IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
Appeal No. ED 106593

SHARON NEWTON, and BRIAN NEWTON

Plaintiffs/Appellants

vs.

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

Defendants/Respondents

Appeal from the Circuit Court of the County of St. Louis
Twenty-First Judicial Circuit, Division 12
State of Missouri

Cause No. 16SL-CC02003

Honorable Stanley J. Wallach

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This Court of Appeals has general appellate jurisdiction of this appeal because this appeal – concerning the application of the continuing care doctrine to toll the statute of limitations under RSMo. §516.105 - does fall not within the exclusive jurisdiction of the Supreme Court under Article V Section 3 of the Missouri Constitution and is an appeal taken by parties aggrieved by a final judgment of the Circuit Court of St. Louis County, disposing of all issues and parties and entered on 1/5/18. (A16, LF #57). RSMo. §512.020.5; Rule 74.01(a); Rule 81.05(a). Plaintiffs-Appellants filed a timely motion for new trial and motion to amend judgment raising the issues raised in this appeal on 2/5/18. (LF #58). The motion was denied on 4/3/18. (LF #60). Plaintiffs-Appellants timely filed a notice of appeal raising the issues on 4/9/18. (LF #64). Rule 81.04(a).

STATEMENT OF FACTS

As the Court correctly stated in its judgment of 1/5/18 (A16, LF #57, page 1):

> "The Plaintiffs brought this medical negligence action against the Defendants, alleging that Defendant, Doctor Christina Kay Meddows-Jackson, provided negligent medical care to Plaintiff Sharon Newton in connection with removal of an ovarian cyst and an ensuing post-operative infection. First Amended Petition, ¶ ¶ 2-3. [A1, LF #31]. The Plaintiffs allege that Defendants failed to perform timely blood testing and wound culture, and failed to prescribe appropriate antibiotics. *Id* at 3. The Plaintiffs allege this negligence took place between July 16, 2012 and August 1, 2012. *Id*. The Plaintiffs allege that the infection caused scarring, resulting in infertility.
>
> The Plaintiffs filed this action on June 1, 2016. The Defendants raised the statute of limitations as an affirmative defense. Affirmative Defenses 5. [LF #32]."

The Trial Court granted Respondents' Motion for Summary Judgment on 1/5/18, finding that more than two years had passed between the last visit to Defendants that treated the infection, which the Court determined to be 2/5/13, and the filing of the original petition on June 1, 2016. (App. A35, A16, LF #57, page 3-4). The Court therefore found that the statute of limitations under RSMo. §516.105 had run. *Id*. The Court also found that the continuing care exception invoked by Plaintiffs-Appellants did not apply to toll the running of the limitations period through Plaintiff Sharon Newton's

2015 visits to Dr. Meddows-Jackson. This was because, according to the Judgment:

1. It was "undisputed" that "Ms. Newton last saw Dr. Meddows-Jackson for follow up care relating to the cyst removal and post-operative infection on 2/5/13." (Judgment, A16, LF #57, page 2), and

2. There was no genuine issue of fact that "the visit of 1/29/15 was for a general gynecological exam, creating a new physician-patient relationship, rather than ongoing care for the 2012 infection." (Judgment, A16, LF #57, page 3) and

3. "There is nothing in the record to support Plaintiffs' contention that the 2015 visits were part of a continuum of care from the cyst removal in 2012", and that "at the 5/11/15 visit Dr. Meddows-Jackson noted that both of Ms. Newton's fallopian tubes were abnormal from her pelvic abscess." (Judgment, A16, LF #57, page 3).

Plaintiffs-Appellants' Response to Respondents' Statement of Uncontroverted Material Fact, Memorandum in Opposition to Summary Judgment and Motion for New Trial or to Amend the Judgment all argued, with citations to evidence from the record, that there were genuine issues of material fact as to the application of the continuing care doctrine, and specifically to the conclusion that the last visit for treatment related to the infection was in 2013. (Plaintiffs' Response to Respondents' Statement of Uncontroverted Fact, A4, LF #42, ¶ ¶ 10,11,15; Plaintiffs' Memorandum in Opposition to Summary Judgment, LF #45; Plaintiffs' Motion For New Trial or To Amend Judgment (LF #58). Plaintiffs' Response cited evidence that Plaintiff Sharon Newton's infertility was discussed and tested for at the 1/29/15 visit and continued to be treated at later visits in 2015. (A4, LF #42, ¶15). Plaintiff Sharon Newton's medical records for the visit of

1/29/15 noted her desire to get pregnant and contained orders for fertility testing. (LF #49, page 34).

Plaintiffs' Response (A4, LF #42, ¶ 15) stated, with regard to the 1/29/15 visit:

> Plaintiffs admit this was an annual well woman exam and that nothing in the medical record aside from the medical history expressly mentions the dermoid cyst or the subsequent post operative wound infection. However, as testified to by Plaintiff Sharon Newton at her deposition, it was at this visit that Sharon and Dr. Meddows-Jackson discussed Sharon's difficulty getting pregnant, and at which the doctor ordered the test that showed the damage to fallopian tubes. Dr. Meddows-Jackson told Plaintiff Sharon Newton that the damage to the fallopian tubes was "from the infection." [LF #47] *Exh. A, Sharon Newton depo, page 45.*

Paragraph 10 of Plaintiffs' Response to Respondents' Statement of Uncontroverted Fact [A4, LF #42] stated:

> "Plaintiffs deny that 'this (2/5/13) was the last time, Dr. Meddows-Jackson saw Ms. Newton in relation to her post-operative wound infection stemming from the right ovarian cystectomy Ms. Newton underwent on July 10, 2012, for treatment of her dermoid cyst.' Defendants fail to cite any evidence in support of this statement and it is contradicted by Dr. Meddows-Jackson's own statements from back at the time, as well as the records of other Mercy doctors. [LF #43] *See Exh. 1, page 1-4*: Dr. Meddows-Jackson's 5/11/15 statement in her medical records (omitted from Defendants' exhibits) where Dr. Meddows-Jackson states

that the fallopian tubes damage found in 2015 was from the 2012 intra-abdominal infection: "Both of her fallopian tubes are abnormal from her pelvic abscess.… She will get Depo Provera for contraception until tubal occlusion is documented.…" [LF #43] *Exh. 1 page 1.* Dr. Meddows-Jackson went on to recommend treatment for the damage to the fallopian tubes: "35 y.o. female presents for Essure occlusion of her right fallopian tube. Her right fallopian tube is abnormal and is adhered to bowel. She is at high risk of getting an ectopic and ectopic pregnancy can be very dangerous for her as salpingectomy is not an option. A discussion regarding the procedure was held with the patient in the office. … [LF #43] *Exh. 1, page 4*. Also, back in 2015, Dr. Meddows-Jackson told Plaintiff Sharon Newton that the damage to the fallopian tubes found in 2015 was from the 2012 infection. [LF #47] *Exh. A, depo of Sharon Newton, page 46*. Dr. Corey Wagner's record from 4/28/15 also states that the fallopian tube damage was from the "previous florid abdominal infection." [LF #43] *Exh. 1, page 7.* Dr. Meddows-Jackson acknowledged in her deposition that the damage to the fallopian tubes like Sharon had are most commonly caused by intra-abdominal infections, and that the damage to Sharon's fallopian tubes found in 2015 could be from the infection that Dr. Meddows-Jackson treated in 2012. [LF #48] *Exh. B, Dr. Meddows-Jackson depo, pages 12, 19*. Dr. Meddows-Jackson admitted that whatever infection Plaintiff had in August 2012 was from her July 2012 surgery. *Id*, *page 31*. Although Dr. Meddows-Jackson apparently now doubts that Plaintiff Sharon Newton ever had a pelvic abscess, [LF #48] *depo Exh. B, p. 6,* back on

9/11/12, "pelvic abscess" was part of her assessment, along with wound infection. [LF #43] *Exh. 1, p. 6.*

Paragraph 11 of Plaintiffs' Response (A4, LF #42) stated:

> Plaintiffs deny that following February 5, 2013, Dr. Meddows-Jackson did not recommend any follow up care or expect Plaintiff Sharon Newton to seek care for the results of the infection. Plaintiffs' expert Dr. McMeeking has testified that although the intra-abdominal infection was no longer active after 2012, the damage the 2012 infection caused was discovered in 2015 and treated by Dr. Meddows-Jackson at the May 2015 visit. [LF #44] Exh. 2, McMeeking depo page 102-103. Dr. Meddows-Jackson agreed in her deposition that the damage to the fallopian tubes like Sharon had are most commonly caused by intra-abdominal infections, and that the damage to Sharon's fallopian tubes found in 2015 could be from the infection that Dr.Meddows-Jackson treated in 2012. [LF #48] Exh. B, Dr. Meddows-Jackson depo, pages 12, 19. While it is true that Dr. Meddows-Jackson initially diagnosed a "wound infection", it is also true that after admission to the hospital 8/15/12-8/17/12 Dr. Meddows-Jackson noted the diagnoses of a rectus muscle and likely pelvic abscesses: "The patient was admitted to the hospital for an abscess that she has post operatively in her rectus muscle and likely in her pelvis." [LF #43] Exh. 1 page 9, discharge summary of Dr. Meddows-Jackson. When Plaintiff Sharon Newton's fallopian tubes were found damaged in 2015, Dr. Meddows-Jackson wrote in the medical record "Both of her fallopian tubes are abnormal from her pelvic abscess" and recommended a procedure to

block a damaged tube, in order to avoid a dangerous pregnancy. [LF #43] Exh. 1, pages 1 and 4.

Plaintiffs-Appellants' arguments in opposition to summary judgment were restated in Plaintiffs' Motion for New Trial or To Amend Judgment. (LF #58).

The 2013 care by the Defendant corporation went through at least 6/18/13, when Plaintiff was seen by Dr. McBride. (LF #38, Defendants' Statement of Uncontroverted Material Fact, page 3, ¶ 12).

POINT RELIED ON

I.

THE TRIAL COURT REVERSIBLY ERRED IN ITS JUDGMENT OF 1/5/18 THAT THE STATUTE OF LIMITATIONS HAD RUN BECAUSE, CONTRARY TO THE COURT'S FINDING, THERE WERE GENUINE ISSUES OF MATERIAL FACT AS TO THE APPLICATION OF THE CONTINUING CARE DOCTRINE, GIVEN EVIDENCE CITED BY PLAINTIFF-APPELLANTS IN OPPOSITION TO SUMMARY JUDGMENT AND IN THEIR AFTER TRIAL MOTIONS THAT THE 2015 VISITS WERE RELATED TO THE DAMAGE CAUSED BY THE 2012 ALLEGED ACTS OF NEGLIGENCE.

Thatcher v. De Tar, 173 S.W.2d 760, 76--761 (Mo. 1943)

Weiss v. Rojanasathit, 975S.W.2d 113, 119-20 (Mo. bane 1998)

Dunagan v. Shalom Gelriatric Center, 967 S.W.2d 285,289 (Mo.App.W.D. 1998)

Brickey v. Concerned Care of Midwest, Inc., 988 S.W.2d 592, 597-598 (Mo.App. ED 1999)

ARGUMENT

A. Standard of Review

As this Court recently set forth in *Jobe v. AAA Trailer Servs., Inc.*, 544 S.W.3d 306, 308–09 (Mo.App. ED 2018):

> The propriety of summary judgment is solely an issue of law. *City of DeSoto v. Nixon*, 476 S.W.3d 282, 286 (Mo. banc 2016). Appellate courts review a grant of summary judgment de novo. *ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). When considering appeals from summary judgments, we review the record in the light most favorable to the party against whom judgment was entered. *Id*.
>
> The criteria on appeal for testing the propriety of summary judgment are no different from those employed by the trial court to determine the propriety of sustaining the motion initially." *Frye v. Levy*, 440 S.W.3d 405, 407 (Mo. banc 2014). "A 'defending party' may establish a right to summary judgment by showing (1) facts that negate any of the claimant's necessary elements; (2) that the claimant, after an adequate period of discovery, has not been able and will not be able to produce sufficient evidence to allow the trier of fact to *309 find the existence of any one of the claimant's elements; or (3) that there is no genuine dispute as to the existence of the facts required to support the movant's properly pleaded affirmative defense." *Nail v. Husch Blackwell Sanders, LLP*, 436 S.W.3d 556, 561 (Mo. banc 2014).
>
> "The record below is reviewed in the light most favorable to the party against

whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record." *Shiddell v. Bar Plan Mut.*, 385 S.W.3d 478, 483 (Mo.App. W.D. 2012). "However, facts contained in affidavits or otherwise in support of the party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion." *Id*. Even if the facts alleged by the movant in a summary judgment motion are uncontradicted, they must still establish a right to judgment as a matter of law. *Miller v. City of Wentzville*, 371 S.W.3d 54, 57 (Mo.App. E.D. 2012) (citing *Kinnaman–Carson v. Westport Ins. Corp.*, 283 S.W.3d 761, 765 (Mo. banc 2009)). " 'The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment.' " *Kinnaman–Carson*, 283 S.W.3d at 765 (quoting *Lewis v. Biegel*, 204 S.W.3d 354, 356 (Mo.App. W.D. 2006)). "The trial court is prohibited from granting summary judgment, even if no responsive pleading is filed in opposition to a summary judgment motion, unless the facts and the law support the grant of summary judgment." *Id*.

Jobe v. AAA Trailer Servs., Inc., 544 S.W.3d 306, 308 (Mo.App. ED 2018)

Summary judgment is appropriate if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Rule 74.04(c)(3).* Where the record contains competent materials establishing two plausible but contradictory accounts of the essential facts, a "genuine issue" of material fact exists and cannot be granted. *Montgomery v. S. Cty. Radiologists, Inc.*, 49 S.W.3d 191, 193 (Mo. 2001) (as to

the corporate defendant, reversing a trial court's grant of summary judgment on statute of limitations grounds and finding continuing treatment).

B. Argument and Authorities

The Judgment incorrectly called it "undisputed" that "Ms. Newton last saw Dr. Meddows-Jackson for follow up care relating to the cyst removal and post operative infection on February 5, 2013." (Judgment, A16, LF #57, page 2). While it was undisputed that the active infection was over by the 2015 visits, (LF# 42, page 4), there was evidence cited by Plaintiffs-Appellants that the 2015 visits were related to that infection because the 2015 visits concerned the damage caused by the infection. (A4, LF #42, paragraphs 10,11 and 15; LF #45, LF #58).

The Trial Court's apparent focus on the date of the last active treatment for the infection on 2/5/13 as ending the tolling of continuing care is contrary to case law. The seminal case on the continuing treatment doctrine, *Thatcher v. De Tar*, 173 S.W.2d 760 (Mo. 1943), involved a needle left behind in an appendectomy more than 4 years before suit was filed but less than 2 years before the surgeon's last treatment for abdominal pain. *Thatcher v. De Tar*, 173 S.W.2d 760, (Mo. 1943). The Supreme Court in *Thatcher* did not focus on when the appendicitis was over, but on when patient last treated with the surgeon for the consequences of the needle being left behind, holding that the statute of limitations against a healthcare provider is tolled until the last time the patient treated with the provider, as long as the treatment is "continuing and of such a nature as to charge the medical man with the duty of continuing care and treatment which is essential

to recovery." *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943). See also *Weiss v. Rojanasathit*, 975S.W.2d 113, 119-20 (Mo. banc 1998).

The Judgment here finds that there was no continuing treatment in 2015 because there was a "cessation of the necessity giving rise to the relationship" under *Weis, supra,* on 2/5/13, and that the visit of 1/29/15 was for a general gynecological exam, creating a new physician-patient relationship, rather than ongoing care for the 2012 infection. (Judgment A16, LF #57, page 3). In support, the Judgment cites the medical records showing the visit was "for annual routine Pap and checkup," and that the patient was "not currently having problems." *Id*. The Court also cited *Dunagan v. Shalom Geriatric Center*, 967 S.W.2d 285,289 (Mo.App.W.D. 1998) (ongoing care for Alzheimers did not toll statute for medical negligence causing bone fractures).

The case cited in the Judgment as support for the conclusion that the continuing care doctrine did not apply to the 2015 visits, does not actually support it. In *Dunagan v. Shalom Geriatric Ctr*., 967 S.W.2d 285, 289 (Mo.App. WD 1998) the Court found that the continuing care exception was not applicable even though the Defendant nursing home continued to treat the decedent for Alzheimer's disease within the limitation period. The Appellate Court found the continuing treatment for Alzeimers did not constitute continuing care of the injuries – fractures - caused by the alleged acts of neglect. Here, Plaintiffs-Appellants' evidence showed the converse - that the treatment within two years of filing the petition – the 2015 visits - did involve discussion and testing for the damages – infertility – caused by the alleged negligent failure to appropriately treat the infection.

In *Dunagan* there was no tolling because the continuing treatment was not for the injury. Here, the opposite is true – the continuing treatment in 2015 was for the alleged injury.

The Judgment here also found a lack of any issue over the character of the 1/29/15 visit as "for" the infection, in part because the medical records called it a well woman visit and said the Plaintiff reported no problems. (Judgment, A16, LF #57, page 3). Plaintiffs-Appellants, however, cited evidence in opposition to summary judgment and in their after trial motions that Plaintiff' Sharon Newton's infertility – the damage claimed here as resulting from the infection – was discussed and tests were ordered for it at the 1/29/15 visit, and further that the infertility damage was treated by Defendants at the 5/11/15 visit. (A4, LF #42, ¶s 10,11,15,16; LF #58). This testimony was corroborated by the medical records for the visit of 1/29/15 which noted Plaintiff Sharon Newton's desire to get pregnant and contained orders for fertility testing. (LF #49, page 34).

Contrary to the Trial Court's finding, the discussion and testing for infertility at the 1/29/15 visit, and the treatment on 5/11/15, under *Thatcher* and *Weiss* were "for" the condition that created the relationship between Plaintiff Sharon Newton and Defendants because, according to Plaintiffs' evidence, the infertility treated by Defendants in January and May of 2015 was a result of Defendants' negligence in treating the infection in 2012. Case law is clear that when considering application of the continuing care doctrine, the treatment should be considered as a whole until it ceases and the obligations arising therefrom should not be conceptually fragmented. *Shaw v. Clough*, 597 S.W.2d 212, 216 (Mo.App. WD 1980); *Adams v. Lowe*, 949 S.W.2d 109, 111 (Mo.App. ED 1997). A physician has a continuing obligation to treat a patient who returns with complications, or

see to it that some other competent person does so, where the doctor knows or should know that a condition exists that requires further medical attention to prevent injurious consequences. *Weiss v. Rojanasathit*, 975 S.W.2d 113, 120 (Mo. 1998).

