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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ALAN M. LESCHYSHYN, *Plaintiff/Appellant*,

v.

DINESHKUMAR PATEL, et al., *Defendants/Appellees*.

No. 1 CA-CV 18-0402
FILED 3-19-2019
AMENDED PER ORDER FILED 3-25-2019

Appeal from the Superior Court in Maricopa County
No. CV2017-001657
The Honorable Sherry K. Stephens, Judge

AFFIRMED

COUNSEL

Alan M. Leschyshyn, Anthony, Texas
Plaintiff/Appellant

Quintairos Prieto Wood & Boyer PA, Phoenix
By Andrew E. Rosenzweig, Rita J. Bustos
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge David D. Weinzweig delivered the decision of the Court,
in which Judge Kent E. Cattani and Judge James P. Beene joined.

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WEINZWEIG, Judge:

¶1 Alan M. Leschyshyn appeals the superior court’s grant of summary judgment in favor of Dr. Dineshkumar Patel and Advanced Endocrine & Metabolism, P.C. (collectively, “Patel”). He argues the court erred in concluding his medical malpractice claim was barred on statute of limitations grounds. We affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 This is a medical malpractice lawsuit. Leschyshyn sued Dr. Patel, his former endocrinologist, in February 2017 for prescribing two drugs—Parlodel in March 2005 and AndroGel in May 2006—without warning him about their “dangers and serious side effects,” including “uncontrollable compulsive behaviors, such as compulsive gambling or risk taking, compulsive sex, compulsive overspending and hypersexuality.”

¶3 Leschyshyn had been an accountant for over 20 years with no criminal history when he visited Dr. Patel in February 2005. Dr. Patel determined that Leschyshyn had elevated prolactin levels and prescribed Parlodel to treat the condition in March 2005. Dr. Patel then prescribed AndroGel, a testosterone replacement therapy, in May 2006. Leschyshyn took Parlodel and AndroGel until 2015.

¶4 Leschyshyn experienced side effects from the medication in late 2006. According to medical records, he visited Dr. Patel in November 2006 for a “consult on meds (side effects),” and reported being “irritable and angry.” Parlodel triggered “aggressive outbursts.” And within weeks of starting AndroGel, Leschyshyn exhibited “atypical behaviors and mental states.” In March 2007, his behavior was “completely out of the ordinary.” He began masturbating in public places and amassing immense debt; he made poor career choices and business decisions. The anomalous behavior continued in 2010 and 2011, when he used corporate funds to pay his personal taxes and falsified corporate financial results. And then, beginning in 2012, Leschyshyn embarked on a sophisticated, three-year criminal conspiracy to commit wire, mail and bank fraud. He was arrested on February 18, 2015 and accused of orchestrating a \$20 million scam.

¹ We view the facts in the light most favorable to Leschyshyn, the party against whom judgment was entered, and draw reasonable inferences in his favor. *In re Estate of Evitt*, 245 Ariz. 352, 354, ¶ 8 (App. 2018).

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¶5 Meanwhile, between 2006 and 2015, Dr. Patel frequently changed the prescribed dose of Parlodel and AndroGel in response to Leschyshyn's blood test results and his complaints of aggressive behavior, irritability and agitation. In addition, Leschyshyn unilaterally decreased his Parlodel intake in 2009 to self-correct for mood fluctuations.

¶6 After his February 2015 arrest, Leschyshyn twice confronted Dr. Patel about the side effects associated with Parlodel and AndroGel. Leschyshyn showed Patel information from the internet about Parlodel's side effects and said he believed Parlodel was causing his problems, including "spending money" and "brain function." The medical records state: "[Leschyshyn] was concern[ed] about side effect[s] on brain function. He [was] on it form [sic] 2005." Dr. Patel discontinued the Parlodel prescription, but continued to prescribe AndroGel. In later visits, Leschyshyn reported the symptoms had disappeared.

¶7 Leschyshyn pled guilty in February 2016 to ten counts of wire, mail and bank fraud in federal court. The court received many character letters from friends and family for sentencing purposes, "some of these letters noted a great change in Mr. Leschyshyn's behavior starting in approximately 2005/2006." In another letter, Leschyshyn's wife said the medications "had severe negative effects on his personality, ability to make solid choices and clouded his judgment when dealing with people and important situations. I noticed these changes, even addressed them, but having his inhibitions clouded prevented him from reaching the depth of care and concern as he had before."

¶8 Leschyshyn also provided expert reports to mitigate his sentence from two doctors and a pharmacologist who opined that his abnormal behaviors were caused by Parlodel and exacerbated by AndroGel. One of his experts wrote that "Novartis, the manufacturer of Parlodel, now includes [a] warning in their FDA package insert," which provides:

[Patients] can experience intense urges to gamble, increased sexual urges, intense urges to spend money uncontrollably, and other intense urges. Patients may be unable to control these urges while taking one or more of the medications that are generally used for the treatment of Parkinson's disease and that increase central dopaminergic tone, including Parlodel. In some cases, although not all, these urges were reported to have stopped when the dose was reduced or the medication was discontinued. Because

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patients may not recognize these behaviors as abnormal it is important for prescribers to specifically ask patients or their caregivers about the development of new or increased gambling urges, sexual urges, uncontrolled spending or other urges while being treated with Parlodel.

The record does not indicate when the manufacturer's warning was issued.

¶9 The federal court refused to mitigate Leschyshyn's sentence based on the expert testimony because the experts did not connect the medication to Leschyshyn's criminal conduct. The judge explained:

Poor impulse control, to me, is not especially relevant with respect to the type of crime that we had involved in this particular case. It's just not a significant factor for this court to take into consideration. Poor impulse control might mean something to the Court in a rape case or . . . a case of completely aberrant behavior where someone goes out and robs a store. . . This is a multi-year, 20-million-dollar fraud, very sophisticated. Factoring companies, setting up other people, helping people to figure out how to defraud insurers and the fraud factoring companies. That's not an impulse control type crime.

Leschyshyn was sentenced to 235 months in federal prison on October 31, 2016.

¶10 Leschyshyn sued Patel on February 17, 2017 for negligence, negligent misrepresentation and fraudulent concealment. He claimed that Patel had prescribed Parlodel and AndroGel without warning of the side effects, and caused him to suffer harm and injuries, including memory impairment and other cognitive defects, emotional distress, loss of freedom and employment, economic and financial losses, medical expenses and "being a co-conspirator in a white-collar crime, fraud and money laundering case." He alleged the statute of limitations was tolled under the discovery rule and based on Dr. Patel's alleged fraudulent concealment. He claimed he did not discover the cause and nature of his injuries until 2015 or 2016.

¶11 Patel moved for summary judgment in December 2017, arguing Leschyshyn failed to file his complaint within the two-year limitations period under A.R.S. § 12-542. Leschyshyn objected and asserted the limitations period was tolled under the "unsound mind" exception. A.R.S. § 12-502. The superior court entered judgment in Patel's favor,

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finding Leschyshyn “failed to produce sufficient evidence that he was of unsound mind” and that he “was on notice to investigate whether his alleged injury resulted from malpractice well before the two year statute of limitations expired.” Leschyshyn timely appealed.

DISCUSSION

¶12 Leschyshyn challenges the superior court’s decision granting summary judgment on statute of limitations grounds. We review the superior court’s grant of summary judgment *de novo* and “will affirm the judgment if it is correct for any reason.” *S & S Paving & Const., Inc. v. Berkley Reg’l Ins. Co.*, 239 Ariz. 512, 514, ¶ 7 (App. 2016). Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(a). “Upon a moving party’s prima facie showing that no genuine issue of material fact exists, the opposing party bears the burden of producing sufficient evidence that an issue of fact does exist.” *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 33 (1998).

¶13 Leschyshyn was required to commence and prosecute his medical malpractice action “within two years after the cause of action accrue[d]” under A.R.S. § 12-542. He did not. Leschyshyn did not sue until February 2015; but Dr. Patel first prescribed him Parlodel in 2005 and then AndroGel in 2006. And the record indicates that Leschyshyn reported side effects from the medications in 2006; his friends and family noticed a “great change” in his behavior and “distinct personality deviation” as early as 2005 or 2006; his “behavior [was] completely out of the ordinary” by March 2007; and Dr. Patel frequently changed the dosage in response to side effects and blood tests.

¶14 Leschyshyn argues his tort claims were tolled, however, because he was of an unsound mind until 2015. Arizona law tolls the statute of limitations for persons of “unsound mind” under A.R.S. § 12-502 because “it is unfair to bar an action in which the plaintiff is mentally disabled and thus unable to appreciate *or pursue* his or her legal rights.” *Doe*, 191 Ariz. at 325, ¶ 41 (emphasis in original). To survive summary judgment based on the “unsound mind” provision, Leschyshyn needed to provide the court with “hard evidence” he was “unable to manage his daily affairs or to understand his legal rights or liabilities.” *Id.* at 326, ¶ 42 (quotation omitted). Conclusory averments are not enough, including “assertions that one was unable to manage daily affairs or understand legal rights and liabilities.” *Id.*

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¶15 The court properly granted summary judgment here because Leschyshyn did not come forward with “hard evidence” to prove an unsound mind from 2006 to 2015. His “hard evidence” consists of the criminal charges and sentences against him; his poor decisions and impaired judgment in personal, professional and financial matters; the opinions of his expert witnesses at sentencing; and a warning from Parlodel’s manufacturer at some unknown point.

¶16 This evidence does not demonstrate that Leschyshyn was unable to carry on the day-to-day affairs of human existence; nor does it show he did not understand his legal rights or liabilities. To the contrary, his complex financial and insurance fraud indicates an acute awareness of laws and how to avoid them. His expert witnesses in the criminal sentencing proceedings did not conclude he was unable to understand his legal rights or liabilities. The experts merely opined that Leschyshyn had poor impulse control, impaired judgment and reduced mental capacity on the medications. Nor does he prove an “unsound mind” with simple averments that he did not know his behavior was abnormal; especially given the record evidence, which includes the statements of friends and family who recognized “great [behavioral] changes” in 2006 and 2007. And unlike the plaintiff in *Doe*, Leschyshyn provides no evidence he was institutionalized for mental health reasons, experienced suicidal ideation, could not function at work and could not keep employment. *See id.* at 327, ¶ 46 (recognizing such facts as hard evidence of unsound mind).

CONCLUSION²

¶17 We affirm the superior court’s grant of summary judgment on statute of limitations grounds.



AMY M. WOOD • Clerk of the Court
FILED: JT

² Leschyshyn appears to request oral argument and requests the opportunity to attend by telephone or, alternatively, for an attorney to be appointed. We deny his requests.