

STATE OF MICHIGAN
COURT OF APPEALS

CAROL KRUSCHKE,

Plaintiff-Appellant,

v

JAMES R. LOVELL, M.D., and JAMES R.
LOVELL, M.D., P.C.,

Defendants-Appellees,

and

MARQUETTE GENERAL HOSPITAL,

Defendant.

UNPUBLISHED
November 3, 2005

No. 259601
Marquette Circuit Court
LC No. 03-040879-NH

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(7) in this medical malpractice case in which plaintiff's cause of action is predicated on a claim that defendant Lovell performed a medically unnecessary hysterectomy in April 1998. Defendants successfully argued below that summary dismissal was proper on the basis that the claim was time-barred. The trial court rejected plaintiff's argument that she could not have reasonably discovered her claim for medical malpractice until the fall of 2002, at which time she was informed by another doctor, quite emphatically, that the hysterectomy was medically unnecessary and constituted an inappropriate surgery under acceptable medical standards. We reverse and remand.

Plaintiff saw Dr. Lovell on April 17, 1998, in the emergency room at Marquette General Hospital. She went to the emergency room because she was suffering from lower abdominal pain. Plaintiff was treated by Lovell while in the emergency room, and she was admitted into the hospital later that evening. Plaintiff testified that she had surgery the following morning. She recalled Lovell telling her that he was going to do a laparoscopy and that he was concerned about a chocolate cyst.

Dr. Lovell testified that he saw plaintiff in the emergency room and that his physician's assistant had informed him that plaintiff had an abnormal ultrasound. Lovell maintained that he discussed the topic of surgery with plaintiff, including the possibility of a complete hysterectomy, depending on the findings during the laparoscopy. In performing the laparoscopy, Lovell found what he classified as a "huge" cyst on plaintiff's left ovary; it was eight or nine centimeters in diameter. The area was "very extensively involved with endometriosis," and Lovell noted that plaintiff's right ovary was also "very extensively involved superficially with endometriosis." Lovell testified that he could have removed the cyst without performing a laparotomy, but he felt that it would not have been safe to so proceed.

Dr. Lovell then removed plaintiff's left and right fallopian tubes and ovaries, uterus, and cervix. Lovell indicated that once he looked inside the cyst, he was not concerned with malignant growth. However, he could not send a frozen section of the cyst to the lab because it ruptured as he was removing it. Lovell testified that the left ovary and fallopian tube had been involved with the cyst and endometriosis, and, therefore, he felt it was appropriate to remove them. Lovell also stated that, although the uterus and cervix were normal, it was general procedure to perform a total hysterectomy and remove both. He did record in his operative notes that plaintiff indicated in one of her first visits with his office a wish for sterilization. Lovell also admitted, however, that plaintiff indicated on her surgical consent form that she did not wish to have a total hysterectomy if possible. The doctor testified that he removed plaintiff's ovaries, fallopian tubes, uterus, and cervix because they were "involved" with endometriosis beyond repair and that the best course of action was to remove the diseased tissue.

Plaintiff testified that she remembered waking up after the surgery with pain in her stomach, and she noticed that her stomach was heavily bandaged. Plaintiff also stated that she knew that Dr. Lovell came in to talk with her after the surgery, but she could not remember the nature of the conversation. She admitted that she left the hospital after the surgery "under the impression that they had taken both ovaries and [her] uterus." Lovell asserted that he saw plaintiff after the surgery in the hospital and that he was certain that he had explained the full extent of the surgery to her, but he could not recall plaintiff's reaction.

Plaintiff indicated that she went to see Dr. Lovell on June 3, 1998, but she did not remember the specifics of any conversation between the two, although she was certain that they spoke, in general, about the surgery. Plaintiff testified that, by the time of this appointment, she was fully aware that her uterus had been removed and that she could not have children, and she also knew that both her ovaries had been removed and that she would need hormone therapy. Plaintiff further testified that at that appointment, she "was in shock and in anger. [She] just didn't want the outcome to have been what it was." Lovell stated that, with respect to the June 3, 1998, office visit, he discussed the surgery, the findings, and the pathology report with plaintiff. Dr. Lovell additionally recalled that they had a lengthy discussion and that he was certain he had informed plaintiff that the surgery had been medically necessary. Lovell further indicated that he saw plaintiff five times post-operation and that the last office visit was in March 1999. He stated that at an appointment in December 1998, plaintiff expressed her unhappiness because she was still having pain on her left side.

Plaintiff testified that she stopped treating with Dr. Lovell and began treating with Dr. Licia Raymond in September 1999. Plaintiff contended that at that time she was still experiencing lower left abdominal pain and had been since the time of the surgery. She

additionally testified that, although Dr. Raymond talked about doing further abdominal surgery in order to determine the cause of the pain, plaintiff never had this surgery performed. Plaintiff treated with Raymond until September 2001, at which time she had to go to Ohio to help care for her ill father. She testified that, while in Ohio, she went to see Dr. John Griffith in October 2002 for a refill on her estrogen prescription. Plaintiff maintained that she only saw Dr. Griffith once and that he viewed her surgical scar, at which point they discussed her hysterectomy. She informed Griffith that Dr. Lovell had found a cyst on her ovary and had diagnosed endometriosis. Plaintiff stated that Griffith repeatedly asked her whether Lovell had been trained in the United States. She testified that Griffith was “astounded,” and he told her that “there’s just no way you get a hysterectomy because you’ve got a[n] ovarian cyst and endometriosis.” Plaintiff contended that Griffith told her that he would offer her medical support if she wanted to pursue the matter legally.

Plaintiff filed her complaint against defendants on September 8, 2003. The parties stipulated to dismiss defendant Marquette General Hospital on July 2, 2004. Subsequently, defendants filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff’s claim was barred by the statute of limitations. The trial court agreed, ruling that plaintiff’s claim was barred by the statute of limitations and that plaintiff did not show that her claim was saved by the discovery rule.

MCR 2.116(C)(7) allows for summary dismissal where a claim is barred by the statute of limitations. We review de novo a trial court’s decision on a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). “Absent a disputed issue of fact, this Court decides de novo, as a question of law, whether a cause of action is barred by a statute of limitations.” *City of Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002).

The period of limitation for a malpractice action is two years. MCL 600.5805(6). “In general, a plaintiff in a medical malpractice case must bring his claim within two years of when the claim accrued, or within six months of when he discovered or should have discovered his claim.” *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219; 561 NW2d 843 (1997), citing in part MCL 600.5838. A medical malpractice claim “accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.” MCL 600.5838a(1). In order to meet the general two-year limitation period, plaintiff was required to file her suit within two years from the date of her surgery, and this was not accomplished. Plaintiff did not file suit until September 8, 2003.¹ Accordingly, plaintiff’s medical malpractice action is time-barred unless she proves that the discovery rule applies.

The discovery rule is an alternative means for commencing the running of the statutory period of limitation in a medical malpractice case. *Lumley v Bd of Regents for the Univ of Michigan*, 215 Mich App 125, 130-131; 544 NW2d 692 (1996). This rule allowed plaintiff to

¹ A notice of intent to file suit was served on defendants on April 3, 2003.

commence her medical malpractice action within six months after she discovered or should have discovered the existence of the claim. MCL 600.5838a(3).² The burden of establishing application of the discovery rule such that the case would not be time-barred was on plaintiff. *Id.* An objective standard is applied to determine when a plaintiff should have discovered a possible cause of action. *Solowy, supra* at 221. “[T]he 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 222. In *Moll v Abbott Laboratories*, 444 Mich 1, 23-24; 506 NW2d 816 (1993), cited favorably in *Solowy, supra* at 221-224, our Supreme Court described the “possible cause of action” standard as follows:

This standard advances the Court’s concern regarding preservation of a plaintiff’s claim when the plaintiff is unaware of an injury or its cause, yet the standard also promotes the Legislature’s concern for finality and encouraging a plaintiff to diligently pursue a cause of action. Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action. We see no need to further protect the rights of the plaintiff to pursue a claim, because the plaintiff at this point is equipped with sufficient information to protect the claim. This puts the plaintiff, whose situation at one time warranted the safe harbor of the discovery rule, on equal footing with other tort victims whose situation did not require the discovery rule’s protection.

A plaintiff need not have the ability to prove all of the elements of her malpractice action for the discovery provision to commence running. *Solowy, supra* at 224. “Further, the plaintiff need not know for certain the he had a claim, or even know of a likely claim before the six-month period would begin.” *Id.* at 221-222. Additionally, the “possible cause of action standard” does not require that a plaintiff know of the full extent of her injury before the clock begins to run. *Id.* at 224.

The discovery rule does not allow a plaintiff “to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim.” *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995). “A plaintiff must act diligently to discover a possible cause of action and ‘cannot simply sit back and wait for others’ to inform her of its existence.” *Id.*, quoting *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986).

Here, it is extremely important to focus on the nature of the claimed injury. Plaintiff maintains that Dr. Lovell performed an unnecessary, complete hysterectomy. Such a claim

² Because this is a claim involving “permanent loss of or damage to a reproductive organ resulting in the inability to procreate,” MCL 600.5838a(2)(b), the discovery provision under MCL 600.5838a(3) applies. The only difference between the discovery provision in MCL 600.5838a(3) and MCL 600.5838a(2), which applies to medical malpractice actions that do not involve damage to reproductive organs or fraud by the healthcare professional, is that under MCL 600.5838a(3), there is no period of repose. Under MCL 600.5838a(2), there is a period of repose of six years after the date of the act or omission that is the basis of the claim.

would not necessarily reveal or manifest itself by way of pain or other physical symptoms as is the case in most medical malpractice actions; it is strictly a matter of having the medical information, knowledge, and expertise necessary to realize that a surgical procedure was unwarranted. A careful review of plaintiff's deposition testimony does not disclose that plaintiff believed or had any reason to believe that the hysterectomy was medically unnecessary, such that she should have timely sought an opinion from another doctor after the fact regarding the necessity of the surgery. Indeed, in post-operative office visits, Dr. Lovell reinforced to plaintiff that the hysterectomy was medically necessary.

There is no evidence that any doctor, prior to plaintiff's treatment with Dr. Griffith, informed her that the hysterectomy was unnecessary. While plaintiff may have been upset with defendant Lovell for performing the hysterectomy because of notice issues or simply because of the nature of such an overwhelmingly serious and personal surgical procedure, we find nothing in the record suggesting that she questioned or had doubts about the medical necessity of the hysterectomy following the surgery. Moreover, there is absolutely no indication whatsoever in the record that plaintiff herself had the medical acumen to question the necessity of having a hysterectomy performed. Additionally, there is nothing in the factual history of this case that would lead a reasonable person, who lacks a medical background, to question the necessity of the surgery at the time of the hysterectomy. We cannot help but wonder aloud how a female layperson would discover, with any degree of certainty or accuracy, the existence of an unnecessary hysterectomy without being informed of such by a doctor, and we do not believe that it was incumbent upon plaintiff, *under the circumstances*, to search out other doctors in order to seek a second opinion regarding the necessity of the surgery and to determine the existence of a malpractice claim. Indeed, it was a matter of mere happenstance that Dr. Griffith volunteered his opinion that the hysterectomy was unnecessary, where plaintiff did not see him in an attempt to procure such an opinion. Plaintiff acted as diligently as could be expected under the scenario that played out in this case. On the basis of objective facts, plaintiff did not discover, nor should she have discovered, a possible cause of action for an unnecessary hysterectomy until October 2002 when she saw Dr. Griffith.

With respect to defendants' and the trial court's emphasis on plaintiff's knowledge early on that a hysterectomy was performed and that such knowledge in and of itself commenced the running of any discovery period, the position is wholly lacking in merit when considering the nature of this claim. Simply having knowledge that she underwent a hysterectomy did not place plaintiff on notice that she had a "possible cause of action" premised on a claim that the procedure was medically unnecessary.³

³ We feel it necessary to address some of the arguments presented against our ruling as posed by the dissent. The dissent mistakenly focuses on plaintiff's knowledge of her hysterectomy and her unhappiness with having the surgical procedure performed. However, knowledge of the hysterectomy alone is not knowledge of a possible cause of action. Awareness of the "injury" in the context of this case must mean awareness of a medically unnecessary hysterectomy. In general terms, when one is "injured," it is self-evident that he or she has suffered harm, e.g., a person is hit by a car resulting in a broken leg, thereby starting the clock on the limitation period.

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In *Jackson v Vincent*, 97 Mich App 568; 296 NW2d 104 (1980), this Court addressed, in part, a statute of limitations defense in a situation where the plaintiff consulted with a second doctor who opined that the defendant doctor performed an unnecessary surgical procedure a couple of years earlier.⁴ The *Jackson* panel, quoting *Leary v Rupp*, 89 Mich App 145, 149; 280 NW2d 466 (1979), noted that knowledge of an act and resulting injury may be insufficient to commence the running of the limitation period and that in order to “discover” alleged malpractice, a person must know of the act or omission itself and have good reason to believe that the act was itself improper or was done in an improper manner. *Jackson, supra* at 572. Under certain circumstances, mere knowledge of the act itself will be sufficient where it alone gives one a good reason to believe it was improper. *Id.* “In contrast, a person may know of both the act and some resulting pain but not be aware of any wrongdoing by defendant.” *Id.*, quoting *Leary, supra* at 149. The *Jackson* panel further stated, “In our opinion, the six month period commences to run where a patient is informed of the condition which causes the pain or disability and in addition is informed that the act which caused the pain or disability need not have been done.” *Jackson, supra* at 576 (citations omitted).

Under the factual circumstances presented in the case at bar, although plaintiff had knowledge of the act itself, i.e., the hysterectomy, plaintiff did not have reason to believe that the hysterectomy was unnecessary⁵ until Dr. Griffith conveyed such an opinion to plaintiff. Even though plaintiff was experiencing some pain, there is nothing in the record suggesting that this led her to believe that the hysterectomy itself was not medically warranted, nor was there any evidence associating the pain with an unnecessary hysterectomy.

(...continued)

Plaintiff had no knowledge that she sustained harm or an injury in the true sense of those terms. An individual is not “harmed” or “injured” when a medically necessary operation or surgical procedure is performed. In fact, just the contrary would be true. Plaintiff believed that the hysterectomy was necessary, and defendant doctor reinforced that belief in post-surgical treatment. Although the harm or injury is in actuality occurring at the time of the unnecessary surgery, a plaintiff does not know of an injury until such time as he or she discovers or should have discovered that the surgery was not medically necessary. With respect to plaintiff’s unhappiness, she was unhappy, not because, in her mind, an unnecessary hysterectomy was performed, but simply because a hysterectomy was performed that she was not necessarily expecting. There is a difference. In response to the dissent’s remarks that we are, allegedly, being disingenuous and condescending by presuming that a modern woman would be too ignorant to detect the possibility that an unnecessary hysterectomy was performed under the circumstances, we cannot help but wonder where and when the dissent obtained his medical degree, with a specialty in gynecology no less, allowing him to speak with such unabated confidence that the medical facts and details listed in his footnote 5 would raise the specter of a possible cause of action for a medically unnecessary hysterectomy. The truth is that a woman, as well as a man, place their trust in their physicians to do what is medically appropriate, predicated on the knowledge that a doctor, not the patient, has the medical training necessary to take the right course of action.

⁴ “[I]n August 1977[,] plaintiff was told by her second doctor that there was no need for Dr. Vincent to have cut and/or sewn the nerves into muscle tissue[.]” *Jackson, supra* at 573.

⁵ We wish to make clear that the medical necessity of the hysterectomy is a factual issue to be resolved at a later date, and we take no position with regard to the soundness of plaintiff’s allegation that the surgery was unnecessary.

In *Kermizian v Sumcad*, 188 Mich App 690; 470 NW2d 500 (1991), the plaintiff brought suit for damages for urinary incontinence that allegedly resulted from an improperly performed prostate surgery nine years earlier. At the center of the dispute was whether the plaintiff filed suit within six months after he discovered or should have discovered his claim. This Court, reversing the trial court's order which had granted the defendant doctor's motion for summary disposition, stated:

While the incontinence continued for nine years before plaintiff filed his claim, plaintiff testified that he believed that the incontinence was a part of the healing process. According to plaintiff, it was not until May or June 1986 that he was informed [by another doctor] that the incontinence was permanent and that excessive material might have been cut away during the surgery. Contrary to the trial court's findings, the deposition testimony does not reflect that Dr. Mulero told plaintiff in 1984 that the problem was permanent or that plaintiff was told that the incontinence could last for up to only one year after the surgery. [*Id.* at 696.]

Our case provides an even more compelling basis to utilize the discovery rule. Here, plaintiff was not informed of the possibility that the hysterectomy was unnecessary until 2002; there is no evidence that Dr. Lovell or Dr. Raymond informed her of such a possibility. To the contrary, Lovell told plaintiff that the surgery was necessary. Furthermore, there is no indication in the record that plaintiff's physical symptoms could be attributed to an unnecessary hysterectomy. In other words, as opposed to the situation in *Kermizian* where the symptom of incontinence was a result of an allegedly botched prostate surgery, plaintiff's occasional pain, based on the record before us, does not evidence that defendant doctor committed medical malpractice by performing an unnecessary hysterectomy; there is no correlation.

Accordingly, the six-month discovery period did not commence to run until plaintiff was informed by Dr. Griffith that the hysterectomy was not medically appropriate, and, hence, the medical malpractice action was timely filed, which we find as a matter of law.

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

/s/ David H. Sawyer
/s/ William B. Murphy