IN THE SUPREME COURT OF THE STATE OF NEVADA

SUNRISE MOUNTAINVIEW HOSPITAL, INC., A NEVADA CORPORATION,
Petitioner,
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; YAKOV SHAPOSHNIKOV, M.D.; AND YAKOV SHAPOSHNIKOV, M.D., A PROFESSIONAL CORPORATION,
Real Parties in Interest.

No. 60539

FILED

OCT 31 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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 in a medical malpractice action.

Real party in interest Ronald Bures was diagnosed with colon cancer in February 2010.[1] In February 2011, Bures then filed a medical malpractice action against petitioner Sunrise Mountainview Hospital, Inc. based on Bures' doctor's failure to order a follow-up colonoscopy within two to three years. After the district court dismissed Bures' first amended

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

complaint for failure to attach an expert affidavit as to Sunrise,[2] Bures filed a second amended complaint in June 2011 alleging an ostensible agency claim as to Sunrise.

Sunrise then moved to dismiss on the ground that Bures' second amended complaint was time-barred by NRS 41A.097(2), Nevada's statute of limitations governing medical malpractice claims. Specifically, Sunrise contended that because Bures "discovered" his "injury" at the time of his February 2010 cancer diagnosis, his June 2011 claim was barred by NRS 41A.097(2)'s 1-year discovery period.

The district court denied Sunrise's motion as to Bures' ostensible agency claim, and Sunrise filed this writ petition, asking that this court issue a writ of mandamus directing the district court to dismiss Bures' ostensible agency claim as time-barred under NRS 41A.097(2). We deny the 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). "Although we generally decline to consider writ petitions that challenge district court orders denying motions to dismiss . . . , we may exercise our discretion when no factual disputes exist and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule." Advanced Countertop Design v. Dist. Ct., 115 Nev. 268, 269, 984 P.2d 756, 758 (1999). It is petitioner's burden

[2]Bures named several other defendants in his February complaint, and attached an expert affidavit regarding those other defendants.

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 was not obligated to grant Sunrise's motion to dismiss

A court can 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. NRCP 12(b)(5); Shupe & Yost, Inc. v. Fallon Nat'l Bank, 109 Nev. 99, 100, 847 P.2d 720, 720 (1993). In determining whether a complaint should be dismissed, the district court must accept all the factual allegations in the complaint as true, Pemberton v. Farmers Insurance Exchange, 109 Nev. 789, 792, 858 P.2d 380, 381 (1993), and must determine whether the complaint "sets forth allegations sufficient to make out the elements of a right to relief." Edgar v. Wagner, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). "A claim should not be dismissed ... unless it appears to a certainty that the plaintiff is not entitled to relief under any set of facts which could be proved in support of the claim." Hale v. Burkhardt, 104 Nev. 632, 636, 764 P.2d 866, 868 (1988).

Sunrise argues that the district court was compelled to dismiss the claims against it in the second amended complaint because, from the face of the complaint, the claims were filed more than one year after Bures knew or should have known of his injury. In relevant part, NRS 41A.097(2) provides:

> [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). In Winn v. Sunrise Hospital & Medical Center, 128 Nev. ___, ___, 277 P.3d 458, 462 (2012), this court recently considered

what it means to "discover" one's "injury" for purposes of triggering NRS 41A.097(2)'s 1-year discovery period. In doing so, we reiterated that "a plaintiff 'discovers' his injury 'when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action.'" Id. (quoting Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983)). In other words, for a plaintiff to "discover" his injury, he must not only realize that he has been harmed, but he must also "ha[ve] facts before him that would have led an ordinarily prudent person to investigate further into whether [his] injury may have been caused by someone's negligence." Id. at ___, 669 P.2d at 462.

We stressed in Winn that the triggering date for the 1-year discovery period is generally a question of fact, and that this date may be determined as a matter of law "[o]nly when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action." Id. at ___, 277 P.3d at 466. Thus, in Winn, we concluded that the district court had improperly determined the discovery date as a matter of law when the only evidence supporting the determination was that the plaintiff had been informed of an unexpectedly bad surgery result. Id. at __, 277 P.3d at 463.

Nothing on the face of Bures' second amended complaint supports petitioner's argument that Bures was put on inquiry notice as a matter of law merely by learning of his cancer diagnosis. Although the complaint states that Bures was diagnosed with colon cancer in February 2010, the physical harm is but one step of the analysis, as there remains to consider the question of when Bures could attribute this diagnosis to his doctor's negligence. See Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248,

252 (1983) The trier of fact must determine when Bures knew or should have known of facts giving rise to his claims. Bemis v. Estate of Bemis, 114 Nev. 1021, 1026, 967 P.2d 437, 441 (1998).[3] The district court was, therefore, not obligated to dismiss the complaint pursuant to clear authority under a statute or rule. Accordingly, we conclude that our intervention by way of extraordinary relief is not warranted, and we

ORDER the petition DENIED.

_____, C.J.
Cherry

_____, J.
Douglas

_____, J.
Parraguirre

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

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[3]The district court properly determined that Bures had no "legal injury" until he contracted colon cancer, as he had not been damaged. See Massey, 99 Nev. at 726, 669 P.2d at 250-51 (defining "injury" for purposes of NRS 41A.097 as "'legal injury,' i.e., all essential elements of the malpractice cause of action," including damages). As Bures was not diagnosed with colon cancer until February 2010, and no party has provided any evidence of when Bures contracted cancer, we likewise deny Sunrise's alternate basis for writ relief.