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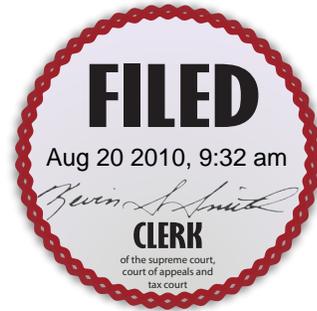
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IN THE
COURT OF APPEALS OF INDIANA

KURT RETRUM, M.D.,
ALAN P. SAWCHUCK, M.D.,
ST. JOHN'S HEALTH SYSTEM, and
ST. VINCENT HEALTH, INC.,

Appellants-Defendants,

vs.

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No. 48A02-1002-PL-00097

SARAH TINCH, Personal Representative)
of the Estate of R. C. TINCH,)
)
Appellee-Plaintiff.)
)

INTERLOCUTORY APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable G. George Pancol, Judge
Cause No. 48D02-0904-PL-362

August 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

The plaintiff estate filed a medical malpractice claim against the defendant physicians. The defendants sought summary judgment based on the applicable statute of limitations. The trial court denied summary judgment, and the defendants were granted leave to file this interlocutory appeal. We conclude as a matter of law that the estate's action is time-barred. The designated evidence reveals that (1) the estate filed its action after the expiration of the limitations period, (2) the decedent was informed of a potential malpractice claim over thirteen months before the statutory period expired, and (3) it was reasonably possible to file within those thirteen months, despite the decedent's debilitation and his counsel's difficulty in obtaining medical records. We reverse and remand for entry of summary judgment in favor of the defendants.

Facts and Procedural History

Decedent R.C. Tinch began experiencing pain in his lower pelvis. He consulted Dr. Alan P. Sawchuck for evaluation. Dr. Sawchuck ordered a CT scan. The CT was performed at St. John's Health Center on July 26, 2005. Radiologist Dr. Kurt Retrum read the CT and made no finding of renal lesions.

Tinch had another CT taken on June 4, 2006, at Community Hospital of Anderson. This CT scan revealed the presence of renal tumors. Tinch was diagnosed with renal cell carcinoma. Tinch and his wife Sarah were also informed on June 4 that the renal tumors should have been apparent from the prior CT reviewed by Dr. Retrum.

Tinch underwent a right radical nephrectomy in July 2006. He began chemotherapy the following September. He suffered debilitating physical pain, weakness, and fatigue. Soon he was housebound and for the most part bedridden. Tinch required constant care from Sarah and could not be left unattended. He died on May 15, 2007.

Tinch and Sarah consulted an attorney in April 2007, shortly before Tinch's death. They were interested in filing a malpractice claim against Drs. Retrum and Sawchuck. Prospective counsel first wanted to collect evidence and assess the strength of Tinch's case. Counsel requested medical records from Tinch's then-current physicians, Drs. Fisher and Elsharty, but received no response from either doctor. Sarah retrieved the records from Dr. Fisher's office and delivered them to counsel in August 2007. Counsel sent two more requests to Dr. Elsharty and finally received his records in November. Still, counsel desired more information. Counsel requested

additional records from St. John's Health Center. These materials were not received until December. Sarah also obtained two compact discs containing images of Tinch's CT scans. One disc showed an image of the CT performed by Dr. Retrum on July 26, 2005. The other contained an image of an earlier CT which predated the alleged malpractice. Sarah mistakenly forwarded the second disc to the law firm instead of the first. Counsel furnished all records, including the incorrect CT disc, to a medical expert. The expert rendered an unfavorable opinion of Tinch's case. Counsel sent a letter to Sarah in December 2007 declining further representation and returning Tinch's medical records. Sarah soon realized she had provided counsel with the wrong CT disc. She brought counsel the correct disc containing Tinch's July 26 CT. An expert subsequently reviewed Tinch's records and rendered a favorable opinion of the case in May 2008. Counsel decided to represent the Tinches and pursue their claim.

Tinch's estate filed a proposed medical malpractice complaint on June 3, 2008. The complaint alleged negligence by Drs. Retrum and Sawchuck in failing to diagnose Tinch's cancer from the July 26 CT.

The defendants moved for summary judgment. They argued that the estate's claims were barred by the Indiana Medical Malpractice Act's two-year statute of limitations. The trial court issued a written order denying the motion. The court found material issues of fact as to:

1. Whether the date that the Plaintiff was aware of an injury and that the injury was attributable to an act or omission by a health care provider was before or after the occurrence based two year statute of limitations.
2. Whether applying the medical malpractice statute is unconstitutional when applied to Plaintiff and in violation of Article One Section Twenty-Three of the Indiana Constitution.

3. Whether the claim could have been reasonably asserted before the statute expired.

4. Whether information the Plaintiff had within the period prescribed by the statu[t]e of limitations establishes an undisputed issue of fact that in the exercise of due diligence should lead to the discovery of the medical malpractice.

Appellants' App. p. 6.

The defendants sought leave to file an interlocutory appeal. The trial court granted certification, and we accepted jurisdiction.

I. Standard of Review / Burdens of Proof

When reviewing the entry or denial of summary judgment, our standard of review is the same as that of the trial court: summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1269 (Ind. 2009). All facts established by the designated evidence, and all reasonable inferences from them, are to be construed in favor of the nonmoving party. *Naugle v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007).

A defendant in a medical malpractice action who asserts the statute of limitations as an affirmative defense bears the burden of establishing that the action was commenced beyond that statutory period. *Herron v. Anigbo*, 897 N.E.2d 444, 448 (Ind. 2008), *reh'g denied*. Once this is done, however, the burden shifts to the plaintiff to establish an issue of fact material to a theory that avoids the defense. *Id.*

II. The Medical Malpractice Statute of Limitations

The Indiana Medical Malpractice Act sets forth the following two-year statute of limitations for actions brought against healthcare professionals:

A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect

Ind. Code § 34-18-7-1(b).

The medical malpractice statute of limitations is occurrence-based, meaning it runs from the date of the negligent act or omission rather than the time the negligence is discovered. *Herron v. Anigbo*, 897 N.E.2d 444, 448 (Ind. 2008), *reh'g denied*. The statute has been held constitutional on its face, *see Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 403-04, 404 N.E.2d 585, 603-04 (1980), but our Supreme Court has found it unconstitutional as applied in certain circumstances, *see Booth v. Wiley*, 839 N.E.2d 1168, 1172 (Ind. 2005); *Martin v. Richey*, 711 N.E.2d 1273, 1282 (Ind. 1999). The statute has been held violative of Article 1, Sections 12 and 23 of the Indiana Constitution where applied to bar the claim of a patient who could not reasonably be expected to learn of his injury within the two-year period. *Martin*, 711 N.E.2d at 1282. It has also been held unconstitutional where applied to bar the claim of a patient who knows of the injury but is unable in the exercise of reasonable diligence to attribute it to malpractice. *Booth*, 839 N.E.2d at 1172.

Accordingly, the Supreme Court has established the following methodology for applying the statute. The date on which the limitations deadline is activated is known as the “trigger date.” *Herron*, 897 N.E.2d at 449. The trigger date is the point at which the plaintiff either knows of the malpractice and resulting injury or learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. *Id.* at 448-49. A plaintiff whose trigger date occurs after the original

limitations period has expired may institute a claim for relief within two years of the trigger date. *Id.* at 449. But if the trigger date falls within the two-year limitations period, the plaintiff must file before the statute of limitations has run if possible in the exercise of due diligence. *Id.* If the trigger date is within the two-year period but in the exercise of due diligence a claim cannot be filed within the limitations period, the plaintiff must initiate the action within a reasonable time after the trigger date. *Id.*

III. Contested and Uncontested Issues in this Case

There is no dispute that Tinch's estate commenced its action beyond the two-year statutory period. The alleged malpractice occurred on July 26, 2005, when Dr. Retrum interpreted Tinch's CT. The limitations expired two years later on July 26, 2007. The estate did not file its complaint until the following June 3, 2008. The defendants have thus made an initial showing that the estate's claim was untimely.

The burden now shifts to the estate to establish facts that avoid the limitations defense. The estate maintains that its action was timely filed in light of the Tinch's applicable trigger date.

The parties apparently agree that the Tinch's trigger date was, as a matter of law, June 4, 2006. On that date the Tinch's were informed that renal tumors should have been detected by Dr. Retrum from the initial CT scan. This information should have either made the Tinch's aware of malpractice or led to the discovery thereof.

The Tinch's trigger date thus fell inside the two-year limitations period and left thirteen months remaining before the statutory deadline. The Tinch's were required to file their claim before the running of the statute if possible in the exercise of due

diligence. If in the exercise of due diligence they could not file within the limitations period, then they had to initiate the action within a reasonable time after the trigger date.

The resulting issues in this case are (1) whether in the exercise of due diligence, the Tinches could have filed a proposed complaint within the thirteen months remaining in the statutory period, and (2) if not, whether the estate's complaint was filed within a reasonable time after the trigger date. We find the first question dispositive and therefore need not address the second.

IV. Due Diligence in Filing Claim

The decisive issue in this case is whether, in the exercise of due diligence, the Tinches could have filed their proposed complaint within the thirteen months remaining in their limitations period.

The Supreme Court recently found a malpractice action time-barred where, although the decedent was both receiving cancer treatment and suffering mental illness, she had nine months remaining after her trigger date and failed to timely file. *See Overton v. Grillo*, 896 N.E.2d 499, 504 (Ind. 2008), *reh'g denied*. In *Overton*, the decedent consulted the defendant physician for a routine mammogram. *Id.* at 501. The defendant identified no malignancies. *Id.* Fifteen months later, the decedent was diagnosed with breast cancer. *Id.* She underwent chemotherapy and radiation treatment and allegedly began to suffer from severe depression, anxiety, and sleep deprivation. *Id.* at 501, 504. She and her husband filed a claim against the defendant after the limitations period had expired. *Id.* at 501, 502. The defendant argued that the action was untimely filed, and our Supreme Court agreed. *Id.* at 501. The Court first held that the decedent's

trigger date was the time of her cancer diagnosis. *Id.* at 503-04. That left nine months in the limitations period to file a claim. *See id.* at 501, 504. The Court next determined whether it was reasonably possible to file before the statute had run. *See id.* at 504. The Court found that “nothing prevented the Overtons from filing in the nine months remaining in the limitations period.” *Id.* Though the decedent was undergoing treatment and claimed to have been battling depression and anxiety, this evidence was “insufficient as matter of law to establish an ongoing incapacity.” *Id.*

In light of *Overton*, we conclude as a matter of law that the Tinchés could have reasonably filed their action before the expiration of their limitations period. The Tinchés had not nine but thirteen months remaining after their trigger date to initiate a claim. Tinch was no doubt weak and debilitated from his cancer treatment, but there is no indication that he and Sarah were incapable of contacting legal representation sooner and getting the ball rolling. And though plaintiff’s counsel encountered delays and mix-ups in obtaining records and expert opinions, thirteen months would have proven more than sufficient to investigate and evaluate the case had it been pursued with due diligence following the trigger date. We conclude that thirteen months afforded the Tinchés ample time to file. The estate has designated insufficient evidence of incapacity to create a genuine issue of material fact on the defendants’ limitations defense. We therefore reverse and remand for entry of summary judgment in favor of the defendants.

Reversed and remanded.

MAY, J., and ROBB, J., concur.