

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

YVETTE HOLMES	:	
	:	CIVIL TRIAL DIVISION
	:	
Appellant/Plaintiff,	:	Lead Case:
	:	MAY TERM, 2006
	:	No. 2724
	:	
v.	:	JUNE TERM, 2004
	:	No. 0349
	:	
	:	Superior Court Docket No.
CARMEN WILLIAMS, M.D., BETH W.	:	2163 EDA 2006
RACKOW, M.D., PREMAL THAKER, M.D.,	:	
CALEB B. KALLEN, M.D.	:	
	:	
Appellees/Defendants	:	

OPINION

PROCEDURAL HISTORY

Plaintiff appeals from the Order dated August 2, 2006, wherein the lower Court granted defendants Motion for Judgment on the Pleadings and dismissed plaintiff's second action (May Term, 2006 No. 2724).

FACTUAL BACKGROUND

On June 14, 2002, plaintiff Yvette Holmes (Holmes) was admitted by Dr. Carmen Williams (Dr. Williams), to the Hospital of the University of Pennsylvania in order to undergo a total abdominal hysterectomy and bilateral salpingo-ooophorectomy¹ as the definitive treatment for endometriosis and chronic pelvic pain. (Defendants' Motion For

¹ Salpingo-ooophorectomy is the surgical removal of a fallopian tube and an ovary. *Mosby's Medical Dictionary* (6th ed.) 2002.

Judgment On The Pleadings, Exhibit C, pg. 2). Although only thirty-seven (37) years old, Holmes had a 20-year history of chronic pelvic pain and several years history of endometriosis. (Defendants' Motion For Judgment On The Pleadings, Exhibit C, pg. 2). She underwent multiple laparoscopic² procedures for pain, and her pain had been refractory³ to medical therapy. (Defendants' Motion For Judgment On The Pleadings, Exhibit C, pg. 2).

The hysterectomy was performed by Dr. Williams, Premal Thaker, M.D. (Dr. Thaker) as assistant surgeon, and Beth Rackow, M.D. (Dr. Rackow) also assisting in the surgery. (Id.). During the surgery, an O'Sullivan O'Connor device was used for retraction of the tissues away from the operative field. (Id.). The hysterectomy procedure was determined to be otherwise uneventful. (Id.).

However, Holmes developed left-sided pain and weakness immediately following her hysterectomy surgery and she had difficulty getting out of bed. (Id.). On June 18, 2002, she was discharged home and, since that time, had complained of low back pain and hair-tingling sensation in her left lower extremity over the anterior surface of her left leg. (Id.).

In August 2002, Holmes presented to the Hospital of the University of Pennsylvania (HUP) Emergency Room with complaints of left lower extremity pain and persistent weakness, along with numbness involving her right upper extremity extending to her right leg. (Defendants' Motion For Judgment On The Pleadings, Exhibit C, pg. 3).

² The examination of the abdominal cavity with a laparoscope [illuminated tube with an optical system] through one or more small incisions in the abdominal wall, usually at the umbilicus. The procedure is used for inspection of the ovaries and fallopian tubes, diagnosis of endometriosis, destruction of uterine leiomyomas and myomectomy. *Mosby's Medical Dictionary* (6th ed.) 2002.

³ Pertaining to a disorder that is resistant to treatment. *Mosby's Medical Dictionary* (6th ed.) 2002.

Holmes contends that the O'Sullivan O'Connor retractor was improperly placed by defendants and used during the performance of the hysterectomy causing her to sustain permanent left L5 lumbar radiculopathy causing such pain and discomfort. (Id.).

On June 8, 2004, plaintiff Holmes, and her husband Darryl Holmes⁴, filed her original Complaint against Drs. Rackow, Thaker, Williams. In addition they included Dr. Peter Craig, Dr. Linda Chen, Dr. Angelina Castro, The University of Pennsylvania Health System and the Trustees of the University of Pennsylvania. (Defendants' Motion For Judgment On The Pleadings, pg.1). This original action did not include Dr. Caleb Kallen (Dr. Kallen).

Plaintiff has since amended her Complaint two (2) times. (See Docket, June Term, 2004, No. 0349). In addition to filing her Third Amended Complaint, plaintiff also instituted a new action under a separate court term and number on May 19, 2006. (See Docket May Term, 2006, No. 2724).

In her Third Amended Complaint, plaintiff alleged that the defendants, Drs. Rackow, Thaker, Williams, Craig, Chen, Castro, HUP and The Trustees of HUP were liable for injuries allegedly suffered by her as a result of the hysterectomy performed at HUP. (Defendants' Motion For Judgment On The Pleadings, pg.2).

Upon completion of discovery, defendants filed their Motion for Summary Judgment on March 6, 2006 seeking the dismissal of defendants Drs. Craig, Chen and Castro on the basis that plaintiff's had not produced any expert testimony which was critical of their care of plaintiff. Defendants Motion was subsequently granted on May 24, 2006. (Defendants' Motion For Judgment On The Pleadings, pg.2).

⁴ Plaintiff Darryl Holmes has since passed away thereby extinguishing his claim.

Plaintiff subsequently filed her second action (May Term, 2006, No. 2724). In the second action, plaintiff alleges that she only recently discovered that the June 15, 2002 hysterectomy procedure at issue in the June 2004 action was not “medically necessary and should not have been performed.” (Defendants’ Motion For Judgment On The Pleadings, pg.2). Plaintiff’s second action also added Dr. Kallen as a named defendant. The allegations in the second action also contain language analogous to that of the original action.

Plaintiff consolidated these two cases on May 22, 2006. (See Docket, June Term, 2004, No. 0349). Defendants filed their Motion for Judgment on the Pleadings on July 5, 2006 under the new action.⁵

The Court granted defendants’ Motion for Judgment on the Pleadings on August 3, 2006. Plaintiff’s filed their appeal to this Order on August 4, 2006 and filed their 1925(b) Statement of Matters Complained Of On Appeal accordingly.

Plaintiff raises two issues on appeal:

1. Whether the trial Court committed an error of law or abused its discretion as to the timeliness of granting the Motion for Judgment On The Pleadings.
2. Whether the trial Court committed an error of law or abused its discretion in dismissing the Complaint for statute of limitations where the plaintiff alleges that she recently discovered that the June 2002 hysterectomy was not medically necessary despite previous litigation involving this matter.

⁵ A second Order was issued consolidating these 2 cases. The second consolidated Order was issued on July 13, 2006 by Judge New. (See Docket, May Term, 2006, No. 2724).

LEGAL ANALYSIS

According to the Pennsylvania Rules of Civil Procedure, "after the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for a judgment on the pleadings." *Pa.R.C.P. 1034(a)*. A motion for judgment on the pleadings is in the nature of a demurrer as it gives the means to test the legal sufficiency of the pleadings. All of the plaintiffs' allegations must be taken as true for the purposes of a motion for judgment on the pleadings. In addition, the motion should be granted where the law is clear and trial would be "a fruitless exercise." *Bata v. Central-Penn National Bank*, 423 Pa. Super. 373, 378, 224 A.2d 174, 178 (1966). It is well-settled that judgment on the pleadings is appropriate if there are no disputed issues of fact. *Williams by Williams v. Lewis*, 319 Pa. Super. 552, 555, 466 A.2d 682, 683 (1983).

In *Newspaper Guild of Greater Philadelphia v. Philadelphia Daily News, Inc.*, 401 Pa. 337, 342; 164 A.2d 215, 218 (1960), appellant initially contended that the Guild's motion for judgment on the pleadings, pursuant to Pa.R.C.P. 1034, was prematurely filed before the pleadings were closed. *Id.* Our Supreme Court found that "Guild failed to reply to the 'New Matter' contained in the appellant's answer within *twenty days* from the date of service thereof." (emphasis added). *Id.* The *Guild* Court further held that "[s]ince not replied to, the averments of fact therein must be taken as admitted." *Id.* at 343. Pa.R.C.P. 1029,.; *W.T. Price, Inc. v. Robbins*, 298 Pa. 568 (1930). "Once this is established, the pleadings are closed (there were at that point no open pleadings to which to reply) and a motion under Rule 1034 was in order." *Id.*

Defendants served their Answer with New Matter to plaintiff on July 13, 2006. (Certificate of Service, Defendants' Answer with New Matter). According to the rules and caselaw, plaintiff had twenty (20) days to file their response to the New Matter. This would have required that they file their response on August 2, 2006. The Court granted Defendant's Motion for Judgment on the Pleadings on August 2, 2006, but did not docket the Order until August 3, 2006. At that point no response to the New Matter had been filed with the Court. In fact no response was filed to the New Matter. Since the twenty (20) days had passed and plaintiff failed to file a response the averments in the new matter are deemed admitted and the pleadings were closed.

In applying the principle in *Guild* to the case sub judicie, it was proper for the Court to consider the Motion for Judgment on the Pleadings because once the plaintiff did not file an Answer within the time period allowed, the pleading phase of the action was closed.

We will now address the second issue as to whether discovery rule is applicable to the second action to stay the tolling of the statute of limitations from the June 2002 hysterectomy.

Section 5524 provides that "an action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another," must be commenced within two years. *42 Pa.C.S.A. 5524*.

Our Supreme Court explains that "it is the duty of a party asserting a cause of action to use all reasonable diligence to be properly informed of the facts and

circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period.” *Hayward v. Medical Center of Beaver County*, 530 Pa. 320, 608 A.2d 1040, 1040 (Pa. 1992); *Pocono International Raceway, Inc., v. Pocono Produce Inc.*, 503 Pa. 80, 468 A.2d 468, 471 (Pa. 1983); *Walters v. Ditzler*, 424 Pa. 445, 227 A.2d 833, 835 (Pa. 1967). Lack of knowledge, mistake or misunderstanding does not toll the running of the statute of limitations. *Pocono*, 468 A.2d at 471.

The "discovery rule" is an exception to the general rule that once the statutory period has expired, the party is barred from bringing suit. *Murphy v. Diogenes A. Saavedra, M.D., P.C.*, 560 Pa. 423 , 746 A.2d 92 (2000). The discovery rule provides that where the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible. *Id.* (citing *Schaffer v. Larzelere*, 410 Pa. 402, 189 A.2d 267, 270 (Pa. 1963)). Prior to applying the exception of the discovery rule to a case, the Court must address the ability of the injured party, exercising reasonable diligence, to know that she has been injured by the act of another. *Pocono*, 468 A.2d at 471.

Ms. Holmes’ surgery, which is the subject of the initial and subsequent action was performed on June 15, 2002. Thus the applicable statute of limitations expired on June 15, 2004.

In plaintiff’s Third Amended Complaint of her first action, (June Term, 2004 No. 349), she claimed *inter alia* defendants’ negligence consisted of the following:

- (e) improperly diagnosing the condition of plaintiff, Yvette Holmes after her hysterectomy; (emphasis added)

- (f) performing unnecessary, incorrect and/or improper procedures, medical and/or surgical during the hysterectomy, upon the person of the plaintiff, Yvette Holmes, (emphasis added). Complaint (June Term, 2004 No. 349), ¶14.

Following the completion of discovery in the initial action, which included depositions of Yvette and Darryl Holmes and defendant Drs. Rackow, Williams and Thaker, expert reports were produced. On January 30, 2006, plaintiff's expert, Dr. Douglas Phillips, M.D. opined that Drs. Rackow, Williams and Thaker deviated from the standard of care in their performance of the June 15, 2002 hysterectomy. (Defendants' Motion For Judgment On The Pleadings, Exhibit C). In his report Dr. Phillips makes no mention of any conduct on the part of Dr. Caleb Kallen, M.D. Dr. Phillips, who is a board certified gynecologist; he also never suggests in his report that the hysterectomy procedure was not medically necessary. *Id.*

On May 19, 2006, plaintiff filed her second action alleging that she only recently discovered that the hysterectomy was not "medically necessary and should not have been performed." (Complaint, May Term, 2006 No.2724, ¶10-12). Plaintiff cites to an April 24, 2006 report of defendants' psychiatry expert, Christina L. Herring, M.D., who was produced in the first action, to infer that the June 15, 2002 hysterectomy was not medically necessary and should not have been performed. (Motion For Judgment On The Pleadings, Exhibit F). Plaintiff's specifically relies on the excerpt:

Her [plaintiff] primary physician has taken her complaints seriously. One doesn't recommend a total abdominal hysterectomy without cause; however, despite many visits for intractable abdominal pain and multiple laparotomies, the hysterectomy performed in June 2002 revealed a normal uterus, normal ovaries and no abdominal adhesions.

The only abnormality found was two extremely tiny (2mm) lesions. These nearly microscopic endometrical lesions were surely not the cause of her severe abdominal pain...(Id., Exhibit F, pg.1).

In her second Complaint, plaintiff makes the identical claims in the May 2006 action as is evidenced in paragraph 14 of her Third Amended Complaint, where she alleges:

- (e) improperly diagnosing the condition of plaintiff, Yvette Holmes after her hysterectomy; (emphasis added);
- (f) performing unnecessary, incorrect and/or improper procedures, medical and/or surgical during the hysterectomy, upon the person of the plaintiff, Yvette Holmes; (emphasis added). (Complaint, May Term, 2006 No. 2724).

These allegations by plaintiff in the second action are identical to those made in the first action.

Once the patient is aware or should reasonably have become aware that medical treatment is causing her personal injury the statute begins and the prospective plaintiff is required to begin doing those things for which the statute of limitations specifically provides time: "an opportunity to select and consult with a lawyer, investigation, initiation of suit, discovery, joinder of additional parties, etc." *Keating v. Zemel*, 281 Pa. Super. 129, 134 n.4, 421 A.2d 1181, 1184 (1980). It is during this two year period that the medical malpractice plaintiff, like any other plaintiff pursuing any other legal claim, makes the decision whether or not to pursue any legal rights he may possess. *Id.*

The very fact that plaintiff makes these allegations in her first action, acts as actual knowledge of her theory of liability that the medical procedure was unnecessary.

Therefore, at the time of the initial action, plaintiff was aware of her theory of liability for unnecessary medical procedure and therefore statute of limitations cannot be tolled on this basis.

For these reasons, the discovery rule was inapplicable in this case and the plaintiff's second action was correctly dismissed by this Court.

In addition plaintiff's Complaint was also stricken for violation of Pa.R.C.P. 1020(d). This rule provides:

If a transaction or occurrence gives rise to more than one cause of action heretofore asserted in assumpsit and trespass, against the same person, including cause of action in the alternative, they shall be joined in separate counts in the action against any such person. Failure to join a cause of action as required by this subdivision shall be deemed a waiver of that cause of action as against all parties to the action.

Pa.R.C.P. 1020(d) is to be "liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding" to which it is applicable. The purpose of Pa.R.C.P. 1020(d) is to avoid multiplicity of suits, thereby ensuring the prompt disposition of all rights and liabilities of the parties in a single suit. *Hineline v. Strousberg*, 402 Pa.Super. 187, 586 A.2d 455 (1991). Pursuant to the requirements of Pa.R.C.P. 1020(d), plaintiffs waived the causes of action brought in the second action by not joining them in their first action for the reasons discussed above.

Accordingly the plaintiff's second action was also dismissed as a matter of law.

CONCLUSION

In light of the foregoing analysis, this Court believes that the Motion for Judgment on the Pleadings of Defendants, Drs. Rackow, Thaker, Williams and Kallen was properly granted, and respectfully requests that it be affirmed by the Court above.

BY THE COURT:

12-14-2006

Date

ALLAN L. TERESHKO, J.

cc:
James R. Radmore, Esq. for Appellant
James A. Young, Esq./Michael J. Burns, Esq./Stephanie Victoria Shreibman, Esq. for Appellee