

Winter 2003

Exception Becomes the Rule: The Missouri Supreme Court Expands th Continuing Care Exception - *Montgomery v. South County Radiologists, Inc., The*

James B. York

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

James B. York, *Exception Becomes the Rule: The Missouri Supreme Court Expands th Continuing Care Exception - Montgomery v. South County Radiologists, Inc., The*, 68 Mo. L. REV. (2003)

Available at: <https://scholarship.law.missouri.edu/mlr/vol68/iss1/16>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

The Exception Becomes the Rule: The Missouri Supreme Court Expands the Continuing Care Exception

*Montgomery v. South County Radiologists, Inc.*¹

I. INTRODUCTION

For over sixty years, physicians in Missouri have relied on the two-year statute of limitation on medical malpractice claims and its limited number of exceptions to avoid potential liability arising from stale claims.² One of those exceptions, the continuing care exception, provides a limited set of circumstances in which plaintiffs can bring claims after the running of the two-year statute of limitation.³ Until recently, the continuing care exception was limited in its application and allowed physicians to avoid stale claims while providing patients with a clear time frame in which to bring their actions.⁴ That limited application, however, has been changed drastically by the Missouri Supreme Court's decision in *Montgomery v. South County Radiologists, Inc.*⁵

This Note addresses the importance of the Missouri Supreme Court's decision in *Montgomery* and its future effect on the continuing care exception, the Missouri statute of limitation, and the health care environment in general. First, this Note examines the origins of the continuing care exception and its development throughout Missouri jurisprudence. This Note then reviews the majority's decision in *Montgomery* and argues that the Missouri Supreme Court inappropriately extended the scope of the exception. Finally, this Note suggests that the interpretation of the continuing care exception used by the majority in *Montgomery* offers no guidance for providers of auxiliary medical services, which will result in an overall increase in the cost of health care and result in the application of the exception in more cases than the Missouri statute of limitation, effectually transforming the exception into the rule.

II. FACTS AND HOLDING

On February 14, 1995, Evan Montgomery was referred to St. Anthony's Medical Center by his neurosurgeon to have x-rays and an MRI on his lower back.⁶ On the same day, Dr. Szoko, a physician employed by South County

1. 49 S.W.3d 191 (Mo. 2001).

2. *Id.* at 193.

3. *See infra* note 15.

4. *Montgomery*, 49 S.W.3d at 194.

5. *See id.*

6. Evan Montgomery had previously suffered from chronic lower lumbar pain. *Id.*

Radiologists, Inc. (“SCR”),⁷ read and interpreted the x-ray films and MRI imaging of Evan Montgomery’s lower back.⁸ Persistent complications forced Montgomery back to St. Anthony’s for further x-rays and MRIs on July 31 and November 3 of the same year.⁹ Each time, a different physician employed by SCR reviewed and interpreted the x-rays and MRI films.¹⁰ After the first referral, it was common for patients to receive further radiological services at St. Anthony’s and it was South County’s “standard of care” to require its physicians to “review and compare previous radiologists’ reports and films.”¹¹ All three South County physicians failed to detect and diagnose an osteosarcoma (a cancerous tumor) on Montgomery’s spine.¹²

On May 23, 1997, Evan and Judith Montgomery filed suit against SCR and the three reviewing physicians employed by SCR for medical negligence.¹³ The circuit court judge granted Dr. Szoko’s motion for summary judgment and SCR’s motion for partial summary judgment with respect to the radiological services performed on February 14.¹⁴ Dr. Szoko and SCR alleged that the Montgomerys filed their action outside the established two-year statute of limitation.¹⁵ The trial court agreed and specifically noted that Dr. Szoko and

Thus, to isolate a cause, he was referred to St. Anthony’s Medical Center to obtain radiological services. *Id.*

7. South County Radiologists, Inc. is an entity that hires physicians specializing in the field of radiology to look at and interpret films taken by technicians at St. Anthony’s Medical Center. *Id.* Through a contractual relationship, SCR is the exclusive provider of radiology services at St. Anthony’s Medical Center. *Id.*

8. *Id.* at 193.

9. *Id.*

10. It was the established policy and practice of SCR to “assign radiologists on a rotating basis.” *Id.*

11. *Id.* “When a patient is first referred to SCR, a patient file—or ‘jacket’—is created, on which an SCR radiologist records patient diagnostics and information. Each time an SCR radiologist reviews films of a patient, the radiologist includes both the film and report in the patient’s jacket.” *Id.* at 192-93. At no time did any radiologist employed by South County have any personal contact with Montgomery. *Id.* at 193.

12. Approximately two weeks after the final referral with the SCR, Montgomery’s x-rays and MRI films were reviewed by a physician not employed by South County who subsequently detected the osteosarcoma. *Id.*

13. *Id.*

14. *Id.* at 192.

15. *Id.* at 193. The statute reads:

All actions against physicians, hospitals . . . and any other entity providing health care services and all employees of any of the foregoing acting in the course and scope of their employment, for damages for malpractice, negligence, error or mistake related to health care shall be brought within two years from the date of occurrence of the act of neglect complained of.

MO. REV. STAT. § 516.105 (2000).

SCR did not fall within the “continuing care” exception in its grant of summary judgment.¹⁶

Following the trial court’s decision, the Montgomerys appealed to the Eastern District of the Missouri Court of Appeals.¹⁷ On appeal, the Montgomerys alleged that there was a genuine issue of material fact regarding the trial court’s determination that the continuing care exception did not apply to Dr. Szoko and SCR.¹⁸ The court of appeals reversed and remanded the case back to the trial court with the majority holding that the continuing care exception did in fact apply to both Dr. Szoko and SCR.¹⁹ After the decision, the Missouri Supreme Court heard the case. The majority opinion, written by Judge Benton, held that the continuing care exception did not apply to Dr. Szoko. Thus, the grant of summary judgment with regard to him was appropriate. The continuing care exception did apply to SCR, however, and, thus, the granting of partial summary judgment with regard to SCR was improper. The court remanded the case for trial.²⁰ The majority held that SCR was an entity that provided continuing radiological services and, thus, had a duty of continuing care until its relationship with Mr. Montgomery ended.²¹ Chief Justice Limbaugh filed an opinion in which he concurred with the majority with regard to Dr. Szoko and dissented with regard to the application of the continuing care exception to SCR.²²

16. The continuing care exception is commonly known as the “Thatcher Rule,” as it was created in *Thatcher v. De Tar*, in which the Missouri Supreme Court held that “where the treatment is continuing and of such nature as to charge the medical [provider] with the duty of continuing care and treatment which is essential to recovery until the relation ceases,” the statute of limitation does not begin to run until that relationship ends. *Thatcher v. De Tar*, 173 S.W.2d 760, 762 (Mo. 1943); *see also Montgomery*, 49 S.W.3d at 194.

17. *Montgomery*, 49 S.W.3d at 193 (“The Montgomerys dismissed—without prejudice—their claims against the remaining defendants (including the other two SCR radiologists), making a final judgment for purposes of appeal.”).

18. *Montgomery v. S. County Radiologists, Inc.*, No. ED 77285, 2000 WL 1846432, at *3 (Mo. Ct. App. Dec. 19, 2000), *aff’d in part and rev’d in part*, 49 S.W.3d 191 (Mo. 2001).

19. *Montgomery*, 49 S.W.3d at 195.

20. *Id.*

21. *Id.*

22. *Id.* at 196-97.

III. LEGAL BACKGROUND

A. *Missouri's Statute of Limitation in Medical Malpractice Cases*

Prior to its current codification in Missouri Revised Statutes Section 516.105,²³ the statute of limitation in medical malpractice actions was amended and moved from Sections 1012 and 1016 to Sections 516.100 and 516.140 respectively.²⁴ A discussion of the history and the evolution of the statute is necessary to analyze its language and determine its specific purpose.

All statutes of limitation in Missouri have their general origins in the 1807 Territorial Laws of Missouri.²⁵ More specifically, however, the statute of limitation for medical negligence currently codified in Section 516.105 originated in an 1849 act.²⁶ In that act, for the first time, statutory language separated medical negligence from all other types of negligence and fixed a two-year statute of limitation for general acts of negligence²⁷ and a five-year statute of limitation for acts of medical negligence.²⁸ These separate periods for bringing actions for general negligence and actions for medical negligence remained until the General Assembly amended the section in 1921.²⁹ The amendment continued to separate actions for general negligence from actions for medical negligence, but it changed the statute of limitation for medical negligence from five to two years.³⁰ More importantly, the Missouri General Assembly changed the statutory language itself. Under the 1849 provisions, actions for both general negligence and medical negligence began to toll when damages were ascertainable.³¹ The 1921 amendment, however, changed the medical negligence provisions to read that all actions for medical negligence must be brought within two years "from the date of the act of neglect complained of."³² In 1945, the General Assembly reenacted much of former Section 1016, and added various causes of action, but the medical negligence portion remained distinct.³³ The reenacted provisions

23. *Id.* at 195.

24. *Laughlin v. Forgrave*, 432 S.W.2d 308, 311-13 (Mo. 1968).

25. *Id.* at 312.

26. Act of Feb. 4, 1849, art II, §§ 4-6, 1849 MO. LAWS 73, 74-75 (reforming the pleadings and practice in Courts of Justice in Missouri).

27. *Laughlin*, 432 S.W.2d at 312 ("Section 6, Article II of an 1849 Act . . . fixed a two year limitation on . . . an action for libel, slander, assault, battery, or false imprisonment").

28. *Id.* *But see infra* note 34.

29. *Laughlin*, 432 S.W.2d at 312.

30. *Id.*

31. *Id.* at 313.

32. *Id.* at 312.

33. *Id.* at 312-13. "Again, significantly, and indicative of its intent to treat malpractice actions differently from other actions so far as the date of commencement

were later compiled into a new chapter of the revised code and set out in Section 516.140.³⁴ The Missouri Supreme Court has explained the distinction between statutes related to the limitation on bringing a general negligence claim and a medical negligence claim as a clear sign of “legislative intent to treat particularly with medical malpractice actions and fix a specific date when the statute of limitation shall begin to run against those actions” and that date was to be different from the date when the statute is to run in all other actions.³⁵

In 1976, the legislature again modified the language setting forth the limitation on medical negligence claims found in Section 516.140.³⁶ The new Act, Section 516.105,³⁷ contained almost identical language as to the general statute of limitation rule (two years from the date of neglect), but it contained a specific exception with regard to acts of medical negligence which allow foreign objects to remain within the body after surgery has taken place.³⁸ In these rare instances, the statute provided that the two-year statute of limitation was not to begin running until the date of discovery.³⁹

B. The “Thatcher Rule”

The continuing care exception has its origins in the Missouri Supreme Court’s *Thatcher v. De Tar* decision.⁴⁰ In *Thatcher*, William Thatcher brought a medical malpractice suit against B. E. De Tar for leaving a surgical needle in his body during an appendectomy operation.⁴¹ The operation was completed on August 25, 1937, but Thatcher remained in considerable pain after the operation.⁴² Dr. De Tar continued to treat Thatcher until some time in October

of the running of the statute is concerned, the General Assembly, in 1945, repealed and reenacted [Section] 1016 . . . but left intact and unchanged the provision that malpractice actions shall be brought within two years from the date of the act of neglect.” *Id.* at 313.

34. *Id.* at 310. Section 516.140 stated the general rule that all “actions against physicians, surgeons, and others, for damages for malpractice . . . shall be brought within two years from the date of the act of neglect complained of.” *Id.*; see MO. REV. STAT. § 516.140 (1959).

35. *Laughlin*, 432 S.W.2d at 312.

36. *Weiss v. Rojanasathit*, 975 S.W.2d 113, 117 (Mo. 1998); see *infra* note 44.

37. *Weiss*, 975 S.W.2d at 117; see *Montgomery*, 49 S.W.3d at 195.

38. *Weiss*, 975 S.W.2d at 117. Section 516.105 has survived equal protection, due process, right of privacy, and special law challenges. *Ross v. Kansas City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397, 400-01 (Mo. 1980).

39. *Weiss*, 975 S.W.2d at 117.

40. 173 S.W.2d 760, 762 (Mo. 1943).

41. *Id.* at 761.

42. *Id.*

of 1939, when Thatcher obtained the services of another physician who discovered the needle and successfully removed it.⁴³

Thatcher did not file suit within the established two-year statute of limitation and the circuit court dismissed the action.⁴⁴ According to the statute at the time, all actions for medical malpractice must be “brought within two years from the date of the act of neglect complained of.”⁴⁵ In a unanimous decision, the Missouri Supreme Court held that common sense and notions of justice dictated that the statute of limitation in the case did not begin to run until “the treatment by the defendant ceased.”⁴⁶ Thus, when the treatment by a physician is continuing or of the type to charge the physician with a duty of continuing care essential to recovery, the statute of limitation does not begin to run until the relationship ceases.⁴⁷

In reaching its decision, the court relied on two key elements. First, the court relied on statutory authority found in Section 1012 of the Missouri Revised Statutes.⁴⁸ Section 1012 stated the general rule in Missouri that statutes of

43. *Id.* Dr. De Tar did not perform an x-ray on Thatcher at any time after the August 25, 1937 appendectomy nor during his subsequent treatment. *Id.*

44. *See* MO. REV. STAT. § 1016 (1939) (“All actions against physicians, surgeons, dentists, roentgenologists, nurses, hospitals and sanitariums for damages for malpractice, error, or mistake shall be brought within two years from the date of the act of neglect complained of.”).

45. *Id.* Today, the relevant portions of the 1939 version of Missouri Revised Statutes Section 1016 have been amended and are now codified as Missouri Revised Statutes Section 516.105 (2000), which reads as follows:

All actions against physicians, hospitals, dentists, registered or licensed practical nurses, optometrists, podiatrists, pharmacists, chiropractors, professional physical therapists, and any other entity providing health care services and all employees of any of the foregoing acting in the course and scope of their employment, for damages for malpractice, negligence, error or mistake related to health care shall be brought within two years from the date of occurrence of the act of neglect complained of, except that:

(1) In cases in which the act of neglect complained of is introducing and negligently permitting any foreign object to remain within the body of a living person, the action shall be brought within two years from the date of the discovery of such alleged negligence, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligence, whichever date first occurs.

Id. \

46. *Thatcher*, 173 S.W.2d at 762.

47. *Id.*

48. *Id.* Section 1012 read as follows:

Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of actions shall have accrued: Provided, that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong

limitation for causes of action based on negligence and breach of contract do not begin to run until the damages resulting therefrom are ascertainable.⁴⁹ Furthermore, Section 1012 expressly stated that it applies to all following sections, and, thus, the court found that the language in Section 1012 controlled actions for medical negligence under Section 1016.⁵⁰ The court, therefore, applied the “until damages resulting therefrom are ascertainable” rule to medical negligence cases and held that the statute of limitation did not run until the treatment by the physician ceased.⁵¹

Finally, the court relied on the holdings of other courts in various states that had similar statutes of limitation for medical negligence and had found a continuing care exception to apply to their respective statutes.⁵² Specifically, the court was persuaded by the decisions in three cases in Ohio and Minnesota.⁵³ From these cases, the Missouri Supreme Court found that a large number of jurisdictions had adopted the rule that statutes of limitation in medical negligence cases do not begin to run until the relationship with the treating physician ceases.⁵⁴ Furthermore, the treatment by a physician and the employment of the physician by the patient should be “considered as a whole,” and if malpractice occurs within the scope of that relationship, any statute of limitation should not run until the treatment itself ceases.⁵⁵

The Missouri Supreme Court first applied the “Thatcher rule,” or the continuing care exception,⁵⁶ as it applied to Section 516.105 in *Shaw v. Clough*.⁵⁷ In *Shaw*, Robert Shaw consulted a physician after experiencing considerable pain in his neck.⁵⁸ The physician diagnosed Shaw with cervical spondylitic disease and recommended a procedure in which a bone plug would be removed from Shaw’s thigh and fused with the bone in his neck to prevent further

is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

MO. REV. STAT. § 1012 (1939).

49. *Thatcher*, 173 S.W.2d at 762.

50. *Id.*

51. *Id.*

52. *Id.* (relying on the holdings in cases from California, Minnesota, New York, Ohio, and Wisconsin).

53. *See* *Schmitt v. Esser*, 226 N.W. 196, 197 (Minn. 1929); *Bowers v. Santee*, 124 N.E. 238, 240 (Ohio 1919); *Gillette v. Tucker*, 65 N.E. 865, 870 (Ohio 1902).

54. *Thatcher*, 173 S.W.2d at 763.

55. *Id.*; *see also* *Schmitt*, 226 N.W. at 197.

56. *See supra* note 16.

57. 597 S.W.2d 212 (Mo. Ct. App. 1980).

58. *Id.* at 214.

deterioration.⁵⁹ The physician performed the operation in March 1975 and continued to treat Shaw on an out-patient basis after that time.⁶⁰ Unfortunately, Shaw began having pain in his thigh where the physician had removed the bone plug.⁶¹ In August 1975, exploratory surgery on Shaw's thigh revealed that the physician had negligently performed the original procedure.⁶² Shaw brought suit in April 1977 against the physician for medical negligence.⁶³ The trial court granted the physician's motion for summary judgment based on the two-year statute of limitation in Section 516.105.⁶⁴ The Missouri Supreme Court, relying on the holding in *Thatcher v. De Tar*, however, held that the continuing care exception applied and that the statute of limitation period provided for in Section 516.105 did not begin to run until August 1975, when the relationship ended.⁶⁵ In its holding, the court stated that the doctor-patient relationship is an intensely personal one in which the patient places his or her trust in the physician's skills and judgment.⁶⁶ If the physician is negligent in his treatment, the physician should be held responsible and because the doctor-patient relationship is so personal, the statute of limitation should not begin to run until the relationship has ceased.

Following the *Shaw* decision, the Missouri courts of appeals considered the continuing care exception to Section 516.105 in a number of modern situations. First, in *Green v. Washington University Medical Center*,⁶⁷ the Eastern District refused to extend the continuing care exception to a group of medical providers, including two radiologists, who failed to diagnose the presence of a calcified kidney stone in the plaintiff.⁶⁸ The court found that the isolated actions by the group of physicians did not meet the definition set forth in *Thatcher*.⁶⁹ Specifically, the court stated that, because the radiologists only interpreted x-rays and an electrocardiogram and did not personally see or examine the plaintiff, they could not be charged with the duty of continuing care.⁷⁰

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* Exploratory surgery revealed "an entrapment of the lateral femoral cutaneous nerve at the donor site for the bone graft for the neck stabilization." *Id.*

63. *Id.* Specifically, Shaw alleged that the physician's care was negligent and that the damage done to his thigh was in fact permanent. *Id.*

64. *Id.* at 213.

65. *Id.* at 215-16.

66. *Shaw*, 597 S.W.2d at 215.

67. 761 S.W.2d 688 (Mo. Ct. App. 1988).

68. *Id.* at 689. The plaintiff brought suit approximately three years after the initial examination by Dr. Terrell, an internist, and the interpretation of x-rays and an electrocardiogram by Dr. Murphy and Dr. Garrett. *Id.*

69. *Id.* at 690. For a discussion of the holding in *Thatcher*, see *supra* note 16.

70. *Green*, 761 S.W.2d at 689-90.

Less than a year after the decision in *Green*, in *Shroyer v. McCarthy*,⁷¹ the Western District also refused to extend the continuing care exception.⁷² In this case, the plaintiff wished to avoid the limitation provided in Section 516.105 based on the time it took him to discover the identity of the physician who had caused the injury by negligently operating an electrical muscle stimulation unit.⁷³ The plaintiff was injured in September 1984, but the identity of the treating physician was not known until February 1987.⁷⁴ The court, relying on *Laughlin v. Forgrave*,⁷⁵ held that the General Assembly specifically used the words “from the date of the act of neglect.”⁷⁶ The court found, therefore, there was no exception in Missouri that stopped Section 516.105 from continuing to run while the plaintiff strove to identify his or her treating physician.⁷⁷

In 1997, in *Shah v. Lehman*,⁷⁸ the Eastern District refused to broaden the scope of the continuing care exception to include hospitals.⁷⁹ In that case, the plaintiff underwent two operations relating to the same hip condition at the defendant hospital within a nine-year period.⁸⁰ The court found no precedent in Missouri law for extending the continuing care exception to hospitals.⁸¹ Furthermore, the court found that a nine-year period between procedures did not meet the definition of continuing care.⁸²

The following year, the Western District Court of Appeals relied heavily on the holding in *Shah v. Lehman* in refusing to apply the continuing care exception to an adult care facility.⁸³ In *Dunagan v. Shalom Geriatric Center*,⁸⁴ the plaintiff brought suit seeking damages for five separate injuries that had occurred over a three-year period from April 1992 through September 1995.⁸⁵ The plaintiff filed

71. 769 S.W.2d 156 (Mo. Ct. App. 1989).

72. *Id.* at 160-61.

73. *Id.* at 157. The plaintiff sustained burns to his arm and wrist when a physician employed by Ford Motor Company negligently operated an electrical muscle stimulation unit. *Id.*

74. *Id.* at 160.

75. 432 S.W.2d 308 (Mo. 1968).

76. *Shroyer*, 769 S.W.2d at 160.

77. *Id.* at 160-61.

78. 953 S.W.2d 955 (Mo. Ct. App. 1997).

79. *Id.* at 958.

80. *Id.* at 956.

81. *Id.* at 958 (“Plaintiff has not referred us to any case that has applied the ‘continuing care’ exception to a hospital. Nor has our independent research disclosed any.”).

82. *Id.*

83. *See Dunagan v. Shalom Geriatric Ctr.*, 967 S.W.2d 285 (Mo. Ct. App. 1998).

84. *Id.* at 289.

85. *Id.* at 287. The plaintiff, an Alzheimer’s disease patient, alleged the following injuries: a fractured left leg on April 22, 1992; a fractured right hip on July 13, 1992; a

his action more than two years after the first three injuries had occurred.⁸⁶ Because of this, the trial court held that Section 516.105 barred those claims.⁸⁷ The court of appeals agreed, holding that the continuing care exception had only applied “in cases where a single physician has provided the continuing treatment, not where an entity has provided continuing care.”⁸⁸ In defining the exception, the court stated that, “under the continuing care exception, the statute does not begin to run against a plaintiff until the defendant ceases to treat the injury caused by the act of neglect.”⁸⁹ The exception only applies in cases where the relationship is of such a nature to “charge the medical man with the duty of continuing care and treatment which is essential to recovery.”⁹⁰ Because these were five separate acts and not the continuing treatment of a single injury, the court held that the continuing care exception did not apply.⁹¹ Also, although the plaintiff received continuing care for Alzheimer’s disease, the disease was not the injury caused by the alleged acts of neglect.⁹² The injuries caused by the alleged act of neglect were the five separate fractures he suffered.⁹³ The court found that the plaintiff failed to prove that he received continuing care for the fractures that was “essential to his recovery,” and because of this, the continuing care exception did not apply.⁹⁴

Four months after the decision in *Dunagan v. Shalom Geriatric Center*, the Missouri Supreme Court attempted to clarify the continuing care exception in *Weiss v. Rojanasathit*.⁹⁵ The court held that the continuing care exception did not apply to a gynecologist who failed to inform a patient of a precancerous condition.⁹⁶ In its decision, the court clarified the continuing care exception by stating that a physician owes a duty of continuing care unless the relationship is ended by: “(1) the mutual consent of the parties, (2) the physician’s withdrawal after reasonable notice, (3) the dismissal of the physician by the patient, or (4) the cessation of the necessity that gave rise to the relationship.”⁹⁷ The court

fractured left hip on November 14, 1992; fractured left leg and knee in January 1995; and a fractured left ankle on September 20, 1995. The plaintiff filed suit on June 30, 1995. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 289.

89. *Id.*; see also *Hill v. Klontz*, 909 S.W.2d 725, 726 (Mo. Ct. App. 1995).

90. *Dunagan*, 967 S.W.2d at 289.

91. *Id.*

92. *Id.*

93. *Id.*; see *supra* note 85.

94. *Dunagan*, 967 S.W.2d at 289.

95. 975 S.W.2d 113 (Mo. 1998).

96. *Id.* at 119-21.

97. *Id.* at 119-20; see also *Reed v. Laughlin*, 58 S.W.2d 440, 442 (Mo. 1933); *Cazzell v. Scholfield*, 8 S.W.2d 580, 587 (Mo. 1928).

expressed concern over the outcome of the decision, but it felt constrained by the express language of the statute.⁹⁸ Judge Price wrote that “the legislative branch of the government has determined the policy of the state and clearly fixed the time when the limitation period begins to run against actions for malpractice.”⁹⁹ Because of this, the court stated that arguments to change the policy should be addressed by the General Assembly and not the court, whose duty it is to interpret laws, “not to disregard the law as written by the General Assembly.”¹⁰⁰

IV. INSTANT DECISION

A. *The Majority*

In *Montgomery v. South County Radiologists, Inc.*,¹⁰¹ the majority began its opinion by quickly affirming the circuit court’s ruling granting summary judgment to Dr. Szoko.¹⁰² The Missouri Supreme Court found that Dr. Szoko performed only a single act of interpreting an x-ray.¹⁰³ The express language of Section 516.105, therefore, required the action to be brought within two years.¹⁰⁴ The court held that “where a physician commits an act of neglect on one specific date, and has no other contact with the patient, the statute of limitation begins to run on that date.”¹⁰⁵

The majority then turned its attention to the question of applying the continuing care exception to South County Radiologists (“SCR”) as an entity. The majority began its discussion by stating that, while it is true that the physician-patient relationship ends when the necessity that gave rise to the relationship ends, the necessity that gave rise to the relationship was “the patient’s ailment or condition.”¹⁰⁶ The majority stated that “an entity that provides continuing radiological services has a proportionate duty of continuing care until its relation with the patient ends.”¹⁰⁷ Furthermore, because the patient

98. *Weiss*, 975 S.W.2d at 121. The court was given concern by the plaintiff’s argument that Section 516.105 serves an injustice to those who are unable to ascertain or discover their damages until after the two-year statute of limitation. *Id.*

99. *Id.*

100. *Id.*

101. 49 S.W.3d 191 (Mo. 2001).

102. *Id.* at 193-94.

103. *Id.* at 193.

104. *Id.* at 193-94.

105. *Id.* at 194. For a complete discussion of the services performed by Dr. Szoko see *supra* notes 6-12 and accompanying text.

106. *Montgomery*, 49 S.W.3d at 194; see also *Cazzell v. Schofield*, 8 S.W.2d 580, 587 (Mo. 1928).

107. *Montgomery*, 49 S.W.3d at 195; see also *Poluski v. Richardson Transp.*, 877 S.W.2d 709, 713 (Mo. Ct. App. 1994).

complained to his neurosurgeon of pain on three occasions over a nine-month period and because the neurosurgeon ordered tests from SCR on each occasion, the physician as well as the entity had a duty of continuing care.¹⁰⁸ The necessity that “gives rise to the relationship is the patient’s ailment or condition.”¹⁰⁹ Thus, the relationship continued until it was “ended by the consent of parties, or revoked by the dismissal of the physician, or until his services are no longer needed.”¹¹⁰ This duty arises because treating physicians must rely on services from supporting entities such as groups providing radiological services.¹¹¹ Based on this, the majority rejected SCR’s contention that it did not owe the patient a duty of continuing care.¹¹²

Finally, the majority decided that, because the plain language of Section 516.105 includes entities that provide health care, those entities must also be subject to the continuing care exception to Section 516.105.¹¹³ In reaching its holding, the majority stated that while no court had yet applied the exception to entities, no case expressly stated that entities could not be subject to the continuing care exception,¹¹⁴ and, thus, because SCR could be subject to the continuing care exception, summary judgment was not appropriate and the case was remanded.¹¹⁵

B. *The Dissent*

Chief Justice Limbaugh, in his dissenting opinion, expressed concern with the reasoning used by the majority to expand the scope of the continuing care exception.¹¹⁶ He concurred with the majority holding that the continuing care

108. *Montgomery*, 49 S.W.3d at 195 (“While SCR’s obligations are not as comprehensive as the treating physician’s, its services are of such a nature to charge it with accurately interpreting and comparing x-rays and MRIs for the same complaint by the same patient about the same part of the body, three times within a nine-month period.”).

109. *Id.* at 194.

110. *Id.*; see also *Cazzell*, 8 S.W.2d at 587.

111. *Montgomery*, 49 S.W.3d at 195.

112. *Id.*

113. *Id.* The statute expressly covers any “entity providing health care services.” Thus, there is no statutory distinction between individual physicians and health care entities. *Id.*; see also MO. REV. STAT. § 516.105 (2001).

114. *Montgomery*, 49 S.W.3d at 195; see also *Shah v. Lehman*, 953 S.W.2d 955, 958 (Mo. Ct. App. 1997); *Dunagan v. Shalom Geriatric Ctr.*, 967 S.W.2d 285, 289 (Mo. Ct. App. 1998).

115. *Montgomery*, 49 S.W.3d at 195.

116. *Id.* at 196-97 (Limbaugh, C.J., concurring in part and dissenting in part).

exception did not apply to Dr. Szoko.¹¹⁷ He disagreed, however, with the majority's decision to apply the exception to SCR.¹¹⁸

Beginning his dissent, Chief Justice Limbaugh stated that, under the express language of Section 516.105, the continuing care exception should be limited to situations like that in *Thatcher v. De Tar*¹¹⁹ where the "continuing care is an act of continuing negligence."¹²⁰ The legislature has continuously amended the statute without extending its scope and because of this, Chief Justice Limbaugh argued, deference must be afforded to the legislature.¹²¹

Furthermore, Chief Justice Limbaugh took issue with two particular aspects of the majority's reasoning. First, Chief Justice Limbaugh argued, the majority inaccurately defined "necessity" by stating that "the necessity that gives rise to the relationship is the patient's ailment or condition."¹²² While this definition may fit with a primary treating physician, Chief Justice Limbaugh stated, it does not fit with physicians or entities that merely perform single acts of diagnostic procedure.¹²³ These individuals are consulted for the purpose of performing these services and for these services alone.¹²⁴ More importantly, when Montgomery and the treating physician contracted with SCR to perform the diagnostic services, "neither they, nor the treating physician, nor the patient intended that care or treatment would continue beyond the conduct of the examination ordered."¹²⁵

Finally, though he agreed with the notion that entities as well as individual physicians should be subject to the continuing care exception, Chief Justice Limbaugh disagreed with the majority's statements that, because physicians rely on specialists, those providing specialty services have a proportionate duty of continuing care until that relationship ends.¹²⁶ The fault in this logic, according to Chief Justice Limbaugh, is that the "duty of continuing care arises from the need for the entity in question to provide continuing care, not from the

117. *Id.* at 196 (Limbaugh, C.J., concurring in part and dissenting in part).

118. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

119. 173 S.W.2d 760 (Mo. 1943).

120. *Montgomery*, 49 S.W.3d at 196 (Limbaugh, C.J., concurring in part and dissenting in part). Both *Thatcher v. De Tar* and Missouri Revised Statutes Section 516.105(1) state that the statute of limitation ceases to run in cases of medical negligence where a foreign object is permitted to remain in the body of a patient. *Thatcher*, 173 S.W.2d at 762; MO. REV. STAT. § 516.105(1) (2001).

121. *Montgomery*, 49 S.W.3d at 196 (Limbaugh, C.J., concurring in part and dissenting in part).

122. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

123. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

124. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

125. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

126. *Id.* at 197 (Limbaugh, C.J., concurring in part and dissenting in part).

circumstance that care or treatment was in fact provided.”¹²⁷ Simply put, the majority held that the continuing care exception applies because SCR performed multiple services over a period of time, not “that there was a duty of continuing care to conduct those successive examinations.”¹²⁸ Therefore, Chief Justice Limbaugh contended, each of the diagnostic services was a separate act, rather than continuing conduct, and, therefore, the statute of limitation barred the claims against both Dr. Szoko and SCR.¹²⁹

V. COMMENT

In *Montgomery*, the Missouri Supreme Court made two important determinations with regard to the continuing care exception to the two-year statute of limitation in Missouri Revised Statutes Section 516.105.¹³⁰ First, the court held that, through a plain reading of the statute, the continuing care exception applies to entities as well as individual physicians.¹³¹ Though this is arguably an expansion in the scope of the statute, it is a logical expansion and one that appears consistent with the intent of the legislature.¹³² The continuing care exception is a common law exception to statutes of limitation in medical cases, and, thus, it is not mandated by statutory authority. The Missouri General Assembly has, however, continued to revise Section 516.105 without expressing any dissatisfaction with the exception in its revisions, therefore, arguably giving its implicit approval.¹³³ Furthermore, the legislature has continued to amend the statute to establish the boundaries of the limitation, and, by implication, the boundaries of the exception. In the 2001 revision of Section 516.105, the legislature used the phrase “or any other entity providing health care services.”¹³⁴ This phrase clearly expresses an intent to hold physician groups accountable without regard to legal identity. Simply put, medical professionals should not avoid potential liability by forming an organization. This is a logical step in applying the continuing care exception in today’s complex medical environment.

The court’s second determination, however, does not appear consistent with legislative intent and is an unfortunate example of the courts improperly taking upon themselves the role of the Missouri General Assembly. In *Montgomery*, the majority, after holding that the continuing care exception applied to entities as

127. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

128. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

129. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

130. *See supra* note 15.

131. *Montgomery*, 49 S.W.3d at 195 (Limbaugh, C.J., concurring in part and dissenting in part).

132. *See supra* Part III.A.

133. *See supra* notes 25-39.

134. MO. REV. STAT. § 516.105 (2001).

well as individual physicians, expanded the statute to cover those medical providers who have no personal contact with a patient and who provide merely auxiliary medical services.¹³⁵

In its opinion, the majority stated that, although the physician-patient relationship ends by the “cessation of the necessity that gave rise to the relationship,” that necessity is the patient’s ailment or condition.¹³⁶ Thus, when Montgomery received radiological services from SCR, it was his ailment or condition that was the “necessity” that gave rise to the relationship between him and SCR; therefore, SCR owed him a duty of continuing care.¹³⁷ In his dissent, Chief Justice Limbaugh correctly stated that this is an inaccurate definition of “necessity.”¹³⁸ With radiological services, or most other auxiliary services, the purpose of the auxiliary service is to obtain diagnostic interpretations or test results, not to cure an ailment or condition. The definition established by the majority can only logically be applied to primary treating physicians. In the context of auxiliary services, the necessity that gave rise to the relationship ends once the medical provider interprets the diagnostic results.¹³⁹

Furthermore, it is clear that medical personnel who provide auxiliary services usually have little or no personal contact with patients, and neither they, nor the patients, intend the relationship to be personal or continue beyond the diagnostic services ordered.¹⁴⁰ This kind of relationship is vastly different than the relationship that gave rise to the continuing care exception in *Thatcher*,¹⁴¹ and the vast majority of courts that have interpreted the continuing care exception have held that the exception is only intended to apply a duty of continuing care to a doctor-patient relationship that is “a highly personal and close one.”¹⁴² Instead of this limited application, the *Montgomery* decision potentially imposes the duty of continuing care on virtually every provider of medical services. Thus, radiologists, pharmacists, chemists, lab technicians, x-ray technicians, and virtually every other medical care provider would seem to be subject to the continuing care exception even though they have no contact with the patient. Forcing these groups to be subject to liability for stale claims will result in an unnecessary increase in the cost of health care, health insurance, and medical malpractice insurance. The result will be a net loss for patients.

Also, in its holding, the majority relied on the fact that each radiologist for SCR provided a report to a common file on Montgomery and the fact that each

135. *Montgomery*, 49 S.W.3d at 195.

136. *Id.* at 194.

137. *Id.*

138. *Id.* at 196 (Limbaugh, C.J., concurring in part and dissenting in part).

139. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

140. *Id.* (Limbaugh, C.J., concurring in part and dissenting in part).

141. *Thatcher v. De Tar*, 173 S.W.2d 760 (Mo. 1943).

142. *Shaw v. Clough*, 597 S.W.2d 212, 215 (Mo. Ct. App. 1980).

successive radiologist compared his or her findings to the previous report.¹⁴³ According to the majority, this is evidence that SCR had a continuing duty to Montgomery.¹⁴⁴ This would be true if SCR were a group of physicians practicing primary care. SCR, however, is a group of radiologists who perform auxiliary diagnostic services with no personal relationship or personal contact with the patients receiving those tests. Because there is no personal relationship or contact between SCR radiologists and those patients receiving tests, the policy of reviewing previous reports is necessary in order to properly interpret the diagnostic tests. Thus, the policy of reviewing previous reports is evidence that there was in fact no personal relationship between SCR and the patients receiving tests. Instead of seeing it this way, the majority's holding provides a disincentive for medical groups performing diagnostic or other auxiliary services to review the reports generated by previous diagnostic tests.

Next, the majority reasoned that, because physicians rely on those who provide auxiliary services, entities that provide those services should have a proportionate duty of continuing care with that of the treating physician.¹⁴⁵ Based on this reasoning, whether or not a provider of auxiliary services falls within the continuing care exception is at the discretion of the treating physician. As long as the treating physician continues to refer a patient for diagnostic tests, the auxiliary service providers will be performing continuing care that, in reality, neither they nor the patient have control over. Of course, if the radiologist or other auxiliary service provider ordered the diagnostic tests or treatment, the provider would fall within the traditional continuing care exception.¹⁴⁶ This, however, is not the case in *Montgomery*. In this case, the SCR radiologists did not have personal contact with Montgomery and never ordered follow-up tests.¹⁴⁷ The majority imposes a duty of continuing care upon the radiology group because the treating physician decided to order more tests. Simply stated, the majority's decision holds that an auxiliary service provider has a duty of continuing care because he or she is referred to perform successive diagnostic services, not because there was a duty of continuing care to provide those services.¹⁴⁸ This is not only an illogical result, but it is one that gives no guidance to providers of auxiliary services.

Finally, the majority's decision seems a clear departure from the intent of the Missouri General Assembly. Although the continuing care exception has no statutory equivalent, the General Assembly has continuously amended Section

143. *Montgomery*, 49 S.W.3d at 192-93.

144. *Id.* at 194-95.

145. *Id.* at 195.

146. *Id.* at 197.

147. *See id.* at 196.

148. *Id.*

516.105 to clearly state when an exception is to apply.¹⁴⁹ After the decision in *Thatcher v. De Tar*,¹⁵⁰ the Missouri General Assembly amended the statute to include an exception for physicians who negligently leave foreign objects in the body of those on whom they operate.¹⁵¹ In those instances, the statute of limitation does not begin to run until the date of discovery.¹⁵² Furthermore, after the decision in *Weiss v. Rojanasathit*,¹⁵³ the General Assembly amended the statute to include an exception for a physician's negligent failure to report the results of medical tests.¹⁵⁴ In those instances, the statute of limitation does not begin to run until the date of discovery.¹⁵⁵ In both of these instances, the Missouri Supreme Court properly ruled according to the statute of limitation and allowed the Missouri General Assembly to act.¹⁵⁶ This is the constitutional role of the court system. As the Missouri Supreme Court stated in *Weiss*, it is the legislative branch of the government that determines the policy of the state and the "court must follow the policy determination expressed there."¹⁵⁷ It is not the role of the courts to circumvent the legislative process, especially when the General Assembly has clearly stated its position. Arguments to change clearly established statutory law "should be addressed to the General Assembly" because its members are held accountable by the voters of the State of Missouri.¹⁵⁸ As stated by the Missouri Supreme Court in *Laughlin v. Forgrave*,¹⁵⁹ "our function is to interpret the law; it is not to disregard the law as written by the General Assembly."¹⁶⁰ In *Montgomery*, the Missouri Supreme Court ignored these principles and overstepped its bounds. In effect, the Missouri Supreme Court improperly voided Section 516.105 and applied the continuing care exception to virtually every type of medical care provider. Thus, by broadening the scope of the continuing care exception, Section 516.105 has lost the effect the legislature intended it to have and will now apply only to a minority of situations. Because of this, the Missouri Supreme Court seems to have made the exception the rule.

149. See *supra* notes 25-39.

150. 173 S.W.2d 760 (Mo. 1943); see also *supra* notes 40-55.

151. MO. REV. STAT. § 516.105(1) (2001).

152. *Id.*

153. 975 S.W.2d 113 (Mo. 1998); see also *supra* notes 95-100.

154. MO. REV. STAT. § 516.105(2) (2001).

155. *Id.*

156. See *supra* notes 33-39.

157. *Weiss*, 975 S.W.2d at 121.

158. *Id.* at 117; see also *Laughlin v. Forgrave*, 432 S.W.2d 308, 314 (Mo. 1968).

159. 432 S.W.2d 308 (Mo. 1968).

160. *Id.* at 314.

VI. CONCLUSION

In *Montgomery v. South County Radiologists, Inc.*,¹⁶¹ the Missouri Supreme Court determined that the continuing care exception to the two-year statute of limitation in Section 516.105 applies to entities as well as individual physicians¹⁶² and that the continuing care exception applies to groups that provide merely auxiliary diagnostic services.¹⁶³ The first determination is consistent with the language of Section 516.105 and is a logical progression in the modern medical care environment. The majority's second determination, however, is not consistent with the language of Section 516.10 or the holdings in previous cases and is an unfortunate example of a court taking the role of the Missouri General Assembly upon itself. By expanding the scope of the continuing care exception to cover providers of auxiliary services and forcing these groups to defend stale claims, the result will be an unnecessary increase in the overall cost of health care while providing an incentive for medical groups to find new ways to avoid liability for stale claims. Furthermore, the majority's reasoning provides no guidance for providers of auxiliary services because whether the group has a duty of continuing care will depend on how often the primary physician refers the patient to the group for diagnostic services. Finally and most importantly, the majority's decision is a clear departure from the intent of the Missouri General Assembly. The majority's overly broad expansion of the scope of the continuing care exception will result in the exception applying in more cases than the rule in Section 516.105. This, in effect, nullifies the legislature's intent of limiting actions against medical providers to the specific provisions listed and has made the exception the rule in Missouri.

JAMES B. YORK

161. 49 S.W.3d 191 (Mo. 2001).

162. *Id.* at 194.

163. *Id.* at 195.