Circuit Court for Washington County
Case No. C-21-CV-18-000773

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 626

September Term, 2020

BRANDON SHAUT

v.

ROBINWOOD DENTAL CENTER, ET AL.

Graeff,
Arthur,
Wells,
JJ.

Opinion by Wells, J.

Filed: August 6, 2021

On July 17, 2018, appellant Brandon Shaut filed a claim with the Health Care Alternative Dispute Resolution Office alleging that an oral surgeon at Robinwood Dental Center, P.C. (hereafter, "the dental center") severed his lingual nerve during the extraction of Mr. Shaut's wisdom teeth. Mr. Shaut maintained that the severed nerve left him with no feeling in his tongue. After waiving arbitration, the case proceeded in the Circuit Court for Washington County.

After taking Mr. Shaut's deposition, the dental center moved for summary judgment arguing that Mr. Shaut knew soon after the May 29, 2015 surgery that his tongue was injured. According to the dental center, Mr. Shaut was on inquiry notice of his claim days after surgery and, thus, his claim was time-barred because it was filed outside of the three-year statute of limitations. The circuit court agreed, concluding that Mr. Shaut was on inquiry notice by June 11, 2015 and granted summary judgment in favor of the dental center.

Mr. Shaut appealed. The primary question he poses is whether the circuit court erred in granting summary judgment.[1] For the reasons we explain, we hold that the circuit court erred in finding as a matter of law that Mr. Shaut was on inquiry notice of a claim against the dental center as of June 11, 2015 and reverse the judgment.

[1] Mr. Shaut raises a subsidiary issue, arguing that there were disputed material facts that the circuit court ignored which would have also defeated the motion for summary judgment. Because we reverse on the statute of limitations issue, it is not necessary for us to reach this question.

FACTUAL AND PROCEDURAL BACKGROUND

The facts supporting the motion for summary judgment came from Mr. Shaut's deposition and his treatment record at the dental center. At his deposition, Mr. Shaut testified that after he attained a position with the Montgomery County Fire and Rescue, he decided to get his "teeth fixed." Believing that he needed to have his wisdom teeth extracted before he got braces, Mr. Shaut consulted with the dental center staff on April 20, 2015 about removing his wisdom teeth.[2] During the consultation, Mr. Shaut scheduled the extractions for May 29, 2015. He also signed a consent form and was given medication to take before the procedure. Mr. Shaut explained that as a result of the consultation, he believed a specific oral surgeon would be doing the extractions and that he would be "put to sleep" during the procedure.

On Friday, May 29, 2015, Mr. Shaut arrived at the dental center with his girlfriend. To Mr. Shaut's surprise, Dr. Harold Butler was going to perform the procedure, not the oral surgeon that he had expected. Dr. Butler began by applying an anesthetic to several locations in Mr. Shaut's mouth. Mr. Shaut testified that he was startled that he was not going to be put to sleep as he was told, but he did not complain. As the operation began, Mr. Shaut said that he grew increasingly uncomfortable. Shortly after the procedure started, he asked the doctor to stop. According to Mr. Shaut, Dr. Butler told him that he could not give him any more of the local anesthetic and then in an exasperated tone said, "[i]f you don't like it why don't you go across the street and get put under like everyone

[2] One basis of the negligence complaint against the dental center was that they failed to ask Mr. Shaut why he needed to have his otherwise healthy wisdom teeth removed.

else." Feeling "shocked" and "intimidated," Mr. Shaut still moved forward with the extractions. After the surgery was finished, Mr. Shaut's girlfriend drove him home.

The next morning, Mr. Shaut testified that he woke up and realized that he had no sensation in his tongue. "I had a new lisp, and something didn't feel right. My tongue was still numb but, I could feel other things in my mouth … it just felt like my tongue was dead." He told his girlfriend and his best friend about what he was experiencing. The friend apparently also had his wisdom teeth extracted but told Mr. Shaut that he did not have problems with his tongue. During the weekend, Mr. Shaut explained that he "tried to adjust" to the fact that he had lost sensation in his tongue and was having trouble eating and talking. He admitted that he had "started to freak out."

On Monday, June 1, the first day that it was open after the surgery, Mr. Shaut called the dental center. He spoke with a woman who placed him on hold. The woman quickly came back on the line and told him that having a numb tongue was a normal side effect of having one's wisdom teeth removed. During the conversation, Mr. Shaut scheduled a post-operation consultation with Dr. Butler and got a prescription for pain medication.

The consultation with Dr. Butler occurred four days later on June 5. At that time, the doctor irrigated the extraction sites. Mr. Shaut said he also recalled that Dr. Butler took a sharp medical instrument and pricked various parts of Mr. Shaut's tongue. Mr. Shaut testified that while the doctor was doing this, he "couldn't feel anything," except "way in the back." Mr. Shaut testified that he thought his mouth was healing, except for his tongue. He said that he "was trying to deal with this new disability." The dental office's note, which counsel questioned Mr. Shaut about, noted that Mr. Shaut had "feeling under his

tongue on the right and on the left." Mr. Shaut denied that he told the doctor this. A follow-up consultation with Dr. Butler was scheduled within one week.

Mr. Shaut returned to the dental center on June 11, still complaining of no feeling in his tongue. At his deposition, Mr. Shaut said that Dr. Butler told him that with time and the use of pain medication, his tongue would get better, particularly now that, according to the doctor's note, Mr. Shaut had regained sensation at the back of his tongue. Mr. Shaut denied telling Dr. Butler that he had regained sensation anywhere on his tongue. He also admitted that he did not follow-up with Dr. Butler, because he "didn't want to talk to him." He acknowledged that this was because he felt like Dr. Butler had hurt him and that Dr. Butler was "responsible" for injuring his tongue. Mr. Shaut's pleadings state that he was no longer a patient of the dental center as of November 11, 2015.

Mr. Shaut did return to the dental center six months later, on January 5, 2016, but only to get his dental records. On the authorization form to release the medical records, under the heading "services requested," someone wrote: "Evaluate tongue numbness following 3rds extractions." Under "reason for referral," someone had written: "2nd opinion at patient's request." Mr. Shaut denied writing these two statements or that he had seen this form. He did not recall if he retrieved his records because he wanted to get a second opinion about what caused his tongue to go numb.

By late 2015, Mr. Shaut had investigated having orthodontic work done at Toothman Orthodontics. During the December 2, 2015 meeting with Dr. Toothman, Mr. Shaut told the doctor that he had his wisdom teeth removed and as a result, he still could not feel his tongue. According to Mr. Shaut, Dr. Toothman said, "[W]ow I can't believe

that happened." When counsel asked if Dr. Toothman said that Dr. Butler had done anything that caused injury to his tongue, Mr. Shaut said "No." Mr. Shaut began orthodontic treatment with Dr. Toothman in 2016.

After consulting with an attorney, on July 17, 2018, Mr. Shaut filed a claim against Dr. Butler with the Health Care Alternative Dispute Resolution Office (HCADRO), asserting that during the extraction of the Mr. Shaut's wisdom teeth, Dr. Butler severed Mr. Shaut's lingual nerve. Later, Mr. Shaut underwent an Independent Medical Examination with Dr. Richard Kramer on September 28, 2018 who opined that the loss of sensory function in Mr. Shaut's tongue was "likely due to bilateral neurotmesis, probably transections." After waiving arbitration, Mr. Shaut filed a negligence complaint against the dental center and Dr. Butler in the Circuit Court for Washington County.

After Mr. Shaut's deposition was taken, the dental center moved for summary judgment. The basis of their argument was that Mr. Shaut filed his claim with HCADRO outside the applicable statutory three-year limitations period. Specifically, the dental center argued that Mr. Shaut's cause of action accrued soon after surgery when Mr. Shaut began complaining of a numb tongue. Relying on this Court's holding in *Jacobs v. Flynn*, 11 Md. App. 342 (2000), the dental center argued that Mr. Shaut's cause of action accrued by June 11, 2015, at the latest, because his deposition testimony revealed that by that date he believed Dr. Butler had injured his tongue.

Further, they argued that Dr. Butler's statements to Mr. Shaut on June 5 and 11, 2015, where he said, in effect, that the tongue was healing and that Mr. Shaut would regain sensation in part of his tongue over time, should not toll the statute of limitations. Relying

on the holding in *Lutheran Hospital of Maryland v. Levy*, 60 Md. App. 227 (1984), the dental center argued that Mr. Shaut knew that he was injured on May 30th and if the injury was not permanent, as Dr. Butler claimed, any healing would go to the measure of damages, not whether the injury had occurred.

Finally, the dental office argued that no one told Mr. Shaut that Dr. Butler was negligent between May 30, 2015 and June 2018, when he consulted with an attorney. They argued that the same information that Mr. Shaut had on May 30, 2015 was no different from the information he had in June 2018. Consequently, the cause of action accrued on the earlier date.

Relying on *Lutheran Hospital* and the holding in *Jacobs*, Mr. Shaut agreed that the discovery rule applied in this case. But he argued that the dental center had confused date of injury-in-fact with the date that Mr. Shaut realized he had a legal claim. Mr. Shaut argued that he did not realize that he suffered a legally cognizable injury until June 2018 largely because of Dr. Butler's comments that numbness in the tongue was "a normal side effect," and that regaining some sensation was "a good sign," and that these comments were attempts to "confuse[] and obfuscate[]" Dr. Butler's negligence. Additionally, Mr. Shaut argued that there were material facts in dispute such that the court could not determine at that stage in the proceedings "when the Plaintiff understood that he might maintain a legal action for negligence against Dr. Butler and his practice."

On February 7, 2020, the circuit court conducted a hearing on the dental center's motion for summary judgment. At the hearing's conclusion, the court took the matter under advisement. The court filed a memorandum opinion and order on August 17, 2020,

essentially setting forth the court's factual findings and conclusions of law. After examining the relevant cases, the court turned to *Young v. Medlantic Lab. P'ship*, 125 Md. App. 299, 305-06 (1999), and wrote in its findings that "a cause of action accrues (thereby triggering the limitations period) when the patient discovers, or should have discovered, that he or she has a cause of action." Further, the court noted that the standard is not subjective, but, rather, a cause of action accrues when the circumstances "put a person of ordinary prudence on inquiry." *Poffenberger v. Risser*, 290 Md. 631, 638 (1981).

The court concluded that Mr. Shaut was "on inquiry notice that he had suffered an injury and possible wrongdoing the day after his procedure when he woke up on May 30, 2015 with a numb tongue." "Given the circumstances," the court wrote, "it was unreasonable for the plaintiff not to have pursued even a minimal investigation into the cause of the injury soon after his final visit to Robinwood on June 11, 2015." The court granted summary judgment in favor of the dental center, and Mr. Shaut appealed. Additional facts will be discussed later in the opinion.

STANDARD OF REVIEW

In *Anderson v. The Gables*, 404 Md. 560 (2008), the Court of Appeals summarized the standards applicable to appellate review of a grant of a motion for summary judgment:

> In considering a trial court's grant of a motion for summary judgment, this Court reviews the record in the light most favorable to the non-moving party. If no material facts are placed in genuine dispute, this Court must determine whether the circuit court correctly entered summary judgment as a matter of law. *See* Maryland Rule 2-501(f).

Anderson, 404 Md. at 571(internal citations and quotations omitted). And "when reviewing the grant of a motion for summary judgment, ordinarily, [our review] is limited to the grounds relied upon by the [trial] court." *Deering Woods v. Spoon*, 377 Md. 250, 263 (2003). When an appellate court reviews a trial court's grant of summary judgment, it examines "the same information from the record and determines the same issues of law as the trial court." *Miller v. Bay City*, 393 Md. 620, 632 (2006). In reviewing the trial court's decision to grant a motion for summary judgment, we only look to the evidence submitted in supporting and opposing the motion. *Id*.

DISCUSSION

The Court Erred in Concluding that the Statute of Limitations Began to Run on June 11, 2015 Based on the Discovery Rule

A. Parties' Contentions

Mr. Shaut argues that the "sole issue in this appeal is whether the trial court properly granted summary judgment based on its finding that Mr. Shaut's injury was 'discoverable' on June 11, 2015…." He argues that the court incorrectly interpreted the holding in *Lutheran Hospital* and inappropriately determined that Mr. Shaut was on inquiry notice of his claim the day after surgery. And, he asserts that there were disputes of material fact that should have defeated summary judgment.

In contrast, the dental office argues that the circuit court properly applied both prongs of the discovery rule to find that the applicable statute of limitations accrued on June 11, 2015. They argue that any prudent person experiencing numbness in the tongue immediately after oral surgery would have investigated whether they had a legal claim

against the doctor who performed the surgery. Further, the dental office argued that the court correctly applied the holding in *Lutheran Hospital* to find that Mr. Shaut was on inquiry notice of his injury on the last day he visited the dental office for a post-operative consultation about his tongue: June 11, 2015. Finally, the dental office argues that if there were disputes of fact, they were not material. Thus, the court's grant of summary judgment was proper.

B. The Discovery Rule

Maryland Code Annotated, (1973, 2020 Rep'l Vol.), Courts and Judicial Proceedings ("CJ") § 5-109(a)(2) states that,

> [a]n action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider, as defined in § 3-2A-01 of this article, shall be filed within the earlier of:
> (1) Five years of the time the injury was committed; or
> (2) Three years of the date the injury was discovered.

Historically, the rule in Maryland was that a cause of action accrued on the date the wrong was committed. *Hahn v. Claybrook*, 130 Md. 179, 182 (1917). Whether the plaintiff knew or should have known of the wrong was not considered in determining accrual. This "date of the wrong" rule did not differentiate between a plaintiff who was "blamelessly ignorant" of his potential claim and a plaintiff who had "slumbered on his rights." *Harig v. Johns–Manville Prods.*, 284 Md. 70, 83 (1978). The Court of Appeals has observed that "in certain professional services actions, the rule was harsh. It barred plaintiffs' suits not only before these plaintiffs were aware of any harm, but before it was possible for them to learn that the negligence had taken place, because the injury involved

professional services and the plaintiff was not qualified to ascertain the injury." *Waldman v. Rorhbaugh*, 241 Md. 137, 140 (1966).

In the absence of any statutory provision to the contrary, the Court of Appeals adopted what is known as the discovery rule because of the "unfairness inherent in charging a plaintiff with slumbering on rights not reasonably possible to ascertain." This rule now applies in all civil actions, and generally provides that a cause of action accrues "when a plaintiff in fact knows or reasonably should know of the wrong." *Id*. (citation omitted).

As mentioned, the Court of Appeals first recognized the discovery rule over one hundred years ago in *Hahn*, a medical malpractice case, which held that the cause of action did not accrue until an injury was discoverable, although it was ultimately found to have been time-barred. *See also Harig*, 284 Md. at 83 ("In situations involving the latent development of disease, a plaintiff's cause of action accrues [under the discovery rule] when he ascertains, or through the exercise of reasonable care and diligence should have ascertained, the nature and cause of his injury."). Thus, the discovery rule was adopted to resolve unfairness and injustice. *Pierce v. Johns–Manville Sales Corp*., 296 Md. 656, 665 (1983).

The discovery rule requires that the plaintiff have notice of a claim to start the running of limitations—an objective standard. In *Poffenberger*, the Court of Appeals explained that such notice occurs as "express cognition or awareness implied from 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry . . . with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.'" 290 Md. at 637. Put another way, "the

discovery rule" "tolls the accrual date of the action until such time as the potential plaintiff either discovers [their] injury or should have discovered it through the exercise of due diligence." *Poole v. Coakley & Williams Const., Inc.*, 423 Md. 91, 131-32 (2011) (citations omitted). The discovery rule protects plaintiffs in a position "where it was not reasonably possible to have obtained notice of the nature and cause of an injury...." *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 91, 95 (2000).

"Under the discovery rule, a cause of action *accrues* (thereby triggering the limitations period) when the patient discovers, or should have discovered, that he or she has a cause of action." *Young v. Medlantic Lab. P'ship*, 125 Md. App. 299, 305-06 (1999) (emphasis in original). The standard is an objective one. Knowledge of the accrual of a cause of action is measured by whether circumstances existed that should "have put a person of ordinary prudence on inquiry." *Poffenberger, supra*. And it "is ordinarily a question for the jury or the ultimate factfinder as to whether the plaintiff failed to discover the cause of action because [they] failed to exercise due diligence or whether [they were] unable to discover it (and, as a result, unable to exercise due diligence) because the defendant concealed the wrong." *Dashiell v. Meeks*, 396 Md. 149, 168-69 (2006).

The discovery rule employs a two-pronged test. The first prong "concerns the nature and extent of actual knowledge necessary to cause an ordinarily diligent plaintiff to make an inquiry or investigation that an injury has been sustained." *Georgia-Pacific Corp. v. Benjamin*, 394 Md. 59, 89 (2006). For inquiry notice, a person must have actual notice, either express or implied. Express knowledge is direct, whether written or oral, from sources "cognizant of the fact[s]." *Poffenberger*, 290 Md. at 636-37(citation omitted).

Implied notice occurs "when a plaintiff gains knowledge sufficient to prompt a reasonable person to inquire further." *Pennwalt Corp. v. Nasios*, 314 Md. 433, 447 (1988). Constructive notice or knowledge will not suffice for inquiry notice. *See Poffenberger*, 290 Md. at 637.

The second prong "requires that after a reasonable investigation of facts, a reasonably diligent inquiry would have disclosed whether there is a causal connection between the injury and the wrongdoing." *Georgia-Pacific*, 394 Md. at 90. The requirement for inquiry notice is that if a person investigates diligently, the causal connection between injury and the suspected negligence would be revealed. *Id*. *See CSX Transport Inc. v. Miller*, 159 Md. App. 123, 151 (2004) ("The discovery rule fixes accrual at the time the plaintiff first becomes aware of both (1) the existence of an injury and (2) the cause of the injury.")

C. Application of the Discovery Rule in This Case

Here, regarding the first prong, the trial court concluded that Mr. Shaut was on actual notice of an injury on May 30, 2015. Although the court seemed to combine the two inquiries, the court found that Mr. Shaut was on notice of an actual injury the day after surgery, "when he woke up on May 30, 2015 with a numb tongue." The court also noted that Mr. Shaut testified, "I realized that I could not feel my tongue, I had a new lisp, something did not feel right. My tongue was still numb, but I could feel other things in my mouth … I was extremely concerned that I could not feel my tongue anymore."

As to the second prong, when Mr. Shaut was on notice of a possible connection between the injury and Dr. Butler's possible professional negligence, the court found that

by June 11, 2015, Mr. Shaut was on notice of a possible causal connection when he admitted that on that date that he felt Dr. Butler was "responsible." We think the circuit court's analysis is flawed.

Reviewing the evidence in the light most favorable to Mr. Shaut, as the law requires, reveals several factors existed that would not have placed Mr. Shaut on inquiry notice until sometime after June 11, 2015. First, before surgery, Mr. Shaut signed a consent form. A copy of the form was placed into evidence at the deposition.[3] The form states that in addition to several days of "discomfort, pain[,] swelling, and nausea" that might occur after the operation, Mr. Shaut could experience

> Injury to the nerve(s) underlying the teeth or tongue resulting in numbness, burning or tingling of the teeth, chin, lips, cheeks, gums, and/or tongue with possible altered taste or loss of taste that may persist for several days, weeks, months, or in remote cases, permanently.

A day after the procedure, Mr. Shaut found that his tongue was numb. Based on what the consent form stated, Mr. Shaut could have expected numbness in the tongue and an altered or complete loss of taste for "several days, weeks, months, or in remote cases, permanently." Reviewing the evidence in Mr. Shaut's favor, as we must, he could have reasonably understood the numbness in this tongue to be of some duration, perhaps permanently. That would be the case despite his best friend not experiencing the same physiological symptoms, and the fact that Mr. Shaut was "freaking out" over the lack of sensation in his tongue.

[3] A copy of the form may be found at page E203.

Second, the record shows that Mr. Shaut consulted with Dr. Butler personally twice after the surgery: June 5 and 11, 2015.[4] On both occasions, Dr. Butler probed Mr. Shaut's tongue with a sharp instrument and noted that Mr. Shaut had sensation toward the back of his tongue. Assessing the evidence in the light most favorable to Mr. Shaut, Dr. Butler left Mr. Shaut with the impression that with time his tongue would heal. Indeed, Dr. Butler noted that the fact that Mr. Shaut had experienced some sensation in his tongue was "a good sign."

Later, on June 11, when Mr. Shaut had his final post-operative consultation with Dr. Butler about his tongue, he recalled:

> [COUNSEL FOR DENTAL CENTER]: What, if anything, do you remember telling Dr. Butler about your tongue on June 11, 2015?
>
> MR. SHAUT: That it was numb. And he said that the Medrol Dosepak [pain-killing drug dispensing unit] might make it better with time.
>
> After Dr. Butler pricked the very back of Mr. Shaut's tongue and reassured him that having sensation in that area was "a good sign," Counsel asked:
>
> [COUNSEL FOR DENTAL CENTER]: And that reassured you, right?
>
> MR. SHAUT: That did.
>
> [COUNSL FOR DENTAL CENTER]: Did you still think that Dr. Butler was responsible for your numb tongue?
>
> MR. SHAUT: I did.

[4] Mr. Shaut testified that he called the dental center on June 1 and expressed his concern about his tongue to a woman who answered the phone. She put Mr. Shaut on hold, seemingly to consult with someone, returned to speak with Mr. Shaut and, according to him, said that a numb tongue was "a normal side effect from wisdom tooth removal." Whether Dr. Butler was the person with whom the woman spoke is not disclosed in the record.

This colloquy demonstrates that by June 11, 2015, Mr. Shaut had an injury to his tongue and suspected that Dr. Butler was responsible for it. But he was also "reassured" by Dr. Butler's comment that having sensation at the back of tongue indicated that his tongue was, in fact, healing. Averments in Mr. Shaut's statement of claim before HCADRO also demonstrate that Dr. Butler told Mr. Shaut that "it could take up to one year to return to a pre-operative state." After the one year passed without improvement, the complaint states that Mr. Shaut "lost confidence in Dr. Butler and [the dental center]."

Mr. Shaut argues that Dr. Butler's comments deceived Mr. Shaut about "the full nature, extent and cause of his injury." In other words, Mr. Shaut argues that because Dr. Butler "downplayed" the extent of the injury, the discoverability of Dr. Butler's possible wrongdoing was delayed. In this respect, Mr. Shaut argues that the circuit court erroneously applied the *Lutheran Hospital* holding in finding that the cause of action accrued in June, rather than later, after Mr. Shaut consulted with Dr. Toothman and had better reason to suspect that Dr. Butler caused his injury. As the court and the parties have differently interpreted *Lutheran Hospital*'s holding, it is worth looking at in detail.

In *Lutheran Hospital*, this Court overturned a jury verdict in Elizabeth Levy's favor, holding that her claim against the hospital was barred by limitations. On October 25, 1973, Ms. Levy had broken her ankle and it was set in a cast at Lutheran Hospital. 60 Md. App. at 233. Later, a doctor at the same hospital, "told her to throw away her crutches, get orthopedic shoes, and walk on the ankle." She was discharged in February 1974. *Id.* Because the ankle was giving her problems, in April 1974, Ms. Levy saw Dr. Wiedmann at Mercy Hospital who informed her that her ankle "was all messed up," asking, "Who the

hell told you to walk on that ankle?" *Id*. According to Ms. Levy, the first time she believed there was a problem was after Dr. Wiedmann told her that her ankle "wouldn't get any better." *Id*. Ms. Levy did not initiate a lawsuit because she did not think a lawyer would take her case and she believed that she could not sue a hospital. *Id*. at 234. After a chance meeting with someone in a department store who told her that she could sue the hospital, in early 1975, Ms. Levy consulted with an attorney and a Dr. Decker, who replaced her ankle joint. *Id*. The attorney obtained medical records from Lutheran but did not obtain x-rays, so Lutheran's negligence could not be established. Finally, in 1977, Dr. Decker obtained the necessary x-rays from Lutheran for him to opine that malpractice had occurred. *Id.* On June 15, 1978, Ms. Levy filed suit against Lutheran. *Id*. The trial court held that Ms. Levy was entitled to damages because the statute of limitations did not begin to run until early 1975, when she became "suspicious concerning her physical condition." *Id.* The trial court further noted that the "suit was actually filed within three years from the date from which the existence of a viable claim should have been known." *Id.*

This Court reversed and held that Ms. Levy's claim was barred by limitations. We explained:

> The evidence bearing on this examination [at Mercy in April 1974] permits no conclusion other than that Ms. Levy became aware that she might have been wronged [by someone at Lutheran Hospital] when she consulted Dr. Wiedmann in April of 1974. Although the doctor could not recall just what he had said to Ms. Levy on that occasion, and although he asserted that he had never discussed possible malpractice with her, **she insisted that he had asked her "who in hell told you to walk on that ankle?**" Regardless of what was actually said, Ms. Levy came away from the visit with a belief that "**something wrong had been done**." She expressly so stated in her deposition and confirmed this in her testimony at trial.

> We are aware that Ms. Levy, with only a ninth-grade education, was a layperson "unskilled in medicine." *Waldman v. Rohrbaugh,* 241 Md. 137, 145, 215 A.2d 825 (1966). Unlike the unsuccessful registered nurse appellant in *Jones v. Sugar,* 18 Md. App. 99, 305 A.2d 219 (1973), she was totally lacking in medical expertise. But the visit to Dr. Wiedmann did not occur in a vacuum. The ankle had given Ms. Levy continuing pain and trouble. The more she walked on it, she said, the worse it got. **Between her discharge from Lutheran and her consultation with Dr. Wiedmann she saw another physician. He also asked her who had told her to walk on the ankle. And she herself was the one "who figured something wrong had been done" after her conversation with Dr. Wiedmann**. Even though the "wrong" she then thought existed (being told to walk on the ankle) was not the "wrong" ultimately established (improper casting), she believed that a "wrong" had occurred. Reasonably prompt investigation would have developed its precise nature.
>
> On the record before us, then, a reasonable fact finder could only conclude that in April 1974 Ms. Levy had "knowledge of circumstances which ought to have put [her] on inquiry [thus charging her] with notice of all facts which such an investigation would have disclosed if it had been properly pursued." *Poffenberger,* 290 Md. at 637-38, 431 A.2d 677.

Id. at 236-37 (emphasis added).

Here, both Mr. Shaut and the dental center reference *Lutheran Hospital*, but they interpret its holding differently. Mr. Shaut argues *Lutheran Hospital* "shows that direct, heightened, and exclamatory statements to plaintiffs about the severity of an injury, do in fact put the plaintiff on inquiry notice." He argues that Dr. Butler's comments during the June 5 and 11 consultations were like those of the doctor who told Ms. Levy to put away her crutches and walk on her ankle. In Mr. Shaut's opinion, "even if a plaintiff is aware of a physical injury, a dismissive doctor's downplaying of the injury can mean that the plaintiff is not on inquiry notice." It was only after Dr. Toothman's comment that notice of a possible cause of action against Dr. Butler and the dental center arose. Addressing Mr. Shaut's initial suspicions about Dr. Butler, he argues that *Lutheran Hospital*

emphasizes "the actions and reactions of doctors toward an injury are clearly weighted much more heavily in determining whether a plaintiff is on inquiry notice than the thoughts or internal deliberations of the plaintiff."

In contrast, the dental center argues that Mr. Shaut misinterprets *Lutheran Hospital* because "the actual statements that Dr. Wiedmann made to Ms. Levy were not the basis for this Court's determination of why she was on inquiry notice of her injury in April of 1974." The dental center analyzed *Lutheran Hospital*'s reasoning and emphasized "it was therefore the totality of the circumstances, including Ms. Levy's interpretation of [Dr. Wiedmann's] statements, that this Court held caused her to have knowledge of her injury." Furthermore, the dental center counters Mr. Shaut's second assertion, stating "the holding in *Lutheran* did not establish some kind of weighted injury notice standard that applies to the opinions of treating doctors and/or the degree of emphasis that they place on statements about a plaintiff's injuries." The dental center points to part of the *Lutheran Hospital* holding which states:

> [A] cause of action accrues "when there are facts known [or with reasonable diligence discoverable] which would serve as the basis of an actionable claim and not necessarily when the patient is informed by counsel that he has a cause of action." The same is true of opinions by medical experts. The crucial date is the date the claimant is put upon inquiry, not the date an expert concludes there has been malpractice. To hold otherwise would frustrate the statute's policy against stale claims and its concerns with fading memories and lost evidence.

(citing *Jones v. Sugar*, 60 Md. App. 227, 240 (1984)).

Our reading of *Lutheran Hospital* is more aligned with Mr. Shaut's interpretation than the dental center's. Mr. Shaut, like Ms. Levy, had what seemed to be an injury shortly

after Dr. Butler performed the surgery. It was only after consulting with Dr. Toothman could it be said that there were enough objective facts for Mr. Shaut to suspect that Dr. Butler breached the applicable standard of care. And in *Lutheran Hospital*, this Court did not solely rely on the statements Dr. Wiedmann made to Ms. Levy to determine whether she was on inquiry notice. Rather, we looked at the totality of the circumstances, which included Ms. Levy's continuing pain and the worsening of her ankle over time, her seeing another physician before Dr. Wiedmann, and her own determination that something wrong had been done to her ankle before we concluded that her cause of action had accrued. Similarly, the fact that Mr. Shaut's tongue was still numb approximately seven months after surgery, Dr. Butler's comments that recovery of sensation in the tongue could take several months, coupled with Dr. Toothman's comment supplied Mr. Shaut with sufficient information that a diligent inquiry would have established if there was in fact a breach in the standard of care. 60 Md. App. at 236.

In addition to his reliance on *Lutheran Hospital*, Mr. Shaut also points us to *Jacobs v. Flynn*, 131 Md. App. 342 (2000), which he argues stands for the proposition that "Dr. Butler's actions failed to put Mr. Shaut on inquiry notice." *Jacobs* concerned a medical malpractice claim against several private medical providers who Mr. Jacobs alleged breached the standard of care in the treatment of his back pain. *Id*. at 351. One group of doctors thought the pain was caused by cancer, but another group of doctors thought the pain could be caused by an infection. *Id*. at 51-52. The second group of doctors ordered several tests, including a bone scan, to determine if osteomyelitis, which can cause an infection, was the source of Mr. Jacobs' back pain. Dr. Flynn interpreted the bone scan as

normal. *Id*. at 352. After further tests, Mr. Jacobs' condition worsened. Ultimately, Mr. Jacobs was transferred to the University of Maryland Hospital ("UMH") where he was diagnosed with an epidural abscess, a pocket of pus lying outside of the spinal cord. *Id*. at 353. The infection from the abscess caused Mr. Jacobs to become permanently paralyzed from approximately his waist down. He later died from unrelated causes. *Id*.

The Court of Special Appeals was called upon to address several issues in the appeal, one of which was whether the circuit court properly dismissed the complaint against Dr. Flynn based on limitations. Mr. Jacobs claimed that Dr. Flynn misdiagnosed the bone scan which showed the epidural abscess. *Id.* at 360. But Dr. Flynn was not one of the defendants in the initial lawsuit; Mr. Jacobs did not add him as a defendant until several months later. Dr. Flynn moved for summary judgment in HCADRO and for judgment at the close of Mr. Jacobs' case. The circuit court ruled in Dr. Flynn's favor, concluding that Mr. Jacobs had filed a claim against Dr. Flynn outside the three-year limitations period. The court explained:

> I believe that the Plaintiff's claim against Dr. Flynn is barred by the limitations.... I believe the Plaintiff has to within the statute, within three years, has to have discovered his injury. I don't believe that he need [s] to know the mechanics of his injury. I don't even know that he need[s] to know with specificity who caused his injury. The evidence in this case is, that in the spring of '91, he realized that he was paralyzed and that it was the product of negligence. I think he then was put on notice, go out and muster your case, drum up a case against whoever you think caused your injuries.... [I]n the spring of '91, the Plaintiff, his two daughters, realized that, or had reason to believe, well specifically, that he had been injured likely as the result of negligence on parts of physicians associated with likely his hospitalization in Howard County.... [N]o reasoning juror as I see it could conclude that in the spring of '91 he wasn't aware of his injury.... [A]nd that's the issue.

Id. at 360-61.

On appeal to this Court, we affirmed the circuit court. Pertinent to this discussion, in that analysis we held that after Mr. Jacobs was admitted to UMH and was diagnosed with an epidural abscess, Mr. Jacobs and members of his family admitted that they had overheard "'the comments of several doctors who attended' him [and that] caused Mr. Jacobs and his family to believe that he had not been properly cared for by his prior physicians and that 'the paralysis could have been prevented.'" *Id*. at 366. We concluded that Mr. Jacobs' family knew Dr. Flynn was one doctor in the group of doctors who had treated Mr. Jacobs immediately prior to his admission to UMH and so, he could have been included as a defendant in the initial lawsuit. *Id*. at 368.

From this holding, Mr. Shaut argues that it was the information that Mr. Jacobs and his family learned at the hospital that triggered the discovery rule. We agree. The mere fact that a plaintiff suffers an injury does not alone place the plaintiff on inquiry notice. We conclude that the plaintiff must have some notice that the physician breached the applicable standard of care, in addition to the injury.

We find further support for this conclusion in *Baysinger v. Schmid Prods. Co.*, 307 Md. 361 (1986). There, a woman sued the manufacturer of her intrauterine device ("IUD"), asserting that it had caused her to suffer "severe abdominal pain and high fever," due to "acute peritonitis with bilateral tubo-ovarian abscesses," which caused her to become infertile. *Id*. at 363. When her doctors removed the IUD in 1979, Ms. Baysinger specifically asked them if it had caused her illness. One of her doctors told her "that there could be several possible causes but [that he] could not state the [IUD] was responsible."

Id. at 363. Just over three years later, Ms. Baysinger saw an advertisement regarding IUD lawsuits in a local newspaper. She consulted legal counsel and filed suit in 1984.

The trial court granted the manufacturer's motion for summary judgment on limitations grounds, finding the case similar to *Lutheran Hospital*. Specifically, the court found that Ms. Baysinger was on notice and should have commenced an investigation as of the time she had surgery to remove the IUD. As a result, the trial court ruled that her case was not timely filed. *Id*. at 356-66. We affirmed. *Id*. at 362.

But the Court of Appeals reversed, holding that "suspicions" about the cause of injury was insufficient. The plaintiff's knowledge of "wrongdoing" was required:

> In the instant case, the question of fact presented was: when did Mrs. Baysinger have knowledge of circumstances which would cause a reasonable person in her position to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the wrong? While the sparse record of facts before the trial judge demonstrated that Mrs. Baysinger's suspicions concerning the cause of her infection included the intrauterine device, it also showed that she initiated a preliminary investigation by discussing her suspicions with Dr. Cho, and that Dr. Cho told her he had "no way of determining whether her infection was caused by the Saf-T-Coil or by some other unrelated occurrence or instrumentality." The record further discloses that at that time Dr. Gallaher had no idea of what caused her illness, and consequently further investigation by way of inquiry of Dr. Gallaher would have been fruitless. **We further note that while the record indicates that Mrs. Baysinger entertained various suspicions concerning the cause of her illness, there is no evidence that she then suspected, or reasonably should have suspected, wrongdoing on the part of anyone**. Whether a reasonably prudent person should then have undertaken a further investigation is a matter about which reasonable minds could differ, and it was therefore inappropriate for resolution by summary judgment.

307 Md. at 366-68 (emphasis added).

Here, Mr. Shaut's deposition testimony similarly indicated that while he suspected Dr. Butler caused his tongue to go numb, the evidence also suggests he did not have knowledge that Dr. Butler might have committed malpractice until sometime after he consulted with Dr. Toothman in December 2015. Considering the evidence in this record in the light most favorable to Mr. Shaut, we conclude that summary judgment was improper because there was a genuine dispute of material fact regarding when Mr. Shaut was on inquiry notice of a malpractice claim against Dr. Butler and the dental center. To paraphrase what we said in *Young*, 125 Md. App. at 312, "reasonable minds could differ over whether [Mr. Shaut] should have further investigated" a malpractice claim against Dr. Butler more than three years before he filed his claim on July 17, 2018. Accordingly, we reverse the circuit court's judgment and remand for further proceedings consistent with this opinion.

THE JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY IS REVERSED. THE CASE IS REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY THE COSTS.

The correction notice(s) for this opinion(s) can be found here:

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