FILED
DEC 21 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BARBARA L. KEITH,)
Appellant,)
vs.)
ZAE HURKIN, D.O.,)
Appellee.)

Filed December 21, 1978

726
2-61393

Appeal from Madison District Court - A. V. Hass, Judge.

Plaintiff patient appeals grant of summary judgment to defendant doctor in medical malpractice action barred by statute of limitations. - Affirmed.

Ronald A. Baybayan, of Mike Wilson Law Firm, Des Moines, for Appellant.

Mr. Michael H. Figenshaw, of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for Appellee.

Submitted to Oxberger, C. J., and Donielson, Snell and Carter, JJ.

PER CURIAM

Plaintiff Barbara Keith appeals grant of summary judgment to defendant Zane Hurkin, D. O., in suit for medical malpractice. We affirm.

On January 25, 1973, plaintiff was examined by defendant who discovered a lump in plaintiff's left breast. Defendant prescribed a hormone medication and advised plaintiff that he would check the lump periodically. In March, 1974, another doctor examined plaintiff and ordered a breast biopsy. This biopsy revealed a malignancy and plaintiff underwent a radical mastectomy on April 19, 1974. Shortly thereafter, the doctor who performed the surgery informed plaintiff that if the operation had occurred one year earlier he could have guaranteed a good result. Plaintiff discussed the potential complications of her surgery with several other doctors. On September 3, 1974, plaintiff's cancerous right breast was removed. The lawsuit which is the subject of this appeal was filed September 3, 1976. In his answer to plaintiff's petition, defendant interposed the statute of limitations, § 614.1, The Code, as a bar to the action and subsequently moved for a summary judgment on this ground. Trial court granted summary judgment to defendant.

Entry of summary judgment is proper when the only conflict between the parties concerns the legal consequences of undisputed facts. Goodwin v. City of Bloomfield, 203 N.W.2d 582, 588 (Iowa 1973). Plaintiff argues that a genuine issue of material fact exists as to when she first discovered defendant's negligence. In her deposition, plaintiff stated that she had formed an opinion by April, 1974, that defendant had improperly cared for her. Nevertheless she contends she did not discover defendant's wrongful conduct until after her second breast surgery, September 3, 1974. The limitation statute at issue begins to run on the date of discovery or the date when plaintiff should have discovered the injury by the exercise of reasonable care. Section 614.1(9), The Code. Under this record, plaintiff knew she had cancer in April, 1974, and she was informed that a biopsy should have been performed when the lump was first discovered. Plaintiff herself admits that at that time she felt defendant had been negligent in his earlier treatment. We hold there is no genuine issue of material fact as to when plaintiff

discovered the basic operative facts constituting her cause of action. Since discovery occurred more than two years before this action was brought, plaintiff's claim is barred by limitations.

Plaintiff also attempts to escape the bar of the statute by arguing that defendant fraudulently concealed the facts concerning his improper treatment, care, and diagnosis. This exception only applies when the patient is blamelessly unaware of what has happened. Schebly v. Baker, 217 N.W.2d 708, 722 (Iowa 1974). We have already concluded that plaintiff was aware of her condition and the possible negligence of defendant in April, 1974. She cannot claim concealment if she has knowledge. Id.

Finally, defendant contends trial court erred in granting defendant summary judgment because defendant failed to specially plead the statute of limitations as an affirmative defense in his answer. At no point below did plaintiff raise the issue of the alleged insufficiency of defendant's answer. It is too late to do so on appeal. See Ashby v. School Township of Liberty, 250 Iowa 1201, 1205-1206, 98 N.W.2d 848 (1959).

AFFIRMED.