

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

BRENDA WARNER,

Plaintiff,

vs.

DR. GILBERT ROSS,

Defendant.

CIVIL NO. 660/1996

ACTION FOR DAMAGES

NOT FOR PUBLICATION

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CABRET, J.

MEMORANDUM OPINION

(June 15, 1999)

Brenda Warner sued Dr. Gilbert Ross, a dentist, for medical malpractice. In her complaint, Warner alleged that Dr. Ross's treatment in connection with his extraction of an impacted wisdom tooth fell below the applicable standard of care. Dr. Ross denied Warner's allegations and moved for summary judgment on the ground that her complaint is barred by the statute of limitations for medical malpractice actions. Dr. Ross's motion is currently before the Court, and for reasons which follow, the motion is granted.

I. STANDARD FOR SUMMARY JUDGMENT

To prevail on his motion for summary judgment, Dr. Ross must show that "[t]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). In determining whether Dr. Ross has met this burden, the Court must view the evidence in a light most favorable to Warner as the party opposing his motion. See Fleming v. Frett, 33 V.I. 58, 60 (Terr. Ct. 1995).

II. THE FACTS

Viewed in a light most favorable to Warner, the evidence shows that she visited Dr. Ross on April 23, 1994, because her wisdom tooth was causing her severe pain. After examining Warner, Dr. Ross informed her that the wisdom tooth was impacted and needed to be removed but that it could not be done that day because the gum surrounding the tooth was infected. Dr. Ross prescribed an antibiotic to treat the infection and made an appointment to remove the tooth five days later. On April 28, 1994, Warner returned to Dr. Ross to have the tooth extracted. The procedure took approximately two hours. According to Warner, Dr. Ross "was having a lot of problems getting [the tooth] out. Obviously he was extremely frustrated. . . . He was unhappy. He was angry. . . . His assistant asked him to leave the room because he was so agitated."¹

Warner returned to Dr. Ross on May 5, 1994 to have a suture removed. During that same visit, Dr. Ross also treated Warner for a condition, called dry socket, which he stated is a very common complication associated with the extraction. Dr. Ross described dry socket as "a

¹ Warner Dep. at 32-33.

condition of irritated bone lining the socket site and heals by itself in 1-2 weeks but can be very painful."² To treat Warner's dry socket, Dr. Ross inserted a medicated packing into the extraction site. Dr. Ross removed the packing from Warner's mouth on May 9, 1994. According to Warner, during this visit she informed Dr. Ross that her tongue was numb. In her deposition and in discovery responses, Warner stated that Dr. Ross informed her that any pain and numbness were only temporary. Specifically, in an interrogatory response Warner stated that Dr. Ross told her that she "would remain numb for several days."³ Warner reiterated in another interrogatory responses that Dr. Ross told her condition was only "temporary."⁴ During her deposition, Warner testified: "I asked him how long my tongue would remain numb. He said it could last up to weeks. He may have said six months, I am not real sure."⁵ Dr. Ross denies that Warner complained of any numbness.

Although Warner continued to experience pain and numbness in her mouth, she did not call Dr. Ross and never returned to see him again. In her deposition, Warner explained that she never contacted Dr. Ross again because she "was afraid of him."⁶ Warner elaborated that she was "afraid [Dr. Ross had] done something wrong."⁷ Later in her deposition, Warner explained: "I was unhappy with him from the day that he took the tooth out. I was unhappy with him

² Defendant's response to Pl.'s First Interrogs., Number 14.

³ Pl.'s Resp. to Defendant's first Interrog's., No. 4.

⁴ Id. at Nos. 4, 18 (a) and (b).

⁵ Warner Dep. at 39.

⁶ Id. at 37.

⁷ Id.

because of the frustration, and anger, and, obviously, he was not -- he was very upset and nervous about what he had done. He apologized several times before I left the office. Q. But in spite of that you went back to see him to finish up the treatment? For the aching, yes. Q. By that time you had drawn the conclusion he had done something wrong? A. Yes."⁸

Warner did not immediately seek treatment from another dentist for her pain and numbness, but rather "gave it six months."⁹ Then, on December 1, 1994, Warner went to another dentist to have her teeth cleaned. During this visit, Warner told the dental hygienist about her irritation and numbness. According to Warner, the hygienist told her "that was not normal."¹⁰ Eleven months later, on November 2, 1995, Warner learned for the first time from a Nevada dentist that her numbness was caused by nerve damage associated with the wisdom tooth extraction.

Warner filed her complaint against Dr. Ross on October 30, 1996. She alleged he was negligent in failing to inform her of the risk of nerve damage and in his performance of the extraction. During his deposition, Dr. Ross acknowledged that there was a recognized risk of nerve damage associated with the extraction. He explained that the procedure involved cutting into the soft tissue around the tooth and that "you cannot know where the nerves are in that soft tissue."¹¹ Although Dr. Ross stated that he apprised Warner of this risk during her initial office visit, Warner denies that he provided any such information.

⁸ Id. at 39-40.

⁹ Id. at 37.

¹⁰ Id. at 38.

¹¹ Ross Dep. at 35.

III. DISCUSSION

In the Virgin Islands, the statute of limitations for medical malpractice actions is two years. V.I. Code Ann. tit. 27, § 166d (a) (1997). Although it is clear that Dr. Ross last treated Warner more than two years before she filed her complaint, she contends that the limitation period was tolled under the "discovery rule" and under the fraudulent concealment tolling doctrine.

A. The Discovery Rule

Under the discovery rule, if the injury or its cause is not immediately evident to the plaintiff, the limitation period is tolled "until the plaintiff knows, or reasonably should know: (1) that he or she has been injured; and (2) that the injury has been caused by another party's conduct." Joseph v. Hess Oil, 867 F.2d 179, 182 n. 8 (3rd Cir. 1989) (citation omitted). *See also* Phillip v. Taylor, 18 V.I. 437, 440 (D.V.I. 1981). "The plaintiff need not know the exact medical cause of the injury; that [her] injury is due to another's negligent conduct; or that [she] has a cause of action." Bohus v. Beloff, 950 F.2d 919, 924-25 (3rd Cir. 1991) (analyzing identical discovery rule under Pennsylvania law) (citations omitted).

The polestar of the discovery rule is not the plaintiff's actual knowledge, but rather whether the knowledge was known, or through the exercise of diligence, knowable to the plaintiff. Every plaintiff has a duty to exercise reasonable diligence in ascertaining the existence of the injury and its cause. Although there are very few facts which reasonable diligence cannot discover, . . . there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. The question whether a plaintiff has exercised reasonable diligence is usually a jury question. The statute of limitations begins to run as soon as the plaintiff has discovered or, exercising reasonable diligence, should have discovered the injury and its cause.

Id. at 925 (citations and punctuation omitted).

In this case, the undisputed evidence shows that the limitation period was not tolled by the discovery rule. Warner's own testimony shows that she was generally dissatisfied with Dr. Ross' treatment from the time he extracted the tooth. This fact, combined with Warner's observations that Dr. Ross was visibly upset and nervous about what he had done and that he apologized for his conduct should have awakened Warner to inquire about the existence and cause of her injury. *See McClure v. LeRoy*, 890 P.2d 425 (Or.App. 1995) (dentist's apologetic statements following procedure would have caused reasonable person to make further inquiry). Even if the Court were to find that Dr. Ross's apologetic conduct did not provide Warner with constructive notice of her injury and its cause, it is undisputed that by the time of her last visit she had concluded that he had done something wrong. This conclusion, in combination with Dr. Ross' apologies and her unusual numbness, conclusively show that she either knew or should have known that further inquiry was necessary. *See Bigansky v. Thomas Jefferson Univ. Hosp.*, 658 A.2d 423 (Pa. Super. 1995) (plaintiff's suspicion that there was a problem due to various factors precluded tolling of limitations under discovery rule).

Although Warner had concluded by May 9, 1994, that Dr. Ross "had done something wrong,"¹² she contends that the limitation period was tolled beyond that date because she reasonably relied on his assurances that her symptoms could "last up to weeks" and "were only temporary."¹³ The Court disagrees.

¹² Warner Dep. at 40.

¹³ Pl.'s Resp. to Defendant's first Interrog's., Nos. 4, 18 (a) and (b); Warner Dep. at 39.

Warner cannot rely on her deposition testimony in which she stated that Dr. Ross may have said the pain could last up to six months. This testimony would be inadmissible at trial and failed to create a genuine issue of material fact for summary judgment purposes. In this regard, Warner positively stated in interrogatory responses that Dr. Ross told her she "would remain numb for several days."¹⁴ Likewise, Warner affirmatively stated in her deposition that Dr. Ross said the numbness "could last up to weeks."¹⁵ In her deposition testimony, however, Warner then added: "[h]e may have said six months, I am not real sure."¹⁶ It is clear that this latter testimony is mere conjecture, and "[i]t is axiomatic that a witness will not be permitted to speculate, guess, or voice suspicions as to the facts." 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6026, at 231 (1990). Inasmuch as Warner would not be permitted to present such testimony at trial, her "deposition can hardly be thought to create a genuine issue of material fact-- that is, a triable issue." Unterreiner v. Volkswagen of America Inc., 8 F.3d 1206, 1211 (7th Cir. 1993) (quoting Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989)).

Furthermore, although Warner is correct that the limitations period is tolled by a physician's assurances which lull a patient into a false sense of security, the patient's reliance on such assurances must be reasonable. See Bohus, 950 F.2d at 929; Held v. Neft, 507 A.2d 839, 842-43 (Pa.Super. 1986). In Held, the plaintiff similarly contended that although she lost confidence in her physician's ability to treat her, she relied on his assertions as to the cause of her

¹⁴ Pl.'s Resp. to Defendant's first Interrog's., No. 4.

¹⁵ Warner Dep. at 39.

¹⁶ Id.

discomfort and that she should not worry about it. The court found that in light of the plaintiff's loss of confidence in the physician, her reliance on his assurance was unreasonable. Id. at 842-43.

In Bohus, *supra*, the Third Circuit analyzed Held and other cases to determine whether the Bohus plaintiff reasonably relied on her physician's assurances. That analysis is helpful here. In Bohus, the defendant physician performed surgery on the plaintiff's foot to correct a bunion deformity. After the surgery, the plaintiff continued to experience pain in her foot but her physician assured her that the pain would eventually subside. Six months later, the plaintiff still complained of pain and the physician informed her it would take six months to a year to heal. One month later the plaintiff consulted another physician and informed him that "the condition of her feet had 'troubled her.'" Bohus, 950 F.2d at 922. The second physician confirmed that the surgery performed by the defendant was reasonable and gave the plaintiff a two-month medical excuse from work. Still experiencing pain one month later, the plaintiff consulted a third physician who informed her that her pain was the result of normal healing. Approximately four months later, the plaintiff consulted a fourth physician who informed her that her initial physician had done something wrong.

In establishing whether the limitation period was tolled due to the first physician's assurances, the court found:

Although the deteriorating condition of [the plaintiff's] feet could have led her to question the validity of [the defendant/physician's] prognosis, we believe the jury could have found that [the plaintiff] reasonably relied on [the physician's] assurances. There was no reason for [the plaintiff] to challenge [the defendant/physician's] prognosis during the six months following her surgery. Once it became clear that her pain was worsening rather than subsiding, we believe the jury could have found that [the plaintiff] exercised reasonable diligence by seeking additional medical opinions.

Id. at 927. In concluding that the plaintiff exercised due diligence, the court distinguished cases in which the plaintiffs were "put on notice of their injuries by statements made by physicians they consulted after leaving the defendant/doctors' care." Id. (Citing MacCain v. Montgomery Hosp. 578 A.2d 970 (Pa.Super. 1990) (consulting physicians criticized defendant/doctor's mammogram interpretation); DeMartino v. Albert Einstein Med. Ctr., 460 A.2d 295 (Pa.Super. 1983) (consulting dentist informed plaintiff that "'whoever had done the root canal "could not have been watching what he was doing"(")). The court also distinguished Held, where the evidence showed that the plaintiff left her treating physician because she "'decided he was not a very good surgeon.'" Held, 507 A.2d at 842 (quoting plaintiff's deposition testimony). The Bohus court found that in Held, due diligence required that when the plaintiff left the defendant's care, she should have sought "'further professional advice to ascertain the true cause of her injury.'" Bohus, 950 F.2d at 929. This is because, as the court found in Held, "plaintiff's reliance on the defendant's assurances became unreasonable as soon as she lost confidence in the defendant's professional ability." Id. By contrast, after the plaintiff in Bohus left the defendant's care, she "immediately sought other medical opinions--the proper course of action according to Held. Moreover, the opinions she received corroborated [the defendant/physician's] prognosis." Id.

In this case, when Warner lost confidence in Dr. Ross, "the proper course for her would have been to exercise diligence at that time and seek further professional advice to ascertain the true cause of her injury." Held, 507 A.2d at 843. This case, like Held, is distinguishable from Bohus because the plaintiff had a reason to immediately challenge her health care provider's prognosis. Indeed, this case is even more compelling than Held, because here Warner not only lost confidence in her treating dentist, but she was afraid of him and had concluded that he had

done something wrong. Moreover, even if Warner could have reasonably relied on Dr. Ross' prognosis, the evidence shows that he told her that her pain and numbness could last "up to weeks." In light of this prognosis, it is inexplicable that Warner waited almost seven months before mentioning the problem to a dental hygienist. Although "lay persons should not be charged with greater knowledge of their physical condition than that possessed by the physicians on whose advice they rely[, t]here is indeed some point in time when a patient's own 'common sense' should lead her to conclude that it is no longer reasonable to rely on the assurances of her doctor." Bohus, 950 F.2d at 929-30 (citations omitted). In this case, that point in time was no later than the end of June, 1994, which was a matter of "weeks" after Dr. Ross informed Warner her pain and numbness could last "up to weeks."

B. Fraudulent Concealment Tolling Doctrine

Warner also argues that the statute of limitations was tolled under the fraudulent concealment tolling doctrine because Dr. Ross concealed the fact of her injury. Under this doctrine, a statute of limitations is tolled where a defendant's fraudulent concealment prevents a plaintiff from knowing that she has a cause of action. Davis v. Grusemeyer, 996 F.2d 617, 624 (3rd Cir. 1993); 54 C.J.S. Limitations of Actions § 88 (1987). This tolling doctrine is read into every federal statute of limitation, Davis, 996 F.2d at 624, and is expressly provided for by the Virgin Islands Code which states:

a toll of the statute of limitations shall operate for any period during which the health care provider had actual knowledge of any act, omission or neglect or knowledge of facts which would reasonably indicate such act, omission or neglect which is the basis for a malpractice claim and failed to disclose such fact to the patient.

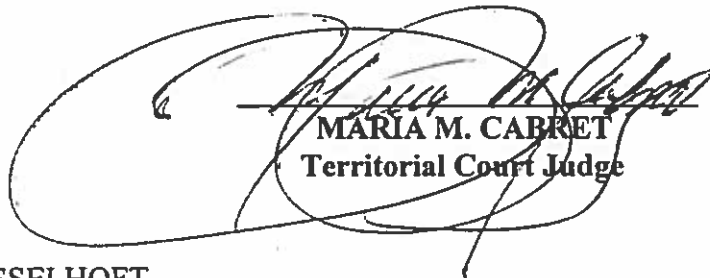
V.I. Code Ann. tit. 27, §166d (a) (1997). As pointed out by Warner, "[a] delayed limitations period encourages the professional tortfeasor to fulfill his 'fiduciary duty of full disclosure; it prevents the fiduciary from obtaining immunity for an initial breach of duty [i.e. the malpractice] by a subsequent breach of the obligation of disclosure.'" Lasley v. Helms, 880 P.2d 1135, 1137 (Ariz. Ct. App. 1994). Warner ignores, however, a qualification to the rule which is expressed in the cases she cited in support of this argument: "[c]onstructive fraud, if proven, is sufficient to toll the running of the statute of limitations until the plaintiff either knows, or through due diligence should have known, of the fraud." Id. See Gutierrez v. Mofid, 705 P.2d 886 (Cal. 1985); Acton v. Morrison, 155 P.2d 782 (Ariz. 1945); see also 54 C.J.S. Limitations of Actions § 89, at 128 (1987) ("even where a trust or confidential relation exists between the parties, a lack of all diligence is not excused").

Although evidence in this case supports Warner's contention that the limitation period was tolled due to Dr. Ross' concealment, the tolling period was not sufficient to place her complaint within the two-year statute of limitation. Viewed in a light most favorable to Warner, a jury could find that Dr. Ross knew of the risk of nerve damage and that her numbness was caused by such damage. A jury could further find that Dr. Ross concealed such knowledge when, on May 9, 1994, he informed Warner that the numbness was only temporary and could last weeks. Even if Warner relied on such a misrepresentation, however, she has not explained why she took no action to discover the true cause of her numbness when the symptoms continued through the end of May, into June and throughout the summer months. Warner's lack of diligence in this regard cannot be excused. See id. Thus, although Dr. Ross' concealment of Warner's injury initially tolled the statute of limitations, the tolling period lasted only until the

time that diligence demanded some investigation. Under the evidence presented, viewed in a light most favorable to Warner, this tolling period ended no later than the end of June of 1994.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that Warner's complaint against Dr. Ross is barred by the two-year statute of limitations. The limitation period was not tolled by the discovery rule because by the time of Warner's last visit to Dr. Ross, she had concluded that he had done something wrong. Thus, Warner was at least on inquiry notice of her malpractice claim against Dr. Ross at that time. Moreover, in light of her conclusion that Dr. Ross had done something wrong and her loss of confidence in him, she could not reasonably rely on his prognosis. And, although the limitation period was briefly tolled by Dr. Ross' concealment of the cause of Warner's numbing, there is no evidence justifying her lack of diligence to discover the true cause of her numbness when the symptoms lasted longer than Dr. Ross stated it would. Accordingly, Warner's October 30, 1996, malpractice complaint, which was filed more than two years after her April 28, 1994 tooth extraction by Dr. Ross, and beyond the several week tolling period attributed to his fraudulent concealment, is barred by the statute of limitations.



MARIA M. CABRET
Territorial Court Judge

ATTEST:
YVONNE V. WESSELHOFT
Clerk of the Court

By: _____
Deputy Clerk

Dated: _____