IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DONNA MORTON,	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 04C-09-156 PLA
	)	
SKY NAILS	)	
Defendant.	)	

Submitted: February 2, 2005
Decided: February 3, 2005

UPON DEFENDANT'S
MOTION TO DISMISS
GRANTED

Richard H. Cross, Jr., Esquire, Wilmington, Delaware, Attorney for Plaintiff.

Douglass L. Mowrey, Esquire, Newark, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

ORDER

Defendant's Motion To Dismiss is hereby **GRANTED**. It appears to the Court that:

1. On September 15, 2002, Plaintiff Donna Morton paid to have a pedicure done by Defendant Sky Nails. Sky Nails allegedly negligently allowed the water in their feet-soaking basins to become corrupted, causing Morton to catch a fungal infection that resulted in personal injury.

2. The Complaint, filed on September 17, 2004, offers three grounds for relief: breach of contract, breach of warranty, and negligence. Defendant has moved to dismiss, arguing that Morton missed the two-year statute of limitations for actions alleging personal injury. The Court heard oral argument on the motion on February 2, 2005.

3. The Court has no trouble discerning that Defendant's motion must be **GRANTED**. 10 Del. C. § 8119 is crystal clear:

> No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained…

This statute is based upon the type of damage suffered -- personal injury-- and not on the kind of action the plaintiff chooses to pursue.[1] In other words, the

[1] *Heritage v. Board of Educ*., 447 F. Supp. 1240 (D. Del. 1978).

statute applies to personal injury claims in both contract and tort[2], and precludes all of Morton's allegations.

4. Plaintiff argues that Morton's injury was "inherently unknowable," within the meaning of *Walmart Stores, Inc. v. AIG Life Ins. Co.*,[3] until she visited the doctor eight days after the incident. The Court disagrees. This case is not at all similar to the examples of "unknowable injury" cited by the plaintiff, including: defective construction, accounting malpractice, legal malpractice, and a defective septic tank. This is a straight-forward action for personal injury in which the plaintiff sat on her rights for over two years after the date she was injured. Plaintiff cannot justifiably complain of being deprived of her day in court when she ignored her injury for that amount of time.

This is especially true because adopting the plaintiff's position would inject uncertainty into personal injury practice that could wreak havoc upon the judicial system. Without a firmly enforced statute of limitations, anyone who develops any medical condition could farcically relate it back to "that car accident I had six years ago," or "that birthday cake I ate when I was two." Courts would then always have to conduct a threshold inquiry into whether the injury was "unknowable" regardless of the tenuousness of the claim. Perhaps one day the

[2] *Natale v. Upjohn Co.*, 236 F. Supp. 37 (D. Del. 1964).
[3] 860 A.2d 312, 319 (Del. Supr. 2004). This case, like the other examples cited by Plaintiff, is entirely off-point, in that it involves a change in the tax code to cease recognizing certain insurance contracts as deductible.

General Assembly or Delaware Supreme Court will mandate such a system, but this Court will not start along that slippery slope for this case.

5. Because Plaintiff failed to meet the applicable statute of limitations, Defendant's Motion To Dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary – Civil
cc: Richard H. Cross, Jr., Esquire
Douglass L. Mowrey, Esquire