IN THE COURT OF APPEALS OF IOWA

No. 3-219 / 12-1134
Filed May 30, 2013

**MARTIN F. HAMMEN, Individually,
SIMONE P. SHARP HAMMEN, Individually,
and MARTIN F. HAMMEN and SIMONE P.
SHARP HAMMEN, Together as Next Best
Friends and Natural Parents of BO F.
HAMMEN, a Minor Child, Deceased,**
Plaintiffs-Appellants/Cross-Appellees,

vs.

**LYNETTE I. ILES, M.D., and
WASHINGTON COUNTY HOSPITAL
AND CLINICS,**
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Washington County, Myron L. Gookin, Judge.

Interlocutory appeal from the trial court's grant of partial summary judgment in favor of defendants in a wrongful death suit and denial of summary judgment on plaintiffs' consortium claim. **AFFIRMED ON BOTH APPEALS.**

Laura Lemos and John C. Wagner of John C. Wagner Law Offices, P.C., Amana, for appellants.

Mikkie Schiltz and Robert Waterman of Lane & Waterman, L.L.P., Davenport, for appellee Iles.

Nancy Penner and Constance Alt of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellee hospital.

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Martin and Simone Hammen, parents of Bo Hammen, who died in June 2010, appeal from the trial court's grant of summary judgment in favor of the defendant doctor and hospital in their medical malpractice suit. They contend the court erred in concluding the statute of limitations barred amending their petition to substitute Bo's estate as plaintiff and barred claims on Bo's behalf. On cross appeal, the doctor and hospital contend the court erred in denying their motion for summary judgment on the parents' loss of consortium claims. We affirm on appeal and on cross-appeal.

I. Background Facts and Proceedings

Bo Hammen was born on September 16, 2006. Because of complications during birth, Bo suffered severe injuries. He died on June 10, 2009, as a result of those injuries. On June 8, 2011, the parents individually and as next friends filed suit against Lynette I. Iles, M.D. and Washington County Hospital and Clinics alleging medical malpractice, vicarious liability on the part of the hospital for the actions of the doctors, breach of contract, and loss of consortium.

In January 2012, the defendants filed a joint motion for summary judgment alleging (1) Bo's claims belonged to his estate and no estate had been opened to pursue his claims within the applicable limitation period and (2) the breach of contract claim and Iowa Rule of Civil Procedure 1.206 loss of consortium claims were time barred. On March 22, 2012, the motion for summary judgment came on for hearing. That same day, the parents opened an estate for Bo and moved to amend their petition to substitute Bo's estate as a plaintiff for the parents as

next friends and to add a claim of fraudulent concealment. The court held a hearing on the parents' motion to amend on May 10.

On May 18, the court issued its ruling on all the motions. The court concluded the parents lacked standing to bring the wrongful death claims on Bo's behalf. *See Troester v. Sisters of Mercy Health Corp.*, 328 N.W.2d 308, 312 (Iowa 1982) (noting under Iowa Code section 611.22 only the legal representative of a decedent's estate has authority to bring the action). The court denied their motion to substitute the administrator of Bo's estate, concluding there had been no one with standing to file the suit when the statute of limitations ran on the claims because Bo's estate was not opened until months later. The court also denied the parents' motion to add a claim for fraudulent concealment.

On the parents' rule 1.206 loss of consortium claims, the court noted the language of the rule and Iowa Code section 613.15A (2011), which both provide parents can sue for damages "resulting from injury to or death of a minor child," contains the disjunctive "or," giving parents the option to sue for injuries to a child while living or to sue for wrongful death. The court concluded a claim for wrongful death does not accrue until the child's death, so the applicable two-year limitation period begins to run at the child's death. *See* Iowa Code § 614.1(2). Therefore, the court denied the defendants' motion for summary judgment, finding the parents' loss of consortium claims were timely filed.

The parents appealed. The defendants filed an application for interlocutory appeal. The parents then filed an application for interlocutory appeal. The supreme court granted both applications.

II. Scope and Standards of Review

We review summary judgment rulings for correction of errors at law. *McCormick v. Nikkel & Assocs.*, 819 N.W.2d 368, 371 (Iowa 2012). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3). "When reviewing a court's decision to grant summary judgment, 'we examine the record in the light most favorable to the nonmoving party and we draw all legitimate inferences the evidence bears in order to establish the existence of questions of fact.'" *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012) (citation omitted).

We afford trial courts considerable discretion in ruling on motions for leave to amend pleadings. *Davis v. Ottumwa YMCA*, 438 N.W.2d 10, 14 (Iowa 1989). Consequently, we will reverse only if the record indicates the court clearly abused its discretion. *Id.*; *Ellwood v. Mid States Commodities, Inc.*, 404 N.W.2d 174, 179 (Iowa 1987). We will find an abuse of discretion only when the court exercises its discretion to a clearly unreasonable extent or upon clearly untenable grounds. *McElroy v. State*, 637 N.W.2d 488, 495 (Iowa 2001); *Davis*, 438 N.W.2d at 14.

III. Merits

Parents' appeal

A. Application of Statute of Limitations to Motion for Leave to Amend and to Bo's Claims. The parents contend the trial court erred in denying their motion for leave to amend the petition to substitute Bo's estate as a plaintiff and in

determining the applicable statute of limitations on his claims. Section 614.9 addresses medical malpractice actions:

> a. Except as provided in paragraph "b", those founded on injuries to the person or wrongful death against any physician and surgeon, 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.
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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 parents assert Iowa Code section 614.9(b), rather than (a) applies because Bo was under the age of eight when he died, therefore, they have until the tenth anniversary of his birth to file suit. In support of this reading, they cite the language in section 611.22: "Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if the deceased had survived." They argue, "If Bo had lived, then the statute of limitation on a medical malpractice claim on his behalf would not have expired until September 13, 2016. It would 'accrue' at birth and run for ten years." They also argue because paragraph "b" expressly includes actions "subject to paragraph 'a'," which includes both medical

malpractice and wrongful death actions, paragraph "b" must toll the statute also for wrongful death actions until the child would have reached the age of ten.

The trial court concluded section 614.9(b) referred to living minors. We agree. Section 614.1(9)(b) extends the limitations period for actions "brought on behalf of a minor." Implicit in the use of the term "minor" elsewhere in the code, is the fact the minor is a living person. *See, e.g.*, Iowa Code §§ 633.3(28) ("a person who is not of full age"); 598.1(6) ("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.").

Our conclusion is supported by *Christy v. Miulli*, 692 N.W.2d 694, 705 n.4 (Iowa 2005) (noting courts in other states have held "that a limitations statute such as section 614.1(9)(b) applies only to living children"); *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 . . . ."). Although advocating for a different result, a recent law review article analyzed a number of cases from various jurisdictions, all coming to the same conclusion when construing similar minor tolling statutes. 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, 502-520 (2009). We conclude the district court correctly understood Iowa Code section 614.1(9)(b) as tolling the statute of limitations only so long as the minor is alive. Consequently, the two-year limitation period in section 614.1(9)(a) applies to Bo's claims.

The parents sought to amend the pleading to substitute Bo's estate as a plaintiff. Bo died on June 10, 2009. The lawsuit was filed on June 8, 2011, two days short of two years after Bo's death. However, Bo's estate was not opened and an administrator appointed until March 22, 2012. The parents argue the requested substitution should relate back to the filing of the suit. The trial court correctly concluded Iowa law does not support their position. At the time the parents filed the suit, they lacked the capacity to sue on Bo's behalf. The right to maintain a wrongful death suit and recover wrongful death damages is entirely statutory and is vested exclusively in the estate representative. *Troester*, 328 N.W.2d at 312. There was no estate in existence when the statute of limitations expired, so there was no one with the capacity to make any claims on Bo's behalf, and the suit was defective. *See id.* "Therefore, this action did not toll the statute of limitations." *See Estate of Dyer v. Krug*, 533 N.W.2d 221, 224 (Iowa 1995). The relation-back doctrine does not apply to save this suit filed by persons without the capacity to sue on Bo's behalf. *See id.* (affirming the dismissal of a wrongful death action filed by a plaintiff who was not the estate's personal representative); *see also In re Estate of Voss*, 553 N.W.2d 878, 881-82 (Iowa 1996) (noting appointment as administrator after statute of limitations expired will not relate back). The trial court correctly denied the parents' motion for leave to amend to substitute the administrator of Bo's estate as a plaintiff.

B. Motion for Leave to Amend to Add Fraudulent Concealment Claim. The parents also asked to amend the petition to claim the defendants' fraudulent concealment of information was an excuse for missing the deadline for filing suit imposed by the statute of limitations. They contend the court erred in holding the

statute of limitations barred amending the petition to add a fraudulent concealment claim.

The trial court noted a fraudulent concealment claim can overcome a statute of limitations defense, *see Christy*, 692 N.W.2d at 700, but denied the motion for leave to amend because the petition was timely filed. The parents had argued they didn't discover the full extent of the malpractice until the doctor's deposition, taken months after the suit was filed. The trial court stated it was "at a loss to understand how there is any claim of fraudulent concealment that caused the Plaintiffs to miss the statute of limitations deadline when, in reality, they did not miss the deadline. The Plaintiffs simply were not the proper parties to file the claim."

We conclude the trial court did not abuse its discretion in denying the request to add fraudulent concealment as a claim. The facts in the record do not support it, and there is no basis for claiming the defendants' fraudulent concealment of facts prevented the parents from filing suit within the applicable statute of limitations.

C. Breach of Contract Claim. The parents contend the trial court erred in granting summary judgment on the breach of contract claim. The trial court concluded Bo's estate had only a claim for wrongful death and the parents' loss of consortium claims did not include breach of contract under rule 1.206 or section 613.15A.

Assuming for our analysis a contract for care existed, the contract was between the mother and the doctor and hospital. Therefore, Bo had no contractual claim. The parents argue because the statute of limitations in section

614.1(9) applies "to the other claims" in a medical malpractice case, breach of contract "is an additional allowable claim" in a medical malpractice case. *See Frideres v. Schiltz*, 540 N.W.2d 261, 268 (Iowa 1995) (answering the certified question whether the new statute of limitations law, section 614.1(8A), applied retroactively).

The *Frideres* case does not address what claims are available in a medical malpractice case. It answered certified questions from a federal district court (1) whether the statute of limitations for actions related to sexual abuse, which was enacted after the events giving rise to the claim, applied retroactively, and (2) what was the scope of the statute. *Id.* at 267-68. In considering the scope of the statutory language "action for damages for injury suffered as a result of sexual abuse which occurred when the injured person was a child," the court concluded the definitions in the criminal code applied to the terms "sexual abuse" and "child." The court also noted its interpretation of the meaning of "arising out of patient care" in section 614.1(9) bore on the scope of "as a result of sexual abuse" in section 614.1(8A). *Id.* at 268 (citing *Langner v. Simpson*, 533 N.W.2d 511, 516 (Iowa 1995)). In *Langner*, the issue was which statute of limitations applied to all the claims raised by the patient—the general statute of limitation in tort cases or the medical malpractice statute of limitations. *Id.* The court determined the statutory language "those founded on injuries to the person" and "arising out of patient care" meant the malpractice statute of limitations applied to all the plaintiff's claims, noting "[a]ll the claims . . . arose out of injuries allegedly suffered while Kathy was under the care of Simpson and the hospital." *Id.* Because the petition in *Langner* included breach of contract among the six claims

raised against Doctor Simpson, *see id.*, the parents in this case argue their breach of contract claims against the doctor and hospital fall within the statute.

Any allowable breach of contract claim in this case relates only to injuries to the mother arising from her care. *See id.* As we noted above, Bo had no contract with the doctor and hospital, so had no breach of contract claims. The injuries to the mother, if any, occurred during her care; they are not based on injuries to Bo. The mother's breach of contract claim is not allowable as part of her rule 1.206 loss of consortium claims relating to Bo's death. Applying the statute of limitations in section 614.1(9), the time began to run when the contract was performed in September 2006. The statute of limitations had already expired nearly three years before the breach of contract claim was filed. The trial court did not abuse its discretion in granting summary judgment on this claim.

Cross Appeal

The defendants cross-appeal from the trial court's denial of their motion for summary judgment on the parents' loss of consortium claims, contending the court erred in holding two different statute of limitations periods applied to the parents' rule 1.206 claim. The trial court considered the disjunctive language in rule 1.206 and section 613.15A, "resulting from injury to *or* death of a minor child" (emphasis added), and concluded the parents had the option to sue for injuries to a living child *or* to sue for wrongful death. The court then concluded "a loss of consortium claim by the parents associated with a claimed wrongful death of the minor child does not accrue for purposes of Iowa Code section 614.1(2) until the child dies." The court concluded summary judgment must be denied because the claim was filed within two years of Bo's death.

The defendants argue the court erred because "once the statute of limitations starts, nothing stops it unless tolled by statute" and the court's ruling "violates the rule against splitting a cause of action." We address each argument in turn.

A. Running of the Statute. Iowa Code section 614.1(2) applies to the parents' claim. It encompasses "[i]njuries to person or reputation—relative rights—statute penalty." Iowa Code § 614.1(2). It sets a two-year limitation on claims "founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort." *Id.* The defendants contend the injuries to relative rights accrued when the parents had "a right to institute and maintain a suit, [which was when they were] entitled to a legal remedy." *See Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461-63 (Iowa 2008). We agree with the trial court's conclusion the parents could not sue for loss of consortium based on wrongful death until the death occurred. Consequently, their "right to institute and maintain a suit" based on injuries to their rights from Bo's death accrued at his death. The two-year statute of limitations had not expired before the parents filed their rule 1.206 loss of consortium claims.

B. Splitting a Cause of Action. The defendants also argue the court's ruling violates the rule against splitting a cause of action. They cite to *LeBeau v. Dimig*, 446 N.W.2d 800, 802-03 (Iowa 1989), for the proposition two or more limitation periods do not apply to the same incident. In *LeBeau*, the plaintiff suffered injuries in a vehicle accident and developed epilepsy several years later. 446 N.W.2d at 801. The trial court denied summary judgment, holding the issue of when the epilepsy was or should have been discovered was a factual issue.

Id. We reversed, holding the two-year period began with the original injuries; the supreme court agreed. *Id.* The supreme court examined the rationale for statutes of limitation and their application to cases where one incident causes injuries, and later there is a manifestation or discovery of more serious injuries. *Id.* at 801-803. The court held there were no disputed facts "as to the knowledge of the plaintiff of the necessary elements for bringing her cause of action within the two-year statute of limitations, based on her initial injuries," the discovery rule, therefore, did not apply. *Id.* at 803.

The supreme court cited to *LeBeau* in its analysis in *Rathje*. *Rathje*, 745 N.W.2d at 461. After a lengthy discussion of the development of the discovery rule and the statute of limitations in medical malpractice actions, *see id.* at 447-61, the court concluded:

> We think it is 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. Moreover, it is equally clear this twin-faceted triggering event must at least be identified by sufficient facts to put a reasonably diligent plaintiff on notice to investigate.
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> This approach rejects the claim by the Rathjes that "the injury" that will trigger the statue can be separated into different degrees of harm or different categories of harm that separately give rise to different triggering dates. The statute does not work in that manner. . . .
>
> The statute begins to run only when the injured party's actual or imputed knowledge of the injury and its cause reasonably suggest an investigation is warranted.

Id. at 461-62. The defendants assert the parents knew of "the injury" to their right to consortium shortly after Bo's birth, so the two-year statute of limitations expired before the parents brought their claims. The cases they cite, however, do not address the language in rule 1.206 and section 613.15A specifically

authorizing damage claims based on either of two different causes—injury to a minor child *or* death of a minor child. We conclude the trial court correctly determined the applicable two-year limitation period began to run on the date of Bo's death. Consequently, the court did not abuse its discretion in denying the defendant's motion for summary judgment on the parents' loss of consortium claims.

We affirm on appeal and on cross appeal.

AFFIRMED ON BOTH APPEALS.