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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 07/28/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

SCOTT FORRER, M.D.,) 1 CA-CV 10-0712
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 28, Arizona Rules of
VICKI JOHANSEN and JOHN DOE) Civil Appellate Procedure)
)
JOHANSEN, husband and wife;)
STATE OF ARIZONA, a body)
politic; and ARIZONA MEDICAL)
BOARD, a department of the State)
of Arizona,)
)
Defendants/Appellees.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-003244

The Honorable Edward O. Burke, Judge (Retired)

AFFIRMED

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by David Monroe Quantz
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by Dan O'Connor
Scott Mihalik
Attorneys for Defendant/Appellee Vicki Johansen

P O R T L E Y, Judge

¶1 Dr. Scott Forrer, M.D., appeals the order dismissing his complaint against the Arizona Medical Board (the "Board") and Vicki Johansen for failure to state a claim upon which relief may be granted. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Forrer filed a complaint against the Board and Johansen on February 2, 2010, alleging: (1) intentional infliction of emotional stress; (2) fraud; (3) fraudulent schemes and artifices; (4) intentional interference with future economic advantage; (5) libel; (6) slander; (7) fraudulent schemes and practices; (8) civil racketeering; (9) computer tampering; (10) tampering with a public record; (11) tampering with physical evidence. The claims are the result of three Board investigations that started in 2005 and ended in 2008.

¶3 The first investigation began in May 2005 when a former patient filed a complaint with the Board. Forrer responded by providing the patient's file but did not hear from the Board until June 8, 2006, when Johansen requested additional information. Later that month, an independent medical expert claimed that Forrer's file was incomplete. Forrer, however,

contends that his file was complete, but Johansen purposefully removed eleven pages to distort the file.

¶14 After Forrer's insurer filed a complaint against him with the Arizona Department of Insurance, which was forwarded to the Board, the second investigation began in July 2006. Johansen was again assigned to investigate the complaint, and Forrer provided Johansen with the relevant material, which included a nerve conduction study and electromyographic evaluation ("the study"). The printed date on the study was incorrect, so Forrer handwrote the correct date. When he was confronted with the study in October 2006, the handwritten date had been replaced with an incorrect typewritten date. Forrer alleges that Johansen purposefully removed the handwritten date and replaced it with the incorrect typewritten date. As a result, the Board accused Forrer of inadequately maintaining patient records.

¶15 The third investigation was initiated in February 2008 when another patient filed a complaint. Johansen was again assigned as the investigator. Forrer alleges that Johansen falsified prescription information in the patient's file to make it appear that he was overprescribing medicine. The investigation was subsequently dismissed.

¶16 Forrer sued, and the Board moved to dismiss the complaint pursuant to Arizona Rule of Civil Procedure 12(b)(6)

alleging that: (1) the claims were barred by the statute of limitations; (2) the notice of claim was untimely; and (3) criminal charges are not a basis for civil liability. Johansen joined the Board's motion and additionally claimed that she had not been properly served with a notice of claim. Forrer responded and, after a hearing, the trial court granted both motions to dismiss. Forrer appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶7 Forrer contends that the trial court erred by dismissing his claim based on the statute of limitations.¹ Rule 12(b)(6) provides that a party may move to dismiss a suit for "[f]ailure to state a claim upon which relief can be granted." Our review is de novo, *Dube v. Likins*, 216 Ariz. 406, 411, ¶ 5, 167 P.3d 93, 98 (App. 2007), and we analyze the sufficiency of the complaint in light of Rule 8, which only requires sufficient factual allegations to "give the opponent fair notice of the

¹ Forrer, however, does not address whether the trial court erred by finding that Johansen was not properly served with a notice of claim. Because we can affirm the trial court on any ground argued below, see *State v. Rojers*, 216 Ariz. 555, 559, ¶ 17, 169 P.3d 651, 655 (App. 2007), and arguments not raised on appeal are waived, *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004), we affirm the trial court's grant of the motion to dismiss as to Johansen. We, therefore, only consider whether the trial court erred by dismissing the claims against the Board.

nature and basis for the claim," but must do more than include "mere conclusory statements." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶¶ 6-7, 189 P.3d 344, 346 (2008) (quoting *Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027-28 (1956)) (internal quotation marks omitted).

¶8 Claims against "any public entity or public employee" are subject to a one-year statute of limitations. A.R.S. § 12-821 (2003). The one-year statute of limitations accrues "when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." A.R.S. § 12-821.01(B) (2003); *Dube*, 216 Ariz. at 411, ¶ 7, 167 P.3d at 98. Stated differently, "a cause of action does not accrue until the plaintiff knows or with reasonable diligence should know the facts underlying the cause [of action]." *Doe v. Roe*, 191 Ariz. 313, 322, ¶ 29, 955 P.2d 951, 960 (1998). We, therefore, must consider: (1) when the claim occurred; (2) the applicable limitations period; (3) when the claim was filed; and (4) possible tolling or suspending the limitations period. *Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996).

¶9 Although, and as Forrer contends, the accrual date of a claim is usually a jury question, *Doe*, 191 Ariz. at 323, ¶ 32, 955 P.2d at 961, a statute of limitations defense may be

asserted as the basis for a motion to dismiss when "it appears from the face of the complaint that the claim is barred." *Anson v. Am. Motors Corp.*, 155 Ariz. 420, 421, 747 P.2d 581, 582 (App. 1987); *Engle Bros., Inc. v. Superior Court*, 23 Ariz. App. 406, 408, 533 P.2d 714, 716 (1975). A motion to dismiss is appropriate because "averments of time and place are material" when testing the sufficiency of a complaint. Rule 9(f); see 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1308 (3d ed. 2010) ("Since [Federal] Rule [of Civil Procedure] 9(f) makes allegations of time material, however, the defense of the statute may be raised on a motion to dismiss under [Federal] Rule [of Civil Procedure] 12(b)(6) when it is apparent from the face of the complaint that the time limit for bringing the claim for relief has passed.").

¶10 Here, the complaint was filed on February 2, 2010. In order for Forrer's complaint to be timely, his claims would have needed to accrue after February 2, 2009. Forrer's claims, however, arose out of events occurring between May 2005 and October 2008. Forrer does not dispute that Johansen's actions occurred well before February 2, 2009. In fact, he admits that he suspected wrongdoing during the investigations. But he contends that he could not discover the events in question before hiring a forensic document analyst to confirm his suspicions.

¶11 Although it is necessary to investigate a claim before filing a complaint, see Rule 11, Forrer was confronted with an altered document in October 2006, but he waited to investigate the issue until December 2008. Forrer noticed that missing pages in his file were replaced with page dividers in April 2007, but he took no action to investigate his belief that Johansen had purposefully distorted the file. Finally, Forrer claims that Johansen altered documents in October 2008 to make it appear that he was overprescribing medication, but he did nothing to investigate his claim until he filed his complaint in February 2010.

¶12 The discovery rule is not intended to allow plaintiffs to ignore their suspicions and postpone their investigations. Indeed, plaintiffs have a "duty to investigate with due diligence to discover the necessary facts." *Doe*, 191 Ariz. at 324, 955 P.2d at 962; see *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 23, 44 P.3d 990, 996 (2002); *Little v. State*, 225 Ariz. 466, 470, ¶ 13, 240 P.3d 861, 865 (App. 2010). Even if the forensic document analyst's opinion was necessary to file the complaint, but see *Little*, 225 Ariz. at 470, ¶ 13, 240 P.3d at 865 (stating that the court's holding in *Walk* "does not provide or suggest that a plaintiff first must receive an expert medical opinion stating that malpractice has occurred"), Forrer could not delay his investigation for two years.

¶13 Forrer, however, claims that he was "prohibited" and "intimidated" by the Board's rules and regulations from discussing the details of the investigations with anyone other than the Board's staff. Specifically, he cites A.R.S. § 32-1451.01(C) (2007), which provides "any information received and records or reports kept by the board as a result of the investigation procedure outlined in this chapter are not available to the public."² Section 32-1451.01, however, does not prohibit a doctor from investigating Board misconduct or from disclosing information to a doctor's lawyer. In fact, the Board's investigation letter stated that Forrer could "share the[] documents with any legal counsel [he] retain[ed]." Section 32-1451.01(C), therefore, did not prevent Forrer from investigating his complaint. *Grand v. Nacchio*, 225 Ariz. 171, 175 n.1, ¶ 20, 236 P.3d 398, 402 n.1 (2010) ("In evaluating motions to dismiss, Arizona courts consider only the 'well-pled facts,' not legal conclusions.").

¶14 Because Forrer failed to file his complaint within the one-year statute of limitations period, the trial court did not err when it dismissed Forrer's complaint.

² In his opening brief, Forrer claims that A.R.S. § 32-1451.01(C) provides that "[t]he doctor and the doctor's attorney may not release any information obtained under this section to any other person." The quoted language previously appeared in A.R.S. § 32-1451(I) prior to 2002 when it was removed by the legislature. 2002 Ariz. Sess. Laws, ch. 165, § 1 (2d Reg. Sess.).

CONCLUSION

¶15 Based on the foregoing, we affirm the order dismissing Forrer's complaint.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Judge

/s/

ANN A. SCOTT TIMMER, Chief Judge