SUPERIOR COURT
OF THE
STATE OF DELAWARE

VIVIAN L. MEDINILLA
JUDGE

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July 28, 2020

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Re: ***Delisa L. Jones v. Thomas P. Barnett, M.D. and Surgical Associates, P.A.*, C.A. No.: N18C-08-110 VLM**

Dear Counsel:

Oral arguments were heard on June 26, 2020 whereby Defendants presented a dispositive motion, specifically moving for the partial dismissal of Plaintiff's claims under 18 *Del. C.* §6853, 18 *Del. C.* § 6856, and Delaware Superior Court Civil Rule 12(b). In the alternative, Defendants seek partial summary judgment under Delaware Superior Court Civil Rule 56. For the reasons stated below, Defendants' Motion for Partial Dismissal/Partial Summary Judgment on the Statute of Limitations is **DENIED.**

I. Factual and Procedural Background[1]

Delisa L. Jones ("Plaintiff") alleges continual medical negligence claims against Defendants Thomas P. Barnett ("Dr. Barnett") and Surgical Associates, P.A. for treatment rendered in May of 2016. She alleges that on May 9, 2016, the Defendant physician performed a contraindicated subtotal colectomy surgery, which

[1] The Court's recitation is based on Plaintiff's Complaint filed on August 13, 2018; Defendants' Motion for Partial Dismissal/Partial Summary Judgment filed on May 15, 2020 and Opening Brief filed May 29, 2020; Plaintiff's Response to Defendants' Motion for Partial Dismissal/Partial Summary Judgment filed on June 12, 2020; and Defendants' Reply filed on June 19, 2020.

resulted in the removal of most of her colon. On May 18, Dr. Barnett performed an exploratory surgery and discovered two perforations to the small bowel that occurred during the May 9 surgery. Dr. Barnett attempted a corrective surgical procedure to repair the two small bowel perforations by suturing them closed. Plaintiff allegedly went into septic shock from the injuries sustained in both surgeries. On May 27, 2016, Dr. Barnett consulted with a colorectal surgeon, who performed corrective surgery on the same day. Plaintiff then underwent numerous corrective surgeries and remained hospitalized for an extended period due to complications from the procedures.

Plaintiff filed her Complaint alleging medical negligence on August 13, 2018. On May 15, 2018, Defendants filed this Partial Motion to Dismiss/Partial Motion for Summary Judgment, arguing in both motions that the Statute of Limitations bars Plaintiff's claims related to the first surgery. On June 12, 2020, Plaintiff filed her Response in Opposition, followed by Defendants' Reply on June 19, 2020. On June 26, 2020, this Court hear oral arguments. The matter is ripe for consideration.

II. Standard of Review

On a Motion to Dismiss under Civil Court Rule 12(b),[2] all well-pleaded allegations in the complaint must be accepted as true.[3] Even vague allegations are considered well plead if they give the opposing party notice of a claim.[4] The Court must draw all reasonable inferences in favor of the non-moving party;[5] however, it will not "accept conclusory allegations unsupported by specific facts," nor will it "draw unreasonable inferences in favor of the non-moving party."[6] Further, "a motion to dismiss is the proper vehicle for a statute of limitations defense where the pleading itself demonstrates that the claim was brought after the statutory period has run."[7] Whether a complaint is barred by a statute of limitations is a question of law.[8]

Alternatively, on a Motion for Summary Judgment, Civil Court Rule 56 requires Defendants demonstrate there is no genuine issues as to any material fact

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[2] *See* DEL. SUPER. CT. CIV. R. 12(b).
[3] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[4] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).
[5] *Id.*
[6] *Price v. E.I. DuPont de Nemours & Co.*, 25 A.3d 162, 166 (Del. 2011) (internal citation omitted).
[7] *Wilson v. Kirlin*, 2011 WL 1465576, at *1 (Del. Super. Ct. Apr. 15, 2011) (citing *Brooks v. Savitch*, 576 A.2d 1329, 1330 (Del. Super. Ct. 1989)).
[8] *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).

and that the moving party is entitled to judgment as a matter of law.[9] If the moving party satisfies its initial burden, the non-moving party must sufficiently establish the "existence of one or more genuine issues of material fact."[10] Summary judgment will not be granted if there is a material fact in dispute or if "it seems desirable to inquire thoroughly into [the facts] in order to clarify the application of the law to the circumstances."[11] All facts and reasonable inferences must be considered in a light most favorable to the non-moving party.[12]

III. Discussion

Under 18 *Del. C.* § 6856,[13] the applicable statute of limitations (SOL) for actions alleging medical malpractice is two years for injuries discovered at the time of the wrongful act[14] and three years for "inherently unknowable injuries."[15] Under 18 *Del. C.* § 6856(4), as invoked here, a plaintiff may toll the statute of limitations for a period of ninety days by sending a Notice of Intent to investigate to each potential defendant or defendants by certified mail.[16]

Defendants do not challenge Plaintiff's right to pursue her claims as to the second surgery. As to the first surgery, however, Defendants contend that where her ninety-day tolling period expired on August 8, 2018, the SOL bars her untimely filing five days later. Plaintiff maintains she filed her continual medical negligence

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[9] *See* DEL. SUPER. CT. CIV. R. 56(c).

[10] *Quality Elec. Co., Inc. v. E. States Const. Serv., Inc.*, 663 A.2d 488, 1995 WL 379125, at *3-4 (Del. 1995) (citing DEL. SUPER. CT. CIV. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979); *State v. Regency Group, Inc.*, 598 A.2d 1123, 1129 (Del. Super. Ct. 1991)).

[11] *Ebersole v. Lowengrub*, 180 A.2d 467, 469-70 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).

[12] *Nutt v. A.C. & S. Co.*, 517 A.2d 690, 692 (Del. Super. Ct. 1986) (citing *Mechell v. Palmer*, 343 A.2d, 621 (Del. 1975); *Allstate Auto Leasing Co. v. Caldwell*, 394 A.2d 748, 752 (Del. Super. Ct. 1978)).

[13] *See* 18 *Del. C.* § 6856 ("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 malpractice shall be brought after the expiration of 2 years from the date upon which such injury occurred; provided, however, that: (1) Solely 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, such action may be brought prior to the expiration of 3 years from the date upon which such injury occurred, and not thereafter; . . . .").

[14] *See id.*

[15] *Ogden v. Gallagher*, 591 A.2d 215, 218 (Del. 1991) (citing *Benge v. Davis*, 553 A.2d 1180, 1182 (Del. 1989) (citing *Ewing v. Beck*, 520 A.2d 653, 659 (Del. 1987))).

[16] *See* 18 *Del. C.* § 6856(4).

claim within the SOL. This Court agrees. Neither dismissal nor summary judgment is appropriate.

A. Continual Medical Negligence Claim is Within Statute of Limitations

Delaware law recognizes that a viable cause of action exists for the ongoing tort known as continuous negligent medical treatment.[17] In a continuing medical negligence claim, the applicable date for SOL purposes or the "date upon which such injury occurred" is the last act in the negligent medical continuum.[18] Here, Plaintiff alleges the negligent medical treatment involved interrelated surgical procedures. Dr. Barnett performed surgeries on May 9 and 18, 2016; the second an attempt to correct the first. The record further establishes that Plaintiff remained hospitalized as her condition worsened following both surgeries, and that after an unsuccessful attempt to address problems with both, Dr. Barnett made a decision to consult with a colorectal surgeon on May 27 who performed the first of several corrective surgeries.

Following the rationale in *Ogden v. Gallagher*, the Court finds that the allegations of medical negligent treatment here are "so inexorably intertwined" as to constitute "one continuing wrong."[19] Also applying the rationale in *Ewing*,[20] the SOL runs from the date of the last act in the alleged negligent continuum. Here, Dr. Barnett remained involved in the treatment of Plaintiff after the first and second surgeries he performed such that the SOL did not begin to run until the last act in the alleged negligent continuum when Dr. Barnett consulted with a colorectal surgeon on May 27, 2016. As such, Plaintiff filed her Complaint before the SOL was set to expire on August 25, 2018.

B. Continual Medical Negligence Claims Sufficiently Plead with Particularity and Established

Defendants alternatively seek partial summary judgment under Rule 56 also on Statute of Limitation grounds. The argument is two-fold: that Plaintiff failed to allege "continuous medical negligence" in her Complaint to satisfy Delaware Superior Court Civil Rule 9(b),[21] and that throughout the course of discovery,

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[17] *See Ewing v. Beck*, 520 A.2d 653, 659 (Del. 1987).
[18] *Ogden*, 591 A.2d at 219 (citing *Benge v. Davis*, 553 A.2d 1180, 1183 (Del. 1989) (citing *Ewing*, 520 A.2d at 663)).
[19] *Id.* (citing *Ewing*, 520 A.2d at 664).
[20] *Ewing*, 520 A.2d at 662-63 (citing *Oakes v. Gilday*, 351 A.2d 85 (Del. Super. Ct. 1976)).
[21] DEL. SUPER. CT. CIV. R. 9(b).

Plaintiff has failed to set forth with particularity a continuous course of medical negligence, and file within the applicable tolling period as to her first surgery.

As to the tolling argument, the Court has determined that Plaintiff filed her claims within the SOL under Rule 12(b). Since the motion filed is in the alternative, the Court reviews whether a different decision would be favorable to Defendants instead under Rules 9(b) and 56, respectively.

Under Rule 9(b), the Court is not persuaded that summary judgment should be entered against Plaintiff because she failed to *explicitly* articulate in her Complaint "continual medical negligence" or "continuum of negligence." Delaware case law makes clear that, when interpreting the Medical Practices Act, such an argument would exalt form over substance.[22] Although "plead with particularity" is not defined within Civil Rule 9(b), "particularity" requires a defendant to be apprised of: "(1) what duty, if any, was breached; (2) who breached it; (3) what act or failure to act breached the duty, and (4) the party upon whom the act was performed."[23] The four corners of Plaintiff's Complaint allege sufficiently that the medical treatment Plaintiff received from April 14, 2016 to May 27, 2016 was interrelated (i.e., so inexorably intertwined) that she sufficiently places Defendants on notice with particularity that her claims stem from the alleged negligence of several surgeries as one continuing wrong.

Not only pled but also proffered, the record reflects sufficient evidence to survive a Rule 56 motion. Defendants suggest that because the expert did not express an opinion regarding the particularity of a continuum theory, that dismissal is appropriate. Not so. Plaintiff's expert opines that Defendants breached the standard of care beginning on April 14, 2016 and continuing through May 27, 2016, and that those breaches proximately caused Plaintiff serious permanent injury including but not limited to being on a JG tube for the rest of her life. Accepting facts and inferences in the light most favorable to Plaintiff, summary judgment as to the first surgery as presented here is not appropriate. There remain genuine issues of material fact for the fact finder to consider in support of Plaintiff's continual medical negligence theory.

[22] *Barriocanal v. Gibbs*, 697 A.2d 1169, 1172-73 (Del. 1997).
[23] *Myer v. Dyer*, 542 A.2d 802, 805 (Del. Super. Ct. 1987).

For the foregoing reasons, Defendants' Partial Motion to Dismiss/Partial Motion for Summary Judgment is **DENIED.**

IT IS SO ORDERED.

/s/ Vivian L. Medinilla
Vivian L. Medinilla
Judge