

KB/PL/mc
01-30272

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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RALPH PRESS, as Administrator of the
Estate of PHYLLIS PRESS, Deceased,

AFFIRMATION

Plaintiff,

Index No.:

- against -

LILA G. HOLLIN, as Executrix of the
Estate of SIDNEY HOLLIN, M.D.,
Deceased,

Defendant.
-----x

KATHLEEN M. BECK, an attorney admitted to practice before the Courts of the State and an associate of the firm of MARTIN, CLEARWATER & BELL, attorneys of record for defendant, HOLLIN, affirms the following under the penalty of perjury.

1. I am familiar with the facts and circumstances of this case by virtue of a review of the file on this matter maintained by my office.

2. This affirmation is submitted in support of the instant motion which seeks an order pursuant to CPLR Section 3211(a)(5); 214-a and EPTL Section 5-4.1, dismissing the above-captioned action as it is barred by the Statute of Limitations.

3. This is a wrongful death action predicated on an

underlying claim of medical malpractice commenced by the service of a Summons and Complaint on or about August 21, 1985 (Exhibit "A").

4. On September 25, 1985, issue was joined by the service of an Answer, accompanied by a Demand for Change of Venue from Supreme Court New York County to Supreme Court Nassau County and also accompanied by various discovery demands. (Exhibit "B").

5. Thereafter, upon a Notice of Motion dated September 25, 1985 and upon various supporting affirmations and affidavits, defendant HOLLIN made a motion, pursuant to CPLR Sections 510 and 511(b), to change the venue of this action from Supreme Court New York County to Supreme Court Nassau County (Exhibit "C").

6. Following the receipt of plaintiff's Affirmation in Opposition (Exhibit "D"), the Court issued an Order [Ain, J.] dated November 29, 1985, granting the motion to change venue (Exhibit "E").

7. Thereafter, a copy of the Order with Notice of Entry was served on plaintiff and the appropriate arrangements were made to transfer the court file from Supreme Court New York County to Supreme Court Nassau County.


8. Additionally, on or about October 7, 1985, plaintiff served a Bill of Particulars pursuant to defendant's demand (Exhibit "F").

9. In regard to the instant motion, the relevant facts are that the last date of treatment rendered to plaintiff's decedent by the late DR. HOLLIN was June 10, 1981 (Exhibit "G": Office Records of DR. HOLLIN; and Exhibit "H": Examination Before Trial of Plaintiff, RALPH PRESS). Plaintiff's Bill of Particulars states that plaintiff's decedent expired on April 5, 1984 (Exhibit "F"). Consequently, there was a period of approximately two years and 10 months between the last medical treatment and plaintiff's death.

10. Upon the facts set forth in paragraph #9, supra, and upon the argument set forth in the accompanying Memorandum of Law, it is submitted that plaintiff's action is barred by the Statute of Limitations.

WHEREFORE, it is respectfully requested that the Court issue an Order dismissing plaintiff's action in all respects as it is barred by the Statute of Limitations.

Dated: New York, New York
February 12, 1991


KATHLEEN M. BECK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MEMORANDUM OF LAW
PRELIMINARY STATEMENT

This memorandum of law is submitted in support of defendant's motion for an Order to dismiss the above-captioned case pursuant to CPLR Section 3211(a)(5), 214-(a), and EPTL Section 5-4.1.

FACTS

Both PHYLLIS PRESS and DR. HOLLIN are deceased. Therefore, the relevant facts are contained in the office records of Dr. HOLLIN and plaintiff's Bill of Particulars.

DR. HOLLIN'S records establish that he first rendered medical treatment to PHYLLIS PRESS in 1975. Specifically, in November, 1975, at Mt. Sinai Hospital, DR.

HOLLIN surgically repaired an internal carotid artery aneurysm and small superclinoid internal carotid aneurysm (Exhibit "G"). Thereafter, on December 18, 1975, January 19, 1976, March 8, 1976, June 29, 1977, June 4, 1979 and June 10, 1981, DR. HOLLIN treated PHYLLIS PRESS in his office (Exhibit "G"). The notation on DR. HOLLIN'S records on the last date of treatment of June 10, 1981, indicates that the patient was neurologically without problems, that a CT Scan was advised and it includes the phrase - - return one year (Exhibit "G").²

By the absence of any recording on DR. HOLLIN'S chart after June 10, 1981, it appears that plaintiff's decedent did not obtain a CT Scan nor did she ever return for further treatment by DR. HOLLIN. This interpretation is supported by the recitations in plaintiff's Bill of Particulars which states that MRS. PRESS' next and last medical treatment after June 10, 1981 was obtained at St. John's Hospital in March, 1984 (Exhibit "F").

Further, the plaintiff, RALPH PRESS as administrator of

²Since Dr. Hollin is dead, it is obviously impossible to obtain his interpretation of the entries on his office records. However, the clear meaning of his writing is that the patient was advised to return in one year. In full, the note appears to state:

6/10/81 c/o fatigue, neck & RUE discomf, "nervous" -- L
eye feel weak
Neuro OK, advise CT Scan
Ret 1 yr

(Exhibit "G").

the Estate of PHYLLIS PRESS states in his Examination Before Trial that he believed his wife, MRS. PRESS, never made another office appointment with DR. HOLLIN after the June 10, 1981 office visit (Exhibit "H" pg. 23). MR. PRESS stated prior to his marriage his wife was treated by DR. HOLLIN for a cerebral aneurysm. MR. PRESS stated he spoke with DR. HOLLIN for the first time by telephone after he and MRS. PRESS returned from their honeymoon in the summer of 1977. DR. HOLLIN told MR. PRESS that MRS. PRESS could lead a normal life and get pregnant. MR. PRESS stated prior to their marriage MRS. PRESS saw DR. HOLLIN once every two weeks initially after surgery and then every three months; subsequent to their marriage, he stated his wife saw DR. HOLLIN yearly from 1977 until June, 1981 (Exhibit "H" pgs. 9-11).

MR. PRESS stated with each yearly visit in 1977, 1978, 1979, 1980 and 1981 his wife was reassured everything was fine. After the June, 1981 visit MRS. PRESS discontinued her medication (Dilantin and Valium) and never made any further appointments with DR. HOLLIN. Significantly, during the 1981 office visit to DR. HOLLIN, MRS. PRESS did complain of fatigue neck and right upper extremity discomfort and was advised to undergo a CT Scan. MRS. PRESS was told to return in one year. The plaintiff did not return to DR. HOLLIN for any further treatment after the June 10, 1981 visit and did not undergo

the CT Scan. (Exhibit "G" and Exhibit "H" pgs. 21-23).

The Bill of Particulars further asserts that while an in-patient at that institution, MRS. PRESS sustained a cerebral aneurysm and expired on April 5, 1984 (Exhibit "F").

ARGUMENT

POINT

Plaintiff's wrongful death action is barred by the Statute of Limitations because at the time of plaintiff's decedent's death, the Statute of Limitations on the underlying action for medical malpractice had already expired.

It is well settled that the prerequisite for having a viable wrongful death action is the existence of a timely claim on an underlying action or theory at the time of plaintiff's decedent's death. EPTL 5-4.1; Kelliher v. N.Y. General & H. RR Co., 212 N.Y. 207 (1914). That prerequisite does not exist in the instant case. Here, the last date of treatment rendered by DR. HOLLIN to PHYLLIS PRESS was on June 10, 1981. MRS. PRESS expired on April 5, 1984, more than two and one-half years after the last date of treatment.

Accordingly, the Statute of Limitations for medical malpractice, which underlies the wrongful death action, had already expired prior to plaintiff's decedent's death. Hence, the wrongful death action must be dismissed.

Moreover, plaintiff cannot rely on the "continuous treatment doctrine" to overcome the expiration of the Statute of Limitations on the underlying claim of medical malpractice. More specifically, the fact that the June 10, 1981 office notation indicates -- return in one year -- does not permit plaintiff to credibly assert that the last date of treatment was June 10, 1982 and thus avoid the expiration of the Statute of Limitations on the medical malpractice claim.

The continuous treatment doctrine holds that the time to institute a medical malpractice action is stayed when the course of treatment, which includes the alleged wrongful conduct, has run continuously and is related to the initial condition or complaint.³ McDermott v. Torre, 56 N.Y.2d 399, 452 N.Y.S.2d 351 (1982). The burden of proof that a course of treatment was continuous rests on the plaintiff. Barrella v. Richmond Memorial Hospital, 88 A.D.2d 379, 453 N.Y.S.2d 444

³Based upon the information available at this stage of the action, it cannot be properly determined whether there was a relation between the prior treatment and Mrs. Press' demise. Thus, the second prong of the doctrine is not addressed in this motion.

(2nd Dept. 1982). The controlling legal principles applicable to the instant case are embodied in the recent Court of Appeals decision of Richardson v. Ostenreich, 64 N.Y.2d 896, 487 N.Y.S.2d 731 (1985). In addition to the law, Richardson is particularly instructive in that its facts stand in clear contrast to those of the case at bar and demonstrate that there was not a continuous course of treatment in this case.

In brief, in Richardson, the plaintiff was treated by the physician defendant on various dates between January, 1973 through October 8, 1974, at which time the plaintiff was given an appointment to return on December 4, 1974. Plaintiff did not return on that date but testified at her deposition that she intended to keep the appointment but she was unable to do so due to illness that had confined her to her bed. The date of what constituted the last date of treatment was critical because the then applicable three year Statute of Limitations expired on November 30, 1977 -- thus, if the last date of treatment was on October 8, 1974, the Statute of Limitations expired and the suit would be dismissed and, if the last date of treatment was December 4, 1974, the Statute had not expired and the suit was viable.

Under the facts in Richardson, the Court determined that treatment did not terminate until December 4, 1974. In its holding, the Court reasoned:

when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with periodic treatments which characterized the treatment in the immediate past [then the date of last treatment should be the date of the last scheduled appointment].

64 N.Y.2d at 898, 899.

In the instant case, the only evidence that reflects on possible future treatment after June 10, 1981 by DR. HOLLIN is the entry on his chart advising plaintiff's decedent to obtain a CT Scan and return in one year. Applying the restrictive standards put forth by the Court of Appeals in Richardson, plaintiff cannot meet his burden of showing that there was a continuous course of treatment beyond June 10, 1981.

First of all, the June 10, 1981 notation -- return in one year -- is not "a regularly scheduled appointment." At best, assuming that this information was communicated to plaintiff's decedent, the notation was only advisory in nature. Additionally, the recommendation to return in one year cannot logically be construed as an appointment "in the near future."

Moreover, the significance of there being a regularly scheduled appointment is that the physician and the patient "explicitly" intended that there be medical treatment in the near future. Here, there was no meeting of minds at all. Preliminarily, since both parties are deceased, one can only speculate as to their respective specific subjective intentions. Hence, as in any case where intent is not verbally expressed, the Court must infer the intentions of the parties from their objective conduct and the circumstantial evidence available. See People v. Mackey, 49 N.Y.2d 274, 425 N.Y.S.2d 288 (1980). In this action, the facts are unequivocal that plaintiff's decedent did not return in one year and, based upon plaintiff's Bill of Particulars, did not even obtain a CT Scan as advised by DR. HOLLIN. And, as opposed to the facts in Richardson where the plaintiff at least testified that she intended to return but was prohibited due to illness, we have no evidence of her intent to return. Rather, we are left with the facts that she did not return and did not seek any follow-up treatment at all. Accordingly, based upon the well accepted principles in evaluating intent, it is evident that MRS. PRESS did not "explicitly anticipate" or intend to seek further treatment from DR. HOLLIN. Where a plaintiff does not seek corrective treatment there is no sound basis for applying the continuous treatment doctrine. Rizk v. Cohen, 73 N.Y.2d 98, 538 N.Y.S.2d 229 (1989).

The most compelling proof that MRS. PRESS' treatment by DR. HOLLIN ceased on June 10, 1981 was the testimony given by MR. PRESS during his examination before trial on December 10, 1990. MR. PRESS stated that his wife was not treated by DR. HOLLIN after June 10, 1981; did not make any further appointments with DR. HOLLIN after June 10, 1981 and to the best of his knowledge, did not telephone DR. HOLLIN after June 10, 1981 (Exhibit "H"). Absent any treatment after June 10, 1981 the statute of limitations on the medical malpractice claim expired on December 10, 1983 and therefore, at the time of MRS. PRESS' death in 1984, this wrongful death action was already untimely.

Furthermore, the fact that a patient does not return for treatment has been determined to be a critical factor in establishing that a continuous course of treatment did not exist. Daniec v. Synthes, Ltd. USA., 110 A.D.2d 675, 487 N.Y.S.2d 808 (2nd Dept. 1985); Barrella v. Richmond Memorial Hospital, 88 A.D.2d 379 (2nd Dept. 1982).

Additionally, while there is no definitive quantitative test as to how much time between treatments (or anticipated treatments) constitutes continuous treatment and tolls the

running of the Statute [Barrella v. Richmond Memorial Hospital, 453 N.Y.S.2d at 448], the period of one year under the circumstances of this case cannot be interpreted to constitute "continuous treatment." In Richardson, the Court implicitly found that two months was not too long. However, in Barrella, the Appellate Division, Second Department held that a gap of eight and one-half months did not constitute continuous treatment. It is submitted that where as here there was a recommendation to return in one year and where the patient did not return, that there is no sound reason to find a course of continuous treatment beyond June 10, 1981.

Finally, it would not serve the purposes of sound public policy to award plaintiff the benefit of claiming that treatment lasted beyond June 10, 1981, considering the one year time period involved and the fact that plaintiff's decedent did not return to see the physician as recommended.

In sum, the Court should find that the last date of treatment was on June 10, 1981 and the plaintiff's action is barred by the Statute of Limitations.

CONCLUSION

Plaintiff's action for wrongful death is barred by the Statute of Limitations and should be dismissed.

Respectfully submitted,

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