THE SUPREME COURT OF IOWA

NO. 19-2078

CHRISTINE KOSTOGLANIS
Plaintiff-Appellant

vs.

LEROY L. YATES; and DIAMOND MEDICAL SPA & VEIN, P.C. an Iowa Professional Corporation,
Defendants-Appellees

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY (NO. LACE 130418)
THE HONORABLE MARLITA A. GREVE

DEFENDANTS-APPELLEES' FINAL BRIEF

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Black's Law Dictionary (11th ed. 2019)

ROUTING STATEMENT

This medical malpractice case is appropriate for transfer to the Iowa Court of Appeals, as it requires only the application of existing legal principles. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Dr. Yates performed a surgical liposuction procedure on Plaintiff on June 17, 2015, after which she developed a wound complication. (App. 6). Plaintiff filed her Petition on June 15, 2018, roughly three years after her surgery, alleging that Dr. Yates failed to perform the procedure appropriately. (App. 6). In her Petition, Plaintiff asserted claims for negligent misrepresentation, breach of contract, and fraudulent misrepresentation. *Id*. At deposition, Plaintiff stated that she believed Dr. Yates was not qualified to perform the surgery and failed to perform the surgery appropriately. (Kostoglanis Dep. 96:10–97:7, App. 77–78).

During the pendency of her case, and relevant to Defendants' motion for summary judgment, Plaintiff failed to designate any experts by her May 1, 2019 deadline. (App. 34–36).

On July 2, 2019, Defendants filed their Motion for Summary Judgment. (*Id.*) In their Motion and supporting documents, Defendants argued:

1) the statute of limitations barred all of Plaintiff's claims, which were founded on medical negligence, regardless of their being cast as contract and misrepresentation claims;
2) Plaintiff failed to designate qualified experts in support of her claims; and
3) Plaintiff's claims of misrepresentation against Dr. Yates failed, as she did not rely on any representations of his in electing for the surgical procedures at the Defendant medical clinic.[1]

Plaintiff resisted Defendants' Motion on all grounds. The district court held oral argument, and ultimately granted Defendants' Motion for Summary Judgment, finding all of Plaintiff's claims were outside the two-year limitation period of Iowa Code §

[1] In support of this contention, Defendants cited Plaintiff's deposition, in which she stated she decided to go through with surgery based on representations of a clinic nurse, rather than Dr. Yates. (App. 69).

614.1(9)(a). (App. 389–395). The court declined to grant Defendants' Motion on any other grounds. *Id*.

Plaintiff filed a Motion to Reconsider, seeking reconsideration of the ruling regarding claims of misrepresentation related to the Defendant medical clinic. Defendants resisted (App. 402–404). The district court denied Plaintiff's Motion for Reconsideration, (App. 405–406), and Plaintiff filed a Notice of Appeal. (App. 407–408).

STATEMENT OF THE FACTS

Dr. Yates performed a cosmetic liposuction procedure on Plaintiff Christine Kostoglanis at the Diamond Medical Spa & Vein, P.C. on June 17, 2015. (App. 52). Plaintiff received and executed a written informed consent form before the procedure. (Kostoglanis Dep. 69:15–19, App. 69; Ex. 3, App. 82–93). That form expressly disclosed the possibility of wound infection and even skin necrosis resulting from the surgical procedure. (App. 83–84).

Immediately after surgery, Plaintiff complained of concerns with fluid leakage and incisional issues. (Kostoglanis Dep. at

78:12–83:9, App. 70–74). Within two weeks of the surgery, she sought a second opinion from another healthcare provider related to a wound complication from the surgery. (*Id.* at 87:15–88:17, App. 37).

Almost three years later, Plaintiff filed this suit on June 15, 2018, styling her claims regarding the outcomes evident immediately after the surgery as ones for breach of contract, fraudulent misrepresentation, and negligent misrepresentation. (App. 6–15).

