

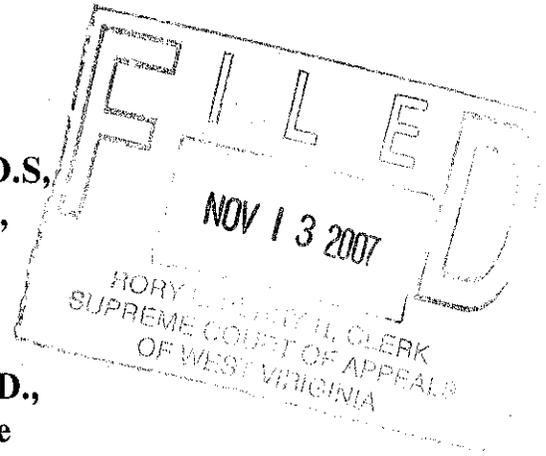
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

33521
No. 070005

R. BROOKS LEGG, Jr., D.D.S.,
Plaintiff Below, Appellant,

v.

RICHARD C. RASHID, M.D.,
Defendant Below, Appellee



BRIEF OF APPELLANT

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I. INTRODUCTION

This is the brief of the Appellant, R. Brooks Legg, Jr., D.D.S. (Dr. Legg), in an appeal by the appellant from an order entered by the Circuit Court of Kanawha County granting summary judgment to the appellee, Richard C. Rashid, M.D. (Dr. Rashid), in a suit brought by Dr. Legg pursuant to *West Virginia Code, 55-7B-4*, the Medical Professional Liability Act. In its order granting summary judgment for Dr. Rashid, the lower court held that Dr. Legg's civil action was filed after the statute of limitations had run on his claim against Dr. Rashid.

Dr. Legg underwent a procedure performed by Dr. Rashid on January 13, 1997. The procedure is referred to as Automated Lamellar Keratoplasty (ALK). This procedure was performed on Dr. Legg's left eye and a subsequent procedure was performed by Dr. Rashid on the same eye two weeks later because Dr. Legg suffered loss of vision in his left eye following the first procedure.

The Circuit Court mistakenly granted summary judgment in favor of Dr. Rashid because it failed to understand that Dr. Rashid committed medical malpractice in the pre-operative procedures prior to Dr. Legg's procedure and then, following the unsuccessful procedures performed on Dr. Legg's eye, Dr. Rashid engaged in conduct that tolled the statute of limitations for the period from the date of the original procedure until at least July 2003, when Dr. Legg learned from another medical practitioner that the pre-operative procedure of Dr. Rashid was the source of the unsuccessful procedure performed in 1997. That is, Dr. Rashid failed to instruct Dr. Legg to cease use of his hard contacts for a period of time consistent with the standard of care for successful completion of ALK procedures on persons who are users of hard contact lenses.

Dr. Legg also exercised reasonable diligence in discovering the cause of the failed 1997 ALK, and he asserts that the Circuit Court failed to apply the correct standard related to such exercise of reasonable diligence in reaching its decision to grant Dr. Rashid's motion for summary judgment.

The statute of limitations was tolled through the conduct of Dr. Rashid in that he

remained in contact with Dr. Legg during the six and one-half years between the date of the first ALK procedure and Dr. Legg's appointments with Dr. Wiley in Morgantown, West Virginia, in July through September 2003. It was during Dr. Legg's consultations with Dr. Wiley, sometime after the 1st of July, 2003, that he learned that the standard of care for performing surgery such as ALK required that hard-contact lens wearers not wear the lenses for a period of four weeks prior to the procedure. Dr. Rashid performed the ALK after Dr. Legg had not worn his hard contact lenses for a period of only 72 hours; however, Dr. Rashid never disclosed to Dr. Legg that this failure to remove the hard contact lenses for a minimum of four weeks prior to the ALK procedure, the standard of care for the procedure, was the true reason that the ALK procedure was not successful.

In fact, Dr. Rashid fraudulently concealed and misrepresented material facts about the cause of the injury to Dr. Legg's eye (i.e., the failure to comply with the standard of care for pre-operative ALK), and Dr. Rashid repeatedly told Dr. Legg that new technology not yet approved for use in the United States would soon be available and would repair the "bad result" suffered by Dr. Legg. Unbeknownst to Dr. Legg, it appears from the facts of this matter that Dr. Rashid hoped to correct his own malpractice when new technology was available.

Unfortunately, Dr. Legg, as a medical professional, chose to believe his treating physician and good friend when told that he had suffered a bad result. Even more unfortunate, Dr. Rashid chose to conceal and misrepresent to Dr. Legg the true cause of the failed procedure.

The Circuit Court completely failed to understand that it was the pre-operative malpractice committed by Dr. Rashid and his subsequent concealment and misrepresentation of the material facts leading to the botched ALK that caused injury to Dr. Legg and Dr. Rashid's concealment and misrepresentation of material facts also tolled the statute of limitations in this action until Dr. Legg learned from Dr. Wiley in July 2003 the true reason for the injury he suffered at the hands of Dr. Rashid. Dr. Legg's civil action was filed within the statute of limitations on June 9, 2005, and the Circuit Court should not have granted summary judgment in favor of Dr. Rashid.

II. STATEMENT OF FACTS

Dr. Legg filed his complaint against Dr. Rashid on June 9, 2005, in the Circuit Court of Kanawha County, alleging medical malpractice by Dr. Rashid in performing the ALK, including the pre-operative surgery procedures, and all requirements for filing a medical malpractice action in the State of West Virginia were met by Dr. Legg prior to filing the complaint.

Dr. Legg's claims against Dr. Rashid began with the pre-operative malpractice of Dr. Rashid in 1997 and the subsequent failed ALK performed on January 13, 1997 and the second failed procedure performed two weeks later. Dr. Legg did immediately realize that the first ALK procedure had not corrected his vision, and had in fact greatly diminished his vision¹ when he removed the bandage from his eye on January 14, 1997. Dr. Legg contacted Dr. Rashid and a second procedure was scheduled for two weeks later. This procedure failed to correct Dr. Legg's vision and he continued to consult with his trusted medical expert, Dr. Rashid, regarding correction of his vision problems.

Dr. Rashid never informed Dr. Legg that the failed ALK resulted from Dr. Rashid's failure to adhere to the standard of care related to removal of hard-contact lenses prior to performing the ALK procedure. In fact, as Dr. Legg testified in his deposition, Dr. Rashid repeatedly led Dr. Legg to believe that the failed ALK procedure could be corrected. Dr. Rashid fitted Dr. Legg with a corrective soft-contact lens for his left eye in March or April of 1997 (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 30, Lines 10 - 21). Later, in the Summer of 1997, Dr. Rashid attempted to correct Dr. Legg's left-eye vision by fitting him with a hard-contact lens (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 32, Lines 23 - 24 and Page 33, Lines 1 - 14). Even with the two lens fittings by Dr. Rashid, Dr. Legg's vision did not return to his pre-ALK vision (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at

¹ Following the failed ALK on January 13, 1997, Dr. Legg suffered the following injuries/damages:

1. Double image, double-blurred image (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 25, Lines 5 - 6)
2. Cannot read as before (id., Page 25, Lines 13 - 24; Page 26, 27, 28, 29, and 30, Lines 1 - 12).
3. Constantly must wet contact in left eye (id., Page 37, Lines 14 - 18).
4. Vision not as good as right eye (id., Page 38, Lines 5 - 24; Page 39 - 40, Lines 1 - 15).
5. Trouble getting spare contacts (id., Page 40, Lines 16 - 24).

Page 33, Lines 10 - 24 and Page 34, Lines 1 - 22). Next, during the Summer of 1997, Dr. Rashid asked to perform ALK on Dr. Legg's right eye, but Dr. Legg wished for the left eye to be corrected first, and Dr. Rashid indicated that technology was in use in Canada and Mexico that could correct the failed 1997 ALK procedure completed on the left eye (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 31, Lines 14 - 24; Page 32, Lines 1 - 14). Dr. Legg continued to receive treatment from Dr. Rashid until the latter part of 2000 (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 35, Lines 7 - 9). Dr. Rashid remained in contact with Dr. Legg in a doctor-patient relationship for three (3) years after the failed January 1997 ALK (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 35, Line 10 through Page 39, Line 10). Dr. Rashid stopped providing treatment to Dr. Legg in the Fall of 2000 (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 41, Lines 19 - 24).

However, Dr. Rashid's concealment and misrepresentation of the material facts that resulted in Dr. Legg's injury to his left eye continued. After school started at West Virginia University for Fall, 2002, Dr. Legg visited the WVU Eye Institute and obtained some pamphlets, and later saw Dr. Wiley regarding his vision and was told that they had applied for the new computer assisted laser, and it would be there sometime in 2003 and Dr. Legg continued to contact Dr. Wiley's office regarding the availability of the new technology; Dr. Legg's visit to WVU Eye Institute was initiated because during the summer of 2002, Dr. Rashid had telephoned Dr. Legg and told him that that (Dr. Wiley at the WVU Eye Institute) "was the only place that was going to have the, or the first place to have the computer-assisted laser" and Dr. Rashid commented that Dr. Wiley "was a good man." (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 46, Lines 17 - 24 and Page 47, Lines 1 - 3; Page 50, Lines 18 - 23; Page 51, Lines 9 - 23; Page 52, Lines 1 - 2; and Page 54, Lines 1 - 6).

Prior to the discovery by Dr. Legg through his contact with Dr. Wiley, Dr. Rashid assured Dr. Legg that "everything is going to be fine, you know . . . [e]ventually when the new laser surgery gets here it's going to be fine." (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 92, Lines 20 - 23).

When the computer-assisted laser technology, which was highly touted by Dr. Rashid to Dr. Legg as the "fix" for the failed 1997 ALK, was finally available in the United States, Dr. Legg took action upon the continuing advice of Dr. Rashid and scheduled the treatment through Dr. Wiley. In July and August 2003, Dr. Legg was in contact with Dr. Wiley's office and was told that the new computer-assisted laser technology machine was being calibrated (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 55, Lines 4 - 9). An appointment was finally arranged for September 2003, and Dr. Legg visited Dr. Wiley and he directed Dr. Legg to leave his left hard-contact lens out of the eye for a period of at least four (4) weeks, and Dr. Legg stated at that time "that's not how we did it at Dr. Rashid's office" and Dr. Wiley refused to do the surgery unless the lens was out for at least four (4) weeks (Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 55, Lines 12 - 18).

Thus, the earliest time when Dr. Legg discovered that Dr. Rashid had concealed from him the material fact that it was the pre-operative failure to remove the hard-contact lens from his eye for a period far in excess of 72 hours prior to the failed 1997 ALK was during the time period beginning in July 2003 through September 2003. Dr. Legg's complaint was filed on June 9, 2005, a time period well within the statute of limitations for filing a malpractice action against Dr. Rashid related to the "botched" 1997 ALK because Dr. Rashid continued to remain involved in Dr. Legg's care as his treating physician until 2000 and remained in contact with Dr. Legg (*see Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, at Page 54, Lines 1 - 6 "Q. Okay, Dr. Wiley's office, though, was who you were seeking information from regarding the availability of the new laser, computer assisted laser. A. Right. I decided to go with the surgery there after talking with Dr. Rashid, because I trusted Dr. Rashid. I think he's a very knowledgeable man."*), and provided advice to Dr. Legg, regarding treatment that Dr. Rashid claimed would correct the failed 1997 ALK, and not until the Dr. Rashid-advocated treatment was available did Dr. Legg discover the material facts that caused his left-eye injury at the hands of Dr. Rashid.

No matter what Dr. Rashid's motivation in leading Dr. Legg to believe that new computer-assisted laser technology would fix the failed 1997 ALK, the record evidence clearly

shows that Dr. Legg was reasonably diligent in attempting to determine the cause of the injury to his left eye that was the result of the Dr. Rashid's malpractice. Indeed, he continued to consult with Dr. Rashid and consulted with other health care professionals in an attempt to, at the very least, regain his left eye's ability to function to the level it was at prior to the 1997 ALK and this diligence continued up to the time that Dr. Wiley told him in September 2003 that use of a hard-contact lens must be ceased at least four (4) weeks prior to such procedure on his eye².

III. STANDARD OF REVIEW

The applicable standard of review related to an appeal of a Circuit Court's entry of summary judgment is a *de novo* review. *Syllabus Point 1, Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). *See also Syllabus Point 1, Chrystal R. M. v. Charlie A. L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995), holding that "[w]here the issue on an appeal from the Circuit Court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review. *Quoted with approval in Pritt v. Republican Nat. Committee*, 210 W.Va. 446, 557 S.E.2d 853 (2001).

The Supreme Court has indicated that a Circuit Court's entry of summary judgment is reviewed *de novo*. In determining whether a motion for summary judgment is appropriate, the Court will apply the same test that the Circuit Court should have applied initially. The Supreme Court is not wed, therefore, to the lower court's rationale, but may rule on any alternate ground manifest in the record. The Supreme Court will resolve all reasonable doubts in favor of the nonmoving party. Thus, for a grant of summary judgment to be proper, the moving party must

² It is noteworthy that part of Dr. Rashid's argument that the rationale for granting summary judgment was appropriate in his "Response of Dr. Rashid to Dr. Legg's Petition for Appeal" is that he obtained new malpractice coverage and purchased "tail coverage" that extended to September of 2004 and that that date was chosen with the advice of counsel because it was long past the statutory deadline for filing any claim based on what would be otherwise uncovered "past acts." This is noteworthy because *West Virginia Code, 55-7B-4*, clearly permits claims to be brought within ten years after the date of the injury if (1) an injury is not discovered although the injured party has exercised reasonable diligence, or (2) if the injured party is a minor under the age of ten years at the time of the injury, or (3) if the health care provider or its representative has committed fraud or collusion by concealing or misrepresenting material facts about the injury. Thus, Dr. Rashid's argument that he "found himself in the unexpected and inequitable position of having to defend an uninsured claim for medical malpractice filed more than eight years after the procedure" and forced to "personally bear all fees, costs and expenses of defending an action" is a self-serving attempt to diminish the suffering of Dr. Legg during this time period.

show that there is an absence of evidence to support the nonmoving party's case and a determination that the evidence is so one-sided that one party must prevail as a matter of law. Quoting F. Cleckley, R. Davis, L. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* at Chapter VII, Pages 927 - 928 (2003 Edition). Likewise, this Court also reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by the Court. Quoting F. Cleckley, R. Davis, L. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* at Cumulative Supplement 2004, Page 98 (Cumulative Supplement 2004 to 2003 Edition).

Applying this Court's standard of review to this case, it is clear that the Circuit Court improperly and erroneously granted Dr. Rashid's motion for summary judgment.

IV. ARGUMENT

A. THE CIRCUIT COURT OF KANAWHA COUNTY IMPROPERLY AND ERROUNEOUSLY GRANTED DR. RASHID'S MOTION FOR SUMMARY JUDGMENT BASED UPON ITS FAILURE TO CORRECTLY APPLY CLEAR PRINCIPLES OF STATUTORY INTERPRETATION OF WEST VIRGINIA CODE, 55-7B-4: HEALTH CARE INJURIES; LIMITATIONS OF ACTIONS; EXCEPTIONS.

The Circuit Court committed error in granting Dr. Rashid's motion for summary judgment in this case because it failed to apply clear principles of statutory interpretation in applying *West Virginia Code, 55-7B-4*, to the facts of this case.³ Dr. Legg clearly has shown through his deposition testimony that the statute of limitations was tolled during the time period

³ West Virginia Code, 55-7B-4:

(a) A cause of action for injury to a person alleging medical professional liability against a health care provider arises as of the date of the injury, except as provided in subsection (b) of this section, and must be commenced within two years of the date of such injury, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs: Provided, that in no event shall any such action be commenced more than ten years after the date of injury.

(b) A cause of action for injury to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years of the date of such injury, or prior to the minor's twelfth birthday, whichever provides the longer period.

(c) The periods of limitation set forth in this section shall be tolled for any period during which the health care provider or its representative has committed fraud or collusion by concealing or misrepresenting material facts about the injury.

up to, at the earliest, July, 2003 (and he received actual verbal information from Dr. Wiley in September 2003 that the hard contact lens in his left eye must be left out for a period of at least four (4) weeks), when he first scheduled appointments with Dr. Wiley's office for the new computer assisted laser procedure recommended as the fix for the 1997 ALK by Dr. Rashid. Also, during this time period, Dr. Legg remained in contact with Dr. Rashid (and Dr. Rashid even called him on the telephone in 2002) and was advised repeatedly by him that the new technology would remedy the failed 1997 ALK.

Dr. Legg first points this Court to its decision in Bradshaw v. Soulsby, 210 W.Va. 682, 558 S.E.2d 681 (2001), in which this court dealt with proper methods of statutory interpretation of West Virginia's when it addressed the wrongful death act contained in *West Virginia Code*, 55-7-5. In Bradshaw, this Court rightly stated that "[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something that the Legislature omitted." Bradshaw v. Soulsby, 210 W.Va. 682, 558 S.E.2d 681 (2001), *Quoting Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996).

Just as *West Virginia Code*, 55-7-5, does not, as an element of the cause of action, require an action to be filed within 2 years, *West Virginia Code*, 55-7B-4, does not require an action to be filed within 2 years, and the Circuit Court's granting of summary judgment in favor of Dr. Rashid was an act of judicial usurpation of the authority of the West Virginia Legislature to enact *West Virginia Code*, 55-7B-4, and state therein that "in no event shall any such action be commenced more than ten years after the date of injury" or the other provisions of the statute, including the exercise of reasonable diligence by a claimant and the tolling of the statute of limitations for any period during which the health care provider commits fraud or collusion by concealing or misrepresenting material facts about the injury.

By blindly accepting Dr. Rashid's argument in his motion for summary judgment that Dr. Legg failed to file his cause of action within two years after the botched 1997 ALK, the Circuit Court completely ignored the clear intent of the West Virginia Legislature as embodied in the

clear and unequivocal language of *West Virginia Code, 55-7B-4*.

B. THE QUESTION OF WHETHER DR. LEGG EXERCISED REASONABLE DILIGENCE IN DISCOVERING THE INJURY COMPLAINED OF IN HIS COMPLAINT OR WHETHER DR. RASHID'S ACTIONS TOLLED THE STATUTE OF LIMITATIONS BY FRAUDULENTLY CONCEALING OR MISREPRESENTING MATERIAL FACTS ABOUT THE INJURY IS A QUESTION TO BE DETERMINED BY A JURY AND THEREFORE GRANTING SUMMARY JUDGMENT IN FAVOR OF DR. RASHID WAS ERROR BY THE CIRCUIT COURT.

This Court has consistently held that the discovery rule presents a question of fact to be determined by a jury, and is therefore not to be used as the basis for the granting of a motion for summary judgment. The question of whether Dr. Legg exercised reasonable diligence in discovering the cause of the injury to his eye or whether Dr. Rashid engaged in acts that fraudulently concealed or misrepresented material facts about the injury suffered by Dr. Legg is a question to be determined by a jury; therefore, it is clear that the Circuit Court erred in granting Dr. Rashid's motion for summary judgment.

This Court has addressed these issues before, and the holdings of this Court consistently agree with Dr. Legg's position that the basis of the granting of Dr. Rashid's motion for summary judgment are not ones properly within the province of a Circuit Court, but are rather questions for a jury. In *Syllabus Point 5 of Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), this Court stated that "[t]he **question of when plaintiff knows** or in the exercise of reasonable diligence has reason to know **of medical malpractice is for the jury**. [Emphasis Added].

In *Stephens v. West Virginia College of Graduate Studies*, 203 W.Va. 81, 506 S.E.2d 336 (1998), this Court affirmed an order granting summary judgment on facts that make it clear that the opposite result is necessary in Dr. Legg's appeal to this Court.

In *Stephens*, a married couple sought counseling for marital problems, and Mrs. Stephens became intimately involved with the counselor, Kenneth Jarrett. The counseling began in March

1991, and continued for approximately two years. In February 1992, Mrs. Stephens' husband began counseling with Peggy Dent, and in April 1992, Mrs. Stephens, in an apparent joint counseling session with her husband and Dent, confided that she was having an affair (it is unclear from the record whether Jarrett's name was disclosed, but Dent apparently knew that Mrs. Stephens' intimate partner was a counselor). Dent informed Mrs. Stephens at that time that she should report her therapist because his actions were "completely unacceptable." Dent also informed Linda Geronilla⁴ of the inappropriate relationship between Mrs. Stephens and her therapist, and Geronilla told Dent to urge Mrs. Stephens to report her therapist to the Board of Examiners in Counseling, but Mrs. Stephens refused to do so. Mrs. Stephens ended her counseling sessions with Jarrett in November, 1993, and subsequently obtained counseling from a variety of different professionals for numerous problems, including panic attacks, eating disorders, and severe depression. Jarrett and Mrs. Stephens ended their intimate relationship in April, 1995, when Jarrett moved from the area. After Jarrett's departure, Mrs. Stephens required extensive hospitalization for bulimia and depression. On October 31, 1995, Mr. and Mrs. Stephens filed a complaint against Jarrett and the West Virginia College of Graduate Studies alleging professional negligence, breach of fiduciary duty, and infliction of emotional distress. As a result of third-party pleadings and complaint amendments, ACT, Geronilla, Conrad, Dent, Humphreys Memorial United Methodist Church and the chairman of the Church's Board of Trustees were also named as defendants in the action.

Mrs. Stephens filed her civil action on October 31, 1995, and this Court found that notice by ACT counselors (Dent and Geronilla) to Mrs. Stephens of the impropriety of Jarrett's actions clearly occurred in both Spring and Fall 1992, more than two years prior to the filing of her action. This Court stated clearly that "[g]iven these facts, it is apparent that if ACT's conduct rendered it liable to Mrs. Stephens, such liability would have attached either in the spring of 1992 or the fall of 1992, and could have been the subject of a civil action no later than the spring

⁴ Linda Geronilla was also an employee/counselor with the same group as Jarrett.

of 1994 or the fall of 1994." This Court held that the claims of the Stephenses against ACT were time-barred because they did not file their action until October 1995. See Stephens v. West Virginia College of Graduate Studies, 203 W.Va. 81, 506 S.E.2d 336, at 341-342.

Dr. Legg, unlike the Stephenses, acted within the time set by statute for filing his action against Dr. Rashid once he discovered, during his consultations with Dr. Wiley in July through September 2003, the reason for the failed 1997 ALK - *the pre-operative failure of Dr. Rashid to have him remove his hard-contact lens for a period of time consistent with the standard of care for performing ALK.*

To put the matter clearly, Mrs. Stephens was certainly aware that her therapist groped her and later engaged in sexual relations with her, but this Court's reasoning in Stephens puts the time when liability attached to the therapist's employer at the time when Mrs. Stephens was informed by a subsequent counselor of the inappropriateness of Jarrett's acts.

In the case *sub judice*, Dr. Legg knew that his eyesight in his left eye was greatly impaired at the time of the removal of the bandage from his eye in January 1997, but he chose to believe Dr. Rashid that this impairment was merely a "bad result" and that coming technology (as Dr. Rashid continually led Dr. Legg to believe during consultations subsequent to the 1997 ALK) would correct the matter; it was not until Dr. Legg discovered (was informed) that the failure to remove his hard-contact lens for a sufficient period of time consistent with the applicable standard of care did liability attach to Dr. Rashid's acts. Dr. Legg filed his civil action within the two-year time period called for under both the discovery rule and the applicable statute (*when viewed either from the point of view that the "reasonable diligence standard" or the "fraudulent concealment standard" applies*), and it was the Circuit Court's failure to correctly apply both the discovery rule and the applicable statute to the facts of this case that led to the improper granting of summary judgment in favor of Dr. Rashid.

More recently, this Court held in *Syllabus Point 6 of Merrill v. West Virginia Dept. of Health and Human Resources*, 219 W.Va.151, 632 S.E.2d 307 (2006), that "[i]n tort actions, unless **there is a clear statutory prohibition to its application**, under the discovery rule the

statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." [Emphasis Added] In *Syllabus Point 7* of Merrill, this Court stated that "[m]ere ignorance of the existence of a cause of action or the identity of the wrongdoer does not prevent the running of statute of limitations; the discovery rule applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." And consistent with prior holdings of this Court (and consistent with Dr. Legg's assertion that this suit should never have been dismissed on summary judgment in favor of Dr. Rashid), *Syllabus Point 8* of Merrill states that "[f]raudulent concealment requires that the defendant commit some positive act tending to conceal the cause of action from the plaintiff, although **any act or omission tending to suppress the truth is enough.**" [Emphasis Added].

It is clear that the issues of whether Dr. Legg exercised reasonable diligence in discovering the cause of his injury or whether Dr. Rashid engaged in acts amounting to fraudulent concealment of the cause of the injury are questions of fact to be determined by a jury. This Court's prior holdings make that clear and Dr. Legg merely asks that this Court grant him the opportunity to present his case to a jury and allow that jury to carry out the clear intent of the West Virginia Legislature in enacting *West Virginia Code 55-7B-4*.

C. GRANTING SUMMARY JUDGMENT IN FAVOR OF DR. RASHID WAS NOT APPROPRIATE WHERE DR. LEGG CAN POINT TO ONE OR MORE DISPUTED MATERIAL FACTS THAT WOULD SWAY THE OUTCOME OF THE LITIGATION UNDER APPLICABLE LAW.

The Circuit Court should not have granted Dr. Rashid's motion for summary judgment because Dr. Legg has demonstrated that one or more material facts exist that are capable of swaying the outcome of the litigation under applicable law.

Both the acts of Dr. Rashid in continuing to tell Dr. Legg that as yet unapproved, but coming soon, technology would correct his greatly impaired left eye, as well as Dr. Legg's

exercise of reasonable diligence in seeking the cause of the failed 1997 ALK procedure, are material facts that would sway the outcome of the litigation under the applicable law. See *Deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006, attached hereto and made part of this Brief of Appellant*). Dr. Legg reasserts that this Court should apply its holding in *Syllabus Point 5 of Gaither v. City Hosp., Inc., 199 W.Va. 706, 487 S.E.2d 901 (1997)*, this Court stated that "[t]he **question of when plaintiff knows** or in the exercise of reasonable diligence has reason to know **of medical malpractice is for the jury**." [Emphasis Added]. Also, Dr. Legg reasserts that application of the fraudulent concealment provision of *West Virginia Code, 55-7B-4* is applicable in this case.

V. CONCLUSION

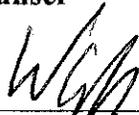
The Circuit Court failed to properly analyze Dr. Legg's claims and improperly applied both the discovery rule and the applicable statute, *West Virginia Code, 55-7B-4*, to the facts of this case when it granted Dr. Rashid's motion for summary judgment.

WHEREFORE, the Appellant, R. Brooks Legg, Jr., D.D.S., respectfully requests that this Court reverse the granting of Dr. Rashid's motion of summary judgment by the Circuit Court of Kanawha County and remand this case with instructions and permit the same to proceed to a trial by jury on all issues raised in appellant's timely-filed complaint alleging medical malpractice by the Appellee.

Respectfully Submitted.

R. BROOKS LEGG, JR., D.D.S.

By Counsel


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 070005

**R. BROOKS LEGG, Jr., D.D.S.,
Plaintiff Below, Appellant,**

v.

**RICHARD C. RASHID, M.D.,
Defendant Below, Appellee**

CERTIFICATE OF SERVICE

I, Wayne King, counsel for the Appellant, R. Brooks Legg, Jr., D.D.S., hereby certify that on this the 13th day of November, 2007, I served a true copy of the foregoing Brief of Appellant with copy of deposition of R. Brooks Legg, Jr., D.D.S., 2/13/2006 attached, upon counsel for the Appellee by placing the same in the facilities of the U. S. Mail, first-class postage prepaid, and addressed as follows:

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