IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DUANE EAMON; AND DANETTE EAMON,
Appellants,
vs.
ANDREW SCOTT MARTIN, M.D.; AND CROVETTI BONE AND JOINT INSTITUTE OF SOUTHERN NEVADA, LTD.,
Respondents.

No. 67815

FILED

MAR 04 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a district court order granting summary judgment. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

This is a medical malpractice action in which appellant Duane Eamon underwent surgery on his arm in January 2006 which he alleges was performed negligently. A few months after the surgery, Eamon began experiencing severe pain at the surgical site, which his physician indicated he "shouldn't be." The physician specifically informed Eamon that he shouldn't still be experiencing the same pain as he did before the surgery, and instructed him to report back in one month for further observation.

Despite this instruction, Eamon did not see another physician for three years, until April 2009, even though the unusual pain (which Eamon described as "horrible") continued, and he suffered a serious loss of motion in his arm. In May 2009, a different physician x-rayed the arm and instructed Eamon to return one month later for further examination, but Eamon failed to return for another year until 2010, when he finally returned and reported that the symptoms were worsening. The physician

injected a painkiller into the arm, but the pain continued and, in 2012, Eamon visited yet another physician who performed a CT scan and diagnosed the need for additional surgery. On February 4, 2013, the second surgery was performed, during which Eamon alleges that he learned for the first time that the 2006 surgery was performed incorrectly and a bone screw and suture anchor were found to have been inserted incorrectly. He filed the instant action one year later on February 3, 2014. The district court granted summary judgment against Eamon, concluding that the action was not filed before the expiration of the three-year statute of limitations period under NRS 41A.097. Eamon now appeals.

We review a district court's grant of summary judgment de novo. *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). On appeal, the parties agree that the relevant facts are largely undisputed, but disagree regarding the legal conclusions that arise from those facts. Eamon contends that he was not aware of the 2006 malpractice until the second surgery was conducted on February 4, 2013. He therefore contends that the three-year statute of limitations did not begin to run until this date, and his action is timely as a matter of law. He also contends that even if the limitations period began earlier, it should be deemed tolled because the respondents "concealed" their alleged malpractice until it was discovered during the 2013 surgery. Respondents contend that the action is untimely because the statute of limitations was triggered as early as 2006 when Eamon was informed that his pain was unusual and was instructed to return for further examination, advice that he ignored for several years even though the unusual pain continued unabated.

NRS 41A.097(2) contains two limitations periods governing the filing of medical malpractice claims. A claim must be filed either within one year after a plaintiff discovers, or through the exercise of reasonable diligence, should have discovered the injury, or within three years after the injury actually occurred, whichever comes first. 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." *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). A person is placed on "inquiry notice" when he or she "should have known of facts that would lead an ordinarily prudent person to investigate the matter further." *Winn v. Sunrise Hospital*, 128 Nev. ___, ___, 277 P.3d 458, 462 (2012) (internal quotation marks omitted). This does not mean that the accrual period begins when the plaintiff discovers the precise facts pertaining to his legal theory, but only to the general belief that someone's negligence may have cause the injury. *Id.* (citing *Massey*, 99 Nev. at 728, 669 P.2d at 252). Thus, the plaintiff "discovers" the injury when "he had facts before him that would have led an ordinarily prudent person to investigate further into whether [the] injury may have been caused by someone's negligence." *Id.*

Determining the accrual date is ordinarily a question of fact for the jury, unless the facts are "uncontroverted" and "irrefutably demonstrate" the accrual date, in which case the district court may determine it as a matter of law. *Id.* at 463.

Respondents argue that Eamon's claim is untimely under either the one-year deadline or the three-year deadline. Here, the relevant facts are undisputed, so the question is whether those facts "irrefutably demonstrate" the accrual date of the action. Essentially, the

question before us boils down to whether experiencing serious post-surgical pain that doesn't abate and worsens over time, being told that the pain is unusual and "shouldn't be" present, and failing to pursue further examination of the source of the pain despite the recommendation of physicians constitutes legal notice that the statutory clock has started running on a potential malpractice claim.

In *Libby v. Eighth Judicial District Court*, the Nevada Supreme Court held that a plaintiff whose surgery had been negligently performed is placed on "inquiry notice" of the negligence as soon as an "appreciable manifestation of the injury" occurs, whether or not the plaintiff is aware of the cause of the injury. 130 Nev. ___, ___, 325 P.3d 1276, 1280 (2014). The court concluded in the case before it that "tests showed that the MRSA infection had persisted despite the . . . surgical intervention," and even though the plaintiff "was not aware of the cause of the continued MRSA infection," the statute of limitations commenced once she learned that the surgery had not resolved the infection. *Id.* at 1280-81.

We conclude that *Libby* governs this action. As early as 2006, only a few months after the surgery, Eamon was told that his post-surgical pain "shouldn't be" present and that he should not be experiencing the same pain that he felt before the surgery. Rather than diligently investigating whether something might have gone wrong, he then failed (against his physician's instructions) to return for further examination for three years, during which the unusual pain never stopped and actually got worse. When he finally returned three years later in 2009, his pain was so severe and he had lost so much motion in his arm that an x-ray was ordered and he was instructed to return a month later for further

examination. There is some evidence that during this visit the need for more dramatic intervention was discussed, including the possibility of a second surgery. Nonetheless, Eamon then failed to return for further examination for yet another year.

Under these circumstances, the undisputed facts demonstrate that Eamon began experiencing an "appreciable manifestation of the injury" possibly before, but no later than, 2009. Had Eamon exercised "reasonable diligence" in pursuing further testing at that time, he might well have discovered the alleged negligence much earlier than he ultimately did. *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983) (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"). But he did not. Consequently, we conclude that the statute of limitations began to run no later than 2009.

Nonetheless, Eamon contends that, even if the statutory period began to run as early as 2009, it must be deemed tolled because the Respondents affirmatively "concealed" their malpractice. A plaintiff who alleges that the limitations period should be tolled for concealment must satisfy a two-prong test: (1) that the physician intentionally withheld information (2) that was "material," meaning the information would have objectively hindered a reasonably diligent plaintiff from timely filing suit. *Winn*, 128 Nev. at ___, 277 P.3d at 464.

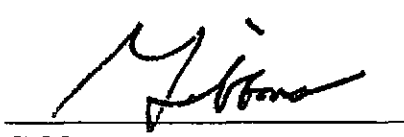
In *Winn*, the Nevada Supreme Court held that the statutory deadline could be tolled when the physician refuses to deliver copies of the plaintiff's medical records in a timely manner. Eamon's claim of concealment is not like that. Rather, Eamon asserts that the medical

records were delivered to him promptly, but that the records did not admit that malpractice occurred. We conclude that this is not the type of "concealment" the Nevada Supreme Court contemplated. As an initial observation, whether malpractice has actually occurred or not has not yet been proven, and so Eamon cannot reasonably contend at this stage that a material fact has been "concealed" from him; if there is no malpractice, then there was no concealment, absent specific factual allegations showing otherwise.

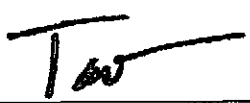
Even if there were, concealment only tolls the statute of limitations where the information would have objectively hindered a reasonably diligent plaintiff from filing suit. In this case the allegedly concealed information was available to Eamon through other means before the deadline expired; had he been diligent and undergone further medical examination when his physicians recommended it rather than wait while the pain worsened, he could have discovered the alleged malpractice within the statutory period.

Consequently, we conclude that the district court did not err in granting summary judgment in favor of Respondents, and we therefore,

ORDER the judgment of the district court AFFIRMED.



_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Douglas W. Herndon, District Judge
Stephen E. Haberfeld, Settlement Judge
Potter Law Offices
John H. Cotton & Associates, Ltd.
Daehnke Stevens, LLP
Eighth District Court Clerk