

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES TALBOTT, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, MELANIE TALBOTT; MELANIE TALBOTT; AND AMOS TALBOTT, INDIVIDUALLY,
Appellants,

vs.

ASPEN FAMILY MEDICINE, LLC
A/K/A ASPEN FAMILY MEDICAL, LLC;
CARSON MEDICAL GROUP, A
PROFESSIONAL CORPORATION;
COLLEEN C. LYONS, M.D.; AND
MERRITT W. DUNLAP, M.D.,
Respondents.

No. 51535

FILED

FEB 25 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a medical malpractice action.¹ First Judicial District Court, Carson City; William A. Maddox, Judge.

On April 21, 2005, James Talbott, a minor, and his parents, individually and on behalf of James, filed a complaint in district court for claims of medical negligence, negligent infliction of emotional distress, and loss of consortium. The claims arose from the care and treatment provided at Carson Tahoe Hospital (CTH) following James's birth in April 2003. Soon after birth, James was diagnosed with Group B Streptococcal

¹The Talbotts' challenge various interlocutory orders in the context of an appeal from the final judgment. See Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (holding that if the appeal is from a final judgment, "interlocutory orders entered prior to the final judgment may properly be heard by this court").

meningitis. He is permanently disabled and suffers from cerebral palsy, mental retardation, and associated injuries. The Talbotts filed claims against CTH; all doctors involved in James's medical care at the hospital, including Dr. Dunlap and Dr. Lyons; and the doctors' respective business entities, Carson Medical Group (CMG) and Aspen Medical Services (Aspen). Both Dr. Dunlap and CMG, as well as Dr. Lyons and Aspen, filed a motion for partial summary judgment as to all of the Talbotts' claims against their respective business entities. The district court granted both CMG and Aspen's motions for summary judgment. This appeal followed.²

On appeal, the Talbotts argue that the district court erred in (1) granting summary judgment and (2) denying their request for additional discovery and an evidentiary hearing. We conclude that all of the Talbotts' arguments are without merit and, as such, affirm the order of the district court.

Summary judgment

The Talbotts argue that the district court erred in granting summary judgment because issues of material fact remain. The Talbotts contend that the district court improperly found that Dr. Lyons and Dr. Dunlap were acting as independent contractors and not through their businesses. The Talbotts allege that the district court invaded the province of the jury in granting summary judgment because the existence of an agency relationship is generally a question of fact for the jury. We disagree.

²The parties are familiar with the facts, and we do not recount them further here, except as pertinent to our disposition.

This court reviews orders granting summary judgment de novo. Yeager v. Harrah's Club, Inc., 111 Nev. 830, 833, 897 P.2d 1093, 1094 (1995). Summary judgment is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c); see Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Under NRCP 56, the burden of proving that there is no genuine issue of material fact lies with the moving party. Maine v. Stewart, 109 Nev. 721, 726-27, 857 P.2d 755, 758 (1993). However, once the moving party satisfies his or her burden as required by NRCP 56, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. Id. at 727, 857 P.2d at 759. “[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.” Wood, 121 Nev. at 729, 121 P.3d at 1029.

We conclude that summary judgment was proper because the Talbotts failed to demonstrate that Dr. Lyons or Dr. Dunlap acted as agents of their respective business entities at the time they treated James at CTH. The Talbotts failed to present evidence to indicate that either Aspen or CMG had any connection to the treatment of James. Rather, all evidence presented to the district court showed that Dr. Lyons and Dr. Dunlap were individually compensated and, in fact, acting as independent contractors. As such, we must confirm that there were no genuine issues of material fact left to be tried to a jury on these claims and the district court did not err in granting summary judgment. Accordingly, we affirm the district court's grant of summary judgment.

Evidentiary hearing

The Talbotts argue that the district court abused its discretion in denying their request for additional discovery and an evidentiary hearing before ruling on the motions for summary judgment when the motions for summary judgment included newly disclosed documentation. The Talbotts contend that a continuance under NRCP 56(f) was appropriate because the existence of a contract with CTH was revealed for the first time in the summary judgment motions despite the Talbotts' due diligence. The Talbotts argue that a hearing is required under FJDCR 15(9) and D.C.R. 15, because D.C.R. 15 states that "[a]ny proceeding which requires evidence, testimony or fact finding must be held in open court." We disagree.

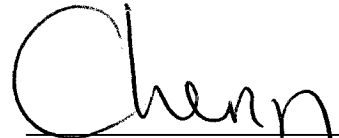
When faced with a motion for summary judgment, we review a district court's denial of a motion for continuance in order to conduct further discovery under an abuse-of-discretion standard. Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005) (citing Harrison v. Falcon Products, 103 Nev. 558, 560, 746 P.2d 642, 643 (1987)). "[A] motion for a continuance under NRCP 56(f) is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact." Id. (citing Bakerink v. Orthopaedic Associates, Ltd., 94 Nev. 428, 431, 581 P.2d 9, 11 (1978)). Factors in determining whether a district court may grant a continuance include timeliness and diligence. Summerfield v. Coca Cola Bottling Co., 113 Nev. 1291, 1294, 948 P.2d 704, 706 (1997); Ameritrade, Inc. v. First Interstate Bank, 105 Nev. 696, 700, 782 P.2d 1318, 1320 (1989). Where "a party fails to carry its burden under NRCP 56(f), postponement of a ruling on a motion for summary judgment is unjustified." Bakerink, 94 Nev. at

431, 581 P.2d at 11 (quoting Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 297 (8th Cir. 1975)).

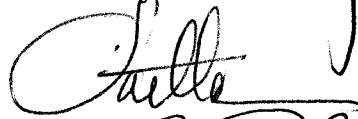
We conclude that the Talbotts' argument that the district court abused its discretion in denying their request for additional discovery is without merit because the Talbotts failed to identify further discovery that would have led to creating a genuine issue of material fact. We further conclude that the district court did not err in denying the request for an evidentiary hearing because the proceeding did not require "evidence, testimony or fact finding." See D.C.R. 15. Additionally, the "grant or denial of [a requested hearing] shall lie within the Court's discretion." FJDCR 15(9). We conclude that there was substantial evidence in the record to support the district court's ruling and, as such, the district court did not manifestly abuse its discretion in denying the Talbotts' request for an evidentiary hearing.

In light of the foregoing discussion, we


ORDER the judgment of the district court AFFIRMED.

 _____, J.

Cherry

 _____, J.

Saitta

 _____, J.

Gibbons

cc: First Judicial District Court Dept. 2, District Judge
Jill I. Greiner, Settlement Judge
Janet, Jenner & Suggs
White & Wetherall, LLP/Reno
Alverson Taylor Mortensen & Sanders
Lemons Grundy & Eisenberg
Carson City Clerk