

STATE OF MICHIGAN
COURT OF APPEALS

ANGEL SMITH,

Plaintiff-Appellant,

v

JOHN T. BEUKER and JOHN T. BEUKER,
M.D., P.C.,

Defendants-Appellees.

UNPUBLISHED
December 9, 2003

No. 241169
Calhoun Circuit Court
LC No. 01-001576-NM

Before: Murray, P.J., and Gage and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting the motion for summary disposition filed by defendants (hereinafter "defendant"). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On February 3, 1998 defendant performed reconstructive surgery on plaintiff's anterior cruciate ligament (ACL). Plaintiff underwent physical therapy, but continued to experience pain in her knee. Defendant performed an arthroscopic evaluation of the knee on August 10, 1998. Plaintiff continued to experience severe pain and instability in her knee. In November 1998 defendant informed plaintiff that he had no further treatment to offer her. Defendant treated plaintiff with pain medication until March 1999 when he announced his retirement.

In June 1999 plaintiff began treating with Dr. Redmond. Dr. Redmond recommended a second ACL reconstruction if the degenerative changes in the knee were not too extensive. On April 18, 2000 Dr. Redmond performed ACL reconstructive surgery on plaintiff's knee. Following the surgery he informed her that defendant improperly located a screw during the first surgery, and that the misplaced screw was the likely cause of her continuing problems.

On September 22, 2000 plaintiff filed a notice of intent (NOI) to file a medical malpractice action, and on April 23, 2001 filed suit alleging that defendant committed malpractice by failing to properly perform reconstructive surgery on February 3, 1998. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's action was barred by the general two-year statute of limitations, and that the six-month discovery rule did not apply because plaintiff could not establish that she did not discover and should not have discovered her cause of action until six months before she filed her NOI. Defendant asserted that the latest that plaintiff should have known of a possible cause of action was in

September 1999 when Dr. Redmond recommended that she undergo a second ACL reconstruction. In response, plaintiff alleged that a question of fact existed as to whether she discovered or should have discovered her claim within six months of filing suit. She asserted that it was not until April 2000 when Dr. Redmond performed surgery that she learned that defendant had not performed the February 3, 1998 surgery in a correct manner, and that she had no reason to believe that her continuing pain was caused by negligent medical treatment until that time. The trial court granted defendant's motion for summary disposition, finding that defendant's reasoning was persuasive.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The statute of limitations for medical malpractice actions is two years. MCL 600.5805(6).¹ 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 the plaintiff to know with certainty that the defendant committed malpractice. It requires that the plaintiff know of the act or omission giving rise to the malpractice and that the plaintiff had reason to believe that 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 burden of proving 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). 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. *Solowy, supra* at 230.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. She asserts that defendant led her to believe that pain in her knee was to be expected following ACL reconstructive surgery, and that it was not until April 2000 when Dr. Redmond performed surgery that she learned that a screw was not positioned correctly during the February 1998 surgery and was the source of her continuing pain. We disagree and affirm the trial court's order granting defendant's motion for summary disposition. The evidence showed that when defendant performed ACL reconstructive surgery on February 3, 1998 he told plaintiff the healing process would be lengthy. Plaintiff engaged in physical therapy; however, her condition did not improve. As early as June 1998 plaintiff questioned another physician regarding the need for further surgery. In June 1999 Dr. Redmond diagnosed a failed ACL reconstruction, and in September 1999 he recommended that plaintiff have further ACL reconstructive surgery to deal with her continuing problems. Whether a plaintiff should have discovered a claim is tested objectively by application of a reasonable person standard. *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993). Furthermore, in order to have discovered a claim a plaintiff need not know that his or her injury was caused by the defendant's negligence and need not be

¹ This limitations period was formerly set out in MCL 600.5805(5).

aware of the details of the evidence necessary to prove the claim. *Soloway, supra* at 224. The evidence showed that as of September 1999 plaintiff was aware that the initial surgery had not addressed her problem, and that she needed further ACL reconstructive surgery to deal with her continuing pain and discomfort. The fact that plaintiff was not aware that defendant had misplaced a screw was not necessary for her to have discovered her claim. *Id.* The trial court correctly found that the undisputed evidence showed that plaintiff should have been aware of her injury and its possible cause at this time, and that the claim accrued at that time. *Id.* at 222. The trial court correctly decided the issue as a matter of law, *id.* at 230, and properly granted summary disposition in favor of defendant on the ground that plaintiff's action was barred by the statute of limitations. MCL 600.5805(6); MCL 600.5838a(2).

Affirmed.²

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly

² Even if plaintiff did not learn of her injury and its possible cause until April 18, 2000, when Dr. Redmond performed surgery and discovered that a screw implanted by defendant was improperly positioned, plaintiff's claim would still be time barred. The six-month discovery period would have expired on October `18, 2000. Plaintiff issued her NOI in September 22, 2000 and thus tolled the statute of limitations for 182 days. MCL 600.5856(d). The last date on which plaintiff could have filed her complaint in a timely manner was April 18, 2001. Plaintiff did not file her complaint until April 23, 2001.