IN THE COURT OF APPEALS OF IOWA

No. 2-518 / 11-2017
Filed October 17, 2012

ESTATE OF ANDY SAMUEL AYALA-GOMEZ, by its Personal Representatives TATIANA AYALA-GOMEZ and SALVADOR A. GOMEZ,
Plaintiffs-Appellants,

vs.

STEVEN D. SOHN, M.D.,
Defendant-Appellee.

Appeal from the Iowa District Court for Dallas County, Paul R. Huscher, Judge.

A child's estate appeals a summary judgment ruling concluding the pertinent time period for filing a medical malpractice action had expired. **AFFIRMED.**

Frederick W. James of The James Law Firm, P.C., Des Moines, and Tito Trevino of Trevino Law Office, Fort Dodge, for appellants.

Erik P. Bergeland and Steven Scharnberg of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee.

Heard by Vaitheswaran, P.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VAITHESWARAN, P.J.

A child's estate appeals a summary judgment ruling concluding a medical malpractice action was not timely filed.

I. Background Facts and Proceedings

The record reveals the following undisputed facts. *See* Iowa R. Civ. P. 1.981(3) (requiring summary judgment movant to show the absence of any genuine issue of material fact). In 2008, the parents of a one-year-old child took him to a hospital's emergency room, where he was examined by Dr. Steven Sohn. Dr. Sohn had the child sent home. The next day, the parents returned to the hospital with their child, who was unresponsive. Despite resuscitation efforts, the child died that day.

The child's estate filed a medical malpractice action against Dr. Sohn in 2011, more than three years after the child's death. The estate sought damages for the child's "funeral and burial and for his physical and mental pain and suffering sustained prior to death and for the drugs, medical and other hospital expenses incurred prior to his death."

Dr. Sohn's answer to the petition raised a statute of limitations defense. Dr. Sohn later sought summary judgment based on that defense, arguing the action was barred by the general two-year statute of limitations for medical malpractice claims set forth in section 614.1(9)(a) (2011).[1] The estate responded with several arguments, the primary one being that the action was timely under

[1] The Iowa Supreme Court has characterized a portion of this provision as a statute of repose rather than a statute of limitations. *Estate of Anderson ex rel. Herren v. Iowa Dermatology Clinic, P.L.C.*, 819 N.W.2d 408, 414 (Iowa 2012). We find it unnecessary to delve into this distinction for purposes of this appeal and will use the nomenclature used by the parties.

the specific limitations period for minors set forth in section 614.1(9)(b), referred to as the minor tolling provision. The district court concluded the general two-year limitations period was applicable. The court rejected the estate's remaining arguments. The estate appealed.

II. Analysis

Iowa Code section 614.1(9), the statute of limitations for medical malpractice actions, states:

> a. *Except as provided in paragraph "b"*, those founded on injuries to the person or wrongful death against any physician . . . 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. . . .
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> b. An action subject to paragraph "a" and brought on behalf of a minor who was under the age of eight years when the act, omission, or occurrence alleged in the action occurred shall be commenced no later than the minor's tenth birthday or as provided in paragraph "a", whichever is later.

(Emphasis added.)

The estate concedes, as it must, that it did not file its lawsuit within the two-year time frame prescribed by section 614.1(9)(a). It reiterates that the lawsuit was timely under the minor tolling provision set forth in section 614.1(9)(b).[2]

[2] As a preliminary matter, the estate argues Dr. Sohn waived his statute of limitations defense by failing to raise it in a pre-answer motion to dismiss. We are not persuaded by this contention. While Dr. Sohn could have raised the defense in that fashion, he was not required to do so. *See Matney v. Currier*, 203 N.W.2d 589, 594 (Iowa 1973) ("While the bar of the statute of limitations might have been raised otherwise, it was entirely proper for defendant to affirmatively allege it as an affirmative defense in a separate division of his answer which was a pleading responsive to the plaintiff's claim for relief.").

The district court declined to apply the minor tolling provision, reasoning the position taken by the estate "would require two amendments" to section 614.1(9)(b), indicated in italics as follows:

> b. An action subject to paragraph "a" and brought on behalf of a minor, *or the estate of a deceased minor*, who was under the age of eight years when the act, omission, or occurrence alleged in the action occurred shall be commenced no later than the minor's tenth birthday, *or*, *in the case of the estate of a deceased minor*, *not later than the date on which the deceased minor would have attained the age of ten had he or she lived*, or as provided in paragraph "a", whichever is later.

The court also stated, "Obviously, the legislature could have enacted such a statute, had it wished to do so. The fact is that the legislature did not do so, and the court is bound by the statute as it was written." We discern no error in this reasoning. *See Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005) (reviewing summary judgment for errors of law); *see also* Iowa R. Civ. P. 1.981(3) (requiring summary judgment movant to show entitlement to judgment as a matter of law).

Section 614.1(9)(b) extends the limitations period for actions "brought on behalf of a minor." As Dr. Sohn points out, "minor" is defined elsewhere in the Iowa Code as "a person who is not of full age." Iowa Code § 633.3(28); *see also id.* §§ 598.1(6) (defining minor child as "any person under legal age"); 599.1 ("The period of minority extends to the age of eighteen years, but all minors attain their majority by marriage."). Implicit in this definition is a presumption that a minor is a person who is living. In contrast, the "estate" of a minor is not a person, living or dead, but "the real and personal property of either a decedent or a ward" or a trust. *Id.* § 633.3(15). Because the "estate" of a minor is not a living child, the estate cannot avail itself of the "minor" tolling provision as it is currently

written. *See Schultze v. Landmark Hotel Corp.*, 463 N.W.2d 47, 49 (Iowa 1990) (stating we may not, "under the guise of judicial construction, add modifying words to the statute or change its terms."); *Knott v. Rawlings*, 96 N.W.2d 900, 901 (Iowa 1959) (rejecting State's argument that "a child of the age of sixteen years, or under," meant a child less than seventeen, reasoning the legislature "chose the words 'sixteen years, or under' in preference to the words 'under seventeen years' which it would have used had it intended what the State maintains it intended").[3]

Our conclusion is reinforced by language in *Christy*, an action that included loss of parental consortium claims filed by a mother as "next friend and parent" of her children. 692 N.W.2d at 699. The court there addressed a defense argument that "to include claims brought by administrators or executors [in section 614.9(1)(b)] would lead to the absurd result that there would be no statute of limitations applicable to a deceased minor's claim because the deceased minor would never have a tenth birthday so as to terminate the limitations period." *Id.* at 705 n.4. The court rejected the argument, observing that courts in other states have held "that a limitations statute such as section 614.1(9)(b) applies only to living children." *Id.*

[3] On the other hand, one commentator has noted the word "birthday" has two different definitions—it can mean either "'the anniversary of a birth. . . . [or] the day of a person's birth.'" Gretchen R. Fuhr, *Civil Procedure/Tort Law—Better Off Dead?: Minority Tolling Provision Cannot Save Deceased Child's Claim*, 31 W. New Eng. L. Rev. 491, 521 (2009) (quoting Random House Webster's College Dict. 134 (2d ed. 1997)) [hereinafter Fuhr]. This commentator suggests the more logical interpretation of the word "birthday" in minority tolling provisions is the "anniversary of one's birth" because that "is the meaning most often used in everyday conversation." *Id.* at 522. The estate cites no Iowa authority that has construed the term "birthday" in this fashion, and we decline to do so.

We also find certain out-of-state opinions persuasive.[4] *See* Fuhr, 31 W. New Eng. L. Rev. at 492 (noting the "majority of courts . . . have come to the same conclusion—a child ceases to have birthdays after he dies; therefore, the savings provision no longer applies as it would if he had survived"); *see also* 25A C.J.S. *Death* § 163 (2012) ("Minority tolling of the limitations period for a survival medical malpractice claim does not apply to the time after a minor patient's death when the patient's parent, rather than the patient, is the person entitled to bring a survival action as personal representative of the patient's estate."). In *Armijo*, 704 P.2d at 429–30, the court stated "[t]hat the statute gives a minor under age seven 'until his ninth birthday in which to file' presupposes that the child is living at the time his cause of action accrues and is potentially able to reach his ninth birthday." Similarly, in *Dachs*, 354 S.W.3d at 100, the court stated the "tragic reality of this case is that Elizabeth Dachs was stillborn and will not have an eleventh birthday." And, in *Vance*, 726 N.W.2d at 82, the court stated it was

> not persuaded that "birthday," as used in the statute, expresses a clear legislative intent to provide a cutoff for the assertion of legal rights based on the "anniversary" of a deceased minor's birth. Rather § 5851(7) clearly references the happening of specific birthdays in the phrases "the person has not reached his or her *eighth birthday*" and "*tenth birthday*."

That said, one of the estate's arguments gives us pause. The argument goes as follows: section 614.1(9)(b) refers to actions "on behalf of a minor"; the minor child would have required a representative to raise his cause of action

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[4] Those opinions include: *Dachs v. Hendrix*, 354 S.W.3d 95, 100 (Ark. 2009); *Vance v. Henry Ford Health System*, 726 N.W.2d 78, 82–83 (Mich. Ct. App. 2006); *Runstrom v. Allen*, 191 P.3d 410, 413 (Mont. 2008); and *Regents of University of New Mexico v. Armijo*, 704 P.2d 428, 430 (N.M. 1985).

whether he was dead or alive; the estate belongs to the minor and is the representative of the minor, whether characterized as "the estate" or as "next friend"; the estate's lawsuit only seeks relief for injuries personal to the minor; and because the estate is simply "standing in the shoes" of the minor, it should be able to avail itself of the minor tolling provision.

We agree with the estate that the child's cause of action had to be brought by a representative, whether the child was living or dead. *See* Iowa R. Civ. P. 1.210 (stating action of minor to be brought by conservator, guardian, or next friend); *see also* Iowa Code §§ 611.20 ("All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same."); 611.22 (stating action may be brought "by or against the legal representatives or successors in interest of the deceased"); *Troester v*. *Sisters of Mercy Health Corp*., 328 N.W.2d 308, 312 (Iowa 1982) (stating section 611.20 "keeps alive for the benefit of the decedent's estate the cause of action which the deceased prior to his death could have brought had he survived the injury, with recovery enlarged to include the wrongful death"). We also agree the estate was acting as a representative of the minor and, if there was an error in bringing the lawsuit in the estate's name rather than in the name of the parents as next friends of the child, that error could be overlooked. *See Christy*, 692 N.W.2d at 704 n.3 (noting minor's loss of parental consortium claim had to be brought by the administrator or executor of the parent's estate rather than the surviving parent as "next friend and parent" but analyzing claims as if they had been brought by proper party); *accord Anderson v*. *Bristol*, *Inc*., 847 F. Supp. 2d. 1128, 1134–35 (S.D. Iowa 2012) (stating plaintiff's error "in originally naming

Anderson's 'Estate' as plaintiff, rather than herself," was understandable, did not cause any discernible prejudice to the defendants, and was promptly corrected by a timely amendment, which allowed the action to be "'treated as if brought in the name of the real party in interest'" (citation omitted)). Finally, we agree the petition only raises claims personal to the child.

However, our agreement on these points does not lead to a conclusion that the estate acquired the right to invoke the minor tolling provision. That is because section 614.1(9)(b) only tolls the statute of limitations as to living minors. In other words, the estate's argument, while facially appealing, brings us full-circle to where we started: the child's representative can bring an action to recover damages for injuries to the child but, if the child is not living, the representative cannot take advantage of section 614.1(9)(b) to extend the time for filing the lawsuit because the disability of minority is terminated by the child's death. *See In re Estate of Hoenig*, 298 N.W. 887, 891 (Iowa 1941) ("That . . . a disability [of minority] is terminated by the death of the disabled person has been held by us."); *Gibbs v*. *Sawyer*, 48 Iowa 443, 444 (1878) ("[W]e think the disability must be held to have been removed by the death of the minor."); 54 Am. Jur. 2d *Limitation of Actions* § 174 (2010) ("[A] minor's 'disability' terminates at his or her death."); *see also Runstrom*, 191 P.3d at 413 ("Based on the plain language of § 27-2-401(1), MCA, we conclude minority tolling does not apply to the time after [the minor's] death, when [the father]—not [the minor]—was the "person entitled to bring the survival action."); *Armijo*, 704 P.2d at 430 ("When the term of minority ends either by the death of the minor or by the minor attaining the specified age,

so too must end the applicability of the minority savings clause . . . and the statute commences to run at that time.").

In reaching this conclusion, we have considered the seeming anomaly of affording a non-living minor less time to sue than a living minor. While the result appears harsh, the unvarnished reality is as the district court stated: "No passage of time will increase or diminish the effects of negligent medical treatment given to a person who died as a result." *See Schultze*, 463 N.W.2d at 51 (finding no unjust unfairness in refusing to invoke discovery rule to extend statute of limitations for wrongful death actions "because all the information from which the cause of death could be ascertained was available to plaintiff at the time of his wife's death"). At the end of the day, equitable arguments for applying the minor tolling provision, as appealing as they are, hold little sway in the face of "the priorities that the legislature has set forth in an express statutory provision." *Id.*

We conclude the district court did not err in declining to apply the minor tolling provision set forth in section 614.9(1)(b).

III. Other Arguments

The estate next raises the following constitutional challenge:

> To apply a general medical malpractice statute of limitations, Iowa Code § 614.1(9)(a), to the malpractice claims of deceased minors rather than applying the minority tolling statute, Iowa Code § 614.1(9)(b), would violate the equal protection and due process clauses of the federal and statute constitutions, as it would deny deceased minors' representatives an equal opportunity under the law to pursue an action.

We examine these equal protection and due process claims together and apply a rational basis test to this non-fundamental right. *See King v. State*, 818 N.W.2d 1, 23, 27–28 (Iowa 2012). As noted, the legislature reasonably could have

determined that death fixes a number of issues that would otherwise remain outstanding. For that reason, we agree with Dr. Sohn that "the equal application of the two-year wrongful death statute to all wrongful death cases is entirely consistent and rational in light of the goals of Iowa Code § 614.1(9)."

Because the statute was constitutionally applied, the estate's facial challenge must also fail. *See War Eagle Village Apts*. *v*. *Plummer*, 775 N.W.2d 714, 722 (Iowa 2009) ("'A facial challenge asserts that the statute is void for every purpose and cannot be constitutionally applied to any set of facts.'" (citation omitted)); *State v*. *Dudley*, 766 N.W.2d 606, 626 (Iowa 2009) (noting that if a statute is constitutional as applied to the defendant, the defendant lacks standing to make a facial challenge unless a recognized exception exists).

The estate finally argues that if the minority tolling provision of section 614.1(9)(b) does not apply, then no statute of limitations has yet been enacted to address the malpractice claims of deceased minors. We disagree. Section 614.1(9)(a) clearly governs, as this is a cause of action "founded on . . . wrongful death against [a] physician . . . arising out of patient care."

We affirm the district court's summary judgment ruling in favor of Dr. Sohn.

AFFIRMED.