IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHELLE NORVELL,
Appellant,
vs.
R. MARCUS VENNART, M.D.; TINA PHYFER; AND WOMEN'S SPECIALTY CARE, LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP,
Respondents.

No. 68544



*ORDER OF AFFIRMANCE*

This is an appeal from a district court order granting summary judgment for defendants. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Appellant Michelle Norvell sued Dr. R. Marcus Vennart,[1] Tina Phyfer, and Women's Specialty Care, LLP, (collectively "respondents") after learning they had failed to accurately inform her of the result of a medical test.[2] Nurse Phyfer met with Norvell in February 2008 and obtained samples for a HALO test, which assesses a patient's risk for breast cancer. Shortly thereafter, an unidentified caller from Women's Specialty Care informed Norvell that "everything looks great." Over the following year, Norvell's breast health deteriorated and she was diagnosed with breast cancer in July 2009. In March 2012, Norvell requested a copy of her medical records, and learned for the first time that her 2008 HALO results indicated a high risk of breast cancer. In March 2013, Norvell

[1]Norvell also sued Dr. Vennart's professional corporation and limited liability partnership, but later stipulated to dismiss those parties.

[2]We do not recount the facts except as necessary to our disposition.

sued respondents alleging that they failed to accurately inform her of the HALO test results, which caused her to receive a delayed diagnosis and treatment.

On appeal, Norvell asserts that summary judgment was inappropriate because the respondents may have intentionally concealed the true results of the 2008 test results from her, thus tolling the statute of limitations. Further, Norvell argues that summary judgment was inappropriate because the parties had yet to engage in the discovery process, thereby preventing her from obtaining the facts necessary to defeat respondents' motion. We disagree.

We review an order granting summary judgment de novo. *Winn v. Sunrise Hosp. & Medical Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012). NRS 41A.097(2) provides that a medical malpractice action must be commenced within "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." A plaintiff alleging medical malpractice must bring suit within both the three-year statute of limitations and the one-year discovery period. *Libby v. Eighth Judicial District Ct.*, 130 Nev. ___, ___, 325 P.3d 1276, 1279 (2014); *Winn*, 128 Nev. at 251, 277 P.3d at 461. The three-year statute of limitations "begins to run once there is an appreciable manifestation of the plaintiff's injury," *Libby*, 130 Nev. at ___, 325 P.3d at 1280, which in this case was no later than June 2009, when Norvell was diagnosed with breast cancer. *See id.* (noting that cancer becomes an "injury" when diagnosed).

However, the statutory period may be tolled if the alleged wrongdoer concealed "any act, error or omission upon which the action is based" from the plaintiff. NRS 41A.097(3). Tolling occurs when 1) the

wrongdoer concealed its negligent acts and 2) this concealment would have hindered the plaintiff's ability, despite reasonable diligence, to timely file suit. *See Winn*, 128 Nev. at 256-57, 277 P.3d at 465 (holding the plaintiff was required to show the provider "withheld records after being presented with an unequivocal request for them, and (2) that this intentional withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit").

Here, the three-year statute of limitations began to run no later than July 2009, when Norvell was diagnosed with breast cancer. *See Libby*, 130 Nev. at ___, 325 P.3d at 1280. Because the longer three-year statute of limitations expired in July 2012, well before Norvell filed suit, we need not address whether Norvell also met the shorter one-year discovery period. *See Winn*, 128 Nev. at 251, 277 P.3d at 461.

Norvell's affidavit and brief concede that she presently lacks evidence which would demonstrate that a genuine issue exists regarding whether respondents "intentionally" concealed their alleged negligence.[3] On appeal, Norvell speculates that such evidence "may" exist and argues that although she failed to request additional discovery under NRCP 56(f), the district court's failure to continue the motion sua sponte constituted error mandating reversal. Although Norvell provides arguments regarding why additional discovery should have been granted, her

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[3]On appeal, and before the district court, Phyfer argues that because Norvell does not allege that Phyfer took any action which concealed the tests results, summary judgment should be granted as to her. We agree that this argument provides an alternative basis for granting summary judgment as to the claims against Phyfer. *See Winn*, 128 Nev. at 257, 277 P.3d at 465 (holding that NRS 41A.097(3)'s tolling provision applies only to the defendant responsible for the concealment).

argument ignores the fact that "a request for a continuance contained within the opposition to the [summary judgment] motion is not sufficient" to satisfy NRCP 56(f)'s affidavit requirement. *See Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 872, 265 P.3d 698, 700 (2001).

Having failed to make a proper 56(f) request below, Norvell cannot request such relief from us for the first time on appeal. Consequently, the unanswered questions of what further discovery might have revealed, such as, why the respondents failed to accurately report the 2008 test results to Norvell, and why Norvell apparently did not receive the written HALO results until 2012, are matters that we cannot consider in this appeal. As Norvell's only argument on appeal is that intentional concealment tolled the statute of limitations, yet Norvell acknowledges that the facts currently in her possession do not support her claim, we conclude that summary judgment was proper. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (holding that if the moving party demonstrates the absence of a genuine issue of material fact the opposing party assumes the burden of production). Therefore, the district court did not err in granting summary judgment,[4] and accordingly we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

[4]We have carefully considered Norvell's remaining arguments and conclude they are not persuasive.

cc: Hon. Adriana Escobar, District Judge
Stephen E. Haberfeld, Settlement Judge
Law Office of Lisa Rasmussen
Daehnke Stevens, LLP
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk