



### **Introduction**

Before this Court is Defendants' motion precluding Plaintiff from relying on a cause of action for continuous negligent medical treatment. Plaintiff opposes the motion. Because Plaintiff failed to allege continuous negligent medical treatment with particularity, Defendants' motion is *granted*.

### **Background**

Plaintiff Alisa Moore sought treatment from Defendant Nancy Fan, M.D., 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 argues the injection was given on September 21, 2000. The date of the injection is important to determine whether Ms. Moore's action, filed on September 18, 2002, is time barred.<sup>1</sup>

Based upon a review of Ms. Moore's medical records and other evidence available to the Court, it is unclear when Dr. Fan gave Ms. Moore the Depo-Provera injection. This Court previously concluded that there is a factual dispute as to when the injection was given which must be decided by the jury, not by the Court.

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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.

However, Plaintiff now contends that her Amended Complaint alleges continuous negligent medical treatment as a cause of action and, thus, the action would not be barred even if the injection was given on August 1, 2000, because Dr. Fan continued her allegedly negligent treatment by prescribing Depo-Provera on September 21, 2000. According to Plaintiff, the statute of limitations would have started to run on September 21, 2000, and her action would be timely regardless of the date of the injection. Plaintiff does not dispute the two year statute of limitations, but simply argues that the last negligent act occurred on September 21, 2000.

Defendant asserts that Plaintiff failed to allege the continuous negligent treatment cause of action with particularity, and thus the action must be barred. Further, Defendant contends that even if the cause of action was alleged with particularity, the writing of a prescription which was never filled is not sufficient to qualify as the last act in the negligent continuum.

### **Discussion**

The Delaware Supreme Court first recognized a cause of action for continuous negligent treatment in *Ewing v. Beck*.<sup>2</sup> In *Ewing*, the Court stated that such a claim must assert a continuous course of improper examination or treatment that was substantially uninterrupted. The Court held that the plaintiff must allege with particularity a continuous course of treatment over a finite period of time.<sup>3</sup> The Court

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<sup>2</sup> 520 A.2d 653, 664 (Del. 1987).

<sup>3</sup> *Id.* at 665.

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went on to state that “the facts in the records must establish that the treatment was inexorably related so as to constitute one continuing wrong.”<sup>4</sup> Further, the Court held:

[W]hen the cause of action is for continuous negligent medical treatment, the “date upon which such injury occurred” is the last act in the negligent medical continuum. Therefore, if a plaintiff has a cause of action for continuous negligent medical treatment and that fact becomes known within two years of an act in the alleged negligent continuum, the statute of limitations 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.<sup>5</sup>

In *Ewing*, Dr. Beck treated the decedent, William Ewing, for bladder cancer from 1974 until Mr. Ewing’s death in 1980. Despite allegations of long term treatment by Dr. Beck for Mr. Ewing’s bladder cancer, the Court still found that the complaint failed to “demonstrate the type of interrelationship that can fairly be construed as asserting a continuum of negligent medical treatment.”<sup>6</sup>

In *Bissell v. Papastavros’ Associates Medical Imaging*, the court found that Plaintiff’s complaint alleged continuous negligent treatment with particularity.<sup>7</sup> In

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<sup>4</sup> *Id.* at 664.

<sup>5</sup> *Id.* at 663.

<sup>6</sup> *Id.* at 665.

<sup>7</sup> 626 A.2d 856, 864 (Del. Super. Ct. 1993).

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*Bissell*, the allegation made in the complaint was that a mammogram taken in 1988 was misinterpreted when originally read and was again misinterpreted when read in 1989 in conjunction with a 1989 mammogram. Plaintiff's complaint showed that two mammograms were taken, one in 1987 and another in 1988. The 1988 report indicated that it was compared to the 1987 report. The complaint also indicated that a 1989 mammogram was compared to the 1988 mammogram. In addition, affidavits showed that the standard is to compare older mammograms to more recent ones. Thus, the court concluded that the tests themselves established a continuum and that because the two allegedly negligent acts, misreading the 1988 mammogram in 1988 and then again in 1989, related to the same condition, the early detection of breast cancer, the complaint sufficiently established continuous negligent medical treatment.

The question before this Court is whether the Plaintiff's complaint alleged with particularity a cause of action for continuing negligent medical treatment. In her amended complaint, Ms. Moore alleges that Dr. Fan diverted from the acceptable standards of medical care on September 21, 2000 when she administered, or ordered to be administered, an injection of Depo-Provera to Ms. Moore. The complaint makes reference to Dr. Fan's failure to advise Ms. Moore of the risks of Depo-Provera "at any time during her treatment of Alisa Moore," but only identifies a specific negligent act - the administering of the Depo-Provera. At no point does the amended complaint indicate that Dr. Fan committed any other negligent acts or that she negligently treated Ms. Moore on any date other than the date the injection of Depo-Provera was actually administered, whether it was August 1, as the Defendants

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allege, or September 21, as Ms. Moore alleges. Thus, Dr. Fan could not have been on notice at the time the amended complaint was filed that Ms. Moore would assert continuing negligent medical care as a cause of action in this case

### **Conclusion**

Therefore, because a cause of action for continuous negligent medical treatment must be alleged with particularity, and the Plaintiff has failed to do so, Defendants' motion to preclude the Plaintiff from asserting a cause of action for continuous negligent medical treatment is *granted*.<sup>8</sup>

IT IS SO ORDERED.

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

WLW/dmh

oc: Prothonotary

xc: Counsel

File

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<sup>8</sup> Because the Plaintiff's complaint did not allege continuing medical negligence with particularity, it is not necessary for the Court to address whether the writing of a prescription was an "act" as contemplated by the Supreme Court in *Ewing*.