IN THE SUPREME COURT OF THE STATE OF NEVADA

MARILYN MONROE, AS NATURAL MOTHER AND GUARDIAN AD LITEM OF JAMES MONROE, A MINOR,
Appellant,
vs.
BARRY HALPERN, M.D.,
Respondent.

No. 50174

ORDER OF REVERSAL AND REMAND

Appeal from a district court order dismissing a medical malpractice action on statute of limitations grounds. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

This case involves a claim of medical malpractice by appellant Marilyn Monroe (Monroe), as natural mother and guardian ad litem of James Monroe (James), a severely brain damaged child, against respondent Dr. Barry Halpern.

FACTS AND PROCEDURAL HISTORY

James was born by cesarean section at Sunrise Hospital on May 31, 1995. During the cesarean section, Dr. Deborah Hughes, the physician performing the operation, lacerated James' head with a scalpel. Shortly thereafter, he was transported to the neonatal intensive care unit at Sunrise Hospital under Halpern's supervision. Halpern attempted to stop James' bleeding for approximately one hour before calling a pediatric surgeon to close the wound. James was subsequently admitted to the Southwest Regional Neonatal Center where he was cared for by Dr. J. Parker Kurlinski. Monroe ultimately claimed that Halpern and Kurlinski negligently treated her child.

Monroe filed her first complaint for negligence, which did not name Halpern or Kurlinski as defendants, on August 3, 1998. The procedural history of Monroe's initial complaint is convoluted and largely tangential to the issues in this appeal. Accordingly, we only discuss the complaint insofar as it involves Halpern and the instant case.

On or about June 17, 2004, Monroe amended her initial complaint to include claims against Halpern and Kurlinski.[1] After several hearings, the district court dismissed the claims against Halpern and Kurlinski without prejudice pursuant to NRCP 15(a). Monroe appealed and ultimately settled with Kurlinski after a settlement conference. In addition, at Monroe's request, this court dismissed the appeal as to Halpern without prejudice for Monroe to proceed in district court in the instant case, which is discussed immediately below.[2]

In December 2004, while the appeal was pending, Monroe filed a separate complaint against Halpern and Kurlinski. Halpern moved to dismiss the action based on the four year statute of limitations set forth in NRS 41A.097, which the district court granted.[3]

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[1]We note that there is no evidence that Monroe sought leave to amend her complaint prior to adding the new defendants. See NRCP 15(a).

[2]This recapitulation of the course of proceedings in these matters is necessarily abbreviated and slightly truncated. The tortured procedural history of these cases has been caused by the fragmented nature in which the claims on behalf of Monroe and James have been prosecuted. This is largely the fault of plaintiff's counsel.

[3]Pursuant to the settlement in the previous case, Kurlinski is not a party to this separate appeal.

Monroe now appeals the dismissal of the December 2004 complaint. The primary issue on appeal is whether Monroe was barred from bringing this claim on behalf of James under the four year statute of limitations contained in NRS 41A.097. Because we conclude that this action was not barred by the statute of limitations contained in NRS 41A.094, we reverse the district court's decision.

DISCUSSION

NRS 41A.097 provides that the statute of limitations for an action alleging injury or death caused by a health care provider prior to 2002 is four years from the date of injury, or two years from the date the plaintiff discovers or should have discovered the injury, whichever occurs first. However, NRS 41A.097(4) further provides:

> If the parent, guardian or custodian fails to commence an action on behalf of that child within the prescribed period of limitations, the child may not bring an action based on the same alleged injury against any provider of health care upon the removal of his disability, except that in the case of:
>
> (a) Brain damage or birth defect, the period of limitation is extended until the child attains 10 years of age.

Here, it is undisputed that James constitutes a child with brain damage or a birth defect. Halpern, however, argues that the claim on behalf of James falls within the four year statute of limitations, and not the 10 year statute of limitations contained in NRS 41A.097(4)(a), because (1) Monroe discovered, or should have discovered, injuries related to James' laceration in 1998 when she filed her original lawsuit, and (2) she

has already, for the purposes of NRS 41A.097(4), commenced an action on James' behalf because she initiated litigation against other defendants.[4]

We disagree. While Monroe commenced an action on James' behalf as it relates to other defendants, e.g. Sunrise Hospital, she did not commence an action against Halpern until 2004. Because James is a brain damaged child and because Monroe commenced an action on James' behalf against Halpern within the 10 year statute of limitations within NRS 41A.097(4), we conclude that this action is timely and not barred by NRS 41A.097.[5] Thus, Monroe was free to file her complaint at any time before May 31, 2005 regardless of when she discovered James' injuries.

Accordingly, we

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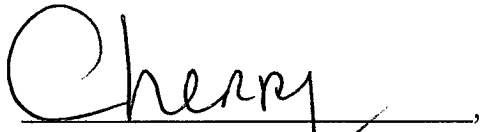
[4]Monroe v. Columbia Sunrise Hosp., 123 Nev. ___, 158 P.3d 1008 (2007).

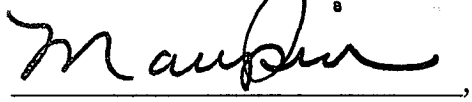
[5]We distinguish the previous Monroe case, where we held that the 10 year statute of limitations did not apply, on the basis that Monroe had already commenced on James' behalf against Sunrise Hospital. See Monroe, 123 Nev. ___, 158 P.3d 1008 (2007). We further note that our statement that claims against Sunrise Hospital or its subsidiaries necessary related back to the original complaint was limited to Sunrise Hospital. Moreover, while Monroe amended the original complaint to include Halpern as a defendant, ostensibly without leave of court under NRCP 15(a), that amended complaint was dismissed without prejudice.

Further, because we conclude that Monroe's appeal has merit, we deny Halpern's request for attorney fees and costs on appeal.

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



Cherry, J.



Maupin, J.

Saitta, J.

cc: Hon. Mark R. Denton, District Judge
Althea Gilkey
Alverson Taylor Mortensen & Sanders
Eighth District Court Clerk