STATE OF MICHIGAN

COURT OF APPEALS

EDWARD MIELEWSKI, as Personal Representative of the Estate of BONNIE LEE MIELEWSKI, Deceased,

Plaintiff-Appellee,

v

LABORATORY CORPORATION OF AMERICA, f/k/a NATIONAL HEALTH LABORATORIES, INCORPORATED, and LABORATORY CORPORATION OF AMERICA HOLDINGS,

Defendants-Appellants,

and

FAMILY CARE CLINIC, P.C., d/b/a FIRST CARE MEDICAL CENTERS, a/k/a PAUL J. FORMAN, D.O., a/k/a MARK L. DIEM, D.O. CLINIC, P.C., FIRST CARE HEALTH PLAN, INC., and MICHAEL PRICE, P.A.,

Defendants.

UNPUBLISHED
February 12, 2002

No. 225269
Oakland Circuit Court
LC No. 99-014609-NH

Before: White, P.J., and Whitbeck, C.J. and Holbrook, Jr., J.

PER CURIAM.

Defendant, Laboratory Corporation of America ("LabCorp") appeals by leave granted the circuit court's order denying LabCorp's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

On November 24, 1994, Bonnie Lee Mielweski, plaintiff's wife and decedent, had a pap smear test performed at First Care Medical Center.[1] Decedent's specimen was forwarded to defendant LabCorp and examined by a cytotechnologist. The reported test result stated that the specimen was satisfactory but limited,[2] and that the result was within normal limits. After an examination the following year, decedent was informed in December, 1995 that cancerous cells were present in her latest pap smear specimen.

The physician told plaintiff and decedent that the cancer could be treated locally under anesthesia, but once the surgery began, the surgery had be stopped after it was discovered that the cancer had "gone too far." Decedent was referred to another physician who recommended a radical hysterectomy; however, this procedure also had to be stopped because the cancer had spread too far. Decedent was then advised to undergo radiation therapy. After three attempts, the radiation therapy was completed. From the initial 1995 diagnosis, decedent's health steadily declined. After a consultation with another physician who treated decedent's mother, decedent was advised that her condition was terminal and her prognosis indicated that she had four to eight weeks to live. Decedent died January 22, 1997.

Sometime in 1996, during the course of decedent's treatment, plaintiff made a request to obtain decedent's 1994 pap smear results. Plaintiff began to have concerns regarding the adequacy of decedent's treatment by her doctors. Plaintiff informed decedent that he was going to consult with a lawyer. During plaintiff's deposition, when asked why plaintiff requested decedent's pap smear test results to take to the attorney, plaintiff explained:

> You read about pap smears being wrong and this being wrong and something else being wrong. So the only thing I could think of, like I said, I was thinking about Dr. Coleman and Beaumont Hospital, and I had to have a starting point someplace. So I went just to get the pap smear.

Plaintiff testified that he read the report after he obtained it and saw that the report stated that the results were within normal limits. When asked whether he believed the report was correct at the time, understanding that he is not a doctor, plaintiff responded:

> I didn't know - - the thing I couldn't understand was why she still had cancer and, you know, if it says it's negative, why does she have cancer? That's what I couldn't understand.

Several days after receiving the 1994 pap smear test results from the clinic, plaintiff had his first consultation with an attorney. On February 3, 1997, the attorney requested decedent's medical records. At some point, the attorney referred the case to plaintiff's present lawyers and in December 3, 1997, plaintiff's new lawyers sent a follow-up letter to LabCorp requesting the pap smear slide for review. LabCorp responded that, pursuant to company procedures, decedent's test results would not be made available unless a physician made the request or the

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[1] Apparently, decedent had had a pap smear performed in 1993, which showed abnormal results.

[2] The report explained that "satisfactory but limited indicates the specimen may provide useful diagnostic information but is of less than optimal quality. Repeat pap smear may be indicated."

person making the request obtained a court order compelling disclosure. Plaintiff commenced an action and obtained the slide. Plaintiff's attorneys had the slide reviewed and it was determined that the 1994 specimen had been misread. Rather than being within normal limits, the test revealed cancerous cells. Plaintiff testified that the first time he was informed that the 1994 slide may have been misread was when his present attorney so informed him.

Plaintiff filed his Notice of Intent to File a Claim against LabCorp on June 24, 1998. Plaintiff filed his complaint on December 22, 1998. The circuit court denied LabCorp's motion for summary disposition on the basis that plaintiff's claim was timely because he filed it within six months of when his attorneys received the original pap smear specimen.

On appeal, LabCorp argues that the circuit court misinterpreted the possible cause of action standard when it found that plaintiff's claim was timely because plaintiff filed his notice of intent within six months of receiving decedent's pap smear slide. We agree.

A trial court's grant or denial of summary disposition is reviewed de novo by this Court. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra*, 456 Mich 337. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition may be granted when the movant is entitled to judgment as a matter of law, or the affidavits or other proofs show that there is no genuine issue of material fact. *Morales, supra*, 458 Mich 294.

Generally, an action charging malpractice may not be brought unless the action is commenced within two years of when the claim accrued, or within six months of when the plaintiff discovers or should have discovered the claim, whichever is later. MCL 600.5805(5); MCL 600.5838a(2); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997). The burden of establishing that the plaintiff neither discovered nor should have discovered the claim more than six months before filing is on the plaintiff. MCL 600.5838a(2); *Solowy, supra* at 231.

In *Solowy, supra* at 232, our Supreme Court stated:

> 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.

Decedent's illness was not the type of illness that defied even a possible diagnosis until a test, or a battery of tests, could limit the possibilities, which would necessitate application of the flexible standard suggested in *Solowy*. Rather, the totality of information available to plaintiff when he and decedent were informed that decedent had an aggressive cancer narrowed the possible causes to either one of two possibilities. Specifically, the cancer either manifested itself between the 1994 and 1995 pap smears, or the cancer manifested itself in the 1994 pap smear and was misinterpreted. Indeed, although plaintiff stresses that he was concerned with possible treating physician malpractice, not with a misreading of the pap smear, he testified that when he went to see the first lawyer, he was aware of "pap smears being wrong and this being wrong and something else being wrong . . ." and that when he obtained the report he questioned how decedent could have had a negative report and still have cancer. Further, plaintiff's counsel requested the lab slides on December 3, 1997, more than six months before the notice was filed. The denial of LabCorp's motion for summary disposition was improper because there was no genuine issue regarding whether plaintiff filed his notice of intent within the statute of limitations or six-month discovery rule.

Reversed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.