EFiled: Sep 18 2020 03:15PM EDT
Filing ID 65946067
Case Number 182,2020

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.	§	

REPLY BRIEF OF DEFENDANTS BELOW, APPELLANTS GI ASSOCIATES OF DELAWARE, P.A., ADVANCE ENDOSCOPY CENTER, LLC, AND NATWARLAL RAMANI, M.D.

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

/s/ Bradley J. Goewert
Bradley J. Goewert, Esquire (I.D. #4402)
Lorenza A. Wolhar, Esquire (I.D. #3971)
1007 N. Orange Street, Suite 600
P.O. Box 8888
Wilmington, DE 19899-8888
(302) 552-4328
Email: bjgoewert@mdwcg.com
Attorneys for Appellants/Defendants Below, GI Associates of Delaware, P.A., Advance Endoscopy Center, LLC and Natwarlal Ramani, M.D.

Dated: September 18, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

ARGUMENT IN REPLY

I. THE CONTINUOUS NEGLIGENT MEDICAL TREATMENT DOCTRINE DOES NOT APPLY TO TOLL THE STATUTE OF LIMITATIONS IN A CASE WHERE THERE IS ONLY ONE ACT OF ALLEGED NEGLIGENCE AND NO NEGLIGENT ACT OCCURRED WITHIN THE LIMITATIONS PERIOD SET FORTH IN 18 *DEL. C.* § 6856

Plaintiffs Below, Appellees, first argue that the Superior Court properly applied the continuous negligent medical treatment doctrine to toll the statute of limitations for five years to March 23, 2016, the date when Mr. King first learned he had cancer. (Answ. Br. at 8; Op. Br., Exhibit A, Memorandum Opinion at p. 14). Plaintiffs tacitly acknowledge that if the allegations in the complaint allege a cause of action for a single act of medical negligence, and the statute of limitations is not tolled, then the complaint is time-barred under 18 *Del. C.* § 6856. None of Plaintiffs' arguments support tolling the limitations period until Mr. King discovered his injury.

Under Section 6856, the two-year statute of limitations begins to run in a cause of action for a single act of medical negligence on the date of the alleged wrongful act or admission. *Dunn v. St. Francis Hospital, Inc.*, 401 A.2d 77, 81 (Del. 1979); *see also Ewing v. Beck*, 520 A.2d 653, 658 (Del. 1987) (discussing *Dunn*). The statute begins to run on the same date for "inherently unknowable injuries," but the limitations period is extended to three years. *Dunn*, *supra* at 81 ("[T]he three-year time period in Section 6856(1) runs from the time when the

wrongful act occurred and not from the time when that act was discovered."). The three-year time limit is a "finite cut off" for "inherently unknowable injuries." *Id.*

Plaintiffs argue that the statute of limitations in this case need not run from the date of an alleged wrongful act because this case involves a "continuum of negligent treatment." (Answ. Br. at 7). But there is no "continuum" of *negligent* medical treatment. There is just one alleged wrongful or negligent act, and that act occurred in April 2011 when Dr. Ramani recommended a follow-up colonoscopy in three-five years versus three years. (A-88-89). Plaintiffs do not dispute this. (*Id.*). Instead, they assert that the sole alleged negligent act was "inexorably related to the [non-negligent] colonoscopy in 2016 so as to constitute one continuing wrong." (Answ. Br. at 7). This argument cannot withstand scrutiny.

In *Ewing*, this Court stated that a single cause of action may be brought under the continuous negligent medical treatment doctrine "if *any* act of medical negligence" within a continuum of negligent medical care "falls within the period during which suit may be brought." *Ewing*, 520 A.2d at 662 (emphasis supplied). *Ewing* plainly contemplates that a cause of action for continuous negligent medical treatment involves more than one act of alleged negligence. Specifically, this Court stated:

> When there is a continuum of negligent medical care related to *a single condition* occasioned by negligence, the plaintiff has but one cause of action—for continuing negligent medical treatment. If <u>*any act of medical negligence*</u> within that continuum falls within

> the period during which suit may be brought, the plaintiff is not obliged to split the cause of action but may bring suit for the consequences of the entire course of conduct.

Id. (first emphasis in original; second emphasis supplied).

Plaintiffs and the Superior Court misconstrue the continuous negligent medical treatment doctrine. Both seize on the phrase "continuum of negligent treatment," and ignore the requirement that an "*act of medical negligence*" within that continuum must fall "within the period during which suit may be brought." *Ewing*, *supra* at 662 (emphasis supplied). Here, the only act of alleged medical negligence occurred in April 2011. Plaintiffs' complaint, filed seven years later, is thus time-barred. *Dunn*, *supra*.

The Superior Court's ruling, and Plaintiffs' argument, turn on the unsupported premise that the continuous negligent medical treatment doctrine allows a non-negligent act to toll the limitations period for an earlier negligent act that is time-barred. They focus on the fact that this Court in *Ewing* held that the statute of limitations begins to run in a cause of action under the continuous negligent medical treatment doctrine two years "from the 'the last' act in a negligent continuum before the patient had actual or constructive knowledge of the medical negligence." (Answ. Br. at 6, *citing Ewing*, *supra* at 663). The Superior Court held, and the Plaintiffs contend, that the "last act" triggering the statute of limitations in this case is the non-negligent colonoscopy that Dr. Ramani

performed in March 2016. (Op. Br., Exhibit A, Memorandum Opinion at p. 14). This argument fails because the follow-up colonoscopy was not negligently performed. *Ewing*, 520 A.2d at 662. Indeed, this Court's "synopsis" of the *Ewing* case provides that the "*statute of limitations begins to run at time of last act of negligence in the continuum*." *Ewing*, 520 A.2d at 653 (emphasis supplied). Plaintiffs concede this point in Section III of their brief by seeking alternative relief on the basis that *Ewing* "has been interpreted as requiring the last act in the continuum to be performed negligently." (Answ. Br. at 15).

This argument also fails because this Court did not eschew the limitations period set forth in 18 *Del. C.* § 6856 in adopting the continuous negligent medical treatment doctrine. To the contrary, this Court stated in *Ewing* that the "applicable statute of limitations is 18 *Del. C.* § 6856." *Ewing*, 520 A.2d at 658. The term "last act," for purposes of determining when the statute of limitations is triggered under the continuous negligent treatment doctrine, must thus be construed consistently with 18 *Del. C.* § 6856. The Superior Court's interpretation violates *Ewing* and Section 6856. Indeed, in *Ewing* this Court refused to adopt the "negligent treatment doctrine" because it would result in the "expansion of the limitation period that 18 *Del. C.* § 6856 was intended to avoid." *Id.* at 661. Because the Superior Court's application of the continuous negligent medical treatment doctrine results in the expansion of the limitation period that Section

6856 was intended to avoid, its ruling should be reversed.

In addition to misconstruing the continuous negligent medical treatment doctrine, Plaintiffs argue that various cases cited in Defendants' Opening Brief, *Dunn*, *supra*, *Meekins v. Barnes*, 745 A.2d 893 (Del. 2000), *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009) and *Stafford v. Ctr. for Neurology, Neurosurgery & Pain Mgmt., P.A.*, 2004 WL 1431734 (Del. May 28, 2004), are distinguishable. These arguments lack merit. None of the cases that Plaintiffs seek to distinguish holds, or even suggests, that the limitations period for a cause of action for continuous negligent medical treatment *begins to run from the date of a non-negligent act*. And, none holds that a cause of action for continuous negligent medical treatment applies to toll the limitations period where there is only one alleged, and time-barred, wrongful act.

In *Meekins*, for example, this Court addressed the complaint in the context of the continuous negligent medical treatment doctrine and construed the last act in the negligent continuum as an act of alleged *negligence*. The fact that plaintiff did not know about her potential claim at the time was irrelevant:

> Meekins had a cause of action as early as December 21 or December 22, 1994. *That is when Dr. Barnes examined the mammogram and reported to Dr. Dworkin, allegedly negligently and inaccurately*, that there were no signs of cancer, no change from prior mammograms and *recommended* continued annual examinations in spite of Meekins' medical history. Under the Delaware medical malpractice statute, the fact that Meekins did not know of the potential claim for

> negligent diagnosis and recommendation until December 1995 did not toll the beginning of the two-year statute of limitations.

Meekins, 745 A.2d at 900 (emphasis supplied). Here, the last and *only* alleged negligent act occurred in April 2011, when Dr. Ramani recommended a return colonoscopy in three-five years. *Meekins* also confirms that the limitations period set forth in 18 *Del. C.* § 6856 applies to a cause of action for continuous negligent medical treatment. Under Section 6856, the statute of limitations begins to run from an alleged negligent act and is not tolled until an injury is discovered. *Ewing*, 520 A.2d at 663; *see also Meekins*, 745 A.2d at 900.

Plaintiffs correctly note that *Dunn* did not involve the application of the continuous negligent medical treatment doctrine. (Answ. Br. at 9). But this argument misses the mark. *Dunn* is significant because in interpreting 18 *Del. C.* § 6856, this Court rejected the discovery rule in medical negligence cases. *Dunn*, *supra* at 81. Plaintiffs wrongly seek to revive that rule in the context of this case. They argue that the Superior Court properly tolled the limitations period until March 2016, when Mr. King learned for the "first time" that he had cancer. (Answ. Br. at 8, 20).

Plaintiffs attempt to distinguish *Meekins* and *Dambro*, *supra*, on the basis that the patients in those cases "had actual knowledge of the medical negligence within two years of the negligence." (Answ. Br. at 9). This argument also misses the mark. Neither of those cases hold, in contravention of *Dunn*, that the statute of

limitations is tolled under the continuous negligent medical treatment doctrine until a plaintiff has actual knowledge of medical negligence. Moreover, this Court in *Ewing* acknowledged that a cause of action for continuous negligent medical treatment may involve an inherently unknown injury. Under those circumstances, the statute of limitations expires in three years—just as in any other medical negligence action. *Ewing*, 520 A.2d at 664 (*citing Dunn*, *supra*).

Plaintiffs' attempt to distinguish *Stafford* also fails. They blatantly ignore the fact that this Court stated that the statute of limitations under the continuous negligent medical treatment doctrine "begins to run *from the date of the last episode of medical negligence* in the continuum of treatment." *Id.* at *1. Plaintiffs make no effort whatsoever to explain why this is an incorrect statement of Delaware law.

Lastly, Plaintiffs argue that this Court should reject past precedent because it "has never confronted a fact-pattern like this one." (Answ. Br. at 12). This argument lacks merit.

Plaintiffs contend that if the statute of limitations begins to run from the date of the alleged wrongful act, *see, e.g.*, *Dunn*, *supra*, this "would establish a limitations hurdle that could never be surmounted." (*Id.*). But Mr. King is no different than any other "blamelessly ignorant" patient whose medical negligence action is barred by the three-year limitations period applicable to "inherently

unknowable" injuries. *Ewing*, 520 A.2d at 658; *see also Dunn*, 401 A.2d at 79. This Court in *Ewing* acknowledged that "[t]he apparent injustice of barring a plaintiff's action before he could have reasonably been aware that he had a claim is patent." *Ewing*, 520 A.2d at 663, n.12. Nevertheless, the clear language of 18 *Del. C.* § 6856 "provides a three-year maximum for medical malpractice actions." *Id.*

For the reasons set forth above and in Defendants' Opening Brief, the Superior Court erred in applying the continuous negligent medical treatment doctrine to toll the limitations period until the date that Mr. King discovered his injury. Accepting the Superior Court's reasoning, under the guise of the continuous negligent medical treatment doctrine, would amount to application of a discovery rule which the legislature and this Court have rejected.

II. THE DEFINITION OF THE TERM "INJURY" AS SET FORTH IN 18 *DEL. C.* § 6856 IS HIGHLY RELEVANT TO A CAUSE OF ACTION FOR CONTINUOUS NEGLIGENT MEDICAL TREATMENT

Plaintiffs argue that the definition of "injury" in 18 *Del. C.* § 6856 is irrelevant to the central issue of whether the Superior Court correctly applied the continuous negligent medical treatment doctrine. This entire argument, consisting of two short paragraphs, lacks merit. (Answ. Br. at 13-14).

The thrust of Plaintiffs' argument is that the definition of the term injury is irrelevant because "the Superior Court never interpreted or applied 18 *Del. C.* § 6856 in its opinion." (Answ. Br. at 13). Plaintiffs are wrong. The Superior Court stated: "For purposes of Section 6856, the date upon which the 'injury' occurred depends on whether the case involves a single act of negligence or a continuous course of negligent medical treatment." (Op. Br., Exhibit A, Memorandum Opinion at pp. 3-4). The statute of limitations in a medical negligence action begins to run from the date upon which the "injury" occurred. *Dunn*, 401 A.2d at 80. For the purpose of construing § 6856, this is the date of the alleged wrongful act or admission. *Id.*; *see also Ewing*, 520 A.2d at 663.

As set forth above, this Court held that the limitations period set forth in 18 *Del. C.* § 6856 applies to a cause of action for continuous negligent medical treatment. *Ewing*, 520 A.2d at 662. Consequently, the definition of the term "injury" in 18 *Del. C.* § 6856 is highly relevant to the central issue in this appeal.

In addition, Plaintiffs present arguments in the alternative on appeal that directly relate to the definition of the term "injury." (Answ. Br. at 20-36). For this reason too, the definition is not irrelevant.

III. THE CONTINUOUS NEGLIGENT MEDICAL TREATMENT DOCTRINE SHOULD NOT BE MODIFIED TO TOLL THE STATUTE OF LIMITATIONS UNTIL THE "LAST ACT OF TREATMENT" WHERE A SINGLE ACT OF NEGLIGENCE IS ALLEGED

Plaintiffs next ask for relief in the alternative. They concede that *Ewing* has been interpreted as requiring the last act in an alleged continuum of negligent medical treatment "to be performed negligently," which renders the Superior Court's ruling erroneous. (Answ. Br. at 15). Consequently, they ask this Court follow the "majority of state courts" that have adopted a "form" of the continuous negligent medical treatment doctrine that tolls the statute of limitations "until the last act of treatment related to the initial negligence, regardless of whether or not the last act was negligently performed." (*Id.*).

The doctrine that Plaintiffs ask this Court to adopt is not a "form" of the continuous negligent medical treatment doctrine. Rather, they are asking this Court to adopt the "continuing medical treatment" doctrine. Under this doctrine:

> [T]he statute of limitations for a medical malpractice action would begin to run on the last day the plaintiff received treatment from the defendant health care provider for the same or related condition which is the subject matter of the Complaint, whether or not negligence continued throughout the entire course of treatment.

Ewing, 520 A.2d at 659.

In refusing to adopt the continuing treatment doctrine in *Ewing*, this Court acknowledged that the doctrine "has been recognized in many jurisdictions." *Id.* at

660. Nevertheless, it concluded that the doctrine was not the law in Delaware because it had not been adopted by the legislature when it enacted 18 *Del. C.* § 6856. *Id.* The Court declined to soften the harshness of the statutory accrual rule existing in 18 *Del. C.* § 6856 by "judicial legislation." *Id.* at 661. In doing so, it noted that "[s]ince at least 1907, this Court has refused to rewrite clear statues of limitations to provide exceptions." *Id.* at 660. The negligent treatment doctrine would have resulted in "the expansion of the limitation period that 18 *Del. C.* § 6856 was intended to avoid." *Id.* at 661.

Plaintiffs present no compelling reason for why this Court should engage in "judicial legislation" in this case. In support of their argument, they string cite twenty-two cases from other jurisdictions, and assert that they "all reflect that the modern trend is to hold that the limitations period begins to run from the date of the 'last act' before the patient received the correct diagnosis, whether or not the last act was negligently performed." (Answ. Br. at 16). But most of the cases pre-date *Ewing*. They most certainly don't reflect a "modern trend." And even if they did, this Court has "no alternative but to enforce Section 6856 in accordance with its plain terms," even if it produces an unfortunate result. *Ewing*, 520 A.2d at 660 (*quoting Reyes v. Kent General Hospital, Inc.*, 487 A.2d 1142, 1146 (Del. 1984)).

Plaintiffs discuss only one case, *Parr v. Rosenthal*, 57 N.E.3d 947 (Mass. 2016), in advocating for adoption of the continuing treatment doctrine. *Parr* is

inapposite. Unlike Delaware, there was no "explicit legislative direction" that precluded the court in *Parr* "from recognizing a continuing treatment exception in determining when a medical malpractice cause of action accrues." *Parr*, 57 N.E.3d at 958. And, unlike Delaware, the discovery rule applies to the statute of limitations for medical malpractice claims in Massachusetts. *Id.* at 956. *Parr* does not compel reversal of *Ewing*.

In short, Plaintiffs are not asking this Court to adopt a different "form" of the continuous negligent medical treatment doctrine. Instead, they ask this Court, in the alternative, to adopt the continuing treatment doctrine which is inconsistent with 18 *Del. C.* § 6856 and has been previously rejected. *Ewing*, 520 A.2d at 660–64. States that have adopted the continuous negligent medical treatment doctrine, like Delaware, hold that the limitations period does not begin to run "until the date of the last act of negligence." *See, e.g.*, *Baker v. Farrand*, 26 A.3d 806, 816 (Ma. 2011).

IV. THERE IS NO BASIS TO OVERTURN *DUNN* AND A DISCOVERY RULE IS INCONSISTENT WITH LEGISLATIVE INTENT OF 18 *DEL. C.* § 6856

Continuing to cover all bases in an effort to extend the statutorily mandated limitations period applicable to medical negligence actions, Plaintiffs also argue in the alternative that *Dunn* should be overruled and a discovery rule adopted in cancer cases. (Answ. Br. at 20). Plaintiffs contend that *Dunn* has been improperly applied in cancer cases such as *Meekins* and *Dambro*. Like the plaintiffs in *Dunn*, *Meekins* and *Dambro*, Plaintiffs seek to alter the date on which the "injury occurred" for purposes of the beginning of the limitations period under Section 6856. This argument has been repeatedly rejected, and should be rejected here.

Plaintiffs contend that *Dunn* is irrelevant in this appeal because it does not involve the continuous negligent medical treatment doctrine, that the holding in *Dunn* is contrary to the plain language of 18 *Del. C.* § 6856 and that the primary case on which *Dunn* relies has been overturned. (Answ. Br. at 20). These arguments fail.

First, this Court in *Ewing* applied *Dunn* in adopting the continuous negligent medical treatment doctrine. *Ewing*, 520 A.2d at 663. Moreover, both *Meekins* and *Dambro*, which rejected the argument that Plaintiffs make here, involved consideration of the continuous negligent medical treatment doctrine. *Meekins*, 745 A.2d at 899, *Dambro*, 974 A.2d at 126. *Dunn* is not rendered irrelevant

because this case involves an allegation of continuous negligent medical treatment.

Second, *Dunn* is not contrary to the plain language of 18 *Del. C.* § 6856. In *Dunn*, this Court held that "there is no doubt that the [statutory] phrase 'injury occurred' refers to the date when the wrongful act or omission occurred." *Dunn*, 401 A.2d at 77. This holding was reaffirmed in *Meekins* and *Dambro* when plaintiffs challenged the continued viability of *Dunn* and its interpretation of 18 *Del. C.* § 6856 in the context of a cancer case. *Meekins*, 745 A.2d at 897-898, *Dambro*, 974 A.2d at 126. There is no legitimate basis to reach a contrary conclusion in this case. The statutory phrase has remained unchanged since the *Dunn* Court interpreted the statute.

To the extent that Plaintiffs cite statutes from other jurisdictions, they have no bearing in this case. (Answ. Br. at 22). The focus in interpreting 18 *Del. C.* § 6856 is what the Delaware legislature intended when it enacted the statute in 1976. The intent was "to eliminate the uncertainty created by the present open-ended period of limitations." *Dambro*, 974 A.2d at 130. The uncertainty that the legislature intended to avoid would be created if *Dunn* is overturned and a discovery rule is adopted.

Third, this Court's decision in *Dunn* was not based on a decision of an Arizona intermediate appellate court. (Answ. Br. at 22). Plaintiffs claim that the only "authority" the *Dunn* Court relied on in defining the date of injury as the date

of the negligent act, is the case of *Landgraff v. Wagner*, 546 P.2d 26 (Ariz. Ct. App. 1976). (Answ. Br. at 22, 23). Plaintiffs mischaracterize *Dunn*. In determining "whether the statute of limitations commenced to run when the negligent act or omission was committed or when the harm first manifested itself to the patient," the Court looked to the plain language of the statute itself and its legislative history. *Dunn*, 401 A.2d at 79. It stated that the question could be answered "on the face of the statute itself," and that "an examination of the legislative history confirms the conclusion." *Id.* After examining the legislative history, this Court held "there is no doubt that the phrase 'injury occurred' refers to the date when the wrongful act or omission occurred." *Id.* at 80. The *Dunn* Court's interpretation of 18 *Del. C.* § 6856 was not based on *Landgraff*.

Plaintiffs also assert that *Dunn* was "wrongly decided" because the *Dunn* Court "disregarded the plain meaning of the statute" and failed to consider the 'common law meaning of personal injury" as it was required to do. (Answ. Br. at 23). These arguments fail for the reasons set forth above. "When deciding questions of statutory construction, this Court must 'ascertain and give effect to the intent of the legislature.'" *Dambro*, 974 A.2d at 129 (*quoting Delaware Bay Surgical Serv. v. Swier,* 900 A.2d 646, 652 (Del. 2006)). This Court's interpretation of 18 *Del. C.* § 6856, as set forth in *Dunn* and reaffirmed in *Meekins* and *Dambro*, is fully consistent with the intent of the legislature. Insofar as

Plaintiffs contend that Defendants are seeking an "extension of *Dunn*," this makes no sense. (Answ. Br. at 24). *Dunn* interpreted Section 6856, and the challenged portion of the statute has not changed. The Delaware General Assembly has had ample opportunity to legislatively overrule *Dunn*, *Meekins* and *Dambro*, but has declined to do so.

It is unavoidable that statutes of limitation will "cause harsh results on occasion." *Delaware Solid Waste Authority v. News-Journal Company*, 480 A.2d 628, 634 (Del. 1984). But it is not the province of this Court to expand the limitations period set forth in Section 6856, as Plaintiffs urge this Court to do. *Ewing*, 520 A.2d at 661.

V. 18 *DEL. C.* § 6856 PASSES CONSTITUTIONAL SCRUTINY

In a final effort to avoid this Court's past precedent and the limitations period set forth in 18 *Del. C.* § 6856, Plaintiffs argue that this Court should follow the "majority of courts" and "find Section 6856 unconstitutional in the absence of a limited discovery rule." (Answ. Br. at 26). This Court held in *Dunn* that Section 6856 is constitutional, and there is no basis to reach a different conclusion in this case.[1]

In *Dunn*, this Court examined and rejected the plaintiffs' argument that 18 *Del. C.* § 6856 is unconstitutional if the phrase "injury occurred" refers to the date on which the wrongful act or omission occurred. *Dunn*, 401 A.2d at 80. The Court held that the statute does not violate the constitutional provision that "all courts shall be open, and every man for an injury done him in his person shall have remedy by due course of law." *Id.* at 79. This Court subsequently held that the statute also does not deny plaintiffs due process or equal protection of the law. *Reyes*, 487 A.2d at 1146.

Plaintiffs challenge the *Dunn* Court's conclusion that Section 6856 is constitutional. (Answ. Br. at 29). They contend that one of the cases the Court referenced in its constitutional analysis, the Arizona case of *Landgraff*, *supra*, was

---

[1] Initially, Defendants assert that there are sufficient state law grounds on which to decide this interlocutory appeal. Consequently, this Court should decline to address the various constitutional arguments, presented in the alternative, by Plaintiffs. *Dambro*, 974 A.2d at 129, n.16 (Del. 2009).

overturned by *DeBoer v. Brown*, 673 P.2d 912, 914 (Ariz. 1983). The Arizona statute in effect at the time of *DeBoer* was subsequently held unconstitutional in *Kenyon v. Hammer*, 688 P.2d 961 (Ariz. 1984), in part because it was "contrary to [the] purpose of the discovery rule." *Id.* at 979. The Delaware General Assembly, however, specifically repudiated a medical malpractice "discovery rule" by passing Section 6856. *Ewing*, 520 A.2d at 658. Arizona's twisted litigation history does not undermine *Dunn*. In addition, this Court cited various other cases in rendering its ruling on the constitutionality of Section 6856. *Dunn*, 401 A.2d at 81 (citing cases).

Plaintiffs also highlight another case cited in *Dunn*, the case of *Owen v. Wilson*, 537 S.W.2d 543 (Ark. 1976), and contend that it constitutes an "inadequate legal foundation" for the *Dunn* decision. (Answ. Br. at 29). According to Plaintiffs, it is "inadequate" because the Arkansas Supreme Court subsequently adopted the continuous treatment doctrine. But this has no impact on the quoted portion of *Owen*, namely, that Courts should generally defer to a legislative determination regarding a statutory limitations period unless the time period is unreasonable. *Dunn*, 401 A.2d at 80. In fact, this Court has adhered to this general legal principle for over one-hundred years. *Ewing*, 520 A.2d at 653 ("Since at least 1907, this Court has refused to rewrite clear statutes of limitations to provide exceptions.").

In a continuing effort to re-litigate *Dunn*, Plaintiffs also take issue with a case that was not even cited by this Court in *Dunn*—the New Jersey case of *Rosenberg v. Town of N. Bergen*, 293 A.2d 662 (N.J. 1972). *Rosenberg* was referenced in the *Dunn* Superior Court opinion. Plaintiffs highlight *Rosenberg* because it provided that the statute of limitations did not run until a wrong was discovered. (Answ. Br. at 30). Plaintiffs then direct this Court to *Fernandi v. Strully*, 173 A.2d 277 (N.J. 1961), a case referenced in *Rosenberg* and not addressed at all in the context of *Dunn*. These cases have no bearing on the constitutionality of 18 *Del. C.* § 6856. At best, they show that New Jersey has adopted the discovery rule in the context of medical malpractice cases.

Next, Plaintiffs assert that, since *Dunn*, numerous other state courts have held "that legislation designed to abrogate the common law discovery rule in medical malpractice cases violated state constitutional provisions." (Answ. Br. at 30). Plaintiffs string cite several cases, but fail to develop any argument to show how those cases or unspecified constitutional provisions render 18 *Del. C.* § 6856 unconstitutional. This argument is not persuasive, especially given the unique legislative history of 18 *Del. C.* § 6856.

Switching gears, Plaintiffs argue that the Pennsylvania Supreme Court's recent decision in *Yanakos v. UPMC*, 218 A.3d 1214 (Pa. 2019), supports a conclusion that 18 *Del. C.* § 6856 is unconstitutional. (Answ. Br. at 30-32).

Yanakos did not address the constitutionality of a statute of limitations. It addressed a statute of repose. *Yanakos*, 218 A.3d at 1223. Moreover, the Pennsylvania Supreme Court acknowledged that the right to a remedy is *not* a fundamental right. *Id.* at 1222. In any event, *Yanakos* turned on the lack of evidence to show that the seven-year repose period had a substantial relationship to the legislative goal of controlling malpractice insurance costs by providing actuarial predictability to insurers. *Id.* at 1226. The Pennsylvania Supreme Court noted that the statute of repose, as enacted, did not offer insurers a definite period after which there will be no liability "because it exempts foreign objects cases and minors, so insurers still have to account for those unpredictable 'long-tail' cases in calculating malpractice insurance premiums." *Id.*

The legislative of goal of 18 *Del. C.* § 6856 is set forth in the report to the Governor by the statute's drafting committee, which provides: "The overall effect [of the Medical Malpractice Act] will be to eliminate the uncertainty created by the present open-ended period of limitations." *Dambro*, 974 A.2d at 130 (*quoting* Report of the Delaware Medical Malpractice Commission, at 3–4, Feb. 26, 1976). The statute was enacted because of "concern over the rising cost of malpractice liability insurance." *Dunn*, 401 A.2d at 79. The rising costs "led in some instances" to "the withdrawal of liability insurance companies from the business of insurance health care providers in Delaware." *Id.* at 79, n.1. This, in turn,

endangered "the ability of the citizens of Delaware to continue to receive quality health care as well as adequate and just compensation for negligent injuries." *Id.* The General Assembly thus considered the ability of citizens to be compensated in the event of medical malpractice when creating the more stringent limitations periods set forth in Section 6856.

Unlike the repose statute in *Yanakos*, 18 *Del. C.* § 6856 does not specifically exempt unpredictable "long-tail" cases, thereby offering insurers a definite period after which there will be no liability. And, unlike the repose statute in *Yanakos*, 18 *Del. C.* § 6856 has a substantial relationship to the legislative goal of controlling insurance costs so that insurance companies do not continue to leave the jurisdiction. *Yanakos* is inapposite and unpersuasive.

Next, Plaintiffs argue in another alternative, that Section 6856 should be deemed unconstitutional as applied to the facts of this case. (Answ. Br. at 33). This is yet another variation of Plaintiffs' argument that Delaware should adopt a discovery rule for medical negligence claims. Plaintiffs claim that there was no injury to discover before the limitations period expired. Putting aside that this is not true given the legal definition of injury, the mere fact that Plaintiffs claim is time-barred, does not render Section 6856 unconstitutional. It is unavoidable that statutes of limitation will "cause harsh results on occasion." *Delaware Solid Waste Authority*, 480 A.2d at 634.

In a final alternative argument, Plaintiffs contend that Section 6856, as construed in *Dunn*, violates their constitutional right to equal protection under the law. (Answ. Br. at 34). Plaintiffs assert that medical tort victims are treated differently than all other tort victims. (Answ. Br. at 36). Plaintiffs urge this Court to revisit *Dunn* and hold Section 6856 unconstitutional.

This Court has already revisited the issue. In *Reyes*, *supra*, this Court held that the running of the statute from the time of the alleged wrongful act or omission is not a denial of equal protection. 487 A.2d at 1146. Regardless, state legislatures have broad discretion in enacting laws which affect some groups of citizens differently from others. *McGowan v. Maryland*, 366 U.S. 420 (1961). Such classifications are prohibited only when they arbitrarily or irrationally discriminate among similarly situated persons. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). Plaintiffs have presented no argument to show, especially in light of the legislative history of 18 *Del. C.* § 6856 and the fact that a fundamental right is not at issue, that the limitation periods applicable in medical negligence actions are arbitrary or irrational. To the contrary, the legislative classifications bear a "rational relationship" to the legitimate state purpose set forth above. *Zobel v. Williams*, 457 U.S. 55 (1982).

CONCLUSION

For the reasons stated herein and in the opening brief, the opinion of the Superior Court should be reversed and the instant case dismissed based on existing Delaware law. Moreover, all of the arguments raised by Plaintiffs in the alternative should be rejected.

Respectfully submitted,

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN

/s/ Bradley J. Goewert

Bradley J. Goewert, Esquire (I.D. #4402)
Lorenza A. Wolhar, Esquire (I.D. #3971)
1007 N. Orange Street, Suite 600
P.O. Box 8888
Wilmington, DE 19899-8888
(302) 552-4328
Email: bjgoewert@mdwcg.com
Attorneys for Appellants/Defendants Below, GI Associates of Delaware, P.A., Advance Endoscopy Center, LLC and Natwarlal Ramani, M.D.

Dated: September 18, 2020

LEGAL/132691720.v1