IN THE COURT OF APPEALS OF IOWA

No. 6-782 / 96-0164 000268

BETTY J. McCLENDON,

Plaintiff-Appellant,

vs.

DAVID BECK, EDWIN CROWELL, and NORTH IOWA MERCY HEALTH CENTER, a Delaware Corporation,

Defendants-Appellees.

FILED
FEB 26 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K. Bovard, Judge.

Plaintiff appeals from the district court order sustaining defendants' motions for summary judgment because her medical malpractice action was barred by the statute of limitations. **REVERSED AND REMANDED.**

Michael A. Smith of Lundy, Butler & Smith, P.C., Eldora, and John P. Whitesell of Whitesell Law Office, Iowa Falls, for appellant.

Kermit Anderson, Kerry A. Finley, and Thomas A. Finley of Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines, for appellee-Crowell.

Roberta M. Anderson and Walter C. Schroeder of Schroeder & Anderson, Mason City, for appellees-Beck and North Iowa Mercy Health Center.

Heard by Cady, P.J., Huitink, J., and Schlegel, S.J.* Sackett, J., takes no part.

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

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SCHLEGEL, S.J.

Betty McClendon appeals the trial court's order sustaining defendants' motions for summary judgment in this medical malpractice case. She contends the trial court was in error when it ruled that her case was time-barred by the statute of limitations. She claims that she is excused from the effects of the statute of limitations on grounds that her true condition was fraudulently concealed by the defendants and by the continuous treatment exception to the two-year statute of limitations.

Iowa Code section 614.1 (1995), the statute of limitations under review here, states in part:

> **614.1. Period.** Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
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> . . . .
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> **2. Injuries to person or reputation – relative rights – statute penalty.** Those founded on injuries to the person . . . within two years.
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> . . . .
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> **9. Malpractice.** Those founded on injuries to the person . . . against any physician and surgeon . . . arising out of patient care, within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of, the injury or death for which damages are sought in the action . . . .

McClendon underwent a surgery for the correction of back pain on September 21, 1988, performed by Dr. Edwin Crowell in consultation with Dr. David Beck. The surgery was performed at North Iowa Mercy Health Center. That surgery failed to correct McClendon's back problem. Drs. Crowell and Beck obtained McClendon's

permission to submit to a second operation to implant plates and pedicle screws to prevent slippage of the back. That surgery was performed on October 19, 1989. Plates and screws were implanted on both the left and right sides of McClendon's spine. Immediately following the second surgery, McClendon suffered extreme pain in her right leg.

On October 27, 1989, further surgery was performed to replace or reconfigure a screw which it was believed, on the basis of examination, was cutting or pressing against the right sciatic nerve.

On October 30, 1989, Drs. Beck and Crowell performed still another surgery for the purpose of removing the plate and screws from the right side of McClendon's spine and for the repair of a ruptured intervertebral disc.

On August 23, 1990, Drs. Beck and Crowell again performed surgery on McClendon's back. This time the surgery was to remove the last of the plates and screws from her spine.

Following each of the surgeries, McClendon's pain continued unabated and she did not improve. The last consultation with Dr. Beck was on May 3, 1993, at which time she was informed her condition would not improve. Until that time, McClendon believed that by following the regimen Drs. Beck and Crowell prescribed and taking medication as prescribed, her condition would improve and she would ultimately be healed completely. In this belief, she was supported by a letter from Dr.

Beck dated November 7, 1989, to her family doctor, Dr. Graham, which stated, in part:

> Ultimately, Betty is doing well. Her back pain is all resolved except for a mild foot drop which I think will recover. I think she will have a good outcome.

Following the visit with Dr. Beck on May 3, 1993, McClendon knew she would not improve and that the surgeries in 1988, 1989, and 1990 did not achieve the desired effect. Suit against Drs. Beck and Crowell and against North Iowa Mercy Health Center was commenced by petition filed on June 27, 1994. The suit seeks damages for negligence in her medical treatment based on both specific and general negligence. McClendon also alleged misrepresentation constituting willful and wanton disregard for her rights and safety and asked for compensatory and punitive damages.

Defendants made a general denial and affirmatively pleaded that McClendon's cause of action was barred by the statute of limitations prescribed by Iowa Code chapter 614.

Defendants filed motions for summary judgment based upon the theory that the action is barred by the two-year statute of limitations prescribed by Iowa Code sections 614.1, 614.1(2), and 614.1(9). Plaintiff resisted the motions, claiming the tolling of the statute of limitations because of actions of defendants. Plaintiff supported her resistance with the affidavit of Sunny S. Kim, M.D., which alleged care and treatment of the plaintiff which was not the proper standard of care of a physician

in the circumstances. Upon hearing, the trial court sustained defendants' motions for summary judgment, stating:

> The court concludes defendants have established by the requisite burden of proof that no material issue of fact exists and that defendants are entitled to judgment as a matter of law.

McClendon appeals the trial court's ruling on two grounds. She claims the trial court incorrectly applied the fraudulent concealment exception to section 614.1(9). She further claims the trial court incorrectly failed to apply the continuous treatment exception to section 614.1(9). Upon careful consideration, we reverse the trial court and remand the case to the district court for trial on its merits.

1. FRAUDULENT CONCEALMENT. McClendon's first claim is that the court erred in refusing to find there was a genuine issue of material fact on her claim that the defendants fraudulently concealed her true condition until May 3, 1993.

Iowa has long recognized the effect of fraudulent concealment upon the operation of statutes of limitations. The rule states:

> [W]here the party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment prevented such other from obtaining knowledge thereof, the statute would only commence to run from the time the right of action was discovered, or might, by the use of diligence, have been discovered.

Koppes v. Pearson, 384 N.W.2d 381, 386 (Iowa 1986) (quoting *District Township of Boomer v. French*, 40 Iowa 601, 603 (1875)).

In *Koppes*, the Iowa supreme court held that the medical malpractice statute of limitations was subject to the fraudulent concealment exception. That case instructs us:

> The person relying on fraudulent concealment to avoid a statute of limitations ordinarily has the burden to prove that the defendant affirmatively concealed the facts on which the plaintiff would predicate its cause of action. *See Brown* [*v. Public Employment Relations Bd.*], 345 N.W.2d 88, 96 (Iowa 1984). Our cases also recognize, however, that the requirement of affirmative acts of concealment may be relaxed where a confidential or fiduciary relationship exists between the person concealing the cause of action and the aggrieved party. [ ] The close relationship of trust and confidence between patient and physician gives rise to duties of disclosure which may obviate the need for a patient to prove an affirmative act of concealment. *See Schnebly v. Baker*, 217 N.W.2d 708, 721 (Iowa 1974). If fraudulent concealment is established, the statute of limitations does not commence to run until the plaintiff discovers, or in the exercise of reasonable care should discover, the basis for the cause of action. *Id.*; *Gruener v. City of Cedar Falls*, 189 N.W.2d 577, 580 (Iowa 1971).

Koppes, 384 N.W.2d at 386 (citations omitted). The court continued:

> The question remains whether we should recognize fraudulent concealment as an exception to the special medical malpractice statute when its language appears at first blush to tolerate no exceptions:
>
> > [I]n no event shall any action be brought more than six years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death unless a foreign object unintentionally left in the body caused the injury or death.
>
> Iowa Code § 614.1(9)
>
> For several reasons we conclude that this statute of limitations is subject to our venerable fraudulent concealment exception.

Id. at 386-87.

The continued viability of the fraudulent concealment exception was recognized by legislative counsel for the Iowa Medical Society in an article quoted in *Koppes*, as follows:

> The doctrine of "fraudulent concealment" is applicable [to Iowa Code section 614.1(9)]. The statute of limitations will not start to run if the fact of the injury is known to the defendant and he conceals it from the injured party. Further, a physician owes his patient a fiduciary duty, therefore, he has a duty to disclose the injury -- suppression or concealment of the fact of the injury may constitute fraudulent concealment which would prevent the statute from running.

Id. at 388 (quoting *West, Iowa Medical Liability Legislation -- A Summary of House File 803*, 65 Iowa Med. Soc'y J. 493, 496-97 (1975)).

Fraudulent concealment is a question of fact for the trier of fact. If there is evidence from which it can be found that the cause was concealed from plaintiff, summary judgment is not justified.

On appeal from summary judgment, the court reviews the record in the light most favorable to the party against whom the motion is filed. *Haack v. Burlington Northern Inc.*, 309 N.W.2d 147, 150 (Iowa App. 1981); *see also McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 154 (Iowa 1976). The court's task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied, and to reverse the grant of summary judgment if it appears from the record there is an unresolved issue of material fact. *D.R.R. v. English Enters.*, 356 N.W.2d 580, 582 (Iowa App. 1984).

McClendon claims Drs. Beck and Crowell and North Iowa Mercy Health Center fraudulently concealed the true nature of her condition and injuries until after the statute of limitations ran. As evidence of that concealment, she points to the letter

written by Dr. Beck to McClendon's family physician following the 1989 surgeries, assuring Dr. Graham the surgeries went well and that they were quite pleased with the surgical outcome. The letter opined that she would have a good result. The visit with Dr. Beck on May 3, 1993, after McClendon claims she merely followed the directions of Drs. Beck and Crowell, was the first time she was advised by her surgeons that she would not improve. We believe the facts thus alleged are evidence from which a fact finder could find fraudulent concealment as that doctrine is applied to medical treatment. Accordingly, summary judgment is inappropriate with respect to the issue of fraudulent concealment. We cannot hold the defendants have carried their burden of proof that there is no evidence of fraudulent concealment such as to avoid the submission of that issue to the fact finder. We cannot say there is no genuine issue of material fact on that issue. Affording every reasonable inference to the nonmoving party, we believe this issue should be decided by the fact finder at trial. We intimate no view on the merits of McClendon's claim of fraudulent concealment or any other issue of fact which must ultimately be decided in the district court. On remand, McClendon will have the burden to prove all elements of her claim of fraudulent concealment.

On this issue, the trial court is reversed and the case is remanded to the district court for further proceedings.

2. CONTINUING CARE. A number of courts hold that when the plaintiff is in the continuing care of the negligent actor for the same injury out of which the malpractice action arose, the statute of limitations may be tolled under certain circumstances until the end of treatment. This is the continuous treatment doctrine. *Langner v. Simpson*, 533 N.W.2d 511, 519 (Iowa 1995). McClendon claims she was under the continuous care of Drs. Beck and Crowell, and by association, North Iowa Mercy Health Center. She claims she relied upon Drs. Beck and Crowell for their expertise. Both she and her family physician carried out the course of treatment prescribed by those doctors and relied upon their expertise in handling the case.

The court in *Langner* discussed the rationales for supporting the continuous treatment doctrine. First, it is unreasonable to expect a patient under the continuous care of a physician to discover that the doctor's acts may be the cause of injury. *Id.* Second, *Langner* suggests it is absurd to expect a patient who is being treated by a doctor or hospital to interrupt corrective treatment by instituting suit against either while under their continuing care. *Id.* at 520. As indicated by *Langner*, it would make no sense to require that a patient sue the doctor while in the process of following his instructions to obtain a cure.

Was McClendon in the continuing care of Drs. Beck and Crowell? McClendon did not see Dr. Beck from 1990 following her last surgery, according to the record, until May 3, 1993. Whether she saw Dr. Crowell during that period is not

clear. It is her claim and that of Dr. Graham that she remained under the care of Dr. Graham who followed the instructions from Drs. Beck and Crowell in his continuing treatment of her. There is no evidence that either Dr. Beck or Dr. Crowell dismissed McClendon from their care. Upon the last visit, on May 3, 1993, Dr. Beck continued to suggest solutions to her problems with pain resulting, in part, from the surgery.

Once again, this is a fact issue not subject to a determination on a question of law. While it is not apparent the Iowa Supreme Court has addressed this doctrine, except to note its existence and to discuss it in connection with the doctrine's enunciation in *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078, 1080 (2d Cir.1988), the Iowa Court of Appeals has adopted the rationale for the continuous treatment doctrine in the case of *Dudden v. Goodman*, 543 N.W.2d 624, 628 (Iowa App. 1995). In that case, the relationship was attorney-client. There, the court stated:

> Where, as here, there is a continuous attorney-client relationship, it would be palpably unjust and quite unreasonable to require a client of a lawyer to obtain a second opinion on every professional decision the lawyer makes.

Dudden v. Goodman, 543 N.W.2d at 629.

We adopt the continuous treatment doctrine for purposes of this case and hold that whether the facts demonstrate a continuous treatment by the defendants is a question for the fact finder. The continuous treatment doctrine requires that there be a close nexus between the doctor whose conduct is the subject of the suit and other doctors who continue the treatment. In this case, the fact finder must find there was

a close nexus between Drs. Beck and Crowell and Dr. Graham in order to find that McClendon received continuous treatment from Drs. Beck and Crowell. With such a finding, the statute of limitations would be tolled until the facts became known by advice from the treating doctors to Dr. Graham.

The issue of continuous treatment must be submitted to the fact finder and the result of that finding will determine if the continuous treatment exception tolls the statute of limitations.

The decision of the trial court is reversed and the case is remanded to the district court for proceedings in accordance with this opinion.

REVERSED AND REMANDED.