

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 33834

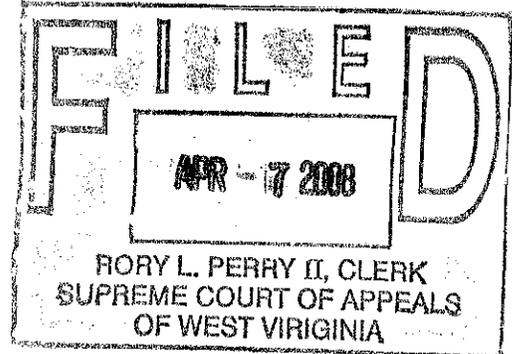
**PAUL E. FORSHEY and
MELISSA L. FORSHEY,**

Appellants/Plaintiffs below,

v.

THEODORE A. JACKSON, M.D.,

Appellee/Defendant below.



REPLY BRIEF OF THE APPELLANTS

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

**PAUL E. FORSHEY and
MELISSA L. FORSHEY,
Appellants/Plaintiffs,
By Counsel**

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Counsel for Appellant/Plaintiffs below

The Appellee has misstated a number of facts and has placed the emphasis on others in an effort to distract this Court's attention away from the fact that:

1. The Circuit Court did not treat the motion to dismiss as a motion to dismiss, quoting, rather, the standard for summary judgment and, more importantly, reaching factual determinations that are reserved strictly for the fact finder; and
2. Plaintiffs' expert witness has opined that the leaving of the blade in the hand on July 6, 1995 is not the only breach of the standard of care committed by the Appellee; rather, each medical treatment thereafter, including October 22, 1996, October 25, 1996, January 6, 1997, and January 8, 1997, when the Appellant presented with pain and swelling at the incision site, required, in order to comply with the standard of care, the performance of an x-ray to eliminate the possibility of a foreign body was required.

The recognition of these two facts requires a reversal of the Circuit Court's order dismissing this action **but does not** require this Court to (1) adopt the continuous medical treatment doctrine; or (2) find that there are any exceptions to the ten year statute of repose as expressed in W. Va. Code § 55-7B-4. Rather, it merely requires that this Court find that **the Plaintiffs/Appellants can prove a set of facts that would entitle them to relief**, *John W. Lodge Distribution Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 245 S.E.2d 157 (1978), that is:

- (1) that the October 22, 1996, October 25, 1996, January 6, 1997, and/or January 8, 1997 treatments constitute one or more breaches of the standard of care required of Defendant/Appellant separate from the operation, itself; and
- (2) in the exercise of reasonable care Plaintiff/Appellant did not know or should not have known of the existence of the blade in his hand until July 6, 2005; and
- (3) that the failure to x-ray the Plaintiff/Appellant's hand on one or more of those occasions caused him injury; and
- (4) that the Plaintiffs/Appellants have suffered damages as a result of such injury.

The Plaintiffs will prove (1) above by the testimony of their expert witness, Edward O. Eskew, D.O., and submitted the opinions to the Circuit Court in support of this factual issue.

The Plaintiffs are entitled to have a jury to determine (2) above, as whether the Plaintiffs knew or should have known of the existence of an actionable injury is a question left to the finder of fact. *Gaither v. City Hospital, Inc.*, 199, W. Va. 706, 714-715, 487 S.E.2d 901, 909-10 (1997); and *Hill v. Clarke*, 161 W. Va. 258, 262, 241 S.E.2d 572, 574 (1978).

The Plaintiffs will prove (3) above by testimony of their expert witnesses, Dr. Eskew, and a vocational expert.

Finally, the Plaintiffs are entitled to have a jury determine (4) (damages) above. Thus, the Plaintiffs can and have met their burden on the motion to dismiss ***even if this Court decides not to address the application of the continuous medical treatment doctrine.***

However, this case is uniquely poised to have this Court address the issue of the applicability of the continuous medical treatment doctrine in West Virginia. The Appellee contends that this Court rejected the application of the continuous medical treatment doctrine in the case of *Jones v. Aburahma*, 215 W.Va. 521, 600 S.E.2d 233 (2004). In *Jones*, the plaintiff did not directly raise the issue of the application of the continuous medical treatment doctrine in her brief; rather, the plaintiff argued that because the hospital failed to timely supply copies of medical records, the statute of limitations should be tolled under the fraud exception. Further, there was no indication

in the record that the plaintiff in *Jones* alleged any medical malpractice as a result of subsequent treatment. On that limited argument, this Court found that:

The record reveals that Ms. Jones knew, or reasonably should have known, of the appellees' alleged negligence on or before October 1, 1998. The appellants make no allegation, and we see no evidence in the record of any malpractice on November 23, 1998. The treatments that Ms. Jones received from the appellees after October 1, 1998, were not additional acts of malpractice, but treatment for the alleged medical malpractice that had already occurred. In the instant case, the statute of limitations begins to run at the date of injury-not from the last date of treatment. The circuit court correctly found that the statute of limitations was triggered for Ms. Jones' medical malpractice action on October 1, 1998.

