

STATE OF MICHIGAN
COURT OF APPEALS

DREAMLA KAY CLARK and CHARLES
CLARK,

UNPUBLISHED
December 13, 2002

Plaintiffs-Appellants,

V

No. 233739
Tuscola Circuit Court
LC No. 99-018250-NH

JACK MARTIN, DDS, and JACK MARTIN,
DDS, PC,

Defendants-Appellees.

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

In this dental malpractice case, plaintiffs appeal as of right an order granting summary disposition for defendants. Plaintiffs assert that their action is not barred by the six-year statute of repose because defendants wrongfully left a foreign object in her body and fraudulently concealed the cause of action. We affirm.

This Court reviews a trial court's ruling on a summary disposition motion de novo. *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In determining whether a party is entitled to judgment as a matter of law under MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in plaintiff's favor. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001); *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, whether the statute of limitations bars the claim is a question of law reviewed de novo. *Id.*

In general, the statute of limitations for a medical malpractice claim is two years from the time the claim accrued. MCL 600.5805(5). But if the injury is not discovered within two years, MCL 600.5838a(2) – a statute of repose – allows a plaintiff to bring a claim for a maximum period of six years, although within that time frame, the claim must be brought within six months from when the injury is discovered or should have been discovered. MCL 600.5838a(2).

Additionally, the previous version of MCL 600.5838a(2) applies to plaintiffs' claim. See 1993 PA 178. That subsection contained a foreign-body exception that permitted claims to be brought past the statute of repose "[i]f a foreign object was wrongfully left in body of the

patient.”¹ MCL 600.5838(2)(b). However, the suit still had to be commenced within six months of when the injury was or should have been discovered, unless MCL 600.5805 or 600.5851-5856 applied. MCL 600.5838(3).

Of these exceptions, MCL 600.5855 would apply if plaintiffs’ fraudulent concealment claim is valid. In cases of fraudulent concealment, a plaintiff has two years from the time the claim is discovered or should have been discovered to file suit. *Id.*

To invoke the fraudulent concealment exception, defendants must have fraudulently concealed the fact that plaintiff had a cause of action. *Eschenbacher v Hier*, 363 Mich 676, 681; 110 NW2d 731 (1961). Plaintiffs sufficiently alleged specific acts or misrepresentations that amounted to fraudulent concealment in their complaint. See *Sills v Oakland General Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996).

Fraudulent concealment is defined as follows:

“Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent.” [*Dunmore v Babaoff*, 149 Mich App 140, 145; 386 NW2d 154 (1985), quoting *DeHaan v Winter*, 258 Mich 293, 296; 241 NW 923 (1932).]

“[M]ere silence is not enough” to establish fraudulent concealment. *Id.* at 145-146. “A fraudulent concealment claim cannot be established unless the plaintiff proves some affirmative act or misrepresentation on the part of the defendant which is designed to prevent subsequent discovery.” *Id.* at 146.

However, in cases where a defendant owes the plaintiff a fiduciary duty, a higher standard exists, and this Court will closely examine the facts to determine whether the doctor made sufficient disclosures and whether what the doctor said or did not say was fraudulent concealment. *Eschenbacher, supra* at 679-680; *Walerych v Isaac*, 63 Mich App 478, 482; 234 NW2d 573 (1975); *Kroll v VandenBerg*, 336 Mich 306, 311-312; 57 NW2d 897 (1953).

Plaintiff’s evidence showed that Dr. Martin viewed the x-ray he took after filling her roots and determined that the amount the titanium extruded past the apex was acceptable. Her expert also agreed that the root canal was performed within the standard of care provided that she was informed of the extrusion.

Moreover, plaintiff failed to show that when Dr. Martin told her that her problems were not related to her tooth, he knew otherwise. The pain plaintiff complained of was not in the area of her tooth. Her other physicians diagnosed the problem as sinus-related. There was no evidence that Dr. Martin knew her problems were the result of the overfilled root. Misdiagnosis may be negligence, but it is not fraudulent concealment. *Sills, supra* at 310.

¹ Unless otherwise noted, all references to MCL 600.5838a are to the previous version of the statute that governs plaintiffs’ claim.

Plaintiff failed to present a question of fact that defendant fraudulently concealed a cause of action from her, and the trial court correctly held that her claim was barred under the statute of repose.

Plaintiff next claims that the titanium fill Dr. Martin inserted into her root canal was a wrongfully left foreign object.

Plaintiff's expert, Dr. Ash, was deposed and testified that the technique Dr. Martin used to perform plaintiff's root canal, the solid core technique, is accepted by the dentistry profession. Further, Dr. Ash acknowledged that although at first she thought the object was a broken file, after reviewing Dr. Martin's records, she did not dispute that it was part of the titanium solid core he had inserted into plaintiff's root canal.

The rules of statutory construction require this Court to give effect to the intent of the Legislature. *Omelenchuk v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002), citing *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). Where the language of the statute is unambiguous, this Court applies the "ordinary and generally accepted meaning" and forgoes judicial construction. *Tryc, supra* at 135, citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). Although if the language is ambiguous, this Court may examine legislative history, *Luttrell v Dep't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984), there is no recorded legislative history explaining this provision.

Because the foreign-object provision was an exception to the statute of repose for medical malpractice claims, we conclude that leaving a foreign object in a patient's body is necessarily different than negligence in performing the procedure. We also conclude that the Legislature did not intend to encompass instances where an object was purposely left but slightly misplaced. Rather, the Legislature more likely intended that claims regarding poorly placed items be construed as general medical malpractice.

This conclusion is in line with the interpretations of other jurisdictions interpreting similar statutes. See *Meadors v Still*, 344 Ark 307; 40 SW3d 294, 300 (2001) (finding that an overfilled breast implant was not a foreign object because it was not "unknown"); *Fisher v McCrary-Rost Clinic, PC*, 580 NW2d 723 (Iowa 1998) (holding that a clip on a fallopian tube was not a foreign object because it was deliberately left, even though it was misplaced); *Shah v Lehman*, 953 SW2d 955 (Mo App ED 1997) (finding that a negligently but intentionally placed hip restrictor was not a foreign object); *Newman v Keuhnelian*, 248 AD2d 258; 670 NYS2d 431 (1998) (finding that a catheter was a fixation device excluded from the statutory definition of foreign object).

We therefore hold that the titanium fill purposely inserted into plaintiff's root canal was not a foreign object within the meaning of the exception to the statute of repose. The fact that it extended slightly beyond what may have been deemed a perfect placement did not transform this deliberately placed filling into a "foreign object." The trial court was therefore correct in holding that the statute of repose barred plaintiff's claim.

Affirmed.

/s/ Richard Allen Griffin

/s/ Helene N. White

/s/ Christopher M. Murray