IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CANDY VAUGHN, AS ADMINISTRATRIX OF THE ESTATE OF JAMES VAUGHN, CANDY VAUGHN AS WIFE OF JAMES VAUGHN AND CAND VAUGHN IN HER OWN RIGHT,	)	
Plaintiffs,	)	
v.	)	C.A. No. N13C-07-132 ALR
JEFFREY I. JACKERSON, D.O. and MILFORD MEMORIAL HOSPITAL and ADAM S. BROWNSTEIN, M.D. and MILFORD MEDICAL ASSOCIATES, PA and RONALD M. LIEBERMAN, D.O and DELAWARE SPINE INSTITUTE and KENT DIANOSTIC RADIOLOGY ASSOCIATES, PA	)	
Defendants.	)	

Submitted: December 16, 2013
Decided: December 18, 2013

Upon Defendants' Motions to Dismiss
Denied

Upon Defendants' Motions for Summary Judgment
Denied without prejudice

Lisa M. Grubb, Esquire, of Schmidt Kirfides & Fridkin, Wilmington, Delaware, attorney for Plaintiffs.

Bradley J. Goewert, Esquire and Joshua J. Inkell, Esquire, of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware, attorneys for Defendants Jeffrey I. Jackerson, D.O. and Kent Diagnostic Radiology Associates, P.A.

Joshua H. Meyeroff, Esquire, of Wharton Levin Ehrmantraut & Klein, P.A., attorney for Defendants Adam S. Brownstein, M.D. and Milford Medical Associates, P.A.

Peter C. McGivney, Esquire, of Elzufon Austin Tarlov & Mondell, P.A., for Defendants Ronald M. Lieberman, D.O. and Delaware Spine Institute.

Rocanelli, J.

This is a medical malpractice and wrongful death action. Defendants seek judgment on the grounds that the lawsuit was not filed within the applicable statute of limitation. Plaintiffs contend that the case was filed in a timely manner. There has been no discovery at this time and the factual record is not developed.

1. Defendants' Contentions

Defendants Ronald M. Lieberman, D.O. and Delaware Spine Institute filed a motion for summary judgment, alleging that the Plaintiffs' claims are barred by the statute of limitations. Defendants Lieberman and Delaware Spine Institute treated James Vaughn for hip and leg pain between November 17, 2010 and January 28, 2011. Defendant argues that the two year statute of limitations begins on the date of the alleged misdiagnosis or, under the continuing medical treatment doctrine, on the last date of the medical treatment. Thus, claims against Defendants Lieberman and Delaware Spine Institute are barred by the statute of limitations, since any misdiagnosis would have occurred on January 28, 2011 at the latest, and suit was not filed until July 11, 2013, more than two years later.

Defendants Jeffrey I. Jackerson, D.O. and Kent Diagnostic Radiology Associates, P.A. filed a motion to dismiss with prejudice. Defendants Jackerson and Kent Diagnostic's alleged misdiagnosis occurred on September 29, 2010 and James Vaughn and Plaintiff Candy Vaughn became aware of the injury on July 22, 2011. Thus, Defendants Jackerson and Kent Diagnostic allege that the two year statute of limitations for a medical malpractice applies because Plaintiffs became aware of the injury within the statutory two year period and, thus, Plaintiffs' claims against them are barred and should be dismissed with prejudice.

Defendants Adam S. Brownstein, M.D. and Milford Medical Associates, P.A. joined in Defendants Jackerson and Kent Diagnostic's motion to dismiss with prejudice. Defendants Brownstein and Milford Medical claim that their involvement in the case is also due to the alleged misreading of the September 29, 2010 x-ray, and any claims against them are barred by the statute of limitations because Plaintiffs had knowledge within two years of the alleged misdiagnosis.

2. Plaintiffs' Response to Dispositive Motions

Plaintiffs argue that the three year statute of limitations applies to the medical negligence action because, although Plaintiff, Candy Vaughn, knew her husband James Vaughn had cancer on July 22, 2011, she was not aware that the September 29, 2010 x-ray was suspicious of cancer until June 2013. Thus, according to Plaintiffs, under the medical malpractice statute of limitations, the statute began to run when Candy Vaughn became aware of the injury, which she did not know or discover during the two year statute of limitations. Plaintiffs also argue equitable tolling. For the motion for summary judgment, Plaintiffs argue that the motion is premature without discovery to determine when Plaintiffs learned of the misread x-ray. Finally, Plaintiffs argue that there is a conflict of law between the wrongful death statute and the medical malpractice statute.

3. Some of the applicable dates are as follows:

- **April 2010**: Decedent, James Vaughn, sought diagnosis and treatment for pain in his right hip in April 2010 by Dr. Adam Brownstein and Milford Medical Associates, P.A.

- **September 29, 2010**: X-rays were taken by Kent Diagnostic Radiology Associates, P.A. and interpreted by Dr. Jeffrey Jackerson.
- **November 17 2010 – January 28, 2011**: James Vaughn was treated by Dr. Ronald Lieberman at the Delaware Spine Institute for pain in his right hip and leg.
- **July 20, 2011**: Vaughn was treated at Bayhealth Medical Center for a fracture of the right femur and a large mass was discovered in his upper right leg, which was later determined to be a malignant bone tumor.
- **July 22, 2011**: Vaughn was transferred to Pennsylvania Hospital where it was determined that the tumor was dedifferentiated chondrosarcoma of the right proximal femur.
- **June 1, 2012**: The tumor caused Vaughn's death.
- **July 11, 2013**: Candy Vaughn, as Administratrix of the Estate of James Vaughn and in her own right brought a survival action alleging medical negligence of all Defendants in their failure to properly diagnose and treat James Vaughn, which caused his death.

4. The standard of review for Motions to Dismiss

"A motion to dismiss must be decided solely upon the allegations in the complaint."[1] In reviewing a motion to dismiss, the Court must take all well-pled allegations as true and all reasonable inferences must be made in favor of the non-moving party.[2] Vague factual allegations are considered well-pled if they provide notice of the claim to the other party and the

[1] *American Bottling Co. v. Crescent/Mach I Partners, L.P.*, 2009 WL 3290729, at *2 (Del. Super. Sept. 30, 2009).
[2] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

court should deny the motion unless the claimant "could not recover under any reasonably conceivable set of circumstances susceptible to proof."[3] However, the Court will not "blindly accept conclusory allegations unsupported by specific facts, nor does [it] draw unreasonable inferences in the plaintiffs' favor."[4]

5. The standard of review for Motions for Summary Judgment

Summary judgment may be granted only where the moving party can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[5] The moving party bears the initial burden of proof, and once that is met, the burden shifts to the non-moving party to show that a material issue of fact exists.[6] In reviewing the facts at the motion for summary judgment phase, the Court must view the facts "in the light most favorable to the non-moving party."[7]

6. Statutes of Limitations

The medical malpractice statute provides that a cause of action cannot be brought after two years from the date the injury occurred.[8] When a single action of medical negligence is alleged, the "injury occurs when the wrongful act or omission occurs."[9] When an action for continuous medical treatment is alleged, then "the injury occurs at the time of the last act in the negligent medical continuum."[10] However, the statute creates an exception when the injury "was unknown to and could not in the exercise of reasonable diligence have been discovered by the

[3] *Id.*
[4] *Gantler v. Stephens*, 965 A.2d 695, 704 (Del. 2009) (citation omitted).
[5] Super. Ct. R. Civ. P. 56.
[6] *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).
[7] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).
[8] 18 *Del. C.* §6856.
[9] *Dambro v. Meyer*, 974 A.2d 121, 126 (Del. 2009).
[10] *Id.*

injured person," an action may be brought three years from the date the injury occurred.[11] In order for a plaintiff to receive the three year statutory period, "[the plaintiff] must show that the injury could not reasonably have been known [], and that the injury was, in fact, not known to [the plaintiff] during the two year period from the date of the injury."[12]

Under the wrongful death state, a cause of action cannot be brought after two years from "the accruing of the cause of such action."[13] "[A] cause of action for wrongful death accrues when a qualifying survivor is chargeable with knowledge of a potential cause of action, *i.e.*, when the survivor does or should become aware of the cause of the decedent's death which gives rise to liability for wrongful death."[14] A wrongful death action that alleges medical malpractice depends on the whether the decedent's claim for medical negligence would be viable, had the decedent survived.[15] Thus, the statute of limitations for the medical malpractice action, which "begins to run on the date of the alleged wrongful act or omission," must be met in order for a wrongful death action based on medical negligence to be a viable claim.[16]

7. The Factual Record is Inadequate

The Court cannot discern on the record before it at this time the dates on which the plaintiffs should be charged with knowledge of the potential causes of action alleged in this lawsuit.

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[11] 18 *Del. C.* §6856(1).
[12] *Reyes v. Kent Gen. Hosp., Inc.*, 487 A.2d 1142, 1144-45 (Del. 1984).
[13] 10 *Del. C.* §8107;
[14] *In re Asbestos Litig. West Trial Grp.*, 622 A.2d 1090, 1092 (Del. Super. 1992).
[15] *Drake v. St. Francis Hosp.*, 560 A.2d 1059 (Del. 1989) (citing *Milford Mem'l Hosp., Inc. v. Elliott*, 210 A.2d 858, 869 (Del. 1965)).
[16] *Id.* at 1061 (citing *Reyes*, 487 A.2d at 1145-46).

NOW, THEREFORE, IT IS HEREBY ORDERED this 20th day of December 2013, Defendants' Motions to Dismiss are hereby DENIED and Defendants' Motions for Summary Judgment are hereby DENIED WITHOUT PREJUDICE.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli