IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DUANE LEE LOWE, INDIVIDUALLY; AND THERESE LOWE, INDIVIDUALLY AND AS THE WIFE OF DUANE LEE LOWE,
Appellants,
vs.
CHRISTOPHER MICHAEL AHN, M.D., INDIVIDUALLY,
Respondent.

No. 64464

FILED

MAY 28 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment, pursuant to a jury verdict, in a medical malpractice case. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Appellant Duane Lowe underwent an 11-hour spine surgery. Sometime during either the surgery or the 15-hour recovery period following the surgery, Lowe suffered a brachial plexus injury to his arm. As relevant to this appeal, appellants Lowe and his wife Therese Lowe sued the anesthesiologist, Dr. Ahn, for failing to properly pad, position, and monitor Lowe's arm.

At trial, both sides presented extensive expert testimony on the issue of negligence. Appellants' experts testified Ahn was negligent in padding, positioning, and monitoring the arm during the unusually lengthy surgery. Ahn's experts testified Ahn's actions met the applicable standard of care. Experts from both sides testified Ahn was responsible for positioning, padding, and monitoring Lowe's arms, and nerve injuries

were a known risk. All experts agreed Lowe's comorbidities contributed to the risk of injury.

Appellants argued because Lowe had suffered an injury to his arm during surgery on his back, the doctrine of res ipsa loquitur created a presumption Ahn was negligent. Appellants proposed a jury instruction compelling the jury to apply this negligence presumption to Ahn.[1] Ahn countered that the res ipsa presumption did not apply to him because NRS 41A.100(1)(d), the relevant statute, applies only when the injury is not within the scope of the physician's treatment; here Ahn's treatment included padding, positioning, and monitoring of Lowe's arm.

The district court, citing *Banks v. Sunrise Hospital*, 120 Nev. 822, 102 P.3d 52 (2004), found a res ipsa loquitur instruction appropriate. The district court reasoned there remained a question of fact regarding

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[1]Appellants' proposed instruction read:

> The law provides for a rebuttable presumption that a personal injury was caused by medical malpractice where the personal injury occurred under the following circumstance:
>
> An injury was suffered during the course of treatment to a part of the body not directly involved in such treatment or proximate thereto.
>
> In this action, it has been established that an injury was suffered during the course of treatment to a part of the body not directly involved in such treatment or proximate thereto. The effect of this rebuttable presumption is that it places upon the defendants the [burden] of proving, by a preponderance of the evidence, that the personal injury was not caused by negligence.

whether appellants established the predicate facts under NRS 41A.100(1)(d). Accordingly, the district court instructed the jury on the form res ipsa loquitur instruction[2] substantially similar to instructions given in *Carver v. El-Sabawi*, 121 Nev. 11, 107 P.3d 1283 (2005) and *Johnson v. Egtedar*, 112 Nev. 428, 915 P.2d 271 (1996). This instruction allowed the jury to determine whether, under the facts of the case, the res ipsa loquitur presumption of negligence applied to Ahn.

The jury found Ahn was not negligent, and did not address damages.

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[2]That instruction read:

> The law provides for a rebuttable presumption that a personal injury was caused by medical malpractice where the personal injury occurred under the following circumstance:
>
> If you find by a preponderance of the evidence that an injury was suffered during the course of treatment to a part of the body not directly involved in such treatment or proximate thereto, then a rebuttable presumption operates to shift to the defendants the burden of proving, by a preponderance of the evidence, that the personal injury was not caused by negligence.
>
> If, on the other hand, you do not find by a preponderance of the evidence that an injury was suffered during the course of treatment to a part of the body not directly involved in such treatment or proximate thereto, then the burden of proving by a preponderance of the evidence consisting of expert medical testimony that the personal injury was caused by negligence remains with the plaintiff.

On appeal, appellants argue the district court erred in giving the form res ipsa loquitur instruction instead of the instruction appellants proposed. Appellants further argue the district court erred in allowing defense experts to voice speculative opinions on causation, and offering cumulative inappropriate opinions prejudicing appellants' case. Appellants also assert the district court erred in prohibiting appellants from presenting evidence of Lowe's future medical expenses and lost earning capacity.

The primary issue before this court is whether the district court instructed the jury correctly on the law of res ipsa loquitur. We review a district court's determination regarding jury instructions for abuse of discretion. *Banks*, 120 Nev. at 832, 102 P.3d at 59. We will not reverse a judgment for an erroneous jury instruction unless, from the totality of the evidence, it appears the "error has resulted in a miscarriage of justice." *Carver*, 121 Nev. at 14, 107 P.3d at 1285.

NRS 41A.100(1) replaces the common law doctrine of res ipsa loquitur in medical malpractice cases. *Banks*, 120 Nev. at 832, 102 P.3d at 59. NRS 41A.100(1)(d) reads, in pertinent part,

> Liability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony . . . is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstance of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the personal injury or death occurred in any one or more of the following circumstances:

> ...
> (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto[.]

If a plaintiff presents evidence suggesting the situation falls within one of the factual predicates set forth in NRS 41A.100(1), but there remains a genuine dispute regarding whether the factual predicate is met, the trial court should give a res ipsa loquitur instruction tasking the jury with determining whether a factual predicate exists. *See Johnson*, 112 Nev. at 434, 915 P.2d at 274; *see also Born v. Eisenman*, 114 Nev. 854, 859, 962 P.2d 1227, 1230 (1998).

We cannot say here the district court abused its discretion in giving the form res ipsa loquitur instruction and allowing the jury to determine whether the negligence presumption applied to Ahn. The res ipsa loquitur instruction was the same instruction our Supreme Court approved in *Johnson*, where the patient suffered tears to her spinal dura, psoas major muscle, colon, and ureter during a spine surgery. *Johnson*, 112 Nev. at 431, 915 P.2d at 273. There, the Supreme Court held because the plaintiff presented some evidence the case fell under NRS 41A.100(1), the district court should have allowed the jury to determine whether the res ipsa loquitur presumption applied. *Id.* at 434, 915 P.2d at 274-75. Here, appellants sued for negligence on the grounds Ahn failed to properly position, pad, and monitor Lowe's arm during surgery. Experts from both sides testified positioning, padding, and monitoring the arm was one of Ahn's specific duties during the surgery. Experts also testified nerve injury to a limb is a known risk of this procedure. Under these facts, we cannot say that the presumption must apply as a matter of law.

We likewise do not agree *Banks* mandates application of the presumption. Critically, *Banks* did not discuss the differences between the

two res ipsa instructions. *Banks* only required *a* res ipsa loquitur instruction be given under the particular facts of that case. And, like many medical malpractice actions, the *Banks* decision is highly fact-based with regards to the application of NRS 41A.100(1). To hold *Banks* necessitates application of plaintiff's proposed res ipsa loquitur instruction to all anesthesiologist malpractice cases when the patient suffers an injury to any part of the body outside the immediate area of surgery, without regard to the anesthesiologist's duties or treatment, would both overextend *Banks'* holding and supersede the requirements of NRS 41A.100(1).

Accordingly, we do not reverse the district court for refusing to give appellants' preferred res ipsa loquitur instruction to the jury.

Regarding the standard for medical expert testimony on alternate theories of causation, we are not persuaded under these facts the district court violated the rules set forth in *Williams v. Eighth Judicial District Court*, 127 Nev. ___, 262 P.3d 360 (2011). *Williams* made clear where an expert's testimony is offered to "either contradict the plaintiff's expert or furnish reasonable alternative causes to that offered by the plaintiff," it need not be stated to a reasonable degree of medical certainty. *Williams*, 127 Nev. at ___, 262 P.3d at 368. *See also Leavitt v. Siems*, 130 Nev. ___, ___, 330 P.3d 1, 5-6 (2014). Here, Ahn's experts' opinions regarding alternate causation were offered to directly rebut appellants' theory of causation. Furthermore, Nevada law is clear speculative opinion testimony is not prohibited under circumstances like those in this case because the jury determines the expert's credibility and assesses the weight of the testimony. *Leavitt*, 130 Nev. at ___, 330 P.3d at 6. Accordingly, the district court did not violate the *Williams* rule. Moreover,

we note the record reflects that Ahn's experts testified to a reasonable degree of medical certainty.

Finally, we determine appellants' arguments involving cumulative inappropriate expert opinions are without merit. Appellants point to only four instances Lowe's counsel objected to statements of two defense experts. But, in all four instances objected to, the jury was admonished not to consider the testimony. Under such circumstances, the Nevada Supreme Court has set a high bar for reversing a jury verdict and, given the evidence supporting Ahn's defense here, appellants have not shown why these four instances mandate reversal of the verdict. *See Gunderson v. D.R. Horton, Inc.*, 130 Nev. ___, ___, 319 P.3d 606, 612 (2014); *Lioce v. Cohen*, 124 Nev. 1, 17-18, 174 P.3d 970, 981 (2008).

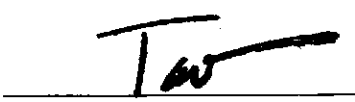
Our holding regarding the res ipsa loquitur instruction moots appellants' additional arguments regarding their inability to submit evidence of damages to the jury; thus, we do not discuss those issues.

Having considered appellants' contentions and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Silver

cc: Hon. Joanna Kishner, District Judge
John Walter Boyer, Settlement Judge
Law Office of William R. Brenske
John H. Cotton & Associates, Ltd.
Eighth District Court Clerk