IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CATHERINE C. MEYER and, WILLIAM R. MEYER, her husband	)	
Plaintiff,	)	
v.	)	C.A. No. 07C-10-224-JRS
TIMOTHY DAMBRO, M.D., EDELL RADIOLOGY ASSOCIATES, P.A., and DIAGNOSTIC IMAGING ASSOCIATES, P.A.	)	
Defendants.	)	

Date Submitted: June 27, 2008
Date Decided: September 30, 2008

Upon Defendants' Motion for Summary Judgment
DENIED.

Bartholomew J. Dalton, Esquire, DALTON & ASSOCIATES, P.A., Wilmington, Delaware. Attorney for Plaintiffs.

John A. Elzufon, Esquire, ELZUFON AUSTIN REARDON TARLOV & MONDELL, P.A., Wilmington, Delaware. Attorney for Defendants.

SLIGHTS, J.

I.

In this opinion, the Court considers whether a medical negligence action brought by Plaintiff, Catherine Meyer ("Meyer"), against Defendants, Timothy Dambro, M.D. ("Dambro"), Edell Radiology Associates, P.A. ("ERA"), and Diagnostic Imaging Associates, P.A. ("DIA")(collectively "Defendants"), is barred by the healthcare malpractice statute of limitations.[1] Defendants contend that settled authority interpreting Section 6856 requires the Court to conclude that the statute of limitations began to run on the date Meyer contends the first act of medical negligence occurred, regardless of whether *vel non* that act caused her injury. Meyer contends that, in this case, the statute of limitations did not begin to run until the date on which her expert opines the Defendants' medical negligence actually caused injury. If the Court accepts Defendants' interpretation of Section 6856, then Meyer's claim is time-barred. If, on the other hand, the Court accepts Meyer's interpretation, then the question of when the statute of limitations began to run in this case cannot be decided definitively on this record and must await resolution of disputed factual issues by the jury.

---

[1] "No action for the recovery of damages upon a claim against a health care provider for personal injury, including personal injury which results in death, arising out of medical negligence shall be brought after the expiration of 2 years from the date upon which such injury occurred." 18 *Del. C.* § 6856 ("Section 6856").

Upon consideration of the parties' written submissions and oral argument, the Court is satisfied that the record with respect to the timeliness of Meyer's claim reveals genuine issues of material fact regarding the date on which Meyer's claim of medical negligence actually accrued, and the date on which the statute of limitations began to run. Accordingly, Defendants' motion for summary judgment must be **DENIED.**

II.

Meyer began treatment with DIA for breast cancer screenings in March of 1997.[2] She returned for a scheduled follow-up mammogram three years later and continued to do so annually from 2000 through 2003.[3] After each procedure, Meyer was informed by DIA that the studies revealed no abnormalities.[4] Meyer's 2005 mammogram, taken on March 8, 2005, was read by Dambro.[5] The report, prepared by Dambro, stated that the film was normal; there were no suspicions of breast cancer. She was told to return a year later for follow up screening.

On May 4, 2006, Meyer returned to DIA for her annual mammogram. The

---

[2]Transaction Identification Number ("Trans. I.D.") 20337878 at 2.

[3]Meyer did not return for a mammogram in 2004. Trans. I.D. 18936245 at 2.

[4]Trans. I.D. 18936245 at 2.

[5]Trans. I.D. 18936245 at 2.

study was read by Dr. Stephen Edell who advised Meyer that the results were "[h]ighly suggestive of malignancy."[6] Following a consultation with her gynecologist, Meyer was evaluated by a surgeon, Dr. Virginia Clemmer, who suggested that she undergo a biopsy to determine whether the lesion identified in the mammogram was malignant. The biopsy was performed on May 18, 2006, and confirmed the presence of cancer.[7] Upon learning that she had breast cancer, Meyer chose to receive specialized treatment at Fox Chase Cancer Center.[8] Meyer treated at Fox Chase with Dr. Elin Sigurdson, who informed her that further surgery would be necessary as the biopsy "did not get all of the cancer."[9] Meyer began pre-operative chemotherapy treatments on July 7, 2006, and continued to receive these treatments throughout the fall. She experienced numerous negative side effects from the treatments including nausea, vomiting, throat spasms and hair loss. [10]

Meyer completed her chemotherapy treatment in May of 2007. In the eleven months that followed her original diagnosis of breast cancer she underwent two surgeries to remove the cancer, sixteen chemotherapy treatments, three colonoscopies,

---

[6]Trans. I.D. 18936245 at 2.

[7]Trans. I.D. 18936245 at 2.

[8]Trans. I.D. 20337878, at 3.

[9]Trans. I.D. 20337878, Exhibit A at 1.

[10]Trans. I.D. 20337878, Exhibit A at 2.

two months of physical therapy to treat Lymphedema (a build up of fluid near the lymph nodes) and a one week hospitalization for lung and heart complications relating to the chemotherapy.[11]

According to her affidavit, Meyer began to reflect on her cancer diagnosis and course of treatment as she was convalescing over the summer of 2007. She thought it "strange" that her cancer was so advanced when first diagnosed even though she had been "diligent" about getting her mammograms and had been assured repeatedly that the studies were normal.[12] In September of 2007, Meyer contacted an attorney to investigate whether the breast cancer had been present on earlier mammograms that had been read as normal and whether any of her health care providers had committed medical negligence.

On October 24, 2007, Meyer filed a complaint, accompanied by the statutorily-required affidavit of merit from a competent medical professional, alleging medical negligence against Dambro, Women's Imaging Center of Delaware, and DIA.[13] Specifically, Meyer alleged that Defendants' treatment of her fell below the standard

---

[11]Trans. I.D. 20337878, Exhibit A at 1-3.

[12]*Id.* at 4.

[13]Trans. I.D. 16794912. An amended complaint was filed on December 10, 2007 that added defendant, ERA. Trans. I.D. 17595793. All parties agree that the amended complaint relates back to the filing date of the original complaint. Also, Women's Imaging Center of Delaware, P.A. was subsequently dismissed from the case. Trans. I.D. 20447085.

of care by: (1) failing to diagnose the presence of breast cancer in her March 8, 2005 mammogram; (2) failing thereafter to recommend a biopsy to evaluate the potentially cancerous lesion; (3) failing to recommend followup evaluations; and (4) rendering treatment without her informed consent.[14] On January 8, 2008, Defendants filed an answer in which they denied any wrongdoing and asserted as an affirmative defense that Meyer's claim was barred by the applicable statute of limitations.[15]

III.

Defendants have moved for summary judgment on the ground that Meyer's claims are barred by Section 6856 which sets forth a two year statute of limitations for medical malpractice actions that begins to run from "the date upon which the injury occurred." In support of their motion, Defendants rely principally upon two decisions of the Supreme Court of Delaware, *Dunn v. St. Francis*[16] and *Meekins v. Barnes,*[17] in which the Court held, for purposes of Section 6856, that "injury occurs" when the negligent act occurred, not when there is a physical manifestation of the alleged malpractice. Under this interpretation of the statute, Meyer's injury occurred

[14]Trans. I.D. 17595793 at 2-3.

[15]Trans. I.D. No. 17935294.

[16]401 A.2d 77 (Del. 1979).

[17]745 A.2d 893 (Del. 2000).

on March 8, 2005, when Dambro allegedly misread her mammogram. According to Defendants, Meyer's October 24, 2007 complaint was filed more than two years after the "injury occurred" and, consequently, it is time barred.

In response, Meyer argues initially that *Dunn* and *Meekins* were wrongly decided.[18] At oral argument, counsel for Meyer conceded that *this* Court could not decide this case by determining that clear Supreme Court authorities were wrong. That argument, although preserved here, must be presented in the first instance to the Supreme Court. Nevertheless, Meyer argues that the statutory framework within which *Dunn* and *Meekins* were decided has changed in a significant way with the recent enactment of amendments to 18 *Del. C.* §6853 ("Section 6853"). These amendments now require plaintiffs in healthcare malpractice cases to secure an affidavit from a competent expert who will swear that the defendant(s) breached the standard of care and that such breach(es) proximately caused injury to the plaintiff. Without this so-called "affidavit of merit," plaintiff's complaint cannot be filed with this Court.

According to Meyer's expert witness, Meyer's breast cancer did not metastasize until, at the earliest, November 1, 2005.[19] Consequently, the expert avers

---

[18]Trans. I.D. No. 20337878 at 7.

[19]*Id.*

that he could not have sworn out an affidavit of merit earlier than November 1, 2005 because "[he] would not have been able to state that there were reasonable grounds to believe that the delay [in diagnosing cancer] caused a medically provable injury to the plaintiff."[20] According to Meyer, a judicial determination that her cause of action accrued at the time of the alleged misdiagnosis would run afoul of Section 6853 since she could not actually seek redress for that wrong until such time as she could secure an affidavit of merit that met all of the statutory requisites.

Additionally, Meyer argues that the injury in this case was "unknown" within the two years limitations period as contemplated by Section 6856 and, therefore, she had three years from the date "upon which her injury occurred" to file her claim.[21] Meyer also argues that Defendants engaged in a continuously negligent course of treatment of her between March 8, 2005 and May 8, 2006 and, accordingly, the statute of limitations began to run on the last date of treatment in the continuum (May 8, 2006).[22] Finally, Meyer argues that 18 *Del. C.* § 6856 is unconstitutional as

---

[20] *Id.* at 8.

[21] *Id.* at 11-13(citing 18 *Del. C.* § 6856(1)).

[22] *Id.* at 14.

applied to her and all other sufferers of breast cancer.[23]

IV.

The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist.[24] Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[25] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment will not be granted.[26]

The moving party bears the initial burden of demonstrating that the undisputed

---

[23] *Id.* at 16. The Court will not address this argument because there are sufficient state law grounds upon which to decide this motion. *Carper v. Stiftel*, 384 A.2d 2, 7-8 (Del. 1977)("Accordingly, pursuant to the settled policy of the Court not to decide a Constitutional question unless its determination is essential to the disposition of the case, we do not reach the Federal Constitutional issue.").

[24] *Oliver B. Cannon & Sons, Inc.* v. *Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973).

[25] *Id.*

[26] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962). *See also Cook v. City of Harrington*, 1990 WL 35244, at *3 (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more throughly into the facts in order to clarify the application of law to the circumstances.").

facts support the proffered basis for dispositive relief.[27] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder or that the legal theories raised in support of the motion are deficient.[28] As stated, when reviewing the record, the Court must view the evidence in the light most favorable to the non-moving party.[29]

V.

Defendants have brought a motion which, in this Court's view, could have been granted in short order if it had been filed prior to July 11, 2003, the date on which the Governor signed amendments to Section 6853 into law. As explained below, based on now settled precedent, the statute of limitations in a medical negligence action begins to run on the date of the alleged negligent act. Meyer did not file her claim within two years of that date. Moreover, there are no grounds to extend that date beyond two years. The undisputed facts reveal that the injury of which Meyer complains (the spread of her breast cancer) became known to her prior to the expiration of two years from the date of the alleged misdiagnosis. Under these

---

[27] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

[28] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[29] *See United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *Brzoska*, 668 A.2d at 1364.

circumstances, the three year statute of limitations set forth in Section 6853(1) is not available to her. Likewise, because Meyer became aware of the alleged injury within two years of the last alleged negligent act, the continuous negligent treatment doctrine cannot extend the statute of limitations. These determinations can be made as a matter of clear statutory mandate, or clear precedent of our Supreme Court. The matter is complicated, however, by the affidavit of merit provisions of Section 6853, and the potential impact these provisions may have on a plaintiff's ability to seek redress in this Court for medical negligence under the existing statute of limitations jurisprudence.

The Court will first address the issues that, in its view, present a clear path to resolution - - the applicability of the unknown injury provision of Section 6856(1) and the continuous negligent treatment doctrine. The Court will then address the issue of whether the practical impact of Section 6853 must, in certain circumstances, affect the statute of limitations determination under Section 6856.

A. The Unkown Injury Provision of Section 6856

Section 6856 provides, in relevant part, that the two year statute of limitations for medical negligence claims will be extended to three years "[s]olely in the event of personal injury the occurrence of which, *during such period of 2 years*, was unknown to and could not in the exercise of reasonable diligence have been

discovered by the injured person...."[30] The undisputed facts reveal that Meyer became aware that she had metastasizing breast cancer in May, 2006, well within the two years following the date of the alleged misdiagnosis in March, 2005. Under these facts, the three year statute of limitations in Section 6856(1) does not apply.[31]

B. The Continuous Negligent Treatment Doctrine

In *Ewing v. Beck,*[32] the Supreme Court of Delaware first recognized that continuous negligent medical treatment can extend the statute of limitations in certain limited circumstances:

> When there is a continuum of negligent medical care related to *a single condition* occasioned by negligence, the plaintiff has but one cause of action - for continuing negligent medical treatment. If any act of medical negligence within that continuum falls within the period during which suit may be brought, the plaintiff is not obliged to split the cause of action but may bring suit for the consequences of the entire course of conduct.... [F]or the purpose of construing § 6856 ... when the cause of action is for continuous negligent medical treatment, the 'date upon which such injury occurred' is the last act in the negligent medical continuum.[33]

A plaintiff seeking to extend the statute of limitations by stating a cause of action for continuous negligent treatment must plead the supporting facts with particularity in

---

[30]Section 6856(1)(emphasis supplied).

[31]*See Reyes v. Kent General Hosp., Inc.,* 487 A.2d 1142, 1145 (Del. 1984).

[32]520 A.2d 651, 661 (Del. 1987).

[33]*Id.* at 662, 663 (emphasis in original).

her complaint in a manner that will demonstrate "that the treatment was inexorably related so as to constitute one continuing wrong."[34] In this case, Defendants have not challenged the sufficiency of Meyer's pleading; they have, instead, challenged whether the undisputed facts developed in discovery bear out what Meyer has alleged in the pleading.

Significantly, *Ewing* made clear that, in a continuous negligent treatment case, "the statute of limitations begins to run for two years from the last act in the negligent continuum *prior* to the point in time when the plaintiff has actual knowledge of the negligent course of treatment or in the exercise of reasonable diligence could have discovered the negligent course of treatment."[35] To apply the statute of limitations properly in this context, the Court must ascertain two critical dates: (1) the date on which the plaintiff had actual or constructive notice of the negligent treatment; and (2) the date on which the last act in the negligent continuum occurred immediately prior to the plaintiff receiving notice.[36] If a plaintiff has a claim for continuous negligent treatment, and the basis for this claim becomes known to her within two years of an act in the alleged negligent continuum, then she must bring that claim

---

[34] *Id.* at 664.

[35] *Id.* at 665 (emphasis supplied).

[36] *See Benge v. Davis,* 553 A.2d 1180, 1184 (Del. 1989).

within "two years from the last act in the negligent continuum prior to the point in time when the plaintiff [had notice of the negligent treatment]."[37]

In this case, the undisputed facts reveal that the last alleged "negligent act" occurred on March 8, 2005,when Dambro allegedly misread Meyer's mammogram. In the months that followed March 8, 2005 up to Meyer's next study on May 6, 2006, during which Meyer relied upon Dambro's allegedly negligent misdiagnosis and did not seek further treatment, Defendants engaged in no further negligent "acts," as that term has been defined by our Supreme Court.[38] Meyer became aware of the last act in the alleged negligent continuum well within two years from the date of that act. Whether one concludes that the continuous negligent treatment doctrine does not apply here (as Defendants vigorously contend) or, applying the doctrine (as Meyer urges), that the statute of limitations expired on March 8, 2007, the distinction, like "blue on black, tears on a river, a match on a fire ...," makes no difference here.[39] The complaint was not filed within two years from the date of the last alleged negligent act in the continuum and would, therefore, be time barred, even under the

---

[37]*Ewing*, 520 A.2d at 665.

[38]*See Benge,* 553 A.2d at 1185 (defining "negligent act," distinguishing continuous *negligent* treatment doctrine from continuing treatment doctrine, and holding that Delaware recognizes the former but not the latter). Meyer does not contend that the May 4, 2006 mammogram was negligently performed or read.

[39]Kenny Wayne Shepherd, *Blue on Black,* (Trouble Is, Warner Bros. 1997).

most liberal application of the continuous negligent treatment doctrine.

C. The Impact of Section 6853 Upon Section 6856

As stated, under *Dunn* and *Meekins*, the two year statute of limitations set forth in Section 6856 began to run on March 8, 2005, when Dambro allegedly misread Meyer's mammogram.[40] If the Court were to follow this precedent, then the outcome here would be clear - - Defendant's motion would have to be granted because Meyer's complaint was not timely filed. Meyer, however, has asked the Court to consider whether the passage of amendments to Section 6853 should alter application of *Dunn* and *Meekins* in cancer and other similar cases where the negligent act typically does not itself cause injury at, or even near, the time of the act. This is an issue of first impression and, in the Court's view, one of significant importance to litigants in healthcare malpractice claims. To resolve it, the Court has two options. The Court could certify the question to the Supreme Court of Delaware under Supreme Court Rule 41.[41] Or, the Court could decide the question with the expectation that the matter would be reviewed by the Supreme Court *de novo* as a question of law. Because the Court is satisfied that its views on the issue may be

---

[40] *See Dunn,* 401 A.2d at 80 ("Thus, through examination of the legislative history, there is no doubt that the phrase "injury occurred" [in Section 6856] refers to the date when the wrongful act or omission occurred."); *Meekins,* 745 A.2d at 897 (same).

[41] *See* Del. Supr. Ct. R. 41(a)(i)(Delaware courts may *sua sponte* certify questions of law to the Supreme Court if certain criteria are satisfied).

useful to the Supreme Court, the Court will decide the issue now and certify the issue for interlocutory appeal should either party file the appropriate application.[42]

1. Section 6856 Before The Amendments To Section 6853

In *Dunn,* the Court recited at some length the legislative history of Delaware's Health Care Malpractice Act (later changed to "Medical Negligence Act") and concluded that the General Assembly intended to "eliminate the uncertainty created by [an] open-ended period of limitations" by setting a two year statute of limitations that could be extended to a three year cap in the case of inherently unknowable injuries.[43] In recognition of this legislative intent, the Court determined that the General Assembly intended that the date on which "injury occurs" under Section 6856 must be the fixed date on which "the wrongful act or omission occurred."[44] This holding was reiterated in *Meekins,* a case involving alleged misdiagnosis of breast cancer.[45]

---

[42]*See* Del. Supr. Ct. R. 42(c). *See also Michael v. State*, 529 A.2d 752, 758 (Del. 1987)(noting that trial court's analysis of issue of law, even though reviewed *de novo*, can be of assistance to the appellate court); *New Castle County Dep't. of Land Use v. Univ. of Del.*, 842 A.2d 1201, 1206 (Del. 2004)(same observation made in the context of lower court's interpretation of statute in case of first impression).

[43]*Dunn*, 401 A.2d at 79-80.

[44]*Id.* at 80.

[45]*Meekins*, 745 A.2d at 897.

Notwithstanding *Dunn* and *Meekins*, and the certainty both decisions correctly sought to bring to health care providers in Delaware, our Supreme Court has recognized that in certain medical negligence actions, the determination of when the statute of limitations will begin to run necessarily depends upon the resolution of disputed issues of fact by the jury. In *Papastavros Assoc. Med. Imaging v. Bissell*, for instance, when applying the continuous negligent treatment doctrine, the Court affirmed the trial court's determination that "the existence of a continuum of negligent care was a fact issue for the jury."[46] The Court has also recognized that the determination of when a plaintiff knew or should have known of an injury caused by negligence, for statute of limitations purposes, implicates an issue of fact.[47] The notion that a jury may need to resolve disputed factual issues before the Court can properly apply the statute of limitations is not novel. Indeed, it is not at all uncommon for this court to submit such issues to the jury.[48]

---

[46]1995 Del. LEXIS 223, at **3-4.

[47]*Reyes*, 487 A.2d at 1144-45.

[48]*See e.g. Greco v. University of Delaware*, 619 A.2d 900, 905 (Del. 1993)(recognizing the "time of discovery rule" implicates factual issues); *Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1035 (Del. 2003)("Chrysler also appeals the Superior Court's post-trial ruling that agreed with the jury's finding that the statute of limitations did not bar recovery...").

2. The Enactment of a Statutory Affidavit of Merit Requirement

On July 11, 2003, the Governor signed into law a requirement that an affidavit of merit accompany every complaint alleging malpractice against a healthcare provider.[49] This affidavit, submitted by an expert with statutorily-prescribed "qualifications," must establish a *prima facia* case for medical negligence by setting forth the applicable standard of care, the alleged deviation from the standard of care, and the causal link between the breach and the plaintiff's alleged injury.[50] Failure to submit the affidavit of merit is fatal to the pleading.[51]

The purpose of the affidavit of merit is to act as a filter to screen out meritless medical negligence claims before they are filed:

> By requiring an Affidavit of Merit, the General Assembly intended to require review of a patient's claim by a qualified medical professional, and for that professional to determine that there are reasonable grounds to believe that the health provider has breached the applicable standard of care that caused the injuries claimed in the complaint.[52]

---

[49] 18 *Del. C.* § 6853(a)-(d).

[50] *See Yong v. Nemours Found.*, 2004 WL 3119784, at *4 (D. Del. Dec. 1, 2004).

[51] 18 *Del. C.* § 6853(a) ("No healthcare negligence lawsuit shall be filed in this State unless the complaint is accompanied by an affidavit of merit..."); *Jackson v. First Corr. Med. Servs.*, 380 F.Supp 2d 387 (D.Del. 2008)(dismissing complaint for failing to attach affidavit of merit).

[52] *Beckett v. Beebe Medical Ctr.*, 897 A.2d 753, 757 (Del. 2006).

Prior to the enactment of the affidavit of merit requirement, a plaintiff in a medical negligence action could file her complaint alleging medical negligence before the extent to which the negligence proximately caused injury to her (if at all) was known to her. Indeed, in *Meekins,* the Supreme Court observed that "[i]n theory, Meekins could have brought an action at [the time of] the allegedly negligent diagnosis, although her damages would be difficult to quantify."[53] That observation, absolutely accurate at the time it was made, is no longer accurate in the wake of the amended Section 6853. A plaintiff's cause of action for medical negligence does not accrue until such time as she is able to secure an affidavit of merit from a competent expert who is prepared to opine that the health care defendant(s) breached the applicable standard(s) of care ***and*** that such breach(es) proximately caused the plaintiff's injuries. No longer can a plaintiff file a complaint for medical negligence when the causation of injury is not yet established to a reasonable degree of medical probability.[54]

In most instances, the affidavit of merit requirement will have no impact on the statute of limitations. The alleged act of medical negligence will be accompanied by

---

[53] *Id*. at 897.

[54] *Cf, Beckett*, 897 A.2d at 758 (allowing a plaintiff to file an affidavit of merit *after* the filing of the complaint, but only to correct a "procedural defect" upon concluding that plaintiff's counsel in good faith had determined that the affidavit was not necessary).

a causally related injury. For instance, a surgery performed below the standard of care will typically cause injury. A delivery of a child performed below the standard of care will typically cause injury to mother and/or child. But a failure to diagnose cancer, or a failure to diagnose infection,[55] may or may not proximately cause injury at the time of the negligent act. In this case, for instance, Meyer does not (and could not) allege that the breast cancer in its localized form was proximately caused by the negligence of any Defendant. Her expert, using staging techniques that are becoming ever more sophisticated, has opined that the breast cancer moved from a local disease process to a regional disease process, at the earliest, after November 1, 2005.[56] Prior to the cancer's spread from a local to a regional disease, Harris represents that he "would not have been able to state that there were reasonable grounds to believe that the delay caused a medically provable injury to the patient."[57] Absent causation, Meyer would have been unable, through her designated expert, to establish a *prima facie* claim of medical negligence against Defendants, as required by Section 6853,

---

[55]Here, the Court draws a distinction between a failure to diagnose an infection that was not caused by negligence and those infections caused by negligence. In the former scenario, the failure to diagnose infection may or may not be accompanied by a proximately caused injury. In the latter scenario, the negligence proximately causes the infection which itself is the injury.

[56]Trans. ID 20337878, Ex. F, §§ 7-8 (Dr. David Harris ("Harris") opines that Meyer's cancer spread from her breast to her lymphatic system after November 1, 2005).

[57]*Id.* Dr. Harris goes on to state: "Had I been asked to sign an Affidavit of Merit [prior to November, 2005], as I understand from Mr. Dalton Delaware now requires, I would have declined."

until after November 1, 2005.

In this case, the spread of Meyer's cancer and, therefore, the presence of an injury proximately caused by the alleged misdiagnosis, occurred within two years of the date of the alleged medical negligence. Thus, one could conclude that the affidavit of merit requirement has not worked an unreasonable hardship on the plaintiff here. Meyer had approximately eighteen months after the alleged proximately-caused injury to obtain her affidavit of merit and file her claim. But this will not always be the case. There may well be instances where, according to medical experts, a plaintiff who has received substandard medical care that is below applicable standards has yet to sustain an injury proximately caused by the substandard care within two years of the alleged act or omission.[58] Even though this hypothetical plaintiff's cause of action for medical negligence has yet to accrue because she cannot meet the statutory requisites to assert her claim, under *Dunn* and *Meekins*, the statute of limitations would run out before her claim could be brought.

Meyer characterizes the dilemma as a "Catch 22 problem," and with good reason.[59] In Delaware, medical negligence claims are creatures of statute. To

[58]Of course, these opinions implicate matters of medicine, not matters of law. They are subject to testing on cross examination and/or rebuttal by contrary expert testimony. They are not, however, susceptible to judicial determination. They offer good grist for a jury.

[59]Trans. ID 20337878, at 8.

conclude that a statute of limitations begins to run at a time before all elements of a statutory claim have been satisfied may well leave certain plaintiffs without a remedy. The amendments to Section 6853 have further refined the prerequisites of the medical negligence claim and further tied them to the plaintiff's ability to secure competent expert testimony to support her claim. The requirement to do so has been shifted by Section 6853 from some time after the filing of a complaint but prior to trial (usually by the summary judgment deadline) to the outset of the litigation.[60] The running of the statute of limitations must be tied in a meaningful way to the plaintiff's ability to meet her newly-imposed statutory burden to make a claim.[61] In the case of failure to diagnose a condition where the failure does not immediately cause injury, the statute of limitations must begin to run as of the first date upon which the plaintiff could have submitted an affidavit of merit that satisfies all statutory requisites - - an issue of fact, if disputed, to be resolved by the jury with the benefit of carefully crafted jury

---

[60] *See McBride v. Shipley Manor Health Care*, 2005 Del. Super. LEXIS 87, at *2 ("It is consistent with the General Assembly's intent when it enacted the Affidavit of Merit requirement to require Plaintiffs to produce an expert sooner, rather than later.").

[61] *See* NORMAN J. SINGER, 2B SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §53:01, at 322 (6th ed. 2000)(Courts are generally encouraged to acknowledge that statutes are not "read in isolation or passed in a vacuum.").

instructions and jury interrogatories.[62] This construction allows the Court to harmonize Section 6853 and Section 6856,[63] and "to construe [Section 6856] so as to establish just and reasonable guidelines for different classes of cases (here, delayed causation) in light of the general policy of repose."[64]

The Court is aware that this holding will increase litigation regarding the start of the limitations period in medical negligence cases and that this is contrary to the stated legislative purpose of Section 6856.[65] But, just as in cases involving the continuous negligent treatment doctrine, the application of which is often dependant upon jury determinations of disputed facts, the rare medical negligence case where a plaintiff alleges delayed causation that has delayed her ability to obtain an affidavit of merit will also require the jury to make factual determinations before the Court can apply the statute of limitations.

---

[62]Unlike the "time of discovery" scenario addressed in *Dunn* and *Meekins*, where the Court determined that the statute of limitations should begin to run on the earliest date that the plaintiff could have filed her claim (the date of the negligent act), this case presents a scenario where the plaintiff could not have filed on that date. The earliest date that a claim accrues under the amended Section 6853 is the earliest date the plaintiff's expert should have been able to opine that a breach of the standard of care proximately caused injury to the plaintiff.

[63]*Id.* at 323.

[64]*LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007)(citations omitted).

[65]The Court must presume that the General Assembly was aware of this purpose ("to eliminate uncertainty created by [an] open-ended period of limitations" - *Dunn*, 401 A.2d at 79) when it enacted the affidavit of merit requirement. Sutherland, *supra*, at § 53:01.

In this case, plaintiff's expert alleges that the deviation from the standard of care did not proximately cause injury to Meyer until November 1, 2005. If the jury agrees, the Court must conclude that the complaint was timely filed. If, however, the jury accepts the defense position that the cancer matastacized on an earlier date, or that a calculable increased risk of injury occurred on an earlier date, this determination will inform the Court's application of the statute of limitations.[66]

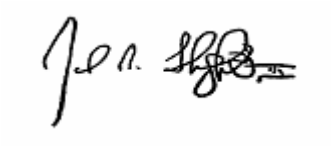
VI.

Based on the foregoing, the Court finds that genuine issues of material fact exist as to the date on which Defendants' alleged breach of the standard of care proximately caused injury to Meyer, and the date on which her statutory cause of action for medical negligence accrued. Accordingly, Defendants' motion for summary judgment based on the statute of limitations must be **DENIED**.

---

[66]The Court acknowledges the Defendants' argument that Delaware recognizes an "increased risk of harm" as a cognizable injury. *See United States v. Anderson*, 669 A.2d 73 (Del. 1995). To the extent expert testimony establishes that the plaintiff sustained an increased risk of harm as a proximate result of misdiagnosed cancer, the statute of limitations would begin to run on the date the increased risk can reasonably be calculated, as that is the date on which a plaintiff could have received an affidavit of merit to support her claim. The Court has not received any evidence (and certainly not undisputed evidence) that Meyer sustained an increased risk of harm as a proximate result of the alleged misdiagnosis of her breast cancer. Such evidence can be presented at trial if properly supported. If presented, the jury can be given special interrogatories to reflect their findings on this potentially dispositive issue.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary