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Boman v. Elkanich, 140 Nev. Adv. Op. 21 (Apr. 25, 2024)

Megan Cunnington

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WHEN A PATIENT RELIES ON A PHYSICIAN DURING TREATMENT, THE PATIENT'S DEGREE OF DILIGENCE REQUIRED TO DISCOVER HARM IS DIMINISHED, ESPECIALLY IF THE PHYSICIAN REASSURES THE PATIENT THAT THEY WOULD IMPROVE.

Summary

The Nevada Supreme Court determined when a patient is on inquiry notice as to their legal injury and if the patient's degree of diligence is diminished while undergoing treatment from the negligent physician. A patient discovers their injury when they recognize the damage suffered and understand the health care provider negligent cause their injury. It found that a patient has a reduced degree of diligence to discover the harm while under the physician's care, particularly if the physician reassures the patient that they will improve. This left genuine, factual disputes as to when Appellant should have known of the Defendant's negligence, which is a question for the jury or trier of fact to decide.

Background

The Court analyzed a motion to dismiss, explicitly applying the reasoning of *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983), a summary judgment case. Appellant Keith Boman, a board-certified cardiologist, saw Gary Flangas, M.D., a pain management specialist, for pain in his spine in 2019. Boman went to Dr. Elkanich, a Bone & Joint Specialist, in September 2020 after injections failed to alleviate his pain. Dr. Elkanich diagnosed Boman with severe lumbar spinal stenosis. He offered two treatment options: more injections or a larinectomy, a surgical procedure.

Dr. Elkanich performed Boman's larinectomy on October 19, 2020. Boman was unable to move or feel his left leg when he awoke. Dr. Elkanich "nicked" and repaired Boman's spinal cord. Dr. Elkanich reassured Boman that it would improve. Boman stayed in a rehab facility for two weeks. Boman asked Dr. Elkanich to order an MRI, which he underwent on October 24, 2020. The MRI revealed "'6 by 5.1-centimeter-deep hematoma that was crowding the nerves of the roots'…the cauda equina." Dr. Elkanich performed another surgery two days later. Boman's pain lessened, but did not go away. He still could not feel his left leg.

Boman left the rehab on November 13, still experiencing paralysis in his left leg. He underwent physical therapy for five months and saw Dr. Elkanich for follow-up treatment. On January 5, 2021, Boman alleges that Dr. Elkanich downplayed his post-surgical complications. Dr. Elkaich gave Boman a referral on April 23. On June 1, 2021, Boman saw Dr. Flagnas for a second opinion, who told Boman he had "cauda equina syndrome with exacerbation from post-operative hematoma." Boman argues that this is when he was put-on notice as to Dr. Elkanich's professional negligence.

Boman filed his complaint on June 2, 2022, alleging professional negligence; negligent hiring, training, supervision, and/or credentialling/privileging; and corporate negligence/vicarious liability against Dr. Elkanich, Bone & Joint Specialists, Mountain View Hospital, Sunrise Health System, and HCA Healthcare. The claims against Mountain View, Sunrise, and HCA were dismissed and not appealed. Defendants moved to dismiss the complaint because it was passed the one-year statute of limitations in NRS 41.A097.[2] The Court noted that

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[1] By Megan Cunnington.

[2] NRCP 12(b)(5).

this action occurred before the Nevada legislature revised the new statute of limitations to two years, effective October 1, 2023, and not retroactive.

Dr. Elkanich contends that Boman was on notice as to his potential claims and legal injury when he was discharged from the hospital in 2020. The district court found that Boman was on notice on either October 19, 2020, the date of his surgery, or on October 24, 2020, when he underwent the MRI. The district court concluded that the accrual date was sometime in October 2020 and dismissed the complaint.

Discussion

Boman argued the district court erred because it did not interpret "legal injury" and "discovery" properly.[3] According to the appellant, "injury" means a legal injury, and "discovery" means having inquiry notice of the cause of action. Appellant contends that he could not have had legal notice until Dr. Flangas provided a second opinion on June 1, 2021. Respondents maintain that Boman had inquiry notice when he experienced pain and was aware of his surgical injuries in October 2020.

The Court reviewed the order de novo.[4] Nevada employs a notice pleading standard where "[a] 'complaint should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.'"[5] All factual allegations must be construed in the plaintiff's favor.[6] District courts can dismiss a complaint after the statute of limitations has passed.[7]

The Court analyzed the professional negligence statute to define injury.[8] Using *Massey*, the Court found that injury is a "legal injury."[9] "A legal injury includes 'both the 'physical damage' and the `[professional] negligence causing the damage.'"[10] A plaintiff discovers their injury when they know, or with reasonable diligence should have known, facts that would prompt a reasonable person to investigate a potential claim.[11] A person is put on "inquiry notice" when they should have known of facts that would prompt an ordinarily prudent person to investigate further.[12] It does not require a plaintiff to understand a legal theory, but they should believe someone's negligence caused their injury.[13] The discovery can be either actual or presumed, but it must include both the recognition of the damage suffered and the understanding that it was caused by the health care provider's negligence.[14] Accrual date is a question of fact for the jury to decide. The district court may decide as a matter of law if the evidence showing the accrual date is "irrefutable."[15]

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[3] NRS 41A.097.
[4] Nelson v. Burr, 138 Nev., Adv. Op. 85,521 P.3d 1207, 1210 (2022).
[5] Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).
[6] *Id.* at 227-28, 181 P.3d at 672. *See* Nelson, 138 Nev., Adv. Op. 85, 521 P.3d at 1210.
[7] Engelson v. Dignity Health, 1.39 Nev., Adv. Op. 58, 542 P.3d 430, 436 (Ct. App. 2023) (quoting Bemis v. Est. of Bemis, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998)).
[8] NRS 41A.097(2).
[9] Massey v. Litton, 99 Nev. 723, 726, 669 P.2d 248, 251 (1983).
[10] Engelson,139 Nev., Adv. Op. 58, 542 P.3d at 437 (alteration in original).
[11] Winn v. Sunrise Hosp. & Med. Ctr., 128 Nev. 246, 252, 277 P.3d 458, 462 (2012).
[12] *Id.* (quoting Inquiry Notice, Black's Law Dictionary (9th ed. 2009)).
[13] *Id.* at 252–53, 277 P.3d at 462.
[14] Massey v. Litton, 99 Nev. 723, 726, 669 P.2d 248, 251 (1983).
[15] Winn, 128 Nev. at 251, 277 P.3d at 462.

In *Massey*, after hip replacement surgery, the plaintiff experienced a loss of sensation in her left leg and foot.[16] Her treating physician initially assured her that this was neither unusual nor permanent, and that physical therapy would help. Plaintiff remained under the physician's care for many months, with the physician consistently assuring that her condition would improve. Six months post-surgery, the physician admitted he could not explain her condition. When the plaintiff sued, the physician moved to dismiss the complaint as untimely, arguing the statute of limitations started with the discovery of symptoms. The Court disagreed, noting Plaintiff is entitled to rely on the physician's skills and judgment.[17] It characterized the doctor-patient relationship as "fiduciary in nature."[18] So the patient may not have been, or should not have been, aware of her claim. The Court found summary judgement inappropriate.[19]

The Court *Massey* resolved on summary judgement because the district court considered matters outside the pleadings.[20] But the Court nevertheless found *Massey* instructive because the holding concerned whether a patient can rely on a physician's advice during treatment, resulting in less diligence from the patient to discover their legal injury.[21]

The Court held that the district court erred when it found that Boman was on inquiry notice of his legal injury no later than October 24, 2020. Dr. Elkanich informed Boman about a surgical complication. But he assured Boman that his leg issues should improve over time. Since Boman was under Dr. Elkanich's continued care, he was entitled to rely on the doctor's judgment, reducing the degree of diligence required to uncover potential negligence.[22]

There is no irrefutable evidence that Boman was on inquiry notice in October 2020.[23] Assuming the allegations are true, and drawing all inferences in Plaintiff's favor, Boman did not know his issues were the result of Dr. Elkanich's negligence until he sought a second opinion from Dr. Flangas on June 1, 2021. Thus, there is not irrefutable evidence the statute of limitations expired prior to Boman's filing date. Factual disputes remain as well.

Conclusion

Taking all factual inferences in favor of Boman, the Court concluded that there is no irrefutable evidence showing Boman was on inquiry notice of his claims against Dr. Elkanich by October 24, 2020. Boman's degree of diligence was diminished while under Dr. Elkanich's care, as he was continually reassured his condition would improve. If there are genuine disputes of fact as to the accrual date, then determining that accrual date is a question of fact for the jury to resolve.[24]

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[16] Massey, 99 Nev. at 724, 669 P.2d at 249.
[17] *Id.* at 728, 669 P.3d at 252 (quoting Sanchez v. S. Hoover Hosp., 553 P.2d 1129, 1135 (Cal. 1976)).
[18] *Id.* (quoting Sanchez, 553 P.2d at 1135).
[19] *Id.* at 742 n.1, 728, 669 P.2d at 249 n.1, 252.
[20] *Id.* at 728, 669 P.2d at 252; Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005); Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007).
[21] Massey, 99 Nev. at 728, 669 P.2d at 252.
[22] *See* Massey, 99 Nev. at 728, 669 P.2d at 252; *see also* Engelson, 139 Nev., Adv. Op. 58, 542 P.3d at 439.
[23] *See* Winn, 128 Nev. 246, 251, 277 P.3d 458, 462 (2012).
[24] *Id.* at 251, 462.