IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY SYMONDS, M.D.; SCOTT HAMBRECHT, D.P.M.; SOUTHWEST MEDICAL ASSOCIATES; AND EDWARD E. HOLDEN, M.D.,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE STEWART L. BELL, DISTRICT JUDGE,
Respondents,
and
SUZANNE L. JOHNSON, AN INDIVIDUAL, AND SUZANNE L. JOHNSON, AS EXECUTRIX OF THE ESTATE OF JOSHUA C. JOHNSON,
Real Parties in Interest.

No. 41908

FILED

SEP 0 3 2004

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

ORDER PARTIALLY GRANTING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus or prohibition challenging a district court order that denied petitioners' motions to dismiss the underlying action.

04-16072

Facts

On October 9, 1997, Dr. Jerry Henry, a podiatrist, performed surgery on Joshua Johnson's left foot. Apparently, Joshua developed an infection, and petitioner Dr. Scott Hambrecht, also a podiatrist, performed a second surgery on November 9, 1998, to remove part of Joshua's left big toe. At the time of Joshua's second foot surgery, he was under the care of several physicians. During this time period, petitioner Dr. Gary Symonds treated Joshua for general internal medicine issues and acted as his primary care physician. Joshua also saw a cardiologist, petitioner Dr. Edward Holden. On December 8, 1998, Dr. Hambrecht performed another surgery on Joshua's left foot. Joshua died on December 24, 1998.

On December 20, 2000, Joshua's wife, real party in interest Suzanne Johnson, as executor of the Estate of Joshua Johnson, filed a medical malpractice complaint in proper person against Dr. Hambrecht, Dr. Henry, and petitioner Southwest Medical Associates (Southwest Medical). The complaint alleged that Southwest Medical was liable for Dr. Hambrecht's negligence under theories of respondeat superior, ostensible agency, and negligent supervision. Johnson's complaint also contained a "doe" clause.

On May 1, 2001, Johnson, again as executor of Joshua's estate, filed an amended complaint against Dr. Hambrecht, Dr. Henry, and Southwest Medical. The amended complaint clarified the allegations of negligence and contained a "doe" clause that was essentially identical to the clause in the original complaint.

Subsequently, Johnson retained counsel, and on March 24, 2003, filed a second amended complaint, which added a wrongful death claim on her own behalf as Joshua's heir. The second amended complaint

also added medical malpractice claims against Dr. Symonds and Dr. Holden.[1] In addition, the second amended complaint further explained Johnson's allegations of negligence. Specifically, Johnson claimed that Joshua suffered from various medical ailments when he was admitted for foot surgery on November 9, 1998, and again on December 8, 1998, and that his care required a "team approach." Johnson claimed that the various doctors responsible for his care failed to properly communicate, and that the course of medication administered to Joshua led to his untimely death.

After Dr. Symonds was served with a summons and the second amended complaint, he moved to dismiss the complaint based on Johnson's failure to include a medical expert affidavit, and on statute of limitations grounds. Dr. Holden filed a similar motion based on the lack of an affidavit, and Dr. Hambrecht and Southwest Medical moved to dismiss Johnson's newly asserted individual claims based on the statute of limitations.

The district court denied the motions at a hearing. According to the hearing transcript, the district court concluded that the second amended complaint related back to the date of the original complaint, and thus Johnson's claims against Dr. Symonds, Dr. Holden, and her claims as Joshua's heir against Dr. Hambrecht were not barred by the statute of limitations. Dr. Symonds then filed this petition for a writ of mandamus

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[1]The second amended complaint also added claims against Dr. Mark Turner and Dr. Jane Berkner-Arnold. However, it appears that Dr. Turner and Dr. Berkner-Arnold were never served with the second amended complaint, and thus never became parties to the action. See Rae v. All American Life & Cas. Co., 95 Nev. 920, 605 P.2d 196 (1979).

or prohibition. Dr. Holden joined in the petition, as did Dr. Hambrecht and Southwest Medical.

Discussion

Writ relief is an extraordinary remedy that will only issue at the discretion of this court.[2] A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse of discretion.[3] The writ of prohibition is the counterpart of the writ of mandamus and is available to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the district court's jurisdiction.[4]

Generally, this court will not exercise its discretion to consider writ petitions challenging district court orders that deny motions to dismiss, unless pursuant to clear authority under a statute or rule, the district court is obligated to dismiss the action, or an important issue of law requires clarification.[5] The interests of judicial economy remain the primary standard by which this court will exercise its discretion.[6]

The statute of limitations with respect to Dr. Symonds and Dr. Holden

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[2]Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

[3]See NRS 34.160; State of Nevada v. Dist. Ct. (Alzalone), 118 Nev. 140, 42 P.3d 233 (2002).

[4]See NRS 34.320.

[5]Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997).

[6]Id.

NRS 41A.097 requires a party to file an action for wrongful death due to medical malpractice within four years of the date of injury or two years after the party reasonably should have discovered such injury.[7] In the underlying case, Johnson's second amended complaint named Dr. Symonds and Dr. Holden as defendants four and one-half years after Joshua's death. The district court concluded that Johnson's second amended complaint, in its entirety, related back to the date that the original complaint was filed. In so concluding, the district court blurred the distinction between adding a claim and adding a party.

NRCP 15

Generally, leave to amend should be granted liberally.[8] As explained in Servatius v. United Resort Hotels,[9] however, this court's general rule is that an amendment may be made to correct a mistake in the name of a party, but a new party may not be brought into the action

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[7]NRS 41A.097 states 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:
>
> > (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[.]

[8]See NRCP 15(a).

[9]85 Nev. 371, 455 P.2d 621 (1969).

under NRCP 15 once the statute of limitations has run. Nevertheless, Servatius provides that a new defendant can be brought into an action even if the statute of limitations has run if the defendant: (1) had actual notice of the institution of the action; (2) knew it was a proper defendant in the action; and (3) was not misled to its prejudice.[10]

In the past, the "Servatius rule" has been used by this court to allow a plaintiff to add a defendant after the statute of limitations has run when the plaintiff made a mistake in nomenclature in the original complaint. For example, in Bender v. Clark Equipment Company[11] we allowed the plaintiff to add Clark Manufacturing, Inc. as a party defendant, after the plaintiff mistakenly named Clark Equipment Co. as the defendant. In that case, the plaintiff quickly discovered his mistake and filed an amended complaint.

In the underlying case, however, Johnson's second amended complaint did not seek to correct a mistake in nomenclature; rather, it sought to add two entirely new defendants. Moreover, none of the allegations in the original or amended complaint notified Dr. Symonds or Dr. Holden that Johnson intended to include them as parties to this action. Consequently, this case does not fit within the limited parameters of the Servatius rule.[12]

Johnson asserts that under NRCP 15(c), the second amended complaint should relate back to the date of the original complaint because

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[10]Id. at 373, 455 P.2d at 622-23.

[11]111 Nev. 844, 897 P.2d 208 (1995).

[12]See Lunn v. American Maintenance Corp., 96 Nev. 787, 618 P.2d 343 (1980).

all of the allegations asserted against Dr. Symonds and Dr. Holden arise out of the same conduct, transaction, or occurrence as the original complaint. NRCP 15(c) states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

The plain language of NRCP 15(c) limits the rule's application to the addition of claims, not parties.[13] Thus, NRCP 15(c) does not apply.

NRCP 10(a) - Doe Pleading

Nevertheless, if Johnson's original complaint satisfies the doe pleading provision of NRCP 10(a), then Johnson could properly substitute Dr. Symonds and Dr. Holden as defendants. Under NRCP 10(a), a "party whose name is not known may be designated by any name, and when his true name is discovered, the pleading may be amended accordingly." In cases where NRCP 10(a) applies, the amended pleading relates back to the date of the original complaint. In Nurenberger Hercules-Werke v. Virostek,[14] this court set forth three elements that a party must satisfy to invoke NRCP 10(a). The party must:

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[13]See Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873, 882, 822 P.2d 1100, 1106 (1991) (stating that "NRCP 15(c), by its terms, applies only to claims or defenses, neither of which may be logically construed to include the add[ition] or substitut[ion] of parties"); see also Frances v. Plaza Pacific Equities, 109 Nev. 91, 847 P.2d 722 (1993).

[14]107 Nev. 873, 822 P.2d 1100.

> (1) plead[] fictitious or doe defendants in the caption of the complaint;
> (2) plead[] the basis for naming defendants by other than their true identity, and clearly specify[] the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based; and
> (3) exercis[e] reasonable diligence in ascertaining the true identity of the intended defendants and promptly mov[e] to amend the complaint in order to substitute the actual for the fictional.[15]

The Nurenberger court also noted that NRCP 10(a) is "not intended to reward indolence or lack of diligence by giving plaintiffs an automatic method of circumventing statutes of limitations."[16] Further, we recognized that "fictitious defendants may not be properly included in a complaint merely as a precautionary measure in the event theories of liability other than those set forth in the complaint are later sought to be added by amendment."[17]

In the underlying case, Johnson's doe clause stated:

> The names or capacities, whether individual, corporate, association, co-partnership, or otherwise, of defendant nurses and/or attendants DOES I through X and DOES XI through XIII, and unknown to Plaintiffs, who therefore allege that the defendants designated as DOES I through XV are responsible in some manner for the events and happenings referred to in this action and directly and proximately caused damages to the Plaintiffs as herein alleged. The legal responsibility of said Defendants DOES I through XV arises out of, but is not limited to their master/servant or other agency relationship

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[15]Id. at 881, 822 P.2d at 1106.

[16]Id., 822 P.2d at 1105.

[17]Id.

with Defendants [Dr. Hambrecht, Dr. Henry, or Southwest Medical].

Under the fairly stringent requirements enunciated in Nurenberger, Johnson's "doe" clause, when read in its entirety, failed to satisfy the second prong. Specifically, Johnson's doe clause does not contemplate additional medical malpractice claims against additional doctors. Instead, it is limited to nurses and/or attendants working for the originally named defendants. Accordingly, all of Johnson's claims against Dr. Symonds and Dr. Holden are barred by the statute of limitations, and the district court manifestly abused its discretion in denying these petitioners' motion to dismiss.

Conclusion

We have previously used the extraordinary remedy of mandamus to mandate dismissal of an action that was barred by the statute of limitations.[18] Here, judicial economy favors granting extraordinary relief to Dr. Symonds and Dr. Holden, as they were impermissibly added to the action after the statute of limitations had run. Accordingly, we direct the clerk of this court to issue a writ of mandamus compelling the district court to grant Dr. Symonds' and Dr. Holden's motions to dismiss. We also conclude that petitioners Dr. Hambrecht and Southwest Medical have not demonstrated that extraordinary relief is

[18]See State ex rel. Dep't Hwys. v. District Ct., 95 Nev. 715, 601 P.2d 710 (1979), disapproved on other grounds by Nurenberger Hercules-Werke, 107 Nev. at 879-80, 822 P.2d at 1104.

warranted at this time and therefore deny the petition with respect to these petitioners.[19]

It is so ORDERED.[20]

Becker, J.
Becker

Agosti, J.
Agosti

GIBBONS, J. dissenting:

As I would not intervene by way of extraordinary relief at this time, I dissent.

Gibbons, J.
Gibbons

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[19]See NRAP 21(b); Smith, 107 Nev. at 677, 818 P.2d at 857; Moore v. District Court, 96 Nev. 415, 610 P.2d 188 (1980) (stating that mandamus relief is not warranted to compel partial summary judgment with respect to a party's claim). It appears that we can review the district court's denial of Dr. Hambrecht's and Southwest Medical's dismissal motions on direct appeal if they are aggrieved by the final judgment. NRAP 3A(b)(1); see Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 971 P.2d 1251 (1998) (stating that interlocutory orders may be challenged on appeal from final judgment).

[20]On March 5, 2004, we entered a clerk's order granting the real parties in interest's motion for an extension of time to file an answer to this writ petition. On March 10, 2004, we received and filed an opposition to the real parties in interest's motion for an extension of time. We elect to treat the opposition as a motion for reconsideration. No good cause appearing, we deny the motion. Further, in light of this order, we deny as moot petitioners' motion for stay and motion to file a reply to the real parties in interest's answer.

cc: Hon. Stewart L. Bell, District Judge
Hutchison & Steffen, Ltd.
Mayor, Horner & Stryker, Ltd.
Robichaud Law Office
Victor Lee Miller
Mark E. Peplowski
Clark County Clerk