

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

MILTON HUNTER,	:	
	:	
Plaintiff,	:	NO: 3:CV-00-0036
	:	
v.	:	
	:	(JUDGE CAPUTO)
UNITED STATES,	:	
	:	
Defendant.	:	

MEMORANDUM

Plaintiff Milton Hunter (“Hunter”), formerly a federal prisoner, brought this medical malpractice suit against the United States (“the government”) on July 2, 1999.

(Complaint, Doc. 1.) Hunter alleges that negligence by prison medical personnel at the Federal Correctional Institution at Schuylkill, Pennsylvania (“SCI-Schuylkill”) caused him to undergo painful urinary and urologic symptoms, humiliation, and mental anguish about the possible existence of serious untreated pathology, particularly prostate cancer. (Doc. 1 ¶¶ 21-22.) As Hunter’s cause of action arises under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 2671-2680, it is subject to the statute of limitations of 28 U.S.C. § 2401(b), which forever bars a tort claim against the United States unless it is presented to the appropriate federal agency within two years of its accrual.

The government asserts that Hunter has failed to comply with the two year statute of limitations, and therefore it moves for dismissal under Rules 12(b)(1) and 12(b)(6), or in the alternative for summary judgment under Rule 56. (United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment, Doc. 11.) According to the

government, a prior lawsuit filed by Hunter in February of 1996 and concerning the same alleged negligence shows that Hunter's cause of action accrued more than two years before the filing of his administrative claim in July of 1998. (Memorandum of Law in Support of United States' Motion, Doc. 12.) Hunter argues in response that the "continuing treatment" doctrine delays the accrual of his cause of action, and thus the commencement of the statutory period, until he ceased to be under the care of the government's doctors. (Memorandum of Law in Support of Plaintiff's Answer to Defendant's Motion for Summary Judgment, Doc. 16.) Further, Hunter invokes the "continuing tort" doctrine to defer the accrual of his action until the termination of the allegedly tortious activity. (Id.) Because neither the continuing treatment doctrine nor the continuing tort doctrine can delay the accrual of a medical malpractice cause of action beyond the point when the victim is aware of his injury and its cause, the government's motions to dismiss will be granted.

LEGAL STANDARD

The government has moved for dismissal under Rule 12(b)(1) and Rule 12(b)(6), and in the alternative for summary judgment under Rule 56. (Doc. 11.) As an affirmative defense, a statute of limitations defense may be raised in a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted. Bethel v. Jendoco Construction Corp., 570 F.2d 1168, 1174 (3d Cir. 1978). However, since a statute of limitations defense will usually involve factual questions as to when a plaintiff discovered or should have discovered the elements of its cause of action, the defendant will bear a heavy burden in seeking to establish that the claim is barred as a matter of law. Southern

Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 425 (3d Cir. 1999).

The FTCA represents a limited waiver of the sovereign immunity of the United States which Congress granted subject to the statute of limitations contained in 28 U.S.C. § 2401(b). United States v. Kubrick, 444 U.S. 111, 117, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979). Therefore, since compliance with § 2401(b) is a jurisdictional prerequisite to suit under the FTCA, a statute of limitations defense under § 2401(b) may also be raised in a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. See Deakyne v. Dept. of the Army Corps of Engineers, 701 F.2d 271, 274 at n. 4 (3d Cir. 1983); Johnson v. The Smithsonian Institute, 189 F.3d 180, 189 (2d Cir. 1999); Osborn v. United States, 918 F.2d 724, 728 (8th Cir. 1990); Rosales v. United States, 824 F.2d 799, 802 (9th Cir. 1987); Crawford v. United States, 796 F.2d 924, 927-28 (7th Cir. 1986). However, the subject matter jurisdiction of a district court should not be challenged in a Rule 56 motion. See Mortensen v. First Federal Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977) (where the defendant presents evidence that the court lacks jurisdiction, "the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. Pro. 56"); Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997) (citing Mortensen); Osborn, 918 F.2d at 729; Crawford, 796 F.2d at 928. As Judge Posner explained in Crawford, though the existence of a genuine issue of material fact regarding the merits of a claim justifies proceeding to a full trial, no case can properly go to trial unless the court has first concluded that it possesses jurisdiction. 796 F.2d at 928. "The omission from the Federal Rules of Civil Procedure of a provision for converting a Rule

12(b)(1) motion into a summary judgment motion if evidence is submitted with it was not an oversight.” Id.¹ Accordingly, this court will consider the government’s statute of limitations defense only under Rules 12(b)(6) and 12(b)(1).

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. Dismissal should not be granted simply because the plaintiff’s allegations do not support the legal theory on which he intends to proceed, Bowers v. Hardwick, 106 S.Ct. 2841, 2849, 478 U.S. 186, 202, 92 L.Ed.2d 140 (1986), but only where it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

Accordingly, dismissal is appropriate “only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff’s favor, no relief could be granted under any set of facts consistent with the allegations of the complaint.” Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998) (citing ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994)). See

1 Although a few Third Circuit decisions seem to imply that the issue of subject matter jurisdiction may be resolved on summary judgment, see, e.g., Int’l Ass’n of Machinists & Aerospace Workers v. Northwest Airlines, 673 F.2d 700 (3d Cir. 1982), the language used admits of other interpretations, and no panel of the circuit appears to have addressed the question directly. For instance, in Northwest Airlines the court stated that, for a plaintiff facing a 12(b)(1) motion supported by evidentiary submissions, “a conclusory response will not suffice any more in this jurisdictional context than it would if the ultimate merits were at issue in a conventional summary judgment context.” Id. at 711. But here the court is clearly comparing a factual (as opposed to a facial) 12(b)(1) challenge to a summary judgment motion; it is not equating them. Determining that a material factual issue exists is simply not enough to resolve a challenge to the district court’s subject matter jurisdiction. As jurisdiction must be found before the court has the authority to try the merits of the case, the issue of subject matter jurisdiction cannot be resolved under Rule 56.

also Heffernan v. Hunter, 189 F.3d 405, 408 (3d Cir. 1999).

In deciding a motion to dismiss, a court should generally consider only the allegations contained in the complaint and the exhibits attached to the complaint; matters of public record such as court records, letter decisions of government agencies and published reports of administrative bodies; and “undisputably authentic” documents which the plaintiff has identified as a basis of his claims and which the defendant has attached as exhibits to his motion to dismiss. See Pension Benefit Guaranty Corp. v. White Consolidated Industries. Inc., 998 F.2d 1192, 1196-97 (3d Cir. 1993); Dykes v. Southeastern Pennsylvania Transp. Authority, 68 F.3d 1564, 1567 (3d Cir. 1995) (noting that where “a complaint relies upon a document, ... the plaintiff obviously is on notice of the contents of the document and the need for a chance to refute evidence is greatly diminished”). However, a court need not assume the plaintiff can prove facts he has not alleged, City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 (3d Cir. 1998), nor credit the plaintiff’s “bald assertions,” “unsupported conclusions,” “unwarranted inferences,” or “legal conclusions masquerading as factual conclusions,” Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997).

For a court considering a Rule 12(b)(6) motion, the relevant inquiry is not whether the plaintiff will ultimately prevail on the merits of his claims, but only whether he is entitled to offer evidence in support of them. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Further, while the plaintiff, in order to survive a motion to dismiss, must set forth information from which each element of a claim may reasonably be inferred, Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993), it is the

defendant who bears the burden of establishing that the complaint fails to state a claim upon which relief can be granted, Gould Electronics Inc., v. United States, 220 F.3d 169, 178 (3d Cir. 2000).

Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of a complaint where the court lacks subject matter jurisdiction. Unlike dismissal under Rule 12(b)(6), dismissal under Rule 12(b)(1) is not a judgment on the merits of the plaintiff's case, but only a determination that the court lacks the authority to hear the case. Mortensen, 549 F.2d at 891. A court may treat a Rule 12(b)(1) motion either as a facial or a factual challenge to its subject matter jurisdiction. Gould, 220 F.3d at 178. "In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." Id. at 176 (citing Pension Benefit Guaranty Corp., 998 F.2d at 1196). Since the Gould court, in determining what materials may be considered in a facial attack, cited Pension Benefit Guaranty Corp.'s treatment of what may be considered in a Rule 12(b)(6) motion, it follows that the whole range of materials that may properly be considered in a Rule 12(b)(6) motion may also be considered in a Rule 12(b)(1) facial attack. This conclusion comports with the fact that both a Rule 12(b)(6) motion and a Rule 12(b)(1) facial attack argue that the propriety of dismissal is apparent from the face of the complaint, even when the allegations contained within the complaint are viewed in the light most favorable to the plaintiff. Accordingly, a court presented with a Rule 12(b)(1) facial attack may consider the allegations contained in the complaint and the exhibits attached to the complaint; matters of public record such as court records, letter decisions of government

agencies and published reports of administrative bodies; and “undisputably authentic” documents which the plaintiff has identified as a basis of his claims and which the defendant has attached as exhibits to his motion to dismiss. See Pension Benefit Guaranty Corp., 998 F.2d at 1196-97.

If the defendant submits and the court considers evidence that controverts the plaintiff’s allegations, the motion must be treated as a factual challenge under Rule 12(b)(1). Gould, 220 F.3d at 178. In such cases, “the trial court is free to weigh evidence and satisfy itself as to the existence of its power to hear the case.” Mortensen, 549 F.2d at 891. No presumption of truthfulness attaches to the plaintiff’s allegations, and the burden of proof is on the plaintiff to show that the court possesses jurisdiction. Id. However, the plaintiff must be permitted to respond to the defendant’s evidence with evidence supporting jurisdiction. Id. See also Berardi v. Swanson Memorial Lodge No. 48 of the Fraternal Order of Police, 920 F.2d 198, 200 (3d Cir. 1990) (district court enjoys “substantial procedural flexibility,” but must allow plaintiff some opportunity to respond, such as by allowing affidavits or depositions, or by conducting an evidentiary hearing). If the court chooses to receive affidavits or other documentary evidence from both sides, but cannot resolve the jurisdictional question due to a disputed issue of material fact, “the court must conduct a plenary trial on the contested facts prior to making a jurisdictional determination.”² Gould, 220 F.3d at 177 (citing Int’l Ass’n of

² Here the existence of a disputed, material jurisdictional fact does not lead to a full trial on the merits, as in summary judgment, but to a trial only of the facts necessary to determine whether jurisdiction will lie. In some cases, however, this may amount to a full trial on the merits. See Crawford, 796 F.2d at 929.

Machinists & Aerospace Workers v. Northwest Airlines, 673 F.2d 700, 712 (3d Cir. 1982). Where some or all of these facts are also relevant to the merits of the case, i.e., where jurisdiction and the merits are intertwined, the court should require less proof in the jurisdictional context than would be required in a determination on the merits. Northwest Airlines, 673 F.2d at 711 (citing Mortensen, 549 F.2d at 892).

In the present matter, this court will consider only the allegations contained in the complaint, the official docket of Hunter's 1996 lawsuit in the Eastern District of Pennsylvania, the judicial opinion disposing of that lawsuit, and the letter opinion by the Federal Bureau of Prisons denying Hunter's administrative tort claim. The last three of these documents are matters of public record, and thus may properly be considered in a Rule 12(b)(6) motion or a Rule 12(b)(1) facial attack. See Pension Benefit Guaranty Corp., 998 F.2d at 1196-97; Gould, 220 F.3d at 178 (citing Pension Benefit Guaranty Corp., 998 F.2d at 1196). As both of the government's motions turn on whether, viewing all the allegations in the light most favorable to Hunter, Hunter's administrative tort claim was filed within the two year limitations period embodied in 28 U.S.C. § 2401(b), this court will treat the two motions together.

