IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARK GOLDEN; AND ROBERTA GOLDEN, HUSBAND AND WIFE,
Appellants,
vs.
JAMES S. FORAGE, M.D., AN INDIVIDUAL; JAMES FORAGE, M.D., LTD., A NEVADA CORPORATION; DUKE FORAGE ANSON NEUROSURGICAL, LLP, D/B/A THE SPINE AND BRAIN INSTITUTE, A NEVADA LIMITED PARTNERSHIP,
Respondents.

No. 72163

FILED

OCT 13 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Mark and Roberta Golden appeal a district court order granting summary judgment. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Mark and Roberta Golden filed a complaint against Dr. James Forage; James Forage, M.D., LTD; Duke Forage Anson Neurosurgical, LLP (collectively "Dr. Forage") alleging negligence and other claims arising from injuries sustained during and after Dr. Forage performed a fusion surgery on Mark in 2013. Dr. Forage moved for summary judgment, arguing the Goldens' claim was barred by NRS 41A.097(2)'s one-year statute of limitations. The district court granted the motion, and this appeal followed.[1]

On appeal, the Goldens argue the district court erred by granting Dr. Forage's motion for summary judgment and by denying their countermotion for partial summary judgment. Specifically, we must

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

determine whether the record establishes as a matter of law that the Goldens discovered the legal injury more than a year before they filed their complaint.

We review an order granting summary judgment de novo. *Winn v. Sunrise Hosp. & Med.l Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012). Summary judgment is appropriate where "the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original)(internal quotations omitted); *see also* NRCP 56(c). In deciding a motion for summary judgment, courts must view the evidence and inferences "in a light most favorable to the nonmoving party." *Id.*

NRS 41A.097(2), the controlling statute of limitations, provides that "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[.]"

The plaintiff must file suit within both the one-year and the three-year limitation periods.[2] *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 364-65, 325 P.3d 1276, 1279 (2014); *Winn*, 128 Nev. at 250-51, 277 P.3d at 461 (2012). The date on which the one-year statute of limitation began to run is ordinarily a question of fact for the jury, and may be decided as a matter of law only where the uncontroverted facts establish the accrual date. *Winn*, 128 Nev. at 253, 277 P.3d at 463.

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[2]But, under NRS 41A.097(3), of the statute will be tolled for concealment. Neither concealment nor the three-year statute is at issue in this case.

The one-year statute of limitations under NRS 41A.097(2) begins to run when the plaintiff discovers the "legal injury," which encompasses both the physical damage and its negligent cause. *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). In *Massey*, the court explained that this discovery occurs when the plaintiff has inquiry notice, which occurs when the plaintiff knows facts that would make a reasonable person conclude someone else's negligence caused his or her physical injury. *Id.* The plaintiff need not be aware of the precise causes of action he or she may ultimately pursue. *Winn*, 128 Nev. at 252-53, 277 P.3d at 462. Rather, the statute begins to run once the plaintiff knows or should have known facts giving rise to a "general belief that someone's negligence may have caused his or her injury." *Id.*

Here, the Goldens contend they did not discover the legal injury until September 2015 when they consulted with a neurosurgeon who apprised them of their causes of action regarding the surgery and aftercare. Yet, the Goldens adamantly and repeatedly testified in their depositions that Dr. William Smith informed them on September 11, 2014, that Dr. Forage had used an inappropriately-long screw and inserted it at an angle that impacted a nerve and impinged on an artery. The Goldens further testified Dr. Smith attributed Dr. Forage's failure to see the problem or to act upon it to arrogance, and "absolutely" gave them the clear impression that he felt Dr. Forage had been negligent. Dr. Smith's notes corroborate the Goldens' testimony as Dr. Smith recorded the problems with the screw and stated that he communicated this to the Goldens. Finally, the Goldens testified they were suspicious the surgery may have been incorrectly performed even before they met with Dr. Smith.

In light of these facts, we conclude the Goldens either discovered their legal injury in September 2014, or were on inquiry notice of their injury

at that date. Nevada law is clear that a plaintiff need not know the facts pertaining to the precise legal theories to discover the legal injury, so long as the plaintiff knows, or should at that point know, "facts that would lead an ordinarily prudent person to investigate the matter further." *Winn*, 128 Nev. at 252-53, 277 P.3d at 462. Although the Goldens may not have known the precise facts or legal theories they could pursue in September 2014, the record shows they believed that Dr. Forage had been negligent and that this negligence injured Mark. Under the narrow facts of this case, the district court did not err by granting Dr. Forage's motion for summary judgment and denying the Goldens' motion for partial summary judgment.[3] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Jerry A. Wiese, District Judge
Ara H. Shirinian, Settlement Judge
Galliher Law Firm
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

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[3]We are unpersuaded by the Goldens' argument that the legal injury underlying the complaint is Mark's blackouts and falls, and that they could not have discovered this injury prior to September 2015. The Goldens' argument that the falls and blackouts were in fact the injury underlying the complaint is belied by Mark's testimony, the expert's affidavit, and the complaint itself. We also note the Goldens revised their arguments to raise the falls and blackouts only *after* Dr. Forage moved for summary judgment.