

October 21, 1993, the last date on which Dr. Shah could have scheduled a recheck visit within the alleged standard of care. But the Court's reasoning ignores the summary-judgment proof that the November 22, 1994 exam was a part of Shah's follow-up treatment for Moss's retinal condition; thus, the Court starts limitations running on Moss's alleged negligent follow-up claim while the follow-up treatment itself is ongoing. Even more troubling is the anomalous result that the Court's reasoning produces — *limitations began to run on Moss's claim before he suffered an injury*.

To the extent Moss alleges that Shah negligently performed the buckle-removal surgery, I agree with the Court that limitations has run because the date of the breach or tort is readily ascertainable. But considering the nature of Moss's negligent follow-up claim and the facts presented, I cannot agree that the date of this alleged breach or tort is readily ascertainable. Accordingly, limitations began to run from the date the course of treatment that is the subject of Moss's claim was completed. Because Shah did not prove as a matter of law that Moss's course of treatment ended more than two years before suit was filed, summary judgment in Shah's favor was improper, as the court of appeals held. 7 S.W.3d 690, 695. Because the Court holds otherwise, I respectfully dissent.

I Statute of Limitations

The Medical Liability and Insurance Improvement Act provides that a medical negligence suit must be filed

within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01. Thus, the Act provides that the statute of limitations for

medical malpractice claims runs from one of three dates: (1) when the breach or tort occurs; (2) when the health care treatment that is the subject of the claim is completed; or (3) when the hospitalization for which the claim is made ends. *See Earle v. Ratliff*, 998 S.W.2d 882, 886 (Tex. 1999).

A plaintiff may not simply choose which of these three dates is the most favorable. *See id.* If the date of the alleged negligence can be ascertained, limitations must run from the date of the tort whether or not the patient continues to see the doctor. *See id.* On the other hand, if the injury occurs during a course of treatment for a particular condition and the date of the alleged breach or tort is not readily ascertainable, limitations runs from the date the course of treatment ends. *See Kimball v. Brothers*, 741 S.W.2d 370, 372 (Tex. 1987). Which limitations period applies depends upon the facts of the case and the nature of the claims asserted. *See Rowntree v. Hunsucker*, 833 S.W.2d 103, 106 (Tex. 1992).

II Standard of Review

As a defendant moving for summary judgment on the affirmative defense of limitations, Shah bore the burden of conclusively establishing his defense. *See Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex. 1996). Unless the summary-judgment record shows as a matter of law that the limitations period began and ended before Moss initiated his suit, Shah has not met this burden. *See Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex. 1983). We review the record in the light most favorable to the non-movant, Moss, resolving any factual disputes in his favor. *See Chambers v. Conaway*, 883 S.W.2d 156, 157 (Tex. 1993).

III Discussion

Under the facts presented, the exact date of the alleged breach or tort is not ascertainable. Shah

acknowledges that he cannot pinpoint the date between October 1993 and November 1994 when Moss's right retina re-detached. But more importantly, for limitations purposes, Shah did not conclusively establish a single, discrete date when he allegedly breached his duty to provide medically acceptable care, because Moss's expert characterizes the entirety of Shah's treatment as a breach of the standard of care. This situation is precisely what the course-of-treatment doctrine was intended to cover. *See Husain v. Khatib*, 964 S.W.2d 918, 919 (Tex. 1998).

The Court concludes that a course-of-treatment analysis is immaterial because Shah breached a duty to provide follow-up treatment on a readily ascertainable date, October 21, 1993, the last date expressly labeled a "re-check" visit in Shah's records. In reaching that conclusion, the Court assumes that Shah could only have breached a duty to schedule follow-up visits to monitor Moss's retinal condition on the dates of Moss's office visits, relying on *Husain*, *Bala*, *Kimball*, *Chambers*, and *Rowntree*. *See Husain*, 964 S.W.2d 918; *Bala v. Maxwell*, 909 S.W.2d 889 (Tex. 1995); *Chambers*, 883 S.W.2d 156; *Rowntree*, 833 S.W.2d 103; *Kimball*, 741 S.W.2d 370. That reliance is misplaced.

In *Husain*, *Bala*, and *Rowntree*, the plaintiffs alleged that the defendant doctors breached duties to perform tests or take specific actions that could have prevented or diagnosed illness; the plaintiffs complained, essentially, that the doctors were negligent in failing to take diagnostic measures that would have revealed the need to establish a course of treatment for the illness that was the subject of the plaintiffs' claims. *See Husain*, 964 S.W.2d at 920; *Bala*, 909 S.W.2d at 891-92; *Rowntree*, 833 S.W.2d at 108. In each case, the plaintiff was already suffering the malady that should have been discovered had the test been timely given. *See id.* Thus, the tort was complete. Because a doctor's failure to order a test or

perform a specific evaluation on a particular date is readily ascertainable, and because the defendants could have breached a duty only when they had an opportunity to perform the examinations, the limitations period began to run each time the defendants failed to order tests or perform evaluations. *See id.*

Here, though, Moss has not alleged that Shah failed to diagnose an existing condition. Instead, Moss alleges that Shah, by removing the buckle when he did, assumed a standard of care indicating a different course of follow-up treatment. Shah allegedly breached this standard of care, causing Moss's injury, by failing to perform appropriate follow-up to monitor Moss's retinal condition after the buckle was removed. *Cf. Gross v. Kahanek*, 3 S.W.3d 518, 521 (Tex. 1999) (noting that medical standards may require a physician who prescribes powerful medication to monitor closely the patient's reaction to the medication). Because Shah's inappropriate follow-up treatment was ongoing and constituted the breach, the precise date of the tort alleged in this case is not readily ascertainable. When, as here, (1) the date of the alleged breach or tort is not readily ascertainable, (2) a continuous course of treatment has been established with respect to the specific condition that forms the basis of the lawsuit, and (3) the standard of care requires periodic follow-up examinations for that condition, the statute of limitations begins to run when the course of treatment is completed. *See Rowntree*, 833 S.W.2d at 106 (citing *Nykorchuck v. Henriques*, 577 N.E.2d 1026, 1029 (N.Y. 1991)).

The Court's reliance on *Kimball* is similarly misplaced. In *Kimball*, the plaintiff was taken to surgery on March 11, 1982, but the anesthesiologist defendant had trouble intubating him and the surgery was postponed. 741 S.W.2d at 371. The defendant had no further contact with the plaintiff, who was discharged from the hospital on March 17, 1982. *Id.* Although it was undisputed that the alleged breach

or tort causing the injury occurred on March 11th, plaintiff argued that limitations did not begin to run until the last day of his hospitalization. *Id.* at 372. We rejected Kimball’s argument because the statute expressly limited that option to claims based upon the hospitalization itself, rather than discrete, identifiable, negligent acts. *Id.* But we also noted that the statutory provision allowing limitations to run from the completion of medical or health care treatment contemplates a situation like the present one, in which “the patient’s injury occurs during a course of treatment for a particular condition and the only readily ascertainable date is the last day of treatment.” *Id.*

Neither does *Chambers* support the Court’s analysis. There, the plaintiff sued her doctor for failing to diagnose her breast cancer. 883 S.W.2d at 157. She presented summary-judgment proof that the doctor, as her primary care physician, had a continuing duty to monitor and treat complaints of which he had notice, including her breast lump. *Id.* at 158. Because the physician had continually breached this duty up to and including her final appointment, and the patient had sued within two years of that date, we held that the claim was not time-barred. *Id.* Thus, *Chambers* actually supports the notion that, if the applicable standard of care requires follow-up for a particular condition, a physician may breach an ongoing duty to monitor that condition without doing so on any single date, as Moss alleges in this case.

The Court’s analysis is also flawed because it applies an inappropriate review standard. We must review the summary-judgment record and resolve any factual disputes in the non-movant’s favor. *Chambers*, 883 S.W.2d at 157. The Court concludes that the court of appeals erred in applying a course-of-treatment analysis because “Moss’s medical records demonstrate that Moss’s last ‘recheck’ visit was on October 23, 1993, and Dr. Shah did not diagnose the second detached retina until Moss visited Dr.

Shah more than twelve months later on November 22, 1994.” ___ S.W.3d at ___. But viewed in the light most favorable to Moss, the summary-judgment evidence creates a fact issue whether the November 22, 1994 visit was part of Moss’s retinal course of treatment. Moss was specifically referred to Shah to treat his retinal condition, and the buckle-removal surgery and any necessary follow-up were part of the course of treatment for that condition. Moss went to other eye specialists about problems with his visual acuity and his eye muscles, but the nature of the specific problem for which Shah treated Moss — retinal detachment — never changed.

I agree that neither the mere continuing relationship between a physician and a patient nor the continuing nature of a diagnosis will alone support a finding that a course of treatment was established for a particular condition. *Rowntree*, 833 S.W.2d at 105-06. If an examination does not relate to treatment of the condition that gives rise to the litigation but is “discrete and complete,” it does not constitute continuous treatment. *Nykorchuck*, 577 N.E.2d at 1028. Here, though, Shah testified that Moss continued to see Shah for “routine periodic checkups” after the buckle-removal surgery. And, contrary to the Court’s conclusion that the November 22, 1994 visit was not a recheck for the buckle-removal surgery, Shah’s notes from Moss’s October 1993 recheck visit specifically note that Moss’s condition should be rechecked in one year. The November 1994 visit was originally scheduled for October 20, 1994, almost exactly one year after the October 21, 1993 visit. Although the Court implies that the November 1994 appointment did not relate to a follow-up course of treatment, the summary-judgment posture of this case requires us to resolve this dispute in Moss’s favor.

IV Conclusion

Because Shah did not conclusively establish that the November 1994 visit was “discrete and complete” and unrelated to a follow-up course of treatment for Moss’s retinal detachment, summary judgment in his favor was improper. Accordingly, the court of appeals’ judgment should be affirmed. Because the Court concludes otherwise, I respectfully dissent.

Harriet O’Neill
Justice

OPINION DELIVERED: December 20, 2001