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 7, 2005
Decided: February 16, 2005

UPON PLAINTIFF'S
MOTION FOR REARGUMENT
DENIED

MEMORANDUM OPINION

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

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

ABLEMAN, JUDGE

Plaintiff in a personal injury case waited over two years from the date of the conduct at issue to file a complaint. Plaintiff argues that her injury was "inherently unknowable" for five days following her contact with Defendant, and that the statute of limitations should be tolled for that amount of time. Because Plaintiff brought her statute of limitations problem upon herself through inexcusable and unexplained intransigence, the "time of discovery" doctrine does not apply, and dismissal of her complaint was appropriate. Plaintiff's Motion For Reargument is therefore **DENIED**.

Facts

Plaintiff paid Defendant to perform a pedicure on September 15, 2002. Plaintiff alleges that she noticed a rash on her feet on September 20, 2002. On September 23, 2002, Plaintiff's doctor opined that the rash was caused by soaking her feet in dirty water. Plaintiff believes the culprit water was that used to rinse her feet during the September 15, 2002 pedicure. Plaintiff waited until September 17, 2004 to file this personal injury action. The Court dismissed the action in a February 3, 2005 Opinion, finding that, pursuant to 10 Del. C. § 8119, the two-year statute of limitations for personal injury actions had run.

Standard

The standard for a Motion For Reargument pursuant to Superior Court Civil Rule 59(e) is that the court "misapprehended the law or facts" in its previous

decision, such that the outcome would have been different if the court had been fully and correctly informed.[1] The Rule exists solely to allow a court to correct an obvious blunder without recourse to an appeal.[2]

Discussion

Plaintiff believes the Court erred in declining to apply the "time of discovery" rule to her complaint. During the Motion to Dismiss, she argued that her injury was "inherently unknowable" until she saw her doctor, or at least until she noticed the rash. In doing so, the plaintiff failed to grasp that the concept of "unknowable injury" is exceptionally fact driven, and that cases cited to support such a claim must be factually similar. Instead, the plaintiff barraged the Court with cases whose facts were entirely dissimilar to the facts of this case. These included: (1) a corporate dispute over whether Congress' intent to change certain provisions of the tax code was inherently unknowable, (2) legal and accounting malpractice, (3) and cases of defective construction and faulty septic tanks. The corporate case, *Walmart Stores, Inc. v. AIG Life Ins. Co.*[3], formed Plaintiff's principle argument. The only reference to *Layton v. Allen*[4], the source of the "time of discovery" rule and the seminal Delaware case on this issue, came as a citing acknowledgement for one of the defective construction cases.

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[1] *Steadfast Ins. Co. v. Eon Labs Mfg., Inc.*, 1999 WL 743982 (Del. Super.)
[2] *Hessler, Inc. v. Farell*, 260 A.2d 701 (Del. 1969).
[3] 860 A.2d 312 (Del. Supr. 2004).
[4] 246 A.2d 794 (Del. Supr. 1969).

Plaintiff has made a more focused research effort for this motion, and cited three cases involving negligent infliction of personal injury. The first of these is *Layton*, in which a doctor left a surgical instrument inside a patient, causing problems seven years later. This is a particularly gruesome case of unknowable injury for which courts had long sought to bend the applicable statute of limitations, and is not particularly relevant to an exterior injury from a contaminated pedicure. Moreover, unlike this plaintiff, the plaintiff in *Layton* brought all appropriate action within one year of realizing she was injured.

Plaintiff's next case is *Ison v. E.I. Dupont de Nemours and Co.*[5] In *Ison,* the plaintiffs were born without eyes, and then sued when they realized that their condition was linked to exposure to a fertilizer manufactured by the defendant. Judge Toliver rejected the plaintiffs' attempt to make the statute of limitations hinge on knowledge of possible causation. Instead, the court reaffirmed the *Layton* standard, i.e. that, in cases of latent injury, the statute of limitations begins to run when the condition first manifests itself. *Ison* makes it clear that the statute of limitations in this case did not, as the plaintiff argues, begin to run when she saw her doctor on September 23, 2002, and thereby realized a possible causation link between her rash and the pedicure performed by the defendant. It leaves open the

[5] 2002 WL 962205 (Del. Super.).

possibility, however, that the statute in this case began to run when the plaintiff first noted her injury, i.e. September 20, 2002.

Finally, in *Greco v. University of Delaware*[6], the plaintiff brought a medical negligence claim against her physician, alleging that he failed to diagnose that birth control pills were causing her various medical problems. The Court rejected the plaintiff's argument that, under *Layton*, her injury was "inherently unknowable" until she collapsed in a seizure. Instead, the Court found that her injury was knowable, and that the statute of limitations began to run, as soon as the doctor acknowledged that he did not know what was wrong with the plaintiff and that she should seek specialist care.

In considering Plaintiff's request to bend the statute of limitations so she may litigate her foot-rash complaint, the Court believes it particularly important to place the "time of discovery" doctrine in context. The rule is a legal codification of the doctrine of equitable tolling, through which the Chancellor, using equity's power to act on the person rather than the claim, could prevent a party from raising an otherwise valid statute of limitations defense if the equities so mitigated.

Layton is the archetypical example of why Delaware has imported this equitable doctrine into the law courts. It would be grossly unfair for a doctor to escape liability for leaving a surgical instrument inside a patient solely because the

[6] 619 A.2d 900 (Del. Supr. 1993).

illness caused by that negligence manifested more than two years after the surgery. The Supreme Court made it clear that the "time of discovery" doctrine is based on equitable considerations when it announced the rule in *Layton*:

> Upon the bases of reason and justice, we hold that when an inherently unknowable injury, such as is here involved, has been suffered by one blamelessly ignorant of the act or omission and injury complained of, and the harmful effect thereof develops gradually over a period of time, the injury is 'sustained' under § 8118 [now 10 Del. C. § 8119] when the harmful effect first manifests itself and becomes physically ascertainable.[7]

Because the "time of discovery" rule is, fundamentally, an equitable tenet, it would be irrational for courts to construe it while ignoring the equities of the particular case in which it is invoked. The Supreme Court clearly weighed the equities in *Layton*, expressing its reason for creating an exception to the statute of limitations thusly:

> This is not the usual tort case in which some physical impact serves to notify the plaintiff of the violation of his rights before the expiration of the period of limitations. This case involves an injury of the 'inherently unknowable' type--the product of a period of time rather than a point of time. The plaintiff in this case was 'blamelessly ignorant' of the act or omission and injury complained of; she had no way of knowing that her rights had been violated until the first pain was experienced about seven years after the operation; and the injurious condition of which she complains developed over the intervening years and did not exist at the point of time when the wrongful act or omission occurred.[8]

The Court weighed the equities of this case when considering the Motion To Dismiss, and found the plaintiff's side to be sorely lacking. Most important to this analysis was the familiar maxim "Equity aids the vigilant, not those who sleep on

[7] *Layton*, 246 A.2d at 798.
[8] *Id.* at 797.

their rights."[9] This plaintiff noticed a rash on her foot, and then sat on her rights for two years. That circumstance is entirely unlike *Layton*, in which the doctor's negligence did not cause detectable injury until five years after the statute of limitations had already run. Indeed, all the reasons for creating an exception to the statute of limitations in *Layton* -- the nature of the injury, the time of its manifestation, its scope and severity, and alacrity in bringing the claim -- militate against doing so for this plaintiff. Simply put, this plaintiff was not "blamelessly ignorant," within the meaning of *Layton*; her failure to file her action in a timely fashion is both unexplained and inexcusable. A cite to *Layton*, without something more, is therefore not enough to invoke the "time of discovery" rule.

Plaintiff has not offered anything to suggest that the Court should ignore the "blamelessness" portion of the *Layton* test. Both *Ison* and *Greco* are cases in which courts declined to extend the statute of limitations for intransigent plaintiffs beyond the bare minimum required by *Layton*. If anything, these cases represent a narrowing of the *Layton* standard, not a license for litigants to inexcusably delay filing a complaint. While it is true both cases cite *Layton*'s "moment of manifestation" language, given the holdings, that language must be construed as narrowly as possible. The tightest way to interpret the "time of discovery" rule is to reserve its application for cases like *Layton*, i.e. cases where "inherent

[9] *Blakeley v. Scanlon*, 1991 WL 247801 (Del. Supr.); 27 Am. Jur. 2d Equity § 120 (2004).

unknowability" of an injury causes the statute of limitations to run *through no fault of the plaintiff*. The cases the plaintiff cited in her response to the Motion to Dismiss affirm this interpretation.[10]

Finally, the Court believes it appropriate to briefly discuss the important policy concerns that dictate this result. Statutes of limitations exist to provide certainty and finality to the law, and to ensure that sinister parties cannot strategically delay filing their actions until troublesome witnesses disappear and the other party becomes unable to construct a defense. The Delaware Supreme Court has, from time to time, relaxed the application of such statutes where the equities clearly dictated. These exceptions are meant to prevent the unsavory from invoking a legal technicality to defraud and injure the blameless. Plaintiff has not cited, nor have I found, a single case where the Delaware Supreme Court has created an exception to a statute of limitations to grant a neglectful plaintiff or

[10] In *Walmart Stores*, the Supreme Court found that a sophisticated corporate party was at fault for failing to foresee changes in the tax code, and therefore could not invoke the "time of discovery" rule. *Desanco v. Walters*, 1992 WL 9078 (Del. Super.) at *2, applied the *Layton* rule to a case of defective construction, finding the plaintiff's blamelessly ignorant of certain structural defects in their house that the seller intentionally concealed. *Accord Kent County Motor Sales Co., v. O.A. Newton & Sons Co.,* 1991 WL 215909 (Del. Super.)(construction defects); *Wilson v. Simon*, 1990 WL 63922 (Del. Super.)(defective design); *Rudginski v. Pullella*, 378 A.2d 646 (Del. Super. 1977)(defective septic tank). *Issacson, Stolper & Co. v. Artisan's Savings Bank*, 330 A.2d 130 (Del. Supr. 1974) also cited *Layton*'s "blamelessly ignorant plaintiff" standard as justification for extending the rule to accounting malpractice. Finally, the same logic was applied to legal malpractice in *Pioneer Nat. Title Ins. Co. v. Child, Inc.*, 401 A.2d 68 (Del. Super. 1977). All of these cases emphasize the blamelessness of the plaintiff and their inability to discover their injury in a timely fashion. Not one of them discard's the "blamelessness" aspect of *Layton*, or implies that that case functionally obviates any plaintiff's need to comply with statutes of limitations regardless of knowledge of their injuries.

plaintiff's counsel a "do-over" period in which to file a complaint. Indeed, Delaware law provides the exact opposite.[11]

The reason is obvious: Delaware does not reward neglect or obstinacy, especially at the cost of further crowding an already stressed Superior Court docket. The plaintiff's interpretation of the "time of discovery" rule would require every court in every action to conduct a preliminary hearing to determine when the statute of limitations began to run. The Court is, of course, willing to conduct this inquiry when the equities dictate. I do not believe, however, that *Layton* requires me to do so in order to rescue a party who offers no excuse for her failure to follow applicable Delaware law. Moreover, an action involving a rash on one's foot is not an appropriate case to make a substantial and burdensome inroad into a law that serves, from the judiciary's perspective, such a salutary purpose. For all these reasons, Plaintiff's Motion For Reargument is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

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

[11] *Greco,* 619 A.2d 900 (Del. Supr. 1993).