

STATE OF MICHIGAN
COURT OF APPEALS

ANNA HORTON, Personal Representative of the
ESTATE OF ANNETTE HORTON, Deceased,

UNPUBLISHED
November 6, 2001

Plaintiff-Appellant,

V

No. 222952
Wayne Circuit Court
LC No. 98-828319-NH

ST. JOHN HEALTH SYSTEM-DETROIT-
MACOMB CAMPUS, d/b/a/ DETROIT
RIVERVIEW HOSPITAL,

Defendant-Appellee,

and

BON SECOURS HOSPITAL, GEORGE COSTEA,
D.O., and DETROIT RIVERVIEW INTERNAL
MEDICINE ASSOCIATES,

Defendants.

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting summary disposition to defendant Detroit Riverview Hospital (defendant) on statute of limitations grounds, MCR 2.116(C)(7), in this medical malpractice action alleging a failure to timely diagnose decedent Annette Horton's breast cancer. We affirm.

Defendant's motion for summary disposition argued that plaintiff's claim was barred by the two-year limitations period for medical malpractice claims and was also barred under the six-month discovery rule. Plaintiff argued that her claim was timely under either limitation period, and further contended that decedent's insanity tolled the running of the statutory period. The circuit court agreed with defendant.

We review the circuit court's grant of summary disposition de novo. *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). In reviewing a motion brought under MCR 2.116(C)(7), a court must consider all documentary evidence filed or submitted by

the parties. The contents of the complaint must be accepted as true unless specifically contradicted by affidavits or other appropriate documentation submitted by the moving party. *Id.*, citing *Patterson v Kleiman*, 447 Mich 429, 432, 434 n 6; 526 NW2d 879 (1994).

I

Plaintiff first argues that the circuit court erred in granting summary disposition because her claim was timely under the six-month discovery limitation period, which did not begin to run until the day she learned her condition was “terminal.” We disagree.

Under the discovery rule, “an action involving a claim based on medical malpractice may be commenced ... within 6 months after the plaintiff discovers or should have discovered the existence of the claim....” MCL 600.5838a(2). In *Moll v Abbot Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993), the Court adopted the “possible cause of action” standard for determining when the discovery rule period begins to run. This standard applies in medical malpractice actions. *Solowy v Oakwood Hosp*, 454 Mich 214, 222; 561 NW2d 843 (1997).

Under the “possible cause of action” standard, “once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action.” *Moll, supra*, at 24. Further:

Michigan jurisprudence compels not only the use of an objective standard for determining when an injury is discovered, but it also compels strict adherence to the general rule that “subsequent damages do not give rise to a new cause of action.” *Larson [v Johns-Manville Sales Corp]*, 427 Mich 301, 315; 399 NW2d 1 (1986).] The discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury. [*Moll, supra* at 18.]

In the instant case, plaintiff alleges that from March of 1992 to January of 1995, decedent presented to defendant with right breast pain but was not diagnosed with breast cancer. Plaintiff’s decedent was first diagnosed with cancer, involving “a high grade large tumor with lymph node involvement,” in April of 1995. Plaintiff’s decedent underwent a radical mastectomy in June, 1995, and then chemotherapy and radiation. In early 1996, a metastatic lesion was found on her left femur, requiring radiation. Decedent was informed that her condition was terminal in January, 1997. She died in March 1997.

Under the possible cause of action standard, the decedent should have discovered that the progression of her cancer to an advanced stage was possibly caused by defendant’s alleged failure to timely diagnose her condition. Although plaintiff frames decedent’s injury as death from cancer, and argues that decedent was not informed her condition was “terminal” until shortly before decedent’s death, decedent’s death was a consequence of the progression of her cancer to an advanced stage. Decedent’s death was the “later realized consequence,” i.e., the “subsequent damage” which does “not give rise to a new cause of action.” Further, decedent had knowledge that her cancer had metastasized in early 1996, more than six months before her death.

Because the six-month period expired before decedent's death, decedent did not have a viable cause of action upon her death. MCL 600.5852 provides, in pertinent part:

If a person dies *before the period of limitations has run or within 30 days after the period of limitations has run*, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. [Emphasis added.]

Because decedent died well after the six-month period expired, the above provision does not apply. Accordingly, we conclude that the circuit court did not err when it concluded that plaintiff's claim was time barred under the six-month discovery rule.

II

Plaintiff next argues that the circuit court erred in dismissing her claim because she presented sufficient evidence to create a factual dispute regarding whether the decedent was insane when the claim accrued, a condition which would toll the limitations period. We disagree.

The tolling provision found in MCL 600.5851 states, in pertinent part:

- (1) [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

To prevent the one-year period from beginning to run, the condition of incapacity must be continuous. MCL 600.5851(4). The burden is on the plaintiff to show that he or she is entitled to the benefit of this statute. *Warren Consolidated Schools v WR Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994).

Plaintiff failed to sustain this burden. MCL 600.5851(2), the tolling statute, defines insanity as:

- (2) ... a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane.

The Supreme Court has identified a number of factors which would indicate a person is mentally deranged under the above provision, including an inability to attend to personal and business affairs such that it becomes necessary to explain matters an ordinary person would understand, including simple legal procedures. *Lemmerman v Fealk*, 449 Mich 56, 71-73; 534 NW2d 695 (1995).

Here, plaintiff asserts that the two affidavits she provided in response to defendant's motion for summary disposition present evidence that decedent was unable to manage her personal and business affairs from the time her claim accrued until her death. In those affidavits, plaintiff and Tondalaya Horton, decedent's sister, averred:

In the late 1980's Annette was diagnosed as Manic Depressive and has been hospitalized and medicated for this condition for a number of years. From April of 1995, when Annette was first diagnosed with cancer until her death, Annette was mentally and physically, incapable of caring for her children or otherwise looking after her affairs as a result of the treatment necessary to treat her disease, which left her fatigued, confused and disoriented, as well as her underlying mental condition.

In order to create a genuine issue of fact, a party must present evidence that would be admissible at trial. *Cox v Dearborn Heights*, 210 Mich App 389, 398; 534 NW2d 135 (1995). As defendant correctly points out, "opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *SSC v Detroit Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

The affidavits were unsupported by any medical records. They referred to a diagnosis made in the late 1980's. No dates were given in connection with the alleged hospitalizations for the manic depressive condition. The affidavit states in conclusory form that decedent was mentally and physically unable to care for her children and look after her affairs due to the treatment and to her underlying mental condition. However, the treatment does not date back to January or April of 1995, when the cause of action accrued; the underlying mental condition in 1995 was not established; and the inability to care for her children or her affairs is linked not only to her mental condition, but her physical condition as well. We agree with the circuit court's determination that the affidavits were insufficient to create a genuine issue of material fact.

Although plaintiff correctly points out that summary disposition is improper where evidence before the court is conflicting, *Deflaviis v Lord & Taylor*, 223 Mich App 432, 436; 566 NW2d 661 (1997), where no material factual dispute exists, whether plaintiff's claim is barred is a question for the court as a matter of law, *Baker v DEC International*, 218 Mich App 248, 253; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich 247; 580 NW2d 894 (1998). Here, the circuit court correctly concluded that plaintiff's affidavits were too conclusory to create a material factual dispute and that, therefore, plaintiff's claim was time barred.

III

Plaintiff also argues that the circuit court erred in concluding her claim was untimely because the accrual date which triggers the general two-year limitations period was not the date decedent last visited defendant before being diagnosed with cancer, but rather the date when the mammogram was finally requested. Again, we disagree.

Generally, a plaintiff has two years from the date the claim accrues to commence a medical malpractice action. MCL 600.5805(1), (4). The Legislature has explained the accrual date as follows:

[A] claim based on the medical malpractice of a person who is, or who holds himself or herself out to be, a licensed health care professional . . . accrues at the time of the act or omission which 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).]

Plaintiff's argument that the omission continued until the proper tests were finally requested on April 17, 1995 under a "continuing tort" theory is unsupported. This Court has declined to adopt a continuing-wrong theory in the context of a medical malpractice action. *McKiney v Clayman*, 237 Mich App 198, 208; 602 NW2d 612 (1999). In *McKiney*, the plaintiff alleged that the defendant "failed to properly evaluate her condition by not diagnosing her cancer and failed to properly treat her by neglecting to conduct appropriate examinations and neglecting to refer her to other, more appropriate and competent healthcare providers." *Id.* at 202. Thus, like the plaintiff's allegations in the present case, the plaintiff in *McKiney* was suing the defendant because of a failure to act or an omission rather than for a negligent act.

Moreover, the plaintiff in *McKiney* contended that these omissions or failures continued until the physician-patient relationship was terminated. *Id.* Here, plaintiff contends that the omissions continued until the proper diagnostic testing was finally requested. Thus, in both cases, the plaintiffs argue that the omission continued to occur well beyond the last appointment where their physicians failed to diagnose their cancer.

The *McKiney* panel concluded that, because the plaintiff did not allege any new omissions beyond the defendant's failure to diagnose the cancer at the last doctor's appointment, the accrual date was the date the defendant last saw the plaintiff. *Id.* at 207. Applying the reasoning in *McKiney* to the case at bar, the date of the last omission was January 10, 1995, the date when defendant last saw plaintiff and failed to order a mammogram.

Because the circuit court correctly concluded that the accrual date was January 10, 1995, decedent's claim was barred before her death on March 6, 1997. Thus, the circuit court's conclusion that the two-year limitations period bars plaintiff's lawsuit was correct.

Affirmed.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White