STATE OF MICHIGAN

COURT OF APPEALS

JOHN G. HOTKA,

Plaintiff-Appellant,

v

MARK A. ALEXANDER and CHAFFEE ALEXANDER, P.C.,

Defendants-Appellees.

UNPUBLISHED
November 30, 1999

No. 206568
Wayne Circuit Court
LC No. 96-628067 NM

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10) in this action for legal malpractice. We reverse.

This case arises out of defendants' legal representation of plaintiff in a medical malpractice claim against a radiologist for misreading a CT scan by failing to recognize that the scan indicated the presence of a benign brain tumor. Plaintiff had sought medical treatment for the deteriorating vision in his left eye and was informed of two possible diagnoses—low-tension glaucoma or a tumor exerting pressure on his optic nerve. However, in both 1989 and 1990, plaintiff underwent CT scans and was told that they indicated that he did not have a tumor. Plaintiff was repeatedly diagnosed with glaucoma. On March 1, 1994, plaintiff met with a new physician, Dr. Phelan, about his continuing concerns regarding the deterioration of vision in his left eye. Plaintiff informed Dr. Phelan that he had been previously told that CT scans did not indicate he had a tumor. Dr. Phelan informed plaintiff that CT scans were an appropriate diagnostic tool at the time the scans were performed, but that newer MRI technology could yield more accurate results. Dr. Phelan accordingly scheduled plaintiff for an MRI and told him that his vision deterioration was likely not the result of glaucoma. On March 14, 1994, the day after plaintiff underwent an MRI, Dr. Phelan diagnosed plaintiff with a benign tumor affecting his optic nerve. Dr. Phelan then referred plaintiff to Dr. Trobe, a neurophtalmologist, and asked plaintiff to obtain the CT scans from 1989 and 1990. Plaintiff could only obtain the 1990 CT scan, and he brought it to his appointment with Dr. Trobe on March 24, 1994. Dr. Trobe informed plaintiff that the 1990 CT scan did indicate that a tumor was present.

Plaintiff then sought legal representation to bring a claim for medical malpractice against the radiologist that misread the 1990 CT scan. However, that action was dismissed because the applicable limitation period had expired. Plaintiff then brought an action against defendants for legal malpractice, alleging that his attorney-client relationship with them began before the limitation period had expired on his medical malpractice claim. Plaintiff therefore alleged that defendants negligently failed to take the necessary steps to bring his medical malpractice action within the limitation period.

Defendants moved for summary disposition, arguing that the limitation period on plaintiff's medical malpractice claim had expired before their representation of plaintiff had begun, thus shielding them from any liability for legal malpractice. Defendants argued that plaintiff should have known of the existence of a possible cause of action for medical malpractice on March 1, 1994. Therefore, defendants argued, the applicable six-month limitation period had already expired by the time that their representation of plaintiff began on September 14, 1994, when plaintiff signed a retainer agreement. The trial court agreed and granted defendants' motion for summary disposition under MCR 2.116(C)(10).

We review the trial court's decision whether to grant a motion for summary disposition under MCR 2.116(C)(10) de novo to determine whether any genuine issue of material fact exists that would prevent entering judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In making this determination, we view the documentary evidence in a light favoring the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Additionally, whether a claim was brought within the applicable limitation period is a question of law that we review de novo. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

In a legal malpractice action, a plaintiff must prove the following: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). Where the legal malpractice action is based on an alleged failure to bring an underlying claim before the expiration of the limitation period, the plaintiff is unable to prove causation where the legal representation did not begin until after the expiration of the applicable limitation period for the underlying claim. *McCluskey v Womack*, 188 Mich App 465, 473-474; 470 NW2d 443 (1991). Therefore, if defendants' representation of plaintiff did not begin until after the limitation period for plaintiff's medical malpractice claim had expired, then summary disposition for defendants would be appropriate.

The general statute of limitations for malpractice claims provides that a malpractice action must be brought within two years of when the claim accrued. MCL 600.5805(4); MSA 27A.5805(4). 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). Plaintiff's medical malpractice claim arose out of the alleged misreading of the 1990 CT scan; therefore, by 1994, the general limitations period had expired. However, a medical malpractice claim may also be brought within six months of when the

plaintiff discovered or should have discovered the existence of the claim. MCL 600.5838a(2); MSA 27A.5838(1)(2). It is this six-month discovery rule that is at issue in the instant case.

The Supreme Court has adopted a "possible cause of action" standard for determining when the discovery-rule period begins to run. *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 221-223; 561 NW2d 843 (1997); *Moll v Abbott Laboratories*, 444 Mich 1, 23-24; 506 NW2d 816 (1993). Under this standard, the discovery-rule period begins to run when the plaintiff 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*. The plaintiff must "possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id*. at 226.

Defendants argue that, as of his March 1, 1994 meeting with Dr. Phelan, plaintiff had sufficient information to know that he had a possible medical malpractice action for the failure of previous physicians to diagnose his tumor. According to defendants, plaintiff became aware of two possible diagnoses—glaucoma or a tumor. Defendants argue that plaintiff therefore had knowledge of an injury and a possible negligent act of failing to diagnose that injury. At that meeting, Dr. Phelan did inform plaintiff that glaucoma was probably not a correct diagnosis; however, Dr. Phelan specifically told plaintiff that his previous physicians had ordered appropriate diagnostic testing. Moreover, defendants' argument assumes that the negligent actions of plaintiff's previous physicians consisted of the failure to diagnose the tumor. Plaintiff's medical malpractice claim, however, was brought against a radiologist for the specific negligent act of misreading a 1990 CT scan that indicated that a tumor was present.[1] Although plaintiff concedes that he was aware of a possible injury, i.e., a tumor, as of March 1, 1994, plaintiff correctly notes that he was, at that point, unaware of the possibility that the 1990 CT scan had been negligently misread. Therefore, we conclude that plaintiff was not aware of a possible cause of action on March 1, 1994.

We also conclude that plaintiff was not aware of a possible cause of action relating to the misreading of the 1990 CT scan until March 24, 1994.[2] Plaintiff underwent an MRI on March 13, 1994, and was informed the next day that he did, in fact, have a tumor. At this point, plaintiff was clearly aware that he had suffered an injury. However, he was still without any information to suggest that the 1990 CT scan indicated that a tumor was present or that the scan was misread. Indeed, plaintiff had been specifically informed by Dr. Phelan that, although plaintiff's previous physicians had ordered appropriate diagnostic tests, newer technology had been developed that might aid in making a more accurate diagnosis. Instead of having information of possible negligent acts, plaintiff was given information that suggested that his previous physicians were not negligent. On March 24, 1994, however, plaintiff was specifically informed that the 1990 CT scan was misread because it did indicate that plaintiff had a tumor, yet plaintiff had been previously told that the scan indicated no tumors. It was only at this point that plaintiff was aware of a possible causal connection between the injury and a specific negligent act. *Solowy*, *supra* at 232.

Therefore, the six-month discovery-rule period did not begin to run until March 24, 1994. When plaintiff signed a retainer agreement with defendants on September 14, 1994, the six-month period had not expired. Therefore, defendants' argument that they cannot be liable for legal malpractice

because the limitation period had expired before their legal representation of plaintiff had begun must fail. *McCluskey*, *supra* at 473-474. Accordingly, plaintiff may proceed with his legal malpractice claim, and the trial court erred in granting defendants' motion for summary disposition. Because of our resolution of this issue, we do not address plaintiff's argument that he established an attorney-client relationship with defendants before the date on which he signed the retainer agreement. This Court may decline to address issues not necessary to the resolution of the case at hand. See *Kernen v Homestead Development Co*, 232 Mich App 503, 513; 591 NW2d 369 (1998); *People v Yeoman*, 218 Mich App 406, 414 n 1; 554 NW2d 577 (1996).

Reversed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] Plaintiff's action also named the hospital where the CT scan was administered.

[2] Because the facts are not in dispute, the question when plaintiff discovered or should have discovered the medical malpractice claim is a question of law for a court to decide. *Solowy*, *supra* at 216.