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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ELLEN BREMER, surviving spouse of GARY BREMER, deceased, on behalf of the surviving statutory beneficiaries of GARY BREMER which are ELLEN BREMER, spouse; KEVIN BREMER, son; KARY BREMER, son; KENNETH BREMER, son; VERNIE BREMER, son; and VINCE BREMER, son, Plaintiffs/Appellants, v. ANGEL GONZALEZ and ERIKA GONZALEZ, husband and wife; and DU-BROOK DAIRY, INC., an Arizona corporation, Defendants/Appellees.	2 CA-CV 2011-0064 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. SV1100CV200900338

Honorable Robert Carter Olson, Judge

REVERSED AND REMANDED

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B R A M M E R, Judge.

¶1 Ellen Bremer (Bremer), on behalf of Gary Bremer's surviving statutory beneficiaries, appeals from the trial court's order entering summary judgment against her and in favor of defendants Angel Gonzalez, Erika Gonzalez, and Du-Brook Dairy, Inc. (collectively Du-Brook) on any claims relating to Gary's death. Bremer argues a genuine issue of material fact regarding causation of Gary's death precludes summary judgment and the trial court erred in finding as a matter of law the actions or omissions of Gary's treating physician to have been an intervening and superseding cause of his death. We reverse and remand.

Factual and Procedural Background

¶2 We view the facts and reasonable inferences therefrom in the light most favorable to Bremer. *See Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 13, 122 P.3d 6, 11 (App. 2005) (reviewing grant of summary judgment, we view facts in light most favorable to nonmoving party). On February 13, 2008, Gary delivered a load of grain to Du-Brook Dairy, Inc. As he unloaded the grain, he was struck by a front-end loader

operated by Angel Gonzalez, an employee of Du-Brook Dairy, Inc.[1] Gary suffered severe injuries to his lower legs and was transported to a hospital where he underwent a number of surgical procedures to treat his wounds. Several weeks later, he was transferred to a Sierra Vista rehabilitation center with open wounds on his legs that were infected with methicillin-resistant staphylococcus aureus (MRSA). On May 21, 2008, Gary was taken to the Sierra Vista Regional Health Center where it was determined he had sustained an acute myocardial infarction (MI). Due to his MRSA infection, the treating physician was "loathe to take [Gary] to the Cardiac Catheterization Laboratory" and sent him back to the extended care facility for continued antibiotic therapy to treat the MRSA. Gary died on June 10, 2008 of a cardiac arrhythmia.

¶3 Ellen Bremer, Gary's surviving spouse, filed a wrongful death action pursuant to A.R.S. §§ 12-611 through 12-613 on behalf of Gary's surviving statutory beneficiaries and against Angel Gonzalez, his wife Erika Gonzalez, and Du-Brook Dairy, Inc. The complaint alleged that, as a result of defendants' negligence, plaintiffs suffered damages "resulting from the death of Gary Bremer."[2]

¶4 Du-Brook filed a motion for partial summary judgment on Bremer's wrongful death claims alleging: (1) Bremer had failed to present evidence of a causal connection between the accident and Gary's death and (2) Gary's MI and his physician's

[1]For the purposes of this appeal, we need not reach the question whether Gonzalez was negligent in his operation of the front-end loader because Du-Brook contends it is not liable for Gary's death despite any alleged negligence.

[2]The complaint also claimed liability for personal injuries suffered by Gary and requested punitive damages. Those claims are not at issue on appeal.

negligent treatment of it were intervening, superseding causes of his death. The trial court denied summary judgment and ordered additional disclosure and discovery. After further discovery, Du-Brook filed a second motion for partial summary judgment based on the same arguments. After oral argument on the motion, the court granted partial summary judgment on the issue of proximate cause, finding "the failure of the attending physician to provide . . . prompt intervention or therapy was an intervening and superseding cause of the harm to [Gary], which broke the natural and continuous sequence of events from the original industrial injury, such that . . . the industrial injury . . . was not the proximate cause of [Gary's] death." Because the court found a superseding cause, it did not address whether the initial accident-related injury otherwise was a cause of Gary's MI or death.

¶5 The trial court granted Du-Brook's motion to dismiss any claims filed on behalf of Gary's statutory beneficiaries relating to his death. The court entered a final judgment on those claims pursuant to Rule 54(b), Ariz. R. Civ. P. This appeal followed.

Discussion

¶6 We review a trial court's grant of summary judgment de novo. *Hourani*, 211 Ariz. 427, ¶ 13, 122 P.3d at 11. "A motion for summary judgment should only be granted if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Id.*, *quoting* Ariz. R. Civ. P. 56(c).

Proof of Causation

¶7 Bremer argues the evidence supports an inference the injuries Gary suffered on February 13, 2008 were a proximate cause of his death. Proximate cause is defined as

"that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). The definition of proximate cause includes the element of causation in fact. *Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, ¶ 13, 231 P.3d 946, 950 (App. 2010). However, a defendant's act or omission need not be the only cause or a major cause of the injury; liability exists even if the act or omission contributes only slightly to plaintiff's damages. *Braillard v. Maricopa Cnty.*, 224 Ariz. 481, ¶ 50, 232 P.3d 1263, 1278 (App. 2010).

¶8 Causation ordinarily is a question of fact for the jury's determination. *Salica*, 224 Ariz. 414, ¶ 16, 231 P.3d at 951. A plaintiff "'need only present probable facts from which the causal relationship reasonably may be inferred.'" *Braillard*, 224 Ariz. 481, ¶ 50, 232 P.3d at 1278-79, *quoting Robertson*, 163 Ariz. at 546, 789 P.2d at 1047.

¶9 In this case, Bremer presented sufficient evidence from which reasonable persons could infer the accident hastened the onset of Gary's cardiac problems and was a cause of his MI and death. Bremer's medical expert Dr. Ira Ehrlich stated in his affidavit:

> The wounds suffered by [Gary] as a result of the industrial accident . . . became infected, resulting in sepsis. [Gary] also underwent surgical procedures to treat the wounds suffered in the industrial accident. The trauma of the wounds and the associated complications and treatment resulted in stress to [Gary]. The trauma, surgical procedures, infections and sepsis hastened the onset of the cardiac problems that eventually resulted in his myocardial infarction and were a cause of his death.

See In re 1996 Nissan Sentra, 201 Ariz. 114, ¶ 6, 32 P.3d 39, 42 (App. 2001) (facts trial court considers in ruling on motion for summary judgment include those in affidavit or deposition). "Generally, . . . when a qualified expert testifies that a defendant's negligence . . . caused or contributed to an accident and resulting injury, that evidence 'is sufficient to prevent summary judgment and warrant a trial.'" *Souza v. Fred Carries Contracts, Inc.*, 191 Ariz. 247, 254, 955 P.2d 3, 10 (App. 1997), *quoting Dole Food Co. v. N.C. Foam Indus., Inc.*, 188 Ariz. 298, 306, 935 P.2d 876, 884 (App. 1996). A qualified expert may render such opinions unless they are based on sheer speculation and not supported by relevant facts. *Id.* There is no dispute Gary's accident-related injuries caused infection and required surgical procedures preceding his MI; indeed, Gary's medical records support these facts. From those facts, Ehrlich developed his opinions to a reasonable degree of medical probability. *See Barrett v. Harris*, 207 Ariz. 374, ¶ 17, 86 P.3d 954, 959 (App. 2004) (causation must be probable, not merely possible). Ehrlich's affidavit rested on admissible evidence and raised an issue of causation sufficient to preclude summary judgment.

¶10 Du-Brook discounts Ehrlich's opinion because Ehrlich stated in his first deposition that Gary had preexisting coronary disease and that, even without the accident, Gary probably would have had an MI "at some point in his life."[3] However, Ehrlich also

[3]Du-Brook also notes Ehrlich acknowledged the acts or omissions of Gary's treating physician were also a cause of the death. However, a defendant's act or omission need not be the only cause or a major cause of the injury, *see Braillard*, 224 Ariz. 481, ¶ 50, 232 P.3d at 1278, and, as discussed below, an intervening cause only precludes

stated "the great likelihood is that [the MI] would have been later," and subsequently opined Gary's cardiac problems and death were hastened by the accident and its complications. Even assuming Gary had a cardiac condition pre-existing the February 13 accident, that fact would not preclude liability for a negligent act or omission that exacerbated the condition. *See* Restatement (Second) of Torts § 458 & cmt. a (1965) (negligent actor liable for injury that reduces other's vitality "as to render him peculiarly susceptible to a disease" or "light[ing] up" of a latent disease also liable for disease contracted because of lowered vitality); *see also* Restatement (Third) of Torts (Liab. for Physical & Emotional Harm) § 31 (2010) (liable for harm of "a greater magnitude or different type" than expected because of preexisting condition). Medical testimony typically is used to prove whether reduced vitality caused the "lighting up" of a latent disease. Restatement (Second) of Torts § 458 cmt. b. Liability may exist even where a negligent act reduces another's vitality so slightly that, "but for the subsequent disease there would be no actionable injury."[4] *Id.* cmt. d.

¶11 Du-Brook also notes Ehrlich cited neither Gary's medical records nor a medical journal to support his opinion that the stress from the accident accelerated Gary's cardiac condition. However, Ehrlich stated he was aware of the literature regarding injuries in general and suggested his opinion regarding the accident's exacerbation of

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liability if it is a superseding cause, *see Petolicchio v. Santa Cruz Cnty. Fair & Rodeo Ass'n*, 177 Ariz. 256, 263, 866 P.2d 1342, 1349 (1994).

[4]Du-Brook also contends Gary's death was too removed temporally from the accident to have been caused by it. However, Du-Brook has not explained why the timeline here precludes a finding of causation where the evidence supports that Gary had not healed from his wounds and infection at the time of his MI.

Gary's cardiac conditions would be reflected in standard cardiac textbooks. Du-Brook does not dispute that Ehrlich is an expert competent to form medical opinions based on the available evidence, nor does it provide any authority to support its suggestion that those opinions must be based on additional citations to medical authorities. *See Souza*, 191 Ariz. at 254, 955 P.2d at 10 (expert testimony negligence caused or contributed to injury may preclude summary judgment).

¶12 Further, Bremer contends "even if the accident did not cause or contribute to the initial myocardial infarction, [Gary] would have survived the heart attack if his treating physicians had instituted prompt . . . intervention or . . . therapy."[5] The record supports Ehrlich's opinion that Gary's infection from the injuries he suffered in the accident delayed his cardiac treatment. Ehrlich opined that without the delay, Gary would have made a substantial recovery from his cardiac condition and would not have died on June 10, 2008. Therefore, even if the February 13 accident was not a cause of the MI Gary suffered, Bremer presented an issue of material fact as to whether the accident-related injury caused Gary's death by delaying treatment of his heart condition. *See*

[5]Du-Brook contends Ehrlich "renounced the earlier opinions he had allegedly given about [Gary] not being able to obtain appropriate care due to an infection." However, the record reveals Du-Brook's characterization has exaggerated Ehrlich's "renunciation." In the portion of his deposition upon which Du-Brook relies, Ehrlich merely noted that a statement contained in Bremer's disclosure materials that Gary "would have undergone coronary bypass surgery had he not had the accident resulting in the infection" misrepresented his testimony. He testified instead that because "the issue of coronary bypass surgery in this particular situation was a red herring," "it did not matter whether this was treated with angioplasty and stenting or whether it was treated with coronary bypass surgery." He further stated that Gary's treatment had been delayed because of the infection, and nothing in his later affidavit was inconsistent with this earlier clarification.

Brand v. J.H. Rose Trucking Co., 102 Ariz. 201, 205, 427 P.2d 519, 523 (1967) (multiple proximate causes may exist "if each was an efficient cause without which the resulting injuries would not have occurred").

¶13 At oral argument, Du-Brook suggested Ehrlich's opinion as expressed in his affidavit "conflicted with" statements in his first deposition and that his deposition testimony was "not sufficient causation evidence from an expert." *See Braillard*, 224 Ariz. 481, ¶ 50, 232 P.3d at 1278-79 (plaintiff must present probable facts from which causal relationship may be inferred). However, Ehrlich stated in his first deposition that, "to a reasonable degree of medical probability," stress and Gary's previous surgical procedures from the accident were "certainly enough to create an increase in his likelihood of [MI], and to precipitate or to hasten the inevitable that may have occurred down the line several years." He further stated that this injury played a role in the treating physician's decision-making process, and that "a result of that decision-making process led to the choice of treatment, which did, to a reasonable degree of medical probability, contribute to [Gary's] death." In his second deposition, he confirmed his opinion "to a reasonable degree of medical probability" that if Gary had received prompt treatment for his cardiac condition, he would have made a substantial recovery. We find no conflict between Ehrlich's deposition testimony and his affidavit. For these reasons, Bremer presented a genuine issue of material fact regarding causation sufficient to preclude summary judgment.

Superseding Cause

¶14 Bremer argues the trial court erred in finding the treating physician's failure to treat Gary properly after his MI was an intervening and superseding cause of his death.[6] An intervening cause breaks the chain of proximate causation only if it is a superseding cause. *Petolicchio v. Santa Cruz Cnty. Fair & Rodeo Ass'n*, 177 Ariz. 256, 263, 866 P.2d 1342, 1349 (1994). A superseding cause is one that is not reasonably foreseeable and "when, looking backward, after the event, the intervening act appears extraordinary." *Ontiveros v. Borak*, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983). Proximate cause focuses on the foreseeability of the injury, not the defendant's degree of culpability. *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047 (act or omission need not be abundant cause of injury). "[W]e 'take a broad view of the class of risks and victims that are foreseeable, and the particular manner in which the injury is brought about need not be foreseeable.'" *Tellez v. Saban*, 188 Ariz. 165, 172, 933 P.2d 1233, 1240 (App. 1996), *quoting Rogers ex rel. Standley v. Retrum*, 170 Ariz. 399, 401, 825 P.2d 20, 22 (App. 1991).

¶15 A cause need not be capable of causing harm independently; an accident may have more than one proximate cause. *Brand*, 102 Ariz. at 205, 427 P.2d at 523; *see also Ontiveros*, 136 Ariz. at 505, 667 P.2d at 205 ("[M]ore than one person may be liable for causing an injury and . . . a particular defendant may not avoid liability for his

[6]Because we conclude there is a question of material fact regarding whether the February 13 accident caused Gary's MI, we need not address Du-Brook's argument that the MI was an intervening and superseding cause "completely unrelated to the accident" and precluding liability.

causative act by claiming that the conduct of some other person was also a contributing cause.").

¶16 The Restatement (Second) of Torts § 457 (1965) provides:

> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

See also Ritchie v. Krasner, 221 Ariz. 288, ¶ 29, 211 P.3d 1272, 1283 (App. 2009); Restatement (Third) of Torts § 35 (Liab. for Physical & Emotional Harm) (2010) (liable for enhanced harm caused by rendering aid reasonably required by injury); Restatement (Second) of Torts § 447 (1965) (negligent intervening act not superseding unless highly extraordinary).

¶17 In this case, the facts do not support the trial court's finding of an intervening and superseding cause as a matter of law. The court noted Ehrlich "admitted" the acts or omissions of the treating physician were a cause of Gary's death. However, neither the court nor Du-Brook explains, nor does the record support, why the alleged negligence of Gary's treating physician was so extraordinary that a finder of fact could not conclude it was reasonably foreseeable. Du-Brook contends, "this case involved unforeseeable and extraordinary events," but identifies no extraordinarily negligent act or omission by Gary's treating physician. It merely notes Bremer had alleged the physician fell below the applicable standard of care. This is insufficient to support a finding of a superseding cause as a matter of law.

¶18 Du-Brook draws our attention to Restatement § 457 cmt. e, which clarifies that an actor is not liable "for harm resulting from negligent treatment of a disease or injury which is not due to the actor's negligence, even though the other takes advantage of his being in the hospital to secure treatment for it."[7] However, an actor who is the legal cause of bodily harm remains liable for treatment services that "are so rendered as to increase the harm or even to cause harm which is entirely different from that which the other had previously sustained." *Id.* cmt. a. The actor is liable not only for the original injury but also the harm resulting from the negligent medical services later rendered. *Id.*

¶19 In this case, the facts precluding summary judgment are not merely that the accident caused Gary to enter a medical facility—for example, where he may have "take[n] advantage of his being in the hospital" to have another procedure performed, *id.* cmt. e, illus. 6—but that the injuries from the accident and the resulting complications hastened his MI and death. Even assuming, without deciding, any negligence on the treating physician's part was the major cause of Gary's death, proximate cause does not focus on the actor's degree of culpability, and the relative degree of fault between persons who contributed to the injury is an issue for the finder of fact to determine. *Robertson*, 163 Ariz. at 546, 789 P.2d at 1047; A.R.S. § 12-2506(B), (C). Du-Brook has

[7]Du-Brook also cites *Barrett*, 207 Ariz. 374, ¶ 18, 86 P.3d at 959, in which the court determined Restatement § 457 did not impute liability to a doctor because there was no evidence his consultation advice proximately caused the injury. This case is distinguishable because, as discussed above, Bremer has presented an issue of material fact whether the February 13 accident was a proximate cause of Gary's death.

failed to identify any action taken by Gary's treating physician that, in hindsight, appears so extraordinary that it was not reasonably foreseeable.

¶20 The trial court erred in entering summary judgment in favor of Du-Brook on any claims relating to Gary's death. Bremer presented a genuine issue of material fact regarding causation sufficient to preclude summary judgment, and the court erred in finding the negligence of Gary's treating physician was a superseding cause precluding liability as a matter of law.

Disposition

¶21 For the foregoing reasons, we reverse the trial court's order granting summary judgment in favor of Du-Brook and dismissing the claims of Gary's statutory beneficiaries for any claims relating to his death, and remand for further proceedings consistent with this decision.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge