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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2075**

Charlene Moran, et al.,
Appellants,

vs.

Henry Buchwald, M. D.,
Respondent,

Andy C. Chiou, M. D.,
Respondent.

**Filed October 28, 2008
Affirmed
Stauber, Judge**

Hennepin County District Court
File No. 27CV077781

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Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal in this medical-malpractice action, appellant argues that the district court erred in granting respondents' motion for summary judgment on the basis that appellant's claim was barred by the applicable statute of limitations. Because appellant suffered some actionable injury at the time of the alleged negligent act, her claim is barred by the statute of limitations, and we affirm.

FACTS

Appellant Charlene Moran has been an insulin-dependent diabetic since the late 1970s. In 1981, appellant became involved in an experimental therapy program related to her diabetes. As part of this program, an Infusaid insulin pump and catheter were implanted in appellant's cephalic vein to provide chronic insulin administration. The program was overseen by respondent Dr. Henry Buchwald, and between 1981 and 1993, appellant saw Dr. Buchwald several times for surgical procedures to either update or fix problems associated with the insulin pump.

On August 26, 1993, Dr. Buchwald and respondent Dr. Andy Chiou, a resident from the University of Minnesota, removed appellant's insulin pump and catheter and performed a capsulectomy. After this procedure was completed, appellant did not return to be seen or treated by either Dr. Buchwald or Dr. Chiou, and the procedure ended appellant's participation in the experimental program. In May 2003, appellant began experiencing symptoms of pulmonary emboli. A month later, it was discovered that a

piece of catheter was present in appellant's left subclavian vein extending into the superior vena cava. The piece of catheter was eventually removed in May 2004.

In September 2006, appellant brought suit against Dr. Buchwald and Dr. Chiou alleging that they were negligent in failing to remove the entire insulin pump catheter from appellant. Dr. Buchwald and Dr. Chiou subsequently moved for summary judgment contending that appellant's claims were barred pursuant to Minn. Stat. § 541.076(b) (2006), because she failed to initiate an action within four years of the August 26, 1993 surgery. Appellant responded by claiming that there was no actual injury until May 2003, when her symptoms appeared. Thus, appellant argued that the statute of limitations should not begin to run until that time.

On August 30, 2007, the district court granted Dr. Buchwald and Dr. Chiou's motion for summary judgment. The district court found that appellant sustained an injury when a portion of a catheter was left inside her during the surgery on August 26, 1993, and that she terminated treatment with Dr. Buchwald and Dr. Chiou on that date. Thus, the district court concluded that appellant's action was time-barred by over nine years because the four-year statute of limitations under Minn. Stat. § 541.076 (2006), began running on August 26, 1993, requiring that any action be brought on or before August 26, 1997. This appeal followed.

DECISION

The district court shall grant summary judgment if the pleadings, discovery, and affidavits show that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from

summary judgment, this court asks whether there are any issues of material fact and whether the district court erred in applying the law. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). This court must consider the evidence in the light most favorable to the party against whom summary judgment was granted. *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). Construction and application of a statute of limitations is a question of law, which this court reviews de novo. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

Appellant argues that the district court erred in concluding that her claim was barred by the applicable statute of limitations. The statutory limitations period that governs appellant's medical malpractice action is set forth in Minn. Stat. § 541.076(b) (2006). This statute provides: "An action by a patient or former patient against a health care provider alleging malpractice, error, mistake, or failure to cure, whether based on a contract or tort, must be commenced within four years from the date the cause of action accrued." Minn. Stat. § 541.076(b).

Recently, the Minnesota Supreme Court clarified that in medical malpractice cases, a cause of action accrues when the plaintiff suffers some legally compensable damages as a result of the negligence. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 721-22 (Minn. 2008); *see Antone v. Mirviss*, 720 N.W.2d 331, 335 (Minn. 2006) (stating that the general rule in tort cases is that a statute of limitations "begins to run when the cause of action accrues, that is, when the plaintiff can allege sufficient facts to survive a motion to dismiss for failure to state a claim upon which relief can be granted."). In medical-malpractice cases, however, the manifestation of the injury can

come years after the alleged negligent treatment or misdiagnosis. *See Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993) (failure to diagnose breast cancer not discovered until more than two years after the physician told the plaintiff “not to worry”). To protect the patient, “[s]ome jurisdictions have adopted a ‘discovery rule’ tolling the running of the statute of limitations until the patient discovers or should have discovered the injury.” *Molloy v. Meier*, 660 N.W.2d 444, 454 (Minn. App. 2003) (citing David W. Feeder, II, *When Your Doctor Says, “You Have Nothing to Worry About,” Don’t be So Sure: The Effect of Fabio v. Bellomo on Medical Malpractice Actions in Minnesota*, 78 Minn. L. Rev. 943, 954 n.48 (1994)), *aff’d* 679 N.W.2d 711 (Minn. 2004). However, Minnesota courts have explicitly rejected this approach. *Johnson v. Winthrop Labs. Div. of Sterling Drug, Inc.*, 291 Minn. 145, 149, 190 N.W.2d 77, 81 (1971). Thus, the statute of limitations in Minnesota “for medical malpractice may bar a cause of action before the injured party discovers they are suffering damages caused by negligent medical conduct.” *Zagaros v. Erickson*, 558 N.W.2d 516, 521 (Minn. App. 1997), *review denied* (Minn. Apr. 17, 1997).

To balance concerns about the potentially harsh effects of limitations statutes, the courts of Minnesota have created tolling doctrines that delay the accrual of the statutory period past the normal accrual date. *Broek v. Park Nicollet Health Servs.*, 660 N.W.2d 439, 442 (Minn. App. 2003), *review denied* (Minn. July 15, 2003). First, “fraudulent concealment” by a physician tolls the running of the statute of limitations. *Id.* Appellant readily concedes that fraudulent concealment has not been asserted here. Second, the termination-of-treatment rule, the tolling doctrine relevant here, delays accrual until

treatment for the particular condition is terminated. *Johnson*, 291 Minn. at 149, 190 N.W.2d at 80.

A practical reason for this general rule is that the actionable treatment does not ordinarily consist of a single act or, even if it does, it is most difficult to determine the precise time of its occurrence. A policy reason is that the patient must repose reliance upon his physician in the completion of the course of curative treatment, a relationship of trust which inhibits the patient's ability to discover acts of omission or commission constituting malpractice.

Swang v. Hauser, 288 Minn. 306, 309, 180 N.W.2d 187, 189-90 (1970). Under the termination-of-treatment rule, a cause of action can be extended beyond the date when the injury occurred. *Broek*, 660 N.W.2d at 443.

Minnesota courts have created an exception to the termination-of-treatment rule for cases when the alleged malpractice consists of a single act of negligence that is complete at a precise time. *Id.* Under this "single-act" exception, the following four elements must be present for the exception to apply: "(1) a single act (2) which is complete at a precise time, and (3) which no continued course of treatment can either cure or relieve, and (4) where the plaintiff is actually aware of the facts upon which the claim is based." *Crenshaw v. St. Paul Ramsey Med. Ctr.*, 379 N.W.2d 720, 721 (Minn. App. 1986), *review denied* (Minn. Mar. 27, 1986). Where these elements are present, the statute of limitations begins to run at the time of the alleged negligent act, or at the latest, when the damage from the alleged event of malpractice occurs. *See id.* at 721-22 (statute of limitations began to run on the date that the alleged event of malpractice occurred); *see also Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 429 (Minn. 1988)

(plaintiff's cause of action accrued when she sustained damage from an earlier identifiable single act of alleged negligence).

Here, the district court found that “the termination of treatment rule, not the single act exception, applies to this matter” because “a continued course of treatment, removal of the remaining portion of the catheter from the infusion pump, could have cured the problem,” and there was no evidence appellant was aware of the negligence prior to her termination of treatment. The district court then concluded that appellant's claim accrued on August 26, 1993, because (1) appellant terminated treatment with respondents on that date; and (2) appellant “sustained injury on that date when a portion of the catheter was left inside her after the surgery.” Thus, the district court held that appellant's claim was barred by the applicable four-year statute of limitations.

Appellant argues that the district court erred in applying the termination of treatment rule because she did not suffer any injury until 2003. Appellant claims that because she did not suffer any injury until May 2003, her claim did not accrue until that time and, therefore, the district court erred in concluding that her claim was barred under the statute of limitations. We disagree. Appellant suffered a compensable injury at the time of the alleged negligent act. In fact, appellant conceded at oral argument that she could have sued immediately following the alleged negligent act because she suffered some legally compensable damages as a result of respondents' failure to remove the entire catheter from appellant. *See MacRae*, 753 N.W.2d at 721-22 (stating that a cause of action accrues when the plaintiff suffers some legally compensable damages as a result of the negligence). Thus, appellant was injured on August 26, 1993, the date of the

alleged negligent act. It is undisputed that appellant terminated treatment with respondents on this date. Accordingly, on this record, appellant's claim accrued on August 26, 1993, and the district court did not err in concluding that appellant's cause of action was barred by the statute of limitations.

Affirmed.