

STATE OF MICHIGAN  
COURT OF APPEALS

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SHERYL MITCHELL,

Plaintiff-Appellant,

v

HARANATH POLICHERLA, M.D., P.C., d/b/a  
POINTE MEDICAL CENTER, POINTE  
MEDICAL CENTER, P.C., and THULASI DIVI,  
M.D.,

Defendants-Appellees.

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UNPUBLISHED  
November 15, 2005

No. 255476  
Wayne Circuit Court  
LC No. 00-002058-NH

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In a prior appeal, *Mitchell v Policherla*, unpublished opinion per curiam of the Court of Appeals, issued 5/22/03 (Docket Nos. 237578 & 238217), this Court held that any of plaintiff's claims which accrued before October 11, 1998, were time barred. *Id.*, slip op at 5. On remand, the trial court determined that plaintiff could not establish any act of malpractice accruing after October 11, 1998, and, accordingly, once again granted summary disposition. Plaintiff now challenges that decision.

We review the trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Whether a cause of action is barred by the statute of limitations is a question of law that we review de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

Plaintiff testified that she underwent a mammogram in March 1998. The mammogram showed an area of dense fibroglandular tissue and the radiologist recommended further evaluation by way of a spot compression test. At this point, the facts come somewhat in dispute. Defendants maintain that plaintiff was informed of this at an April 1998 appointment, but that she declined a follow-up mammogram. Plaintiff testified that she did not learn the results of the mammogram until a visit to Dr. Divi sometime in December 1998. Plaintiff further claims that Dr. Divi told her at that visit that the mammogram showed a spot on her left breast, but that the

condition was nothing to worry about, and that she (Divi) would monitor it. Plaintiff's recollection of the events are not consistent with the medical records maintained by defendants, which show that the results of the mammogram were reviewed during a visit on April 20, 1998. The records further show that plaintiff was seen again in mid-September and then not until March 1999.

It is not in dispute that plaintiff's next mammogram was not conducted until April 1999. It is also agreed that that mammogram revealed that a mass "highly suggestive of malignancy" had developed. Plaintiff asserts that defendants were negligent for failing to diagnose and treat the spot before April 1999.

Given the procedural posture of the case, we accept plaintiff's version of the events as true. But even under plaintiff's version of the facts, we believe that the trial court correctly granted summary disposition. In determining when a medical malpractice claim accrues, Michigan does not recognize the concept of a "continuing wrong" or continuing-treatment rule. *McKinney v Clayman*, 237 Mich App 198, 208; 602 NW2d 612 (1999). In *McKinney*, the defendant misdiagnosed a growth on the plaintiff's tongue as being non-malignant during a December 3, 1993, visit. The parties had various consultations regarding the issue over the next few months, with the defendant pursuing a course of treatment for the plaintiff on the basis that they were dealing with a precancerous growth. In March 1994, a biopsy was performed and the plaintiff learned that the growth was, in fact, malignant. The plaintiff filed a medical malpractice action against the defendant on December 21, 1995, more than two years after the defendant's misdiagnosis of the growth, but less than two years after the last consultation between the plaintiff and the defendant regarding the growth. The plaintiff argued that the accrual date for the medical malpractice claim should be the date of the last consultation between the plaintiff and the defendant regarding the issue, which occurred in March 1994. This Court disagreed, concluding that the accrual date was the date that the defendant misdiagnosed the plaintiff's condition and began a course of treatment for a precancerous growth. *Id.* at 208-209. In reaching this conclusion, the Court noted that the plaintiff "does not allege any new, distinct negligent acts or omissions by defendant in the early months of 1994, but indicates that defendant merely adhered to his original misdiagnosis and treatment determination." *Id.* at 207.

Turning to the case at bar, plaintiff argues that her claim accrued on the date Dr. Divi allegedly told her the spot was nothing to worry about and did not order a spot compression test, that being in December 1998. But even if that is the date that Dr. Divi communicated a misdiagnosis to plaintiff, that does not mean that that is the date that a misdiagnosis occurred. Rather, if Dr. Divi did make a misdiagnosis, it occurred at the time of the March 1998 mammogram when Dr. Divi received the radiologist's report that indicated a suspicious mass which, while likely benign in the opinion of the radiologist, merited a follow-up mammogram with a spot compression test, and Dr. Divi failed to advise plaintiff to schedule a follow-up mammogram. That is, Dr. Divi's act of malpractice, assuming there was one, occurred in March or April of 1998 when Dr. Divi reviewed the radiology report and concluded that there was no need to order an immediate follow-up and that it would be sufficient to merely "keep an eye on" the condition.

Plaintiff would have us conclude that any subsequent visit by her to Dr. Divi, at which Dr. Divi either (1) communicated her diagnosis and treatment plan ("nothing to worry about, we'll just keep an eye on it") or (2) did not order a follow-up mammogram, constituted a new act

of malpractice. But it is clear that under *McKiney*, any such visit merely represented Dr. Divi adhering to the “original misdiagnosis and treatment determination.” *Id.* at 207. Had a new test been performed and Dr. Divi again failed to properly diagnose a malignant mass, that might represent a new act of malpractice with a new accrual date. But no such test was performed until April 1999, at which time the proper diagnosis was rendered. But plaintiff’s own deposition testimony shows not that a new test was performed at the December 1998 appointment, but merely that Dr. Divi communicated her diagnosis and treatment plan to plaintiff after plaintiff inquired, as she was leaving the appointment, what the results of the March 1998 mammogram had been.

For these reasons, we conclude that plaintiff’s medical malpractice claim accrued before October 11, 1998, and, as required by our prior holding, we conclude that it is time-barred.

As for plaintiff’s claim that the trial court prematurely granted summary disposition before Dr. Divi’s deposition could be taken, we disagree. Because under our analysis it is irrelevant whether plaintiff saw Dr. Divi in September 1998 as the medical records report or in December 1998 as plaintiff claims, even if Dr. Divi’s testimony at deposition would establish that plaintiff did, in fact, see Dr. Divi in December 1998, that would not change the analysis of the statute of limitations issue.

Affirmed. Defendants may tax costs.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Patrick M. Meter