STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY D. WHITE and DIANA WHITE,

Plaintiffs-Appellants,

v

DETROIT RECEIVING HOSPITAL and PADRAIC SWEENEY, M.D.,

Defendants-Appellees.

UNPUBLISHED
April 28, 2000

No. 210921
Wayne Circuit Court
LC No. 96-624866-NH

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and dismissing their medical malpractice claim on the basis that it is barred by the applicable statute of limitations. We affirm.

On December 6, 1991, plaintiff[1] slipped on ice and injured his left leg/ankle. When the pain did not subside after several hours, he called 911 and was taken to the defendant hospital on December 7, 1991. Plaintiff was initially examined in the emergency room by medical personnel, whom the hospital cannot identify. Plaintiff complained of leg and foot tenderness as well as swelling. The examination revealed that the front of plaintiff's leg (the "anterior tibia area") was extremely tender. The examiner noted that plaintiff's left foot could not be flexed due to extreme pain. Defendant Padraic Sweeney, who was responsible for the final diagnosis, diagnosed plaintiff as having an acute sprain of the left ankle/foot. Thereafter, plaintiff was discharged with a prescription for pain medication and crutches. He was instructed to return to the emergency room if his condition worsened.

According to plaintiff, he first attempted to walk on the injured foot three or four days later, but was unable to do so. Over the next few days, the injury progressed to the point that plaintiff could not bend his ankle or flex his toes. On December 15, 1991, plaintiff returned to the emergency room and was examined by a different doctor, who diagnosed plaintiff as having anterior compartment syndrome ("ACS"). Between December 15, 1991, and January 6, 1992, plaintiff underwent four surgeries on his left leg to remove dead muscle tissue. By the time the surgery was performed, the entire muscle of plaintiff's anterior tibial compartment was irreversibly damaged by the ACS.

On January 6, 1992, plaintiff was discharged from the hospital. He continued physical therapy at defendant hospital until 1993. According to plaintiff, despite the muscle loss and pain, defendant hospital's doctors led him to believe that he could expect to recover full function of his leg. Plaintiff claims that, after years of rehabilitation, the condition of his leg did not improve. All of plaintiff's rehabilitation occurred at defendant hospital. Plaintiff averred in an affidavit that he retained counsel on March 30, 1995, to determine if his rehabilitation treatment had been negligently performed. On April 6, 1995, plaintiff signed an authorization for release of his medical records from defendant hospital. On October 7, 1995, plaintiff's attorney informed him that, according to a medical consultant, the rehabilitation doctors had not been negligent, but rather, defendant Sweeney's negligent failure to diagnose the ACS on December 7, 1991, resulted in the irreversible muscle damage. On October 31, 1995, plaintiff served defendants with a Notice of Intent to File Claim. On April 6, 1996, plaintiffs filed their original complaint, alleging malpractice. The trial court granted summary disposition for defendants[2] on the basis that plaintiffs' claim was untimely.

On appeal, plaintiffs argue that the trial court erred in granting summary disposition because they brought the present action within six months of discovering their claim. We disagree that plaintiffs' claim was timely. The question whether a claim was filed within the period of limitations is one of law and is, therefore, reviewed de novo. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997); *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Furthermore, we review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When a motion for summary disposition is premised on MCR 2.116(C)(7), the nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor. *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). "[T]he court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties." *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). If no facts are in dispute, whether the claim is statutorily barred is a question of law. *Dewey, supra*.

Generally, no person may bring an action charging malpractice unless he commences the action within two years of when the claim accrued, MCL 600.5805(4); MSA 27A.5805(4), or within six months of when the plaintiff discovers or should have discovered the claim, whichever is later. MCL 600.5838a(2); MSA 27A.5838(1)(2). Under the six-month discovery rule, MCL 600.5838a(2); MSA 27A.5838(1)(2), the burden of establishing that the plaintiff neither discovered nor should have discovered the claim at least six months before the expiration of the limitations period is on the plaintiff. MCL 600.5838a(2); MSA 27A.5838(1)(2), *Solowy, supra* at 231. The discovery rule does not require that a plaintiff know with certainty or likelihood that the defendant committed malpractice. *Id.* at 222. Rather, it requires that the plaintiff know of the act or omission giving rise to the malpractice and that the plaintiff have reason to believe that the act or omission was improper or was performed in an improper manner; a claim accrues once the plaintiff is aware of the injury and of its possible cause. *Id.*, quoting *Moll v Abbott Laboratories*, 444 Mich 1, 23-24; 506 NW2d 816 (1993); see also *Griffith v Brant*, 177 Mich App 583, 587; 442 NW2d 652 (1989). In *Solowy, supra* at 232, our Supreme Court explained:

> 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. When the cause of the plaintiff's injury is difficult to determine because of a delay in diagnosis, the "possible cause of action" standard should be applied with a substantial degree of flexibility. In such cases, courts should be guided by the doctrine of reasonableness and the standard of due diligence, and must consider the totality of information available to the plaintiff concerning the injury and its possible causes.

We find that, in this case, plaintiff knew or should have known of a possible cause of action at least six months before October 31, 1995, the date plaintiffs filed their Notice of Intent to File Claim. On December 7, 1991, plaintiff was diagnosed with a sprained ankle. He was sent home with instructions to return if his condition worsened. Although no other intervening event occurred, plaintiff's condition worsened considerably over the next eight days. The pain increased to the point that plaintiff could no longer flex his toes or bend his ankle. When he returned to the hospital on December 15, 1991, he was correctly diagnosed as having ACS, a much more serious condition than the prior-diagnosed sprained ankle/foot. Plaintiff thereafter underwent four surgeries on his left leg. By the time of the first surgery, the muscle tissue in his leg had completely deteriorated. Plaintiff has never claimed that he believed that the ACS was caused by the sprained ankle. Under such circumstances, we conclude that, at the time plaintiff was told he suffered from ACS, as opposed to a simple sprained ankle, and was informed that the condition caused complete muscle deterioration necessitating multiple surgeries to remove dead muscle, plaintiff knew or should have known that he had a possible cause of action based on the improper diagnoses and treatment following his initial hospital visit.[3]

Plaintiff claims that he did not know of a possible claim until October 7, 1995, because he is "unsophisticated" and ignorant of the medical aspects of ACS. He further claims that he did not know of a possible claim until his expert reviewed all of defendant hospital's records. However, these claims fail given that the standard to be applied is whether plaintiff knew of should have known of a "possible cause of action." *Solowy, supra* at 232. Moreover, the test to be applied in determining when a cause of action accrued is an objective one, based on objective facts, not on what a particular plaintiff subjectively believed. *Id.*; *Shields v Shell*, 237 Mich App 682, 691; 604 NW2d 719 (1999).

Plaintiffs' final claim that the trial court erred in failing to rule that defendants' fraudulent conduct prevented him from discovering a possible cause of action is without merit. "Under MCL 600.5855; MSA 27A.5855, the statute of limitation is tolled when a party conceals the fact that the plaintiff has a cause of action." *Sills v Oakland General Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996). Under MCL 600.5838a(2)(a) and (3); MSA 27A.5838(1)(2)(a) and (3), if a plaintiff shows fraudulent concealment, the period of limitations is tolled six months after the date the plaintiff knew or should have known of a possible claim. "Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Dunmore v Babaoff*, 149 Mich App 140, 145; 386 NW2d 154 (1985), quoting *Buszak v Harper Hosp*, 116 Mich App

650, 654; 323 NW2d 325 (1982), quoting *Delta v Winter*, 258 Mich 293, 296; 241 NW 923 (1932). A plaintiff seeking to toll the statute of limitations based on fraudulent concealment "must prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery." *Sills, supra*. Proof of "[m]ere silence is insufficient" and misdiagnosis is not an affirmative act designed to conceal a claim. *Id*.

In the instant case, plaintiff claims that he was led to believe defendant hospital's doctors had done everything that was supposed to be done, and nothing could have been done differently in regard to the initial diagnosis. He further indicates that he was told his leg muscles would be restored and that his surgery "went well." However, the assurances that plaintiff received from certain individuals who worked for defendant hospital did not fraudulently conceal plaintiff's possible malpractice claim for alleged improper treatment of his leg. Although plaintiff was told that his leg was healing, there is no evidence that defendants' employees took any affirmative actions to mislead or hinder plaintiffs' acquisition of information that would disclose their right of action or that defendants' employees' actions were "calculated to draw the veil of secrecy over the act . . . ." *Eschenbacher v Hier*, 363 Mich 676, 682; 110 NW2d 731 (1961).

Further, plaintiffs claim that defendant Sweeney's conduct was fraudulent because he informed defendant hospital's risk management personnel that there were no signs of ACS on December 7, 1991, when plaintiff was initially treated. However, such an act did not serve to mislead plaintiff or hinder his acquisition of necessary information. At the time defendant Sweeney made the comment to the risk management personnel, plaintiff was aware that he suffered from ACS, as opposed to a sprained ankle. As such, it was not error for the trial court not to find that defendants' actions did not constitute fraudulent concealment of plaintiffs' possible cause of action.[4]

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Brian K. Zahra

[1] "Plaintiff" refers to Anthony White. His wife, Diana White, has a derivative loss of consortium claim.

[2] The trial court's order granting defendants' third motion for summary disposition is the order appealed from in the present case. Defendants' two prior motions for summary disposition brought before different trial judges were denied without prejudice.

[3] The conclusion that plaintiff knew or should of known of a possible cause of action soon after learning of the ACS is further supported by evidence suggesting that, on December 23, 1991, plaintiff asked a treating doctor whether he would be in his condition if he had seen the right doctor the first time. The doctor did not respond affirmatively. Contrary to plaintiff's claim, even though he was merely asking a question, his comment demonstrates the awareness of a "possible" cause of action based on the initial improper medical diagnosis.

[4] We also reject plaintiffs' suggestion that the case is not proper for summary disposition because two other judges had previously denied defendants' motions for summary disposition. Both judges denied defendants' motions without prejudice.