IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ELBERT BYRON ROSE, *Plaintiff/Appellant*,

v.

FELIPE ALBUQUERQUE, M.D., *Defendant/Appellee*.

No. 1 CA-CV 16-0634
FILED 10-3-2017

Appeal from the Superior Court in Maricopa County
No. CV2016-004572
The Honorable Joshua D. Rogers, Judge

AFFIRMED

COUNSEL

Law Office of Fredrick M. Jones, Phoenix
By Fredrick M. Jones
Counsel for Plaintiff/Appellant

Kent & Wittekind, P.C., Phoenix
By Richard A. Kent, James A. Frisbie
Co-Counsel for Defendant/Appellee

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By Eileen Dennis GilBride
Co-Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones delivered the decision of the Court, in which Judge Jon W. Thompson and Chief Judge Samuel A. Thumma joined.

J O N E S, Judge:

¶1 Elbert Rose appeals the trial court's order concluding his claims against Felipe Albuquerque, M.D., were untimely and entering judgment in Dr. Albuquerque's favor. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In May 2014, Rose filed a lawsuit (the First Lawsuit) alleging Dr. Albuquerque committed medical malpractice in the course of removing a tumor on June 6, 2012 and caused partial paralysis of his face. The First Lawsuit was dismissed for failure to prosecute in July 2015.

¶3 In April 2016, Rose filed this lawsuit (the Second Lawsuit) against Dr. Albuquerque based upon the same facts, alleging medical battery and lack of informed consent for the June 2012 surgery. Dr. Albuquerque moved for judgment on the pleadings in the Second Lawsuit, arguing Rose's claims were barred by the applicable two-year limitations period. Rose opposed dismissal, asserting the medical battery claim was newly discovered.

¶4 After briefing and oral argument, the trial court granted judgment on the pleadings in the Second Lawsuit.[1] Rose timely appealed,

[1] Although Dr. Albuquerque did not file an answer, Arizona Rule of Civil Procedure 12(c) does not require a responsive pleading as a prerequisite to seeking judgment on the pleadings. *See* Ariz. R. Civ. P. 12(c) (authorizing a motion for judgment on the pleadings "[a]fter the pleadings are closed — but no later than the date on which dispositive motions must be filed"), (h)(2) ("Failure to state a claim upon which relief can be granted . . . may be raised . . . by a motion under Rule 12(c).").

and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1)[2] and -2101(A)(1).

DISCUSSION

¶5 Rose argues the trial court erred in applying a two-year statute of limitations to both the First and Second Lawsuits because the "two actions are separate" — the First Lawsuit alleging medical malpractice arising out of statute, and the Second Lawsuit alleging medical battery arising from common law. Whether a particular statute of limitations applies to a given action presents a question of law subject to *de novo* review. *Jensen v. Beirne*, 241 Ariz. 225, 228, ¶ 9 (App. 2016) (citations omitted).

¶6 All of Rose's claims arise from "injuries done to the person of another." A.R.S. § 12-542. Thus, actions alleging damages resulting from medical battery or a lack of informed consent are governed by the same limitations period and "shall be commenced and prosecuted within two years after the cause of action accrues." *Id.*; *see also Neeriemer v. Superior Court*, 13 Ariz. App. 460, 461 (1970) (accepting without comment the trial court's application of A.R.S. § 12-542 to the plaintiff's claim for "battery by reason of lack of informed consent"). Accordingly, we find no error in the application of A.R.S. § 12-542.

¶7 Rose argues the trial court erred by entering judgment in favor of Dr. Albuquerque after determining the Second Lawsuit was untimely. A party is entitled to judgment on the pleadings "if the complaint fails to state a claim for relief." *Save Our Valley Ass'n v. Ariz. Corp. Comm'n*, 216 Ariz. 216, 218, ¶ 6 (App. 2007) (quoting *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, ¶ 2 (App. 1999)). In reviewing entry of judgment on the pleadings, "we accept as true the factual allegations of the complaint, but review the trial court's legal conclusions *de novo*." *Id.* at 218-19, ¶ 6 (citing *Mobile Cmty. Council for Progress, Inc. v. Brock*, 211 Ariz. 196, 198, ¶ 5 (App. 2005)).

¶8 The Second Lawsuit alleges misconduct occurring in 2012 but was not filed until April 2016, almost four years later. The discovery rule "may delay commencement of the time period within which suit must be filed" to the date "the plaintiff knew or by the exercise of reasonable diligence should have known of the defendants' conduct." *Logerquist v. Danforth*, 188 Ariz. 16, 19 (App. 1996) (quoting *Mayer v. Good Samaritan*

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[2] Absent material changes from the relevant date, we cite a statute's current version.

Hosp., 14 Ariz. App. 248, 252 (1971)). Although a plaintiff cannot be "charged with 'a duty to file a complaint based on information []he subjectively believed to be false or unbelievable at the time,'" a cause of action accrues when the plaintiff becomes aware of information that would put a reasonable person on notice to investigate whether a claim exists. *Walk v. Ring*, 202 Ariz. 310, 316, ¶¶ 22-23 (2002) (quoting *Doe v. Roe*, 191 Ariz. 313, 324, ¶ 35 (1998)).

¶9 To the extent Rose seeks the protection of the discovery rule, he bears the burden of presenting evidence suggesting it may apply to delay accrual. *Logerquist*, 188 Ariz. at 19 (citing *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 155 (App. 1993)). Rose has not met that burden. Rose admits he "believed that Dr. Albuquerque had not followed the proper protocols for an informed consent" at the time of the June 2012 surgery. This information would put a reasonable person on notice to investigate whether a claim exists. *See Walk*, 202 Ariz. at 316, ¶¶ 22-23. And, indeed, Rose investigated, identified a claim, and filed a lawsuit — the First Lawsuit — within two years of June 2012.

¶10 Although Rose asserts "he was unsure what documents he had signed" before the June 2012 surgery, his obligation to file his claims within the applicable limitations period did not turn on that knowledge. *See id.* Nor is Rose's failure to fully investigate the lack of informed consent or to obtain additional evidence to support a claim on that basis of any consequence. By his own admission, Rose knew the conduct he believed to be tortious and the identity of the alleged tortfeasor, as asserted in the Second Lawsuit, at the time the First Lawsuit was filed, in May 2014, before the statute of limitations expired. Thus, the discovery rule does not make this Second Lawsuit timely. Accordingly, Rose has not established any error in the trial court's conclusion that the Second Lawsuit was untimely and barred by the statute of limitations.

CONCLUSION

¶11 The trial court's order entering judgment on the pleadings in Dr. Albuquerque's favor is affirmed.