Opinion issued August 1, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00045-CV

JAMES MASON, CHARLES VANCE, HELEN MASON, MURPHY MASON, AND ANNA PAYNE, Appellants

V.

AMED-HEALTH, INC., D/B/A A*MED COMMUNITY HOSPICE AND FOLASADE OJO, M.D., Appellees

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On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Case No. 16-CV-0731

O P I N I O N

This is a medical liability claim filed against a hospice-care company and its medical director—appellees, AMed-Health, Inc., *d/b/a* A*Med Community Hospice and Dr. Folasade Ojo—by appellants, patient Charles Vance and the

friends in whose home he received hospice care, James Mason, Helen Mason, Murphy Mason, and Anna Payne (collectively, the Masons). The Masons and Vance sued A*Med and Dr. Ojo for negligence arising out of a fire that occurred when Vance smoked a cigar while using oxygen prescribed by Dr. Ojo and provided by A*Med. The trial court granted summary judgment in favor of A*Med and Dr. Ojo and dismissed the Masons' and Vance's claims.

In six issues, the Masons and Vance argue that: (1) the trial court erred in finding A*Med and Dr. Ojo owed no duty to the Masons; (2) the trial court erred in granting summary judgment on the basis that A*Med and Dr. Ojo did not breach the standard of care; (3) the trial court erred in granting summary judgment in favor of Dr. Ojo on the issue of causation; (4) the trial court erred in granting summary judgment on the Masons' and Vance's claim of gross negligence; (5) A*Med's and Dr. Ojo's no-evidence motions were conclusory and should not have been granted; and (6) "If the trial court is deemed to have granted summary judgment on how to measure property damages, then the trial court is in clear error."

Because we conclude that the Masons and Vance raised a material fact issue on each element of their negligence claims against A*Med and Dr. Ojo, we reverse and remand for further proceedings.

Background

Vance is a veteran with a medical history of depression, post-traumatic stress disorder (PTSD), heart disease, and smoking. He had fallen on hard times and was staying in the home of his friend, James Mason. In January 2015, Vance was admitted to Clear Lake Regional Medical Center to be treated for pneumonia and congestive heart failure, where his primary attending physician was Dr. Rakesh Shah. At the time of his hospitalization, Vance was on numerous medications including Norco—a narcotic pain medication—and various anti-depressants. Dr. Shah prescribed some additional medications for depression, sleep-aids, narcotic pain medications, and oxygen via nasal cannula due to Vance's congestive heart failure and pneumonia. After considering Vance's condition and the possibilities of releasing him to a hospital or care center run by the Veteran's Administration (VA), Dr. Shah ultimately determined that Vance could be released to receive hospice care at home.

On February 5, 2015, Vance was released from the hospital to Mason's home, where Vance received hospice care from A*Med and its medical director, Dr. Ojo. Mason's home was located on Rice Road in Dickinson, Texas. Mason and his siblings, Murphy Mason, Helen Mason, and Anna Payne, had inherited the home from their parents. At the time Vance was released to home hospice care, James Mason lived in the home along with a friend and her two young children.

On February 5, 2015, Vance was seen by an A*Med social worker and by a hospice nurse, identified as "Nurse Amezquetta," who completed the initial care plan, performed an assessment, and implemented Dr. Ojo's admitting orders. Dr. Ojo ordered a "comfort kit" of medications for Vance that included morphine and lorazepam. Dr. Ojo also continued Dr. Shah's orders for Vance to receive oxygen and Norco. Dr. Ojo testified that the purpose of the comfort kit medications was to allow her hospice patients to die in peace.

On February 6, 2015, Nurse Ranay Danek, a "field nurse" with A*Med, provided hospice nursing services to Vance. She performed an assessment in which she determined that Vance was alert and oriented and able to take his medications without the aid of a caregiver. Danek was aware of the medications that had been prescribed for Vance, including morphine and other narcotic pain relievers in addition to his anti-depressants and sleep aids. Vance informed Danek that he was a smoker, and she provided him with verbal and written admonishments regarding the dangers of smoking while using oxygen. Danek testified that there were also warnings placed on the wall, the oxygen canisters, and the oxygen concentrator near Vance's bed. Danek testified that she was aware of the dangers posed by smoking while on oxygen. She stated that smoking while on oxygen could "literally blow your house up. . . . I'm not saying this is an outlier, this is a very real possibility." Dr. Ojo also acknowledged the dangers of smoking

while on oxygen, and she admitted that at least one former patient had died in a fire caused by smoking while on oxygen.

James Mason likewise testified in his deposition that he did not provide any caregiving to Vance and that Vance took care of himself, although he would have provided care to Vance if he had been asked to do so. Mason testified that he was aware of the dangers of smoking around oxygen and that he had asked Vance to smoke outside the house after the oxygen was delivered. Mason testified that, because he was concerned, he asked the A*Med nurse whether, "with all the medicine and stuff," Vance should be drinking and smoking like he was. The nurse told him, "Go ahead, let him do what he want[s] to do," and "it's all right because he's going to die soon." Mason denied that he was ever warned by any A*Med personnel of the danger posed by the oxygen, and he denied seeing any warning signs posted in his home. Murphy Mason likewise testified that he saw Vance smoking on the porch of the home on occasion and that he did not see any warnings or signs up in the home, although he also acknowledged that he was not looking for any warning signs.

Danek visited Vance again on February 10, 2015, and again determined that he was alert and oriented and able to understand and act on the instructions that she had provided to him. On this visit, Danek observed an ashtray by Vance's bedside, which was also where the oxygen canister was placed. Vance told her that the

ashtray was old, and she again admonished him regarding the dangers of smoking. Vance also testified that, during this visit, he and Danek discussed his medications and she encouraged him to take all of the medications that had been prescribed to him. He testified that February 10, 2015, was the first time since being released to home hospice care that he took all of his prescribed medications.

