STATE OF MICHIGAN

COURT OF APPEALS

ANDREW PALUDA and CATHERINE PALUDA, Plaintiffs-Appellants, v ASSOCIATES OF INTERNAL MEDICINE, P.C., and STEPHEN A. WILLIAMS, M.D., Defendants-Appellees.	UNPUBLISHED June 21, 2012 No. 303789 Oakland Circuit Court LC No. 2010-112989-NH

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs Andrew and Catherine Paluda (collectively, the Paludas) appeal by right the trial court's opinion and order dismissing their claims against defendants Associates of Internal Medicine, P.C. (Associates) and Stephen A. Williams, M.D. as untimely. Because we conclude that—given the evidence actually presented by the parties on Williams and Associates' motion for summary disposition—the trial court properly determined that the Paludas' claims were untimely, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In November 2005, Andrew Paluda went to see Williams for a checkup. During that visit, Williams performed a Prostate Specific Antigen (PSA) test on Andrew. The test results showed that Andrew had a mildly elevated PSA, which might indicate that he had prostate cancer. Williams stated that he informed Andrew about the results and asked him to schedule a follow-up appointment. Andrew Paluda testified at his deposition that Williams did not inform him about the results and did not schedule any follow-up tests.

After the 2005 test, Andrew Paluda continued to consult with Williams. However, Williams took no further action with regard to the elevated test result. Andrew Paluda had a general health evaluation with Williams in March 2007, but Williams did not discuss the prior prostate test or schedule a new test.

In July 2008, Andrew Paluda went to see Williams with complaints that he was having difficulty urinating. Williams performed a prostate examination on Andrew and tested his prostate antigen level again. The test revealed that his antigen level was now more than ten times the normal level. Andrew was diagnosed with prostate cancer in August 2008.

The Paludas gave Williams and Associates notice of their intent to sue in May 2010 and filed their complaint in November 2010. They alleged that Williams failed to inform Andrew Paluda about the results from the November 2005 PSA test and did not take any follow up measures despite repeated contacts over the next two years. The Paludas further alleged that the failure to inform them about Andrew's test results, as well as the failure to take specific actions with regard to Andrew's prostate health during later visits and contacts breached the applicable standard of care. Finally, they alleged that Williams and Associates "fraudulently and wrongfully concealed their acts and omissions of malpractice."

In November 2010, Williams and Associates moved for summary disposition under MCR 2.116(C)(8) and (C)(10). They argued that the Paludas' claims accrued in November 2005—after the initial elevated prostate test results came back—and, therefore, they had to sue by November 2007 under the applicable period of limitations. Further, to the extent that the discovery rule might apply, they argued that the Paludas knew or should have known that they had a potential claim for malpractice once Andrew was diagnosed with prostate cancer in August 2008. As such, they had to sue under the discovery rule within six months of that date, which was January 2009. Because they did not give notice that they were going to sue until May 2010, their complaint was untimely and should be dismissed. In response to this motion, the Paludas presented evidence that Williams did not inform them about the elevated test results from 2005 and continued to conceal that information—by not revealing it or acting on it—until Andrew's diagnosis with cancer. This concealment, they maintained, amounted to fraudulent concealment that extended the applicable period of limitations to two years from the date that they knew or should have known that they had a claim for malpractice.

Andrew Paluda died in January 2011.

In February 2011, the trial court issued an opinion and order on the motion for summary disposition. The trial court agreed with Williams and Associates that the normal two year period of limitations had passed. It also agreed that the Paludas knew or should have known about their claims in August or September 2008—or at best, in June 2009. As such, the six month period for discovered claims had also expired. Finally, the trial court rejected the Paludas' claims that they had sufficiently alleged fraudulent concealment:

> [T]he Complaint contains no allegation which states or reasonably infers that any Defendant engaged in an affirmative act or misrepresentation designed to prevent the discovery of the Plaintiff[s'] claim. The blanket allegation in Paragraph 19 of the Complaint that "Defendants fraudulently and wrongfully concealed their acts and omissions of malpractice" is insufficient to state a claim for fraudulent concealment because it is a mere statement of a pleader's conclusion, unsupported elsewhere by allegations of fact. . . .

> Being generous, the Complaint at most alleges the failure to inform—i.e., silence. However, "[m]ere silence is not enough." . . .

For these reasons, the trial court granted Williams and Associates' motion for summary disposition, denied the Paludas' motion for leave to amend their complaint to more specifically state the elements of fraudulent concealment, and dismissed their claims.

This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

On appeal, the Paludas argue that the trial court erred when it determined that their complaint was untimely and dismissed it on that basis. In the alternative, they argue that the trial court abused its discretion when it denied them leave to amend their complaint to more specifically state facts to support their claim that Williams and Associates fraudulently concealed their claim. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court reviews a trial court's decision on a motion for leave to amend for an abuse of discretion. *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 666; 760 NW2d 565 (2008).

B. THE PERIOD OF LIMITATIONS

As a preliminary matter, we note that the trial court granted Williams and Associates' motion under MCR 2.116(C)(8) and (C)(10). However, it determined that summary disposition was appropriate because the undisputed facts established that the Paludas' claims were untimely under the applicable period of limitations. A party should move for summary disposition under MCR 2.116(C)(7) when challenging whether the plaintiff's complaint is barred under the applicable period of limitations. See *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). Accordingly, we will review the trial court's decision to grant summary disposition under MCR 2.116(C)(7). See *Spiek v Dep't of Corrections*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). In reviewing whether the trial court properly granted a motion brought under MCR 2.116(C)(7), this Court reviews all documentary evidence and will accept the complaint as factually accurate unless contradicted by affidavits or other documents. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010). When the parties have submitted documentary evidence, this Court will review the evidence in the light most favorable to the non-moving party. *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010). If the facts are undisputed, whether the claim is barred is an issue of law for the court; however, if there is a question of fact, dismissal is inappropriate. *Id.*

Under MCL 600.5838a(1), 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." In their complaint, the Paludas alleged that Williams committed various discrete acts of malpractice, beginning in November 2005 and continuing to March 2007. Accepting these allegations as true, the latest date that they could have sued under MCL 600.5838a(1) was March 2009. Thus, their claims were plainly untimely. However, the Legislature has extended the period of limitations for hidden injuries.

Under MCL 600.5838a(2), a plaintiff may assert a medical malpractice claim after the two-year period has expired, provided that he or she brings the claim within six months after discovering that such a claim exists. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 221; 561 NW2d 843 (1997). The six-month discovery period "begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Id.* at 222. This standard does not require a plaintiff to know with certainty that he or she has a claim. *Id.* Instead, the six-month limitations period begins to run once a plaintiff either becomes aware of an injury and its possible cause or when he or she objectively should have become aware of the injury and its possible cause. *Id.* at 222-223.

Here, the undisputed documentary evidence showed that Andrew Paluda was diagnosed with prostate cancer in August 2008 and was told how advanced it was by September 2008. Given the advanced stage and Andrew Paluda's knowledge concerning his prior treatments, he knew or should have realized that he had had prostate cancer for some time and, as such, he knew or should have known that Williams might have negligently failed to properly detect or diagnose his condition at an earlier stage. See *id.* at 224-225; see also *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 78; 592 NW2d 112 (1999) (stating that the objective facts need only demonstrate a possible causal connection between the injury and the defendant's conduct). Moreover, a plaintiff is charged with "the exercise of reasonable diligence" to discover a possible cause of action. *Moll v Abbott Laboratories*, 444 Mich 1, 16; 506 NW2d 816 (1993). Using reasonable diligence, the Paludas could have discovered that the failure to detect Andrew's prostate cancer at an earlier stage was, at least in part, due to Williams' negligence. As such, the Paludas had until February 2009 to sue under MCL 600.5838a(2), which they did not do.

The Paludas also alleged and argued that their claim was timely because Williams' fraudulent concealment of the facts prevented them from discovering their claim until February 2010, which was when they received a copy of Andrew's medical records. A defendant's fraudulent or wrongful concealment of a claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue extends the applicable period to 2 years from the date that the person entitled to sue discovers or should have discovered the existence of the claim. MCL 600.5838a(3); MCL 600.5855. Generally, "[f]raudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 642; 692 NW2d 398 (2004) (internal quotation marks and citation omitted). Accordingly, mere silence is normally not sufficient to establish fraudulent concealment. *Id.* at 642, 645-646; *Sills v Oakland Gen Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).

We agree with the trial court that the Paludas did not sufficiently plead fraudulent concealment in their complaint. In addition, we conclude that, in their reply to Williams and Associates' motion for summary disposition, the Paludas relied on Williams' silence to establish fraudulent concealment; indeed, their argument is that Williams' failure to disclose the test results and to take steps to act on those test results during subsequent interactions with Andrew Paluda constituted both a breach of the standard of care and fraudulent concealment. But Williams' silence in the face of the test results and his failure to act on the test results does not amount to the employment of artifice, "planned to prevent inquiry" or to "escape investigation." *Doe*, 264 Mich App at 642. Thus, setting aside the fact that the Paludas did not properly allege acts of fraudulent concealment, see *Sills*, 220 Mich App at 310 (noting that a plaintiff must "plead in the complaint acts or misrepresentations that comprised fraudulent concealment"), the Paludas did not present any evidence in response to Williams and Associates' motion that would establish fraudulent concealment through affirmative acts.

We acknowledge that there is an exception to the mere silence rule; if the parties have a fiduciary relationship such that the defendant had a duty to disclose the malpractice, the failure to disclose the malpractice can constitute fraudulent concealment. See *Brownell v Garber*, 199 Mich App 519, 527; 503 NW2d 81 (1993). The physician-patient relationship is a fiduciary relationship. *Melynchenko v Clay*, 152 Mich App 193, 197; 393 NW2d 589 (1986). Accordingly, Williams had a fiduciary duty to fully and fairly disclose any mistakes that he might have made in treating Andrew. See *Brownell*, 199 Mich App at 527. Williams was not, however, required to reveal malpractice about which he was unaware. *Id.* at 528-529. And, in this case, the Paludas did not allege or bring forth evidence to show that Williams understood that he had made mistakes in caring for Andrew and failed to disclose those mistakes in order to prevent discovery of a malpractice claim. For these reasons, we cannot conclude that the trial court erred when it determined that MCL 600.5855 did not apply to extend the applicable period of limitations.

Finally, the Paludas argue that the trial court abused its discretion by denying their motion to amend their complaint to more clearly allege facts in support of their claim that Williams and Associates fraudulently concealed their malpractice. However, on appeal, the Paludas failed to address this issue. As such, they have abandoned it. *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004).

In any event, we do not agree that amendment would save their claim. Once Williams and Associates made a properly supported motion for summary disposition on the grounds that, given the evidence, the Paludas' claims were barred under the applicable period of limitations, the Paludas had the burden to respond with evidence showing that their complaint was timely as a matter of law, or at the least, that there was a question of fact as to whether their complaint was timely. See *Barnard Mfg*, 285 Mich App at 374. As such, they had an independent duty to present evidence that established Williams' fraudulent concealment in their reply brief—notwithstanding any inadequacies in their complaint; they could not avoid dismissal by promising to "allege" new facts in an amended complaint or by presenting novel arguments and new evidence after the trial court decided the motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999) (stating that a "mere promise" to come forth with evidence to support a claim is insufficient to avoid summary disposition); *Barnard Mfg*, 285 Mich App at 380-381 (explaining that this Court must review the trial court's decision

on a motion for summary disposition by considering only the arguments and evidence actually raised by the parties in support or opposition to the motion). Consequently, we cannot conclude that the trial court abused its discretion when it refused to grant the Paludas leave to amend.

The trial court did not err when it dismissed the Paludas' claims as untimely.

Affirmed. As the prevailing parties, Williams and Associates may tax their costs. MCR 7.219(A).

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Mark T. Boonstra