2019 IL App (4th) 180778-U

NO. 4-18-0778

FILED
August 2, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KATHY BRANDT,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Coles County
SARAH BUSH LINCOLN HEALTH CENTER,	)	No. 16L15
ROGER RIVES, M.D., MATTHEW JONES, M.D.,	)	
and JOSHUA GARRETT, M.D.,	)	Honorable
Defendants-Appellees.	)	James R. Glenn,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Turner and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendants' motions for partial summary judgment based on application of the medical malpractice statute of repose.

¶ 2 In May 2016, plaintiff, Kathy Brandt, brought a medical malpractice action against defendants, Sarah Bush Lincoln Health Center (SBL Health Center), Dr. Roger Rives, and five other physicians, alleging she sustained personal injuries after part of a medical instrument was left in her body during a surgical procedure performed by Dr. Rives in January 2001. In November 2018, the trial court granted partial summary judgment in favor of both SBL Health Center and Dr. Rives, finding the statute of repose barred plaintiff from pursuing a cause of action against those two defendants for damages for any act or omission occurring prior to May 27, 2012, *i.e.*, four years before the filing of plaintiff's complaint. Plaintiff appeals, arguing the court

erred in granting defendants' motions for partial summary judgment because (1) defendants were barred from asserting the statute of repose as an affirmative defense by the doctrine of equitable estoppel and (2) there was sufficient evidence to establish a continuing course of negligent medical treatment by defendants, which would toll the four-year statute of repose. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In January 2001, Dr. Rives, a urologist, performed a bladder suspension surgery on plaintiff at SBL Health Center to address an issue of incontinence. During the surgery, he placed titanium anchors into plaintiff's pelvic bone by the use of a metal device called an "anchor driver." In June 2015, part of an anchor driver was found inside plaintiff's body near her pelvic bone and removed. In May 2016, plaintiff filed her medical malpractice complaint against SBL Health Center, Dr. Rives, and five other physicians. Only plaintiff's claims against SBL Health Center and Dr. Rives are at issue in this appeal. We address the facts and issues only as they pertain to those two defendants.

¶ 5 In her complaint, plaintiff alleged she presented to SBL Health Center in January 2001, "with a symptomatic cystocele and some stress incontinence." She was seen by Dr. Rives who performed surgery on her in the form of an endoscopic bladder suspension. During the procedure, Dr. Rives used "anchors to support the suspension." Plaintiff asserted that after the bladder suspension surgery and "in a continuing course," she experienced unusual pain in her pelvic area. According to plaintiff, she notified Dr. Rives of her continuing pain "and was told there was nothing wrong." Specifically, she alleged that she returned to defendants in July and August 2004, December 2009, and August 2012, complaining of continued pain which she associated with the "anchors" placed during her January 2001 surgery. Plaintiff asserted X-rays were taken

at all three visits and each time she was informed that the imaging showed nothing that could account for her pain symptoms. However, according to plaintiff, the X-rays from December 2009 and August 2012 clearly showed a "foreign body hardware piece" in her pelvis.

¶ 6 Plaintiff alleged she underwent a second surgical procedure with Dr. Rives in August 2012 in the form of "a bladder inst[i]llation and transvaginal ob[t]urator tape procedure." When consulting with Dr. Rives about the second surgery, plaintiff and her husband complained "about the feeling that a metal 'anchor' or the like was poking into her." Plaintiff asserted that Dr. Rives stated "it was impossible that anything was placed in her that would be causing such pain." Plaintiff alleged that further reports of pain were made to Dr. Rives in September 2012 and to SBL Health Center's emergency room in August 2014. During the August 2014 visit, plaintiff underwent a CT scan of her abdomen and pelvis. According to plaintiff, the CT scan was initially read by a teleradiologist and she was informed that it "showed no problems." However, the following day, a radiologist read the scan and noted a "2.2 cm metallic object."

¶ 7 Plaintiff alleged she next returned to SBL Health Center on June 11, 2015, reporting "pain around her pubic symphysis" and was ultimately diagnosed with " 'pubic cellulitis overlaying retained public symphysis hardware.' " She asserted she was informed that she might have an anchor in her pubic bone that needed to be removed and was transferred to St. John's Hospital in Springfield, Illinois. Plaintiff alleged that an X-ray report noted the anchor devices from her surgery as well as " 'a radiodense 2.4 cm cylindrical structure overlying the anchor in the right pubic bone which may represent a piece of broke hardware, initially used to place an anchor within the pubic symphysis.' " On June 12, 2015, she underwent surgery at St. John's Hospital to remove the unidentified object, which she asserted "proved to be the instrument or

part of the instrument that was used to place anchors for the [January 2001] bladder surgery and was abandoned by [Dr. Rives] and left within plaintiff."

¶ 8 Plaintiff alleged that SBL Health Center and Dr. Rives were negligent in several respects, including (1) failing to account for the medical devices used or placed in plaintiff's body during the January 2001 bladder surgery; (2) continually misinforming or misleading plaintiff regarding the presence of a "foreign metallic body" in or around her pelvis through June 2015; (3) allowing the foreign metallic body to remain in plaintiff through June 2015, despite specific complaints, examinations, and radiology studies that demonstrated its presence; (4) failing to follow up on the August 2014 radiology report indicating the presence of a metallic object; and (5) failing to diagnose or recognize the presence of a foreign body instrument left within plaintiff. As to only SBL Health Center, plaintiff additionally alleged negligence in connection with its procedures, or lack thereof, for transmitting radiology findings and reports to patients and treating physicians, and for specifically failing "to have its radiology department communicate the necessary findings that demonstrated a symptomatic foreign object in plaintiff." As to only Dr. Rives, plaintiff additionally alleged negligence based on his failure to adequately examine plaintiff's December 2009 and August 2012 radiology films and August 2014 CT scan and report, adequately examine plaintiff, refer plaintiff to another treatment provider, and consult with radiologists or other medical professionals regarding plaintiff's long-term and continuing complaints of pelvic pain.

¶ 9 In July and August 2016, SBL Health Center and Dr. Rives filed answers to plaintiff's complaint. Both defendants raised the affirmative defense that plaintiff's claims were barred in whole or in part by the statute of repose. Plaintiff responded, arguing the doctrine of

equitable estoppel applied to prevent defendants from raising a statute of repose defense.

¶ 10 In August 2017, SBL Health Center filed a motion for partial summary judgment, arguing plaintiff's case was governed by the four-year statute of repose, barring her from recovering damages for any alleged negligence that occurred more than four years prior to the filing of her complaint. It asserted that although the statute of repose may be tolled when there is an ongoing course of negligent medical treatment, the alleged negligent treatment in this case was not continuous and unbroken. Following a hearing in February 2018, the trial court denied the motion on the basis that a genuine issue of fact existed regarding whether the case involved a continuing course of negligent medical treatment.

¶ 11 In September 2018, SBL Health Center filed a supplemental motion for partial summary judgment. It incorporated its previous motion by reference and alleged that additional discovery had been conducted in the case, revealing that plaintiff obtained medical treatment involving urinary tract issues and abdominal or pelvic pain from providers other than defendants and that she failed to follow up with referrals to medical specialists. It argued that such circumstances further showed "a break in Dr. Rives' treatment of [p]laintiff such that the 'continuous and unbroken course of treatment' exception to the statute of repose [did] not apply."

¶ 12 Plaintiff filed a response to SBL Health Center's supplemental motion, and incorporated her response to the SBL Health Center's original motion. She argued that there was a sufficient continuing course of negligent treatment to sustain the exception to the repose period and, alternatively, whether there was a continuing course of negligent treatment was a disputed question of fact for the jury. Additionally, plaintiff argued the doctrine of equitable estoppel applied to bar SBL Health Center from asserting the four-year statute of repose as a defense.

