STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA S. ROJAS and STEVEN J. ROJAS,

Plaintiffs-Appellants,

v

SPARROW HOSPITAL and LUIS A. GONZALES, M.D.,

Defendants-Appellees.

UNPUBLISHED
August 10, 2001

No. 222298
Ingham Circuit Court
LC No. 99-089738-NH

Before: Neff, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's orders granting defendants' motions for summary disposition in this medical malpractice action, finding that plaintiffs' action was barred by the statute of limitation. We affirm.

I

On September 12, 1996, plaintiff Patricia Rojas (herein "plaintiff" or collectively with her husband, "plaintiffs") gave her written consent for a vaginal hysterectomy. The same day, defendant Luis Gonzalez, M.D., performed the hysterectomy, leaving a surgical sponge inside plaintiff's pelvic region. On March 9, 1999, plaintiffs filed an action alleging two medical malpractice claims: one premised on the sponge and another alleging that the hysterectomy was unnecessary, and a battery claim premised on the unnecessary surgery, which plaintiffs alleged voided the consent for surgery.

The trial court initially granted summary disposition of the battery claim in favor of defendants, finding that an allegation that the surgery was unnecessary did not void plaintiff's consent and thus establish a battery. On reconsideration, the court granted summary disposition for defendants on the remaining claims, on the ground that plaintiffs' action was barred by the statute of limitation, MCR 2.116(C)(7).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

II

On appeal, this Court reviews the grant or denial of summary disposition de novo. *Herald Co v City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). In deciding a motion under MCR 2.116(C)(7), a court must consider the affidavits, pleadings and other documentary evidence, accepting all well-pleaded allegations as true and construing them in a light most favorable to the nonmoving party. *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 706; 620 NW2d 319 (2000); *Sills v Oakland General Hosp*, 220 Mich App 303, 307; 559 NW2d 348 (1996). If no genuine issue of material fact exists, a court must decide as a matter of law whether the claim is statutorily barred. *Id*.

III

Plaintiffs first argue that the trial court erred in concluding that their action was barred by the statute of limitation because certain statutory and common-law exceptions apply to the two-year limitation period. We disagree.

Plaintiff's claims accrued on the date of her hysterectomy surgery, September 12, 1996. MCL 600.5838a(1). In general, the period of limitation for a medical malpractice claim is two years after the claim accrued or six months after plaintiff discovered, or should have discovered, the existence of the claim, whichever was later. MCL 600.5838a(2). Plaintiffs filed their complaint and affidavit of merit on March 9, 1999.

Plaintiff discovered the presence of the sponge no later than April 14, 1997, as admitted in her complaint, and certainly no later than June 5, 1997, when the sponge was surgically removed. Therefore, the two-year limitation period is the longer, and controlling, limitation period for that claim, expiring September 12, 1998.

A

Plaintiffs contend that because Dr. Gonzalez fraudulently concealed the existence of the sponge, plaintiff had two years from the time she discovered her claim, or until June 5, 1999, to file her medical malpractice claim, pursuant to MCL 600.5838a(3), which they contend incorporates the general limitation period for fraudulent concealment provided in MCL 600.5855. We agree with the trial court that the evidence does not support an allegation of fraudulent concealment; thus, MCL 600.5838a(3) is inapplicable.

To assert a claim for fraudulent concealment, a plaintiff must plead adequate facts to establish that the defendant committed affirmative acts or misrepresentations designed to prevent discovery of the claim. *Sills*, *supra* at 310; *Patterson v Flick's Estate*, 69 Mich App 101, 104, 112; 244 NW2d 371 (1976). Such facts have not been shown.

Plaintiffs' complaint alleged that "Gonzalez assured [plaintiff] that the pain, distress, and redness were normal after-effects of the operation performed on her and that it was probably just healing"; that Dr. Gonzalez "negligently concealed from the plaintiff that the sponge had been

left in her abdomen by insisting that the x-ray of [plaintiff] only revealed evidence of the stitches used during the first operation"; and that Gonzales suggested "to [plaintiff] that the x-ray of her abdomen showed that there was not a foreign object in [her] abdomen and that the x-ray showed only the stitches used in the hysterectomy." These allegations do not establish an affirmative act of concealment.

Negligence, by definition, is the failure to use the care a reasonably prudent person would under similar circumstances. Black's Law Dictionary (6th ed), p 1032. It is characterized chiefly by inadvertence or like action. *Id*. Plaintiffs assert in their brief on appeal that "Gonzales knew or should have known that the pain and discomfort was the result of his surgical sponge having been left in Rojas's abdomen since it was easily detectable on the x-ray and he had reviewed the x-rays on numerous occasions." Plaintiffs provide no citation to the record for this assertion, and we find no record support for this statement.[1] Even if supported by the record, such assertions do not support a claim of fraudulent concealment. The mere fact that Dr. Gonzales was incorrect in his evaluation does not establish an affirmative act or misrepresentation intended to prevent discovery of plaintiff's claim. *Sills, supra* at 310.

Because plaintiffs' complaint failed to allege affirmative acts of concealment, the provisions of MCL 600.5838a(3) do not apply. Given the lack of record evidence supporting concealment, we find no merit in plaintiffs' further contention that they are entitled to amend their complaint to plead additional facts to establish a fraudulent concealment claim.

B

Plaintiffs likewise contend that their unnecessary surgery claim was timely filed. Plaintiffs argue that they did not discover the surgery was unnecessary until after an expert reviewed plaintiff's file in December 1998, and they filed their complaint within six months of this discovery.

Plaintiffs discovered the "unnecessary surgery" claim no later than February 12, 1998. On February 12, 1998, plaintiffs served a supplemental notice of intent to bring a malpractice action against defendants based on the theory that the hysterectomy was not medically necessary. Once again, the two-year limitation period, from the time the claim accrued, is the longer, and controlling, limitation period, expiring September 12, 1998.

The six-month discovery period of MCL 600.5838a begins to run when, on the basis of objective facts, a plaintiff should have known of a possible cause of action. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 221-222; 561 NW2d 843 (1997). "Once a plaintiff is aware of an

[1] In fact, this statement appears inconsistent with plaintiffs' assertions that "[d]ue to an inability to determine the cause of [plaintiff's] suffering," a second physician, Dr. Bryant, performed surgery in the same general area" as Dr. Gonzales and that Dr. Bryant's operation revealed a surgical sponge that had been left in plaintiff's abdomen.

injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id*. at 223. On February 12, 1998, at the latest, plaintiff was

aware of her injury and its possible cause because she filed a notice of intent to bring a malpractice claim based on that very injury and cause. The discovery period of MCL 600.5838a was thereby triggered. Moreover, plaintiffs cannot hold the period of limitation in abeyance while they seek professional assistance to determine the existence of a claim. *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

Plaintiffs additionally argue that discovery was delayed until plaintiff was informed of her expert's conclusion because she was emotionally unstable at the time she was first told that the hysterectomy may have been unnecessary. Although plaintiff's situation is unfortunate, she was represented by counsel no later than July 16, 1997, more than one year before the period of limitation expired. Plaintiffs cite no authority for the proposition that her distress tolled the period of limitation. "A party may not leave it to this Court to search for authority to support its position." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 495-496; 593 NW2d 180 (1999).

C

Finally, plaintiffs claim that the trial court should have applied the common law discovery rule to delay the running of the limitation period because Dr. Gonzales concealed the claim and because it is difficult to determine the accrual date of plaintiff's claim. We find no basis for applying the common law rule in the present case because the facts do not justify an extension of the statutory period. *Poffenbarger v Kaplan*, 224 Mich App 1, 13; 568 NW2d 131 (1997). Plaintiffs had a fair opportunity to bring their action against defendants. *Id*. at 14.

Because none of the claimed exceptions apply, we find that plaintiffs' medical malpractice claims were barred by the statute of limitation. MCL 600.5838a(3); MCL 600.5805(5).

IV

Plaintiff next argues that the trial court erred in dismissing her battery claim. Plaintiff claims her consent was void because the surgery was allegedly unnecessary. We disagree.

Plaintiff consented to the operation performed, a vaginal hysterectomy. There was no allegation that the surgery performed exceeded the scope of the written consent. If a physician operates on a patient without consent, he has committed battery and may be required to respond in damages. *Werth v Taylor*, 190 Mich App 141, 146; 475 NW2d 426 (1991). However, where consent was obtained, no action for battery lies. See *Young v Oakland General Hosp*, 175 Mich App 132, 139-141; 437 NW2d 321 (1989). Plaintiffs cite no authority for their proposition that a patient's consent is void if the surgery is later deemed unnecessary, and this Court finds none. Dismissal of plaintiffs' battery claim was proper.

V

Plaintiffs also argue that defendants failed to timely file the requisite affidavits of meritorious defense and were in default, thereby precluding defendants' motions for summary disposition. Defendants' affidavits of meritorious defense is a moot issue because plaintiffs' claims were barred prior to filing by the statute of limitation. MCL 600.5838a(2); see also *Ewing v Bolden*, 194 Mich App 95, 103-104; 486 NW2d 96 (1992).

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert J. Danhof