STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

CAROLE SUE SCHETTLER,

Plaintiff,

v

File No. 06-25379-NH
HON. PHILIP E. RODGERS, JR.

DAVID HALSTED, Ph.D.,

Defendant.

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DECISION AND ORDER
GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

This is a professional malpractice action. The Plaintiff Carole Sue Schettler ("Schettler") originally filed a notice of intent to file suit pursuant to MCL § 600.2912 on October 15, 2004, alleging medical malpractice or professional negligence against Defendant David Halsted, Ph.D. ("Halsted") in his capacity as a psychologist. She claimed that the Defendant did not properly diagnose and treat her psychological condition and further engaged in sexual acts with her throughout ten years of therapy from approximately 1993 through "August or September of 2003." Plaintiff filed a Complaint against the Defendant on June 9, 2005[1] in Grand Traverse County Circuit Court File No. 05-24640-NH.

The Defendant filed a motion for partial summary disposition on the statute of limitations issue. At the hearing on the Defendant's motion, Plaintiff's counsel indicated she wanted to

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[1] There is some discrepancy between the dates used by the parties and the dates in the official court file. The Court is relying upon the dates in the official court file.

voluntarily dismiss the action without prejudice and was to submit a stipulated dismissal order. When counsel failed to submit a stipulated order, the Court entered an order on March 23, 2006 dismissing the case for Plaintiff's failure to attend case evaluation. The order did not specify whether the dismissal was with or without prejudice. Counsel subsequently filed a stipulated order voluntarily dismissing the case without prejudice and the Court signed that order on March 30, 2006.[2]

On March 28, 2006, the Plaintiff filed a new notice of intent to file suit. On July 31, 2006, the Plaintiff filed a Stipulation and Order to Waive the Notice Period and Allow the Filing of Complaint. The Court signed the Order that same day and the case was assigned Grand Traverse Circuit Court File No. 06-25379-NH.

In this pending action, the Plaintiff alleges a failure to properly diagnose her psychological condition, appropriately treat her and necessarily refer her to another provider. In lieu of an answer, the Defendant filed this motion for summary disposition, pursuant to MCR 2.116(C)(7) and (8), claiming that the Plaintiff's claim is barred by the applicable statute of limitations. The Court heard the oral arguments of counsel on October 30, 2006 and took the matter under advisement. Both parties filed supplemental briefs. The Court now issues this written decision and order and, for the reasons stated herein, grants in part and denies in part the Defendant's motion.

Standard of Review

Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is time-barred. *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). In reviewing a request for summary disposition pursuant to MCR 2.116(C)(7), the Court must consider all the documentary evidence provided by the parties and accept as true all of plaintiff's well-pleaded allegations, unless contradicted by documentary evidence. *Id* at 202; *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681-682; 599 NW2d 546 (1999); *Holmes v Michigan Capitol Med Ctr*, 242 Mich App 703, 705-706; 620 NW2d 319 (2000). If no facts are in dispute, and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. However, if a material factual

[2] The Court has ruled that the case was dismissed without prejudice.

dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997), quoting *Baker v DEC Int'l*, 218 Mich App 248, 252-253; 553 NW2d 667 (1996). See also, *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (2000).

Applicable Statute

MCL § 600.5838 is both a statute of limitations and a statute of repose. A statute of limitation, prescribes the time limits in which a party may bring an action that has already accrued. It prescribes the time limit in which a plaintiff who is injured within the statutory period must bring suit and also prevents a plaintiff from bringing suit if she sustained an injury outside the statutory period. A statute of repose prevents a cause of action from ever accruing when the injury is sustained after a designated statutory period has elapsed.

In general, a plaintiff in a medical malpractice case must bring his claim within two years of when the claim accrued, or within six months of when she discovered or should have discovered her claim, but in no event "later than six years after the date of the act or omission that is the basis for the claim." MCL § 600.5805(4) and MCL § 600.5838a(2). A malpractice claim accrues "at the time of the act or omission that is the basis for the claim of medical malpractice." MCL § 600.5838a(1).

