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Practice and Pleading--Statute of Limitations--Malpractice (Breedlove v. Aiken, 85 Ga. App. 719 (1952))

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in the *Baumann* case has been severely criticized,[19] subsequent New York decisions have recognized it as precedent,[20] refusing to enjoin the unauthorized use of a plaintiff's name unless it interfered with a property right.[21]

To support the injunction granted in the instant case, the court recognized a property right in a name. In so doing, however, it merely stated that a wife has ". . . a property right in the . . . protection of her good name . . . ," without giving any interpretation of, or authority for, that phrase.[22]

Although it would be difficult to predict the outcome of a future case on the same facts, this present decision follows an apparent tendency of modern equity to protect personal rights by liberalizing the traditionally rigid concept of property rights.

PRACTICE AND PLEADING — STATUTE OF LIMITATIONS — MALPRACTICE.—Defendant-physician performed two unauthorized operations on plaintiff, on January 14, 1949, but plaintiff was not informed of these until January 28, 1949. This malpractice[1] suit was commenced on January 20, 1951. The defendant's motion to dismiss was granted on the ground that the action was barred by the two year personal injury statute of limitations.[2] The Georgia Court of

[19] *See* Baumann v. Baumann, *supra* note 18 at 390-5, 165 N. E. at 822-4 (dissenting opinions); see Note, 4 ST. JOHN'S L. REV. 100 (1929).

[20] See Lowe v. Lowe, 241 App. Div. 711, 269 N. Y. Supp. 994 (1st Dep't), *rev'd*, 265 N. Y. 197, 192 N. E. 291 (1934); Somberg v. Somberg, 238 App. Div. 723, 265 N. Y. Supp. 223 (1st Dep't 1933), *rev'd*, 263 N. Y. 1, 188 N. E. 137 (1934); Metlis v. Metlis, 104 N. Y. S. 2d 407 (Sup. Ct. 1951); Marquis v. Marquis, 178 Misc. 702, 35 N. Y. S. 2d 675 (Sup. Ct. 1942); *cf.* Spitzer v. Spitzer, 191 Misc. 343, 77 N. Y. S. 2d 279 (Sup. Ct. 1947); Fondiller v. Fondiller, 182 Misc. 628, 50 N. Y. S. 2d 393 (Sup. Ct. 1944); Kiebler v. Kiebler, 170 Misc. 81, 9 N. Y. S. 2d 909 (Sup. Ct. 1939).

[21] Kranz v. Kranz, 169 Misc. 658, 7 N. Y. S. 2d 830 (Sup. Ct. 1938) (confusion of names deprived plaintiff of opportunities to obtain gainful employment).

[22] Niver v. Niver, 200 Misc. 993, 995, 111 N. Y. S. 2d 889, 891 (Sup. Ct. 1951).

[1] "Malpractice . . . means bad or unskillful practice, resulting in injury to the patient, and comprises all acts and omissions of a physician or surgeon as such to a patient as such, which may make the physician or surgeon either civilly or criminally liable." HERZOG, MEDICAL JURISPRUDENCE 153, § 180 (1931). It has been stated that an unauthorized operation, while an assault and battery, is also malpractice, even though no negligence is charged. Physicians' and Dentists' Bureau v. Dray, 8 Wash. 2d 38, 111 P. 2d 568 (1941); *see* Bakewell v. Kahle, 232 P. 2d 127, 129 (Mont. 1951).

[2] The remedy for malpractice in some jurisdictions, including Georgia, lies

Appeals reversed, and *held* that, because of the fiduciary relationship between physician and patient, the non-disclosure of the unauthorized operations constituted actual fraud, thus bringing the case within the fraud statute of limitations, which ran from the time plaintiff learned of the operations. *Breedlove v. Aiken,* 85 Ga. App. 719, 70 S. E. 2d 85 (1952).

The maximum time within which an action for malpractice must be commenced in the United States corresponds closely to that limiting other types of personal injury actions such as assault and battery.[3] An example of the law prevalent in this country is the New York statute,[4] which provides that a malpractice suit cannot be brought after two years from the date the cause of action accrues.[5] This limitation was imposed because of the legislative desire to protect doctors from a protracted period of uncertainty, during which they might be sued at any time for occurrences long-since forgotten.[6]

A specific act of malpractice may consist of either negligence in treatment or a deliberate tort.[7] Where there is no concealment of the wrongful act, there is no problem in applying the statute of limitations; but where the tort is fraudulently concealed,[8] it is difficult to determine when the cause of action should accrue. Because of the fiduciary relationship between doctor and patient,[9] New York has

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in an action for personal injuries, while in New York and other states, a distinction is made in the form of the action, and the remedy lies in a suit specifically for malpractice. See, *e.g.*, GA. CIV. CODE § 3-1004 (1933); ILL. REV. STAT. c. 83, § 24 (1949); N. J. REV. STAT. 2:24-2 (1937); NEB. REV. STAT. § 25-208 (1943); N. Y. CIV. PRAC. ACT § 50 (1952).

[3] See, *e.g.*, CAL. CODE CIV. PROC. § 340 (1951); ANN. LAWS MASS. c. 260, § 4 (1932); PA. STAT. ANN. tit. 12, § 34 (Purdon, 1895); TEX. STAT. art. 5526 (Vernon, 1948); *see* Physicians' and Dentists' Bureau v. Dray, *supra* note 1, 111 P. 2d at 569.

[4] *Compare* N. Y. CIV. PRAC. ACT § 50 (1952) ("The following actions must be commenced within two years after the *cause of action has accrued:*

"1. An action to recover damages for . . . malpractice.") (emphasis added), *with* GA. CIV. CODE § 3-1004 (1933) ("Actions for injuries to the person shall be brought within two years after the *right of action accrues* . . . .") (emphasis added).

[5] *See* Barnes v. Gardner, 170 Misc. 604, 606, 9 N. Y. S. 2d 785, 787 (Sup. Ct. 1939). By way of contrast, the English statute of limitations bars the action after six years from the date the cause of action accrues, whether the action be "founded on simple contract or on tort." Limitation Act, 1939, 2 & 3 GEO. 6, c. 21, § 2.

[6] *See* Albert v. Sherman, 167 Tenn. 133, 67 S. W. 2d 140, 142 (1934). "Recognition of a contrary rule would permit a plaintiff afflicted with some malady to trace that malady to an original cause alleged to have accrued years and years ago. No practicing physician or dentist would ever be safe. The origin of disease is involved in uncertainty at best."

[7] Franklyn v. Peabody, 249 Mich. 363, 228 N. W. 681 (1930); Nolan v. Kechijian, 75 R. I. 165, 64 A. 2d 866 (1949).

[8] Brysen v. Aven, 32 Ga. App. 721, 124 S. E. 553 (1924) (syllabus by the court).

[9] Tabor v. Clifton, 63 Ga. App. 768, 12 S. E. 2d 137 (1940); *see* Schmuck-

construed a doctor's concealment of an injury to be malpractice, and therefore subject to the malpractice statute of limitations.[10] Thus, unless the injury is discovered and an action brought before the statute has run, relief is denied, and the doctor is thereby allowed to take advantage of his own wrong.[11]

To avoid this undesirable result, there have been various attempts to circumvent the statute. New York, following the minority,[12] permits a patient to sue for breach of contract,[13] provided the complaint is so framed as to state only a cause of action *ex contractu*.[14] This remedy affords but partial relief, however, since recovery is limited to damages naturally flowing from the breach, and does not compensate for conscious pain and suffering.[15] New York has also allowed an action where the treatments for the same illness extended beyond the two-year period, and the suit was brought within two years from the termination of the doctor-patient relationship.[16] This, too, is an incomplete solution, since it has no effect on cases where the relationship was not continued subsequent to the injury.

The construction of the Georgia statute, as followed in the instant case, would seem to be the most practical of any applied by

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ing v. Mayo, 183 Minn. 37, 235 N. W. 633 (1931); Moses v. Miller, 202 Okla. 605, 216 P. 2d 979, 983 (1950); see 21 ST. JOHN'S L. REV. 77, 79 (1946).

[10] Tulloch v. Haselo, 218 App. Div. 313, 218 N. Y. Supp. 139 (3d Dep't 1926). "The failure to speak and to disclose his negligent act was a breach of duty which constituted malpractice." *Id.* at 317, 218 N. Y. Supp. at 142; see PRASHKER, NEW YORK PRACTICE 36, 39 (2d ed. 1951).

[11] *See* Schmucking v. Mayo, *supra* note 9. ". . . (A) person should not be permitted to shield himself behind the statute of limitations where his own fraud has placed him. He should not be permitted to profit by his own wrong, and it would strike the moral sense strangely to permit him to do so." *Id.*, 235 N. W. at 634; see 16 ST. JOHN'S L. REV. 101, 103 (1941).

[12] See cases collected in Note, 74 A. L. R. 1256 (1931).

[13] Conklin v. Draper, 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dep't), *aff'd*, 254 N. Y. 620, 173 N. E. 892 (1930); *accord*, Keating v. Perkins, 250 App. Div. 9, 293 N. Y. Supp. 197 (1st Dep't 1937); *see* Frankel v. Wolper, 181 App. Div. 485, 486, 169 N. Y. Supp. 15, 16 (2d Dep't 1918), *aff'd*, 228 N. Y. 582, 127 N. E. 913 (1920); Monahan v. Devinny, 223 App. Div. 547, 548, 229 N. Y. Supp. 60, 61 (3d Dep't 1928).

[14] Allegations as to pain and suffering are unsuited to a contract action and hence the suit falls into the tort category to which the malpractice statute of limitations applies. Horowitz v. Bogart, 218 App. Div. 158, 217 N. Y. Supp. 881 (1st Dep't 1926); *see* Monahan v. Devinny, *supra* note 13.

[15] Conklin v. Draper, *supra* note 13; *see* Monahan v. Devinny, *supra* note 13 at 548, 229 N. Y. Supp. at 61; see 1942 LEG. DOC. No. 65(E), 1942 REPORT, N. Y. LAW REVISION COMMISSION 167, 172; PRASHKER, NEW YORK PRACTICE 36, 37 (2d ed. 1951).

[16] Sly v. Van Lengen, 120 Misc. 420, 198 N. Y. Supp. 608 (Sup. Ct. 1923); Nervick v. Fine, 195 Misc. 464, 87 N. Y. S. 2d 534, *aff'd*, 275 App. Div. 1043, 91 N. Y. S. 2d 924 (2d Dep't 1949). This rule has been applied in other jurisdictions. Petrucci v. Heidenreich, 43 Cal. App. 2d 561, 111 P. 2d 421 (1941); Thatcher v. DeTar, 351 Mo. 603, 173 S. W. 2d 760 (1943); *see* Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P. 2d 82, 84 (1942).

the courts thus far. Here the court held, that where a duty to speak exists because of a fiduciary relationship, and there is a concealment of material facts, the fraud statute of limitations is applicable,[17] and the plaintiff has two years from the date he discovered the injury within which to bring his action.

New York has tried and rejected this interpretation, on the theory that it is the malpractice, and not the concealment, which is the proximate cause of the injury.[18] Although the wording of the New York fraud [19] and malpractice statutes is such that they would appear to be open to a judicial interpretation similar to that in the case under discussion, it is not likely to occur, since it would involve the overruling of case law, a step the courts are always reluctant to take.

An alternate solution, suggested by the New York Law Revision Commission, is a statutory amendment providing that an action may be commenced within one year after the date of discovery, but not more than six years after the occurrence of the injury.[20] This recommendation, which would remove the problem from the courts, appears to be the most comprehensive and satisfactory of any yet proposed.[21] Not only would it apply to cases where there was no fraudulent concealment, but it would preserve the original purpose of the statute—the protection of doctors from an unduly protracted period of liability. This latter consideration, however, has been weakened by the prevalence of malpractice insurance today.[22]

It is submitted that the gravity of the problem of fraudulently concealed malpractice merits the serious attention of both the legis-

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[17] Brysen v. Aven, 32 Ga. App. 721, 124 S. E. 553 (1924); Buchanan v. Kull, 323 Mich. 381, 35 N. W. 2d 351 (1949); Schmucking v. Mayo, 183 Minn. 37, 235 N. W. 633 (1931).

[18] "The concealment alleged is not the wrong which must be made the gravamen of 'an action to procure a judgment on the ground of fraud' within Civil Practice Act, section 48." Tulloch v. Haselo, 218 App. Div. 313, 316, 218 N. Y. Supp. 139, 142 (1st Dep't), *aff'd*, 254 N. Y. 620, 173 N. E. 892 (1930).

[19] *Compare* N. Y. CIV. PRAC. ACT § 48 (1952) ("The following actions must be commenced within six years after the cause of action has accrued: . . . 5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."), *with* GA. CIV. CODE § 3-807 (1933) ("If the defendant, or those under whom he claims, shall have been guilty of a fraud by which the plaintiff shall have been debarred or deterred from his action, the period of limitations shall run only from the time of the discovery of the fraud.").

[20] See 1942 LEG. DOC. No. 65(E), 1942 REPORT, N. Y. LAW REVISION COMMISSION 135.

[21] "Its purpose is to give to a person injured by malpractice a reasonable opportunity to discover the facts on which his claim is based, and to require prompt action on such claim when the facts are discovered." *Id.* at 136; see 16 ST. JOHN'S L. REV. 101, 108 (1941); PRASHKER, NEW YORK PRACTICE 36, 39 (2d ed. 1951).

[22] See 21 ST. JOHN'S L. REV. 77, 79 (1946).

lature and the courts, to the extent that a prompt attempt should be made to solve it before the law in this respect becomes merely a tool to be used by the unscrupulous, to the detriment, not only of those injured, but of the reputation of the medical profession itself.

PROPERTY—ADVERSE POSSESSION—CLAIM OF RIGHT.—In 1912, the defendants began to develop and cultivate part of the land adjoining their own, although aware that they had no rights there. Plaintiff purchased this adjoining property in 1947, and then initiated the present ejectment action. Defendants claimed that they had title by adverse possession. In reversing the appellate court decision, the Court of Appeals *held* that, under the statutes,[1] there must be a claim of right, or hostility, in addition to actual occupation, as evidenced by a sufficient cultivation of the land.[2] *Van Valkenburgh v. Lutz,* 304 N. Y. 95, 106 N. E. 2d 28 (1952).[3]

In England adverse possession commenced under the statute of Henry III,[4] as a means of getting land into productive use. To accomplish this end, the law provided that if a settler would occupy the premises for a stipulated period he would acquire, for all practical purposes, a fee simple in the land. The true owner was simultaneously penalized if he failed to pursue his remedy within that

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[1] N. Y. CIV. PRAC. ACT § 39 (1952). "Adverse possession under claim of title not written. Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely."

N. Y. CIV. PRAC. ACT § 40 (1952). "Essentials of adverse possession under claim of title not written." For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

"1. Where it has been protected by a substantial inclosure.

"2. Where it has been usually cultivated and improved."

[2] By way of dicta, the court discussed adverse possession through mistaken entry. It was pointed out that "Lutz himself testified that when he built the garage he had no survey and thought he was getting it on his own property, which certainly falls short of establishing that he did it under a claim of title hostile to the true owner." Van Valkenburgh v. Lutz, 304 N. Y. 95, 99, 106 N. E. 2d 28, 30 (1952). On its face, this statement seems to contradict the present law. Roulston v. Stewart, 40 App. Div. 200, 57 N. Y. Supp. 1061 (2d Dep't 1899). It is submitted that what the Court meant was that title to all the land could not pass where the original entry was by mistake, but only to that part which was occupied.

[3] Loughran, Ch. J., Fuld and Desmond, JJ., dissenting.

[4] WALSH, REAL PROPERTY 783 (2d ed. 1937).