STATE OF MICHIGAN

COURT OF APPEALS

DONALD DENNIS and EDITH DENNIS,

Plaintiffs-Appellees,

v

DAVID M. DAVIS, M.D.,

Defendant-Appellant.

UNPUBLISHED
June 19, 2001

No. 221611
Oakland Circuit Court
LC No. 98-011340-NH

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

In this medical malpractice case, defendant appeals by leave granted from the trial court's order denying his motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations). We reverse and remand for entry of judgment consistent with this opinion.

Plaintiff[1] filed this malpractice action on December 17, 1998, alleging that after removing a cancerous lump from his throat on May 2, 1989, defendant failed to prescribe radiation therapy and instead informed plaintiff's wife that radiation therapy was unnecessary. About a year later, and perhaps as late as April 1991, plaintiff and his wife had a meeting with defendant, during which defendant asked if plaintiff had undergone radiation therapy. Plaintiff or his wife reminded defendant that he had opined that plaintiff did not need radiation, at which point defendant stated something to the effect "oh, that's right, he didn't." Plaintiff and his wife moved from the state, and plaintiff enjoyed good health until January 1998, when another cancerous lump was discovered and removed from his throat. In May 1998, plaintiff filed a notice of intent to sue, pursuant to MCL 600.2912b, and filed his complaint after the notice period. Defendant moved for summary disposition, asserting the applicable statute of limitations. Plaintiff responded by arguing that defendant's statement at the post-operative conference, allegedly confirming his earlier statement that radiation therapy was not necessary, amounted to fraudulent conduct sufficient to avoid application of the limitation period. Plaintiff claimed he did not discover, nor did he have reason to discover, his cause of action against

[1] Edith Dennis' loss of consortium claim is derivative. For simplicity, we will refer to Donald Dennis as plaintiff.

defendant until January 1998. The trial court observed that the evidence of fraudulent concealment was slight, but found it sufficient to create a jury question.

We review de novo a decision on a motion for summary disposition pursuant to MCR 2.116(C)(7). We must determine whether defendant is entitled to judgment as a matter of law. *Rheaume v Vandenberg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998). In doing so, we "consider all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the plaintiff." *Id.* at 420.

Absent fraudulent conduct by defendant designed to conceal plaintiff's cause of action, plaintiff's claim is time-barred.[2] Stated differently, plaintiff's claim is timely only if defendant's fraudulent conduct or concealment by defendant reasonably kept plaintiff from discovering his claim until January 1998. Hence, we first focus on whether defendant's statement at the post-operative conference ("oh, that's right, he didn't") was sufficient to put the question of fraudulent concealment to a jury. If that question is answered affirmatively, we then focus on whether that statement was adequate to prevent plaintiff from discovering his claim until January 1998.

In order to demonstrate fraudulent conduct "[t]he plaintiff must prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery [of the claim]. Mere silence is insufficient." *Sills v Oakland Gen'l Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996). "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *Buszek v Harper Hospital*, 116 Mich App 650, 653; 323 NW2d 330 (1982); see *Draws v Levin*, 332 Mich 447, 452-453; 52 NW2d 180 (1952). It is the plaintiff's *cause of action* that must be fraudulently concealed. It does not matter whether the cause of action is concealed by hiding the negligent act, hiding the existence of an injury, or otherwise distracting the plaintiff from learning of the existence of a cause of action. *Eschenbacher v Hier*, 363 Mich 676, 680-682; 110 NW2d 731 (1961).

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[2] This case is controlled by the provisions of limitation and repose from the Revised Judicature Act that were in effect at the time the alleged malpractice occurred. *Roberts v Golden*, 131 Mich App 615, 617; 345 NW2d 924 (1984). Of the pertinent provisions, § 5805 of the RJA imposed a two-year period of limitations on malpractice claims. MCL 600.5805. Section 5838a of the RJA allowed that, for claims of medical malpractice, a claim may be brought in the period prescribed in § 5805, or within six months of when the claim was discovered or should have been discovered, provided it was brought within six years of the alleged malpractice. However, if the claim was concealed by the defendant's fraudulent conduct, the six-year limitation period did not apply, and the claim could be commenced within six months of when it was discovered or should have been discovered, or with the periods prescribed in § 5805 or § 5855, whichever was longer. MCL 600.5838a (amended by 1993 PA 78). Section 5855 gave a two-year period within which to commence an action following the time when it was discovered or should have been discovered in cases where the claim was fraudulently concealed by the defendant. MCL 600.5855. This Court has previously equated the "fraudulent conduct" described by § 5838a with "fraudulent concealment" under § 5855. *Sills v Oakland Gen'l Hosp*, 220 Mich App 303, 309-310; 559 NW2d 348 (1996).

In this case, defendant never concealed from plaintiff the fact that he failed to prescribe radiation therapy. At most, defendant may have acted affirmatively to conceal from plaintiff the fact that his prior failure to prescribe radiation treatment left plaintiff more vulnerable to a recurrence of cancer. However, it is not enough for plaintiff to establish that defendant's statement was false and misleading; he must also present evidence that defendant's statement was fraudulent. *Buszek, supra* ("The acts relied on must be of an affirmative character and fraudulent"). For the statement to be proven fraudulent, as opposed to being merely negligent, plaintiff would have to establish that defendant knew that his statement was untrue and he nevertheless said it in order to conceal plaintiff's cause of action. See *Clement-Rowe v Mich Health Care*, 212 Mich App 503, 507; 538 NW2d 20 (1995). Plaintiff's theory relies on conjecture alone to establish this point. Drawing every legitimate inference in plaintiff's favor does not entail giving substance to conjecture, nor is speculation sufficient to create a jury-submissible question. *Hall v Consolidated Rail Corp*, 462 Mich 179, 187; 612 NW2d 112 (2000).

We also conclude that defendant's conduct did not prevent plaintiff from discovering his claim within the limitation period. Plaintiff was aware that radiation therapy was available as a supplemental treatment, and that he had not received it. Nothing prevented plaintiff from seeking a second opinion regarding the advisability of radiation therapy, and, if anything, defendant's question at the post-operative conference should have aroused plaintiff's suspicions. Statutory tolling of the period of limitations on the basis of fraudulent concealment "was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by facts known, and the plaintiff must be held chargeable with knowledge of facts which [he] ought, in the exercise of reasonable diligence, to have discovered." *Kroes v Harryman*, 352 Mich 642, 649; 90 NW2d 444 (1958) (citation and internal quotation marks omitted). See also, *Witherspoon v Guildford*, 203 Mich App 240, 248-249; 511 NW2d 720 (1994); *Grebner v Runyon*, 132 Mich App 327, 340; 347 NW2d 741 (1984).

We reverse the order denying defendant's motion for summary disposition, and remand for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra