

STATE OF MICHIGAN
COURT OF APPEALS

CARL MONTAGUE and NANCY MONTAGUE, as
husband and wife,

UNPUBLISHED

Plaintiff-Appellants,

v

No. 190246

Saginaw Circuit Court

ST. MARY'S MEDICAL CENTER, P.C.,

LC No. 94-005062-NH

Defendant,

and

GERALD R. SCHELL, M.D., SAGINAW
VALLEY NEUROSURGERY, P.C.,
SURYARAO KURUMETRY, M.D., CARO
COMMUNITY HOSPITAL, and WAHEED
AKBAR, M.D., Jointly and Severally,

Defendants-Appellees.

Before: Taylor, P.J., and Gribbs and R. D. Gotham,* JJ.

TAYLOR, P.J. (concurring).

I concur with reference to this Court's reversal of the order of summary disposition granted to defendants on the basis of the statute of limitations but write to explain my views. First, the majority opinion's statement regarding how we review (C)(7) motions is incomplete. For the correct test see, *Turner v Mercy Hosp*, 210 Mich App 345, 348; 533 NW2d 365 (1995) (review under MCR 2.116(C)(7) is limited to the complaint only if documentary evidence has not been submitted).

Plaintiff filed his lawsuit on November 10, 1994. The issue thus is whether plaintiff discovered or reasonably should have discovered the existence of a malpractice claim by May 10, 1994 (six months earlier). After a review of the record in this case, it is not clear to me that a reasonable person

* Circuit judge, sitting on the Court of Appeals by assignment.

in plaintiffs' circumstances would have discovered the claim before May 10th of 1994. *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993); *Shawl v Dhital*, 209 Mich App 321, 324-325; 529 NW2d 661 (1995).

On May 14, 1992, plaintiff Carl Montague fell from a ladder and sustained injuries to his lower back, right leg and right hip. Dr. Kurumetry performed a lumbar myelogram on plaintiff on July 15, 1992. Dr. Schell performed a right L-4 hemi-laminectomy for removal of the L4/L5 disc on August 13, 1992. Dr. Shell referred plaintiff to Dr. Akbar in late 1992 because of continuing pain. Dr. Akbar performed a decompression laminectomy of L-5 and a lateral fusion on January 25, 1994. On February 24, 1994, Dr. Shell took an x-ray of plaintiff's right hip due to continued complaints of pain. On March 31, 1994, plaintiff saw Dr. Akbar for follow-up on his second back surgery and presented many complaints. Plaintiff indicates that he was finally informed on May 16, 1994, that the x-ray showed he was suffering from traumatic necrosis and/or a fracture of the right hip. On June 29, 1994, plaintiff underwent a total hip replacement. Plaintiff's lawsuit alleged that the failure to perform appropriate examinations and testing resulted in the unnecessary removal of the disc at L4/L5, harmful physical therapy and an unnecessary spinal fusion.

What is unclear is how focused on particular symptoms the second surgery was. If indeed plaintiffs were informed that it was to address a specific complaint, and then following surgery the situation was not significantly improved, then it could be that the discovery rule would bar a claim that the first surgery was actionable. Yet, the record is not sufficiently developed to allow us to reach such a conclusion. *Moll v Abbott Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993); *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). Accordingly, I concur in reversal of the court's order granting summary disposition to the non-Akbar defendants.

I also agree that the trial court abused its discretion in refusing plaintiffs' request to file an amended complaint against Dr. Akbar but write to expand the rationale. The trial court indicated that it was granting summary disposition to Dr. Akbar under MCR 2.116(C)(7). However, Dr. Akbar never filed a motion under MCR 2.116(C)(7). Nevertheless, I agree with the majority opinion's treating this grant of summary disposition as if it had been granted under MCR 2.116(C)(8). The reason is that in plaintiffs' first amended complaint there was no indication of Dr. Akbar's treatment dates. This was a (C)(8) defect. Moreover, had the court granted the motion under (C)(8), it would then under MCR 2.116(I)(5) have been constrained to grant plaintiffs an opportunity to file an amendment unless the evidence then before the court showed that an amendment would not be justified. The evidence before the court at the time it granted Dr. Akbar summary disposition did not show that an amendment would not be justified. Further, plaintiffs failure to file a formal motion to amend is understandable in that the defendants had filed a motion for a more definite statement or for summary disposition. Thus, there was a distinct possibility that the court might have merely ordered plaintiffs to file an amended complaint pursuant to the defendants' request as a result of the motion hearing. Under these circumstances, the court abused its discretion in denying plaintiffs' request to file an amended complaint against Dr. Akbar.

/s/ Clifford W. Taylor