IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROSALINA HUGHES, INDIVIDUALLY,
Appellant,
vs.
MICHEL DACCACHE, D.D.S., INDIVIDUALLY; AND DR. MICHEL J. DACCACHE ORAL & MAXILLOFACIAL SURGERY, LTD., A PROFESSIONAL LLC,
Respondents.

No. 82147-COA

ORDER OF AFFIRMANCE

Rosalina Hughes appeals from a district court summary judgment in a professional negligence action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.[1]

In 2015, Hughes met with respondent Michel Daccache, D.D.S., to have a dental implant placed.[2] After Dr. Daccache placed Hughes's initial dental implant, over the next several months the implant fell out twice, requiring Dr. Daccache to replace it, using a progressively larger screw each time. The record supports that immediately after Dr. Daccache replaced the implant the second time, Hughes experienced pain and facial swelling.

In August 2016, Hughes expressed her concern to Dr. Daccache about the pain and swelling that she was experiencing in her mouth ever

[1]We note that Senior Judge Joseph Bonaventure, who was covering in Department 1, signed the initial order denying the motion for summary judgment and that Judge Cory, upon his return, heard the motion for reconsideration and ultimately granted summary judgment, which is the subject of this appeal.

[2]We recount the facts only as necessary for our disposition.

since he installed her implant for the third time. At this meeting, Dr. Daccache obtained a blood sample from Hughes for testing and informed her that he also wanted to perform a biopsy. After the biopsy results came back, Dr. Daccache informed Hughes that she had B-cell lymphoma in her mouth and told her that he could no longer help her.[3]

In September and October 2016, Hughes saw a number of different medical providers, complaining of pain and swelling in her mouth. One of these providers declined to recommend endodontic treatment but advised Hughes to return to the practitioner who placed her dental implant for reevaluation. Medical records from another provider note that Hughes reported that her face had been in constant pain and swollen since Dr. Daccache placed the implant. Other medical records note that a provider recommended sinus surgery and possible removal of Hughes's dental implant. One medical provider evaluated Hughes for swelling and noted that her dental implant was floating with no surrounding bone.

On November 21, 2016, Hughes filed a handwritten complaint against Dr. Daccache with the Nevada Board of Dental Examiners (dental board complaint). In this complaint, Hughes alleged that she had a massive infection eating away her facial bone and was on antibiotics, all of which was caused by Dr. Daccache's "bad bridge and implant." Hughes stated that she was misdiagnosed with cancer[4] and that another dentist informed her that

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[3]We note that is unclear as to the exact date Dr. Daccache informed Hughes of her cancer diagnosis; however, the biopsy report is dated October 2016. The record supports that she was aware of the diagnosis at the time she filed her complaint with the dental board.

[4]Hughes presented no evidence that she was, in fact, misdiagnosed with cancer.

Dr. Daccache should have never performed a bone graph on her bone with an implant. In December 2016, Hughes began chemotherapy. Hughes's implant was removed on December 8, 2016, prior to beginning chemotherapy, and once it was removed Hughes learned that her implant was rotted and corroded, which is as she suspected in her complaint to the board. Hughes's symptoms and pain began to vanish in the days following the removal of the implant.[5] She continued to undergo chemotherapy until August 28, 2017.

After Hughes completed chemotherapy, she alleges that subsequent scans revealed her cancer "was a very small, localized lymphoma that had no connection with the significant swelling in her mouth."[6] On August 27, 2018, Hughes filed a malpractice lawsuit, which included a mandatory expert affidavit against Dr. Daccache and respondent Dr. Michel J. Daccache Oral and Maxillofacial Surgery, Ltd. In the attached affidavit, an Illinois dentist opined that "Dr. Daccache should have known that Ms. Hughes's many symptoms were caused by an infected dental implant," listed a number of areas where Dr. Daccache's conduct allegedly fell below the standard of care, and asserted that Dr. Daccache was responsible for Hughes's injuries.

Dr. Daccache moved for summary judgment, arguing that the statute of limitations began to run when Hughes filed her dental board complaint on November 21, 2016. Thus, Dr. Daccache argued that Hughes's

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[5]We acknowledge that in Hughes's district court complaint she indicates that the implant was removed and chemotherapy commenced in December 2017, but this appears to be a typographical error as she *completed* chemotherapy on August 28, 2017. The record supports that the implant was removed in December 2016.

[6]Hughes made this allegation in her complaint and in subsequent pleadings but failed to present any evidence in support of this allegation.

lawsuit was untimely and should be dismissed. In her opposition, Hughes argued that the statute of limitations did not begin to run until August 28, 2017, the day after Hughes completed chemotherapy and learned that the cancer had no connection to the swelling in her, and that even if she had filed her legal complaint outside the statute of limitations, the statute of limitations should be tolled because Dr. Daccache concealed his malpractice. The district court initially denied Dr. Daccache's motion, noting that when Hughes knew or should have known of the facts giving rise to her cause of action and whether Dr. Daccache concealed material facts from Hughes were both questions for the jury.

Dr. Daccache subsequently filed a motion for reconsideration of the court's denial of his motion for summary judgment. Judge Cory granted Dr. Daccache's motion for reconsideration and ultimately his motion for summary judgment, finding that Senior Judge Bonaventure's previous order was clearly erroneous and merited reconsideration. This appeal followed.

On appeal, Hughes contends that: (1) the district court erred in granting Dr. Daccache's motion for reconsideration because Dr. Daccache failed to satisfy the requirements of NRCP 60(b); (2) public policy disfavors reconsideration because Dr. Daccache engaged in "judge shopping"; (3) the district court erred in granting Dr. Daccache's motion for reconsideration; and (4) the district court erred in granting Dr. Daccache's motion for summary judgment. We disagree.

Dr. Daccache did not move for reconsideration under NRCP 60(b) and the rule does not apply

As a preliminary matter, Dr. Daccache did not move for reconsideration pursuant to NRCP 60(b), and the district court did not grant his motion based on this rule. On appeal, Hughes argues that the district court erred in granting Dr. Daccache's motion for reconsideration because

Dr. Daccache failed to set forth a basis for reconsideration under NRCP 60(b), such as mistake, inadvertence, surprise, or excusable neglect. Dr. Daccache replies that he did not seek relief under Rule 60(b) but rather properly sought relief under EDCR 2.24.

As the Nevada Supreme Court has clearly explained,

> NRCP 60(b) applies only to final judgments. By its terms, the rule allows parties to seek relief from 'a *final* judgment, order, or proceeding.' Federal courts have interpreted identical language in the analogous federal rule as permitting a court to grant relief only from a judgment, order, or proceeding that is *final*. Our conclusion is bolstered by this interpretation, because the Nevada Rules of Civil Procedure are based closely on the federal rules.

Barry v. Linder, 119 Nev. 661, 669, 81 P.3d 537, 542 (2003) (emphases in original) (footnotes omitted), *superseded by rule on other grounds as stated in LaBarbera v. Wynn Las Vegas, LLC*, 134 Nev. 393, 395, 422 P.3d 138, 140 (2018). An order denying summary judgment is not a final judgment. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 454, 215 P.3d 697, 700 (2009) (citing *GES, Inc. v. Corbitt*, 117 Nev. 265, 268, 21 P.3d 11, 13 (2001)).

Therefore, Hughes's argument that the district court erred in granting Dr. Daccache's motion for reconsideration because he did not set forth a basis for reconsideration under NRCP 60(b) fails. Because an order denying summary judgment is not a final judgment, Dr. Daccache could not seek relief under Rule 60(b) and did not need to justify reconsideration under the rule and—contrary to Hughes's argument—he did not do so.

Hughes's judge shopping argument is unpersuasive

Hughes argues that Dr. Daccache engaged in "judge shopping" because he was unsatisfied with the senior judge's ruling so he waited months to submit an order on that ruling and then immediately filed a

motion for reconsideration with the district court. Hughes relies on *Moore v. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244 (1976), for the proposition that former District Court Rule (DCR) 27 was intended to prevent judge shopping.[7]

As a preliminary matter, Hughes failed to present any evidence that Dr. Daccache engaged in judge shopping, and her entire argument is hinged on the fact that Dr. Daccache waited months after the summary judgment hearing to submit the order and notice of entry of order. At no point was Hughes's case transferred to a different department, and the senior judge was only covering the department when he denied Dr. Daccache's motion for summary judgment.

Additionally, this case is distinguishable from *Moore*. In that case, the City of Las Vegas moved for summary judgment. 92 Nev. at 404, 551 P.2d at 245. The district court denied that motion and a subsequent motion for rehearing. *Id.* The district court judge then lost his bid for reelection, and the case was assigned to another judge. *Id.* The City of Las Vegas subsequently filed a second motion for rehearing, which the new judge granted. *Id.* On appeal, the Nevada Supreme Court noted that former DCR 27 was designed to "prevent 'judge shopping' once a motion is granted or denied" and "preclude litigants from attempting to have an unfavorable determination by one district judge overruled by another." *Id.* at 404, 551 P.2d at 246. Further, the Nevada Supreme Court held, because the City of

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[7]Although the District Court Rules must be followed by the district courts in Nevada, the Eighth Judicial District Court has also adopted its own local rules. Former District Court Rule 27 is almost identical to Eighth Judicial District Court Rule (EDCR) 7.12. Thus, there is an applicable rule discouraging judge shopping; however, this does not prevent a district court judge from rehearing a matter decided by another judge pursuant to EDCR 2.24.

Las Vegas' second motion for rehearing "raised no new issues of law and made reference to no new or additional facts" the district court abused its discretion in entertaining the motion. *Id.* at 405, 551 P.2d at 246.

Former DCR 27, which Hughes raises in her brief, and EDCR 7.12, which are the applicable rules, both provide that the same application, petition, or motion may not be made again except upon the consent in writing of the judge to whom the motion was first made. Unlike in *Moore*, where the City of Las Vegas filed two motions for rehearing, here, Dr. Daccache did not file the same motion twice. Rather, Dr. Daccache filed one motion for summary judgment, which the senior judge denied, and he then filed one motion for reconsideration. Dr. Daccache's motion for reconsideration was the first time he sought relief from the denial of his summary judgment motion. Because Dr. Daccache did not file the same motion, Hughes's argument that Dr. Daccache engaged in judge shopping is unpersuasive.

Reconsideration standard

Hughes argues that the district court erred in granting reconsideration because she demonstrated that there were genuine disputes of material fact as to the date when Hughes knew or should have known of her legal injury and whether or not Dr. Daccache concealed material facts from her regarding her condition. The district court considered these facts to be within the purview of the jury.

We review a district court's decision to grant a motion for reconsideration for abuse of discretion. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). A district court "may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga, & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Thus, if the district court properly determines

the earlier decision was clearly erroneous, the court does not err in reconsidering the motion. To determine if the district court abused its discretion by reconsidering its earlier decision, this court must determine whether the district court's initial order denying Dr. Daccache's motion for summary judgment was clearly erroneous.

The initial denial of summary judgment was clearly erroneous

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)'s one-year limitation period is a statutory discovery rule that begins to run when a 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." *Libby v. Eighth Judicial Dist. Court*, 120 Nev. 359, 364, 325 P.3d 1276, 1279 (2014) (internal quotation marks omitted). For purposes of NRS 41A.097(2), "an injury is discovered once the injured party possesses facts that would lead 'an ordinarily prudent person to investigate further into whether [his or her] injury may have been caused by someone's negligence.'" *Kushnir v. Eighth Judicial Dist. Court*, 137 Nev., Adv. Op. 41, ___ P.3d ___, ___ (2021) (citing *Winn*, 128 Nev. at 253, 277 P.3d at 462).

To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions set forth in the pleadings, but must instead present specific facts demonstrating the existence of a genuine factual issue supporting his or her claims. *See* NRCP 56(c); *see also Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005). The nonmoving party "is not entitled to build a case on the gossamer threads of whimsy, speculation[,] and conjecture." *Pegasus v. Reno Newspapers, Inc.*,

118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002) (internal quotation marks omitted).

The statute of limitations barred the suit

Hughes argues that the statute of limitations did not begin to run until August 28, 2018, the day after she finished chemotherapy and learned that her cancer had no connection to the swelling in her mouth.

We conclude that the uncontroverted facts show that Hughes was on inquiry notice more than a year in advance of the date she filed her complaint. Numerous medical records show that Hughes complained to various medical providers of facial pain and swelling. These records show that Hughes told one provider that her face had been in constant pain and was swollen since the placement of her dental implant. Other medical records note that Hughes presented with complaints of facial swelling related to her dental implant. In a third set of medical records, a doctor noted that Hughes's swelling began soon after a dental implant was placed. Dr. Daccache's medical records also show that Hughes's husband called Dr. Daccache's office in July 2016— months before Hughes received a cancer diagnosis—and reported that Hughes's face was swollen.

Hughes's dental board complaint explicitly states, in her own handwriting, that she had a massive infection caused by a bad bridge and dental implant. In that same complaint, Hughes noted that she took time off of work due to swelling and pain, and that a specialist informed her of Dr. Daccache's alleged negligence.

Additionally, Hughes failed to point to any evidence in the record to support her allegation that it was not until after she completed chemotherapy that she learned that all of her pain in her mouth had been caused by the dental implant and not her cancer. While Hughes alleged in her complaint that after she completed chemotherapy, subsequent scans

revealed that her cancer was small, localized, and had no connection with the swelling in her mouth, Hughes failed to present medical records or other evidence to support this claim.

Thus, arguably, Hughes was aware that the dental implant was the alleged cause of her injury no later than November 21, 2016, the date she filed her dental board complaint. *See Libby*, 120 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"). Nevertheless, even if she was not on inquiry notice of her legal injury at the time she filed the board complaint, by December 2016 after the implant was removed, and her suspicion regarding its condition confirmed, she had actual knowledge of a problem with the implant. Further, she indicates that within days after the removal of the implant her pain and swelling substantially improved.

Thus, at least as of December 2016 she was aware of her injury and on inquiry notice that her injury may have been caused by Dr. Daccache's negligence in placing the implant. There is no genuine dispute that her complaint was filed more than one year after December 2016, when the problems with the implant were confirmed and her physical condition improved with its removal. And, there is no indication that completion of chemotherapy was necessary for her to be able to pursue her claim of professional negligence against Dr. Daccache based on her knowledge at or near the time of the implant removal. Therefore, we conclude that her knowledge of the implant and her improved condition after the removal of the dental implant (well before she completed chemotherapy) "would put a reasonable person on inquiry notice" of her cause of action, and that the record irrefutably demonstrates Hughes was on inquiry notice more than a year before she filed her complaint. *See Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983).

Concealment did not toll the statute of limitations

Hughes next argues that NRS 41A.097(3) tolled the statute of limitations because there is a genuine issue of material fact as to whether Dr. Daccache concealed any act, error, or omission. In particular, Hughes asserts that the Illinois dentist's affidavit shows that Dr. Daccache: (1) should have known that Hughes's symptoms were caused by an infected dental implant; (2) failed to advise Hughes of the poor likelihood of success of the third implant because the implant rejected two prior times; (3) prescribed Hughes antibiotics for a period of nine months; (4) failed to conduct follow-up 3D image scans in a timely manner; and (5) used clone dental implants without advising Hughes of the risks.

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. This includes obtaining an expert affidavit. *Kushnir*, 137 Nev., Adv. Op. 41, ___ P.3d at ___ ("In other words, the concealment must have interfered with a reasonable plaintiff's ability to satisfy the statutory requirement that the complaint be accompanied by an expert affidavit."). Thus, to toll NRS 41A.097(2)'s limitations period, the plaintiff must show that (1) the provider intentionally concealed information, and (2) this concealment "would have hindered a reasonably diligent plaintiff" from procuring an expert affidavit. *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 that the record supports the district court's decision that Hughes failed to demonstrate a basis for tolling the statute of

limitations, at least as of December 2016, notwithstanding the use of the earlier date on which she filed her board complaint. Hughes presented no evidence showing that Dr. Daccache intentionally concealed information that would have hindered Hughes from timely pursuing her claims after the removal of her implant and her temporal improvement. Hughes's reliance on the Illinois dentist's affidavit to demonstrate concealment is misplaced. Specifically, the expert does not opine that he would have been unable to provide his affidavit in support of Hughes based on any alleged concealment by Dr. Daccache. And, certainly, once the implant was removed revealing its eroded condition and Hughes's improvement immediately following removal, any alleged concealment by Dr. Daccache during his treatment of Hughes regarding the implant could no longer act as a legal impediment to obtaining an expert affidavit. Thus, Hughes failed to show that NRS 41A.097(3)'s tolling provision applied after the implant was removed.

Accordingly, we conclude that Judge Cory properly granted reconsideration and summary judgment, and we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 1
Sgro & Roger
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk