JENDRUSINA v MISHRA

Docket No. 325133. Submitted February 10, 2016, at Detroit. Decided August 4, 2016, at 9:00 a.m. Leave to appeal sought.

Kerry Jendrusina filed a medical malpractice action in the Macomb Circuit Court against his primary care providers, Dr. Shyam Mishra and Shyam N. Mishra, M.D., PC, alleging that defendants failed to take action as required by the relevant standard of care when plaintiff's blood tests demonstrated worsening and eventually irreversible kidney disease. Mishra diagnosed plaintiff with renal insufficiency in 2007, and subsequent lab reports revealed abnormal and worsening levels of two blood measures related to kidney function. However, plaintiff was neither informed of the diagnosis nor given copies of the lab reports. Plaintiff was aware that his kidneys were being tested, but plaintiff did not understand the reason for the testing; Mishra did not always communicate the test results to plaintiff. In 2009, Mishra conducted an ultrasound on plaintiff's kidneys and informed plaintiff that his kidneys were "fine." On January 3, 2011, plaintiff went to the hospital with flu-like symptoms, and hospital staff determined that plaintiff was in irreversible kidney failure. On September 20, 2012, plaintiff was examined by Dr. Jukaku Tayeb, a treating nephrologist, who informed plaintiff that plaintiff's irreversible kidney failure could have been prevented had defendants referred plaintiff to a nephrologist earlier. Plaintiff alleged that, before his conversation with Tayeb, he did not know that his kidney failure had developed over years and could have been avoided with an earlier referral and treatment. Plaintiff notified defendants of his intent to sue on March 18, 2013, and plaintiff filed the claim on September 17, 2013. Defendants moved for summary disposition, alleging that the complaint was time-barred under MCL 600.5838a(2) because plaintiff should have discovered his claim on January 3, 2011, and plaintiff failed to initiate the claim within six months of that date. Plaintiff responded that the limitations period did not begin to run until September 20, 2012, and therefore the claim had been initiated within the six-month discovery period. The court, James M. Biernat, Jr., J., granted summary disposition in favor of defendants, concluding

that plaintiff should have discovered the existence of his claim when he was diagnosed with kidney failure on January 3, 2011. Plaintiff appealed.

The Court of Appeals *held*:

MCL 600.5838a(2) provides, in pertinent part, that an action involving a claim based on medical malpractice is barred unless the action is commenced within six months after the plaintiff discovers or should have discovered the existence of the claim. The discovery period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. Significantly, the Legislature chose the phrase "should have" rather than "could have" in the statutory text. Therefore, the inquiry is not whether it was possible for a reasonable lay person 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. The determination of what a plaintiff should have discovered must be based on what the plaintiff knew or was told, not on what the plaintiff's doctors knew or what can be found in specialized medical literature. In this case, defendants never informed plaintiff that plaintiff had kidney disease or might develop kidney disease, and defendants never provided plaintiff with copies of his lab reports. Additionally, the mere performance of a noninvasive, commonly administered kidney-imaging study that yielded a normal result did not constitute an objective fact from which plaintiff should have surmised that he had a possible cause of action when later diagnosed with kidney failure. The record did not support the view that plaintiff should have known of a possible cause of action when plaintiff was informed of his diagnosis of kidney failure on January 3, 2011, because plaintiff was unaware that he had a history of kidney disease and because plaintiff was unaware that his lab reports indicated that his kidney failure was the result of a slowly progressing condition rather than an acute event. There was no evidence that plaintiff should have discovered his claim until he talked with Tayeb on September 20, 2012. Therefore, the trial court erred by granting defendants' motion for summary disposition.

Reversed and remanded for further proceedings.

JANSEN, J., dissenting, agreed with the trial court's holding that the limitations period began to run on January 3, 2011, the date on which plaintiff became aware of his diagnosis of kidney failure that so plainly contradicted everything Mishra had told plaintiff until that point. Judge JANSEN disagreed with the majority's conclusion that plaintiff's ignorance of the progres-

sive nature of his kidney disease demonstrated that he should not have known of a possible cause of action: first, the majority did not limit its review to the medical evidence in the record but instead conducted its own research on the pathophysiology of kidney failure; and second, plaintiff knew that he had elevated kidney test levels and that Mishra had performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there might be an issue with his or her kidneys. Furthermore, Michigan Supreme Court caselaw provides that the discovery rule applies to the discovery of an injury, not to the discovery of a later-realized consequence of the injury. While plaintiff's testimony indicated that he did not have actual knowledge of the existence of his claim until September 20, 2012, MCL 600.5838a(2) requires the court to consider when a plaintiff should have discovered the existence of a claim. Because plaintiff should have discovered the existence of his claim on January 3, 2011, the date on which he learned that he had kidney failure, Judge JANSEN would have affirmed the trial court's order granting summary disposition in favor of defendants.

LIMITATIONS OF ACTIONS — MEDICAL MALPRACTICE — DISCOVERY RULE.

MCL 600.5838a(2) provides, in pertinent part, that an action involving a claim based on medical malpractice is barred unless the action is commenced within six months after the plaintiff discovers or should have discovered the existence of the claim; the discovery period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action; the inquiry is not whether it was possible for a reasonable lay person to have discovered the existence of the claim, but rather whether it was probable that a reasonable lay person would have discovered the existence of the claim; the determination of what a plaintiff should have discovered must be based on what the plaintiff knew or was told, not on what the plaintiff's doctors knew or what can be found in specialized medical literature.

McKeen & Associates, PC (by *Brian J. McKeen* and *John R. LaParl, Jr.*), and *Bendure & Thomas, PLC* (by *Mark R. Bendure*), for Kerry Jendrusina.

Plunkett Cooney PC (by *Karen E. Beach*) for Shyam Mishra, M.D., and Shyam Mishra, M.D., PC.

Before: GLEICHER, P.J., and JANSEN and SHAPIRO, JJ.

SHAPIRO, J. Plaintiff, Kerry Jendrusina, filed this medical malpractice case against his primary care providers, Dr. Shyam Mishra, a specialist in internal medicine, and Shyam N. Mishra, M.D., PC. Defendants moved for summary disposition, asserting that plaintiff's notice of intent to sue, and therefore the complaint, had not been timely filed. Plaintiff responded that the claim had been initiated within the six-month discovery period defined by the Legislature in MCL 600.5838a. That statute provides, in pertinent part, "[A]n action involving a claim based on medical malpractice may be commenced . . . within 6 months after the plaintiff discovers or *should have* discovered the existence of the claim . . . ." MCL 600.5838a(2) (emphasis added). The trial court granted defendants' motion, finding that the claim was not timely. In so ruling, the trial court effectively substituted the phrase "*could have*" for "*should have*" in the statute. Because we are to follow the text of the statute as written, we reverse and remand.

On January 3, 2011, plaintiff went to the hospital with flu-like symptoms. He was found to be dehydrated, and, after performing various tests, the hospital staff determined that plaintiff was in irreversible kidney failure. As a result, plaintiff was placed on lifetime dialysis with its attendant morbidity and mortality.

Plaintiff asserts that defendants failed to take action as required by the relevant standard of care, such as a referral to a nephrologist (kidney specialist), despite the fact that for several years plaintiff's blood tests—contained within plaintiff's medical chart maintained by Mishra—demonstrated worsening and even-

tually irreversible kidney disease. Plaintiff further asserts that had Mishra complied with the standard of care, plaintiff's irreversible kidney failure would have been avoided.

According to plaintiff, he did not discover the existence of his claim until September 20, 2012. On that date, plaintiff was seen by Dr. Jukaku Tayeb, a treating nephrologist. According to plaintiff's testimony:

> [Tayeb] came in and what it was, he got full biopsy, not just a short version out of Clinton Henry Ford, out of Detroit. He got that and read through it and reviewed the case and talked to the pathologist, I guess, and he goes, "I got your full pathology report here," and he goes, "Did your doctor -- Why didn't you come to a nephrologist?" I said I was with an internist. The internist said everything was fine .... Then he started ranting, saying, "The doctor should have sent you. I could have kept you off of dialysis. You should have came [sic] here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came [sic] to a nephrologist early on."

Plaintiff testified that when Tayeb told him this, he "was shocked. I was dumbfounded. That was like someone punching me in the gut." He testified that before that conversation with Tayeb, he did not know his kidney failure had developed over years and could have been avoided with an earlier referral and treatment. He testified that until then, "I thought it happens, it happens." He testified that immediately after this visit with Tayeb, he called his wife and said: "Oh, my God. I think Mishra screwed up." The following day, plaintiff contacted an attorney. Calculating the six-month discovery period from September 20, 2012, plaintiff timely initiated this case. The trial court concluded, however, that plaintiff should have discov-

ered the existence of his claim when he was diagnosed with kidney failure in January 2011.

In reviewing the trial court's analysis, we must be strictly guided by the language of the statute. "If the language of a statute is clear and unambiguous, this Court must enforce the statute as written." *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011).

> Our function in construing statutory language is to effectuate the Legislature's intent. Plain and clear language is the best indicator of that intent, and such statutory language must be enforced as written. [*Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012) (citations omitted).]

Significantly, we note that the Legislature chose the phrase "should have" rather than "could have" in the statutory text. According to the *New Oxford American Dictionary* (3d ed), "could" is "used to indicate *possibility*," whereas "should" is "used to indicate what is *probable*." (Emphasis added.)[1] Therefore, the inquiry is not whether it was *possible* for a reasonable lay person 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.

Plaintiff's medical chart maintained by Mishra includes the results of his routine blood tests. Beginning in 2007, lab reports filed within the chart consistently

[1] Other dictionaries provide consistent definitions. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "could" as "an alternative to *can* suggesting less force or certainty" and "should" as "used in auxiliary function to express obligation." *Random House Webster's College Dictionary* (2d ed) defines "could" as "used to express conditional possibility or ability" and "should" as "used to indicate duty, propriety, or expediency."

contained abnormal and worsening levels of two blood measures related to kidney function: *creatinine*[2] and *eGFR*.[3]

While these test results are clearly relevant to the issue of whether Mishra complied with the standard of care, they are not relevant to the issue of when plaintiff should have discovered his potential claim unless there is evidence that plaintiff was made aware of the repeated and increasingly abnormal indications of kidney disease. Defendants offer no evidence that this was the case. First, it is undisputed that defendants' office never provided plaintiff with copies of his lab reports. Second, plaintiff testified that defendants never told him that he had kidney disease or that he might develop kidney disease. Indeed, given defendants' failure to introduce contrary evidence, defendants have not even created a question of fact on the issue.[4]

Defendants point out that in a 2008 office note, Mishra wrote down a diagnosis of "chronic renal fail-

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[2] Creatinine is a waste product of muscle metabolism that is normally filtered out by the kidneys and discharged in urine. Standard blood test panels include a measure of creatinine in the blood. According to the record before us, normal blood levels of creatinine are in the range of 0.5 to 1.3 milligrams per deciliter of blood (mg/dL). If creatinine levels go above that range, the elevated levels suggest that the kidneys are not adequately filtering creatinine, which may be a sign of kidney failure. According to Dr. Mishra's records, plaintiff's creatinine level in 2007 was 1.5 mg/dL. Over the next several years, plaintiff's creatinine level, according to Dr. Mishra's chart, grew increasingly elevated until it reached 4.99 mg/dL by the end of 2010.

[3] The lab measure known as eGFR refers to "estimated glomerular filtration rate" and should normally be greater than 60 milliliters of blood per minute (mL/min/1.73m^2). Beginning in 2007, plaintiff's level fell below 60 mL/min/1.73m^2 and continued to decrease over the next five years until it was measured at 12 mL/min/1.73m^2 in 2011.

[4] Even if there were a question of fact, it should be resolved by the jury, not by the trial court on a motion for summary disposition. See *Kincaid v Cardwell*, 300 Mich App 513, 523; 834 NW2d 122 (2013).

ure." However, the note contains no reference to a discussion of this with the patient, i.e., plaintiff, and plaintiff testified that no such discussion ever occurred. Specifically, plaintiff testified as follows:

> *Q.* . . . I'm looking at your records from Dr. Mishra's [office], December 22nd, 2008, so this would have been a few days before Christmas at the end of 2008. Dr. Mishra had diagnosed you with chronic renal failure; do you remember that?
>
> *A.* No, he never told me that.
>
> *Q.* You don't remember having any discussion with him about that then?
>
> *A.* No, not at all.
>
> *Q.* You had swelling in your legs at that time. Do you remember that?
>
> *A.* Yes. He said it was because of my weight problem.
>
> *Q.* So you don't remember any discussion December 2008 about having chronic renal failure?
>
> [Objection omitted.]
>
> *A.* No.
>
> *Q.* When is the first time you recall having a discussion with Dr. Mishra about kidney failure?
>
> *A.* He never discussed it with me.

Defendants have not submitted any evidence indicating that, contrary to plaintiff's testimony, Mishra discussed this diagnosis with plaintiff. As noted, the office chart does not indicate that the diagnosis was relayed to or discussed with the patient, and it is undisputed that plaintiff neither saw nor had copies of those records until after he retained an attorney immediately following his September 20, 2012 conversation with Tayeb.[5]

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[5] In addition, despite the fact that defendants obtained an order to conduct ex parte meetings with plaintiff's physicians, the record con-

In *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 221-222; 561 NW2d 843 (1997), our Supreme Court held that what the claimant discovered or should have discovered is "a possible cause of action." This point was critical in *Solowy* because the plaintiff in that case did not dispute that she knew her doctor might have committed malpractice. *Id.* at 225. Instead, she argued that the six-month time frame was not triggered until she had, in her own mind, confirmed that this was the case. *Id.* at 218-219. The facts of *Solowy* merit description. In 1986, the plaintiff had skin cancer on her ear. *Id.* at 216. The defendant excised it, and, according to the plaintiff, he told her in the same year that the cancer was "gone." *Id.* at 216-217. Then in 1992, the plaintiff discovered a similar lesion on her ear at the same site, but she took no action for some time because of the defendant's assurance that the cancer was gone. *Id.* at 217-218. Eventually she went to a new doctor who advised that the new lesion was either a recurrence of the prior cancer or a benign lesion. *Id.* at 217. A biopsy showed that it was a recurrence, and the plaintiff claimed that a more invasive surgery was required as a result of the defendant's incorrect assurance to her that the cancer was gone. *Id.* at 217-218. The plaintiff filed suit less than six months from the date of the biopsy but more than six months from the date the second doctor told her that the lesion might be a recurrence of her cancer. *Id.* at 218.

The plaintiff argued that even though she knew that she had a *possible* cause of action after being so advised, it was only after the biopsy that she knew or should have known that she had an *actual* cause of

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tains no testimony or affidavits from any of these physicians indicating that before the September 20, 2012 conversation with Tayeb, they advised plaintiff that his kidney disease could or should have been recognized and treated years earlier by Mishra.

action. *Id.* at 224-225. She argued that, had the biopsy been benign, she would have learned that her possible cause of action was, in fact, not a cause of action. *Id.* The *Solowy* Court concluded that the discovery date is when the plaintiff learns of a "possible cause of action" rather than learning of a "certain" cause of action. *Id.* at 221-222. However, the *Solowy* Court continued to apply the "should have" standard, stating:

> [T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. [*Id.* at 222.]

In *Solowy*, the time began to run when the plaintiff learned that there was a significant chance—in *Solowy* it was 50/50—that her doctor had committed malpractice. She knew that if her diagnosis was skin cancer, then she had grounds to file suit because she had previously had skin cancer at that location, it had been treated, and her doctor told her that it was "gone." *Id.* at 217, 224.

In the instant case, the record does not support the view that, when diagnosed with kidney failure, plaintiff "should have known of a possible cause of action." *Id.* at 222. As far as he knew, he had no previous history of kidney disease and did not know of the lab reports showing that his kidney failure was the result of a slowly progressing condition rather than an acute event. In *Solowy*, the plaintiff knew that her doctor might have committed malpractice as soon as the tumor grew back; she was only waiting to learn whether she was in fact injured as a result of his actions. In this case, the opposite is true; after diagnosis in January 2011, plaintiff knew he was sick, but he lacked the relevant data about his worsening lab reports and the medical knowledge to know that his doctor might have committed malpractice. The critical

difference between plaintiff in this case and the plaintiff in *Solowy* is that the plaintiff in *Solowy* neither required nor lacked special knowledge about the nature of the disease, its treatment, or its natural history.[6] She knew exactly what her relevant medical history was at all times. She simply delayed pursuing her claim in order to wait for final confirmation of what she already knew was very likely true. Moreover, the *Solowy* plaintiff had visible symptoms that were clearly recognizable as a likely recurrence of her skin cancer long before the ultimate diagnosis. In this case, however, plaintiff's first recognizable symptom, i.e., urine retention, did not occur until January 2011 when it precipitated his hospitalization.

"[T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Id.* at 222. An objective standard, however, turns on what a reasonable, ordinary person would know, not what a reasonable physician (or medical malpractice attorney) would know. Therefore, the question is whether a reasonable *person*, not a reasonable *physician*, would or should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease.

Indeed, defendants do not contend that a reasonable lay person understands the anatomy, physiology, or pathophysiology of kidneys. One would be hard-pressed to find a reasonable, ordinary person—who is

[6] "Natural history" is a medical term meaning the expected course of a disease absent treatment. See *Merriam-Webster's Collegiate Dictionary* (11th ed). For example, whether kidney failure can occur suddenly or only over an extended period of time requires knowledge of the "natural history" of kidney disease.

not a medical professional—who knows what creatinine is or what an abnormal creatinine level means in addition to knowing how kidneys fail, why they fail, and how quickly they can fail.[7]

Moreover, plaintiff did not visit Mishra specifically for kidney problems. He saw him as a primary care provider for over 20 years. Unlike the plaintiff in *Solowy*, plaintiff never had surgery or even any treatment for the relevant organ or condition. He had routine complete blood counts and metabolic lab work done, as does virtually every patient who undergoes annual physicals. There is no evidence that he ever saw the blood test reports that showed the normal reference ranges, which would have revealed that his creatinine levels were high, or that he was ever advised of the relationship between creatinine levels and kidney disease. Defendants suggest that because Mishra once ordered a kidney ultrasound for plaintiff after an episode of edema and one slightly elevated lab report in 2008, plaintiff should have realized upon diagnosis of kidney failure that he had kidney disease back in 2008. However, the ultrasound was reported as normal.[8] As-

[7] Our dissenting colleague suggests that any reasonable person would know that kidney failure must develop over a long period. She offers no grounds for such a conclusion. Moreover, her assertion is inconsistent with medical knowledge. Kidney failure can occur very quickly and has several possible causes, such as reduction in blood flow, allergic reaction, infection, adverse reaction to medication, dehydration, kidney stones, cancer, nerve damage, and others. See Mayo Clinic, *Acute Kidney Failure: Causes* <http://www.mayoclinic.org/diseases-conditions/kidney-failure-basics/causes/con-20024029> (accessed April 28, 2016) [https://perma.cc/5MPK-RZBP]. And contrary to the dissent's claim, we do not cite this medical text to justify plaintiff's belief; we do so to refute the dissent's claim that plaintiff's belief was inconsistent with science and therefore unreasonable.

[8] The dissent suggests that plaintiff was told by Mishra that his blood tests were being done specifically due to concern about his kidneys and that after each test, Mishra assured plaintiff that his kidneys were fine.

suming that a reasonable, ordinary person would even recall a normal ultrasound performed years earlier, there is no reason that such a person would consider a *normal* ultrasound result as evidence that Mishra was simultaneously committing malpractice in some manner. Rather, the normal ultrasound rationally supported that Mishra had made no errors at all. The mere *performance* of a noninvasive, commonly administered kidney-imaging study that yielded a normal result does not constitute an "objective fact" from which plaintiff should have surmised that he had a possible cause of action when later diagnosed with kidney failure. See *Solowy*, 454 Mich at 222.

It was *possible* for plaintiff to have discovered the existence of a possible claim shortly after presenting to the hospital and being told that he had kidney failure. To have done so, however, he would have had to have undertaken an extensive investigation to discover more information than he had. Presumably, plaintiff could have (1) studied the various causes and speeds of progression of kidney disease, (2) requested

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However, this suggestion is not consistent with the record. As already noted, plaintiff testified that he was told only once, in late 2008, that his "kidney number" on a single blood test was a little high and that he was correctly advised that his follow-up ultrasound was normal. There is *no* testimony that Mishra thereafter discussed plaintiff's kidney health with him except in notifying him that his annual blood tests, which included many non-kidney tests, were normal. The dissent's characterization of these communications as revealing to plaintiff that he had "elevated kidney levels" (i.e., plural) is inaccurate. (Emphasis added.) There is a substantial and striking difference between a single conversation three years before diagnosis and a subject of repeated discussion. Therefore, contrary to the dissent's argument, the 2012 diagnosis was not "plainly contradictory to everything Dr. Mishra had said up until that point." Mishra likely told plaintiff many things between 2008 and 2012. Regarding plaintiff's kidneys, there were but two conversations: one in 2008 referring to a mildly elevated test, and the accurate report of a normal kidney ultrasound in early 2009.

copies of his previous years' blood test reports, and (3) considered whether there were signs of progressive kidney disease in those reports. However, there is no basis in statute, common law, or common sense to impute such a duty to people who become ill.

Defendants seem to suggest that the diagnosis of any serious illness in and of itself suffices to place on a reasonable person the burden of discovering a potential claim against a primary care physician if at any time in the past the physician *tested* an organ involved in a later diagnosis and reported normal results.[9] Certainly any new diagnosis or worsened diagnosis or worsened prognosis is an "objective fact," but it is a substantial leap to conclude that this fact alone *should* lead any reasonable person to *know* of a possible cause of action. We agree that anytime someone receives a new diagnosis, worsened diagnosis, or worsened prognosis, that individual *could* consider whether the disease could or should have been discovered earlier. Moreover, diligent medical research and a review of the doctor's notes might reveal that an earlier diagnosis should have been made. That, however, is not the standard. We must determine what the plaintiff "should have discovered" on the basis of what he knew or was told, not on the basis of what his doctors knew or what can be found in specialized medical literature. Therefore, the elevated levels of creatinine in plaintiff's blood tests during prior years is of no moment given the absence of any evidence that plaintiff ever saw those reports or that he knew what the word "creatinine" meant, let alone the pathophysiology of kidney failure, its measures, its

[9] The discovery rule does not incorporate the logical fallacy of *post hoc, ergo propter hoc* (after this, therefore because of this).

causes, its natural history, or its treatment.[10]

To hold as defendants suggest would not merely be inconsistent with the text of the statute, but it would also be highly disruptive to the doctor-patient relationship for courts to advise patients that they "should" consider every new diagnosis as evidence of possible malpractice until proven otherwise. Had the Legislature intended such a result, it would have used the phrase "could have discovered," not "should have discovered."

On the present facts, defendants have demonstrated that before the September 20, 2012 meeting with Tayeb, plaintiff *could* have discovered that he had a possible cause of action for malpractice. However, the statute triggers the six-month discovery period only when plaintiff *should* have discovered that he had a possible cause of action. Given the plain language of the statute, the trial court erred by granting defendants' motion for summary disposition.[11]

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[10] Although plaintiff's kidney disease was diagnosed after he had undergone tests for kidney disease (among many other tests), it simply does not follow that the tests were related to his disease. More information was required to make that link, and that information was supplied by Tayeb.

[11] Plaintiff also challenges another ruling which we agree was erroneous. However, in light of our ruling, the issue appears to be moot. Before being deposed, plaintiff provided an affidavit to the trial court, averring, as he later did in his deposition, that he had spoken with Tayeb on September 20, 2012, and that, on that date, Tayeb informed him that had he been referred to a nephrologist earlier, he may have delayed or avoided his current state of renal failure and dialysis. More specifically, plaintiff averred that Tayeb stated that defendants' failure to refer plaintiff to a nephrologist was inappropriate and was a serious contributor to plaintiff's medical condition. Plaintiff presented this affidavit in his brief addressing the timeliness of his claim. The trial court refused to consider the affidavit on the grounds that it was inadmissible hearsay. This ruling was erroneous as a matter of law given that the affidavit was not offered for the truth of the matter asserted by

Reversed and remanded for further proceedings. We do not retain jurisdiction.

GLEICHER, P.J., concurred with SHAPIRO, J.

JANSEN, J. (*dissenting*). I respectfully dissent because I believe that the limitations period began to run when plaintiff learned that he had kidney failure in January 2011. Accordingly, I would affirm the trial court's order granting summary disposition in favor of defendants.

In 1988, defendant Dr. Shyam Mishra began treating plaintiff as his primary care physician. According to plaintiff's complaint, Dr. Mishra diagnosed him with renal insufficiency in 2007. The evidence presented by the parties establishes that Dr. Mishra began regularly testing plaintiff's kidneys at least as early as 2007. The tests continued on a regular basis. According to plaintiff, Dr. Mishra did not always communicate with plaintiff regarding his test results. Plaintiff testified that he did not know why Dr. Mishra was testing his kidneys, but he did know that Dr. Mishra was testing his kidney levels. He believed that the tests were connected with the edema he began to experience in 2008. He explained, "I didn't hear until the leg started swelling they were monitoring something for kidneys."

