IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK LEWIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF HESTER I. KARLEN, DECEASED,
Appellant,
vs.
STEVEN R. KENNEDY, M.D.; J. ANDREW CAMERON, M.D.; AND WASHOE MEDICAL CENTER,
Respondents.

No. 38012

FILED

APR 18 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order granting summary judgment in a medical malpractice action.[1]

Appellant, Hester I. Karlen, was taken to Washoe Medical Center in Reno on October 14, 1992, following an automobile accident.[2] According to the attending physician, Stephen Kennedy, M.D., she presented with radiating neck and shoulder pain. Dr. Kennedy interpreted cervical radiological studies as negative for fractures, concluded that Ms. Karlen sustained a "cervical strain/sprain" in the accident, and released her to return home with a cervical collar and pain medication. He instructed her not to drive and to return if there was a "change in her symptoms of pain greater than 2-3 days."

During a routine review of Ms. Karlen's x-rays the next morning, Washoe Medical Center physician Eugene A. DeBardelaben, M.D., noted a discrepancy and recommended additional diagnostic studies.

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[1]See NRAP 3A(b)(1).

[2]On October 26, 1992, Ms. Karlen was involved in a second motor-vehicle accident, which is not the subject of the case before this court.

M.D., noted a discrepancy and recommended additional diagnostic studies. Dr. J. Andrew Cameron, another physician at the center, agreed with the recommendation and attempted telephonic and mail contact with the patient. Ms. Karlen, however, denied ever receiving any information from the hospital.

Ms. Karlen's pain continued and, after consulting several other physicians, she sought treatment with Dr. William Dawson in 1993. A CT scan ordered by Dr. Dawson revealed an old cervical fracture. Having concluded that the doctors at Washoe Medical Center had misdiagnosed Ms. Karlen's condition following the October 14, 1992 accident, he advised her accordingly. Ms. Karlen eventually underwent a surgical repair of her neck in 1994.

Later, in 1996, during discovery proceedings in a separate malpractice case brought by Ms. Karlen against a local chiropractor, she received additional documentation regarding the diagnostic failure at Washoe Medical Center in 1992.[3] Ultimately, in 1998, Ms. Karlen submitted a claim against respondents to the Nevada Medical Legal Screening panel. After the panel made its findings, she filed the action below against respondents in the district court.

Ms. Karlen admitted at her pre-trial deposition that she discussed CT scan results confirming the prior cervical fracture with Dr. Dawson in 1993, and admitted to receiving his advice at that time that

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[3]Ms. Karlen filed suit against the chiropractor on the basis that the doctor's manipulations to her spine worsened her condition. She alleges in the current case that she believed for several years that her difficulties were caused by misfeasance of the chiropractor. Only through discovery in that case, she alleges, did she become aware that the respondents might have been legally responsible.

physicians at Washoe Medical Center should have given her an accurate diagnosis.

Because of her admission that she was privy to information in 1993 that placed her on notice of a possible claim of malpractice against respondents, and because the action was not submitted for review by the medical legal screening panel until 1998, the district court granted respondents' motion for summary judgment on statute of limitation grounds. Ms. Karlen appeals.

DISCUSSION

A trial court may grant summary judgment in favor of a defending party if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] Additionally, "[s]ummary judgment is proper when a cause of action is barred by the statute of limitations."[5]

This court reviews summary judgment orders de novo.[6] We will uphold a grant of summary judgment when a review of the record in a light most favorable to the non-moving party reveals that there are no triable issues of material fact and that the moving party is entitled to judgment as a matter of law.[7] We have also held that "[a] litigant has a

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[4]NRCP Rule 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[5]Clark v. Robison, 113 Nev. 949, 950-51, 944 P.2d 788, 789 (1997).

[6]See Day v. Zubel, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996).

[7]Executive Mgmt. v. Ticor Title Ins. Co., 118 Nev. ___, ___, 38 P.3d 872, 874 (2002).

right to trial where there is the slightest doubt as to the facts,"[8] and that summary judgment may be reversed only if there is a genuine issue as to a material fact, or the law does not support the judgment.[9]

We conclude that Ms. Karlen raised no genuine issues of fact undermining the district court's entry of summary judgment below.

NRS 41A.097,[10] provides that actions against medical service providers such as the respondents in this case must be commenced within

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[8]Nehls v. Leonard, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981).

[9]See First Interstate Bank v. Green, 101 Nev. 113, 694 P.2d 496 (1985).

[10]NRS 41A.097 provides, in pertinent part:

> 1. 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 4 years after the date of injury or 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first, for:
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> (a) Injury to or the wrongful death of a person occurring before October 1, 2002, based upon alleged professional negligence of the provider of health care;
>
> . . . .
>
> (c) Injury to or the wrongful death of a person occurring before October 1, 2002, from error or omission in practice by the provider of health care.
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> 2. 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 2 years after the plaintiff discovers or through the

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four years "after the date of injury," or within "two years after the plaintiff discovers or through the exercise of reasonable diligence should have discovered the injury, whichever occurs first." (Emphasis added.) The term "injury," as used in this context, means a legal injury,[11] i.e., referring to the essential elements of a cause of action, not merely the fact of physical harm.[12] Thus, a "legal injury" is sustained on the date upon which the elements of the tort have been satisfied, or on the date the plaintiff becomes possessed of facts that reasonably place him or her on notice that such a cause of action exists.

Ms. Karlen admitted to possessing knowledge in 1993 that the respondent physicians misdiagnosed her condition upon her presentation

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. . . *continued*

> use of reasonable diligence should have discovered the injury, whichever occurs first, for:
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> (a) Injury to or the wrongful death of a person occurring on or after October 1, 2002, based upon alleged professional negligence of the provider of health care;
>
> . . . .
>
> (c) Injury to or the wrongful death of a person occurring on or after October 1, 2002, from error or omission in practice by the provider of health care.
>
> 3. This time limitation is tolled for any period during which the provider of health care has concealed any act, error or omission upon which the action is based and which is known or through the use of reasonable diligence should have been known to him.

[11]See Pope v. Gray, 104 Nev. 358, 760 P.2d 763 (1988).

[12]See Massey v. Litton, 99 Nev. 723, 669 P.2d 248 (1983).

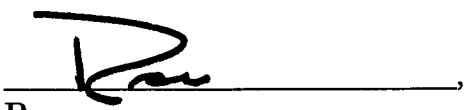
at the Washoe Medical Center or, at least, failed to timely advise of the necessity to conduct additional diagnostic studies. Thus, the district court correctly found that the 1993 consultation with Dr. Dawson placed Ms. Karlen "on inquiry notice of a potential malpractice claim" and that she failed to commence proceedings for a time period exceeding three years "past the running of the statute." This being the case, her claims that she initially thought that the chiropractor caused her injuries, that information from the chiropractor's attorneys in 1996 confirmed the misdiagnosis, that her medical claim was so complex as to vitiate any inquiry notice in 1993, and that respondents withheld information until after expiration of the limitation period, do not overcome the existence of inquiry notice in 1993.

CONCLUSION

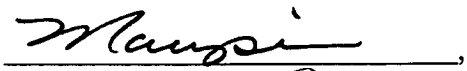
Ms. Karlen was clearly possessed of actual knowledge of her "legal injury," the potential existence of a meritorious malpractice claim against respondents, in 1993. Her failure to commence proceedings for some five years after her consultation with Dr. Dawson implicates NRS 41A.097, barring her malpractice action as a matter of law.

In light of the above, we therefore

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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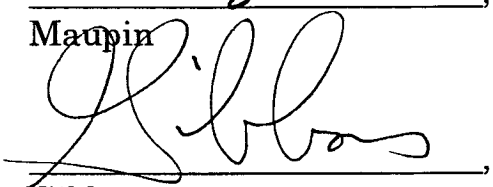

_____, J.
Gibbons

cc: Hon. Steven R. Kosach, District Judge
Martin G. Crowley
Piscevich & Fenner
Washoe District Court Clerk