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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 94679-5

NO. 336972-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Judith Margarita Reyes, on her own
behalf and on behalf of the Estate of Jose Luis Reyes,
Deceased, and on behalf of her minor children, Erik (n/m/n)
Reyes (dob: 3/12/98) and Leslie Maria Reyes (dob: 6/23/99);

Appellant,

v.

Yakima Health District, a public entity in the State of Washington;
Christopher Spitters, M.D.; John Does Nos. 1-20;

Respondents.

BRIEF OF RESPONDENT
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I. INTRODUCTION

This action arises out of medical care provided to Appellant Judith Margarita Reyes' husband, Jose Luis Reyes, by Respondents Yakima Health District ("YHD") and Christopher Spitters, MD. Mrs. Reyes brought an action against Dr. Spitters for survivorship and wrongful death on behalf of Mr. Reyes' estate, herself, and her two children arising out of allegations of medical negligence and the tort of outrage. Dr. Spitters denies these claims.

On May 5, 2015, the trial court granted summary judgment dismissal of Mrs. Reyes' medical negligence claim because a declaration from her medical expert, Dr. Rosa Martinez, was insufficient to establish a *prima facie* claim of medical negligence. Thirteen days later, Mrs. Reyes filed an untimely Motion to Reconsider Dismissal ("Motion for Reconsideration") that contained a second declaration from Dr. Martinez. On July 15, 2015, the trial court denied Mrs. Reyes' Motion for Reconsideration, declined to consider the second declaration as it applied to the dismissed medical negligence claim, and granted summary judgment dismissal of Mrs. Reyes' remaining claim for outrage. The trial court also independently dismissed the wrongful

death claims against Dr. Spitters and YHD on the basis that the claims were barred by the statute of limitations. Mrs. Reyes appeals the summary judgment dismissal of her medical negligence, outrage, and wrongful death claims.

II. ASSIGNMENTS OF ERROR

Issue One: Whether the trial court properly dismissed Mrs. Reyes' medical negligence claim against Dr. Spitters because Dr. Martinez' first expert declaration was insufficient to support a claim of medical negligence?

Issue Two: Whether the trial court properly denied Mrs. Reyes' untimely Motion for Reconsideration and properly declined to consider Dr. Martinez' second declaration as it applied to Mrs. Reyes' medical negligence claim?

Issue Three: Whether the trial court properly dismissed Mrs. Reyes' claim for the tort of outrage?

Issue Four: Whether the trial court properly dismissed Mrs. Reyes wrongful death claims on the independent basis that they were barred by the statute of limitations?

III. COUNTER-STATEMENT OF THE CASE

Mrs. Reyes' Statement of the Case in her Opening Brief is not an accurate reflection of Mr. Reyes' medical records or the

procedural history of this case. The following Counter-Statement of the Case is based on Mr. Reyes' medical records from YHD, Dr. Spitters, the Yakima Chest Clinic, and the Washington State Department of Health's Public Health Laboratory and the May 5, 2015 and July 15, 2015 Verbatim Reports of Proceeding.

A. Factual History

Dr. Spitters is an infectious disease specialist certified by the American Board of Preventive Medicine. CP 29. One of Dr. Spitters' sub-specialties is the prevention and treatment of tuberculosis. As part of his practice, Dr. Spitters contracts with local public health districts in Washington to serve as their Local Health Officer. CP 29. Dr. Spitters is the Local Health Officer for YHD, where he helps evaluate and treat the district's tuberculosis patients. CP 29. The care provided by Dr. Spitters to Mr. Reyes in July and August 2010 was done in this capacity.

In 2009, Mr. Reyes presented to Rizwana Kahn, MD at the Yakima Chest Clinic complaining of intermittent chest pain. CP 149. A November 19, 2009 chest x-ray and a December 5, 2009 CT scan showed infiltrates in Mr. Reyes' lungs, leading to a differential diagnosis of pneumonia. CP 149. When Mr. Reyes'

symptoms did not subside, Dr. Kahn recommended a bronchoscopy to take samples from Mr. Reyes' lungs. CP 149.

Mr. Reyes underwent a bronchoscopy on April 20, 2010. CP 153. A sputum sample taken during the bronchoscopy tested positive for tuberculosis. CP 144; 146. On May 18, 2010, Mr. Reyes' positive tuberculosis results were reported to the Washington Department of Health and Yakima Health District by the Yakima Valley Memorial Hospital Microbiology Lab. CP 144; 146. Additional sputum samples analyzed by the Washington State Department of Health's Public Health Laboratory also cultured positive for tuberculosis. CP 155-158; 216.

On May 25, 2010, Mr. Reyes began tuberculosis treatment at YHD where he was prescribed a four drug combination of isoniazid, rifampin, ethambutol, and pyrazinamide. CP 7; 159; 213. During the course of Mr. Reyes' treatment, YHD attempted to monitor Mr. Reyes' liver function via hepatic (liver) function blood testing, but Mr. Reyes failed to come in for testing. CP 211; 222. YHD nurse Lela Hansen, RN urged Mr. Reyes to come in for testing. He finally presented to YHD for testing on July 8, 2010, approximately six weeks after he began treatment. CP 211. At the time, he denied any symptoms of a drug induced liver injury. The

next day, Devika Singh, MD, MPH, another infectious disease specialist for YHD, reviewed Mr. Reyes' test results, which showed low liver function levels. CP 211. Dr. Singh immediately instructed Nurse Hansen to hold Mr. Reyes' medication and have him return to YHD for more testing, but Mr. Reyes did not return. CP 211. Nurse Hansen contacted Dr. Spitters, the Local Health Officer for YHD and told him about Mr. Reyes. CP 211.

Dr. Spitters reviewed Mr. Reyes' medical records and called him, leaving a message in English and Spanish and asking for Mr. Reyes to call back immediately. CP 211. Dr. Spitters also told Nurse Hansen to continue to hold Mr. Reyes' medication and to send Mr. Reyes to the Emergency Room (ER). CP 212. Dr. Spitters reached Mr. Reyes via phone on July 15, 2010. CP 213. During their conversation, Mr. Reyes admitted that he had been experiencing fatigue and nausea for several weeks and that he had been drinking alcohol while taking his tuberculosis medications. CP 213. Mr. Reyes had been previously warned that drinking while on his tuberculosis medication could increase his risk of a drug induced liver injury. CP 211. Dr. Spitters directed Mr. Reyes to go to the ER, but Mr. Reyes declined. CP 213. Dr. Spitters also diagnosed Mr. Reyes with a drug induced liver injury. He

instructed Nurse Hansen to continue to hold Mr. Reyes' tuberculosis treatment and to send Mr. Reyes to the ER so that he could undergo additional liver tests and be referred for transplant review. CP 213-214.

In spite of the calls from Nurse Hansen and Dr. Spitters, Mr. Reyes did not return to YHD for over a week. CP 215. On July 16, 2010, Mr. Reyes presented to YHD for additional liver function testing, which was somewhat improved. CP 215. Dr. Spitters examined Mr. Reyes in the YHD clinic on July 21, 2010. CP 215-219. Dr. Spitters worked with Mr. Reyes' internal medicine specialist, Gilbert Ong, MD, and helped connect Mr. Reyes with the Hepatology Department at the University of Washington to treat Mr. Reyes' liver injury and potentially provide him with a liver transplant. CP 221; 224-225. Sadly, Mr. Reyes' condition declined over the course of the next several weeks, and he passed away from liver failure at the University of Washington on August 6, 2010. CP 226.

Mrs. Reyes Opening Brief alleges that Dr. Spitters called YHD "negligent" and that he accepted fault for Mr. Reyes' injury and death on behalf of YHD. *Opening Brief* at 6-7. Dr. Spitters denies these allegations, which are unsubstantiated by the record

before this Court. However, even if the Court takes Mrs. Reyes' far-fetched allegations as true, they are irrelevant to the issues set forth in Mrs. Reyes' Opening Brief.

B. Procedural History

Mrs. Reyes filed this lawsuit individually and on behalf of her two minor children and Mr. Reyes' estate on October 3, 2014. CP 4. On December 2, 2014, Dr. Spitters filed a Motion for Summary Judgment on the statute of limitations, arguing that he was not subject to the 60 day Notice of Claim statute, RCW 4.92, which tolls the statute of limitations for medical negligence claims. CP 17-27. The trial court denied Dr. Spitters' motion. 5/5 RP 13:1-8. This decision is not at issue on appeal.

On October 27, 2014, Dr. Spitters sent his First Interrogatories and Requests for Production to Mrs. Reyes, requesting that she identify her medical expert(s) in this case. CP 411-412. Dr. Spitters made many attempts to elicit Mrs. Reyes' discovery responses, including CR 26(i) conferences, a Motion to Compel, and an Agreed Order between the parties stating that Mrs. Reyes would respond by a specific date. CP 398-410; 460-462. Mrs. Reyes violated the Agreed Order, failing to respond to Dr. Spitters' discovery requests by the agreed deadline, so Dr. Spitters

filed a Motion to Dismiss for Failure to Comply with Discovery and a Motion for Summary Judgment re Lack of Experts. CP 398-410; 460-462. After Dr. Spitters filed these motions, Mrs. Reyes responded to his discovery requests. In response, Dr. Spitters struck his Motion to Dismiss for Failure to Comply with Discovery. 5/5 RP 3:16-4:4. On April 27, 2015 Mrs. Reyes' filed her first declaration from Dr. Martinez in response to Dr. Spitters' Motion for Summary Judgment re Lack of Experts. CP 108-113. The declaration contained a copy of Dr. Martinez' Curriculum Vitae. CP 114-116.

In reply to his Motion for Summary Judgment re Lack of Experts, Dr. Spitters explained that Dr. Martinez' declaration was insufficient to establish a *prima facie* claim of medical negligence for several reasons. CP 108-116. First, Dr. Martinez' declaration was a regurgitation of Mrs. Reyes' Complaint and contained no evidentiary support for any of her conclusory statements. CP 130. For example, many of the paragraphs in Dr. Martinez' declaration were either identical or almost identical to the paragraphs in the Complaint. CP 7-9; 109-113; 132. Dr. Martinez also stated that her opinions were based on Mr. Reyes' medical records, but she never actually referenced the records when making her conclusory

statements. This included Dr. Martinez' assertion that Mr. Reyes was never diagnosed with tuberculosis in spite the CT, chest x-ray and several laboratory cultures that grew tuberculosis from his sputum. CP 109-113; 133.

Second, Dr. Martinez' declaration failed to establish her as an expert qualified to speak to the standard of care for an infectious disease specialist treating tuberculosis in Washington. CP 134-137. Dr. Martinez is a family practice physician specializing in pain management, internal medicine, and geriatrics. CP 108-109. While her declaration stated that she was qualified to testify regarding the diagnosis and treatment of tuberculosis, she failed to demonstrate any actual experience(s) that would establish that qualification. CP 109; 134-137.

Third, Dr. Spitters demonstrated that Dr. Martinez' declaration failed to articulate the actual standard of care as it applied to Dr. Spitters, an infectious disease specialist. CP 108-113; 137-138. Fourth, Dr. Martinez provided absolutely no testimony establishing a causal connection between Dr. Spitters (who was not contacted and did not begin caring for Mr. Reyes until after Mr. Reyes' diagnosis, treatment, and injury occurred) and Mr. Reyes' injury. CP 108-113; 138-139.

At the May 5, 2015 hearing on Dr. Spitters' summary judgment motion, the trial court agreed with Dr. Spitters, explaining:

> Look, I take this very seriously, because this is the nail in the coffin, and it sounds like Mr. Reyes suffered a horrible death, but at this point we don't have any facts to establish what the causation is, what the standard of care is, whether Dr. Martinez is qualified to reach these conclusory statements that she makes, and I agree with Mr. Kerley. You don't need a whole lot, but you need more than is here…
>
> She indicates that they violated the standard of care but she doesn't indicate anywhere that she's aware of the protocols in this State for the diagnosis and treatment of tuberculosis, which apparently they believe that he had.
>
> She indicates that she studied the medical records, doesn't say what records… There's just so many ambiguities here. I think this declaration is very deficient.

5/5 RP 44: 13-20; 45:12-18; 46:3-5. The trial court also rejected Mrs. Reyes' counsel's request to submit a supplemental declaration under CR 56(f). 5/5 RP 43:14-44:10. The Court based its ruling on counsel's admission that Dr. Martinez had been working on Mrs. Reyes' case for over a year so any supplemental opinions from Dr. Martinez would not constitute newly discovered evidence. 5/5 RP 38: 17-22; 43:14-44:10.

On May 11, 2015, Dr. Spitters filed his Motion for Summary Judgment re Tort of Outrage, asking the trial court to dismiss Mrs. Reyes' remaining claim. CP 195-206. YHD filed a similar motion on Mrs. Reyes' remaining claims and a Motion for Summary Judgment to dismiss Mrs. Reyes' wrongful death claims on the statute of limitations. CP 261-266. Dr. Spitters joined YHD's motion to dismiss the wrongful death claims. CP 272-275.

On May 18, 2015, Mrs. Reyes filed a Motion for Reconsideration of the trial court's May 5, 2015 decision to dismiss her medical negligence claim. CP 228. Mrs. Reyes attached a second declaration from Dr. Martinez to the Motion for Reconsideration. CP 229-231. In response, Dr. Spitters argued that Mrs. Reyes' Motion for Reconsideration was untimely and deficient under CR 59 because it failed to state any facts or law upon which it was based. CP 237; 240. Dr. Spitters also noted that Dr. Martinez' second declaration was filed in direct violation of the trial court's May 5, 2015 decision and that, even if the trial court were to consider it, the declaration still failed to support a medical negligence claim because it failed to sufficiently articulate the standard of care as it applied to Dr. Spitters, how Dr. Spitters

violated the standard of care, and any causal connection between Dr. Spitters' care and Mr. Reyes' injury. CP 238-240.

At a hearing on July 15, 2015, the trial court agreed with Dr. Spitters, declining to consider Mrs. Reyes' untimely Motion for Reconsideration or Dr. Martinez' deficient second declaration, filed in direct opposition to the trial court's previous order. 7/15 RP 21:20-22:7. However, the trial court recognized that the second declaration was still deficient because Dr. Martinez' legal conclusion that Dr. Spitters and YHD violated the standard of care was insufficient to explain the standard of care required of Dr. Spitters and how he failed to follow it. 7/15 RP 38:12-39:16. Therefore, even if the trial court had considered Dr. Martinez' second declaration, the declaration was insufficient to support a claim of medical negligence. 7/15 RP 44:15-19.

The trial court also granted Dr. Spitters' Motion for Summary Judgment re Tort of Outrage and YHD's two motions, dismissing Mrs. Reyes' remaining claims. The trial court reasoned that public health institutions and their physicians are permitted by statute to compel patients to undergo tuberculosis treatment for public safety purposes, so Mrs. Reyes' allegations were insufficient to support a claim for outrage. 7/15 RP 40:22-41:5.

The trial court also dismissed Mrs. Reyes' wrongful death claims, brought individually and on behalf of her two children, on the independent basis that they were barred by the three year statute of limitations for wrongful death claims. 7/15 RP 11:8-18. Mrs. Reyes appeals the dismissal of her wrongful death, medical negligence, and tort of outrage claims.

IV. ARGUMENT

A. The trial court properly dismissed Mrs. Reyes' medical negligence claim because Dr. Martinez' initial declaration was insufficient to establish a *prima facie* claim of medical negligence.

"De novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The purpose of summary judgment is "to examine the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding [an] unnecessary trial" where there is no genuine issue as to a material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Summary judgment should be granted where the moving party can point to the absence of evidence supporting each element of a claim and the plaintiff fails to provide evidence supporting his claim. *Id.* at 230. A plaintiff must set forth specific

facts rebutting the moving party's contentions and disclose that a genuine issue as to a material fact exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). In short, where the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the trial court should grant the summary judgment motion. *Young*, 112 Wn.2d at 230 (internal citations omitted).

"Generally in a medical malpractice claim, a plaintiff needs testimony from a medical expert to establish two required elements—standard of care and causation." *Keck v. Collins*, 184 Wn.2d 358, 361, 357 P.3d 1080 (2015) (citing RCW 7.70.040; *Grove v. PeaceHealth St. Joseph Hosp.*, 182 Wn.2d 136, 144, 341 P.3d 261 (2014)). To survive a motion for summary judgment dismissal for a lack of expert support, the plaintiff must provide competent expert testimony establishing the facts that form the elements of her claim: the standard of care as it applies to the defendant physician and how the alleged breach caused the plaintiff's damages. *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983). The plaintiff may meet this burden by submitting the declaration of a qualified expert that sets forth specific facts that

would be admissible into evidence to establish the elements of the plaintiff's medical negligence claim. CR 56(e).

Dr. Spitters moved for summary judgment dismissal of Mrs. Reyes' medical negligence claim because Mrs. Reyes failed to provide Dr. Spitters with her experts and their opinions in response to his discovery requests. In response, Mrs. Reyes filed the Declaration of Dr. Martinez, which was insufficient to establish a *prima facie* claim of medical negligence. Therefore, the trial court properly dismissed Mrs. Reyes' medical negligence claim on May 5, 2015. This Court should affirm the trial court's ruling.

1. Dr. Martinez' declaration regurgitated Mrs. Reyes' Complaint and failed to provide sufficient factual support to establish a *prima facie* claim of medical negligence.

Under CR 56(e) a plaintiff may submit an expert declaration or affidavit in opposition to a motion for summary judgment.

> **Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.** Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is

> made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but **a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial**. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

CR 56(e) (emphasis added). Where a medical expert's declaration fails to meet the requirements of CR 56(e), the trial court should dismiss the plaintiff's medical negligence claim.

This issue was addressed by the Division I Court of Appeals in *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 851 P.2d 689 (1993). In *Guile*, the plaintiff's medical negligence claim arose out of complications from gynecological surgery. *Id.* at 20. The defendant moved for summary judgment dismissal for lack of expert support and the plaintiff responded with an expert declaration. *Id.* at 21. The trial court granted the defendant's motion, finding the declaration deficient. *Id.* On appeal, the court reviewed the declaration, finding that it contained only a summarization of the plaintiff's postsurgical complications and the unsupported conclusion that the plaintiff's surgical complications were caused by the defendant's "faulty technique." *Id.* at 27. The declaration did "little more than reiterate the claims made in

Guile's complaint." *Id.* Therefore, the declaration lacked adequate factual support, making dismissal appropriate. *Id.*

The Washington Supreme Court acknowledged *Guile* as authoritative in *Keck v. Collins*, stating:

> We note that the expert in *Guile* failed to link his conclusions to any factual basis, including his review of the medical records. In contrast to the expert in *Guile*, Dr. Li connected his opinions about the standard of care and causation to a factual basis: the medical records.

Keck, 184 Wn.2d at 373 (holding that although a plaintiff's initial expert declaration was insufficient to support her medical negligence claim, two additional declarations filed in response to a defendant doctor's motion for summary judgment were sufficient to establish a claim for medical negligence).

Under *Guile*, *Keck*, and CR 56(e), Dr. Martinez' declaration must reference <u>specific facts</u> in this case that would create a genuine issue of material fact on the elements of medical negligence. Here, like in *Guile*, Dr. Martinez' declaration was deficient.

First, Dr. Martinez' declaration was essentially a regurgitation of Mrs. Reyes' Complaint. Paragraphs 6.1 to 6.11 of the Complaint are either identical or nearly identical to paragraphs

4(f) through 4(l) of Dr. Martinez' declaration. CP 7-9; 109-113. This is insufficient to create a genuine issue of material fact under *Guile*, *Keck*, and CR 56(e).

Although Dr. Martinez' declaration contains the conclusory statement that her opinions are based on Mr. Reyes' medical records, it does not contain a single, accurate citation to Mr. Reyes' medical records, which are in Mrs. Reyes' possession. CP 109. Dr. Martinez did not cite to Mr. Reyes' medical records because she could not; the medical records directly contradicted her unfounded conclusions. For example, Dr. Martinez concluded that Mr. Reyes was never diagnosed with tuberculosis, stating "Mr. Reyes did not have tuberculosis. He was never found to be suffering from tuberculosis." CP 2-3. Yet, multiple chest x-rays, CT scans, and a sputum culture that tested positive for tuberculosis led Dr. Kahn to diagnose Mr. Reyes with tuberculosis and refer him to YHD. CP 144; 146; 149. Sputum cultures taken from Mr. Reyes' lungs were also analyzed by a laboratory at the Department of Health where they grew Mycobacterium tuberculosis complex (tuberculosis). CP 156-158.[1]

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[1] WAC 246-170-011 defines a "confirmed case" of tuberculosis as "an individual who has a positive bacteriologic culture for Mycobacterium tuberculosis complex or a suspected case that shows response to an appropriate

Dr. Martinez also concludes that Dr. Spitters failed to accurately diagnose Mr. Reyes and that he prescribed medications that were contraindicated. CP 110. However, Dr. Spitters did not learn about Mr. Reyes or begin caring for him until July 2010. CP 211. At that point, Mr. Reyes had already been diagnosed with tuberculosis and prescribed medication to treat it. A July 8, 2010 blood test had already shown that Mr. Reyes' liver levels were low, and Dr. Singh and Nurse Hansen had already decided to hold Mr. Reyes medication on July 9, 2010. CP 211.

Dr. Martinez' declaration contains incorrect factual conclusions without referencing Mr. Reyes' medical records, as required by *Guile*, *Keck* and CR 56(e). This reason alone was a sufficient basis for the trial court's summary judgment dismissal. However, even if the trial court had assumed that all of Dr. Martinez' inaccurate conclusions were true, the declaration still failed to establish a *prima facie* claim of medical negligence.

2. Dr. Martinez' declaration failed to establish that she is qualified to speak to the standard of care for infectious disease specialists treating tuberculosis in Washington State.

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course of treatment." WAC 246-170-011. Mr. Reyes had multiple sputum cultures that cultured positive for tuberculosis, meaning that his was a "confirmed case" of tuberculosis under WAC 246-170-011.

"[E]xpert testimony will generally be necessary to establish the standard of care ... and most aspects of causation." *Young*, 112 Wn.2d at 228 (quoting *Harris*, 99 Wn.2d at 449). "The general rule is that a practitioner of one school of medicine is incompetent to testify as an expert in a malpractice action against a practitioner of another school." *Eng v. Klein*, 127 Wn. App. 171, 176, 110 P.3d 844 (2005). Therefore, an expert in one medical specialty may not testify regarding the standard of care as it applies to a physician who practices in a different medical specialty. However, there are three well-established exceptions to this rule. *Id.* These exceptions arise where:

> (1) the methods of treatment in the defendant's school and the school of the witness are the same; (2) the method of treatment in the defendant's school and the school of the witness should be the same; or (3) the testimony of a witness is based on knowledge of the defendant's own school.

Id. (citing *Miller v. Peterson*, 42 Wn. App. 822, 831, 714 P.2d 695 (1986) (holding that an orthopedic surgeon could testify as an expert in a case against a podiatrist so long as the surgeon and podiatrist used the same methods of treatment)).

For one of these exceptions to apply, the medical expert is required to have "sufficient expertise to demonstrate familiarity

with the procedure or medical problem at issue." *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 173, 810 P.2d 4 (1991); *Morton v. McFall*, 128 Wn. App. 245, 253, 115 P.3d 1023 (2005). However, merely stating that an expert is "familiar" with the appropriate measures for treating a patient is not sufficient; the expert must both state that she has knowledge of the relevant standard of care as it applies to the defendant provider and provide a basis for that familiarity. *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 495-496, 183 P.3d 283 (2008). Therefore, "the expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness area of expertise." *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916 (2000) (quoting *State v. Farr Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999)).

This principle was demonstrated in this Court's 2008 decision in *Davies v. Holy Family Hospital*, 144 Wn. App. 483. In *Davies*, the plaintiff brought a claim for the wrongful death of his wife following kidney surgery at the defendant hospital. *Davies*, 144 Wn. App. at 487. The hospital filed a motion for summary judgment to dismiss the claims against its staff due to lack of expert support, and in response the plaintiff filed a declaration

from his radiology expert. *Id.* at 489. The declaration stated that the radiologist was "familiar" with the appropriate measures to be taken by "hospital staff, including nursing staff" in response to the medical condition at issue; the trial court found this deficient, granting summary judgment dismissal. *Id.* at 496. On appeal, this Court upheld the summary judgment dismissal because the declaration failed "to reference any education, medical training, or supervisory experience which could demonstrate his familiarity with the standard of care in other health care fields." *Id.* at 495-496.

This Court recognized that under CR 56(e) merely stating that the radiologist was familiar with the standard of care was not sufficient to establish familiarity. *Id.* Therefore, because the expert failed to establish that he had sufficient expertise or familiarity with the standard of care applicable to the hospital staff members, he could not be "deemed competent to establish the standard of care or to testify regarding a breach of that standard." *Id.* at 496.

Tuberculosis is considered a serious public health threat in Washington, and its diagnosis and treatment are highly regulated. RCW 70.28.005; WAC 246-170 *et. seq.* Each district health

officer, such as Dr. Spitters, is responsible for the control of tuberculosis within his or her jurisdiction. WAC 246-170-021. Local health departments, such as YHD, are required to create and maintain a tuberculosis prevention program and provide services for the prevention, treatment, and control of tuberculosis. WAC 246-170-031. Individualized treatment planning must be consistent with the American Thoracic Society/Centers for Disease Control and Prevention. WAC 246-170-031(1)(c).

Dr. Martinez is a family practice physician with a clinic in Yakima where she treats chronic pain, internal medicine, and geriatric patients. CP 108-109. Her declaration states,

> "I am well-qualified to identify liver disease problems, diagnosis of tuberculosis, and the proper care and treatment of these diseases, including the proper pharmaceutical protocol to avoid adverse side effects (such as occurred in the case of Jose Reyes, deceased)."

However, nothing in Dr. Martinez' declaration or its attached curriculum vitae demonstrates that she has ever practiced as an infectious disease specialist or local health officer treating tuberculosis patients at a local health district in Washington State or anywhere else. Nor does her declaration identify any <u>specific experience(s)</u> that would establish that she has treated tuberculosis

patients in Washington and is familiar with the standard of care as it applies to Dr. Spitters specifically. She has also failed to demonstrate any familiarity or experience with Washington's strict regulations governing tuberculosis.

Under CR 56(e), *Davies*, *Miller*, *Eng* and other relevant case law, Dr. Martinez must affirmatively demonstrate that she has sufficient professional experience to speak to the standard of care as it applies to Dr. Spitters, an infectious disease specialist treating a tuberculosis patient. Dr. Martinez' qualifications must be supported by facts, not just a conclusory statement in her declaration. Dr. Martinez' declaration fails to meet this burden. The trial court correctly recognized this deficiency, and its decision should be affirmed.

3. Dr. Martinez' declaration failed to articulate the standard of care as it applies to Dr. Spitters

In medical negligence cases, the plaintiff must establish that the defendant doctor failed to comply with the accepted standard of care. *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637 (1997). The standard of care is established via expert testimony; the expert must identify accepted practices in Washington and provide evidence of a statewide standard of care as it pertains to the defendant. *Adams v. Richland Clinic, Inc.*,

P.S., 37 Wn. App. 650, 656, 681 P.2d 1305 (1984) (affirming a trial court's summary judgment dismissal where plaintiff's medical experts failed to identify accepted medical practices in Washington).

"Testimony reflecting only a personal opinion or testimony of experts that they would have followed a different course of treatment than that of the defendant is insufficient to establish a standard of care." *Id.* at 655. Testimony that the expert would have followed a different course of care, handled the case differently, or disagreed with what the care should have been, does not establish negligence. *Ketchum v. Overlake Hosp. Med. Ctr.*, 60 Wn. App. 406, 412, 804 P.2d 1283 (1991); *Versteeg v. Mowrey*, 72 Wn.2d 754, 759, 455 P.2d 540 (1967). Negligence cannot be inferred merely from the fact that the plaintiff had a bad outcome because "a bad result is not in itself evidence of negligence." *Stone v. Sisters of Charity*, 2 Wn. App 607, 611, 476 P.2d 299 (1970); *see also*, *Christensen v. Munsen*, 123 Wn.2d 234, 867 P.2d 626 (1994) (affirming use of jury instruction stating that "a poor medical result is not, in itself, evidence of negligence).

Local health officers and their staff have broad authority and discretion to protect public health when treating tuberculosis. RCW 70.28.005.

> "Although the recommended course of treatment for tuberculosis varies somewhat from one individual to another, at a minimum, effective treatment requires a long-term regimen of multiple drug therapy. Some drugs are effective with some individuals but not others. The development of the appropriate course of treatment for any one individual may require trying different combinations of drugs and repeated drug susceptibility testing. The course of treatment may require as long as several years to complete."

WAC 246-170-002(d).

Dr. Martinez' declaration failed to articulate the standard of care as it applied to Dr. Spitters, an infectious disease specialist treating tuberculosis in Washington State, governed by RCW 70.28 and WAC 246-170. In her declaration, Dr. Martinez opined that Dr. Spitters "committed medical negligence in the care and treatment of Jose Reyes" and that "Jose Reyes expired due to the failures of Dr. Spitters… to observe the standard of care for health care institutions and physicians acting in the same or similar circumstances in the State of Washington." CP 113. However, this legal conclusion is insufficient to lay out the standard of care actually required of Dr. Spitters.

Not only did Dr. Martinez' declaration fail to articulate the standard of care, but she failed to explain how Dr. Spitters' actual care deviated from it. By the time Dr. Spitters began treating Mr. Reyes, Mr. Reyes had already been diagnosed with tuberculosis, begun a four-drug treatment consistent with WAC 246-170-002(d), undergone a blood test that showed low liver function levels, and had his medication held by Dr. Singh and Nurse Hansen. CP 211. Dr. Spitters' care was limited to advising Nurse Hansen how to proceed, continuing to hold Mr. Reyes' medication, urging Mr. Reyes to return to YHD for more testing, coordinating with other providers to treat Mr. Reyes' liver injury, and working to get Mr. Reyes to the University of Washington for further treatment and a potential liver transplant. CP 211-226. Nothing in Dr. Martinez' declaration discussed how this care failed to meet the standard of care.

The trial court properly recognized Dr. Martinez' failure to articulate the standard of care as it applied to Dr. Spitters. The trial court's dismissal of Ms. Reyes' medical negligence claims should be affirmed by this Court.

4. Dr. Martinez' declaration failed to establish any causal link between Dr. Spitters' medical care and Mr. Reyes' liver injury.

Dr. Martinez' declaration fails to articulate how any alleged breach of the standard of care by Dr. Spitters caused Mr. Reyes' drug induced liver injury. Expert testimony is generally necessary to establish causation in medical negligence cases. *Harris*, 99 Wn.2d at 449. "The evidence will be deemed insufficient to support the jury's verdict, if it can be said that considering the whole of the medical testimony the jury must resort to speculation or conjecture in determining such causal relationship." *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968), *followed by Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 863, 313 P.3d 431 (2013).

While Dr. Martinez' declaration claims that Mr. Reyes died due to the failure of Dr. Spitters to meet the standard of care, she never actually articulated how Dr. Spitters' care caused Mr. Reyes' liver injury and later his death. CP 113. Dr. Martinez neither recognized nor disputed that Dr. Spitters became involved in Mr. Reyes' medical care in July 2010, after Mr. Reyes' drug induced liver injury had already occurred. Her unsubstantiated conclusion that Dr. Spitters caused Mr. Reyes' injury neither denied this fact

nor demonstrated any plausible way that Dr. Spitters could have caused Mr. Reyes' injury.

Dr. Martinez' declaration is insufficient to support a *prima facie* claim of medical negligence. The trial court recognized these deficiencies and properly dismissed Mrs. Reyes' medical negligence claim. This Court should affirm the trial court's ruling.

B. The trial court properly denied Mrs. Reyes' untimely Motion for Reconsideration and properly declined to consider Dr. Martinez' second declaration.

A trial court's denial of a motion for reconsideration and its decision whether to consider new or additional evidence is reviewed for abuse of discretion. *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473 (2013). "An abuse of discretion exists only if no reasonable person would have taken the view the trial court adopted, the trial court applied the wrong legal standard, or it relied on unsupported facts." *Fishburn, v. Pierce Cty. Planning & Land Servs. Dep't*, 161 Wn. App. 452, 472, 250 P.3d 146 (2011), *citing Salas v. Hi–Tech Erectors*, 168 Wn.2d 664, 668–69, 230 P.3d 583 (2010).

In *Keck v. Collins*, the Washington Supreme Court held that a trial court's decision to strike an untimely filed expert declaration is also reviewed for abuse of discretion, but the trial

court must first consider the factors set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), on the record before striking the evidence. *Keck*, 184 Wn.2d at 362. These factors include whether a lesser sanction would probably suffice, whether the violation was willful or deliberate, and whether the violation substantially prejudiced the opposing party. *Id.* at 369 (citing *Blair v. Ta–Seattle E. No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011)). However, *Keck* and *Burnet* do not apply to the trial court's decision to deny Mrs. Reyes' Motion for Reconsideration and its decision not to consider Dr. Martinez' second declaration in this case.

In *Keck*, all three declarations at issue were filed with the trial court <u>before</u> the hearing on the defendant's summary judgment motion. Here, Dr. Martinez' second declaration was not filed until thirteen days <u>after</u> the May 5, 2015 hearing dismissing Mrs. Reyes' medical negligence claim. The trial court could not have considered Dr. Martinez' second declaration during the May 5, 2015 hearing because it had not been filed with the Court. *Keck* does not require a trial court to apply *Burnet* to a non-existent declaration. The trial court's decision to deny Mrs. Reyes' untimely Motion for Reconsideration with Dr. Martinez'

accompanying second declaration should be reviewed for abuse of discretion.

1. The trial court properly denied Mrs. Reyes' untimely Motion for Reconsideration

A trial court may, upon a motion, reconsider a decision made on summary judgment. CR 59(a). However, "A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment..." CR 59(b).

> In asking the trial court to reconsider its ruling, the litigant must identify the specific reasons in fact and law as to each ground on which the motion is based. Under CR 59(a)(4), reconsideration is warranted if the moving party presents new and material evidence that it could not have discovered and produced at trial. If the evidence was available but not offered until after the opportunity passed, the party is not entitled to submit the evidence.

Fishburn, 161 Wn. App. at 472-73 (internal citations omitted); CR 59.

Mrs. Reyes' Motion for Reconsideration and Dr. Martinez' accompanying second declaration were filed on May 18, 2015, thirteen days after the May 5, 2015 hearing during which the trial court dismissed Mrs. Reyes' medical negligence claim. CP 228-231. The untimeliness of the motion and its accompanying declaration was sufficient grounds for the trial court to deny Mrs. Reyes' motion and decline to consider Dr. Martinez' second

declaration. However, the Motion for Reconsideration also failed to identify any law or facts as grounds for reconsideration, further supporting the trial court's decision to deny it. CP 228. This Court should, therefore, affirm the trial court's denial of Mrs. Reyes' Motion for Reconsideration.

2. The trial court properly declined to consider Dr. Martinez' second declaration as it applied to Mrs. Reyes' medical negligence claim.

A supplemental expert declaration is not a proper basis for a motion for reconsideration. This rule was illustrated by the Division I Court of Appeals in *Adams v. W. Host, Inc.*, 55 Wn. App. 601, 779 P.2d 281 (1989). In *Adams*, the plaintiff was injured when stepping off of an elevator. *Id.* at 603-604. The defendant elevator company brought a motion for summary judgment, and the plaintiff responded with an expert declaration, which the trial court found insufficient to support her claims. *Id.* at 607. After the plaintiff's claims were dismissed she filed a motion for reconsideration and submitted a second declaration from her expert. *Id.* at 608. The trial court denied the motion, and on appeal the court held, "The realization that Gill [the plaintiff's expert]'s first declaration was insufficient does not qualify the

second declaration as newly discovered evidence. The motion for reconsideration was properly rejected by the trial court." *Id.* at 608.

Counsel for Mrs. Reyes made an oral motion to supplement Dr. Martinez' declaration at the May 5, 2015 hearing. The trial court denied this motion, reasoning that Dr. Martinez had been involved in Mrs. Reyes' case for over a year, any supplemental declaration submitted after the hearing would not constitute newly discovered evidence, and CR 56 did not provide grounds to continue the hearing for Mrs. Reyes to get a more thorough declaration. 5/5 RP 38: 17-18; 43:14-44:10. The trial court's decision not to consider Dr. Martinez' second declaration as it applied to Mrs. Reyes' dismissed medical negligence claim on July 15, 2015, was consistent with *Adams* and CR 56 and was well within its judicial discretion. Therefore, the trial court's decision should be affirmed.

3. Even if the trial court had granted Mrs. Reyes' Motion for Reconsideration and considered Dr. Martinez' second declaration, the second declaration is insufficient to support a *prima facie claim* of medical negligence

Even if this Court were to find that the trial court abused its discretion in denying Mrs. Reyes' Motion for Reconsideration, this

error is harmless because Dr. Martinez' second declaration is insufficient to support a *prima facie* claim of medical negligence.

Dr. Martinez' second declaration stated the legal conclusion that "Jose Reyes expired due to the failures of Dr. Spitters and Yakima Health District to observe the standard of care for health care institutions and physicians acting in the same or similar circumstances in the State of Washington." CP 231. She also claimed that Mr. Reyes was never diagnosed with tuberculosis and that Dr. Spitters "committed medical malpractice" by failing to "immediately terminate" Mr. Reyes' medication when he first presented to Dr. Spitters. CP 230. However, like her first declaration, Dr. Martinez' second declaration failed to reconcile these unsupported conclusions with the medical records, which demonstrate that by the time Dr. Spitters first learned about Mr. Reyes, his injury had already occurred and the medication had already been stopped.

Dr. Martinez' conclusory opinions neither referred to the medical records, nor were they supported by the records. The declaration also failed to establish what the standard of care actually required of Dr. Spitters or how the care provided by Dr. Spitters could have caused Mr. Reyes' liver injury and death. The

trial court recognized these deficiencies. CP 38:12-39:16. Therefore, even if the trial court were required to consider Dr. Martinez' second declaration as it applied to the dismissed medical negligence claim, the declaration would still have failed to save Ms. Reyes' medical negligence claim from summary judgment dismissal. The trial court's ruling should be affirmed.

C. The trial court properly dismissed Mrs. Reyes' claim for the tort of outrage.

The trial court's summary judgment dismissal of Mrs. Reyes' claim for the tort of outrage should be reviewed de novo. *Briggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009) ("We review an order granting summary judgment de novo."). "The tort of outrage is synonymous with a cause of action for intentional infliction of emotional distress." *Christian v. Tohmeh*, 191 Wn. App. 709, 735, 366 P.3d 16 (2015). Outrage has three elements: 1) extreme and outrageous conduct, 2) intentional or reckless infliction of emotional distress, and (3) the actual result to the plaintiff of severe emotional distress. *Id.*, *citing Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003); *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). A defendant's conduct is considered outrageous only if the "conduct has been so

outrageous in character and extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* at 736, *citing Grimsby*, 85 Wn.2d at 59.

1. Mrs. Reyes' outrage claim is barred by RCW 7.70, which provides the exclusive remedy for personal injury claims arising from healthcare.

Washington law does not permit a plaintiff to bring a claim for the tort of outrage where that claim arises out of medical care. "[W]henever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70." *Branom v. State*, 94 Wn. App. 964, 969, 974 P.2d 335 (1999), *review denied*, 138 Wn.2d 1023 (1999). RCW 7.70's exclusive remedy provides three causes of action:

> (1) That injury resulted from the failure of a health care provider to follow the accepted standard of care;
>
> (2) That a health care provider promised the patient or his or her representative that the injury suffered would not occur;
>
> (3) That injury resulted from health care to which the patient or his or her representative did not consent.

RCW 7.70.030.

Outrage is not a recognized cause of action under RCW 7.70.030. This principle was illustrated in the Division I Court of Appeals' 1999 decision in *Branom v.* State, 94 Wn. App. 964. In *Branom*, the plaintiffs brought claims for the failure to obtain informed consent and the tort of outrage in connection with the medical treatment and death of their son, who was born premature. *Branom*, 94 Wn. App at 966. The *Branom* court held that, "[t]his injury occurred as the result of health care and therefore can be brought under only one of the three causes of action defined in RCW 7.70.030. Negligent infliction of emotional distress is not one of these authorized claims." Id. at 975. This Court has since recognized *Branom* as good law. *See, e.g.*, *Wright v. Jeckle*, 104 Wn. App. 478, 16 P.3d 1268 (2001), *as amended on reconsideration in part* (2001) (recognizing *Branom* as authoritative and holding that the entrepreneurial aspects of medicine are "non-healthcare activities" that may give rise to a cause of action under the Consumer Protection Act).

The Division I Court of Appeals again recognized the exclusivity of RCW 7.70 in *Reed v. ANM Health Care*, 148 Wn. App. 264, 271, 225 P.3d 1012 (2008). In *Reed*, a plaintiff brought claims for outrage against a defendant nurse when the nurse

excluded the plaintiff from her dying partner's bedside the night before her death. *Id.* at 267-268. The defendant argued that her motivation for excluding the plaintiff was medical and that the plaintiff, therefore, could not bring an outrage claim against her because those claims did not fall under the three causes of action listed in RCW 7.70.030. *Id.* at 268. The *Reed* court agreed that RCW 7.70.030 provides the exclusive remedies for claims arising from healthcare, but it remanded to the trial court because it was unclear whether the defendant's actions arose out of health care or an independent discrimination against the plaintiff and her partner, a same-sex couple. *Id.* at 273. The *Reed* court recognized that:

> The key question in determining whether an injury occurs as a result of health care is whether the injury occurs during the process in which a medical professional is utilizing the skills which the professional has been taught in examining, diagnosing, treating or caring for the patient. Thus, when the conduct complained of is part of the health care provider's efforts to treat and care for a patient's medical needs, the injury occurs as a result of health care and the claim falls under chapter 7.70 RCW.

Id. at 271 (internal citations omitted). *Reed* remains good law.

Taken together, *Branom* and *Reed* establish that outrage is an independent cause of action from medical negligence and that

outrage is not available where a plaintiff's injuries arise from healthcare under RCW 7.70. *Branom* and *Reed* apply in this case.

In her Opening Brief, Mrs. Reyes conceded that her outrage claim arises from healthcare provided to Mr. Reyes by Dr. Spitters and YHD:

> However, the record is clear that the defendants-appellees' [Respondents, Dr. Spitters and YHD's] decisions were all based upon medical treatment of Jose Reyes, and that no one sought to visit further violence upon him for anything other than the medical negligence in his care and treatment.

Opening Brief at 12. Under *Branom*, *Reed*, and RCW 7.70.030, a claim for outrage is not available to Mrs. Reyes and was properly dismissed on summary judgment.

Also of note, Mrs. Reyes argues that her claim for outrage should be actionable because it was triggered by a violation of the standard of care. *Opening Brief*, p. 12-13. This is an incorrect statement of the law. RCW 7.70.040 defines the standard of care as "that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances." RCW 7.70.040(a).

Washington law does not recognize any other definition of the standard of care.

A claim for the tort of outrage is not available to Mrs. Reyes because the injuries alleged in this case arise out of the medical care provided to Mr. Reyes. Therefore, this Court should affirm the trial court's summary judgment dismissal of Mrs. Reyes' outrage claim.

2. Even if Mrs. Reyes were permitted to allege a claim for the tort of outrage, the alleged conduct is permitted under Washington law and does not constitute "extreme and outrageous" conduct required to establish an outrage claim.

Even if a claim for the tort of outrage were available to Mrs. Reyes, the care and allegations at issue in this case are insufficient to support her outrage claim as a matter of law. Mrs. Reyes alleges that Dr. Spitters knowingly forced Mr. Reyes to take a medication that he knew would kill Mr. Reyes. *Opening Brief* at 13. She also alleges that YHD and Dr. Spitters "threatened Mr. Reyes with arrest and incarceration if he refused or failed to take the prescribed anti-tuberculosis drugs." *Opening Brief* at 2. These allegations are inconsistent with Mr. Reyes' medical records that illustrated when and how Dr. Spitters cared for Mr. Reyes.

However, even assuming that Mrs. Reyes' allegations are true, they do not support an outrage claim.

This Court recently examined the requirements of the tort of outrage as they apply to healthcare providers in *Christian v. Tohmeh*, 191 Wn. App. 709. The Court relied on several cases where plaintiffs brought claims for outrage against healthcare providers, including *Benoy v. Simons*, 66 Wn. App. 56, 831 P.2d 167 (1992). *Christian*, 191 Wn. App. at 739. In *Benoy*, a plaintiff alleged that her neonatologist pressured her to create a guardianship for her infant son, needlessly kept her son on life support, said that the son's condition improved when it deteriorated, told the plaintiff to bring her son's body home on a bus, and billed her for needless care. *Benoy*, 66 Wn. App. at 62. The Division I Court of Appeals held that even if the plaintiff's allegations were true, the conduct was not outrageous. *Id.* at 63.

This Court in *Christian* also cited six examples from other jurisdictions where a health care provider's conduct did not rise to the level of "outrageous" conduct required under the law. *Christian*, 191 Wn. App. at 739; *see, e.g., Reigel v. SavaSeniorCare LLC*, 292 P.3d 977 (Colo. Ct. App. 2011) (holding that plaintiff's allegations that nursing home staff who

allegedly refused to assist plaintiff's husband during heart attack and falsified charts did not rise to outrageous behavior under the law); *Cangemi v. Advocate S. Suburban Hosp.*, 364 Ill. App. 3d 446, 845 N.E.2d 792 (Ill. App. Ct. 2006) (holding plaintiff's allegation that her obstetrician attempted to conceal birth injuries to son by fraudulently telling plaintiff that the size of son's head necessitated a caesarian section did not constitute intentional infliction of emotional distress); *C.M. v. Tomball Regional Hospital*, 961 S.W.2d 236 (Tex. App. 1997) (where plaintiff, a rape victim, alleged that hospital staff interviewed her rudely in a waiting room and told her that it did not treat rape victims and that she probably lost her virginity by riding a bike, this conduct did not rise to the "level of extreme and outrageous conduct necessary to allow recovery for intentional infliction of emotional distress"). This Court recognized that in each of these cases, the health care providers' conduct did not fall within the perimeters of outrageous conduct. *Christian*, 191 Wn. App. at 739. *Christian* and the cases upon which this Court relied demonstrate the extremely high bar for a medical provider's conduct to rise to "extreme and outrageous." Mrs. Reyes' allegations do not meet this bar.

The alleged behavior in this case is permitted under RCW 70.28 and RCW 70.30, which govern the treatment and control of tuberculosis. These chapters recognize that "[t]uberculosis has been and continues to be a threat to the public's health in the state of Washington." RCW 70.28.050(a). Therefore, while the legislature respects the rights of individuals, the legitimate public interest in protecting public health outweighs this interest, and "it is imperative that public health officials and their staff have the necessary authority and discretion to take actions as are necessary to protect the health and welfare of the public." RCW 70.28.050(b)-(c).

To that end, public health officials and staff have the power to determine whether the examination or treatment of a tuberculosis patient is necessary for the protection of public health. RCW 70.28.031(d). Where a patient is reasonably suspected of having tuberculosis, public health officers are required to examine the patient and "isolate and treat or isolate, treat, and quarantine such persons, whenever deemed necessary for the protection of the public health." RCW 70.28.031(a). The local health officer also has the authority to order a non-compliant tuberculosis patient to submit to examination, treatment, isolation, or quarantine, subject

to due process requirements, and if the patient fails to submit to the order, he or she is guilty of a criminal misdemeanor. RCW 70.28.031(d)-(f); RCW 70.28.032; RCW 70.28.033; RCW 70.28.035.

Dr. Spitters' treatment of Mr. Reyes in this case is sanctioned by RCW 70.28. As a public health officer, upon learning of Mr. Reyes' tuberculosis diagnosis, Dr. Spitters was required to examine Mr. Reyes and determine the proper course of treatment for him. Here, Mr. Reyes had already begun treatment and indicated signs of a liver injury, leading Dr. Singh and Nurse Hansen to hold his medications. CP 211. In response, Dr. Spitters instructed Nurse Hansen to send Mr. Reyes to the hospital for continued evaluation and told her to keep holding Mr. Reyes' medications. CP 211. In spite of calls from Dr. Spitters and Nurse Hasen, it took Mr. Reyes over a week to return to YHD for further testing and care. CP 215. Dr. Spitters examined Mr. Reyes in the clinic at YHD on July 21, 2010 and worked with Dr. Ong and the University of Washington to pursue further treatment options for Mr. Reyes. CP 216-219. This care is reasonable under RCW 70.28 and in no way constitutes extreme or outrageous conduct sufficient to support an outrage claim.

In addition, even if Mrs. Reyes allegation that Dr. Spitters or a YHD healthcare provider threatened Mr. Reyes with incarceration if he were noncompliant with his tuberculosis treatment and follow-up, such threats are sanctioned by RCW 70.28. Therefore, the trial court properly held that these allegations are insufficient to sustain a claim for outrage as a matter of law. The trial court's decision to dismiss Mrs. Reyes' outrage claim should, therefore, be affirmed.

D. The trial court properly dismissed Mrs. Reyes' wrongful death claims on the independent basis that they are barred by the statute of limitations.

On June 2, 2015, this Court held that wrongful death claims arising under RCW 4.24.010 are subject to a three year statute of limitations under the general torts statute RCW 4.16.080. *Fast v. Kennewick Pub. Hosp. Dist.*, 188 Wn. App. 43, 53, 354 P.3d 858 (2015), *as amended on denial of reconsideration* (2015), *review granted*, 185 Wn.2d 1001, 366 P.3d 1244 (2016). Unlike the medical malpractice statute of limitations, RCW 4.16.350, which may be tolled for one year upon a good faith request for mediation under RCW 7.70.110, the general tort statute of limitations is not subject to a one year tolling period. *Id.*

Mr. Reyes passed away on August 6, 2010. CP 10. Over four years later, on October 3, 2014, Mrs. Reyes filed her Complaint, alleging claims for wrongful death individually and on behalf of her two children. CP 5; 13. After this Court issued its decision in *Fast*, YHD moved for summary judgment dismissal of Mrs. Reyes' wrongful death claims. CP 306-308. Dr. Spitters joined YHD's motion. CP 272-275. Recognizing *Fast* as a controlling independent basis for dismissal, the trial court dismissed Mrs. Reyes' wrongful death claims on July 15, 2010.

Under *Fast*, Mrs. Reyes' wrongful death claims are barred by the three year statute of limitations set forth in RCW 4.16.080. This Court should therefore affirm the trial court's decision to dismiss these claims.

Of note, the Washington Supreme Court has certified *Fast* for appeal. *Fast v. Kennewick Pub. Hosp. Dist.*, 185 Wn.2d 1001, 366 P.3d 1244 (2016). Oral argument is set for July 7, 2016.[2] To the extent that the Supreme Court does not issue a ruling prior to the hearing on this appeal, this Court should follow its decision in *Fast*. However, even if the Supreme Court were to overturn *Fast* and apply the medical malpractice statute of limitations and tolling

[2] https://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByCase&courtId=A08 (accessed 5/19/16)

period to wrongful death claims, the error on this issue is harmless and summary judgment dismissal is still appropriate.

Mrs. Reyes' wrongful death claims arise out of the alleged medical negligence of Dr. Spitters and YHD. CP 13. The trial court properly dismissed Mrs. Reyes' claim for medical negligence. Therefore, her wrongful death claims should still be dismissed because they are predicated on her medical negligence claim. Dr. Spitters respectfully requests that this Court affirm the trial court's decision to dismiss Mrs. Reyes' wrongful death claims.

V. CONCLUSION

The trial court properly dismissed each of Mrs. Reyes' claims for medical negligence, the tort of outrage, and wrongful death against Dr. Spitters. For the reasons set forth above, Mrs. Reyes failed to establish each of these claims as a matter of law. Given the foregoing arguments and the record set forth before the Court, it is clear that the trial court's decisions on summary judgment were proper and consistent with Washington law and should be affirmed.

DATED this 1st day of June, 2016, at Seattle, Washington.

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VI. CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the dated signed below, I caused to be served in the manner indicated a true and accurate copy of the foregoing, **BRIEF OF RESPONDENT, CHRISTOPHER SPITTERS, M.D.**, by the method indicated below and addressed to the following:

Counsel for Appellant J.J. Sandlin, Esq., WSBA #7392 Sandlin Law Firm, P.S. PO Box 228 Zillah, WA 98953 Phone: (509) 829-3111 Fax: (888) 875-7712 Sandlinlaw@lawyer.com	☐ U.S. Mail, Cert. ☐ Hand Delivery ☐ Facsimile ☐ Overnight ☑ E-mail ☑ Messenger
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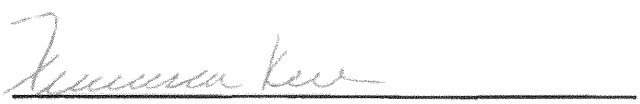
Signed this 1st day of June, 2016, at Seattle, Washington.



Francesca Kerr

VII. APPENDIX A

C.M. v. Tomball Regional Hosp., 961 S.W.2d 236 (1997) A-2-11

Cangemi v. Advocate South Suburban Hosp., 364 Ill.App.3d 446 (2006) A-12-32

Reigel v. SavaSeniorCare L.L.C., 292 P.3d 977 (2011) A-33-52

KeyCite Yellow Flag - Negative Treatment
Distinguished by Johnson v. Nacogdoches County Hosp., Tex.App.-Tyler, August 20, 2003

961 S.W.2d 236
Court of Appeals of Texas,
Houston (1st Dist.).

C.M., Individually and as Next Friend of L.M. a Minor Child, Appellants,
v.
TOMBALL REGIONAL HOSPITAL, Albert D. Friday, Jr., and Mary Ruckman, Appellees.

No. 01–95–00623–CV.
|
April 17, 1997.
|
Rehearing Overruled June 10, 1997.

Mother of 15-year-old rape victim brought action on victim's behalf against hospital where she had initially gone for care following rape and also against hospital nurse and medical director. Defendants moved for summary judgment, and the 270th District Court, Harris County, Richard Hall, J., granted motion, and plaintiff appealed. The Court of Appeals, Mirabal, J., held that: (1) fact issues precluded summary judgment on claims that hospital had violated Emergency Medical Treatment and Active Labor Act (EMTALA) by refusing to treat victim; but (2) hospital had not violated protected privacy right of patient, as would give rise to Section 1983 action; and (3) conduct of nurse, who had performed initial screening, did not support claim for intentional infliction of emotional distress.

Affirmed in part, reversed in part, and remanded.

West Headnotes (18)

[1] **Appeal and Error**
Judgment

Summary judgment cannot be affirmed on any grounds not presented in motion for summary judgment.

Cases that cite this headnote

[2] **Appeal and Error**
Reasons for Decision

When trial court's order granting summary judgment does not specify grounds relied on for its ruling, summary judgment will be affirmed if any of theories advanced are meritorious.

Cases that cite this headnote

[3] **Health**
Duty to Provide Emergency Care or Admit; Penalties

Emergency Medical Treatment and Active Labor Act (EMTALA) imposes two requirements on hospitals: (1) hospital must conduct appropriate medical screening of persons visiting hospital's emergency room, and (2) hospital may not transfer out of hospital those patients whose medical conditions have not been stabilized. Social Security Act, § 1867(a, b), as amended, 42 U.S.C.A. § 1395dd(a, b).

1 Cases that cite this headnote

[4] **Health**
Duty to Provide Emergency Care or Admit; Penalties

Provision of Emergency Medical Transfer and Active Labor Act (EMTALA) under which hospitals must provide "appropriate medical screening" requires hospital to provide each patient with medical screening similar to one that it would provide to any other patient, and thus, hospital fulfills its "appropriate medical screening" requirement when it conforms to its standard screening procedures. Social Security Act, § 1867(a), as amended, 42 U.S.C.A. §

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1395dd(a).

1 Cases that cite this headnote

[5] **Health**
Duty as to Indigents; Screening and Dumping

To come within protection of Emergency Medical Transfer and Active Labor Act (EMTALA), plaintiff need not allege that he was indigent or uninsured, nor need he allege that economic, race, ethnicity, or any other reason motivated hospital to treat him disparately from other patients. Social Security Act, § 1867(a), as amended, 42 U.S.C.A. § 1395dd(a).

1 Cases that cite this headnote

[6] **Health**
Duty to Provide Emergency Care or Admit; Penalties

Any material departure by hospital from its standard screening procedure constitutes "inappropriate screening" and, thus, a violation of screening requirement under Emergency Medical Transfer and Active Labor Act (EMTALA). Social Security Act, § 1867(a), as amended, 42 U.S.C.A. § 1395dd(a).

1 Cases that cite this headnote

[7] **Health**
Burden of Proof

Patient bringing screening violation action against hospital under Emergency Medical Transfer and Active Labor Act (EMTALA) carries burden of showing that hospital treated patient disparately from its standard screening procedures. Social Security Act, § 1867(a), as amended, 42 U.S.C.A. § 1395dd(a).

1 Cases that cite this headnote

[8] **Judgment**
Tort Cases in General

Genuine issue of material fact as to whether hospital nurse had materially departed from hospital's standard emergency screening procedures for sexual assault victims in connection with treatment of 15-year-old girl who had been raped on previous day precluded summary judgment in action brought against hospital under Emergency Medical Treatment and Active Labor Act (EMTALA). Social Security Act, § 1867(a), as amended, 42 U.S.C.A. § 1395dd(a).

1 Cases that cite this headnote

[9] **Judgment**
Tort Cases in General

Genuine issue of material fact as to whether 15-year-old rape victim had suffered damages as result of hospital's alleged material departure from its standard emergency screening procedures for sexual assault victims precluded summary judgment in action brought against hospital under Emergency Medical Treatment and Active Labor Act (EMTALA). Social Security Act, § 1867(a), as amended, 42 U.S.C.A. § 1395dd(a).

1 Cases that cite this headnote

[10] **Civil Rights**
Common Law or State Law Torts

Section 1983 imposes liability for violations of rights protected by Federal Constitution, not for violations of duties of care arising out of tort law. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[11] **Constitutional Law**
Right to Privacy

Guarantees of personal privacy under Federal Constitution are limited to those that are fundamental or implicit in concept of ordered liberty. U.S.C.A. Const.Amends. 4, 14.

1 Cases that cite this headnote

[12] **Constitutional Law**
Disclosure of Personal Matters

One type of privacy interest protected by Federal Constitution is right to be let alone, which protects individual's interest in avoiding disclosure of personal information; privacy interest focuses on government action that is intrusive or invasive. U.S.C.A. Const.Amends. 4, 14.

Cases that cite this headnote

[13] **Constitutional Law**
Medical Records or Information
Health
Records and Duty to Report; Confidentiality in General

Fifteen-year-old rape victim's right under Federal Constitution to privacy with respect to medical records was not implicated by actions of nurse at public hospital who performed initial screening before turning away victim where victim was not admitted and no examination was conducted, so that no medical records were created. U.S.C.A. Const.Amends. 4, 14.

Cases that cite this headnote

[14] **Constitutional Law**
Medical Records or Information
Privileged Communications and Confidentiality
Nature of Privilege; Necessity of Statute

Physician-patient privilege that protects from disclosure medical records and confidential communications between physician and patient is but a rule of evidence, and has no bearing on whether patient has privacy interest protected by Federal Constitution. U.S.C.A. Const.Amends. 4, 14.

1 Cases that cite this headnote

[15] **Constitutional Law**
Particular Issues and Applications
Health
Confidentiality; Patient Records

Conduct of nurse at public hospital in interviewing 15-year-old rape victim and victim's mother in front of other individuals in hospital waiting room, which allowed fact that victim had been raped to become public, did not violate victim's right to privacy under Federal Constitution, as no protected privacy interest exists in facts of crime against a person. U.S.C.A. Const.Amends. 4, 14.

Cases that cite this headnote

[16] **Constitutional Law**
Records or Information

Person does not have constitutionally protected privacy interest in facts of crime committed against that person. U.S.C.A. Const.Amends. 4, 14.

Cases that cite this headnote

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[17] **Damages**
Nature of Conduct
Damages
Necessity of Proof as to Damages in General

Plaintiff has exceptionally difficult burden to meet in action for intentional infliction of emotional distress, and may recover only where conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. Restatement (Second) of Torts § 46(1)

8 Cases that cite this headnote

[18] **Damages**
Health Care

Conduct of nurse at hospital emergency room to which 15-year-old rape victim had gone for treatment in allegedly stating that hospital did "not like to deal with rape victims," inferring that victim may have lost her virginity by falling or riding a bike or horse, and interviewing victim and her mother in public waiting room rather than private room did not rise to level of extreme and outrageous conduct necessary to allow recovery for intentional infliction of emotional distress.

12 Cases that cite this headnote

Attorneys and Law Firms

***238** Gerald E. Bourque, Spring, for Appellant.

Jeffrey B. McClure, Jeffrey Donald Meyer, Houston, for Appellee.

Before MIRABAL, COHEN and HEDGES, JJ.

OPINION

MIRABAL, Justice.

This case involves claims of (1) violations of 42 U.S.C. § 1395 dd (the Emergency Medical Treatment and Active Labor Act or "EMTALA"); (2) invasion of privacy under 42 U.S.C. § 1983 ("Section 1983"); (3) and intentional infliction of emotional distress. The claims arise out of the treatment of a 15–year–old girl at Tomball Hospital's emergency room on the day following her rape. The trial court granted a take-nothing summary judgment in favor of the defendant hospital, doctor and nurse. We affirm in part, and reverse in part.

This suit was brought by C.M., individually and as next friend of her minor daughter. The petition alleges, in relevant part,[2] that on June 16, 1992, at approximately 2:00 p.m., the minor was raped by a 27–year–old man. ***239** The next day, the minor's mother and neighbor took the minor to the Tomball Hospital Emergency Room for examination. The petition alleges that defendant Mary Ruckman, the head nurse: (1) refused examination of the minor to determine the degree of the injury to her; (2) refused to prepare a "rape kit" on the minor; (3) treated the minor and her mother with "disdain, disgust and indignity"; and (4) caused information about the rape of the minor to be broadcast among other patrons of the emergency room by interviewing the minor in the public waiting room.

Against defendant nurse Ruckman, plaintiffs asserted causes of action based on: (1) intentional infliction of emotional distress for the way she conducted the interview of the minor rape victim in the public waiting room of the hospital; and (2) invasion of the minor's right to privacy under 42 U.S.C. § 1983.

Against defendant Tomball Regional Hospital, plaintiffs asserted causes of action based on: (1) violation of 42 U.S.C. § 1395 dd (EMTALA), due to the failure and refusal of the emergency room to provide an appropriate medical screening exam, or stabilizing treatment, for the minor; and (2) violation of 42 U.S.C. § 1983 by maintaining emergency room policies, customs, and practices that are "deliberately indifferent to the juvenile female sexual assault victim's right to privacy," causing public disclosure of private facts.[3]

Against defendant Albert D. Friday, Jr., M.D., the medical director of the emergency department for the Hospital, plaintiffs alleged a violation of 42 U.S.C. § 1983. Specifically, plaintiffs asserted that, as a supervisory official who promulgates and enforces policy for the emergency room, Dr. Friday demonstrated a "deliberate indifference to rape victims' rights to privacy and tacitly authorized the implementation of policies and

practices that caused the invasion of the minor's privacy and the disclosure of confidential information." Further, plaintiffs alleged Dr. Friday's failure to implement policies as recommended by the Texas Department of Health proximately caused the unreasonable disclosure of private facts.

Defendants moved for summary judgment, addressing each cause of action, and the trial court granted summary judgment.

In a sole point of error, plaintiffs assert the trial court erred by granting defendants' motion for summary judgment when there were disputed fact issues as to each asserted cause of action.

The standard for appellate review of a summary judgment for a defendant is whether the summary judgment proof establishes, as a matter of law, that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's cause of action. *Lear Siegler, Inc. v. Perez,* 819 S.W.2d 470, 471 (Tex.1991); *Gibbs v. General Motors Corp.,* 450 S.W.2d 827, 828 (Tex.1970). The movant has the burden to show that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548–49 (Tex.1985). Evidence favorable to the non-movant will be taken as true in deciding whether there is a disputed material fact issue that precludes summary judgment. *Id.* Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Randall's Food Mkts., Inc. v. Johnson,* 891 S.W.2d 640, 644 (Tex.1995). A summary judgment for the defendant, disposing of the entire case, is proper only if, as a matter of law, plaintiff could not succeed upon any theories pleaded. *Smith, Seckman, Reid, Inc. v. Metro Nat'l Corp.,* 836 S.W.2d 817, 819 (Tex.App.—Houston [1st Dist.] 1992, no writ); *Havens v. Tomball Community Hosp.,* 793 S.W.2d 690, 691 (Tex.App.—Houston [1st Dist.] 1990, writ denied); *Dodson v. Kung,* 717 S.W.2d 385, 390 (Tex.App.—Houston [14th Dist.] 1986, no writ). Once the defendant produces sufficient evidence to establish the right to a summary judgment, the plaintiff must set forth sufficient evidence to give rise to a fact issue to ***240** avoid a summary judgment. "*Moore" Burger, Inc. v. Phillips Petroleum Co.,* 492 S.W.2d 934, 936–37 (Tex.1972).

[1] [2] A summary judgment cannot be affirmed on any grounds not presented in the motion for summary judgment. *Hall v. Harris County Water Control & Improvement Dist. No. 50,* 683 S.W.2d 863, 867 (Tex.App.—Houston [14th Dist.] 1984, no writ). When a trial court's order does not specify the grounds relied on for its ruling, the summary judgment will be affirmed if any of the theories advanced are meritorious. *State Farm Fire & Cas. Co. v. S.S.,* 858 S.W.2d 374, 378 (Tex.1993); *Jones v. Legal Copy, Inc.,* 846 S.W.2d 922, 924 (Tex.App.—Houston [1st Dist.] 1993, no writ).

The uncontroverted summary judgment evidence shows that on June 16, 1992, the minor plaintiff was raped. She was brought to Tomball Hospital's emergency room approximately 23 hours later, on June 17, 1992. Mary Ruckman, the head nurse on duty, conducted the minor's screening upon arrival.

Rather than take the minor to a private room, Ruckman conducted the entire screening in the emergency waiting room of the hospital. During the screening, Ruckman was informed that the minor had been raped, and that she was in severe pain. Ruckman did not take the minor's vital signs, nor did she ask for any medical history, nor was any physical examination done whatsoever. Ruckman did, however, ask questions concerning the minor's rape, and asked if the minor had bathed. Learning that the minor had bathed, Ruckman stated that there was nothing the hospital could do for the minor, and told the minor and her mother to go to their family doctor. No other instructions were given by Ruckman. The mother repeatedly asked for an examination of her daughter to determine whether her daughter was all right. Ruckman insisted that there was nothing the hospital could do for the minor. The minor and her mother left. On their way home, they stopped at their family doctor's office, which was closed. The next morning the minor and her mother went back to their family doctor's office and were notified that the doctor was in surgery and, thus, could not conduct a full examination. However, the nurse did a preliminary examination and provided the minor with rape crisis information. She also instructed them to go to Ben Taub Hospital, which they did, and a full examination, including a rape kit, was performed.

When Nurse Ruckman interviewed the minor and her mother in the public waiting room, 10 to 15 people were in the room and "easily overheard the entire discussion," according to the mother's affidavit. One person present was Chris Moore, a person who apparently knew the minor, and Moore told others about the rape. Two days later, the minor was told by another child that the child knew about the rape from Moore's disclosures. The mother also stated the minor was "emotionally devastated" by the loss of confidentiality, and they had to leave Tomball and move their residence because the minor was "too upset to continue living in the same neighborhood and going to the same schools when

everyone knew of the incident." The minor "gets ill when discussions of going to the doctor arise." The minor is now "obsessed with her privacy," will not talk to her mother about anything, is afraid of any sort of medical activity, and will not trust anyone with private information.

Article 42 United States Code § 1395 dd

Plaintiffs asserted that Tomball Hospital violated EMTALA by improperly screening the minor. More specifically, plaintiffs alleged that because Tomball Hospital did not prepare a rape kit as required by Tomball Hospital's procedures manual for sexually assaulted patients, and did not conduct an examination of the minor to determine whether an emergency medical condition existed, Tomball Hospital failed to properly screen and treat the minor pursuant to the requirements of EMTALA.

Tomball Hospital asserted, as its first ground for summary judgment, that it conducted the screening of the minor just as it would conduct the screening of any other patient who came into the hospital emergency room in a similar situation, and that is all ***241** that is required by EMTALA.[4]

[3] EMTALA imposes two requirements: (1) the hospital must conduct an appropriate medical screening of persons visiting the hospital's emergency room; and (2) the hospital may not transfer out of the hospital those patients whose medical conditions have not been stabilized. 42 U.S.C. § 1395 dd (a), (b); *Brewer By & Through Brewer v. Miami County Hosp.*, 862 F.Supp. 305, 307 (D. Kansas 1994).

[4] [5] [6] [7] Section 1395 dd(a) of EMTALA requires a medicare provider hospital with an emergency room to accept any individual who comes to the emergency department and requests an examination or treatment for a medical condition. The hospital must conduct an appropriate medical screening within the capability of the hospital's emergency department to determine whether or not an emergency medical condition exists. 42 U.S.C.. 1395 dd(a). The Act does not define "appropriate medical screening." However, the congressional purpose behind the enactment of EMTALA supports the conclusion that this language requires a hospital to provide each patient[5] with a medical screening similar to one that it would provide to any other patient. *Holcomb v. Humana Medical Corp.*, 30 F.3d 116, 117 (11th Cir.1994); *Gatewood*, 933 F.2d at 1041; *Cleland v. Bronson Health Care Group, Inc.*, 917 F.2d 266, 268 (6th Cir.1990). Thus, a hospital fulfills its "appropriate medical screening" requirement when it conforms to its standard screening procedures. By the same token, any material departure from its standard screening procedure constitutes an "inappropriate screening" and, thus, a violation of the screening requirement. *Gatewood*, 933 F.2d at 1041 (hospital fulfills the "appropriate medical screening requirement" when it conforms in its treatment of a particular patient to its standard screening procedure); *see also Repp v. Anadarko Mun. Hosp.*, 43 F.3d 519, 522 (10th Cir.1994) (hospital violates EMTALA when it does not follow its own standard emergency screening procedure; however, mere de minimis variations from hospital's standard procedures do not amount to a violation of hospital policy and, thus, are not violations of EMTALA). A patient bringing a screening violation action against a hospital carries the burden of showing that the hospital treated the patient disparately from its standard screening procedures. *Williams v. Birkeness*, 34 F.3d 695, 697 (8th Cir.1994).

Tomball Hospital's procedure manual, as it deals with medical investigations in cases of suspected sexual assault, was offered as proof of Tomball Hospital's screening procedures concerning raped and sexually assaulted victims. The stated purpose of the manual is:

> to provide for the *medical detection* and *emotional support* of a person who has been the victim of a sexual assault to include provision of immediate safety, *evidence collection*, comfort, *privacy*, *preventative* and emergency medical treatment and referral services.

(Emphasis added.) The manual outlines detailed procedures to be conducted by the hospital staff upon a victim's arrival.[6] In her answers to interrogatories, nurse Ruckman admitted that she did not follow any of the detailed procedures.

[8] Plaintiffs offered ample evidence to raise an issue of fact regarding whether the minor's screening was in violation of EMTALA. ***242** Viewing the evidence in the light most favorable to plaintiffs and resolving all inferences in favor of plaintiffs, the record shows that the minor was raped; that her mother took her to Tomball Hospital within 23 hours after the rape and requested an examination to determine if the minor was hurt; Ruckman was informed that the minor was "bleeding from her bottom"[7] and in severe pain as though "someone was tearing [her] apart;" upon learning that the minor had bathed after the rape, Ruckman refused the minor an

examination, stating, "We do not like to deal with rape victims, especially after they have taken a bath or a shower or anything;" Ruckman implied that the minor was not raped and could have lost her virginity in a number of ways, including riding a bike or a horse; Ruckman did not follow the Hospital's standard emergency room procedures for screening and treating the victim of a suspected sexual assault.

We conclude a material fact issue was raised regarding whether the hospital materially departed from its standard emergency screening procedures in this case; therefore, Tomball Hospital was not entitled to summary judgment on its first ground.

[9] Tomball Hospital's second ground for summary judgment was that, regardless of whether a screening violation occurred, plaintiffs were not damaged from any screening violation and, thus, it is still entitled to summary judgment as a matter of law. This argument is without merit.

42 U.S.C. 1395 dd (d)(2)(A) specifically states:

> [a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.[8]

The plaintiffs' petition sought damages for reasonable medical expenses for necessary medical treatment; lost wages; mental anguish; pain and suffering; and reasonable attorneys' fees. Both the mother and the minor testified regarding the pain the minor was suffering, and the humiliation the minor felt in response to Ruckman's implied belief that the minor was not raped. Additionally, the mother states in her affidavit that, because the interview was conducted in the emergency waiting room rather than in a private room, individuals overheard the interview, which led to the minor's friends and neighbors finding out about the incident. This humiliation forced the minor and her family to move from Tomball.

Additionally, Mary Krause, the peer counselor and group facilitator for sexual assault victims at the Houston Area Women's Center, where the minor has been receiving counseling, stated in her affidavit that statements made in the context of an admittance interview at a hospital, in a care provider/patient relationship, can compound the sexual assault recovery process by adding additional issues that need to be addressed in counseling. According to Krause, the statements and actions by Ruckman in the emergency room caused the minor to have additional compounded emotional issues requiring counseling.

We conclude the evidence raises a material fact issue regarding whether plaintiffs suffered recoverable damages as a result of any screening violation by Tomball Hospital.

Accordingly, we hold the trial court erred in granting summary judgment in favor of Tomball Hospital on the causes of action based on 42 U.S.C. § 1395dd.

Article 42 United States Code § 1983

With regard to plaintiffs' claims against all three defendants under 42 U.S.C § 1983, defendants ***243** asserted as grounds for summary judgment that (1) plaintiffs have no constitutionally recognized privacy interest; (2) plaintiffs did not reasonably expect the information to remain private; and (3) medical malpractice does not form the basis of a section 1983 claim.

Plaintiffs asserted that defendants violated the minor's right to privacy under 42 U.S.C.1983[9]. Plaintiffs claim a privacy right regarding the minor's medical records, her identity, and her condition as a victim of sexual assault. They assert the minor's right to privacy was violated by the fact that the minor's screening was conducted in the emergency room waiting area rather than a private room, causing plaintiffs' conversations with Ruckman to be overheard by people in the waiting area.

[10] Section 1983 imposes liability for violations of rights protected by the United States Constitution, not for violations of duties of care arising out of tort law. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 447 (5th Cir.1994). Plaintiffs assert the minor had a constitutionally protected right to privacy under the Fourth and Fourteenth Amendments to the U.S. Constitution.

[11] [12] Guarantees of personal privacy are limited to those that are "fundamental" or "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). One type of privacy interest that is protected by the U.S. Constitution is the "right to be let alone", which protects an individual's interest in avoiding the disclosure of personal

information. *Whalen v. Roe,* 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977); *City of Sherman v. Henry,* 928 S.W.2d 464, 467 (Tex.1996). This privacy interest focuses on government action that is intrusive or invasive. *Whalen,* 429 U.S. at 599, 97 S.Ct. at 876.. Thus, an individual's medical records have been declared to be within a zone of privacy protected by the Federal Constitution. *Whalen,* 429 U.S. at 601, 97 S.Ct. at 877; *G.M.C. v. Director of Nat'l Inst.,* 636 F.2d 163, 166 (6th Cir.1980); *United States v. Westinghouse Elec. Corp.,* 638 F.2d 570, 577 (3rd Cir.1980); *Tarrant County Hosp. Dist. v. Hughes,* 734 S.W.2d 675, 679 (Tex.App.—Fort Worth 1987, orig. proceeding).

[13] In the present case, the minor was not admitted into the hospital and a medical exam was not conducted. During the minor's screening, Ruckman had pen and paper in hand but did not make any notes; thus, no medical records were created. Accordingly, the minor's privacy right with regard to her medical records was not violated.

[14] Plaintiffs contend that the Texas Rules of Civil Evidence contain a physician-patient privilege that protects from disclosure medical records and confidential communications between a physician and a patient. *See* TEX.R.CIV.EVID. 509(b)(2). However, this is but a rule of evidence, and has no bearing on whether the minor has a privacy interest protected by the U.S. Constitution.

[15] [16] The crux of plaintiffs' complaint is that the defendants' actions caused the "public disclosure of private facts"; that by interviewing plaintiffs in the emergency waiting room, it became public that the minor was a rape victim. Plaintiffs claim damage to their reputations as a result of the public disclosure. However, plaintiffs do not cite any case recognizing a person's constitutionally protected privacy interest in the facts of a crime committed against the person, and we have found none. *See Scheetz v. The Morning Call, Inc.,* 946 F.2d 202, 209 (3rd Cir.1991) (no valid section 1983 action for re-publication of information contained in a police report regarding wife's allegation of spouse abuse); *see also Paul v. Davis,* 424 U.S. 693, 699, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976) (injury to reputation is not a liberty interest protected by the Fourteenth Amendment.).

***244** We conclude the summary judgment was proper in favor of all three defendants on plaintiffs' section 1983 claims.

Intentional Infliction of Emotional Distress

Plaintiffs also pled that nurse Ruckman's conduct and statements with regard to the minor were so "extreme and atrocious" that they rose to the level of intentional infliction of emotional distress. The mother testified in her deposition that nurse Ruckman treated them like dirt and told them, "We do not like to deal with rape victims." She also testified about Ruckman's remarks implying that the minor could have lost her virginity by falling, or riding a bike or a horse, rather than by being a victim of rape. The evidence showed Ruckman interviewed plaintiffs in the public waiting room, rather than a private room. Plaintiffs argue that Ruckman's behavior, coming from a health-care provider in the context of an admittance interview with a sexually assaulted minor, rises to the level of intentional infliction of emotional distress.

Ruckman's ground for summary judgment was that her conduct did not constitute intentional infliction of emotional distress as a matter of law.

[17] In Texas, a plaintiff has an exceptionally difficult burden to recover under this cause of action. In *Twyman v. Twyman,* 855 S.W.2d 619, 621–22 (Tex.1993), the supreme court adopted section 46(1) of the RESTATEMENT (SECOND) OF TORTS (1965), according to which recovery is to be had for outrageous conduct "only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.* at 621. We believe that (1) the court has said what it means, and (2) Ruckman's conduct does not meet the Restatement standard as a matter of law.

Beginning with *Twyman,* the supreme court has weighed conduct under the intentional infliction of emotional distress standard. In *Twyman,* the court held that the wife's allegations that the husband "intentionally and cruelly attempted to engage her in 'deviate sexual acts' " fell within the category of conduct for which liability could attach. 855 S.W.2d at 623.

In *Massey v. Massey,* the court left standing the court of appeals' upholding of liability for intentional infliction of emotional distress, while rejecting the negligent infliction cause of action. 867 S.W.2d 766 (Tex.1993). The involved conduct represented a pattern of continued harassment that was specifically addressed to the plaintiff during her 22–year marriage to defendant. *See Massey v. Massey,* 807 S.W.2d 391, 399–400 (Tex.App.—Houston [1st Dist.] 1991, writ denied, 867 S.W.2d 766).

In *Wornick Co. v. Casas,* 856 S.W.2d 732, 734

(Tex.1993), the supreme court examined conduct arising out of the employer-employee relationship. It held that handling a termination of employment in an insensitive manner and escorting a fired salaried employee off the premises with a security guard did not constitute intentional infliction of emotional distress as a matter of law. *Id.* at 734.

In *Mattix–Hill v. Reck,* the court held that the actions of a Department of Human Services (DHS) caseworker did not rise to the level of intentional infliction of emotional distress upon the mother of a child placed in DHS custody. 923 S.W.2d 596, 598 (Tex.1996). The caseworker had removed a minor girl from the home of her mother and stepfather after the girl accused her stepfather of sexual molestation. *Id.* at 596. At one point, the caseworker informed the mother that the girl would not be returned to her. *Id.* at 597. When the girl ran away from the foster home, the caseworker telephoned the mother to inform her of the girl's actions and asked the mother to come to the DHS office to sign a plan of permanent placement. *Id.* The mother testified that she was extremely upset by that conversation. *Id.* During the three days she was missing, the girl was allegedly raped by more than one man while she was under the influence of alcohol, drugs, or both. *Id.* After the stepfather confessed that he had molested the girl, the wife separated from him and instituted divorce proceedings. *Id.* The girl was ultimately returned to the mother's custody. *Id.*

***245** The mother filed suit on her own behalf and as next friend of the girl against DHS, the caseworker, and four of her colleagues for intentional infliction of emotional distress, among other claims. The court held there was "no evidence of intentional infliction of emotional distress," noting that the evidence showed activities that are a part of a caseworker's job, which is often carried out in a highly emotionally charged atmosphere. *Id.* at 598.

[18] In the present case, plaintiffs point to the following acts as being some evidence of outrageous conduct on the part of Ruckman:

(1) Ruckman treated the plaintiffs like dirt and told them, "We do not like to deal with rape victims."

(2) Ruckman inferred that the minor could have lost her virginity by falling or riding a bike or a horse, rather than by being a victim of rape.

(3) Ruckman interviewed the plaintiffs in a public waiting room rather than in a private room.

According to the supreme court, "[r]ude behavior does not equate to outrageousness, and behavior is not outrageous simply because it may be tortious." *Natividad v. Alexsis, Inc.,* 875 S.W.2d 695, 699 (Tex.1994). Ruckman's conduct was an isolated contact with plaintiffs. The actions took place while she was doing her job, although doing it badly. She was rude, insensitive, and uncaring. But her conduct did not rise to the level of intentional infliction of emotional distress under prevailing standards.

Accordingly, we conclude the summary judgment for Ruckman was proper on the intentional infliction of emotional distress cause of action.

We affirm the summary judgment in favor of Dr. Friday; we affirm the summary judgment in favor of nurse Ruckman; and we affirm the summary judgment in favor of Tomball Hospital on the cause of action based on 42 U.S.C. § 1983. We reverse the summary judgment in favor of Tomball Hospital on the cause of action based on 42 U.S.C. § 1395 dd (EMTALA), and we remand that portion of the judgment to the trial court for further proceedings.

All Citations

961 S.W.2d 236

Footnotes

1 This Act is also known as the "Patient Anti–Dumping Act".

2 Plaintiffs also sued the man who raped the minor, and the owner and the tenant of the home where the rape occurred. These defendants, and the causes of action against them, are not involved in this appeal.

3 Plaintiffs' petition alleged that the Texas Department of Health suggests that all sexual assault victims be considered medical emergencies and that medical facilities should provide private offices for interviews with sexual assault victims, citing Tex. Evidence Collection Protocol, April 1992.

4 It is uncontested that EMTALA applies.

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5 Congress enacted EMTALA to prevent "patient dumping" (the practice of private hospital emergency rooms refusing to treat indigent patients by transferring them to a public hospital or by merely turning them away). H.R.Rep. No. 241, 99th Cong., 1st Sess., pt. 3 at 5 (1986) *reprinted* in 1986 U.S.C.C.A.N. 726. However, to come within the protection of EMTALA, a plaintiff need not allege he was indigent or uninsured, nor need he allege that economic, race, ethnicity or any other reason motivated the hospital to treat him disparately from other patients. *Ruiz v. Kepler,* 832 F.Supp. 1444, 1447 (D.N.M.1993); ***see also*** *Gatewood v. Washington Healthcare Corp.,* 933 F.2d 1037, 1040 (D.C.Cir.1991).

6 The detailed procedures include the following:
1. Place patient in treatment room # C and provide as much privacy as possible.
2. Offer emotional support. If at all possible, arrange for one person to be with the patient throughout the entire exam.
3. Obtain vital signs, history of allergies and other information necessary to complete E.R. chart.

7 There is conflicting evidence about whether nurse Ruckman was told about the bleeding. We must view the evidence in the light most favorable to plaintiffs.

8 Additionally, 42 U.S.C. section 1395 dd (d)(1)(A) states: "[a] participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than $50,000 (or not more than $25,000 in the case of a hospital with less than 100 beds) for each such violation."

9 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

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364 Ill.App.3d 446
Appellate Court of Illinois,
First District, First Division.

Michael CANGEMI and Madeline Clement Belt,
Plaintiffs–Appellants,
v.
ADVOCATE SOUTH SUBURBAN HOSPITAL, an Illinois corporation, Edgar Del Castillo, M.D.,
Defendants–Appellees.

No. 1–04–3155.
|
March 6, 2006.

Synopsis
Background: Patient and her then 20-year-old child sued hospital and physician for medical negligence for injuries allegedly sustained during the delivery of child. The Circuit Court, Cook County, Sharon J. Coleman, J., dismissed action and denied plaintiffs' request to file a second amended complaint. Plaintiffs appealed.

Holdings: The Appellate Court, Gordon, J., held that:

[1] dismissal of respondeat superior claim against hospital acted as a dismissal of their against physicians who were not served and was a final, appealable judgment as to all claims and all defendants;

[2] patient and child did not adequately plead the duty and breach elements of a negligence cause of action against consulting physician;

[3] patient and child failed to allege knowledge or ratification of alleged fraudulent concealment of its agent on part of hospital, as was required to toll statute of limitations on claims against hospital;

[4] failing to allow a second amended complaint which made additional allegations of fraudulent concealment and agency against hospital was not an abuse of discretion;

[5] patient and child failed to establish nexus between physician's alleged fraudulent statement and child's physical injuries, as was required to find physician liable for damages caused by his alleged fraudulent misrepresentation that the caesarian section was necessitated by the size of the baby's head; and

[6] patient and child's proposed second amended complaint failed to state a claim for spoliation of evidence.

Affirmed.

West Headnotes (35)

[1] **Appeal and Error**
⇐Dismissal of one or more parties

Circuit court's dismissal of respondeat superior claim of patient and her son against hospital, a properly served defendant that successfully moved for dismissal, acted as a dismissal of their against physicians who were not served, as hospital and physicians collectively constituted a "unified tortfeasor" for purposes of malpractice complaint and, thus, order of dismissal constituted a final, appealable judgment as to all claims and all defendants. Sup.Ct.Rules, Rule 304(a).

Cases that cite this headnote

[2] **Pretrial Procedure**
⇐Insufficiency in general

Motions to dismiss pursuant to section of Code of Civil Procedure governing defects appearing on face of pleading attack the legal sufficiency of the complaint by pointing to defects which appear on the face of the complaint. S.H.A. 735 ILCS 5/2–615.

2 Cases that cite this headnote

[3] **Pretrial Procedure**
⇐Insufficiency in general

The question presented on review of a motion to dismiss pursuant section of Code of Civil Procedure governing defects appearing on face of pleading is whether sufficient facts are contained in the pleadings which, if established, could entitle plaintiff to relief. S.H.A. 735 ILCS 5/2–615.

1 Cases that cite this headnote

[4] **Pretrial Procedure**
Affirmative Defenses, Raising by Motion to Dismiss

While a motion to dismiss pursuant to section of Code of Civil Procedure allowing for involuntary dismissal of claim based on certain defects or defenses attacks the legal sufficiency of the complaint, it generally does so by raising affirmative matter that avoids the legal effect of or defeats the claim. S.H.A. 735 ILCS 5/2–619.

2 Cases that cite this headnote

[5] **Limitation of Actions**
Motion

The statute of limitations is normally an affirmative defense appropriate only to motions to dismiss pursuant to section of Code of Civil Procedure allowing for involuntary dismissal of claim based on certain defects or defenses; however, where it appears from the face of the complaint that the statute of limitations has run, such a defense can also be raised in a motion to dismiss under section governing defects appearing on face of pleading. S.H.A. 735 ILCS 5/2–615, 2–619.

3 Cases that cite this headnote

[6] **Limitation of Actions**
Concealment of Cause of Action

Generally, a plaintiff alleges fraudulent concealment of cause of action to toll the statute of limitations must show affirmative acts by the defendant which were designed to prevent, and in fact did prevent, the discovery of the claim. S.H.A. 735 ILCS 5/13–215.

6 Cases that cite this headnote

[7] **Limitation of Actions**
Concealment of Cause of Action

Mere silence of the defendant and the mere failure on the part of the plaintiff to learn of a cause of action do not amount to fraudulent concealment that would toll statute of limitations. S.H.A. 735 ILCS 5/13–215.

3 Cases that cite this headnote

[8] **Limitation of Actions**
Concealment of Cause of Action

Fraudulent misrepresentations which form the basis of the cause of action do not constitute fraudulent concealment under statute governing tolling of statute of limitations for fraudulent concealment of cause of action, absent a showing that the misrepresentations tended to conceal the cause of action. S.H.A. 735 ILCS 5/13–215.

7 Cases that cite this headnote

[9] **Negligence**
Elements in general

The elements of negligence include duty, a breach of that duty, proximate cause, and damages.

Cases that cite this headnote

[10] **Limitation of Actions**
Concealment by agent or third person

The fraudulent concealment of a cause of action by someone other than the defendant may toll the limitations period only where the person fraudulently concealing the cause of action is in privity with or an agent of the defendant. S.H.A. 735 ILCS 5/13–215.

3 Cases that cite this headnote

[11] **Health**
Pleading

Patient and her child failed to adequately plead duty and breach elements of negligence cause of action against consulting physician for brain damage sustained by child prior to his delivery via caesarean section, based on physician's failure to attend to patient until nearly two hours after fetal monitor was placed on her, and on his one-hour delay of surgery after first observing fetal distress; there was no allegation physician was even aware of patient's presence in hospital prior to when he was summoned, that he had duty to perform surgery himself, that he was capable of such a procedure, or that he had additional duty beyond calling "code blue," scheduling caesarean section, and obtaining patient's consent for surgery, to cause other physicians to perform surgery in timely manner.

Cases that cite this headnote

[12] **Limitation of Actions**
Ignorance, trust, fraud, and concealment of cause of action

Patient and her child failed to allege knowledge or ratification of alleged fraudulent concealment of its agent on part of hospital, as was required to toll statute of limitations on medical malpractice claims against hospital. S.H.A. 735 ILCS 5/13–212(a), 13–215.

1 Cases that cite this headnote

[13] **Limitation of Actions**
Concealment by agent or third person

A principal is not estopped from raising the statute of limitations as a defense unless the principal knew, or participated in, the concealment alleged to have been committed by the agent.

Cases that cite this headnote

[14] **Limitation of Actions**
Concealment of Cause of Action

The tolling effect of fraudulent concealment is equitable in nature, as are statutes of limitations.

Cases that cite this headnote

[15] **Appeal and Error**
Ratification, estoppel, waiver, and res judicata
Appeal and Error
Failure to Urge Objections

Patient and her child forfeited their right to claim on appeal that doctrine of equitable estoppel provided a reason independent from fraudulent concealment provision for tolling statute of limitations to reverse the circuit court's dismissal of their case on the basis of timeliness, where patient and child did not assert claim in the court below and did not respond to hospital's waiver contentions in their reply brief. S.H.A. 735 ILCS 5/13–212(a), 13–215.

2 Cases that cite this headnote

[16] **Limitation of Actions**
Estoppel to rely on limitation
Limitation of Actions
Concealment of Cause of Action

The main difference between general equitable estoppel and fraudulent concealment that tolls a statute of limitations is that, although they both involve the defendant doing something to lull or induce the plaintiff to delay the filing of his claim, equitable estoppel may apply even where the defendant's actions are unintentionally deceptive. S.H.A. 735 ILCS 5/13–215.

Cases that cite this headnote

[17] **Appeal and Error**
Amended and Supplemental Pleadings
Pleading
Discretion of Court

Whether to grant a motion to amend pleadings rests within the discretion of the trial court, and a reviewing court will not reverse a trial court's decision absent an abuse of that discretion.

1 Cases that cite this headnote

[18] **Appeal and Error**
Amended and Supplemental Pleadings
Pleading
Discretion of Court

The relevant factors to be considered in determining whether the circuit court abused its discretion on deciding whether grant a motion to amend pleadings are: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.

3 Cases that cite this headnote

[19] **Appeal and Error**
Amended and Supplemental Pleadings

If a proposed amendment does not state a cognizable claim, and thus, fails the first of the *Loyola Academy* factors, courts of review will often not proceed with further analysis.

2 Cases that cite this headnote

[20] **Limitation of Actions**
Concealment by agent or third person

Although general agency law may well impute an agent's fraud to an unknowing principal, for purposes of tolling a statute of limitations, only a knowing principal will be estopped from asserting the statute of limitations on the basis of the fraudulent concealment of an agent. S.H.A. 735 ILCS 5/13–215.

Cases that cite this headnote

[21] **Limitation of Actions**
Amendment of original pleading

Failing to allow a second amended complaint by patient and child which made additional allegations of fraudulent concealment and agency against hospital was not an abuse of trial court's discretion, where proposed amended complaint did not allege knowledge on the part of any principal of hospital. S.H.A. 735 ILCS 5/13–215.

Cases that cite this headnote

[22] **Fraud**

Elements of Actual Fraud

To state a claim for fraudulent misrepresentation, a plaintiff must allege: (1) a false statement of material fact; (2) that the party making the statement knew the statement was false or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on that statement and did, in fact, rely on it; (4) the statement was made for the purpose of inducing the other party to act; and (5) that reliance by the person to whom the statement was made led to his injury.

2 Cases that cite this headnote

[23] **Fraud**
Duty to disclose facts

Although an affirmative misrepresentation is normally required to state a claim for fraudulent misrepresentation, a mere concealment may amount to a misrepresentation when it is done with an intent to deceive under circumstances creating an opportunity and a duty to speak, and the concealed information is such that the other party would have acted differently had he been aware of it.

2 Cases that cite this headnote

[24] **Fraud**
Time to sue and limitations
Health
Limitations; time requirements
Limitation of Actions
Suspension or stay in general; equitable tolling

The statutes of limitations and repose apply to any action against a hospital or physician arising out of patient care whether predicated on negligence or fraud; concomitantly, the requirements for tolling the limitations period for an action for fraud against a hospital are the same as those for negligence. S.H.A. 735 ILCS 5/13–212.

1 Cases that cite this headnote

[25] **Limitation of Actions**
Ignorance, trust, fraud, and concealment of cause of action

Absent allegation that any principal of hospital was aware of the fraud, patient and child failed to adequate pled fraudulent concealment to toll their claim of fraud against hospital. S.H.A. 735 ILCS 5/13–212, 13–215.

Cases that cite this headnote

[26] **Fraud**
Injury and causation

Patient and child failed to establish nexus between physician's alleged fraudulent statement and child's physical injuries, as was required to find physician liable for damages caused by his alleged fraudulent misrepresentation that the caesarian section was necessitated by the size of the baby's head, when in fact it was indicated by symptoms of fetal distress.

1 Cases that cite this headnote

[27] **Fraud**
Injury and causation

Generally, the damage necessary to support a cause of action for fraud must be pecuniary in nature.

Cases that cite this headnote

[28] **Fraud**
Injury and causation

In an action for fraud, damages may not be predicated on mere speculation and must be a proximate consequence of the fraud.

Cases that cite this headnote

[29] **Damages**
Elements in general

To state a claim for intentional infliction of emotional distress, a plaintiff must allege: (1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended to inflict severe emotional distress or knew that there was a high probability that his conduct would do so; and (3) the defendant's conduct actually caused severe emotional distress.

10 Cases that cite this headnote

[30] **Damages**
Health care

Allegation that physician attempted to conceal the injuries sustained by child by fraudulently telling patient that the caesarean section was necessitated by the size of the baby's head was insufficient to state a cause of action for intentional infliction of emotional distress; it would have been contradictory to allege that physician also intended for his false statement to cause patient's and child's emotional distress, because he allegedly intended that patient and child never discover the falsity of his statement.

9 Cases that cite this headnote

[31] **Limitation of Actions**
Amendment of original pleading

Declining to allow patient and child to amend complaint with additional allegations of negligence and additional allegations of fraudulent concealment on the part of physician, which would toll limitations period applicable to their direct cause of action against him was not an abuse of discretion; no new instance of negligence was alleged and instead the same acts that were found to be insufficient to establish negligence or fraudulent concealment were merely alleged in greater detail. S.H.A. 735 ILCS 5/13–212, 13–215.

Cases that cite this headnote

[32] **Torts**
Particular cases
Torts
Pleading

Patient and child's proposed second amended complaint failed to state a claim for negligent spoliation of evidence; document they alleged was destroyed by hospital and physician was provided to them prior to the initiation of medical malpractice suit and that document was in the record and its authenticity had not been challenged by either hospital or physician.

2 Cases that cite this headnote

[33] **Torts**
Negligence
Torts
Pleading

To state a claim for negligent spoliation, a plaintiff must allege that but for the spoliation by defendant, plaintiff likely would have prevailed in the underlying suit.

2 Cases that cite this headnote

[34] **Torts**
Particular cases

That document allegedly destroyed by hospital and physician was in the record and was provided to patient by hospital less than a year prior to the initiation of medical malpractice suit precluded recovery for intentional spoliation of evidence.

1 Cases that cite this headnote

[35] **Torts**
Spoliation, Destruction, or Loss of Evidence

As with negligent spoliation of evidence, the injury contemplated by a claim for intentional spoliation must relate to the ability to bring an underlying claim.

2 Cases that cite this headnote

Attorneys and Law Firms

****796** Robert A. Holstein, Holstein Law Offices, LLC, Chicago, for Appellant.

Brian Schroeder, Cassiday, Schade & Gloor, LLP, Chicago, for Appellee Advocate South Suburban Hospital.

Susan Condon, Clausen Miller P.C., Chicago, for Appellee Edgar Del Castillo, M.D.

Opinion

Justice GORDON delivered the opinion of the court:

***448 ***907** Michael Cangemi and his mother, Madeline Clement Belt, appeal the dismissal of their amended complaint against defendants Advocate South Suburban Hospital (Advocate Hospital) and Edgar Del Castillo, M.D., for medical negligence for injuries allegedly sustained during the delivery of Michael in 1982. Plaintiffs allege that the statutes of limitation and repose normally applicable to such a cause of action (see 735 ILCS 5/13–212 (West 2004)) do not apply here because the defendants fraudulently concealed the existence of the cause of action (see 735 ILCS 5/13–215 (West 2004)). Plaintiffs further appeal the circuit court's denial of their motion to file a second amended complaint. For the reasons that follow, we affirm.

I. BACKGROUND

On July 7, 2003, plaintiffs filed their complaint, seeking recovery for brain damage sustained by Michael prior to his delivery *****908 **797** via caesarean section in 1982, and for other damages sustained by both Michael and Madeline, including pain, discomfort, emotional distress, loss of normal life and "other damages of a personal and pecuniary ***449** nature." Plaintiffs' complaint named as defendants Advocate Hospital, Drs. Del Castillo, Simpson, and McMann, and the estates of the deceased Drs. Hiatt and Chavez. Count I of the complaint charged direct negligence against Advocate Hospital, while counts II and III charged Advocate Hospital with vicarious liability for the negligence of the other defendants on the theories of respondeat superior and apparent agency. Count IV was a direct charge of negligence against Dr. Hiatt. Count V alleged that the statutes of limitation and repose that would normally be applicable to the above counts were tolled in this case because the defendants fraudulently concealed Michael's injuries by not informing Madeline of the circumstances surrounding his birth.

Defendants Advocate Hospital, Del Castillo, and McMann each subsequently moved for dismissal pursuant to sections 2–615 and 2–619 of the Code of Civil Procedure. 735 ILCS 5/2–615, 2–619 (West 2004). The estates of Drs. Hiatt and Chavez were not served, no appearances where made on their behalf, and they were not explicitly included in any of the other defendants' motions to dismiss. On December 23, 2003, the circuit court granted Advocate Hospital's and Dr. Del Castillo's section 2–615 motions to dismiss and struck plaintiffs' complaint with leave to amend. The court declined to rule on these defendants' section 2–619 motions and the court did not address either of Dr. McMann's and Dr. Simpson's combined motions to dismiss. With regard to Advocate Hospital and Dr. Del Castillo's section 2–615 motions, the court noted that the complaint was insufficient to support fraudulent concealment because no allegations were made that the defendants acted in an affirmative manner to conceal the circumstances around Michael's birth.

On March 19, 2004, plaintiffs filed their first amended complaint in which they dropped Dr. Simpson as a

defendant. The complaint consisted of six counts and a "historical and factual background" section which contained specific allegations of fraudulent concealment applicable to all counts. Count I remained a direct charge of negligence against Advocate Hospital, and counts II and III remained as charges of vicarious liability against Advocate hospital on the theories of *respondeat superior* and apparent agency. Counts IV, V, and VI, respectively, charged Drs. Hiatt, Del Castillo, and Chavez with negligence.

The plaintiffs alleged the following in their first amended complaint. At approximately 9 p m. on January 17, 1982, Madeline was admitted to Advocate Hospital due to labor pains for her pregnancy with Michael. She was two weeks past her due date and was admitted upon the authorization of her physician, Dr. Richard Hiatt, although he was not present at the time of her admission. During ***450** the evening of January 17, and into the morning of January 18, Madeline experienced contractions at five-minute intervals followed by irregular contractions. She also experienced lower abdominal pain, back pain, severe pressure in the abdomen and "bloody show." Dr. Hiatt was called several times after her admission but was "unavailable."

In the early morning of January 18, Madeline discharged meconium stains and amniotic fluid and her cervix was dilated to three centimeters. At 7:55 a.m., a fetal monitor was placed on her by hospital staff. At approximately 9:50 a.m., while apparently awaiting the arrival of her physician, Dr. Hiatt, Madeline saw a doctor for the first time since being admitted *****909 **798** when Dr. Del Castillo arrived after being summoned by hospital staff for consultation. Dr. Del Castillo observed "fetal distress," called a "code blue," and ordered an emergency caesarean section. He had Madeline sign a consent form for the surgery but did not tell her that he had observed fetal distress. Rather, he said: "a c-section is necessary because your baby's head is too large for your birth canal. You will injure your baby if we force a natural delivery or your baby could die."

Michael was delivered via caesarean section at approximately 11 a.m. on January 18, 1982. He had suffered fetal distress prior to birth, had been "stillborn,"[1] and required resuscitation with oxygen upon delivery. Plaintiffs' complaint further alleged that although hospital records indicated that Dr. Hiatt had performed the surgery, he actually did not arrive until after it was completed.

In the recovery room after the delivery, Madeline spoke to a nurse named Karen. Madeline asked Karen whether Dr. Hiatt had arrived in time to perform the surgery and whether there were any complications. Karen responded by saying: "Dr. Hiatt was there during the whole operation. Everything went well, your baby was born without any symptoms or indications of any problems. He is a fine baby."

Later that afternoon, another nurse, named Gertrude, attended to Madeline. Madeline asked Gertrude whether Dr. Hiatt had been to see her yet and whether he had performed the surgery. Gertrude responded that Dr. Hiatt had not yet been to see her, but that he had performed the caesarean section. Upon inquiry by Madeline, Gertrude further stated "the records show your baby had no problems, everything was fine."

***451** The next day, on January 19, 1982, Dr. Hiatt visited Madeline in her room at the hospital for the first time. He stated that everything went "fine" during the delivery. He further stated:

> "I am sorry for not getting to the hospital earlier yesterday. If I had I would have been able to have told you earlier about how large your baby's head had gotten this past couple of weeks so that we were best off to do C-section. I could have avoided all of that last minute hurrying around you had to go through. The reason I did the C-section was to be safe. There may have been damage to the baby because of how large his head had grown. * * * I was there just in time. Everything went well with your labor and delivery, the baby was born without any symptoms of any possible complications or problems. Everything will be fine."

On January 20, 1982, Madeline was visited in her hospital room by Dr. Chavez. He introduced himself as one of the doctors who had assisted in delivering her baby. Dr. Chavez stated:

> "Dr. Hiatt did a very good job. We didn't have any problems with your delivery. Your baby is very healthy. He had no problems. We had to hurry because you were ready but everything went perfect. Your baby will be fine. He had no problems."

In February of 1982, Madeline visited Dr. McMann in her office. Madeline asked Dr. McMann whether she had received Michael's birth records. Dr. McMann stated that she had. She further ***910 **799 stated: "I didn't study the charts in detail but from what I saw, your labor and delivery and Michael's birth went fine. The chart didn't show any problems. He is very healthy."

In the summer of 2002, approximately 20 years later, Madeline, who had since moved to Texas, was in Chicago visiting a friend. She decided that a complete set of Michael's medical records might be helpful in his attempts to obtain financial assistance for college from the state of Texas on the basis of being developmentally slow. Michael had recently graduated from high school at the age of 20. Madeline visited Advocate Hospital and obtained a partial set of Michael's birth records. On her return flight to Texas in August of 2002, Madeline reviewed those records and "learned for the very first time that Michael had suffered from fetal distress due to loss of oxygen prior to birth which necessitated the emergency C-section and that Michael was not breathing when born and had to be resuscitated."

In April of 2004, defendants Advocate Hospital, Dr. Del Castillo, and Dr. McMann each filed motions to dismiss plaintiffs' first amended complaint pursuant to sections 2–615 and 2–619. As before, the estates of Drs. Hiatt and Chavez remained unserved and no appearances were made on their behalf. On May 19, 2004, plaintiffs filed a *452 consolidated response to the defendants' motions to dismiss. Attached to plaintiffs' response were numerous exhibits including affidavits of Madeline and her attorney, several of Michael's hospital records, and nursing protocols. None of these documents had previously been part of the pleadings.[2] As an alternative to their response requesting that defendants' motions be denied, plaintiffs also requested leave to file a second amended complaint. On August 4, 2004, the circuit court heard oral arguments on the defendants' motions, and on August 6, 2004, the court issued its memorandum opinion and order in which it stated:

> "Defendants [Advocate Hospital], Edgar Del Castillo, M.D., and Barbara J. McMann, M.D.'s Motions to Dismiss are granted, as the amended complaint is barred by the statute of limitations.
>
> Plaintiffs' Motion for Leave to Amend their Complaint is denied, the court finding that an amended pleading cannot cure the statute of limitations problem."

On August 31, 2004, plaintiffs filed a motion for reconsideration in which they contended that the court erred in failing to allow a second amended complaint. Attached to their motion was a proposed second amended complaint which, according to plaintiffs, made numerous additional factual allegations, stated new causes of action, and included additional exhibits that were not previously available. On September 10, 2004, the court heard oral arguments on the motion and issued an order in which it denied plaintiffs' motion for reconsideration and plaintiffs' request to file a second amended complaint. Plaintiffs subsequently appealed.

II. ANALYSIS

On appeal, plaintiffs raise two primary issues: whether the circuit court erred in concluding that their claims were barred by the statute of limitations and not subject ***911 **800 to the fraudulent concealment exception; and whether the circuit court abused its discretion in denying their request to file a second amended complaint to make additional allegations based on newly discovered medical records. In particular, plaintiffs contend that they alleged specific affirmative instances of fraudulent concealment on the part of the defendants which negated the applicability of the statutes of limitations and repose. Plaintiffs *453 further contend with regard to the second issue that their proposed second amended complaint contained additional allegations and exhibits not previously available which made the circuit court's denial of their request an abuse of discretion. As to the first issue, Advocate Hospital counters that any fraudulent concealment perpetrated by its agents cannot be attributed to it for purposes of tolling the statute of limitations. Dr. Del Castillo also contends that plaintiffs have failed to properly allege fraudulent concealment attributable to him. As to the second issue, both defendants contend that the plaintiffs' proposed second amended complaint fails to remedy the defects in the first amended complaint, and, therefore, the circuit court's refusal to allow the second amendment was proper.

A. Jurisdiction

[1] Before discussing the substantive issues of this appeal, we are first compelled to address whether we have jurisdiction. Although Advocate Hospital concedes that we have jurisdiction and Dr. Del Castillo does not address the issue, it is our duty to consider jurisdiction *sua sponte*. *Salemi v. Klein Construction Co.*, 266 Ill.App.3d 110,

113, 203 Ill.Dec. 309, 639 N.E.2d 629, 631 (1994). As noted, plaintiffs' original complaint named Advocate Hospital and five individual doctors as defendants. Plaintiffs' amended complaint omitted one of the originally named doctors, Elda H. Simpson, M.D., leaving the hospital and four doctors as defendants. Defendants Advocate Hospital, Dr. Del Castillo, and Dr. McMann all filed motions to dismiss plaintiffs' amended complaint, all of which were granted by the circuit court in its August 6, 2004, order. Plaintiffs have opted not to appeal the circuit court's order with regard to Dr. McMann; thus Advocate Hospital and Dr. Del Castillo are the only appellees before us. The remaining defendants, the estates of Drs. Hiatt and Chavez, were named in both the original and amended complaints (as well as plaintiffs' proposed second amended complaint); however, plaintiffs never served these defendants or voluntarily dismissed them from the suit. Moreover, the circuit court never explicitly dismissed plaintiffs' claims against Drs. Hiatt and Chavez or addressed whether they remained defendants.

Supreme Court Rule 304(a) provides:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgement as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. * * * In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revisions ***454** at any time before the entry of a judgment adjudicating all the claims, rights and liabilities of all the parities." 155 Ill.2d R. 304(a).

The purpose of Rule 304(a) is "to discourage piecemeal appeals in the absence of just reason, and to remove the uncertainty which exists when a final judgment is entered on less than all matters in the controversy." *Petersen Bros. Plastics, Inc. v.* *****912 **801** *Ullo,* 57 Ill.App.3d 625, 630, 15 Ill.Dec. 70, 373 N.E.2d 416, 420 (1978).

It is clear that the circuit court did not make such an "express written finding" in the orders being appealed here. However, plaintiffs contend that since Drs. Hiatt and Chavez were never served, the circuit court never had *in personam* jurisdiction over them. Thus, plaintiffs would contend that those unserved defendants did not constitute "parties" as contemplated by Supreme Court Rule 304(a) and the circuit court's dismissal with regard to Advocate Hospital and Drs. Del Castillo and McMann constituted a final judgement as to all parties and claims.

However, plaintiffs' reasoning does not comport with Illinois case law. For instance, in *Zak v. Allson,* 252 Ill.App.3d 963, 964–65, 192 Ill.Dec. 200, 625 N.E.2d 160, 161–62 (1993), the plaintiff's complaint for breach of contract named two defendants, one of whom, Allson, was never served, never appeared, and no relief was ever sought on his behalf. The other defendant, Tinghino, successfully moved to dismiss plaintiff's complaint on the basis of *res judicata* and plaintiff appealed. *Zak,* 252 Ill.App.3d at 964, 192 Ill.Dec. 200, 625 N.E.2d at 161. The court found that Allson was still a "defendant and a party within the context of Rule 304(a)" despite the fact that he had never been served. *Zak,* 252 Ill.App.3d at 965, 192 Ill.Dec. 200, 625 N.E.2d at 162, citing *Mares v. Metzler,* 87 Ill.App.3d 881, 42 Ill.Dec. 832, 409 N.E.2d 447 (1980). Therefore, the court found that it lacked jurisdiction to hear the appeal because the circuit court never made the express written finding required by Supreme Court Rule 304(a). *Zak,* 252 Ill.App.3d at 965, 192 Ill.Dec. 200, 625 N.E.2d at 162.

However, despite the flaw in plaintiffs' argument as to why we have jurisdiction, the rule as expressed in *Zak,* that even unserved defendants constitute parties for purposes of the requirements of Rule 304(a), is subject to an exception. In *Merritt v. Randall Painting Co.,* 314 Ill.App.3d 556, 559, 247 Ill.Dec. 400, 732 N.E.2d 116, 118 (2000), like in *Zak,* certain defendants brought a motion to dismiss while other defendants named in the complaint where never served, or present, or otherwise represented before the court. However, the *Merritt* court distinguished its facts from those of *Zak:*

> "In the instant case, the liability of Randall Painting Company, one of the defendants that was served and moved for dismissal, is predicated, in part, upon the alleged acts of its agents and ***455** employees, the four unserved defendants. Accordingly, as to the acts alleged to have been committed by the four unserved defendants, Randall Painting Company and those defendants constitute a unified tortfeasor." *Merritt,* 314 Ill.App.3d at 559, 247 Ill.Dec. 400, 732 N.E.2d at 118, citing *Towns v. Yellow Cab Co.,* 73 Ill.2d 113, 123–24, 22 Ill.Dec. 519, 382 N.E.2d 1217, 1221 (1978) (wherein the court stated: "When an action is brought against a master based on the alleged negligent acts of his servant, and no independent wrong is charged on behalf of the master, his liability is entirely derivative, being founded upon the doctrine of *respondeat superior.* In this regard, it has been said that the liability of the master and servant for the acts of the servant is deemed that of one tortfeasor and is a consolidated or unified one").

The *Merritt* court further stated:

"[t]he claims asserted against Randall Painting Company under the theory of *respondeat superior* and those asserted against the four unserved defendants 'are one and the same' (***913 **802 *Towns*, 73 Ill.2d at 125[, 22 Ill.Dec. 519, 382 N.E.2d at 1222]). Under these circumstances, we interpret the trial court's order as a dismissal of the complaint in its entirety. Accordingly, we find we have jurisdiction over the instant appeal under Rule 301." *Merritt*, 314 Ill.App.3d at 559, 247 Ill.Dec. 400, 732 N.E.2d at 118.

See also *Towns*, 73 Ill.2d at 122, 22 Ill.Dec. 519, 382 N.E.2d 1217, 1221 ("a judgment for either the master or servant, arising out of an action predicated upon the alleged negligence of the servant, bars a subsequent suit against the other for the same claim of negligence where the agency relationship is not in question").

As in *Merritt*, the plaintiffs here allege that Advocate Hospital (a properly served defendant that successfully moved for dismissal) is responsible for the negligence of its agents through the doctrine of respondeat superior. Moreover, plaintiffs' complaint does not allege any negligence against Dr. Hiatt or Dr. Chavez that is not also attributed to Advocate Hospital through *respondeat superior*. Advocate Hospital has not contested the agency status of these doctors and, as noted, has conceded that we have jurisdiction. Accordingly, we find that rule enunciated in *Merritt* applies here, and the circuit court's dismissal of plaintiffs' claim against Advocate Hospital acted as a dismissal of plaintiffs' claims against Drs. Hiatt and Chavez as they collectively constitute a "unified tortfeasor" for purposes of plaintiffs' complaint. *Merritt*, 314 Ill.App.3d at 559, 247 Ill.Dec. 400, 732 N.E.2d at 118. Therefore, the circuit court's order constituted a final judgment as to all claims and all defendants, and we have jurisdiction under Supreme Court Rule 301.

***456** B. Fraudulent Concealment

[2] [3] [4] We next address plaintiffs' contention that the circuit court erred in granting defendants' motions to dismiss because the statutes of limitation and repose were rendered inapplicable by the defendants' fraudulent concealment of the cause of action. As noted, the defendants each brought motions to dismiss under sections 2–615 and 2–619. Motions to dismiss pursuant to section 2–615 attack the legal sufficiency of the complaint by pointing to defects which appear on the face of the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 484, 203 Ill.Dec. 463, 639 N.E.2d 1282, 1289 (1994). The question presented on review of a motion to dismiss pursuant to section 2–615 is "whether sufficient facts are contained in the pleadings which, if established, could entitle plaintiff to relief." *Nickum*, 159 Ill.2d at 488, 203 Ill.Dec. 463, 639 N.E.2d at 1291. On the other hand, while a motion to dismiss pursuant to section 2–619 also attacks the legal sufficiency of the complaint, it generally does so by raising affirmative matter that avoids the legal effect of or defeats the claim. *Nickum*, 159 Ill.2d at 485, 203 Ill.Dec. 463, 639 N.E.2d at 1289. The question on review of a motion to dismiss pursuant to section 2–619 is "whether there is a genuine issue of material fact and whether defendant is entitled to judgment as a matter of law." *Nickum*, 159 Ill.2d at 494, 203 Ill.Dec. 463, 639 N.E.2d at 1294.

[5] As noted, the circuit court did not specifically delineate whether it was granting defendants' motions on the basis of section 2–615 or section 2–619. The court, however, did state "the amended complaint is barred by the statute of limitations." The statute of limitations is normally an affirmative defense appropriate only to motions to dismiss pursuant to section 2–619; however, where it appears from the face of the complaint that the statute of limitations has run, such a defense can also be raised in a section 2–615 motion to dismiss. See ***914 **803 *Lissner v. Michael Reese Hospital & Medical Center*, 182 Ill.App.3d 196, 206, 130 Ill.Dec. 673, 537 N.E.2d 1002, 1008 (1989). Thus, because plaintiffs' complaint essentially conceded that the statutes of limitations and repose had passed, plaintiffs had the burden of pleading fraudulent concealment to overcome those limits. Therefore, if the circuit court was correct in finding that fraudulent concealment was not adequately pled, dismissal would have been appropriate on the basis of timeliness under either section 2–615 or section 2–619. In either case, we review both motions *de novo*. *King v. First Capital Financial Services Corp.*, 215 Ill.2d 1, 12, 293 Ill.Dec. 657, 828 N.E.2d 1155, 1161 (2005).

The statutes of limitation and repose applicable to actions against physicians and hospitals are set out in section 13–212 of the Illinois Code of Civil Procedure. 735 ILCS 5/13–212 (West 2004). Subsection (a) states:

***457** "Except as provided in Section 13–215 of this Act, no action for damages for injury or death against any physician * * * or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known * * * of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years

after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death." 735 ILCS 5/13–212(a) (West 2004).

Subsection (b) states in pertinent part:

"Except as provided in Section 13–215 of this Act, no action for damages for injury or death against any physician * * * or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 8 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death where the person entitled to bring the action was, at the time the cause of action accrued, under the age of 18 years; provided, however, that in no event may the cause of action be brought after the person's 22nd birthday." 735 ILCS 5/13–212(b) (West 2004).

Thus, because Madeline was an adult at the time Michael was born, she was subject to section 13–212(a), which imposed a two-year limitations period running from the date she discovered her injury, or, at most, a four-year repose period running from the date of the defendants' alleged negligence. However, since Madeline has alleged that she first discovered her injury in 2002, some 20 years after the alleged negligence, the discovery facet of section 13–212(a)'s limitations period would not apply because the four-year repose period set a maximum time limit and cut off her claim in January of 1996. Similarly, section 13–212(b) applied to Michael as a minor at the time of the alleged negligent conduct, and imposed a maximum repose period of eight years stemming from the date of the negligence. Thus, according to section 13–212(b), Michael's claim expired in January of 1990.

However, while plaintiffs concede that the time frames set out in section 13–212 were exceeded prior to the filing of their initial complaint, they rely on section 13–215, as referred to in section 13–212, to save their claims. Section 13–215 states:

"If a person liable to an action fraudulently conceals the cause of such action ***915 **804 from the knowledge of the person entitled thereto, the *458 action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." 735 ILCS 5/13–215 (West 2004).

Thus, according to plaintiffs, their complaint filed July 3, 2003, was timely because it was filed less than five years after Madeline's discovery of the cause of action in August of 2002.

[6] [7] [8] Generally, a plaintiff who invokes section 13–215 to toll the statute of limitations must show

"affirmative acts by the defendant which were designed to prevent, and in fact did prevent, the discovery of the claim. [Citations.] Mere silence of the defendant and the mere failure on the part of the plaintiff to learn of a cause of action do not amount to fraudulent concealment. [Citations.]

It has been held that a plaintiff must plead and demonstrate that the defendant made misrepresentations or performed acts which were known to be false, with the intent to deceive the plaintiff, and upon which the plaintiff detrimentally relied. [Citations]. * * * In addition, fraudulent misrepresentations which form the basis of the cause of action do not constitute fraudulent concealment under section 13–215 in the absence of a showing that the misrepresentations tended to conceal the cause of action. [Citations.]" *Foster v. Plaut,* 252 Ill.App.3d 692, 699, 192 Ill.Dec. 238, 625 N.E.2d 198, 203 (1993).

Plaintiffs contend that they adequately pled fraudulent concealment on the part of Dr. Del Castillo to sustain their negligence claim against him and to attribute his negligence as an agent to Advocate Hospital as a principal. Specifically, plaintiffs contend that Dr. Del Castillo fraudulently told Madeline that a caesarean section was necessary because of the size of the baby's head, when in fact signs of fetal distress, and not the baby's size, necessitated the surgery. Plaintiffs contend that Dr. Del Castillo made this misrepresentation to conceal his negligence and that of the hospital in not reacting to the fetal distress sooner. The instances of negligence plaintiffs attribute to Dr. Del Castillo consisted of his failure to attend to Madeline until nearly two hours after the fetal monitor was placed on her, and his one-hour delay of the surgery after first observing fetal distress. We find plaintiffs contentions unavailing.

[9] Plaintiffs have failed to adequately state a cause of action against Dr. Del Castillo for negligence. Illinois is a fact-pleading state and "[a] plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted." *Jordan v. Knafel,* 355 Ill.App.3d 534, 544, 291 Ill.Dec. 527, 823 N.E.2d 1113, 1122 (2005). The elements of negligence include duty, a breach of that duty, proximate cause, and damages. *459 *Kirwan v. Lincolnshire–Riverwoods Fire Protection District,* 349 Ill.App.3d 150, 155, 285 Ill.Dec. 380, 811 N.E.2d 1259, 1263 (2004). Plaintiffs first contend that Dr.

Del Castillo was negligent in not attending to Madeline until after he was summoned at 9:50 a.m. However, plaintiffs' first amended complaint did not allege that Dr. Del Castillo was even aware of Madeline's presence in the hospital prior to when he was summoned at 9:50 a.m. Nor did the amended complaint allege sufficient facts to establish that Dr. Del Castillo was under a duty to be aware of Madeline's presence. Similarly, plaintiffs made no allegation that the hospital staff who attended to Madeline prior to Dr. Del Castillo's arrival were his agents such that their negligence in failing to summon him earlier could be *****916 **805** imputed to him. See *Caligiuri v. First Colony Life Insurance Co.,* 318 Ill.App.3d 793, 801, 252 Ill.Dec. 212, 742 N.E.2d 750, 756 (2000). Furthermore, plaintiffs' contention that Dr. Del Castillo was negligent in delaying that surgery after observing fetal distress is unsupported by the amended complaint. Plaintiffs did not allege that Dr. Del Castillo had a duty to perform the surgery himself or that he was even a surgeon capable of such a procedure. Nor did plaintiffs allege that Dr. Del Castillo had an additional duty beyond calling the "code blue," scheduling the caesarean section, and obtaining Madeline's consent for the surgery, to cause other physicians to perform the surgery in a timely manner. Rather, with regard to Dr. Del Castillo's duty, plaintiffs' amended complaint generally stated:

> "At all relevant times, Del Castillo, individually and as agent of [Advocate Hospital], had a duty to possess and apply the knowledge and use the skills and care ordinarily used by reasonably well qualified medical practitioner [*sic*] in the same or similar localities under circumstances similar to those in this case."

Such a general statement, without more, cannot stand for the specific breaches of duty plaintiffs appear to assume Dr. Del Castillo committed, namely, that he breached a duty to attend to Madeline earlier and a duty to further expedite the surgery after observing a problem.

[10] [11] Fraudulent concealment, as codified in section 13–215, is not a cause of action in and of itself; rather, it acts as an exception to the time limitations imposed on other, underlying causes of action. See generally 735 ILCS 5/13–215 (West 2004). Thus, any fraudulent concealment attributable to Dr. Del Castillo would be irrelevant to *his* liability unless he also was negligent. In this regard, we note that the fraudulent concealment of a cause of action by someone other than the defendant may toll the limitations period only where the person fraudulently concealing the cause of action is in privity with or an agent of the defendant. *Serafin v. Seith,* 284 Ill.App.3d 577, 590, 219 Ill.Dec. 794, 672 N.E.2d 302, 311 (1996). As such, if Dr. Del Castillo's statements to Madeline constituted fraudulent concealment, they could potentially ***460** act to toll the limitations period on an action against Advocate Hospital if Dr. Del Castillo were an agent. However, regardless of whether plaintiffs adequately pled fraudulent concealment, they have not adequately pled the duty and breach elements of a negligence cause of action against Dr. Del Castillo. While, as previously noted, the circuit court based its dismissal of plaintiffs claims against Dr. Del Castillo on the running of the statute of limitations, "[a] court of review may affirm a trial court's judgment upon any ground appearing in the record, regardless of whether it was relied upon by the trial court and regardless of whether the reasoning of the trial court was correct." *In re Marriage of Lehr,* 317 Ill.App.3d 853, 862, 251 Ill.Dec. 336, 740 N.E.2d 417, 424–25 (2000). Accordingly, we find that dismissal was proper under section 2–615. *Nickum,* 159 Ill.2d at 488, 203 Ill.Dec. 463, 639 N.E.2d at 1291.

[12] Plaintiffs similarly contend that they adequately pled fraudulent concealment attributable to Advocate Hospital to sustain their negligence causes of action against that defendant. Specifically, plaintiffs contend that the statements made by the hospital's actual or apparent agents Drs. Del Castillo, Hiatt, and McMann and nurses "Karen" and "Gertrude" constituted affirmative acts that were made with the intention of concealing the cause of action.[3] Advocate Hospital, on the other *****917 **806** hand, contends that the fraudulent concealment of an agent cannot apply to toll the limitations period on a cause of action against a principal unless the principal is actually aware of the agent's fraudulent concealment. Thus, according to Advocate Hospital, since plaintiffs did not allege that any " officer, director or other principal" of the hospital knew of any fraudulent concealment, the plaintiffs' causes of actions expired in accordance with the deadlines set out in section 13–212 at least by 1986 and 1990 respectively.

In support, Advocate Hospital first cites *Wood v. Williams,* 142 Ill. 269, 31 N.E. 681 (1892). In that case, plaintiff gave defendants money to invest in a mortgage that turned out to be forged. Defendant's ***461** pled the statute of limitations as a defense. *Wood,* 142 Ill. at 275–76, 31 N.E. at 681. Plaintiff argued that the cause of action had been fraudulently concealed by Fursman, an agent of defendants. *Wood,* 142 Ill. at 279, 31 N.E. at 683. The supreme court affirmed the dismissal on the basis of

untimeliness quoting section 276 of Wood on Limitations: " '[t]he fraudulent concealment must have been that of the party sought to be charged, and a mere allegation of proof that it was the act of his agent will not be sufficient, unless he is in some way shown to have been instrumental in or cognizant of the fraud.' " *Wood,* 142 Ill. at 280–81, 31 N.E. at 683, quoting H. Wood, Wood on Limitations § 276 (1882).

Wood has been approved of and followed by our supreme court in *Chicago Park District v. Kenroy Inc.,* 78 Ill.2d 555, 563, 37 Ill.Dec. 291, 402 N.E.2d 181, 185 (1980). In *Kenroy,* the Chicago Park District initiated eminent domain proceedings to acquire a parcel of land owned by the defendants. *Kenroy,* 78 Ill.2d at 558, 37 Ill.Dec. 291, 402 N.E.2d at 183. However, prior to the proceedings, defendants bribed a city alderman to support the rezoning of the real estate from "R4 residential use" to "planned development No. 67." *Kenroy,* 78 Ill.2d at 559, 37 Ill.Dec. 291, 402 N.E.2d at 183. The property was successfully rezoned and its value for purposes of the eminent domain proceedings was thereby increased by $5 million. *Kenroy,* 78 Ill.2d at 559, 37 Ill.Dec. 291, 402 N.E.2d at 183. Several years later, the Chicago Park District and the City of Chicago, having discovered the fraud, brought suit to impose a constructive trust. *Kenroy,* 78 Ill.2d at 559–60, 37 Ill.Dec. 291, 402 N.E.2d at 183. Defendants raised the statute of limitations as a defense and the plaintiffs argued that the cause of action had been fraudulently concealed by the alderman. *Kenroy,* 78 Ill.2d at 560, 37 Ill.Dec. 291, 402 N.E.2d at 184. The court stated:

> "It is ordinarily true that the fraudulent concealment of a cause of action by a person other than the defendant will not toll the statute of limitations. [Citing, among other cases, *Wood,* 142 Ill. at 280–81, 31 N.E. at 683, and *Bryan v. United States,* 99 F.2d 549, 552 (10th Cir.1938).] However, if the third person is in privity with or occupies an agency relationship with the defendant, then the *defendant's knowledge or approval of the concealment* has generally been held ***918 **807 sufficient to toll the limitation period." (Emphasis added.) *Kenroy,* 78 Ill.2d at 563, 37 Ill.Dec. 291, 402 N.E.2d at 185, citing *Laventhol, Krekstein, Horwath & Horwath v. Tuckman,* 372 A.2d 168, 170–71 (Del.1976), *Pashley v. Pacific Electric Ry. Co.,* 25 Cal.2d 226, 235–36, 153 P.2d 325, 330 (1944), *Oddo v. Interstate Bakeries, Inc.,* 271 F.2d 417, 423–24 (8th Cir.1959), *Schram v. Burt,* 111 F.2d 557, 563 (6th Cir.1940), G. Bogert, Trusts § 955, at 506–10 (2d ed.1916), 2 G. Wood, Wood on Limitations § 276 at 1374–75 (4th ed.1916).

*462 The court determined that "the existence of an agency relationship, privity or even an actual conspiracy" between the defendants and the city alderman had been adequately alleged, and then held that section 22 of the Limitations Act (the predecessor of section 13–215) applied to toll the cause of action against defendants because they actively induced the alderman to fraudulently conceal the cause of action from the city. *Kenroy,* 78 Ill.2d at 564, 37 Ill.Dec. 291, 402 N.E.2d at 186. Thus, under the analysis in *Kenroy,* accountability for an agent's fraudulent concealment does not extend to a principal unless the principal is shown to have known or approved of the concealment.

[13] Likewise, in *Barbour v. South Chicago Community Hospital,* 156 Ill.App.3d 324, 325, 108 Ill.Dec. 862, 509 N.E.2d 558, 559 (1987), the plaintiff filed suit against the defendant hospital alleging that while she was a patient for purposes of receiving an abortion, an unauthorized tubal ligation was also performed without her consent or knowledge. Plaintiff contended that the hospital was equitably estopped by section 13–215 from raising a statute of limitations defense because the hospital's agents, a Dr. Harrod and a nurse August, fraudulently concealed the cause of action by telling plaintiff that she was still fertile and providing her with birth control. *Barbour,* 156 Ill.App.3d at 326, 330, 108 Ill.Dec. 862, 509 N.E.2d at 560, 563. Citing *Wood,* 142 Ill. 269, 31 N.E. 681, and *Kenroy,* 78 Ill.2d 555, 37 Ill.Dec. 291, 402 N.E.2d 181, the court stated: "Under Illinois law, a principal is not estopped from raising the statute of limitations as a defense unless the principal knew, or participated in, the concealment alleged to have been committed by the agent." *Barbour,* 156 Ill.App.3d at 330, 108 Ill.Dec. 862, 509 N.E.2d at 563, citing *Wood,* 142 Ill. 269, 31 N.E. 681 and *Kenroy,* 78 Ill.2d 555, 37 Ill.Dec. 291, 402 N.E.2d 181. The court then noted:

> "[plaintiff] does not allege that the hospital's board of directors knew of the alleged conspiracy nor does [plaintiff] claim that any other department chief was aware of the alleged conspiracy. Instead, [plaintiff] attempts to hold the hospital, as principal, liable for an agent's alleged concealment of a cause of action. However, Illinois courts, including the supreme court, have refused to expand the doctrine of equitable estoppel set forth in section 13–215 to include an unknowing principal." *Barbour,* 156 Ill.App.3d at 330–31, 108 Ill.Dec. 862, 509 N.E.2d at 563, citing *Wood,* 142 Ill. 269, 31 N.E. 681; *Kenroy,* 78 Ill.2d 555, 37 Ill.Dec. 291, 402 N.E.2d 181.

Plaintiffs, however, attempt to distinguish *Wood, Kenroy,* and *Barbour,* on the basis that the agents in those cases were not full-time employees and, thus, were "nonservant" agents as opposed to the physicians and nurses in this case, who were employees and "servants" of

Advocate Hospital. With respect to the "servant" agents in the ***463** instant case, plaintiffs urge us to apply the general rule of agency law that a principal may be liable for an agent's acts done in the course of employment "although the principal did not authorize or justify, or participate in, or, *****919 **808** indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them." J. Story, Story on Agency § 452 (1882). In further support of this proposition, plaintiffs cite *Pashley v. Pacific Electric Ry. Co.*, 25 Cal.2d 226, 153 P.2d 325 (1944), a California case that was among three other out-of-state cases cited in *Kenroy*. See *Kenroy*, 78 Ill.2d at 563, 37 Ill.Dec. 291, 402 N.E.2d at 185. In *Pashley*, the plaintiff sustained an eye injury while riding as a passenger on defendant's street car. *Pashley*, 25 Cal.2d at 227, 153 P.2d at 326. Defendant railway company sent plaintiff to physicians in its employ who told plaintiff not to see any other physician and that he would make a full recovery, when in fact, they knew plaintiff would eventually get a cataract that would impair his vision. *Pashley*, 25 Cal.2d at 228, 153 P.2d at 326. The *Pashley* court noted that the deceit of the physicians was done for the benefit of their employer and held: "the fraud of the agents will be imputed to the principal for the purpose of preventing the running of the statute of limitations whether the principal was aware of it or not." *Pashley*, 25 Cal.2d at 236, 153 P.2d at 330. See also *Lightner Mining Co. v. Lane*, 161 Cal. 689, 703, 120 P. 771, 777 (1912). Thus, according to plaintiffs, when dealing with employee or servant agents, like the physicians in *Pashley* and the physicians and nurses here, the general rules of agency apply with equal force in the context of the statute of limitations and the potential tolling effect of fraudulent concealment.

However, the distinction urged by plaintiffs with respect to the impact of fraudulent concealment between nonservant and servant agents is not made in *Wood*, *Kenroy*, or *Barbour*. Rather, the Illinois cases that have addressed the issue have not made the degree or scope of agency a dispositive consideration in determining whether an agent's fraudulent concealment can be imputed to a defendant principal, but have rested the inquiry on whether the defendant principal had knowledge of the fraudulent concealment. See *Wood*, 142 Ill. 269, 31 N.E. 681; *Kenroy*, 78 Ill.2d 555, 37 Ill.Dec. 291, 402 N.E.2d 181; *Barbour*, 156 Ill.App.3d at 326, 108 Ill.Dec. 862, 509 N.E.2d at 560; see also *Serafin*, 284 Ill.App.3d at 590, 219 Ill.Dec. 794, 672 N.E.2d at 311. While this rule has a relatively long history (see *Wood*, 142 Ill. at 280–81, 31 N.E. at 683, citing H. Wood, Wood on Limitations § 276 (1882)), there are no cases in Illinois purporting to reject, repudiate or otherwise modify this rule, and plaintiffs have only proffered the California cases of *Pashley* and *Lightner* that are in direct contradiction. Moreover, we have found support for the rule that only a knowing principal will be estopped from asserting ***464** the statute of limitations due to the fraudulent concealment of an agent in other jurisdictions. See *Bryan v. United States*, 99 F.2d 549, 552 (10th Cir.1938) ("The fraudulent concealment must have been that of the party sought to be charged, and fraudulent concealment by one who stands in the relation of agent to another will not bind the principal, unless the latter induced or had knowledge thereof"); *School District of City of Sedalia v. De Weese*, 100 F. 705, 710 (W.D.Mo.1900); *Stevenson v. Robinson*, 39 Mich. 160, 160, 1878 WL 7044 (1878) (holding that the fraudulent concealment which will take a claim out of the statute of limitations must be that of the person sought to be charged); *Vance v. Mottley*, 92 Tenn. 310, 319, 21 S.W. 593, 595 (1893); *Huntington National Bank v. Huntington Distilling Co.*, 152 F. 240, 248 (S.D.W.Va.1907).

[14] Although not otherwise articulated, it would seem that the rationale behind this rule is consistent with the rationale behind statutes of limitations in general. For instance, it has been said that statutes *****920 **809** of limitations "represent a pervasive legislative judgment that it is unjust to fail to put an adversary on notice to defend [an action] within a specified period of time, and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." 51 Am.Jur. 2d *Limitation of Actions* § 13 (2000). Although a principal may rightly have to face liability for the acts of an agent even though he has no actual knowledge of the acts and has not approved of them, that potential liability does not run in perpetuity. The tolling effect of fraudulent concealment is equitable in nature, as are statutes of limitations (51 Am.Jur.2d *Limitation of Actions* §§ 399, 13 (2000)); however, while equity is clearly not in favor of a tortfeasor who hides his own wrongful conduct even years after the limitations period has run, such disfavor would not necessarily attach as between an unknowing principal defendant and a plaintiff who brings a late claim. Courts in Illinois have decided not to extend the liability of an unknowing principal on the basis of the fraudulent concealment of an agent. See *Wood*, 142 Ill. 269, 31 N.E. 681; *Kenroy*, 78 Ill.2d 555, 37 Ill.Dec. 291, 402 N.E.2d 181; *Barbour*, 156 Ill.App.3d at 326, 108 Ill.Dec. 862, 509 N.E.2d at 560; *Serafin*, 284 Ill.App.3d at 590, 219 Ill.Dec. 794, 672 N.E.2d at 311. Accordingly, we find that plaintiffs' claims against Advocate Hospital are untimely because they have not alleged knowledge or ratification of the agents' alleged fraudulent concealment on the part of Advocate Hospital.

However, we note that the rule limiting the tolling effect

of fraudulent concealment to only those principals with knowledge of their agents' concealment has been relaxed on a very limited basis with respect to corporations, which can only act through their agents. In *Barbour,* for example, in holding that knowledge of an agent is not ***465** attributable to a corporation, the court noted that, under its facts, no such knowledge was received by the board of directors, indicating that awareness on the part of a director may equated to knowledge of the corporation. *Barbour,* 156 Ill.App.3d at 326, 108 Ill.Dec. 862, 509 N.E.2d at 560. This would be consistent with the general principle that

> "while a corporation may conduct its business through its president and other officers who are agents of the corporation, the ultimate source of all authority lies in the board of directors who stand in the place of and for their individual stockholders, and in the sense of control they exercise over corporate affairs may be said to actually constitute the corporation. Thus it is that the acts of the president and other officers of the corporation serve to bind the corporation only because they (presumably at least) reflect the will of the directors with whom all corporate acts are required to originate. [Citation.]" *Federal Land Bank of St. Louis v. Bross,* 122 S.W.2d 35, 39 (Mo.App.1938).

Accordingly, we affirm the circuit court's dismissal of plaintiffs' claims against Advocate Hospital.

C. Equitable Estoppel

[15] [16] Plaintiffs next contend that doctrine of equitable estoppel provides a reason independent from the fraudulent concealment provision of section 13–215 to reverse the circuit court's dismissal of their case on the basis of timeliness. However, defendants contend that plaintiffs have waived this argument by not asserting in the court below that equitable estoppel is operative on its own dynamic independent of the fraudulent concealment provision of section 13–215. Notably, plaintiffs do not respond to defendants' waiver contentions in their reply brief. We agree that plaintiffs have forfeited *****921 **810** their right to raise the issue and we therefore decline to address it.[4] See *Central Illinois Public Service Co. v. Allianz Underwriters Insurance* ***466** *Co.,* 244 Ill.App.3d 709, 720, 184 Ill.Dec. 833, 614 N.E.2d 34, 42 (1993) ("It is well settled that issues not raised in the trial court are generally waived on appeal").

D. Plaintiffs' Request for Leave to File a Second Amended Complaint

Plaintiffs next contend that although their first amended complaint adequately pled fraudulent concealment to toll the statute of limitations, the circuit court abused its discretion in failing to allow a second amended complaint which made additional allegations of fraudulent concealment and agency, raised additional causes of action based on common law fraud, and charged defendants with destruction of evidence. Plaintiffs stress that the circuit court made its initial ruling on this issue on August 6, 2004, prior to seeing the proposed second amended complaint and then, at the hearing on plaintiffs' motion for reconsideration, stated that it would stand on its earlier ruling. Plaintiffs contend that the circuit court made its ruling under a mistaken assumption that a pleading cannot fix a statute of limitations problem when, in fact, pleadings with regard to fraudulent concealment *can* save an otherwise untimely complaint.

Plaintiffs' proposed second amended complaint consists of 14 counts and a background and fraudulent concealment section applicable to all counts. Counts I and II charge Advocate Hospital with direct negligence with respect to Michael and Madeline. Counts III and IV charge Dr. Hiatt with negligence (although, Dr. Hiatt's estate has remained unserved). Counts V and VI charge Dr. Del Castillo with negligence. Counts VII, VIII, IX, and X charge Advocate Hospital with vicarious liability for the torts of Drs. Hiatt and Del Castillo under the doctrines of *respondeat superior* and apparent agency. Count XI charges Advocate hospital fraudulent concealment as a "substantive cause of action." Count XII charges Dr. Del Castillo with fraudulent misrepresentation. Counts XIII and XIV charge Advocate Hospital and Dr. Del Castillo with spoilation of evidence.

****811 ***922** [17] [18] [19] ***467** Whether to grant a motion to amend pleadings rests within the discretion of the trial court, and a reviewing court will not reverse a trial court's decision absent an abuse of that discretion. *Lee v. Chicago Transit Authority,* 152 Ill.2d 432, 467, 178 Ill.Dec. 699, 605 N.E.2d 493, 508 (1992). The relevant factors to be considered in determining whether the circuit court abused its discretion are

> "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.,* 146 Ill.2d 263, 273, 166 Ill.Dec. 882, 586 N.E.2d 1211, 1215–16

(1992), citing *Kupianen v. Graham,* 107 Ill.App.3d 373, 377, 63 Ill.Dec. 125, 437 N.E.2d 774 (1982).

A proposed amendment must meet all four *Loyola Academy* factors; however, "if [a] proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis." *Hayes Mechanical, Inc. v. First Industrial, L.P.,* 351 Ill.App.3d 1, 7, 285 Ill.Dec. 599, 812 N.E.2d 419, 424 (2004).

[20] [21] With regard to their charges of direct negligence and vicarious liability against Advocate Hospital, plaintiffs assert that their proposed amended complaint, like their first amended complaint, made sufficient allegations of fraudulent concealment perpetuated by Drs. Hiatt and Del Castillo and hospital staff, which is attributable to Advocate Hospital through the general rules of agency. However, as stated above, although general agency law may well impute an agent's fraud to an unknowing principal, for purposes of section 13–215, only a knowing principal will be estopped from asserting the statute of limitations on the basis of the fraudulent concealment of an agent. See *Wood,* 142 Ill. at 280–81, 31 N.E. at 683; *Kemroy,* 78 Ill.2d at 563, 37 Ill.Dec. 291, 402 N.E.2d 181; *Barbour,* 156 Ill.App.3d at 326, 108 Ill.Dec. 862, 509 N.E.2d at 560. Plaintiffs' proposed amended complaint does not allege knowledge on the part of any principal of Advocate Hospital. Therefore, plaintiffs' allegations of negligence against Advocate Hospital do not meet the first *Loyola Academy* factor and the dismissal by the circuit court of these claims did not amount to an abuse of discretion.

[22] [23] Plaintiffs' proposed amended complaint also alleged new causes of action against Advocate Hospital and Dr. Del Castillo based on fraud. As noted, fraudulent concealment as set out in section 13–215 does not establish an independent cause of action, but merely acts to toll the statute of limitations applicable to various claims. See 735 ILCS 5/13–215 (West 2004). However, allegations of fraud that may overlappingly satisfy section 13–215 may potentially be sufficient to state ***468** an independent cause of action. To state a claim for fraudulent misrepresentation, a plaintiff must allege:

> "(1) a false statement of material fact; (2) that the party making the statement knew the statement was false or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on that statement and did, in fact, rely on it; (4) the statement was made for the purpose of inducing the other party to act; and (5) that reliance by the person to whom the statement was made led to his injury. [Citation]." *Stewart v. Thrasher,* 242 Ill.App.3d 10, 15–16, 182 Ill.Dec. 930, 610 N.E.2d 799, 803 (1993).

****812 ***923** Furthermore, although an affirmative misrepresentation is normally required to state a claim, a mere concealment may amount to a misrepresentation when it is "done with an intent to deceive under circumstances creating an opportunity and a duty to speak," and the "concealed information [is] such that the other party would have acted differently had he been aware of it." *Stewart,* 242 Ill.App.3d at 16, 182 Ill.Dec. 930, 610 N.E.2d at 803.

[24] [25] Plaintiffs contend that Advocate Hospital, through its staff and agents, including Dr. Del Castillo, fraudulently misrepresented the circumstances surrounding Michael's birth and thereby independently caused Michael's injuries as well as damages in the form of emotional and financial hardships associated with Michael's diminished capacity. However, the statutes of limitations and repose in section 13–212 apply to any action against a hospital or physician arising out of patient care whether predicated on negligence or fraud. See 735 ILCS 5/13–212 (West 2004). Concomitantly, the requirements for tolling the limitations period for an action for fraud against a hospital are the same as those for negligence. See 735 ILCS 5/13–215 (West 2004); *Foster,* 252 Ill.App.3d at 699, 192 Ill.Dec. 238, 625 N.E.2d at 203. As above, plaintiffs allege that the fraud was perpetrated by Advocate Hospital's agents and do not allege that any principal of the hospital was aware of the fraud. Therefore, plaintiffs have, again, not adequately pled fraudulent concealment to toll their claim of fraud against Advocate Hospital. Consequently, plaintiff's have failed to satisfy the first *Loyola Academy* factor and the circuit court's refusal to allow the amendment cannot be deemed an abuse of discretion on the basis of this claim.

[26] Plaintiffs similarly allege in their proposed amended complaint that Dr. Del Castillo is liable for damages caused by his fraudulent misrepresentation that the caesarian section was necessitated by the size of the baby's head, when in fact it was indicated by symptoms of fetal distress. Specifically, the paragraph in plaintiffs' proposed amended complaint dealing with the damages caused by Dr. Del Castillo's alleged fraud states:

> ***469** "97. Michael's injuries as well as Madeline's resulting from the fraudulent misrepresentation and the intentionally inflicted emotional distress resulting from the recently determined information that all of the emotion, time, energy and expense and years of sociological consultation,

> psychological consultation, psychological care, psychiatric care, educational consultation, special educational efforts, and sibling and family adjustments all directed at the care and treatment of wrongfully diagnosed and believed emotional and environmentally induced developmental causes contributing to Michael's learning issues was in fact due to physical injuries received while an unborn patient at the defendant hospital 22 years ago."

Although the damages alleged by this paragraph are not altogether clear, plaintiffs apparently are contending that Dr. Del Castillo's fraud caused them damages only in the form of emotional distress, and that their emotional distress arose from their not knowing that all of the previous emotional and financial hardships resulting from Michael's brain damage were actually caused by medical negligence rather than some other factor. To the extent, if any, that this paragraph purports to allege that Dr. Del Castillo's alleged fraudulent misrepresentation was the cause of Michael's brain damage, we would find it untenable because those damages, if wrongfully caused at all, would have occurred as a *****924 **813** result of negligence regardless of any misrepresentation. In other words, there is no nexus between Dr. Del Castillo's alleged fraudulent statement and Michael's physical injuries. Thus, plaintiffs, apparently recognizing this limitation of their fraud claim, allege damages of emotional distress stemming from not knowing the truth about Michael's birth.

[27] [28] As noted, a claim for fraudulent misrepresentation must allege "that reliance by the person to whom the statement was made led to his injury. [Citation]." *Stewart,* 242 Ill.App.3d at 16, 182 Ill.Dec. 930, 610 N.E.2d at 803. See also *City of Chicago v. Michigan Beach Housing Cooperative,* 297 Ill.App.3d 317, 323, 231 Ill.Dec. 508, 696 N.E.2d 804, 809 (1998) ("Damage is an essential element of fraud"). Generally, the damages necessary to support a cause of action for fraud must be pecuniary in nature. See *Michigan Beach Housing Cooperative,* 297 Ill.App.3d at 323, 231 Ill.Dec. 508, 696 N.E.2d at 809 ("fraud primarily addresses the invasion of economic interests"); *Giammanco v. Giammanco,* 253 Ill.App.3d 750, 761–62, 192 Ill.Dec. 835, 625 N.E.2d 990, 1000 (1994); D. Dobbs, Remedies § 9.1, at 591 (1973). Although some cases have extended this rule to include those things "which the law recognizes as of pecuniary value," a plaintiff's damages to support a claim of fraud must nevertheless be "material," and may not consist solely of emotional harm. ***470** *Giammanco,* 253 Ill.App.3d at 762, 192 Ill.Dec. 835, 625 N.E.2d at 1000, citing 37 Am.Jur.2d *Fraud & Deceit* § 292, at 388 (1968), *Shults v. Henderson,* 625 F.Supp. 1419, 1426 (W.D.N.Y.1986), *Walsh v. Ingersoll–Rand Co.,* 656 F.2d 367, 371 (8th Cir.1981) ("damages for emotional harm are not recoverable in actions in fraud"). See also *Jurcich v. General Motors Corp.,* 539 S.W.2d 595, 601–02 (Mo.App.1976) (holding that plaintiff failed to state damages to support a claim for fraud when he alleged that the defendant's fraud caused him pain and suffering but not the underlying injury). Furthermore, "[i]n an action for fraud, damages may not be predicated on mere speculation and must be a proximate consequence of the fraud. [Citation.]" *Leahy Realty Corp. v. American Snack Foods Corp.,* 253 Ill.App.3d 233, 254, 192 Ill.Dec. 801, 625 N.E.2d 956, 971 (1993). Therefore, plaintiffs' allegation of fraudulent misrepresentation against Dr. Del Castillo in their proposed amended complaint fails to allege damages recoverable under that tort.

[29] [30] Additionally, to state a claim for intentional infliction of emotional distress, a plaintiff must allege "(1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended to inflict severe emotional distress or knew that there was a high probability that his conduct would do so; and (3) the defendant's conduct actually caused severe emotional distress." *Tuite v. Corbitt,* 358 Ill.App.3d 889, 899, 294 Ill.Dec. 367, 830 N.E.2d 779, 789 (2005). Plaintiffs have clearly not satisfied the second element of intentional infliction of emotional distress. Plaintiffs allege that Dr. Del Castillo attempted to conceal the injuries sustained by Michael by fraudulently telling Madeline that the caesarean section was necessitated by the size of the baby's head. Thus, it would be contradictory to allege that Dr. Del Castillo also intended for his false statement to cause the plaintiffs emotional distress, because he allegedly intended that the plaintiffs never discover the falsity of his statement. Therefore, since plaintiffs' proposed second amended complaint fails to state a cause of action for either fraudulent misrepresentation or intentional infliction of emotional distress, the circuit court did not abuse its discretion *****925 **814** in disallowing an amendment on these bases.

[31] With regard to their charge of negligence against Dr. Del Castillo in their proposed second amended complaint, plaintiffs contend that they made additional allegations of negligence and additional allegations of fraudulent concealment on the part of Dr. Del Castillo, which would toll the limitations period applicable to their direct cause of action against him. However, no new instance of

negligence is alleged; rather, the same acts are merely, in the words of plaintiff, "alleged in greater detail." Plaintiffs, as before, do not allege that Dr. Del Castillo had a duty to attend to Madeline prior to the time he saw her at 9:50 ***471** a.m. Moreover, they allege that Michael had suffered injuries *in utero* prior to Dr. Del Castillo's arrival. Furthermore, as with their first amended complaint, plaintiffs' proposed amended complaint alleged that Dr. Del Castillo negligently delayed the caesarean section from 9:50 to 11 a.m.; however, while both the first amended complaint and the proposed second amended complaint acknowledge that Dr. Del Castillo ordered the surgery to be performed after his arrival at 9:50 a.m., neither complaint specifically alleges that Dr. Del Castillo, having been called for consultation, had a duty to perform the surgery himself or otherwise expedite it by means other than those he actually employed. Therefore, we find that plaintiffs' allegation of negligence against Dr. Del Castillo also fails the first *Loyola Academy* factor and the alleged fraudulent concealment attributable to Dr. Del Castillo is thereby irrelevant.

[32] Finally, the last counts of plaintiffs' proposed amended complaint charges defendants with fraudulent spoliation of evidence in furtherance of their fraudulent concealment. Specifically, the proposed amended complaint states that "Dr. Del Castillo, individually or in concert with [Advocate Hospital] have fraudulently secreted [the consultation report]," and that Advocate Hospital "has *intentionally* secreted and/or destroyed Plaintiffs' critical medical records." (Emphasis added.) In their brief, plaintiffs support their spoliation claim solely in a footnote, in which they state:

> "[w]here a duty arises through law or voluntary undertaking to retain and preserve evidence, then the destruction or the secreting of evidence—like the evidence of Dr. Del Castillo's consultation report—serves as a predicate for a claim of *negligence* in the spoliation of evidence." (Emphasis added.)

In support of this contention, plaintiffs cite three Illinois cases. See *Boyd v. Travelers Insurance Co.*, 166 Ill.2d 188, 209 Ill.Dec. 727, 652 N.E.2d 267 (1995); *Andersen v. Mack Trucks, Inc.*, 341 Ill.App.3d 212, 276 Ill.Dec. 203, 793 N.E.2d 962 (2003); *Jackson v. Michael Reese Hospital & Medical Center*, 294 Ill.App.3d 1, 228 Ill.Dec. 333, 689 N.E.2d 205 (1997).

In *Boyd*, the supreme court refused to recognize an independent tort for negligent spoliation of evidence, but noted that a cause of action for negligent spoliation could be established under general negligence theories. *Boyd*, 166 Ill.2d at 192–93, 209 Ill.Dec. 727, 652 N.E.2d at 270. The court stated: "[i]n a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence *caused the plaintiff to be unable to prove* an underlying lawsuit." (Emphasis original.) *Boyd*, 166 Ill.2d at 196, 209 Ill.Dec. 727, 652 N.E.2d 267. The court further stated: "A plaintiff must demonstrate * * * that but for the defendant's loss or destruction ***472** of the evidence, the plaintiff had a reasonable probability of succeeding in the underlying suit." ****815 ***926** *Boyd*, 166 Ill.2d at 196 n. 2, 209 Ill.Dec. 727, 652 N.E.2d at 271 n.2. Thus, the injury for which a claim of spoliation of evidence seeks redress is necessarily related to the plaintiff's ability to bring an underlying claim. The *Andersen* and *Jackson* cases cited by plaintiffs similarly discuss negligent spoliation of evidence and are in accordance with *Boyd*. See *Andersen*, 341 Ill.App.3d at 215, 276 Ill.Dec. 203, 793 N.E.2d at 966; *Jackson*, 294 Ill.App.3d at 10, 228 Ill.Dec. 333, 689 N.E.2d at 211.

[33] Although, due to inconsistencies between plaintiffs' proposed amended complaint and their appellate brief, it is not clear whether plaintiffs intended to state a claim for intentional or negligent spoliation of evidence, in either case, plaintiffs cannot state a new cause of action based on spoliation. As noted, to state a claim for negligent spoliation, a plaintiff must allege that but for the spoliation by defendant, plaintiff likely would have prevailed in the underlying suit. *Boyd*, 166 Ill.2d at 196, 209 Ill.Dec. 727, 652 N.E.2d at 271. Plaintiffs cannot show such a likelihood here because the document they allege was destroyed by the defendants was provided to them prior to the initiation of this suit. More importantly, the document in question is in the record and its authenticity has not been challenged by either defendant.

[34] [35] Similarly, plaintiffs proposed amended complaint does not state a claim for intentional spoliation of evidence. After addressing spoliation in the context of negligence, the supreme court in *Boyd* declined to specifically recognize intentional spoliation of evidence as a tort in Illinois; however, the court noted that even if such a tort were recognized, under the facts of that case, the plaintiffs had not sufficiently alleged an intentional destruction of evidence. *Boyd*, 166 Ill.2d at 201, 209 Ill.Dec. 727, 652 N.E.2d at 273. Plaintiffs cite to no case that specifically recognizes intentional spoliation of evidence as a tort in Illinois. Neither have we found such an Illinois case. See *Dardeen v. Kuehling*, 213 Ill.2d 329, 335–36, 290 Ill.Dec. 176, 821 N.E.2d 227, 231 (2004) (discussing but not expanding *Boyd's* treatment of spoliation); accord *Andersen*, 341 Ill.App.3d at 215, 276 Ill.Dec. 203, 793 N.E.2d at 966; *Jackson*, 294 Ill.App.3d at 10, 228 Ill.Dec. 333, 689 N.E.2d at 211; *Jones v.*

O'Brien Tire & Battery Service Center, Inc., 322 Ill.App.3d 418, 420–22, 256 Ill.Dec. 463, 752 N.E.2d 8, 11–12 (2001); *Kelly v. Sears Roebuck & Co.,* 308 Ill.App.3d 633, 646, 242 Ill.Dec. 62, 720 N.E.2d 683, 693 (1999); *Chidichimo v. University of Chicago Press,* 289 Ill.App.3d 6, 10–11, 224 Ill.Dec. 125, 681 N.E.2d 107, 110 (1997). However, as in *Boyd,* even if intentional spoliation were a tort in Illinois, plaintiffs have not alleged facts to support such a cause of action. We think that, as with negligent spoliation, the injury contemplated by a claim for intentional spoliation must relate to the ability to bring an underlying claim. See ***473** *Boyd,* 166 Ill.2d at 196, 209 Ill.Dec. 727, 652 N.E.2d at 271. See also T. Fischer, Annot., *Intentional Spoliation of Evidence, Interfering with Prospective Civil Action as Actionable* 70 A.L.R.4th 984, 985, 1989 WL 571976 (1989) (characterizing the action as dealing with "[interference] with another's prospective or actual civil action against another"). Therefore, the fact that document allegedly destroyed by the defendants is in the record and was provided to Madeline by the defendant hospital less than a year prior to the initiation of the suit precludes recovery under this theory. The damages plaintiffs state in the spoliation claim of their proposed amended complaint consisted of "additional attorneys fees in an effort to locate the document," and "aggravated emotional distress." These alleged injuries do not reflect on the ability to *****927 **816** bring an underlying claim and would therefore not be recoverable under an intentional spoliation of evidence claim, particularly where the allegedly spoliated evidence is part of the record. Rather, if the injuries alleged by plaintiffs are recoverable at all, they would be recoverable only under some other theory of law not articulated or otherwise urged by plaintiffs. Accordingly, as with the other counts of plaintiffs' proposed second amended complaint, plaintiffs' spoliation claims do not warrant a reversal of the circuit court's order.

III. CONCLUSION

For the foregoing reasons, we affirm.

Affirmed.

BURKE and McBRIDE, JJ., concur.

All Citations

364 Ill.App.3d 446, 845 N.E.2d 792, 300 Ill.Dec. 903

Footnotes

1 Both defendants contest the use of the term "stillborn" as it does not appear in any of the hospital records plaintiffs later attached as exhibits to their reply to defendants' motions to dismiss, as will be discussed below. However, no hospital records were attached to the original or amended complaints to contradict plaintiffs characterization of Michael's birth.

2 We note that these exhibits are missing from this part of the record. However, Michael's "complete medical records" are attached to plaintiffs' subsequent motion to reconsider as are the nursing protocols. The affidavits of Madeline and her attorney, which were purportedly attached to plaintiffs' response, are entirely absent from the record. These affidavits are not specifically relied upon by any party; therefore, we will make our decision based on the record provided.

3 We note that although plaintiffs' allegations of Dr. Del Castillo's negligence, as discussed above, are insufficient to state a claim against him and consequently cannot be vicariously imputed to Advocate Hospital through an agency relationship, plaintiffs have alleged several other instances of negligence against other agents of Advocate Hospital that may well suffice to state a cause of action against Advocate Hospital even though those alleged agents were either not joined or dismissed from the case. For instance, plaintiffs alleged negligence on the part of hospital staff and nurses, as well as Drs. Hiatt, Chavez and McMann. In addition, plaintiffs also allege direct negligence against Advocate Hospital that was fraudulently concealed by its agents.

4 It may be noted that prior to 1982, the predecessor to the statute of limitations applicable here (see 735 ILCS 5/13–212 (West 2004); Ill.Rev.Stat.1977, ch. 83, par. 22.1) did not specifically refer to the fraudulent concealment statute, which is currently section 5/13–215, and was previously section 22 of the Limitations Act. At that time, it was not clear whether the fraudulent concealment statute in the Limitations Act applied to medical malpractice cases; the supreme court, in *Witherell v. Weimer,* 85 Ill.2d 146, 158, 52 Ill.Dec. 6, 421 N.E.2d 869 (1981), declined to resolve the issue and instead applied general principles of equitable estoppel to prevent the defendant doctors in that case from asserting the statute of limitations. However, in 1982 the statute was amended and reference was specifically made to the

fraudulent concealment statute. See Pub. Act 82–783, art. III, § 43, eff. July 13, 1982. Since the amendment, several courts have referred to the effect of the fraudulent concealment statute as equitable estoppel. See, *e.g.*, *Barbour*, 156 Ill.App.3d at 330, 108 Ill.Dec. 862, 509 N.E.2d at 563. The main difference between general equitable estoppel and section 13–215 fraudulent concealment is that, although they both involve the defendant doing something to lull or induce the plaintiff to delay the filing of his claim, equitable estoppel may apply even where the defendant's actions are unintentionally deceptive. Compare *Foster*, 252 Ill.App.3d at 699, 192 Ill.Dec. 238, 625 N.E.2d at 203, with *Witherell*, 85 Ill.2d at 159, 52 Ill.Dec. 6, 421 N.E.2d 869. However, to the extent that section 13–215 and equitable estoppel remain distinct, their differences would not change the outcome here, even if plaintiffs had preserved an equitable estoppel argument, and our earlier discussions with respect to fraudulent concealment would still apply.

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292 P.3d 977
Colorado Court of Appeals,
Div. V.

Janis M. REIGEL, Plaintiff–Appellee,
and
Brent Reigel and Bradley Reigel,
Plaintiffs–Appellees and Cross–Appellants,
v.
SAVASENIORCARE L.L.C., a Delaware limited liability company; SavaSeniorCare Administrative Services, L.L.C., a Delaware limited liability company; and SSC Thornton Operating Company, L.L.C., a Delaware limited liability company, d/b/a Alpine Living Center,
Defendants–Appellants and Cross–Appellees.

No. 10CA1665.
|
Dec. 8, 2011.
|
Rehearing Denied Jan. 26, 2012.

Synopsis
Background: Spouse and son of deceased patient brought action against nursing facility operator, operator's parent company, and personnel services company alleging negligence and outrageous conduct. The District Court, Adams County, Katherine R. Delgado, J., entered judgment in favor of spouse and son. Defendants appealed.

Holdings: The Court of Appeals, J. Jones, J., held that:

[1] evidence was insufficient to establish an agency relationship between administrative services company and nursing home administrator;

[2] evidence was insufficient to establish an agency relationship between administrative services company and employees of nursing home;

[3] trial court error in instructing jury on causation was not harmless;

[4] evidence was insufficient to support claim of outrageous conduct; and

[5] in a wrongful death action, each heir-plaintiff is not required to prove noneconomic losses.

Reversed in part, vacated in part, and remanded.

West Headnotes (29)

[1] **Appeal and Error**
Direction of verdict

Personnel services company properly preserved for appellate review issue of whether trial court erred in denying directed verdict on negligence claim finding company owed patient a duty of care, in action brought by spouse and son of patient following patient's death, alleging negligence and outrageous conduct; although company did not object to jury instruction stating that nurses who cared for patient leading up to his death were agents of personnel services company, personnel services company moved for directed verdict based on spouse's alleged failure to present evidence that it owed patient a duty of care.

Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court

The Court of Appeals reviews a district court's ruling on a motion for directed verdict de novo.

2 Cases that cite this headnote

[3] **Appeal and Error**
Appeal from ruling on motion to direct verdict
Appeal and Error
Effect of evidence and inferences therefrom on direction of verdict

When reviewing a district court's ruling on a motion for directed verdict in which the motion concerns a question of fact, the court of appeals considers whether the evidence, viewed in the light most favorable to the nonmoving party, compels the conclusion that reasonable jurors could not disagree and that no evidence or inference therefrom has been received at trial upon which a verdict against the moving party could be sustained; however, where the motion concerns a question of law, the court may make an independent determination of the legal question.

2 Cases that cite this headnote

[4] **Negligence**
Duty as question of fact or law generally

Whether a particular defendant owes a legal duty to a particular plaintiff is ordinarily a question of law.

Cases that cite this headnote

[5] **Principal and Agent**
Questions for jury

Whether an agency relationship exists is ordinarily a question of fact.

Cases that cite this headnote

[6] **Corporations and Business Organizations**
Evidence

Testimony of nurse in response to question on cross-examination answering "yes" when asked if she worked for "Sava Senior Care" was insufficient to establish that she worked for "Savaseniorcare L.L.C." or "SavaSeniorCare Administrative Services, L.L.C.," and therefore did not support claim of negligence based on agency relationship between nurse and LLCs, brought against the LLCs by spouse and son of deceased patient; although both LLCs were involved in operation of the nursing home where nurse was employed, nurse had twice testified that she worked for a different company that operated the nursing home, and the question asked to her on cross examination failed to clarify which LLC she was being asked about.

Cases that cite this headnote

[7] **Principal and Agent**
Sufficiency to support verdict or finding as to agency

Evidence that administrative services company that provided management services to nursing home operator, provided a corporate structure document to nursing home administrator for nursing home's license application was insufficient to establish an agency relationship between administrative services company and administrator, and therefore, did not support claim of negligence based on agency relationship between administrator and administrative services company, brought against the administrative services company by spouse and son of deceased patient.

Cases that cite this headnote

[8] **Principal and Agent**
Sufficiency to support verdict or finding as to agency

Testimony by nursing home administrator that nursing home operator paid administrative services company a management fee, and administrative services company had recruited therapists for the nursing home, was insufficient to establish an agency relationship between administrative services company and employees of nursing home, and therefore, did not support claim of negligence based on agency relationship between nursing home employees and administrative services company, brought against the administrative services company by

spouse and son of deceased patient.

Cases that cite this headnote

[9] **Appeal and Error**
Cases Triable in Appellate Court

The issue of the correct test of proximate cause on a negligence claim is a legal one that is reviewed de novo by the Court of Appeals.

1 Cases that cite this headnote

[10] **Negligence**
Necessity of legal or proximate causation

To recover on a negligence claim, a plaintiff must show that the defendant's alleged negligence proximately caused the claimed injury.

4 Cases that cite this headnote

[11] **Negligence**
Necessity of and relation between factual and legal causation

Proximate cause, as required to recover on a negligence claim, has two aspects: causation in fact and legal causation.

4 Cases that cite this headnote

[12] **Negligence**
"But-for" causation; act without which event would not have occurred
Negligence
Continuous sequence; chain of events

As to causation in fact, as required to prevail on claim of negligence, the test is the 'but for' test—whether, but for the alleged negligence, the harm would not have occurred; the requirement of 'but for' causation is satisfied if the negligent conduct in a natural and continued sequence, unbroken by any efficient, intervening cause, produces the result complained of, and without which the result would not have occurred.

6 Cases that cite this headnote

[13] **Negligence**
Substantial factor

In establishing causation in fact, as required to prevail in a negligence claim, where some events unrelated to the defendant's conduct may also have contributed to bringing about the claimed injury, the plaintiff must show that the defendant's alleged negligence was a substantial factor in producing the injury.

2 Cases that cite this headnote

[14] **Negligence**
In general; degrees of proof

The plaintiff in a claim for negligence must prove causation in fact by a preponderance of the evidence.

3 Cases that cite this headnote

[15] **Negligence**
Proximate Cause

Causation, as required to establish a claim of negligence, is a question of fact for the jury unless the facts are undisputed and reasonable minds could draw but one inference from them.

3 Cases that cite this headnote

[16] **Negligence**
Requisites, Definitions and Distinctions
Negligence
"But-for" causation; act without which event would not have occurred

In establishing causation in fact, as required to prevail in a negligence claim, where some events unrelated to the defendant's conduct may also have contributed to bringing about the claimed injury, the plaintiff must prove that the defendant's conduct was a cause without which the injury would not have occurred, and it is insufficient merely to establish that defendant's conduct increased the risk of harm to the person injured.

4 Cases that cite this headnote

[17] **Appeal and Error**
Evidence and witnesses, instructions relating to
Health
Instructions

Error in instructing jury that defendant could be found negligent if its conduct increased the risk of patient's death or deprived him of a significant chance to avoid death, was not harmless in action brought by spouse and son of patient against nursing home operator following patient's death, alleging negligence and outrageous conduct; although instruction also included a correct statement of the required "but for" causation, the additional language permitted the jury to find nursing home negligent without finding "but for" causation.

Cases that cite this headnote

[18] **Negligence**
In general; degrees of proof

To establish causation, as required to prevail in a claim of negligence, the plaintiff need not prove with absolute certainty that the defendant's conduct caused the plaintiff's harm; however, the plaintiff must establish causation beyond mere possibility or speculation.

3 Cases that cite this headnote

[19] **Health**
Proximate cause

Issue of whether, but for nursing home employees' alleged negligence, patient would have been able to have an angioplasty procedure, and would have been among the ninety percent of people for whom the procedure is a success, was one for jury in action brought by spouse and son of deceased patient against nursing facility operator, operator's parent company, and personnel services company.

Cases that cite this headnote

[20] **Damages**
Health care

Evidence that nursing home nurses were abrupt, irresponsible, and lacking in sensitivity in responding to requests from spouse of patient to address his allegedly deteriorating condition, and that nurses, failed to attend closely to patient's condition, and falsified his chart was insufficient to establish that nurse's engaged in conduct that sufficiently extreme or outrageous to support claim of outrageous conduct brought by spouse and son of patient against nursing facility operator, operator's parent company, and personnel services company.

Cases that cite this headnote

[21] **Damages**
Elements in general

The elements of an outrageous conduct claim are (1) the defendant engaged in extreme and outrageous conduct, (2) recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) causing the plaintiff severe emotional distress.

10 Cases that cite this headnote

[22] **Damages**
Nature of conduct
Damages
Humiliation, insults, and indignities

The level of outrageousness required to constitute tort of extreme and outrageous conduct is extremely high, and the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community; mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are insufficient.

9 Cases that cite this headnote

[23] **Damages**
Nature of conduct

Conduct, otherwise permissible, may become extreme and outrageous, as would support tort claim of outrageous conduct, if it is an abuse by the actor of a position in which he has actual or apparent authority over the other, or the power to affect the other's interests.

9 Cases that cite this headnote

[24] **Damages**
Mental suffering and emotional distress

An outrageous conduct claim may be submitted to the jury only if reasonable persons could differ on whether the defendant's conduct was sufficiently outrageous.

Cases that cite this headnote

[25] **Appeal and Error**
Cases Triable in Appellate Court
Damages
Mental suffering and emotional distress

Whether reasonable persons could differ on issue of whether the defendant's conduct was sufficiently outrageous to support a tort claim of outrageous conduct, is a question of law that the Court of Appeals reviews de novo, considering the totality of the evidence pertaining to the defendant's conduct.

2 Cases that cite this headnote

[26] **Appeal and Error**
Amended and Supplemental Pleadings

The Court of Appeals reviews a district court's decision on a motion to amend a complaint for an abuse of discretion.

2 Cases that cite this headnote

[27] **Statutes**
Purpose

In interpreting a statute, the goal of the court is to give effect to the General Assembly's purposes by adopting an interpretation that best effectuates those purposes.

Cases that cite this headnote

[28] **Death**
Right of action of person injured
Death
Compensation for loss or injury resulting from death in general

Under the Wrongful Death Act, the right of the heirs to collect damages does not arise from a separate tort, but instead is wholly derivative of the injury to the decedent, and whether an individual heir suffers actual damages is irrelevant; unlike a loss of consortium claim that requires proof of personal damages, a wrongful death action involves a shared injury among survivors such that there is no individualized recovery of damages. West's C.R.S.A. § 13–21–102.5(2)(b).

Cases that cite this headnote

[29] **Death**
Loss or Injury Resulting from Death
Death
Apportionment and distribution of amount recovered

In a wrongful death action, although different heirs may suffer different noneconomic losses as a result of a decedent's death, each heir-plaintiff is not required to prove noneconomic losses; whether damages are awarded for economic or noneconomic losses, all damages awarded are owned jointly and distributed through the statutes of descent and distribution. West's C.R.S.A. § 13–21–201(2).

Cases that cite this headnote

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Opinion

Opinion by Judge J. JONES.

Dennis Reigel died shortly after being taken to a hospital emergency room from a nursing facility owned by defendant SSC Thornton Operating Company, L.L.C., doing business as Alpine Living Center (Alpine). Mr. Reigel's surviving spouse, Janis M. Reigel, and surviving sons, Brent Reigel and Bradley Reigel, sued Alpine; Alpine's parent company, SavaSeniorCare L.L.C. (SSC); SavaSeniorCare Administrative Services, L.L.C. (Administrative Services), which provided payroll and personnel services to Alpine; and others.

As of the date of trial, only the claims against Alpine, SSC, and Administrative Services for negligence and outrageous conduct remained. The court directed a verdict in defendants' favor on the sons' claims. The jury found in Ms. Reigel's favor on her negligence and outrageous conduct claims, awarding her a total of $450,000 in damages.[1]

***981** Defendants appeal those verdicts. The sons cross-appeal the district court's directed verdict in defendants' favor on their claims, and its award of costs to defendants for those claims.

We reverse the judgments against SSC and Administrative Services on both claims, reverse the judgment against Alpine on Ms. Reigel's outrageous conduct claim, vacate the judgment against Alpine on Ms. Reigel's negligence claim, reverse the judgment and costs award against the sons, and remand the case for a new trial on plaintiffs' negligence claim against Alpine.

I. Factual Background

The following facts are taken from the record of the trial, which we view in the light most favorable to the jury's verdicts. *See Fair v. Red Lion Inn*, 943 P.2d 431, 436 (Colo.1997) (in ruling on a motion for directed verdict, court must view the evidence in the light most favorable to the nonmoving party); *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1172 (Colo.App.2010) (same standard applies in reviewing a challenge to the sufficiency of the evidence).

After undergoing surgery for an injury unrelated to this appeal, Mr. Reigel was admitted to Alpine for a one-week rehabilitation period.

One day before his scheduled discharge, Mr. Reigel began experiencing health problems. By 2:30 p.m. that day, his heart rate had dropped to fifty-four beats per minute from its normal range of around eighty beats per minute, his blood pressure had dropped, and he had developed nausea. According to Dr. Ethan Cary, Mr. Reigel's attending doctor at Alpine, the nurse assigned to Mr. Reigel, Sarah Pemkiewicz, told Dr. Cary only about Mr. Reigel's nausea. Ms. Pemkiewicz also failed to adequately chart Mr. Reigel's condition or to monitor his vital signs.[2]

By 10:00 p.m., Mr. Reigel's heart rate had risen to 134 beats per minute. Dr. Cary was not notified. Mr. Reigel's fluid intake for the day had been less than one-fifth of the recommended amount.

Mr. Reigel did not take in any fluids the following day. According to Ms. Reigel, he was disoriented, could not focus, could not urinate, and was sweating though his skin was cold and clammy. He also experienced increasing shortness of breath. After taking Mr. Reigel's vital signs and listening to his lungs, Ms. Pemkiewicz called Dr. Cary to report the shortness of breath. At about 1:10 p m., Dr. Cary ordered a chest x-ray, a urinalysis, and several other lab tests to be done as soon as possible. Ms. Pemkiewicz did not take the urinalysis because Mr. Reigel was unable to urinate, but she ordered the x-ray and the other lab tests.

In the meantime, Ms. Reigel grew increasingly concerned about her husband's condition. Between 1:00 p.m. and 4:00 p m., she asked Ms. Pemkiewicz, another nurse, and Jackie Cho (Mr. Reigel's case manager and Alpine's director of social services) about either having a doctor or a registered nurse evaluate Mr. Reigel or transferring him to a hospital. According to Ms. Reigel, the nurses refused her requests because they were either involved in completing the ordered tests or waiting for the lab results. Ms. Cho also refused the requests, telling Ms. Reigel in a "caustic" tone of voice that if an emergency existed "we would call an ambulance."

At some point after 2:00 p.m., Ms. Pemkiewicz received the chest x-ray results and reported those results to Dr. Cary, who told her to transfer Mr. Reigel to a hospital. She called an ambulance at about 4:30 p m.

According to one of the paramedics on duty, there was no nurse in Mr. Reigel's room when he arrived at Alpine. Due to a delay caused by one of Alpine's nurses in obtaining the transfer paperwork, it took about thirty minutes to transfer Mr. Reigel to a hospital that was "almost across the street" from Alpine.

***982** The emergency room doctor who treated Mr. Reigel, Dr. Michelle Reeves, concluded that he had been having a heart attack since the previous day. Mr. Reigel died a few hours later.

II. Defendants' Appeal

On appeal, defendants contend that the district court erred in (1) denying their motion for directed verdicts on Ms. Reigel's negligence claim; (2) denying their motion for directed verdicts on Ms. Reigel's outrageous conduct claim; (3) allowing Ms. Reigel to recover punitive damages; and (4) admitting evidence from a website concerning Alpine's history of treatment deficiencies and comparing its care to that of other nursing facilities. We agree in part with defendants' first contention and remand the case for a new trial on the negligence claim against Alpine only. We also agree with defendants' second contention. Consequently, we address their third and fourth contentions only to the extent relevant to the case on remand.

A. The Defendants Other Than Alpine Were Entitled to a Directed Verdict on the Negligence Claim

SSC and Administrative Services (collectively, the Sava Defendants) contend that the district court erred in denying their motion for directed verdicts on the negligence claim. Specifically, they argue that Ms. Reigel did not establish that they owed a duty of care to Mr. Reigel because she did not present evidence showing that she could impute Alpine's employees' alleged negligence to the Sava Defendants by piercing the corporate veil. Ms. Reigel does not dispute that she failed to prove a basis for piercing the corporate veil, but argues that the Sava Defendants owed a duty of care to Mr. Reigel because the evidence showed that Alpine's employees were their agents. We conclude that Ms. Reigel did not present evidence to establish that Alpine's employees were the Sava Defendants' agents. It follows that the district court erred in denying the Sava Defendants' motion for directed verdicts on the negligence claim.

1. The Issue Was Preserved for Review

[1] Initially, we reject Ms. Reigel's contention that the Sava Defendants failed to preserve this issue for appellate review because they did not object specifically to the jury instruction stating, "Jackie Cho, Sarah Pemkiewicz, and [another nurse who treated Mr. Reigel] were the agents of the defendants, at the time of this occurrence. Therefore, any act or omission of the agent was in law the act or omission of the defendants."

The Sava Defendants moved for directed verdicts based on Ms. Reigel's alleged failure to present evidence that they owed Mr. Reigel a duty of care. By doing so, they properly preserved the issue for our review. *See In re Rosen,* 198 P.3d 116, 119 (Colo.2008) (the issue whether a party is entitled to judgment as a matter of law is preserved by moving for a directed verdict); *Omedelena v. Denver Options, Inc.,* 60 P.3d 717, 727 (Colo.App.2002) (where one defendant joined in another defendant's motion for a directed verdict, it preserved the issue therein for appellate review even though it did not submit an alternative jury instruction regarding the issue); *see also Aspen Highlands Skiing Corp. v. Aspen Skiing Co.,* 738 F.2d 1509, 1517–18 (10th Cir.1984), *aff'd,* 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985).

2. Standard of Review

[2] [3] We review a district court's ruling on a motion for directed verdict de novo. *Churchill v. Univ. of Colo. at Boulder,* 293 P.3d 16, 34 (Colo.App.2010) (*cert. granted* 2011 WL 2176390 (May 31, 2011)). Where the motion concerns a question of fact, we consider whether the evidence, viewed in the light most favorable to the nonmoving party, " 'compels the conclusion that reasonable jurors could not disagree and that no evidence or inference [therefrom] has been received at trial upon which a verdict against the moving party could be sustained.' " *Hildebrand,* 252 P.3d at 1163 (quoting *Brossia v. Rick Constr., L.T.D. Liab. Co.,* 81 P.3d 1126, 1131 (Colo.App.2003)). However, where the motion concerns a question of law, we "may make an independent determination of [the] legal question." *Omedelena,* 60 P.3d at 722; ***983** *accord Tricon Kent Co. v. Lafarge N. Am., Inc.,* 186 P.3d 155, 159 (Colo.App.2008).

[4] [5] Whether a particular defendant owes a legal duty to a particular plaintiff is ordinarily a question of law. *See Univ. of Denver v. Whitlock,* 744 P.2d 54, 57 (Colo.1987). But here the existence of a duty ultimately turns on whether Alpine's employees were the Sava Defendants' agents. Whether such a relationship exists is ordinarily a question of fact. *See Stortroen v. Beneficial Finance Co.,* 736 P.2d 391, 395 (Colo.1987); *Gorsich v. Double B Trading Co., Inc.,* 893 P.2d 1357, 1361 (Colo.App.1994). Therefore, we will review the Sava Defendants' contention assuming it presents a factual question.

3. The Sava Defendants Did Not Owe a Duty of Care to Mr. Reigel

To recover on a wrongful death claim founded on negligence, a plaintiff must show, among other things, that the defendant owed the decedent a duty of care. *See Solano v. Goff,* 985 P.2d 53, 54–55 (Colo.App.1999); *see also Day v. Johnson,* 255 P.3d 1064, 1068–69 (Colo.2011); *Greenberg v. Perkins,* 845 P.2d 530, 533 (Colo.1993).

Ms. Reigel's theory that the Sava Defendants owed Mr. Reigel a duty of care is premised on the precept that a principal is liable for negligent acts its agent commits on behalf of the principal that are within the scope of the agency relationship. *Smith v. Multi–Fin. Secs. Corp.,* 171 P.3d 1267, 1271 (Colo.App.2007); *see Willey v. Mayer,* 876 P.2d 1260, 1264 (Colo.1994). She contends that the Sava Defendants could be held liable as principals for the allegedly negligent actions in this case because evidence presented at trial showed the following: (1) Earl Woomer, Alpine's nursing home administrator, and Ms. Pemkiewicz were "Sava" employees; (2) the nurse consultant to Alpine's director of nursing, Sharon Darlene Brown, was a "Sava" employee; (3) when Mr. Woomer filled out Alpine's license application to operate a health care facility, Administrative Services provided him with a corporate structure document that he attached to the application; and (4) Administrative Services provided management services to Alpine.[3]

The evidence that Mr. Woomer worked for "Sava" was from his deposition testimony. However, at trial, Mr. Woomer clarified that he had been an employee of Alpine, not of either of the Sava Defendants. He noted that when he had been deposed, he had believed he had worked for "Sava Senior Care," but when he later reviewed his payroll checks, he saw that they said Alpine. No documentary evidence was introduced showing that Mr. Woomer worked for an entity other than Alpine.

Similarly, Ms. Pemkiewicz twice testified that she "work[ed] for Alpine." And, though, on cross-examination by plaintiffs' counsel, she responded

"Yes" to the question, "And the company that you worked for was Sava Senior Care; is that right?" neither she nor counsel specified whether "Sava Senior Care" was SavaSeniorCare L.L.C., SavaSeniorCare Administrative Services, L.L.C., or some other entity. Nor can we reasonably infer which company she meant. Ms. Reigel suggests, without record support, that Ms. Pemkiewicz meant SSC. The record shows that counsel and sometimes witnesses routinely referred to Sava without drawing any distinction among the defendant entities.

[6] Consequently, we conclude that, viewing the testimony in the light most favorable to Ms. Reigel, she did not present sufficient evidence to prove that Mr. Woomer or Ms. Pemkiewicz were employees of one of the Sava Defendants. She argues no other theory under which they could be regarded as agents of one of the Sava Defendants. *See Hildebrand,* 252 P.3d at 1163; *cf. Catholic Archdiocese of Denver v. City & County of Denver,* 741 P.2d 333, 337–38 (Colo.1987) (the district court erred in finding that the news carriers were the news publishers' agents where the virtually uncontradicted evidence was that the carriers were not the publishers' ***984** employees); *Colo. Ranch Estates, Inc. v. Halvorson,* 163 Colo. 146, 152, 428 P.2d 917, 920 (1967) (the district court erred in entering judgment against one defendant where the allegations were only sufficient to sustain a judgment against another defendant).

Ms. Brown testified at trial that she had reported "[i]n a fashion" to a nurse consultant who had helped Alpine correct its treatment deficiencies. When asked, "Do you know the name of the company that [the nurse consultant] worked for?" Ms. Brown responded, "No. I guess she was employed by Sava." Not only was this testimony seemingly pure speculation, *see Cowin & Co. v. Medina,* 860 P.2d 535, 539 (Colo.App.1992) (mere guesses are insufficient evidence to establish an allegation), Ms. Brown did not identify to which Sava Defendant she was referring, if either. And although Mr. Woomer later testified that the consultant was employed by "Sava Senior Care, that's all I know," he later clarified that he had been using SavaSeniorCare as a generic term, not referring to a specific entity.

[7] The mere fact that Administrative Services provided a corporate structure document to Mr. Woomer for Alpine's license application is clearly insufficient to establish an agency relationship between Administrative Services and Mr. Woomer. *See W. Fire Truck, Inc. v. Emergency One, Inc.,* 134 P.3d 570, 575 (Colo.App.2006) (" 'Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his ... behalf and subject to his ... control, and consent by the other so to act.' " (ultimately quoting Restatement (Second) of Agency § 1(1) (1958))); *cf. Moses v. Diocese of Colo.,* 863 P.2d 310, 325 (Colo.1993) (there was sufficient evidence of an agency relationship where the defendants possessed and exercised the right of control over the manner of performing work and of hiring, compensating, and counseling the employee).

[8] Finally, we reject Ms. Reigel's contention that evidence demonstrated that Administrative Services had an agency relationship with Alpine's employees because it provided management services to Alpine. Citing only to Mr. Woomer's testimony, Ms. Reigel alleges that Alpine paid Administrative Services a management fee in exchange for its help in correcting Alpine's treatment deficiencies, among other things.[4] However, Mr. Woomer testified that he was not sure to which Sava company Alpine had paid the management fee. When asked specifically what Administrative Services had done for Alpine, Mr. Woomer recalled only that it had recruited Alpine's therapists.[5] Alpine's therapists did not commit any of the allegedly negligent actions in this case, and there was no evidence that Administrative Services provided any clinical services to Alpine patients. Further, and in any event, Ms. Reigel cites no authority for the proposition that one company's mere payment to another for services renders the former's employees general agents of the latter.

Therefore, we conclude that the evidence was not sufficient to enable reasonable jurors to agree that either of the Sava Defendants owed a duty of care to Mr. Reigel on the theory that Alpine's employees were their agents. It follows that the district court erred in denying the Sava Defendants' motion for directed verdicts. Accordingly, we reverse the judgment entered against the Sava Defendants on the negligence claim.[6]

***985** B. The Negligence Verdict Against Alpine Must Be Vacated But Alpine Was Not Entitled to a Directed Verdict on the Negligence Claim

Alpine contends that the evidence was insufficient to support a jury finding of causation in connection with the negligence claim. Its initial premise for this contention is that the court concluded erroneously that to establish causation, Ms. Reigel was only required to present evidence that the alleged negligence substantially increased the risk of harm to Mr. Reigel—a standard more easily met than the "but-for" causation test dictated by Colorado Supreme Court precedent.[7] The court applied the increased risk standard in denying defendants' motion

for directed verdicts and in subsequently instructing the jury on causation. Alpine argues that the jury's negligence verdict cannot stand, and that, applying the correct test for causation, the evidence was insufficient even to present a jury question of the negligence claim.

We agree with Alpine that the district court erred by applying an incorrect test for causation. Because the court instructed the jurors that the incorrect test governed their deliberations, we must vacate the judgment. But though the judgment must be vacated, we disagree with Alpine that it was entitled to a directed verdict because we conclude that the evidence would have been sufficient to support a verdict under the correct test.

1. The District Court Applied an Incorrect Test of Proximate Cause

a. Standard of Review

[9] The issue of the correct test of proximate cause is a legal one. *See Highlands Ranch University Park, LLC v. Uno of Highlands Ranch, Inc.,* 129 P.3d 1020, 1026 (Colo.App.2005) (whether the district court applied a correct legal standard is a question of law). Therefore, our review of that issue is de novo. *See Freedom Colo. Info., Inc. v. El Paso County Sheriff's Dep't,* 196 P.3d 892, 897 (Colo.2008).

b. Analysis

[10] [11] To recover on a negligence claim, a plaintiff must show that the defendant's alleged negligence proximately caused the claimed injury. *Callaham v. First Am. Title Ins. Co.,* 837 P.2d 769, 771 (Colo.App.1992). Proximate cause has two aspects: causation in fact and legal causation. *See Ludlow v. Gibbons,* 310 P.3d 130, ——, 2011 WL 5436481 (Colo.App.2011); *Moore v. W. Forge Corp.,* 192 P.3d 427, 436 (Colo.App.2007). Alpine's contention does not concern legal causation, and consequently we do not address it.

[12] [13] As to causation in fact,

> "[t]he test ... is the 'but for' test—whether, but for the alleged negligence, the harm would not have occurred. The requirement of 'but for' causation is satisfied if the negligent conduct in a 'natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which the result would not have occurred.' "

N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct, 914 P.2d 902, 908 (Colo.1996) (quoting *Smith v. State Comp. Ins. Fund,* 749 P.2d 462, 464 (Colo.App.1987)); *accord Graven v. Vail Assocs., Inc.,* 909 P.2d 514, 520 (Colo.1995). Where some events unrelated to the defendant's conduct may also have contributed to bringing about the claimed injury, the plaintiff must show that the defendant's alleged negligence was a substantial factor in producing the injury. *N. Colo. Med. Ctr.,* 914 P.2d at 908; *Graven,* 909 P.2d at 520–21; *Smith,* 749 P.2d at 464; *see also Rodriguez v. Healthone,* 24 P.3d 9, 15 (Colo.App.2000), *aff'd in part & rev'd in part on other grounds,* 50 P.3d 879 (Colo.2002).

[14] [15] The plaintiff must prove causation in fact by a preponderance of the evidence. *Kaiser Found. Health Plan of Colo. v. Sharp,* 741 P.2d 714, 719 (Colo.1987); *Allen v. Martin,* 203 P.3d 546, 565 (Colo.App.2008). Causation is a question of fact for the jury unless the facts are undisputed and ***986** reasonable minds could draw but one inference from them. *Allen,* 203 P.3d at 566; *Sanderson v. Heath Mesa Homeowners Ass'n,* 183 P.3d 679, 683 (Colo.App.2008).

Here, in denying defendants' motion for directed verdicts, the district court concluded that reasonable jurors could determine that defendants had caused Mr. Reigel's death because Ms. Reigel had introduced evidence that the alleged negligence had substantially increased the risk of harm to Mr. Reigel or had deprived him of a significant chance to avoid death and was, therefore, a substantial factor in his death.[8] The court also subsequently rejected defendants' tendered instruction on but-for causation and instead instructed the jury, as relevant here, as follows:

> The word "cause" as used in these instructions means an act or failure to act that in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.
>
> If more than one act or failure to act contributed to the claimed injury, then each act or failure to act may have been a cause of the injury. A cause does not have to be the only cause or the last or nearest cause. It is enough if the act or failure to act joins in a natural and probable way with some other act or failure to act to cause some or all of the claimed injury.

> One's conduct is not a cause of another's death, however, if, in order to bring about such death, it was necessary that his or her conduct combine or join with an intervening cause that also contributed to cause the death. An intervening cause is a cause that would not have been reasonably foreseen by a reasonably careful person under the same or similar circumstances.
>
> ....
>
> For the plaintiff to recover from the defendants on her claim of negligence, you must find that all of the following have been proved by a preponderance of the evidence:
>
> 1) Dennis Reigel died;
>
> 2) The defendants were negligent; and
>
> 3) The defendants' negligence was a cause of the plaintiff's damage.
>
> If you find that any one or more of these three statements has not been proved, then your verdict must be for the defendants.
>
> On the other hand, if you find that all of these three statements have been proved, then your verdict must be for the plaintiff.
>
> *If you find that Alpine's negligence increased the risk of Dennis Reigel's death or deprived Dennis Reigel of some significant chance to avoid death, you may also find that Alpine's negligence was a cause of Dennis Reigel's death.*

(Emphasis added.)

The court based its decisions to deny the motion for directed verdicts and to instruct the jury concerning an increase in the risk of death on *Sharp v. Kaiser Foundation Health Plan of Colorado,* 710 P.2d 1153 (Colo.App.1985) (*Sharp I*), *aff'd,* 741 P.2d 714 (Colo.1987). In *Sharp I,* the division held that "the jury should be allowed to decide the issue of causation [where] there is expert testimony" that the defendants' conduct was a substantial factor in causing the injury in that it "substantially increased [the] plaintiff's risk of the resulting harm or substantially diminished the chance of recovery." 710 P.2d at 1155.

On certiorari review, the supreme court did not reach the increased risk issue because it concluded that the plaintiffs had presented sufficient evidence of but-for causation. *Sharp,* 741 P.2d at 720.

Alpine contends that the "increased risk" standard articulated in *Sharp I* is inconsistent with the but-for test as applied in Colorado. It notes that the Tenth Circuit Court of Appeals has held that the Colorado Supreme Court would not agree with *Sharp I*'s increased risk standard. *June v. Union Carbide Corp.,* 577 F.3d 1234 (10th Cir.2009).

In *June,* the Tenth Circuit began by recognizing that in the years since *Sharp I* was ***987** decided, the Colorado Supreme Court has consistently followed the but-for causation test. *Id.* at 1238–39. The court then determined that *Sharp I*'s reasoning was inconsistent with that test and was analytically flawed because it took certain provisions of the Restatement (Second) of Torts out of context. *See id.* at 1239–41, 1245 (comparing Restatement (Second) of Torts §§ 430–433, with Restatement (Third) of Torts §§ 26–27, 29, and Proposed Final Draft of the Restatement (Third) of Torts: Liability for Physical Harm). The court noted that by looking only to sections 430, 431, and 433, which address legal causation and the substantial factor concept, "one could easily conclude that courts ... have substantial leeway to depart from but-for causation in imposing liability." *Id.* at 1241. However, the court noted that section 432 states:

> (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.
>
> (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.

Thus, the court concluded that the allegedly negligent conduct of the defendant must satisfy one of section 432's alternative requirements before it can even qualify as a substantial factor under the other Restatement sections. *Id.* Consequently, to establish causation under Colorado law, a plaintiff must show either that (1) but for the defendant's alleged negligence, the claimed injury would not have occurred, or (2) the defendant's alleged negligence was a necessary component of a causal set that would have caused the injury. *Id.* at 1245.

Though we are not bound by the Tenth Circuit's reasoning, we find it persuasive, and therefore decline to follow *Sharp I. See Valentine v. Mountain States Mut. Cas. Co.,* 252 P.3d 1182, 1195 (Colo.App.2011) (a division of the court of appeals is not bound by another division's decision).

[16] As the Tenth Circuit recognized, the Colorado Supreme Court has continued to adhere to the but-for test. *See, e.g., N. Colo. Med. Ctr.*, 914 P.2d at 908; *Graven*, 909 P.2d at 520. Though the court has spoken in terms of the defendant's negligence being a "substantial factor" where other potential causes may be at play, the court has not retreated from the requirement that the defendant's conduct be a cause without which the injury would not have occurred. *See N. Colo. Med. Ctr.*, 914 P.2d at 908; *Graven*, 909 P.2d at 520–21; *see also Viner v. Sweet*, 30 Cal.4th 1232, 135 Cal.Rptr.2d 629, 70 P.3d 1046, 1050–51 (2003) (under Restatement (Second) of Torts § 432, the substantial factor test subsumes the but-for causation test; however, it does not abrogate the requirement that the plaintiff must prove that but for the alleged negligence, the injury would not have occurred). As both a logical and practical matter, the fact that a defendant's conduct increased the victim's risk of injury does not necessarily mean that the defendant's conduct was a but-for cause of the injury or a necessary component of a causal set of events that would have caused the injury. Put another way, the victim's injury may well have occurred regardless of whether the defendant's conduct increased the risk that it would occur. Thus, the increased risk of harm test articulated in *Sharp I* is inconsistent with Colorado Supreme Court precedent.

Consequently, we conclude that the district court erred in ruling that Ms. Reigel was only required to present evidence that Alpine's alleged negligence increased Mr. Reigel's risk of death or deprived him of a significant chance to avoid death.

2. The Negligence Verdict Against Alpine Must Be Vacated

[17] We reject Ms. Reigel's assertion that any error in instructing the jury as to increased risk was harmless because the jury instructions, read as a whole, correctly instructed the jury on the but-for causation standard. *See* C.R.C.P. 61.

It is true, as noted above, that one instruction said, "The word 'cause' as used in these ***988** instructions means an act or failure to act that in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened...." This appears to be a correct statement of the law. And the other instruction correctly recited the elements of the negligence claim. But it also said, in the last paragraph: "If you find that Alpine's negligence increased the risk of Dennis Reigel's death or deprived Dennis Reigel of some significant chance to avoid death, you may also find that Alpine's negligence was a cause of Dennis Reigel's death."

The jury may well have viewed the latter instruction as expounding on the definition of causation in the last paragraph of the first instruction—that is, that the but-for test could be satisfied by evidence of a substantial increase in the risk. Thus, the instructions allowed a verdict in Ms. Reigel's favor even if the jury concluded that Alpine's alleged negligence was not a but-for cause of Mr. Reigel's death in the sense contemplated by Colorado Supreme Court precedent. Consequently, we conclude that the district court's error was not harmless. *See Young v. Colo. Nat'l Bank*, 148 Colo. 104, 125, 365 P.2d 701, 713 (1961) ("[T]he giving of incompatible instructions on the burden of proof is fatal error."); *Steward Software Co., LLC v. Kopcho*, 275 P.3d 702, —— (Colo.App.2010) (*cert. granted* 2011 WL 1106763 (Mar. 28, 2011)) (same) ("error in one instruction cannot be rendered harmless by the mere giving of other instructions that state the law correctly"; citing *Harper v. James*, 246 Ind. 131, 203 N.E.2d 531, 533–34 (1965)).

3. Alpine Was Not Entitled to a Directed Verdict on the Negligence Claim

Though the district court erred in applying the test for proximate cause to Alpine's motion for directed verdict, it does not necessarily follow that the court erred in denying the motion. Rather, we must determine whether the evidence (and inferences that reasonably could have been drawn therefrom) would have supported a verdict against Alpine under the correct test. Viewing the evidence in the light most favorable to Ms. Reigel, we conclude that it would have.

[18] To establish causation, " '[t]he plaintiff need not prove with absolute certainty that the defendant's conduct caused the plaintiff's harm ... [h]owever, the plaintiff must establish causation beyond mere possibility or speculation.' " *Nelson v. Hammon*, 802 P.2d 452, 457 (Colo.1990) (ultimately quoting *City of Longmont v. Swearingen*, 81 Colo. 246, 251, 254 P. 1000, 1002 (1927)); *see* Restatement (Second) of Torts § 433B cmt. b (1965) ("[The plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not.").

Initially, we reject Alpine's contention that Ms. Reigel failed to present any evidence of but-for causation because no witness testified that if Alpine had called an ambulance at the first sign of trouble, Mr. Reigel would not have died. Such conclusive testimony is not necessary to prove causation. *See Nelson,* 802 P.2d at 457; *Boatright v. Berkley United Methodist Church,* 518 P.2d 309, 310 (Colo.App.1974) (not published pursuant to C.A.R. 35(f)) (causation may be proved by circumstantial evidence); *see also Hildebrand,* 252 P.3d at 1163 (in resolving a motion for directed verdict, the court must consider whether "no evidence *or inference [therefrom]* " has been received at trial that can sustain the verdict (emphasis added)).

Ms. Reigel presented evidence from which reasonable jurors could conclude that had Mr. Reigel been taken to the hospital immediately after he allegedly began having the heart attack, he would not have died.

For example, Dr. Cary testified that when a person becomes dehydrated, he has a greater risk of suffering a heart attack. He then confirmed that if Mr. Reigel was dehydrated on the day before he was transferred to the hospital, it was likely that the dehydration affected his heart rate. As noted, on that day, Mr. Reigel's fluid intake was less than one-fifth of the recommended amount and his heart rate had fluctuated between 54 and 134 beats per minute. Dr. Cary also testified that the dehydration could have contributed ***989** to Mr. Reigel having a heart attack. Though Dr. Cary then said he was not sure whether dehydration would have been a substantial contributing factor in triggering the heart attack because Mr. Reigel had "so many other risk factors for heart disease," reasonable jurors could infer from this evidence that Mr. Reigel would not have had the heart attack, and consequently would not have died, had he not been dehydrated.

Alpine's expert in noninvasive cardiology, Dr. Philip Wolf, testified that if a person who had a massive heart attack like Mr. Reigel's is able to have an angioplasty procedure within ninety minutes of the heart attack beginning, there is a ninety percent chance that the procedure will be successful. He later clarified that the ninety percent success rate figure did not apply in Mr. Reigel's case because (1) in his opinion, nobody could have diagnosed him with a heart attack earlier, and (2) the cardiologist who had treated Mr. Reigel after he arrived at the emergency room, Dr. Carlos Mendoza, had determined that Mr. Reigel had too many other health problems to make immediate surgery a viable option.[9] However, Ms. Reigel presented evidence disputing both bases for this latter conclusion, thereby suggesting that the ninety percent success rate figure would have applied in Mr. Reigel's case.

As to the first basis, Dr. Wolf's opinion was that Mr. Reigel did not begin to have a heart attack until around the time he arrived at the emergency room. A reasonable juror could infer that Dr. Wolf's opinion about the alleged inability to diagnose Mr. Reigel's heart attack earlier was in turn based on his opinion that Mr. Reigel was not having a heart attack before he arrived at the emergency room. However, as noted, Dr. Reeves testified that Mr. Reigel had begun having a heart attack on the previous day. And in Mr. Reigel's emergency room admission report, which Ms. Reigel introduced at trial, one of Mr. Reigel's doctors said that he also believed Mr. Reigel's heart attack had begun twenty-four to forty-eight hours before he arrived at the emergency room.[10]

As to the second basis, Dr. Reeves testified that if Mr. Reigel had come to the hospital earlier, with stable vital signs, and he had not been on blood thinning medication or experiencing renal failure, she would have told the cardiologist that there was less risk associated with a heart surgery procedure. The presence of the blood thinning medication was allegedly due to Alpine's nursing staff's negligence in giving Mr. Reigel two doses of blood thinning medication after Dr. Cary had ordered that the medication be discontinued. The renal failure had allegedly begun early in the afternoon of the day Mr. Reigel was transferred to the hospital due to poor blood flow resulting from Mr. Reigel's untreated heart attack and dehydration.

Similarly, according to evidence at trial, Dr. Mendoza had given three reasons why he did not want to immediately perform an angioplasty procedure on Mr. Reigel: (1) Mr. Reigel was having problems with his blood clotting; (2) he was experiencing renal failure; and (3) he had difficulty lying flat because of shortness of breath. As noted, the first two problems were allegedly caused by Alpine's employees' negligence. And the third problem, Mr. Reigel's increasing shortness of breath, did not begin until the day he was transferred to the hospital.

[19] Based on this evidence, we conclude that reasonable jurors could agree that but for Alpine's employees' alleged negligence, Mr. Reigel would have been (1) able to have an angioplasty procedure, and (2) among the ninety percent of people for whom the procedure is a success.

***990** In sum, we conclude that Ms. Reigel's evidence was sufficient to withstand Alpine's motion for directed

verdict. *Compare Nelson,* 802 P.2d at 456–57 (where a doctor testified that one gram of penicillin "might have had some effect in reducing the chance" the plaintiff would have developed the condition, but that two grams was the standard recommendation, the testimony was nonetheless sufficient to support an inference that one gram of penicillin would have prevented the condition), *and Johnson v. Nat'l R.R. Passenger Corp.,* 989 P.2d 245, 249–50 (Colo.App.1999) (where a surgeon testified that if the plaintiff had a preexisting hip condition, there was a ten to fifteen percent chance that he would have spontaneously recovered, there was sufficient evidence of causation for the jury to decide that the hip condition allegedly caused by the defendant would not have required surgery but for the conduct at issue), *with Braud v. Woodland Village L.L.C.,* 54 So.3d 745, 751–52 (La.Ct.App.2010) (where there was no testimony that the alleged negligence caused or contributed to the decedent's death, there was no evidence that the decedent suffered an injury that he would not otherwise have suffered); *see also Coffran v. Hitchcock Clinic, Inc.,* 683 F.2d 5, 10–11 (1st Cir.1982) (the plaintiff introduced sufficient evidence of causation where one expert testified that there was a fifty percent chance that if the defendants had performed the test they allegedly negligently failed to perform, they could have diagnosed the condition and prevented the injury; though another expert disagreed, the jury was free to credit the first expert's testimony); *Mayes v. Bryan,* 139 Cal.App.4th 1075, 44 Cal.Rptr.3d 14, 25 (2006) (causation is proven where there is sufficient evidence for the jury to infer that absent the defendant's negligence, there was a reasonable medical probability the patient would have obtained a better result).

Accordingly, though the district court applied the wrong test in ruling on Alpine's motion for directed verdict, the court did not err in denying the motion. We vacate the judgment entered against Alpine on Ms. Reigel's negligence claim and remand for a new trial on that claim.

C. Alpine Was Entitled to a Directed Verdict on the Outrageous Conduct Claim

[20] Defendants contend that the district court erred in denying their motion for directed verdicts on Ms. Reigel's outrageous conduct claim because (1) the alleged conduct was not sufficiently outrageous as a matter of law, and (2) Ms. Reigel did not present evidence that would allow the jury to attribute that conduct to the Sava Defendants. Because we have decided above that there is insufficient evidence that the actions of Alpine's employees could be attributed to the Sava Defendants, we need only address the first contention.

[21] The elements of an outrageous conduct claim are "(1) the defendant engaged in extreme and outrageous conduct, (2) recklessly or with the intent of causing the plaintiff severe emotional distress, and (3) causing the plaintiff severe emotional distress." *Pearson v. Kancilia,* 70 P.3d 594, 597 (Colo.App.2003).

[22] The level of outrageousness required to constitute extreme and outrageous conduct is extremely high. *Coors Brewing Co. v. Floyd,* 978 P.2d 663, 666 (Colo.1999); *Pearson,* 70 P.3d at 597; *McCarty v. Kaiser–Hill Co., L.L.C.,* 15 P.3d 1122, 1126–27 (Colo.App.2000). The conduct must be " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Coors Brewing Co.,* 978 P.2d at 666 (quoting Restatement (Second) of Torts § 46 (1965)); *accord Tracz v. Charter Centennial Peaks Behavioral Health Sys., Inc.,* 9 P.3d 1168, 1175 (Colo.App.2000). "Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are insufficient." *Pearson,* 70 P.3d at 597; *see also* Restatement (Second) of Torts § 46 cmt. d.

[23] However, "[c]onduct, otherwise permissible, may become extreme and outrageous if it is an abuse by the actor of a position in which he has actual or apparent authority over the other, or the power to affect the other's interests." *Zalnis v. Thoroughbred* ***991** *Datsun Car Co.,* 645 P.2d 292, 294 (Colo.App.1982); *see also* Restatement (Second) of Torts § 46 cmt. e. Conduct may also become outrageous where the defendant proceeds though he knows that the plaintiff "is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." Restatement (Second) of Torts § 46 cmt. f; *see English v. Griffith,* 99 P.3d 90, 93 (Colo.App.2004). Nevertheless, in both scenarios, a defendant is still not liable for mere insults, indignities, or annoyances that are not extreme or outrageous. Restatement (Second) of Torts § 46 cmts. e, f ("It must be emphasized again, however, that major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough.").

[24] [25] An outrageous conduct claim may be submitted to the jury only if reasonable persons could differ on whether the defendant's conduct was sufficiently outrageous. Whether reasonable persons could differ on that issue is a question of law that we review de novo, considering the totality of the evidence pertaining to the defendant's conduct. *Han Ye Lee v. Colo. Times, Inc.,* 222

P.3d 957, 963 (Colo.App.2009); *Green v. Qwest Servs. Corp.*, 155 P.3d 383, 385 (Colo.App.2006); *Pearson*, 70 P.3d at 597.

Ms. Reigel's evidence of outrageous conduct was as follows.

- Alpine employees allegedly refused Ms. Reigel's requests, while she was crying, to send Mr. Reigel to the hospital or have a registered nurse or doctor evaluate him.

- When Ms. Reigel went to see Ms. Cho about the aforementioned requests, Ms. Cho allegedly said, "in the most caustic voice [Ms. Reigel had] ever heard, [']Well, if it was an emergency, we would call an ambulance.['] "

- The Alpine employees responded to Ms. Reigel's requests in a manner that made her feel "[l]ike [she] was going crazy. Like they thought [she] was totally overreacting, like [she] was so upset. Why is she so upset, we're doing all these things, we're doing all these tests, we're waiting for results."

- Between 2:45 and 4:30 p.m. on the last day Mr. Reigel was at the facility, no nurse or other Alpine employee allegedly checked on Mr. Reigel.
- Ms. Pemkiewicz allegedly falsified an entry on Mr. Reigel's chart by noting that at 4:30 p.m. his blood pressure was normal. Ms. Reigel testified that neither Ms. Pemkiewicz nor any other Alpine employee was in Mr. Reigel's room at that time. And, when the paramedics took his blood pressure four to five minutes later, it was abnormally low.[11]

The district court concluded that these facts were sufficient to allow Ms. Reigel's outrageous conduct claim to go to the jury. We disagree.

Though there is evidence that the nurses and Ms. Cho were abrupt, irresponsible, and lacking in sensitivity in responding to Ms. Reigel's requests for help, we conclude that the evidence was not sufficient to lead "an average member of the community ... to exclaim, 'Outrageous!' " *Rugg v. McCarty*, 173 Colo. 170, 177, 476 P.2d 753, 756 (1970); Restatement (Second) of Torts § 46 cmt. d; *cf. Humana of Ky., Inc. v. Seitz*, 796 S.W.2d 1, 3–4 (Ky.1990) (where a nurse delayed in responding to the plaintiff's room, told her to "shut up" though she was distressed at having given birth to a stillborn baby, and told her that the baby would be disposed of in the hospital, her conduct was not extreme and outrageous; although the nurse's conduct was "cold, callous, and lacking sensitivity," it was not beyond all bounds of decency); *C.M. v. Tomball Reg'l Hosp.*, 961 S.W.2d 236, 244–45 (Tex.App.1997) (where the defendant treated the plaintiffs "like dirt," told them ***992** "[w]e do not like to deal with rape victims," suggested that the alleged victim, a minor, could have lost her virginity by riding a bike or horse, and interviewed the minor in a public waiting room, her "rude, insensitive, and uncaring" conduct was not sufficiently outrageous to present a jury question).

Similarly, the evidence that Alpine's employees did not attend closely to Mr. Reigel while his condition was deteriorating was not sufficient to create a jury question on outrageousness. The period of the alleged inattentiveness was less than two hours. Ms. Reigel introduced no evidence suggesting that the employees knew that during this time Mr. Reigel was experiencing a serious health problem that required immediate treatment. Further, Ms. Pemkiewicz had already taken Mr. Reigel's vital signs, contacted Dr. Cary, and ordered multiple lab tests in response to Mr. Reigel's allegedly worsening condition. Though she and the other employees may have failed to monitor Mr. Reigel adequately or to recognize that his symptoms required immediate treatment, reasonable persons could not conclude that this conduct rose to the level of being "atrocious[ ] and utterly intolerable in a civilized community." *Rugg*, 173 Colo. at 177, 476 P.2d at 756; *Roget v. Grand Pontiac, Inc.*, 5 P.3d 341, 345 (Colo.App.1999) ("Outrageous conduct occurs when an actor intentionally and recklessly causes severe emotional distress."); Restatement (Second) of Torts § 46; *cf. Jones v. Muskegon Cnty.*, 625 F.3d 935, 948 (6th Cir.2010) (where two prison nurses allegedly received medical packets from the inmate claiming that he was seriously ill and ignored the packets for several months because they thought he was "faking it," this deliberate indifference to his serious medical needs was not sufficiently extreme or outrageous to support the inmate's claim because it would not cause a reasonable juror to exclaim "outrageous!"); *Tater–Alexander v. Amerjan*, 2009 WL 1212977, *6–7 (E.D.Cal.2009) (unpublished memorandum decision) (where the doctor refused to treat the plaintiff with full knowledge of his medical diagnosis, the complaint sufficiently pled outrageous conduct); *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 619 P.2d 1032, 1035 (1980) (the nursing home's two-day delay in informing the plaintiff that her husband was terminally ill was unjustifiable but did not fall within the "quite narrow range of 'extreme and outrageous' conduct"); *Payton Health Care Facilities, Inc. v. Estate of Campbell*, 497 So.2d 1233, 1240 (Fla.Dist.Ct.App.1986) (where the plaintiff's expert testified that the standard of care at the deceased's health care facility was "an outrageous deviation from the acceptable standard," there was sufficient evidence to sustain the extreme and

outrageous conduct verdict); *Lykins v. Miami Valley Hosp.*, 157 Ohio App.3d 291, 811 N.E.2d 124, 147–48 (2004) (where the defendants allegedly failed to diagnose a patient properly, summary judgment for the defendants was appropriate on the extreme and outrageous conduct claim though the defendants' alleged negligence was a matter for the jury).

Finally, as to Ms. Pemkiewicz's alleged falsification of Mr. Reigel's chart, we note that she allegedly did this (1) outside the presence of Mr. or Ms. Reigel, and (2) after the paramedics had arrived to transport Mr. Reigel to the hospital. There is no indication that the alleged falsification affected Mr. Reigel's care or was part of a pattern of conduct that took place over the course of that care.

Accordingly, we conclude that the evidence was insufficient to create a jury question on Ms. Reigel's outrageous conduct claim. *See Coors Brewing Co.*, 978 P.2d at 665 (where the defendant's executives allegedly engaged in an extensive criminal conspiracy and fired the plaintiff to cover up the misconduct by making him appear solely responsible therefor, the alleged conduct did not rise to the requisite high level of outrageousness as a matter of law); *City of Lafayette v. Barrack*, 847 P.2d 136, 139 (Colo.1993) ("courts are more likely to find conduct outrageous if it involves a course of conduct rather than a single incident").

We are not persuaded otherwise by *DeCicco v. Trinidad Area Health Ass'n*, 40 Colo.App. 63, 573 P.2d 559 (1977), on which Ms. Reigel relies. In *DeCicco*, a hospital administrator refused to send an ambulance to a woman who had lapsed into a coma unless ***993** her doctor (who had recently resigned from the hospital) consented to having her sent to the administrator's hospital, not the hospital the doctor had determined was best able to treat the woman's condition. *Id.* at 64, 573 P.2d at 560–61. The administrator's hospital provided the only ambulance service in the county. *Id.*, 573 P.2d at 560. Due to its refusal to send an ambulance, the doctor had to request an ambulance from New Mexico, which resulted in a substantial delay in transporting the woman to the hospital. *Id.* at 65, 573 P.2d at 560. The woman died one hour after arriving in the hospital. *Id.* Based on these facts, the division concluded, "defendants' refusal of ambulance service to the critically ill Mrs. DeCicco on grounds irrelevant to her need for, or the availability of the service" could constitute extreme and outrageous conduct. *Id.* at 66, 573 P.2d at 562.

Here, unlike in *DeCicco*, none of Alpine's employees knew that Mr. Reigel was critically ill. The allegation is that they should have known. Nor was there evidence of a history here suggesting personal antagonism between the Reigels or their doctors and Alpine and its employees. Further, as noted, according to Ms. Reigel, Alpine's nurses refused to send Mr. Reigel to the hospital or to have a registered nurse or doctor evaluate him because they were waiting for results from lab tests that had been ordered in response to his condition. Thus, their reason for refusal was not irrelevant to that condition. Though, as noted, the nurses may have failed to monitor Mr. Reigel adequately, this conduct is not comparable to the deliberate indifference to the patient's known condition in *DeCicco*.

Therefore, we conclude that the district court erred in denying Alpine's motion for directed verdict on Ms. Reigel's outrageous conduct claim.

D. Plaintiffs May Seek Punitive Damages on Remand

Defendants contend that the district court erred in allowing Ms. Reigel to recover punitive damages on her negligence and outrageous conduct claims because (1) the court abused its discretion in permitting Ms. Reigel to amend her complaint to request punitive damages shortly before trial; (2) the court erred in denying defendants' motion for directed verdicts based on Ms. Reigel's failure to establish that any managerial employee committed the wrongful acts at issue; and (3) punitive damages are not awardable on an outrageous conduct claim. We need not address the second contention because we cannot anticipate the nature of the evidence that may be presented on remand. And we need not address the third contention because we have determined that Alpine was entitled to a directed verdict on the outrageous conduct claim. We address the first contention only as it pertains to Alpine.

1. Standard of Review

[26] We review a district court's decision on a motion to amend a complaint for an abuse of discretion. *Cody Park Prop. Owners' Ass'n, Inc. v. Harder*, 251 P.3d 1, 5 (Colo.App.2009); *DeHerrera v. Am. Family Mut. Ins. Co.*, 219 P.3d 346, 353 (Colo.App.2009). A court abuses its discretion where its decision is manifestly arbitrary, unreasonable, or unfair. *Cody Park Prop. Owners' Ass'n*, 251 P.3d at 5.

2. The District Court Did Not Abuse Its Discretion in Allowing Ms. Reigel to Amend the Complaint

Under C.R.C.P. 16(b)(8), a party has "120 days after the case is at issue [to move] to amend [the] pleadings." However, section 13–64–302.5(3), C.R.S.2011, provides:

> In any civil action or arbitration proceeding alleging negligence against a health care professional, exemplary damages may not be included in any initial claim for relief. A claim for such exemplary damages may be asserted by amendment to the pleadings only after the substantial completion of discovery and only after the plaintiff establishes prima facie proof of a triable issue. If the court or arbitrator allows such an amendment to the complaint under this subsection (3), it may also, in its discretion, permit additional discovery on the question of exemplary damages.

***994** The Reigels filed their initial complaint on January 23, 2007. The case became at issue on October 17, 2008, and the trial was scheduled to begin on January 19, 2010.

Discovery began in early 2009. Between September and December 2009, the Reigels moved three times to compel discovery related to defendants' relationships to one another and defendants' individual awareness of and ability to respond to the alleged treatment deficiencies at Alpine. The district court granted these motions. It also found that defendants had abused the discovery process and awarded the Reigels their attorney fees for one of the motions. Defendants provided the last of their discovery responses in December 2009.

In the meantime, on November 13, 2009, the Reigels moved to amend their complaint to request punitive damages based on Alpine's history of treatment deficiencies, as reflected in surveys on Medicare.gov.[12] Defendants opposed the motion, arguing in relevant part that it was untimely because the surveys had occurred between 2005 and 2007 and were therefore available to the Reigels long before they moved to amend. The court granted the motion without explanation.

Thereafter, defendants moved to continue the trial date to allow them to conduct discovery and prepare motions related to the punitive damages request. The court denied the motion, again without explanation.

We first note that although the court did not make any express findings in granting the Reigels' motion, we can discern the basis for its decision from the parties' briefs in the district court. Therefore, the omission does not require reversal. *See Great Neck Plaza, L.P. v. Le Peep Rests., LLC,* 37 P.3d 485, 489 (Colo.App.2001); *Foster v. Phillips,* 6 P.3d 791, 796 (Colo.App.1999); *Ross v. Denver Dep't of Health & Hosps.,* 883 P.2d 516, 519 (Colo.App.1994).

We reject defendants' suggestion that the Reigels were bound by the time limitation in C.R.C.P. 16(b)(8), rather than that in section 13–64–302.5(3). The Colorado Rules of Civil Procedure do not apply to the extent they are " 'inconsistent or in conflict with the procedure and practice provided by the applicable statute.' " *City of Steamboat Springs v. Johnson,* 252 P.3d 1142, 1145 (Colo.App.2010) (quoting C.R.C.P. 81(a)); *see Hernandez v. Downing,* 154 P.3d 1068, 1071 (Colo.2007); *cf.* C.R.C.P. 15(a) ("[A] party may amend his pleading only by leave of court ... and leave shall be freely given when justice so requires.").

Further, we are not persuaded by Alpine's argument that the surveys were publicly available. Regardless of when the surveys were available, the Reigels had to discover to whom the surveyed deficiencies could be attributed. Even after the Reigels filed their motion, defendants were providing discovery relating to which of them knew about and could respond to Alpine's deficiencies. Accordingly, we conclude that the Reigels properly moved to amend their complaint "after the substantial completion of discovery and ... after ... establish[ing] prima facie proof of a triable issue." § 13–64–302.5(3); *see also Polk v. Denver Dist. Court,* 849 P.2d 23, 27 (Colo.1993) (when a moving party knows of the claim and whether the moving party states an acceptable reason for the delay are important factors in determining whether to allow an amended complaint).

Finally, we reject Alpine's contention that the district court abused its discretion in allowing the amended complaint because it later denied defendants' motion for a continuance. Though section 13–64–302.5(3) allows the court to "in its discretion, permit additional discovery on the question of exemplary damages," it does not require the court to permit such discovery or to continue the trial at the defendant's request.

***995** Consequently, we conclude that the district court did

not abuse its discretion in granting the Reigels' motion to amend their complaint to request punitive damages.

E. Medicare.gov Evidence

Before trial, defendants filed a motion in limine to exclude the Medicare.gov evidence. The Reigels responded that the evidence was admissible solely in relation to their Colorado Consumer Protection Act (CCPA) claim. The district court ruled that the evidence was admissible.

The Reigels dismissed the CCPA claim before trial. Nevertheless, at trial, the Reigels sought to introduce some of the evidence. Defendants objected that the evidence was hearsay, unreliable, and unduly prejudicial. The court overruled the objection, saying that it "ha[d] ruled on this issue previously." No one mentioned that the Reigels had formerly sought to admit the evidence solely for their CCPA claim.

From this record, we cannot ascertain whether the district court believed the evidence was relevant as to claims other than the CCPA claim. Consequently, on remand, if plaintiffs attempt to introduce this evidence, the court should determine whether it is admissible in relation to their negligence claim against Alpine.

III. The Sons' Cross–Appeal

The sons cross-appeal the district court's directed verdict in defendants' favor on the wrongful death claim, and its award of costs to defendants for that claim. They contend, relying on *Steedle v. Sereff*, 167 P.3d 135 (Colo.2007), that because Ms. Reigel introduced evidence that she suffered noneconomic damages, the district court erroneously concluded that they were also required to prove personal damages.[13] We agree that reversal of these decisions is required.

The sons' contention requires us to interpret certain provisions of the Wrongful Death Act, §§ 13–21–201 to –204, C.R.S.2011. The question we must resolve is whether, when multiple plaintiffs bring a wrongful death action based on a decedent's death and the plaintiffs only seek damages for noneconomic losses, each plaintiff must establish that he personally suffered damages for noneconomic losses to remain a party to the action. We answer that question in the negative.

A. Standard of Review

Because the sons' contention presents an issue of statutory construction, our review is de novo. *Foiles v. Whittman*, 233 P.3d 697, 699 (Colo.2010).

B. The Sons May Participate in the Action as Plaintiffs

[27] In interpreting a statute, our goal is to give effect to the General Assembly's purposes by adopting an interpretation that best effectuates those purposes. *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1189 (Colo.2010). To do so, "we look first to the plain language of the statute, giving the language its commonly accepted and understood meaning." *Id.* (citation omitted). Where, as here, the statute exists as part of a comprehensive statutory scheme, we must read the scheme as a whole so that we may give consistent, harmonious, and sensible effect to all of its parts. *Union Pacific R.R. Co. v. Martin*, 209 P.3d 185, 189 (Colo.2009); *Frank M. Hall & Co., Inc. v. Newsom*, 125 P.3d 444, 448 (Colo.2005). Where the statutory language is clear and unambiguous, we enforce it as written and do not resort to other rules of statutory construction. *Smith*, 230 P.3d at 1189.

Sections 13–21–201 and –202, C.R.S.2011, of the Wrongful Death Act authorize a decedent's surviving spouse and heirs to seek damages if the decedent's death was caused by negligence. The surviving spouse and heirs can bring only one wrongful death action, § 13–21–203(1)(a), C.R.S.2011, and they own the judgment obtained in that action "under the statutes of descent and distribution," § 13–21–201(2), C.R.S.2011.

***996** Regarding the damages the heirs may recover, section 13–21–203(1)(a) provides, in relevant part:

> in every [wrongful death] action the jury may give such damages as they may deem fair and just, with reference to the necessary injury resulting from such death, including damages for noneconomic loss or injury ... and including within noneconomic loss or injury damages for grief, loss of companionship, pain and suffering,

> and emotional stress, to the surviving parties who may be entitled to sue....

Section 13–21–102.5(2)(b), C.R.S.2011, defines noneconomic loss or injury as "nonpecuniary harm for which damages are recoverable by the person suffering the direct or primary loss or injury, including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life."

[28] In *Steedle*, the supreme court considered whether the $150,000 statutory damages cap in the Colorado Governmental Immunity Act applied separately to each family member who was a plaintiff on a wrongful death claim. 167 P.3d at 136. In concluding that it did not, the court noted that under the Wrongful Death Act, "the right of the heirs to collect damages ... does not arise from a separate tort, but instead is wholly derivative of the injury to the decedent." *Id.* at 140. Thus, the court reasoned, "[w]hether an individual heir suffers actual damages is irrelevant; unlike a loss of consortium claim that requires proof of personal damages, a wrongful death action involves a shared injury among survivors such that there is no individualized recovery of damages." *Id.*

[29] Though it is true that different heirs may suffer different noneconomic losses as a result of a decedent's death, we are not persuaded that this requires each heir-plaintiff to prove noneconomic losses. Whether damages are awarded for economic or noneconomic losses, all damages awarded are owned jointly and distributed through the statutes of descent and distribution. *See* § 13–21–201(2); *Steedle*, 167 P.3d at 140. As applied here, that means that whatever noneconomic damages Ms. Reigel established were owned by the sons as well.

It follows that the district court erred in dismissing the sons from the case. And because the award of costs against the sons was premised on that dismissal, it further follows that the award cannot stand. On remand, the sons will be entitled to participate as plaintiffs on the negligence claim.

The judgment against SSC and Administrative Services is reversed. The judgment against Alpine is reversed as to the outrageous conduct claim and vacated as to the negligence claim. The judgment and associated order awarding costs against the sons are reversed. The case is remanded for a new trial on plaintiffs' negligence claim against Alpine.

Judge CARPARELLI and Judge FURMAN concur.

All Citations

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Footnotes

1 The jury apportioned fault amongst Alpine, SSC, and Administrative Services in varying percentages. The court also reduced the damages award to the extent the punitive damages awarded exceeded the actual damages awarded.

2 Ms. Pemkiewicz did not note on Mr. Reigel's chart that he had developed nausea. Further, when she administered the nausea medication Dr. Cary had prescribed, she failed either to take Mr. Reigel's vitals or to note his vital sign readings on his chart. When she did take his heart rate, she did not look at his chart to see what his normal heart rate range was. The State Board of Nursing for Colorado later issued a letter of admonition regarding Ms. Pemkiewicz's failure to timely document her care of Mr. Reigel.

3 Ms. Reigel does not argue that there was any evidence that Alpine itself was an agent of the Sava Defendants. *See First Horizon Merch. Servs., Inc. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 177 (Colo.App.2007) (an agent may be a corporation as well as an individual). Consequently, we do not address that issue.

4 The district court found that Annaliese Impink, the senior vice president and chief operations counsel of SavaSeniorCare L.L.C., had testified in her deposition (the transcript of which was read at trial) that Administrative Services had "provided services to Alpine, including assistance with quality assurance, such as helping to cure deficiencies." However, our review of Ms. Impink's testimony indicates that she never referred to Administrative Services or to services it allegedly provided to Alpine.

5 Mr. Woomer also conjectured that "[Administrative Services] helped us administratively, which had to do with probably offices or accounts payable, accounting, things like that."

6 Ms. Reigel argues that if we conclude that she did not establish that the Sava Defendants owed Mr. Reigel a duty of care, we should not reverse the damages awards against them, but rather should simply remand for the district court to apportion those damages to Alpine. Because we conclude in section II.B.2 below that the judgment on her negligence claim against Alpine must be vacated, we do not address this argument.

7 The Sava Defendants also raise this contention, but because we have decided that they were otherwise entitled to directed verdicts, we address it only as it pertains to the negligence claim against Alpine.

8 Defendants' counsel argued in open court and filed a written motion specifically challenging this theory of causation in connection with defendants' motion for directed verdicts. Defendants also objected to plaintiffs' proposed jury instruction on this theory of causation.

9 Dr. Wolf testified that Mr. Reigel's non-negligence-related medical conditions included terminal lung cancer, emphysema, a recent history of pulmonary emboli, pulmonary hypertension, sleep apnea, and "massive" obesity. Consequently, Dr. Wolf also testified that had he been the doctor treating Mr. Reigel, he would have told the surgeon not to operate because Mr. Reigel "was in no shape to go through the surgery and to survive."

10 Regarding the alleged difficulty in diagnosing Mr. Reigel, we also observe that Dr. Wolf testified it would have been difficult for a doctor to have diagnosed Mr. Reigel with a heart attack when he arrived at the emergency room. However, he later admitted that one of the emergency room doctors had actually been able to diagnose Mr. Reigel with a heart attack.

11 Ms. Reigel also alleges that Ms. Pemkiewicz falsified the chart by suggesting that at 5:15 p.m. Mr. Reigel "was in generally good health, except for shortness of breath." Though the chart for this period notes that Mr. Reigel had "troubled breathing," it also states that multiple lab tests had been ordered, indicates that one of the lab test results was abnormal, and notes that a doctor had ordered that Mr. Reigel be sent to the emergency room. Thus, this entry does not suggest that, aside from the shortness of breath, Mr. Reigel was in generally good health.

12 Those deficiencies were, as relevant here, that Alpine (1) had hired employees without checking whether they had histories of abusing or neglecting residents; (2) did not have the necessary policies or infrastructure to prevent mistreatment and neglect of its residents; (3) had failed to provide adequate quality of care to numerous residents; (4) was not creating adequate care plans to instruct Alpine's employees how to care for particular residents; (5) had failed to properly medicate its residents; (6) had employed at least one nurse who did not follow the doctor's orders in regard to a lab test; and (7) was not keeping accurate and appropriate medical records.

13 The sons contend in their reply brief that the district court also erred by finding that they did not present evidence of personal damages. We do not address issues raised for the first time in a reply brief. *See Arnold v. Anton Coop. Ass'n*, 293 P.3d 99, 106 (Colo.App.2011).

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