REBECCA JEAN, Individually and as Administratrix of the Estate of Lewis S. Jean	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
vs.	:	NO. 01-00576
ROBERT E. PURCELL, JR., M.D. SUSQUEHANNA GASTROENTEROLOGY ASSOCIATES, LTD., GLEN HOFSTROM, M.D. WILLIAMSPORT HOSPITAL AND MEDICAL CENTER/SUSQUEHANNA HEALTH SYSTEM, SUSQUEHANNA HEALTH SYSTEM DEPARTMENT OF PATHOLOGY, and GENE T. FRIES, M.D.,	:	CIVIL ACTION - LAW JURY TRIAL DEMANDED
Defendant	:	MOTION FOR SUMMARY JUDGMENT

Date: August 6, 2003[1]

OPINION and ORDER

Facts/Procedural Background

Before the Court for determination are the motions for summary judgment of the various defendants, which seek to dismiss Plaintiff's wrongful death and survival claims on the basis that the actions were commenced after the statute of limitations had expired. Defendants Robert E. Purcell, Jr., M.D. and Susquehanna Gastroenterology Associates, Ltd filed their motion on February 13, 2003. Defendant Gene T. Fries, M.D. filed his motion on March 6, 2003. Defendants The Williamsport Hospital and Medical Center and Susquehanna Health System filed their motion on March 17, 2003.

[1] This Opinion was originally drafted June 13, 2003 and presumably filed on or about that date. The Court has recently learned the Opinion was not filed of record timely.

Rebecca Jean (Jean) instituted the present suit on April 12, 2001 by filing a Praecipe to Issue Writ of Summons. A Complaint was filed on June 14, 2001. The theory underlying Jean's claim is that the defendants failed to diagnose stomach cancer in Lewis Jean while he was under their care. From December 1989 until May 1998, Lewis Jean was being treated by Dr. Purcell, an agent of Susquehanna Gastroenterology Associates, Ltd. Lewis Jean came under the care of Dr. Purcell after being referred by his family physician, Dr. Glen Hofstrom,[2] for gastrointestinal problems. Dr. Purcell performed an endoscopic exam of Lewis Jean in 1989 and 1990. Each of the endoscopies resulted in biopsies being taken. Each biopsy sample was submitted to Dr. Gene T. Fries, a pathologist for evaluation and diagnosis. Dr. Fries did not report any finding of gastric carcinoma in either biopsy. The conclusion made by Dr. Purcell was that Lewis Jean suffered a small prepyloric ulcer. Dr. Purcell continued to care for Lewis Jean's gastrointestinal problems but did not perform another endoscopy or take another biopsy of the prepyloric ulcer until 1998. At that time, it was determined that the ulcer was now large. Mr. Jean began to have more severe gastrointestinal problems leading to a blockage in 1998. He became dissatisfied with Dr. Purcell's care in May 1998 and left Dr. Purcell's care at that time. Thereafter he received treatment for his gastrointestinal problems from Dr. Sommers and Dr. Burns, both partners of Dr. Purcell.

On June 25, 1998, Jean under went surgery performed by Dr. Todhunter in an attempt to correct and alleviate the continued stomach problems he was experiencing. A tumor was discovered during the course of surgery. On June 30, 1998, Dr. Serwint, an oncologist,

[2] In their motion for summary judgment, the Williamsport Hospital and Medical Center and Susquehanna Health Systems assert that Plaintiff has discontinued her claim against Dr. Hofstrom. If this is the case, Plaintiff needs to secure the written consent of all parties or seek leave of Court pursuant to Pa. R.C.P. 229(b).

diagnosed Lewis Jean with T4 gastric carcinoma with direct extension into the gallbladder. Lewis Jean and his wife, Plaintiff, were advised of this diagnosis in June 1998. Lewis Jean died on April 19, 1999.

Defendants contend that the claims made by Jean are barred by the statute of limitations. Dr. Purcell and Susquehanna Gastroenterology Associates, Ltd., (hereafter collectively "Purcell") argue that they are entitled to summary judgment because the action was not commenced within the two-year statute of limitations. Purcell advances two bases to support this conclusion. The first is that Jean had two years from the diagnosis of the cancer on June 30, 1998 to file the complaint since that is when Jean knew of the injury and that it was caused by others. The second is that under ***Held v. Naft***, 507 A.2d 839 (Pa. Super. 1986), Jean had two years from the June 1998 hospitalization to file the claim once Lewis Jean had become dissatisfied with Dr. Purcell's care and began treating with Dr. Somers and Dr. Burns.

The Williamsport Hospital concurs with and incorporates the argument of Dr. Fries in support of its motion for summary judgment. The liability of the Williamsport Hospital is contingent upon the liability of Dr. Fries, its alleged agent. The Williamsport Hospital asserts that since the claim against Dr. Fries should be dismissed via summary judgment, then the claim against it should be dismissed as well.

Dr. Fries argues that he is entitled to summary judgment based on the statute of limitations. Dr. Fries asserts that the two-year statute of limitations bars both the survival and wrongful death actions. Dr. Fries asserts that the statute of limitations on the survival action begins to run from the date decedent knew or should have known of the injuries. Dr. Fries contends that the date was June 25, 1998. Dr. Fries argues that is when Lewis Jean knew there

could be a potential medical malpractice cause of action. Dr. Fries argues that is when Lewis Jean knew he had cancer and that no doctor had previously diagnosed him with the disease despite constantly being under a physician's care for over nine years.

In response, Jean argues that the statute of limitations does not bar her claim and Defendants are not entitled to summary judgment. Jean asserts that the defendants are not entitled to summary judgment on the wrongful death claim because the statute of limitations does not begin to run on that cause of action until the date of death. Lewis Jean died on April 19, 1999. The action was initiated on April 12, 2001 by Praecipe to Issue Writ of Summons. As the action was initiated within two years from the date of death, Jean argues that summary judgment is not appropriate as to this cause of action.

Jean also asserts that the defendants are not entitled to summary judgment on the survival action because a genuine issue of fact exists. Citing to ***McClain v. Montgomery Hosp.***, 578 A.2d 970, 972-73 (Pa. Super. 1990), Jean asserts that under the discovery rule, "the limitations period will be tolled until the 'plaintiff, knows or in the exercise of reasonable diligence should have known, (1) that he has been injured, and (2) that his injury has been caused by another's conduct.'" Plaintiff's Brief in Opposition to Motion for Summary Judgment, ***Jean v. Purcell***, No. 01-00,576 at 6 (Lycoming Cty.). As such, Jean asserts that the central issue is when did she discover the causal connection between the injury and another's conduct. Jeans contends that she could not have ascertained the cause of the injury until she received the records of Dr. Purcell and Dr. Hofstrom. Jean argues that there is a genuine issue of fact as to when Jean received the records; therefore, summary judgment is inappropriate.

Discussion

The central issue before the Court is whether the two-year statute of limitations bars Jean's wrongful death and survival actions. In order to answer that question, the Court must determine when the medical negligence claim against the defendants accrued and began the running of the statute of limitations. The Court holds that the medical negligence claim accrued on the date when Lewis Jean was diagnosed with cancer. As a result, the wrongful death claim is not barred by the statute of limitations, but the survival action is.

A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. Summary judgment may be properly granted "when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815, 821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The party making the motion has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " 'in the light most favorable to the non-moving party accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences.'" ***Godlewski***, 597 A.2d at 107 (quoting ***Hower v. Whitmak Assoc.***, 538 A.2d 524 (Pa. Super. 1988)). Summary judgment will only be entered in cases that "are free and clear from doubt" and any "doubt must be resolved against the moving party." ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

A statute of limitations requires an injured individual to bring his claim within a "certain time of the injury, so that the passage of time does not damage the defendant's ability to adequately defend against [the] claims made." ***Dalrymple v. Brown***, 701 A.2d 164, 167 (Pa. 1997). "Statutes of limitations have as their purpose the 'stimulation of the prompt pursuit of legal rights and the avoidance of the inconvenience and prejudice resulting from deciding stale cases on stale evidence.'" ***Ingenito v. AC & S, Inc.***, 633 A.2d 1172, 1175 (Pa. Super. 1993) (quoting ***DeMartino v. Albert Einstein Med. Ctr., N.D.***, 460 A.2d 295, 299 (Pa. Super. 1983)).

Generally, the statute of limitations starts to run as soon as the right to institute and maintain a suit arises. ***Dalrymple***, 701 A.2d at 167; ***Gatling v. Eaton Corp.***, 807 A.2d 283, 289 (Pa. Super. 2002). "As a matter of general rule, a party asserting a cause of action is under a duty 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." ***Pocono Int'l Raceway, Inc. v. Pocono Produce***, 468 A.2d 468, 471 (Pa. 1983). A lack of knowledge, mistake, or misunderstanding does not toll the running of the statute of limitations. ***Ibid***. As soon as the statutorily prescribed period for instituting a cause of action has expired, the injured party is barred from bringing the action. ***Baumgart***, 666 A.2d 238, 240 (Pa. 1995); ***Pocono***, 468 A.2d at 471.

The discovery rule is an exception to the general rule that the statute of limitations starts to run as soon as the right to institute and maintain a suit arises and is borne out of "the *inability* of the injured, *despite the exercise of due diligence*, to know of the injury or its cause." ***Pocono***, 468 A.2d at 471 (emphasis in original). " 'An injury is done when the act heralding a possible tort inflicts damage which is physically objective and ascertainable."

Groover v. Riddle Memorial Hosp., 516 A.2d 53, 57 (Pa. Super. 1987), *allocatur denied*, 528 A.2d 957 (Pa. 1987) (quoting ***Ayers v. Morgan***, 154 A.2d 788, 792 (Pa. 1959)). The discovery rule test provides that the statute of limitations does not begin to run until "'the plaintiff knows, or reasonably should know (1) that he has been injured, and (2) that his injury has been caused by another party's conduct.'" ***Carns v. Yingling***, 594 A.2d 337, 339 (Pa. Super. 1991) (quoting ***Cathcart v. Keene Industrial Insulation***, 471 A.2d 493 (Pa. Super. 1984)); ***MacCain v. Montgomery Hosp.***, 578 A.2d 970, 972-73 (Pa. Super. 1990). The most import basis underlying the application of the discovery rule is the plaintiff's inability to know of the injury, despite the exercise of due diligence. ***Pocono***, 468 A.2d at 471. Before a court can apply the discovery rule, it must address the ability of the plaintiff to ascertain the facts of a cause of action through the exercise of reasonable diligence. ***Ibid.***

Reasonable diligence is an objective standard. ***Ingenito***, 633 A.2d at 1174. If the plaintiff has the means of discovering the injury and that another caused it, then the suit is barred if the plaintiff fails to use those means. ***Ibid.*** "The polestar of the Pennsylvania discovery rule is not a plaintiff's actual acquisition of knowledge, but whether the information, through the exercise of due diligence, was knowable to the plaintiff." ***Id.*** at 1175. "The failure to make inquiry when information is available is a failure to exercise reasonable diligence as a matter of law." ***Ibid.*** The knowledge possessed by the plaintiff that starts the statute of limitations is not that he has a cause of action. ***Id***. at 1174-75. The plaintiff does not need to know the precise medical cause of the injury or that the injury was the result of negligent conduct. ***Carns***, 584 A.2d, at 340. The triggering information is that the plaintiff knows or should know that he has been injured and the injury was the result of another's conduct.

"'Once [a plaintiff] possesses the salient facts concerning the occurrence of his injury and who or what caused it, he has the ability to investigate and pursue his claim.'" ***Id***. at 1174-75 (quoting ***Burnside***, 505 A.2d 987-88) (change in original). "A diligent investigation may require one to seek further medical examination as well as competent legal representation." ***Id***. at 1175.

Lewis Jean's cause of action against the defendants for negligently failing to diagnose stomach cancer accrued on the date Lewis Jean was diagnosed with stomach cancer. This is the point in time when Lewis Jean possessed the salient facts that would enable him to determine that he suffered an injury and that it was caused by another's conduct. It is immaterial that Lewis Jean did not know that the failure to diagnose was the result of negligence on the part of the Defendants. Lewis Jean had the necessary facts to investigate and pursue any possible claim he had against the defendants as of the date of the diagnosis.

Two cases are illustrative on this point. In ***Carns v. Yingling***, the Superior Court held that a medical negligence suit for failure to diagnose an abscessed fistula was barred by the two-year statute of limitations. 584 A.2d at 340. The Superior Court concluded that when the plaintiff was diagnosed with the abscessed fistula the statute of limitations began to run. It was on that date that plaintiff knew he was injured since the doctors never indicated he was suffering from this condition while he was undergoing treatment for the extreme pain in his pelvic area. ***Ibid.*** The statute of limitations began to run on the date of the diagnosis because it was then that plaintiff knew he suffered an injury and that it was the defendant doctors who failed to diagnose the condition. ***Ibid.***

In ***MacCain v. Montgomery Hosp.***, a medical negligence cause of action for failure to diagnose breast cancer was barred by the two-year statute of limitations. 578 A.2d at 973. The cause of action accrued on the date the plaintiff was told she had breast cancer. ***Id***. at 974. It was on that date that she should have been aware that the earlier negative mammogram was misread. ***Ibid***. It was on that date that the plaintiff was aware that she was injured and it was caused by the conduct of her doctor.

As these cases illustrate, the date the cause of action accrued in the case *sub judice* is the date Lewis Jean was diagnosed with cancer. Prior to that date, he was not told by any of the defendants that he had cancer. It was on that date that he knew he was injured (had contracted cancer) and that the injury (or increased risk of harm resulting from an earlier diagnosis of the cancer) was caused by the conduct of another (Defendants' failure to diagnose the cancer earlier). The fact that Lewis Jean might not have known the medical cause of his injury or that Defendants acted negligently does not toll the running of the statute of limitations. It began to run on the day of the diagnosis, the day Lewis Jean was aware he suffered an injury.

Contrary to the argument of Dr. Purcell, based on ***Held v. Naft***, *supra,* the date of accrual of Jean's cause of action is not the date when Lewis Jean became dissatisfied with and left the care of Dr. Purcell. The fact that a patient becomes dissatisfied with the care of a physician does not, by itself, start the running of the statute of limitations on a medical malpractice claim. While the decision to leave a physician's care might be some evidence that a patient knew an injury was suffered, as something would usually precipitate such an action, the mere decision to leave is not enough to establish that the plaintiff was injured and that the

injury was caused by another. In ***Held,*** the Superior Court relied on the patient's dissatisfaction with the doctor and loss of confidence in his professional abilities to conclusively demonstrate that her claim that the statute should be tolled was without merit. 507 A.2d, at 842-43. The ***Held*** court ruled that once the plaintiff lost confidence in her doctor, it could hardly be said that her reliance on his assurances was reasonable; therefore, the alleged physician's conduct of secreting the patient's injury could not be a basis for the tolling of the statute of limitations. ***Held*** does not stand for the proposition that mere patient dissatisfaction with a doctor starts the running of the statute of limitations on a medical malpractice claim the patient may have.

The statute of limitations does not begin to run when Jean received the medical records from the doctors. While the exact date she received the records is a contested issue, the resolution of it is unnecessary for the disposition of the summary judgment motions. The statute of limitations accrued and began to run on the date of diagnosis. While the medical records would provide Jean with more specifics as to the injury and exactly who might be responsible, Jean already had sufficient information when the diagnosis of cancer was made known to start the running of the statute of limitations. In fact, getting the medical records is the type of investigation that should be done to ferret out the details and viability of any cause of action, but it is not necessary to establish that an injury occurred and that it was caused by another's conduct.

In the case *sub judice*, the statute of limitations began to run on the date Lewis Jean was diagnosed with cancer. Whether that date was June 25, 1998, the day of the surgery or June 30, 1998, the date Dr. Serwint diagnosed Lewis Jean with T4 gastric carcinoma and

made that diagnosis known to Lewis Jean, is of no consequence to the resolution of the summary judgment motions. If either date is used, the result is the same.

The Court also notes that using the date a diagnosis is made, which indicates that a prior failure to make a correct diagnosis has occurred, as the date on which the cause of action accrues benefits all parties. It is a date that is readily ascertainable. In most situations this will be a date of significance and within the knowledge of both the patient and the treating physician. Clearly, both should then be aware of the existence of potential legal rights and liabilities and can act accordingly.

The Court must now apply this holding that the two-year statute of limitations began to run on the date Lewis Jean was diagnosed with cancer to the wrongful death and survival actions.

Wrongful Death Action

42 Pa. C.S.§5524(2) is the statute of limitations that governs wrongful death and survival actions. ***Baumgart v. Keene Bldg. Products Corp.***, 633 A.2d 1189, 1192 (Pa. Super. 1993), *aff'd by an equally divided court*, 666 A.2d 238 (Pa. 1995). The act provides that:

> The following actions and proceedings must be commenced within two years:
>
> (2) 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.

42 Pa.C.S. §5524(2). Determining when a cause of action accrues for statute of limitations purposes is different for wrongful death and survival actions. ***Moyer v. Rubright***, 651 A.2d 1139, 1141 (Pa. Super. 1994). This is because the wrongful death and survival actions are designed to redress distinctly different injuries. ***Ibid.***

The statute of limitations for a wrongful death claim begins to run when a pecuniary loss is sustained by the beneficiaries of the person who has died do to the tort of another. ***Sunderland v. R.A. Barlow Homebuilders***, 791 A.2d 384, 390 (Pa. Super. 2002); ***Moyer***, 651 A.2d at 1142. This event occurs on the date of death. ***Sunderland***, 791 A.2d at 390; ***Baumgart*** 633 A.2d at 1194. Therefore, a wrongful death action must be brought within two years of the date of death. ***Sunderland***, 791 A.2d at 390; ***Moyer***, 651 A.2d at 1142.

Generally, a wrongful death action cannot be maintained if the decedent, had he lived, would be barred from recovering for his injuries. ***Sunderland***, 791 A.2d at 391 "A wrongful death action is derivative of the injury which would have supported the decedent's own cause of action and is dependant upon the decedent's cause of action being viable at the time of death." ***Ingenito***, 633 A.2d at 1176. If the underlying cause of action would be time barred as to the decedent, then the wrongful death action is time barred as to his relatives. ***Moyer***, 651 A.2d at 1142. Thus, to bring a wrongful death claim within the statute of limitations, the decedent must have had a viable tort action at the time of death. ***Id.*** at 1142-43.

Jean's wrongful death claim is not barred by the two-year statute of limitations. The action was initiated on April 12, 2001 by the filing of a Praecipe for Writ of Summons. Lewis Jean died on April 19, 1999. The suit was instituted within two years of the decedent's death. The cause of action also meets the requirement that the cause of action must be viable under the statute of limitations at the date of death. Jean was diagnosed with cancer on either June 25, 1998 or June 30, 1998. Jean died on April 19, 1999. One year had not passed since the cause of action accrued when Jean died. Therefore, the cause of action was still viable at the date of the decedent's death.

Survival Action

A survival action is not a new cause of action occasioned by the death of the decedent. ***Sunderland***, 791 A.2d at 391. It is a cause of action that accrues to the decedent that survives his death. ***Ibid.*** Generally, the statute of limitations begins to run on the date of injury, as though the decedent was bringing his own suit. ***Moyer,*** 651 A.2d at 1141.

The survival action is barred by the two-year statute of limitations. The cause of action accrued on the date of diagnosis. It is on this date that the decedent was aware of his injury and that it was caused by the conduct of another. Regardless of whether or not Lewis Jean knew the medical cause of his injury or that that it was the result of negligence on the part of the defendants, the decedent had knowledge of the salient factors he needed to begin to investigate to answer these questions and establish a cause of action for medical negligence. Despite this, the medical malpractice suit was not initiated for almost three years from the date of diagnosis. Therefore, the survival action is barred as being filed after the two-year statute of limitations.

Conclusion

The motions for summary judgment of the defendants must be denied in part and granted in part. The statute of limitations began to run on Jean's medical malpractice claim on the date Lewis Jean was diagnosed with cancer. The wrongful death claim was brought within the statute of limitations, but the survival action was not. Therefore, the wrongful death claim may proceed, but the survival claim is barred by the statute of limitations.

O R D E R

It is hereby ORDERED that the Motions for Summary Judgment filed by the various Defendants asserting the statute of limitations as a defense as a matter of law will be denied in part and granted in part.

The Motions are denied as to the wrongful death claims as they are not barred by the two-year statute of limitations.

The Motions are granted as to the survival actions as they are barred by the two-year statute of limitations.

The survival actions asserted against each Defendant are dismissed.

BY THE COURT:

William S. Kieser, Judge

cc: Gregory A. Stapp, Esquire
David R. Bahl, Esquire
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