Circuit Court for Prince George's County
Case No. CAL 18-32511

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 553

September Term, 2022

SHELLY BLACKSTON

v.

DOCTORS WEIGHT LOSS CENTERS INC., ET AL.

Graeff,
Nazarian,
Tang,

JJ.

Opinion by Graeff, J.

Filed: June 29, 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 case arises from a liposuction procedure that Dr. Alba Roy Heron, Jr. ("Dr. Heron"), one of the appellees, performed on Shelly Blackston, appellant, at his office in Alexandria, Virginia. The procedure caused Ms. Blackston to suffer permanent physical and emotional injuries.

On September 21, 2018, Ms. Blackston filed a complaint in the Circuit Court for Prince George's County against appellees, Dr. Heron, Doctors Weight Loss Centers, Inc., A. Roy Heron Global Foundation for Community Wellness, and the Heron Smart Lipo Center.[1] She alleged that Dr. Heron breached the standard of care in numerous respects, before, during, and after the procedure, and he failed to obtain proper informed consent.

Following a five-day trial, the jury returned a verdict in Ms. Blackston's favor, awarding her a total of $2,300,900 in damages, which included non-economic damages of $2,000,000, economic damages of $60,000, and medical expenses in the amount of $240,900. Appellees filed several post-trial motions, including a motion for statutory remittitur, which the court granted, in part, and denied, in part. As explained in more detail, *infra*, the court reduced the total award to $1,055,900, plus interest and costs, and the parties dispute which state's law governs the damages recoverable.

Ms. Blackston presents the following question for this Court's review, which we have rephrased slightly, as follows:

[1] Although a cross-appeal was filed, to avoid confusion we refer to the parties herein as Ms. Blackston and appellees.

> Did the circuit court err in applying Maryland's law on the limitation of non-economic damages, when the failure to obtain informed consent and the medical malpractice causing harm occurred in Virginia?

Appellees filed a cross-appeal, presenting the following additional questions for this Court's review, which we have rephrased slightly, as follows:

1. Did Ms. Blackston provide appellees with adequate notice of the intention to rely on Virginia law pursuant to Md. Code Ann., Cts. & Jud. Proc. Art. ("CJ") § 10-504 (2020 Repl. Vol.)?

2. Did the circuit court err in failing to reduce the award of past medical expenses in accordance with CJ § 3-2A-09(d)(1)?

For the reasons set forth below, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Dr. Heron is a cosmetic surgeon who has an office in Virginia and a Virginia medical license. On January 12, 2015, Ms. Blackston visited Dr. Heron at his office. She did not see Dr. Heron that day, but she completed general intake forms, and his staff showed her a short video that explained the liposuction procedure.

On January 15, 2015, Ms. Blackston returned to Dr. Heron's office for a pre-operative evaluation. During the evaluation, Ms. Blackston discussed the risks of the procedure with Dr. Heron, and she signed a consent form based on those discussions. Dr. Heron then took Ms. Blackston to the exam room to take measurements and evaluate her condition. Dr. Heron explained the risks with a traditional liposuction procedure and persuaded Ms. Blackston to choose an alternative laser-assisted liposuction method, which he called "Smart Lipo." Ms. Blackston testified that Dr. Heron represented that the

procedure was "minimally invasive" and "no big deal." The consent form indicated that "[a]n infection is quite unusual after this type of surgery."

On January 30, 2015, Dr. Heron performed the liposuction procedure. Prior to the surgery, Dr. Heron prescribed an oral antibiotic for Ms. Blackston to take before the procedure, but he did not administer any other antibiotics during the procedure. Dr. Heron also gave Ms. Blackston analgesic pills two hours prior to the surgery to help with any pain.

Using a local anesthetic, Dr. Heron made several incisions and suctioned fat tissue from six locations on Ms. Blackston's body. Ms. Blackston testified that, as soon as the procedure began, she immediately was in a lot of pain and was screaming. There was no report of pain in the medical records, and Dr. Heron testified that screaming was abnormal for a procedure like this.

The surgery lasted for approximately six and a half hours, which included three separate breaks. There was one break for a snack and two breaks to allow Ms. Blackston to go to the bathroom. The entire procedure, including preparation, surgery, and recovery period, lasted from approximately 11:00 a.m. until 11:15 p.m.

Approximately two hours after the procedure, Ms. Blackston complained of "dizziness and excruciating pain." Dr. Heron "injected some Lidocaine to numb her and make her feel better." Ms. Blackston testified that the pain continued for the next several days. Following the procedure, Ms. Blackston returned to her home in Upper Marlboro, Maryland.

On February 3, 2015, Ms. Blackston visited Dr. Heron again for a post-operative evaluation. She reported that she was miserable and in a lot of pain, and she had a fever and nausea. Dr. Heron testified that Ms. Blackston had some drainage, but there were no signs of infection. He instructed her to continue to take the oral antibiotic he prescribed before the procedure.

Over the next several days, Ms. Blackston's condition worsened. She was bleeding, developed a high fever, and was "throwing up constantly." The incisions were swollen and oozing puss. Ms. Blackston testified that she reported her deteriorating conditions to Dr. Heron and sent him photographs, but when she asked for an appointment, she was told to come to the group weight loss clinic on February 14, 2015. Dr. Heron denied any such communication.

On February 7, 2015, Ms. Blackston's mother called Dr. Heron requesting to refill the prescription for the antibiotic. She stated that Ms. Blackston was okay but "wanted more antibiotics since the [incision] sites were still open and to prevent an infection." Dr. Heron denied that Ms. Blackston had an infection at this time. He testified that, if she had indicated that she had an infection, he would not have renewed the same antibiotic and would have made an appointment to see her.

On February 14, 2015, Ms. Blackston went to the group weight loss session. She testified that Dr. Heron was "annoyed" with her because she disrupted the group, who "left because they saw how bad [she] looked," with blood and drainage oozing from her

incisions. Dr. Heron refused to examine her, even after she showed him her wounds and described her symptoms. Instead, he turned his back and refused to speak to her.

Dr. Heron testified that Ms. Blackston showed him her incisions, which were still open and draining fluid, and he advised her to make an appointment to see him on February 17, 2015. He testified that, if Ms. Blackston had been bleeding or had a concerning discharge on this date, he "would have stopped and immediately seen her."

Later on February 14, after leaving Dr. Heron's office, Ms. Blackston collapsed and was taken to MedStar Southern Maryland Hospital Center. She was diagnosed with methicillin-resistant *Staphylococcus aureus* ("MRSA"), a highly dangerous, contagious bacterial infection. She received several surgeries and rounds of antibiotics to treat the infection. Doctors attempted to contact Dr. Heron, but he did not call back. Dr. Heron testified that he did not receive this message, but he did attempt to call on his own after receiving the medical records.

On September 21, 2018, Ms. Blackston filed a complaint in the Circuit Court for Prince George's County, alleging one count of medical malpractice. The complaint alleged that Dr. Heron negligently performed the procedure, and he breached the standard of care during and immediately after the procedure and in his post-operative care. The complaint also alleged that Dr. Heron failed to advise that, because of her weight, she had an increased risk for complications.

On January 24, 2020, Ms. Blackston filed a pre-trial statement asserting, among other things, that certain provisions of Virginia law applied to the case. Specifically, she

claimed that Virginia Code § 8.01-581.15 governed the limitation on damages and the maximum amount recoverable was $2,150,000.[2] On March 6, 2020, Ms. Blackston submitted proposed jury instructions, which all cited Maryland law. Ms. Blackston requested instructions on damages, including damages generally, compensatory damages, susceptibility to injury, an instruction explaining that damages are not subject to state or federal income tax, and an instruction on life expectancy. There was no proposed instruction on the issue of a damages cap.

On March 9, 2020, trial began. Ms. Blackston offered testimony from numerous people, including two medical experts on the issue of causation: Dr. Praful Ramineni, a plastic surgeon who treated Ms. Blackston when she was admitted to MedStar, and Dr. Ian Frank, an expert in infectious diseases. During the voir dire examination of Dr. Ramineni, counsel for appellees objected to his qualification as an expert, stating that, pursuant to CJ § 3-2A-02(c), Dr. Ramineni could not testify as to the standard of care required in this case because he is a plastic surgeon and Dr. Heron is a cosmetic surgeon. Counsel argued that Ms. Blackston needed to call a cosmetic surgeon, "somebody who does Smart Lipo, who doesn't have just plastic surgery training."

[2] As discussed in more detail, *infra*, under Maryland law, Md. Code Ann., Cts. & Jud. Proc. Art ("CJ") § 3-2A-09(b) (2020 Repl. Vol.) limits the value of non-economic damages to $755,000. CJ § 3-2A-09(d)(1) limits past medical expenses to the amount actually paid, which appellees contend is $68,224.98. Under Virginia law, however, Virginia Code § 8.01-581.15 provides Ms. Blackston can recover up to $2,150,000 in an action for medical malpractice.

Counsel for Ms. Blackston argued, however, that Virginia law would apply because "all of the events in this case took place in Virginia." Under Virginia law, Dr. Ramineni could testify because he was familiar with liposuction generally. Counsel stated that Maryland law would apply to any procedural issues.

Counsel for appellees objected and stated that, if Ms. Blackston is "asserting Virginia law, we need to make that decision now" because it was not clear that she was relying on anything other than Maryland law. Appellees requested to be heard on the issue of applicable law, but the court stated that it would apply Maryland law. The court then qualified Dr. Ramineni as an expert and allowed him to testify.[3]

Dr. Ramineni opined that Dr. Heron breached the standard of care in numerous ways, and these various breaches increased the risk that Ms. Blackston would develop an infection. Specifically, he testified that Dr. Heron breached the standard of care by: (1) failing to give an intravenous antibiotic "within 30 minutes to one hour of the procedure"; (2) failing to adequately prepare the skin and take other precautions during the procedure to prevent contamination and bacteria growth; (3) failing to perform the surgery in stages, and instead, continuing the procedure past the recommended six-hour mark; (4) taking numerous breaks during the procedure; and (5) failing to give sufficient postoperative care by (a) continuing the same antibiotic when Ms. Blackston showed signs of infection, and (b) failing to examine her in a timely fashion.

[3] No issue regarding Dr. Ramineni's testimony has been raised on appeal.

Dr. Ramineni stated that Ms. Blackston was a suboptimal candidate for liposuction because of her weight, which increased the risk of infection. Additionally, he testified that the consent form was misleading and contained false information about the options for surgery. Specifically, the form conflated the "extraordinarily rare" risks associated with a traditional liposuction procedure in a way that would lead the patient to choose the Smart Lipo option instead.

Dr. Ramineni opined that the bacteria that caused the infection was "introduced" to Ms. Blackston during the January 30, 2015, procedure. He explained that "these are deep soft tissue infections . . . not superficial . . . . And the depth of the infections tend to [show] that some have been introduced into the wound itself because it's starting on the inside out, not the outside in." He stated that the sort of bacteria present was not the sort "you would worry about so much in a postoperative period," and it was introduced sometime during the actual procedure.

Dr. Frank testified that "the longer the surgery, the more likely infection is going to occur." He opined that Ms. Blackston's infection was "seeded" during the Smart Lipo procedure because "infections of this type happen at the time of surgery," and it was "impossible that the infection could have occurred postoperatively." The laser instrument used to perform the procedure "introduced the infections in the various locations," and the bacteria did not merely invade her body through another means. Additionally, he testified that "infections don't manifest themselves immediately after a surgical procedure. . . . [I]t takes some time before you see the signs and symptoms of an infection after a surgery."

Dr. Frank opined that, had Ms. Blackston received an appropriate antibiotic in a timely fashion, she could have avoided hospitalization and the numerous surgeries it took to treat the infection. Upon seeing that the prescribed antibiotic was not working, Dr. Heron should have switched Ms. Blackston to a different type of antibiotic, one which was effective against MRSA.

Dr. Frank testified that there was some evidence of the presence of an infection during Ms. Blackston's February 3, 2015 postoperative evaluation. On cross-examination, however, he stated that, based on Dr. Heron's notes from that visit, he could not determine, as a matter of fact, that there were clinical signs of an infection on this date. Dr. Heron had "poor documentation practice[s]," but from the evidence he reviewed, he could conclusively state that Ms. Blackston's infection was clinically evident by February 7, 2015.

Dr. Eric Nuermberger, an expert in infectious diseases, testified for appellees. He agreed that "MRSA could have gotten deep beneath Ms. Blackston's skin . . . if it was pushed there by surgical instruments at the time of the procedure." He could not say, however, to any degree of medical probability, whether Ms. Blackston's infection was seeded during the January 30, 2015 procedure, or sometime after. He testified that, in his opinion, it was equally possible that the infections in multiple wound sites were developed either during the procedure or afterwards. He stated that a "clear mechanism by which the infection occurred" could not be established. Based on photos and testimony regarding red

or swollen skin by February 7, 2015, he would assume that the infection had been going on for a week.

Dr. Nuermberger testified that, if the skin was not decontaminated after the several breaks, this would be considered a breach of the standard of care. Dr. Nuermberger disagreed that a different antibiotic would have prevented the numerous procedures Ms. Blackston underwent, but he agreed that the antibiotic provided would not be effective against MRSA.

Dr. Jared Mallalieu, a cosmetic surgeon, testified that Dr. Heron complied with the standard of care in this case, and he absolved Dr. Heron of any responsibility. He testified that there was proper informed consent, that an intravenous antibiotic was not required, and that taking breaks did not increase the risk of infection. Dr. Mallalieu also testified that Ms. Blackston was not showing clinical signs of infection on February 3, 2015, but she could have been infected with the MRSA bacteria at this time. He stated that the information presented to Dr. Heron on February 7, 2015 was consistent with an infection. Dr. Mallalieu concluded that nothing Dr. Heron did caused Ms. Blackston's infection.

Dr. Heron testified that, in the more than 6,000 Smart Lipo surgeries that he had performed, Ms. Blackston was the only patient who developed an infection. He stated that obese patients were associated with significantly higher risks of liposuction-related complications. He normally would not perform this procedure on a person of Ms. Blackston's size, but he made an exception in her case because she agreed to attend a weight loss program after surgery. Ms. Blackston denied such an agreement.

Dr. Heron testified that he requires all patients to have a physical performed at least 12 months prior to the surgery, and he depends on the physician's assessment to know whether he can proceed with the surgery. Ms. Blackston's physical was performed by her mother, who is a practicing physician specializing in internal medicine. Ms. Blackston indicated on the form, however, that the physical was performed by a different doctor. Dr. Heron testified that it is ethically incorrect to treat a family member, and he would not have accepted this clearance had he known Ms. Blackston's mother performed the physical.

After the close of the testimony, counsel for appellees made a motion for judgment regarding the events occurring on February 14, 2015. Ms. Blackston agreed that she did not contend that there was a breach of the standard of care on February 14 that caused injury, but the testimony regarding that was admissible for credibility and truthfulness purposes. The court granted the motion. The Court then gave jury instructions on the issue of damages generally, but it did not discuss the damages cap or remittitur under state law.

On March 16, 2020, following a five-day trial, the jury returned a verdict in favor of Ms. Blackston. The verdict sheet contained four questions: (1) "Do you find that Dr. Heron complied with the standards of care while treating Ms. Blackston"; (2) "Do you find that Dr. Heron provided appropriate Informed Consent"; (3) Do you find that this breach in the standard of care and/or a failure of informed consent was a cause of the injury; and (4) "What damages, if any, do you find." The jury found that Dr. Heron breached the standard of care in treating Ms. Blackston, he failed to provide appropriate informed

consent, and that these breaches were the cause of injury to Ms. Blackston. It awarded Ms. Blackston damages in the amount of $2,300,900, as follows:

- Medical Expenses: $240,900;
- Economic Damages: $60,000;
- Non-Economic Damages: $2,000,000.

On March 25, 2020, appellees filed post-trial motions for judgment notwithstanding the verdict ("JNOV"), a conditional new trial, and/or statutory remittitur. As relevant to the issues on appeal, they argued, in a footnote:

> It is anticipated that Plaintiff will argue that Virginia law applies to this case. If that argument is indeed made, a proper reply will be filed with this [c]ourt. At this juncture, however, this [c]ourt ruled at trial that Maryland law controlled. In addition, Plaintiff never filed the appropriate notice . . . to assert Virginia law, and Plaintiff is estopped from arguing Virginia law applies by her use of Maryland law in her entire [case], including jury instructions.

On April 27, 2020, Ms. Blackston filed an opposition to the post-trial motions. As relevant, she argued that "Virginia substantive law applies to this case, and [appellees'] motion for statutory remittitur should be denied." Ms. Blackston stated that the case was brought in Maryland because Dr. Heron resides in Prince George's County, Maryland. She argued that the damages cap is a matter of substantive law, and pursuant to the principle of *lex loci delicti*, the proper law to apply is the law of the place of the wrong, which was Virginia. Ms. Blackston argued that she was not estopped from relying on Virginia law because the issues of the damages cap and the collateral source rule were never presented to the jury, and "there is no conflict between Maryland and Virginia law on liability issues in this case."

Appellees filed a reply to Ms. Blackston's opposition. They argued that Maryland substantive law applied because the infection manifested while Ms. Blackston was in Maryland. Appellees asserted that Maryland law is clear that "the place of the injury is where the injury was suffered, not where the alleged wrongful act took place." Accordingly, that the procedure took place in Virginia was immaterial, and the court should consider only where "the last act required to complete the tort occurred." Appellees argued that the evidence indicated that the infection manifested sometime between February 7, 2015 and February, 14, 2015, when Ms. Blackston was home in Maryland, and as such, Maryland law applied. They also argued that Ms. Blackston failed to give proper notice of her reliance on Virginia law pursuant to CJ § 10-504.

Ms. Blackston filed a surreply to appellees' response, arguing that the place of injury was the same as the place of the negligence. Ms. Blackston asserted that Dr. Frank testified that the bacteria was introduced to her body during the procedure, and that was when the injury occurred. Ms. Blackston argued that notice was properly given in her pre-trial statement.

On March 14, 2022, the court held a hearing on the motions. Appellees argued that Ms. Blackston failed to comply with the notice requirements set forth in CJ § 10-504 because she did not inform them of her intention to rely on Virginia law until her "pretrial statement filed approximately one month before trial." They stated that this was not reasonable, and notice should have been provided "before the close of discovery" to allow them to assess any defenses under that foreign law.

As for the choice of law analysis, appellees argued that the correct analysis was to look at the place of injury, not the place of the wrong. They argued that "[i]t is not where the infection was seeded, which was in Virginia. It's where the infection manifested." Appellees asserted that it was uncontroverted that there was no manifestation of infection prior to February 7, 2015, and when the infection manifested, between February 7 and 14, Ms. Blackston was in Maryland. They stated that "[i]t's the manifestation that is when the tort is complete" because there is no injury without a manifestation. Accordingly, they argued that Maryland law applied, there was a cap on damages, and "therefore the noneconomic numbers need to be back to $755,000." They also stated that Ms. Blackston was entitled to recover only the amounts paid out of pocket for the medical bills, which they asserted was $68,224.98.

Ms. Blackston argued that she gave notice in the pre-trial statement, and "[t]he issue of Virginia law applying to the damages in this case, didn't arise until there was a verdict." Until there was a verdict, there was no reason to address the differences between Virginia and Maryland law.

As for the choice of law analysis, Ms. Blackston argued that the cases cited by appellees were limited to occupational diseases. The proper analysis in this case was to look at the place of the wrong, which clearly was Virginia because: (1) Dr. Heron's office is located there; (2) that is where the surgery and post-operative care took place; and (3) that is where Dr. Heron called in a second prescription for antibiotics. Counsel for Ms. Blackston noted that Dr. Frank testified that the infection was seeded in Virginia during

the procedure, and "clearly Virginia is the place of the wrong." Accordingly, Virginia law applied, including the Virginia damages cap, and under the collateral source rule, "the full amount of bills are recoverable."

The court ultimately denied the motions for JNOV and a conditional new trial, finding that Ms. Blackston's "expert was sufficiently qualified and capable of rending an opinion," and there was sufficient evidence presented "for the jury to reach its conclusion." With respect to the motion for statutory remittitur, the court granted it, in part, and denied it, in part. The court found that, pursuant to CJ § 3-2A-09(b), the non-economic damages award should be remitted from $2,000,000 to $755,000. The court denied, however, the motion to remit the past medical expenses pursuant to CJ § 3-2A-09(d)(1), and it left in place the jury's award of $240,900. Accordingly, the court reduced the total award from $2,300,900 to $1,055,900, plus interest and costs.

This appeal followed.

STANDARD OF REVIEW

This case presents a choice of law issue. That is a question of law to be determined by this Court *de novo*. *See Erie Ins. Exch. v. Heffernan*, 399 Md. 598, 619–20 (2007) (answering a choice of law issue as a certified question of law from the United States District Court). *Accord Sing Fuels Pte Ltd. v. M/V Lila Shanghai*, 39 F.4th 263, 270 (4th Cir. 2022) ("Choice-of-law determinations are questions of law that we review de novo."); *Nix v. Major League Baseball*, 62 F.4th 920, 932 (5th Cir. 2023) ("We review de novo a district court's choice of law determination.").

DISCUSSION

I.

Choice of Law

Ms. Blackston contends that the circuit court erred by failing to apply Virginia law relating to the limitation of damages. She asserts that "Maryland adheres to the *lex loci delicti* rule in analyzing choice of law problems," and that principle applies the substantive law of the place where the wrong was committed and the harm was done. She argues that the harm was done in Virginia, where Dr. Heron: (1) failed to obtain proper informed consent; (2) began the liposuction procedure which caused her intense pain; and (3) inserted the instrument into her body, which seeded the bacteria causing the infection. Ms. Blackston notes that, if the Virginia damages cap applies, the verdict would be reduced from $2,300,900 to $2,150,000.

Appellees contend that Maryland law applies to this case because there was no evidence or finding of fact by the jury that Ms. Blackston suffered an injury in Virginia. Specifically, they argue that, although there was testimony that the bacteria was seeded in Virginia, there was no specific jury finding on this issue, and therefore, this Court cannot presume that such a finding was made. In any event, they argue that, even if the jury did find that the bacteria was seeded during the procedure, there was no evidence that the bacteria caused immediate injury to Ms. Blackston. They assert that Maryland was the place of the wrong/ injury because it was where the bacteria took effect and Ms. Blackston developed signs of infection. Accordingly, they assert that this Court should affirm the

decision of the circuit court granting remittitur of the non-economic damages pursuant to CJ § 3-2A-09(b). They argue, however, that the court erred in denying the motion to remit the past medical expenses in accordance with the requirements of CJ § 3-2A-09(d)(1).

Determining whether the law of Virginia or Maryland applies is significant to the damages recoverable here. With respect to non-economic damages, if Maryland law applies, CJ § 3-2A-09(b) limits the value of non-economic damages in this 2015 cause of action to $755,000.[4] CJ § 3-2A-09(d)(1) limits past medical expenses to the amount actually paid, which appellees contend was $68,224.98.[5] If Virginia law applies, however,

[4] CJ § 3-2A-09(b) provides as follows:

> (b)(1)(i) Except as provided in paragraph (2)(ii) of this subsection, an award or verdict under this subtitle for noneconomic damages for a cause of action arising between January 1, 2005, and December 31, 2008, inclusive, may not exceed $650,000.
>
> (ii) The limitation on noneconomic damages provided under subparagraph (i) of this paragraph shall increase by $15,000 on January 1 of each year beginning January 1, 2009. The increased amount shall apply to causes of action arising between January 1 and December 31 of that year, inclusive.

[5] CJ § 3-2A-09(d)(1) provides that a verdict for past medical expenses shall be limited to:

> (i) The total amount of past medical expenses paid by or on behalf of the plaintiff; and
>
> (ii) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay.

Virginia Code § 8.01-581.15 limits the total amount recoverable to $2,150,000, and past medical expenses would not be limited by CJ § 3-2A-09(d)(1).[6]

In assessing which law to apply, we note that Maryland adheres to the traditional choice of law principle of *lex loci delicti*. *See Lab'y Corp. of Am. v. Hood*, 395 Md. 608, 615 (2006); *Heffernan*, 399 Md. at 620.[7] Under this principle, "where the events giving rise to a tort action occur in more than one State," a court shall apply the substantive law of the place "where the injury—the last event required to constitute the tort—occurred." *Hood*, 395 Md. at 615. *Accord B-Line Med., LLC v. Interactive Digital Sols., Inc.*, 209 Md. App. 22, 49 (2012). "[A]n injury is deemed to occur where the plaintiff first suffers harm, even if the tortious conduct subsequently results in additional or more severe harm elsewhere." *Karn v. PTS of Am., LLC*, 590 F. Supp. 3d 780, 797 n.6 (D. Md. 2022).

"Procedural matters, however, are always governed by the law of the forum." *Lewis v. Waletzky*, 422 Md. 647, 657–58 (2011). *Accord Heffernan*, 399 Md. at 632–33. ("[S]ubstantive law [is] to be determined by the place of wrong, and the procedural law [is] to be determined by the law of the forum."). Therefore, as a threshold determination, we must first decide whether the law at issue is substantive or procedural. *Id*. at 615.

[6] Virginia Code § 8.01-581.15 provides that for an injury occurring between July 1, 2014, through June 30, 2015, "any verdict returned against a health care provider in an action for malpractice . . . the total amount recoverable . . . shall not exceed . . . $2.15 million."

[7] Our analysis in this section addresses Ms. Blackston's question presented and appellees' second question presented.

It is well settled under Maryland law that a statutory cap on non-economic damages is a matter of substantive tort law and not procedural law. *See Lewis*, 422 Md. at 661; *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 48, *cert. denied*, 327 Md. 626 (1992). Although we have not been pointed to, nor have we found, any Maryland case that has specifically addressed the issue, we conclude that a statutory cap on past medical expenses also is a matter of substantive tort law. *See Lewis*, 422 Md. at 662, 665 (explaining that procedural matters are those that simply affect the administration of justice and "substantive tort law encompasses 'the extent of liability and the right to, and measure of, contribution.'") (quoting *Heffernan*, 399 Md. at 633) (cleaned up). *Accord* CJ § 3-2A-10 (explaining that, "[e]xcept as otherwise provided in §§ 3-2A-08A and 3-2A-09 . . . the [other] provisions of this subtitle shall be deemed procedural in nature"). Therefore, the principle of *lex loci delicti* applies to our analysis, and we must look to where the events giving rise to the tort occurred.

A cause of action for medical negligence arises where the injury first comes into existence, not where the ultimate damage is suffered. *See Burnside v. Wong*, 412 Md. 180, 200 (2010) (recognizing that a "medical injury may occur even though all of the resulting damage to the patient has not yet occurred"); *Green v. N. Arundel Hosp. Ass'n, Inc.*, 366 Md. 597, 612 (2001) (venue was proper in the county where the negligent diagnosis and treatment occurred, rather than where the ultimate cardiac arrest occurred); *Oxtoby v. McGowan*, 294 Md. 83, 97 (1982) ("[M]edical injury occurs . . . even though all of the resulting damage to the patient has not been suffered."). *Accord Williams v. Gyrus ACMI,*

Inc., 790 F. Supp. 2d 410, 415 (D. Md. 2011) (injury occurred for purposes of *lex loci delicti* at the time the shim was left in her body, "even if she did not begin to experience pain or other symptoms from the shim's presence until she relocated" to another state).

Here, Ms. Blackston had a legally cognizable injury on the day of the procedure. Dr. Raminemi and Dr. Frank both testified that the infection was introduced during the procedure in Virginia, and none of appellees' experts could definitively state to the contrary.[8] The evidence, therefore, was that Ms. Blackston was "injured" during the surgery in Virginia, and Virginia law applies with respect to the damages recoverable.[9]

II.

Notice

Appellees contend that, even if Virginia law applies, it would not in this case because Ms. Blackston failed to provide reasonable notice of her intention to rely on Virginia law. They assert that the late notice created an unfair surprise because, under Virginia law, the potential amount recoverable would be double that of the amount allowable under Maryland law.

[8] Appellees state in their brief that "Ms. Blackston's own experts, Dr. Frank and Dr. Flenner, could not even agree whether it was possible to determine when the bacteria was introduced." Dr. Flenner, however, did not testify at trial, and Dr. Frank merely disagreed with Dr. Flenner's statement in a deposition that he was unable to determine to a reasonable degree of medical certainty that the injury occurred during or after the procedure.

[9] Additionally, the injury relating to the failure to give proper informed consent occurred in Virginia, based on the evidence that Ms. Blackston signed the consent form in Dr. Heron's office in Virginia.

Ms. Blackston argues that this contention is without merit. She notes that she expressly informed the court in her pre-trial statement that she intended to rely on Virginia law with respect to any limitation on damages. She asserts that this notice was reasonable, and appellees did not raise any concern regarding this issue at that time.

CJ § 10-504 provides that if a party intends to rely on the law of another jurisdiction, that party is required to provide "reasonable notice . . . to the adverse parties either in the pleadings or by other written notice." The Supreme Court of Maryland[10] has explained:

> Our courts have interpreted [CJ § 10-504] to mean that, if a party wishes to rely on a foreign law, notice should be given in the trial court so that the adverse party has an adequate opportunity to prepare his arguments on the foreign law. . . . Although we may, in our discretion, take judicial notice of foreign law where the statutory notification was not given and proof of the foreign law was not presented, . . . we [will] decline to do so [when] the case proceeded in the trial court on the assumption that Maryland law was applicable. . . .

Beale v. Am. Nat. Lawyers Ins. Reciprocal, 379 Md. 643, 652 n.5 (2004) (citations omitted). "If the circumstances indicate that no unfair surprise would result, notice of intent to rely on foreign law may be filed up to the start of trial." *Frericks v. Gen. Motors Corp.*, 274 Md. 288, 297 (1975).

Here, Ms. Blackston gave notice of her intent to rely on Virginia law regarding damages in the pre-trial statement, which was filed more than one month before the start of trial. We conclude that this afforded appellees sufficient time to object and challenge

[10] 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.

the reliance on foreign law or to change their trial tactics. The notice was reasonable and in compliance with CJ § 10-504. Accordingly, Ms. Blackston is entitled to the maximum damages under Virginia law, i.e., $2,150,000.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO ENTER JUDGMENT FOR APPELLANT IN THE AMOUNT OF $2,150,000. COSTS TO BE PAID BY APPELLEES.