No. 33834 – *Paul E. Forshey and Melissa L. Forshey v. Theodore A. Jackson, M.D.*

Starcher, J., dissenting:

FILED
December 30, 2008
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

The majority opinion in this case is a magnificent injustice.

The facts in this case are clear: the defendant doctor, Theodore Jackson, left a scalpel blade in plaintiff Paul Forshey's hand during surgery in 1995. The huge x-ray exhibit presented to the Court during oral argument made it as plain and clear as the nose on one's face. Nobody questions whether malpractice occurred – not even Dr. Jackson.

Not surprisingly, as a result of the malpractice, the plaintiff experienced an adverse result. The plaintiff had pain, swelling, tenderness, and a knot in his hand. The defendant doctor poked and prodded the plaintiff for two years, but didn't do anything else – like an x-ray of the plaintiff's hand.

Then, in 2005, a different doctor working on a different injury took an x-ray of the plaintiff's hand and *voilà*, discovered the scalpel blade.

The majority opinion correctly decides to apply the continuing treatment doctrine and continuing tort doctrine to the plaintiff's case. The problem is that the majority opinion mangled the application of those doctrines. The injury in this case wasn't just the scalpel blade left in the plaintiff's hand. It wasn't, as the majority opinion says, "the continuation of the ill effects of an original wrongful act[.]" ___ W.Va. at ___, ___ S.E.2d

at ___ (Slip Op. at 25). It was that the defendant doctor screwed up and committed malpractice by failing to properly diagnose the error in two years of trying.

The majority opinion should have erred on the side of fairness, held that the suit was not time-barred and let the plaintiff pursue his action (which most likely would have resulted in a speedy settlement).

And there is a very recent precedent for finding such actions are not time barred.

Earlier this term, this Court twisted itself into a pretzel in order to find that a case filed *by a doctor* was not time-barred. In *Rashid v. Tarakji*, ___ W.Va. ___, ___ S.E.2d ___ (No. 33596, November 5, 2008), a doctor filed a lawsuit against another doctor in a contract dispute. The plaintiff doctor's lawyers – Bradley Sorrells and Scott Segal – filed the case in 1997 and it was dismissed in 2001 for lack of activity. In 2005, the lawyers attempted to re-file the case, and it was dismissed again on the ground of *res judicata*. Then, a new lawyer attempted to get the case reinstated in 2006, and when the circuit court refused to allow the reinstatement, the plaintiff-doctor's lawyer appealed.

On appeal, this Court allowed the plaintiff doctor to pursue his action against the other doctor. The Court decided *Rashid* on technical grounds, holding that because the 2001 dismissal order did not dot every *i* or cross every *t*, then the order was invalid. But to reach that decision, the Court had to overlook and excuse the fact that the plaintiff doctor's lawyers did nothing substantive on the doctor's case for over nine years. (But remember, in the instant case, the non-lawyer plaintiff is being punished for not doing anything

"substantive" in 1997 to diagnose his pain – that is, he refused to submit to exploratory surgery.)

The take-away message, as I see it, is that this Court will do whatever it takes to protect doctors and lawyers from malpractice claims – no matter how meritorious those claims might be. But average citizens, obviously injured by a doctor's negligence, are not entitled to similar protection under our laws.

I therefore respectfully dissent.