STATE OF MICHIGAN

COURT OF APPEALS

GARY TYSON,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN BOARD OF REGENTS,

Defendant-Appellee.

UNPUBLISHED
September 22, 2009

No. 285068
Court of Claims
LC No. 07-000104-MH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent.

It is undisputed that the x-ray in question was taken at the VA Medical Center and that the report of the x-ray interpretation was captioned "VAMC Ann Arbor, MI." It is also undisputed that this report listed Dr. Ebrahim as "Primary Interpreting Staff" and "Attending Radiologist." Further, it is undisputed that nothing in plaintiff's medical records suggested, let alone stated, that Dr. Ebrahim was not an employee of the VAMC, but instead an employee of the University of Michigan Health Center or that the VAMC contracted with the University for radiology services.

Given these undisputed facts, plaintiff reasonably initiated his legal action against the VAMC. Under federal law, such a lawsuit may only be brought under the provisions of the Federal Tort Claims Act, 28 USC §1291. As a condition precedent to such a suit, a claimant must file an administrative claim with the federal government within two years of the incident giving rise to the claim. This notice is filed on what is called a Form 95 in which the basic allegations must be set forth. Plaintiff filed the Form 95 on September 26, 2005 alleging that:

> Farhad Ebrahim, a radiologist at the VA Hospital in Ann Arbor, mis-read an x-ray of left ankle as having no fracture or dislocation. In fact, the film clearly demonstrated a fracture, same being acknowledged by Dr. Ebrahim and others at the time later films were taken on 10-8-04. As a result of the failure to properly read and report the film, Mr. Tyson went on to weight bear on his ankle, causing displacement of same and permanent deformity. Had it been diagnosed and then treated with casting and non-weight bearing at the time of the initial read, the probable result would have been normal or near normal function of the joint.

> Instead, Mr. Tyson has significant swelling and pain that interferes with all aspects of his daily life . . . He has a displaced fracture with deformity of the ankle causing severe pain, swelling and disability.

The federal government may respond to the Form 95 and the statute of limitations under the FTCA requires that suit be filed within six months of the federal government's response to the Form 95. 28 USC §2675(a). However, the federal government is not obligated to respond. If no response is provided, the claimant may file suit six months after the filing of the Form 95, but no period of limitations cuts off his right to sue absent the filing of a response to the Form 95. *Id.*

On October 12, 2006, plaintiff filed suit in federal court against the Department of Veterans Affairs, as an agency of the United States. Under the FTCA, suit against the individual government employee or official may not be filed. Only the United States may be named as a defendant. Thus, Dr. Ebrahim was not sued.

On December 2, 2006, the United States filed its answer to the federal court complaint. Neither its answer nor its affirmative defenses asserted that Dr. Ebrahim was not an employee of the United States. However, on January 24, 2007, the U.S. Attorney's office sent a letter to plaintiff's counsel advising that Dr. Ebrahim was not an employee of the VAMC. The letter went on to state that, at the time of the alleged malpractice, Dr. Ebrahim was providing radiology services at VMAC as an employee of the University of Michigan Medical Center which, the letter explained, provided radiology services to the VAMC pursuant to contract.

Two weeks later, on February 6, 2007, plaintiff mailed a Notice of Intent under MCL 600.2912b to the University of Michigan Board of Regents as operators of University of Michigan Hospitals and Health Centers (UMHC) and alleging that its employee, Dr. Ebrahim, was negligent in his treatment of plaintiff at the VAMC.

The United States filed a motion to dismiss the federal case against it for lack of subject matter jurisdiction. The motion asserted that Dr. Ebrahim was not a federal employee, but rather an independent contractor and that under the FTCA, the United States may not be sued if the tortfeasor is an independent contractor, even if the work was performed at a federal facility and was within the scope of the work the federal government retained him to do. Plaintiff opposed the motion, but the U.S. District Court agreed with the United States and dismissed the federal case on June 26, 2007 for lack of jurisdiction under the FTCA.

Subsequently, plaintiff filed the instant action in the Michigan Court of Claims against the UM Regents as operators of UMHC. Defendant moved for summary disposition in the Court of Claims pursuant to MCR 2.116(C)(7), asserting that the statute of limitations had expired prior to filing of the suit. Plaintiff responded by arguing that its suit against the University of Michigan was initiated (by the mailing of the notice of intent) less than six months after plaintiff discovered the existence of a possible claim against the University of Michigan and so the case was timely pursuant to MCL 600.5838(2), which provides in pertinent part:

> [A]n action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections

> 5851 to 5856, *or within 6 months after the plaintiff discovers or should have discovered the existence of the claim.* [Emphasis added.][1]

The trial court granted defendant's motion and dismissed the case. The hearing transcript indicates that the court did so on two grounds. First, it held that the six month discovery period as to UMHC ran from the date plaintiff discovered that he may have been a victim of medical malpractice (October 8, 2004) by Dr. Ebrahim regardless of whether plaintiff could have known of the role of UMHC. Second, the trial court held that even if the relevant discovery date was when plaintiff could or should have discovered that Dr. Ebrahim was a UMHC employee, the six month period had expired prior to the date the NOI was mailed. On this issue, the trial court opined that "this Court cannot conceive how plaintiff could not have discovered who the defendant doctor's employer was within the limitations period" and although the VAMC medical records did not indicate that Dr. Ebrahim was employed by UMHC, this fact "does nothing to diminish the fact that other options were available to the plaintiff for determining the defendant's employer within the limitations period." The trial court opined that it was not "completely impossible for [plaintiff] to determine who the defendant doctor's employer was."

In its first ruling, i.e., that the date of plaintiff's discovery of Dr. Ebrahim's relationship to UMHC was irrelevant, the trial court relied on rulings of this Court that the six-month discovery period applies only to discovery of the possibility that malpractice occurred, but not to the discovery of the possible tortfeasor's identity. However, all the cases relied upon by the trial court and cited by defendant involve the identity of the person or entity that actually committed the tort rather than the identity of a tortfeasor's principal. See *Poffenbarger v Kaplan*, 224 Mich App 1; 568 NW2d 131 (1997) (plaintiff failed to timely sue the radiologist who allegedly misread her x-ray); *Weisburg v Lee*, 161 Mich App 443; 411 NW2d 728 (1987) (plaintiff failed to timely sue one of her doctors who had been identified in the records); *Hall v Fortino*, 158 Mich App 663; 405 NW2d 106 (1986) (plaintiff failed to timely sue the radiologist who allegedly misread her x-ray); *Lefever v American Red Cross*, 108 Mich App 69; 310 NW2d 278 (1981) (plaintiff failed to timely sue the entity that provided tainted blood). Discovery of the actual tortfeasor is available through the personal knowledge of the plaintiff and/or his medical records to which a prospective plaintiff has a legal right. The same is not true of the identity of the tortfeasor's principal. Indeed, by obtaining his medical records, plaintiff was able to identify the alleged active tortfeasor and timely brought his federal suit against the entity he reasonably believed was the tortfeasor's principal given the records and information available to him. Thus, plaintiff did not "simply sit back and wait for others" to inform him of the existence of his claim. See *Turner v Mercy Hosp & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

Our Supreme Court has previously recognized that there are some circumstances in medical malpractice cases where "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 . . . ." *Solowy v Oakwood Hospital*, 454 Mich 214, 232; 561 NW2d 843 (1997). I

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[1] This is limited by the six year statute of repose. MCL 600.5838a(2).

conclude that this is one of those situations and would hold that where a medical malpractice plaintiff files a claim of vicarious liability against an alleged tortfeasor's apparent principal and where there is no information contained in the plaintiff's medical records that indicates that the principal was any entity other than the one named by the plaintiff, the six-month discovery rule contained in MCL 600.5838a(2) permits the plaintiff to file a claim against the actual principal within six months of the production of the information which alerts or should reasonably alert the plaintiff to the actual principal's identity.

It is not the purpose of the medical malpractice statutory scheme to create a set of procedural impossibilities that would prevent potentially meritorious claims from being presented.[2] Nor, by requiring plaintiffs to know the unknowable before suit is filed, should we encourage medical providers to enter into non-public agreements that render agency relationships opaque so as to take advantage of such procedural impossibilities.

The conclusion that the six-month discovery rule includes discovery of the existence of a principal where there is an unknown agency relationship requires that we address the question whether plaintiff in this case could or should have discovered defendant's agency role prior to the expiration of the statute of limitations. The trial court applied the wrong standard on this question by concluding that plaintiff had to show that discovery that Dr. Ebrahim was an employee of UMHC was "completely impossible." The correct standard is whether plaintiff, acting with due diligence, could or should have discovered it. In this case, there is no evidence to suggest that plaintiff, acting with due diligence, could have discovered Dr. Ebrahim's employment relationship with UMHC.

Plaintiff's medical records identified Dr. Ebrahim as an "attending radiologist" and a "staff physician" at the VAMC, and no evidence was presented that there existed any mechanism by which UMHC's role as principal could have been discovered earlier than it was. There were no affidavits produced that indicated that Dr. Ebrahim, VAMC or UMHC disclosed or were willing to voluntarily disclose the existence of these employment and contractual relationships prior to suit. The VAMC had no duty to reveal this information until suit against it was filed and discovery commenced. Dr. Ebrahim similarly had no duty to disclose his employer to plaintiff until litigation commenced. Finally, even if UMHC became aware of the suit to which it was not a party, it is unreasonable to expect it to sua sponte disclose that it was Dr. Ebrahim's employer and provided contractual radiology services to VAMC. These realities, along with the undisputed fact that there is nothing in plaintiff's medical records that gives any indication of an employer for Dr. Ebrahim other than the VAMC, are sufficient to conclude that plaintiff met his burden of demonstrating that his suit against UMHC is not precluded by the statute of limitations, but rather falls within the six month discovery limitations period. Defendant did not offer any evidence to the trial court, nor to this Court, that there was a reasonable pre-suit mechanism by which plaintiff could have determined who Dr. Ebrahim's employer was, or even that there was any basis to question the reasonable conclusion that his employer was the facility

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[2] See *Bush v Shabahang*, 484 Mich 156; ___ NW2d ___ (2009); *Potter v McLeary*, 484 Mich 397; ___ NW2d ___ (2009).

where he was a "staff physician." While the trial court stated that "other options were available to the plaintiff for determining the defendant's employer within the limitations period" neither the court nor defendant stated what those "other options" were.

Given the increasingly complex business interrelationships among health care providers, the majority's conclusion is likely to have unintended consequences. The majority's holding invites, if not encourages, attorneys for medical malpractice claimants to file pre-suit requests for copies of health care system contracts and it is difficult to see why health care providers should be permitted to withhold such contracts where they also seek to rely on the secrecy of those documents to evade legal action. The majority's ruling also encourages claimants' attorneys to file a notice of intent against any possible employer of a physician whenever they file suit against that physician. This could mean, for example, that any time a radiologist is sued, every radiology group and health system within a broad geographical area would be sent a notice alleging that they are the employer or principal of the physician. It does not seem reasonable to conclude that the Legislature's intent was to design a system where in order to protect a client's right to bring suit, his or her attorney would have to file suit against every related professional group and health system in the county, or even beyond, and to have each of these entities incur defense costs. Moreover, such an approach may put attorneys into an ethical conflict as they find themselves caught between the rock of their ethical duty to preserve claims against unknown principals and the hard place of their ethical duty to only file claims against those whom the attorney reasonably believes his client has an arguable claim. I think it ill-advised to adopt a rule that draws members of the bar into such a quandary.

It is plainly more practical and, I believe, in keeping with the Legislature's intent in adopting MCL 600.5838(2), to include discovery of the treater's principal within the scope of the six-month discovery rule. This does not mean that plaintiffs may sit on their rights, as the statute still requires that suit be filed within six months after the plaintiff discovers or should have discovered the existence of the claim against the principal. Application of the six-month discovery period in this setting properly balances protection of health care providers from stale claims and their right to privately contract with the need to provide claimants an opportunity to identify their health care provider's principal and allow them access to legal redress under the doctrine of respondeat superior. Accordingly, I dissent.

/s/ Douglas B. Shapiro