

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 33834

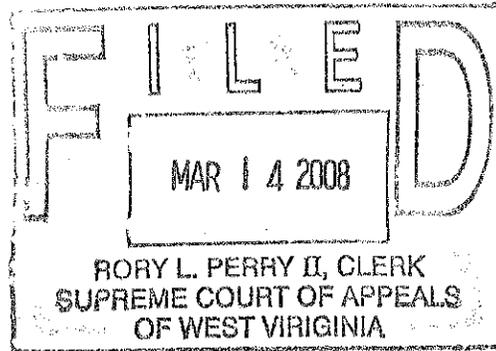
PAUL E. FORSHEY and
MELISSA L. FORSHEY,

Appellants/Plaintiffs below,

v.

THEODORE A. JACKSON, M.D.,

Appellee/Defendant below.



BRIEF OF APPELLEE

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
THE HONORABLE JENNIFER BAILEY WALKER, PRESIDING
Civil Action No. 06-C-1534

THEODORE A. JACKSON, M.D.
Appellee/Defendant
By Counsel

Robert J. D'Anniballe, Jr., Esquire
W.Va. Bar ID# 920
Pietragallo Gordon Alfano Bosick & Raspanti, ^{LLP}
3173 Main Street
Weirton, WV 26062
Telephone: (304)748-7740
Fax: (304) 748-0620
Email: RJD@Pietragallo.com
Counsel for Appellee/Defendant

TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
I. NOTE OF ARGUMENT KIND OF PROCEEDING AND RULING BELOW	2
II. STANDARD OF REVIEW	3
III. STATEMENT OF THE FACTS OF THE CASE.....	3
IV. ASSIGNMENTS OF ERROR RELIED UPON APPEAL BY THE APPELLANTS.....	7
V. ARGUMENT AND DISCUSSION OF LAW.....	8
A. The Circuit Did Not Err in Dismissing the Appellants'/ Plaintiffs' Complaint Because the Action was Barred by West Virginia Code §55-7b-4(a).....	8
B. The "Continuous Medical Treatment" Doctrine Has Been Rejected by This Court and, Therefore, the Statute of Repose Began to Run on the Date of the Surgical Procedure and Not The date of the Last Treatment by the Appellee.....	11
VI. RELIEF PRAYED FOR AND CONCLUSION	18

TABLE OF AUTHORITIES

	<u>Page</u>
<u>West Virginia Law:</u>	
<u>Ewing v. Bd. Of Educ. Of Cty. of Summers,</u> 202 W.Va. 228; 503 S.E.2d 541 (1998).....	11
<u>Gaither v. City Hospital,</u> 199 W.Va. 706; 487 S.E.2d 901 (1997)	5, 7, 9, 13, 14
<u>Humble Oil v. Lane,</u> 152 W.Va. 578; 165 S.E.2d 379 (1969).....	15
<u>Jones v. Aburahma,</u> 215 W.Va. 521; 600 S.E.2d 233 (2004)	7, 11, 13
<u>Jones v. Trustees of Bethany College,</u> 177 W.Va. 168; 351 S.E.2d 183 (1986)	8
<u>Morgan v. Grace Hosp. Inc.,</u> 149 W.Va. 783; 144 S.E. 2d 156 (1965)	15
<u>Cart v. Marcum,</u> 188 W.Va. 241, 423 S.E.2d 644 (1992)	9
<u>State, ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.,</u> 194 W.Va. 770, 461 S.E.2d 516 (1995).....	3
W.Va. Code § 55-7B-1 et. seq.	2, 4
W. Va. Code § 55-7B-4	4, 6, 7
W.Va. Code § 55-7B-4(a)	2, 8, 9
W.Va. Code § 55-7B-4(b)	5
<u>Law of Other Jurisdictions:</u>	
<u>Blanchette v. Barrett,</u> 229 Conn. 256; 640 A.2d 74 (1994).....	17
<u>Follis v. Watkins,</u> 367 Ill. Ap.3d 548; 855 N.E.2d 579 (2006).....	17
<u>Lane v. Lane,</u> 295 ARK. 671; 752 S.W.2d 25 (1988).....	16, 17
<u>Stallings v. Gunter,</u> 99 N.C.App. 710; 394 S.E.2d 212 (1990).....	17
Ark. Code Ann. § 16-114-203 (1987).....	16
<u>Treatises:</u>	
61 AM.Jur.2d Physicians, Surgeons, etc., § 299	16

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAUL E. FORSHEY and
MELISSA L. FORSHEY,

Appellants/Plaintiffs below,

No. 33834

v.

THEODORE A. JACKSON, M.D.,

Appellee/Defendant below.

**APPELLEE THEODORE A. JACKSON, M.D.'S
BRIEF**

**I. NOTE OF ARGUMENT
KIND OF PROCEEDINGS AND RULING BELOW**

This case originated when the Appellants' Complaint was filed in the Circuit Court of Kanawha County, West Virginia, bearing Case No. 06-C-1534, on August 3, 2006, pursuant to the provisions of the West Virginia Medical Professional Liability Act ("MPLA"), W.Va. Code § 55-7B-1 *et. seq.* (2007). Appellants' action was brought relating to a medical procedure performed on July 6, 1995.

On or about September 18, 2006, Appellee filed his Motion to Dismiss Plaintiff's Complaint due to the fact that Appellants failed to file the subject malpractice claim within two years of the date of injury, and further, failed to file their Complaint within ten years following the date of the alleged injury. Judge Jennifer Bailey Walker correctly and appropriately dismissed Appellants'/Plaintiffs' Complaint pursuant to the MPLA, specifically, the statute of repose found at W.Va. Code § 55-7B-4(a). Appellants now seek in their appeal of this matter for this Court to change or alter the provisions of the

West Virginia Medical Professional Liability Act and to overrule West Virginia precedent to adopt the "continuous medical treatment" doctrine.

The judgment of the Circuit Court of Kanawha County, West Virginia was correct and the arguments offered by the Appellants in this case do not support that the Kanawha County Circuit Court was erroneous in dismissing the Appellants'/Plaintiffs' Complaint. As there is no basis for reversing the rulings of Judge Jennifer Bailey Walker, this Honorable Court should deny the relief requested by the Appellants.

II. STANDARD OF REVIEW

This appeal is taken from an Order of the Circuit Court of Kanawha County, West Virginia granting the Appellee/Defendant's Motion to Dismiss in Civil Action 06-C-1534. Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. Syl. Pt. 2 State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). Although the standard of review is *de novo*, the Appellants have not offered any argument which should cause this Court to reach a different conclusion than was reached by the Circuit Court of Kanawha County, West Virginia.

III. STATEMENT OF THE FACTS OF THE CASE

Appellant Paul E. Forshey underwent a surgical procedure to his left hand on July 6, 1995 related to carpal tunnel syndrome. Appellee, Theodore A. Jackson, M.D. performed the surgical procedure. Appellants have alleged that on or about October 22 and October 25, 1996 Appellant Paul E. Forshey returned to Appellee physician complaining of pain in his left hand. Thereafter, on January 8, 1997, Appellant Paul E. Forshey presented for an office visit at Appellee physician's request relating to

Appellant Paul E. Forshey's complaints of pain in his left hand. As a result of this examination, the Appellee physician scheduled Appellant Paul E. Forshey for exploratory surgery which was scheduled for February 3, 1997. On January 31, 1997, Appellee's office contacted Appellant Paul E. Forshey in order to reschedule the exploratory surgery due to a scheduling conflict. The surgery was then scheduled for February 17, 1997; however, on February 13, 1997, Appellant Paul E. Forshey cancelled the surgery and indicated that he would reschedule the same at a future date. However, Appellant Paul E. Forshey did not contact Appellee to reschedule the surgery.

Thereafter, Appellants allege that on July 22, 2005 during an x-ray for an unrelated injury Appellant Paul E. Forshey discovered that a foreign body, specifically, a scalpel blade used by Dr. Jackson during the July 6, 1995 surgery was found in his left hand. See Appellants'/Plaintiffs' Screening Certificate of Merit. Edward W. Eskew, D.O., Appellant/Plaintiffs' expert, has offered a Certificate of Merit wherein he opined that the foreign body was left in the palmar aspect of the Appellant Paul E. Forshey's left thumb during the course of the surgical procedure performed by Appellee in 1995. Appellants filed their Complaint on August 3, 2006 pursuant to the provisions of the W.Va. Code § 55-7B-1, *et seq.*

Based on the above facts, specifically that the alleged injury occurred on July 6, 1995, and the fact that there were no allegations of concealment or fraud included in the Complaint, Judge Walker properly analyzed the well-settled law governing this matter and made the following Conclusions of Law:

1. Pursuant to the provisions of West Virginia Medical Professional Liability Act, W.Va. Code § 55-7B-4, Plaintiffs' action must have been filed (1) within two years of the date of injury, or (2) within two years of the date when such person discovers or with the exercise

of reasonable diligence, should have discovered the injury, whichever occurs last.

2. The Medical Professional Liability Act, in clear and concise language, includes a statute that places an outside limit of ten years on the filing of medical malpractice claims, **regardless of the date of discovery**, unless there is evidence of fraud, concealment, or misrepresentation of material fact by the medical provider. Gaither v. City Hospital, Inc., 199 W.Va. 706, 487 S.E.2d 901 (1997). [Emphasis added.] Mere ignorance of the existence of the cause of action or the evidence of the wrong does not prevent the running of the statute of limitations.
3. In the instant case, the Plaintiffs have failed to demonstrate that the Defendant misrepresented material facts or otherwise acted to prevent the Plaintiff from discovering the nature of his injuries. By Plaintiff's own admission in their Notice of Claim, Plaintiff acknowledged that he complained of painful swelling and a knot over the palmar aspect of his left thumb in 1996 or 1997. Furthermore, Dr. Jackson scheduled an exploratory surgery for February 3, 1997, and the same was later rescheduled for February 17, 1997, due to a scheduling conflict. The Plaintiff subsequently cancelled the surgery. Therefore, the Plaintiff cannot claim that the Defendant acted in a manner to prevent the Plaintiff from discovering the nature of his injuries. It was at this time, in 1996 or 1997, when the Plaintiff acknowledged that he complained of painful swelling in, and a knot over the palmar aspect of his thumb, that he, with the exercise of reasonable diligence, should have discovered the injury and the Plaintiffs' Complaint should have been filed within ten years of this date due to the application of the discovery rule. However, viewing in a light most favorable to the Plaintiff, pursuant to West Virginia's Statute of Repose discussed above, the absolute latest that this action could have been filed would have been on July 6, 2005, which is ten years after the date of the original surgery and alleged injury.
4. The West Virginia Medical Professional Liability Act § 55-7B-4(b) provides:

"That in no event shall any such action be commenced more than 10 years after the date of injury." [Emphasis added.]
5. The laws of the State of West Virginia are controlling in this matter.

See Order of Kanawha County Circuit Court dated April 5, 2007.

Based upon the above findings, Judge Walker followed West Virginia law and properly granted the Defendant's Motion to Dismiss and ordered that the action be dismissed with prejudice and stricken from the Court's docket with costs assessed to the Plaintiffs. Appellants' criticisms of the Circuit Court's Findings of Fact are disingenuous at best, as each of the eight Findings of Fact not only have been undisputed by Appellants, but also, much of the language of the eight Findings of Fact of the Circuit Court was derived from the Appellants'/Plaintiffs' Complaint, Memorandum in Opposition to Defendant's Motion to Dismiss, and Appellants'/Plaintiffs' Screening Certificate of Merit and Notice of Claim. Appellants further argue that the Circuit Court improperly made a finding of fact that included that "the plaintiff has failed to demonstrate that the defendant misrepresented material facts or otherwise acted to prevent the plaintiff from discovery the nature of his injuries", and "therefore, the plaintiff cannot claim that the defendant acted in a manner to prevent the plaintiff from discovering the nature of his injuries." Appellants are incorrect that this was included in the Circuit Court's findings of fact and, instead, was included in the Circuit Court's Conclusions of Law. Finally, based upon the controlling and unambiguous law of West Virginia, the only truly relevant facts in this case are that the surgery where the surgical blade was left in Appellant Paul E. Forshey's hand occurred on July 6, 2005 and that the Appellants'/Plaintiffs' Complaint was devoid of allegations of fraud or concealment.

Accordingly, the trial court correctly concluded that West Virginia law does not permit an action to be commenced pursuant to the MPLA beyond the ten year period set forth in the statute of repose, W.Va. Code § 55-7B-4.

**IV. ASSIGNMENTS OF ERROR RELIED
UPON ON APPEAL BY THE APPELLANTS**

Appellants have asserted two separate assignments of error for this Honorable Court to consider, as follows:

A. The Circuit Court Erred By Finding That The Cause Of Action Sued Upon Accrued No Later Than The Date Of The Surgery And, Accordingly, The Ten Year Statute Of Repose Barred The Action; And,

B. The Circuit Court Erred By Finding That The Plaintiffs Could Not Prove Additional, Independent Instances Of Breach Of The Standard Of Care Which Constitutes Separate Causes Of Action For Medical Negligence Associated With The Four Follow-Up Examinations, Which Causes Of Action, If Proven, Would Not Be Barred By The Ten Year Statute Of Repose.

The Honorable Jennifer Walker Bailey, Circuit Court Judge of Kanawha County, West Virginia, did not err in granting the Appellee/Defendant's Motion to Dismiss as West Virginia law is well-settled that only in the event of fraud, concealment, or misrepresentation of material facts by the healthcare provider may an action brought pursuant to the MPLA be commenced more than ten years after the date of injury. See Gaither, 199 W.Va. 706, 487 S.E.2d 901 (1997); W.Va. Code § 55-7B-4. Further, "treatments" for the alleged malpractice that had already occurred are not additional acts of malpractice, and, as such, the statute of limitations and statute of repose began to run at the date of the injury, and not from the last date of treatment. Jones v. Aburahma, 215 W.Va. 521, 600 S.E.2d 233 (2004). Thus, the trial court was correct in finding that the Appellants'/Plaintiffs' action was barred and properly dismissed the same.

V. ARGUMENT AND DISCUSSION OF LAW

A. THE CIRCUIT COURT DID NOT ERR IN DISMISSING THE APPELLANTS'/PLAINTIFFS' COMPLAINT BECAUSE THE ACTION WAS BARRED BY WEST VIRGINIA CODE § 55-7B-4(a)

The trial court did not err in dismissing Appellants' Complaint because Appellants' action was brought outside of the ten year limit imposed to bring a medical malpractice claim. "The [MPLA] ... requires an injured plaintiff to file a malpractice claim against a healthcare 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." W.Va. Code § 55-7B-4(a) (2007). The Act also places an outside limit of 10 years on the filing of medical malpractice claims, regardless of the date of discovery, unless there is evidence of fraud, concealment, or misrepresentation of material facts by the healthcare provider. *Id.* The language of the Act could not be clearer or more precise.

Appellants' expert, Edward W. Eskew, D.O., has opined that the foreign body that was found in Appellant Paul E. Forshey's hand was the scalpel blade used by Appellee physician during the July 6, 1995 surgery. As such, it should be undisputed that any alleged negligent conduct occurred on July 6, 1995 when Appellee physician performed the operation upon Appellant Paul E. Forshey.

Admittedly, however, the Legislature enacted a statutory expression of the "discovery rule" in recognition that in the area of malpractice often the plaintiff is not aware that an injury has been inflicted. Jones v. Trustees of Bethany College, 177 W.Va. 168, 169, 351 S.E.2d 183, 184 (1986). 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 claim. Syl. Pt. 1, Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992). However, it is well settled that when interpreting the discovery rule that 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 where 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. Gaither v. City Hospital, Inc., 199 W.Va. 706, 712, 487 S.E.2d 901, 907 (1997).

The facts at hand present the classic set of circumstances where the application of the discovery rule is generally sought, however, Appellants have attempted to unnecessarily complicate the matter in an attempt to avoid application of the statute of repose. Appellant Paul E. Forshey has alleged that he experienced pain and swelling in his left hand since the time of his surgery in 1995, approximately 11 years prior to filing his action. See Appellants'/Plaintiffs' Screening Certificate of Merit. As such, it would be unreasonable for Appellants to claim ignorance as to the existence of a cause of action. Clearly, with the exercise of reasonable diligence he would have been able to determine the cause of his alleged injury.

In any event, however, the West Virginia Legislature has considered the "discovery rule," and has made the determination that regardless of the circumstances and the reasons for a plaintiff's failure to bring an action alleging medical malpractice, such action must be commenced within 10 years of the date of injury, unless there is evidence of fraud, concealment or misrepresentation. W.Va. Code § 55-7B-4(a). As such, Appellants' reliance upon Gaither v. City Hospital, Inc., for the position that

Appellants'/Plaintiffs' case was not time barred due to the discovery rule, is misplaced. Gaither would provide support to Appellants' claim only if Appellants had failed to discover his injury beyond the statute of limitations but within the 10 year statute of repose. However, in this case, Appellants/Plaintiffs did not file suit within the statute of repose, and therefore, when Appellant Paul E. Forshey should have discovered the injury is irrelevant to the analysis of this matter. Therefore, any argument of Appellants regarding application of the discovery rule and the Circuit Court's findings regarding the same is misplaced. Further, there have been no allegations of fraud or concealment made in this case. See Appellants'/Plaintiffs' Complaint. The undisputed facts of this case present the exact opposite.

Indeed, due to Appellant Paul E. Forshey's continued complaints of pain, Appellee physician recommended and scheduled exploratory surgery in an attempt to determine the cause of Appellant Paul E. Forshey's pain. As such, Appellee was actively attempting to determine the problem with his hand instead of attempting to conceal the cause of his pain. It was Appellant Paul E. Forshey that cancelled the surgery that would have determined and corrected the problem, as it is reasonable that the foreign body would have been removed during the exploratory surgery. Without the allegations of fraud, which again there are none in this case, West Virginia law does not permit medical malpractice actions to be commenced outside of the 10 year statute of repose regardless of circumstances. Due to the fact that the date of injury was July 6, 1995, the Circuit Court was correct in granting Defendant's Motion to Dismiss because it was clear that no relief could be granted under any set of facts that could be proved

consistent with the allegations. See Ewing v. Bd. Of Educ. Of Cty. of Summers, 202 W.Va. 228, 235, 503 S.E.2d 541, 548 (1998).

B. THE "CONTINUOUS MEDICAL TREATMENT" DOCTRINE HAS BEEN REJECTED BY THIS COURT AND, THEREFORE, THE STATUTE OF REPOSE BEGAN TO RUN ON THE DATE OF THE SURGICAL PROCEDURE AND NOT THE DATE OF THE LAST TREATMENT BY THE APPELLEE

This Court has determined that treatments for alleged malpractice are not additional acts of malpractice. As such, the statute of limitations in this case began to run the date of the surgery and not the date of the last treatment. See Jones v. Aburahma, 215 W.Va. 521, 600 S.E.2d 233 (2004). As noted above, Appellants' expert, Edward W. Eskew, D.O., has opined that the pain that Appellant Paul E. Forshey complained of in 1996 through 1997 and the treatment for such complaints were a direct result of Appellee inadvertently leaving a scalpel blade in the Appellant Paul E. Forshey's hand. As such, it should be undisputed that the treatments that the Appellant Paul E. Forshey received from Appellee after 1995 were not additional acts of medical malpractice, but were treatments for the alleged malpractice that had already occurred. Therefore, the trial court appropriately found that the statute of limitations and repose began to run at the date of the alleged injury, July 6, 1995, and not from the last date of treatment. See, e.g. Id.

In Jones, the plaintiff had a coronary angioplasty, a heart catheterization, and a stent placement at Charleston Area Medical Center ("CAMC"). At the site of the catheterization, the plaintiff developed a pseudoaneurysm. In early August of 1998, the plaintiff was admitted to CAMC and had a vascular consultation with the defendant physician. Jones, 215 W.Va. at 522, 600 S.E.2d at 234. On August 24, 1998,

Defendant physician advised plaintiff to "continue her normal activities" and that there was a fifty percent chance that the pseudoaneurysm would improve "spontaneously." Id. On September 10, 1998, plaintiff contacted defendant physician's office and was informed that she had been scheduled for surgery on September 30, 1998. Id. Later that evening, plaintiff's pseudoaneurysm ruptured and blood began pooling underneath plaintiff's skin. Id. Plaintiff was rushed to a local hospital and then transported to CAMC. At CAMC defendant physician repaired plaintiff's ruptured pseudoaneurysm. Id. at 235, 523. Plaintiff remained in the hospital and received follow up care. However, while hospitalized, she suffered a stroke. Id. After receiving rehabilitative treatment for her stroke, the plaintiff was discharged from CAMC on September 28, 1998. On October 1, 1998, plaintiff was re-admitted for treatment of an infection at the site of the ruptured pseudoaneurysm. Id. Plaintiff was again discharged from CAMC on October 22, 1998. Plaintiff last sought treatment from the defendant physician on November 23, 1998. Id.

On January 12, 1999, plaintiff and her husband engaged the services of an attorney who requested plaintiff's medical records from CAMC. Id. Despite several subsequent requests, CAMC did not provide plaintiff's medical records to plaintiff's counsel until July 30, 1999. Id. Plaintiff did not file her action against defendant physician until November 17, 2000. Id. The defendant physician filed a motion for summary judgment alleging that plaintiff's action was barred by the statute of limitation which began to run at the latest, October 1, 1998, the date plaintiff was admitted to CAMC for treatment of an infection at the site of her catheterization. Id. Plaintiff argued that the statute of limitation should begin to run on November 23, 1998, the date that the

defendant physician last provided medical care to plaintiff. Id. The plaintiff also argued that the “discovery rule” should toll the statute of limitations based upon the defendant’s delay in providing plaintiff’s medical records. Id.

The Circuit Court granted defendant’s motion for summary judgment finding that the alleged acts of negligence all occurred on or before October 1, 1998 and that the discovery rule did not toll the statute of limitations. Therefore, the Circuit Court found that the plaintiff’s action was barred by the statute of limitations. As such, the plaintiff appealed from the Circuit Court’s order granting summary judgment.

This Court began its analysis by considering the discovery rule previously set forth in Gaither v. City Hospital, Inc., 199 W.Va. 706, 487 S.E.2d 901 (1997). The Jones Court noted that where “causal relationships are so well established [between the injury and its cause] that we cannot excuse a plaintiff who pleads ignorance.” Jones, 215 W.Va. at 524, 600 S.E.2d 236. Even in such instances, when an individual knows or should reasonably know of the injury and its cause, the injured party must “make a strong showing of fraudulent concealment, an inability to comprehend the injury, or other extreme hardship” for the discovery rule to apply. Id.

The Jones Court then went on to consider when the statute of limitations would have begun to run. In Jones, the Court began its analysis by finding that the plaintiff knew or reasonably should have known of the physician’s alleged negligence on or before October 1, 1998. The Court further found that the treatments that plaintiff received from the physician after October 1, 1998 were not additional acts of malpractice, but instead amounted to treatment for the alleged malpractice that had already occurred. Id. at 525, 237. Therefore, the court held that the statute of

limitations begins to run at the date of injury, not the last date of treatment. Id. As such, the Jones Court found that the Circuit Court correctly found that the statute of limitations was triggered for plaintiff's medical malpractice action on October 1, 1998. The court further found that despite the fact that plaintiff's medical records may not have been timely provided that this did not rise to the level of fraudulent concealment and the discovery rule, therefore, did not apply to extend the statute of limitations. As such, the Jones Court affirmed the Circuit Court's order granting summary judgment in favor of the physician.

The facts of the instant case are strikingly similar to those presented in Jones. Both in this case and in Jones, the Plaintiffs sought subsequent follow up treatment relating to complaints that resulted from the alleged malpractice. Appellants specifically admit that the follow up visits were as a result of the alleged medical error and not for other treatment. See Appellants' Brief at p. 12. In this case, as in Jones, the trial court appropriately found that the date that triggered the statute of limitations, and in this case, the statute of repose, was the date of the alleged malpractice and not the dates of follow up treatment for the same. As such, in this case as in Jones, the Kanawha County Circuit Court appropriately followed well-established West Virginia precedent in finding that the ten-year statute of repose was triggered on the date of the surgery and, thus, Appellants' action was time barred and correctly dismissed with prejudice.

Hence, Appellants are incorrect in their position that this Court has not addressed in the medical negligence context the application of the "continuous medical treatment" doctrine. While the plaintiff in Jones may not have specifically referred to the doctrine by name, Plaintiffs certainly urged the court to accept the logic underlying the doctrine.

However, the Jones Court considered the subsequent treatment of the Plaintiff and rejected the doctrine. As this issue of law already has been addressed, it is not necessary to consider the non-binding precedent of other jurisdictions. This is especially true because West Virginia courts have long acknowledged that statutes of limitations and statutes of repose serve an important function in the operation of the law and should be favored unless the plaintiff can avoid the same within a strictly construed exception. Humble Oil v. Lane, 152 W.Va. 578, 583, 165 S.E.2d 379, 383 (1969). The basic purpose of statutes of repose is to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and to avoid inconvenience which may result from delay in asserting rights or claims when its practicable to assert them. See, e.g., Morgan v. Grace Hosp. Inc., 149 W.Va. 783, 791, 144 S.E. 2d 156, 161 (1965). The object of such statutes is to compel the exercise of a right of action within a reasonable time. Humble Oil v. Lane, 152 W.Va. 578, 583, 165 S.E. 2d 379, 383 (1969). Further, it is well-established that such statutes should receive liberal construction in furtherance of their manifest object; as all other statutes receive, and should not be explained away and their purpose eroded. Id. Finally, if West Virginia were to adopt the "continuous medical treatment" doctrine, the Circuit Courts of West Virginia would then be left with the daunting task of determining in each case whether treatment was mere follow up for the alleged malpractice or separate events of malpractice. This would open up the floodgates to medical malpractice litigation which would undermine the very purpose of the MPLA and its statute of repose.

Additionally, Appellants make inconsistent arguments with regard to the proposed adoption of the continuous medical treatment doctrine. Specifically,

Appellants begin their argument by stating “the ‘continuous medical treatment doctrine’ works to toll the accrual of a cause of action for medical negligence during a course of treatment, which includes the wrongful acts or omissions, where the treatments have run continuously and is related to the original condition or complaint. See, 61 AM.Jur.2d Physicians, Surgeons, etc., § 299.” Appellants then state in their brief that, “while often couched in terms of a ‘tolling’ doctrine the continuous medical treatment doctrine does not actually ‘toll’ the statute of limitations; rather, it applies so that the cause of action does not accrue until the date of the last treatment by the physician for the alleged condition.” See Appellants’ Brief at p. 9. The Appellants present this argument in an attempt to persuade this Court that the continuous medical treatment doctrine is not akin to the “discovery rule” because the MPLA specifically addresses this issue and mandates that the statute of repose cannot be tolled beyond the ten-year period. However, Appellants’ position that the doctrine applies to determine when a cause of action accrues instead of “tolling” the statute of limitations is inconsistent with the law cited by the Appellants and existing West Virginia law. See, supra.

Further, it is of significance that Arkansas’ statute of limitation does not include a statute of repose. See, Ark. Code Ann. § 16-114-203 (1987). Instead, the court in Lane v. Lane, 295 Ark. 671, 675, 752 S.W.2d 25, 27 (1988), had to consider only the application of the doctrine on the applicable statute of limitations and not a statute of repose. It is quite possible that the Supreme Court of Arkansas may have come to a different result had a statute of repose been at issue.

Additionally, it also is significant to review the statutory time periods applicable in the cases cited by Appellants where the continuing medical treatment doctrine was

applied to statutes of repose. Unlike West Virginia, where a plaintiff is afforded a liberal ten years to bring a claim under the MPLA, the plaintiffs in the cases cited by Appellant were afforded a much shorter period of time to discover their injury. See e.g. Blanchette v. Barrett, 229 Conn. 256, 640 A.2d 74 (1994) (considering Connecticut repose provision that an action must be brought within three years of the date of injury); Stallings v. Gunter, 99 N.C.App. 710, 394 S.E.2d 212 (1990) (providing that action must be filed within four years of the date of injury); Follis v. Watkins, 367 Ill. Ap.3d 548, 855 N.E.2d 579 (2006) (discussing application to four year statute of repose).

In light of the well-settled position of West Virginia courts that statutes of limitation and repose should be strictly construed, it is quite reasonable that issues such as instances of alleged continuing treatment were contemplated by the legislature when drafting the statute of repose. This would account for the West Virginia Legislature's adoption of the liberal ten-year time limitation.

Further, even if this Court is persuaded by the Appellants' argument that this Court should adopt a "continuous medical treatment" doctrine, the same should not apply to the instant case. As noted by Appellants, the Supreme Court of Arkansas has applied the continuous medical treatment doctrine where an injury is caused by the result of several treatments resulting in a cumulative effect instead of a single situation which caused the harm. See, Lane v. Lane, 295 Ark. 671, 675, 752 S.W.2d 25, 27 (1988). The Lane court provided as an example a plaintiff who was subjected to a series of radiation treatments of which the radiologist negligently and repeatedly administered an overdose of radiation. In such a case, no single treatment of radiation

would have caused the ultimate harm, and instead, it would be the culmination of all of the treatments which would have resulted in the ultimate outcome.

In the instant case, it is readily apparent that the alleged injury occurred as a result of a surgical blade being left in Appellant Paul E. Forshey's hand. Therefore, Appellant Paul E. Forshey's alleged injury did not occur as a result of the cumulative effect of several treatments, and instead, occurred as the result of a single easily identifiable treatment, the surgery where the foreign object was inadvertently left in his hand. In fact, even Appellants concede that if medical error occurred in this case, it was when the blade was left in Appellant Paul E. Forshey's hand. See, Appellants' Brief at p. 12. Therefore, as the alleged injury can be identified as occurring as the result of one single treatment, the July 6, 1995 surgery, the continuing medical treatment doctrine would be inapplicable to the subject case. As such, even if this Court would adopt the continuing medical treatment doctrine, the Circuit Court did not err in dismissing Appellants'/Plaintiffs' Complaint.

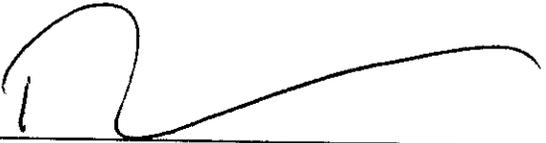
VI. RELIEF PRAYED FOR AND CONCLUSION

It is clear from the foregoing that the Circuit Court did not err in finding that the Appellants' cause of action accrued at the time of the surgery, as this is when the alleged malpractice occurred. As such, the Circuit Court did not err in finding that the Appellants'/Plaintiffs' claims were barred by the MPLA, W.Va. Code § 55-7B-4(a) and dismissing Appellants'/Plaintiffs' claims. Based upon all of the above, Appellee respectfully requests that this Honorable Court deem the relief requested by Appellee and affirm the ruling of the Circuit Court of Kanawha County, West Virginia.

THEODORE A. JACKSON, M.D.
Respondent/Defendant

By Counsel

BY:



ROBERT J. D'ANNIBALLE, JR.

Robert J. D'Anniballe, Jr., Esquire
W.Va. Bar ID# 920
Pietragallo Gordon Alfano Bosick & Raspanti, ^{LLP}
3173 Main Street
Weirton, WV 26062
Telephone: (304)748-7740
Fax: (304) 748-0620
Email: RJD@Pietragallo.com
Counsel for Appellee/Defendant

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 33834

PAUL E. FORSHEY and
MELISSA L. FORSHEY,

Appellants/Plaintiffs,

v.

THEODORE A. JACKSON, M.D.,

Appellee/Defendant.

CERTIFICATE OF SERVICE

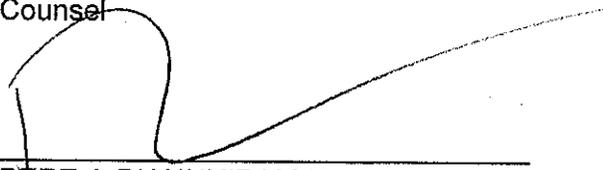
Service of a true copy of the foregoing Brief of Appellee was had upon the parties by mailing a true copy of the same by regular U.S. Mail, postage prepaid, to Appellants/Plaintiffs as follows on this 12th day of March, 2008:

Anne E. Shaffer
Underwood & Proctor
923 Third Avenue
Huntington WV 25701

THEODORE A. JACKSON, M.D.
Respondent/Defendant

By Counsel

BY:


ROBERT J. D'ANNIBALLE, JR.
W.Va. Bar ID# 920

Pietragallo Gordon Alfano Bosick & Raspanti, ^{LLP}
3173 Main Street
Weirton, WV 26062
Telephone: (304)748-7740
Fax: (304) 748-0620
Email: RJD@Pietragallo.com
Counsel for Appellee/Defendant