NO. COA11-192
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

RICHARD BLAKE WHITE, Administrator of the Estate of Richard Dylan White,
Plaintiff,

v.

Mecklenburg County
No. 10 CVS 8117

MAXIM HEALTHCARE SERVICES, INC., MAXIM HEALTH SYSTEMS LLC, MAXIM HABILITATION SERVICES, LLC, HICKORY HOMECARE AND STAFFING, CHARLOTTE HOMECARE, CHESTER L. DAVIS, AND TRACY A. HOUCK,
Defendants.

Appeal by plaintiff from orders entered 10 September 2010 and 9 September 2010 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 August 2011.

J. Neal Rodgers, attorney for plaintiff.

Shumaker, Loop & Kendrick, LLP by Scott M. Stevenson and Scott A. Hefner, attorneys for defendants Chester L. Davis and Tracy A. Houck.

Parker Poe Adams & Bernstein, LLP by Harvey L. Cosper, Jr., for defendants Maxim Healthcare Services, Inc., Maxim Health Systems, LLC, Maxim Habilitation Services, LLC, Hickory Homecare and Staffing and Charlotte Homecare.

ELMORE, Judge.

Richard Blake White, plaintiff, administrator of the estate of Richard Dylan White, appeals orders denying summary judgment for plaintiff and granting summary judgment in favor of Chester L. Davis (defendant Davis), Tracy A. Houck (defendant Houck), Maxim Healthcare Services, Inc., Maxim Health Systems, LLC, Maxim Habilitation Services, LLC (together defendants Maxim), Hickory Homecare and Staffing (defendant Hickory), and Charlotte Homecare (defendant Charlotte). After careful consideration, we affirm the decision of the trial court.

Dylan White was an eleven-year-old quadriplegic who was paralyzed in an automobile accident at the age of five. He was dependent upon a ventilator. The ventilator used by Dylan was a Pulmonetic LTV 950. This particular ventilator contained three safety alarms: 1) a high pressure alarm, 2) a low pressure alarm, and 3) a low minute volume alarm. The high pressure alarm was to sound if the ventilator tube became obstructed. The low pressure alarm and the low minute volume alarm were to sound if there was a complete disconnect or partial disconnect of the ventilator tube. According to Dylan's doctor, the high pressure alarm was to be set at all times at "23" and the low pressure alarm was to be set at all times at "8."

A team of caregivers was responsible for monitoring Dylan day and night. Defendant Davis and defendant Houck cared for Dylan during the day. Barbara Brown cared for Dylan during the night. Both defendant Davis and defendant Houck were employees of defendants Maxim. Brown was an employee of White Home Nursing Services. Defendant Davis and defendant Houck were required to complete a pediatric extended hour nursing flow sheet every time they provided care for Dylan. These sheets provided a shift summary of each caregiver. Each sheet also required the caregiver to indicate the alarm settings of the ventilator. These sheets were dated, and completed in carbon copies. The white copy became a part of Dylan's medical record, the yellow copy was left with Dylan's parents, and the pink copy was retained by defendants Maxim for their corporate records.

On 19 April 2006, Dylan was at home in his bed. At approximately 1:30 AM, Brown discovered that Dylan was pale and cold to the touch. Brown notified Dylan's parents of his condition, and they immediately called 911. Dylan was pronounced dead at 1:45 AM.

Brown later discovered that the ventilator tube was leaking air. However, the ventilator alarm did not alert Brown that the tube was not properly attached. A respiratory therapist,

Jennifer Lewis, who was employed by Apria Healthcare, was responsible for maintaining the alarm settings. Lewis examined the ventilator on two separate occasions prior to Dylan's death. On both occasions, Lewis noted in the Ventilator Performance Record that the high pressure alarm was set at "23" and the low pressure alarm was set at "4," in contravention of doctor's orders. Lewis left a copy of the Ventilator Performance Record at Dylan's house.

On 6 September 2006, a test of the ventilator was conducted to determine the alarm settings at the time of Dylan's death. The ventilator test was videotaped, and plaintiff's counsel was present for the test. During the test, the ventilator technician informed everyone present that the high pressure alarm was set at "23" and the low pressure alarm was set at "4."

In September 2006, plaintiff filed suit against Brown and White Home Nursing Services, PLLC. Later, plaintiff amended his complaint to assert claims against Apria Group, Inc., Apria Healthcare, Inc., Pulmonetics Systems, Inc., and Datex-Ohmeda, Inc. In December 2009, a subpoena was issued allowing plaintiff to examine the pediatric extended hour nursing flow sheets of defendant Davis and defendant Houck from February 2006 to April 2006. On the sheets dated 14 April 2006 and 16 April 2006,

defendant Davis and defendant Houck indicated that the high pressure alarm was set at "23" and the low pressure alarm was set at "8." However, both defendant Davis and defendant Houck later admitted to falsifying those sheets. Defendant Houck testified that she never checked the alarm settings. She stated, "I was told that he didn't like his ventilator messed with, that if any changes were to be made, if he had any problems that I was to notify Tracy and she would make those changes to the ventilator." Defendant Davis was also asked whether it was true that he failed to check the alarm settings each day and he testified, "Yeah, I didn't."

On 12 April 2010, plaintiff filed suit against defendant Davis, defendant Houck, defendants Maxim, defendant Charlotte, and defendant Hickory for medical negligence, gross negligence, and punitive damages. On 17 June 2010, defendants Maxim, defendant Charlotte, and defendant Hickory filed a motion for summary judgment. On 30 June 2010, defendant Davis and defendant Houck filed a motion for summary judgment. On 30 July 2010, plaintiff filed a motion for summary judgment. On 9 September 2010 and 10 September 2010, the trial court entered orders granting summary judgment in favor of defendant Davis, defendant Houck, defendants Maxim, defendant Charlotte, and

defendant Hickory, because plaintiff failed to file suit within the time allowed by the applicable statute of limitations. Accordingly, the trial court denied plaintiff's motion for summary judgment. Plaintiff now appeals.

An appellate court reviews the trial court's order allowing summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). "Summary judgment is appropriate when there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." *Id.* (quotations and citations omitted).

Plaintiff first argues that the trial court erred in granting defendants' motion for summary judgment. Specifically, plaintiff argues that the case was filed within one year of discovery of the injury. In addition, plaintiff also argues that 1) the doctrine of equitable estoppel and 2) the doctrine of fraudulent concealment bar defendants' statute of limitations argument. We disagree.

According to N.C. Gen. Stat. § 1-53(4), a two-year statute of limitations applies to "[a]ctions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2[.]" N.C. Gen. Stat. § 1-53 (2009). "[A]ny action brought for wrongful death must be

asserted in conformity with the applicable statutory provisions." *King v. Cape Fear Memorial Hospital, Inc.*, 96 N.C. App. 338, 341, 385 S.E.2d 812, 814 (1989). Furthermore, a plaintiff is required to bring a wrongful death claim within two years of the deceased's death, or the claim is barred. *Id.*

Here, Dylan was pronounced dead on 19 April 2006. On 12 April 2010, plaintiff filed suit against defendants for medical negligence, gross negligence, and punitive damages. Therefore, we conclude that plaintiff failed to file his claim within the two-year statutory period, and his claim is barred.

Plaintiff argues that the doctrines of 1) equitable estoppel and 2) fraudulent concealment save his claim from being barred by a two-year statute of limitations. Plaintiff contends that defendant Davis and defendant Houck concealed their identities as tortfeasors, because they falsely stated on the pediatric extended hour nursing flow sheets dated 14 April 2006 and 16 April 2006 that the low pressure alarm was set at "8." Plaintiff further contends that he did not discover that this information was false until he received a copy of the sheets pursuant to the December 2009 subpoena. Again, we disagree with plaintiff.

"Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007) (citation omitted). To establish the doctrine of equitable estoppel, plaintiff is required to show, among other factors, that he had a "lack of knowledge and the means of knowledge of the truth as to the facts in question[.]" *Id.* at 34, S.E.2d at 405.

Here, the extended hour nursing flow sheets in question were completed in carbon copies. The yellow copy of each sheet was left with plaintiff. Plaintiff also received a copy of the Ventilator Performance Record which indicated that the low pressure alarm was set at "4" and not "8." These two reports, when viewed together, were sufficient to indicate to plaintiff that there was a discrepancy in the reporting of the alarm settings of the ventilator. Furthermore, counsel for plaintiff was present at the 6 September 2006 testing of the ventilator. There, the ventilator technician informed everyone present that the low pressure alarm was set at "4." Again, this information

should have alerted plaintiff to the fact that the information stated on the extended hour nursing flow sheets was inaccurate. Therefore, we conclude that plaintiff did not lack knowledge of the facts in question, and he is unable to establish the doctrine of equitable estoppel.

With regards to the doctrine of fraudulent concealment, "[i]t is generally held that where there is concealment of fraud or continuing fraud, the statute of limitations does not bar a suit for relief on account of it[.]" *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 155, 143 S.E.2d 312, 318 (1965) (quotations and citations omitted). However, "where a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for purposes of the statute of limitations." *Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984).

Here, for the reasons we have previously discussed, we conclude that plaintiff, in the exercise of due care, would have learned or discovered the fraud in question. Therefore, the doctrine of fraudulent concealment did not apply to plaintiff's claim.

Finally, plaintiff argues that the trial court erred in denying plaintiff's motion for summary judgment. We disagree.

As we have previously concluded, plaintiff's claim was barred by the statute of limitations. Therefore, the trial court did not err in denying plaintiff's motion for summary judgment.

Affirmed.

Judges McGEE and HUNTER, JR., Robert N., concur.

Report per Rule 30(e).