



## **I. Motions to Dismiss**

As an initial matter, the Court previously reserved ruling on Defendant Grayer's Motion to Dismiss [21] in an effort to afford Plaintiff an opportunity to amend his Complaint to allege facts supporting a claim against Defendant Grayer. (See Order dated November 23, 2009 [23].) The filing of Plaintiff's Amended Complaint renders Defendant Grayer's first Motion to Dismiss moot. Accordingly, Defendant Grayer's Motion to Dismiss [21] is **DENIED as moot**.

Plaintiff Larson has failed to file a response in opposition to Defendant Grayer's Second Motion to Dismiss [30]. Plaintiff has previously been instructed by the Court that failure to respond to a motion indicates that there is no opposition, and the Court may grant the motion. (See Order dated November 23, 2009 [23] at 2.) Accordingly, Defendant Grayer's Second Motion to Dismiss [30] is **GRANTED**. Plaintiff's claims are **DISMISSED** as to Defendant Loren Grayer.

## **II. Motion for Summary Judgment**

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. FED.

R. Civ. P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non-movant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986).

Plaintiff alleges that Defendant Wilkes, an ophthalmologist, negligently performed eye surgery on Plaintiff in 2002. The undisputed facts demonstrate that Dr. Wilkes performed the eye surgery on December 26, 2002 and last treated Plaintiff on September 8, 2003. (Dkt. No. [34] Statement of Material Facts.) Plaintiff was incarcerated from December 2002 through June 2007. (Id.) Plaintiff originally filed this case on May 22, 2009.

Defendant Wilkes, M.D. moves for judgment as a matter of law on Plaintiff's medical malpractice claim on the basis that the claims: (1) are barred

by the two-year medical malpractice statute of limitations; (2) barred by the two-year statute of limitations applicable for injuries to the person; (3) barred by the five-year medical malpractice statute of repose; (4) lack the required expert testimony regarding an alleged violation of the medical standard of care in this medical malpractice case; and (5) lacks the required expert testimony addressing causation. (Dkt. No. [34] at 2-3.)

In opposition, Plaintiff appears to contend that the statutes of limitations and repose were tolled by either: (1) his period of incarceration in which he was at the “mercy” of prison staff for medical treatment; (2) his alleged amputation and eye injury; or (3) the continuous tort doctrine. (Dkt. No. [36].)

“An action for medical malpractice shall be brought within two years after the date on which an injury or death arises from a negligent or wrongful act or omission occurred.” O.C.G.A. §9-3-71(a). Accordingly, Plaintiff may not recover for injuries arising from an action that occurred prior to May 22, 2007.

The Court does not find a basis for tolling of the applicable statute of limitations. The party seeking to invoke the tolling provisions of the statute of limitations bears the burden of proof at trial. Milburn v. Nationwide Ins. Co.,

228 Ga.App. 398, 491 S.E.2d 848, 852 (1997). Prior to July 1, 1984, O.C.G.A. § 9-3-90 tolled the running of statutes of limitation for “persons imprisoned.” However, the legislature, amended the statute, effective July 1, 1984, by deleting prisoners from the groups of people protected by the tolling provision. Since Plaintiff’s alleged cause of action occurred after the statute was amended, he is not protected by the tolling provision. Further, Georgia tolls the limitation period during periods of disability for persons who are legally incompetent because of mental illness from which they suffer at the time the cause of action accrues or thereafter, if such subsequent disability is not voluntarily caused or undertaken by the person claiming the benefit thereof. O.C.G.A. §§ 9-3-90, 9-3-91. Here, however, Plaintiff does not allege that he suffers from a mental illness or disability. Physical disability alone, in the case of amputation or eye injury, does not toll the time limitation. Phillips v. Adams, 436 S.E.2d 567, 568 (Ga. Ct. App. 1993). Finally, the continuous treatment doctrine is inapplicable here because it is undisputed that Dr. Wilkes stopped seeing Plaintiff as a patient on September 8, 2003.<sup>1</sup> Accordingly, Plaintiff’s medical malpractice

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<sup>1</sup>The continuing treatment doctrine provides that,


“[i]f the treatment by the doctor is a continuing course and the patient's illness, injury or

claim against Defendant Wilkes may not be tolled and is barred by the statute of limitations. Defendant Wilkes' Motion for Summary Judgment [34] is **GRANTED**.

### **Conclusion**

Based on the foregoing, Defendant Grayer's Motion to Dismiss [21] is **DENIED as moot**, Defendant Grayer's Second Motion to Dismiss [30] is **GRANTED**, and Defendant Wilkes' Motion for Summary Judgment [34] is **GRANTED**.

**SO ORDERED** this 17th day of September, 2010.

  
**RICHARD W. STORY**  
United States District Judge

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condition is of such a nature as to impose on the doctor a duty of continuous 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. [Cit.]”

Williams v. Young, 247 Ga.App. 337, 340, 543 S.E.2d 737 (2000), rev'd Young v. Williams, 274 Ga. 845, 846, 560 S.E.2d 690 (2002). However, the continuing treatment doctrine has been found inapplicable in Georgia due to its conflict with O.C.G.A. 9-3-71(a). Kaminer v. Canas, 282 Ga. 830, 832 (Ga. 2007).