

IN THE SUPREME COURT OF THE STATE OF NEVADA

NICOLE HANLEY, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF STEPHANIE T. BROCK, DECEASED; KERRY D. BROCK, SR., INDIVIDUALLY, AND AS HEIR OF THE ESTATE OF STEPHANIE T. BROCK, DECEASED; KERRY D. BROCK, SR., AS PARENT AND NATURAL GUARDIAN OF KERRY DEWAYNE BROCK, JR., A MINOR, INDIVIDUALLY, AND AS HEIR OF THE ESTATE OF STEPHANIE T. BROCK, DECEASED; AND KERRY D. BROCK, SR., AS PARENT AND NATURAL GUARDIAN OF MAHOGANY THERESE CHALIZE BIAS, A MINOR, INDIVIDUALLY, AND AS HEIR OF THE ESTATE OF STEPHANIE T. BROCK, DECEASED, Appellants,
vs.
FRANK P. SILVER, M.D.; AND FRANK P. SILVER, M.D., A PROFESSIONAL CORPORATION, Respondents.

No. 50068

FILED

JUL 23 2008

TRACIE A. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting respondents' NRCP 12(b)(5) motion to dismiss.¹ Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

¹Pursuant to NRAP 34(f), we have determined that oral argument is not warranted in this appeal.

On June 17, 2005, Stephanie Brock, the deceased wife of appellant Kerry Brock, underwent a procedure to treat an ovarian cyst and adhesions by respondent Dr. Frank Silver. During the procedure, Dr. Silver perforated Mrs. Brock's sigmoid colon. The perforation was neither diagnosed nor treated prior to Mrs. Brock's discharge later that day. Two days later, Mrs. Brock was taken to North Vista Hospital complaining of severe abdominal pain and swelling. Mrs. Brock was pronounced dead at North Vista Hospital approximately two hours later.

Appellants filed a complaint alleging negligence and wrongful death on November 16, 2006. On December 15, 2006, respondents filed an NCRP 12(b)(5) motion to dismiss appellants' complaint, alleging that appellants' complaint was barred by the statute of limitations for medical malpractice actions, NRS 41A.097. Appellants opposed the motion.

Following a hearing, the district court granted a 60-day continuance to permit limited discovery regarding the issue of when appellants' cause of action accrued. Both parties filed supplemental pleadings regarding the outcome of the discovery. After a hearing regarding the additional discovery, the district court entered an order granting respondents' motion to dismiss appellants' complaint based on the expiration of the statute of limitations. In its order, the district court made a factual finding, resolving a dispute over when appellant Kerry Brock became aware of the possibility of negligence by finding that Brock's July 13, 2005, visit to an attorney was conclusive on this point. This appeal followed.

Under NRCP 12(b), if matters outside of the pleadings are presented to and not excluded by the district court, a motion made under 12(b)(5) shall be treated as one for summary judgment. In this case, the

district court relied on matters outside of the pleadings, so we construe the dismissal order as one granting summary judgment.² Accordingly, we review the district court's order of summary judgment de novo, "to determine whether the evidence properly before the district court 'demonstrate[s] that no genuine issue as to any material fact [remains] and that the moving party is entitled to summary judgment as a matter of law.'"³ While we construe the facts in the light most favorable to the nonmoving party, we also place the burden on the nonmoving party to "set forth facts demonstrating the existence of a genuine issue in order to withstand a disfavorable summary judgment."⁴ To successfully defend against a summary judgment motion, the nonmoving party must, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.⁵ On summary judgment, the district court may not resolve factual disputes when both sides produce evidence in support of their positions.⁶

²Witherow v. State, Bd. of Parole Comm'rs, 123 Nev. ___, ___, 167 P.3d 408, 409 (2007), cert. denied, ___ U.S. ___, 128 S. Ct. 1669 (2007).

³Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. ___, ___, 163 P.3d 405, 407 (2007) (alterations in original) (internal quotations omitted) (quoting Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)).

⁴Sustainable Growth v. Jumpers, LLC, 122 Nev. 53, 61, 128 P.3d 452, 458 (2006).

⁵Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. ___, ___, 172 P.3d 131, 134 (2007).

⁶NRCP 56(c) (stating that summary judgment is only appropriate when there are no genuine issues of material fact).

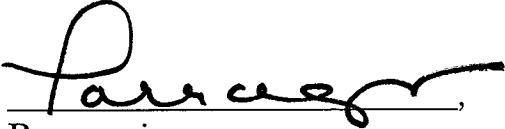
NRS 41A.097(2) states, in relevant part, that an action for injury or death against a provider of health care may not be commenced more than three years after the date of injury or one year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first. This court has defined “injury” for purposes of the discovery rule to mean “legal injury,” which “encompasses not only the physical damage but also the negligence causing the damage.”⁷

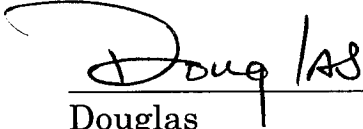
Our review of the record reveals that appellants set forth specific facts demonstrating the existence of a genuine factual issue regarding the timing of appellants’ knowledge of the possibility of negligence. Appellants were initially informed that Mrs. Brock’s death was caused by a heart attack. Appellants were also informed by the pathologist who performed the autopsy that Mrs. Brock’s death was an accident. Appellants had no medical records to support a belief that malpractice had occurred. Appellants also claim that the lack of results from Kerry Brock’s July 13, 2005, meeting with representatives of a law firm led them to believe that no negligence had occurred. Appellants assert that they first learned of the possibility of negligence when they were provided with a report by a medical expert on November 16, 2006, stating that the expert believed that respondents’ actions fell below the applicable standard of care, and on that same day, appellants filed their complaint.

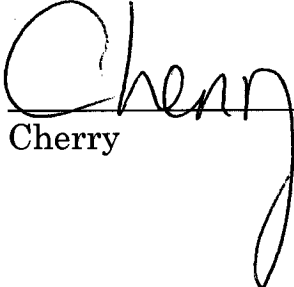
⁷Pope v. Gray, 104 Nev. 358, 361, 760 P.2d 763, 765 (1988) (quoting Massey v. Litton, 99 Nev. 723, 726, 669 P.2d 248, 250 (1983)).

Based on the specific facts introduced by appellants, a genuine issue of material fact regarding the timing of appellants' knowledge of the legal injury in this case is presented. As there remained a genuine issue of material fact, the district court erred in granting summary judgment. Accordingly, we

REVERSE the district court's order dismissing appellants' complaint and REMAND this matter to the district court for further proceedings consistent with this order.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Elizabeth Goff Gonzalez, District Judge
William C. Turner, Settlement Judge
Harris/Schwartz
John H. Cotton & Associates, Ltd.
Eighth District Court Clerk