STATE OF MICHIGAN

COURT OF APPEALS

DANIEL FEDERSPIEL, SHARRIE FEDERSPIEL, and JACOB FEDERSPIEL,

Plaintiffs/Counterdefendants-Appellees,

v

THOMAS A. ENDICOTT, D.D.S.,

Defendant-Appellant,

and

THOMAS A. ENDICOTT, D.D.S., P.C.,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
December 16, 2004

No. 250390
Lenawee Circuit Court
LC No. 03-001133-NZ

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The reviewing Court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* The motion may be granted only where the claim alleged is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.* (citation and internal quotation marks omitted). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and

the moving party is entitled to judgment as a matter of law. *Id.* at 540, citing MCR 2.116(C)(10) and (G)(4).

Plaintiffs' complaint alleges that defendants failed to timely comply with their request for copies of their dental records, thereby causing them to lose the opportunity to pursue a dental malpractice action against defendants. Assuming, arguendo, that such a claim may be recognized[1], plaintiffs here have neither pleaded facts nor shown evidentiary support for their claim that defendants' conduct caused them to lose a viable malpractice action. A plaintiff must commence a medical malpractice action within two years of when the claim accrues, or within six months after the plaintiff discovers or should have discovered the claim, whichever is later. MCL 600.5805(6); 600.5838a(2); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219-220; 561 NW2d 843 (1997). However, the two-year limitation period for medical malpractice actions is tolled during the notice period after the notice of intent to file a claim is given in compliance with MCL 600.2912b. MCL 600.5856(d); *Roberts v Mecosta Co Hosp (After Remand)*, 470 Mich 679, 686; 684 NW2d 711 (2004). Here, plaintiff Sharrie Federspiel first received treatment from defendants on October 17, 2000, plaintiff Jacob Federspiel received treatment on October 23, 2000, and plaintiff Daniel Federspiel received treatment on November 7, 2000. Thus, the earliest possible date for the expiration of any of plaintiffs' malpractice claims was October 17, 2002—ten days after plaintiffs received the requested records. Although plaintiffs claim that this did not leave them sufficient time to have the records reviewed by an expert to file a notice of intent by October 17, 2002, we find that plaintiffs failed to factually support this argument and, regardless, plaintiffs' causation claim is still fatally defective for several reasons.

First, plaintiffs have not shown that the records were necessary in order to commence a timely action or file a notice of intent. MCL 600.2912b(4) provides that the written notice of intent must include a statement of the factual basis for the claim, the applicable standard of care, the manner in which the standard of care was breached, the action that should have been taken to comply with the standard of care, the manner in which the breach of the standard of care caused the alleged injury, and the names of all health professionals and health facilities notified of the claim. *Roberts, supra* at 686. Although plaintiffs make the conclusory statement that they could not have prepared an adequate notice of intent without the records, they have never identified, either below or on appeal, any information in the records that was essential to preparation of a notice of intent that could not have been found elsewhere. As such, if plaintiffs had viable dental malpractice claims, they expired because plaintiffs failed to provide a notice of intent, not because defendants failed to provide copies of the records.

Furthermore, plaintiffs lost opportunity claim is analogous to a legal malpractice claim wherein the plaintiff alleges that attorney error caused the plaintiff to lose a meritorious lawsuit. In such a case, the plaintiff must show that, "but for the attorney's alleged malpractice she would have been successful in the underlying suit." *Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002). Likewise, plaintiffs here must show that defendants' delay in providing records caused them to lose a meritorious malpractice action. Plaintiffs have never alleged any

[1] A common-law claim for "lost opportunity" to pursue a malpractice action has apparently not been recognized in Michigan.

facts supportive of a successful malpractice action. Indeed, none of the plaintiffs even allege that any of them were ever injured as a result of defendants' treatment.

For these reasons, plaintiffs have both failed to plead facts supportive of a cognizable claim, or establish evidentiary support for any such claim. The trial court erred in denying defendants' motion for summary disposition. We therefore reverse and remand for entry of judgment in favor of defendants.

Reversed and remanded for proceedings consistent with this opinion. We retain no jurisdiction.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly