IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN H. KERNS,
Appellant,
vs.
DENNIS CAMPTON, M.D.; ARCON-PAHRUMP, INC., D/B/A PAHRUMP VALLEY MEDICAL CENTER AND PAHRUMP MEDICAL CENTER; NYE COMMUNITY MEDICAL CENTER, D/B/A PAHRUMP VALLEY MEDICAL CENTER AND PAHRUMP MEDICAL CENTER; AND WILLIAM CARLE, P.A.,
Respondents.

No. 44141

KEVIN H. KERNS,
Appellant,
vs.
ARCON-PAHRUMP, INC., D/B/A PAHRUMP VALLEY MEDICAL CENTER AND PAHRUMP MEDICAL CENTER; NYE COMMUNITY MEDICAL CENTER, D/B/A PAHRUMP VALLEY MEDICAL CENTER AND PAHRUMP MEDICAL CENTER; AND WILLIAM CARLE, P.A.,
Respondents.

No. 44709

FILED

APR 19 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

These are consolidated appeals from a district court summary judgment in a medical malpractice action and an order awarding attorney fees and costs. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition. We hold that summary judgment was improper here, since the respondents did not meet their

06-08275

burden of showing the absence of genuine issues of fact as to when appellant Kevin Kerns discovered, or should have discovered, his legal injury.

Joinder

As an initial matter, we review Kerns' assignment of error as to the joinder of respondent Dr. Campton in the motion for summary judgment. In Exber, Inc. v. Sletten Construction Co., this court held that "[f]ailure to comply with the formal requirements of Rule 56 is subject to the harmless-error rule."[1] This court explained that absent any prejudice to the opposing party, a court may permit other parties to join a summary judgment motion.[2]

Although Dr. Campton's joinder motion did not include the words "in his favor" when mentioning the summary judgment motion he was seeking permission to join, such an omission from the exact wording in NRCP 56(b) is not fatal to a joinder motion. Additionally, Kerns has not made any showing of prejudice caused by the joinder of Dr. Campton.

We conclude, therefore, that permitting the joinder of Dr. Campton to the summary judgment motion was proper, as it was not prejudicial to Kerns, and thus not harmful, nor error.

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[1]92 Nev. 721, 733, 558 P.2d 517, 524 (1976) (permitting oral joinder in summary judgment motion at the hearing on the motion).

[2]Id. at 733-34, 558 P.2d at 525 ("The bases for permitting judgment on [summary judgment motions] made orally at the original Rule 56 hearing are lack of any real prejudice visited on the party against whom the judgment was granted, and implementation of the policy underlying Rule 56, which is expediting the disposition of cases wherever possible.").

Summary judgment based on statute of limitations

This court reviews an order granting summary judgment de novo, and without deference to the lower court's findings.[3] Summary judgment will be upheld when, after reviewing the record in a light most favorable to the nonmoving party, there remain no genuine issues of material fact and moving party is entitled to judgment as a matter of law.[4]

Kerns first argues that since this court has held that it is a question of fact when a plaintiff knew or should have known of the facts supporting a cause of action, summary judgment was inappropriate here, since there was a dispute as to when Kerns should have known of the facts supporting his malpractice claim. Kerns claims that his later deposition testimony casts doubt on exactly what he was told upon his admittance to UMC, and that such doubt creates an issue of fact precluding summary judgment.

Respondents William Carle and the Pahrump Medical Center (the Center) respond that the plaintiff's time of discovery can be decided as a matter of law when there is uncontroverted evidence of that discovery. They further contend such evidence exists here in the form of Kerns' own testimony. We disagree.

Generally, a cause of action accrues, for the purposes of the statute of limitations, "when the wrong occurs and a party sustains

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[3]Caughlin Homeowners Ass'n v. Caughlin Club, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993).

[4]Wood v. Safeway, Inc., 121 Nev. ____, ____, 121 P.3d 1026, 1031 (2005).

injuries for which relief could be sought."[5] However, this court has recognized the "discovery rule" exception.[6] "Under the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action."[7]

In Massey v. Litton, this court specifically applied the discovery rule to medical malpractice cases.[8] This court held that the term "injury," as used in the medical malpractice statutes, meant "legal injury," defined as "all essential elements of the malpractice cause of action."[9]

As to the actual discovery of the legal injury, the Massey court concluded that such discovery "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."[10] "[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."[11] "The focus is on the patient's knowledge of or access to facts rather than on h[is] discovery of legal theories."[12]

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[5]Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990).

[6]Id.

[7]Id.

[8]99 Nev. 723, 669 P.2d 248 (1983).

[9]Id. at 726, 669 P.2d at 250-51.

[10]Id. at 727, 669 P.2d at 251.

[11]Id. at 728, 669 P.2d at 252.

[12]Id.

In Oak Grove Investors v. Bell & Gosset Co., a case decided the same year as Massey, this court applied the discovery rule to a claim for tortious damage to real property, and held that:

> [w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact. A litigant has the right to a trial where the slightest doubt as to the facts exists.[13]

More recently, this court reaffirmed that general rule that when a plaintiff "discovered or should have discovered the facts constituting a cause of action" was a question of fact.[14] This court further held, however, that such a determination can be a matter of law, but "[o]nly where uncontroverted evidence proves [when] the plaintiff discovered or should have discovered the facts[.]"[15]

Finally, this court has held that when a summary judgment motion is based on the date of discovery of legal injury, the moving party has the burden of showing the absence of a genuine issue of material fact as to when the other party discovered or should have discovered that injury.[16]

It is clear from Kerns' deposition testimony that he knew that it was the opinion of the UMC emergency room doctor that a blood test should have been done at the Center. It is also clear that on that first day

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[13]99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983).

[14]Siragusa v. Brown, 114 Nev. 1384, 1400, 971 P.2d 801, 812 (1998) (applying the discovery rule to a civil conspiracy claim).

[15]Id. at 1401, 971 P.2d at 812.

[16]Oak Grove, 99 Nev. at 623, 668 P.2d at 1079.

at UMC, Kerns knew of at least the potential of his eventual injury, since he was informed of the possibility of an amputation. However, it is less clear that Kerns knew that his injury probably would not have progressed to such a dire point if the Center had done the blood test, and acted upon the results appropriately.

Kerns' initial deposition testimony about his conversation with Dr. Golan at UMC could be interpreted to indicate knowledge of legal injury. But his later testimony seems instead to indicate that Kerns knew that the time delay in getting treatment had caused severe problems, but that Kerns was uncertain whether the delay was due to negligence by the Center and Carle, or Kerns' own delay in getting to UMC when his foot got worse.

We find that Kerns' deposition testimony does not provide uncontroverted evidence of his discovery of legal injury, and that the defendants, therefore, did not meet their burden of showing that no genuine issue of material fact remains.

Thus, we conclude that summary judgment was improper, since there remains a triable issue of fact as to the date when Kerns discovered or should have discovered his legal injury. We therefore reverse the district court order granting summary judgment, and remand this matter to the district court for further proceedings.

Attorney fees award

In his brief to this court, Kerns simply requests that if summary judgment is set aside, that the award of attorney fees should also be set aside. The record is devoid of any indication of the statutory authority or other basis for the attorney fee award. However, having

concluded that summary judgment was improper here, we need not address the statutory authority for the award. An award of attorney fees and costs based on an improperly granted summary judgment is also improper, and must be reversed.[17] Accordingly, we also reverse the attorney fee award.

It is so ORDERED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Robert W. Lane, District Judge
John H. Cotton & Associates, Ltd.
Kummer Kaempfer Bonner & Renshaw/Las Vegas
Leslie Mark Stovall
Nye County Clerk

[17]Maine v. Stewart, 109 Nev. 721, 729, 857 P.2d 755, 760 (1993).