Control No. 15080755

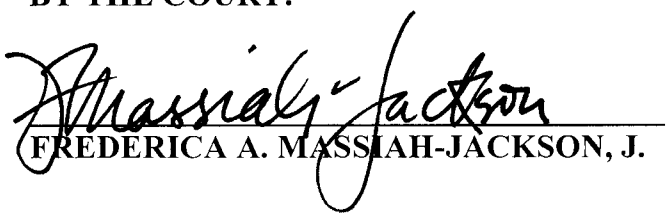
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JACK WOLFBERG **Plaintiff** vs. VIDYA SAGAR BANKA, M.D., VIDYA S. BANKA, M.D. & ASSOCIATES, BANKA & BANKA MEDICAL SPECIALTIES, P.C., PENNSYLVANIA HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM, PENN MEDICINE t/d/b/a PENNSYLVANIA HOSPITAL, THE UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM, and THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA **Defendants**	:	DECEMBER TERM, 2013 NO. 3574 Wolfberg Vs Banka Etal-ORDER 13120357400110

ORDER

And Now, this 22nd day of October, 2015, after considering the Motion for Judgment on the Pleadings based on the MCARE Act's Statute of Repose, filed by the Banka Defendants, Plaintiff Jack Wolfberg's Response thereto, after oral argument held October 14, 2015, and, for the reasons set forth in Court Exhibit "A", attached hereto, it is hereby **ORDERED** that the Motion for Judgment on the Pleadings is **GRANTED** and all claims relating to conduct prior to December 30, 2006, are **Dismissed With Prejudice**.

BY THE COURT:



FREDERICA A. MASSIAH-JACKSON, J.

Court Exhibit "A"

Vidya Sagar Banka, M.D. is a physician specializing in the field of cardiovascular medicine and interventional cardiology. Dr. Banka and his medical practice have been affiliated with Pennsylvania Hospital. On April 2, 2013, Penn Medicine released a statement to the public and to patients of Dr. Banka:

> "After learning of concerns about the appropriateness of some cardiac stent placements performed by a private physician, Vidya Banka, MD, at Pennsylvania Hospital, we conducted a review of a sample of his cases, including consulting with outside cardiovascular experts. Because the findings of this sample review showed that some patients received cardiac stents where the patient testing did not appear to show significant vascular blockages, we have notified the U.S. Attorney and the State Board of Medicine and have accepted his resignation from the medical staff at Pennsylvania Hospital. We are contacting patients who had cardiac stents placed by Dr. Banka to notify them of our findings and are committed to ensuring that Dr. Banka's patients are under the ongoing care of a physician and that their questions and concerns are addressed. If requested, we will assist them in arranging to see a Penn cardiologist at no cost, or to have their records transferred to another physician of their choice. The University of Pennsylvania Health System remains committed to providing the highest quality of care to every patient and we are confident that this is an isolated situation."

As a result of this notice, many of Dr. Banka's patients learned for the first time that unnecessary and unwarranted invasive procedures and implantations may have been performed on them. Many of Dr. Banka's patients sought evaluations and medical reviews from other cardiologists to determine their health situation.

Subsequently, numerous civil actions were filed against Dr. Banka, his professional group and Penn Medicine. The Banka Defendants have filed a series of dispositive motions based on the Medical Care Availability and Reduction of Errors Act's (MCARE) seven year statute of repose, 40 P.S. §1303.513(a). The Banka Defendants contend that at least four plaintiffs did not file suit until more than seven years after some or all of the cardiac catherization procedures, and thus the lawsuit is barred in whole or in part by the applicable statute of repose. This Court is constrained to agree.

The MCARE statute of repose applies to litigation which is filed on or after the effective date of March 20, 2002. Title 40 P.S. §1303.513 provides in pertinent part:

> "(a) GENERAL RULE.–Except as provided in subsection (b) or (c), no cause of action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort or breach of contract."

Pennsylvania Appellate Courts have explained that §1303.513(a) sets forth the maximum period of time to file medical professional liability claims -- 7 years. In Matharu v. Muir, D.O., 86 A.3d 250 (Pa. Superior Ct. 2014), the unanimous en banc Court interpreted this statute and held that the seven year period commences on the date of alleged tort or the breach of contract. 86 A.3d at 263:

> "This definition's clear distinction between the 'tort or breach of contract' and the resulting injury establishes that the 'tort or breach of contract' refers to the act underlying the liability claim, rather than the accrual of the cause of action itself."

All of the Plaintiffs rely on Bulebosh v. Flannery, D.P.M., 91 A.3d 1241 (Pa. Superior Ct. 2014) in support of their argument that suit was filed promptly within seven years of the date on which the Plaintiff's medical professional cause of action arose. In each case the Plaintiff was not aware of Dr. Banka's alleged misconduct until the 2013 letter from Penn Medicine. In each case, the Plaintiff asserts that the injury, i.e., the tort, was not learned until 2013 and suit is timely.

In Bulebosh, supra, the Superior Court had to "grapple" with the issue of when did the cause of action arise because it was required to make a determination of whether or not the MCARE statute of repose was applicable to that case. The Appellate Court analyzed the dates of surgery, manifestation of harm, and accrual of the cause of action to conclude that both the negligent act and the ascertainable injury pre-dated 2002, thus, the MCARE statute of repose did not apply.

In Osborne v. Lewis, M.D., 59 A.3d 1109 (Pa. Superior Ct. 2012), the Superior Court was again required to make an initial determination of whether or not the MCARE statute of repose was applicable. There, the tortious act occurred prior to 2002 and the cause of action arose after 2002, thus, the MCARE statute of repose did apply. The lawsuit was barred and denial of summary judgment was reversed as an error of law.

The four Plaintiffs herein are not challenging whether or not the March 2002 statute of repose is applicable. In each case both the tort and knowledge of injury occurred after 2002. All parties acknowledge the seven year statute of repose is applicable. The issue here is to determine the deadline for filing a civil action.

In Abrams v. Pneumo Abex Corporation, 981 A.2d 198 (Pa. 2009), the Supreme Court reiterated the definition of a statute of repose and noted that it completely abolishes and eliminates a party's cause of action. 981 A.2d at 211:

> "A statute of repose is defined as a 'statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury.' BLACK'S LAW DICTIONARY 1451 (8th ed. 2004). Thus,
>
>> A statute of repose . . . limits the time within which an action may be brought and is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered. Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in a statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted.
>
> *City of McKeesport v. Workers' Compensation Appeal Board (Miletti),* 560 Pa. 413, 421, 746 A.2d 87, 91 (2000)."

See also, Vargo v. Koppers Company, Inc., 715 A.2d 423, 425-426 (Pa. 1998), statute of repose bars a plaintiff's suit before it happens; completely abolishes and eliminates the cause of action; Noll v. Harrisburg Area YMCA, 643 A.2d 81, 84 (Pa. 1994) abolishes and eliminates a cause of action.

Next, to the extent that each Plaintiff has argued that claims including, battery, fraud, misrepresentation, unjust enrichment and/or punitive damages are not barred by the MCARE statute of repose, this Court does not agree.

Plaintiffs suggest that the statute of repose applies solely to medical negligence claims. The MCARE Act is not limited to negligence but rather specifically applies to "a medical professional liability claim". §1303.513(a). The MCARE statute defines medical professional liability claims, at 40 P.S. §1303.103:

> "'Medical professional liability claim.' Any claim seeking the recovery of damages or loss from a health care provider arising out of any tort or breach of contract causing injury or death resulting from the furnishing of health care services which were or should have been provided."

In these cases Dr. Banka's interventional cardiology conduct and/or misconduct arose out of his furnishing of health care services, as per the above statutory definition. See also, Strine v. Commonwealth, 894 A.2d 733 (Pa. 2006); Aria Health v. MCARE Fund, 88 A.3d 336 (Pa. Commonwealth Ct. 2014). Accordingly, the related claims including battery, fraud, misrepresentation, reckless/outrageous conduct and others, are all behaviors involved with the exercise of medical skills associated with specialized training.

Finally, Plaintiffs have presented a compelling argument that they should not be penalized by the statute of repose when the Banka Defendants and Penn Medicine delayed more than a year before disclosing ". . . concerns about the appropriateness of some cardiac stent placements performed by a private physician, Vidya Banka, M.D., at Pennsylvania Hospital . . . .". After further reflection, this Court concludes that because the statute of repose abolishes and eliminates the right to a cause of action, the related claims do not exist. Moreover, it would be error to bring equitable considerations such as a discovery rule to toll

the MCARE statute of repose to these cases. Repose statutes bar suits even if the injury has not been discovered. Abrams v. Pneumo Abex Corporation, supra, 981 A.2d at 211; see also, Hearing Transcript, dated October 14, 2015, N.T. 40-45, 56-59.

Mr. Jack Wolfberg was a patient of Dr. Banka at Penn Medicine. Plaintiff-Wolfberg alleges in his Amended Complaint at Paragraphs 21 and 22:

> "21. Dr. Banka performed unwarranted and unnecessary interventional cardiology procedures on Jack Wolfberg at Pennsylvania Hospital on or about December 21, 2005, consisting of coronary artery stent procedure of his mid segment of the right coronary artery (RCA).
>
> 22. On December 21, 2005, Dr. Banka also recommended that Jack Wolfberg undergo recanalization of the left anterior descending artery distal to the anastomotic site of the LIMA."

It is this conduct which provides the basis for the Motion to Dismiss based on the MCARE Act's statute of repose filed by the Banka Defendants. 40 P.S. §1303.513(a).

- The MCARE Act statute of repose has an effective date of March 20, 2002, and it is applicable to this litigation.

- The maximum period of time for Plaintiff-Wolfberg to file medical professional liability claims was:

December 21, 2005 ..... seven year deadline was ..... December 21, 2012.

- Plaintiff-Wolfberg's civil action was commenced on December 30, 2013. This date is beyond the repose period and therefore the Plaintiff's cause of action is eliminated. All related medical professional liability claims which arose out of Dr. Banka's behaviors during the relevant time period are also dismissed with prejudice.