

STATE OF MICHIGAN
COURT OF APPEALS

NZ BRYANT,

Plaintiff-Appellant,

v

HENRY FORD HEALTH SYSTEM and KANDIS
K. RIVERS, M.D.,

Defendants-Appellees.

UNPUBLISHED
December 12, 2017

No. 334716
Oakland Circuit Court
LC No. 2016-153282-NH

Before: JANSEN, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition under MCR 2.116(C)(7), dismissing plaintiff's medical malpractice case on the ground that it was time-barred. We affirm.

On October 9, 2015, plaintiff filed a complaint against defendants in the Wayne Circuit Court that was subsequently removed to the Oakland Circuit Court. In his complaint, plaintiff stated that he underwent a transurethral resection of the prostate (TURP) surgery performed by defendant Dr. Kandis Rivers on April 1, 2013. Thereafter, plaintiff experienced problems with ejaculation and, on May 9, 2013, Rivers advised him to wait eight months for improvement. But after eight months, plaintiff saw no improvement. In January 2014, plaintiff discussed the problem with his primary care physician who advised plaintiff that ejaculation problems are a known and common risk of TURP surgery. Plaintiff alleged in his complaint that Rivers had never told him that information. In March 2015, plaintiff sought a second opinion regarding his problem and was advised that his ejaculatory disorder—known as retrograde ejaculation, i.e., semen flows backward into the bladder, was permanent and he was sterile. Again, plaintiff alleged in his complaint that he was never advised that permanent ejaculation problems and sterility were risks of the TURP surgery.

In Count I of his complaint, plaintiff asserted a medical malpractice claim against defendant Rivers for:

- a. Failing to inform Plaintiff that retrograde ejaculation is a known and common risk of TURP surgery and that it is an irreversible condition so that Plaintiff could make a knowledgeable evaluation regarding the TURP surgery so he could make an informed decision about proceeding with the surgery.

b. Failing to inform Plaintiff that the surgery resulted in him being rendered sterile instead, she misled him into thinking his condition could improve over time.

Plaintiff also alleged that, as a direct and proximate result of Rivers' negligence and malpractice, he (1) "was placed in a position of making a crucial uniformed [sic] decision and prevented him from deciding not to proceed with the surgery[.]" (2) "is no longer able to produce sperm in a normal manner, he was forced to cancel his plans for having children and is deeply depressed and is psychologically [sic] distraught over being sterile[.]" and (3) "has suffered the loss of his ability to procreate in a normal manner, deprivation of the normal enjoyments of life as well as pain, suffering, humiliation, embarrassment and mental and emotional anguish and anxiety." In Count II, plaintiff asserted a malpractice claim against Rivers' employer, Henry Ford Health System.

Subsequently, defendants filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's case must be dismissed as time-barred by the two-year statute of limitations. Specifically, defendants argued, the consent form was signed and the surgery was performed on April 1, 2013—that was the last day that plaintiff could have been informed about the risks of the TURP procedure. Plaintiff had two years from the date of the alleged malpractice to file suit. Plaintiff sent his notice of intent (NOI) on March 30, 2015, one day before the statute of limitations expired—which resulted in a tolling period of 182 days from the date the NOI was sent, MCL 600.2912b, plus the "tacked" one day. Therefore, plaintiff had until September 29, 2015 to file his lawsuit but he filed it on October 9, 2015. Accordingly, his complaint was untimely and must be dismissed with prejudice.

Plaintiff filed a response to defendants' motion for summary disposition, arguing that his medical malpractice claim against Rivers accrued on May 9, 2013, the date in which Rivers told plaintiff to wait eight months for improvements and failed to inform him that he suffered from permanent retrograde ejaculation that rendered him sterile.

Defendants filed a reply to plaintiff's response to their motion for summary disposition, arguing that plaintiff's medical malpractice case is premised on the purported failure of Rivers to provide plaintiff with all of the necessary information to make an informed consent to the TURP procedure. Thus, only discussions that occurred between Rivers and plaintiff *before* the procedure are relevant to the date-of-accrual issue. Since the consent form was signed and the surgery was performed on April 1, 2013, that is the date plaintiff's claim accrued, if at all. Thus, plaintiff's complaint had to be filed by September 29, 2015 to be timely, and it was not filed by that date. Accordingly, the case must be dismissed with prejudice as time-barred.

The trial court issued an opinion and order following oral arguments, granting defendants' motion for summary disposition. The trial court held that the basis for plaintiff's claim of medical malpractice was Rivers' alleged failure to obtain plaintiff's informed consent before the TURP surgery that rendered him sterile. Thus, his claim accrued on April 1, 2013, and his complaint filed on October 9, 2015 was untimely. Accordingly, plaintiff's case was dismissed with prejudice.

Plaintiff then filed a motion for reconsideration, arguing that his complaint specifically alleged that defendant Rivers was negligent for failing to inform him that the surgery caused him

to suffer from permanent retrograde ejaculation and for misleading him into believing that his condition would improve over time. Thus, the date his cause of action accrued was May 9, 2013, which was his last treatment date with Rivers. Accordingly, plaintiff requested the trial court reconsider its ruling.

The trial court subsequently denied plaintiff's motion for reconsideration, holding that all of plaintiff's alleged injuries stem from the purported lack of informed consent. That is, his injuries were the proximate result of defendant Rivers' failure to inform plaintiff of the risks associated with the TURP surgery. The court noted:

More specifically, Plaintiff alleges in the complaint that the April 2013 surgery resulted in him suffering from retrograde ejaculation and becoming sterile. There are no allegations in the complaint that Plaintiff was further harmed as a result of Dr. Rivers allegedly failing to diagnose Plaintiff with sterility and retrograde ejaculation in May 2013. In fact, according to Dr. Jerry Weinberg's affidavit of merit, retrograde ejaculation is irreversible. Therefore, it is clear that the alleged injuries flow from Plaintiff allegedly being unaware of certain risks *before* the surgery was performed—not from any failure on the part of Dr. Rivers *after* the surgery was performed.

Therefore, the trial court denied plaintiff's motion for reconsideration and this appeal followed.

Plaintiff argues that the trial court failed to recognize that the failure to diagnose plaintiff's retrograde ejaculation and sterility was medical malpractice and, thus, plaintiff's complaint was timely filed. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(7) should be granted if, after considering the complaint's allegations as true and any documentary evidence submitted by the parties, the claim is barred by the statute of limitations. *Maiden*, 461 Mich at 119; see also *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 419; 684 NW2d 864 (2004). We also review de novo whether a claim is barred by the applicable period of limitations. *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

In pleading a traditional claim of medical malpractice, the plaintiff alleges that “a physician's breach of the standard of care proximately caused a concrete injury[.]” *Taylor v Kent Radiology, PC*, 286 Mich App 490, 502; 780 NW2d 900 (2009). With regard to the burden of proof, MCL 600.2912a(2) explains: “In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.” And, as set forth in MCL 600.5838a(1), a claim based on medical malpractice “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.”

In this case, as the trial court noted, plaintiff did not allege that he “suffered an injury that more probably than not was proximately caused” by defendant Rivers' failure to diagnose his retrograde ejaculation condition and sterility on May 9, 2013. See MCL 600.2912a(2). In other

words, even if defendant Rivers did breach the standard of care by failing to diagnose plaintiff's condition on May 9, 2013, plaintiff did not allege that any specific injury resulted, i.e., that his irreversible ejaculatory disorder was aggravated, worsened, or changed as a consequence. See *Taylor*, 286 Mich at 510.

In fact, considering plaintiff's complaint as a whole, it is clear that the basis for his medical malpractice claim is defendant Rivers' alleged failure to inform plaintiff before the surgery that he could develop a retrograde ejaculation condition and become sterile after the TURP surgery. As stated several times in his complaint, plaintiff alleged that he was never advised of these risks of the surgery; thus, he was prevented from making an informed decision, i.e., tendering an informed consent. It is well-established that "[t]he doctrine of informed consent requires a physician to warn a patient of the risks and consequences of a medical procedure." *Wlosinski v Cohn*, 269 Mich App 303, 308; 713 NW2d 16 (2005). Therefore, plaintiff's claim for medical malpractice accrued on April 1, 2013, "at the time of the act or omission that is the basis for the claim of medical malpractice," MCL 600.5838a(1)—*before* the surgery was performed when he was allegedly not advised about the risks of developing a retrograde ejaculation condition and becoming sterile. Because plaintiff's claim accrued on April 1, 2013, his complaint that was filed on October 9, 2015 was untimely. Accordingly, the trial court properly granted defendants' motion for summary disposition on the ground that plaintiff's medical malpractice case was time-barred.

Affirmed. Defendants are entitled to costs as the prevailing parties. MCR 7.219(A).

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron