ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Monte L. Hoffner and Kris Hoffner, Plaintiffs/Appellants,	)	
vs.	)	Supreme Court No. 20020208
George M. Johnson, M.D. and Fargo Clinic/MeritCare, Defendants/Appellees.	)	District Court No. 02-C-0026

APPEAL FROM THE DISTRICT COURT'S MEMORANDUM ON MOTIONS TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
CASS COUNTY CASE NO. 02-C-0026
HONORABLE LESTER KETTERLING
DISTRICT JUDGE

REPLY BRIEF

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I. INTRODUCTION

On appeal from a summary judgment, the evidence is viewed in a light most favorable to the party against whom the summary judgment was granted. Adams v. Canterra Petroleum, Inc., 439 N.W.2d 540 (N.D.1989). Using that standard, Appellants' claim was brought within two years of when it accrued and therefore the claim should be allowed to proceed. In the alternative, the statute terminating any claim not brought with six years of the act or omission of alleged malpractice is an unconstitutional statute of repose. Without waiving or conceding any of its previous arguments, Appellants submit the following reply.

II. ARGUMENT

1. CAUSE OF ACTION ACCRUED IN DECEMBER, 1999.

It is Appellants' position that their claim should be allowed to proceed because it was commenced within two years of when it accrued. See Section 28-01-18(3), N.D.C.C. Monte Hoffner's cause of action did not accrue until he had an injury. In his case, the injury did not manifest itself until Monte Hoffner began having flu-like symptoms and losing weight in December, 1999. Prior to that date he had not experienced any pain nor did he have any reason to see a doctor about a disease for which he was told he no longer had. Once he began experiencing symptoms, he underwent testing in Devils Lake and was told that he had diabetes. Then, and only then, did he have an ability to bring a claim.

In order for the claim to be barred by the six year outer limit, it must be for a non-

discovery. In Anderson v. Shook, 333 N.W.2d 708 (N.D. 1983), the court interpreted Section 28-01-18(3), N.D.C.C., to extend the limitation of actions against a physician up to six years from the act or omissions of alleged malpractice "by a non-discovery thereof. . ." A non-discovery assumes there must be something to discover. In Monte Hoffner's case, he did not have an injury until December, 1999, when he began losing weight and having flu-like symptoms. Prior to that time, there was nothing to discover. Accordingly, the six year outer limit is not applicable to this cause of action.

Appellees argue that statute of limitations "inherently involve a balancing of interests." [Appellees' Brief at page 7.] The Appellees quote this Court's decision in Anderson v. Shook, 333 N.W.2d 708 (N.D. 1983):

> On the one hand, parties injured by the action of others must be given an opportunity to seek relief in the courts. On the other hand, potential defendants are entitled to eventual repose. The intended effect of statutes of limitation is to stimulate activity and punish neglect. Anderson, supra, at 712.

Unless the District Court is reversed, then the Hoffners will definitely be denied their opportunity to seek relief. They will end up being punished, but not for neglect. They will be punished for not bringing a claim which would have been impossible to commence before December, 1999. Such a result is unconscionable.

2. THE SIX YEAR MAXIMUM STATUTE OF LIMITATIONS PROVISION IS A STATUTE OF REPOSE, WHICH VIOLATES THE EQUAL PROTECTION CLAUSE (Art. 1, Sec. 21) AND THE "OPEN COURTS" PROVISION (Art. 1, Sec. 9).

If the Court agrees that Section 28-01-18(3), N.D.C.C., terminates this claim, then it is Appellants' position that this is an unconstitutional statute of repose. Contrary to Appellees' argument, the North Dakota Medical Malpractice statute is both a statute of

limitation and a statute of repose. The first part of the statute limits the time when an action can be brought. That limitation is two years. The two years, however, begins to run when a plaintiff knows, or with reasonable diligence should know, of injury, its cause, and defendant's possible negligence. Wheeler v. Schmid Laboratories, Inc., 451 N.W. 2d 133 (N.D. 1990). The statute goes on to state that no action shall be brought more than six years after "the act or omission of alleged malpractice by a non-discovery thereof...." Section 28-01-18(3), N.D.C.C. This part of the statute is a "statute of repose." A statute of repose period begins to run from the occurrence of some event other than the event of an injury that gives rise to a cause of action and, therefore, bars a cause of action before the injury occurs. Hanson v. Williams County, 389 N.W.2d 319, 321 (N.D. 1986) cited by Appellees at p. 13. In other words, a statute of repose cuts off a right of action, regardless of whether a cause of action even exists at the time.

