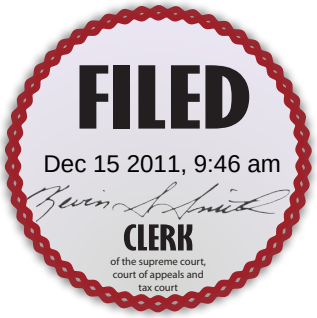

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IN THE COURT OF APPEALS OF INDIANA

THERESA L. TRENSEY and LOUIS L. ROTH, SR., as Parents and Representatives of Louis Roth, Jr.,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 02A05-1104-CT-222
GARLAND D. ANDERSON, M.D., PARKVIEW MEDICAL GROUP, and UNNAMED HOSPITAL, INC. d/b/a UNNAMED HOSPITAL,	)	
Appellees-Defendants.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0907-CT-281

December 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Theresa L. Trensey and Louis L. Roth, Sr., as parents and representatives of Louis Roth, Jr., deceased (collectively "Parents"), appeal the trial court's grant of summary judgment in favor of Garland D. Anderson, M.D., Parkview Medical Group, and Unnamed Hospital, Inc. d/b/a Unnamed Hospital on Parents' complaint for damages alleging medical malpractice. Parents raise two issues for our review, which we consolidate and restate as whether the trial court erred when it found, as a matter of law, that their complaint is barred by the applicable statute of limitations.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 29, 2005, Louis, who was fourteen years old, underwent a new patient evaluation with Dr. Anderson, a family medicine practitioner. And Louis continued to see Dr. Anderson on a periodic basis until June 11, 2007. On that date, Dr. Anderson found that Louis had lost seventeen pounds, but Dr. Anderson otherwise noted that his physical examination of Louis was normal. However, on June 24, one of Louis' family members called Dr. Anderson's office and reported that Louis had a persistent cough and continued weight loss. Dr. Anderson advised that Louis seek treatment at the emergency room at the hospital, including a chest x-ray.

On June 27, Dr. Anderson received a telephone call from someone in the emergency room, who reported that Louis had a low iron count and pneumonia. Dr. Anderson stated that he would come to the hospital to attend to Louis, but the emergency room employee told Dr. Anderson that Louis' family had stated that they "no longer

wanted [Dr. Anderson's] services." Appellants' App. at 142. Accordingly, Dr. Anderson did not provide any medical treatment to Louis on that day or thereafter.

On August 2, Louis' stepmother telephoned Dr. Anderson to inform him that the family had moved to South Carolina and that a physician there had diagnosed Louis with lymphoma on July 21. After that call, Dr. Anderson sought to obtain Louis' medical records from his June 27 hospitalization to review them for educational purposes. Louis died on August 5, 2007.

On July 10, 2009, Parents filed a proposed complaint for damages with the Department of Insurance naming Dr. Anderson, Parkview Medical Group, and Unnamed Hospital as defendants. And on July 16, Parents filed a complaint with the Allen Superior Court. After the defendants filed a motion for preliminary determination and for judgment on the pleadings asserting a statute of limitations defense, Parents filed an amended complaint asserting that their action was not time barred under the doctrines of fraudulent concealment and continuing wrong. The defendants then moved for summary judgment on the statute of limitations issue, and the trial court granted that motion following a hearing. This appeal ensued.

DISCUSSION AND DECISION

We review a summary judgment order de novo. Bules v. Marshall County, 920 N.E.2d 247, 250 (Ind. 2010). The purpose of summary judgment is to end litigation about which there can be no factual dispute and which may be determined as a matter of law. Shelter Ins. Co. v. Woolems, 759 N.E.2d 1151, 1153 (Ind. Ct. App. 2001), trans. denied. We must determine whether the evidence that the parties designated to the trial

court presents a genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); Bules, 920 N.E.2d at 250. We construe all factual inferences in the nonmoving party's favor and resolve all doubts as to the existence of a material issue against the moving party. Bules, 920 N.E.2d at 250. Summary judgment is a lethal weapon and courts must be mindful of its aims and targets and beware of overkill in its use. Heeb v. Smith, 613 N.E.2d 416, 420 (Ind. Ct. App. 1993), trans. denied. When the moving party asserts the statute of limitations as an affirmative defense and establishes that the action was commenced beyond the statutory period, the burden shifts to the nonmovant to establish an issue of fact material to a theory that avoids the defense. Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 695 (Ind. 2000).

Where, as here, the trial court makes findings and conclusions in support of its entry of summary judgment, we are not bound by such findings and conclusions, but they aid our review by providing reasons for the trial court's decision. In re Estate of Lee, 954 N.E.2d 1042, 1045 (Ind. Ct. App. 2011). If the entry of summary judgment can be sustained on any theory supported by the record, we will affirm. Id.

The Indiana Medical Malpractice Act's two-year statute of limitations runs from the date of the negligent act or omission. Ind. Code § 34-18-7-1. Here, Parents contend that Dr. Anderson failed to diagnose Louis' lymphoma, and they allege that defendants' medical treatment of Louis was generally negligent and fell below the applicable standard of care. Because Dr. Anderson last treated Louis on June 24, 2007, the statute of limitations would have run by June 24, 2009, at the latest. But Parents contend that their

claims are not barred by the statute of limitations as a matter of law. In particular, they maintain that the doctrines of fraudulent concealment and continuing wrong operate to preclude summary judgment in favor of the defendants.[1] We address each in turn.

Fraudulent Concealment

In Boggs, our Supreme Court explained fraudulent concealment as follows:

> Under that doctrine, a person is estopped from asserting the statute of limitations as a defense if that person, by deception or violation of a duty, has concealed material facts from the plaintiff and thereby prevented discovery of a wrong. Hughes v. Glaese, 659 N.E.2d 516, 519 (Ind. 1995). If the concealment is active, it is tolled until the patient discovers the malpractice, or in the exercise of due diligence should discover it. If the concealment is constructive, in this case by reason of an ongoing duty arising from the continuing physician-patient relationship, the statute of limitations is tolled until the termination of the physician-patient relationship, or, as in the active concealment case, until discovery, whichever is earlier. See id. Constructive concealment consists of the failure to disclose material information to the patient. See id. Active concealment involves affirmative acts of concealment intended to mislead or hinder the plaintiff from obtaining information concerning the malpractice. See id. at 521 (quoting Keesling v. Baker & Daniels, 571 N.E.2d 562, 565 (Ind.Ct.App.1991)). Under either strand of the doctrine, the patient must bring his or her claim within a reasonable period of time after the statute of limitations begins to run. See id. at 519.

730 N.E.2d at 698 (emphasis added).

Parents contend that Louis and Dr. Anderson had an "ongoing physician-patient relationship" from September 29, 2005, until August 2, 2007. Brief of Appellants at 7. And Parents maintain that Dr. Anderson's failure to disclose material information to

[1] Parents' argument on appeal focuses on the physician-patient relationship between Dr. Anderson and Louis. Parents do not make any separate argument or direct us to designated evidence regarding the dates or duration of a physician-patient relationship between Parkview Medical Group and/or Unnamed Hospital. For purposes of this appeal, then, we address the doctrines of fraudulent concealment and continuing wrong as they relate to the defendants as a group using the dates of the physician-patient relationship between Dr. Anderson and Louis. Parents concede, however, that the doctrine of continuing wrong is inapplicable to their claim against Unnamed Hospital.

Louis concerning his medical condition constituted constructive concealment during that time. Accordingly, Parents assert that they timely filed their complaint within a reasonable period of time after the termination of the physician-patient relationship under Boggs. We cannot agree.

This court has set forth factors to consider in determining when the physician-patient relationship ends:

> The subjective views of the parties are important and a consideration must be given to objective factors, including, but not limited to, the frequency of the visits, whether a course of treatment was prescribed by the doctor (to be followed with or without consultation), the nature of the illness, the nature of the physician's practice and whether the patient began consulting other physicians for the same malady.

Frady v. Hedgcock, 497 N.E.2d 620, 623 (Ind. Ct. App. 1986), trans. denied.

Here, it is undisputed that Louis last saw Dr. Anderson in person for medical treatment on June 11, 2007. Thereafter, Dr. Anderson gave medical advice to Louis on June 24, namely, advised him to seek emergency medical treatment. But when Dr. Anderson offered to come to the hospital to treat Louis on June 27, a family member of Louis' stated that they "no longer wanted [his] services." Appellants' App. at 142. There is no evidence that Dr. Anderson provided medical treatment or advice to Louis after June 24. While he spoke to Louis' stepmother on August 2, that conversation consisted solely of the stepmother informing Dr. Anderson that Louis had been diagnosed with lymphoma. And while Dr. Anderson sought to obtain Louis' medical records from his June 27 hospitalization, the undisputed evidence shows that that was solely for educational purposes and not for any provision of medical care for Louis.

We hold that the physician-patient relationship between Dr. Anderson and Louis ended on June 24, 2007, as a matter of law. Because Parents allege constructive concealment and not active concealment, the statute of limitations was not tolled after that date. See Boggs, 730 N.E.2d at 698. Parents did not file their complaint until July 10, 2009, or more than two years after the termination of the physician-patient relationship. Parents maintain that under the doctrine of fraudulent concealment, they had a reasonable period of time after the statute of limitations began to run to file their complaint, and they assert that under the circumstances they did so. In particular, Parents state that their "move [to South Carolina in July 2007] and the natural grief from the loss of their son [in August 2007] makes the time period reasonable." Brief of Appellants at 8.

While we are sympathetic to Parents' predicament, Indiana Supreme Court precedent makes clear that the facts of this case do not justify a more than two-year delay in filing suit after termination of the physician-patient relationship. See, e.g., Boggs, 730 N.E.2d at 699 (holding 22 1/2 month delay after termination of physician-patient relationship before filing suit unreasonable as a matter of law). The doctrine of fraudulent concealment does not bar the defendants from asserting the statute of limitations defense. See, e.g., id.

Continuing Wrong

Parents next contend that the doctrine of continuing wrong precludes the defendants' assertion of the statute of limitations defense. The doctrine of continuing wrong is applicable where an entire course of conduct combines to produce an injury.

Boggs, 730 N.E.2d at 699. The doctrine of continuing wrong is not an equitable doctrine; rather, it defines when an act, omission, or neglect took place. Id. (citing Havens v. Ritchey, 582 N.E.2d 792, 795 (Ind. 1991)). When this doctrine attaches, the statute of limitations does not begin to run until the wrongful act ceases, and at that point the plaintiff may bring the claim within the normal statutory period. Id.

But again, Parents' contention on this issue rests on their assertion that the physician-patient relationship did not terminate until August 2007. Because we hold that the physician-patient relationship terminated on June 24, 2007, the doctrine of continuing wrong does not extend the statute of limitations here. See id.

In sum, when defendants asserted the statute of limitations as an affirmative defense in their motion for summary judgment, the burden shifted to Parents to establish an issue of fact material to a theory that avoids the defense. See Boggs, 730 N.E.2d at 695. Because the physician-patient relationship between Dr. Anderson and Louis terminated as a matter of law on June 24, 2007, neither the doctrine of fraudulent concealment nor continuing wrong save Parents' complaint from being time barred. The trial court did not err when it entered summary judgment for the defendants.

Affirmed.

RILEY, J., and MAY, J., concur.