

STATE OF MICHIGAN
COURT OF APPEALS

CAROLYN J. PRINS and PETER A. PRINS,

Plaintiffs-Appellees,

v

WILMA Y. EWALD, M.D.,

Defendant-Appellant,

and

SPECTRUM HEALTH EAST RADIOLOGY and
SPECTRUM HEALTH,

Defendants.

UNPUBLISHED

April 12, 2005

No. 253498

Kent Circuit Court

LC No. 02-005011-NH

CAROLYN J. PRINS and PETER A. PRINS,

Plaintiffs-Appellees,

v

SPECTRUM HEALTH EAST RADIOLOGY and
SPECTRUM HEALTH

Defendants-Appellants,

and

WILMA Y. EWALD M.D.,

Defendant.

No. 253499

Kent Circuit Court

LC No. 02-005011-NH

Before: Judges Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Pursuant to a Supreme Court remand, in this medical malpractice action, defendants appeal as on leave granted from the trial court's denial of their motions for summary disposition brought pursuant to MCR 2.116(C)(7) on the ground that this action is barred by the statute of limitations. We reverse and remand for entry of an order granting summary disposition in favor of defendants. The trial court erroneously denied defendants' motions for summary disposition because plaintiff's medical malpractice claim was not filed within the six-month discovery period recognized under MCL 600.5838a(2).

Plaintiff¹ is a licensed practical nurse with more than forty years' experience in the health care system. Following the removal of a cancerous tumor on her neck, plaintiff was treated by defendant Ewald with radiation oncology treatment between November 24, 1997, and January 20, 1998, at defendant Spectrum Health. Plaintiff testified that she had "terrible terrible pain" from the radiation and told Ewald in December 1997 that "it burns terribly." Ewald responded that the pain and burning was "something that could be expected." Following the radiation, plaintiff remained free from cancer but experienced other symptoms, such as severe headaches, fatigue, and dizziness, which caused her to consult with her primary care physician, Dr. Daniel Drumm. Dr. Drumm described plaintiff's cognitive difficulties at the time as a "difficulty putting it all together," or difficulty putting "all the information" together.

Plaintiff was eventually referred to Dr. John Keller, a neurosurgeon. Dr. Keller performed various tests on plaintiff between April 24 and April 27, 2001, and informed her that she may have radiation necrosis, i.e., dead brain tissue caused by the therapy she received from Ewald in 1997 and 1998. Dr. Keller performed brain surgery on plaintiff on May 1, 2001, removing an abnormal area of brain tissue from an area located above and behind her ear. After the surgery, Dr. Keller told plaintiff that he believed that the tissue he removed from her brain had indicated that she had radiation necrosis. Plaintiff testified that, from her nursing education, she knew that Dr. Keller's reference to radiation necrosis meant she had "radiation in that area and that was from previous radiation surgery." On May 9, 2001, during a follow-up office visit with plaintiff, Dr. Keller informed her that a pathology report had confirmed his belief, and the necessity for her surgery had indeed resulted from radiation necrosis. Plaintiff did not file a Notice of Intent to File Claim against defendants until November 16, 2001.

We review a trial court's grant of summary disposition under MCR 2.116(C)(7) *de novo*. *McKiney v Clayman*, 237 Mich App 198, 200-201; 602 NW2d 612 (1999). Whether a cause of action is barred by the statute of limitations is a question of law that this Court also reviews *de novo*. *Id.* at 201. "We consider all documentary evidence submitted by the parties and accept as true the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence." *Id.* "We view the uncontradicted allegations in the plaintiff's favor and ascertain whether the claim is time-barred as a matter of law." *Id.*

¹ Although plaintiff's husband is also a named party in this appeal, his claim is derivative of his wife's claim. This Court will, therefore, only address Mrs. Prins' claim, and will refer to her as "plaintiff."

In general, a plaintiff must bring a malpractice claim within two years of the act or omission that forms the basis of the claim or within six months after the plaintiff discovers or reasonably should have discovered that he or she has a claim, whichever is later. MCL 600.5805(6); MCL 600.5838a(2). “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.” MCL 600.5838a(2).

Here, it is undisputed that plaintiff did not initiate a malpractice action within two years of the alleged malpractice. The alleged incidents of malpractice occurred between November 24, 1997 and January 20, 1998, when plaintiff received radiation treatment from defendant Ewald following the removal of a cancerous lump in her neck. Plaintiff filed her notice of intent to file a cause of action pursuant to MCL 600.2912b on November 16, 2001.² Because plaintiff filed her claim more than two years after the act or omission that formed the basis of the claim, the only issue here is the proper application of the six-month discovery rule set forth in MCL 600.5838a(2).

