IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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Mark Reynolds

Opinion Number: _____

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No. A-1-CA-41413

PEGASUS LEGAL SERVICES FOR CHILDREN; ARACELI M., a minor; MARISELA SANCHEZ; and ISAAC MAESTAS,

Plaintiffs-Appellants,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO, a body corporate of the STATE OF NEW MEXICO, for itself and its public operations; UNM HEALTH SCIENCES CENTER, and its components; UNM HOSPITAL; UNM SCHOOL OF MEDICINE; and DAVID G. LEMON, M.D.,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Nancy J. Franchini, District Court Judge

Durham, Pittard & Spalding LLP
Caren I. Friedman
Rosalind B. Bienvenu
Santa Fe, NM

Curtis & Co.
Lisa K. Curtis
Theresa V. Hacsi
Albuquerque, NM

for Appellants

Riley Keller Gonzales
David A. Gonzales
D. Chet Alderete
Spirit A. Gaines
Jared West
Albuquerque, NM

for Appellees

OPINION

IVES, Judge.

{1} This medical malpractice case requires us to apply the law of New Mexico regarding multiple tortfeasors in the context of jury instructions. The key question pertains to the successive tort rule that if "a first injury is caused by an original tortfeasor[and t]hat injury then causally leads to a second distinct injury, or a distinct enhancement of the first injury, caused by a successive tortfeasor," then the original tortfeasor is jointly and severally liable for both injuries. *Payne v. Hall*, 2006-NMSC-029, ¶¶ 12-13, 139 N.M. 659, 137 P.3d 599.

{2} The patient is Areceli M., who, as an infant, was diagnosed and treated by several doctors over the course of several weeks, first in New Mexico and later in Colorado. In New Mexico, Defendant Dr. David Lemon, an employee of Defendant University of New Mexico Hospital (UNMH), removed significant portions of Areceli's colon. In Colorado, several medical providers who are not defendants provided treatment, including surgeries that removed significant portions of Areceli's small intestine. The latter procedures resulted in a long-term condition called short bowel syndrome. The jury returned a verdict in favor of Defendants.

{3} On appeal, Plaintiffs contend that the district court erred by denying Plaintiffs' request for a jury instruction that would have allowed Plaintiffs to argue to the jury that, under successive tort law, Defendants were jointly and severally liable for the

loss of Areceli's small intestine and resulting short bowel syndrome. We hold that the evidence raised fact questions for the jury about successive tort liability for one of the two theories of negligence pursued by Plaintiffs, and that the absence of successive tort law instructions on that theory was prejudicial to Plaintiffs. We also hold that Plaintiffs did not raise their successive tort theory too late in the litigation and that they preserved the instructional error issue. We therefore reverse and remand for a new trial as to one of Plaintiffs' two theories of negligence, but we decline to disturb the jury's verdict as to Plaintiffs' other theory of negligence because the jury received instructions on the law applicable to that theory.

BACKGROUND

I. The Evidence at Trial

{4} After Plaintiffs Marisela Sanchez and Isaac Maestas saw blood in the diaper of their infant daughter, Areceli, they took her to a hospital in Las Vegas, New Mexico. Given the seriousness of Areceli's condition, Areceli was transferred to UNMH in Albuquerque because that facility had a higher level of care and more specialty services. A few hours after arriving that night, doctors at UNMH performed an ultrasound and diagnosed Areceli with an ileocolic intussusception—a condition in which the small intestine "telescopes" into the colon. To try to undo the telescoping, they unsuccessfully attempted an air enema, which involved pushing air through Areceli's rectum. After the enema, Areceli underwent a computed

tomography (CT) scan, was monitored and treated in the pediatric intensive care unit for the rest of the night, and, after blood tests showed her hematocrit and hemoglobin levels were low, she received a blood transfusion.

{5} In the morning, a second attempt to undo the telescoping was made by Dr. Lemon, a pediatric surgeon at UNMH. He performed a surgery called a subtotal colectomy. The surgery involved removing a significant portion of Areceli's colon and a small amount of her small intestine, and then reattaching the remaining portions and suturing Areceli's mesentery.

{6} After the surgery, Dr. Lemon wrote in his operative note that he performed a different operation: a right ileocolectomy with ileocolonic anastomosis. This surgery would have involved the removal of less of Areceli's colon than was removed, along with the small amount of small intestine. After the surgery, Plaintiff Marisela Sanchez, Areceli's mother, did not recall Dr. Lemon telling her how much of Areceli's colon he removed.

{7} Areceli stayed at UNMH for a few more days. After she began to eat, urinate, defecate, and pass gas normally, she was released from UNMH, and she returned home to Pueblo, Colorado.

{8} Areceli was stable for a short time. However, after about two weeks, she became fussy, stopped eating, and stopped sleeping. Her parents took her to a hospital in Pueblo, which transferred her to a hospital in Colorado Springs. There,

several doctors, who we describe collectively as the Colorado doctors, took charge of Areceli's care. Dr. Kristen Darden, a radiologist, first performed an ultrasound, after which she suspected Areceli had a repeat ileocolic intussusception—a second episode of telescoping.

{9} To reverse the telescoping, Dr. David Bliss, a pediatric surgeon, then ordered a contrast reduction enema, which Dr. Darden performed by instilling contrast dye and air into Areceli's colon and small intestine. Areceli's condition only worsened. After some time, the Colorado doctors performed a CT scan, which revealed that Areceli had a "possible bowel obstruction [or a] possible volvulus" (a malrotation of her intestine).

{10} Dr. Bliss performed exploratory surgery. He discovered Areceli's small intestine had herniated through a hole in her mesentery. Dr. Bliss performed additional surgeries, removing significant portions of Areceli's small intestine that had died due to the hernia. The removal of her small intestine left her with a long-term condition called short bowel syndrome. Because of this syndrome, Areceli has great difficulty absorbing nutrients and has to be fed through a gastronomy tube surgically placed in her stomach.

II. Procedural History

{11} Plaintiffs did not sue any of the Colorado doctors; they sued only Defendants, alleging that their negligence caused Areceli's injuries. Plaintiffs' two theories of

the case were that Dr. Lemon acted negligently by failing to accurately communicate the care he provided in his postoperative note and in his conversation with Areceli's parents and that he also acted negligently by failing to timely perform surgery and by failing to properly close the mesentery.

{12} In their answers, Defendants denied that any of Areceli's injuries were caused by their negligence, and Defendants sought to shift the blame for Areceli's short bowel syndrome entirely to the Colorado doctors through a proximate cause defense and, alternatively, sought to spread the blame through a comparative fault defense. Specifically, Defendants contended that Dr. Darden improperly diagnosed Areceli with an ileocolic intussusception; "failed to properly dilute the" substance used for contrast in "the contrast and air enema"; and inserted, and "failed to recognize that she had inserted," the improperly diluted contrast in Areceli. Defendants also contended that Dr. Bliss negligently ordered the enema; "failed to timely order a CT [s]can"; "failed to timely diagnose [Areceli's] bowel obstruction"; and failed to inform the other Colorado doctors of Areceli's recent surgery at UNMH. Despite these allegations, Defendants did not seek to join any of the Colorado doctors as parties.

{13} Plaintiffs sought to rebut Defendants' theories both factually and legally, and their legal rebuttal was based on a theory of successive tortfeasor liability. Plaintiffs explicitly identified that theory for the first time after Defendants filed their answer

and after discovery closed, when Plaintiffs proposed to add the following language and amend the original version of the pretrial order: "Defendants' negligence caused additional medical treatment and if any Colorado providers' subsequent treatment was provided negligently[,] it was foreseeable and Defendant is the original tortfeasor and liable for that harm as well." The district court rejected this addition.

{14} Following presentation of evidence at trial, Plaintiffs renewed their request to present their successive tort theory to the jury. Plaintiffs proposed an instruction on the topic that tracked UJI 13-1802B NMRA:

> In this case, if you find that [Defendants] were negligent and caused injury to [Plaintiff], they are also responsible for any harm caused by medical care that [Plaintiff's] injury reasonably required, even if the medical care was negligently performed.

In support of their proposed instruction, Plaintiffs argued that successive tort law applied to the evidence presented at trial and that they were pursuing the theory to rebut Defendants' theory that the Colorado doctors negligently caused Areceli's short bowel syndrome.

{15} Defendants opposed giving the jury a successive tort instruction for both procedural and substantive reasons. Defendants' procedural argument was that Plaintiffs failed to plead the theory; that they raised it too late in the litigation; and that allowing Plaintiffs to pursue the theory after the close of discovery would be prejudicial to Defendants. Defendants' substantive argument was that Plaintiffs failed to prove their successive tort theory at trial.

{16} The district court ruled against Plaintiffs for purely procedural reasons, concluding that Plaintiffs failed to plead successive tort theory and the parties did not try the theory by consent. The court did not reach the substantive question of whether the evidence might support successive tort liability, warranting an instruction on the topic.

{17} Consistent with the district court's ruling, the jury received instructions and a special verdict form based on ordinary principles of medical negligence and damages, including comparative fault. The special verdict form required the jury to answer two questions of fact to determine whether Defendants were liable for any damages. First, the jury was asked to decide whether Dr. Lemon was negligent. Second, if he was negligent, the jury was asked to determine whether his negligence was "a cause of a plaintiff's injuries and damages." Although the jury instructions identified the different ways that Plaintiffs claimed Dr. Lemon had been negligent, the verdict form did not ask the jury to specify which acts of alleged negligence by Dr. Lemon were and were not proven by Plaintiffs. Nor did the verdict form ask the jury to specify which injuries and damages were or were not caused by any negligent act of Dr. Lemon. The verdict form's lack of specificity with respect to the acts of alleged negligence and the injuries claimed by Plaintiffs is consistent with the example special verdict forms for personal injury cases, UJI 13-302F NMRA, and

with the verdict form for comparative fault cases, UJI 13-2220 NMRA, both of which use general language: "negligence" and "injuries and damages."

{18} During deliberations, the jury sent a note to the district court, asking whether the term "injuries" in the verdict form "refer[s] specifically . . . to [Areceli's] small bow[e]l syndrom[e]." While discussing how to answer the question, the parties emphasized the dispute over Areceli's injuries. Plaintiffs argued that Areceli suffered four discrete injuries. During her time at UNMH, because of the delayed surgery, there was pain and suffering, loss of blood, and the loss of more of her colon than necessary. Then, in Colorado, she developed short bowel syndrome. But Defendants argued her only injury was the short bowel syndrome developed in Colorado. The district court simply instructed the jury "to rely on the jury instructions and the evidence provided."

{19} The jury found that Dr. Lemon was negligent, but, consistent with the special verdict form, the jury did not identify any specific act or acts of negligence. However, the jury also found that Dr. Lemon's negligence did not cause injuries or damages. The jury therefore returned a verdict in favor of Defendants.

{20} Plaintiffs appeal the district court's denial of their request to instruct the jury on successive tortfeasor liability. Defendants respond that a successive tortfeasor instruction was not supported by the evidence, was procedurally barred, and was not properly requested.

DISCUSSION

{21} We discuss the three issues in this appeal in turn. First, we explain why we conclude that the evidence did not warrant successive tort instructions as to Plaintiffs' theory that Dr. Lemon inaccurately communicated the type of surgery he performed, but that the evidence did warrant successive tort instructions on Plaintiffs' theory that Dr. Lemon negligently delayed and negligently performed surgery. Second, we explain why we disagree with the district court's procedural ruling that Plaintiffs could not pursue their successive tort theory because they raised it too late in the litigation. Finally, we explain why we conclude that Plaintiffs preserved their claim of error.

I. The Evidence at Trial Required Jury Instructions on Successive Tort Law as to One of Plaintiffs' Two Theories of Negligence

{22} Plaintiffs argue that the jury should have received an instruction on Plaintiffs' successive tortfeasor theory because it was supported by the evidence presented at trial. *See Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 19, 141 N.M. 808, 161 P.3d 853 ("A party is entitled to instructions on all of [their] correct legal theories of the case if there is evidence in the record to support the theories."). According to Plaintiffs, because the jury was not fully instructed on the applicable law, the instructions were confusing, and Plaintiffs suffered prejudice.

{23} Reviewing the issue de novo, *see id.*, we agree with Plaintiffs in part.[1] We disagree with Plaintiffs that successive tort law applies to their theory that Dr. Lemon negligently described the surgery in his operative note and in his communication with Areceli's parents, but we agree with Plaintiffs that the evidence supported the giving of jury instructions on successive tort law as to their theory that Dr. Lemon negligently delayed and negligently performed the surgery. We explain the reasons for these differing conclusions by first summarizing the relevant parts of New Mexico's legal framework for cases involving multiple tortfeasors. We then apply that framework to the evidence presented at trial. In so doing, we explain why

[1]Defendants assert that our standard of review is abuse of discretion, citing *Sonntag v. Shaw*, 2001-NMSC-015, ¶ 15, 130 N.M. 238, 22 P.3d 1188. *Sonntag* was decided before *Benavidez*, which states that the standard of review is de novo, 2007-NMSC-026, ¶ 19, and we have found no precedential or even nonprecedential opinions from our Supreme Court or this Court that apply the abuse of discretion standard of review set forth in *Sonntag*. *Benavidez* appears to be the last word from our Supreme Court on the topic, and this Court has consistently relied on *Benavidez*. *See Hoeschen v. N.M. Dep't of Transp.*, 2026-NMCA-023, ¶ 28, 584 P.3d 1136; *City of Albuquerque v. Tecolote Res., Inc.*, 2024-NMCA-029, ¶ 8, 544 P.3d 321; *Sandoval v. Gurley Props. Ltd.*, 2022-NMCA-004, ¶ 11, 503 P.3d 410; *Lopez v. Devon Energy Prod. Co.*, 2020-NMCA-033, ¶ 9, 468 P.3d 887; *Mikeska v. Las Cruces Reg'l Med. Ctr.*, 2016-NMCA-068, ¶ 23, 388 P.3d 266; *Dills v. N.M. Heart Inst., P.A.*, 2016-NMCA-023, ¶ 13, 367 P.3d 467; *Silva v. Lovelace Health Sys., Inc.*, 2014-NMCA-086, ¶ 13, 331 P.3d 958; *Talbott v. Roswell Hosp. Corp.*, 2008-NMCA-114, ¶ 25, 144 N.M. 753, 192 P.3d 267. And, in any event, the abuse of discretion standard of review includes de novo consideration of the application of the law to the facts, which is the task before us. *See N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450 ("[E]ven when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo." (internal quotation marks and citation omitted)).

Plaintiffs' negligent communication theory could only be pursued under concurrent tort law, and why the evidence at trial required jury instructions on both concurrent and successive tort law as to Plaintiffs' theory that the surgery was negligently delayed and performed. Finally, we explain why the absence of successive tort law instructions as to the latter theory was prejudicial to Plaintiffs.

A. Legal Framework

{24} The law pertinent to this multiple tortfeasor case consists of a general rule and an exception. The general rule is several liability, *see Payne*, 2006-NMSC-029, ¶ 11, under which the fault of "each plaintiff, defendant, beneficiary, and non-party that caused the plaintiff's total damage" is compared so that each is liable for the portion of damages they negligently caused. *Richter v. Presbyterian Healthcare Servs.*, 2014-NMCA-056, ¶ 63, 326 P.3d 50; *see* NMSA 1978, § 41-3A-1(A)-(B) (1987). This general rule of several liability and comparative fault applies to concurrent torts—that is, when "the negligent acts or omissions of two or more persons combine to produce a single injury." *Lujan v. Healthsouth Rehab. Corp*., 1995-NMSC-057, ¶¶ 8, 10, 120 N.M. 422, 902 P.2d 1025; *see Payne*, 2006-NMSC-029, ¶ 11 ("[W]hen concurrent tortfeasors negligently cause a single, indivisible injury, the general rule is that each tortfeasor is severally responsible for its own percentage of comparative fault for that injury." (emphasis omitted)).

{25} But when the torts are not concurrent but are instead successive, an exception applies. *See Payne*, 2006-NMSC-029, ¶ 13. Under the exception, the first tortfeasor is jointly and severally liable "for the full extent of both injuries, those caused by both the original tortfeasor and the successive tortfeasor." *Id.*; *see* § 41-3A-1(C)(4) (stating that the doctrine of joint and several liability applies to situations "having a sound basis in public policy"). The original tortfeasor may seek indemnification from the successive tortfeasor but only for the second or enhanced injury. *See Lujan*, 1995-NMSC-057, ¶ 17.

{26} To distinguish between concurrent and successive torts, courts in our state apply the rule succinctly stated by our Supreme Court in *Payne*: Torts are successive only if the first tortfeasor negligently caused "a first injury" that "causally le[d] to a second distinct injury, or a distinct enhancement of the first injury" that was "caused by a successive tortfeasor." 2006-NMSC-029, ¶ 12. This rule, as elaborated on in *Payne*, can be distilled into five elements that must be established when—as in this case—an injured plaintiff seeks to hold a defendant tortfeasor liable for a first injury allegedly caused by the defendant, and also liable for a second injury that resulted from the medical treatment for the first injury. The five elements are:

1. the first tortfeasor acted negligently, *see id.* ¶¶ 15, 19, 23, 29;

2. the first tortfeasor's negligence was a proximate cause of—both a cause-in-fact of and a foreseeable cause of—an injury, *see id.*;

3. the first injury was a proximate cause of—both a cause-in-fact of and a foreseeable cause of—subsequent medical treatment, *see id.* ¶¶ 26-28, 30;

4. subsequent medical treatment was provided, either properly or negligently, by a second tortfeasor, causing a second injury, *see id.* ¶¶ 15, 21, 32, 47; and

5. the first injury is causally distinct from the second injury, which is either a separate injury or an enhancement of the first injury, *see id.* ¶¶ 14-15, 19, 22-23.[2]

Elements 1 and 2—negligence and causation of an injury—must, of course, also be established in single-tortfeasor negligence cases, as well as in cases involving concurrent tortfeasors. What sets successive tort liability apart is the addition of elements 3, 4, and 5.

{27} The process for determining whether the elements of successive tort liability have been established divides tasks between the trial judge and the jury in the traditional manner. The judge answers questions of law, and the jury answers questions of fact. This seems simple, but implementing it is sometimes complex. *See id.* ¶¶ 42-43.

{28} Implementation is at its simplest when the evidence allows the judge to determine, as a matter of law, that successive tort law does not apply. This determination may be made when, for example, there is no evidence that an act of alleged negligence caused distinct injuries, *see id.* ¶ 48, or when it is not foreseeable

[2]To simplify somewhat, we have stated the elements in terms of a single first tortfeasor and a single second tortfeasor, even though in this case there were multiple alleged second tortfeasors.

that the plaintiff would receive medical treatment for the first injury. *See id.* ¶¶ 19-22, 28, 30 (recognizing that whether medical treatment was foreseeable is a legal question). Of course, in situations like these, the jury should not receive any successive tort instructions. The instructions should require the jury to apply the general rule of concurrent torts by comparing fault.

{29} Implementation becomes somewhat more complex when the judge concludes as a matter of law, or the parties agree, that successive tort law will apply if the jury determines that the first tortfeasor negligently caused an original injury. This occurs if elements 3, 4, and 5 are undisputed—that is, if medical treatment for the first injury was foreseeable, *see id.* ¶¶ 26-28, 30, such treatment was provided and caused a second injury, *id.* ¶ 28, and there are causally-distinct injuries. *Id.* ¶ 30. Then the original tortfeasor will be jointly and severally liable for the second injury if the jury finds that elements 1 and 2 have been proven—that is, if the first tortfeasor negligently caused the first injury. *Id.* ¶¶ 12-13. This must be explained to the jury using jury instructions tailored to fit the case. *See id.* ¶¶ 46-47; UJI 13-1802B.[3]

[3]The uniform successive tort instructions and verdict form that were in place throughout the pendency of the district court proceedings were the versions of UJIs 13-1802B, 13-1802C NMRA, 13-1802D NMRA, and 13-2222 NMRA adopted by our Supreme Court in 2007, shortly after *Payne* was decided. We note that while the appeal in the present case was pending, an amended set of proposed uniform instructions and a new set of proposed verdict forms on successive tort law was published for comment by our Supreme Court. *See* Proposed Revisions to the Uniform Jury Instructions-Civil, Proposal No. 2026-025 (Mar. 6, 2026),

{30} Implementation becomes even more complex when the jury must resolve factual disputes pertaining to more than the first two elements. *See Payne*, 2006-NMSC-029, ¶¶ 19, 23-25, 34-36, 40, 42-43. *Payne* illustrates this. There, our Supreme Court concluded that the trial evidence regarding one of the plaintiffs' theories required the jury to resolve factual disputes about whether negligent provision of medical care by the first tortfeasor and lone defendant caused a first injury that was separate and causally distinct from an injury caused by the second tortfeasor, a different medical provider. *Id.* ¶¶ 19, 23-25. In other words, factfinding by the jury was needed as to more than the elements of liability under ordinary tort law for the first injury: negligence (element 1) and causation of an injury (element 2). *See id.* ¶ 23. Factfinding was also needed as to two of the elements unique to successive tort liability: a second injury caused by the second tortfeasor (element 4) and causal distinctness of the second injury from the first (element 5). *Id.* ¶¶ 24-25. When, as in *Payne*, such extensive factfinding by the jury is required, the jury must receive more elaborate instructions and verdict forms to ensure that the verdict is based on the applicable law—which may be concurrent tort law or successive tort law, depending on the facts found by the jury. *Id.* ¶¶ 43-47; *see* UJI 13-1802E NMRA.

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https://supremecourt.nmcourts.gov/wp-content/uploads/sites/2/2026/04/Proposal-2026-025-Successive-Tortfeasor-no-comments-received.pdf.

{31} Complexity does not top out there. Its peak is reached when a plaintiff alleges multiple acts of negligence by the first tortfeasor, and the jury is not required to play the same role with respect to each act. For example, in *Payne*, as we have noted, the evidence did not require the jury to play any role in determining whether one of the plaintiff's theories of negligence established successive tort liability, *see* 2006-NMSC-029, ¶ 48, but the evidence required it to play a role as to the plaintiff's other theory of negligence, *see id.* ¶ 49. Under circumstances like these, the jury must receive a separate set of instructions as to each theory and a verdict form specifically tailored to the acts of alleged negligence and the specific injuries to which those acts correspond. *Id.* ¶¶ 48-50.

B. The Evidence Presented Factual Disputes That Required Concurrent Tort Law Instructions as to One Theory of Liability and Alternative Instructions on Concurrent and Successive Tort Law as to the Other Theory

{32} Having described the legal framework, we now answer the following question as to each of Plaintiffs' theories: whether the jury should have been instructed on successive tort law so that it could determine whether Defendants were jointly and severally liable for any of Areceli's injuries. First, we explain why we conclude that successive tort law does not apply as a matter of law to Plaintiffs' theory that Dr. Lemon negligently failed to accurately communicate which surgical procedure he performed on Areceli, and that therefore only concurrent tort law applies to this theory. Second, we explain why we conclude that jury instructions were needed so

that the jury could determine whether Plaintiffs had established the elements of successive tort liability as to their theory that Dr. Lemon acted negligently by delaying Areceli's surgery and by improperly closing Areceli's mesentery during that surgery. This leads to our third conclusion: The absence of successive tort instructions prejudiced Plaintiffs by preventing them from pursuing a potentially viable theory of joint and several liability for Areceli's short bowel syndrome.

1. Plaintiffs' First Theory: Negligent Communication

{33} We agree with Defendants that successive tortfeasor law does not apply to Plaintiffs' theory that, in Dr. Lemon's post-surgery note and in conversation with Areceli's parents, he did not accurately communicate which surgical procedure he performed on Areceli at UNMH, and that these inaccuracies had an adverse impact on the treatment Areceli received in Colorado. Plaintiffs' theory appears to have been—and, based on the evidence, could only have been—that Dr. Lemon's negligent communication was a cause of Areceli's short bowel syndrome. The problem Plaintiffs face with respect to this theory is identical to the problem faced by the plaintiffs in *Payne*. There, as here, one of the theories of negligence was that the first tortfeasor failed to communicate the patient's medical history to the second tortfeasor, which was a medical provider. *Payne*, 2006-NMSC-029, ¶ 48. Our Supreme Court recognized that such a "theory cannot support a successive tortfeasor claim" when there is no evidence that the first tortfeasor caused a first injury that

was then followed by a second injury caused by the second tortfeasor. *Id.* In other words, the allegedly negligent communication caused only "a single injury"—the injury that occurred when the second tortfeasor provided medical care to the patient. *Id.* Because only one injury was allegedly caused by the failure to share the patient's medical history in *Payne*, successive tort law did not apply to that theory of negligence.

{34} The same is true here. Plaintiffs did not contend that Dr. Lemon's inaccurate communication caused an injury that then foreseeably required further medical treatment in Colorado. This becomes clear when we parse the theory, considering each claimed injury and alleged act of negligence. Plaintiffs did not present evidence that the communication failures caused any of the injuries that allegedly occurred while Areceli was receiving treatment from Defendants: blood loss, pain and suffering, and loss of more of her colon than necessary. Those injuries allegedly occurred because Dr. Lemon negligently delayed surgery. Nor did Plaintiffs present evidence that the inaccurate communications caused Areceli's mesentery to open before she began receiving treatment in Colorado. That injury occurred, according to Plaintiffs' expert, because Dr. Lemon delayed surgery and failed to properly close Areceli's mesentery, which allowed it to open after she left UNMH. The only injury that the negligent communication could possibly have contributed to, based on the evidence, was Areceli's short bowel syndrome—the injury that Areceli suffered

when her small intestine was removed in Colorado. The theory was that Dr. Lemon's failure to communicate had a negative impact on the care provided in Colorado because the providers there diagnosed and treated Areceli relying on inaccurate information about her medical history. In other words, the alleged negligence of Dr. Lemon's poor communication combined with the actions of the Colorado doctors to cause a single injury: short bowel syndrome. *Payne* teaches that such theories may not be pursued under successive tort law and may only be pursued under concurrent tort law. 2006-NMSC-029, ¶ 48. We therefore hold that the evidence did not support successive tort instructions for this theory, and because the jury received complete instructions on the law applicable to this theory—concurrent tort law—we decline to undo the jury's verdict in favor of Defendants on this theory.

2. Plaintiffs' Second Theory: Negligently Delaying and Performing Surgery

{35} We reach a different conclusion about Plaintiffs' other theory of negligence: that Dr. Lemon negligently delayed and negligently performed Areceli's surgery. As to this theory, the jury did not receive instructions regarding all the law that potentially applied to the evidence. The jury only received instructions on concurrent tort law, but the evidence presented factual disputes about whether successive tort law or concurrent tort law applied. We hold that, as to this theory, the evidence supported successive tort instructions, and the jury should have been instructed on both successive and concurrent tort law in the alternative. We explain the reasons

for our holding by first describing Plaintiffs' theory and Defendants' defense, and then describing how the evidence created factual disputes about whether the elements of successive tort liability were satisfied.

{36} Plaintiffs contended that two acts of negligence by Dr. Lemon combined to cause Areceli's mesentery to herniate before she received treatment in Colorado. The first act of alleged negligence was delaying Areceli's surgery. Plaintiffs presented evidence that the delay allowed more of Areceli's colon to die, requiring removal of more of Areceli's colon than would have been required had she received timely surgery. Removal of more of her colon entailed making a larger hole in her mesentery. Plaintiffs presented evidence that Dr. Lemon acted negligently a second time by failing to properly close that hole. These acts of negligence combined, according to Plaintiffs' expert, to cause the mesentery to herniate, reopening a hole through which Areceli's small intestine passed, cutting off the blood flow and causing it to die.

{37} All of this was disputed by Defendants. They presented evidence that Dr. Lemon did not negligently cause any of Areceli's injuries and that her most serious injury, short bowel syndrome, was caused exclusively by the Colorado doctors. Defendants' expert testified that the timing of Dr. Lemon's surgery and his performance of the surgery itself were appropriate, leading to a successful outcome, and that there was no hernia and therefore no dead intestinal tissue before Areceli

received treatment in Colorado. The hernia, according to Defendants' expert, occurred only because the Colorado doctors negligently diagnosed Areceli and then negligently treated her by giving her an enema, placing excessive pressure on the sutured mesentery, which forced it to reopen.

{38} The evidence at trial created factual disputes that required jury instructions regarding the elements of successive tort liability. We discuss each element in turn.

{39} The jury should have considered, and did consider, the first and second elements: whether Dr. Lemon was negligent and whether any negligence by him caused injury. As we have described, the parties vigorously disputed these elements at trial, supporting their positions with expert testimony. Defendants did not contend at trial and do not contend on appeal that the evidence presented by Plaintiffs was insufficient to create factual questions for the jury as to these elements. Indeed, if the evidence did not present factual questions for the jury as to these elements, which are essential to every negligence claim, Plaintiffs' case should not have gone to the jury at all.

{40} The evidence also presented factual disputes about the third element: whether Dr. Lemon's negligence caused Areceli to need medical treatment after she left UNMH and returned home to Colorado. Plaintiffs' expert testified that if Dr. Lemon had not been negligent in delaying surgery and failing to close Areceli's mesentery adequately, Areceli likely never would have needed treatment in Colorado. Plaintiffs

contended that the Colorado providers treated Areceli for injuries she suffered because of Dr. Lemon's negligence. Defendants' expert testified to the contrary that the condition for which Areceli received treatment in Colorado was not caused by Dr. Lemon's negligence but was instead a condition that arose spontaneously and was then negligently diagnosed and treated by the Colorado doctors, as described above. The conflicting evidence created a question of fact that should have been answered by the jury.

{41} Turning to the fourth element, the jury could have found in favor of Plaintiffs because the parties did not dispute that the medical treatment provided in Colorado was a cause of Areceli's short bowel syndrome. Indeed, the parties' experts agreed that the surgeries in Colorado, which removed Areceli's small intestine, were the ultimate cause of Areceli's short bowel syndrome—a condition that only occurs when the small intestine is removed.

{42} Before discussing the fifth element, we pause to address an important legal point regarding the fourth element about which there was some confusion in this case. At trial and in their brief on appeal, Defendants argued that Plaintiffs' position that the Colorado doctors acted heroically—providing treatment appropriately rather than negligently—barred Plaintiffs from relying on a theory of successive tort liability. However, at oral argument before this Court, Defendants' counsel candidly conceded that Defendants' original position was incorrect. In the hope of preventing

similar confusion in future cases, we reiterate that proof of negligence by the second tortfeasor, or actor, is not required.[4] "When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, *whether provided properly or negligently*, will cause additional harm. Therefore, the person causing the original injury is also liable for the additional injury caused by subsequent medical treatment, if any." *Payne*, 2006-NMSC-029, ¶ 47 (emphasis added) (internal quotation marks omitted); *accord Lujan*, 1995-NMSC-057, ¶ 14; *see also* UJI 13-1802B (explaining that the original tortfeasor is "responsible for any harm caused by medical care that the plaintiff's injury reasonably required, even if the medical care was negligently performed").

{43} The fifth element presented a fact question for the jury: whether the treatment provided by the Colorado doctors caused a second or enhanced injury that was causally distinct from an original injury caused exclusively by Defendants. As Defendants acknowledge on appeal, "the divisibility of injuries" was disputed at trial. Defendants note that they have "always maintained and argued that there was

[4]The use of the word "tortfeasor" is potentially confusing. In many contexts, "tortfeasor" is used in a strictly technical sense to refer to a "wrongdoer"—"[s]omeone who commits a tort," by negligently, recklessly, or intentionally causing harm to another. *Tortfeasor*, *Black's Law Dictionary* (12th ed. 2024). However, *Lujan* and *Payne* teach that, when used to refer to a person who is a "successive tortfeasor," the word "tortfeasor" has a broader meaning—someone whose conduct causes harm, even if that person did not act negligently. *See Payne*, 2006-NMSC-029, ¶ 8; *Lujan*, 1995-NMSC-057, ¶ 14.

one, singular injury, [Areceli's] short bowel syndrome, which [Defendants] contended was caused directly and solely by the [Colorado doctors]." In support of their position, Defendants presented the expert testimony, as we have described. But, as we have also described, Plaintiffs presented a very different narrative involving negligence by Dr. Lemon and several injuries. Plaintiffs' expert testified that Areceli's colon had to be removed because Dr. Lemon negligently delayed surgery; that during that surgery he failed to properly close the mesentery; and that that failure caused a hole in her mesentery to open, eventually requiring medical care in Colorado, including the removal of her small intestine. Based on this version of events, a reasonable jury could have found causally-distinct injuries—that the removal of her small intestine caused short bowel syndrome, which was either a distinct second injury or an enhancement of a first injury caused exclusively by Dr. Lemon.[5] *See Payne*, 2006-NMSC-029, ¶¶ 13, 15. In sum, the evidence presented

[5] In *Lujan*, our Supreme Court identified the existence of "divisible and causally-distinct injuries" as the touchstone for successive torts, but then noted that, to distinguish between successive and concurrent tortfeasors, "courts [in other jurisdictions] have considered several *other* factors that are relevant." 1995-NMSC-057, ¶ 11 (emphasis added). Our Supreme Court did not explicitly adopt these factors in *Lujan*, and it has not adopted or even mentioned them in any subsequent precedents, including *Payne*. We note that the out-of-jurisdiction case relied upon by *Lujan* holds that "[w]hether liability for harm to a plaintiff is capable of apportionment is a question of law for the court," *Voyles v. Corwin*, 441 A.2d 381, 383 (Pa. Super. Ct. 1982), but that—after *Lujan* was decided—our Supreme Court made clear in *Payne* that the divisibility question is sometimes for the jury. 2006-NMSC-029, ¶ 43. For these reasons, it is unclear to us whether the factors mentioned in *Lujan* are part of New Mexico law. Although our conclusion as to the fifth element

questions of fact for the jury about whether Areceli suffered a single, indivisible injury or causally-distinct, divisible injuries.

{44} For these reasons, we conclude that the evidence at trial could have allowed a reasonable jury to find that all five of the elements of successive tortfeasor liability were satisfied as to the theory that Dr. Lemon negligently delayed and negligently performed surgery. We therefore hold that, for this theory, the jury should have been instructed on both successive tort law and concurrent tort law as alternatives. *See id.* ¶¶ 44-47. The upshot of this holding, together with our holding regarding Plaintiffs' negligent communication theory, is that here, as in *Payne*, the evidence warranted only concurrent tort instructions as to one of Plaintiffs' theories, but warranted alternative concurrent and successive tort instructions as to its other theory. *See id.* ¶¶ 48-50.

C. Prejudice to Plaintiffs

{45} We believe that Plaintiffs were prejudiced by the absence of successive tort law instructions on Plaintiffs' theory that Dr. Lemon negligently delayed and performed surgery. Prejudice occurred because the jury did not receive guidance

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hinges on the existence of factual disputes about whether the injuries are divisible, our conclusion could also be supported by the *Lujan* factors that seem applicable to the claims, defenses, and evidence in this case. The medical care at issue was provided by different medical providers in different states at different times, the bulk of the evidence relevant to these separate instances of medical care does not overlap, and the nature of the injuries is not the same. *See Lujan*, 1995-NMSC-057, ¶ 11.

about the law that applied to Plaintiffs' theory that Defendants were jointly and severally liable for Areceli's short bowel syndrome. *See Benavidez*, 2007-NMSC-026, ¶ 25 (concluding that prejudicial error occurred because the jury was not fully instructed regarding the applicable law and because the absence of an instruction deprived the plaintiff "of an important part of her theory" of liability). Importantly, this theory, if accepted by the jury, could have supported a verdict holding Defendants jointly and severally liable for Areceli's short bowel syndrome even if the jury concluded that the Colorado doctors were negligent, as Defendants contended. In other words, successive tort law provided a basis for completely rebutting Defendants' defense. That rebuttal could have resulted in a verdict for Plaintiffs if the jury found that Defendants and the Colorado doctors were negligent causes of distinct injuries: an original injury which required subsequent medical treatment that, whether provided negligently or properly, caused a second injury. This theory was based on successive tort law, and the lack of instructions on successive tort law prevented Plaintiff from arguing—and the jury from considering—the theory. *See Kirk Co. v. Ashcraft*, 1984-NMSC-065, ¶ 6, 101 N.M. 462, 684 P.2d 1127 (concluding that an instructional error was prejudicial because it prevented the jury from fully considering the law applicable to the defendant's theory of the case); *Sutherlin v. Fenenga,* 1991-NMCA-011, ¶ 17, 111 N.M. 767, 810 P.2d 353 (explaining that reversible error occurs when the absence of jury

instructions that are justified by the facts results in "the slightest prejudice"). The jury instructions were deficient because they required the jury to consider all of Plaintiffs' theories under the general rule, several liability, and prevented the jury from considering whether the exception, joint and several liability, applied to one of Plaintiffs' theories.

{46} Instructed only on several liability, this jury determined that Dr. Lemon's negligence did not cause Areceli's injuries. But because the instructions were limited to several liability, the jury was not asked to consider whether there were two injuries and whether the first caused the need for additional medical care that in turn, caused the second. Thus, as to the negligence theory that warranted alternative concurrent and successive tort instructions, the jury "was asked the wrong question," and "we lack confidence in the jury's verdict, especially when it found negligence but no causation for any of [Areceli]'s injuries." *See Payne*, 2006-NMSC-029, ¶ 36. Because the given instructions precluded Plaintiffs from arguing, and the jury from finding, that Defendants caused an injury that led to a second injury, Areceli's short bowel syndrome, Plaintiffs were prejudiced.

{47} Our dissenting colleague reaches the opposite conclusion, but we perceive no basis for holding that the error in this case was harmless. The dissent asserts that this case is unlike *Payne* because here the jury was "properly instructed on the core element of causation as to Defendants, and found there to be none." *Dissent* ¶ 65.

But this also happened in *Payne*, and yet our Supreme Court reversed because the jury was not properly instructed on successive tort law. In *Payne*—just as in this case—the jury received an instruction that "defined proximate cause without differentiating between the original injury and the successive injury." 2006-NMSC-029, ¶ 33. In *Payne*—just as in this case—the verdict form did not differentiate injuries. *See id.* ¶ 9. The jury in *Payne* was asked whether the first tortfeasor's "negligence 'was a proximate cause of the injuries and damages,'" *id.* ¶¶ 9, 33 (emphasis omitted), and the jury in this case was asked whether Dr. Lemon's negligence was "a cause of a plaintiff's injuries and damages."[6] And in *Payne*—just as in this case—"the jury returned a special verdict finding that [the first tortfeasor] was negligent but not a proximate cause of [the plaintiff's] injuries and damages." 2006-NMSC-029, ¶ 10. But none of this rendered the improper successive tort

[6]The dissent contends that Plaintiffs "fail[ed] to request a special verdict form that would clarify exactly what Dr. Lemon did negligently from the four types they alleged." *Dissent* ¶ 69. We do not blame Plaintiffs for the lack of specificity. The district court requested the special verdict form after it ruled that the jury would not be instructed on successive tort law and would be instructed only on concurrent tort law. Consistent with the district court's ruling, Plaintiffs submitted a special verdict form that included the general language regarding negligence, injuries, and damages that appears in the Uniform Jury Instructions that our Supreme Court has adopted for use in concurrent tort cases. *See* UJI 13-2220 (requiring the jury to determine whether "any negligence" of the defendant was "a cause of [the] plaintiff's injury and damages"). And when Plaintiffs submitted the special verdict form, they stated that they were not waiving their contention that successive tort law applies. We will not fault Plaintiffs for complying with the district court's ruling at the time of trial and then challenging that ruling on appeal based on the trial record available to them.

instructions in *Payne* harmless because—although "the jury was asked about the causation of injuries considered as a whole"—our Supreme Court concluded that the jury "was never asked the critical question about causation of a separate, original injury" by the first tortfeasor. *Id.* ¶ 33. Our Supreme Court observed that the "generic negligence jury instructions" that were used "asked about causation of [the p]laintiff's 'injuries,' possibly all of them considered together, without differentiating between what [the first tortfeasor's] negligence caused and what the [second tortfeasor's] negligence caused." *Id.* ¶ 34. In short, because the jury "was asked the wrong question," our Supreme Court "lack[ed] confidence in the jury's verdict, especially when it found negligence but no causation for any of [the p]laintiff's injuries." *Id.* ¶ 36. This reasoning applies fully to the present case, and it points to the same conclusion: the error was prejudicial, not harmless.

{48} Because the error in this case prevented the jury from answering critical questions about causation, we disagree with the dissent that the verdict may be salvaged by applying the general verdict rule. *Dissent* ¶¶ 68-69. As the dissent acknowledges, the general verdict rule does not apply when the jury received an erroneous instruction. *See, e.g.*, *Bustos v. Hyundai Motor Co.*, 2010-NMCA-090, ¶ 48, 149 N.M. 1, 243 P.3d 440 ("A general verdict may be affirmed under any theory supported by evidence unless an erroneous jury instruction was given."). Here, the jury received erroneous instructions that prevented the jury from considering

Plaintiffs' successive tort theory—a theory that could have fully rebutted Defendants' defenses and resulted in a verdict in favor of Plaintiffs. The general verdict rule therefore does not apply.

{49} The dissent's expansive application of the general verdict rule appears to be a novel one. The dissent cites no case in which a court has applied the general verdict rule when, as in this case, the jury was prevented from considering a theory, and we are aware of no such case. The dissent relies exclusively on cases in which the appellants were seeking to undo jury verdicts by arguing that the jury should not have considered one or more alternative theories of liability that were presented at trial. *See Goodman v. OS Rest. Servs., LLC*, 2020-NMCA-019, ¶¶ 16-19, 461 P.3d 906 (explaining that, under the general verdict rule, "if the jury's verdict is legally sustainable on any . . . theory [of liability] advanced by [the p]laintiff, we need consider its propriety no further"); *Bustos*, 2010-NMCA-090, ¶¶ 47-49 (applying the general verdict rule to uphold a verdict for the plaintiffs because any error in permitting the plaintiffs to present evidence to the jury about an alternative theory of liability was harmless when there was substantial evidence to support the verdict based on a different theory). Under such circumstances, the rationale for affirming based on the general verdict rule is an assumption that jury's verdict was based on any of the legally and factually viable theories that the jury did, in fact, consider. *See Bustos*, 2010-NMCA-090, ¶ 49 ("[W]e must assume the jury accepted the theory

argued by counsel that was supported by substantial evidence."). That rationale does not apply to a verdict returned by a jury that did not consider a viable theory erroneously omitted from the jury instructions. Such verdicts require a different analysis because they present a different question: whether the omission was prejudicial. Here, it was. Because the jury did not consider the theory of successive tort—and the unique questions of fact that arise under that theory—the general verdict rule does not allow us to conclude that the error was harmless.

II. Plaintiffs Timely Raised Their Successive Tort Theory

{50} Defendants argue that the district court correctly refused to instruct the jury on Plaintiffs' successive tortfeasor theory because Plaintiffs raised that theory too late in the proceedings and allowing Plaintiffs to pursue that theory after discovery closed would be unfairly prejudicial to Defendants. Plaintiffs argue that, under *Saiz v. Belen School District*, 1992-NMSC-018, 113 N.M. 387, 827 P.2d 102, their successive tort theory was a rebuttal to Defendants' defenses and was therefore raised in a timely fashion. We agree with Plaintiffs.

{51} In *Saiz*, a young child died from electrocution when he simultaneously touched a metal fence surrounding a high school football field and an electrical conduit on the field's lighting system. *Id.* ¶¶ 1-4. The metal fence was installed by the defendant, and the lighting system was designed and installed by the defendant's contractors. *Id.* ¶ 3. The child's estate sued only the defendant, contending that the

electrical system was negligently installed and maintained, and that the defendant was liable for the acts of its contractors. *Id.* ¶ 5. In its answer, the defendant raised as an affirmative defense the fault of others, and at trial the defendant "sought to lay off damages against various nonparties," including an architect and an electrician who had done work for defendant as independent contractors. *Id.* ¶¶ 6. The estate responded to this defense by seeking to hold the defendant jointly and severally liable for the harm caused by the independent contractors because they were engaged in inherently dangerous activities. *Id.* ¶¶ 7-9. This Court rejected the estate's argument, concluding, as relevant here, that the estate was required to raise the joint and several liability claim in its pleadings, but that the estate failed to do so. *Id.* ¶ 9.

{52} Our Supreme Court disagreed, holding that the estate was permitted to raise its theory of joint and several liability for the first time at trial. *Id.* ¶¶ 38-40. The Court recognized that the plaintiff's pursuit of its theory of the case at trial "does not preclude the plaintiff from rebutting any other theory offered by way of defense." *Id.* ¶ 40. The Court recognized that "[w]here a defendant seeks to avoid liability through the apportionment of fault to other tortfeasors, the defendant should anticipate that, for any number of reasons, the defense may be subject to attack at trial." *Id.* The Court relied on "Rule 1-012(B) [NMRA, which] specifically provides a party may raise at trial any issue in law or fact raised by a pleading to which that party is not required to respond." *Saiz*, 1992-NMSC-018, ¶ 40. The implication is

that because the defendant included an affirmative defense in its answer to the complaint blaming others for the child's death, and because the estate was not required to file a pleading in response to defendant's answer, the estate was permitted to raise its rebuttal to the affirmative defense for the first time at trial.

{53} *Saiz* applies here. Like the defendant in *Saiz*, Defendants filed an answer to the complaint that sought to place blame on others. Like the plaintiff in *Saiz*, Plaintiffs were not required to file a pleading in response to Defendants' answer. And, as in *Saiz*, here the joint and several liability theory was raised to rebut defenses that sought to place blame on others. Under *Saiz*, when Defendants chose to assert a causation defense that shifted blame entirely to the Colorado doctors and, alternatively, a comparative fault defense that spread some of the blame to the Colorado doctors if the jury found that Defendants negligently caused injury, Defendants should have anticipated that Plaintiffs would attack those defenses at trial. *See id.* One such attack was based on successive tort theory, under which Defendants could be held jointly and severally liable for Areceli's short bowel syndrome even if the jury found that the Colorado doctors were negligent. Because successive tort theory was raised to rebut Defendants' affirmative defenses, under *Saiz* Plaintiffs were not required to explicitly raise their theory in a responsive pleading or at any other time before trial.

{54} We do not perceive legal significance in the factual distinction drawn by Defendants between *Saiz* and this case. Defendants argue that unlike in *Saiz*, in this case the joint and several liability theory raised by Plaintiffs in rebuttal was inconsistent with their primary theory of liability. Specifically, Defendants assert that the primary and rebuttal theories raised by the plaintiffs in *Saiz* were both theories of "direct liability," but, in contrast, Plaintiffs' primary theory was that "Dr. Lemon directly caused all their claimed injuries and damages by his direct negligence," while their rebuttal theory involved both Dr. Lemon and the Colorado doctors playing causal roles with respect to Areceli's short bowel syndrome. We are unpersuaded. We do not believe that any such factual distinctions are significant given the breadth of the legal rationale in *Saiz*. There, our Supreme Court reasoned that because an answer to a complaint does not require a plaintiff to file a responsive pleading regarding affirmative defenses, a plaintiff is free to raise at trial "*any* issue in law or fact" that would rebut an affirmative defense, and that a defendant who seeks to blame others "should anticipate that, *for any number of reasons*, the defense may be subject to attack at trial." *Saiz*, 1992-NMSC-018, ¶ 40 (emphasis added). This broad reasoning encompasses what occurred in this case for the reasons we have explained.

{55} Even if we were to agree with Defendants that *Saiz* requires some degree of consistency between the primary and rebuttal theories for the purpose of preventing

unfair surprise, we believe that Plaintiffs' theories are sufficiently consistent to prevent unfair surprise. Under both theories, evidence was presented that Dr. Lemon's negligence played a causal role with respect to all of Areceli's injuries, including her short bowel syndrome; Defendants were liable for all of Areceli's injuries; and the main injury, short bowel syndrome, did not occur until the Colorado doctors removed her small intestine. *See id.* ¶ 39 (noting that "the thrust" of the plaintiff's theory was consistently that the defendant against whom several liability had been asserted "was completely responsible" for the injuries). What Plaintiffs sought to add by way of their rebuttal theory was applicable law under which the jury could hold Defendants liable for all of Areceli's injuries even if the jury found that the Colorado doctors acted negligently. Importantly, under both this rebuttal theory and their primary theory, Plaintiffs premised Defendants' liability on Dr. Lemon's negligence, which Plaintiffs pleaded in their complaint and sought to establish throughout the litigation. In this we see no inconsistency that created unfair surprise at trial.[7]

[7]The dissent asserts that we have created a "per se rule that permits a party to litigate a case one way, and when that is unsuccessful, try again with another." *Dissent* ¶ 71. We disagree with this characterization of our holding. To the extent that the dissent's characterization is intended to describe what occurred in this case, we do not share the dissent's perspective. Plaintiffs did not seek to pursue an entirely new theory of the case after their original theory was unsuccessful. Plaintiffs sought to add their successive tort theory twice before evidence was submitted to the jury—at points in time when neither side had been declared unsuccessful. That theory was raised not to gain a second bite at the apple but instead to rebut Defendants' defenses.

{56} We note that in the district court, the inconsistency complained of by Defendants was based on their misunderstanding, described above, that successive tort liability requires proof that the second tortfeasor was negligent. Defendants argued that because the second tortfeasor must be negligent to hold the first tortfeasor liable, Plaintiffs' successive tort theory was inconsistent with their theory that the Colorado doctors did not act negligently but instead acted properly and "are heroes who saved" Areceli. But that is not the law, and it therefore does not render Plaintiffs' rebuttal theory inconsistent with their primary theory.

{57} In closing, we highlight that—although, under *Saiz*, Plaintiffs were not required to raise their rebuttal theory earlier in the proceedings—the Rules of Civil Procedure provide tools that may be used if earlier notice of rebuttal theories would make the proceedings more just or more efficient. *See* Rule 1-016(A) NMRA. For example, in a case involving complex issues like successive tort liability, upon request of a party or on its own initiative, a district court may enter a pretrial scheduling order that requires the plaintiff to identify—at some point before trial, perhaps before the close of discovery—theories they might raise to rebut affirmative defenses. *See* Rule 1-016(C)(10) (identifying as a subject for discussion at pretrial conferences "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems"). And if the identification of

potential rebuttal theories requires more time for discovery or trial preparation, the district court may grant extensions of time "[f]or good cause shown." Rule 1-016(B).

III. The Successive Tort Instruction Issue Was Preserved

{58} Defendants contend that Plaintiffs failed to preserve the issue of whether the instructions should have included a successive tort instruction. Defendants' primary argument is that although Plaintiffs requested one of the uniform successive tort instructions, the one they requested, which was based on UJI 13-1802B, does not fit the evidence in this case, and therefore Plaintiffs did not comply with Rule 1-051(I) NMRA ("For the preservation of any error in the charge, objection must be made to any instruction given, . . . or, in case of a failure to instruct on any point of law, a correct instruction must be tendered, before retirement of the jury."). Relatedly, Defendants point out that Plaintiffs did not propose a verdict form that fit the evidence in the case. Plaintiffs assert that they preserved the issue by requesting that the district court include their successive tort theory in the pretrial order, and again by requesting a successive tort instruction at the jury instruction conference and in a trial brief. We hold that the issue was preserved.

{59} Plaintiffs' repeated requests to pursue their successive tort theory accomplished the three purposes of the preservation requirement imposed by Rule 12-321(A) NMRA and Rule 1-051(I), which are (1) to allow the opposition "a fair opportunity to respond" and explain why the court should reject the request, (2) to

"alert the district court to a claim of error so that any mistake can be corrected at that time," and (3) to develop a record sufficient for appellate review. *Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791; *see Martinez v. Friede*, 2004-NMSC-006, ¶ 26, 135 N.M. 171, 86 P.3d 596 (recognizing that Rule 1-051(I) is designed to ensure that the purposes of preservation are served), *superseded by rule on other grounds as stated in State v. Moreland*, 2008-NMSC-031, ¶ 11, 144 N.M. 192, 185 P.3d 363. First, Plaintiffs' requests afforded Defendants ample opportunity to oppose the requests and explain why the district court should reject those requests. Defendants took that opportunity by responding both orally and in writing. Defendants urged the district court to rule against Plaintiffs on the procedural ground that they raised their successive tort theory too late and on the substantive ground that the evidence did not support successive tort liability at all—and therefore no instruction of any variety on the subject—because there was no evidence of distinct injuries. Second, Plaintiffs' requests alerted the district court that Plaintiffs sought to present their successive tort theory to the jury and that it would be error to prohibit Plaintiffs from doing so, and the district court ruled that Plaintiffs could not do so. Third, Plaintiffs' requests developed a record that suffices to allow us to review their claim of error.

{60} Because the purposes of the preservation requirements were served here, we do not accept Defendants' preservation argument, which we view as overly-

technical under the specific circumstances of this case. Defendants do not argue that the uniform successive tort instruction proposed by Plaintiffs incorrectly describes successive tort law. They argue instead that Plaintiffs selected a uniform jury instruction that does not apply to the evidence in this case. The uniform instructions include several on successive tort liability, and the one proposed by Plaintiffs, UJI 13-1802B, may be used only if the divisibility of injuries is not a disputed question for the jury to answer—that is, when divisibility is agreed on by the parties or determined by the trial judge as a matter of law. Plaintiffs' proposed instruction matched their position that the divisibility of injuries was undisputed and even UJI 13-1802B would have required the jury to consider multiple injuries: an injury caused by Dr. Lemon and "any harm" subsequently caused by the Colorado doctors' medical care. In any event, the district court never decided the substantive question of whether the divisibility of injuries was disputed because it denied Plaintiffs' request for a successive tort instruction for purely procedural reasons. The court concluded that they raised the theory too late in the litigation and that they therefore could not pursue their successive tort theory at all. This procedural ruling made it unnecessary for the district court to rule on the substantive questions of whether the evidence required the successive tort theory to go to the jury and if so, whether UJI 13-1802B or a different instruction on successive tort law was the best fit for the evidence in the case. But rulings on these substantive questions were fairly invoked

by Plaintiffs' multiple requests to pursue their successive tort theory and for the jury to be instructed on that theory. *See* Rule 12-321 ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."). Indeed, had the district court ruled in Plaintiffs' favor on the procedural question, it would have been necessary for the district court to rule on the substantive questions. Plaintiffs invoked rulings on both the procedural and substantive questions, and we will not apply the preservation requirement in a way that bars appellate review of the substantive question merely because the procedural ruling prevented the substantive question from being fully explored. Under these circumstances, declining to review Plaintiffs' claim of error would elevate form over substance; it would punish Plaintiffs for not requesting alternative sets of successive tort instructions at the outset, even though every purpose of the preservation rule was served by the requests that Plaintiffs did make. *See Martinez*, 2004-NMSC-006, ¶ 26 (recognizing that "Rule 1-051(I) is not intended to be punitive" but is instead designed to ensure that the purposes of preservation are served).

CONCLUSION

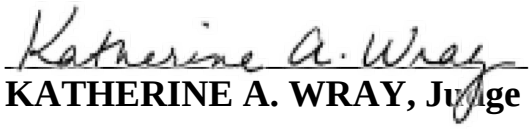
{61} We reverse and remand for a new trial, and any other proceedings that might be appropriate, solely on whether Defendants are liable based on Plaintiffs' theory that Dr. Lemon negligently delayed and negligently performed Areceli's surgery—the only theory about which the jury did not receive instructions on the applicable

law. Because the concurrent tort and comparative fault verdict form did not specify whether the act of negligence by Dr. Lemon pertained to either aspect of the negligence claim regarding the surgery, the jury's negligence finding may not be relied on by Plaintiffs at trial on remand. A jury must answer that question. Because the jury received appropriate instructions about Plaintiffs' theory that Dr. Lemon failed to accurately describe the surgery he performed, we decline to undo the jury's verdict in favor of Defendants on that theory.

{62} **IT IS SO ORDERED.**

ZACHARY A. IVES, Judge

I CONCUR:



KATHERINE A. WRAY, Judge

J. MILES HANISEE, Judge, dissenting

HANISEE, Judge (dissenting).

{63} I would affirm the jury's verdict that Defendants Dr. Lemon and various UNM-based entities—despite Dr. Lemon being negligent in some unknown respect, given the absence of a sufficiently specific special verdict form—*caused no* direct injury to Areceli. In my view, the successive tort rule—a rule that applies exclusively to ensuing injuries by subsequent actors following injuries caused by an initial tortfeasor, and assigns the burden of joint and several liability to the initial tortfeasor—bears no relevance to the predicate question under the successive tort rule, answered by the jury in the negative, of whether negligence on the part of Dr. Lemon caused injury to Areceli. It follows that because *no* injury to Areceli was a product of Dr. Lemon's negligence, Defendants are not responsible for any separate and distinct injury caused by any successive actor. *See Payne*, 2006-NMSC-029, ¶ 15 ("[O]nly when these elements are found—negligence, *causation*, *and a distinct original injury*—may the original tortfeasor be held jointly and severally responsible for the subsequent or enhanced injury as well." (emphasis added)). As such, even if the majority is correct that an instruction as to the successive tort rule should have been given by the district court, the error fails to warrant or compel rejection of the jury's verdict, limited though it was to having absolved Dr. Lemon of causing injury to Areceli from negligent acts. I therefore respectfully dissent.

{64} This is a legally tricky case, as the majority capably explains, *see* maj. op. ¶¶ 27-31, but I ultimately part ways with my colleagues in two central respects. First, to reiterate, nothing about the successive tort rule affects the condition precedent necessary to successive tort liability resolved by the jury (as the same question would have been asked of the jury had a successive tort instruction been given); namely, that Dr. Lemon was not "a cause of [Plaintiffs'] injuries and damages." In deciding differently, the majority holds the successive tort rule to apply and concludes a jury instruction must have been given as to its application on two of Plaintiffs' four claims of negligence by Dr. Lemon, discussed by the majority as two theories (effectively surgical and nonsurgical) of negligence. *See* maj. op. ¶¶ 3, 11. It is on this basis that the majority reverses the jury's verdict, stating the need for a properly instructed jury to retry fact questions related to ensuing injury caused by nondefendants under the successive tort rule, as well as a do-over as to Plaintiffs' theory of negligence regarding injuries arising from Dr. Lemon's own surgical actions, *see* maj. op. ¶ 55—the latter task being the very theory the first jury fully considered and rejected.

{65} In *Payne*, a case that revolved around successive tort liability from the outset, our Supreme Court identified the following error in the successive tort liability jury instruction: the jury "was never asked the critical question about causation of a separate, original injury." 2006-NMSC-029, ¶ 33. In the instant case, however, the

jury was properly instructed on the core element of causation of a separate, original injury as to Defendants, and found there to be none. Stated succinctly, without causation of an original injury, there can be no successive tort liability. *See id.* ¶ 15; *Lujan*, 1995-NMSC-057, ¶ 16 (stating that joint and several liability applies to an enhanced injury "[i]n cases involving successive tortfeasors whose *separate causal contributions* to the plaintiff's harm can be measured" (emphasis added)); *Turpie v. Sw. Cardiology Assocs., P.A.*, 1998-NMCA-042, ¶ 17, 124 N.M. 787, 955 P.2d 716 (concluding that a doctor found not to have caused the death of a patient cannot then be held liable for other claimed damages stemming from the patient's death and that a jury finding of no causation "controls all other aspects of the case").

{66} Thus, that the jury in this case did not receive a successive tort liability instruction is harmless error, if error at all, and is thus of no moment in light of the jury's ultimate decision that Dr. Lemon's negligence did not cause any injury to Areceli. *See ERICA, Inc. v. N.M. Regul. & Licensing Dep't*, 2008-NMCA-065, ¶ 24, 144 N.M. 132, 184 P.3d 444 ("On appeal, error will not be corrected if it will not change the result." (internal quotation marks and citation omitted)); *see also Traster v. Steinreich*, 523 N.E.2d 861, 863 (Ohio Ct. App. 1987) (holding there to be "no harm in the failure to give the instruction on the successive tortfeasor theory" when the jury found the defendants not negligent and therefore unable to have caused

injury[8]); *Pena v. Northeast Ohio Emergency Affiliates, Inc.*, 670 N.E.2d 268, 281 (Ohio Ct. App. 1995) ("In order for the doctrine to apply, there must be an originally negligent party whose acts necessitated the negligent acts or omissions of others."). **{67}** To be clear, I agree with the majority that the successive tort rule could apply in this case to injuries caused by corrective surgical procedures made necessary by virtue of Dr. Lemon's negligence during a surgical procedure that he performed and that caused injury, but cannot apply to any deficit in Dr. Lemon's postoperative notes or later communications with Areceli's family. *See* maj. op. pp. ¶ 33. This holding makes sense given the successive tort rule is a "positive rule of decisional law" available in specific circumstances wherein joint, and not merely several, liability exists for the original tortfeasor for enhanced injuries arising from acts of a second, unrelated actor. *See Lewis ex. rel. Lewis v. Samson*, 2001-NMSC-035, ¶ 33, 131 N.M. 317, 35 P.3d 972 (internal quotation marks and citation omitted); *see also Payne*, 2006-NMSC-029, ¶ 13 ("[T]he successive tortfeasor doctrine imposes joint and several liability on the original tortfeasor for the full extent of both injuries, those caused by both the original tortfeasor and the successive tortfeasor."). It is correct as

[8]I acknowledge that in *Traster*, the jury found the defendant *not* negligent, unlike in this case. *See* 523 N.E.2d at 863. However, a cause of action for negligence further includes elemental requirements of causation and injury, neither of which the jury found here. Thus, in my view, *Traster*'s holding that the trial court's not having given a successive tort instruction was not reversible error is instructive given the verdict here rejecting the predicate claim of negligence.

a matter of law that *if* that negligence were rooted in surgical failures by Dr. Lemon, Defendants could be jointly responsible for damages occasioned by necessary corrective surgery resulting in "separate and causally-distinct [second] injuries" to Areceli. *See Payne*, 2006-NMSC-029, ¶ 14 (emphasis omitted). Yet, instead the jury sided with Defendants as to the absence of any initial injury caused by Defendants. But ultimately, the majority accepts only half the jury's verdict: the determination that Dr. Lemon was negligent regarding some aspect (surgical or nonsurgical, we don't know which) of medical care Areceli received from Defendants. The other half—that such caused no injury—is effectively erased by today's ruling.

{68} This brings me to my second point of disagreement with the majority: the record is needlessly unclear regarding whether Defendants were found liable for negligence for which the successive tort rule applies (surgical negligence by Dr. Lemon) or for negligence that cannot justify application of the successive tort rule (nonsurgical negligence by Dr. Lemon). *See* maj. op. ¶ 46. Assuming without agreeing that despite the jury's finding that Dr. Lemon *caused no* injury, the nature of the negligence matters, in my view the general verdict rule otherwise applies to the verdict at hand. *See Goodman*, 2020-NMCA-019, ¶ 16 ("[U]nder the general verdict rule, a general verdict may be affirmed under any theory supported by evidence unless an erroneous jury instruction was given." (internal quotation marks

and citation omitted)); *see also Bustos*, 2010-NMCA-090, ¶¶ 48-49 (analyzing jury instructions for harmless error in the general verdict rule context).

{69} Here, the general verdict rendered may and should be affirmed because two theories posited by Plaintiffs were that Dr. Lemon erred in identifying the exact surgical procedure he performed in postoperative notes or otherwise erred in his communications after surgery, i.e., nonsurgical negligence. Importantly, because the failure to give a successive tort instruction in either nonsurgical circumstance is no failure at all, the entire basis set forth by the majority as reversible error is in fact only *possible* error at best. But because Plaintiffs—whose burden it was to prove the allegations set forth in their complaint at trial—failed to request a special verdict form that would clarify exactly what Dr. Lemon did negligently from the four types of negligence they alleged, two of which are deficient from the standpoint of successive tort, we are left with one simple question: Does one theory supported by evidence and properly instructed support the general verdict, and therefore defeat a determination that the failure to give the successive tort rule instruction as to another theory warrants reversal? The answer to that question under the general verdict rule is yes. *See Goodman*, 2020-NMCA-019, ¶ 16; *Bustos*, 2010-NMCA-090, ¶ 48. Here, two of the four theories pursued by Plaintiffs were unsuitable from the standpoint of the successive tort rule, and under the general verdict rule we assume the jury to have found only nonsurgical negligence on the part of Dr. Lemon. As such, the case

ends exactly where it did, in district court following issuance of a defense verdict that should be affirmed on the trial record before this Court. *See also Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶ 52, 127 N.M. 47, 976 P.2d 999 (holding the appellant not to have "borne its burden of proving error").

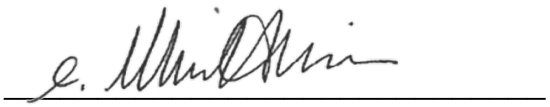
{70} Lastly, the question of whether Plaintiffs timely raised, or were even required to timely raise, applicability of the successive tort rule need not be resolved. But to reverse and remand for new trial proceedings, as the majority directs, it must be. I express some concern regarding the analysis employed in this regard by the majority. *Saiz*, relied on by the majority to allow Plaintiffs to rebut Defendants' theory of the case by use of the successive tort rule, applies in a different context: concurrent liability in the effectuation of an inherently dangerous activity. *See* maj. op. ¶¶ 50-55; *Saiz*, 1992-NMSC-018, ¶¶ 34-35. Typically, concurrent tortfeasors either have some relationship to one another in a given circumstance that results in injury, or operate alongside one another in some action for which joint liability is permissible, such as the inherently dangerous activity of constructing and maintaining the adjacent fencing and lighting system in *Saiz*. 1992-NMSC-018, ¶¶ 9-10. True, the rationale that underpins *Saiz*—that a plaintiff need not declare their intention to respond to a defendant's theory of defense by filing a responsive pleading or adjusting their own case in chief accordingly, *id.* ¶¶ 39-40—might well apply in the successive tort construct, as explained by the majority. But it seems this legally

differing circumstance is why *Saiz* was careful to note its application to "the facts of this case." *Id.* ¶ 39.

{71} Here, unlike in *Saiz*, where the allegedly negligent parties participated in a single injury rather than two separate and distinct injuries, Plaintiffs chose not to sue subsequent care providers, and Defendants opted not to seek joinder of the parties Defendants believed were responsible for Areceli's injuries. *See* maj. op. ¶ 11. Indeed, the proceedings below—beginning with Plaintiffs' complaint, continuing through the completed process of discovery, and ultimately including the trial itself (limited in scope by the denial of Plaintiffs' postdiscovery effort to introduce a theory of successive tort liability by which Defendants could be liable for ensuing injuries caused by others)—were characterized by straightforward but competing perspectives: Plaintiffs presented evidence and argued that Areceli's injuries were caused by Defendants; Defendants likewise maintained Areceli's injuries were caused by ensuing actors. Indeed, the jury was told "[P]laintiffs deny what [D]efendants say about the negligence of [nondefendants]." All told, these were strategic decisions that persisted beyond discovery through closing arguments. To extend *Saiz* to successive torts as the majority does herein, while not illogical based on the rationale expressed by *Saiz*, is less a matter of binding precedent, as the majority concludes, and more a question of whether the justification that underpins *Saiz* also applies to the successive tort rule. *See* maj. op. ¶ 50. I suggest if indeed it

does, it should be on a case-by-case basis and not a per se rule that permits a party to litigate a case one way, and when that is unsuccessful, try again with another.

{72} For the reasons stated above, I respectfully dissent.



J. MILES HANISEE, Judge