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Court of Appeals of Michigan.
Joseph E. McGUIRE, Plaintiff-Appellant,
v.
Walter BRADLEY, D.O., Defendant-Appellee.

Docket No. 73196.
Submitted March 21, 1984.
Decided May 21, 1984.
Released for Publication Nov. 9, 1984.

Patient brought malpractice action against osteopath following treatment for an ankle injury. The Circuit Court, Wayne County, Thomas J. Brennan, J., granted accelerated judgment to osteopath, and patient appealed. The Court of Appeals held that patient did not meet his burden of proving that he, as a result of physical discomfort, appearance, conditions or otherwise, neither discovered nor should have discovered the existence of his claim before expiration of the six-month limitation period.

Affirmed.

West Headnotes

[1] Limitation of Actions 241 95(12)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action
241k95 Ignorance of Cause of Action
241k95(10) Professional Negligence or Malpractice
241k95(12) k. Health Care Professionals in General. Most Cited Cases
(Formerly 241k95(1))

For limitations purposes, when patient received a second diagnosis and treatment from a specialist, he either knew, or should have known, of the existence of his claim against osteopath who originally treated him for an ankle injury. M.C.L.A. § 600.5838(2).

[2] Limitation of Actions 241 197(2)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k194 Evidence
241k197 Weight and Sufficiency
241k197(2) k. Ignorance, Trust, Fraud, and Concealment of Cause of Action. Most Cited Cases

Patient did not meet his burden of proving that he, as a result of physical discomfort, appearance, condition or otherwise, neither discovered nor should have discovered the existence of his malpractice claim against osteopath before expiration of the six-month limitation period. M.C.L.A. § 600.5838(2).

****4 *288** D. Michael O'Bryan, Southfield, for plaintiff-appellant.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen by Robert G. Kamenec, Detroit, for defendant-appellee.

Before KELLY, P.J., and BEASLEY and O'BRIEN,[FN*] JJ.

FN* John N. O'Brien, 6th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to Const.1963, Art. 6, Sec. 23, as amended 1968.

PER CURIAM.

Plaintiff-appellant, Joseph E. McGuire, appeals from an order granting accelerated judgment to defendant-appellee, Walter Bradley, D.O., in an osteopathic malpractice case.

In May, 1978, plaintiff injured his ankle during a motorcycle race and sought medical attention from defendant. Defendant diagnosed plaintiff's injury as pulled tendons in the right ankle, gave him a pair of crutches, prescribed medication for the swelling, and advised him to stay off the ankle. Plaintiff says that he saw defendant****5** three weeks later and was told that the pain which he was ***289** experiencing was not uncommon for his type of injury and that he should gradually try to walk on the ankle.

Subsequently, on the advice of a friend, plaintiff went to a specialist for a second opinion because of persistent pain and an inability to walk without a limp. The specialist found a broken bone in plaintiff's ankle and immediately performed surgery in October, 1978. Eventually, in November, 1981, after experiencing further and continuing discomfort, plaintiff returned to defendant and was told he had arthritis in the ankle. Defendant's medical assistant has purportedly told him then that the lapse in time between the injury and the surgery would cause arthritis to build. Medication was prescribed for the arthritic condition and plaintiff then sued defendant for malpractice.

The trial court found that, as a matter of law, plaintiff discovered, or should have discovered, his cause of action against defendant in September, 1978, at the time that he received a second contradictory diagnosis indicating the existence of a broken bone in his ankle. Plaintiff argues that he only knew of the claim when apprised of the cause of his arthritis by defendant's medical assistant in November, 1981, and that a question of fact thus exists which precludes accelerated judgment in favor of defendant. Plaintiff's complaint was filed on December 11, 1981.

Under M.C.L. § 600.5838(2); M.S.A. § 27A.5838(2), plaintiff was obliged to assert his claim for malpractice within six months "after the plaintiff discovers or should have discovered the existence of the claim, whichever is later".

The statute also provides that the burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition or otherwise, ***290** neither discovered nor should have discovered the existence of the claim at least six months before the expiration of the period otherwise applicable to the claim is on the plaintiff. The statute further provides that a malpractice action not commenced within this time period is barred.

In *Adkins v. Annapolis Hospital*,[FN1] plaintiff suffered a fractured foot, which was misdiagnosed at the hospital, and plaintiff was discharged. The trial court found that, at the point when another doctor correctly diagnosed the fracture, plaintiff had reason to know that the previous treatment was improper. Since he failed to act within the six-month period, this Court found that the trial court properly granted defendant's motion for accelerated judgment.

FN1. 116 Mich.App. 558, 323 N.W.2d 482 (1982), *lv. gtd.* 417 Mich. 1043 (1983).

[1][2] In the within case, it seems clear that when plaintiff received the second diagnosis and treatment from the specialist he either knew, or should have known, of the existence of his claim. He does not, nor is he apparently able to, assert facts which would meet the statutory burden of proof placed upon him. We do not believe that he has raised issues of fact which, if treated in the light favorable to him, would preclude accelerated judgment.

Consequently, we decline to interfere with the conclusion of the trial judge that plaintiff's claim was

barred and accelerated judgment should be granted. [FN2]

FN2. *Wallisch v. Fosnaugh*, 126 Mich.App. 418, 336 N.W.2d 923 (1983); *Leyson v. Krause*, 92 Mich.App. 759, 285 N.W.2d 451 (1979); *Adkins v. Annapolis Hospital*, *supra*.

Affirmed.

Mich.App.,1984.
McGuire v. Bradley
137 Mich.App. 287, 358 N.W.2d 4

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