¶ 13 In October 2018, Dr. Rives joined in SBL Health Center's supplemental motion for partial summary judgment and adopted its arguments. He additionally argued that plaintiff could not claim that equitable estoppel barred defendants from raising a statute of repose defense. Dr. Rives asserted that for equitable estoppel to apply, plaintiff had to prove that he made representations that he knew were untrue and, in this case, plaintiff could not do so because she could not establish that he had any knowledge that surgical hardware was retained within her pelvis after the January 2001 surgery.

¶ 14 The record reflects that the parties attached various documents to their filings, including depositions of the parties and medical records of treatment plaintiff received during the relevant 15-year time period. The medical records show that following her January 2001 bladder surgery, plaintiff followed up with Dr. Rives in February and March 2001. On February 8, 2001, plaintiff called Dr. Rives's office and reported feeling something "pop in [her] bladder area" and that she was experiencing right back, side, and leg pain. The following day, Dr. Rives determined plaintiff "had exacerbation of her interstitial cystitis." He prescribed medication and recommended a follow-up appointment in four weeks. On March 9, 2001, Dr. Rives noted plaintiff "still ha[d] some slight tenderness over the right side of her symphysis." He opined she "may very well have recurrent bladder pain in the future, not related to her repaired cystocele, but to the chronic inflammation from which she suffers." He recommended plaintiff return for "intravesical DMSO" with recurrent pain.

¶ 15 In 2003, plaintiff moved to Alaska. There, on May 4, 2004, she visited the emergency room at Fairbanks Memorial Hospital, complaining of "[e]pigastric pain for two days." Plaintiff was examined and given IV fluids and medication. Abdominal X-rays were taken show-

ing "[n]o explanation for [plaintiff's] abdominal pain." Plaintiff was discharged from the hospital in stable condition with a diagnosis of acute nausea and "abdominal pain of unknown etiology." She was also "encouraged to follow up with [the] Fairbanks Clinic if she continue[d] to have problems."

¶ 16 On June 8, 2004, plaintiff called Dr. Rives's office and reported having soreness "across [her] 'crotch bone.' " She stated she felt "a knot in there" if she crossed her legs or leaned up against a counter. Plaintiff reported she had moved to Alaska but would be back in Illinois the following month. An appointment was scheduled with Dr. Rives for July 6, 2004. Dr. Rives's medical records document the July 6 visit as a follow up to plaintiff's bladder suspension surgery, noting the surgery occurred 3½ years earlier. At the visit, plaintiff complained of "sharp, shooting pains in the right side of her symphysis" and suggested that "anchors [were] coming out." She also reported that "the pain in [her] pubic bone area [was] always there," she could not cross her legs or lean against a cabinet, and she experienced pain with intercourse.

¶ 17 On examination, Dr. Rives noted "some point tenderness on the top of [plaintiff's] symphysis just at the right of midline." His impression was pelvic pain. Dr. Rives prescribed medication and recommended a pelvic bone scan and X-rays. A radiology report from SBL Health Center dated July 8, 2004, showed the following findings: "A single view of the pelvis reveals no acute bony abnormality. No evidence of degenerative change is present. Several anchored devices are present overlying the right superior pubic ramus and left superior pubic ramus." The radiologist's impression was of "NO ACUTE FINDING" and "POSTOPERATIVE CHANGE INVOLVING BOTH SUPERIOR PUBIC RAMI NEAR THE SYMPHYSIS."

¶ 18 On July 9, 2004, plaintiff followed up with Dr. Rives for her pelvic pain. Dr.

Rives's medical records state as follows:

> "The patient got no relief with Neurontin. She has chronic low back pain also as well as knee discomfort and states she has no cartilage in either knee. Her films were reviewed with Dr. Ruffolo. She has no evidence of inflammation in her symphysis. She does have some mal-rotation of her symphysis and radiographic findings of degenerative joint disease in her SI joints."

Dr. Rives had the following impression: "Pelvic discomfort. Osteoarthritis with significant degenerative disease. No evidence of inflammation or infection." He recommended that plaintiff see a rheumatologist in Alaska.

¶ 19 Plaintiff returned to Alaska and on September 14, 2004, was seen at the Fairbanks Clinic for a "new patient visit." Her "main complaint" was identified as multiple joint aches and pains. Plaintiff denied that she was experiencing any urinary symptoms, abdominal pain, dysuria, or incontinence.

¶ 20 On March 25, 2006, plaintiff was seen at the Fairbanks Memorial Hospital emergency room and complained of painful urination. She was reported as having a history of urinary tract infections and a one week history of "dysuria, frequency, and bladder 'spasms.' " Hospital records show plaintiff had a history of "[b]ladder suspension surgery in 2000 [*sic*]." An examination of plaintiff's abdomen showed "tenderness in the suprapubic region, midline, with guarding, no rebound." She was diagnosed with a urinary tract infection, prescribed medication, told to follow up with "primary care," and return to the emergency room as needed.

¶ 21 On January 25, 2007, plaintiff was seen at the Fairbanks Memorial Hospital emergency room for a "sudden onset of right upper quadrant abdominal pain with nausea." She

denied "having a history of abdominal pain." Upon examination, her abdomen was tender in the upper quadrant area. Ultimately, plaintiff was diagnosed with acute abdominal pain and discharged home. In the event her symptoms did not completely resolve, plaintiff was told "to follow up with Dr. Steiner, who she [chose] as her primary care provider."

¶ 22 In 2009, plaintiff moved back to Illinois. At her deposition, plaintiff testified that in December 2009, she fell off of a ladder and broke her left leg. She sought treatment at SBL Health Center. Medical records show that on December 10, 2009, plaintiff underwent X-rays based on reports of pain in her pelvis after a fall. Findings on the radiology report include "staples overlying the pubic bone from prior surgical procedure." The radiologist's impression was "NO ACUTE PATHOLOGY REFERABLE TO THE PELVIS."

¶ 23 On August 7, 2012, plaintiff returned to Dr. Rives for care. She reported experiencing pain on the right side of her bladder, incontinence, and pressure and burning in her bladder. Plaintiff also complained that intercourse was almost impossible due to incontinence and discomfort. On August 17, 2012, plaintiff underwent a pelvic bone scan at SBL Health Center. The results of the scan were normal with no evidence of osteitus pubis. On August 27, 2012, Dr. Rives performed a second bladder surgery on plaintiff. Both her preoperative and postoperative diagnoses were "[u]rethral insufficiency with secondary stress urinary incontinence, interstitial cystitis."

¶ 24 On September 4, 2012, plaintiff followed up with Dr. Rives. She reported having multiple concerns including pain in her right flank after ingesting food, groin discomfort, and pain when leaning against a countertop. On examination, Dr. Rives noted "tenderness over [plaintiff's] symphysis" but that he could not "feel any irregularity with certainty." He noted the

following impression:

> "Satisfactory postoperative course. Multiple areas of pain. discussion was then held with patient. I did not advise expiration in trying to remove her anchors in the face of a normal bone scan. I did offer to give her a Medrol Dosepak to see if that would help. The patient stated that the pain was not that bad. I told the patient we can try Elmiron to see if that would help her discomfort in the flank area. She does not believe that is necessary at this time."

Dr. Rives recommended limited activity for plaintiff for five weeks and that plaintiff return when necessary.

¶ 25 On August 27, 2014, plaintiff underwent a CT scan of her abdomen and pelvis at SBL Health Center in connection with complaints of pain. A report from the scan shows the following finding: "Question of postoperative anchors surrounding the pubic symphysis with right sided metallic linear radiodensity partially within the anterior right pubic bone; correlate with surgical history. This measures up to approximately 2.2 cm."

¶ 26 On June 11, 2015, plaintiff was seen at SBL Health Center's emergency department by Dr. Lucas Catt. She reported noticing a small bump in the pubic area that got bigger and more painful. Plaintiff reported pain radiating to her lower back and right flank. Dr. Catt noted a CT scan of plaintiff's abdomen and pelvis showed "a history of prior surgery to the pubic symphysis with a right symphysis hardware extruding from the bone with the tip in the subcutaneous fat and [a] small amount of edema surrounding the portion of the hardware ***." He assessed plaintiff as having pubic cellulitis overlying retained pubic symphysis hardware.

¶ 27 Following a hearing in October 2018, the trial court granted defendants' supple-

mental motions for partial summary judgment. In ruling on the motions, the trial court determined that although there was a genuine issue of material fact as to whether there was a continuing course of negligent treatment of plaintiff by defendants from the time of the January 2001 bladder surgery to July 2004, there was no such issue regarding treatment occurring after that time. The court found plaintiff completed her course of treatment with Dr. Rives following their visit on July 9, 2004, when Dr. Rives noted an impression of pelvic discomfort and recommended that plaintiff see a rheumatologist in Alaska. Thereafter, plaintiff did not seek treatment with either defendant until December 2009, when she was seen at SBL Health Center for a leg fracture, and August 2012, when she saw Dr. Rives for bladder incontinence. The court concluded that, as a matter of law, the treatment plaintiff received in December 2009 and August 2012 was not a continuation of her previous course of treatment with defendants. Accordingly, it held that the four-year statute of repose barred plaintiff from recovering damages for any alleged negligence by defendants that occurred before May 27, 2012—four years prior to the filing of her complaint.

¶ 28 The trial court further found that neither defendant was equitably estopped from asserting the statute of repose as a defense. It determined that supreme court case authority required plaintiff to establish that Dr. Rives knew his representations to plaintiff were untrue when he made them. The court determined there was no dispute in the instant case that Dr. Rives "was unaware that the metal applicator was left within *** plaintiff's body after the surgery in 2001." It further held that plaintiff could not establish any facts that would demonstrate that Dr. Rives made representations that he knew were untrue. Finally, the court also made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. March 8, 2016), which allowed its order to be imme-

diately appealable. In November 2018, the court entered a written order consistent with its oral ruling.

¶ 29 This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 A. Standard of Review

¶ 32 On appeal, plaintiff challenges the trial court's grant of defendants' motions for partial summary judgment on the basis of the statute of repose.

¶ 33 "Summary judgment is proper when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Stevens v. McGuireWoods LLP*, 2015 IL 118652, ¶ 11, 43 N.E.3d 923 (quoting 735 ILCS 5/2-1005(c) (West 2012)). "The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists." *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14, 27 N.E.3d 67. "While plaintiffs are not required to prove their case at summary judgment stage, they must present some facts to support the elements of their claims." *Vaughn v. Nevill*, 286 Ill. App. 3d 928, 933, 677 N.E.2d 482, 486 (1997). On appeal, a trial court's summary judgment ruling is subject to *de novo* review. *Stevens*, 2015 IL 118652, ¶ 11.

¶ 34 The four-year medical malpractice statute of repose is contained in section 13-212(a) of the Code of Civil Procedure (Code) (735 ILCS 5/13-212(a) (West 2014)). That section provides as follows:

"Except as provided in Section 13-215 of this Act, no action for damages for inju-

> ry or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but *in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death*." (Emphasis added.) 735 ILCS 5/13-212(a) (West 2014).

¶ 35 Section 13-212(a)'s "four-year repose period is triggered by the occurrence of the act or omission that caused the injury" and may bar an action "even before the plaintiff has discovered the injury." *Orlak v. Loyola University Health System*, 228 Ill. 2d 1, 7-8, 885 N.E.2d 999, 1003 (2007). Although the statute of repose "may result in harsh consequences, the legislature enacted the statute of repose for the specific purpose of curtailing the 'long tail' exposure to medical malpractice claims brought about by the advent of the discovery rule." *Id.* at 8.

¶ 36 B. Equitable Estoppel

¶ 37 In arguing that the trial court erred in granting defendants' motions for partial summary judgment, plaintiff first contends that defendants were barred from asserting a statute of repose defense by the doctrine of equitable estoppel due to their own false or misleading statements. Plaintiff asserts that the court applied the wrong standard when evaluating her equitable estoppel claim, erroneously concluding that she was required to show that defendants

knowingly made false statements. She maintains, instead, that equitable estoppel does not require knowledge of the falsity of a statement when a fiduciary relationship is involved.

¶ 38 The doctrine of equitable estoppel may be applied to bar a defendant from raising a statute of repose defense. *Mega v. Holy Cross Hospital*, 111 Ill. 2d 416, 425, 490 N.E.2d 665, 669 (1986). "The general rule is that where a person by his or her statements and conduct leads a party to do something that the party would not have done but for such statements and conduct, that person will not be allowed to deny his or her words or acts to the damage of the other party." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313, 751 N.E.2d 1150, 1157 (2001).

¶ 39 Our supreme court has repeatedly set forth six elements that a party must show to establish equitable estoppel. *Falcon Funding, LLC v. City of Elgin*, 399 Ill. App. 3d 142, 157, 924 N.E.2d 1216, 1229 (2010) (noting that the supreme court has set forth six elements of equitable estoppel "over at least the last 20 years"); see also *Orlak*, 228 Ill. 2d at 21-22; *DeLuna v. Burciaga*, 223 Ill. 2d 49, 82-83, 857 N.E. 2d 229, 249 (2006); *Geddes*, 196 Ill. 2d at 313; *Parks v. Kownacki*, 193 Ill. 2d 164, 180, 737 N.E.2d 287, 296 (2000); *Vaughn v. Speaker*, 126 Ill. 2d 150, 162-63, 533 N.E.2d 885, 890 (1988); *Ozier v. Haines*, 411 Ill. 160, 163-64, 103 N.E.2d 485, 487 (1952); *Lowenberg v. Booth*, 330 Ill. 548, 555-56, 162 N.E. 191, 195 (1928). In the context of this case, supreme court authority required plaintiff to demonstrate that (1) defendants misrepresented or concealed material facts; (2) defendants knew at the time they made the representations that they were untrue; (3) she did not know that the representations were untrue when they were made and when she decided to act, or not, upon the representations; (4) defendants intended or reasonably expected that she would determine whether to act, or not, based upon the representations; (5) she reasonably relied upon the defendants' representations in good faith to her detri-

ment; and (6) she would be prejudiced by her reliance on defendants' representations if defendants were permitted to deny the truth thereof. See *Orlak*, 228 Ill. 2d at 21-22 (quoting *Deluna*, 223 Ill. 2d at 82-83).

¶ 40 The knowledge required by the second element of an equitable estoppel analysis "need not be actual but may be implied." *Vaughn*, 126 Ill. 2d at 162. Additionally, for equitable estoppel to apply, "[i]t is not necessary that the defendant intentionally mislead or deceive the plaintiff." *Orlak*, 228 Ill. 2d at 22. Instead, "[a]ll that is required is that the plaintiff reasonably relied on the defendant's conduct or representations in delaying suit." *Id.*

¶ 41 As stated, plaintiff argues that equitable estoppel in the context of a fiduciary relationship does not require knowledge of the falsity of a representation by the party against whom equitable estoppel is alleged. To support her argument, plaintiff primarily relies on the supreme court's decisions in the companion cases of *Witherell v. Weimer*, 85 Ill. 2d 146, 421 N.E.2d 869 (1981) (hereinafter (*Witherell I*) and *Witherell v. Weimer*, 118 Ill. 2d 321, 515 N.E.2d 68 (1987) (hereinafter *Witherell II*). Relevant to this appeal, the plaintiff in those cases filed an action against her doctors, alleging she sustained severe injuries to her legs due to their negligent conduct. *Witherell I*, 85 Ill. 2d at 148-49. The trial court dismissed the plaintiff's claims on the basis that she failed to bring suit within the allowable time limits. *Id.* at 148.

¶ 42 The facts at issue in those cases showed the plaintiff was prescribed birth control pills and began to experience pain and spasms in her legs shortly thereafter. *Id.* at 149. She consulted with the defendant doctors and was hospitalized because of a suspected blood clot in her leg. *Id.* The doctor who prescribed the pills told the plaintiff that she had a "muscle condition" that she would have to live with. *Id.* The plaintiff continued to experience leg problems, which

progressively worsened. *Id.* However, the prescribing doctor maintained that the plaintiff did not have to worry, the pills did not cause blood clots, the pills were safe, and that the pills would not hurt the plaintiff. *Id.* Over a period of several years, he repeatedly reassured the plaintiff that her leg problems were related to her "muscle condition" and not the pills. *Id.* at 149-50. He informed her that the blood clot she was previously treated for was gone and that she did not have blood clots. *Id.* at 150. Ultimately, the plaintiff consulted with a different physician who diagnosed her with bilateral thrombosis and informed the plaintiff that her veins were occluded from old blood clots. *Id.* In its factual recitation of the case, the supreme court noted as follows:

> "Excerpts from the Ortho-Novum product information apparently contained in the physician's desk reference book indicate that 'A statistically significant association has been demonstrated between use of oral contraceptives and the following serious adverse reactions: Thrombophlebitis ***.' It also states: 'The physician should be alert to the earliest manifestations of thrombotic and thromboembotic disorders, thrombophlebitis ***. Should any of these occur or be suspected, the drug should be discontinued immediately.' " *Id.* at 151.

¶ 43 On review, the supreme court determined the trial court erred, holding that principles of equitable estoppel applied and the plaintiff was "entitled to an opportunity to prove the allegations upon which the estoppel and her cause of action are based." *Id.* at 160. In reaching its decision, the court cited case authority for "the maxim that no man may take advantage of his own wrong" and that equitable estoppel includes instances of "unintentional deception." (Internal quotation marks omitted.) *Id.* at 158-59. It further stated as follows:

> " 'Moreover, it is not necessary that the defendant intentionally mislead or de-

> ceive the plaintiff, or even intend by its conduct to induce delay. (Citations.) Rather, all that is necessary for invocation of the doctrine of equitable estoppel is that the plaintiff reasonably rely on the defendant's conduct or representations in forbearing suit." *Id.* at 159.

¶ 44 Additionally, the supreme court characterized the doctor-patient relationship as a fiduciary one, noting that "the patient normally reposes a great deal of trust and confidence in the doctor, accepting his recommendations without question." *Id.* It concluded that the doctors in the case could be estopped by their past conduct "from now urging that [the] plaintiff should have sooner complained against them for a condition they repeatedly assured her she did not have." *Id.* at 160.

¶ 45 In *Witherell II*, 188 Ill. 2d at 324-25, the matter returned to the supreme court for review following a trial and a verdict in favor of the plaintiff. One of the issues presented for review was whether the jury's verdict on the issue of equitable estoppel was against the manifest weight of the evidence. *Id.* at 329. In finding that it was not, the court stated that "[t]he defendant is estopped from asserting the limitations bar if the plaintiff's failure to act within the statutory period results from reasonable reliance on the defendant's conduct or representations." *Id.* at 330. Again, it also stated that an intent to mislead, deceive, or delay by the defendant was unnecessary. *Id.*

¶ 46 In reviewing the relevant supreme court case authority, we cannot agree with plaintiff's conclusion that she was not required to establish that defendants knowingly made untrue representations for equitable estoppel to apply. Both before and after *Witherell I and Witherell II*, supreme court decisions addressing the issue of equitable estoppel uniformly set forth six

elements that are to be considered when determining whether the doctrine applies. Neither *Witherell I* nor *Witherell II* explicitly discusses or rejects the knowledge of falsity element of equitable estoppel or even references all of the six elements. Rather, the discussion in both cases indicates the court's primary concerns were the elements of intent and reliance. There is no indication in either case that the supreme court intended to modify the long-held requirements of equitable estoppel.

¶ 47 We otherwise find no legal authority for plaintiff's argument that the presence of a fiduciary relationship between the parties renders the second element, *i.e.*, the knowledge of falsity element, in an equitable estoppel analysis unnecessary. Instead, we note that in *Deluna*, 223 Ill. 2d at 82-83, a case involving a legal malpractice cause of action and fiduciary relationships, the court continued to set forth the six elements of equitable estoppel without qualification.

¶ 48 Here, we find that to sufficiently allege equitable estoppel against defendants, plaintiff was required to allege that defendants made representations they knew were false and present some facts to support that element of her claim. No such allegations or factual support was presented in this case. Accordingly, the doctrine of equitable estoppel did not toll the statute-of-repose period.

¶ 49 C. Continuing Course of Negligent Treatment

¶ 50 On appeal, plaintiff next argues that the trial court erred in granting defendants' motions for partial summary judgment because she alleged sufficient facts to show a continuing course of negligent treatment by defendants. Alternatively, she asserts that the case involves disputed issues of fact that should be resolved by a jury.

¶ 51 "[A] plaintiff is not barred by the statute of repose if she can demonstrate that

there was an ongoing course of continuous *negligent* medical treatment." (Emphasis in original.) *Cunningham v. Huffman*, 154 Ill. 2d 398, 406, 609 N.E.2d 321, 325 (1993). "To prevail under this cause of action a plaintiff must demonstrate: (1) that there was a continuous and unbroken course of *negligent* treatment, and (2) that the treatment was so related as to constitute one continuing wrong." (Emphasis in original.) *Id.* "[O]nce treatment by the negligent physician is discontinued, the statute of repose begins to run, regardless of whether or not the patient is aware of the negligence at termination of treatment." *Id.*

¶ 52 Misdiagnosis is not a continuous act. *Jones v. Dettro*, 308 Ill. App. 3d 494, 498, 720 N.E.2d 343, 346 (1999). Additionally, "[i]ntermittent or occasional medical services at substantial intervals do not satisfy the continuous treatment doctrine." *Jones*, 308 Ill. App. 3d at 498; see also *Collins v. Sullivan*, 287 Ill. App. 3d 999, 1002, 679 N.E.2d 423, 425 (1997) (finding that a doctor's treatment was not continuous where almost nine years passed between treatment dates); *Flynn v. Szwed*, 224 Ill. App. 3d 107, 115, 586 N.E.2d 539, 545 (1991) (finding treatment was not continuous, but intermittent and sporadic where it involved "a year-long regular course of treatment, followed by a 15-month gap, two weeks of treatment and a 12-month gap").

¶ 53 Here, the undisputed facts show significant gaps in plaintiff's treatment with both defendants such that she cannot establish a continuing course of negligent medical treatment. The record shows plaintiff underwent bladder surgery in January 2001 with Dr. Rives. She followed up with him relative to that surgery in February and March 2001. A period of approximately 3½ years then elapsed before plaintiff next had contact with defendants in June and July 2004. Following that approximate two-month period of treatment in 2004, plaintiff did not return to SBL Health Center until December 2009, over five years later, and in connection with a bro-

ken leg. She did not see Dr. Rives again until August 2012, over eight years after she last received treatment from him.

¶ 54 Given the considerable gaps in plaintiff's treatment with defendants, we find it is most appropriately characterized as intermittent and not continuous. Like in *Collins*, 287 Ill. App. 3d at 1002, which involved a nine-year gap in treatment, "[t]o accept plaintiff's argument would nullify the purpose of section 13-212 [of the Code] and conflict with the legislature's goal of producing finality to the exposure of medical providers to suit." Accordingly, the trial court did not err in finding the statute of repose was applicable to plaintiff's claims against defendants in this case and granting their motions for partial summary judgment.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the trial court's judgment.

¶ 57 Affirmed.