IN THE COURT OF APPEALS OF IOWA

No. 4-173 / 93-1298

FILED
MAY 26 1994
CLERK SUPREME COURT

WILLIAM VENARD,

Appellant/Cross-Appellee,

vs.

BRUCE FLEMING,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

The plaintiff appeals, and defendant cross-appeals, a ruling of the district court dismissing plaintiff's action against the defendant for legal malpractice and professional negligence. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

H. Daniel Smith and Karl D. Vogt of Sherrets, Smith & Gardner, P.C., Omaha, Nebraska, for appellant.

John M. French of Stuart, Tinley, Peters, Thorn, French & Hughes, Council Bluffs, for appellee.

Heard by Donielson, C.J., and Hayden and Habhab, JJ.

DONIELSON, C.J.

Venard filed his original action against Fleming on June 11, 1992, alleging Fleming was negligent in failing to represent him properly in a lawsuit. Fleming filed a pretrial motion to dismiss, maintaining the case should be dismissed pursuant to the two-year statute of limitations of Iowa Code section 614.1(2) (1991). The district court ruled the five-year period of section 614.1(4) applied, so Venard's claim was not barred. Fleming asked for disclosure of expert witnesses by September 24, 1992. Venard responded on December 30, 1992, he had not obtained any experts to date but would supplement the response as expert witnesses were determined.

Fleming filed a motion for summary judgment on April 6, 1993, alleging under section 668.11 Venard had failed to certify his experts within 180 days. Venard voluntarily dismissed this action pursuant to Iowa Rule of Civil Procedure 215 on April 15, 1993. Venard filed his second petition against Fleming on April 19, 1993. In a pre-answer motion Fleming argued the action was barred by the two-year limitation of Iowa Code section 614.1(2) (1993). Fleming also alleged the second action should be dismissed because of the voluntary dismissal of the original action. The district court ruled Fleming had failed to certify his experts within 180 days, and he should not be allowed to circumvent this statute by dismissing the original action and later filing a new,

identical action. The district court dismissed the second action with prejudice.

Venard next filed a motion for new trial and reconsideration and a motion to amend his petition to include claims for breach of contract, constructive fraud and negligent misrepresentation. The district court denied the motion. Venard appeals, and Fleming cross-appeals.

We review the discretionary rulings of the district court for an abuse of discretion. Hantsbarger v. Coffin, 501 N.W.2d 501, 505 (Iowa 1993). To show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

Venard dismissed his first suit pursuant to Iowa Rule of Civil Procedure 215 which reads in pertinent part:

> A party may, without order of court, dismiss that party's own petition, counterclaim, cross-petition or petition of intervention, at any time up until ten days before the trial is scheduled to begin. . . . A dismissal under this rule shall be without prejudice, . . .

Id. We hold this rule to be dispositive of this issue. "A dismissal without prejudice leaves the parties as if no action had been instituted. It ends the particular case but is not such an adjudication in itself as to bar a new action between the parties." Pollock v. Deere and Co., 282 N.W.2d 735, 738 (Iowa 1979) (quoting Windus v. Great Plains

Gas, 254 Iowa 114, 124, 116 N.W.2d 410, 415-16 (1962)). The district court abused its discretion by improperly looking to events in the prior dismissed case as a basis for granting Fleming's pre-answer motion to dismiss and for denying Venard's motion for new trial and for reconsideration. We therefore reverse the decisions of the district court dismissing the case and refusing to reconsider it and remand with instructions to reinstate Venard's petition.

Fleming asserts in his cross-appeal the district court erred in deciding the applicable period of limitations for legal malpractice actions. We disagree. "Our statute of limitations applicable to attorney malpractice is in section 614.1(4), which provides a five-year limitation period." Norton v. Adair County, 441 N.W.2d 347, 355 (Iowa 1989). We therefore affirm the decision of the district court concerning the applicable period within which to file an action.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.