STATE OF MICHIGAN

COURT OF APPEALS

PETE C. TSILIMIGRAS, as Personal Representative for the ESTATE OF ANTHI TSILIMIGRAS; PETE C. TSILIMIGRAS; GEORGIA TSILIMIGRAS; AGAPI TSILIMIGRAS; and DEMETRI TSILIMIGRAS,

Plaintiffs-Appellants,

v

BORGESS MEDICAL CENTER; KALAMAZOO NEUROLOGY, P.C.; DR. DAVID FLAGLER; BRONSON/VICKSBURG HOSPITAL; PHYSICIANS CENTER OF PHYSICAL MEDICINE, P.C.; DR. AUGUSTUS L. GUERRERO; DR. BRYAN D. VISSER; and MARY FREE BED REHABILITATION CENTER,

Defendants-Appellees.

UNPUBLISHED
October 23, 1998

No. 202841
Kalamazoo Circuit Court
LC No. 95-001633 NH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Cavanagh, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). We affirm.

I. BACKGROUND

Plaintiffs filed suit against defendants alleging medical malpractice for improper care and rehabilitation of plaintiffs' decedent, Anthi Tsilimigras, after she suffered a stroke. Anthi Tsilimigras died after filing the amended complaint, and her husband, as personal representative of her estate, was substituted for her as a plaintiff in the suit.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). The trial court granted the MCR 2.116(C)(7) motion, on the ground that plaintiffs'

claims were barred by the two-year statute of limitations. The trial court also granted the MCR 2.116(C)(10) motion, on the ground that plaintiffs could not prove their malpractice case because they asserted the physician-patient privilege during two pretrial depositions, and were thus barred from presenting medical evidence pursuant to MCR 2.306(D)(4) and MCR 2.314(B). On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

II. SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)

> In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), we must accept plaintiff's well-pleaded allegations as true, and consider all the documentary evidence submitted by the parties. The motion should not be granted . . . if there are disputed factual issues concerning when discovery of the claim occurred, or reasonably should have occurred. [*Shawl v Dhital*, 209 Mich App 321, 323-324; 529 NW2d 661 (1995) (citations omitted).]

"In general, a plaintiff in a medical malpractice case must bring his claim within two years of when the claim accrued, [see MCL 5805(4); MSA 27A.5805(4),] or within six months of when he discovered or should have discovered his claim [, see MCL 5838a(2); MSA 27A.5838(1)(2)]."[1] *Solowy v Oakwood Hospital*, 454 Mich 214, 219; 561 NW2d 843 (1997). A medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1); MSA 27A.5838(1)(1). Plaintiffs do not contest that the June 13, 1995, filing of their original claim fell outside the two-year time period established in MCL 5805(4); MSA 27A.5805(4). Rather, plaintiffs argue that the two-year period does not apply in this circumstance because: (1) the six-month discovery rule is applicable; and (2) the defendants fraudulently concealed the existence of the claim.

A. Six-Month Discovery Rule

The plaintiff in a medical malpractice case bears "the burden of coming forward with evidence to show a disputed issue of material fact on the discovery issue." *Solowy, supra* at 231.

Under the discovery rule, plaintiffs have the burden of proving that they neither discovered nor should have discovered, through the exercise of reasonable diligence, the existence of the malpractice claim as a result of physical discomfort, appearance, condition or otherwise. MCL 600.5838a(3); MSA 27A.5838(1)(3); *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

> The six-month discovery rule 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. 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. [*Solowy, supra* at 232.]

Accord *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 254-255; 506 NW2d 562 (1993).

In the case at hand, the facts indicate that plaintiffs actually discovered, or should have discovered through the exercise of reasonable diligence, the existence of their medical malpractice claim more than six months prior to the filling of their original claim on June 13, 1995. Plaintiffs Pete, Georgia and Demetri Tsilimigras claim that they did not discover their causes of action until December 13, 1994. However, plaintiffs' deposition testimony and the documentary evidence establish that each of them had serious concerns about Anthi's treatment before May 13, 1993.

1. Defendants Flagler, Kalamazoo Neurology, P.C. and Borgess Medical Center

Plaintiff Georgia Tsilimigras testified that in October 1992 she was aware that Dr. Flagler had been rude, not taken an adequate history, and not done a proper physical examination of Anthi. Plaintiff Demetri Tsilimigras testified that he was disappointed with Dr. Flagler's decision not to accept Anthi as a patient on October 26, 1992. Further, he testified that he was aware at the time that Dr. Flagler did not take any notes during his evaluation of Anthi, and did not ask Anthi questions about her living arrangements or psychological condition. Plaintiff Pete Tsilimigras, Anthi's husband, testified that he disagreed at the time with Dr. Flagler's decision not to admit his wife to an inpatient rehabilitation unit. This evidence shows that plaintiffs Pete, Georgia and Demetri Tsilimigras had questions about the propriety of Dr. Flagler's evaluation and his denial of rehabilitation immediately after Anthi's appointment on October 26, 1992. The lack of a proper evaluation by Dr. Flagler is the basis of plaintiffs' claim against the doctor. Accordingly, plaintiffs' claim against Dr. Flagler is time-barred. Therefore, summary disposition pursuant to MCR 2.116(C)(7) was proper. *Turner, supra* at 353. Furthermore, these three plaintiffs have no claim against Kalamazoo Neurology, P.C. or Borgess Medical Center because those claims arise solely from defendant Flagler's alleged malpractice.

2. Defendant Mary Free Bed Rehabilitation Center

Plaintiff Georgia Tsilimigras testified that Anthi received very poor care at defendant Mary Free Bed Rehabilitation Center (hereafter "Mary Free Bed") and observed that Anthi was unbathed, developed peritonitis, had pulled out her feeding tube and that the nurses did not wear masks. Georgia also testified that Anthi was very sick when she left Mary Free Bed and attributed the change in Anthi's condition to the care she received at Mary Free Bed. Plaintiff Demetri Tsilimigras testified that Anthi was very sick and depressed at Mary Free Bed and her chronic illnesses, including her blood pressure, diabetes, peritonitis, dialysis and kidney failure were not controlled.

Plaintiff Pete Tsilimigras testified that he saw two nurses at Mary Free Bed giving Anthi dialysis without wearing masks, he knew it was wrong and told them they were supposed to wear masks. Pete also testified that the dialysis at Mary Free Bed was dirty many times he was there, that he saw Anthi lying in bed with feces on her at least two or three times and that he was not satisfied with the care Anthi received at Mary Free Bed. This evidence establishes that plaintiffs Pete, Georgia and Demetri Tsilimigras were aware of Anthi's condition while she was at defendant Mary Free Bed and observed the care she received at the facility, and knew, or should have known or had reason to believe, that her

care was improper when she was discharged on August 14, 1992. Therefore, plaintiffs' suit against Mary Free Bed is also time-barred.

3. Defendants Bronson/Vicksburg Hospital, Guerrero, Visser and Physicians Center of Physical Medicine, P.C.

As to plaintiffs' claim against defendant Bronson/Vicksburg Hospital (hereafter "Bronson"), plaintiff Georgia Tsilimigras testified that she thought Anthi's discharge from Bronson after ten days of treatment was improper and that Anthi received improper care at Bronson. Plaintiff Demetri Tsilimigras testified that he was upset that Anthi had been discharged from Bronson before completing an expected four to eight week rehabilitation program. According to Demetri, he felt at the time that his mother was making progress and would have benefited from a longer stay at Bronson. Plaintiff Pete Tsilimigras also testified that he was upset when Anthi was discharged from Bronson. Pete testified that he made an appointment with one of his wife's doctors to discuss the discharge, but the doctor never showed up for the meeting. Pete further testified that at the time his wife was discharged he felt as if he had been lied to by those taking care of her. The records of defendants Guerrero and Visser confirm that plaintiffs were upset over Anthi's discharge from Bronson.

This evidence establishes that plaintiffs Pete, Georgia and Demetri Tsilimigras were aware of a possible cause of action for negligence and malpractice against defendants Bronson, Guerrero and Visser and knew, or should have known or had reason to believe, that Anthi's care was improper when she was discharged from the hospital on May 13, 1993. Plaintiffs' claims against Bronson, Guerrero and Visser are thus time-barred. Additionally, because the claim against defendant Physicians Center of Physical Medicine, P.C., arises solely from the acts of defendants Guerrero and Visser, that claim was properly dismissed by the trial court.

4. Plaintiff Agapi Tsilimigras

Plaintiffs also claim that summary disposition is not proper as to plaintiff Agapi Tsilimigras because she has not been deposed. We disagree. Plaintiffs misconstrue the burden of proof in the six-month discovery rule. Agapi has the burden of proving that she neither discovered nor should have discovered the existence of malpractice. Agapi cannot rely on the six-month discovery rule because she failed to sustain her burden of proof and create a disputed issue of fact on the discovery issue.

B. Fraudulent Concealment

Plaintiffs also claim that defendants fraudulently concealed malpractice. We disagree. "Under MCL 600.5855; MSA 27A.5855 [the Michigan fraudulent concealment statute,[2]] the statute of limitations is tolled when a party conceals the fact that the plaintiff has a cause of action." *Sills v Oakland General Hospital*, 220 Mich App 303, 310; 559 NW2d 348 (1996). In a malpractice case, "[t]he plaintiff must prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery." *Id.* "'"If there is a known cause of action, there can be no fraudulent concealment which will interfere with the operation of the statute . . . ."'" *Smith v Sinai*

Hospital of Detroit, 152 Mich App 716, 727; 394 NW2d 82 (1986), quoting *Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935), quoting 37 CJ, p 976.

We are unimpressed and unpersuaded by plaintiffs' argument that defendants surreptitiously concealed the existence of the medical malpractice claim by focusing plaintiffs' attention of Anthi's future care as opposed to her present and past care. As we have just observed, see discussion *supra* part IIA, the evidence before the trial court establishes that plaintiffs knew, or should have known, that they had causes of action at each stage of Anthi's treatment.

III. SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

Because we have concluded that summary disposition was properly granted under MCR 2.116(C)(7), we need not address plaintiffs' final claim that the trial court erred in dismissing their claims pursuant to MCR 2.116(C)(10). We do note, however, our agreement with the trial court's conclusion that because plaintiffs raised the physician-client privilege in pre-trial depositions, summary disposition was proper pursuant to MCR 2.314(B)[3] and MCR 2.116(C)(10). See *Domako v Rowe*, 438 Mich 347, 354; 475 NW2d 30 (1991).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

[1] Although the *Solowy* Court cited MCL 600.5838; MSA 27A.5838 with respect to the six-month discovery rule, *Soloway*, *supra* at 219, the Court also later observed that the six-month discovery rule applicable to that medical malpractice case is found at MCL 600.5838a(2); MSA 27A.5838(1)(2). *Solowy*, *supra* at 221. As the *Solowy* Court observed, the language of MCL 600.5838a(2); MSA 27A.5838(1)(2), the discovery rule specific to medical malpractice claim, is in all significant respects the same as the general malpractice discovery rule found in MCL 600.5838; MSA 27A.5838. *Solowy*, *supra* at 223 n 3.

[2] The statute reads:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

[3] MCR 2.314(B)(2) reads:

Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.