STATE OF MICHIGAN

COURT OF APPEALS

YVONNE RUFFIN,

Plaintiff/Appellant/Cross-Appellee,

v

DHANVANT PAREKH, M.D.,

Defendant/Appellee/Cross-Appellant.

UNPUBLISHED
December 22, 1998

No. 204838
Wayne Circuit Court
LC No. 95-513483 NI

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition in this medical malpractice action. Defendant cross appeals from an order denying his motion for mediation sanctions. We affirm in part, reverse in part, and remand.

I.

On October 11, 1994, defendant received written notice of plaintiff's intent to sue. On May 11, 1995, after the 182-day notice period, plaintiff filed a complaint against defendant alleging that he negligently failed to remove a foreign body from her pelvis during a surgical procedure. Defendant moved for summary disposition on the ground that plaintiff's claim was not timely filed.[1] The trial court agreed and granted defendant's motion.

On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition. We disagree. Motions for summary disposition under MCR 2.116(C)(7) are reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Limbach v Oakland Co Bd of Road Comm'rs*, 226 Mich App 389, 395;573 NW2d 336 (1997). When reviewing a motion granted pursuant to MCR 2.116(C)(7), we must consider the affidavits, pleadings, and other documentary evidence filed or submitted at the time of the trial court's decision. See MCR 2.116(G)(5). If there is no genuine issue of material fact, whether a claim is barred by the statute of limitations is a question of law for the court. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995).

A medical malpractice action must be brought within two years of when the claim first accrues, or within six months of the time the claim was discovered or should have been discovered. *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997), citing MCL 600.5805(4); MSA 27A.5805(4) and MCL 600.5838; MSA 27A.5838. Here, the parties agree that the issue is confined to whether plaintiff acted within six months of the time her claim was discovered or should have been discovered. The parties also agree on the facts essential to our resolution of this appeal: As of June 1993, plaintiff had undergone pelvic surgery four times, the most recent procedure being a tubal ligation performed by defendant on November 20, 1991. Following the 1991 tubal ligation, plaintiff began to experience abdominal pain. X-rays performed in May 1992 indicated the possibility of a foreign body in plaintiff's abdomen. Medical records from a June 29, 1993, meeting between plaintiff and a surgeon indicate that plaintiff was informed of the existence of a foreign body, possibly a Penrose drain, in her left pelvis, apparently left during a previous pelvic surgery. The surgeon recommended that plaintiff not have the foreign body removed, due to the risks that would be associated with its removal. Shortly after her meeting with the surgeon, plaintiff consulted an attorney to determine whether she had a cause of action regarding the existence of the foreign body in her pelvis. However, there is no indication that plaintiff took any legal action against anyone with respect to the foreign body until she mailed defendant the notice of intent to sue in October 1994.

For purposes of the six-month discovery rule, the period of limitations begins to run when, "on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Solowy*, *supra* at 222. As soon as a person is aware of an injury and its possible cause, she is equipped with the necessary knowledge to preserve and diligently pursue her claim. *Id*. at 223. With this in mind, we agree with the trial court's assessment that on June 29, 1993, when the surgeon confirmed that a foreign body was left in her pelvis during one of her previous pelvic surgeries, plaintiff was, or should have been, aware of the injury (the existence of a foreign body in her pelvis), and aware of its *possible* cause (the previous pelvic surgery performed by defendant). This conclusion is further supported by the fact that plaintiff consulted an attorney shortly after the June 29, 1993, meeting with the surgeon. See *Szatkowski v Isser*, 151 Mich App 264, 271; 390 NW2d 668 (1986). At this point, she was bound to diligently pursue her claim. Because she took no action by December 29, 1993, when the six-month period of limitations expired, her claim was barred.

Plaintiff's assertion that she did not know the extent of her injury because her healthcare providers did not request additional procedures to remove the object is irrelevant. "The discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury." *Moll v Abbott Laboratories*, 444 Mich 1, 18; 506 NW2d 816 (1993). Similarly, the fact that plaintiff had undergone four prior pelvic surgeries, presumably performed by four different physicians, is also irrelevant. The discovery rule applies to the discovery of a possible claim, not to the discovery of the defendant's identity. *Poffenbarger v Kaplan*, 224 Mich App 1, 12; 568 NW2d 131 (1997); see also *Hall v Fortino*, 158 Mich App 663, 668; 405 NW2d 106 (1986).

Finally, we reject plaintiff's argument that she did not "discover" her claim until a subsequent surgical procedure revealed that the foreign body was a sponge rather than a Penrose drain. According to plaintiff, this fact was significant because her original attorney, in a letter dated February 21, 1994,

confirmed that in a meeting held on February 10, 1994, he and plaintiff had agreed that defendant "would not be the appropriate person to sue" because "a review of the records" showed that defendant did not use a Penrose drain in the course of his surgery. While plaintiff may have been misled by her attorney's advice, his advice was irrelevant for purposes of defendant's motion for summary disposition, because the meeting referred to in the letter occurred more than one month *after* the six-month period of limitations had already expired. Plaintiff's reliance on the "medical records" was also misplaced. This is so because none of the medical records submitted by the parties below addressed the issue whether a Penrose drain was used during the surgery performed by defendant. Accordingly, there was no showing that plaintiff could have been misled during the relevant period of time.

For these reasons, the trial court's order granting defendant's motion for summary disposition is affirmed.

II.

With respect to defendant's cross appeal, we note that our Supreme Court's use of the word "must" in MCR 2.403(O)(1) indicates that an award of costs, as a mediation sanction, is mandatory, not discretionary. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129-130; 573 NW2d 61 (1997). Therefore, the trial court was in error when it denied defendant's motion as an exercise of discretion. Because plaintiff rejected the mediation evaluation and failed to improve her position after mediation, defendant is entitled to an award of actual costs pursuant MCR 2.403(O)(1). Although the court rule has subsequently been amended to allow for the exercise of discretion in cases such as this, see MCR 2.403(O)(11), we must decline plaintiff's request to apply the amendment retroactively because the case was not pending in the trial court when the amendment became effective. See *Prosoli v Mullins*, 111 Mich App 8, 14; 314 NW2d 508 (1981) ("The rule in Michigan is that changes in judicial procedure apply to all further proceedings in actions then pending.").

The order denying defendant's motion for mediation sanctions is reversed. On remand, the trial court is instructed to enter an order awarding mediation sanctions to defendant in the amount of his actual costs.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] Defendant's motion for summary disposition was brought under MCR 2.116(C)(10). However, because defendant sought summary disposition solely on the ground that plaintiff's claim was not timely filed, his motion should have brought under MCR 2.116(C)(7), which covers claims barred by the statute of limitations. In this regard, we note that exact technical compliance with MCR 2.116(C) is not required. *Mollet v Taylor*, 197 Mich App 328, 332; 494 NW2d 832 (1992). Because it does not appear that either party could have been misled by the mislabeling of defendant's motion for summary

disposition, we will review this case as if defendant's motion had been brought and granted under MCR 2.116(C)(7). *Id.*