

STATE OF MICHIGAN  
COURT OF APPEALS

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SHIRLEY L. CHULPSA,

Plaintiff-Appellant,

v

DR. MCGILLICODDY, DR. CLARKE and DR.  
BOLAND,

Defendants-Appellees.

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UNPUBLISHED  
September 2, 1997

No. 191768  
Washtenaw Circuit Court  
LC No. 94-001185 NH

Before: O'Connell, P.J., and White and C. F. Youngblood\*, JJ.

MEMORANDUM.

Plaintiff appeals by right, summary disposition, based on the statute of limitations, in this medical malpractice action. This case is being decided without oral argument pursuant to MCR 7.214(E).

Although plaintiff's original complaint is in two counts, the second of which sounds in fraud and misrepresentation which might arguably be subject to a six-year statute of limitations under RJA §5813, that claim is not pursued apparently because the promises or warranties on which that aspect of plaintiff's complaint is based require a writing by which the defendant physicians agreed to perform the surgery in question without using the metal devices which formed the gravamen of plaintiff's complaint. MCL 566.132(1)(g); MSA 26.922(1)(g). No such writing appears in the lower court record nor is one claimed to exist anywhere in plaintiff's pleadings, and accordingly that claim must be regarded as one for personal injury subject, at most, to a three year period of limitations under RJA §5805(8). *Gilmore v O'Sullivan*, 106 Mich App 35; 307 NW2d 695 (1981). As plaintiff's cause of action arose in February, 1991, and suit was not filed until March, 1994, the statute of limitations bars the fraud and misrepresentation claim.

As to the medical malpractice aspects of plaintiff's complaint, which is subject to a two year period of limitations, RJA §5805(4), measured from the date of treatment which is the subject of the complaint, RJA §5838, plaintiff relies on the six month date of discovery exception of RJA §5838a. Here, however, immediately after surgery plaintiff was advised that a metal rod and screws were used

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

to perform the surgery, and even before the surgery plaintiff was aware that use of metal was undesirable. Plaintiff therefore had ample information to launch the necessary investigation and, with due diligence, to discover the asserted claim for malpractice within the two years provided, and the filing of this action in March, 1994, was untimely. *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 224-225; \_\_\_ NW2d \_\_\_ (1997).

Affirmed.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Carole F. Youngblood