STATE OF MICHIGAN

COURT OF APPEALS

FELIX KONOPKA, JR., as Personal Representative of the ESTATE OF KIM MARY KONOPKA, Deceased,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL, PAUL GOODMAN, M.D., RALPH T. ZADE, JR., M.D., METRIC MEDICAL LAB, ROBERT T. GOLDMAN, M.D., GILKEY & ORTIZ & ASSOCIATES, P.C., WILLIAM GILKEY, M.D., EDUARDO ORTIZ, M.D., EMMA L. BIXBY HOSPITAL and UNIVERSAL STANDARD MEDICAL LABORATORIES,

Defendants-Appellees.

UNPUBLISHED
January 23, 1998

Nos. 197692;199077
Oakland Circuit Court
LC No. 95-499553-NH

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

In docket number 197692 of this consolidated appeal, plaintiff, as personal representative of the estate of his deceased wife, appeals an interlocutory order. We consider plaintiff's appeal of this interlocutory order pursuant to our Supreme Court's order remanding this issue to this Court for consideration as on leave granted.[1] In docket number 199077, plaintiff appeals as of right a final order granting all defendants summary disposition and dismissing this case with prejudice. We affirm.

We first consider plaintiff's appeal of the final order granting summary disposition in favor of all defendants. The sole issue raised by plaintiff in this appeal is whether he filed his action within the six-month period permitted by the discovery rule. Thus, our recitation of the facts is necessarily limited to those relevant to that issue.

From approximately 1974 until March, 1986, plaintiff's wife obtained gynecological care from S. Leonard Cohn, M.D. During this time, Dr. Cohn obtained a number of pap smears and other tissue specimens from plaintiff's wife. Defendant William Beaumont Hospital and its agents, defendant Paul Goodman, M.D., and defendant Ralph T. Zade, Jr., M.D. (the Beaumont defendants), evaluated several of these pap smears between 1981 and 1984. In March, 1986, defendant Universal Standard Medical Laboratories[2] and its agent, defendant Robert T. Goldman, M.D. (the Universal defendants), also evaluated a pap smear obtained from plaintiff's wife.

In December, 1987, plaintiff's wife began receiving gynecological care from defendant Gilkey and Ortiz & Associates, P.C., and its agents, defendant William Gilkey, M.D., and defendant Eduardo Ortiz, M.D (the Gilkey defendants). That same month, the Gilkey defendants obtained a pap smear from plaintiff's wife. The agents of defendant Emma L. Bixby Hospital evaluated this pap smear. In December, 1988, the Gilkey defendants obtained another pap smear from plaintiff's wife. In January, 1989, plaintiff's wife was diagnosed with advanced cervical cancer. In October, 1989, plaintiff's wife died from this disease.

In November, 1991, plaintiff, as personal representative of his wife's estate, filed a wrongful death action against Dr. Cohn premised on Dr. Cohn's alleged medical malpractice in failing to diagnose plaintiff's wife's cervical cancer. The case eventually settled in 1993.

On or about September, 10, 1994, plaintiff, as personal representative of his wife's estate, filed a wrongful death action premised on medical malpractice against defendants in Wayne Circuit Court. The complaint alleged, in relevant part, that the Beaumont defendants, the Universal defendants and the agents of defendant Bixby had failed to diagnose or identify cancer cells in plaintiff's wife's pap smears. In June, 1995, this action was dismissed without prejudice apparently based on plaintiff's failure to comply with the statutory notice provision applicable to medical malpractice actions. See MCL 600.2912b; MSA 27A.2912b. The June, 1995, order dismissing this action provided that plaintiff had fourteen days to file another action against defendants and that the statute of limitations "shall be tolled from the date that the present action was commenced until the date that the new action shall be commenced."

Within fourteen days, plaintiff filed this action against defendants in Oakland Circuit Court. The complaint in this case contained the same allegations against defendants as the September, 1994, complaint.

In June, 1996, the Beaumont defendants moved for summary disposition pursuant to MCR 2.116(C)(7). The Beaumont defendants contended that in light of the documentary evidence submitted in support of their motion there was no question of fact but that as of at least December 7, 1992, the date of Dr. Cohn's deposition in plaintiff's action against Dr. Cohn, plaintiff should have been aware of the possibility that his wife's pap smears had been improperly analyzed. The Beaumont defendants contended that this case and plaintiff's September, 1994, action were therefore barred by the six-month discovery rule because these actions had been filed more than six months after plaintiff discovered or should have discovered the existence of a possible medical malpractice claim. Subsequently, the Universal defendants and defendant Bixby Hospital joined in the Beaumont defendants' motion.

In response, plaintiff contended that he only became aware of a possible cause of action against defendants on March, 24, 1994, when he read an article in Fortune magazine concerning the possible relationship between misdiagnosed pap smears and the development of cervical cancer. Plaintiff contended that his claim was therefore not barred by the statute of limitations because he filed his September, 10, 1994, complaint within six months of his March 24, 1994, discovery of a possible cause of action against defendants.

The trial court granted summary disposition in favor of all defendants. In a written opinion, the trial court ruled that plaintiff's complaint[3] was barred by the statute of limitations because plaintiff should have discovered the existence of his malpractice claims more than six months before plaintiff filed his complaint.

On appeal, plaintiff raises various arguments for his contention that the trial court erred in granting summary disposition in favor of defendants. While we sympathize with plaintiff's tragic loss, we respectfully disagree with plaintiff's arguments.

This Court reviews a summary disposition determination de novo as a question of law. *Poffenbarger v Kaplan*, 224 Mich App 1, 6; 568 NW2d 131 (1997). The period of limitation in a wrongful death action is governed by the statute of limitations applicable to the underlying claim. *Id*. Whether the acts of malpractice occurred before or after October 1, 1986 (the effective date of certain tort reform amendments relating to the medical malpractice), the discovery rule provides that a medical malpractice action may be commenced "within 6 months after the plaintiff discovers or should have discovered the existence of the claim." MCL 600.5838(2); MSA 27A.5838(2); MCL 600.5838a(2); MSA 27A.5838(1)(2); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222-223, n 3; 561 NW2d 843 (1997). The six-month period begins to run in medical malpractice cases when the plaintiff, on the basis of objective facts, is aware of a possible cause of action. *Solowy*, *supra* at 232. This occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician. *Id*. When the cause of the plaintiff's injury is difficult to determine because of a delay in diagnosis, the "possible cause of action" standard should be applied with a substantial degree of flexibility. *Id*. In such cases, courts should be guided by the doctrine of reasonableness and the standard of due diligence, and must consider the totality of information available to the plaintiff concerning the injury and its possible causes. *Id*.

The plaintiff bears the burden of coming forward with evidence to show a disputed issue of material fact on the discovery issue. *Id*. at 231. The discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim. *Turner v Mercy Hosp & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995). The discovery period applies to the discovery of a possible claim, not the discovery of the defendant's identity. *Poffenbarger, supra*.

In this case, there is no question that plaintiff and his wife were aware of her cervical cancer by January, 1989. Thus, the dispositive issue is when plaintiff discovered or should have discovered a possible causal link between this injury and the acts or omissions of defendants in allegedly failing to identify cancer cells in plaintiff's wife's pap smears.

The documentary evidence submitted below in support of defendants' motions for summary disposition indicates that during the weeks and months following the cancer diagnosis, plaintiff and his wife sought a second medical opinion and then "decided that we would see an attorney to make sure that all the treatment she had received up to this point was good treatment." In April, 1990, plaintiff's counsel obtained "pathology slides" from counsel for defendant Bixby and indicated that "the slide was to be reviewed by an expert."

In November, 1991, plaintiff filed suit against Dr. Cohn. The complaint against Dr. Cohn indicated that the evaluation of the various pap smears obtained from plaintiff's wife had revealed discrepancies and inconsistent results. Specifically, the initial results of a December, 1981, pap smear revealed severely dysplastic cells. The initial results of a September, 1982, pap smear were unclassifiable. And, the initial results of an April, 1983, pap smear showed atypical changes. However, in May, 1983, these three pap smears were to sent to Dr. John Frost, who "identified the presence of large tissue fragments that most probably represented an endocervical adenocarcinoma." Subsequent pap smears obtained by Dr. Cohn in 1984 continued to exhibit abnormalities, except for a December, 1984, smear that was "interpreted as negative for abnormality." Finally, a March, 1986, pap smear "indicated the presence of hypertrophic endocervical cells." During his December 7, 1992, deposition, Dr. Cohn discussed the relationship of pap smears and the identification of cervical cancer. Dr. Cohn also discussed the discrepancy between the initial interpretations and Dr. Frost's interpretation of the 1981, 1982 and 1983 pap smears.

Thus, on the basis of these objective facts we agree that plaintiff should have known by at least December 7, 1992, that a possible cause of his wife's cervical cancer was a failure to properly analyze plaintiff's wife's pap smears. Thus, plaintiff was aware at this time of a possible cause of action. *Solowy, supra* at 222. Because plaintiff did not file suit within the following six months, plaintiff's claims are barred. *Id*. at 221-222.

Plaintiff again contends that his September, 10, 1994, complaint against defendants is not barred because it was brought within six months after March 24, 1994, which is the date that plaintiff read Fortune magazine and discovered that misread pap smears resulting in undiagnosed cervical cancer may have been a cause of his wife's death. However, this argument goes only to the issue of when, on the basis of subjective facts, plaintiff actually knew of a possible causal link between his wife's cancer and defendants' alleged negligent interpretation of her pap smears. *Moll v Abbott Laboratories*, 444 Mich 1, 17-18; 506 NW2d 816 (1993). This evidence does not create a disputed issue of material fact concerning the issue of when, on the basis of objective facts, plaintiff should have discovered a possible causal link between his wife's cancer and defendants' alleged negligence.

Plaintiff contends that the fact that he consulted an attorney in 1989 is insufficient proof that he was aware of a malpractice claim against defendants. However, our disposition of this case is not premised solely on the fact that plaintiff consulted an attorney in 1989, but rather is premised on all of the previously discussed objective facts available to plaintiff as of December, 1992.

Plaintiff contends that he did not have a duty to search out every possible cause of his wife's cancer. Whatever the merits of this argument, we simply note that as of December, 1992, plaintiff had

available to him objective facts from which he should have known that a possible cause of his wife's cancer was the improper diagnosis of her pap smears.

Finally, plaintiff contends that the issue of when he should have discovered a claim against defendants is a question of fact for the jury. We disagree. When, as in this case, the facts are undisputed concerning when the plaintiff should have discovered a claim, the question is one of law for resolution on summary disposition. *Solowy, supra* at 216.

Accordingly, we affirm the grant of summary disposition in favor of defendants.

We next consider plaintiff's appeal of the interlocutory order. This order compelled the law firm retained by plaintiff in his suit against Dr. Cohn to comply with a subpoena duces tecum and produce its entire legal file in this case. Plaintiff contends that this file is protected by the attorney-client privilege. We note that after the entry of this order, the trial court entered another order staying this matter during the pendency of plaintiff's interlocutory appeal. Thus, there appears to be no question but that summary disposition was granted in favor of defendants without consideration of any material or information contained in the legal file of plaintiff's former counsel. Thus, even assuming without deciding that the interlocutory order was erroneously entered, the error was harmless because plaintiff was not prejudiced by the error. MCR 2.613(A); *Tropical Paint & Oil Co v Hall*, 225 Mich 293, 296; 196 NW 354 (1923). Accordingly, reversal on this ground is not required. *Tropical Paint, supra*.

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski

[1] *The Estate of Kim Mary Konopka v William Beaumont Hosp*, 453 Mich 883 (1996).

[2] Apparently defendant Universal was formerly known as defendant Metric Medical Laboratories.

[3] The trial court did not distinguish between the September, 1994, complaint and the June, 1995, complaint.