STATE OF MICHIGAN

COURT OF APPEALS

NIKKI STEVENS and JOHN JACKOWIAK, III, as Co-Guardians and Co-Conservators of the Estate of SUSAN JACKOWIAK, Plaintiffs-Appellants,	UNPUBLISHED May 18, 2017
v	No. 332449 Kalamazoo Circuit Court LC No. 2015-000422-NH
STURGIS HOSPITAL, INC., STURGIS EMERGENCY PHYSICIANS, P.L.L.C., MARCUS E. RAINES, M.D., SUMMIT RADIOLOGY, P.C., ERIK BEKKERS, M.D., BRONSON METHODIST HOSPITAL, MARK G. TAGETT, M.D., HEALTHCARE MIDWEST, P.C., d/b/a HEALTHCARE MIDWEST GENERAL & VASCULAR SURGEONS, PARAGON HEALTH, P.C., d/b/a ADVANCED VASCULAR SURGERY, and DANIEL J. JOHNSTON, M.D., Defendants-Appellees.	

Before: MARKEY, P.J., and MURPHY and METER, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right a March 23, 2016, order granting summary disposition to defendants under MCR 2.116(C)(7) (statute of limitations). We affirm.

Plaintiff went to the emergency room of Sturgis Hospital on September 11, 2013, complaining of abdominal pain and vomiting. The attending physician, Dr. Marcus Raines, inserted a central line into a vein in her right chest. Dr. Erik Bekkers read a chest x-ray to confirm that the line was positioned properly. Further imaging revealed abnormalities in plaintiff's abdomen, and for this reason plaintiff was transferred, later that same day, to Bronson Hospital. Plaintiff complained of pain and gastrointestinal distress, and a computerized

[1] For ease of reference, we refer to Susan Jackowiak as "plaintiff" in this opinion.

tomography scan on September 13, 2013, revealed that the central line was positioned improperly and extending too far, into her ascending aorta. On September 14, 2013, Dr. Daniel Johnston and Dr. Mark Tagett performed surgery on plaintiff, while she was under anesthesia, to locate the central line and attempt to remove it. Ultimately, a sternotomy was necessary to stop plaintiff's internal bleeding. Plaintiff suffered a stroke during the procedure.

Plaintiff remained at Bronson Hospital until October 1, 2013, and was then discharged to a rehabilitation facility. Plaintiff filed a complaint under her own name on September 21, 2015. On January 20, 2016, letters of guardianship and conservatorship were issued to Nikki Stevens and John Jackowiak, III, and an amended complaint substituting them as the named plaintiffs was filed on January 21, 2016.

In lieu of filing answers, defendants[2] filed motions for summary disposition, arguing that plaintiff's lawsuit was barred by the two-year limitations period in MCL 600.5805(6). Defendants cited MCL 600.5838a(1), which states that a claim based on medical malpractice "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim."

Plaintiff claimed that the statute of limitations did not bar her lawsuit because she was entitled to disability tolling under MCL 600.5851(1), which states, in part:

> Except as otherwise provided in subsections (7) and (8) [not applicable here], if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

Defendants argued that plaintiff could not be deemed insane because she herself signed authorizations to release her medical records. Defendants further rejected any argument based on "traumatic insanity," a doctrine plaintiff had invoked to claim that because she was allegedly rendered insane by defendants' negligence, the limitations period could be extended even if she was not insane at the very moment of negligence. Defendants claimed that the case law plaintiff cited in support of this doctrine was outdated and that, even if the doctrine did apply, plaintiff could not prove any insanity such that the limitations period could be extended.

The motion hearing took place on February 29, 2016, and on March 27, 2016, the trial court issued a very detailed and lengthy opinion from the bench. After discussing the parties' arguments and various statutes and case law, the court noted that the alleged acts of malpractice occurred on September 11, September 13, and September 14, 2013. The court noted that plaintiff herself acknowledged that her alleged insanity did not come into existence until

[2] Defendants' motions were filed in separate stages, but for purposes of this opinion it is not necessary to go into details regarding exactly which defendant made specific arguments at which particular time.

September 14, 2013. The court stated, therefore, that any malpractice claims related to actions on September 11 and September 13, 2013, were clearly barred. Regarding September 14, 2013, the trial court stated:

> Plaintiff asserts that her insanity, on the basis of experiencing a stroke, came into existence during surgery on that date. The record, however, does not include documentary evidence that supports plaintiff's claim that she suffered mental derangement to the level that prevented her from comprehending rights she is otherwise bound to know as a result of her September 14 stroke.

The court noted that progress notes before plaintiff's release from the hospital on October 1, 2013, failed to establish any insanity and that plaintiff failed to present any other evidence of insanity.

The court ultimately stated that even if it accepted plaintiff's argument that the traumatic insanity doctrine should somehow apply to the present case, plaintiff had nonetheless failed to present evidence creating a genuine issue of material fact regarding insanity.[3]

The trial court subsequently entered an order granting summary disposition to defendants "for the reasons stated on the record[.]"

We review de novo a trial court's ruling on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Summary disposition under MCR 2.116(C)(7) is appropriate "when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). The court must consider affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Id*. "If there is no factual dispute, whether a plaintiff's claim is barred under the applicable statute of limitations is a matter of law for the court to determine." *Id*. at 523. In other words, "[i]f the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

Plaintiff argues that the doctrine of traumatic insanity applies to this case and allows an extension of the limitations period because she was rendered insane by defendants' negligence. As noted by defendants, however, it is axiomatic that if plaintiff presented insufficient evidence of insanity, any argument regarding the traumatic insanity doctrine is rendered moot. Accordingly, we initially address the issue of plaintiff's alleged insanity.

MCL 600.5851 states, in part:

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[3] The court declined to place any emphasis on the guardianship or on plaintiff's signing of documents.

> (1) Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.
>
> (2) *The term insane as employed in this chapter means a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane*.
>
> (3) To be considered a disability, the infancy or insanity must exist at the time the claim accrues. If the disability comes into existence after the claim has accrued, a court shall not recognize the disability under this section for the purpose of modifying the period of limitations. [Emphasis added.]

As evidence of insanity, plaintiff cites medical progress notes from June 25, 2015, stating that she had problems with both short-term and long-term memory. In these same progress notes, the doctor wrote that "just when [plaintiff's] memory became faulty is not certain. It may have been since the stroke, perhaps before." The doctor further wrote: "Higher integrative functions intact enough for purposes of this interview. Memory testing is not gone into in detail at this time."

Plaintiff also cites neurology progress notes from September 16, 2013,[4] which stated that plaintiff displayed "[s]ome receptive aphasia[.]"[5] These same notes indicated that plaintiff was "awake, alert, and conversant" and that her speech was "clear." In addition, medical records indicated that plaintiff had a procedure performed on September 16, 2013, and that the physician had obtained consent for it from plaintiff, who "state[d] understanding of the procedure being performed."

Finally, plaintiff cites the appointment of her co-guardians and co-conservators as evidence of her insanity.

Plaintiff simply has not presented sufficient evidence of insanity to raise a genuine issue of material fact. Even though plaintiff had "[s]ome" receptive aphasia according to her September 16, 2013, neurology progress notes, the progress notes do not evidence that plaintiff could not comprehend her legal rights, and in fact a doctor noted that she specifically consented to a medical procedure on September 16, 2013. In addition, the September 19, 2013, notes made

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[4] Similar notes were made on September 17, 2013, but plaintiff does not cite to these in making her appellate argument. At any rate, they do not change our analysis.

[5] At the motion hearing, plaintiff's attorney explained that "receptive aphasia is defined as, you hear the voice or see the print, but you can't make sense of the words."

no note of receptive aphasia and stated that plaintiff was "awake, alert, and conversant" and that her speech was "clear, spontaneous and fluent." Her discharge notes stated that she was "[o]riented to person, place, time and situation" and that her speech and "[t]hought content" were normal. The brief reference to receptive aphasia, with no further corroboration and in fact with further notes evidencing sanity, is simply not sufficient to raise a genuine issue of material fact regarding insanity. Moreover, as aptly noted by the trial court, the doctor who saw plaintiff on June 25, 2015, did not perform any detailed memory testing and did not make any medical conclusions regarding plaintiff's complaints of memory loss. In addition, memory loss in itself is insufficient to raise a genuine issue of material fact regarding insanity. See, e.g., *Asher v Exxon Co, USA*, 200 Mich App 635, 637, 641; 504 NW2d 728 (1993). Finally, appointment of the co-guardians occurred after the running of the limitations period and had no bearing on whether plaintiff was insane during the limitations period.[6]

Plaintiff failed to raise a geniune issue of material fact regarding insanity and we need not even reach the issue regarding the applicability of the traumatic insanity doctrine.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Patrick M. Meter

[6] In fact, defendants presented evidence that plaintiff exhibited coherence during the guardianship proceedings and agreed to the guardianship because of her desire for "assistance with medical needs, finances, and daily physical activities . . . ."