court reasoned that appellant's claim was similar to one in which a doctor

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[9]I am unsure what medical expenses the Estate of Josephine incurred, and what bills, if any, would still be owed should the appellants successfully demonstrate that respondents were negligent, but that issue is not before this court.

negligently fails to diagnose cancer in a patient. *Id.* at 411, 893 P.2d at 349. Although the doctor did not cause the cancer, the doctor may still be held liable for "the more extensive pain, suffering and medical treatment the patient must undergo by reason of the negligent diagnosis." *Id.* The supreme court concluded that "[t]he 'chance' lost here[ ] was Sundi Greco's legally protected right to choose whether to abort a severely deformed fetus[,]" which resulted in Greco giving birth to a severely deformed child. *Id.*

Here, Jerri and Jeremy argue that respondents' negligence caused them to lose the chance of having a living daughter, however briefly. Jerri further argues that due to respondents' negligence, she lost the chance of delivering a live baby and was instead forced to endure eight additional hours of labor before delivering a stillborn daughter. These are the lost chances that Jerri and Jeremy seek to recover for, along with the resulting mental suffering and anguish. Based on *Greco*, I believe that loss-of-chance would apply in this situation. Put another way, the "chance" lost was Jerri and Jeremy's right to experience a live birth. Jerri additionally lost the chance to deliver a living daughter, and instead was forced to endure at least an additional eight hours of labor, before delivering a stillborn daughter. As Dr. Pine testified that Josephine would have been born alive absent respondents' negligence, I believe that a genuine issue of material fact exists as to this claim. Accordingly, I concur with the majority opinion and believe that summary judgment was improperly granted.

_____, C.J.
Gibbons

SILVER, J., dissenting:

Despite the incredibly tragic facts of this case, I believe that this court is constrained to affirm the district court's grant of summary judgment. I agree that the Stephensons easily met their burden of establishing a question of fact regarding the element of breach for purposes of summary judgment in this medical malpractice action. Dr. Pine, in no uncertain terms, testified at his deposition that respondents breached the standard of care in this case. But, in light of *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589 (1991), I conclude that the Stephensons failed to meet their burden of establishing an issue of fact to overcome summary judgment regarding the element of causation. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (discussing the standards that must be met with regard to summary judgment). Here, neither Dr. Pine's testimony nor any other evidence presented to the district court established that, to a reasonable medical probability, some negligent act or omission by respondents "reduced a substantial chance of survival given appropriate medical care." *Perez*, 107 Nev. at 6, 805 P.2d at 592. Thus, the Stephensons failed to present evidence that, but for the alleged malpractice, the fetus would have survived despite the mother's ovarian infection, which had been present for at least two days prior to delivery. This lack of evidence coupled with the supreme court's declaration that "[s]urvivors of a person who has a truly negligible chance of survival should not be allowed to bring a case fully through trial," makes it clear that the district court properly granted summary judgment in favor of respondents. *Id.* at 7. 805 P.2d at 592; *see also Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134.

The majority concludes summary judgment was improper because Dr. Pine's testimony established that, but for the alleged negligence, the baby would have at least been born alive. But in their complaint, the Stephensons alleged the negligence caused the baby's *death*; they did not seek to recover for the lost chance to have the baby born alive. Even assuming, *arguendo*, that this issue was sufficiently raised to the district court, the Stephensons have not provided this court with either relevant legal support or cogent argument for their position. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Thus, under existing case law, this court should narrowly resolve this case utilizing the record before it.

Nevertheless, the majority addresses the merits of the Stephensons' bald assertion that a cause of action exists in Nevada for the lost chance of a live birth. As a result, the majority ignores the limits set upon this court's judicial power:

> As an intermediate appellate court, our freedom of action in resolving a particular case is bounded on many sides. Above, our power is constrained by existing precedent of the Nevada Supreme Court under principles of stare decisis. *Hubbard v. United States,* 514 U.S. 695, 718, 720 (1995) (Rehnquist, C.J., dissenting) (stare decisis "applies a *fortiori* to enjoin lower courts to follow the decision of a higher court"). Below, we are limited by the issues actually raised, argued, and disposed of before the district court. *See Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *State v. Wade,* 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989) ("This court will

not consider issues raised for the first time on appeal.").

Quisano v. State, Docket No. 66816 (Order of Affirmance, Feb. 18, 2016) (Tao, J., dissenting).

The doctrines of justiciability, preservation of issues, and waiver are not mere technicalities or doctrines of convenience that this court may selectively ignore simply because we wish to address an issue. The result here is an order that reaches well beyond the questions actually litigated below and argued on appeal, and operates to create new law unnecessary in resolving the case actually pending before this court. I, therefore, respectfully dissent.

Silver, J.

Silver

cc: Hon. Douglas W. Herndon, District Judge
Stephen E. Haberfeld, Settlement Judge
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Eighth District Court Clerk