

IN THE SUPREME COURT OF THE STATE OF NEVADA

YAKOV SHAPOSHNIKOV, M.D.; AND
YAKOV SHAPOSHNIKOV, M.D., A
PROFESSIONAL CORPORATION,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
VALORIE J. VEGA, DISTRICT JUDGE,
Respondents,

and

RONALD BURES; AND SUNRISE
MOUNTAINVIEW HOSPITAL, INC., A
NEVADA CORPORATION,
Real Parties in Interest.

No. 60237

FILED

OCT 31 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging a district court order denying a motion to dismiss.

Real party in interest Ronald Bures was diagnosed with colon cancer in February 2010 and filed a medical malpractice lawsuit against petitioners in February 2011. Bures' complaint alleged that Yakov Shaposhnikov, who performed a colonoscopy on Bures in September 2006, fell below the standard of care by failing to order a follow-up colonoscopy within two to three years.¹

Petitioners moved to dismiss Bures' complaint on the ground that it was time-barred by NRS 41A.097(2), Nevada's statute of

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

limitations governing medical malpractice claims. Specifically, petitioners contended that the alleged negligence occurred in 2006, when Shaposhnikov failed to order the follow-up colonoscopy, and that the 2011 lawsuit was therefore time-barred by NRS 41A.097(2)'s 3-year limitation period. The district court denied the motion, and petitioners filed this petition asking this court to issue a writ of mandamus directing the district court to dismiss Bures' complaint on the ground that it is time-barred as a matter of law. We deny petitioners' requested writ relief.

Grounds for writ relief

The decision to entertain a writ of mandamus on its merits is within this court's sole discretion. Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). "A writ of mandamus is available to . . . control a manifest abuse or arbitrary or capricious exercise of discretion . . ." State v. Dist. Ct. (Armstrong), 127 Nev. ___, ___, 267 P.3d 777, 779 (2011). "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." Id. at ___, 267 P.3d at 780 (quotation and alteration omitted). A writ of mandamus may issue "where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. We typically decline to consider writ petitions that challenge district court orders denying motions to dismiss, but here, petitioners argue that an exception to that general policy exists and that we should exercise our discretion because no factual dispute exists and the district court was obligated to dismiss the action pursuant to clear statutory authority. See Advanced Countertop Design v. Dist. Ct., 115 Nev. 268, 269, 984 P.2d 756, 758 (1999). It is petitioners' burden to demonstrate that our intervention

through extraordinary relief is warranted. Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

The district court properly applied NRS 41A.097(2) to the facts of this case

NRS 41A.097(2) provides in relevant part:

[A]n action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first

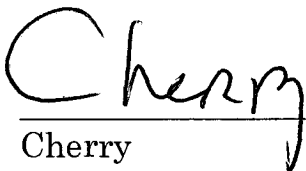
(Emphasis added).


Petitioners argue that the alleged negligence occurred on September 28, 2006, the date of the colonoscopy, and thus that is the date on which the three year statute of limitations contained in NRS 41A.097(2) began to run. In Massey v. Litton, 99 Nev. 723, 726, 669 P.2d 248, 250-51 (1983), however, this court held that the term “injury” does not mean the allegedly negligent act. Rather, this court equated the term “injury” with “legal injury,’ i.e., all essential elements of the malpractice cause of action,” and specifically held that “injury’ encompasses . . . damage as well as negligent cause.” 99 Nev. at 726, 728, 669 P.2d at 250, 252.


The essential elements of a malpractice claim are: “(1) that the doctor’s conduct departed from the accepted standard of medical care or practice; (2) that the doctor’s conduct was both the actual and proximate cause of the plaintiff’s injury; and (3) that the plaintiff suffered damages.” Prabhu v. Levine, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Thus, as Bures was not damaged, and therefore could not have suffered a legal injury, until he contracted colon cancer, the alleged legal injury did not necessarily accrue in September 2006 as asserted by petitioners.

The district court properly recognized as much in ruling on petitioners' motion to dismiss.² The district court also properly drew all inferences in Bures' favor when it concluded that, absent evidence to suggest otherwise, the cancer may have developed immediately before Bures' February 2010 diagnosis. See Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Thus, as we perceive no manifest abuse of discretion by the district court and the district court was not obligated to dismiss Bures' complaint pursuant to clear statutory authority, we conclude that extraordinary relief in the form of a writ of mandamus is not warranted. Accordingly, we

ORDER the petition DENIED.


_____, C.J.
Cherry


_____, J.
Douglas


_____, J.
Parraguirre

²To the extent petitioners argue that Bures is seeking to recover only for his lost chance of survival, this argument is belied by the plain language of Bures' complaint. Namely, among other things, Bures seeks to recover damages for "costs incurred to treat the cancer."

cc: Hon. Valorie J. Vega, District Judge
Cotton, Driggs, Walch, Holley, Woloson & Thompson/Las Vegas
Pengilly Robbins Slater
Hall Prangle & Schoonveld, LLC/Las Vegas
Eighth District Court Clerk