In the instant case, Appellees are using the second part of the statute to extinguish Monte Hoffner's claim before it even accrued. According to Appellees, Monte Hoffner's claim was extinguished on or about May 28, 1998 (six years after the defendant wrote the letter) and at least one year before he had an injury, knew its cause and the defendant's possible negligence. It wasn't until December, 1999, when Monte began losing weight and experiencing other symptoms that he went to Devils Lake Clinic and was told that he still had diabetes. Although his cause of action had not accrued before the six year "outer limit" provided by the statute, the defendants now argue he has no claim.

Appellant has already cited the cases of Hanson and Dickie v. Farmers Union Oil Co., 2000 ND 111, 611 N.W.2d 168 (N.D. 2000) in which this Court found the products liability statute of repose to be unconstitutional. For all the same reasons, Appellant

urges this Court to find the medical malpractice statute of repose to be unconstitutional. In addition to the rationale of Hanson and Dickie, the Supreme Court of Washington found medical malpractice statutes of repose to be unconstitutional. DeYoung v. Providence Medical Center, 960 P.2d 919, 926 (Wash. 1998) ("We hold the eight year statute of repose in RCW 4.16.350(3) violates the privileges and immunities clause of the state constitution."). In Martin v. Richey, 711 N.E.2d 1273 (Ind.1999), the Supreme Court of Indiana ruled on the precise issue before this court. In Indiana, the applicable statute essentially provides medical malpractice claims must be filed within two years of the date of the alleged act, omission or neglect. Indiana Code Section 34-18-7-1(b). The Indiana Supreme Court found the statute unconstitutional as it applied to the plaintiff and stated:

> We find the statute of limitations as applied to plaintiff in this case is unconstitutional under Section 23 because it is not "uniformly applicable" to all medical malpractice victims within the meaning of *Collins v. Day*, 644 N.E.2d 72 (Ind.1994). Simply put, the statute precludes Melody Martin from pursuing a claim against her doctor because she has a disease which has a long latency period and which may not manifest significant pain or symptoms until several years after the asserted malpractice. The statute of limitations is also unconstitutional under Section 12 because it requires plaintiff to file a claim before she is able to discover the alleged malpractice and her resulting injury, and, therefore, it imposes an impossible condition on her access to the courts and pursuit of her tort remedy. Martin, supra, at 1279.

Monte Hoffner was in the same position as Melody Martin. He is in the small class of medical malpractice plaintiffs that have a disease with a long latency period which did not manifest significant pain or symptoms until seven years after he was told by the defendant he no longer had the disease. If the Appellees are correct, then Monte Hoffner was required to commence a lawsuit before he had an injury. Such a claim would have been dismissed for failure to state a claim. Monte Hoffner and his family are

now in the position where they could not have brought a claim before the six year "outer limit" of the statute, but are barred from bringing the claim now. This impossible dilemma unconstitutionally denies them access to the courts. It also denies them equal protection under the law because this provision of the medical malpractice statute arbitrarily denies relief to a small class of adult medical malpractice plaintiffs. such as Monte Hoffner, who do not have an injury during six years period after the alleged negligent act or omission.

III. CONCLUSION

This lawsuit, having been commenced within two years of when the cause of action accrued, must be allowed to go forward. In the alternative, the Court must find that the six year medical malpractice statute of repose unconstitutionally denies this plaintiff equal protection under the law and open access to the courts. Accordingly, the District Court's Order granting summary judgment must be reversed.

Dated this 30th day of October, 2002.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was on the 30th day of October, 2002, mailed to the following:

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