If discovery of the existence of the claim is prevented by the fraudulent conduct of the health care professional, the action may be commenced within two years or "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL § 600.5838a(2)(a) and (3). 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(3). "A medical malpractice action that is not commenced within the time prescribed by this subsection is barred." MCL 600.5838a(3).

The Defendant's Motion

The Defendant contends that the statute of limitations expired as to the last action or inaction complained of in August of 2005, two years after the Defendant stopped treating the

Plaintiff or, alternatively, on September 15, 2005, two years after the Plaintiff sought psychological services from another psychologist. The Defendant further claims:

> ". . . any of Plaintiff's claims prior to March 28, 2004 are barred by the applicable two year statute of limitations. Claims prior to 1999 are clearly barred by the 'in any event, no later than six years after the alleged act or omission' rule."
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> "All claims prior to two years preceding the filing date of the Notice of Intent (March 28, 2006) are clearly time barred. Since two years prior to the filing of the Notice of Intent is March 28, 2004 and Plaintiff, per her own erroneous calculations claims in her Complaint that she terminated the relationship in October, 2003, Plaintiff has failed to state her claim so as to avoid the effect of the statute of limitations provisions."

1.

First, the Defendant claims that the statute of limitations expired in August 2005 as to the last action or inaction complained of, which occurred at the latest in August of 2003, or, alternatively, on September 15, 2005, two years after the Plaintiff sought psychological services from another psychologist. Even assuming the Defendant is correct as to when the Plaintiff's claim accrued, the Plaintiff filed her initial malpractice claim on June 9, 2005, well within two years of August 2003.[3]

Under Michigan law the period of limitations on a cause of action is tolled during the time that a prior suit is pending between the parties if the prior action is not adjudicated on its merits. *Annabel v C. J. Link Lumber Co,* 115 Mich App 116; 320 NW2d 64 (1982), rev'd on other grounds 417 Mich 950; 331 NW2d 900; MCL § 600.5856.[4]

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[3] Since the Plaintiff gave her initial notice of intent to file suit on October 15, 2004, before the limitations period would have expired, it had no tolling effect.

[4]The statutes of limitations are tolled when:

> (1) the complaint is filed and a copy of the summons and complaint are served on the defendant, or when
>
> (2) jurisdiction over the defendant is otherwise acquired, or when
>
> (3) the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for immediate service, but in this case the statute shall not be tolled longer than 90 days thereafter.

MCL § 600.5856 provides conditions for tolling of statutes of limitations and permits a plaintiff to avoid the bar of a statute of limitations when there has been a prior suit not adjudicated on the merits. *Affiliated Bank of Middleton v American Ins Co,* 77 Mich App 376; 258 NW2d 232 (1977). See also, *Napier v Hawthorn Books, Inc*, 449 F Supp 576 (ED Mich 1978); *Sanderfer v Mount Clemens General Hosp*, 105 Mich App 458; 306 NW2d 322 (1981) (first malpractice action dismissed for plaintiffs' failure to serve complaint did not toll statute of limitations because court never acquired jurisdiction over defendant). At the time a medical malpractice claim accrues, an adult has two years under the statute of limitations within which she must commence the action. MCLA § 600.5805(3). Where a suit is commenced, but later dismissed without prejudice, the statute is tolled for the period of time during which the court had jurisdiction over the defendant, and thereafter the statute begins to run again. *Stewart v Michigan Bell Telephone Co*, 39 Mich App 360, 368; 197 NW2d 465 (1972).

In the instant case, the Plaintiff first filed her malpractice suit on June 9, 2005. That action was dismissed without prejudice on March 23, 2006. Since the dismissal was without prejudice and was not an adjudication on the merits, the statute tolling the limitations period during the pendency of the first lawsuit applies. *Yeo v State Farm Fire and Cas Ins Co,* 242 Mich App 483; 618 NW2d 916 (2000); *Meda v City of Howell,* 110 Mich App 179; 312 NW2d 202 (1981).

2.

The Defendant's argument that the Plaintiff's claims prior to March 28, 2004 are barred by the applicable two year statute of limitations is flawed. March 28, 2004 is two years before the Plaintiff gave her second notice of intent to file suit. This argument ignores the earlier filed suit during which the statute of limitations was tolled. Therefore, calculations based on the date that the Plaintiff gave notice of her intent to file the second suit are wrong.

The Committee Comment states:

In the event of the dismissal, on some ground other than on the merits (as for example lack of jurisdiction over the subject matter) of an action in which jurisdiction over the defendant is acquired, **the period of time from the time of service or the acquisition of jurisdiction over the defendant until dismissal will not count as a part of the time of limitation, for during such time the statute has been tolled.** (Emphasis added.) Thus, in the instant case, the statute of limitations was tolled for the period of time during which the Plaintiff's first case was pending.

3.

The Defendant's argument that any claims arising out of acts or omissions that occurred more than two years before the Plaintiff filed suit are barred by the statute of limitations is misleading at best. First, there were two suits filed. The first one was filed on June 9, 2005 and, as noted above, tolled the statute of limitations while it was pending. Therefore, we have to look back two years from June 9, 2005, minus any time that the statute ran following dismissal of the first suit.

4.

In determining when the Plaintiff's cause of action accrued, the case of *McKiney v Clayman*, 237 Mich App 198; 602 NW2d 612 (1999) is instructive. The *McKiney* case is similar to the instant case in that the malpractice allegations are misdiagnosis, inappropriate treatment and refusal to refer to another provider in both cases. In addition, the plaintiffs in both cases do not offer a specific date on which defendant's failures allegedly occurred, but instead insist that these failures represented ongoing deficiencies that continued until the termination date of the parties' physician-patient relationship. The cases differ, however, in that the plaintiff in *McKiney* relied upon telephone communications with the defendant after she stopped seeing him at office visits as evidence of their continuing relationship and his continuing malpractice. The Plaintiff in this case relies upon the fact that the Defendant continued to misdiagnose her condition, inappropriately treat her and refuse to refer her to another provider right up until she terminated their relationship at the earliest in August of 2003.

The Court in *McKiney* criticized the plaintiff for relying on the "last treatment rule" that was abrogated by the Legislature in 1986 and for ignoring the statutory language defining accrual as "the time of the act or omission which is the basis for the claim." MCL 600.5838a(1). The Court analyzed the plaintiff's pleadings and found that the plaintiff clearly based her malpractice claim on defendant's failure to diagnose her cancer and defendant's allegedly improper election of a course of treatment. The Court held that her claim was barred because she could not allege any act or omission within the period of limitation, saying:

> Presumably defendant's diagnosis and treatment decisions initially occurred at some point before his first laser treatment removal in 1990 of the spot that had appeared on plaintiff's tongue. We may assume for purposes of our analysis that defendant's subsequent 1992 and 1993 misdiagnoses and decisions to continue

> utilizing laser treatment after the spot's recurrences constituted separate acts or omissions that would represent new accrual dates. Even assuming further that defendant's December 3, 1993, restatement of his belief that plaintiff did not have cancer qualified as a separate, distinct diagnosis of plaintiff's condition in light of the contrary information she had received from Henry Ford Hospital doctors, plaintiff nowhere alleged any subsequent new act or omission beyond December 3, 1993, that would extend her claim's accrual date. [*Id* at 204-205].

In the instant case on the other hand, the Plaintiff does not rely solely on her relationship with the defendant or the last treatment date. Instead, she relies upon the fact that up until the end of the relationship the Defendant reiterated his misdiagnosis, engaged in inappropriate treatment and refused to refer her to another provider, thereby committing specific acts or omissions through August of 2003 that support her claim of malpractice.

5.

The Plaintiff had two years or 730 days after August of 2003 to file her complaint. The limitation period ran from August 2003 (date of last acts or omissions) until June 9, 2005 (date first lawsuit was filed), approximately 667 days. The statute of limitations was tolled on June 9, 2005 when the Plaintiff filed her initial lawsuit until that lawsuit was dismissed on March 23, 2006 (287 days). The statute of limitations ran again from March 23, 2006 (date of dismissal of first suit) until March 28, 2006 (date of second notice of intent) or 5 days, for a total of 672 days. The statute of limitations was tolled again for 182 days when the Plaintiff gave her second notice of intent to file suit on March 28, 2006. She filed this action on July 31, 2006, within the 182 days, by stipulation waiving the notice period. Therefore, the Plaintiff's second lawsuit was timely filed with respect to any acts or omissions of malpractice which occurred on or after June 9, 2003.

