STATE OF MICHIGAN

COURT OF APPEALS

CHRIS ALLEN SARR,

Plaintiff-Appellant,

v

VERLENE KAY MARKWELL,

Defendant-Appellee.

UNPUBLISHED
December 7, 2004

No. 248752
Lenawee Circuit Court
LC No. 02-001032-NO

Before: Cavanagh, P.J. and Kelly and H. Hood*, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing his claims with prejudice, denying his request for attorney fees, and enjoining him from further filings. We affirm in part, vacate in part and remand.

Plaintiff and defendant have three children and were divorced in 1992. In early 1999, defendant reported that she suspected plaintiff of sexually abusing two of the children. Plaintiff ultimately pleaded no-contest to four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under the age of thirteen). On August 13, 1999, plaintiff was sentenced to eleven to thirty-five years' imprisonment. In 2000, a trial to terminate plaintiff's parental rights was held in the juvenile division of the Washtenaw probate court.

Plaintiff filed his complaint for "statutory negligence" on December 11, 2002, alleging a cornucopia of wrongful acts by defendant from 1984 to 1999 that led to the parties divorce in 1992, various harms to the parties' children, and plaintiff's 1999 criminal prosecution and incarceration. Plaintiff further alleged that in 2000 and 2001, defendant was responsible for child abuse, lying, and "mayhem" either leading up to and/or occurring within the context of the child protection proceedings. Plaintiff generally alleged that defendant owed him a legal duty based on the terms of judgment of divorce, and on appeal contends that his action is to "enforce the provisions of the divorce decree." Defendant denied all allegations in the complaint with the exception of residence and the date of the parties' marriage and divorce.

Both parties moved for summary disposition. The trial court denied plaintiff's motion for summary disposition and granted defendant's motion and awarded her attorney fees. The trial court also "enjoined [plaintiff] from filing any civil action regarding these same issues."

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

Plaintiff argues that that the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(9). This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 608; 673 NW2d 111 (2003). MCR 2.116(C)(9) provides that a motion for summary disposition may be raised on the ground that the opposing party has failed to state a valid defense to the claim asserted against him. The motion tests the sufficiency of a defendant's pleadings alone, and all well-pled allegations are accepted as true. *Allstate Ins Co v Morton*, 254 Mich App 418, 421; 657 NW2d 181 (2002). Summary disposition is proper if the defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery. *Id.* at 421.

Defendant's pleadings deny each and every factual allegation by plaintiff except for the parties' residences and the dates of their marriage and divorce. If defendant's pleadings were true, as we must presume they are, plaintiff's factual allegations must, logically, be untrue. Defendant's pleadings are not so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery. *Allstate, supra* at 421. Indeed, the opposite is true: if defendant's pleadings were true, no factual discovery could allow plaintiff to recover. Because defendant stated a valid defense, summary disposition was properly denied pursuant to MCR 2.116(C)(9).

Plaintiff also argues that the trial court erred in granting summary disposition to defendant. Although the trial court did not specify under which court rule it granted defendant's motion, after reviewing the record we find summary disposition was properly granted pursuant to MCR 2.116(C)(5) and (7).

With regard to plaintiff's allegations of wrongful conduct occurring prior to plaintiff's incarceration, plaintiff's complaint is barred by the statute of limitation. MCR2.116(C)(7). A claim of negligence is subject to a three-year statute of limitation. MCL 600.5805(10). Assuming without deciding that plaintiff's complaint for "statutory negligence" actually states a claim, plaintiff began serving his sentence in August 1999 -- more that three years before he filed his complaint. However, plaintiff contends that the statute of limitation is tolled because he did not discover his cause of action until he "received documents" in February 2001 that had been fraudulently concealed by defendant until that date.

MCL 600.5855 allows a cause of action that was fraudulently concealed to be brought within two years after it is discovered. *Boyle v General Motors Corp*, 468 Mich 226, 227 n 1; 661 NW2d 557 (2003). However, "[t]his Court has consistently held that a plaintiff's discovery of his injury does not coincide with his discovery that it may be legally compensable. A plaintiff need not know he has suffered an invasion of a legal right before a cause of action accrues." *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 244-245; 492 NW2d 512 (1992). "To trigger the running of the period of limitation, the plaintiff need only have information that would lead a reasonable person to be aware, or after diligent inquiry to become aware, of the plaintiff's injury and a likely cause of the injury." *Id*. at 244, quoting *Moll v Abbott Laboratories*, 192 Mich App 724, 731; 482 NW2d 197 (1992). Thus, summary disposition is inappropriate if "a question of fact exists as to when a plaintiff discovered or should have discovered a cause of action." *Mascarenas, supra* at 245.

We conclude that no question of fact exists as to whether the defendant fraudulently concealed plaintiff's cause of action. Plaintiff concedes in his complaint that he "could allege in 1999 the defendants [sic] intents [sic] in 1999 but could not prove it until 2001." This admission establishes that plaintiff was aware of his injuries and knew or should have known at that time that he had an injury that presented a possible cause of action. As this Court has previously held:

> "'It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim.'" [*Lemson v General Motor Corp*, 66 Mich App 94, 97; 238 NW2d 414 (1975), quoting *Weast v Duffie*, 272 Mich 534, 539; 264 NW 401 (1935).]

Therefore, in relation to the wrongful conduct of defendant occurring before plaintiff's incarceration on August 13, 1999, we conclude the trial court did not err in granting summary disposition to defendant pursuant to MCR 2.116(C) (7).[1]

With regard to the allegations of post-incarceration conduct on part of the defendant, we conclude that summary disposition was properly granted pursuant to MCR 2.116(C)(5) (party asserting the claim lacks the capacity to sue). Upon review of affidavits attached to plaintiff's complaint, as well as this Court's own records, plaintiff's parental rights were terminated following the child protective proceedings in 2000. Thus, plaintiff has no standing to complain of any actions by the defendant with respect to the children. The purpose of the standing requirement is to ensure that only those who have a substantial interest are allowed to come into court and complain. To have standing, a party must show a substantial interest and a personal stake in the outcome of the controversy which is different from that of the general public. *Franklin Historic District Study Committee v Village of Franklin*, 241 Mich App 184, 187-188; 614 NW2d 703 (2000). Because plaintiff's rights were terminated, he no longer has any legally protected interest in the children that is in any way different than that of the general public.[2]

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[1] Moreover, the record is devoid of any support for plaintiff's claim that defendant "fraudulently concealed" any actual or potential cause of action. Although he alleges that he "received documents" which would establish defendant fraudulently concealed his cause of action, these documents are not contained in the record. Furthermore, to the extent that they are identified as police reports and case management records from the Family Independence Agency, defendant fails to show how these documents could have been "suppressed" by the defendant. Plaintiff, as the appellant, has the burden of providing the reviewing court with a record that verifies the basis of any argument on which reversal or other claim for appellate relief is predicated. *Petraszewsky v Keeth (on Remand)* 201 Mich App 535, 540; 506 NW2d 890 (1993).

[2] Even if his rights had not been terminated, any actions by defendant would have been either governed by the divorce decree where the family court had retained jurisdiction and as such were post-judgment matters (custody and support) or were already litigated in the child protective proceedings. MCR2.116(C)(6) (another action has been initiated between the same parties

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Next, plaintiff argues that he was entitled to attorney fees from defendant. We disagree. This Court reviews a trial court's decision whether to award attorney fees for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). A party does not have a right to attorney fees. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723. "This Court has [] held that an award of legal fees is authorized where the party requesting payment of the fees *has been forced to incur them* as a result of the other party's unreasonable conduct *in the course of the litigation*." *Id*. (emphasis added). Plaintiff has not yet incurred any attorney fees in this action. Furthermore, no evidence at the time of plaintiff's motion showed that defendant had committed any unreasonable conduct during the course of this litigation. We also note that plaintiff's argument that he is entitled to counsel at no cost to him is without merit because the outcome of this proceeding will not affect his "interest in physical liberty." *Mead v Batchlor*, 435 Mich 480, 497-498; 460 NW2d 493 (1990). Therefore, the trial court did not abuse its discretion when it failed to grant plaintiff's request for attorney fees.[3]

Finally, plaintiff contends that the trial court erred in prohibiting him from any future filings. A trial court's grant of injunctive relief is reviewed for an abuse of discretion, although the grant must be based on the facts of the case and may not be arbitrary. *Michigan Coalition of State Employee Unions v Michigan Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). Because the record is unclear as to the legal basis for the ruling and the trial court's reasoning in granting the injunction, we vacate the order and remand for further proceedings.

Affirmed in part, vacated in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood

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involving the same claim.

[3] We decline to address plaintiff's claim that the trial court improperly awarded attorneys fees to defendant. Plaintiff failed to identify this as an issue in his questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).