IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTINA KUSHNIR, M.D.; AND WOMEN'S CARE CENTER OF NEVADA,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIERRA DANIELLE JONES, DISTRICT JUDGE,
Respondents,
and
THE ESTATE OF CAROL A. GAETANO, DECEASED; AND VINCENT GARBITELLI, ADMINISTRATOR,
Real Parties in Interest.

No. 81779-COA

FILED
JUN 16 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER GRANTING PETITION FOR WRIT OF MANDAMUS*

This original petition for a writ of mandamus challenges a district court's order denying petitioners' motion for summary judgment.

In December 2015, petitioner Christina Kushnir, M.D., performed a diagnostic laparoscopy on Carol Gaetano during which Gaetano sustained a perforation to her colon requiring hospitalization.[1] It is unclear whether the procedure alone caused the perforation or whether it was caused by the procedure in conjunction with Gaetano's advanced cancer. Gaetano died on January 17, 2016. Real party in interest and co-administrator of Gaetano's Estate (the Estate) Vincent Garbitelli, M.D.,

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

ordered an autopsy from the coroner's office.[2] The coroner issued its autopsy report on January 22, 2016. Dr. Garbitelli also consulted with an attorney regarding a potential medical malpractice claim shortly after Gaetano's death.

The Estate and Dr. Garbitelli received Gaetano's complete medical records in August 2016. Approximately 15 months later, in November 2017, the Estate filed a complaint against Dr. Kushnir and her employer, Women's Care Center of Nevada, Inc., alleging medical malpractice pursuant to NRS 41A.015. Dr. Garbitelli provided the expert affidavit for the complaint. Petitioners Dr. Kushnir and Women's Care Center (collectively Dr. Kushnir) filed a motion to dismiss, arguing that the complaint was untimely. The Estate opposed the motion on the grounds that the one-year limitations period was tolled because Dr. Kushnir had allegedly concealed the true cause of Gaetano's perforated colon by telling the family it was caused by the cancer. The district court denied the motion, reasoning that more discovery needed to be conducted.

Later, after discovery was significantly completed, Dr. Kushnir again moved for summary judgment arguing that the complaint was untimely. Specifically, Dr. Kushnir argued that the Estate was on inquiry notice of the claim as of August 2016, when it received a copy of Gaetano's medical records, and therefore the November 2017 complaint was untimely filed. After a hearing on the motion, the district court denied the request, concluding that "questions of fact exist with respect to Dr. Kushnir's alleged concealment . . . ." Dr. Kushnir now petitions this court for a writ of mandamus.

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[2]Dr. Garbitelli is also Gaetano's second cousin.

The gravamen of Dr. Kushnir's writ petition is that the Estate's medical malpractice complaint was untimely filed and therefore the district court was obligated to grant her motion for summary judgment pursuant to NRS 41A.097(2). Specifically, Dr. Kushnir contends that the Estate was on inquiry notice of the claim no later than August 2016, once it received the medical records, and therefore the complaint that the Estate filed in November 2017 was barred by the one-year statute of limitations. The Estate argues that the district court correctly denied the summary judgment motion because of unresolved facts regarding Dr. Kushnir's alleged concealment. We agree with Dr. Kushnir and therefore grant the petition for a writ of mandamus.

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether to consider a writ of mandamus is within this court's sound discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Ordinarily, extraordinary writ relief is not available to challenge a district court's order denying summary judgment, "but an exception applies when 'no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action.'" *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 363, 325 P.3d 1276, 1278 (2014) (quoting *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997)).

"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." *Id.* at 364, 325 P.3d at 1279 (internal quotation marks omitted). "[A] person is put on

'inquiry notice' when he or she should have known of facts that 'would lead an ordinarily prudent person to investigate the matter further.'" *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012) (quoting *Inquiry Notice*, *Black's Law Dictionary* (9th ed. 2009)). Accordingly, 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." *Id.* at 253, 277 P.3d at 462.

Pursuant to NRS 41A.097(3), however, "[subsection 2's] 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." Thus, a plaintiff seeking to toll subsection 2's one-year discovery period must show an intentional concealment and "establish that he or she satisfied subsection 2's standard of 'reasonable diligence.'" *Winn*, 128 Nev. at 255, 277 P.3d at 464. In short, the Estate must establish that (1) Dr. Kushnir "intentionally withheld information," and (2) "that this withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit." *Id.*

As a preliminary matter, we note that for purposes of this petition we assume (without deciding) that Dr. Kushnir intentionally withheld and/or concealed information following the surgery. Nevertheless, for the reasons articulated below, the Estate's claim fails as a matter of law.

In its answering brief, the Estate concedes and agrees with Dr. Kushnir that the Estate and Dr. Garbitelli received Gaetano's medical records in August 2016. The record also indicates that Dr. Garbitelli consulted with an attorney shorty after Gaetano's death, indicating that he suspected negligence early on. Furthermore, Dr. Garbitelli's expert affidavit, which was attached to the November 2017 complaint, states that

his expert medical opinions contained therein are based on his "education, training, 40 years of medical practice, *review of the medical records* and facts of this case." (Emphasis added.) Thus, the undisputed facts establish that the discovery rule was triggered in August 2016 when Dr. Garbitelli "had facts before him that would have led an ordinarily prudent person to investigate further," thus putting him on inquiry notice of the cause of action. *Winn*, 128 Nev. at 253, 277 P.3d at 462. As a result, the one-year statute of limitations expired in August 2017, making the November 2017 complaint untimely. Accordingly, we conclude that Dr. Kushnir correctly asserts that the one-year statute of limitations had run on the Estate's medical malpractice claim.

Despite these undisputed facts, the Estate appears to argue that the concealment clause tolls the one-year statute of limitations indefinitely and that a claim of concealment forgives the reasonable diligence requirement. Therefore, the Estate argues, the district court correctly denied Dr. Kushnir's summary judgment motion. We conclude, however, that these arguments are unpersuasive.

First, the tolling provision is not limitless. Although subsection 3 states that "[subsection 2's] time limitation is tolled for any period during which the provider of health care has concealed any act, error or omission," NRS 41A.097(3), possibly suggesting never-ending tolling, *Winn* clarifies that the concealment must be of the type that "would have hindered a reasonably diligent plaintiff from procuring an expert affidavit." *Winn*, 128 Nev. at 255, 277 P.3d at 464. In other words, the concealment must have prevented the plaintiff from satisfying the statutory requirement that the complaint be accompanied by an expert affidavit. *See* NRS 41A.071.

Here, the alleged concealment was Dr. Kushnir's statement that Gaetano's advanced cancer, and not the laparoscopic procedure, caused

the perforation to her colon, which is alleged to be the primary cause of a premature death. But this alleged concealment did not prevent Dr. Garbitelli from procuring an expert affidavit. Indeed, Dr. Garbitelli's affidavit states that it was the medical records that revealed the alleged negligence; medical records that had been in his possession since August 2016 and served as the basis of his expert affidavit. Accordingly, even assuming that Dr. Kushnir concealed the true cause of the perforated colon, the tolling period, if any, ended in August 2016 when Dr. Garbitelli received the medical records and was put on inquiry notice of the claim. Therefore, the one-year statute of limitations expired in August 2017—three months before the complaint was filed.

Nevertheless, relying on *Winn*, the Estate argues that the concealment tolls the statute of limitation despite the discovery rule. The Estate misconstrues *Winn*. In *Winn*, the supreme court concluded that although the plaintiff's complaint was filed more than one year after discovery of the injury, 128 Nev. at 250, 277 P.3d at 461, it could not affirm the district court's grant of summary judgment based on the statute of limitations because "factual issues remain[ed] as to whether Sunrise concealed records from Winn so as to warrant tolling . . . ." *Id.* at 258, 277 P.3d at 466. Those unresolved factual issues related directly to whether the undisclosed information was material to the plaintiff's claim, thus hindering the procurement of an expert affidavit. *Id.* at 256, 277 P.3d at 465. Here, as explained above, no such hindrance occurred, because the Estate possessed the medical records in August 2016, and those records provided Dr. Garbitelli with all the information necessary to discover the alleged medical malpractice and prepare his expert affidavit. This is particularly true in this case in light of Dr. Garbitelli's extensive medical knowledge and experience as reflected in his affidavit in support of the

complaint he filed on behalf of the estate. Accordingly, *Winn* is unavailing on this point.

Second, the Estate's argument that concealment forgives the reasonable diligence requirement is without merit. *Winn*, in fact, manifestly states the opposite. Specifically, the *Winn* court noted that "a plaintiff seeking to toll subsection 2's one-year discovery period must . . . establish that he or she satisfied subsection 2's standard of 'reasonable diligence.'" *Id.* at 255, 277 P.3d at 464. Thus, reasonable diligence is clearly required and the Estate was not reasonably diligent here, as it waited almost 3 months to review the medical records and approximately 15 months to file its complaint after being placed on inquiry notice in August 2016. Consequently, we conclude that this contention is meritless as it finds no support in controlling law. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).[3]

Accordingly, we conclude that extraordinary writ relief is warranted because no material disputed factual issues exist as to when the Estate was on inquiry notice of the cause of action, and, based on those same undisputed facts, subsection 3's tolling provision is inapplicable. *Libby*, 130

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[3]Additionally, the Estate suggests the November 2017 complaint was timely because it was filed "within one year of Dr. Garbitelli having *actual knowledge* of [Dr.] Kushnir's negligence." (Emphasis added.) Actual knowledge, however, is not the standard; rather, subsection 2's one-year limitation period is triggered "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*, 130 Nev. at 364, 325 P.3d at 1279 (quoting *Massey v. Litton*, 99 Nev. 723, 726-28, 669 P.2d 248, 250-52 (1983)). Therefore, this contention, too, fails as a matter of law.

Nev. at 363, 325 P.3d at 1278. Thus, the undisputed facts establish that the one-year statute of limitations expired in August 2017, making the November 2017 complaint untimely. As a result, "pursuant to clear authority under a statute or rule, the district court [was] obligated to dismiss [the] action." *Id.* at 363, 325 P.3d at 1278 (quoting *Smith*, 113 Nev. at 1345, 950 P.2d at 280). Therefore, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to enter summary judgment in favor of the petitioners.[4]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
McBride Hall
Heaton & Associates
Eighth District Court Clerk

[4]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.