IN THE SUPREME COURT OF THE STATE OF DELAWARE

TIMOTHY DAMBRO, M.D., EDELL RADIOLOGY ASSOCIATES, P.A., and DIAGNOSTIC IMAGING ASSOCIATES, P.A.,	§	No. 534, 2008
Defendants Below-Appellants,	§	
v.	§	Court Below – Superior Court of the State of Delaware, in and for New Castle County
CATHERINE C. MEYER and WILLIAM R. MEYER, her husband,	§	C.A. No. 07C-10-224
Plaintiffs Below-Appellees.	§	

AMICI CURIAE BRIEF OF AMERICAN MEDICAL ASSOCIATION AND MEDICAL ASSOCIATION OF DELAWARE ARGUING FOR REVERSAL IN SUPPORT OF APPELLANTS

Victor F. Battaglia, Sr.
Biggs & Battaglia
921 N. Orange St.
P.O. Box 1489
Wilmington, Delaware 19899
302/655-9677

Leonard A. Nelson
Office of General Counsel
American Medical Association
515 N. State St., 14th Floor
Chicago, Illinois 60654
312/464-5532

Attorneys for *Amici Curiae*
American Medical Association and Medical Association of Delaware

Date of Filing: December 16, 2008

Table of Contents

Table of Authorities

Statement of Identity and Interest of *Amici* and of Their Authority to File Brief

The American Medical Association ("AMA"), an Illinois not-for-profit corporation, is the largest professional organization of physicians and medical students in the United States. Its nearly 240,000 members practice in every state, including Delaware, and in every medical specialty. The objects of the AMA are to promote the science and art of medicine and the betterment of public health.

The Medical Society of Delaware ("MSD"), a Delaware not-for-profit corporation, is a professional organization of the physicians who live or work in Delaware. The core purpose of MSD is to guide, serve and support Delaware physicians, promoting the practice and profession of medicine to enhance the health of Delaware.

The AMA and the MSD submit this brief on their own behalves and on behalf of the Litigation Center of the AMA and the State Medical Societies ("the Litigation Center"). The Litigation Center is an unincorporated association among the AMA and the state medical societies. Its purpose is to advance AMA policies within the American legal system.

The AMA and MSD have a vital interest in the law affecting the rights and obligations of physicians and their patients. The decision of the trial court to deny the defendants' motion for summary judgment, based on the interplay between the affidavit of merit law and the statute of limitations, is inconsistent with established Delaware law. As the court itself noted, its holding, if upheld, will increase litigation regarding the start of the limitations period in medical negligence cases – a result contrary to the stated legislative purpose of 18 *Del. C.* § 6856. Opinion below, at 22.

An *amicus* brief is desirable because if the decision is not corrected, it will nullify the statutory and decisional law of Delaware. It could impact not only the immediate parties to this action but also all physicians practicing in Delaware, their patients and the availability of medical care in Delaware. Furthermore, a decision by this Court could be considered by other states, with similar statutory schemes.

Amici seek leave of this Court to file this brief under Del. Supreme Court Rule 28(e), pursuant to motion filed herewith.

Argument

Meyer contends that, through a faulty reading of her mammogram, the defendants misdiagnosed a cancerous tumor on approximately March 8, 2005. As a result, she asserts, the tumor metastasized at some date no earlier than November 1, 2005, and she suffered damages. Her expert witness has opined that, notwithstanding that Meyer was afflicted with a potentially treatable cancer in March, the resulting injury only became "medically provable" in November. Based on the expert's opinion, Meyer has argued that the two-year statute of limitations, 18 *Del. C.* § 6856, began to run in November, notwithstanding this Court's long established opinions that it began to run on the date of the negligent act or omission. The trial court accepted Meyer's argument and denied a defense motion for summary judgment, based on the premise that the affidavit of merit law, 18 *Del. C.* § 6853, impliedly amended the statute of limitations.

Both Meyer and the trial judge are wrong. The denial of summary judgment should be reversed for the following reasons: (1) the expert's statements about what constitutes an "injury" are irrelevant, as they are based on incorrect legal conclusions; (2) neither the language of § 6853 nor the policy behind it provide a basis for revisiting this Court's interpretations of § 6856 – thus, the statute of limitations began to run on the date of the alleged misdiagnosis, not the date on which Meyer could have obtained an affidavit of merit; and (3) the statute of limitations is a reasonable, constitutional balance between plaintiffs' interest in redress and society's interest in repose. Whether § 6856 imposed a hardship on Meyers, *vel non*, it reflects a proper legislative judgment, which should be enforced.

I. The Affidavit of Meyer's Expert did not Raise A Material Issue of Fact, Because It was Premised on Incorrect Legal Conclusions.

The affidavit of Meyer's expert is based on incorrect legal conclusions. Although artfully drafted, it does not raise a genuine issue of material fact, only a question of law.

The expert opined that, at some time after November 1, 2005, Meyer's cancer progressed from a local disease with an excellent prognosis to a regional disease with a significantly lower survival rate. (¶ 7). From this factual statement, he concluded that the injury occurred only after November 1, 2005. "Simple growth" of the tumor, without a quantifiable change in its stage, would not have presented a medically provable injury in the eyes of Meyer's expert. (¶ 8).

The expert apparently believed that the growth of a pre-metastatic cancer does not injure a patient. Whatever may be the medical implications of such a statement, the conclusion is legally incorrect. Obviously, the tumor's metastasis may have exacerbated Meyer's injury, but an injury was nevertheless present in some degree before the metastasis, as a result of the alleged misdiagnosis.

Section 6853 (c) requires that an affidavit of merit opine that the defendant's breach of the applicable standard of care proximately caused the injury alleged in the complaint. Further, § 6853 (e) makes clear that the injury in question must be a "personal injury". According to Meyer and her expert, the defendants negligently failed to diagnose her breast cancer. If the allegation is true, she then suffered a legally cognizable injury.

Black's Law Dictionary (8th Ed. 2004) defines a "personal injury" as – "In a negligence action, any harm caused to a person, such as a broken bone, a cut, or a bruise; bodily injury." An alleged failure to identify a cancerous growth, even if that growth was

not yet metastatic and had an "excellent" prognosis, would be harmful and would thus fall within this definition.[1] In addition to the injury arising from the tumor's localized growth, the increased risk of harm arising out of its potential virulence would have been a further injury. *United States v. Anderson*, 669 A.2d 73 (Del. 1995) (failure to diagnose cancer established damages).

In *Meekins v. Barnes*, 745 A.2d 893 (Del. 2000), this Court held that under the medical malpractice statute, a radiologist's negligent failure to diagnose cancer was an "injury," which triggered the statute of limitations, even though the extent of that injury was not then manifest. "In theory, Meekins could have brought an action at that time had Meekins known of the allegedly negligent diagnosis, although her damages would be difficult to quantify." *Id.* At 897.

That holding applies here. Meyer's expert could properly have signed an affidavit in March, 2005, which would have said that (1) the defendants violated the standard of care when they failed to diagnosis her cancer, which was then localized and had an excellent prognosis, and (2) assuming Meyer would rely on the defendants' statements (and thus would not seek a second opinion from another radiologist), the failure to diagnosis the cancer would proximately caused its continued existence and growth (rather than its treatment), with a potential danger of metastasis.[2] Based on *Meekins*, a court could have concluded that such an affidavit would have established the *prima facie* requirements for an action in medical malpractice, albeit that the principal injury, which

[1] 18 *Del. C.* § 6850 states that any legal terms or words of art in Chapter 68 of the Insurance Code are, unless otherwise defined, to have "such meaning as is consistent with the common law."
[2] Were such an affidavit impossible, Meyer could not have a cause of action in the first instance, and summary judgment would have been proper on that basis.

resulted from the eventual metastasis, would not yet have occurred. Such an affidavit would also have satisfied the requirements of § 6853.

The expert would *not* have had to determine whether the continued existence, growth, and potential danger of metastasis of the tumor would be an "injury" under Delaware law. The expert would not have had to concern himself with the rate of growth, the likelihood of metastasis, or the extent of the injury. He would not have had to decide how much of the injury was "provable", whether the cancer might have gone into spontaneous remission, what form of follow-up treatment[3] or investigation, if any, might have been required, or whether some aspects of Meyer's injury might have been "medically speculative." Those considerations would have related to the quantification issue addressed in *Meekins* and might have borne on Meyer's claim for a large damage award. They would not, however, have been pertinent to whether an injury had occurred.

Meyer's expert asserted, based on his understanding of Delaware law, that he would have refused to sign an affidavit of merit until November, 2005. (¶8). That may be so, but the point is irrelevant. Legally, Meyer could have obtained an affidavit from another expert immediately after the allegedly negligent act, in March, 2005, just as this Court held in *Meekins*.