Jones v. Aburahma, 215 W.Va. 521, 524, 600 S.E.2d 233, 236 (2004). While it certainly appears that this Court did not believe that the subsequent medical treatment tolled the running of the statute of limitations, without discussion of the continuous medical treatment doctrine, it is unclear whether this Court was asked to adopt such doctrine.

The instant case, while not requiring the adoption of the continuous medical treatment doctrine, presents an excellent opportunity for this Court to directly address the doctrine. As noted in the *Brief of the Appellant*, this Court has adopted the doctrine as it relates to legal malpractice. It seems only reasonable to conclude that this Court would adopt the doctrine as to medical malpractice if called upon directly to do so. The Appellants, herein, request that this Court do just that.

The Appellee makes a great point to argue that the statute of repose places a ten year limit on the filing of medical malpractice actions **regardless of the date of discovery**. By reiterating this point, Appellee is apparently trying to convince the Court that the Appellants are arguing against this point. This is wholly not true. The ten year statute of repose is absolute and the discovery rule does not extend the ten years. **This**

is not a point of contention with the Appellants. In this case, it is the start of the ten years that is at issue. It will be a matter for the jury to decide whether the discovery rule extends the two year statute of limitations. At issue here is when the ten years began. There are a few choices.

The Appellee argues that the only date upon which the ten years could, *under any set of facts*, begin to run was July 6, 1995, the date of the surgery. However, the Appellants argue that the ten years, under the set of facts supported by their expert, Dr. Eskew, began anew on October 22, 1996, and again on October 25, 1996, and again on January 6, 1997, and, finally, again on January 8, 1997. This is because the expert states that medical malpractice was committed by the Appellee on each of these dates. Also, under the continuous medical treatment doctrine, the ten years began on January 8, 1997, the last date that the Appellant treated with the Appellee for the condition of his hand. Thus, the discovery rule does not come into play until the factual issue is decided whether the two year statute of limitations ran two years after these dates or two years after the Appellant discovered the blade in his hand during an x-ray. Thus, this red herring set out by the Appellee is an attempt to divert this Court's attention from the real issue.

In conclusion, the Appellants respectfully request that this Court rule:

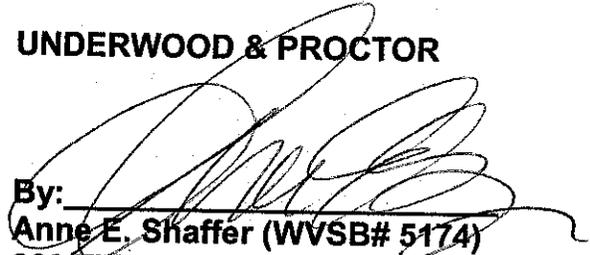
1. That the cause of action for medical malpractice did not begin to accrue until January 8, 1997, the date of the last medical treatment of the Appellant; *or in the alternative;*

2. That the ten year statute of repose does not bar an action filed on August 3, 2006, because the malpractice occurred on October 22, 1996, October 25, 1996, January 6, 1997 and January 8, 1997.

PAUL E. FORSHEY and MELISSA L. FORSHEY, Petitioners/Plaintiffs,
By Counsel

DATED: April 4, 2008

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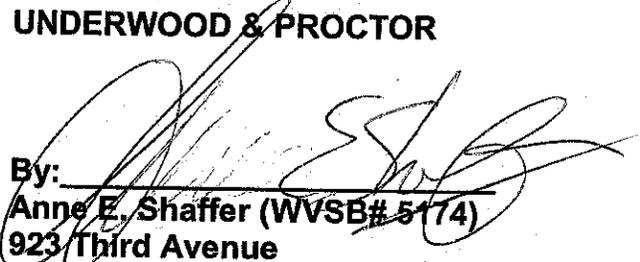
CERTIFICATE OF SERVICE

I, Anne E. Shaffer, counsel for Appellant do hereby certify that the foregoing Reply Brief of the Appellant was served upon the following by depositing the same in the United States Mail, postage prepaid, addressed as follows:

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