In The

Supreme Court of Virginia

RECORD NO. 100052

ALYSSA CHALIFOUX,

Appellant,

v.

RADIOLOGY ASSOCIATES OF RICHMOND, INC.,

Appellee.

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

Record Number: 100052

Alyssa Chalifoux,

Appellant,

v.

Radiology Associates of Richmond, Inc.,

Appellee.

BRIEF OF APPELLEE

Appellee, Radiology Associates of Richmond, Inc. ("Radiology Associates"), by counsel, submits this brief in opposition to the brief of the Appellant, Alyssa Chalifoux ("Ms. Chalifoux").

I. STATEMENT OF THE CASE

In this medical malpractice action, Ms. Chalifoux alleges that four separate radiologists, each employed by Radiology Associates, negligently interpreted and reported seven different imaging studies ordered by Ms. Chalifoux's neurologists. Ms. Chalifoux asserted that the radiologists should have detected a benign and very rare abnormality in the region of the right cavernous sinus on imaging studies reported on December 24,

2002, March 11, 2003, March 24, 2003, August 4, 2003, and February 16, 2004. A radiologist employed by Radiology Associates detected this abnormality in a report dated October 24, 2005, and it was reported to Ms. Chalifoux's treating neurologist at that time. Ms. Chalifoux, however, did not file her Complaint until October 12, 2007 -- approximately two years and eight months after the February 16, 2004 radiology report, the last imaging study which Ms. Chalifoux claims a radiologist negligently interpreted.

Under well settled Virginia law, professional negligence claims are governed by a two-year statute of limitations from the date of injury. Ms. Chalifoux conceded the initial injury was December 23, 2002, the date the first imaging study was performed. Radiology Associates issued its report of the December 23, 2002 study on December 24, 2002. Accordingly, Radiology Associates filed a Plea of the Statute of Limitations. The parties filed Expert Designations regarding the Plea and briefed the issue. In Ms. Chalifoux's Brief in Opposition to Radiology Associates' Plea of the Statute of Limitations, she asserted that the continuing treatment doctrine extended the statute of limitations for her claim. J.A. 117-29. On August 13, 2009, the parties submitted the Plea of the Statute of Limitations to the Circuit Court for the City of Richmond, The Honorable C. N. Jenkins, Jr. ("the trial

court") for an evidentiary hearing. The trial court heard testimony from the parties' expert witnesses and Ms. Chalifoux, and also considered deposition testimony and other documents admitted into evidence.

At a subsequent hearing on August 17, 2009, the trial court sustained the Plea of the Statute of Limitations. Thereafter, Ms. Chalifoux filed a Motion for Reconsideration and submitted additional written evidence. On October 1, 2009, the trial court issued a letter opinion sustaining the plea. On October 7, 2009, the trial court entered an Order denying the Motion for Reconsideration and dismissing the case.

Ms. Chalifoux filed a Notice of Appeal on October 30, 2009. On December 3, 2009, Ms. Chalifoux filed a Notice of Filing Transcripts of the August 13, 2009 and August 17, 2009 hearings. Ms. Chalifoux filed a Petition for Appeal on January 7, 2010. Radiology Associates filed its Brief in Opposition on January 28, 2010. This Court awarded an appeal by Order entered April 15, 2010.

II. QUESTION PRESENTED

> Did the trial court correctly grant Radiology Associates' Plea of the Statute of Limitations and dismiss this case with prejudice? (Assignments of Error 1-3).

III. STATEMENT OF FACTS TO CORRECT AND AMPLIFY APPELLANT'S STATEMENT OF FACTS

On October 12, 2007, Ms. Chalifoux filed this medical malpractice action against Radiology Associates. J. A. 1-2.[1] By order entered October 1, 2008, Ms. Chalifoux filed an Amended Complaint increasing the *ad damnum*. J.A. 3. In her Amended Complaint, Ms. Chalifoux alleged that while she was under the care and treatment of her neurologist, John D. Blevins, M.D. ("Dr. Blevins"), Radiology Associates interpreted various radiological studies the neurologist ordered for her. J.A. 4-5 at ¶¶ 2 and 3. Specifically, Ms. Chalifoux claimed that four radiologists employed by Radiology Associates negligently interpreted and reported various imaging studies ordered by Ms. Chalifoux's neurologist on five separate occasions, specifically December 24, 2002; March 11, 2003; March 24, 2003; August 4, 2003; and February 16, 2004. Ms. Chalifoux alleged that these studies "would have shown a tumor [2] as early as December 2002." J.A. 5 at ¶ 5.

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[1] Citations to the Joint Appendix shall appear as "J. A. ___." Citations to transcript excerpts in the Joint Appendix shall include the line citation and in the case of a transcript citation that contains four pages of transcript per page, citations shall include the page of the transcript and line citation.

[2] In the trial court as well as in this Court, Ms. Chalifoux consistently has stated that she had a "tumor" or "brain tumor." In fact, Ms. Chalifoux was diagnosed with a cavernous sinus lesion of her trigeminal nerve consistent with amyloidoma. This was a benign abnormality, not a malignant neoplasm.

On October 28, 2008, Radiology Associates filed a Plea of the Statute of Limitations. J.A. 10.

On January 8, 2009, Ms. Chalifoux, responding to Radiology Associates' First Request for Admissions, admitted that she was injured on December 23, 2002, the date of the first imaging study ordered by Ms. Chalifoux's treating physician. J.A. 75, Interrogatory Number 4. A radiologist from Radiology Associates reported this imaging study on December 24, 2002. J.A. 26. It was also clear from Ms. Chaifoux's responses to Radiology Associates' Requests for Admission that she would assert that the continuing treatment doctrine extended the statute of limitations in this case. J.A. 54-76.

In the same responses, Ms. Chalifoux also admitted that all of the imaging studies in question were ordered by her treating physicians, Dr. Blevins or David Stein, M.D. ("Dr. Stein"). J.A. 54, 57-58, 61, 65, 68. Additionally, Ms. Chalifoux admitted that the radiologists made their reports to her treating physicians and not to her directly. J.A. 55, 58, 62, 65, 69. Ms. Chalifoux further admitted that the radiologists were consultants to her clinical physicians and that they did not order treatment for her. J.A. 55-56, 58-59, 62-63, 65-66, 69-70.

Finally, Ms. Chalifoux admitted that Radiology Associates' reading and reporting of the last study, the October 22, 2005 MRI, was not negligent. J.A. 72-73. This study read by a radiologist employed by Radiology Associates detected the abnormality at issue and, by report dated October 24, 2005, this finding was conveyed to Ms. Chalifoux's treating neurologist. J.A. 34-35. In her brief, Ms. Chalifoux quotes language from the October 24, 2005 report and erroneously states that "[i]t is admitted by defendant Radiology Associates that this intracranial tumor was present and visible on every brain study examined and interpreted by defendant Radiology Associates since Dec. 2002." Appellant's Brief at 6. Ms. Chalifoux has mischaracterized the context of the language in the October 24, 2005 report. Clearly, Radiology Associates has made no admission of liability in this litigation.

On August 13, 2009, the trial court conducted an evidentiary hearing on the disputed questions of fact. The trial court heard testimony from Radiology Associates' expert witness, Karsten Konerding, M.D. ("Dr. Konerding").[3] J.A. 226-76. Dr. Konerding is Board certified in Diagnostic Radiology, licensed in the Commonwealth of Virginia and has an active

[3] Radiology Associates filed a lengthy Expert Witness Designation for Dr. Konerding, before the evidentiary hearing, on May 26, 2009. J.A. 12-35. Ms. Chalifoux also filed an Expert Witness Designation before the evidentiary hearing. J.A. 77-105.

clinical practice in diagnostic radiology. J.A. 227-28. Like the radiologists from Radiology Associates, Dr. Konerding has a community based practice at hospitals in Richmond, Virginia. J.A. 227. Dr. Konerding testified that he had reviewed the reports of eight imaging studies of Ms. Chalifoux interpreted by four different radiologists of Radiology Associates from December 23, 2002 through October 22, 2005. J.A. 228. Specifically, Dr. Konerding had reviewed the following eight reports:

1) **12.23.02 MRI Brain** interpreted by Robert Y. Fidler, Jr., M.D., and reported to plaintiff's clinical physician, David Stein, M.D., via written report electronically signed on 12.24.02.

2) **3.09.03 MRI Brain** interpreted by A. John Kuta, M.D. and reported to plaintiff's clinical physician, John D. Blevins, M.D., via written report electronically signed on 3.11.03.

3) **3.09.03 MRA Head** interpreted by A. John Kuta, M.D. and reported to plaintiff's clinical physician, John D. Blevins, M.D., via written report electronically signed on 3.11.03.

4) **3.20.03 MRI C-Spine** interpreted by Steven M. Wiebe-King, M.D. and reported to plaintiff's clinical physician, John D. Blevins, M.D., via written report electronically signed on 3.24.03.

5) **8.02.03 RAD Skull** interpreted by J. Keith Thompson, M.D. and reported to plaintiff's clinical physician, John D. Blevins, M.D., via written report electronically signed on 8.4.03.

6) **8.02.03 MRI Brain** interpreted by J. Keith Thompson, M.D. and reported to plaintiff's clinical physician, John D. Blevins, M.D., via written report electronically signed on 8.4.03.

7) **2.15.04 MRI Brain** interpreted by J. Keith Thompson, M.D. and reported to plaintiff's clinical physician, John D. Blevins, M.D., via written report electronically signed on 2.16.04.

8) **10.22.05 MRI Internal Auditory Canal**[4] interpreted by A. John Kuta, M.D. and reported to plaintiff's clinical physician, John D. Blevins, M.D., via written report electronically signed on 10.24.05.

In Ms. Chalifoux's brief she states that Dr. Konerding did not review any of the actual imaging studies in contrast to her expert, Maurice Lipper, M.D. ("Dr. Lipper") who reviewed all of the imaging studies. See Appellant's Brief at 12. However, the role of Dr. Lipper and Dr. Konerding at the evidentiary hearing was not to testify regarding the interpretation of the imaging studies and whether the interpretation complied with the standard of care. Rather, the scope of the expert testimony related to the role of diagnostic radiologists both in general and with regard to the particular circumstances relating to Ms. Chalifoux.

Dr. Konerding testified that the role of the diagnostic radiologist is that of a consultant to the primary or treating physician for purposes of interpreting a diagnostic radiology examination. J.A. 229. Dr. Konerding testified that the diagnostic radiologist's care is episodic and not continuing

[4] Again, Ms. Chalifoux did not claim a breach of the standard of care with respect to the study read on October 24, 2005. Rather, this is the study in which a radiologist detected the rare abnormality in the region of the right cavernous sinus and Meckel's cave near the trigeminal nerve. J.A. 34-35.

care. Id. Additionally, Dr. Konerding testified that the diagnostic radiologist has no continuing relationship with the patient, whether it is a patient who has had a single radiology examination or a patient who has had a series of examinations. Id.

Dr. Konerding further discussed that a patient's clinical physician orders a specific imaging study for a patient, and that while a radiologist interprets and reports the study ordered, the radiologist cannot change the examination. J.A. 230. Rather, the diagnostic radiologist would have to contact the ordering physician to change or amend the order for the diagnostic test. Id. Additionally, Dr. Konerding testified that in the interpretation of a current radiologic study, "if prior examinations are available, good practice may require comparison with previous examinations." J.A. 232. Dr. Konerding explained that such a practice occurs when the diagnostic radiologist detects abnormalities or unexplained findings on the current examination and the radiologist looks at previous examinations to determine whether the abnormalities or unexplained findings were present on previous examinations. J.A. 233.

Dr. Konerding also testified that as the diagnostic radiologist's role is that of a consultant, the diagnostic radiologist interprets the imaging study and reports the results to the ordering clinical physician and not to the

patient. J.A. 232-33. Typically, according to Dr. Konerding, the diagnostic radiologist does not interact with the patient. J.A. 232. The diagnostic radiologist's relationship with the patient ends when the radiologist delivers his report of the interpretation of the imaging studies to the referring physician. J.A. 235-36.

Ms. Chalifoux's expert witness, Dr. Lipper, testified that he is partially retired and has a practice as a diagnostic radiologist at a teaching institution, not a community based practice.[5] J.A. 282, 304-05. Dr. Lipper agreed that the referring physician orders the radiology study, the hospital performs the imaging study and the diagnostic radiologist interprets the study and makes a report to the referring physician. J.A. 286, 305-08. Dr. Lipper agreed with Dr. Konerding that the diagnostic radiologist would have to contact the ordering physician to change or amend the order for the diagnostic test. J.A. 311-12. Moreover, Dr. Lipper testified that if a patient

[5] Ms. Chalifoux included in her Brief the many standard of care opinions she elicited from Dr. Lipper at the evidentiary hearing. Dr. Lipper's standard of care opinions were clearly not relevant to the issue of the statute of limitations and the trial court routinely sustained Radiology Associates' objections to these opinions. See Appellant's Brief at 10,13-15; J.A. 292-97. Similarly, Ms. Chalifoux has included excerpts from the American College of Radiology Practice Guidelines. These guidelines were simply not relevant to trial court's ruling on the statute of limitations. Moreover, it is well settled in Virginia such that policies, protocols and procedures are not admissible at trial to show negligence. See Pullen v. Nichols, 226 Va. 343, 310 S.E.2d 452 (1983).

has an imaging study that is read as normal, the radiologist would not continue to follow the patient. J.A. 310. The only significant divergence between Dr. Lipper's opinions and those of Dr. Konerding was Dr. Lipper's conclusion that Radiology Associates' relationship with Ms. Chalifoux was a "continuum of care" because she "presented to the same practice with the same symptoms and the same problems." J.A. 300.

In Ms. Chalifoux's Brief, she discusses other areas of Dr. Lipper's testimony at the evidentiary hearing that were not in any way relevant to Ms. Chalifoux. Examples include the following testimony from Dr. Lipper: (1) "[a]s part of the radiologist's role, he will determine which study the patient should have, what kind of protocols are used for a particular study, whether the patient needs contrast administration, what area of the brain needs to be studied and then he will 'see the study with the patient;'" (2) "radiologists are empowered to change, modify, and recommend different studies based upon the plaintiff's symptoms;" (3) "Dr. Lipper is copied on records by the referring doctor concerning his ongoing treatment with a patient . . . In serious cases, the radiologist tends to follow-up with referring doctor concerning care of patient." Appellant's Brief at 12-13.

Here, however, there was no contention by Ms. Chalifoux nor was there evidence before the trial court that any radiologist from Radiology

Associates had a hand in the technical aspect of any of Ms. Chalifoux's imaging studies or viewed the studies with Ms. Chalifoux personally. Moreover, there was no contention by Ms. Chalifoux nor was there evidence submitted to the trial court that any radiologist from Radiology Associates changed, modified, or recommended a different study for Ms. Chalifoux. Finally, there was no contention by Ms. Chalifoux nor was there evidence submitted to the trial court that Ms. Chalifoux's referring neurologists copied any radiologist from Radiology Associates on records concerning Ms. Chalifoux's ongoing treatment.

Ms. Chalifoux testified at the evidentiary hearing that the imaging studies were performed at Henrico Doctors' Hospital. J.A. 319. Moreover, Ms. Chalifoux conceded that her neurologist did not refer her to any particular radiologist for the imaging studies. J.A. 323.

Ms. Chalifoux also submitted into evidence at the evidentiary hearing the June 24, 2009 deposition transcript of Harold F. Faunce, D.O.,[6] the President and corporate designee of Radiology Associates. J.A. 390-419. In his deposition, Dr. Faunce testified that he has been the President of Radiology Associates for ten years. J.A. 391; page 5, lines 12-17. Dr. Faunce described Radiology Associates' role with respect to Ms. Chalifoux

[6] For clarification, Dr. Faunce is a D.O. or Doctor of Osteopathy. The June 24, 2009 deposition transcript incorrectly refers to Dr. Faunce as a M.D.

as consultants for her doctors who read imaging studies and provide reports to Ms. Chalifoux's doctors. J.A. 392; page 6, lines 1-3.

Dr. Faunce testified that Radiology Associates performs its services at Henrico Doctors' Hospital through a contract with the hospital. J.A. 392; page 8, lines 16-21. Dr. Faunce testified that Henrico Doctors' Hospital provides the facilities, equipment and the technical staff for the imaging studies. J.A. 396; page 22, lines 1-10. Dr. Faunce testified that no one associated with Radiology Associates performed the imaging studies for Ms. Chalifoux; rather, the imaging studies were performed by technologists employed by Henrico Doctors' Hospital. J.A. 392; page 6, line 16-25; J.A. 397; page 26, lines 24-25 through page 27, lines 1-3; J.A. 407; page 69, lines 20-24. Dr. Faunce testified that the radiologists from Radiology Associates utilized equipment at Henrico Doctors' Hospital to view the imaging studies and to dictate the reports for the imaging studies. J.A. 408; page 70, lines 4-13. Moreover, Dr. Faunce testified that the imaging studies are stored at the hospital on a computerized storage system called a PACS system. J.A. 392; page 8, lines 1-6. Dr. Faunce testified in his deposition that Radiology Associates' responsibility with respect to an outpatient such as Ms. Chalifoux was to "interpret the images, create a

report, review the report, and sign the report . . . and send it to the referring physician. J.A. 402; page 48, lines 5-9.

In Ms. Chalifoux's Brief, she states that there was consensus among Drs. Konerding, Lipper and Faunce about several matters. Appellant's Brief at 9-10. First, Ms. Chalifoux states that these physicians testified that "[i]f a radiologist believes that an exam ordered is inappropriate or that more exams are needed, then he should contact the referring physician to amend the order or recommend other studies." Appellant's Brief at 10. Here, however, there was no contention by Ms. Chalifoux or evidence before the trial court that any radiologist from Radiology Associates had any contact with Ms. Chalifoux's treating physicians, other than submitting the written reports to the treating physicians. Ms. Chalifoux also states that "[m]embers of a group radiology practice have the power and authority to request referring doctor's treatment notes to get a history of patient's symptoms, especially if they believe the reported symptoms are vague or inadequate." Id. Again, there was no contention by Ms. Chalifoux or evidence before the trial court that any radiologist from Radiology Associates requested treatment notes from Ms. Chalifoux's referring neurologists to get a history of her symptoms.

After the August 13, 2009 evidentiary hearing, the trial court granted Radiology Associates' Plea of the Statute of Limitations at a hearing on August 17, 2009 and stated that a formal opinion order would be forthcoming. J.A. 345-55. In the meantime, Ms. Chalifoux filed a Motion for Reconsideration, along with two affidavits, one from Ms. Chalifoux and another from Dr. Lipper. J.A. 193-205. Radiology Associates filed a responsive Memorandum of Law. J.A. 206-09.

By letter opinion dated October 1, 2009, the trial court sustained Radiology Associates' Plea of the Statute of Limitations and dismissed the case with prejudice. J.A. 210-14. The trial court held that this action arose from a neurologist's referral of Ms. Chalifoux to Radiology Associates on five separate occasions for the interpretation of various radiological studies. J.A. 210-11. The trial court found that Ms. Chalifoux's studies were "single, isolated acts which do not toll the statute of limitations under the continuous treatment rule." J.A. 211. The trial court held that the treatment offered by Radiology Associates terminated after Radiology Associates produced its reports and sent the reports to Ms. Chalifoux's clinical physician. J.A. 214. Additionally, the trial court held that any "comparison of test results suggest adherence to appropriate diagnostic procedure, rather than an assumption of ongoing treatment." J.A. 213-14. Finally, the trial court held that

Radiology Associates was under no duty to follow-up with Ms. Chalifoux at a later date, as it treated her "only upon the referral of her clinical physician." J.A. 214. The trial court concluded that under these facts, the continuous treatment rule was not applicable. J.A. 211.

By Order entered October 7, 2009, the trial court denied Ms. Chalifoux's Motion for Reconsideration and dismissed the case. J.A. 215.

IV. ARGUMENT

The Trial Court Correctly Granted Radiology Associates' Plea of the Statute of Limitations And Dismissed This Case With Prejudice. (Assignments of Error 1-3).

Standard Of Review.

Radiology Associates had the burden of proof on its Plea of the Statute of Limitations. As discussed below, Radiology Associates met that burden and the trial court correctly granted Radiology Associates' Plea of the Statute of Limitations and dismissed this case with prejudice.

In Fines v. Kendrick, this Court discussed the standard of review when a trial court has sustained a plea of the statute of limitations *after conducting an evidentiary hearing* involving "sharply conflicting evidence" regarding whether the statute of limitations had been tolled:

> Upon review to this Court, the decision of disputed questions of fact made by the trial court sitting without a jury has the same effect as the verdict of a jury. Hence, the judgment will not be

> disturbed unless it is plainly wrong or without evidence to support it. (citations omitted).

219 Va. 1084, 1088, 254 S.E.2d 108, 111 (1979). In Fines, a plaintiff sought to toll the statute of limitations for his medical malpractice claim on the grounds that he was insane at the time of the alleged malpractice. The Court held that the plaintiff had the burden of proof to establish that he was insane as defined by statute "so as to toll the statute of limitations." 219 Va. at 1086, 1088, 254 S.E.2d at 110, 111.

In Transcontinental Ins. Co. v. RBMW, Inc., 262 Va. 502, 510, 551 S.E.2d 313, 317 (2001), this Court held that when an appeal presents mixed questions of law and fact, "[t]he factual findings of the trial court are entitled to the same weight as a jury verdict and will not be set aside unless it appears from the evidence that the judgment is plainly wrong and without evidence to support it." Finally, this Court has held that with respect to questions of law, it will apply a *de novo* standard of review. Janvier v. Arminio, 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006).

Ms. Chalifoux erroneously asserts that a plea of the statute of limitations is "the functional equivalent of a summary judgment motion" and a plea in bar "may not be granted if there are any material facts genuinely

in dispute."[7] Appellant's Brief at 16, 39-41. A Plea in Bar is not a Motion for Summary Judgment. Rule 3:8 of the Rules of this Court governs pleas. See Rule 3:8, Rules of Virginia Supreme Court (2010 Repl. Vol.). In Nelms v. Nelms, noting that a familiar use of a plea is a statute of limitations plea, this Court held that a plea is a discrete form of defensive pleading which "does not address the merits of the issues raised by [the Complaint];" but "alleges a single state of facts or circumstances . . . which, if proven, constitutes an absolute defense to the claim." 236 Va. 281, 289, 374 S.E.2d 4, 8 (1988). In contrast, Rule 3:20 of the Rules of this Court governs a summary judgment motion and provides that "[s]ummary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute." Rule 3:20, Rules of Virginia Supreme Court (2010 Repl. Vol.).

[7] The cases cited by Ms. Chalifoux to support her claim that the trial court erred in ruling on Radiology Associates' Plea in Bar do not involve a Plea of the Statute of Limitations submitted to the trial court for an evidentiary hearing, but involve summary judgment motions. See Gay v. Norfolk and Western Railway Co., 253 Va. 212, 483 S.E.2d 216 (1997) (motion for summary judgment); Shevel's Inc.–Chesterfield v. Southeastern Associates, Inc., 228 Va. 175, 320 S.E.2d 339, 342 (1984) (motion for summary judgment); Montgomery v. South County Radiologists, Inc., 49 S.W.3d 191, 193 (Mo. 2001) (Missouri law involving a motion for summary judgment).

Here, Ms. Chalifoux never objected to proceeding with the August 13, 2009 evidentiary hearing on Radiology Associates' Plea of the Statute of Limitations. Prior to the hearing, *both* parties filed Expert Designations and lengthy memoranda. J.A. 12-35; 77-105. Moreover, both parties presented expert witness testimony at the evidentiary hearing. Additionally, Ms. Chalifoux testified at the hearing and submitted other written evidence to the trial court, such as the discovery deposition of the President of Radiology Associates, Dr. Faunce. J.A. 279, 318-27, 390-419. Even if some objection existed to the trial court determining disputed questions of fact regarding the Plea of the Statute of Limitations, by actively participating as she did and not raising any formal objection to the proceedings, Ms. Chalifoux waived any such objection.

Accordingly, Ms. Chalifoux cannot now credibly claim that material facts are genuinely in dispute. Rather, the parties submitted the Plea of Statute of Limitations, and whether the continuing treatment rule was applicable here, to the trial court to resolve disputed questions of fact. The trial court's decision regarding any disputed questions of fact has the same effect as the verdict of a jury and its judgment "will not be disturbed unless it is plainly wrong or without evidence to support it." Fines, supra.

The Trial Court Did Not Err In Granting Radiology Associates' Plea Of The Statute Of Limitations.

After conducting an evidentiary hearing, the trial court correctly held that Ms. Chalifoux's claim against Radiology Associates was time-barred. This matter is governed by Virginia Code § 8.01-243(A), which provides that the statute of limitations for personal injuries is two years. See Va. Code Ann. § 8.01-243(A). Accordingly, Ms. Chalifoux had up to two years to file this action after accrual of the claim.

Virginia Code § 8.01-230 provides that "the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person." Va. Code Ann. § 8.01-230. It is well settled in Virginia that the statute of limitations begins to run when the plaintiff is injured, not when the plaintiff discovers the injury. Hawks v. DeHart, 206 Va. 810, 146 S.E.2d 187 (1966); St. George v. Pariser, 253 Va. 329, 332, 484 S.E.2d 888, 890 (1997).

Ms. Chalifoux conceded that her injury occurred when the imaging studies were interpreted and reported. The first such injury causing event was December 24, 2002 when, as Ms. Chalifoux stated in her interrogatory answers, the initial imaging study was interpreted and reported by Radiology Associates. J.A. 75, Interrogatory Number 4. At the other end

of the timeline, Ms. Chalifoux admitted that the interpretation of the October 22, 2005 MRI of the Internal Auditory Canal was not negligent. J.A. 34-35, 72-73. Accordingly, even though according to her own discovery responses the first harm occurred on December 24, 2002, the last arguable date for accrual was February 16, 2004, the date of the last study for which Ms. Chalifoux asserts was negligently reported and interpreted. Under these facts, the trial court correctly held that Ms. Chalifoux's Complaint filed on October 12, 2007, almost three years later, was barred by the two-year statute of limitations.[8]

The Trial Court Correctly Held That The Continuing Treatment Doctrine Did Not Apply.

Ms. Chalifoux argues that the trial court erred in holding that the continuing treatment doctrine did not apply to this case. The seminal case regarding the continuing treatment doctrine is Farley v. Goode, 219 Va. 969, 252 S.E.2d 594 (1979). In Farley, a plaintiff alleged that a dentist who

[8] Although Virginia has not adopted a discovery rule, it is notable that it was the October 24, 2005 imaging study in which Radiology Associates reported the rare abnormality in the region of the right cavernous sinus and Meckel's cave near the trigeminal nerve. Ms. Chalifoux acknowledges in her Brief that this information was reported to her on October 24, 2005. Appellant's Brief at 2. The last imaging study for which Ms. Chalifoux claims Radiology Associates breached the standard of care was on February 15, 2004. Therefore, Ms. Chalifoux had two years from February 15, 2004, or until February 15, 2006, to file her Complaint. On October 24, 2005, four months before the statute of limitations ran, Ms. Chalifoux knew about the detection of the rare abnormality.

had examined and treated the plaintiff over a period of years had failed to diagnose a dental condition. Recognizing that in Virginia there is no discovery rule, this Court carved out a narrow exception to the rule that the statute of limitations runs from the date of injury:

> We hold under these facts that when malpractice is claimed to have occurred during a continuous and substantially uninterrupted course of examination and treatment in which a particular illness or condition should have been diagnosed in the exercise of reasonable care, the date of injury occurs, the cause of action for that malpractice accrues, and the statute of limitations commences to run when the course of examination and treatment if any, for that particular malady terminates.

Farley, 219 Va. at 976, 252 S.E.2d at 599. In Grubbs v. Rawls, the Court explained the rationale behind the continuing treatment rule:

> Part of our rationale in *Farley* was that as long as the physician-patient relationship continued as to a particular malady or injury, then it could not be said that treatment had ceased. Another part of our rationale in *Farley* was that unless a patient could properly wait to the end of treatment before being required to sue his or her physician, suits might have to be brought while the physician is in the midst of effecting a cure. We noted further that permitting a patient to wait until the termination of treatment before being required to file suit was conducive to mutual confidence between physician and patient because it gave the physician all reasonable time and opportunity to correct mistakes made at the beginning of a course of treatment.

235 Va. 607, 611-12, 369 S.E.2d 683, 686 (1988).

In Farley, this Court made clear that when the alleged malpractice constitutes a single, isolated act, the continuing treatment rule does not apply:

> Parenthetically, we note that the rule applied today presupposes that a continuous course of improper examination or treatment which is substantially uninterrupted is proved as a matter of fact. Where the malpractice complained of constitutes a single, isolated act, however, the rule of decision in Hawks v. DeHart, supra, will continue to apply.

219 Va. at 980, 252 S.E.2d at 601 (emphasis added). See also Hawks, supra (holding that statute of limitations commences to run from date of injury). This Court again reiterated this holding in finding that the "continuing undertaking doctrine" does not apply to a case involving the services of an insurance broker and insurance agency, as such services "ordinarily entail separate, independent acts" that do not "require continuing work." Harris v. K & K Insurance Agency, Inc., 249 Va. 157, 162, 453 S.E.2d 284, 286-87 (1995). In Harris, this Court reiterated that the continuing treatment doctrine "operates as a limited exception to the rule requiring strict construction of statutes of limitation." 249 Va. at 161, 453 S.E.2d at 286.

Here, Ms. Chalifoux simply did not show that the continuing treatment rule applied. Rather, the trial court made a factual determination, based on the evidence before it, that the role of the radiologists in this case consisted

of single isolated acts, not continuing care by the radiologists. The record from the trial court is ample to support the trial court's finding that the continuing treatment rule did not apply:

- The radiologists were consultants to Ms. Chalifoux's treating physicians.
- The treating physicians ordered all of Ms. Chalifoux's imaging studies.
- Ms. Chalifoux's treating physicians did not refer her to any particular radiologist for the imaging studies.
- The treating physicians chose the imaging studies Ms. Chalifoux received.
- There was no evidence that any radiologist changed, modified, or recommended a different study for Ms. Chalifoux.
- All of Ms. Chalifoux's imaging studies were performed at Henrico Doctors' Hospital.
- Henrico Doctors' Hospital provided the facilities, equipment and the technical staff for the imaging studies.
- There was no evidence that any radiologist had a hand in the technical aspect of any of Ms. Chalifoux's imaging studies.
- The radiologists utilized equipment at Henrico Doctors' Hospital to view the imaging studies and to dictate the reports for the imaging studies.
- There was no evidence that any radiologist viewed the studies with Ms. Chalifoux personally.
- The radiologists interpreted the imaging studies and then gave a written report to the treating physicians, not directly to Ms. Chalifoux.
- There was no evidence that any radiologist had any contact with Ms. Chalifoux's treating physicians other than submitting the written reports to the treating physicians.
- The radiologists did not examine Ms. Chalifoux.
- The radiologists did not order any diagnostic studies for Ms. Chalifoux.

- The radiologists did not treat or order treatment for Ms. Chalifoux.
- There was no evidence that any radiologist requested treatment notes from Ms. Chalifoux's treating physicians to get a history of her symptoms.
- There was no evidence that Ms. Chalifoux's treating physicians copied any radiologist on records concerning Ms. Chalifoux's ongoing treatment.
- The radiologists had no further physician-patient relationship with Ms. Chalifoux once they reported the imaging studies to the treating physicians.
- The radiologists' role ended when the radiologists signed and sent a report to Ms. Chalifoux's treating physicians.
- The imaging studies were stored at Henrico Doctors' Hospital on a computerized storage system called a PACS system.
- The radiologists had no continuing duty to go back and re-open a report regarding Ms. Chalifoux after the radiologist had electronically signed the reports.

See infra at 8-20. As discussed above, the trial court's factual conclusions have the same effect as the verdict of a jury and cannot be set aside unless plainly wrong. See Fines, supra; Transcontinental Insurance Co., supra.

Accordingly, while Ms. Chalifoux's treating clinical physicians provided continuing treatment to Ms. Chalifoux, in their consultant roles the physicians at Radiology Associates did not. Ms. Chalifoux's claim that "there is evidence of 'active consultation' by defendant Radiology Associates with the referring physicians throughout the course of its multiple examinations and diagnoses of its patient, Ms. Chalifoux" is simply wrong and no evidence to support this contention was submitted to the trial

court. See Appellant's Brief at 36. Rather, while both Dr. Lipper and Dr. Faunce discussed in general terms that a radiologist sometimes might have some involvement with a patient's ongoing treatment, there was no evidence that this occurred with regard to Ms. Chalifoux. Specifically, there was no evidence that any radiologist had any contact with Ms. Chalifoux's treating physicians other than submitting the written reports to the treating physicians, no evidence that any radiologist requested treatment notes from Ms. Chalifoux's treating physicians to get a history of her symptoms, and no evidence that Ms. Chalifoux's treating physicians copied any radiologist on records concerning Ms. Chalifoux's ongoing treatment.

Equally without support is Ms. Chalifoux's argument that a continuing course of examination and treatment can be imputed to Radiology Associates from the continuing treatment of Ms. Chalifoux's treating physicians. Ms. Chalifoux makes the bald assertion that "Dr. Blevins relied exclusively upon the defendant to provide diagnostic radiology services during this entire time period and developed a continuing treatment plan for Ms. Chalifoux based on the diagnoses provided by defendant Radiology Associates." Appellant's Brief at 38. Dr. Blevins did not testify at the evidentiary hearing in the trial court and, therefore, there was no evidence regarding the extent of Dr. Blevin's reliance or non-reliance on the reports

of Radiology Associates in his development of a treatment plan for Ms. Chalifoux. In any event, this Court has not expanded Virginia jurisprudence to include imputing the continuing treatment rule for treating physicians to consultants to the treating physicians and clearly there is no factual basis for doing so here.

Rather, the record before the trial court clearly established that the radiologists' role concerning Ms. Chalifoux entailed separate, independent acts that did not involve continuing work. This Court has made clear that the continuing treatment doctrine is a *limited* exception to the rule that requires strict construction of the statute of limitations. There was credible evidence to support the trial court's finding that the nature of the role of Radiology Associates with respect to Ms. Chalifoux was such that the single, isolated acts did not toll the statute of limitations under the continuing treatment rule. J.A. 211. Finding that the continuing treatment rule did not apply, the trial court properly held that Ms. Chalifoux's claim was time-barred.

The Trial Court's Reliance On Case Authority Was Appropriate.

Ms. Chalifoux argues that the trial court did not consider prevailing Virginia law in ruling on the Plea of the Statute of Limitations, but "unfairly plucked" an appellate decision from Arkansas, Baker v. Radiology

Associates, 72 Ark. App. 193, 35 S.W.3d 354 (2000). Appellant's Brief at 18-27, 22. Ms. Chalifoux's assertion that the Baker decision was wrongly used as the "primary source" for the trial court's decision to grant Radiology Associates Plea of the Statute of Limitations is incorrect. Appellant's Brief at 18. Rather, the trial court very clearly stated at the August 17, 2009 hearing that it considered numerous Virginia cases and also discussed at length in its October 1, 2009 letter opinion decisions from this Court such as Farley and Grubbs. J.A. 211-13; 349-51. The trial court also noted that it relied on a Virginia Circuit Court case, Hollingsworth v. Shenandoah Medical Imaging, Inc., 38 Va. Cir. 324, 1996 WL 1065478 (Circuit Court for the City of Winchester, 1996), which addressed the application of the continuing treatment rule in an analogous situation. Additionally, the trial court considered a very detailed decision from the United States Court of Appeals for the Fourth Circuit, Castillo v. Emergency Medicine Associates, P.A., 372 F.3d 643 (4th Cir 2004), where the Fourth Circuit had analyzed numerous Virginia cases and applied Virginia law regarding the continuing treatment doctrine.

In Castillo, the United States Court of Appeals for the Fourth Circuit examined the continuing treatment doctrine in a case involving episodic care, such as in this case. In Castillo, Castillo presented to an Emergency

Department on October 10, 1999, with complaints of abdominal pain and nausea. 372 F.3d. at 645. Castillo was seen by an Emergency Department physician, "Dr. Doe," who was employed by Emergency Medical Associates, P.A. ("EMA"). Id. Castillo was diagnosed with a urinary tract infection and discharged from the Emergency Department with a prescription and discharge instructions to contact her physician or return to the Emergency Department if her condition worsened. Id. On October 14, 1999, Castillo called the Emergency Department and reported that her condition had not improved. Id. Castillo spoke to an unidentified Emergency Department physician who prescribed a new medication over the telephone. Id. On October 19, 1999, Castillo returned to the Emergency Department and was seen by another Emergency Department physician who admitted her to the hospital where she later underwent surgery for a perforated intestine. Id. "All of the emergency department physicians who treated Castillo were employed by EMA." Id.

On October 19, 2001, Castillo filed her original complaint against EMA, alleging that EMA was liable for the acts and omissions of its agents in the treatment of Castillo on October 10, 1999 – Castillo's first visit to the

Emergency Department. Id.[9] EMA filed a motion for summary judgment on the ground that Castillo failed to bring her medical malpractice claim within two years from the date it accrued. Id. Castillo argued that there was a genuine issue of material fact as to the date of injury and, in the alternative, that the district court should apply the continuing treatment doctrine to toll the statute of limitations while she was under the care of the physicians employed by EMA. Id. at 645-46.

The district court granted the defendants' motion for summary judgment, finding that the statute of limitations barred Castillo's claims against both the Emergency Department physicians and the corporation that employed them. Id. at 646. The district court found that there was no genuine issue of material fact with respect to the date of Castillo's injury. Id. Moreover, the district court found that the continuing treatment doctrine did not apply because the physician-patient relationship between Castillo and Dr. Doe "terminated upon her discharge from the Emergency

[9] As in this case, Castillo did not allege that the physician employed by EMA was negligent in his treatment of her with respect to the last visit to the Emergency Department on October 19, 1999 when Castillo was admitted to the hospital for a perforated intestine. Again, Ms. Chalifoux did not claim negligence with respect to the reading and reporting of the imaging study on October 22, 2005. Rather her allegations of negligence relate to the studies read and reported in December 2002, March 2003, August 2003 and February 2004. Ms. Chalifoux's Complaint was filed two years and eight months after the last of these imaging studies.

Department on October 10, 1999 and, so necessarily did her physician-patient relationship with EMA." Id.

On appeal, the Fourth Circuit affirmed the district court. First, the Fourth Circuit found that there was no genuine issue of material fact as to the date of injury; and that the district court appropriately found that Castillo's injury occurred during the time period before October 19, 1999, when the perforation went untreated resulting in infections and scarring. Id. at 646-48.

With respect to the continuing treatment doctrine, the Fourth Circuit noted that the Virginia Supreme Court "has not addressed whether the continuing treatment doctrine applies in a situation such as this, when a patient is treated by different emergency room physicians during separate incidents and those physicians are employed by the same association." Id. at 648. After reviewing relevant Virginia law, the Fourth Circuit held:

> When an individual is treated by more than one physician for the same ailment, that individual has separate physician-patient relationships with each physician, and the continuing treatment doctrine applies separately to treatment by each physician. *See Hewlette v. Proffer*, 55 Va. Cir. 387, 389-90 (2001) ("*Grubbs* does not provide a separate standard for a 'joint treatment' situation; the statute of limitations was determined for each physician separately and independently of their joint treatment of the plaintiff."). The application of the continuing treatment doctrine requires more than the continuous treatment

> of a single ailment; the physician-patient relationship must be continuous as well.

Id. at 648-49.

In Castillo, the Fourth Circuit examined the Hollingsworth case, just as the trial court did here.[10] Hollingsworth brought a medical malpractice action against a radiologist and a radiology clinic for allegedly negligence in reading a mammogram. Hollingsworth's treating physician had ordered a mammogram for her that was performed on June 4, 1990 at Winchester Women's Specialists "pursuant to a contract between Shenandoah Medical Imaging and Winchester Women's Specialists, by an employee of Shenandoah Medical Imaging, defendant, Alan F. Knull, M.D." Id. at 1. Dr. Knull, a radiologist, interpreted the imaging study as showing no evidence of a malignancy and he ordered the standard follow-up. Id. On October 7, 1991, Hollingsworth had a second follow-up mammogram at Shenandoah

[10] In Castillo, the Fourth Circuit examined additional Virginia circuit court cases where similar results were reached. In Merritt v. Clark, 40 Va. Cir. 13 (1995), the trial court held that the continuing treatment rule did not apply when plaintiff was seen on two separate visits by two different emergency room physician who were employed by the same corporation. The Merritt court reasoned that the emergency department physicians were not the plaintiff's "regular physician" and the visits were isolated and, therefore, the continuing treatment doctrine did not apply. Similarly, in Pidgeon v. Wake, 34 Va. Cir. 336, 341 (1994), the trial court held that the continuing treatment doctrine did not apply to an emergency room physician as emergency room physicians were employed to provide emergency care and not continuing care.

Medical Imaging and the report for this study was dictated by Dr. Read and reviewed and signed by Dr. Knull. Id. at 1-2. The October 1991 report noted malignant calcifications, which resulted in a biopsy that revealed the presence of invasive carcinoma. Id. at 2.

Hollingsworth filed her Complaint on September 24, 1993, claiming that Dr. Knoll negligently read the June 4, 1990 imaging study. Id. After considering the evidence regarding the date of Hollingsworth's injury, the trial court found that the Complaint was not filed within two years after the date of injury and, therefore, the claim was time-barred. Id. at 7. Additionally, the court found that the continuing treatment doctrine did not apply to Dr. Knoll and Shenandoah Medical Imaging. The trial court reasoned that the continuing treatment doctrine does not apply to situations where the alleged malpractice consists of a single isolated act. Id. at 8-9. The court noted that "Virginia has yet to adopt the broader course of treatment rule for purposes of applying the continuing treatment exception to the statute of limitations in professional malpractice actions." Id. at 9. Rather, the court held:

> In this case, Dr. Knull's two readings of the x-rays in June 1990, and again in October 1991, were single, isolated acts, they were not continuous treatment of the Plaintiff, so the continuing treatment rule has no application to the cases against Dr. Knull and Shenandoah Medical Imaging.

Id. Accordingly, the trial court sustained Dr. Knull and Shenandoah Medical Imaging's Plea of the Statue of Limitations. Id.

In Castillo, the Fourth Circuit stated that before it could consider whether the continuing treatment doctrine applied to the isolated visits to the Emergency Department, it must first address whether the continuing treatment doctrine could be applied to a corporation. Id. at 649. The Court noted that Castillo did not allege a direct physician-patient relationship with EMA, the corporation that employed the Emergency Department physicians. Id. at 650. Rather, Castillo was claiming that an indirect relationship arose with EMA through her interactions with its employees, the Emergency department physicians. Id. Finding that "Virginia law does not take us this far," the Court held:

> It is undisputed that all three emergency department physicians with whom Castillo had contact were employed by EMA. It is also undisputed that treating Castillo was within the scope of each of the emergency department physician's agency. However, the future determination that the existence of a physician-patient relationship with the individual employees provides a basis for asserting the continuing treatment doctrine against the corporate health care provider that employs them is one we need not make on these facts. Even if Virginia law clearly allowed Castillo to reach EMA because of the continuing care of its physician-employees, we conclude that the discrete and isolated nature of the emergency room contacts do not support such a claim.

Id. at 650. The Fourth Circuit held that "Castillo saw two different emergency department physicians during two isolated visits more than a week apart." Id. The Court concluded that Castillo had "no reasonable expectation of an ongoing physician-patient relationship" and did not contract for continuing care with the Emergency Department physicians and EMA. Id. at 650-51. Accordingly, the Fourth Circuit concluded that the district court did not err in finding that Castillo's action was barred by the statute of limitations. Id. at 652.

In addition to case authority applying Virginia law, the trial court also appropriately considered as guidance the Baker decision, an appellate court ruling from Arkansas. Ms. Chalifoux argues that the trial court's reliance on this case, which was not cited by either party, was "misplaced as it is inconsistent with Virginia law." Appellant's Brief at 18. First, in conducting independent research, the trial court was not only appropriate, but commendable. It is axiomatic that a trial court may consider all case law it deems relevant and instructive.

In this regard, the trial court was well within its authority to consider as guidance the Baker decision – a decision which examined the continuing treatment doctrine in the context of diagnostic radiology, specifically whether it is episodic or continuing treatment. Noting that the

Arkansas continuous treatment rule was "similar to Virginia's rule," the trial court was persuaded by the factual similarities between the Baker case and this case. J.A. 213. That is, in both cases there was "no indication that the radiologists were engaged in any active consultation with the referring physician or in the ongoing treatment of the plaintiff for any specific condition." Id. Additionally, the trial court noted that in Baker, even though the radiologists reviewed nine separate mammograms of the plaintiff over a number of years and the mammograms were viewed in conjunction with previous exams to determine if any change had occurred, "a comparison of test results suggest adherence to appropriate diagnostic procedure, rather than an assumption of ongoing treatment." J.A. 213-14. Here, the trial court appropriately considered a plethora of case authority in reaching its decision to grant Radiology Associates' Plea of the Statue of Limitations on the facts before it.

Ms. Chalifoux's Journal Article Is Not Part Of The Record.

Finally, Ms. Chalifoux attached as Exhibit A to her Brief a 2001 journal article entitled *Malpractice Issues in Radiology.* Appellant's Brief at 22. This decade old medical journal article, written from a litigation perspective, surveyed decisions from jurisdictions across the country. Notably, there are no cases cited in this journal article discussing Virginia

law. This journal article is not part of the record on appeal as it was not considered by the trial court in ruling on Radiology Associates' Plea of the Statute of Limitations.

V. CONCLUSION

Radiology Associates respectfully requests that this Court affirm the judgment of the trial court dismissing this case with prejudice and for such other relief as the Court deems just and proper.

Respectfully submitted,

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VI. CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, counsel for Radiology Associates of Richmond, Inc. certifies that this 18th day of June, 2010, fifteen (15) paper copies of the Appellee's Brief were filed by hand in the office of the Clerk of this Court and that three (3) copies were sent by first class mail, postage prepaid, to the following:

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