STATE OF MICHIGAN

COURT OF APPEALS

RONALD M. BRYANT,

Plaintiff-Appellant,

v

DETROIT MEDICAL CENTER, a public Corporation, DETROIT RECEIVING HOSPITAL, a subsidiary of the DMC, DETROIT INDUSTRIAL CLINIC, a subsidiary of the DMC,

Defendants-Appellees/Cross-Appellants,

and

CONCENTRA MANAGED CARE,

Defendant.

UNPUBLISHED
November 27, 2001

No. 223132
Wayne Circuit Court
LC No. 98-836367-NH

Before: Holbrook, Jr., P.J., and Cavanagh and Gribbs*, JJ.

PER CURIAM.

This is a medical malpractice case. Plaintiff appeals by right from an order of the trial court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and dismissing his cause of action. We affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). In reviewing a motion brought under MCR 2.116(C)(7), we accept as true all of plaintiff's well-pleaded allegations, construing them in a light most favorable to plaintiff. *Witherspoon v Guilford*, 203 Mich App 240, 243; 511 NW2d 720 (1994). "Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate." *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 340; 568 NW2d 847 (1997).

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

Plaintiff is suing defendants for injuries he sustained resulting from treatment performed by B.C. Liu, M.D., at defendant Detroit Industrial Clinic (DIC). DIC is a wholly owned subsidiary of defendant Detroit Medical Center (DMC). Plaintiff was employed by DMC as a security officer. According to plaintiff, he was initially injured on March 2, 1993,[1] "while subduing a violent individual" in a bathroom adjacent to the emergency room of defendant Detroit Receiving Hospital (DRH). The following day, plaintiff was examined by a nurse at DRH, who referred him to DIC. At DIC, plaintiff was given some pain medication and asked to return a couple of days later. On plaintiff's next visit, he was examined by Dr. Liu. According to plaintiff, Dr. Liu diagnosed plaintiff's injury as a strain to the left-side of plaintiff's neck. Plaintiff alleges that on March 24, 1993, he was injured while Dr. Liu was treating plaintiff's injury with traction. Plaintiff was placed in a chair with a collar around his neck. Plaintiff alleges that he was injured when Dr. Liu set the traction machine at 100 pounds of pressure instead of 10 pounds. Plaintiff asserts that the machine jerked him up and down somewhere between 5 and 10 times before the collar popped off. Subsequently, Dr. Liu reset the machine at 10 pounds, and plaintiff continued with his treatment. Plaintiff continued to receive treatment at DIC for the next three weeks. Additionally, after seeing Dr. Clara Morton in April 1993, plaintiff underwent a six-week course of physical therapy at DRH.

Plaintiff returned to work four weeks after his on-the-job injury. Plaintiff alleges that after his return to work, he continued to "experience some discomfort in the area of his upper left back, particularly during cold weather." He testified at his deposition that he periodically experienced soreness and a lack of mobility in his head after returning to work. "There was a couple of times I had to call in sick," plaintiff testified, "I couldn't even move." Plaintiff stated that he had periodic numbness in his arm since 1994. Nonetheless, plaintiff testified he did not recall having any treatment after the six weeks of physical therapy at DRH until he went to the Riverside Hospital emergency room in 1996.

Riverside Hospital referred plaintiff to William A. Athens, Jr., D.O., in September 1996. Plaintiff alleges that Dr. Athens diagnosed "a chronic cervical spine muscle spasm with rotator cuff tendinitis." Dr. Athens proscribed six weeks of physical therapy, including traction. However, plaintiff was experiencing so much pain that the traction treatments were discontinued after about three sessions.

In September 1997, plaintiff was examined by neurologist Bassam Maaz, M.D. Plaintiff indicated he specifically sought out a neurologist because the condition "was not getting any better." Plaintiff testified that soreness manifested itself every couple of weeks, and that pain would return every two or three months. Dr. Maaz scheduled plaintiff for a Magnetic Resonance Imaging (MRI) test on September 8, 1997. Plaintiff alleges that he was not informed of the results of the MRI, which "disclosed numerous problems with [p]laintiff's cervical discs, including a tear, herniation, and a bulge at several locations." Again, plaintiff underwent a six-week period of physical therapy, which included hot packs, massage, and ultrasound treatments.

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[1] Plaintiff's amended complaint indicates that the date was on or about March 3, 1993. His deposition testimony indicates that the injury occurred on March 2, 1993, and that he was first seen for treatment on March 3. In his brief on appeal, plaintiff indicates that the correct date is March 2.

During this time, plaintiff was seen by Dr. Maaz somewhere between six to ten times, and once by a Dr. Austin.

In November 1997, plaintiff was sent to Stephen M. Papadopoulus, M.D., and then to Philip J. Mayer, M.D. Dr. Mayer was identified by plaintiff as being a neurosurgeon. Dr. Mayer scheduled a second MRI on November 19, 1997. Plaintiff contends that it was not until he was informed of the results of the second MRI that he realized his continuing back injury may have been caused by the mistaken application of 100 pounds of pressure by Dr. Liu.[2] Dr. Mayer recommended that plaintiff have surgery.

Plaintiff filed his notice of intent on March 6, 1998,[3] and his complaint on November 9, 1998. Because the original complaint was not accompanied by an affidavit of merit, DMC filed a motion to dismiss, which was scheduled for a hearing on December 11, 1998. On the morning of the hearing, plaintiff filed an amended complaint that was accompanied by a brief letter signed by Arnold Markowitz, M.D. The letter reads:

> After my review of the records provided on the above case, I feel there was medical negligence in so much as Mr. Bryant suffered his injury due to excessive amounts of traction as well as his original work associated injury.
>
> If I can be of further assistance, please contact me.

The letterhead identifies Dr. Markowitz's specialty as "internal medicine – infectious disease."

At the December 11 hearing, DMC argued that the Markowitz letter did not meet the requirements of an affidavit of merit, as set forth in MCL 600.2912d(1).[4] After hearing plaintiff's responsive argument one week later, the trial court denied DMC's motion to dismiss.

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[2] Plaintiff testified that he first told his wife about the incident with Dr. Liu in December 1997. When asked why he thought about that incident in December 1997, plaintiff stated that it was because the pain associated with the traction that he was being treated with in 1997 brought up the memory.

[3] Plaintiff's notice of intent to file a claim tolled the six-month discovery period for 182 days. MCL 600.2912b(1).

[4] MCL 600.2912d(1) reads:

> Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [600.2169] . . . . The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
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> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or (continued…)

"The general limitation period for malpractice actions[5] provides that a plaintiff must bring his action within two years of when the claim first accrues." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997). Pursuant to statute, medical malpractice claims accrue "at the time of the act or omission that 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). In this case, the act that is the basis of the claim occurred on March 24, 1993. Accordingly, plaintiff would have had to commence his action on or before March 24, 1995. Clearly, plaintiff did not meet this deadline.

However, plaintiff argues that his action is saved by the six-month discovery rule, which provides that "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, whichever is later." MCL 600.5838a(2). Plaintiff argues that he did not have the information he needed to discover his cause of action until he was informed by Dr. Mayer of the results of his second MRI. We disagree.

"[T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. *Solowy, supra* at 222.

> Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action. . . . This puts the plaintiff, whose situation at one time warranted the safe harbor of the discovery rule, on equal footing with other tort victims whose situation did not require the discovery rule's protection. [*Moll v Abbott Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993).]

"The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff." MCL 600.5838a(2).

After reviewing the record, we conclude that the trial court correctly granted defendants summary disposition. Contrary to plaintiff's contention, the material facts are not in dispute. Rather, it is the legal consequences of the undisputed facts that forms the basis of the parties' dispute, and which is at the heart of our analysis. *Moll, supra* at 26. We believe that a person in plaintiff's position, exercising reasonable diligence, would have discovered a possible cause of

(…continued)

> care was breached by the health professional or health facility receiving the notice.
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> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
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> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [Footnote omitted.]

[5] MCL 600.5805(1), (4).

action on the day that Dr. Liu overloaded the traction machine. Plaintiff admitted in his deposition that he understood that the sharp pain he experienced when the traction machine was overloaded was different in kind from the pain he experienced as a result of his on-the-job injury. He also testified that the pain he felt in the three weeks following the incident with Dr. Liu was sharper than what he had experienced after his on-the-job injury. Additionally, plaintiff indicated that he understood the machine was causing the pain. In fact, plaintiff was specifically told by Dr. Liu that the machine was set too high. Once Dr. Liu set the machine at the proper level, plaintiff was able to continue with the traction treatment. Plaintiff did not need to precisely know the extent of his injury before the clock began to run. *Solowy, supra* at 224.[6]

Alternatively, giving plaintiff the benefit of the doubt, we conclude that plaintiff certainly should have discovered his cause of action no later than September 1996, when he sought and received treatment from Riverside Hospital and Dr. Athens. According to his own testimony, by this time he had been seen by three doctors (Liu, Maaz, and Athens), had been treated at two hospitals (DRH and Riverside), and had been through extended periods of physical therapy twice, and was in the process of receiving physical therapy for the third time. Plaintiff testified that he had continued to experience periodic soreness, pain, and numbness since the incident with Dr. Liu. After returning to work four weeks after the incident near the DRH emergency room, plaintiff testified that he would have so-called "bad days" about three or four times each month. Indeed, plaintiff stated that sometime between September 1996 and the last time he received treatment, he had missed work "a couple of times" because he "couldn't even move." See *Solowy, supra* at 227 (observing that a court examining when the discovery rule's six-month period begins to run should consider "the totality of the information available to the plaintiff, including his own observations of physical discomfort"). Plaintiff was unable to complete the traction treatments proscribed by Dr. Athens because of the pain associated with them. Rather than obscuring discovery of plaintiff's cause of action, plaintiff's physical symptoms and lack of successful treatment should have alerted plaintiff to his possible cause of action. Accordingly, we hold that the six-month discovery rule period expired no later than March 1997, which was one year before plaintiff filed his notice of intent. Plaintiff not having met his burden of proof on the matter, we conclude that the trial court correctly granted summary disposition to defendants based on the statue of limitations.

Given our conclusion that plaintiff's complaint was untimely, we need not address defendants' argument on cross-appeal that plaintiff's affidavit of merit was inadequate because it does not satisfy the requirements of MCL 600.2912d.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Roman S. Gribbs

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[6] Plaintiff argues that he was misled by both defendants' doctors and an unnamed "private physician" (presumably Dr. Athens) about the nature and extent of his injury. This argument fails for two reasons. First, the "possible cause of action" standard does not "require that the plaintiff be aware of the full extent of [an] injury before the clock begins to run." *Solowy, supra* at 224. Second, plaintiff did not plead fraudulent concealment in his amended complaint.