IN THE COURT OF APPEALS OF IOWA

FILED
MAY 28 1992
CLERK SUPREME COURT

No. 1-552 / 91-536

GARY FETT, PAM FETT, JOE FETT, and JESSIE FETT,

Appellants,

vs.

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TRACY WAKER,

Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

Plaintiffs appeal from the district court's dismissal of their action after concluding defendant is entitled to summary judgment. **AFFIRMED.**

Randall J. Shanks, Council Bluffs, for appellants.

Scott J. Rogers of Peters Law Firm, P.C., Council Bluffs, for appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

On December 2, 1987, Gary Fett was a passenger in a motor vehicle driven by Tracy Waker. Fett sustained back injuries when the vehicle was involved in a one-car accident. Fett alleges Waker lost control of her vehicle.

On numerous occasions during the two years following the accident, Fett was contacted by William Kincade, an insurance adjuster for Waker's insurance carrier. Kincade made repeated offers which Fett refused on the basis that he was not ready to discuss settlement until his back had healed. During these negotiations Fett was unrepresented by counsel.

After he became aware that the statute of limitations had expired, Kincade contacted Fett on December 13, 1989, and made a final offer to settle the matter for $1,500. On December 29, 1989, Fett responded that he would accept $2,000. Kincade then agreed to settle for $2,000. On that date Fett contacted Randall J. Shanks to serve as his attorney.

On January 9, 1990, plaintiffs filed their cause of action seeking damages for Fett's personal injuries and his family's loss of consortium. In her answer, Waker raised the affirmative defense that plaintiffs' claims are barred by the statute of limitations because they arose more than two years before the commencement of this action.

Waker then filed a motion for summary judgment which the district court granted on April 2, 1991. The court recognized that a defense based on the statute of limitations may be waived. The court found no showing that Waker intended to waive the defense. The court concluded that, as a matter of law, a mere offer to settle after the statute of limitations has run does not show a waiver. The court concluded Fett's action was barred by the statute of limitations and dismissed his action. Plaintiffs appeal.

In reviewing the grant or denial of a summary judgment motion, we view the underlying facts contained in the pleadings and the inferences to be drawn therefrom in the light most favorable to the party opposing the motion, and give to such a party the benefit of any doubt as to the propriety of granting summary judgment. Harrington v. Chicago & Northwestern Transportation Co., 452 N.W.2d 614, 615 (Iowa App. 1989). Our 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. Id.

Summary judgment should not be granted where there is need for a trial, that is, where there are genuine factual issues that properly can be resolved only by a trier of fact because they may reasonably be resolved in favor of either party. Behr v. Meredith Corp., 414 N.W.2d 339, 341

(Iowa 1987). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Id. Further, summary judgment will not lie if the dispute about a material fact is genuine, where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.

Fett claims the district court should not have granted summary judgment in this case because there were genuine issues of material fact which should be decided by a jury. He states that the question of whether or not Kincade intended to waive the statute of limitations defense is a question of fact.

A defense based on the statute of limitations is personal and may be waived. Beeck v. Kapalis, 302 N.W.2d 90, 94 (Iowa 1981). Waiver is the voluntary or intentional relinquishment of a known right. In re Guardianship of Collins, 327 N.W.2d 230, 234 (Iowa 1982). In addition to intent to give up the right, the plaintiff must also show the existence of that right and actual or constructive knowledge that it exists. Carter v. Continental Telephone Co., 373 N.W.2d 524, 526 (Iowa App. 1985).

Where acts and conduct are relied upon as proof of waiver, such intention must clearly appear. Continental Casualty Co. v. G. R. Kinney Co., 258 Iowa 658, 661, 140 N.W.2d 129, 130 (1966). The issue of waiver where acts and

conduct are relied upon is usually one of fact for the jury, although it is true occasionally where the evidence is not disputed, the question becomes one of law for the court. Id.

We affirm the district court's grant of summary judgment in this case. We agree with the district court's conclusion that a mere showing of an offer of settlement after the statute of limitations has run does not show waiver of a defense based on the statute of limitations. There are no genuine issues of material facts because Fett has not alleged sufficient facts to show waiver of a statute of limitations defense by Waker or her agents.

Costs of this appeal are assessed to appellants.

AFFIRMED.