Circuit Court for Baltimore City
Case No. 24-C-21-005442

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 449

September Term, 2022

LOUIS NICASSIO

v.

BEKMAN, MARDER & ADKINS, LLC, *ET AL.*

Nazarian,
Friedman,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: March 28, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

** This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104

In September 2013, Louis Nicassio was injured when the hospital bed he rented to recover from back surgery collapsed under him, and he hired Gregory Hopper of the law firm Bekman, Marder & Adkins, LLC[1] ("BMA")[2] to represent him in a products liability claim against the bed rental company. BMA took custody of the bed but, at some point later on, lost it. On October 13, 2016, Mr. Hopper and Mr. Nicassio exchanged emails in which Mr. Hopper explained that the bed was lost. He also explained that he didn't believe that BMA's negligence was the cause of the bed's disappearance, but that Mr. Nicassio might have a malpractice claim against BMA and might wish to speak with another attorney. Mr. Nicassio did not seek the advice of another attorney at that time, but instead moved forward with his products liability case with BMA as his counsel.

In January 2019, BMA withdrew from the case and Mr. Nicassio retained new counsel who determined that the case had been compromised severely by the loss of the bed. Mr. Nicassio then entered into an agreement with the bed rental company to undertake a high-low arbitration, after which the arbitrator found that the only appropriate remedy for the spoliation of the bed was dismissal of Mr. Nicassio's claim against the bed rental company.

Several days before the arbitration decision was issued, Mr. Nicassio, through his new counsel, filed a malpractice claim against BMA in the Circuit Court for Baltimore

[1] The firm is currently known as Bekman, Marder, Hopper, Malarkey & Perlin LLC.

[2] The appellees in this case are Bekman, Marder & Adkins, LLC, Gregory Hopper, and Paul Bekman. We'll refer to them collectively as "BMA."

City. He sought damages for the loss of the bed and the dismissal of his products liability case. BMA moved to dismiss the claim as barred both by the three-year statute of limitations and by the doctrine of collateral estoppel. The circuit court granted the motion on limitations grounds and dismissed Mr. Nicassio's malpractice suit. Mr. Nicassio appeals and we affirm.

I. BACKGROUND[3]

A. The Underlying Litigation.

In September 2013, Mr. Nicassio underwent back surgery. Before returning home, he rented a hospital bed from Medi-Rents, a medical equipment company. Several days after the bed was delivered, Mr. Nicassio used it for the first time, but it collapsed and caused him to roll off the bed and fall to the floor. As a result of the fall, he incurred injuries that required further medical care, including additional surgeries.

Medi-Rents was notified about the broken bed on October 9, 2013. That same day, Mr. Nicassio's housemate, Terrance Doyle, took photographs of the bed, specifically the parts that malfunctioned, but the photos were of poor quality and did not show the condition of the bed clearly or completely. One of the photos showed a tether that was supposed to be attached to the bed lying unattached on the floor.

[3] Because this case is before us on appeal from the trial court's grant of a motion to dismiss, we accept as true the facts set forth in Mr. Nicassio's complaint, as well as the uncontroverted facts set forth in the supplemental documents the trial court considered, and we construe them in the light most favorable to Mr. Nicassio. *See Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284 (2018); *Smith v. Danielczyk*, 400 Md. 98, 105 (2007).

In January 2014, Mr. Nicassio retained BMA to represent him in his products liability claim against Medi-Rents, with Mr. Hopper as the lead attorney on the case. Later that month, Mr. Hopper visited Mr. Nicassio's residence and took a series of photographs, none of which showed the tether that had been visible in Mr. Doyle's October photos. In April 2014, Mr. Hopper and another BMA attorney rented a truck, moved the bed from Mr. Nicassio's residence to a space dedicated for BMA's use in the basement of the firm's building, and notified the firm's building manager. The bed was relocated twice in BMA's building and ultimately discarded—according to the firm, without BMA's knowledge.

In September 2016, while preparing Mr. Nicassio's lawsuit, BMA learned that the bed was lost. On September 13, 2016, BMA filed the lawsuit against Medi-Rents on Mr. Nicassio's behalf in the Circuit Court for Baltimore City (we'll call that case the "Underlying Litigation").[4] On or before October 12, 2016, BMA informed Mr. Nicassio that the bed could not be located. And on October 12, 2016, Mr. Nicassio sent Mr. Hopper an email inquiring about the consequences of the loss of the bed, including potential detriment to the case and liability for the loss:

> Greg
>
> Any news on the bed?
>
> How much of a detriment will it be on the case if not recovered?
>
> Does the storage facility have and [sic] responsibility or liability of its contents?
>
> Does your firm have any insurance policy that would cover this

[4] The case was styled *Nicassio v. Medi-Rents & Sales, Inc.*, Civil Case No. 24-C-16-005048.

> type of occurrence?
>
> If the bed is not found, would it help to get a mock type and model of the bed for the court to see tangible evidence while having the photographs to view?
>
> Lou

Mr. Hopper replied via email the following day. In his message, Mr. Hopper outlined several ways in which the loss of the bed could affect the case. He also told Mr. Nicassio that although he did not believe BMA had been negligent in losing the bed, "[w]e have professional malpractice insurance" and Mr. Nicassio "could consider bringing a claim against" them:

> We haven't been able to locate the bed. I think it is likely gone and not recoverable.
>
> I've been able to locate a number of pictures that I took of the bed. We also have [Mr. Doyle]'s pictures. I think this gives us 55 in total.
>
> We have two theories: 1. The people putting the bed together failed to insert the pin causing the bed to drop. 2. The people putting the bed together inserted the pin, but because of wear and tear at the connection point the pin failed causing the bed the [sic] fall. Given the age of the bed, we aren't pursuing a claim against the manufacturer. And we never had the pin, which is probably the most critical evidence (if it was ever there). The case turns on the maintenance and assembly of the bed.
>
> I think the pictures, testimony, and exemplar should be enough to make your case. You and [Mr. Doyle] will testify that there was no pin and he and you looked afterwards and it wasn't on the carpet. It's not present at any of the photographs that I took. [Mr. Doyle]'s photographs are not great, but it's not on the floor there either. I don't think that the presence or absence of the bed should factor into that question.
>
> We will definitely buy an exemplar bed. I agree it would be helpful in working out and explaining what happened.

> **The defense will likely attempt to raise the loss of the bed as an issue at trial.** We/you will file a motion to keep evidence of the loss out. **It is possible a judge would allow them to argue to the jury that the absence of the bed prevents the experts from offering real opinions or ruling out other alternatives. The defense may also claim that we/you destroyed it on purpose because the evidence was bad for us in some way and we didn't want the jury to see it.** The court may have a hearing on this issue before trial where we would testify and put in testimony from people associated with the building.
>
> Our building would not have any liability other than the value of the bed.
>
> **We have professional malpractice insurance. You could consider bringing a claim against us.** Under the circumstances, I think it was an unforeseen event and we weren't given notice that the bed had been moved, was not where it was supposed to be, or was being put back. **I don't think it was negligence, but I would understand if you wanted to talk to another attorney about it.**
>
> **If you are thinking about suing us then you should hire new counsel and replace us as your attorneys. So we are clear, I'm not suggesting that you go that route, but merely pointing out that it is one route you could go.**
>
> I'm still in the process of figuring out who the people on the crew were and whether I can locate them. I think it's unlikely that we are going to find it.
>
> I've copied [the firm's managing partner] Paul [Bekman] on this email.
>
> Greg

(Emphasis added.)

In response, Mr. Nicassio asked Mr. Hopper, "[I]f you were in my position, what approach would you pursue?" Mr. Hopper replied on October 17, 2016, stating first, "We think we can represent you well here," but then explaining that he would understand "if [Mr. Nicassio] ha[d] concerns and want[ed] to hire someone else":

> Lou:
>
> I've spoken to [Mr. Bekman] and we are comfortable moving forward as your attorneys. We think we can represent you well here. We know the case and your complex medical history—which is likely going to be the biggest issue moving forward.
>
> With all of that said, if you have concerns and want to hire someone else, we understand and would work with you and them to make the transition an easy one.
>
> Let me know what you want to do.
>
> Greg

Mr. Nicassio responded, "I have confidence in you and [Mr. Bekman]'s reliability and belief. Let's move forward."[5]

As the Underlying Litigation progressed, counsel for Medi-Rents sought to have its expert examine the bed. Mr. Hopper informed Medi-Rents that the bed had been lost and provided Medi-Rents with the photographs he and Mr. Doyle had taken. In July 2018, counsel for Medi-Rents filed a motion to disqualify Mr. Hopper from serving as Mr. Nicassio's counsel due to his loss of the bed. The trial court denied the motion, finding that the case "did not involve any obviously unethical conduct"; the court also denied a later motion to reconsider the disqualification motion. In December 2018, Medi-Rents's expert in mechanical engineering testified at his deposition that because the bed was gone, he could not render opinions regarding the cause of the accident or the condition of the bed.

In January 2019, BMA withdrew from representing Mr. Nicassio in the Underlying Litigation. In February 2019, Mr. Nicassio retained Steven Vinick to take over representation from BMA in the Underlying Litigation. Mr. Vinick determined that the

[5] We'll refer to the October 12–17 email exchange as the "bed emails."

case had been compromised severely by the loss of the bed and, on behalf of Mr. Nicassio, entered into an agreement with Medi-Rents to engage in a high-low arbitration. The arbitrator was asked to determine whether evidence had been spoliated and, if so, the appropriate remedy.

The arbitration took place on September 24, 2021, and the arbitrator issued a binding decision on December 6, 2021. He found, in pertinent part, that "Mr. Hopper was . . . negligent, and clearly so" in failing to "take reasonable measures to preserve the bed for Mr. Nicassio's litigation," that "Mr. Nicassio was at least negligent in discarding the tether," that "the degree of fault on the part of Mr. Nicassio and his attorney, Mr. Hopper, [was] substantial," and that "the prejudice caused to Medi-Rents by the discarding of the medical bed and the tether [was] 'extraordinary, denying it the ability to adequately defend its case.'" In light of these factual findings, the arbitrator determined that the appropriate sanction was to dismiss all of Mr. Nicassio's claims against Medi-Rents in their entirety and award him the $25,000 floor stipulated in the parties' high-low agreement. Mr. Nicassio did not challenge that decision.

B. The Malpractice Action.

On December 3, 2021, three days before the arbitrator issued his decision, Mr. Nicassio filed a complaint for legal malpractice against BMA in the circuit court. He alleged that BMA breached its duty of care to Mr. Nicassio when it lost the bed.[6] In

[6] Mr. Nicassio also brought a claim for "Spoliation of Evidence." The circuit court dismissed this claim because Maryland does not recognize spoliation as an independent cause of action. Mr. Nicassio has not appealed that ruling.

response, BMA filed a motion to dismiss or, in the alternative, for summary judgment, arguing that Mr. Nicassio's claim was barred by the doctrine of collateral estoppel and the three-year statute of limitations imposed by Maryland Code (1973, 2020 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article ("CJ"). With regard to collateral estoppel, BMA argued that the arbitrator's finding that Mr. Nicassio was negligent in discarding the tether amounted to a finding that Mr. Nicassio was contributorily negligent in causing the dismissal of the Underlying Litigation, and therefore that he was barred from recovering against BMA. As for the statute of limitations, BMA argued that the limitations period on Mr. Nicassio's legal malpractice claim began running at the latest on October 13, 2016, the date of the bed emails, when it is undisputed that Mr. Nicassio was aware of the loss of the bed and was informed about his potential malpractice claim. Because their motion to dismiss and Mr. Nicassio's complaint alleged facts relating to the arbitration and to the bed emails, BMA attached the arbitration decision and the emails to its motion as exhibits.

In his opposition to BMA's motion, Mr. Nicassio relied on those same documents to argue that his disposal of the tether "was not the proximate cause of the loss of the underlying case against Medi-Rents" and that his claims were not time-barred because the limitations period did not begin running until he incurred damages as a result of BMA's loss of the bed, which, he contended, did not occur until the arbitrator issued his arbitration decision in December 2021. He also argued that his claims should not be dismissed as time-barred because there were genuine issues of fact as to when he was on notice of his injury,

"whether [he] reasonably relied on [BMA's] assurances that the loss of the bed was insignificant," and "when he incurred damage." BMA filed a reply addressing each of these arguments.

On April 11, 2022, the circuit court heard argument from both parties and issued its ruling from the bench. Based on its "consideration of the papers, the proceedings, the exhibits, [and] the argument of counsel," the court held that "Mr. Nicassio was put on notice that he had potentially a viable claim to investigate upon learning that his counsel . . . had lost the bed . . . no later than October 13, 2016." The court explained that, as of that date, Mr. Nicassio "knew that there was an injury and he was then on notice to investigate," so that's when the clock started running:

> Mr. Nicassio was put on notice that he had potentially a viable claim to investigate upon learning that his counsel, [BMA], had lost the bed which was the physical subject of his claim against Medi-Rents no later than October 13, 2016.
>
> * * *
>
> Laypersons seek second opinions all the time; whether it[']s for professional services, legal or medical, and make decisions all the time whether to continue with their existing counsel or their existing doctor.
>
> And to suggest that that doesn't happen or that it shouldn't have happened in this case or that that exploration couldn't have been considered by Mr. Nicassio would then serve only to extend beyond the statutory period contemplated for claims such as these for a period of time that indeed flies in the face of what the accrual date is.

Based on these findings, the court granted BMA's motion to dismiss Mr. Nicassio's claims on limitations grounds and declined to decide BMA's collateral estoppel argument. Mr. Nicassio filed this timely appeal.

II. DISCUSSION

This appeal presents two issues for our review:[7] *first*, whether the trial court erred in dismissing Mr. Nicassio's legal malpractice claim on limitations grounds; and *second*, if so, whether we should affirm the dismissal anyway because Mr. Nicassio's claim is barred by the doctrine of collateral estoppel.

"The standard of review of the grant or denial of a motion to dismiss is whether the trial court was legally correct." *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 284 (2018) (*citing RRC Ne., LLC v. BAA Md., Inc.*, 413 Md. 638, 643–44 (2010)). Therefore, our review is *de novo*. *Lipp v. State*, 246 Md. App. 105, 110 (2020) (*citing D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 350 (2019)). We "'accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party.'" *Davis*, 457 Md. at 284 (*quoting Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004)).

Our review of the facts is "'limited generally to the four corners of the complaint

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[7] Mr. Nicassio phrased the Question Presented as follows:

> 1. Whether the Trial Court erred in granting Appellees' Motion to Dismiss on statute of limitations grounds where a question of fact exists as to whether Appellant was sufficiently put on notice of a legal malpractice claim at the time Appellees informed him that they had lost a piece of evidence in his product liability case, but assured him that they could successfully continue to represent him in the case.

BMA phrased the Question Presented as: "Did the Circuit Court properly dismiss Nicassio's Complaint with prejudice?"

and its incorporated supporting exhibits, if any.'" *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 497 (2014) (*quoting RRC Ne.*, 413 Md. at 643). But, as we explained in *Smith v. Danielczyk*, 400 Md. 98, 105 (2007), we will also consider exhibits appended to the opposing party's response when the facts therein are "uncontroverted":

> Because there seems to be no dispute regarding . . . extraneous material appended to appellees' motion to dismiss and none of the relevant factual averments by appellees . . . were controverted, we shall regard the exhibits and the additional averments as simply supplementing the allegations in the complaint and consider the relevant facts pled in the complaint, as so supplemented.

Id. (citation omitted); *see also Tri-County Unlimited, Inc. v. Kids First Swim Sch. Inc.*, 191 Md. App. 613, 619–20 (2010) (because the trial court considered undisputed supplemental information "outside of the pleadings" in granting motion to dismiss rather than treating the motion as a motion for summary judgment as ordinarily required under Maryland Rule 2-322(c), we "regard[ed] that additional information as supplementary to the allegations in the complaint" and "review[ed] the court's ruling under the motion to dismiss standard").

Mr. Nicassio did not contend in the trial court, and does not contend now, that the documents BMA attached to its motion to dismiss—the arbitration decision and the bed emails—contained facts that are in dispute or created any disputes of fact. To the contrary, he relied on those same documents in opposing BMA's motion in the trial court and in his brief in this Court, and the trial court considered them in its decision to grant BMA's motion to dismiss. We will, therefore, "regard that additional information as supplementary to the allegations in the complaint" and "review the [trial] court's ruling under the motion

to dismiss standard." *Tri-County Unlimited*, 191 Md. App. at 620.

A. The Circuit Court Did Not Err In Granting BMA's Motion To Dismiss On Limitations Grounds.

Mr. Nicassio argues *first* that the trial court erred when it dismissed his case on limitations grounds. He contends that the existence of genuine issues of fact precluded the trial court from determining when the limitations period began running, and, in any case, that the period had not begun running on October 13, 2016.

In general, statutes of limitations serve "'to provide adequate time for a diligent plaintiff to bring suit as well as to ensure fairness to defendants by encouraging prompt filing of claims.'" *Fairfax Sav., F.S.B. v. Weinberg & Green*, 112 Md. App. 587, 612 (1996) (*quoting Hecht v. Resolution Trust Corp.*, 333 Md. 324, 338 (1994)). These statutes reflect "public policy established by the General Assembly regarding a reasonable time in which to file suit," *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 713 (2003), and they "are to be strictly construed." *Murphy v. Merzbacher*, 345 Md. 525, 532 (1997). In Maryland, "[a] civil action at law shall be filed within three years *from the date it accrues* unless another provision of the Code provides a different period of time within which an action shall be commenced." CJ § 5-101 (emphasis added). This three-year limitations period applies to legal malpractice claims. *Supik*, 152 Md. App. at 712.

So: when does a cause of action "accrue," and who gets to make that decision? Historically, the accrual date for limitations purposes was "the date the wrong occurred." *Id.* at 713 (*citing Doe v. Archdiocese of Wash.*, 114 Md. App. 169, 176 (1997)). But "[r]ecognizing the unfairness inherent in charging a plaintiff with slumbering on his rights

where it was not reasonably possible to have obtained notice of the nature and cause of an injury," Maryland courts have "adopted the discovery rule to determine the date of accrual." *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 95 (2000) (*citing Hahn v. Claybrook*, 130 Md. 179, 186–87 (1917)). Under the discovery rule, the limitations period does not begin to run "until the time the plaintiff discovers, or through the exercise of due diligence, should have discovered, the injury." *Id.* at 95–96. This rule "ordinarily applies to all actions where limitations are governed by the three[-]year statute of limitations," including "malpractice litigation." *Id.* at 96 (citations omitted).

Maryland has adopted several other exceptions to the general rule that the limitations period begins to run on "the date the wrong occurred," all of which are essentially corollaries of the discovery rule: (1) the continuation of events theory, (2) fraud, and (3) when the plaintiff is under a disability. *Supik*, 152 Md. App. at 713–16. Under the continuation of events theory, which applies "'in cases where there is an undertaking which requires a *continuation of services*, . . . the statute [of limitations] begins to run only from the time the services can be completed . . . .'" *Frederick Rd.*, 360 Md. at 97 (*quoting Washington, Balt. & Annapolis Elec. R.R. Co. v. Moss*, 130 Md. 198, 204–05 (1917)). This theory "is based on the equitable principle of detrimental reliance. When a relationship develops between two parties, built on trust and confidence, the confiding party may rely upon the 'good faith of the other party so long as the relationship continues to exist.'" *Supik*, 152 Md. App. at 714 (*quoting Frederick Rd.*, 360 Md. at 98). This doctrine is especially applicable "in fiduciary relationships such as the attorney-client relationship

where ‘a client has the right to rely on his or her lawyers’ loyalty and to believe the accuracy and candor of the advice they give.’” *Id.* (*quoting Frederick Rd.*, 360 Md. at 103). Critically, however, “continuous representation alone is not sufficient to avoid the bar of limitations.” *Edwards v. Demedis*, 118 Md. App. 541, 561 (1997) (citation omitted). Indeed, “[n]otwithstanding the confidential relationship, if the confiding party knows, or reasonably should know, about a past injury, accrual for statute of limitations purposes will begin on the date of inquiry notice, and not the completion of services.” *Supik*, 152 Md. App. at 714–15. In other words, as under the discovery rule, once “something occurs to make [the confiding party] suspicious,” the party then has a duty “to make inquiries about the quality or bona fides of the services received.” *Frederick Rd.*, 360 Md. at 98. And if those inquiries would have revealed the injury, then the failure to inquire will not toll the running of the limitations period. *Id.*

Under CJ § 5-203, fraud also will postpone the accrual of a cause of action. The fraud exception applies when both (1) “an adverse party fraudulently conceals knowledge of a cause of action” and (2) the plaintiff has “pl[ed] fraud with particularity.” *Supik*, 152 Md. App. at 715. In such a case, the cause of action will accrue as soon as the plaintiff has actual or inquiry notice of the fraud. CJ § 5-203. As with the discovery rule and the continuation of events doctrine, a plaintiff is on inquiry notice when they “‘hav[e] knowledge of circumstances which would cause a reasonable person in the position of the plaintiff[] to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged fraud.’” *Frederick Rd.*, 360 Md. at 99 (*quoting*

O'Hara v. Kovens, 305 Md. 280, 302 (1986)). And finally, accrual will be postponed when the plaintiff is "under a 'disability' at the time of the injury." *Supik*, 152 Md. App. at 715. Pursuant to CJ § 5-201, "a minor or mental incompetent . . . shall file his action within the lesser of three years or the applicable period of limitations after the date the disability is removed."

Importantly, though, "none of these tolling concepts is even relevant until a plaintiff has sustained a legal injury . . . ." *Supik*, 152 Md. App. at 716. This is because "[a] cause of action does not accrue . . . until all elements are present, including damages." *Fairfax Sav.*, 112 Md. App. at 613 (citation omitted). Indeed, and even where "a reasonable person might [have] be[en] able to foresee a future injury" at an earlier point in time, accrual will not occur until "the date[] of the actual injury." *Supik*, 152 Md. App. at 716. Even so, Maryland does not follow the "maturation of harm" rule, under which precise damages must be known for a cause of action to accrue. *Id.* at 720–21. Rather, accrual occurs as soon as "some evidence of legal harm has been shown, even if the precise amount of damages is not known, . . . and even if plaintiff has suffered only trivial injuries." *Fairfax Sav.*, 112 Md. App. at 613 (cleaned up). Therefore, "the dispositive issue in determining when limitations begin to run is when the plaintiff was put on notice that he may have been injured," *id.* (citation omitted), and "ignorance as to the exact amount of damages sustained at [the time of] discovery of [the] wrong 'is not a sufficiently sound reason to postpone the accrual of the action . . . .'" *Id.* at 613 (*quoting Feldman v. Granger*, 255 Md. 288, 296 (1969)).

And this brings us to the question of who determines the accrual date. The court does: "the determination of when a cause of action 'accrues' under [CJ] § 5-101 . . . is one left to the court for judicial determination." *Supik*, 152 Md. App. at 710 (*citing Frederick Rd.*, 360 Md. at 95 (citations omitted)). "This determination may be based solely on law, solely on fact, or on a combination of law and fact, and is reached after careful consideration of the purpose of the statute and the facts to which it is applied." *Frederick Rd.*, 360 Md. at 95 (*citing Poffenberger v. Risser*, 290 Md. 631, 634 (1981)). Importantly, though, while "factual determination[s] may be made by the court," a trial court may grant a motion to dismiss or issue summary judgment on the basis of limitations "only when there is no genuine dispute of material fact as to when the action accrued." *Supik*, 152 Md. App. at 710–11.

Mr. Nicassio advances two theories for why his case should not have been dismissed on limitations grounds. He argues *first* that there were genuine disputes of material fact as to when he knew, or reasonably should have known, of his injury, and that the accrual date for his malpractice claim should have been left to a jury to decide. *Second*, he claims that he suffered no injury until the arbitration decision was issued, and thus that his cause of action could not have accrued until that date.

1. No genuine dispute of material fact precluded the trial court from concluding that Mr. Nicassio's malpractice claim accrued on October 13, 2016.

Mr. Nicassio argues that because BMA "continued to represent [him] until approximately January of 2019, . . . the continuation of events doctrine applies to, and tolls,

the running of statute of limitations in this matter" until 2019. He acknowledges that the doctrine does not toll the accrual date if "Mr. Nicassio had knowledge of facts, more than three years before filing his Complaint, that would lead a reasonable person to investigate, and when such an investigation was undertaken, with reasonable diligence, it would have revealed wrongdoing on the part of [BMA]." He claims, however, that the question of when he "had knowledge of facts . . . that would lead a reasonable person to investigate" is a genuine issue of material fact that must be left to a jury, precluding the trial court's dismissal of his case. We disagree.

On October 13, 2016, Mr. Hopper confirmed by email that the bed had been lost and he informed Mr. Nicassio, in so many words, of his potential malpractice claim against BMA:

> We haven't been able to locate the bed. I think it is likely gone and not recoverable.
>
> * * *
>
> **We have professional malpractice insurance. You could consider bringing a claim against us.** Under the circumstances, I think it was an unforeseen event and we weren't given notice that the bed had been moved, was not where it was supposed to be, or was being put back. **I don't think it was negligence, but I would understand if you wanted to talk to another attorney about it.**
>
> **If you are thinking about suing us then you should hire new counsel and replace us as your attorneys. So we are clear, I'm not suggesting that you go that route, but merely pointing out that it is one route you could go.**

(Emphasis added.)

This email notwithstanding, Mr. Nicassio argues that discovery is required to reveal

"what he knew, when he knew it, and what the significance of the information was to him." It isn't. *First* of all, there does not actually appear to be a dispute as to the operative facts. Mr. Nicassio cannot deny that he knew that the bed was lost as of October 13, 2016 at the latest. He can, and does, claim that he did not yet understand at that time that he had suffered some harm as a result. But his October 12 email suggests otherwise—in that email, he asked not *whether* the loss of the bed would harm he case but rather "[*h*]*ow much* of a detriment" it would be "on the case." (Emphasis added.)

Second, and more importantly, even if there were some dispute about what Mr. Nicassio understood as of October 13, 2016, there was no *material* dispute because the trial court was not required to find that Mr. Nicassio was on actual notice of his injury to determine the accrual date for his cause of action. The court needed only to find that Mr. Nicassio was on inquiry notice of his injury, an objective standard. In other words, it doesn't matter what Mr. Nicassio understood and when he understood it. What matters is whether the information in the October 13, 2016 email would have made a reasonable person "suspicious" enough "to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge" of their injury. *Frederick Rd.*, 360 Md. at 98–99 (citation omitted). And there can be no dispute on this record that it would.

Despite Mr. Hopper's disclosure of a potential malpractice claim, it's possible that a reasonable person receiving the bed emails would not have understood immediately that they (or, more to the point, their case) had been injured, especially given Mr. Hopper's statement that he "d[id]n't think it was negligence" and his insistence that BMA could still

represent Mr. Nicassio well in the Underlying Litigation. Those statements were risky and could have been misleading given the centrality of the allegedly defective bed to the bed-focused claim against Medi-Rents. Nevertheless, we agree with the circuit court that, viewed together, BMA's disclosure of *both* the loss of the bed *and* the potential malpractice claim[8] would make a reasonable person suspicious enough to seek the advice of another attorney. So we agree with the circuit court that as of October 13, 2016, Mr. Nicassio was on inquiry notice of his claim and had a duty "to make inquiries about the quality or bona fides of the services received," even under the continuation of events doctrine. *Id.* at 98. And because seeking such advice would have revealed to Mr. Nicassio at that time that he had a malpractice claim against BMA, his accrual date wasn't tolled, and his cause of action accrued on October 13, 2016.

Mr. Nicassio points to *Frederick Road Limited Partnership v. Brown & Sturm*, 360 Md. 76 (2000), and argues that under the continuation of events doctrine, and despite BMA disclosing the loss of the bed and the potential malpractice claim, it might have been reasonable for him to forgo investigation and rely on his attorneys' assurances that they could represent him well. We don't read the case that broadly. *Frederick Road* was a legal

[8] Although obvious, it's worth emphasizing that our holding here is limited to the facts of this case, where the piece of evidence lost was significant (indeed, *the* evidence on which Mr. Nicassio's entire underlying litigation rested), the loss was disclosed, *and* the attorney disclosed the potential malpractice claim. In other words, in *combination*, the significance of the evidence lost and the malpractice disclosure would have led a reasonable person to seek additional legal advice and would have made Mr. Nicassio's injury immediately clear to another attorney. It is far less clear that disclosing the loss of the bed would, in the absence of the malpractice disclosure, have put Mr. Nicassio was on inquiry notice as of October 13, 2016.

malpractice case in which the Supreme Court of Maryland (at the time named the Court of Appeals of Maryland)[9] held that where the clients had in good faith relied upon the correctness of their attorneys' advice, the question of whether it was reasonable for them to have continued to rely even after certain issues arose was a question of fact for the jury. *Id.* at 106. Mr. Nicassio claims that the facts of his case are "in significant ways, similar" to those at issue in *Frederick Road*, but the ways in which the cases differ are still more significant.

First and foremost, in *Frederick Road*, the plaintiff clients pleaded fraud with particularity, and the Court distinguished the case from several others in which the Court had found the actions time-barred as a matter of law because "neither negligent nor fraudulent concealment was at issue in those cases . . . ."[10] *Id.* at 110. *Frederick Road* was based primarily on the Court's application of the fraud exception to the general accrual rule, not the continuation of events doctrine. And because Mr. Nicassio has not pleaded fraud with particularity—or at all, and nor could he because his attorneys disclosed their

[9] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

[10] The cases that the Court distinguished in *Frederick Road* were *Feldman v. Granger*, 255 Md. 288 (1969), *Leonhart v. Atkinson*, 265 Md. 219 (1972), and *Watson v. Dorsey*, 265 Md. 509 (1972). *Id.* at 110.

negligent act to him—*Frederick Road* doesn't help him.

Several other key facts distinguish this case from *Frederick Road*. Here, BMA explicitly told Mr. Nicassio that he might have a malpractice claim against them, but "at no time during the representation in tax court or thereafter did . . . [the attorney in *Frederick Road*] advise the [plaintiffs] that they may have a cause of action against [him] for negligent advice." *Id.* at 86. Additionally, the Court in *Frederick Road* found it significant that the plaintiffs had "sought legal advice from four attorneys . . . none of whom identified [the defendant attorneys] as potential malpractice defendants." *Id.* at 105. Indeed, it was because the plaintiffs had engaged so diligently in an investigation that failed nevertheless to reveal their injury that the Court in *Frederick Road* found that reasonable minds could differ regarding whether the plaintiffs were on inquiry notice of their cause of action:

> Quite clearly, reasonable minds could conclude that, to require the petitioners in this circumstance, while the respondents continued to represent them, not only to be suspicious of their lawyers, but to ferret out, by seeking yet more legal advice than that being obtained from Brown, Sturm, Burton and Hochberg, every possibility that their lawyers may have provided negligent advice, or that they were being defrauded, would amount to the exercise of extraordinary diligence, rather than that usually required, usual or ordinary diligence.

Id. at 105–06 (citation omitted). The same cannot be said here, where Mr. Nicassio took no steps until January 2019, more than two years after he received the bed emails, to make any investigation into his potential malpractice claim. For his part, Mr. Nicassio argues that to the extent that he had a duty to obtain a second opinion, that duty was fulfilled when he received and relied upon Mr. Hopper's email explaining that he had "spoken to [Mr.

Bekman] and we are comfortable moving forward as your attorneys. We think we can represent you well here." But a reasonable person would, upon receiving and reading that email, have understood that Messrs. Hopper and Bekman had an interest in avoiding a malpractice suit against BMA and, accordingly, would have sought out the advice of unbiased counsel. It was Mr. Nicassio's choice to do so or not, but that decision didn't stop or delay his claims against BMA and its lawyers from accruing. And ultimately, no material disputes of fact precluded the trial court from concluding that Mr. Nicassio's cause of action accrued on October 13, 2016.

2. Mr. Nicassio's injury occurred when the bed was lost, not when his damages were fixed by the arbitration decision.

Mr. Nicassio's *second* theory is that his cause of action did not accrue until the "arbitrator found that the absence of the bed was fatal to [his] product liability claim," which occurred on December 6, 2021. He provides two explanations. *First*, he claims that until the date of the arbitration decision, "the damage to [his] product liability case resulting from the loss of the bed was a mere possibility." In other words, he argues that his malpractice claim did not accrue until that date because a cause of action cannot accrue until all elements are present, and he did not suffer an injury until the negative arbitration decision was issued. *Second*, he argues that until the arbitration decision was issued, he did not know, and through the exercise of reasonable diligence could not have known, that he had suffered an injury, so the discovery rule tolled the accrual date until that time.

Mr. Nicassio's *first* argument stands at odds with both the record in this case and the law. On the facts, Mr. Nicassio's emails demonstrate that he understood as early as

October 12, 2016 that he had been harmed by the loss of the bed—specifically, when he asked Mr. Hopper not *whether* but "[*h*]*ow much* of a detriment" the loss would be to his case. (Emphasis added.) Additionally, his attorneys, presumably with the awareness that he couldn't state a claim until he had suffered some form of damage, filed Mr. Nicassio's lawsuit against BMA on December 3, 2021, three days *before* the arbitration decision was issued.

As Mr. Nicassio himself stated in his complaint, the harm he suffered took the form of the "significant diminishment of the value of his claim in the Underlying Litigation due to [BMA]'s loss of the bed." Stated differently, he was injured to the extent that the value of his claim against Medi-Rents decreased after the bed was lost. He suffered this harm the moment the bed was lost, even if the precise amount of damages was unclear until the arbitration decision was issued. And because Maryland does not follow the maturation of harm rule, claims accrue as soon as "some evidence of legal harm has been shown." *Fairfax Sav.*, 112 Md. App. at 613.

That all said, we might not conclude in every case involving spoliation that the injury occurred the moment the evidence was lost. We can imagine, for example, a case in which the lost evidence was less central to the claim than the bed was here, and thus it might well remain unclear until much later in the life of the case *whether* its loss would affect the ultimate outcome. In that hypothetical, the cause of action might not accrue the moment the client learned that the evidence was lost because the harm would remain a mere possibility until the case concluded. In this case, though, nobody, least of all Mr.

Nicassio, had any doubt on October 13, 2016 about *whether* the loss of the bed—*the* piece of evidence on which Mr. Nicassio's entire products liability case rested—would affect the ultimate outcome of the Underlying Litigation. Once the bed was lost, the only outstanding question was *how much* harm the loss would do to Mr. Nicassio's products liability claim. And although it's true that the precise answer wasn't known until December 6, 2021, the damage had been done, and his claim accrued, long before.

Mr. Nicassio's *second* argument here is incorrect for all the reasons we have already discussed in this and the previous section. A reasonable person receiving the bed emails would have sought the advice of another attorney, and because the fact (although not necessarily the extent) of Mr. Nicassio's injury would have immediately been obvious to that attorney, Mr. Nicassio was on inquiry notice of his cause of action as of October 13, 2016. And again, that's not some subtle interpolation on our part—his email to Mr. Hopper asks (and answers) the very questions a person on inquiry notice must ask.

B. We Decline To Decide Whether Dismissal Of Mr. Nicassio's Malpractice Claim Was Required Under The Doctrine Of Collateral Estoppel.

In addition to defending the circuit court's decision on limitation grounds, BMA asks us to hold as well that Mr. Nicassio's claim is barred by the operation of collateral estoppel. BMA argues that because the arbitrator found "that Mr. Nicassio was at least negligent in discarding the tether" and that the "degree of fault on the part of Mr. Nicassio and his attorney, Mr. Hopper, was substantial," Mr. Nicassio's negligence contributed as a matter of law to the dismissal of the Underlying Litigation. Therefore, BMA asserts, the

arbitrator found that Mr. Nicassio was contributorily negligent in bringing about the harm he suffered,[11] collateral estoppel bars Mr. Nicassio from relitigating that issue here, and we must affirm the dismissal of Mr. Nicassio's malpractice suit because his contributory negligence bars him from recovering.

Although BMA argued this theory in support of its motion to dismiss, the court expressly declined to decide the motion on those grounds, and we decline to address it in the first instance on appeal. To be sure, Maryland Rule 8-131(a) provides that "[o]rdinarily the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." But we are affirming the trial court's dismissal of Mr. Nicassio's case on limitations grounds, and addressing this theory in the first instance would neither guide the trial court nor avoid the expense and delay of another appeal.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.

[11] We offer no views on whether the arbitrator in fact made such a finding.