

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAVID CARRIVEAU and LAURA  
CARRIVEAU,

Plaintiffs-Appellants,

v

ROBERT MANDELL, D.O., TRI-COUNTY  
ORTHOPEDICS GROUP, BRENT L.  
BINGHAM, D.O., and BOTSFORD GENERAL  
HOSPITAL,

Defendants-Appellees.

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UNPUBLISHED  
September 10, 2002

No. 233007  
Oakland Circuit Court  
LC No. 99-016497-NH

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On March 30, 1979, David Carriveau fractured his upper left arm and damaged the soft tissues and the radial nerve. Dr. Mandell performed an open reduction of the fracture. Carriveau refractured his arm in July 1979. On July 16, 1979, Drs. Mandell and Bingham repaired the fracture by inserting a plate and screws. Thereafter Carriveau experienced total numbness in his left arm, and was unable to move his wrist or open his hand. Dr. Mandell maintained the numbness was due to scarring related to the original injury. Dr. Eugene Horrell, a hand surgeon, performed several procedures designed to give Carriveau some function in his arm. In 1998, Dr. Horrell informed Carriveau the original injury could not have caused the loss of function of the radial nerve, and the nerve must have been damaged during the surgery in July 1979.

Plaintiffs filed suit alleging that defendants committed malpractice by damaging the radial nerve during the July 1979 surgery, and this negligence proximately caused Carriveau's injuries. The complaint alleged that Dr. Mandell told Carriveau the cause of his injuries was callus and scarring, and that Dr. Mandell made this statement knowing it was false and with the intent to conceal his negligence. The complaint alleged that Carriveau first discovered the negligence in 1998. Laura Carriveau asserted a claim for loss of consortium.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that plaintiffs' claims were barred by the applicable statute of limitations, and that a genuine issue of fact did not exist regarding fraudulent concealment or delayed discovery of the claim because medical records from 1981-1983 established that Carriveau was aware he had suffered radial nerve palsy as a result of the July 1979 surgery. In response, plaintiffs argued that although Carriveau was aware of the loss of function in his arm immediately after the 1979 surgery, his ability to pursue a claim was hindered by Dr. Mandell's fraudulent explanation that the numbness was a result of the original injury.

The circuit court granted summary disposition in favor of defendants, finding the evidence established that Carriveau knew as early as 1981 that he lost function in the arm after the July 1979 surgery, and that that knowledge was sufficient to make him aware that he had a possible cause of action. The circuit court concluded that plaintiffs' cause of action was not filed within six months of the discovery of a possible cause of action, as required by MCL 600.5838a(2).

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

The statute of limitations for medical malpractice actions is two years. MCL 600.5805(5). The two-year limitations period is subject to a six-month discovery rule exception. Under this exception a claim may be commenced after the expiration of the two-year period if it is commenced within six months after the plaintiff discovered or should have discovered the claim. MCL 600.5838a(2). The discovery rule does not require that the plaintiff know with certainty the defendant committed malpractice. It requires the plaintiff know of the act or omission giving rise to the malpractice and that the plaintiff have reason to believe it was improper. A claim accrues once the plaintiff is aware of the injury and its possible cause. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997). The determination of whether and when a plaintiff discovered or should have discovered a claim is a question of fact for the jury, unless the facts are undisputed and the trial court can properly decide the issue as a matter of law. *Id.*, 230.

As a general rule, if the existence of a claim or the identity of the person who is liable for the claim is fraudulently concealed, the action can be brought within two years after the person who is entitled to bring the action discovers or should have discovered the existence of the claim or the identity of the person who is liable. MCL 600.5855; MCL 600.5838a(2)(a). For fraudulent concealment to toll the running of the limitations period the fraud must be manifested by an affirmative act or misrepresentation. Silence alone is not sufficient. *Bradley v Gleason Works*, 175 Mich App 459, 462-462; 438 NW2d 330 (1989). There must be the employment of artifice designed to prevent inquiry or to escape investigation, and to mislead or hinder the acquisition of information disclosing the existence of a claim. *McCluskey v Womack*, 188 Mich App 465, 472; 470 NW2d 443 (1991).

Plaintiffs argue the circuit court erred by granting defendants' motion for summary disposition. We disagree and affirm. David Carriveau sustained the original injury in March 1979. Dr. Mandell performed surgery to repair the fracture, and Carriveau's condition began to improve. In July 1979, Carriveau refractured the arm. Dr. Mandell performed additional surgery, after which Carriveau lost all function in the arm. Knowledge of the existence of the

condition, in and of itself, is insufficient to give rise to a cause of action. The claimant must also be aware that an act or omission was improper. *Solowy, supra*, 222.

The evidence, in particular the medical records generated when Carriveau underwent additional surgeries in 1981-1983, establish that at that time Carriveau was aware his arm had been improving before he refractured it, but he lost function in the arm after the July 1979 surgery. The loss of function had not occurred after the original injury, in spite of the fact that surgery had been required at that time; however, a loss of function occurred after the July 1979 surgery. The evidence showed that Carriveau associated the nerve injury with the surgery and that he was aware that after the July surgery he had an injury different in kind than after the original surgery.

Even assuming arguendo that Dr. Mandell's explanation was an attempt at fraudulent concealment, the attempt did not succeed, and Carriveau learned of the existence of an injury and its possible cause as early as 1981. The circuit court did not err in finding the undisputed evidence showed that Carriveau was aware of his injury and its possible cause as early as 1981, and that the claim accrued at that time. *Id.* The circuit court correctly decided the issue as a matter of law, *id.*, 230, and properly granted summary disposition in favor of defendants on the ground that plaintiffs' action was barred by the statute of limitations. MCL 600.5805(5); MCL 600.5838a(2).

Affirmed.

/s/ Helene N. White  
/s/ Janet T. Neff  
/s/ Kathleen Jansen