IN THE SUPREME COURT OF THE STATE OF DELAWARE

NANCY TAYLOR and CYRIL E. TAYLOR, Plaintiffs Below- Appellants, v. JONATHAN PONTELL, M.D., Defendant Below- Appellee.	§ § § § § § § § § § § §	 No. 214, 2010 Court Below: Superior Court of the State of Delaware in and for New Castle County C.A. No. 09C-12-017

Submitted: July 13, 2010
Decided: September 2, 2010

Before **STEELE**, Chief Justice, **BERGER**, and **RIDGELY**, Justices.

ORDER

This 2nd day of September 2010, it appears to the Court that:

(1) Plaintiff-below Nancy Taylor ("Taylor") appeals from the Superior Court's order granting Defendant-below Jonathan Pontell, M.D.'s motion for judgment on the pleadings because her claim was barred by a tolling of the statute of limitations set forth in 18 *Del. C.* §6856 (the "Health Care Act"). Taylor argues in this appeal that 10 *Del. C.* §8818(a) (the "Savings Statute") is applicable to the Health Care Act. We find no merit to her argument and affirm.

(2) Taylor first consulted Defendant-below, Jonathan Pontell, M.D. ("Dr. Pontell"), when he was affiliated with Atlantic Skin and Cosmetic and Surgery

Group, P.C. of Pennsylvania and Delaware. Taylor originally inquired about a laser procedure to correct wrinkling in her neck area, and Dr. Pontell suggested a "mini face lift" for the wrinkling problem and a chin implant to correct a separate jowelling issue. When Taylor asked about the potential risks, Dr. Pontell told her that he had never had any issues except one implant dislodged during a subsequent dental surgery.

(3) On November 10, 2006, Dr. Pontell performed the procedure and inserted a Gortex chin implant. As soon as the general anesthesia wore off, Taylor experienced numbness in her chin area. Taylor met with Dr. Pontell on November 12th, November 20th, November 22nd, December 1st, and December 15th and complained of the numbness. On January 19, 2007, Dr. Pontell performed a second surgical operation to revise the chin implant. Taylor again met with Dr. Pontell on January 22 2007, January 29th, February 22nd, May 3rd, and in August of 2007, complaining of her symptoms each time. She was told they would resolve over time.

(4) On October 5, 2007, Taylor consulted a neurologist, Seth Haplea, M.D., who diagnosed her condition as slowly improving sensory dysfunction of the chin/lower lip status post-chin implant. Dr. Haplea opined that no treatment would aid recovery. She met with him again two times in January and September

of 2008, and he felt that because of the length of time since the surgical operations, further improvement was doubtful.

(5) On February 19, 2009, Taylor filed a lawsuit against Dr. Pontell in the Court of Common Pleas of Chester County, Pennsylvania. She alleged medical negligence for failing to obtain informed consent for the surgical procedure which resulted in a permanent nerve injury to Taylor's face and chin. On August 14, 2009, that court dismissed the case for lack of jurisdiction because the surgery was preformed in Wilmington, Delaware. On September 11, 2009, Taylor filed a notice of appeal with the Court of Common Pleas of Chester County, which is still pending.

(6) On December 1, 2009, Taylor filed this action in the Superior Court for New Castle County. Dr. Pontell moved for judgment on the pleadings, asserting that this action is barred by the statute of limitations for medical negligence, 18 *Del. C.* § 6856, because this lawsuit was filed more than two years from the date of the alleged medical negligence. Taylor responded that the Savings Statute, 10 *Del. C.* § 8118(a) applies to this medical negligence case. The Superior Court rejected Taylor's argument and granted Dr. Pontell's motion for judgment on the pleadings. This appeal followed.

(7) The parties do not dispute that this action was filed beyond the two year limitation period for medical negligence actions within 18 *Del. C.* § 6856.

The sole issue on appeal is whether the Savings Statute applies to this medical negligence action. Our review of the trial court's grant of a motion for judgment on the pleadings presents a question of law which we review *de novo*.[1]

(8) The Savings Statute provides:

> (a) If in any action duly commenced within the time limited therefor [sic] in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.[2]

With exceptions not relevant to this case, the Health Care Act provides:

> No action for the recovery of damages upon a claim against a health care provider for personal injury, including personal injury which results in death, arising out of medical negligence shall be brought after the expiration of 2 years from the date upon which such injury occurred[.][3]

(9) This Court addressed the application of the Savings Statute to the Health Care Act in *Christiana Hospital v. Fattori*.[4] In that case, the plaintiffs filed their action in both the United States District Court for the Western District of

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[1] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993) (citations omitted).
[2] 10 *Del. C.* § 8118(a).
[3] 18 *Del. C.* § 6856.
[4] 714 A.2d 754 (Del. 1998).

Pennsylvania and the Court of Common Pleas of Fayette County, Pennsylvania.[5] Both actions were dismissed for lack of jurisdiction, and the Plaintiffs then filed suit in the Delaware Superior Court.[6] The defendants moved to dismiss the complaint, contending that the claims were barred by the two year statute of limitation.[7] Plaintiff argued that the Savings Statute applied, and allowed a one year extension of the statute of limitations running from the dismissal of the Pennsylvania actions.[8] The Superior Court denied the motion to dismiss but certified to this Court an interlocutory appeal which was accepted.[9] This Court held that the Savings Statute does not apply to actions brought under the Health Care Act because the General Assembly expressly restricted the time period for initiating a claim for medical negligence to the time period for such claims under 18 *Del. C.* § 6856. We found that the General Assembly intended to "write on a clean slate with respect to the limitations period for medical malpractice actions" and "break with past legal standards."[10] Accordingly, we held that the Plaintiffs actions were barred by a tolling of the two year statute of limitations.[11]

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[5] *Id.* at 755.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 757.
[11] *Fattori*, 714 A.2d at 757.

(10) This case is controlled by our holding in *Fattori*.[12] The General Assembly has taken no action to address our holding in *Fattori* or to announce any intention for the Savings Statute to apply to medical negligence actions. Although the General Assembly did amend the Health Care Act in 2003, the amendments related only to adding an Affidavit of Merit requirement for medical negligence actions and did not address the Savings Statute.[13] Because Taylor's complaint is barred by a tolling of the applicable statute of limitations, the Superior Court did not err in granting Dr. Pontell's motion for judgment on the pleadings.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

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[12] Taylor argues that our refusal of an interlocutory appeal in *PMA v. Reddy*, 988 A. 2d 938 (Del. 2010), indicates the Court has changed its view. A discretionary refusal of an interlocutory appeal has no precedential effect nor does it serve to suggest any point of view on the substantive merits of any legal issue in the case. *Compare U.S. v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a *writ* of *certiorari* imports no expression of opinion upon the merits of the case.").

[13] *See* 74 Del. Laws c. 148.