

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN STEVE FOWLER,
INDIVIDUALLY; AND JOYCE S.
MELCHIONA, AS THE PERSONAL
REPRESENTATIVE OF NANCY ANN
FOWLER, HER DECEASED SISTER,
AND AS ADMINISTRATOR OF THE
ESTATE OF NANCY ANN FOWLER,
Appellants,
vs.
EDWARD M. KOPF, M.D.; JOSEPH
KOPF; AND TROY PERRY,
Respondents.

No. 44519

FILED

MAY 17 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Blooms*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal of district court orders granting summary judgment and dismissal in a personal injury and wrongful death case. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge. A vehicle struck appellant John S. Fowler and his wife Nancy, killing her. The unidentified driver did not stop to aid the couple. A Las Vegas Metropolitan Police Department investigation identified the vehicle as that belonging to respondent Dr. Edward M. Kopf. John Fowler and Joyce S. Melchiona (collectively "the Fowlers") sued Dr. Kopf for negligence, negligent entrustment, wrongful death, and loss of consortium. The district court subsequently granted the Fowlers leave to amend, substituting respondents Joseph Kopf and Troy Perry for the Doe defendants in the original complaint. In the amended complaint, the Fowlers sued Joseph and Perry for negligence, wrongful death, and loss of consortium.

The district court subsequently granted Dr. Kopf's motion for summary judgment as to all the Fowlers' causes of action. The district court also granted summary judgment in Joseph's favor and granted Perry's motion to dismiss. In reaching its decisions, the district court concluded that the Fowlers had failed to timely amend their complaint to relate the substitution of Joseph and Perry back to the date of the original complaint for purposes of the two-year limitations period applicable in personal injury cases.

The district court properly granted summary judgment to Dr. Kopf and Joseph. However, we conclude that the district court erred when it found that the Fowlers had failed to exercise reasonable diligence under NRCP 10(a) to investigate and discover Perry's identity as an alleged tortfeasor for purposes of relating their amended complaint back to the date of their original complaint.

DISCUSSION

As to Dr. Kopf's summary judgment, the Fowlers failed to set forth genuine issues of material fact.¹ The Fowlers did not establish that

¹Summary judgment is appropriate when the pleadings and other evidence on file demonstrate 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." NRCP 56(c); see Wood v. Safeway, Inc., 121 Nev. ____, ____, 121 P.3d 1026, 1031 (2005) (abandoning the "slightest doubt" standard of summary judgment and clarifying that "[s]ummary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law"). We review a district court's grant of summary judgment de novo. GES, Inc. v. Corbitt, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001).

Dr. Kopf entrusted the vehicle to Joseph or Perry, or that he drove the vehicle himself at the time it struck the Fowlers.

We disagree with the Fowlers' contention that the district court erred when it granted Joseph's motion for summary judgment, dismissing him from the case. Under NRCP 10(a), a plaintiff may name in a complaint fictitious Doe defendants and, when the plaintiff discovers the defendants' true names, amend the complaint. Proper application of NRCP 10(a) requires a "clear correlation between the fictitious defendants and the pleaded factual basis for liability."² The district court may grant leave to substitute named defendants for Doe defendants when the plaintiff satisfies the following elements:

- (1) [plead] fictitious or doe defendants in the caption of the complaint;
- (2) [plead] the basis for naming defendants by other than their true identity, and clearly specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based;
- and (3) [exercise] reasonable diligence in ascertaining the true identity of the intended defendants and promptly mov[e] to amend the complaint in order to substitute the actual for the fictional.³

The amended complaint then relates back to the date of the original complaint for purposes of tolling the limitations period.⁴ Although the

²Nurenberger Hercules-Werke v. Virostek 107 Nev. 873, 881, 822 P.2d 1100, 1105 (1991).

³Id. at 881, 822 P.2d at 1106. For purposes of NRCP 10, the district court determines whether the plaintiffs exercised reasonable diligence as a matter of law. Id. at 881, 822 P.2d at 1105.

⁴Under NRS 11.190(4)(e), a plaintiff must file a personal injury or wrongful death complaint within two years of the date of injury. The

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Fowlers properly pleaded and alleged a factual basis for naming Doe defendants in their original complaint, they failed to exercise reasonable diligence in ascertaining Joseph's identity as an intended defendant.

However, we conclude that the district court erred when it granted Perry's motion to dismiss the complaint as untimely under the statute of limitations. We emphasized in Nurenberger Hercules-Werke v. Virostek that "[t]he right to amend and relate back should rarely be denied plaintiffs irrespective of the extent of the delay whenever the intended defendant has sought in any way to mislead or deceive the complaining party."⁵ Prior to Dr. Kopf's December 2003 deposition and Joseph's January 2004 deposition, the Fowlers lacked a sufficient evidentiary basis to name Perry as a defendant under the NRCP 11 requirement that all pleadings be made in good faith. Perry's absence from the jurisdiction impeded the Fowlers' investigation of his involvement in the accident. The record suggests that Perry abandoned Dr. Kopf's vehicle and immediately fled to California. The record further suggests that Perry took affirmative steps to mislead the Fowlers in their attempts to identify him as a likely defendant. Thus, the district court erred when it dismissed Perry.


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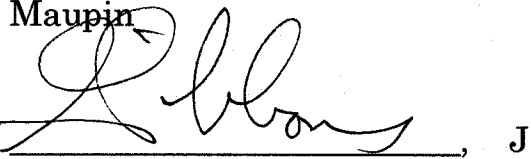
Fowlers filed their original complaint against Dr. Kopf on September 6, 2001, a few days before the two year statute of limitations ran on their tort claim. The Fowlers did not amend their complaint to include Joseph and Perry until April 2004, approximately two and one-half years after the original complaint was filed.

⁵107 Nev. at 881, 822 P.2d at 1005-06.

We have considered the Fowlers' remaining contentions on appeal and conclude that they are without merit. Accordingly, we

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

 J.

Maupin
 J.

Gibbons

 J.
Hardesty

cc: Hon. Mark R. Denton, District Judge
Mainor Eglet Cottle, LLP
Prince & Keating, LLP
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.
Clark County Clerk