

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

ALISA MOORE, :  
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 :  
 Plaintiff, :  
 :  
 :  
 v. :  
 :  
 :  
 NANCY FAN, M.D. and WOMEN :  
 TO WOMEN OB/GYN ASSOC., :  
 :  
 :  
 Defendants. :

Submitted: March 19, 2004  
Decided: April 1, 2004

**ORDER**

Upon Defendants' Motion for Summary Judgment.  
Denied.

Mary E. Sherlock, Esquire of Brown Shiels Beauregard & Chasanov, Dover, Delaware and A. Richard Barros, Esquire of Barros McNamara Malkiewicz & Taylor, Dover, Delaware, attorneys for the Plaintiff.

Jeffrey M. Austin, Esquire and Diane M. Andrews, Esquire of Elzufon Austin Reardon Tarlov & Mondell, P.A., Wilmington, Delaware, attorneys for Defendants.

WITHAM, J.

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C.A. No. 02C-09-027 WLW  
April 1, 2004

### **Introduction**

Before this Court is Defendants Nancy Fan, M.D. and Women to Women OB/GYN Associates' motion for summary judgment. Plaintiff Alisa Moore opposes the motion. Based on the following, and after hearing and considering oral arguments, Defendants' motion is *denied*.

### **Background**

Alisa Moore sought treatment from Dr. Fan for ongoing pain and complications from endometriosis. Dr. Fan tried various treatments, including monthly injections of Lupron from January 7, 2000, to June 29, 2000. Following the series of Lupron injections, Dr. Fan prescribed Depo-Provera injections to be given once every three months. In November 2000, Ms. Moore experienced health problems allegedly as a result of the Depo-Provera. Defendants contend that the Depo-Provera injection was given on August 1, 2000. However, Plaintiff insists the injection was given on September 21, 2000. The date of the injection is important as Ms. Moore's action might be barred by the statute of limitations because Plaintiff filed her complaint on September 18, 2002.<sup>1</sup>

The medical records are unclear as to when Dr. Fan gave Ms. Moore the first Depo-Provera injection. Ms. Moore claims that the injection was given on September 21, 2000 and relies upon that fact that at her September 21, 2000 appointment, the records state "Current Meds: none," but the records on October 5, 2000 state "Current

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<sup>1</sup> The Statute of Limitations for medical malpractice claims is established in 18 Del. C. § 6856 as two years from the date of the injury.

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Meds: Depo” and “B.C.: Depo.”<sup>2</sup> Thus, Ms. Moore argues that if the injection was given on August 1, 2000, the September 21 records would state that she was taking Depo-Provera under her current medications and birth control.

Dr. Fan admitted in her deposition that the medical records do not clearly state that the injection was given on August 1, 2000. She said she discussed the side effects of the medication with Ms. Moore and gave her a prescription for Depo-Provera. She stated that because she told Ms. Moore to follow up in three months, Ms. Moore would have received her first injection during the August 1, 2000 office visit. In addition, Dr. Fan stated that the office keeps a supply of Depo-Provera to use immediately when a patient needs to be treated right away, thus she believes she would have given Ms. Moore an injection on August 1, 2000. However, the medical records do not clearly state that an injection was given on August 1, 2000, nor do they indicate that an injection was given on September 21, 2000.

In addition to Dr. Fan's deposition testimony, the Defendants rely on the original typewritten report from the Plaintiff's medical expert, Dr. Crane, which originally stated that the first Depo-Provera injection was given on August 1, 2000. However, that date was later crossed out and September 21, 2000 was handwritten in its place.<sup>3</sup> Thus, Defendants argue that the injection was actually given on August 1,

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<sup>2</sup> “B.C.” on the medical chart means birth control.

<sup>3</sup> The Defendants' motion states, “Without explanation in his report this date [August 1, 2000] was subsequently crossed out and replaced with a handwritten notation with the date September 21, 2000.” Defendants attached copies of the original report and the amended report. Plaintiff did not offer any explanation as to how or why the expert's report was modified.

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but that the Plaintiff is now using September 21 to keep her claim from being barred by the statute of limitations.

Finally, the Defendants contend that, according to medical records, Plaintiff told her treating physician at St. Mary's Hospital in Brooklyn, New York, on November 7, 2000, that it had been three months since her last Depo-Provera injection. If this were the case, this means the injection would have been given on August 1, 2000. However, Plaintiff argues that the record says "2-3 mths since Depo" and therefore the injection was given on September 21, 2000.

The Plaintiff insists that there is a factual dispute as to when the injection was given which must be decided by a jury, not by the Court on a motion for summary judgment. In addition, in her response, Plaintiff contends that under a "continuum of negligence" theory, the action would not be barred even if the injection was given on August 1, 2000, because Dr. Fan prescribed Depo-Provera on September 21, 2000.<sup>4</sup>

### **Discussion**

Superior Court Civil Rule 56(c) provides that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact."<sup>5</sup> The moving party bears the initial burden of showing that no material issues of fact are present.<sup>6</sup> The burden then shifts to the nonmoving party to

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<sup>4</sup> *Ewing v. Beck*, 520 A.2d 653 (Del. 1987) (Supreme Court recognized a cause of action for continuous negligent treatment).

<sup>5</sup> Super. Ct. Civ. R. 56.

<sup>6</sup> *Martin v. Nealis Motors, Inc.*, 247 A.2d 831,833 (Del. 1968).

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demonstrate that there is a genuine issue of material fact.<sup>7</sup> Summary judgment should only be granted when, after viewing the record in a light most favorable to the non-moving party, there is no genuine issue of material fact.<sup>8</sup>

In this case there is a genuine issue of material fact; that is, when the injection was given. The facts as presented are confusing at best and merit further investigation. The Plaintiff says the injection was given on September 21, 2000, but the Defendants say it was given on August 1, 2000. It is unclear from the medical records presented to the Court when the injection was actually given. Viewing the facts in a light most favorable to the non-moving party, it appears there is a factual dispute as to when the injection was given which must be decided by the trier of fact. Thus, it would be inappropriate for this Court to grant Defendants' motion for summary judgment.

At this time, the Court will not address the issue relating to the continuous negligent treatment doctrine, as the parties have not fully briefed the matter.

### **Conclusion**

After reviewing the submissions by the parties, the Court finds that there is a factual dispute which must be decided by the jury. Therefore, Defendants' motion for summary judgment is *denied*.

IT IS SO ORDERED.

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<sup>7</sup> *Id.*

<sup>8</sup> *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *see also McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

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/s/ William L. Witham, Jr.  
J.

WLW/dmh  
oc: Prothonotary  
xc: Order Distribution  
File