IN THE SUPREME COURT OF THE STATE OF NEVADA

ADELE GRUBE,
Appellant,
vs.
DALLAS PENROD,
Respondent.

No. 45395

FILED

DEC 01 2006

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

ORDER OF AFFIRMANCE

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

On March 6, 2001, respondent Dr. Dallas Penrod performed an initial surgery on appellant Adele Grube by removing disintegrated fragments of wood from her injured left foot. Afterward, Grube began to experience complications, including swelling, pain, and drainage from the wound, which never fully closed. At Grube's request, Dr. Penrod ordered an MRI of the foot in May 2001 and noted that the results looked clear.

However, approximately one month thereafter, Dr. Penrod suggested the use of an exploratory surgery in light of Grube's continued complications. The second surgery, performed on June 25, 2001, resulted in the removal of almost an entire toothpick from Grube's injured foot. Dr. Penrod showed the toothpick to both Grube and her husband and acknowledged, on June 29, 2001, that his subsequent review of the original MRI revealed the existence of the toothpick in the foot.[1]

[1]Specifically, in her deposition, Grube testified that on June 29, 2001 Dr. Penrod "told [her] that he went back and looked at the MRI, and that he saw the toothpick in an area that he hadn't looked before."

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During the following month, Grube returned to Dr. Penrod's office for evaluations and dressing changes. She finally consulted another doctor regarding her foot because she "felt as though [Dr. Penrod] lied to [her]" when he told her that the MRI was clear. And while the wound ultimately healed, Grube allegedly began to experience walking problems and the development of curled toes and a bunion on her left foot.

As a result, on July 8, 2003, more than two years after Dr. Penrod acknowledged his oversight in interpreting the original MRI, Grube initiated legal action against the doctor for medical malpractice. In response, Dr. Penrod moved for summary judgment, arguing that the suit was barred under the two-year statute of limitations. The district court agreed and granted summary judgment in favor of Dr. Penrod. This appeal followed.

On appeal, Grube contends that the two-year statute of limitations did not expire as her expert witness, Dr. Arlene Hoffman, opined that Grube could not have known about the damage to her foot until after her wound had healed, less than two years before the filing of the medical malpractice complaint.[2] Grube further contends that the limitations period was tolled by her reliance on Dr. Penrod's professional care and by the doctor's alleged concealment of information. Upon de novo review, we conclude that both contentions lack merit.[3]

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[2]Specifically, Dr. Hoffman averred that Grube "would not have recognized that she suffered damage until the skin had closed and she was able to put her full weight on the foot."

[3]The standard of review for an appeal of a summary judgment is de novo. Wood v. Safeway, Inc., 121 Nev. 724, ___, 121 P.3d 1026, 1029 (2005).

Under Nevada law, "an action for injury [occurring before October 1, 2002] . . . against a provider of health care may not be commenced more than 4 years after the date of injury or 2 years after the plaintiff discovers or through use of reasonable diligence should have discovered the injury, whichever occurs first . . . ."[4] We have previously held that the latter discovery rule commences when a patient "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."[5]

Applying this rule here, we conclude that Grube was on notice of her medical malpractice claim on or before June 29, 2001—more than two years prior to filing suit—when Dr. Penrod first acknowledged his failure to identify the toothpick in the original MRI. The fact that Grube may not have developed precise knowledge of her injuries until some time thereafter is irrelevant since the commencement of the limitations period depends on "the patient's knowledge of or access to facts rather than on [the] discovery of legal theories."[6]

Similarly, any alleged assurances or concealment on the part of Dr. Penrod are insufficient to raise a genuine issue of material fact. Because Grube had actual knowledge of a possible medical malpractice claim when Dr. Penrod acknowledged his oversight in interpreting the original MRI, the two-year statute of limitations began to run on or before June 29, 2001, and any subsequent actions by Dr. Penrod would not toll

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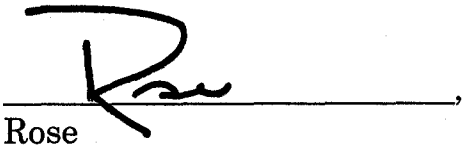
[4]NRS 41A.097(1).

[5]Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983).

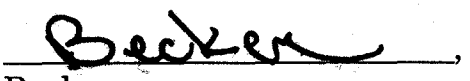
[6]Id.; see Dolan v. Borelli, 16 Cal. Rptr. 2d 714, 718 (Ct. App. 1993).

the running of the statute.[7] As such, we conclude that the district court did not err in granting summary judgment. Accordingly, we

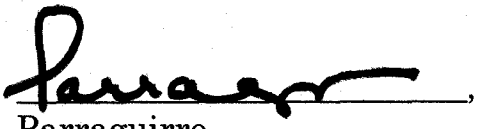
ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Rose



_____, J.
Becker



_____, J.
Parraguirre

cc: Hon. Brent T. Adams, District Judge
Leonard I. Gang, Settlement Judge
Demetras & O'Neill
Nall & Miller, LLP
Piscevich & Fenner
Washoe District Court Clerk

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[7]See Floyd v. Western Surgical Associates, 773 P.2d 401, 404 (Utah Ct. App. 1989) (noting that knowledge of a possible connection between the surgery and the injuries is sufficient to begin the running of the statute of limitations).