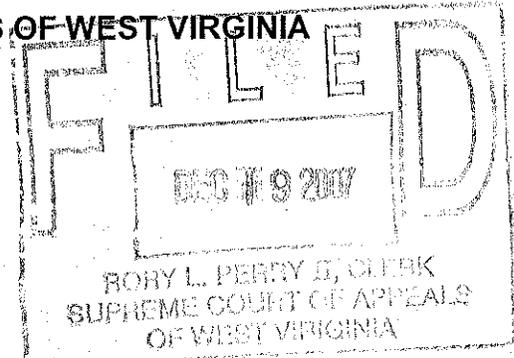


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

33521  
NO. 070005



**R. BROOKS LEGG, Jr., D.D.S.,**

Appellant/Plaintiff,

v.

**RICHARD C. RASHID, M.D.,**

Appellee/Defendant.

=====  
**BRIEF OF THE APPELLEE**  
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## TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES .....	ii
II.	STATEMENT OF FACTS .....	1
III.	STANDARD OF REVIEW .....	2
IV.	ARGUMENT	
	A. Summary Judgment Was Appropriate in This Case Because Dr. Legg's Claim Was Filed Over Six Years After the Two-Year Statute of Limitations Expired. ....	2
	B. Summary Judgment Was Appropriate in This Case Because There Was No Basis for Application of the Discovery Rule .....	6
V.	CONCLUSION .....	9

## TABLE OF AUTHORITIES

### Cases

<i>Gaither v. City Hospital</i> 487 S.E.2d at 901 (W.Va. 1997) .....	2-6
<i>Harrison v. Seltzer</i> 268 S.E.2d 312 (W.Va. 1980) .....	5-6
<i>Hickman v. Grover</i> 358 S.E.2d 810 (W.Va. 1987) .....	6
<i>Minshall v. Health Care &amp; Retirement Corp. of America</i> 537 S.E.2d 320, 323 (W.Va. 2000) .....	9
<i>Painter v. Peavy</i> 451 S.E.2d 755 (W.Va. 1994) .....	2

### West Virginia Code

§ 55-7B-4 .....	2-5, 7
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## STATEMENT OF FACTS

On January 13, 1997, Dr. Rashid performed an elective procedure ("the Procedure") known as Automated Lamellar Keratoplasty, or "ALK,"<sup>1</sup> on Dr. Legg's left eye. See Transcript of Dr. Legg's 2/13/06 deposition (hereinafter "Legg Tr.") at 9. On January 10, 1997, Dr. Legg signed a document evincing his informed consent to the Procedure and his understanding of the inherent risks, including "irregular astigmatism," "blindness," and "even loss of the eye." See Exhibit A. Despite these known risks, both Dr. Rashid and Dr. Legg hoped and intended that the Procedure would be completely successful and "eliminate [Dr. Legg's] dependency on corrective lenses." *Id.*

Unfortunately, as Dr. Legg discovered the very next day, one of the known risks occurred. The Procedure caused injury, an irregular astigmatism, to Dr. Legg's left eye. Far from the intended improvement, Dr. Legg immediately realized that he had "greatly diminished vision." Brief of Appellant (hereinafter "Legg Brief") at 3. Instead of being able to see well without corrective lenses, Dr. Legg found that he had blurry, double vision. *Id.* Dr. Legg graphically described what he saw when the bandage was removed on January 14, 1997:

I couldn't even see the door. It was really terrible vision. Really, really terrible. And I had patients scheduled for the following day, and I thought I was going to have a heart attack.

Legg Tr. at 17.

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1. ALK is a type of refractive eye surgery in which a device called a microkeratome is used to remove a thin slice of the cornea, reshaping it for corrected vision. As with all forms of refractive eye surgery, there are risks of serious complications from ALK, including blindness.

Dr. Legg's vision never improved. In 2006 he testified that his vision was "as bad now as it was [in January, 1997]." See Legg Tr. at 97. However, for almost eight-and-a-half years Dr. Legg took no legal action. Then, on June 9, 2005, Dr. Legg filed the Complaint that commenced this action. Following full discovery, Dr. Rashid filed a Motion for Summary Judgment. By Order dated August 22, 2006 ("the Order"), the Circuit Court of Kanawha County granted Dr. Rashid's motion, after finding the action to be time-barred under *W.Va. Code* § 55-7B-4.

### STANDARD OF REVIEW

The question presented in this appeal is whether the Circuit Court's grant of summary judgment was appropriate. Accordingly, this appeal is subject to *de novo* review. *Gaither v. City Hospital*, 487 S.E. 2d 901, 905 (W.Va. 1997) (citing *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994)).

### ARGUMENT

**A. Summary Judgment Was Appropriate in This Case Because Dr. Legg's Claim Was Filed Over Six Years After the Two-Year Statute of Limitations Expired.**

Dr. Legg and Dr. Rashid agree that the statute of limitations applicable in this case is provided by the Medical Professional Liability Act. *W.Va. Code* § 55-7B-4(a). As this

Court ruled in *Gaither v. City Hospital*, 487 S.E.2d at 901 (W.Va. 1997), the “Act requires an injured plaintiff to file a malpractice claim against a health care provider within two years of the date of the 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.’” *Id.* at 906.

In *Gaither*, this Court provided a detailed analysis of the “discovery rule” while considering the question: “when does a plaintiff receive sufficient information under the ‘discovery rule’ to trigger the statute of limitations?” *Id.* Specifically, the Court was presented with the claim of Timothy Gaither, whose right leg was surgically amputated above the knee after he sustained “head injuries and a severe fracture to his right leg” in a motorcycle accident on October 17, 1989. *Id.* at 903.

Until early 1993, Mr. Gaither apparently “believed that the loss of his leg was caused solely by the motorcycle accident.” *Id.* at 904. Even the hospital’s counsel “conceded at oral argument that [Mr. Gaither] did not have any knowledge suggesting that the hospital had done anything wrong until 1993.” *Id.* at 908. This Court found that until 1993, Mr. Gaither “could have reasonably believed that his injuries were solely the result of his motorcycle accident and his own negligence.” *Id.* at 910.

In early 1993, a prosthetic specialist was the first person to ever raise the issue with Mr. Gaither of “whether he lost his right leg due to trauma or loss of circulation.” *Id.* at 904. That inquiry prompted Mr. Gaither to finally question and investigate whether his loss was caused by something other than the trauma of the accident. His medical records were obtained and those records indicated that delay by City Hospital was believed to have been

a contributing factor in the loss of Mr. Gaither's leg. *Id.* at 905. Less than one year later, Mr. Gaither "filed [his] malpractice action against City Hospital on January 7, 1994." *Id.*

This Court found that the "discovery rule" provision of *W.Va. Code* § 55-7B-4(a) applied to Mr. Gaither's claim because he reasonably:

believed that his injuries were solely the result of his motorcycle accident and his own negligence. The appellant certainly knew in October 1989 of the existence of his injury and knew that City Hospital owed him a duty of due care. However, we find nothing in the record to indicate that the appellant had any reason to know before January 1993 that City Hospital may have breached its duty and failed to exercise proper care, or that City Hospital's conduct may have contributed to the loss of his leg.

*Id.* at 910. In *Gaither* this Court held that "a claim will not be barred by the statute of limitations so long as it is reasonable for the patient not to recognize that the condition might be related to the treatment." *Id.* at 909. This is exactly what this Court found to be the case with Mr. Gaither. Until January of 1993, it was reasonable for him not to have recognized that the loss of his leg was in any way related to his treatment. For Mr. Gaither, the two-year period of *W.Va. Code* § 55-7B-4(a) did not begin until January, 1993. Thus, this Court found Mr. Gaither's complaint to have been timely when filed in January, 1994.

Significantly, in *Gaither* this Court went on to state "we do not go so far as to require recognition by the plaintiff of negligent conduct." *Id.* at 909. Instead, this Court held "that once a patient is aware, or should reasonably have become aware, that medical treatment by a particular party has caused a personal injury, the statute begins." *Id.* In reaching that

conclusion this Court recognized that “in some circumstances causal relationships are so well established that we cannot excuse a plaintiff who pleads ignorance.” *Id.* at 907. This Court restated the rule that “the statute of limitations will begin to run once the extraordinary result is known to the plaintiff ***even though he may not be aware of the precise act of malpractice.***” *Id.* (citing *Harrison v. Seltzer*, 268 S.E.2d at 315) (emphasis added).

In this case, the injury complained of occurred in the course of the Procedure on January 13, 1997. Dr. Legg became aware of that injury when the bandages came off just one day later. There is no dispute about this fact. Dr. Legg candidly admits that he “immediately realize[d] that the [Procedure] had not corrected his vision, ***and had in fact greatly diminished his vision when he removed the bandage from his eye on January 14, 1997.***” Legg Brief at 3 (emphasis added).

Unlike Mr. Gaither, Dr. Legg had no reasonable basis to believe that his injury was caused by anything other than the treatment. Dr. Legg admits he immediately recognized that the Procedure “had in fact greatly diminished his vision.” *Id.* Because Dr. Legg recognized “the extraordinary result” of the Procedure on January 14, 1997, the two year statute of limitations began to run on that date and it expired on January 14, 1999. Dr. Legg did not file his action until June 9, 2005, which was more than six years too late. Accordingly, it was appropriate for the Circuit Court to grant Dr. Rashid’s Motion for Summary Judgment.

**B. Summary Judgment Was Appropriate in This Case Because There Was No Basis for Application of the Discovery Rule.**

In a labored effort to revive his late-filed complaint, Dr. Legg makes the assertion that he:

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.*

Legg Brief at 11 (emphasis original). However, this argument fails because it is not supported by the law or the facts.

Dr. Legg's argument fails as a matter of law because it attempts to impose a requirement for the start of the statute's running that was expressly rejected by *Gaither*: the requirement of "recognition by the plaintiff of *negligent* conduct." *Gaither* at 909 (emphasis original). As this Court noted, tolling the statute until recognition of negligent conduct would "result in a situation 'where the statute of limitations would almost never accrue until after the suit was filed.'" *Id.* (citing *Hickman v. Grover*, 358 S.E.2d 810 (W.Va. 1987)). This Court has flatly rejected such an unwieldy requirement and held that "the statute of limitations will begin to run once the extraordinary result is known to the plaintiff even though he may not be aware of the precise act of malpractice." *Id.* at 907 (quoting *Harrison v. Seltzer*, 268 S.E.2d at 315).

Dr. Legg's argument rests on the legally irrelevant assertion that it was not until

2003 that he “discovered (was informed)” some precise act of malpractice.<sup>2</sup> Legg Brief at 11. This assertion does nothing to revive any claim against Dr. Rashid. Dr. Legg knew everything that was required for the statute to begin on January 14, 1997. On that date he knew “that the condition [of his left eye] might be related to the treatment.” *Gaither* at 909. Accordingly, the statute began to run on that date and it expired on January 14, 1999. When Dr. Legg filed his Complaint in June of 2005, he was more than six years too late.

Second, Dr. Legg’s argument fails because it misstates the facts. The argument is premised on the assertion that the statute was tolled “until at least July 2003, when Dr. Legg learned from [Dr. Wiley] that the pre-operative procedure of Dr. Rashid was the source of the unsuccessful procedure performed in 1997.” Legg Brief at 1. Dr. Legg claims that he first contacted Dr. Wiley in July and August of 2003 and that “[a]n appointment was finally arranged for September 2003.” *Id.* at 5. However, as was established below, the referenced appointment with Dr. Wiley was actually on December 10, 2002. This was clearly shown in Dr. Wiley’s deposition transcript, the relevant portion of which was attached to the Defendant’s Reply to Plaintiff’s Response to Defendant’s Motion for Summary Judgment:

Q. . . . what was done for the patient [Dr. Legg] during the initial exam and initial visit of **December ‘02?**

A. I performed a topography measurement, which is a measurement of the corneal curvature, and determined that there was kind of an unusual irregular astigmatism in the left eye, and then postulated that that can be due to a variety of things including potentially a change in the curvature of the cornea induced by chronic contact lens wear . . . . **He opted to**

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2. The claim that this precise act constituted malpractice is disputed. Dr. Rashid adamantly denies that he violated any standard of care in treating Dr. Legg.

***come back after having stopped the lens for several weeks for me to redo some measurements.***

Q. So the plan of December 10<sup>th</sup> [2002] was to do what for this patient?

A. Basically, refer him to [Dr.] Charleton, because his original question to me on our initial visit was could I perform a laser treatment to correct the vision in the left eye. That was a question he had for me.

Usually we won't provide any information concerning laser vision correction until someone's been out of contacts for quite some time, because we know contact lenses can alter the curvature and the refractor status of the eye. So, typically we ask people to be out of the hard lenses for quite some time. Usually it's a month or two for hard contact lenses. Usually it's several weeks for soft contact lenses.

Dr. Wiley Depo Tr. at 12-13 (emphasis added). This fact was expressly recognized by the Circuit Court, which found that Dr. Legg's "consultation [with Dr. Wiley] occurred in December, 2002, more than two years prior to the filing of his Complaint." The Order at 4-5. Thus, even if Dr. Legg's argument had a sound legally foundation, it would fail because it lacks factual support.

In a final, tortured effort to make this 1997 claim fit within the saving provisions of *W.Va. Code* § 55-7B-4, Dr. Legg peppers his brief with vague assertions of fraud on the part of Dr. Rashid. See, e.g., Legg Brief at 2, 4, 11 and 12. This effort must also fail because no claim of fraud was raised below. No claim of fraud was asserted in the original Complaint filed by Richard Lindsay, nor was that pleading ever amended. Likewise, no such claim was ever advanced by any of Dr. Legg's subsequent counsel in this action. Moreover, the Circuit Court directly addressed this non-issue when it found that "[t]here is no allegation of fraudulent concealment by the defendant and the Court finds no evidence

thereof." The Order at 4, para. 7.

This Court has ruled that although

review of the record from a summary judgment proceeding is *de novo*, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.

*Minshall v. Health Care & Retirement Corp. of America*, 537 S.E.2d 320, 323 (W.Va. 2000). Accordingly, this late, vaguely-stated claim of fraud should not be considered by this Court.

### CONCLUSION

In this case it was entirely appropriate for the Circuit Court to grant Dr. Rashid's Motion for Summary Judgment. It is unfortunate that Dr. Legg received a bad result from the Procedure. However, he learned of that result almost eight-and-a-half years before his Complaint was filed. When the bandage was removed on January 14, 1997, Dr. Legg recognized that his vision was "[r]eally, really terrible." There is no dispute about whether Dr. Legg appreciated that condition of his left eye was directly related to the Procedure. Dr. Legg admits that he "immediately realize[d]" that the Procedure "had in fact greatly diminished his vision."

In a case of such immediate recognition, the statute of limitations is not tolled. There is no waiting until some later time for a patient to identify what he believes to be some specific act of negligence. Under West Virginia law, when there is immediate

recognition that injury was caused by the treatment, the statute begins to run immediately. Thus, for any medical malpractice claim that Dr. Legg might have filed against Dr. Rashid, the statute began to run on January 14, 1997 and it expired on January 14, 1999. When Dr. Legg's Complaint was filed in June of 2005, it was over six years too late. Accordingly, it was entirely appropriate for the Circuit Court to grant Dr. Rashid's Motion for Summary Judgment and the Order should be affirmed by this Court

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CERTIFICATE OF SERVICE

I, W. Bradley Sorrells, hereby certify that on this 19<sup>th</sup> day of December, 2007, the foregoing **Brief of the Appellee** was served upon the Appellant by mailing a true copy to his counsel of record, via First Class U.S. Mail, postage pre-paid, in an envelope addressed as follows:

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