STATE OF MICHIGAN

COURT OF APPEALS

RENE ORTA and SANDRA ORTA,

Plaintiffs-Appellants,

v

HEALTH ONE MEDICAL CENTER, P.C., TOTAL HEALTH CARE, INC., JIT N. GOONEWARDENA, M.D., FADI OSKA, M.D., and BASIL RODANSKY, M.D.,

Defendants-Appellees,

and

HENRY GUNARTA, M.D.,

Defendant.

UNPUBLISHED
February 15, 2002

No. 226615
Wayne Circuit Court
LC No. 99-926941-NH

Before: Sawyer, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

According to the complaint, Total Health Care, Inc., plaintiff Rene Orta's health maintenance organization (HMO), referred him to Health One Medical Center, P.C, where he was treated by the individual doctors between March 24, 1997, and May 8, 1997. The complaint alleged that the defendant physicians were negligent in diagnosing the symptoms of bladder cancer as a kidney stone. The complaint in this medical malpractice action was filed on August 26, 1999. Following a hearing, the trial court agreed with defendants that summary disposition was appropriate under MCR 2.116(C)(7) because the statute of limitations had expired before plaintiffs filed suit.

[1] Plaintiff Sara Orta advanced a derivative claim for loss of consortium.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). When reviewing a motion decided under MCR 2.116(C)(7), this Court accepts as true the well-pleaded allegations in the complaint and construes them in the non-moving party's favor. The Court must consider the pleadings, affidavits, and other documentary evidence to determine whether a genuine issue of material fact exists. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 340; 568 NW2d 847 (1997). "Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. Otherwise, where no material facts are in dispute, this Court may decide the question as a matter of law." *Id*.

The limitation period for a malpractice claim is two years from the time the claim accrues. MCL 600.5805(1), (5). A medical malpractice claim accrues at the time of the act or omission that gave rise to the claim "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). A medical malpractice claim may be filed within the two-year limitation period or within six months after the plaintiff discovers or should have discovered the claim, whichever is later. MCL 600.5838a(2). The parties do not dispute that plaintiffs' cause of action accrued on May 8, 1997. Thus, plaintiffs had until May 8, 1999, to file suit.

Unlike other claims, a medical malpractice complaint cannot be filed at any time during the limitation period. Pursuant to statute, the plaintiff cannot file a medical malpractice action until the adverse party is provided with written notice "not less than 182 days before the action is commenced." MCL 600.2912b(1). If the limitation period would expire during the notice period under subsection 2912b(1), the limitation period is tolled "for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with [MCL 600.2912b]." MCL 600.5856(d).

In this case, plaintiffs gave notice to defendants Goonewardena, Oska, Health One Medical Center, P.C., and Total Health Care, Inc. on August 24, 1998. At that time, not quite sixteen months of the limitation period had elapsed. The 182-day waiting period expired on February 22, 1999. At that time, a little over ten weeks remained in the two-year limitation period. Because the statutory waiting period under MCL 600.2912b(1) ended before the limitation period expired, the § 5856(d) tolling provision is inapplicable, *Omelenchuk v Warren*, 461 Mich 567, 574; 609 NW2d 177 (2000), and the last day of the limitation period remained May 8, 1999. Neither the fact that not all potential defendants were included in the notice of intent, nor the fact that plaintiffs served a second notice of intent in March 1999 allowed plaintiffs to claim an additional 182-day waiting period before filing suit. MCL 600.2912b(6)[2]. We find no basis for concluding that defendants waived the right to assert the statute of limitations as a defense because they never claimed that the notice of intent was defective, as

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[2] MCL 600.2912b(6) provides:

> After the initial notice is given to a health professional or health facility under this section, the tacking or addition of successive 182-day periods is not allowed, irrespective of how many additional notices are subsequently filed for that claim, and irrespective of the number of health professionals or health facilities notified.

was the case in *Roberts v Mecosta Co General Hosp*, 240 Mich App 175; 610 NW2d 285 (2000), lv gtd 463 Mich 959 (2001).

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Brian K. Zahra