

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY FAIR, AN INDIVIDUAL,  
Appellant,  
vs.  
CATHOLIC HEALTHCARE WEST, A  
FOREIGN NON-PROFIT  
CORPORATION,  
Respondent.

No. 52229

**FILED**

**DEC 23 2009**

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

ORDER OF REVERSAL

This is an appeal from a district court order granting a motion to dismiss in a medical malpractice action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

While being treated for the potential new onset of diabetes at St. Rose Dominican Hospital (owned and operated by respondent Catholic Health Care West, hereinafter "St. Rose"), appellant Jeffrey Fair, a paraplegic, developed a bedsore on his lower back resulting from St. Rose's failure to rotate his body during his stay at the hospital. Despite St. Rose's assurances otherwise, it subsequently failed to provide Fair with follow-up home medical care to treat his bedsore, which ultimately morphed into a serious bone infection that required multiple medical procedures.

As a result of his physical injury, Fair filed a medical malpractice cause of action against St. Rose. The district court concluded that his cause of action was time barred by NRS 41A.097's statute of limitations.

On appeal, Fair contends that the district court erred by dismissing his medical malpractice cause of action on the basis that it was time barred under NRS 41A.097 because the complaint, fairly read,

alleges that he did not discover his legal injury until mid-February 2007, when he became aware that St. Rose would not provide him with follow-up home care. For the following reasons, we agree, and therefore, reverse the district court's order of dismissal. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

#### Standard of review

The standard of review for an order granting a motion to dismiss is rigorous and this court must construe the pleadings liberally, draw every fair inference in favor of the nonmoving party, and accept all factual allegations of the complaint as true. See Simpson v. Mars Inc., 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). Ultimately, this court will uphold a district court's decision to dismiss a plaintiff's complaint only if "it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him . . . to relief." Id.

#### Discovery of Fair's legal injury

Under NRS 41A.097(2), an action for medical malpractice may not be commenced more than 1 year after the plaintiff discovers or, through reasonable diligence, should have discovered the injury. The term "injury," for purposes of NRS 41A.097, refers to a "legal injury," which encompasses all essential elements of the cause of action, including not only "physical damage but also the negligence causing the damage." Massey v. Litton, 99 Nev. 723, 726, 669 P.2d 248, 250 (1983).

Accordingly, this court has concluded that NRS 41A.097's statute of limitations does not begin to run until "the patient discovered, or should have discovered, that he or she suffered physical [damage] and that it resulted from the health care provider's negligence." Pope v. Gray, 104 Nev. 358, 361, 760 P.2d 763, 765 (1988) (citing Massey, 99 Nev. at 727-28, 669 P.2d at 251). "The focus is on the patient's knowledge of or

access to facts rather than on h[is] discovery of legal theories.” Massey, 99 Nev. at 728, 669 P.2d at 252.

In Massey, this court recognized that the continuous care of a physician should factor into determining when a patient discovers his legal injury, stating that it would be unfair to “bar the suit of a patient acting reasonably in trusting his doctor and relying upon his advice.” 99 Nev. at 726, 669 P.2d at 251. The Massey court explained that,

“[T]he patient is fully entitled to rely upon the physician’s professional skill and judgment while under his care, and has little choice but to do so. It follows, accordingly, that during the continuance of this professional relationship, which is fiduciary in nature, the degree of diligence required of a patient in ferreting out and learning of the negligent causes of his condition is diminished.”

Id. at 728, 669 P.2d at 252 (alteration in original) (quoting Sanchez v. South Hoover Hospital, 553 P.2d 1129, 1135 (Cal. 1976)).

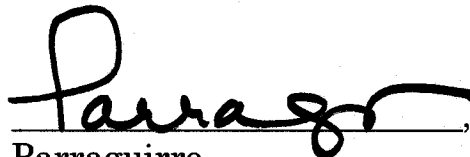
Here, Fair’s complaint alleges that he was released from the hospital two days after his bedsore was discovered with the understanding that St. Rose would provide follow-up medical care to treat his wound. While Fair was aware that his bedsore was a stage two ulcer at the time of his discharge, he alleges that he did not know the nature, extent, and severity of the bedsore until after St. Rose failed to provide follow-up care and he found out that the bedsore was infected.

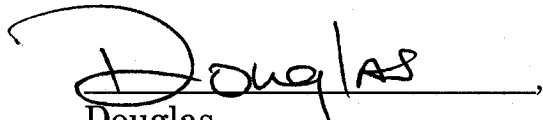
As indicated in Massey, a patient should not be burdened with the responsibility of bringing a medical malpractice claim while relying on a health care provider’s assurances that it is attempting to correct the injury. See Massey, 99 Nev. at 728, 669 P.2d at 252. Therefore, accepting as true the allegation that St. Rose assured Fair that it would provide him

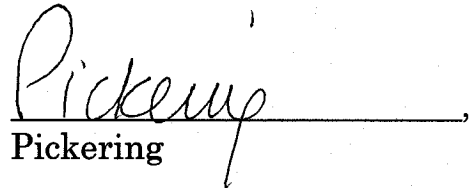
with continuing medical care to treat his wounds, we conclude that Fair should be given the opportunity to establish that he did not discover his legal injury until he became aware that St. Rose would not provide any further remedial care to cure the bedsore in mid-February 2007.

Based on the above, because Fair filed his medical malpractice cause of action on February 4, 2007, we conclude that the district court erred by granting St. Rose's motion to dismiss Fair's complaint. Accordingly, we reverse the district court's order.

IT IS SO ORDERED.

  
Parraguirre J.

  
Douglas J.

  
Pickering J.

cc: Hon. Douglas W. Herndon, District Judge  
Howard Roitman, Settlement Judge  
Law Offices of Richard McKnight, P.C.  
Carroll, Kelly, Trotter, Franzen & McKenna  
Eighth District Court Clerk