STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

WILLIAM GRIMES and VIRGINIA GRIMES, husband and wife,

Plaintiffs,

vs

File No. 92-10601-NH
HON. PHILIP E. RODGERS, JR.

JOHN O. ZACHMAN, M.D., Individually, JOHN O. ZACHMAN, M.D., P.C., JOHN G. MILLIKEN, M.D., F.A.C.P., P.C., LEE W. HAWKINS, M.D., P.C., WILLIAM A. HOWARD, M.D., P.C., JAMES G. MILLIKEN, M.D., F.C.C.P., P.C., and S. LEE WARNAAR, M.D., d/b/a MILLIKEN MEDICAL BUILDING, Jointly and Severally,

Defendants.
_____/

Michael R. Dunn (P13024)
Attorney for Plaintiffs

R. Jay Hardin (P35458)
Attorney for all Defendants except Hawkins

Louis A. Smith (P20687)
Attorney for Defendant Hawkins

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Attorney for Defendant Hawkins

DECISION AND ORDER

In this medical malpractice litigation, Plaintiffs assert that Defendant Dr. John O. Zachman was negligent in not referring Plaintiff William Grimes to a urologist when he discovered nodularity on Mr. Grimes' prostate in 1987. In Count I, Plaintiffs claim, among other things, that Defendant Zachman failed to "properly treat, test and care for" Plaintiff William Grimes. Count II is Plaintiff Virginia Grimes' complaint for loss and interference with the parties' conjugal relationship.

The parties have filed cross-motions for summary disposition. First, all Defendants, except Defendant Zachman and Defendant Hawkins, filed a motion for dismissal based on non-involvement, pursuant to MCR 2.119 and MCL 600.2912c; MSA 27A.2912(3). Within a few days, Defendant Hawkins filed a similar motion. With those two motions, all of the named Defendants, except Defendant John O. Zachman, filed Affidavits of Non-Involvement.[1] Plaintiffs timely responded to this Court's Pre-Hearing Order which set forth the time frames for response and reply to the motions for summary disposition based on non-involvement.

On October 26, 1993, pursuant to the parties' stipulation, this Court granted Defendants' motion for summary disposition based on non-involvement "to the extent that Plaintiffs shall not assert claims of active negligence against the aforementioned Defendants." The Order states that, "Plaintiff may continue to assert that said Defendants are vicariously liable for the alleged negligence of Dr. Zachman." The named Defendants retain "the right to seek dispositive relief on any and all theories of vicarious liability that have been pled against them."

Defendants Zachman, Milliken, Howard, Milliken, and Warnaar subsequently filed a motion for summary disposition pursuant to MCR (C)(7) and (10); Defendant Hawkins joined in the motion. Defendants argue that Plaintiffs' claims are barred by the applicable statutes of limitation, MCL 600.5838a; MSA 27A.5838(1) and MCL 600.5838(2); MSA 27A.5838(2).

Plaintiffs timely filed their response to this motion and a cross-motion pursuant to MCR 2.116(I). A hearing on the motions was held on October 25, 1993. As requested by the Court, the parties filed supplemental briefs within 14 days of their oral arguments. This Court has reviewed the motions, the briefs,

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[1] Defendant John O. Zachman was William Grime's primary physician and is the only Defendant whose treatment, actions or omissions are the subject of this action. The remaining Defendants are alleged to be vicariously liable.

affidavits, transcripts and the Court file.

The standard of review for a (C)(7) motion is set forth in Moss v Pacquing, 183 Mich App 574, 579 (1990).

> In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. Wakefield v Hills, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. Levinson v Sklar, 181 Mich App 693, 697; 449 NW2d 682 (1989); Hazelton v Lustig, 164 Mich App 164, 167; 416 NW2d 373 (1987).

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741 (1989).

> A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).
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> The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372.

The statutory provisions regarding the accrual of a professional negligence claim are found in MCL 600.5838, which reads, as follows:

> (1) Except as otherwise provided in sectional 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed professional accrues at the time that person discontinues serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
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> (2) Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. 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 shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.

MCL 600.5805; MSA 27A.5805 otherwise provides for a two year time limit on malpractice claims.

MCL 600.5838a, describes when a medical malpractice claim accrues and the burden of proving a timely claim. It provides, as follows:

> (1) A claim based on the medical malpractice of a person who is, or who holds himself or herself out to be, a licensed health care professional, licensed health facility or agency, employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, or any other health care professional, whether or not licensed by the state, accrues at the time of the act or omission which is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
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> (2) . . . The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, 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 shall be on the plaintiff. A medical malpractice action which is not commenced within the time prescribed by this subsection is barred.

The parties agree that Dr. Zachman provided medical treatment to William Grimes during the years 1974 to 1980; and that he last saw Mr. Grimes as a patient was on October 9, 1990. There is no dispute that this suit was filed more than two years after the last date of treatment. MCL 600.5838(1). The issue, then, is whether the complaint was filed within six months of when the claim was discovered or should have been discovered. MCL 600.5838(2); MCL 600.5838a.

The chronology of Mr. Grimes' medical treatment, and subsequent activity of his counsel, physicians and a medical expert, is central to this Court's consideration of the instant motions. In their brief in opposition to Defendants' motion for summary disposition and in support of their motion, Plaintiffs set forth, as undisputed facts, the following chronology:

> 1. That the alleged malpractice occurred on October 27, 1987, and thereafter, when the defendant, Dr. Zachman, noted "nodularity" and failed to refer the plaintiff to a urologist.
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> 2. Dr. Zachman last performed a rectal examination in September, 1990. Through that date he never referred the plaintiff to a urologist.
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> 3. Plaintiff was first seen by a urologist on November 5, 1990, and thereafter, on the basis of the urological work-up was told he had a probable cancer of the prostate.[2]
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> 4. The plaintiff first consulted with attorney Michael Dunn in October of 1991.
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> 5. Plaintiff's attorney received defendant's medical records in mid to late December of 1991. Additional relevant records were received in the early part of 1992,

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[2] This Court notes that Dr. Borden's hand-written record of the consultation (Exhibit 2 attached to Defendants' supplemental brief) shows that he recorded the chief complaint thusly, [patient] "knows prostate is enlarged and Dr. up north suggested f/u here with urologist."

including those from Duke University Medical Center in North Carolina and Dr. Borman [sic] in Florida.

6. Plaintiffs' counsel forwarded all records to Dr. Timothy McHugh for review in June, 1992. An additional copy of Dr. Zachman's record was forwarded in July of 1992.

7. Dr. McHugh expressed his expert opinion to Michael Dunn in a conference on September 1, 1992 that malpractice had been committed, and further communicated the details of that malpractice as previously set forth in this brief.

8. Suit was filed on November 30, 1992.

Plaintiffs take the position that they did not know they had a cause of action until Dr. McHugh opined in the fall of 1992 that Dr. Zachman's failure to refer Mr. Grimes to a urologist in 1987 was malpractice. On this basis, Plaintiffs argue that this litigation was timely filed.

Defendants, in their supplemental brief, present as undisputed facts, a description of Dr. Zachman's treatment of Mr. Grimes, the patient's medical sequelae and offer documentary support. First, Defendants show that Dr. Zachman provided treatment to Mr. Grimes for sixteen years and that he examined the patient's prostate gland twelve times. The following information is provided in the Defendants' brief:

4. Dr. Zachman did not refer Plaintiff to a urologist at any time. (Exhibit A and Plaintiffs' Brief in Opposition, p 16)

5. Dr. Zachman last provided medical care or treatment to Plaintiff on October 9, 1990. (Exhibit A)

6. An internist in Florida (Dr. Reeves) referred Plaintiff to a urologist (Dr. Borden) less than one month after this last treatment. (Exhibit 1 -- Reeves letter and Exhibit 2 -- Borden record)

7. On November 5, 1990, Dr. Borden performed a prostate examination and based on the findings ordered follow up tests. (Exhibit 3 -- Borden Letter)

8. On November 17, 1990, a working diagnosis of prostate cancer was confirmed. (Exhibit 4 -- Pathology

Report and Exhibit 5 -- Borden Letter)

9. On November 20, 1990, at Plaintiff's request, Dr. Zachman forwarded a complete medical record, including the type-written notes describing nodularity and nodules, to Plaintiff and his physicians. (Exhibit A)

10. On December 11, 1990, Plaintiff had surgery. (Exhibit 6 -- Operative Note)

11. The following spring, in April 1991, [sic][3] Plaintiff had a second surgical procedure because the cancer had spread outside the gland. (Exhibit 7)

12. In October 1991, Plaintiff consulted attorney Michael Dunn to investigate a medical malpractice claim. (Plaintiffs' Brief in Opposition p. 16)

13. On December 17, 1991, Dr. Zachman sent his medical record, including the type-written notes describing the prostate examinations to Michael Dunn, as legal counsel to Plaintiff. (Exhibit A)

14. In January, 1992, Plaintiff's [sic] counsel obtained records from subsequent treaters. (Plaintiffs' Brief in Opposition, p. 19)

15. On June 15, 1992, more than six (6) months after he received Dr. Zachman's medical record, Plaintiff's [sic] counsel forwarded them to an expert witness for review. (McHugh Letter attached to Plaintiffs' Brief in Opposition, p. 16)

Defendants argue that Plaintiff Grimes knew or should have known that he had a possible cause of action against Dr. Zachman when he underwent surgery in December, 1990.

In its consideration of the instant (C)(7) and (10) motions, this Court found the Supreme Court's recent opinion in Moll v Abbott Laboratories, 444 Mich 1; ____ NW2d ____ (1993) to be both persuasive and instructive.[4] Plaintiffs object to Defendants' reliance on Moll, and argue that it must be distinguished as a

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[3] The second surgical procedure was performed in April, 1992.

[4] The Moll Court addressed claims of women whose mothers had taken the prescribed drug DES while pregnant for the Moll plaintiffs.

pharmaceutical product liability case. The asserted topical distinction has not been shown to have legal merit.

To the contrary, there is significant similarity between the latent development of symptomatology and later manifestation of diseases and conditions which ultimately result in medical malpractice claims and products liability claims related to either pharmaceutical products or asbestos exposure. By their nature, certain diseases and conditions progress and are undetectable or undetected for long periods of time; not infrequently, the disease process does not reveal itself until it has undergone significant development. The legal issues relevant to the application of statutes of limitation in all such cases is quite similar, and require the Court to determine when the Plaintiff knew or should have known of a condition which was arguably the fault, in whole or in part, of a product or another's negligence. The Moll case, albeit one predicated on a pharmaceutical product liability complaint, does contain a discussion of fact and law analogous to this medical malpractice action.

Plaintiffs argue that their attorney had a duty to collect all pertinent medical records, find a well qualified and appropriate expert, obtain a full and thorough review and a written letter of merit prior to filing the lawsuit. The claim does not accrue, according to this analysis, until Plaintiffs' counsel is satisfied that all elements of the case have been discovered. Thus, Plaintiffs argue their claim did not accrue until they received an opinion from their expert.[5]

> In order to discover the existence of the claim the plaintiff must know of the act or omission of the defendant and have reason to believe that the medical treatment was improper or was performed in an improper manner. Leavy v Rupp, 98 Mich App 145 (1979); Leyson v Krauss, 92 Mich App 759 (1979); Jackson v Vincent, 97

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[5] Plaintiffs confuse the standard of care applicable to their attorney with the accrual of a cause of action. As will be discussed ahead, Michigan law contemplates filing a cause of action and provides time to secure the requisite medical opinions or the case may be dismissed without prejudice and without sanctions.

Mich App 568 (1980); Pendelle v Jarka, 156 Mich App 405, 412 (1987).

> It is undisputed that neither plaintiffs nor plaintiffs' counsel discovered the act or omission of the defendant and the fact that it rendered the medical care improper until Dr. Timothy McHugh advised plaintiffs' counsel that the defendant, Dr. Zachman, had found nodularity of the prostate, and that such was an indicator of possible cancer. That specific factual information rendered Dr. Zachman's failure to refer the plaintiff to a urologist as improper medical care. This information was not received until September 1, 1992 and the lawsuit was filed within six months from that date, therefore timely under the discovery statute. Plaintiffs' supplemental brief at p 12.

This Court disagrees with Plaintiffs' analysis. The Supreme Court has adopted an objectively verified discovery rule to determine the accrual of medical malpractice, products liability, asbestos and pharmaceutical products liability cases. Johnson v Caldwell, 371 Mich 368, 379; 123 NW2d 785 (1963); Larson v Johns-Manville, 427 Mich 301; 399 NW2d 1 (1986). The Moll Court carefully delineated the conditions precedent to the accrual of such claims:

> A cause of action for personal injuries accrues when a plaintiff can allege, in a complaint, each element of the asserted claim. Generally, a well-pleaded claim for personal injury must allege that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, (3) the defendant's breach was the proximate cause of the plaintiff's injuries, and (4) damage. Connelly[6] at 150. However, in a pharmaceutical products liability action, as in other cases in which we have applied the discovery rule, the defendant's duty and breach generally predate the plaintiff's awareness of an injury and of its cause. Accordingly, under the discovery rule, the plaintiff's claim accrues when the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered, the two later occurring elements: (1) an injury, and (2) the causal connection between plaintiff's injury and the

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[6] Connelly v Paul Ruddy's Co, 388 Mich 146; 200 NW2d 70 (1972).

defendant's breach. See, generally, Caldwell, Polgar[7], and Larson, supra.

The Supreme Court discussed its rationale for adopting an objective test to determine when the discovery period begins, and those remarks are equally applicable to this Court's consideration of the instant motion:

> While we have provided judicial relief to plaintiffs whose actions would be barred by the statute of limitations through no fault of their own, id., we will not encourage and cannot allow a plaintiff to sleep on an objectively known cause of action.
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> Adoption of a subjective test would allow a DES plaintiff to legally forestall suit until the time she is convinced that she is injured.
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> "If plaintiff prevails on question at issue here, that point is never reached until a plaintiff is subjectively certain of the cause of the injury. That, of course, will never be more than three years prior to filing the complaint because the date of such 'discovery' will be completely under the control of the plaintiff." Keith-Popp v Eli Lilly & Co, 639 F Supp 1479, 1482 (WD Wisc, 1986).
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> We have consistently held that under the discovery rule, a cause of action accrues when "the claimant knows or should have known of the disease [injury] . . . .[8] While the term "knows" is obviously a subjective standard, the phrase "should have known" is an objective standard based on an examination of the surrounding circumstances. Consequently, we find that a plaintiff's cause of action accrues when, on the basis of objective facts, the plaintiff should have known of an injury[.]

Moll, supra, at ____.[9]

The Moll Court cautioned that the discovery period commences when the plaintiff has a "possible cause of action." To allow a potential claimant to sit on the knowledge that he or she has a

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[7] Williams v Polgar, 391 Mich 6; 215 NW2d 149 (1974).

[8] Larson at 304.

[9] This text is taken from p 15 of the Syllabus prepared by the Reporter of Decisions for the Supreme Court. At this writing, only the initial page in the official reporter has been determined.

possible cause of action until he or she has determined that he has a "likely cause of action," according to the Moll Court, "wrecks havoc with the legislative policies underlying the statute of limitations. That statute of limitations encourages claimants to investigate and pursue causes of action." Moll, supra, at ___.[10]

Plaintiffs' claim can only be timely filed if Mr. Grimes' knowledge in fact of a standard of care violation controls the date when he became on notice of a "likely" claim against Defendant Zachman. This Court finds such an argument is contrary to the prevailing law.

Justice Cavanagh, author of the Moll Court majority opinion, expressly rejected Plaintiffs' analysis when he cited with approval the following remarks from Kroll v Vanden Berg, 336 Mich 306, 311; 57 NW2d 897 (1953):

It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting

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[10] p 21 of Syllabus reporting of Moll, see also, United States v William A. Kubrick, 444 US 111, 100 S Ct 352 (1979). There, the Supreme Court opined, as follows:

> We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government. If there exists in the community a generally applicable standard of care with respect to the treatment of his ailment, we see no reason to suppose that competent advice would not be available to the plaintiff as to whether his treatment conformed to that standard. * * * But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make.

Kubrick, supra at S Ct 359-360.

or preserving his claim.
Moll, supra at ____.[11]

As previously noted, Moll requires only that a Plaintiff be aware of an injury and a causal connection between the injury and Defendant's alleged breach of duty. Plaintiff need not know whether Defendant, in fact, has violated a standard of care applicable to his or her profession. In Michigan, the Plaintiff in a medical malpractice action must file either security or an affidavit of merit within 91 days after the filing of the complaint. MCL 600.2912d; MSA 27A.2912(4), Having received the medical records, Plaintiff could have filed his complaint, sought an expert review and either dismissed the complaint or filed an affidavit of merit if the review confirmed his suspicions. Instead, Plaintiffs' counsel sat on the records for six months and never did file an affidavit of merit. Ample time is provided by the statute, then, to obtain confirming expert opinion or dismiss without sanctions.

The discovery period would have to commence on May 30, 1992 for this action to be timely filed. MCL 600.5838(a)(2). Yet, Plaintiff was aware he had cancer and underwent surgery shortly after last treating with Dr. Zachman on October 9, 1990. Plaintiff retained counsel in October, 1991 and a second surgery was performed in April, 1992. The Plaintiffs were on notice of their claim against the Defendants when the first surgery was performed in December, 1990. They retained counsel 10 months later and, despite counsel having all the medical records in December, 1991, no request for an opinion was made until June, 1992. This delay is chargeable to Plaintiffs and their counsel, not to the Defendants.

Applying the objective test to the instant facts, this Court's concludes that Mr. Grimes was equipped with sufficient information to file a complaint and seek an affidavit of merit well before May 30, 1992. Plaintiff William Grimes was on notice that there was a possibility that Defendant Zachman had overlooked some indicator

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[11] p 22 of Syllabus reporting of Moll.

that a cancerous condition existed when he underwent surgery related to cancer of the prostate twice within eighteen months of his last visit to Dr. Zachman.

Plaintiffs have not met their burden of showing that they neither discovered nor should have discovered the existence of the claim until their expert issued his findings in September, 1992. MCL 600.5838a(2). There is no genuine issue of material fact for the jury's consideration in this matter. Metropolitan Life Ins Co, supra.

For the foregoing reasons, Defendants' motion for summary disposition is granted. MCR 2.116(C)(7) and (10). Plaintiffs' motion is denied. The claims against Defendants alleged to be vicariously liable are also dismissed in light of the foregoing rulings. There shall be no award of costs and the complaint is dismissed in its entirety and with prejudice.

A judgment consistent with this decision and order should be submitted in a manner consistent with MCR 2.602(B)(3).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/20/94