

STATE OF MICHIGAN
COURT OF APPEALS

NANCY LORD, Individually and as Personal
Representative of the Estate of JANIS KERR
LORD, deceased,

Plaintiff–Appellant,

v

ST. JOHN HOSPITAL & MEDICAL CENTER,
KUMARA RAMA, M.D., and DORIS JULIE
JACOBS, M.D.,

Defendants–Appellees.

UNPUBLISHED
September 20, 1996

No. 182137
LC No. 94-410650

Before: Jansen, P. J., and Reilly, and M.E. Kobza,* JJ.

PER CURIAM.

Plaintiff appeals as of right an order from the trial court granting summary disposition pursuant to MCR 2.116(C)(7) to all defendants. Plaintiff filed a claim alleging that Dr. Rama negligently performed an endarectomy¹ on plaintiff’s decedent, and that St. John Hospital and Dr. Jacobs failed to properly treat plaintiff’s decedent in the emergency room. The trial court granted summary disposition because the statute of limitations had run with respect to all defendants. We affirm.

On July 30, 1991, at Bon Secours Hospital, Dr. Rama performed a left-carotid endarectomy on Janis Lord, plaintiff’s mother. This procedure involved grafting a vein from Lord’s ankle and using it as a patch to suture the carotid artery closed. Plaintiff alleged that this procedure was improperly performed. A few days after the surgery, Lord developed swelling on her neck at the site of the surgery. On August 3, 1991, plaintiff’s father took Lord to the emergency room at St. John Hospital. Lord went into respiratory arrest, and Dr. Jacobs unsuccessfully attempted to intubate Lord and perform a tracheotomy. Lord died on August 3, 1991. Autopsy findings indicated that there were two small holes in the vein patch and there was a laceration of the common carotid artery below where the patch was placed. Dr. Rama testified at his deposition that according to the autopsy report, the laceration was in the area where attempts at intubation and the tracheotomy had been made. On March

31, 1994, plaintiff filed this action alleging that Lord's death was attributable to the negligence of defendants.

This Court reviews a summary disposition determination de novo as a question of law. *Borman v State Farm*, 198 Mich App 675, 678; 499 NW2d 419 (1993). When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7) that the claim is barred because of the statute of limitations, this court must accept as true the plaintiff's well-pleaded allegations and construe them in favor of the plaintiff. *Michigan Millers Ins Co v West Detroit Bldg Co, Inc*, 196 Mich App 367, 370; 494 NW2d 1 (1992). If there are no facts in dispute, the issue whether the claim is statutorily barred is a question of law for the court. *Id.*

I. SIX-MONTH DISCOVERY RULE

Plaintiff argues that she did not know, nor should she have known, of her cause of action against Dr. Jacobs and St. John Hospital for the negligent severing of her mother's carotid artery until March, 1994. A medical malpractice claim may be commenced after the expiration of the general two-year period of limitations if it is filed within six months after the plaintiff discovered or should have discovered the existence of the claim. MCL 600.5838a(2); MSA 27A.5838(1)(2); *Shawl v Dhital*, 209 Mich App 321, 324; 529 NW2d 661 (1995). The determination of whether and when a plaintiff discovered or should have discovered a claim is a question for the jury to decide, unless the facts are undisputed and support but one conclusion. *Moll v Abbott Laboratories*, 444 Mich 1, 27-28, n 36; 506 NW2d 816 (1993).

The material facts of this case are undisputed. Plaintiff and her family set out to determine the cause of their mother's death within days after the death occurred. Plaintiff was appointed personal representative of her mother's estate in 1991, and listed a chose in action as the only asset of the estate. At plaintiff's request, an autopsy was performed shortly after Lord's death. In October, 1991, an attorney acting on plaintiff's behalf requested, received and reviewed copies of decedent's medical records and autopsy results in 1991. The records were in the possession of attorneys from 1991 to 1994, when plaintiff requested them and got them from Milt Greenman, another attorney who reviewed the records. The autopsy report indicated that Lord's carotid artery was lacerated in an area not associated with Lord's endarectomy. Having had the records reviewed to determine the cause of Lord's death, plaintiff should have discovered her claim against Dr. Jacobs and St. John Hospital. Plaintiff filed her suit on March 31, 1994, more than six months after the records were first reviewed by an attorney on plaintiff's behalf. Thus, the trial court properly found that plaintiff's claims against Dr. Jacobs and St. John Hospital were not timely under the six-month discovery rule. The trial court did not err in granting summary disposition in favor of Dr. Jacobs and St. John Hospital.²

II. SUMMARY DISPOSITION FOR ST. JOHN HOSPITAL

Plaintiff also argues that the trial court erred when it summarily dismissed defendant St. John Hospital because St. John Hospital failed to timely join Dr. Jacobs' motion for summary disposition. We conclude that there was no error. Plaintiff had notice of the motion and a fair opportunity to be heard. St. John Hospital, as well as Dr. Rama, concurred in the motion at the hearing on the motion.

Both plaintiff and her attorney were present at the hearing. They did not object to defendants' concurrence. Plaintiff had timely notice of Dr. Jacobs' motion, which was based on the statute of limitations. St. John Hospital's defense is essentially the same as Dr. Jacobs' defense because its liability stems from the same act of alleged negligence. Plaintiff had adequate notice and the opportunity to be heard. We discern no prejudice. Therefore, the trial court properly granted St. John Hospital summary disposition, despite the untimely concurrence in Jacobs' motion.

III. APPLICABLE STATUTE OF LIMITATIONS

Finally, plaintiff argues that her claims were wrongful death claims, governed by a three-year statute of limitations. This argument is without merit. In all actions brought under the wrongful death statute the limitations period is governed by the provision applicable to the liability theory of the underlying wrongful act. *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 349; 533 NW2d 365 (1995), citing *Hawkins v Regional Medical Laboratories, PC.*, 415 Mich 420, 436; 329 NW2d 729 (1982). The underlying theory of liability in plaintiff's case is medical malpractice. Therefore, plaintiff's case is governed by the two-year medical malpractice statute of limitations, MCL 600.5805(4); MSA 27A.5805(4).

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael J. Kobza

¹ This surgery involves opening the carotid artery and scraping its internal surface to promote better blood flow.

² At oral argument, plaintiff's counsel conceded that the statute of limitations barred the claims against Dr. Rama.