6.

MCL § 600.5838a(2) provides, in pertinent part:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or **within 6 months after the plaintiff discovers or should have discovered the existence of the claim**, whichever is later. [Emphasis added.]

Pursuant to this statutory provision, a plaintiff's claim is barred unless she files it within two years of the act or omission complained of or she can prove that she filed her claim within six months of when she discovered or should have discovered her claim. Absent disputed facts, the question of when the Plaintiff discovered or should have discovered her claim is a question of law to be determined by trial judge. *Solowy v Oakland Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997).

The Plaintiff admits that she discovered the existence of her claim when she saw another psychologist in September of 2003. She did not file her initial lawsuit until June 9, 2005 - after the six months had run. Therefore, the Plaintiff's claim would be untimely under the discovery rule. However, the Plaintiff need not rely on the discovery rule in this case because she filed her complaint within two years of acts or omissions complained of.

7.

The Defendant claims that all of the events prior to 1999 are barred by the "in any event, no later than six years after the alleged act or omission" rule or statute of repose contained in MCL § 600.5838a(3). The Defendant is correct that the statute of repose precludes the Plaintiff from pursuing any claim based on an act or omission that occurred more than six years ago. The six years is calculated from the date of filing.

The Plaintiff initially filed an action on June 9, 2005. Six years before June 9, 2005 would be June 9, 1999. Therefore, the Plaintiff is precluded from pursuing any claim based on an act or omission that occurred prior to June 9, 1999 because of the six-year statute of repose.

8.

The Plaintiff claims that the Defendant fraudulently concealed the existence of her claim from her by using psychological techniques to manipulate her and keep her dependent upon him. Generally, for fraudulent concealment to postpone the running of a limitations period, the fraud must be manifested by an affirmative act or misrepresentation; the plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. Mere silence is insufficient to establish fraudulent concealment which would toll a statute of limitations. For purposes of tolling the statute of limitations based on fraudulent concealment, plaintiff must plead in the complaint the acts or misrepresentations

that comprised the fraudulent concealment. MCL § 600.5855. See, *Sills v Oakland General* Hosp, 220 Mich App 303; 559 NW2d 348 (1997); *Buszek v Harper Hosp*, 116 Mich App 650, 654; 323 NW2d 330 (1982).

The Plaintiff concedes that fraud must be specifically pled with particularity and that her Complaint is lacking in this respect. She requests the opportunity, pursuant to MCR 2.116(I)(5), to amend her Complaint to more specifically allege fraudulent concealment. However, the Plaintiff need not rely upon allegations of fraudulent concealment to toll the statute of limitations because, as discussed above, her lawsuit was timely filed. And, if she can prove fraudulent concealment, she still had to file her lawsuit within six months of when she discovered or should have discovered the existence of the claim. As discussed above, she readily admits that she did not file her lawsuit within six months of discovering the existence of her claim.

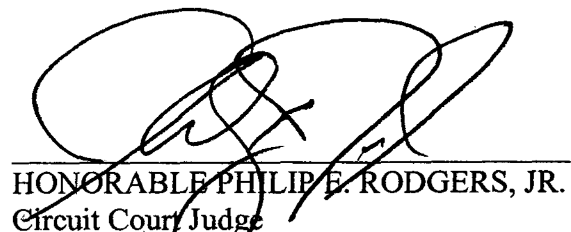
Conclusion

The Defendant's Motion for Summary Disposition on the statute of repose issue should be and hereby is granted. The Plaintiff is precluded from pursuing any claims arising out of acts or omissions which occurred prior to June 9, 1999.

The Defendant's Motion for Summary Disposition on the statute of limitations issue should be and hereby is denied without prejudice. The Plaintiff's lawsuit was timely filed for any acts or omissions which occurred on or after June 9, 2003.

The discovery rule and allegations of fraudulent concealment are irrelevant because the Plaintiff's complaint was timely filed within two years of acts or omissions complained of. Amending her complaint to specifically allege fraud with particularity would be futile. Therefore, her request to amend her complaint should be and hereby is denied.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 11/16/06