IN THE UTAH COURT OF APPEALS

----ooOoo----

Larry Roth, Plaintiff and Appellant, v. Peder J. Pedersen, M.D., Defendant and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20090139-CA F I L E D (October 29, 2009) 2009 UT App 313

Third District, Salt Lake Department, 080917484
The Honorable Denise P. Lindberg

Attorneys: David E. Ross II, Park City, for Appellant
Dennis C. Ferguson, Salt Lake City, for Appellee

Before Judges Greenwood, Orme, and McHugh.

McHUGH, Judge:

Larry Roth appeals the trial court's grant of Dr. Peder J. Pedersen's motion for judgment on the pleadings, which dismissed with prejudice Roth's medical malpractice claim against Pedersen. We affirm.

Whether a motion for judgment on the pleadings is properly granted is a question of law, which we review for correctness. See MBNA Am. Bank, N.A. v. Williams, 2006 UT App 432, ¶ 2, 147 P.3d 536. "When reviewing a grant of [such] a motion . . . , this court accepts the factual allegations in the complaint as true; we then consider such allegations and all reasonable inferences drawn therefrom in a light most favorable to the plaintiffs." Intermountain Sports, Inc. v. Department of Transp., 2004 UT App 405, ¶ 7, 103 P.3d 716 (internal quotation marks omitted). Further, "[t]he applicability of a statute of limitations and the applicability of the discovery rule are [also] questions of law, which we review for correctness." Russell Packard Dev., Inc. v. Carson, 2005 UT 14, ¶ 18, 108 P.3d 741 (internal quotation marks omitted).

Roth argues that the trial court improperly considered materials outside the pleadings to conclude that the two-year statute of limitations for filing a medical malpractice claim

against Pedersen had expired. Specifically, he claims the trial court considered Pedersen's memorandum supporting his motion for judgment to extrapolate the date upon which Roth first became aware of his legal injury. In reviewing a motion for judgment on the pleadings, a trial court may only consider the pleadings. See Utah R. Civ. P. 12(c); see also id. R. 7(a) (listing the following pleadings: complaint, answer, reply to a counterclaim, answer to a cross-claim, third party complaint, and third party answer). "'If a court does not exclude material outside the pleadings and fails to convert a rule 12[(c)] motion to one for summary judgment, it is reversible error unless the dismissal can be justified without considering the outside documents.'" Tuttle v. Olds, 2007 UT App 10, ¶ 6, 155 P.3d 893 (quoting Oakwood Vill., LLC v. Albertsons, Inc., 2004 UT 101, ¶ 12, 104 P.3d 1226).[1] Although we agree that the trial court relied upon material outside of the pleadings in "finding" that Roth became aware of the legal injury on October 13, 2004, we nevertheless uphold the order granting the motion because "'the dismissal can be justified without considering the outside document[],'" see id.

The Utah Health Care Malpractice Act (the Act) requires an action to be commenced within two years "after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs." Utah Code Ann. § 78B-3-404(1) (2008).[2] The Utah Supreme Court has "repeatedly interpreted the phrase 'discovered the injury' as meaning discovering the 'injury and the negligence which resulted in the injury,' also referred to as 'legal injury.'" Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶ 25, 640 Utah Adv. Rep. 8 (quoting Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979)); see also Brower v. Brown, 744 P.2d 1337, 1338-39 (Utah 1987) ("[T]he plaintiff must know of the injury and of the negligence which caused the injury."); Foil, 601 P.2d at 148 ("[T]he two-year

---

[1]Tuttle v. Olds, 2007 UT App 10, 155 P.3d 893, addresses the same question in the context of a motion to dismiss under rule 12(b)(6). See id. ¶ 7. However, because "[t]he Utah Rules of Civil Procedure contain identical provisions for converting motions under rules 12(b)(6) and 12(c) into motions for summary judgment," id. ¶ 7 n.1, the same standard of review applies for a 12(c) motion as for one under 12(b)(6).

[2]For the convenience of the reader, we reference the 2008 codification of section 78B-3-404 because the renumbered statute contains language identical to the version in effect when Roth's cause of action arose. See Utah Code Ann. § 78B-3-404 amendment notes (2008) (noting that statute had been renumbered and reorganized but no substantive changes were made).

provision does not commence to run until the injured person knew or should have known that he had sustained an injury and that the injury was caused by negligent action.").

In his complaint, Roth avers that he underwent resection surgery in May 2004 to remove a cancerous section of his colon. The affected area had been marked by tattoos to assist with the resection. Roth further alleges that six months after the resection surgery, the doctor who had first identified the cancerous polyps, and the doctors who performed a second colonoscopy saw the original tattoo markings, indicating that the wrong area of Roth's colon had been removed during the May 2004 resection surgery. Roth also asserts that he had a second surgery to remove the correct site. The answer states that the date of that surgery was January 24, 2005.

It is clear from the pleadings that Roth was aware that a legal injury had occurred at least by the time he initiated legal action against the general surgeon in May 2006. Thus, Roth knew both that he had suffered a legal injury and that it had happened during the resection surgery. That awareness triggered the statute of limitations regardless of whether Roth knew the precise identity of the wrongdoer. See McDougal v. Weed, 945 P.2d 175, 177 (Utah Ct. App. 1997) (interpreting the Act to start the statute of limitations once a plaintiff or patient discovers that an injury has occurred and that injury was likely the result of negligence, not upon the establishment of the identity of the person responsible); see also Daniels, 2009 UT 66, ¶ 28 ("Under McDougal[v. Weed, 945 P.2d 175 (Utah Ct. App. 1997)], a plaintiff need not know the identity of the responsible tortfeasor, but must know which medical event allegedly caused his injury.").

