

STATE OF MICHIGAN
COURT OF APPEALS

SHARON SCHILLER

Plaintiff-Appellant,

and

JUDSON BOYD,

Plaintiff,

v

EMMANUEL AMAYO

Defendant,

and

PONTIAC GENERAL HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
October 15, 1996

No. 175966
LC No. 93-450924-NH

Before: Reilly P.J., and Michael Kelly, and C.L. Bosman,* JJ.

PER CURIAM.

Plaintiff Sharon Schiller (plaintiff) appeals as of right the May 5, 1994, directed verdict entered in favor of defendant Pontiac General Hospital following plaintiffs' proofs. Defendant Dr. Emmanuel Amayo had defaulted, and is not a party to this appeal. We affirm.

Plaintiff first contends that the trial court abused its discretion in refusing to allow amendment of the complaint to allege constructive fraud. We disagree. MCR 2.118(A)(2) provides that leave to amend shall be "freely given when justice so requires." Contrary to plaintiff's assertions, constructive fraud was not raised as a theory until March 14, 1994, the day of trial and more than a year after the

* Circuit judge, sitting on the Court of Appeals by assignment.

action was filed. Although mere delay is an insufficient ground for denial of a motion to amend, if the delay is prejudicial, e.g. it would prevent a party from having a fair trial, it is grounds for a denial of a motion to amend.. *Terhaar v Hoekwater*, 182 Mich App 747; 452 NW2d 905 (1990) *Executone Business Systems Corp v IPC Communications, Inc*, 177 Mich App 660, 672-673; 442 NW2d 755 (1989). Considering that defendant had not prepared to defend against this theory, the court had reason to conclude that the delay was prejudicial. Furthermore, when the issue was raised again on March 24, 1994, the court expressed its opinion that the relationship between a hospital and a patient did not support a duty of disclosure which is necessary for a constructive fraud claim. In other words, the court opined that the amendment would be futile, although that language was stricken from the order later issued by the court. In any event, considering the undue delay and the apparent futility of the amendment, we find no abuse of discretion. *Milnikel v Mercy-Memorial Medical Center, Inc*, 183 Mich App 221, 222; 454 NW2d 132 (1989).

Plaintiff next contends that the trial court erred in dismissing her claim of “corporate negligence” against the hospital on the basis of the statute of limitations. This Court has previously held that a corporate negligence claim against a hospital is in fact one for medical malpractice. *Danner v Holy Cross Hospital*, 189 Mich App 397, 398; 474 NW2d 124 (1991); *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647; 438 NW2d 276 (1989). Conceding that the action was not filed within two years after the claim accrued, plaintiff advanced two arguments to avoid the statute of limitations bar: (1) the action was filed within six months after plaintiff discovered or should have discovered the claim and was timely under the discovery rule of MCL 600.5838a(2); MSA 27A.5838(1); and (2) defendant’s fraudulent concealment of the claim extended the limitations period under MCL 600.5838a(2)(a); MSA 27A.5838(1)(2)(a), as this statute existed before the effective date of the amendments of 1993 PA 78.

Summary disposition under MCR 2.116(C)(7) should not be granted if there are factual disputes regarding when discovery occurred or reasonably should have occurred. *Simmons v Apex Drug Stores*, 201 Mich App 250, 254; 506 NW2d 562 (1993). However, a court may conclude that there is no genuine issue of material fact as to when a plaintiff discovered or should have discovered the claim. *Id.* In this case, neither defendant’s motion for summary disposition nor plaintiff’s response to the motion separately address the discovery rule as it applies to plaintiff’s claim against the hospital for negligent selection, retention and supervision of Dr. Amayo. Understandably, the court’s discussion of its ruling also does not address the issue. Rather, defendant, plaintiff and the court focused on when plaintiff should have discovered her claim against Dr. Amayo. The issue was first raised in plaintiff’s motion for reconsideration filed one week after the hearing. The court denied the motion, citing *Charbeneau v Wayne County General Hospital*, 158 Mich App 730, 732; 405 NW2d 151 (1987) for the proposition that a court may properly deny a motion for reconsideration resting on a legal theory and facts that might have been pled or argued before the court’s ruling. Because plaintiff did not argue that the discovery rule applied to her claim against the hospital until after the court’s ruling, we cannot conclude that the trial court erred when it failed to deny defendant’s motion on this basis or that the trial court abused its discretion in denying the motion for reconsideration. *Id.*

In regard to plaintiff's argument that fraudulent concealment tolled the statute of limitations, the acts of concealment suggested by plaintiff occurred after the original complaint was filed. The filing of complaint, which included the allegations of direct negligence against the hospital, demonstrated that plaintiff knew of the existence of the claim at that time. Therefore, assuming the acts occurred, they did not conceal the existence of the claim from plaintiff because she knew of the claim at the time the alleged acts of concealment were committed.

Finally, plaintiff claims that the trial court improperly granted a directed verdict on plaintiff's claim of actual fraud against the hospital. This claim was premised on plaintiff's contention that two hospital employees, a nurse and an admitting clerk, gave affirmative answers when she asked if the hospital was a good one and whether Dr. Amayo was a good doctor. We agree with the trial court that by their responses, the employees did not make statements of fact, but rather expressed their opinions. Because fraud cannot be premised on an expression of an opinion, the directed verdict was properly granted. *Graham v Myers*, 333 Mich 111, 115; 52 NW2d 621 (1952); *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 554-555; 487 NW2d 499 (1992).

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Michael J. Kelly

/s/ Calvin L. Bosman