

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHIRLEY MARRS,
Appellant,

vs.

STEVEN A. SCHIFF, M.D.; JOHN A.
SHIELDS, M.D.; AND JOHN A.
SHIELDS, M.D. AND STEVEN A.
SCHIFF, M.D., A PROFESSIONAL
CORPORATION,
Respondents.

No. 53601

FILED

FEB 09 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment in a medical malpractice action and from a post-judgment order denying a new trial and NRCP 60(b) relief. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant Shirley Marrs filed suit on September 1, 2005, against respondents Steven Schiff and John Shields, alleging that they negligently diagnosed her with and treated her for metastatic bone cancer that she never had. Following the close of Marrs' case-in-chief, respondents moved for judgment as a matter of law on the basis that Marrs' case was time-barred by NRS 41A.097, Nevada's statute of limitations governing medical malpractice actions.

The district court granted respondents' motion, concluding that Marrs' "injury" had occurred on May 19, 2000, thereby triggering NRS 41A.097(1)'s four-year limitations period. The district court further concluded that Marrs had not introduced any evidence that the respondents had concealed their alleged negligence from her, which, under NRS 41A.097(3), could have tolled the four-year limitations period.

On appeal, Marrs contends that the district court erred in granting judgment as a matter of law because she presented sufficient evidence from which a jury could conclude that the statute of limitations should have been tolled. We agree, and therefore reverse the district court's judgment and remand for further proceedings.¹

Standard of review

We review de novo a district court's decision to grant judgment as a matter of law. Nelson v. Heer, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007). In so doing, we view the evidence and inferences arising therefrom in the light most favorable to the nonmoving party. Id. at 222, 163 P.3d at 424.

Tolling for concealment

NRS 41A.097(3) provides that:

[NRS 41A.097(1)'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 and which is known or through the use of reasonable diligence should have been known to the provider of health care.

NRS 41A.097(3) (emphasis added).

While we recognize that the term "concealment" usually connotes "the act of refraining from disclosure; esp., an act by which one prevents or hinders the discovery of something," Black's Law Dictionary 327 (9th ed. 2009), we must "construe statutes to give meaning to all of their parts and language." Harris Assocs. v. Clark County Sch. Dist., 119

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.


Nev. 638, 642, 81 P.3d 532, 534 (2003) (quoting Coast Hotels v. State, Labor Comm'n, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001)). By including the phrase “through the use of reasonable diligence should have been known” in the tolling provision, we conclude that the Legislature meant to allow for tolling during periods when a doctor fails to exercise “reasonable diligence” to discover a possible “act, error or omission” upon which a medical malpractice lawsuit could be based.

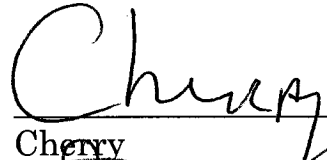
Here, Marrs introduced a radiology report that respondents received in April 2002. The radiologist’s report indicated that the lesion suspected of being metastatic bone cancer had been stable for “almost two years” since the May 2000 diagnosis. Based upon this sustained stability, the radiologist’s report concluded that the lesion “may represent a benign enchondroma or bone infarction rather [than] metastasis.” Marrs’ standard-of-care expert, Dr. Stephen Hufford, opined that upon receiving the radiologist’s report, respondents should have ordered a biopsy in order to confirm that Marrs’ cancer had, in fact, metastasized.

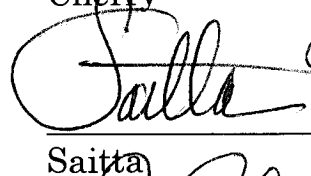
Based on the radiology report and related testimony, we conclude that Marrs raised a triable issue of fact as to whether the four-year limitations period should have been tolled based on concealment.² Accordingly, we

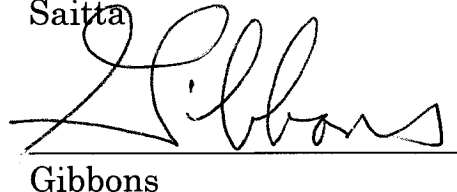
²We note that a jury might have also inferred a lack of reasonable diligence from Dr. Shields’ own equivocal testimony regarding what he knew the significance of a benign enchondroma to be. Whether the tolling period may have ended at some point is also a question of fact that must be resolved by a jury. Cf. Day v. Zubel, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996) (“The appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted.”).


ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.³

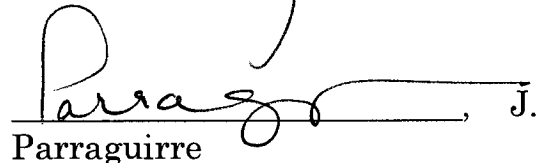
 _____, C.J.
Douglas

 _____, J.
Cherry

 _____, J.
Saitta

 _____, J.
Gibbons

 _____, J.
Pickering

 _____, J.
Parraguirre

³In light of this disposition, Marrs' appeal from the district court order denying her motion for a new trial and her NRCP 60(b) motion is dismissed as moot. Estate of Lomastro v. American Family Ins., 124 Nev. 1060, 1079 n.55, 195 P.3d 339, 352 n.55 (2008). After a review of the record, we conclude that District Court Judge Flanagan did not abuse his discretion in determining that District Court Judge Kosach had not exhibited improper signs of bias against Marrs. Nevertheless, in light of the prior history of this case, we direct that upon remand, the case be heard by a different judge so as to avoid any appearance of impropriety.

cc: Hon. Steven R. Kosach, District Judge
Hon. Patrick Flanagan, District Judge
Wm. Patterson Cashill, Settlement Judge
Matthew L. Sharp
Stephen H. Osborne
Peter Chase Neumann
Lemons, Grundy & Eisenberg
Washoe District Court Clerk