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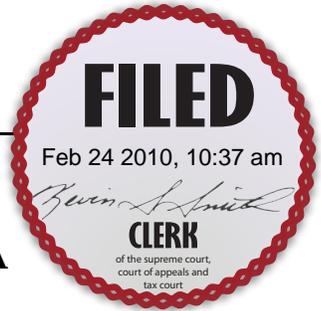
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IN THE
COURT OF APPEALS OF INDIANA

NANCY SUE CONWAY and)
PATRICK CONWAY,)
Appellants-Respondents,)

vs.)

No. 49A02-0906-CV-513

DR. JOHN SCHNEIDER and ORTHO INDY,)
Appellees-Petitioners,)

vs.)

DR. LINDSEY R. ROLSTON, CENTER FOR)
ORTHOPEDIC SURGERY AND SPORTS)
MEDICINE, DR. THOMAS GLYNN,)
RICHMOND RADIOLOGISTS, INC.,)
WHITEWATER VALLEY IMAGING CENTER,)
and JIM ATTERHOLT, Commissioner,)
Department of Insurance, Indiana Patient's)
Management Fund,)
Appellees-Respondents.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Theodore M. Sosin, Judge
Cause No. 49D02-0812-MI-58443

February 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Nancy Sue Conway (“Nancy”) and Patrick Conway bring an interlocutory appeal to challenge the grant of summary judgment to Dr. John Schneider, Ortho Indy,¹ and Whitewater Valley Imaging Center (“WVIC”) upon a proposed complaint for medical negligence in failing to diagnose and treat Nancy’s rotator cuff tear. We affirm in part, reverse in part, and remand for further proceedings.

Issues

The Conways present four issues, which we consolidate and restate as two:

- I. Whether the trial court erroneously granted summary judgment to WVIC upon concluding that the claim against it was time-barred; and
- II. Whether the trial court erroneously granted summary judgment to Dr. Schneider and Ortho Indy upon concluding that the claim against them was time-barred.

Facts and Procedural History

On May 18, 2005, Nancy fell down steps at her place of employment, and experienced

¹ Ortho Indy is a professional group of which Dr. Schneider is a member.

shoulder pain severe enough to cause her to seek medical treatment. Nancy's primary care physician ordered an MRI of Nancy's right shoulder, which was administered at WVIC on July 18, 2005 and evaluated by Dr. Thomas Glynn.

Dr. Glynn documented the MRI findings as follows:

RESULT: The long head of the biceps tendon appears to be alright as does the glenoid labrum. I see no fluid in the shoulder joint or in the bursa. The tendons of the rotator cuff are felt to be adequately seen and have a normal MRI appearance. There is a small subchondral degenerative cystic area seen in the superolateral head of the humerus. No other abnormalities are noted anywhere.

IMPRESSION: There is a small subchondral cystic area seen in the superolateral aspect of the humeral head. In all other respects, the study is entirely normal.

(App. 26-27.)

On January 12, 2006, Nancy was referred to Dr. Schneider at Ortho Indy. He noted that he had reviewed the 2005 MRI report. He diagnosed Nancy as having rotator cuff tendonitis and treated her with a cortisone injection and anti-inflammatory medication. On June 20, 2006, Dr. Schneider performed an arthroscopy of the right shoulder and arthroscopic subacromial decompression. He noted a "very ratty biceps tendon" that was not ruptured but had "longitudinal defects and fraying of the tendon along its course within the joint." (App. 96.) He further noted that a search was made for a rotator cuff tear, but none was found. Nancy was sent to physical therapy and continued on anti-inflammatory medication.

Nancy returned to Dr. Schneider in August of 2006, reporting continued pain. During her examination, she was "tearful and concerned." (App. 101.) She was treated with a steroid injection and advised to resume physical therapy. Nancy last visited Dr. Schneider on

September 8, 2006. He noted that Nancy had tendonitis and shoulder impingement syndrome, and that her range of motion was “quite good” but “associated with pain.” (App. 104.) Dr. Schneider halted physical therapy and prescribed a different anti-inflammatory medication. He advised a one-month follow up visit.

Nancy continued to be unable to perform certain lifting, pushing, and pulling tasks and to experience increased pain as compared to her pain before the surgery. She did not return to Dr. Schneider after September of 2006, as he had advised, but was referred to Dr. Lindsey Rolston of the Center for Orthopedic Surgery and Sports Medicine. Dr. Rolston examined Nancy and ordered an X-ray screen. X-rays of Nancy’s right shoulder “were remarkable for an adequate decompression of the subacromial space.” (App. 111.) His assessment included the following language:

It should be known that her initial MRI on July 18, 2005, was negative for a rotator cuff tear. Review of Dr. Schneider’s arthroscopy note on 06/20/2006 is remarkable for a “ratty biceps tendon.” This tendon was not ruptured. There is a longitudinal defect and fraying of the tendon along its course. Her symptoms today correspond with this 100% as she has severe pain with biceps provocative testing. It seems as if the cuff has been adequately decompressed with her surgery; however, she may benefit greatly from a biceps tenotomy.

(App. 111.) Nancy elected not to undergo the biceps tenotomy. Dr. Rolston released Nancy from treatment on June 4, 2007, finding that she had “reached maximal medical improvement.” (App. 116.) He assigned no permanent impairment rating.

Nancy continued to experience pain and was referred to a pain specialist. On July 26, 2007, Dr. Scott Taylor recommended an MR arthrogram “to rule out any evidence of extrinsic abnormality that has been missed on [the] plain MRI.” (App. 120.) On August 16,

2007, Dr. Michael Kaveney reviewed both the first and second MRIs with Nancy. In his opinion, the first MRI showed a small rotator cuff tear. By the time of the second MRI, the reviewing radiologist had detected a “large recurrent rotator cuff tear,” with “complete full thickness tears” of the supraspinatus and infraspinatus tendons. (App. 123.)

Dr. Kaveney opined that the tear was either caused by or exacerbated by the fall in 2005. He performed surgery to repair the rotator cuff tear in September of 2007. On August 15, 2008, Nancy was released from Dr. Kaveney’s care with a permanent impairment rating of the upper extremity of 10%.

On October 22, 2008, the Conrads filed their proposed complaint.² As amended, the proposed complaint alleged that a technician at WVIC had positioned Nancy for the 2005 MRI in an inappropriate manner and obtained an MRI result of “very poor quality.” (App. 55.) Allegedly, Dr. Glynn negligently accepted the poor-quality MRI and failed to ascertain that the rotator cuff tear appeared on the MRI.

It was further alleged that Dr. Schneider examined the MRI but also negligently failed to order a second MRI or observe the tear. Additionally, Dr. Schneider did not diagnose a tear during surgery or order post-surgical diagnostic testing. With regard to Dr. Rolston, the Conways alleged that he failed to personally review the MRI or order adequate testing. Nancy alleged that, as a result of the defendants’ negligence, she had suffered economic loss, endured unnecessary surgery and physical therapy, and experienced permanent damage as a

² The named defendants include Dr. Schneider, Ortho Indy, WVIC, Dr. Lindsey Rolston, Center for Orthopedic Surgery and Sports Medicine, Dr. Thomas Glynn, Richmond Radiologists, Inc, and Jim Atterholt, Commissioner, Indiana Department of Insurance, Indiana Patient’s Management Fund.

result of the delay in the repair of her rotator cuff. Patrick alleged a loss of Nancy's companionship.

On December 18, 2008, Dr. Schneider and Ortho Indy filed a petition for preliminary determination pursuant to Indiana Code Section 34-18-11-1 and a motion for summary judgment. Therein, they alleged that the Conway's proposed complaint was time-barred according to Indiana Code Section 34-18-7-1(b) (providing that claims against health care providers are to be brought within two years of the alleged act, omission, or neglect). On February 18, 2009, WVIC also moved for a preliminary determination of law and summary judgment, alleging that the proposed complaint (filed three years after Nancy's 2005 MRI) was outside the two-year limitations period and was time-barred. The Conways responded that assertion of the statute of limitations was estopped due to fraudulent concealment and detrimental reliance.

On March 30, 2009, the trial court conducted a hearing and granted summary judgment in favor of Dr. Schneider, Ortho Indy, and WVIC. The trial court certified its order for interlocutory appeal and this court accepted jurisdiction.

Discussion and Decision

I. Propriety of Summary Judgment - WVIC

A. Standard of Review

“The entry of summary judgment on a motion for a preliminary determination is subject to the same standard of appellate review as any other entry of summary judgment.” Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 695 (Ind. 2000). Summary judgment is

appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). All facts and reasonable inferences drawn from those facts are to be construed in favor of the nonmoving party. Boggs, 730 N.E.2d at 695. Nevertheless, when the moving party asserts the statute of limitations as an affirmative defense and establishes that the action was commenced beyond the statutory period, the burden shifts to the non-movant to establish an issue of fact material to a theory that avoids the defense. Id. This is appropriate because the facts establishing incapacity or the reasonableness of the plaintiff's diligence in filing his or her claim are uniquely within the plaintiff's knowledge. Id. Here, the Conways seek to avoid the defense by arguing that Nancy could not have discovered her injury before the expiration of the limitations period and that material factual disputes remain relative to the doctrines of fraudulent concealment and continuing wrong.

B. Analysis

The Indiana Medical Malpractice Act provides for a two-year statute of limitations in medical malpractice actions as follows:

A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.

Ind. Code § 34-18-7-1(b). The occurrence based statute is constitutional on its face but may violate the Indiana Constitution "if applied to a plaintiff who despite exercise of reasonable diligence does not learn of the injury or malpractice before the period expires." Herron v.

Anigbo, 897 N.E.2d 444, 446 (Ind. 2008), reh'g denied. In the majority of cases, limitations issues are resolvable as a matter of law. Id. However, there may exist genuine issues of material fact as to when the plaintiff, in the exercise of reasonable diligence, should have learned of the injury or disease and that such may be attributable to malpractice. Id. If limitations issues cannot be resolved as a matter of law, factual disputes must be submitted to the trier of fact. Id.

The Indiana Constitution does not mandate a discovery rule. Id. at 448 (citations omitted). However, the statute denied a remedy and therefore violated the Indiana Constitution when applied to bar the claim of a patient who could not reasonably be expected to learn of the injury within the two-year period. Id. In short, there is no reason to investigate a problem that has not yet manifest symptoms. Too, the statute was unconstitutional if applied to a patient who knows of the injury but is unable, in the exercise of reasonable diligence, to attribute it to malpractice. Id. (citing Booth v. Wiley, 839 N.E.2d 1168, 1172 (Ind. 2005)).

The critical date, although it has sometimes been referred to as the “discovery date,” is more accurately termed a “trigger date,” because actual or constructive discovery of the malpractice often postdates the time when predicate facts are known. Id. at 449. The trigger date “in most circumstances does not start a fixed limitations period.” Id. It is instead “the date on which a fixed deadline becomes activated.” Id.

The time in which to file a claim after a “trigger date” in an occurrence-based statute varies with the circumstances. Id. A plaintiff whose “trigger date” is after the original

limitations period has expired may bring a claim for relief within two years of the “trigger date.” Id. (citing Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999) and Van Dusen v. Stotts, 712 N.E.2d 491 (Ind. 1999)). However, if the “trigger date” is within two years after the date of the alleged malpractice, the plaintiff must file before the statute of limitations has run, if it is possible to do so “in the exercise of due diligence.” Id. If such a claim cannot be filed within the limitations period, the action must be initiated “within a reasonable time after the trigger date.” Id.

Reasonable diligence requires pursuing the facts in order to determine whether there is a claim. Id. As explained by our Indiana Supreme Court:

Because the Medical Malpractice Act provides an occurrence-based limitations period, reasonable diligence requires more than inaction by a patient who, before the statute has expired, does or should know of both the injury or disease and the treatment that either caused or failed to identify or improve it, even if there is no reason to suspect malpractice. As a matter of law, the statute requires such a plaintiff to inquire into the possibility of a claim within the remaining limitations period, and to institute a claim within that period or forego it.

Id. In Brinkman v. Bueter, 879 N.E.2d 549 (Ind. 2008), a plaintiff who was not treated for preeclampsia in pregnancy and later received a diagnosis of eclampsia was then obligated in exercise of reasonable diligence to learn of the earlier substandard care as the eclampsia brought to light the potential of the preeclampsia. In Martin, the limitations period started when breast cancer was identified, because the patient was in a position to uncover the failure to identify the cancer in an earlier mammogram. 711 N.E.2d at 1273. In Harris v. Raymond, 715 N.E.2d 388 (Ind. 1999), the limitations period for a defective jaw implant was tolled

until a second physician discovered a shattered implant while treating the patient for an earache.

In Overton v. Grillo, 896 N.E.2d 499, 504 (Ind. 2008), reh'g denied, the trigger date, as a matter of law, was when Mrs. Overton learned that she had cancer, bringing to light the potential that an earlier mammogram had been misread. The potential link between the earlier mammogram and her cancer “was not obscured by alternative explanations.” Id. On the other hand, “[w]here the plaintiff knows of an illness or injury, but is assured by professionals that it is due to some cause other than malpractice, this fact can extend the period for reasonable discovery.” Herron, 897 N.E.2d at 451. The trigger date is tolled as a matter of law when the alleged malpractice was not reasonably discoverable within the limitations period. Id. at 450-51.

The date on which WVIC administered Nancy’s MRI was July 18, 2005. On July 26, 2007, Dr. Taylor ordered another MRI, in the event that the first MRI was not accurate or sufficiently comprehensive. In August of 2007, outside the two-year limitations period, Nancy was informed that she did indeed have a rotator cuff tear. During the limitations period, she had been assured by medical professionals that she had no rotator cuff tear but instead had tendonitis and shoulder impingement syndrome. Pursuant to Herron, her “trigger date” was August 16, 2007, the date on which she was in a position to discover the failure to identify the rotator cuff tear in the earlier MRI. As it was outside the two-year limitations period, she had two years from that date to bring her claim. See Herron, 897 N.E.2d at 449.

October 22, 2008, the date that Nancy filed her proposed complaint, was within two years of this trigger date. Accordingly, the claim against WVIC is not time-barred.

II. Propriety of Summary Judgment – Dr. Schnieder & Ortho Indy

Dr. Schneider last saw Nancy at Ortho Indy on September 8, 2006, more than two years before she filed her proposed complaint on October 22, 2008. However, the Conways contend that, as a matter of law, Dr. Schneider treated Nancy until November 6, 2006 because of her use of anti-inflammatory medication Dr. Schneider had prescribed for her.³ Alternatively, the Conways contend that the applicable statute of limitations was tolled until wrongful acts on the part of Dr. Schneider were remedied. They assert that “the applicable period in which to file did not start until [Nancy] was released by Dr. Rolston.” Appellant’s Brief at 21.

The Conways argue that Dr. Schneider’s actions or omissions amount to passive constructive fraud. “The doctrine of fraudulent concealment estops a defendant from asserting a statute of limitations defense when the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the malpractice.” Babcock v. Lafayette Home Hosp., Woman’s Clinic, 587 N.E.2d 1320, 1323 (Ind. Ct. App. 1992). Failure of the physician to disclose what he or she knows, or in the exercise of reasonable care should have known, satisfies the conduct requirement so as to toll the running of the statute of limitation. Id. at 1324. However, the

³ When Dr. Schneider last saw Nancy, he provided her with a sixty-day prescription, refillable three times. Nancy re-filled the prescription on October 6, 2006 and was given a supply to last until November 6, 2006. The parties agree on these facts but disagree as to whether the physician-patient relationship ended with the last office visit or with the prescription refill and use.

“tolling” terminates when the physician-patient relationship terminates or when the patient learns of the malpractice, or discovers information that would lead to the discovery of the malpractice through the exercise of reasonable diligence. Id.

Where the “continuing wrong” doctrine is applicable, that is, where the malpractice involves an entire course of conduct, including the failure to make a proper diagnosis and properly treat a condition, the statute of limitations begins to run at the end of the continuing wrongful act. Palmer v. Goreci, 844 N.E.2d 149, 156 (Ind. Ct. App. 2006, trans. denied). Nevertheless, when a patient’s only claim is the health care provider’s failure to diagnose and treat a disease or injury, the omission cannot extend beyond the time the health care provider last rendered a diagnosis. Havens v. Ritchey, 582 N.E.2d 792, 795 (Ind. 1991). Although Nancy took Naprosyn prescribed by Dr. Schneider after September 8, 2006, she has not alleged that the medication caused her harm. Instead, she alleged a failure to diagnose and treat her rotator cuff tear.

Accordingly, contrary to the Conway’s assertion, the doctrines of continuing wrong and fraudulent concealment do not toll the statute of limitations until treatment by subsequent physicians has ended and arguably revealed the full extent of any injuries of the patient. The date upon which Dr. Rolston released Nancy is not controlling.

The last opportunity for Dr. Schneider to diagnose Nancy was on September 8, 2006, when he noted that Nancy had tendonitis and shoulder impingement syndrome. Even assuming applicability of the doctrines of continuing wrong or fraudulent concealment, they

would not have tolled the statute of limitations past September 8, 2006 or extended the time to file a claim beyond September 8, 2008.

Nancy was not suffering from a latent or undiscovered condition, as she knew from the time of the fall that she was experiencing significant pain. However, the potential malpractice did not come to light until the accurate diagnosis. The applicable “trigger date” is August 16, 2007, the date on which Nancy learned that she had a rotator cuff tear that had been missed despite the first MRI.

This trigger date fell within the two-year statute of limitations. Consistent with the guidance of our supreme court in Herron, the Conways were required to bring their claims before the statute of limitations expired, if it was possible to do so “in the exercise of due diligence.” 897 N.E.2d at 449. The Conways had slightly over one year of the limitations period remaining. The designated materials reveal no reason why the proposed complaint could not possibly have been filed, in the exercise of due diligence, within the time remaining before September 8, 2008.

Dr. Schneider and Ortho Indy have demonstrated that the proposed complaint was filed outside the two-year limitations period. The burden shifted to the Conways to demonstrate an issue of fact material to a theory that avoids the statute of limitations defense. Herron, 897 N.E.2d at 447. They failed to do so. The proposed complaint, as to Dr. Schneider and Ortho Indy, is time-barred.

Conclusion

The “trigger date” was outside the two-year statute of limitations running from when WVIC last treated Nancy; thus, she had two years from the “trigger date” in which to file her proposed complaint. The proposed complaint was not time-barred as to WVIC. The “trigger date” was within the two-year statute of limitations running from when Dr. Schneider (of Ortho Indy) last treated Nancy; thus, she had until the end of the two-year limitations period in which to file her proposed complaint. She did not do so; the proposed complaint is time-barred as to Dr. Schneider and Ortho Indy.

Affirmed in part, reversed in part, and remanded.

BAKER, C.J., and ROBB, J., concur.