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Case Number 182,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GI ASSOCIATES OF DELAWARE, P.A., ADVANCE ENDOSCOPY CENTER, LLC, and NATWARLAL RAMANI, M.D.,	§	No. 182, 2020
Defendants Below, Appellants,	§	Court Below: Superior Court of the State of Delaware
v.	§	
MONICA KING ANDERSON, Individually and as Personal Representative of the ESTATE OF WILLIAM KING, STEPHANIE KING, HEATHER GUERKE, and AMBER WITHROW,	§	C.A. No.: N18C-04-158
Plaintiffs Below, Appellees.	§	

OPENING BRIEF OF DEFENDANTS BELOW, APPELLANTS GI ASSOCIATES OF DELAWARE, P.A., ADVANCE ENDOSCOPY CENTER, LLC, AND NATWARLAL RAMANI, M.D.

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

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Dated: August 4, 2020

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NATURE OF PROCEEDINGS

This medical negligence action was filed on April 16, 2018 against Defendants Below, Appellants, Natwarlal Ramani, M.D. and associated medical professional entities, GI Associates of Delaware, PA and Advance Endoscopy Center, LLC (collectively "Defendants"), stemming from the care and treatment administered to decedent, William King. (A-1, A-25). The Plaintiffs Below, Appellees, are Mr. King's family, together with his estate (collectively "Plaintiffs").

An Amended Complaint was filed on June 21, 2018, to add a copy of three notices of intent to investigate potential claims of medical negligence pursuant to 18 *Del. C.* § 6856(4). (A-30). The certified mail receipts show that the notices were mailed to Defendants on January 26, 2018, although the letters are dated January 26, 2017. (A-36-44). Defendants filed an answer to the amended complaint raising the affirmative defense of statute of limitations. (A-51). Plaintiffs subsequently sought to file a second amended complaint to correct the date of a repeat colonoscopy that took place in 2016.

On January 22, 2020, Defendants moved for summary judgment on the basis that Plaintiffs' claims were barred by the statute of limitations applicable in cases involving single acts of alleged medical negligence. (A-57, A-64). Plaintiffs' Second Amended Complaint was filed on January 27, 2020. (A-292). Defendants

filed an answer once again asserting the affirmative defense of statute of limitations. (A-301).

On April 28, 2020, the Superior Court issued a Memorandum Opinion and Order denying Defendants' summary judgment motion. *See* Memorandum Opinion, hereto as Exhibit A. Although this case indisputably involves a single act of alleged negligence, the Superior Court held that Plaintiffs' claims are not time-barred under the doctrine of continuous negligent medical treatment because the statute of limitations began to run five years after the negligent act. (*Id.)*

Thereafter, the Superior Court granted the Defendants' application for a certificate of interlocutory appeal without objection by Plaintiffs. (A-23). This Court accepted the application on July 1, 2020.

Defendants now submit their opening brief on interlocutory appeal and request that the decision of the Superior Court be reversed.

SUMMARY OF ARGUMENT

1. A cause of action for continuous negligent medical treatment against a health care provider arises from two or more related acts of negligence, and the statute of limitations begins to run two years form the last negligent act in the continuum of negligent medical care.

2. For purposes of determining the running of the statute of limitations in a case involving a single act of alleged medical negligence, the term "injury" as it appears in 18 *Del. C.* § 6856 is defined as when the alleged act of negligence took place, not at some other vague and undefined date.

STATEMENT OF FACTS

Plaintiffs' Complaint was filed on April 16, 2018, alleging a continuing course of negligent medical treatment by Dr. Ramani and his practice group. (A-25). Plaintiffs amended their complaint two times, but the salient facts alleged remain unchanged, except for a correction in the Second Amended Complaint regarding the date of a repeat colonoscopy that took place in 2016. The correct date of March 23, 2016 is set forth in the Second Amended Complaint. (A-294 at ¶¶ 21, 24).

Plaintiffs alleged that Mr. King obtained colonoscopies from Dr. Ramani on February 8, 2004, July 19, 2005, September 25, 2006, and December 6, 2007. (A-293 at ¶¶ 8, 10, 12, 14). Mr. King was diagnosed with colon cancer in 2007, and underwent surgery. (A-293 at ¶¶ 14-15).

On January 22, 2009, Dr. Ramani performed a colonoscopy and recommended a repeat colonoscopy in 1-2 years. (A-294 at ¶¶ 17-18). On April 4, 2011, Dr. Ramani performed a repeat colonoscopy and, following that colonoscopy, recommended a repeat colonoscopy in 3-5 years. (A-294 at ¶¶ 19-20). Approximately five years later, on March 23, 2016, Dr. Ramani performed the repeat colonoscopy. (A-294 at ¶ 21). This colonoscopy was "incomplete secondary to malignant growth in the colon, per the colonoscopy results reported on or about March 23, 2016." (*Id.*).

Mr. King was subsequently diagnosed with colon cancer and died on August 2, 2016. (A-294 at ¶¶ 22, 23). Plaintiffs alleged that "Defendants' negligence constitutes a continuing course of interrelated and inseparable medical treatment up to and including March 23, 2016, such that the allegations set forth in this complaint constitute a single continuing wrong and/or injury to Mr. King." (A-294 at ¶ 24) (emphasis in original).

On August 20, 2019, Plaintiffs disclosed their sole standard of care expert, a gastroenterologist, Dr. Steven Moss. (A-88). The disclosure provided that Dr. Ramani breached the standard of care on April 26, 2011, by recommending that Mr. King return for a repeat colonoscopy in 3-5 years versus 3 years:

> . . . Defendants breached the standard of care on April 26, 2011 by recommending that William King return for colonoscopy in 3-5 years. The standard of care, and the consensus guidelines governing colonoscopy surveillance, required that repeat colonoscopy be recommended and performed 3 years after the April 4, 2011 colonoscopy, which showed 3 polyps ranging in size from 3 to 11 mm . . . . Dr. Moss will testify that this breach of the standard of care resulted in delay in the diagnosis and treatment of colon cancer, which ultimately developed into untreatable metastatic stage IV colon cancer causing significant pain and suffering, medical treatment and expenses, and the patient's untimely death on August 2, 2016.

(A-88-89).[1]

[1] Although Dr. Moss's disclosure identified April 26, 2011 as the date of the breach of the standard of care, Plaintiffs' various complaints imprecisely indicate that the repeat colonoscopy was recommended on April 4, 2011. (A-27, A-32, A-294 at ¶¶ 19, 20). This discrepancy is irrelevant, however, as the different dates do

Dr. Moss subsequently testified during deposition about the alleged breach of the standard of care during Dr. Ramani's care and treatment of Mr. King. (A-117-118; *see also* A-144, A-163). According to Dr. Moss, the sole breach occurred on April 26, 2011, when Dr. Ramani recommended that Mr. King return for a follow-up colonoscopy in 3-5 years. (A-88; *see also* A-117-118, A-144, A-163). Dr. Moss opined that Dr. Ramani should have told Mr. King to return in 3 years "at most." (A-117; *see also* A-144, A-163). No other wrongful or negligent act or omission was identified by Dr. Moss. (A-117-118).

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not alter the statute of limitations analysis. The April 26, 2011 date was used in Defendants' underlying motion for summary judgment, and will be used in this brief. In its opinion, the Superior Court referred to April 4, 2011 as that date of the alleged wrongful act. Exhibit A.

ARGUMENT

I. A CAUSE OF ACTION FOR CONTINUOUS NEGLIGENT MEDICAL TREATMENT AGAINST A HEALTH CARE PROVIDER ARISES FROM TWO OR MORE RELATED ACTS OF NEGLIGENCE, AND THE STATUTE OF LIMITATIONS BEGINS TO RUN TWO YEARS FROM THE LAST NEGLIGENT ACT IN THE CONTINUUM OF NEGLIGENT MEDICAL CARE

A. Question Presented

Did the Superior Court err as a matter of law in applying the continuous negligent medical treatment doctrine in a case involving a single act of alleged negligence, thereby changing the date when the injury occurred and thus when the statute of limitations began to run? *See* Exhibit A.

B. Scope of Review

Questions of statutory interpretation are questions of law which are reviewed *de novo* by this Court. *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009). This Court must determine "whether the Superior Court erred as a matter of law in formulating or applying legal principles." *Id.* (quoting *Delaware Ins. Guar. Ass'n v. Christiana Care Health Serv.*, 892 A.2d 1073, 1076 (Del. 2006)). "When deciding questions of statutory construction, this Court must 'ascertain and give effect to the intent of the legislature.'" *Id.* (quoting *Delaware Bay Surgical Services, P.C. v. Swier*, 900 A.2d 646, 652 (Del. 2006)). Finally, "this Court must reject any reading of a statute that is inconsistent with the intent of the General Assembly." *Dambro,* 974 A.2d at 129.

C. Merits of Argument

Defendants moved for summary judgment on the basis that Plaintiffs' Complaint is time-barred under the limitation periods set forth in 18 *Del. C.* § 6856. (A-72-75). There is no dispute that this case involves a single act of alleged negligence. According to Plaintiffs' expert, Dr. Moss, this single act of negligence occurred on April 26, 2011, when Dr. Ramani allegedly breached the standard of care in recommending that Mr. King return for a repeat colonoscopy in 3-5 years versus, at most, 3 years. (A-88; *see also* A-117-118, A-144, A-163). Dr. Moss testified that there were no other breaches of the standard of care during Mr. King's course of treatment with Dr. Ramani, including during Mr. King's follow-up appointment for a repeat colonoscopy on March 23, 2016. (A-117-118). Plaintiffs' medical negligence action was filed on April 16, 2018, seven years after the sole alleged negligent act. (A-25).

The statute of limitations in actions alleging medical negligence is set forth in the Medical Negligence Act[2] which provides, in part, that:

> 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:

[2] In 1998, the Medical Malpractice Act was amended and is now referred to as the Medical Negligence Act. *Dambro v. Meyer*, 974 A.2d at 130.

> (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 . . . .

18 *Del. C.* § 6856.

Section 6856 requires an action for medical negligence to be filed within two years "from the date upon which [the] injury occurred." 18 *Del. C.* § 6856. If an injury is "inherently unknowable" within those two years, an action may be brought "prior to the expiration of 3 years from the date upon which [the] injury occurred." *Id.*; *see also Ewing v. Beck*, 520 A.2d 653, 658 (Del. 1987). The purpose of section 6856 was to "limit the open-ended aspect of the prior law which provided in the case of an 'inherently unknowable' injury that the applicable period began to run when the injured person became aware of his injury." *Dunn v. St. Francis Hospital, Inc.,* 401 A.2d 77, 79 (Del. 1979) (citing *Layton v. Allen*, 246 A.2d 794 (Del. 1968)).

Consistent with legislative intent, in cases involving a single act of alleged medical negligence, this Court has repeatedly held that "there is no doubt that the [statutory] phrase 'injury occurred' refers to the date when the wrongful act or omission occurred." *Dambro*, 974 A.2d at 138 (citing *Dunn,* 401 A.2d at 80); *Meekins v. Barnes*, 745 A.2d 893, 897 (Del. 2000). When the cause of action is for continuous negligent medical treatment, however, the "date upon which such

injury occurred" is "the last act in the negligent medical continuum." *Ewing v. Beck*, 520 A.2d at 663 (emphasis in original).

At issue here is the date upon which the statute of limitations begins to run. If it began when the single act of alleged negligence occurred, as under *Dunn, Meekins* and *Dambro,* Plaintiffs' Complaint is time-barred. The limitations period would have expired two years later on April 26, 2013 or, at the latest, on April 26, 2014, as Defendants argued below. 18 *Del. C.* § 6856. The Superior Court held, however, that this case "does not involve a single act of negligence but instead involves a continuous course of negligent medical treatment." Exhibit A at 6. Applying the continuous negligent medical treatment doctrine, the Superior Court concluded that Plaintiffs' Complaint was timely because the statute of limitations did not begin to run until Mr. King had his repeat colonoscopy on March 23, 2016.

The Superior Court erred as a matter of law in its application of the continuous negligent medical treatment doctrine. This doctrine does not apply in a case that involves a single act of negligence, and it should not have been applied here to toll the commencement date of the limitations period.

In *Ewing v. Beck*, this Court recognized continuous negligent medical treatment as a valid basis for a medical negligence action and applied the limitations period set forth in 18 *Del. C.* § 6856. *Ewing*, 520 A.2d at 661; *see also Meekins*, 745 A.2d at 898. Under this doctrine, a plaintiff has one cause of action

for continuous negligent medical treatment when "there is a continuum of negligent medical care related to a *single condition* occasioned by negligence." *Ewing*, 520 A.2d at 662 (emphasis in original). "A complainant invoking the continuous negligent medical treatment doctrine has the burden of alleging with particularity a course of continuing negligent medical treatment during a finite period." *Benge v. Davis*, 553 A.2d 1180, 1183 (Del. 1989) (citing *Ewing*, *supra* at 662).

Significantly, a "bare allegation by a plaintiff that there has been continuous negligent medical treatment is not enough, in and of itself, to successfully defeat a defendant's Motion for Summary Judgment based upon the statute of limitations." *Ewing*, 520 A.2d at 662. 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 alleged negligent treatment can be segmented or is, in fact, so inexorably intertwined that there is but one continuing wrong." *Id.* The facts in the record must also "establish that the treatment was inextricably related so as to constitute one continuing wrong." *Id.* at 664. "Absent such an unbroken interrelated chain of events, the applicable statute of limitations *will apply to each alleged wrong* and not to the course of treatment as a whole." *Id.* (emphasis added).

As set forth above, under the continuous negligent medical treatment doctrine "the statute of limitations runs from the last act in a `continuum of

negligent medical care related to a single condition occasioned by negligence.'" *Benge*, 553 A.2d at 1183 (quoting *Ewing*, 520 A.2d at 662). To determine when the statutory period of limitations begins to run, this Court in *Ewing* held:

> [I]f a plaintiff has a cause of action for continuous negligent medical treatment and that fact becomes known within two years of an act in the alleged negligent continuum, 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.

Ewing, 520 A.2d at 663.

The rule espoused in *Ewing* requires a court to engage in a two-part inquiry. First, a court must determine the date upon which the plaintiff had actual or constructive knowledge of the negligent course of treatment using the reasonably prudent person standard. *Benge*, 553 A.2d at 1184. Second, a court must determine the date of the last act in the negligent continuum immediately prior to that date by objective analysis. *Id.*

Here, the Superior Court held that under the continuous negligent medical treatment doctrine, the two-year statute of limitations began to run on March 23, 2016—the date that Mr. King returned to Dr. Ramani for another repeat colonoscopy. The care and treatment received on March 23, 2016 was not negligent. (A-117-118).

Dr. Moss, Plaintiffs' expert, testified that Dr. Ramani breached the standard

of care on April 26, 2011, by recommending that Mr. King return for a return colonoscopy in "three to five years," because "three years would have been the absolute maximum, according to the guidelines." (A-117-118; *see also* A-88). Dr. Moss was then asked whether Dr. Ramani breached the standard of care "in any other time in his care and treatment of the plaintiff," and Dr. Moss answered: "No, he did not." (A-117-118). He further testified that all of the other care and treatment that Dr. Ramani provided "met the standard of care," and he offered this opinion "based on a reasonable degree of medical probability." (*Id.*). There is simply no dispute that this case involves a single act of alleged negligence.

Although the care and treatment that Dr. Ramani provided to Mr. King on March 23, 2016 was indisputably *not* negligent, the Superior Court held that the statute of limitations ran from that date because it was the "last act" in a continuum of negligent medical treatment before Mr. King was subsequently diagnosed with colon cancer. Exhibit A at 10. The Court reasoned that at the time of his cancer diagnosis, "Mr. King either had actual knowledge of Dr. Ramani's negligent course of treatment or could have discovered Dr. Ramani's negligent course of treatment in the exercise of reasonable diligence." *Id.*

In rendering its ruling, the Superior Court expressly rejected Defendants' argument that the "last act" in the continuum of negligent medical care must be the last alleged "negligent act." *Id.* at 13-14. It reasoned:

> The continuous negligent medical treatment doctrine acknowledges a cognizable claim where the sum total of multiple acts, some of which may not be negligent in and of themselves, constitutes negligent treatment. An act that is part of the negligent treatment may be deemed the "last act" for purposes of the second prong of the statute of limitations analysis.

Exhibit A at 13.

According to the Superior Court, "while Dr. Ramani breached the standard of care by making a wrongful recommendation on April 4,[3] it was the recommendation and the resulting too-late treatment that comprised the continuous negligent medical treatment." *Id.* at 14.

The Superior Court's reasoning is flawed. Its finding that the two-year statute of limitations began to run on March 23, 2016 is tantamount to an adoption of the continuing treatment doctrine, which this Court expressly rejected. *Ewing*, 520 A.2d at 660. Under the continuing treatment doctrine, "the statute of limitations does not begin to run as long as the patient-plaintiff relies on the defendant health care provider for any treatment." *Benge*, 553 A.2d at 1184–85. The continuing treatment doctrine "provides that the statute of limitations begins to run from the last act of treatment by the defendant health care provider, whether or not that last act was negligent." *Id.* It is "the last act of the defendant which activates the running of the statute of limitations" under the continuing treatment doctrine. *Id.* That is precisely what the Superior Court's ruling accomplished in

[3] *See*, n. 1, *infra*.

this case. In doing so, the Superior Court effectively changed the date of Mr. King's injury, and thus when the statute of limitations began to run, under the guise of the continuous negligent medical treatment doctrine.

Moreover, the Superior Court's efforts to justify the application of the continuous negligent medical treatment doctrine in a case where there is only one alleged act of negligence lack merit. The Superior Court reasoned that each act in a negligent continuum need not be an act of negligence because "such a requirement would render the doctrine superfluous, as plaintiffs would already have a cause of action for each individual act." Exhibit A at 12-13. This reasoning reflects a misapprehension of the continuous negligent medical treatment doctrine. The doctrine allows for a series of two or more related negligent acts by a single health care provider, some of which may be time-barred if construed as separate causes of action, to proceed as a single cause of action for continuous negligent medical treatment. While allegations of negligence are generally examined separately for statute of limitations purposes, *Ewing*, 520 A.2d at 662, that is not the case where a cause of action exists for continuous negligent medical treatment. *Id.* at 664. A cause of action for continuous negligent medical treatment does not accrue until the last negligent act, thereby tolling the limitations period for prior negligent acts in the continuum of negligent medical treatment.

Indeed, in *Ewing*, while reviewing case law addressing the continuous

negligent medical treatment doctrine, this Court stated:

> 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.

Ewing, 520 A.2d at 662 (first emphasis in original; second emphasis added) (citing *Tamminen v. Aetna Cas. & Sur. Co.*, 327 N.W.2d 55 (Wis. 1982)).[4]

And, in a later opinion, this Court expressly stated that the limitations period for a cause of action for continuous negligent medical treatment runs from the last episode of medical negligence:

> Under the continuous negligent medical treatment doctrine, where individual episodes in a course of medical treatment are so interrelated that there is no proper basis for compartmentalizing the episodes, *the statute of limitations begins to run from the date of the last episode of medical negligence in the continuum of treatment.*

Stafford v. Ctr. for Neurology, Neurosurgery & Pain Mgmt., P.A., 2004 WL 1431734, *1 (Del. May 28, 2004) (emphasis added).[5]

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[4] In adopting the continuous negligent medical treatment doctrine, this Court cited as instructive the Wisconsin Supreme Court's decision in *Tamminen*, *supra*. In what is referred to as the *Tamminen* rule, under Wisconsin law, which guided this Court in *Ewing*, a cause of action for continuous negligent medical treatment does not accrue "until the last negligent act." *Robinson by Robinson v. Mount Sinai Med. Ctr.*, 402 N.W.2d 711, 715 (Wis. 1987).

[5] Defendants cited *Stafford* in their opening brief in support of summary judgment. (A-75-76). The Superior Court made no reference to *Stafford* in its

The Superior Court's application of the continuous negligent medical treatment doctrine, in a case where there is only one alleged wrong and not a continuum of negligent medical care, is nothing more than an end-run around the limitations period applicable to single acts of negligence. The Superior Court acknowledged that "the decisional law is well-settled" with respect to single acts of negligence. *Exhibit* A at 4. It noted that this Court "has consistently held that where there is a single act of medical negligence, typically a misdiagnosis or a failure to diagnose, the statute of limitations for medical negligence begins to run on the date that the single act of negligence occurred." *Id.*

To avoid application of this well-settled law, the Superior Court applied the continuous negligent medical treatment doctrine even though the doctrine is not supported by the record facts. By doing so, the Superior Court tolled the beginning of the statute of limitations for Mr. King's "inherently unknowable" injury for five years—to the date when he knew or could have known of his injury. Such tolling is inconsistent with the intention of the Delaware legislature to modify the prior "inherently unknowable" injury rule of *Layton v. Allen*, and limit it to three years in 18 *Del. C.* § 6856. *Dunn*, 401 A.2d at 79.

In short, the effect of the Superior Court's statute of limitations

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Memorandum Opinion, and the Superior Court did not explain how this Court in *Stafford* misconstrued the continuous negligent medical treatment doctrine so as to defend its ruling.

interpretation in this case would return Delaware to the pre-section 6856 days of "uncertainty created by [an] open-ended period of limitations." *Ewing*, 520 A.2d at 653. In *Meekins* and *Dambro*, this Court recognized that it may "seem harsh" that a statute of limitations begins to run from the date of the negligent act. However, it also noted that the legislature "designed the Medical Malpractice statute to ameliorate the harshness of the statute of limitations by providing an additional year to bring a suit in cases where the patient did not have knowledge of the claim until after the two-year period expired." *Dambro*, 974 A.2d at 131; *Meekins*, 745 A.2d at 898. This Court's adoption of the continuous negligent medical treatment doctrine did not change the decisional law with respect to single acts of negligence. Pursuant to *Dunn*, *Meekins* or *Dambro*, the statute of limitations began to run on the date of the alleged negligence, even for Mr. King's inherently unknowable injury.

For the above reasons, the Superior Court's ruling denying summary judgment must be reversed. The continuous negligent medical treatment doctrine does not apply to toll the limitations period because there is no dispute that this case involves a single act of negligence. Because this is a single act of negligence case, the statute of limitations began to run on April 26, 2011, the date of the alleged wrongful act. Plaintiffs' Complaint, filed over seven years later, is plainly untimely. Defendants are thus entitled to summary judgment as a matter of law.

II. FOR PURPOSES OF DETERMINING THE RUNNING OF THE STATUTE OF LIMITATIONS IN A CASE INVOLVING A SINGLE ACT OF MEDICAL NEGLIGENCE, THE TERM "INJURY" AS IT APPEARS IN 18 *DEL. C.* § 6856 IS DEFINED AS WHEN THE ALLEGED ACT OF NEGLIGENCE TOOK PLACE, NOT SOME OTHER VAGUE AND UNDEFINED DATE OF INJURY

A. Question Presented

Did the Superior Court err as a matter of law in its interpretation and application of 18 *Del. C.* § 6856 by holding that the phrase "injury occurred" does not refer to the date of the wrongful act in a cause of action for a single act of medical negligence on the basis that the date of the wrongful act and the date of injury are not the same? *See* Exhibit A.

B. Scope of Review

Questions of statutory interpretation are questions of law which are reviewed *de novo* by this Court. *Dambro*, 974 A.2d at 129. This Court must determine "whether the Superior Court erred as a matter of law in formulating or applying legal principles." *Id.* (quoting *Delaware Ins. Guar. Ass'n*, *supra*). "When deciding questions of statutory construction, this Court must 'ascertain and give effect to the intent of the legislature.'" *Id.* (quoting *Delaware Bay Surgical Serv.*, *supra*). Finally, "this Court must reject any reading of a statute that is inconsistent with the intent of the General Assembly." *Dambro,* 974 A.2d at 129.

C. Merits of Argument

Defendants moved for summary judgment on the basis that Plaintiffs' Complaint is time-barred. (A-72-75). The Superior Court's denial of Defendants' motion constitutes reversible error.

Again, there is no dispute that this case involves a single act of alleged negligence. (A-88, A-117-118). And, as set forth above, under settled precedent of this Court, *Dunn*, *Meekins* and *Dambro*, in a single act of negligence case the statutory phrase "injury occurred," as set forth in 18 *Del. C.* § 6856, "refers to the date when the wrongful act or omission occurred." *Dunn*, 401 A.2d at 80; *Meekins,* 745 A.2d at 897; *Dambro*, 974 A.2d at 138. Plaintiffs' expert, Dr. Moss, identified the date of injury as April 26, 2011—the date that Dr. Ramani allegedly breached the standard of care in recommending a return colonoscopy. (A-88). Pursuant to *Dunn*, *Meekins* and *Dambro*, Plaintiffs' claims are time-bared because he filed suit seven years later, on April 18, 2018.

The Superior Court wrongly rejected the Defendants' reliance on the decisional law of *Dunn*, *Meekins* and *Dambro*. Exhibit A at 6-7. It reasoned, *inter alia*, that "the decisional law involving single acts of negligence is not applicable where, as here, the injury and the negligence did not take place on the same date." *Id.* at 7. The only legal authority cited in support of this conclusion is the dissenting opinion of Justice Berger in *Meekins*, *supra*, versus the controlling

opinion of the majority. Justice Berger, like the Superior Court here, concluded that she did not "understand the need to construe 'date of injury' to mean 'date of negligent act' in a case like this, where the two dates are not the same." *Meekins*, 745 A.2d at 902 (Berger, J., dissenting). Although the Superior Court invoked Justice Berger's dissent in *Meekins* to avoid applying the well-settled decisional law involving single acts of negligence, it pointedly failed to adopt Justice Berger's "date of injury." If it had, Plaintiffs' claims are still time-barred.

In *Meekins*, the defendant doctor allegedly misdiagnosed a mammogram in December 1994, and advised Mrs. Meekins to come back for another mammogram in a year. 745 A.2d at 895 (Berger, J., dissenting). Plaintiffs' expert witness opined that the defendant doctor breached the standard of care by not requiring a follow-up mammogram in six months, and no later than June 1995. *Id.* Based on the expert's standard of care opinion, the plaintiffs argued that the statute of limitations "did not begin to run until the time for the alleged proper six-month follow-up mammogram arrived in June 1995." *Id.*

The *Meekins* majority rejected the plaintiffs' argument. Justice Berger agreed with plaintiffs. She reasoned that the date of injury was six months after the alleged misdiagnosis, in June 1995, when Mrs. Meekins "would have begun cancer treatment if she had come back for another mammogram." *Id.* at 902. She further reasoned that it was only after June 1995 that "the radiologist's error caused

injury by depriving [Mrs.] Meekins of immediate cancer treatment." *Id.*

The Superior Court ignored Justice Berger's conclusion that the date of injury is the date that the plaintiffs' expert opined was the proper date for a follow-up mammogram. Instantly, Plaintiffs' expert, Dr. Moss, recommended a follow-up colonoscopy 3 years, at most, from the date of Mr. Kings' April 4, 2011 colonoscopy. (A-117, A-144, A-163). Assuming, *arguendo,* that the rationale of Justice Berger's dissent applies, the date of injury in this case is April 4, 2014. Plaintiffs' Complaint, filed four years later on April 16, 2018, is consequently time-barred under 18 *Del. C.* § 6856.

Putting aside the Superior Court's reliance on the dissent in *Meekins*, the definition of injury set forth in *Dunn*, *Meekins* and *Dambro* controls the outcome of this case. The Superior Court here, like the plaintiffs in *Dunn*, *Meekins* and *Dambro*, seeks an alternative interpretation of the statutory phrase "date upon which such injury occurred" and the subsequent calculation of the statute of limitations there from. *See, e.g.*, *Dunn*, 401 A.2d at 80. Such an attempt must be rejected here, just as it was in *Meekins* and *Dambro*, which are also delay of diagnosis cases.

Notably, in rejecting Defendants' argument that the expert opinion of Dr. Moss established the date of injury as April 26, 2011, the Superior Court concluded that "the legal question of when the 'injury occurred' is not controlled

by the professional opinion of Plaintiffs' standard of care expert." Exhibit A at 8. But, by refusing to apply the decisional law applicable to single acts of negligence on the basis that the date of injury and date of negligence are not the same, the Superior Court has confused the legal definition of injury in medical negligence with the factual or medical definition of injury. This Court has repeatedly and consistently made it clear that in the context of medical negligence, the phrase "injury occurred" refers to the date of the medically negligent act. *Dunn*, 401 A.2d at 80, *Meekins*, 745 A. 2d at 89, *Dambro*, 974 A.2d at 138. Consistent with this Court's precedent and the intent of Section 6856, the legal definition of injury is the date of the medically negligent act.

In sum, because it is settled law that date of injury refers to the date of the alleged wrongful act in cases involving single acts of negligence, Plaintiffs' Complaint is time-barred.

CONCLUSION

For the above reasons, this Court should reverse the Superior Court's ruling denying summary judgment to Defendants. The continuous negligent medical treatment doctrine does not apply to toll the commencement of the limitations period for a single act of alleged negligence, and Plaintiffs' claims are thus time-barred as a matter of law.

Respectfully submitted,

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/s/ Bradley J. Goewert

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Dated: August 4, 2020

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EXHIBIT A

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Case No. N18C-04-158 ALR

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MONICA KING ANDERSON, Individually and as Personal Representative of the ESTATE OF WILLIAM KING, STEPHANIE KING, HEATHER GUERKE, and AMBER WITHROW,	)	
Plaintiffs,	)	
v.	)	C.A. No. N18C-04-158 ALR
GI ASSOCIATES OF DELAWARE, P.A., ADVANCE ENDOSCOPY CENTER, LLC, and NATWARLAL RAMANI, M.D.,	)	
Defendants.	)	

Submitted: March 13, 2020
Decided: April 28, 2020

Upon Defendants' Motion for Summary Judgment
DENIED

MEMORANDUM OPINION

Bradley J. Goewert, Esquire, Lorenza A. Wolhar, Esquire, Marshall, Dennehey Warner, Coleman & Goggin, Wilmington, Delaware, Attorneys for Defendants.

Timothy E. Lengkeek, Esquire, Young, Conaway, Stargatt & Taylor, LLP, Wilmington, Delaware, Attorney for Plaintiffs.

Rocanelli, J.

This is a medical negligence case involving a continuum of negligent medical treatment. William King was at high risk for developing colorectal cancer. Starting in or about 2004, Mr. King was a patient of Defendant Natwarlal Ramani, M.D. who performed repeated colonoscopies. Dr. Ramani's associated medical professional entities, GI Associates of Delaware, P.A. and Advance Endoscopy Center, LLC, are also defendants (collectively, "Defendants").

On April 4, 2011, Dr. Ramani performed a repeat colonoscopy which showed benign tumors in Mr. King's colon. Following the procedure, Dr. Ramani recommended to Mr. King that he return for a colonoscopy within 3 to 5 years. As directed by Dr. Ramani, Mr. King scheduled a repeat colonoscopy with Defendants to take place on March 23, 2016—within 5 years of the April 4, 2011 colonoscopy. Unfortunately, Dr. Ramani could not complete the procedure on March 23, 2016 because a malignant growth had formed in Mr. King's colon.

Mr. King died just a few months later. By letter dated January 26, 2017, Mr. King's family, who are the plaintiffs in this lawsuit together with Mr. King's estate, gave notice to Defendants of an investigation of Defendants' treatment of Mr. King. This lawsuit was filed on April 16, 2018.

Defendants seek summary judgment in their favor on the ground that this lawsuit is time-barred. Specifically, Defendants contend that this case involves a single act of negligence that took place on April 4, 2011, when Dr. Ramani told Mr.

King to return for his next colonoscopy within 3 to 5 years. Plaintiffs oppose summary judgment on the grounds that this lawsuit involves a continuum of negligent treatment rather than a single act of negligence and that it was filed within the applicable statute of limitations.

As set forth more fully in this opinion, the Court concludes that the statute of limitations began to run on March 23, 2016, the date of the last act in a continuum of negligent medical treatment; that the statute of limitations was tolled for up to 90 days by the notice of investigation on January 26, 2017; and that this lawsuit filed on April 16, 2018 was timely filed within the tolled statute of limitations period. Accordingly, summary judgment must be denied.

STANDARD OF REVIEW

The Court may grant summary judgment 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 judgment as a matter of law."[1] A genuine issue of material fact is one that "may reasonably be resolved in favor of either party."[2] 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.[3] At the motion for summary judgment phase, the Court must view the facts "in the light most favorable to the

[1] Super. Ct. Civ. R. 56(c).
[2] *Moore v. Sizemore*, 405 A.2d 679, 680–81 (Del. 1979).
[3] *Id.*

non-moving party."[4] Summary judgment is appropriate only if Plaintiffs' claims lack evidentiary support such that no reasonable jury could find in Plaintiffs' favor.[5]

DISCUSSION

The applicable statute of limitations for medical negligence actions is set forth in Section 6856 of Title 18 of the Delaware Code which provides in relevant part:

> 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 . . . .[6]

Plaintiffs may toll the limitations period up to 90 days "by sending a Notice of Intent to investigate to each potential defendant or defendants by certified mail, return receipt requested, at the defendant's or defendants' regular place of business."[7] Medical negligence actions involving ascertainable injuries are barred after two years from the "date upon which such injury occurred,"[8] subject to a tolling period of up to 90 days.[9] For purposes of Section 6856, the date upon which the "injury"

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[4] *Brozka v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).
[5] *See Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1200–05 (Del. 2015); *Edmisten v. Greyhound Lines, Inc.*, 2012 WL 3264925, at *2 (Del. Aug. 13, 2012).
[6] 18 *Del. C.* § 6856.
[7] *Id.* § 6856(4).
[8] *See id.* § 6856 ("No action . . . against a health-care provider for personal injury . . . arising out of medical negligence shall be brought after the expiration of 2 years from the date upon which such injury occurred . . . .").
[9] *See id.* § 6856(4) ("A plaintiff may toll the above statutes of limitations for a period of time up to 90 days . . . .").

occurred depends on whether the case involves a single act of negligence or a continuous course of negligent medical treatment.

I. Single Acts of Negligence

With respect to single acts of negligence, the decisional law is well-settled. The Delaware Supreme Court has consistently held that where there is a single act of medical negligence, typically a misdiagnosis or a failure to diagnose, the statute of limitations for medical negligence begins to run on the date that the single act of negligence occurred. Hence, according to the Delaware Supreme Court, where there has been a single act of medical negligence, the date of the "injury" is the date on which the medically "wrongful act or omission occurred."[10]

Dunn v. St. Francis Hospital[11] involves a single act of negligence by a surgeon. In *Dunn*, the Delaware Supreme Court held that the phrase "injury occurred" in Section 6856 refers to the date of the wrongful act or omission.[12] *Dunn* involved a negligently performed surgery and a plaintiff who did not experience the resulting pain until five years later.[13] Examining the text of the statute and its legislative history, the Court concluded that the purpose of Section 6856 was to "limit the open-ended aspect of the prior law which provided in the case of an

[10] *Dambro v. Meyer*, 974 A.2d 121, 126 (Del. 2009) (quoting *Meekins v. Barnes*, 745 A.2d 893, 897–98 (Del. 2000)).
[11] 401 A.2d 77 (Del. 1979).
[12] *See id.* at 79–81.
[13] *See id.* at 78.

'inherently unknowable' injury that the applicable period began to run when the injured person became aware of his injury."[14] Accordingly, the Court found that the date on which the plaintiff's pain manifested had no bearing on when the limitations period began; rather, the source of the pain—the negligent surgery—was the injury.[15] Thus, the limitations period began on the date of the negligent surgery because it was a single act of negligence.

Dambro v. Meyer also involved a single negligent act: a misread mammogram.[16] In *Dambro*, the Supreme Court held that the two-year statute of limitations began to run on the date that the defendant-doctor failed to diagnose breast cancer that should have been evident on the mammogram.[17] The Court noted that, for purposes of Section 6856, the injury—"the delay in treatment"—occurred on the "date that the cancer could have been diagnosed but was not."[18] Similarly, in *Meekins v. Barnes*, another case involving a single negligent act of a misread mammogram, the Court held that the injury occurred on the date that the defendant-

[14] *Id.* at 79 (citing *Layton v. Allen*, 246 A.2d 794 (Del. 1968)).
[15] *See id.* at 80–81.
[16] 974 A.2d at 124–25.
[17] *See id.* at 131–32.
[18] *Id.* at 132.

doctor examined the mammogram and negligently failed to diagnose the plaintiff's cancer.[19]

Citing the decisions of the Delaware Supreme Court which involve a single act of negligence, Defendants argue that Plaintiffs' claims are time-barred because, according to Plaintiffs' own expert witness, Dr. Ramani breached the standard of care on April 4, 2011, when Dr. Ramani instructed Mr. King to return for a repeat colonoscopy within 3 to 5 years. According to Defendants, this advice constitutes a single act of negligence and the decisional law involving single acts of negligence interprets the word "injury" to mean "negligence" in the context of Section 6856. Accordingly, according to Defendants, the statute began to run on April 4, 2011 and expired two years later on April 4, 2013 or, at most, on April 4, 2014.[20]

Defendants' reliance on the decisional law involving single acts of negligence is misplaced for several reasons. First, the case before the Court does not involve a single act of negligence but instead involves a continuous course of negligent medical treatment, which is a separate and distinct cause of action subject to a

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[19] 745 A.2d at 897–98; *see also Reyes v. Kent Gen. Hosp., Inc*., 487 A.2d 1142, 1144–45 (Del. 1984) (finding the "injury occurred" on the date that an emergency room physician failed to diagnose a malignant tumor).

[20] Section 6856 provides a separate three-year limitations period for injuries that were "unknown to and could not in the exercise of reasonable diligence have been discovered by the injured person," 18 *Del. C.* § 6856(1), the effect of which is to "both codify the 'inherently unknowable' injury rule of the *Layton* case, and to limit it to three years." *Meekins*, 745 A.2d at 896–97. Plaintiffs do not ask the Court to apply the three-year limitations period.

different Section 6856 analysis.[21] Second, the decisional law involving single acts of negligence is not applicable where, as here, the injury and the negligence did not take place on the same date. Importantly, each of the cases relied upon by Defendants involved medically negligent acts that immediately gave rise to the plaintiffs' injuries. Third, Defendants conflate Plaintiffs' expert's *medical* opinion regarding Dr. Ramani's negligence with the *legal* analysis construing the date of injury.

Unlike the injuries in the cases involving single acts of negligence, Mr. King's injury did not arise at the time of the alleged breach of the standard of care. There is no record evidence that Mr. King had cancer which was missed or misdiagnosed by Dr. Ramani during the April 4, 2011 colonoscopy. Rather, after his colonoscopy on April 4, 2011, Mr. King remained under Dr. Ramani's negligent treatment and returned, as instructed, within 5 years for a repeat colonoscopy. While Plaintiffs claim that Dr. Ramani failed to meet the standard of care on April 4, 2011 by advising Mr. King to return for a repeat colonoscopy in 3 to 5 years, under the correct legal analysis involving a continuum of negligent treatment, Mr. King's injury did not occur until Mr. King followed the advice of his physician and had a repeat colonoscopy on March 23, 2016. On that date, Dr. Ramani could not complete Mr.

[21] *See* Second Am. Compl. ¶ 24; *cf. Ewing v. Beck*, 520 A.2d 653, 661 (Del. 1987) ("[W]hat the Delaware courts have recognized is more appropriately described as a *cause of action* for continuous negligent medical treatment." (emphasis added)).

King's routine screening colonoscopy because there was a malignant growth on his colon and the cancer had advanced too far for effective treatment. Accordingly, the decisional law governing single acts of negligence does not apply to this case.

Moreover, this Court finds that the legal question of when the "injury occurred" is not controlled by the professional opinion of Plaintiffs' standard of care expert, who testified at his deposition that Dr. Ramani breached the standard of care on April 4, 2011 by advising Mr. King to return for a repeat colonoscopy in 3 to 5 years "whereas, the standard of care would be three years, at most I would say."[22] According to Plaintiffs' expert, Mr. King "was even more likely to develop cancer than the average person" and therefore "certainly three years would have been the absolute maximum, according to the guidelines."[23]

Justice Berger's dissenting opinion in *Meekins* is instructive here. In *Meekins*, Justice Berger disagreed with the majority conclusion that the date of the negligent act and date of the injury were the same date. Justice Berger emphasized that the plain language of the Delaware statute provides that the limitations period runs from the date of injury.[24] While the date of injury and the date of negligence are frequently the same, Justice Berger explained, the date of malpractice is not the controlling date; rather, the controlling date is the date of the injury: "I would follow settled

[22] Moss Dep. 25:9–11, Oct. 14, 2019.
[23] Moss Dep. 25:11–16.
[24] *See Meekins*, 745 A.2d at 901–02 (Berger, J., dissenting).

principles of statutory construction, and give effect to the plain language of § 6856. The statute provides that the limitations periods runs from the 'date upon which such injury occurred.' That date is the date on which the negligent act caused harm."[25]

For Mr. King, who followed his doctor's advice and had a repeat colonoscopy within 5 years as instructed, the injury occurred on March 23, 2016, the day Dr. Ramani could not complete the prescribed colonoscopy because a malignant growth had developed in Mr. King's colon. While Dr. Ramani may have breached the standard of care on April 4, 2011, the injury occurred when Mr. King followed the medical advice he was given. Here, the date of negligence and the date of injury are two separate dates. Accordingly, the decisional law involving single acts of negligence does not apply to Plaintiffs' claims. Instead, application of Section 6856 to Plaintiffs' claims is governed by the continuous negligent medical treatment doctrine.

II. Continuous Negligent Medical Treatment

A. The two-year statute of limitations began to run on March 23, 2016

Delaware recognizes the doctrine of continuous negligent medical treatment as a separate cause of action that is applicable "[w]hen there is a continuum of negligent medical care related to *a single condition* occasioned by negligence."[26] "If

[25] *Id.* at 902.
[26] *Ewing v. Beck*, 520 A.2d 653, 662 (Del. 1987).

any act of medical negligence falls within the period during which suit may be brought, the plaintiff . . . may bring suit for the consequences of the entire course of conduct."[27] Bare allegations of continuous negligent medical treatment are not enough to overcome a defendant's motion for summary judgment based on statute of limitations grounds.[28] Instead, the Court must examine the facts alleged to determine whether "the negligent treatment, as alleged, can be segmented or is, in fact, so inexorably intertwined that there is but one continuing wrong."[29]

Claims of continuous negligent medical treatment are subject to the limitations period set forth in Section 6856, which, for claims of continuous negligent medical treatment, runs from the date of the "last act" in the negligent continuum.[30] The Court applies a two-part inquiry to determine the date of the "last act."[31] First, the Court must determine "the date upon which the plaintiff had actual or constructive knowledge of the negligent course of treatment," applying a

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[27] *Id.* at 662.
[28] *See Ogden v. Gallagher*, 591 A.2d 215, 219 (Del. 1991) ("[A] complaint brought under the continuous negligent medical treatment theory of recovery must allege with particularity a continuous course of negligent medical treatment over a finite period of time.").
[29] *Ewing*, 520 A.2d at 662.
[30] *Id.* at 663 ("[I]f a plaintiff has a cause of action for continuous negligent medical treatment . . . , the state of limitations begins to run for two years from the last act in the negligent continuum . . . .").
[31] *See Meekins*, 745 A.2d at 899 (discussing the two-part inquiry required by the holding in *Ewing*).

reasonably prudent person standard.[32] Second, the Court must determine "what is the date of the 'last act' in the negligent continuum immediately prior to the date that the patient received knowledge, actual or constructive, of the negligent course of treatment."[33] The "last act" in the negligent continuum "must be an *affirmative* happening or event" and is ascertained by an objective analysis.[34]

With respect to the first prong, Mr. King acquired knowledge of Dr. Ramani's alleged negligence sometime after March 23, 2016, the date of the incomplete repeat colonoscopy, when Mr. King was diagnosed with colon cancer. At that time, Mr. King either had actual knowledge of Dr. Ramani's negligent course of treatment or could have discovered Dr. Ramani's negligent course of treatment in the exercise of reasonable diligence.

With respect to the second prong, Defendants argue that the limitations period "begins on the date of the last *negligent* act in the continuum of negligent medical care."[35] Defendants correctly note that the Delaware Supreme Court has distinguished the "continuing treatment doctrine," which is not recognized in Delaware, from the "doctrine of continuous negligent medical treatment," which is

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Defs.' Reply Br. Supp. Mot. Summ. J. 11–12 (emphasis added).

recognized as a valid cause of action in Delaware. The Court in *Benge v. Davis* explained the distinction:

> Under the continuing treatment doctrine, the statute of limitations begins to run at the end of a course of treatment for a condition brought about by a prior negligent act, whether or not the continuous treatment is also negligent. On the other hand, under the doctrine of continuous negligent medical treatment, the statute of limitations runs from the last act in a "continuum of negligent medical care related to *a single condition* occasioned by negligence." The difference between the two doctrines, for statute of limitation purposes, is that under the doctrine of continuous negligent medical treatment, the focus is limited to the last act in the negligent continuum, not the last act of any treatment.[36]

Here, Defendants argue that treating a non-negligent act, i.e., the repeat colonoscopy on March 23, 2016, as the "last act" for purposes of the continuous negligent medical treatment doctrine would amount to adopting the continuing treatment doctrine, which the Supreme Court has expressly rejected. Accordingly, Defendants argue, "the last act" must have been "the last *negligent* act."[37]

Defendants' argument misconstrues the purpose of the continuous negligent medical treatment doctrine, which provides a cause of action to plaintiffs "[w]hen there is a *continuum* of negligent medical care."[38] In other words, the doctrine applies to circumstances where a series of acts by a medical professional *taken together* constitute negligence on the part of the medical professional. Each act

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[36] 553 A.2d 1180, 1183 (Del. 1989) (quoting *Ewing*, 520 A.2d at 662).
[37] Defs.' Reply Br. Supp. Mot. Summ. J. 11–12 (emphasis added).
[38] *Ewing*, 520 A.2d at 662 (emphasis added).

alone need not be an act of negligence—such a requirement would render the doctrine superfluous, as plaintiffs would already have a cause of action for each individual act.

In *Ewing v. Beck*, the first Delaware Supreme Court decision to officially recognize the continuous negligent medical treatment doctrine, the Supreme Court acknowledged that plaintiffs injured by a continuum of negligent medical care have "but *one* cause of action."[39] The continuous negligent medical treatment doctrine acknowledges a cognizable claim where the sum total of multiple acts, some of which may not be negligent in and of themselves, constitutes negligent treatment. An act that is part of the negligent treatment may be deemed the "last act" for purposes of the second prong of the statute of limitations analysis. That is not to say that any act by the medical professional in relation to the condition for which the plaintiff received negligent treatment can constitute the "last act."[40] The act must be one that, *together with other acts taken during the course of treatment*, forms the negligent whole.

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[39] *Id.* (emphasis added).

[40] *See Benge*, 553 A.2d at 1183 ("The difference between the [continuing treatment doctrine and the continuous negligent medical treatment doctrine] . . . is that under the doctrine of continuous negligent medical treatment, the focus is limited to the last act in the negligent continuum, not the last act of any treatment."); *Ewing*, 520 A.2d at 663 n.11 ("The cause of action recognized today . . . assumes a continuous course of improper examination or treatment which is substantially uninterrupted. . . . Our focus is limited to the last act in the negligent continuum[,] *not* the last act of any treatment.").

Here, the date of the last act in the continuum of negligent treatment was March 23, 2016, the date on which Dr. Ramani attempted but could not complete Mr. King's repeat colonoscopy due to the malignant growth on Mr. King's colon. Mr. King's March 23, 2016 visit was directed by Dr. Ramani's April 4, 2011 recommendation to return for a repeat colonoscopy within 3 to 5 years. On March 23, 2016, Dr. Ramani attempted but failed to complete the repeat colonoscopy because a malignant growth on Mr. King's colon had developed between the two visits. These acts—the April 4 recommendation and the March 23 failed colonoscopy—are so inexorably intertwined so as to constitute one continuous wrong. In other words, while Dr. Ramani breached the standard of care by making a wrongful recommendation on April 4, it was the recommendation *and* the resulting too-late treatment that comprised the continuous negligent medical treatment. Accordingly, the two-year statute of limitations began to run on March 23, 2016, the date of the "last act" in the negligent medical continuum.

B. Plaintiffs' claims are not time-barred

By letter dated January 26, 2017, Plaintiffs informed Defendants of Plaintiffs' intention to investigate potential claims of medical negligence. Section 6856 provides that a notice of intent to investigate may toll the limitations period by up to 90 days, which "shall run from the last day of the applicable statute of limitations."[41]

[41] 18 *Del. C.* § 6856(4).

Accordingly, the two-year limitations period was tolled by up to 90 days from March 26, 2018. Plaintiffs filed the Complaint within the tolled limitations period, on April 16, 2018. Accordingly, Plaintiff's claims are not time-barred and summary judgment must be denied.

CONCLUSION

This medical negligence case does not involve a single act of negligence. Rather, it involves a continuum of negligent medical treatment related to a single condition occasioned by negligence. The date of the breach of the standard of care, April 4, 2011, and the date of Mr. King's injury, March 23, 2016, are two different dates. Nevertheless, the April 4 recommendation and the March 23 failed colonoscopy are so inexorably intertwined so as to constitute one continuous wrong. Accordingly, this lawsuit was timely filed on April 16, 2018 within the tolled statute of limitations period.

Denial of summary judgment is not an extraordinary ruling. Indeed, summary judgment is frequently denied. Nevertheless, this Court appreciates that denial of summary judgment for the reasons set forth herein may merit appellate review before a final judgment.

NOW, THEREFORE, this 28th day of April 2020, Defendants' Motion for Summary Judgment is hereby DENIED.

IT IS SO ORDERED.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli