

Dippolito v Cicchiello
2019 NY Slip Op 34524(U)
April 25, 2019
Supreme Court, Orange County
Docket Number: Index No. EF007527/18
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

BARBARA DIPPOLITO,

Plaintiff,

- against -

LAWRENCE A. CICCHIELLO, M.D., MICHELE M. GRECO, M.D., JOSEPH RACANELLI, M.D., HUDSON VALLEY DIAGNOSTIC IMAGING, PLLC, RADIOLOGIC SERVICES, P.C. and ST. LUKE'S CORNWALL HOSPITAL,

Defendants.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF007527/18

DECISION and ORDER

Motion Date: March 13, 2019

The following papers numbered 1 through 27 were read and considered on (1) a motion by Defendant Lawrence A. Cicchiello, M.D., pursuant to CPLR § 3212, for partial summary judgment; (2) a motion by Defendant Michele M. Greco, M.D., pursuant to CPLR § 3212, for partial summary judgment; (3) a motion by Defendant Joseph Racanelli, M.D., pursuant to CPLR § 3212, for partial summary judgment; and (4) a cross motion by Defendant St. Luke's Cornwall Hospital, pursuant to CPLR § 3212, for partial summary judgment.

Table listing document titles and page numbers: Notice of Motion- Milligram Affirmation- Exhibits A-P (1-3), Opposition- Jordan Affirmation- Exhibit A- Dippolito Affidavit (10-12), etc.

Upon the foregoing papers, it is hereby,

ORDERED, that the motions are denied.

Introduction

The Plaintiff Barbara Dippolito commenced this action to recover damages for medical malpractice arising from the alleged failure to properly diagnose breast cancer.

The Plaintiff alleges that, from on or about April 24, 2014, through around May 10, 2018, she went to the Defendant Hudson Valley Diagnostic Imaging, PLLC (hereinafter “Hudson Valley Imaging”), for mammograms and ultrasounds, which were read by the Defendant doctors Lawrence A. Cicchiello, M.D., Michele M. Greco, M.D., and Joseph L. Racanelli, M.D. (hereinafter referred to collectively as the “Defendant Doctors”). However, she alleges, the Defendants failed to timely diagnose breast cancer.

The Defendant doctors each move for partial summary judgment. Each argues that the action is time-barred as to any alleged malpractice that occurred more than two-and-one-half years from the date of commencement.

The Plaintiff argues that the statute of limitation as to all treatment dates was tolled by the continuous treatment doctrine.

The Defendant St. Luke's Cornwall Hospital (hereinafter “St. Luke's”) also moves for summary judgment. St. Luke's notes that the Plaintiff alleges that it may be held vicariously liable for the conduct of Hudson Imaging and the Defendant doctors. Thus, it argues, to the extent the complaint is dismissed as against the Defendant Doctors, it must be dismissed as against it.

The motions are denied, for the reasons set forth herein.

Factual Background/Procedural History

The Plaintiff alleges that the Defendant Doctors all specialize in the field of diagnostic radiology, and that all are employees, etc. of the Defendant Hudson Valley Imaging and the

Defendant Radiologic Associates, P.C.

Further, that Hudson Valley Imaging is affiliated with St. Luke's.

The Plaintiff alleges that, from on or about April 24, 2014, through at least May 10, 2018, she used Hudson Valley Imaging exclusively for radiologic and diagnostic testing and procedures for her breasts. Specifically, she alleges:

On April 24, 2014, she underwent a bilateral screening mammogram at Hudson Valley Imaging.

The images were interpreted and reported by Cicchiello, who compared the same to two prior mammograms dated February 15, 2012, and March 15, 2013. Cicchiello identified a new nodular density in the left upper outer quadrant of the Plaintiff's left breast, and recommended a diagnostic mammogram and ultrasound. He observed that the right breast had no new densities, no suspicious clusters of micro calcifications, no areas of architectural distortion, or skin thickening.

On April 25, 2014, the Plaintiff underwent a diagnostic mammogram of her left breast.

The images were interpreted and reported by Greco, who found "the nodular density present within the upper outer left breast persists on additional imaging."

On April 25, 2014, she underwent an ultrasound of her left breast.

The images were interpreted and reported by Greco, who found a "4 mm hypochoic nodule in the 1 clock position, 6 cm from the nipple within the left breast," assigned his findings a "BI-RADS category 3¹" and recommended short interval follow-up.

¹According to Johns Hopkins Medicine, BI-RADS is an acronym for Breast Imaging Reporting and Data System. The number score denotes the following: 0: The mammogram study is still incomplete; 1: The mammogram study is negative (no evident signs of cancer); 2: The mammogram study is normal, but other findings (such as cysts) are described in the report; 3: The mammogram study is probably normal, but there's an approximately 2 percent chance of

On October 27, 2014, the Plaintiff underwent a diagnostic mammogram of her left breast.

The images were interpreted and reported by Racanelli, who found "an area of nodularity in the upper outer quadrant of the left breast...stable.... there are no sonographic findings."

On October 27, 2014, she underwent an ultrasound of her left breast.

The images were interpreted and reported by Racanelli, who compared the images to the images from April 25, 2014. Racanelli found "a persistent hypoechoic nodule in the left breast at the 1:00 position...this is 6 cm from the nipple margin.... this lesion measures 0.4 cm." Racanelli assigned his findings a BI-RADS category 2. Racanelli recommended a follow-up visit in six months, and clinical correlation.

On April 24, 2015, the Plaintiff underwent a bilateral screening mammogram.

The images were interpreted and reported by Racanelli, who found "no suspicious nodules or micro calcifications." and assigned his findings a BI-RADS category 1.

On April 24, 2015, the Plaintiff also underwent an ultrasound of her left breast for the six-month follow-up on the nodule.

The images were interpreted and reported by Racanelli, who found "a 0.4 cm cyst in the left breast at the 1 clock position...unchanged since the prior exam," and assigned his findings a BI-RADS category 2. Routine follow-up was recommended with clinical correlation as needed.

On May 4, 2016, the Plaintiff underwent a bilateral screening mammogram.

The images were interpreted and reported by Racanelli, who found "no suspicious nodules

cancer; 4: The mammogram study is suspicious and that there is an approximately 20 percent to 35 percent chance that a breast cancer is present; 5: The mammogram study is highly suspicious, and there is a 95 percent chance of breast cancer; and 6: A diagnosis of breast cancer has been confirmed.

or micucalcifications," and assigned his findings a BI-RADS category 1.

On May 4, 2016, the Plaintiff underwent an ultrasound of her left breast for follow-up on her nodule.

The images were interpreted and reported by Greco, who found "a stable 0.3 cm hypoechoic nodule in the left breast 1:00 position, 6 cm from the nipple," and assigned her findings a BI-RADS category 2.

Rancanelli compared the images to those obtained on April 24, 2015, and found that there were no suspicious nodules or micro calcifications, and no radiographic changes. Routine follow-up and clinical correlation was again recommended.

On June 20, 2017, the Plaintiff underwent a bilateral screening mammogram.

The images were interpreted and reported by Cicchiello, who compared the images to all prior images. Cicchiello found "no mammographic evidence of malignancy...stable appearance both breasts," and assigned his findings a BI-RADS category 1.

On June 20, 2017, the Plaintiff underwent an ultrasound of her left breast as follow-up of a mass in her left breast.

The images were interpreted and reported by Cicchiello, who found "a 3 mm hypoechoic mass in the left breast at the 1:00 position 6 cm from the nipple...this is unchanged dating back to 4/25/2014," and assigned his findings a BI-RADS category 2.

Cicchiello noted no new densities, no suspicious clusters of micro calcifications, no architectural distortion, no skin thickening, and no significant findings. He recommended routine follow-up.

On May 10, 2018, the Plaintiff underwent a bilateral diagnostic mammogram and ultrasound.

The images were interpreted and reported by Cicchiello, who compared the images to all prior images.

The mammogram images indicated stable benign asymmetries in the left breast which were unchanged from all prior mammogram studies, with no evidence of malignancy.

However, the ultrasound images revealed a "7 mm heterogeneous mass in the left breast at the 1:00 position is suspicious" as well as a "new 7 mm hypoechoic mass in the left breast at the 12:00 position and a 1.0 cm left axillary lymph node with cortical thickening." Cicchiello assigned his findings a BI-RADS category 4 and recommended ultrasound-guided core needle biopsies of the two masses and axillary lymph node.

In May 2018, the Plaintiff underwent biopsy of her left breast.

The pathology results showed Stage IV cancer in the breast.

The Plaintiff alleges that this was the first time she was told and became aware that she had breast cancer.

The Motions of the Defendant Doctors

Each of the Defendant Doctors is being represented by the same counsel, Steven Milligram. Each move for summary judgment on the same ground, to wit: that any claim arising from alleged malpractice that occurred more than two-and-one-half years prior to the commencement of this action is time-barred.

Further, Milligram argues, no otherwise time-barred allegations are revived by application of recent amendments to CPLR § 214-a, as they relate to the discovery of cancer.

Finally, Milligram asserts, the statute of limitations as to any allegation was not tolled by the continuous course of treatment doctrine.

In opposition to the motions, the Plaintiff submits affirmations from her attorney, Laura Jordan.

Jordan argues that the statute of limitation was tolled for the entire year period at issue because it constituted a continuous course of treatment. That is, beginning on April 24, 2014, the Defendant Doctors continually monitored the Plaintiff based on the abnormal finding of a nodule in her left breast. Indeed, she notes, the reports of the ultrasounds and mammograms from April 25, 2014, October 27, 2014 and April 24, 2015, all indicate that they are follow-ups for the abnormal finding in the Plaintiff's left breast. In fact, she notes, it was the Defendant Doctors who advised and instructed the Plaintiff to return to them for follow-up for monitoring and evaluation of her abnormal left breast condition.

At a minimum, Jordan argues, the motions should be denied as premature because no disclosure had occurred and it appeared that facts essential to justify opposition to the motion may exist but cannot be stated. For example, she asserts, there are significant issues of fact whether the moving Defendants engaged in a continuous course of treatment as to the Plaintiff, "including facts that may be in the exclusive control of defendants, such as records, letters, notices, and office procedures defendants have for monitoring and following-up on irregular or abnormal breast imaging findings such as [the Plaintiff's].

Additionally, Jordan notes, no testimony had been taken, and the Plaintiff had not had an opportunity to question the Defendant Doctors about their involvement in her medical care and treatment.

Jordan notes that all of the breast imaging radiology reports for the Plaintiff from 2014 through 2018 have "Hudson Valley Imaging" printed at the top and are electronically signed by the

interpreting and reporting radiologist at the bottom. Also, she notes, the reports through 2017 indicate that the Plaintiff is being followed by Hudson Valley Imaging and its radiologists for the abnormality of her left breast (nodule/mass).

Jordan asserts that the Plaintiff only terminated her patient-physician relationship with the Defendant Doctors and Hudson Valley Imaging after she was diagnosed with Stage IV breast cancer.

At the very least, Jordan argues, there are issues of fact present as to whether "plaintiff was being monitored for a specific medical condition and whether plaintiff was aware of this monitoring to an extent that the underlying purpose of the continuous treatment would be served by tolling the accrual of plaintiff's claim until the completion of her treatment."

The Plaintiff also submits her own affidavit.

The Plaintiff avers that, as early as February 2012, she became a patient of Hudson Valley Imaging in New Windsor for all of her breast imaging and breast health care. She went there on a continuous basis until May 2018.

In February 2012 and March 2013, she went to Hudson Valley Imaging for her annual mammogram. No abnormalities were brought to her attention.

However, she asserts, after her annual mammogram on April 24, 2014, she was told that there was an irregularity, a new abnormality, in her left breast that was suspicious and required further evaluation. She was told to come back the next day for another mammogram and an ultrasound. This, she avers, was the first time that any abnormality or irregularity was brought to her attention. It was also the first time she was told to come back for further evaluation of her left breast.

The next day, she notes, she returned to Hudson Valley Imaging and underwent another mammogram and an ultrasound of her left breast. She was told that the radiologist found and

confirmed the presence of an abnormality and irregularity in her left breast, and was told to return in six months for a follow-up examination and testing.

On October 27, 2014, she returned to Hudson Valley Imaging and underwent a mammogram and an ultrasound on left breast. She was told that the abnormality was still present, and they needed to monitor and evaluate again in six months.

On April 24, 2015, she returned to Hudson Valley Imaging and underwent an ultrasound on her left breast. She was told to return for a follow-up in 12 months.

On May 4, 2016, she returned to Hudson Valley Imaging and underwent ultrasound testing on her left breast, and mammograms of both breasts. She was told that the left breast irregularity “had not changed much in comparison to the April 2015 ultrasound,” and was told to return in one year.

On June 20, 2017, she returned to Hudson Valley Imaging and underwent an ultrasound of her left breast, and mammograms of both breasts. She was told to follow-up in one year.

On May 10, 2018, she returned to Hudson Valley Imaging and underwent and an ultrasound of her left breast and mammograms of both breasts. During the ultrasound examination, she avers, the radiologist “appeared very flustered,” and told her that further imaging was needed to evaluate abnormal findings in her left breast.

The very next day, on May 11, 2018, she underwent a PET/CT scan performed by Hudson Valley Imaging. Shortly thereafter, her physicians informed her that she had Stage IV, incurable, metastatic left breast cancer.

The Plaintiff avers that, throughout the time period from April 2014 until May 2018, she was continuously a patient of Hudson Valley Imaging and its radiologists (the Defendant Doctors) for

all of her breast imaging and breast health medical needs and, more specifically, for the purpose of continually following-up on, evaluating and monitoring the irregular abnormality detected in her left breast, beginning in April 2014.

Throughout that entire time period, she asserts, she had trust and confidence that Hudson Valley Imaging and its radiologists were providing her with the best medical care for her breast imaging evaluations and tests, and were following-up on the discerned abnormalities in her left breast in order to catch any breast cancer in its early stages. In fact, she avers, her ongoing patient-physician relationship with Hudson Valley Imaging and its radiologists was so important to her that she would often travel for hours to their office for imaging studies and evaluations, including the follow-up imaging and evaluations at issue.

The Plaintiff asserts that her physicians at Hudson Valley Imaging specifically instructed her to return for follow-up evaluations of her left breast abnormality on April 25, 2014, October 27, 2015, April 24, 2015, May 4, 2016, June 20, 2017 and May 10, 2018, and that, at each of those follow-up dates, they performed ultrasound image testing of her left breast only to evaluate, monitor and follow-up on the abnormality first identified on April 24, 2014. Further, she avers, at each of the appointments, she was instructed, and it was her understanding, that the follow-up visits were for breast imaging and ultrasounds of her left breast related to the abnormality.

Further, she notes, after the April 2014 imaging revealed the abnormality in her left breast, Hudson Valley Imaging and its radiologists sent her letters instructing her as to the proper follow-up interval (6 months in beginning and then one year) to continuously evaluate and monitor the abnormality in her left breast.

They also mailed her reports in April 2014 that indicated the size and location of the left

breast irregular abnormality. Further, after all subsequent follow-up appointments, they mailed her reports indicating that the left breast abnormality was unchanged.

Based upon the information provided to her by Defendants from April 2014 through May 2018, she avers, she understood that Hudson Valley Imaging and the Defendant Doctors were continuously monitoring her left breast abnormality, and that it was expected that she would return for follow-up testing and evaluation.

Further, she asserts, she followed all instructions, recommendations and evaluation plans, and always complied with any plan for follow-up breast imaging evaluations.

Finally, she avers, it was not until after May 10, 2018, when she was diagnosed with terminal Stage IV metastatic left breast cancer, that she chose to terminate her ongoing and continuous patient-physician relationship with Hudson Valley Imaging and its radiologists.

St Luke's Cross Motion

St. Luke's also moves for partial summary judgment.

In support of its motion, St. Luke's submits an affirmation from counsel, Ellen Fischer.

Fischer notes that all of the claims as against St. Luke's arise from alleged vicarious liability for the negligence of the Defendant Doctors. Thus, she argues, to the extent that any claims as against the Defendant Doctors are dismissed as time-barred, the same causes of action must be dismissed as against St. Luke's.

Fisher notes that St. Luke's also denies that it may be held vicarious liable for the conduct of the Defendant Doctors, as St. Luke's did not employ any of the doctors, and none of the studies at issue were performed at St. Luke's. However, she asserts, St. Luke's is not seeking to dismiss the complaint as against it based on the same at this time.

In opposition to St. Luke's motion, the Plaintiff submits an affirmation from her attorney, Laura Jordan.

Jordan notes that the various radiologic reports appended to the Plaintiff's motion papers all have printed as the top, "Hudson Valley Imaging affiliated with St. Luke's Cornwall Hospital."

Otherwise, she asserts, St. Luke's's arguments that any claim is time-barred should be rejected for the same reasons argued *supra* as to the Defendant Doctors and Hudson Valley Imaging.

In reply, Fischer notes that the Plaintiff did not address the contention of the Defendant Doctors that the amendment to CPLR 214-a is inapplicable to this matter. Thus, she argues, it should be deemed admitted.

Further, she asserts, although the Plaintiff argues that there was a continuous course of treatment for her left breast, she failed to establish this claim, despite having access to all necessary information to do so. Specifically, Jordan argues, for the continuous treatment doctrine to apply, the treatment which includes the wrongful acts or omissions must run continuously and must be related to the same original condition or complaint. Here, she argues, the Plaintiff failed to establish that the nodular density she claims was being monitored was actually cancerous. Indeed, Jordan asserts, it is not even clear whether the cancer was located in the same place as the initial nodular density, to wit: When interpreting the April 24, 2014, mammogram, Cicchiello identified a nodular density in the left upper outer quadrant, but did not specify the exact position. Similarly, she notes, when interpreting the diagnostic ultrasound of April 25, 2014, Greco identified a benign appearing nodular density in the upper outer left breast, also without specifying the exact position. Further, she notes, when interpreting the April 24, 2014, ultrasound, Greco noted a 4 mm nodule in the 1:00 position, 6 cm from the nipple, and stated that it likely corresponded to the nodule seen on mammogram.

Racanelli's interpretation of the October 27, 2014, mammogram included a finding of an area of nodularity in the upper outer quadrant of the left breast. When interpreting the ultrasound performed on October 27, 2014, Dr. Racanelli located a 0.4 nodule in the left breast at 1:00, 6 cm from the nipple.

Fischer argues that the Plaintiff presented no evidence, expert or otherwise, that the initial finding was related to her ultimate cancer diagnosis.

Further, she asserts, the Plaintiff admits that the April 24, 2015, mammogram was read as entirely negative with no suspicious nodules, and that only a "routine" mammographic follow-up was recommended at that time. In other words, Fischer argues, there was no abnormal finding, and the only recommendation was for routine mammography screening.

Similarly, she asserts, the ultrasound of the same date indicates that there was a 0.4 cm cyst in the left breast at the 1 o'clock position which was unchanged from the prior examination. Indeed, Fischer contends, that the Plaintiff did not in fact return for a visit until over a year later establishes that the subsequent screening was routine in nature.

In addition, Fischer notes, the May 4, 2016, mammogram report states that the results were "negative" and that there were no suspicious nodules. The ultrasound of the same date also found that the previous 1:00 nodule was stable, and in the same position of 6 mm from the nipple, and benign.

Similarly, she notes, the June 2017 ultrasound, performed one year later, continued to show a stable 3 mm finding in the left breast at 1:00 at 6 cm from the nipple, and the mammogram report continued to state that there were no suspicious findings. Again, she notes, the Plaintiff did not return for year.

Indeed, Fischer asserts, it was not until the May 10, 2018, mammogram and ultrasound reports that a new finding of a 7mm mass at the 12:00 position, and a 7 mm mass in the 1:00 position 9 cm from the nipple (not 6 cm) is reported. There was also a mention of a 1.0 cm left axillary lymph node.

Fischer argues that there is no expert or other evidence in the record that the 7 mm nodule located at 1:00 but at 9 cm from the nipple, was the same one that was previously described at 6 cm.

Further, she asserts, there is no expert or other evidence in the record that establishes that the 1:00 nodule at 6 cm was even cancerous.

Rather, she contends, the Plaintiff's counsel states, without support, that the biopsy of the "left breast" was positive for breast cancer. Importantly, however, she asserts, it was never claimed, let alone proved, that: a. the biopsy was of the nodule at the "1:00 position 6 cm from the nipple," which the Plaintiff's counsel claims was being monitored by the 2014-2015 films, rather than the 2018 finding at 9 cm from the nipple, as described in the report; or b. that the biopsy in fact revealed that the breast cancer was from the nodule at the "1:00 position 6 cm from the nipple," as opposed to the nodule of 9 cm from the nipple, or the new nodule at 12:00.

Indeed, Fischer notes, the Plaintiff's counsel did not attach the biopsy report of the left breast, let alone a physician's affidavit stating that the Plaintiff's breast cancer corresponded to the "1:00 at 6 cm" nodule that she alleges was being followed up upon.

Fischer notes that the Plaintiff's counsel herself is not qualified to render such an opinion.

In addition, Fischer argues, any claim that additional disclosure is required to establish opposition to the motion is without merit. Rather, she asserts, whether or not the 2014-2015 films in question monitored a nodule which turned out to be cancerous is at the heart of the Plaintiff's case,

and all of the information necessary to provide an expert opinion as to the same (*i.e.*, the Plaintiff's films and medical records) is within the Plaintiff's control or access, and should have been obtained prior to instituting this lawsuit in order to complete the certificate of merit attached to the Complaint.

Finally, she argues, disclosure from the other Defendants is not necessary to resolve this issue.

In reply, counsel for the Defendant Doctors, Steven Milligram, argues that none of the Defendant Doctors' motions should be denied as premature. Indeed, he asserts, the Plaintiff failed to demonstrate any evidentiary basis to suggest that additional disclosure might lead to relevant evidence. Rather, he contends, the Plaintiff merely lists various issues, such as the office procedures and each radiologist's involvement in the medical care and treatment of Plaintiff, that are irrelevant for the analysis of the motion at bar. Thus, he argues, the Plaintiff failed to offer anything beyond mere hope and speculation that further discovery might lead to relevant evidence sufficient to defeat the motion for summary judgment.

Otherwise, he asserts, the continuous treatment doctrine does not toll the statute of limitation as to any claim.

Here, he argues, none of the Defendant Doctors were a "treating physician" for the Plaintiff. Rather, their roles were limited to interpreting mammogram and ultrasounds, and reporting finding. None assumed a general duty of care to independently diagnose the Plaintiff's medical condition.

In general, he notes, the Courts have held that a patient's continuing general relationship with a physician, or routine, periodic health examinations, do not constitute "continuous treatment." Nor do isolated breast examinations, only one of which is alleged to have been performed by a Defendant Doctor during the relevant period. Rather, he argues, each of the examinations was "discrete and

complete.”

Finally, Milligram notes, the Plaintiff did not address the issues raised concerning the applicability of the amendments to CPLR § 214-a. Rather, he asserts, the entirety of her opposition is premised on the continuous treatment doctrine.

Discussion/Legal Analysis

The Defendant Doctors' Motion

In general, an action for medical malpractice must be commenced within two years and six months 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*.

Relevant to the case at bar, the Legislature, effective January 31, 2018, amended CPLR § 214-a to provide as follows.

(b) where the action is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within two years and six months of the later of either (i) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment where there is continuous treatment for such injury, illness or condition. For the purpose of this section the term “continuous treatment” shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition.

L.2017, c. 506, § 2, eff. Jan. 31, 2018. The Legislature also amended CPLR §203 to include the same language. (The amendments are also known as “Laver's Law.”)

According to the sponsor of the bill,

In medical malpractice cases, arising out of a misdiagnosis or the failure to diagnose, the injury suffered by the victim of such a tort is often discovered until well after the statute

of limitation has expired.

This bill would remove this significant loophole in the law, which allows a patient's rights to expire without the patient even knowing that she had any rights. The bill would not mandate that any claim be deemed meritorious - instead, the bill would merely prevent the state statute of limitations from being used as an unfair and inequitable shield from professionally negligent medical misconduct.

New York Sponsors Memorandum, 2017 S.B. 6800, NY Spons. Memo., 2017 S.B. 6800.

Here, the action was commenced on July 19, 2018. Thus, under the general rule, the Plaintiff, in the absence of a continuous course of treatment, would be time-barred from seeking damages for any act or omission that occurred prior to January 19, 2016 (*i.e.*, two-and-a-half years prior to commencement).

Thus, here, in the absence of a continuous course of treatment, the Plaintiff is time-barred from seeking damages for any alleged malpractice that occurred during her April 25, 2014, October 27, 2014, and April 24, 2015, visits. That is, only her visits on May 4, 2016, and afterward are within the relevant two-and-a-half year period of limitation.

The Court notes that the Plaintiff does not challenge the contention of the Defendant Doctors that the statute of limitation as to any date is not revived by application of the recent amendments to CPLR § 214-a (*supra*). Further, the Court notes, the Defendant Doctors appear correct. *NYPRAC-PI § 5:87; New York Practice Series--Personal Injury Practice in New York; Filing Suit: Time Bars and Pleading Concerns.*

Consequently, it must be determined whether the Plaintiff raised a triable issue of fact that the otherwise time-barred acts and omissions are timely under the continuous course of treatment doctrine. *Ozimek v. Staten Island Physicians Practice, P.C.*, 101 A.D.3d 833 [2nd Dept. 2012]. The Court finds that she has.

The continuous course of treatment doctrine tolls the statute of limitations when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint. *Lohnas v. Luzi*, 30 N.Y.3d 752; *Cohen v. Gold*, 165 A.D.3d 879 [2nd Dept. 2018]. Essential to the application of the doctrine is that there has been a course of treatment established with respect to the relevant condition. Thus, a mere continuing relation between physician and patient, or the continuing nature of a diagnosis, is insufficient to invoke the doctrine. *Cohen v. Gold*, 165 A.D.3d 879 [2nd Dept. 2018]. “Treatment” does not necessarily terminate upon the last visit, if further care or monitoring of the condition is explicitly anticipated by both physician and patient, as manifested by a regularly scheduled appointment for the near future. *Cohen v. Gold*, 165 A.D.3d 879 [2nd Dept. 2018]. Thus, included within the scope of continuous treatment is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment. *Cohen v. Gold*, 165 A.D.3d 879 [2nd Dept. 2018]. Even the monitoring of an abnormal condition may be sufficient to support the application of the continuous treatment toll. *Cohen v. Gold*, 165 A.D.3d 879 [2nd Dept. 2018]. The critical inquiry is not whether the defendant failed to make a diagnosis or undertake a course of treatment during the period of limitation, but whether the plaintiff continued to seek treatment for the same or related conditions giving rise to his or her claim of malpractice, during that period. *Cohen v. Gold*, 165 A.D.3d 879 [2nd Dept. 2018]. Accordingly, a defendant cannot defeat the application of the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, if the defendant treated the plaintiff continuously over the relevant time period for symptoms that are ultimately traced to that condition. *Cohen v. Gold*, 165 A.D.3d 879 [2nd Dept. 2018].

Here, there is a question of fact as to whether there was a continuous course of treatment that began on the April 25, 2014, visit, at which time the Defendant Doctors first observed an abnormality in the Plaintiff's left breast, and after which the breast was subjected to greater scrutiny than the right breast.

The Court finds no merit or support for the contention of St. Luke's that, in order to raise a triable issue of fact as to the application of the doctrine, the Plaintiff must demonstrate, in effect, that the abnormality initially detected on April 25, 2014, was the same, or was the actual source, of the cancer at issue. Not only is such a contention contrary to the basic definition of the doctrine, which requires treatment for the same *or a related* condition, but also, there are numerous cases concerning breast cancer with similar fact patterns; none of which state or evince such a narrow interpretation of the term "condition." *See, e.g., Ozimek v. Staten Island Physicians Practice, P.C.*, 101 A.D.3d 833 [2nd Dept. 2012]; *Cherise v. Braff*, 50 A.D.3d 724 [2nd Dept. 2008].

Otherwise, in general, whether a course of treatment concerns the same or a related condition is a question of fact for the jury. *Canter v. East Nassau Medical Group*, 270 A.D.2d 381 [2nd Dept. 2000].

Finally, in their reply brief, the Defendant Doctors appear to be raising new arguments concerning the nature of the duty they owed the Plaintiff, and whether they were "treating" her for the condition at issue. *Mosezhnik v. Berenstein*, 33 A.D.3d 895 [2nd Dept. 2006]. The Court does not find these arguments to be within the scope of the issues raised by the motion. Otherwise, new arguments may not be raised in reply papers.

In sum, the motions of the Defendant Doctors are denied.

St. Luke's Cross Motion

Given the analysis *supra*, St.Luke's cross motion must also be denied.

Accordingly, and for the reasons discussed herein, it is hereby,

ORDERED, that the motions and cross motion are denied; and it is further,

ORDERED, that the parties, through respective counsel, are directed to, and shall, appear for a Status Conference on Wednesday, June 5, 2019, at 9:15 a.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: April 25, 2019
Goshen, New York

ENTER



HON. ROBERT A. ONOFRY, A.J.S.C.

TO: POWERS & SANTOLA, LLP
Attorneys for Plaintiff
Office & P.O. Address
100 Great Oaks Boulevard, Suite 123
Albany, New York 12203

CATANIA, MAHON, MILLIGRAM & RIDER, PLLC
Attorneys for Defendant Doctors and Hudson Valley Imaging
Office & P.O. Address
One Corwin Court, P.O. Box 1479
Newburgh, New York 12550

FELDMAN, KLEIDMAN, COFFEY,
SAPPE & REGENBAUM, L.L.P.
Attorneys for Defendant St. Luke's Hospital
Office & P.O. Address
995 Main Street, P.O. Box A
Fishkill, New York 12524