STATE OF MICHIGAN

COURT OF APPEALS

KENNETH ZIMNICKI,

Plaintiff-Appellant,

v

MICHAEL ROLLINS,

Defendant-Appellee.

UNPUBLISHED
December 26, 2000

No. 217900
Wayne Circuit Court
LC No. 97-739463-NH

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and dismissing his action with prejudice on the basis that it is barred by the applicable statute of limitations. We affirm.

In reviewing a motion under MCR 2.116(C)(7), we accept a plaintiff's well-pleaded allegations as true and construe them in favor of the plaintiff. *Witherspoon v Guilford*, 203 Mich App 240, 243; 511 NW2d 720 (1994); *Smith v Quality Const Co*, 200 Mich App 297, 299; 503 NW2d 753 (1993). The motion should not be granted unless no factual development could provide a basis for recovery. *Simmons v Apex Drug Stores*, 201 Mich App 250, 252; 506 NW2d 562 (1993). If no facts are in dispute, the issue of whether the plaintiff's claim is statutorily barred is a question of law. *Witherspoon, supra* at 243; *Smith, supra* at 299. Furthermore, the question whether a claim was filed within the period of limitations is one of law and, therefore, our review is de novo. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997).

Generally, a plaintiff must bring his malpractice action within two years of when the claim first accrues under MCL 600.5805(1) and (4); MSA 27A.5805(1) and (4). Medical malpractice claims accrue "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). Claims for acts or omissions giving rise to a claim of malpractice which occurred after October 1, 1986, accrue on the date of the alleged act or omission giving rise to the claim. *Solowy, supra* at 220. Assuming that defendant's final act or omission occurred on the last visit on February 2, 1995, the statute would have run on

February 2, 1997, more than four months before plaintiff filed his notice of intent to sue on June 12, 1997 and more than ten months before plaintiff filed his complaint.

There is also a six-month "latent" discovery rule which provides that "an action involving a claim based on medical malpractice may be commenced . . . 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).

In *Solowy, supra* at 222-223, our Supreme Court held that the "possible cause of action" standard announced in *Moll v Abbott Laboratories*, 444 Mich 1, 18; 506 NW2d 816 (1993), applies to medical malpractice claims. The Court explained that "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." *Solowy, supra* at 222. "Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." *Moll, supra* at 23-24. The *Solowy* Court further explained that "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." *Solowy,supra* at 232.

The Court set forth other rules which aid our analysis. First, the discovery rule applies to discovery of the injury, not to the discovery of the consequences of the injury which are subsequently realized. *Id*. at 223-224. Second, the standard does not require the plaintiff to know that the injury "was in fact or even likely caused by the defendant doctors' alleged omissions," nor does the standard require that the plaintiff is aware of the "full extent of [the] injury before the clock begins to run." *Id*. at 224. Finally, in considering whether objective facts exist such that the plaintiff should know that a possible cause of action exists, a court must consider "the totality of the 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.

The question whether the statute of limitations bars plaintiff's substantive claims asks at what point in time objective facts existed such that plaintiff knew or should have known of a possible cause of action against defendant. Where, as in this case, the facts essential to such a determination are undisputed, "the question whether a plaintiff's cause of action is barred by the statute of limitations is a question of law to be determined by the trial judge." *Moll, supra* at 26. Applying the rules clearly laid out in *Solowy* to the facts of this case, we find that the trial court correctly granted summary disposition.

Our review of the uncontested facts leads us to conclude that plaintiff should have known of a possible cause of action at the earliest on April 21, 1995 when he met with Dr. Kamath who referred him to an ear, nose and throat ("ENT") specialist Dr. Fink, or on October 23, 1995, when Dr. Fink discussed with him "what he has and what has happened" and referred him to an even more specialized ENT surgeon, Dr. Marks. Certainly, plaintiff should have known of a possible cause of action when he met with Dr. Marks on December 1, 1995, and the doctor immediately diagnosed him with cholesteatoma and recommended a CT scan, an audiogram, and either a one- or two-stage surgical procedure. Even giving plaintiff the benefit of the doubt, he should have realized that a possible cause of action existed when Dr. Marks performed the third

surgery on November 4, 1996, given plaintiff's assertion that he believed that two surgeries constituted "normal" treatment for his disease. Certainly no later than November 5, 1996, when Dr. Marks discussed with plaintiff that he was going to need another exploration, plaintiff should have realized his possible cause of action.

Thus, at the very latest, pursuant to the six month discovery rule, MCL 600.5838a(2); MSA 27A.5838(1)(2), plaintiff had to commence his action by May 5, 1997. Plaintiff, however, did not file his notice of intent to sue until June 12, 1997, and did not file his complaint until Dec 11, 1997. Accordingly, plaintiff's cause of action was not brought within the limitations period, even applying the discovery rule, and his malpractice claim was time barred.[1]

Finally, we reject plaintiff's argument that the trial court abused its discretion by denying his motion for leave to amend his complaint to include a claim a fraudulent concealment.

The grant or denial of leave to amend is within the trial court's discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). We will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion which resulted in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

Reasons which justify denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, and futility. *Weymers*, *supra* at 658. An amendment would be futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Amendments which add allegations that merely restate those already made are futile, as are amendments which add allegations that still fail to state a claim. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

On the record before us, we concluded that the trial court did not abuse its discretion in denying plaintiff's motion to amend because the amendment to add the fraudulent concealment claim would have been futile, and would have merely restated claims already made.

In *Dunmore v Babaoff*, 149 Mich App 140, 145; 386 NW2d 154 (1985), this Court explained:

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[1] To the extent that plaintiff implies that it was defendant's burden to show that plaintiff knew or should have known of the malpractice, he is wrong. As statutorily provided, the burden was on plaintiff:

> The burden of proving that the plaintiff, as a result of the physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. [MCL 600.5838a(2); MSA 27A.5838(1)(2); *Solowy, supra* at 231.]

> 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. [Citations omitted.]

Furthermore, 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 v Oakland General Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996). "Mere silence is insufficient." *Id*.

Although defendant should have better informed plaintiff of the nature and progression of his disease, his failure to do so alone, unaccompanied by affirmative acts or misrepresentations designed to prevent subsequent discovery, is insufficient to demonstrate a colorable claim of fraudulent concealment. Therefore, plaintiff's amendment would have been futile and the trial court did not abuse its discretion by denying his motion to amend.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy