

STATE OF MICHIGAN
COURT OF APPEALS

DARLENE DUDEK,

Plaintiff-Appellant-Cross-Appellee,

v

ST. JOHN'S HOSPITAL,

Defendant-Appellee-Cross-
Appellant.

UNPUBLISHED

June 11, 2002

No. 230352

Macomb Circuit Court

LC No. 00-002117-NH

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) based on the trial court's finding that the action was time-barred under the applicable statutes of limitations. We affirm.

I. Basic Facts and Procedural History

On January 8, 1998, a medical instrument called a trocar¹ was discovered inside plaintiff's abdomen by Dr. Lenna Dines during an exploratory laparotomy,² which was a surgery undertaken to identify the cause of abdominal pain suffered by plaintiff. The operative report concerning the surgery provided, in relevant part:

On reaching the fascia there was noted to be a plastic foreign body in the midline which is protruding through the fascia. Dissection is undertaken about this to remove this foreign body. This foreign body is plastic and appears to be a tube. It protrudes through the fascia in what appears to be an area of a previous trocar placement from laparoscopic surgery. This area is excised as is the scar tissue and fibrous tissue that had surrounded the foreign body. After excision of this, the fascia is incised transversely.

¹ A trocar is a sharp-pointed surgical instrument enclosed in a cannula [tube] used for withdrawing fluid from a cavity, such as the abdominal cavity.

² A laparotomy is a surgical incision through the abdominal wall.

The patient was transferred to the Post-Anesthesia Care Unit in stable and satisfactory condition. Specimens were sent to Pathology. These specimens included the area of staples that had been removed. The foreign body that was removed from the fascia was also sent.

Plaintiff testified at her deposition that Dr. Dines had indicated to her shortly after the January 8, 1998 surgery that the foreign object had probably been left behind during a previous gallbladder surgery, which surgery was performed by Dr. Donn Schroder on February 27, 1996. An operative report concerning the gallbladder surgery was never produced for plaintiff, her counsel, or her expert to observe and evaluate. According to plaintiff, she has undergone seven laparoscopic procedures since 1991.

Plaintiff filed a medical malpractice action against defendant and Dr. Schroder³ on December 8, 1998, in the Wayne Circuit Court. The complaint alleged that a foreign object was left in plaintiff's abdomen during the 1996 surgery in which plaintiff's gallbladder was removed. The complaint further alleged that Dr. Schroder breached the standard of medical care by failing to remove the foreign object and by failing to inform plaintiff that a foreign object had remained in her body. Plaintiff additionally alleged a count of fraud based on the assertion that Dr. Schroder fraudulently represented to plaintiff that the surgery was "uneventful," and based on the assertion that Dr. Schroder knew a foreign object remained in plaintiff's body.

On September 22, 1999, Dr. Schroder was deposed, and he indicated that although there was no operative report, he recalled the 1996 gallbladder surgery and that it went very smoothly without any problems. Dr. Schroder described the surgery, and a transcript of Dr. Schroder's deposition was provided to plaintiff's medical expert. Based on Dr. Schroder's description of the surgery and the location of the incisions, plaintiff's expert determined that the foreign object could not have been left behind during the gallbladder surgery.

Plaintiff's expert then opined that the foreign object was most likely left behind during a laparoscopic procedure performed by Dr. Thomas Hartzell on November 8, 1995, which procedure was undertaken after plaintiff had complained of severe lower abdominal pain.⁴ On January 12, 2000, plaintiff filed a motion for leave to amend the complaint, arguing that based on additional information obtained through discovery, it was possible that the foreign object was left behind during Dr. Hartzell's surgery in 1995. The proposed first amended complaint alleged that the foreign object was left in plaintiff's abdomen either during the 1996 gallbladder surgery or the 1995 laparotomy. The proposed amended complaint still named Dr. Schroder as a defendant but not Dr. Hartzell, and the complaint still contained the fraud claim. Defendants challenged the motion to amend on the basis that any amendment would be futile because the statute of limitations would bar any claim arising out of the 1995 laparoscopic procedure.

³ Dr. Shroder was a named defendant in plaintiff's original complaint.

⁴ The operative report, referencing the nature of the surgery, provided: "This is a 39-year-old white female, status post laparoscopic assisted vaginal hysterectomy and bilateral salpingo-oophorectomy, who presented with severe lower abdominal pain in the left lower quadrant."

On February 14, 2000, Wayne Circuit Judge Louis F. Simmons, Jr., granted leave to amend, and plaintiff filed the first amended complaint, which, as opposed to the original proposed amended complaint, removed Dr. Schroder as a defendant, leaving only defendant hospital and retaining the fraud claim, referencing fraud simply on the part of defendant's employees and agents.⁵ Additionally, the first amended complaint, as actually filed, definitively asserted that the foreign object was left in plaintiff's abdomen during the 1995 laparoscopic procedure.

Defendant then filed a motion for change of venue on the basis that the 1995 laparoscopic procedure was performed at St. John Surgical Center located in Macomb County, and not in Wayne County.⁶ Pursuant to an order entered on May 10, 2000, the Wayne Circuit Court transferred the case to the Macomb Circuit Court where the case was assigned to Judge John B. Bruff.

Defendant then filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that the motion for leave to amend was not filed until more than two years after the act of malpractice, and more than six months after plaintiff's discovery of a possible claim, which occurred during Dr. Dines' surgery on January 8, 1998; therefore, plaintiff's action was time-barred under the applicable statutes of limitations. Defendant further argued that plaintiff's claim did not relate back to the filing of the original complaint because the allegations in the first amended complaint did not arise out of the same transaction or occurrence as alleged in the original complaint. Defendant next argued that the fraud claim also failed because it was filed more than two years after the discovery of plaintiff's cause of action on January 8, 1998. Finally, and in the alternative, defendant argued that plaintiff failed to file a new affidavit of merit in support of the allegations in the first amended complaint, thereby requiring dismissal.

The trial court issued a written opinion and order granting defendant's motion for summary disposition. The trial court first ruled that the first amended complaint did not relate back to the filing of the original complaint because a different transaction was involved, i.e., the 1995 laparoscopic procedure in the amended complaint, and the 1996 gallbladder surgery in the original complaint. The trial court then found that "plaintiff has clearly established that her causes of action were fraudulently concealed from her."⁷ Therefore, pursuant to MCL 600.5855, plaintiff "had two years from the date she discovered the existence of her claim to file an amended complaint." However, plaintiff discovered the existence of a foreign object on January 8, 1998, but she did not move to file an amended complaint until January 12, 2000; therefore, plaintiff did not timely move to file an amended complaint, and her claims were time-barred according to the trial court.

⁵ The lower court record also contains a March 9, 2000 stipulated order dismissing Dr. Schroder as a defendant.

⁶ The 1996 gallbladder surgery was performed at St. John Hospital in Detroit, and the 1995 laparoscopic procedure was performed at St. John Surgical Center in Macomb County.

⁷ Defendant filed a cross-appeal challenging the trial court's finding that plaintiff established that her causes of action were fraudulently concealed.

I. Applicable Law

A. MCR 2.116(C) (7) and Standard of Review

MCR 2.116(C)(7) provides, in part, for summary disposition where a claim is barred by a statute of limitations. This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence, and construe them in the plaintiff's favor. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision as to whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo. *Id.*

B. Statutes of Limitations and Exceptions

MCL 600.5805(5) provides that "[e]xcept as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice." Because plaintiff also raised a fraud claim that resulted in personal injury, MCL 600.5805(9) is applicable, and that provision provides that "[t]he period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." See *Coats v Uhlmann*, 87 Mich App 385, 391-392; 274 NW2d 792 (1978); *Case v Goren*, 43 Mich App 673, 680-682; 204 NW2d 767 (1972).

MCL 600.5838a(1) provides that a medical malpractice claim "accrues 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 further provides, in relevant part:

(2) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 . . . , or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. . . . 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. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. This subsection does not apply, and the plaintiff is subject to the period of limitations set forth in subsection (3), under 1 of the following circumstances:

(a) If discovery of the existence of the claim was prevented by the fraudulent conduct of . . . the health facility against whom the claim is made

(3) An action involving a claim based on medical malpractice under circumstances described in subsection (2)(a) or (b) may be commenced at any time within the applicable period described in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.

MCL 600.5855 provides that “[i]f a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.”

C. Relation Back of Amendments

MCR 2.118(D) provides that “[a]n amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.” The doctrine of relation back was invented to allow courts to associate the amended matter with the original pleading so that the amended complaint would not be barred by a statute of limitations. *Smith v Henry Ford Hospital*, 219 Mich App 555, 558-559; 557 NW2d 154 (1996). The reason for the doctrine as a means of defeating a statute of limitations is the desire of the courts not to have valid claims avoided by legal technicalities. *Id.*

III. Parties’ Arguments on Appeal

Plaintiff first argues that a question of fact existed regarding when she should have discovered her cause of action under six-month discovery provision of MCL 600.5838a, thus summary disposition was improper. Plaintiff next argues that pursuant to the fraudulent concealment statute, MCL 600.5855, plaintiff had two years to bring her cause of action from the time she discovered the actual act of negligence and the identity of the negligent doctor, which date was September 22, 1999; the date of Dr. Schroder’s deposition. Finally, plaintiff argues that the claim presented in the first amended complaint related back to the date of filing the original complaint.

Defendant first argues that the six-month discovery provision of MCL 600.5838a was never raised below; therefore, it is not preserved for appeal. Defendant further argues that even if MCL 600.5838a can be argued on appeal, it does not save plaintiff’s amended complaint because plaintiff discovered or should have discovered her claims on January 8, 1998, when Dr. Dines found the foreign object during surgery, and the motion to amend was not filed until January 12, 2000. Defendant next argues that the date of Dr. Schroder’s deposition, September 22, 1999, should not be considered because it does not reflect the discovery of plaintiff’s possible cause of action, and because it evidenced a lack of due diligence, coming nearly ten months after the original complaint was filed. Defendant concludes that there is simply no factual dispute for a jury to decide regarding the date of discovery of a possible cause of action.

Defendant next argues that plaintiff cannot establish fraudulent concealment under MCL 600.5855, and that the allegations in the amended complaint do not rise to the level of fraudulent concealment. In the alternative, defendant argues that even if plaintiff had a legitimate claim of fraudulent concealment, MCL 600.5855 does not save plaintiff's amended complaint because it was not filed within two years of discovery of the fraudulent concealment, which, again, would have been January 8, 1998. Next, defendant asserts that the relation-back doctrine does not apply because the amended complaint was based on an entirely different surgical procedure. Finally, defendant argues that the amended complaint should also have been dismissed because plaintiff failed to file a new affidavit of merit along with the amended complaint.

IV. Analysis

We initially reject plaintiff's claim that the first amended complaint relates back to the filing of the original complaint. In *Doyle v Hutzel Hospital*, 241 Mich App 206, 215; 615 NW2d 759 (2000), this Court, quoting *LaBar v Cooper*, 376 Mich 401, 406; 137 NW2d 136 (1965), stated:

“The amendment relates back to the date of the original pleading and, therefore, is not barred by limitations, whenever the claim or defense asserted in the amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. *It is thus beside the point that the amendment introduces new facts, a new theory, or even a different cause of action, so long as it springs from the same transactional setting as that pleaded originally.* The new test satisfies the basic policy of the statute of limitations, because the transactional base of the claim must still be pleaded before the statute runs, thereby giving defendant notice within the statutory period that he must be prepared to defend against all claims for relief arising out of the transaction.” [Emphasis in original.]

Here, the transactional setting giving rise to the claim in the original complaint was the 1996 gallbladder surgery performed by Dr. Schroder, and not the 1995 laparotomy performed by Dr. Hartzell. The first amended complaint did not introduce new facts, a new theory, or a different cause of action arising out of the gallbladder surgery, but instead alleged a new transactional setting. Therefore, the first amended complaint did not relate back, and the trial court's analysis was correct regarding that issue.

Next, it is clear that plaintiff's medical malpractice and fraud claims were filed outside the general statute of limitations if the causes of action were deemed to have accrued at the time of the 1995 laparotomy. Thus, we must determine on which date the six-month discovery provision of MCL 600.5838a began to run. The trial court, although citing MCL 600.5838a, did not address this issue, nor did plaintiff raise the issue in her response to defendant's motion for summary disposition. Generally, an issue is not preserved for appeal if it is not raised before the trial court, unless resolution of the issue is necessary for a proper determination of the case, the claim presents a question of law for which all facts have been presented, or manifest injustice would result. *Ramirez v Bureau of State Lottery*, 186 Mich App 275, 283; 463 NW2d 245 (1990). We find it necessary to consider this issue for purposes of making a proper determination as to the applicability of the statute of limitations.

Plaintiff maintains that it was the September 22, 1999 deposition of Dr. Schroder that triggered her knowledge of a possible cause of action based on the 1995 surgery performed by Dr. Hartzell. Plaintiff's motion for leave to file a first amended complaint was filed on January 12, 2000; therefore, it was clearly filed within six months of the deposition. Contrary to plaintiff's assertion that Dr. Schroder's deposition triggered the date plaintiff became aware of a cause of action based on the 1995 surgery, defendant asserts that the proper date to focus on is January 8, 1998; the date Dr. Dines discovered the foreign object.

We agree with the trial court that the operative date to apply the statute of limitations analysis is January 8, 1998. In *Solowy v Oakland Hospital Corp*, 454 Mich 214, 221-222; 561 NW2d 843 (1997), our Supreme Court, citing *Moll v Abbott Laboratories*, 444 Mich 1, 23-24; 506 NW2d 816 (1993), stated that a plaintiff becomes aware of a possible cause of action, for purposes of commencing the time period under the discovery rule, when the plaintiff is aware of an injury and its possible cause. The *Moll* Court stated that the "possible cause of action" standard "advances the Court's concern regarding preservation of a plaintiff's claim when the plaintiff is unaware of an injury or its cause" *Moll, supra* at 24.

Obviously, plaintiff became aware of a potential injury on January 8, 1998, upon the discovery of the foreign object and resulting scar tissue. She also was aware of the cause – one of her prior laparoscopic surgeries. Once a plaintiff is aware of the injury and its possible cause, the plaintiff had the necessary knowledge to preserve and pursue her claim. Distilled to its essence, plaintiff's argument is simply that she didn't discover the *identity* of the defendant until September 22, 1999. This is similar to the proposition rejected by this court in *Poffenbarger v Kaplan*, 224 Mich App 1; 568 NW2d 131 (1997). The *Poffenbarger* panel, addressing an attempt by the plaintiff to add party defendants through an amended complaint, stated "[t]he discovery period applies to discovery of a possible claim, *not the discovery of the defendant's identity*." (Emphasis added). *Id.* at 12, citing *Weisburg v Lee*, 161 Mich App 443, 448; 411 NW2d 728 (1987).

Because plaintiff knew of her cause of action on January 8, 1998 and did not move to amend the complaint until January 12, 2000, her medical malpractice and fraud claims were time barred. The trial court did not err in granting summary disposition pursuant to MCR 2.116(C)(7).

Although unnecessary to our resolution of this matter, we note our disagreement with the trial court's finding of fraudulent concealment. The sole claim alleged in the complaint as constituting an affirmative misrepresentation is that defendant asserted that the surgery was "uneventful." Plaintiff fails to identify in any manner the person who allegedly made the statement, and the statement is vague at best. Plaintiff made this exact same allegation in the original complaint, attributing the comment to Dr. Schroder, who did not perform the 1995 laparoscopic procedure, leaving us to question the validity of the allegation. Plaintiff fails to allege any affirmative act designed to prevent subsequent discovery. We believe plaintiff did not sufficiently allege that defendant's employees or agents committed fraudulent concealment in connection with the 1995 surgery.

Finally, because of our resolution on the statute of limitations issue, we do not address defendant's argument that plaintiff failed to file a new affidavit of merit with the first amended complaint.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly