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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GI ASSOCIATES OF DELAWARE, P.A., ADVANCE ENDOSCOPY CENTER, LLC, and NATWARLAL RAMANI, M.D.,	§	No. 182, 2020
Defendants Below, Appellants	§	Court Below: Superior Court of the State of Delaware
v.	§	
MONICA KING ANDERSON, Individually and as Personal Representative of the ESTATE OF WILLIAM KING, STEPHANIE KING, HEATHER GUERKE, and AMBER WITHROW,	§	C.A. No.: N18C-04-158
Plaintiffs Below, Appellees	§	

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The question presented on this appeal is whether a legitimate claim can be barred by the statute of limitations before the claim even arose. That issue is one of first impression. This Court has not yet decided when the statute of limitations begins to run for a blamelessly unaware patient where there is neither an injury nor actual or constructive knowledge that medical negligence occurred in the two (or three) years after the alleged negligence occurred.

William King, Jr. ("Mr. King") died of colon cancer in 2016. (A-27)[1]. Mr. King is survived by his wife, Stephanie, and their three daughters. (A-28). Mr. King submitted to multiple colonoscopies between 2004 and 2011, all performed by Defendant Dr. Ramani. (A-26-27). Plaintiffs' Complaint alleges that Dr. Ramani breached the standard of care in 2011 when he instructed Mr. King to return for a repeat colonoscopy within three to five years. (A-28).

Under the applicable standard of care, Dr. Ramani was required to instruct Mr. King to return for a repeat colonoscopy in a maximum of three years, not "three to five years." (A-117). When Mr. King returned for a repeat colonoscopy five years later on March 23, 2016, Dr. Ramani was unable to complete that procedure due to malignant growth in the colon. (A-27). Mr. King was

[1] Plaintiffs cite to Appellant's Appendix as A-___.

subsequently diagnosed with colon cancer and died of complications from that disease later that year. (A-27).

In their Complaint, Plaintiffs specifically pled that "Defendants' negligence constituted a continuing course of interrelated and inseparable medical treatment." (A-32). Plaintiffs' expert, Steven F. Moss, M.D., the director of the gastroenterology fellowship at Brown University Medical School opined that (i) the standard of care and (ii) the prevailing Guidelines for Colonoscopy Surveillance After Screening and Polypectomy: A Consensus Update by the US Multi-Society Task Force on Colorectal Cancer (hereinafter "Guidelines"), required repeat colonoscopy within three years after Dr. Ramani discovered, during the 2011 colonoscopy, a sessile serrated adenoma greater than one centimeter. (A-117, A-163). Dr. Moss further testified that if Dr. Ramani had performed a repeat colonoscopy within three years, not five years, Mr. King would have survived. (A-72).

Defendants moved for summary judgment on January 22, 2020 on the basis that Plaintiffs' claims were barred by the statute of limitations. On April 28, 2020, the Superior Court denied Defendants' Motion, holding that the statute of limitations began to run from the colonoscopy performed on March 23, 2016, which was the last act in "a continuum of negligent medical treatment related to a single

condition occasioned by negligence." Superior Court Opinion, attached to Defendants' Opening Brief as Exhibit A (hereinafter cited as Exhibit A) at 2.

This Court accepted this appeal on July 1, 2020, and Defendants filed their Opening Brief on August 4, 2020. This is Plaintiff's Answering Brief requesting that the Superior Court's decision be affirmed.

SUMMARY OF THE ARGUMENT

1. Denied. The Superior Court properly held that the statute of limitations began to run after the colonoscopy was performed on March 23, 2016, which was the last act in a continuum of negligent medical treatment.

2. Denied. However "injury" under 8 *Del. C.* §6856 is defined, it is irrelevant in a case where the issue is the applicability of the continuous negligent medical treatment doctrine, which provides that the statute of limitations does not begin to run until the last act in a continuum of negligent medical treatment.

3. Alternatively, this Court should follow the majority of other state courts that have confronted this issue and hold that the last act itself need not be negligently performed for the statute of limitations to be tolled under the continuous negligent medical treatment doctrine. Plaintiffs preserved this issue below at (A-328-32).

4. Alternatively, this Court should follow the majority of other state courts that have confronted this issue and adopt a limited discovery rule for cases where, as here, no injury or knowledge thereof has manifested within two (or three) years of the medically negligent act. Plaintiffs preserved this issue below at (A-318-28).

5. Alternatively, this Court should follow the majority of other state courts that have confronted this issue and find Section 6856 unconstitutional as applied in

absence of a limited discovery rule. Plaintiffs preserved this issue below at (A-332-46).

STATEMENT OF FACTS

Mr. King was a patient at high risk for developing colon cancer. Exhibit A at 1. Starting in 2004, Mr. King was a patient of Dr. Ramani and his practice, GI Associates of Delaware, P.A. and Advance Endoscopy Center, LLC. *Id*. Between 2004 and 2011, Dr. Ramani performed serial colonoscopies to monitor suspicious growths in Mr. King's colon. *Id*. On April 4, 2011, Dr. Ramani performed a repeat colonoscopy, which showed a sessile serrated adenoma greater than one centimeter. (A-117, A-163). Following the 2011 colonoscopy, Dr. Ramani instructed Mr. King to return for repeat colonoscopy within three to five years. Exhibit A at 1. As directed by Dr. Ramani, Mr. King returned for repeat colonoscopy in 2016, which was within Dr. Ramani's five year window. *Id*. Dr. Ramani was unable to complete that colonoscopy due to malignant growth in the colon. *Id*. Mr. King was diagnosed with Stage Four colon cancer and died five months later. *Id*. and (A-166).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE STATUTE OF LIMITATIONS BEGAN TO RUN AFTER THE COLONOSCOPY WAS PERFORMED ON MARCH 23, 2016, WHICH WAS THE LAST ACT IN A CONTINUUM OF NEGLIGENT MEDICAL TREATMENT.

A. Question Presented

Did the Superior Court properly apply the continuous medical negligence doctrine?

B. Scope of Review

The standard and scope of review is *de novo*. *Arnold v. Society for Sav. Bancorp*, 650 A.2d 1270, 1276 (Del. 1994); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1204 (Del. 1993).

C. Merits of Argument

Defendants premise their entire argument on the assertion that "there is no dispute that this case involves a single act of alleged negligence." Def. Op. Brief at 8, 20. That premise and accusation is incorrect. To the contrary, this entire dispute turns on whether this case involved a single act of negligence or a continuum of negligent medical treatment. Plaintiffs argued, and the Superior Court agreed, that Dr. Ramani's negligent act in 2011 (instructing Mr. King to return within three to five years rather than within three years) was inexorably related to the colonoscopy in 2016 so as to constitute one continuing wrong, that resulted in this action being timely filed. Exhibit A at 14.

Under the continuing negligent medical treatment doctrine (hereafter "the Doctrine"), the statute of limitations begins to run for two years starting from the "last act" in the negligent continuum before the patient had actual or constructive knowledge of the medical negligence. *Ewing v. Beck*, 520 A.2d 653, 663 (Del. 1987) (holding that the plaintiff has a claim for continuing negligent medical treatment "[w]hen there is a continuum of negligent medical care related to a *single condition* occasioned by negligence") (*emphasis added*). For the Doctrine to apply, "the facts in the record must establish that the treatment was inexorably related so as to constitute one continuing wrong." *Id*. at 664. In *Ewing*, this Court declined to apply the Doctrine because the patient had consulted with an independent health care provider for the condition at issue before the "last act" in the continuum, thereby providing the patient actual knowledge of the medical negligence within the statute of limitations period. *Id*. at 667.

Here, in contrast, it is undisputed that the medical negligence and colon cancer were not *known* or *discoverable* prior to the 2016 colonoscopy. The Superior Court found that the "last act" in the continuum was the 2016 colonoscopy, after which Mr. King learned for the first time that he had Stage Four colon cancer. (A-166). Unlike *Ewing*, Mr. King did not suffer any symptoms or consult with an independent health care provider before returning for a repeat colonoscopy five years later, as instructed.

Defendants argue that the Superior Court erred by applying the Doctrine to this case because there was a "single act" of negligence as opposed to a continuous wrong. For support, the Defendants rely on *Dunn v. St. Francis Hospital, Inc*., 401 A.2d 77 (Del. 1979); *Meekins v. Barnes*, 745 A.2d 893 (Del. 2000); and *Dambro v. Meyer*, 974 A.2d 121 (Del. 2009). Defendants' reliance on these cases is misplaced. None of these cases were decided on the basis that there was a continuous wrong versus a "single act" of negligence. Moreover, each of these cases is readily and significantly distinguishable.

Dunn involved a claim that a surgeon operated on the wrong side of the patient's spine, a fact unknown to the patient until he began to experience symptoms five years later. *Dunn*, 401 A.2d at 78. Holding that Delaware no longer recognized the "discovery rule" in medical negligence cases, the *Dunn* court affirmed the dismissal of the case. *Id*. at 79. Significantly, no claim for continuous medical negligence was made in *Dunn,* making *Dunn* legally distinguishable.

Meekins and *Dambro*, which did involve claims for continuous medical negligence, are factually distinguishable. Unlike Mr. King, the patients in *Meekins* and *Dambro* had actual knowledge of the medical negligence within two years of the negligence, despite the fact that they had not suffered any adverse effects during those two years. *Meekins*, 745 A.2d at 899; *Dambro*, 974 A.2d at 136. Because the patients in those cases failed to sue within two years of the date of negligence despite

having actual knowledge of the negligence (misread mammograms), the Court in both cases held that the statute of limitations had expired. *Id*.

Defendants also rely on *Stafford v. Ctr. for Neurology, Neurosurgery & Pain Mgmt., P.A*., 2004 WL 141734 (Del. May 28, 2004). That case is likewise distinguishable. In *Stafford*, this Court affirmed the Superior Court's grant of summary judgment on limitations grounds where the Superior Court found the Doctrine did not apply in light of: (1) the separation of time between the alleged acts of negligence; (2) the nature of the complaints; and (3) the plaintiff's failures to return as directed for follow-up examinations and testing. *Id*. at *2. None of these circumstances is present in this case.

Defendants' position rests on an extremely fragile premise - that the Doctrine does not apply because Plaintiffs cannot show that the 2016 colonoscopy was, in and of itself, performed in a negligent manner. By framing their argument in this way, Defendants attempt to avoid the real issue. Plaintiffs' do not contend that the 2016 colonoscopy was *performed* negligently. Rather, Plaintiffs' position is that Dr. Ramani's instructed *timing* of the 2016 colonoscopy *was negligent*, and was "inexorably related" to his follow-up instruction to Plaintiff in 2011 (come back in 3 to 5 years).

The Superior Court was not persuaded by Defendants' effort to "conflat[e] Plaintiffs' expert's medical opinion regarding Dr. Ramani's negligence

with the legal analysis construing the date of injury." Exhibit A at 7. The Superior Court correctly noted that the question of when the statute of limitations began to run "is not controlled by the professional opinion of Plaintiffs' standard of care expert." *Id*. at p. 8. In other words, the Superior Court rejected Defendants' attempt to portray this case as a "single act of negligence."

Because (as the trial court found) Dr. Ramani's negligent recommendation to return in three to five years was inexorably inseparable from the colonoscopy he performed in 2016 (a minimum of two years after it should have occurred), the Superior Court correctly applied the Doctrine to the instant case. Under the Doctrine, Plaintiffs' complaint was timely filed within two years of the last act in the negligent continuum, -- the day that Dr. Ramani attempted to provide follow-up care (colonoscopy) in accordance with the timing that he had (negligently) instructed.

Defendants also argued below that the Superior Court was duty-bound to dismiss Plaintiffs' Complaint under the doctrine of *stare decisis*.[2] But as Plaintiffs

[2] Plaintiffs submit that *stare decisis* does not apply because this case is distinguishable from the cited decisions of this Court. But, even if *stare decisis* applies, this Court has long recognized that "the common law must not remain static and that our nation's constitutional forms of democracy have entrusted the judiciary with developing that body of jurisprudence." *Aizupitis v. State*, 699 A.2d 1092, 1094 (Del. 1977). Although the doctrine of *stare decisis* "imparts continuity and predictability to our law[,] … precedents, over time, may lose their acceptability and a case wrongly decided at the inception should not preclude reconsideration simply because it is a quarter of a century old." *Keeler v. Harford Mut. Ins. Co.,* 672 A.2d

argued below, this Court has never confronted a fact-pattern like this one. Moreover, Plaintiffs submit Defendants' position cannot be the law, because, if accepted, it would bar a legitimate claim before the claim ever arose and would establish a limitations hurdle that could never be surmounted

Defendants' position, were it to become the definitive law of Delaware, would risk the health and safety of patients in this state. Unscrupulous health care providers specializing in the diagnosis, prevention or treatment of cancer could, in effect, immunize themselves from civil liability by recommending that patients return for follow-up testing or procedures at a time after the applicable period would have expired.

For these reasons, the Superior Court properly applied the continuous negligent treatment doctrine and Plaintiffs respectfully submit that this Court should affirm the judgment on that basis.

1012, 1017 (Del. 1996). This Court has overruled precedent in cases where it became clear that the law had changed dramatically, *Travelers Indemnity Co. v. Lake,* 594 A.2d 38 (Del. 1991), or where its application would lead to absurd results, *Verrastro v. Bayhospitalists, LLC*, 208 A.3d 720 (Del. 2019).

II. "INJURY" UNDER 18 *DEL*. C §6856, HOWEVER DEFINED, IS IRRELVANT TO THE CENTRAL ISSUE OF WHETHER THE SUPERIOR COURT CORRECTLY APPLIED THE CONTINUOUS NEGLIGENT MEDICAL TREATMENT DOCTRINE

A. Question Presented

Is the definition of "injury" in 18 *Del. C*. §6856 relevant to the application of the continuous negligent medical treatment doctrine to the facts of this case?

B. Scope of Review

The standard and scope of review is *de novo*. *Arnold*, 650 A.2d at 1276; *Desert Equities, Inc.,* 624 A.2d at 1204.

C. Merits of Argument

The Defendants' second argument is an irrelevance and not a ground for reversal because the Superior Court never interpreted or applied 18 *Del. C*. §6856 in its opinion. Rather, the Superior Court held that "[c]laims of continuous negligent medical treatment are subject to the limitations period set forth in Section 6856, which, for claims of continuous negligent medical treatment, runs from the date of the 'last act' in the negligent continuum." Exhibit A at 10. However defined, the statutory term "injury" is immaterial to, and has no bearing upon, the correctness of this holding.

Contrary to Defendants' arguments, the Superior Court correctly analyzed *Dunn*, *Dambro*, *Meekins* and 18 *Del. C*. §6856 when concluding that this

case does not involve a single act of negligence. Defendants have failed to show otherwise, and their effort to create an issue based on a definition of "injury" that played no role in the Court's analysis should be rejected as another effort to avoid confronting the only issue properly present in this case.

III. ALTERNATIVELY, SHOULD THIS COURT NOT AFFIRM ON THE BASIS OF ARGUMENT I, THEN IT SHOULD EXTEND THE CONTINUOUS NEGLIGENT MEDICAL TREATMENT DOCTRINE TO ENCOMPASS THE FACT PATTERN PRESENTED HERE.

A. Question Presented

Should this Court follow the majority of other state courts that have confronted this issue and hold that the last act in the continuum need not be negligently performed for the statute of limitations to be tolled under the continuous negligent medical treatment doctrine?

B. Scope of Review

The standard and scope of review is *de novo*. *Arnold*, 650 A.2d at 1276; *Desert Equities, Inc.,* 624 A.2d at 1204.

C. Merits of Argument

If this Court were to accept Defendants' argument that the statute of limitations began to run from the time of a "single act" and thereby expired two years after that "single act" (when Dr. Ramani provided negligent follow-up instructions in 2011), then this Court should revisit its 1987 decision in *Ewing*, 520 A.2d 653, which, since then, has been interpreted as requiring the last act in the continuum to be performed negligently.

Unlike *Ewing*, the majority of state courts that have adopted a form of the continuous medical negligence doctrine have held that the statute of limitations does not begin to run until the *last* act of treatment related to the initial negligence,

regardless of whether or not the last act was negligently performed. *Gillette v. Tucker*, 65 N.E. 865 (Ohio 1902); *De Haan v. Winter*, 241 N.W.2d 923 (Mich. 1932); *Williams v. Elias*, 1 N.W.2d 121 (Neb. 1941); *Hotelling v. Walther*, 130 P.2d 944 (Ore. 1942); *Thatcher v. De Tar*, 173 S.W.2d 760 (Mo. 1943); *Hundley v. St. Francis Hospital*, 327 P.2d 131 (Cal. 1958); *Borgia v. City of New York*, 187 N.E.2d 777 (N.Y. 1962); *Frazer v. Osbourne*, 414 S.W.2d 118 (Tenn. 1966); *Samuelson v. Freeman*, 454 P.2d 406 (Wash. 1969); *Johnson v. Winthrop Laboratories*, 190 N.W.2d 77 (Minn. 1971); *Farley v. Goode*, 252 S.E.2d 594 (Va. 1979); *Sheldon v. Sisters of Mercy Health Corp*., 300 N.W.2d 746 (Mich. App. Ct. 1980); *Metzger v. Kalke*, 709 P.2d 414 (Wyo. 1985); *Skoglund v. Blandkenship*, 481 N.E.2d 47 (Ill. 1985); *Vinklarek v. Cane*, 691 S.W.2d 108 (Tex. Civ. App. 1985); *Lane v. Lane*, 752 S.W.2d 25 (Ark. 1988); *Horton v. Carolina Medicorp, Inc*., 472 S.E.2d 778 (N.C. 1996); *Weiss v. Roganasathit*, 975 S.W.2d 113 (Mo. 1998); *Sherwood v. Danbury Hospital*, 746 A.2d 730 (Conn. 2000); *Liffengren v. Bendt*, 612 N.W.2d 629 (S.D. 2000); *Carter v. Haygood*, 892 So.2d 1261 (La. 2005); *Harrison v. Valentini*, 184 S.W.2d 521 (Ky. 2005).

These decisions all reflect that the modern trend is to hold that the limitations period begins to run on the date of the "last act" before the patient received the correct diagnosis, whether or not the last act was negligently performed. The Wyoming Supreme Court has observed that "[c]ourts which have addressed the

issue *uniformly* hold that where the defendant physician has provided a continuing course of care for the same or related complaints, the cessation of treatment completes the 'act' which starts the running of the statutory period for filing suit." *Metzger v. Kalke,* 709 P.2d 414, 417 (Wyo. 1985) (emphasis added). Notably, the Delaware Supreme Court did not address or cite *Metzger* when it decided *Ewing* only two years later in 1987.

Most recently, the Supreme Judicial Court of Massachusetts, applying the continuous treatment doctrine held that the statute of limitations began to run on the date of the last act (regardless of negligence) before the patient received the correct diagnosis. *Parr v. Rosenthal*, 57 N.E.3d 947 (Mass. 2016). It reasoned that a patient "realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered" by a health care provider. *Id*. at 958. The Massachusetts court rejected the defendant's argument that adopting the continuous treatment doctrine amounted to "improper judicial legislation" and found there was nothing to indicate that the legislature had rejected the continuing treatment doctrine. *Id* at 959. The court found that legislature silence did not reflect a conscious intent to reject the continuing treatment doctrine and,

therefore, the court was permitted to adopt the Doctrine as part of a common-law interpretation of when a claim arises. *Id*.[3]

Plaintiffs submit that manifest injustice would result if the law requires Mr. King, and all patients similarly situated, to obtain a second opinion or perform his own independent medical research to determine whether he should undergo repeat colonoscopy earlier than instructed by his treating physician (Dr. Ramani). Reversing the Superior Court's judgment would require patients such as Mr. King to hire a "backup doctor" to review the recommendations made by their treating physician, even if the patient has no reason to mistrust their doctor's advice, have no notice of the negligence (actual or constructive), and experience no injury during the intervening period.

To reiterate, Plaintiffs submit that the facts presented here and the trial court's holding do no violence to this Court's determinations in *Ewing*, *Dunn*, *Meekins* or *Dambro*. But, should this Court disagree, Plaintiffs respectfully ask this Court to revisit the continuous negligent treatment doctrine and apply it to reach the result that the statute of limitations does not begin to run until the last act of treatment

[3] The Supreme Courts of Ohio, Oregon, and Pennsylvania agree that judicially adopting a discovery rule does not nullify the legislative purpose of enacting a statute of limitations. *Oliver v. Kaiser Community Health Foundation*, 449 N.E.2d 438 (Ohio 1983*); Berry v. Branner*, 421 P.2d 996, 998 (Or. 1966); *Ayers v. Morgan*, 154 A.2d 788 (Pa. 1959).

related to the initial negligence, whether or not the last act was performed negligently.

IV. ALTERNATIVELY, THIS COURT SHOULD OVERTURN *DUNN* AND ADOPT A LIMITED DISCOVERY RULE IN CANCER CASES

A. Question Presented

Alternatively, should this Court follow the majority of other state courts that have confronted this issue and adopt a limited discovery rule for cases where, as here, there is no manifested injury or knowledge thereof within two years of the medically negligent act?

B. Scope of Review

The standard and scope of review is *de novo*. *Arnold*, 650 A.2d at 1276; *Desert Equities, Inc.,* 624 A.2d at 1204.

C. Merits of Argument

Defendants argue that Mr. King suffered cognizable injury in 2011 (even though there was no cancer to diagnose or injury to him). Unfathomable as that argument would be to anyone exercising common sense, nevertheless, that is the law that Defendants ask this Court to ordain by seeking to have this Court expand *Dunn* to the facts of this case. To reiterate, *Dunn* did *not* involve the continuous negligent medical treatment doctrine, making it irrelevant to the resolution of the issue presented on this appeal. However, should this Court disagree, then Plaintiffs respectfully urge that *Dunn* be overturned because (i) *Dunn*'s holding is contrary to the plain language of 18 *Del. C.* §6856, and (ii) the primary case on which the *Dunn*

Court relied in finding that "time of injury equals time of the negligent act" has been overturned.

In 1979, the *Dunn* Court faced the question of whether the discovery rule announced in *Layton v. Allen,* 246 A.2d 794 (Del. 1968), remained the law after the enactment of Section 6856. Chapter 68 of Title 18 (the "Chapter"), enacted by the Delaware General Assembly in 1976, provided that "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 two years from *the date upon which such injury occurred*." 18 *Del. C*. §6856 (emphasis added).

The General Assembly legislated, by its plain meaning, that the statute of limitations begins to run on the date of the *personal injury*, not the date of medical negligence. *State Farm Mut. Auto. Ins. Co. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995) (holding that the plain meaning of a statute is binding).[4] If the General Assembly intended the statute of limitations to run from the date of the *wrongful act*

[4] The General Assembly further provided that "[a]ny legal term or word of art used in this chapter, not otherwise defined, shall have such meaning as is consistent with the common law." 18 *Del. C*. §6850. The General Assembly did not define "*personal injury*" in the Chapter. Black's Law Dictionary defines "personal injury," in relevant part, as "a hurt or damage done a man's person, such as a cut or bruise, a broken bone or the like." *Personal Injury*, BLACK'S LAW DICTIONARY (6th ed. 1990).

as opposed to the date of *personal injury* (as *Dunn* held), it would have used "*act*" and not "*personal injury*" in Section 6856.[5] Indeed, the General Assembly did precisely that in 2010 when it added subsection (3) of Section 6856, which provides: "Notwithstanding any provision to the contrary, a cause of action based on the sexual abuse of a child patient by a health-care provider may be brought at any time following the commission of the *act or acts* that constituted the sexual abuse." 18 *Del. C*. §6856(3) (emphasis added).

Despite the plain language of the statute as originally enacted, the *Dunn* Court held that the "time of injury" is synonymous with the "time of negligence" in medical negligence cases. The only authority the Court cited for that proposition was an intermediate Arizona appellate decision. *Dunn* at 80, *citing Landgraff v. Wagner*, 546 P.2d 26 (Ariz. Ct. App. 1976). After *Dunn* was decided in 1979, however, the Arizona Supreme Court *reversed Landgraff*, holding that the "date of injury" is not the "date of the negligence" in failure to diagnose cases alleging medical negligence. *DeBoer v. Brown*, 673 P.2d 912, 914 (Ariz. 1983). *Dunn* and *DeBoer* cannot be reconciled. And, since *DeBoer* overturned the only precedent on

[5] *See e.g*., Section 516.105, Revised Statutes of Missouri, which provides in part that "All actions against physicians, for damages for malpractice, negligence, error or mistake related to health care shall be brought within two years from the occurrence of the act of neglect complained of . . . ."

which the *Dunn* court relied in defining the date of injury as the date of the negligent act, Plaintiffs respectfully submit that *Dunn* should likewise be overturned.

Plaintiffs further submit that *Dunn* was wrongly decided. *First*, the *Dunn* Court disregarded the plain meaning of the statute by conflating the date of personal injury with the date of the negligent act. *Second*, the Court failed to consider the common law meaning of "personal injury," which it was required to do under the Chapter because "personal injury" is not a defined phrase in the Chapter. *See* footnote 3, supra. Under the common law, "personal injury" is defined, in relevant part, as "a hurt or damage done a man's person, such as a cut or bruise, a broken bone or the like." *Personal Injury*, BLACK'S LAW DICTIONARY (6th ed. 1990). *Third*, Section 6856 is a statute of limitations, not a statute of repose. As such, it is amenable to judicial application of the limited discovery rule Plaintiffs urge this Court to adopt. *California Public Employees' Retirement System v. ANZ Securities*, - U.S. -, 137 S. Ct. 2042 (2017) ("The purpose and effect of a statute of repose ... is to override customary tolling rules arising from the equitable powers of courts" because the "object of a statute of repose [is] to grant complete peace to defendants.").[6]

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[6] In *ANZ Security*, the United States Supreme Court described the difference between a statute of limitation and a statute of repose. There, the Court held:

> [S]tatutory time bars can be divided into two categories: statutes of limitations and statutes of repose. Both are mechanisms used to limit the temporal extent or duration

Regretfully, *Dunn* has been extended to cases involving the misdiagnosis of breast cancer claims in *Meekins* and *Dambro*, leaving women harmed by medical negligence without legal recourse. In this appeal, Defendants seek a further extension of *Dunn*, this time to a claim where there the patients hold no knowledge of the wrongful act, no cancer to misdiagnose, and no injury within the prescribed two years.

> of liability for tortious acts, but each has a distinct purpose. Statutes of limitations are designed to encourage plaintiffs to pursue diligent prosecution of *known claims*. In accord with that objective, limitations periods being to run when the cause of action accrues—that is, when the plaintiff can file suit and obtain relief. In a personal-injury or property-damage action, for example, more often than not this will be when the *injury occurred or was discovered*. In contrast, statutes of repose are enacted to give more explicit and certain protection to defendants. These statutes effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time. For this reason, statutes of repose begin to run on the date of the last culpable act or omission of the defendant.

Id. at 2024. In enacting Section 6856, the General Assembly neither indicated it was a statute of repose nor used language commonly employed in legislation creating a statute of repose. *See e.g*., 10 *Del. C*. §8106 ("No action to recover damages for trespass . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action."). Section 6856 is not a statute of repose, as it provides that a patient must file suit two years after a personal injury occurred.

For this Court to accept Defendants' position that the period of limitations expired on April 26, 2013 (or April 26, 2014), it would be arbitrary and capricious because no personal injury (or even cancer) had yet befallen Mr. King. Such a proposed construction of Section 6856 should shock the conscience of any court because it would require plaintiffs to do the impossible – file a lawsuit before any cause of action has even arisen.[7] If, however, this Court were to reach such a result under *Dunn* and its progeny, then this Court should overturn *Dunn* and adopt the Arizona Supreme Court's *DeBoer* decision by adopting a limited discovery rule for cases where there is no injury or knowledge within two years of the medically negligent act.

[7] The Texas Supreme Court has held that the refusal to adopt a discovery rule requires plaintiffs "to do the impossible—to sue before they have any reason to know that they should sue. Such a result is rightly described as 'shocking' and is so absurd and unjust that it ought not be possible." *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex. 1984). Requiring a plaintiff to bring a claim for medical negligence before the claim arises is like "boarding the bus to topsy-turvy land.'" *Dincher v. Marlin Firearms, Co*., 198 F.2d 821 (2d Cir. 1952) (Frank, J. dissenting) ("Except in topsy-turvy land, you can't die before you are conceived, or be divorced before you ever marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad").

V. SECTION 6856 IS UNCONSTITUTIONAL

A. Question Presented

Alternatively, should this Court follow the majority of state courts that have confronted this issue and find Section 6856 unconstitutional in the absence of a limited discovery rule?

B. Scope of Review

The standard and scope of review is *de novo*. *Arnold*, 650 A.2d at 1276; *Desert Equities, Inc.,* 624 A.2d at 1204.

C. Merits of Argument

The holding urged by Defendants would create a manifest injustice. As set forth above, this Court can avoid such a result by expanding the continuous negligent medical treatment doctrine or by adopting a limiting discovery rule for cases such as this. Should the Court refuse to do either, then Plaintiffs submit Section 6856 is unconstitutional facially and as applied to the circumstances presented here.

Even though it has no Open Courts provision, the United States Constitution, through the Due Process Clause, has been construed to guarantee a fundamental right of access to justice. *Bound v. Smith*, 430 U.S. 817 (1977). Access to justice is so essential that the Fourteenth Amendment has been held to embrace the mandate that it is "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pacific Ry. Co. v. Humes*, 115

U.S. 512, 521 (1885). *See also Chambers v. Baltimore & O. R.R.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force."). The U.S. Supreme Court has applied these principles to find that no law can pass constitutional muster if it bars citizens "from resorting to the court to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964).

Unlike the U.S. Constitution, the Delaware Constitution, like most state constitutions, contains an Open Court clause. William Blackstone characterized Open Court clauses as the right to a legal remedy for injury. *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 343 (Ore. 2001). Article I, Section 9, of the Delaware Constitution guarantees that "[a]ll courts shall be open; and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by the due course of law . . . without sale, denial or unreasonable delay or expense . . . ." Del. Const. art. I, §9.

This Court has held "when it comes to interpreting provisions of our Delaware Constitution, we have previously highlighted the significance of knowing the original text, context, and evolution of any phrase that appears in the present Delaware Constitution." *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 642 (Del. 2017). In *Bridgeville Rifle & Pistol Club, Ltd.*, this Court noted that due to the influence of John Dickinson (who was the Governor of Pennsylvania in

the 1780's and President of the 1792 Delaware Constitutional Convention), many provisions of the Bill of Rights of the Delaware Constitution of 1792 were identical to the 1790 Pennsylvania Constitution, *Id*. at fn. 45.

Delaware's 1792 Constitution contained a nearly identical Open Courts clause and right to a legal remedy found in the Pennsylvania Constitution of 1790. Both constitutions contain nearly identical provisions today. The current Constitution of the Commonwealth of Pennsylvania provides that "[a]ll courts shall be open; and every man for an injury done in his lands, goods, person or reputation shall have remedy by due course of law . . . without sale, denial or delay." Pa. Const. art. IX, §11.[8]

John Dickinson was a contemporary of William Blackstone, having studied law with him in England. *Bridgeville Rifle & Pistol Club* at fn. 45. In his Commentaries, Blackstone declared that "it would be 'in vain' for the law to recognize rights, if it were not for the remedial part of the law that provides the methods for restoring those rights when they wrongfully are withheld or invaded." *Smothers*, 23 P.3d at 343. "To Blackstone, the guarantee of legal remedy for injury 'is what we mean properly, when we speak of the protection of the law.'" *Id*.

[8] Pennsylvania derived its Open Courts provision from William Penn's Frame of Government, which, in turn, drew upon Edward Coke's reading of the Magna Carta. Suzanne L. Abram, *Problems of Contemporaneous Construction in Constitutional Interpretation*, 38 Brandeis L.J. 613, 630 (2000).

The *Dunn* Court, nevertheless, found Section 6856 constitutional. As discussed in Section IV, *supra*, the *Dunn* Court relied heavily on *Landgraff,*[9] a decision from the Arizona intermediate court of appeals. The Arizona Supreme Court has since overturned *Landgraff* on constitutional grounds, holding that Arizona's state constitution guarantees the right to a legal remedy. *Kenyon v. Hammer*, 688 P.2d 961, 966 (Ariz. 1984). The *Kenyon* decision was issued by the Arizona Supreme Court just one year after that court issued the *DeBoer* decision, (discussed *supra* in Section IV), overturning *Landgraff*'s holding that "time of injury" equals "time of the negligent act." *Dunn* cannot be reconciled with either *Kenyon* or *DeBoer*.

In addition to and apart from *Landgraff* having been gutted by the Arizona Supreme Court after *Dunn* was decided, the other precedent on which the *Dunn* Court relied constitutes an inadequate legal foundation for the decision. *First*, although the *Dunn* Court cited *Owen v. Wilson*, 537 S.W.2d 543 (Ark. 1976), the Arkansas Supreme Court subsequently adopted the continuous treatment doctrine, which the Plaintiffs raised and discussed in Argument I, *supra*. *Second*, the *Dunn* Court cited approvingly to the trial judge's opinion, which in turn relied on a New Jersey case for the proposition that the legislature has the power to "abolish old [rights] as long as they are not vested." *Dunn v. Felt*, 379 A.2d 1140, 1141 (Del.

[9] 546 P.2d 26 (Ariz. Ct of App. 1976).

Super. Ct. 1977) citing *Rosenberg v. Town of North Bergen*, 293 A.2d 662 (N.J. 1972). But, although not cited by the lower court's decision in *Dunn*, *Rosenberg* also held that "the statute of limitations shall not be deemed to run until a wrong has been *discovered*." *Rosenberg*, 293 A.2d at 665 (emphasis added). Also not noted by the lower court decision in *Dunn* was *Rosenberg's* citation to a prior New Jersey Supreme Court decision holding that the statute of limitations for a medical negligence claim does not begin to run until two years after the *discovery* of the injury. *Fernandi v. Strully*, 173 A.2d 277 (N. J. 1961).

During the decades since *Dunn* was decided, numerous other state courts have since held that legislation designed to abrogate the common law discovery rule in medical malpractice cases violated state constitutional provisions. *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984); *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7 (Mo. 1986); *Gaines v. Preterm-Cleveland, Inc*., 514 N.E.2d 709 (Ohio 1987); *Khonke v. St. Paul Fire & Marine Ins. Co*., 410 N.W.2d 585 (Wis. Ct. App. 1987); and *McCollum v. Sisters of Charity of Nazareth Health Corp*., 799 S.W.2d 15 (Ky. 1990).

Most recently, in 2019 the Pennsylvania Supreme Court found that a seven-year statute of repose for medical negligence claims (that provided no exception for the discovery rule) was unconstitutional under an Open Courts provision nearly identical to that of Delaware. *Yanakos v. UPMC*, 218 A.3d 1214

(Pa. 2019). The construction of an almost identical counterpart in the Pennsylvania Constitution by the Pennsylvania Supreme Court is instructive here, particularly since both constitutional provisions can be traced back to the same person, John Dickinson.

In *Yanakos*, the Pennsylvania Supreme Court noted that statutes which infringe on the right to a remedy are subject to an intermediate level of constitutional scrutiny. Under that standard a court must determine (i) whether the statute was related to an important government interest; (ii) whether the classification was drawn so as to be closely related to the objective of the legislation; and (iii) whether the person excluded from an important right or benefit is permitted to challenge his exclusion on the grounds that in his particular case, denial of the right or benefit would not promote the purpose of the classification. *Id*. at 1222.

Under intermediate scrutiny, the proponent of the statute bears the burden to demonstrate the appropriateness of the means the statute employs to further its interest. *Id*. at 1223. The *Yanakos* Court found the legislative policy of controlling insurance costs to be an important purpose. *Id*. Even so, the court held that the seven year statute of repose was not substantially related to achieving that goal. *Id*. at 1226. Specifically, the court found that the proponents of the legislation failed to provide any evidence that the seven-year statute of limitations had any substantial relationship to the legislative goal of controlling insurance costs. *Id*.

In this case, Plaintiffs raised this issue below, and the Defendants failed to rebut it or raise it in their Opening Brief. Common sense, however, would suggest that claims for the overwhelming majority of victims of medical negligence accrue before the two year statute of limitations expires. Given the small number of such claims that would exist, it is doubtful that disallowing claims such as this would bear any substantial relationship to the legislative purpose of Section 6856, which was to reduce the number of claims or control insurance costs.

Plaintiffs respectfully submit that the time has come for this Court to overturn *Dunn*, informed by the reasoning and result in *Yanakos*. Since *Dunn*, the overwhelming majority of state supreme courts that have addressed similar issues have ruled in accord with *Yanakos. Kenyon,* 688 P.2d at 966 (overruling *Landgraff*, the primary case relied upon by the *Dunn* Court); *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984); *Gaines v. Preterm-Cleveland, Inc*., 514 N.E.2d 709 (Ohio 1987); *Davis v. Moran*, 735 P.2d 1014 (Idaho 1987); *Steingart v. White*, 1988 Cal.App.3d 406 (Cal. App. Ct. 1988); *Edmonds v. Cytology of Maryland, Inc*., 681 A.2d 546 (Md. Ct. App. 1996); and *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

These decisions all reflect the modern trend, held by a majority of courts deciding this issue, that patients have a constitutional right to the benefit of the discovery rule in cases such as this. As such, Plaintiffs respectfully request that

this Court revisit *Dunn* and find Section 6856 unconstitutional to the extent it abrogated the common law discovery rule in "failure to diagnose" cases.

Alternatively, Plaintiffs respectfully urge that Section 6856 is unconstitutional as applied to the facts of this case. In *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999), the Indiana Supreme Court found a two-year statute of limitations unconstitutional as applied in a failure to diagnose cancer case, holding:

> To require Plaintiff under these circumstances to file her claim before the expiration of the two-year medical malpractice statute of limitations would require her to file a claim before she was aware of the malpractice and the resulting injury and would impose an impossible condition on her access to the courts and pursuit of a tort remedy. *In other words, it would require her to file a claim before such claim existed*. This application of the medical malpractice statute of limitation is so unreasonable as to violate section 12 (the Indiana Constitution's Open Courts provision).

Id. at 1284-85.

In this case, Mr. King did not know, or in the exercise of reasonable diligence could not have discovered, that Dr. Ramani's recommendation to return in three to five years for repeat colonoscopy was negligent. Moreover, unlike the patient in *Martin*, there was not even an injury to discover, as the cancer would have been treatable had Dr. Ramani performed a repeat colonoscopy in three years, as opposed to five years.

Since *Dunn*, the majority of state supreme courts that have confronted this issue have adopted the time of discovery rule. *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980); *Mastro v. Brodie*, 682 P.2d 1162 (Colo. 1984); *Condon v. A.H. Robbins*, 349 N.W.2d 622 (Neb. 1984); *Lillicrap v. Martin*, 591 A.2d 41 (Vt. 1989); *Stanbury v. Bacardi*, 953 S.W.2d 671 (Tenn. 1997); *Lagassey v. State*, 846 A.2d 831 (Conn. 2004); *Long v. Memorial Hospital*, 969 So.2d 35 (Miss. 2007); *Rathje v. Mercy Hospital*, 745 N.W.2d 443, 445 (Iowa 2008); and *Sherrill v. Souder*, 325 S.W.2d 584 (Tenn. 2010). The Iowa Supreme Court noted in 2008 that "*nearly all jurisdictions* in this country apply some form of the discovery rule to statutes of limitations in medical negligence cases." *Rathje,* 745 N.W.2d at 462 (emphasis added).

Alternatively, Plaintiffs contend that Section 6856 (as construed by *Dunn*) violates their constitutional right to equal protection under the law. A statute that treats similarly-situated claimants differently violates the constitutional right to equal protection. *Reyes v. Kent General Hospital, Inc.,* 487 A.2d 1142 (Del. 1984). Plaintiffs submit that their wrongful death claim will be treated differently from at least three classes of other similarly-situated claimants should their complaint be dismissed.

First, tort claimants who have a claim against a health care professional are treated differently from those who have any other tort claim, because the

discovery rule is unavailable to them. *ISN Software Corp. v. Richards, Layton & Finger, P.A.*, 226 A.2d 727, 733 (Del. 2020) (holding that in order to ameliorate the harshness of the occurrence rule, the statute of limitations in tort is tolled under the discovery rule "when the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of."). Likewise, in *Brown v. E.I. duPont de Nemours and Co., Inc.*, this Court held that the statute of limitations only begins to run when "a legal injury is sustained," which the Court noted was "when plaintiffs were on notice of a potential tort claim." 820 A.2d 362, 369 (Del. 2003).

Second, tort claimants who have a long-latency claim against a health care provider are treated differently from a tort claimant who has a long-latency claim against a non-health care defendant. *Stagg v. Bendix Corp.*, 486 A.2d 1150 (Del. 1984) (statute of limitations involving long-latency diseases begins to run when the harmful effects of the disease first manifest and become physically ascertainable).

Third, Delaware law allows the statute to be tolled for fraud but not when the injuries are "inherently unknowable" (or occurred, as in this case) and "the injured party is blamelessly ignorant." *Hiznay v. Strange*, 415 A.2d 489 (Del. Super. Ct. 1980). Allowing a patient alleging medical negligence to toll the statute for fraud but not when she is blamelessly ignorant of an inherently unknowable injury (or, in

this case, without injury) is arbitrary and deprives patients of their right to equal protection under the law.

To summarize, *the division of tort victims into two classes*, medical negligence tort victims and all other tort victims, violates equal protection. *Kenyon*, 688 P.2d 961 (overruling *Landgraff*, upon which *Dunn* was based). Section 6856, as interpreted by *Dunn*, treats those tort claimants unequally. As such, Plaintiffs ask this Court to revisit *Dunn* and hold that Section 6856 is unconstitutional (facially or as applied) as it violates the right to a remedy and open access to the courts and the equal protection of the law.

CONCLUSION

For all of the reasons set forth above, the decision below should be affirmed.

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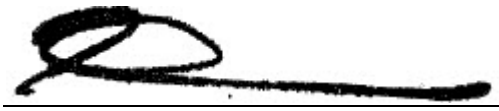

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