IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE ESTATE OF JOHN CRONIN; JOCELYN CRONIN, INDIVIDUALLY, AND AS THE SURVIVING SPOUSE OF JOHN CRONIN; KYLEE CRONIN, INDIVIDUALLY, AND AS THE NATURAL DAUGHTER OF JOHN CRONIN; AND SAM CRONIN, INDIVIDUALLY, AND AS THE NATURAL SON OF JOHN CRONIN,
Appellants,
vs.
G4 DENTAL ENTERPRISES LLC D/B/A G4 BY GOLPA; MIKE GOLPA, D.D.S.; ANNA SHAGHARYAN, D.M.D.; ARSHID TORKAMAN, D.D.S.; AND SCOTT YOUNG, D.O.,
Respondents.

No. 84075-COA

FILED

APR 04 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

The estate of John Cronin, Jocelyn Cronin,[1] Kylee Cronin, and Sam Cronin appeal from a district court order granting motions to dismiss each of their claims in a tort action. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.[2]

[1]We refer to John and Jocelyn Cronin by their first names throughout this order for clarity.

[2]The Honorable Judge Bonnie A. Bulla did not participate in the decision of this matter.

23-10281

John Cronin, who was a resident of California over the age of 60, hired the respondents to design and surgically install dental implants.[3] The respondents are a dental implant practice, known as G4 Dental Enterprises LLC d/b/a G4 by Golpa (G4 by Golpa), along with three dentists (Drs. Golpa, Shagharyan, and Torkaman) and an anesthesiologist (Dr. Young). At the time John hired the respondents, he had several diagnosed comorbidities—including hypertension, obstructive sleep apnea (OSA), asthma, and chronic obstructive pulmonary disease (COPD).

On November 5, 2019, John went into the respondents' office for surgery. He was sedated using nitrous for several hours while 23 teeth were removed and replaced with implants. During the procedure, John's blood oxygen level dropped below 90%. When the surgery concluded, John could not walk without assistance, was unable to regain full coherence, and his blood oxygen level remained around 90%.

Even though his blood oxygen level did not improve, John was discharged to his wife, Jocelyn, to recover at a hotel. At discharge, Jocelyn was told that the surgery had gone well and that there were no complications. She was allegedly given no post-operative instructions other than Dr. Shagharyan's instruction to "put a towel under [John's] pillow as

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[3]We recount the facts only as necessary for our disposition. As this is an appeal from the district court's order granting the respondents' motions to dismiss the estate's amended complaint, the recounted facts are taken from the parties' briefs, the amended complaint, and the supporting affidavits of merit where appropriate. Discovery has not yet been conducted in this case. At this stage in litigation, we consider all factual allegations in a plaintiff's complaint as true and draw all inferences in their favor. *Buzz Stew, LLC v. City of North Las Vegas,* 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

there might be some bleeding" and that "they had trouble waking John up from the procedure, but that everything was fine."

At the hotel, John remained deeply drowsy and unalert. He remained this way until hours later when he woke up violently vomiting blood. The alleged catalyst was that the sutures in John's mouth were not fully closed during surgery and were continuing to bleed and drain into his stomach. Jocelyn saw John vomiting and immediately called 9-1-1. John was transported via ambulance to Spring Valley Hospital where he died in the ICU of cardiopulmonary arrest the morning after his dental implant surgery.

The estate of John Cronin, his wife Jocelyn, and his two children, Kylee and Sam, (collectively "the estate") filed a complaint against the respondents. The estate brought seven causes of action against the respondents: (1) medical negligence; (2) wrongful death; (3) intentional infliction of emotional distress (IIED); (4) negligent infliction of emotional distress (NIED); (5) elder abuse; (6) fraud or intentional misrepresentation; and (7) negligent misrepresentation. Each cause of action was against each respondent, except for the claims of fraud and negligent misrepresentation—those were not brought against Dr. Young. The estate attached two affidavits of merit from medical professionals to the complaint in support of the medical negligence claim, as required under NRS 41A.071. The complaint was filed just days shy of the one-year statute of limitations that applied to the medical negligence claim. *See* NRS 41A.037(2).

Each respondent moved to dismiss the complaint under NRCP 12(b)(5). The estate opposed the motions and brought its own countermotion seeking leave to amend. The estate attached a sample of its proposed amended complaint to the countermotion and noted that it

planned to add two additional causes of action—product liability and general negligence. The district court denied the respondents' motions to dismiss and granted the estate leave to amend to "properly and specifically plead the allegations."

The estate filed an amended complaint that added the two additional causes of action for a total of nine causes of action against the respondents, except for Dr. Young who remained omitted from the fraud and negligent misrepresentation claims. The same affidavits of merit were attached to the amended complaint. The amended complaint was filed within the two-year statute of limitations applicable to the product liability and general negligence claims.

The respondents again filed motions to dismiss, arguing that the estate used its amended complaint to reclassify the case as something other than medical negligence. Also, the respondents argued that the supporting affidavits of merit were too vague to satisfy the estate's burden to identify each respondent, or to set forth an alleged act of negligence as to each respondent as required under NRS 41A.071.

In its oral decision, the district court found that the two affidavits of merit were defective because they did not provide what materials the experts reviewed to come to their conclusions,[4] and the alleged

[4]Neither the respondents nor the district court cited authority to support the proposition that it is necessary to identify the materials relied on by an expert in an affidavit of merit. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an argument that lacks the support of relevant authority). This court has reached the opposite conclusion. *See, e.g., Brown v. St. Mary's Reg'l Med. Ctr.*, No. 81434-COA, 2022 WL 1183458, at *3 (Nev. Ct. App. Apr. 20, 2022) (Order of Affirmance). Furthermore, no

wrongful conduct was not sufficiently specific as to each respondent. The court also took issue with the estate amending the complaint to "morph" its case, which the court found was only a medical negligence case, into a completely different case alleging general negligence and product liability.

In its written order, the district court stated that it had only granted the estate leave to amend so it could "address certain pleading discrepancies identified by the [respondents] in their respective motions." The referenced discrepancies, however, were not identified in the initial order granting the estate leave to amend. The only direction within the initial order was for the estate to "properly and specifically plead the allegations." The court also found that the expert affidavits were insufficient because they needed to "opine" on all the causes of action in the estate's complaint because "the entirety" of the estate's claims arose from medical judgment, treatment, or diagnosis. Although the entire complaint could have been dismissed on that basis alone, the district court addressed the merits of the estate's other claims and again found that each must be independently dismissed. Normally, a complaint dismissed for failure of an affidavit of merit to comply with NRS 41A.071 is dismissed without prejudice. In this instance, however, the order was entered after the statute of limitations had passed on many of the estate's claims. So, the order effectively ended the estate's case.

This appeal followed, and the estate raises the following arguments: (1) the affidavits of merit complied with NRS 41A.071; (2) the estate's claims for ordinary negligence should have survived a motion to

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such requirement is within NRS 41A.071. Therefore, we decline to adopt such a requirement.

dismiss under the common knowledge exception; (3) the district court failed to analyze the estate's claim for elder abuse under a theory of financial exploitation of John; (4) the implant used by the respondents is a product, making a claim for strict product liability proper against the respondents; and (5) the district court erred in dismissing the fraud and intentional misrepresentation claims. We agree that the estate's claims for medical negligence should have survived a motion to dismiss. We also agree that the product liability claim as to each respondent except Dr. Young, as well as the estate's claim for fraud as it related to the respondents' treatment of John, should not have been dismissed. We disagree that the estate properly brought claims for ordinary negligence and elder abuse.[5] Therefore, we affirm in part, reverse in part, and remand for further proceedings.

Nevada is a notice pleading jurisdiction that liberally construes pleadings. *See* NRCP 8(a); *see also Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599, 584 P.2d 159, 160 (1978); *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 309, 468 P.3d 862, 878 (Ct. App. 2020). Notice pleading requires plaintiffs to allege facts supporting a legal theory, but it does not require the legal theory itself be correctly identified. *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995). If a complaint fails to meet the notice pleading standard, then the plaintiff has

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[5]In its opening brief, the estate did not argue that the district court erred in dismissing its claims for IIED, NIED, negligent misrepresentation, or wrongful death. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised in an appellant's opening brief are deemed waived). Further, we do not supply an argument on a party's behalf, and review only the issues that the parties present on appeal. *See Pelkola v. Pelkola*, 137 Nev. 271, 273, 487 P.3d 807, 809 (2021). Therefore, we do not disturb the district court's dismissal of these causes of action.

failed to state a claim, and the claim may be dismissed. NRCP 12(b)(5). A complaint should be dismissed "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [it] to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

If outside of the statute of limitations, a district court may grant a plaintiff leave to amend its complaint to add an additional claim if that claim relates back to the original pleading. NRCP 15(c)(1). A new claim relates back if it "arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." *Id.* For claims not outside of the statute of limitations, NRCP 18(a) is permissive and allows joinder of those claims as either independent or alternative claims. Nevada law allows a plaintiff to plead alternative claims, and so long as one of the claims is sufficient, the pleading survives a motion to dismiss. NRCP 8(d)(2).[6]

On review of a motion to dismiss, this court recognizes all factual allegations in the complaint as true, draws all inferences in the plaintiff's favor, and reviews the district court's legal conclusions de novo. *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672. This court also reviews issues of statutory construction de novo. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014).

When read together with the amended complaint, the affidavits of merit satisfied NRS 41A.071

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[6]At the time of amendment, the claims for product liability and general negligence were both within their respective statutes of limitation, so these claims could have been brought independently by the estate and did not need to relate back to the medical negligence claim under NRCP 15(c)(1). *See* NRS 11.190(4)(e); *see also* NRCP 18(a).

The district court found that the estate's affidavits of merit were too vague to satisfy NRS 41A.071(1) and (4), whether read alone or in conjunction with the amended complaint. The estate concedes that, when read alone, its affidavits of merit do not include a specific respondent's name listed correspondingly to each line-by-line allegation of breach, but argues that *Zohar v. Zbiegien* directs the district court to read the complaint and affidavits of merit together to determine if NRS 41A.071 was satisfied. *See id.* at 741, 334 P.3d at 407 (concluding that an expert affidavit of merit attached to a medical malpractice claim, which otherwise properly supported the allegations in the complaint but did not identify all respondents by name in the affidavit, still complied with NRS 41A.071). The respondents argue that the amendment of NRS 41A.071 shows that the Nevada Legislature intended to remedy affidavits of merit that were too generalized.[7]

NRS 41A.071 was amended by the Nevada Legislature in 2015. This statute, as amended, requires a plaintiff suing on a claim of professional negligence to include an affidavit that:

> (1) Supports the allegations contained in the action;
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> (2) Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;

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[7]Only Drs. Golpa, Shagharyan, and G4 by Golpa raise this argument on appeal, so this is not a uniform argument by the respondents. Drs. Torkaman and Young argue the district court correctly applied *Zohar* by reading the amended complaint and affidavits of merit together before dismissing the complaint. As both arguments are addressed in this order, we still refer to the respondents collectively throughout.

> (3) Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
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> (4) Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

Complaints and affidavits attached to complaints are read together by a district court when deciding a motion to dismiss. *See* NRCP 10(c) (providing that "[a] copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes"); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (stating that "courts *must* consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on motions to dismiss, in particular, documents incorporated into the complaint by reference" (emphasis added)).

As the Legislature did not include any limitation on the incorporation of the affidavit and complaint, which it could have done, complaints for medical negligence and affidavits of merit are still read together, even after the amendment of NRS 41A.071. *Cf. Palmer v. Del Webb's High Sierra*, 108 Nev. 673, 680, 838 P.2d 435, 439–40 (1992) (Young, J., concurring) (explaining that "[t]he legislature could have easily provided that an occupational disease "means," "is" or "is defined as" any disease which "arises out of and in the course of the employment," but that the legislature did not, in fact, do so.) Further, in the eight years since amendment, this court and the supreme court of Nevada have continued to affirm the district courts' reliance on *Zohar* and its jurisprudence that an affidavit of merit and complaint for medical negligence must be read together. *See, e.g., Soong v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, No. 8272, 2021 WL 2935695, at *1 (Nev. July 12, 2021) (Order Granting Petition for Writ of Mandamus); *Brown v. St. Mary's Reg'l Med.*

Ctr., No. 81434-COA, 2022 WL 1183458, at *3 (Nev. Ct. App. Apr. 20, 2022) (Order of Affirmance); *cf. Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1028, 102 P.3d 600, 605 (2004) (recognizing that "NRS 41A.071 governs the threshold requirements for initial pleadings in medical malpractice cases, not the ultimate trial of such matters").

The purpose of NRS 41A.071 is to ensure that plaintiffs file non-frivolous medical malpractice actions. *Baxter*, 131 Nev. at 766, 357 P.3d at 931. The purpose is not to force medical negligence claimants to conduct independent discovery outside of litigation. Adopting such a harsh interpretation would "undoubtedly deny many litigants the opportunity to recover against negligent parties." *Zohar*, 130 Nev. at 739, 334 P.3d at 406.

Here, when the amended complaint and affidavits of merit are considered together, the estate has satisfied its burden under NRS 41A.017. In this case, John is no longer alive to provide the estate with specific details concerning "who did what" both prior to and during his surgery. This information is solely in the respondents' possession and would necessarily be revealed during discovery.

Even so, the affidavits support allegations that the respondents failed to properly screen, evaluate, and warn John before the implant procedure. The affidavits also support allegations that the sedation of John was improper, as was the failure to monitor him, stabilize him post-operation, and discharge him into conditions the respondents should have known would exacerbate John's low blood oxygen level. This is not an exhaustive list of what the affidavits support; yet it is sufficient to show, that when read together with the complaint, each respondent was identified as having failed to "use the reasonable care, skill or knowledge" required of health care providers when rendering treatment or medical services to

John.[8] *See* NRS 41A.015. Thus, we disagree with the district court's finding that the affidavits of merit lacked the requisite specificity pursuant to *Zohar*, and conclude that the district court erred in dismissing the estate's medical negligence claims against each respondent.

The estate's claims for general negligence were properly dismissed

The estate argues that its ordinary negligence claims were improperly dismissed because such claims do not need an expert affidavit. The estate also highlights that several of its averments, like those alleging negligent marketing, do not sound in professional negligence. In addition, the estate contends that its claims involving the respondents' medical treatment of John fall into the common knowledge exception, and thus a supporting expert affidavit was not required.

The respondents argue that each of the estate's claims arise from their medical judgment, treatment, or diagnosis of John as each of the respondents asserts that they are a provider of health care as understood under NRS 41A.017.[9] Further, the respondents assert that the estate

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[8]We read allegations of negligence by the surgical and attending dentists as applying to both Drs. Torkaman and Shagharyan. There has been no discovery in this case, and John never regained consciousness to tell anyone which dentist, or if both dentists, conducted his surgery. *Cf. Rocker v. KPMG LLP*, 122 Nev. 1185, 1196, 148 P.3d 703, 710 (2006), *abrogated on other grounds by Buzz Stew*, 124 Nev. 224, 181 P.3d 670 (allowing a relaxed pleading standard when facts necessary for pleading "are peculiarly within the defendant's knowledge" before discovery).

[9]A "provider of health care" includes "a physician licensed pursuant to chapter 630 or 633 of NRS . . . dentist . . . clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees." NRS 41A.017.

alleges an insufficient factual basis to support claims of negligence other than professional negligence.

To prevail on a general claim of negligence, a plaintiff must establish four elements: "(1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages." *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009). Nevada law recognizes a common knowledge exception to the medical expert affidavit requirement that allows for a plaintiff to bring a general negligence claim in a case that involves, or is adjacent to, medical treatment. *Estate of Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. 350, 350, 466 P.3d 1263, 1264-65 (2020). This exception provides that "where lay persons' common knowledge is sufficient to determine negligence without expert testimony, the affidavit requirement does not apply." *Id.* at 350, 466 P.3d at 1265. This exception is "extremely narrow and only applies in rare situations." *Id.* at 356, 466 P.3d at 1268.

To determine how to characterize a claim, this court looks to the gravamen of each claim "rather than its form to see whether each individual claim is for medical negligence or ordinary negligence." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 643, 403 P.3d 1280, 1285 (2017). The framework for determining whether a claim falls under the common knowledge exceptions is as follows: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Curtis*, 133 Nev. at 356, 466 P.3d at 1268 (quoting *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 684 N.W.2d 864, 871 (Mich. 2004)).

The estate's allegations of general negligence can largely be summarized into two categories: (1) those that relate to the treatment of John, and (2) those that involve alleged misleading marketing. The estate failed to state any claim for general negligence in either category for two reasons. First, the estate's allegations arising from the respondents' intake, treatment, and discharge of John all occurred within the course of the professional relationship between the parties wherein the respondents were relying on their medical judgment. Their judgment at each stage of John's care raises questions beyond what common knowledge and experience provide, so the allegations related to John's treatment arise from medical negligence and were properly dismissed as general negligence claims.

Second, on those claims that do not involve any form of medical judgment—such as those for alleged negligent marketing—the estate has not pleaded sufficient factual allegations to support the claims. Nowhere in the amended complaint does the estate allege that John ever saw the respondents' marketing materials or heard the alleged misrepresentations. Nor does the estate allege that John was influenced by the respondents' marketing in his choice to undergo implant surgery at G4 by Golpa. In fact, on appeal, the estate claims that John met the respondents at a golf event and was convinced to inquire about their services from that meeting. So, in its amended complaint and on appeal, the estate has failed to make any allegation, allege facts, or otherwise make an argument that can reasonably support an inference that the respondents' marketing was a legal cause of John's injuries and death. As causation is an essential element to a general

negligence claim, the estate failed to state a claim for general negligence.[10] Thus, the district court properly dismissed all of the estate's general negligence claims.

The estate's claim for elder abuse was properly dismissed

Regarding elder abuse, the estate argues that the district court disregarded its allegations that John was subjected to financial exploitation by the respondents. The estate asserts that its allegations show that the respondents targeted older persons for pecuniary gain. The respondents argue that this claim is purely medical negligence and that the estate is trying to avoid capped damages.

An action for elder abuse is a statutory cause of action found under NRS 41.1395. It is a separate and distinct cause of action from professional negligence. *Yafchak v. S. Las Vegas Med. Invs., LLC*, 138 Nev., Adv. Op. 70, 519 P.3d 37, 40 (2022). While legally discrete, the facts supporting these two types of claims are often closely related or overlapping. *Id.* Under the statute, exploitation means, in relevant part, "any act taken by a person who has the trust and confidence of an older person . . . to . . . [o]btain control, through *deception, intimidation or undue influence*, over the money, assets or property of [an] older person . . . with the intention of permanently depriving" the older person of their money, assets, or property. NRS 41.1395(4)(b)(1) (emphasis added).

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[10]In addition to causation, the estate also needed to satisfy that the respondents had a duty of care and breach of that duty. *See Sanchez*, 125 Nev. at 824, 221 P.3d at 1280. The estate's complaint does not allege the duty of care of the marketer of a dental implant, nor how that duty was breached.

Assuming without concluding that the estate could establish that the respondents obtained "control" over John's money by selling him dental implants, the estate has not alleged any facts that give rise to an inference of either *intimidation* or *undue influence* by the respondents in the transaction. Alleged *deception* can be reasonably inferred from the estate's multiple allegations of misleading marketing. But again, the estate failed to allege that John was persuaded by or even saw the marketing. Further, while the price of the implants is significant, there is no allegation that the amount charged to John was outside of the normal market range. Accordingly, the district court properly dismissed the claim for elder abuse against all respondents.

The estate alleged sufficient facts to bring a claim of product liability against all respondents except Dr. Young

The estate avers that the G4 Implant Solution, which was the service John hired the respondents for, is both a procedure *and* a product. Dr. Golpa seemingly invented this proprietary process that involves the design and in-house engineering of custom dental implants, of which G4 by Golpa claims to be the only provider.[11] As to Drs. Shagharyan and Torkaman, the estate alleges that they operate their dental practices inside the G4 by Golpa's office space, are joint venturers of G4 by Golpa, and sell the G4 Implant Solution to customers. The estate avers that the implant could have failed in some way, but without discovery, it is unknown if the failure was due to the technique, the design, or the manufacturing of the implant itself.

[11]The estate included language from G4 by Golpa's website that appears to substantiate these allegations.

On appeal, G4 by Golpa and Dr. Golpa do not dispute that the implant is their product.[12] Instead, they argue that there is no allegation that the implant itself caused John's death or was somehow defective.[13] Drs. Shagharyan and Torkaman argue that only a procedure is at issue, not a product. Young argues he is not a seller of goods and only an anesthesiologist.

Under Nevada law, recovery for strict product liability requires a plaintiff to prove the following: "[(1)] the product had a defect which rendered it unreasonably dangerous, [(2)] the defect existed at the time the product left the manufacturer, and [(3)] the defect caused the plaintiff's injury." *See Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 214, 826 P.2d 570, 571 (1992).

A product is defective if it is "dangerous because [it] fail[s] to perform in the manner reasonably to be expected in light of [its] nature and intended function." *Allison v. Merck & Co.*, 110 Nev. 762, 767, 878 P.2d 948, 952 (1994). There are various ways for a plaintiff to establish that a product is unreasonably dangerous. For example, a product may be unreasonably dangerous and defective if the manufacturer failed to provide an adequate warning. *See, e.g., Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191, 209 P.3d 271, 275 (2009). In these instances, a plaintiff can meet their burden of

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[12]*See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious); *see also Schueler v. Ad Art, Inc.*, 136 Nev. 447, 454-55, 472 P.3d 686, 692-93 (Ct. App. 2020) (utilizing the case-by-case approach to conclude that a casino's large exterior sign was a product "within the meaning of the doctrine of strict products liability").

[13]Contrary to this argument, the estate alleged in its amended complaint that the product was dangerous, defective, and caused John's injury and death. So, the argument by G4 by Golpa and Dr. Golpa fails.

persuasion by demonstrating that a different warning would have prompted them to take precautions to avoid the injury. *Id.* Strict liability may also be imposed, even for a product that is faultlessly made, if it was unreasonably dangerous to place the product in the hands of a user without suitable warning about the safe and proper use of the product, such as a dental implant may be in the theoretical hands of an undertrained dentist. *See Motor Coach Indus., Inc. v. Khiabani*, 137 Nev. 416, 419-20, 493 P.3d 1007, 1011-12 (2021). Likewise, if a commercially feasible design could have made the product safer, then that product may be found to be unreasonably dangerous. *Eads v. R.D. Werner Co.*, 109 Nev. 113, 114-15, 847 P.2d 1370, 1371 (1993).

There are also various theories of product liability recovery. For example, the doctrine of product liability is applicable to both the design and manufacture of all types of products. *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970). Perhaps most importantly here, a product can still be found to be the legal cause of an injury even if it is not the sole cause of the injury, so long as it is a substantial factor in the injury. *Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 520, 893 P.2d 367, 370 (1995).

The first element in a product liability claim is that the product had a defect that rendered it unreasonably dangerous. The estate alleged that the unreasonable danger of the implant included the respondents' failure to test, failure to warn, and that the product—as used—was dangerous. The second element is that the defect in the product must have existed at the time the product left the manufacturer. Considering that G4 by Golpa allegedly markets the implant as being manufactured at its "in-house laboratories," any defect in John's implant would have been present

when it left the manufacturer. The third element, that the defect caused the plaintiff's injury, is similarly met. The estate alleged that the implant injured John and led to his death. The estate did not need to allege it was the sole cause of John's death—only that it was a substantial factor. *See Price,* 111 Nev. at 520, 893 P.2d at 370.

The district court found that there was no set of facts that would entitle the estate to relief on a product liability claim. However, the estate alleged that the implant was insufficiently tested, that there was a failure by the respondents to properly warn about the side effects of the implant, and that the implant was unreasonably dangerous as designed, and any or all of which caused the death of John. Considering that Dr. Golpa invented the implant, and that each implant is custom designed and manufactured in-house, there are several plausible factual scenarios where a dangerous, improperly tested, or faulty designed implant could have obstructed John's oxygen or protracted his surgery, either of which may have been a reasonably substantial factor in John's death.

Because G4 by Golpa and Dr. Golpa designed the implant, and manufactured and sold it to customers with the alleged assistance of Drs. Shagharyan and Torkaman, the district court erred in finding there was no tangible product at issue in this case. Further, the district court was mistaken that there was no set of facts that would entitle the estate to relief on its claim. Thus, the district court erred in dismissing the product liability claim against G4 by Golpa and Drs. Golpa, Shagharyan, and Torkaman. We conclude, however that the product liability claim against Dr. Young was properly dismissed because there is no allegation by the estate that supports a reasonable inference that he sells, profits from, designs, or installs the implant.

The estate's claims for fraud and intentional misrepresentation

The estate argues that its claims for fraud should have survived. The estate alleges fraud based upon the respondents' marketing and misrepresentations related to John's treatment. Generally, in making an allegation for fraud, a plaintiff must state with particularity the circumstances constituting the fraud. NRCP 9(b). The circumstances that must be specified include the time, place, identity of the parties involved, and nature of the fraud, though mental states of a party may be averred generally. *Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874, 874 (1981).

The estate's allegations of deceptive or fraudulent marketing practices fail under NRCP 12(b)(5) because there are no facts in the amended complaint that show justifiable reliance on a false statement and damage by the reliance. *See Blanchard v. Blanchard*, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992) (explaining that a claim for intentional misrepresentation requires, among other elements, justifiable reliance on a false statement and damage as a result of the reliance). As addressed above, the estate never alleged that John relied on, was influenced by, or even saw or heard the respondents' marketing materials or public statements. Instead, on appeal, the estate says that the respondents directly solicited John at a golf event. But no allegations of what was said by the respondents to John at the golf event appear in the amended complaint.

Turning to its fraud claim based upon alleged misrepresentations related to John's treatment, the estate argues that a relaxed pleading standard should apply since John was the only one who

would have information about the representations made to him, other than the respondents. The respondents do not answer this argument on appeal.[14]

When a plaintiff cannot plead fraud with particularity because the facts necessary for pleading with particularity "are peculiarly within the defendant's knowledge" before discovery, a relaxed pleading standard is allowed. *See Rocker v. KPMG LLP*, 122 Nev. 1185, 1196, 148 P.3d 703, 710 (2006), *abrogated on other grounds by Buzz Stew*, 124 Nev. 224, 181 P.3d 670. In such a situation, a district court may permit the plaintiff to conduct limited discovery to amend the complaint, generally when the plaintiff: (1) pleaded sufficient facts in the complaint to support a strong inference of fraud; (2) averred that a relaxed pleading standard was appropriate; and (3) showed in the complaint that fraud could not be pleaded with more particularity because the required information is in the defendant's possession. *Id.* at 1195, 148 P.3d at 709.

Taking as true the estate's remaining allegations related to John's treatment, its claims of fraud should have survived a motion to dismiss under NRCP 12(b)(5). For example, the estate alleges that the respondents fabricated John's medical records, lied to John about him being a suitable candidate for the procedure, and lied about the safety of the procedure to induce John to use their services. These are sufficient facts to support an inference of fraud. Also, the record shows that the estate raised the difficulty of pleading allegations related to the respondents' conduct, as well as statements made to John, given that he was never fully coherent after surgery and there has not yet been any discovery in this case. This

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[14]*See Ozawa*, 125 Nev. at 563, 216 P.3d at 793 (treating a party's failure to respond to an argument as a concession that the argument is meritorious).

was adequate for the district court to apply a relaxed pleading standard and order limited discovery regarding the fraud claims rather than dismissal.

Accordingly, we

REVERSE the dismissal of the medical negligence claim, the product liability claim against G4 by Golpa and Drs. Golpa, Shagharyan, and Torkaman, and the fraud claims relating to John's treatment, AFFIRM the dismissal of the remaining claims, and REMAND to the district court for proceedings consistent with this order.[15]

_____, C.J.
Gibbons

_____, J.
Westbrook

cc: Hon. Adriana Escobar, District Judge
Hon. William C. Turner, Settlement Judge
Bighorn Law/Las Vegas
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
McBride Hall
John H. Cotton & Associates, Ltd.
Lipson Neilson P.C.
Eighth District Court Clerk

[15]Insofar as the parties have raised any other arguments that are not specifically address in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.