

IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIO GARCIA, M.D., F.A.C.S.; AND  
JULIO GARCIA, M.D., LTD., A NEVADA  
CORPORATION,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA, IN  
AND FOR THE COUNTY OF CLARK; AND  
THE HONORABLE RON ISRAEL,

DISTRICT JUDGE,

Respondents,

and

YESENIA "JESSIE" ALVAREZ,

Real Party in Interest.

No. 58686

**FILED**

NOV 22 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Alvarez*  
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying petitioners' motion for summary judgment and granting real party in interest's countermotion to reinstate previously dismissed claims.

Real party in interest, Yesenia Alvarez, was employed as an aesthetician in the office of petitioner Dr. Julio Garcia, a plastic surgeon. As part of Alvarez's compensation she received two free liposuction procedures from Dr. Garcia on August 28, 2002, and July 2, 2003. Alvarez alleges that during the second of these procedures, Dr. Garcia injected her breasts with saline without her consent. Dr. Garcia admits that he injected Alvarez's breasts with saline, but contends that the injections took place during the first procedure.<sup>1</sup>

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<sup>1</sup>In her original and first amended complaints, Alvarez alleged that the saline injections occurred during the first procedure, on August 28, 2002, but she alleges in her second amended complaint that the injections took place during the second procedure, on July 2, 2003.

Alvarez admits that she became aware of the saline injections immediately upon waking after the procedure, and was aware at least within days after the procedure that Dr. Garcia had shown her breasts to other employees while she was still under sedation. Alvarez testified at deposition on January 4, 2005, in a previous, unrelated action between the parties, that as of that date she had knowledge of all of her causes of action against Dr. Garcia related to the injections. Alvarez filed her complaint in this case on January 4, 2007, more than three and a half years after she alleges the injections took place and two years after her deposition in the unrelated action.

Alvarez alleged 15 causes of action against Dr. Garcia: medical malpractice/negligence, medical malpractice/negligence per se, negligence-res ispa loquitur, breach of contract, contractual and tortious breach of implied covenant of good faith and fair dealing, civil assault, civil battery, negligent/intentional infliction of emotional distress, fraudulent concealment, unreasonable intrusion upon seclusion of plaintiff, unreasonable publicity given to private facts, negligent misrepresentation, fraudulent concealment, breach of fiduciary duty, and declaratory relief. On May 17, 2007, the district court dismissed all of Alvarez's causes of action other than her two breach of contract and the declaratory relief causes of action. On January 18, 2011, Dr. Garcia filed a motion for summary judgment on Alvarez's remaining causes of action, arguing that her breach of contract claims were really tort claims that were time-barred. Alvarez opposed the motion and filed a countermotion for summary judgment regarding the same causes of action as well as a countermotion to reinstate all of her previously dismissed causes of action. The district court denied both the motion and countermotion for summary judgment, but granted Alvarez's motion to reinstate her previously dismissed causes of action. Dr. Garcia challenges the denial of his motion

for summary judgment and the grant of Alvarez's counter-motion to reinstate previously dismissed claims in his petition.

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. International Game Tech. v. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of mandamus is an extraordinary remedy, and whether a petition for extraordinary relief will be considered is solely within this court's discretion. See Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). The right to appeal following a final judgment generally constitutes an adequate legal remedy, precluding writ relief. International Game Tech., 124 Nev. at 197, 179 P.3d at 558. When a case is in the early stages of litigation, however, and judicial economy and administration are taken into consideration, an appeal is not always an adequate remedy, making writ relief appropriate. Id. at 198, 179 P.3d at 559. Although we generally will not exercise our discretion to consider mandamus petitions that challenge district court orders denying summary judgment, an exception to this general rule exists when judgment in petitioners' favor is clearly required by statute. Smith v. District Court, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997). Here, having considered the writ petition, answer, and reply, as well as the supporting documents, we conclude that our intervention by way of mandamus is warranted and we grant the petition.

Alvarez's motion to reinstate previously dismissed claims

Our review of the petition, answer, and supporting documents, including the hearing transcript, shows that the district court erred in granting Alvarez's motion to reinstate her previously dismissed claims, as neither the hearing transcript nor the district court order provided any legal basis to reinstate the claims. Alvarez asserted in her counter-motion that the statute of limitations for her claims were tolled by her cause of

action for fraudulent concealment. A fraudulent concealment defense, however, requires a showing both that Dr. Garcia used fraudulent means to keep Alvarez unaware of her cause of action and that Alvarez was, in fact, ignorant of the existence of her cause of action. Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1521 (9th Cir. 1983). The record here shows that Alvarez was aware of Dr. Garcia's actions upon waking from her surgery; therefore, the fraudulent concealment doctrine is not applicable to toll the statute of limitations for any of her claims. Id.

Dr. Garcia's motion for summary judgment


The district court also was required to grant Garcia's motion for summary judgment. Alvarez alleged claims for breach of contract and breach of the implied covenant of good faith and fair dealing; however, the basis for her claims are the saline injections that are also the basis for her tort claims. Alvarez argues that the informed consent form that she signed, but that Dr. Garcia did not sign, was a contract for her liposuction procedure. Dr. Garcia asserts that Alvarez's contract actions are in fact tort claims and the tort statute of limitation should be applied to them.

In determining whether an action is on a contract or in tort, this court looks at the nature of the grievance to determine the character of the action, not the form of the pleadings. State Farm Mut. Auto. Ins. v. Wharton, 88 Nev. 183, 186, 495 P.3d 359, 361 (1972). "It is settled that an action against a doctor arising out of his negligent treatment of a patient is an action sounding in tort and not one based upon a contract." Christ v. Lipsitz, 160 Cal. Rptr. 498, 501 (Ct. App. 1979) (quoting Bellah v. Greenson, 146 Cal. Rptr. 535, 542 (Ct. App. 1978)). Accordingly, Alvarez's breach of contract claims sound in tort, and are subject to a two-year statute of limitation. NRS 11.190(4)(e). Since Alvarez was aware of Dr.

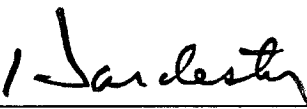
Garcia's actions upon waking from her procedure in 2003, her claims, which were not brought until 2007, are time-barred.

As Alvarez has no remaining causes of action that were brought timely, her declaratory relief claim must be dismissed. Builders Ass'n v. City of Reno, 105 Nev. 368, 369, 776 P.2d 1234, 1234 (1989) (holding that "[t]he Uniform Declaratory Judgments Act does not establish a new cause of action or grant jurisdiction to the court when it would not otherwise exist"). Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order granting Alvarez's countermotion to reinstate previously dismissed claims and to grant petitioners' motion for summary judgment.<sup>2</sup>

  
\_\_\_\_\_, C.J.  
Saitta

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Ron Israel, District Judge  
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas  
Bowen Law Offices  
Eighth District Court Clerk

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<sup>2</sup>In light of this decision, we vacate the stay imposed by our September 15, 2011, order.