IN THE COURT OF APPEALS OF IOWA

No. 6-077 05-0602
Filed April 26, 2006

MARY MULDOON and
PATRICK MULDOON,
Plaintiffs-Appellants,

vs.

W. RICHARDS BURGMAN, M.D. and
DANIEL PELC, D.D.S.,
Defendants-Appellees.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Mary and Patrick Muldoon appeal the entry of summary judgment in favor of a physician on their medical malpractice claim. **AFFIRMED.**

Mark W. Fransdal of Redfern, Mason, Dieter, Larsen & Moore, P.L.C., Cedar Falls, for appellants.

George L. Weilein of Gallagher, Langlas & Callagher, Waterloo, for appellee-W. Richards Burgman.

Charles Miller, Davenport, for appellee-Daniel Pelc.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

We must decide whether a medical malpractice lawsuit was timely filed. We agree with the district court that the suit was untimely.

I. Background Facts and Proceedings

On September 21, 2000, Mary Muldoon saw her family physician about a growth in her mouth. He referred her to Dr. W. Richards Burgman, an ear, nose, and throat specialist. Muldoon saw Dr. Burgman for the first time on September 25, 2000. She informed him that three family members had cancer. Dr. Burgman diagnosed the growth as "tonsil tags," prescribed a two-week course of antibiotics, and noted he would "reevaluate at that point to see whether the tags have actually shrunk down."

On October 9, 2000, Muldoon returned to Dr. Burgman for a follow-up visit. The physician noted that the throat "[l]ooks better." His medical record further stated:

> I will follow her in two weeks if her symptoms persist at which point we will arrange for biopsy, if she improves and the swelling disappears she will be followed up PRN.

Mary did not return to Dr. Burgman after two weeks.

Over the next several months, the growth increased in size. By the late summer and fall of 2001, Muldoon experienced some bleeding in her mouth. Her snoring also worsened.

On December 7, 2001, Muldoon returned to her family physician. He obtained a magnetic resonance image of the growth, advised her it was a tumor, and scheduled an appointment with Dr. Burgman. After examining her, Dr.

Burgman admitted her for a biopsy. The biopsy results confirmed that Muldoon had mouth and throat cancer.

Mary and her husband, Patrick Muldoon, sued Dr. Burgman on November 14, 2003.[1] They alleged he was negligent in failing to diagnose Mary's oral cancer in September and October 2000. Dr. Burgman moved for summary judgment on the ground that the lawsuit was not timely filed. The district court agreed with Burgman and entered judgment in his favor. This appeal followed.

II. Statute of Limitations

The issue before the district court was whether the Muldoons' claim was time-barred by Iowa Code section 614.1(9)(a) (2003). That provision mandates the filing of medical malpractice actions

> within two years after the date on which the claimant knew, or through the use of reasonable diligence should have known . . . of the injury . . . for which damages are sought in the action, whichever of the dates occurs first.

In applying this provision, we must ask when a plaintiff gains knowledge of his or her injury sufficient to be put on inquiry notice to investigate further. *McClendon v. Beck*, 569 N.W.2d 382, 385 (Iowa 1997).

The district court found Muldoon "was placed on inquiry notice well before two years prior to the filing of the lawsuit in this case." The court reasoned:

> In this case, Ms. Muldoon was concerned about her condition as early as 2000, when she initially met with Defendant Burgman. Her condition worsened during 2001. The worsening of her condition increased dramatically during the late summer and fall of 2001. She was experiencing pain, unexplained bleeding, swelling, a change in color of the condition, and even began snoring. The condition was lifting the right side of her tongue and causing

[1] The Muldoons also sued a dentist but that claim is not at issue on appeal.

> discomfort. It is not disputed that there was a fairly dramatic change of condition well before she again sought medical advice.

The court concluded "there is no issue of material fact preventing summary judgment from being entered in this case." Our review of this ruling is for errors of law. *Cubit v. Mahaska County*, 677 N.W.2d 777, 781 (Iowa 2004).

As a preliminary matter, we must address two competing contentions concerning the district court's evaluation of the facts. The Muldoons argue that the district court failed to view the facts in the light most favorable to them. *See Fouts ex rel. Jensen v. Mason,* 592 N.W.2d 33, 33 (Iowa 1999). Dr. Burgman responds that the district court may have considered what he characterizes as "sham affidavits" proffered by the Muldoons in resistance to his summary judgment motion. *Cf. Smidt v. Porter*, 695 N.W.2d 9, 21-22 (Iowa 2005) (noting absence of Iowa authority on sham affidavits). Both contentions are cured by our standards of review. First, we, like the district court, are obliged to view the record in a light most favorable to the nonmoving party. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). Second, we must "indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question." *Id.* To the extent the Muldoons' affidavits differ from their sworn deposition testimony, most of the differences are clarifications of the deposition testimony.

Turning to the record, it is undisputed that the growth in Mary Muldoon's mouth became bigger more than two years before she sued. The Muldoons contend there is a dispute as to whether this enlargement placed Mary Muldoon

on inquiry notice to investigate further. We agree with the district court that they did not generate an issue of material fact on this question.

In addition to the increased size of the growth, Muldoon attested that, in August 2001, she "noticed a small amount of blood" mixed in with her toothpaste and saliva. She further attested that, in October 2001, she detected "the taste of blood" in her mouth.[2] She attested that her snoring "became worse sometime in the fall of 2001, sometime between late October and late November."[3] While she stated she had no reason to ascribe these developments to the growth in her mouth, the law only requires awareness that a problem exists. *Langner v. Simpson*, 533 N.W.2d 511, 518 (Iowa 1995).

In assessing Mary Muldoon's awareness, it is relevant that her family had a history of cancer; three family members were diagnosed with the disease and, as a result, she attested she "was concerned about the possibility of cancer." Although she also stated that Dr. Muldoon's "tonsil tags" diagnosis "dispelled that

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[2] Dr. Burgman correctly points out that Mary Muldoon's affidavit makes reference to only two bleeding incidents, whereas her deposition testimony implies there were more. The following exchange is relevant:

> Q. Between August and October, as I understand it, you were continuing to experience some bleeding upon brushing your teeth, but it was not every time you brush them, is that correct?
>
> A. Right.

The affidavit does not directly contradict this testimony. We cite the affidavit because it is the most favorable evidence on behalf of the Muldoons.

[3] Again, Dr. Burgman notes a discrepancy between Mary Muldoon's affidavit and her deposition testimony. Mary testified by deposition that the growth caused her to "snore terribly." In her affidavit, she attested that she did not have any reason to believe her snoring was related to the tonsil tag. To the extent these versions are contradictory, we rely on the affidavit only as evidence of the undisputed fact that Mary Muldoon experienced snoring problems. As for the timing of these problems, Muldoon acknowledges they may have begun as early as October of 2001, which is two years and one month before she sued.

concern," reasonable minds could only conclude that her family history should have heightened her awareness of a problem in the summer and early fall of 2001. *See Langner*, 533 N.W.2d at 518 (stating "reasonable minds could draw only one conclusion").

Based on Mary Muldoon's affidavit, which is concededly the most favorable evidence on her behalf, we conclude she was placed on inquiry notice of a problem in the summer and early fall of 2001, rather than in late November 2001, as claimed by the Muldoons. In other words, the developments during that time frame were "sufficient to alert a reasonable person of the need to investigate." *Christy v. Miulli*, 692 N.W.2d 694, 703 (Iowa 2005).[4]

The Muldoons did not file their lawsuit until mid-November 2003. This was outside the two-year limitations period prescribed by Iowa Code section 614.1(9)(a). Having found no genuine issue of material fact that would preclude summary judgment, we discern no error in the district court's conclusion that the Muldoons' action was time-barred. *See* Iowa R. Civ. P. 1.981(3).

III. Equitable Estoppel

The Muldoons contend they may invoke the doctrine of equitable estoppel to preclude Dr. Burgman from relying on the statute of limitations as a defense. *See Miulli*, 692 N.W.2d at 701 (defining the doctrine). Dr. Burgman counters that the Muldoons failed to preserve error on this issue. We agree with Dr. Burgman.

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[4] We need not decide precisely when the "injury" occurred. *See Schlote v. Dawson*, 676 N.W.2d 187, 193 (Iowa 2004) (defining injury as physical harm rather than the wrongful act that caused the injury). It is sufficient to note that Mary Muldoon had notice to inquire further more than two years before she sued.

The Muldoons did not assert equitable estoppel in their petition, in their resistance to Dr. Burgman's motion for summary judgment, or at the hearing on the motion for summary judgment. The first time they raised the doctrine was in a supplemental resistance to the summary judgment motion submitted after the hearing but before the district court ruled. The district court made no mention of this principle in its final ruling and the Muldoons did not follow-up with a Rule 1.904(2) motion for enlarged findings of fact and conclusions of law. *See* Iowa R. Civ. P. 1.981(3) (stating where summary judgment is rendered on the entire case, Rule 1.904(2) shall apply). As there is no indication that the district court decided the issue, we conclude error was not preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

AFFIRMED.