

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SOUTH CAROLINA
COURT OF APPEALS

S.C. Supreme Court

Hon. John D. Geathers, Thomas E. Huff, and Paula H. Thomas
Court of Appeal Judges

Case No. 2009-CP-37-1428

Andrea Beth Campbell Petitioner

v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA .. Respondents

APPENDIX TO PETITION FOR
A WRIT OF CERTIORARI

Brian S. McCoy, Esq.
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt, Esq.
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone
Attorneys for Petitioner

Lawrence M. Hunter, Jr., Esq.
Hunter & Foster, P.A.
P.O. Box 10309
Greenville, SC 29603
(864) 242-2111
Attorney for Respondents

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Andrea Beth Campbell, Appellant,

v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN
Assoc., PA, Respondents.

Appellate Case No. 2011-195507

Appeal From Oconee County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2012-UP-579
Submitted October 1, 2012 – Filed October 24, 2012

AFFIRMED

Brian Scott McCoy, of McCoy Law Firm, LLC, of Rock
Hill, and Mark T. Hurt, of The Law Offices of Mark T.
Hurt, of Abingdon, VA, for Appellant.

Lawrence Mims Hunter, Jr., of Hunter & Foster, PA, of
Greenville, for Respondent.

PER CURIAM: Andrea Beth Campbell appeals the trial court's grant of the
motion for summary judgment of Ronnie A. Brockway, M.D., and Oconee

OB/GYN Assoc., PA (Respondents), arguing the trial court erred in granting Respondents' motion for summary judgment after finding no genuine issues of material fact existed and they were entitled to judgment as a matter of law because the statute of limitations barred Campbell's malpractice claim.

We hold the trial court properly granted summary judgment to Respondents because the applicable statute of limitations barred Campbell's medical malpractice claim. *See Young v. S.C. Dep't of Corrs.*, 333 S.C. 714, 717, 511 S.E.2d 413, 415 (Ct. App. 1999) ("Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."); S.C. Code Ann. § 15-3-545(A) (2005) (providing the statute of limitations for medical malpractice claims); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("Statute of limitations requiring actions to be commenced within a time period after a person knew or should have known that he had a cause of action means that the injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist."); *id.* ("The statute of limitations begins to run from this point and not when advice of counsel is sought or full-blown theory of recovery is developed."); *id.* at 64-65, 437 S.E.2d at 47 ("The date of discovery is not when the plaintiff discovers a witness to support or prove his case.").

Here, Campbell commenced her action against Brockway with a notice of intent to file suit on June 26, 2009. Consequently, for her action to be timely, the date of discovery of the injury or when it reasonably ought to have been discovered could not have been prior to June 26, 2006. Brockway performed a surgical procedure on Campbell on August 9, 2005, and Campbell stated he informed her that day he injured her but discounted the fact as "no big deal." However, the evidence indicates that not long thereafter, she started complaining of problems she believed were caused by the procedure. She complained to Brockway until February 27, 2006. After she stopped seeing Brockway, Campbell complained of those problems to other medical professionals and counselors until mid-June 2006. Therefore, the facts, taken in the light most favorable to Campbell, leave only one reasonable inference: Campbell's continuing complaints of various problems, which she indicated appeared after the procedure in which she suffered an injury, put her on notice prior to June 26, 2006 that she had a claim against Brockway stemming from the procedure. Accordingly, the trial court properly granted summary judgment to Respondents.

AFFIRMED.¹

HUFF, THOMAS, and GEATHERS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-37-1428

Andrea Beth Campbell, ... Appellant

v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA..... Respondents

PETITION FOR REHEARING

Brian S. McCoy, Esq. (SC Bar #2155)
McCoy Law Firm
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276)623-0808 Phone

Attorneys for Appellant

TABLE OF AUTHORITIES

<i>Benton v. Roger C. Peace Hospital</i> , 313 S.C. 520 , 443 S.E. 2d 537 (S.C. 1994)	1, 2
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<i>Knox v Greenville Hosp. Sys.</i> , 362 S.C. 566, 608 S.E. 2d 459 (S.C. App. 2005)	3

Campbell petitions the Court for a rehearing because the Court overlooked, and consequently failed to address, Campbell's contention that the lower court's decision is in direct conflict with the South Carolina Supreme Court decisions of *Benton v. Roger C. Peace Hosp.*, 443 S.E.2d 537 (S.C. 1994) and *Dean v. Ruscon Corp.*, 468 S.E.2d 645 (S.C. 1996). As explained in Campbell's briefing in the lower court, (ROA 112-14), and in this Court, (Initial Br. 12-14), *Benton* and *Dean* control and mandate that Campbell's claim for her distinct neurological injury accrued on May 2, 2007, when she first had notice of it (within the limitations period), regardless of when her claim for the superficial nicking of the vagina accrued. Thus, this Court's decision --- upholding the lower court's dismissal of all claims, including her distinct claim for neurological injury, on statute of limitations grounds based a determination that all her claims accrued when she received notice of the nicking of her vagina --- is precluded by controlling law. *See Benton, Dean.*

The South Carolina Supreme Court has summarized its holding in *Benton v. Roger C. Peace Hosp.*, 443 S.E.2d 537 (S.C. 1994), as follows:

In *Benton*, a Down's Syndrome patient fell from his wheelchair and suffered facial lacerations which were readily apparent and discoverable. Later, a second more insidious injury arose from neurological damage which could have been caused by the fall or something else. Because the nature of the neurological injury was not discoverable by the appearance of facial lacerations, we held these

injuries to be two separate, distinct, and severable harms. Thus, we held that the statute of limitations began to run at different times for each injury.

Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (S.C. 1996).

Here, regardless of when Campbell's claim for her vaginal laceration was discoverable, the claim for her neurological injury -- her permanent genital pain and numbness -- was not discoverable by Campbell until she learned from a treating physician on May 2, 2007, that they were the result of nerve damage from defendant Brockway's LEEP procedure.¹ (See ROA 112) In fact, Brockway, and Campbell's treating medical providers up through the end of June 2006 indicated to her that there was no physical cause for the pain, and suggested that the problems of which Campbell complained, mainly the cervical pain and discomfort, was of a purely psychological origin. (ROA 113) Like the plaintiff in *Benton*, Campbell suffered from a neurological condition that could have been the result of the alleged negligence of defendant Brockway, or another cause and was not put on notice that it was caused by Brockway until well within the limitations period. Thus, *Benton* and *Dean* are directly on point.

Accordingly, the *Benton* and *Dean* decisions of the South Carolina Supreme Court compel the conclusion that Campbell's permanent neurological injuries -- her cervical pain and numbness -- are, for purposes of the statute of limitations, distinct injuries from the superficial vaginal laceration Campbell

suffered, and that consequently the accrual of her claim for those neurological injuries is not determined by the accrual for her claim for the vaginal laceration. As noted above, the accrual of the claim certainly did not accrue at the time of the operation, or any time before June 28, 2006; rather it accrued no earlier than May 2, 2007, well within the limitations period.

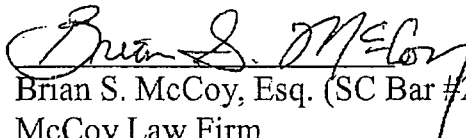
¹ The principle set forth in *Benton* is compatible with the principle cited in the lower court's opinion that the fact that the injured party may not comprehend the full extent of the damage is immaterial, (ROA 6), citing *Joubert v. South Carolina*, 341 S.C. 176, 183-184, 534 S.E.2d 1, 8-9 (S.C. App. 2000). *Joubert* addressed the situation where it is only the extent of the damage, not its cause that is in question. *Benton* addresses the situation, which is present here, where there are two distinct injuries, and the claimant is not on sufficient notice that the second injury resulted from the same act of the tortfeasor that caused the other injury. This point also distinguishes *Knox v. Greenville Hospital System*, 608 S.E. 2d 459 (S.C. App. 2005), which the lower court opinion also relied upon, (ROA 10).

CONCLUSION

Because the Court overlooked Campbell's argument that the *Dean* and *Benton* decisions of the South Carolina Supreme Court preclude the lower court's decision dismissing, on statute of limitations grounds, Campbell's neurological injury claim, and that they, in fact do preclude it, Campbell requests that the Court rehear this case and reverse the lower court's decision to the extent that it dismisses Campbell's neurological injury claim.

November 7, 2012

Respectfully submitted,


Brian S. McCoy, Esq. (SC Bar #2155)
McCoy Law Firm
378 E. Main Street Rock
Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-37-1428

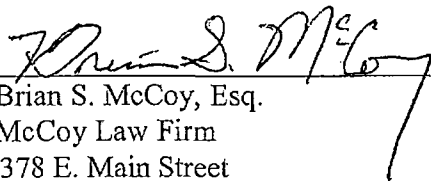
Andrea Beth Campbell, ...Appellant

v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA, ...Respondents

PROOF OF SERVICE

I hereby certify that I served the Petition for Rehearing of Appellant by depositing a copy of same by electronic means and by U.S. Mail, postage prepaid, on November 7, 2012, addressed to the Respondents' counsel of record Lawrence M. Hunter, Jr., Esq., Hunter & Foster, P.A., P.O. Box 10309, Greenville, SC 29603.


Brian S. McCoy, Esq.
McCoy Law Firm
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-37-1428

Andrea Beth Campbell.....Appellant

v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA, ... Respondents

RESPONDENTS' RETURN TO PETITION FOR REHEARING

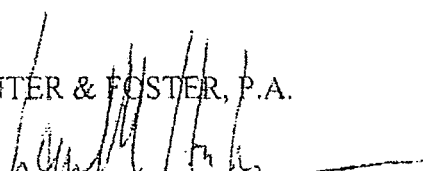
HUNTER & FOSTER, P.A.
Lawrence M. Hunter, Jr., Esquire
S.C. Bar # 011808
Post Office Box 10309
Greenville, South Carolina 29603
(864) 242-2111

Attorneys for Respondents

The Respondents respectfully request that the Petition for Rehearing be denied. Contrary to the argument presented by Campbell, the opinion of the lower court does not violate either *Benton v. Roger C. Peace Hosp.*, 443 SE2d 537 (S.C. 1994) or *Dean v. Ruscon Corp.*, 468 S.E.2d 645 (S.C. 1996). As this Court correctly noted in its opinion affirming the lower court, Campbell was on notice prior to June 26, 2006, of a claim arising from the procedure of August 9, 2005. Under the rule of *Dean*, the fact that Campbell might not have comprehended the full extent of her damage is immaterial. The result in *Benton* is distinguishable because the injury in that case, suffered by a patient who suffered from Down's Syndrome and was mentally disadvantaged, was not discoverable from the appearance of the symptoms that were observable after the act of alleged negligence. Here, Campbell repeatedly complained to her medical practitioners prior to June 26, 2006, of problems she believed were caused by the procedure.

For the reasons stated above, Petition for Rehearing should be denied.

HUNTER & FOSTER, P.A.


Lawrence M. Hunter, Jr., Esquire
S.C. Bar # 011808
Post Office Box 10309
Greenville, South Carolina 29603
(864) 242-2111

Dated: 11/14/12
Greenville, SC

Attorney for Respondents Ronnie A. Brockway,
M.D., and Oconee OB/GYN Associates, PA

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-37-1428

Andrea Beth Campbell.....Appellant

v.

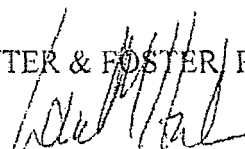
Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA, ... Respondents

PROOF OF SERVICE

I hereby certify that the original and six (6) copies of the Respondent's Return to Petition to Rehear were filed with the South Carolina Court of Appeals, and one (1) copy was served upon counsel for the Appellant on this date by depositing same in the United States Mail, postage prepaid, addressed as follows:

Brian S. McCoy, Esq.
McCoy Law Firm
378 East Main Street
Rock Hill, SC 29730

HUNTER & FOSTER, P.A.



Lawrence M. Hunter, Jr., Esquire
S.C. Bar # 011808
Post Office Box 10309
Greenville, South Carolina 29603
(864) 242-2111

Dated: 11/14/12
Greenville, SC

Attorney for Respondents Ronnie A. Brockway,
M.D., and Oconee OB/GYN Associates, PA

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-37-1428

Andrea Beth Campbell..... Appellant

v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA..... Respondents

REPLY BRIEF IN SUPPORT OF
PETITION FOR REHEARING

Brian S. McCoy, Esq. (SC Bar #2155)
McCoy Law Firm
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276)623-0808 Phone

Attorneys for Appellant

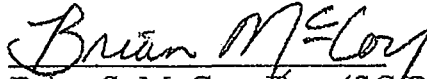
The Respondents do not dispute that this Court and the court below apparently overlooked and did not expressly address Appellant's key argument that the South Carolina Supreme Court decisions in *Benton v. Roger C. Peace Hosp.*, 443 S.E.2d 657 (S.C. 1994), and *Dean v. Ruscon Corp.*, 468 S.E.2d 645 (S.C. 1996), preclude both the lower court's summary judgment, and this court's affirmation of it. Neither court distinguished or even acknowledged those decisions.

Those two decisions control here. Respondents' attempt to distinguish the *Benton* decision fails on its face because it ignores that *Benton* (and *Dean*) address not just a single injury, but the situation present here – two distinct injuries caused by the tort, a superficial physical injury, and a more serious neurological injury. See *Dean*, 468 S.E.2d at 647 (analyzing *Benton*). And, as is true here, “[b]ecause the nature of the neurological injury was not discoverable by the [superficial physical injury], we held these injuries to be two separate, distinct, and severable harms. Thus, we held that the statute of limitations began to run at different times for each injury.” *Id.*

Accordingly, this Court should rehear this case, address Petitioner's argument that controlling law compels a different result, and reverse the lower court's decision to the extent that it dismisses Petitioner's neurological injury claim.

November 20, 2012

Respectfully submitted,



Brian S. McCoy, Esq. (SC/Bar #2155)

McCoy Law Firm

378 E. Main Street

Rock Hill, SC 29730

(803) 366-2280 Phone

Mark T. Hurt

The Law Offices of Mark T. Hurt

159 West Main Street

Abingdon, VA 24210

(276) 623-0808 Phone

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-37-1428

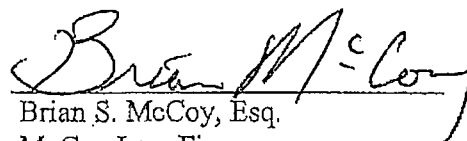
Andrea Beth Campbell.....Appellant

v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA.....Respondents

PROOF OF SERVICE

I hereby certify that I served the Brief in Support of Petition for Rehearing of Appellant by depositing a copy of same by electronic means and by U.S. Mail, postage prepaid, on November 20, 2012, addressed to the Respondents' counsel of record Lawrence M. Hunter, Jr., Esq., Hunter & Foster, P.A., P.O. Box 10309, Greenville, SC 29603.



Brian S. McCoy, Esq.
McCoy Law Firm
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

Attorneys for Appellant

The South Carolina Court of Appeals

Andrea Beth Campbell, Appellant,

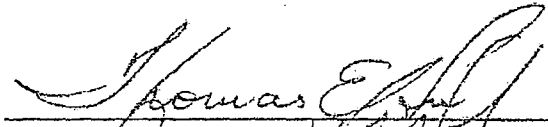
v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN
Assoc., PA, Respondents.

Appellate Case No. 2011-195507

ORDER

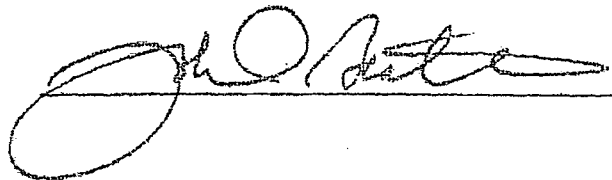
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.





J.

J.



J.

Columbia, South Carolina

cc: Lawrence Mims Hunter, Jr.
Brian Scott McCoy

FILED

November 30, 2012

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA
COURT OF APPEALS
Hon. John D. Geathers, Thomas E. Huff, and Paula H. Thomas
Court of Appeal Judges

Case No. 2009-CP-37-1428

Andrea Beth Campbell Petitioner

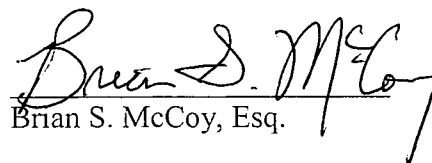
v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA Respondents

PROOF OF SERVICE

Certificate of Service

I hereby certify that on this 27th day of December 2012, two copies of the Appendix To
Petition for a Writ of Certiorari, two copies of the Record on Appeal, Brief of Appellant,
Brief of Respondents, and Reply Brief of Appellant were filed with the South Carolina
Supreme Court, and one copy was delivered by Federal Express One Day Delivery to Lawrence
H. Hunter, Jr., Esq., Hunter & Foster, P.A., P.O. Box 10309, Greenville, SC 29603, attorney for
Respondents.


Brian S. McCoy, Esq.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2009-CP-37-1428

Andrea Beth Campbell Appellant

v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA .. Respondents

RECORD ON APPEAL

Brian S. McCoy, Esq.
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt, Esq.
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

Attorneys for Appellant

Lawrence M. Hunter, Jr., Esq.
Hunter & Foster, P.A.
P.O. Box 10309
Greenville, SC 29603
(864) 242-2111

Attorney for Respondent

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STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Andrea Beth Campbell,

Plaintiff,

vs.

Ronnie A. Brockway, M.D., and
Oconee OB/GYN Associates PA,

Defendants.

IN THE COURT OF COMMON PLEAS

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

C.A. No. 2009-CP-37-1428

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FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT

THIS CASE is before the Court on motion of the Defendants Ronnie A. Brockway, M.D. and Oconee OB/GYN Associates PA (hereafter "the Defendants"), who have moved for summary judgment contending that they are entitled to judgment as a matter of law because the claims of Plaintiff Andrea Campbell (hereafter "Campbell") are barred by the three year statute of limitations. For the reasons stated herein, the Defendants' motion is GRANTED.

BACKGROUND

The facts underlying this dispute, viewed in a light most favorable to the Plaintiff for purposes of this motion, are as follows:¹

The claims that Campbell makes in this matter stem from a doctor-patient relationship that began on or about July 19, 2005, when Campbell sought medical care from the Defendants after receiving an abnormal result on a pap smear test. Test results indicated a diagnosis of "chronic ulcerative endocervicitis with squamous metaplasia" and "moderate dysplasia (CIN II), focal."

¹ The Court notes the Defendants dispute all allegations of negligence made by Campbell, and they support their denial with the affidavit of Mark T. Moore, a practicing OB/GYN. For purposes of this order, however, the Plaintiff's allegations are viewed in a light most favorite to her.

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On August 9, 2005, Brockway performed a LEEP/CONE procedure on Campbell in his office. According to Campbell, during the LEEP procedure Brockway negligently removed more tissue than was necessary, failed to provide sufficient anesthesia, and inadvertently cut into the Plaintiff's vaginal wall. Campbell alleges that as a result of Brockway's negligence, she has suffered severe cervical pain, infections, abnormal bleeding, nerve damage, disability, and other losses.

Campbell contends in her complaint that the LEEP procedure was not called for under the circumstances, that additional testing should have been performed, that other treatment options should have been considered, that written consent should have been obtained prior to the procedure, and that the Defendants are liable for associated acts of medical negligence.

In support of her complaint, Campbell filed an affidavit of Joel Cooper, MD, a physician practicing in the state of New York. In his affidavit, Cooper alleges six deviations from what he believed to be the appropriate standard of care. Each of those specifications stem directly from the LEEP procedure performed on August 9, 2005.

The record before the Court contains a *pro se* complaint signed and filed by Campbell on August 9, 2008, three years after the LEEP procedure, in the United States District Court for the District of South Carolina under civil action number 8:08-cv-02819-HMH-BHH. In that complaint, Campbell alleged that on August 9, 2005, Brockway had "refused to perform the HPV DNA test requested by Plaintiff and proceeded with a LEEP conization procedure" and that "during the procedure the anesthesia wore off and Plaintiff Campbell flinched causing Defendant Brockway to damage her vaginal wall." Campbell further alleged that on or about May 19, 2006, Dr. Marian Bertotti reported to her that there was no evidence that Campbell currently had the disease, or had had the HPV disease at any point in her life, and that the LEEP procedure had been unnecessary.

The record before the Court also contains affidavits filed by both Plaintiff and Defendants in support of their respective positions. The Defendants filed with their motion on August 17, 2010, the affidavit of Mark Moore, MD, wherein Dr. Moore relates a series of complaints made by Campbell between November 30, 2005, and June 13, 2006. In those complaints, which the Defendants contend show that Campbell knew or should have known of the existence of her claim on those respective dates, Campbell attributed the origin of her complaints to the LEEP procedure performed by the Defendants.

In response, the Plaintiff submitted her own affidavit of May 10, 2011, in which she alleges that it was on June 28, 2006, rather than May 19, 2006 as she alleged in her federal court complaint, that Dr. Bertotti first reported to her that the LEEP procedure had been unnecessary. The Plaintiff submits the latter date as that on which the statute of limitations should be considered as triggered, but she does not retract or amend any other statement made in her federal court complaint. Notably, the Plaintiff does not deny or alter in her affidavit the allegation of paragraph six of the federal court complaint that "Defendant Brockway refused to perform the HPV DNA test requested by Plaintiff Campbell and proceeded with a LEEP conization procedure."

On November 15, 2008, again acting *pro se*, Campbell voluntarily dismissed the federal court action.

Campbell initiated this current action by means of a Notice of Intent to File Suit on June 26, 2009, -- three years, ten months, and seventeen days after the LEEP procedure about which she complains.

APPLICABLE LAW

I. THE SUMMARY JUDGMENT STANDARD

Under the South Carolina Rules of Civil Procedure, a defendant is entitled to summary judgment "if the 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 the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (SC 2009). However, one may not avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. A party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of the pleadings, but instead must set forth specific facts showing that there is a genuine issue of material fact to justify proceeding to trial. Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 313, 411 S.E.2d 672, 673 (S.C. App. 1991), rev'd in part on other grounds, 311 S.C. 218, 428 S.E.2d 700 (1993). See also Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (S.C. App. 1988)

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 2250, 626 S.E.2d 1, 5 (2006). Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 677 S.E.2d 32 (SCApp 2009)

II. THE THREE YEAR STATUTE OF LIMITATIONS

Under S.C. Code §15-3-20, "Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued...." S.C. Code Ann. §15-3-545 provides a three year limitations period for causes of action arising from medical negligence:

In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.

Historically, a cause of action accrued at the time of the allegedly negligent act. Strong v. University of South Carolina School of Medicine, 316 S.C. 189, 447 S.E.2d 850 (1994) (1 David W. Louisell and Harold Williams, Medical Malpractice, 13.02 (1993)). However, South Carolina has altered this calculation by adopting the discovery rule, whereby "the statute of limitations does not run from the date of the negligent act, but from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence." McClain v. Jarrard, M.D., 354 S.C. 218, 220, 580 S.E.2d 763, 764 (S.C.App.2003) (citing Wilson v. Shannon, 299 S.C. 512, 513, 386 S.E.2d 257, 258 (S.C.App.1989)); see also Strong, supra; Knox v. Greenville Hosp. System, 362 S.C. 566, 608 S.E.2d 459 (S.C.App.2005); Arant v. Kressler, 327 S.C. 225, 489 S.E.2d 206 (1997); Preer v. Mims, 323 S.C. 516, 476 S.E.2d 472 (1996); Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996).

The discovery rule has been described as follows:

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Moreover,

the fact that the injured party may not comprehend the full extent of the damage is immaterial.

Joubert v. South Carolina Dept. of Public Services, 341 S.C. 176, 190-191, 534 S.E.2d 1,8-9 (S.C. App 2000) (citing Dean v. Ruscon Com., 321 S.C.360, 364, 468 S.E.2d 645, 647 (1996)) (emphasis added).

The test of whether a person should have known that a cause of action has arisen is objective, not subjective. Republic Contracting Corporation v. South Carolina Department of Highways and Public Transportation, 332 S.C. 197, 207, 503 S.E.2d 761, 767 (S.C.App 1998); Maher v Tietex Corporation, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (S.C.App. 1998); Wiggins v Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994)).

It is not necessary that a plaintiff consult with an attorney or develop a full theory of recovery before a cause of action accrues and the statute begins to run. Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). Republic, 332 S.C at 198, 503 S.E.2d at 767. Maher v Tietex Corporation, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (S.C.App. 1998).

There is no "continuing treatment" exception to the discovery rule in South Carolina. Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (S.C. 2003). See Hecht v. First Nat. Bank & Trust Co. 208 Kan. 84, 490 P.2d 649, 656 (1971)

"The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of the injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury." Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994).

ANALYSIS

After hearing, consideration of the affidavits filed by the parties, and a thorough review of the record, and construing the evidence in a light most favorable to the Plaintiff, the Court finds that there is no genuine issue of material fact but that more than three years elapsed from the date on which an objective person knew or could have known that the Defendants allegedly deviated from the standard of care and the date on which Plaintiff filed her Notice of Intent.

The Court finds as one independent basis for its ruling that an objective person of common knowledge and experience should have been put on notice that some right of the Plaintiff's had been violated, or that some claim against the Defendant might exist, as a result of the meeting with Dr. Bertotti, a physician with First Choice Health Care in Johnson City, Tennessee which Campbell has alleged in her federal court complaint occurred on or about May 19, 2006.

In her federal complaint, Campbell alleges that Dr. Bertotti conducted an HPV DNA test and reported that there were no findings of disease or any indication that the Plaintiff had "the disease" at any point in her life, and further commented that the LEEP conization procedure performed by the Defendants was unnecessary. Dr. Bertotti diagnosed the Plaintiff with acute inflammation and prescribed antibiotics.²

The Court notes that in her affidavit of May 10, 2011, Campbell seeks to modify the date on which she received this information. In paragraph seven of her affidavit, she alleges that it was not until June 28, 2006, that she received the explanation that the LEEP procedure had been unnecessary. Campbell submits in support of her assertion what appear to be medical

² In paragraph nine of her federal court complaint, Campbell alleges that on or about May 19, 2006, she: "was seen by Dr. Marian Bertotti, a physician with First Choice Health in Johnson City, Tennessee, regarding extreme pain and disruption in sexual satisfaction. Dr. Bertotti conducted a HPV DNA test and reported that there were no signs of the disease, or any indication that Plaintiff Campbell had had the disease at any point in her life. Dr. Bertotti concluded that the LEEP conization procedure was unnecessary. Plaintiff Campbell is diagnosed with an acute inflammation and treated with antibiotics."

office records of May 19, 2006, and June 28, 2006, but it does not appear to the Court that either of these records establish the correct date of the alleged diagnosis to be later than May 19, 2006, as neither record contains documentation of any diagnosis or statement by Bertotti that the LEEP procedure had been unnecessary.

Further, even if the Court were to allow the Plaintiff to contradict a statement she made three years previously in her federal court pleading and adopt the latter date for that on which she received Bertotti's diagnosis, the operative issue in the discovery rule is the *earlier* of the date on which an objective person *should have known of the claim by the exercise of reasonable diligence*, or the date on which the Plaintiff "actually" became aware of her claim. Here, the Plaintiff's own affidavit shows that the test Dr. Bertotti ordered on May 19, 2006, was the same test which the Plaintiff requested that Brockway perform on August 9, 2005.³ The Plaintiff does not indicate any reason why this test was not available to her from other providers prior to May 19, 2006, and in fact her affidavit establishes that she was aware that the test was available to her from another medical professional no later than this date.

The question before the Court for purposes of this summary judgment motion is whether the statute of limitations as applied to this case has been extended under **the discovery rule**. The discovery rule is an objective test, and does not mean the date of "actual discovery," but the date when a cause of action "reasonably ought to have been discovered" as a result of "the exercise of reasonable diligence." The question is not when Campbell *actually* discovered facts that she contends support her claim, but when she *should have* discovered those facts using reasonable diligence. Campbell has submitted nothing to this Court to explain why the HPV test she requested and obtained on or about May 19, 2006, or the opinion that she allegedly received from Dr. Bertotti on June 28, 2006, could not have been obtained earlier had she used

³ In regard to Campbell's knowledge about the availability of HPV testing prior to June 28, 2006, and her diligence in pursuing it, it is also significant to note that, according to paragraph five of her federal complaint, she had requested the same test on May 17, 2005, from the nurse practitioner at Redfern Women's Clinic.

reasonable diligence to pursue them.⁴ The same consideration applies to the Plaintiff's allegation that it was even later, on May 2, 2007, that she received an opinion from Dr. Sameh Ward that her pain was a result of the LEEP procedure performed by Dr. Brockway. Campbell provides no basis to establish why this opinion about the source of the pain, about which she had complained since shortly after the procedure, was not obtained earlier.⁵ A plaintiff such as Campbell may not wait indefinitely to consult with an attorney or develop a full theory of recovery, and then claim that the cause of action did not accrue and the statute of limitations begin to run until the date that she obtained the opinion. See Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

As a separate and alternative basis for this ruling, the Court finds that Plaintiff was on notice of her cause of action from the date of her procedure on August 9, 2005, based on the uncontradicted evidence that the Defendant nicked her vaginal wall during the procedure *and advised the Plaintiff on that date of having done so*. Campbell admits in paragraph three of her May 10, 2011, that she was made aware of this cut by Dr. Brockway himself even before the LEEP procedure was complete. Also, Campbell makes no attempt in her affidavit to contradict the allegation in her federal court complaint that "at some point during the procedure the local anesthesia wore off and Plaintiff Campbell flinched causing Defendant Brockway to damage her vaginal wall. Defendant Brockway interrupted the conization procedure to causing [sic] damage to the cervix of Plaintiff Campbell."

⁴ Exhibit B of the Plaintiff's affidavit, the "Patient Test Results," indicates a "Specimen Date" of May 19, 2006, thus confirming that the Plaintiff was aware on that date of the availability to her of the test which she alleges to be the basis for her discovery of her cause of action.

⁵ The Court also notes that the medical record which Campbell attaches in support of paragraph eight of her affidavit to establish that the correct trigger date of the statute of limitations was May 2, 2007, the date of her consultation with Dr. Ward, makes no reference to any medical negligence in performance of the procedure. Instead, that record simply states that "her pain started after a lead [sic] procedure" and that she has "neuropathic problems stemming from her previous surgery from scarring, diabetes, and thyroid, all of which are aggravating the condition." The relationship of the start date of her alleged pain to the LEEP procedure was not new information to Campbell, as she stated the same complaint to numerous physicians in the months immediately after the procedure, as documented in the affidavit of Dr. Moore.

On this point the Court finds instructive the case of Knox v Greenville Hospital System, 608 S.E.2d 459 (S.C.App. 2005), wherein the Court of Appeals affirmed an award of summary judgment against a plaintiff who alleged that "he did not know the extent of his injury until the July 26, 2000, diagnosis by the orthopedic surgeon." Knox, at 461. Although Campbell alleges that the extent of the pain suffered by the plaintiff distinguishes Knox from her case, the Court finds that rule applied in Knox, which must also be applied here, is that the statute of limitations begins to run on the date on which facts existed sufficient to place "a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against [the Hospital] might exist." Knox, at 462.

Here, Campbell knew on the date of the surgery that Brockway had nicked her vaginal wall during surgery, that she had flinched, and that her vaginal wall had been damaged. She further knew on the same date that the HPV test which she had requested had allegedly been "refused." She further knew on the same date that Brockway had allegedly "failed to discuss with Campbell other treatment options" (see paragraph 13e of the complaint). She further knew on the same date that the Defendants had allegedly "failed to obtain a written consent from Campbell for the LEEP/CONE procedure" (see paragraph 13f of the complaint). She further knew on the same date that Brockway had allegedly "failed to inform Campbell as to the amount of tissue that would be removed during the LEEP/CONE procedure or that other organs would be affected by the LEEP/CONE procedure." (see paragraph 13g of the complaint). Under the facts of this case, as in Knox, we "find it immaterial that [the Plaintiff] did not know the extent of her injury on [the date of surgery]." Knox, at 462, citing Young v. South Carolina Dept. of Corr., 333 S.C. 714, 720, 511 S.E.2d 413, 416 (Ct.App.1999) ("[T]he statute of limitations is not tolled during the period of time in which a plaintiff is merely unaware of the extent of an actionable injury.") Under these facts, Campbell knew or should have known on August 9, 2005, the date

of the surgery, of facts sufficient to place her on notice that some right had been invaded or some claim might exist.

CONCLUSION

Under either above the above-referenced scenarios, this Court finds that the Plaintiff's filing on June 29, 2009, was outside §15-3-545's three year statute of limitation. By her own statements and sworn testimony, Campbell shows that she was aware prior to June 28, 2006, of the factual basis for the claims presented in this case. The fact that she now alleges that she did not comprehend the full extent of her damage, or develop a full-blown theory of recovery, until after June 28, 2006, is immaterial. See Dean v Ruscon, 321 S.C. at 364, 468 S.E.2d at 647.

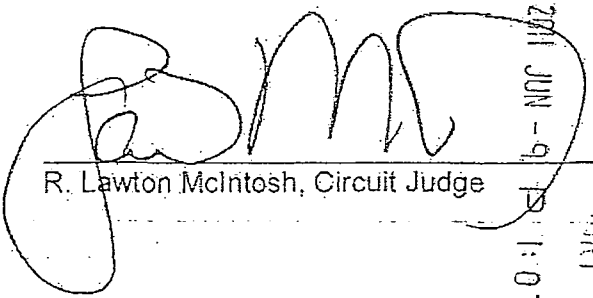
For the reasons stated above, this Court finds that Campbell's action is barred by South Carolina Code §15-3-545.

The law of South Carolina constrains this Court to find that Campbell has failed to act with proper diligence in pursuing her claim, and that the Defendants are entitled to judgment as a matter of law that Campbell's action is barred by the statute of limitations.

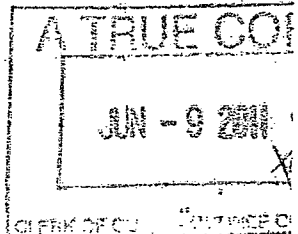
THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF DISMISSAL AS TO ALL CLAIMS BY THE PLAINTIFF IN THIS MATTER IS HEREBY GRANTED.

IT IS SO ORDERED.

Dated: 6-3-6/


R. Lawton McIntosh, Circuit Judge

FILED O'CONNOR, SC.
BEVERLY H. WHITEFIELD
CLERK
JUN - 9 2011
11:07



COPY

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

FILED OCONEE SC
BEVERLY H. WHITEHEAD
CLERK OF COURT
2009 JUN 26 P 3:32

ANDREA BETH CAMPBELL,)

Plaintiff,)

v.)

CIVIL ACTION NO. _____

RONNIE A. BROCKWAY, M.D.,)

and)

OCONEE OB-GYN ASSOCIATES, P.A.,)
a South Carolina professional corporation,)

Defendants)

Common Pleas # 2009-cp-37-793

Notice Of Intent To File Suit

Plaintiff, Andrea Beth Campbell, by and through her attorney, pursuant to S.C. Code § 15-79-125, hereby files this Notice of Intent to File Suit against Ronnie A. Brockway, M.D., and Oconee OB-GYN Associates, P.A., a South Carolina professional corporation, alleging injury as a result of medical malpractice.

I

Adverse Parties

1. Upon information and belief, Ronnie A. Brockway, M.D. is a citizen and resident of South Carolina, and his place of business at all relevant times in question has been and currently is 215 Stark Way, Seneca, South Carolina in Oconee County. At all relevant times Dr. Brockway has been and is engaged in the medical specialty of obstetrics and gynecology.
2. Oconee OB-GYN Associates, P.A. is a South Carolina professional corporation. Upon information and belief, its principal place of business at all relevant times has been and is located in Oconee County, South Carolina.
3. Upon information and belief, at all relevant times specified herein. Dr. Brockway was and still is employed by the defendant Oconee OB-Gyn Associates, P.A. of Seneca, South Carolina.

*Short And Plain Statements Of The Facts Showing That The Party
Filing The Notice Is Entitled To Relief*

4. On July 19, 2005, Campbell consulted with Dr. Brockway as a result of the reported results of a May 17, 2005 abnormal pap smear that was performed on her by another physician.

5. That day, Dr. Brockway performed a biopsy on Campbell, taking samples of tissues from Campbell's cervical area.

6. The July 19, 2005 biopsy pathology report indicated "chronic ulcerative endocervicitis with squamous metaplasia" and "moderate dysplasia (CIN II), focal."

7. On August 9, 2005, Dr. Brockway told Campbell that he needed to perform the LEEP/CONE procedure on her.

8. That same day, he performed the LEEP/CONE procedure on her.

9. Prior to performing the LEEP/CONE procedure, Dr. Brockway

a) did not obtain or review any medical records of her treatment by other physicians other than the May 17, 2005 pap smear report;

b) failed to conduct the standard test for Human Papilloma Virus ("HPV") on Campbell; but nonetheless diagnosed her with HPV;

c) failed to do a repeat pap smear on Campbell;

d) failed to check for the source of dysplasia as noted in the July 19, 2005 biopsy pathology report prior to doing the LEEP/CONE procedure;

e) failed to discuss with Campbell other treatment options as alternatives to the LEEP/CONE procedure;

f) failed to obtain a written consent from Campbell to the LEEP/CONE procedure;

g) failed to inform Campbell as to the amount of tissue that would be removed by the LEEP/CONE procedure or that other organs would be affected by the LEEP/CONE procedure.

10. During the LEEP/CONE procedure, Dr. Brockway

a) removed more tissue from the central portion of Campbell's cervix than was justified in the circumstances;

b) failed to provide Plaintiff with an adequate amount of anesthesia during the LEEP/CONE procedure;

c) negligently cut into Campbell's vaginal wall.

11. After performing the LEEP/CONE procedure, Dr. Brockway failed to treat Campbell with a prophylactic antibiotic to prevent post-operative infection.

12. After the LEEP/CONE procedure was performed, Campbell returned to Dr. Brockway several times with complaints of cervical pain and other problems. Dr. Brockway

i) failed to assess Campbell properly and treat her. He failed to diagnose and treat post-operative cervical infection and tissue damage resulting from the LEEP/CONE procedure;

ii) failed to refer Plaintiff for additional diagnostic testing and treatment of her continuing complaints of pain, sexual dysfunction and inflammation.

14. To the extent permitted under applicable law, the statements contained in the affidavit of Dr. Cooper that is being filed contemporaneously with this Notice is hereby incorporated herein by reference.

13. The above-noted actions by Dr. Brockway deviated from the applicable standard of care and constituted medical negligence. In his treatment of Campbell, Dr. Brockway

i) negligently failed to assess Campbell's condition properly;

ii) improperly prescribed the LEEP/CONE procedure to treat Campbell's condition;

iii) failed to obtain informed consent from Campbell for the LEEP/CONE procedure;

iv) negligently performed the LEEP/CONE procedure, including negligently removing an excessive amount of tissue;

v) negligently failed to assess and treat Campbell's post-LEEP/CONE complaints, including infections; and

vi) negligently failed to refer Campbell in a timely manner to the appropriate specialist for the treatment of Campbell's post-operative complaints.

14. As a result of Dr. Brockway's negligence, Campbell has suffered severe cervical pain, infections, abnormal bleeding, nerve damage, disability and other losses.

III

Standard Interrogatories

Plaintiff's Responses to Standard Interrogatories are the South Carolina Rules of Civil Procedure attached hereto as Exhibit A.

COPY

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

ANDREA BETH CAMPBELL,

Plaintiff,

v.

RONNIE A. BROCKWAY, M.D.,

and

OCONEE OB/GYN ASSOCIATES, PA,

Defendants

Common Pleas # 2009-cp-37-1428

Reference

CIVIL ACTION NO.: 2009-CP-37-793

FILED OCONEE, SC
BEVERLY R. WHITFIELD
CLERK OF COURT
2009 NOV 19 P 12:02

COMPLAINT

Andrea Beth Campbell, Plaintiff, for this cause of action for medical negligence against Defendants, Ronnie A. Brockway, M.D., and Oconee OB/GYN, PA. , states as follows:

1. Plaintiff is currently a citizen and resident of Carter County, Tennessee.
2. Upon information and belief, Ronnie A. Brockway, M.D. is a citizen and resident of South Carolina and his place of business is 215 Stark Way, Seneca, South Carolina in Oconee County.
3. Oconee OB-GYN Associates, P.A. is a South Carolina professional corporation. Its principal place of business is located in Oconee County, South Carolina.
4. Upon information and belief at all relevant times specified herein Dr. Brockway was employed by the defendant Oconee OB-Gyn Associates, PA of Seneca, South Carolina.

5. Pursuant to S.C. Code § 15-79-125, Plaintiff filed her Notice of Intent to File Suit (Notice) on June 26, 2009.

6. The Notice was timely served on defendants.

7. On September 23, 2009, a mediation was held, which failed to resolve plaintiff's claims.

Factual Allegations

8. On July 19, 2005, Campbell consulted with Dr. Brockway as a result of the reported results of a May 17, 2005 abnormal pap smear that was performed on her by another physician.

9. On that same date, Dr. Brockway performed a biopsy on Campbell, taking samples of tissues from Campbell's cervical area.

10. The July 19, 2005 biopsy pathology report indicated "chronic ulcerative endocervicitis with squamous metaplasia" and "moderate dysplasia (CIN II), focal."

11. On August 9, 2005, Dr. Brockway told Campbell that he needed to perform the LEEP/CONE procedure on her.

12. On that same date, Dr. Brockway performed the LEEP/CONE procedure on Campbell.

13. Prior to performing the LEEP/CONE procedure, Dr. Brockway

- a. did not obtain or review any medical records of her prior treatment by other physicians other than the May 17, 2005 pap smear report;
- b. failed to conduct the standard test for Human Papilloma Virus ("HPV") on Campbell, but nonetheless diagnosed her with HPV;

- c. failed to obtain a repeat pap smear on Campbell;
- d. failed to check for the source of dysplasia as noted in the July 19, 2005 biopsy pathology report prior to doing the LEEP/CONE procedure;
- e. failed to discuss with Campbell other treatment options as alternatives to the LEEP/CONE procedure;
- f. failed to obtain a written consent from Campbell for the LEEP/CONE procedure;
- g. failed to inform Campbell as to the amount of tissue that would be removed during the LEEP/CONE procedure or that other organs would be affected by the LEEP/CONE procedure.

14. During the LEEP/CONE procedure, Dr. Brockway

- a. removed more tissue from the central portion of Campbell's cervix than was justified under the circumstances;
- b. failed to provide Plaintiff with an adequate amount of anesthesia during the LEEP/CONE procedure; and
- c. negligently cut into the Plaintiff's vaginal wall.

15. After performing the LEEP/CONE procedure, Dr. Brockway failed to treat Campbell with a prophylactic antibiotic to prevent post-operative infection.

16. After the LEEP/CONE procedure was performed, Campbell returned to Dr. Brockway several times with complaints of cervical pain and other problems. Dr. Brockway

a. failed to properly assess and treat Campbell. He failed to diagnose and treat post-operative cervical infection and tissue damage resulting from the LEEP/CONE procedure;

b. failed to refer Plaintiff for additional diagnostic testing and treatment of her continuing complaints of pain, sexual dysfunction and inflammation.

17. To the extent permitted under applicable law, the statements contained in the affidavit of Dr. Cooper that is being filed contemporaneously with this Notice is hereby incorporated herein by reference.

18. The above-noted actions by Dr. Brockway deviated from the applicable standard of care and constituted medical negligence. In his treatment of Campbell, Dr. Brockway

a. negligently failed to assess Campbell's condition properly;

b. improperly prescribed the LEEP/CONE procedure to treat Campbell's condition;

c. failed to obtain informed consent from Campbell for the LEEP/CONE procedure;

d. negligently performed the LEEP/CONE procedure, including negligently removing an excessive amount of tissue;

e. negligently failed to assess and treat Campbell's post-LEEP/CONE complaints, including infections; and

f. negligently failed to refer Campbell to the appropriate specialist for the treatment of Campbell's post-operative complaints in a timely manner.

19. As a result of Dr. Brockway's negligence, Campbell has suffered severe cervical pain, infections, abnormal bleeding, nerve damage, disability and other losses.

20. Dr. Brockway committed his aforementioned negligence with the assistance of other agents and/or employees of Oconee OB-GYN Associates, P.A.

Count One — Negligent Failure To Obtain Informed Consent

21. Paragraphs 1 through 20 are incorporated herein by reference.

22. Dr. Brockway was negligent and he departed from the generally accepted recognized standard of care and skill to which he is held in the medical profession in providing care to Ms. Campbell. More specifically, the Defendant failed to obtain informed consent from Ms. Campbell to do the LEEP procedure and removed more tissue from the central portion of the cervix than was justified under the circumstances and lacerated her vaginal wall.

23. If Ms. Campbell had been properly informed of the risks and possible complications of the LEEP procedure being performed, she reasonably would have refused those procedures.

24. As a direct and proximate result of the Defendant's negligent failure to inform and obtain consent, Ms. Campbell has suffered substantial damages, including pain, nerve damage, disability, loss of income, and other losses.

Count Two — Negligence And Professional Malpractice Of Surgeon

25. Paragraphs 1 through 24 are incorporated herein by reference.

26. By his aforementioned actions and inaction, Dr. Brockway breached his duty of care to Plaintiff in his treatment of Plaintiff,

27. Dr. Brockway was negligent and failed to exercise reasonable and ordinary care in his treatment of plaintiff, and departed from the generally accepted recognized standard of care and skill to which he is held in the relevant health care provider community.

28. As a direct and proximate result of that failure, Ms. Campbell has suffered substantial damages, including pain, nerve damage, disability, loss of income, and other losses.

Count Three – Vicarious Liability Of Oconee OB/GYN Associates, P.A.

29. Paragraphs 1 through 31 are incorporated herein by reference.

30. Defendant Oconee OB/GYN Associates, P.A., and its agents, servants and/or employees were negligent and acted with less than, or failed to act with reasonable care in accordance with such standards in the care and treatment of the plaintiff. They departed from the generally accepted and recognized standards of care and skill to which each of them is held in the relevant health care provider community. The negligence of the agents, servants and/or employees of Oconee OB/GYN Associates, P.A. is imputed to Oconee OB/GYN Associates, P.A. by operation of law.

31. Since Dr. Brockway was an employee, agent, or an apparent agent, of Oconee OB/GYN Associates, P.A. or was held out by Oconee OB/GYN Associates, P.A. to be an agent of Oconee OB/GYN Associates, P.A., then Oconee OB/GYN Associates, P.A. is responsible for any and all of his negligence under the doctrines of agency or apparent agency or such similar doctrines.

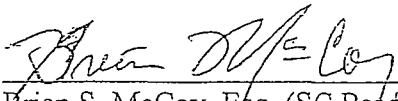
32. The negligence of those Oconee OB/GYN Associates, P.A. employees and/or agents and/or apparent agents was a direct and proximate cause of plaintiff's injuries; therefore Oconee OB/GYN Associates, P.A. is liable for those injuries.

33. Pursuant to S.C. Code § 15-36-100(B), the affidavit of our expert witness, Joel J. Cooper, M.D., FACOG, FACS, is attached hereto as Exhibit A.

WHEREFORE, Plaintiff Andrea Campbell requests judgment against the Defendants as follows:

1. That proper process be issued to the Defendants requiring a response to this Complaint within the time allowed by law.
2. That the Plaintiff have judgment against the Defendants in the amount of \$1,000,000.
3. That all court costs be taxed to the Defendants.
4. That Plaintiff have trial by jury and that Plaintiff have such other further relief to which the Plaintiff may prove entitled.

Respectfully submitted,
ANDREA BETH CAMPBELL



Brian S. McCoy, Esq. (SC Bar #2155)
633 E. Main Street
Suite 500
Rock Hill, SC 29730
(803) 366-2280 Phone
(803) 366-0643 Fax

Of counsel:

Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone
(276) 623-0212 Fax

BEVERLY H. WHITFIELD
CLERK OF COURT
2009 JUN 26 PM 3:32
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**AFFIDAVIT OF
JOEL J. COOPER, M.D., FACOG, FACS**

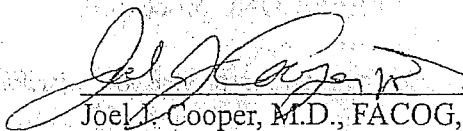
Common Pleas # 2009-cp-37-793

I, Joel J. Cooper, M.D., FACOG, FACS, being first duly sworn, make the following statements based on personal knowledge, except where otherwise noted.

1. I am a physician licensed to practice medicine by the State of New York.
2. I am board-certified by the American Board of Obstetrics and Gynecology.
3. I have engaged in an active medical practice in the field of Obstetrics and Gynecology since 1973.
4. The information on my attached CV is true and correct.
5. I have reviewed medical records of Dr. Ronnie A. Brockway of Ocone OB-Gyn Associates, P.A., for his treatment of Andrea Beth Campbell, and other related medical records of the treatment of Ms. Campbell. Those records show the following:
 - a. On July 19, 2005, Andrea Campbell saw Dr. Brockway as a result of a May 17, 2005 abnormal pap smear that was reported to her by another physician.
 - b. Dr. Brockway reviewed the pap smear report but did not obtain or review any other medical records of Ms. Campbell prior to during his treatment of her.
 - c. On July 19, 2005 Dr. Brockway performed a biopsy, taking samples of tissues from Ms. Campbell's cervical area.
 - d. The July 19, 2005 biopsy pathology report indicated "chronic ulcerative endocervicitis with squamous metaplasia" and "moderate dysplasia (CIN II), focal."
 - e. On August 9, 2005, Dr. Brockway performed the LEEP procedure on Ms. Campbell.
 - f. Prior to performing the LEEP procedure, Dr. Brockway did not take a pap smear from Ms. Campbell.
 - g. Prior to performing the LEEP procedure, Dr. Brockway did not confirm that Ms. Campbell had HPV.
 - h. There is no documentation in the medical records that Dr. Brockway discussed other treatment options as alternatives to the LEEP procedure that he performed.
 - i. There is no documentation in the medical records that Dr. Brockway obtained a written consent from Ms. Campbell for the LEEP procedure.

- j. During the LEEP/CONE procedure, Dr. Brockway removed extensive tissue from the cervix than was justified under the circumstances, falsely noting she had circumferential disease, and lacerated the vaginal wall.
 - k. Dr. Brockway did not provide Ms. Campbell with an adequate anesthesia for the LEEP/CONE procedure.
 - l. Prior to performing the LEEPCONE procedure, Dr. Brockway did not perform tests to detect cervical infections.
 - m. Dr. Brockway did not properly treat Ms. Campbell for her post-LEEP/CONE procedure complaints of constant cervical pain and abnormal bleeding.
 - n. Dr. Brockway did not refer Ms. Campbell for additional diagnostic testing and treatment of her continuing complaints of pain, sexual dysfunction and inflammation.
6. Based on my review of the aforementioned medical records and facts, it is my professional opinion that Dr. Brockway was negligent and deviated from the applicable standard of care in his treatment of Ms. Campbell. Those deviations include but are not limited to the:
- a. failure to disclose to Ms. Campbell options to the LEEPCONE procedure and to obtain a signed informed consent to the LEEPCONE, performed procedure from Ms. Campbell prior to performance of the procedure;
 - b. failure to provide adequate anesthesia for the LEEP/CONE procedure;
 - c. failure to control the surgical instruments during the LEEP/CONE procedure, causing a vaginal wall laceration;
 - d. failure to perform diagnostic testing for cervical infections prior to the LEEP/CONE procedure;
 - e. failure to diagnose the symptoms of nerve irritation and/or damage following the LEEP/CONE procedure;
 - f. failure to timely refer Ms. Campbell to an appropriate specialist for diagnosis and treatment of her post-LEEP/CONE procedure cervical pain.
7. It is my professional opinion that the negligence of Dr. Brockway was a proximate cause of pain and other damages suffered by Ms. Campbell.
8. My statements and opinions above are expressed with a reasonable degree of medical certainty.
9. I am qualified by my education, training and experience to render these opinions and statements.

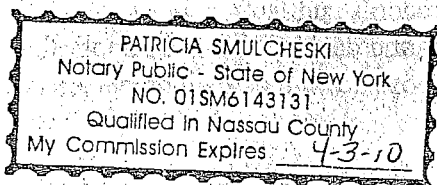
10. I reserve the right to amend my opinion and statements should additional information become available to me.


Joel L. Cooper, M.D., FACOG, FASC

Sworn to and subscribed before me in my presence this

24th day of June, 2009, a New York Notary Public.

Patricia Smulcheski, Notary Public



STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Andrea Beth Campbell,

Plaintiff,

VS.

Ronnie A. Brockway, M.D., and
Ocone OB/GYN Associates PA,

Defendants.

Further, in the alternative and even under the most liberal possible construction of the discovery rule, there is also no genuine issue of material fact as to Campbell's action being barred. Campbell's last treatment with Dr. Brockway was on **February 27, 2006**, and there is no allegation of any negligence other than is alleged against Dr. Brockway. In addition, on **May 19, 2006**, Campbell alleges that another physician told her that the procedure she complains of had been unnecessary. Even following a subjective standard, rather than the objective standard required by the law of this state, any argument that Campbell was subjectively unaware of her claim was lost on that date. Therefore at the very latest this action was barred on **May 19, 2009**.

Under the facts and law as explained below, the Defendants request that their motion be granted.

BACKGROUND

The Defendants adamantly maintain that no medical negligence has been committed in this case. However, for purposes of this motion, Campbell's allegations are taken in a light most favorable to her. Those allegations are set forth in the Complaint filed with this Court (Exhibit 1), and also in a *pro se* complaint filed by Campbell with the United States District Court on **August 8, 2008**. (Exhibit 2) According to Campbell's own allegations, and other documents cited herein, the underlying facts of this matter are as follows:

On **July 19, 2005**, Campbell sought medical care from the Defendants after receiving an abnormal result on a pap smear test performed at Redfern Health Center in Clemson. (Exhibit 1, Complaint, par. 8.) Additional testing indicated "chronic ulcerative endocervicitis with squamous metaplasia" and "moderate dysplasia (CIN II), focal." (Exhibit 1, Complaint, par. 10)

On August 9, 2005, Brockway told Campbell that her condition required that he perform a LEEP/CONE procedure (hereafter "LEEP procedure"), which he then performed in his office on that same date. (Exhibit 1, Complaint, par. 11).¹

The first event showing Campbell's awareness of a potential cause of action against Brockway occurred on this date. Campbell alleges that even before the procedure began, Brockway "refused" her request for additional testing before conducting the LEEP procedure. (Exhibit 2, Complaint, par 6: Brockway "refused to perform [an] HPV DNA test requested by the Plaintiff" prior to the procedure.) This refusal is precisely one of the allegations that Campbell now asserts as negligence.²

The second event showing Campbell's awareness of a potential cause of action on August 9, 2005, took place even before the procedure was completed. Campbell alleges that *"at some point during the procedure the local anesthesia wore off and Plaintiff Campbell flinched causing Defendant Brockway to damage her vaginal wall. Defendant Brockway interrupted the conization procedure to causing damage to the cervix of Plaintiff Campbell."*³ (Exhibit 2, Complaint, par 7.) There can be no doubt but that Campbell was aware of this event, because she herself alleges that Brockway told her during the procedure that he had unintentionally cut the side of her vaginal wall during the procedure. (Exhibit 3, page 002035, par. 3: Medical

¹ The Defendants deny the implication of Campbell's complaint that she was not properly informed about the need for the procedure. Brockway had discussed the need for the LEEP procedure at least three times prior to August 9, 2005, as outlined in the affidavit of Mark Moore, MD. (Exhibit 7, par. 3 d-f).

² The Defendants deny this characterization of the discussion of the need for the test, but for purpose of this motion the allegation is presumed to be true.

³ Presumably this sentence should read "due to causing damage to the cervix...." Again, the Defendants deny Campbell's allegation of negligence.

record of Women's Nutritional Health Center wherein Campbell reports that Brockway stated to her at the time of the procedure "that the cauterizing tool cut into the side of my vaginal wall.")⁴

In addition to the above two specific events that occurred on **August 9, 2005**, Campbell makes clear throughout her subsequent medical records that the pain which she alleges to have suffered, and for which she brings her claim, *began with the procedure itself*. For example, according to the same set of medical records, Campbell stated to Connie Pennington, MD, on 6/21/07, that "*all of her pain started by LEEP by Dr. Brockway in S.C.*" (Exhibit 3, page 002033, "History of present illness.") Also, in response to a questionnaire from the Servy Institute for Reproductive Endocrinology asking how long she had suffered from her symptoms, Campbell wrote in June of 2006 that she had suffered pelvic pain and anxiety "Since Aug 05" (Exhibit 9).

The allegations of the complaint make clear that Campbell's claim centers on the events of **August 9, 2005**. Campbell alleges that the LEEP procedure was not called for under the circumstances, that additional testing should have been performed, that other treatment options should have been considered, that written consent should have been obtained prior to the procedure, and associated acts of medical negligence. (Exhibit 1, Complaint, par. 13) Campbell further alleges that excessive tissue was removed during the procedure, inadequate anesthesia was provided, and that the vaginal wall had been negligently cut. (Exhibit 1, Complaint, par. 14). Campbell alleges that Brockway failed to treat her with an appropriate antibiotic, and that on several subsequent visits, Brockway failed to diagnose and treat post-

⁴ Again, for purposes of this motion the Plaintiff's allegations are construed in a light most favorable to her, but if this matter proceeds the Defendants will vigorously contest the claim that any event of medical negligence occurred.

operative cervical infection and tissue damage arising from the procedure, and failed to refer the Plaintiff for additional testing and treatment. (Exhibit 1, Complaint par. 15-16).

Along with her complaint Campbell filed an affidavit of Joel Cooper, MD, a physician practicing in the state of New York. In his affidavit, Cooper alleges six deviations from what he believed to be the appropriate standard of care. Each of those specifications stem directly from the LEEP procedure performed on August 9, 2005. (Exhibit 1, Complaint, Exhibit A, Affidavit of Joel Cooper, MD, paragraph 6)

In implicit recognition that the statute of limitations had begun to run on the date of the procedure, three years after the procedure, almost to the day, Campbell filed a *pro se* complaint in the United States District Court for the District of South Carolina, Greenville Division. In that complaint, filed August 8, 2008, in addition to Brockway Campbell named as defendant the Redfern Health Center at Clemson University.⁵ (Exhibit 2, Federal Court Complaint) The federal court complaint states essentially the same allegations now presented here. Her *pro se* complaint stated that on August 9, 2005, Brockway "refused to perform the HPV DNA test requested by Plaintiff and proceeded with a LEEP conization procedure" and that "during the procedure the anesthesia wore off and Plaintiff Campbell flinched causing Defendant Brockway to damage her vaginal wall." (Exhibit 2, pages 2-3) The federal court action was never served on the Defendants, and was dismissed voluntarily by Campbell, again acting *pro se*, on November 15, 2008. (Exhibit 4)

On June 26, 2009, Campbell filed this current action by means of a Notice of Intent to File Suit -- three years, ten months, and seventeen days after the LEEP procedure giving rise to this claim.

⁵ August 9, 2008, the actual three year anniversary of the procedure, was a Saturday.

SUMMARY JUDGMENT STANDARD

Under the South Carolina Rules of Civil Procedure, a defendant is entitled to summary judgment "if the 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 the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC.

As held in Hoard ex rel. Hoard v Roper Hosp. Inc., 387 S.C. 539, 694 S.E.2d 1 (SC 2010), a medical malpractice case in which our Supreme Court recently upheld a summary judgment for the defendant granted by Judge Nicholson, a plaintiff alleging medical malpractice must provide evidence showing: (1) the generally recognized and accepted practices and procedures that would be followed by the average, competent physician in the defendant's field of medicine under the same or similar circumstances; and (2) the defendant departed from the recognized and generally accepted standards. Jones v. Doe, 372 S.C. 53, 61, 640 S.E.2d 514, 518 (Ct.App.2006). Additionally, the plaintiff must demonstrate the defendant's departure from such generally recognized practices and procedures proximately caused the plaintiff's alleged injuries and damages. David v. McLeod Regl. Med. Ctr., 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006).

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (SC 2009). However, one may not avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. A party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of the pleadings, but instead must set forth specific facts showing that there is a genuine issue of material fact to justify proceeding to

trial. Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 313, 411 S.E.2d 672, 673 (S.C. App. 1991), rev'd in part on other grounds, 311 S.C. 218, 428 S.E.2d 700 (1993). See also Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (S.C. App. 1988)

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 2250, 626 S.E.2d 1, 5 (2006). Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 677 S.E.2d 32 (SCApp 2009)

ARGUMENT

A. THE THREE YEAR STATUTE OF LIMITATIONS AND APPLICABLE PRECEDENT

Under S.C. Code Section 15-3-20, "Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued...." S.C. Code Ann. Section 15-3-545 provides a three year limitations period for causes of action arising from medical negligence:

In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.

The "discovery rule" governs the standard for determining when a cause of action accrues for purposes of the statute of limitations. The discovery rule has been described as follows:

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Moreover, *the fact that the injured party may not comprehend the full extent of the damage is immaterial.*

Joubert v. South Carolina Dept. of Public Services, 341 S.C. 176, 190-191, 534 S.E.2d 1,8-9 (S.C. App 2000) (citing Dean v. Ruscon Com., 321 S.C.360, 364, 468 S.E.2d 645, 647 (1996)) (emphasis added):

Application of the statute of limitations is governed by a number of fundamental principles:

The test of whether a person should have known that a cause of action has arisen is objective, not subjective. Republic Contracting Corporation v. South Carolina Department of Highways and Public Transportation, 332 S.C. 197, 207, 503 S.E.2d 761, 767 (S.C.App 1998) (stating that "[t]he test of whether a person should have known the operative facts [giving rise to a cause of action] is objective, rather than subjective. ... That an injured party may not comprehend the extent of the injuries is immaterial.") (internal citations omitted). Maher v Tietex Corporation, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (S.C.App. 1998) ("The test is objective," citing Wiggins v Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994)).

Consultation with an attorney or a full development of a theory of recovery is not necessary for a cause of action to accrue. Snell v. Columbia Gun Exchange, Inc., 276 S.C.

301, 303, 278 S.E.2d 333, 334 (1981). See also Republic, 332 S.C. at 198, 503 S.E.2d at 767 ("The statute of limitations begins to run when a plaintiff knows or should know of a potential claim against another party, not when the plaintiff develops a full-blown theory of recovery"). Maheer v. Tietex Corporation, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (S.C.App. 1998) ("The statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'") Instead, an injured party must act promptly when the facts and circumstances of the injury would place a reasonable person on notice that a claim against another party might exist. Republic, at 767.

The South Carolina Supreme Court has emphatically rejected application of a "continuing treatment" doctrine as an exception to the discovery rule in South Carolina. Even if such a rule were applied in this state, the last treatment by the Defendants was more than three years before filing of this litigation. Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (S.C. 2003) (in regard to the statute of repose: "After careful consideration, it is our opinion the continuous treatment rule should not be judicially adopted. Put simply, we find judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via the statutes discussed above. See Hecht v. First Nat. Bank & Trust Co. 208 Kan. 84, 490 P.2d 649, 656 (1971) (describing other states' adoption of the continuous treatment rule as "a judicial effort to soften the harshness of the statutory accrual rule" and refusing to judicially legislate in this area). Certainly, this is an area where the Legislature can create statutory law if it so chooses.")

Summary judgment is appropriate in a medical negligence case such as this one where no genuine issue of material fact exists as to the facts establishing the statute of

limitations defense. A number of reported medical malpractice cases establish firm precedent for granting judgment as a matter of law where the facts of the case are clear. These include the following:

In Arant v Kressler, 327 S.C. 225, 489 S.E.2d 206 (SC 1997), a patient brought a medical malpractice claim against her obstetrician and gynecologist claiming negligent performance of a dilation and curettage ("D&C"). There, the plaintiff alleged that remnants of the placenta had been left behind in her delivery, requiring the subsequent D&C and leading to probable infertility. At trial, the plaintiff sought to amend her causes of action to include the doctor who performed the original delivery, even though more than three years had passed since the delivery date. The Supreme Court upheld the denial of that request on the grounds that more than three years had passed since the plaintiff had been told by another doctor that the corrective operation was necessary because the delivery doctor had not removed the entire placenta. Under such circumstances the patient was held to have been on sufficient notice of the claim to make a timely claim. Arant, at 229. The Court overruled the plaintiff's argument that the statute did not begin to run until the patient became aware of the treating physician's actual negligence, citing Strong v Univ. of South Carolina School of Medicine, 316 S.C. 189, 447 S.E.2d 850 (1994).

Similarly, in Johnston v Bowen, 313 S.C. 61, 437 S.E.2d 45 (SC 1993), our Supreme Court upheld summary judgment in the case of a patient who received knee surgery from the same surgeon in 1983 and 1984, but stopped seeing him in 1987 and consulted other physicians for her persistent knee pain. The record in that case indicates that the plaintiff sought the advice of an attorney in 1987, but failed to file suit until four years later. Under those facts, the Supreme Court held:

Statute of limitations requiring actions to be commenced within a time period after a person knew or should have known that he had a cause of action means that the injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist. Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981). The statute of limitations begins to run from this point and not when advice of counsel is sought or full-blown theory of recovery is developed. Id. The date of discovery is not when the plaintiff discovers a witness to support or prove his case. Buxton v. Perry, 32 Wash.App. 211, 646 P.2d 779, rev. denied, 97 Wash.2d 1040 (1982). [emphasis added]

Johnston, at 64.

Summary judgment was also granted in a medical negligence case under the statute of limitations in Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36 (SC 1987). In that case, the plaintiff alleged improper medical care during her pregnancy leading to her infant being stillborn in 1979. The plaintiff there sought legal counsel almost immediately after the stillbirth, but did not file suit until 1985. After finding that the medical malpractice statute of limitations was constitutional, the Supreme Court noted that the plaintiff had "raised concerns and questions about potential malpractice before Mrs. Smith left the hospital...." and that her consultation with an attorney and request for medical records were indications that the plaintiff through the exercise of reasonable diligence should have known that she had a cause of action. Smith, at 425-426.

Summary judgment was also awarded to the defendant on statute of limitations grounds in Strong v University of South Carolina School of Medicine, 316 S.C. 189, 447 S.E.2d 850 (SC 1994). In that case, the plaintiff underwent several eye operations, by the end of the third of which (on May 11, 1989) the patient was blind. The Supreme Court held that the statute barred an action filed on May 11, 1992, even though the plaintiff continued treatment with the same practice until at least June of 1989. The Court rejected the contention that the plaintiff's poor

educational background and blindness were sufficient to justify that he was not on notice that he had a claim until his medical records were forwarded to his attorney in February of 1991. The Court further held that no argument for extension of the statute of limitations could be made after the doctor-patient relationship ended. Strong, at 192.

With the above statutory law and case precedent as background, we return to the facts of Campbell's claim:

1. CAMPBELL RECOGNIZED ON AUGUST 9, 2005, THAT SHE HAD A CLAIM AGAINST THE DEFENDANTS FOR MEDICAL MALPRACTICE.

Under the facts set forth above, Campbell was clearly aware on the date of the procedure, **August 9, 2005**, of the facts and circumstances that she alleges to exist that would have placed a reasonable person on notice of a claim. Campbell herself makes three clear allegations that show that she was aware that a claim had arisen on the date of the procedure.

First, she alleges that Brockway "refused to perform [an] HPV DNA test requested by the Plaintiff" prior to the procedure. (Exhibit 2, Complaint, par 6) That this was a matter of conscious dispute in Campbell's mind is shown by her federal court complaint, where Campbell faults the staff at Redfern Health Center for previously refusing the HPV DNA test, just as she requested from Brockway. (Exhibit 2, par. 16, Exhibit 3, page 002035, par. 2) These allegations show that the issue of receiving an HPV DNA test was a matter of great concern to Campbell even prior to **August 9, 2005**. In alleging that Brockway was negligent for failing to provide such a test, Campbell is advancing a claim based on the same argument that she made both to Redfern prior to the 9th of August, and to Brockway on that date. The Defendants deny

that any medical negligence was involved in the testing decision, but regardless of the merits the claim was fully known to Campbell on **August 9, 2005**, at the time of the procedure.

Second, Campbell alleges that Brockway reported to her at the time of the procedure that he had cut the side of her vaginal wall after she flinched when the local anesthetic wore off prior to the end of the procedure. (Exhibit 2, Complaint, par 7., and Exhibit 3, page 00235, par. 3) Regardless of whether this incident caused any relevant injury or constituted medical negligence, which the Defendants maintain is not the case, this statement by Campbell establishes conclusively that she was aware of the allegedly accidental and significant cut, which she claims to be medical negligence in this current action, on the date of the procedure.

Third, Campbell has stated numerous times in the medical histories she has provided to other doctors, that the pain which she complained of in this action started with the LEEP procedure on **August 9, 2005**. For example, Campbell stated to Connie Pennington, MD, on 6/21/07, that "*all of her pain started by LEAP by Dr. Brockway in S.C.*" (Exhibit 3, page 002033, "History of present illness.") The allegation that the pain she complains of began on that date is additional evidence that Campbell was fully aware of her potential claim on **August 9, 2005**.

In addition to the above evidence, it is significant that Campbell herself took previous legal action based on the acknowledgement that the statute of limitations had begun to run the date of the procedure. Campbell filed her *pro se* federal court complaint on Friday, **August 8, 2008**, almost three years to the day from the date of the LEEP Procedure. The filing of a *pro se* federal court complaint is itself strong evidence that the Plaintiff had ample intelligence and capacity to understand the facts of the case, investigate them herself, and protect her own interests. Had she chosen to continue that action the statute of limitations would not have

applied, but by voluntarily dismissing it on **November 15, 2008**, and not re-filing this current action until **June 26, 2009**, this matter is now barred.

Under the above facts, about which there is no genuine issue of material fact, on **August 9, 2005**, Campbell had actual knowledge of her claim, and the three year statute of limitations began to run on that date. Whether or not on that date Campbell fully comprehended the full extent of the damage is immaterial. Joubert, at 190.

2. UNDER THE OBJECTIVE PERSON STANDARD OF THE DISCOVERY RULE, EVEN IF HER CAUSE OF ACTION DID NOT ARISE ON AUGUST 9, 2005, IT AROSE NO LATER THAN MAY 19, 2006.

The above facts alleged by Campbell herself show clearly that she recognized her claim on **August 9, 2005**. Even if Campbell had somehow been unaware on August 9, 2005, of the facts that she now alleges in support of her claim, numerous events prior to June 26, 2006, would have placed a reasonable person on notice that a claim existed. The documentation from the record, which far exceeds that which is required to meet the discovery rule's objective person standard, may be summarized as follows:

Campbell alleges that Brockway "conducted follow-up examinations of Plaintiff Campbell on a weekly basis until **September 15, 2005**, and on a monthly basis from **September 15, 2005**, through **February 27, 2006**, *without offering treatment for progressive pain and bleeding.*" (Exhibit 2, page 3, par. 8). In other words, Campbell was aware of her "pain and bleeding," and also aware that Brockway was (allegedly) not offering any treatment to her, and yet she took no action to investigate and pursue her claim during that same period. These are the same allegations that Campbell now submits as evidence of medical negligence, and a reasonable

person would have known that they were sufficient to place her on notice of a potential claim at the time they occurred.

In another highly significant admission in her federal court complaint, Campbell alleges that on or about May 19, 2006, she:

“was seen by Dr. Marian Bertotti, a physician with First Choice Health in Johnson City, Tennessee, regarding extreme pain and disruption in sexual satisfaction. Dr. Bertotti conducted a HPV DNA test and reported that there were no signs of the disease, or any indication that Plaintiff Campbell had had the disease at any point in her life. Dr. Bertotti concluded that the LEEP conization procedure was unnecessary. Plaintiff Campbell is diagnosed with an acute inflammation and treated with antibiotics.”

(Exhibit 2, page 3, par. 9, emphasis added).⁶

This allegation -- made in a court pleading by Campbell herself -- clearly shows that on May 19, 2006, she held what she believed was evidence from a physician that the LEEP procedure had been “unnecessary.” Therefore no later than May 19, 2006, Campbell believed she had persuasive medical testimony to support her position. *Nevertheless*, May 19, 2009, passed without suit being filed. Under any construction of the evidence in this case, the statute of limitations barred this action after that date.

Further, in her responses to discovery in this current action, Campbell produced a copy of the Decision by which she was awarded benefits by the Social Security Administration. (Exhibit 5, Social Security Administration Decision) The first paragraph of that order, signed by Administrative Law Judge Douglas G. White, stated that “the claimant is alleging disability since May 31, 2006.” (Exhibit 5, page 1). In that order, Judge White recited a number of Findings of

⁶ Once again, the Defendants dispute the contention that the LEEP procedure was inappropriate. The Defendants are not aware of any office note corroborating Campbell's allegation that Bertotti actually made such a statement. The issue here, however, is Campbell's awareness of the allegation, and by her complaint she establishes that she was fully aware of the basis for bringing a claim on May 19, 2006.

Fact, based on Campbell's own allegations, which show that Campbell was actively involved in pursuing the facts which would have placed a reasonable person on notice of this well before

June 26 of 2006:

(1) "Dr. Bland further testified that the claimant has perceived pain from a gynecological procedure, but no objective findings for that." (The context of the Order makes clear that this gynecological procedure to which Campbell was referring was the LEEP procedure by Brockway.) (Exhibit 5, page 3, second par. from bottom).

(2) "Dr. Schacht testified that Ms. Campbell has unfounded beliefs regarding her body, including (but not limited to) the belief that feces seeps (into and) from her vagina. Extensive tests for this, however, were fully negative. He further testified that the claimant has committed herself fully to these beliefs and she travels all over the country to see different doctors in regard to those beliefs." (Exhibit 5, page 3, last par.)

(3) "The record reveals that Dr. Schacht's testimony is fully supported by the record. The claimant has been treated by Dr. Marcus Cooper (a pain medicine specialist) for obsessive-compulsive characteristics, pelvic neuropathic pain, a pain disorder, and a mood disorder. She has been to medical clinics in many distant areas in regard to her complaints. At the Vanderbilt University Medical Center she complained of chronic pelvic pain and sexual dysfunction without objective findings." (Exhibit 5, page 4, par. 1)

(4) "Decision: Based on the application for a period of disability and disability insurance benefits protectively filed on September 19, 2006, the claimant has been disabled under sections 216(i) and 223(d) of the Social Security Act beginning on **May 31, 2006**. (Exhibit 5, page 4, final par.)

Another document in Campbell's discovery responses is of particular note. In Attachment kk (Exhibit 6), Campbell correctly lists her final office visit to Ocone OBGYN as **June 13, 2006**. As will be discussed below, in actuality Campbell's last consultation with Dr. Brockway was in **February of 2006**, so the date of last treatment relevant to this case is even earlier. However, given that Campbell did not receive any treatment from the Defendants after **June 13, 2006**, there is absolutely no possibility that any conduct by the Defendants contributed to Campbell's delay in discovering her alleged cause of action past that date.

In addition to the above facts, the Defendants have filed with their motion for summary judgment an affidavit of Dr. Mark Moore, a practicing OB-GYN medical doctor in Greenville, South Carolina. (Exhibit 7) In his affidavit, Dr. Moore finds no evidence of medical negligence on the part of the Defendants, but – more germane to this motion -- Moore notes numerous statements by Campbell to her medical professionals in which she expressed her complaints about the LEEP procedure prior to June 26, 2006. These complaints show that Campbell was (or should have been) well aware of the existence of her claim prior to that date:

- a) On November 30, 2005, Ms. Campbell complained to Dr. McDonald, her primary care physician at Redfern, that she was concerned about vaginal swelling and thickness after the LEEP/Cone procedure. ("She had a LEEP procedure done in the fall but she is concerned that there might be something swollen there.")
- b) On December 12, 2005, Ms. Campbell complained to Nurse Practitioner Whelchel at Redfern of "feeling like things are falling out" and "feel like a stick is crammed up in my vagina". Nurse Whelchel denied observing any abnormalities in the vaginal vault.
- c) On February 27, 2006, Ms. Campbell presented to Dr. Brockway a detailed time line listing multiple gynecological and sexual complaints that she stated had begun in the fall of 2005.
- d) On March 2, 2006, Ms. Campbell completed a patient intake form with the Clemson Counseling and Psychological Services ("CAPS") Division of Redfern in which she summarized her reason for seeking treatment as "Sexual Dysfunction after LEEP." This complaint resulted in a triage evaluation prepared at Redfern stating "One of health complications included a LEEP procedure. Client reports decreased intensity during orgasm as a result."
- e) On March 9, 2006, Ms. Campbell, returned to the CAPS division of Redfern, met with counselor Eunice Lehmacher, and reported "distress regarding her loss of intensity during orgasm due to the LEEP medical procedure last year."
- f) On March 24, 2006, Ms. Campbell consulted with Johnson City, Tennessee, OBGYN, at which time Dr. Crowder documented her complaint as "LEEP in August – feels "numb" since LEEP – no sensation." Dr. Crowder documented a normal vaginal exam.

- g) On May 24, 2006, Ms. Campbell consulted with Dr. Jack Stevens, a counselor at Fort Hill Presbyterian Church in Fort Hill, and reported sexual dysfunctions after that LEEP procedure.
- h) On May 26, 2006, Ms. Campbell complained to Dr. Rose Marie McDonald at Redfern that she was "still having some decreased sensation in the genital area after her LEEP procedure." Dr. McDonald documented a normal pelvic exam and referred her to Dr. Jerry Sherrill, a neurologist in Seneca.
- i) By letter of May 31, 2006, Dr. Sherrill reported to Dr. McDonald that he had seen Ms. Campbell, and that she had reported to him that she was experiencing multiple sexual problems including anorgasmia. Dr. Sherrill documented in his notes that he performed a complete physical exam, the results of which were essentially within normal limits.
- j) On June 13, 2006, Ms. Campbell complained to Dr. Philip Caron of sexual dysfunction. Dr. Caron recorded in his notes that "Patient has a previous active and healthy sexual function and [she] relates the change in her sexual responsiveness to a leep procedure she underwent in September of 2005." Dr. Caron documented a normal vaginal exam, counseled her for forty minutes on sexual function, recommended that she adjust the psychoactive medications she had been taking, and recommended that she continue her counseling sessions.

In addition to the above complaints to her doctors, Campbell was clearly investigating in preparation for this action well prior to June 26, 2006. The Defendants' office records (Exhibit 8) show that Campbell requested and was provided full sets of her treatment records on both March 21, 2006, and June 6, 2006.⁷

Under these facts, there is no genuine issue of material fact but that Campbell was in a position where she "should have known by the exercise of reasonable diligence that a cause of action [had arisen] from the wrongful conduct." The "exercise of reasonable diligence" means that the injured party must act with some promptness where the facts and circumstances of an

⁷ These dates are established via the "Log to track disclosures" completed in the Defendants' office, and the corresponding two "Request to Inspect And Copy Protected Health Information" documents signed by Campbell herself. The request of March 21 is dated by Campbell as "2005," but this is clearly a scrivener's error because Campbell was not a patient of the Defendants' practice by that date.

injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. As held in Joubert and other precedent cited above, the fact that Campbell may claim that she allegedly did not comprehend the full extent of the damage is immaterial. Under the facts of this case this action was barred by the statute of limitations at the time it was filed, and summary judgment should be awarded to the Defendants.

3. THERE IS NO "CONTINUING TREATMENT" DOCTRINE IN SOUTH CAROLINA TO PROVIDE RELIEF FROM THE EFFECT OF THE STATUTE OF LIMITATIONS. EVEN IF SUCH A DOCTRINE APPLIED HERE, IT WOULD NOT AVAIL CAMPBELL, AS HER LAST TREATMENT FROM THE DEFENDANTS WAS LONGER THAN THREE YEARS BEFORE THIS ACTION WAS FILED.

In order to anticipate a possible argument that Campbell may advance in opposition to this motion, it should be observed that the so-called "continuous treatment" doctrine is of no avail to Campbell in saving her claim from the statute of limitations. As generally formulated, this rule is understood to mean that if treatment by a doctor is given in a continuing course, and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated, unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive. Preer v. Mims, 323 S.C. 516, 476 S.E.2d 472 (S.C.1996).

In Preer, a case involving a patient who claimed he had become addicted to Vicodin due to his doctor's negligence, the Supreme Court noted that the continuous treatment doctrine had not previously been adopted in this state, and declined the invitation in that case to adopt it. The Court held, however, that "[i]f we chose to adopt it, the formulation of the doctrine would include a discovery exception, as has been recognized by many courts. See Anderson v. Short,

323 S.C. 522, 476 S.E.2d 475 (1996). This means that even if the rule applied here, the facts of the continuing treatment would still be scrutinized to determine when a reasonable person would have discovered that a cause of action existed.

In 2003, the Supreme Court revisited the continuous treatment rule in Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (S.C. 2003), a case centering on the statute of repose, but also considering the entire statutory scheme regarding limitation periods. Harrison involved a fact pattern far more sympathetic to the patient than is present here, because during much of the time in issue the plaintiff had been involuntarily committed to a mental hospital and diagnosed as a schizophrenic. Harrison, at 111. ("[W]e agree with petitioner that it is not reasonable to expect ... a diagnosed, institutionalized schizophrenic who has been adjudged to be incompetent to have been able to discover negligent psychiatric treatment." Harrison, at 112.) Nevertheless, the Court held that "[a]fter careful consideration, it is our opinion the continuous treatment rule should not be judicially adopted. Put simply, we find judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via the statutes..... See Hecht v. First Nat. Bank & Trust Co. 208 Kan. 84, 490 P.2d 649, 656 (1971) (describing other states' adoption of the continuous treatment rule as "a judicial effort to soften the harshness of the statutory accrual rule" and refusing to judicially legislate in this area). Certainly, this is an area where the Legislature can create statutory law if it so chooses.")

In what appears to be the most recent case examining continuing treatment in the context of a statute of limitations defense, United States District Judge Cameron Currie issued an opinion on September 22, 2009, examining the question in the context of a claim against the Dorn VA Center, which had allegedly allowed a patient to fall and break his hip. In Wilks v US,

2009 WL 3065794 (D.S.C 2009), Judge Currie wrote "... South Carolina has not adopted the continuous treatment rule...."

Under the facts of the present case, Campbell's final visit for treatment with Brockway was February 27, 2006. Campbell also visited Oconee OBGYN (to see Dr. Caron, Brockway's partner) on June 13, 2006, (Exhibit 3, p. 002035, paragraphs 5 & 6; Exhibit 6, Attachment kk), but neither in her complaint nor in her expert's affidavit (Exhibit 1) is there any reference to any acts of negligence performed by anyone other than Brockway. Therefore, even if South Carolina did follow the "continuing treatment" rule, Campbell did not receive any treatment from Brockway after February 27, 2006. Even under this continuing treatment theory, which does not apply, the statute of limitations would have expired on February 27, 2009, approximately four months before this suit was filed.

CONCLUSION

Under the undisputed facts, this action is barred by South Carolina Code Section 15-3-545 because it was not filed within three years of the date on which it arose, as calculated under any reasonable construction of the law. The above facts fully support the conclusion that there is no issue of fact but that Campbell knew of the existence of her claim on August 9, 2005, the date of the procedure. Under this construction of the evidence, the statute of limitations expired some ten months before this suit was filed.

Even under the "continuing treatment" rule, which does not apply in South Carolina, the ~~last date of treatment by Brockway, the only doctor whose actions are alleged to be negligent,~~ was February 27, 2006. Under these facts the statute of limitation expired some four months before this suit was filed. If the date of last treatment by Dr. Brockway's partner, who is not

alleged to be negligent, is considered, the statute still expired some thirteen days before this suit was filed.

Even if the objective reasonable person discovery rule is stretched to give Campbell every benefit of every doubt, her own allegations establish that she was aware of her cause of action no later than May 19, 2006, the date on which Dr. Bertotti allegedly told her that the LEEP procedure had been unnecessary. Under these undisputed facts, the statute of limitations expired over thirty days before this suit was filed.

The law of South Carolina is clear. The three year statute of limitations runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Reasonable diligence means that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damage is immaterial. This test is objective, and not subjective. A plaintiff such as Campbell is not allowed to await consultation with an attorney or the development of a full-blown theory of recovery before filing suit.

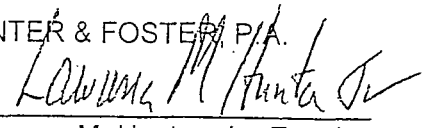
"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Moates v. Bobb, 322 S.C. 172, 470 S.E.2d 402 (SC App. 1996)

Campbell has failed to act with proper diligence, and her action is now barred.

For the above reasons the Defendants request that this Court grant their motion, enter judgment on their behalf as to all claims brought by the Plaintiff, and order such other and further relief as the Court deems just and proper.

Respectfully Submitted,

HUNTER & FOSTER, P.A.


Lawrence M. Hunter, Jr., Esquire
S.C. Bar # 011808
Post Office Box 10309
Greenville, South Carolina 29603
(864) 242-2111

Dated: *August 17, 2010*
Greenville, SC

Attorney for Defendants Ronnie A. Brockway,
M.D., and Oconee OB/GYN Associates, PA

EXHIBIT LIST

1. Campbell Complaint Filed November 19, 2009
2. Campbell Federal Court Complaint filed August 8, 2008
3. Records from Women's Nutritional Health, Jonesborough, Tennessee
4. Notice of Dismissal of Federal Court Action dated November 15, 2008.
5. Social Security Administration Decision
6. Campbell Discovery Response Attachment kk Listing Treatment Dates with Defendants
7. Affidavit of Mark T. Moore, MD (with attachments)
8. Documentation of Requests for Medical Records
9. Records from Servy Institute for Reproductive Endocrinology

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

ANDREA BETH CAMPBELL,)

Plaintiff,)

vs.)

Civil Action No.: _____

JURY DEMANDED

RONNIE BROCKWAY, M.D., Individually and)

as Agent, Servant or Employee of Oconee)

OB/GYN Associates, P.A.; PHILIP CARON,)

D.O., Individually and as Agent, Servant or)

Employee of Oconee OB/GYN Associates, P.A.;)

NETTIE ROBINSON, L.P.N., Individually and)

as Agent, Servant, or Employee of Oconee)

OB/GYN Associates, P.A.; OCONEE OB/GYN)

ASSOCIATES, P.A., a domestic corporation;)

ANNETTE ROCHESTER WHELCHER, N.P.,)

Individually and as Agent, Servant, or Employee)

of Redfern Health Center; REDFERN HEALTH)

CENTER, a subsidiary of Clemson University,)

Defendants,)

COMPLAINT

Comes now the Plaintiff *pro se* against Defendants and states the following:

1.

Plaintiff is a resident of Tennessee taking residence and domicile at Hampton, Carter County, Tennessee.

2.

Defendant, Ronnie Brockway, upon information and belief, is a citizen and resident of the State of South Carolina, County of Oconee, and was at all times hereinafter mentioned a medical doctor with a practice known as Oconee OB/GYN Associates, P.A., located in Seneca, South Carolina, in the County of Oconee. Upon information and

belief, at all times hereinafter mentioned, Dr. Brockway was an agent, servant or employee of Oconee OB/GYN Associates, P.A. He performed the Loop Electrosurgical Excisional Procedure, hereinafter referred to as LEEP conization procedure on the Plaintiff on or about August 9, 2005 and continued to treat the Plaintiff for complications from the procedure until June 26, 2006.

3.

Under the laws of the State of South Carolina, an action between a resident of this state and a party not a resident of this state may be brought before Federal Court on grounds of diversity of citizenship on a claim the damages of which equal or exceed \$75,000. Accordingly, Plaintiff Andrea Beth Campbell, a citizen and resident of the State of Tennessee brings this diversity action, the amount in controversy of which is over \$75,000, before the United States District Court for the District of South Carolina, Greenville Division against Defendants Ronnie Brockway, a citizen and resident of this state, and Oconee OB-GYN, a South Carolina corporation.

4.

Defendant, Oconee OB/GYN Associates, P.A., upon information and belief, is a Corporation organized under the laws of the State of South Carolina, engaged in the business of the practice of medicine in Oconee County, South Carolina, of which its shareholders derive substantial economic benefit.

5.

On or about May 17, 2005 the Plaintiff was diagnosed by Nurse Practitioner, Annette Whelchel of Redfern Women's Clinic at Clemson University in Clemson, South Carolina with an abnormal pap smear suspicious of the presence of Human Papillomavirus, hereinafter referred to HPV. Ms. Whelchel refused Plaintiff's request for further testing, specifically a HPV DNA test to confirm the presence of HPV. Ms. Whelchel referred the Plaintiff to Defendant Brockway and Defendant Oconee for further treatment.

6.

On or about August 9, 2005 Defendant Brockway reviewed the medical records and examined Plaintiff Campbell at his office at Oconee OB/GYN Associates, P.A.

Defendant Brockway refused to perform the HPV DNA test requested by Plaintiff Campbell and proceeded with a LEEP conization procedure.

7.

On or about August 9, 2005 Defendant Brockway did administer a local anesthesia to Plaintiff Campbell in preparation for the LEEP conization procedure. At some point during the procedure the local anesthesia wore off and Plaintiff Campbell flinched causing Defendant Brockway to damage her vaginal wall. Defendant Brockway interrupted the conization procedure to causing damage to the cervix of Plaintiff Campbell.

8.

Defendant Brockway conducted follow-up examinations of Plaintiff Campbell on a weekly basis until September 15, 2005 and on a monthly basis from September 15, 2005 through February 27, 2006 without offering treatment for progressive pain and bleeding.

9.

On or about May 19, 2006 Plaintiff Campbell was seen by Dr. Marian Bertotti, a physician with First Choice Health Care in Johnson City, Tennessee regarding extreme pain and disruption in sexual satisfaction. Dr. Bertotti conducted a HPV DNA test and reported that there were no signs of the disease, or any indication that Plaintiff Campbell had had the disease at any point in her life. Dr. Bertotti concluded that the LEEP conization procedure was unnecessary. Plaintiff Campbell is diagnosed with an acute inflammation and is treated with antibiotics.

10.

The Defendant, Ronnie Brockway, M.D., individually and as agent, servant or employee of Oconeé OB/GYN Associates, P.A. was negligent, negligent per se and grossly negligent as to his treatment of Plaintiff Campbell.

11.

At the relevant times specified herein Dr. Philip Caron, D.O. was employed by the co-Defendant Oconee OB/GN Associates, P.A. of Seneca, South Carolina. Dr. Philip Caron, D.O. failed to examine, diagnose and treat the Plaintiff.

12.

The adverse parties to this action are, upon information and belief, Nettie Robinson, L.P.N., resident of South Carolina; Oconee OB/GYB Associates, P.A., a domestic corporation registered in South Carolina.

13.

At the relevant times specified here Nettie Robinson, L.P.N. was employed by the co-Defendant Oconee OB/GYN Associates, P.A. of Seneca, South Carolina.

14.

The adverse parties to this action are, upon information and belief, Annette Rochester Whelchel, resident of South Carolina; Redfern Health Center, Medical Services, Redfern Health Center, a State organization and subsidiary of Clemson University, Clemson South, Carolina.

15.

At the relevant times specified herein Annette Rochester Whelchel, N.P., was employed by the co-Defendant Redfern Health Center, Medical Services, Redfern Health Center, State organization and subsidiary of Clemson University, Clemson, South Carolina.

16.

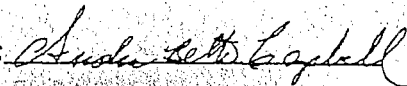
Annette Rochester Whelchel, N.P. performed a PAP Test on the Plaintiff and diagnosed the Plaintiff as having HPV and refused to perform the HPV DNA test requested by Plaintiff Campbell. Annette Rochester Whelchel, N.P. recommended a LEEP conization procedure without conclusively knowing if the Plaintiff had HPV. Annette Rochester Whelchel, N.P. failed to conduct the standard test for the Human Papilloma Virus. Annette Rochester Whelchel, N.P. failed to conduct any other test to diagnose the cause of mild dysplasia. The Plaintiff returned to Annette Rochester Whelchel, N.P. for follow up care from complication from the LEEP procedure. Annette Rochester Whelchel, N.P. failed to adequately diagnose and treat the Plaintiff during follow up care. Annette Rochester Whelchel, N.P. failed to diagnose and/or treat the Plaintiff for infection following the improperly performed LEEP procedure.

17.

The Defendants are jointly and severally liable to the Plaintiff.

WHEREFORE Plaintiff prays for judgment against the Defendants, for an amount of actual and punitive damages to be determined by the jury and for the costs of the action.

BY:


Andrea Beth Campbell

126 Shook Branch Road

Hampton, TN 37658

August 8, 2008
August 8, 2008

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF OCONEE

Andrea Beth Campbell,

, Plaintiff.

v.

Ronnie A. Brockway, MD,
and Oconee OB-GYN
Associates, PA,

SUBPOENA IN A CIVIL CASE
Case Number: 09-CP-37-1428
Pending in OCONEE County

, Defendants.

TO: Records Custodian
Women's Nutritional Health
1103 E. Jackson Blvd., Suite 1
Jonesborough, TN 37659

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM:

DATE AND TIME:

☐ YOU ARE COMMANDED to appear in the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION:

DATE AND TIME:

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

ANY and ALL medical and/or office records, REGARDLESS OF DATE, pertaining to Andrea B. Campbell, whose DOB is [REDACTED] and whose SSN is [REDACTED]. Your response should include, but is not limited to, a copy of the patient information sheet and/or health history questionnaire filled out by the patient on his/her initial visit to your office, and any and all medical records from the first time you treated this patient for any reason to the present.

PLACE: Office of Lawrence M. Hunter, Jr.,
Esq., P.O. Box 10309, Greenville, SC 29603

DATE AND TIME:
On or before April 27, 2010

☐ YOU ARE COMMANDED to permit inspection of the following premises at the time specified below.

PREMISES

DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30 (b) (6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Lawrence M. Hunter, Jr. Esq., P.O. Box 10309, Greenville, SC 29603 (864) 242-2111

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45 (c) (1) AND THAT NOTICE AS REQUIRED BY RULE 45 (b) (1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney for DEFENDANT

ISSUING OFFICER'S SIGNATURE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) DATE

(7/93) (See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on Reverse)

SCCA FORM 254

1 Note 6/21/2007 10:33:00 AM

Andrea Campbell, Gender: F, [REDACTED] Encounter Date and Time: 6/21/2007 10:33AM, Examiner: Connie J. Pennington, MD

Chief complaint

The Chief Complaint is: ? R-V fistula.

History of present illness

Andrea Campbell is a 49 year old female.

Chronic vaginal pain for 2 years now. Dr. Weaver has seen her. Was worked up at Sloane-Kettering Cancer institute, sees a vulva specialist. Has been seen at Duke by physician/psychiatrist. Has been on and off of antibiotics for a year. Thinks she passes feces through her vagina or at least once. Colonoscopy in 1999/2000 at JCMC. All of her pain started by LEAP by Dr. Brockway in S.C. BM's every day. Firm. No pain with BM's. ? E. Coli infections in vagina.

Past medical/surgical history

LEAP in S.C.
ganglion cyst removed
ACL repair
basal cell ca scalp X 2
HTN
diabetes.

Personal history

Behavioral history: No tobacco use.

Alcohol: Not using alcohol.

Lives in Hampton. Not working.

Family history

No malignant neoplasm of the large intestine.

Review of systems

Systemic symptoms: Feeling tired or poorly. No fever and no recent weight change.

Head symptoms: No headache.

Eye symptoms: No blurry vision.

Otolaryngeal symptoms: Hearing loss. No epistaxis, no sore throat, and no bleeding gums. No mouth sores.

Neck symptoms: No swollen glands in the neck.

Breast symptoms: No breast lump, no nipple discharge, and no pain in breast.

Cardiovascular symptoms: No chest pain or discomfort. Palpitations.

Pulmonary symptoms: No dyspnea, no cough, no hemoptysis, and no wheezing.

Gastrointestinal symptoms: Appetite not decreased. No pain when defecating, no bowel urgency, and no hematochezia. No diarrhea, no fecal incontinence, and no constipation.

Genitourinary symptoms: No hematuria and no polyuria. No urinary incontinence. No dysuria.

Endocrine symptoms: No polydipsia and not alternately too hot and too cold. No excessive sweating.
Generalized decrease in strength.

Skin symptoms: Pruritus not localized to a skin rash or sores and no rash.

Hematologic symptoms: No tendency for easy bruising.

Musculoskeletal symptoms: No localized soft tissue swelling of the leg. No back pain. No localized joint pain and no muscle cramps.

Neurological symptoms: Lightheadedness and dizziness. No confusion or disorientation, no paralysis, no tingling, and no numbness.

Psychological symptoms: No anxiety, no depression, and no insomnia.

Physical findings

Vital signs:

Vital Signs/Measurements	Value
Temperature	97.0 F
RR	16 breaths/min
PR	75 bpm
Blood pressure	108/77 mmHg
Weight	213 lbs
Height	66 in

General appearance:

° Awake. ° Alert. ° Oriented to time, place, and person. ° In no acute distress.

Neck:

° Thyroid showed no abnormalities.

Lungs:

° Clear to auscultation.

Cardiovascular system:

Heart Rate And Rhythm: ° Normal.

Abdomen:

Visual Inspection: ° Abdomen was normal on visual inspection.

Auscultation: ° Bowel sounds were normal.

Palpation: ° Abdominal palpation revealed no abnormalities.

Skin:

° General appearance was normal.

Neurological:

° System: normal.

Mental Status Findings: ° Mental status was normal.

Normal vaginal and rectal exam. Tender rectovaginal septum.

Assessment

Vaginal pain.

Therapy

• Complete colonoscopy Explained risks and benefits of colonoscopy including but not limited to bleeding infection, and perforation. Pt understands and wishes to proceed.

Plan

Needs colonoscopy, recommend MRI, that is scheduled. Doubt she has R-V fistula.



Description of Deep LEEP Conization Procedure August 2005

Before the surgery, I felt hot inside the vagina for several months to the point that an inserted finger felt cool.

The nurse practitioner at Clemson University did a Pap and insisted that I had HPV and a colposcopy along with LEEP was necessary. I asked for an HPV test twice, and she denied the test because she said that she knew that I had HPV.

I asked the surgeon if I could have an HPV test and that I had abnormal cells before; but, not HPV. Before getting onto the table, I asked the surgeon, Ronnie Brockway, if I could wait and think about this some more. He said, "No." Before he began, I asked if he would perform this procedure on his wife, he hesitated and proceeded. During the surgery, the numbing wore off and I felt pain and flinched. Dr. Brockway stated that the cauterizing tool cut into the side of my vaginal wall, and he had to stop the bleeding by cauterizing the cut. He then administered more numbing agent to finish the surgery.

I continued to bleed after the surgery for about a month. During this time, I went back to Dr. Brockway, and he administered topical applications and cauterized the area again to stop the bleeding.

I asked for an antibiotic as a preventative and Dr. Brockway said that I didn't need it. In November, I felt as if my pelvic area was dropping out. In January, I was urinating deep red blood. In February, I had become numb in the genital area and in pelvic pain. I became sexually impaired. I went back to Dr. Brockway asked for help. He stated, "go on an antidepressant, ...and go home and put my butt over my head to relieve pelvic congestion." Then he had his nurse, Nettie Robinson, talk with me. I asked her if she thought, this was all in my head, she replied, "Yes."

Dr. Brockway took a leave of absence as a result, I assumed that he was not practicing, so in June of 2006, I saw his partner, Dr. Coron. He did not exam me and he told me to focus on spiritual matters. I was in intense pain.

By July 2006, I went to the Servy Institute of Reproductive Endocrinology in Augusta, Georgia. She found a massive bacterial infection and inflammation with cultures and q-tip test in every area inside my pelvic area and genitalia with the exception of my anus.. My clitoris was split from the infection.

The pain level had risen to a level 10 with 10 being the worse possible pain. I began convulsions and dry heaves every waking moment from the pain. I did not know someone could feel so much pain and still be conscious. I thought I would die, which would have been a relief.

After several rounds of antibiotics the infections is still present. And, after tricyclic antidepressants, anticonvulsants, nerve pain medications, the pain level is still a 4 to 5 out of 10, with 10 being worse case, every day of my life. The medications have raised my blood sugar and blood pressure. My mental functions are impaired from the medications and pain to where I cannot read, study or work. I am non functional sexually with pain replacing any pleasurable sensation. I am in chronic pain and just existing in life. This "Hell" is not living.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Clement F. Haynesworth Federal Building
300 East Washington Street
Greenville, SC 29601

Clerk of the Court, P.O. Box 10768, Greenville, SC 29603

RECEIVED
USDC CLERK, GREENVILLE.

2008 DEC -1 P 1:3.

ANDREA BETH CAMPBELL,

Plaintiff,

vs.

RONNIE BROCKWAY, M.D., Individually and
as Agent, Servant or Employee of Oconee
OB/GYN Associates, P.A.; PHILIP CARON,
D.O., Individually and as Agent, Servant or
Employee of Oconee OB/GYN Associates, P.A.;
NETTIE ROBINSON, L.P.N., Individually and
as Agent, Servant, or Employee of Oconee
OB/GYN Associates, P.A.; OCONEE OB/GYN
ASSOCIATES, P.A., a domestic corporation;
ANNETTE ROCHESTER WHELCHER, N.P.,
Individually and as Agent, Servant, or Employee
of Redfern Health Center; REDFERN HEALTH
CENTER, a subsidiary of Clemson University,

Defendants,

C/A No.: 8:08-2819-HMH-BHH
NOTICE OF VOLUNTARY
DISMISSAL WITHOUT
PREJUDICE

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

The Plaintiff, Andrea Beth Campbell, hereby gives notice that the above-captioned action is voluntarily dismissed, *without prejudice* against the defendant(s), Ronnie Brockway, M.D.; Philip Caron, D.O.; Nettie Robinson, L.P.N.; Annette Rochester Whelchel, N.P., residents of South Carolina; Oconee OB-GYN Associates, P.A., a domestic corporation registered in South Carolina; and Redfern Health Center, a State organization and subsidiary of Clemson University, Clemson South, Carolina.

Date: November 15, 2008

Andrea Beth Campbell
Signature of plaintiff

Andrea Beth Campbell
P.O. Box 330
126 Shook Branch Road
Hampton, TN 37658
423-747-8755

SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review

DECISION

IN THE CASE OF

Andrea B. Campbell
(Claimant)

(Wage Earner)

CLAIM FOR

Period of Disability and Disability Insurance
Benefits

[REDACTED]
(Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

This case is before the undersigned on a request for hearing dated December 5, 2007. The claimant appeared (in the lobby) but waived testimony at a hearing held on July 23, 2008, in Kingsport, TN. Appearing and testifying were Dr. Thomas Schacht, a psychologist; Susan Bland, M.D., an internist, and JoAnn Bullard, a vocational expert. The claimant is represented by Harry J. Smith, an attorney. The claimant is alleging disability since May 31, 2006.

ISSUES

The issue is whether the claimant is disabled under sections 216(i) and 223(d) of the Social Security Act. Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

There is an additional issue whether the insured status requirements of sections 216(i) and 223 of the Social Security Act are met. The claimant's earnings record shows that the claimant has acquired sufficient quarters of coverage to remain insured through December 31, 2006. Thus, the claimant must establish disability on or before that date in order to be entitled to a period of disability and disability insurance benefits.

After careful review of the entire record, the undersigned finds that the claimant has been disabled from May 31, 2006 through the date of this decision. The undersigned also finds that the insured status requirements of the Social Security Act were met as of the date disability is established.

APPLICABLE LAW

Under the authority of the Social Security Act, the Social Security Administration has established a five-step sequential evaluation process for determining whether an individual is disabled (20 CFR 404.1520(a)). The steps are followed in order. If it is determined that the

claimant is or is not disabled at a step of the evaluation process, the evaluation will not go on to the next step.

At step one, the undersigned must determine whether the claimant is engaging in substantial gainful activity (20 CFR 404.1520(b)). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. If an individual engages in SGA, she is not disabled regardless of how severe her physical or mental impairments are and regardless of her age, education, and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

At step two, the undersigned must determine whether the claimant has a medically determinable impairment that is "severe" or a combination of impairments that is "severe" (20 CFR 404.1520(c)). An impairment or combination of impairments is "severe" within the meaning of the regulations if it significantly limits an individual's ability to perform basic work activities. If the claimant does not have a severe medically determinable impairment or combination of impairments, she is not disabled. If the claimant has a severe impairment or combination of impairments, the analysis proceeds to the third step.

At step three, the undersigned must determine whether the claimant's impairment or combination of impairments meets or medically equals the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, and 404.1526). If the claimant's impairment or combination of impairments meets or medically equals the criteria of a listing and meets the duration requirement (20 CFR 404.1509), the claimant is disabled. If it does not, the analysis proceeds to the next step.

Before considering step four of the sequential evaluation process, the undersigned must first determine the claimant's residual functional capacity (20 CFR 404.1520(e)). An individual's residual functional capacity is her ability to do physical and mental work activities on a sustained basis despite limitations from her impairments. In making this finding, the undersigned must consider all of the claimant's impairments, including impairments that are not severe (20 CFR 404.1520(e) and 404.1545; SSR 96-8p).

Next, the undersigned must determine at step four whether the claimant has the residual functional capacity to perform the requirements of her past relevant work (20 CFR 404.1520(f)). If the claimant has the residual functional capacity to do her past relevant work, the claimant is not disabled. If the claimant is unable to do any past relevant work or does not have any past relevant work, the analysis proceeds to the fifth and last step.

At the last step of the sequential evaluation process (20 CFR 404.1520(g)), the undersigned must determine whether the claimant is able to do any other work considering her residual functional capacity, age, education, and work experience. If the claimant is able to do other work, she is not disabled. If the claimant is not able to do other work and meets the duration requirement, she is disabled. Although the claimant generally continues to have the burden of proving disability at this step, a limited burden of going forward with the evidence shifts to the Social Security Administration. In order to support a finding that an individual is not disabled at this step, the Social Security Administration is responsible for providing evidence that demonstrates that other

work exists in significant numbers in the national economy that the claimant can do, given the residual functional capacity, age, education, and work experience (20 CFR 404.1512(g) and 404.1560(c)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, the undersigned makes the following findings:

1. The claimant's date last insured is December 31, 2006.
2. The claimant has not engaged in substantial gainful activity since May 31, 2006, the alleged onset date (20 CFR 404.1520(b) and 404.1571 *et seq.*).
3. The claimant has the following severe impairment(s): somatoform disorder, depression and musculoskeletal impairments (20 CFR 404.1520(c)).
4. The severity of the claimant's somatoform disorder meets the criteria of section 12.07 of 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d)).

In making this finding, the undersigned considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and SSRs 96-4p and 96-7p. The undersigned has also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and SSRs 96-2p, 96-5p, 96-6p and 06-3p.

The claimant was present in the lobby at the hearing, but she waived her presence at the hearing itself. The claimant's representative reported that Ms. Campbell has not worked since the alleged onset date.

Dr. Bland testified that the claimant has a ligament and cartilage problem in her knee and she continues to wear a knee brace. She testified that an MRI showed a lumbar spine disc problem and she has probable carpal tunnel syndrome of her left upper extremity. Dr. Bland further testified that the claimant has perceived pain from a gynecological procedure, but no objective findings for that. Dr. Bland concluded that the claimant is limited to lifting 30 pounds occasionally and 15 pounds frequently, but that there are numerous non-exertional limitations as well.

Dr. Schacht testified that Ms. Campbell has unfounded beliefs regarding her body, including (but not limited to) the belief that feces seeps (into and) from her vagina. Extensive tests for this, however, were fully negative. He further testified that the claimant has committed herself to these beliefs and she travels all over the country to see different doctors in regard to those beliefs. He noted that she has developed a very strict (and complicated) medicine regimen. He further noted that she has very significant limitations in regard to concentration, persistence and pace as a result of her unfounded beliefs. Significant other limitations are also present. Dr. Schacht reasonably and credibly concluded that the claimant's impairments meet the criteria of Medical listing 12.07.

The record reveals that Dr. Schacht's testimony is fully supported by the record. The claimant has been treated by Dr. Marcus Cooper (a pain medicine specialist) for obsessive-compulsive characteristics, pelvic neuropathic pain, a pain disorder, and a mood disorder. She has been to medical clinics in many distant areas in regard to her complaints. At the Vanderbilt University Medical Center she complained of chronic pelvic pain and sexual dysfunction without objective findings. She reported (during a psychiatric consultative evaluation) that her pain has "put a halt to everything in her life". Ms. Campbell has been treated for similar problems at numerous clinics and facilities throughout the region. She has been psychiatrically treated (since August 2006) at the Indian Path Pavilion. Exhibit 31F comprises a listing of the claimant's prescription and over-the-counter medication and medication supplements. It consists of 4 full type written pages.

After considering the evidence of record, as summarized above, the undersigned finds that the claimant's medically determinable impairment(s) could reasonably be expected to produce the alleged symptoms and that the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are credible.

The State Agency Medical Consultant's opinion was given little weight because the undersigned has evidence which the state agency did not have. This includes the medical expert testimony.

5. The claimant has been under a disability, as defined in the Social Security Act, from May 31, 2006 through the date of this decision (20 CFR 404.1520(d)).

DECISION

Based on the application for a period of disability and disability insurance benefits protectively filed on September 19, 2006, the claimant has been disabled under sections 216(i) and 223(d) of the Social Security Act beginning on May 31, 2006.

/s/ *Douglas G. White*

Douglas G. White
Administrative Law Judge

August 4, 2008

Date

*Oconee OB GYN - Brockway
215 Stark Way
Seneca, SC 29678*

Date	Description	Amount of Service	Pearce Insurance
7/19/2005	Office Visit	\$315.50	
7/21/2005	LEVEL IV Surgical Path 2 Units	\$410.00	
10/19/2005	Insurance Payment		\$262.80
8/9/2005	Leep Conization	\$831.50	\$385.32
8/11/2005	Surgical Path 4 Units	\$820.00	
10/19/2005	Insurance Payment		\$541.60
8/22/2005	Insurance Payment		\$147.20
9/19/2005	Insurance Payment		\$385.32
2/27/2006	Office Visit	\$80.50	
2/27/2006	Lab Pap	\$37.00	
4/10/2006	Insurance Payment		\$56.98
6/13/2006	Office Visit	\$87.50	
7/17/2006	Insurance Payment		\$56.98

\$2,582.00 \$1,836.20

ATTACHMENT kk

FILED OCT 17 2009
BEVERLY H. HINTON
CLERK OF COURT
2009 AUG 17 P 12:54

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	
	)	
Andrea Beth Campbell,	)	
	)	
Plaintiff,	)	AFFIDAVIT OF MARK T. MOORE, M.D.
	)	
vs.	)	
	)	
Ronnie A. Brockway, M.D., and	)	
Oconee OB/GYN Associates, PA	)	C.A. No. 2009-CP-37-1428
	)	
Defendants.	)	
	)	

I, Mark T. Moore, M.D., being first duly sworn, do hereby swear or affirm as follows based on my own personal knowledge, except where otherwise noted:

1) I am over eighteen (18) years of age, I am legally competent, and I make this Affidavit based upon my background, education, training and experience.

2) I am a medical doctor, certified and licensed by the State of South Carolina. I am a Diplomate of the American Board of OB/GYN, as well as a Fellow of American College of OB/GYN. I am on the teaching staff of the Greenville Hospital System, Greenville, S.C. I have engaged in active medical practice in the field of Obstetrics and Gynecology since 1991, and I am familiar with the applicable standards of care in this field. The information on CV which is attached as Exhibit 1 to this affidavit is true and correct.

3) The opinions I have stated in this affidavit are based upon my review of the medical records of Dr. Ronnie A. Brockway, Oconee OB-GYN Associates, P.A., Clemson Redfern Health Center, and numerous other medical providers regarding their treatment of Andrea Beth Campbell. These records are of the type normally relied upon in my professional practice for use in diagnosing and evaluating the proper standard of care and treatment of medical conditions in the field of obstetrics and gynecology. Among these records are a number that I find particularly significant:

a) On January 14, 2005, Sarah Mullins, Family Nurse Practitioner with Redfern Health Center, performed a pap smear test which resulted in a

report of "Atypical Squamous Cells of Undetermined Significance (ASC-US)," requiring further follow-up.

- b) On May 17, 2005, a repeat pap smear was performed at Redfern. This test revealed "Low grade squamous intraepithelial lesion (LSIL); and encompassing HPV / mild dysplasia / CIN I." As a result, the Pathologist recommended a "colposcopic evaluation with directed tissue biopsy."
- c) On July 19, 2005, Dr. Brockway performed the recommended colposcopy and directed tissue biopsy, and he recorded physical exam findings of cervical dysplasia, cervicitis, with suspected CIN I and "probable HPV, high."
- d) Also on July 19, 2005, Dr. Brockway discussed with Ms. Campbell the probability of needing to perform a LEEP Conization procedure (often referred to as "LEEP/Cone"), depending on the results of the pathology report. He provided a therapeutic course of antibiotics for her cervicitis as well as in preparation for the probable LEEP/Cone procedure.
- e) On July 22, 2005, Dr. Brockway received the pathology report, which revealed that Ms. Campbell had "chronic ulcerative endocervicitis with squamous metaplasia" and "moderate dysplasia (CIN II), focal."
- f) On July 25, 2005, Dr. Brockway informed Ms. Campbell that the pathology results revealed moderate dysplasia. He again discussed the LEEP/Cone procedure as the best treatment course, and provided information on the risks and benefits of the procedure. He informed Ms. Campbell that the best date for her to obtain this procedure would be between day 8 and 14 of her cycle, and as a result the LEEP/Cone procedure was scheduled to be performed in his office on August 9, 2005. Dr. Brockway prescribed appropriate pain medications to be taken before and after the procedure.
- g) On August 9, 2005, when she returned for the scheduled procedure, Dr. Brockway reviewed with Ms. Campbell for the third time her diagnosis of moderate dysplasia. He discussed with her that this was consistent with high-risk HPV disease, and that there was no need for an HPV typing test because the same treatment course would be needed regardless of the result of that test. After this discussion Dr. Brockway provided a dose of anesthetic that in my experience was appropriate, and then he performed the LEEP/Cone procedure. After the procedure, he provided appropriate post-procedure instructions and counseling.
- h) After several normal post-procedural recovery visits involving minimal reports of bleeding, Ms. Campbell returned to Dr. Brockway on February 27, 2006, with multiple emotional and new sexual dysfunction complaints. Dr. Brockway made extensive notes of these complaints, and performed a

pelvic and neurological exam which he documented as within normal limits. He further provided counseling and recommended that she resume her antidepressant, which she had indicated she had stopped. This is Ms. Campbell's last documented visit with Dr. Brockway.

- i) On June 13, 2006, Ms. Campbell returned for a final visit to Ocone OB/GYN. At that time Ms. Campbell's pelvic exam was found to be within normal limits and she was provided extensive counseling. It was further recommended that she adjust her intake of psychoactive medications and continue her counseling treatment.
- 4) After reviewing the medical records listed above and others, I have reached a number of opinions to a reasonable degree of medical certainty about this matter, among which are the following:
- a) It is my opinion that the care provided by Dr. Brockway and Ocone OB/GYN did not deviate from the appropriate standard of medical care. The LEEP/Cone procedure was medically indicated by the results of Ms. Campbell's abnormal pap smears and the results of the colposcopy and directed tissue biopsy.
 - b) Based on the description of the LEEP/Cone procedure in his records, Dr. Brockway removed the transformation zone along with surrounding dysplastic tissue. This is the appropriate procedure as recommended by the American Society for Colposcopy and Cervical Pathology (the "ASCCP"). ASCCP management guidelines require removal of the entire transformation zone, which is determined by the size and shape of the individual patient's cervix. I see no evidence in the records that Dr. Brockway removed excessive tissue in this procedure.
 - c) In regard to the allegation that Dr. Brockway falsely noted the existence of circumferential disease, I see no evidence that Dr. Brockway's diagnosis was incorrect because the clinical findings he noted in his records of the colposcopic exam were consistent with circumferential disease being present.
 - d) In regard to the allegation that Dr. Brockway failed to control his surgical instruments resulting in laceration of the vaginal wall, a vaginal wall laceration is a known risk of this procedure, and the existence of a minor laceration not requiring stitches does not indicate a deviation from the standard of care.
 - e) In regard to the allegation that Dr. Brockway was negligent in failing to perform diagnostic testing for cervical infections prior to the LEEP/Cone procedure, additional cervical infection testing was not indicated because

of Ms. Campbell's prior testing history and because of the pre-operative antibiotic coverage prescribed by Dr. Brockway.

- f) In regard to the allegation that Dr. Brockway failed to refer Ms. Campbell for further diagnosis or treatment of post-LEEP/Cone procedure cervical pain, I see no evidence in the records prior to Ms. Campbell's last visit with Oconee OB/GYN to indicate that any of the symptoms about which she complained are complications from the LEEP/Cone procedure. Further, I do not see from the records that Ms. Campbell sought additional referrals or treatment from Oconee OB/GYN.
 - g) It is my opinion that Dr. Brockway complied with applicable professional standards for providing and obtaining informed consent from his patient prior to conducting the LEEP procedure. This opinion is based on (1) the notes regarding the office visit of July 19, 2005, in which Dr. Brockway discussed with Ms. Campbell the probable need for the LEEP/Cone procedure, (2) the notes regarding the office visit/phone call of July 25, 2005, regarding the pathology results, the risks and benefits of LEEP/Cone procedure, the antibiotic coverage, and the proper timing for the procedure, and (3) the notes regarding the office visit of 8/9/05, in which Dr. Brockway again discussed with his patient why additional HPV testing was not indicated, as well as proper post-operative care.
- 5) In forming the opinions stated above, I am aware that Ms. Campbell complained of a series of gynecological, psychological, and neurological symptoms which she relates to the LEEP/Cone procedure. These complaints are documented in the following treatment notes:
- a) On November 30, 2005, Ms. Campbell complained to Dr. McDonald, her primary care physician at Redfern, that she was concerned about vaginal swelling and thickness after the LEEP/Cone procedure. ("She had a LEEP procedure done in the fall but she is concerned that there might be something swollen there.") A copy of this the medical record for this visit is attached as Exhibit 2 to this affidavit.
 - b) On December 12, 2005, Ms. Campbell complained to Nurse Practitioner Whelchel at Redfern of "feeling like things are falling out" and "feel like a stick is crammed up in my vagina". Nurse Whelchel denied observing any abnormalities in the vaginal vault. A copy of the medical record for this visit is attached as Exhibit 3 to this affidavit.
 - c) On February 27, 2006, Ms. Campbell presented to Dr. Brockway a detailed time line listing multiple gynecological and sexual complaints that she stated had begun in the fall of 2005. A copy of the chart note and time line is attached as Exhibit 4 to this affidavit.

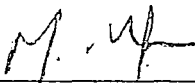
- d) On March 2, 2006, Ms. Campbell completed a patient intake form with the Clemson Counseling and Psychological Services ("CAPS") Division of Redfern in which she summarized her reason for seeking treatment as "Sexual Dysfunction after LEEP." A copy of this document is attached as Exhibit 4 to this affidavit. This complaint resulted in a triage evaluation prepared at Redfern stating "One of health complications included a LEEP procedure. Client reports decreased intensity during orgasm as a result." A copy of this triage document is attached as Exhibit 5 to this affidavit.
- e) On March 9, 2006, Ms. Campbell, returned to the CAPS division of Redfern, met with counselor Eunice Lehmacher, and reported "distress regarding her loss of intensity during orgasm due to the LEEP medical procedure last year." A copy of the medical record for this visit is attached as Exhibit 6 to this affidavit.
- f) On March 24, 2006, Ms. Campbell consulted with Johnson City, Tennessee, OBGYN, at which time Dr. Crowder documented her complaint as "LEEP in August - feels "numb" since LEEP - no sensation." Dr. Crowder documented a normal vaginal exam. A copy of this medical record is attached as Exhibit 7 to this affidavit.
- g) On May 24, 2006, Ms. Campbell consulted with Dr. Jack Stevens, a counselor at Fort Hill Presbyterian Church in Fort Hill, and reported sexual dysfunctions after that LEEP procedure. A copy of this counseling record is attached as Exhibit 8 to this affidavit.
- h) On May 26, 2006, Ms. Campbell complained to Dr. Rose Marie McDonald at Redfern that she was "still having some decreased sensation in the genital area after her LEEP procedure." Dr. McDonald documented a normal pelvic exam and referred her to Dr. Jerry Sherrill, a neurologist in Seneca. A copy of this medical record is attached as Exhibit 9 to this affidavit.
- i) By letter of May 31, 2006, Dr. Sherrill reported to Dr. McDonald that he had seen Ms. Campbell, and that she had reported to him that she was experiencing multiple sexual problems including anorgasmia. Dr. Sherrill documented in his notes that he performed a complete physical exam, the results of which were essentially within normal limits. A copy of this medical report is attached as Exhibit 10 to this affidavit.
- j) On June 13, 2006, Ms. Campbell complained to Dr. Philip Caron of sexual dysfunction. Dr. Caron recorded in his notes that "Patient has a previous active and healthy sexual function and [she] relates the change in her sexual responsiveness to a leep procedure she underwent in September of 2005." Dr. Caron documented a normal vaginal exam, counseled her for forty minutes on sexual function, recommended that she adjust the

psychoactive medications she had been taking, and recommended that she continue her counseling sessions. A copy of this medical record is attached as Exhibit 11 to this affidavit.

- k) On June 26, 2006, Ms. Campbell consulted with Dr. Edouard Servy of the Servy Institute of Reproductive Endocrinology in Augusta. At that time Ms. Campbell provided a patient intake form listing a complaint of painful intercourse, pelvic discomfort, and pelvic pain "after LEEP." Dr. Servy recorded in his notes her complaints of "painful intercourse only since LEEP procedure, pelvic discomfort and pelvic pain also after LEEP." A copy of this patient intake form and medical record is attached as Exhibit 12 of this affidavit.
 - l) On August 26, 2006, Dr. Diana Dell of the Women's Behavioral Health division of Duke University Medical Center reported to Dr. Fred Hartley of Johnson City, Tennessee, that she had seen Ms. Campbell and taken an extensive history. Dr. Dell records that Ms. Campbell complained of anorgasmia, but that "I believe her anorgasmia is much more related to her use of amitriptyline than to her previous LEEP procedure." A copy of this letter is attached as Exhibit 13 of this affidavit.
- 6) In regard to the complaints listed in paragraph five of this affidavit, and in light of the established medical science in this field, I see no basis for any allegation that Dr. Brockway or O'cone OBGYN failed to diagnose any nerve irritation and/or damage arising from the LEEP/Cone procedure. Further, in my opinion the records and the science in this field do not indicate any physical basis or etiology for anorgasmia or nerve dysfunction as a direct complication of the LEEP/Cone procedure.
- 7) The opinions in this affidavit are given to a reasonable degree of medical certainty and are specifically based on the documents listed above. I reserve the right to alter, amend, modify, reduce, or expand these opinions if and when additional information is presented.

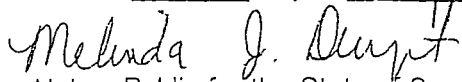
FURTHER AFFIANT SAYETH NOT.

FURTHER AFFIANT SAYETH NOT.



Mark T. Moore, MD.

SWORN TO AND SUBSCRIBED before
me this 26 day of July, 2010.


Notary Public for the State of South Carolina
My Commission Expires: Aug 15, 2015

CURRICULUM VITAE

Mark Tilman Moore, M.D.

Personal

Birth: March 2, 1961, Spartanburg, South Carolina

Married: Cathy Traynham Moore – 1983

Children: Matthew and Michael

Education

Wofford College, Spartanburg, S.C. BS Chemistry. 1983.

Medical University of S.C. – Charleston, S.C. MD, 1987.

Internship Spartanburg Regional Medical Center 1987 – 88.

Residency OB/GYN: Medical College of Virginia, Richmond, Virginia, 1988 – 91.

Medical License

S.C. # 15206

Appointments

Teaching Staff, GHS, Greenville, S.C.

Memberships

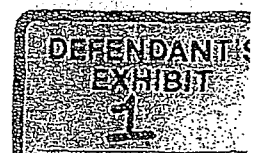
Diplomat American Board of OB/GYN

Fellow of American College of OB/GYN

South Carolina Medical Association

Piedmont OB/GYN Society

Alpha Omega Alpha Honor Medical Society



HEALTH CENTER
UNIVERSITY
X 344054
TMSON. SC 29634-4054

OUTPATIENT RECORD

TELEPHONE: (864) 656-2
FAX NO.: (864) 656-0

Name [11/30/2005 [SS# [Page 1
CAMPBELL, ANDREA
[]

11-30-05 S: CC follow up wants to talk about Strattera
Smoker: YES (NO) LMP: DRUG ALLERGIES: + Lexapro
Date MEDS:
300 O: T 99.0 P 64 R 16 BP 122/80 Pain Level 0/10 WT
Time Identified barriers to communication:
None Cultural Religious Cognitive Language Emotions
P: McDonald Campbell

11/30/05 CAMPBELL, ANDREA B.

S1: Patient wants to continue Strattera prescribed last year by her family physician in TN for attention deficit. She has been using 1/4 of a 40mg capsule several days a week. We have discussed the appropriate dosing of this and she understands why it has most likely not been effective. Vital signs are stable. She is alert and oriented to time, place and person. Her affect is bright.

A: ATTENTION DEFICIT.

P: Rx for Strattera 40mg x #60 as previously prescribed by her physician. She will begin by taking 1/4 of the capsule daily for 4 days, then 1/2 for 4 days, 3/4 of a capsule for 4 days, then 1 whole capsule for 4 days and after we week add the second capsule.

S2: Patient has had some sensation of thickening at the introitus. She had a LEEP procedure done in the fall but she is concerned that there might be something swollen there.

O: No exam done.

A: VAGINAL COMPLAINT.

P: Referred to Women's Clinic.

S3: Patient is having anxiety and concerns about her academic performance and the potential of having to switch from a PhD to a masters program. She is currently on Lexapro, but hasn't been taking it regularly.

O: She is slightly agitated and anxious, but this is a fairly typical presentation for her at her office visits.

A: DEPRESSION WITH POOR MEDICATION COMPLIANCE.

P: Patient is instructed to begin her Lexapro at 5mg a day and after 4 days she is to increase to 10mg. If she wishes, she can return after Christmas and we will change her medication. She seems to indicate that she does not think that Lexapro is the most effective drug for her. We will see her after exams for a medication change.

R.M. McDONALD M.D./kac 500 T: 12/1/05

12-1-05

000406

RED FERN HEALTH CENTER
CLEMSON UNIVERSITY
BOX 344054
CLEMSON, SC 29634-4054

OUTPATIENT RECORD

507000

TELEPHONE: (864) 656-2233
FAX NO.: (864) 656-0760

12/02/2005
Name [REDACTED]

SS# [REDACTED]

Page 20

12/12/05

Date

10:15am

Time

S: @ Thank you. - "feel like things are falling out" - feel like
a stick is crammed up in my vagina - dry/c, some dryness
O: T 98/164 R 116 BP 100/60 Pain Level 3/10 WT [REDACTED]
LMP: Dec 1, 05 Other: Wants Rx for Ovarian [REDACTED]

Identified barriers to communication:

None Cultural Religious Cognitive Language Emotional
P. A. Wheelchel RNFP/dmp, Ovarian [REDACTED]

12/12/05 CAMPBELL, ANDREA B.

10 A.M.

S: Reported to the Women's Clinic today at 10 o'clock with complaint of having possible prolapsed uterus. "Feels like there is something falling out" she states, "like a stick is crammed up in her vagina." Denies any discharge. Having some dryness.

O: Vital signs are stable. Pain is 3 out of 10, she said it's more annoying. I looked in the vagina and I do not see anything. She had nice red tissue at the cervical os, probably from her LEEP procedure she had back in August, but nothing abnormal about the tissue really concerns me. I also did a pelvic and there is some mucosal area that may be a little more prominent, and she states that is where she is feeling the dryness, but I am not feeling anything abnormal, nor did I see anything abnormal in the vaginal vault.

A: FOR LACK OF ANYTHING ELSE VAGINAL PAIN AND DRYNESS.

P: At this point to use Relagard 1-2 applicators every day for 7 days, dispense 1 with 1 refill and we will follow up with Andrea as needed.

ANNETTE WHELCHER, RNFP/dmp

1362

AW
12-12-05

PROGRESS NOTES

PATIENT NAME	DATE OF BIRTH
CHART	

DATE	SERVICE	NOTES
02/27/00	wt. 221 BP: 124/80	Gyn Problem. Series of 7 - since 10/05 10/05 - had sex less intense orgasm than usual to even to masturbation Thaligging - feel of dx or tile all falling out a feel of roughness in vagina - better when a tampon inserted - up ache in crotch p several hours standing gives concern of life issues "don't want to live & orgasm" discovery that concern - resolve Lexapro Kort w/c
		Sexual feeling back some - but clitoris didn't respond to stimulation - no orgasm! got all upset got on Internet - read stuff. tried comp times & real anxious re "numbness" or lack of sensitivity Real concerned about adverse effects on sexuality no hot flushes, sweats v/v - sensation to like torch - periditoral & perianal - good support cx high ant re appears uterus mid & tender - dx @ Pp Valen - sf. pain elicited. small red bump in central cx slip. 1) re anat p keep round rears poss pelvic congestion - overanxious P. - 73 - anitony, psychosexual issues - try step 4 - 1st N - Pp - LBP down HPV 9/9/99 mi



Andrea Ruth Campbell

Date	Description
October 2005	Orgasm Intensity Diminished, Feeling Something Rough in Vagina
Nov 15, 2005	Sensation of falling down in pelvic area Muscle contractions of pushing down
	Feeling of Something Rough in Vagina
December 2005	Ache in Pelvic Area especially when standing Feeling of falling down in pelvic area persists
	Deep Internal Orgasms Absent Lack of Tactile Sensation in Genital Area
December 12, 2005	Visit to Redford Chiropractic Office For feeling of rough stick in Vagina Area and Fallen over Feeling
	Muscle Pressure Finding: Felt in Uterus Even Ph Vaginal Lubricate - No Effect
Jan 5, 6, 7, 2006	Blood in Urine and Dark Brown, Fever
	Appears when taking mega dose of vitamins Disappears when flushing with water
	Helped friend move furniture upstairs King Mattress, Arrived
	Feeling of Something fallen down in Vagina area Still persists along with sticking sensation Also noted in buttock of genital area at times as if bruised or kicked by a horse in the genital area
	Felt Inside Vaginal Area and Fingers Reaching protruding in Vaginal Area
February 14, 2006	Feeling of Roughness in Vagina During masturbational sensation stopped at extreme pleasure with no climax, feeling of desire intense with no release. Clitoris does not extend, and I feel numb in genital area. Anxious

CLEMSON
UNIVERSITY
COUNSELING AND PSYCHOLOGICAL SERVICES
REDFERN HEALTH CENTER
Box 344022
Clemson, SC 29634-4022

INTAKE FORM
Page 1 of 4

Client: ANDREA CAMPBELL

SS#: [REDACTED]

Date: 7-2-06

I. PERSONAL INFORMATION:

School Mailing Address: [REDACTED] Phone (home): [REDACTED]

City zip

Where you actually live: [REDACTED] Phone (work): [REDACTED]

City zip

Is your address updated on the CU mainframe? ☒ Yes ☐ No

(Cellular): [REDACTED]

Permanent Address: [REDACTED]

City/state

zip

Phone: [REDACTED]

Should CAPS need to contact you by mail, would you prefer: ☐ school address ☐ where you live ☐ permanent address

At what phone number may CAPS leave a message on your answering machine/voice mail? [REDACTED]

II. STATISTICAL INFORMATION:

Age: 40 Date of Birth: [REDACTED] Gender: ☐ Male ☒ Female

Relationships status: ☒ single ☐ dating ☐ engaged ☐ living together ☐ married ☐ separated ☐ divorced ☐ widowed

Ethnic Origin: ☐ African American ☐ Asian American ☒ Caucasian (white) ☐ Hispanic American
☐ Native American ☐ Other: _____

Nationality: ☒ U.S. citizen ☐ Other. Specify: _____ Are you a veteran? ☐ yes ☐ no

Who referred you to CAPS? (Check all that apply):

- | | | | |
|---|--|--|--|
| 1. ☐ Self | 5. ☐ The Tiger | 9. ☐ Parents/family | 13. ☐ Academic Support Center |
| 2. ☐ Student Health Center | 6. ☐ CU Catalog | 10. ☐ Friend | 14. ☐ Disabilities office |
| 3. ☐ Health Education | 7. ☐ Greek organization | 11. ☐ Judicial Services | 15. ☐ Faculty/Staff member:
(name & dept.) |
| 4. ☒ Women's Clinic | 8. ☐ Housing | 12. ☐ Other | |

III. ACADEMIC DATA:

Classification: ☐ Freshman ☐ Sophomore ☐ Junior ☐ Senior Graduate ☐ Master's ☒ Doctorate

Year graduated from high school: 1974 SAT/ACT: _____ GPA: 3.6

Major: Business Administration Total Courses this semester: _____ Hours: 13

In the past, my grades have been: ☒ Excellent ☐ Good ☐ Fair ☒ Poor

This semester, my grades will probably be: ☐ Excellent ☐ Good ☒ Fair ☐ Poor

Are you a transfer student? ☐ Yes ☒ No Date of 1st semester at CU: 10 Previous College: _____

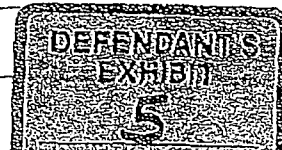
Degrees earned: B.S. Computer Science Field: _____ From what school: East TN State

IV. EMPLOYMENT DATA:

Are you working? ☒ Yes ☐ No If yes, number of hours per week: 20 Location: McAdams

What are your principal job duties: Computer Science Lab TA

000708



Page 2 of 4

SS#:

Are you currently under the care of a medical doctor or other health practitioner? ☒ Yes ☐ No If yes, please answer the following:

List all allergies: Penicillin, K-Flex

Where/Whom? Dr. Jack Stevenson 8/24-5/05

For how long (approximate number of months)?

Dr. Susan Owen's (1999-2001) - Relationships, Work, &

School stress was feeling well after surgery and now this

Köygenç.

000709

If your parents divorced, how old were you then?

- 76 -

CLEMSON
UNIVERSITY
COUNSELING AND PSYCHOLOGICAL SERVICES

INTAKE FORM
Page 3 of

Client: Andrew B Campbell

SS#: [REDACTED]

VIII. SOCIAL SYSTEM:

Do you live in a: ☐ house ☐ residence hall ☐ on-campus apartment ☒ off-campus apartment # of roommates: 0

If you have roommates, how would you rate your relationship to them? ☐ Excellent ☐ Good ☐ Fair ☐ Poor

With whom do you usually talk over your problems or plans? Friends

How many of your friends do you have at CU? _____ In the Clemson area? 2 If your closest friends are not in the area, where
Tennessee

To what, if any, church or spiritual organizations do you belong? (Optional) Life Group - Mt Taber

To what, if any, CU organizations do you belong? None

IX. AVAILABLE SCHEDULE: Please indicate with an "A" the hours you would be available for an appointment:

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
8:00 - 9:00					
9:00 - 10:00					
10:00 - 11:00					
11:00 - 12:00				A	
12:00 - 1:00				A	
1:00 - 2:00	A			A	
2:00 - 3:00	A				
3:00 - 4:00	A				
4:00 - 5:00	A	A		A	
5:00 - 6:00		A			
6:00 - 7:00					

X. INFORMED CONSENT/EMERGENCY NOTIFICATION:

I have read, understood, and signed the Client Rights and Responsibilities/Informed Consent which delineates the limits to confidentiality, the risks and benefits of counseling, and the possible financial obligations. I hereby authorize CAPS to contact the following person in case of emergency. I further understand that I may rescind this authorization in writing at any time.

Terry Lewis, P.O.A.
Name/Relationship

[REDACTED]
Address

[REDACTED]
Phone

Client Signature: Andrew B Campbell

Date: 3-2-02

600710

FOR OFFICE USE ONLY

PD: _____ IC: _____ F: _____ CIA: _____ AO: _____

CLEMSON UNIVERSITY COUNSELING AND PSYCHOLOGICAL SERVICES REDFERN HEALTH CENTER Box 344022 Clemson, SC 2963-4022	TRIAGE EVALUATION Client: <u>CAMPBELL, Andrea</u> Date: March 2, 2006
--	--

Age: 48 Gender: F Clinician: Davis, Stacey

Presenting Problem:

Ct reports several health complications over past year. Emotional stress associated with academic department as well as the death of her father in 2003. Reports good physical health until past year. One of health complications included a LEEP procedure. Ct reports decreased intensity during orgasm as a result. Describes sexuality as "essence" of who she is and difficulty adjusting to changes. Concerned that decreased intensity during orgasm could be related to anxiety and stress. Denies decrease in libido. Currently seeking consultation about problem with medical professionals.

HISTORY & RELEVANT INFORMATION
☐ Current Outpatient Treatment (<i>specify</i>):
☐ Psychiatric Hospitalization (<i>explain</i>):
☐ Suicidal Ideation &/or Plan (<i>specify</i>): Denies
☐ Hx Suicide Attempts (<i>explain</i>):
☐ Current ETOH/Substance Use (<i>specify</i>):
☐ Hx ETOH/Substance Use (<i>specify</i>):
☐ Current Medical Problems (<i>specify</i>): carcinoma on head; pre-cancerous cervical cells; recent knee surgery
☐ Current Medications (<i>specify</i>): Strattera; d/c Lexapro in January.

Acuity Level: ☒ Non-Urgent ☐ Urgent ☐ Emergency/Crisis

Tracking Level: I

DISPOSITION
☐ Group Counseling (<i>specify</i>):
☒ Individual Counseling (<i>specify</i>): Lehmacher 3/9 12:30 p.m.
☐ Substance Abuse Counseling (<i>specify</i>):
☐ Medical Consultation (<i>specify</i>): Referral to McDonald to consult about anxiety medication (has seen McDonald in past for treatment of anxiety).
☐ Other Referrals (<i>specify</i>):
☐ Terminate (<i>explain</i>):

Initial Diagnostic Impression: Deferred

SD
Stacey Davis, MA

HS
Hal Stevens, PsyD

3/2/06
Date

3/2/06
Date

CAPS 100: 5/00

Page 1

Revised: 1/01, 1/02, 1/03, 05/03

000705

CLEMSON UNIVERSITY COUNSELING AND PSYCHOLOGICAL SERVICES REDFERN HEALTH CENTER Box 344022 Clemson, SC 29634	INTAKE SUMMARY Client: CAMPBELL, Andrea [REDACTED] Date: March 9, 2006
--	--

Counselor: Eunice Lehmacher

I. **SUBJECTIVE:** (Presenting Problem(s) and Symptoms, including duration and previous coping strategies): Ct initially reported due to distress regarding her loss of intensity during orgasm due to LEEP medical procedure last year. Ct reported anxiety and hopelessness after realizing physical changes which she has since mostly overcome by gaining information and consulting medical professionals, and beginning counseling. Ct reported additional issues of concern including career directions, grief over death of F, memory problems which affect her academic performance. Ct stated she "wants to get back to a fully functioning human being." Ct reported counseling has helped her in the past.

A. **Identifying Information:** Ct is a 48 year old Caucasian female who is in the Computer Science doctoral program.

B. **Referral Source:** Women's Clinic

C. **Family History:** Ct is the youngest of two children of her parents. Ct's M died in 1992. Her F died three years ago from heart failure after 29 days in ICU. Ct reported she made daily decisions during this time regarding continued medical interventions. Ct reported she experienced depression and anxiety following her F's death for about one year during which time she had counseling. Ct reported her older sister, who is disabled, lives on her F's property which belongs to ct. Ct reported some conflict regarding the future of this property.

D. **Social History:** Ct reported having two boyfriends. She reported her roommate (a 20 year old whom she was fond of and saw almost as a son) moved out her around the time her F died adding to her depression at the time. Ct reported still talking to this young man, who no longer lives in the area, nearly daily. Ct currently has no roommate. She reported having several friends she talks to here and in TN.

E. **Work History:** Ct is a teaching assistant in Computer Science

F. **School History:** Ct reported being successful in school getting mostly A's and having no trouble concentrating until 3 years ago. Ct reported at that time she began to have trouble remembering things for tests regardless of how long she studied. Ct also reported problems with test anxiety beginning at this time. She reported being told by her department that she couldn't get her PhD here this winter, and has since decided to get a master's here and transfer to another university for a different PhD program next year. Ct is currently in the process of looking for this program and expresses frustration at department at CU.



New Gyn Intake

Name: Andrea Campbell Chart #: 924471 Date: 3/24/06 Age: 48
 G D P Ab Contraception: Condoms/Withdrawal LMP: 3/16/06
 CC: Leep in August - feels "numb" since leep - no sensation
return monthly since leep getting closer together
pelvic pressure
irritation vaginal w/ standing - pressure in pelvis

Medical History	+/-	Comment	Surgical History
Thyroid	+	goiter nontoxic	
Hypertension	+		Leep - Hqslc - margins free
Cardiac	-		ACL 2006
Diabetes	-		
Hepatitis	-		
Renal Dis/UTI	+	acc UTI	skin cancer 2006
Seizures/Epilepsy	-		gonorrhea cyst
Other			

Patient Educ./Issues Discussed	Review of Systems	Urinary
Medications	HEENT	Abd Pain
Preventative Care	Breast	Pelvic Pain
Lifestyle Issues	SOB	Dyspareunia
Educational Material Given	Chest Pain	Chg bowel
Other	GI	Blood in stool

Physical Exam			
Wt: <u>220</u> lb	Ht: <u>5'4"</u>	BP: <u>127/87</u>	P: <u>71</u> Temp: <u>98.6</u>
HEENT	clear	Vulva	normal
Chest	clear	Vagina	normal
Breast	normal	Cervix	normal
Cardiac	normal	Uterus	normal
ABD	normal	Adnexa	normal
Skin	normal	Rectal	

Impression:

Perimenopausal

Plan:

Signature: [Signature]
 Assistant: [Signature]



Andrea Campbell
 ID: Campbell
 03-
 CLARITY: ---
 COLOR: YELL
 MULTISTIX 1
 GLU NEGATIVE
 BIL NEGATIVE
 KET NEGATIVE
 SG 1.015
 BLD NEGATIVE
 pH 6.5
 PRO NEGATIVE
 URO 0.2 E.U.
 HIT NEGATIVE
 LEU TRA E

1st Pap
 12/7/06
 neg

2nd Pap
 P/C Dec
 X24yr

Ok family
w/ 50 is new one

(24)

Andrea Campbell

484

(17) B

24 May '06

Terry helped care for her TH, & ETSU VT saw her - July '05 - Virginia saw her, said, "I'll see you in a month, & I'll see her -

There

Wayne ^{in her dept.} Madison - ~~acquiring~~ teach & they down - Dean Brad School had file of my stuff - saw him in Dec. - & 2 new assignments - ~~visited~~ UGA, UVA, Wm & Henry applied all 4, rejected by all - ~~replied~~ GRE.

McGregor - I did all but the big paper - he came in to see about

I decided trip to Haskin in Comp Sci.

in TH, working w/ Dad's property.

my gentles before round - &

~~not~~ clinic - ~~anew~~ ^{at home} ~~studies~~ - by your - X-ray

of 2 types of agents - clinical & cervical used a number

hairs
any way

have lost my serenity - my Mysofayes Leap ^{w/} ^{low}

deep external agents

deep total alterations

July 25
Sept 15

Still - benign carcinoma removed Sept 15 July 25

look 49

have lost my enthusiasm for living - Nease Kel

cervix lost 1/3/4"

Gyn says "I'm your best" - MDO

always ready to say again, & always

I could feel w/ Kagel exorcism

aura, psycho, and part of me

was alive
offense,
breathing.

Paper - 1st left June 5, find 9th



001694

REDFERN HEALTH CENTER
CLEMSON UNIVERSITY
BOX 344054
CLEMSON, SC 29634-4054

OUTPATIENT RECORD

25E000

TELEPHONE: (864) 656-2233
FAX NO.: (864) 656-0760

Name 05/26/2006 [REDACTED] SS# Page 28
CAMPBELL, ANDREA
[REDACTED]

5-26-06 S: follow up - ? hormone panel pelvic US +
Date O: T P 68 R 16 BP 128/72 Pain Level 0 / 10 WT
Time 1020 LMP: Other: ? neurologist
Identified barriers to communication: unable to focus, wakes up crying
None Cultural Religious Cognitive Language Emotional
P: Dr. McDonald - maddock

05/26/06 CAMPBELL, ANDREA B.

- S: I had a phone call from Dr. Jack Stevenson yesterday afternoon asking me to talk to Andrea about the possibility of using Wellbutrin for symptoms of depression. She comes in today to talk with me about multiple medical problems. Andrea is a patient well known to me; we have treated her for anxiety, symptoms of mild depression, attention deficit disorder, etc. The patient comes in stating that she is still having some sensory deficits. She feels as though light touch throughout body has diminished. She is still having some decreased sensation in the genital area after her LEEP procedure. She is concerned about hormonal changes, she is concerned about anxiety. She says she feels hopeless but is not suicidal. She is aware that she is going through a stressful time in transitioning from her current academic program to new plans.
- O: Vital signs are stable. She is alert and oriented to time, place and person. She is dressed well, makeup is applied. She denies suicidal thoughts. She does admit to feelings of anxiety for which 0.25 mg of Xanax daily seems to relieve these symptoms. She describes herself as finding no pleasure in life and having episodes of crying.
- A: PATIENT'S SYMPTOMS SOUND QUITE A BIT LIKE DEPRESSION. SHE IS CONCERNED ABOUT NEUROLOGICAL PROBLEMS BECAUSE SHE HAS A COUSIN WITH MS, AND A DEMONSTRATED WHO HAD PARKINSON'S DISEASE. IN JANUARY, WHILE TAKING AMITRIPTYLINE AND STRATTERA SHE HAD AN EPISODE OF NUMBNESS ON THE LEFT SIDE OF THE FACE. SHE FEELS THIS IS CONCERNING HER QUITE A BIT ABOUT ITS POSSIBLE PREDICTION OF FUTURE NEUROLOGICAL PROBLEMS.
- P: We will refer her to a neurologist for assessment. We will refer her to the Women's Clinic for Ms. Whelchel to decide if she needs a pelvic ultrasound. I will order a CBC, comp-met, TSH, FSH for fasting next week. We will hold off on starting Wellbutrin or any other medications until she is seen by the neurologist.

R. McDONALD, M.D./dmp

3404

000397



To: Rosa Marie McDonald, MD
Confidential

Covenant Medical Transcription

06/04/06 9:43:06 Page 2 of 4

Lake Ridge Neurological, PA

Orlando A. Ricalde, MD
Jerr F. Sherrill, Jr., MD

EEG Evoked Potentials
EMG Sleep Studies

103 Omni Drive, Suite B * Seneca SC 29672
(864) 885-9866 * Fax (864) 888-8307

May 31, 2006

Chart: 15684

Rose Marie McDonald, MD

RE: CAMPBELL, Andrea

Dear Rose Marie:

Thank you for the kind referral of patient Andrea Campbell for consultation and evaluation for "anorgasmia."

As you know, the patient is a 48-year-old right-handed white female. The patient states that her main problem is anorgasmia and lack of being able to reach orgasm either when she masturbates or when she has sex with her "sexual partner of the past 20 years." This is a male. She is not married. The patient states that she went on amitriptyline and Strattera. She has had other problems. She tore her ACL this past year. She had surgery for that in May. She is still in left knee brace. She has had basal cell carcinoma removed from the skin of her head. Her father died. She has been under a lot of stress. She has had a cervical procedure. This was a LEEP conization. She has gotten slightly better. She went off Lexapro and Strattera in September. She has been markedly numb at her privates. This includes the genitalia but also her nipples. She self stimulates frequently but states that the "feeling is not there like it used to be." She states that her face had gone numb of late. She wakes up crying. She has depression. She states "I don't want to live like this." She has had problems with her right 2nd toe. It will turn purple. She has chronic numbness of the dorsum of her left thumb after a ganglion cyst was removed from that digit.

She is rather pan positive. She states she feels numb all over. Lexapro and Strattera were actually discontinued in December. She has had feelings as if she is being "stuck frequently" (painful paresthesias) at the pelvic region and sometimes feels as if "I've been kicked in the crotch." She has tried some over-the-counter cream to help when she climaxes calls Zestra. She denies any red desaturation or hot water bath type symptoms. She denies numbness at both feet. I had her cough and she stated that that caused some pain to shoot from her low back into her pelvic region. She states she has been diagnosed by blood work with elevated level of testosterone. This increases her sex drive but also leads to an increase of facial hair, etc. She sees Dr. Brockway OB-GYN. She states that he told her to place her "derriere over her head level" when she tries to have sex, etc. Apparently this has not helped. The patient, on the combination of Elavil and Strattera felt some numbness at her left face and left upper extremity. She feels a little bit restless on Strattera but it does help her concentrate and she is trying to finish her PhD. She has not been on Wellbutrin. She sees a counselor but not a psychiatrist.



000479

CAMPBELL, Andrea
May 31, 2006
Page 2

MEDICATIONS: Diovan 40 mg p.o. q.h.s., Strattera 20-40 mg per day, Xanax 0.25 mg q.h.s. (occasionally takes one in the daytime for anxiety).

ALLERGIES: Keflex, i.v. contrast,

PAST MEDICAL HISTORY: Reviewed - see sheet.

PAST SURGICAL HISTORY: Reviewed - see sheet.

SOCIAL HISTORY: Reviewed - see sheet.

HABIT HISTORY: Reviewed - see sheet.

FAMILY HISTORY: Reviewed - see sheet.

REVIEW OF SYMPTOMS: Reviewed - see sheet.

PHYSICAL EXAMINATION:

VITAL SIGNS: BP: 128/78 P: 84 RR: 24 T: 98.6 Ht: 5'7" Wt: 228 pounds

GENERAL APPEARANCE: Well-developed, well nourished. No toxic appearance. She is overweight.

HEENT: Normocephalic, atraumatic. Sclerae and conjunctiva clear. Nose and throat clear. No adenopathy.

NECK: Supple. No bruits. No thyromegaly. Negative Spurling's.

LUNGS: Clear to auscultation.

CARDIOVASCULAR: Regular rate and rhythm with no murmur, rub, or gallop.

ABDOMEN: Soft, positive bowel sounds. No masses or tenderness.

EXTREMITIES: No joint swelling or erythema. There is pitting pedal edema. The feet feel cool but pulses are adequate. There is negative Tinel's at the left wrist. Negative straight leg raise.

RECTAL: Rectal exam shows normal perianal tone bilaterally, good rectal tone, no mass, etc., normal bilateral inguinal sensation, normal vaginal region sensation.

NEUROLOGICAL EXAMINATION:

MENTAL STATUS: Alert and oriented times three.

SPEECH: Language is normal.

CRANIAL NERVES: II-WNL, III-WNL, IV-WNL, V-WNL, VI-WNL, VII-WNL, VIII-WNL, IX-WNL, X-WNL, XI-WNL, XII-WNL except mild left sided ptosis.

MOTOR EXAM: No drift. Normal power, tone, and bulk without fasciculation and normal fine motor activity bilaterally.

DEEP TENDON REFLEXES: 2/4 reflexes throughout; normoreflexic, with down going toes.

CEREBELLAR EXAM: Bilateral heel-knee-shin and finger-to-nose intact.

GAIT/STATION: Normal gait with normal Romberg and normal tandem.

SENSORY: There is hemihypesthesia. No extinction. Good cortical sensory bilaterally. She states that she is numb at all digits of both hands but worse at digit 1 of the left hand but all of this seems rather subjective. There is no radicular pattern of loss at the left upper extremity and no peripheral neuropathy pattern on checking: vibratory, temperature, light touch, or JPS. There is question of a peripheral neuropathy pattern to pinprick only at the right leg but not the left leg.

000480

CAMPBELL, Andrea
May 31, 2006
Page 3

MECHANICAL: Please see the above.

OTHER: There is no spinal level. I would note there is no Marcus Gunn or INC.

IMPRESSION/PLAN:

1. Anorgasmia. I am not sure that this is neurologic. I could not rule that out. She states she is numb all over but her exam is nearly completely normal. There is slight question of decreased pin prick sensation at the right leg and also there is mild left ptosis (probably congenital), otherwise her entire neurologic exam in regard to both the CNS and PNS is completely normal. Probably this is either fibromyalgia or conversion disorder or else vascular, etc. She should continue to follow up with OB-GYN. She has no trouble voiding, etc. We might recommend Viagra use to her OB-GYN (if there is no contraindication).
2. We are going to check left upper extremity EMG/NCV to rule out carpal tunnel syndrome formally and also left lower extremity NCV to rule out peripheral neuropathy. We are also going to check MRI of the pelvis to make sure there is not a neuroma at the pudendal nerve (that might need surgical extraction). I do not believe she needs MRI of the brain. We are going to check the following: T4, B12, sed rate, CBC, PTT and INR.
3. I recommend her doctors begin Wellbutrin. This can help depression and has a low risk of sexual side effects. I recommend beginning at Wellbutrin XL 150 mg per day and could push it further. We gave her a TIA sheet and asked her to go on aspirin 81 mg p.o. q day with food coated. We are consulting Dr. Mouzon. For anxiety I asked her to try to taper down off Xanax and we are trying Effexor 5 mg t.i.d p.r.n. and warned her of the possible side effects. To help with her concentration I recommend that she continue on the Strattera. She states she sees in Tennessee a primary care specialist, Mary Ann Bertoni. I would note that I did a rectal exam with a female nurse chaperone present. We might consider referral to Vanderbilt University. They have a pudendal neuralgia clinic. Kleine-Levin is a possibility or PCOS - polycystic ovarian disease. Topamax could be considered (for weight loss). She might have a touch of pseudodementia. Her memory testing was great today at 3/3 at five minutes.
4. She also states she has a problem where her clitoris will not "extend." I suppose that may respond to Viagra. I defer to her other doctors in regard to that. A urology consult could be considered. She is very "pan positive." I do not believe that she needs Aricept. I suppose even acupuncture could be considered. We might consider obtaining a polysomnogram study to rule out OSA. She had good spontaneous whorls pulsations on funduscopic. No evidence for any hypothalamic lesion. I doubt her coarctation of the aorta caused all of this.
5. We will see her soon in follow-up.

Thank you for this kind referral.

Sincerely yours,

JERRY F. SHERRILL JR, MD/tib
Dictated not read

cc: Ronnie Brockway, MD

000481

Oconee OB/GYN Associates

215 Stork Way

Seneca, South Carolina

864-882-1311

Progress Note

Patient Name: Andrea Campbell

Acct #: 21017

Chief Complaint: inability to have an orgasm

Date of Service: 6/13/06

time in service: (25min)

48 year-old G0 presents with an LMP of 5/17/06 with complaints of sexual dysfunction related to what she feels is an insensitivity of her clitoris. Patient has a previous active and healthy sexual function and relates the change in her sexual responsiveness to a leap procedure she underwent in September of 2005. This was accomplished for moderate dysplasia. She saw Dr. Brockway in February 2006 with similar complaints. He was noted at that time that her cervix had healed completely. She had a normal neurologic examination at that visit.

She has been on multiple psychoactive medications including Elavil, Wellbutrin and Strattera. She seen several counselors at this time for anxiety and ADHD.

HPI: (4)

Location: pelvis

Severity: subjectively severe

Duration: a nine months

Context: intercourse

Modifying factors: none

Associated signs and symptoms: none

ROS: (2)

Constitution: No fevers, chills, fatigue, malaise, or abnormal weight loss

GI: No diarrhea, constipation, distention, nausea, vomiting, or bright red blood per rectum

GU: No hematuria, frequency, urgency, stress urinary incontinence, pad use, enuresis, or nocturia

endocrine: No hot flushing, night sweats, vaginal dryness

PMH, PSH, FMH, SH, -- reviewed and updated on problem summary list.

Pelvis:

vulva: No rash or lesion

vagina: No discharge or lesions

cervix: No CMT or lesions

uterus: NSSC, nontender, and no masses

adnexa: Left: Nontender without mass

Right: nontender without mass

r/v: no masses, gualac neg

- A: 1. Female orgasmic disorder - 302.73
2. Dysplasia, status post therapy

- P: 1. Extensive counseling (40 minutes) concerning sexual function, menopausal and premenopausal changes in sexuality, the effects of medications on orgasm is accomplished.
2. Recommend attempts to discontinue psychoactive drugs which may be exacerbating her problem
3. continue counseling sessions in hopes of resolving her anxiety disorder

Philip D. Caron DO



QUESTIONNAIRE

Hormonal Evaluation: Menopausal Syndrome

NAME: ANORNA BETH CAMPBELL AGE: 48

Number of deliveries: 0 Age of youngest child: 14/2

Date of last menstruation: 6-15-66

Are you still cycling? Yes / No _____ How often? _____

Have you taken any hormonal treatment? Yes _____ No ☒

Describe: _____

SYMPTOMS		Yes	No	SYMPTOMS		Yes	No
headaches			✓	lack of sex drive			✓
hot flashes			✓	vaginal dryness			✓
cold sweats			✓	pelvic discomfort	After LBP ✓		
depression		✓		pelvic pain	After LBP ✓		
irritability			✓	pelvic relaxation			✓
anxiety		✓		heart palpitations			✓
lack of energy		✓		painful joints			✓
lack of memory		✓		breast pain			✓
breast secretions			✓	acne, skin problems			✓
painful intercourse	(LOS)	After LBP		swelling			✓
loss of urine			✓	frequent urination			✓
painful urination			✓	hair loss	✓ 5-10% sign		
excess of hair			✓				

OTHER SYMPTOMS: _____



new, 6/26/16
AM (17)

INITIAL OFFICE EVALUATION

RE: ANDREA CAMPBELL
CHART: 15381
REFERRAL: Rita McConnell

06/26/06

CC/HPI:

Andrea is 48 YO from Clemson, SC. She also at times lives in Tenn. She is single at this time. She is a graduate student in computer research.

CURRENT MEDICATIONS:

1. Diovan for hypertension since 2002.
2. Tribulus herb, tyrosine, amino acids.

PAST MEDICAL HX: Mononucleosis. No broken bones. She has had panic attacks recently.

PAST SURGICAL HX:

1. Resection of ganglion cyst in 1978.
2. Basal carcinoma of the head in 9/05.
3. ACL/meniscus tear in 5/05.
4. LEEP conization in 8/05 for moderate dysplasia per Dr. Ronnie Brockway.

ALLERGIES: Penicillin and Keflex and contrast dye for CT scan.

FAMILY MEDICAL HX: Heart disease in the mother who died at age 68 from congestive heart failure. Father age 87 with rupture of aortic aneurysm with multisystem failure.

Menstrual History:

Menarche: Age 11. Interval: q 28 days after LEEP; prior to that 33-40 days. Duration: 5-7 days. Pain is minimal. No PMS. Flow is moderate. LMP: 6-15-06. No abnormal discharge. Abnormal bleeding: The patient lists after the LEEP, she had many, many weeks of bleeding.

Gestational History: She has never been pregnant and has no desire to become pregnant.

Contraceptive History: Condoms. Withdrawal. Short-term birth control pill use.

Pap Smear: Her last Pap smear was June 2006. History of previous abnormal Pap smear in January 2006 and this repeated as normal.

Mammogram: Her last mammogram was in 1995. No history of previous abnormal mammogram. She states "yes" she is checking her breasts regularly.

Hormonal Evaluation Questionnaire: She marks off depression, anxiety, lack of energy, lack of memory, painful intercourse only since LEEP procedure, pelvic discomfort and pelvic pain also after the LEEP, and hair loss starting about five years ago.

SOCIAL HX: She does not smoke. She cooks with alcohol only but does not drink alcohol.

7/25/06 *file on*
(15) 000155



DUKE UNIVERSITY MEDICAL CENTER

COPY

Diana L. Dell, MD

Women's Behavioral Health

DUMC Box 3263

Durham, NC 27710

Phone: 919-668-2570

Fax: 919-684-6243

dell0001@mc.duke.edu

August 26, 2006

Fred Hartley, MD
203 E. Watauga Avenue
Johnson City, TN 37604

Re: Andrea Campbell

MR# FE4848

Dear Dr. Hartley:

I saw the above referenced patient yesterday, on referral from Dr. Charles Hammond. She is bright, articulate, and clearly suffering a great deal at this time. Because of the degree of that suffering, the majority of my time with her was spent listening to her story and advising her about the management of chronic pain. Although I was unable to complete my usual complete psychiatric examination in the 1.5 hours, she presented me with 15 pages of typed historical data about the evolution and current state of her condition which I have now reviewed. I wish that I could be more helpful, but I will comment on the parts where I think I can help. I will attempt to address the issues in the order presented to me by Ms. Campbell (see attached 4-page document entitled "Questions for Dr. Dell")

Pelvic pain. Ms. Campbell presents with a constellation of pelvic and vulvovaginal pain that she describes in overlapping ways that made it hard for me to separate out. Dealing first with the pelvic pain, it is described as severe, constant, and having both a stabbing quality and an aching quality with prolonged standing. In her description to me, it was clearly the stabbing pain which was most bothersome to her. She has had an MRI of the pelvis which showed no detectable neural or other lesions. It is not apparent whether or not she has had endoscopic evaluation of her bladder or colon, which would be more likely to spasm, which could account for the stabbing quality.

Vaginal pain. Ms. Campbell reported to me that it sometimes feels like everything is falling out; that when she sits it feels like she is sitting on a ball. Her gynecologic records reflect similar complaints, with the notation that this symptom is better with tampon inserted. One might consider uterine prolapse, which is often more painful in its earliest stages - except for the fact that I would



- 89 - North Carolina 27710

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9/16/06
(36)
LPHW

expect her to have more pain (not diminished sensation) with sexual activity. Also countering that possibility are the PE notes from 2-27-06, showing a normal-looking cervix which appeared to be well-supported.

Vulvovaginal area. Patient complains of persistent numbness and lack of sensitivity in her entire genital area, which inhibits her ability to achieve orgasm. However, again referring to PE notes from 2-27-06, the clinician noted positive sensation to light touch in both peri-clitoral and peri-anal areas. In addition, patient has apparently been diagnosed with vestibulitis (for which she has used several courses of antibiotics), which would be associated with increased vulvar sensation.

Patient also complains of a "rough" or "sandpaper" sensation around her cervix and in her vagina. I am unclear as to what this might represent, unless it is related to her perimenopausal status. A trial on estrogen cream might be helpful.

Anorgasmia. Patient's most consistent symptoms, and the one which causes her the most distress, appears to be a change in sexual function. She was previously able to achieve orgasm easily. Her present inability to achieve orgasm causes her great concern. I believe her anorgasmia is much more related to her use of amitriptyline than to her previous LEEP procedure. Wellbutrin or Buspar can be used to offset this side-effect, but have not worked for this patient.

Tremors and dry heaves. These two symptoms, often mentioned together by Ms. Campbell in both her interview and written materials, were best relieved by amitriptyline. I believe these symptoms are related to her anxiety disorder and should be aggressively managed in the context of her overall treatment.

Diagnostic Impression, Multi-axial Diagnosis

- Axis I Pain Disorder Associated with Both Psychological Factors and a General Medical Condition, Chronic [307.89]
 Anxiety Disorder NOS [300.00]
 Psychosexual Dysfunction with Inhibited Female Orgasm [302.73]
 Depressive Disorder NOS [311]
- Axis II Deferred
- Axis III S/P LEEP procedure for CIN II
 Vestibulitis
 Hypertension
- Axis IV Disability secondary to Axis I disorder
- Axis V GAF = 60

Given your training in Ob-Gyn instead of Psychiatry, the diagnostic criteria for Pain Disorder are listed below:

- A. Pain in one or more anatomical sites is the predominant focus of the clinical presentation and is of sufficient severity to warrant clinical attention.
- B. The pain causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

- C. Psychological factors are judged to have an important role in the onset, severity, exacerbation, or maintenance of the pain.
- D. The symptom or deficit is not intentionally produced or feigned (as in Factitious Disorder or Malingering).
- E. The pain is not better accounted for by a Mood, Anxiety, or Psychotic Disorder and does not meet the criteria for Dyspareunia.

Recommendations:

1. Ms. Campbell needs a single practitioner who can coordinate the care for her complex condition.
 - My first choice would be a Pain Clinic, since they are very experienced at treating pain symptomatically, regardless of what causes the pain. And they are adept at treating the depression that results from those painful conditions.
 - My second choice would be a psychiatrist experienced in dealing with anxiety disorders, since this patient's symptoms are markedly exacerbated by her anxiety.
2. While locating the appropriate Pain or Psychiatric practitioner, a trial on Neurontin would be appropriate – both because it may diminish neurogenic pain and because it is very effective at reducing anxiety in most patients. Given that Ms. Campbell, like most anxious patients, is very sensitive to medication effects and side-effects, I would start her at 100 mg HS. At about 3 day intervals I would increase her to BID, then TID. As her tolerance for the drug is proven, I would gradually increase the dose to about 300 mg TID.
3. Acupuncture may be a beneficial modality for this patient. She has seen one practitioner and had no real benefit. I would consult with another practitioner before deciding that it is not effective for her.
4. CBT (Cognitive Behavior Therapy) is often helpful for dealing with pain conditions, helping the patient to refocus on the positive areas of their lives. Both Pain Clinics and Psychiatrists provide that treatment modality.
5. Although I did not discuss it with the patient, laparoscopy to rule out endometriosis might be considered. Hysterectomy might also be considered if prolapse is recognized. I would not, however, consider either modality until her anxiety and depression are well controlled and she is no longer spending all of her days in bed.

I am sorry that I cannot be more helpful, but I think that this patient can improve with better management of her anxiety and depression. If I can be of any further assistance, please do not hesitate to contact me.

Yours very truly,

Diana L. Dell, MD

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Oca : Ob - Gyn Associates, P.A.

215 Stork Way
Seneca, South Carolina 29678
(864) 882-1311

Log to Track Disclosures of PHI (for our information only)

Patient Name: Andrea Campbell

For each disclosure, fill in the date it occurred along with a description of the type of disclosure. In addition, you need to provide a description of the PHI disclosed along with the names and titles to whom it was disclosed.

Date	Description of Disclosure	Who Requested	Employee Name
7-19-05	Progress Note 7-19-05	Palmer Health Center	B. Badley
3-26-06	All records 7-19-05 2-27-06	Andrea Campbell	B. Badley
6/7/06	All Records 7-19-05 2-27-06	ANDREA CAMPBELL	AF
12/11/06	Tennessee Disability	medical chart	MEB
4-2-08	Progress Note 6/13/06	Andrea Campbell	MD
6-25-09	All records	Andrea Campbell ~~Medical~~	B. Badley
7-1-09	(Every page of chart) All Records	SCITUA Tom McCall	P. Thrasher

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000006

Oconee Ob - Gyn Associates, P.A.

*215 Stork Way
Seneca, South Carolina 29678
(864) 882-1311*

REQUEST TO INSPECT AND COPY PROTECTED HEALTH INFORMATION

Patient Name: ANORBA BETH CAMPBELL

Date of Birth: [REDACTED] SS: [REDACTED]

Patient Address: [REDACTED]
Street

[REDACTED]
Apartment #

[REDACTED]
City, State Zip

It is the policy of the Practice to charge a reasonable fee for photocopying expenses that is consistent with state and federal laws.

1. The Practice will charge a reasonable fee for search, handling, photocopying its patient medical records.
2. The fee will apply to requests made with patient authorization. There will be no charge for copies (when the patient is referred by the physician or healthcare provider to another physician or healthcare provider for continuation of treatment for a specific condition) as required by SC Law.
3. Fees for copies are to be paid prior to the release of copies.
4. The fees for photocopies as allowed by SC Law are as follows:
 - a) Handling fee: \$10.00 will be assessed for each request.
 - b) The first 30 pages: A fee of .65 per page.
 - c) Additional pages: .50 per page beginning page 31.
 - d) Postage: Actual postage charge will be added to photocopies sent by mail.
5. Reduced fees are allowed under state /federal guidelines for WORKER'S COMPENSATION, VOCATIONAL REHABILITATION, Medicare, etc. will be accepted as payment in full.

Total Cost: \$15.00

Signature of Patient or Legal Guardian: Andrea L. Campbell

Print Name of Patient or Legal Guardian: _____ Date: 3-21-05

Oconee Ob - Gyn Associates, P.A.

*215 Stork Way
Seneca, South Carolina 29678
(864) 882-1311*

REQUEST TO INSPECT AND COPY PROTECTED HEALTH INFORMATION

Patient Name: ANDREA CAMPBELL

Date of Birth: [REDACTED]

SSN: [REDACTED]

Patient Address: [REDACTED]

Street

Apartment #

City, State Zip

It is the policy of the Practice to charge a reasonable fee for photocopying expenses that is consistent with state and federal laws.

1. The Practice will charge a reasonable fee for search, handling, photocopying its patient medical records.
2. The fee will apply to requests made with patient authorization. There will be no charge for copies (when the patient is referred by the physician or healthcare provider to another physician or healthcare provider for continuation of treatment for a specific condition) as required by SC Law.
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 - d) Postage: Actual postage charge will be added to photocopies sent by mail.
5. Reduced fees are allowed under state /federal guidelines for WORKER'S COMPENSATION, VOCATIONAL REHABILITATION, Medicare, etc. will be accepted as payment in full.

Total Cost: 10.00 ✓ PAID

Signature of Patient or Legal Guardian: [Signature]

6-6-06

Print Name of Patient or Legal Guardian: _____

Date: _____

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Andrea Beth Campbell,

Plaintiff,

vs.

Ronnie A. Brockway, MD, and Oconee
OB-GYN Associates, PA

Defendants.

IN THE COURT OF COMMON PLEAS

VERIFICATION

C.A. No. 2009-CP-37-793

To be filled out and returned by the Records Custodian for Servy Institute for Reproductive Endocrinology, with regard to patient Andrea Beth Campbell:

1. The first day this patient was ever seen in this office for any reason was

6/26/06

2. The attached is a true and correct copy of the entire file for this patient, including all of our records on this patient from the date first seen in this office for any reason until the present day. Our response to this subpoena includes all admission/background information taken from the patient, nurse's notes, doctor's notes, and records from other medical providers forwarded to us to assist in our diagnosis.

Pages 1 through 116
Servy Institute for Reproductive Endocrinology

By: *Conie S. Thibault M.D.*

Signature

Dated: 8/17/09

Sworn to and subscribed to before me
this 17th day of August, 2009.

John D. Rutledge
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires 8/20/2013

QUESTIONNAIRE

Hormonal Evaluation: Menopausal Syndrome

NAME: ANDREA BETH CAMPBELL AGE: 48

Number of deliveries: 0 Age of youngest child: 1/12

Date of last menstruation: 6-15-06

Are you still cycling? Yes ☒ No ☐ How often? _____

Have you taken any hormonal treatment? Yes ☐ No ☒

Describe: _____

SYMPTOMS	Yes	No	SYMPTOMS	Yes	No
headaches		☒	lack of sex drive		☒
hot flashes		☒	vaginal dryness		☒
cold sweats		☒	pelvic discomfort	<u>After LBP</u> ☒	
depression	☒		pelvic pain	<u>After LBP</u> ☒	
irritability		☒	pelvic relaxation		☒ I wish
anxiety	☒		heart palpitations		☒
lack of energy	☒		painful joints		☒
lack of memory	☒		breast pain		☒
breast secretions		☒	acne, skin problems		☒
painful intercourse	<u>105</u> <u>After LBP</u>		swelling		☒
loss of urine		☒	frequent urination		☒
painful urination		☒	hair loss	<u>Yes</u> <u>5 yrs ago</u>	
excess of hair		☒			

OTHER SYMPTOMS: _____

rev. 6/26/06
AM
(17)

How long have you suffered from such symptoms? ^{Pelvic Pain, Anxiety} Since Aug 05; Recently Intensified

Comments: Since Menarche 05

List the medications you are presently taking: Dionon 40mg

Have you undergone a hysterectomy? Yes _____ No ☒

When? _____ Why? _____

Were ovaries also removed? Yes _____ No _____

Any other pelvic surgery? LEBP Conization Aug 2005

Do you have a history of:	YES	NO	DESCRIPTION
Vascular problems		☒	
Liver ailment		☒	
Heart disease	☒	☒	<u>Grad School</u> <u>High Blood Pressure since Jan 2002</u>
Weight gain	☒		<u>50 lbs since grad school</u>
Weight loss			

(18)

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

ANDREA BETH CAMPBELL,)

Plaintiff,)

v.)

RONNIE A. BROCKWAY, M.D., et al.)

Defendants)

CIVIL ACTION NO.: 2009-CP-37-1428

**Plaintiff's Opposition To Defendants' Motion
For Summary Judgment**

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
CLERK OF COURT
2011 MAY 12 A 11:44

Plaintiff Andrea Campbell opposes defendants' motion for summary judgment. Defendants' sole basis for their motion is their contention that plaintiff's action is barred by the statute of limitations. As demonstrated below, plaintiff filed her action within three years of her discovery on May 2, 2007, that defendant Brockway's LEEP procedure was the cause of her pain — her neurological injury, and defendant's factual and legal contentions to the contrary are erroneous. Accordingly, the Court should deny defendants' motion.

Facts

Dr. Brockway tells Campbell that she needs the LEEP procedure to treat her condition. The LEEP procedure is intended to treat abnormal cervical cells. In the

procedure, the surgeon uses a thin wire loop electrode which is attached to an electrosurgical generator. The generator transmits an electrical current that cuts away the abnormal cervical tissue in the immediate area of the loop wire.

On August 9, 2005, he performs the LEEP procedure on her. (Campbell Aff. ¶ 2) Unbeknownst to Campbell, the procedure is unnecessary and unwarranted in the circumstances, and Brockway excises too much of the cervix material during the operation. (Affidavit of Joel J. Cooper, M.D. ¶ 5j)

After the operation, Campbell experiences genital discomfort and pain focused in her cervix. It does not subside. Although Dr. Brockway continues to treat Campbell post-operatively for several months thereafter, he never tells her about his excessive removal of cervix tissue, or suggest that her discomfort and pain might be caused by that excessive tissue removal during his procedure.

(Campbell Aff. ¶9) To the contrary, during Campbell's last office visit on February 27, 2006, Dr. Brockway dismisses her physical complaints as being "in your head." (Campbell Aff. ¶ 4)

In an attempt to find out the cause, and possible solution, of her problems, Campbell consults over the next four months with at least four physicians who all tell her that her genitals are normal. None of those physicians indicate that there is any link between the LEEP procedure and her problems; in fact, they rule it out by

telling her that there is no physical problem with her genitals. (See Moore Aff. ppgs. 5-6)

Not until May 2, 2007, does a medical provider tell her, contrary to the suggestions of Dr. Brockway, and all of Campbell's other physicians whom she had consulted, that her genital discomfort, including severe cervical pain, is actually "neuropathic pain" — the result of the damaging of nerves during the LEEP procedure, rather than simply "in her head," i.e., a psychological explanation.¹ (Campbell Aff. ¶ 4) On August 8, 2008, Campbell files a pro se medical malpractice complaint against Brockway in federal court. She voluntarily dismisses that complaint. On June 26, 2009, Campbell files her Notice of Intent to File Suit, which stops the limitations period from running further.

The relevant time line is shown below:

- Aug. 5, 2005 — Dr. Brockway performs the LEEP procedure on Campbell. (Campbell Aff. ¶ 2)
- Feb. 27, 2006 — During office visit with Dr. Brockway, his assistant tells Campbell that her complaints about her numbness and lack of sensitivity in her genital area: "he [Dr. Brockway] thinks it is all in your head" and referred her to a

¹One of her consulting physicians, Dr. Bertotti, did tell her on June 28, 2006, that, based on the negative HPV test that Dr. Bertotti ordered, the LEEP procedure had been unnecessary. (See Campbell Aff. ¶ 7) However, even using that date as the accrual date for the running of the limitations period, Campbell's action is timely.

posting outside the office with a name of a therapist.
(Campbell Aff. ¶ 4)

- Mar. 24, 2006 – “Dr. Crowder documented a normal vaginal exam.”
(Moore Aff. p. 5)
- May 26, 2006 – “Dr. McDonald documented a normal pelvic exam.”
(Moore Aff. p. 5)
- May 31, 2006 – “Dr. Sherill documented in his notes that he performed a complete physical exam, the results of which were essentially within normal limits.” (Moore Aff. p. 5)
- June 13, 2006 – “Dr. Philip Caron documented a normal vaginal exam, counseled her for forty minutes on sexual function, recommended that she adjust the psychoactive medication she had been taking and recommended that she continue her counseling sessions.” (Moore Aff. p. 6)
- June 28, 2006 – Campbell is told for the first time that the LEEP procedure was unnecessary, based on the results of the HPV test. (Campbell Aff. ¶ 7)
- May 2, 2007 – Campbell learns for the first time that her pain is neuropathic and the result of the nerve damage from the LEEP procedure are the cause of her pain. (Campbell Aff. ¶ 8)
- Aug. 8, 2008 – Campbell files malpractice action in federal court against Brockway.
- Dec. 1, 2008 – Campbell voluntarily dismisses federal action.
- June 26, 2009 – Campbell files Notice of Intent to File Suit (which stops the running of the statute).

Argument

South Carolina's applicable statute of limitations for a medical malpractice action provides that it "must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or *three years from date of discovery or when it reasonably ought to have been discovered*, not to exceed six years from date of occurrence." S.C. Code Ann. § 15-3-545 (emphasis added). The South Carolina Supreme Court has held that "reasonably ought to have been discovered" means "should have known that he had a cause of action." *Smith v. Smith*, 354 S.E.2d 36, 40 (S.C. 1977). That Court has characterized the discovery prong of the statute as a "reasonable diligence" requirement. *Strong v. University of S.C. School of Medicine*, 447 S.E.2d 850, 852 (S.C. 1994). It has held that

the exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of the injury would put a person of common knowledge on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point

Smell v. Columbia Gun Exchange, Inc., 278 S.E.2d 333, 334 (S.C. 1981).

"[N]otice that some right of his has been invaded" means "you have to be able to

discern that someone else proximately caused that injury” *Rogers v. Efird’s Exterminating Co.*, 325 S.E.2d 541, 542 (S.C. 1985).

Campbell sought diligently to discover the source of her problems with genital discomfort and pain. First, she continued to go to Brockway, who treated and counseled Campbell after the LEEP procedure for several months. In response to Campbell’s complaints of genital discomfort and pain, Brockway never suggested that they might be the result of the LEEP procedure. In fact, he indicated that her problems were purely psychological. She then sought treatment and diagnosis of her condition from several other medical providers.

Despite Campbell’s diligent efforts to have her problems with genital discomfort and pain diagnosed and treated after her LEEP procedure, Campbell did not have the facts that would have enabled her to discern that she had a claim against defendant Brockway for that injury until a medical provider informed her on May 2, 2007, of his conclusion that the injury was the result of the LEEP procedure. In fact, all of her medical providers who saw her prior to June 28, 2006, found her genitals to be normal, suggesting that the cause of condition was psychological. None suggested that the LEEP procedure was the cause. Accordingly, the limitations period for her claims did not began to run until May

2, 2007. See *Smith*, 354 S.E. 2d at 40 (S.C. 1977); *Snell*, 278 S.E.2d at 334 (S.C. 1981); *Rogers*, 325 S.E.2d at 542 (S.C. 1985).

Defendants contend that all of Campbell's claims accrued no later than May 19, 2006. Defendants even contend that Campbell discovered or should have discovered all of her claims against him on the date of the LEEP procedure. As demonstrated below, defendants' contentions are wrong, and their motion should therefore be denied.

I. Defendants' May 19, 2006 Trigger Date Fails: Dr. Bertotti Did Not Inform Campbell Of The HPV DNA Test Results And That The LEEP Procedure Was Unnecessary Until June 28, 2006.

Defendants' key argument is that the statute of limitations had to begin running at least by May 19, 2006, because that is when one of Campbell's treating physicians, Dr. Bertotti, purportedly told her that the LEEP procedure had been unnecessary. (Brockway Br. 22) As demonstrated below, defendants simply have the wrong date.

On May 19, 2006, Dr. Bertotti ordered a test to see if Campbell had the HPV virus. (see Campbell Aff. ¶ 5, Att. A (May 19, 2006 Notes of Dr. Bertotti)). However, the lab did not run the test and issue the results until June 6, 2006. (*Id.*, Att. B (June 6, 2006 Report of Molecular Pathology Lab)). So there is simply no way that Dr. Bertotti could have told her the results of test, and that the LEEP

procedure was thus unnecessary during the May 19, 2006 office visit, as Brockway contends. In fact, it was not until Campbell's next visit to Dr. Bertotti on June 28, 2006, that she was counseled about the results of the test and learned for the first time from Dr. Bertotti that the LEEP procedure was unnecessary. (*Id.* at ¶ 7 & Att. C (June 28, 2006 Note of Dr. Bertotti)). Thus, if this event was a trigger for the limitations period to start running, as defendants contend, then Campbell's filing of her Notice of Intent To File Suit was timely, since it was done less than three years later.

To summarize, the actual events were as follows:

- May 19, 2006 – Dr. Bertotti orders a test for the HPV virus
- June 6, 2006 – The lab performs the test and issues the report
- June 28, 2006 – During Campbell's office visit, Bertotti informs her for the first time of the negative test results and that the LEEP procedure was unnecessary.

In coming up with the May 19, 2006 date, defendants ignored the actual medical records and cited Campbell's complaint that she filed in federal court on August 8, 2008. However, a read of the actual language in the complaint shows that even the federal complaint does not support defendants' contention:

On or about May 19, 2006 Plaintiff Campbell was seen by Dr. Marian Bertotti, a physician with First Choice Health Care in Johnson City, Tennessee regarding

extreme pain and disruption in sexual satisfaction. Dr. Bertotti conducted a HPV DNA test and reported that there were no signs of the disease, or any indication that Plaintiff Campbell had had the disease at any point in her life. Dr. Bertotti concluded that the LEEP conization procedure was unnecessary.

(Def's Br. Exh. 2, p. 3, ¶ 9). The complaint alleges that Campbell was seen by Dr. Bertotti on May 19, 2006, it does not allege that Dr. Bertotti reported the results of the HPV DNA test on that same day. Thus, the complaint is consistent with the medical records and Campbell's testimony that the results were reported to her on June 28, 2006.²

II. The Limitations Period Did Not Begin Running On The Day Of The Operation — August 9, 2005.

Defendants claim that Campbell has made three clear allegations that show that she was "aware" that a claim had arisen as of the date of the procedure, August 9, 2005. However, as shown below, each of those contentions fails.³

² In any case, that complaint from another case, which was voluntarily dismissed by Campbell prior to an answer being filed, is not competent summary judgment evidence in this action.

³ Defendants make the curious argument that the fact that Campbell filed her federal complaint just before the three year anniversary of the LEEP procedure is evidence that she was aware of her claims as of the date of the procedure. (See. Defs' Br. 13) This is simply wrong. All that the filing shows is that Campbell was aware of her potential claims by the date of the filing. This is easily explained by what she had learned on June 28, 2006 (that the procedure was unnecessary) and May 2, 2007 (that her permanent pain was caused by nerve damage from the LEEP procedure). The fact that she was aware of at least some of her potential claims as of August 8, 2008 is not inconsistent with Campbell's position that her filing of the Notice of Intent to File Suit was timely.

A. Campbell's Observation She Related To Subsequent Physicians That Her Pain Began Around The Time Of The LEEP Procedure Did Not Trigger The Limitations Period.

Defendants contend erroneously that Campbell's observation she related to subsequent physicians — that the pain that she was experiencing began around the time of the LEEP procedure — somehow triggered the commencement of the limitations period. (Def's Br. 12) First, nowhere in those medical histories can defendant point to where Campbell was blaming defendant for the pain she was experiencing. Rather, she was simply relating that the onset of some of her problems coincided with LEEP procedure in order to assist them in their diagnosis and treatment of her.

More importantly, the inquiry as to when a potential plaintiff is held accountable for discovering a cause of action is "an objective, not subjective, one." *Knox v. Greenville Hosp. Sys.*, 608 S.E.2d 459, 462 (S.C. App. 2005). And until May 2, 2007, Campbell had no objective basis for relating her ongoing pain to the LEEP procedure. In fact, the only relevant factual information she possessed — what Brockway and all the subsequent treating physicians had told her of their examinations and diagnoses of her, supported a contrary conclusion — that her physical genital organs were normal, and that the pain was purely psychological. Determining the cause of that pain was not within the realm of

common knowledge, not determinable by a "person with common knowledge." Rather, Campbell was dependent on those medical experts for that information.

Accordingly, Campbell's medical histories in the records of her subsequent treatment do not support an accrual date for her claims of August 9, 2005.

B. Whether Or Not Campbell Alleged In Another Complaint That She "Recommended" To Defendant That He Perform An HPV DNA Test Is Irrelevant To the Limitations Issue.

Defendants erroneously contend that the limitations period began running on the day of the procedure because Campbell, on August 8, 2008, alleged in an earlier dismissed pro se complaint that defendant "refused to perform the HPV DNA test requested by Plaintiff Campbell and proceeded with a LEEP conization procedure." (Def.'s Br. 12-13) As discussed below, this is wrong for several reasons.

Whether a LEEP procedure might be indicative in the absence of an HPV virus test is not within the realm of common knowledge. Thus, the failure of Brockway to perform the HPV virus test is not a fact that would have put Campbell on notice that she had a claim against Brockway sufficient to trigger the running of the limitations period. *See Snell*, 278 S.E.2d at 334 (to trigger limitations accrual, fact must put "a person of common knowledge on notice that... some claim against another party might exist"). The fact that Campbell might

have been unhappy with Brockway's actions is not enough to charge her with notice of a claim against him sufficient to trigger the running of the statute of limitations. See *Garner v. Houck*, 435 S.E.2d 847, 849 (S.C. 1993)(fact that "the son was unhappy with his mother's nursing care prior to her death," did not begin the running of the limitations period on his wrongful death claim).

Further, without citing any authority, defendants argue incorrectly that "for purposes of [the summary judgment motion], the allegation is presumed to be true." (Def's Br. 3 n. 2) However, this allegation is not an allegation from plaintiff's complaint in this case; rather it is from a complaint filed in another case that was voluntarily dismissed by plaintiff prior to its service. Defendants have cited no authority to support their contention that the allegations in that complaint from another case are presumed to be true in this case. And in fact, there is no such presumption. Neither that complaint nor the allegations therein are competent summary judgment evidence.

Additionally, even if the allegation was properly considered, it reflects Campbell's understanding of the relevant events as of August 8, 2008, when she filed that complaint, not her understanding of them as of August 9, 2005. By August 8, 2008, she had learned many things that she did not know as of August 9, 2005 — that she was negative for the HPV virus and that, consequently, the LEEP

procedure was unnecessary, and that the LEEP procedure was the cause of her pain.

Furthermore, regardless of whether or not the HPV test should have been performed, a viable medical malpractice claim requires an injury. Under the assumption that the purpose of the HPV test is to rule out the LEEP procedure only for those who are HPV-negative, if Campbell had been HPV-positive, then defendant's failure to perform the HPV test would not have been actionable. And Campbell did not learn that she was HPV-negative, and the significance of that fact, until June 28, 2006.

C. Whether Or Not Campbell Alleged In Another Complaint That Defendant Brockway Nicked Campbell's Vagina During The Procedure Is Irrelevant To the Limitations Issue.

Defendants argue that the limitations period began to run on August 9, 2005, because of Campbell's allegation in the complaint she filed on August 8, 2008, in another case, that defendant Brockway nicked Campbell's vaginal wall during the procedure and that Campbell became aware of it at the time. (Def.'s Br. 13) As discussed below, this argument also fails for several reasons.

First, as noted earlier, that prior complaint, which was filed and dismissed in another case, is not cognizable summary judgment evidence in this case. Further, to the extent it is considered, it needs to be recognized that it reflects Campbell's

understanding of events as of the time when she filed that complaint, August 8, 2008, not as of the time of the operation. By August 8, 2008, Campbell had learned that the LEEP procedure had been unnecessary, and that it had resulted in her nerve damage.

Further, there is no indication that the nicking was the result of negligence by Brockway; to the contrary, it is characterized in the prior complaint as resulting from the flinching by the plaintiff. The knowledge of this nicking injury, by itself, is simply not enough to trigger the commencement of the limitations period. *True v. Monteith*, 489 S.E. 2d 615, 617 (S.C. 1997) (“The statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another.”).

Additionally, defendant Brockway at the time characterized the nicking to Campbell as “no big deal” and “nothing to worry about.” (Campbell Aff. ¶ 3) Prior to July 2006, none of her many subsequent treating physicians who examined her genitals found any problem with her vagina.

Finally, as demonstrated in the section below, whether or not Campbell’s claim for the superficial injuries from the nicking of the vagina began to accrue at the time of the procedure, Campbell’s claims for her cervical injuries, including

nerve damage and severe cervical pain, would not thereby also begin to accrue for limitations purposes at the time of the procedure. Instead, as explained below in section D, the decision of the South Carolina Supreme Court in *Benton v Roger C. Peace Hosp.*, 493 S.E.2d 577 (S.C. 1994), mandates that each distinct injury have its own accrual period. Her claim for cervical injuries and pain accrued when she obtained facts that would put a person on common knowledge on notice that she had a claim against Brockway for those injuries. *See Snell*. She did not get those facts until May 2, 2007, when Dr. Sameh A. Ward diagnosed her cervical pain as neuropathic pain and linked it to nerve damage during the LEEP procedure.

D. The *Benton* Decision Mandates That Campbell's Claim For Her Distinct Neurological Injury Accrued On May 2, 2007, Regardless Of When Her Claim For the Superficial Nicking Of The Vagina Accrued.

The South Carolina Supreme Court has summarized its holding in *Benton v. Roger C. Peace Hosp.*, 443 S.E.2d 537 (S.C. 1994) as follows:

In *Benton*, a Down's Syndrome patient fell from his wheelchair and suffered facial lacerations which were readily apparent and discoverable. Later, a second more insidious injury arose from neurological damage which could have been caused by the fall or something else. Because the nature of the neurological injury was not discoverable by the appearance of facial lacerations, we held these injuries to be two separate, distinct, and severable harms. Thus, we held that the statute of limitations began to run at different times for each injury.

Dean v. Ruscon Corp., 468 S.E.2d 645, 647 (S.C. 1996). Here, regardless of when Campbell's claim for her vaginal laceration was discoverable, the claim for her neurological injury — her permanent genital pain and numbness — was not discoverable by Campbell until she learned from a treating physician on May 2, 2007, that they were the result of nerve damage from defendant Brockway's LEEP procedure. *See Benton*. Like the plaintiff in *Benton*, Campbell suffered from a neurological condition that could have been the result of the alleged negligence of defendant Brockway, or another cause. In fact, Brockway, and Campbell's treating medical providers up through the end of June 2006, indicated to her that there was no physical cause for the pain, and suggested that the problems of which Campbell complained, mainly the cervical pain and discomfort, was purely of a psychological origin. It was not until May 2, 2007, that Campbell acquired contrary information when one of her treating physicians linked her condition to nerve damage from the LEEP procedure.⁴

⁴ The principle set forth in *Benton* is compatible with the principle that defendants rely upon that "the fact that the injured party may not comprehend the full extent of the damage is immaterial," (see Defs' Br. 8, citing *Joubert v. South Carolina*, 534 S.E.2d 1, 8-9 (S.C. App. 2000)). *Joubert* is addressing the situation where it is only the extent of the damage, not its cause that is in question. *Benton* addresses the situation where there are two distinct injuries, and the claimant is not on sufficient notice that the second injury resulted from the same act of the tortfeasor that caused the second injury. The principle in *Benton* clearly applies here.

Accordingly, Campbell's permanent neurological injuries — her cervical pain and numbness, — are distinct injuries from the superficial vaginal laceration Campbell suffered, and the accrual of her claim for those neurological injuries is not determined by the accrual for her claim for the vaginal laceration. And the accrual of the claim certainly did not accrue at the time of the operation, or anytime before June 28, 2006; rather it accrued no earlier than May 2, 2007, well within the limitations period.

III. The Court Should Deny The Defendants' Motion Since The Facts, Or The Proper Inferences To Be Drawn From Them Are In Dispute, Or Are Not Clear.

The statute of limitations defense is an affirmative defense. Accordingly, defendants have the burden of proving the defense. In the summary judgment context here, defendants must produce undisputed evidence establishing that Campbell's action is barred by the statute of limitations as a matter of law. And, as defendants concede, the evidence must be viewed in the light most favorable to Campbell, and the Court must draw all inferences that can reasonable be drawn from that evidence that are favorable to Campbell. (Def.'s Br. 6)

Defendants have developed scant evidence to support their statute of limitations defense to date. No depositions have been taken. To prevail on their motion, defendants must show that undisputed evidence establishes, as a matter of

law, that constructive knowledge of the nature and cause of her neurological injuries should be imputed to Campbell as of June 25, 2006. Defendants have failed to do this. At a minimum, the inferences to be drawn from the facts are in dispute; therefore, the statute of limitations defense is a jury issue. *See Garner v. Houck*, 435 S.E.2d 847, 849 (S.C. 1993) (summary judgment was not proper because "there was no evidence conclusively showing that the [plaintiff] should have suspected negligence;" rather, where "there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury"). Accordingly, defendants' motion should be denied. *See Id.*

IV. The Decisions Cited By Defendants Undermine Their Position.

The decisions that defendants cite actually undermine their position. All of them held that the plaintiff had sufficient notice of his claim based either on his consultation with an attorney about a possible medical malpractice claim, or being informed of deficiencies with the defendant physician's actions in a subsequent consultation with another physician. *See Arant v. Kressler*, 489 S.E.2d 206 (S.C. 1997)(plaintiff had notice because he had been told by another doctor that the corrective operation was necessary because the defendant doctor had not removed the entire placenta); *Johnston v. Bowen*, 437 S.E.2d 45 (S.C. 1994)(statute had run

where plaintiff sought the advice of an attorney in 1987, but failed to file suit until four years later); *Smith v. Smith*, 354 S.E.2d 36 (S.C. 1987)(consulted with attorney); *Strong v. University of South Carolina School of Medicine*, 447 S.E.2d 850 (S.C. 1994)(patient had constructive notice of claim from the physician's note in his patient record that the blindness was due to poor follow-up care).

In contrast to the circumstances in those decisions, Campbell neither consulted with an attorney nor was informed by a treating physician or other medical provider of any deficiency in defendant's treatment of her until June 28, 2006, within three years of Campbell's filing of her Notice of Intent.

Conclusion

Based on the foregoing, Campbell requests that the Court deny defendants motion for summary judgment.

Respectfully submitted,



Brian S. McCoy, Esq. (SC Bar #2155)
633 E. Main Street
Suite 500
Rock Hill, SC 29730
(803) 366-2280 Phone
(803) 366-0643 Fax

8. Attachment D is a true and correct copy of my May 2, 2007 medical record that I obtained from Dr. Sameh A. Ward of Pain Medicine Associates, P.C. On this date Dr. Ward explained for the first time that my pain was caused from nerve damage as a result of the August 9, 2005 LEEP procedure performed by Dr. Ronnie A. Brockway.
9. At no time during Dr. Brockway's post-operative treatment of me did he tell me about his excessive removal of tissue from my cervix, or suggest that this may have been the cause of my discomfort and pain.

Further affiant saith naught.

Andrea Campbell
Andrea Campbell

STATE OF TENNESSEE

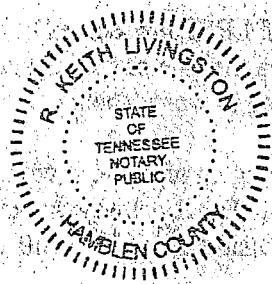
COUNTY OF

Sworn to before me and subscribed in my presence by the said Andrea Campbell, this 10th day of May 2011.

R. Keith Livingston
Notary Public

My Commission Expires:

MARCH 24, 2014



104848

Date: 5/19/06 Time: AM PM

NAME: Andrea Campbell

Historian: ☐ patient ☐ other ☐ good historian ☐ historic

CC: ☐ needs GYN Exm ☐ vaginal problem ☐ pelvic pain ☐ abnl PAP
☐ menstrual problem ☐ BC management ☐ other

HPI: feels well ☐ no new problems ☐ (fu of prior visit) ☐ has concern:
Surgery for ACL repair May 05
Scraped cervix - benign
Core LEEP Aug 05
"Cervix just above me act" - Abnl
So someplace else for PPH
On birth control until Dec. PPH promise all accounts

LNMP: ☐ last pap HPV - benign
☐ menses regular ☐ last days ☐ not much pain
G D P (T P L) last PG
last Mammogram
☐ seen med list ☐ PFSH reviewed

RDS ☒ el or presnt ☐ = neg or absent ☐ = somewhat ☐ = abnl

GENERAL/CONST	GU
☒ sleep ☐ nappellia ☐ fatigued	☐ vag disch: itching
☐ fever ☐ malaise ☐ reg exercise	☐ urine problem
	☐ irreg menses
CARDIAC	☐ hot flashes ☐ night sweats
☐ chest pain ☐ often rare mild severe	☐ pelvic/abnl pain
☐ palp ☐ dizzy ☐ chest heaviness	☐ freq UTIs ☐ stones
☐ DOE ☐ edema	ENDOCRINE
RESPIRATORY	☐ breast pain ☐ swelling ☐ mass
☐ asthma ☐ smoker	☐ dry skin ☐ lethargy ☐ wt gain
☐ bronchitis ☐ pneumonia	☐ neck fullness
☐ AD ☐ cough ☐ SOB ☐ wheeze	☐ swallowing trouble

LAB DUE: ☐ chol ☐ UA ☐ PAP

☐ ALLERGIES ☐ see face sheet

Marian L. Bertotti, MD
First Choice HealthCare, PC
Gyn Eval Pre-Menopause

HEAR: ☒ WNL ☐ murmur ☐ tachy ☐ PMI displaced
☐ heave ☐ (hr)

BREAS: ☒ WNL ☐ mass ☐ tenderness ☐ disch ☐ ax nodes

ABD: ☒ WNL ☐ tend ☐ organomegaly ☐ bruils ☐ mass

PELVIC Spec ☐ lesion ☐ vulva ☐ vagina ☐ cr
☐ vulva, vault ☐ fx nl ☐ disch
☐ bimanual exam nl ☐ tendr ☐ is / mass
☐ F. done

E.T.: ☒ WNL

SIGN: ☒ WNL

NEUR: ☒ WNL ☐ CN def ☐ DTR's abnl ☐ weakness

DIAGNOSIS:

Annual Gyn eval	V72.3	P.R.	625.4
Vaginitis	112.1	Dysmenorrhea	625.3
Vaginosis	131.01	Stress incontinence	625.6
Vaginitis spec	610.10	Peri-Menopausal	627.9
Bacterial vaginosis	610.10	Breast Mass	611.72
PID acute	614.3	Breast Pain	611.71
Uterine Mass	616.4	FCD Breast	610.1
Amenorrhea	626.0	Endometriosis	617.0
IBS	564.1	UTI	599.0
Abd Pain spec site	749.00	Anxiety generalized	300.02
DUD	626.8	Depression	296.2

Other: ADD, Depression, Sleep
Disorder / HTN

TREATMENT:
Reflex Therapy

FIU ☐ D ☐ W ☐ M ☐ WVE due ☐ months

LAB ☐ due in ☐ W ☐ M

☐ instr led to call if SX worsen or if new SX develop

☐ FIU ☐ call if not better / well in ☐ D ☐ W ☐ M

Physician Signature: Bertotti

☐ see: reverse ☐ addendum dictated ☐ 50% OV in consult mode

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VITAL SIGNS
BP 124/74 74 74 T: 37.2 WT: 221

PHYSICAL EXAM ☒ normal or present ☐ = negative ☐ = abnl finding

APPEARANCE ☒ alert ☐ NAD ☐ NAI ☐ facial pleasant ☐ cheerful
☐ anxious ☐ depressed ☐ unkempt ☐ in pain ☐ mod sv
☐ appear ill ☐ fatigued ☐ delirious ☐ obese ☐ slender

☐ Caut ☐ Black ☐ Hispanic ☐ Asian ☐ Other

HEENT:
☐ head inspection nm ☐ pain on percussion over sinuses
☐ mouth / gums nm ☐ paleness ☐ ulcerations
☐ post pharynx nm ☐ pharyngeal erythema ☐ tonsil exudate

☐ neck nm ☐ goiter ☐ adenopathy ☐ bruils

CV: ☐ heart sounds nm ☐ rates ☐ rhonchi ☐ wheezes ☐ hsp exp
☐ nm excursion ☐ stridor ☐ resp distress ☐ acc muscle use
☐ nm to percussion

001001

EXHIBIT

A

Molecular Pathology Laboratory
Network, Inc.
250 E. Broadway
Maryville, TN 37804



MOLECULAR PATHOLOGY
LABORATORY NETWORK, INC.

865-380-9746

800-932-2943

Fax: 865-380-9191

PATIENT TEST RESULTS

Patient	Campbell, Andrea	Specimen Date	05/19/2006
ID #	P08-11654	Received Date	05/30/2006
Facility ID #	Not Provided	Report Date	06/01/2006
Physician(s)	Marian Bertotti M.D.	Amended Report Date	06/06/2006
Johnson City Medical Center			

Test: Human Papillomavirus DNA (HPV) Hybrid Capture II

Specimen: SurePath

Category	HPV Types	Patient Results
Low risk	6, 11, 42, 43, 44	Not Detected
High risk	16, 18, 31, 33, 35, 39, 45, 51, 52, 56, 58, 59, 68	Not Detected

*Amendment: corrected provider's name

Thank you for your referral.

The hybrid capture DNA assay is a hybridization antibody capture assay using chemiluminescence to qualitatively detect the presence of eighteen HPV types. The HPV DNA assay can differentiate between two HPV DNA groups: low risk and high/intermediate risk HPV types in cervical specimens (cervical swabs and fresh cervical biopsies), fresh urethral biopsies or other biopsy material suspected of harboring HPV.

The use of this test is indicated:

- To aid in the diagnosis of sexually transmitted HPV infections with HPV types 6, 11, 16, 18, 31, 33, 35, 39, 42, 43, 44, 45, 51, 52, 56, 58, 59, and 68.
- To distinguish between infections with HPV types 6, 11, 42, 43, and 44 which are principally associated with low-grade squamous intraepithelial lesions (LSIL), and HPV types 16, 18, 31, 33, 35, 39, 45, 51, 52, 56, 58, 59, and 68 which are typically associated with squamous intraepithelial lesions (SIL) of all grades, especially high grade SIL (HSIL) and invasive cancer of the cervix.
- To serve as an adjunct to the Pap smear in the identification of women who may be at increased risk for SIL.
- To aid in the triage of patients with equivocal or ASCUS (atypical squamous cells of undetermined significance) Pap smear results in order to better determine the need for referrals to colposcopy.

Explanation:

Performance characteristics of the Digene Hybrid Capture II (HCII) as reported in product literature supplied by Digene coupled with observations by Molecular Pathology Laboratory Network, Inc (MPLN) have led to the decision to implement an interpretative result of "equivocal" for borderline results. Test results in the range of 1.0-2.5 relative light units (RLU)/positive cutoff value have sometimes been shown to be negative upon retest at MPLN. This observation could possibly be due to differential sensitivity of the assay for detection of some HPV genotypes at low viral load, sampling adequacy issues, or false positive results. Accordingly, MPLN recommends obtaining another specimen from patients with a test result of equivocal. HPV results should be correlated with cytologic and/or patient historical information before treatment.

Melissa R. Morgan

Melissa Morgan, MT (ASCP)
Medical Technologist

Bridget Russell

Bridget Russell, MT (ASCP)
Medical Technologist

*mailed
typist*

001133

SCANNED

Elizabeth W. Hubbard, M.D. - Medical Director - Molecular Pathology Laboratory

MPLN Ref. # 051006332-18-HPV

TOTAL P.02

EXHIBIT

B

104898

Date: 6-28-06 Time: AM PM

NAME: Andrea Campbell

Historian: ☒ patient ☐ other ☐ good historian ☐ histrionic

CC: ☐ needs GYN Exam ☒ vaginal problem ☐ pelvic pain ☐ abnl PAP
☐ menstrual problem ☐ BC management ☐ other anxiety

HPI: feels well ☐ no new problems ☐ lit of prior visit ☐ has concern:
Saw self therapist in SC
verru dyman
given Heronville, Devonshire St.
not involved in Strattera - stopped
Doesn't want to start (telephoned)

LNMP: last pap all other LMP
☐ menses regular ☐ last days ☐ not much pain
G P T P A last PG HPV
☐ last Munro
☐ see med list ☐ PFSH reviewed

ROS ☒ all or present ☐ none or absent ☐ some or partial ☐ none or absent

GENERAL/CONST
☒ sleep ☒ appetite ☐ fatigued
☒ fever ☐ malaise ☐ veg: exercise

CARDIAC
☐ chest pain ☐ often mild ☐ severe
☐ palp ☐ dizzy ☐ chest heaviness
☐ DOE ☐ edema

RESPIRATORY
☐ asthma ☐ smoker
☐ bronchitis ☐ pneumonia
☐ SOB ☐ wheeze

ENDOCRINE
☐ breast pain ☐ swelling ☐ mass
☐ dry skin ☐ lethargy ☐ weight gain
☐ neck fullness
☐ swallowing trouble

LAB DUE: chol UA PAP

☐ ALLERGIES ☐ see face sheet

HEAR: WNL ☐ murmur ☐ tachy ☐ PMI displaced
☐ heave ☐ hril

BREAS: WNL ☐ mass ☐ tenderness ☐ disc ☐ ax nodes

ABD: WNL ☐ tend ☐ organomegaly ☐ bruits ☐ mass

PELVIC
☐ vulva, vault, cx nl ☐ lesion ☐ vulva vagina cx
☐ bit initial exam nl ☐ disc ☐ is / mass
☐ F. done

EXT: WNL

SKIN: WNL

NEUR: WNL ☐ CN def ☐ DTR's abnl ☐ weakness

DIAGNOSIS:

Annual Gyn eval	V72.3	Pain	625.4
Vaginitis	112.1	Dysmenorrhea	625.3
Vaginosis	131.01	Stress Incontinence	625.6
Vaginitis	616.10	Post-Menopausal	627.9
Bacterial vaginosis	616.10	Breast Mass	611.72
PID acc	614.3	Breast Pain	611.71
breag Me	620.4	ICD Breast	610.1
Amnion	626.0	Endometriosis	617.9
IDS	604.1	UTI	599.0
Abd Pain	780.00	Anxiety generalized	300.02
DUB	626.8	Depression	296.2

Other: X

VITAL SIGNS
 BP 120/70 PULSE 78 T: 97.7 WT: 177

PHYSICAL EXAM ☒ normal or present ☐ none or absent ☐ some or partial ☐ none or absent

APPEARANCE ☒ well ☐ ill ☐ MAD ☐ NAI ☐ nasal ☐ present ☐ cheerful
☐ anxious ☐ depressed ☐ unkempt ☐ in pain ☐ mod sv
☐ appears ill ☐ fatigued ☐ deb-nxism ☐ obese ☐ slender

CAUC ☒ Black ☐ hisp ☐ Asian ☐ Other

HEENT
☒ head inspection nl ☐ pain on percussion over sinuses
☒ mouth / gums nl ☐ paleness ☐ ulcerations
☒ post. pharynx nl ☐ pharyngeal erythema ☐ tonsil exudate

CH
☒ neck nl ☐ goiter ☐ adenopathy ☐ bruits
☒ breath sounds nl ☐ rales ☐ rhonchi ☐ wheezes ☐ exp
☒ and excursion ☐ stidor ☐ resp distress ☐ acc muscle use
☒ no to percussion

TREATMENT: Consult / Reviewed

F/U ☐ D ☐ W ☐ M ☐ WVE due months

LAD ☐ due in W M

Instr. led to call ☐ SX ☐ women or if new SX develop

F/U ☐ call ☐ not better / not doing ☐ D ☐ W ☐ M

Physici. Signature: [Signature]

see: ☐ verse ☐ addendum dictated ☒ > 50% OV in consult mode

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EXHIBIT

C

FOLLOW-UP

PATIENT: Campbell, Andrea
OS: 05-02-07
PHYSICIAN: Sameh A. Ward, M.D.

REFERRING: Michael Krychman, M.D.

PAST HISTORY: Ms. Campbell is a 50-year-old who was originally seen at the clinic on 2/22/07. At that point she was complaining of pelvic pain. Her pain started after a lead procedure. At that point she developed an infection and this has caused pain over the pelvic area. She has brought a voluminous amount of medical records. Some of these records showed that there was a problem during the procedure where there was injury to the vaginal wall which was repaired. At this point she has seen multiple physicians and multiple institutions trying to help her with her pain in the pelvic area and also with issues with orgasm and with the issues of dealing with her pain. The patient feels that Amitriptyline and Lyrica was helping her the most although the Amitriptyline has caused her to have diabetes and high blood pressure so she weaned off of that and the Lyrica caused her some muscle weakness. Neurontin causes her to have a foggy head. The patient is a Ph.D. student and she was diagnosed with diabetes on 9/2/06. She was also diagnosed with an E-coli infection and bacterial infection. In 1988 she had an Epstein bar virus and she feels that she was tired a lot but at that point she was working 70 hours. Also at one point she was diagnosed with cervicitis and she continues to have cervicitis up till now. Before 2002 she did not have any infections. The patient has received an ACL repair in the past and she did well with that. Standing and sitting increases the pain for her. She received an MRI of the pelvis which was within normal limits. At this point she cannot tell if she has numbness over the lower extremities because of the Lyrica.

She describes the pain as throbbing, shooting, burning, slitting, stabbing, aching, sharp and constant. Her pain intensity is between 4-5/10.

HPI: The patient comes today for follow-up. At this point her complaint is as above and she is trying to find some relief so she can continue back on her Ph.D. program.

FSH: Per initial interview, no changes noted.

REVIEW OF SYSTEMS: GEN: Negative. EYES: No double vision. ENT: No epistaxis, drainage. CARDIOVASCULAR: Negative for angina. RESPIRATORY: No dyspnea. GI: Negative for vomiting. GU: No urgency, hematuria, incontinence. HEMATOLOGIC: No bleeding, excess clotting. SKIN: Negative. LYMPHATIC: no node enlargement.

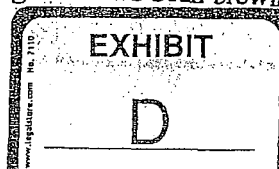
OBJECTIVE: PLDQA/VS is noted. The patient is A&O x 3. The patient is has good affect. Her gait is slow and on antalgic. She is able to stand from the seated position with no distress.

IMPRESSION:

1. Pelvic pain.
2. Neuropathic pain.
3. Diabetes mellitus.
4. Hypothyroidism.
5. Status post basal cell carcinoma removal.
6. Chronic depression/anxiety.
7. Tremors and convulsions with medications.

PLAN:

1. At this point I spent more than 40 minutes to review all of the records that she had brought with her and we spent more than 45 minutes discussing the history and her situation. At this point I informed her that I think she has neuropathic problems stemming from her previous surgery from scarring, diabetes and thyroid, all which are aggravating the condition. I think she may have fibromyalgia that has been brewing up and started when she had the Epstein virus in 1988.



2. At this point we are going to approach it in a quite conservative manner. We are going to give her Zanaflex 2 mg 1 p.o. t.i.d. #90 with 3 refills to see if this will help with her pain. She has enough Lyrica to help with the neuropathic symptoms.
3. I am referring this patient to Dr. Cooper for a health focus clinical interview and to assist the patient in making lifestyle changes consistent with Pain Medicine Associates' fibromyalgia protocols.
4. I discussed with her that we can consider doing spinal cord stimulation to cover up the pain although at this point we will see how the medication will do for her. The patient was satisfied at the end of the interview and we will see her in about 4-5 weeks to determine subsequent steps of treatment.
5. We are going to send her for a lumbar MRI to be sure that we are not dealing with lumbar degenerative disc disease or neuropathic symptoms stemming from her back.

Thank you for allowing us to participate in this patient care.

Sameh A. Ward, M.D.

SW/va

D: 05/02/07

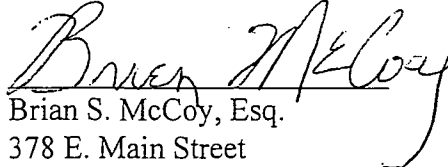
T: 05/07/06

*Dictated but not edited

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

December 14, 2011


Brian S. McCoy, Esq.
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt, Esq.
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-37-1428

Andrea Beth Campbell.....Appellant

v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA. Respondents

BRIEF OF APPELLANT

Brian S. McCoy, Esq. (SC Bar #2155)
633 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

Attorneys for Appellant

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE LOWER COURT ERR BY GRANTING SUMMARY JUDGMENT THAT, AS A MATTER OF LAW, THE STATUTE OF LIMITATIONS SET FORTH IN S.C. CODE SECTION 15-3-545 BARRED ALL OF PLAINTIFF CAMPBELL'S MEDICAL MALPRACTICE CLAIMS?

STATEMENT OF THE CASE

The Notice of Intent to File Suit was filed on June 26, 2009. The Complaint and supporting affidavit were filed on November 19, 2009 asserting claims of medical malpractice against a physician and his employer.

On August 17, 2010, the defendants filed a Motion for Summary Judgment and Memorandum and materials in support thereof. The sole basis for the Motion was the affirmative defense that the statute of limitations barred the action. Plaintiff filed a Memorandum in Opposition to Motion for Summary Judgment and supporting materials. At the time the Motion was filed, no depositions had been taken and discovery was not complete.

Oral argument was held on May 16, 2011 before Judge R. Lawton MacIntosh. The lower court issued an Order Granting Defendants' Motion for Summary Judgment dated June 3, 2011 and file-stamped June 9, 2011. The plaintiff timely filed a Notice of Appeal on July 9, 2011. By Order filed August 19, 2011, this Court granted appellant an extension until September 7, 2011 to file her initial brief and designations.

FACTS

On August 9, 2005, defendant Dr. Brockway performs the LEEP procedure on plaintiff Campbell. (R. p. 117 ¶ 2) The LEEP procedure is intended to treat abnormal cervical

cells. In the procedure, the surgeon uses a thin wire loop electrode which is attached to an electrosurgical generator. The generator transmits an electrical current that cuts away the abnormal cervical tissue in the immediate area of the loop wire. Unbeknownst to Campbell, the procedure is unnecessary and unwarranted in the circumstances, and Brockway excises too much of the cervix material during the operation. (R. p. 23 ¶ 5j).

During the procedure, Campbell is aware that Brockway "nicked" her vaginal wall. However, Brockway assured her it was nothing to worry about, and she accepted her doctor's medical statement in this regard. (R. p. 117 ¶ 2) Of course, Campbell is completely unaware of Brockway's negligent excise of too much cervix material, which resulted in neurological damage.

After the operation, Campbell experiences genital discomfort and pain focused in her cervix. It does not subside. Although Dr. Brockway continues to treat Campbell post-operatively for several months thereafter, he never tells her about his excessive removal of cervix tissue, or suggests that her discomfort and pain might be caused by that excessive tissue removal during his procedure. (R. p. 118 ¶9) To the contrary, during Campbell's last office visit on February 27, 2006, Dr. Brockway dismisses her physical complaints as being "in your head." (R. p. 117 ¶ 4)

In an attempt to find out the cause, and possible solution, of her problems, Campbell consults over the next four months with at least four physicians who all tell her that her genitals are normal. None of those physicians indicate that there is any link between the LEEP procedure

and her problems; in fact, they rule it out by telling her that there is no physical problem with her genitals. (R. pp. 67-68)

Not until May 2, 2007, does a medical provider tell her, contrary to the suggestions of Dr. Brockway, and all of Campbell's other physicians whom she had consulted, that her genital discomfort, including severe cervical pain, is actually "neuropathic pain," the result of the damaging of nerves during the LEEP procedure, rather than simply "in her head," i.e., a psychological explanation.¹ (R. p 117 Aff. ¶ 4) On August 8, 2008, Campbell files an unverified pro se medical malpractice complaint against Brockway in federal court. She voluntarily dismisses that complaint before it is served. In that complaint, Campbell alleged that she was seen by Dr. Bertotti on May 19, 2006, that a HPV DNA test was performed, and that based on the results of the test, Dr. Bertotti concluded that the LEEP procedure had been unnecessary. That complaint, however, contains no allegation regarding the date that the results of the test were received by Dr. Bertotti or when Campbell had any knowledge of the results or Bertotti's conclusion. In her affidavit that she filed in opposition to summary judgment, Campbell provides that information by testifying that she first became aware of the test results on June 28, 2006. On May 2, 2007, Campbell is first informed that her pain is the result of the LEEP procedure. (R. pp. 118 ¶ 8) This neuropathic pain was caused by Brockway's negligent removal of too much cervix material during the operation (R. p. 23 ¶ 5j), and is distinct from the vaginal nick.

¹ One of her consulting physicians, Dr. Bertotti, did tell her on June 28, 2006, that, based on the negative HPV test that Dr. Bertotti ordered, the LEEP procedure had been unnecessary. (R. p. 117 ¶ 7) However, even using that date as the accrual date for the running of the limitations period, Campbell's action is timely.

On June 26, 2009, Campbell files her Notice of Intent to File Suit, which stops the limitations period from running.

The relevant time line is shown below:

Aug. 5, 2005	Dr. Brockway performs the LEEP procedure on Campbell. (R. p. 117 ¶ 2)
Feb. 27, 2006	During office visit with Dr. Brockway, his assistant tells Campbell that her complaints about her numbness and lack of sensitivity in her genital area; he [Dr. Brockway] thinks it is all in your head and referred her to a posting outside the office with a name of a therapist. (R. p. 117 ¶ 4)
Mar. 24, 2006	Dr. Crowder documented a normal vaginal exam. (R. p. 67)
May 26, 2006	Dr. McDonald documented a normal pelvic exam. (R. p. 67)
May 31, 2006	Dr. Sherill documented in his notes that he performed a complete physical exam, the results of which were essentially within normal limits. (R. p. 67)
June 13, 2006	Dr. Philip Caron documented a normal vaginal exam, counseled her for forty minutes on sexual function, recommended that she adjust the psychoactive medication she had been taking and recommended that she continue her counseling sessions. (R. p. 68)
June 28, 2006	Campbell is told for the first time that the LEEP procedure was unnecessary, based on the results of the HPV DNA test. (R. p. 117 ¶ 7)
May 2, 2007	Campbell learns for the first time that her pain is neuropathic and the result of the nerve damage from the LEEP procedure. (R. p. 118 ¶ 8)
Aug. 8, 2008	Campbell files malpractice action in federal court against Brockway. (R. pp. 48-52)
Dec. 1, 2008	Campbell voluntarily dismisses federal action. (R. p. 57)
June 26, 2009	Campbell files Notice of Intent to File Suit (which stops the running of the statute). (R. pp. 12-14)

ARGUMENTS

The lower court gave two bases for its grant of summary judgment to defendants: (1) that plaintiff should have known of her claim when she met with Dr. Bertotti on May 19, 2006 and was given a HPV DNA test (R. p. 7); and (2) that plaintiff was on notice on the date of the LEEP procedure performed by Defendant Brockway on August 9, 2005 because plaintiff was aware that Brockway "nicked" her vaginal wall during the procedure. (R. p. 9) Neither basis supports the grant of summary judgment.

Standard of Review

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate only when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860. "[I]n cases applying a preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Statute of Limitations and the Discovery Rule

South Carolina's applicable statute of limitations for a medical malpractice action provides that it "must be commenced within three years from the date of the treatment, omission,

or operation giving rise to the cause of action or *three years from date of discovery or when it reasonably ought to have been discovered*, not to exceed six years from date of occurrence.”

S.C. Code Ann. §15-3-545 (emphasis added). The South Carolina Supreme Court has held that “reasonably ought to have been discovered” means “should have known that he had a cause of action.” *Smith v. Smith*, 291 S.C. 420, 426, 354 S.E.2d 36, 40 (S.C. 1977). That Court has characterized the discovery prong of the statute as a “reasonable diligence” requirement. *Strong v. University of S.C. School of Medicine*, 316 S.C. 189, 191, 447 S.E.2d 850, 852 (S.C. 1994). It has held that

the exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of the injury would put a person of common knowledge on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point

Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 302, 278 S.E.2d 333, 334 (S.C. 1981).

“[N]otice that some right of his has been invaded” means “you have to be able to discern that someone else proximately caused that injury.” *Rogers v. Efid’s Exterminating Co.*, 284 S.C. 377, 378, 325 S.E.2d 541, 542 (S.C. 1985).

I. THE LOWER COURT ERRED BY HOLDING AS A MATTER OF LAW THAT THE TRIGGER DATE WAS NO LATER THAN MAY 19, 2006, BECAUSE THE UNDISPUTED EVIDENCE SHOWS THAT CAMPBELL DID NOT LEARN OF THE TEST RESULTS AND THEIR SIGNIFICANCE UNTIL JUNE 28, 2006.

The lower court found that Campbell’s claims accrued no later than May 19, 2006 the date of her visit to Dr. Bertotti when he ordered the HPV virus test. (R. pp. 7-9) As demonstrated, this is wrong – the lower court simply misconstrued the operative facts.

In an alternate finding, the lower court found that the claims accrued even earlier because it determined that Campbell was not diligent in discovering her claims by failing to get that test ordered herself. As shown below, in reaching this finding, the lower court relies on a fact not in the summary judgment record, and imposes a diligence requirement that far exceeds the “common knowledge” standard set forth by the South Carolina Supreme Court.

A. There Is No Summary Judgment Evidence That Campbell Learned Of The Results, Or Their Significance, Prior To June 28, 2006. In Fact, The Evidence Is To The Contrary.

On May 19, 2006, Dr. Bertotti ordered a test to see if Campbell had the HPV virus. (R. p. 117 ¶ 5 & p. 119) However, the lab did not run the test and issue the results until June 6, 2006. (*Id.*, R. p. 120). So there is simply no way that Dr. Bertotti could have told her the results of the test, and that the LEEP procedure was thus unnecessary, during the May 19, 2006 office visit, as the lower court found. (R. pp. 7-8) In fact, it was not until Campbell’s next visit to Dr. Bertotti on June 28, 2006, that she was informed of and counseled about the results of the test and learned for the first time from Dr. Bertotti that the LEEP procedure was unnecessary. (*Id.* at R. p. 117 ¶ 7 & p. 121). Thus, if this event was a trigger for the limitations period to start running, then Campbell’s filing of her Notice of Intent To File Suit was timely, since it was done less than three years later.

To summarize, the actual events were as follows:

May 19, 2006	Dr. Bertotti orders a test for the HPV virus
June 6, 2006	The lab performs the test and issues the report, which was sent to Dr. Bertotti.

June 28, 2006

During Campbell's office visit, Bertotti informs her for the first time of the negative test results and that the LEEP procedure was unnecessary.

In relying upon the May 19, 2006 date, the lower court disregarded the actual medical records, and instead relied upon the unverified pro se complaint that Campbell filed in federal court on August 8, 2008 and voluntarily dismissed before it was served. However, a read of the actual language in the federal complaint shows that even it does not support such a finding:

On or about May 19, 2006 Plaintiff Campbell was seen by Dr. Marian Bertotti, a physician with First Choice Health Care in Johnson City, Tennessee regarding extreme pain and disruption in sexual satisfaction. Dr. Bertotti conducted a HPV DNA test and reported that there were no signs of the disease, or any indication that Plaintiff Campbell had had the disease at any point in her life. Dr. Bertotti concluded that the LEEP conization procedure was unnecessary.

(R. p. 50 ¶ 9). The complaint alleged that Campbell was seen by Dr. Bertotti on May 19, 2006; it does *not* allege that Dr. Bertotti reported the results of the HPV DNA test on that same day. Thus, the complaint is consistent with the medical records and Campbell's affidavit testimony that the results were reported to her on June 28, 2006.

Furthermore, even if the federal complaint could be reasonably construed in the way that the lower court construed it, which it cannot, that pleading from another case is not conclusive on the issue. The lower court treated it as a judicial admission --- conclusive and uncontrovertible. (R. pp. 7-8) This was error. It is well-established that allegations in a pleading in another case cannot constitute judicial admissions. *See, e.g., Nichols Media Consultants v. Ken Morehead Inv., Co.*, 491 N.W.2d 368 (Neb. App. 1992) ("A pleading from a different case at bar does not qualify as a judicial admission."); *Wilson v. Armer Oil Co.*, 496 S.W. 2d 702, 707 (Tex.

App. Ft. Worth 1973) (“Admissions by a party contained in a pleading that he filed in another case are not conclusive against him and such party can offer other evidence tending to explain or contradict such admissions.”); *Enquip, Inc. v Smith-McDonald Corp.*, 655 F.2d 115, 118 (7th Cir. 1981) (pleading in another case “was not a judicial admission, and thus not binding or conclusive,” citing *inter alia*, McCormick, Evidence § 265 at 635 (2nd ed. 1972)). If a party’s pleadings from another case are used as evidence supporting a summary judgment motion, then that party may controvert them with conflicting evidence and thereby create a material issue of fact defeating the motion. See *Enquip, Inc.*, 655 F.2d at 118-119 (summary judgment not proper where nonmovant created issue of fact by controverting statements in his pleading from another case). With her affidavit, Campbell controverted the lower court’s construction of the federal complaint’s allegations on this issue. Thus, the lower court’s ruling on this issue was erroneous for this additional reason.

B. Plaintiff Clearly was Diligent

There can be no doubt that Campbell was diligent in seeking to discover the source of her problems with genital discomfort and pain. First, she continued to go to Brockway, who treated and counseled Campbell after the LEEP procedure for several months. In response to Campbell’s complaints of genital discomfort and pain, Brockway never suggested that they might be the result of the LEEP procedure. In fact, he indicated that her problems were purely psychological. She then sought treatment and diagnosis of her condition from several other medical providers.

Despite Campbell's diligent efforts to have her problems with genital discomfort and pain diagnosed and treated after her LEEP procedure, Campbell did not have the facts that would have enabled her to discern that she had a claim against defendant Brockway for that injury until a medical provider informed her on May 2, 2007, of his conclusion that the injury was the result of the LEEP procedure. In fact, all of her medical providers who saw her prior to June 28, 2006, found her genitals to be normal, suggesting that the cause of condition was psychological. None suggested that the LEEP procedure was the cause. Accordingly, the limitations period for her claims did not begin to run until May 2, 2007. See *Smith*, 291 S.C. at 426, 354 S.E. 2d at 40 (S.C. 1977); *Snell*, 276 S.C. at 302, 278 S.E.2d at 334 (S.C. 1981); *Rogers*, 284 S.C. at 378, 325 S.E.2d at 542 (S.C. 1985).

The lower court held that Campbell was not diligent in discovering her claims because she "has submitted nothing to this Court to explain why the HPV test she requested and obtained" from Dr. Bertotti could not have been obtained by her earlier.² (R. p. 8) As discussed below, this is wrong for several reasons.

First, it is based on an error of fact. Nowhere in the summary judgment evidence is there any indication that Campbell requested the HPV test from Dr. Bertotti. More importantly, whether a LEEP procedure might be indicated in the absence of an HPV DNA test is clearly not within the realm of common knowledge for a physician. Employing his medical expertise in evaluating Ms. Campbell's situation, Dr. Brockway concluded that the LEEP procedure was

² This statement in the Opinion demonstrates that the lower court used the incorrect standard. The burden was on the defendants to prove that a lay person such as Campbell, who has no medical training, reasonably should have known that she should have had a HPV DNA test performed for her conditions. Using this correct standard, it is apparent that the defendants failed to make any such showing whatsoever.

indicated for Ms. Campbell without first performing that test, and made his conclusion clear to Ms. Campbell. How could Ms. Campbell be expected to have the medical expertise to second-guess his conclusion? Thus, the failure of Brockway to perform the HPV DNA test is not a fact that would have put Campbell on notice that she had a claim against Brockway sufficient to trigger the running of the limitations period. *See Snell*, 276 S.C. at 301, 278 S.E.2d at 334 (to trigger limitations accrual, fact must put “a person of common knowledge on notice . . . some claim against another party might exist”). The fact that Campbell might have been unhappy with Dr. Brockway’s actions, including his failure to accede to her request for a HPV DNA test, is not enough to charge her with notice of a claim against him sufficient to trigger the running of the statute of limitations. *See Garner v. Houck*, 312 S.C. 481, 485, 435 S.E.2d 847, 849 (S.C. 1993)(fact that “the son was unhappy with his mother’s nursing care prior to her death,” did not trigger the running of the limitations period on his wrongful death claim).

II. THE LOWER COURT ERRED BY HOLDING AS A MATTER OF LAW THAT THE LIMITATIONS PERIOD BEGAN TO RUN ON THE DATE OF THE LEEP PROCEDURE

The lower court also held that the statute began to run on the date of the procedure, August 9, 2005, because Campbell was aware of a superficial “nick” to her vaginal wall on that date. However, as shown below, this holding is wrong.

A. Campbell’s Knowledge of a Mere Nick During The Procedure Is Irrelevant To the Limitations Issue.

The knowledge of a nicking injury, by itself, is simply not enough to trigger the commencement of the limitations period. *True v. Monteith*, 327 S.C. 116, 117, 489 S.E. 2d 615, 617 (S.C. 1997)(“The statute of limitations is triggered not merely by knowledge of an injury but

by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another”).

Importantly, defendant Brockway at the time characterized the nicking to Campbell as “no big deal” and “nothing to worry about.” (R. p. 117 ¶3) Certainly, the patient Campbell is entitled to rely upon the medical advice of her physician Dr. Brockway. Also, prior to July 2006, none of her many subsequent treating physicians who examined her genitals found any problem with her vagina.

Finally, as demonstrated in the section below, whether or not Campbell’s putative claim for the superficial injuries from the nicking of the vagina began to accrue at the time of the procedure, Campbell’s claims for her cervical injuries, including nerve damage and severe cervical pain, would not thereby also begin to accrue for limitations purposes at the time of the procedure. Instead, as explained below, the decision of the South Carolina Supreme Court in *Benton v Roger C. Peace Hosp.*, 313 S.C. 520, 493 S.E.2d 577 (S.C. 1994), mandates that each distinct injury have its own accrual period. Her claim for cervical injuries and pain accrued when she obtained facts that would put a person on common knowledge on notice that she had a claim against Brockway for those injuries. *See Snell*. She did not get those facts until May 2, 2007, when Dr. Sameh A. Ward diagnosed her cervical pain as neuropathic pain and linked it to nerve damage during the LEEP procedure.

III. THE LOWER COURT IGNORED THE CONTROLLING DECISION OF *BENTON v. ROGER C. PEACE HOSPITAL*, WHICH MANDATES A DIFFERENT ACCRUAL OF THE VAGINA NICK CLAIM AND THE NEUROLOGICAL PAIN CLAIM.

Campbell extensively argued in her summary judgment brief and at oral argument that the *Benton* decision by the South Carolina Supreme Court controls regarding the issue of the "nick" to her vaginal wall, and her separate extensive neurological injury. Inexplicably, in its Order, the lower court does not even mention this controlling law, which mandates that Campbell's claim for her distinct neurological injury accrued on May 2, 2007, regardless of when her claim for the superficial nicking of the vagina accrued.

The South Carolina Supreme Court has summarized its holding in *Benton v. Roger C. Peace Hosp.*, 443 S.E.2d 537 (S.C. 1994) as follows:

In *Benton*, a Down's Syndrome patient fell from his wheelchair and suffered facial lacerations which were readily apparent and discoverable. Later, a second more insidious injury arose from neurological damage which could have been caused by the fall or something else. Because the nature of the neurological injury was not discoverable by the appearance of facial lacerations, we held these injuries to be two separate, distinct, and severable harms. Thus, we held that the statute of limitations began to run at different times for each injury.

Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (S.C. 1996). Here, regardless of when Campbell's claim for her vaginal laceration was discoverable, the claim for her neurological injury -- her permanent genital pain and numbness -- was not discoverable by Campbell until she learned from a treating physician on May 2, 2007, that they were the result of nerve damage from defendant Brockway's LEEP procedure. *See Benton*. Like the plaintiff in *Benton*, Campbell suffered from a neurological condition that could have been the result of the

alleged negligence of defendant Brockway, or another cause. In fact, Brockway, and Campbell's treating medical providers up through the end of June 2006, indicated to her that there was no physical cause for the pain, and suggested that the problems of which Campbell complained, mainly the cervical pain and discomfort, was of a purely psychological origin. It was not until May 2, 2007, that Campbell acquired contrary information when one of her treating physicians linked her condition to nerve damage from the LEEP procedure.³

Accordingly, Campbell's permanent neurological injuries -- her cervical pain and numbness, -- are distinct injuries from the superficial vaginal laceration Campbell suffered, and the accrual of her claim for those neurological injuries is not determined by the accrual for her claim for the vaginal laceration. And the accrual of the claim certainly did not accrue at the time of the operation, or any time before June 28, 2006; rather it accrued no earlier than May 2, 2007, well within the limitations period.

IV. SUMMARY JUDGMENT WAS IMPROPER BECAUSE THE FACTS AND INFERENCES ARE IN DISPUTE.

The statute of limitations defense is an affirmative defense. Accordingly, defendants had the burden of proving the defense. Undoubtedly, under the summary judgment standard, they failed to carry the burden. They produced no evidence to support their statute of limitations defense, and the plaintiff submitted evidence disputing all allegations. No depositions were

³ The principle set forth in *Benton* is compatible with the principle cited in the Opinion that the fact that the injured party may not comprehend the full extent of the damage is immaterial, (R. p. 6, citing *Joubert v. South Carolina*, 341 S.C. 176, 183-184, 534 S.E.2d 1, 8-9 (S.C. App. 2000)). *Joubert* is addressing the situation where it is only the extent of the damage, not its cause that is in question. *Benton* addresses the situation where there are two distinct injuries, and the claimant is not on sufficient notice that the second injury resulted from the same act of the tortfeasor that caused the second injury. This also distinguishes the Opinion's reliance upon *Knox v. Greenville Hospital System*, 608 S.E. 2d 459 (S.C. App. 2005) (R. p. 10) because Campbell had no reason to

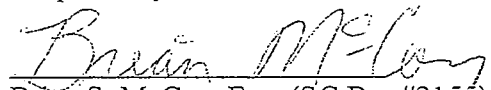
taken. Defendants failed to submit undisputed evidence to establish, as a matter of law, that constructive knowledge of the nature and cause of her neurological injuries should be imputed to Campbell before June 26, 2006. At a minimum, the inferences to be drawn from the facts are in dispute; therefore, the statute of limitations defense is a jury issue. *See Garner v. Houck*, 435 S.E.2d 847, 849 (S.C. 1993) (summary judgment was not proper because "there was no evidence conclusively showing that the [plaintiff] should have suspected negligence;" rather, where "there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury"). Accordingly, summary judgment was improper.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the lower court.

January 3, 2011

Respectfully submitted,


Brian S. McCoy, Esq. (SC Bar #2155)
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt, Esq.
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

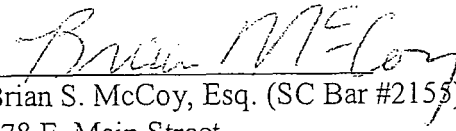
Attorneys for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

January 3, 2011


Brian S. McCoy, Esq. (SC Bar #2155)
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt, Esq.
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

Attorneys for Appellant

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STATEMENT OF ISSUE ON APPEAL

- I. DID THE LOWER COURT ERR BY GRANTING SUMMARY JUDGMENT THAT AS A MATTER OF LAW THE STATUTE OF LIMITATIONS SET FORTH IN S.C. CODE § 15-3-545 BARRED THE PLAINTIFF'S ACTION?**

STATEMENT OF THE CASE

Campbell's Notice of Intent to File Suit was filed on June 26, 2009. Her complaint and supporting affidavit, filed on November 19, 2009, asserted claims of medical malpractice against the Defendants.

The Defendants timely filed an Answer, and on August 17, 2010, the Defendants filed a Motion for Summary Judgment and Memorandum and materials in support thereof based on the affirmative defense of the statute of limitations. The Plaintiff filed a Memorandum in Opposition to Motion for Summary Judgment and supporting materials.

Oral argument was held on May 16, 2011, before Judge R. Lawton MacIntosh. On June 3, 2011, the lower court issued an Order Granting Defendants' Motion for Summary Judgment. The plaintiff timely filed a Notice of Appeal on July 9, 2011.

FACTS

On July 19, 2005, Campbell sought medical care from the Defendants after receiving an abnormal result on a pap smear test performed at Redfern Health Center in Clemson. (R. p. 16, par. 8.) Additional testing indicated "chronic ulcerative endocervicitis with squamous metaplasia" and "moderate dysplasia (CIN II), focal." (R. p. 16, par. 10)

On August 9, 2005, Brockway told Campbell that her condition required that he perform a LEEP/CONE procedure (hereafter "LEEP procedure"), which he then performed in his office. (R. p. 16, par. 11).¹ According to Campbell, during the LEEP procedure Brockway negligently removed more tissue than was necessary, failed to provide sufficient anesthesia, and inadvertently cut into the Plaintiff's vaginal wall. (R. p. 17, par. 14) Campbell alleges that as a result of Brockway's negligence, she has suffered severe cervical pain, infections, abnormal bleeding, nerve damage, disability, and other losses. (R. p. 19, par. 19)

In her complaint, Campbell alleges that the LEEP procedure was not called for under the circumstances, that additional testing should have been performed, that other treatment options should have been considered, that written consent should have been obtained prior to the procedure, and that the Defendants are liable for associated acts of medical negligence. (R. pp. 16-18, par. 13, 14, 18) In support of her complaint, Campbell filed an affidavit of Joel Cooper, MD, a New York physician who alleges six deviations from what he believes to be the appropriate standard of care. Each of those specifications stem directly from the LEEP procedure performed on August 9, 2005. (R. 23, par. 6)

Campbell states that Brockway, before he began the LEEP procedure on August 9, 2005, "refused" her request for additional testing. (R. p. 49, par 6: Brockway "refused to perform [an] HPV DNA test requested by the Plaintiff" prior to the procedure.) This

¹ For purposes of this appeal this allegation is deemed admitted, but the Defendants deny any implication that Campbell was not properly informed beforehand about the need for the procedure. Brockway had discussed the need for the LEEP procedure prior to August 9, 2005, as outlined in the affidavit of Mark Moore, MD, (R. pp. 63-69).

allegation is contained in paragraph 13 (b) of the Complaint as “failed to conduct the standard test for Human Papillova Virus (“HPV”) on Campbell, but nonetheless diagnosed her with HPV” (R. p. 16) and in paragraph 6 (b) of the expert affidavit attached to Campbell’s complaint as “failure to perform diagnostic testing for cervical infections prior to the LEEP/CONE procedure.” (R. p. 23)²

Campbell also alleges that, during the LEEP procedure, “*at some point during the procedure the local anesthesia wore off and Plaintiff Campbell flinched causing Defendant Brockway to damage her vaginal wall. Defendant Brockway interrupted the conization procedure to causing damage to the cervix of Plaintiff Campbell.*”³ (R. p. 50, par. 7.) Campbell alleges that Brockway told her during the procedure that he had unintentionally cut the side of her vaginal wall. (R. p. 56, par. 3: Medical record of Women’s Nutritional Heath Center wherein Campbell reports that Brockway stated to her at the time of the procedure “that the cauterizing tool cut into the side of my vaginal wall.”)

As established through medical records obtained in discovery, Campbell repeatedly reported to her treating physicians that the pain which she alleges to have suffered, and for which she brought her action, began with the LEEP procedure on August 9, 2005. These records before the lower court included (1) those of Connie Pennington, MD, dated 6/21/07, wherein Campbell stated “*all of her pain started by LEAP by Dr. Brockway in S.C.*” (R. p. 54, “History of present illness”) and (2) those of the Servy Institute for Reproductive Endocrinology dated June of 2006 wherein

² The Respondents deny this characterization of the discussion of the need for the test, but for purpose of this appeal the allegation is presumed to be true.

³ Presumably this sentence should read “due to causing damage to the cervix....”

Campbell responded to a question by stating that she had suffered pelvic pain and anxiety "Since Aug 05" (R. p. 97).

On August 8, 2008, almost three years to the day from the LEEP procedure, Campbell filed a *pro se* complaint in the United States District Court for the District of South Carolina under civil action number 8:08-cv-02819-HMH-BHH. (R. p. 48) In that complaint, Campbell alleged that on or about May 19, 2006, Dr. Marian Bertotti reported to her that there was no evidence that Campbell currently had the disease, or had had the HPV disease at any point in her life, and that the LEEP procedure had been unnecessary. (R. p. 50, par. 9)

On November 15, 2008, again acting *pro se*, Campbell voluntarily dismissed the federal court action. (R. p. 57)

On June 26, 2009, three years, ten months, and seventeen days after the LEEP procedure giving rise to this claim, Campbell instituted this action by means of a Notice of Intent to File Suit.

ARGUMENTS

Standard of Review

In reviewing an order granting summary judgment, the appellate court applies the same standard as that applied at the trial court level.. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) A defendant is entitled to summary judgment "if the 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 the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC.

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009). However, one may not avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. A party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of the pleadings, but instead must set forth specific facts showing that there is a genuine issue of material fact to justify proceeding to trial. Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct.App.1991), rev'd in part on other grounds, 311 S.C. 218, 428 S.E.2d 700 (1993). *See also* Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct.App.1988)

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 2250, 626 S.E.2d 1, 5 (2006). Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 677 S.E.2d 32 (Ct.App. 2009).

The Statute of Limitations and the Discovery Rule

Under S.C. Code Ann. § 15-3-20, "Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued...." S.C. Code Ann. § 15-3-545 provides a three year limitations period for causes of action arising from medical negligence:

In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.

The "discovery rule" governs the standard for determining when a cause of action accrues for purposes of the statute of limitations. Our Supreme Court has described this rule as follows:

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party *might* exist. Moreover, *the fact that the injured party may not comprehend the full extent of the damage is immaterial.* [emphasis added]

Dean v. Ruscon Com., 321 S.C.360, 364, 468 S.E.2d 645, 647 (1996) (emphasis added).

It is especially critical under the facts of the present case to emphasize that our Supreme Court has held that the discovery rule does not require **actual** knowledge of the right to a claim, but only that the facts and circumstances indicate that a claim **might** exist. As held by Judge Houck in the case of Ashley River Industries v. Mobil Oil Corp. 135 F.Supp.2d 733 (2000):

Assuming for the benefit of the plaintiffs that they had no *actual* knowledge that a cause of action existed, the crux of the inquiry in this case is when the plaintiffs had enough information such that it should have acted promptly to determine whether a cause of action might exist against the defendants for the injuries claimed in this case. Ashley River Industries, at 742.

...
First, the discovery rule does not require actual notice of anything, or knowledge of the full extent of the damage. Dean v. Ruscon Corp., 468 S.E.2d at 647. It requires a party to act promptly to investigate the existence of a claim where "the facts and circumstances" indicate that a claim "might exist." Id., at 743.

The test of whether a person should have known that a cause of action has arisen is objective, not subjective. Republic Contracting Corporation v. South Carolina Department of Highways and Public Transportation, 332 S.C. 197, 207, 503 S.E.2d 761, 767 (Ct.App.1998) (stating that "[t]he test of whether a person should have known the operative facts [giving rise to a cause of action] is objective, rather than subjective. ... That an injured party may not comprehend the extent of the injuries is immaterial.") (internal citations omitted). Maher v. Tietex Corporation, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App.1998) ("The test is objective," citing Wiggins v Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994))

Consultation with an attorney or a **development of a full-blown theory of recovery** is not necessary for a cause of action to accrue. Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). See also Republic, 332 S.C. at 198, 503 S.E.2d at 767 ("The statute of limitations begins to run when a plaintiff knows or should know of a potential claim against another party, not when the plaintiff develops a full-blown theory of recovery"). Maher v Tietex Corporation, 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct.App.1998) ("The statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'") Instead, an injured party must act promptly when the facts and circumstances of the injury would

place a reasonable person on notice that a claim against another party might exist. Republic, at 767.

In Johnston v Bowen, 313 S.C. 61, 437 S.E.2d 45 (SC 1993), the Supreme Court upheld summary judgment in the case of a patient who received knee surgery from the same surgeon in 1983 and 1984, but stopped seeing him in 1987 and consulted other physicians for her persistent knee pain. The record in that case indicates that the plaintiff sought the advice of an attorney in 1987, but failed to file suit until four years later. Under those facts, the Supreme Court held:

Statute of limitations requiring actions to be commenced within a time period after a person knew or should have known that he had a cause of action means that the injured party must act with some promptness **where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist.** Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 278 S.E.2d 333 (1981). The statute of limitations begins to run from this point and not when advice of counsel is sought or full-blown theory of recovery is developed. Id. The date of discovery is not when the plaintiff discovers a witness to support or prove his case. Buxton v. Perry, 32 Wash.App. 211, 646 P.2d 779, rev. denied, 97 Wash.2d 1040 (1982). [emphasis added]

Johnston, at 64.

It should also be noted that the South Carolina Supreme Court has emphatically rejected application of a "continuing treatment" doctrine as an exception to the discovery rule in South Carolina. Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003) (in regard to the statute of repose: "After careful consideration, it is our opinion the continuous treatment rule should not be judicially adopted. Put simply, we find judicial adoption of the continuous treatment rule would run afoul of the absolute limitations policy the Legislature has clearly set via the statutes discussed above. See Hecht v. First Nat. Bank & Trust Co. 208 Kan. 84, 490 P.2d 649, 656 (1971) (describing other states'

adoption of the continuous treatment rule as “a judicial effort to soften the harshness of the statutory accrual rule” and refusing to judicially legislate in this area). Certainly, this is an area where the Legislature can create statutory law if it so chooses.”)

As will be discussed below, the essential defect in the Appellant’s case is that she fails to acknowledge that after the procedure complained of she was quickly aware of facts and circumstances which indicated to her that a claim “might exist.” The Appellant’s cause must fail because she is ignoring the facts clearly established in the record before the lower court, and instead she is asking to toll the beginning of the running of the statute of limitations until after she developed a “full-blown theory of recovery” and discovered a witness to support her case.

I. THE LOWER COURT DID NOT ERR IN HOLDING THAT THE TRIGGER DATE FOR THE STATUTE OF LIMITATIONS WAS NO LATER THAN MAY 19, 2006.

The Appellant disputes the lower court’s holding that the latest date by which the statute of limitations was triggered was May 19, 2006, but a review of the evidence before the court shows that this holding is amply supported by the facts and governing law:

First, it should be noted that Campbell incorrectly alleges that the lower court treated the statements made in her federal court affidavit as a judicial admission. Nowhere in the Order appealed from does the lower court make such a holding, and in fact the Order explicitly states that its ruling as to the May 19, 2006, trigger date is supported by the record “even if the Court were to allow the Plaintiff to contradict a statement she made three years previously in her federal court pleading.” (R. p. 8.)

Rather than treating the federal court pleading as an admission, the lower court correctly observed that the issue to be decided in evaluating the discovery rule is the date on which an objective person should have known by the exercise of reasonable diligence that a claim might exist. As stated in the order (R. p. 8), the test provided on May 19, 2006, was the same test which Campbell had requested on May 17, 2005, from the Redfern Clinic, and on August 9, 2005, from Brockway. (*see also* R. p. 49, par. 5-6). It is clear from this record, and Campbell makes no attempt to argue otherwise in her affidavit, that she was well aware of the existence and availability of this test prior to the LEEP procedure. Campbell makes no contention that she was restricted in any way from receiving this test from alternate providers prior to consulting Dr. Bertotti had she simply used reasonable diligence to request it.⁴

The record provided the lower court additional clear evidence that Campbell was aware of facts sufficient to place a reasonable person on notice that a claim might exist as of May 19, 2006. Campbell alleges that Brockway “conducted follow-up examinations of Plaintiff Campbell on a weekly basis until September 15, 2005, and on a monthly basis from September 15, 2005, through February 27, 2006, *without offering treatment for progressive pain and bleeding.*” (R. p. 50, par. 8). In other words, Campbell was aware of her “pain and bleeding,” and also aware that Brockway was allegedly not offering any treatment to her, yet she took no action to obtain alternate treatment or investigate and pursue her claim during that same period. These same allegations of failure to treat are

⁴ As stated in paragraphs 3(g) and 4(a) of the Affidavit of Mark Moore, MD, (R. pp. 64-65) the explanation for the fact that both Redfern and Brockway declined to order the HPV test at Campbell’s request is that due to the prior diagnosis of moderate dysplasia, the LEEP / Cone procedure would be the correct course of treatment regardless of the result of the HPV test.

now submitted as evidence of medical negligence, and there can be no question but that Campbell was aware of these facts and circumstances at the time they occurred.

Further, in her responses to discovery, Campbell produced a copy of a Social Security Administration Decision by which she was awarded disability benefits. (R. pp. 58-61) In that order, Administrative Law Judge Douglas G. White recited that Campbell was alleging disabling pain from the procedure as of March 31, 2006:

(1) "Dr. Bland further testified that the claimant has perceived pain from a gynecological procedure, but no objective findings for that." (The context of the Order makes clear that this gynecological procedure to which Campbell was referring was the August 5, 2005, LEEP procedure by Brockway.) (R. p. 60).

(2) "Dr. Schacht testified that Ms. Campbell has unfounded beliefs regarding her body, including (but not limited to) the belief that feces seeps (into and) from her vagina. Extensive tests for this, however, were fully negative. He further testified that the claimant has committed herself fully to these beliefs and she travels all over the country to see different doctors in regard to those beliefs." (R. p. 60)

(3) "The record reveals that Dr. Schacht's testimony is fully supported by the record. The claimant has been treated by Dr. Marcus Cooper (a pain medicine specialist) for obsessive-compulsive characteristics, pelvic neuropathic pain, a pain disorder, and a mood disorder. She has been to medical clinics in many distant areas in regard to her complaints. At the Vanderbilt University Medical Center she complained of chronic pelvic pain and sexual dysfunction without objective findings." (R. p. 61)

(4) "Decision: Based on the application for a period of disability and disability insurance benefits protectively filed on September 19, 2006, the claimant has been disabled under sections 216(i) and 223(d) of the Social Security Act beginning on **May 31, 2006**. (R. p. 61)

The lower court also had before it the affidavit of Dr. Mark Moore, a practicing OB-GYN physician in Greenville. (R. pp. 63-69) In his affidavit, Dr. Moore cited numerous medical records containing statements made by Campbell to her treating physicians in which she expressed her complaints about the LEEP:

- a) On November 30, 2005, Campbell complained to Dr. McDonald, her primary care physician at Redfern, that she was concerned about vaginal swelling and thickness after the LEEP/Cone procedure. ("She had a LEEP procedure done in the fall but she is concerned that there might be something swollen there.") (R. p. 66)
- b) On December 12, 2005, Campbell complained to Nurse Practitioner Whelchel at Redfern of "feeling like things are falling out" and "feel like a stick is crammed up in my vagina". Nurse Whelchel denied observing any abnormalities in the vaginal vault. (R. p. 66)
- c) On February 27, 2006, Campbell presented to Brockway a detailed time line listing multiple gynecological and sexual complaints that she stated had begun in the fall of 2005. (R. p. 66)
- d) On March 2, 2006, Campbell completed a patient intake form with the Clemson Counseling and Psychological Services ("CAPS") Division of Redfern in which she summarized her reason for seeking treatment as "Sexual Dysfunction after LEEP." This complaint resulted in a triage evaluation prepared at Redfern stating "One of health complications included a LEEP procedure. Client reports decreased intensity during orgasm as a result." (R. p. 67)
- e) On March 9, 2006, Campbell, returned to the CAPS division of Redfern, met with counselor Eunice Lehmacher, and reported "distress regarding her loss of intensity during orgasm due to the LEEP medical procedure last year." (R. p. 67)
- f) On March 24, 2006, Campbell consulted with Johnson City, Tennessee, OBGYN, at which time Dr. Crowder documented her complaint as "LEEP in August - feels "numb" since LEEP - no sensation." Dr. Crowder documented a normal vaginal exam. (R. p. 67)

Even after May 19, 2006, Campbell continued to make statements to her physicians showing clearly that she attributed her symptoms to the LEEP procedure:

- g) On May 24, 2006, Campbell consulted with Dr. Jack Stevens, a counselor at Fort Hill Presbyterian Church in Fort Hill, and reported sexual dysfunctions after that LEEP procedure. (R. p. 67)
- h) On May 26, 2006, Campbell complained to Dr. Rose Marie McDonald at Redfern that she was "still having some decreased sensation in the genital area after her LEEP procedure." Dr. McDonald documented a normal pelvic exam and referred her to Dr. Jerry Sherrill, a neurologist in Seneca. (R. p. 67)

- i) By letter of May 31, 2006, Dr. Sherrill reported to Dr. McDonald that he had seen Campbell, and that she had reported to him that she was experiencing multiple sexual problems including anorgasmia. Dr. Sherrill documented in his notes that he performed a complete physical exam, the results of which were essentially within normal limits. (R. p. 67)
- j) On June 13, 2006, Campbell complained to Dr. Philip Caron of sexual dysfunction. Dr. Caron recorded in his notes that "Patient has a previous active and healthy sexual function and [she] relates the change in her sexual responsiveness to a leep procedure she underwent in September of 2005." Dr. Caron documented a normal vaginal exam, counseled her for forty minutes on sexual function, recommended that she adjust the psychoactive medications she had been taking, and recommended that she continue her counseling sessions. (R. p. 67)

In addition to the above complaints to her doctors, Brockway's office records (R. pp. 92-94) show that Campbell requested and was provided full sets of her treatment records on both March 21, 2006, and June 6, 2006.⁵

The above evidence in the record fully supports the lower court's conclusion that by May 19, 2006, Campbell was in a position where she should have known by the exercise of reasonable diligence that a cause of action might have arisen from the LEEP procedure. The "exercise of reasonable diligence" means that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party **might** exist. As held in the numerous cases cited above, the fact that Campbell may claim that she allegedly did not comprehend the full extent of the damage is immaterial. The lower court's ruling in that the statute of limitations began to run no later than May

⁵ These dates are established via the "Log to track disclosures" completed in the Defendants' office, and the corresponding two "Request to Inspect And Copy Protected Health Information" documents signed by Campbell herself. The request of March 21 is dated by Campbell as "2005," but this is clearly a scrivener's error because Campbell was not a patient of the Defendants' practice by that date.

19, 2006, is fully supported by the record, and the lower court committed no error in reaching that conclusion.

II. THE LOWER COURT DID NOT ERR IN HOLDING THAT THE STATUTE OF LIMITATIONS BEGAN TO RUN ON THE DATE OF THE LEEP PROCEDURE

The Appellants also argue that the lower court was wrong in holding as an independent basis for its order that Campbell was or should have been aware on the date of the procedure, August 9, 2005, of the facts and circumstances that should have placed a reasonable person on notice that a claim might exist. This is incorrect because, as recited in the lower court's order, Campbell's own allegations show clearly that she was or should have been aware that a claim might exist on the date of the procedure.

First, Campbell alleges that Brockway "refused to perform [an] HPV DNA test requested by the Plaintiff" prior to the procedure. (R. p. 49, par. 6) That this was a matter of conscious dispute in Campbell's mind is shown by her federal court complaint, where Campbell faults the staff at Redfern Health Center for also refusing the HPV DNA test just as she faults Brockway. (R. p. 51, par. 16; R. p. 56, par. 2) These allegations establish beyond dispute that the issue of receiving an HPV DNA prior to the LEEP procedure, which Campbell now alleges was professional negligence to refuse, was known to her -- and in fact a matter of great concern -- on August 9, 2005.

Also, Campbell admits that Brockway reported to her *on the same date* that he had cut the side of her vaginal wall during the procedure. (R. p. 50, par 7, and R. p. 56, par. 3) Although the Appellants attempt to argue that this cut is distinguishable from the claim that excessive tissue was removed, the essential point is that Campbell was fully

aware that she had received vaginal damage on the date of the procedure, as she complained repeatedly to her doctors as related above. When Campbell stated to Connie Pennington, MD, on June 21, 2007, that "*all of her pain started by LEAP by Dr. Brockway in S.C.*" (R. p. 54, "History of present illness"), she establishes from her own testimony that she both knew that Dr. Brockway had accidentally cut her vagina, and that her pain started on that date. "*[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial.*" Dean Id.

Also on August 9, 2005, Campbell was fully aware of the treatment options that Brockway discussed with her as of that date, and so she was aware that Brockway had allegedly "failed to discuss with Campbell other treatment options," which she now alleges as a specification of medical negligence. (R. p. 17, par. 13e). Likewise, Campbell knew on the same date that Brockway had not obtained her consent for the LEEP procedure in writing, which she alleges as a specification of medical negligence. (R. p. 17, par. 13f). Campbell further knew on the same date that Brockway had allegedly failed to inform her as to the effect that the procedure would have on other organs. (R. p. 17, par. 13g). Given the pain that Campbell repeatedly stated to her doctors manifested itself from the time of the procedure, Campbell was certainly on notice of sufficient facts and circumstances to determine that a claim "might" exist.

Statements made in the federal court complaint, although not judicial admissions, also support the lower court's findings in that they show Campbell's capacity to act to protect her interests within the three year statute of limitations period. The coincidence that it was filed on Friday, August 8, 2008, almost exactly three years to the day from the date of the LEEP procedure, combined with with the observation that it was filed *pro se*,

is strong evidence that Campbell labored under no disability of intelligence or capacity to understand the facts of her case, investigate them herself, and protect her own interests. Had Campbell simply chosen to continue that action, she would have met the requirements of the statute of limitations, but by voluntarily dismissing that action on November 15, 2008, and failing to re-file until June 26, 2009, her action is now barred.

In this regard the trial court correctly cited the case of Knox v. Greenville Hospital System, 608 S.E.2d 459 (S.C.App. 2005). In Knox, the Court of Appeals affirmed an award of summary judgment against a plaintiff who alleged that "he did not know the extent of his injury until the July 26, 2000, diagnosis by the orthopedic surgeon." Knox, at 461. Although Campbell alleges that the extent of the pain suffered by the plaintiff distinguishes Knox from her case, the statute of limitations begins to run on the date on which facts existed sufficient to place "a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against [the Hospital] might exist." Knox, at 462.

Campbell's action fails for the same reason expressed in Knox, in that it is "immaterial that [the Plaintiff] did not know the extent of her injury on [the date of surgery]. Knox, at 462, citing Young v. South Carolina Dept. of Corr., 333 S.C. 714, 720, 511 S.E.2d 413, 416 (Ct.App.1999) ("[T]he statute of limitations is not tolled during the period of time in which a plaintiff is merely unaware of the extent of an actionable injury.") Young, at 303.

Thus the trial court ruled correctly that there is no genuine issue of material fact but that on August 9, 2005, Campbell knew or should have known of facts and

circumstances which indicated that a claim might exist, and the three year statute of limitations began to run on that date.

III. THE LOWER COURT DID NOT MISAPPLY THE CASE OF BENTON V. ROGER C. PEACE HOSPITAL

Campbell also argues incorrectly that the trial court order violates the rule of Benton v Roger C. Peace Hospital, 443 S.E. 2d 537 (1994).

First, the Respondents would note that even though the Appellants complain that the lower court's order did not address Benton, the Appellants filed no motion to reconsider asking the lower court to rule explicitly on that argument.

More importantly, the lower court ruling does not violate Benton. The heart of Benton, as stated in the excerpt cited by the Appellants, is that the alleged neurological injury to that patient, who was mentally retarded and suffered from Down's Syndrome "was not discoverable by the appearance of facial lacerations..." that were readily observable after the fall. Benton, at 539. Our Supreme Court in Benton held that the neurological damage was not time barred because it "could have been caused by the fall from the wheelchair or from some other failure to properly care for [the patient]." Benton, at 524. This "some other failure" under the facts reported in Benton could have been any number of actions or inactions taken by the Roger C. Peace Hospital during a stay stated in the opinion to have lasted almost a month long, from December 2, 1987, to December 28, 1987. Benton, at 522.

Here, it is absolutely clear that Campbell's claim, if at all, arose from a single procedure, and that the pain and injury -- which Campbell herself has repeatedly stated to her medical practitioners began on that date, manifested itself, at least in Campbell's

mind, on August 9, 2005. Each of the specifications of negligence alleged in this case relate directly to the August 9th procedure, and combined with Campbell's emphatic contention in multiple statements made to multiple numbers of her own treating physicians that her troubles originated with the LEEP procedure, this case exhibits none of the difficulties of Benton, which is inapposite for that reason.

IV. THE LOWER COURT DID NOT ERR IN HOLDING THAT SUMMARY JUDGMENT WAS PROPER IN THIS CASE.

The law of South Carolina is clear. The three year statute of limitations begins to run on the date that an injured party either knows or should have known by the exercise of reasonable diligence that a cause of action might exist as a result of the allegedly wrongful conduct. Reasonable diligence means that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damage is immaterial. The discovery rule test is objective rather than subjective, and a plaintiff may not wait until she consults with an attorney or develops a full-blown theory of recovery before the statute begins to run.

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Moates v. Bobb, 322 S.C. 172, 470 S.E.2d 402 (Ct.App.1996)

Campbell has failed to act with proper diligence, and her action is now barred.

CONCLUSION

For the reasons stated above, the order of the lower court should be sustained.

HUNTER & FOSTER, P.A.



Lawrence M. Hunter, Jr., Esquire
S.C. Bar # 011808
Post Office Box 10309
Greenville, South Carolina 29603
(864) 242-2111

Dated: 12/28/11
Greenville, SC

Attorney for Defendants Ronnie A. Brockway,
M.D., and Oconee OB/GYN Associates, PA

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-37-1428

Andrea Beth Campbell.....Appellant

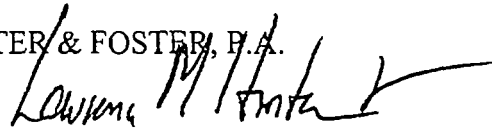
v.

Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA, ... Respondents

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

HUNTER & FOSTER, P.A.



Lawrence M. Hunter, Jr., Esquire
S.C. Bar # 011808
Post Office Box 10309
Greenville, South Carolina 29603
(864) 242-2111

Dated: 12/28/11
Greenville, SC

Attorney for Defendants Ronnie A. Brockway,
M.D., and Oconee OB/GYN Associates, PA

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

Hon. R. Lawton McIntosh, Circuit Court Judge

Case No. 2008-CP-37-1428

Andrea Beth Campbell.....Appellant

v.

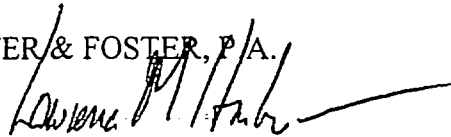
Ronnie A. Brockway, M.D., and Oconee OB/GYN Assoc., PA, ... Respondents

PROOF OF SERVICE

I hereby certify that fifteen (15) copies of the Final Brief of Respondent were filed with the South Carolina Court of Appeals, and three (3) copies were served upon counsel for the Appellants on this date by depositing three (3) copies in the United States Mail, postage prepaid, addressed as follows:

Brian S. McCoy, Esq.
633 E. Main Street, Suite 500
Rock Hill, SC 29730

HUNTER & FOSTER, P/A.



Lawrence M. Hunter, Jr., Esquire
S.C. Bar # 011808
Post Office Box 10309
Greenville, South Carolina 29603
(864) 242-2111

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Attorney for Defendants Ronnie A. Brockway,
M.D., and Oconee OB/GYN Associates, PA

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REPLY BRIEF OF APPELLANT

Brian S. McCoy, Esq.
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt, Esq.
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

Attorneys for Appellant

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As discussed below, defendants in their responding brief abandoned the lower court's first basis for its summary judgment. They do not dispute that it is based on an erroneous determination of the relevant dates. As also shown below, the defendants, in attempting to defend the lower court's alternative "lack of diligence" basis for its summary judgment, actually refute it by conceding that what plaintiff allegedly failed to do was irrelevant to the determination as to whether she had a claim, and, in any case, by demonstrating the complexity of the medical issues on this point, defendants showed that no "person of common knowledge" would thereby be put on notice of her claims. Additionally, as plaintiff shows below, defendants fail to rebut plaintiff's argument that this "lack of diligence" basis is wholly irrelevant to plaintiff's claim arising out of her neurological pain.

Finally, defendants attempt unsuccessfully to distinguish the South Carolina Supreme Court decision of *Benton v. Roger C. Peace Hosp.*, 443 S.E.2d 537 (S.C. 1994), by using an obviously erroneous factual assumption. Plaintiff rebuts that assumption below by pointing to the undisputed evidence. The *Benton* decision, which the court below ignored, is controlling and compels a reversal of the decision below.

1. Defendants Do Not Dispute That The Lower Court's First Stated Basis For Summary Judgment Was Wrong Because It Was Derived From Erroneous Findings Of Fact

In her opening brief, plaintiff demonstrated that the lower court's first basis for its summary judgment — that the limitations trigger date was purportedly May 19, 2006

based on the plaintiff's meetings with Dr. Bertotti, (R. pp. 7-8), was erroneous based on the fact that the undisputed evidence showed that the applicable date was June 28 rather than May 19. (Appellant's Br. at 3-4). In their response, defendants do not even attempt to defend the lower court ruling on this point. (See Respondents' Br. at 9) And with good reason, it is simply indefensible.

Instead, defendants distract with a side issue. Disregarding the relevant facts contained in medical records and plaintiff's affidavit on this point, the lower court based its ruling on a misreading of plaintiff's allegations in her dismissed federal pro se complaint, in effect treating those allegations (as misread by the court) as un rebuttable judicial admissions. (R. pp. 2-3). Defendants contend incorrectly that the court below did not treat those allegations as judicial admissions. (Respondents' Br. at 9-10) They fail to address the fact that the lower court relied upon its (mis)reading of those allegations as a basis for its summary judgment ruling even though that misreading was contradicted by plaintiff's affidavit. Because those allegations cannot constitute judicial admissions, a conclusion that defendants do not dispute, plaintiff's affidavit (which was consistent with, and clarified, the medical records) precludes summary judgment on this basis. *See Enquip, Inc. v. Smith-McDonald Corp.*, 655 F.2d 115, 118, (7th Cir. 1981).

2. Defendants Unwittingly Refute The Court's Alternative "Lack Of Diligence" Basis For Its Summary Judgment. It Fails For Two Additional Reasons As Well.

Abandoning a defense of the lower court's first basis for its summary judgment, defendants attempt to defend the lower court's alternative basis for its ruling — that while plaintiff did not know she had a cause of action; she was not "diligent" enough in discovering it because she did not successfully convince one of her treating physicians to perform a HPV test. (Respondents' Br. at 9-10)¹ In attempting to defend that basis, they unwittingly refute it: They concede that obtaining the results of an HPV test, by itself, would have provided *no* indication as to the necessity of the LEEP procedure, and thus, no indication as to whether plaintiff had a claim against defendants for subjecting plaintiff to an unnecessary procedure. (Respondents' Br. at 9 n. 4 (there is expert medical testimony that "due to the prior diagnosis of moderate dysplasia, the LEEP/Cone procedure would be the correct course of treatment regardless of the result of the HPV test.")). As shown below, the lower court's "diligence" basis for its summary judgment fails for two additional reasons as well.

The lower court's "lack of diligence" basis fails for the additional reason that it improperly imposes an unprecedented obligation on a potential plaintiff not only to convince medical providers to perform a specific diagnostic test on her, but also to possess the advanced medical knowledge sufficient to interpret the significance of the

¹ Defendants' suggestion that plaintiff could have successfully demanded and obtained the HPV test from one of her physicians under her health insurance program is pure speculation.

results of those tests in her specific circumstances, e.g., where she purportedly has a "prior diagnosis of moderate dysplasia." The lower court's imposition of that obligation is directly contrary to the South Carolina Supreme Court's directive that a potential plaintiff has a duty to act in response to becoming aware of facts *only* when those facts would put "a *person of common knowledge* and experience on notice .. some claim against another party might exist." *See Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (S.C. 1981)(emphasis added).

Finally, the court's "lack of diligence" basis fails because it is irrelevant to the gist of plaintiff's claim-the neurological pain emanating from her cervical area (which plaintiff ultimately learned was the result of defendant Brockway's excise of too much cervix material during the LEEP operation). As noted in the opening brief, plaintiff was diligent in seeking out the nature and source of that pain by consulting in a timely manner with several different physicians. Every one of whom she consulted outside of the limitations period indicated that the pain did not have a physical cause and was not related to her LEEP procedure, but was purely psychological in nature and origin. (See Appellant's Br. at 9-10).²

Tellingly, in an attempt to salvage the "lack of diligence" basis, defendants throw

² Defendants' suggestion that plaintiff's experience of pain after the LEEP procedure, by itself, triggered the commencement of the limitations period is, of course, wrong. *See Knox v. Greenville Hasp. Sys.*, 608 S.E.2d 459, 462 (S.C. App. 2005)("The mere presence of pain or discomfort, to be sure, will ordinarily not serve to trigger the commencement of the applicable statute of limitations.").

"on the wall" a lot of cites to evidence that the lower court did not cite or rely on in its opinion in the hopes that something will "stick." (See, e.g., Respondents' Br. at 10-11.) (referring to a Social Security Administrative Decision (R. pp. 58-61). That attempt fails. The lower court's "lack of diligence" basis is simply untenable and supports a reversal of its decision.

Indicative of defendants' flawed reasoning offered in support of the lower court's summary judgment is their bizarre contention that plaintiffs act of filing her federal *pro se* complaint on August 8, 2008, somehow supports the lower court's summary judgment because it "show[s] Campbell's capacity to act to protect her interests within the three year statute of limitations period." (Respondents' Br. at 15). Plaintiff agrees that she had the requisite knowledge to protect her interests on August 8, 2008, which was within the three years of the LEEP procedure; in fact she had that knowledge even earlier, on May 2, 2007. But those facts do nothing to support the lower court's summary judgment. South Carolina's test for determining the limitations period is *not*, as defendants suggest, whether a plaintiff has the capacity to act to protect her interests within three years of the tortious act; rather, it is whether plaintiff acted to protect her interests within three years *after* she acquired that capacity, *see* S.C. Code Ann. § 15-3-545 (plaintiff has three years "from the date of discovery [of her tortiously-caused injury] or when it reasonably ought to have been discovered"). Thus, whether plaintiff acquired requisite knowledge and capacity to act on August 8, 2008, or earlier on May 2, 2007, even though both dates are within three years of the tortious act, neither date would support the lower court's

summary judgment, but would in fact preclude it.

3. **Defendants Fail To Distinguish *Benton*. It Is On Point And Compels A Reversal.**

The court below failed to address the application of South Carolina Supreme Court decision, *Benton v. Roger C. Peace Hosp.*, 443 S.E.2d 537 (S.C. 1994), or even acknowledge plaintiffs argument below (which was reasserted in her opening appellate brief) that it is controlling, which it is. In their attempt to distinguish *Benton*, defendants contend erroneously that the nature of all of plaintiff's problems was obvious, and that they all "arose from a single procedure,"-her LEEP procedure, was obvious. (Respondent's Br. at 17) As demonstrated in detail in plaintiff's opening brief, that connection was not obvious to any of the several physicians who examined her through 2006. To the contrary, *all* of those treating physicians, *including defendant Brockway*, suggested to plaintiff that the nature of her cervical pain did *not* arise from her LEEP procedure or *any* physical cause; but was purely psychological in nature and origin. No treating physician linked that condition to her LEEP procedure until May 2, 2007. (See Appellant's Br. at 3)

Accordingly, even if the limitation period for the vagina "nick" claim (and for the unnecessary surgery claim) commenced at the time the procedure was performed, *Benton* nonetheless mandates that the limitations period for plaintiff's claims arising out of her distinct and separate neurological pain in her cervix commenced at a different date —on May 2, 2007, when she learned of the real nature of her injury, and that it was linked to

the LEEP procedure. *See Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (S.C. 1996)("the statute of limitations [begins] to run at different times for each injury" where the injuries are "two separate, distinct, and severable harms" and the nature of one injury is "discoverable" at a date later than the other injury)(discussing *Benton*, 443 S.E.2d 537).

In attempting to distinguish *Benton*, defendants repeatedly rely upon *Knox v. Greenville Hospital System*, 608 S.E.2d 459 (S.C. App. 2005)(patient was aware during the surgery of likely nerve damage in his wrist, but did not learn until later that the nerve damage was permanent), and its "extent of his injury" holding (the fact that plaintiff did not learn until later that his nerve damage was permanent did not extend the limitations period), (Appellee's Br. at 15-16). But the relevant facts do not fit *Knox*. As the facial lacerations, and the more serious neurological injuries in *Benton* were distinct and separate harms, the superficial vagina laceration, and the neurological injuries from the excess cervical excision in this case were likewise distinct. While feminine anatomy might be a mystery to some, it is beyond dispute that the vagina is separate and distinct from the cervix. There is absolutely no evidence or logic to support defendants' idea that the neurological pain emanating from the cervix (from the excise of cervix material) was a *Knox-type* extension of the superficial laceration injury to plaintiff's vagina.

Therefore, *Benton's* application to this case provides a separate and sufficient ground, in and of itself, for reversal as to the summary dismissal of plaintiff's claim based

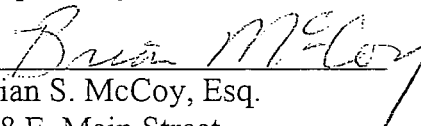
on her neurological injuries, *i.e.*, her cervical pain.

Conclusion

Based on the above, and plaintiff's opening brief, plaintiff Campbell requests that the Court reverse the summary judgment issued by the court below and remand the case to it for further proceedings.

January 3, 2011

Respectfully submitted,


Brian S. McCoy, Esq.
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280 Phone

Mark T. Hurt, Esq.
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276) 623-0808 Phone

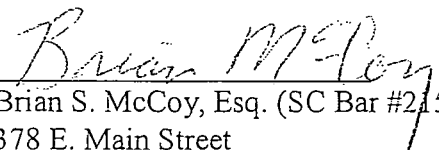
Attorneys for Appellant

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

January 3, 2011


Brian S. McCoy, Esq. (SC Bar #2155)
378 E. Main Street
Rock Hill, SC 29730
(803) 366-2280
Phone

Mark T. Hurt, Esq.
The Law Offices of Mark T. Hurt
159 West Main Street
Abingdon, VA 24210
(276)623-0808 Phone

Attorneys for Appellant