

STATE OF MICHIGAN
COURT OF APPEALS

MARILYN JEAN SMITH, f/k/a MARILYN JEAN DANIELS,

Plaintiff-Appellant,

v

JULES REINHARDT, D.O., and KNOLLWOOD CLINIC,

Defendants-Appellees.

UNPUBLISHED
March 16, 2001

No. 220256
Lapeer Circuit Court
LC No. 97-024200-NM

MARILYN JEAN SMITH, f/k/a MARILYN JEAN DANIELS,

Plaintiff-Appellant,

v

CHARLES FINNELL, D.O., LEONARD A. BARROW, D.O., CHARLES LEIDHEISER, D.O., GLENN D. BLANKENHORN, JR., D.O., and KNOLLWOOD CLINIC,

Defendants-Appellees.

No. 220257
Lapeer Circuit Court
LC No. 98-025301-NM

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition, based on the statute of limitations. We affirm.

This is a medical malpractice case based on the alleged negligence of defendant, Dr. Jules Reinhardt.¹ Plaintiff alleges that Dr. Reinhardt placed an intrauterine device (IUD) in her body in 1968, in preparation for a surgical procedure. Plaintiff further alleges that Dr. Reinhardt assured her that he would remove the IUD after completing the surgical procedure, but that he failed to do so. Plaintiff contends that she did not learn that the IUD had not been removed until approximately thirty years later, when medical tests confirmed its continuing presence. Plaintiff alleges that Dr. Reinhardt committed medical malpractice when he failed to remove the IUD as promised, and that his malpractice prevented plaintiff from conceiving children with her second husband.

The circuit court granted defendants' motion for summary disposition, ruling that the statute of limitations barred plaintiff's claim. The circuit court reasoned that plaintiff should have discovered her malpractice cause of action more than two years prior to the date on which she filed her action. Because we conclude that a reasonable person would have discovered a possible cause of action for medical malpractice more than two years before plaintiff filed this action, we affirm the trial court's grant of summary disposition.

We review de novo a trial court's decision regarding a motion for summary disposition. *Poffenbarger v Kaplan*, 224 Mich App 1, 6; 568 NW2d 131 (1997); *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995). Whether plaintiff should have discovered a possible cause of action for medical malpractice is a question of law for resolution on summary disposition because the facts relevant to determining the issue are undisputed. *Solowy v Oakwood Hospital Corp.*, 454 Mich 214, 216; 561 NW2d 843 (1997).

Plaintiff argues that the discovery rule tolled the limitations period applicable to her claim, until the date when she received actual notice that the IUD allegedly inserted by Dr. Reinhardt remained inside her body. Plaintiff contends that a person exercising reasonable diligence would not have discovered Dr. Reinhardt's alleged malpractice until that date. Finally, plaintiff argues that her malpractice claim is not time-barred because she properly filed her action within two years from the date that she discovered the IUD's continued presence.

In 1968, when Dr. Reinhardt provided medical services to plaintiff, an action for medical malpractice accrued on the last day of professional service:

A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose. [MCL 600.5838; MSA 27A.5838.]²

¹ The liability of the remaining defendants is either vicarious or derivative of Dr. Reinhardt's liability. Therefore, if the trial court properly granted summary disposition to Dr. Reinhardt based on the statute of limitations defense, then it properly granted summary disposition as to all defendants.

² Throughout this opinion, we apply the statutes in effect at the time that plaintiff's cause of
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At that time, plaintiff had two years after the date of accrual in which to file her malpractice action. *Dyke v Richard*, 390 Mich 739, 743-744; 213 NW2d 185 (1973). It is undisputed that Dr. Reinhardt last treated plaintiff in a professional capacity in 1968. Therefore, unless the running of the limitations period has been tolled, plaintiff's cause of action for medical malpractice became time-barred in 1970, over thirty years before she filed suit.

In 1968, the statute describing the accrual date of a malpractice action, MCL 600.5838; MSA 27A.5838, did not provide a tolling mechanism for those cases in which the plaintiff failed to immediately discover the cause of action. However, at that time, the common law of this state provided that the limitations period in malpractice actions could be tolled under the discovery rule. Our Supreme Court explained this tolling rule in *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963):

Simply and clearly stated the discovery rule is: the limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act.

The current version of the discovery rule requires a plaintiff to file a medical malpractice action within six months from the date when the plaintiff discovered or should have discovered the existence of the claim. MCL 600.5838a(2); MSA 27A.5838(1)(2). However, when plaintiff's claim accrued, the two-year limitations period simply did not begin to run until the date when plaintiff discovered, or should have discovered, the cause of action. As our Supreme Court explained:

[W]e hold that an action based on malpractice by a state licensed person must be brought within two years of the time when such person discontinues treating or otherwise serving the plaintiff, *or within two years of the time when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the asserted malpractice, whichever is later.* [*Dyke, supra* at 747 (emphasis added).]

Thus, plaintiff had two years from the date of discovery, not six months, to file her medical malpractice claim.

To determine when the discovery rule period began to run on plaintiff's cause of action, we apply the "possible cause of action" test set forth in *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993); *Solowy, supra*.³ In *Moll, supra* at 24, our Supreme Court stated, "[o]nce a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." Further, in *Solowy, supra* at 221-222, the Court explained:

[T]he plaintiff need not know for certain that he had a claim, or even know of a likely claim before the [discovery] period would begin. Rather, the discovery rule

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action accrued. Subsequently enacted statutes are inapplicable to plaintiff's claim.

³ Plaintiff concedes that the "possible cause of action" test applies in the present case.

period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action.

The trial court concluded that a person in plaintiff's position, exercising reasonable diligence, would have discovered a possible cause of action for medical malpractice more than two years before plaintiff filed her suit. The trial court relied on the following facts, viewed in the light most favorable to plaintiff: (1) Dr. Reinhardt performed surgery on plaintiff in 1968, at which time he inserted an IUD; (2) plaintiff gave birth to five children before Dr. Reinhardt completed that procedure; (3) plaintiff's second husband had two children from a prior relationship; (4) after the 1968 procedure, plaintiff unsuccessfully attempted to conceive children with her second husband, over the course of several years.

The trial court ruled that a reasonable person, faced with these facts, should have sought professional medical advice regarding her sudden inability to conceive. We agree. Plaintiff may not have received actual knowledge that the IUD was still in place until March 26, 1999. However, plaintiff certainly knew by the early 1970's that she was experiencing a sudden inability to conceive children. It is that very inability that plaintiff asserts as her damages in the present case. Given the surgical procedure performed by Dr. Reinhardt in 1968 and the lack of any intervening medical procedures, a reasonably prudent person in plaintiff's position should have linked her inability to conceive children to the surgical procedure performed by Dr. Reinhardt. While plaintiff may not have understood the specific cause of her infertility, i.e., the IUD, she should have understood that Dr. Reinhardt may have done something during the 1968 surgery that prevented her from subsequently conceiving children. Accordingly, we hold that the discovery rule period began to run and expired long before plaintiff filed the instant suit. The circuit court correctly granted defendants' motion for summary disposition based on the statute of limitations.

Given our resolution of the statute of limitations issue, we need address neither the trial court's decision regarding the doctrine of laches nor the trial court's decision regarding plaintiff's motion to amend her complaint.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter