

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FAR No. _____

Appeals Court No. 2021-P-0352

Joan Moran and Shawn Moran, Appellants

V.

Carolyn Benson, Herbert Markley, MD, and NERHC, Inc.
d/b/a The New England Regional Headache Center, Inc.,
Appellees

On Appeal From Worcester Superior Court

**Plaintiff - Appellants' Application for Further
Appellate Review**

Date: 03/21/2022

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TABLE OF CONTENTS

| | |
|---|---|
| REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW..... | 4 |
| STATEMENT OF PRIOR PROCEEDINGS..... | 4 |
| STATEMENT OF FACTS..... | 6 |
| POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT..... | 8 |
| REASONS FOR FURTHER APPELLATE REVIEW..... | 8 |

APPENDIX

EXHIBIT A Decision of the Appeals Court

EXHIBIT B Order of the Appeals Court affirming
Judgment

TABLE OF AUTHORITIES

Cases

| | |
|---|----|
| <i>Rudenauer v. Zafiropoulos</i> , 445 Mass. 353 (2005)..... | 8 |
| <i>Gibbs Ford, Inc. v. United Truck Leasing Corp.</i> , 399 Mass. 8, 13 (1987)..... | 14 |
| <i>Gennari v. Revere</i> , 23 Mass. App. Ct. 979, 503 (1987) (rescript)..... | 14 |

Statutes

| | |
|----------------------------|---|
| M.G. L. c. 231, § 60D..... | 9 |
|----------------------------|---|

I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, Plaintiffs - Appellants Joan and Shawn Moran respectfully request this Court grant further appellate review of the Appeals Court's Decision affirming the dismissal of plaintiffs' claims. Further appellate review is necessitated by substantial reasons affecting the public interest and the interests of justice. Specifically, the Appeals Court misinterpreted and misapplied the medical malpractice statute of repose and the failure to reverse its decision will leave an incorrect and unjust precedent for future cases.

II. STATEMENT OF PRIOR PROCEEDINGS

Plaintiffs - Appellants Joan and Shawn Moran (the "Plaintiffs") filed their Complaint on October 7, 2019. The Complaint alleged negligence on the part of two sets of defendants, 1) Herbert Markley, MD, Carolyn Benson, and NERHC, Inc., d/b/a The New England Regional Headache Center, Inc. (the "Headache Center" defendants), and 2) Raymond Sauls, MD and UMass Memorial Healthcare, Inc. (the "Primary Care"

defendants).¹ Plaintiffs filed their Offer of Proof for the Medical Malpractice Tribunal on January 15, 2020. On February 19, 2020 the Headache Center Defendants filed a Motion to Dismiss and an accompanying Memorandum in Support, along with Plaintiffs' Opposition. On July 22, 2020 the Honorable James G. Reardon, Jr. held a hearing on the Motion to Dismiss. On August 13, 2020 Judge Reardon issued a Memorandum and Order and Decision on Defendants' Motion to Dismiss, allowing the Motion. On September 14, 2020 the plaintiffs filed a Petition for Interlocutory Relief pursuant to G.L. c. 231, s. 118, seeking review of the Decision allowing the Motion to Dismiss. On November 4, 2020 the Single Justice (Singh, J.) denied plaintiffs' petition.

On February 24, 2021 the Superior Court entered Separate and Final Judgment to the Headache Center defendants. On March 11, 2021 plaintiffs filed a Notice of Appeal to the Appeals Court. After briefing and argument, on March 1, 2022 the Appeals Court issued a decision affirming The Superior Court's

¹ Another defendant, CentMass Association of Physicians, Inc., which plaintiffs alleged employed Dr. Sauls, has been dismissed by agreement.

dismissal of plaintiffs' claims against the Headache Center defendants. A copy of the Appeals Court's Decision is appended hereto as Exhibit A.

On February 1, 2021 the Primary Care defendants filed a Motion for Summary Judgment based on the Statute of Repose. On March 8, 2021, following a hearing, the Honorable Susan Sullivan denied the Primary Care defendants' Motion for Summary Judgment. On April 7, 2021 the Primary Care defendants filed a Petition for Interlocutory Relief pursuant to G.L. c. 231, s. 118 asking that the denial of the Motion for Summary Judgment be vacated and that the Single Justice grant Summary Judgment. On May 11, 2021 the single justice (Henry, J.) denied the Primary Care defendants' petition and the plaintiffs' claims against them remain active.

III. STATEMENT OF FACTS

The facts as described by the Appeals Court in the Background section of its decision are largely accurate. Ms. Moran sought treatment from the defendants for headaches. They ordered an MRI that showed multiple sclerosis. When she returned to the defendants following the MRI they failed to inform her

that the MRI showed multiple sclerosis. Thereafter they continued to treat her with medication for her headaches, even though her headaches did not improve. Plaintiffs allege that continuing to simply prescribe medication without any improvement in symptoms was negligent, and in fact each subsequent visit was more negligent than the earlier visits because more time had passed without improvement. Unbeknownst to Ms. Moran, the cause of the headaches was multiple sclerosis. Rather than simply prescribe the same ineffective medication in the face of continuing symptoms the defendants should have done further "work-up" to determine what was causing the symptoms, including another MRI or a thorough review of the patient chart, or both. Either action would have revealed the actual cause of her headaches, and both should have taken place in the seven-year period prior to the filing of the Complaint, including up to July of 2013.

IV. POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether the Appeals Court erred when it decided as a matter of law that the medical malpractice Statute of Repose extinguishes all subsequent negligent acts because of an earlier so-called "definitively established event."
2. Whether the Appeals Court erred when it determined as a matter of law that a failure to later diagnose a medical condition cannot amount to a separate act of negligence.

V. REASONS FOR FURTHER APPELLATE REVIEW

The Appeals Court erred when it determined that liability for multiple later acts of negligence is extinguished as a matter of law by the medical malpractice statute of repose because the first act of negligence was a "definitively established event." In doing so it misinterpreted this Court's decision in *Rudenauer v. Zafiropoulos*, 445 Mass. 353 (2005), which clearly held to the contrary, that additional liability for acts of negligence within the statute of repose period are not extinguished. The rule established in *Rudenauer* is logical and fair, especially when considered in light of the draconian nature of the statute of repose.

In addition, the question of whether subsequent acts or omissions constitute a single, continuing act

is fact sensitive and must be decided by the finder of fact, not as a matter of law and certainly not by a Court at the Motion to Dismiss stage.

A. The Appeals Court Decision Would Result in Manifest Injustice to the Plaintiffs

1. Liability for Negligent Acts or Omissions occurring within the Seven-Year Period Prior to the Filing of the Complaint is not Extinguished by an Earlier Negligent Act or Omission

The statute of repose provides that medical malpractice cases shall not "be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based. . ." M.G. L. c. 231, § 60D. A defendant is not liable to a plaintiff for negligent conduct that occurred more than seven years before the Complaint was filed, but remains liable to the plaintiff for negligent conduct that occurred within seven years of the filing of the Complaint. Simply stated, being negligent more than seven years prior to the filing of a Complaint does not absolve a defendant of any and all negligent acts or omissions that come later.

This Court explained how to apply the statute of repose in cases involving subsequent acts of

negligence in *Rudenauer v. Zafiropoulos*, 445 Mass. 353 (2005). In *Rudenauer* the patient alleged that her doctor negligently failed to diagnose kidney cancer over a period of years that extended beyond seven years prior to the filing of the Complaint, but also included treatment within the seven years prior to the filing of the Complaint. 445 Mass. at 354-55, 360. This Court held that Ms. Rudenauer's claims based on acts or omissions beyond the seven-year period were barred by the Statute of Repose. However, it also noted that she had alleged additional negligent acts within the seven-year period that were not extinguished by the Statute of Repose. Specifically, this Court held:

We recognize that the plaintiff alleges additional negligence after August 30, 1994, for which liability would not be extinguished by the statute of repose (suit was filed August 30, 2001). However, her claims allegedly arising during the post-August 30, 1994, period suffer from a "complete failure of proof concerning an essential element" of the plaintiff's case. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711, 575 N.E.2d 734 (1991). Although the prospective testimony of plaintiff's expert witnesses, viewed in the light most favorable to the plaintiff, could be read as evidence of failures by Zafiropoulos to meet the relevant standard of care in 1995, there is no evidence that the alleged negligence caused any harm. The only proffered testimony on causation is that "[h]ad a biopsy been performed by September of

1994, it likely would have resulted in a curative resection." The plaintiff has not come forward with any evidence that a different course of testing in 1995 (between Rudenauer's February 21, 1995, visit and the diagnosis of cancer in December, 1995) would have affected the ultimate outcome. (Nor is there any evidence of negligence or causation pertaining to the period between September, 1994, and February 21, 1995.) Thus, the plaintiff has not presented sufficient evidence to reach a jury as to any alleged negligence after August 30, 1994.

Rudenauer, 445 Mass. at 360 (emphasis added).

Although this Court held on reviewing the denial of a Motion for Summary Judgment that Ms. Rudenauer's claims failed for lack of proof, it clearly stated that the statute of repose would not extinguish liability for additional negligence after August 30, 1994.

There is no exception to the rule in *Rudenauer* when a doctor continues to make mistakes similar to those he made more than seven years prior to the filing of the complaint. Although a doctor cannot be held liable merely because he continues to treat a patient after his negligent act or omission, if he makes subsequent errors within the seven-year period he is liable for those mistakes. As discussed below, to hold otherwise would result in horrific consequences never intended by the Legislature.

2. The Appeals Court Erred when it Decided as a matter of law that Defendants' Initial and Subsequent Negligent Acts or Omissions all Constitute a Single, Continuing Act of Negligence

In its decision, the Appeals Court makes passing reference to this Court's interpretation of the statute of repose in *Rudenauer*, but it fails to explain why it does not apply here. Instead, it simply noted that this Court held that Ms. Rudenauer's claims failed for other reasons and explained that a "definitively established event," the MRI, occurred more than 8 years before the complaint was filed. This ignores the separate, subsequent acts of negligence alleged by the plaintiff, given a liberal reading of the Complaint, drawing all reasonable inferences in plaintiffs' favor.

The Appeals Court determined that the "definitively established event" was the failure to appreciate that Ms. Moran had multiple sclerosis, inform her of this and treat her, in October of 2011. It held that this "failure, which persisted for almost two years after multiple appointments, arises from the initial failure to inform her of the MRI results and treat her accordingly" and amount to "nothing more

than defendants' acts of continuing treatment." See Exhibit A at Pages 5-6.

But defendants' negligence was not simply a one-time failure to diagnose multiple sclerosis. After they failed to read (or simply ignored) the MRI report defendants continued to treat Ms. Moran for her headaches by prescribing migraine medication. Despite the medication Ms. Moran's symptoms continued without improvement. It is now clear that this was because she had multiple sclerosis and not migraine headaches. But the defendants did nothing in the face of ongoing symptoms with no improvement, other than to continue to prescribe medication. That was negligent given the ineffectiveness of the course of medication they prescribed.

Each time defendants simply ordered medication without trying to discover the cause of her headaches they committed a separate, and more flagrant negligent act, because each time they had more information. They knew, at the very least, that more time had passed and her condition had not improved. Defendants should have conducted a further "work-up" including

ordering another MRI or at the very least reviewing their own chart.

To be clear, plaintiffs are not simply alleging that defendants should have reviewed their entire chart each time a patient comes back for a visit. But in the face of ongoing symptoms, with their current treatment not working, their failure to do so was negligent and distinct from their first mistake.

The question of whether defendants' conduct was a single, continuing act, or whether it was separate acts of negligence cannot be decided as a matter of law, and certainly should not be decided as a matter of law under the standard applicable to a Motion to Dismiss, given "the relatively light burden to be carried in maintaining a complaint." *Gibbs Ford, Inc. v. United Truck Leasing Corp.*, 399 Mass. 8, 13 (1987). "[D]ismissals on the basis of pleadings, before the facts have been found, are discouraged." *Gennari v. Revere*, 23 Mass. App. Ct. 979, 503 (1987) (rescript).

A jury should decide whether defendants' conduct was simply a continuing act, or amounted to separate negligent acts. At the very least a Court should

decide this issue at the Summary Judgment stage, after the facts have been discovered.

By way of example, the plaintiffs in this case could learn during discovery that the defendants did, in fact, become aware that the MRI suggested multiple sclerosis in or around July of 2013, or even later, and planned to tell plaintiff about it but forgot to do so. Or worse that the defendants became aware of the results and decided to conceal this from Ms. Moran. Surely liability for such conduct would not be extinguished by the Statute of Repose.

Nor should a Court decide, based only on the Complaint, what amounts to a "definitively established event." Here the Court, without the benefit of discovery and Summary Judgment facts and arguments, decided as a matter of law plaintiffs' theory of negligence. This is improper at the Motion to Dismiss Stage.

By way of example, had plaintiffs pleaded in their Complaint only the facts and allegations within the seven-year period prior to filing there would be no basis for dismissal. The Complaint would contain only the facts that Ms. Moran was seeing the headache

center defendants for the visits within the seven-year period, that her symptoms were not improving and that the defendants did not order an MRI, which was negligent. A Court could not dismiss a Complaint based only on those facts, all of which plaintiffs allege in this matter. They should not be punished for including a more complete set of facts. Nor should future plaintiffs be encouraged to exclude facts more than seven years prior to filing for fear that their case will be dismissed.

B. The Appeals Court Decision Raises a Significant Issue of Public Concern to all Patients

Further appellate review is also necessary because the interpretation of the statute of repose when applied to continuing treatment by doctors and other medical care providers creates an incentive to cover up prior mistakes.

The Appeals Court ruled that once the Headache Center defendants negligently failed to appreciate (or ignored) the MRI findings in 2011 the clock started to run on the statute of repose, even though they continued to treat Ms. Moran. Under this analysis, medical care providers who make similar mistakes and

later realize their mistakes within seven years will be encouraged to withhold this realization from patients at subsequent visits, hoping that the clock will run out before they can be sued. This would set a terrible precedent and is against the public interest.

It is clearly not what the Legislature intended when it enacted the Statute of Repose.

The Statute of Repose already leads to harsh, unfair results. Allowing doctors to take further advantage is unnecessary and will be even more draconian.

Conclusion

This Court must overturn the Appeals Court's decision that has resulted in manifest injustice to the plaintiffs and threatens to set a terrible precedent that will encourage doctors to cover up their mistakes.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

**Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure**

I, Scott Heidorn, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs,
appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, 10.5 characters per inch, and contains 10, total non-excluded pages.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on March 21, 2022, I have made service of this Application for Further Appellate Review upon the attorney of record for each party, by the Electronic Filing System on:

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EXHIBIT A

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRReporter@sjc.state.ma.us

21-P-352

Appeals Court

JOAN MORAN & another¹ vs. CAROLYN BENSON & others.²

No. 21-P-352.

Worcester. January 5, 2022. - March 1, 2022.

Present: Vuono, Meade, & Grant, JJ.

Repose, Statute of. Negligence, Statute of repose, Medical malpractice. Medical Malpractice. Practice, Civil, Dismissal, Claim barred by statute of repose.

Civil action commenced in the Superior Court Department on October 7, 2019.

A motion to dismiss was heard by J. Gavin Reardon, Jr., J., and separate and final judgment was entered by him.

Scott M. Heidorn for the plaintiffs.
J. Peter Kelley for the defendants.

MEADE, J. This appeal presents a medical malpractice case in which the plaintiffs alleged negligence by the defendants due

¹ Shawn Moran.

² Herbert Markley and NERHC, Inc., doing business as the New England Regional Headache Center, Inc.

to a delayed diagnosis and treatment of Joan Moran's (Moran) progressive multiple sclerosis. Carolyn Benson, N.P., Herbert Markley, M.D., and NERHC, Inc., doing business as the New England Regional Headache Center, Inc. (defendants), moved to dismiss the complaint, arguing that the plaintiffs' claims are barred by the statute of repose. See G. L. c. 260, § 4. After a hearing before a Superior Court judge, the motion was allowed, a separate and final judgment entered, and this appeal ensued. We affirm.

1. Background. "We recite the facts asserted in the . . . complaint, taking them as true for purposes of evaluating the motion to dismiss." Edwards v. Commonwealth, 477 Mass. 254, 255 (2017). In 2011, Moran was experiencing headaches. On October 14, 2011, she sought treatment for her headaches from the defendants. The defendants ordered a magnetic resonance imaging (MRI) scan to determine the cause of her headaches. On October 25, 2011, the MRI was conducted. Two days later, based on the MRI, a radiologist wrote a report which indicated that Moran likely had multiple sclerosis. The radiologist sent the report to the defendants on the same day.

On November 14, 2011, Moran had a follow-up appointment with the defendants, but none of them advised her that she needed to be monitored, or receive treatment, for multiple sclerosis. Similar inaction occurred at Moran's later

appointments in January, March, and June of 2012. Throughout this time, Moran continued to exhibit symptoms of multiple sclerosis.

At her June 11, 2012 appointment, Moran was advised to follow up in four months; however, she did not return to see the defendants at that time. Moran was last seen by the defendants in July of 2013, at which time she was prescribed migraine medication. In September of 2019, Moran saw a neurologist who diagnosed her with a progressive form of multiple sclerosis. Between October 2012 and the present, Moran's condition has deteriorated significantly due to lack of proper treatment. As a result of the delayed diagnosis and treatment, Moran has suffered significant injury. The complaint in this matter was filed on October 7, 2019.

2. Discussion. A. Standard of review. We review de novo the allowance of a motion to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). A.L. Prime Energy Consultant, Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 424 (2018). We accept "the facts alleged in the complaint as true and draw[] all reasonable inferences in the plaintiff[s'] favor." Edwards, 477 Mass. at 260. However, "[w]e do not regard as 'true' legal conclusions cast in the form of factual allegations." Id., quoting Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 39 n.6 (2009). To survive a motion

to dismiss, the facts alleged must "'plausibly suggest[] (not merely [be] consistent with)' an entitlement to relief."

Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully" (citation omitted). Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

B. Statute of repose. General Laws c. 260, § 4, second par., provides:

"Actions of contract or tort for malpractice, error or mistake against physicians, surgeons . . . hospitals and sanatoria shall be commenced only within three years after the cause of action accrues, but in no event shall any such action be commenced more than seven years after occurrence of the act or omission which is the alleged cause of the injury upon which such action is based except where the action is based upon the leaving of a foreign object in the body" (emphasis added).

The emphasized language above constitutes a statute of repose, "[t]he effect [of which] 'is to place an absolute time limit on the liability of those within [its] protection and to abolish a plaintiff's cause of action thereafter, even if the plaintiff's injury does not occur, or is not discovered, until after the statute's time limit has expired.'" Parr v. Rosenthal, 475 Mass. 368, 382 (2016), quoting Rudenauer v. Zafiropoulos, 445 Mass. 353, 356-357 (2005). "Statutes of repose are to be contrasted with statutes of limitation, which commence at the

time a cause of action accrues, typically when damages are sustained or discovered." Joslyn v. Chang, 445 Mass. 344, 347 (2005).

C. Separate acts or omissions. Moran claims that the judge erred in determining that the statute of repose required the dismissal of her complaint because she alleged additional negligent acts or omissions (after the initial 2011 failure to disclose the diagnosis of multiple sclerosis) that fell within the seven-year period and were not extinguished by the statute. In particular, Moran seeks to characterize each encounter with the defendants, in which they did not advise and treat her for multiple sclerosis, as a separate negligent act or omission, including the defendants' continued prescription of migraine medication up to July of 2013. We disagree.

"A repose period begins to run from some 'definitely established event,' abolishing a plaintiff's cause of action thereafter, even if the injury does not occur, or is not discovered, until after the statute's time limit has expired." Rudenauer, 445 Mass. at 358. See McGuinness v. Cotter, 412 Mass. 617, 622 (1992). Here, as the judge properly determined, the act or omission which is the alleged cause of Moran's injury, i.e., the "definitely established event," was the failure to inform her of, and treat her for, the diagnosis of multiple sclerosis in October of 2011. That failure, which

persisted for almost two years after multiple appointments, arises from the initial failure to inform her of the MRI results and to treat her accordingly, which was the negligence alleged in the complaint.

Moran labors hard to claim the defendants' actions within the repose period are separate acts or omissions constituting negligence; however, such acts are nothing more than the defendants' acts of continuing treatment. In particular, Moran claims that each instance in which she was treated by the defendants, and not properly diagnosed, constituted a separate act of medical malpractice. Relying on Rudenauer, 445 Mass. at 360, she asserts that the statute of repose would not extinguish any treatment incidents that occurred within seven years of her filing the suit. Although the Rudenauer court alluded to such incidents, it held that those claims suffered from a "complete failure of proof concerning an essential element" of the plaintiff's case. Id., citing Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991).

In any event, Moran's claim is without merit because the negligence alleged in the complaint is that the defendants neither advised her that she needed to be monitored for her progressive multiple sclerosis, nor did they set in motion a plan for responsible care and treatment of her condition by a multiple sclerosis specialist. This was the entirety of her

claim, and the treatment within the seven-year period was not alleged to be separate acts of negligence, but merely acts of continued treatment. Even if we generously read the complaint to have alleged separate acts of negligence, that reading would nonetheless be eclipsed by the fact that the "definitely established event" of the MRI occurred nearly eight years before the complaint was filed. See McGuinness, 412 Mass. at 622.

As the Supreme Judicial Court recognized in Rudenauer itself:

"The repose provision of G. L. c. 260, § 4, reflects a legislative determination that an absolute time limit is appropriate in medical malpractice actions despite those conflicting values. Its clear language, as supported by its history and purpose, permits no conclusion other than that the Legislature intended to extinguish malpractice claims seven years after negligent acts or omissions even when a doctor's treatment of, or responsibility for, a condition continued beyond the alleged negligence."

Rudenauer, 445 Mass. at 358. From the concluding clause of this portion of the opinion, the court made it clear that there is no continuing treatment exception to the statute of repose.

Indeed, the court held that "[i]t would be especially inappropriate to read § 4 as 'intending' a continuous treatment exception. Tolling under such rules would vitiate the statute of repose." Id. at 359. See Joslyn, 445 Mass. at 350

("statutes of repose are not subject to any form of equitable tolling"); Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 631 n.19 (1997) (same). If the Legislature intended otherwise,

it would have included continuing treatment along with the only expressed exception in the statute for "leaving of a foreign object in the body." G. L. c. 260, § 4. See Stearns v. Metropolitan Life Ins. Co., 481 Mass. 529, 536 (2019). See also Fernandes v. Attleboro Hous. Auth., 470 Mass. 117, 129 (2014) ("The omission of particular language from a statute is deemed deliberate where the Legislature included such omitted language in related or similar statutes"). Moran cannot simply recharacterize her claim to avoid the operation of a statute of repose. See Dighton v. Federal Pac. Elec. Co., 399 Mass. 687, 692, cert. denied, 484 U.S. 953 (1987); Szulc v. Siciliano Plumbing & Heating, Inc., 99 Mass. App. Ct. 729, 733-734 (2021).

As the Supreme Judicial Court has concluded in the past, the operation of a statute of repose can lead to harsh results. See, e.g., Rudenauer, 445 Mass. at 358; Joslyn, 445 Mass. at 351; Nett v. Bellucci, 437 Mass. 630, 647 (2002); Harlfinger v. Martin, 435 Mass. 38, 46-47 (2001); Klein v. Catalano, 386 Mass. 701, 713 (1982). This case is no different. Even where a possibly meritorious claim will go unredressed by operation of the statute of repose, that is a policy decision the Legislature has made.³ Joslyn, supra at 351. The principles of judicial

³ The statute of repose was enacted as "'part of a larger . . . effort to curb the cost of medical malpractice insurance and keep such insurance available and affordable,' [which adjusted] the economics of the practice and consumption of

restraint embodied in art. 30 of the Massachusetts Declarations of Rights prohibits us from revisiting and altering that policy choice. Joslyn, supra at 351-352. See Zayre Corp. v. Attorney Gen., 372 Mass. 423, 433 (1977). See also art. 30, supra ("the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men").

Judgment affirmed.

medical services in the Commonwealth." Joslyn, 445 Mass. at 349, quoting Harlfinger, 435 Mass. at 43.

EXHIBIT B

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 21-P-352

JOAN MORAN & another

vs.

CAROLYN BENSON & others.

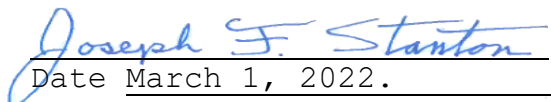
Pending in the Superior

Court for the County of Worcester

Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

 , Clerk
Date March 1, 2022.
