IN THE SUPREME COURT OF THE STATE OF NEVADA

HEATHER DREYER-LEFEVRE,
Appellant,
vs.
FRED MORISSETTE AND
SOUTHLAND INDUSTRIES,
Respondents.

No. 56653

FILED

JUL 01 2011

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

In March 2008, appellant Heather Dreyer-Lefevre suffered injuries in an automobile accident in Clark County that involved respondent Fred Morissette, who was driving a vehicle owned by respondent Southland Industries. An initial medical evaluation diagnosed only minor injuries for which Dreyer-Lefevre sought treatment. However, after receiving a course of treatment, including consultations with several doctors in August 2008, and further diagnosis, Dreyer-Lefevre received an MRI in May 2010, and was subsequently diagnosed with a herniated disc in her spinal column.

In May 2010, Dreyer-Lefevre filed a personal injury complaint against Morissette and Southland to recover for her spinal injury. The defendants filed a motion to dismiss the lawsuit under NRS 11.190(4)(e) because the March 2008 automobile accident occurred more than two years prior to Dreyer-Lefevre filing the complaint and thus ran afoul of the statute of limitations. The district court granted the motion and dismissed the complaint with prejudice.

Dreyer-Lefevre now argues on appeal that the district court erred because the discovery rule applied to her personal injury claim. Thus, she argues that the statute of limitations did not begin to run until the discovery of her more severe spinal injury, which was revealed by the MRI. We disagree and therefore affirm the district court's dismissal of Dreyer-Lefevre's lawsuit. The parties are familiar with the facts, and we do not recount them further here except as is necessary for our disposition.

DISCUSSION

Standard of review

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision dismissing a complaint pursuant to NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complaint. Id. A court may dismiss a complaint for failure to state a claim upon which relief can be granted if the action is barred by the statute of limitations. Bemis v. Estate of Bemis, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998).

NRS 11.190 bars Dreyer-Lefevre's personal injury claim

Dreyer-Lefevre argues that the discovery rule applies here, and thus, the statute of limitations set forth in NRS 11.190(4)(e) does not bar her claim. We disagree.

NRS 11.190(4)(e) provides a two-year limitations period for personal injury claims. Meadows v. Sheldon Pollack Corp., 92 Nev. 636, 637, 556 P.2d 546, 546 (1976) (noting that because "the gravamen of [the parties] cause of action [was] in tort to recover damages for personal injuries . . . the two year statute of limitation of NRS 11.190(4)(e)" applies.). "The general rule concerning statutes of limitation is that a

cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought." Petersen v. Bruen, 106 Nev. 271, 281, 792 P.2d 18, 24-25 (1990). The "discovery rule" is an exception to the general rule, whereby "the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action," because "the policies served by statutes of limitation do not outweigh the equities reflected in the proposition that plaintiffs should not be foreclosed from judicial remedies before they know that they have been injured and can discover the cause of their injuries." Id. at 274, 792 P.2d at 20.

Dreyer-Lefevre argues that this court has tolled the statute of limitations on medical malpractice cases, legal malpractice actions, fraud cases, RICO claims, contract and conversion actions, and other types of cases. Although Dreyer-Lefevre concedes that she received treatment for the diagnosed strain on March 28, 2008, and that she would be barred from seeking damages for that injury, she argues that the discovery rule should apply because neither she nor her treating physicians knew that she had sustained a spinal column injury until she received her MRI in May 2008, which revealed the herniated disc. Dreyer-Lefevre contends that triggering the limitations period based on the minor strain injury and not the severe spinal injury is inconsistent with Massey v. Litton, 99 Nev. 723, 725-28, 669 P.2d 248, 250-52 (1983). Further, Dreyer-Lefevre submits that NRS 11.190(4)(e) was tolled pursuant to Petersen because she did not know, nor should she have known, about the herniated disc, and therefore, she should not be prevented from judicial remedies because she discovered her more severe injury later.

At the outset, we note that Dreyer-Lefevre fails to cite a single case or statute that directly supports the application of the discovery rule to her personal injury claim, which is generally applied where the act giving rise to the cause of action and the manifestation of damages are not contemporaneous. See Oak Grove Inv. v. Bell & Gosett Co., 99 Nev. 616, 622, 668 P.2d 1075, 1078 (1983), overruled on other grounds by Calloway v. City of Reno, 116 Nev. 250, 264, 993 P.2d 1259, 1268 (2000), overruled on other grounds by Olson v. Richard, 120 Nev. 240, 89 P.3d 31 (2004). Further, we conclude that Petersen is not controlling or persuasive based upon its narrow application to child sexual assault. 106 Nev. at 277-82, 792 P.2d at 22-25.

Dreyer-Lefevre's failure to cite compelling authority notwithstanding, we note that while the Legislature has seen fit to expressly apply the discovery rule to other of causes of action, see NRS 11.190(2)(a) (applying to a cause of action for deceptive trade practice); NRS 11.190(3)(a) (applying to a cause of action to recover a stolen animal), it is notably absent from NRS 11.190(4)(e). Therefore, we conclude that the discovery rule does not apply to a cause of action that NRS 11.190(4)(e) controls. See State, Dep't of Taxation v. DaimlerChrysler, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) (stating that subject matter omitted from a statute is deemed intentional).

Moreover, we are convinced by the reasoning set forth in Gregory v. Union Pacific R. Co., 673 F. Supp. 1544 (D. Nev. 1987), that the discovery rule should not apply to Dreyer-Lefevre's subsequent diagnosis. In Gregory, a Nevada federal court dismissed a similar claim after determining that the complainant knew of his initial injury, and its cause, but did not file a claim until four years after the incident, when he finally

discovered that he had in fact received a more serious injury. Id. at 1547. While this court has not expressly addressed the issue, other state courts have concluded, as in Gregory, that the discovery rule does not toll a personal injury claim based upon a subsequent, more severe diagnosis of an injury. See Erickson v. Scotsman, Inc., 456 N.W.2d 535, 539 (N.D. 1990) (applying statute of limitations to ankle injury), relied on by Dunford v. Typhus, 776 N.W.2d 539, 542 (N.D. 2009) (applying statute of limitations to post-traumatic stress disorder); Rowe v. John Deere, 533 A.2d 375, 376-78 (N.H. 1987) (applying statute of limitations to head injury). As stated in Gregory, "[i]t is widely accepted that a cause of action for a tort accrues when there has been an invasion of the plaintiff's legally protected interest," whereby the "statute of limitations begins to run at the time of the tortious act." 673 F. Supp. at 1546.

Gregory offers a persuasive rebuttal to Dreyer-Lefevre's unpersuasive attempt to separate her minor and limited diagnosis from her subsequent and more severe diagnosis, whereby each diagnosis represented a separate injury. See Gregory, 673 F. Supp. 1546-47. Dreyer-Lefevre sustained an identified injury in an identified accident and started receiving treatment for that injury, in which she had a reasonable opportunity to determine the full extent of her injury and to file her complaint within the two-year limitations period. See id. at 1547. Dreyer-Lefevre in fact concedes that she is foreclosed under NRS 11.190(4)(e) from seeking damages related to the first diagnosis.

Because Dreyer-Lefevre's doctors diagnosed her with a minor, yet compensable personal injury in March 2008, and she knew the automobile accident caused that injury even though she did not know the extent of the injury, we conclude that Dreyer-Lefevre's cause of action

accrued at the time of the accident and initial diagnosis, and thus, it is barred by NRS 11.190(4)(e). See Petersen, 106 Nev. at 274, 792 P.2d at 20; see also Massey, 99 Nev. at 727, 669 P.2d at 251. We hold that the district court did not err by dismissing Dreyer-Lefevre's complaint and by refusing to apply the discovery rule to when Dreyer-Lefevre knew or should have known that her injury was more serious than originally diagnosed. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Timothy C. Williams, District Judge
William F. Buchanan, Settlement Judge
Stovall & Associates
Kahle & Associates
Eighth District Court Clerk