

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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March 31, 2010

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Re: *Farmer v. Faith A. Brosch, M.D., et al.*

C.A. No. 09C-10-135-JRS

Upon Plaintiffs' Motion for Reargument. DENIED.

Upon Plaintiffs' Motion for Leave to Amend Complaint. DENIED.

*Upon Defendant Faith A. Brosch, M.D.'s and Maternity and
Gynecology Associates, P.A.'s Motion to Dismiss. GRANTED.*

Dear Counsel:

Pending before the Court are three motions: (1) Plaintiffs' motion for

reargument of the Court’s February 12, 2010, letter opinion and order (“the February 12 opinion”) granting the motion to dismiss filed by defendants, Christiana Care Health Services, Inc. and Christiana Care Corporation (collectively “CCHS”); (2) Plaintiffs’ motion to amend their complaint to conform with 18 *Del. C.* § 6856(3); and (3) the motion to dismiss filed by defendants, Faith A. Brosch, M.D. and her medical practice, Maternity and Gynecology Associates (collectively “Dr. Brosch”). Each of these motions relate in some way to the Court’s February 12 opinion in which the Court determined that the plaintiffs’ complaint must be dismissed with prejudice because it was filed beyond the two year statute of limitations applicable to medical negligence claims and did not strictly conform to the tolling provisions of 18 *Del. C.* § 6856(3)(“Section 6856”). Plaintiffs seek reargument of that decision on the grounds that the Court’s construction of Section 6856 was too strict and that they, in fact, conformed with the spirit if not the letter of the statute. They also seek to amend their complaint in order to correct the deficiencies identified by the Court in the February 12 opinion. They argue that their proposed amendments should “relate back” to the date of filing of the original complaint.

Dr. Brosch has moved to dismiss the complaint against her on the same grounds identified in the Court’s February 12 opinion. Specifically, Dr. Brosch argues that the plaintiffs’ complaint was filed beyond the statute of limitations and

that plaintiffs failed strictly to conform to the tolling provisions of Section 6856. Plaintiffs, of course, oppose the motion on the same grounds raised in their opposition to CCHS' motion and in their motion for reargument.

For its part, CCHS opposes plaintiffs' motion for reargument and their motion to amend the complaint. CCHS contends that the Court correctly decided its motion to dismiss, and that the plaintiffs' attempt to amend a complaint that was filed beyond the statute of limitations cannot succeed as a matter of law. The Court will address the motions in turn.

1. Plaintiffs' Motion for Reargument

In its February 12 opinion, relying heavily upon the Supreme Court of Delaware's decision in *Leatherbury v. Greenspun*,¹ this Court held that "literal compliance [with Section 6856 is] required," including the requirement in Section 6856(3) that "a plaintiff seeking to avoid the impact of the two-year statute of limitations [must] establish compliance with Section 6856(3) *in the complaint*."² The Court then held that plaintiffs' failure to make any reference to their notice of intent to investigate within their complaint or to attach a copy of the notice of intent to investigate to their complaint resulted in a failure literally to comply with Section

¹ 939 A.2d 1284 (Del. 2007).

² *Id.* at 1292 (emphasis supplied).

6856(3). Consequently, plaintiffs' could not avail themselves of the tolling provisions of Section 6856.³

The Court has read *Leatherbury* anew and remains convinced that its holding requires a very strict reading and application of Section 6856, particularly with respect to its "mandatory provisions."⁴ Given that Section 6856 operates to toll an otherwise applicable statute of limitations for medical negligence claims, it is not surprising that our Supreme Court has determined that its provisions must be strictly construed. As the Court recognized in *Leatherbury*, the Delaware Medical Malpractice Act, including Section 6856, "clearly reflect[s] the General Assembly's intent to limit the number of medical malpractice actions."⁵

Based on the foregoing, plaintiffs' motion for reargument is **DENIED**.

