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

VICKIE L. GROSS and STEVEN GROSS,	)	
Plaintiff,	)	
	)	C.A. No. 07C-07-139 PLA
v.	)	
BETH R. SCHUBERT, M.D. and DIANE TERRANOVA, MSN, APN,	)	
Defendants.	)	

Submitted: May 28, 2008
Decided: June 2, 2008

ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
GRANTED

Gilbert F. Shelsby, Esquire, SHELSBY & LEONI, Stanton, Delaware, Attorney for Plaintiffs.

Colleen D. Shields, Esquire, ELZUFON AUSTIN REARDON TARLOV & MONDELL, P.A., Wilmington, Delaware, Attorney for Defendants.

ABLEMAN, JUDGE

Introduction

In this medical malpractice case, Defendants Beth R. Schubert, M.D. and Diane Terranova, MSN, APN (collectively "Defendants") have filed a Motion for Summary Judgment on the basis that plaintiffs' claims are barred by the applicable statute of limitations. The action was filed by Plaintiff more than two years after the date of her last treatment by Defendants. For reasons that are more fully set forth hereafter, the Court concludes that there is no legitimate justification for tolling of the statute. The Motion for Summary Judgment is therefore granted.

Statement of Facts

Plaintiff Vickie L. Gross ("Gross")[1] was treated by Defendants Beth R. Schubert, M.D., an obstetrician gynecologist, and Diane Terranova, MSN, APN, her nurse, for a period of three years from 2002 through 2005. On February 28, 2005, the final date that Gross sought treatment by Defendants, she was referred for a mammogram and ultrasound to evaluate breast complaints.[2] An excision biopsy performed on March 10, 2005 confirmed that Gross had breast cancer.[3]

[1] The plaintiffs in this case are Vickie L. Gross and her husband, Steven Gross. For purposes of this motion, the Court will refer to the plaintiffs as "Gross."

[2] Docket 1 (Complaint), ¶ 9.

[3] *Id.*, ¶ 10.

On December 22, 2005, Gross submitted a written request to Defendants for her medical records.[4] In response, Defendants mailed copies of treatment notes, including a written explanation advising Gross that they would not produce notes from other physicians because they were not legally permitted to do so. Gross was further advised that all handwritten forms filled out by patients "for information gathering purposes" were not maintained as part of the medical record. Gross then sent a second written request on May 18, 2006.

Thereafter, Gross filed complaints with the State of Delaware Division of Professional Regulation and with the Department of Health and Human Services Office for Civil Rights. In both complaints, Gross acknowledged that she had received copies of Defendants' treatment notes in January 2006 but claimed that she had not received copies of handwritten registration forms that she had personally completed for each visit.[5] Both complaints were resolved without any adverse action against the Defendants.

Presumably as a result of communications with the Department of Health and Human Services, Plaintiff's medical records from other physicians, which had previously been withheld, were produced by

[4] Docket 30 (Defs.' Mot. for Summ. J.), Ex. D.

[5] *Id.*, Exs. F & G.

Defendants in January 2006. Defendants were still unable to produce annual handwritten intake forms that had been filled out by Gross, however, because they had not been retained. As of January 2006, therefore, Gross had received all of the records maintained in Defendants' offices.[6]

Plaintiffs filed this action on July 16, 2007. In addition to the claims of medical negligence, Gross alleges in her Complaint that Defendants refused to produce and subsequently destroyed Gross's medical records in an effort fraudulently to conceal a claim of medical negligence, and in so doing, have inhibited her ability to pursue this action.[7]

Parties' Contentions

In their motion for summary judgment, Defendants argue that Gross's claims are barred by the applicable two-year statute of limitations, since the date of the filing of the Complaint was more than two years after her last date of treatment with Defendants.[8] Defendants submit that Gross knew of her claim in March 2005 when the excision biopsy revealed high-grade carcinoma of the left breast, and that tolling of the statute is not appropriate in this instance. Defendants further contend that Defendants' destruction of

[6] This was confirmed by Department of Health & Human Services letter dated November 8, 2006. *See id.*, Ex. G.

[7] Docket 1, Counts II & III.

[8] *See* 18 *Del. C.* § 6856.

Gross's handwritten notes could not have had any effect upon her ability to file a timely lawsuit because she ultimately filed a Complaint with a statutorily-compliant Affidavit of Merit, thus establishing that the absence of these documents did not prevent her from pursuing this action. Moreover, Gross could have mailed Defendants a Notice of Intent to Investigate before the statute had expired in order to toll the statute of limitations pursuant to 18 *Del. C.* § 6856(3), but she failed even to pursue this remedial option.

Gross disputes that the statute of limitations began running on February 28, 2005. She contends that the continuum of negligent medical care extended until December 22, 2005, the date she learned that Defendants had destroyed her medical records. Although it is unknown when her intake forms were shredded,[9] Gross maintains alternatively that the statute began to toll when the documents were destroyed.

Standard of Review

When considering a motion for summary judgment, the Court's function is to examine the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to

[9] After Gross filed her brief in opposition to Defendants' motion for summary judgment, Defendants submitted an affidavit from Beth R. Schubert, M.D., in which she stated that employees in her office converted Gross's paper documents to a computer file by scanning them and subsequently shredding them on March 10, 2005. *See* Defs.' Reply Br. to Pls.' Opposition to Summ. J., Ex. A.

judgment as a matter of law.[10] The court must "view the evidence in the light most favorable to the non-moving party."[11] "The moving party bears the initial burden of demonstrating that the undisputed facts support his legal claims."[12] If the proponent properly supports his claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[13] Summary judgment will not be granted if, after viewing the record in a light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[14] If, however, the record reveals that there are no material facts in dispute and judgment as a matter of law is appropriate, then summary judgment will be granted.[15] Where there are no material facts at issue, and the dispute focuses on a question of law, summary judgment is appropriate.[16]

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[10] Super Ct. Civ. R. 56(c).

[11] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. Ct. 2005).

[12] *Id.* at 879.

[13] *Id.* at 880.

[14] *Id.* at 879.

[15] *Id.*

[16] *Sierra Club v. Del. Dep't of Natural Res. and Envtl. Control*, 919 A.2d 547, 555 (Del. Mar. 9, 2007) (App. II), *aff'g Sierra Club v. DNREC*, C.A. No. 1724-N (Del. Ch. Jun. 19, 2006).

Discussion

In a medical negligence action to recover damages for personal injuries, the statute of limitations is two years.[17] The statute may be tolled where the plaintiff's injury was "inherently unknowable" and could not have been discovered with the exercise of reasonable diligence within the two-year period.[18] In such cases, a plaintiff has three years to bring the action.[19]

Where the plaintiff's cause of action is for continuous negligent treatment, the statute 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."[20] Once a claim of continuous negligent medical care has been alleged, the Court must determine the date when the statute of limitations begins to run.[21] The Court must engage in a two-step inquiry to determine both (1) the date upon which the plaintiff had actual or constructive

[17] 18 *Del. C.* § 6856.

[18] *Id.* § 6856(1); *Meekins v. Barnes*, 745 A.2d 893, 896-97 (Del. 2000).

[19] *Meekins*, 745 A.2d at 897. In this case, neither party has argued that the three-year provision is applicable.

[20] *Ewing v. Beck*, 520 A.2d 653, 663 (Del. 1987).

[21] *Ogden v. Gallagher*, 591 A.2d 215, 219 (Del. 1991).

knowledge of the negligent course of treatment; and (2) the date of the "last act" in the negligent continuum immediately prior to the date that the plaintiff received actual or constructive knowledge of the negligent course of treatment.[22] The Court applies an objective test, i.e., the reasonably prudent person standard, to determine whether the plaintiff should have discovered the allegedly negligent conduct.[23] A plaintiff who consults with an independent health care provider about a condition that is the subject matter of the treatment is presumed to have known, or in the exercise of reasonable diligence, could have known about the negligent course of conduct on the date of the independent consultation.[24]

Gross's Complaint alleges that Defendants negligently failed to evaluate and diagnose carcinoma of the left breast.[25] Although it is undisputed that her last treatment date with Defendants was February 28, 2005, the record is unclear as to whether the health care provider who performed the excision biopsy was "independent" or part of the same health

[22] *Benge v. Davis*, 553 A.2d 1180, 1184 (Del. Super. Ct. 1989) (citing *Ewing*, 520 A.2d at 663).

[23] *Ewing*, 520 A.2d at 664.

[24] *Id.* at 665. A health care provider is not independent if he or she is part of a medical group or clinic with the same health care provider who is alleged to have engaged in a continuous course of negligent medical treatment. *Id.* at 664 n.14.

[25] Docket 1, Count I. For purposes of this motion, the Court assumes that all of Plaintiffs' claims are pleaded with particularity. *See Ewing*, 520 A.2d at 664 (holding that allegations of continuing negligent medical treatment must be pleaded with particularity).

care group as Defendants. Nonetheless, because the excision biopsy revealed cancer on March 10, 2005, Gross was certainly aware of Defendants' potential negligence by that date. Viewing the evidence in the light most favorable to Gross, the Court will assume for purposes of this motion that the health care provider who discovered the carcinoma was not independent. Therefore, under the first prong of the analysis, the Court finds that Gross had actual or constructive knowledge of Defendants' alleged negligent course of conduct at the latest by March 10, 2005.[26]

Turning to the second inquiry, the Court must determine the date of the last act in the negligent continuum. The last act must be either an act or omission that occurs "within the context of an affirmative happening or event."[27] The act or omission must be a form of medical treatment and not a ministerial act.[28] Examples of affirmative acts include surgery, an emergency room visit, a prescription for medication, or an office visit or consultation.[29]

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[26] Defendants agree that the last possible date on which Gross had knowledge was March 10, 2005. *See* Defs.' Reply to Pls.' Opposition to Summ. J., ¶ 4.

[27] *Ogden*, 591 A.2d at 220.

[28] *Id.*

[29] *Meekins*, 745 A.2d at 899 (citations omitted).

In this instance, the last act or omission by Defendants occurred at the latest on March 10, 2005, when Gross learned that she had carcinoma of the left breast. It was at that point that Gross ended her treatment with Defendants. She did not request her records until December 22, 2005, nearly nine months after her last visit. Defendants' failure to produce these records could only be considered the last act within the continuum if it occurred within the context of the March 2005 office visit, the last affirmative act.[30] Gross's request for records was wholly unrelated to any treatment by Defendants,[31] and their production or non-production was a ministerial act not related to treatment.[32] The Court therefore concludes that the statute of limitations expired on March 10, 2007, two years after Gross's excision biopsy.

Gross's contention that Defendants' alleged fraudulent concealment and destruction of her records tolls the statute is similarly unavailing. For fraudulent concealment to toll the statute of limitations in a medical negligence action, the physicians must have actual knowledge of the wrong

[30] Other than her request for records on December 22, 2005, Gross has not alleged any other affirmative act within the alleged continuum of negligent medical care.

[31] Docket 30, Exs. D & E. Her December 22, 2006 and May 18, 2006 requests do not suggest that the records are related to any treatment.

[32] *See Meekins*, 745 A.2d at 900 (holding that a doctor's failure to contact plaintiff to return for an evaluation was not an affirmative act that could toll the statute).

done and must have affirmatively acted to conceal it from the patient.[33] The statute will be tolled only until the plaintiff discovered her rights or until she could have discovered them through the exercise of reasonable diligence.[34] Thus, fraudulent destruction of her own handwritten notes will toll the statute only if Gross could not have discovered her cause of action as a result of Defendants' conduct.

By March 10, 2005, Gross was aware of Defendants' alleged negligence because she had actual knowledge on that date that Defendants failed to diagnose her cancer. Any fraudulent destruction of the handwritten records cannot serve to toll the statute because the destruction is irrelevant to any claims of medical negligence arising from Defendants' failure to diagnose and treat her cancer.[35] Notably, Gross has put forth no evidence that Defendants intended to conceal any evidence of their own negligence. In fact, she concedes that Defendants produced her entire medical file, with

[33] *Shockley v. Dyer*, 456 A.2d 798, 799 (Del. 1983).

[34] *Id.*

[35] *See id.* at 800 ("In further support of their appeal, plaintiffs argue that defendant as a physician had an affirmative duty of making a full disclosure of all the facts surrounding the operation, and his failure to do so constituted a breach of fiduciary responsibility. This argument has no relevance to the statute of limitations issue.").

the sole exception of the forms that Gross herself completed.[36] In other words, she has failed to allege that Defendants withheld any information that prevented her from discovering her cause of action. The statute of limitations cannot be tolled on this basis.

What is perhaps the most compelling reason for disregarding Gross's tolling argument is the fact that she was ultimately capable of filing this lawsuit, without obtaining the notes. What is more, the filing of the Complaint was accompanied by a statutorily-required Affidavit of Merit.[37] Thus, any claim by Gross that the notes were necessary to pursue her case is disingenuous. Moreover, had Gross believed that Defendants' destruction of her handwritten forms inhibited her ability to file suit, she could have tolled the statute for ninety days by filing a Notice of Intent within the statutory period.[38] Gross filed a Notice of Intent on March 23, 2007, but that was thirteen days after the two-year statute of limitations expired.[39] Even if the Notice of Intent had been filed within the statutory period, Gross still waited

[36] In fact, Gross conceded in her brief that "the progress notes do not reflect what she wrote down in her intake form." Docket 33, ¶ 6. Because Gross knew the contents of her intake forms and has failed to allege that any other information was missing from her records, Gross has failed to put forth any evidence that Defendants' alleged fraudulent concealment prevented her from discovering her cause of action.

[37] Docket 30, Ex. H.

[38] *See* 18 *Del. C.* § 6856(3).

[39] Docket 30, Ex. I.

until July 16, 2007, more than ninety days after the Notice was filed, to initiate this litigation. Thus, even if the Notice served to toll the statute, which it did not, the suit was untimely because it was filed after the ninety-day period.

The type of proof required in the case *Ogden v. Gallagher*[40] is not required in this instance. *Ogden* addressed the question of whether the last act in the continuum of negligent care could be a defendant physician's failure to forward plaintiff's records in the context of an affirmative recommendation for treatment. In that case, the defendant recommended that the plaintiff obtain a second medical opinion, but failed to forward the plaintiff's relevant medical records, thereby compromising her diagnosis and treatment. The Supreme Court reversed the Trial Court's grant of summary judgment because the defendant had not offered expert proof of the relevant medical standards or of his compliance with those standards.[41]

The *Ogden* case is distinguishable from the case at bar. Here, the issue is whether the destruction of handwritten records nearly nine months after Gross's last treatment with Defendants tolls the statute. Unlike *Ogden*, the production of those records was unrelated to any affirmative act of

[40] 591 A.2d 215 (Del. 1991).

[41] *Ogden*, 591 A.2d at 222.

treatment by Defendants. It is undisputed that, after March 10, 2005, Defendants engaged in no affirmative act related to plaintiff's treatment for carcinoma. Defendants could not have breached any relevant standard of care because Defendants ceased "care" for Gross in March 2005, long before the records were sought. Thus, there is no need for Defendants to offer proof of the applicable standard of care.

Conclusion

For all of the foregoing reasons, the Court finds that Gross should have known through the exercise of reasonable diligence by March 10, 2005 that she had a cause of action for medical negligence against Defendants. The Court further holds that Defendants' act of destroying portions of Gross's records was not an affirmative act related to her medical treatment and thus was not the "last act" within the continuum of alleged negligent

care. There being no genuine issue of material fact, Defendant is entitled to judgment as a matter of law. Accordingly, Defendant's Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Gilbert F. Shelsby, Jr., Esq.
Colleen D. Shields, Esq.