

STATE OF MICHIGAN
COURT OF APPEALS

VALERIE J. ROHDE, Personal Representative for
the Estate of HENRY C. ROHDE,

UNPUBLISHED
February 19, 2013

Plaintiff-Appellant,

v

No. 308773
Arenac Circuit Court
LC No. 11-011675-NH

GOPI NALLANI, M.D., ADVANCED
DIAGNOSTIC IMAGING, P.C., BRENT J.
RAAP, D.O., BRENT J. RAAP, D.O., P.C.,
STANDISH COMMUNITY HOSPITAL, INC.
d/b/a ST. MARY'S OF MICHIGAN STANDISH
HOSPITAL,

Defendants-Appellees,

and

NORTHERN BAY HEALTH CARE, L.L.C., and
DORAISAMY VENKITAPATHY, M.D.,

Defendants.

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

In this malpractice dispute, plaintiff Valerie J. Rohde, as the personal representative of the Estate of Henry C. Rohde,¹ appeals by right the trial court's order granting summary disposition in favor of defendants Gopi Nallani, M.D., Advanced Diagnostic Imaging, P.C., Brent J. Raap, D.O., Brent J. Raap D.O., P.C., and Standish Community Hospital, Inc., on the ground that the suit was untimely.² See MCR 2.116(C)(7). On appeal, we must determine whether the trial court properly concluded that Rohde knew or should have known about his malpractice claims by October 2008. We conclude that there was a question of fact as to the

¹ For ease of reference, we shall use Rohde to refer to the decedent, Henry C. Rohde.

² The trial court also dismissed the Estate's claims against defendants Doraisamy Venkitapathy, M.D., and Northern Bay Health Care, L.L.C., but those dismissals are not at issue in this appeal.

point when Rohde had sufficient knowledge to put him on notice of his claims, which must be resolved by a jury. For that reason, we reverse the trial court's order granting summary disposition in favor of defendants and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

Rohde went to the Hospital's emergency department in September 2007 for chest pain. The hospital staff x-rayed his chest and the x-ray revealed a density. Nallani interpreted the chest x-ray and determined that there was no evidence of active pulmonary disease. Furthermore, he found that there were "[n]o significant osseous or soft tissue abnormalities." Nallani testified at his deposition that he did not find any abnormalities in the chest x-ray; he conceded that there did appear to be a density in the x-ray, but stated that if he did not identify it in 2007, it was because it appeared to be a benign lesion.

Rohde followed up with Raap, who was his primary care physician. Raap diagnosed Rohde with angina and benign hypertension.

Rohde returned to the Hospital in October 2008; on this visit, he complained of pain in his left ribs. Venkitapathy reviewed the x-rays from this visit and determined that Rohde had fractured ribs. Venkitapathy testified at his deposition that he also noticed "a scar on opposite side of the lung at the apex", but stated that this finding was not noted in the emergency room records. He explained that it was his usual practice to discuss incidental findings with the patient and that he, therefore, likely discussed his findings with Rohde. He said he told Rohde to follow up with his primary care physician.

Clinton Rogers, M.D., reviewed the x-rays from October 2008 and, in a report dated October 16, 2008, disagreed that there were any rib fractures. Rogers noted that there was a "spiculated lesion" in the right lung, which could also be seen in the September 2007 x-ray. He opined that the abnormality was most likely a parenchymal scar, but indicated that neoplastic process could not be ruled out. Rogers recommended a follow up study in three months.

Rohde testified at his deposition that he was told that there was scarring on his right lung, but that he was not told about the possibility of cancer.

In November 2008, Rohde saw Raap for rib and back pain. Raap stated that he did not have the newest x-rays and did not suspect cancer. However, Rohde returned to Raap for a physical in December 2008 and Raap stated that he told Rohde about the abnormality in his lung. Further, he testified that, given the potential for cancer, he had ordered a CT scan for Rohde and scheduled it for January 2009. Rohde said he did not recall being told about a CT scan or the possibility of cancer. He testified that, had he been told it was possibly cancer and that a CT scan had been scheduled, he would have gone to the appointment. Raap testified that he reviewed the phone records and confirmed that a call had been placed to Rohde regarding the appointment. Rohde did not show up for the CT appointment.

On July 24, 2010, Rohde once again went to the Hospital. On this visit, he complained of dizziness, headache, vision problems, and weakness. The emergency room doctor indicated that it was probable that Rohde had lung cancer. Rohde testified that it was thereafter that he was informed that he had cancerous brain and chest tumors.

Rohde sued defendants for malpractice on July 20, 2011.

After Rohde died in January 2012, the trial court substituted Valerie Rohde, as the personal representative of Rohde's estate, to serve as plaintiff. And, later that same month, the trial court granted defendants' motion for summary disposition on the grounds that the Estate's claim was untimely:

Basically, Mr. Rohde knew in the fall of 2008 that he had at least a spot, and I don't think Mr. Rohde is a doctor; didn't sound to me like he was real highly educated maybe, but the objective standard applies here, and based upon the totality of the circumstances, I find that by exercising [due] diligence he should have discovered or he—that he had at least potentially something bad by November or December of 2008 so, therefore, I am granting defendants' motions for summary disposition.

The Estate now appeals.

II. PERIOD OF LIMITATIONS

A. STANDARD OF REVIEW

The Estate argues on appeal that the trial court erred in concluding that its claims were untimely. This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. MCR 2.116(C)(7)

Under MCR 2.116(C)(7), a defendant may be entitled to summary disposition if the plaintiff's claims are untimely under the applicable statute of limitations. The moving party may support a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence and the trial court must consider the supporting materials. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The court must consider the documentary evidence in the light most favorable to the nonmoving party. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). If there is no factual dispute, whether a plaintiff's claim is barred under the applicable period of limitations is a matter of law for the court. *Id.* However, the trial court must deny the motion if there "are factual disputes regarding when discovery occurred or reasonably should have occurred." *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 254; 506 NW2d 562 (1993).

C. ANALYSIS

The period of limitations for malpractice is two years. MCL 600.5805(6). A medical malpractice claim 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.” MCL 600.5838a(1). However, the Legislature provided a discovery exception to the two-year period: a plaintiff may sue within the applicable two-year period or “within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.” MCL 600.5838a(2).

Here, the first x-ray arguably revealed an abnormality in September 2007. Therefore, the two-year period began to run and expired in September 2009. MCL 600.5805(6); MCL 600.5838a(1). Even if Rohde’s claim did not accrue with the September 2007 x-ray, there was evidence that Rohde’s claim accrued by October 2008. Therefore, the two-year period expired in—at the latest—October 2010. MCL 600.5805(6); MCL 600.5838a(1). Because Rohde did not file his notice until January 2011, his claim would be untimely unless saved under MCL 600.5838a(2).

The Estate argues that Rohde did not know or have reason to know of his injury—the fact that he had cancer—until he was formally diagnosed with it after the July 24, 2010 tests. He argues that the six-month period began to run on July 24, 2010, which made his January 13, 2011 notice timely and tolled the period of limitations. See MCL 600.5856(c). It follows, the Estate further maintains, that Rohde’s July 20, 2011 complaint was timely. In contrast, defendants argue that Rohde knew or should have known of his claim much earlier.

All parties cite *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993) and *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997), to support their various positions. However, in both *Moll* and *Solowy* there were no factual disputes about the time that the plaintiffs knew or should have known about their claims. *Moll*, 444 Mich at 8-9, 28; *Solowy*, 454 Mich at 230. Here, there are disputed facts.

The parties presented evidence that established that Rohde was told he had a spot or scarring on his lung in October or November 2008. Raap testified that in December 2008 he informed Rohde that there was probable scarring on his lung, but that a CT scan would be required to rule out cancer. Rohde, however, denied ever being told about cancer. He testified that he had only been told there was scarring on his lung. As our Supreme Court has explained:

The six-month discovery rule period begins to run in medical malpractice cases when the plaintiff, on the basis of objective facts, is aware of a possible cause of action. This occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician. When the cause of the plaintiff’s injury is difficult to determine because of a delay in diagnosis, the “possible cause of action” standard should be applied with a substantial degree of flexibility. In such cases, 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 concerning the injury and its possible causes. [*Solowy*, 454 Mich at 232.]

A reasonable jury could, on the basis of Rohde's testimony, conclude that Rohde did not know or otherwise have reason to know that he had cancer or that his physicians failed to properly diagnose the cancer until after his formal diagnosis in July 2010. Nevertheless, on the basis of Raap's testimony, a reasonable jury could find that Rohde had actual notice that he might have cancer at some earlier point. Accordingly, there was a question of fact as to whether and when Rohde knew or should have known about his claim. And, depending on how the jury resolves that fact question, Rohde's complaint might have been timely filed within the six month period provided under MCL 600.5838a(2). Consequently, the trial court erred when it dismissed the Estate's claims as untimely.

For these reasons, we reverse the trial court's decision to grant summary disposition, vacate its order dismissing the Estate's claims against defendants as untimely, and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, the Estate may tax its costs. MCR 7.219(A).

/s/ Jane E. Markey

/s/ Michael J. Kelly