ARGUMENT

I. The district court correctly held Plaintiff's claims are time-barred under the applicable statute of limitations.

a. Preservation of Error

Defendants agree error was preserved on this issue. (App. 395).

b. Standard of Review

The Court reviews a ruling on summary judgment for correction of errors at law. *Bagelmann v. First Nat'l Bk.*, 823 N.W.2d 18, 23 (Iowa 2012).

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law. *Kapadia v. Preferred Risk Mut. Ins. Co.*, 418 N.W.2d 848, 849 (Iowa 1988). An issue of fact is "material" only when it might affect the outcome of the suit, given the governing law. *Fees v. Mut. Fire and Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992).

On appeal, the court reviews the facts in the light most favorable to the non-moving party and affords the non-moving party every legitimate inference that may be reasonably deduced from the record. *Id.* Where a motion for summary judgment is supported, "the non-moving party must set forth specific facts showing the existence of genuine issue for trial. Speculation is not sufficient to generate a genuine issue of fact." *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005); *see also Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012).

The purpose of summary judgment is to avoid the expense of needless trials and streamline the litigation process. *See Diamond Prods. Co. v. Skipton Painting & Insulating, Inc.*, 392 N.W.2d 137 (Iowa 1998); *Drainage Ditch No. 119 v. Inc. City of Spencer*, 268 N.W.2d 493, 499 (Iowa 1978). Iowa's appellate courts will not dis-

turb an award of summary judgment where a plaintiff is unable to demonstrate every element of her *prima facie* case.

c. The district court properly granted Defendants' Motion for Summary Judgment as Plaintiff's claims are founded in medical negligence, and she cannot evade the lapsed statute of limitations by bringing claims under contract or misrepresentation theories.

i. Plaintiff seeks to recover for alleged medical negligence.

While Plaintiff articulates her claims as being founded in contract and misrepresentation, they are actually allegations of professional negligence. They arise out of a surgical procedure Dr. Yates performed on Plaintiff that allegedly resulted in personal injury to Plaintiff. (App. 6–15). The district court correctly concluded "that all of Plaintiff's claims are 'founded on injuries to the person' and 'aris[e] out of patient care.'" (Ruling (quoting Iowa Code § 614.1(9)(a) and *Founded On*, *Black's Law Dictionary* (11th ed. 2019) (defining "founded on" as "Having as a basis"; *Arise*, *Black's Law Dictionary* (defining "arise" as "1. To originate; to stem (from) . . . 2. To result (from)"), App. 393).

Plaintiff's dissatisfaction with the results of Dr. Yates' medical treatment does not convert claims of medical negligence into breach of contract or misrepresentation claims so as to extend her

applicable statute of limitations (or evade expert witness certification requirements of Iowa Code § 668.11[2]). The basis of Plaintiff's claims is her claim that Dr. Yates was not qualified to perform the procedure and did not perform the procedure competently. (Pet. ¶ 33–41, App. 12–13; Kostoglanis Dep. 96:10–97:7, App. 77–78). She offered no other factual basis for her claim. *Id.*

The actual nature of her claim is based on medical negligence. There could be no finding of liability against Defendants without first establishing that Dr. Yates lacked qualifications to perform the surgery and that he did not perform the surgery within accepted standards of care. The district court properly held, "all of Plaintiff's claims are inextricably connected to the allegedly deficient surgery performed by Dr. Yates." (App. 392–393).

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[2] Defendants also moved for summary judgment because Plaintiff lacked necessary expert support for her claims (App. 34–35; 44–48); however, the district court declined to grant summary judgment on these grounds, finding that Defendants first should have filed a motion to strike individuals identified in Plaintiff's discovery responses. (App. 393–394). While Plaintiff's Brief discusses the district court's Ruling on this issue, as well as the issue related specifically to claims against Dr. Yates failing as Plaintiff did not rely on his representations, these issues are not before this Court. Defendants do not believe remand to the district court is appropriate, but in the event of a remand, the issue of sufficiency of experts would properly be addressed further in that court.

ii. Courts dispose of claims according to their nature, rather than their appellation.