DISCUSSION

Hunter filed his administrative claim with the Federal Bureau of Prisons on July 14, 1998. (January 6, 1999 Letter Opinion of Federal Bureau of Prisons Re: Claim T-NER-98-401, Doc. 14 attachment #2.) Hunter had earlier filed a lawsuit in the Eastern

District of Pennsylvania alleging inadequate medical treatment of urinary tract problems he suffered while incarcerated at SCI-Schuylkill. (December 23, 1997 Memorandum and Order of Judge Norma L. Shapiro at 2-8.) That lawsuit was filed on February 16, 1996, more than two years before the filing of Hunter's administrative tort claim in July of 1998. (United States District Court for the Eastern District of Pennsylvania (Philadelphia), Civil Docket for Case # 96-CV-1196, at 3.) Therefore, if Hunter's claim accrued by the time of his 1996 lawsuit, both his claim against the United States and this court's jurisdiction to hear that claim will have been extinguished pursuant to 28 U.S.C. § 2401(b).

A claim for medical malpractice authorized by the Federal Tort Claims Act accrues when the plaintiff is aware of both the existence of his injury and its cause, regardless of whether or not he recognizes that the treatment which caused the injury may have constituted medical malpractice. United States v. Kubrick, 444 U.S. 111, 122-23, 100 S.Ct. 352, 359-60, 62 L.Ed.2d 259 (1979). The standard to be applied is that of a reasonable person: did the plaintiff possess facts "such that, as a reasonable person, he should have known" of his injury and its cause? Barren v. United States, 839 F.2d 987, 990 (3d Cir. 1988). In Kubrick, the Supreme Court was concerned that it not construe § 2401(b) too broadly since to do so would enlarge the scope of Congress' waiver of sovereign immunity. Kubrick, 444 U.S. at 117, 100 S.Ct. at 357. Hence the Court refused to delay the accrual of a cause of action where a malpractice plaintiff's predicament does not differ from that of any other tort claimant:

That [the plaintiff] has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very

difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who inflicted the injury. He is no longer at the mercy of the latter.... A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community.... But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether or not to sue, which is precisely the same judgment that other tort claimants must make.

Id., 444 U.S. at 122-24, 100 S.Ct at 359-60. The Court recognized that its construction of § 2401(b) would make it impossible to enforce some otherwise perfectly valid claims.

Id., 444 U.S. at 123-24, 100 S.Ct. 360-61. Nevertheless, it believed its holding was necessitated by the clear legislative purpose “to require the reasonably diligent presentation of tort claims against the government.” Id.

Under the accrual rule set forth in Kubrick, it appears that Hunter’s cause of action accrued no later than the time he filed his first lawsuit. The instant complaint, brought by Hunter after the denial of his administrative claim, alleges that Dr. David Malinov and other government medical personnel negligently diagnosed and treated his urinary tract ailments during his incarceration at SCI-Schuylkill from January of 1995 to April of 1996. (Complaint, Doc. 1 ¶¶ 13-22.) His first lawsuit, brought against Dr. Malinov and Dr. Kenneth Moritsugu, the Medical Director and Assistant Director of the Bureau of Prisons, also alleged negligent treatment of his urinary tract ailments during his incarceration at SCI-Schuylkill. (December 23, 1997 Memorandum and Order of Judge Norma L. Shapiro at 2-8.) It is clear, then, that the injury complained of in each of Hunter’s lawsuits, as well as in his administrative tort claim, is one and the same, and that Hunter was aware of this injury and its cause at the time he filed his first complaint in February of

1996. Consequently, since Hunter did not file an administrative claim with the relevant federal agency until July of 1998, more than two years after he was aware of both the existence of his injury and its cause, his claim against the government is forever barred. See 28 U.S.C. § 2401(b).

To avoid this conclusion, Hunter has cited a leading case expounding the “continuing tort” doctrine, which holds that a cause of action based on continuing tortious activity does not accrue until the tortious conduct ceases. See Page v. United States, 729 F.2d 818 (D.C. Cir. 1982). The Page court justified the doctrine thus:

Since usually no single incident in a continuous chain of tortious activity can fairly or realistically be identified as the cause of significant harm, it seems proper to regard the cumulative effect of the conduct as actionable. Moreover, since one should not be allowed to acquire a right to continue tortious conduct, it follows logically that statutes of limitation should not run prior to its cessation.

Id. at 822 (citations and internal quotes omitted). At least one circuit has adopted the continuing tort doctrine. See Gross v. United States, 676 F.2d 295, 300 (8th Cir. 1982). In Gross, the Eighth Circuit held that the Kubrick rule does not apply where the tortious conduct is of a continuing nature. Id. The Gross court held that a plaintiff’s cause of action does not accrue until the tortious conduct ceases, even where the plaintiff became aware of his injury and its cause prior to the end of the conduct. Id.

The Third Circuit has not adopted the strong form of the continuing tort doctrine espoused by the Eighth Circuit. In Kichline v. Consolidated Rail Corp., 800 F.2d 356 (3d Cir. 1986), the Third Circuit considered the effect of its decision in Fowkes v. Pennsylvania R.R. Co., 264 F.2d 397 (3d Cir. 1959), on the settled doctrine that a toxic

tort victim's cause of action accrues when he becomes aware of the disease and its cause. The Kichline court noted that, although Fowkes held that the statute did not begin to run until the plaintiff ceased to be exposed to the dangerous condition, the jury in Fowkes specifically found that the plaintiff had been unaware of his injury during the period of exposure. Kichline, 800 F.2d at 359. The court then stated:

We understand Fowkes to mean that continuing conduct of defendant will not stop the ticking of the limitations clock begun when plaintiff obtained the requisite information. On discovering an injury and its cause, a claimant must choose to sue or forego that remedy. This interpretation is supported by Kubrick, which requires a plaintiff to take prompt action to seek redress.

Id. at 360. To the extent that Page stands for a contrary proposition, the court went on, "we decline to follow it." Id. Thus the Third Circuit has declined to adopt a form of the continuing tort doctrine that would defer the accrual of Hunter's cause of action beyond the point at which he became aware of his injury and its cause.³

Hunter also argues that the "continuing treatment" doctrine delayed the accrual of his cause of action until he ceased to be under the treatment of the government's physicians. This doctrine appears to have entered Third Circuit jurisprudence by way of

³ The Kichline court made only one concession to the continuing tort doctrine. Some courts have held that, where a plaintiff's injury was caused incrementally by the defendant's continuous tortious activity, a plaintiff who cannot recover for the injury itself due to the statute of limitations also cannot recover for any subsequent aggravation of that injury, even where the aggravation occurred within the statutory period. See, e.g., Mounts v. Grand Trunck Western R.R., 198 F.3d 578 (6th Cir. 2000). The Kichline court, however, did recognize a separate "aggravation" cause of action. 800 F.2d at 361. Recognizing this cause of action alleviates the concern of the Page court, quoted above, that a tortfeasor might acquire a right to continue his tortious conduct once the statute of limitations had run.

a footnote⁴ in the pre-Kubrick case of Tyminski v. United States, 481 F.2d 257 (3d Cir. 1973), in which the court stated:

Plaintiff-Appellant has argued that continuous treatment should act as an alternative test for determining when a claim accrues under the Tort Claims Act. We reject this approach. We find no value in the contention that a person who knows of the existence of the acts upon which his claim for negligence in a medical malpractice case is based may nevertheless forestall bringing suit until the treatment for his injuries is complete. The rationale for the continuous treatment rule as expressed by the New York Court of Appeals in Borgia v. New York, 12 N.Y.2d 151, 237 N.Y.S.2d 319, 187 N.E.2d 777 (1962) does, however, have value in determining reasonable diligence to discover the acts constituting negligence.... [In Borgia,] the rule is premised on the notion that a person should not be required to investigate the cause of his injuries or to bring suit while receiving necessary treatment for the injuries. The interest in preventing stale claims convinces us that this rationale for the rule has no merit when a person knows of the acts constituting negligence. In this situation little, if any, investigation is necessary to determine whether a meritorious cause of action exists. A different situation is posed, however, when a person does not know of the acts constituting negligence. Under these circumstances the rationale for the continuing treatment test has value in determining the exercise of reasonable diligence to discover the acts constituting negligence.

Id. at 264 n. 5 (citations omitted). Though the Tyminski footnote preceded the Supreme Court's Kubrick decision, it is still the law in this circuit once the description of what the victim must know for accrual to occur, "the acts constituting negligence," is refined to "the existence of the injury and its cause." Once this refinement is made, the contours of the continuing tort doctrine seem clear. Where the tort victim does not yet know of his injury, the fact that he was being treated by the physician who committed the wrongdoing is relevant to whether he *should have* known, by the exercise of due diligence, of the

4 Since the parties vigorously dispute the meaning of the Tyminski footnote, it is appropriate to quote it at length.

existence of his injury and its cause, that is, whether a reasonable person in such circumstances would have been aware of the injury and its cause. Where, however, the tort victim has actual knowledge of his injury and its cause, the continuous treatment doctrine is ineffective to delay the accrual of the tort cause of action. As the Tyminski court emphasized, there is “no value in the contention that a person who knows of the existence of the acts upon which his claim for negligence is based may nevertheless forestall bringing suit until the treatment for his injuries is complete.” Id.

Hunter relies heavily on another Third Circuit case, decided shortly after Tyminski, to argue for a more robust conceptualization of the continuing treatment doctrine. In Ciccarone v. United States, 486 F.2d 253 (3d Cir. 1973), the court stated that “the continued existence of the physician-patient relationship ... tolls the statute of limitations” in medical malpractice cases. Id. at 256. However, the Ciccarone court explained that the continuing treatment doctrine was crafted “because it was thought that a private physician, knowing of his actionable mistake, might be able to conceal it from his patient or continuously lull the patient into failing to institute suit within the ordinarily permissible time period.” Id. at 257 (citations and internal quotes omitted). The court then found that the doctrine did not apply to the case before it because the circumstances made it unreasonable to think that any concealment or continuous lulling had occurred. Id.

Insofar as Ciccarone would permit the deferral of accrual while the tortfeasor conceals the existence of the injury from the victim, it is consistent both with Tyminski and with Kubrick. If it is read, however, to allow for the deferral of accrual after the plaintiff becomes aware of the injury for as long as the tortfeasor “continuously lulls” his victim into

not instituting suit, then Ciccarone will be inconsistent with both Tyminski and Kubrick. In particular, it will conflict with the Kubrick court's desire to place medical malpractice claimants on an equal footing with all other tort claimants. The Supreme Court expressed this principle as follows: "But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make." Kubrick, 444 U.S. at 124, 100 S.Ct. at 360. But every potential tort plaintiff, especially those who are injured by someone with whom they have an existing relationship, is subject to being persuaded not to sue. Further, a medical malpractice victim who knows of his injury but is being influenced not to sue may still "protect himself by seeking advice in the medical and legal community." Id. 444 U.S. at 123, 100 S.Ct at 360. Therefore, in light of the aforementioned considerations underlying Kubrick, and given that court's recognition of an express legislative purpose "to require the reasonably diligent presentation of tort claims against the government," id., the better reading of Ciccarone is one that does not allow accrual to be deferred beyond the point at which the victim becomes aware of his injury, even where the physician "continuously lulls" the victim into not instituting suit. Accordingly, the lulling not to bring suit mentioned in Ciccarone should be understood to refer to situations in which a doctor-tortfeasor dissuades a victim who has an inkling that something is wrong, but no concrete knowledge as yet, from making an investigation that would reveal the existence of the injury. This reading accords with Kubrick and Tyminski by limiting the operation of the continuing treatment doctrine to the period of time preceding the victim's recognition that he has been injured.

Under this reading of Ciccarone, the continuing treatment doctrine relieves a tort victim who is under the treatment of the physician-tortfeasor from the obligation of making an investigation into whether and by what he has been injured. Such a victim will be immune from the charge that, under the objective standard for accrual, he *should have known* of his injury and its cause, because a reasonable person under the circumstances would have been aware of them. However, consistently with Kubrick and Tyminski, a victim of medical malpractice who has actual knowledge of his injury and its cause will not be able to invoke the continuing treatment doctrine to contend that his cause of action did not accrue until his treatment ended. This reading of Ciccarone not only comports with the principles underlying Kubrick, but it also is the only interpretation in accord with the clear statement in Tyminski that there is “no value in the contention that a person who knows of the existence of the acts upon which his claim for negligence is based may nevertheless forestall bringing suit until the treatment for his injuries is complete.” 481 F.2d at 264 n. 5.⁵

⁵ This reading is also consistent with the Third Circuit’s only post-Kubrick statement concerning the continuing treatment doctrine: “We must emphasize that [the plaintiff’s] situation cannot be characterized as one akin to a perpetration of a fraud or a continuing treatment by a physician, or the development of a transference relationship by a patient with her doctor, which might mask the malpractice and excuse the failure to timely file a claim.” Barren, 839 F.2d at 991 n. 6 (citations omitted). This comment clearly indicates that continuing treatment defers accrual because it conceals or masks the malpractice. It in no way suggests that a victim with actual knowledge of his injury and its cause will be excused from the obligation to timely file a claim.

Other post-Kubrick courts have construed the continuing treatment doctrine even more narrowly than this court does today. See, e.g., Sunday v. U.S. Veterans Administration, 1991 WL 158098, *3 (E.D. Pa.) (“the continuous treatment doctrine, in which a person is under continuous treatment by a physician and relies on the advice of that physician, will not toll the statute of limitations if a reasonable person in possession of the facts would know that some thing was wrong”).

As Hunter had actual knowledge of his injuries and their cause at the time he filed his first lawsuit, the continuing treatment doctrine cannot delay the accrual of his cause of action beyond that time. Further, as noted above, the Third Circuit has not adopted the strong form of the continuing tort doctrine that defers accrual until the cessation of the tortious conduct. Consequently, Hunter's cause of action for negligent treatment of his urinary tract ailments accrued no later than the time he filed his first lawsuit, and his failure to file his administrative claim within two years of that date operated both to bar his claim forever and to deprive this court of subject matter jurisdiction. Accordingly, the government's motions to dismiss under Rule 12(b)(6) and Rule 12(b)(1) will be granted.

An appropriate order will follow.

December 15, 2000 _____
Date

A. Richard Caputo
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

MILTON HUNTER,	:	
	:	
Plaintiff,	:	NO: 3:CV-00-0036
	:	
v.	:	
	:	(JUDGE CAPUTO
UNITED STATES,	:	
	:	
Defendant.	:	

ORDER

NOW, this 15th day of December, 2000 IT IS HEREBY ORDERED that

1. Defendants' Motion to Dismiss under Rule 12(b)(6) (Doc. 3) is **GRANTED**;
2. Defendants' Motion to Dismiss under Rule 12(b)(1) (Doc. 3) is **GRANTED**;
3. The Clerk of the Court shall mark this case closed.

A. Richard Caputo
United States District Judge

Filed 12/15/2000