STATE OF MICHIGAN

COURT OF APPEALS

BARBARA MEIXNER and GARY MEIXNER,

Plaintiffs-Appellees,

V

HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD WESTLAND CLINIC,

Defendant-Appellant.

UNPUBLISHED
October 25, 2002

No. 232334
Wayne Circuit Court
LC No. 00-009094-NH

Before: Meter, P.J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order denying its motion for summary disposition on the ground that plaintiff's[1] claim is barred by the statute of limitations. We reverse, and remand.

This Court reviews a grant of summary disposition de novo. *Brennan v Edward D Jones & Co*., 245 Mich App 156, 157; 626 NW2d 917 (2001). When reviewing a motion for summary disposition 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. *Id*. Provided there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, whether a plaintiff's claim is barred by the statute of limitations is a question of law that is reviewed de novo by this Court. *Id*.

The limitations 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). Further, a medical malpractice claim may be filed within the two-year period or within six months after the plaintiff discovers or should have

[1] The singular "plaintiff" refers to Barbara Meixner, who treated at defendant clinic. The limitations period for Mr. Meixner's derivative claim for loss of consortium is no different than the limitations period applicable to his wife's malpractice claim.

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

discovered the claim, whichever is later, but in no circumstances can it be filed more than six years after the date of the act or omission giving rise to the claim. MCL 600.5838a(2).

To the extent plaintiff's claim is based on defendant's failure to take chest x-rays before September 30, 1993, her claim would be barred because the negligent omission would have occurred more than six years before plaintiff filed her notice of intent to sue. To the extent plaintiff's claim is based on the failure to diagnose possible cancer between November 1993 and November 1996, her claim would have accrued on November 6, 1996, the last date plaintiff was treated at the clinic before her cancer was discovered the following year. She did not file suit by November 1998. Therefore, plaintiff's claim is barred if she in fact discovered her claim before March 30, 1999, and is barred unless she can show that she could not have discovered her claim before March 30, 1999.

Whether plaintiff discovered her claim within the six-month period is determined by what plaintiff knew and when she knew it, which is necessarily subjective. Whether plaintiff should have discovered her claim within the six-month period is to be determined by an objective test: would a reasonable person in plaintiff's circumstances have discovered the claim? *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993). Under the objective test, the issue of when plaintiff should have discovered her claim is determined by the "possible cause of action" standard. Under this standard, a plaintiff should have discovered her claim when she is aware of an injury and its possible cause, i.e., information that, when viewed in its totality, suggests a nexus between the injury and the negligent act. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 221-223, 226; 561 NW2d 843 (1997). "The law does not require that the plaintiff know with absolute certainty that the physician committed malpractice before the six-month discovery period begins to run." *Griffith v Brant*, 177 Mich App 583, 588; 442 NW2d 652 (1989).

Plaintiff, a long-time smoker, treated with defendant for persistent coughing and underwent a chest x-ray in November 1993. She claimed that she was never told the results of the 1993 x-ray. Her cough persisted and in October 1997, a new chest x-ray showed suspected lung cancer. Shortly thereafter, plaintiff was diagnosed with advanced-stage lung cancer. Although she was not told that defendant had committed malpractice and did not know all the specifics of a malpractice claim, the fact that the cancer was so advanced that it had spread from plaintiff's lungs to her brain indicated that defendant failed to diagnose the cancer during its earlier stages. Plaintiff acknowledged that while she was undergoing treatment in early 1998, she suspected there was a problem with her treatment at the clinic relating to the discovery of the cancer, yet she failed to act for over a year. "A plaintiff must act diligently to discover a possible cause of action and 'cannot simply sit back and wait for others' to inform her of its existence." *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995), quoting *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986). Because the undisputed facts showed that plaintiff should have known of her cause of action in early 1998 at the latest, the trial court erred in denying defendant's motion.

We reverse and remand with instructions to enter judgment for defendant on the grounds that plaintiff's claim is time barred by the applicable statute of limitations. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns