IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLEN REZA,
Appellant,
vs.
STACEY HUDSON, M.D.,
Respondent.

No. 54140

FILED

MAY 17 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a medical malpractice action. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant Marlen Reza filed a medical malpractice action against respondent Stacey Hudson, M.D., alleging that Dr. Hudson damaged her vocal cords during several surgeries.[1] Prior to trial, the district court granted summary judgment to Dr. Hudson on the basis that Reza knew of her cause of action as of the day after her surgery, and therefore, she failed to file her suit within NRS 41A.097(2)(a)'s two-year statutory limitation period for medical malpractice actions.[2]

---

[1]The parties are familiar with the facts and we do no recount them here except as necessary to our disposition.

[2]NRS 41A.097 was amended in 2004 by initiative petition, Ballot Question No. 3, effective November 23, 2004. Prior to that time, NRS 41A.097(2)(a) provided a two-year discovery limitation period. The amendment changed the two-year period to a one-year period. The amendment provided that the one-year limitation period applies only "to a cause of action that accrues on or after" November 23, 2004. NRS 41A.097 Revisers Notes. Because there are questions of fact regarding when Reza's cause of action accrued, we do not reach whether the one-year or two-year provision governs Reza's claim.

On appeal, Reza argues that the district court erred by concluding that her complaint was time-barred by NRS 41A.097(2)(a)'s limitation period for claims in which the plaintiff either knew or should have known of the defendant's alleged negligence. Specifically, Reza argues that a post-surgery complication or bad outcome, standing alone, is insufficient as a matter of law to provide constructive or inquiry notice of a claim, and that there are questions of fact as to when she should have known of her cause of action. Because there was conflicting testimony as to when Reza should have known of her cause of action, we agree, and therefore reverse the district court's order granting summary judgment.[3]

"This court reviews a district court's grant of summary judgment de novo." See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Under NRCP 56(c), a district court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Wood, 121 Nev. at 729, 121 P.3d at 1029.

The current version of NRS 41A.097(2)(a) contains two time periods for asserting a medical malpractice cause of action: "an action for

---

[3]We caution that our holding is limited to the facts of this case. A district court may be able to determine the accrual of a cause of action, as a matter of law, if sufficient facts are present.

injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first."[4] Thus, while the latest a plaintiff may file a complaint is three years after the injury, they may have to file sooner depending on when they discovered or should have discovered the injury.

There is no dispute that Reza's complaint was filed within the general three-year limitation period.[5] Instead, this case turns on a determination of whether Reza's complaint was filed within one year of when she discovered or should have exercised reasonable diligence to discover her injury.

In Massey v. Litton, 99 Nev. 723, 669 P.2d 248 (1983), we addressed the question of when NRS 41A.097(2)(a)'s discovery period should commence. The statute provides that the period commences upon discovery of an "injury." NRS § 41A.097(2)(a). However, because the word "injury" is ambiguous, we analyzed caselaw from other jurisdictions, which had interpreted the word "injury" in three different ways. Massey, 99 Nev. at 726-728, 669 P.2d at 250-252. Specifically, other jurisdictions have defined the term "injury" as referring to: (1) "the allegedly negligent act or omission;" (2) "the physical damage resulting from the act or

---

[4]As noted above, the discovery portion of the statute may set a limitation period of 2 years, depending upon the accrual date of the cause of action.

[5]Reza was physically injured on September 21, 2004, and she filed her complaint on July 10, 2007.

omission;" or (3) "the 'legal injury,'" which encompasses both the physical harm and the negligent act causing the harm. Id. at 726, 669 P.2d at 250.

We ultimately concluded that, as used in NRS 41A.097(2)(a), "the term 'injury' encompasses not only the physical damage but also the negligence causing the damage." 99 Nev. at 726, 669 P.2d at 250. In other words, to commence the running of the discovery limitations period, a plaintiff's discovery of her injury "may be either actual or presumptive, but must be of both the fact of damage suffered and the realization that the cause was the health care provider's negligence." Id. at 727, 669 P.2d at 251. "[A] patient discovers his legal injury when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." Id. at 728, 669 P.2d at 252; c.f. Jolly v. Eli Lilly & Co., 751 P.2d 923, 28 (Cal.1988) ("So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.").

Here, the district court found that Reza "discovered her legal injury as of September 22, 2004." It is undisputed that, by September 22, 2004, Reza was aware of the fact that she had suffered a serious injury during her surgeries. It is also undisputed that Reza was informed shortly thereafter that her injuries were of a permanent nature. However, these facts, standing alone, are insufficient to establish, as a matter of law, inquiry notice. Therefore, summary judgment is inappropriate on this record.

Prior to surgery, Dr. Hudson specifically informed Reza "that there was a potential for vocal cord injury" if she elected to proceed with the surgery. Accordingly, when Reza suffered vocal cord paresis as a

result of her surgery, she had no reason to suspect that it was not an ordinary complication that had occurred without negligence. Indeed, Dr. Hudson had specifically warned her that such a complication could occur even in the best of circumstances. Because Reza suffered a complication that is ordinarily associated with the surgery she endured, the mere manifestation of that complication was not sufficient to put her on notice that her injury had been caused by negligence.[6]

Additionally, Dr. Hudson continued to treat Reza for approximately a year and a half following surgery. During this time, Dr. Hudson never suggested that Reza's injuries had been negligently caused. Reza testified that she did not discover that her injuries may have been caused by Dr. Hudson's negligence until December 2006, when an expert informed her of the possibility.[7]

---

[6]Dr. Hudson's reliance on Graham v. Hansen, 180 Cal.Rptr. 604 (Ct. App.1982), is misplaced. In Graham, the plaintiff submitted to a medical procedure that she was informed would take a very short amount of time and that was perfectly safe. 180 Cal.Rptr. at 609. Despite these assurances, the plaintiff suffered serious and unexpected injuries during surgery. Id. Based on these facts, the Graham court found that the plaintiff should have known about her possible cause of action. Id. at 610.

Here, unlike the plaintiff in Graham, Reza did not suffer an unusual or unexpected injury following a minor surgery. To the contrary, Dr. Hudson informed Reza that her injury was a common and normal complication of the surgery he performed.

[7]We note that the date upon which Reza actually discovered evidence of negligence is not dispositive in determining the commencement of the discovery limitations period. Rather, the correct inquiry should focus on when Reza knew "or, through the use of reasonable diligence, should have known of facts that would put a

continued on next page . . .

In granting Dr. Hudson's motion for summary judgment, it appears that the district court may have conflated the concept of knowledge of legal injury, as expressed in Massey, with knowledge of a bad outcome or serious post-surgical complication. We specifically rejected that approach in Massey v. Litton, 99 Nev. at 726, 669 P.2d at 250-51 (explaining that discovery of the "physical damage resulting from the act or omission," standing alone, does not trigger the discovery portion of NRS 41A.097(2)(a)).[8] Thus, we conclude that the district court reached a conclusion that is not supported by the record. Because questions of fact remain as to when Reza "should have known of facts that would put a

---

. . . continued

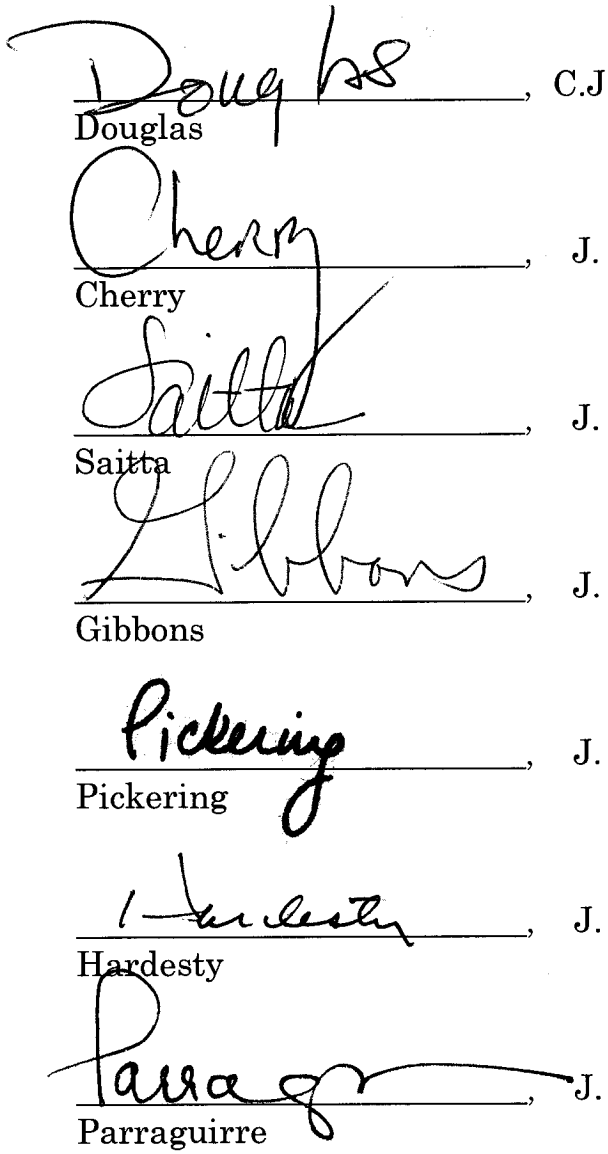
reasonable person on inquiry notice of his cause of action." Massey, 99 Nev. at 728, 669 P.2d at 252 (emphasis added).

[8]Dr. Hudson argues that Reza should be judicially estopped from asserting that she did not know of her claim because she applied for workers' compensation and social security disability benefits in 2004 and, in her application for benefits, Reza stated that she was injured during the surgery she received from Dr. Hudson. See Marcuse v. Del Webb Communities, Inc., 123 Nev. 278, 287-88, 163 P.3d 462, 468-69 (2007) (providing an overview of Nevada's law regarding judicial estoppel).

Again, while it is undisputed that Reza had knowledge of serious complications within a day of her first surgery, that knowledge is not in itself sufficient to trigger the commencement of the discovery limitation period. Reza must also have had notice that those injuries were negligently caused. Accordingly, we reject Dr. Hudson's argument for judicial estoppel.

reasonable person on inquiry notice of [her] cause of action,"[9] Massey, 99 Nev. at 728, 669 P.2d at 252, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



Douglas, C.J.

Cherry, J.

Saitta, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

[9]Because we reverse the district court's order on this ground, we do not reach Reza's argument that the district court's order fails to set forth sufficient factual and legal determinations as required by NRCP 56(c).

cc: Hon. Steven R. Kosach, District Judge
Carolyn Worrell, Settlement Judge
De Castroverde Law Group
Sterling Law, LLC
Christiansen Law Offices
Lemons, Grundy & Eisenberg
Washoe District Court Clerk