# STATE OF MICHIGAN

# COURT OF APPEALS

TRUDY MOSLEY and MARK MOSLEY,

Plaintiffs-Appellants,

v

DR. JEFFREY MENDELSON, M.D., MENDELSON ORTHOPEDICS, P.C., and MENDELSON KORNBLUM DIAGNOSTICS, LLC,

Defendants-Appellees.

UNPUBLISHED
May 13, 2021

No. 354144
Wayne Circuit Court
LC No. 20-000045-NH

Before: BOONSTRA, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting defendants' motion for summary disposition. We affirm.

## I. PERTINENT FACTS AND PROCEDURAL HISTORY

The facts underlying this case are largely undisputed. In 2016, defendant Dr. Jeffrey Mendelson, M.D. (Dr. Mendelson) performed total knee replacement surgery on plaintiff Trudy Mosley's (Mosley) left knee. Between 2016 and 2018, Mosley saw Dr. Mendelson several times complaining of pain and swelling in her knee; Dr. Mendelson examined her knee at these visits and opined that the prosthetic knee he had implanted during the surgery was properly placed. On October 31, 2018, Dr. Mendelson reviewed x-rays of Mosley's knee and again opined that the prosthetic was properly implanted. Unsatisfied with Dr. Mendelson's assurances, Mosley consulted on December 12, 2018 with another surgeon, Dr. Lawrence Morawa, M.D. (Dr. Morawa), who opined that her prosthetic knee had been improperly implanted, causing her pain and swelling. (*Id.*). On January 22, 2019, Mosley saw another doctor, Dr. Timothy McGlaston, M.D. (Dr. McGlaston), who concurred with Dr. Morawa that her prosthetic had been improperly implanted. In March 2019, Dr. McGlaston performed corrective surgery on Mosley's knee.

On May 21, 2019, plaintiffs filed a Notice of Intent to sue for medical malpractice. On January 2, 2020, plaintiffs filed a complaint alleging medical malpractice against defendants. In

lieu of an answer, defendants filed a motion for summary disposition, arguing that plaintiffs' claim was barred by the medical malpractice statute of limitations, and that plaintiffs had failed to properly file and serve an affidavit of merit with their complaint. After defendants filed their motion, plaintiffs filed an affidavit of merit on February 4, 2020.

The trial court decided defendants' motion without oral argument, issuing an opinion and order granting defendants' motion on June 24, 2020. The trial court held that, accepting Mosley's allegations as true, her injury occurred when Dr. Mendelson performed the total knee replacement surgery in 2016, and that plaintiffs therefore had filed their complaint outside of the two-year statute of limitations for medical malpractice actions found in MCL 600.5805(8). Further, the trial court held that plaintiffs had failed to satisfy their burden of showing that the "discovery rule" of MCL 600.5838a(2) (which provides that a plaintiff may file a lawsuit for medical malpractice within 6 months of the time that she discovered or should have discovered her claim) applied. The trial court found that the "very latest Ms. Mosley should have objectively discovered her injury was December 12, 2018, when Dr. Morawa told her the surgery was improperly performed by Dr. Mendelson." Because plaintiffs did not file their lawsuit until January 2, 2020, the discovery rule did not save their suit from being time-barred, even accounting for the additional 182-day tolling that resulted from the filing of the Notice of Intent in May 2019. The trial court rejected plaintiffs' argument that Mosley could not have reasonably discovered her injury until her consultation with Dr. McGlaston on January 22, 2019, as well as their claim that Dr. Mendelson committed "continuing malpractice" when he told her during her post-surgical visits that the prosthetic had been correctly implanted. Additionally, the trial court held that plaintiffs had failed to file their affidavit of merit with their complaint as required by MCL 600.2912d(1) or show good cause for filing the affidavit late, and that plaintiffs' complaint was therefore not actually "filed" until February 4, 2020. Accordingly, the trial court dismissed plaintiffs' complaint as untimely.

This appeal followed.

## II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). We also review de novo issues of statutory interpretation. *Id.*

> Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations. See *Wade v. Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute. *Tumey v Detroit*, 316 Mich 400, 410; 25 NW2d 571 (1947). In determining whether a plaintiff's claim is barred because of immunity granted by law, the reviewing court will accept the allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Although generally not required to do so, see MCR 2.116(G)(3), a party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must

> consider, *Maiden*, 461 Mich at 119; 597 NW2d 817, citing MCR 2.116(G)(5). The reviewing court must view the pleadings and supporting evidence in the light most favorable to the nonmoving party to determine whether the undisputed facts show that the moving party has immunity. *Tryc v Mich Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996). If there is no factual dispute, whether a plaintiff's claim is barred under the applicable statute of limitations is a matter of law for the court to determine. *Zwiers v Growney*, 286 Mich App. 38, 42; 778 NW2d 81 (2009). However, if the parties present evidence that establishes a question of fact concerning whether the defendant is entitled to immunity as a matter of law, summary disposition is inappropriate. *Id*. In those cases, the factual dispute must be submitted to the jury. See *Tumey*, 316 Mich at 411, 25 NW2d 571. [*Id*. at 522-523.]

