IN THE COURT OF APPEALS OF IOWA

No. 9-014 / 07-1869
Filed March 26, 2009

SCHARY SANT AMOUR and
CHRISTIAN SANT AMOUR,
Plaintiffs-Appellants,

vs.

MARK E. HERMANSON, M.D., GENESIS HEALTH GROUP, GENESIS HEALTH SYSTEM, and OTHER UNKNOWN PARTIES,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

The plaintiffs appeal from the district court's grant of summary judgment in favor of the defendants. **AFFIRMED IN PART AND REVERSED IN PART.**

John Riccolo of Riccolo & Semelroth, P.C., Cedar Rapids, for appellants.

Charles E. Miller, Thomas D. Waterman, and Diane M. Reinsch of Lane & Waterman, L.L.P., Rock Island, IL, for appellees.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

SACKETT, C.J.

The plaintiffs-appellants, Schary and Christian Sant Amour, appeal from the district court ruling on the defendants-appellees' motion for summary judgment in their medical negligence suit. The court granted the motion, concluding the suit was time-barred by both the statute of limitations and the statute of repose. The Sant Amours contend the court erred in granting summary judgment because (1) a genuine issue of material fact exists concerning the date Schary Sant Amour knew or should have known of her brain tumor, and (2) the court did not apply the continuous treatment or continuum of negligent treatment doctrine to the facts of this case. We affirm in part and reverse in part.

Scope of Review. Review of a district court's ruling on a motion for summary judgment is for correction of errors at law. Iowa R. App. P. 6.4; *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Phillips*, 625 N.W.2d at 717. The evidence is reviewed in the light most favorable to the nonmoving party. *Kolarik v. Cory Int'l Corp.*, 721 N.W.2d 159, 162 (Iowa 2006). In addition, the nonmoving party is entitled to every legitimate inference that can be reasonably deduced from the record. *Hansen v. Anderson, Wilmarth & Van der Maaten*, 630 N.W.2d 818, 822-23 (Iowa 2001).

Background. In May of 1998, Schary Sant Amour suddenly developed tinnitus and a complete loss of hearing in her left ear. She saw Dr. Hermanson

for these problems. He believed the problems were either caused by a virus or were idiopathic. He prescribed a steroid and told her if the hearing loss did not improve, a referral to a specialist might be warranted. The steroid helped the hearing loss, but the tinnitus remained.

In November of 1998, Sant Amour again consulted Dr. Hermanson for intermittent hearing fluctuations and continued tinnitus. A hearing screening showed she had normal hearing, except for a slight loss at high frequencies. His notes provided that "at this time, no treatment seems to be indicated for the ear." He believed she had suffered from a virus, but that the cause could be idiopathic.

At a routine physical exam in December of 2000, she mentioned the left ear tinnitus. Dr. Hermanson's exam showed normal hearing in both ears and some problems with intermittent tinnitus. He did not prescribe any treatment or refer her to a specialist for further evaluation.

At a routine physical exam in July of 2002, Sant Amour again mentioned the tinnitus, describing episodes of it getting louder, then returning to a baseline level. Dr. Hermanson's exam revealed a "mild high frequency hearing loss in the left ear with persistent tinnitus." He did not prescribe any treatment or refer her to a specialist for further evaluation.

In July of 2005, Sant Amour experienced a sudden loss of hearing. She was seen by a nurse practitioner who made a referral to a specialist. The specialist diagnosed Sant Amour's brain tumor in July of 2005.

In December of 2006, the Sant Amours filed suit against Dr. Hermanson and his employer, alleging medical negligence. In August of 2007, the

defendants moved for summary judgment, alleging the suit was barred by the statute of limitations. The district court determined the act or occurrence alleged in the petition occurred in May of 1998. It did not view Sant Amour's 2000 and 2002 routine physical exams as continuing treatment of the 1998 hearing problems. It concluded both the two-year statute of limitations and the six-year statute of repose found in Iowa Code section 614.1(9) (2007) applied. Accordingly, it granted the motion for summary judgment and dismissed the case. The Sant Amours appeal.

Merits. *Statute of Limitations.* We first note that both parties agree two supreme court decisions rendered after the appeal was filed[1] clarified the law concerning what triggers the running of the statute of limitations so that a genuine issue of material fact exists concerning when the statute of limitations commences under the facts of this case. We reverse that portion of the district court's ruling granting summary judgment based on the statute of limitations. We next consider whether the district court correctly determined the statute of repose also bars the Sant Amours' claims.

Statute of Repose. Iowa law distinguishes between statutes of limitations and statutes of repose:

> "Statutes of repose are different from statutes of limitation, although they have comparable effects." A statute of limitations bars, after a

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[1] *See Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461 (Iowa 2008) ("We think it clear our legislature intended the medical malpractice statute of limitations to commence upon actual or imputed knowledge of *both the injury and its cause in fact*." (emphasis added)); *Murtha v. Cahalan*, 745 N.W.2d 711, 718 (Iowa 2008) ("[I]t is still a fact question under this record as to when she knew or should have known, *of that injury and its cause in fact*." (emphasis added)).

> certain period of time, the right to prosecute an accrued cause of action.
>
> By contrast, a statute of repose "terminates any right of action after a specified time has elapsed, regardless of whether or not there has as yet been an injury."
>
> A statute of repose period begins to run from the occurrence of some event other than the event of an injury that gives rise to a cause of action and, therefore, bars a cause of action before the injury occurs.
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> Under a statute of repose, therefore, the mere passage of time can prevent a legal right from ever arising.

Bob McKiness Excavating & Grading, Inc. v. Morton Bldgs., Inc., 507 N.W.2d 405, 408 (Iowa 1993) (citations omitted).

Iowa Code section 614.1(9) (2005) provides:

> 9. Malpractice.
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> a. Except as provided in paragraph "b", those founded on injuries to the person or wrongful death against any physician and surgeon, osteopath, osteopathic physician and surgeon, dentist, podiatric physician, optometrist, pharmacist, chiropractor, physician assistant, or nurse, licensed under chapter 147, or a hospital licensed under chapter 135B, arising out of patient care, 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, whichever of the dates occurs first, *but in no event shall any action be brought more than six years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death* unless a foreign object unintentionally left in the body caused the injury or death.

(Emphasis added.) The statute sets limits on medical malpractice actions and includes both a statute of limitations and a statute of repose. *See Albrecht v. Gen. Motors Corp.*, 648 N.W.2d 87, 92 (Iowa 2002). The emphasized statutory language quoted sets a six-year time limit for commencing an action that runs from "the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death." Iowa Code § 614.1(9)(a).

The focus is not on the claimed injury, but rather on "the act or omission or occurrence" and does not require that a claim have accrued or that an injury have been discovered. *Albrecht*, 648 N.W.2d at 92 (citing *Bob McKiness Excavating*, 507 N.W.2d at 408).

Because the focus is not on the claimed injury, but rather on some act or omission or occurrence related to a defendant, we cannot say there must be only one act or omission or occurrence to which a plaintiff must point as being the sole cause of an injury. The case before us is an example of a plaintiff alleging multiple acts or omissions or occurrences that constituted negligent care and treatment. This is not, however, related to the "continuous treatment" or "continuum of negligent treatment" doctrines that may act to toll the statute of *limitations*. *See Ratcliff v. Graether*, 697 N.W.2d 119, 124-25 (Iowa 2005) (quoting *Waldman v. Rohrbaugh*, 215 A.2d 825, 827-28 (1966));[2] *see also Rathje*, 745 N.W.2d at 454 ("A cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.").

In the petition filed on December 29, 2006, Sant Amour pled that Dr. Hermanson was negligent in his care and treatment of her "in one or more of the

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[2] *Waldman* provides:

> [I]f the treatment by the doctor is a continuing course and the patient's disease or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the [doctor] for the particular disease or condition involved has terminated, unless during the course of treatment the patient learns or should reasonably have learned of the harm, in which case the statute runs from the time of knowledge, actual or constructive.

following particulars." She then listed the examinations on May 11, 1998, November 3, 1998, December 20, 2000, and July 11, 2002, asserting "failure to order or perform appropriate diagnostic tests and evaluations" on each date. She also asserted "failure to refer [her] to a [specialist]" on each date. The defendants argue that Sant Amour claims the act causing her injury occurred in 1998, citing *only* the May 11, 1998 date from the Sant Amours' petition. Appellants respond that the defendants "failed to include the other allegations of negligence" made in the petition. These acts alleged occurred in 2000 and 2002, within the six-year statute of repose. The district court found "the act or omission or occurrence alleged in the petition occurred on May 11, 1998, when Dr. Hermanson allegedly misdiagnosed her condition or failed to refer her to a specialist." Consequently, it determined the Sant Amours' claims were time-barred and granted summary judgment based on the statute of repose. We affirm the district court's grant of summary judgment based on the six-year statute of repose as it relates to all claims prior to December 20, 2000.

Schary Sant Amour's routine physical examination in 2000 occurred on December 20. She told Dr. Hermanson she continued to have intermittent problems with tinnitus. In the examination, Dr. Hermanson checked Sant Amour's hearing. He screened her hearing because of her previous history of hearing loss. Hearing screening is not a part of routine physical exams as performed by Dr. Hermanson. The petition was filed on December 19, 2006. This date of this physical exam is within the six-year statute of repose. If there is a genuine issue of material fact relating to an "act or omission or occurrence

alleged in the action to have been the cause of the injury," the action would not be barred by the statute of repose. The district court should not have granted summary judgment on any of the claims related to this date on that basis.

Schary Sant Amour also alleged Dr. Hermanson was negligent in examining her during another routine physical examination in 2002. Clearly claims related to this date would not be barred by the six year statute of repose. As with the 2000 examination, if there is a genuine issue of material fact relating to this date, the district court should not have granted summary judgment on the claims related to this date as time-barred by the statute of repose.

We affirm the district court's grant of summary judgment for defendants on the plaintiffs' 1998 claims based on the statute of repose. We reverse the grant of summary judgment based on the statute of repose as to the Sant Amours' 2000 and 2002 claims.

Summary. Based on the supreme court's clarification of the law concerning the application of the statute of limitations in medical negligence actions in *Rathje*, 745 N.W.2d at 461, and *Murtha*, 745 N.W.2d at 718, we reverse the grant of summary judgment based on the two-year statute of limitations because genuine issues of material fact exist.

Concerning the six-year statute of repose, we affirm the grant of summary judgment as to all claims before December 20, 2000. We reverse the grant of summary judgment as to the claims arising from the 2000 and 2002 examinations because they are not time-barred by the statute of repose.

AFFIRMED IN PART AND REVERSED IN PART.