

STATE OF MICHIGAN
COURT OF APPEALS

MAUREEN RUGG, Individually and as Personal
Representative of the Estate of DONALD RUGG,
Deceased, JENNIFER RUGG, STEPHANIE
RUGG, and CHRISTOPHER RUGG,

UNPUBLISHED
January 17, 2003

Plaintiffs-Appellants,

v

SPARROW HOSPITAL, JEFFREY JOHNSON,
M.D., SCOTT RANDALL, M.D., and HAYES
GREEN BEACH MEMORIAL HOSPITAL,

No. 234814
Ingham Circuit Court
LC No. 97-086829-NH

Defendants-Appellees.¹

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). We affirm.

I. Basic Facts and Procedural History

This action arises out of a medical malpractice claim brought against defendants as a result of Donald Rugg's (Rugg) death from cancer. Plaintiffs allege that defendants were negligent in failing to discover the cancer during an exploratory laparotomy and duodenojejunostomy performed on January 29, 1994.² During the procedure, Dr Johnson noted an area of thickened tissue in Rugg's duodenum, but failed to perform a biopsy, deeming it unnecessary. After experiencing continued symptoms of nausea, vomiting, and weight loss, an upper gastrointestinal x-ray (UGI) was performed on August 15, 1996, which revealed a high

¹ Defendants Scott Randall, M.D. and Hayes Green Beach Memorial Hospital were dismissed from the case in the lower court after reaching a settlement. As such, the term "defendants" refers only to defendants Jeffrey Johnson, M.D. and Sparrow Hospital.

² Rugg had a history of testicular cancer beginning in 1978 when he was diagnosed with left testicular cancer, which had to be removed. In 1987, Rugg developed cancer in the right testicle that required removal of the second testicle. By 1993, Rugg gradually began experiencing symptoms of nausea, vomiting, and weight loss.

likelihood of the presence of cancer in Rugg's duodenum. An esophagogastroduodenoscopy (EGD) was also performed on August 15, 1996, during which biopsies were obtained. On August 19, 1996, preliminary pathology reports confirmed the existence of cancer in the duodenum and an exploratory laparotomy performed on August 22, 1996, confirmed the existence of cancer of the same tissue type as that found in the second testicular carcinoma in 1987, located in the same area of the duodenum as the 1994 surgery.

On February 12, 1997, plaintiffs filed a notice of intent under MCL 600.2912b. On August 21, 1997, plaintiffs filed their complaint. Thereafter, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), claiming that plaintiffs' claim was barred by the applicable statute of limitations. The trial court agreed, finding that for purposes of MCL 600.5838a(2), the six-month statute of limitations for discovering a claim of medical malpractice began running on August 19, 1996, the date the EGD revealed the existence of carcinoma in Rugg's duodenum. Relying on *Omelenchuk v City of Warren*, unpublished opinion of the Court of Appeals, entered April 6, 1999 (Docket No. 204098), the trial court also found that plaintiffs were not entitled to the full 182 day tolling period of MCL 600.2912b, but only to 154 days because defendants failed to respond to plaintiffs' notice of intent. The trial court therefore concluded that plaintiffs' claim should have been filed on or before July 16, 1997. Because plaintiffs' claim was not filed until August 21, 1997, the trial court determined that it was barred under MCL 600.5838a and granted defendants' motion for summary disposition, dismissing plaintiffs' complaint. This appeal by plaintiffs followed.

II. Standard of Review

This Court reviews a decision granting summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by a statute of limitation is a question for the court to decide as a matter of law. *Id.* However, if a material factual dispute exists, summary disposition is inappropriate. *Id.*

III. Analysis

Plaintiffs argue on appeal that the trial court erred in applying the 154 day tolling period and finding as a matter of law that the statute of limitations barred their claim. We find that the trial court erred in applying the 154 day tolling period, but hold that plaintiffs' claim is still statutorily barred.

Generally, "[t]he period of limitation for a medical malpractice action is two years from the time a claim first accrues." *Lindsey v Harper Hospital*, 455 Mich 56, 60-61; 564 NW2d 861 (1997); MCL 600.5805(4). However, MCL 600.5838a specifically provides that "an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805, or sections 5851 to 5856, or within six months after

the plaintiff discovers or should have discovered the existence of the claim, whichever is later.” MCL 600.5838a(2) (emphasis added). See also MCL 600.5838.

Keeping the statute of limitations in mind, a claimant must also follow the rules provided in MCL 600.2912b when bringing a medical malpractice claim. First, a plaintiff cannot file suit without first giving notice required under MCL 600.2912b(1). *Omelenchuk v City of Warren*, 461 Mich 567, 572; 609 NW2d 177 (2000). Second, no suit can be filed for 182 days after notice is given, which can be reduced to 154 days if the health professional of facility fails to respond to the notice. *Id.* at 572-573; see also MCL 600.2912b(1) and (8). Because section 2912b establishes an interval during which one cannot file suit, MCL 600.5856(d) provides for a tolling of the statute of limitations if the interval when a potential plaintiff is not allowed to file suit would end after the expiration of the limitation period. *Omelenchuk, supra* at 573-574; see also MCL 600.5856(d). However, as our Supreme Court in *Omelenchuk, supra*, made clear, “the limitation period is tolled for the full [182] days,” regardless of whether the defendants responded to the notice. *Id.* at 575-577. In reaching its holding, the Supreme Court reversed the decision of the Court of Appeals, finding that the Court of Appeals had erred in its interpretation of MCL 600.5856(d). *Id.* at 576. Thus, the trial court in this case erred in applying the 154 day tolling period to plaintiffs’ claim. Nevertheless, we find such error harmless because even with the benefit of the 182 day tolling period, plaintiffs claim is still barred by the statute of limitations.

Resolution of this issue turns on when plaintiffs discovered or should have discovered the existence of the claim for purposes of the six-month discovery rule period under MCL 600.5838a(2). It is well established that the “possible cause of action” standard for determining when the discovery period begins to run applies in the medical malpractice context. *Solowy v Oakwood Hospital Corp*, 454 Mich 214, 221; 561 NW2d 843 (1997). An objective standard applies in determining when a plaintiff should have discovered a claim. *Id.* “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.” *Id.* at 221-222. Once a plaintiff is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action and is equipped with the necessary knowledge to preserve and diligently pursue his claim. *Id.* at 222-223.

Application of the “possible cause of action” standard to the facts of this case supports the trial court’s conclusion that the suit is barred. Plaintiffs were aware of a possible cause of action no later than August 19, 1996, the date the EGD confirmed the existence of cancer in the duodenum. During this visit, Rugg’s treating surgeon informed plaintiffs that pathology reports confirmed the presence of cancer in the duodenum and advised plaintiffs of his concern that this presence of cancer was a recurrence of Rugg’s previous testicular cancer. Plaintiffs were also fully aware of Rugg’s history of cancer and Dr. Johnson’s decision not to perform a biopsy on the thickened tissue area during the January 29, 1994 surgery. In fact, plaintiff Maureen Rugg, a registered nurse, was concerned about Dr. Johnson’s decision not to perform a biopsy of the irregular tissue in the duodenum considering Rugg’s history of cancer. Therefore, as of August 19, 1996, plaintiffs knew of an injury, i.e., cancer, and its possible cause, i.e., a recurrence of the earlier testicular cancer.

The fact that the *exact* tissue type and location of the cancer was not discovered until August 22, 1996, does not change our holding. Plaintiffs need not be able to prove each element of the cause of action before the statute of limitations begins to run. *Solowy, supra* at 224. Nor are plaintiffs required to know that the injury was in fact caused or even likely caused by defendants' alleged omissions. *Id.* All that is required is 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." *Id.* at 226. Under the circumstances of this case, we find that no material factual dispute exists with regard to the fact that as of August 19, 1996, plaintiffs possessed sufficient information to suggest a nexus between the injury and the negligent act. Therefore, considering the totality of information available to plaintiffs, the six-month discovery rule period began to run on August 19, 1996.

Accordingly, the six-month discovery limitation period was to expire on February 19, 1997. However, plaintiffs filed their notice of intent on February 12, 1997, seven days before the limitation period was to expire. As a result, the period of limitations was tolled 182 days, tolling plaintiffs' period of limitation until August 13, 1997; it then resumed for another seven days, expiring on August 20, 1997. MCL 600.2912b; MCL 600.5856(d). Consequently, plaintiffs did not file their complaint until August 21, 1997, missing the statute of limitations cut off by one day. While we are sympathetic to plaintiffs, their claim is nevertheless barred. See *Solowy, supra* at 225-226 (arbitrariness of statute of limitations is unavoidable). As such, the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald