

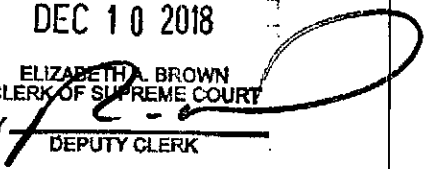
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICOLE CALLAHAN, AN
INDIVIDUAL,
Appellant,
vs.
BRENDAN G. JOHNSON, D.D.S.,
INDIVIDUALLY; AND HOLTZEN AND
JOHNSON, LTD., D/B/A NEVADA
ORAL AND FACIAL SURGERY, A
NEVADA DOMESTIC PROFESSIONAL
CORPORATION,
Respondents.

No. 74549-COA

FILED

DEC 10 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Nicole Callahan appeals from an order granting summary judgment in a tort action. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Callahan went to Nevada Oral & Facial Surgery to have her wisdom teeth removed. She met with Dr. Brendan Johnson, who informed her that the wisdom teeth on the right side of her mouth were abnormally close to her nerves. Dr. Johnson removed Callahan's wisdom teeth on February 10, 2014. Immediately thereafter, Callahan experienced pain, numbness, and loss of taste on the left side of her tongue. Her symptoms did not resolve in subsequent weeks, and on March 10 Dr. Johnson mentioned the possibility of nerve damage and suggested that Callahan see a microsurgeon.

On April 22, 2014, Callahan had her first appointment with microsurgeon Dr. Mark Glyman. Callahan listed "lingual nerve damage" as the reason for that visit. Dr. Glyman examined Callahan and opined that she had sustained a nerve injury during the February 10 procedure. On

May 5, 2014, Dr. Glyman performed corrective surgery. He discovered that the nerve had been cut and pulled, and opined that the nerve had been caught in one of the surgical instruments. Dr. Glyman shared his findings with Callahan and her husband following the surgery and again at Callahan's follow-up appointment on May 12. Dr. Glyman told Callahan that the nerve could take eight months to heal. On May 7, Callahan called Dr. Johnson to report that her nerve had been cut. On October 7, 2014, Callahan, who had not recovered, spoke with Dr. Glyman about the February 10 surgery, and Dr. Glyman allegedly criticized the way Dr. Johnson had performed that surgery.

On September 28, 2015, Callahan filed a malpractice lawsuit against Dr. Johnson and Holtzen and Johnson, Ltd. d/b/a Nevada Oral & Facial Surgery (collectively "Dr. Johnson"). Dr. Johnson moved for summary judgment, arguing that the statute of limitations expired and thus barred the lawsuit. The district court ultimately agreed and granted the motion. This appeal followed.¹

On appeal, Callahan contends the district court erred by concluding 1) the statute of limitations barred her lawsuit and 2) there was no concealment that would toll the statute of limitations. She asserts that Dr. Johnson misled her about the location of her injured lingual nerve and the reason for the injury. She claims Dr. Johnson told her that her lingual nerve was injured because it was abnormally close to her teeth, but in actuality her alveolar nerve was abnormally close to her teeth and the injured lingual nerve was not. She contends that the statute of limitations did not begin to accrue until after her conversation with Dr. Glyman on

¹We do not recount the facts except as necessary to our disposition.

October 7, 2014, as until that point she had no reason to suspect that Dr. Johnson was negligent. We disagree.

We review an order granting summary judgment de novo, and consider the evidence in the light most favorable to the nonmoving party. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012). NRS 41A.097(2), the controlling statute of limitations, provides:

Except as otherwise provided in subsection 3, an 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

A plaintiff must file suit within both the one-year and the three-year limitation periods. *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 364-65, 325 P.3d 1276, 1279 (2014); *Winn*, 128 Nev. at 251, 277 P.3d at 461. Only the one-year statute of limitations is at issue here. Under Nevada law, the one-year statute of limitations begins to run when the plaintiff “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). Our supreme court has clarified that the plaintiff need not know the “precise legal theories” underlying her claim, so long as the plaintiff has a “general belief that someone’s negligence may have caused his or her injury.” *Winn*, 128 Nev. at 252-53; 277 P.3d at 462. Thus, at its core the one-year statute of limitation requires the “plaintiff to be aware of the cause of his or her injury.” *Libby*, 130 Nev. at 365, 325 P.3d at 1279 (addressing the rule from *Massey* and *Winn*). The district court may determine the accrual date as a matter of law if the evidence irrefutably demonstrates that date. *Winn*, 128 Nev. at 253, 277 P.3d at 463.

We conclude the uncontroverted facts show that Callahan was on inquiry notice more than a year in advance of the date she filed her complaint. Critically, Callahan knew that her nerve had been cut during the February 10 surgery and that this injury caused her complained-of symptoms. Callahan testified that her symptoms began immediately following the February 10 surgery and that Dr. Johnson and Dr. Glyman both opined that her symptoms stemmed from nerve damage sustained during that surgery. On April 22, 2014, when Callahan first presented to Dr. Glyman, she listed “lingual nerve injury” as the reason for her visit. Moreover, Callahan testified that Dr. Glyman confirmed during the May 5 surgery that Callahan’s nerve had been cut in half and that he told her of the injury no later than May 12.² Dr. Johnson’s medical records also show that Callahan called Dr. Johnson shortly after her May 5 surgery to tell him that the nerve had been cut, but repaired in surgery.

Although Callahan may have misunderstood which nerve was actually injured and why, she was still aware of the cause of her injury—that her nerve had been cut in half during the February 10 surgery—by no later than May 12, 2014. *See Libby*, 130 Nev. at 365, 325 P.3d at 1279 (holding that the one-year statute of limitation requires the “plaintiff to be aware of the cause of his or her injury”). We conclude this knowledge “would put a reasonable person on inquiry notice” of her cause of action, and that the record therefore irrefutably demonstrates Callahan was on inquiry

²Notably, too, Dr. Glyman testified that he believed the nerve had been cut and then caught in a handpiece and stretched during the February surgery, and that he told Callahan and her husband of his findings following the May surgery.

notice more than a year before she filed her complaint. *See Massey*, 99 Nev. at 728, 669 P.2d at 252.


Callahan next argues that NRS 41A.097(3) tolled the statute of limitations here, where Dr. Johnson misled Callahan to believe that her lingual nerve was injured because it was abnormally close to her teeth and that her symptoms were normal and would eventually pass. NRS 41A.097(3) tolls the statute "for any period during which the provider of health care has concealed any act, error or omission upon which the action is based." But, this provision applies only where the plaintiff proves that there was "an *intentional act* that objectively hindered a reasonably diligent plaintiff from timely filing suit." *Libby*, 130 Nev. at 367, 325 P.3d at 1281. Thus, to toll NRS 41A.097(2)'s statute of limitation, the plaintiff must show that 1) the provider intentionally concealed the information, and, 2) this concealment "would have hindered a reasonably diligent plaintiff" from timely pursuing the cause of action. *See Winn*, 128 Nev. at 251, 277 P.3d at 462 (discussing circumstances under which the one-year discovery rule would be tolled).


We conclude the record supports the district court's conclusion of no tolling. Callahan presents no evidence showing that Dr. Johnson intentionally concealed information that would have hindered Callahan from timely pursuing her claims. Callahan testified that Dr. Johnson described to her how he had performed the surgery, acknowledged she may have sustained nerve damage, and suggested she see a microsurgeon. To the extent Dr. Callahan misdiagnosed the exact cause of her pain, Callahan does not show an intentional act of concealment. Moreover, Callahan does not demonstrate that Dr. Johnson's actions hindered her ability to timely pursue her cause of action here. As set forth above, Callahan knew she had

sustained a nerve injury during the February 10 surgery, she sought treatment for that injury in the spring of 2014, and she learned by no later than May 12, 2014 that her nerve had in fact been cut in half. Thus, the evidence does not show that NRS 41A.097(3)'s tolling provision applies here.

Accordingly, we conclude the district court properly granted summary judgment, and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Joanna Kishner, District Judge
Sharp Law Center
Levy Law Firm
Stark Friedman & Chapman
John H. Cotton & Associates, Ltd.
Eighth District Court Clerk