IN THE SUPREME COURT OF MISSOURI

No. SC97687

SHARON NEWTON, and BRIAN NEWTON,

Plaintiffs/Appellants,

v.

MERCY CLINIC EAST COMMUNITIES D/B/A MERCY CLINIC OB/GYN, and CHRISTINA KAY MEDDOWS-JACKSON, MD,

Defendants/Respondents.

Appeal from Circuit Court of St. Louis County
Twenty-First Judicial Circuit, Division 12
Case No. 16SL-CC02003
The Honorable Stanley J. Wallach

SUBSTITUTE BRIEF OF DEFENDANTS/RESPONDENTS *MERCY CLINIC EAST COMMUNITIES D/B/A MERCY CLINIC OB/GYN, and CHRISTINA KAY MEDDOWS-JACKSON, MD*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

JURISDICTIONAL STATEMENT

In this Appeal, Plaintiffs-Appellants Sharon Newton and Brian Newton challenge the Order and Judgment of Judge Stanley J. Wallach of the Circuit Court of St. Louis County granting summary judgment in favor of Respondents Mercy Clinic East Communities d/b/a Mercy Clinic OB/GYN (hereinafter referred to as "Mercy Clinic") and Christina Kay Meddows-Jackson, MD (hereinafter referred to as "Dr. Meddows-Jackson"). Legal File ("L.F."), 57, pp. 1-4; Appendix ("A"), 2-5. The Circuit Court's Order and Judgment disposed of all claims and issues involving Appellants and Respondents. L.F. 57, p. 4; A5.

Appellants appealed to the Missouri Court of Appeals, Eastern District, which reversed the Circuit Court's Judgment. *See Sharon Newton, et al. v. Mercy Clinic East Communities d/b/a Mercy Clinic OB/GYN, et al.*, No. ED 106593, 2018 WL 6613437 (Mo. App. E.D. Dec. 18, 2018). Respondents filed an application for transfer in this Court. On April 2, 2019, this Court sustained the application. This Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

The undisputed facts demonstrated Sharon Newton was last seen by Dr. Meddows-Jackson for the necessity that gave rise to their physician-patient relationship on February 5, 2013. Appellants did not file suit until June 1, 2016. Appellants' claims were barred by the statute of limitations because they were brought after February 5, 2015. L.F. 57, pp.1-4; A2-5.

Appellants brought this medical negligence action against Respondents alleging Dr. Meddows-Jackson, who was acting as an employee or agent of Mercy Clinic East Communities d/b/a Mercy Clinic OB/GYN, provided negligent post-operative care to Ms. Newton following an ovarian cyst removal procedure performed on July 10, 2012. *See* Appellants' First Amended Petition, L.F. 33, pp. 1-2 at ¶¶ 1-3. Appellants do not allege Dr. Meddows-Jackson negligently performed the ovarian cyst removal. Rather, Appellants solely take issue with Dr. Meddows-Jackson's post-operative management of a surgical site infection. *See* Appellants' First Amended Petition, L.F. 33, pp. 1-2. Specifically, Appellants allege Respondents "were negligent between approximately 7/16/12 and 8/1/12 in failing to perform timely blood testing and a wound culture and in failing to prescribe appropriate antibiotics" in treating the surgical site infection. *See* Appellants' First Amended Petition, L.F. 33, p. 2 at ¶ 3. As a result of this alleged negligence, Appellants claim the surgical site infection ultimately led to Ms. Newton's fertility issues, which Appellants did not discover until 2015. *See* Appellants' First Amended Petition, L.F. 33, p. 2 at ¶ 4.

As is reflected by the summary judgment record and the trial court's Judgment, the following timeline of events is undisputed.[1]

- July 3, 2012: Ms. Newton presented to the emergency room with pain, was diagnosed with an ovarian cyst, and was advised that she needed to see a gynecologist to have it emergently removed. *See* Deposition of Sharon Newton, L.F. 47, at p. 6, lines 11-24.

- July 5, 2012: Ms. Newton presented to Dr. Meddows-Jackson for the very first time for the sole purpose of surgically treating this ovarian cyst. *See* Deposition of Sharon Newton, L.F. 47, at p. 6, line 11 through p. 7 line 23.

- July 10, 2012: Dr. Meddows-Jackson surgically removed the ovarian cyst. *See* Sharon Newton's Medical Records, L.F. 49, at pp. 3-7, MERCY INPT 000165-169.

- July 16, 2012, to August 1, 2012: Dr. Meddows-Jackson saw Ms. Newton on three separate occasions – July 16, 2012, July 24, 2012, and August 1, 2012 – for post-operative care, which included evaluation and treatment of a surgical site infection. *See* Sharon Newton's Medical Records, L.F. 49, at pp. 11-23, MERCY OUTPT 000113-114,

[1] Of the 16 material facts listed in Respondents' Statement of Uncontroverted Material Facts, Appellants only specifically denied Paragraphs 7, 10, 11, and 16 with references to any discovery, exhibits, or affidavits. As such pursuant to Rule 74.04(c)(2), the remaining twelve facts were not controverted and shall be deemed admitted in support of the Judgment granted in Respondents' favor.

000124-132, 000141-144; *see also* Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 42, p. 2 at ¶¶ 4-6.

- August 15, 2012: When the prescribed antibiotics did not resolve the surgical site infection, Dr. Meddows-Jackson admitted Ms. Newton to Mercy Hospital, and consulted with an infectious disease specialist to assume the role of managing and treating Ms. Newton's surgical site infection. *See* Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 42, pp. 2-3 at ¶ 7.

- September 11, 2012: Dr. Meddows-Jackson saw Ms. Newton in the office for follow up of the surgical site infection. *See* Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 42, p. 4 at ¶ 8.

- February 5, 2013: Dr. Meddows-Jackson saw Ms. Newton once more for evaluation of her surgical site infection. At this visit, Dr. Meddows-Jackson did not recommend any follow up care or expect Ms. Newton to seek any further care from her for any treatment of the condition that gave rise to their physician-patient relationship – the surgical removal of the ovarian cyst and the attendant post-operative care. *See* Respondents' Statement of Uncontroverted Facts, L.F. 38, p. 3 at ¶¶ 10-11; *see also* Deposition of Dr. Meddows-Jackson, L.F. 48, p. 150, line 22 through p. 151, line 11; Sharon Newton's Medical Records, L.F. 49, p. 28 at MERCY OUTPT 000179.

- January 29, 2015: Ms. Newton presented to Dr. Meddows-Jackson for a well-woman general gynecological exam, at which point Ms. Newton expressed she was not currently having problems, but would like to get pregnant and undergo diagnostic testing to assess her fertility. *See* Respondents' Statement of Uncontroverted Facts; L.F.

38, at ¶ 15; *see also* Sharon Newton's Medical Records, L.F. 49, pp. 31-35, at MERCY OUTPT 000249-253; Appellants' Brief, p. 7 (expressly stating the January 29, 2015, visit was for an "annual well-woman exam, and that nothing in the medical record[s] aside from the medical history expressly mentions the [ovarian] cyst or the subsequent post-operative wound infection").

- May 11, 2015: After diagnostic testing ordered by Dr. Meddows-Jackson revealed Ms. Newton's fallopian tubes were blocked, which may have been related to scarring from the surgical site infection treated two years prior, Ms. Newton underwent a procedure by another physician specializing in minimally invasive gynecology, to treat the newly discovered damage to her fallopian tubes. *See* Exhibit 1 to Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 43, pp. 1-4.

- June 9, 2015: Dr. Meddows-Jackson last saw Ms. Newton. *See* Sharon Newton's Medical Records, L.F. 49, pp. 36-37, at MERCY OUTPT 000307-000308.

Additionally, Appellants' expert witness, Dr. Alexander McMeeking, testified Ms. Newton's surgical site infection was resolved and done being treated by the February 5, 2013, visit:

> A: …So once the infection is gone, unless the person has a new infection, I don't expect to ever see them again. And, again, if the patient doesn't need further surgery, I wouldn't expect them to see the surgeon again for that – related to that surgery.
>
> Q: So I guess what you're telling us is that the infection was over and being done treated in 2012, but the damage from the infection was discovered in 2015; is that accurate to say?
>
> A: Yes, that's my understanding.

See L.F. 43, p. 2, lines 4 through 10 and 16 through 21; *see also* Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 42, pp. 5-7 at ¶ 10.

Based on the above undisputed timeline of events, the trial court found Ms. Newton was last seen by Dr. Meddows-Jackson for care involving the necessity that first gave rise to their relationship – the emergent ovarian cyst removal and attendant post-operative care – on February 5, 2013, at which point in time their physician-patient relationship ceased. The trial court further found "…there is nothing in the record to support [Appellants'] contention that the 2015 visits were part of a continuum of care from the cyst removal in 2012." *See* Judgment, L.F., p. 3. Because Appellants failed to bring suit within two years of this final post-operative visit, the trial court held Appellants' actions were barred by the statute of limitations. *See* Judgment, L.F. 57, pp. 3-4; A4-5.

Appellants appealed. After an opinion by the court of appeals reversing the trial court's judgment, this Court granted transfer.

POINTS RELIED ON

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENTS PRESENTED UNDISPUTED FACTS DEMONSTRATING APPELLANTS' ACTIONS WERE TIME BARRED AS A MATTER OF LAW AS THEY WERE FILED AFTER THE TWO YEAR STATUTE OF LIMITATIONS SET FORTH IN RSMO. § 516.105 EXPIRED AND COULD NOT BE TO TOLLED THROUGH THE CONTINUING CARE EXCEPTION.

Weiss v. Rojanasathit, 975 S.W.2d 113 (Mo. banc 1998)

Montgomery v. South County Radiologists, Inc., 49 S.W.3d 191 (Mo. banc 2001)

RSMo. § 516.105.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE RESPONDENTS PRESENTED UNDISPUTED FACTS DEMONSTRATING APPELLANTS' ACTIONS WERE TIME BARRED AS A MATTER OF LAW AS THEY WERE FILED AFTER THE TWO YEAR STATUTE OF LIMITATIONS SET FORTH IN RSMO. § 516.105 AND COULD NOT BE TOLLED THROUGH THE CONTINUING CARE EXCEPTION.

Introduction

The undisputed facts demonstrate Appellants' actions, which were filed on June 1, 2016, nearly four years after the alleged negligent conduct at issue between July 16, 2012, and August 1, 2012, are time barred as a matter of law pursuant to RSMo. § 516.105. There is no dispute the actions were brought more than two years after the claimed negligent conduct, and Appellants failed to satisfy their burden of establishing that the continuing care exception applied. Throughout their brief, Appellants misconstrue the legal application of the continuing care exception. Essentially, they argue that because Ms. Newton returned to Dr. Meddows-Jackson for a routine well-woman gynecological examination, wherein a new condition was discovered that may be related to Dr. Meddows-Jackson's earlier cyst removal and post-operative care, this subsequent course of care at the beginning of 2015 was continued treatment of the care rendered between July 2012 and February 2013. This argument confuses the continuing care exception with the subsequent discovery of a possible consequence of prior treatment. As its name implies, the continuing care exception focuses upon **continuing**

care. It does not apply to subsequent care that discovers, for the first time, a new condition that may be related to separate previous care, after the previous care ceased.

This misguided interpretation significantly expands the continuing care exception, and directly conflicts with the well-recognized principle that exceptions to statutes of limitation are to be strictly construed. It also contravenes the Missouri Legislature's and Missouri court's longstanding rejection of the discovery rule in medical negligence actions. Such a result would be an unprecedented expansion of the continuing care exception, and allow patients to circumvent the statute of limitations by simply making an appointment to see a former health care provider for evaluation of a potential "complication" discovered years after the allegedly negligent care.

Standard of Review

Summary judgment allows a trial court to enter judgment for the moving party where the party has demonstrated a right to judgment as a matter of law based on facts about which there is no genuine dispute. *Powel v. Chaminade College Preparatory*, 197 S.W.3d 576, 580 (Mo. banc 2006). The propriety of summary judgment is a question of law. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

"Appellate review of the grant of summary judgment is *de novo*." *Id.* Accordingly, on appeal, summary judgment will be upheld "if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist." *Id.* at 377.

A defendant may establish a right to summary judgment by demonstrating any of the following: (1) facts that negate any one of the claimant's essential elements; (2)

failure and inability of the non-moving party to produce evidence sufficient to find the existence of any one of the claimant's essential elements; or (3) absence of genuine dispute of each fact necessary to support the movant's affirmative defense. *Id*. at 381 (emphasis added). Once the defendant establishes a *prima facie* showing that it is entitled to judgment as a matter of law, the burden shifts to the plaintiff to set forth specific facts, by discovery, affidavit, deposition, or otherwise, showing the existence of a material fact. *Id*. The plaintiff may not rely on allegations and denials in the pleadings. *Id*. A "genuine issue" of material fact only exists where the record contains competent materials that support two plausible, but contradictory, accounts of essential facts. *Id*. at 382. Disputed issues of material fact must be real, not merely argumentative, imaginary, or frivolous. *Id*.; *see also Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo. banc 1996) (recognizing that an issue of fact is genuine only if it is "a real and substantial one," and thus, a genuine issue of fact may not consist "merely of conjecture, theory, and possibilities").

"Statutes of limitation are favored in the law and cannot be avoided unless the party seeking to do so brings [itself] strictly within a claimed exception." *White v. Zubres*, 222 S.W.3d 272, 276 (Mo. banc 2007) (emphasis added). Because they are favored in the law, exceptions to the statutes of limitation must be strictly construed, even in cases of hardship. *Woodruff v. Shores*, 354 Mo. 742, 746 (Mo. 1945). Accordingly, any plaintiff seeking to toll his or her claim through an exception bears the burden of showing strict compliance with the claimed exception. *Chambers v. Nelson*, 737 S.W.2d 225, 227 (Mo. App. E.D. 1987).

Of note, Missouri courts have previously upheld a trial court's grant of summary judgment in a medical negligence action where a plaintiff has failed to demonstrate the undisputed facts give rise to the application of the continuing care exception to prevent the claim from being time barred as a matter of law. *See Weiss v. Rojanasthit*, 975 S.W.2d 113, 120 (Mo. banc 1998) (affirming trial court's grant of summary judgment in favor of the defendant gynecologist where patient failed to follow up with gynecologist within recommended timeframe, and thus, discharged the duty of continuing care); *Hooe v. Saint Francis Medical Center*, 284 S.W.3d 738, 739-40 (Mo. App. S.D. 2009) (affirming trial court's decision to grant summary judgment in favor of the defendant health care provider where the undisputed facts showed there was a significant gap between the physician's alleged negligent conduct and the subsequent visit relied upon in an effort to create a continuum of care); *Brickey v. Concerned Care of Midwest, Inc.*, 988 S.W.2d 592, 598 (Mo. App. E.D. 1999) (concluding trial court correctly granted summary judgment on plaintiff's medical negligence action where the undisputed facts showed the continuing care exception was inapplicable to toll plaintiffs' actions); *Dunagan By and Through Dunagan v. Shalom Geriatric Center*, 967 S.W.2d 285, 289 (Mo. App. W.D. 1998) (finding the trial court correctly granted summary judgment in favor of the defendant nursing home where plaintiff failed to show the nursing home's ongoing care and treatment of the patient constituted continuing care); *Shah v. Lehman*, 953 S.W.2d 955, 958 (Mo. App. E.D. 1997) (upholding trial court's grant of summary judgment where the undisputed facts showed the continuing care exception was not applicable).

A. Appellants Did Not Satisfy Their Burden of Showing Their Causes of Action Fall within the Continuing Care Exception

Under Missouri law, medical negligence actions must generally be brought within two years of the allegedly negligent act pursuant to RSMo. § 516.105, which provides as follows:

> All actions against physicians . . . and any other entity providing health care services and all employees of any of the foregoing acting in the course and scope of their employment, for damages for malpractice, negligence, error or mistake related to health care ***shall be brought within two years from the date of occurrence of the act of neglect complained of...***

RSMo. § 516.105 (emphasis added), A6. The medical negligence statute of limitations "begins to run from the date of the alleged act of negligence." *Kamerick v. Dorman*, 907 S.W.2d 264, 266 (Mo. App. W.D. 1995). As this Court observed in *Batek v. Curators of the University of Missouri*, the legislature enacted a shorter and more stringent statute of limitations for medical negligence actions for several different reasons, including: (1) to limit the burdens and disruption that malpractice litigation imposes on the delivery of accessible health care, (2) to reduce uncertainty and expense toward the goal of preserving affordable health care for the greatest number of individuals, and (3) to stem the tide of a perceived crisis brought about by a flood of frivolous medical negligence claims. *Batek v. Curators of the University of Missouri*, 920 S.W.2d 895, 899 (Mo. 1996); *see also Laughlin v. Forgrave*, 432 S.W.2d 308, 313-14 (Mo. banc 1968) (recognizing the Missouri legislature showed a clear intent to treat medical negligence actions different from general negligence actions by fixing a specific date when the statute of limitations begins to run – "from the date of the act of neglect"). Moreover,

Missouri courts consistently recognize statutes of limitations are favored in the law and cannot be avoided unless the plaintiff proves it falls within an exception. *Zubres*, 222 S.W.3d at 276 (Mo. banc 2007) (stressing strict compliance is required with regard to statutory exceptions).

With respect to section 516.105, Missouri law recognizes only four circumstances when the two year statute of limitations may be tolled. *Davidson v. Lazcano*, 204 S.W.3d 213, 216 (Mo. App. E.D. 2006). Three exceptions are codified in the statute itself, and the fourth arose from common law. The three statutory exceptions are: (1) when a foreign object is left in the body, (2) when there is a negligent failure to inform of test results, or (3) when the person bringing the action is a minor less than eighteen years of age. *See* RSMo. § 516.105, A6. None of these statutory exceptions are applicable.

Appellants attempt to rely upon the fourth, common law exception commonly referred to as the continuing care exception. Appellants' reliance on this exception, however, is fundamentally misguided because Missouri precedent consistently demonstrates the two year statute of limitations is not tolled by the continuing care exception simply because a health care provider subsequently provided treatment for a new condition discovered years later that was purportedly related to the initial course of treatment.

Missouri law has been consistent in its statement of the continuing care exception to the statute of limitations. The exception exists only until the health care provider ceases treating the "necessity that gave rise to the relationship." *Weiss*, 975 S.W.2d at 120.

When this Court first created the continuing care exception in *Thatcher v. DeTar*, it examined cases from several jurisdictions and concluded the statute of limitations does not commence running until treatment by the physician or surgeon has terminated, **where the treatment is continuing and of such nature as to charge the medical man with the duty of continuing care and treatment which is essential to recovery until the relation ceases**. 173 S.W.2d 760, 763 (Mo. 1943) (emphasis added).

More recently, in *Weiss v. Rojanasthit* and *Montgomery v. South County Radiologists, Inc.*, this Court further articulated how a court should determine whether the continuing care exception applies. *Weiss v. Rojanasthit*, 975 S.W.2d 113 (Mo. banc 1998); *Montgomery v. South County Radiologists, Inc.*, 49 S.W.3d 191 (Mo. banc 2001). First and foremost, in *Montgomery*, this Court stressed "a **prerequisite** for the continuing care exception is that a patient is under the doctor's **continuing** care." *Montgomery*, 49 S.W.3d at 194 (emphasis added). Additionally, in both *Weiss* and *Montgomery*, this Court set forth clear limitations to the exception when it stated,

> …Missouri courts have recognized that the statute of limitations does not commence to run against a plaintiff patient **until treatment by the medical defendant ceases**. This is sometimes referred to as the continuing treatment theory and applies where the treatment is continuing and of such nature as to charge the medical man with the duty of continuing care and treatment which is essential to recovery until the relation ceases. **The duty to attend the patient continues so long as required unless the physician-patient relationship is ended by** (1) the mutual consent of the parties, (2) the physician's withdrawal after reasonable notice, (3) the dismissal of the physician by the patient, or (4) **the cessation of the necessity that gave rise to the relationship**. Absent good cause to the contrary, where the doctor knows or should know that a condition exists that requires further medical attention to prevent injurious consequences, the doctor must render such attention or must see to it that some other competent person does so **until termination of the physician-patient relationship**.

Weiss, 975 S.W.2d at 119-120 (emphasis added) (internal quotations and citations omitted); *Montgomery*, 49 S.W.3d at 194. In addition to requiring the plaintiff to satisfy the prerequisite of being under the health care provider's **continuing** care, a close examination of these cases reveals two key, yet distinct components. The first is the duty of a health care provider to continue rendering treatment to the patient, as needed. *See Weiss*, 975 S.W.2d 113 ("Absent good cause to the contrary, where the doctor knows or should know that a condition exists that requires further medical attention to prevent injurious consequences, the doctor must render such attention or must see to it that some other competent person does so until termination of the physician-patient relationship."). The second is a statement of the four methods in which this duty of continuing care can be discharged through the termination of the physician-patient relationship, and in turn, invoke the running of the statute of limitations. *See id*. at 119-120; *see also Montgomery*, 49 S.W.3d at 194.

Crucial in this analysis is the time when the patient leaves the health care provider's care because treatment of the necessity that gave rise to their relationship has ceased, or the relationship has terminated through another method. This exception to the statute of limitations was created by the courts to recognize the duty of a health care provider to continue caring for a patient until the patient recovers from the particular illness or condition that initially gave rise to their relationship. The purpose of this exception was not to retroactively eliminate the protections the statute of limitations affords to health care providers when, after a significant period of time, the patient

returns to the health care provider for care other than "the necessity that gave rise to the [prior] relationship." *Weiss*, 975 S.W.2d at 120.

Accordingly, focusing on whether a health care provider subsequently provided treatment for complications discovered years later, even if arising from an earlier course of treatment, to impose a duty of continuing care, as Appellants argue here, is contrary to the standards set forth by this Court. Again, the test set forth by this Court more than half a century ago in *Thatcher* focused on when "the treatment of the patient's ailment by the defendant ceases." *Thatcher*, 351 Mo. at 608. This Court's most recent reiteration of this standard in *Weiss* and *Montgomery* further makes clear that a health care provider is no longer charged with a duty of continuing care once the physician-patient relationship ends, which can occur through the "cessation of the necessity that gave rise to the relationship." *Weiss*, 975 S.W.2d at 119-120; *Montgomery*, 49 S.W.3d at 194.

The exception is intended to apply when a patient remains under the health care provider's **continuing** care for the condition that gave rise to their relationship, and only to the extent that further care and treatment should be anticipated proactively. It was never intended to apply to **episodic** care for a new condition that may be related to the prior alleged negligence, in retrospect.

Following these standards, in order for the continuing care exception to apply here, Appellants must demonstrate Dr. Meddows-Jackson owed a duty of continuing care to Ms. Newton following the February 5, 2013, visit. Appellants did not make such a showing.

Applying the undisputed facts of this case to the continuing care exception standards articulated by this Court, it is clear Ms. Newton established a physician-patient relationship with Dr. Meddows-Jackson in July of 2012 for the purpose of surgically treating her ovarian cyst and providing attendant post-operative care, which in this particular instance included treatment of a surgical site infection. *See* Deposition of Sharon Newton, L.F. 47, p. 6, line 11 through p. 7, line 23. As reflected in the medical records and the parties' respective deposition testimony, Ms. Newton continued seeing Dr. Meddows-Jackson for this expected and necessary post-operative care through February 5, 2013. *See* L.F. Respondents' Statement of Uncontroverted Facts, pp. 2-3 at ¶¶ 4-8, 10; *see also* Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 42, pp. 2-5 at ¶¶ 4-8, 10. Unlike the prior post-operative visits between Ms. Newton and Dr. Meddows-Jackson, there is nothing in the chart from the February 5, 2013, visit indicating any follow up of the condition that gave rise to their physician-patient relationship was recommended or contemplated by either party. *See* Sharon Newton's Medical Records, L.F. 49, p. 28 at MERCY OUTPT 000179. Additionally, after this visit, neither Ms. Newton nor Dr. Meddows-Jackson had any reason to believe, let alone know, Ms. Newton would require any further care related to the condition that gave rise to their relationship, i.e., the ovarian cyst and attendant post-operative care. *See* Deposition of Sharon Newton, L.F. 47, p. 31, line 14 through page 33, line 1; *see also* Deposition of Dr. Meddows-Jackson, L.F. 48, p. 150, line 22 through p. 151, line 11.

Moreover, Appellants' own expert, Dr. Alexander McMeeking, testified the surgical site infection was resolved and done being treated by this February 5, 2013, visit.

See Deposition of Dr. Alexander McMeeking, L.F. 44, pp. 2-3. In doing so, Appellants' own expert expressly acknowledged he would not expect to see a patient again once he is done treating an infection. *Id.*

Furthermore, and of particular significance, the undisputed facts demonstrate Dr. Meddows-Jackson did not manage or treat Ms. Newton's ovarian cyst or surgical site infection beyond this February 5, 2013 visit.[2] Rather, at best and accepting Appellants'

[2] As noted in Respondents' Statement of Uncontroverted Facts, Ms. Newton presented to Respondent Mercy Clinic East Communities d/b/a Mercy Clinic OB/GYN and was seen by Dr. Meddows-Jackson's partner, Dr. Marsha McBride, on two separate occasions, May 23, 2013, and June 18, 2013, at which point in time Dr. McBride also examined the incisional site, and deemed the surgical site infection was resolved as of June 18, 2013, at the latest. *See* Respondents' Statement of Uncontroverted Facts, L.F.38, p. 3 at ¶ 12; *see also* Sharon Newton's Medical Records, L.F. 49, pp. 29-30 at MERCY OUTPT 000188, 000210. Appellants' allegations directed against Mercy Clinic East Communities d/b/a Mercy Clinic OB/GYN are solely based upon agency for the alleged negligent conduct provided by Dr. Meddows-Jackson during the surgical site infection care between July 16, 2012, and August 1, 2012. *See* Appellants' First Amended Petition, L.F. 33, pp. 1-2. Moreover, Appellants' summary judgment pleadings are completely devoid of any arguments, or even any reference, to these two subsequent visits with Dr. McBride. *See Appellants' Response to Respondents' Statement of Facts*, L.F. 42 and *Appellants' Memorandum in Opposition to Respondents' Motion for*

position for sake of argument, Dr. Meddows-Jackson's subsequent treatment in 2015 was for **newly discovered injuries** arising from their earlier physician-patient relationship. This may raise an issue of causation, but not one of the prior discontinuation of treatment.

In light of these undisputed facts, it is evident Dr. Meddows-Jackson's care of the necessity that gave rise to their physician-patient relationship, i.e., the surgical removal of the ovarian cyst and attendant post-operative care that included treatment of a surgical site infection, ceased at this final post-operative follow up visit on February 5, 2013. Because no further care was needed for the condition that gave rise to their original relationship following the February 5, 2013, office visit, the trial court correctly found Dr. Meddows-Jackson no longer owed Ms. Newton a duty of continuing care beyond that point in time. *See* Judgment, L.F. 57, pp. 3-4, A4-5; *see also Weiss*, 975 S.W.2d at 119-20; *Montgomery*, 49 S.W.3d at 194.

Summary Judgment, L.F. 45. Accordingly, Appellants did not properly raise and preserve the issue of whether these subsequent visits should be factored into the applicability of the continuing care exception for appeal. *Joshi v. St. Luke's Episcopal Presbyterian Hosp.*, 142 S.W.3d 862, 866 (Mo. App. E.D. 2004). Even if this Court were to consider these subsequent visits with Dr. McBride, these two visits would not alter the analysis because the last of these visits occurred on June 18, 2013, more than two years before Appellants filed suit on June 1, 2016.

When Ms. Newton unilaterally presented to Dr. Meddows-Jackson on January 29, 2015, after nearly two years of not being under Dr. Meddows-Jackson's care, it was not for the purpose of undergoing any further evaluation or treatment of the ovarian cyst or the long since resolved surgical site infection. Rather, the undisputed facts clearly show this visit was for the sole purpose of undergoing a well-woman exam for general gynecological care, at which point Ms. Newton first raised concerns with her ability to conceive. *See* Respondents' Statement of Uncontroverted Facts, L.F. 38, p.4 at ¶ 15; *see also* Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 42, p.9 at 15; Appellants' Brief, at p. 7. While this January 29, 2015, visit created a new physician-patient relationship between Dr. Meddows-Jackson and Ms. Newton for the purpose of providing general gynecological care, this new relationship is blatantly insufficient to impose a duty of continuing care on Dr. Meddows-Jackson between February 5, 2013, and January 29, 2015, and thus insufficient to invoke tolling of the statute of limitations, consistent with current Missouri precedent. To allow these facts to trigger a tolling of the statute of limitations under the continuing care exception would result in the unprecedented **retroactive** imposition of a duty of care on a health care provider.

B. The Cases Relied Upon by Appellants Do Not Support Application of the Continuing Care Exception to the Undisputed Facts

Appellants cite several cases in a misguided attempt to support their proposition that the two year statute of limitations can be revived through the continuing care exception by simply showing a health care provider subsequently provided care for a

new condition that may be related to a prior course of care. None of the cases cited by Appellants support such an overreaching expansion of the continuing care exception.

For instance, Appellants cite *Weiss* to argue Dr. Meddows-Jackson had a duty of continuing care from July 2012 through June 2015 because Dr. Meddows-Jackson knew as of January 2015 that she had a duty to treat Ms. Newton's blocked fallopian tubes. This argument, however, completely ignores the prerequisite that a patient must remain under the health care provider's **continuing** care. Additionally, and more importantly, this argument improperly shifts the focus onto what a health care provider knew or should have known at the time the patient returns for care and a new condition is discovered, rather than on what the health care provider knew or should have known at the time of the cessation of the treatment that gave rise to their relationship. Contrary to Appellants' assertion, *Weiss* does not stand for such a proposition.

In *Weiss*, this Court faced the question of whether the continuing care exception applies where a physician fails to inform a patient of abnormal test results, and if so, for how long. *Weiss*, 975 S.W.2d at 119-120. Ultimately, the *Weiss* Court found it need not make that determination because the physician-patient relationship terminated when the patient failed to return for the three-month follow up visit, thus bringing an end to the physician's duty of continuing care and starting the running of the statute of limitations. *Id*. at 120. As such, if anything, *Weiss* merely emphasizes the importance of relying upon the four methods in which a physician-patient relationship can be terminated to determine if and when a health care provider is discharged of the duty of continuing care.

Appellants, however, ask this Court to ignore the four methods in which a health care provider's duty of continuing care can be discharged, and instead to focus on when the patient was last treated by the health care provider for a new condition discovered years later. Specifically, Appellants ask this Court to impose a duty of continuing care on Dr. Meddows-Jackson from July 5, 2012, through June 9, 2015, simply because Ms. Newton returned to Dr. Meddows-Jackson in January 2015, on her own accord, wherein a new diagnosis was discovered that may have arisen from the prior course of treatment. Appellants claim this is the case regardless of whether the undisputed facts show their initial physician-patient relationship ended on February 5, 2013, after the emergent ovarian cyst removal and attendant post-operative care were deemed completed by both Dr. Meddows-Jackson and Ms. Newton.

Nothing in *Weiss* stands for such a broad standard. More importantly, Appellants' argument directly conflicts with the long-standing principle that foreseeability serves as the "touchstone for the creation of a duty," and would greatly frustrate the underlying purposes of a limitations period, which are favored in the law. *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P.*, 75 S.W.3d 247, 257 (Mo. banc 2002); *see also Lough by Lough v. Rolla Women's Clinic, Inc.*, 866 S.W.2d 851, 855 (Mo. banc 1993) (recognizing "foreseeability is the paramount factor in determining existence of a duty"); *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 507 (Mo. banc 1999). Accordingly, and contrary to Appellants' assertion, speculative hindsight knowledge is not a determinative factor for deciding whether a health care provider owes a duty of continuing care that would toll the statute of limitations, nor should it ever be.

Rather, per *Weiss*, the focus must be on what the health care provider knew or should have known at the time of the cessation of the necessity that gave rise to the relationship. *Weiss*, 975 S.W.2d at 119-120.

Appellants' reliance on *Thatcher v. DeTar* is equally misplaced. While Appellants correctly cite *Thatcher* for the proposition that the statute of limitations "does not commence running until treatment by the physician or surgeon has terminated, where the treatment is continuing and of such nature as to charge the medical man with the duty of continuing care and treatment which is essential to recovery until the relation ceases," Appellants' reliance on *Thatcher* for any purpose other than this standard is misguided.

In *Thatcher*, the plaintiff presented to the defendant physician with complaints of abdominal pain in August 1937. *Thatcher*, 351 Mo. at 605-06. That same month, to treat this initial complaint of abdominal pain, the defendant performed an appendectomy, wherein he negligently left a needle in the plaintiff's body. *Id.* Following the procedure, the plaintiff continued treatment with the same physician, continuing to voice complaints of abdominal pain, the same complaint he had at the start of their relationship. *Id* at 606-07. Between August 1937 and October 1939, the defendant continued to treat the plaintiff for his complaints of abdominal pain. *Id*. at 607. In doing so, the defendant continuously failed to order an x-ray, which would have shown the needle, even though he recognized at his deposition it was advisable to do so. *Id*. In August 1941, the plaintiff brought suit alleging the defendant negligently performed the appendectomy by leaving the needle in his body, and failed to properly treat plaintiff thereafter when he

continuously failed to discover the presence of the needle during his post-operative visits. *Id*.

Under these facts, the court concluded the continuing care exception tolled the statute of limitations throughout the time in which the defendant negligently failed to discover the needle causing the ongoing abdominal pain, which first gave rise to their relationship. *Id*. at 608. Accordingly, unlike the facts presented before this Court, the defendant in *Thatcher* not only failed to treat the original condition that gave rise to their physician-patient relationship, but also continued to provide ongoing negligent care without any break in care. *Id*.

Similarly, in *Montgomery v. South County Radiologists, Inc.*, the plaintiff expressed complaints of chronic lower back pain, which prompted his neurosurgeon to refer him to the defendant radiology group for diagnostic radiological services. 49 S.W.3d at 192 (Mo. banc 2001). During a nine-month period, the plaintiff presented to the defendant radiology group on three separate occasions, February 14, 1995, July 31, 1995, and November 3, 1995, to undergo x-rays and an MRI of his lumbar spine, which were read, compared to prior studies, and interpreted by a different defendant radiologist from the same group during each visit. *Id*. In March 1997, the plaintiff brought suit against the radiology group and the three individual radiologists alleging they consistently failed to detect and diagnose a cancerous tumor in his spine during each radiology test. *Id*. The defendant radiologist who interpreted the first studies on February 14, 1995, moved for summary judgment, and the defendant radiology group

moved for partial summary judgment with respect to any allegations pertaining to the first visit claiming such actions were barred by the two year statute of limitations. *Id*.

Under these particular facts, where each radiologist from the group continued to negligently read the plaintiff's images, this Court determined the defendant radiology group had a duty of continuing care to "accurately [interpret] and [compare] x-rays and MRIs for the same complaint by the same patient about the same part of the body, three times within a nine-month period." *Id*. at 195 (emphasis added). Accordingly, for these specific reasons, the Court found the defendant radiology group could be charged with a duty of continuing care to toll the statute of limitations during the nine-month period in which the plaintiff continued to undergo the same examination for the same purpose. *Id*. Not only is the subsequent care that Appellants rely on here in an effort to toll the statute of limitations far from the same examination for the same condition, but also Appellants do not claim the subsequent care constituted ongoing negligence, as was the case in *Montgomery*.

It is also worth noting that in *Montgomery*, this Court found it would be improper to charge the radiologist who performed the February 1995 services with a duty of continuing care even though that radiologist participated as a shareholder with the other two radiologists involved in the plaintiff's subsequent visits, never withdrew from the plaintiff's care, was never dismissed by the plaintiff, and provided services essential to plaintiff's ultimate diagnosis and recovery. *Id*. at 194. In reaching this conclusion, the Court explained there was nothing to indicate the initial radiologist's care of the plaintiff was continuing. *Id*. Applying this same rationale to this case, the trial court did not err in

finding there was nothing in the record to demonstrate Dr. Meddows-Jackson should be charged with a duty of continuing care beyond the February 5, 2013.

In addition to mischaracterizing this Court's decisions in *Thatcher*, *Weiss*, and *Montgomery*, Appellants briefly cite to several appellate opinions in support of their argument by merely relying on one or two phrases from each case without providing greater context. A careful examination of these cases shows they do not support Appellants' broad, unprecedented expansion of the continuing care exception they are asking this Court to adopt here.

For instance, Appellants cite to *Shaw v. Clough*, *Adam v. Lowe*, *Norman v. Lehman*, and *Cole v. Ferrill-Duncan Clinic*; however, in each of these cases, the facts clearly showed ongoing, contemplated care, therefore satisfying the critical prerequisite that the patient remain under the health care provider's **continuing** care. A key element that Appellants have not and cannot establish under the facts presented here.

In *Shaw v. Clough*, the plaintiff first presented to the defendant physician in January 1975 for evaluation of a neck injury from two months earlier. 597 S.W.2d 212, 214 (Mo. App. W.D. 1980). To treat this neck injury, the defendant performed two procedures in February 1975 and March 1975, the latter of which was the focus of plaintiff's allegations of negligence. *Id.* While plaintiff's neck injury resolved, he immediately began to experience post-operative complications from the area where the defendant took the bone graft for the second procedure, which led to the plaintiff remaining under the defendant's continuing care for this immediate post-operative complication through August 1975. *Id.* Under these facts, the court concluded the

physician undertook surgical treatment of the neck injury and its concomitant responsibilities post-operatively and the plaintiff remained under this physician's continuous care for this condition through August 1975. *Id*. at 215. While this case may demonstrate Dr. Meddows-Jackson owed a duty of continuing care to Ms. Newton for the surgical removal of the ovarian cyst and attendant post-operative care, including treatment of a surgical site infection, during the time Ms. Newton remained under her continuing care through February 5, 2013, it by no means stands for the proposition that an indirect injury, discovered years later and well after the patient was no longer under the health care provider's continuing care, is sufficient to trigger the continuing care exception.

Similarly, in *Adams v. Lowe*, this Court considered whether the defendant dentist's treatment of the patient's root canal terminated on the date of the root canal itself or the subsequent follow up visit. 949 S.W.2d 109, 110 (Mo. App. E.D. 1997). Plaintiff underwent root canals on two teeth in April 1993. *Id*. At the conclusion of the root canals, the defendant dentist told plaintiff he would reevaluate those same teeth and may need to discuss putting crowns on both during the next follow up visit. *Id*. As recommended and contemplated, the plaintiff returned for his follow up visit on November 2, 1993, approximately seven months later. *Id*. During this visit, plaintiff expressed his teeth were still tender, and the dentist found the root canals had not resolved all of the problems with those particular teeth. As such, the defendant dentist recommended the plaintiff make another appointment with him to further assess what additional treatment may be needed. *Id*. While the plaintiff scheduled an appointment

for December 1993, he skipped this appointment and sought a second opinion from another dentist. *Id.* On May 25, 1995, the plaintiff filed his petition alleging the defendant dentist negligently performed the root canals in April 1993. *Id.* The defendant dentist then moved for summary judgment asserting plaintiff's claims were barred by the statute of limitations because the alleged negligence occurred at the time of the root canal. *Id.*

The court found the plaintiff's claims fell within the continuing care exception because further treatment of the two teeth was contemplated and discussed between both parties at the April 1993 visit, and it was clear the November 1993 visit was planned and necessary to continue assessing whether the root canals resolved the issues with those two teeth. *Id.* at 111. Accordingly, the court found the relationship between the defendant dentist and the plaintiff did not terminate until after the scheduled November 1993 follow up visit. *Id.* Of note, unlike the undisputed facts currently before this Court, the subsequent visit giving rise to the continuing care in *Adams* was specifically arranged by the defendant dentist to specifically reevaluate whether the patient's condition that first gave rise to their relationship – the tenderness in his two teeth – had resolved.

Appellants' reliance on *Norman v. Lehman* is equally misplaced for similar reasons. In *Norman v. Lehman*, the plaintiff presented to the defendant orthopedic surgeon with complaints of knee pain, which led to him undergoing a knee procedure on September 22, 2006. *Norman v. Lehman*, 347 S.W.3d 611, 612 (Mo. App. E.D. 2011). After this initial surgery, the plaintiff continued to have problems with his knee, so the same defendant performed another knee procedure on October 16, 2006. *Id.* When this

second procedure failed to relieve his knee problems, the plaintiff presented to the defendant once more on November 7, 2006, for further evaluation of this knee pain, at which point in time the physician discussed further treatment options with the plaintiff. *Id*. On November 14, 2006, the plaintiff presented to a new physician for evaluation of his ongoing knee issues; however, there was a factual dispute as to whether the plaintiff had initiated seeing another physician four days earlier, thereby extinguishing his physician-patient relationship with the defendant physician on November 10, 2006, instead. *Id*. at 613-14. Based on these facts, the court concluded there was a genuine issue of material fact as to whether the plaintiff's physician-patient relationship ended on November 10, 2006, or November 14, 2006, the former of which would have barred the plaintiff's action that was filed on November 12, 2008. *Id*. at 615. Unlike the undisputed facts currently before this Court, at the last visit on November 7, 2006, the defendant knew the original condition plaintiff presented to him with had not been resolved, and both the plaintiff and the defendant contemplated future care for this unresolved, original condition that gave rise to their relationship.

For related reasons, Appellants' mistakenly rely upon *Cole v. Ferrill-Duncan Clinic*. In *Cole*, the plaintiff alleged his primary care provider failed to order prostate cancer detection tests during his routine physical exams in December 1997, January 1999, October 2000, and August 2001. *Cole v. Ferrill-Duncan Clinic*, 185 S.W.3d 740, 742 (Mo. App. S.D. 2006). Of importance, during this initial visit and subsequent visits, prostate exams were conducted. *Id.* After the defendant physician retired in September 2001, the plaintiff began seeing another physician, who ordered a prostate cancer

detection test, which ultimately led to plaintiff's prostate cancer diagnosis in October 2002. *Id*. Plaintiff brought suit on April 15, 2003. *Id*. Defendant never moved to dismiss the plaintiff's actions on the grounds that they were time barred by the statute of limitations; however, at trial, the defendant argued the plaintiff could not bring in evidence of the negligent care prior to April 15, 2001, as those prior acts of negligence were barred by the two year statute of limitations. *Id*. at 743. The trial court disagreed with defendant's evidentiary argument on the grounds that the earlier visits came within the continuing care exception. *Id*.

On appeal, the court never directly issued a ruling as to whether the continuing care exception tolled plaintiff's claims; however, it did agree evidence of the earlier visits could be introduced to the jury by relying upon the continuing care exception. *Id*. In reaching this conclusion, the court focused on the fact the defendant physician undertook plaintiff as a patient for the purpose of performing routine physicals, which on each occasion included an exam intended to detect abnormalities in the prostate gland, such as cancer. *Id*. at 744. Additionally, the court noted an expert had testified that more likely than not, a prostate screening test would have disclosed cancer at the initial visit. *Id*. at 745. Accordingly, the court reasoned one of the conditions that gave rise to their original relationship was the cancer, which required the tests the defendant negligently failed to perform throughout the entirety of their relationship. *Id*.

Unlike *Cole*, the relationship between Dr. Meddows-Jackson and Ms. Newton was not founded for the purpose of providing routine general gynecological care. Rather, their relationship was established for the purpose of surgically treating Ms. Newton's

ovarian cyst that required emergent removal and attendant post-operative care, which Dr. Meddows-Jackson provided between July 5, 2012, and February 5, 2013. Of significance, unlike the plaintiff in *Cole*, Ms. Newton does not claim Dr. Meddows-Jackson negligently treated her from July 5, 2012, through June 9, 2015, but instead, claims the negligence was limited to July 16, 2012, and August 1, 2012, during the course of their original physician-patient relationship. Moreover, unlike *Cole* where the condition remained cancer throughout the four visits, the condition Ms. Newton first presented for – the ovarian cyst and attendant post-operative care – was not the same as the condition she presented for in January 2015 – general gynecological care and evaluation concerning her ability to conceive. Thus, *Cole* is readily distinguishable from the facts presented here.

Appellants' reliance on *Dunagan By and Through Dunagan v. Shalom Geriatric Center* and *Brickey v. Concerned Care of Midwest*, to support the applicability of the continuing care exception in this case is misguided as well, but for slightly different reasons than those set forth above. Both of these cases demonstrate the courts' need to see something more than an indirect relationship between the injury and the subsequent care for the continuing care exception to apply. *Dunagan*, 967 S.W.2d at 285; *Brickey*, 988 S.W.2d at 592.

In *Dunagan*, the plaintiff, who suffered from Alzheimer's disease, was admitted to defendant's nursing home facility on December 1991, to receive nursing and health care. *Id*. at 287. The plaintiff initially brought suit on June 1995, and then filed an amended petition in March 1996, alleging the facility was negligent and careless by permitting him

to fall and sustain fractures to his lower body three times in 1992 and two times in 1995. *Id*. at 289. The *Dunagan* court found the claims for the 1992 falls and fractures were time barred and not tolled by the continuing care exception because the plaintiff did not establish the defendant facility provided continuing treatment of those earlier fractures. *Id*.

Brickey is very similar to *Dunagan* in that it involves a patient who sustained two separate fractures in 1993 and a head injury in March 1995 while a resident at the defendant nursing home. *Brickey*, 988 S.W.2d at 594. With respect to the two 1993 fractures, the patient was transferred to an outside hospital for further treatment and evaluation both times, and then readmitted to the nursing home. *Id*. The plaintiffs initially filed a medical negligence action in December 1995, but that action was dismissed without prejudice and subsequently refiled in August 1997. *Id*. The defendant nursing home moved for summary judgment, and plaintiffs argued the statute of limitations was tolled through the continuing care exception because the nursing home continued to treat the patient's 1993 leg fractures up until her death in March 1995. *Id*. at 598.

In rejecting this argument, the court found the 1993 fractures were treated when the patient was transferred to an outside hospital and subsequently readmitted to the nursing home. *Id*. Even though the patient remained under the nursing home's continuing care, which undoubtedly involved some ongoing, indirect care for the patient's injuries as one's fractures do not immediately heal once a cast is placed, the

court concluded the ongoing generalized care provided by the nursing home was not essential to the patient's recovery from those particular fractures. *Id*.

The *Dunagan* and *Brickey* plaintiffs' attempts to toll the statute of limitations through the continuing care exception based on general medical care is similar to Appellants' attempt here to toll the statute of limitations by relying upon the subsequent, general gynecological care provided to Ms. Newton nearly two years after the necessity that gave rise to their initial relationship ceased.[3] Even though both of the patients in *Dunagan* and *Brickey* remained under the defendants' ongoing general care, the courts properly concluded such generalized care was insufficient to toll the statute of limitations under the continuing care exception because it was not essential to the patients' respective recoveries. Here, the undisputed facts do not even go as far as *Dunagan* and *Brickey* as Ms. Newton did not remain under Dr. Meddows-Jackson's continuing care for general gynecological needs. Additionally, and following *Dunagan* and *Brickey*, even if one were to assume for sake of argument that Ms. Newton's blocked fallopian tubes and resulting impaired fertility were caused by her surgical site infection, the general

[3] While the courts in *Dunagan* and *Brickey* both applied the continuing care exception standards to the underlying facts, it should also be noted both decisions were made before this Court expanded the exception beyond physicians in *Montgomery*. As such, the courts in *Dunagan* and *Brickey* also seemed to express some reservation as to whether the continuing care exception could apply to either of the defendant health care entities. *Dunagan*, 967 S.W.2d at 289; *Brickey*, 988 S.W.2d at 597-98.

gynecological care that Ms. Newton later received in 2015 was not essential to her recovery from the ovarian cyst and the surgical site infection.

Appellants' reliance on *Hooe v. St. Francis Medical Center* for the proposition that the continuing care exception applies to toll the statute of limitations as long as the patient returns to the health care provider within two years of the alleged medical negligence is based upon a misreading of the case. Contrary to Appellants' assertion, footnote 5 in *Hooe* merely stands for the proposition that the Court was unable to find any cases applying the continuing care exception where the alleged continuing care was more than two years apart. *Hooe*, 284 S.W.3d at 739. Accordingly, while the *Hooe* court suggests the continuing care exception should not be applied when the gap in the alleged continuing treatment is more than two years, it certainly did not set forth a specific timeframe in which the continuing care exception should always apply as Appellants seem to posit. *Id.* Nor did it hold any care within the two years of the alleged negligent care is, simply due to that timeframe, adequate to trigger the continuing care exception. *Id.*

Lastly, Appellants cite to *Hill v. Klontz* and *Shah v. Lehman.* The courts in both cases, however, never actually applied the continuing care exception to the underlying facts because the decisions were based upon procedural issues.

For example, in *Hill v. Klontz*, the plaintiff filed a medical negligence action on June 16, 1994, against the defendant physician claiming he negligently prescribed her improper medications during the course of their physician-patient relationship between November 6, 1991, and June 26, 1992. 909 S.W.2d 725, 726 (Mo. App. S.D. 1995). The

defendant physician filed a motion to dismiss with an accompanying affidavit stating plaintiff was his patient through June 15, 1992, but he did not render any further care or treatment to her after that point. *Id*. Based on this alone, the trial court dismissed the action. *Id*.

On appeal, the court simply concluded the petition did not show the action was time barred, and the trial court record failed to specify whether it treated defendant's motion as one for summary judgment. *Id*. at 727. In remanding the action, the appellate court specifically stated it rendered "no opinion on whether [section] 516.105 is a bar to the instant action because it lack[ed] a sufficient record upon which to base such a determination." *Id*.

Despite the limited analysis in *Hill*, Appellants appear to be taking the following dicta contained within the opinion out of context: "Section 516.105 does not begin to run against a plaintiff until the defendant ceases to treat the injury caused by the act of neglect, and the subsequent treatment serves to toll the statute of limitations." *Id*. at 726. Of importance, while this particular sentence may play into Appellants' position, it is not the standard consistently articulated by this Court when addressing the applicability of the continuing care exception as is evidenced in *Weiss* and *Montgomery*. Additionally, it should be noted that the *Hill* court did not even ultimately apply this standard. Accordingly, Appellants' reliance on *Hill* for the proposition that "the 'ailment' has been repeatedly defined as including the injury" is improper.

Similarly, in *Shah v. Lehman*, the plaintiff sought to apply the continuing care exception to a hospital. *Shah v. Lehman*, 953 S.W.2d at 957. Upon reviewing the

continuing care exception standards in effect at that time, the court quickly concluded the continuing care exception did not apply because the exception had not yet been extended beyond a physician. *Id.* at 958; *see also Uelk v. Barnes-Jewish Hospital*, No. ED77114, 2000 WL 1873293, at *2 (Mo. App. E.D. Dec. 26, 2000) (same). Accordingly, the court never had the opportunity to apply the continuing care exception standards.

None of the cases cited by Appellants actually support their claim that the two year statute of limitations can be revived any time a patient returns to a health care provider for care that is potentially related, in any way, to the health care provider's prior alleged negligent care. This is especially so when the necessity that gave rise to the original physician-patient relationship already ceased. In fact, adopting the position that the continuing care exception tolls the statute of limitations until treatment of all injuries, including unknown injuries, is tantamount to asking this Court to adopt a discovery rule, which has consistently been rejected by both the Missouri Legislature and Missouri courts.

C. Appellants' Reliance on the Continuing Care Exception Amounts to an Improper Attempt to Circumvent the Missouri Legislature's and Missouri Courts' Rejection of the Discovery Rule

Appellants attempt to prevent their claims from being time barred as a matter of law by improperly claiming the continuing care exception tolls their actions through 2015 when Ms. Newton discovered her new "damages" or "injuries." *See* Appellants' Brief, pp. 7-9, 16-18. This position amounts to nothing more than an attempt to expand the continuing care exception in a manner that contravenes the Missouri Legislature and Missouri courts' ongoing rejection of the discovery rule in medical negligence actions.

Missouri law is clear that the two year statute of limitations set forth in section 516.105 requires all actions against health care providers to be brought "within two years of the date of the alleged acts of negligence; *irrespective of when the damage is discovered*." *Young v. Medrano*, 713 S.W.2d 553, 554 (Mo. App. S.D. 1986) (emphasis added), *citing Laughlin*, 432 S.W.2d at 314. In interpreting the Missouri Legislature's intent and strictly applying section 516.105, this Court and other Missouri appellate courts have consistently found the statute "commences to run upon the occurrence of the act of neglect, not upon the ascertainment of the damage resulting from the wrong." *Weiss*, 975 S.W.2d at 119. In *Weiss*, this Court further observed that "continuing or subsequently developing damages or injuries do not start the running of section 516.105 anew." *Id.*; *see also Green v. Washington University Medical Center*, 761 S.W.2d 688, 690 (Mo. App. E.D. 1988) (rejecting plaintiff's assertion that his damages were delayed and that no cause of action accrued until there was a clinical manifestation of damage by finding his argument was "tantamount to a request to adopt the discovery rule in malpractice actions"); *Sanders v. H. Nouri, M.D., Inc.*, 688 S.W.2d 24, 26 (Mo. App. E.D. 1985) (finding plaintiff's wrongful conception action was barred by the statute of limitations because the limitations period began to run on the date of the failed sterilization procedure rather than the date in which the child was conceived or the pregnancy was discovered).

Appellants' Response to Respondents' Motion for Summary Judgment, as well as their Brief, make it clear they are seeking to toll the statute of limitations not just to the time at which Ms. Newton discovered her surgical site infection, but until she discovered

the full extent of her injuries allegedly arising from the surgical site infection. *See generally* Appellants' Memorandum in Opposition to Respondents' Motion for Summary Judgment, L.F. 45; Appellants' Motion for New Trial and to Amend Judgment, L.F. 58; Appellants' Brief. The undisputed facts demonstrate Appellants were aware of the alleged negligent conduct and initial damages stemming from it in 2012. *See* Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 42, pp. 2-7, 10-11 at ¶¶ 7, 10, and 16. Specifically, Appellants knew by the end of September 2012, at the latest, that Ms. Newton developed a surgical site infection that required additional antibiotics, testing, and an inpatient admission, which resulted in Ms. Newton undergoing additional pain and suffering, losing time from work for several weeks, and incurring medical bills. *See* Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 42, pp. 2-4, 10-11 at ¶¶ 4-8; *see also* Deposition of Sharon Newton, L.F. 47, at p. 48, line 9 through p. 48, line 4 (acknowledging the surgical site infection was a complication she developed after the ovarian cyst removal, which resulted in an inpatient admission and medical expenses). Under these facts, tolling Appellants' claims through 2015 would result in application of the discovery rule, which has consistently been rejected for medical negligence actions in Missouri. More importantly, it would also extend the discovery rule itself to the date at which the last evidence of damage or injury is discovered, even when the occurrence of the act of neglect and some damages therefrom were already known years earlier.

Accordingly, Appellants' arguments are tantamount to adopting a super-extended discovery rule in medical negligence actions, which again has consistently been rejected

by the Missouri Legislature and this Court. If this Court were to adopt Appellants' position, the statute of limitations would never expire. Under such a broad standard, a plaintiff could unilaterally revive the statute of limitations at any point, regardless of how much time has passed, by visiting a prior health care provider who rendered alleged negligent care as long as the subsequent care is tangentially related to the prior care.

D. Public Policy Supports Affirming Summary Judgment in Favor of Respondents

Permitting Appellants' causes of action to be tolled through 2015 would also directly conflict with the underlying purposes of a limitations period: to prevent stale claims and provide a sense of finality to defendants. *Graham*, 984 S.W.2d at 507. Here, none of the undisputed facts come close to suggesting Dr. Meddows-Jackson, or even Ms. Newton for that matter, foresaw a need for ongoing care, let alone a need for ongoing care related to the original condition that gave rise to their physician-patient relationship beyond the last post-operative follow up visit on February 5, 2013. *See* Respondents' Statement of Uncontroverted Facts, L.F. 38, p. 3 at ¶¶ 10-11; *see also* Deposition of Dr. Meddows-Jackson, L.F. 48, p. 150, line 22 through p. 151, line 11; Sharon Newton's Medical Records, L.F. 49, p. 28 at MERCY OUTPT 000179. Of importance, Ms. Newton does not allege she had the tubal blockage at the February 5, 2013, visit, nor does she claim Dr. Meddows-Jackson knew or should have known Ms. Newton would one day develop this tubal blockage and require treatment.

Applying the continuing care exception in the manner requested by Appellants would in essence allow the statute of limitations to be tolled as long as there is a

possibility that a patient may one day return to a health care provider for treatment of a new condition that may be remotely related to the prior alleged negligence, in retrospect, regardless of whether the new condition discovered years later was known or any follow up care was contemplated at their last visit. Such a result would be illogical and run contrary to the purpose of finality that is served by the statute of limitations.

Moreover, since this Court expanded the continuing care exception to apply to all health care providers in *Montgomery*, such a broad interpretation of the continuing care exception would result in a significant erosion of the two year statute of limitations for not only physicians, but all health care providers. This, in turn, would create an untenable situation in today's health care environment and greatly undermine the purposes of this particular statute of limitations. It would also pose a significant disincentive to providing health care services, if the health care provider must continually reassess the extent to which providing present services might revive long stale claims. This would be a particularly cumbersome burden for large health care organizations, such as hospitals, where often times the health care providers do not have the option of deciding whether they will treat the patient.

While Appellants advance their own public policy argument as well, this argument, like the various other arguments advanced in their Brief, is misguided. In yet another effort to explain why the continuing care exception should apply even though the undisputed facts indicate otherwise, Appellants note the underlying rationale of the continuing care exception is based on the concept that the physician-patient relationship is highly personal, and therefore, the statute of limitations should not begin to run until

the patient is no longer under the physician's continuing care. *See* Appellants' Brief, at 19-21.

The undisputed facts in this case demonstrate this rationale is inapplicable here. The alleged negligent conduct at issue in this case centers on Dr. Meddows-Jackson's treatment of Ms. Newton's surgical site infection between July 16, 2012, and August 1, 2012. *See* L.F. 33, pp. 1-2 at ¶¶ 2-3. As evidenced by the following exchange, Appellants' own expert specifically admitted Ms. Newton's surgical site infection resolved by February 5, 2013:

> A: …So once the infection is gone, unless the person has a new infection, I don't expect to ever see them again. And, again, if the patient doesn't need further surgery, I wouldn't expect them to see the surgeon again for that – related to that surgery.
>
> Q: So I guess what you're telling us is that the infection was over and being done treated in 2012, but the damage from the infection was discovered in 2015; is that accurate to say?
>
> A: Yes, that's my understanding.

See L.F. 43, p. 2, lines 4 through 10 and 16 through 21; *see also* Appellants' Response to Respondents' Statement of Uncontroverted Facts, L.F. 42, pp. 5-7 at ¶ 10 (acknowledging Appellants' sole medical expert testified that the surgical site infection was no longer active beyond the February 5, 2013, post-operative visit, but once again further claiming the alleged damage from the 2012 infection was not discovered until 2015).

When Ms. Newton presented to Dr. Meddows-Jackson on January 29, 2015, this was for a well-woman general gynecological exam and discussion of her ability to

conceive, which created a new physician-patient relationship. *See* Respondents' Statement of Uncontroverted Facts, L.F. 38, p. 4 at ¶ 15; *see also* Judgment, L.F. 57, p.3, A4. It was only after this visit that the possibility of any tenuous relationship back to the first course of treatment became apparent to either Ms. Newton or Dr. Meddows-Jackson.

Based on these undisputed facts, finding the statute of limitations began to run as of February 5, 2013, at the latest, would not undermine the purpose of the continuing care exception. The public policy concern raised by Appellants is only an issue when the care is continuing, and here there are simply no facts showing Ms. Newton remained under Dr. Meddows-Jackson's continuing care between February 5, 2013, and January 29, 2015. While Appellants might argue Ms. Newton was not aware of the **full extent** of her injuries in February of 2013 because they were not discovered until nearly two years later in January 2015, such a contention would only demonstrate once again that Appellants are attempting to rely upon the continuing care exception in a manner that would in effect enact the discovery rule consistently rejected in medical negligence actions under Missouri law.

CONCLUSION

Not only are the undisputed facts clear, but the legal implications of these undisputed facts point to only one conclusion: Appellants' actions are time barred as a matter of law because they did not bring suit within two years of the alleged negligent conduct, nor did they satisfy their burden of showing their actions were tolled by the continuing care exception. The undisputed facts show the condition that gave rise to their original physician-patient relationship in July 2012 – the surgical removal of the ovarian

cyst and attendant post-operative follow up care including the surgical site infection – ended on February 5, 2013, at the very latest. While Ms. Newton may not have discovered the full extent of her alleged damages until January 2015, the undisputed facts make clear that this subsequent care and treatment does not suffice to come within the continuing care exception. More broadly, adopting Appellants' position would result in a drastic expansion of the continuing care exception for all health care providers in a manner that conflicts with the long-standing principle that statutes of limitation are favored in the law and exceptions to them are to be strictly construed, and it would allow plaintiffs to easily circumvent the Missouri Legislature's consistent rejection of the discovery rule in medical negligence actions.

WHEREFORE, Respondents pray this Court affirm the trial court's judgment.

Certificate of Service

The undersigned certifies a copy of this brief was filed electronically this 10th day of May, 2019, causing automated delivery to the following counsel of record:

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Rule 84.06(c) Certificate of Compliance

The undersigned counsel, attorney of record of Respondents, certifies as follows:

1. This brief complies with the requirements of Rule 55.03.

2. This brief complies with the limitations in Rule 84.06(b) because the brief contains 12,022 words. This word count includes the entire brief, with the exception of the cover, the certificate of service, the certificate required by Rule 84.06(c), and signature block;

3. This brief has been prepared in a proportionally spaced typeface (13-point Times New Roman) using Microsoft Word 2010 for Windows;

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