

NOT DESIGNATED FOR PUBLICATION

No. 125,343

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DOMINIQUE MOON, SURVIVING SPOUSE OF NICOLAS MOON, DECEASED,
on Behalf of all Wrongful Death Heirs, and
BRIAN BINA, ADMINISTRATOR OF THE ESTATE OF NICHOLAS MOON,
Appellants,

v.

ELSIE STEELBERG, M.D., and ADVOCATES FOR
BEHAVIORAL HEALTH,
Defendants,

and

WALGREEN CO.,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC A. COMMER, judge. Opinion filed May 12, 2023.
Affirmed.

Christopher L. Schnieders, of Napoli Shkolnik PLLC, of Overland Park, and *Kenneth Chesebro*,
pro hac vice, of New York, New York, for appellants.

Chris S. Cole and *Anthony M. Singer*, of Woodard, Hernandez, Roth & Day, LLC, of Wichita, for
appellee.

Before SCHROEDER, P.J., WARNER and CLINE, JJ.

WARNER, J.: This is a wrongful-death lawsuit against Walgreen Co. ("Walgreens")
arising from Nick Moon's prescription-drug-related death. The district court granted

summary judgment for Walgreens on two grounds, and then Moon's widow and estate went to trial and obtained a judgment against the doctor who wrote Moon's prescriptions. Moon's widow and estate now appeal the decision to grant summary judgment for Walgreens.

But the plaintiffs appeal only one of the independent grounds on which the district court granted summary judgment. The failure to appeal the other—that Walgreens lacked a legal duty to intervene in Moon's treatment—disposes of the plaintiffs' claims because that ground alone suffices to uphold the district court's decision. And the plaintiffs acquiesced in the jury verdict by collecting on that judgment, which prevents them from seeking additional damages from Walgreens. We thus affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In early 2016, there was a workplace shooting at the Excel plant in Hesston. The shooter killed three people and wounded others. Among the wounded was Moon, who worked at the plant.

Moon suffered serious physical and mental fallout from the shooting. He was shot through his right lower leg, shattering his tibia and fibula. These injuries led to multiple surgeries and chronic pain. He suffered from PTSD, depression, anxiety, and sleep issues. Moon was also devastated about the death of one of the victims, who had been "like a sister" to him. He also exhibited behavioral changes like avoiding crowds and routine tasks, wearing a Kevlar vest in public, and becoming obsessed with guns.

Moon's treatment and death

Through a workers-compensation proceeding, Moon was referred to a psychiatrist—Dr. Elsie Steelberg. Dr. Steelberg had practiced medicine since 1960,

spending 18 years as an anesthesiologist before shifting to psychiatry. At some point after the shooting, Moon also began therapy and substance-abuse treatment.

When Moon began seeing Dr. Steelberg, she prescribed him several medications to address his physical pain and mental-health issues. Most relevant here, his prescriptions included Norco (an opioid also known as hydrocodone) and Lorazepam (a benzodiazepine). While not an unusual combination, opioids and benzodiazepines—when taken together—can be dangerous and even life threatening.

As time went on, Moon's physical and mental-health issues continued. Dr. Steelberg increased Moon's Norco and Lorazepam dosages, and later prescribed another benzodiazepine. In September 2017—about a year and a half after the shooting—Dr. Steelberg transitioned Moon from Norco to oxycodone, a stronger opioid. In this period, Dr. Steelberg received two letters from Moon's insurance company noting that he was receiving an opioid amount exceeding the workers-compensation carrier's morphine-equivalent dose threshold. These letters served as notifications and were not intended to replace Dr. Steelberg's clinical judgment. Dr. Steelberg later wrote Moon's insurance company a letter expressing concern that he was not receiving his medications and confirming her prescription decisions.

Moon filled most of his prescriptions at a Walgreens in Newton. Besides one time when Moon went to fill his Lorazepam prescription a day early—which the pharmacist did after contacting Dr. Steelberg—there were no issues with his prescriptions at Walgreens and no signs that he was abusing his medication.

In late October 2017, Moon's wife relocated to Missouri with their son, while Moon remained in Newton. Then, in December of that same year, Moon was found dead at his Newton home. The cause of death was mixed drug toxicity. Police found an empty oxycodone bottle near Moon's body that he had filled about a week earlier. The bottle had

contained 180 doses and was supposed to last for a month, suggesting that Moon ingested a month's worth of oxycodone in under a week. In the months before his death, Moon experienced problems in his personal life and had expressed suicidal thoughts. The coroner could not determine whether Moon's death was intentional.

Moon's heirs and estate file suit

Moon's widow and the administrator of his estate subsequently brought a lawsuit against several parties, seeking damages for Moon's death. The lawsuit named Dr. Steelberg, her practice group, Walgreens, Moon's other therapists and their employer, and Injured Workers Pharmacy (another pharmacy where Moon had filled some prescriptions) as defendants, alleging that the defendants negligently caused Moon's death. As the litigation progressed, multiple defendants settled or were dismissed, and ultimately only Dr. Steelberg, her practice group, and Walgreens remained.

The district court's final pretrial order crystalized the parties' claims and defenses. Moon's estate made 11 claims against Walgreens:

- Five claims about Walgreens' failure to contact Dr. Steelberg with concerns about Moon's prescriptions;
- Two claims about Walgreens' failure to communicate with Moon directly about the risks associated with his prescriptions;
- Three claims about the way Walgreens filled the prescriptions—that is, by using "incomplete and second hand information" about Moon's history, by inadequately considering the interactions of his medications, and by ignoring internal policies when filling specific prescriptions;

- One claim about Walgreens' failure to offer or encourage Moon to keep Naloxone (an opioid antagonist that can be lifesaving during an overdose).

Summary judgment for Walgreens

Walgreens sought summary judgment on two independent grounds. First, Walgreens asserted that there was no evidence—absent rank speculation—of causation. That is, there was no evidence that Moon would be alive even if Walgreens had done what his estate claimed it should have done. Second, Walgreens asserted that Kansas law imposed no duty on its pharmacists to intervene in Moon's treatment or Dr. Steelberg's prescription decisions.

The district court heard arguments on Walgreens' motions and granted judgment in Walgreens' favor on both bases shortly before trial was set to begin. The court found that Walgreens had no duty to interfere with a doctor's treatment decisions and, even if there were, there was no evidence from which a jury could find Walgreens' inaction proximately caused Moon's death. This decision resolved all claims against Walgreens, so the court dismissed it from the case.

Though not part of the record on appeal, the parties agree that Moon asked the district court to allow an interlocutory appeal of its summary-judgment ruling. The court denied that request since the remaining parties had been preparing for the looming jury trial, finding the matter could be appealed with any other claims after the trial.

The jury verdict, satisfaction of judgment, and appeal

The plaintiffs' case against the remaining defendants—Dr. Steelberg and her practice group—proceeded to a jury trial. After hearing all the evidence, the jury found that the plaintiffs had suffered about \$2.5 million in damages from Moon's death.

The verdict form asked the jury to apportion the fault, if any, for Moon's death between Dr. Steelberg, her practice group, and Moon himself. The jury found that each of the three actors was partially responsible—Dr. Steelberg was 40% at fault; the practice group contributed 15% of the fault; and Moon bore 45% of the responsibility. Accounting for proportional fault and other legal limitations, the district court entered judgment against Dr. Steelberg for \$1,030,000 and against her practice group, Advocates for Behavioral Health, for \$386,250.

After the trial and judgment against Dr. Steelberg, Moon's widow and estate appealed the district court's earlier grants of summary judgment for Walgreens. They did not appeal any aspect of the jury verdict or the trial judgment.

The day after the plaintiffs filed their notice of appeal, the plaintiffs, Dr. Steelberg, and her practice agreed to resolve the plaintiffs' claims and the jury's verdict through a \$1 million payment to the plaintiffs and their counsel, with \$700,000 paid immediately and \$300,000 to be paid in one year. The district court approved this resolution in an order, stating the resolution did not "in any way impact plaintiffs' claims against Walgreen Co."

The plaintiffs acknowledge that, with this resolution, the final judgment against Dr. Steelberg and Advocates for Behavioral Health has been satisfied. They also acknowledge that they have not challenged any aspect of the jury verdict on appeal. But they challenge the district court's grant of summary judgment to Walgreens, asserting that their claims that Walgreens negligently and proximately caused Moon's death should be allowed to go to trial.

DISCUSSION

The plaintiffs raised several claims against Walgreens in their petition, all alleging that Walgreens was negligent in its interactions with Moon. In each of these claims, the plaintiffs had the burden to prove that Walgreens owed Moon a legal duty that Walgreens breached, and that this breach caused Moon's death. See *Sall v. T's, Inc.*, 281 Kan. 1355, Syl. ¶ 2, 136 P.3d 471 (2006). The plaintiffs did not have to prove that they would succeed on these claims at trial to overcome Walgreens' motion for summary judgment. But they had to show that it was legally *possible* for them to prevail and that the outcome of the case turned on genuine factual disputes that required a trial to resolve.

Kansas courts have long recognized that—given the factual nature of negligence claims—summary judgment "is seldom proper in negligence cases." *Esquivel v. Watters*, 286 Kan. 292, Syl. ¶ 3, 183 P.3d 847 (2008). This is because summary judgment is only appropriate when "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." K.S.A. 2022 Supp. 60-256(c)(2). "In the vast majority of cases, claims based on negligence present factual determinations for the jury, not legal questions for the court." *Hauptman v. WMC, Inc.*, 43 Kan. App. 2d 276, Syl. ¶ 1, 224 P.3d 1175 (2010). But summary judgment is proper in a negligence case when "the only questions presented are questions of law" or when "reasonable persons could arrive at only one conclusion" under the facts. 43 Kan. App. 2d 276, Syl. ¶ 1.

A party seeking summary judgment must show there are no disputed questions of material fact—that there is nothing the fact-finder could decide that would change the outcome in the case. See *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). In reviewing a summary-judgment motion, the district court views the evidence in the light most favorable to the nonmoving party, giving that party the benefit of every reasonable inference drawn from the evidentiary record. 289 Kan. at

900. Because summary judgment tests the legal viability of a claim, we apply this same framework on appeal. *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013).

Although summary judgment is rare in negligence actions, appellate courts have upheld summary judgment when the defendant had no legal duty to act because "[w]hether a duty exists is a question of law." *Sall*, 281 Kan. 1355, Syl. ¶ 2. Here, the district court entered summary judgment in Walgreens' favor for two independent reasons—one arising from Walgreens' absence of a legal duty and one relating to causation:

- The court found that a pharmacy like Walgreens has no legal duty under Kansas law to intervene in the physician-patient relationship or to second-guess a physician's prescriptions for a patient. See *Nichols v. Central Merchandise, Inc.*, 16 Kan. App. 2d 65, 68, 817 P.2d 1131, *rev. denied* 250 Kan. 805 (1991). Thus, because Walgreens had no duty to intervene in Dr. Steelberg's treatment of Moon, the district court granted Walgreens judgment as a matter of law as to all the plaintiffs' claims.
- The court found that the plaintiffs could not prove that Walgreens caused Moon's death. The court concluded that the plaintiffs had offered no facts, beyond speculation, showing that even if Walgreens had contacted Dr. Steelberg regarding the prescriptions or declined to fill the prescriptions, it would have changed the doctor's treatment decisions. In particular, the court pointed to Dr. Steelberg's refusal to alter Moon's prescriptions when Moon's insurance company told her the prescribed dosages exceeded the workers-compensation carrier's limits. The district court found that this absence of evidence to support the plaintiffs' causation analysis independently resulted in judgment for Walgreens on all but one of the plaintiffs' 11 claims against the pharmacy.

On appeal, the plaintiffs argue that summary judgment was improper. They argue that because the district court did not grant summary judgment for Walgreens based on causation for all the plaintiffs' claims, the outstanding claim should have proceeded to trial. Plaintiffs now characterize that claim as a claim for the "negligent filling of prescriptions."

Walgreens disputes this position on several fronts. Walgreens notes that the district court's summary-judgment rulings disposed of all claims and asserts that the claim that the plaintiffs are articulating on appeal differs from that described in the parties' final pretrial order. Walgreens also asserts that there are two reasons why we should not reach the plaintiffs' arguments at all:

- First, the plaintiffs did not appeal the district court's ruling that Walgreens had no duty to intervene in the physician-patient relationship, and that deficiency alone is sufficient to support judgment in its favor.
- Second, because the plaintiffs did not appeal the jury verdict, they are bound by the jury's findings regarding the extent of their damages and fault. And because they have acquiesced to that verdict and judgment by accepting payment, they cannot now seek a second trial that would undermine those findings.

We agree on both counts and thus affirm the judgment of the district court.

1. *The plaintiffs' challenge to the district court's ruling on causation is moot because they did not appeal the court's alternative ruling that Walgreens had no legal duty to intervene in Moon's relationship with Dr. Steelberg.*

Under Kansas law, pharmacists must "exercise professional judgment regarding the accuracy, validity and authenticity of any prescription order" and "shall not dispense a prescription drug if the pharmacist, in the exercise of professional judgment, determines

that the prescription is not a valid prescription order." K.S.A. 2022 Supp. 65-1637(a); see also K.A.R. 68-2-20(b), (e) (2022 Supp.).

In the negligence context, this court has recognized that pharmacists have no legal duty "to question a judgment made by the physician as to the propriety of a prescription or to warn customers of the hazardous side effects associated with a drug." *Nichols*, 16 Kan. App. 2d at 68 (quoting *McKee v. American Home Products*, 113 Wash. 2d 701, 720, 782 P.2d 1045 [1989]). Rather, pharmacists have "a duty to accurately *fill* a prescription . . . and to be alert for clear errors or mistakes in the prescription." *Nichols*, 16 Kan. App. 2d at 68 (quoting *McKee*, 113 Wash. 2d at 720). The plaintiffs do not contend that Moon's prescriptions were invalid or that Walgreens filled them inaccurately.

The district court relied on *Nichols* to find that Walgreens had no duty to intervene in the doctor-patient relationship between Dr. Steelberg and Moon. This reflects the majority approach in other jurisdictions that have considered the issue. See, e.g., *Walls v. Alpharma USPD, Inc.*, 887 So. 2d 881, 886 (Ala. 2004); *Moore ex rel. Moore v. Memorial Hospital of Gulfport*, 825 So. 2d 658, 665 (Miss. 2002); *Klasch v. Walgreen Co.*, 127 Nev. 832, 838, 264 P.3d 1155 (2011) (citing *Nichols*, 16 Kan. App. 2d at 67). And because the plaintiffs do not challenge this finding—or *Nichols*—on appeal, the district court's alternative causation ruling is superfluous.

As we have indicated, the district court granted Walgreens summary judgment on two independent legal bases—lack of a legal duty and lack of causation. The plaintiffs attempt to paint the district court's ruling regarding the absence of a duty narrowly, arguing that the lack of duty only applied to their failure-to-warn claims. But the district court's ruling was not so narrow. Quoting *Nichols*, the district court noted that pharmacists have no duty "to question a judgment made by the physician as to the propriety of a prescription or to warn customers of the hazardous side effects." And the district court's ruling indicated that, "*through all of their contentions*, [the plaintiffs] seek

to put the pharmacists in a position of interfering with or questioning the physician's treatment decisions. The law does not impose such a duty.'" (Emphasis added.) The district court's finding about Walgreens' lack of duty applied to all the plaintiffs' claims.

On appeal, however, the plaintiffs only challenge the district court's causation ruling. The decision not to appeal the duty-based ruling leaves intact an independent basis for summary judgment, regardless of whether the district court erred in its ruling on causation. See *Greenwood v. Blackjack Cattle Co.*, 204 Kan. 625, 627-28, 464 P.2d 281 (1970) (finding it unnecessary to decide issue on appeal when appellant failed to challenge alternative basis for judgment).

At oral argument before this court, the plaintiffs' attorney tried to change course and challenge both the district court's duty ruling and the *Nichols* decision. But these issues were not before us; the plaintiffs' briefs did not challenge the finding, based on *Nichols*, that Walgreens owed Moon no duty to intervene in his care. See *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018) (issues not briefed are deemed waived or abandoned). Indeed, the plaintiffs did not even mention *Nichols*, let alone argue that it was wrong, in their initial brief on appeal, and they made only a passing reference to it—but did not argue its merits or application—in their reply brief. The last-minute attempt to pivot at oral argument and challenge that decision does not allow for a meaningful response to that argument by Walgreens or meaningful consideration of that question by the court. In short, the issue is not before us on appeal.

Thus, the district court's unchallenged ruling that Walgreens lacked a legal duty to intervene in Moon's care resolves this case. Because this finding provides an independent basis for summary judgment, any discussion of causation—the only issue the plaintiffs raise on appeal—would be academic and have no practical effect on this case. See *Greenwood*, 204 Kan. at 628 (courts do not determine abstract or academic questions); see also *State v. Roat*, 311 Kan. 581, Syl. ¶ 1, 466 P.3d 439 (2020) (claim is moot when

"the actual controversy has ended" and a judgment "would be ineffectual for any purpose" and "would not have an impact on any of the parties' rights").

The district court granted summary judgment on two separate but equally definitive grounds: duty and causation. Both are required to establish a negligence claim. The plaintiffs appeal only one of those grounds, leaving the other intact. This remaining ground—that Walgreens owed no duty to intervene in Moon's medical care—is dispositive here. Because we affirm the district court's grant of summary judgment on that basis, we need not address the plaintiffs' arguments regarding causation.

2. *The plaintiffs acquiesced in the jury verdict by collecting on that judgment, and Kansas law prevents them from seeking additional damages from Walgreens.*

Because Walgreens had no legal duty to intervene in the doctor-patient relationship between Dr. Steelberg and Moon, the district court correctly granted judgment in Walgreens' favor. But even absent such a ruling, the procedural posture of this case—where the plaintiffs presented their damages to a jury, have not appealed that verdict, and have accepted payment in satisfaction of that judgment—would not allow the plaintiffs to seek additional damages in tort from Walgreens, or some other party, for Moon's death.

Kansas law employs the principle of comparative fault in negligence cases. See K.S.A. 2022 Kan. 60-258a. Under this principle, any party whose causal negligence is claimed to have contributed to an alleged injury must be joined as an additional party to the lawsuit and must be included as a party at trial. See *Rodina v. Castaneda*, 60 Kan. App. 2d 384, 387, 494 P.3d 172, *rev. denied* 314 Kan. 855 (2021).

Here, the plaintiffs sued Walgreens, in addition to Dr. Steelberg and her practice group, alleging that Walgreens was partially responsible for Moon's death. Their efforts

to have Walgreens present at trial, so that the pharmacy's alleged fault could be considered and compared, were thwarted by the district court's summary-judgment ruling. The plaintiffs then presented their claims against Dr. Steelberg and her practice group to the jury at trial.

At trial, the plaintiffs were required to prove their damages—that is, they were required to show the extent of the injuries that they had suffered. After hearing all the evidence, the jury concluded that the plaintiffs had suffered roughly \$2.5 million in losses as a result of Moon's death. The jury also found that Moon himself was 45% at fault for his passing—and that proportion of fault was attributed to the plaintiffs. See K.S.A. 2022 K.S.A. 60-258a(a) ("If a party claims damages for a decedent's wrongful death, the negligence of the decedent, if any, must be imputed to that party."). The jury divided the remaining proportional fault between Dr. Steelberg and her practice group.

The plaintiffs did not appeal any aspect of the jury's ruling. Nor do they provide any argument or evidence as to why the jury's damage assessment or its findings regarding Moon's comparative fault were erroneous. Thus, the plaintiffs are bound by those findings—they cannot assert that the jury's award of damages should have been different or that Moon's fault should be reassessed. Accord *Arnett*, 307 Kan. at 650.

The plaintiffs also acknowledge that the proportion of their damages the jury did not attribute to Moon—the damages caused by Dr. Steelberg and her practice group—have been paid, and the resulting judgment has been satisfied.

Based on this combination of events—the plaintiffs' decision not to appeal, and thus accept the jury verdict, and the decision to accept full payment of the damages from that judgment—Walgreens argues that the plaintiffs cannot maintain their claims that Walgreens' actions caused Moon's death and led to additional damages. We agree—the plaintiffs have acquiesced to the jury's verdict and resulting judgment.

When a party acquiesces in a judgment, that party forfeits the right of appellate review. *Varner v. Gulf Insurance Co.*, 254 Kan. 492, 494, 866 P.2d 1044 (1994). "The gist of acquiescence sufficient to cut off a right to appeal is voluntary compliance with the judgment"—assuming its burdens or accepting its benefits. 254 Kan. at 494 (quoting *Younger v. Mitchell*, 245 Kan. 204, Syl. ¶ 1, 777 P.2d 789 [1989]). The plaintiffs' decision here to accept the jury verdict against Dr. Steelberg and collect on that judgment means that they agreed to be bound by it and forfeited any right to challenge any part of that decision. This includes the jury's assessment of the damages the plaintiffs suffered and the relative fault of each of the parties at trial (and most notably, Moon's fault).

The plaintiffs urge that the policies behind acquiescence do not apply here, as the district court's summary-judgment ruling—not any action by the plaintiffs—prevented them from comparing the fault of Walgreens at trial. For support, they turn to *Hemphill v. Ford Motor Co.*, 41 Kan. App. 2d 726, 731-33, 206 P.3d 1 (2009), when this court refused to apply the acquiescence doctrine to bar an appeal against one defendant even though the plaintiffs accepted a judgment against another defendant. But the claims in that case arose out of a contract that only involved some of the parties. 41 Kan. App. 2d at 728. As a result, this court observed that the "acceptance of payment from [one defendant in that case] doesn't logically relate to whether the Hemphills' claims against [a different defendant] are subject to arbitration." 41 Kan. App. 2d at 729.

The same is not true here. The plaintiffs had one claim for damages—the injuries that they suffered as a result of Moon's death. The plaintiffs' claims against each of the three defendants involved at the time of the summary-judgment briefing—Dr. Steelberg, Advocates for Behavioral Health, and Walgreens—were all based on negligence, arguing that each defendant was responsible to some extent for that tragedy. Thus, these claims required a comparison of the parties' proportional fault for the plaintiffs' injuries. K.S.A. 2022 Supp. 60-258a.

The plaintiffs have not demonstrated that the district court erred when it granted summary judgment in Walgreens' favor. But even if it had, to compare Walgreens' fault with the other defendants, the plaintiffs had to appeal the jury's verdict and seek a new trial where Walgreens could be included. Such an action would have provided an avenue by which a jury would have the opportunity to compare all potential fault. But the plaintiffs have not appealed the jury's findings, thus waiving those arguments. And they have accepted payment in full satisfaction of the proportion of the damages not caused by Moon. They have thus foreclosed any opportunity to reconsider damages or reassess fault.

We affirm the district court's decision granting summary judgment for Walgreens. The plaintiffs have not challenged the ruling that Walgreens had no duty to intervene in Moon's care, and that ruling was an independent basis for summary judgment. The plaintiffs also acquiesced in the judgment against Dr. Steelberg, which prevents them from seeking additional damages based on negligence against Walgreens.

Affirmed.