2. Plaintiffs' Motion to Amend Complaint.

Plaintiffs seek to amend their complaint to include references to the notice of intent to investigate within the body of the complaint and also to attach a copy of the notices to the complaint as required by Section 6856. Defendants oppose the motion

³ See *Farmer v. Brosch*, C.A. No. 09C-10-135- JRS, Slights, J., Letter Op. at 4 (Del Super. Feb. 12, 2010).

⁴ See *Leatherbury*, 939 A.2d at 1292.

⁵ *Id.* at 1290. See also *Christiana Hosp. v. Fattori*, 714 A.2d 754, 757 (Del. 1998) ("the sweeping nature of the 1976 legislation [the Delaware Medical Malpractice Act] conveys an intention of a complete break with the past legal treatment of medical malpractice claims.").

on the ground that the relation back doctrine does not apply to a complaint that was originally filed beyond the statute of limitations.⁶

Plaintiffs' motion to amend is premised upon a fundamentally flawed assumption. Plaintiffs assume that if the Court grants their motion, the provisions of Delaware Superior Court Civil Rule 15(c) would allow the Court to determine that the filing of the amended complaint relates back to a time at which the plaintiffs would have been permitted to file their complaint under our rules of procedure and applicable statutory law. The complaint in this case, however, was not filed within the applicable statute of limitations. Indeed, it was filed more than two months beyond the statute of limitations. And, while plaintiffs intended to avail themselves of the tolling provisions in Section 6856, their effort to do so was flawed in that they failed literally to comply with the statute. Consequently, there is nothing to "relate back" to - - the original complaint was not timely filed and, as such, it is a nullity.

The plaintiffs' motion to amend, in essence, invites the Court to legislate an indefinite grace period for the filing of medical negligence complaints that nowhere

⁶ There is some confusion regarding the timing of the filing of the various motions in this case. It appears that plaintiffs' motion to amend was filed on February 4, 2010. The Court did not receive a courtesy copy of the motion in Chambers and was unaware of its filing at that time. Consequently, the Court issued its February 12 opinion granting CCHS' motion to dismiss without addressing plaintiffs' motion to amend. Because the Court has determined that the motion to amend is without merit, the Court need not address the arguments raised in that motion in its decision on the motion for reargument. The Court notes that plaintiffs' motion to amend was noticed for presentation before another judge of this Court which may explain why this judge was not made aware of it until well after it was filed.

appears in the text of Section 6856 and that is wholly inconsistent with the legislative intent behind Delaware's Medical Malpractice Act. Specifically, plaintiffs seek a ruling that would allow a plaintiff to amend a complaint in the face of a motion to dismiss in order to correct a defect under Section 6856 after the statutory tolling period expired, and then would allow the amendment to relate back to a time beyond the expiration of the statute of limitations but within the window created by the statute's tolling provision. If the Court endorsed such a reading of Rule 15(c) and Section 6856, then the Court would create, by Court order, an indefinite extension of the otherwise finite statutory tolling window. This result does not jibe with the "strict construction" of Section 6856 that our Supreme Court has mandated.⁷

Based on the foregoing, plaintiffs' motion to amend must be **DENIED**.

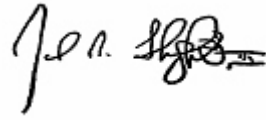
3. Dr. Brosch's Motion to Dismiss

Dr. Brosch has moved to dismiss the complaint on the same grounds raised by CCHS in its motion to dismiss, and the same grounds relied upon by the Court in its February 12 opinion dismissing the complaint as to CCHS. These same grounds apply equally to plaintiffs' complaint as it relates to Dr. Brosch. Accordingly, Dr. Brosch's motion to dismiss the complaint must be **GRANTED**.

IT IS SO ORDERED.

⁷*Leatherbury*, 979 A.2d at 1292.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joe R. Slights, III". The signature is written in a cursive style with a horizontal line at the end.

Joseph R. Slights, III

JRS, III/sb