N THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF ERIKA LEWIS; AL LEWIS AND BARBARA LEWIS, INDIVIDUALLY; AND BARBARA LEWIS AS ADMINISTRATOR OF THE ESTATE OF ERIKA LEWIS, DECEASED, Appellants, vs. MARC O. O'CONNOR, M.D.; SUNRISE HOSPITAL, D/B/A SUNRISE HOSPITAL AND MEDICAL CENTER; SUNRISE HOSPITAL, INC., D/B/A SUNRISE HOSPITAL AND MEDICAL CENTER, LLC; AND COLUMBIA SUNRISE HOSPITAL, D/B/A SUNRISE HOSPITAL, Respondents.	No. 39849
ESTATE OF ERIKA LEWIS; AL LEWIS AND BARBARA LEWIS, INDIVIDUALLY; AND BARBARA LEWIS AS ADMINISTRATOR OF THE ESTATE OF ERIKA LEWIS, DECEASED, Appellants, vs. MARC O. O'CONNOR, M.D.; AND SUNRISE HOSPITAL, D/B/A SUNRISE HOSPITAL AND MEDICAL CENTER, Respondents.	No. 39911

FILED

MAR 03 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from separate judgments entered on a jury verdict in a medical malpractice case in favor of respondents Dr. Marc O'Connor and Sunrise Hospital. Eighth Judicial District Court, Clark County; Ronald D. Parraguirre, Judge.

05-04185

These appeals arise from the district court's denial of the appellants' proffered jury instruction on a loss of chance theory of recovery.[1] Because the appellants pled and presented their case at trial based on a traditional negligence theory, we conclude that the district court did not abuse its discretion in rejecting the instruction, and therefore affirm the judgments.

FACTS AND PROCEDURAL HISTORY

On the morning of November 26, 1995, Erika Lewis became critically ill and her mother took her to respondent Sunrise Hospital on an emergency basis. Respondent Dr. Marc O'Connor, a pediatric emergency room physician, oversaw Erika's emergency room care. Shortly after her transfer to a pediatric ward, Erika suffered cardiac arrest and died.

The appellants sued Dr. O'Connor and Sunrise Hospital for wrongful death, proceeding on a traditional negligence theory. At trial, both parties presented expert testimony as to whether Dr. O'Connor and the Sunrise Hospital nursing staff met the standard of care in their treatment of Erika, with most of the appellants' witnesses testifying that she had better than a 50 percent chance of survival, and the respondents' experts testifying that she had practically no chance of survival. The appellants also presented the deposition testimony of Dr. Jeffrey Johnson, who described how the respondents' treatment of Erika fell below the standard of care. Dr. Johnson stated that Erika had a 75 percent chance of surviving the emergency room, but had no better than a 40 percent chance of surviving in the long term. The respondents relied on Dr.

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[1]Perez v. Las Vegas Medical Center, 107 Nev. 1, 6, 805 P.2d 589, 592 (1991) (creating a right of malpractice recovery in wrongful death or debilitating injury cases based upon loss of chance of survival or avoidance of debilitating injury).

Johnson's testimony to bolster their theory that Erika would not have survived regardless of the respondents' actions.

Near the close of trial proceedings, the question arose as to whether the appellants could rely on loss of chance as an alternative theory of recovery. The appellants moved to amend the complaint to include this theory, arguing that the jury should hear alternative theories of recovery The respondents opposed the motion, asserting that, because the appellants presented their case at trial based upon traditional negligence principles, the appellants could not change or add new theories of recovery (prior to trial, based upon what appeared to be good and sufficient litigation judgment, counsel for appellants repudiated any intent to pursue a loss of chance case, in the alternative or otherwise). The district court denied appellants' motion to amend to conform to proof.

On the last day of trial, Lewis proposed the following loss of chance instruction:

> The plaintiffs also seek to recover damages based on the loss of chance doctrine. The plaintiff must present evidence tending to show, to a reasonable medical probability that some negligent act or omission by one or both of the defendants reduced a substantial chance of survival for Erika Lewis given appropriate medical care.

The district court denied this instruction, stating that the evidence failed to support a loss of chance theory of recovery and that such an instruction would confuse the jury.

The jury ultimately returned a 5-3 verdict in favor of respondents. Appellants appeal, asserting that the district court's failure

to instruct the jury regarding the loss of chance doctrine warrants a new trial.

DISCUSSION[2]

Proofs adduced at trial arguably justified an instruction based on a loss of chance theory. Certainly, expert witnesses testified that Erika started out with less than a 50 percent chance of survival apart from the quality of treatment provided by respondents. In addition, the district court improperly refused this instruction based upon perceived confusion from providing instructions on alternate theories of recovery. However, because the appellants prepared and tried their case based on a traditional negligence theory, and renounced the loss of chance theory until both sides rested their respective cases, the district court otherwise properly exercised its discretion in refusing the instruction. In reaching this result, we make several observations regarding the two theories and their interplay.

First, it is unnecessary for a plaintiff to specifically plead loss of chance because it lies outside the ambit of NRCP 9 regarding the pleading of special matters. Also, because of the liberality of pleading

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[2]We reject respondents' assertion that we lack jurisdiction over this appeal because appellants filed their notice of appeal during the pendency of a NRCP 59(e) motion to alter or amend judgment. Although couched in terms of NRCP 59(e), the substance of the motion did not implicate that rule. Accordingly, NRAP 4 does not operate to nullify appellants' notice of appeal in this instance. As this court has stated, it "has never hesitated to look to the substance of the relief sought, rather than the label attached to it." Southern Nev. Homebuilders v. N. Las Vegas, 112 Nev. 297, 303, 913 P.2d 1276, 1280 (1996), overruled on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 35 P.3d 964 (2001).

allowed under NRCP 8,[3] a complaint that avers proximate causation and damages provides sufficient notice to sustain either a traditional negligence theory or a theory based upon loss of chance of recovery.[4] It was therefore unnecessary for the appellants to seek amendment of the complaint to conform to the proof supporting loss of chance, because the complaint was sufficient as stated.

Second, alternative instructions on the two alternate theories would not have resulted in undue jury confusion. Despite argument and legal authority that suggests otherwise, the two theories are not mutually antagonistic. Accordingly, when evidence adduced at trial conflicts regarding a patient's chance of survival, the plaintiff may proffer an alternative instruction based on a loss of chance theory of recovery.[5] Thus, the district court erred in refusing the instruction on loss of chance based on perceived complexity in the use of instructions concerning alternate theories of recovery.

Finally, the appellants' proposed loss of chance instruction failed to inform the jury as to the proper method of calculating damages

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[3]See Chavez v. Robberson Steel Co., 94 Nev. 597, 599, 584 P.2d 159, 160 (1978) ("Nevada is a notice-pleading jurisdiction and liberally construes pleadings to place into issue matter which is fairly noticed to the adverse party.").

[4]Similarly, a defendant may defend against traditional negligence or medical malpractice claims by arguing for reduced damages under a proximate cause analysis without specifically alleging loss of chance as a matter of "avoidance" under NRCP 8(c).

[5]Likewise, a medical malpractice defendant may argue loss of chance in the alternative, by stating, for instance, that the defendant's actions did not proximately cause the patient's death, but rather, reduced by a substantial degree the patient's chance of survival.

under this theory. A proper instruction would have advised the jury to multiply the percentage chance of lost survival actually caused by the respondents by the total amount of damages it would have awarded under a traditional wrongful death claim.[6] That said, the failure to offer a more specific loss of chance instruction is not determinative of our resolution of the matter on appeal. As noted, the parties litigated the matter through the conclusion of evidence on the assumption that the appellants would not press a loss of chance claim. Thus, the district court's refusal to give the proffered loss of chance instruction does not compel reversal.[7]

CONCLUSION

Even though sufficient evidence supported an instruction on the alternative loss of chance theory of recovery, the district court did not abuse its discretion in denying the appellants' proffered instruction. Appellants renounced a loss of chance theory from the outset and presented their case based on a traditional negligence theory. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

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[6]Perez, 107 Nev. at 6, 805 P.2d at 592.

[7]See Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (stating that this court will affirm the order of the district court if it reached the correct result, but for different reasons).

cc: District Judge
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