STATE OF MICHIGAN

COURT OF APPEALS

RONALD AUSTIN,

Plaintiff-Appellee,

v

OAKWOOD UNITED HOSPITALS, INC., d/b/a HERITAGE HOSPITAL and DR. A. STONE,

Defendants,

and

SANGANUR V. MAHADEVAN, M.D., and SANGANUR V. MAHADEVAN & ASSOCIATES, P.C.,

Defendants-Appellants.

UNPUBLISHED
June 27, 2000

No. 211482
Wayne Circuit Court
LC No. 97-736272 NH

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Defendants Sanganur V. Mahadevan, M.D. and Sanganur V. Mahadevan & Associates, P.C. appeal by leave granted the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7) (statute of limitations). We reverse.

On December 30, 1993, plaintiff, a psychiatric nurse, was taken to Heritage Hospital after his wife found him unconscious. Because plaintiff complained of pain near his temple, a CT scan was performed on plaintiff's head. Dr. A. Stone[1] interpreted the image as showing no abnormalities.

[1] On January 2, 1996, plaintiff filed a medical malpractice complaint against Oakwood United Hospitals, Inc. d/b/a Heritage Hospital, Dr. A. Stone, and Dr. J. Kleber, who ordered blood tests and the CT scan on December 30, 1993. Eventually, in November 1996, this Court ordered that the trial

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Between January 24, 1994 and October 28, 1994, plaintiff complained to defendant Dr. Mahadevan (hereinafter "defendant"), his personal physician, of various symptoms including increased shoe size, weight gain, chest, head, jaw and neck enlargement, shoulder pain and numbness and weakness in his right hand.

On November 4, 1994, an MRI revealed a very large mass in plaintiff's brain near his pituitary gland, and he subsequently was diagnosed with acromegaly, a disorder marked by the overproduction of growth hormones leading to the abnormal growth of body parts and facial features. On December 2, 1994, plaintiff underwent tumor resection surgery at Henry Ford Hospital, where the growth was partially removed.

Plaintiff initially filed in January 1996 a medical malpractice claim against Heritage and Dr. Stone. During the course of discovery, plaintiff learned from Dr. Samuel A. Mickelson that plaintiff's December 30, 1993 CT was misinterpreted and that it actually showed "a large obvious tumor involving the pituitary gland." Dr. Mickelson also wrote that plaintiff's acromegaly diagnosis and treatment were delayed because the tumor was overlooked, and that this delay resulted in "irreversible growth and distortion" of plaintiff's features.

On February 28, 1997, plaintiff subpoenaed defendant's medical records, which he received on March 5, 1997. On March 28, 1997, plaintiff filed a notice of his intent to sue defendant for failing to timely diagnose plaintiff. Plaintiff filed his first amended complaint, which added defendant, on January 9, 1998. Defendant responded with a motion for summary disposition on the basis that plaintiff failed to comply with the statute of limitations. The trial court denied the motion, stating that the point at which plaintiff discovered or should have discovered his claim represented an issue of fact for the jury's determination.

(...continued)

court enter an order granting those defendants summary disposition and dismissing plaintiff's claim without prejudice because of plaintiff's failure to comply with statutory notice provisions. MCL 600.2912b; MSA 27A.2912(2). On November 10, 1997, plaintiff refiled the complaint against Oakwood d/b/a Heritage Hospital and Drs. Stone and Kleber. Plaintiff's brief on appeal indicates that Dr. Kleber was voluntarily dismissed from the suit.

On October 23, 1998, the trial court granted plaintiff's motion to file a second amended complaint to add as defendants (1) Harris, Birkhill, Wang, Songe & Associates, P.C., which contracted to provide Heritage Hospital's radiology services, and (2) James Joseph Kochkodan, M.D., another Heritage Hospital doctor who allegedly read and interpreted as negative plaintiff's December 30, 1993 CT scan. None of these parties having some affiliation with Heritage Hospital are parties to the instant appeal.

This Court on October 20, 1998 granted defendant Mahadevan a stay of further lower court proceedings pending appeal, but plaintiff's claims against the remaining defendants apparently proceeded.

We review de novo both the trial court's summary disposition ruling and the legal question whether, under the undisputed relevant facts, plaintiff's claim against defendant is barred by a statute of limitations. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000).

The statute of limitations for a medical malpractice claim is two years from the time the claim accrues, or "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5805(4); MSA 27A.5805(4); MCL 600.5838a(2); MSA 27A.5838(1)(2). A medical malpractice 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).

Plaintiff's instant claim therefore accrued at the time of defendant's act or omission that gave rise to plaintiff's malpractice allegations. Plaintiff's malpractice allegations asserted that defendant failed to timely diagnose his acromegaly. In light of the fact that plaintiff was diagnosed with acromegaly in November 1994, we find that defendant correctly argues that his act or omission, the failure to sooner diagnose plaintiff's condition, must have occurred before November 21, 1994. Accordingly, to satisfy the statute of limitations plaintiff should have filed the claim against defendant by November 21, 1996. MCL 600.5805(4), 600.5838a(1); MSA 27A.5805(4), 27A.5838(1)(1).

Plaintiff contends, however, that he timely filed his claim within six months of its discovery.[2] MCL 600.5838a(2); MSA 27A.5838(1)(2).

> 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 v Oakwood Hospital Corp*, 454 Mich 214, 232; 561 NW2d 843 (1997) (emphasis added).]

While the standard should be applied with flexibility, it should nevertheless be maintained so that the legitimate legislative purposes behind the rather stringent medical malpractice limitation

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[2] Plaintiff initially argues in his brief on appeal that part of defendant's appeal brief should be stricken because it discusses issues not addressed within defendant's application for leave to appeal. It appears from the available record, however, that the issues within the application for leave to appeal and defendant's subsequent appeal brief are identical. Both discuss the trial court's failure to apply an objective standard in determining when plaintiff knew of or should have discovered his claim. Defendant's rephrasing of the question presented did not inject any new or different issues.

provisions are honored. *Id*. at 230.

In this case, plaintiff was aware of his acromegaly no later than November 21, 1994, the date he was diagnosed. Arguably, plaintiff became aware that he suffered from acromegaly even prior to that date. Defendant's records indicate that plaintiff knew by January 24, 1994 that his features were enlarging, and that on October 28, 1994 plaintiff specifically expressed concern regarding acromegaly.[3] Given these objective and undisputed facts, plaintiff became aware of the tumor and resultant acromegaly by November 21, 1994. This awareness, coupled with the fact that plaintiff knew that since sometime during 1989 his feet, hands, jaw, forearm and chest were increasing in size, constitutes a sufficient "minimum level of information" to suggest to plaintiff that defendant had failed to timely diagnose his acromegaly from January 1994 until October 1994. *Solowy*, *supra* at 226.

The *Solowy* Court indicated, however, that in some cases it might "be unfair to deem the plaintiff aware of a possible cause of action before he could reasonably suspect a causal connection to the negligent act or omission." *Id*. Plaintiff argues that in this case he was unaware of any causal connection between his advanced condition and defendant's allegedly negligent failure to diagnose him until plaintiff on March 5, 1997 reviewed defendant's medical records.

Assuming that plaintiff did not know of his acromegaly prior to his November 1994 diagnosis, it is conceivable that it would not occur to plaintiff that a delay in diagnosis caused him any permanent disfigurement until that specific finding was made. Even though plaintiff noticed changes in his own physical appearance as early as 1989, we assume for purposes of argument that his November 1994 diagnosis was insufficient to arouse plaintiff's suspicion of defendant's malpractice. The significant date then becomes that when plaintiff knew or should have known that a delay in his diagnosis caused him some permanent disfigurement.

We find that plaintiff knew or should have known of his possible cause of action against defendant no later than March 18, 1996. On that date, Dr. Mickelson wrote to plaintiff's attorney that plaintiff's CT scan was misread and that a delay in plaintiff's diagnosis caused irreversible disfigurement. Dr. Mickelson's letter read as follows:

> As per your request, I have reviewed the records and X rays from Heritage Hospital on Mr. Ronald Austin. The CT scans from Heritage Hospital dated December 30, 1993 show a large obvious tumor involving the pituitary gland and

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[3] To the extent that plaintiff cites the deposition testimony of defendant for the contrary proposition that defendant first suggested to plaintiff the possible diagnosis of acromegaly, of which plaintiff was otherwise unaware, we note that defendant's deposition testimony was not provided the trial court when it ruled on defendant's motion for summary disposition, nor does defendant's deposition appear elsewhere within the lower court record. Therefore, we will not consider it for the first time on appeal. MCR 7.210(A); *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 579-580; ___ NW2d ___ (2000) ("This Court's review is limited to the record developed by the trial court.").

> sphenoid sinus yet the X ray report from Heritage indicates a "normal" scan. The tumor was obviously missed at that time which created a delay in diagnosis and delay in effective treatment until 12/94. As the tumor was a growth hormone producing tumor causing Acromegaly, the delay in diagnosis would have allowed continued manifestations of Acromegaly with continued irreversible growth and distortion of normal hand, feet, jaw and facial appearance as well as the other manifestations of Acromegally [sic].

Plaintiff correctly observes that this letter specifically addresses Dr. Stone's alleged malpractice in interpreting the CT scan, and was not based on defendant's medical records. The relevant, undisputed facts reveal, however, that by the time of plaintiff's receipt of Dr. Mickelson's March 18, 1996 letter, plaintiff was aware of the following: (1) his acromegaly, which resulted in enlargement and distortion of "normal hand, feet, jaw and facial appearance," (2) that his condition existed at least since December 1993, (3) that from January 1994 through October 1994 he had reported to defendant various symptoms of acromegaly, (4) that despite these reported symptoms, defendant did not during this time period recognize plaintiff's condition, and (5) that the failure to diagnose his condition from January 1994 through November 1994 "allowed continued [and irreversible] manifestations of Acromegaly." We find that these facts represent at least some minimum level of information that suggests a connection between the injury and defendant's failure to diagnose plaintiff's acromegaly from January through October 1994. *Solowy*, *supra*. By the time plaintiff received Dr. Mickelson's March 18, 1996 letter, plaintiff had the necessary knowledge to preserve and pursue his claim.

Plaintiff's argument that he could not have known about defendant's malpractice until he reviewed defendant's medical records on March 5, 1997 is without merit. The argument might be more convincing if defendant's office notes indicated that defendant noticed plaintiff's symptoms, but did not discuss them with plaintiff or otherwise act.[4] Under such circumstances, the only way plaintiff could have discovered defendant's failure to diagnose his acromegaly would have been to review defendant's records. The uncontested facts show, however, that from January through October 1994 plaintiff specifically informed defendant of his symptoms, and that defendant referred plaintiff for further acromegaly testing specifically because of the increasing size of plaintiff's features and his weight gain. In light of the facts that plaintiff and defendant had multiple conversations about plaintiff's symptoms and one or more conversations about acromegaly prior to plaintiff's November 1994 diagnosis, we find it disingenuous for plaintiff now to suggest his unawareness of defendant's alleged failure to properly diagnose plaintiff.

While plaintiff asserts that he could not have been equipped with any knowledge of defendant's potential malpractice until he actually reviewed defendant's medical records, we fail to comprehend and plaintiff fails to suggest what additional, specific information vital to his malpractice claim against

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[4] To the extent that plaintiff suggests such a proposition, again relying on defendant's deposition testimony, we again note that "[t]his Court's review is limited to the record developed by the trial court." *Kent Co Aeronautics Bd*, *supra*.

defendant that plaintiff lacked before viewing defendant's records. We

expressly reject plaintiff's suggestion that medical malpractice plaintiffs are entitled to await their receipt and review of medical records before they may be deemed to have discovered a potential claim. Where, as here, the injured plaintiff knows or should know, based on the totality of the other available circumstances, of a potential malpractice claim, permitting the plaintiff to delay filing suit until he receives a doctor's medical records would contravene the legislative intent to "'compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend'; 'to relieve a court system from dealing with "stale" claims . . .'; and to protect 'potential defendants from protracted fear of litigation.'" *Moll v Abbott Laboratories*, 444 Mich 1, 14; 506 NW2d 816 (1993), quoting *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974), quoting 51 Am Jur 2d, Limitation of Actions, § 17, pp 602-603. See also *Solowy*, *supra* at 222 (The "possible cause of action standard" "promotes the Legislature's concern for finality and encouraging a plaintiff to diligently pursue a cause of action."), quoting *Moll*, *supra* at 24.

We conclude that the objective, uncontested facts in evidence reveal that plaintiff knew or should have known about both his injury and the impact of defendant's allegedly negligent failure to diagnose his injury no later than March 18, 1996, and that plaintiff did not timely file his claim within six months of this date. Accordingly, defendant is entitled to summary disposition pursuant to MCR 2.116(C)(7).

Reversed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ William C. Whitbeck