



McCallen v. Sherwin

2001 | Cited 0 times | New York Supreme Court | October 5, 2001

This opinion is uncorrected and will not be published in the Official Reports.

Limitation of Actions--Medical Malpractice

(*1)

MOTION DATE:09/18/01

MOTION SEQUENCE: 004

The following papers read on this motion:

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This is an action for medical malpractice. Defendants Steven R. Sherwin, M.D. , John L. Gomes, M.D. , and Garden City Obstetrics & Gynecology, P.C. are moving for summary judgment dismissing the complaint. By short form order dated February 23, 2000, the court denied defendants' prior motion for summary judgment without prejudice to renewal upon completion of discovery. ¹ Discovery having been completed, defendants are, in effect , renewing their prior motion. Defendants contend that plaintiffs' claims with respect to Dr. Sherwin and Dr. Gomes are barred by the statute of limitations. More specifically, Dr. Gomes argues that the action is untimely because the statute of limitations was not tolled by the continuous treatment doctrine. Dr. Sherwin argues that the action is untimely as to him because he is not vicariously liable for any malpractice (*3)which may have been committed by Dr. Gomes, regardless of whether Dr. Gomes' treatment falls under the continuous treatment doctrine.

Defendants Dr. Steven Sherwin and Dr. John Gomes are obstetricians who practiced together as a



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professional corporation known as Garden City Obstetrics & Gynecology, P.C. Dr. Sherwin was a founding shareholder of the professional corporation. Dr. Gomes joined the professional corporation as an employee in July, 1990 and became a shareholder in July, 1992. Plaintiff Linda McCallen had been a patient of defendant Garden City Obstetrics since December, 1991. After Mrs. McCallen discovered that she was pregnant in January, 1992, she began to receive prenatal care at Garden City Obstetrics and was seen by both Dr. Sherwin and Dr. Gomes.

On August 25, 1992 Dr. Gomes delivered Mrs. McCallen's baby at Winthrop University Hospital. The birth was uncomplicated, but Mrs. McCallen did not pass her placenta spontaneously. Although Dr. Gomes extracted the organ manually, placental fragments continued to adhere to Mrs. McCallen's uterus. Dr. Gomes then performed a gentle curettage of the uterus in an attempt to remove the remaining placental fragments. However, it turned out that this procedure was not completely successful.

Mrs. McCallen was discharged from the hospital on August 28, 1992 and was seen by Dr. Sherwin for her first post-partum visit on September 8. At that time Dr. Sherwin was concerned that Mrs. McCallen might still be retaining placental tissue, but his plan was to allow her to pass the remaining tissue on her own. Dr. Sherwin did not treat Mrs. McCallen after that date. On September 11, Mrs. McCallen returned to Garden City (*4)Obstetrics complaining of a fever and was seen by Dr. Gomes. Suspecting that Mrs. McCallen continued to retain placental tissue, Dr. Gomes prescribed antibiotics and ordered a sonogram. After the sonogram confirmed Dr. Gomes' concern, he performed a dilation and curettage on Mrs. McCallen on September 18 to remove the retained placental tissue. Pathologic analysis of the placental fragments which were removed at that time indicated that Mrs. McCallen had a "mild acute inflammation" of the uterus. Dr. Gomes saw Mrs. McCallen for post-operative care on September 25 and October 29. On November 25, 1992, a second sonogram was performed, and Dr. Gomes concluded based on the sonogram findings that Mrs. McCallen's uterus was clear of placental tissue.

Following the second sonogram, Mrs. McCallen continued to receive gynecological care from Dr. Gomes. On May 4, 1993 and January 24, 1994 Mrs. McCallen saw Dr. Gomes for what he characterizes as routine ob/gyn visits. However, on July 23, 1994 Mrs. McCallen, who was interested in becoming pregnant, saw Dr. Gomes and complained of low menstrual flow. On August 10, 1994 Dr. Gomes referred Mrs. McCallen for a procedure known as a hysterosalpingogram, a type of X-ray examination of the uterus. This test revealed that Mrs. McCallen had developed intrauterine adhesions, a condition known as "Asherman's Syndrome." Dr. Gomes characterizes these adhesions as the "natural consequences" of the manipulation and curettage procedures which he had performed on Mrs. McCallen in August and September of 1992. However, plaintiff's expert, Dr. Frederic Gonzalez, asserts that the adhesions were caused by (*5)infection of the uterus which was brought about by the retained placental fragments. Dr. Gonzalez further opines that Dr. Gomes departed from good and accepted medical practice by not prescribing antibiotics earlier and by not performing a D & C until after the infection had become acute.



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In any event, on February 27, 1995 Mrs. McCallen saw Dr. Gomes after she obtained a positive result from a home pregnancy test. However, Dr. Gomes concluded based on a sonogram that she had miscarried. On May 16, 1995, an additional sonogram indicated that Mrs. McCallen had suffered another miscarriage. Dr. Gomes performed another dilation and curettage on Mrs. McCallen on June 21, 1995. On July 6, 1995 Mrs. McCallen saw Dr. Gomes and voiced concern about her two pregnancy losses. On September 8, 1995 another hysterosalpingogram was performed which revealed persistent intrauterine adhesions. On October 11, 1995 Dr. Gomes performed a procedure known as hysteroscopy in an attempt to dissect Mrs. McCallen's intrauterine adhesions. Although Dr. Gomes informed Mrs. McCallen on October 19 that he believed that this procedure was successful, it turned out that he was incorrect. On January 24, 1996 Mrs. McCallen saw Dr. Gomes complaining of lack of menstrual flow. In February, 1996 Dr. Gomes ordered a third hysterosalpingogram which revealed that her uterine adhesion condition was persisting. This action for medical malpractice was commenced on April 16, 1996.

The court considers first the timeliness of the action with respect to Dr. Gomes. Dr. Gomes maintains that since he last treated plaintiff for her retained placenta condition (*6) on November 25, 1992, the continuous treatment doctrine does not serve to toll the statute of limitations. The court does not take such a narrow view of the continuous treatment doctrine. CPLR 214-a provides that "an action for medical, dental, or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission, or failure." The statute codifies the toll for continuous treatment which was applied at common law. *Young v. NYC Health & Hospitals Corp.*, 91 N.Y.2d 291 (1998). Where a patient's visits to a doctor constitute a single course of treatment or are part of continuing efforts by the doctor to treat a particular condition, the statute of limitations will be tolled while the doctor's course of treatment is continuing. *Gordon v. Magun*, 83 N.Y.2d 881 (1994). The continuous treatment doctrine does not apply where there has been merely a continuing relationship between physician and patient. *McDermott v. Torre*, 56 N.Y.2d 399, 405 (1982). Nor will the statute of limitations be tolled where the patient initiates return visits merely to have his or her condition checked. *Id.* However, the fact that the doctor informs the patient that the condition has been resolved does not of itself bar a finding of continuous treatment. As the Court of Appeals stated in *McDermott*,

Included within the scope of 'continuous treatment' is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment. Thus, there will be continuing treatment when (*7) a patient, instructed that he or she does not need further attention, soon returns to the doctor because of continued pain in that area for which medical attention was first sought.

56 N.Y.2d at 406. On the other hand, the statute of limitations will not be tolled where there is no connection between the condition which was overlooked or not properly treated and the course of treatment on which plaintiff relies to invoke the continuous treatment doctrine. *Nykorchuck v.*



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Henriques, 78 N.Y.2d 255, 259 (1991).

This court holds that the term "continuous treatment" includes treatment of a secondary condition in the same area of the body, which condition allegedly arose because the defendant doctor failed to follow good and accepted medical practice with respect to the condition for which he was first consulted. In the case at bar, plaintiff's expert has given an opinion that the intrauterine adhesions were caused by a uterine infection which defendants failed to diagnose and treat effectively in a timely manner. Whether defendants departed from the standard of care of good and accepted medical practice will of course be determined at trial. However, the court concludes that because Dr. Gomes was continuing to treat the sequellae of plaintiff's retained placenta condition until February, 1996, the claim asserted by plaintiff Linda McCallen against defendants Dr. Gomes and Garden City Obstetrics & Gynecology, P.C. is timely.

On the other hand, the continuous treatment doctrine does not toll the statute of limitations with respect to a spouse's derivative claim. *Porubic v. Oberlander*, 274 A.D. (*8)2d 316 (1st Dep't 2000). Accordingly, since summary judgment searches the record, the court will grant summary judgment dismissing the claims asserted by plaintiff James R. McCallen against defendants Dr. Gomes and Garden City Obstetrics & Gynecology, P.C. for loss of services.

The court now turns to the timeliness of the action with respect to Dr. Sherwin. Dr. Sherwin maintains that regardless of whether Dr. Gomes' treatment falls under the continuous treatment doctrine, it cannot toll the statute of limitations as to Dr. Sherwin because he is not vicariously liable for Dr. Gomes' malpractice. Section 1505(a) of the Business Corporation Law which provides that

Each shareholder, employee or agent of a professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation.

Under this statute, a physician who is a shareholder, officer, or employee of a professional service corporation is not vicariously liable for the malpractice of another doctor who is an officer, director or employee of the corporation. *Hill v. St. Clair's Hospital*, 67 N.Y.2d 72, 79 (1986).

Similarly, where a doctor who is a member of a professional corporation continues to provide treatment to the patient, the mere fact that another doctor is also a member of (*9)the professional corporation, without more, is not sufficient to toll the statute of limitations as to the non-treating doctor. *Pellegrino v. Millard Philmore Hospital*, 140 A.D.2d 954 (4th Dep't 1988). Plaintiff must show that the other doctor participated in treatment or was at least actively consulted on the case in order to impute to the other doctor the continuous treatment of a member of the professional corporation. *Id.* In her affidavit in opposition to defendants' summary judgment motion, plaintiff alleges that it was her understanding that Dr. Gomes was consulting with Dr. Sherwin about her case. Plaintiff



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alleges that until the early part of 1993 she spoke with Dr. Sherwin about her condition on the telephone and that he prescribed at least one course of medication in an attempt to bring on her menses. Plaintiff further claims that on numerous occasions Dr. Gomes told her that he had consulted with Dr. Sherwin,² and that in March, 1995 Dr. Sherwin was present for a conference with Dr. Gomes in which treatment options were discussed with plaintiff. Since there is a factual issue as to whether Dr. Gomes actively consulted with Dr. Sherwin as to plaintiff's case, Dr. Sherwin's motion for summary judgment dismissing the claim asserted by plaintiff Linda McCallen is denied. However, for the reasons discussed above, the derivative claim against Dr. Sherwin asserted by plaintiff James McCallen is dismissed. SO ORDERED (*10) Dated: October 5, 2001

1. Defendants moved for reargument of the summary judgment motion. By short form order dated May 23, 2000, the court granted reargument and upon reargument adhered to its original decision denying summary judgment with leave to renew.

2. Such a statement by Dr. Gomes would be binding on Dr. Sherwin because it is an admission by one partner relating to a matter within the scope of the partnership business. Partnership Law § 22.

