SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Bruce L Hudson, Esquire
Hudson & Castle Law, LLC
2 Mill Road, Suite 202
Wilmington, Delaware 19806
Counsel for Plaintiff

Todd J. Krouner, Esquire
Scott J. Koplik, Esquire
Law Office of Todd Krouner
93 North Greeley Avenue
Chappaqua, New York 10514
Counsel for Plaintiff *Pro Hac Vice*

Gregory S. McKee, Esquire
Joshua H. Meyeroff, Esquire
Wharton, Levin, Ehrmantraut & Klein, P.A.
300 Delaware Avenue, Suite 1220
Wilmington, Delaware 19899
Counsel for Defendants

Re: Thomas Baird v. Frank R. Owczarek, M.D., Eye Care of Delaware, LLC, and Cataract and Laser Center, LLC
C.A. No. N11C-09-241 RRC

Submitted: March 4, 2013
Decided: April 1, 2013

Upon Defendants' Motion for Partial Summary Judgment.
DENIED.

Dear Counsel:

I. INTRODUCTION

Defendant Ophthalmologist and his related businesses move for partial summary judgment in Plaintiff's medical negligence case. Defendant Ophthalmologist performed Plaintiff's LASIK surgery in January 2004, as well as Plaintiff's LASIK enhancement surgery in October 2009. Plaintiff claims that Defendants engaged in a course of continuous negligence spanning from the first LASIK surgery until Plaintiff's enhancement surgery.

In Defendants' Motion for Partial Summary Judgment, Defendants seek to dismiss the portions of Plaintiff's medical negligence claim related to the January 2004 LASIK surgery, as well as all treatment that occurred before September 2009. Plaintiff's original complaint was filed in September 2011, and Defendants contend the prior treatment is barred by the applicable two-year limitations period. Defendants contend there are no genuine issues of material fact that permit tolling the statute of limitations, and that summary judgment is appropriate as a matter of law.

Plaintiff contends that the continuous negligence doctrine permits him to claim medical negligence for a period beyond the normal period of limitations. Plaintiff also contends there are material facts in dispute that are jury questions. According to Plaintiff, one such jury question is whether Plaintiff's LASIK treatment was accomplished through a co-managed care model, such that visits with health care providers other than the named Defendants are included within the negligence continuum.

The Court finds that the continuous negligence doctrine is potentially applicable to this case, but that material facts are in dispute regarding certain aspects of Plaintiff's LASIK treatment. Jury resolution of this factual dispute is necessary to determine whether and to what extent the continuous negligence doctrine applies to Plaintiff's treatment. Therefore, Defendant's Motion for Partial Summary Judgment is **DENIED**.

II. STIPULATED FACTUAL HISTORY

In large part, the parties have stipulated to the underlying facts at issue.[1] Where the parties have been unable to stipulate to facts, both parties provided additional facts. The additional facts are either disputed or are deemed immaterial by opposing counsel and therefore, were not included in the joint stipulation.

The parties also differ regarding the proper inferences to be drawn from the agreed-upon facts. The body of the joint stipulation is set forth in *toto* below.

1. On or about January 16, 2004, Matthew Epstein, O.D. ("Dr. Epstein") referred Plaintiff Thomas Baird ("Mr. Baird") to Frank Owczarek, M.D. ("Dr. Owczarek") (collectively, with Eye Care of Delaware, LLC, and Cataract and Laser Center, LLC, ("Defendants") for purposes of a LASIK surgery evaluation.

2. On January 16, 2004, Mr. Baird was evaluated by Defendants for LASIK surgery.

3. In consultation with Defendants, after Dr. Owczarek advised Mr. Baird that he was a suitable candidate, Mr. Baird agreed to undergo LASIK surgery with Defendants and was scheduled for LASIK surgery on both eyes on January 27, 2004.

4. On January 19, 2004, Defendants sent a letter to Dr. Epstein, updating him on their appointment with Mr. Baird and noting that Mr. Baird was "tentatively scheduled for the Lasik procedure on January 27 [, 2004.]"

5. On January 26, 2004, Dr. Epstein performed a preoperative evaluation of both of Mr. Baird's eyes for purposes of his LASIK surgery which was scheduled for January 27, 2004.

6. On January 27, 2004, Dr. Owczarek performed a final screening and LASIK surgery on both Mr. Baird's left eye and Mr. Baird's right eye.

7. Although it is disputed whether the January 27, 2004 LASIK surgery was contraindicated, it is undisputed that the performance of the surgery was uneventful.

8. On January 28, 2004, Mr. Baird returned to see Dr. Owczarek for his postoperative examination after the LASIK procedures. Mr. Baird was told by Dr. Owczarek to follow-up with Dr. Epstein on February 10, 2004, for his postoperative care. Following the January 28, 2004 visit with Defendants, Mr. Baird did not return to Dr. Owczarek or Defendants for the remainder of 2004, nor did he see Dr. Owczarek or Defendants at any time in 2005 or 2006.

[1] *Baird v. Owczarek*, Stipulation of Facts, N11C-09-241 (RRC), Transaction ID. 49901534 (Mar. 4, 2013).

9. On January 28, 2004, Defendants sent a letter to Dr. Epstein, updating him on Mr. Baird's LASIK surgery and postoperative appointment. Defendants noted: "We have scheduled him to see you on February 10 for his postoperative care. Should there be any problems or complications, we would be happy to assist you again."

10. Mr. Baird visited Dr. Epstein on February 10, 2004, for his two-week postoperative visit.

11. Mr. Baird visited Dr. Epstein on April 20, 2004, for his three-month postoperative visit.

12. Following the office visit to Dr. Epstein on April 20, 2004, Mr. Baird did not return to Dr. Epstein at any other time in 2004. Mr. Baird likewise did not visit Dr. Epstein at any point in 2005.

13. On March 27, 2006, Mr. Baird returned to Dr. Epstein with complaints that his right eye vision was "blurry for two days" but got "better." Dr. Epstein examined Mr. Baird at that time. The office record from Dr. Epstein dated March 27, 2006 notes under the section titled "Past Eye Treatment or Surgery," that Mr. Baird had "LASIK surgery [in] 2004." Dr. Epstein did not refer Mr. Baird to Dr. Owczarek or Defendants at this time.

14. On July 2, 2007, Mr. Baird visited Dr. Owczarek at Dr. Epstein's referral because he "[b]roke [a] drill bit this AM [and it] flew into OD [right eye]". Mr. Baird reported feeling a "FB [foreign body] sensation". He was told to follow-up with Dr. Epstein in the future. Defendants' patient chart for this July 2, 2007 visit notes under "Ocular HX [history]" that Mr. Baird had LASIK surgery with Dr. Owczarek on January 27, 2004.

15. The drill bit incident had no bearing on the outcome of the LASIK surgeries that Dr. Owczarek performed on Mr. Baird.

16. On July 2, 2007, Defendants sent a letter to Dr. Epstein, updating him on Mr. Baird's July 2, 2007 appointment and stated: "I [Dr. Owczarek] advised him to return to your office for a follow up in the future. Should any problems arise, we would be happy to assist you again."

17. On December 3, 2007, Mr. Baird returned to Dr. Epstein with complaints of a vision decrease in reading. The office record from Dr. Epstein dated December 3, 2007, notes under the section titled "Past Eye Treatment or Surgery" that Mr. Baird had "LASIK surgery [in] 2004." Dr. Epstein did not refer Mr. Baird to Dr. Owczarek or Defendants at this time.

18. On September 9, 2009, Mr. Baird returned to Dr. Epstein and reported that he "noticed decreased distance vision since @ 2 years ago." He noted that he "wears cheaters (+1.25) which work well." Dr. Epstein referred Mr. Baird to Dr. Owczarek and Defendants at that time for a potential LASIK enhancement evaluation.

19. On September 30, 2009, Mr. Baird returned to Dr. Owczarek for a potential LASIK surgery "enhancement" evaluation. Dr. Owczarek examined Mr. Baird and

recommended that he undergo a LASIK surgery enhancement of the left eye at that time. Mr. Baird agreed to undergo a LASIK surgery enhancement of the left eye which was scheduled for October 14, 2009.

20. On September 30, 2009, Defendants sent a letter to Dr. Epstein and stated that Mr. Baird would be scheduling an enhancement with Defendants "sometime in the next few weeks."

21. Dr. Owczarek performed LASIK enhancement surgery on Mr. Baird's left eye on October 14, 2009.

22. On October 15, 2009, Defendants sent a letter to Dr. Epstein, updating him on Mr. Baird's LASIK enhancement surgery and confirming that Dr. Epstein would perform Mr. Baird's post-LASIK enhancement care and treatment.

23. When Dr. Epstein refers a potential LASIK co-management patient to Dr. Owczarek, if Dr. Owczarek and the patient choose to proceed forward with a LASIK procedure, Dr. Epstein receives a portion of the fees charged by Defendants to the patient.

24. In Mr. Baird's case, Dr. Epstein received twenty percent (20%) of the fee paid by Mr. Baird to Defendants for the LASIK procedures in 2004. Dr. Epstein also received a portion of the fees paid by Mr. Baird to Defendants for the LASIK enhancement to the left eye in 2009.

III. PLAINTIFF'S DISPUTED FACTS

Plaintiff proffered a "Statement of Disputed Facts" that the parties were unable to agree upon for the joint stipulation.[2] Plaintiff's "Statement of Disputed Facts" is reproduced in pertinent part herein:[3]

1. From January 16, 2004, continuing through April 20, 2011, Defendants negligently treated Plaintiff's corneas in connection with LASIK surgery. Compl., ¶¶ 17-32.

2. Defendants and Dr. Epstein co-managed Plaintiff's LASIK care, pursuant to Defendants' written co-management protocols, a copy of which is annexed hereto as Exhibit A. This written, documented relationship belies Dr. Epstein's alleged independence.

[2] *Baird v. Owczarek*, Plaintiff's Statement of Disputed Facts, N11C-09-241 (RRC), Transaction ID. 49905728 (Mar. 4, 2013).
[3] The Court has not provided the attached exhibits referenced in Plaintiff's Statement of Disputed Facts.

3. The following facts further evidence the co-managing relationship:

    a. On January 27, 2004, Dr. Owczarek told Mr. Baird that he may experience visual regression, including blurriness. In that case, Mr. Baird may require LASIK enhancement surgery. Owczarek Tr. 77:22-24 ("Q. Was there any discussion in terms of enhancements? A. We always mention that."); Baird Tr. at 41:7-13 ("Dr. Owczarek said that if there – they don't get it right, that –if there is a problem that they can go back and do what they call it a touchup or an enhancement");

    b. After each appointment, Dr. Owczarek sent a letter to Dr. Epstein, updating him on the patient's condition, confirming the referral back to Dr. Epstein and offering to provide any future services that may be needed. A copy of Dr. Owczarek's letters dated January 19, 2004, January 28, 2004, July 2, 2007, September 30, 2009, and October 15, 2009, are annexed hereto as Exhibit B;

    c. On January 28, 2004, Dr. Owczarek explained that post-operative care would be handled by Dr. Epstein, and that only upon Dr. Epstein's referral would Mr. Baird return to Defendants for LASIK enhancement evaluation. Owczarek Tr. 79:15-19 ("A. If the vision is already that good as his, then, next morning, then I feel that my job is done. *Dr. Epstein does the rest*.")(emphasis added); Baird Tr. at 64:8-15 ("the standard way they did it was to go to your optometrist and then if there was a problem he would send you back to Dr. Owczarek");

    d. Dr. Owczarek paid $790, 20% of the surgical fee, to Dr. Epstein. Owczarek Tr. 172:7-21. In order for that fee to be anything other than an illegal kickback, pursuant to 42 U.S.C.A. § 1320a-7b, Dr. Epstein had to render substantial services, which he did. *Id*.;

    e. After his referral to Defendants, Dr. Epstein examined the patient one time before the initial LASIK surgery, and six times post-operatively. A copy of Dr. Epstein's patient chart from January 1, 1998 through the present, is annexed hereto as Exhibit C;

    f. Dr. Epstein reported orally to Defendants on his appointments. *Id*. at TB000048 ("talked to Dr. Mitchell about enhancement of OS"); TB000054 ("3/9/04 talked to Dr. Mitchell"); and

    g. Dr. Epstein referred Plaintiff to Defendants for initial LASIK surgery on January 27, 2004, and LASIK enhancement on October 14, 2009.

4. Defendants claim that Mr. Baird's appointments with Dr. Epstein were "routine optometry exams." Reply, ¶ 3. In fact, these appointments were post-operative LASIK care with the co-managing optometrist, at Dr. Owczarek's direction. *See* Pl's Opp., Exh. D, notes dated March 27, 2006, December 3, 2007, and September 9, 2009 ("LASIK 2004").

5. With the exception of a single appointment on July 2, 2007, all of Defendants' appointments with Plaintiff were "inexorably related" to Defendants' negligent, contraindicated LASIK surgeries.[4] Even at that July 2, 2007 appointment, ostensibly concerning a drill bit accident, Mr. Baird mentioned – and Dr. Owczarek noted in his chart – that he had LASIK surgery with Dr. Owczarek on January 27, 2004. A copy of Dr. Owczarek's July 2, 2007 treating note, Bates stamped TB000006, is annexed hereto as Exhibit D.

6. The drill bit incident has nothing to do with the liability or damage issues in this case. *See* Transcript of deposition of Dr. Trattler dated January 16, 2013, a copy of which is annexed hereto as Exhibit E ("Trattler Tr.") at 113:5-12. However, it demonstrates that Mr. Baird considered Dr. Owczarek to be his treating ophthalmologist at the time.

7. Dr. Epstein's action, or inaction, is not a material contributing cause of any injury alleged herein. Plaintiff's injuries were caused exclusively by Defendants' contraindicated LASIK surgeries on January 27, 2004, and October 14, 2009.[5]

IV. PROCEDURAL HISTORY

Plaintiff filed suit in September 2011. Defendants moved to dismiss portions of the Complaint in October 2011, asserting that portions of the Complaint's allegations were outside the limitations period. Plaintiff first moved to amend the complaint in November 2011 and Defendants withdrew the motion for partial summary judgment without prejudice. The Complaint was amended again in May 2012.

Defendants moved for partial summary judgment in August 2012. Briefing was completed in November 2012 and oral argument was held in January 2013. At oral argument the Court ordered supplemental briefing and requested that the parties enter into a joint stipulation of facts. After attempting in good faith to agree upon a joint stipulation of facts, counsel for both parties contacted chambers regarding facts that were disputed and facts for which materiality was disputed.

[4] The parties should not conflate two seemingly similar, yet definitely different, concepts:

1. the continuing tort doctrine and
2. the continuous treatment rule.

The continuous treatment rule is not the law in Delaware. But the Supreme Court has recognized the tort of continuing negligent medical treatment – a type of continuous tort.

[5] Defendants also proffered a "Submission of Additional Facts." *Baird v. Owczarek*, Defendants' Submission of Additional Facts, N11C-09-241 (RRC), Transaction ID. 49902100 (Mar. 4, 2013). The Court does not provide those facts herein because the Court need not reach them in addressing this motion.

After conferring, the Court ordered that the parties provide a joint stipulation to the extent possible and then provide separate submissions with disputed or additional facts. All factual submissions were filed on March 4, 2013.

V. CONTENTIONS

A. Defendants' Contentions

Defendants seek partial summary judgment on the claims addressing the initial LASIK surgery in January 2004 and all subsequent treatment through September 2009. Defendants assert that the October 2009 LASIK surgery is not "inexorably related"[6] to the initial surgery. Defendants contend that the facts do not constitute a negligent course of treatment because there was an approximate five year gap in treatment and because Plaintiff knew, or reasonably could have known, about his injuries as early as 2005.

Alternatively, Defendants argue that if the Court concludes that the continuous negligence treatment theory[7] is potentially applicable, the continuum ended when Plaintiff consulted with Dr. Epstein for routine optometry visits in the interim between the initial LASIK surgery and the LASIK enhancement.

B. Plaintiff's Contentions

Plaintiff contends that multi-year gap between visits with a LASIK surgeon is to be expected in the "culture of LASIK." A lengthy gap according to Plaintiff should not lead to a conclusion that the secondary surgery was unrelated to the prior surgery.

Plaintiff also asserts that his LASIK care and treatment was co-managed between Dr. Owczarek and Dr. Epstein. Plaintiff posits that while surgery and explicitly related care was handled by Dr. Owczarek, Dr. Epstein was to complete all post-operative follow-up care. Moreover, Plaintiff contends that Dr. Epstein was responsible for referring Plaintiff to Dr. Owczarek if surgical complications manifested.

---

[6] Defendants used the phrase "inexorably related" in its papers on this Motion, whereas the Delaware Supreme Court used the phrase "inexorably intertwined" in this context in *Ewing v. Beck*, 520 A.2d 652, 662-63 (Del. 1987).

[7] Descriptions of the name of this legal theory have been inconsistent in the jurisprudence. In different cases it has been described as the "continuing negligence theory," "continuous negligence theory," or the "negligent course of treatment" theory.

Plaintiff argues that the circumstances constitute a course of negligent medical care related to a single condition and that the negligent treatment is "inexorably intertwined" such that it constitutes a continuing wrong. Plaintiff asserts that complaint was timely filed because the initial Complaint was filed in September 2011, less than two years after the last allegedly negligent act occurred in October 2009, which was the LASIK enhancement surgery.

Lastly, Plaintiff contends that there are material facts in dispute which preclude summary judgment. Notably, Plaintiff asserts there are material facts in dispute regarding whether Plaintiff's LASIK treatment was completed through Drs. Owczarek and Epstein's co-managed care.[8]

VI. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[9] On summary judgment, the Court must view the facts in the light most favorable to the non-moving party.[10] Once a moving party establishes that no material facts are disputed, the non-moving party bears the burden to demonstrate a material fact issue by offering admissible evidence.[11] The non-moving party must do "more than simply show that there is some metaphysical doubt as to material facts."[12]

VII. THERE ARE MATERIAL FACTS IN DISPUTE THAT COMPEL A JURY QUESTION TO DETERMINE THE PRESENCE AND EXTENT OF CONTINUING NEGLIGENCE.

The Delaware Supreme Court provided in *Ewing v. Beck*[13] that

[8] This argument was only made implicitly in Plaintiff's Answering Brief and during oral argument on Defendant's Motion, but was made explicit in supplemental briefing ordered by the Court.

[9] Super. Ct. Civ. R. 56(e).

[10] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970).

[11] See Super. Ct. Civ. R. 56(e); *Phillips v. Del. Power & Light Co.*, 216 A.2d 281, 285 (Del. 1966).

[12] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

[13] 520 A.2d 652 (Del. 1987).

> 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.[14]
>
> . . .
>
> The facts alleged by a plaintiff in support of a cause of action for continuous negligent medical treatment must be examined to see if the negligent treatment, as alleged, can be segmented or is, in fact, so inexorably intertwined that there is but one continuing wrong. If the allegation in a Complaint for continuing negligent medical treatment during a finite period is supported by the facts in the record, the statute of limitations runs from the date of the last act in the negligent continuum.[15]

The Delaware Supreme Court further provided in *Ogden v. Gallagher*[16] that absent a consultation or second opinion with an "independent health care provider," continuous negligent treatment does not stop and potentially start anew, when the original doctor performs a second surgery.[17] In *Ogden*, the Plaintiff alleged that he experienced complications following an original surgery that had not healed properly.[18] A second surgery was performed by the same doctor, but the complications persisted.[19] The plaintiff in *Ogden* eventually had a third surgery with a new surgeon, after which the plaintiff was informed that he had suffered from an infection associated with the prior two surgeries.[20]

In this case, the Court finds that there are material facts in dispute, which preclude granting Defendant's Motion for Partial Summary Judgment. Determining whether the continuous negligence theory applies requires analysis of facts, which are presently unresolved and disputed.

---

[14] *Id*. at 662(emphasis original).
[15] *Id*. at 662-63.
[16] 591 A.2d 215 (1991).
[17] *Id*. at 220.
[18] *Id*. at 217.
[19] *Id*.
[20] *Id*. at 218.

Even assuming the facts in the light most favorable to Plaintiff, and thus that there was a continuum of negligent medical care, (ultimately itself a jury question), a separate factual analysis is then required to determine whether the negligent treatment is so "inexorably intertwined that there is one continuing wrong."[21] Furthermore in then applying *Ogden*, it must next be resolved whether Plaintiff's intervening treatment with Dr. Epstein constituted a "consultation . . . with an independent health care provider."[22]

Even reaching that issue, there remains a factual dispute regarding whether Plaintiff's LASIK treatment involved a co-managed care relationship between Drs. Owczarek and Epstein, or rather, whether consulting with Dr. Epstein between both surgeries constituted a consultation with an "independent health care provider."[23]

It is not within the Court's discretion to grant summary judgment in any circumstances, when

> from the evidence produced, there is a reasonable indication that a material fact is in dispute. Nor will summary judgment be granted if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstances.[24]

Here, the parties dispute the facts regarding Plaintiff's LASIK treatment, and specifically, the nature of the relationship of Drs. Owczarek and Epstein. This dispute is material because resolution of this fact is potentially determinative of whether the "independent health care provider" analysis from *Ogden* is implicated. That determination, based upon the material fact dispute, will be potentially determinative as to the extent of continuing negligence. In light of this materiality, it is desirable for the Court to engage a more complete factual inquiry to clarify how these facts affect Plaintiff's continuing negligence theory claim.

On summary judgment, the facts must be analyzed in the light most favorable to the non-movant.[25] Where there are disputed material facts, the Court need not then analyze whether summary judgment is appropriate as a matter of

[21] *Ewing*, 520 A.2d at 662.
[22] *Ogden*, 591 A.2d at 220.
[23] *Id*.
[24] *Ebersole v. Loewngrub*, 54 Del. (4 Storey) 463, 468-69 (Del. 1962).
[25] *Moore*, 405 A.2d 679, 680 (Del. 1970).

law.[26] Therefore, the Court need not reach Defendants arguments that summary judgment is appropriate as a matter of law.

VIII. CONCLUSION

Because there are material facts in dispute, Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

_____

Richard R. Cooch, R.J.

cc: Prothonotary

[26] Super. Ct. Civ. R. 56(e).