STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN and ARTHUR KOOIKER,

Plaintiffs-Appellants,

v

FRANCINE VAGOTIS, M.D., and FRANCINE VAGOTIS, M.D., P.C.,

Defendants-Appellees.

UNPUBLISHED
June 9, 2000

No. 217209
Kent Circuit Court
LC No. 98-004746-NH

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Plaintiffs Kathleen and Arthur Kooiker[1] appeal as of right from an order granting summary disposition to defendants Francine Vagotis, M.D. and Francine Vagotis, M.D., P.C. (collectively, "defendant") in this malpractice case. We affirm.

Defendant is a doctor who specializes in plastic surgery. On January 26, 1995, defendant performed a bilateral breast reduction on plaintiff. In her complaint, plaintiff alleged that immediately after the procedure, she suffered from excessive bleeding and drainage, pain, induration of the breast, and delayed healing. Plaintiff further alleged that she complained to defendant about the appearance of her breasts immediately after surgery and that defendant assured her that her delayed healing was normal and that any scarring and disfigurement would improve over time. Plaintiff also alleged that she was ashamed of and embarrassed by the appearance of her disproportional breasts, and that she continued to experience nipple numbness, discharge, and pain for many months following the surgery.

Plaintiff's final visit to defendant occurred on July 12, 1995. Between July 1995 and May 1997, plaintiff did not see any doctor for problems concerning her breasts. In May 1997, plaintiff visited her primary care physician, who referred plaintiff to a specialist for an examination of her breasts for a reason unrelated to the reduction surgery. Plaintiff visited the specialist on June 10, 1997, at which time, alleged plaintiff, the specialist "hinted" to plaintiff that she may have a potential malpractice claim against defendant. On December 10, 1997, defendant was served with a notice of plaintiff's intent to file a claim and on May 7, 1998, plaintiff filed this action for medical malpractice.

Plaintiff argues on appeal that the circuit court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations). This Court reviews the circuit court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor. *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). The court must also consider the affidavits, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5). If the affidavits and other documentary evidence show that no genuine issue of material fact is in dispute, then whether the claim is statutorily barred is a question of law for the court. *Dewey, supra*.

Pursuant to MCL 600.5838a(2); 27A5838(1)(2), plaintiff had two time periods within which she could have timely filed her suit against defendant. First, pursuant to the general malpractice period of limitations prescribed in MCL 600.5805(4); MSA 27A.5805(4), plaintiff could have sued defendant within two years of when her claim accrued. *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997). A claim accrues "at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1); MSA 27A.5838(1)(1); *Solowy, supra* at 220. Here, the act or omission that plaintiff alleges is the basis for her claim includes the surgery performed by defendant on January 26, 1995, and the treatment plaintiff received from defendant both before and after the date of the surgery, ending on July 12, 1995. Assuming July 12, 1995 as the latest possible accrual date, under § 5805(4), the latest date on which plaintiff could have timely filed her claim was July 12, 1997. Because plaintiff did not file her notice of intent until December 10, 1997,[2] and her complaint until May 7, 1998, plaintiff's claim is barred unless she can show that she filed her claim within the six-month discovery period provided for in MCL 600.5838a(2); MSA 27A.5838(1)(2); *Solowy, supra* at 221.

In *Poffenbarger v Kaplan*, 224 Mich App 1, 11; 568 NW2d 131 (1997), this Court explained that

> [a] plaintiff is deemed to have discovered a cause of action when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, an injury and its possible cause. The test of whether the plaintiff discovered or should have discovered a cause of action is an objective test. The plaintiff need only be aware that she has a possible cause of action, not that she has likely cause of action. Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue her claim. The law imposes on such a plaintiff "a duty to diligently pursue the resulting legal claim." [*Id.;* citations omitted.]

The burden of establishing that the plaintiff neither discovered nor should have discovered the claim at least six months before the expiration of the limitations period is on the plaintiff. MCL 600.5838a(2); MSA 27A.5838(1)(2); *Solowy, supra* at 231. In other words, the plaintiff bears "the burden of coming forward with evidence to show a disputed issue of material fact on the discovery issue." *Id.*

Plaintiff maintains that she did not realize she had a cause of action for malpractice until she visited another specialist in June 1997 and the specialist suggested that plaintiff may have a legal cause of action against defendant. However, it is not necessary that a plaintiff recognize that she has suffered an invasion of a legal right in order for the discovery rule to begin to accrue. *Szatkowski v Isser*, 151 Mich App 264, 269; 390 NW2d 668 (1986). Further, the discovery rule does not require that a plaintiff know with certainty or likelihood that the defendant committed malpractice. *Solowy, supra* at 222. The discovery rule merely requires that the plaintiff know of the act or omission giving rise to the malpractice and that the plaintiff have reason to believe that the act or omission was improper or was performed in an improper manner. *Id.* In applying the discovery rule, "the court should consider the totality of the information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id.* at 227.

Here, plaintiff did not meet her burden of showing that a disputed issue of material fact on the discovery issue exists. The overwhelming evidence shows that plaintiff had reason to believe that her surgery was improperly performed well before her visit to the specialist in June 1997. At her deposition, plaintiff specifically described problems (including discoloration, firmness, flatness, swelling, scarring, sensitivity of the nipples, nipple misalignment, and disproportional size of her breasts to the rest of her body) that allegedly resulted from the surgery, and she testified that these problems were clearly observable in July 1995 (when she stopped receiving treatment from defendant for her breasts). Plaintiff acknowledged that she expressed concerns to defendant before surgery regarding the proportionality of her breasts to the rest of her body, that defendant assured her that her reduced breasts would be proportional, and that after viewing her breasts after surgery, plaintiff was of the opinion that her breasts were wholly out of proportion to the rest of her body. Although she allegedly continued to have concerns about her appearance after her treatment under defendant ended, plaintiff presents no evidence that she made any further inquiry regarding the results of her breast surgery until she saw the specialist in June 1997. Because plaintiff, through the reasonable exercise of diligence, should have discovered that she had a possible cause of action well before her visit to the specialist in June 1997, her May 7, 1998 claim, preceded by her December 10, 1997 notice of intent, was not timely under the six-month discovery period.

Plaintiff also argues that summary disposition was not appropriate because there was a disputed issue of material fact with regard to whether defendant fraudulently concealed any malpractice claim so that the statute of limitations should have been tolled pursuant to MCL 600.5855; MSA 27A.5855, which provides as follows:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within the 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Plaintiff argues that this section applies because defendant fraudulently concealed any claim against her by falsely assuring plaintiffs that the outcome of the surgery was normal and by failing to forward records to plaintiff's primary care physician.

However, even if defendant had taken steps to conceal any alleged malpractice claim, plaintiff's action is still barred under the six-month discovery rule because, as discussed above, plaintiff had reason to believe that the surgery was improperly performed. Indeed,

> [t]he fraudulent concealment which will postpone the operation of the statute must be the concealment of the fact that plaintiff has a cause of action. If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute, and in this behalf a party will be held to know what he ought to know, pursuant to the rule hereinbefore stated (i.e., by the exercise of ordinary diligence).
>
> It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim." [*Tonegatto v Budak*, 112 Mich App 575, 583-584; 316 NW2d 262 (1982), quoting *Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935).]

See also MCL 5838a(2)(a); MSA 27A.5838(1)(2)(a); *Sills v Oakland General Hosp,* 220 Mich App 303, 309-310; 559 NW2d 348 (1996). Here, none of the actions alleged on the part of defendant prevented plaintiff from observing the results of her surgery. Because plaintiff should have, through reasonable diligence, known of her cause of action, her action must have been filed within the ordinary periods of limitation, that is, within two years of the act or omission or within six months of discovery. Because plaintiffs failed to file within either statute of limitations, summary disposition was appropriate.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffrey G. Collins

[1] Arthur Kooiker's claim for loss of consortium is derivative in nature; thus, in this opinion "plaintiff" will refer to Kathleen Kooiker only.

[2] The statute of limitations in a medical malpractice action is tolled by the filing of a notice of intent, pursuant to MCL 600.2912b; MSA 27A.2912(2), for the applicable notice period if the statute of limitations otherwise would have run during the notice of intent period. MCL 600.5856(d); MSA 27A.5856(4).