

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

RICHARD C. RASHID, M.D.,

Defendant.

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CATHY C. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

Civil Action No. 05-C-1235

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came on for hearing on the 19th day of July, 2006 pursuant to Defendant Richard C. Rashid, M.D.'s Motion for Summary Judgment, based upon plaintiff's case being time barred pursuant to West Virginia Code §55-7B-4(a). Present were A. Wayne King, counsel for plaintiff, and Bruce L. Freeman, counsel for defendant. After mature consideration of the matters raised in the pleadings and the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. In August 1996, the plaintiff, R. Brooks Legg Jr., D.D.S., a practicing dentist who wore hard contact lenses due to poor vision, decided to have a corrective surgical procedure to enhance his vision. The plaintiff contacted Dr. Rashid regarding Automated Lamellar Keratoplasty ("ALK") which was a type of corrective vision surgery commonly performed at that time.
2. In January 1997, Dr. Rashid performed ALK surgery on plaintiff's left eye and upon removing his eye patch the next day, plaintiff realized immediate loss of vision in that eye.

3. Because plaintiff's vision was so poor, Dr. Rashid performed a second procedure two weeks later intended to give the plaintiff his desired vision correction. However, plaintiff received no significant improvement from that procedure.

4. Subsequent to the surgical procedures performed by the defendant, plaintiff not only had terrible vision but also had difficulty wearing a contact lens in his left eye.

5. Following the two surgical procedures, Dr. Rashid informed the plaintiff that further procedures would be necessary to correct plaintiff's vision, the necessary procedures were not yet available in the United States, and Dr. Rashid did not know when the procedures would be available.

6. In the spring of 2001, plaintiff consulted with Dr. Michael Harris who informed the plaintiff that he was unable to fit a contact lens in plaintiff's left eye due to corneal irregularities caused by the surgeries plaintiff underwent in January 1997.

7. In December 2002, plaintiff consulted Dr. Lee Wiley in Morgantown, West Virginia who explained to plaintiff that before the cornea can be measured for surgical correction, the patient must stop wearing contact lenses for one to two months to allow the cornea to revert to its natural curvature.

8. On June 9, 2005, plaintiff filed suit against Dr. Rashid alleging damages arising from the surgical procedures performed by Dr. Rashid in January 1997.

CONCLUSIONS OF LAW

1. Summary judgment is a device "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial," if, in essence, there is no real dispute

as to salient facts or if only a question of law is involved.” Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755, 758 n. 5 (1994) (quoting Oakes v. Monongahela Power Co., 158 W.Va. 18, 207 S.E.2d 191 (1974)). As such, a motion for summary judgment should be granted when it is clear that there is no genuine issue of material fact to be tried and that inquiry concerning the facts is not desirable to clarify the application of the law. Syl. Pt. 3, Aetna Casualty and Surety Co. v. Federal Insurance Co. of N.Y., 148 W.Va. 160, 133 S.E.2d 770 (1963).

2. In the last several years, the West Virginia Supreme Court of Appeals has attempted to outline rules for determining when the statute of limitations has run. It has recognized that, generally, the statute of limitations begins to run when a tort occurs; however, under the discovery rule, the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his or her claim. Gaither v. City Hospital, Inc., 199 W.Va. 706, 487 S.E.2d 901 (1997).

3. In determining whether the discovery rule should apply, the Gaither Court divided plaintiffs into two categories: (1) plaintiffs who know or reasonably should know of the existence of an injury and its cause; and (2) plaintiffs who are unable to know of the existence of an injury or its cause.

4. For a plaintiff who knows or reasonably should know of the existence of an injury and its cause, the rule is:

Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the 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.

Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992).

5. For a plaintiff who is unable to know of the existence of an injury or its cause, the discovery rule will apply and 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. Gaither, 199 W.Va. at 714, 487 S.E.2d at 909.

6. In the case at bar, the plaintiff expressly admits immediately recognizing his injury the day after his surgery in January 1997. There is no allegation of fraudulent concealment by the defendant and the Court finds no evidence thereof. The plaintiff was specifically informed by Dr. Rashid that his condition will not improve without further surgical procedures which were not available in this country and no time frame was given in which they would become available. Plaintiff was further advised by Dr. Harris of the relationship between the January 1997 surgeries and plaintiff's difficulty wearing contact lenses. As noted in Gaither, when an injury occurs of such a character that the plaintiff cannot reasonably claim ignorance of the existence of a cause of action, the burden shifts to the plaintiff to prove entitlement to the benefit of the discovery rule. The plaintiff herein has not carried that burden.

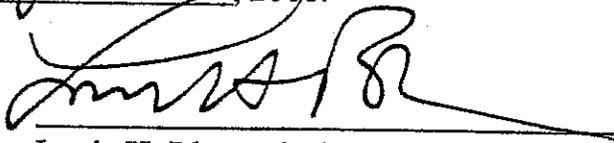
7. Plaintiff argues that under Dr. Rashid's care he was told to leave his contact lenses out for only a few days prior to his surgery, which is contrary to the information provided in his consultation with Dr. Wiley. It is this event, according to the plaintiff, which is the earliest date when the statute of limitations begins to run. This argument fails for two reasons. First, that

consultation occurred in December 2002, more than two years prior to the filing of his Complaint. Secondly, the West Virginia Supreme Court of Appeals has been clear that where the adverse results of medical treatment are so extraordinary that the patient is immediately aware that something went wrong, the statute of limitations will begin to run even though he may not be aware of the precise act of malpractice. Harrison v. Seltzer, 165 W.Va. 366, 371, 268 S.E.2d 312, 315 (1980).

It is therefore ORDERED, ADJUDGED, and DECREED that defendants Motion for Summary Judgment be and is hereby GRANTED and plaintiff's Complaint against defendant is hereby DISMISSED with prejudice. The objection and exceptions of the plaintiff are hereby noted and preserved.

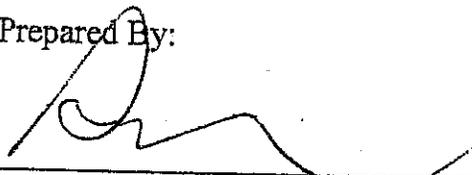
The Clerk is directed to forward certified copies of this Order to all counsel of record.

Entered this 22 day of Aug, 2006.



Louis H. Bloom, Judge

Prepared By:



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8/22/06

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY E. BATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 23rd
DAY OF August, 2006
Cathy E. Batson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA