STATE OF MICHIGAN

COURT OF APPEALS

NANCY XIONG,

Plaintiff-Appellee,

v

AMANDA GORSLINE, OD, MERIDIAN EYECARE, PC, and MERIDIAN EYECARE VISION & LEARNING CENTER, PLLC,

Defendants-Appellants.

UNPUBLISHED
December 16, 2021

No. 354702
Ingham Circuit Court
LC No. 20-000223-NH

Before: STEPHENS, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

In this interlocutory appeal, defendants appeal as on leave granted[1] the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7). We reverse.

I. BACKGROUND

Defendants provided eyecare to plaintiff for years. Beginning in 2009, plaintiff started complaining of symptoms with her eyes consistent with glaucoma, and she repeated these complaints over the ensuing years. Tests defendants took over these years consistently showed that plaintiff's eye-pressure levels were above the normal range, but defendants never recommended additional testing or treatments to address the issue. Plaintiff last visited defendants on October 25, 2016.

On February 5, 2018, plaintiff visited a new physician to have her eyes examined. At that exam, plaintiff's eye-pressure levels again tested elevated, and plaintiff's new physician referred plaintiff to a specialist out of concern. On February 8, 2018, the specialist, Dr. Sonia Rana,

[1] *Xiong v Gorsline*, unpublished order of the Court of Appeals, entered January 26, 2021 (Docket No. 354702).

diagnosed plaintiff with glaucoma. On February 16, 2018, Dr. Rana informed plaintiff that she had suffered permanent vision damage as a result of the delay in diagnosing the glaucoma.

Roughly 18 months later, on August 6, 2019, plaintiff served defendants with a notice of intent (NOI). In the NOI, plaintiff asserted that Dr. Rana had told her that the delayed diagnosis caused permanent damage and that defendants' failure to diagnose her with glaucoma was the basis of a potential lawsuit.

On April 22, 2020, plaintiff filed her complaint against defendants. In lieu of an answer, defendants moved for summary disposition, arguing that plaintiff's claim was time-barred because plaintiff had known about her claim since Dr. Rana told her that the delayed diagnosis caused permanent damage, and more than six months had elapsed since then. In answer, plaintiff argued that she did not know she had a claim until February 2020 when a specialist at the University of Michigan informed her that defendants breached the standard of care. In support of her answer, plaintiff attached (1) an affidavit in which she averred that she was first told that defendants breached the standard of care in February 2020 and (2) an affidavit from Dr. Rana in which the doctor stated that she did not tell plaintiff anything about whether defendants breached the applicable standard of care. After a hearing, the trial court denied defendants' motion. This appeal followed.

II. STANDARD OF REVIEW

On appeal, defendants argue that the trial court erred by denying their motion for summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants moved for summary disposition under MCR 2.116(C)(7). As applicable here, summary disposition is appropriate under that subrule if the action is barred by a statute of limitations. MCR 2.116(C)(7). "The question whether a cause of action is barred by the applicable statute of limitations is one of law, which this Court reviews de novo." *Frank v Linkner*, 500 Mich 133, 140; 894 NW2d 574 (2017) (quotation marks and citation omitted). When reviewing a motion for summary disposition made under MCR 2.116(C)(7), this Court considers "all documentary evidence and accept[s] the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it." *Id.* (quotation marks and citation omitted).

III. ANALYSIS

In general, the limitations period "is 2 years for an action charging malpractice." MCL 600.5805(8). However, in what has come to be known as the "discovery rule," MCL 600.5838a(2) provides that a malpractice action may be commenced "within 6 months after the plaintiff discovers or should have discovered the existence of the claim . . . ." "The burden of proving that the plaintiff . . . neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff." MCL 600.5838a(2). Plaintiff does not dispute that her complaint was filed after the two-year limitations period set forth in MCL 600.5805(8), and so her complaint is timely only if it was filed "within 6 months after the plaintiff discover[ed] or should have discovered the existence of the claim," MCL 600.5838a(2).

Our Supreme Court first addressed MCL 600.5838a(2)'s discovery rule in *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997). There, the plaintiff had developed a cancerous lesion on her left ear, and had it treated by Drs. Thomas and Joanna Chapel. *Id*. at 216. During the course of her treatment, Drs. Chapel told the plaintiff "that the cancer was 'gone' and that there was no chance of it recurring." *Id*. at 217. The plaintiff last treated with Drs. Chapel in 1986, and then about five years later, the plaintiff discovered another, similar lesion on her same ear. *Id*. at 216-217. Plaintiff met with a new doctor on March 27, 1992, who advised her that the lesion could be cancerous, but she would need to run more tests to know for certain. *Id*. On April 9, 1992, the new doctor informed the plaintiff that the lesion was indeed a recurrence of cancer. *Id*. The plaintiff filed suit on October 5, 1992—more than six months after being told that the lesion could be cancerous, but less than six months after learning that the lesion was indeed cancerous. *Id*. at 217-218.

The question before the Court in *Solowy* was whether the plaintiff's suit was timely, and the Court held that it was not. In so doing, the Court held that the possible-cause-of-action standard that had been used in other contexts applied to the discovery rule. *Id*. at 223. The Court explained, "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id*. In applying this standard to the facts of the case before it, the *Solowy* Court explained that the plaintiff "was aware of a possible cause of action no later than March 27, 1992," because it was at that time that "the plaintiff knew of an injury, i.e., the progression of the lesion on her ear, and its possible cause, i.e., the failure of Drs. Chapel to inform her that the cancer could recur and that she should seek follow-up treatment." *Id*. at 224.

In further explaining its ruling, the *Solowy* Court stated that that the possible-cause-of-action standard does not require that a plaintiff know that his or her injury "was in fact or even likely caused by the defendant doctors' alleged omissions." *Id*. In summing up the possible-cause-of-action standard, the Court explained that it "requires that the plaintiff possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id*.

Recently, in *Bowman v St John Hosp & Med Ctr*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket Nos. 160291, 160292); slip op at 13, our Supreme Court reiterated *Solowy*'s holding, explaining that the plaintiff in *Solowy* was aware of her possible cause of action on March 27, 1992, because it was at that time that she "had enough information at her disposal to know that her former doctors might have committed malpractice." The Court surmised, "In Ms. Solowy's case, she could have inferred the possibility of medical malpractice when [her new doctor's] statements directly contradicted those she'd received from her former doctors." *Id*. at ___; slip op at 15. Explaining the rule from *Solowy*, the *Bowman* Court said that a "plaintiff 'should have discovered' a possible cause of action when she learned facts from which she could have inferred, without speculation or conjecture, that an earlier professional might have committed malpractice." *Id*. at ___; slip op at 15. In other words, "a plaintiff 'should have discovered' a possible cause of action when the available facts would let her infer malpractice." *Id*. at ___; slip op at 17.

Applying the standard announced in *Solowy* and reiterated in *Bowman* to the facts of this case, we have little difficulty concluding that plaintiff "should have discovered" a possible cause of action on February 16, 2018, when Dr. Rana informed plaintiff that she had suffered permanent

vision damage as a result of the delay in diagnosing her glaucoma. At that time, plaintiff knew that she had suffered an injury (permanent vision damage) and the cause of that injury (a delayed diagnosis). From this information and plaintiff's treatment history, plaintiff could have inferred that defendants might have committed malpractice. Plaintiff had treated with defendants for years, and had complained of symptoms with her eyes dating back to 2009, yet defendants did little. Then, on February 5, 2018, defendant met with a new physician and again complained about symptoms with her eyes. This new doctor immediately referred plaintiff to Dr. Rana, who diagnosed plaintiff with glaucoma three days later, and, just eight days after that, informed plaintiff that she had suffered permanent vision damage as a result of a delayed diagnosis. In short, plaintiff complained to defendants about problems with her eyes for years and defendants did virtually nothing, and then when plaintiff made the same complaints to a different doctor, she was informed just 11 days later that not only she did she have glaucoma but that the delayed diagnosis caused permanent vision damage. This information clearly suggested a nexus between defendants' failure to timely diagnose glaucoma and plaintiff's permanent vision loss. See *Solowy*, 454 Mich at 226. In other words, on the basis of the information known to plaintiff following her appointment with Dr. Rana on February 16, 2018, plaintiff "could have inferred, without speculation or conjecture, that [defendants] might have committed malpractice," and she therefore " 'should have discovered' a possible cause of action" at that time. *Bowman*, ___ Mich at ___; slip op at 15.

In arguing against this result, plaintiff contends that defendants failed to present "supportive evidence to address the precise knowledge and information [plaintiff] possessed or was told and when she possessed the information or was told, making any analysis superfluous." Contrary to plaintiff's argument, defendants provided support for their claim that Dr. Rana told plaintiff that her permanent vision loss was the result of a delayed diagnosis at plaintiff's February 16, 2018 appointment by pointing to plaintiff's notice of intent, wherein plaintiff stated that at the February 16, 2018 appointment, she was "told by Dr. Rana that her optic nerves have been damaged and cannot be repaired, a direct result of the delayed diagnosis." Plaintiff contends that defendants "do not have any verification of Dr. Rana ever discussing a delayed diagnosis," but it is unclear what "verification" defendants needed in light of this fact being averred to by plaintiff in the notice of intent. See *Podmajersky v Dep't of Treasury*, 302 Mich App 153, 166-167; 838 NW2d 195 (2013) (holding that a letter written by party's attorney was admissible evidence against the party).[2] Regardless, plaintiff admits on appeal that, after speaking with Dr. Rana, "she . . . knew that a delay existed and it caused the damage to her optic nerves." As explained, this information coupled with her treatment history would let plaintiff infer malpractice by defendants.

Plaintiff contends that defendants are not entitled to summary disposition on the basis of *Jendrusina v Mishra*, 316 Mich App 621, 626; 892 NW2d 423 (2016), wherein this Court explained that under *Solowy* "the inquiry is not whether it was *possible* for a reasonable lay person

[2] To any extent that plaintiff's affidavit that she attached to her answer to defendants' motion for summary disposition could be construed as plaintiff averring that Dr. Rana never discussed a delayed diagnosis with plaintiff, such an averment directly conflicts with the statements in plaintiff's notice of intent, and plaintiff cannot create a question of fact by submitting an affidavit contradicting her previous statements. See *Cox v Hartman*, 322 Mich App 292, 302 n 6; 911 NW2d 219 (2017).

to have discovered the existence of the claim; rather, the inquiry is whether it was *probable* that a reasonable lay person would have discovered the existence of the claim." *Jendrusina* further explained that the measure is that of "a reasonable person, not a reasonable physician." *Id*. at 634. Relying on *Jendrusina*, plaintiff maintains that it was only probable that a reasonable person would have discovered her claim against defendants when she knew that defendants had breached the standard of care—knowledge that she did not possess until February 2020 when she met with a specialist at the University of Michigan. However, *Jendrusina* simply does not support plaintiff's argument that "[o]nly when [plaintiff] possessed sufficient knowledge of . . . the standard of care for optometrists diagnosing and treating glaucoma did the statutory obligation to institute the instant claim within 6 months begin."[3]

Yet, even if *Jendrusina* did support plaintiff's argument (which it does not), it would unquestionably conflict with both *Solowy* and *Bowman*, and we therefore could not follow it. See *Charles A Murray Trust v Futrell*, 303 Mich App 28, 48-49; 840 NW2d 775 (2013) (explaining that this Court must follow the opinions of our Supreme Court, and because only the Supreme Court can overrule itself, if an opinion of this Court conflicts with an opinion of the Supreme Court, this Court must follow the edicts of the Supreme Court). In *Solowy*, no one told the plaintiff that her previous doctors had violated the standard of care at her March 27, 1992 appointment, yet our Supreme Court held that she should have discovered her claim at that time. *Solowy*, 454 Mich

[3] We note that plaintiff's argument significantly differs from the plaintiffs' arguments in *Jendrusina* and *Solowy*. In those cases, the plaintiffs argued that they should not have discovered their injuries—and therefore their claims—before the injuries were diagnosed. In *Solowy*, the question was whether the plaintiff should have discovered her claim before tests confirmed that the lesion on her ear was cancerous, *Solowy*, 454 Mich at 216, and in *Jendrusina*, the question was whether the plaintiff should have discovered that his treating doctor failed to diagnose kidney disease after he was admitted to the hospital with kidney failure, *Jendrusina*, 316 Mich App at 631. *Solowy* concluded that the plaintiff should have discovered her cause of action after she was told that the lesion *could* be cancerous because that contradicted what her previous doctors had told her. *Solowy*, 454 Mich at 224. In *Jendrusina*, however, no one had told the plaintiff "that he had kidney disease or that he might develop kidney disease" before he was admitted to the hospital, and it was not until he met with a nephrologist a year after being admitted to the hospital with kidney failure that he learned he possibly had kidney disease. *Jendrusina*, 316 Mich App at 625-627. Here, unlike in both those cases, it is undisputed that plaintiff received the diagnosis of her injury more than six months before she filed her complaint. That is, she is not arguing that she should not have discovered her injury more than six months before filing her complaint—the situations cautioned of in *Solowy*, 454 Mich at 226 ("We caution, however, that a delay in diagnosis may delay the running of the six-month discovery period in some cases. Some illnesses and injuries may defy even a possible diagnosis until a test, or a battery of tests, can limit the possibilities. In such a case, it would be unfair to deem the plaintiff aware of a possible cause of action before he could reasonably suspect a causal connection to the negligent act or omission."). Instead, plaintiff only argues that she should not have discovered that defendants *breached the standard of care* more than six months before her complaint was filed. That argument is markedly different from the arguments made by the plaintiffs in *Solowy* and *Jendrusina*.

at 225. Moreover, the Court said in no uncertain terms that the possible-cause-of-action standard does not require that a plaintiff know that his or her injury "was in fact or even likely caused by the defendant doctors' alleged omissions." *Id*. at 224. Even more explicitly, our Supreme Court in *Bowman* explained that "a plaintiff is not entitled to await a definitive professional opinion" to determine whether he or she has a possible cause of action. *Bowman*, ___ Mich at ___ n 4; slip op at 18 n 4 (quotation marks and citation omitted). In light of this authority, plaintiff's argument that she should have discovered her claim only after medical professionals had informed her that defendants had breached the standard of care is without merit.

Relying on her same mistaken reading of *Jendrusina*, plaintiff argues that her and Dr. Rana's affidavits that she attached to her answer to defendants' motion for summary disposition foreclose a conclusion that plaintiff should have discovered her claim before February 2020 because both affiants averred that Dr. Rana never told plaintiff that defendants breached the standard of care. For the reasons previously explained, plaintiff did not need a medical opinion that defendants breached the standard of care before she could infer that defendants might have committed medical malpractice. Thus, the information in plaintiff's and Dr. Rana's affidavits did not preclude summary disposition.

IV. CONCLUSION

For the reasons explained in this opinion, we conclude that the facts available to plaintiff following her February 16, 2018 appointment with Dr. Rana were sufficient to allow her to infer malpractice by defendants, and therefore she should have discovered her claim at that time.[4] Plaintiff filed her complaint more than six months after February 16, 2018, and more than two years after her final visit with defendants on October 25, 2016. Accordingly, plaintiff's complaint is time-barred, and the trial court should have granted summary disposition to defendants.

Reversed.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien

[4] We acknowledge that in *Bowman*, our Supreme Court outlined a new requirement of diligence when determining whether a plaintiff should have discovered a claim. Under this diligence requirement, if "the facts should arouse her suspicion," then a plaintiff has a "duty to investigate" whether he or she has a claim. *Bowman*, ___ Mich at ___; slip op at 16. We decline to address whether the facts in this case should have aroused plaintiff's suspicions and whether she adequately fulfilled her "duty to investigate" given that we resolved this case under the standard announced in *Solowy*.