Rel: May 26, 2023

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-0847

Alicia Marie Sampson, as administratrix of the Estate of Joshua Aaron Sampson, deceased

v.

HeartWise Health Systems Corporation; HeartWise Clinic, LLC; Isaac Health & Prevention Partners, LLC; William A. Nixon, M.D.; and Jeffrey A. Saylor, M.D.

Appeal from Marshall Circuit Court (CV-17-900377)

MENDHEIM, Justice.

Alicia Marie Sampson ("Alicia"), as administratrix of the estate of her deceased husband, Joshua Aaron Sampson ("Josh"), appeals from a summary judgment entered by the Marshall Circuit Court in favor of HeartWise Health Systems Corporation ("HeartWise Health"); HeartWise Clinic, LLC ("HeartWise Clinic") (HeartWise Health and HeartWise Clinic are collectively referred to as "HeartWise"); Isaac Health & Prevention Partners, LLC ("Isaac Health"); William A. Nixon, M.D.; and Jeffrey A. Saylor, M.D. (Nixon and Saylor are collectively referred to as "Drs. Nixon and Saylor") in a wrongful-death action. We affirm in part and reverse in part the judgment of the circuit court and remand the case.

I. Facts

Isaac Health, which is owned by Drs. Nixon and Saylor, operates a health clinic that is located in Albertville. Drs. Nixon and Saylor are board-certified physicians practicing in the specialty of family medicine. Isaac Health has a licensing agreement with HeartWise Clinic to use the cardiovascular-disease-prevention program that HeartWise Health has developed, and so the Isaac Health clinic is known as a HeartWise clinic.

In its summary-judgment motion, HeartWise described its business model as follows:

> "A HeartWise clinic, like Isaac Health, utilizes a screening tool developed by HeartWise Health Systems Corporation ('HeartWise Health Systems'). HeartWise Health Systems is a limited liability company based in Austin, Texas. HeartWise Health Systems developed a screening program and software that enable doctors to evaluate their patients' heart health. HeartWise Health Systems operates under the name HeartWise Clinic, LLC. HeartWise Clinic, LLC meanwhile, enters into licensing agreements with health care providers, such as Isaac Health, allowing the health care providers to utilize the HeartWise program. At these licensed HeartWise clinics, the medical staff performs certain screening tests and the data generated from these tests is entered into HeartWise software. The software then generates a report. Based on the report, the physician uses his or her medical judgment to develop a treatment plan. HeartWise Health Systems does not interpret or analyze the report. Rather, HeartWise Health Systems ensures only that the data is accurately input into the software. The medical staff at a licensed HeartWise clinic has full discretion to implement a treatment that is in its patients' best interests. In short, the program itself is a screening program, not a diagnostic program."[1]

(Citations omitted.)

[1]Alicia disputes HeartWise's statements that it "does not interpret or analyze the report" and that "the program itself is a screening program, not a diagnostic program." See, e.g., Alicia's brief, pp. 6-7.

More specifically, at its HeartWise clinic, Isaac Health administers a battery of up to 31 physical tests that are intended, according to the licensing agreement, "to assist in the detection of early evidence of vascular and cardiac abnormalities." After reviewing HeartWise materials and reports, Dr. Jared Ellis, Alicia's standard-of-care expert, a board-certified family-medicine physician, summarized his understanding of the HeartWise program this way: "A person would come in and have a standardized battery of lab tests, EKG, limited left ventricular ultrasound with a three-minute stress [test], ultrasound of the carotid arteries, aorta, thyroid, a smattering of lab tests, pulmonary function test, [and patient] history forms." Anna Remillard, the corporate representative for HeartWise, explained in her deposition that a HeartWise clinic's staff -- in this case employees of Isaac Health -- performs the tests on patients and then sends the data points collected from the tests to HeartWise's headquarters in Austin, Texas. HeartWise's staff then inputs the data into HeartWise's proprietary software program that uses "screening principles" or "protocols" developed by Dr. Jay Cohn at the Rasmussen Center for cardiac screening at the University of Minnesota to generate a report based on

the test results. The report provides a readout as to whether the patient's results for each test are "normal" or "abnormal" based on the protocols contained in the software. Remillard further testified that, after the report is generated, it is then sent back to the HeartWise clinic and is given both to the physician and the patient. Remillard noted that "no independent medical doctor reviews and evaluates this data" before the report is returned to the clinic because "[t]he nurse practitioner and the ultrasound tech within the clinic are the ones who are overseen by the doctor, and we [HeartWise] don't get into the practice of medicine for their patients and exercising any sort of clinical judgment for their patients."

On August 21, 2015, Josh visited the Isaac Health clinic and -- although they all arrived separately -- so did his mother, Michelle Sampson, and his wife Alicia. Josh was 29 years old at the time he visited the clinic. There is no dispute between the parties as to why Josh wanted to obtain a medical evaluation of his cardiovascular system: on December 3, 2014, Michelle's husband and Josh's father, Lowell Sampson, died at the age of 56 from "right ventricular dysplasia," which is a "congenital heart defect." The parties agree that Lowell's death led

the Sampson family to seek somewhere that they could receive heart evaluations to determine whether they had inherited Lowell's heart defect.

However, why Josh picked the Isaac Health clinic as the place to obtain such a medical evaluation is disputed by the parties. The parties agree that Michelle's daughter and Josh's sister, Amanda Chastain ("Amanda"), a nurse at Marshall Medical Center North, recommended using a HeartWise clinic to Josh and the other members of the Sampson family. In fact, Amanda and her husband at that time, Josh Chastain, had appointments at the Isaac Health clinic before the date of Josh's appointment.[2] The dispute between the parties arises from whether Amanda's recommendation was the sole reason Josh went to the Isaac Health clinic.[3] In the paperwork Josh filled out at the clinic, he indicated that he had learned about the clinic from his sister. Alicia testified in her deposition that she had no knowledge of whether Josh had learned anything about HeartWise from the Internet or another form of

[2]In her deposition taken on December 7, 2018, Alicia testified that Amanda and Josh Chastain were no longer married.

[3]The Isaac Health clinic was the only HeartWise clinic near where the Sampson family lived.

advertising before his visit to the Isaac Health clinic on August 21, 2015. In contrast, Michelle testified extensively about how her family learned about HeartWise before she, Josh, and Alicia visited the Isaac Health clinic, and about what she and Josh saw and discussed while at the clinic during that August 21, 2015, appointment.

Because Michelle's testimony is pivotal to the parties' arguments concerning Alicia's assertion of fraud against HeartWise and Isaac Health, we provide here several excerpts from Michelle's deposition testimony.

> "Q. [Counsel for Isaac Health and Drs. Nixon and Saylor:] I think Alicia testified that Amanda said to her or the family that HeartWise was a place that you could get a heart work-up and suggested or recommended it to the family. Is that consistent with your understanding?
>
> "A. [Michelle Sampson:] Yes.
>
> "Q. Before he went to HeartWise, did Josh ever do any type of independent research about HeartWise, and what I mean by that, did he look on the internet, do any type of research about it?
>
> "A. I think that we probably looked together on the internet after Amanda told us about it.
>
> "….

"Q. [Counsel for HeartWise:] Do you specifically remember, as you sit here today, ma'am, who if anybody was with you when you looked at either a computer or a telephone?

"A. The best I remember, we were sitting -- which was our normal routine, we sit in the breakfast area, and that's where we all came together. It's next to the living room. And we were all sitting around, and Amanda and her husband and Josh, myself -- I'm not sure if Alicia was there, she may have been, and she [Amanda] was, like, I want all of us to do this, you know, and I've already set up the appointment for me and Josh Chastain.

"And she [Amanda] told us about it, you know, I think we pulled it up [the HeartWise website] on -- I don't remember if it was the computer, a laptop, or if it was on a cell phone, read through it, and I said I'll do it if everybody else does it. And Josh said we'll do it, and I don't know if he told me to make the appointment or Alicia to make the appointment. I don't remember who made his appointment and Alicia's appointment, but I made my appointment.

"Q. All right, so let me see if I can piece that together, ma'am. Your daughter Amanda and her husband Josh had already made their appointments at HeartWise, right?

"A. Yes, to the best of my memory.

"Q. All right, and they were encouraging other family members to do the same thing?

"A. Yes.

"Q. And since Amanda is a nurse --

"A. Yes.

"Q. -- y'all were probably inclined to follow her advice, were you not?

"A. Yes.

"Q. And so it's your recollection that maybe y'all were in a room together and perhaps looked at something on the HeartWise website, right?

"A. Yes.

"Q. Do you specifically know, ma'am, and this is very important, okay, do you specifically know what if anything Josh, your son, read on that website?

"A. I don't specifically know.

"Q. Thank you. Did Josh ever say to you either expressly or to the effect that, you know, Mom, if I had not read what was on that website I wouldn't have gone to HeartWise? Did he ever say anything like that to you?

"A. No, he didn't say that to me.

"Q. Do you think at the end of the day, ma'am, he would have gone to HeartWise on the basis of your other daughter's recommendation?

"A. Yes.

"....

"Q. [Alicia's counsel:] And after accessing the HeartWise website and discussing the HeartWise website was a decision made by the family to go to HeartWise?

"A. Yes.

"Q. Including Josh --

"….

"Q. -- your son Josh?

"A. Yes.

"Q. Okay. Now, you go to HeartWise. He gets there first, and then --

"A. I got there first.

"Q. I'm sorry, you got there first. And then I think you told me you went back and had some tests and then you came back in the waiting room?

"A. I went back and had the ultrasound, and then I came back in the waiting room, and he had gotten there --

"Q. Okay.

"A. -- and was in the process of filling out his paperwork.

"Q. And did y'all have a discussion at that time?

"A. Yes.

"Q. All right. In the waiting room at the HeartWise Clinic in --

"A. Albertville.

"Q. -- Albertville, thank you, did that clinic have information posted on the walls about the HeartWise Clinic and the services that that clinic offered?

"A. Yes, it was a big sign. I don't think it was posted on the wall, it was just kind of a stand-alone big sign.

"Q. Okay, a big sign. And did y'all look at that big sign?

"A. He was reading -- he was filling out the papers, and I was like, this is good, Josh, because this takes care of everything, this covers everything. This is good, I'm really glad we're all doing this.

"Q. All right. And when you say this, are you referring to the big sign in the HeartWise Clinic itself?

"A. Yes, the tests and everything that they do, I was glad that they were all going through that thorough testing to make sure everybody was okay.

"Q. All right. And that was while he is still in the waiting room filling out papers before he went back to have any of the tests done?

"A. Yes.

"Q. Before the EKG and before the ultrasound or echo or whatever the testing that was done?

"A. Yes.

"Q. All right. And so based on what you saw on that sign when you discussed to Josh -- did you relate that to him?

"A. Yes.

"Q. And did he look at the sign himself?

"A. Yes.

"Q. Okay. And after both of you had read the sign containing the HeartWise information pertaining to the tests that they conducted and the cardiac or heart evaluation and assessment that they did, did both of you believe that the HeartWise testing would either diagnose his heart condition if he had one or rule it out if he did not?

"….

"A. Yes.

"Q. Okay. And did I hear you say that you said something to him, this is just what we need?

"A. Yes.

"Q. And did he say anything in response to that?

"A. He agreed.

"….

"Q. [Counsel for Isaac Health and Drs. Nixon and Saylor]: Yes, ma'am. So you and Josh had already made the decision to undergo the HeartWise testing before you got there that day, correct?

"A. Yes, because we had looked at the information on-line.

"Q. Okay. Even if there were no brochures or signs in the lobby, you still would have moved forward with the testing, correct?

"A. If it was a blank office with nothing? I don't know.

"Q. Are you saying that if there wasn't a brochure or a sign on the wall that you would have walked out?

"A. If I walked into an office and it's a medical office that looked like this and there wasn't anything on the wall, regardless of what it said on the internet I probably wouldn't have went through with it because I was afraid it was -- HeartWise was new to me. I probably wouldn't have. I would have questioned it, did you just move into the office or … I mean, I think anybody would.

"Q. I am not suggesting that the wall would have been blank, I'm just saying if you would not have seen advertisements on the wall or a brochure, I'm just confirming that you still would have moved forward with the testing?

"A. When I got there it and it affirmed what I had heard -- I got there first. I went back. When Josh got there and we were talking, I was, like, this is what we need, I'm telling my son that, this is a good thing.

"Q. It confirmed or affirmed your belief, correct?

"A. That what they said they were going to do, it was there, so this was a good thing.

> "Q. And the decision to go to HeartWise to have this testing done wasn't based on something that was on the wall at HeartWise or in a brochure at HeartWise, correct?
>
> "A. The appointment was scheduled because my daughter recommended it and because we looked at the information [on the HeartWise website] to see what they tested for. When we got to HeartWise it affirmed to me that this was the right place, that this was a reputable place. They have the information there, they had the brochures there, they had the sign there. That was exactly what we had seen and what we needed, that what they offered was what we needed."

Michelle testified that the HeartWise brochure she and Josh viewed at the Isaac Health clinic was very similar in content to the brochure she was shown during her deposition and that Alicia submitted as evidence in opposition to HeartWise's summary-judgment motion. The HeartWise brochure stated that the "HeartWise Total Body Assessment" "[e]liminates months of experimentation finding the right diagnosis" for many conditions, including "Heart Attack[,] Heart Blockage[, and Heart Disease]." The HeartWise brochure described the HeartWise program as "[a] wholehearted approach to living." It also provided an explanation of each of the 31 tests offered as part of the HeartWise program. The introductory paragraph to the test descriptions stated:

> "The HeartWise Executive Health Program is designed to provide a comprehensive screening of cardiovascular and

> other related abnormalities which may be impairing your health and decreasing your quality of life. Most health care facilities in the US are disease-oriented -- they seek to identify and treat diseases which have already developed. In contrast, the HeartWise approach is preventive. Its wide-ranging tests, crafted by leading research facilities in the field of cardiovascular care, are designed to identify factors which may be putting you at risk before disease has fully developed. Alternatively, for patients who are already suffering from cardiovascular disease, the HeartWise full-body screening not only closely monitors the effectiveness of your treatment plan within your body; it also identifies other conditions which may be developing as a result of your current disease. Finally, our health care providers work closely with you to create a treatment plan uniquely tailored to your body and lifestyle. Our goal is to save you and your loved ones from the snowballing costs of heart disease in the future, as well as increasing vitality and the overall quality of your health now. Of the tests listed below, your provider may omit several tests depending on their medical appropriateness for you; however, if you prefer that they be conducted, please discuss this with your provider."

The description of the "Left Ventricular Cardiac Ultrasound Screening" stated:

> "Structural changes of the heart can occur months or even years before patients detect symptoms. Using a state-of-the-art GE Vivid I ultrasound machine, we measure for structural abnormalities in the major pumping chamber of the heart (left ventricle). An enlarged left ventricular indicates increased risk for ischemia and dysrhythmias. Abnormalities in this test may necessitate a complete echocardiogram."

After his arrival at the Isaac Health clinic, Josh filled out several patient-history forms. Josh then underwent the full battery of testing provided at the Isaac Health clinic. After completing the regimen of testing, Josh set up a follow-up appointment for reviewing the results and went home. Dr. Saylor testified that he reviewed Josh's initial intake medical exam and his EKG. Then the data points gathered from the tests administered to Josh were relayed to HeartWise's headquarters, and the data points were entered into HeartWise's software program. A HeartWise report was generated for Josh from that information. After Josh's report was sent to the Isaac Health clinic, Dr. Saylor reviewed its findings.

On September 18, 2015, Josh and Michelle returned to the clinic for a follow-up visit. During that visit, a nurse practitioner reviewed the HeartWise report with Josh; Michelle sat with Josh during his appointment. The HeartWise report recommended that Josh should follow up on matters such as his weight, diet, smoking, poor sleep quality, and anxiety. The report stated that the data from the left ventricular

echocardiogram was within the "normal" range.[4] The HeartWise report also stated that Josh's EKG was "normal" as "interpreted by medical provider."[5] Michelle testified that when Josh met with the nurse practitioner, other than making suggestions about needing to lose weight, to exercise, and to stop using tobacco, the nurse practitioner told Josh "in sum and substance" that he had "a clean bill of health" and that "Josh even said, so I'm healthy, and I can go on and live my life, and she [the nurse practitioner] said yes." Michelle stated that the nurse practitioner did not tell Josh in any way that he "needed to have any further diagnostic work-up or testing relative to his heart." Alicia

---

[4]In his deposition, Dr. Saylor explained that "the measurements [for the left ventricular echocardiogram] are performed by our ultrasonographer," Courtney Gulley, and that those measurements are sent to the HeartWise headquarters to be entered into the HeartWise software program. Dr. Saylor stated that he did not believe that the images from the left ventricular echocardiogram are sent to HeartWise and that "no one interpreted the [ultrasound] film prior to [Josh's] passing away."

[5]In his deposition, Dr. Saylor testified that he personally interpreted Josh's EKG, that the EKG was "accurately interpretable," and that it showed normal readings. Dr. Nixon agreed with Dr. Saylor's medical opinion concerning Josh's EKG. Dr. Ellis also agreed that Josh's EKG was "interpretable as normal." In contrast, Alicia's causation expert, Dr. Joseph Salloum, a cardiologist, testified that "the technical quality of this EKG is poor enough that I would request it to be repeated, and I would not interpret it."

testified that when she saw Josh at home later that day after the follow-up appointment, Josh related that he was told that "[h]e needed to exercise and lose weight, but everything else was fine, was normal."

On October 5, 2015, Josh collapsed at home while working on a construction project. He was taken to the Marshall Medical Center North Emergency Room, but he died the same day. The Sampson family procured a private autopsy to determine the cause of Josh's death. The autopsy report concluded that Josh died due to an arrhythmia secondary to hypertrophic cardiomyopathy, which is a congenital heart condition.

On September 15, 2017, Alicia, as administratrix of Josh's estate, filed a complaint in the Marshall Circuit Court asserting a wrongful-death claim against HeartWise, Isaac Health, and Drs. Nixon and Saylor. The complaint asserted two legal theories for recovery: (1) fraud, which was asserted against HeartWise and Isaac Health; and (2) negligence, which was asserted against HeartWise, Drs. Nixon and Saylor, and vicariously against Isaac Health. The allegation of fraud against Isaac Health and the allegations of negligence against Isaac Health and Drs. Nixon and Saylor are asserted pursuant to the Alabama Medical Liability Act ("the AMLA"), § 6-5-480 et seq. and § 6-5-540 et seq., Ala.

Code 1975. See Alicia's brief, p. 1 (stating that Alicia "concedes that the AMLA applies to the fraud claim alleged against Isaac Health and to the negligence claims pleaded against Isaac Health and Drs. Nixon and Saylor"). As to the fraud and negligence allegations asserted against HeartWise, Alicia contends -- and HeartWise agrees -- that "HeartWise is not within the definitions of 'healthcare provider'" provided in the AMLA, see § 6-5-481, Ala. Code 1975, and, therefore, that "both the fraud and negligence claims against HeartWise are governed by general common law and not by the AMLA." Alicia's brief, p. 2. See also HeartWise's brief, p. 1.

On July 12, 2022, HeartWise filed a summary-judgment motion as to all the allegations asserted against it. With respect to Alicia's fraud allegations, HeartWise contended that "the claim did not survive Joshua's death," citing Alabama's Survival Statute, § 6-5-462, Ala. Code 1975. HeartWise also argued that Alicia had failed to establish that Josh had reasonably relied upon representations from HeartWise in deciding to undergo testing at the Isaac Health clinic. With respect to Alicia's allegations of negligence against HeartWise, HeartWise contended that

Alicia "seeks to impose a duty on [HeartWise] that is owed solely by Isaac Health and [Drs. Nixon and Saylor]."

On August 26, 2022, Isaac Health and Drs. Nixon and Saylor filed a "Motion to Adopt and Incorporate Co-defendant's Motion for Summary Judgment" in which they stated that,

> "to the extent [Alicia] alleges fraud against [Isaac Health and Drs. Nixon and Saylor], these defendants hereby adopt and incorporate the arguments set forth in [HeartWise's] Motion for Summary Judgment as if set out in full herein. Additionally, all claims against [Isaac Health and Drs. Nixon and Saylor] are governed by and subsumed under the Alabama Medical Liability Act and subject to the provisions thereof."

Alicia concedes on appeal that she made no fraud allegation against Drs. Nixon and Saylor. See, e.g., Alicia's brief, p. 9 (stating that "[t]wo separate independent claims are pleaded: (1) fraud against Isaac Health; and (2) AMLA medical-malpractice negligence against Isaac Health and Drs. Nixon and Saylor"). Likewise, Isaac Health and Drs. Nixon and Saylor concede that they never moved for a summary judgment with respect to Alicia's negligence allegations against them. See, e.g., brief of Isaac Health and Drs. Nixon and Saylor, pp. 1, 24 ("These Appellees joined HeartWise's Motion for Summary Judgment as to the fraud claim. … (Dr. Saylor and Dr. Nixon's joinder in that motion was only to the

extent that [Alicia] might argue fraud against them.)"; "Isaac Health and Drs. Nixon and Saylor acknowledge that they did not move for summary judgment on the medical negligence claims asserted by [Alicia]."). Indeed, on September 6, 2022, Isaac Health and Drs. Nixon and Saylor filed a "Supplement to Motion for Summary Judgment" that sought to advance an additional argument against Alicia's fraud allegations against Isaac Health.[6] That supplement to the summary-judgment motion expressly stated: "This motion does not address the claims against [Isaac Health and Drs. Nixon and Saylor] under the AMLA."

On September 8, 2022, after holding a hearing, the circuit court entered a summary judgment in favor of all the defendants with respect to all of Alicia's allegations. In pertinent part, that judgment provided:

> "2. The Motions for Summary Judgment filed by the defense for all remaining Defendants is GRANTED as to the alleged fraud claims and wrongful death claim brought by [Alicia]. Abrams v. Ciba Speciality Chemicals Corp., 663 F.

[6]In their "Supplement to Motion for Summary Judgment," Isaac Health and Drs. Nixon and Saylor contended that a plaintiff can plead only one cause of action against a health-care provider and that, therefore, Alicia could not assert allegations of fraud and negligence against Isaac Health. Isaac Health and Drs. Nixon and Saylor do not reiterate that argument in this appeal.

Supp. 2d (2009). Alabama Code Section 6-5-462. Nationwide Mut. Ins. Co. v. Wood, 121 So. 3d 982 (2013).

"3. This disposes of all the issues set for trial on September 12, 2022."[7]

Alicia appeals from the September 8, 2022, summary judgment.

II. Standard of Review

"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.'

[7]That judgment first stated that the parties had agreed to dismiss nurse Jana Zeitvogel from the action. The briefs do not mention Nurse Zeitvogel, but she appears to have been included as a party by way of Alicia's April 10, 2019, "First Amendment to Complaint." That amendment is of no consequence to this appeal.

> West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

III. Analysis

Alicia challenges the circuit court's summary judgment with respect to all of her allegations against HeartWise, Isaac Health, and Drs. Nixon and Saylor: the allegations of fraud against HeartWise and Isaac Health, and the allegations of negligence against HeartWise, Isaac Health, and Drs. Nixon and Saylor. Before we specifically address the issues and arguments with respect to each party, we note that the parties do not discuss Alicia's allegations in the most precise fashion. The parties argue about Alicia's "claims" of fraud and her "claims" of negligence. However, this Court previously has explained that such is not the correct framing for allegations in a wrongful-death action.

> "The complaint alleges several different counts against ITEC and IC, including products liability (count VIII), negligence and/or wanton conduct (count IX), violation of the AEMLD (count X), and breach of warranty (count XI). However, those counts are not separate claims. Instead, Sledge can maintain an action against ITEC and IC only under Ala. Code 1975, § 6-5-410, for wrongful death, which she specifically alleged in count XV of the complaint. Alabama Power Co. v. White, 377 So. 2d 930, 933 (Ala. 1979) ('[I]n Alabama there is but one cause of action for wrongful death, i.e., [Ala.] Code 1975, § 6-5-410.'); see also Carter v. City of

> Birmingham, 444 So. 2d 373, 375 (Ala. 1983) (noting that 'under Alabama law only a wrongful death action may be maintained, and only punitive damages are recoverable'). Counts VIII through XI in this case cannot be maintained by Sledge outside a wrongful-death action under § 6-5-410, Ala. Code 1975; instead, those counts are '"mere variations of legal theory"' underlying Sledge's single wrongful-death claim, Scrushy[v. Tucker, 955 So. 2d 988, 998 (Ala. 2006)] (quoting Stearns v. Consolidated Mgmt., Inc., 747 F.2d 1105, 1109 (7th Cir. 1984)), and Sledge can recover only one set of damages for all. Trott v. Brinks, Inc., 972 So. 2d 81, 84 (Ala. 2007) (noting that, in a wrongful-death action, 'the only recoverable damages are punitive damages')."

Sledge v. IC Corp., 47 So. 3d 243, 247 (Ala. 2010) (footnotes omitted and emphasis added).

Sledge's explication that a wrongful-death plaintiff's allegations may involve variations on legal theories for recovery but that those theories do not compose separate "claims" is not just a matter of semantics for purposes of this case. As we will explain, the nature of Alicia's fraud theory has implications regarding the relevance of Alabama's Survival Statute in this case. Likewise, the viability of Alicia's allegations of negligence against HeartWise is determined in part by the underlying nature of Alicia's theory of negligence. Before we reach those issues, however, we will first address the circuit court's disposition of

Alicia's allegations of negligence against Isaac Health and Drs. Nixon and Saylor.

A. Alleged Negligence by Isaac Health and Drs. Nixon and Saylor

Alicia correctly observes that the circuit court entered a summary judgment in favor of Isaac Health and Drs. Nixon and Saylor with respect to her negligence allegations against them even though those parties never moved for a summary judgment concerning those negligence allegations. This was a clear error because Isaac Health and Drs. Nixon and Saylor did not raise the negligence allegations against them in either their motion to join HeartWise's summary-judgment motion or in their supplement to the summary-judgment motion, and they concede on appeal that they did not move for a summary judgment as to those allegations. We have addressed this same procedural context on multiple occasions.

> "Further, although the trial court's summary-judgment order in favor of the City, on its face, appeared to dismiss all claims in favor of the City, the City's motion for a summary judgment moved only for a summary judgment on the nuisance claim and the inverse-condemnation claim. Consequently, only those claims were properly before the trial court on the summary-judgment motion. See Robinson v. JMIC Life Ins. Co., 697 So. 2d 461, 461 (Ala. 1997) ('At the outset, we note that the trial court's judgments adjudicated all of Robinson's claims. This was error, because the

> defendants had sought summary judgments only as to the fraudulent suppression claim.'). See also Parr v. Goodyear Tire & Rubber Co., 641 So. 2d 769, 772 (Ala. 1994); Henson v. Mobile Infirmary Ass'n, 646 So. 2d 559, 562 (Ala. 1994); Sexton v. St. Clair Fed. Sav. Bank, 653 So. 2d 959, 962 (Ala. 1995); and Bibbs v. MedCenter Inns of Alabama, Inc., 669 So. 2d 143, 144 (Ala. 1995)."

Baugus v. City of Florence, 968 So. 2d 529, 532 (Ala. 2007).

We have explained the necessity of reversing a trial court's judgment in such situations accordingly:

> "'[A] defendant who moves for a summary judgment on the ground of "a failure of the [plaintiff's] evidence ... must indicate where the [plaintiff's] case suffers an evidentiary failure." Kennedy v. Western Sizzlin Corp., 857 So. 2d 71, 78 (Ala. 2003). If such a summary-judgment motion "does not inform the trial court (and the [plaintiff]) of a failure of the [plaintiff's] evidence on a fact or issue, no burden shifts to the [plaintiff] to present substantial evidence on that fact or issue. Therefore, summary judgment for a failure of proof not asserted by the motion for summary judgment is inappropriate." Tanner v. State Farm Fire & Cas. Co., 874 So. 2d 1058, 1068 n.3 (Ala. 2003) (citations omitted).
>
> "'Thus, ... a trial court should not grant a summary judgment, and an appellate court will not affirm one, on the basis of an absence of substantial evidence to support an essential element of a claim or affirmative defense unless the motion for a summary judgment has properly raised that absence of evidence and has thereby

> shifted to the nonmoving party the burden of producing substantial supporting evidence.'
>
> "Hollis v. City of Brighton, 885 So. 2d 135, 140 (Ala. 2004). See also Turner v. Westhampton Court, L.L.C., 903 So. 2d 82, 87 (Ala. 2004) (stating that '[s]ummary judgment cannot be entered against the nonmoving party on the basis of a failure of that party's proof unless the motion for summary judgment has challenged that failure of proof')."

Kruse v. Vanderbilt Mins., LLC, 189 So. 3d 42, 55 (Ala. 2015) (plurality opinion).

In short, because Isaac Health and Drs. Nixon and Saylor never moved for a summary judgment with respect to Alicia's negligence allegations against them, those allegations were never properly presented to the circuit court for adjudication, and the burden never shifted to Alicia to defend those allegations.[8] Accordingly, we reverse the

[8]The dissenters to this portion of the opinion assert that Alicia needed to file a Rule 59(e), Ala. R. Civ. P., motion in the circuit court to preserve this error for appellate review. However, in all of the cases in which this Court has encountered the same procedural posture as this case -- cases in which the trial court entered a summary judgment on claims that were not "properly before the trial court on the summary-judgment motion," Baugus v. City of Florence, 968 So. 2d 529, 532 (Ala. 2007) -- this Court has reversed the summary judgment regardless of whether a Rule 59(e) motion was filed. See Patel v. Shah, 295 So. 3d 659, 668 (Ala. 2019) (plurality opinion); Robinson v. JMIC Life Ins. Co., 697 So. 2d 461, 461 (Ala. 1997) (plurality opinion); Hatch v. Health-Mor, Inc., 686 So. 2d 1132, 1132 (Ala. 1996); Sexton v. St. Clair Fed. Sav. Bank, 653 So. 2d 959, 962 (Ala. 1995); Bibbs v. MedCenter Inns of Alabama, Inc.,

669 So. 2d 143, 144 (Ala. 1995); Parr v. Goodyear Tire & Rubber Co., 641 So. 2d 769, 772 (Ala. 1994); and Henson v. Mobile Infirmary Ass'n, 646 So. 2d 559, 562 (Ala. 1994). Cf. James v. Rane, 8 So. 3d 286, 288 (Ala. 2008).

The logic of the summary-judgment reversals in those cases is that if the non-moved-for claims were never properly presented to the trial court for adjudication in the summary-judgment motions, the nonmoving parties had no notice to present arguments or evidence against summary judgment on those claims, the movants never satisfied the initial burden of production for entitlement to a summary judgment, and, therefore, the trial courts never had authority to enter a summary judgment on those claims. Indeed, the deliberate choice not to include certain claims in a summary-judgment motion -- which is effectively what Isaac Health and Drs. Nixon and Saylor did here in only seeking summary judgment as to Alicia's fraud allegations, not as to her negligence allegations -- is akin to a party not moving for a summary judgment at all. When a trial court enters a summary judgment for a party that made no such motion, this Court reverses the judgment based on a lack of notice. See, e.g., Giles v. Brookwood Health Servs., Inc., 5 So. 3d 533, 555 (Ala. 2008) ("'Because Rule 56[, Ala. R. Civ. P.,] requires, at the least, that the nonmoving party be provided with notice of a summary-judgment motion and be given an opportunity to present evidence in opposition to it, the trial court violates the rights of the nonmoving party if it enters a summary judgment on its own, without any motion having been filed by a party.'" (quoting Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 927 (Ala. 2002))).

It is true that the opinion in Employees of the Montgomery County Sheriff's Dep't v. Marshall, 893 So. 2d 326, 331 (Ala. 2004), suggested that a Rule 59(e) motion would be necessary to preserve such an error, but that suggestion was dictum because the Marshall Court ultimately concluded that the nonmoving plaintiffs had waived any objection to the trial court's entry of a summary judgment on non-moved-for claims by failing to make any arguments on appeal pertaining to those claims. That is not the case here because Alicia specifically argues to us that Isaac Health and Drs. Nixon and Saylor did not move for a summary judgment

summary judgment entered in favor of Isaac Health and Drs. Nixon and Saylor with respect to Alicia's negligence allegations against those parties.

B. Alleged Fraud by HeartWise and Isaac Health

Alicia's fraud allegations against HeartWise are premised on the advertising on HeartWise's website. Her fraud allegations against Isaac Health are premised on HeartWise advertising materials that were present in the Isaac Health clinic's waiting room. Alicia asserts that

---

with respect to her negligence allegations against them and that, therefore, they never fulfilled the initial burden required for entitlement to a summary judgment. See Alicia's brief, pp. 9-11. Moreover, although the Marshall Court cited Henson and Hatch, it failed to note that there was no indication in those opinions that a Rule 59(e) motion was filed or was necessary to reverse the trial courts' summary judgments on the non-moved-for claims in those cases.

Lay v. Destafino, [Ms. 1210383, Feb. 17, 2023] ___ So. 3d ___, ___ (Ala. 2023), which is relied upon by the dissenters, is inapposite because that case presented a starkly different procedural posture in which a trial court's final judgment failed to itemize damages. That error did not substantively affect the outcome of the case; it was akin to a clerical error that solely rested with the trial court. In contrast, the summary-judgment context here implicates the burdens placed on the parties, the fate of certain allegations, and the reviewing responsibility of the trial court. Additionally, unlike here, the decision in Lay relied upon direct supporting authority, i.e., Green Tree Acceptance, Inc. v. Standridge, 565 So. 2d 38 (Ala. 1990), in which the only distinguishing feature was a jury trial rather than a bench trial.

HeartWise's website and the advertising materials allegedly played a role in Josh's selecting the Isaac Health clinic for a heart evaluation. Specifically, in her original complaint, Alicia stated:

> "8. [Alicia] further avers that the intent and purpose of [Josh's] visit to the [Isaac Health] Heartwise Clinic was to either definitively diagnose or rule out a congenital heart condition. [Josh's] father had recently died from an underlying congenital heart defect, and this was the sole impetus for [Josh's] visit to the Defendant, Heartwise Clinic.
>
> "9. [Josh's] presentation to [HeartWise] was induced by [HeartWise's] and Isaac Health's express representations, separately and severally, that the Heartwise program would detect serious health risks in patients and provide real results that would create actionable outcomes for improved health. Said Defendants also affirmatively represented that they possessed proprietary algorithms that compare test results from decades of data in order to provide a comprehensive analysis of a patient's well-being.
>
> "10. [HeartWise] and Isaac Health further expressly represented that Heartwise takes the guesswork out of the patient's health. They further represented that Heartwise was a full body exam designed to provide a 360-degree view of an individual's health. These defendants further represented that the Heartwise experience would provide an in-depth report that improves patient health, reduces preventable illnesses and gets to the root cause of issues, rather than addressing only symptoms. These same defendants also represented that the Heartwise program was able to detect and prevent heart attack, stroke, and multiple additional conditions with 'hidden' symptoms, as well as total body assessment including, but not limited to: aneurysm, heart attack, heart blockage, heart disease, among other things.

> "11. [HeartWise] and Isaac Health further expressly represented that the Heartwise program was designed to provide a comprehensive screening of cardiovascular and other related abnormalities including, but not limited to the following: arterial stiffness, comprehensive blood pressure assessment, carotid artery analysis, abdominal aortic ultrasound screening, electrocardiogram, left ventricular cardiac ultrasound screening, among others.
>
> "12. [Alicia] further avers that the representations set forth in paragraphs 9-11 above were false and misleading, and [HeartWise] and Isaac Health knew they were false, or alternatively, recklessly misrepresented them, with the intent to induce [Josh] and others to rely upon the same.
>
> "13. [Alicia] further avers that [Josh] believed the express misrepresentations set forth in paragraphs 9-11, relied upon them and presented to the defendants' clinic to definitively diagnose, treat, or rule out any underlying congenital heart condition that he was suffering from."

HeartWise and Isaac Health offer several arguments in support of the circuit court's summary judgment in their favor with respect to Alicia's fraud allegations. Initially, they contend that Alicia's fraud allegations were precluded by Alabama's Survival Statute. Based on the cases the circuit court cited in its summary judgment, it appears that the circuit court agreed with that argument.

Alabama's Survival Statute, § 6-5-462, Ala. Code 1975, provides:

> "In all proceedings not of an equitable nature, all claims upon which an action has been filed and all claims upon which no action has been filed on a contract, express or implied, and

> all personal claims upon which an action has been filed, except for injuries to the reputation, survive in favor of and against personal representatives; and all personal claims upon which no action has been filed survive against the personal representative of a deceased tortfeasor."

"'Under the Alabama survival statute, § 6-5-462, Ala. Code 1975, an unfiled claim sounding in tort will not survive the death of the person with the claim, Malcolm v. King, 686 So. 2d 231 (Ala. 1996); Georgia Cas. & Sur. Co. v. White, 582 So. 2d 487 (Ala. 1991).'" Nationwide Mut. Ins. Co. v. Wood, 121 So. 3d 982, 984 (Ala. 2013) (quoting Brooks v. Hill, 717 So. 2d 759, 763 (Ala. 1998)). HeartWise and Isaac Health contend that because fraud is a personal tort, and because Josh did not file a fraud claim against them before his death, Alicia's fraud "claim" did not survive Josh's death.

The fundamental problem with that argument, as we hinted at the outset of the "Analysis" portion of this opinion, is that it misunderstands the nature of Alicia's fraud allegations. Alicia is asserting that the alleged fraud contributed to Josh's death. In other words, the alleged fraud is one theory of recovery for Alicia's claim of wrongful death. Alabama's Wrongful Death Act, § 6-5-410, Ala. Code 1975, "remains the sole remedy for the tortious infliction of death in our state …." King v. National Spa

& Pool Inst., Inc., 607 So. 2d 1241, 1248 (Ala. 1992). See also Sledge, 47 So. 3d at 247. Because of the nature of Alicia's fraud allegations, i.e., because the fraud is alleged to be a contributing cause of Josh's wrongful death, there is no issue of "survival" with respect to such a "claim" -- the theory of recovery based on fraud.[9] See In re Rezulin Prods. Liab. Litig., 133 F. Supp. 2d 272, 287 n.49 (S.D.N.Y. 2001) (explaining that, "[h]ere, the Alabama complaint alleges that the alleged fraud caused the death of plaintiff's decedent. See Cantley v. Lorillard Tobacco Co., Inc., 681 So. 2d 1057 (Ala. 1996) (stating fraud claims in wrongful death action). This Court therefore regards the Alabama complaint as asserting a wrongful death claim. Accordingly, defendants' attack on the fraud claim as having been extinguished by the death of plaintiff's decedent is without merit.").

[9]Isaac Health cites Gillion v. Alabama Forestry Ass'n, 597 So. 2d 1315, 1322 (Ala. 1992), as a case in which this Court has "held that an unfiled fraud claim is barred after the death of the person holding the claim." Brief of Isaac Health and Drs. Nixon and Saylor, p. 12. But Gillion was not a wrongful-death action; Gillion was an insurance case in which the wife of the decedent was seeking damages for breach of contract, bad faith, and fraud against two insurance companies. The other cases Isaac Health cites -- Miller v. Dobbs Mobile Bay, Inc., 661 So. 2d 203 (Ala. 1995), Mitchell v. Folmar & Assocs., LLP, 854 So. 2d 1115 (Ala. 2003), Bates v. L & N Emp. Credit Union, 374 So. 2d 323, 324 (Ala. 1979), and Sanford v. Western Life Ins. Co., 368 So. 2d 260, 263 (Ala. 1979) -- likewise were not wrongful-death actions, and so they do not speak to the issue of the "survival" of Alicia's fraud allegations.

Therefore, we reject the notion that § 6-5-462 precludes Alicia's fraud allegations against HeartWise and Isaac Health.

Both HeartWise and Isaac Health also contend that Alicia failed to present substantial evidence with respect to multiple elements of fraud. "The elements of fraud are (1) a false representation (2) of a material existing fact (3) reasonably relied upon by the plaintiff (4) who suffered damage as a proximate consequence of the misrepresentation." Padgett v. Hughes, 535 So. 2d 140, 142 (Ala. 1988). Specifically, HeartWise and Isaac Health argue that Alicia failed to introduce substantial evidence: (1) that HeartWise's advertising constituted a false representation; (2) that Josh reasonably relied upon representations of HeartWise and Isaac Health in choosing to undergo a heart evaluation at the Isaac Health clinic; and (3) that the alleged fraud proximately caused Josh's death.

At the outset, we decline to address the arguments from HeartWise and Isaac Health with respect to whether the representations in question were false or whether the alleged fraud actually caused Josh's death because neither HeartWise nor Isaac Health ever raised those issues in the circuit court. In its summary-judgment motion (which Isaac Health

adopted), HeartWise contended that "[Alicia] cannot prove the necessary elements of fraud." But HeartWise's motion then proceeded to argue only that there was no evidence indicating that Josh reasonably relied upon representations made by HeartWise, not that there was no evidence of false representations or that the alleged fraud did not cause Josh's death. This Court will not "affirm the trial court on any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court" when "a summary-judgment movant has not asserted before the trial court a failure of the nonmovant's evidence on an element of a claim or defense and therefore has not shifted the burden of producing substantial evidence in support of that element …." Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003). Therefore, we will not consider the issues raised on appeal regarding misrepresentation and causation as a basis for affirming the circuit court's summary judgment in favor of HeartWise and Isaac Health with respect to Alicia's fraud allegations.

Alicia contends that she submitted substantial evidence showing that Josh reasonably relied on representations from HeartWise --

representations that she says were ratified by Isaac Health -- about the HeartWise program in deciding to come to the Isaac Health clinic for a heart evaluation.

> "'An essential element of any fraud claim is that the plaintiff must have reasonably relied on the alleged misrepresentation.' Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1160 (Ala. 2003). Section 6-5-101, Ala. Code 1975, provides that '[m]isrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party ... constitute legal fraud.' Thus, reliance in the form that the misrepresentation is 'acted on by the opposite party' is an essential element of fraud in Alabama. Liberty Nat'l Life Ins. Co. v. Allen, 699 So. 2d 138, 141 (Ala. 1997).
>
> "Moreover, the burden is on the party alleging fraud to prove by substantial evidence the element of reliance. Allstate Ins. Co. v. Eskridge, 823 So. 2d 1254, 1264 (Ala. 2001). …
>
> "Reliance requires that the misrepresentation actually induced the injured party to change its course of action. …
>
> "….
>
> > "'"To determine whether or not a misrepresentation was actually relied upon, whether it was a cause in fact of the damage, the sine qua non rule is often applied. If the plaintiff would not have acted on the transaction in question but for the misrepresentation, such misrepresentation was an actual cause of his loss. If he would have adopted the same course irrespective of the misrepresentation and would have

> sustained the same degree of damages anyway, it can not be said that the misrepresentation caused any damage, and the defendant will not be liable therefor."'
>
> "Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortgage Co., 390 So. 2d 601, 611 (Ala. 1980) (quoting Fowler V. Harper and Fleming James, Jr., The Law of Torts § 7.13 (1956)). See also Fisher v. Comer Plantation, Inc., 772 So. 2d 455, 466 (Ala. 2000) ('When deciding whether the plaintiff relied on a misrepresentation, the fact-finder must consider whether the plaintiff would have chosen a different course but for the suppression of a material fact.')."

Hunt Petroleum Corp. v. State, 901 So. 2d 1, 4-5 (Ala. 2004) (emphasis added). "Whether a plaintiff has reasonably relied on a defendant's misrepresentation is usually a question of fact." McIver v. Bondy's Ford, Inc., 963 So. 2d 136, 142-43 (Ala. Civ. App. 2007) (citing Foremost Ins. Co. v. Parham, 693 So. 2d 409, 421 (Ala. 1997)).

HeartWise and Isaac Health argue that the evidence demonstrates that Josh came to the Isaac Health clinic because of the recommendation of his sister, Amanda, who is a nurse. Alicia counters that the evidence indicates that Josh's decision to choose to go to the Isaac Health clinic for a heart evaluation was influenced by his sister's recommendation and by information on HeartWise's website.

In support of their arguments concerning the element of reliance, all the parties cite the deposition testimony of Michelle Sampson, the pertinent portions of which we recounted in our rendition of the facts. HeartWise emphasizes a section of Michelle's testimony in which she stated that Josh never said to her that he would not have gone to the Isaac Health clinic if he had not read the information on HeartWise's website and that she believed that Josh would have gone to the Isaac Health clinic solely on the basis of Amanda's recommendation. Alicia counters by noting that in several portions of Michelle's testimony she stated that she thought the whole family looked at the HeartWise website after Amanda had told them about the HeartWise program. HeartWise rejoins that Michelle admitted that she did not "specifically know" what Josh had read on the HeartWise website.

When we assess deposition testimony for the purpose of determining whether it defeats a motion for summary judgment, we must "view the testimony as a whole, and, so viewing it, determine if the testimony is sufficient to create a reasonable inference of the fact the plaintiff seeks to prove." Hines v. Armbrester, 477 So. 2d 302, 304 (Ala. 1985). See also Mohr v. CSX Transp., Inc., 309 So. 3d 1204, 1211 (Ala.

2020) ("We reiterate that this Court has cautioned against the practice of relying on isolated excerpts of deposition testimony to argue in favor of a proposition the testimony as a whole does not support."). There is no doubt that Michelle's testimony is somewhat contradictory with respect to whether Josh relied in part upon information on HeartWise's website in deciding to make an appointment at the Isaac Health clinic. However, "[t]he evidence must be viewed in the light most favorable to the nonmoving party." Moore v. Spiller Associated Furniture, Inc., 598 So. 2d 835, 836 (Ala. 1992). When the evidence is viewed as a whole in that light, a fair-minded person could conclude that information provided by HeartWise helped persuade Josh to go to the Isaac Health clinic. See, e.g., Fuqua v. Ingersoll-Rand Co., 591 So. 2d 486, 488 (Ala. 1991). Thus, we conclude that Alicia presented substantial evidence of reasonable reliance with respect to her fraud allegations against HeartWise.

However, we cannot reach the same conclusion with respect to Alicia's fraud allegations against Isaac Health. Michelle's deposition testimony reflects that Josh was already at the Isaac Health clinic for his appointment when he viewed information about the HeartWise program in the Isaac Health clinic's waiting room. Indeed, Alicia admits in her

appellate brief that she "is not asserting that Josh 'relied' upon the sign and brochure [in the waiting room] in initially making his HeartWise appointment. The primary relevance of the sign and brochure is their substantive informational content." Alicia's brief, p. 22 (emphasis in original). There is no evidence indicating that Josh would not have proceeded with the appointment without the HeartWise materials present in the Isaac Health clinic's waiting room. The only evidence Alicia points to is a portion of Michelle's deposition testimony in which she stated that if the waiting-room walls had been blank, she probably would have walked out of the clinic and not proceeded with the appointment. But that testimony is speculative as to what would have happened if the Isaac Health clinic's waiting room had been bare, and that testimony speaks only to what Michelle would have done, not Josh. In short, there is simply no evidence indicating that Josh's action of proceeding with the appointment would have changed if he had not seen the HeartWise materials at the Isaac Health clinic. Therefore, even if it could be said that Isaac Health "ratified" HeartWise's advertising claims because of the presence of the sign and brochures in the Isaac Health clinic waiting room, Josh did not reasonably rely upon Isaac Health's

representations. See Hunt Petroleum Corp., 901 So. 2d at 4-5. Accordingly, we affirm the circuit court's summary judgment with respect to Alicia's fraud allegations against Isaac Health.

C. Alleged Negligence by HeartWise

In her original complaint, Alicia presented the following allegations of negligence:

> "17. [Alicia] avers that a thorough and comprehensive cardiovascular analysis would have definitively diagnosed [Josh's] underlying cardiac condition and would have led to the implementation of a defibrillator which would have resulted in [Josh's] long-term survival and prevented his unfortunate and untimely death.
>
> "18. [Alicia] further avers that the Defendants, [HeartWise], Isaac Health, William A. Nixon, M.D., and Jeffery Saylor, M.D., separately and severally, fell below the minimum standard of care required of them, and hence were negligent in one or more of the following ways, to wit:
>
> "a. Negligently diagnosed, cared for, and treated [Josh];
>
> "b. Negligently failed to accurately interpret [Josh's] EKG;
>
> "c. Negligently interpreted [Josh's] EKG as normal, when in truth and fact, it was uninterpretable;
>
> "d. Negligently interpreted [Josh's] sonogram of the heart as normal when, in truth and fact, it was abnormal;

"e. Negligently failed to diagnose [Josh's] hypertrophic cardiomyopathy;

"f. Negligently diagnosed [Josh's] cardiovascular system as normal;

"g. Negligently failed to refer [Josh] to a cardiologist for a bona-fide, legitimate cardiovascular diagnostic work-up and evaluation;

"h. Negligently represented that 'Heartwise -- a wholehearted approach to living' would provide a 360-degree view of an individual's health;

"i. Negligently represented that 'Heartwise -- a wholehearted approach to living' was able to detect and prevent heart attack, stroke, and multiple additional conditions with 'hidden' symptoms, as well as total body assessment, including, but not limited to: aneurysm, heart attack, heart blockage, heart disease, among other things;

"j. Negligently represented that 'Heartwise -- a wholehearted approach to living' was designed to provide a comprehensive screening of cardiovascular and other related abnormalities;

"k. Negligently failed to perform a complete echocardiogram of [Josh's] heart;

"l. Negligently failed to give [Josh] accurate informed consents as to the inherent limitations and restrictions on [its] incomplete testing.

> "….
>
> "20. [Alicia] further avers that the above-referenced departures and deviations from the minimum standard of care, separately and severally, combined and concurred to proximately cause the preventable wrongful death of [Josh] on October 5, 2015."

We begin by noting that Alicia's allegations of negligent misrepresentation are included within the rubric of fraud.

> "A negligent misrepresentation constitutes legal fraud. See § 6-5-101, Ala. Code 1975 ('Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud.')."

Bryant Bank v. Talmage Kirkland & Co., 155 So. 3d 231, 235 (Ala. 2014). Therefore, we do not address those allegations in this part of our analysis concerning Alicia's negligence allegations against HeartWise.

In the circuit court, HeartWise contended that Alicia's negligence allegations against it must fail because HeartWise did not owe a duty to Josh. HeartWise notes that, based on its licensing agreement with Isaac Health, it had a contractual duty to provide certain services to Isaac Health. In part, that licensing agreement provided:

> "2.1 [HeartWise] shall assist [Isaac Health] staff in managing the day-to-day business affairs and operations of [the Isaac Health clinic] during the term of this agreement

> (the 'Management Services'). Management Services provided by [HeartWise] shall including, without limitation, the following: …. (v) processing patient reports (i.e., [HeartWise] patient results folders) and shipping folders to site to aid physician in patient care ….
>
> "….
>
> "2.4 Throughout the term of this Agreement, [Isaac Health] retains final decision-making authority with respect to patient care."

> "7.6 … Nothing herein shall be deemed to restrict [Isaac Health] from engaging in the traditional practice of medicine as performed by [Isaac Health] prior to this Agreement."

HeartWise argues that the foregoing provisions of the licensing agreement illustrate that Alicia's negligence allegations against it seek to impose a duty upon HeartWise that it simply did not possess. Specifically, HeartWise contends that it had no duty to diagnose, care for, or treat Josh's medical conditions because, as Alicia's own family-medicine expert, Dr. Jared Ellis, testified, the HeartWise program is "a program with specific protocols for cardiac screening," not a diagnostic service. Deposition testimony from HeartWise corporate representative Anna Remillard that we recounted in the rendition of facts supports that HeartWise's responsibilities included inputting data from the testing

performed by Isaac Health staff into its proprietary software to generate a report on a patient's testing results that reflects where those results fall within the protocols contained in the software program. HeartWise does not employ an independent doctor to review patient testing results. In fact, according to Dr. Saylor, HeartWise did not even receive the imaging produced from Josh's left ventricular echocardiogram, and so HeartWise could not have performed any sort of diagnosis concerning the condition of Josh's heart. In its brief, HeartWise describes its service as being similar to medical screenings:

> "The HeartWise program is similar to an x-ray. The doctor or other medical professional determines whether to order an x-ray for a patient, and then the doctor interprets the result of the x-ray and determines a course of treatment for the patient based on the results. Like an x-ray, clinical laboratory tests, a blood pressure monitor, or an EKG, the HeartWise software is a tool for doctors to assist them in evaluating their patients. Ultimately, the doctors use their own medical expertise and judgment to interpret the results of the screening and develop a course of treatment."

