

STATE OF MICHIGAN
COURT OF APPEALS

CHERYL SPEKTOR, a/k/a CHERYL SPECTOR,
and GENE SPEKTOR, a/k/a GENE SPECTOR,

UNPUBLISHED
August 21, 2003

Plaintiffs-Appellees,

v

SINAI HOSPITAL, a/k/a DETROIT MEDICAL
CENTER, GENISE KERNER, M.D., and
LAURIE KATZ, M.D.,

No. 239081
Wayne Circuit Court
LC No. 01-100177-NH

Defendants-Appellants.

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendants appeal by leave granted an order of the Circuit Court denying their motion for summary disposition. We reverse and remand.

On September 13, 1997, defendant Sinai Hospital admitted plaintiff Cheryl Spektor¹ for treatment of a blood clot in her left leg. Defendants Dr. Laurie Katz and Dr. Genise Kerner treated plaintiff. On September 20, 1997, defendant Sinai Hospital readmitted plaintiff, who was complaining of swelling, extreme pain, and discoloration of her left leg. Plaintiff knew, at this point, that amputation of a portion of her leg was a possibility. To no avail, plaintiff questioned hospital personnel regarding the reasons for the declining condition of her left leg. By October 24, 1997, plaintiff was hospitalized for gangrene of her left foot. In early 1998, Dr. Anderson informed plaintiff that that her leg problems may be a result of premature discharge from the hospital and/or premature change in blood thinning medication. In April 1998, a surgeon amputated the toes on plaintiff's left foot, as a result of her original blood clot. In April 2000, a vascular surgeon, Dr. Klein, told plaintiff that the deterioration of her leg was a "complete mystery." According to plaintiff's deposition testimony, this confirmed to her that medical personnel had failed to adequately treat her blood clot in September 1997.

¹ Because Gene Spektor's claim is a derivative claim for loss of consortium, the singular term "plaintiff" will be used in this opinion to refer to Cheryl Spektor. Gene Spektor will be referred to by name.

On June 30, 2000, plaintiff filed a notice of intent to file a medical malpractice claim. On January 2, 2001, plaintiff filed the complaint. The complaint alleged, inter alia, that defendants acted negligently while providing medical services to plaintiff.

On September 10, 2001, defendants moved for summary disposition of plaintiffs' claims, arguing that plaintiff should have known of her claims by March 1998, and therefore, the statute of limitations barred the lawsuit. Plaintiff contended that she could not have discovered the claim until her discussion with Dr. Klein in April 2000. Thus, plaintiff argued that the statute of limitations had not expired when the notice of intent was filed on June 30, 2000. The circuit court denied defendants' motion for summary disposition.

Defendants' first issue on appeal is that plaintiff failed to file her claims of medical malpractice within the time allotted by the statute of limitations. We agree.

This Court reviews, de novo, a circuit court's denial of a motion for summary disposition brought pursuant to MCR 2.116(C)(7). *Fournier v Mercy Community Health Care Sys-Port Huron*, 254 Mich App 461, 465; 657 NW2d 550 (2002). We consider all the documentary evidence, affidavits and pleadings that the parties submitted to the circuit court in a light most favorable to the non-movant. *Fournier, supra*; *Terrace Land Dev Corp v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002); MCR 2.116(G)(5). If there is no factual dispute and reasonable minds would not differ as to the legal effect of the relevant facts, this Court determines, as a matter of law, whether the statute of limitations bars the cause of action. *Id.*

A medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim ... regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). The Legislature requires a plaintiff to commence a medical malpractice lawsuit (i) within two years from the time "the claim first accrued," MCL 600.5805(1), (6) or (ii) "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later," MCL 600.5838a(2). A plaintiff commences the action when the plaintiff files the complaint. MCR 2.101(B).

Here, plaintiffs' medical malpractice claim accrued, at the latest, on September 18, 1997. The complaint alleges that defendants Dr. Kerner and Dr. Katz provided negligent medical services to plaintiff from September 13, 1997, through September 18, 1997.

Plaintiff concedes that she did not commence her action within the two-year time period provided for in MCL 600.5805(1), (6). However, plaintiff argues that the action was commenced within the period of time that the six-month "discovery rule" provides. Thus, this Court must determine when plaintiff discovered, or should have discovered the malpractice claim. MCL 600.5838a(2).

As mentioned, *supra*, the six-month "discovery rule" limitations period begins to run when the plaintiff discovers or should have discovered her claim. MCL 600.5838a(2). With regard to the six-month discovery period, plaintiff has the burden of proving that she, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least six months before she commenced her medical malpractice lawsuit. MCL 600.5838a(2); *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995). The limitations period will begin to run,

regardless of the plaintiff's ability to prove each element of his or her claim. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 224; 561 NW2d 843 (1997). Hence, "[o]nce a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy, supra* at 223; see also *Moll v Abbott Labs*, 444 Mich 1, 24; 506 NW2d 816 (1993).

Plaintiff argues that she first discovered the claims against defendants Dr. Kerner and Dr. Katz during April 2000, when Dr. Klein, plaintiff's vascular surgeon, told her that he (Dr. Klein) was mystified by the deterioration of her left leg. Defendants argue that plaintiff should have discovered her claim in the fall of 1997, and, in any event, did know of her claim in 1998. We agree that plaintiff should have discovered her potential cause of action against defendants prior to plaintiff's conversation with Dr. Klein in April 2000.

When defendants provided plaintiff with her initial treatment in September 1997, plaintiff knew that her leg contained a blood clot. In addition, plaintiff was aware of the methods that defendants were employing to remove the clot. Plaintiff testified that when the hospital discharged her on September 18, 1997, the condition of her leg had improved. Plaintiff soon became aware that the health of her left leg was deteriorating, and she returned to the hospital on September 20, 1997, complaining of numbness, swelling, extreme pain, and gross discoloration. A doctor notified her that her leg was becoming worse and that amputation of the leg was possible. Plaintiff testified that she knew, at this point, that her blood clot was severe.

We believe plaintiff should have discovered her cause of action by, at least, April 1998. Plaintiff was "aware of an injury," and the deterioration in the health of her left leg at the time of her discharge from the hospital on September 18, 1997. In addition, plaintiff was aware of "its possible cause," the persistence of her blood clot, despite medical treatment. By October 24, 1997, plaintiff's left foot had developed gangrene, and by April 1998, a surgeon had amputated the toes of plaintiff's left foot. By April 1998, plaintiff was clearly aware of these manifestations of her injury and also understood that the presence of the blood clot caused them. Furthermore, by this point both Dr. Anderson and Dr. Bloom had told plaintiff that her declining condition may have resulted from a premature discharge from the hospital and/or a premature change in the blood thinning medication. Even plaintiff acknowledged at her deposition that she might have thought "something," but she did not pursue it until she received confirmation from Dr. Klein.

A plaintiff is deemed to have discovered a possible cause of action when the plaintiff discovers an injury and its possible cause. *Gebhardt v O'Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994). The plaintiff needs to only be aware that she has a possible cause of action, not that she has a likely cause of action. *Gebhardt, supra* at 544. As noted, *supra*, once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue her claim. *Solowy, supra* at 223. Plaintiff's contention that she first discovered her claim after her conversation with Dr. Klein in April 2000 is unpersuasive and does not comport with the facts. As plaintiff herself testified, "I think he just sort of confirmed it for me." Thus, plaintiff's statement supports that she discovered a possible injury and possible claim by, at least, April, 1998. Furthermore, "the discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim." *Turner, supra* at 353. Accordingly, based upon the undisputed facts, reasonable minds would not differ in finding that plaintiff was aware of an injury and a possible cause of action by

April 1989, and should have filed within six-months of discovering her possible cause of action, rather than upon getting confirmation from Dr. Klein. See, generally, *Gebhardt, supra* at 544-545; *Fournier, supra* at 465; *Turner, supra* at 353.

Because plaintiff should have discovered her claim by, at least, April 1998, the statute of limitations provided her with six months to commence her action. MCL 600.5838a(2). The six-month period concluded before plaintiff commenced her action. Plaintiff's notice of intent, which she sent to defendants on June 30, 2000, was, likewise, sent too late to toll the statute of limitations. Therefore, the trial court erred in denying defendants' motion for summary disposition because plaintiff's medical malpractice claims are barred by the statute of limitations.² MCR 2.116(C)(7).³

We reverse the order denying defendants' motion for summary disposition, and remand for entry of an order granting summary disposition to defendants. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly

² We note that Gene Spektor's claim for loss of consortium also fails because, as a derivative claim, it stands or falls with the primary claim for medical malpractice. *Long v Chelsea Community Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996); *Furby v Raymark Industries, Inc*, 154 Mich App 339, 397 NW2d 303 (1986) (stating that "loss of consortium is derivative and recovery in an action for loss of consortium is contingent upon the injured person's recovery of damages").

³ Based upon our resolution, it is unnecessary to address defendants' second issue on appeal.