Donovan v Keating
2013 NY Slip Op 33394(U)
December 17, 2013
Supreme Court, New York County
Docket Number: 107208/08
Judge: Alice Schlesinger

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

PART IA PART 16

Index Number : 107208/2008
DONOVAN, MARGUERITA
vs.
KEATING, DELIA MARGARET
SEQUENCE NUMBER : 006
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted to the extent of severing and dismissing the claims sounding in negligent hiring and supervision and lack of informed consent, but the motion is otherwise denied in accordance with the accompanying memorandum decision.

FILED

DEC 23 2013

COUNTY CLERK'S OFFICE
NEW YORK

DEC 17 2013

Dated: December 17, 2013

ALICE SCHLESINGER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MARGUERITA DONOVAN,

Plaintiff,

-against-

DELIA MARGARET KEATING, M.D., LINDA ROSE LATRENTA, M.D., MICHAEL ARTHUR COHEN, M.D., NIELS H. LAUERSEN, M.D., REGINALD T. PUCKETT, M.D., STEVEN J. SFERLAZZA, M.D., MEMORIAL SLOAN-KETTERING GUTTMAN DIAGNOSTIC CENTER A/K/A STELLA 7 CHARLES GUTTMAN BREAST DIAGNOSTIC INSTITUTE MEMORIAL HOSPITAL FOR CANCER AND ALLIED DISEASES AND MEMORIAL SLOAN-KETTERING CANCER CENTER,

Defendants.

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Index No. 107208/08
Motion Seq. No. 006

SCHLESINGER, J.:

Plaintiff Marguerita Donovan commenced this medical malpractice action on May 22, 2008 against defendants Memorial Sloan-Kettering Cancer Center (Memorial) and various individual doctors, claiming that they failed to timely diagnose and treat her breast cancer. Defendant Memorial and all the individual defendant doctors, Delia Margaret Keating, M.D., Linda Rose Latrenta, M.D., Michael Arthur Cohen, M.D., and Steven J. Sferlazza, M.D., have moved for partial summary judgment, dismissing all claims relating to medical service provided to Ms. Donovan before 2001.[1] Defendants assert that the pre-2001 claims are barred by the 2½ year statute of limitations for medical malpractice set forth in CPLR § 214-a and that the doctrine of continuous treatment does not apply to allow the inclusion of those claims in this suit.

[1] Five of the seven named defendants have moved. According to the Notice of Motion, the case was previously dismissed against the remaining two defendants Dr. Niels H. Lauersen and Dr. Reginald T. Puckett.

While plaintiff has stipulated to discontinue her claims for negligent hiring and supervision and lack of informed consent (Aff in Opp, ¶2), she has otherwise opposed defendants' motion, arguing that the doctrine of continuous treatment extends to cover her treatment dating back at least to 1997, when defendant Dr. Sferlazza first noted an abnormality in plaintiff's left breast and the need for follow-up due to Ms. Donovan's increased risk for breast cancer based on her family history.

Background Facts

Ms. Donovan began receiving mammograms at Memorial in 1990 when she was only 33 years old (Donovan EBT, Exh F, 28:20-29:24), and she continued to receive them from Memorial during the entire time at issue here (29:16-24). Though mammograms to screen for breast cancer typically begin at age 40 for women[2], Ms. Donovan began receiving mammograms earlier because she had an extensive family history of breast cancer. (Def Motion, Exh J, Patient Personal History forms dated January 27, 1997, March 14, 1998, March 24, 1999, March 19, 2000; see also Donovan EBT 35:5-36-3). In the personal history reports she completed at Memorial, Ms. Donovan stated that her mother was 35 when diagnosed and died at age 51 from breast cancer that had metastasized to the bone. Her maternal grandmother was diagnosed in her 50's, and her maternal aunt was diagnosed at age 60.

Dr. Sferlazza, a radiologist at Memorial, saw Ms. Donovan for a mammogram each year from January 1997 through April 2001 (Bill of Particulars, Motion Exh C); the time period in question includes the mammograms and reports from 1997 through and

[2] *See* "American Cancer Society Guidelines for the Early Detection of Cancer," http://www.cancer.org/healthy/findcancerearly/cancerscreeningguidelines/american-cancer-society-guidelines-for-the-early-detection-of-cancer. Last revised May 3, 2013.

including 2000. After 2001, other radiologists at Memorial performed Ms. Donovan's mammograms, as discussed more fully below.

Dr. Sferlazza saw Ms. Donovan for a bilateral mammogram on January 27, 1997. His January 29, 1997 report, addressed to Ms. Donovan's gynecologist Dr. Lauersen, stated: "No suspicious mass, malignant appearing calcification, or secondary signs of carcinoma evident." His impression and recommendation was "No mammographic evidence of malignancy. Annual mammogram advised." (Exh E)

Dr. Sferlazza conducted another bilateral mammogram of Ms. Donovan the following year on March 14, 1998. His March 17, 1998 report was identical to the 1997 report (Exh F). Dr. Sferlazza conducted another bilateral mammogram of Ms. Donovan the following year, on March 24, 1999. His March 25, 1999 report was identical to his reports from the two preceding years (Exh G). Dr. Sferlazza again conducted a bilateral mammogram of Ms. Donovan the following year on March 31, 2000. His report was, again, identical to the three prior reports (Exh H).

On April 4, 2001 Dr. Sferlazza conducted a bilateral mammogram of Ms. Donovan; whereas the prior reports simply described the mammogram as "bilateral," here the mammogram was described as "diagnostic." Further, for the first time Dr. Sferlazza included in his report a reference to a mass in Ms. Donovan's left breast. Significantly, though, the doctor also found "no significant change" from the prior mammograms after comparing the films, suggesting that he had, in fact, noticed the mass before, even though he had not included that fact in his previous reports. The 2001 report (Exh L) stated:

> FINDINGS: This exam is compared to multiple previous studies dating back to 1/27/97 including the most recent mammogram of 03/31/2000.

PARENCHYMAL PATTERN: Scattered fibroglandular densities.

(1) No suspicious mass, malignant appearing calcifications, or secondary signs of carcinoma evident in the breasts bilaterally. There has been no significant change since the previous mammogram. There is a stable 1.5 cm mass with coarse calcifications and obscured margins in the lower outer 4 axis of the left breast with features most consistent with a fibroadenoma. It corresponds to a palpable mass detected by the nurse practitioner. The remainder of the exam is normal.

IMPRESSION AND RECOMMENDATION: BIRADS CATEGORY 2: Benign.

(1) No mammographic evidence of malignancy in the breasts bilaterally. Recommend yearly mammogram. Discuss findings and recommendations with patient.

During Dr. Sferlazza's deposition, he confirmed that he was, in fact, aware of the referenced mass in Ms. Donovan's left breast as early as 1997. Although he had not mentioned the mass in his earlier report due to a "technical error", he had completed a patient recall card after the 1997 mammogram to request that Ms. Donovan return before her next annual mammogram for follow-up testing with respect to the abnormality he had observed. However, due to an apparent oversight at Memorial, Ms. Donovan was not called back for follow-up testing before her next annual mammogram. These facts were confirmed by Dr. Sferlazza in the following exchange at his deposition (Aff in Opp, Exh A,118:5 -119:2):

Q. So, yes, at that moment in time [January 27, 1997] you asked for this patient to come back for further workup?

A. Yes.

Q. What is it that caused you to ask this patient to come back for further workup as of January 27, 1997?

A. There was a calcification within the mass that had been a change from the prior mammogram.

Q. So, two things, one, you have got a mass that you have discerned the presence of and, two, you have assessed that mass has calcification associated with it, correct?

A. Yes.

Q. Did either of those two findings make it into your report?

A. No.

Q. Can you tell me why?

A. It was likely a technical error.

Although the 1997 mammogram report did not mention the mass, Dr. Sferlazza had noted in Ms. Donovan's chart that he had detected a mass, by completing a pink patient recall card (Sferlazza EBT 116:4-117:6). The patient recall card was intended to request that Ms. Donovan return to the radiologist's office for further studies because of concerns related to the mass. Describing the circumstances that led to his completion of a patient recall card for Ms. Donovan in 1997, Dr Sferlazza testified at his deposition as follows (116:21-117:6):

Q. So, what is a patient recall card?

A. When I read the screening mammogram, if there is a finding that I may want to further evaluate, that I would like to further evaluate, I usually fill this card out.

Q. What was the finding that caused you to fill out that card?

A. It was a mass.

However, as noted above, despite the completion of the patient recall card, Ms. Donovan was not asked to come back for additional evaluation before her next yearly mammogram (129:6-21). It nevertheless appears that the patient recall card remained in Ms. Donovan's medical records file at Memorial, as it appears that Dr. Sferlazza

located the pink card and discussed it while reviewing the file at his deposition (114:15-17, 116:13-17).

In subsequent years, radiologists at Memorial other than Dr. Sferlazza performed mammograms for Ms. Donovan. They, too, referred to the mass in Ms. Donovan's left breast in their own reports, tracing its identification back to 1997, even though mention of the mass had not been included in Dr. Sferlazza's reports from 1997 to 2000. Also, those doctors presumably were using the same medical records file that Dr. Sferlazza had been using for the patient, and they would likely have seen the patient recall card referring to the mass.

The mammograms performed beginning and after 2001 are not at issue on this motion, but they are nevertheless relevant as they confirm the identification of an abnormality as early as at least 1997 and follow-up by the physicians. For example, Dr. Latrenta's June 19, 2003 report stated that the nurse practitioner had palpated a 2 cm mass in Ms. Donovan's left breast. The mammogram revealed a "stable 1.7 obscured mass" which the doctor stated "may correspond to the palpable abnormality" detected in 1998 and was unchanged (Aff in Opp, Exh C).[3] Dr. Keating's 2004 mammography report stated: "Comparison is made to 3/26/2002, 6/19/2003, 4/4/2001, and 1/27/1997 [mammograms]. A 1.4cm equal-density mass in the left lower outer quadrant is less conspicuous in comparison to mammogram dating back to 1997, and it was previously associated with coarse calcifications which have resolved" (Aff in Opp, Exh B).

[3] Neither counsel has included the 2002 mammogram report, but it appears from the Bill of Particulars that the mammogram was performed by defendant Dr. Cohen (Def Motion, Exh C).

By the time Dr. Miller examined Ms. Donovan in December 2006, the mass had grown to 2.2 cm. Like the other physicians, Dr. Miller identified the mass as the same one previously identified and "dating back to 2001" when the mass was first referenced in a report (Aff in Opp, Exh D). Therefore, the moving defendants here do not ask that the 2001-2006 period be stricken from this suit, even though the 2½ year statute of limitations would date back only to December 2005 based on the May 2008 commencement of suit, implicitly acknowledging that at least an issue of fact exists regarding continuous treatment during that period of time.

As plaintiff emphasizes, however, Ms. Donovan received all mammograms and related treatment for breast cancer at Memorial continuously from at least 1997 through 2006. Although defense counsel in the moving papers makes a distinction between a "mass" and a "suspicious mass", the Memorial doctors appear to have tracked the same mass in Ms. Donovan's left breast from 1997 to 2006, when it was finally identified as Stage II(b) breast cancer. In 2006, Memorial officially identified the mass as "suspicious" (Aff in Opp, Exh D). Ms. Donovan underwent a needle biopsy, which revealed infiltrating ductal carcinoma. She underwent surgery on her left breast to remove the Stage II(b) cancer (Motion, Exh I). She then underwent chemotherapy and elected to have a bilateral mastectomy and a bilateral oophorectomy (Aff in Support, ¶ 7). Ms. Donovan has been cancer-free for seven years.

At her deposition, Ms. Donovan was questioned extensively about her awareness that abnormalities had been detected on her mammograms, and she recalled various incidents dating back to 1992. For example, she recalled being brought in on various occasions by the radiologist to look at her films, specifically in 1992 and

also in 2001 and 2006 and perhaps on other occasions as well (36:22 - 38:23). In 1992 the radiologist showed Ms. Donovan "architectural changes" on the mammogram and recommended follow up with "spot films" (38:24 - 39:6). Ms. Donovan recalled asking the radiologist about the significance of the finding, but she could not recall precisely what he said (43:17-24). She did return to the office for additional spot films before her next mammogram, which were "inconclusive" (45:13-16).

In addition, Ms. Donovan recalled having been told in 2001 that a nodule had been located in her left breast (57:20-25). She further recalled that she had been told of the "fibrocystic changes" in her breast before the 2001 report, but she could not recall precisely when she had been informed of that issue (70:23 - 71:11). In sum, Ms. Donovan recalled having received information from her radiologists about various issues with her left breast over the years, beginning well before the 2001 cut-off date that the moving defendants are urging here, though the extent of her recollection varied based on the particular circumstances.

Discussion

As noted above, the issue here is whether, as defendants contend, Ms. Donovan's pre-2001 claims are barred by the statute of limitations, or whether, as plaintiff contends, the continuous treatment doctrine applies to include claims dating back to at least 1997, when the Memorial physicians identified an abnormality in Ms. Donovan's left breast that was ultimately determined to be cancerous. The controlling statute, CPLR § 214-a, provides in relevant part that:

> An action for medical ... malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure; ...

As the Court of Appeals has repeatedly emphasized, "under the 'continuous treatment doctrine,' a Statute of Limitations ... period does not begin to run until 'the course of treatment which includes the wrongful acts or omissions has run *continuously* and is *related to* the same original condition or complaint' ..." *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 (1998), citing *Borgia v City of New York,* 12 NY2d 151, 155 (1962)(with emphasis supplied in *Young).* Explaining the policy considerations underlying the continuous treatment doctrine, the *Young* court stated (at 291-92) that:

> The toll of the continuous treatment doctrine was created to enforce the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action ...

In the oft-cited case involving breast cancer, *Nykorchuck v Henriques,* 78 NY2d 255 (1991), the Court of Appeals emphasized that there must actually be a "course of treatment," as opposed to only periodic examinations when no breast condition has been identified, before the continuous treatment doctrine can be applied. Specifically, the Court of Appeals stated as follows (at 258-59):

> Thus, essential to the application of the doctrine is that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit. We have held that neither the mere "continuing relation between physician and patient" nor "the continuing nature of a diagnosis" is sufficient to satisfy the requirements of the doctrine (*McDermott v Torre*, 56 NY2d 399, 405-406). In the absence of continuing efforts by a doctor to treat a particular condition, none of the policy reasons underlying the continuous treatment doctrine justify the patient's delay in bringing suit. ... While the failure to treat a condition may well be negligent, we cannot accept the self-contradictory proposition that the failure to establish a course of treatment is a course of treatment.

Building on this concept, the Court of Appeals in *Young, supra,* indicated that where a plaintiff "was unaware of the need for further treatment of her breast and that no course of treatment for that condition had otherwise been established during the dispositive time period, the purpose of the toll would not be served by its application ..." 91 NY2d at 293.

Citing to these holdings and the specific language quoted above, the moving defendants here argue that the continuous treatment doctrine does not apply in this case because plaintiff was not aware of a breast condition that was being treated. However, the application of the continuous treatment doctrine depends on a fact-intensive inquiry, and both *Nykorchuck* and *Young* are distinguishable from the case at bar. What is more, several cases exist that support plaintiff's position here.

In *Nykorchuck*, the patient was being treated by the defendant doctor for infertility problems over a period of about ten years, beginning in 1974. The treatment included surgery and post-operative care. During one of the visits in 1979, the patient noted a lump in her right breast, which the doctor examined and attributed to noncancerous fibrocystic disease. Also, when the plaintiff was admitted for the infertility surgery in 1982, an unspecified person identified lumps in both breasts, but no further evaluation or follow-up was performed. In December 1985, while still receiving treatment for her infertility problems, the patient detected enlargement of the mass in her right breast. Upon examination the following month, the defendant doctor referred the patient to an oncologist, who diagnosed breast cancer. The court held that the continuous treatment doctrine did not apply because the patient was being treated for a wholly separate medical condition of endometriosis and infertility, and the periodic breast examinations were unrelated and did not constitute a course of treatment.

Like the plaintiff in *Nykorchuck*, the plaintiff in *Young* was being treated at the defendant clinic for high blood pressure and arthritis, conditions wholly unrelated to her breasts. On a particular clinic visit, she complained of breast pain and a mammogram was performed. While the mammogram report noted some irregularities and recommended follow up in three months, the plaintiff was not advised of the test results, and she concluded that her mammography was negative. About eighteen months later, the defendant clinic asked plaintiff to return for another mammogram, at which time the abnormality was confirmed. A subsequent biopsy revealed cancer. The Court of Appeals held that since plaintiff was not receiving treatment for a breast condition, nor was she even aware of the need for treatment, the continuous treatment doctrine did not apply.

The facts of the instant case are sharply different from those in both *Nykorchuck* and *Young*. First and foremost, in those cases the patient was being treated for a condition wholly unrelated to breast cancer, and the breast examinations were periodic only and limited in number and scope. In contrast here, the plaintiff Marguerita Donovan was seeing the defendants for one reason and one reason only — her breast condition, with a particular focus on her high risk for breast cancer due to her family history. What is more, as indicated above, defendant Dr. Sferlazza detected a breast abnormality in 1997, and he and the other defendant radiologists followed a continued course of treatment based on those early findings, with regular and frequent mammograms and examinations, until cancer was ultimately confirmed some years later in 2006.

Specifically, although Dr. Sferlazza's examination reports from 1997, 1998, 1999, and 2000 all state "No suspicious mass, malignant appearing calcification, or

secondary signs of carcinoma evident...No mammographic evidence of malignancy," he admitted at his deposition that he had, in fact, detected a mass in Ms. Donovan's left breast during the 1997 examination. While he simply recommended annual mammograms in his written report, he also completed a pink patient recall card to have Ms. Donovan return earlier for follow-up testing. Other Memorial physicians referred to the mass in Ms. Donovan's left breast in their own reports, tracing its identification back to 1997, even though mention of the mass had not been included in Dr. Sferlazza's reports from 1997 to 2000. Presumably, Ms. Donovan's treating physicians saw her entire medical history, including the patient recall card from 1997, and they therefore were focused on the abnormality detected in 1997 in Ms. Donovan's left breast during their mammograms and examinations. Thus, from the physician's perspective, there was a course of treatment being followed.

In this regard, this case is also readily distinguishable from *Sinclair v Cahan*, 240 AD2d 152 (1st Dep't 1997), relied upon by defendants. The plaintiff first saw defendant Dr. Cahan, a thoracic surgeon, in January 1980. In 1985, she complained of pain after wearing a wired bra, but nothing unusual was detected. Dr. Cahan did not see the decedent for another four years, until 1989. That same year, her gynecologist had her begin hormone therapy. In 1991, Dr. Cahan saw the plaintiff again and detected a mass, which proved to be cancerous. The court found that the visits with the defendant thoracic surgeon were sporadic, with large gaps in between, and consisted of nothing more than routine visits with nothing that would "allow plaintiffs to leap the 28-month chasm back to June of 1989 (and presumably even further) to establish a 'course of treatment' under the continuous treatment doctrine." *Id.* at 154. In contrast, as

demonstrated above, Ms. Donovan's visits were regular and frequent, and all examinations and tests were performed by specialized radiologists focused on the abnormalities detected in Ms. Donovan's left breast.

Wholly misplaced is the defendants' reliance on *Young* to argue that the continuous treatment doctrine does not apply because the plaintiff Ms. Donovan was unaware of any need for treatment. As detailed above, Ms. Donovan began receiving mammograms at a young age precisely because of her increased risk for breast cancer based on her family history. She testified at her deposition that she was advised of certain abnormalities detected on her mammograms as early as 1992, when she was called back to the office for additional spot films. Additionally, she specifically recalled being advised of a nodule in 2001, and recalled that other issues had been brought to her attention before that time, though she could not recount the specifics. Nevertheless, she returned to the radiologists each and every year, and the sole purpose for those visits was her awareness and the awareness of her physicians of abnormalities relating to her breast condition. Unlike the plaintiff in *Young,* Ms. Donovan did not assume that the test results were negative; on the contrary, she was advised of various issues during the course of her treatment and returned to the defendants regularly for follow-up.

What is more, and quite significantly, the First Department in *Prinz-Schwartz v Levitan,* 17 AD3d 175 (1st Dep't 2005), did not interpret the element of patient knowledge as rigidly as defendants suggest. In fact, while defendants argue that *Young* mandates affirmative proof of the patient's knowledge of a course of treatment for a particular condition, *Prinz-Schwartz* indicates that such knowledge may be "inferred from the irregularities noted in the examination reports." *Id.* at 179. As further relevant

here, the First Department held that such an inference was sufficient to defeat the defendant's motion for summary judgment on the continuous treatment doctrine.

Prinz-Schwartz has many similarities to the case at bar, and contrary to defendants' suggestion, actually supports plaintiff's position in this case. Like Ms. Donovan here, the plaintiff in *Prinz-Schwartz* returned to Memorial Sloan-Kettering on a frequent and regular basis solely for mammograms. Until cancer was diagnosed in September of 2000, each of the examinations between 1986 and 2000 resulted in negative findings for breast cancer. However, as in Ms. Donovan's case, "certain irregularities" were detected by the physicians, such as "fibrocystic changes," and follow-up was recommended.

Citing various appellate cases, the *Prinz-Schwartz* plaintiff argued that for purposes of the continuous treatment doctrine, "treatment" may consist of the consistent monitoring of a specific condition or abnormality for the purpose of detecting a disease. *Id.* at 178. The Supreme Court disagreed and granted the defense motions for summary judgment dismissing all claims prior to June 10, 1999. The lower court held that the examinations were routine in nature and insufficient to establish a continuous course of treatment.

The Appellate Division disagreed and reversed, stating that:

> Because the conflicting evidence in the record raises a triable issue of fact as to whether plaintiff was being monitored for a specific breast condition during the course of these regular examinations, we reverse and deny defendants' motions.

With an implicit emphasis on the heavy burden on the moving defendants and the drastic nature of summary judgment, the First Department went on to explain its

reasoning. That explanation is relevant here, particularly insofar as the court construed "treatment" to include "monitoring" and did not insist on direct proof of plaintiff's knowledge of a condition:

> We conclude that defendants have failed to demonstrate as a matter of law that no continuous treatment existed prior to June 1999. It is undisputed that numerous irregularities were found in plaintiff's breasts between 1988 and 1995 .... further, it may be inferred from the irregularities noted in the examination reports that plaintiff had some awareness that the condition of her breast was being monitored from year to year for the purposes of detecting breast cancer.
>
> Nevertheless, on this record it cannot be determined as a matter of law whether the frequency and intensity of the monitoring of plaintiff's breasts rose to a level sufficient to qualify as continuous treatment. There are triable issues of fact as to whether plaintiff was being monitored for a specific medical condition and whether plaintiff was aware of this monitoring to an extent that the underlying purpose of the continuous treatment doctrine would be served by tolling the accrual of plaintiff's claim until the completion of the treatment ...

Id. at 179, citations omitted.

So too here the defendant physicians noted irregularities in Ms. Donovan's left breast, and they were monitoring the condition closely in light of her increased risk for breast cancer based on family history. Unlike the plaintiff in *Young,* Ms. Donovan did not assume negative findings; on the contrary, she was aware of certain abnormal findings and returned to her physicians religiously for follow-up. Thus, as in *Prinz-Schwartz*, triable issues of exist "as to whether plaintiff was being monitored for a specific medical condition and whether plaintiff was aware of this monitoring to an extent that the underlying purpose of the continuous treatment doctrine would be served by tolling the accrual of plaintiff's claim until the completion of the treatment."

The denial of summary judgment is also consistent with other appellate cases interpreting the continuous treatment doctrine to bar dismissal where an issue exists as to the extent of the patient's awareness of her condition. For example, in *Irizarry v New York City Health & Hosps. Corp.*, 268 AD2d 321 (1st Dep't 2000), the First Department reversed the lower's court's decision granting the defendant summary judgment based on the continuous treatment doctrine. Citing *Young*, the lower court had held that dismissal was warranted because the plaintiff had not been made aware of any abnormal results in her mammogram. However, the appellate court found that an issue of fact existed that precluded summary judgment, stating (at p 323) that: "As this record shows, as far as the deceased was concerned, whether she needed further treatment of her breast condition was never resolved or disposed of until the mammogram's results became available to her treating physicians and could be read." The possibility thus existed that "the deceased remained under the care and treatment of [her] physicians while she awaited the mammography results." Similarly, here, the possibility exists that Ms. Donovan remained under the care and treatment of the Memorial physicians as they followed up on the abnormalities detected by Dr. Sferlazza before 2001.

The Second Department has followed suit. Citing *Irizzary* and distinguishing *Young,* the Second Department reversed a grant of summary judgment and found issues of fact in *Nelson v Weiss,* 275 AD2d 399 (2000). The plaintiff there had made frequent visits to the offices of the defendant doctors for prenatal care, during which time a lump was detected in her right breast. She was told that a follow-up examination would be conducted at the conclusion of her pregnancy. After plaintiff delivered her child, an examination was made and a referral to a breast surgeon resulted in a

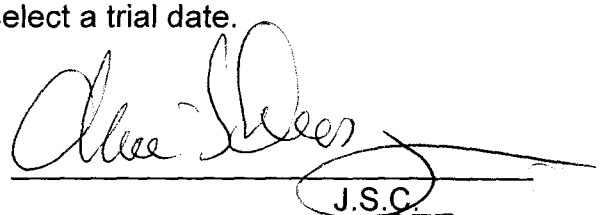
diagnosis of breast cancer. The appellate court held that dismissal was unwarranted, stating that: "Under the circumstances, issues of fact have been raised as to the nature of the plaintiff's visits to the defendants' offices and whether her physicians explicitly contemplated further postpartum treatment of her breast condition ...." *Id.* at 400 (citations omitted).

Relying on these cases, this Court finds on the record as a whole that plaintiff has presented sufficient evidence in opposition to defendants' motion to defeat the motion for partial summary judgment and allow this case to go forward to trial on all issues dating back to at least 1997. Triable issues of fact exist as to whether Ms. Donovan was receiving a course of treatment for a specific medical condition, the extent to which she was aware of her condition, and the extent to which the policies behind the continuous treatment doctrine would be served by tolling the accrual of her claim.

Accordingly, it is hereby

ORDERED that defendants' motion for partial summary judgment is granted to the extent of severing and dismissing the causes of action sounding in negligent hiring and supervision and lack of informed consent, but the motion is otherwise denied. Counsel shall appear for a pre-trial conference on Wednesday, January 29, 2014 at 9:30 a.m. prepared to discuss settlement and select a trial date.

Dated: December 17, 2013



J.S.C.
ALICE SCHLESINGER