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Torts--Action in Fraud against Physician

Michael Honohan

Recent Decisions

TORTS — ACTION IN FRAUD AGAINST PHYSICIAN

The plaintiff underwent surgery for the removal of diseased ovaries and fallopian tubes. Two or three days after the operation, plaintiff complained to the doctor that she was still experiencing the same pain and swelling in her abdomen that had troubled her before the operation. The doctor told the woman that he had removed her uterus, tubes, and ovaries, and that her pain must be coming from some other source. The physician continued to treat the patient for approximately thirteen months, during which time he again assured her on several occasions that he had removed the organs. Eventually plaintiff's condition grew critical, whereupon she consulted another physician, who advised an exploratory abdominal operation. The operation was performed and a diseased left ovary, which had ruptured and formed a cyst "as large as a basketball," was discovered and removed. Plaintiff brought an action against the doctor for fraud and deceit, to which defendant demurred on the grounds that plaintiff had failed to state a cause of action and that the action was barred by the applicable statute of limitations. The trial court sustained the demurrer but, on appeal, the Oklahoma Supreme Court overruled the lower court's decision and remanded the case for trial.[1]

In its opinion, the supreme court enumerated the essential elements of fraud in Oklahoma,[2] and concluded that the facts as alleged in this case would support an action in fraud and deceit. The court went on to declare that the action was not barred by the applicable statute of limitations because the suit was commenced within the statutory period of two years after the fraud was discovered, although more than two years after the operation had been performed.

The application of the theory of deceit in this case represents a comparatively recent development in the evolution of this doctrine. Traditionally, the action of deceit was confined to a great extent to the invasion of interests of a financial or commercial character.[3] However, this can be attributed to the historical development of the action,[4] rather than to any inherent limitation in its nature. That this is true can be discerned from the recognition long given in two

1. Nutt v. Carson, 340 P. 2d 260 (Okla. 1959).

2. *Id.* at 263. The essentials of fraud as stated by the court are: (a) a material representation by defendant, (b) which is false, (c) and which defendant knew was false when he made it, or which was made recklessly without knowledge of the truth, (d) that defendant intended that plaintiff rely on it, (e) that plaintiff did rely on it, (f) that he thereby suffered injury.

3. See PROSSER, TORTS 521 (2d ed. 1955). See also RESTATEMENT, TORTS, Scope Note to Chapter 22, preceding § 525.

4. STREET, FOUNDATIONS OF LEGAL LIABILITY, 375-76 (1906).

jurisdictions to actions for deceit based solely on personal injuries,[5] and from the extension of deceit in still a third state to what was essentially a malpractice action.[6]

The application of the deceit theory to a suit against a doctor presents a problem which the court in *Nutt v. Carson* did not mention. Since the statutes of limitation for fraud and for malpractice are, for all practical purposes, the same in Oklahoma,[7] the court was not compelled to consider this question which has often been raised in other jurisdictions: *viz.*, does the form of the action determine which statute of limitations is to be applied? Most malpractice actions contain elements of negligence as well as a breach of contract between the physician and patient; consequently, actions have been brought under both theories. The majority of courts have reasoned that the plaintiff's injury in malpractice cases is caused principally by the physician's negligence, and that, therefore, the statute of limitations for negligence is appropriate, even when the injured party sues on the contract.[8] However, a significant minority of jurisdictions have held that, if the action is brought on the contract, the statutory limitation for that action applies.[9]

"Malpractice" in Ohio

In Ohio, the problem has been resolved by the enactment of a special statute of limitations for malpractice, which the Ohio courts have determined applies regardless of the form of the action.[10] Unfortunately, as a result of this strict application of the statute, the malpractice victim in Ohio sometimes finds that the scales of justice appear to be weighted in favor of the negligent physician. The Ohio Supreme Court has ruled that fraudulent concealment of malpractice by a physician will not toll the running of the one year statute of limitations, since this is not expressly provided for in the statute.[11] As a result, there have been several cases in Ohio in which the plaintiff has been denied relief because he did not become aware of the

5. Flaherty v. Till, 119 Minn. 191, 137 N.W. 815 (1912); Benoit v. Perkins, 79 N.H. 11, 104 Atl. 254 (1918).

6. Krestich v. Stefanez, 243 Wisc. 1, 9 N.W.2d 139 (1943).

7. The statutory limit is two years for both fraud and malpractice in Oklahoma. Also, the statutory periods both begin to run against the action when the fraud is discovered, as determined by the words of the statute for fraud (12 OKLA. STAT. § 95 subd. 3), and by decision for malpractice (Seanor v. Browne, 15 Okla. 222, 7 P.2d 627 (1932)).

8. Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 Pac. 98 (1918); Hurlburt v. Gillett, 96 Misc. 585, 161 N.Y. Supp. 994 (1916). See Annot., 74 A.L.R. 1256.

9. Staley v. Jameson, 46 Ind. 159, 15 Am. Rep. 285 (1874). See Annot., 74 A.L.R. 1256, 1260.

10. Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919), *overruling* McArthur v. Bowers, 72 Ohio St. 656, 76 N.E. 1128 (1905), *overruling* Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902).

11. Delany v. Campbell, 157 Ohio St. 22, 104 N.E.2d 177 (1952).

tort until more than one year after the physician had stopped treating him.[12]

It would seem that the answer to this problem would be a suit in fraud. The period of limitation for fraud in Ohio is four years.[13] Moreover, the statute expressly provides that the period does not commence running until the fraud is discovered. This remedy, however, is also foreclosed to the plaintiff in Ohio. In *Swankowski v. Diethelm,*[14] the appellate court ruled that an action in fraud, where the cause of action is fundamentally one of malpractice, is governed by the statute of limitations for malpractice. The court in this case supported its decision by reference to the well-established rule in Ohio that the form of the action must be distinguished from the cause of the action, and that where the cause of the action is malpractice, that statutory limit must be applied.[15]

As the situation now exists in Ohio, the deceived malpractice victim has no remedy after the one year statute of limitations has run. But it is conceivable that the suit in fraud offers another solution to the problem. The doctrine of equitable estoppel has often been used by the courts to bar a defense based upon the statute of limitations, where the elements of estoppel have otherwise been present,[16] and one area in which estoppel is most readily applied is fraud. In *McCampbell v. Southard,* the Ohio Supreme Court stated:

> It is generally held that if the defendant has been guilty of fraud by knowingly making false representations to the plaintiff and thereby causing him to allow the statutory period to run, he may be estopped from asserting the statute of limitations as a bar.[17]

CONCLUSION

It is palpably inequitable that a physician, by his own artifice, should be allowed to prevent his victim from invoking his legal remedies. As the Ohio Supreme Court stated in *Bowers v. Santee:*

> The law should not require impossible or unreasonable things. It should not impose upon the patient a duty that he can only know through expert knowledge which he does not possess, but as to which he is compelled to accept the judgment of his physician or surgeon.[18]

As a possible solution to this problem, it is suggested that the Ohio courts take cognizance of the fact that other jurisdictions are beginning to recognize an action resting in fraud against physicians,

12. *Ibid.;* Amstutz v. King, 103 Ohio St. 674, 135 N.E. 973 (1921).

13. OHIO REV. CODE § 2305.09.

14. 98 Ohio App. 271, 129 N.E.2d 182 (1953).

15. See note 10 *supra.*

16. McLearn v. Hill, 276 Mass. 519, 177 N.E. 617 (1931); Brookman v. Metcalf, 4 Robt. 568 (N.Y. 1867). See Annot., 130 A.L.R. 8, 64.

17. 62 Ohio App. 341, 23 N.E.2d 955 (1937).

18. 99 Ohio St. 361, 367, 134 N.E. 238, 240 (1919).