The application of the six-month discovery rule was outlined by our Supreme Court in *Solowy v Oakwood Hospital*, 454 Mich 214, 221-222; 561 NW2d 843 (1997):

This Court adopted the “possible cause of action” standard announced in *Moll [v Abbott Laboratories]*, 444 Mich 1; 506 NW2d 816 (1993)]. The majority concluded that an objective standard applied in determining when a plaintiff should have discovered a claim. Further, the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin. Rather, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff *should have* known of a possible cause of action. [Emphasis added.]

“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 his claim.” *Id.* at 223.

In this case, plaintiff alleged negligence on the part of defendant Ewald for employing too high a level of radiation during the radiation treatment she received between November 24, 1997 and January 20, 1998, and unnecessarily radiating plaintiff’s brain, causing radiation necrosis as a result. Defendants argued in support of their motion for summary disposition that Dr. Keller had clearly disseminated the pathology report’s confirming diagnosis of radiation necrosis to plaintiff no later than May 9, 2001, during a meeting with her at his office. Consistent with defendants’ argument below, plaintiff acknowledged at her deposition that Dr. Keller told her during their May 9, 2001, meeting that her pathology report confirmed that the dead brain tissue was “definitely” radiation necrosis. As a registered nurse with 40 years’ experience, plaintiff testified that she knew radiation necrosis meant dead brain tissue resulting

² This notice of intent filing date is critical to filing a claim within the statutory time period allowed because it tolls the statute of limitations. MCL 600.5856(c).

from the radiation treatment she received in 1997 and 1998. Plaintiff also expressed anger at Dr. Ewald for his radiation treatment, testifying that she told Dr. Keller, “I felt I was being burned [by Ewald]. . . . Could she [defendant Ewald] have gone in my brain and – and hit me too hard, too high?”

In analyzing whether plaintiff had an awareness of her condition and its relation to the alleged negligence, the law does not require that she know with absolute certainty that defendant committed malpractice before the six-month period begins to run. *Griffith v Brant*, 177 Mich App 583, 588; 442 NW2d 652 (1989). Rather, “it merely requires that the plaintiff know of the act and have *reason to believe* that the physician’s act was improper.” *Id.* (emphasis in original). Consistent with this standard, we find that on May 9, 2001, plaintiff had at minimum, a reason to believe that Ewald’s acts were negligent. This May 9 meeting was when Dr. Keller specifically told plaintiff the pathology report revealed radiation necrosis and plaintiff acknowledged this as being caused by the radiation treatment she received from defendant Ewald.

Plaintiff argues that, because she was suffering from impaired cognitive abilities following her surgery, she was not able to understand the diagnosis, and therefore, the running of the six-month period should have been delayed until June 6, 2001, when she met with her primary care physician, Dr. Drumm. In *Solowy*, our Supreme Court recognized that a plaintiff’s unawareness of an injury may delay the running of the six-month discovery rule when the injury or cause of the alleged injury is unclear:

[A] delay in diagnosis may delay the running of the six-month discovery period in some cases. Some illnesses and injuries may defy even a possible diagnosis until a test, or a battery of tests, can limit the possibilities. In such a case, it would be unfair to deem the plaintiff aware of a possible cause of action before he could reasonably suspect a causal connection to the negligent act or omission. While according to *Moll*, *supra*, the “possible cause of action” standard requires less knowledge than a “likely cause of action standard,” it still requires that the plaintiff possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act. In other words, the “possible cause of action” standard is not an “anything is possible” standard. [*Solowy, supra* at 226.]

The problem with plaintiff’s argument that the six-month period should be delayed past May 9, 2001, is that under the totality of the circumstances, plaintiff’s own deposition testimony belies her position that she was unaware of her diagnosis until June 6. The “flexibility approach” espoused in *Solowy, supra* at 226-227, contemplates a “delay in diagnosis” or a situation where the cause of injury is difficult to determine. There was no delay in diagnosis or difficulty in determining why plaintiff suffered from radiation necrosis. Indeed, plaintiff testified that at her May 9, 2001, visit to Dr. Keller’s office, Dr. Keller specifically told her that the cause of her radiation necrosis was the radiation she received from Dr. Ewald.

Moreover, “[i]n applying the flexible approach, courts should consider the totality of the information available to the plaintiff, including [her] own observations of physical discomfort and appearance, [her] familiarity with the condition through past experience or otherwise, and [her] physician’s explanation of possible causes or diagnoses of [her] condition.” *Solowy, supra*, at 227. In this case, plaintiff testified that, based on her 40-year background working as a nurse,

she understood that the diagnosis of radiation necrosis was from her previous radiation treatment. Thus, it was clear that, based on plaintiff's own experiences and observations of her condition, she knew what caused her radiation necrosis no later than May 9, 2001.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot