STATE OF MICHIGAN

COURT OF APPEALS

KAY L. FLAVIN,

Plaintiff-Appellant,

v

ELLEN S. BEAN, M.S.W., A.C.S.W.,

Defendant-Appellee.

UNPUBLISHED
August 12, 2004

No. 247916
Oakland Circuit Court
LC No. 2001-036288-NH

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(7) (action barred by statute of limitations). Plaintiff contends that the trial court erred in granting summary disposition to defendant, in denying plaintiff's motion for reconsideration, and in denying plaintiff's request to amend her complaint.[1] We affirm.

Whether a cause of action is barred by the statute of limitations is a question of law that this Court reviews de novo. *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). Similarly, we review de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). "We consider all documentary evidence submitted by the parties and accept as true the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence." *Id.* "We view the uncontradicted allegations in the plaintiff's favor and ascertain whether the claim is time-barred as a matter of law." *Id.* This Court reviews a trial court's decision with respect to a motion for reconsideration and a motion to amend pleadings for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Backus v Kauffman (On Reh)*, 238 Mich App 402, 405; 605 NW2d 690 (1999).

[1] This case involves allegations of professional malpractice against defendant, who is a state-licensed social worker. The medical malpractice statute of limitations applies to health care professionals who are licensed or registered under MCL 333.16101 to MCL 333.18838. See MCL 600.5838a(1)(b). MCL 333.18509 and MCL 333.18511 provide for the registration of social workers and certified social workers. Therefore, the medical malpractice statute of limitations applies in this action.

In general, a plaintiff must bring a medical malpractice claim within two years of the act or omission that forms the basis of the claim or within six months after the plaintiff discovers or reasonably should have discovered that she has a claim, whichever is later. MCL 600.5805(6); 600.5838a(2). In the case at hand, the trial court found that plaintiff did not file her claim within two years of the date on which defendant ceased treating plaintiff, a date sometime in October 1998. Plaintiff, on the other hand, contends that she continued to see defendant, albeit not in an office setting, after this time and that each time there was improper contact between plaintiff and defendant between 1998 and 2000, there was a new "act or omission which is the basis for the claim of medical malpractice."

For acts of malpractice that occurred before October 1, 1986, the claim accrued on the date that the defendant "'discontinue[d] treating or otherwise serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.'" *Solowy v Oakland Hosp Corp*, 454 Mich 214, 219-220; 561 NW2d 843 (1997), quoting MCL 600.5838(1). However, "[o]n October 1, 1986, an accrual provision specific to medical malpractice claims became effective." *Id.* at 220. This provision provides that 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). The unambiguous language of MCL 600.5838a(1) "reflects the Legislature's desire to focus the accrual date of medical malpractice claims on the occasion of the act or omission complained of, and the Legislature's clear rejection of the notion that the existence of a continuing physician-patient relationship by itself could extend the accrual date beyond the specific, allegedly negligent act or omission charged." *McKiney, supra* at 203.

Plaintiff alleges, in both of the complaints that she filed,[2] that she received marital and individual counseling from defendant from 1995 through 1998. Plaintiff does not allege in either complaint any contact between her and defendant after 1998. Accepting plaintiff's well-pleaded allegations as true, *McKiney, supra* at 201, plaintiff's counseling with defendant ended in 1998. Assuming for purposes of our analysis that the act or omission occurred on the last day of 1998, i.e., December 31, 1998, plaintiff's complaint was filed beyond the two-year statute of limitations.

Plaintiff, however, argues that defendant's contacts with plaintiff through November and December of 2000 constituted independent negligent acts or omissions and served as the basis for the accrual date of this claim. This Court has addressed the issue of whether continued treatment of a plaintiff by the defendant can extend the accrual date for medical malpractice claims. In *McKiney, supra* at 201, the plaintiff argued on appeal that because she continued to receive treatment, by way of telephone, from the defendant through March 3, 1994, the March date constituted the accrual date of her malpractice claim and "the trial court therefore erred in relying on the date of plaintiff's last visit to defendant's office as the appropriate accrual date." This Court looked at the plaintiff's complaint, wherein she alleged that the defendant "failed to

[2] Plaintiff filed a complaint in November 2001 and another in May 2002.

properly evaluate her condition by not diagnosing her cancer, and failed to properly treat her by neglecting to conduct appropriate examinations . . . ." *Id.* at 202. The Court stated that the plaintiff offered no specific date on which the defendant's failures allegedly occurred, but instead maintained "that these failures represented ongoing deficiencies that continued until the termination date of the parties' physician-patient relationship, March 3, 1994." *Id.* This Court stated that "[p]resumably defendant's diagnosis and treatment decisions initially occurred at some point before his first laser treatment removal in 1990 . . . ." *Id.* at 204.

This Court further stated that it could assume for purposes of its analysis that the defendant's "subsequent 1992 and 1993 misdiagnoses and decisions to continue utilizing laser treatment after the spot's recurrences constituted separate acts or omissions that would represent new accrual dates." *Id.* The Court continued:

> Even assuming further that defendant's December 3, 1993, restatement of his belief that plaintiff did not have cancer qualified as a separate, distinct diagnosis of plaintiff's condition in light of the contrary information she had received from Henry Ford Hospital doctors, plaintiff nowhere alleged any subsequent new act or omission beyond December 3, 1993, that would extend her claim's accrual date. [*Id.* at 204-205.]

Regarding the 1994 telephone conversations, this Court found that the plaintiff's testimony did not allege any new, distinct, negligent acts or omissions by the defendant in the early months of 1994, but indicated that the defendant "merely adhered to his original misdiagnosis and treatment determination." *Id.* at 207. "Because [the] defendant's misdiagnosis and allegedly negligent treatment decisions occurred at some point no later than December 3, 1993, over two years before the plaintiff's filing" of the malpractice claim, this Court concluded that the trial court properly granted the defendant summary disposition under MCR 2.116(C)(7). *Id.*

Like the plaintiff in *McKiney*, who did not allege any new, distinct negligent acts or omissions by the defendant in the early months of 1994, plaintiff's affidavit does not allege any new negligent acts or omissions. Rather, plaintiff states that she and defendant celebrated Christmas together and that they met casually to discuss personal and marital issues that occurred after plaintiff began therapy with a different therapist, Sydney Reiter.[3] Based on the malpractice allegations contained in plaintiff's complaint, defendant's alleged malpractice occurred at some point no later than December 31, 1998. Thus, plaintiff failed to file her claim within the two-year period of limitation.

With regard to the six-month discovery rule, the trial court found that plaintiff's claim remained barred because she did not file the claim within the allowable time period once she was advised by her second therapist of the professional and ethical rules for psychotherapy.

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[3] While plaintiff alleges that she paid over $10,000 to defendant for therapeutic services rendered from 1996 to 1998, there is no indication regarding how much of this amount was paid after 1998. Moreover, the affidavit containing the information about payment was filed *after* the court granted summary disposition to defendant.

Our Supreme Court stated the following with regard to the six-month discovery rule:

> This Court adopted the "possible cause of action" standard announced in *Moll* [*v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993)]. The majority concluded that an objective standard applied in determining when a plaintiff should have discovered a claim. Further, the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin. Rather, the 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 221-222.]

"Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id.* at 223. Thus,

> [t]he six-month discovery rule period begins to run in medical malpractice cases when the plaintiff, on the basis of objective facts, is aware of a possible cause of action. This occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician. When the cause of the plaintiff's injury is difficult to determine because of a delay in diagnosis, the "possible cause of action" standard should be applied with a substantial degree of flexibility. [*Id.* at 232.]

In the case at hand, defendant argued in support of her motion for summary disposition that Reiter informed plaintiff of the alleged breaches of duty by defendant early on in plaintiff's treatment with Reiter. Defendant cited a report that was prepared by Reiter. In this report, Reiter stated: "Early on it was clear that something was amiss; and I advised this patient about the professional and ethical rules for the provision of psychotherapy, but again her attachment and loyalty [to] Ellen Bean seemed to make her guarded and resistant to this information." Plaintiff contends that her subsequent therapist did not advise her of a potential cause of action against defendant and that even if such information had been given to her, she suffered from a mental condition that precluded her from comprehending those rights she was otherwise bound to know.[4] Plaintiff attached Reiter's affidavit to her response to defendant's motion for summary disposition; in this affidavit, Reiter stated that she did not advise plaintiff that she had a claim against defendant for malpractice. However, the law does not require that the plaintiff know with absolute certainty that the defendant committed malpractice before the six-month period begins to run. *Griffith v Brant*, 177 Mich App 583, 588; 442 NW2d 62 (1989). Rather, "[i]t merely requires that the plaintiff know of the act and have *reason to believe* that the physician's act was improper." *Id.* (emphasis in original). Based on Reiter's report, plaintiff possessed a level of information that indicated a nexus between her injury and defendant's negligent acts. *Solowy, supra* at 226. We note that Reiter did not give any specific dates in her report. However, even if "early on" in their relationship was interpreted to mean January 2001 (after two years of counseling sessions), the statute of limitations would nonetheless bar plaintiff's claim,

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[4] As discussed *infra*, the evidence in support of this mental condition was submitted after the trial court ruled on the motion for summary disposition.

because plaintiff did not file her claim until November 16, 2001, after the six-month discovery period. Therefore, the trial court did not err in granting summary disposition to defendant under MCR 2.116(C)(7).

Plaintiff also contends that the trial court erred *if* it accepted defendant's position that plaintiff's then divorce attorney advised her that she had a potential cause of action against defendant. Plaintiff concedes that the trial court's opinions did not attribute to plaintiff the knowledge of her divorce attorney and that the court did not specifically indicate that it relied on this assertion in making its ruling. However, plaintiff argues that to the extent that the trial court placed any subconscious reliance on defendant's assertion, this assertion was rebutted by the attorney's affidavit. Plaintiff has provided no authority to support her contention that this Court should review an argument that the trial court did not address but could have "subconsciously" considered in its ruling. "A party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). Thus, we decline to address this argument.

Plaintiff next contends that the trial court erred in denying her motion for reconsideration. In her motion, plaintiff argued that she timely filed the claim because the statute of limitations was tolled due to her mental derangement. We disagree.

Under MCL 600.5838a(2), "[t]he 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 600.5851 provides:

> (1) Except as otherwise provided in subsections (7) and (8), if 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. This section does not lessen the time provided for in section 5852.
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> (2) The term insane as employed in this chapter means 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.
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> (3) To be considered a disability, the infancy or insanity must exist at the time the claim accrues. If the disability comes into existence after the claim has accrued, a court shall not recognize the disability under this section for the purpose of modifying the period of limitations.

Plaintiff submitted, as part of her motion for reconsideration, the supplemental affidavit of Reiter, wherein Reiter stated that it was her professional opinion that during 1999, 2000, and part of 2001, plaintiff suffered from mental derangement that prevented her from comprehending rights that she was otherwise bound to know. This Court has stated that it finds no abuse of discretion in the denial of a motion for reconsideration that rests on testimony that could have been presented at the time the issue first was argued. *Churchman, supra* at 233. Plaintiff does

not state why Reiter could not have provided her additional information at the time of the motion for summary disposition. Plaintiff was a patient of Reiter at the time the motion for summary disposition was filed. Thus, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Plaintiff also contends that the trial court erred in denying her request to amend her complaint to include a fraudulent concealment claim. We disagree.

Under MCL 600.5838a(2)(a), the statute of limitations in a medical malpractice action may be extended because of the fraudulent concealment of the claim by the defendant. In interpreting MCL 600.5838a(2)(a), this Court examines case law concerning the general fraudulent concealment statute, MCL 600.5855. See *Sills v Oakland General Hosp,* 220 Mich App 303, 309-310; 559 NW2d 348 (1996). Under MCL 600.5855, "the statute of limitation is tolled when a party conceals the fact that the plaintiff has a cause of action." *Sills, supra* at 310. To invoke this provision, "there must be concealment by the defendant of the existence of a claim or the identity of a potential defendant." *McCluskey v Womack,* 188 Mich App 465, 472; 470 NW2d 443 (1991). "[T]he fraud must be manifested by an affirmative act or misrepresentation." *Witherspoon v Guilford,* 203 Mich App 240, 248; 511 NW2d 720 (1994). Thus, "[t]he plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery." *Id.*

Even if we were conclude that plaintiff was alleging fraudulent concealment of the claim on the part of defendant and that this allegation was pleaded with the requisite degree of specificity as required by MCR 2.112(B)(1), the tolling provision is not available to a plaintiff who knew or should have known about the existence of the claim. *McCluskey, supra* at 472-473. As discussed above, plaintiff knew or should have known about this potential claim within the limitation period. Thus, the trial court did not abuse its discretion in ruling that plaintiff's proposed amendment would have been futile.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper