SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

February 3, 2006

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RE: Condon, *et al.* v. Neighborcare, Inc., *et al.*, C.A. No. 05C-04-005

DATES SUBMITTED: January 19, 2006

Dear Counsel:

Pending before the Court are two lawsuits which have been filed as a result of Patricia Conway's death, allegedly because the oxygen concentrator to which she was hooked up was defective. These suits are captioned Condon, *et al.* v. Neighborcare, Inc., C.A. No. 04C-12-012 ("Condon I") and Condon, *et al.* v. Neighborcare, Inc., *et al.*, C.A. No. 05C-04-005 ("Condon II"). The defendants in the respective lawsuits have filed motions to dismiss the complaints. I entertained oral argument in both matters on January 19, 2006. At that time, I allowed for further discovery in Condon I and explained I would be dismissing the complaint in Condon II. This is my decision granting defendants' motion to dismiss Condon II.

In order to address Condon II, I first must discuss Condon I.

On December 21, 2004, Ralph M. Condon, Sr., individually, and as administrator of the Estate of Patricia Conway; Hunter K. Conway, Jr.; and Hunter K. Conway, Sr. filed their first complaint against Neighborcare, Inc. The Superior Court Civil Case Information Statement ("CIS") form, which was filed with the complaint, stated the civil case type was "Personal Injury".

The complaint contains the following allegations. Patricia Conway died on January 30, 2003. "Defendant owns and operates a skilled nursing care facility known as the Seaford Retirement and Rehabilitation Center ("Seaford Center") located at 1100 Norman Eskridge Highway, Seaford, Delaware, 19973." Shortly before she died, Patricia Conway was admitted as a patient at the Seaford Center. Her doctor prescribed the use of an oxygen concentrator. Her oxygen levels decreased and she was taken to Nanticoke Hospital. While at the hospital, her oxygen levels rose back up. When she was transferred back to the Seaford Center, those levels went back down. This pattern of fluctuating oxygen levels and transfers between facilities was repeated over a period of a few weeks. Finally, on the morning of January 26, 2003, the Seaford Center contacted her son Ralph M. Condon, Sr. ("Condon") and informed him that Patricia Conway's oxygen level had dropped to 33%. Condon is an Emergency Medical Technician and he took an oxygen bottle from his vehicle to hook up to Patricia Conway. Specifically, the complaint alleges:

> 22. Mr. Condon disconnected the Seaford Center's concentrator and connected his oxygen bottle. While disconnecting the Seaford Center's concentrator, Mr. Condon noticed that there was very little air going through the tubing.

23. After Mr. Condon connected his oxygen bottle, his mother's oxygen levels immediately began to rise.

24. Mr. Condon immediately contacted the nurse on duty, Teresa Atkins ("Ms. Atkins") and told her about the problem with the concentrator.

25. Ms. Atkins immediately disconnected Mr. Condon's oxygen bottle and reconnected the Seaford Center's concentrator. Again, decedent's oxygen levels began to drop while hooked up to this concentrator.

26. Ms. Atkins also noticed that the Seaford Center concentrator was emitting very little air and went to the supply room to retrieve another concentrator.

27. Ms. Atkins disconnected the faulty concentrator and connected the supply room concentrator to decedent. Decedent's oxygen levels began to immediately rise upon being connected to the supply room concentrator.

28. Decedent used the defective concentrator for over two weeks.

29. Decedent's oxygen levels dropped precipitously as a result of the use of the defective concentrator.

30. This loss of oxygen caused decedent's health to rapidly deteriorate ultimately leading to her death on January 30, 2003.

COUNT - ONE

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32. Defendant owed a duty of care to their patient to maintain the medical equipment in their facility in proper working condition.

33. Defendant breached their duty of care by failing to maintain the concentrator in proper working order.

34. As a direct and proximate result of Defendant's negligence, Decedent's health rapidly deteriorated resulting in her death on January 30, 2003....

The alleged negligence was discovered on January 26, 2003. Decedent died on January 30, 2003. The two year statutes of limitations for a wrongful death claim (10 Del. C. § 8107), a

personal injury claim (10 Del. C. § 8119), and a malpractice claim (18 Del. C. § 6856) passed in late January, 2005.

On January 19, 2005, Neighborcare, Inc. filed an answer. Its only admission was that it is a Pennsylvania corporation which does business in Delaware. Most of its answers were that it was without knowledge and therefore, it denied the allegations. However, it outright denied the following allegations: that it owned and operated the Seaford Center; that it had anything to do with transferring decedent to Nanticoke Hospital; that the concentrator was "faulty" or "defective", as alleged in paragraphs 27, 28 and 29 of the complaint; and that it owed any duty to decedent or that it breached any duty of care or that its negligence resulted in damages to the various plaintiffs. Neighborcare, Inc. also asserted some affirmative defenses.

On March 1, 2005, Neighborcare, Inc. filed a motion for judgment on the pleadings. Therein, it argued as follows. Plaintiffs are stating a claim for negligence against Neighborcare, Inc. as a health care provider by alleging that Neighborcare, Inc. is the owner of the facility, that Neighborcare, Inc. had a duty to its patient, and that Neighborcare, Inc. breached this duty by not maintaining the equipment in good working order. If the claim is against Neighborcare, Inc. as a health care provider, then the complaint had to comply with Chapter 68 of 18 Del. C. ("Medical Negligence Act"). Thus, plaintiffs were required to file with the complaint an Affidavit of Merit in accordance with 18 Del. C. § 6853. Filing the Affidavit of Merit with the complaint is jurisdictional, and the complaint must be dismissed since no Affidavit of Merit was filed.

On March 29, 2005, plaintiffs filed a motion to amend the complaint to add parties.[1] On

[1]Specifically, plaintiffs seek to add the following entities as defendants: Genesis Eldercare Rehabilitation Services, Inc., t/a Genesis Rehabilitation Services, a Pennsylvania Corporation; Genesis Eldercare Network Services, Inc., f/k/a Genesis Management Resources, t/a

March 20, 2005, plaintiffs filed an Affidavit of Merit.

On April 5, 2005, plaintiffs filed Condon II. The CIS form attached to the complaint states that the case is a malpractice case.

In this second suit, the plaintiffs are the same as in the original. The defendants are: Neighborcare, Inc., a Delaware Corporation, f/k/a Genesis Health Ventures; Genesis Eldercare Rehabilitation Services, Inc., a Pennsylvania Corporation, t/a Genesis Rehabilitation Services; Genesis Eldercare Network Services, Inc., a Pennsylvania Corporation, f/k/a Genesis Management Resources, t/a Genesis Health Care; and Genesis Eldercare Corp., a Delaware Corporation, t/a Genesis Eldercare.

The second complaint is identical to the one in the original suit except for the following specified areas.

First, this second complaint alleges Neighborcare, Inc. is a Delaware corporation while the first complaint alleged Neighborcare, Inc. is a Pennsylvania corporation. Second, the complaint names the additional parties and it states: "Defendants have an ownership interest in and/or own and/or operate a skilled nursing care facility known as" the Seaford Center. Third, the complaint alleges:

> Upon information and belief a series of corporate spinoffs occurred in late 2003 whereby Genesis Health Ventures split into Genesis Health Care and

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Genesis Health Care, a Pennsylvania Corporation; and Genesis Eldercare Corp., t/a Genesis Eldercare, a Delaware Corporation. The amended complaint alleges that Neighborcare, Inc., the original defendant, is formerly known as Genesis Health Ventures. The amended complaint alleges that all of the defendants "have an ownership interest in and/or own and/or operate a skilled nursing care facility known as" the Seaford Center. Otherwise, the amended complaint is the same as the original. Attached to the amended complaint are Notices of Intent to Investigate dated March 29, 2005, which were sent to each of the defendants. The Court will not address the motion to amend until the motion to dismiss is decided.

Neighborcare. Genesis Health Care further split into Genesis Eldercare and Genesis Rehabilitation Servies [sic].

Plaintiffs attached to the second complaint the following documents: copies of Notices of Intent to Investigate dated March 29, 2005, which are addressed to each of the defendants, and Plaintiffs' Answers to Form 30 Interrogatories, which state that they have retained Dr. Robert W. Irwin of Troy, New York, as an expert. Plaintiffs also filed an Affidavit of Merit.

Neighborcare, Inc. was served on April 18, 2005. The remaining defendants were served on April 22, 2005.

Defendants filed a motion to dismiss the complaint in Condon II.

Defendants advance a multitude of grounds in support of their motion to dismiss. I only consider the argument that the complaint is time-barred.[2] They argue as follows. Condon II states a medical malpractice claim. It could not have been filed any later than two (2) years from the date of the injury, which was January 26, 2003. Condon II was not filed until April 5, 2005.

In their response to the motion to dismiss, plaintiffs state: "The gravaman [sic] of the [first] complaint is that Defendants were negligent in their failure to properly maintain and use of [sic] a defective oxygen concentrator." Plaintiff's [sic] Response to Defendants ... Motion to Dismiss Complaint at ¶ 3. Plaintiffs argue that the first lawsuit, which they

[2]Defendants argue that the claim is for vicarious liability, and if the health care provider whose actions are at issue cannot be liable, then the party against whom vicarious liability is sought cannot be liable. They also argue that service of process was not accomplished with regard to the following defendants: Genesis Eldercare Rehabilitation Services, Inc.; Genesis Eldercare Network Services, Inc.; and Genesis Eldercare Corporation. Plaintiffs served them through The Corporation Trust Company. That is not their registered agent. Instead, their registered agent is Corporation Service Company. Defendants' final argument is that plaintiffs have split their claims by filing these two suits and such is not permissible.

maintain was **not** a malpractice suit, was filed within the statute of limitations. They argue that the filing of this original complaint stopped the running of the statute of limitations for a medical malpractice action. They also argue that by sending a Notice of Intent to investigate, they tolled the statute of limitations for an additional ninety (90) days.

I first address the argument that the filing of the original complaint stopped the running of the medical malpractice statute of limitations. That argument does not make sense. The complaint in Condon I would have to be deemed a medical malpractice complaint in order for any tolling of the medical malpractice statute of limitations to have taken place and the statute then only would be tolled as to Neighborcare, Inc., not to the other parties. Since there already would be one suit against Neighborcare, Inc., then the second suit, which would in actuality be duplicative of the first, would have to be dismissed. Thus, this argument, when applied logically, fails.

Plaintiffs also argue that the Notices of Intent toll the statute of limitations for an additional ninety (90) days. They argue, in effect, that the Notices of Intent, sent two months after the statute of limitations passed, revived the statute of limitations.

This argument requires me to examine the fairly recent legislative history of the Medical Negligence Act. The Legislature amended the Medical Negligence Act in July, 2003, by way of House Bill 310, 74 Del. Laws, ch. 148 (2003). The amendment became effective October 9, 2003. The amendment amended 18 Del. C. § 6856 to provide for a tolling of the medical malpractice statute of limitations if Notices of Intent to investigate were sent to defendants. The statute provides in pertinent 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:
>
> (3) 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(s) by certified mail, return receipt requested, at the defendant(s') regular place of business. The notice shall state the name of the potential defendant(s), 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 statue 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 provide compliance with the statute of limitations.

18 Del. C. § 6856.

The synopsis to House Bill 310 provided in pertinent part:

> Additionally a process to allow up to ninety (90) days to investigate a potential negligence claim is added and would extend the medical malpractice statute of limitations accordingly. It is expected that this grace period will give plaintiffs an opportunity to determine whether a potential claim has merit and will result in some lawsuits that might otherwise be filed not being filed.

The statute, by its clear language, says that the statute of limitations on a malpractice action is tolled by sending a Notice of Intent to investigate. The word "toll" means:

> (Of a time period, esp. a statutory one) to stop the running of; to abate <toll the limitations period>.

Black's Law Dictionary (8th ed. 2004) and (7th ed. 1999).

In order to stop the running of the statute of limitations, it must not already have run. Thus, in this case, because the statute of limitations on the medical malpractice claim already had run, plaintiffs could not file their second suit. Sending Notices of Intent to investigate approximately two months after the statute of limitations had run did not revive the statute of

limitations. This second complaint is time barred and must be dismissed.

For the foregoing reasons, the complaint in Condon II is dismissed.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotary's Office