IN THE SUPREME COURT OF THE STATE OF NEVADA

TAWANNA K. CRABB,
Appellant,
vs.
HARMON ENTERPRISES, INC., A NEVADA CORPORATION D/B/A VINTNER GRILL; MINTERBROOK OYSTER COMPANY, A WASHINGTON ENTITY; AND BEST FISH LLC D/B/A CRAB FRESH, A WASHINGTON ENTITY,
Respondents.

No. 60634

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting summary judgment. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Tawanna K. Crabb consumed oysters at Vinter Grill, Harmon Enterprises, Inc.'s restaurant, on August 2, 2007. Several hours later, Crabb became ill. On August 8, 2007, she was diagnosed by a doctor with potential food poisoning. On August 23, 2007, the Southern Nevada Health District sent Crabb a letter regarding her food poisoning. Crabb subsequently learned from the Southern Nevada Health District that tainted oysters likely caused her illness. Crabb filed her original complaint against Vinter Grill and multiple fictitious defendants on August 18, 2009. In the complaint she alleged two counts of negligence and one count of breach of contract for the preparation and service of tainted oysters. After Crabb completed non-binding arbitration with Vinter Grill, she amended her complaint to allege negligence against Best

Fish LLC, the oyster wholesaler, and Minterbrook Oyster Company, the oyster harvester.

The case was referred to the district court's short trial program before a judge pro tempore. Best Fish filed a motion for summary judgment on the issue of statute of limitations, which Minterbrook and Vinter Grill joined. The judge pro tempore granted the motion for summary judgment. The district court approved the judge pro tempore's decision and entered summary judgment against Crabb. This appeal followed. As the parties are familiar with the facts, we do not recount them further except as necessary for our disposition.

We review de novo the district court's order granting summary judgment and the application of a statute of limitations. *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). We conclude that the district court did not err in granting summary judgment because Crabb filed her initial complaint after the statute of limitations expired.

In applying the statute of limitations in this case, we address two issues. First, we hold that all of Crabb's claims were for personal injuries despite how they were styled in the complaint or described in later briefing. Thus, they were governed by the two-year statute of limitations under NRS 11.190(4)(e). Second, we hold that Crabb had inquiry notice of her claims on August 8, 2007, and that her statute of limitations period expired on August 8, 2009. Because Crabb filed her original complaint on August 18, 2009, she brought these claims ten days too late.

All of Crabb's claims were for personal injuries and were governed by the two-year statute of limitations under NRS 11.190(4)(e)

Crabb argues that her claims are not barred by the statute of limitations because her breach of implied warranty claim has a four-year statute of limitations. She also argues that because her negligence claim was for food poisoning, it was actually a products liability claim for which there is a four-year statute of limitations.

Crabb's purported products liability claim was actually a negligence claim

As a preliminary matter, we note that Crabb did not plead a products liability claim but only pleaded breach of contract and negligence claims. Later, in her motion to reconsider the judge pro tempore's decision granting summary judgment, Crabb identified her negligence claims as product liability claims.

When reviewing a complaint, we "look at the substance of the claims, not just the labels used in the . . . complaint." *Nevada Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004). To plead a strict products liability claim, a plaintiff must allege that "(1) the product had a defect which rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the plaintiff's injury." *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191, 209 P.3d 271, 275 (2009) (internal quotations omitted). To plead a negligence claim, a plaintiff must allege that: "(1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages." *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996).

In both the original complaint and the amended complaint, Crabb identified her claims as those for negligence and breach of contract. In the negligence claims, Crabb alleged that she was harmed by the negligence of Vinter Grill, Minterbrook, and Best Fish in carrying out various tasks and duties. She alleged that Vinter Grill "was negligent in their [sic] duty to the public and to Ms. Crabb" and failed to "comply with the required food standards" set out in the applicable health code. Crabb alleged that Best Fish and Minterbrook "were negligent in that they failed to harvest and ship the Oysters to [Vinter] Grill in such a way that it [sic] would be fit for consumption."

Crabb failed to make a strict products liability claim because she did not allege in any claim that the oysters were unreasonably dangerous. Instead, she alleged that Vinter Grill's, Minterbrook's, and Best Fish's preparation, handling, and processing of the oysters breached duties that they owed to her. Because she focused on the respondents' conduct and not on the condition of the oysters, Crabb's purported products liability claims were actually negligence claims.

Crabb's breach of contract claims sound in tort and were governed by the statute of limitations for personal injury claims

In her original complaint and the amended complaint, Crabb alleged that Vinter Grill breached an implied contract by serving tainted oysters to her. While we recognize that a personal injury claim may be pleaded as a breach of contract, a contract claim for personal injury is treated as a tort claim because the "gravamen of this action is in tort to recover damages for personal injuries." *Blotzke v. Christmas Tree, Inc.*, 88 Nev. 449, 450, 499 P.2d 647, 647 (1972) (holding that a claim for breach of an implied contract to provide a safe workplace sounded in tort). As a result, the relevant tort statute of limitations, and not a contract statute of

limitations, applies to a breach of contract claim for personal injuries. *Id.*; *see also Meadows v. Sheldon Pollack Corp.*, 92 Nev. 636, 637, 556 P.2d 546, 546 (1976) (holding that a breach of contract claim relating to an elevator malfunction sounded in tort because it sought to recover for personal injuries). Like other personal injury claims, an implied warranty claim for personal injuries caused by unfit food sounds in tort and not in contract. *Ritchie v. Anchor Cas. Co.*, 286 P.2d 1000, 1006 (Cal. Ct. App. 1955); *see also Gosling v. Nichols*, 139 P.2d 86, 87 (Cal. Ct. App. 1943) ("The gravamen of a cause of action for breach of an implied warranty that food is fit for human consumption is the personal injury which results, and the action 'sounds in tort.' The cause of action is not ex contractu."). Because all of Crabb's causes of action were to recover for the physical harm she suffered, they were tort claims for personal injuries. As a result, the tort statute of limitations for personal injuries applied to Crabb's contract claims.

Crabb's claims were governed by the two-year statute of limitations under NRS 11.190(4)(e)

NRS 11.190(4)(e) provides a two-year statute of limitations for "an action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another." This statute applies to negligently-caused personal injuries. *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. ___, ___ n.4, 255 P.3d 238, 243 n.4 (2011) (applying NRS 11.190(4)(e) to a negligence personal injury claim). When a personal injury claim is articulated as a breach of contract, NRS 11.190(4)(e)'s two-year statute of limitations applies. *Meadows*, 92 Nev. at 637, 556 P.2d at 546 (explaining that although the plaintiff alleged breach of contract, "the gravamen of his cause of action is in tort to recover damages for personal injuries; thus, the two-year limitation of NRS

11.190(4)(e) is applicable"). Because Crabb's claims were to recover damages for personal injuries that she suffered, they were governed by NRS 11.190(4)(e) and were subject to its two-year statute of limitations.

Crabb had inquiry notice of her injury on August 8, 2007 and thus filed her complaint ten days after the statute of limitations ran

"[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, 274, 792 P.2d 18, 20 (1990). However, the discovery rule tolls "the statutory period of limitations . . . until the injured party discovers or reasonably should have discovered facts supporting a cause of action." *Id.* This rule requires a plaintiff to use due diligence in determining the existence of a cause of action and delays the accrual of the cause of action until the plaintiff obtains inquiry notice. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (applying the inquiry notice standard to determine when the applicable statute of limitations ran).

Inquiry notice occurs when a plaintiff "should have known of facts that 'would lead an ordinarily prudent person to investigate the matter further.'" *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. ___, ___, 277 P.3d 458, 462 (2012) (quoting *Black's Law Dictionary* 1165 (9th ed. 2009)). Factual knowledge "need not pertain to precise legal theories the plaintiff may ultimately pursue, but merely to the plaintiff's general belief that someone's negligence may have caused his or her injury." *Id.*

In *Winn*, a father obtained inquiry notice of a possible medical malpractice claim when he received medical records documenting potential negligence that occurred during a surgery and caused severe brain damage to his daughter. 128 Nev. at ___, 277 P.3d at 463. We held that the reception of the medical records suggesting negligence, and not

the injury itself, started the statute of limitations period because "it is unlikely that an ordinarily prudent person would begin investigating whether a cause of action might exist on the same day as being informed that his or her child's surgery had gone drastically wrong." *Id.*; *see also Ridenour v. Boehringer Ingelheim Pharm., Inc.*, 679 F.3d 1062, 1066 (8th Cir. 2012) (applying Nevada's discovery rule to hold that inquiry notice occurred when a plaintiff saw a law firm advertisement suggesting a connection between a drug he took and symptoms he was suffering). Thus, the statute of limitations begins to run when a plaintiff discovers facts suggesting a potentially negligent cause of harm and not when the injury itself is discovered.

On August 8, 2007, Crabb was diagnosed "with some sort of infectious process such as an infectious colitis or food poisoning versus diverticulitis," from which she previously suffered. Thus, Crabb was informed on August 8, 2007, that she might have been the victim of food poisoning. As occurred in *Winn* when the father obtained the medical records, Crabb's diagnosis alerted her to a potentially negligent cause of her injury. Thus, Crabb had inquiry notice on August 8, 2007.

The Southern Nevada Health District's letter of August 23, 2007, and its subsequent communications with Crabb were irrelevant to when she received inquiry notice. While the letter led to a conversation which provided more information about the specific cause of Crabb's injury, it does not change the commencement of her statute of limitations period because she was diagnosed with potential food poisoning before the date of the letter. Thus, Crabb already had inquiry notice because she had reason to suspect a negligent cause for her injury.

Because Crabb had inquiry notice of her injury on August 8, 2007, the statute of limitations period for this injury started to run on that date. Since all of her claims were covered by NRS 11.190(4)(e), she had two years from the date of discovery to file her complaint. Thus, Crabb needed to file her complaint by August 8, 2009, to comply with the statute of limitations. Since she filed her complaint on August 18, 2009, she missed the statute of limitations period by ten days. Thus, her claims were barred by a failure to adhere to the statute of limitations. As a result, the district court did not err in granting summary judgment.[1]

Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas

_____, J.
Saitta

cc: Hon. David B. Barker, District Judge
Hon. Paul R. Kirst, District Judge, Pro Tem
Janet Trost, Settlement Judge
David J. Winterton & Associates, Ltd.
The Doyle Firm, P.C.
Pyatt Silvestri & Hanlon
Ray Lego & Associates
Eighth District Court Clerk

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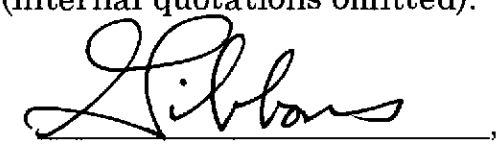
[1]Because the statute of limitations precludes Crabb's claims and resolves this appeal, we will not address the other issues raised by the parties.

GIBBONS, C.J., dissenting:

I would reverse the judgment of the district court as to respondent Harmon Enterprises, Inc., only. There is a genuine issue of material fact as to the date the statute of limitations accrued. Even though Crabb was diagnosed on August 8, 2007, she did not receive the Southern Nevada Health District's letter informing her of the tainted oysters until August 23, 2007. Since the facts regarding Crabb's inquiry notice are in controversy, summary judgment is inappropriate and the trier of fact must determine when the statute of limitations began to accrue. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) ("Whether plaintiffs exercised reasonable diligence in discovering their causes of action is a question of fact to be determined by the jury or trial court after a full hearing.") (internal quotations omitted).



_____, C.J.
Gibbons