Later in the evening of February 10, 2015, while James Mason was in the shower, Vance decided to smoke a cigar. Vance agreed in his deposition that representatives from A*Med told him not to smoke with the oxygen on, that he knew that oxygen and smoking "doesn't mix," and that A*Med had given him written admonishments and instructions regarding using oxygen. Vance testified that he knew smoking with his oxygen on was dangerous and could cause a fire, and he had agreed to follow Danek's admonishment that he smoke outside. However, on the night of the fire, it was cold outside so he decided to smoke inside. Vance testified that he believed he was impaired from the medication he was taking, and so he did not realize that he had not turned the oxygen off. When Vance lit his cigar, a fire broke out.

Vance was able to get himself out of the home. James Mason likewise escaped from the fire after helping his friend and her two young children escape. Both Vance and Mason sustained burns requiring treatment at the hospital and a burn center. Vance and the Masons also sustained property damage as a result of

the fire—the Masons' home was completely destroyed along with the majority of the personal property stored in and around the home.

Vance and the Masons sued A*Med and Dr. Ojo for causes of action based on medical malpractice and gross negligence "which led to personal injuries and property damage from an oxygen-fed house fire caused by prescribing and providing multiple mind-altering medicines to a disabled veteran on hospice (Mr. Vance), who was a known smoker, and not providing a nicotine substitute." The Masons and Vance specifically asserted that A*Med and Dr. Ojo breached the duty of care owed to them by failing to properly educate both Vance and Mason about the dangers of smoking while on oxygen and explicitly identifying the high risk of fire.

They asserted that Dr. Ojo deviated from the standard of care by "taking over Mr. Vance's care in a hospice setting," and "either failing to notice that Mr. Vance was a smoker who was being prescribed home oxygen and opiate pain drugs without a nicotine replacement, or in noticing and failing to provide or offer the nicotine replacement." They further alleged that "A*Med deviated from the standard of care by not providing a nicotine replacement for Mr. Vance, not offering a nicotine replacement for Mr. Vance, and not educating either Mr. Vance or James Mason on combination use of sedative agents, smoking, and oxygen." The Masons and Vance also asserted that A*Med's nurse's home inspection was

inadequate and that she wrongly "told James Mason that Mr. Vance could smoke because he was going to die anyway" and failed to remove the oxygen or take other measures when she learned that Vance was a smoker. Finally, they asserted that A*Med deviated from the standard of care by delivering between twelve and fourteen canisters of oxygen at once, as this was an excessive amount of oxygen and created an explosion hazard.

A*Med moved for traditional and no-evidence summary judgment, and Dr. Ojo moved to join this motion. Among other grounds, A*Med asserted that the Masons were third-party, non-patient plaintiffs and, thus, the Masons could not establish that A*Med owed them any duty, a required element in medical negligence lawsuits. A*Med further argued that there was no probative evidence that it had breached any duty owed to Vance. A*Med also argued that neither the Masons nor Vance had any clear and convincing evidence to support their claims for gross negligence. A*Med supported its motion for summary judgment with excerpts from the depositions of Danek, Vance, and James Mason.

In response, the Masons and Vance asserted that both A*Med and Dr. Ojo owed duties to them, which they violated by prescribing narcotic pain killers, anti-anxiety medication, anti-depressants, and oxygen simultaneously to a known smoker. The Masons and Vance also argued that Dr. Ojo and A*Med personnel knew that Vance was a smoker but did not offer any smoking cessation medicines

to Vance. The Masons and Vance also asserted that no one warned Vance or Mason about the dangers of Vance's drug and oxygen treatments while being a smoker. The Masons and Vance supported their response with deposition testimony and other evidence.

Regarding Dr. Ojo, the Masons and Vance argued, "Dr. Ojo didn't make a personal evaluation of Vance's risk of smoking while on oxygen; instead, he was given a booklet that told him not to smoke in the house with oxygen. She didn't offer Vance a nicotine replacement, but decided to wait for him to state that he wanted to quit smoking." They also asserted that Dr. Ojo "would not admit that the medicines would make Vance less alert."

The Masons and Vance also cited portions of the deposition of their medical expert, Dr. Chau, who testified that the fire hazard posed by smoking near oxygen is a well-known problem. Dr. Chau testified that the U.S. Department of Veteran Affairs had published a directive to guide providers to evaluate the risk of patients starting fires while on oxygen treatment, to require nicotine replacement therapy, and to provide education to the other residents of the patient's home.

Dr. Chau also testified that "Dr. Ojo deviated from the standard of care by essentially prescribing home oxygen and opiates, pain meds, not offering alternatives to smoking," and "not offering any form of nicotine replacement." The Masons and Vance also provided evidence, based on A*Med's records, that Danek

noted in one of her reports that she saw an ashtray near Vance's bed. The report indicated that Danek discussed the dangers of smoking while on oxygen with Vance at that time, but Vance agreed with her that he would smoke outside and told her that the ashtray was "old." Danek testified at her deposition that she discussed the results of her evaluation of Vance with Dr. Ojo, including Vance's status as a current smoker, but she did not receive any new or different orders from Dr. Ojo.

The Masons and Vance argued, "Instead of offering a nicotine replacement, or alerting Dr. Ojo to the presence of an ashtray, Nurse Danek showed Mr. Vance the A*Med smoking handbook and told him that a person cannot smoke in the home." Dr. Chau opined that A*Med's counseling and education were insufficient, stating that after the discovery of the ashtray near Vance's bed, A*Med and Dr. Ojo should have taken action:

> [O]ne alternative should have been provided, educational alternatives, education to the caregivers around him of the dangers of fire at that particular case, understanding of the scenario in which he smoked, what was the condition of the oxygen when he was smoking.
>
> But also, a discussion with the physician, the medical director, this is a very high-risk patient in a high-risk situation where he is noncompliant. And that noncompliance should have triggered some type of plan that said, "Okay. We need to come in at this point and offer him a smoking cessation program, a—counseling and, you know, remove his oxygen." He's too high risk.

Dr. Chau further opined that Vance should not have been on home oxygen at all due to his mental health issues, his history of "noncompliance," and A*Med's documentation that he "would have continued smoking anyway."

The Masons argued that A*Med and Dr. Ojo owed them a duty because the injuries to their property were a foreseeable result of prescribing narcotics and oxygen to a smoker. They asserted that A*Med and Dr. Ojo had a duty to find out who Vance was living with and to provide them with the same warnings that Vance ought to have received.

The trial court granted the traditional and no-evidence motion for summary judgment, stating in its order that A*Med "shall have summary judgment granted in its favor as to all claims made by Plaintiffs, JAMES MASON, CHARLES VANCE, HELEN MASON, MURPHY MASON and ANNA PAYNE."

Following this ruling, Dr. Ojo filed a separate motion for no-evidence and traditional summary judgment. She argued, again, that the Masons and Vance failed to provide evidence showing that she owed a legal duty to the Masons, that she breached any legal duty owed to Vance, or that she caused any harm to either the Masons or Vance, and that they failed to provide clear and convincing evidence of gross negligence or exemplary damages. The Masons and Vance again responded, providing similar arguments to those they had set out in the response to A*Med's motion.

The trial court granted Dr. Ojo's summary judgment motion, finally disposing of all claims of all parties. This appeal followed.

Summary Judgment

On appeal, the Masons and Vance assert multiple arguments challenging the trials court's grant of A*Med's and Dr. Ojo's motions for summary judgment.

A. Standard of Review

We review summary judgments de novo. *See City of Richardson v. Oncor Elec. Delivery Co.*, 539 S.W.3d 252, 258 (Tex. 2018). When the trial court grants summary judgment without specifying the grounds for granting the motion, as it did in this case, we affirm its judgment if any one of the grounds is meritorious. *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017).

To prove entitlement to summary judgment on traditional grounds, the movant bears the burden of showing that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Oncor Elec.*, 539 S.W.3d at 258–59. To meet this burden, the movant must conclusively negate at least one essential element of each of the nonmovant's causes of action or conclusively prove all the elements of an affirmative defense. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). A matter is conclusively proved if reasonable people could not differ as to the conclusion to be

drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

If the movant meets its burden, then the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Transcon. Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Summary-judgment evidence raises a fact issue if reasonable and fair-minded jurors could differ in their conclusions in light of the evidence presented. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). When reviewing the grounds for summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *See Sommers for Ala. & Dunlavy, Ltd. v. Sandcastle Homes, Inc.*, 521 S.W.3d 749, 754 (Tex. 2017).

A party may move for no-evidence summary judgment after an adequate time for discovery has passed. TEX. R. CIV. P. 166a(i). A trial court must grant a no-evidence motion for summary judgment if the movant identifies one or more elements of a claim or defense for which the nonmovant would have the burden of proof at trial and the nonmovant produces no admissible evidence raising a genuine issue of material fact as to each challenged element. *See id.*; *Lockett v. HB Zachry Co.*, 285 S.W.3d 63, 67 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *see*

also Essex Crane Rental Corp. v. Carter, 371 S.W.3d 366, 383 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (explaining that summary-judgment evidence must be presented in form that would be admissible at trial). To defeat a contention that the nonmovant has no evidence of a cause of action, the nonmovant must adduce more than a scintilla of evidence raising a genuine issue of material fact as to each challenged element. *See W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). "Unless the respondent produces summary judgment evidence raising a genuine issue of material fact, the court must grant the motion." *Id.*

Here, the Masons and Vance alleged causes of action for medical negligence. A cause of action for negligence arises when an actor breaches a legal duty and the breach proximately causes damages. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 246 (Tex. 2008).

B. Duty to the Masons

In their first issue, the Masons assert that the trial court erred in granting summary judgment in favor of A*Med and Dr. Ojo on the ground that the medical care providers did not owe a duty of care to the Masons. A*Med argues that "[i]t is undisputed that the Mason appellants did not have any physician/healthcare provider-patient relationship with" A*Med and, consequently, A*Med owed no duty to the Masons and "there can be no negligence or gross negligence." Dr. Ojo

likewise argues that she owed no duty to the Masons, "who are third-party plaintiffs and not patients of Dr. Ojo."

The existence of a duty is threshold issue in a negligence case. *See id.* (setting out elements of medical negligence case); *Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998) (discussing threshold issue of duty in medical negligence case); *Helbing v. Hunt*, 402 S.W.3d 699, 702 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) ("The threshold inquiry in a negligence case is duty."). "A duty is a legally enforceable obligation to conform to a particular standard of conduct." *Helbing*, 402 S.W.3d at 702 (internal quotation marks omitted). Whether a legal duty exists is typically a question of law for the court. *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 12 (Tex. 2008); *Helbing*, 402 S.W.3d at 702–03 (holding that "[w]hether to impose a duty under certain circumstances is a question of law" but recognizing that existence of duty may become fact question when evidence does not conclusively establish relevant facts and holding that summary judgment is improper if nonmovant's version of facts would support imposition of legal duty) (citing *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996)).

The decision to impose a legal duty requires consideration of "social, economic, and political questions and their application to the facts at hand." *Praesel*, 967 S.W.2d at 397 (citing *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993), *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990),

and *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983)). In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. *Id.* at 397–98; *Phillips*, 801 S.W.2d at 525; *Helbing*, 402 S.W.3d at 703. Courts have also considered whether one party has superior knowledge of the risk or a right to control the actor whose conduct precipitated the harm. *Praesel*, 967 S.W.2d at 397–98; *Graff*, 858 S.W.2d at 920; *Helbing*, 402 S.W.3d at 703 (holding that courts also consider "any other relevant competing individual and societal interests implicated by the facts of the case").

A*Med and Dr. Ojo rely on *Praesel* to support their contention that, because they did not have a provider-patient relationship with the Masons, they owed them no duty of care. In *Praesel*, the supreme court was asked to decide "whether a physician owes a duty to third parties to warn an epileptic patient not to drive or to report the patient's condition to state authorities that govern the issuance of drivers' licenses." 967 S.W.2d at 392. In considering whether it should create a common-law duty to third parties for doctors to warn a patient not to drive, the supreme court recognized that it has "generally limited the scope of the duty owed by physicians in providing medical care to their patients," holding that a medical

care provider's "primary duty is to the patient, not to the patient's relatives." *Id.* at 396 (quoting *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 79 (Tex. 1997)). The supreme court did not, however, create a bright-line rule that medical care providers can never owe a duty of care to nonpatients. *See id.* at 396–97. Instead, the court applied the "the familiar factors" set out above, weighing the social, economic, and political questions involved and applying them to the facts at hand. *Id.* at 397.

The *Praesel* court discussed other cases in which it had considered a physician's liability to third parties, such as *Bird v. W.C.W.*, in which the court held that "a health care professional did not owe a duty to third parties, in part because of the absence of a physician-patient relationship." *Id.* at 396 (citing *Bird v. W.C.W.*, 868 S.W.2d 767, 770 (Tex. 1994)). In *Bird*, a psychologist concluded that a minor child had been sexually abused by the father, leading to criminal and civil proceedings against the father. After those proceedings were dropped, the father sued the psychologist, and the supreme court held that "as a matter of law there is no professional duty running from a psychologist to a third party to not negligently misdiagnose a condition of a patient." *Bird*, 868 S.W.2d at 768; *see Praesel*, 967 S.W.2d 396. In *Praesel*, the supreme court discussed *Bird* and noted that while "[i]t was foreseeable that a parent accused of sexual abuse would suffer harm," there were "countervailing considerations, including the eradication of

sexual abuse, that weighed in favor of allowing mental health professionals to diagnose sexual abuse of a child without the judicial imposition of a duty and consequent civil tort liability to third parties." *Praesel*, 967 S.W.2d at 396 (citing *Bird*, 868 S.W.2d at 769).

The supreme court in *Praesel* also examined two cases from intermediate appellate courts: *Flynn v. Houston Emergicare, Inc.*, and *Gooden v. Tips*. In *Flynn*, an emergency room physician failed to warn the patient, who had taken cocaine, of "an alleged 'crash' phenomenon associated with cocaine use and failed to warn the patient not to drive." *Praesel*, 967 S.W.2d at 397 (citing *Flynn v. Houston Emergicare, Inc.*, 869 S.W.2d 403, 405–06 (Tex. App.—Houston [1st Dist.] 1994, writ denied)). The patient later rear-ended a third party, and the injured third party then sued the physician for failing to monitor the patient properly and failing to warn the patient not to drive. *Flynn*, 869 S.W.2d at 404–05 (noting that "Plaintiff would extend defendants' duty to treat [the patient] in a nonnegligent manner beyond the patient himself to the general public"); *see Praesel*, 967 S.W.2d at 397 (discussing *Flynn*). This Court held that the physician owed no duty to the plaintiff, reasoning that the physician did not create the impairment that resulted in the injury. *Praesel*, 967 S.W.2d at 397; *Flynn*, 869 S.W.2d at 406.

The supreme court contrasted the facts and legal conclusion in *Flynn* with that reached in *Gooden.* In *Gooden*, a physician prescribed Quaaludes to a patient

with a history of drug abuse and failed to warn the patient not to drive. 651 S.W.2d 364, 365 (Tex. App.—Tyler 1983, no writ). The court of appeals in *Gooden* determined that the harm "*was in the general field of danger which should reasonably have been foreseen by the doctor* when he administered the drug" and thus, "*the doctor was under a duty to take whatever steps were reasonable under the circumstances to reduce the likelihood of injury to other motorists*." *Id.* at 370 (emphasis added) (stating, "[W]e point out that we do not hold that a duty arose on the part of Dr. Tips to *control* the conduct of his patient," and expressly limiting its holding "under the facts here alleged" that "Dr. Tips may have had a duty to *warn* his patient not to drive"); *see Praesel*, 967 S.W.2d at 397 (discussing *Gooden*).

After considering these cases, the *Praesel* court turned to the facts as set out in that case. It recognized that none of the patient's physicians had the right or ability to control the epileptic patient's conduct, noting that "it would be very difficult for someone to prevent another from driving in an impaired condition," but it further stated, "[I]t does not necessarily follow that there is no duty to give a warning." *Praesel*, 967 S.W.2d at 398 (citing *Graff*, 858 S.W.2d at 921). It observed that while "there is little utility in failing to warn patients about effects of a drug or condition that are known to the physician but are likely to be unknown to the patient," epileptic patients "know that they are subject to seizures" so that the potential consequences of suffering a seizure while driving "should be obvious to

those who suffer from epilepsy." *Id.* (citing *Bird*, 868 S.W.2d at 770). The court further stated that, "[i]n determining whether to erect a legal duty to warn, we must also consider the efficacy of that warning in preventing injury to third parties," noting that courts cannot "assume that a person who is advised not to drive will actually respond and refrain from driving." *Id.* The supreme court ultimately concluded:

> Balancing both the need for and the effectiveness of a warning to a patient who already knows that he or she suffers from seizures against the burden of liability to third parties, we conclude that the benefit of warning an epileptic not to drive is incremental but that the consequences of imposing a duty are great. The responsibility for safe operation of a vehicle should remain primarily with the driver who is capable of ascertaining whether it is lawful to continue to drive once a disorder such as epilepsy has been diagnosed and seizures have occurred. Accordingly, we decline to impose on physicians a duty to third persons to warn an epileptic patient not to drive.

Id.

Here, we first observe that, while A*Med correctly argues that no provider-patient relationship existed between the Masons and A*Med, that is not the sole basis for imposing a legal duty. The nature of the claims and the relationship among the Masons, Vance, and Vance's medical-care providers in the present case are distinguishable from those in *Praesel*, *Flynn*, and *Gooden*. The Masons were not third parties in the population at large, but instead, had opened their home to allow Vance to receive home hospice care from A*Med and Dr. Ojo. There is evidence that both A*Med and Dr. Ojo were aware, or should have been aware, of

Vance's living situation because representatives from A*Med visited Vance while he was in the Masons' home and had multiple conversations with James Mason. A*Med and its personnel interacted directly with the Masons by delivering oxygen tanks and other related equipment to the Masons' home and by providing care to Vance at the Masons' home, including treating Vance with potentially mind-altering medications. This is unlike the third-party drivers in *Praesel*, *Flynn*, and *Gooden*, who had no pre-existing relationship with either the physicians or the patients prior to the car accidents in which they were injured. *See Praesel*, 967 S.W.2d at 392–93; *Flynn*, 869 S.W.2d at 404–05; *Gooden*, 651 S.W.2d at 365.

The other facts of this case are likewise distinguishable from *Praesel*. It is undisputed that A*Med and Dr. Ojo provided hospice care to Vance in the Masons' home. Vance was a life-long smoker with a history of mental health disorders, including PTSD, who was experiencing congestive heart failure. Dr. Ojo prescribed oxygen, to be used and stored in the Masons' home. She also prescribed multiple medications such as morphine and other narcotic pain relievers, anti-depressants, anti-anxiety medications, and sleep aids. A*Med carried out these orders: it had multiple canisters of oxygen delivered to the Masons' home and it visited Vance there in order to provide treatment to him.

The evidence established that A*Med and Dr. Ojo were both aware of the danger posed by having oxygen in an environment where someone was smoking.

Dr. Ojo had had at least one previous patient die in a fire as a result of smoking while on oxygen. Nurse Danek testified that smoking while on oxygen can "literally blow your house up. . . . I'm not saying this is an outlier, this is a very real possibility." The Masons' expert, Dr. Chau, testified that the fire hazard posed by smoking near oxygen is a well-known problem, and she testified that the VA had published a directive to guide providers to evaluate the risk of patients to start fires while on oxygen treatment, to require nicotine replacement therapy, and to provide education to other residents of the patient's home. She likewise testified that the medications prescribed to Vance, including morphine, other narcotic pain relievers, and sleep aides, would impair Vance's cognition and ability to understand or follow the instructions and warnings that he was given,

Applying the interrelated factors set out in *Praesel* and similar cases to the facts of this case, we conclude that A*Med and Dr. Ojo were under a duty to warn the Masons regarding the danger posed by treating Vance with oxygen in their home and to take other reasonable measures that they, as Vance's medical providers, could take to lessen the risks to other people residing in the home and caring for Vance. Regarding the risk, foreseeability, and likelihood of injury, the medical care providers here were aware of the risk posed by a patient like Vance—a life-long smoker with a history of mental health problems who was in failing health and on mind-altering medications including morphine—being treated with

home oxygen. And Danek's testimony that an oxygen fire was a "real possibility" and Dr. Ojo's previous experience demonstrated that the risk that Vance would start an accidental fire by smoking near the oxygen was foreseeable.

Considering the social utility of A*Med's and Dr. Ojo's conduct and the fact that the medical providers had superior knowledge of the risk posed by a known smoker on mind-altering medication being treated with home oxygen, we conclude that there is great benefit in warning a patient's caregivers or other people in the patient's home of the fire risk posed by smoking around oxygen and in treating the patient in such a way as to lessen the risk to other people residing with the patient. *See Praesel*, 967 S.W.2d at 398 ("[T]here is little utility in failing to warn patients about effects of a drug or condition that are known to the physician but are likely to be unknown to the patient."). The burden of giving adequate warnings to caregivers or others residing in the home with the patient is slight, and, in fact, in most cases would not place any greater burden on the medical care providers than do the duties they owe to their patient. *See id.* at 397–98. Likewise, healthcare providers owe a duty to their patient to take reasonable measures to prevent the risk of fire, and, thus, it is not overly burdensome to hold the providers liable for foreseeable injuries to people or property in close proximity to the patient that were caused by the failure of that duty. *See id.*; *Fleming v. Baylor Univ. Med. Ctr.*, 554 S.W.2d 263, 264 (Tex. App.—Waco 1977), *aff'd*, 561 S.W.2d 797 (Tex. 1977).

A*Med and Dr. Ojo argue that they did not have the right or ability to control Vance with regard to whether or when he chose to smoke. *See Providence Health Ctr. v. Dowell*, 262 S.W.3d 324, 331 (Tex. 2008) (holding that Texas law generally imposes no duty to control acts of another person to prevent harm to third persons absent certain special relationships). While it is true that the court in *Praesel* recognized that none of the physicians had the right or ability to control the patient's conduct, it also stated, "But it does not necessarily follow that there is no duty to give a warning." *See* 967 S.W.2d at 398 (citing *Graff*, 858 S.W.2d at 921). And we observe that the allegations here are not that A*Med and Dr. Ojo failed to control Vance. Rather, the Masons allege that, by failing to adequately warn James Mason and by failing to ensure that Vance was treated as safely as possible, a fire occurred—as it was foreseeable that it would—and the Masons were injured. Regardless of Vance's decisions, the medical care providers here owed a duty to the Masons to take reasonable steps to reduce the risk of harm in treating a patient like Vance in their home, including warning them of the hazard existing in their home so that the Masons themselves could take appropriate action, such as deciding whether to allow Vance to continue being treated in their home or whether he needed supervision and care that they were unable to provide.

Dr. Ojo further argues that she did not "use" the Masons' home to provide medical care because she did not choose where Vance lived. However, the fact that

Dr. Ojo did not choose to place Vance in the Masons' home does not relieve her of her duty to warn her patient and others residing with her patient regarding the risk of smoking while on oxygen. Dr. Ojo argues that the Masons are attempting to sue her for Vance's own actions in failing to heed warnings about smoking while on oxygen, and she argues that she owed no duty to the Masons to provide any specific treatment, such as nicotine replacement therapy, to Vance. As set out above, we are not holding that she had a duty to control Vance. Rather, she had a duty to warn the Masons regarding the hazard that existed in their home and a duty to ameliorate the danger by taking reasonable measures she, as Vance's physician, could take to lessen the risks to a caregiver of taking Vance into his home, such as providing nicotine replacement therapy to Vance.

We conclude that the summary-judgment evidence demonstrated a duty on the part of A*Med and Dr. Ojo to warn the Masons of the hazard posed by the oxygen delivered to their home and used to treat Vance and a duty to take reasonable measures to lessen foreseeable risks to Vance's caretaker under the circumstances known to his health-care providers. Accordingly, the trial court erred to the extent it granted summary judgment on this basis.

We sustain the Masons' first issue.

C. Breach

In their second issue, the Masons and Vance argue that the trial court erred in granting summary judgment because they presented more than a scintilla of evidence raising a fact issue on the element of breach of the standard of care as to both A*Med and Dr. Ojo.

As discussed above, the Masons and Vance presented evidence that Dr. Ojo prescribed home oxygen as part of Vance's treatment, and A*Med had multiple canisters of oxygen along with the related equipment delivered to Vance at the Masons' home. Dr. Ojo also prescribed, and A*Med provided and encouraged Vance to take, a "comfort kit" of drugs including painkillers like morphine, anti-depressants, anti-anxiety medications, and sleep aids. Dr. Chau testified that these drugs were capable of impairing Vance's cognitive function, and Dr. Ojo also testified that the purpose of the drugs was to allow her hospice patients to die in peace. The Masons and Vance further presented evidence that Nurse Danek from A*Med encouraged Vance to take all of the medications prescribed, and Vance testified that he did so for the first time on the night the fire occurred.

Vance acknowledged that A*Med warned him not to smoke with the oxygen on, but he also testified that, on the night of the fire, he was confused. He thought he was complying with the instructions he had been given, but he also believed he was impaired by the medication he had taken and so he did not realize that he had

not turned the oxygen off. When he lit his cigar, it burst into flames and the fire spread. James Mason testified that he was aware of the danger of smoking around oxygen and so he asked the hospice nurse about whether Vance should be smoking. He testified that the nurse told him they should just let Vance smoke because he was already dying. Both James Mason and Murphy Mason testified that they did not see any warning signs about smoking near the oxygen.

Dr. Chau further provided her expert opinion that A*Med's and Dr. Ojo's care fell below the standard of care by failing to provide appropriate education for the risk of smoking while on oxygen; by failing to determine Vance's level of understanding of the risks, especially in light of the number of mind-altering drugs he was taking, his mental-health history, and his history of non-compliance with directives not to smoke; and by failing to offer any form of nicotine replacement.

Dr. Chau also opined that A*Med and Dr. Ojo did not provide sufficient education to the patient, Vance:

> Before I educate anyone, I determine their level of capacity for understanding, their level of education, whatever I am talking about.
>
> So if someone has, you know, health literacy issues—it is not just about fluency in English, but health literacy issues, whether it's education, mental illness, then the level at which you teach someone needs to be deeper than what was documented, stop smoking.
>
> The risks and benefits always has to occur, whether you're talking about smoking cessation or some other prescription or medical procedure. We use capacity. We solicit capacity, whether or not the patient has capacity at that time to understand what we're saying. So if someone is impaired with a substance, it is not enough to just say the patient is alert, oriented times three. They need to demonstrate that

> the patient understood, weighed the risks of benefits, has insight into the disease condition as to why they need to stop smoking or what the condition could be, and then voice that condition.
>
> "I'm going to blow up," right or—in simple layman's terms, "I am going to die. My house is going to set on fire." Or whatever this—you know, it doesn't have to be complicated, but a patient has to voice some level of understanding.

When asked, "What should [A*Med] have done to educate James Mason or the other members of the house?" Dr. Chau answered:

> A standard fire risk—you know, fire risk when using oxygen and any type of smoking, flames. The patient was living in Mason's home. They were delivering oxygen to his home. They knew that he was smoking. They should have informed him the risk of fires in his home just from cigarettes, anybody coming into the home smoking cigarettes.

The Masons and Vance also argue that, due to Dr. Ojo's prescribing numerous medications as part of Vance's "comfort kit," including morphine and other narcotic pain relievers, Vance was confused and impaired at the time of the fire. They cite *Baylor University Medical Center v. Fleming*, 561 S.W.2d 797 (Tex. 1977), for their proposition that warning an impaired patient not to smoke around oxygen is insufficient under Texas law. They assert that Dr. Ojo's conduct in providing these prescriptions for narcotics and oxygen, combined with Vance's medical condition, history of mental illness, and history of smoking was negligent and caused their injuries.

In *Fleming*, the Texas Supreme Court issued a short opinion affirming the Waco Court of Appeals' decision to reverse the trial court's directed verdict

against Fleming on the ground that there was no evidence that his injuries were proximately caused by negligent conduct on the part of the Medical Center. *Id.* The opinion of the Waco Court of Appeals in *Fleming v. Baylor University Medical Center* demonstrates that Fleming, who had been admitted to the hospital, was burned when the oxygen with which he was being treated ignited and he then sued the hospital for negligence. 554 S.W.2d 263, 264 (Tex. Civ. App.—Waco 1977), *aff'd*, 561 S.W.2d 797 (Tex. 1977). Fleming was not able to move without assistance, there was evidence that Fleming "was in a confused state upon admission" and "direct evidence that he was still confused two days before the accident," the fire occurred in the hospital, where "[t]he oxygen could be turned on and off only by hospital personnel," and hospital staff could constantly supervise the patient and his environment. *Id.* at 264–65. Based on the particular facts in *Fleming*, the court concluded that the trial court's grant of a directed verdict was improper. The court noted, in part, the hospital's failure to adequately supervise the patient and its failure to alert the patient's wife to the patient's "insistent smoking and the danger it created." *Id.* at 265–66. The court concluded, "Under the circumstances, the jury would have been entitled to believe that these failures, or any one of them, did not meet the standard of ordinary care," and it also stated, "The evidence we have set forth also shows that the fire in question was a foreseeable consequence that could and probably would result from the failure of

[the hospital's] employees to keep smoking materials from Mr. Fleming, and remove lighted cigarettes from his room, while oxygen was in use." *Id.* at 266.

This case similarly presents a fact question for the jury to resolve. The Masons and Vance presented evidence that, like the patient in *Fleming*, Vance was cognitively impaired at the time of the fire and might not have received adequate warnings or supervision. Vance testified that he thought he had turned the oxygen off, as he had been instructed to do, but he was confused and somehow left the oxygen on. Dr. Chau testified that the medications he was prescribed would negatively impact his cognitive abilities. Vance testified that he took all of his prescribed medications for the first time on the night of the fire, specifically stating that he was "on all the medication the VA gave me[1] and plus the morphine" that was prescribed by Dr. Ojo to ease his breathing issues. He provided a list of his current medications and testified generally that if he was prescribed pills by a doctor, he took them. Vance further stated, "I think I might have been on sleeping pills and anti-anxi—and—uhm—I can't even think—well medication for depression." He also testified that he believed he was impaired at the time of the fire. Although Danek testified that Vance was alert and able to understand her

[1] Vance testified that he had been hospitalized on numerous occasions, both through the Veteran's Administration and at Clear Lake Regional Medical Center. When asked during his deposition about the specific medications he was referring to in this testimony, Vance provided the list of his medications as of the time of the deposition.

instructions on the two occasions that she visited him during the day, her testimony does not constitute conclusive evidence of Vance's mental state in general or at the time of the fire.

A*Med and Dr. Ojo argue that the summary-judgment evidence demonstrated that both Vance and James Mason were warned about and aware of the danger of smoking near oxygen. They point to Danek's testimony and treatment notes that she educated Vance on the risks of smoking while on oxygen, to Vance's testimony that he was told not to smoke with the oxygen on, and to James Mason's testimony that he was aware of the danger of smoking around oxygen. This evidence, however, is controverted by other evidence also in the summary judgment record, as discussed above. Furthermore, the fact that Vance and James Mason were aware of some degree of risk is not sufficient to establish as a matter of law that they had been adequately warned under the circumstances here. Fact issues remain regarding whether the warnings given, if any, were adequate to account for Vance's compromised health and mental state and the effects of the "comfort kit" medications that he had been prescribed.

A*Med and Dr. Ojo also argue that they did not breach the standard of care by failing to offer or prescribe smoking cessation or nicotine replacement therapy in light of Vance's statements that he intended to keep smoking. However, they presented no evidence that such help was offered to or discussed with Vance. Dr.

Chau's testimony indicated that some kind of smoking cessation or nicotine replacement therapy for Vance would have been appropriate.

Dr. Chau testified that she would not have prescribed oxygen to someone with Vance's history. During her deposition testimony, Dr. Chau was asked whether "Charles Vance [should] have been on oxygen at all," and she answered:

> In my opinion, Charles Vance was very high risk. And he was high risk for multiple reasons, including his mental illness and his history of noncompliance or that they documented that he would have continued smoking anyway. And in the light of having depression or having PTSD, along with his chronic co-morbidities, having children in the house in the environment in which he lived in, I would not have given him oxygen.

She further stated that, given his documented history of smoking and "non-compliance," A*Med ought to have explored other "alternatives":

> Oxygen—one alternate should have been provid[ing], educational alternatives, education to the caregivers around him of the dangers of fire at that particular case, understanding of the scenario in which he smoked, what was the condition of the oxygen when he was smoking. But also, a discussion with the physician, the medical director, this is a very high-risk patient in a high-risk situation where he is noncompliant. And that noncompliance should have triggered some type of plan that said, "Okay. We need to come in at this point and offer him a smoking cessation program, a—counseling and, you know, remove his oxygen." He's too high risk.

Thus, Dr. Chau testified that it was improper and a breach of the standard of care to prescribe home oxygen to a patient like Vance, who had a history of smoking, who was not on any nicotine replacement or smoking cessation, and who was taking medications that affected his cognitive functioning and ability to follow

his healthcare providers' instructions. Therefore, there is at least a fact question regarding whether A*Med's and Dr. Ojo's treatment of Vance and failure to warn the Masons regarding the risk of Vance's being treated with home oxygen under the circumstances was a breach of the standard of care.

We conclude that the Masons and Vance presented more than a scintilla of evidence raising a genuine issue of material fact on the element of breach.

We sustain Vance's and the Masons' second issue.

D. Causation

In her separate motion for summary judgment, Dr. Ojo argues that Vance and the Masons failed to provide adequate evidence that any action or inaction on her part was the proximate cause of their alleged injuries. In their third issue, Vance and the Masons argue that they presented sufficient evidence to raise a fact question on the element of causation, and, thus, the trial court erred in granting summary judgment on this basis.

Causation is an essential element of the Masons' and Vance's claims. *See Hogue*, 271 S.W.3d at 246. Proximate cause includes both cause in fact and foreseeability. *Id.* (citing *IHS Cedars Treatment Ctr. of De Soto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798–99 (Tex. 2004), *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002)). Proximate cause cannot be satisfied by mere conjecture, guess, or speculation. *Id.* Cause in fact is established when the act or omission was

a substantial factor in bringing about the injuries, and without which the harm would not have occurred. *Id.*; *Mason*, 143 S.W.3d at 799.

Regarding "cause in fact," the supreme court has explained:

> "In order to be [the proximate cause] of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . [T]his is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm." Accordingly, cause in fact is not established where the defendant's negligence does no more than furnish a condition which makes the injuries possible. In other words, the conduct of the defendant may be too attenuated from the resulting injuries to the plaintiff to be a substantial factor in bringing about the harm.

Mason, 143 S.W.3d at 799 (internal citations and formatting omitted) (quoting *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991)). A plaintiff proves foreseeability of the injury by establishing that "a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission." *Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016). "[F]orseeability does not require that the exact sequence of events that produced an injury be foreseeable." *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex. 2002). "Instead, only the general danger must be foreseeable." *Id.* Expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of a layperson. *Guevara v. Ferrer*, 247 S.W.3d 662, 665 (Tex. 2007).

The summary-judgment evidence demonstrated that the fire that caused the alleged personal injuries and property damage started when Vance lit a cigar while

using oxygen. Dr. Ojo argues that Vance's own actions in continuing to smoke despite the warnings were the proximate cause of the fire. As discussed above, however, the fact that Vance and James Mason acknowledged some awareness of the dangers of smoking around oxygen does not constitute conclusive evidence that Dr. Ojo's treatment plan and warnings were appropriate in the circumstances.

There is likewise a fact question regarding whether A*Med's and Dr. Ojo's failure to adequately warn the Masons and Vance regarding the dangers of smoking while using oxygen caused their damages. Dr. Chau, the medical expert, stated that "smoking and oxygen" caused the fire. Dr. Chau opined that Dr. Ojo deviated from the standard of care by "essentially prescribing home oxygen and opiates, pain meds, [and] not offering alternatives to smoking—not offering any type of alternatives to the smoking cessation," and that, but for those failures, the fire would not have occurred as it did.

Dr. Chau stated,

> If you remove the oxygen, it's less likely to—I mean, he could have—I was not there. He could have theoretically, you know, taken his lighter and set, you know, the mattress on fire. Who knows. But in this particular case, there was a high-risk situation. And having oxygen near any flame increased the fire risk. And that he was cognitively impaired in that situation or potential for cognitive impairment and the lack of education was a setup for higher risk of—higher potential fire.

Thus, there is at least some evidence that Dr. Ojo's and A*Med's treatment of Vance resulted in his having a diminished mental capacity on the night of the fire and that his cognitive impairment was a substantial factor in causing the fire.

We sustain the Masons' and Vance's third issue.

E. Gross Negligence

In their fourth issue, the Masons and Vance argue that the trial court erred in granting summary judgment against them on the gross negligence claims against A*Med and Dr. Ojo.

Gross negligence requires a showing that (1) viewed objectively from the actor's standpoint, the act or omission complained of involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceeds in conscious indifference to the rights, safety, or welfare of others. TEX. CIV. PRAC. & REM. CODE § 41.001(11)(A), (B); *Boerjan v. Rodriguez*, 436 S.W.3d 307, 311 (Tex. 2014) (per curiam). "Evidence of simple negligence is not enough to prove either the objective or subjective elements of gross negligence." *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998).

We have already concluded that summary judgment on the Masons' and Vance's negligence claims was improper because there were material questions of fact on all essential elements of that claim. For the same reasons, we conclude that

there were material issues of fact remaining on their gross negligence claim. Viewed objectively, there was more than a scintilla of evidence that A*Med and Dr. Ojo were aware of an extreme degree of risk of a fire for a patient like Vance. Dr. Chau testified that oxygen-fed fires were a well-known risk and that the VA had created guidelines to help medical providers and caregivers manage the risk. Furthermore, there is more than a scintilla of evidence that A*Med and Dr. Ojo were subjectively aware of the risk but nevertheless proceeded in their treatment of Vance without properly addressing the risk. Danek testified that risk of oxygen fire was a "real possibility," and Dr. Ojo had had at least one patient die under similar circumstances.[2] Dr. Chau testified that the treatment was improper under the circumstances and that there were alternative treatments available that A*Med and Dr. Ojo failed to consider.

We sustain the Masons' and Vance's fourth issue. Because we have concluded that the trial court erred in granting summary judgment in favor of Dr. Ojo and A*Med on these issues, we need not address the Masons' and Vance's arguments in their fifth and sixth issues regarding the sufficiency of the no-evidence motions or the correct theory for determining the amount of damages.

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[2] Dr. Ojo argues that evidence of a former patient's death cannot constitute evidence that she was negligent in this circumstance. We note, however, that the evidence here is relevant to establishing her knowledge of the risks involved.

Conclusion

We reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Landau.