Nevertheless, Roth neglected to file his complaint against Pedersen until August 2008, some three months after the statute of limitations had expired.[3] Accordingly, we conclude that the grant of the motion for judgment and subsequent dismissal were appropriate because Roth failed, as required by the Act, to commence litigation within two years of discovery of his legal injury, which occurred, at the very latest, in May 2006. See

---

[3]Roth did serve a notice of intent to commence legal action on Pedersen on January 12, 2008. However, where the notice is served more than ninety days prior to the expiration of the statute of limitations, the action must actually be commenced within the two-year statute of limitations. See Utah Code Ann. § 78B-3-412(4) (extending the statute of limitations only where notice is filed within the statute of limitations but less than ninety days prior to its expiration).

generally Utah Code Ann. § 78B-3-404(1) (prescribing the statute of limitations for malpractice actions).

Roth alternately contends that the trial court erred in concluding that the statute of limitations had expired pursuant to subsection (1) of Utah Code section 78B-3-404(1), see id. § 78B-3-404(1), because he alleged fraudulent concealment, which is governed by subsection (2)(b) of that section, see id. § 78B-3-404(2)(b). Subsection (2)(b) provides,

> [W]here it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

Id. Pedersen counters that Roth's fraudulent concealment claim must fail because Roth did not state his claim with particularity as required by rule 9(b) of the Utah Rules of Civil Procedure, see Utah R. Civ. P. 9(b) (stating that in allegations of fraud, the "circumstances constituting fraud . . . shall be stated with particularity"); see also Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1185-86 (Utah 1989) (requiring a plaintiff pleading fraudulent concealment under the Act to comply with rule 9(b)'s particularity requirements). Pedersen correctly concedes that "[a] fraud allegation made on information and belief is adequate under rule 9(b), 'as long as it includes the facts upon which the belief is based.'" Kuhre v. Goodfellow, 2003 UT App 85, ¶ 24, 69 P.3d 286 (quoting Arena Land & Inv. Co. v. Petty, 906 F. Supp 1470, 1476 (D. Utah 1994)). However, "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment." Chapman, 784 P.2d at 1186.

Pedersen asserts that Roth's fraudulent concealment claim consists of a single unsupported conclusory allegation. In this allegation, Roth claims that he obtained information in August 2007, from which

> it appears that Dr. Pedersen concealed the fact that he failed to properly consult with [the general surgeon] in May 2004 as to the reasons the tattooing may not have been identified, the reasons the polypectomy site

> could not be seen[,] and [to inform him that] the area requiring surgery remained [unremoved].

Roth argues that he incorporated by reference other factual statements made earlier in the complaint to support his allegation of fraudulent concealment. These factual averments suggest that Pedersen both knew about the problems with ink fading, the discrepancy between the doctors regarding the tattoos' locations, and the reasons why the polypectomy site may not be visible, and neglected to convey that knowledge to the general surgeon. Roth claims that this failure to speak was a breach of the fiduciary duty owed by Pedersen as Roth's physician. See Jensen v. IHC Hosps., Inc., 944 P.2d 327, 333 (Utah 1997) ("Fraudulent concealment requires that one with a legal duty or obligation to communicate certain facts remain silent or otherwise act to conceal material facts."); Nixdorf v. Hicken, 612 P.2d 348, 354 (Utah 1980) (noting that doctors have a fiduciary duty to their patients to disclose "any material information concerning the patient's physical condition"); see also Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶¶ 50-51, 640 Utah Adv. Rep. 8 (reaffirming physician's fiduciary obligation to keep patient apprised of his physical condition post-treatment).

Even assuming that a fiduciary duty to reveal this information existed because of Pedersen's medical partnership with Roth's original doctor and his provision of medical care to Roth, Roth fails to allege that Pedersen "affirmatively acted to fraudulently conceal the alleged misconduct" from Roth, see Utah Code Ann. § 78B-3-404(2)(b) (2008). Indeed, Roth neither avers that he ever consulted with Pedersen about the May 2004 resection surgery nor alleges that Pedersen ever provided Roth with information that misrepresented or concealed his involvement in the surgery. He also does not claim that due to Pedersen's failure to disclose, the general surgeon misrepresented the problems that arose during surgery or the outcome.[4] Furthermore, nowhere in the complaint does Roth allege that he was precluded from further discussing the surgery with or deposing the general surgeon from whose August 2007 testimony he learned of Pedersen's lack of disclosure.[5] Without such factual allegations, Roth's

---

[4]In fact, the answer states that the general surgeon informed Roth that neither he nor Pedersen could see the tattoos but that the general surgeon believed he had removed the correct portion of Roth's colon.

[5]The general surgeon testified that in June 2004, he (continued...)

fraudulent concealment claim is nothing more than a mere conclusory allegation that is insufficient to preclude dismissal. See Chapman, 784 P.2d at 1186 (permitting dismissal where conclusory allegations were not supported by facts). Accordingly, we affirm the trial court's dismissal of this claim for failure to plead fraud with sufficient particularity.

Because the two-year statute of limitations for filing a medical malpractice claim expired at the latest in May 2008, the trial court properly dismissed Roth's August 2008 complaint on a motion for judgment on the pleadings. Additionally, Roth failed to plead fraudulent concealment with particularity as required by rule 9(b) of the Utah Rules of Civil Procedure. Accordingly, we affirm the dismissal with prejudice.

_____
Carolyn B. McHugh, Judge

WE CONCUR:

_____
Pamela T. Greenwood,
Presiding Judge

_____
Gregory K. Orme, Judge

---

[5](...continued)
discussed with Roth's original doctor the lack of disclosure from Pedersen's office regarding the ink fading problems.