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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-365 / 89-629

268

**MICHAEL P. SHAMBAUGH,**

Appellant,

vs.

**MARVIN H. DUBANSKY, M.D.,**

Appellee.

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Appeal from the Iowa District Court for Polk County, Rodney Ryan, Judge.

Plaintiff appeals granting of summary judgment. **AFFIRMED.**

Thomas J. Reilly, Des Moines, for appellant.

John A. McClintock and David C. Brown of Hansen, McClintock & Riley, Des Moines, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

**SCHLEGEL, P.J.**

Plaintiff Michael P. Shambaugh appeals an order sustaining defendant Dr. Marvin H. Dubansky's motion for a summary judgment. Plaintiff's petition alleged that defendant fraudulently failed to disclose plaintiff's osteomyelitis. We affirm the summary judgment.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Miline, 242 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, Miline, 242 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party, Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. Id.; Sherwood v. Nissan, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Gott, 387 N.W.2d at 343; Miline, 242 N.W.2d at 423. If the motion is properly supported, however, the

resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e). The language of our rule and case law are substantially similar or identical to that of rule 56 of the Federal Rules of Civil Procedure, see, e.g., Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88 (1986), from which we may draw for guidance in interpreting our own rule, Sherwood, 179 N.W.2d at 339. We now turn to the facts, all of which appear to be undisputed, as viewed in a light most favorable to the party resisting the motion for summary judgment.

Osteomyelitis is a recurrent bone inflammation. When bacteria are introduced, osteomyelitis may settle in the middle or the lining of the bone. If not treated properly, the inflammation may spread. The inflammation is extremely painful and causes abscesses and sinuses. Suggested treatment is bed rest with fluid and blood transfusions.

In 1962, at age 15, plaintiff Shambaugh fractured his left femur. After initial treatment by a Dr. Yugend, which resulted in circusbiscus ulcers, Shambaugh consulted defendant Dr. Dubansky, an orthopaedic surgeon. Dubansky inserted an intramedullary rod in Shambaugh's leg to correct a malalignment. Dubansky again treated Shambaugh in 1963 to clean out the wound. Although hospital records indicated treatment of osteomyelitis, the surgical consent form specified rod removal only. Dubansky admits he does not remember what he told Shambaugh or his parents

twenty-seven years ago, but Shambaugh maintains he was never told of the osteomyelitis and that the more serious bone inflammation was misrepresented as being a wound infection.

Shambaugh submits that Dubansky again failed to reveal the existence of the disease when Shambaugh entered the Marine Corps in 1966. Regulations required disclosure of disabling conditions, and Dubansky made no mention of osteomyelitis; however, Dubansky had not treated Shambaugh for three years and, based on his records, contends Shambaugh had recovered. Plaintiff's Marine Corps medical record indicates he had a recurrence of osteomyelitis in his hip in 1967. Plaintiff contends that he was told only that he had a "hip infection."

Dubansky treated Shambaugh again in 1976 for osteomyelitis. Contrary to counsel's assertions, Shambaugh stated at least four times in his deposition that he knew in 1976 that he had osteomyelitis. He also stated that Dubansky described the disease to him. Dubansky also treated Shambaugh in 1980 and 1983 for an apparently unrelated problem with his knee; medical records indicate there was no recurrence of osteomyelitis.

In 1984 Shambaugh again experienced a recurrence of osteomyelitis, and his family physician referred him to Dr. Boulden, who hospitalized Shambaugh. Boulden removed a large capsulization of bacteria from Shambaugh's leg. Boulden suggested that the bone inflammation had been

introduced into Shambaugh's leg in 1962 or 1963, and he further suggested that treatment, especially in terms of medication, had been inappropriate.

Shambaugh sued Dubansky in 1985. Shambaugh alleges that Dubansky intentionally concealed the nature and cause of osteomyelitis to conceal malpractice either by Dr. Yugend or himself. Dubansky moved for summary judgment contending the action was barred by the six-year statute of limitations in Iowa Code section 614.1(9) and that there was no support in the record for extending the period of limitations under a theory of fraudulent concealment. The trial court agreed and sustained the motion. Shambaugh appeals.

Under Iowa law, no action for medical malpractice may be brought more than six years after the act or omission. Iowa Code § 614.1(9) (1989). The supreme court recognized in Koppes v. Pearson, 384 N.W.2d 381, 388 (Iowa 1986), that the doctrine of fraudulent concealment survived the enactment of section 614.1(9). The supreme court later explained,

> the statute of limitations does not begin to run until the injured person has actual or imputed knowledge of the facts that would support a cause of action. [Franzen v. Deere & Co.,] 377 N.W.2d [660,] 662 [(Iowa 1985)]. [The supreme court] further explained that
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> > [i]t is not necessary that the person know [these facts] are actionable. Knowledge of the facts and knowledge they are actionable are distinct and unrelated issues for purposes of the discovery rule.
>
> Id.

Sparks v. Metalcraft, Inc., 408 N.W.2d 347, 351 (Iowa 1987). This discovery rule is relaxed somewhat when there is

> fraudulent concealment by the defendant resulting in a claimant's failure to discover facts supporting a legal theory of action. In that event, the statute of limitations would only commence to run from the time the action was discovered, or might by the use of diligence, have been discovered.

Id. at 353.

Shambaugh contends summary judgment was inappropriate because the trial court invaded the province of the jury in deciding material factual issues. The factual disputes involve when plaintiff discovered he was suffering from osteomyelitis and whether Dubansky actually concealed or misrepresented facts. Before reaching a claim of fraudulent concealment or misrepresentation, plaintiff must satisfy the discovery rule for fraudulent concealment in medical malpractice.

The question we must first address is whether, as a matter of law, plaintiff should be charged with knowledge of "facts supporting a legal theory of action," id., which would have caused his action to be barred by the statute of limitations. Taking as true plaintiff's assertion of fact that he did not realize until 1984 that he might have been treated improperly, we are left with the question of whether plaintiff "might by the use of diligence[] have . . . discovered" necessary "facts supporting a legal theory of action." Id.

We recognize that, when there is a fiduciary relationship, "the requirement that affirmative acts of concealment be alleged and proven is supplied by mere silence and diligence in discovering the fraud complained of is, likewise, greatly relaxed." Pride v. Peterson, 173 N.W.2d 549, 555 (Iowa 1970) (citations omitted). Here, however, plaintiff made no showing that he exercised any diligence whatsoever. Even viewing the facts in the light most favorable to the plaintiff, it is clear that Shambaugh knew as early as 1976 the nature of osteomyelitis and was aware that it was a recurring condition. After twenty-two years of recurring pain plaintiff finally learned through gratuitous statements of another physician, whom he saw only at the urging of still another physician, that he might have received inappropriate treatment. Given that plaintiff at least knew the nature of osteomyelitis and made absolutely no effort to ascertain his legal remedies, we think plaintiff's argument stretches the fiduciary exception well past any rational limits.

We are not requiring plaintiff to seek out the details of his cause of action. Gruener v. City of Cedar Falls, 189 N.W.2d 577, 581 (1971). "In its application this doctrine cannot be assumed, mere ignorance is not enough. Plaintiff must allege and prove facts showing . . . that plaintiff exercised diligence to discover the cause of action." Pride, 173 N.W.2d at 555. Although our case law relaxes the requirement of diligence when there is

fraudulent concealment in a doctor-patient relationship, it does not abrogate it entirely. We hold plaintiff's resistance to Dubansky's motion for summary judgment is insufficient.

**AFFIRMED.**