Thatcher focused its analysis on the continued treatment of the injuries and not on the condition (appendicitis) that was originally treated, as well as the duty of the doctor to continue to treat the injuries. The Court noted that "it has been held [in other states] that the statute 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" and that "… the statute of limitations does not begin to run until the treatment of plaintiff's ailment by the defendant ceases." *Thatcher v. De Tar*, 351 Mo. 603, 609, 173 S.W.2d 760, 762 and 763 (1943). The "ailment" has been repeatedly defined as including the injury. See *eg Brickey v. Concerned Care of Midwest, Inc.*, 988 S.W.2d 592, 597-598 (Mo.App. ED 1999) (the continuing care exception provides that the statute begins to run when the defendant ceases to treat the injury caused by the alleged act of negligence or neglect, citing *Dunagan* supra) and *Hill v. Klontz*, 909 SW2d 725,726 (Mo App WD 1995) (citing cases). Here, the treatment by Dr. Meddows-Jackson of the ailment - the injury- did not end before at least 5/11/15.

The Court in *Weiss* similarly focused on the duty of the doctor to attend to injuries potentially resulting from the doctor's care. The Court stated:

"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. *Reed v. Laughlin,* 332 Mo. 424, 58 S.W.2d 440, 442 (1933); *Cazzell v. Schofield,* 319 Mo. 1169, 8 S.W.2d 580, 587 (1928). 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 v. Rojanasathit, 975 S.W.2d 113, 119-20 (Mo. 1998). Appellants' evidence showed that when Plaintiff came back in 2015 she was coming back with problems resulting from Defendants' surgery and negligence. (A4, LF #42, ¶s 10,11,15,16). Under *Weiss*, Dr. Meddows-Jackson had a duty to provide continuing care because Dr. Meddows-Jackson knew or should have known that her services were needed in 2015 in relation to an injury from her 2012 surgery. The issue under the case law is not when the infection was over or what the parties thought in 2013 about the extent of the harm or the need for follow up care. The issue under the case law is whether, when Plaintiff went back in 2015, Dr. Meddows-Jackson had a continuing duty to treat her. Because Plaintiffs-Appellants' evidence showed that the infertility treated in 2015 was caused by the 2012 pelvic abscess, under *Thatcher* and *Weiss*, there was a continuing duty to treat, and treatment undertaken, and therefore continuing care. There is nothing in *Weiss* that supports a finding that the physician-patient relationship was terminated here. In *Weiss,*

the plaintiff was instructed to return for continuing treatment and did not. On that basis, the Court found the physician/patient relationship terminated. *Id.* at 120.

The Trial Court here found that there was a cessation of the condition that gave rise to the physician-patient relationship, i.e. the treatment for the cyst removal and post-operative infection, on 2/5/13. (A16, LF #57, pages 3-4). Plaintiff, however, returned to Dr. Meddows-Jackson in 2015 with, according to Plaintiffs' evidence, an injury caused by Dr. Meddows-Jackson's 2012 negligence and a need for the doctor's services in relation to that injury. As stated in *Montgomery v. S. Cty. Radiologists, Inc*., 49 S.W.3d 191, 194 (Mo. 2001), "The necessity that gives rise to the relationship is the patient's ailment or condition. 'When the physician takes charge of a case and is employed to attend a patient, ... the relation of physician and patient continues until ended by the consent of the parties, or revoked by the dismissal of the physician, *or until his services are no longer needed.*' *Cazzell v. Schofield,* 319 Mo. 1169, 8 S.W.2d 580, 587 (1928)(emphasis added), cited in *Weiss,* 975 S.W.2d at 120." The cessation of the relationship is thus determined by the cessation of the need for the services related to the injury. Plaintiff Sharon Newton went back to Defendants in 2015 with a need for services that, according to Plaintiffs' evidence, arose from Defendants' negligence. Under *Thatcher, Weiss, Montgomery*, Defendants had a duty to treat Plaintiff for that injury, and the statute of limitations was tolled.

The policies behind the continuing treatment doctrine support its application here. In the opinion that was transferred to the Supreme Court in *Montgomery*, the policy was expressed by this Court of Appeals as follows:

The underlying rationale of the *Thatcher* rule and the continuing care exception from other jurisdictions is "based upon the concept that [the exception] stems primarily from the nature of the relationship and that the obligation and treatment be considered as a 'whole' until it ceases and the obligations arising therefrom should not be conceptually fragmented." *Shaw v. Clough,* 597 S.W.2d 212, 215-16 (Mo.App. W.D.1980). The *Thatcher* rule also recognizes the fundamental relationship between a doctor and patient. This relationship is viewed as a "highly personal and close one, encompassing on the part of the patient a basic confidence and reliance upon the skills and judgment of the doctor with a reasonable expectation that such will be met by a deep sense of obligation and proper exercise by the doctor of his incomparable superior knowledge and the dedicated use of his best talents and judgment." *RCA Mut. Ins. Co. v. Sanborn,* 918 S.W.2d 893, 897 (Mo.App. S.D.1996) (quoting *Shaw v. Clough,* 597 S.W.2d 212, 215 (Mo.App. W.D. 1980)). When a patient is under the doctor's continuing care and the doctor is under the duty to treat the patient, then the statute does not begin to run until the doctor-patient relationship is terminated. *Thatcher,* 173 S.W.2d at 762. By tolling the statute of limitations until the termination of the relationship, the doctor is given every opportunity to diagnose and treat the patient. This exception promotes honesty and open communication within the doctor-patient relationship. In turn, this allows doctors to explore the full panoply of diagnostic treatments without fear of patients bringing a medical malpractice suit at the onset of each procedure within their course of treatment.

Montgomery v. S. Cty. Radiologists, Inc., No. ED 77285, 2000 WL 1846432, at *4 (Mo.App. ED 2000), *transferred to Supreme Court and reported at* 49 S.W.3d 191, 195 (Mo. 2001); *see also Cole v. Ferrell-Duncan Clinic,* 185 S.W.3d 740, 743–44 (Mo.App. SD 2006) (tolling exception based on logic, morality, the nature of the physician patient relationship, and that treatment be considered as a whole and should not be conceptually fragmented).

Thus, the point of the continuing care doctrine is to allow the physician and the patient the opportunity to diagnose and treat the injury without forcing the patient to bring suit in the middle of those efforts. Under the Court's judgment here, Ms. Newton would have had to bring suit by 2/5/15, in the middle of Dr. Meddows-Jackson's testing for fertility. That is exactly the kind of situation the continuing care doctrine is meant to avoid.

Cases that have affirmed the grant of summary judgment on statute of limitations grounds despite claims of continuing treatment are far different than this one. *Hooe v. Saint Francis Med. Ctr.*, 284 S.W.3d 738, 739 (Mo.App. WD 2009) involved a 6 year gap which the court found was too long to be continuing. *Shah v. Lehman*, 953 S.W.2d 955, 958 (Mo.App. ED 1997) found that a nine-year lapse in treatments did not constitute continuing care. *Vilcek v. Lee*, 982 S.W.2d 758, 759 (Mo.App. ED 1998) found no continuing treatment in the face of an 8 year gap. In *Dunagan By & Through Dunagan v. Shalom Geriatric Ctr.,* 967 S.W.2d 285 (Mo.App. WD 1998) there was continuing treatment, but not for the injuries claimed, and the tolling was therefore held not applicable. *Brickey v. Concerned Care of Midwest, Inc.*, 988 S.W.2d 592,598

(Mo.App. ED 1999) similarly found that there was no continuing treatment of the injury caused by the act of neglect, and therefore no tolling. *Weiss v. Rojanasathit*, 975 S.W.2d 113,120 (Mo. 1998) found a lack of continuing care when the patient failed to return in a reasonable time as instructed by the doctor. *Kamerick v. Dorman*, 907 S.W.2d 264, 266 (Mo.App. WD 1995) found that a telephone call complaining about the treatment did not rise to the level of continuing treatment. None of these circumstances are present here.

The gap between the visit of 2/5/13 to Dr. Meddows-Jackson and the return visit of 1/29/15, being less than two years, is not too long to permit application of the continuing care doctrine. *Hooe v St. Francis Medical Cen*ter, 284 SW3d 738, 739 and fn 5 (Mo.App. SD 2009) (noting the court's research showing that in cases where continuing care tolled the statute, plaintiffs returned to the medical defendants within two years). It should also be noted that the 2013 care by the Defendant corporation went through at least 6/18/13, when Plaintiff was seen by Dr. McBride. (LF #38, Defendants' Statement of Uncontroverted Material Fact, page 3, ¶ 12). The gap, even according to Defendants-Respondents' version of the facts, as to the Defendant corporation is thus from 6/18/13 – 1/29/15, and under *Montgomery v. S. Cty. Radiologists, Inc*., 49 S.W.3d 191, 194 (Mo. 2001) a medical corporation's continuing care is supplied by all its employees.

Cases that reversed grants of summary judgment on statute of limitations grounds because of continuing treatment include *Adams v. Lowe*, 949 S.W.2d 109, 111 (Mo.App. ED 1997), where this Court applied the continuing care doctrine to reverse summary judgment because the plaintiff had returned to the dentist with unexpected problems

within two years of the filing of the petition. In *Norman v. Lehman*, 347 S.W.3d 611, 615 (Mo.App. ED 2011) this Court reversed the grant of summary judgment finding that material facts were in dispute as to when the physician-patient relationship ended, even though the last visit to the physician was more than two years before filing. *Shaw v. Clough*, 597 S.W.2d 212 (Mo.App. WD 1980) reversed a trial court's grant of summary judgment where there was continuing treatment for a nerve injury from surgery within two years of filing, even though more than two years had passed since the allegedly negligent surgery. *Montgomery v. S. Cty. Radiologists, Inc*., 49 S.W.3d 191, 194 (Mo. 2001) affirmed the grant of summary judgment to a radiologist who saw the plaintiff on a single occasion more than two years before filing, but reversed summary judgment as to the radiology corporation based on services provided by other employed radiologists within two years of filing. *Cole v. Ferrell-Duncan Clinic*, 185 S.W.3d 740, 742 (Mo.App. SD 2006), although not involving summary judgment, held that evidence of negligence in failing to test for prostate cancer more than two years before the filing of the petition could be considered by the jury because of the continuing care exception and the fact that the plaintiff patient continued to treat with the defendant for what eventually became prostate cancer within two years of filing.

As discussed above, the Trial Court's Judgment found a lack of a genuine issue of material fact, despite evidence of treatment for the injury from the infection in 2015, apparently because the active treatment for the infection itself was over in 2013. The focus on that date is inconsistent with the teaching of the cases that the treatment be considered as a whole, *Shaw v. Clough*, 597 S.W.2d 212, 216 (Mo.App. WD 1980);

Adams v. Lowe, 949 S.W.2d 109, 111 (Mo.App. ED 1997), that treatment for the injury constitutes continuing care of the "ailment", *Brickey v. Concerned Care of Midwest, Inc.*, 988 S.W.2d 592, 597-598 (Mo.App. ED 1999) and that because a physician has an obligation to continue to treat the patient when she returns with unanticipated complications of the physicians' medical care, *Weiss v. Rojanasathit*, 975 S.W.2d 113, 120 (Mo. 1998), and as long as the physician's services are needed, *Montgomery v. S. Cty. Radiologists, Inc.*, 49 S.W.3d 191, 194 (Mo. 2001), the Courts will toll the running of limitations period during that time, as to not interfere with the efforts at recovery.

CONCLUSION

For all the foregoing reasons, the Court's Judgment of 1/5/18 should be reversed and the case should be remanded for a jury trial.

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that this brief complies with Special Rule 360 in that it contains 5,219 words, is supplied in searchable PDF form, and that service will be made by the electronic system to Respondents' counsel as a registered user of the electronic filing system.

6/19/18
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