

STATE OF MICHIGAN
COURT OF APPEALS

LARRY LEITH,

Plaintiff-Appellant,

v

HENRY FORD HOSPITAL,

Defendant-Appellee.

UNPUBLISHED

May 16, 2000

No. 211008

Wayne Circuit Court

LC No. 97-704633-CK

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting defendant summary disposition. We affirm.

Plaintiff received an emergency blood transfusion on August 9, 1966 at defendant's facility. In 1996, he learned he was infected with the Hepatitis C virus. Plaintiff alleged that his illness was caused by the 1966 transfusion of tainted blood and that the transfusion was performed against his wishes. This action alleging medical malpractice, assault and battery, and breach of express and implied warranties under the Uniform Commercial Code (UCC) followed.¹

While the trial court's order did not explicitly state the court rules upon which it relied when it dismissed plaintiff's claims, it appears from the record that the trial court dismissed plaintiff's malpractice and assault and battery claims pursuant to MCR 2.116(C)(7). It further appears from the record that the court dismissed plaintiff's breach of warranty claim pursuant to MCR 2.116(C)(8).

First, plaintiff argues that the trial court erred in dismissing his claims because he did not discover his medical malpractice and assault and battery causes of action until September 1996, when he learned of his illness. Plaintiff also argues that his causes of action could not have accrued until 1996 because, until then, he suffered no damages. We disagree. A trial court's grant or denial of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing the trial court's grant of a motion under MCR 2.116(C)(7), this Court considers all documentary evidence submitted by the parties and accepts as true the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence. *McKinney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). "We view the uncontradicted allegations in the plaintiff's

favor and ascertain whether the claim is time-barred as a matter of law. *Id.* With respect to plaintiff's malpractice claim, the statute of limitation in effect at the time the asserted malpractice occurred governs the cause of action. *Karr v Williams*, 126 Mich App 222, 226; 337 NW2d 51 (1983). In 1966, the statute of limitation applicable to the present case stated, in pertinent part:

No person may bring or maintain any action to recover damages for injuries to persons or property unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.

* * *

(3) The period of limitations is 2 years for actions charging malpractice. [MCL 600.5805; MSA 27.5805.]

"Injuries" as that term is used in § 5805, does not mean "physical injuries." See *Coats v Uhlmann*, 87 Mich App 385, 391; 274 NW2d 792 (1978). Rather, section 5805 should be construed comprehensively to include actions brought for injuries resulting from invasions of rights that inhere in persons as persons and property owners. *Id.* at 392.

With regard to when a cause of action accrues, MCL 600.5827; MSA 27A.5827 states:

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

The "time [of] the wrong" contemplated in §5827 is the date an injury results from a defendant's breach of duty. *Lemmerman v Fealk*, 449 Mich 56, 64; 534 NW2d 695 (1995). In 1966, a claim based on the malpractice "of a person who is, or holds himself out to be, a member of a state licensed profession" accrued at the time that person discontinued treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose. MCL 600.5838; MSA 27A.5838.

Our review of the record indicates that defendant discontinued treating plaintiff when he was transferred to Crittenton Hospital within approximately twenty-four hours of receiving the transfusion. Pursuant to MCL 600.5838; MSA 27A.5838, we conclude plaintiff's malpractice claim accrued at the time of plaintiff's transfer. Consequently, plaintiff had two years in which to commence a lawsuit against defendant for medical malpractice. MCL 600.5805; MSA 27A.5805. Because plaintiff waited more than two years before filing his lawsuit in 1997, his medical malpractice claim was time-barred.

Nonetheless, plaintiff contends that the statute of limitations with respect to the medical malpractice claim did not accrue until he discovered his illness in September 1996. We disagree with

this contention. The Michigan Supreme Court, in *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963) adopted the “discovery rule” with regard to a medical malpractice action, stating:

The limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, [a] plaintiff should have discovered the wrongful act.

While the discovery rule announced in *Johnson* has been superseded by statute,² the rule as announced in that case was in effect when plaintiff received his blood transfusion in 1966. The discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury. *Stephens v Dixon*, 449 Mich 531, 538; 536 NW2d 755 (1995). Under the discovery rule, a plaintiff’s claim accrues when he or she discovers, or through the exercise of reasonable diligence “should have discovered: (1) an injury, and (2) the causal connection between [the] injury and the . . . breach.” *Moll v Abbott Laboratories*, 444 Mich 1, 16; 506 NW2d 816 (1993). Once an injury and its possible cause are known, a plaintiff is aware of a possible cause of action for purposes of the discovery rule and the running of the applicable statute of limitations. *Gebhardt v O’Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994). A later injury from the same tortious act does not restart the running of the statute of limitations. *Moll, supra* at 20 n 24.

Here, plaintiff argues that he did not discover his cause of action for medical malpractice until it was determined, in September 1996, that he was infected with Hepatitis C and that this virus may have been caused by the blood transfusion he received at defendant hospital in 1966. Plaintiff’s argument is without merit. Pursuant to applicable law in effect at the time plaintiff’s claims against defendant accrued, plaintiff had two years from the time he discovered this claim to file a lawsuit. See *Johnson, supra* at 379. At the latest, plaintiff was aware of a possible medical malpractice claim within two weeks of receiving the blood transfusion at defendant hospital and suffered emotional and spiritual damage as a result of receiving the blood transfusion.

Thus, under the discovery rule, plaintiff knew, in 1966, that he had suffered an injury and knew that this injury was causally connected to the receipt of transfused blood at defendant hospital. Plaintiff’s later discovery in September 1996 that he was infected with Hepatitis C, although allegedly arising from the 1966 blood transfusion, did not restart the running of the applicable statute of limitations. *Moll, supra* at 20 fn 24. The discovery rule did not operate to overcome the limitation bar simply because plaintiff later realized a consequence of the injury he incurred in 1966. *Stephens, supra* at 538. Moreover, plaintiff’s subsequent diagnosis of Hepatitis C infection did not give rise to a new cause of action against defendant. *Moll, supra* at 18.

Plaintiff also argues that his cause of action against defendant could not have accrued until he had suffered appreciable damages, that is, the diagnosis of Hepatitis C infection in September 1996. This argument is without merit. “The elements of an action for negligence are (1) duty, (2) general standard of care, (3) specific standard of care, (4) cause in fact, (5) legal or proximate cause, and (6) damage.” *Malik v William Beaumont Hospital*, 168 Mich App 159, 168; 423 NW2d 920 (1988). “[A] plaintiff’s cause of action for a tortious injury accrues when all the elements of the cause of action, including the element of damage, have occurred and can be alleged in a proper complaint.” *Travelers*

Ins Co v Guardian Alarm Co of Michigan, 231 Mich App 473, 479; 586 NW2d 760 (1998). Michigan jurisprudence compels:

strict adherence to the general rule that “subsequent damages do not give rise to a new cause of action.” The discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury. [*Moll, supra* at 18.]

The record shows plaintiff incurred damage on learning that he had been given blood while at defendant hospital. The mental or emotional damages suffered by plaintiff can be compared with those suffered by the plaintiff in *Berrios v Miles, Inc*, 226 Mich App 470, 471-472, 477-478; 574 NW2d 677 (1997), in which this Court held that the plaintiff’s claim accrued in 1985 when he was informed that he tested positive for the human immunodeficiency virus (HIV) after receiving a blood transfusion, rather than in 1992 when he began to suffer the debilitating symptoms associated with acquired immunodeficiency syndrome (AIDS). Here, the damages suffered by plaintiff in 1966 established the element of damages for purposes of the running of the applicable statute of limitations.

In addition, our review of the record indicates that plaintiff’s claim for assault and battery accrued approximately two weeks after his transfer from defendant hospital, when he learned he had been given a blood transfusion at that facility. MCL 600.5827; MSA 27A.5827. It was at this time plaintiff incurred at least some mental or emotional injury. A measure of damages in a claim for assault and battery includes any attending mental suffering occasioned by the unlawful personal assault. *Robertson v Hulbert*, 226 Mich 219, 232; 197 NW 505 (1924). Claims for assault and battery normally must be brought within two years after they accrue in order to avoid the statute of limitation bar. MCL 600.5805; MSA 27.5805; *Lemmerman, supra* at 63. For purposes of applying MCL 600.5827; MSA 27A.5827, the “time of wrong” triggering the running of the statute of limitation period is the date a plaintiff’s injury results from a breach of duty. *Id.* at 64. Here, the trial court correctly concluded that plaintiff’s failure to file suit within two years barred his assault and battery claim against defendant. For the reasons stated above with respect to plaintiff’s malpractice claim, we conclude that the discovery rule does not extend to plaintiff’s claim of assault and battery.

Next, plaintiff argues that the trial court erred in dismissing his breach of warranty claim under the UCC. The trial court concluded that defendant’s provision of blood was a service, not the sale of goods, and therefore the UCC did not apply. We agree with the trial court.³ “A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint.” *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In reviewing the trial court’s grant of a motion under MCR 2.116(C)(8), we consider only the pleadings, accepting as true all well-pleaded factual allegations and construing the allegations in a light most favorable to the nonmovant. *Id.* A trial court should grant a motion under MCR 2.116(C)(8) only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.*, quoting *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994).

Michigan adopted the UCC with the passage of 1962 PA 174, which became effective January 1, 1964. Article 2 of the UCC governs the relationship between the parties involved in “transactions in goods.” *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 526; 538 NW2d

424 (1995). Article 2 defines “goods” to include “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action.” Under Article 2, a supplier of goods may be held liable for breach of express and implied warranties if the goods are defective. See MCL 440.2313; MSA 19.2313 and MCL 440.2314; MSA 19.2314.

Where the defendant uses a defective product in the course of providing a service, we must decide whether the “transaction” was primarily a sale or a service. *Ayyash v Henry Ford Health Systems*, 210 Mich App 142, 145; 533 NW2d 353 (1995) (a case involving a warranty claim sounding in tort and products liability). When determining whether the UCC applies in a transaction involving both goods and services, Michigan courts apply the predominant factor test. *Home Ins Co, supra* at 527. Applicability of the UCC depends on

whether [the] predominant factor, [the] thrust, [the] purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved. [*Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 534; 486 NW2d 512 (1992), quoting *Bonebrake v Cox*, 499 F2d 951 (CA 8, 1974).]

If the purchaser’s ultimate goal is to acquire a product, the transaction should be considered in goods and the UCC applies. *Neibarger, supra* at 536. However, if the purchaser’s ultimate goal is to procure a service, the transaction is not governed by the UCC, even though goods are incidentally required in the provision of this service. *Id.* “In the case of a physician or hospital rendering medical care . . . the courts typically have characterized the ‘transaction’ as a service and, accordingly, used negligence rather than strict liability theories of recovery.” *Ayyash, supra* at 146.

Our review of the record shows that plaintiff was involved in an accident and incurred serious, potentially life-threatening injuries as a result. Plaintiff argues, however, that defendant’s only “involvement” was to provide him with a blood transfusion. The primary function of physicians and hospitals is to provide care, not to manufacture or distribute products, *id.*, and there is nothing in the record to refute our assumption that plaintiff was admitted to defendant hospital for the purpose of receiving medical care and treatment for his injuries. Because defendant’s provision of a blood transfusion to plaintiff was merely incidental to its primary function of providing medical care and treatment, we conclude that the UCC is inapplicable to plaintiff’s breach of warranty claim against defendant.

Affirmed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

¹ Plaintiff states in his brief that he was a practicing Jehovah’s Witness, that he lost consciousness when he was transferred to defendant’s hospital and that his mother informed defendant’s personnel that he

did not want a blood transfusion because of his religious beliefs. Plaintiff further states that doctors at defendant hospital gave him a transfusion of approximately five units of blood contrary to his and his family's expressed wishes.

² See *Moll v Abbott Laboratories*, 444 Mich 1, 12 n 16; 506 NW2d 816 (1993).

³ In *McKinstrie v Henry Ford Hospital*, 55 Mich App 659, 660-661; 223 NW2d 114 (1974), this Court concluded that the blood banking and transfusion act, MCL 691.1511; MSA 14.528(1) made the distribution of "whole blood, plasma, blood products, and blood derivatives, for the purpose of injecting or transfusing them" the rendering of a service and not a sale subject to the implied warranty provisions of the UCC. However, the blood banking and transfusion act did not bar plaintiff's claim, because the act did not become effective until June 30, 1967, several months after the date that plaintiff received his transfusion. See 1967 PA 174. While this Court observed in *People v Flenon*, 42 Mich App 457, 463-464, n 13; 202 NW2d 471 (1972), that, as early as 1967, some states recognized recovery for damages against doctors, hospitals and blood centers for the contraction of serum hepatitis from a blood transfusion under theories of breach of warranty and strict liability, we are aware of no Michigan case that recognized recovery under a breach of warranty theory before the passage of the blood banking and transfusion act.