IN THE COURT OF APPEALS OF IOWA

No. 9-292 / 88-1592

FILED
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CLERK SUPREME COURT

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KIMBERLY ANN FITZGERALD, f/k/a KIMBERLY ANN BERGESON and MICHAEL FITZGERALD,

Appellants,

vs.

EDWARD J. DREW, M.D., TAMARISAN NARAYAN, M.D., FREDRIC E. SAGER, D.O., AUSTIN E. SCHILL, M.D., and MERCY HOSPITAL MEDICAL CENTER,

Appellees.

Appeal from the Iowa District Court for Polk County, Dale E. Ruigh, Judge.

The plaintiffs in a medical malpractice action appeal a judgment in favor of all five defendants. **AFFIRMED.**

Thomas J. Reilly, Des Moines, for appellants.

Robin L. Herman and Douglas A. Haag of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for defendant-appellee Drew.

A. Roger Witke of Whitfield, Musgrave & Eddy, Des Moines, for defendant-appellee Narayan.

Michael H. Figenshaw of Bradshaw, Fowler, Proctor & Fairgrave, Des Moines, for defendants-appellees Sager & Schill.

Steven K. Scharnberg and Hugh J. Cain of Duncan, Jones, Riley & Finley, Des Moines, for defendant-appellee Mercy Hospital.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

The plaintiffs in a medical malpractice action appeal a judgment in favor of all five defendants. We affirm.

The plaintiffs contend the district court erred by granting Dr. Drew a summary judgment on the ground the action had not been brought within six years of the acts or omissions complained of, as required by section 614.1(9). The plaintiffs argued that summary judgment was inappropriate because there was a genuine issue of material fact on the timeliness of the action. The plaintiffs suggest that Dr. Drew engaged in ongoing treatment of Kimberly until the April 1982 questionnaire, and that the 1986 petition was filed within six years of that date and was therefore timely under the six-year limit of section 614.1(9). The plaintiffs also argue that summary judgment was inappropriate for the additional reason that there was a genuine issue of material fact on the plaintiffs' claim that Dr. Drew fraudulently concealed their cause of action.

In addition to their statute of limitation issues, the plaintiffs also contend the district court abused its discretion by excluding some of their proposed expert witnesses as a sanction for discovery problems. The plaintiffs argue that such a sanction was unduly harsh because of the crucial role that expert testimony plays in a medical malpractice case; they assert that the exclusion of the expert witnesses was tantamount to a dismissal of

their lawsuit. They also argue that such a harsh sanction was unwarranted because the defendants had almost a year's actual notice of the identity of the experts.

Finally, the plaintiffs contend that if the discovery sanction is held to be an abuse of discretion, the district court also erred by directing verdicts for three defendants at the close of the plaintiffs' evidence. The plaintiffs argue that if all of the proposed experts had testified, the plaintiffs would have generated jury questions as to the negligence of the three defendants in question.

In 1978 Kimberly Ann Bergeson, then a minor, was treated by Dr. Edward Drew for morbid obesity. The treatment involved the surgical removal of part of Kimberly's small intestine, and the reconnection of the remaining parts of the intestine.

In 1984 Kimberly became pregnant for the first time. The pregnancy was marked by numerous complications, pain, and illness, and the fetus eventually died inside Kimberly. Kimberly believes that the complications and fetal death resulted in part from her 1978 treatment for obesity, and in part from the negligence of the doctors and the hospital involved in her 1984 prenatal care.

In 1986, Kimberly and her husband filed the present medical malpractice action against Dr. Drew and against the doctors and hospital involved in her 1984 prenatal care. The case went to trial against all defendants except Dr.

Drew. However, at the close of the plaintiffs' evidence, the district court directed verdicts in favor of three of the four remaining defendants. The case was submitted to the jury against only one defendant, and the jury returned a verdict in favor of that defendant.

I. **Summary Judgment.** Appellant contends the trial court incorrectly granted a summary judgment in favor of Dr. Drew, who performed the abdominal surgery in 1978. Appellant claims that two exceptions apply to prevent the use of Iowa Code section 614.1(9) to bar her claims. Section 614.1(9) states that no claim shall be brought more than six years after the date on which the act or omission occurred. This limitation does not begin until after the patient discovers her injury. It begins to accrue at the time of the act or omission and acts as an absolute bar against bringing a medical malpractice action. There is no question that more than six years has passed since the surgery was done on the appellant. In this case, the surgery occurred in 1978 and this action was filed in 1986. The statute bars the action unless an exception applies.

A summary judgment shall be entered: "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c).

Appellant claims that due to the "ongoing nature of the treatment," the six-year statute does not begin to run until such treatment is finished. Appellant's argument fails for several reasons. There is no evidence in the record to show that there was a genuine issue of fact as to whether the treatment was "ongoing." In addition, the only act committed by the defendant, Dr. Drew, occurred more than six years prior to this action. And finally, Iowa Code section 614.1(9) does not contemplate allowing a patient to bring an action beyond the six-year limit, regardless of whether the treatment was ongoing. The exceptions that do exist to the six-year limit relate to minors and the mentally ill. Kohrt v. Yetter, 344 N.W.2d 245, 247 (Iowa 1984). However, the only reason the language of section 614.1(9) "in no event," was held not to apply to minors and the mentally ill was because the Iowa Code specifically allowed the extension of time for such persons. Id. The six-year limit was enacted to prevent the bringing of claims too far in time from the act or omission, thereby avoiding proof problems and helping to bring down insurance premiums. There is no exception to Iowa Code section 614.1(9) simply because the treatment was ongoing. The language "in no event," clearly means just that.

Appellant next contends that there was evidence of fraudulent concealment and therefore the discovery rule

would apply. If there was fraud on the part of Dr. Drew, the discovery rule would apply under the exception to the six-year limit set out in Koppes v. Pearson, 384 N.W.2d 381, 386 (Iowa 1986). However, there was no evidence in the record that would show any type of fraud committed by Dr. Drew. The pleadings state that there was fraud, but a motion for summary judgment cannot be resisted based only on the pleadings. Byker v. Rice, 360 N.W.2d 572, 574 (Iowa App. 1981). Appellant argues that the mere silence on the part of Dr. Drew is enough to show fraud. The appellant cannot just show that there were no contacts between the plaintiff and the doctor to prove fraudulent silence. The appellant must set out facts that show that the doctor knew the facts as to the injury or cause and yet remained silent. Schnebly v. Baker, 217 N.W.2d 708, 721 (Iowa 1974).

Appellant contends that the reason that she failed to provide proof of the fraudulent concealment was because the trial court did not inform her that the amendment to the pleadings would be considered in resisting the motion for summary judgment. In addition, because notice pleading does not require specific facts to be plead, the appellant could not have been able to defend the motion for summary judgment based on the amended pleading. Iowa Rule of Civil Procedure 80(a) requires the attorney to make sure the pleadings are "well grounded in fact," and therefore the

appellant cannot be heard to complain that she had no facts available when she must have had some available to plead fraudulent concealment in the first place. The trial court was correct in granting a summary judgment in favor of the appellee Dr. Drew.

II. **Exclusion of Expert Witnesses.** Appellant contends the trial court abused its discretion when it excluded the testimony of the plaintiff's experts as a sanction for failing to designate their experts on time. The order that required the experts to be designated by a certain date specifically stated that failure to do so would result in their exclusion. The date of designation was one year from the date of filing and over six months from the date of the hearing requiring the designation. The appellant knew the experts would be excluded if she failed to designate them on time. The appellant also made no efforts to get an extension or to explain the lateness of their designation. The exclusion of the experts was clearly within the discretion of the trial court and we will not reverse unless an abuse of that discretion is shown. Hoekstra v. Farm Bureau Mutual Insurance, 382 N.W.2d 100 at 108 (Iowa 1986). It was not clearly unreasonable to exclude the testimony, when the case had been filed for over one year and the trial court specifically informed the appellant what would happen six months prior to the designation date. The trial court determined that the defendants would

be prejudiced if the experts were not determined by a certain date and correctly provided for their exclusion. The trial court was correct in directing a verdict for defendants.

AFFIRMED.