

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE ESTATE OF WILLARD FERHAT,
JOSEPHINE FERHAT, SPECIAL
ADMINISTRATOR,
Appellants,
vs.
TLC HOLDINGS, LLC D/B/A TLC
LONG TERM CARE CENTER,
Respondent.

No. 55347

FILED

JUL 28 2011

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Decedent Willard Ferhat had a debilitating stroke that resulted in his hospitalization and subsequent care by respondent TLC Holdings, LLC d.b.a TLC Long Term Care Center. Willard's wife, appellant Josephine Ferhat, sued TLC, contending that as a result of the negligent care provided by TLC and the unsanitary condition of TLC's facility, Willard developed bedsores that became infected, causing him to become septic and die. The case proceeded to the mandatory Court Annexed Arbitration Program (CAAP). While the case was pending in the program, TLC filed a motion for summary judgment in the district court. In response, Josephine filed an NRCP 56(f) motion for a continuance, arguing that further discovery would raise a material issue of fact. The district court judge granted TLC's motion for summary judgment and denied Josephine's NRCP 56(f) motion. The court concluded that because Josephine was required to present an expert witness to establish a

material issue of fact related to causation and failed to do so, no genuine issue of material fact existed regarding causation.¹

On appeal, Josephine argues that the district court improperly denied her motion for an NRCP 56(f) continuance and erred in granting summary judgment in TLC's favor.² Josephine contends that the district court erred by granting summary judgment when full discovery, including the designation of expert witnesses, had not yet been undertaken. We agree with Josephine and conclude that the district court abused its discretion by refusing to grant a continuance to allow Josephine to conduct further discovery to properly develop the record. See Aviation Ventures v. Joan Morris, Inc., 121 Nev. 113, 118, 110 P.3d 59, 62 (2005) (reviewing a district court's denial of an NRCP 56(f) motion under an abuse-of-discretion standard).

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

²Josephine also contends that TLC improperly argues for the first time on appeal that this case falls within the purview of NRS Chapter 41A's expert affidavit requirement. We conclude that TLC waived the issue by failing to raise it below. While TLC generally raised an argument regarding the lack of an expert witness to establish causation, it never tied that argument to NRS Chapter 41A's expert affidavit requirement. See Nye County v. Washoe Medical Center, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992) ("Generally, an issue which is not raised in the district court is waived on appeal."). While TLC correctly argues that Josephine was required to provide expert testimony concerning causation, we conclude that Josephine is not barred from doing so because summary judgment was improperly granted at an early stage in the proceedings. See NRS 41A.100; see also Bronneke v. Rutherford, 120 Nev. 230, 235 n.9, 89 P.3d 40, 44 n.9 (2004) ("The recent version of NRS 41A.100(1) continues to require expert medical testimony to prove medical negligence.").

Initially, we address Josephine's contention that TLC's motion for summary judgment could not be granted while the case was in the CAAP, a contention that we have already rejected in U.S. Design & Construction v. International Brotherhood of Electrical Workers Local 357, 118 Nev. 458, 464, 50 P.3d 170, 174 (2002) ("While NAR 4(E) prevents non-dispositive motions from being brought before the district court when arbitration is pending, the district court may still dispose of a case by hearing and ruling upon a motion for summary judgment."); see also Trustees v. Developers Surety, 120 Nev. 56, 59 n.3, 84 P.3d 59, 60 n.3 (2004). Accordingly, we conclude that the district court had the authority to grant summary judgment while the case was pending in the CAAP. However, whether the district court properly did so is a separate consideration, which we turn to next.


NRCP 56(f) permits a district court to grant a continuance when a party opposing a motion for summary judgment is unable to marshal facts in support of its opposition. Such a motion "is appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material fact." See Aviation Ventures, 121 Nev. at 118, 110 P.3d at 62. We have held that when a minimal amount of time has elapsed between the filing of the complaint and the time that summary judgment is entered and no dilatory motive is shown, it is an abuse of discretion to deny an NRCP 56(f) motion for additional time to conduct discovery to compile facts to oppose the summary judgment motion. Id.; Summerfield v. Coca Cola Bottling Co., 113 Nev. 1291, 1294-95, 948 P.2d 704, 705-06 (1997); Ameritrade, Inc. v. First Interstate Bank, 105 Nev. 696, 700, 782 P.2d 1318, 1320 (1989); Harrison v. Falcon Products, 103 Nev. 558, 560, 746 P.2d 642, 642-43 (1987). Here, the grant

of summary judgment occurred approximately a year-and-a-half after the first complaint was filed and before the arbitration commissioner had set a deadline for completing discovery. Moreover, Josephine had not been dilatory in conducting discovery and she explained in her motion how further discovery would develop genuine issues of material fact.

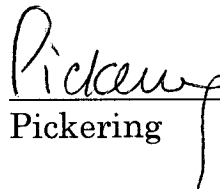
We conclude that the district court abused its discretion by denying Josephine a continuance to conduct discovery before granting the motion for summary judgment, and therefore, that the district court erred in granting summary judgment in favor of TLC. Thus, we reverse the district court's grant of summary judgment and remand so that further discovery may be conducted to substantiate the causation element of the negligence claim.

Accordingly, we

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


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Jennifer Togliatti, District Judge
Jay Earl Smith, Settlement Judge
Victor Lee Miller
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk