STATE OF MICHIGAN

COURT OF APPEALS

WILLS B. DIXON and SANDRA S. DIXON,

Plaintiffs-Appellants,

v

NITIN AMBANI, M.D., TONY E. PINSON, M.D., CASCADES UROLOGY, P.C., and W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendants-Appellees.

UNPUBLISHED
November 22, 2005

No. 256292
Jackson Circuit Court
LC No. 03-006496-NH

Before: Donofrio, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

Plaintiff Wills B. Dixon[1] appeals by right the trial court's order dismissing his claims pursuant to MCR 2.116(C)(7), after concluding that plaintiff's claims of ordinary negligence, fraud and misrepresentation, and intentional infliction of emotional distress sounded in medical malpractice and were barred by the applicable two-year statute of limitations. We affirm.

I. Basic Facts

Plaintiff filed a complaint alleging that he suffered erectile dysfunction as a result of a circumcision performed by defendant Nitin Ambani, M.D. at defendant W.A. Foote Memorial Hospital, Inc. Plaintiff alleged that he suffered postoperative complications including priapism, swelling, bleeding, and pain. Plaintiff alleged that, when he attempted to contact Dr. Ambani postoperatively at defendant Cascade Urology, P.C., he was informed that Dr. Ambani was not available, but defendant Tony E. Pinson was covering for him. However, plaintiff's attempts to contact Dr. Pinson were met with the response that plaintiff should go to the emergency room. When plaintiff presented to the emergency room, a doctor looked at plaintiff's condition and called Dr. Pinson, who recommended a mild compression dressing, which was applied by a male nurse. Even with this treatment, plaintiff suffered a painful priapism for seven days. Ultimately, Dr. Ambani examined plaintiff and treated his condition. However, plaintiff never recovered to

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[1] Because Sandra S. Dixon's claim is derivative of Wills B. Dixon's claims, we use the term plaintiff in the singular throughout this opinion.

his pre-circumcision condition. He remained unable to obtain an erection. When plaintiff informed Dr. Ambani of his problem, Dr. Ambani stated that any problems plaintiff was experiencing "were all in his head."

II. Analysis

Plaintiff asserts that the trial court erred in ruling that his claims sounded in medical malpractice and thus were subject to the two-year statutory period of limitations in MCL 600.5805(6). We disagree.

We review de novo a trial court's determination regarding the timeliness of a claim. *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 570-571; 703 NW2d 115 (2005).

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004) (citation omitted).]

A. Nature of Plaintiff's Claims

This Court recently held that, in determining the nature of a claim, "It is well established that '[t]he gravamen of an action is determined by reading the claim as a whole,' and looking 'beyond the procedural labels to determine the exact nature of the claim.'" *Tipton v William Beaumont Hospital*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (citations omitted). In *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004), our Supreme Court established "two defining characteristics" of medical malpractice claims:

> First, medical malpractice can occur only "'within the course of a professional relationship.'" Second, claims of medical malpractice necessarily "raise questions involving medical judgment." [Citations omitted.]

With these rules in mind, we consider plaintiff's claims.

In his ordinary negligence claim, plaintiff alleged that Dr. Ambani and the hospital failed to adequately inform him of the risks and benefits and/or alternative treatments surrounding his circumcision. Plaintiff alleged that Dr. Ambani and the hospital owed a duty, as plaintiff's physician and treating hospital, to properly inform him of the risks surrounding the procedure. This claim necessarily raises questions involving medical judgment. Therefore, the gravamen of this claim is medical malpractice.

Plaintiff also alleged that Dr. Ambani knowingly made false representations to plaintiff to induce him to have a circumcision. Plaintiff also alleged that Dr. Ambani and the hospital failed to inform him of the possible risks associated with the procedure. This claim is essentially a

restatement of plaintiff's ordinary negligence claim concerning informed consent. Therefore, this claim also sounds in medical malpractice.

In his claim of intentional infliction of emotional distress against Dr. Pinson, plaintiff alleged that, even though Dr. Pinson was supposed to treat defendant Dr. Ambani's patients in his absence, he did not meet plaintiff at the hospital emergency room as he had promised during an earlier telephone conversation nor did he meet with plaintiff during the next six days, despite plaintiff's alleged attempts make an appointment. Plaintiff further alleged that, instead of treating plaintiff, Dr. Pinson "left [plaintiff] to suffer with a 'rock hard' erection and severely swollen penis, which persisted until the stitches at the incision site 'ruptured,'" and that this failure to treat was "intentional, malicious, extreme and outrageous, exceeding all decent and tolerable bounds for a Physician, who has taken a [sic] Oath to help sick and infirmed patients." Such allegations necessarily call into question Dr. Pinson's medical judgment. Therefore, this claim also sounds in medical malpractice.

B. Statutory Period of Limitations

Having determined that plaintiff's claims, despite their labels, actually sound in medical malpractice, we next determine whether the application statutory period of limitation expired before plaintiff filed his complaint. The last date of negligence properly included in plaintiff's case is March 2, 2001.[2] Therefore, the two-year statue of limitations, MCL 600.5805(6), expired on March 2, 2003. Plaintiff sent to defendants a notice of intent to file a claim on May 29, 2003. Plaintiff filed his complaint on November 26, 2003. Therefore, plaintiff's claims are barred unless an exception applies.

Plaintiff asserts that he filed his complaint timely pursuant to MCL 600.5838a(2) because he filed his complaint within six months of discovering his cause of action. We disagree. In *Solowy v Oakwood Hospital Corp,* 454 Mich 214, 221; 561 NW2d 843 (1997), our Supreme Court noted its adoption, in *Moll v Abbot Laboratories,* 444 Mich 1; 506 NW2d 816 (1993), of the "possible cause of action standard" for determining when the discovery rule period begins to run. Our Supreme Court stated:

> The majority [in *Moll]* 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. The majority [in *Moll*] explained:

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[2] Although plaintiff argues that his visit to Dr. Ambani on May 30, 2001, is also included in his complaint, nothing in the affidavit of merit identifies any breaches in the applicable standard of care during the May 30, 2001, office visit. Therefore, pursuant to MCL 600.2912d(1) and *Mouradian v Goldberg,* 256 Mich App 566, 573-574; 664 NW2d 805 (2003), plaintiff failed to commence a claim regarding the May 30, 2001, visit to Dr. Ambani.

> We find that the best balance is struck in the use of the "possible cause of action" standard. This standard advances the Court's concern regarding preservation of a plaintiff's claim when the plaintiff is unaware of an injury or its cause, yet the standard also promotes the Legislature's concern for finality and encouraging a plaintiff to diligently pursue a cause of action. *Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action.* We see no need to further protect the rights of the plaintiff to pursue a claim, because the plaintiff at this point is equipped with sufficient information to protect the claim. This puts the plaintiff, whose situation at one time warranted the safe harbor of the discovery rule, on equal footing with other tort victims whose situation did not require the discovery rule's protection. [*Solowy, supra* at 221-222, quoting in part *Moll, supra* at 23-24 (emphasis in original).]

Plaintiff alleged that, on March 2, 2001, and again on May 30, 2001, plaintiff told Dr. Ambani that he noticed a significant difference in his ability to obtain and maintain an erection after the circumcision. Therefore, soon after the circumcision and postoperative complications, plaintiff noticed the erectile dysfunction and believed the possible cause was the circumcision. Thereafter, plaintiff pursued the opinions of several other urologists, informing each that his inability to obtain and maintain erections followed the circumcision. One urologist noted, in July 2002, that plaintiff's condition may have been caused by the "swelling to the cutaneous nerves to the penis." Another urologist noted, on November 4, 2002, the possibility that "branches of [plaintiff's] dorsal nerve going to the glans penis" were injured during his circumcision.

On the basis of these allegations, plaintiff was aware of his injury and the possible cause of action, at the latest, on November 4, 2002. From this date, the six-month discovery period ended on May 4, 2003. However, plaintiff did not send his notice of intent to file a claim until May 29, 2003. Therefore, plaintiff did not file his claim within six months of discovering his cause of action.

Plaintiff also asserts that he was prevented from discovering his cause of action by Dr. Ambani's fraudulent concealment. We again disagree.

"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 v Oakland General Hospital*, 220 Mich App 303, 310; 559 NW2d 348 (1996). Plaintiff alleged that Dr. Ambani concealed plaintiff's cause of action by telling plaintiff that there were no problems with his circumcision, that any problems "were all in his head," and that it could take "several months, possibly up to a year," for his erections to normalize. However, this Court has determined that, although misdiagnosis might show negligence, it does not amount to fraudulent concealment. *Id.*

Accordingly, because plaintiff's claims are barred by the statute of limitations, the trial court did not err in granting defendants' motions for summary disposition. Affirmed.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly