In The

Supreme Court of Virginia

RECORD NO. 100052

ALYSSA CHALIFOUX,

Appellant,

v.

RADIOLOGY ASSOCIATES OF RICHMOND,

Appellee.

BRIEF *AMICUS CURIAE* OF THE VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS

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STATEMENT OF INTEREST

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

The Virginia Association of Defense Attorneys ("the VADA"), *Amicus Curiae*, by counsel, respectfully requests that this Court affirm the judgment of the Circuit Court for the City of Richmond sustaining Defendant's Plea of the Statute of Limitations and dismissing this action with prejudice.[1] In support thereof, the VADA, by counsel and pursuant to Rule 5:30, submits this Brief *Amicus Curiae*:

Plaintiff asserts in this appeal a position that would render a nullity the statute of limitations as applied to radiologists and other diagnostic consultants in medical malpractice actions. This Court repeatedly has affirmed the overarching policy interest in limiting the time under which an individual, particularly a physician, may be subject to being sued and has deferred to the General Assembly with regard to expansion of any exception to the applicable statute of limitations. Plaintiff in this appeal seeks to establish an indefinite statute of limitations in the context of radiology care.

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[1] The *Amicus Curiae*, the Virginia Association of Defense Attorneys, will refer to itself as "the VADA." Appellant shall be referred to as "Ms. Chalifoux" or "plaintiff" and the Appellee as "Radiology Associates" or "defendant."

In a matter of first impression, this Court is asked to consider expansion of the doctrine of continuous or continuing treatment to radiologists who provide intermittent interpretation of radiology studies performed on a patient and who, in many facilities across the Commonwealth, never see, physically examine or interact with the patient. In Virginia, as in other states, the continuous treatment doctrine has grown into favor due to a public policy interest in fostering a continued relationship between a physician and patient when that patient has an adverse outcome or delayed diagnosis and in providing the patient's established physician an opportunity to effect a cure. The trend nationwide is that the continuing treatment doctrine is inapplicable to intermittent diagnostic services provided by radiologists, pathologists and other consultants because the care does not meet the specific requirements of the doctrine and because application of the doctrine to episodic diagnostic care is not consistent with the policy interests undergirding the continuing treatment doctrine.

In Virginia, the policy basis for the continuing treatment doctrine is no different than in the states that have held that expansion of the doctrine to radiologists is against public policy. An essential limitation

of the doctrine in Virginia is that continuous and uninterrupted treatment for an identified and known medical condition must occur after the alleged negligence or period of negligence. This Court has held that for episodic, single or isolated acts the doctrine is inapplicable.

The VADA and the clients of its members have a compelling interest in the interpretation and application of the continuing treatment doctrine not only to radiologists, but also to other individuals who provide episodic care such as pathologists, and emergency medicine physicians. These individuals undertake to provide care to a patient with no expectation on the part of the physician or the patient that the relationship is ongoing. Without the continuing relationship and the expectation of such, the continuing treatment doctrine should not be applicable.

The trial court thoroughly dissected the law and the policy interests in the Commonwealth and beyond and correctly determined that the facts presented in this case did not support application of the continuing treatment doctrine to the defendant. The trial court committed no error in sustaining defendant's plea of the statute of limitations and the judgment of the trial court should be affirmed.

STATEMENT OF THE CASE

The VADA adopts the Statement of the Case of the Appellee, Radiology Associates of Richmond, Inc.

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).

STATEMENT OF FACTS

The VADA adopts the Statement of Facts contained in the Brief of Appellee, Radiology Associates. The VADA concurs with Radiology Associates that plaintiff included in the Brief of Appellant facts regarding Ms. Chalifoux's medical condition and the testimony of plaintiff's expert that are either inaccurate or not germane to the Assignments of Error. The VADA supplements the Statement of Facts of Radiology Associates as follows, as particularly pertinent to its Brief *Amicus Curiae*:

Plaintiff alleged in this medical malpractice action that various radiologists employed by defendant Radiology Associates negligently interpreted seven individual radiological studies on five distinct occasions from December 24, 2002 until February 15, 2004. Plaintiff did not allege that the interpretation by Radiology Associates employee A. John Kuta, M.D. of the study performed on October 22, 2005 was negligent and has conceded during the course of these proceedings that Dr. Kuta's interpretation of the October 22, 2005 study was appropriate and met the standard of care. (J.A. 72-73)[2]

[2] Citations to the Joint Appendix shall appear as "J.A. ___."

Plaintiff's Statement of Facts blurs the respective roles and responsibilities of Radiology Associates, radiology technicians employed by Henrico Doctors' Hospital, and Ms. Chalifoux's primary care physician, Dr. Stein, and her treating neurologist, Dr. Blevins.

Plaintiff has admitted that the studies at issue were ordered by Dr. Stein or Dr. Blevins based on certain clinical signs and symptoms revealed in their history taking and physical examination of Ms. Chalifoux and that Ms. Chalifoux returned to the care of Dr. Stein and Dr. Blevins once the studies were completed. (J.A. 54-73). The undisputed facts indicate that Radiology Associates had no continuing or ongoing relationship, in law or in fact, with Dr. Stein and Dr. Blevins. (J.A. 397, transcript 27:12 – 28:12)[3]

Once the studies were ordered by Dr. Stein or Dr. Blevins, Ms. Chalifoux presented to Henrico Doctors' Hospital and the studies were performed by radiology technologists employed by Henrico Doctors' Hospital. (J.A. 392, transcript 6:16-21) The radiologists of Radiology Associates did not perform the studies, did not examine

[3] Citations to transcript excerpts contained in the Joint Appendix are by page of the Joint Appendix and line as, e.g. "J.A. 1:1-4" indicating Joint Appendix page 1, and lines 1-4 of the transcript that appears on page 1. For pages of the Joint Appendix that contain four pages of transcript, citations are by page of the Joint Appendix, page of the transcript and line as, e.g. "J.A. 1, transcript 1:1-4."

Ms. Chalifoux and she had no interaction with them at the time the studies were performed. The role of the radiologists was only to interpret the images of the studies that were performed at Henrico Doctors' Hospital by the hospital's employees and report the results to the ordering physician, Dr. Stein or Dr. Blevins. (J.A. 391, transcript 5:22 to J.A. 392, transcript 8:15)

Plaintiff has admitted that after the radiologists of Radiology Associates completed their interpretation of the studies, the results were reported to Dr. Stein or Dr. Blevins and not to Ms. Chalifoux directly. (J.A. 54-73) Plaintiff's expert, Dr. Lipper, also agreed that the studies were ordered by Dr. Blevins or Dr. Stein, performed at the hospital by hospital radiology technologists, interpreted by radiologists of Radiology Associates and that the radiologists reported the results to the ordering physician and not Ms. Chalifoux. (J.A. 305:7 – 308:17) Ms. Chalifoux had no ongoing relationship with any individual radiologist with Radiology Associates. (J.A. 323:19-21)

If prior studies for the patient have been performed of the same anatomy and are available to a radiologist to compare to a recent study, good practice for radiologists may require comparison of the films in some scenarios. (J.A. 232:16 – 233:2, 248:2-14, 298:22-25,

312:14 – 313:11) From the perspective of the radiologist, the purpose of review of prior studies is to determine if any current abnormalities are present on the prior studies and, if so, to discern the significance of those abnormalities. (J.A. 233:3-10, 299:1-8) This best practice, and appropriate diagnostic procedure, for review of prior studies requires a radiologist in certain situations to review films that were interpreted by radiologists from different practice groups, or potentially different cities, to the extent those prior images are accessible to him. (J.A. 234:7-22, 313:6-11) It is undisputed that if a radiologist interprets a radiology study as normal, once he has completed and communicated his interpretation of the images the radiologist has no continuing relationship with the patient or the ordering physician. (J.A. 235:21 – 236:2, J.A. 310:9-16)

Plaintiff alleges that defendant Radiology Associates failed to diagnose her "intracranial tumor." The VADA concurs with the objection made by defendant to plaintiff's mischaracterization of her condition and agrees with Radiology Associates that plaintiff had a benign abnormality. Plaintiff has further alleged that her "tumor" continued to worsen and grew in size from December 2002 until the

time of the October 22, 2005 MRI study, which plaintiff does not allege to have been negligently interpreted. (J.A. 198)

Radiology Associates filed a Special Plea of the Statute of Limitations and the parties voluntarily brought this matter to the trial court at an evidentiary hearing on August 13, 2009. The trial court heard argument from counsel, received exhibits into evidence and heard the live testimony of witnesses, including Dr. Konerding, an expert for Radiology Associates, Dr. Lipper, an expert on behalf of plaintiff, and the plaintiff Alyssa Chalifoux. Plaintiff's counsel raised no objection to the trial court's consideration of defendant's special plea in his opening statement, but, rather, proceeded with argument and the presentation of evidence. (J.A. 224-226)

The factual evidence heard by the trial court, as detailed above, was largely undisputed. The only significant difference between the factual evidence presented by plaintiff and defendant pertinent to defendant's special plea is that plaintiff's medical expert, Dr. Lipper, asserted that Radiology Associates had a "continuum of care" with plaintiff and defendant's medical expert, Dr. Konerding, testified that the care provided to plaintiff by Radiology Associates was episodic and not continuing. (J.A. 300:14-20, 229:2-17) The parties

voluntarily submitted the issues of whether the diagnostic services provided by Radiology Associates to plaintiff were continuing or episodic and whether plaintiff's action was barred by the statute of limitations to the trial court for determination.

The trial court took these matters under advisement for four days and reconvened counsel on August 17, 2009 to issue its opinion from the bench. (J.A. 345-355) Following the August 17 hearing, the trial court issued an opinion letter on October 1, 2009, fully detailing its factual findings and legal conclusions. (J.A. 210-214) The factual findings of the trial court after consideration of the evidence included the following:

1. Plaintiff admitted that defendant was not negligent in the interpretation of the October 22, 2005 MRI study. (J.A. 348:6-11)

2. Plaintiff admitted "the radiologists were consultants to her clinical physician and that they did not order any treatment for her." (J.A. 348:12-15)

3. A comparison of a recent study to images from prior studies "suggests adherence to appropriate diagnostic procedure, rather than an assumption of ongoing treatment." (J.A. 213-214)

4. The treatment offered by the radiologists with Radiology Associates terminated after the radiologist interpreting a given study produced his report and sent the report to the plaintiff's "clinical physician" – Dr. Stein or Dr. Blevins. (J.A. 214)

5. Radiology Associates, “was under no duty to ‘follow-up’ with the patient at a later date, as it treated Plaintiff only upon the referral of her clinical physician.” *Id.*

The trial court concluded that the six occasions on which radiologists with Radiology Associates interpreted images from radiology studies performed on plaintiff, five occasions which plaintiff alleged to be negligent and the final which plaintiff did not allege to be negligent, were single, isolated acts that did not constitute continuing treatment. Accordingly, the trial court sustained defendant’s Special Plea of the Statute of Limitations and dismissed plaintiff’s action with prejudice.

STANDARD OF REVIEW

The VADA adopts the Standard of Review contained in the Brief of Appellee, Radiology Associates, and supplements such legal authority as follows:

On appeal, the factual findings of the trial court after an evidentiary hearing on a statute of limitations plea conducted with full consent and participation of the parties, even with regard to disputed questions of fact, are entitled to the same weight as a jury verdict. *Fines v. Kendrick*, 219 Va. 1084, 1088, 254 S.E.2d 108, 111 (1979); *Westgate at Williamsburg Condominium Association, Inc. v. Richardson*, 270 Va. 566, 573, 621 S.E.2d 114, 117-118 (2005). The trial court's findings regarding whether defendant provided substantially uninterrupted treatment to the plaintiff, the date treatment of the plaintiff by defendant terminated, whether defendant assumed ongoing treatment of plaintiff, and whether defendant and its radiologists were under any duty to follow-up with plaintiff after completion of a report interpreting a radiology study and transmittal of that report to the ordering physician are all questions of fact.

With regard to mixed questions of fact and law, this Court is guided by the familiar standard of *de novo* review, but with strict deference to the factual findings of the trial court. *Westgate*, 270 Va. at 574, 621 S.E.2d at 118. The ultimate conclusion of the trial court that plaintiff's action is barred by the statute of limitations is such a mixed question of fact and law. Nonetheless, plaintiff cannot now assert on appeal that the purely factual matter of whether defendant's treatment of plaintiff constituted single, isolated acts is subject to *de novo* review, having submitted such question of fact to the trial court for determination.

ARGUMENT

I. The continuous treatment doctrine is a limited exception to the statute of limitations, based on a policy interest in fostering continued treatment by a physician once an injury or malady is known.

"Statutes of limitation serve an important and salutary purpose." *Westminster Investing Corporation v. Lamps Unlimited, Inc.*, 237 Va. 543, 547, 379 S.E.2d 316, 318 (1989), quoting *Burns v. Board of Supervisors of Stafford County*, 227 Va. 354, 359, 315 S.E.2d 856, 859 (1984). Statutes of limitation arose from the judicial system of England as early as 1623 and frequently are based in a public policy interest to ensure that suits are commenced before witnesses and evidence are lost.[4] Specific to medical malpractice suits, the General Assembly has determined that it is in the public interest to place certain limitations on medical malpractice actions to protect against escalating costs of medical malpractice insurance that result in

[4] *Burns*, 227 Va. at 358-359, 315 S.E.2d at 859, citing W. Ferguson, *The Statutes of Limitations Saving Statutes* (1978) at 42-43.

reduced access and increased cost of health care that "adversely affect[s] the health, safety, and welfare of Virginia's citizens."[5]

> In light of the policy that surrounds statutes of limitation, the bar of such statutes should not be lifted unless the legislature makes unmistakably clear that such is to occur in a given case. Where there exists any doubt, it should be resolved in favor of the operation of the statute of limitations. . . Thus, courts are obligated to enforce statutes of limitation strictly and to construe any exception thereto narrowly. *Westminster Investing Corporation*, 237 Va. at 547, 379 S.E.2d at 318.

The General Assembly has included in Va. Code § 8.01- 243 two limited exceptions to the two-year statute of limitations specific to medical malpractice actions: (1) a period of one year from the date of discovery of a retained foreign object and (2) a period of one year from the date an injury is discovered in a case in which fraud, concealment or intentional misrepresentation prevented discovery of the injury within the two-year period. Neither exception is applicable to this case.

The continuous treatment doctrine, which is at issue in this case, is not statutory in Virginia as it may be in other states but arises from *Farley v. Goode* in which this Court held that if a plaintiff claims that in the course of continuous examination and treatment a malady should

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[5] *Pulliam v. Costal Emergency Services of Richmond*, 257 Va. 1, 19, 509 S.E.2d 307, 317 (1999), citing *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 94, 376 S.E.2d 525, 528 (1989) (upholding the constitutionality of the cap on medical malpractice damages).

have been discovered, the action does not accrue until "the improper course of examination, and treatment if any, for the particular malady terminates." 219 Va. 969, 976, 252 S.E.2d 594, 599 (1979). The continuous treatment doctrine provides a limited exception to the well-entrenched rule of *Hawks v. DeHart*, 206 Va. 810, 146 S.E.2d 187 (1966) that a cause of action accrues on the date of the injury. The continuous treatment rule is only applicable if:

> 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 announced in *Hawks v. DeHart* [], will continue to apply." 219 Va. at 980, 252 S.E.2d at 601.

The policy underlying the continuous, or continuing, treatment doctrine, as outlined in *Grubbs v. Rawls*, is that it is in the interest of the patient and the physician once a particular malady or injury is known to provide incentive for a continued physician-patient relationship both to permit the physician to effect a cure and to promote "mutual confidence" between the physician and the patient. 235 Va. 607, 611-12, 369 S.E.2d 683, 686 (1988). This Court further clarified in *Grubbs* that the decision in *Farley v. Goode* established an "essential limitation" on the continuing treatment doctrine requiring both continuing diagnosis *and* continuing treatment after the alleged malpractice for the

doctrine to apply. *Id.* at 612, 369 S.E.2d at 686. In the absence of continuing treatment for a known medical condition, the policy rationale of the continuing treatment doctrine is not served.

The Fourth Circuit in *Castillo v. Emergency Medicine Associates*, applying and interpreting Virginia law, undertook an analysis of the application of the continuing treatment doctrine to a patient who was treated on separate episodes by three different emergency medicine physicians employed by the same emergency medicine group. 372 F.3d 643 (2004). The Fourth Circuit held that the "discrete and isolated nature" of the patient's contact with the emergency medicine physicians did not support application of the continuing treatment doctrine. *Id.* at 650. The Fourth Circuit reasoned that there was no reasonable expectation on the part of the patient of the emergency medicine group or the physicians that there was an on-going treatment relationship and that any discrete episodes of care for which a treatment relationship did exist were "neither coordinated nor continuous." *Id.* at 651. Like the *Grubbs* Court, the Fourth Circuit was mindful of the underlying policy rationale of the continuing treatment doctrine in holding that no continuing treatment relationship existed for episodic and isolated emergency medicine care.

II. The national trend, consistent with the trial court's determination, is that the continuing treatment doctrine is inapplicable to radiology services and other episodic diagnostic services, and expansion of the doctrine to such services is not in the interest of public policy.

Plaintiff relies for her assertion that the trial court's determination was inconsistent with an "emerging judicial trend" on an article published in a medical journal in 2001 written by Leonard Berlin, M.D. a radiologist at Rush North Shore Medical Center in Skokie, Illinois. Plaintiff's reliance is misplaced.[6]

Contrary to plaintiff's assertion, the national trend in the past decade is that the continuing treatment doctrine is inapplicable to intermittent diagnostic services provided by radiologists, pathologists and other consultants because the care does not meet the specific requirements of the doctrine and because application of the doctrine to episodic diagnostic care is not consistent with the policy interests undergirding the continuing treatment doctrine. *Zielinski v. Kotsoris*, 279 Conn. 312, 328, 901 A.2d 1207, 1217-18 (2006). The

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[6] In addition to the lack of persuasive legal authority in this article, some of the cases cited do not deal with the continuous treatment doctrine. For example, Dr. Berlin discusses a case from Delaware discussed at length in the Brief of Appellant, *Bissell v. Papastavros Associates*, 626 A.2d 856 (Del. Super. 1993), which analyzes the continuous negligence doctrine, a doctrine that is not applicable to the facts of this case. *Grubbs*, 235 Va. at 613, 369 S.E.2d at 687.

Connecticut Supreme Court in *Zielinski* undertook one of the most comprehensive analyses of the application of the continuous treatment doctrine to radiologists to date.[7] The policy basis for the continuous treatment doctrine articulated by the *Zielinski* court was nearly identical to the policy articulated by this Court in *Grubbs*:

> [t]he policy underlying the continuous treatment doctrine seeks to maintain the physician/patient relationship in the belief that the most efficacious medical care will be obtained when the attending physician remains on a case from onset to cure. *Id.* at 322, 901 A.2d at 1214-1215.

As in *Grubbs*, the policy interest that was the focus of the *Zielinski* court was maintaining the physician/patient treatment relationship once the onset of a medical condition or injury is known and the physician continues to attempt to effect a cure. *Id.* at 322-323, 901 A.2d at 1215. The policy interest was not served, in the view of the court in *Zielinski*, when a duty of follow-up care or continuous treatment was extended to a consultant providing diagnostic services who has returned a negative diagnosis with no

[7] The Connecticut court in *Zielinski* referred to the doctrine as continuous treatment doctrine, as did the Court in *Farley v. Goode*. Subsequent Virginia decisions have referred to the continuing treatment doctrine. "Continuous treatment" and "continuing treatment" shall both be used throughout this brief.

expectation of ongoing care. Such a rule:

> would basically render the statute of limitations a nullity. That result would be against the policy of limiting the liability of defendants to claims brought within a reasonable time." *Id.* at 327, 901 A.2d at 1217.

The Connecticut Supreme Court thus held, consistent with the "general rule" from other states, that a patient's isolated episodes with different physicians of the same employer would not trigger application of the continuing treatment doctrine, particularly when involving consultants like radiologists. *Id.* at 328, 901 A.2d at 1217.

The continuous treatment doctrine and its application to radiologists was developed further in Connecticut in 2007 in *Grey v. Stamford Health System, Inc.*, 282 Conn. 745, 924 A.2d 831 (2007). The Connecticut Supreme Court in *Grey* clarified that based on the policy underlying the continuing treatment doctrine to encourage a patient, and a physician, to continue a treatment relationship for an existing condition, "when the plaintiff had no knowledge of a medical condition and, therefore, had no reason to expect ongoing treatment for it from the defendant, there is no reason to apply the doctrine." *Id.* at 755-56, 924 A.2d 840.

A similar approach to the continuous treatment doctrine is well-established by New York courts. In *McDermott v. Torre*, the state's

highest court held in the context of laboratory services that the considerations implicit in the continuous treatment doctrine are not applicable to a laboratory that performs analysis of lab studies on intermittent and isolated occasions with the results returned to the treating physician. 56 N.Y.2d 399, 437 N.E.2d 1108 (1982). The lower appellate courts in New York have followed such analysis in holding that the continuous treatment doctrine is inapplicable to radiologists who provide discrete, intermittent diagnostic services, with the diagnosis imparted directly to a treating physician. *Noack v. Symenow*, 132 A.D.2d 965, 518 N.Y.S. 495 (1987); *Kaufmann v. Fulop*, 47 A.D.3d 682, 849 N.Y.S.2d 615 (2008).

In the case relied on by the trial court, *Baker v. Radiology Associates*, 72 Ark. App. 193, 35 S.W.3d 354 (Ark. App. 2000), the court held that the continuous treatment doctrine did not apply to the interpretation of mammograms by two radiologists with the same radiology group practice on two distinct occasions. The *Baker* court found unpersuasive the argument advanced by plaintiff that the radiologist's review and comparison of prior studies required application of the doctrine, citing to the New York court's holding in *Noack v. Symenow* that each radiologic diagnosis was "complete and

discrete and does not constitute continuous treatment, despite the fact that on successive occasions the radiologists compared prior studies with the most recent ones." 72 Ark. App. at 200-201, 35 S.W.3d at 359. In most circumstances, radiologists are not engaged in an ongoing treatment relationship with a patient for a known, specific condition; thus, the policy of the continuous treatment doctrine is not furthered and the doctrine is inapplicable. *Id.*

Finally, the theory that the continuing treatment of a primary physician can be imputed to a consultant who provides intermittent episodes of care, commonly referred to as "constructive participation" has been limited in recent years in the states in which it exists. *McDermott*, 56 N.Y.2d 399, 452 N.Y.S.2d 351. In application, the "constructive participation" doctrine could result in a pathologist, radiologist or other consultant providing diagnostic services on one or two occasions being held to the continuing treatment of a primary physician that may extend for many years or even decades. "Constructive participation" indefinitely extending the statute of limitations applicable to a consultant providing episodic diagnostic care is inconsistent with the long-standing policy rationale for the continuing treatment rule and has never been adopted in Virginia.

III. The trial court properly weighed the evidence, reaching its own findings of fact that supported its determination that the continuing treatment doctrine was inapplicable and plaintiff's action barred by the statute of limitations.

After hearing extensive evidence from witnesses for both parties, the trial court made factual findings which must be afforded deference on appeal. *Westgate*, 270 Va. at 573, 621 S.E.2d at 117-118 (2005). The factual findings included that the plaintiff alleged repeated instances of negligence in interpretation of her radiology studies from December 2002 to February 2004 but admitted there was no negligence following February 2004, including no negligence with regard to the interpretation of the October 22, 2005 study. Given these facts and the theories asserted by the parties, the trial court appropriately undertook analysis of the continuing treatment doctrine and whether such doctrine was applicable to delay accrual of the action and running of the statute of limitations to October 22, 2005 even though the last alleged negligent act by defendants was on February 15, 2004.[8]

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[8] Plaintiff appears to have asserted to the trial court that her condition progressively worsened from December 2002 to October 2005. Curiously, plaintiff never advanced the theory affirmed by *St. George v. Pariser* that her cause of action accrued when her "tumor" advanced in size or progressed from one status to another, due to an alleged delay in diagnosis by defendant. "In every misdiagnosis

After noting that plaintiff had conceded that the radiologists of Radiology Associates were consultants who did not order any treatment for her, the Court found as a matter of fact that the treatment provided by defendant terminated after each discrete radiologic study once the radiologist had generated his report and transmitted it to the ordering physician, Dr. Stein or Dr. Blevins. The trial court further found as a matter of fact that Radiology Associates was under no duty to follow-up with plaintiff after the radiologist's report was sent to the ordering physician because treatment was rendered only on an intermittent basis as ordered by Ms. Chalifoux's primary care physician or her treating neurologist. Finally, the trial court's found as a matter of fact that comparison of a current radiology study to prior studies was consistent with the standard of care and appropriate diagnostic procedure and not "an assumption of ongoing treatment." (J.A. 213-214)

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case, the patient has some type of medical problem at the time the physician is consulted. But the injury upon which the cause is based is not the original detrimental condition; it is the injury which later occurs because of the misdiagnosis and failure to treat." 253 Va. 329, 334, 484 S.E.2d 888, 891 (1997). As plaintiff never asserted this theory that may have prevented bar of her action by the statute of limitations, the trial court appropriately did not address such theory and it is not at issue on appeal. Rule 5:25.

In sum, these findings of fact of the trial court supported that there was no continuing relationship, neither a diagnostic relationship nor a treatment relationship, between plaintiff and Radiology Associates between February 2004 and October 2005. The trial court looked to the policy basis for the continuing treatment doctrine presented by this Court in *Grubbs* for guidance, appropriately stating that the rationale for the continuing treatment doctrine is to provide incentive for a physician who is aware of a patient's malady to continue treatment to effect a cure but that the doctrine is inapplicable when the episodes of care are single, isolated acts. After examining controlling Virginia law and other Virginia cases, the trial court reviewed persuasive authority from other states to inform its ruling.

Plaintiff asserts that the trial court inappropriately relied on *Baker v. Radiology Associates*, arguing that *Baker* is inconsistent with Virginia law because the Arkansas courts have not recognized the doctrine of continuing tort, which has been recognized in Virginia.[9] Plaintiff misinterprets the holding of Baker and confuses the doctrines of "continuing tort," "continuing negligence" and "continuing

[9] Plaintiff also asserts that *Baker v. Radiology Associates* was "the primary source" for the trial court's decision, when, in fact, the trial court relied on legal authority from Virginia and unequivocally stated that the *Baker* opinion was merely persuasive.

treatment." Continuing negligence, which plaintiff argues was endorsed by this Court in *Farley v. Goode*, only serves to toll the statute of limitations to the extent plaintiff asserts continued malpractice or wrong-doing over a period of time. While plaintiff is correct that the doctrine of continuing negligence remains viable in the Commonwealth, such doctrine would not prevent a statute of limitations bar of Ms. Chalifoux's action as the last date on which she asserts defendants were negligent was February 15, 2004, more than two years before she filed suit.[10] The continuing tort doctrine, as discussed and rejected by the Arkansas court in *Baker*, provides that in the case of an alleged single act of negligence, the statute of limitations would not begin to run until discovery of the error or misdiagnosis. 72 Ark. App. at 197, 35 S.W.3d at 357. Adoption of a "discovery rule" for medical malpractice actions repeatedly has been rejected by this Court as the province of the General Assembly. *Nunnally v. Artis*, 254 Va. 247, 253, 492 S.E.2d 126, 129 (1997).

The only doctrine pertinent to *Baker v. Radiology Associates* and this case is the continuing treatment doctrine, as correctly stated by the

[10] Similar to this case, the plaintiff in *Baker* asserted negligence in the interpretation of the first two of her three mammograms, both of which occurred more than two years before her action was filed, but not the third, which was performed less than two years before she filed suit.

trial court. Because plaintiff did not allege that defendants were negligent on October 22, 2005, under the clear rule of *Grubbs v. Rawls*, the continuing treatment doctrine is only applicable if Radiology Associates provided continuing and uninterrupted treatment to plaintiff from February 2004 to October 2005. 235 Va. at 612, 369 S.E.2d at 686. The trial court appropriately concluded that it did not. As the episodes of diagnostic services provided by defendant were single, isolated acts, the trial court correctly concluded, in accordance with *Farley v. Goode*, that the continuous treatment doctrine was inapplicable.

Given that plaintiff asserted no theory other than the continuous treatment doctrine to extend the statute of limitations beyond the last incident of alleged negligence in February 2004, the trial court correctly held that plaintiff's action is barred by the statute of limitations and appropriately dismissed it with prejudice.

CONCLUSION

For the reasons set forth above and those asserted by Appellee Radiology Associates of Richmond, the Virginia Association of Defense Attorneys, by counsel, respectfully prays that this Honorable Court affirm the ruling of the trial court sustaining Defendant's Plea of the Statute of Limitations and dismissing this action with prejudice; and for such further relief deemed appropriate.

RESPECTFULLY SUBMITTED,

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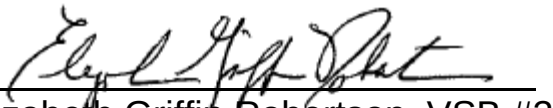
By Counsel Amicus Curiae



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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, counsel for *Amicus Curiae*, the Virginia Association of Defense Attorneys certifies that this 18th day of June, 2010, fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing Brief of *Amicus Curiae* were filed by hand in the office of the Clerk of this Court and that three (3) paper copies were sent by first class mail, postage prepaid, to the following:

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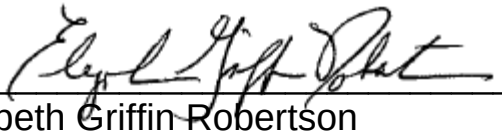
I further certify pursuant to Rule 5:30(a)(2) that written consent of all counsel to filing of this brief *Amicus Curiae* was filed with the Clerk of this Court under separate cover simultaneously with this brief.



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