IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ESTATE OF RUTH BLAKELY, BY AND THROUGH ITS SPECIAL ADMINISTRATOR, SARENA FARANESH,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER, DISTRICT JUDGE,
Respondents,
and
TROPICANA LAS VEGAS, INC., A NEVADA CORPORATION,
Real Party in Interest.

No. 73267

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order dismissing two of petitioner's claims in a torts action.

Petitioner Sarena Faranesh, as special administrator for the estate of Ruth Blakely, sued real party in interest Tropicana Las Vegas, Inc., alleging that the estate's titular decedent, Ruth Blakely, fell at Tropicana's hotel and casino and died from her injuries. Based on that allegation, Faranesh asserted claims against Tropicana for wrongful death, negligence, and "Statutory Violations – Negligence Per Se."

Tropicana then moved to dismiss Faranesh's non-wrongful-death claims, arguing that, because Blakely's injuries resulted in her death, Faranesh could only proceed under NRS 41.085—Nevada's wrongful death statute. That statute provides that, as relevant here, where the "wrongful act or neglect of another" causes a death, the decedent's personal representative may assert a wrongful death claim on behalf of the decedent's estate to recover special damages and any penalties that the decedent could have recovered if he or she had lived. *See* NRS 41.085(2), (5). Faranesh opposed that motion, arguing that she could also assert her non-wrongful-death claims under NRS 41.100[1]—Nevada's survival statute—which preserves claims for "damages which the decedent incurred or sustained before the decedent's death" and authorizes the decedent's personal representative to bring those claims on behalf of the estate. In addition, the parties disputed whether Faranesh's "Statutory Violations – Negligence Per Se" claim should be dismissed as duplicative of her negligence claim.

At the subsequent hearing, the district court orally found that Faranesh's non-wrongful-death claims were, in substance, wrongful death claims and that dismissal of those claims was warranted based on the plain language of NRS 41.085 and NRS 41.100 as well as the supreme court's decision in *Alsenz v. Clark County School District*, 109 Nev. 1062, 864 P.2d

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[1]NRS 41.100(1) was amended effective January 1, 2018, 2017, Nev. Stat., ch. 401, § 16, 2688, but that amendment was enacted after the order that gave rise to this petition, and, therefore, does not affect our disposition of this matter.

285 (1993). Thereafter, the district court entered a written order dismissing Faranesh's non-wrongful-death claims, which cited the authorities identified above without further explanation. This petition followed.

This court has original jurisdiction to grant a writ of mandamus, and issuance of such extraordinary relief is solely within this court's discretion. *See* Nev. Const. art. 6, § 4; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse or an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). In that regard, this court looks to whether the district court misinterpreted or misapplied a law or otherwise reached a decision that was founded on prejudice or contrary to the evidence or rule of law. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011) (explaining when a district court will be deemed to have manifestly abused its discretion or otherwise exercised it in an arbitrary or capricious manner). Here having considered Faranesh's petition and supporting documentation, we elect to exercise our discretion and consider her petition for a writ of mandamus in the interest of judicial economy and to control a manifest abuse of discretion. *See Smith*, 107 Nev. at 677, 818 P.2d at 851; *see also Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558.

In her petition, Faranesh initially challenges the dismissal of her negligence claim, arguing that it was separate and distinct from her wrongful death claim and that the district court therefore erred in

concluding that she could not present it under NRS 41.100 based on *Alsenz*, which held that wrongful death claims must proceed under NRS 41.085. *see* 109 Nev. at 1066-67, 864 P.2d at 288; *see also Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. ___, ___, 401 P.3d 1100, 1104 (2017) (recognizing that the district court's legal conclusions are reviewed de novo, even in the context of a writ proceeding). Tropicana counters that, because Blakely died from her injuries, Faranesh's negligence claim was essentially a wrongful death claim, which could only be asserted under NRS 41.085.

While claims for negligence and wrongful death overlap to the extent they are both premised on negligent conduct, *see* NRS 41.085(2) (authorizing wrongful death claims based on the negligence of another); *see DeBoer v. Senior Bridges of Sparks Family Hosp., Inc.*, 128 Nev. 406, 412, 282 P.3d 727, 732 (2012) (providing that, to prevail on a negligence claim, a plaintiff must establish, among other things, that the defendant owed him or her a duty of care and breached that duty), those claims are separate and distinct. In particular, a negligence claim permits an injured party to recover for his or her injuries while a wrongful death claim permits the heirs and estate of a decedent to recover for losses resulting from the decedent's death. *See DeBoer*, 128 Nev. at 412, 282 P.3d at 732 (recognizing that a negligence claim arises when a tortfeasor's breach of his or her duty of care causes the plaintiff injuries); Dan B. Dobbs et al., *The Law of Torts* § 120, at 373 (2d ed. 2011) (explaining that a negligence claim may be premised on a plaintiff's personal injury); NRS 41.085(2) (authorizing claims based on a decedent's wrongful death).

In the present case, although Faranesh alleged that Blakely died as a result of her injuries, she also alleged that Tropicana's breach of its duty of care caused Blakely to "suffer[ ] severe physical injuries, including a brain injury." As a result, Faranesh's complaint sufficiently set forth a separate and distinct cause of action for negligence. *See DeBoer*, 128 Nev. at 412, 282 P.3d at 732 (setting forth the elements of a negligence claim); *see also Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578-79, 908 P.2d 720, 723 (1995) (recognizing that Nevada is a "notice pleading" state, which only requires that plaintiffs set forth facts which would support a legal theory). Thus, the district court erred in concluding that Faranesh's negligence claim constituted a wrongful death claim and therefore could not proceed under NRS 41.100 based on *Alsenz*.[2] *See Parametric Sound*, 133 Nev. at ___, 401 P.3d at 1104.

As to the district court's reliance on NRS 41.085 and NRS 41.100 to dismiss Faranesh's negligence claim, the parties extensively dispute whether the plain language of those statutes prohibited Faranesh from asserting both a wrongful death and a survival claim under these circumstances. We have considered the parties' arguments in this regard and conclude that the plain language of NRS 41.085 and NRS 41.100 demonstrates that those statutes are not mutually exclusive and that a

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[2]To the extent Tropicana argues that *Alsenz* prohibited a decedent's personal representative from presenting non-wrongful-death claims under NRS 41.100 where a wrongful death claim is also alleged due to the possibility of a double recovery, its argument fails, as *Alsenz* only addressed whether a wrongful death claim may be asserted under NRS 41.100 instead of NRS 41.085. *See* 106 Nev. at 1066-67, 864 P.2d 287-88.

plaintiff may therefore plead separate and distinct wrongful death and survival claims. *See Wheble, P.A.-C v. Eighth Judicial Dist, Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012) ("When a statute is clear on its face, we will not look beyond the statute's plain language."); *see also 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 quotation marks omitted)). Thus, insofar as the district court relied on the plain language of NRS 41.085 and NRS 41.100 to dismiss Faranesh's negligence claim, it erred. *See Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 643, 650, 331 P.3d 905, 909 (2014) (explaining that statutory interpretation is a question of law subject to de novo review).

Finally, we turn to the dismissal of Faranesh's "Statutory Violations – Negligence Per Se" claim. Initially, insofar as that claim was premised on a negligence per se theory, our extraordinary intervention is unwarranted, as such a claim was duplicative of her negligence claim. *See Cervantes v. Health Plan of Nev., Inc.*, 127 Nev. 789, 793 n.4, 263 P.3d 261, 264 n.4 (2011) (providing that a plaintiff who relies on one set of allegations cannot plead both negligence and negligence per se, as the negligence per se doctrine is simply a method of establishing the duty and breach elements of a negligence claim); *cf. Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 460 n.22, 168 P.3d 1055, 1062 n.22 (2007) (explaining, in the context of an appeal, that an appellate court may affirm the district court's decision, if correct, for different reasons than relied upon below). But to the extent that Faranesh's "Statutory Violations – Negligence Per Se" claim was premised

on a violation of NRS 651.070, which provides for equal enjoyment of places of public accommodation without discrimination on the basis of, as relevant here, disability, this claim presented an independent cause of action. *See* NRS 651.090(1) (providing that when any person violates NRS 651.070, the person who is aggrieved by that violation may bring a cause of action).

As to that independent cause of action, the parties' arguments are largely identical to those presented in arguing that Faranesh's negligence claim was erroneously dismissed. But as with Faranesh's negligence claim, her claim for violation of NRS 651.070 was separate and distinct from her wrongful death claim. *Compare* NRS 651.090(1) (creating a cause of action based on discriminatory deprivation of the right to full and equal enjoyment of places of public accommodation), *with* NRS 41.085(2) (authorizing claims based on a decedent's wrongful death). And for the same reasons discussed above, we conclude that the district court erred in relying on *Alsenz*, NRS 41.085, and NRS 41.100 to dismiss Faranesh's "Statutory Violations – Negligence Per Se" claim to the extent that claim was based on Tropicana's alleged violation of NRS 651.070.[3] *See Parametric Sound*, 133 Nev. at ___, 401 P.3d at 1104.

Given the foregoing, we conclude that the district court manifestly abused its discretion in dismissing Faranesh's claims for

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[3]In reaching this conclusion, we make no comment with regard to Tropicana's argument that NRS 651.070 does not encompass claims based on discriminatory barriers to access, as it was not raised during the underlying proceeding and the district court therefore did not have an opportunity to address it in the first instance.

negligence and violation of NRS 651.070.[4] *See Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. Accordingly, we grant Faranesh's petition in part and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order granting Tropicana's motion to dismiss insofar as that order dismissed Faranesh's claims for negligence and violation of NRS 651.070. The petition is denied, however, with regard to Faranesh's negligence per se based claim.

It is so ORDERED.

_____, C.J.
Silver

_____, J.
Gibbons

TAO, J., concurring in part and dissenting in part:

A serious question exists as to whether *Alsenz v. Clark County School District*, 109 Nev. 1062, 864 P.2d 285 (1993), is fundamentally consistent with *Schmutz v. Bradford*, No. 58612 (Order Affirming in Part, Reversing in Part and Remanding, December 19, 2013). The two cases reach conclusions that seem hard to reconcile, and I think the problem

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[4]To the extent Tropicana raises arguments in support of the district court's decision that we have not specifically addressed in this order, we have considered them and conclude they lack merit.

stems from this: *Schmutz* employs a "plain language" approach to statutory interpretation that bases its conclusion upon the text of NRS 41.085 and NRS 41.100, but *Alsenz* analyzes the same statutes using an approach that is anything but "textualist" in method.

Alsenz says this: a wrongful death claim brought under NRS 41.085 must be dismissed if the decedent's estate seeks damages for lost economic opportunities if the decedent's heirs seek those same damages, as doing so would constitute impermissible "double recovery." 109 Nev. at 1065, 864 P.2d at 287 ("Surely the estate could not recover the same type of damage[s] . . . This would amount to double recovery, an unreasonable result."). Notably, *Alsenz* doesn't merely say that the estate cannot ultimately recover the same damages as the heirs, and if the jury awards both parties overlapping damages at trial then any recovery must be reduced accordingly. It actually goes quite a bit further, very expressly holding that the decedent's estate's claim cannot be litigated at all and must be *dismissed* out of the action entirely before trial if the heirs seek those same damages. *Id.* at 1066, 864 P.2d at 287 ("we conclude that Alsenz's wrongful death claim was properly dismissed under NRS 41.085 for lack of recoverable damages.").

The *Alsenz* court required this because it thought that anything else would be an absurd way to read the statute: "Allowing the estate to recover these same damages outside NRS 41.085 would result in double recovery. Statutory interpretation does not allow for such an unreasonable result." *Id.* at 1067, 864 P.2d at 288.

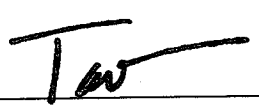
But this strikes me as going way beyond any recognized method of judicially interpreting statutes. It employs the legislative intent or purpose behind NRS 41.085 and NRS 41.100 not as a secondary source for reconciling an ambiguity in the text, but rather as a way to ignore the relatively unambiguous text in order to re-write it to mean something else that the court thinks might work a little better. That's a misapplication of the "absurdity doctrine" that lets us just engage in wholesale re-drafting of any statute we don't like. *See Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. 163, 173 n.7, 359 P.3d 1096, 1103 n.7 (2015) (citing *Jaskolski v. Daniels*, 427 F.3d 456, 461 (7th Cir. 2005)) (the anti-absurdity doctrine "aides interpretation but does not license courts to improve statutes (or rules) substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved." (internal quotations marks omitted)); *see also In re Sunterra Corp.*, 361 F.3d 257, 268 (4th Cir. 2004) ("In assessing whether a plain reading of a statute implicates the absurdity exception, however, the issue is not whether the result would be 'unreasonable,' or even 'quite unreasonable,' but whether the result would be *absurd* . . . if it is plausible that [the legislature] intended the result compelled by the Plain Meaning Rule, we must reject an assertion that such an application is absurd").

It's temptingly easy for judges to discard statutes as "absurd" in order to rewrite them into something we think more logical, clear, and more compatible with the public policy we prefer. After all, when we want to do so, we don't have to actually listen to constituents, engage in public debate, or negotiate and compromise with a large group of elected

legislators, each representing a different slice of a diverse and pluralistic electorate, with the need to cobble together a majority of their votes in support of what we want to do. It seems easy, but it's also inconsistent with the concept of representative self-government in a constitutional republic based on a system of divided powers and checks-and-balances.

That said, in the end intermediate court judges are bound by the doctrine of vertical stare decisis which mandates that we follow any higher court decision regardless of whether we like either the methodology it employs or the ultimate conclusion it reaches. So *Alsenz* is precedent we must faithfully follow, legal method along with legal result, whether we think it correctly decided or not.

All of which raises an interesting question. If we're permitted to use the "absurdity doctrine" as broadly as *Alsenz* does, I think we have to ask: if it's "absurd" to read NRS 41.085 as permitting claims to even be tried if they might potentially result in double recovery, why isn't it equally "absurd" to read NRS 41.100, a parallel statute, in exactly the same way and affirm what the district court did here?



_____, J.
Tao

cc: Hon. Joanna Kishner, District Judge
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