STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT.
Karen P. Harris and G. Ray Harris,	)	
Plaintiffs,	)	C.A. NO.: 2011-CP-42-2379
v	)	ORDER GRANTING SUMMARY SUMMARY JUDGMENT
H. Frederick Butehorn, III, MD and Spartanburg Ear, Nose & Throat Head and Neck Surgery, PA,	)	
Defendants.	)	

Defendants H. Fredrick Butehorn, III, MD and Spartanburg Ear, Nose & Throat Head and Neck Surgery, PA (hereinafter "Defendants") moved before this Court for summary judgment pursuant to Rule 56, South Carolina Rules of Civil Procedure in this medical malpractice action. A hearing was conducted on February 6, 2013. Plaintiffs' Karen P. Harris and G. Ray Harris (hereinafter "Plaintiffs") were represented by G. Ray Harris, Esquire. Defendants were represented by H. Spencer King of The Ward Law Firm, P.A.

Summary judgment shall be granted when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. The movant must first demonstrate that there is no genuine dispute of material fact. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, to defeat the motion, the party opposing summary judgment must present evidence of

specific facts from which the finder of fact could reasonably find for him, thereby showing that there is a genuine issue for trial.

In considering a motion for summary judgment, a court must view the facts in the light most favorable to the non-moving party. While a non-moving party need only submit a scintilla of evidence to avoid summary judgment, the evidence submitted must be material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror. When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for a jury. Moreover, "a court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.'" Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citing Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996)) (emphasis added).

The Plaintiffs filed their Notice of Intent to File Suit on January 21, 2011. The Notice of Intent to File Suit as required by the provisions of § 15-79-125 S.C. Code of Laws is the date that is relevant so far as the expiration of the Statute of Limitations. The surgical procedure involved in this case was December 28, 2007. Dr. Butehorn first saw Mrs. Harris on referral on July 25, 2006 and again on September 18, 2007 with visits following through the surgery and post-op visits. Plaintiff's only expert witness, Charles McConnel, MD has no criticisms of the surgical procedure because of the techniques and manner of the surgical procedure of December 28, 2007 or follow up care.

Dr. McConnel's only criticism of Dr. Butehorn is, as testified in his deposition, that the surgical procedure was unnecessary. He has no criticism of subsequent care. As a medical

malpractice case expert testimony as to breach of standard of care and causation is required to avoid summary judgment.

Mrs. Harris to the contrary testified that she suffered a bleeding incident on January 13, 2008, and while she was hospitalized, she claims Dr. Butehorn abandoned her care to other members of his practice group. All of the otolaryngologists that cared for Mrs. Harris during her hospitalization were Board Certified Otolaryngologists according to Dr. McConnel, and met the standard of care. It was appropriate for the care to be rendered by members of Dr. Butehorn's group. Moreover, Eric Nelson, MD, hematologist, and Arthur Freedman, MD, interventional radiologist, involved in care during the bleeding incident, are supportive of Dr. Butehorn and his practice group and describe appropriate care.

§15-3-545 – Actions for Medical Malpractice provides:

> (A) 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 Supreme Court upheld the Statute and opined that, once the cause of action discovered, a party has three years to bring the action with an absolute bar of six years from the date of the occurrence. In medical malpractice actions, the Statute of Limitations commences to run when the plaintiff discovered, or with reasonable efforts should have discovered, the act of malpractice. Under the discovery rule, the Statute of Limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence that a cause of action exists for the wrongful conduct. The exercise of reasonable diligence means simply that

an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005). No later than the bleeding incident Plaintiffs had notice that they believed care was deficient.

South Carolina does not follow the continuous treatment rule. The continuous treatment rule is that if the treatment by the doctor is 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 Statue runs from the time of discovery, actual or constructive. Harrison v. Bevilaqua, 354 S.C. 129, 135, 580 S.E.2d 109, 112 (2003). The Supreme Court has refused to adopt the continuous treatment rule in medical malpractice cases. Id. at 138, 1 The Court reasoned that this rule would run afoul of the absolute limitations policy in the Legislature as clearly set via the statute of repose and tolling statute for disability. Id.

Defendants also challenged expert qualifications of Plaintiff's expert on the basis that he is no longer in practice, that he last practiced in Pennsylvania in 2005, has not been in practice since that time, has no current office for the practice of medicine or holds a medical license. It is unnecessary for this Court to examine this issue since this Court grants Summary Judgment based upon the Statute of Limitations.

Plaintiff's only expert stated that the only criticism as to Dr. Butehorn was that he performed an unnecessary surgery on December 28, 2007, not any subsequent treatment by

Defendants. Accordingly, this Court grants Defendants' Motion for Summary Judgment based upon this action being commenced after the running of the Statute of Limitations and the case is dismissed with prejudice.

IT IS SO ORDERED.

J. Derham Cole
Presiding Judge, Seventh Judicial Circuit

Spartanburg, SC

March 15, 2013

FILED
CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY