STATE OF MICHIGAN

COURT OF APPEALS

LLOYD GATZ and JO-ANN GATZ,

Plaintiffs-Appellants,

v

MARK HEINZELMANN, M.D., DARYL AULBERT, R.N., MICHELLE STAINSBY, R.N., LAURA PENNEY, S.T., AND COVENANT HEALTHCARE,

Defendants-Appellees,

and

S. BECKLEY and L. ANDERSON,

Defendants.

UNPUBLISHED
February 18, 2021

No. 351278
Saginaw Circuit Court
LC No. 18-035822-NH

Before: M. J. KELLY, P.J., and RONAYNE KRAUSE and REDFORD, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs[1] appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) to defendants Mark Heinzelmann, M.D., Daryl Aulbert, R.N., Michelle Stainsby, R.N., Laura Penney, S.T., and Covenant Healthcare on the basis that plaintiffs' complaint was untimely under MCL 600.5838a(2).[2] For the reasons stated in this opinion, we affirm.

[1] Plaintiff Jo-Ann Gatz's loss of consortium, loss of services, and loss of companionship claims are derivative and are based on her status as plaintiff Lloyd Gatz's spouse. The singular word "plaintiff" in this opinion refers to plaintiff Lloyd Gatz.

[2] For ease of reference defendant Dr. Heinzelmann, who is represented separately from the other defendants, will be identified by his name. Defendants Aulbert, Stainsby, Penney, and Covenant

I. BASIC FACTS

Plaintiff underwent surgery at Covenant Healthcare on February 4, 2000, to remove a mass in his bowel. The mass was biopsied and determined to be noncancerous and otherwise benign. Plaintiff's discharge summary indicated that the surgery was performed without complication; however, as explained below it eventually became apparent that a blue surgical towel was inadvertently left in plaintiff's abdomen. Nine years later, in 2009, plaintiff sought medical treatment for an unrelated issue involving his back, during which time he had imaging studies performed. The studies revealed there was another mass in plaintiff's abdomen, which was subsequently biopsied and found to be consistent with another noncancerous growth. Thereafter, from 2009 to March 2017, plaintiff's physicians continued to monitor possible growth of the mass. Initially, it reflected no growth but later revealed growth of the mass "in significant proportions," and plaintiff had surgery to remove it in March 2017. A subsequent biopsy of the mass revealed that it was an encapsulated blue towel left inside plaintiff's body cavity during the prior surgery performed by Dr. Heinzelmann. The towel was not a "surgical sponge," and it did not have a radiopaque quality.

Plaintiffs filed a complaint against Dr. Heinzelmann and the members of the surgical staff who assisted Dr. Heinzelmann during the 2000 surgery. Plaintiffs alleged medical malpractice by Dr. Heinzelmann, medical neglect by defendants, and vicarious liability of defendant Covenant Healthcare. The complaint also raised claims of fraudulent concealment, assault and battery, res ipsa loquitur, and loss of consortium against all defendants. The parties participated in discovery, and each individual defendant was deposed. Thereafter, all defendants filed motions for summary disposition alleging that plaintiffs' claims were barred by the statute of repose. The trial court agreed and granted summary disposition in defendants' favor.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Plaintiffs argue that the trial court erred by granting summary disposition under MCR 2.116(C)(7). This Court reviews de novo the trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). "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). In analyzing a motion for summary disposition under (C)(7), the trial court must accept as true the contents of the complaint unless contradicted by affidavits, depositions, admissions, or other documentary evidence submitted to the trial court by the moving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Healthcare, who are represented together, will be collectively referred to as "defendants." Defendants S. Beckley and L. Anderson were dismissed from the case upon stipulation and are not parties to this appeal.

B. ANALYSIS

Generally, a two-year limitations period applies to malpractice claims. MCL 600.5805(8); MCL 600.5838a(1). More specifically, as to medical malpractice claims, MCL 600.5838a(2) provides:

> (2) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856,[3] or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.

Thus, a medical malpractice complaint is generally not timely filed if the claim was started later than 6 years after the act or omission that is the basis for the malpractice claim. Yet, under MCL 600.5838a(2)(a), a statutory exception exists, which provides that the statute of repose does not bar a claim "[i]f discovery of the existence of the claim was prevented by the fraudulent conduct of the health care professional against whom the claim is made or a named employee or agent of the health professional against whom the claim is made, or of the health facility against whom the claim is made or a named employee or agent of a health facility against whom the claim is made." If, as a result of fraudulent conduct, a plaintiff is prevented from discovering the existence of a claim, the plaintiff has additional time, under MCL 600.5838a(3), to file his or her claim. In this case, it is undisputed that unless MCL 600.5838a(2)(a) is applicable, plaintiffs' complaint is untimely and their claim is barred by the statute of repose.

Generally, to establish fraudulent concealment, the plaintiff must prove that the defendant committed affirmative acts or misrepresentations that were designed to prevent subsequent discovery. *Buszek v Harper Hosp*, 116 Mich App 650, 654; 323 NW2d 330 (1982). "Mere silence is not enough." *Id*. However, "[a]n exception to this rule is that is an affirmative duty to disclose where the parties are in a fiduciary relationship." *Brownell v Garber*, 199 Mich App 519, 527; 503 NW2d 81 (1993). A fiduciary relationship is often marked by some measure of inequality in the relationship, such as when one places his or her trust in another because of the other's superior knowledge. *In re Estate of Karmey*, 468 Mich 68, 74 n 3; 658 NW2d 796 (2003). The existence of fraudulent concealment in such circumstances can be shown when the plaintiff alleges facts that indicate that the defendant intentionally failed to disclose information so as to mislead the plaintiff, *Brownell*, 199 Mich App at 531, which would allow the period of limitations to expire before the

[3] The exceptions in MCL 600.5851(7) and (8) address claims of medical malpractice accruing to children under eight years old or under 13 years old, respectively, and are not applicable to this case.

plaintiff realizes he or she has a claim. However, the fiduciary must have knowledge, i.e. be aware, of that which was not disclosed. See *id*. at 528-529 ("No fraudulent concealment can be said to occur where [the defendant] is unaware of his malpractice.").

Here, a fiduciary relationship existed between plaintiff and Dr. Heinzelmann. See *Eschenbacher v Hier*, 363 Mich 676, 679-680; 110 NW2d 731 (1961) (recognizing a physician-patient relationship as a fiduciary relationship). However, aside from alleging that defendants were agents of Dr. Heinzelmann and fraudulent concealment can be performed by any healthcare professional against whom the claim is being made or a named employee or agent of the healthcare professional, plaintiffs have not provided factual or legal support for their claim that the remaining defendants were Dr. Heinzelmann's agents or otherwise owed a fiduciary duty to plaintiff. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Consequently, we deem this aspect of plaintiffs' argument to be abandoned.

Notwithstanding that abandonment, plaintiffs failed to present facts establishing fraudulent conduct by any of the defendants in this case. The record reflects that no one on the surgical team, including Dr. Heinzelmann, knew that a blue towel had gone missing during plaintiff's surgery, or that a blue towel was retained inside his body. Absent the requisite knowledge about the retained towel, the fiduciary exception to fraudulent conduct is inapplicable because "the fiduciary must have knowledge of that which was not disclosed." *Brownell*, 199 Mich App at 528-529. Stated differently, even if a fiduciary relationship existed between plaintiff and each defendant, the fact that none of the defendants were aware of the undisclosed knowledge, i.e., the retention of a blue towel, means that plaintiffs cannot show fraudulent concealment by any of the defendants.

Additionally, even under the fiduciary relationship exception there must be "employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action." *Dunmore v Babaoff*, 149 Mich App 140, 145-146; 386 NW2d 154 (1985) (quotation marks and citation omitted). Here, there is no evidence that any of the healthcare providers intentionally left a towel in the patient or offered any information to mislead plaintiffs. There is nothing on the record indicating any defendant hindered plaintiff's discovery of the towel or took any affirmative act that remotely approaches fraud. Accordingly, the facts of this case do not support plaintiffs' claim of fraudulent concealment.

Absent the existence of actual awareness, plaintiffs argue that defendants' constructive knowledge regarding the inappropriate use of blue towels in body cavities and Dr. Heinzelmann's actual knowledge that he had utilized a blue towel during plaintiff's surgery were sufficient to warrant disclosure to plaintiff regarding the nonexistence of a towel count. Plaintiffs posit that this proposition is supported by this Court's holding in *In re Estate of Doyle*, unpublished per curiam opinion of the Court of Appeals, issued March 3, 2016 (Docket No. 324337). We disagree.

In *Doyle*, the subject physician, Dr. Genco, and hospital staff knew at the time of surgery that there was a missing sponge by reason of a sponge count that so indicated. *Id*. at 2. There was a search for the sponge at the time of the surgery, which proved unsuccessful. *Id*. There was also testing done postoperatively in hopes of locating the sponge, which had a radiopaque marker that

the healthcare professionals expected would disclose the sponge if it were retained in the patient's body. *Id*. It did not. *Id*. Nonetheless, being aware of the missing sponge, the physician admitted that its location was never determined and that the intraoperative x-ray performed was not dispositive. *Id*. This Court recognized that "a fiduciary cannot be expected to disclose information about which he or she is unaware . . . or to disclose a breach when he or she failed to appreciate that his or her conduct breached the standard of care." *Id*. at 7. However, this Court also held that "a fiduciary cannot shirk his or her duty to disclose by pleading ignorance to the fact that it was malpractice despite knowing what happened." *Id*. at 7. In that case, the trial court noted:

> That the sponge was not found is undisputed and is of paramount importance in this case. It is axiomatic that the sponge did not spontaneously combust or crawl away on its own. Within the four walls of the operating suite, the sponge had to be someplace. Thus, there existed an undeniable possibility that the sponge was still inside Mr. Doyle—near his heart, the situs of the operation—following his bypass surgery. According to the evidence gleaned during discovery, it was undisputed that Dr. Genco knew about the missing sponge and chose not to document anything about it in Mr. Doyle's medical records, not to discuss it with Mr. Doyle or his family, and not to tell Mr. Doyle's primary care doctor or any subsequent treating physician. [*Id*. at 8.]

This Court ultimately concluded that such circumstances were consistent with an intentional failure to disclose that would constitute fraudulent concealment. *Id*. at 7-8.

We note that we are not bound to follow *Doyle*. See MCR 7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis."). And, although such opinions can be instructive or persuasive, *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3; 783 NW2d 133 (2010), we do not find *Doyle* either instructive or persuasive as it is distinguishable from the present case. Here, Dr. Heinzelmann did not perform counts of blue towels, did not know that a towel had been left behind, and was not aware of anyone who had knowledge of the retained towel. Moreover, there is no evidence to suggest that Dr. Heinzelmann failed to disclose known information at any point in an attempt to deprive plaintiffs of a potential cause of action. This is in sharp contrast to the defendant doctor in *Doyle* who failed to alert the plaintiff that he was aware a sponge had gone missing during that plaintiff's surgery.

Further, contrary to plaintiffs' arguments, it would be illogical to conclude that Dr. Heinzelmann should have disclosed the various other assertions of malpractice alleged by plaintiffs if he was not aware that his conduct violated the standard of care. Notably, while plaintiffs take issue with the fact that Dr. Heinzelmann was unaware whether towels were counted and that Dr. Heinzelmann used blue towels in violation of the applicable standard of care, it is clear from the record that Dr. Heinzelmann believed that he was operating within the standard of care in 2000. Even if Dr. Heinzelmann was wrong in his beliefs, such an alleged breach of the standard of care still would not constitute an *intentional* failure to disclose known, pertinent information, so as to deceive a plaintiff. See *Brownell*, 199 Mich App at 528-529 ("It would be illogical to hold that attorneys who fail to appreciate that they have breached the standard of care have a duty to disclose such a breach notwithstanding their ignorance thereof.").

Lastly, plaintiffs argue that the allegations of fraudulent conduct should have been left for the jury to decide. However, this Court has held that "[i]f no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court." *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010). In this case, there is no proof that defendants were aware that a towel was retained in plaintiff's body following his February 2000 surgery. This fact is determinative in this case and it cannot be said that reasonable minds could differ regarding the legal effect of that fact. Accordingly, the trial court properly decided the merits of defendants' motions for summary disposition.[4]

Affirmed. Having prevailed in full, all defendants may tax costs. See MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Amy Ronayne Krause
/s/ James Robert Redford

[4] In their brief on appeal, plaintiffs contend that the essential question for this Court to answer is "whether or not the willingness to remain undereducated about the impact of using non-radiopaque towels is a burden that must be borne by an innocent Plaintiff or is a benefit to be conferred upon negligent healthcare providers?" Yet, we are constrained to apply the relevant statutes as written, so we cannot engage in a balancing of the equities between an innocent plaintiff and defendant ignorant of their wrongful acts. We note that that a previous version of MCL 600.5838a(2) contained a foreign body exception that permitted claims to be brought past the statute of repose "if a foreign object was wrongfully left in body of the patient." See 1993 PA 78. The legislature, however, determined that such an exception to the statute of repose was unnecessary and removed it in 1993. Whether the statute should once again be amended to provide relief for plaintiffs in situations such as the one at hand is a question for the legislature.