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### Summary of Libby v. Eight Judicial District Court, 130 Nev. Adv. Op. 39

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## CIVIL PROCEDURE: MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

### Summary

The Court determined two issues: (1) when NRS 41A.097(2)'s three-year medical malpractice statute of limitation period commences; and (2) whether the time to file the complaint was properly tolled in accordance with NRS 41A.097(3).

### Disposition

The Court concluded that NRS 41A.097(2)'s three-year limitation period begins to run when a plaintiff suffers appreciable harm, regardless of whether the plaintiff is aware of the injury's cause.

### Factual and Procedural History

Petitioner, Eugene P. Libby, D.O. is an orthopedic surgeon who performed emergency surgery on Megan Hamilton's left knee on November 8, 2005. At the follow up appointment on November 28, 2005, Ms. Hamilton complained of pain in her knee that started one week earlier. At that time, Dr. Libby took an aspirated culture of Ms. Hamilton's knee. The results of the culture tested positive for a bacterium known as Methicillin-Resistant Staphylococcus Aureas (MRSA).

On May 16, 2006, in an effort to fight the MRSA infection, Dr. Libby performed another surgery on Ms. Hamilton's knee to remove surgical screws and washers, which were blocking the antibiotics from killing the infection. The MRSA infection persisted and on August 21, 2006, Dr. Libby lanced Ms. Hamilton's knee and removed a yellowish substance. That was the last procedure performed by Dr. Libby.

Subsequently, Ms. Hamilton had two additional surgeries on her knee performed by different doctors. The first surgery took place on December 15, 2006 and the second on April 15, 2009. Both surgeries removed sutures, which tested positive for MRSA. It was then determined that these sutures were the cause of Ms. Hamilton's injury.

Ms. Hamilton filed her complaint against Dr. Libby on April 14, 2010. Dr. Libby filed a motion for summary judgment based on the fact that more than three years had passed between the end of Dr. Libby's treatment and the filing of the complaint. Therefore, Ms. Hamilton's claims were time-barred by NRS 41A.097(2). The district court denied Dr. Libby's motion for summary judgment. As a result, Dr. Libby filed a writ of mandamus with the Nevada Supreme Court.

### Discussion

#### *Standard of Review*

The Court first noted that it is within its discretion to consider a writ of mandamus.<sup>2</sup> The Court utilized its' discretion since the writ petition posed an issue of

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<sup>1</sup> By Allison Vitangeli

first impression for the Court regarding the three-year limitation period contained in NRS 41A.097(2) begins to run. Moreover, the Court elected to exercise its discretion because the Nevada district courts have inconsistently applied the statute and the Court wanted to clarify this question of law.<sup>3</sup> The Court reviewed this question of law de novo.<sup>4</sup>

*NRS 41A.097(2)'s three-year limitation period begins to run once the plaintiff suffers appreciable harm*

NRS 41A.097(2) provides that “an action for injury . . . 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 . . .”<sup>5</sup>

To determine which event to look at as the catalytic event by which the three-year statute of limitations begins to run, the Court looked at other cases where it interpreted this statute’s one-year limitation period.<sup>6</sup> First, the Court in *Massey* explained that NRS 41A.097(2)’s one-year limitation period begins to run when a plaintiff “knows, or through the use of reasonable diligence, should have known of the facts that would put a reasonable person on inquiry of notice of his case of action.”<sup>7</sup> Furthermore, the term “injury” encompasses a plaintiff’s discovery of damages as well as discovery of the negligent cause of the damages.<sup>8</sup> Subsequently, in *Winn*, the Court recognized that NRS 41A.097(2) requires a plaintiff to satisfy both the one-year discovery rule and the three-year limitation period.<sup>9</sup> Thus, the commencement of a malpractice action is bound by two time frames, which are tied to two different events. Moreover, in *Massey* and *Winn* the Court noted that the Plaintiff must be aware of the cause of his or her injury when applying NRS 41.097(2)’s one-year limitation period. In the present case, the Court declined to extend that theory to NRS 41.097(2)’s three-year limitation period as it would cause it to become irrelevant.<sup>10</sup>

Next, the Court turned to California for guidance on this issue since California’s medical malpractice statute of limitations is identical to Nevada’s statute.<sup>11</sup> California courts have also concluded that a plaintiff need not be aware of the cause of his or her injury for the three-year limitation period to begin to accrue.<sup>12</sup> Moreover, California courts, including the California Court of Appeal, have recognized that a plaintiff must

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<sup>2</sup> *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

<sup>3</sup> *See Wheble v. Eighth Judicial Dist. Court*, 128 Nev. \_\_\_, \_\_\_, 272 P.2d 134, 136 (2012) (entertaining a writ petition when district courts might contradictorily interpret and apply a statute).

<sup>4</sup> *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008)

<sup>5</sup> NEV. REV. STAT. § 41A.097(2).

<sup>6</sup> *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. \_\_\_, \_\_\_, 277 P.3d 458, 461–62 (2012); *Massey v. Litton*, 99 Nev. 723, 726–28, 669 P.2d 248, 250–52 (1983).

<sup>7</sup> 99 Nev. at 726–28, 669 P.2d at 250–52.

<sup>8</sup> *Id.* at 728, 699 P.2d at 252.

<sup>9</sup> *Winn*, 128 Nev. at \_\_\_, 277 P.3d at 461.

<sup>10</sup> *See S. Nev. Homebuilders Ass’n v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

<sup>11</sup> *See Cal. Civ. Proc. Code* § 340.5 (West 2006) (stating “the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever comes first”).

<sup>12</sup> *Marriage & Family Ctr. V. Superior Court*, 279 Cal. Rptr. 475, 478 (Ct. App. 1991).

suffer an appreciable harm in order for the three-year limitation period to commence.<sup>13</sup> The Court specifically analyzed the California Court of Appeal's case, *Garbert v. Superior Court*.<sup>14</sup> There, the plaintiff failed to file a claim for medical malpractice for more than six years after the surgery was performed. The California Court of Appeal reasoned that the plaintiff's claim was barred because the three-year statute of limitations began to run "once there [was] a manifestation of the injury in some significant way."<sup>15</sup>

Subsequently, the Court adopted the reasoning of the California courts and concluded "that the Nevada Legislature tied the running of the three-year limitation period to the plaintiff's appreciable injury and not to the plaintiff's awareness of that injury's possible cause." Applying this interpretation of NRS 41.097(2) to the present case, the Court held that the three-year statute of limitations for Ms. Hamilton's claim against Dr. Libby began to run in August of 2006 when the tests showed that the MRSA infection continued to persist despite the May 2006 surgical intervention. The persistence of the infection was an appreciable and significant manifestation of Ms. Hamilton's injury despite the fact that Ms. Hamilton was still unaware of the cause of the continued MRSA infection.

Since Ms. Hamilton's complaint was filed on April 14, 2010, more than three years from the established date of injury, the district court erred when it denied Dr. Libby's motion for summary judgment. No genuine issues of material fact remain because MS. Hamilton's claims are barred by NRS 41A.097(2)'s commencement limitations.<sup>16</sup>

*NRS 41A.097(3) did not toll the time for Ms. Hamilton to file her complaint*

Next the Court disposed of Ms. Hamilton's second argument. Ms. Hamilton argued that even if her claim is barred by NRS 41A.097(2)'s three-year statute of limitations, the time to bring her claim was tolled under NRS 41A.097(3) based on Dr. Libby's concealment of the suture material remaining in her knee after the May 2006 surgery.

NRS 41A.097(3) provides that the limitation period to bring a claim against a health care provider 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 to the provider of health care."<sup>17</sup> However, this tolling provision only applies when there is an intentional act that objectively hindered a reasonably diligent plaintiff from timely filing suit.<sup>18</sup> Seeing as Ms. Hamilton failed to provide any evidence of an intentional act on the part of Dr. Libby, the Court that there was no genuine issues of material fact remaining as to NRS 41A.097(3)'s tolling provision.

Finally, the Court disposed of Ms. Hamilton's last argument. Ms. Hamilton argued that since NRS 41A.097 was modeled after California's medical malpractice statute of limitations, the foreign-body tolling rule in California's statute should be

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<sup>13</sup> See *Larcher v. Wanless*, 557 P.2d 507, 512 n.11 (Cal. 1976); See *McNall v. Summers*, 30 Cal. Rptr. 2d 914, 919 (Ct. App. 194); See *Garabet v. Superior Court*, 60 Cal. Rptr. 3d 800 (Ct. App. 2007).

<sup>14</sup> 60 Cal. Rptr. 3d 800 (Ct. App. 2007).

<sup>15</sup> *Id.* at 805.

<sup>16</sup> As a result of this conclusion, the Court did not address Dr. Libby's argument that Ms. Hamilton's claims are barred by the one-year limitation period.

<sup>17</sup> NEV. REV. STAT. § 41A.097(3).

<sup>18</sup> *Winn*, supra note 6, at \_\_\_\_, 277 P.3d at 464.

applied to NRS 41A.097. The Court declined to expand NRS 41A.097 because “the Nevada Legislature has not codified a tolling provision similar to the “foreign body” exception in California’s statute...and [the Court] cannot read the language from California’s foreign-body tolling rule into NRS 41A.097”

### Conclusion

Applying NRS 41A.097(2) to the present case, the Court concluded that Ms. Hamilton’s claims were time-barred because the complaint was filed more than three years from the date when tests showed that the MRSA infection persisted despite the surgical intervention. Therefore, the Court instructed the clerk to issue a writ of mandamus directing the district court to grant Dr. Libby’s motion for summary judgment.