HeartWise's brief, p. 33.

Alicia insists that HeartWise owed a duty of due care to Josh under common-law negligence principles "[b]ecause a mistake by HeartWise could foreseeably cause injury to a patient like Josh." Alicia's brief, p. 32. Alicia cites Lance, Inc. v. Ramanauskas, 731 So. 2d 1204 (Ala. 1999), as

an analogous case. Lance was a wrongful-death action initiated against the distributor of vending machines by the parents of a child who was electrocuted by a vending machine located in a hotel. In Lance, this Court explained:

> "A duty of care arises when it is foreseeable that harm may result if care is not exercised. See Bush v. Alabama Power Co., 457 So. 2d 350 (Ala. 1984). Lance maintains that it was under no duty to police the condition of the circuitry providing electrical current to its vending machines because, it says, it was not foreseeable that someone might be electrocuted while using its machines. Lance says that no incident related to an electrical problem associated with its vending machines was reported before the child's death.
>
> "The parents direct our attention to Harris v. Board of Water & Sewer Comm'rs of City of Mobile, 294 Ala. 606, 320 So. 2d 624, 630 (1975), where this Court, citing Havard v. Palmer & Baker Engineers, Inc., 293 Ala. 301, 302 So. 2d 228 (1974), held that 'where one party to a contract assumes a duty to another party to that contract, and it is foreseeable that injury to a third party -- not a party to the contract -- may occur upon a breach of that duty, the promisor owes a duty to all those within the foreseeable area of risk.' The foreseeability of injury to others upon the negligent performance of a contract is the touchstone of tort liability to a third party. See Berkel & Co. Contractors, Inc. v. Providence Hospital, 454 So. 2d 496 (Ala. 1984). The parents maintain that they produced substantial evidence that Lance and the motel had entered into a contract, and that pursuant to that contract Lance had assumed a duty to keep its vending machine safe. The parents say that they submitted substantial evidence that it was foreseeable that injury could occur if the vending machine was not properly installed and

> maintained, and that, therefore, the question of foreseeability was properly submitted to the jury. We agree."

731 So. 2d at 1208-09 (footnote omitted).

Alicia argues that, as with the vending-machine distributor in Lance, HeartWise assumed a duty to ensure that the patient reports it sent to Isaac Health were correct because it knew that Isaac Health would "use and rely upon the HeartWise 'report' in making diagnosis and treatment decisions for their patients. Thus, a material mistake in the 'report' can foreseeably cause injury to a patient such a Josh." Alicia's brief, p. 34.

There are several problems with Alicia's argument. First, based on the assignment of responsibilities contained in the licensing agreement, HeartWise's duties involved providing the software program, correctly inputting into the software program the data points produced from tests performed on a patient, and sending the report generated by the software program back to Isaac Health for Drs. Nixon and Saylor to interpret the report and to provide a diagnosis to the patient. Thus, although Alicia is correct that "a material mistake in the 'report' can foreseeably cause injury to a patient such as Josh," the only potential mistakes that would be within HeartWise's responsibilities are entering testing data points

correctly and having accurate protocols in its proprietary software. But Alicia did not allege that HeartWise negligently entered data points or that its protocols were inaccurate. She alleged such issues as negligently failing to diagnose Josh's hypertrophic cardiomyopathy, negligently interpreting Josh's EKG, negligently interpreting Josh's left ventricular echocardiogram, negligently diagnosing Josh's cardiovascular system as normal, and negligently failing to refer Josh to a cardiologist. The responsibilities for interpreting scans, diagnosing cardiovascular issues, and determining whether referral to a heart specialist was necessary clearly belonged to Drs. Nixon and Saylor, not to HeartWise.

Moreover, even if Alicia had alleged that HeartWise negligently entered data points into its software program or that it had inaccurate protocols for its software program that caused Josh's echocardiogram to be defined as "normal" when that was not, in fact, the case, she provided no evidence in support of such allegations. Alicia's standard-of-care expert, Dr. Ellis, criticized HeartWise for claiming that its program was a "comprehensive" cardiovascular work-up when, in reality, it was limited in its scope. He never testified that HeartWise's report should

have flagged a problem with Josh's heart based on the testing that was performed.

> "Q. [Counsel for Isaac Health and Drs. Nixon and Saylor:] So in terms of comparing it to a comprehensive diagnostic work-up, in other words, a full comprehensive cardiovascular diagnostic work-up, it is not that, correct?
>
> "A. [Dr. Ellis:] Correct.
>
> "Q. And it is not, by the language of the documents that you have, intended to be or represented to be a full comprehensive cardiovascular diagnostic work-up, is it?
>
> "A. Correct.
>
> "Q. Okay. The reality, and I'm really -- I know you're not, or at least I hope you're not -- I'll just put it this way.
>
> "Semantics aside, it is as comprehensive as it is stated to be, isn't it?
>
> A. I'm not sure I would agree with that, and I will elaborate. Comprehensive could be interpreted as either side of the equation. I'm not sure the family would have understood that it wasn't totally comprehensive. In other words, they may have thought that it completely ruled out what they were concerned about. I think it was comprehensive from the point of view of HeartWise and the persons there because they felt that they did their comprehensive evaluation. But the patient is not going to know or the person is not going to know what is or isn't going to be looked for with a particular echocardiogram. They're not going to know that a three-minute stress test is not a full three minutes, and they're not going to know or really understand that a limited left ventricular ultrasound doesn't look at other parts of the heart.

> They might, it depends on how much their baseline healthcare literacy would be, so --
>
> > "….
> >
> > "Q. [Counsel for HeartWise:] All right. And, as I understand your testimony, you do believe that the program itself is a screening program as opposed to a diagnostic program, right?
> >
> > "A. Yes.
> >
> > "Q. All right, and that as a screening program, it's a full battery of tests, thirty-one different tests, is comprehensive, right?
> >
> > "A. Fairly comprehensive. I can't say it's fully comprehensive.
> >
> > "Q. Yes, sir. And as far as the protocol is concerned, it didn't include a full diagnostic echo, right?
> >
> > "A. Yes, that's correct.
> >
> > "Q. It wasn't intended to, was it, sir?
> >
> > "A. Correct.
> >
> > "Q. All right. It also didn't include a diagnostic stress test, right?
> >
> > "A. Correct.
> >
> > "Q. And it wasn't intended to do that either, right?
> >
> > "A. Correct."

(Emphasis added.)

Likewise, Alicia's causation expert, Dr. Joseph Salloum, a cardiologist, specifically testified that the HeartWise program itself was not going to detect Josh's heart problem.

> "Q. [Counsel for Isaac Health and Drs. Nixon and Saylor:] You testified earlier that nothing in the HeartWise records suggest that [Josh was] at risk for an acute pending cardiac event. Explain that to us, if you will.
>
> "A. [Dr. Salloum:] The HeartWise protocol is a screening protocol, okay? Screening protocols don't diagnose. So it is not meant to diagnose -- what -- what puts you at risk of sudden cardiac death or impending bad event is a diagnosis. This is not meant to diagnose in the first place. This is a screening. So there is nothing in here that is going to diagnose this patient with anything; hence, it doesn't give me any information whether he's at risk of sudden cardiac death or not. It's not even meant to do that."

Dr. Salloum testified that the issue was not the HeartWise program itself but, rather, that this particular program was not right for Josh given his age and his patient-history information.

> "Q. [Counsel for HeartWise:] I want you to put away what we know happened in retrospect, the autopsy. What in the HeartWise chart, … standing alone, if anything, suggests that Josh needed a full echocardiogram?
>
> "A. [Dr. Salloum:] Let me start and take a step even before that, if I may. The HeartWise program is built as a screening program for heart disease and others. Screening programs are actually very difficult to do because you have to have a certain population in mind. For example, you do not screen 10-year-olds for Alzheimer's and you do not screen 70-year-olds for

> childhood asthma. The HeartWise program, as it is built, is not built to screen somebody like Josh. This is built to screen somebody who is in their 50's okay?
>
> "….
>
> "When you're dealing with HeartWise, you're measuring carotid artery disease. You're measuring abdominal aortic aneurysm. As somebody who is 29 years old, the incidence of this is almost zero. So he should not have been put in this screening program by Isaac Health in the first place. It does not make sense that Josh and his mother go through the same screening process. …
>
> "….
>
> "THE WITNESS: I'm -- this is not a fault of HeartWise, and I'm not criticizing HeartWise for that. This is not for Josh to go through. …
>
> "….
>
> "A. I'm not criticizing HeartWise. I'm criticizing Isaac Health for putting him through it. And I told them this is not a criticism of HeartWise."

In short, Alicia presented no evidence demonstrating that HeartWise negligently performed any duty assigned to or assumed by it.

Based on the testimony of Dr. Ellis and Dr. Salloum concerning HeartWise, it appears that Alicia tries to contend that HeartWise's program was negligently designed. See Alicia's brief, p. 49 ("HeartWise selected the specific 31 tests to be performed. [Alicia's] experts opine that

the tests are negligent and inadequate. HeartWise designed its testing protocol. If a jury finds that it was negligently designed, HeartWise is liable for negligence."). However, Alicia never alleged in her complaint that HeartWise negligently designed its program, and her expert witnesses did not testify that the HeartWise program was negligently designed. Alicia alleged that the results of the testing were negligently interpreted, which was not HeartWise's responsibility. With respect to HeartWise, Alicia's experts testified, at most, that the HeartWise program was not ideal for Josh and that it was not as comprehensive as it claimed to be, assertions which perhaps concern Alicia's fraud allegations, but not her negligence allegations against HeartWise.

Beyond those problems, the fact remains that the negligence described in Alicia's allegations and that her experts testified about concerned the provision of medical care, i.e., diagnosis, treatment, and care of a patient for potential health issues. Alleged mistreatment for medical care is governed by the AMLA. See Ex parte Addiction & Mental Health Servs., Inc., 948 So. 2d 533, 535 (Ala. 2006) ("'By definition, a "medical-malpractice action" is one for redress of a "medical injury." See [Ala. Code 1975,] § 6-5-540 (purpose of the [AMLA] is to regulate actions

for "alleged medical injury") ...; see also Ala. Code 1975, § 6-5-549.1 (same).'" (quoting Taylor v. Smith, 892 So. 2d 887, 893 (Ala. 2004) (plurality opinion))). However, as we noted in the rendition of the facts, Alicia concedes that the AMLA does not apply to HeartWise. Thus, the nature of Alicia's negligence allegations precludes holding HeartWise at fault for the errors she alleges.

For all the foregoing reasons, we agree with the circuit court's summary judgment entered in favor of HeartWise with respect to Alicia's negligence allegations.

IV. Conclusion

We reverse the circuit court's summary judgment in favor of Isaac Health and Drs. Nixon and Saylor with respect to Alicia's negligence allegations against them because those allegations were never properly presented to the circuit court for adjudication. We also reverse the circuit court's summary judgment in favor of HeartWise with respect to Alicia's fraud allegations against HeartWise because Alicia presented substantial evidence of Josh's reasonable reliance upon HeartWise's representations about its program. We affirm the circuit court's summary judgment in favor of Isaac Health with respect to Alicia's fraud

allegations against Isaac Health because Alicia failed to present substantial evidence that Josh's course of conduct would have changed if he had not seen HeartWise materials in the Isaac Health clinic's waiting room. We also affirm the circuit court's summary judgment in favor of HeartWise with respect to Alicia's negligence allegations against HeartWise for multiple reasons. Accordingly, we remand this case to the circuit court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Wise, Sellers, Stewart, and Mitchell, JJ., concur.

Shaw, J., concurs in part and concurs in the result, with opinion.

Parker, C.J., and Bryan and Cook, JJ., concur in part and dissent in part, with opinions.

SHAW, Justice (concurring in part and concurring in the result).

I concur in the main opinion, except as to footnote 8. I believe that the caselaw cited in the first paragraph of that footnote allows this Court to reverse the portion of the trial court's judgment discussed in part III.A. of the main opinion. Whether the logic of those decisions is correct I leave to another day.

PARKER, Chief Justice (concurring in part and dissenting in part).

I concur in the main opinion except that I dissent from reversing the summary judgment as to the negligence theory against Isaac Health & Prevention Partners, LLC, Dr. William A. Nixon, and Dr. Jeffrey A. Saylor. The main opinion reverses as to that theory because those defendants never attacked that theory in their motion for a summary judgment. But plaintiff administratrix Alicia Marie Sampson never preserved this error -- entering judgment against an unattacked theory -- in the circuit court. By reversing on the basis of this unpreserved error, the main opinion incorrectly treats the error as jurisdictional.

Generally, when a trial court's error appears for the first time in a judgment without prior warning to the party harmed by that error, to preserve the error for appeal that party must give the trial court the first opportunity to correct it by raising it in a motion to alter, amend, or vacate the judgment under Rule 59(e), Ala. R. App. P. See Bonner v. Mahan, 537 So. 2d 460, 462 (Ala. 1988); Lay v. Destafino, [Ms. 1210383, Feb. 17, 2023] ___ So. 3d ___, ___ (Ala. 2023). As we explained just three months ago in Lay,

> "[A]ppellate courts 'cannot consider arguments advanced for the purpose of reversing the judgment of a trial court when those arguments were never presented to the trial court ....'
>
> "....
>
> "... Even though [the appellant] may not have had a prejudgment opportunity to object to the trial court's [error], she did have an opportunity to object after judgment. Namely, she could have filed a timely motion to alter, amend, or vacate the judgment under Rule 59(e) .... While it is true that postjudgment motions under Rule 59(e) are usually elective rather than mandatory, such a motion is necessary to preserve an objection for appellate review when -- as here -- that motion is the only possible mechanism for bringing the alleged error to the trial court's attention. ... Accordingly, ... [the appellant] failed to preserve her ... objection by not giving the trial court a chance to correct its alleged error in the first instance."

___ So. 3d at ___ (citation omitted).

This requirement of filing a Rule 59(e) motion specifically applies to the type of error here -- entry of a summary judgment as to an issue that was not asserted by the summary-judgment movant ("unasserted-issue error"). Employees of Montgomery Cnty. Sheriff's Dep't v. Marshall, 893 So. 2d 326, 330-31 (Ala. 2004); McKenzie v. Killian, 887 So. 2d 861, 863-65 (Ala. 2004), overruled on other grounds, Ex parte Capstone Bldg. Corp., 96 So. 3d 77 (Ala. 2012). The main opinion attempts to cast Marshall's holding on this point as a dictum because the appellants there

also failed to raise the unasserted-issue error in their appellate briefs. ___ So. 3d at ___ n.8. But Marshall's language indicates that the absence of a Rule 59(e) motion and the appellate waiver were each an independent basis for our affirmance as to that aspect of the judgment:

> "[T]he record before us does not reveal whether the [appellants] objected to the trial court in a timely postjudgment Rule 59(e) ... motion that the trial court erred in failing to limit the summary judgment to the claims [attacked by the appellee's summary-judgment motion]. Such a Rule 59(e) motion would have been necessary to preserve such an objection for an appeal .... Similarly, the [appellants] have not presented or argued in brief on appeal the issue whether the trial court erred in entering summary judgment on [the other] claims ... in the absence of a challenge to those claims in [the] summary-judgment motion. Accordingly, we do not consider that issue."

893 So. 2d at 330-31 (citations omitted; emphasis added). Thus, Marshall's language about the necessity of a Rule 59(e) motion was an alternative holding, not a dictum. Notably, the Court of Civil Appeals has twice read Marshall's language as requiring a Rule 59(e) motion. Garrie v. Summit Treestands, LLC, 50 So. 3d 458, 469-70 (Ala. Civ. App. 2010); Leeth v. J & J Props., 69 So. 3d 176, 178 (Ala. Civ. App. 2010). Moreover, the main opinion does not attempt to distinguish McKenzie, this Court's

other case that recognized the same requirement of filing a Rule 59(e) motion to preserve an unasserted-issue error.[10]

The main opinion relies on a string of our cases that reversed summary judgments because of trial courts' unasserted-issue errors. See Parr v. Goodyear Tire & Rubber Co., 641 So. 2d 769 (Ala. 1994); Henson v. Mobile Infirmary Ass'n, 646 So.2d 559, 560-62 (Ala. 1994); Sexton v. St. Clair Fed. Sav. Bank, 653 So. 2d 959, 959-60, 962 (Ala. 1995); Bibbs v. MedCenter Inns of Alabama, Inc., 669 So. 2d 143, 144 (Ala. 1995); Hatch v. Health-Mor, Inc., 686 So. 2d 1132 (Ala. 1996); Robinson v. JMIC Life Ins. Co., 697 So. 2d 461, 461 (Ala. 1997) (plurality opinion); Patel v. Shah, 295 So. 3d 659, 662-63, 667-68 (Ala. 2019) (plurality opinion); cf. Giles v. Brookwood Health Servs., Inc., 5 So. 3d 533, 555-57 (Ala. 2008)

---

[10]The main opinion attempts to distinguish Lay because there the trial court's error, failure to itemize damages in a judgment, did not "implicate[] the burdens placed on the parties, the fate of certain allegations, [or] the reviewing responsibility of the trial court." ___ So. 3d at ___ n.8. But none of those features is a reason to excuse a party from bringing to the trial court's attention its failure to enforce the parties' burdens, to correctly decide the fate of allegations, and to fulfill its reviewing responsibility, after that error has occurred. That is the principle that Lay articulates: Errors that occur without prior notice must still be preserved. And that is the principle that Marshall and McKenzie specifically applied to unasserted-issue errors like the one here.

(reversing because specific defendant did not even move for summary judgment, which is in substance same kind of error). But every one of those cases was decided at the layer of error, not the layer of preservation of error. Those are two separate layers among the three usual layers of appellate analysis (preservation, error, and harm). Ordinarily, an appellate court should check for preservation before analyzing whether the trial court erred. And the appellate court should do so sua sponte, without needing to be prompted by the appellee, because trial courts have an independent interest in not having their judgments reversed based on issues that were not brought to their attention. But in the flurry of a case's arguments, appellate courts do not always remember to do so. Indeed, I freely admit that that is what happened before my plurality opinion in Patel. Alternatively, in cases in which an error was preserved and no one disputes that it was, it is not generally necessary to address preservation in the appellate court's opinion. In either scenario, the court's opinion will be silent about preservation. But that silence does not equal a holding that preservation is not necessary for that kind of error. That is because cases must be read as holding what they say, not what they don't say. See Ex parte James, 836 So. 2d 813, 818 (Ala. 2002)

("Arguments based on what courts do not say, logically speaking, are generally unreliable and should not be favored by the judiciary ...."); Ex parte Town of Lowndesboro, 950 So. 2d 1203, 1209 (Ala. 2006) ("'"For a case to be stare decisis on a particular point of law, that issue must have been ... decided by the court, and its decision made part of the opinion of the case; accordingly, a case is not binding precedent on a point of law where the holding is only implicit or assumed in the decision but is not announced."'" (citations omitted)); Ex parte Williams, 218 So. 3d 792, 796 (Ala. 2016) (Murdock, J., concurring specially) (same); cf. Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."). So our string of cases reversing based on unasserted-issue errors, but silent on preservation, cannot be read as holding anything about the need for preservation.

Although the main opinion characterizes unasserted-issue errors as involving a lack of "authority" of the trial court, that is simply another way of saying that the trial court did not follow the law. And like other failures to follow the law, it must be preserved by raising it to the trial

court before raising it on appeal. The exception to this preservation requirement is issues of a trial court's lack of jurisdiction. But the main opinion does not call unasserted-issue errors jurisdictional, and rightly so. See Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006) ("Subject-matter jurisdiction concerns a court's power to decide certain types of cases."); cf. Moultrie v. Wall, 172 So. 3d 828, 844 (Ala. 2015) ("[The appellant] never argued, at any point during the proceedings below, that the circuit court did not have authority to consider any amendment if the plaintiffs did not actually file a pleading amending their complaint in the circuit court. ... [T]his Court will not reverse the circuit court's judgment based on an argument [the appellant] never presented to the court for its consideration. Although [the appellant] frames this issue as a 'jurisdictional' one, it does not concern the circuit court's subject-matter jurisdiction. ... Whether the plaintiffs should have filed an amendment to their pleadings ... has no bearing on the circuit court's constitutional or statutory authority to consider that claim." (citation omitted)). In essence, the main opinion treats the issue as if it is jurisdictional without calling it jurisdictional.

A trial court's error in entering judgment on the basis of an issue that was not asserted by the movant must be brought first to that court's attention to give it the first opportunity to correct its mistake. See Marshall, 893 So. 2d at 330-31; McKenzie, 887 So. 2d at 863-65. The nonmovant cannot wait to raise this mistake for the first time on appeal. See Lay, ___ So. 3d at ___. Therefore, I dissent from the main opinion on this issue.

BRYAN, Justice (concurring in part and dissenting in part).

I dissent from the main opinion insofar as it reverses the summary judgment entered in favor of Isaac Health & Prevention Partners, LLC, William A. Nixon, M.D., and Jeffrey A. Saylor, M.D., with respect to the negligence allegations against them. Because the nonmovant plaintiff, Alicia Marie Sampson, as administratrix of the estate of her deceased husband, Joshua Aaron Sampson, failed to challenge in a postjudgment motion the propriety of the summary judgment in this regard, she has not preserved that issue for appeal. See Lay v. Destafino, [Ms. 1210383, Feb. 17, 2023] ___ So. 3d ___ (Ala. 2023); Employees of Montgomery Cnty. Sheriff's Dep't v. Marshall, 893 So. 2d 326, 330-31 (Ala. 2004); McKenzie v. Killian, 887 So. 2d 861, 863-65 (Ala. 2004), overruled on other grounds, Ex parte Capstone Bldg. Corp., 96 So. 3d 77 (Ala. 2012); Garrie v. Summit Treestands, LLC, 50 So. 3d 458, 469-70 (Ala. Civ. App. 2010); and Leeth v. J & J Props., 69 So. 3d 176, 178 (Ala. Civ. App. 2010). I concur in the main opinion in all other respects.

COOK, Justice (concurring in part and dissenting in part).

I concur with the main opinion's reversal of the circuit court's summary judgment in favor of Isaac Health and Prevention Partners, LLC, Dr. William A. Nixon, and Dr. Jeffrey A. Saylor with respect to the negligence allegations asserted against them by Alicia Marie Sampson, as administratrix of the estate of her deceased husband, Joshua Aaron Sampson ("Josh"). Those allegations were never properly presented to the circuit court for adjudication and, as a result, cannot serve as an underlying basis for entering a summary judgment in favor of those defendants.[11] Additionally, other than as stated below, I concur with the

[11]In his special writing, Chief Justice Parker correctly points out that Alicia did not ask the circuit court to reconsider its summary judgment on the negligence allegations against Isaac Health and Drs. Nixon and Saylor even though summary judgment had not been requested as to those allegations by those defendants. I agree with Chief Justice Parker that it is the better practice to file a motion pursuant to Rule 59, Ala. R. Civ. P., in such a circumstance. Trial courts need the opportunity to correct their mistakes, and parties who fail to provide such an opportunity proceed at their own risk. As reflected in the cases cited in Chief Justice Parker's writing, we routinely refuse to consider arguments not preserved at the trial level. However, for the reasons thoroughly stated in footnote 8 of the main opinion, I believe that we can nevertheless consider Alicia's argument on appeal related to these allegations and that the circuit court's judgment as to these allegations is due to be reversed.

remainder of the main opinion.

I dissent as to the reversal of the circuit court's summary judgment in favor of HeartWise Health Systems Corporation and HeartWise Clinic, LLC (collectively referred to as "HeartWise"), with respect to Alicia's fraud allegations against HeartWise.[12] Contrary to the main opinion's conclusion, I do not believe that there is substantial evidence of Josh's reliance upon HeartWise's representations about its program.

In Alabama, it is well settled that "'[a]n essential element of any fraud claim is that the plaintiff must have reasonably relied on the alleged misrepresentation,'" and the burden "is on the party alleging fraud to prove by substantial evidence" that reliance exists in a particular case. Hunt Petroleum Corp. v. State, 901 So. 2d 1, 4 (Ala. 2004) (citation omitted). To establish reliance, a party must show that the alleged misrepresentation "actually induced the injured party to change its

[12]Among other things, I agree with the main opinion that fraud allegations can serve as an underlying theory of recovery for a wrongful-death action and that Alicia appears to be making just such allegations. I note that, in such a case, the causal chain must connect the fraud to the victim's death. In other words, the plaintiff must prove that the fraud was the proximate cause of the death. Although HeartWise argues in its brief that the alleged fraud was not the proximate cause of Josh's death, I note that this issue was not raised to the trial court, and, thus, it is not appropriate for us to consider that argument at this time on appeal.

course of action." Id. (emphasis added).

Here, there is no direct, admissible evidence indicating that Josh relied upon any false statement of fact made by HeartWise in choosing to undergo the testing at issue. In other words, there is no substantial evidence of a false statement of fact that "actually induced [Josh] to change [his] course of action." Id. (emphasis added).

Instead, there is direct evidence indicating that in making his decision he relied on other statements and representations that were not made by HeartWise. For example, the intake questionnaire -- which Josh completed -- stated: "How Did You Hear About Us?" "Sister." (Emphasis added.) Contrary to the argument made in Alicia's brief about reliance on statements on HeartWise's website, Josh did not mark the "internet" box in response to this question on the intake questionnaire. (Emphasis added.) The completed questionnaire contains the only statement in the record directly from Josh about what he relied upon.

Although HeartWise pointed out this questionnaire in the very first paragraph of its statement of facts and again in the argument section of its response brief, Alicia never addressed this evidence in her principal brief or in her reply brief. Pardue v. Potter, 632 So. 2d 470, 473 (Ala.

1994) (recognizing that "[i]ssues not argued in the appellant's brief are waived").

This direct evidence from Josh is further corroborated by the unequivocal testimony of Alicia and the testimony of Michelle Sampson (Josh's mother), both of whom admitted under oath that they believed that Josh went to Isaac Health's "HeartWise" clinic based on his sister's recommendation. For instance, Alicia testified:

> "Q: Do you know if he learned about HeartWise from any source other than his sister?
>
> "A: No."

Likewise, Michelle testified:

> "Q: Do you think at the end of the day, ma'am, he would have gone to HeartWise on the basis of your daughter's recommendation?
>
> "A: Yes."

Again, Alicia does not address this evidence in her principal brief or in her reply brief on appeal.

Instead, she simply contends that there is circumstantial evidence of reliance and cites the other testimony from Michelle quoted in the main opinion in support of this contention. However, Michelle's testimony, even when read liberally, merely indicates that Josh

"probably" "looked" at the Internet with her and "looked" at a sign and a brochure at the Isaac Health clinic. It does not indicate that Josh read any particular false statement of fact in those materials or that, if he did, he specifically relied on that false statement. In fact, Michelle testified:

> "Q. Do you specifically know, ma'am, and this is very important, okay, do you specifically know what if anything Josh, your son, read on that website?
>
> "A: I don't specifically know."

(Emphasis added.) When asked whether she specifically knew what, if anything, Josh reviewed on HeartWise's sign at the Isaac Health clinic, she testified: "I don't know that he read every word, but he looked up at the sign." (Emphasis added.)

The reliance element of a fraud claim requires more than "look[ing]" at a document or "look[ing]" at a website or a sign or brochure that contains several different statements in order for a party alleging fraud to meet his or her burden of proof as to that element. At a minimum, it requires the victim (1) to have actually read[13] the false statement at issue

[13]By using the word "read," I should not be understood as limiting the reliance element of a fraud claim to written words. This is simply what is relevant to the allegations in this action. Fraud can certainly occur in other ways, including, without limitation, through oral statements. I also note that Alicia has not alleged that Josh's sister read

and (2) to have then relied upon that false statement in changing his or her course of action.

Here, although the complaint lists many allegedly false statements, the evidence does not show reliance upon any of those alleged statements. Michelle does not testify that Josh actually relied upon any particular false statement from the Internet (or the sign or the brochure). This is unsurprising because she cannot say which statements Josh actually read. Such testimony would also be directly contrary to the only evidence in the record from Josh himself -- the completed questionnaire -- in which he listed his sister as the reason for his visit and did not select the "internet" box.

To the extent that something in Michelle's testimony could be construed as asserting that Josh actually relied upon any particular false statement, her testimony is, at best, speculation, hearsay, or even mind reading. See Hunt, 901 So. 2d at 4 ("Evidence that amounts to 'mere speculation, conjecture, or [a] guess' does not rise to the level of

---

and relied upon any false statement that led her to recommend HeartWise to Josh. Likewise, Alicia has not alleged that any health-care professional read and relied upon any false statement that led them to recommend HeartWise to Josh.

substantial evidence" needed to establish a fraud claim). For instance, she testified "yes" when asked whether she and Josh "believe[ed]" the alleged representations made by HeartWise on its sign at the Isaac Health clinic and whether the information on that sign "appear[ed] to be important to Josh … in terms of undergoing this HeartWise evaluation, testing, and assessment." (Emphasis added.)

The remainder of Michelle's testimony is about her own reliance rather than Josh's reliance. For instance, she testified: "I was, like, this is good, Josh, because this takes care of everything, this covers everything." (Emphasis added.) She also stated that "the thing on that sign stuck out to me" and that if she had "walked into an office and it's a medical office that looked like this and there wasn't anything on the wall, regardless of what it said on the internet [she] probably wouldn't have went through with it …." (Emphasis added.)

Finally, I note that a plaintiff must also prove that the reliance was reasonable and that such a question may be complicated in a medical case. Although the parties use the word "reasonableness" in their briefing, this issue was not argued at the trial level, and therefore we

cannot reach it at this time.[14]

---

[14]The main opinion quotes the Court of Civil Appeals' opinion in McIver v. Bondy's Ford, Inc., 963 So. 2d 136, 142-43 (Ala. Civ. App. 2007), for the proposition that "'[w]hether a plaintiff has reasonably relied on a defendant's misrepresentation is usually a question of fact.'" ____ So. 3d at ____ (Emphasis added). I have been unable to locate an instance when this Court has previously made such a statement. The reasonableness of Josh's reliance is not at issue in this appeal. Thus, to the extent that the main opinion intends to indicate that the "reasonableness" of a party's reliance is "usually" a question of fact, I believe it is dicta. The "reasonableness" of a party's reliance is an objective inquiry, which is the teaching of this Court's prior decision in Foremost Insurance Co. v. Parham, 693 So. 2d 409, 421 (Ala. 1997). This objective inquiry regarding reasonableness will sometimes be a question for the fact-finder and will sometimes be resolved as a matter of law. In fact, this was the key point of Foremost, which overturned prior caselaw that had applied the "justifiable reliance" standard rather than a "reasonable reliance" standard. Foremost expressly mentions that the return to "reasonable" reliance means that the Court can rule, as a matter of law, on the reasonableness of the reliance. Although McIver cites Foremost, it does not mention the very next sentence in Foremost, which stated:

> "[A] return to the 'reasonable reliance' standard will once again provide a mechanism, which was available before Hickox[v. Stover, 551 So. 2d 259 (Ala. 1989)], whereby the trial court can enter a judgment as a matter of law in a fraud case where the undisputed evidence indicates that the party or parties claiming fraud in a particular transaction were fully capable of reading and understanding their documents, but nonetheless made a deliberate decision to ignore written contract terms."

693 So. 2d at 421.