IN THE

Supreme Court of Virginia

RECORD NO. 100052

ALYSSA CHALIFOUX,

Appellant,

v.

RADIOLOGY ASSOCIATES
OF RICHMOND, INC.,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENTS AND AUTHORITIES

I. Contrary to VADA's assertions, there is an evolving legal trend towards applying the continuing treatment rule as the fairer rule in medical malpractice cases.

"Since about 1940, there has been a slow but steady trend towards judicial acceptance of the continuing treatment rule." Morgan v. Schlanger, 374 F.2d 235, 239 (4th Cir. 1967). Thus, even prior to Virginia's formal adoption of the continuing treatment rule, there was an 'evolving legal trend' towards this rule in medical malpractice cases as unquestionably "the fairer rule" to extend the statute of limitations for patients who did not know and had no reason to know of the medical provider's negligence. Id.

Clearly, application of the continuing treatment rule to radiology groups is the more just and enlightened rule in the absence of a statute of limitations discovery rule for this type of case. Since Ms. Chalifoux was repeatedly assured by defendant Radiology Associates over the course of ongoing treatment and multiple return visits that she had no brain tumor/ lesion (brain MRI's) or vascular disease (brain MRA) to account for the progressively worsening neurological symptoms on the right side of her face/head, she relied to her detriment on the defendant's expertise and continuing misdiagnoses and was deprived of any meaningful opportunity to discover the true nature of her medical condition – an intracranial tumor/

lesion that was visible and growing larger on every brain study from Dec. 2002 – Oct. 2005.

A. Even under Connecticut and New York law cited by the VADA, the continuing treatment rule applies to defendant Radiology Associates.

(1) Connecticut law

VADA has cited a couple of cases from Connecticut for its contention that an "evolving legal trend" does not exist. As a preliminary matter, it should be noted that Connecticut employs clearly different legal mechanisms than Virginia when deciding when and whether to apply the continuing treatment rule to a particular healthcare provider. For example, unlike Virginia, Connecticut's medical malpractice actions must be brought "within two years from the date when the injury is first sustained ***or*** in the exercise of reasonable care **should have been discovered**." *See* Zielinski, 901 A.2d 1207, 1213-1214 *citing* §52-584. By contrast, Virginia only allows this 'discovery rule' in very narrowly defined circumstances not pertinent to this case. It should also be emphasized that Connecticut applies the 'discovery rule' to **all** healthcare defendants, including radiology groups.

The earlier case cited by VADA, Zielinski v. Kotsoris, 279 Conn. 312, 901 A.2d 1207 (2006) involved a mere 2 contacts over 3 years (April 1996 and Dec. 1999) with radiologists from Stamford Radiology Associates,

"which functionally is the hospital's radiology department." Zielinski, 279 Conn. at 315. The radiology group misdiagnosed plaintiff's brain tumor on these 2 occasions. The plaintiff brought her claim in Sept. 2001, more than 3 years after the initial misdiagnosis and thus after the lapse of Connecticut's 3-year statute of repose. It is factually distinguishable from the case under review as defendant Radiology Associates continued to perform examinations and diagnoses of Ms. Chalifoux on six (6) separate occasions, including 5 misdiagnoses over 14 months.

The more recent case, Grey v. Stamford Health System, Inc., 282 Conn. 745, 924 A.2d 831 (2007) also involved radiologists with Stamford Radiology Associates, who misdiagnosed Ms. Grey's condition twice on routine mammograms in 1996 and 1997 before finally discovering the breast cancer in 1998. In Grey, the Court discussed Connecticut's approach to the continuing treatment rule in medical malpractice cases.

The Court in Grey held that the continuing treatment rule may be implicated where the patient has an identifiable medical condition that requires ongoing treatment or monitoring, "or that the plaintiff reasonably could have anticipated that the defendant would do so." Grey, 282 Conn. at 754, 924 A.2d at 838. *See also* Watkins v. Fromm, 108 A.D.2d 233, 244, 488 N.Y.S.2d 768 (1985) (holding that continuous treatment doctrine

applies only to "treatment for the same or related illnesses or injuries, continuing after the alleged acts of malpractice."). The Court in Grey also held that,

> [i]t may be that the continuous treatment doctrine would also apply when the plaintiff has presented evidence that the provider had knowledge that the plaintiff continued to exhibit and to receive treatment for suspicious symptoms after a negative diagnosis....

Grey, 282 Conn. at 762, 924 A.2d at 843. In Grey, the plaintiff presented with no suspicious symptoms and did not receive ongoing treatment for an identifiable medical condition. However, in this case Ms. Chalifoux continued to present to defendant Radiology Associates with recurring "suspicious" neurological symptoms and received ongoing treatment for her medical condition, which defendant Radiology Associates certainly knew about when she kept being referred again and again and again by Dr. Blevins for brain imaging.

Moreover, according to plaintiff's expert, Dr. Lipper, as well as defendant's Rule 4:5(b)(6) corporate designee, Dr. Faunce, all of these "suspicious" symptoms would have alerted any physician, including all of defendant's radiologists and neuro-radiologists, who examined and diagnosed Ms. Chalifoux, of the possibility of a brain tumor. Furthermore, consistent with Grey, Ms. Chalifoux' undisputed testimony was that she

anticipated returning to defendant Radiology Associates for imaging as her symptoms never resolved but only grew worse over time.

(2) New York law

VADA cites several New York cases for its contention that supposedly no 'evolving legal trend' exists to apply the continuing treatment rule to radiology groups. Both McDermott v. Torre, 56 N.Y.2d 399, 437 N.E.2d 1108 (N.Y. 1982) and Kaufmann v. Fulop, 47 A.D.3d 682, 849 N.Y.S.2d 615 (2008) involved 1 visit to a diagnostician – 1 biopsy by defendant pathologist in McDermott and 1 follow-up chest x-ray by defendant radiologist in Kaufmann.

By contrast, in the matter *sub judice* defendant Radiology Associates continued to performed examinations and diagnoses of Ms. Chalifoux on six (6) separate occasions, including 5 misdiagnoses over 14 months.

VADA also cites a very brief opinion, Noack v. Symenow, 132 A.D.2d 965, 518 N.Y.S.2d 495 (N.Y. 1987) for the notion that the continuing treatment rule does not apply to a radiology group. In Noack, the radiology group misdiagnosed three (3) bone scans as cancer. The plaintiff subsequently changed physicians who referred the plaintiff to another hospital, where another radiology group correctly diagnosed the plaintiff with metabolic bone disease, not cancer.

Again, the matter under review is factually distinguishable. Defendant Radiology Associates continued to perform examinations and diagnoses of Ms. Chalifoux on six (6) separate occasions, including 5 misdiagnoses over 14 months. Moreover, Ms. Chalifoux stayed with the same neurologist, Dr. Blevins, throughout her treatment course; and the undisputed evidence from both plaintiff's expert, Dr. Lipper, and Ms. Chalifoux herself is that Dr. Blevins relied upon the repeated misdiagnoses of defendant Radiology Associates in developing a treatment plan. In addition, Dr. Lipper has testified that radiology groups "are an adjunct to referring physicians as part of the overall comprehensive treatment and care provided to patients." Joint Appendix, p.200. In his clinical experience, referring physicians such as Ms. Chalifoux' family doctor, Dr. Stein, and her neurologist, Dr. Blevins, rely upon the expertise of radiology groups to provide proper, accurate diagnoses of illnesses and conditions in order to develop treatment plans.

Most salient is the fact that Noack held that the "mere fact" that defendant Radiology Physicians compared prior bone scans with the current scan "does not render treatment continuous." Noack, 132 A.D.2d 965, 966. However, it is telling that neither VADA nor defendant Radiology Associates chose to cite a much more recent New York holding, Elkins v. Goodman, 285 A.D.2d 484, 727 N.Y.S.2d 158 (N.Y. 2001), which found

facts supporting the continuing treatment rule for a radiology group which examined and misdiagnosed five (5) MRI's from May 1992 through August 1995, by failing to detect a tumor's growth over this timeframe.

In Elkin, the Court cited various compelling facts in support of the plaintiff's position, among them:

- comparison of the current MRI with Mr. Elkin's previous MRI's, which the defendant radiology group retained on file;
- the fact that each of the five (5) MRI's was performed and interpreted for the same "unitary purpose" (i.e. the same underlying condition) on each of the periodic visits to the radiologists;
- and the implicit relationship between Elkin's neurosurgeon, Dr. Goodman, and the radiology group, in which the MRI reports were furnished to Dr. Goodman each time.

Thus, contrary to the earlier decision in Noack and the trial court in this case which disregarded this fact, the recent decision in Elkin considered comparison of prior studies with the current MRI a significant fact in plaintiff's favor. The Elkins Court also deemed noteworthy the fact that Elkin returned to the radiology group on each successive occasion for the same "unitary purpose" (i.e. the same underlying condition) and all of Elkin's imaging studies were kept by the radiology group as part of its patient file for Elkin.

All of these facts are present in this case and the trial court either discounted them or completely ignored them in arriving at its conclusion.

II. Contrary to defendant/VADA's position, defendant Radiology Associates in fact did constructively participate in the care and treatment of Alyssa Chalifoux through October 2005.

In arguing against application of the continuing treatment rule, the VADA contends that there was supposedly no constructive participation by defendant Radiology Associates in Ms. Chalifoux' treatment and care. The VADA decided to selectively cite McDermott v. Torre, 56 N.Y.2d 399, 437 N.E.2d 1108 (1982) but failed to mention that McDermott approves of an earlier New York appellate decision, Fonda v. Paulsen, 46 A.D.2d 540, 363 N.Y.S.2d 841 (N.Y. 1975) as supporting plaintiff's claim of continuous treatment. *See* McDermott, 56 N.Y.2d at 406, 437 N.E.2d at 1111.

In Fonda, the supreme appellate court in New York found that the continuing treatment rule did apply to primary treating physicians, medical partners Nelson and Paulsen, as well as pathologist Oram (who reported that a biopsy was non-cancerous), despite substantial gaps in treatment of 20 months with Nelson/Paulsen and 32 months with pathologist Oram. According to the Court in Fonda,

> we are of the opinion that to hold Oram as having 'treated' plaintiff only at the times of his biopsy diagnoses is to take a view of the case which is analogous to the outworn theories

> under which privity of contract was required before liability could ensue. The nature of the pathologist's work is such that he rarely, if ever, has a direct physician-patient relationship with an individual-in other words, he never treats patients in the conventional sense-**but his work is often the basis upon which the nature of subsequent treatments to be given by the attending physician is determined**....**where the pathologist should have reasonably expected that his work would be relied on by other practitioners in determining the mode of treatment, we feel it appropriate to impute to that pathologist or diagnostician constructive participation in that treatment so long as it continued. In this way, the practitioner guilty of the initial malpractice is subject to the same period of limitations as those who continued the malpractice as a reasonably foreseeable result of the initial wrong.**

Fonda v. Paulsen, 46 A.D.2d at 544-545, 363 N.Y.S.2d at 846. In this regard, the Court in Fonda used precisely the same rationale as the Missouri Supreme Court in Montgomery v. South County Radiologists, Inc., 49 S.W.3d 191 (2001) in holding the "diagnostician" (i.e. radiology group) liable. In the era of modern institutional healthcare, it is common for treating physicians to rely upon the expertise of radiologists and other diagnosticians such as pathologists to assist them in the development of treatment plans.

In this case in particular, the plaintiff has offered undisputed evidence that Ms. Chalifoux relied upon the diagnoses of defendant Radiology Associates, and consistent with the holdings in Fonda and Montgomery, her neurologist, Dr. Blevins, relied upon the recurring diagnoses of

defendant Radiology Associates to develop and order treatment modalities for Ms. Chalifoux. As such, Dr. Blevins' ongoing treatment of Ms. Chalifoux through October 2005 should be imputed to defendant Radiology Associates, who constructively participated in Ms. Chalifoux' treatment from Dec. 2002 – Oct. 2005.

III. Contrary to defendant and VADA's position, defendant Radiology Associates' had a continuing duty of care consistent with their continuing physician-patient relationship with Ms. Chalifoux.

The defendant and VADA assert that defendant Radiology Associates had no duty of care after making a diagnosis and communicating the report to Dr. Blevins on each of the six (6) occasions Ms. Chalifoux came to them. The defendant has cited Dr. Lipper's testimony that he may not follow up after a single normal MRI.

However, Ms. Chalifoux' case is not merely a single, normal MRI with no suspicious symptoms to alert the radiologist about a possible tumor. As both Dr. Lipper and Ms. Chalifoux made clear, it is a case involving a deteriorating medical condition in which Ms. Chalifoux continued to return to defendant Radiology Associates multiple times with the same or similar but progressively worsening symptoms. As such, Dr. Lipper has testified clearly and unequivocally that defendant Radiology Associates had a

continuing duty of care to inquire further as to why Ms. Chalifoux' symptoms were not resolving, including speaking with the patient, consulting with Dr. Blevins (or his medical records), and comparing prior brain studies for any missed abnormalities causing the persistent neurological symptoms confined to the right side of Ms. Chalifoux' face/head.

Even defendant Radiology Associates' corporate designee, Dr. Faunce, concurs with plaintiff's expert, Dr. Lipper, that a competent radiologist would have been thinking about possible brain tumor for each of Ms. Chalifoux' visits for imaging with defendant Radiology Associates.

- Various symptoms, including headaches, paresthesias on the right side of the face, sensation disorder, and trigeminal neuralgia, would be part of a differential diagnosis for "brain tumor". "This is what a radiologist thinks in their own mind. This is what a physician thinks in his own mind. Joint Appendix, p.411 (Faunce dep., pp.82-84).

- Any physician when they hear certain terms thinks of certain diseases because they're symptoms and signs of disease. If you have headaches or trigeminal neuralgia, it can be a symptom indicating a possible tumor or inflammatory process of the 5th nerve. "These things we know because we studied them in medical school and we studied them in residency and they alert us as to possibilities of certain things. That's why we have a history....We have a history so we can know a little bit about the patient." Joint Appendix, p.415 (Faunce dep., pp.98-99).

A helpful article on this issue is "Beyond the Viewbox: The Radiologist's Duty to Communicate Findings", 35 J. Marshall L. Rev. 359,

378 (Spring 2002), in which the author cited case law holding that radiologists are part of a "treatment team", in which their duties continue beyond the issuance of a formal report to the treating physician.

> **Radiologists, as physicians are part of the treatment team; therefore, they owe the same duty of care to patients as owed by physicians in direct, "hands on" contact with patients. Even prior to the existence of the ACR standards, courts recognized that a radiologist's duty does not conclude with the issuance of the formal report.**

See also Montgomery v. South County Radiologists, Inc., 49 S.W.3d 191, 195 ("The treating physician, thus, has a comprehensive duty of continuing care and treatment. Likewise, an entity that provides continuing radiological services has a proportionate duty of continuing care until its relation with the patient ends."). *See also* Lyons v. Grether, 218 Va. 630, 239 S.E.2d 103 (1977).

By contrast, the defendant makes the contrived argument that it owed no further duty to Ms. Chalifoux after each misdiagnosis because they claim they didn't know they had missed her intracranial tumor. Defendant Radiology Associates' argument is essentially that because it was negligent but didn't realize it was negligent ***5 times in 14 months***, that each instance of negligence was a supposedly isolated act unrelated to every negligent act or omission. Thus, the defendant makes the brazen plea that their incompetence *coupled with* their willful ignorance somehow exempts their

patient care for Alyssa Chalifoux from Dec. 2002 – Oct. 2005 from being a continuing course of examination and diagnosis. Such an argument is both craven by attempting to hide behind recurring negligence *to avoid liability* and an affront to both common sense and the enshrined values of justice and liability for negligent harm which are the hallmarks of our legal system.

IV. Contrary to the VADA and defendant's position, public policy favors application of the continuing treatment rule to defendant Radiology Associates in this case.

A. Applying the continuing treatment rule to a radiology group like defendant Radiology Associates furthers a remedial purpose of this tolling rule to facilitate the proper diagnosis of Ms. Chalifoux' intracranial tumor.

In another holding from New York which both the defendant and VADA failed to cite, the appellate court in Watkins v. Fromm, 108 A.D.2d 233, 488 N.Y.S.2d 768 (N.Y. 1985) held that extending the continuous treatment rule to a corporate healthcare provider (like defendant Radiology Associates) promoted the salutary purpose of the continuous treatment rule to effect a cure for earlier misdiagnoses or other medical errors. In Watkins, the Court noted that the plaintiff,

> became a patient of the group, rather than of any particular doctor, and had every right to believe that the group, as such, was, in effect, his physician, and that he could continue to be treated by that physician until either he or that physician ended the physician-patient relationship.

Watkins, 108 A.D.2d at 243, 488 N.Y.S.2d at 775. *See also* Lyons v. Grether, 218 Va. 630, 239 S.E.2d 103 (1977). According to the Watkins court,

> [t]he continuity of treatment by the remaining members of the group, who were familiar with his condition, afforded the group an opportunity to utilize their firsthand knowledge of Mr. Watkins' condition and medical history to correct or ameliorate any errors made at an earlier stage of treatment.

Watkins, 108 A.D.2d at 241, 488 N.Y.S.2d at 774.

In this case, the first-hand knowledge of defendant Radiology Associates, who retained a file of all previous brain imaging studies for Ms. Chalifoux, who were familiar with and had access to her medical history and complaints of neurological symptoms, (e.g. headaches, right-sided paresthesias, sensation disorder and trigeminal neuralgia on the right side of her face), who compared her previous studies with present brain MRI studies (including the Oct. 2005 in which they finally correctly diagnosed Ms. Chalifoux intracranial tumor/lesion), put them in the unique position "to correct or ameliorate any errors made at an earlier stage of treatment." Id.

B. Applying the continuing treatment rule to defendant Radiology Associates will promote greater accountability and thus better patient care.

According to the Court in Phillips v. Good Samaritan, 65 Ohio App.2d 112, 416 N.E.2d 646, the plea for blanket immunity by radiologists and kindred specialists is untenable.

> We cannot agree with appellees that radiologists, and kindred specialists, who merely provide what they term "indirect medical care" may somehow categorically escape all liability once such a practitioner has made a correct analysis and has done no more than relay this information through ordinary hospital channels. Once the physician-patient relationship has been found to exist, as could well be found here, the professional responsibilities and duties exist despite the lack of proximity, or the remoteness, of contact between the two as where a consulting physician is involved in only a limited manner. **Therefore, all physicians involved in a case share in the same duties and responsibilities of the primary care physician to the extent of their involvement. It is incumbent upon these medical professionals to coordinate their efforts in a manner that best serves their patient's well-being.**

Thus, a decision not to exempt radiology groups from the continuing treatment rule will foster better patient care as radiologists will take their patient duties more seriously knowing they are not immune from liability for the harmful consequences of recurring misdiagnoses.

CONCLUSION

For the foregoing reasons, the plaintiff, Alyssa Chalifoux, respectfully requests that this Court grant the plaintiff's appeal.

Respectfully submitted,
Alyssa Chalifoux
By Counsel

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CERTIFICATE

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b) The Appellee is Radiology Associates of Richmond, Inc., which is represented by Brewster S. Rawls, Esquire, and Sandra M. Holleran, Esquire, Rawls & McNelis, 1111 E. Main Street, Suite 1701, Richmond, Virginia 23219.

c) Three (3) copies of the foregoing Reply Brief were hand-delivered this 2nd day of July, 2010, to , Esquire, Rawls & McNelis, 1111 E. Main Street, Suite 1701, Richmond, Virginia 23219.

d) Three (3) copies of the foregoing Reply Brief were hand-delivered this 2nd day of July, 2010, to Elizabeth Griffin Robertson with Goodman, Allen & Filetti, PLLC, 4501 Highwoods Parkway, Suite 210, Glen Allen, VA 23060, who filed an *amicus curiae* brief on behalf of the Virginia Association of Defense Attorneys.

e) Counsel for the Appellant desires to state orally and in person the reasons why her Appeal should be granted.

f) That on the 2nd day of July, 2010, 15 copies of this Reply Brief were filed with the Clerk of this Court and copy was filed by email.

Philip S. Marstiller, Jr., VSB#44317