

STATE OF MICHIGAN
COURT OF APPEALS

GARY TYSON,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN BOARD OF
REGENTS,

Defendant-Appellee.

UNPUBLISHED
September 22, 2009

No. 285068
Court of Claims
LC No. 07-000104-MH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

The facts are not in dispute. Plaintiff injured his ankle and went to the Veterans Administration Medical Center (VAMC) in Ann Arbor for treatment on August 12, 2004.¹ Dr. Farhad Ebrahim, a radiologist working at the VAMC, interpreted plaintiff's x-rays as showing no fracture or dislocation and, while at the VAMC, plaintiff was advised of this radiology interpretation. The radiology report issued at the VAMC lists Dr. Ebrahim as "Primary Interpreting Staff" and "Attending Radiologist."

Per medical advice, plaintiff used crutches for five weeks and then started bearing weight on the foot. However, his ankle never healed. He thereafter went to the VAMC in Toledo, Ohio, on October 8, 2004, where new x-rays were taken and a different radiologist compared the new x-rays to the ones taken on August 12. The radiologist concluded that the August 12 films, as well as the new ones, showed a fracture. On October 20, 2004, Dr. Ebrahim dictated an addendum to his August 12, 2004, x-ray report, this time noting the fracture that he had not diagnosed on his initial review. Plaintiff alleges that he was left with a deformity and limited use

¹ The Veterans Affairs Ann Arbor Healthcare System is comprised of the VAMC in Ann Arbor, as well as the VA community-based outpatient clinics located in Toledo, Ohio, Flint and Jackson.

of his foot as a result of the delay in diagnosing the fracture caused by Dr. Ebrahim's initial misinterpretation of the x-ray.

Plaintiff assumed that Dr. Ebrahim was employed by the VAMC and initiated legal action in federal court on October 12, 2006, against the Department of Veterans Affairs, as an agency of the United States.² The United States filed an answer to plaintiff's complaint on December 22, 2006. Plaintiff's attorney was thereafter provided a copy of a contract between the United States and the University of Michigan, whereby the University provided radiology services to the VAMC. Dr. Ebrahim is a faculty member of defendant University and spent one morning per week at the VAMC. Plaintiff's federal complaint was then dismissed for lack of subject matter jurisdiction because Dr. Ebrahim was not an employee of the VAMC.

On February 6, 2007, plaintiff mailed a Notice of Intent under MCL 600.2912b to the University of Michigan Board of Regents as operators of University of Michigan Hospitals and Health Centers (UMHC) alleging that its employee, Dr. Ebrahim, was negligent in his treatment of plaintiff at the VAMC. Subsequently, plaintiff filed the present action in the Michigan Court of Claims against the UM Regents as operators of UMHC. Defendant moved for summary disposition in the Court of Claims pursuant to MCR 2.116(C)(7), asserting that the statute of limitations had expired prior to filing of the suit. Plaintiff responded by arguing that its suit against the University of Michigan was initiated (by the mailing of the notice of intent) less than six months after plaintiff discovered the existence of a possible claim against the University of Michigan and so the case was timely pursuant to MCL 600.5838(2), which provides in pertinent part:

[A]n 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 6 months after the plaintiff discovers or should have discovered the existence of the claim.* [Emphasis added.]³

The trial court granted defendant's motion and dismissed the case, finding that the six month discovery period as to UMHC ran from the date plaintiff discovered on October 8, 2004, that he may have been a victim of medical malpractice by Dr. Ebrahim regardless of whether plaintiff could have known of the role of UMHC.

Plaintiff argues that the six-month discovery rule does not bar his claim of vicarious liability against UMHC because he acted diligently to discover all potentially culpable parties within the appropriate time period and filed the present action within two weeks of discovering the employment relationship between Dr. Ebrahim and UMHC. This argument is without merit.

Motions for summary disposition are reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). A motion is properly granted pursuant to

² Plaintiff's notice of intent was filed on September 26, 2005.

³ This is limited by the six year statute of repose. MCL 600.5838a(2).

MCL 2.116(C)(7) when a claim is barred by a statute of limitations. *Id.* In the absence of disputed facts, this Court also reviews de novo whether the applicable statute of limitations bars a cause of action. *Trentadue v Buckler Automatic Lawn Sprinkler System*, 479 Mich 378, 386; 738 NW2d 664 (2007). A court must accept the non-moving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to decide whether any factual development could provide a basis for recovery when reviewing a MCR 2.116(C)(7) motion. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000). Further, the complaint's contents are accepted as true unless contradicted by documentary evidence submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Generally, a medical malpractice plaintiff must bring his claim within two years of when the claim accrued (MCL 600.5805[6]), or within six months of when he discovered, or should have discovered, his claim (MCL 600.5838a[2]). *Solowy v Oakwood Hosp*, 454 Mich 214, 219; 561 NW2d 843 (1997). 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).

Plaintiff does not contest that the February 6, 2007, filing of this claim fell outside the two-year time period set forth in MCL 600.5805(6). Rather, he argues that the six-month discovery rule is applicable because he did not "discover" that defendant was Dr. Ebrahim's employer until notified by the federal government of this fact in January 2007.

Under the discovery rule, a plaintiff must prove that he neither discovered, nor should have discovered through the exercise of reasonable diligence, the existence of the malpractice claim as a result of physical discomfort, appearance, condition or otherwise. MCL 600.5838a(3); *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995). The discovery rule period begins to run when the plaintiff, on the basis of objective facts, is aware of a possible cause of action. This occurs when the plaintiff is aware of an injury and a possible causal link between it and an act or omission of the physician. *Solowy, supra* at 232; *Moll v Abbott Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993). 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. Moreover, the time of discovery rule applies to the discovery of the claimed malpractice, *not the discovery of a defendant's identity or involvement*. *Poffenbarger v Kaplan*, 224 Mich App 1, 12; 568 NW2d 131 (1997); *Weisburg v Lee*, 161 Mich App 443; 411 NW2d 728 (1987).

In *Poffenbarger, supra*, the decedent was misdiagnosed and ultimately died of lung cancer. The plaintiff originally filed a malpractice claim against one radiologist, but later discovered that the doctor she sued had consulted with another doctor. Relying on the six-month discovery rule, the plaintiff sought to add the new radiologist, Dr. Kaplan, to the lawsuit as a defendant. This Court rejected the plaintiff's argument, holding:

. . . That plaintiff initially may not have been aware of Dr. Kaplan's identity does not alter her duty of diligence in discovering a potential cause of action. The discovery of Dr. Kaplan's identity does not alter her duty of diligence in discovering a potential cause of action. The discovery period applies to discovery of a possible claim, not the discovery of the defendant's identity. [*Poffenbarger, supra* at 12, citing *Weisburg, supra* at 448.]

Plaintiff claims that *Poffenbarger* and *Weisburg* do not apply because his claim against defendant is based on its vicarious liability as an employer. This argument is a difference without a distinction. The courts have clearly stated that the six-month discovery rule relates to the discovery of the *injury* leading to the malpractice action. *Moll, supra* at 18; *Poffenbarger, supra* at 12; *Weisburg, supra* at 448. Otherwise, the two-year rule applies. MCL 600.5805(6); *Solowy, supra* at 219. Dr. Ebrahim's misdiagnosis occurred on the date of plaintiff's injury, August 12, 2004, and plaintiff had knowledge of the misdiagnosis on October 8, 2004. Plaintiff did not file a notice of intent to sue in this case, thus tolling the statute of limitations, until February 6, 2007, which is outside both the two-year and six-month limitation periods. While plaintiff erroneously assumed Dr. Ebrahim was an employee of the VA Medical Center, this error does not override the statute of limitations for medical malpractice cases.⁴

Plaintiff next claims the trial court erred by failing to construe the facts in a light most favorable to him as it questioned his attorney at the motion hearing regarding the actions plaintiff took or did not take to discover Dr. Ebrahim's employer. We disagree.

This Court must accept the non-moving party's well-pleaded allegation as true and construe the allegations in the nonmovant's favor to decide whether any factual development could provide a basis for recovery when reviewing a MCR 2.116(C)(7) motion. *Diehl, supra* at 123; *Alcona Co, supra* at 246. Under that standard, we hold that the court did properly construe the allegations in plaintiff's favor when deciding defendant's motion for summary disposition. We recognize that the trial court did question plaintiff regarding his lack of attempts to discover Dr. Ebrahim's employer and noted that plaintiff failed to provide documentation that it would have been impossible to discover the identity of the employer within the limitation period. However, as discussed above, this information is not relevant for purposes of the controlling law, and has no bearing on the outcome of the motion. The relevant facts in this case are the date of misdiagnosis, date of discovery of misdiagnosis, and date of filing the notice of intent to file a claim. These were not in dispute and were appropriately relied on by the trial court when

⁴ Despite the clear language of the statute, the dissent proposes that the six-month discovery rule should also be applied to discovery of an actual principle pursuant to a "doctrine of reasonableness" and the "standard of due diligence." We disagree, as any policy considerations regarding the purported unintended consequences of application of the plain language of the statute are best left to the Legislature. Further, although not relevant to the analysis regarding application of the six-month discovery rule under the facts of this case, we note that the trial court did, in fact, offer plaintiff the opportunity to procure evidence from the VAMC that it would not have answered plaintiff's questions regarding Dr. Ebrahim's employment status had plaintiff specifically requested such information. The record does not reveal that plaintiff availed himself of this opportunity.

rendering its decision.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot