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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0522**

Richard R. Ryan,
Trustee for the Next-of-Kin of Debra Lynn Ryan,
Decedent for Action for Death by Wrongful Act,
Plaintiff,

Richard R. Ryan, Trustee for Injury Action, and
Richard R. Ryan in his Personal Capacity,
Appellant,

vs.

Dr. Christopher Lindquist, et al.,
Respondents.

**Filed March 25, 2019
Reversed in part and remanded
Schellhas, Judge**

Olmsted County District Court
File No. 55-CV-17-1522

Jerry Korba, Korba Law Office P.A., Fridley, Minnesota (for appellant)

Katherine A. McBride, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Hooten,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant-trustee challenges the dismissal of his dental-malpractice claims against respondents, arguing that the district court erred by dismissing his claim under Minn. Stat. § 573.02, subd. 2 (2018), on the basis that he failed to present the requisite expert testimony to support his claim. Appellant also argues that the district court erred by dismissing his loss-of-consortium claim because it relates to his claim under Minn. Stat. § 573.02, subd. 2. We reverse in part and remand.

FACTS

In February 2014, Debra Ryan visited respondent 12th Street Dental Office complaining of “significant jaw pain.” Respondent Dr. Christopher Lindquist determined that tooth #32 was impacted and required extraction, and he surgically removed the tooth on March 10, 2014. Following the surgery, Ms. Ryan continued to experience pain in her jaw and surrounding areas, resulting in several follow-up visits with Dr. Lindquist and other medical doctors. Eventually, Dr. Lindquist referred Ms. Ryan to Dr. Kevin Amundson, who determined that a portion of the root from tooth #32 remained in the gum following the extraction.

Dr. Amundson removed the root tip of tooth #32 in June 2014, but Ms. Ryan continued having significant jaw pain. As a result, Dr. Amundson diagnosed Ms. Ryan with “significant” temporomandibular joint dysfunction (TMJ) and referred her to the Mayo Clinic, where she received treatment for TMJ. But despite Ms. Ryan making a

multitude of visits to various doctors and undergoing several jaw procedures, her condition worsened.

In January 2015, Ms. Ryan was diagnosed with cancer. Because of the “advanced” nature of the cancer, Ms. Ryan was “not a candidate” for surgery. She received chemotherapy but died on November 1, 2015.

On April 15, 2016, the district court appointed Ms. Ryan’s husband, appellant Richard Ryan, as trustee for Ms. Ryan’s next of kin. As trustee, Mr. Ryan commenced this lawsuit under Minn. Stat. § 573.02 (2018), against respondents Dr. Lindquist and 12th Street Dental. Mr. Ryan claimed that Dr. Lindquist was negligent by using “excessive” force in extracting tooth #32, causing Ms. Ryan’s “lower jaw to become dislocated,” which led to multiple surgeries. Mr. Ryan alleged that, as a result of the trauma inflicted upon her temporomandibular joint, Ms. Ryan was unable to open her mouth to eat, which caused her to become “malnourished.” Mr. Ryan further alleged that Ms. Ryan’s malnourishment led to a decrease in her immunities that caused her to develop nasopharyngeal cancer that ultimately caused her death, and he sought damages under the wrongful-death statute.

In addition to seeking wrongful-death damages, Mr. Ryan asserted a separate claim for special damages under Minn. Stat. § 573.02, subd. 2. Specifically, Mr. Ryan sought to recover medical expenses for treatment provided to Ms. Ryan from the date of the extraction, March 10, 2014, to January 20, 2015, the date on which she was diagnosed with nasopharyngeal cancer. Mr. Ryan also sought to recover damages for his loss of consortium. Mr. Ryan supported his claims with an affidavit by Dr. Eric Schleder, a dentist

who “has been an Associate Professor at the University of Minnesota School of Dentistry for 22 years.”

Respondents moved for summary judgment on the grounds that Mr. Ryan failed to come forward with an admissible expert medical opinion that complied with Minn. R. Evid. 702’s expert-admissibility test to support his wrongful-death and medical-malpractice claims, and that Mr. Ryan therefore could not establish that respondents’ actions or inactions were a direct cause of Ms. Ryan’s death. Respondents claimed that they were entitled to judgment as a matter of law because Mr. Ryan “failed to establish any of the elements of his asserted causes of action.”

The district court determined that although Mr. Ryan’s expert witness “could testify as an expert regarding the standard of care in dentistry,” he did not “qualify as an expert in the field of oncology” and therefore “lacks the requisite knowledge to testify about the effect of a person’s immune system on the causation of cancer.” The court also determined that even if Mr. Ryan’s expert witness “was qualified as an expert in the field of oncology, his opinions lack[ed] foundational reliability” because he did not show that his opinions were based on scientific peer-reviewed literature. The court concluded that Dr. Schleder’s expert opinions were inadmissible, and that because Mr. Ryan lacked admissible expert testimony to establish causation, respondents were entitled to summary judgment with respect to Mr. Ryan’s wrongful-death claim.¹ Without specifically addressing Mr. Ryan’s

¹ Mr. Ryan does not challenge the dismissal of his wrongful-death action under Minn. Stat. § 573.02, subd. 1.

claim for special damages, the court concluded that because “the underlying wrongful death claim is dismissed, Mr. Ryan’s loss of consortium claim must follow suit.”

This appeal follows.

DECISION

Summary judgment is only appropriate when “there is no genuine issue as to any material fact and [a party] is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. This court reviews “a grant of summary judgment de novo to determine whether there are any genuine issues of material fact and whether the court erred in its application of the law to the facts.” *Fenrich v. The Blake School*, 920 N.W.2d 195, 201 (Minn. 2018) (quotation omitted). In conducting this review, we view “the evidence in the light most favorable to the nonmoving party . . . and resolve all doubts and factual inferences against the moving parties.” *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015).

Minnesota law provides that “[a] cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02.” Minn. Stat. § 573.01 (2018). The exceptions provided in Minn. Stat. § 573.02 allow an appointed trustee to continue or maintain an action for wrongful death if the decedent might have maintained such an action, or an action for special damages if the decedent suffered personal injuries and later died “from a cause unrelated to those injuries.” Minn. Stat. § 573.02, subds. 1, 2. “‘Special damages’ are those damages to which an exact dollar amount can be assigned, such as medical expenses or lost wages to date of death.” *Auers v. Progressive Direct Ins. Co.*, 878 N.W.2d 350, 353 (Minn. App. 2016)

(quoting *Deal v. Northwood Children's Home Soc'y*, 608 N.W.2d 922, 925 n.1 (Minn. App. 2000), *review denied* (Minn. June 13, 2000)), *review denied* (Minn. July 19, 2016).

Mr. Ryan argues that he presented the requisite expert testimony in support of his cause of action for special damages under Minn. Stat. § 573.02, subd. 2, and that this court therefore should partially reverse the district court's judgment to allow him to prosecute his claim for medical expenses for treatment provided to Ms. Ryan from the date of the extraction, March 10, 2014, to January 20, 2015, the date that she was diagnosed with nasopharyngeal cancer. Mr. Ryan also argues that he is entitled to loss-of-consortium damages incurred during the same time period.

A. Special damages under Minn. Stat. § 573.02, subd. 2

In a medical-malpractice action, a plaintiff must prove: “(1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant's departure from the standard was a direct cause of the patient's injuries.” *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 717 (Minn. 2008) (quotation omitted). As to the third element, a plaintiff must present competent expert testimony showing that the defendant's action or inaction was a direct cause of the injury. *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 428 (Minn. 2002). “A mere possibility of causation is not enough to sustain a plaintiff's burden of proof.” *McDonough v. Allina Health Sys.*, 685 N.W.2d 688, 697 (Minn. App. 2004) (citing *Walton v. Jones*, 286 N.W.2d 710, 715 (Minn. 1979)). A plaintiff's “failure to provide such admissible expert testimony results in the failure to

establish an essential element of that party's case, and the moving party is entitled to summary judgment as a matter of law." *Id.*

Expert testimony is inadmissible unless it satisfies the requirements of Minn. R. Evid. 702. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012). The supreme court has stated that expert testimony is only admissible under rule 702 if the proponent establishes that the proffered testimony satisfies a four-part test: "(1) the witness must qualify as an expert; (2) the expert's opinion must have foundational reliability; (3) the expert testimony must be helpful to the trier of fact; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard." *Id.*²

Respondents argue that the "district court properly dismissed the case in its entirety because [Mr. Ryan] failed to provide a foundationally reliable expert opinion to support his causes of action." Specifically, respondents claim that Mr. Ryan's expert was properly excluded because Dr. Schleder "does not have medical foundation—admissible facts—for his opinion that Dr. Lindquist dislocated [Ms. Ryan]'s jaw and that this alleged breach of the standard of care caused her temporomandibular disks to become dislocated." Respondents also contend that Dr. Schleder's opinion lacks foundational reliability because his "admitted lack of expertise with respect to nasopharyngeal cancer means that he cannot say when the cancer developed or whether the symptoms that she exhibit[ed]—all of which are symptoms of nasopharyngeal cancer—were caused by the extraction, as opposed to the existing and developing disease."

² Respondents do not argue that Mr. Ryan's claim under Minn. Stat. § 573.02, subd. 2, involves a novel or scientific theory.

The supreme court has outlined three steps that a district court must follow in analyzing the foundational reliability of expert testimony. *Id.* at 167–68. “First, the district court must analyze the proffered testimony in light of the purpose for which it is being offered.” *Id.* “Second, the court must consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying.” *Id.* at 168. Finally, “the proponent of evidence about a given subject must show that it is reliable in that particular case.” *Id.* “As long as the district court considered the relevant foundational reliability factors, [an appellate court] will not reverse its evidentiary finding absent an abuse of discretion.” *Id.*

The parties here recite the facts at length to support their positions. But a review of the district court’s order reveals that the court never considered Mr. Ryan’s cause of action under Minn. Stat. § 573.02, subd. 2. Rather, the court specifically stated in its order that Mr. Ryan asserted “two causes of action: (1) wrongful death in his capacity as Trustee for Ms. Ryan’s Next of Kin, and (2) loss of consortium in his personal capacity.” The court did not consider the steps set forth in *Doe* that must be considered in analyzing the foundational reliability of Dr. Schleder’s opinion with respect to Mr. Ryan’s cause of action under Minn. Stat. § 573.02, subd. 2. We therefore have nothing to review regarding the admissibility of Dr. Schleder’s opinions under Minn. R. Evid. 702 with respect to Mr. Ryan’s cause of action under Minn. Stat. § 573.02, subd. 2. Although respondents claim that “implicit in the district court’s dismissal of the entire matter” is that Mr. Ryan’s claim under Minn. Stat. § 573.02, subd. 2, “suffer[s] from the same lack of factual foundation

and foundational reliability as does the wrongful-death claim,” the court’s lack of any reference to this cause of action belies respondents’ position.

Because the decision whether to admit expert testimony under rule 702 is discretionary, and the district court did not address whether Dr. Schleder’s expert-opinion testimony is admissible with respect to Mr. Ryan’s cause of action under Minn. Stat. § 573.02, subd. 2, we reverse the grant of summary judgment and remand for the court to consider the admissibility of Dr. Schleder’s opinion testimony with respect to that cause of action.

B. Loss-of-consortium claim

“‘Consortium,’ as a general description, represents reciprocal rights inherent in the marital relationship of a husband and wife, including such undefined elements as comfort, companionship, and commitment to the needs of each other.” *Thrill v. Modern Erecting Co.*, 170 N.W.2d 865, 867–68 (Minn. 1969) (footnote omitted). Because a loss-of-consortium claim is a derivative claim, the right to recover from a defendant derives, through marriage, from an injured spouse’s ability to recover from the same defendant. *Huffer v. Kozitza*, 375 N.W.2d 480, 482 (Minn. 1985). A spouse cannot recover for loss of consortium in the absence of direct physical injury to his or her spouse in the underlying tort claim. *Kohler v. Fletcher*, 442 N.W.2d 169, 173 (Minn. App. 1989) (stating that if “wife’s underlying tort claim fails, [husband’s] claim for loss of consortium also fails”), *review denied* (Minn. Aug. 25, 1989).

Here, the district court concluded that because Mr. Ryan’s “underlying wrongful death claim is dismissed, [his] loss of consortium claim must follow suit.” Mr. Ryan

challenges the dismissal of his loss-of-consortium claim as it relates to his cause of action under Minn. Stat. § 573.02, subd. 2. Mr. Ryan contends that if we reverse and remand for consideration of his cause of action under Minn. Stat. § 573.02, subd. 2, we also should reverse and remand the dismissal of his loss-of-consortium claim for the “limited” time period spanning from the date on which tooth #32 was surgically removed on March 10, 2014, to January 20, 2015, the date Ms. Ryan’s cancer was discovered. We agree.

As addressed above, a cause of action under Minn. Stat. § 572.02, subd. 2, is limited to “special damages,” which are limited to those damages to which an exact dollar amount can be assigned, such as medical expenses or lost wages to the date of death. *Beaudry v. State Farm Mut. Auto. Ins. Co.*, 518 N.W.2d 11, 12 n.1 (Minn. 1994), *overruled on other grounds by Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401 (Minn. 2000). But the supreme court has recognized that although a loss-of-consortium claim is derivative, using the same liability as the underlying tort claim, loss-of-consortium claims are “separate claims with separate injuries.” *Huffer*, 375 N.W.2d at 482; *see State Farm Mut. Auto. Ins. Co. v. Village of Isle*, 122 N.W.2d 36, 42 (Minn. 1963) (stating that “loss of consortium cannot fairly be said to constitute an injury to the person, but rather appears to be a consequential item of damage resulting from such a type of injury, and giving rise to a separate and independent cause of action”). And a “spouse’s cause of action for loss of consortium does not abate upon the death of his/her mate.” *Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc.*, 355 N.W.2d 138, 145 (Minn. 1984).

Here, as Mr. Ryan concedes, “his claim for consortium fails” in “the event that [he] fails to show malpractice and injury to [Ms. Ryan] as a result of th[e] malpractice on the

part of the respondent.” Because Mr. Ryan’s loss-of-consortium claim is derivative of his cause of action under Minn. Stat. § 572.02, subd. 2, and the district court failed to address that cause of action in its order for summary judgment, the dismissal of the loss-of-consortium claim was premature. We therefore reverse the district court’s dismissal of Mr. Ryan’s loss-of-consortium claim pending a decision on his cause of action under Minn. Stat. § 573.02, subd. 2.

Reversed in part and remanded.