

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

1352

CA 10-00031

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GORSKI, JJ.

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SANDRA HILTS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FF THOMPSON HEALTH SYSTEM, INC., DOING BUSINESS  
AS THOMPSON HEALTH, VALLEY VIEW FAMILY PRACTICE  
ASSOCIATES, LLP, KATHRYN R. VANGELDER, N.P.,  
AND ROBERT J. OSTRANDER, M.D.,  
DEFENDANTS-RESPONDENTS.  
(APPEAL NO. 2.)

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PEGALIS & ERICKSON, LLC, LAKE SUCCESS (GERHARDT M. NIELSEN OF  
COUNSEL), FOR PLAINTIFF-APPELLANT.

HIRSCH & TUBIOLO, P.C., ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL),  
FOR DEFENDANT-RESPONDENT ROBERT J. OSTRANDER, M.D.

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Appeal from an order of the Supreme Court, Ontario County  
(William F. Kocher, A.J.), entered December 14, 2009 in a medical  
malpractice action. The order granted plaintiff's motion for leave to  
reargue and, upon reargument, granted the motion of defendants for  
summary judgment with respect to treatment received by plaintiff prior  
to September 20, 2003.

It is hereby ORDERED that the order so appealed from is  
unanimously modified on the law by denying those parts of defendants'  
motion seeking summary judgment dismissing the complaint against  
defendants Valley View Family Practice Associates, LLP, Kathryn R.  
VanGelder, N.P. and Robert J. Ostrander, M.D. insofar as it is based  
on their acts of negligence occurring prior to September 20, 2003 and  
reinstating the complaint against those defendants to that extent, and  
as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action  
on March 20, 2006 alleging, inter alia, that defendants failed to  
diagnose an aneurysm of her middle cerebral artery, which ruptured on  
October 31, 2003. Plaintiff first visited defendant Valley View  
Family Practice Associates, LLP (Valley View) with respect to her  
headaches in November 1996, and defendant Robert J. Ostrander, M.D.,  
her primary care physician, diagnosed her with daily chronic headache  
disorder and prescribed Amitriptyline. That was the last time that  
Dr. Ostrander saw plaintiff concerning her headaches. Over the next  
seven years, however, plaintiff visited Valley View approximately 12  
times, and she usually saw defendant Kathryn R. VanGelder, N.P. On

many of those visits, the headaches plaintiff experienced or her Amitriptyline prescription were discussed. The last time plaintiff visited Valley View concerning her headaches prior to her ruptured aneurysm was on January 3, 2001. Following that appointment, plaintiff continued to receive prescriptions for Amitriptyline from Valley View, and she also had an office visit with VanGelder on May 3, 2003. While the main focus of that visit was an unrelated sinus condition, the office notes indicate that plaintiff's headaches were discussed, and a long term medicine log was created, with Amitriptyline being the only drug noted therein.

Defendants moved for summary judgment dismissing the complaint. Supreme Court granted that part of the motion seeking summary judgment dismissing the complaint against defendant FF Thompson Health System, Inc., doing business as Thompson Health. In addition, the court granted those parts of the motion seeking summary judgment dismissing as time-barred the complaint against Dr. Ostrander, Valley View and VanGelder (hereafter, defendants-respondents) insofar as it is based on their acts of negligence occurring prior to September 20, 2003, 2½ years prior to the date on which the action was commenced (see CPLR 214-a). Plaintiff thereafter moved for leave to "reargue and renew" her opposition to those parts of the motion concerning acts of negligence by defendants-respondents prior to September 20, 2003. We agree with plaintiff that the court, upon granting her motion, erred in adhering to its prior determination with respect to those acts of negligence.

Although defendants-respondents established their entitlement to judgment as a matter of law, plaintiff raised a triable issue of fact whether the continuous treatment doctrine operates to toll the statute of limitations (see e.g. *Simons v Bassett Health Care*, 73 AD3d 1252, 1254; *Bonanza v Raj*, 280 AD2d 948). The continuous treatment doctrine tolls the statute of limitations " 'when the course of treatment [that] includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint' " (*McDermott v Torre*, 56 NY2d 399, 405). The doctrine applies where the plaintiff submits evidence establishing "that some of [his or] her return visits to defendants were contemplated by both plaintiff and defendants[] and that defendants treated plaintiff for symptoms indicating the existence of" an undiagnosed condition (*Green v Varnum*, 273 AD2d 906, 907; see *Bonanza*, 280 AD2d 949). "Where, in a case such as this, it is alleged that a medical practitioner fails to properly diagnose a condition, the continuous treatment doctrine may apply as long as the symptoms being treated indicate the presence of that condition" (*Simons*, 73 AD3d at 1254).

In opposition to the motion, plaintiff submitted an affidavit from an expert physician establishing that her complaints of headaches dating back to her office visit with Dr. Ostrander in 1996 were related to the aneurysm she sustained in 2003, and that the failure of defendants-respondents to order additional diagnostic tests that would have disclosed the aneurysm constituted a departure from the accepted standard of medical care. We reject the contention of defendants-

respondents that plaintiff's visits were sporadic and not indicative of a course of continuous treatment, inasmuch as plaintiff submitted evidence in opposition to the motion establishing that at least "some of her return visits to defendants[-respondents concerning her headaches] were contemplated by both plaintiff and defendants[-respondents]" (*Green*, 273 AD2d at 907). In addition, defendants-respondents frequently prescribed medication for plaintiff's headaches (see *Stilloe v Contini*, 190 AD2d 419, 421-422). Although they contend that there were significant gaps in those prescriptions, plaintiff stated that she continually took her medication as directed, and her allegation that she sometimes received medication not reflected by actual prescription scripts is supported by notes in the records of defendants-respondents.

We therefore modify the order by denying those parts of defendants' motion seeking summary judgment dismissing the complaint against defendants-respondents insofar as it is based on their acts of negligence occurring prior to September 20, 2003 and reinstating the complaint against defendants-respondents to that extent.