

STATE OF MICHIGAN
COURT OF APPEALS

SUSAN DESANO,

Plaintiff-Appellant,

v

STEPHEN REPITOR, M.D.

Defendant-Appellee.

UNPUBLISHED

July 10, 1998

No. 200258

Wayne Circuit Court

LC No. 96-603393 NH

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. MCR 2.116(C)(7). The trial court concluded that plaintiff failed to file her action in a timely manner under the applicable statute of limitations for medical malpractice. MCL 600.5805(4); MSA 27A.5805(4). We affirm.

A motion under MCR 2.116(C)(7) may be supported by affidavits, admissions, or other documentary evidence and, if submitted, the supporting evidence must be considered by the court. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 527; 538 NW2d 424 (1995). The deciding court must take the well-pleaded allegations in the pleadings and the factual support submitted by the nonmoving party as true, and summary disposition is proper only if the moving party is entitled to judgment as a matter of law. *Id.* at 527-528. This Court reviews a trial court's grant of summary disposition de novo. Whether a cause of action is barred by the statute of limitations is a question of law that is reviewed under the same standard. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

In Michigan, a plaintiff must generally file her claim for medical malpractice within two years of when the claim accrued, or within six months of when she discovered or should have discovered the claim. MCL 600.5805(4); MSA 27A.5805(4), MCL 600.5838; MSA 27A.5838; *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997). Where, as here, the acts or omissions giving rise to a medical malpractice claim occurred after October 1, 1986, the claim accrues

on the date of the alleged act or omission giving rise to the claim. MCL 600.5838a(1); MSA 27A.5838(1)(1); *id.* at 220.

As indicated in plaintiff's letter of intent to defendant and her first amended complaint, the November 19, 1993, allegedly negligent surgery that defendant performed on plaintiff's right foot and the ensuing infection formed the basis of her claim of malpractice. Because the date of the surgery is the operative date of the act or omission giving rise to plaintiff's claim, MCL 600.5838a(1); MSA 27A.5838(1)(1), plaintiff had two years from that date by which to file her malpractice claim. Because plaintiff filed her claim on January 29, 1996, well after the two-year period, the trial court did not err in summarily disposing of plaintiff's claim pursuant to MCR 2.116(C)(7).

However, plaintiff argues that she should have recourse to the continuing wrongful acts doctrine, because defendant continued to commit malpractice well past January 29, 1994, by over-prescribing Tylenol 3 to her and failing to diagnose the infection that began in her foot. The continuing wrongful acts doctrine provides that when a defendant's wrongful acts are continuing in nature, the period of limitations will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that the defendant's tortious conduct continues. *Horvath v Delida*, 213 Mich App 620, 626; 540 NW2d 760 (1995).¹ Michigan appellate courts have applied this doctrine in limited circumstances. *Id.* However, even assuming arguendo that the doctrine applies in medical malpractice actions, the doctrine applies only to continuing wrongful *acts*, not the continuing negative effects of an earlier wrongful act. *Id.* at 627. The alleged misuse of pain medication in this case is clearly a negative effect of the original allegedly negligent surgery.

Further, insofar as defendant's failure to diagnose plaintiff's infection is concerned, the continuing tort doctrine does not extend the two-year limitations period past January 29, 1996, when plaintiff finally filed suit. Plaintiff's first amended complaint alleges that approximately ten days after the surgery of November 19, 1993, plaintiff's "foot was swollen green and black with a football size growth on the side of it, and patient returned to see [defendant] approximately two weeks after the surgery." In fact, the swelling of plaintiff's foot was so severe after the surgery that plaintiff was forced to buy two pairs of shoes, her right foot being at least two inches larger than her left, due to the large growth on the rear of the damaged foot. Defendant did not correctly diagnose plaintiff's foot as being infected until approximately November 29 or December 1, 1993. Thus, plaintiff's cause of action for defendant's failure to diagnose her infection had to accrue sometime before either November 29 or December 1, 1993, since a cause of action accrues on the date of the act or omission giving rise to the malpractice action. MCL 600.5838a(1); MSA 27A.5838(1)(1). Plaintiff's failure to file suit within two years of these dates makes summary disposition appropriate.

Second, insofar as plaintiff attempts to premise her malpractice claim on defendant's acts of over-prescribing painkillers, she has failed to establish that defendant's acts of allegedly over-prescribing Tylenol 3 delayed discovery of her claim in any way that would make the January 29, 1996, filing of her medical malpractice action timely. Although plaintiff generally alleges that defendant's over-prescribing of painkillers "seriously and dramatically [a]ffected the patients [sic] ability to determine whether or not [defendant] was doing anything at all in her best interest," there is no indication that the painkillers delayed plaintiff's discovery of defendant's allegedly negligent acts. According to her

deposition testimony, the Tylenol 3 made plaintiff nauseous but did not affect her judgment. Approximately two weeks after the surgery, plaintiff was unable to walk on or apply pressure to her swollen and discolored right foot, contrary to defendant's previous assurances that she would be able to walk shortly after her surgery. Plaintiff also testified that, approximately six to seven weeks after her surgery, she was well-aware that something had gone seriously wrong. The six-month discovery rule period, even if applicable in the present situation, begins to run when the plaintiff should have known of a possible cause of action. *Solowy, supra* at 222. In light of her horrendous pain, defendant's mysterious acts of tearing up duplicate prescriptions, and the fact that plaintiff did not recover as defendant had promised her before her surgery, plaintiff should have known of her possible cause of action well before six months prior to January 29, 1996.

Finally, plaintiff argues that the doctrine of *contra non valentem agere nulla currit praescriptio* (a prescription does not run against the party who could not bring a suit), *Kalakay v Farmers Ins Group*, 120 Mich App 623, 626; 327 NW2d 537 (1982), should apply in the instant case. Plaintiff argues that the two-year statute of limitations should be extended by six months, to compensate for the six-month waiting period that ensued after plaintiff gave defendant written notice of filing suit pursuant to MCL 600.2912b; MSA 27A.2912(2). This argument is completely without merit. Had the statute of limitations expired sometime during the six-month waiting period, it could have been extended under MCL 600.5856(d); MSA 27A.5856(d), which provides that the statute of limitations for medical malpractice actions is tolled under those circumstances. See *Morrison v Dickinson*, 217 Mich App 308, 313; 551 NW2d 449 (1996). Plaintiff's argument assumes that all activity in mounting a malpractice action must cease during the six-month waiting period, which is simply not true. See *Neal v Oakwood Hospital Corp*, 226 Mich App 701; 575 NW2d 68 (1998) The purpose of the notice requirement contained in § 2912b(1) is not to prevent prejudice to a potential defendant, but rather is to encourage settlement without the need for formal litigation. *Id.* In this case plaintiff provided her letter of intent on October 11, 1994. Plaintiff had ample time, even after the waiting period expired in April 1995, to comply with the November 1995 limitation deadline. The trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Richard Allen Griffin
/s/ Roman S. Gibbs
/s/ Michael J. Talbot

¹ In Michigan, it is not clear whether the continuing wrongs doctrine applies to continuing negligence. *Horvath, supra* at 627 n 2.