

STATE OF MICHIGAN
COURT OF APPEALS

WALTER CABELL,

Plaintiff-Appellant,

v

VINCENTE B. CARINO, M.D.,

Defendant-Appellee.

UNPUBLISHED
October 20, 2000

No. 214611
Genesee Circuit Court
LC No. 97-058683-NO

Before: McDonald, P.J., and Sawyer and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, an orthopedist, treated plaintiff for a fractured ankle. On March 23, 1995, defendant applied a short leg cast to plaintiff's right foot and ankle. Subsequently, plaintiff developed problems which resulted in the amputation of a toe from his right foot in July 1996.

On June 9, 1997, plaintiff filed a pre-suit notice, and on August 5, 1997, filed a complaint for malpractice. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's suit was barred because it was not filed within two years of the act or omission that was the basis for the claim. Defendant also asserted that the claim was discovered well within the two-year period. The trial court granted the motion, finding that the notice of intent was not filed within two years of the act or omission that was the basis of the claim, and thus did not toll the statute of limitations.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

The statute of limitations for an action charging medical malpractice is two years. MCL 600.5805(4); MSA 27A.5850(4). A medical malpractice 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). The statute of limitations is subject to a six-month discovery exception, under which a claim may be commenced within the

applicable limitations period, or within six months after the plaintiff discovers or should have discovered the claim, whichever is later. MCL 600.5838a(2); MSA 27A.5838(1)(2).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm. While plaintiff's claim accrued on March 23, 1995, MCL 600.5838a(1); MSA 27A.5838(1)(1), he did not file a notice of intent under MCL 600.2912b; MSA 27A.2912(2) until June 1997. Plaintiff's assertion that he did not discover his claim until April 25, 1997, the date he received his medical records from defendant, is without merit. The discovery rule does not require that the plaintiff know with certainty or likelihood that the defendant committed malpractice. Rather, the rule requires only 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 performed in an improper manner. A claim accrues once the plaintiff is aware of the injury and its possible cause. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997); *Griffith v Brant*, 177 Mich App 583, 587; 442 NW2d 652 (1989). Plaintiff's deposition testimony established that by June 1995, at the latest, he was aware of a problem with his toe, and actually believed that the cast placed on his ankle and foot by defendant had caused the problem. Plaintiff did not require access to his medical records to discover his claim. Plaintiff discovered his claim well more than six months before filing the notice of intent. In fact, plaintiff's attorney was investigating his claim in October, 1995, over six months before the notice of intent was filed.

Nor did the court err in rejecting plaintiff's claim that defendant's failure to produce plaintiff's medical records in response to his request excused the timely filing of the notice of intent. Plaintiff has not shown that he could not have filed a timely notice of intent had he acted more diligently.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Helene N. White