

**STATE OF MICHIGAN
COURT OF APPEALS**

VIRGINIA CLARDY, as Personal Representative
of the Estate of PHYLANDRA FIELDS,
Deceased,

Plaintiff-Appellee,

v

AVERY MILBERGER, M.D.,

Defendant-Appellant,

and

GRACE HOSPITAL, WHITTEN & DIAZ,
M.D.'S, P.C., JAMES I. WHITTEN, M.D.,
EDWARD KIM, M.D., and ANESTHESIA
SERVICES, P.C.,

Defendants.

VIRGINIA CLARDY, as Personal Representative
of the Estate of PHYLANDRA FIELDS,
Deceased,

Plaintiff-Appellee,

v

ANESTHESIA SERVICES, P.C.,

Defendant-Appellant,

and

AVERY MILBERGER, M.D., GRACE
HOSPITAL, WHITTEN & DIAZ, P.C., JAMES I.
WHITTEN, and EDWARD KIM, M.D.,

Defendants.

UNPUBLISHED
February 8, 2002

No. 224013
Wayne Circuit Court
LC No. 97-734388-NH

No. 224015
Wayne Circuit Court
LC No. 97-734388-NH

Before: Cavanagh, P.J., and Neff and B. B. MacKenzie*, JJ.

PER CURIAM.

Defendants Avery Milberger, M.D. and Anesthesia Services, P.C. appeal by leave granted from the trial court's order denying their motions for summary disposition pursuant to MCR 2.116(C)(7) [statute of limitations] in this medical malpractice action. We reverse.

On appeal, defendants argue that plaintiff's medical malpractice claims against them are barred by the applicable statute of limitations periods prescribed by MCL 600.5805(5), 600.5838a(2), and 600.5852. Defendants further argue that the fraudulent conduct exception did not toll the statute of limitations and that the equitable estoppel doctrine did not apply; therefore, the trial court erred in denying their motions for summary disposition. We agree.

This Court reviews de novo the grant or denial of a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). Further, whether a plaintiff's claim is statutorily time-barred is a question of law that is reviewed de novo. *Id.* at 47. In this case, plaintiff does not dispute that statutorily imposed limitation periods had expired when she filed her claims against defendants. Plaintiff argues, however, that the limitation periods were tolled because of defendants' fraudulent conduct or, in the alternative, that the equitable estoppel doctrine precluded defendants from raising the statute of limitations as an affirmative defense.

The fraudulent conduct exception at issue in this case is set forth in MCL 600.5838a(2)(a) and provides, in pertinent part:

If discovery of the existence of the claim was prevented by the fraudulent conduct of the health care professional against whom the claim is made or a named employee or agent of the health professional against whom the claim is made, or of the health facility against whom the claim is made or a named employee or agent of a health facility against whom the claim is made.

Although the statute refers to "fraudulent conduct," in *Sills v Oakland General Hosp*, 220 Mich App 303, 309-310; 559 NW2d 348 (1996), this Court looked to cases involving fraudulent concealment under MCL 600.5855 to define such conduct because the statutes have the same general purpose and affect similar policies. Accordingly, the *Sills* Court held that to sufficiently assert that the defendant's fraudulent conduct tolled the statute of limitations, the plaintiff must plead and prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent the plaintiff from discovering that she had a cause of action. *Sills, supra* at 310.

In this case, plaintiff neither alleged fraudulent conduct in her complaint against defendants, nor did plaintiff assert facts that would support this potential claim. Consequently, plaintiff may not seek to toll the limitations period by asserting the fraudulent conduct exception.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

See *Id.*; see, also, *Dunmore v Babaoff*, 149 Mich App 140, 146-147; 386 NW2d 154 (1985). Nevertheless, plaintiff's fraudulent conduct claim would fail.

First, plaintiff claims that codefendant Grace Hospital (Hospital) concealed defendants' identities and the Hospital's actions are attributable to defendants. There are several flaws in this argument, including that plaintiff has not alleged any affirmative actions by the Hospital or defendants that were designed to prevent plaintiff from discovering a cause of action. Mere silence is not sufficient. *Sills, supra*. Further, even if the Hospital or codefendant Kim had fraudulently concealed Milberger's identity, "a defendant cannot be penalized for the fraudulent acts of third parties in concealing the defendant's identity where the defendant played no part." *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 728; 394 NW2d 82 (1986). Although plaintiff argues that the Hospital is responsible for the actions of its ostensible agents, *Grewe v Mount Clemens General Hosp*, 404 Mich 240, 250-251; 273 NW2d 429 (1978), plaintiff cites no authority for the proposition that Milberger is responsible for the actions of the Hospital. Consequently, we need not address this issue. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Finally, plaintiff was not prevented by any alleged misconduct from discovering the "existence of the claim" as required by MCL 600.5838a(2)(a). See, e.g., *Smith, supra* at 726. In sum, the statute of limitations on plaintiff's claim was not tolled by MCL 600.5838a(2)(a).

Next, defendants argue that the equitable estoppel doctrine does not prevent them from asserting a statute of limitations defense because defendants did not induce plaintiff to believe certain facts. We agree.

In *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997), our Supreme Court, citing *Lothian v Detroit*, 414 Mich 160, 176-177; 324 NW2d 9 (1982), considered equitable estoppel as it applies to the statute of limitations and held:

One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. This Court has been reluctant to recognize an estoppel absent intentional or negligent conduct designed to induce a plaintiff to refrain from bringing a timely action.

In the instant case, plaintiff does not allege that defendants falsely represented or concealed any material fact. Instead, plaintiff's equitable estoppel claim relies on her unsupported allegation that defendants are responsible for the actions of the Hospital or codefendant Kim. Consequently, plaintiff has failed to allege or establish facts sufficient to rely on the equitable estoppel doctrine to avoid defendants' statute of limitations defense. See *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999).

In sum, defendants were not equitably estopped from asserting the statute of limitations as a defense to plaintiff's medical malpractice claims and, because the period of limitations was not tolled as a result of fraudulent conduct, plaintiff's claims against these defendants are time-barred. See MCR 2.116(C)(7).

Reversed and remanded for entry of an order granting defendants' motions for summary disposition. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

/s/ Barbara B. MacKenzie