FILED
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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 1-508 / 91-129

**BERNARD P. KRAMER and MADONNA M. KRAMER,** As Conservator of the Property of **SHELLY A. KRAMER,**

Appellees,

576

vs.

**TERRY McGRATH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,**

Appellants.

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Appeal from the Iowa District Court for Kossuth County, Frank B. Nelson, Judge.

Defendants appeal a judgment of the district court, following a jury trial, awarding plaintiffs $250,000 for injuries sustained by plaintiffs' daughter resulting from an automobile accident. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.**

Henry A. Harmon and Daniel J. Hanson of Grefe & Sidney, Des Moines, for appellants.

Bruce Braley of Mosier, Thomas, Beatty, Dutton, Braun & Staack, Waterloo, for appellees.

Heard by Donielson, P.J., and Hayden and Sackett, JJ., but decided en banc.

**PER CURIAM**

Shelly Kramer is the daughter of plaintiffs Bernard and Madonna Kramer. On October 30, 1976, Shelly was injured in an automobile accident while a passenger in a car driven by Jane Ford. At the time of the accident, Shelly was sixteen years old.

Shelly was in a coma following the accident. She was transferred to the Mayo Clinic where she eventually regained consciousness. Mrs. Kramer claimed Shelly's physicians told her Shelly might experience personality changes for approximately one year following the accident. Thereafter, her prognosis was expected to be normal.

Shelly was discharged from the Mayo Clinic on November 17, 1976. After her discharge, Shelly's behavior changed. She became abusive and hostile and had problems with concentration and retention. She had difficulty with daily assignments and tests, and her grades dropped precipitously.

Shelly returned to the Mayo Clinic for follow-up visits on March 28, 1977, and June 22, 1977. Plaintiffs were advised Shelly was progressing normally. Plaintiffs did not mention Shelly's continuing behavior problems during the follow up visits.

In 1978 plaintiffs were contacted by Terry McGrath, an insurance adjuster from State Farm. McGrath stated he was adjusting the claim on behalf of its insured, Jane Ford. Because plaintiffs were also insured with State Farm, Mr.

Kramer testified he thought McGrath was representing his interests as well. During their first meeting McGrath requested and obtained Mr. Kramer's authorization to obtain Shelly's medical records. McGrath stated the records were necessary to pay bills. State Farm's records indicated the last medical payment on Shelly's claim was made seven months prior to McGrath's request for Mr. Kramer's authorization. Mr. Kramer told McGrath Shelly was still having many problems and asked McGrath for his assistance and advise concerning where he could seek help for his daughter. McGrath responded there was nothing he could do.

On August 10, 1978, McGrath wrote a letter to Dr. Beckerman at the Mayo Clinic requesting a full diagnosis on Shelly's head injury. McGrath described Shelly's personality changes and problems she was experiencing and asked whether her head injury could be the cause. McGrath also asked if Dr. Beckerman had any recommendations regarding specialists who deal with problems such as Shelly's.

Dr. Onofrio responded to McGrath's letter on August 28, 1978, stating Shelly suffered a severe closed head injury with brain stem contusion, and because of the magnitude of her injury, personality changes were very likely. In addition, Dr. Onofrio opined Shelly could have a subtle personality disorder which could have been missed in and around the immediate postinjury state. In Dr. Onofrio's opinion, such disorder would be related to the accident.

Dr. Onofrio also offered to see Shelly if her problems were ongoing and increasing.

On September 5, 1978, McGrath wrote to Mr. Kramer stating he had received Shelly's medical report from the Mayo Clinic and he was sending the information to State Farm for their review on settlement. McGrath did not mention Dr. Onofrio's letter nor did he send a copy of the letter to plaintiffs.

In the fall of 1978 McGrath offered to settle with Mr. Kramer for $10,000. Mr. Kramer's counter offer of $12,000 was accepted by State Farm. During their settlement meeting Mr. Kramer claimed McGrath stated the Kramers had no claim because the guest statute was in effect at the time of the accident. Mr. Kramer additionally claimed McGrath stated it would be a waste of the Kramer's time and money to hire an attorney.

Shelly's behavior continued to worsen. Shelly began abusing drugs and alcohol. Plaintiffs eventually contacted Dr. Walter Verduyn in 1987. It was at that time plaintiffs obtained Shelly's medical records from the Mayo Clinic and discovered Dr. Onofrio's letter.

Plaintiffs subsequently filed this action in their capacity as conservators for Shelly. At trial plaintiffs testified had they known about Dr. Onofrio's letter they would have sought appropriate help for Shelly much sooner. Plaintiffs' medical expert, Dr. Frank Gersh, concluded Shelly's personality disorders resulted from the 1976

accident. Plaintiffs' medical expert, Dr. Verduyn, testified if the knowledge known today had been available fifteen years ago and Shelly had been treated accordingly and if her closed head injury had been diagnosed earlier, her quality of life would be significantly better today.

Defendants claimed plaintiffs specifically authorized McGrath to obtain Shelly's medical records which implicitly included Dr. Onofrio's letter. In addition, defendants claimed they were under no duty to share the letter with plaintiffs, plaintiffs had equal access to the letter, and there was no business relationship between them and plaintiffs.

At the conclusion of the evidence, defendants' motion for a directed verdict was granted as to plaintiffs' claims of fraudulent misrepresentation and punitive damages. Plaintiffs' claim of negligent misrepresentation was submitted to the jury. The jury found defendants liable for negligent misrepresentation and awarded plaintiffs $250,000. Defendants' motion for judgment notwithstanding the verdict and for new trial was denied.

Defendants appeal. Plaintiffs cross-appeal the trial court's dismissal of their claims for fraudulent misrepresentation and punitive damages. Our review is for correcting errors of law. Iowa R. App. P. 4.

A. Negligent Misrepresentation.

The court being equally divided, this issue is affirmed by operation of law. Iowa Code § 602.5106(1) (1991).

For affirmance: Donielson, Schlegel and Sackett, JJ.

For reversal: Oxberger, C.J., and Hayden and Habhab, JJ.

B. Fraudulent Misrepresentation.

A second theory of recovery, fraudulent misrepresentation, was also raised in plaintiffs' petition. The trial court directed a verdict in favor of defendants on this claim. In considering the propriety of a motion for a directed verdict, the court views the evidence in the light most favorable to the party against whom the motion was made. Iowa R. App. P 14(f)(2).

To establish fraudulent misrepresentation, plaintiffs must establish the following by clear and convincing evidence: (1) a material misrepresentation (2) made knowingly (scienter) (3) with intent to induce plaintiff to act or refrain from acting (4) upon which plaintiff justifiably relies (5) with damages. Nie v. Galena State Bank & Trust Co., 387 N.W.2d 373, 375 (Iowa App. 1986) (citations omitted). In the present case, McGrath informed plaintiffs he had received Shelly's medical reports. McGrath was silent as to the contents of her medical reports, specifically Dr. Onofrio's letter. Silence or nondisclosure may qualify as actionable fraud. See Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 292-94 (Iowa 1975); Peoples Bank & Trust Co. v. Lala, 393 N.W.2d 179, 187-91 (Iowa App. 1986); Nie v. Galena State Bank & Trust Co., 387 N.W.2d 373 375-77 (Iowa App. 1986). Our

court has cited Restatement (Second) of Torts section 551 with approval in the context of fraudulent misrepresentation by nondisclosure. See Lala, 393 N.W.2d at 187-88; Nie, 387 N.W.2d at 375-76. That section provides:

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
> (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Restatement (Second) of Torts § 551 (1977).

> Silence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, from inequality or condition and knowledge, or other attendant circumstances. In other words, there must be a concealment--that is, the party sought

> to be charged must have had knowledge of the facts which, it is asserted, he allowed to remain undisclosed--and the silence must, under the conditions existing, amount to fraud, because it is an affirmation that a state of things exists which does not, and because the uninformed party is deprived to the same extent that he would have been by positive assertion. Concealment or nondisclosure becomes fraudulent only when there is an existing fact or condition, as distinguished from mere opinion, which the party charged is under a duty to disclose. Concealment in the sense opposed to mere nonactionable silence may consist of withholding information asked for, or of making use of some device to mislead, thus involving act and intention, or of concealing special knowledge where there is a duty to speak. The term generally implies that the person is in some way called upon to make a disclosure. It may be said, therefore, that in addition to a failure to disclose known facts, there must be some trick or contrivance intended to exclude suspicion and prevent inquiry, or else that there must be a legal or equitable duty resting on the party knowing such facts to disclose them.

Wilden Clinic, 229 N.W.2d at 293 (citing 37 Am. Jur. 2d Fraud and Deceit § 145 (1968)).

The record does not reflect the trial court considered section 551 when it directed a verdict for defendants on plaintiffs' claim of fraudulent misrepresentation and, in this case, a fraudulent misrepresentation by nondisclosure. We have recognized such a cause of action. In viewing the evidence in the light most favorable to plaintiffs we conclude substantial evidence was presented which could constitute actionable fraud by nondisclosure.

We reverse and remand for new trial on the plaintiffs' claims for fraudulent misrepresentation and punitive damages. If defendants are found liable on plaintiffs' claim for fraudulent misrepresentation, then that finding

should be used only as a basis for the assessment of punitive damages. Because plaintiffs were compensated for their damages by the jury's award on the negligent misrepresentation claim, no instruction on compensatory damages should be submitted with the fraudulent misrepresentation claim.

Costs of appeal are assessed one-half to appellants and one-half to appellees.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.**