

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA PLAZA and THADDEUS PLAZA,

Plaintiffs-Appellees,

v

KEVIN T. CRAWFORD, D.O.,

Defendant,

and

OAKWOOD HEALTH CARE SYSTEM, d/b/a
OAKWOOD HOSPITAL ANNAPOLIS CENTER,

Defendant-Appellant.

UNPUBLISHED

July 22, 2003

No. 237262

Wayne Circuit Court

LC No. 01-103274-NH

PATRICIA PLAZA and THADDEUS PLAZA,

Plaintiffs-Appellees,

v

KEVIN T. CRAWFORD, D.O.,

Defendant-Appellant,

and

OAKWOOD HEALTH CARE SYSTEM, d/b/a
OAKWOOD HOSPITAL ANNAPOLIS CENTER,

Defendant.

No. 237584

Wayne Circuit Court

LC No. 01-103274-NH

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendants appeal by leave granted from the trial court's orders denying their motion for summary disposition pursuant to MCR 2.116(C)(7), brought on the theory that plaintiffs' medical malpractice claim was barred by the statute of limitations. We reverse and remand for entry of an order granting summary disposition to defendants.

On January 20, 1997, plaintiff Patricia Plaza underwent surgery on her ankle to correct injuries sustained in an automobile accident.¹ Plaintiff's ankle remained in a cast for approximately one year, after which she continued to experience pain and difficulty walking. In November 1998 plaintiff told another physician that she believed that defendant Kevin Crawford, who had performed the surgery, had placed a pin incorrectly in her ankle. However, on the several occasions plaintiff saw Crawford for post-operative treatment, he told her the ankle was fine. Eventually, in February 2000, Crawford told plaintiff that he would have to do the surgery over. At that point, plaintiff sought opinions from other physicians and ascertained that Crawford had likely been negligent in the original surgery and also that her options for correcting the problem at that point would probably be painful and possibly unsuccessful. On July 31, 2000, plaintiff served defendants with a Notice of Intent to File Claim, and she filed her complaint alleging malpractice on January 29, 2001. Defendants moved for summary disposition, arguing that plaintiff's claim was barred by the statute of limitations. The trial court denied the motion after concluding it was unable to find that plaintiff knew or should have known "about a cause of action during the discovery period."

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is time-barred. *McKinney v Clayman*, 237 Mich App 198, 200-201; 602 NW2d 612 (1999). In reviewing a request for summary disposition pursuant to MCR 2.116(C)(7), we consider all of the documentary evidence provided by the parties and accept as true plaintiff's well-pleaded allegations. *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). If no facts are in dispute, whether the claim is barred by the applicable statute of limitations is a question of law that we also review de novo. *Id.*

Generally, a person may not bring an action charging malpractice unless she commences the action within two years of when the claim accrued, MCL 600.5805(6), or within six months after the plaintiff discovers or should have discovered the claim, whichever is later, MCL 600.5838a(2). Under the six-month discovery rule, the burden of establishing that the plaintiff neither discovered nor should have discovered the claim at least six months before the expiration of the limitations period is on the plaintiff. MCL 600.5838a(2); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 231; 561 NW2d 843 (1997). Notably, the discovery rule does not require that a plaintiff know for certain that she has a claim, or even that she know of a likely claim, before the six-month period begins to run. *Solowy, supra* at 221-222. Rather, "[o]nce a claimant is aware

¹ "Plaintiff" hereinafter refers to Patricia Plaza. Her husband, plaintiff Thaddeus Plaza, has only a derivative loss of consortium claim.

of an injury and its possible cause, the plaintiff is aware of a possible cause of action.” *Id.* at 222, quoting *Moll v Abbott Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993); see also *Griffith v Brant*, 177 Mich App 583, 587; 442 NW2d 652 (1989).

Defendants assert that plaintiff’s cause of action accrued on the day the surgery was performed, January 20, 1997, and that the two-year statute of limitations provided by MCL 600.5805(6) had already expired when plaintiff filed her notice of intent in July 2000. Defendants further argue that, even if plaintiff relies on the six-month discovery rule, MCL 600.5838a(2), she should have known about having a possible cause of action in November 1998, when she told another physician that she thought a pin was incorrectly placed. We agree.

The test to be applied in determining whether a plaintiff should have known of the existence of a claim is an objective one, based on objective facts, not a subjective test based on what a particular plaintiff believed. *Moll, supra* at 17-18; *Solowy, supra* at 221. Plaintiff’s claim was based solely on the operation² and was barred by the statute of limitations. Clearly, more than two years passed before plaintiff filed her notice. Furthermore, her own deposition indicates that by November 1998 she knew something was wrong with the outcome of the surgery; she knew of her injury and of its possible cause and, therefore, was aware of a possible cause of action. *Solowy, supra* at 222. Under these facts, the six-month discovery rule does not save a claim that the operation was performed negligently.

We also find unsupportable plaintiff’s assertion that earlier discovery was prevented by defendants’ fraudulent acts. “‘Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent.’” *Tonegatto v Budak*, 112 Mich App 575, 583; 316 NW2d 262 (1982), quoting *DeHaan v Winter*, 258 Mich 293, 296; 241 NW 923 (1932). To properly plead a claim for fraudulent concealment in a malpractice action, the plaintiff must specifically set forth the acts or misrepresentations by the defendant that demonstrate a plan or scheme designed to prevent inquiry or escape investigation of a potential claim by the plaintiff. *Dunmore v Babaoff*, 149 Mich App 140, 146-147; 386 NW2d 154 (1985). Although plaintiff alleges that several statements made by Crawford were intentional misrepresentations, nothing in the record supports the assertion that defendants sought to prevent discovery. Plaintiff was free to discuss the matter with other physicians, and in fact, did so.

We reverse and remand for entry of an order granting summary disposition to defendants. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray

² At oral argument, counsel for plaintiff disavowed any claim that plaintiff alleged any liability for any post-operation negligence by Crawford.