

STATE OF MICHIGAN
COURT OF APPEALS

LISA HAMILTON,

Plaintiff-Appellant,

and

ROGER HAMILTON,

Plaintiff,

v

CHARLES LECHNER D.D.S.,

Defendant-Appellee

and

RAYMOND FORTSON, D.D.S., and
RAYMOND FORTSON, D.D.S., P.C.,

Defendants.

UNPUBLISHED

September 17, 1996

No. 169260

LC No. 93-447586-NH

Before: Gribbs, P.J. and Marilyn Kelly and White, J.J.

PER CURIAM.

Plaintiff appeals the circuit court's orders granting defendant Lechner's motion for summary disposition on statute of limitations grounds and denying plaintiff's motion for reconsideration in this dental malpractice case. We reverse.

Plaintiffs filed a complaint on January 13, 1993 alleging that the orthodontic treatment begun by defendant Lechner (defendant) and continued by defendant Dr. Fortson, who is not a party to this appeal, resulted in a number of problems, including root resorption.

Plaintiff's complaint alleged sixteen violations of the standard of care of orthodontics, most of which apparently apply to both defendants, as no specific defendant is identified, including that

defendant caused periodontal disease and bone loss from extensive orthodontic tooth movement for which defendant failed to obtain plaintiff's informed consent or offer adequate warnings; and that defendant failed to seek consultations and/or referrals to foster and safeguard plaintiff's health in violation of the standard of care and Michigan Dental Association Standards of Ethics and Code of Professional Conduct, Section 1-E, thereby causing plaintiff's injuries. As to defendant Lechner specifically, referred to in the complaint as "Defendant #1," plaintiff alleged that he violated the standard of care by allowing a hygienist to apply, maintain, adjust, and tighten brackets and bands, and treat plaintiff orthodontically; and by commencing and continuing orthodontic treatment without a reasonable treatment plan objectively formulated.

Defendant moved for summary disposition on July 14, 1993, asserting in his motion¹ that he last saw or treated plaintiff in January 1990, that before plaintiff began orthodontic treatment with Dr. Fortson, Dr. Fortson gave her a brochure entitled "You and Your Orthodontist," which outlined potential hazards associated with orthodontic treatment, including root resorption, and that plaintiff discovered or should have discovered her cause of action when Dr. Fortson and Jacobson told her she had root resorption in September or October 1991. Defendant's motion asserted that plaintiff testified at deposition that she had received a brochure from Dr. Fortson, had read the brochure and had signed a form certifying that she understood the brochure. Defendant asserted that Dr. Fortson placed braces on plaintiff's upper anterior teeth in April 1990 and removed the braces in September 1991, and that shortly thereafter, in September or October 1991, plaintiff visited her general dentist, Dr. Jacobson, who informed her that she had root resorption and should take her x-rays to Dr. Fortson and discuss them with him. Defendant asserted that in September or October 1991, plaintiff took her x-rays to Dr. Fortson, "who allegedly confirmed that she had root resorption and also explained to Plaintiff that this was a condition that she 'would rather not have,' but that she should follow the condition with periodic x-rays." Defendant argued that plaintiff's suit, filed in January 1993, alleged that defendants caused her root resorption, and that plaintiff testified that all her problems were a result of root resorption. Defendant thus argued plaintiff's suit was time-barred, because it was not filed within two years of January 1990, the date defendant last treated plaintiff, and was not filed within six months of October 1991, when plaintiff was informed by Drs. Fortson and Jacobson that she had root resorption. MCL 600.5805; MSA 27A.5805, MCL 600.5838a(1), (2); MSA 27A.5838(1). Defendant further argued that plaintiff should be charged with knowledge of the problems associated with, and the potential causes of, root resorption because she had received the brochure from Dr. Fortson.²

Plaintiff's response to defendant's motion,³ filed on July 30, 1993, argued that although she was given a booklet of some kind when under Dr. Fortson's care and signed a form acknowledging its receipt, she did not recall if she received the specific booklet "You and Your Orthodontist." Plaintiff also argued that she read the booklet she received at home and discussed the risks of orthodontic treatment with one of Dr. Fortson's assistants, who informed her that problems generally happen to people that do not take care of their teeth. Plaintiff did not deny that she saw Drs. Jacobson and Fortson in September or October 1991, and that they informed her that she had root resorption. Plaintiff admitted that her complaint alleged root resorption, but argued that her complaint further alleged that defendant's orthodontic treatment was improper and breached standards of dental care. Plaintiff admitted that she did not file her suit within two years of defendant's last treatment date, but denied that

she discovered or should have discovered her suit no later than October 1991, and denied filing her suit more than six months after she discovered her cause of action.

The response to the motion filed July 30 did not include plaintiff's affidavit. On August 3, the day before the hearing on defendant's motion, plaintiff's counsel faxed defense counsel a copy of plaintiff's affidavit, in which she averred that she was not informed by any dentist or doctor that her dental problems and root resorption were caused by improper orthodontic treatment until September 1992, when Dr. Wunderlich informed her that the root resorption was the result of too much trauma from orthodontic treatment, and also informed her that there was a likelihood that she would lose her teeth due to the root resorption. Plaintiff further averred that no dentist or doctor ever informed her that defendant had committed malpractice, and that she did not know that her root resorption was due to orthodontic treatment until Dr. Wunderlich so informed her. Plaintiff filed her affidavit on August 4, 1993.

The hearing on defendant's motion was scheduled for August 4. When the case was called, the circuit court stated it had reviewed the briefs and was going to grant defendant's motion. Plaintiff's counsel requested an opportunity for oral argument and also requested that the court consider "an additional affidavit from my client which was FAXed to defense counsel yesterday." The court denied both requests, stating "Well, you can bring it on for a motion for reconsideration." Plaintiff's counsel then asked the basis of the grant of the motion, and the court stated:

The—pursuant to the defendant's argument, the plaintiff failed to file her suit against Dr. Lechner within the applicable statutory [sic] of limits [sic] period. Claims for dental malpractice must be brought within two years from the date of the act or omission, which is the basis for the malpractice claim, or six months after discovery of the claim whichever is later, pursuant to 600.505 and 600.583 sub (a) sub (1) and (2).

Dr. Lechner . . .

* * *

Last treated the plaintiff in January of 1990, but she did not file suit until January of 1993. Also the plaintiff discovered or should have discovered her suit no later than October 1991 when she was informed by Doctors Colson and is it Sophim? (phonetically). Sorphim?

[Defense Counsel]: It's Fortson and Jacobson.

THE COURT: Fortson and Jacobson that she had a root difficulty, as of this date. She must also be charged with knowledge of the problem associated with the root problem and with the potential causes, because she had received a brochure on the subject and signed a form certifying that she had understood the brochure.

This lawsuit is also barred by the six month discovery provision of the statute of limitations.

The court entered an order dismissing defendant on August 10, 1993. Plaintiff filed a motion for reconsideration on August 27, 1993, to which she attached her affidavit and a letter from Dr. Wunderlich.⁴ Plaintiff's motion argued that she did not discover her cause of action until September 18, 1992, when she was informed by Dr. Wunderlich that defendant's orthodontic treatment caused excessive trauma to her teeth which resulted in severe root resorption. She also argued that the circuit court had refused to consider the affidavit or allow oral argument, and that the court erroneously had made findings of fact regarding when plaintiff discovered her cause of action. Plaintiff argued that the date of discovery was a disputed factual issue and the question should have been left to the jury. Plaintiff further argued that there was never any agreement between the parties that the booklet defendant alleged had been given to plaintiff was the actual booklet she received, and that by adopting defendant's argument that plaintiff was informed of certain complications by a booklet, the court made a finding that plaintiff should have recalled the contents of the booklet when her root resorption arose and should have attributed it to improper treatment, when the booklet only referred to root resorption as a complication. Plaintiff argued that defendant presented no evidence regarding when plaintiff discovered her cause of action, and that for the court to have made a determination on that issue was improper. Lastly, plaintiff argued that her affidavit affirmatively stated the date she discovered her cause of action and that defendant cannot present any evidence to dispute this date.

The circuit court denied plaintiff's motion for reconsideration "for the reason that the motion merely presents the same issues ruled on by the Court, either expressly or by reasonable implication, pursuant to MCR 2.119(f)(3)." The parties stipulated to stay proceedings below during the pendency of plaintiff's appeal.

When reviewing a grant of summary disposition on statute of limitations grounds, MCR 2.116(C)(7), this Court accepts as true all well-pleaded allegations and construes them in favor of the nonmovant. *Grazia v Sanchez*, 199 Mich App 582, 583-584; 502 NW2d 751 (1993). The Court must consider all documentary evidence submitted by the parties. *Summers v City of Detroit*, 206 Mich App 46, 48; 520 NW2d 356 (1994). The motion should not be granted unless no factual development could provide a basis for recovery. *Id.* at 584.

We agree with plaintiff that defendant was not entitled to summary disposition as a matter of law, given that defendant's arguments, which were unsupported by affidavits of defendant or Dr. Fortson, were insufficient to warrant summary disposition where the discovery date was disputed. In cases involving the six-month discovery provision, summary disposition is inappropriate unless the facts are undisputed and a trial court can decide as a matter of law when plaintiff discovered or should have discovered the claim. *Kermizian v Sumcad*, 188 Mich App 690, 692-694; 470 NW2d 500 (1991). An objective, reasonable person standard applies in resolving whether a plaintiff should have discovered the alleged malpractice claim. *Levinson v Trotsky*, 199 Mich App 110; 500 NW2d 762 (1993).

Assuming the booklet defendant relies on is the booklet plaintiff received, the contents of the booklet do not support a finding that, as a matter of law, plaintiff should have discovered her cause of action in October 1991, when she was advised she had root resorption. The booklet, apparently received by plaintiff in February 1990, states that root resorption “may occur” during orthodontic treatment, that “not all root resorption arises from orthodontic treatment,” and that many patients have root resorption prior to orthodontic treatment, describes the condition as “usually mild” and “not affect[ing] the health or longevity of the teeth,” and refers to “associated periodontal (gum) disease” as a possible condition occurring “in later years,” which may threaten tooth longevity. Plaintiff’s awareness that she had root resorption in September or October 1991 does not equate with her having reason to believe that defendant’s treatment had been negligent. The booklet itself is reasonably understood as identifying root resorption as a potential side-effect of proper orthodontic treatment. Plaintiff maintains she was not informed that her root resorption was the result of improper treatment – as distinguished from a recognized, although undesirable, side-effect of proper treatment – until she treated with Dr. Wunderlich in September 1992, within six months of filing her complaint. Defendant presented no facts to the contrary. This Court has recognized that a plaintiff’s awareness of a medical malpractice defendant’s act, and of bad results does not necessarily constitute discovery of malpractice. See *Kermizian, supra*; *Coleman v Dowd*, 185 Mich App 662; 462 NW2d 809 (1990); *Moss v Paquing*, 183 Mich App 574; 455 NW2d 339 (1990).

We reverse and remand to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gibbs
/s/ Marilyn Kelly
/s/ Helene N. White

¹ The lower court record contains defendant’s motion for summary disposition and the proof of service, both of which state that the motion is supported by a brief. Defendant’s motion also states that it is supported by exhibits. However, we have found no brief and no exhibits in the lower court record. The lower court’s docket printout states that defendant filed a motion for summary disposition on July 14, 1993, along with a proof of service, but makes no mention of a brief. However, both parties’ appellate briefs refer to the briefs submitted below.

² While the brochure is not in the circuit court record, plaintiff’s appellate brief refers to “the booklet attached to [defendant’s] motion for summary disposition.” Defendant attached a copy of a sixteen page brochure to his appellate brief. That brochure states in pertinent part:

The purpose of this brochure is to inform the patient and/or parents of the course of events they may expect during orthodontic treatment. It emphasizes the need for patient

and/or parental cooperation, and points out potential risks or problems which may be encountered before or after treatment. Please read this brochure carefully noting any questions you may wish to discuss with me personally at the pre-treatment consultation appointment. Before treatment begins, the patient and/or parents will be expected to sign an informed consent form indicating they have read this brochure and understand its contents and the potential problems and hazards of orthodontic treatment.

As a rule, excellent orthodontic results can be achieved with informed and cooperative patients. Thus, the following information is routinely supplied to anyone considering orthodontic treatment in our office . . .

At the bottom of page seven of the brochure, sub-section C of part III, which is entitled "Potential Problems with Teeth, Mouth, Jaws, or Orthodontics," begins. Sub-section C is entitled "Root Resorption" and states in pertinent part:

This condition is a blunting of the root tips which may occur to varying degrees during orthodontic treatment, but is usually mild and does not affect the health or longevity of the teeth. The upper incisors (front teeth) are most commonly involved . . . If there is an associated periodontal (gum) disease in later years the longevity of the teeth can be threatened. It is difficult, if not impossible to predict who is susceptible to root resorption. Many patients have root resorption prior to orthodontic treatment. The incidence seems to increase with prolonged treatment. This emphasizes the importance of patient cooperation [sic] it is important to get treatment over with as soon as possible.

It should be noted that not all root resorption arises from orthodontic treatment. Trauma, cuts, impaction, endocrine disorders, drugs (e.g. birth control pills) or idiopathic (unknown) reasons can also cause resorption.

³ Plaintiff responded to each paragraph of defendant's motion. The circuit court file contains no brief or documentary evidence.

⁴ The 1 ½page letter is dated "September, 1992" and addressed to plaintiff. Dr. Wunderlich's letterhead states that his practice is limited to periodontics. The letter states in pertinent part:

On 9-18-92 you were seen in this office for consultation regarding mobility and radiographic evidence of shorter than average roots in the upper anterior.

* * *

Your dental history includes a series of orthodontic treatments reportedly started in a general dental office three years ago. You were not happy with the results and reportedly sought additional orthodontic opinions and further orthodontic treatment

including “bicuspid extractions” [sic] was commenced. The bands are reportedly now off for approximately 12 months.

* * *

Both Temporomandibular joints exhibited clicking on opening.

Toothbrush abrasion was evident and mobility was noted in the upper anterior and a few lower teeth.

Radiographically, the upper incisors exhibited what appeared to be foreshortening. Crown/root ratios were not outstanding and would explain to a great extent the clinical mobility seen.

We reviewed the the [sic] possibility that roots may have shortened during the extended orthodontic therapies . . .

We also discussed at great length you concerns of the future prognosis of these teeth in light of their mobility, shorter roots, recession and the like. It was and is my opinion that as a very broad rule of thumb, mobile teeth have a more difficult time remaining healthy periodontally than non-mobile teeth. That in your mouth, it will be very important to maintain excellent gingival health, since any bone loss in your periodontium, would have a more immediate impact than on most people . . . The remote possibility that some further root shortening could occur was also discussed.

Based on the examination and discussion, the following recommendations were made:

[six recommendations are listed, including:]

6. If further root shortening were seen, removal of affected teeth might be indicated before ridge is lost and once healed, either fixed bridge prosthesis or root form dental implants would be necessary.

The most difficult question, is whether any of the tooth loss scenarios will or would occur. There is no way to know that at this time. Recognition of the problem, taking steps to minimize its effects, and sensible observation seem to be the answer. Heavily focusing on the condition, in my opinion will only serve to interfere with the daily quality of life and tend to lead to oral habits that may in fact make deterioration more likely (bruxism, stress, overbrushing).

Any questions regarding the “completeness” of orthodontic therapy must be directed to a licensed orthodontic specialist.