# STATE OF MICHIGAN

# COURT OF APPEALS

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ROY SULLINS,

Plaintiff-Appellant,

v

HENRY FORD HEALTH SYSTEM, d/b/a HENRY FORD HOSPITAL, DAVID S. NATHANSON, M.D., AND ROBERT O'BRYAN, M.D.,

Defendants-Appellees.

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UNPUBLISHED
May 21, 1999

No. 202961
Wayne Circuit Court
LC No. 95-533301 NH

Before: Markey, P.J., and Holbrook, Jr., and Neff, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition to defendants pursuant to MCR 2.116(C)(7) based on the trial court's determination that plaintiff's action for medical malpractice is barred by the applicable statute of limitations because plaintiff failed to file his complaint within the six-month "discovery rule" period, MCL 600.5838a(2); MSA 27A.5838(1)(2). We reverse.

I

In June 1982, plaintiff had surgery to remove a cancerous tumor, called a liposarcoma, from the tissue in his left thigh. In the fall of 1990, plaintiff discovered a new lump in his left thigh which Dr. O'Bryan, plaintiff's treating physician and oncologist, diagnosed as a recurrence of the liposarcoma. In January 1991, Dr. Nathanson, a surgical oncologist to whom plaintiff was referred by Dr. O'Bryan, performed surgery to remove the recurrent tumor in plaintiff's left thigh. Dr. Nathanson wrote a letter to Dr. O'Bryan after the surgery informing him that cancer cells remained at the surgical site. Plaintiff admits that he was advised to continue follow-up with Dr. O'Bryan because liposarcomas have a high rate of recurrence, but denies that he was told that tumor cells remained in the surgical margins where the tumor mass was removed.

In May 1994, plaintiff discovered another lump in his thigh and again consulted Dr. O'Bryan. Plaintiff admits that at that time he assumed it might be a possible recurrence of the liposarcoma. However, Dr. O'Bryan examined the lump, did not refer plaintiff for tests or for a diagnosis, and merely

instructed plaintiff to watch the tumor to see if any changes occurred and to return for a follow-up examination in six months.

On November 24, 1994, plaintiff returned to Dr. O'Bryan for the scheduled follow-up examination. Dr. O'Bryan ordered an MRI to be performed on the lump. Upon receiving the results of the MRI, Dr. O'Bryan informed plaintiff that the lump was possibly a recurrence of the liposarcoma. On January 12, 1995, Dr. Nathanson again attempted to surgically remove the tumor, but was unable to do so because the tumor, which was malignant, had spread to vital structures in plaintiff's thigh. When amputation of his entire left leg was recommended, plaintiff sought a second opinion from the Cleveland Clinic. Doctors at the Cleveland Clinic ultimately performed surgery in which plaintiff's femoral nerve was excised and plaintiff's left leg had reduced functional capacity, but in which plaintiff's limb was saved.

In March or April 1995, plaintiff consulted an attorney to obtain and review his medical records to see if his medical treatments were proper. According to plaintiff, he discovered for the first time that Dr. Nathanson had left cancer cells at the surgical site in the January 1991 operation. On May 5, 1995, plaintiff filed the instant complaint against defendants alleging medical malpractice for failure to remove the recurrent liposarcoma in its entirety in the January 1991 operation, failure to disclose that all of the cancer cells had not been removed, and failure to recommend treatment options after the January 1991 surgery.

Defendants moved for summary disposition on the ground that the two-year statute of limitations on medical malpractice claims barred plaintiff's claim because his cause of action accrued in January 1991 and was not saved by the six-month discovery rule. MCL 600.5805(4); MSA 27A.5805(4) and MCL 600.5838; MSA 27A.5838. Plaintiff did not dispute that his claim accrued in January 1991 and was barred under the general limitations period but argued that his claim was saved under the discovery rule because he did not discover the basis of his claim until March or April 1995 when he first learned that Dr. Nathanson failed to remove all of the cancer during the January 1991 surgery. Relying on *Gebhardt v O'Rourke*, 444 Mich 535; 510 NW2d 900 (1994), for guidance, the trial court agreed with defendants that plaintiff's discovery rule period began to run in May 1994 and that plaintiff's complaint filed in May 1995 was therefore barred.

II

Plaintiff claims that the trial court erred in its determination that the six-month discovery rule period began to run in May 1994. We agree with plaintiff that the trial court erred in this determination.

Whether plaintiff's cause of action is barred by the statute of limitations is a question of law for which we conduct a de novo review and for which we must accept plaintiff's well-pleaded allegations as true. *Moll v Abbot Laboratories*, 444 Mich 1, 26, 27 n 36; 506 NW2d 816 (1993); *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

The applicable six-month discovery rule provides:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. [MCL 600.5838a(2); MSA 27A.5838(1)(2).]

The burden of establishing that plaintiff neither discovered nor should have discovered his claim at least six months before the expiration of the limitations period is on plaintiff. MCL 600.5838a(2); MSA 27A.5838(1)(2).

The discovery rule does not require that a plaintiff know with certainty or likelihood that a defendant committed malpractice. *Solowy v Oakwood Hospital Corp,* 454 Mich 214, 222; 561 NW2d 843 (1997). Rather, as correctly observed by the parties and the trial court below, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a "possible cause of action." *Moll, supra.* The "possible cause of action" standard was announced by our Supreme Court in *Moll, supra,* which involved pharmaceutical products liability claims. The Court then applied that standard in *Gebhardt, supra,* which involved a claim of legal malpractice and which was the case relied on by the court below, and most recently applied that standard in *Solowy, supra,* a medical malpractice case. Unfortunately, the instant trial court did not have the benefit of our Supreme Court's decision in *Solowy* because the Court decided *Solowy* five days after the trial court held the hearing and issued its orders granting summary disposition in this case. We believe that *Solowy* is controlling and is instructive in deciding the issue in this case, where both cases involve claims of medical malpractice based on a recurrence of cancer.

The Court in *Solowy* held that under the "possible cause of action" standard, the six-month discovery rule period begins to run "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.* at 232; emphasis added. The Court noted that

> [w]hile according to *Moll,* the "possible cause of action" standard requires less knowledge than a "likely cause of action standard," it still requires that the plaintiff possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act. In other words, the "possible cause of action" standard is not an "anything is possible standard." [*Solowy, supra* at 226.]

The Court advised that in the context of a delayed diagnosis, which we conclude includes the instant case, courts should maintain a flexible approach in applying the standard. *Id.* at 226, 232. The Court stated that "[in applying this flexible approach, courts should consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, *and his physician's explanations of possible causes or diagnoses of his condition."* *Id.* at 227; emphasis added.

Upon considering the totality of the information available to plaintiff, we are convinced that plaintiff knew of a possible cause of action no earlier than some time after November 24, 1994, when Dr. O'Bryan obtained the results of the MRI test, diagnosed the lump on plaintiff's thigh as a possible recurrence of liposarcoma, and so informed plaintiff. See *Solowy, supra* at 224-228 and 233 [where the Court determined that the plaintiff knew of a possible cause of action once she was aware that her symptoms regarding the lesion on her ear were identical to those she had previously experienced and she was advised by her doctor that the lesion could be a recurrence of cancer]. We conclude that it was not until some time after November 24, 1994, that the instant plaintiff, "while lacking specific proofs, was armed with the requisite knowledge to diligently pursue her claim," particularly in regards to Dr. O'Bryan and any delay in timely diagnosing the recurrence of the cancer. *Id.* at 225. Moreover, in view of the fact that plaintiff's cancer had a high rate of recurrence in any event and accepting plaintiff's denial of any knowledge that defendant Dr. Nathanson had not removed all the cancer cells during the 1991 surgery until he obtained his medical records in March or April of 1995, we do not see how plaintiff could be deemed to be aware of a possible cause of action against Dr. Nathanson until sometime after November 24, 1994 either. Before then he merely had his own concern, i.e., he had no knowledge of either any injury or a possible link with any act or omission by either defendant. The "possible cause of action" standard does not require that the plaintiff know that the injury was in fact or even likely caused by the alleged omissions of the defendant doctors. *Id.* at 224.

We hold that the discovery rule period on plaintiff's cause of action commenced no earlier than November 24, 1994, and that plaintiff's complaint, filed on May 5, 1995, was consequently not time-barred by the statute of limitations in respect to any of the defendants.

We reverse and remand for further proceedings.

We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff