

Appendix A

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ALAN M. LESCHYSHYN, *Plaintiff/Appellant*,

v.

DINESHKUMAR PATEL, et al., *Defendants/Appellees*.

No. 1 CA-CV 18-0402
FILED 3-19-2019

Appeal from the Superior Court in Maricopa County
No. CV2017-001657
The Honorable Sherry K. Stephens, Judge

AFFIRMED

COUNSEL

Alan M. Leschyshyn, Anthony, Texas
Plaintiff/Appellant

Quintairos Prieto Wood & Boyer PA, Phoenix
By Andrew E. Rosenzweig, Rita J. Bustos
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge David D. Weinzweig delivered the decision of the Court,
in which Judge Kent E. Cattani and Judge James P. Beene joined.

WEINZWEIG, Judge:

¶1 Alan M. Leschyshyn appeals the superior court's grant of summary judgment in favor of Dr. Dineshkumar Patel and Advanced Endocrine & Metabolism, P.C. (collectively, "Patel"). He argues the court erred in concluding his medical malpractice claim was barred on statute of limitations grounds. We affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 This is a medical malpractice lawsuit. Leschyshyn sued Dr. Patel, his former endocrinologist, in February 2017 for prescribing two drugs—Parlodel in March 2005 and AndroGel in May 2006—without warning him about their "dangers and serious side effects," including "uncontrollable compulsive behaviors, such as compulsive gambling or risk taking, compulsive sex, compulsive overspending and hypersexuality."

¶3 Leschyshyn had been an accountant for over 20 years with no criminal history when he visited Dr. Patel in February 2005. Dr. Patel determined that Leschyshyn had elevated prolactin levels and prescribed Parlodel to treat the condition in March 2005. Dr. Patel then prescribed AndroGel, a testosterone replacement therapy, in May 2006. Leschyshyn took Parlodel and AndroGel until 2015.

¶4 Leschyshyn experienced side effects from the medication in late 2006. According to medical records, he visited Dr. Patel in November 2006 for a "consult on meds (side effects)," and reported being "irritable and angry." Parlodel triggered "aggressive outbursts." And within weeks of starting AndroGel, Leschyshyn exhibited "atypical behaviors and mental states." In March 2007, his behavior was "completely out of the ordinary." He began masturbating in public places and amassing immense debt; he made poor career choices and business decisions. The anomalous behavior continued in 2010 and 2011, when he used corporate funds to pay his personal taxes and falsified corporate financial results. And then, beginning in 2012, Leschyshyn embarked on a sophisticated, three-year criminal conspiracy to commit wire, mail and bank fraud. He was arrested on February 18, 2015 and accused of orchestrating a \$20 million scam.

¹ We view the facts in the light most favorable to Leschyshyn, the party against whom judgment was entered, and draw reasonable inferences in his favor. *In re Estate of Evitt*, 245 Ariz. 352, 354, ¶ 8 (App. 2018).

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Decision of the Court

¶5 Meanwhile, between 2006 and 2015, Dr. Patel frequently changed the prescribed dose of Parlodel and AndroGel in response to Leschyshyn's blood test results and his complaints of aggressive behavior, irritability and agitation. In addition, Leschyshyn unilaterally decreased his Parlodel intake in 2009 to self-correct for mood fluctuations.

¶6 After his February 2015 arrest, Leschyshyn twice confronted Dr. Patel about the side effects associated with Parlodel and AndroGel. Leschyshyn showed Patel information from the internet about Parlodel's side effects and said he believed Parlodel was causing his problems, including "spending money" and "brain function." The medical records state: "[Leschyshyn] was concern[ed] about side effect[s] on brain function. He [was] on it from [sic] 2005." Dr. Patel discontinued the Parlodel prescription, but continued to prescribe AndroGel. In later visits, Leschyshyn reported the symptoms had disappeared.

¶7 Leschyshyn pled guilty in February 2016 to ten counts of wire, mail and bank fraud in federal court. The court received many character letters from friends and family for sentencing purposes, "some of these letters noted a great change in Mr. Leschyshyn's behavior starting in approximately 2005/2006." In another letter, Leschyshyn's wife said the medications "had severe negative effects on his personality, ability to make solid choices and clouded his judgment when dealing with people and important situations. I noticed these changes, even addressed them, but having his inhibitions clouded prevented him from reaching the depth of care and concern as he had before."

¶8 Leschyshyn also provided expert reports to mitigate his sentence from two doctors and a pharmacologist who opined that his abnormal behaviors were caused by Parlodel and exacerbated by AndroGel. One of his experts wrote that "Novartis, the manufacturer of Parlodel, now includes [a] warning in their FDA package insert," which provides:

[Patients] can experience intense urges to gamble, increased sexual urges, intense urges to spend money uncontrollably, and other intense urges. Patients may be unable to control these urges while taking one or more of the medications that are generally used for the treatment of Parkinson's disease and that increase central dopaminergic tone, including Parlodel. In some cases, although not all, these urges were reported to have stopped when the dose was reduced or the medication was discontinued. Because

patients may not recognize these behaviors as abnormal it is important for prescribers to specifically ask patients or their caregivers about the development of new or increased gambling urges, sexual urges, uncontrolled spending or other urges while being treated with Parlodel.

The record does not indicate when the manufacturer's warning was issued.

¶9 The federal court refused to mitigate Leschyshyn's sentence based on the expert testimony because the experts did not connect the medication to Leschyshyn's criminal conduct. The judge explained:

Poor impulse control, to me, is not especially relevant with respect to the type of crime that we had involved in this particular case. It's just not a significant factor for this court to take into consideration. Poor impulse control might mean something to the Court in a rape case or a case of completely aberrant behavior where someone goes out and robs a store. . . . This is a multi-year, 20-million-dollar fraud, very sophisticated. Factoring companies, setting up other people, helping people to figure out how to defraud insurers and the fraud factoring companies. That's not an impulse control type crime.

Leschyshyn was sentenced to 235 months in federal prison on October 31, 2016.

¶10 Leschyshyn sued Patel on February 17, 2017 for negligence, negligent misrepresentation and fraudulent concealment. He claimed that Patel had prescribed Parlodel and AndroGel without warning of the side effects, and caused him to suffer harm and injuries, including memory impairment and other cognitive defects, emotional distress, loss of freedom and employment, economic and financial losses, medical expenses and "being a co-conspirator in a white-collar crime, fraud and money laundering case." He alleged the statute of limitations was tolled under the discovery rule and based on Dr. Patel's alleged fraudulent concealment. He claimed he did not discover the cause and nature of his injuries until 2015 or 2016.

¶11 Patel moved for summary judgment in December 2017, arguing Leschyshyn failed to file his complaint within the two-year limitations period under A.R.S. § 12-542. Leschyshyn objected and asserted the limitations period was tolled under the "unsound mind" exception. A.R.S. § 12-502. The superior court entered judgment in Patel's favor,

finding Leschyshyn "failed to produce sufficient evidence that he was of unsound mind" and that he "was on notice to investigate whether his alleged injury resulted from malpractice well before the two year statute of limitations expired." Leschyshyn timely appealed.

DISCUSSION

¶12 Leschyshyn challenges the superior court's decision granting summary judgment on statute of limitations grounds. We review the superior court's grant of summary judgment *de novo* and "will affirm the judgment if it is correct for any reason." *S & S Paving & Const., Inc. v. Berkley Reg'l Ins. Co.*, 239 Ariz. 512, 514, ¶ 7 (App. 2016). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). "Upon a moving party's *prima facie* showing that no genuine issue of material fact exists, the opposing party bears the burden of producing sufficient evidence that an issue of fact does exist." *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 33 (1998).

¶13 Leschyshyn was required to commence and prosecute his medical malpractice action "within two years after the cause of action accrue[d]" under A.R.S. § 12-542. He did not. Leschyshyn did not sue until February 2015; but Dr. Patel first prescribed him Parlodel in 2005 and then AndroGel in 2006. And the record indicates that Leschyshyn reported side effects from the medications in 2006; his friends and family noticed a "great change" in his behavior and "distinct personality deviation" as early as 2005 or 2006; his "behavior [was] completely out of the ordinary" by March 2007; and Dr. Patel frequently changed the dosage in response to side effects and blood tests.

¶14 Leschyshyn argues his tort claims were tolled, however, because he was of an unsound mind until 2015. Arizona law tolls the statute of limitations for persons of "unsound mind" under A.R.S. § 12-502 because "it is unfair to bar an action in which the plaintiff is mentally disabled and thus unable to appreciate *or pursue* his or her legal rights." *Doe*, 191 Ariz. at 325, ¶ 41 (emphasis in original). To survive summary judgment based on the "unsound mind" provision, Leschyshyn needed to provide the court with "hard evidence" he was "unable to manage his daily affairs or to understand his legal rights or liabilities." *Id.* at 326, ¶ 42 (quotation omitted). Conclusory averments are not enough, including "assertions that one was unable to manage daily affairs or understand legal rights and liabilities." *Id.*

¶15 The court properly granted summary judgment here because Leschyshyn did not come forward with "hard evidence" to prove an unsound mind from 2006 to 2105. His "hard evidence" consists of the criminal charges and sentences against him; his poor decisions and impaired judgment in personal, professional and financial matters; the opinions of his expert witnesses at sentencing; and a warning from Parlodel's manufacturer at some unknown point.

¶16 This evidence does not demonstrate that Leschyshyn was unable to carry on the day-to-day affairs of human existence; nor does it show he did not understand his legal rights or liabilities. To the contrary, his complex financial and insurance fraud indicates an acute awareness of laws and how to avoid them. His expert witnesses in the criminal sentencing proceedings did not conclude he was unable to understand his legal rights or liabilities. The experts merely opined that Leschyshyn had poor impulse control, impaired judgment and reduced mental capacity on the medications. Nor does he prove an "unsound mind" with simple averments that he did not know his behavior was abnormal; especially given the record evidence, which includes the statements of friends and family who recognized "great [behavioral] changes" in 2006 and 2007. And unlike the plaintiff in *Doe*, Leschyshyn provides no evidence he was institutionalized for mental health reasons, experienced suicidal ideation, could not function at work and could not keep employment. *See id.* at 327, ¶ 46 (recognizing such facts as hard evidence of unsound mind).

CONCLUSION²

¶17 We affirm the superior court's grant of summary judgment on statute of limitations grounds.

² Leschyshyn appears to request oral argument and requests the opportunity to attend by telephone or, alternatively, for an attorney to be appointed. We deny his requests.

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HON. SHERRY K. STEPHENS

CLERK OF THE COURT

T. DeRaddo
Deputy

ALAN M LESCHYSHYN

ALAN M LESCHYSHYN
38415408 FCI LA TUNA
P O BOX 3000
ANTHONY TX 88021

v.

DINESHKUMAR PATEL, et al.

ANDREW E ROSENZWEIG

UNDER ADVISEMENT RULING

East Court Building - Courtroom 712

8:55 a.m. This is the time set for Oral Argument on Defendant's *Motion for Summary Judgment Re: Statute of Limitations*, filed on December 21, 2017. Plaintiff, Alan M. Leschyshyn appears telephonically on his own behalf. Appearing on behalf of Defendants are counsel, Andrew E. Rosenzweig and Rita Bustos.

A record of the proceedings is made digitally in lieu of a court reporter.

Discussion is held regarding *Plaintiff's Objection to Defendant's Motion for Summary Judgment Re: Statute of Limitations*, filed on January 17, 2018. On March 28, 2018, Plaintiff also filed *Plaintiff's Amended Objection to Defendant's Motion for Summary Judgment re: Statute of Limitations*.

Counsel for Defendant requests clarification regarding which document is the intended document which will serve as the Response to Defendants' Motion.

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Plaintiff states that he intended for *Plaintiff's Amended Objection to Defendant's Motion for Summary Judgment re: Statute of Limitations*, filed on March 28, 2018 to be the document that the Court shall consider.

Plaintiff requests that the document that he filed on January 17, 2018 be withdrawn.

IT IS ORDERED granting Plaintiff's oral request to withdraw the January 17, 2018.

IT IS FURTHER ORDERED Plaintiff's Objection to Defendants' Motion for Summary Judgment filed on January 17, 2018 shall be deemed withdrawn and the Court will not consider this document.

IT IS FURTHER ORDERED replacing the January 17, 2018 Response with *Plaintiff's Amended Objection to Defendant's Motion for Summary Judgment re: Statute of Limitations*, filed on March 28, 2018.

Argument is heard on Defendant's Motion for Summary Judgment re Statute of Limitations, filed on December 21, 2017.

IT IS ORDERED taking this matter under advisement.

9:28 a.m. Matter concludes.

LATER:

The Court has considered Defendant's Motion for Summary Judgment Re: Statute of Limitations filed December 21, 2017, Defendants' Separate Statement of Facts in Support of Motion for Summary Judgment Re: Statute of Limitations filed December 21, 2017, Plaintiff's Amended Response to Defendant's Statement of Facts and Objection to Defendant's Motion for Summary Judgment Re: Statute of Limitations filed March 28, 2018, Defendant's Reply in Support of Their Motion for Summary Judgment Re: Statute of Limitations filed January 25, 2018, Defendant's Response to Plaintiff's Separate Statement of Facts in Objection of Defendants' Motion for Summary Judgment Re: Statute of Limitations filed January 25, 2018, Defendants' Expedited Motion to Strike: 1) Plaintiff's Amended Objection to Defendants' Motion for Summary Judgment Re: Statute of Limitations and 2) Plaintiff's Amended Response to Defendant's Statement of Facts filed April 3, 2018, Defendants' Response to Plaintiff's Amended Objection to Defendants' Motion for Summary Judgment Re Statute of Limitations filed April 19, 2018, Defendants' Response to Plaintiff's Motion to Plaintiff's Amended Separate Statement of Facts in Objection of Defendants' Motion for Summary Judgment Re: Statute of

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Limitations and Supplemental Statement of Facts filed April 29, 2018, and the oral argument conducted on April 24, 2018.

At the oral argument, Plaintiff clarified his request that his amended response replace, not supplement, the objection he filed on January 17, 2018. The Court granted his motion to file the amended response, deemed the objection filed on January 17, 2018 withdrawn, and denied Defendants' motion to strike filed on April 3, 2018.

Defendants claim Plaintiff failed to file his complaint within the two year statute of limitations and thus his claims are barred pursuant to A.R.S. § 12-542 (medical malpractice claims must be filed within two years after the cause of action accrues). An injured person need not know all facts underlying a cause of action to trigger the accrual. The plaintiff must possess a minimum knowledge sufficient to identify that a wrong occurred and caused injury. The issue is when would a reasonable person be on notice to investigate whether his condition resulted from malpractice. See *Walk v. Ring*, 202 Ariz. 310 (2002), *Little v. State*, 225 Ariz. 466 (App. 2010), and *Doe v. Roe*, 191 Ariz. 313 (1998). Plaintiff claims the statute of limitations was tolled pursuant to A.R.S. § 12-502 because he was of unsound mind and thus his claim is not barred.

Plaintiff began treatment with Defendant Patel in February 2005. In December 2005, Defendant Patel prescribed AndroGel and Parlodel. Plaintiff continued taking these medications on a regular basis until October 3, 2016. On February 17, 2017 Plaintiff filed a complaint against Defendant Patel and his medical group Advanced Endocrinology & Metabolism claiming Defendants violated the standard of care by prescribing the medications which Plaintiff claims caused behavioral changes starting in 2007. Plaintiff claims he suffered from profound impulsivity as early as 2007. Examples of his impulsivity include masturbating in public places, committing multiple illegal acts, losing his job in January 2011 because he yelled at his boss, and incurring \$130,000 of debt. Plaintiff also claims friends, colleagues, and his wife reported impulsive behaviors and risky decision-making as early as 2007. Plaintiff claims his behavioral changes continued to escalate until he engaged in a sophisticated \$23 million fraudulent scheme from 2012 through 2015. Plaintiff was sentenced to federal prison for 235 months for his crimes.

At the sentencing hearing, Plaintiff presented the testimony of medical experts who opined Plaintiff's atypical behavior and mental state began weeks after starting AndroGel in 2006 and that the impairment was so severe it changed his behavior and mental states in multiple domains, specifically poor impulse control. Another expert concluded he had a distinct personality deviation. The judge in the federal criminal case concluded the evidence was insufficient to mitigate the sentence and found no causal connection between Plaintiff's use of the medications and his criminal behavior. The judge concluded, after reviewing the expert reports, Plaintiff failed to present any information that warranted mitigation based on a mental or

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emotional condition or defect or diminished capacity. The trial court's sentencing decision was upheld on appeal. The appellate court noted the trial judge gave more weight to Plaintiff's leadership role in the offense, his use of sophisticated means to execute the fraudulent schemes, and the \$23 million in losses attributable to him. The appellate court noted the district court was not persuaded there was any causal connection between the side effects of medications and criminal behavior. See *United States of America v. Alan Michael Leschyshyn*, Fifth Circuit Court of Appeals, No. 16-20738, December 11, 2017.

Plaintiff argues the statute of limitation should be tolled because he was of unsound mind, citing to A.R.S. § 12-502. Specifically, Plaintiff claims he could not have discovered his potential claim until February 2015 because his judgment was impaired because of his mental condition. A person is of unsound mind when he is unable to manage his daily affairs or to understand his legal rights or liabilities. Once the statute of limitations is raised in a summary judgment motion, Plaintiff has the burden to produce specific facts proving the claim of unsound mind. Plaintiff must set forth specifics facts – hard evidence- supporting the conclusion of unsound mind. *Doe v. Roe*, 191 Ariz. 313 (1998). In *Florez v. Sergeant*, 185 Ariz. 521 (1996), the court found the opinions of experts insufficient to defeat a summary judgment motion because if depression and stress were sufficient to support a legal finding of unsound mind, then all who have less than satisfactory lives would be of unsound mind. In *Doe v. Roe*, the court found Plaintiff produced facts to prove she was unable to manage her day-to-day affairs because she could not keep a job, had suicidal ideations and was institutionalized for her mental health condition.

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, Ariz.R.Civ.P., *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112 (App. 2008), *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 432 (App. 1993) and *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, 132 P.3d 825, 829 (2006). Thus, a motion for summary judgment should only be granted if the acts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The facts must be viewed in a light most favorable to the party against whom it was direct and summary judgment is inappropriate if there is any doubt as to whether an issue of material fact exists. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242 (App. 2011) and *Joseph v. Markovitz*, 27 Ariz.App. 122, 125, 551 P.2d 571, 574 (1976). A statement of facts is the only means by which a party opposing summary judgment may create a record showing the existence of those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. See Rule 56, Ariz.R.Civ.P.

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The opponent of a motion for summary judgment does not raise a genuine issue of fact by merely stating in the record that such an issue exists. The party must show that competent evidence is available which will justify a trial on the issue. *Flowers v. K-Mart Corp.* 126 Ariz. 495, 499 (App. 1980). An unsupported contention that a dispute exists is insufficient to defeat a motion for summary judgment. *Sewell v. Brookbank*, 119 Ariz. 422, 426 (App. 1978). A nonmoving party may not rest on allegation in its pleadings. See Rule 56, Ariz.R.Civ.P. and *MacConnell v. Mitten*, 131 Ariz. 22, 25 (1982). Vague or generalized unsupported statements are not sufficient to withstand a motion for summary judgment. *Burrington v. Gila County*, 159 Ariz. 320, 767 P.2d 43 (App. 1988).

Given the quantum of evidence required to establish if the statute of limitations should be tolled, viewing the evidence in a light most favorable to Plaintiff, the Court finds there are no genuine issues of material fact and summary judgment for the Defendants is appropriate. Plaintiff failed to provide "hard evidence" he was of unsound mind for the entire period he was allegedly taking medication prescribed by Defendants. See *Doe v. Roe*, 191 Ariz. 313 (1998). The facts provided by the parties show Plaintiff was able to manage his daily affairs and that he understood his legal rights or liabilities for at least some of the period after 2007. Plaintiff was on notice to investigate whether his alleged injury resulted from malpractice well before the two year statute of limitation expired. See *Walk v. Ring*, 202 Ariz. 310, 316. Thus, the statute of limitations is not tolled and Plaintiff's claims are time barred.

For the reasons stated,

IT IS ORDERED granting Defendants' Motion for Summary Judgment Re: Statute of Limitations.



Supreme Court
STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

JANET JOHNSON
Clerk of the Court

September 23, 2019

RE: **ALAN M LESCHYSHYN v DINESHKUMAR PATEL et al**
Arizona Supreme Court No. CV-19-0099-PR
Court of Appeals, Division One No. 1 CA-CV 18-0402
Maricopa County Superior Court No. CV2017-001657

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 23, 2019, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Beene did not participate in the determination of this matter.

Janet Johnson, Clerk

TO:

Alan M. Leschyshyn, 38415408, Federal Correctional Institution,
La Tuna - FCI
Andrew E Rosenzweig
Rita J Bustos
Amy M Wood
lg