IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SCOTT L. BORDELOVE; AND WENDY BORDELOVE, Appellants, vs. DEREK A. DUKE, M.D.; AND DUKE FORAGE ANSON NEUROSURGICAL, LLP D/B/A THE SPINE AND BRAIN INSTITUTE, Respondents.	No. 88330-COA
SCOTT L. BORDELOVE; AND WENDY BORDELOVE, Appellants, vs. DEREK A. DUKE, M.D.; AND DUKE FORAGE ANSON NEUROSURGICAL, LLP D/B/A THE SPINE AND BRAIN INSTITUTE, Respondents.	No. 88637-COA

FILED

MAY 22 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Scott L. Bordelove (Bordelove) and Wendy Bordelove (collectively appellants) bring these consolidated appeals from a district court order granting summary judgment and post-judgment order awarding costs in a tort action. Eighth Judicial District Court, Clark County; Maria A. Gall, Judge.

In December 2018, Bordelove presented to respondents Derek A. Duke, M.D., and Duke Forage Ansons Neurosurgical LLP d/b/a/ The Spine and Brain Institute (the Duke parties) with complaints of severe back pain. Dr. Duke evaluated him and ordered an MRI of the lumbar spine.

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Bordelove was diagnosed with severe spinal stenosis. The next day, Dr. Duke performed emergency surgery on Bordelove's lumbar spine. Prior to surgery, Dr. Duke did not order MRI scans of Bordelove's thoracic or cervical spine.

In late January 2019, during Bordelove's post-operative follow-up, Dr. Duke noted that he had developed "a quite peculiar gait," a symptom of cervical spondylotic myelopathy.[1] Dr. Duke ordered MRI scans of the thoracic and cervical spine on a non-emergent basis. In a subsequent follow up examination in February, Dr. Duke noted Bordelove's "very abnormal gait pattern." Despite these symptoms, Dr. Duke did not instruct Bordelove to obtain the thoracic and cervical MRI scans urgently or refer him to the emergency room based on his symptomology.

In early March, when Bordelove returned to see Dr. Duke for another follow-up visit, he reported being acutely paraplegic for about two days. An emergent MRI of the cervical spine was ordered and revealed "severe [spinal] cord compression." Dr. Duke diagnosed Bordelove with

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[1]Myelopathy is a "[d]isorder of the spinal cord." *Myelopathy*, *Stedman's Med. Dictionary* (2014). Cervical spondylotic myelopathy is "[c]aused by the reduction of the sagittal diameter of the cervical spinal canal as a result of congenital and degenerative changes." Ali A. Baaj et al., *Handbook of Spine Surgery,* Sec. 24.3 (2d ed. 2016). Individuals experiencing cervical spondylotic myelopathy may suffer spinal cord injury due to several interrelated factors, including "[d]irect compression of the cord, microtrauma associated with neck flexion and extension, and vascular injury." *Id.* Gait disturbance is a common early symptom of the disorder. *Id.*

cervical spondylotic myelopathy and emergently performed an anterior-cervical decompression and fusion at levels C3-C7.

Following this surgery, Bordelove continued to experience pain and disability. He was ultimately advised by Dr. Pasquale Montesano, his subsequent treating physician, that further surgery was required to address his continued complaints.

In March 2020, appellants filed a medical malpractice suit against the Duke parties and others.[2] The case proceeded through discovery with several extensions of the discovery deadlines. The pertinent operative deadlines in this case are as follows: close of discovery, December 18, 2023; initial expert disclosure deadline, July 31, 2023; rebuttal expert disclosure deadline, September 29, 2023; and dispositive motions deadline, January 11, 2024.

On July 31, 2023, appellants disclosed Dr. Montesano as both a treating physician and expert witness along with his initial report, prepared in September 2021, and his supplemental report, prepared in September 2022. The disclosure specifically indicated that Dr. Montesano would testify as to his "opinions and conclusions regarding *causation*, the standard of care and any breaches of the standard of care in the treatment of Mr. Bordelove." (Emphasis added and internal parentheses omitted.)

The September 2021 report summarized Bordelove's medical records, and his opinions regarding the breaches of the standard of care.

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[2]Appellant's complaint also included claims for vicarious liability and loss of consortium. However, because those claims were derivative of appellant's professional negligence claim, we focus on the professional negligence claim in evaluating the district court's decision to grant summary judgment in the Duke parties' favor.

Although the September 2021 report does not specifically use the term "causation" or any variation thereof, Dr. Montesano opined that further surgical intervention would be required, and he described the surgery to be performed.

In his September 2022 supplemental report, Dr. Montesano once again addressed the breaches of the standard of care and, specifically, the delay in obtaining the cervical MRI once the symptoms of cervical spondylotic myelopathy were apparent.

Respondents timely designated Dr. Jeffrey Johnson as their expert and disclosed his addendum report near the rebuttal disclosure deadline. In the addendum report, which was prepared in August 2023, Dr. Johnson opined that Bordelove's neurological decline from cervical stenosis started in late February 2019 *after* Dr. Duke had recommended Bordelove obtain a cervical MRI during his follow up visit in January of that year. Therefore, Dr. Johnson opined that Dr. Duke timely recommended the MRI and did not breach the standard of care.

Dr. Montesano also prepared a supplemental report in September 2023, which was disclosed on the deadline for rebuttal disclosures, wherein he acknowledged he reviewed Dr. Johnson's August 2023 addendum report. In his September 2023 supplemental report, Dr. Montesano stated:

> I believe it was Dr. Johnson who described the myelopathy deteriorates in a step-wise fashion and he is certainly correct in that regard and by March, it had deteriorated significantly and it was at that point in time that Dr. Duke acted in a more critical fashion but by then, a significant amount of damage had been done to the spinal cord that was irreversible.

After the expert reports were exchanged, the expert depositions were scheduled in accordance with NRCP 26(b)(4)(A) ("If a report from [an] expert is required . . . the deposition may not be conducted until after the report is provided."). Dr. Montesano's deposition was scheduled for late November 2023, and Dr. Johnson's deposition was scheduled for early December, approximately two weeks before the close of discovery.

In late October, before the expert depositions occurred, Dignity Health, a defendant below but not a party to this appeal, moved for summary judgment on the issue of causation, and the Duke parties joined that motion. Appellants opposed the motion and attached a sworn declaration from Dr. Montesano in support of the opposition. In his declaration, Dr. Montesano indicated that he reached causation opinions to a reasonable degree of medical probability as included in his expert reports, and to which he would testify to at deposition and trial. Dr. Montesano declared, "Dr. Duke's delay in obtaining a cervical spine MRI for Mr. Bordelove was a breach of the standard of care and *a substantial factor in bringing about the irreversible damage to Mr. Bordelove's cervical spine*." (Emphasis added.) Dr. Montesano also opined that Dr. Duke's delay, "resulted in Mr. Bordelove's significantly deteriorated condition and *reduced Mr. Bordelove's substantial chance for a more favorable recovery*." (Emphasis added.)

Appellants subsequently settled with Dignity Health, which withdrew its summary judgment motion. The district court treated the Duke parties' joinder as a separate motion. The Duke parties did *not* file a reply in support of their joinder, and specifically did not file a declaration to refute Dr. Montesano's declaration.

In late November, without having yet conducted the hearing on the Duke parties' motion for summary judgment, the district court prepared a minute order indicating its inclination to grant the motion. In doing so, the court acknowledged that this was not its final order but indicated it was persuaded that the only report provided by Dr. Montesano that addressed causation was the September 2023 supplemental report, which was untimely because initial expert disclosures were due in June 2023. The court emphasized that causation is an element of appellants' case that had to be included in the initial disclosure. However, since the September 2023 supplemental report was untimely, the court indicated it would not consider the report in deciding the Duke parties' summary judgment motion. The court also rejected appellants' position that the belated disclosure was harmless. The court further expressed its inclination to deny NRCP 56(d) relief because appellants had all the information they required to address causation, as evidenced by the untimely September 2023 supplemental report, and, therefore, further discovery was unnecessary. After receiving the court's minute order, the Duke parties cancelled Dr. Montesano's deposition, and Dr. Johnson's deposition was also cancelled.

At the hearing on the Duke parties' motion for summary judgment, counsel for the Duke parties argued that they were prejudiced by appellants' disclosure of the September 2023 supplemental report because Dr. Montesano should not be permitted to offer new causation opinions in the report, which the Duke parties maintained was untimely, and at his deposition, as those opinions should have been disclosed at the time of the initial expert disclosures. Appellants argued that Dr. Montesano offered causation opinions in his earlier reports, and the Duke parties were not

prejudiced by the disclosure of Dr. Montesano's September 2023 supplemental report as this occurred approximately six months before trial.

The district court agreed to review Dr. Montesano's earlier reports and directed appellants' counsel to underline Dr. Montesano's causation opinions in those reports and submit them for the court's review. In the interim, the parties submitted another stipulation and order to extend discovery that was rejected by the court in a minute order. After its review of Dr. Montesano's two timely reports, the court in a minute order granted summary judgment because it could not "locate a causation opinion" but only standard of care opinions. While the court recognized in its minute order that it "must view the evidence, and any reasonable inferences drawn from it, in the light most favorable to the nonmoving party," the court concluded that appellants had "failed to come forward with sufficient evidence to show that [they] ha[d] admissible expert testimony on the issue of causation."

In January 2024, the district court issued its order granting summary judgment. The court specifically found in its order that "[n]either the 2021 Report nor the 2022 Report offers any opinion on causation against the Duke Defendants" and that a causation opinion could not be inferred from either report. It also found that it could not "locate a direct opinion on causation" in the September 2023 supplemental report, although it found the report untimely. Somewhat confusingly, the district court denied appellants' request for NRCP 56(d) relief to allow Dr. Montesano's deposition to proceed before considering the motion for summary judgment, stating that appellants had everything needed to prepare their expert's causation opinions as evidenced by the September 2023 supplemental report. After striking Dr. Montesano's September 2023 supplemental

report as untimely, the district court concluded that appellants "failed to come forward with an admissible expert opinion on the issue of causation—an essential element of [their] claim for professional negligence" and therefore summary judgment was appropriate. The district court's order did not address Dr. Montesano's declaration, attached to appellants' opposition to the summary judgment motion, in which Dr. Montesano set forth his anticipated causation opinions he would be giving at deposition and trial. Appellants moved for reconsideration, which the district court denied. Appellants then filed the appeal in Docket No. 88330-COA to challenge the summary judgment in the Duke parties' favor.

Around the same time, the Duke parties moved for an award of costs, which the court granted, awarding them $22,321 in costs as the prevailing party. Appellants filed the appeal in Docket No. 88637-COA to challenge that decision. The appeals in Dockets No. 88330-COA and 88637-COA were subsequently consolidated.

Appellants raise several arguments in support of their position that the district court erred in granting summary judgment on causation, including by declining to consider expert opinions on causation because those opinions were not directly stated in Dr. Montesano's 2021 and 2022 expert reports, and in failing to consider his September 2023 supplemental report. In turn, the Duke parties argue that appellants failed to present an *admissible* expert opinion on causation that was timely disclosed, and that they would be prejudiced by allowing the disclosure of untimely causation opinions.

"We review a district court's decision to grant summary judgment de novo." *Schueler v. Ad Art Inc.*, 136 Nev. 447, 449, 472 P.3d 686, 689 (Ct. App. 2020). Summary judgment is proper if a "movant shows

that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "A genuine [dispute] of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993). To withstand summary judgment, the nonmoving party must present specific facts demonstrating the existence of a genuine dispute of material fact supporting their claims. *Wood*, 121 Nev. at 729, 121 P. 3d at 1029. Further, "when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.*

The nonmoving party may oppose summary judgment by submitting an affidavit or declaration which "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." NRCP 56(c)(4). A court may consider the affidavit or declaration in deciding the motion. *See* NRCP 56(c)(3) ("The Court need consider only the cited materials, but it may consider other materials in the record."). Further, "the summary judgment procedure is not available to test and resolve the credibility of opposing witnesses to a fact issue." *Aldabe v. Adams*, 81 Nev. 280, 285, 402 P.2d 34, 37 (1965), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384, 1393, 971 P. 2d 801, 807 (1998).

Relevant to a medical malpractice case, "the plaintiff must establish the following: (1) that the doctor's conduct departed from the accepted standard of medical care or practice; (2) that the doctor's conduct was both the actual and proximate cause of the plaintiff's injury; and (3)

that the plaintiff suffered damages." *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Generally, a plaintiff must use expert testimony to establish a breach of the standard of care and causation. NRS 41A.100(1); *Prabhu*, 112 Nev. at 1544, 930 P.2d at 108. Further, causation must be proven within a reasonable degree of medical probability. *Prabhu*, 112 Nev. at 1544, 930 P.2d at 107. Finally, whether a party has proven causation by sufficient evidence is usually determined by the jury. *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981); *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 665 (1998) (providing that "causation is generally an issue of fact for the jury to resolve"); *see also Peeler v. Aiello*, No. 79630-COA, 2021 WL 3260695, at *4 (Nev. Ct. App. Jul. 29, 2021) (Order Reversing, Vacating, and Remanding) ("[I]t is not the district court's role to assess either the credibility or weight of the proffered expert testimony, credibility and weight are matters within the jury's domain.").

In medical malpractice cases, there are generally two types of causation that a party may rely on to prove damages: first, the healthcare provider's breach of the standard of care caused a specific injury or injuries; second, the party was deprived of a substantial chance for a "more favorable recovery" but for the healthcare provider's negligence. *Prahbu*, 112 Nev at 1544, 930 P.2d at 107. Both types of causation must be supported with expert testimony and the experts' opinions must be stated to a reasonable degree of medical probability. *Id.* However, an expert is not required to use the word "causation" as a prerequisite to the admissibility of those opinions. *See DeChambeau v. Balkenbush*, No. 64463, 2015 WL 7687000, at *1-2 (Nev. Nov. 24, 2015) (Order of Reversal and Remand) (reversing summary judgment in a legal malpractice case where the underlying medical

malpractice case had sufficient causation opinions to thwart summary judgment even though the expert physician did not use the word "causation" when discussing injuries incurred as a result of the alleged breach of the standard of care).

In this appeal, we agree with appellants that the district court erred in prematurely granting summary judgment based on appellants' failure to establish a genuine dispute of material fact as to causation for the following reasons. First, the district court should have permitted the depositions of the parties' experts to be completed, in order to more fully explain their opinions regarding causation, particularly since the depositions were timely scheduled during the discovery period. The district court could have accomplished this by granting NRCP 56(d) relief to allow the parties to complete the experts' depositions before ruling on the summary judgment motion. *See Bank of N.Y. Mellon v. Kim*, No. 67758, 2017 WL 1397326, at *1 (Nev. Apr. 14, 2017) (Order Vacating and Remanding) (concluding that the district court abused its discretion by denying the nonmoving party's request for a continuance of a motion for summary judgment to complete discovery, in part because "the record indicate[d] that the [party] was actively pursuing discovery [into the relevant HOA issues] at the time summary judgment was granted").

Second, the district court should have considered Dr. Montesano's declaration submitted in opposition to the Duke parties' motion for summary judgment, particularly since the declaration was unrefuted. *See* NRCP 56(c)(3). In his declaration, Dr. Montesano gave certain causation opinions within a reasonable degree of medical probability thereby raising genuine disputes of material fact regarding causation, i.e., whether earlier intervention would have prevented spinal cord damage.

See, e.g., Bank of N.Y. Mellon, No. 67758, 2017 WL 1397326, at *1 (concluding the district court erred by failing to consider an affidavit in support of a request to continue a motion for summary judgment for further discovery where the appellant filed the affidavit contemporaneously with its opposition to the motion for summary judgment); *see also Foster v. King*, Nos. 78957-COA & 79653-COA, 2021 WL 2155034, at *4-5 (Nev. Ct. App. May 26, 2021) (Order Reversing (Docket No. 78957-COA) Vacating (Docket No. 79653-COA) and Remanding) (concluding that summary judgment was inappropriate in a professional negligence action where the evidence demonstrated genuine disputes of material fact as to an element of the plaintiff's claim—specifically, whether a doctor breached the standard of care).

Finally, the district court should have considered Dr. Montesano's September 2023 supplemental report and the causation opinions set forth therein. Pursuant to NRCP 16.1(a)(2)(F)(i) a party "must supplement [an expert] disclosure[ ] when required under Rule 26(e)." In turn, NRCP 26(e)(2) provides that "[a]ny additions or other changes to [expert testimony] must be disclosed by the time the party's disclosures under Rule 16.1(a)(3), [which concerns pretrial disclosures,] are due." NRCP 16.1(a)(3)(B)(i) requires that "[u]nless the court orders otherwise, these [expert] disclosures must be made at least 30 days before trial." Thus, appellants could serve a supplemental expert report in September 2023, nearly six months before the trial was scheduled to commence, and without

moving to reopen discovery because it remained open for another two months.[3]

While we generally agree that an expert's causation opinions should be disclosed at the time for initial expert disclosures, supplemental reports that are timely made should be considered before granting summary judgment. Particularly where, as here, the September 2023 supplemental report appears to have been prepared in part to respond to the Duke parties' causation expert, Dr. Johnson. *See, e.g., Khoury v. Seastrand*, 132 Nev. 520, 536-37, 541, 377 P.3d 81, 92-93, 95 (2016) (holding that the district court did not abuse its discretion by permitting a medical expert to testify regarding causation opinions that responded to those given by the opposing expert, because "his testimony was within the scope of his specialized knowledge and was disclosed in a supplemental expert report"). Thus, the district court's failure to consider the causation opinions contained in Dr. Montesano's September 2023 supplemental report was an abuse of discretion.

Because there are genuine disputes of material fact regarding causation, including a conflict between the experts regarding the causation between the alleged breaches of the standard of care and damages, the district court erred in granting summary judgment, and we therefore reverse that decision in Docket No. 88330-COA. Given our reversal of the

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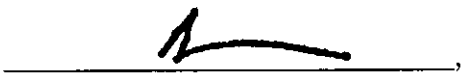
[3]In light of our disposition, we need not address whether causation opinions were expressly set forth in Dr. Montesano's first two expert reports or whether such opinions could be inferred from the reports. Nevertheless, at a minimum, Dr. Montesano explained in his initial reports that additional surgery was required to address Bordelove's ongoing complaints following Dr. Duke's surgery.

summary judgment in favor of the Duke Parties, we necessarily reverse the order awarding the Duke parties costs in Docket No. 88637-COA. And we remand for further proceedings consistent with this order.

It is so ORDERED.[4]



_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Maria A. Gall, District Judge
Christiansen Trial Lawyers
McBride Hall
Eighth District Court Clerk

[4]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for further relief or need not be addressed given our disposition of this appeal.