IN THE COURT OF APPEALS OF IOWA

No. 7-535 / 96-1217

LaRAE JEAN PEDERSEN,

Appellant,

vs.

MARK S. SOLDAT,

Appellee.

FILED
APR 24 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Kossuth County, Patrick M. Carr, Judge.

Pedersen appeals the district court ruling granting Soldat's motion for summary judgment in her legal malpractice action. **AFFIRMED.**

Dee Ann Wunschel and Russell S. Wunschel of the Wunschel Law Firm, P.C., Carroll, for appellant.

Peter J. Leehey of Leehey & Valentine, Fort Dodge, and Mark S. Soldat, Algona, for appellant.

Considered by Sackett, P.J., Mahan, J., and Perkins, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

PERKINS, S.J.

LaRae Pedersen was a nurse at Humboldt County Memorial Hospital in 1990. She was asked to be vaccinated for hepatitis B. Pedersen signed a consent to the vaccination procedure and received her first vaccination on February 11, 1990. Pedersen received a second vaccination on March 11, 1990 and a third vaccination on September 6, 1990.

Following the third vaccination, Pedersen began to develop hearing problems. She retained attorney Mark Soldat in October 1990. The parties' retainer agreement provided that Soldat was to represent Pedersen with respect to her workers' compensation claims against the hospital and its workers' compensation carriers.

In July 1994, Pedersen filed a petition against Soldat alleging he was negligent in his representation of her by failing to pursue an action against the manufacturer of the hepatitis B vaccine within the statute of limitations period.

Soldat's first motion for partial summary judgment was denied. However, the court granted his later-filed motion for summary judgment. The court found Pedersen's case against the vaccine's manufacturer would have failed due to a lack of causation; specifically, it found no evidence Pedersen would have refused the vaccination if properly warned. Therefore, the court concluded, there existed no issues of genuine fact in Pedersen's claim against Soldat.

The court denied Pedersen's Iowa Rule of Civil Procedure 179(b) motion. She appeals.

Pedersen contends the district court erred in granting Soldat's motion for summary judgment where, she alleges, it did not comply with Iowa Rule of Civil Procedure 237(h). Among other things, Pedersen maintains Soldat's motion was defective for failing to state grounds for summary judgment.

Pedersen further argues the district court erred in granting the motion for summary judgment by improperly concluding she would have failed in an action against the vaccine's manufacturer. Pedersen maintains she was not required to present evidence that she would not have taken the vaccine if given proper warnings prior to being accorded the presumption she would have heeded such a warning. She also asserts Soldat did not present adequate evidence to rebut a presumption that she would have heeded a proper warning. Pedersen also contends the question of whether she would have heeded a proper warning was for the jury to decide.

Soldat argues, among other things, Pedersen failed to preserve error on the issues of whether his motion complied with rule 237(h) and whether the court erred in failing to accord her the presumption she would have heeded proper warnings.

Scope of Review

On an appeal a summary judgment is reviewed on error. *Vande Kop v. McGill*, 528 N.W.2d 609, 611 (Iowa 1995). The court upholds summary judgment when the moving party shows no genuine issues of material fact exist and is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). The record is reviewed in the light most favorable to the nonmoving party. *C-Thru Container Corp. v. Midland*

Mfg. Co., 533 N.W.2d 542, 544 (Iowa 1995); *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994).

Ordinarily, contentions and issues must be raised and passed upon by the trial court before they may be raised and decided on appeal. *Vande Kop*, 528 N.W.2d at 613-614; *Federal Land Bank of Omaha v. Steinlage*, 409 N.W.2d 173, 174 (Iowa 1987).

Issues

The appellant claims the trial court erred in granting the defendant's motion for summary judgment:

> 1. Because the defendants motion does not comply with I.R.C.P. 237(h), and
> 2. The trial court did not accord the plaintiff the presumption that an adequate warning would have been heeded.

As to the first claim, a review of the record reveals that appellant did not file a resistance to the motion for summary judgment which identified the defendant's error as required by rule 237(c). By her failure to direct the trial court to the defect now claimed to exist in the motion she has failed to preserve the error and is now precluded from presenting this issue as a ground for appeal.

As to the second claim it is clear by the record presented the appellant did not argue to the trial court that she was entitled to a presumption that with adequate warning she would have refused to be vaccinated. Thus having not raised the issue appellant is precluded from now asserting on her appeal.

In conclusion we find that the trial court in its thirteen page ruling on the motion for summary judgment considered all relevant issues properly presented and we find no error.

The decision of the trial court is affirmed.

AFFIRMED.