

IN THE COURT OF APPEALS OF IOWA

No. 9-598 / 09-0011
Filed October 7, 2009

MATTHEW MUNOZ,
Plaintiff-Appellant,

vs.

**SAMUEL H. BRALAND, in his
Capacity as Personal Representative
of the Estate of Bruce J. Murphy,**
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, D. J. Stovall, Judge.

A plaintiff contends that the district court abused its discretion in refusing to extend the deadline for designation of expert witnesses in a medical malpractice action. **AFFIRMED.**

Angela Campbell and Gary Dickey of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Hayward Draper and John Clendenin of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Mansfield, J. and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, P.J.

We must decide whether the district court abused its discretion in overruling the plaintiff's motion to extend the deadline for designating an expert in a medical malpractice action.

I. Background Facts and Proceedings

Matthew Munoz underwent surgery for a wrist injury. Dr. Bruce Murphy performed the surgery. Murphy subsequently died.

Munoz sued Dr. Murphy's estate for medical malpractice. The estate filed an answer on January 15, 2008, triggering a statutory deadline of July 14, 2008, for Munoz to designate an expert witness on Dr. Murphy's alleged failure to comply with the applicable standard of care.¹ Munoz did not meet this deadline and did not ask for an extension of time on or before the deadline.

On August 6, 2008, Dr. Murphy's estate moved for summary judgment on the ground that Munoz could not prove his medical malpractice case without an expert. On September 19, 2008, Munoz filed his resistance to the estate's summary judgment motion without a supporting expert affidavit. On October 10, 2008, Munoz sought to extend the deadline for designating an expert. He acknowledged that he had yet to obtain an expert opinion but asserted that this

¹ Iowa Code section 668.11(1) (2007) states:

A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:

- a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time of disclosure.
- b. The defendant within ninety days of plaintiff's certification.

was not for lack of effort. He specifically stated that he obtained his medical records on January 15, 2008, the date the estate filed its answer, turned them over to a medical group within a week, and, until September 8, 2008, believed that the group was reviewing the records with a view toward rendering an opinion. Munoz and Murphy's estate stipulated that if Munoz's motion was denied, summary judgment should be entered in favor of the estate.

At the November 12, 2008 hearing on his motion, Munoz again acknowledged he had yet to obtain an expert designation. That designation was filed on November 21, 2008. Three days later, the district court overruled Munoz's motion. The court later granted the estate's summary judgment motion.

II. Analysis

Munoz argues that he had good cause for an extension of the expert designation deadline. In deciding the good cause question, courts have examined "(1) the seriousness of the deviation; (2) the prejudice to the defendant; and (3) defendant's counsel's actions." *Hill v. McCartney*, 590 N.W.2d 52, 55 (Iowa Ct. App. 1998). Our review of the district court's ruling on this issue is for an abuse of discretion. *Nedved v. Welch*, 585 N.W.2d 238, 239 (Iowa 1998).

We believe the first factor is dispositive. Munoz did not seek an extension of the expert designation deadline until three months after the deadline expired and two months after Murphy's estate filed the summary judgment motion. The July 14 statutory deadline came and went. Four months elapsed before an expert was designated. As the district court stated, "[S]uch deviation from the statutory deadline is serious and precludes the Court from finding good cause."

See *Hantsbarger v. Coffin*, 501 N.W.2d 501, 505–06 (Iowa 1993) (finding abuse of discretion for denying motion for extension of deadline where experts had actually been named by the 180-day deadline, and full compliance with section 668.11 came within one week of the deadline); *Hill*, 590 N.W.2d at 55 (“For nearly four months she knew she did not have an expert to assist her and she did nothing.”). We conclude the district court did not abuse its discretion in overruling Munoz’s motion for extension of time to designate an expert witness.

We reach this conclusion notwithstanding Munoz’s assertion that he was not as well prepared as he might have been had Dr. Murphy’s death not forced him to expedite the filing of his malpractice petition. See Iowa Code § 633.410(1) (providing that all claims against a decedent’s estate are forever barred “unless filed with the clerk within the later to occur of four months after the date of the second publication of the notice to creditors or . . . one month after service of notice . . . to the claimant’s last known address”). As the defense points out, the expert designation deadline is triggered by the filing of an answer rather than the filing of a petition and Munoz had the necessary documents to facilitate an expert designation at the time the answer was filed. See Iowa Code § 668.11.

We affirm the denial of Munoz’s motion to extend the expert designation deadline. We find it unnecessary to address the remaining *Hill* factors.

AFFIRMED.