It is for the court, not an expert witness, to interpret Delaware law, including the affidavit of merit statute. *Delaware Bay Surgical Services, P.C. v. Swier*, 900 A.2d 646 (Del. 2006); 75 Am. Jur.2d, Trial § 600. The incorrect legal conclusions of Meyer's expert did not create a material issue of fact. Absent such issue, summary judgment

---

[3] The Mayo Clinic has observed that treatments exist for every type and stage of breast cancer. See article on "Breast Cancer" at http://www.mayoclinic.com/health/breast-cancer/DS00328/DSECTION=treatments%2Dand%2Ddrugs.

should have been granted. Del. Superior Court Rule 56 (c); *Mugglewrth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. 2005).

II. The Event That Started the Running of the Statute of Limitations Was the Date of the Alleged Negligence -- Not the Date Meyer Could Have Obtained An Affidavit of Merit.

Even if, *arguendo,* Meyer would have been legally incapable of obtaining an affidavit of merit until November, 2005, it should make no difference in the outcome. The alleged misdiagnosis occurred on approximately March 8, 2005. It was then, the date of the allegedly negligent act, that the statute of limitations began to run. *Meekins v. Barnes*, 745 A.2d 893 (Del. 2000); *Dunn v. St. Francis*, 401 A.2d 77 (Del. 1979). The trial court recognized that this statement would have been true, based on this Court's holdings, had there been no affidavit of merit statute. It concluded, however, that § 6853 requires a change in these holdings. Such conclusion was wrong.

Dunn construed the words "the date upon which such injury occurred" in § 6856 to mean the date of the negligent act – not the date the results of that negligence became manifest to the plaintiff. It reached that conclusion based on (a) the wording of the statute, which specifically provides in § 6856 (1) for an extension of the limitation period in the event the injury did not become immediately manifest, (b) the legislative history of the statute, and (c) the object of the statute, which was to relieve health care practitioners from uncertain and protracted liability claims, arising from the then-current "open-ended period of limitations." *Id.*, at 79. *Dunn* also noted that any statute of limitations is "by definition arbitrary" and that it can, in "a few unfortunate cases" even act unfairly. *Id.*, at 81. *Meekins* confirmed this holding and applied it to a situation factually on all fours with the one at bar.

Nothing about § 6853 affects the rationale behind the *Dunn* holding. The wording of § 6856 has not changed an iota – § 6856 (1) still provides an extension for injuries that were not manifest at the time of the negligent act. Not only that, but § 6856 (3) provides a 90 day extension if the plaintiff's investigation is still ongoing when the limitations period would otherwise expire.[4] It is impossible to allow a judicially created "date of reasonable discovery" or even "date of possible affidavit of merit" meaning to the "date of injury" without expanding the limited extensions of § 6856 (1) and (3) and thus nullifying the legislative scheme. And, of course, neither the legislative history nor the desirability of providing health care practitioners with dates certain on which their potential liability would be cut off has changed.

If anything, the rationale for beginning the limitation period with the date of the negligent act is even stronger now than it was at the time of the *Dunn* holding. The General Assembly has had nearly 30 years to change the results of that decision, and its failure to do so can be deemed deliberate acquiescence in and incorporation of the holding. *Seinfeld v. Verizon Communications, Inc.*, 909 A.2d 117 (Del. 2006); *Oscar George, Inc. v. Potts*, 115 A.2d 479 (Del. 1955).

Section 6853 requires that a plaintiff demonstrate the provability of her case contemporaneously with the filing of her complaint. It changes neither her burden of proof nor the defenses available to the defendant. In other words, with or without the affidavit of merit requirement, a plaintiff should file her suit only if she has a reasonable basis for believing that she suffered provable medical injuries. This formalistic requirement of a contemporaneous affidavit does not somehow transform the meaning of

[4] Under appropriate circumstances, § 6853 (a)(2) allows a 60 day extension for the filing of an affidavit of merit, on a showing of good cause.

"date upon which such injury occurred" (the date of a substantive event) from the date of the negligent act or omission to the date the plaintiff was able to demonstrate to a court of law that she had a reasonable basis for her suit (the date of a procedural event).

Even if, hypothetically, one were somehow to conclude that Meyer's cancer was not manifest until November, 2005, the time of metastasis, she still had at least 16 months to file her suit.[5] Although she may have suffered practical difficulties in bringing suit within that time limit, § 6853 contemplated and allowed for such difficulties. To hold otherwise would negate the certainty the General Assembly intended for the bringing of medical malpractice suits.

Moreover, a statutory amendment is to be read, if possible, in accordance with pre-existing law. The court will not find an alteration of the original legal framework, unless clearly expressed in the amendment. *Graffagnino v. Amoco Chemical Co.*, 389 A.2d 1302, 1303 (Del. 1978) Implied statutory amendments are disfavored. *State v. Sharon H.*, 429 A.2d 1321 (Del. Super. Ct. 1981).

There is no indication in either the wording of or the legislative history behind § 6853 of an intent to modify the interpretations in *Dunn* and *Meekins.* In fact, as noted in *Beckett v. Beebe Medical Center*, 897 A.2d 753, 757 (Del. 2006), the purpose behind § 6853 was to reduce the filing of meritless medical negligence claims. An implied extension of the statute of limitations would undercut that purpose, as evidence less proximate in time to the underlying events (and thus inherently less reliable) would then be brought before the court.

---

[5] If Meyer could have brought her case within § 6856 (3), she would have had 19 months from the date of possible discovery to file suit. If she could have brought her case under § 6853(a)(2), she would have had 18 months to file the affidavit of merit.

III. As This Court has Already Held, the Statute of Limitations Falls Within Reasonable Bounds and is Therefore Constitutional.

In *Dunn*, this Court specifically held the two year limitation period of § 6856 to be constitutional. *Amici* anticipate that Meyer will argue here, as she did below, that this holding was wrong. However, there is no reason to deviate from the earlier decision. As *Dunn* observed –

> "Society is best served by a complete repose after a certain number of years even at the sacrifice of a few unfortunate cases. Statutes of limitations are by definition arbitrary, and their operation does not discriminate between the just and unjust claim, or the [a]voidable and unavoidable delay." *Id.*, 401 A.2d at 81 (inner citations deleted).

That the statute may have required Meyer to pursue her claim vigorously, at a time when she had difficulty in doing so, is an insufficient reason to declare § 6856 unconstitutional. If such were to be this Court's ruling, then it is difficult to see a principled basis for enforcing any statute of limitations.

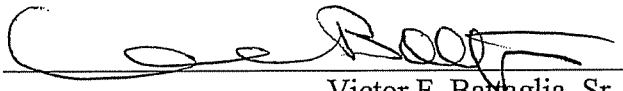
Furthermore, the statutes of limitations in several other states would also have barred Meyer's suit. Arkansas Code § 16-114-203 (two years from date of wrongful act); Idaho Code § 5-219 (two years from time of occurrence, act or omission); Indiana Code § 34-18-7-1 (two years from date of alleged act, omission, or neglect); Nebraska Revised Statutes § 44-2828 (two years after act or omission, with one year extension if not reasonably discoverable within initial two year period); South Dakota Codified Laws § 15-2-14.1 (two years after alleged malpractice, error, mistake, or failure to cure); Tennessee Code § 29-26-116 (one year, with one year extension if not reasonably discoverable within initial one year period); Wyoming Statutes § 1-3-107 (two years after act, error or omission, with two year extension if not reasonably discoverable within initial two year period). Thus, the Delaware law, as it has been interpreted for almost 30

years, comes well within the national norm. It was reasonable at the time of *Dunn*, and it is reasonable now.

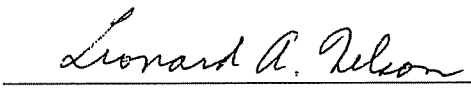
Conclusion

This case falls squarely within the holdings of *Dunn v. St. Francis*, 401 A.2d 77 (Del. 1979), and *Meekins v. Barnes*, 745 A.2d 893 (Del. 2000). The limitation period of § 6853 starts to run from the occurrence of the negligent act or omission. There is no basis for changing those holdings on account of the affidavit of merit law.

Meyer's suit was thus untimely, and the lower court decision should be reversed.



Victor F. Battaglia, Sr.



Leonard A. Nelson

Attorneys for *Amici Curiae*
American Medical Association and Medical Association of Delaware

Victor F. Battaglia, Sr.
Biggs & Battaglia
921 N. Orange St.
P.O. Box 1489
Wilmington, Delaware 19899
302/655-9677
Delaware Bar No. 156

Jon N. Ekdahl
Leonard A. Nelson
Office of General Counsel
American Medical Association
515 N. State St., 14th Floor
Chicago, Illinois 60654
312/464-5532
Appearing *pro hac vice*