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the declarant. See *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986) (holding that statements were not hearsay because they were not introduced to prove the truth of the matter asserted). Plaintiff did not offer the evidence to prove that defendants were negligent, and whether Tayeb's alleged statements were accurate is not relevant to the present issue. Plaintiff relied on Tayeb's alleged statement only to demonstrate how and why he became aware of his possible malpractice claim, not that Mishra was negligent or that his negligence was a proximate cause of any damages. The trial court therefore erred by ruling that the affidavit contained inadmissible hearsay for this purpose. See *id.*

Plaintiff testified that Dr. Mishra never informed him that he suffered from kidney failure or that he should see a nephrologist.

Plaintiff testified in his deposition that Dr. Mishra told him in 2008 that his kidney test results were not a cause for concern and that, although his kidney levels were a bit elevated, there was nothing to worry about because his "kidney number" was under five. In 2009, Dr. Mishra conducted an ultrasound of plaintiff's kidneys and told plaintiff that his kidneys were "fine." He did not tell plaintiff that plaintiff had chronic renal failure. On January 3, 2011, plaintiff reported to the hospital with flu-like symptoms. The emergency room doctors found that plaintiff was in kidney failure and diagnosed him with acute end-stage renal failure. Plaintiff began regular dialysis. More than 20 months later, on September 20, 2012, plaintiff had a conversation with Dr. Jukaku Tayeb, a nephrologist. Plaintiff testified that, during that conversation, Dr. Tayeb told him that he should have been sent to a nephrologist in 2008. Plaintiff testified that Dr. Tayeb stated:

> "The doctor should have sent you. I could have kept you off of dialysis. You should have came [sic] here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came [sic] to a nephrologist early on."

Following that conversation, on March 18, 2013, plaintiff provided Dr. Mishra and Dr. Mishra's practice with a notice of intent to sue. The present case was then filed on September 17, 2013. Relevant to this appeal, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that the claim was time-barred under the statute of limitations. The trial court agreed with defendants and concluded that plaintiff should have discovered

his claim on January 3, 2011. Therefore, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7), finding that plaintiff's claim was barred by the statute of limitations.

I respectfully disagree with the majority's conclusion that plaintiff should not have discovered his claim until he talked with Dr. Tayeb on September 20, 2012. It is undisputed that plaintiff's complaint fell outside the general two-year period of limitations set forth in MCL 600.5805(6). Instead, plaintiff asserts that the alternate six-month "discovery rule" period of limitations set forth in MCL 600.5838a(2) should apply to his claims. The Michigan Supreme Court in *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997), explained that "the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin." Instead, the plaintiff merely needs to know of a *possible* cause of action. *Id.* The rule does not require a plaintiff to be able to prove every element of a cause of action in order for the limitations period to begin running. *Id.* at 224. The Court explained, "In applying this flexible approach, courts should consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id.* at 227. Our Supreme Court has also explained that "[t]he discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury." *Moll v Abbott Laboratories*, 444 Mich 1, 18; 506 NW2d 816 (1993). Additionally, "[t]his Court has held that the discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a

claim." *Turner v Mercy Hosps & Health Servs of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

Plaintiff admits that he was aware that Dr. Mishra was testing his kidneys and that Dr. Mishra never said anything was wrong. He testified in his deposition that in 2008, Dr. Mishra told him that his "kidneys [were] a little bit elevated but not to the point where there was anything to worry about . . . ." In 2009, Dr. Mishra ordered an ultrasound test for plaintiff's kidneys, and Dr. Mishra informed plaintiff that the ultrasound indicated that plaintiff's kidneys were "fine." On January 3, 2011, when plaintiff became aware of this diagnosis that was so plainly contradictory to everything Dr. Mishra had said up until that point, he became "equipped with sufficient information to protect [his] claim." See *Moll*, 444 Mich at 24. Therefore, the limitations period expired six months after this date. See *id.*

Plaintiff argues that he was not able to make the connection between the new diagnosis and Dr. Mishra's alleged negligence until September 20, 2012. The Michigan Supreme Court has stated, however, that this connection is not necessary: "The 'possible cause of action' standard does not require that the plaintiff know that the injury . . . was in fact or even likely caused by the [doctor's] alleged omissions." *Solowy*, 454 Mich at 224. Further, this Court has previously held that "[a] plaintiff must act diligently to discover a possible cause of action and 'cannot simply sit back and wait for others' to inform [him] of its existence." *Turner*, 210 Mich App at 353 (citation omitted). Considering this, it is plain that plaintiff should have discovered his potential claim on January 3, 2011. Therefore, the period of limitations in MCL 600.5838a(2) expired six months after January 3, 2011.

Plaintiff's notice of intent was delivered on March 18, 2013, which was well after the six-month limitations period expired.

The majority concludes that defendants failed to demonstrate that plaintiff should have known that he had a possible cause of action for malpractice when he was hospitalized in January 2011. The majority points to the fact that Dr. Mishra did not inform plaintiff that he had kidney disease and that plaintiff did not have access to his records or lab reports. The majority reasons that plaintiff did not know he had a previous history of kidney disease and was unaware that his kidney disease was a slowly progressing condition, rather than an acute incident.

I disagree with the majority's conclusion that the fact that plaintiff was unaware that he had a progressive kidney disease demonstrates that he should not have known of a possible cause of action. First, the majority relies on evidence outside the record in concluding that kidney failure can occur quickly and has several causes. The majority conducted its own research regarding the pathophysiology of kidney failure and failed to limit its review to the medical evidence in the record. The parties did not discuss the causes or progression of kidney failure in their briefs on appeal, and the majority's discussion of the pathophysiology of kidney disease contains medical conclusions that require expert testimony and that are outside the expertise of the majority. Second, contrary to the majority's conclusion, plaintiff knew that he had elevated kidney test levels. He also knew that Dr. Mishra performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there might be an issue with his or her kidneys. In spite of plaintiff's elevated kidney levels and the ultrasound

test, Dr. Mishra informed plaintiff that his kidneys were fine and that there was nothing to worry about. Plaintiff should have known that he had a possible cause of action when he learned that he had kidney disease, in spite of Dr. Mishra's statements to the contrary. Plaintiff's kidney failure was not a sudden event disconnected to his previous medical diagnoses and treatment. Instead, plaintiff was aware of the fact that Dr. Mishra was monitoring his kidneys and that he had elevated kidney levels, and plaintiff knew that Dr. Mishra performed an ultrasound test specifically to ensure that there was no issue with his kidneys. Therefore, plaintiff should have known of a possible cause of action when he learned that he had kidney failure on January 3, 2011.

The majority also reasons that a reasonable, ordinary person would not understand the medical terminology or the pathophysiology connected with kidney diseases. However, plaintiff's understanding of the terminology and physiology of his condition was not necessary in order for him to know of a possible cause of action. Indeed, Dr. Mishra discussed the issue with plaintiff in terms that plaintiff could understand by informing plaintiff that his "kidney number" was a bit elevated, but informing him that he had nothing to worry about. Plaintiff's deposition testimony reveals that he understood that Dr. Mishra was monitoring his kidneys. Plaintiff was also aware that Dr. Mishra ordered an ultrasound test for his kidneys and that Dr. Mishra concluded that his kidneys were fine after looking at the test. Therefore, this was not a situation in which plaintiff was presented with information that he could not understand. Instead, plaintiff was aware that Dr. Mishra was monitoring his kidneys for a potential problem, but Dr. Mishra reassured him that there was no issue.

Plaintiff's testimony indicated that he had actual knowledge of the existence of his claim once Dr. Tayeb informed him that he could have avoided kidney failure if his physician referred him to a nephrologist earlier. However, MCL 600.5838a(2) requires the court to consider when a plaintiff discovered or *should have* discovered the existence of his claim. Plaintiff should have discovered the existence of a cause of action on January 3, 2011, and he failed to commence the action within six months of this date. Accordingly, I conclude that plaintiff's action was barred by the limitations period in MCL 600.5838a(2), and summary disposition was properly granted pursuant to MCR 2.116(C)(7). Therefore, I would affirm the trial court's order granting summary disposition in favor of defendants.