IN THE SUPREME COURT OF THE STATE OF NEVADA

MARILYN MONROE, INDIVIDUALLY, AND AS NATURAL MOTHER AND GUARDIAN AD LITEM OF JAMES MONROE, A MINOR,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHY A. HARDCASTLE, DISTRICT JUDGE,
Respondents,
and
COLUMBIA SUNRISE HOSPITAL AND MEDICAL CENTER, FORMERLY KNOWN AS SUNRISE HOSPITAL AND MEDICAL CENTER,
Real Party in Interest.

No. 41532

FILED

APR 27 2004

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

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This is a petition for a writ of mandamus in a complex medical malpractice case challenging the district court's order granting real party in interest's, Columbia Sunrise Hospital and Medical Center's, motions for summary judgment and partial summary judgment. Additionally, petitioner, Marilyn Monroe, individually and as natural mother and guardian ad litem of James Monroe, her minor son, seeks a writ of mandamus ordering the respondent district court to grant Monroe's countermotion for leave to amend her complaint.

Monroe filed a medical malpractice complaint regarding the prenatal care given to Monroe and the subsequent delivery of James by Sunrise. Sunrise filed a motion for summary judgment requesting that all of Monroe's claims in her individual capacity be dismissed, claiming that

Monroe had failed to allege any damages. Sunrise also filed a motion for partial summary judgment as to all allegations of negligence arising out of the care and treatment of Monroe or James prior to May 30, 1995. The district court granted both Sunrise's motion for summary judgment and Sunrise's motion for partial summary judgment. Trial on James' remaining claims has been continued pending this writ proceeding.

In her petition for a writ of mandamus, Monroe requests that this court direct the district court to vacate its order granting Sunrise summary judgment and partial summary judgment, and that this court order the district court to grant Monroe's counter-motion for leave to amend the complaint. We have carefully considered Monroe's petition, along with Sunrise's answer, and we are satisfied that this court's intervention by way of extraordinary relief is warranted at this time.

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 an arbitrary or capricious exercise of discretion.[1] Mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered.[2] A writ of mandamus will not issue if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law.[3] An appeal is generally an

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[1]NRS 34.160; see also Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-604, 637 P.2d 534, 536 (1981).

[2]State of Nevada v. Dist. Ct. (Ducharm), 118 Nev. 609, 614, 55 P.3d 420, 423 (2002); Poulos v. District Court, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); see also Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

[3]NRS 34.170; see also State of Nevada v. Dist. Ct. (Ducharm), 118 Nev. at 614, 55 P.3d at 423 (2002).

adequate and speedy remedy, precluding writ relief.[4] Nevertheless, "under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition," this court may exercise its discretion.[5]

In the instant case, if Monroe proceeds to trial on James' remaining claims, and after trial appeals on the issue of the dismissal of her claims and certain dates of alleged negligent treatment by Sunrise, she will be subjected to the undue burden and expense of proceeding to trial once again on these issues. Thus, we conclude that sound judicial economy and administration favor granting Monroe's petition.

Motion for summary judgment as to Monroe's claims

Monroe asserts that the district court erred by granting summary judgment in favor of Sunrise on her claim for negligent infliction of emotional distress. Monroe maintains that she properly pleaded and established a prima facie case for negligent infliction of emotional distress. We agree.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to summary judgment as a matter of law.[6] In determining whether summary judgment is warranted, the court must view all evidence and reasonable

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[4]See Guerin v. Guerin, 114 Nev. 127, 131, 953 P.2d 716, 719 (1998).

[5]State of Nevada v. Dist. Ct. (Ducharm), 118 Nev. at 614, 55 P.3d at 423.

[6]Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441 (1993); see also NRCP 56(c).

inferences in the light most favorable to the nonmoving party.[7] If there is the slightest doubt as to the operative facts, the parties are not to be deprived of a trial on the merits.[8]

"To prevail on a negligence theory, a plaintiff must generally show that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages."[9] Summary judgment is proper only if a moving defendant can show that one of the elements of the plaintiff's prima facie case is clearly lacking as a matter of law.[10]

We have observed that, "'Nevada is a notice pleading jurisdiction and we liberally construe pleadings to place matters into issue which are fairly noticed to the adverse party.'"[11] Further, "'a complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought.'"[12]

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[7]Posadas, 109 Nev. at 452, 851 P.2d at 442.

[8]Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-591 (1991).

[9]Scialabba v. Brandise Constr. Co., 112 Nev. 965, 968, 921 P.2d 928, 930 (1996).

[10]Sims v. General Telephone & Electric, 107 Nev. 516, 521, 815 P.2d 151, 154 (1991).

[11]Hall v. SSF, Inc., 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) (quoting Pittman v. Lower Court Counseling, 110 Nev. 359, 365, 871 P.2d 953, 957 (1994)); see also NRCP 8(a).

[12]Hall, 112 Nev. at 1391, 930 P.2d at 98.

Here, Monroe's complaint names her individually and as guardian ad litem of James. Paragraphs X, XIV, and XIX of the complaint allege that Monroe was seen various times at Sunrise, that Sunrise owed her a high duty of care, and that the prenatal care and treatment she received fell below the standard of care. Paragraph XVII states that as a direct and proximate result of the substandard care rendered by Sunrise, Monroe "suffered extreme emotional damage and both physical and financial hardship." Based on these allegations, we conclude that Sunrise was on notice that emotional damage suffered by Monroe was to be an issue at trial.

Additionally, we conclude that Monroe, as a direct victim, may assert a separate and cognizable cause of action for negligent infliction of emotional distress. We have previously extended recovery for negligent infliction of emotional distress from bystanders to direct victims.[13] We have held that it is only logical to allow a direct victim to recover for negligent infliction of emotional distress if a bystander is allowed such recovery.[14] Thus, we conclude that Monroe can assert a primary claim on her behalf and in recognition of her emotional injuries, as opposed to a derivative injury on behalf of James.

We also note that in order to recover under this theory, Monroe need not establish that physical injury occurred first. We have observed that, "in cases where emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of 'serious emotional distress' causing physical injury or

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[13]Shoen v. Amerco, Inc., 111 Nev. 735, 748, 896 P.2d 469, 477 (1995).

[14]Id.

illness must be presented."[15] The record indicates that there is evidence of serious emotional distress resulting in illness, as Monroe suffered from a nervous breakdown requiring hospitalization.

Accordingly, we conclude that the district court erred in granting Sunrise's motion for summary judgment as to Marilyn's claim of negligent infliction of emotional distress.[16]

Motion for partial summary judgment as to Sunrise's acts of negligence on April 29, 1995; May 22, 1995; May 25, 1995; and May 30, 1995

Monroe claims that the fact that James had not suffered irreversible neurological damage as of May 30, 1995, the date Dr. Lipschitz conducted a biophysical profile of James, does not indicate that he did not suffer any injury on prior dates of treatment by Sunrise; namely, April 29, 1995; May 22, 1995; May 25, 1995; and May 30, 1995. Pursuant to the "loss of chance" doctrine, Monroe maintains that Sunrise's acts decreased James' chance for a more favorable outcome and were a substantial factor in James' irreversible brain damage. Monroe also claims that she has raised a genuine issue of material fact regarding causation for all of Sunrise's acts of negligence prior to May 31, 1995. We agree.

First, we conclude that the facts of this case come within the criteria set forth in Perez v. Las Vegas Medical Center[17] for asserting a

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[15]Olivero v. Lowe, 116 Nev. 395, 399, 995 P.2d 1023, 1026 (2000).

[16]Based on our conclusion herein, we need not address Monroe's argument that she be allowed to assert emotional distress damages as part of a direct medical malpractice claim under the California Supreme Court's ruling in Burgess v. Superior Court, 831 P.2d 1197 (Cal. 1992).

[17]107 Nev. 1, 805 P.2d 589 (1999).

claim under the "loss of chance" doctrine. In Perez, we adopted the "loss of chance" doctrine and recognized that "[u]nder this doctrine, the injury to be redressed by the law is not defined as the death [or debilitating injury] itself, but, rather, as the decreased chance of survival [or avoiding debilitating injury] caused by the medical malpractice."[18] In order to recover damages under the "loss of chance" doctrine, a plaintiff must suffer death or debilitating injury in addition to experiencing a decreased chance of survival.[19] Further, "in order to create a question of fact regarding causation in these cases, the plaintiff must 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."[20] However, expert testimony does not have to specifically quantify the percentage chance of survival.[21]

We have not previously addressed application of the "loss of chance" doctrine in the setting of obstetrical cases. However, we believe that the "loss of chance" doctrine is clearly appropriate in obstetrical medical malpractice cases where the negligence allows a preexisting condition to progress untreated, increasing the risk of harm or eliminating a substantial possibility of improvement or survival.[22]

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[18]Id. at 6, 8, 805 P.2d at 592-93.

[19]Id. at 6, 805 P.2d at 592.

[20]Id.

[21]Id. at 7, 805 P.2d at 592.

[22]Don Apfel, Medical Negligence, Loss of Chance in Obstetrical Cases, Trial, May 1993, at 51.

We conclude that the documents before us provide support for the proposition that Sunrise breached the applicable standard of reasonable medical conduct by not addressing the decelerations that continued to show in the various fetal monitoring strips taken at each of Monroe's visits to Sunrise prior to May 31, 1995. Additionally, Monroe has established through expert testimony that, although the radiographic study showed that James had not sustained irreversible brain injury prior to May 31, 1995, there was in fact low-level, recurrent hypoxic injury to James while in utero and prior to birth and that an earlier birth would have decreased these episodes of low-level injury.

Based on this testimony, we conclude that Monroe presented sufficient evidence to establish a factual question as to whether Sunrise's negligence on the dates of treatment prior to May 31, 1995, was a cause of James' injuries; thus, the district court erroneously granted Sunrise's motion for summary judgment as to all of Sunrise's alleged acts of negligence on April 29, 1995; May 22, 1995; May 25, 1995; and May 30, 1995.

Amendment of complaint

Monroe complains that the district court abused its discretion by denying her leave to amend her complaint pursuant to NRCP 15(a). Monroe maintains that under the relation-back doctrine, she should be allowed to amend the complaint to clearly assert her claims. Additionally, Monroe asserts that her motions for leave to amend were not requested in bad faith or for a dilatory motive.

The disposition of a motion for leave to amend a complaint is within the discretion of the trial court.[23] Generally, leave to amend a complaint is freely given. "'Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion.'"[24] Additionally, this court has noted that leave should be granted to amend a complaint to expressly state a cause of action where sufficient facts were presented to support the cause of action.[25] However, undue delay, bad faith or dilatory motives on the part of the movant constitute sufficient reasons for a district court to deny a motion to amend.[26]

"Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."[27] Additionally, under the relation-back doctrine, if the original pleadings give fair notice of the fact situation from which the new claim for liability arises, for statute of limitations purposes the amendment should relate back. On the other

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[23]Connell v. Carl's Air Conditioning, 97 Nev. 436, 439, 634 P.2d 673, 675 (1981).

[24]Adamson v. Bowker, 85 Nev. 115, 121, 450 P.2d 796, 800 (1969) (quoting Forman v. Davis, 371 U.S. 178 (1962)).

[25]See Sorensen v. First Federal, 101 Nev. 137, 139, 696 P.2d 995, 996 (1985); see also NRCP 15(a).

[26]Kantor v. Kantor, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000).

[27]NRCP 15(c).

hand, if the amendment states a new cause of action describing a new and entirely different source of damages, the amendment will not relate back, because the opposing party has not been put on notice concerning the facts in issue.[28]

Regarding Monroe's motion for leave to amend her complaint to include a claim for "loss of chance," the district court never specified the reason for denying her motion. There is no indication in the record that Monroe acted in bad faith or with dilatory motives in seeking leave to amend her complaint to clearly state a cause of action for "loss of chance." Monroe's original complaint also gave Sunrise fair notice that Monroe alleged negligence by Sunrise on all the dates of treatment and that James was injured by Sunrise's negligence. Further, Monroe did plead that Sunrise's negligence was the proximate cause of the injuries, and the term "loss of chance" is merely a refinement of this proximate cause allegation. Thus, the amendment would not state an entirely new source of damages or facts of which Sunrise had no notice. Accordingly, we conclude that the district court manifestly abused its discretion in denying Monroe's motion to amend for "loss of chance" since the district court made an outright refusal to grant Monroe leave to amend without any justifying reason and since sufficient facts were present to state a cause of action under this doctrine.

Regarding Monroe's motion for leave to amend to state a cause of action for negligent infliction of emotional distress, the record indicates that the amendment relates back because Monroe's emotional distress stemmed from the same conduct and factual situations set forth in the

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[28]See Frances v. Plaza Pacific Equities, 109 Nev. 91, 98, 847 P.2d 722, 726-27 (1993).

original complaint; namely, Sunrise's alleged negligence surrounding the prenatal care of Monroe and the delivery of James. It also appears that Sunrise was put on notice of the general facts in the original complaint. Specifically, Monroe alleged in her complaint that she had "suffered extreme emotional damage and both physical and financial hardship." Because the amendment to add a claim for negligent infliction of emotional distress appears proper and because the district court did not specify any reason for denying the motion for leave to amend, we conclude that the district court abused its discretion in refusing to grant Monroe leave to amend.

We conclude that the district court erred in granting Sunrise's motions for summary judgment and partial summary judgment and in denying Monroe's motion to amend her complaint. Although currently stayed, it appears that trial on the remaining claims in this complex medical malpractice case is scheduled to go forward.[29] If Monroe is not permitted to litigate these issues at the same time, she will be subjected to the undue burden and expense of multiple trials. We therefore conclude that extraordinary relief is warranted.

Accordingly, we ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order granting summary judgment and partial summary judgment to Sunrise and

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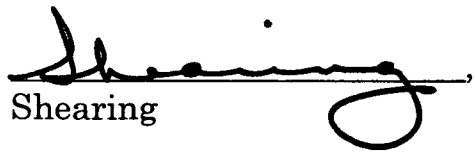
[29]We note that given the complex nature of this case, it may be appropriate on remand for appellant's counsel to associate or consult with an attorney with specific expertise in obstetrical medical malpractice law. See Model Rules of Prof'l Conduct R. 1.1 cmt. 1, 2 (1998).

denying Monroe's motion for leave to file an amended complaint.[30]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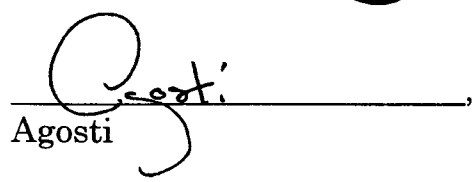
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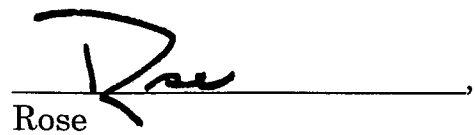
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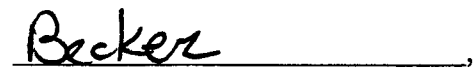
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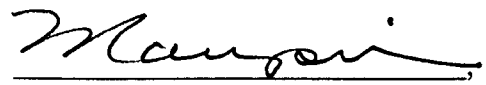
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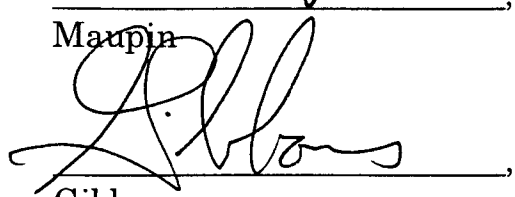
Gibbons, J.

cc: Hon. Kathy A. Hardcastle, District Judge
Althea Gilkey
Earley Savage
Clark County Clerk

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[30]The Honorable Michael L. Douglas, Justice, did not participate in the decision of this matter.