SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

Richard S. Phillips, Esquire
The Phillips Law Firm, P.A.
507 Court Lane
Cambridge, Maryland 21613

Joshua H. Meyeroff, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, Delaware 19899

Maria R. Granaudo Gesty, Esquire
Burns White LLC
1000 North West Street, Suite 1230
Wilmington, Delaware 19801

Re: ***Moore v. Christiana Care Health System, Inc., et al.*,**
C.A. No. S16C-09-018

On Defendants' Motion to Dismiss: GRANTED

Date Submitted: March 14, 2017
Date Decided: June 16, 2017

Dear Counsel:

Pending before the Court is the Defendants' Motion to Dismiss. For the reasons elaborated upon herein, the Motion is GRANTED.

I. Factual Background

In May of 2014, Timothy G. Moore ("Plaintiff") sustained injuries as the result of a motorcycle accident. He received treatment at Kent General Hospital and Christiana Hospital before being released to home care services. On or about May 31, 2014, Christiana Care Home Health and Community Services, Inc. d/b/a/ Christiana Care Visiting Nurse Association ("CCVNA") began

sending nurses, physical therapists, and occupational therapists to care for Plaintiff at home. On June 16, 2014, Plaintiff and his family members expressed their concerns to a visiting nurse that the wound at the surgical site of Plaintiff's left elbow was not healing properly. They reported to the nurse that the wound was leaking yellow fluid, had an odor, and was causing Plaintiff pain and discomfort. The nurse, Debra S. Smith, RN, ("Defendant Smith") assured Plaintiff that the wound was not cause for concern and directed him to continue with his treatment plan. Defendant Smith also advised Plaintiff to call or report to the emergency room if he began to show signs of infection, such as a fever. Although Plaintiff's symptoms worsened during the course of the following days, he did not suffer from a fever or chills. During this time, Plaintiff received in-home occupational therapy ("OT") and physical therapy ("PT") visits but was not seen by a registered nurse or licensed practical nurse.

On July 1, 2014, Plaintiff expressed concern to a visiting OT that the wound had reopened and metal in his elbow was exposed. The OT instructed Plaintiff to call his surgeon, which he did. The OT also contacted Plaintiff's surgeon directly. The physician instructed Plaintiff to report to the Emergency Department. Ultimately, Plaintiff was readmitted and underwent additional surgeries as a result of this infection.

On June 27, 2016, Plaintiff's counsel sent a Notice of Intent to Investigate ("the Notice") to CCVNA. The Notice identified the potential defendants as, "Christiana Care Visiting Nurses Association, individually and as the employer of an as yet un-named visiting nurse."

On September 22, 2016, Plaintiff filed suit against Christiana Care Health System, Inc.;

Christiana Care Health Services, Inc.; CCVNA;[1] Debra S. Smith, RN; Nancy Schirmer, RN; Mariel Burtelle, RN; Terry Angell, RN; and Kimberly D. Jones a/k/a Kimberly D. Banks, LPN.

To date, the Complaint has not been served upon Kimberly D. Jones a/k/a Kimberly D. Banks, LPN.

The represented parties have stipulated to the dismissal of all claims against Christiana Care Health System, Inc., and Christiana Care Health Services, Inc.

II. Discussion

The represented Defendants (hereinafter, "Defendants") have filed the pending Motion to Dismiss. Defendants argue Plaintiff's claims must be dismissed because Plaintiff failed to comply with 18 *Del. C.* § 6856.

Section 6856 of Title 18 of the Delaware Code provides, in relevant part:

> 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; provided, however, that:
>
> (1) Solely in the event of personal injury the occurrence of which, during such period of 2 years, was unknown to and could not in the exercise of reasonable diligence have been discovered by the injured person, such action may be brought prior to the expiration of 3 years from the date upon which such injury occurred, and not thereafter; ...
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> ...
>
> (4) A plaintiff may toll the above statutes of limitations for a period of time up to 90 days from the applicable limitations contained in this section by sending a

[1] The Complaint misidentified this entity as "Christiana Care Health System, Inc. d/b/a Christiana Care Visiting Nurse Association."

> Notice of Intent to investigate to each potential defendant or defendants by certified mail, return receipt requested, at the defendant's or defendants' regular place of business. The notice shall state the name of the potential defendant or defendants, the potential plaintiff and give a brief description of the issue being investigated by plaintiff's counsel. The 90 days shall run from the last day of the applicable statute of limitations contained in this section. The notice shall not be filed with the court. If suit is filed after the applicable statute of limitations in this section, but before the 90-day period in this section expires, a copy of the notice shall be attached to the complaint to prove compliance with the statute of limitations.[2]

On January 6, 2017, he Court heard argument from the parties on Defendants' Motion to Dismiss. With post-argument briefing complete, the matter is now ripe for decision.

A. Standard of Review

Dismissal pursuant to Superior Court Civil Rule 12(b)(6) is appropriate where a plaintiff would not be entitled to relief under any set of conceivable set of circumstance susceptible of proof under the complaint.[3] In considering a motion to dismiss, all well-pleaded allegations in the complaint must be accepted as true.[4] The Rules require a defendant to "raise the defense of limitations in either a motion to dismiss or as an affirmative defense in a responsive pleading."[5]

B. Merits

1. Triggering Date for Statute of Limitations

At issue in this case is whether the Notice tolled the statute of limitations. "In order to stop the

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[2] 18 *Del. C.* § 6856.

[3] *Spence v. Funk*, 396 A.2d 967 (Del. 1978).

[4] *American Ins. Co. v. Material Transit, Inc.*, 446 A.2d 1101 (Del. Super. 1982).

[5] *Verrastro v. Bayhealth Med. Ctr., Inc.*, 119 A.3d 676, 679-80 (Del. Super. 2015) (citation omitted).

running of the statute of limitations, it must not already have run."[6] Defendants argue the statute of limitations began to run on June 16, 2014, when Plaintiff first expressed concern about infection to Defendant Smith. Thus, Defendants assert the Notice failed to toll the statute of limitations because it was sent after June 16, 2016.

In response to Defendants' Motion to Dismiss, Plaintiff alleges that the statute of limitations began to run "two years from the *last act* in the continuum of care and that it was not until [Plaintiff's] hospital visit on July 1, 2014, that he knew or should have known that he was receiving negligent care by [CCVNA], when he was actually diagnosed as having an infection by the hospital emergency room."[7] Accordingly, Plaintiff claims the Notice successfully tolled the statute of limitations because it was sent prior to July 1, 2016.

Defendants take issue with Plaintiff's characterization of this case as falling under the "continuous negligent medical treatment" doctrine. First, they argue case law requires a claim of continuous negligent medical treatment be pled with particularity and Plaintiff did not do so here. Plaintiff responds that the Complaint contains the allegation that, "Plaintiff [] continued his prior care with symptoms worsening over the ensuing days..." and this allegation is sufficient to satisfy his burden of "*alleging with particularity* a course of continuing negligent medical treatment during a finite period"[8] as required.

The Court concludes Plaintiff's bare allegation that he followed his treating physician's care

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[6] *Condon v. Neighborcare, Inc.*, 2006 WL 307501, at *5 (Del. Super. Feb. 3, 2006).

[7] Plaintiff's Answering Brief, Transaction ID 60285111, at 6 (emphasis in original).

[8] *Ewing v. Beck*, 520 A.2d 653, 662 (Del. 1987) (emphasis in original).

instructions does not rise to the level of particularity required to support a claim for continuing negligent medical treatment over a finite period of time. However, even if the cited language was sufficient to plead a claim of continuing negligent medical treatment, such a claim would fail on its merits as elaborated below.

Delaware has adopted the doctrine of continuing negligent medical treatment, but has explicitly *rejected* the "pristine" continuous treatment doctrine under which "the mere fact that there has been continuous treatment, whether negligent or not, for a *condition* occasioned by a prior negligent act, is sufficient to start the statute of limitations running only at the end of the course of treatment."[9] In so doing, the Delaware Supreme Court noted, "Judicial recognition of the doctrine of ... continuing treatment by this Court would result in the same type of expansion of the limitation period that 18 *Del. C.* § 6856 was intended to avoid."[10] Instead, the Court held, "[W]hen the cause of action is for continuous negligent medical treatment, the 'date upon which injury occurred' is the last act in the *negligent* medical continuum."[11]

According to Plaintiff's complaint, the last negligent act that occurred was Defendant Smith's failure to diagnose his elbow wound as an infection on June 16, 2014. Plaintiff does not allege he received any negligent medical treatment following that day. Accordingly, under the theory of continuous negligent medical treatment, the statute of limitations ran on June 16, 2016, and the Notice, having been filed outside of this time frame, failed to toll the statute of limitations.

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[9] *Id*. at 659-60 (emphasis in original).

[10] *Id*. at 661.

[11] *Id.* at 663 (emphasis added).

Having rejected Plaintiff's argument he may rely on the doctrine of continuous negligent medical treatment to extend the statute of limitations, the Court must determine "the date upon which such injury occurred." In determining when the injury occurred, the Court initially turns to the plaintiff's complaint.[12] By Plaintiff's account, the alleged omission is said to have taken place on June 16, 2014. Plaintiff does not allege any negligent act subsequent to Defendant Smith's giving her allegedly negligent medical advice to "stay the course." It is clear from Plaintiff's own actions - informing Defendant Smith of the deteriorating status of his wound and describing the symptoms thereof - that he knew of or, in the course of reasonable diligence could have discovered, the alleged negligent medical advice dispensed on June 16, 2014. Even assuming that Plaintiff had no knowledge of the wound's condition (despite his allegations that he informed Defendant Smith of the condition), on July 1, 2014, he became aware of it. In *Reyes v. Kent General Hospital, Inc.*, the Delaware Supreme Court observed:

> Here, the alleged omission is said to have occurred on September 15, 1980. Around May 11, 1981, [the plaintiff] learned of the alleged omission. Since [the plaintiff] knew of the injury within the statutory period of two years from the date of omission, she had until September 15, 1982 to bring her medical malpractice suit.[13]

That is to say, the fact that Plaintiff's suspicion on June 16, 2014, turned into actual knowledge on July 1, 2014, does not change the triggering date for the statute of limitations.[14] In this case, Plaintiff's cause of action arose on the date Defendant Smith advised Plaintiff his wound was not

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[12] *Zakrzewski v. Singh*, 2001 WL 1628312, at *2 (Del. Super. Nov. 15, 2001).

[13] 487 A.2d 1142, 1145 (Del. 1984).

[14] *See Meekins v. Barnes*, 745 A.2d 893, 897-98 (Del. 2000) ("The fact that [the plaintiff] did not know of the potential claim for misdiagnosis until her next annual examination in December, 1995 did not toll the beginning of the two-year statute of limitations.").

infected - June 16, 2014. The Notice was sent on June 27, 2016, after the statute of limitations had run. As such, it failed to toll the statute of limitations and Plaintiff's suit is time-barred. It is worth noting that statutes of limitation "are by definition arbitrary and their operation does not discriminate between the just and the unjust claim, or the voidable or unavoidable delay."[15]

2. Validity of Notice

The individually named Defendants also challenge the validity of the Notice because it failed to identify them by name. As noted above, the Notice identified as potential defendants, "Christiana Care Visiting Nurses Association, individually and as the employer of an as yet un-named visiting nurse."

The Court concludes that, assuming *arguendo*, the Notice was timely sent, it was deficient as a matter of law. In the recent case of *Verrastro v. Bayhealth Medical Center, Inc.*, the Superior Court analyzed the statutory language as it pertains to the requirements of a notice of intent to investigate.[16] In so doing, the court distinguished between the provisions requiring strict compliance and those for whom more flexibility is allowed due to the "art of legal drafting."[17]

The relevant portion of the 18 *Del. C.* § 6856 reads:

> (4) A plaintiff may toll the above statutes of limitations for a period of time up to 90 days from the applicable limitations contained in this section by sending a Notice of Intent to investigate to each potential defendant or defendants by certified mail, return receipt requested, at the defendant's or defendants' regular place of business. The notice shall state the name of the potential defendant or defendants, the potential plaintiff and give a brief description of the issue being

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[15] *Reyes*, 487 A.2d at 1145 (citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

[16] 119 A.3d at 680-81.

[17] *Id.* at 681.

investigated by plaintiff's counsel.[18]

In *Verrastro*, each notice of intent to investigate was addressed individually to each different doctor or medical practice; however, the body of each notice of intent was identical and stated that the purpose of the notice of intent was to "notify Bayhealth Medical Center, Inc." of the plaintiffs' intent to investigate the facts surrounding the death of plaintiffs' next of kin. The defendants argued that the notice failed to fulfill the mandatory requirements of the statute because the body of the notice did not identify each of them individually. The Superior Court noted that each notice of intent listed the potential plaintiffs, each notice of intent stated the intended potential defendant as an addressee, and each notice of intent "even if it could have been more concisely stated and more artfully constructed" contained a brief description of the issue being investigated.[19] Such is not the case here.

In this case, the Notice is not addressed to *any* of the individually named Defendants. The Notice simply did not serve to put these individually named Defendants on notice of the potential claims against them.[20] Plaintiff declined to make any effort to identify the individually named Defendants and, as such, the Notice is insufficient as a matter of law to toll the statute of limitations.

III. Conclusion

The Motion to Dismiss is GRANTED on the ground that Plaintiff's Complaint was filed outside

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[18] 18 *Del. C.* § 6856.

[19] *Verrastro*, 119 A.3d at 681.

[20] One might quibble that the Complaint, itself, does not even put the individually named Defendants on notice of any wrongdoing: the individuals and their capacities are identified but, with the exception of Defendant Smith, no specific action or inaction is attributed to them. This issue is not before the Court.

of the window provided by the applicable statute of limitations. In addition, the Complaint must be dismissed as to the individually named Defendants because the Notice failed to identify them as required by statute.

The matter remains pending against the unserved Defendant, Kimberly D. Jones a/k/a Kimberly D. Banks, LPN. A Notice pursuant to Superior Court Civil Rule 41(e) will be issuing forthwith.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

oc: Prothonotary