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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed September 6, 1984

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O. T. JAYNES,

Plaintiff-Appellant,

vs.

ARTHUR GELFAND,

Defendant-Appellee.

4-280
83-944

Appeal from the Iowa District Court for Woodbury County—Richard J. Vipond, Judge

Plaintiff appeals from trial court's order granting defendant's motion for summary judgment. AFFIRMED.

William A Shuminsky of Shuminsky, Shuminsky & Molstad, Sioux City, Iowa, for the plaintiff-appellant.

Martin F Heidman and Valli J. Williams of Gleysteen, Harper, Eidsmoe, Heidman & Redmond, Sioux City, Iowa, for the defendant-appellee.

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

SACKETT, J.

Plaintiff, Jaynes, on October 3, 1980, instituted a medical malpractice action against the defendant, Gelfand, charging that defendant doctor was negligent in a 1973 operation. The petition was filed in two counts. Count I claimed that defendant doctor was negligent in the surgery he performed and the treatment he gave plaintiff. Count II claimed that defendant doctor was negligent in leaving an insoluable suture in plaintiff's abdomen.

Defendant answered alleging that the care and treatment rendered plaintiff and the alleged injuries from the care and treatment occurred two years prior to the filing of the petition and therefore his action is barred by section 614.1(9) of the 1979 Code of Iowa. Defendant further alleged that the medical treatment was rendered more than six years prior to the filing of the petition and is barred by 614.1(9).

Plaintiff replied denying his action is barred by 614.1(9) and alleged that defendant fraudulently concealed his negligent acts and that plaintiff did not discover the fraud until November of 1978 when he became dissatisfied with defendant's advice and plaintiff was examined by another doctor. Plaintiff further alleged that the defendant represented plaintiff's injury was temporary and fraudulently concealed the permanent nature of the injuries.

Defendant filed a motion for summary judgment seeking the dismissal of plaintiff's petition and claiming that the alleged acts had occurred more than two years and more than 6 years prior to the filing of the action and were barred by 614.1(9). Defendant further alleged that the case does not involve a foreign object unintentionally left in the body.

Attached to the motion were various documents including an affidavit of defendant doctor that he performed surgery on plaintiff in 1973 and advised plaintiff of the risks. He further stated that plaintiff developed an incisional

hernia in December of 1983 and he urged surgical repair of same but plaintiff refused treatment. He attached copies of his records and those from St. Luke's Medical Center which supported his statements that he had told plaintiff of the problem and advised surgery.

Plaintiff's affidavit filed in resistance stated that the doctor's affidavit was untrue. Plaintiff further alleged that his abdomen bulged and his belly button was located about a foot from where it should be and he called this to the defendant doctor's attention; that the defendant doctor told him that he had left the belly button displaced so the cut could properly heal. In his affidavit plaintiff also stated that he went along with defendant doctor until his daughter took him to another doctor.

The trial court sustained the motion for summary judgments, holding there was no evidence to suggest that there was a delay caused by the defendant's fraudulent concealment and no factual issue existed and that plaintiff's petition is barred by 614.1(2) of the Code of Iowa.

I

Plaintiff contends that the trial court erred in holding as a matter of law that the plaintiff's cause of action was barred by the statute of limitations. In a summary judgment the moving party has the burden of showing the absence of a genuine issue as to any material fact and the material it lodged must be viewed in the light most favorable to the plaintiff. See Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). If, upon the basis of that material in the file before the judge, he would have competent proof to direct a verdict for movant, then it is proper to render summary judgment. See Id.

We must determine if there is a fact issue as to the application of the statute of limitations. Section 614.1(2) of the 1971 Code provides, "Those founded on injuries to the person . . . whether based on contract or tort, . . . with two years." The statute cannot commence to run until the cause of action accrues.

Stoller Fisheries, Inc. v. American Title Ins., 258 N.W.2d 336, 340 (Iowa 1977); Chrischilles v. Griswold, 260 Iowa 453, 461, 150 N.W.2d 94, 100 (1967) "...[T]he date on which a cause of action accrues, and hence, the date from which the statute of limitations starts to run, is the date upon which the right to institute and maintain a suit first arises." Stoller at 340. In order to determine when the plaintiff's cause of action accrued it is necessary to consider first the nature of the theory of liability relied on by plaintiff for relief. See Id.

The surgery occurred on June 22, 1973. Plaintiff accordingly discovered his navel was displaced in August of 1973. In October or November of 1978 defendant doctor ceased treating plaintiff, and in May or June of 1979 plaintiff went to see a new doctor.

Plaintiff claims that the statute has not run because (1) there was a continuous course of treatment until October, 1978, as stated by the doctor, or November, as stated by defendant, and that because the burden is on the defendant to establish the statute of limitation defense that plaintiff has timely filed his action or (2) that the statute began to run in May or June of 1979, that being when plaintiff went to another doctor.

"The limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act. The cause does not accrue until it should have been discovered." Baines v. Blenderman, 223 N.W.2d 199, 201 (Iowa 1974)(emphasis added). Knowledge of an injury may or may not be sufficient to alert a reasonably diligent person to the basis of his claim, depending on the circumstances of the case. Id. [I]t is not enough that a plaintiff knows of the injury for which claim is made as a residual of the purported offensive treatment, but he must know or have reason to know that such treatment was negligently administered. Id. at 202 (quoting from Lopez v. Swyer, 115 N.J. Supr. 237, 245, 279

A.2d 116, 121 (1971) with emphasis in the original quote). Under the discovery rule the statute of limitations can begin to run either when the injury is discovered or when by the exercise of reasonable diligence it should have been. Franzen v. Deere and Co., 334 N.W.2d 730, 732 (Iowa 1983). The party pleading an exception to the normal limitations period has the burden to plead and prove the exceptions. Id.; Brown v. Ellison, 304 N.W.2d 197, 200 (Iowa 1981). Plaintiff knew as early as August of 1973 that his belly button was displaced and shortly thereafter that he suffered an incisional hernia. These were conditions he could physically observe. Sutures were removed in September of 1975. Plaintiff not only knew that he had problems with the incision, but by his own admissions he called them to defendant doctor's attention.

In Schnebly v. Baker, 217 N.W.2d 708, 723 (Iowa 1974), the Iowa Supreme Court refused to toll the claim of parents. In Schnebly the court said "Under Schnebly's testimony about doctor Baker's role, they (the parents) knew the basic operative facts and could make the most of them. We think Dr. Baker did not have to tell Schneblys, before the statute of limitations would run, that he was negligent and that they had a cause of action against him." Schnebly v. Baker, 217 N.W.2d 708, 723 (Iowa 1974). "We now believe the better rule to be that a cause of action based on negligence does not accrue until plaintiff has in fact discovered that he has suffered injury or by the exercise of reasonable diligence should have discovered it and are persuaded the rationale of the discovery doctrine should be adopted." Schnebly at 722 (emphasis added).

"Decisons holding the statute of limitations did not run involve situations in which the patient did not know the facts . . . the statute does not run while the plaintiff is blamelessly aware of what happened." Id. "...[A] person cannot claim concealment, of course, if he has knowledge, and, that a plaintiff may have been unaware of the details of the evidence to support her claim does not change the result." Schnebly at 722. Considering plaintiff's own affidavit, we find he had

knowledge of the problem, for which he is seeking relief, very soon after the surgery. A mere difference in diagnosis between the two doctors as to the extent of the injury does not alter the indisputable fact plaintiff knew he had an injury from the moment it was inflicted. Flynn v. Lucas Co. Memorial Hospital, 203 N.W.2d 613, 616 (Iowa 1973). We affirm the trial court's granting of summary judgment.

II

The plaintiff also challenges a finding of the trial court that there was no evidence that the defendant doctor's conduct was negligent. In lieu of our holding we need not address this issue.

AFFIRMED.