IN THE COURT OF APPEALS OF IOWA

No. 8-798 / 08-0579
Filed October 29, 2008

CYNTHIA KUETER,
Plaintiff-Appellant,

vs.

LEONARD MERRICK, Executor of the ESTATE OF SHIRLEY VOSBERG and AUTO-OWNERS INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Plaintiff appeals the district court's summary judgment ruling finding (1) that her amended petition did not relate back to the original petition under Iowa Rule of Civil Procedure 1.402(5) and (2) that the doctrine of equitable estoppel was not applicable to bar operation of the statute of limitations defense. **AFFIRMED.**

James Roth, Dubuque, for appellant.

Douglas Henry, Dubuque for appellee Leonard Merrick.

Roger Lathrop, Davenport, for appellee Auto-Owners Insurance.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

Personal injury lawsuits must be filed within two years of the event claimed to have caused the injury. Iowa Code § 614.1(2) (2007). Cynthia Kueter was involved in a car accident with Shirley Vosberg on July 15, 2005. Her deadline to sue, therefore, was July 15, 2007.

Kueter filed a personal injury lawsuit against Vosberg on July 10, 2007. She was unaware that Vosberg died on December 1, 2006. *See Jacobson v. Union Story Trust & Sav. Bank*, 338 N.W.2d 161, 163 (Iowa 1983) ("A decedent does not have the capacity to be sued."). On learning of the death, she amended her petition to substitute Vosberg's son, Leonard Merrick, who was the executor of Vosberg's estate. The amended petition was not filed until August 9, 2007.

Merrick moved for summary judgment on the ground that the statute of limitations had expired. *See id.* (stating the statute of limitations is not tolled by a person's death unless otherwise provided by statute). The district court granted the motion, concluding the time to sue expired on July 15, 2007, and Kueter failed to establish that the amended petition filed after that date related back to the timely-filed original petition. This appeal followed.

On appeal, Kueter maintains: (1) she satisfied the requirements for relation back prescribed by Iowa Rule of Civil Procedure 1.402(5) and (2) the doctrine of equitable estoppel precluded Merrick from asserting a statute of limitations defense. We will uphold a grant of summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996).

I. Iowa Rule of Civil Procedure 1.402(5) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The rule contains several requirements, only one of which is at issue here: whether Merrick received notice of the lawsuit's filing within the limitations period so he was not prejudiced in maintaining a defense.

It is undisputed that Merrick received no notice of Kueter's lawsuit until he was served with the amended petition on August 13, 2007. It is also undisputed that the estate's attorney did not receive notice of the lawsuit within the limitations period. *See Stevens v. People's Sav. Bank*, 185 Iowa 619, 624, 171 N.W. 130, 132 (1919) ("The relations of a litigant to his attorneys in the litigation are so close and active and the responsibility of an attorney to his client in such a case is so definite and quasi official in its nature that a notice to the attorney should be deemed as the practical equivalent of actual notice to the client."). Given these undisputed facts, Kueter relies on conceded contacts within the limitations period between her attorney and Vosberg's car insurer. Specifically, Kueter's attorney notified the insurer of Kueter's claim, mentioned that "appropriate legal action" would be taken if he did not hear from the insurer, and corresponded with the insurer about Kueter's medical expenses and Vosberg's

policy limits. These contacts were not sufficient as a matter of law to establish notice to Merrick. *See Alvarez v. Meadow Lane Mall Ltd. P'ship*, 560 N.W.2d 588, 592 (Iowa 1997), *superseded by rule on other grounds*, Iowa R. Civ. P. 1.302(5), *as recognized in Dickens v. Associated Anesthesiologists, P.C.*, 709 N.W.2d 122, 127 (Iowa 2006) ("Notice of intention to bring suit is in no way tantamount to notice of its filing. Notice to an insurer is not notice to its insured." (citations omitted)); *Jacobson*, 338 N.W.2d at 164 (stating notice to insurance company concerning possibility of suit was not tantamount to notice to the executor bank that a suit had been filed); *Butler v. Woodbury County*, 547 N.W.2d 17, 19 (Iowa Ct. App. 1996) ("We are unable to conclude the threat of litigation made in an effort to settle a dispute satisfies the requirement of 'notice of the institution of the action' under [rule 1.402(5)].").

We recognize that Kueter's attorney notified the insurer of her petition on the day it was filed, which was within the limitations period. However, the summary judgment record contains no indication that the insurer had any direct contact with Merrick about the lawsuit. Indeed, the insurer's representative stated in a deposition that the insurer did not communicate with Merrick. On this record, the district court did not err in concluding the contacts between Kueter's attorney and the insurer did not amount to notice of the lawsuit to Merrick within the limitations period. Because the notice requirement was not satisfied, we need not address the remaining requirements of rule 1.402(5).

II. Kueter maintains "[e]quity requires that the defendant be estopped by benefiting from the mistake concerning the identity of the proper party."

Equitable estoppel prevents a defendant from asserting a statute of limitations defense based on the defendant's agreement, representation, or conduct. *Christy v. Miulli*, 692 N.W.2d 694, 700 (Iowa 2005). "There must be conduct amounting to false representation or concealment, and a party relying thereon must be thereby misled into doing or failing to do something he would not otherwise have done or omitted." *Id.* (quoting *DeWall v. Prentice*, 224 N.W.2d 428, 430 (Iowa 1974)).

It is undisputed that Vosberg's insurer did not tell Kueter's attorney that Vosberg was alive after December 1, 2006. Although the insurer also did not tell Kueter's attorney that Vosberg died, Kueter has cited no authority that suggests the insurer or Merrick had an affirmative duty to disclose the death of Vosberg to Kueter. Additionally, this non-disclosure could not be attributed to Merrick because, as noted, the insurer had no direct contact with him.

We conclude the district court did not err in granting summary judgment in favor of Merrick.

AFFIRMED.