A claim's label is not dispositive of whether it sounds in professional malpractice or contract or misrepresentation. Instead, "[t]he gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim." *Lucas v. Awaad*, 830 N.W.2d 141, 150 (Mich. App. 2013) (cleaned up).

The Iowa Supreme Court has explicitly disregarded a plaintiff's nomenclature in order to appropriately manage claims brought in contract that were properly regarded as claims of negligence. Under Iowa law, "[t]he actual nature of the action determines the proper statute of limitations. This determination turns on the nature of the right sued upon and not on the elements of relief sought for the claim." *Venard v. Winter*, 524 N.W.2d 163, 165 (Iowa 1994).

"When disagreement arises as to which of the several periods of limitation contained in Iowa Code section 614.1 is applicable, [courts] must determine, as best [they] can, which of the types of actions described in the statute most nearly characterizes the

action before the court. *Scott v. City of Sioux City*, 432 N.W.2d 144, 147 (Iowa 1988).

In *Kemin Industries, Inc. v. KPMG Peat Marwick, LLP*, the plaintiff, a manufacturer of agricultural products, alleged the defendant accounting company had failed to discover and disclose financial irregularities in an account receivable with which it had been retained to assist. 578 N.W.2d 212, 213 (1998). At trial, the district court submitted the matter on both breach-of-contract and negligence theories; the jury found the plaintiff thirty-five percent at fault, and awarded damages on both theories. *Id.* at 215. After apportioning fault, the total amount of damages awarded under the negligence theory was significantly less than that awarded under the contract theory. *Id.* Following the trial, the district court determined the case should have been submitted solely on the negligence theory, and entered judgment accordingly. *Id.*

On cross-appeal by the defendant, the Iowa Supreme Court approved of the entry of judgment solely on the tort theory of the case. *Id.* at 221. While noting "[a]lmost all relationships involving professional services arise from an offer and acceptance that

would constitute a simple contract", the court determined the claim asserted against the licensed professional "failed to meet the standard of care that the law has placed on that party [was] essentially a negligence cause of action." *Id.* "To hold otherwise", the court explained, "would render inapplicable those provisions of chapter 668 that are specifically tailored to actions involving professional negligence. *Id.* (citing Iowa Code §§ 668.11, 12). Because the plaintiff's claims were founded on allegations of negligence, the court recognized, proceeding to judgment on a contract theory would have cut against their actual nature. *Id.; see also Millwright v. Romer*, 322 N.W.2d 30, 32 n.1 (Iowa 1982) (noting in legal malpractice claim that "contract theory 'is conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence'") (citation omitted); *Long v. Jensen*, 522 N.W.2d 621, 624 (Iowa 1994) (finding claim was one for negligence notwithstanding plaintiff's assertion of both breach of contract and negligence, and finding landlord's contract to keep the property repaired "merely establishes the duty element of the negligence cause of action"); *Timmerman v. Eich*,

809 F. Supp. 2d 932, 955 (N.D. Iowa 2011) (granting summary judgment on breach of warranty claim, finding it was subsumed by professional negligence claim).

iii. This is a negligence action, and the Court should treat it as such.

The district court reasoned "[f]or each of Plaintiff's claims, the allegedly wrongful actions of Defendant Yates, as well as the resulting harm and damages suffered by Plaintiff, are clearly inseparable from the personal injuries caused by the is that heart of her claims for fraudulent and negligent misrepresentation." (App. 392). Again, Plaintiff's claims were based on Dr. Yates' allegedly deficient qualifications "**to perform a certain surgery**" and for "**failing to perform follow up care needed to remedy the problems caused by the deficient surgery**". (*Id.*) (emphasis in original).

As in *Kemin Industries*, Plaintiff's attempt to transform this medical negligence action to one founded in contract or misrepresentation would vitiate the two-year statute of limitations and the strictures imposed by the Iowa legislature in Iowa Code § 668.11,

rendering both nullities in exactly the context in which they were specifically intended to apply. *See* 578 N.W.2d at 221.

Instead, the Court should look beyond Plaintiff's styling of her suit in contract and misrepresentation to examine the substance of her claims: she asserts that a provider of medical treatment was unqualified and failed to meet the applicable standard of care. That claim sounds properly in tort, and this case should be regarded accordingly. Other courts have similarly rejected medical malpractice claims repackaged as contractual in nature. *See, e.g.*, *Lucas*, 830 N.W.2d at 151–52 (reversing denial of summary judgment on plaintiff's fraud and other claims, as they were based on medical malpractice and lacked necessary expert support); *McMichael v. Howell*, 919 So. 2d 18, 23 (Miss. 2005) (noting plaintiff's "argument to support her 'breach of contract' claim is nothing more than medical malpractice."). In one leading case, the Alabama Supreme Court explained:

> The law implies a duty on the part of a physician to exercise due care; it does not imply a promise on his part to do so. *The breach of that duty is actionable in tort, not in contract, and one cannot circumvent these legal restrictions, where, as here, it is apparent that a tort action has been stated.* Its character is not changed by la-

> beling the action one for breach of an implied contract, nor does the allegation that the defendants "impliedly contracted ... or agreed to treat ... and care for," etc., make it so.

Lemmond v. Sewell, 473 So.2d 1047, 1049 (Ala. 1985) (emphasis added).

iv. Plaintiff failed to bring suit within the applicable time provided by the statute of limitations.

Similarly, in determining the appropriate statute of limitations, "the Code requires us to look to the *foundation* of the action. This means that the appropriate statute of limitations is to be ascertained by characterizing the actual nature of the action." *Sandbulte v. Farm Bureau Mut. Ins. Co.*, 343 N.W.2d 457, 462 (Iowa 1984) (citation omitted) (emphasis in original), *overruled on other grounds by Langwith v. Am. Nat. Gen. Ins. Co.*, 793 N.W.2d 215 (Iowa 2010). The court must "determine, as best [it] can, which of the types of actions described in the statute most nearly characterizes the action before the court." *Scott*, 432 N.W.2d at 147.

As discussed above, Plaintiff's claims are best characterized as professional liability claims based on alleged negligence. Plaintiff cannot trigger application of a longer statute of limitations by

repackaging her negligence claim as one based on contract or misrepresentation. *Venard*, 524 N.W.2d 163 at165; *see also Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 533 (Tex. 2016) (holding fraud and other claims arising out of health care services based on acts occurring almost three years earlier were essentially medical malpractice claims time-barred under applicable two-year statute of limitations).

Plaintiff's claims for medical negligence accrued either in June 2015, at the time of the surgery, or no later than July 2015, when she had experienced complications from the surgery and actively sought what she termed a "second opinion". (App. 52, ¶ 3; 53, ¶ 12).

Plaintiff filed suit on June 15, 2018, almost three years after the original surgery and the time that any claim pertaining to the surgery arose. (App. 53, ¶ 13). The statute of limitations for medical malpractice claims in Iowa is set forth in Iowa Code § 614.1(9)(a), which provides that a medical malpractice claim must be filed:

> 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 . . .

Iowa Code § 614.1(9)(a).

Because Plaintiff's claims accrued at the latest in July of 2015, and she did not file suit until June of 2018, she failed to bring her claims within the applicable statute of limitations. As such, her claims fail as a matter of law, and the district court properly found Defendants are entitled to judgment as a matter of law.

CONCLUSION

For the foregoing reasons, Defendants request the district court's ruling granting summary judgment be affirmed.

STATEMENT ON ORAL ARGUMENT

These Defendants do not believe oral argument is necessary. Should oral argument be granted, these Defendants request equal time be given to all parties.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 2,726 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook.

/s/ Desirée A. Kilburg	2020-09-09
Signature	Date

CERTIFICATE OF FILING AND SERVICE

I certify Appellees' Final Brief was filed with the Supreme Court of Iowa by electronically filing the same with the Iowa Supreme Court Clerk on September 9, 2020.

I further certify I served the preceding Appellees' Final Brief on attorneys of record for all other parties by electronically filing this document in accordance with the Chapter 16 Rules on September 9, 2020.

/s/ Beth Hawker