

**Puskarik v Weil**

2009 NY Slip Op 30326(U)

February 6, 2009

Supreme Court, Nassau County

Docket Number: 11125/06

Judge: F. Dana Winslow

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**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

*SCAN*

**Present:**  
**HON. F. DANA WINSLOW,**  
**Justice**

\_\_\_\_\_  
**JOHN PUSKARIK,** **TRIAL/IAS, PART 7  
NASSAU COUNTY**

**Plaintiff,** **MOTION DATE: 9/25/08**  
**MOTION SEQ. NO.: 002**

**-against-** **INDEX NO.: 11125/06**

**PETER WEIL, M.D.,**  
**Defendant(s).**

**The following papers read on this motion (numbered 1-3):**

- Notice of Motion . . . . . 1**
- Affirmation in Opposition . . . . . 2**
- Affidavit in Reply . . . . . 3**

Defendant's motion for summary judgment pursuant to **CPLR §3212** is determined as follows.

This is a medical malpractice action predicated upon the alleged failure of defendant PETER WEIL, M.D. to diagnose and treat prostate cancer. Plaintiff alleges, without contradiction, that defendant was his primary care physician from March 2001 through March 2004. Plaintiff asserts, among other things, that defendant failed to: (i) assess and take into account plaintiff's signs, symptoms and medical history; (ii) timely perform or order appropriate diagnostic tests, including digital rectal examination, PSA blood test and/or biopsy of the prostate; and/or (iii) refer the plaintiff to specialists for evaluation of the prostate. *See* Verified Bill of Particulars, ¶¶ 3, 6, 7 [Motion Exhibit C]. It is undisputed that on March 16, 2004, defendant performed a digital rectal exam which revealed a 3+ prostate with a questionable nodule. This was plaintiff's final office visit with defendant. On March 17, 2004, a blood test revealed an elevated PSA of 697 (normal range is 0-4), and a bone scan showed multi-focal metastatic bone disease. A biopsy performed on March 23, 2004 revealed adenocarcinoma of the prostate. Plaintiff commenced this action by filing a Summons and Complaint on July 13, 2006.

Defendant now moves for an Order: (1) dismissing all allegations regarding care and treatment of plaintiff rendered prior to January 13, 2004, on the ground that such claims are time-barred by the applicable Statute of Limitations; (2) granting summary judgment regarding the care and treatment rendered by defendant in 2004 on the ground that such care and treatment did not cause or contribute to plaintiff's injuries; and (3) dismissing the Complaint in its entirety.

Plaintiff concedes that the care and treatment rendered in March of 2004 (including a March 2<sup>nd</sup> visit, as well as the final visit on March 16<sup>th</sup>) did not cause or contribute to plaintiff's injuries. Accordingly, the sole issue before the Court is whether or not the claims related to care and treatment rendered prior to January 13, 2004 are time-barred. Specifically, the Court must determine whether the "continuous treatment doctrine" is applicable to toll the Statute of Limitations on such claims.

A medical malpractice action must be commenced within 2-1/2 years from the date "of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." **CPLR §214-a**. Under the continuous treatment doctrine, "the time in which to bring a malpractice action is stayed when the course of treatment which includes the wrongful acts or omissions complained of has run continuously and is related to the same original condition or complaint." **McDermott v. Torre**, 56 NY2d 399, 405 (internal quotation omitted). The premise underlying this doctrine is that a patient should not be forced to interrupt corrective medical treatment or undermine the physician-patient relationship in order to preserve his or her legal claims. *See Young v. New York City Health and Hosps. Corp.*, 91 NY2d 291, 296; **Prinz-Schwartz v. Levitan**, 17 AD3d 175, 177. Accordingly, when this doctrine applies, the Statute of Limitations does not commence to run until the conclusion of the course of treatment. **CPLR §214-a**. *See Prinz-Schwartz*, 17 AD3d at 177; **Stilloe v. Contini**, 190 AD2d 419, 421.

"[E]ssential to the application of the doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit." **Nykorchuck v. Henriques**, 78 NY2d 255, 258-259. Neither the continuing relationship between the doctor and patient, nor the continuing nature of a diagnosis, establishes a continuous course of treatment for purposes of the doctrine. *Id.* at 259. Nor do "routine, periodic health examinations" or visits for unrelated health conditions. **Young v. New York City Health and Hosps. Corp.**, 91 NY2d 291, 296. Consistent monitoring, however, of a specific condition or abnormality for the purpose of detecting a disease, may constitute a continuous course of treatment, when the patient is aware of such monitoring and the purpose of the continuous treatment doctrine is served by tolling the

accrual of plaintiff's claim until the conclusion of treatment. *See Prinz-Schwartz*, 17 AD3d at 179.

In the case at bar, the applicability of the continuous treatment doctrine turns on the question of whether or not, prior to January 13, 2004, defendant was consistently monitoring plaintiff for specific symptoms or signs related to prostate disease. The record establishes that for the first two years of the relationship, plaintiff saw defendant on a monthly or bi-monthly basis for the care and treatment of a stroke. There is no evidence of prostate-related complaints prior to September 2001. Thereafter, the parties accounts of the relationship diverge. With respect to the quality and quantum of evidence, the Court finds two distinct time periods: (i) from November 13, 2003 to the end of treatment, and (ii) prior to November 13, 2003.

The events that occurred on November 13, 2003 and thereafter are substantially undisputed. Defendant's own records and testimony reveal that on November 13, 2003, plaintiff complained to defendant about nocturia (excessive urination at night) and decreased urine flow. [Transcript, Examination Before Trial of Peter Weil, M.D., February 8, 2008, attached as Motion Exhibit E ("Weil EBT"), p.55; Medical Records attached as Motion Exhibit F.] According to defendant, both of these conditions can be caused by an enlarged prostate. [Weil EBT, p.56.] Defendant admits that he was aware of plaintiff's decreased urine stream in November 2003, and claims that he urged plaintiff to submit to a digital rectal examination at that time, but plaintiff refused. [Weil EBT p.59] (Plaintiff denies refusing any examination, and there was no relevant notation in the medical records.) Defendant recalled that a follow-up visit was scheduled, but defendant could not recall the date or if it was earlier than the next actual office visit on March 2, 2004. [Weil EBT p.62.] The record of March 2, 2004 states, among other things, that there was "no change in BM or urine." [Weil EBT p.63.] Plaintiff's wife called defendant a week later to inform defendant that plaintiff's urinary symptoms had gotten worse and that plaintiff was "getting up all night to urinate." Defendant advised her to bring him in. [Weil EBT pp.68, 72] On March 16, 2004, defendant noted "[f]requency, decreased stream times three months. Light dysuria" [difficult or painful urination]. At that visit, defendant performed a digital rectal exam, ordered a PSA test and referred plaintiff to a urologist. [Weil EBT p.66-67.]

The above evidence is sufficient to preclude summary judgment on the question of whether or not defendant continuously monitored plaintiff's urinary complaints for purpose of detecting prostate disease from November 13, 2003 until the time of diagnosis in March 2004. Accordingly, the complaint cannot be dismissed in its entirety on Statute

of Limitations grounds. The cause of action may be limited, however, to include only that period of time for which there is sufficient evidence of continuous treatment.

With respect to the time period prior to November 13, 2003, the evidence is contradictory. Defendant's attorney states that "[p]laintiff intermittently treated with Dr. Weil from March 2001 – November 2003 for a variety of focused visits; during this time Dr. Weil did not render care and treatment to the plaintiff for prostate related complaints and/or monitoring." Affidavit in Support, sworn to on June 18, 2008, ¶9. The medical records reflect no notation of urinary complaints prior to November 13, 2003. (They do reflect a complaint of erectile dysfunction on February 15, 2002, which was marked resolved on March 25, 2002.) Defendant stated that "he [plaintiff] had never really complained about any urinary issues" [Weil EBT p.68]. Defendant also testified that the November 13, 2003 visit was the first time in which he discussed the necessity of a rectal examination with plaintiff. He admitted, however, that this testimony was based upon the absence of any earlier notation in the medical records, rather than upon his actual memory. [Weil EBT p.73] Defendant admitted that he does not write everything down regarding his interactions with a patient. [Weil EBT p.34]

Plaintiff and his wife (who accompanied plaintiff on most office visits) portray a different scenario. Both describe a series of ongoing urinary complaints prior to November 2003, as well as specific discussions of prostate cancer and diagnostic testing. Plaintiff's wife testified that in September and October of 2001, plaintiff complained to defendant of frequent urination at night. [Transcript, Examination Before Trial of Elise Puskarik, March 24, 2008, attached as Opposition Exhibit C ("Mrs. Puskarik EBT"), pp.45-49] According to Mrs. Puskarik, the symptoms continued and in February 2002, plaintiff requested a PSA blood test. [Mrs. Puskarik EBT pp. 54, 74.] Mrs. Puskarik also testified that plaintiff might have been given a digital rectal exam at the time he complained about erectile dysfunction (February 2002). [Mrs. Puskarik EBT pp. 92-93.]

Plaintiff testified as follows: He began to complain of urinary frequency sometime between November 2002 and February 2003. [Transcript, Examination Before Trial of John Puskarik, September 5, 2007, attached as Motion Exhibit D ("Plaintiff EBT"), p.41] In response, defendant asked plaintiff about his family history of cancer and prostate cancer, and performed a digital rectal examination. [Plaintiff EBT pp. 43, 46.] Defendant then informed him that his prostate was enlarged, and plaintiff relayed his concern about prostate cancer, and asked for a diagnostic blood test (PSA). [Plaintiff EBT pp. 47, 115]. Defendant indicated to plaintiff, either by implication or gesture, that "he was doing tests, he was staying on top of it." [Plaintiff EBT p.48, p.114-116] Plaintiff

assumed that, because his blood was being drawn monthly, defendant was monitoring his PSA levels. [Plaintiff EBT p.111.] In the summer of 2003, plaintiff began to complain about his difficulty urinating and emptying, and defendant asked questions about this and reassured him. [Plaintiff EBT pp. 74-75] Plaintiff also complained about blood in the urine around that time. [Plaintiff EBT p.76.]

In his affidavit, Plaintiff states generally that from November 2002 until his diagnosis in March 2004, plaintiff complained about urinary frequency and other symptoms on an ongoing basis at nearly all of the office visits, and that based upon defendant's responses, he believed that he was being tested and the condition was being monitored continuously. [Affidavit of John Puskarik, sworn to on August 27, 2008, attached as Opposition Exhibit E]

The Court notes that plaintiffs' testimony regarding rectal examinations is inconsistent with his allegation in the Bill of Particulars. Further, the testimony of plaintiff and his wife do not coincide regarding the timing of plaintiff's complaints. Nonetheless, the Court finds that the testimony of both plaintiffs is consistent regarding the nature of plaintiff's complaints, and their understanding that defendant was monitoring plaintiff's urinary symptoms for purposes of detecting prostate disease prior to November 13, 2003. Insofar as the testimony is neither conclusory nor inherently incredible, the Court finds it sufficient to raise an issue of fact.

Defendant argues, in essence, that plaintiff alleges nothing more than a series of complaints, and that even if his testimony were true, it does not depict a course of treatment, absent evidence of affirmative acts on the part of the doctor. Defendant emphasizes the apparent incongruity between the gravamen of plaintiff's complaint – that defendant failed to act – and the concept of continuous treatment, which implies action. The First Department held otherwise in **Prinz-Schwartz** [17 AD3d at 175], where the majority found that plaintiff's regularly scheduled breast examinations over the course of twelve years, which were negative for breast cancer but occasionally indicated fibrocystic changes or other irregularities, could constitute a course of treatment for purposes of the continuous treatment doctrine. The majority found triable issues of fact regarding whether the plaintiff was being monitored for a specific abnormality or condition and whether the frequency and intensity of the monitoring rose to a level sufficient to qualify as continuous treatment.

This Court finds greater incongruity in the notion that a doctor can potentially bar a cause of action by doing nothing in the face of a plaintiff's complaints. The Court acknowledges that if a physician simply omits to test a patient for a particular disease, then there is no continuous treatment, regardless of the ongoing nature of the relationship or of the disease. When such failure, however, is coupled with ongoing complaints or discussions of a specific and continuous nature, concerning particular problems, signs or symptoms of disease, then such omission becomes an affirmative act – a decision (conscious or otherwise) to delay testing or treatment pending further observation. In this context, the distinction between action and inaction is blurred to the point of insignificance, and the course of observation is tantamount to a course of treatment. As the First Department found in **Prinz-Schwartz** [17 AD3d at 175], the purpose of the continuous treatment doctrine is served by not requiring a patient to interrupt the monitoring of a specific condition in order to protect his or her legal rights.

That is not to say that the Court finds continuous treatment in the case at bar, as a matter of law. Rather, the Court finds that an issue of fact exists precluding summary judgment at this time. It is for a jury to determine whether defendant continuously monitored plaintiff's prostate condition, and for how long a period of time prior to the diagnosis and conclusion of their relationship. Accordingly, it is

**ORDERED**, that defendant's motion for summary judgment pursuant to **CPLR §3212** is **denied**, except to the extent that it is conceded that defendant's care and treatment of plaintiff in March 2004 did not proximately cause the injuries alleged.

This constitutes the decision and Order of the Court.

ENTER:

Dated:

*12/24/09*

*[Handwritten signature]*

J.S.C.

**ENTERED**  
FEB 06 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE