STATE OF MICHIGAN

COURT OF APPEALS

DELIA BROWN,

Plaintiff-Appellant,

v

BALDEV K. MALIK, M.D., BALDEV K. MALIK, M.D., P.C., JAIME CHING, M.D., and WESLEY MIKESELL, M.D.,

Defendants-Appellees,

and

SARENA MEDICAL ASSOCIATES, P.C., and RICHARD CHAROCHAK, D.O.,

Defendants.

UNPUBLISHED
October 1, 1999

No. 208045
Wayne Circuit Court
LC No. 97-706455 NH

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

I. Introduction

In this medical malpractice action, plaintiff-appellant Delia Brown ("Brown") appeals as of right from the order of the trial court granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants Baldev K. Malik, M.D. and Baldev K. Malik, M.D., P.C. (collectively, "Malik"), and Wesley Mikesell, M.D. ("Mikesell"). Brown also appeals from a prior order of the trial court granting summary disposition pursuant to MCR 2.116(C)(7) in favor of defendant Jaime Ching, M.D ("Ching").[1] The basic issue is whether Brown commenced her action within six months of when she discovered her claim. Because we agree with the trial court that Brown discovered or should have discovered her claim at some point between June 1994 and January 1995, more than six months before she brought her action, we affirm.

II. Basic Facts And Procedural History

Brown, who had been experiencing indigestion and episodes of vomiting after eating, received treatment from Mikesell, who prescribed medications such as Zantac to alleviate her symptoms. In March 1994, when Brown's gastrointestinal problems worsened, Mikesell referred her to Malik for testing. Malik performed an esophagogastroduodenoscopy and determined that Brown had a duodenal stricture.[2] Malik then referred Brown to Ching who, on April 12, 1994, performed a surgical procedure to treat the stricture. Almost immediately following the operation, Brown began to have frequent diarrhea, which she had not previously experienced. Brown also continued to experience the original symptoms of indigestion and vomiting.

In June 1994, Brown complained to Ching that her condition had not improved. Ching performed an endoscopy and told Brown that "everything was fine," she needed time to heal, and her symptoms would "slowly go away." Brown then "gave up on" Ching, being of the opinion that the surgery had been unsuccessful. In January 1995, she returned to Malik for treatment; he prescribed medication and instructed her to come back for reassessment in six weeks. However, Brown did not return to Malik's office until January 1996, at which point Malik performed an esophagogastroduodenoscopy and determined that a duodenal stricture was present and that Brown was suffering from gastroparesis[3] as a result of the surgical procedure performed by Ching.

On September 4, 1996, Brown mailed a notice of intent to sue Ching, Malik, Charochak, Mikesell, and Oakwood Hospital Corporation. On March 3, 1997, Brown filed a complaint alleging that the various defendants were liable to her for medical malpractice with respect to their treatment of her gastrointestinal disorder. In July of 1997, Ching moved for summary disposition, arguing that Brown's claim was barred by the applicable two-year statute of limitations for medical malpractice actions. Subsequently, in August of 1997, Malik and Mikesell filed a concurring motion for summary disposition, arguing that Brown's allegations against them involved treatments that occurred before Ching performed surgery. They argued that Brown's causes of action against them accrued on April 12, 1996, the date of the surgery. Because Brown did not file her notice of intent to sue until September 4, 1996, they contended, her claim against them was time-barred by the applicable statute of limitations. Furthermore, they argued, the six-month "discovery rule" exception did not apply. Following a hearing on these motions in October of 1997, the trial court held as follows:

> If this Court were to find that at the outset the proper hospital date in which she knew or should have known that there was a claim to be January of '95, then, the complaint should have been filed no later than July of '95.

* * *

> And even with the most liberal interpretation of the factual record as to medical treatment in the plaintiff's testimony in regards to her concerns that she developed a new symptom, the diarrhea, the continuing of the diarrhea and the changing of physician because of the diarrhea being an additional symptom along with the continuation of the indigestion and the heartburn, the fartherst [sic] most date that the Court can even find that she could have had either objectively or subjectively known that she had a claim would have been January of '95, then therefore the six-month period would have had to have been at the outset July of '95, so the statute as regard [sic] to the six-month period would apply.
>
> The surgery hadn't taken place in April of '94, the complaint would have had to have been filed no later than April of '96, am I not correct?
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> * * *
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> The complaint having been filed in March of '97, again the Court would have to find that the statute of limitation has run.
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> * * *
>
> To the extent that any claims that are asserted against [Malik and Mikesell] would have occurred before the April '94 surgery, then certainly they would be barred as well.
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> * * *
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> At the outset, given the most liberal view of facts, that the most outside date that this Court could even give her would be January of '95.
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> * * *
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> That there were sufficient activity [sic] that one may conclude that prior to that date she may have been aware but by the time she elected to change the physician, having said that she had lost confidence in Dr. Ching and that the symptoms of the diarrhea had continued for that length of time that would be the farthemost [sic] outside date. And even if the Court were to go as far as January of '96, six months from that is still July of '96. And at that point she took a year, a solid year and did absolutely nothing. So, no, the Court will find that the statute of limitation bars the claim and will grant the motion.

III. Preservation Of The Issue And Standard Of Review

Generally, an issue must be raised before and considered by the trial court in order to be preserved for appellate review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1993). Brown opposed the motions for summary disposition, arguing that she commenced the lawsuit within the statutory six-month discovery rule period and that, accordingly, her claim was not time-barred. Moreover, "[n]o exception need be taken to a finding or decision" of a trial

court. MCR 2.517(A)(7). Therefore, this issue is preserved for this Court's review. *Adam*, *supra* at 98. This Court reviews a summary disposition determination de novo as a question of law. *Poffenbarger v Kaplan*, 224 Mich App 1, 6; 568 NW2d 131 (1997). When reviewing a motion under MCR 2.116(C)(7), this Court must accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor, unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant. *Baks v Moroun*, 227 Mich App 472, 477 n 2; 576 NW2d 413 (1998). If no facts are in dispute, whether a claim is statutorily barred is a question of law. *Baks*, *supra* at 477 n 2.

IV. The Medical Malpractice Statute Of Limitations

A. Brown's Argument

Brown argues on appeal that the trial court erred in determining that her medical malpractice claim was barred by the applicable statute of limitations and in thereby granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(7).

B. The General Rule

Generally, a plaintiff in a medical malpractice case must commence the action within two years after the claim first accrued. MCL 600.5805(4); MSA 27A.5805(4); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997). The accrual provision applicable to medical malpractice actions specifies that the claim accrues "at the time of the act or omission that is the basis for the claim . . . regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1); MSA 27A.5838(1)(1). Thus, the claim accrues on the date of the alleged act or omission giving rise to the claim. *Solowy*, *supra* at 220.

Brown concedes that she did not timely file her claim pursuant to this general accrual provision. Her allegations against Ching involve events occurring between April 1994, when he performed a surgical procedure, and June 1994, when he performed an endoscopy[4] and told her that "everything was fine." Her complaint against Malik and Mikesell involve acts and omissions allegedly occurring at unspecified times before the April 1994 surgery. Therefore, she had to file her claim against Ching by June 1996, and her claims against Malik and Mikesell at some point before April 1996 in order to be timely pursuant to MCL 600.5838a(1); MSA 27A.5838(1)(1).

C. The Six Month Exception

Brown contends that her complaint was timely because she commenced the action within six months of when she discovered her claims. The statutory six-month discovery rule, MCL 600.5838a(2); MSA 27A.5838(1)(2), provides:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856,[5] or within 6 months after the

> plaintiff discovers or should have discovered the existence of the claim, whichever is later.

The plaintiff in a medical malpractice action bears the burden of coming forward with evidence to show a disputed issue of material fact regarding when she discovered or should have discovered the claim for purposes of the discovery rule provision. *Solowy*, *supra* at 231.

We employ an objective test to determine whether the plaintiff discovered or should have discovered the existence of a cause of action. *Poffenbarger*, *supra* at 11. The plaintiff need only be aware that she has a possible cause of action based on "physical discomfort, appearance, condition," or other relevant factors. MCL 600.5838a(2); MSA 27A.5838(1)(2). A plaintiff does not need to know that she has a likely cause of action. *Poffenbarger*, *supra* at 11. As recently explained by the Michigan Supreme Court:

> The six-month discovery rule period begins to run in medical malpractice cases when the plaintiff, on the basis of objective facts, is aware of a possible cause of action. This occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician. When the cause of the plaintiff's injury is difficult to determine because of a delay in diagnosis, the 'possible cause of action' standard should be applied with a substantial degree of flexibility. In such cases, courts should be guided by the doctrine of reasonableness and the standard of due diligence, and must consider the totality of information available to the plaintiff concerning the injury and its possible causes. [*Solowy*, *supra* at 232.]

Brown contends that she did not discover, or have any reason to discover, the existence of her causes of action against defendants until April 1996, when Malik advised her of the source of her gastrointestinal problems and of Ching's negligence in performing the surgical procedure in April 1994.[6] Because she commenced her suit against defendants on September 4, 1996,[7] Brown argues, her claim was timely filed pursuant to the six-month discovery provision. We disagree.

The undisputed facts indicate that Brown discovered or should have discovered her claim against defendants at some point between June 1994 and January 1995. Brown testified that, on the day after the surgery performed by Ching, she began to suffer from diarrhea, which she had not previously experienced. She also stated that she realized immediately that the surgery had done nothing to lessen her original gastrointestinal problems because she continued to experience vomiting and indigestion. Most importantly, Brown testified that, after Ching performed an endoscopy in June 1994 and told her that "everything was fine," she "gave up on Dr. Ching" and "went to see Dr. Malik." Plaintiff took this course of action because she knew that whatever procedure Ching had performed was ineffective. Therefore, although Brown did not receive a definitive diagnosis of the source of her continuing problems until April 1996, she was aware of a possible cause of action against defendants well before that time.

The discovery rule "does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim." *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995). Moreover, "[a] plaintiff must act diligently to discover a possible cause of action and 'cannot simply sit back and wait for others' to inform her of its existence. *Id*., citing *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986). Brown's testimony reveals that she, on the basis of clearly manifest symptoms, became aware of a possible cause of action. She became "aware of an injury and a possible causal link between the injury and an act or omission" of the physicians at some point between June 1994 and January 1995. *Solowy*, *supra* at 232. Accordingly, the six-month discovery rule exception does not apply to extend the period of limitations beyond the two years prescribed by MCL 600.5805(4); MSA 27A.5805(4). Therefore, Brown was required to commence her action against defendants no later than April 1996, which was two years following the surgical procedure at issue in this case. Because she did not commence her action until September 4, 1996, her claim is barred.

V. Conclusion

We hold that the trial court did not err in determining that Brown's medical malpractice claim was barred by the applicable statute of limitations and in thereby granting the motions for summary disposition pursuant to MCR 2.116(C)(7). Therefore, we affirm.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] Defendants Sarena Medical Associates, P.C., and Richard Charochak, D.O., were dismissed below and are not parties to this appeal.

[2] We understand these terms to mean that Malik used instruments to examine Brown's esophagus, stomach, and upper intestinal tract, which revealed that her duodenum had narrowed. See Schmidt, Attorney's Dictionary of Medicine (N.Y.: Matthew Bender, 1999), § D, p 223, § E, p 170, § S, p 324.

[3] Gastroparesis is a "mild paralysis of the stomach." Schmidt, *supra* § G, p 36.

[4] Endoscopy is a procedure that uses an instrument, an endoscope, inserted into a natural opening in the body to examine the interior of a body cavity. Schmidt, *supra* § E, p 99.

[5] MCL 600.5851; MSA 27A.5851 through MCL 600.5856; MSA 27A.5856 are provisions that toll the applicable statutory periods of limitations in various circumstances. For example, § 5851 addresses the disabilities of infancy or insanity at the time of the accrual of a claim. These provisions are not applicable to the case at bar.

[6] We note that all of the parties on appeal have cited deposition testimony given by Malik, which was not before the trial court when it granted summary disposition. Thus, we cannot consider it. *Poffenbarger*, *supra* at 4 n 2. However, because defendants presented no evidence to counter Brown's allegation that Malik determined that the stricture "was still present" and that Brown was

"suffering from gastroparesis as a result" of the surgery, we will accept this allegation as true and construe it in Brown's favor. See *Baks, supra* at 477 n 2.

[7] Brown did not file her complaint until March 3, 1997. However, MCL 600.2912b(1); MSA 27A.2912(2)(1) requires a claimant to give the defendant health professional or facility written notice of intent to file a claim not less than 182 days before filing the claim, and MCL 600.5856(d); MSA 27A.5856(d) provides that the applicable statute of limitations may be tolled during the notice period mandated by § 2912b. Therefore, because Brown filed her notice of intent to sue pursuant to § 2912b on September 4, 1996, this is the date on which Brown "commenced" the action for purposes of the statute of limitations.