

COURT WATCH

FROM THE LAW OFFICES OF FLAHERTY, SENSABAUGH & BONASSO, PLLC

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Forshey v. Jackson, Appeal No. 33834

Appeal from the Circuit Court of Kanawha County to the West Virginia Supreme Court of Appeals

ISSUE: When does the continuous medical treatment doctrine apply to a medical malpractice case?

In *Forshey v. Jackson*, the defendant physician performed carpal tunnel surgery on the patient on July 6, 1995. After surgery, the patient continued to experience pain, swelling and tenderness in his left hand. Nevertheless, the physician failed to order any follow-up x-rays on the patient's hand. The patient's last visit with the physician was on January 31, 1997.

During the summer of 2005, the patient suffered an unrelated injury to his left hand. An x-ray of the hand revealed a metallic foreign body in the patient's hand, which was ultimately determined to be a piece of a knife blade. In September 2006, the patient filed a medical malpractice claim against the physician, claiming that the only explanation for the foreign body was the carpal tunnel surgery performed by the physician in 1995. The trial court dismissed the patient's suit, for failing to file his claim within the ten year statute of repose found in West Virginia's Medical Professional Liability Act, W. Va. Code § 55-7B-4.¹ The patient appealed.

On appeal, the patient argued that the continuous medical treatment doctrine should be applied to his case, because the physician committed malpractice each time he saw the patient by not ordering x-rays and diagnosing the foreign body in his hand. Under the continuous medical treatment doctrine, the running of the statute of limitations is tolled when a course of treatment that includes wrongful acts has run continuously and is related to the original complaint. In its opinion, the West Virginia Supreme Court of Appeals officially adopted the continuous medical treatment doctrine, holding that:

[U]nder the continuous medical treatment doctrine, when a patient is injured due to negligence that occurred during a continuous course of medical treatment, and due to the continuous nature of the treatment is unable to ascertain the precise date of the injury, the statute of limitations will begin to run on the last date of treatment.

Despite adopting the continuous medical treatment doctrine, the Court found that the doctrine did not apply to the patient's case because the patient's injury occurred on a certain date – the date of the carpal tunnel surgery – and did not result from a continuing course of treatment. The Court further found that “where the patient suffers an identifiable injury through some affirmative act of negligence on part of the practitioner, the fact that thereafter the practitioner continues to care for and treat the patient does not postpone the commencement of the limitation period.” The Court found that the patient's claim arose on the date of surgery, July 6, 1995.

¹ Section 55-7B-4 provides that no action shall be filed more than ten years after the date of injury.

Under the statute of repose, the patient's claim had to be filed no later than July 6, 2005, ten years after the date of injury.

The patient also argued that his case should not have been dismissed because it constituted a continuing tort. The West Virginia Supreme Court of Appeals previously recognized that a continuing tort "involves a continuing or repeated injury" and found that "the statute of limitations begins to run from the date of the last injury." The Court noted that the concept of a continuing tort requires a showing of repetitious wrongful conduct. The Court further stated that a wrongful act with continuing damages is not a continuing tort. Thus, the Court held that "in the context of a medical malpractice action, in order to establish a continuing tort theory a plaintiff must show repetitious wrongful conduct. Merely establishing the continuation of the ill effects of an original wrongful act will not suffice." Because the patient could not show repetitious wrongful conduct, the West Virginia Supreme Court of Appeals affirmed the dismissal of the case by the trial court.