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RE: **Dana Parsons v. James P. Marvel, Jr., M.D.**
C.A. No. 01C-07-106 WCC

Submitted: September 21, 2001
Decided: November 30, 2001

On Defendant's Motion for Summary Judgment. Granted.

Dear Counsel:

Pending before this Court is the defendant, Dr. James P. Marvel's Motion for Summary Judgment.¹ For the reasons set forth below, the defendant's Motion for

¹ Plaintiff's Response included an unsigned affidavit by plaintiff stating the facts of plaintiff's situation in a more detailed summary. Even though the Response was filed in an

Summary Judgment is granted.

untimely fashion, this Court accepted plaintiff's Response and took it into consideration before deciding this Motion.

On July 13, 1998, while on vacation at Bethany Beach, Delaware, Dana Parsons, (hereinafter “the plaintiff”) was surfing on a boogie board, was knocked over by a wave, and sustained fractures to her left wrist and left elbow.² Immediately following the accident, the plaintiff was transported to Beebe Hospital in Lewes, Delaware where she came under the care of James P. Marvel, Jr., M.D. (hereinafter “the defendant”).

The defendant took x-rays of the plaintiff and advised her that she had multiple fractures to the left elbow and a hairline fracture to her left wrist. On July 14, 1998, the defendant performed an open reduction operation on the plaintiff’s left elbow and wrist. As a result of that surgery, the plaintiff’s left humerus was bound together with five screws.

After the surgery had been completed, the defendant informed the plaintiff that her surgery had gone well and that she would have a cast on her left arm for approximately six to eight weeks. On July 27, 1998, the defendant again examined the plaintiff, x-rayed her arm and informed the plaintiff that she was healing well. The defendant removed the staples from the plaintiff’s incision, and applied a cast to her arm. In early August 1998, the plaintiff returned home to Venice, Italy.³

Approximately two months after the surfing accident and subsequent surgery, the plaintiff was examined by a physician in Italy. After taking x-rays of the plaintiff’s arm, the physician advised the plaintiff that her arm was not healing well and would need to remain casted. In October of 1998, the plaintiff visited yet another Italian physician who informed her that the bones in her elbow were not fusing and that they had started to separate. Immediately after meeting with that physician, the plaintiff contacted the defendant in the United States, informed the defendant about the Italian doctors’ concerns with her healing progress, and sent the defendant a copy of her most recent x-rays. Upon receiving these x-rays, and two phone conversations

² The facts set forth in this opinion were obtained from the complaint and subsequent pleadings of the parties.

³ The plaintiff is a United States citizen who moved to Italy after her marriage to an Italian.

with the plaintiff, the defendant advised her that the problem was not that serious and recommended she move her arm to improve the healing process. The defendant's office note of the conversation revealed the following:

the patient sent me copies of the x-rays, which I reviewed and I am not at all sure that union may not be in place. I have talked to her on the telephone and advised her of my feelings in that regard. She has seen another physician, who seemed to be much more enthusiastic and knowledgeable about this and felt that while there might be fibrous union, that it would be well to replace these fixation screws with a larger type of fixation screw and get her started on early motion.

I would certainly agree with this approach, as I feel that utilizing a plate and screws probably would retard motion, as this was my original intent at the time of surgery, but found that it significantly impaired the possibility of regaining extension of the elbow. The patient plans to proceed with the recommendations of the physician and has advised that she will keep me informed as to her progress.⁴

On October 22, 1998, the plaintiff underwent another surgery in Verona, Italy, but it too failed to cause the bone fragments in the plaintiff's elbow to fuse.

In November of 2000, the plaintiff saw an orthopaedic surgeon in Bologna, Italy, who advised the plaintiff that she would need to seek further care in the United States in order for her to obtain the necessary treatment to allow her arm to heal correctly. Subsequently, the plaintiff did return to the United States and sought the treatment of two new physicians who informed the plaintiff that the defendant had improperly performed the first surgery on her left elbow and wrist.⁵

The issue now before the Court is whether the plaintiff's claim is barred by the

⁴Dr. Marvel's October 13, 1998 office notes 1-2.

⁵ Plaintiff's Complaint at ¶ 17. The exact date of the treatment in 2001 is not set forth in the complaint or in any subsequent pleading filed with the Court.

statute of limitations. The controlling statute under the circumstances of this action is 18 *Del. C.* §6856, which states that

No action for the recovery of damages upon a claim against a health care provider for personal injury . . . shall be brought after the expiration of 2 years from the date upon which such injury occurred; provided however, that: (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.

⁶
. . .

In this case, the plaintiff is attempting to secure the benefit of the extended three year statute of limitations. To do so, she must demonstrate to this Court that her injury, the allegedly improper first surgery, was in fact not known to her during the 2 year period, which began on the date of the injury.⁷ Thus, the issue presented to this Court is when did the plaintiff know or reasonably should have known about the defendant's conduct that would form the basis of the alleged malpractice claim.

In *Reyes v. Kent General Hospital, Inc.*, the Court stated the general provision that “when an inherently unknowable injury becomes known to the plaintiff in the 2 year period from the alleged date of injury, the plaintiff does not get the additional one year extension provided in 18 *Del. C.* §6856(1).”⁸ Moreover, the Court stated in

⁶ 18 *Del. C.* §6856.

⁷ *Reyes v. Kent General Hospital, Inc.*, Del. Supr., 487 A.2d 1142, 1443 (1984).

⁸ *Id.*

*Ewing v. Beck*⁹, that “the limited extension of the statute of limitation period in medical malpractice actions from two years to three years is, in our judgment, intended to give consideration to the problem of an injury which is not physically ascertainable. However, if, in fact an injury is ascertainable (physically or otherwise) within two years, the three year statute of limitations is inapplicable.”¹⁰

Applying the plaintiff’s facts to the above stated law, the Court is first required to review what was known to the plaintiff between July 14, 1998, the date of the alleged improper surgery, and July 14, 2000 to ascertain whether she had sufficient information to reasonably discover her injury within the applicable statute of limitations. From the plaintiff’s complaint, it is undisputed that within this 2 year period she consulted at least two physicians in Italy and had a second surgery to attempt to correct what had unsuccessfully been performed by the defendant. All of her doctors during this period advised her that her arm was not healing properly and it is reasonable to conclude that she realized her arm had not progressed as predicted by the defendant. Even giving the plaintiff the benefit of the doubt, by October of 1998, when the second surgery was performed, the Court must conclude that the exercise of reasonable diligence would have resulted in her discovery of the defendant’s alleged malpractice. Since her injury was reasonably known to her within the two year statute of limitations, her present complaint is untimely filed.

The plaintiff has attempted to blame her lack of knowledge on the medical system in Italy and the lack of physician - patient relationship in their socialist medical system. However, even assuming that this added to the difficulty of obtaining this information, the Court finds it stretches reason and common sense to believe a college educated, United States citizen, who for two years had battled with an injury that was not healing and needed subsequent surgery, did not realize that her injury had not been successfully treated by the defendant. This simply was not an inherently unknowable injury which would expand the statute of limitations.

⁹ Del. Supr., 520 A.2d 653 (1987).

¹⁰ *Ewing v. Beck*, Del. Supr., 520 A.2d 653, 663 (1987).

Because the plaintiff did not file her complaint until July 14, 2001, the Court finds that her claim against the defendant was filed outside of the applicable two year statute of limitations.¹¹ Therefore, in spite of what appears to be a claim that would appropriately be litigated in this Court, the defendant's Motion for Summary Judgment must be **GRANTED**.

IT IS SO ORDERED.

Sincerely yours,

Judge William C. Carpenter, Jr.

cc: Prothonotary

¹¹ 18 *Del. C.* §6856.