

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

MAE BELL JOYNER, ADMINIS-)	
TRATIX OF THE ESTATE OF)	
OLEAN MACLANE,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. S09C-07-019 RFS
)	
MID-ATLANTIC OF DELMAR, LLC,)	
a Corporation licensed to dispense)	
medical and nursing care in the State of)	
Delaware, A NURSE and/or NURSES)	
OF MID-ATLANTIC OF DELMAR,)	
LLC WHOSE NAMES ARE NOT)	
KNOWN INDIVIDUALS,)	
)	
Defendants.)	

MEMORANDUM OPINION

Upon Defendant’s Motion for Summary Judgment. Granted.

Submitted: December 3, 2009
Decided: December 21, 2009

William M. Chasanov, Esquire, Chasanov, Schaeffer & Gray, Georgetown, Delaware, Attorney for Plaintiff.

Gary W. Alderson, Esquire, Elzufon Austin Reardon Tarlov & Mondell, P.A., Wilmington, Delaware, Attorney for Defendant.

STOKES, Judge

Introduction. Defendant Mid-Atlantic of Delmar, LLC (“Delmar”) moves for summary judgment on grounds that the Complaint was not filed within the two-year statute of limitations period for medical malpractice actions.¹ *See* Title 18 *Del.C.* § 6856. Plaintiff Mae Bell Joyner argues that the three-year statute of limitations is applicable because she did not become aware of the injury until she received a letter from the Delaware Division of Health and Social Services (“Division”) indicating neglect in the care of Decedent Olean MacLane. Having carefully reviewed the record, the Court finds that the Complaint was not timely filed within the applicable two-year statute of limitations and that the motion for summary judgment is therefore granted.

Facts. The facts of record are scant. However, the record does not require further development to permit an informed decision. Decedent was a resident of Delmar, a licensed residential nursing facility, for an indefinite period of time. Sometime between January 26, 2007, and February 3, 2007, she suffered a fall, the cause of which is not apparent from the record. Either before or after the fall, Decedent was moved from Delmar to the Emergency Room at Peninsula Regional Medical Center, which is not a party to this action. Decedent died on February 3, 2007, allegedly as a result of Defendant’s negligent care.

Plaintiff does not dispute Defendant’s assertion that on February 6, 2007, three days after Decedent’s death, Plaintiff requested Decedent’s records from Delmar. Nor does

¹The unnamed Defendant Nurse or Nurses did not join in the motion for summary judgment, but its outcome is dispositive as to them as well as to Delmar.

Plaintiff dispute that on February 9, 2007, she filed a complaint with the Division, stating that Decedent had had a fall prior to her death and that Plaintiff had numerous pictures of bruises and other injuries.

On August 19, 2007, the Division responded to Plaintiff's inquiry with a letter which stated in part that "neglect was substantiated." The letter also stated that the matter was being referred to the Division's Licensing Unit, as well as the Delaware Attorney General's office. Plaintiff filed her Complaint on July 14, 2009.

Standard of Review. When considering a motion for summary judgment, the Court's role is to examine the record to determine whether genuine issues of material fact exist; if, after viewing the record in a light most favorable to the nonmoving party, the Court finds no genuine issues of material fact, summary judgment is appropriate.² The Court's decision must be based only on the record presented, including the pleadings, affidavits, and answers to interrogatories, not on what evidence is "potentially possible."³

Discussion. The only issue before the Court is the length of the applicable statute of limitations. Both parties cite to the statute of limitations contained in the Health Care Malpractice Insurance and Litigation Act at 18 *Del. C.* § 6856. Defendant argues that the period for filing this suit is two years and that the Complaint was not timely filed on July 14,

²*New Castle County Council v. State*, 698 A.2d 401 (Del. Super. Ct), *aff'd*, 688 A.2d 888 (Del. 1996).

³*Camac v. Hall*, 698 A.2d 394 (Del. Super. Ct. 1996).

2009. Plaintiff argues that the three-year limitations period applies because she did not know of the injury until she received the letter from the Division in August 2007.

Section 6856(1) extends the general two-year statute of limitations to three years only if plaintiff's injury was unknown and could not have been discovered in the exercise of reasonable diligence during the initial two years from the date on which the injury occurred.⁴ Even under the exception, the statute runs from the date of injury, not the date of knowledge of the injury. Decedent died on February 3, 2007, which means that any negligence occurred on or before that date. Plaintiff's letter of complaint was dated February 9, 2007, which shows that she believed she had reason to question Decedent's care at that time and that the alleged injury was not unknown to her, as required by statute to trigger the three-year statute of limitations

On August 19, 2007, Plaintiff received a letter stating that the Division had determined that "neglect was involved in the incident." While this letter may have furthered Plaintiff's doubts about the Decedent's care, it does not change the outcome as to the statute of limitations. Any alleged injury occurred on or before February 3, 2007, the date of Decedent's death, and it was not unknown to Plaintiff, who sought the Decedent's records from Delmar and wrote a letter of complaint to the Division. Thus the three-year extension is not triggered and the statute began to run no later than February 3, 2007. Even viewing

⁴*Hiznay v. Strange*, 415 A.2d 489, 491 (Del. Super. Ct. 1980).

the facts in a light most favorable to Plaintiff, the Complaint, dated July 14, 2009, was not timely filed pursuant to 18 *Del.C.* § 6856.

IT IS ORDERED that Defendant Delmar's motion for summary judgment is **GRANTED** and the Complaint is dismissed as untimely.

Richard F. Stokes, Judge

Original to Prothonotary