

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WAYNE E. SCHWARTZKOPF,)	
Administrator of the Estate of Elsie M.)	
Schwartzkopf, deceased and WAYNE E.)	
SCHWARTZKOPF, individually and in his)	
own right,)	
)	
Plaintiffs,)	C.A. No. 02C-07-064-MMJ
)	
v.)	
)	
CHARLES A. ESHAM, M.D., et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION

Submitted: December 2, 2003
Decided: February 2, 2004

Michael J. Hood, Esquire, HOOD & TIGANI, *Attorneys for Plaintiffs.*

John A. Elzufon, Esquire, ELZUFON AUSTIN REARDON TARLOV & MONDELL, P.A., *Attorneys for Charles A. Esham, M.D. and Wilmington Medical Associates.*

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Richard Galperin, Esquire, MORRIS, JAMES, HITCHENS & WILLIAMS, LLP, *Attorneys for Christiana Care Health Services, Christiana Care Corporation and Eric Kalish, P.A.*

JOHNSTON, Judge

The following is the Court's decisions concerning the Motion to Dismiss of Charles A. Esham, M.D. and his medical practice, Wilmington Medical Associates ("WMA") ("Defendants").

This is a medical malpractice case filed on July 9, 2002 by the Administrator of the Estate of Elsie Schwartzkopf, and by Wayne E. Schwartzkopf, individually ("Plaintiffs"). Dr. Esham and WMA treated Mrs. Schwartzkopf for severe abdominal pain beginning in February 2000. Over the next few months, Mrs. Schwartzkopf was seen by Dr. Esham on a number of occasions for extreme abdominal pain and weight loss.

Pursuant to the advice of Dr. Esham, Mrs. Schwartzkopf was evaluated and treated by surgeons, including certain co-defendants. The last time Dr. Esham treated Mrs. Schwartzkopf was on July 5, 2002. On July 10, 2000, co-defendant surgeons performed an exploratory laparotomy and discovered a wooden toothpick protruding through the small bowel. The toothpick had caused inflammation, pelvic abscess, and dense adhesions. Mrs. Schwartzkopf was hospitalized from July 20, 2000 through September 29, 2000 and again from October 30, 2000 until March 3, 2001. Plaintiffs allege that Mrs. Schwartzkopf died as a direct and proximate result of Defendants' continuous course of negligent treatment commencing on February 10, 2000 until Mrs. Schwartzkopf's death on March 3, 2001.

On September 6, 2002, Dr. Esham and WMA filed an answer to the complaint. The answer included the affirmative defense of statute of limitations. Dr. Esham and WMA assert that Plaintiffs' claim is time barred because it was filed on July 9, 2002 -- more than two years after July 5, 2000, the last time Dr. Esham or any physician from WMA treated Mrs. Schwartzkopf and evaluated her. Section 6856 of Title 18 of the Delaware Code provides that, for medical malpractice actions, a claim must be brought within two years.¹

Defendants contend that even though the allegations in this complaint include a claim for wrongful death, this does not change the date by which litigation should have been filed. Under Delaware law, an action for wrongful death based on medical malpractice begins to run on the date of the allegedly negligent act or omission, and

¹18 *Del.C.* § 6856 provides:

No action for the recovery of damages upon a claim against a health care provider for personal injury, including personal injury which results in death, arising out of medical negligence shall be brought after the expiration of 2 years from the date upon which such injury occurred; provided, however, that:

(1) Solely in the event of personal injury the occurrence of which, during such period of 2 years was unknown to and could not in the exercise of reasonable diligence have been discovered by the injured person, such action may be brought prior to the expiration of 3 years from the date upon which such injury occurred, and not thereafter;...

not the date of Mrs. Schwartzkopf's death.² Defendants argue that since this action was not filed until July 9, 2002, the Complaint was filed four days too late, and must be dismissed.

Plaintiffs argue that the Motion to Dismiss should be denied because beginning on or about February 10, 2000, and continuing until the date of her death, Mrs. Schwartzkopf was at all times under the continuous negligent medical care and treatment of Defendants. Mrs. Schwartzkopf died as a direct and proximate result of Defendants' continuous course of negligent treatment.

The last time Dr. Esham saw Mrs. Schwartzkopf in person was on July 5, 2000. On that date, Dr. Esham prescribed 100 Darvocet tablets with the recommendation to take as needed for abdominal pain. Mrs. Schwartzkopf had an exploratory laparotomy the following week on July 10, 2000. Plaintiffs contend that Dr. Esham's prescription constitutes a continuation of his negligent care and treatment beyond July 5 until at least July 10, 2000.

Dr. Esham stated in his deposition that his prescription of 100 Darvocet tablets on July 5 placed on him responsibility for the continuing care of Mrs. Schwartzkopf. Hospital records of admission, dated July 10, 2000, show that Mrs. Schwartzkopf did in fact take the Darvocet prescribed by Defendant and the last pill was taken at 8:30

²*Drake v. St. Francis Hospital*, 560 A.2d 1059, 1061-62 (Del. 1989).

p.m. on the evening of July 9, 2000. Moreover, well after the toothpick was discovered on July 10, 2000, Mrs. Schwartzkopf continued to take Darvocet and Soma as prescribed by Dr. Esham.

Plaintiffs allege that the continued prescription of pain medication by Defendant, documented through at least 8:30 p.m. on July 9, 2000, constitutes continuing negligent medical care within two years of the filing of Plaintiffs' complaint at 5:55 p.m. on July 9, 2002. Because the half-life of Darvocet is at least 6-12 hours, the Darvocet prescribed by Dr. Esham remained in Mrs. Schwartzkopf's system until July 10, 2000. Plaintiffs contend that by continually prescribing addictive pain medications, instead of investigating the cause of Mrs. Schwartzkopf's pain, Dr. Esham negligently caused the delay of the appropriate diagnosis and treatment of Mrs. Schwartzkopf's abdominal pain. Plaintiffs allege that at no time prior to the discovery of the toothpick on July 10, 2000, did Mrs. Schwartzkopf know or have reason to suspect that Dr. Esham's treatment was inappropriate or negligent.

The doctrine of continuous negligent medical treatment invoked by Plaintiffs requires the two-part inquiry of the *Ewing* Rule:³ (1) what is the date upon which the plaintiff had actual or constructive knowledge of the negligent course of treatment and; (2) what is the date of the "last act" in the negligent continuum immediately

³*Ewing v. Beck*, 520 A.2d 653, 664-65 (Del. 1987).

prior to the date that the patient received knowledge, actual or constructive, of the negligent course of treatment?

In answering part one of the *Ewing* inquiry, an objective test is employed, *i.e.*, the reasonably prudent person standard.⁴ In determining the date of knowledge, the Court will presume that “a patient who actually consults with an independent health care provider about the same condition which is subsequently the subject matter of an alleged negligent medical continuum knew or in the exercise of reasonable diligence could have known about the prior negligent course of conduct, on the date of the consultation with the independent health care provider.”⁵ In this case, the relevant consultation was July 10, 2000, the date of Mrs. Schwartzkopf’s laparotomy.

Part two of the *Ewing* inquiry also calls for an objective analysis, *i.e.*, what constitutes the “last act” in the negligent continuum. Under the continuous treatment doctrine, it is the last act of the defendant which activates the running of the statute of limitations. According to the *Benge* Court:⁶

The word “act” has been defined as “to perform; to fulfill a function; to put forth energy; to move, as opposed to remaining at rest; ...a thing done or established.” *Ballentine’s Law Dictionary* 17 (3d ed. 1969).

⁴*Id.* at 664.

⁵*Id.*

⁶*Benge v. Davis*, 553 A.2d 1180, 1185 (Del. 1989).

This definition and the general understanding of the word make it clear that an “act” is a form of affirmative conduct. The “last act,” which triggers the statutory period of limitations, in a claim based upon continuous negligent medical treatment, must be an *affirmative* happening or event. In the context of health care treatment, the term “act” can take a variety of forms, for example: surgery (*Cf. Dunn v. St. Francis Hosp., Inc.*, Del. Supr., 401 A.2d 77 (1979)); a prescription for medication (*Cf. Oakes v. Gilday*, Del. Super., 351 A.2d 85 (1976)); an emergency room visit (*Cf. Reyes v. Kent General Hosp., Inc.*, Del. Supr., 487 A.2d 1142 (1984)); and an office visit or consultation (*Ewing v. Beck*, Del. Supr., 520 A.2d 653 (1987)).

In *Benge*, the Delaware Supreme Court specifically enumerated “a prescription for medication” as an example of the term “act.” The *Benge* Court also opined that each day that a patient relies upon a defendant health care provider’s advice does not constitute an “act.”⁷

In *Petrilli v. Gibbs*,⁸ the defendant physician wrote a prescription for pain medication, dated September 29, 1994, to be taken on an as-needed basis. Plaintiff argued that the last act to trigger the statute of limitations under the continuous negligent treatment doctrine was November 25, 1994, when plaintiff was still taking the prescription medication. The *Petrilli* Court held:

Further, even viewing the facts in the light most favorable to the Plaintiff, the date of the last act in Defendant’s continuum of negligence cannot rest on the fact that Mrs. Petrilli, by virtue of a refill, was still

⁷*Id.*

⁸1998 WL 283387 (Del. Super., March 12, 1998) (Quillen, J.).

taking the medication prescribed by Defendant subsequent to November 25, 1994. Given the refill at Mrs. Petrilli's pleasure and the nature of the medication (Tylenol 3), such a claim seems a stretch....⁹

In the instant case, Mrs. Schwartzkopf was directed to take pain medication as needed. Therefore, even viewing the facts in the light most favorable to Plaintiffs, the last act in Dr. Esham's and WMA's continuum of negligence can be no later than the date of the prescription, July 5, 2000.¹⁰

Thus, Plaintiffs had until July 5, 2002 to file a lawsuit against Defendant and WMA. Since this action was not filed until July 9, 2002, it was filed too late and must be dismissed in accordance with 18 *Del.C.* §6856. Courts have no alternative but to enforce the statute of limitations enacted by the legislature in accordance with its terms.¹¹

⁹*Id.*

¹⁰Dr. Esham's prescription left the decision whether and when to take medication to the discretion of the patient. Therefore, the Court need not resolve the issue of the date of the last act in a continuum of negligence in the situation in which a defendant prescribes medication to be taken at specific intervals, or for a finite length of time.

¹¹*Ewing*, 520 A.2d at 660.

Based upon the foregoing, Defendants' Charles A. Esham, M.D. and Wilmington Medical Associates' Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

ORIGINAL: PROTHONOTARY'S OFFICE - CIV. DIV.