# STATE OF MICHIGAN

# COURT OF APPEALS

BARBARA LAGACE,

Plaintiff-Appellant,

v

BAY REGIONAL MEDICAL CENTER, JANE/JOHN DOE, and GINNY WEAVER,

Defendant-Appellees.

UNPUBLISHED
June 14, 2011

No. 294946
Bay Circuit Court
LC No. 09-003087

Before: OWENS, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

In this fraudulent concealment, negligence and medical malpractice case, plaintiff Barbara Lagace appeals as of right from the trial court's grant of defendants Bay Regional Medical Center (BRMC) and Ginny Weaver's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

On June 21, 2001 orthopedic surgeon Dr. Brian deBeaubien performed bilateral knee replacement surgery on plaintiff. After a couple of weeks, plaintiff's left knee became infected, and deBeaubien prescribed two antibiotics, Gentamicin and Vancomycin, to treat the infection. Both of these antibiotics required careful monitoring because when these drugs reach toxic levels in a patient's blood, the patient is at risk for suffering permanent vestibular dysfunction.

Because of this risk, deBeaubien made arrangements to have the Visiting Nurse Association (VNA) administer the prescribed antibiotics. He also arranged to have pharmacist Kevin Spear, R. Ph., dispense the medication and monitor the drugs to assess both their therapeutic level and toxicity, and to adjust dosages of the drugs accordingly.

On Wednesday August 29, 2001 the visiting nurse drew plaintiff's blood and took it to defendant BRMC, for lab analysis. The "Laboratory Test Request" form that the nurse filled out and submitted along with plaintiff's blood work requested that the BRMC lab send the results of the lab test to deBeaubien by fax, and to the VNA. The analysis of the blood work revealed that the amount of Gentamicin in plaintiff's blood had reached toxic levels. At 3:00 p.m. defendant Weaver, who was BRMC's lab manager, called deBeaubien's office to report that plaintiff had a critical value of potassium, but made no mention of the toxic level of antibiotic. A copy of the laboratory results were initialed by "G.W." which stood for "Ginny Weaver." Spear renewed the administration of the drugs at the same dosage for the following week.

On September 2, 2001 plaintiff went to the emergency room of BRMC. She complained that she was suffering from vertigo and dizziness. Tests performed by doctors in the emergency room revealed that she was suffering from signs of renal toxicity from the Gentamicin. Although she was told to immediately stop taking Gentamicin, there was already permanent damage. Plaintiff now suffers from vestibular dysfunction caused by the toxic effects of the Gentamicin.

On December 11, 2003, plaintiff filed suit against deBeaubien, Spear, and the VNA alleging malpractice by failing to monitor, and to appropriately respond to plaintiff's toxic level of Gentamicin. During discovery in November 2004, Spear testified that he did not see the faxed lab results from August 29, 2001. Dr. deBeaubien also stated in November 2004 that he had no recollection of defendant BRMC ever having faxed or telephoned him with the results of plaintiff's August 29, 2001 blood work.

In August 2005, eight months after deBeaubien and Spear's depositions, Weaver testified at deposition that in general, when the lab received a specimen, an employee would put information about where the results should be sent into the "Laboratory Information System." That information was taken from the "Laboratory Test Request" form. She testified that lab results were disseminated to the doctor based on the information in their system. If the results were to be faxed, then it was the lab's custom for a clerical employee to take the results off the computer and to fax out the results. She also testified that the lab did not keep fax logs for longer than several days.

Weaver further testified that she was uncertain about why the format of plaintiff's August 29, 2001 lab result form found in deBeaubien's office files was different from plaintiff's August 9, 2001 result form. She did not think the difference in formats significant, and did not think that the August 29 results were available in the same format as the August 9 results. Plaintiff's counsel adjourned the deposition in order to investigate the discrepancy between the two forms, but never resumed it.

In spring 2008, at trial in plaintiff's first suit, Weaver testified as a witness for the defense. She testified that in her opinion, the August 29, 2001 lab results had not been faxed to deBeaubien or to the VNA. Her opinion was based on the fact that the August 29 lab results form did not have deBeaubien's fax number on it, and as a result, the lab workers would probably have mailed out the results rather than faxed them. Weaver also stated that there would have been no phone calls from the lab to deBeaubien about plaintiff's elevated antibiotic levels based on her reading of this form. Weaver clarified that this was only her speculation and that she had no personal knowledge of whether the results were indeed faxed.

The jury entered a verdict of no cause of action in favor of deBeaubien, the VNA, and Spears. Following the return of the verdict, plaintiff filed a motion for leave to amend her complaint. She sought to add Weaver and BRMC as parties and to add claims of medical malpractice and negligence against them. The trial court denied the motion, determining, "at this stage of the proceedings Plaintiffs are limited to whatever relief may be available on appeal."

On June 6, 2008, plaintiff served a notice of intent to file a claim pursuant to MCL 600.2912b on defendants Weaver and BRMC. On February 9, 2009 plaintiff filed the present

suit against defendants Weaver and BRMC alleging medical malpractice, fraud, res ipsa loquitur, and general negligence.

Defendants filed a motion for summary disposition under MCR 2.116(C)(7), and the trial court granted the motion and issued an opinion that concluded that there was no fraudulent concealment or conduct on the part of defendants. The trial court noted that plaintiff had knowledge of Weaver and BRMC's potential involvement in this case because Weaver had initialed the lab report and made the phone call to deBeaubien's office about plaintiff's potassium levels. Plaintiff now appeals as of right.

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition under MCR 2.116(C)(7) where her negligence and medical malpractice actions were not time barred because they were tolled due to defendants' fraudulent concealment. We disagree.

This Court reviews de novo the grant or denial of summary disposition. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A party is entitled to summary disposition under MCR 2.116(C)(7) if the opposing party's claim or claims are barred under the applicable statute of limitations. In reviewing motions under MCR 2.116(C)(7), this Court will accept the plaintiff's well-pleaded factual allegations as true unless contradicted by the parties' supporting affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "If the pleadings demonstrate that one party is entitled to judgment as a matter of law, or if affidavits and other documentary evidence show that there is no genuine issue of material fact concerning the running of the period of limitations, the trial court must render judgment without delay." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 720; 742 NW2d 399 (2007).

Plaintiff's negligence claim is governed by the three year period of limitations prescribed in MCL 600.5805(10), and her medical malpractice claim is governed by the two year period of limitations prescribed in MCL 600.5805(6). MCL 600.5805 provides, in relevant part:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> (6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.
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> (10) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

MCL 600.5827 specifies when a claim "accrues" as follows:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.
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> MCL 600.5838a(2) states, in relevant part:
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> (2) Except as otherwise provided in this subsection, an 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, whichever is later. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. This subsection does not apply, and the plaintiff is subject to the period of limitations set forth in subsection (3), under 1 of the following circumstances:
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> > (a) If discovery of the existence of the claim was prevented by the fraudulent conduct of the health care professional against whom the claim is made or a named employee or agent of the health professional against whom the claim is made, or of the health facility against whom the claim is made or a named employee or agent of a health facility against whom the claim is made.

Both deBeaubien and Spears testified in their depositions in November, 2004 that they did not see the lab results from August 29, 2001. Further, the lab results had the initials "G.W." on them and a note that said "potassium value called," which indicated that Weaver had some contact with deBeaubien's office related to this blood work. Additionally, plaintiff was also provided with a copy of the August 9, 2001 lab results that clearly had a fax stamp on it. Plaintiff also had a copy of the August 29 lab results that were stamped with "received on September 4, 2001."

By November, 2004, plaintiff had all of this information, including the relevant documents, and knew or should have known that whether the results of the blood work had been transmitted to plaintiff's medical care providers was an important issue in this case. Plaintiff did not depose Weaver until eight months later. The discovery rule in MCL 600.5838a(3) provides that in a case of fraudulent concealment, a medical malpractice lawsuit "may be commenced at any time within the applicable period prescribed in section 5805 [two years] or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." Thus, the present claims were already time barred even before

Weaver's deposition, as they had begun to accrue in November 2004. All of plaintiff's allegations about fraudulent concealment were related to Weaver's deposition testimony taken in August, 2005. Therefore, whether Weaver was fraudulently concealing any claims in her deposition testimony is irrelevant, as the claims were already past the limitations period at that point. The discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim. *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986). A plaintiff must act diligently to discover a possible cause of action and "cannot simply sit back and wait for others" to inform her of its existence. *Id.*

If a question of fact exists regarding when a plaintiff discovered or should have discovered a cause of action, then summary disposition is improper. However, under the facts of this case, we conclude that no genuine issue of fact exists whether plaintiff discovered or should have discovered her possible claim within the statutory period of limitations. See *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 245; 492 NW2d 512 (1992). *Nelson v Ho*, 222 Mich App 74, 88; 564 NW2d 482 (1997).

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Patrick M. Meter