

STATE OF MICHIGAN
COURT OF APPEALS

JOHN ALBRIGHT,

Plaintiff-Appellant,

v

LUCIA ZAMORANO, M.D.,
LUCIA ZAMORANO, M.D., PLLC, and
HARPER-HUTZEL HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
November 14, 2013

No. 311063
Wayne Circuit Court
LC No. 11-001724-NH

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

In this medical-malpractice action, plaintiff appeals by right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7). We affirm.

Plaintiff experienced chronic lower back pain for many years, and his original primary care physician, Dr. John Byrne, referred him to Dr. Jeffrey Fischgrund in 2004. Plaintiff was told that Fischgrund "is a specialist in the field of back problems" Plaintiff stated in his deposition testimony that he was unsatisfied with Fischgrund, and wished to undergo alternative treatment. As a result, plaintiff began seeing Dr. Luis Collazo in about 2005. Plaintiff underwent a number of recurring treatments to reduce his pain, but testified that they were not effective. Plaintiff then received a referral from Collazo to pursue surgery with defendant, Dr. Lucia Zamorano.

According to plaintiff, Zamorano told him that "she could get rid of my pain by 80 percent," and she specifically indicated that the surgery would alleviate plaintiff's need for prescription pain medication. Plaintiff agreed to the surgery, which was performed on October 27, 2007. After the operation, and while he was still in the hospital, plaintiff said Zamorano briefly spoke to him and said, "that all went well, it was a successful fusion [surgery]." After this discussion, plaintiff "wanted more" contact with Zamorano because he "was still having trouble." On February 21, 2008, Zamorano referred plaintiff for an MRI of his lumbar spine. Plaintiff claimed that he felt "extreme pain" in his lower back and down his legs. However, Zamorano allegedly maintained that everything was fine and that plaintiff's post-surgery pain was normal. Plaintiff "didn't want to believe that [the surgery] . . . didn't work." Plaintiff engaged in regular physical therapy for several months after the surgery and felt "relief at

times . . . but nothing ever lasted too long.” The pain in plaintiff’s back returned, and plaintiff “continued to have to take pain medicine.”

At some point between November 2008 and June 2009, Collazo told plaintiff that the surgery had been “successful”; Collazo never suggested that plaintiff seek out any other specialists. However, defendants provided a series of notes generated by Collazo relating to plaintiff’s treatment, including one dated July 30, 2008, stating “Chronic Back Pain Failed Back Surgery” An MRI of defendant’s lumbar spine was reviewed by Collazo, who noted “lumbar MRI, abnormal, referred to neuro.”

By 2009, plaintiff had returned to Byrne. Then, at some point in early 2010, defendant saw Fischgrund again after he ordered a CT scan of plaintiff’s back. A copy of the CT scan report was dated February 11, 2010, and electronically signed on February 12, 2010. After the scan, plaintiff spoke with Fischgrund on February 23, 2010. According to plaintiff, Fischgrund told him at that time that the surgery had been unnecessary or unsuccessful. Fischgrund also told plaintiff that there was a possibility of correcting the defect with additional surgery, but that this included significant risks. Plaintiff sent defendants a notice of his intent to pursue a medical-malpractice claim against them on August 13, 2010.

The trial court ultimately granted defendants’ motion for summary disposition, concluding that plaintiff had sufficient opportunity and information to discover his potential medical-malpractice claim more than six months before this date. On appeal, defendant argues that he could not have reasonably discovered his claim until February 23, 2010, when he consulted with Fischgrund. We disagree.

The trial court’s grant of summary disposition is reviewed de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). Summary disposition is properly granted under MCR 2.116(C)(7) if the plaintiff’s claims are barred by the applicable statute of limitations. If there is no factual dispute, whether a plaintiff’s claim is barred by the applicable period of limitations is a matter of law. *Kincaid v Cardwell*, 300 Mich App 513, 523; 834 NW2d 122 (2013).

“[T]he period of limitations is 2 years for an action charging malpractice.” 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). A plaintiff must bring his medical-malpractice claim “within the applicable period [of limitations] . . . or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.” MCL 600.5838a(2). This six-month discovery period “begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action.” *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997). In other words, the period begins once a plaintiff becomes aware of an injury and its possible cause or when he should have become aware of the injury and its possible cause. *Id.* at 222-223. “[T]he 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,” and a plaintiff “cannot simply sit back and wait for others’ to inform her of [the claim’s] existence.” *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995) (citation omitted).

In this case, plaintiff agreed to undergo surgery in October 2007, on the premise that it would reduce his total pain by 80 percent and eliminate his reliance on prescription pain medication. Plaintiff's testimony established that his pain was somewhat reduced after the surgery, but this reduction was insufficient to permit his discontinuation of prescription medication. Plaintiff sought an additional meeting with Zamorano before March 2008 because he was dissatisfied. He raised the issue of his continued pain with Collazo later in 2008, discussed it further with Byrne in 2009 or 2010, and received another referral to Fischgrund before February 13, 2010. Plaintiff was sufficiently dissatisfied with the outcome of the operation to raise, or seek to raise, the issue before Zamorano and three other physicians more than six months before sending defendants his notice of intent to pursue a medical-malpractice claim on August 13, 2010. Given his observations of physical discomfort and familiarity with his own back condition, plaintiff certainly should have recognized a causal connection between his continued back pain and Zamorano's alleged negligence before February 13, 2010. See *Solowy*, 454 Mich at 227-228. It was beyond factual dispute that plaintiff should have been aware of his injury and its possible cause more than six months before he served his notice of intent on August 13, 2010. The trial court properly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7).

Affirmed. Defendants, having prevailed on appeal, may tax their costs pursuant to MCR 7.219.

/s/ Donald S. Owens

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra