



IN THE COURT OF APPEALS OF IOWA

WILFRED JENSEN,	)	
Plaintiff - Appellant,	)	Filed October 7, 1977
vs.	)	
DR. R. K. WOODS,	)	212
DR. H. R. BRIDENSTINE,	)	<u>2-57400</u>
DR. C. E. WORSTER, AND	)	
DES MOINES GENERAL HOSPITAL	)	
COMPANY,	)	
Defendants - Appellees.	)	

Appeal from Polk District Court - Wade P. Clarke, Judge.

Plaintiff appeals the trial court's ruling that defendant doctors and hospital established as a matter of law that the plaintiff knew or should have known the operative facts of his negligence cause of action for medical malpractice more than two years before the action was brought. - Affirmed.

Gary B. Garrison, of Des Moines, for Plaintiff - Appellant.

Bradshaw, Fowler, Proctor & Fairgrave, of Des Moines, for Defendants - Appellees.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

The sole issue on appeal is whether the defendant doctors and hospital have established as a matter of law that the plaintiff Jensen knew or should have known the operative facts of his cause of action against them more than two years before this action was brought. We affirm the trial court's summary judgment in favor of the defendants.

This is a medical malpractice suit based on an alleged failure of the treating doctors to diagnose a fracture of Jensen's wrist. The operative fact for such a claim is Jensen's knowledge that the original diagnosis was erroneous. On April 27, 1970 Dr. Flapan advised Jensen that he had an old fracture in his wrist and that the fracture had probably existed since the time of the original injury in August 1968. With this information Jensen knew that the original diagnosis by the defendant doctors was erroneous. Jensen did not know whether the doctors' failure to diagnose the fracture was malpractice. The answer to that question would have had to come from securing the original x-rays and obtaining a physician, in the defendants' field, to state whether these original x-rays revealed a fracture. Jensen could also establish malpractice upon a showing that his symptoms dating from the accident in August 1968 indicated the need for additional diagnostic procedures which the defendants failed to perform.

In *Baines v. Blenderman*, 223 N.W.2d 199, 202 (Iowa 1974), the court said:

... it is not necessary to prove the plaintiff knew the specific negligence of the defendant nor that he knew the details of the evidence by which to prove the cause of action. It is enough that he knew or may be reasonably charged with knowledge of sufficient facts to be aware he had a cause of action more than two years before it was brought.

In this case, Jensen had pain in his wrist for two years; Dr. Flapan filled in any blanks in Jensen's awareness of his cause of action when he advised Jensen of the cause of pain: a non-union of an old fracture of his wrist. Jensen was aware that the defendant doctors had originally advised him he had no fracture. Under the *Baines* rationale the defendants were not required to show Jensen knew the specific negligence giving rise to his claim. They had merely to prove Jensen had "sufficient facts to be aware he had a cause of action more than two years before

it was brought." *Baines*, 223 N.W.2d at 202. This they did.

We find no merit in Jensen's claim that the statute did not begin to run because the defendant doctors and hospitals concealed the x-rays from Jensen's counsel until after the suit was filed. Jensen had only to file suit in order to avail himself of the discovery procedures of rules 121-134, Rules of Civil Procedure, The Code 1973, and the sanctions for failure to produce included therein. Under rule 134(b)(2), second unnumbered paragraph, if the defendants had refused to comply with an order to compel discovery of the x-rays, the court could have entered: "An order that the matters regarding which the questions were asked . . . or any other designated facts, shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order . . ."

Finally, Jensen argues that the lapse of time between the filing of the answer (June 13, 1972) and the amendment to the answer (January 18, 1974) raising the statute of limitations as an affirmative defense forecloses the imposition of the time bar. To support this theory of an equitable estoppel or waiver Jensen relies on *Lawrence v. Melvin*, 202 Iowa 886, 211 N.W. 410 (1926) and the cases following *Lawrence* - *Armstrong v. City of Des Moines*, 232 Iowa 711, 6 N.W.2d 287 (1942) and *Cathburtson v. Harter*, 245 Iowa 922, 65 N.W.2d 83 (1954). These cases merely hold the statute of limitations must be pled and made an issue and that the facts constituting such a bar must clearly be shown. We note under rule 88, R.C.P., The Code 1973, ". . . any pleading may be amended before a pleading has been filed responding to it." We find no responsive pleading by Jensen filed between the defendants' original answer and its amendment. Under rule 89, R.C.P. the defendants' amendment is construed as part of the original pleading; it relates back to the time of filing of the original answer.

The trial court properly ruled Jensen's claims were time-barred.

Affirmed.