## III. ANALYSIS

Plaintiffs argue that the trial court erred by determining that plaintiffs filed their medical malpractice complaint outside the two-year limitations period, and by holding that the "discovery rule" did not save plaintiffs' claim. We disagree in both respects.

### A. ACCRUAL OF MALPRACTICE CLAIM

Plaintiffs argue that the trial court erred by holding that the injury caused by Dr. Mendelson's alleged malpractice occurred on July 12, 2016, when Dr, Mendelson performed the total knee replacement surgery, and that plaintiffs' suit was therefore filed outside the two-year limitations period found in MCL 600.5805(8). We disagree.

"A person cannot sue another 'to recover damages for injuries to persons or property unless, after the claim first accrued to plaintiff . . ., the action is commenced within the periods of time prescribed' by statute." *Kincaid*, 300 Mich App at 523, quoting MCL 600.5805(1). MCL 600.5805(8) provides that "the period of limitations is 2 years for an action charging malpractice." A medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim of medical practice." MCL 600.5838a(1). Michigan does not recognize a "continuing-wrong or continuing-treatment rule." *Kincaid*, 300 Mich App at 528. Nonetheless, a plaintiff may be able, in some circumstances, to "allege multiple claims of malpractice premised on discrete acts or omissions" even when those acts lead to a single injury. *Id*. at 525. In such a case, those claims will have independent accrual dates based on the date of the specific act or omission at issue, and a plaintiff may be able to recover damages resulting from later acts or omissions despite the fact that the initial act occurred outside the limitations period. *Id*. However, a plaintiff may not simply rely on a physician's alleged on-going or continuing duty to act throughout the course of treatment, or on the physician "continu[ing] to adhere to a mistaken diagnosis or treatment plan throughout the duration of the patient-physician relationship." *Id*. at 528. Rather, a plaintiff must identify specifically how the physician breached the applicable standard of care in each discrete act or omission. *Id*. at 530.

Plaintiffs essentially argue that Dr. Mendelson committed a new act of malpractice each time he saw Mosley after the total knee replacement surgery and failed to realize that the prosthetic had been improperly implanted. Our review of plaintiffs' complaint, the Notice of Intent, and

plaintiffs' response to defendant's motion for summary disposition convinces us that plaintiffs have merely pled that Dr. Mendelson was negligent by adhering to his original mistaken diagnosis. Although plaintiffs provide some specific dates on which Dr. Mendelson ordered x-rays, ordered a CT scan, and referred plaintiff to a pain management specialist, they have not identified with any specificity how Dr. Mendelson breached the applicable standard of care in each instance, such as might give rise to separate accrual dates. *Id*. at 525. Rather, it appears from plaintiffs' filings that Dr. Mendelson initially diagnosed Mosley as suffering from normal post-surgical pain, and continued, throughout the relevant time period, treating Mosley as though her prosthetic had been correctly implanted but was nonetheless causing her pain. Even if this course of treatment was mistaken or negligent, it constitutes the sort of continued adherence to an initial diagnosis or treatment plan, under *Kincaid*, that does not result in separate accrual dates for separate individual acts of malpractice. See *Kincaid*, 300 Mich App at 534-535 (noting that the plaintiff's allegations that the defendant physician had failed to "inform, refer, and treat" her condition did not sufficiently allege discrete acts or omissions on specific dates after her first treatment) and n 4 (providing a "nonexhaustive list of examples" of possible unreasonable adherence to an initial diagnosis or treatment plan).

The trial court did not err by concluding that plaintiffs' medical malpractice claim accrued on the date of Mosley's total knee replacement surgery. *Kincaid*, 300 Mich App at 522. Therefore, plaintiffs' suit could only survive summary disposition if the limitations period were tolled and the suit filed within the tolling period.

## B. TOLLING OF LIMITATIONS PERIOD

Plaintiffs also argue that the trial court erred by holding that plaintiffs had not filed suit within the period during which the limitations period was tolled under MCL 600.5838a(2), when combined with the 182-day tolling period triggered by the filing of her Notice of Intent under MCL 600.2912b. We disagree. If the underlying relevant facts are undisputed, the question of when a plaintiff should have discovered her claim is a question of law. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997).

The limitations period of MCL 600.5805(8) is subject to a "discovery rule" exception, under which a claim for malpractice may be commenced after the expiration of the two-year limitations period if it is commenced within six months after a plaintiff discovered or should have discovered the claim. MCL 600.5838a(2). A plaintiff is not required to know with certainty that a defendant committed malpractice; "the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Solowy*, 454 Mich at 222. A plaintiff need only be "aware of an injury and its possible cause" so that she is "equipped with the necessary knowledge to preserve and diligently pursue" a claim for malpractice in order for the six-month period to begin to run. *Id*. at 223. The test for determining whether a plaintiff should have discovered a claim is an objective one, *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993), and is applied from the perspective of a reasonable layperson, not an expert, *Jendrusina v Mishra*, 316 Mich App 621, 631; 892 NW2d 423 (2016). When a case involves a delay in correctly diagnosing the cause of an illness or injury, "courts should maintain a flexible approach" in applying this standard and consider the totality of the information available to the plaintiff concerning the injury and possible causes. *Solowy*, 454 Mich at 230. However, a court must also keep in mind the "legitimate legislative purposes behind the rather stringent

medical malpractice limitation provisions" that include "the Legislature's concern for finality" and "encouraging a plaintiff to diligently pursue a cause of action." *Id*. at 222, 230.

MCL 600.2912b(1) provides that an action for medical malpractice shall not be commenced less than 182 days after the filing of a written notice of the plaintiff's intent to sue; this 182 period thus tolls the applicable limitations period. See *Tyra v Organ Procurement Agency of Michigan*, 498 Mich 68, 94; 869 NW2d 213 (2015) ("Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely [notice of intent] and then filing a complaint and an affidavit of merit after the applicable notice period has expired, but before the period of limitations has expired."). After the 182-day period, the clock begins running on whatever time remains in the applicable limitations period. *Id*. By way of example, if a plaintiff first discovered (or reasonably should have discovered) a claim for malpractice outside of the two-year statute of limitations period and filed a notice of intent four months later, the plaintiff would have two months to file suit once the 182-day tolling period had elapsed.

Plaintiffs argue that the trial court erred by determining that the six-month discovery rule period began running no later than December 12, 2018, was subsequently tolled by the filing of the Notice of Intent on May 21, 2019, and ultimately expired on December 11, 2019, nearly a month before plaintiffs filed their complaint. Instead, plaintiffs argue that the correct starting date for the discovery rule period was January 22, 2019, when Mosley consulted with Dr. McGlaston. We disagree.

Plaintiffs argue that, like the plaintiff in *Jendrusina*, Mosley did not receive sufficient information to become aware of her possible medical malpractice claim on the date the trial court fixed as the beginning of the limitations period. But *Jendrusina* is significantly distinguishable. This Court found in *Jendrusina* that the plaintiff had no way of knowing that his doctor might have committed malpractice when he was first diagnosed with kidney failure. *Jendrusina*, 316 Mich App at 630. The plaintiff had no previous history of kidney disease and was not informed of data from various testing that might have informed him that his kidney failure was the result of his physician's failure to diagnose a condition and refer him to a specialist. *Id*. at 631. This Court noted that it was "*possible* for plaintiff to have discovered the existence of a claim shortly after presenting to the hospital and being told that he had kidney failure" but that the plaintiff would have to have "undertaken an extensive investigation to discover more information than he had." *Id*. at 633. This Court declined to impose such a duty on the plaintiff. *Id*.

By contrast, in this case, Mosley was well aware that a possible cause of her pain and swelling was an improperly implanted prosthetic. In fact, Dr. Mendelson invited her to get a second opinion regarding his determination that the prosthetic was properly implanted. When Dr. Morawa informed her that he believed the prosthetic had been improperly implanted, Mosley was "equipped with the necessary knowledge to preserve and diligently pursue" a medical malpractice claim. *Solowy*, 454 Mich at 223. While it very well may have been reasonable, from a *medical* perspective, to seek confirmation of Dr. Morawa's opinion before scheduling surgery, Mosley possessed the requisite knowledge of a possible *legal* claim against defendants once she consulted with Dr. Morawa. In fact, plaintiffs' Notice of Intent (which was timely filed within six months of the December 12, 2018 date) states, "The appointment with Dr. Morawa was the moment [Mosley] had information that the knee replacement by Dr. Mendelson was improper and perhaps

malpractice." (Notice of intent, 2). We agree with plaintiffs' own statement, and hold that the trial court did not err by fixing the start of the discovery rule period as December 12, 2018. We further emphasize that plaintiffs timely filed their Notice of Intent within this period; however, they simply failed to file a complaint within the remaining portion of the limitations period once the 182 days required by MCL 600.2912b had elapsed. *Kincaid*, 300 Mich App at 522.

Because we determine that the trial court correctly held that the complaint itself was filed outside the limitations period for medical malpractice actions, we need not address the trial court's holding that plaintiff's complaint was not considered filed, for statute of limitations purposes, until the filing of the affidavit of merit. See *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000).

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola