UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 016

September Term, 2016

DEBORAH A. SIGETHY, et al.

v.

BRYAN KLEPPER, et al.

Meredith,
Arthur,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: July 20, 2017

On January 2, 2014, Deborah Sigethy, appellant, filed a medical malpractice claim against Dr. Bryan Klepper, appellee, the orthopedic surgeon who performed hip-replacement surgery on her right hip on April 28, 2010.[1] The Circuit Court for Anne Arundel County granted a motion for summary judgment in favor of Dr. Klepper based upon the court's conclusion that, as a matter of law, Ms. Sigethy was on inquiry notice of her claim no later than December 6, 2010, and her claim was therefore barred by the applicable statute of limitations. This appeal followed.

QUESTION PRESENTED

Ms. Sigethy presented one question for our review, which we have restated as follows: Did the circuit court err in finding that, as a matter of law, Ms. Sigethy was on inquiry notice of her claim against Dr. Klepper more than three years before she filed her statement of claim on January 2, 2014?[2]

For the reasons explained below, we answer that question "yes." Accordingly, we will reverse the judgment of the circuit court and remand this case for further proceedings.

[1] Ms. Sigethy's lawsuit included a claim by her husband, Richard Sigethy, for loss of consortium, and he is also an appellant. But there are no separate issues in this appeal relative to him. Similarly, the suit named Dr. Klepper's practice (Chesapeake Orthopaedic and Sports Medicine Center, P.A.) as an additional defendant, and that entity is also an appellee, but, there are no separate issues in this appeal related to that entity.

[2] In her Brief, Ms. Sigethy phrased her question presented as: "May a trial court grant summary judgment on limitations when the plaintiff did not know of and had no reason to know of the Appellees' wrongdoing coupled with harm within three years from the date suit was filed?"

FACTS AND PROCEDURAL HISTORY

In 2005, Dr. Klepper, a board-certified orthopedic surgeon, performed hip-replacement surgery on Ms. Sigethy's left hip. Her recovery from that surgery went smoothly.

Approximately five years later, Ms. Sigethy returned to Dr. Klepper with a complaint regarding pain in her right hip. During an office visit on April 15, 2010, Ms. Sigethy agreed with Dr. Klepper to schedule hip-replacement surgery for her right hip. Dr. Klepper's note from the April 15 visit includes the following summary of the "Plan":

> I explained the pathology and its natural history of progression. I also explained the treatment options, including the benefits and complications of each of the options. . . . At this time, the patient is interested in surgery for hip arthritis. They [sic] are a candidate for a right total hip replacement. I reviewed the risks, benefits and recovery time of this procedure. She has already been through this so she knows what it involves. **Risks of the surgery including but not limited to** bleeding, infection, **hip pain, leg length difference, dislocation,** blood clots in the legs or lungs, need for blood transfusion, **loss of motion or function in the leg, loosening of the implant, need for further surgery and the general risks of surgery and anesthesia were reviewed. They expresses [sic] understanding of these risks and wants [sic] to proceed with right total hip replacement.** I gave her a note to remain out of work pending surgical recovery. Surgery will be scheduled at their [sic] convenience.

(Emphasis added.)[3]

[3] Dr. Klepper's record regarding his pre-operative consultation with Ms. Sigethy before the 2005 surgery reflects that he had similarly advised her about risks of hip-replacement surgery on March 7, 2005, including the following:

> **I explained the risks of this type of procedure including but not limited to** bleeding, infection, **nerve and vessel injury**, blood clots in the legs, need for blood transfusion, **leg length discrepancy, dislocation of the hip, continued pain or need for further surgery.**

(continued . . .)

On April 28, 2010, Dr. Klepper performed hip-replacement surgery on Ms. Sigethy's right hip. Her recovery from this surgery did not go well. She testified during her deposition that she experienced "significantly worse" pain after the 2010 procedure. Ms. Sigethy saw Dr. Klepper for follow-up visits twice, on May 12, 2010, and June 1, 2010. She recalled telling him, during the May 12 visit, that her pain was worse after the second procedure than it had been after the first procedure, and she recalled Dr. Klepper telling her that she needed more physical therapy. In her deposition, Ms. Sigethy testified that, during the two weeks following the surgery, she had physical therapy at home and a nurse came to her house to check on her, and that she did try outpatient physical therapy "probably three or four times" but that she had to stop going because it was too painful. She testified:

> [BY MS. SIGETHY] I could not put weight on it. I had sharp pains, very sharp pains, couldn't walk very far. I did very little physical therapy in the hospital because I couldn't even get to the door, but I thought, well, you know, I'm 57 now. The other one I was 52. I'm older. This one just didn't go as well as the first one, and I just eventually went back to work part time. I thought maybe I was babying it too much. So I went back to work. Didn't help.

Nevertheless, Dr. Klepper never advised Ms. Sigethy that her symptoms were anything other than normal results of successful surgery, and he eventually authorized her to return to work behind the meat counter at Lauer's supermarket. At Dr. Klepper's deposition, his testimony included the following:

(. . . continued)

(Emphasis added.)

Q [BY COUNSEL FOR MS. SIGETHY] In your practice when you install [DePuy] Pinnacle hip hardware, do you have a goal in mind of achieving any particular angle of inclination?

A [BY DR. KLEPPER] I have a goal of having a stable hip when everything is said and done. As I said, I use the reference guide as a reference.

Q As of April of 2010 did you have any difficulty in installing or using DePuy Pinnacle hip hardware and having a satisfactory stable outcome?

A I don't recall any issues, no.

* * *

Q Throughout the surgery of April 28, 2010, did you order any intraoperative radiographic studies or x-rays of Ms. Sigethy's hip to assess the progress of the hip replacement surgery?

A No.

Q Prior to her discharge from the hospital did you order any x-rays to assess the progress or the success of the hip replacement surgery at hitting the safe zone recommended by the manufacturer for angles of anteversion and inclination?

[BY COUNSEL FOR DR. KLEPPER] Objection to form and foundation. You can answer.

THE WITNESS: I typically order an x-ray that gets done in the recovery room, more to look for dislocation and/or fracture, but then in looking back it didn't look like it had actually been done. So we got one when she came to the office in a couple of weeks since her hospital course had been uneventful and just like any another [sic] hip replacement patient.

* * *

Q [BY COUNSEL FOR MS. SIGETHY] She returned to your office for the first post-operative visit on I believe May 12, 2010; is that correct?

A That is correct.

* * *

Q At the May 1[2], 2010 visit the surgical incision was well healed?

A Yes.

Q She was walking with a walker?

A Correct.

Q Is that expected as of two or three weeks post-operative?

A Yes.

Q Is that normal?

A I usually ask people to use it for the first month to six weeks.

* * *

Q Is there an outside range that you consider unacceptably long for a patient to require needing a walker?

A No, not really. . . .

* * *

Q Did Ms. Sigethy have any abnormal complaints of pain on May 12, 2010?

A Not to my recollection.

Q I don't see that you documented one way or another anything about complaints of pain. What, if anything, does that signify to you as to whether she had any abnormal complaints of pain on that visit?

A That there was nothing out of the ordinary from my typical post-operative course.

Q Would you have expected her to be pain free on May 12, 2010, two weeks after surgery?

A No.

* * *

Q She returned to your office about two and a half weeks later on June 1, 2010. Is that right?

A She came back on June 1, yes.

* * *

Q At the bottom in the plan it says, refill Percocet. Do you know if she was taking Percocet or something else?

A I assume she was taking Percocet if that is what I gave her a refill of.

Q For how long would you expect a patient to have pain following a right total hip arthroplasty within normal limits?

A It varies by patient, it varies by their pain tolerance. There are people that take them for several months sometimes. Other folks are often faster. Everybody is different.

Q Is there an outside range beyond which you would consider having pain following a total right hip replacement as abnormal or unusual?

[BY COUNSEL FOR DR. KLEPPER] Objection, form and foundation.

THE WITNESS: I don't have a specific timeframe in mind, no.

* * *

Q [BY COUNSEL FOR MS. SIGETHY] Is there anything unusual . . . , or a cause for concern in your mind, that she was still using a walker as of June 1, 2010?

A No.

* * *

Q Do you have an opinion why she was --- or do you know why she was still complaining of pain and taking Percocet as of June 1, 2010?

A I don't.

Q Is it unusual or out of the ordinary, . . . for a patient that far out from surgery to be taking Percocet occasionally for pain?

A That is not unusual at all at five weeks.

* * *

Q She noted she was moving slower this time than with the previous hip replacement, that is, the one on the left side from 2005.

A From five years prior, right, correct.

Q Does that strike you as unusual or abnormal in any way?

A No.

Q You gave her a prescription for outpatient physical therapy. Is that right?

A Correct.

Q And you told her to return in two months time?

A Correct.

* * *

Q . . . [W]hen is the next interaction you had with Deborah Sigethy?

A I believe it was a phone call on September 30, basically four months later --- one day short of four months.

Q Did you believe there was anything unusual about Ms. Sigethy's condition or her telephone call?

A Not particularly. She stopped physical therapy and was apparently trying to do it on her own and was looking for some guidance as to what she should or shouldn't be doing.

* * *

Q Was there anything about her report to you that caused you concern for her condition or made you think that she needed additional medical care beyond the physical therapy?

A No.

Q What, if any further contact did you have with Ms. Sigethy following the phone call of September 30, 2010?

A The only other office contact I had was a note from October indicating that she could go back to work. We get those requests and we gave her the note. . . . [W]e gave her a note to return to full duty as of November 1, 2010.

* * *

Q As far as you were concerned her hip replacement surgery was a success six months after the surgery was done?

A Yes.

Q Any further personal or professional contact with Ms. Sigethy after October of 2010?

A No.

(Emphasis added.)

Ms. Sigethy testified that she knew "this hip was different, and it was taking longer" for her to heal, but, she said: "I just thought if I kept on working, kept plugging along, it would eventually get better." She testified that, when she did return to work, she experienced difficulty:

> [BY MS. SIGETHY] . . . I started . . . part time, was trying to work my way up to being able to go back full time. I again thought it was my body, something was wrong with my body, why the hip was taking so long to heal. I do know when I used to go out to the meat case to walk up and down to fill it, at the time I didn't know what it was, but I used to - - - I couldn't move. . . .

Her sister-in-law urged her to consult a different orthopedic surgeon, Dr. Randy F. Davis. Ms. Sigethy explained why she went to see Dr. Davis instead of going back to Dr. Klepper:

> Q. [BY COUNSEL FOR DR. KLEPPER] Why did you see Dr. Davis as opposed to going back to see Dr. Klepper?
>
> A. [MS. SIGETHY] . . . [M]y sister-in-law knows of Dr. Davis. She was explaining to him when I had, how long it had been, I think it was seven months [since the operation] at the time, and he said to her, "It's been too long. She should be better by now,"
>
> So he said get her husband to bring me x-rays, and we took them down to him, and they were put on his desk. One Saturday night he had an emergency operation to do, and when he went back to his office he found my x-rays and called me at home, said at that time he didn't see anything. These were the x-rays from the beginning of the second hip, from the beginning.
>
> Q. In the month, the weeks to month after the procedure?
>
> A. The seven months after, yes.
>
> Q. Okay.
>
> A. So he said to me, "I really would like it if you would go get a new set of x-rays," which I did, and then I went to see him December [6]th after the office was closed because I really didn't have an appointment. He was just squeezing me in.
>
> So it was him, Dr. Murphy, and I think it was a John Yingling that was --- I think he was PT there. The three of us plus Rick [Ms. Sigethy's husband and a nominal co-appellant here] and I were in this little tiny room, and he put the x-ray up, turned out the lights, and when we all looked at that one x-ray the ball of my hip was actually just sitting outside of the cup, leaning against the cup, and his first words were, "I don't know how you're doing that job. You cannot go back to that job." That was the last day I worked, took me out of work and then 2011 is when I had four more operations on that right hip; three more, I'm sorry.

Q. **Okay. Well, when you saw the ball out of the hip, did you think something had gone wrong?**

[BY MS. SIGETHY'S COUNSEL]: Objection to form and foundation. You can answer if you can.

[BY THE WITNESS]: **Again, I just thought it was me.** I thought maybe --- I just thought that hip didn't go as well as the first one. It was just different.

[BY DR. KLEPPER'S COUNSEL]: Okay. **Did you think it had something to do with how the procedure was performed?**

A. **No.**

Q. Then what was it that caused you to eventually believe otherwise? Today it's fair to say that you believe that that ball being out of the socket was because of how the procedure was performed?

[BY MS. SIGETHY'S COUNSEL]: Well, objection. You can't talk to her about what you and I have talked about, so if you can answer that question without talking about what you and I have talked about.

[BY THE WITNESS]: I did not know it was that bad until I seen the x-ray.

[BY DR. KLEPPER'S COUNSEL]: **When you saw the x-ray** ---

A. Then I seen.

Q. --- **with Dr. Davis** ---

A. Yes.

Q. ---- **you knew it was bad?**

A. **Yes**.

Q. **Okay. You knew that something was wrong with your hip?**

[BY MS. SIGETHY'S COUNSEL]: Objection.

[BY DR. KLEPPER'S COUNSEL]: Go ahead.

[BY THE WITNESS]: **I just thought --- again, I keep --- I keep saying I thought it was me; my body was just rejecting the hip.**

Q. Well, but something was wrong with the hip. You knew at that point in time that something was [sic] with the hip?

A. Well, when I seen the x-rays.

Q. Right.

A. Right.

Q. Okay. At some point in time you decided to seek out a lawyer?

[BY MS. SIGETHY'S COUNSEL]: That's a yes or no question. Answer yes or no.

[BY THE WITNESS]: No, not at that time.

[BY DR. KLEPPER'S COUNSEL]: I know that. At some point in time you did?

A. I did.

Q. Okay. Separate and aside from anything that you discussed with a lawyer, I don't want to know what you discussed, **what caused you to seek out a lawyer**?

A. **I got a letter from DePuy on recalls.**

Q. All right.

A. **And the letter said that it was a good chance the hip I had was the recall hip. So then I thought that's what's wrong with my hip;** I got a defective hip.

Q. Okay. When did you get this letter?

A. The letter was sent out December 2nd.

Q. Of what year?

A. 2010.

* * *

Q. And **so based on that letter you thought that it was the hip prosthetic ---**

A. Yes.

Q. --- **that was defective**?

A. **Yes.**

Q. Okay. Now you saw . . . Dr. Davis on December 6th of . . . 2010, okay. All right. Now, what did Dr. Davis say he thought needed to be done?

A. Well, he told me that night I needed revision.

Q. Did he say anything about what he thought had caused the ball to come out of the socket?

A. No.

* * *

Q. . . . [Y]ou had said that Dr. Davis told you you needed a revision surgery?

A. Yes.

Q. And why did he say you needed a revision surgery?

[BY MS. SIGETHY'S COUNSEL]: Objection; asked and answered.

[BY THE WITNESS]: I don't know.

[BY DR. KLEPPER'S COUNSEL]: You don't know. He didn't explain why?

A. I'm assuming by the looks of that x-ray, I'm assuming. I'm not a doctor.

Q. Okay. I mean did he explain that your initial hip replacement was not working right?

A. I don't remember him saying that.

Q. Well, you knew you needed a new hip, correct?

A. Correct.

Q. All right. And he didn't tell you why you needed the new hip?

A. No.

* * *

Q. **Did he explain to you anything about the fact that there had been a bony growth in your joint?**

A. You're talking about a calcium buildup around the hip?

Q. Yes.

A. **Yes. You could see it on the x-ray.**

Q. Okay. **So he explained that there was a calcium buildup?**

A. **He showed it to us**.

Q. **Did he say why that calcium buildup had occurred?**

A. **He said it's something like when you get scar tissue, but that's what happens to the bones; that's like scar tissue coming off the bone.**

Q. Did he explain to you what was causing the scar tissue?

A. I don't remember.

Q. And did he – he referred you to the Tate Cancer Center?

A. Yes.

Q. And the Tate Cancer Center was to radiate that calcium?

A. Yes.

Q. Right? **What did Dr. Davis explain to you in terms of what the radiation would do to the calcium?**

A. **He said if I didn't have it done, then it could keep growing and it would eventually lock up my whole hip and I would not be able to walk.**

Q. Okay. **And as a result you scheduled the revision surgery; correct?**

A. **Correct.**

(Emphasis added.)

Dr. Davis's note relative to Ms. Sigethy's visit of December 6, 2010, reflected that Ms. Sigethy had been "referred for evaluation of persistent problems in her right hip ever since she had a right total hip placement." Dr. Davis stated that, "since the time of the surgery," Ms. Sigethy "constantly gets the feeling that the hip is going out of the socket," and "she feels that it is unstable and not easily able to support her weight." Dr. Davis commented that, in comparison to the x-rays taken in June 2010, Ms. Sigethy's December 2010 x-rays show:

> There is a quite impressive area of heterotopic ossification since [June] has appeared which is approximately 4 cm x 3 cm in dimension and is near the area of the lesser trochanter. The most impressive finding is what appears to be a 36 mm head with a well-positioned femoral component but there appears to be distinct and definite subluxation both laterally and anteriorly on the lateral x-ray there does appear to be a relatively weak opposition measures approximately 10° from the vertical on the left correction on the right side and then 35° from neutral on the left side.

> Assessment: Unusual right-sided hip subluxation with heterotopic bone ossification [4]

Dr. Davis's note regarding December 6, 2010, included the following summary of the explanation he gave to the Sigethys:

> Plan: Explained to patient that **there appears to be some change in the position of the inversion of the pouch since the procedure was originally performed and I believe it is likely that this may be related to the work form to the development of the heterotopic bone which could help cause some subluxation. . . . I believe that given the amount of heterotopic bone that has formed it would be reasonable for the patient to receive one preoperative dose of heterotopic radiation at this [sic] recommended by Dr. Oh and his staff to minimize any development of preoperative or postoperative heterotopic ossification. . . .**

(Emphasis added.)

Dr. Davis recommended revision surgery, and noted that "[r]isks include . . . dislocation, leg length discrepancy, nerve injury, . . . as well as the possible need for more extensive pelvic reconstruction." As Ms. Sigethy noted in her deposition testimony quoted above, Dr. Davis performed three revision surgeries.

On January 2, 2014, Ms. Sigethy filed a Statement of Claim in the Health Care Alternative Dispute Resolution Office, as contemplated in Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), §3-2A-01 *et seq*. After arbitration was waived, a complaint was filed in the Circuit Court for Anne Arundel

[4] In his deposition, Dr. Klepper described "heterotopic ossification" as "bone in an area where there wouldn't normally be bone," and testified that it can be caused by surgery: "it can happen in any kind of surgery on the pelvis, acetabular, hip; even times when there is not any surgery on the hip, you can get it," and "[p]eople get it from closed head injuries unrelated to their hip," but heterotopic ossification can also be caused by trauma.

County. Ms. Sigethy's complaint asserted four counts against Dr. Klepper individually and against his practice on an agency theory. In Count I, Negligence, Ms. Sigethy asserted that Dr. Klepper had wrongly placed "the acetabular cup of the right hip prosthesis," or failed to recognize that it was misplaced, leading to the need for her to have revision surgery. Count III charged that Dr. Klepper and his practice failed to obtain informed consent. Counts II and IV asserted loss of consortium claims.[5]

On December 23, 2014, Dr. Klepper filed a motion for summary judgment, arguing that Ms. Sigethy's complaint was time-barred because "there is no dispute that [Ms. Sigethy] had knowledge sufficient to put her on inquiry that she had a potential cause of action more than three (3) years prior to filing suit." Dr. Klepper argued that it was indisputable that Ms. Sigethy was on inquiry notice of her claim against Dr. Klepper no later than the date of her meeting with Dr. Davis on December 6, 2010, at which time Dr. Davis told her she needed to have revision surgery. Dr. Klepper argued that, after being shown the x-rays on December 6, 2010, and being told to stop work, any reasonable person would have commenced investigation of a legal claim against Dr. Klepper, and that the three-year statute of limitations started running at that point. Accordingly, the claim filed on January 2, 2014, was not timely. Dr. Klepper requested a hearing.

Ms. Sigethy filed an opposition, and argued that, although "it is clear that [she] knew as of December [6], 2010, that there was something wrong with her hip that was

[5] The basis of the loss of consortium claim in Count II was the negligence asserted in Count I, while the loss of consortium claim in Count IV arose from the failure to obtain informed consent.

going to require revision surgery, she did not know and had no reason to know" that the issues with her right hip "had anything whatsoever to do with the way that [Dr. Klepper] had performed the hip surgery or that [Dr. Klepper] had done anything negligently or wrong." Ms. Sigethy argued that Dr. Klepper never told her that there had been anything out of the norm relative to her surgery, and, despite recommending a revision, neither did Dr. Davis communicate anything that would have led a reasonable person to conclude that the source of her continuing hip problem was medical malpractice committed by Dr. Klepper.

Ms. Sigethy argued that her three-year deadline for filing a claim against Dr. Klepper should be measured from January 7, 2011, because that is the date on which she opened a letter from her insurance company advising that there had been a recall of certain DePuy prosthetic hip components, and it was likely that she had received one of the recalled components when Dr. Klepper performed her right hip replacement in April 2010. Ms. Sigethy filed an affidavit explaining that she had not opened the recall notice "until January 7, 2011, which was the first time that she had any reason to suspect that the pain and difficulty she had been having with her right hip had been caused by anything other than her own idiosyncratic reaction to the prosthesis." For that reason, Ms. Sigethy argued that there was a material dispute of fact regarding the timeliness of her claims.

The circuit court denied the motion without granting a hearing, explaining, "the court finds reasonableness of discovery/notice a fact question for the jury."

Thereafter, the case was specially assigned to a different judge, and trial was scheduled to begin on March 1, 2016. On February 10, 2016, Dr. Klepper filed a renewed motion for summary judgment, requesting again that a hearing on the motion be conducted. Ms. Sigethy filed an opposition on February 17, 2016. On February 19, 2016, the specially assigned trial judge heard argument, and granted the motion. At the conclusion of the hearing, the court explained that it perceived no genuine dispute of material facts, and that any reasonable jury would have to conclude that Ms. Sigethy was on inquiry notice of her malpractice claim after attending the December 6, 2010, meeting with Dr. Davis:

> Ms. Sigethy acknowledged that when she reviewed the x-rays with Dr. Davis she knew something was wrong with her hip and that she thought her hip problem had something to do with how Dr. Klepper had performed the hip replacement.
>
> She testified in her deposition as follows: ["']Okay, do you think it had something to do with how Dr. Klepper's procedure was performed?[' ']No.[' ']Then, what was it that caused you to eventually believe otherwise? Today it is fair to say that you believe that the ball being out of the socket was because of how the procedure was performed.[' ']I didn't know. I don't know. I did not know that it was bad until I seen the x-ray.[' ']When you saw the x-ray?[' ']Then I seen with Dr. Davis, yes.[' ']You knew it was bad?[' ']Yes.['"]
>
> Dr. Davis confirmed in his December 6th, 2010, progress note that he showed Ms. Sigethy the x-rays; that he advised her that her subluxated and/or dislocated [sic] and she would need a revision procedure.
>
> This Court is aware that generally the issue of whether or not the plaintiff's failure to discover his or her cause of action that [sic] was due to a failure of [sic] his or her part to use due diligence is ordinarily a question of fact for the jury.
>
> However, with the record before me, a reasonable fact finder could only conclude that the plaintiff as of her December 6, 2010 meeting with

> Dr. Davis in which she saw her own x-ray with the ball of her hip outside of the cup had knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which if pursued would have led to knowledge of the alleged wrong.
>
> * * *
>
> . . . The crucial date in our case is December 6, 2010. That is the date that a reasonable fact finder could only conclude that the plaintiff's deteriorating physical condition put her on inquiry notice that she may have been harmed.

This appeal followed.

STANDARD OF REVIEW

In *La Belle Epoque, LLC v. Old Europe Antique Manor, LLC*, 406 Md. 194, 208-09 (2008), the Court of Appeals discussed the standard for appellate review of the grant of a motion for summary judgment:

> In *Anderson v. The Gables*, 404 Md. 560, 948 A.2d 11 (2008), we summarized the standards applicable to our review of the 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. *Bednar v. Provident Bank of Maryland, Inc.*, 402 Md. 532, 542, 937 A.2d 210, 215 (2007); *Rhoads v. Sommer*, 401 Md. 131, 148, 931 A.2d 508, 518 (2007) ("We review the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the facts against the moving party"); *Harford County v. Saks Fifth Ave. Distribution Co.*, 399 Md. 73, 82, 923 A.2d 1, 6 (2007) (In reviewing a trial court's decision on a motion for summary judgment, "we seek to determine whether any material facts are in dispute and, if they are, we resolve them in favor of the non-moving party"); *Serio v. Baltimore County*, 384 Md. 373, 388–89, 863 A.2d 952, 961 (2004); *Lovelace v. Anderson*, 366 Md. 690, 695, 785 A.2d 726, 728 (2001) (In reviewing a grant of the defendants' motions for summary judgment, "we

> must review the facts, and all inferences therefrom, in the light most favorable to the plaintiffs"). 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); *Bednar,* 402 Md. at 532, 937 A.2d at 216; *Saks,* 399 Md. at 82, 923 A.2d at 6; *Prop. and Cas. Ins. Guar. Corp. v. Yanni,* 397 Md. 474, 480, 919 A.2d 1, 5 (2007); *Standard Fire Ins. Co. v. Berrett,* 395 Md. 439, 451, 910 A.2d 1072, 1079 (2006); *Ross v. State Bd. of Elections,* 387 Md. 649, 659, 876 A.2d 692, 698 (2005).

Anderson, 404 Md. at 571, 948 A.2d at 18. In addition, "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, 833 A.2d 17, 24 (2003). Essentially, in reviewing a trial court's grant of summary judgment, we examine "the same information from the record and determine the same issues of law as the trial court." *Miller v. Bay City*, 393 Md. 620, 632, 903 A.2d 938, 945 (2006). We only look to the evidence submitted in opposition and support of the motion for summary judgment in reviewing the trial court's decision to grant the motion. *Miller,* 393 Md. 620, 903 A.2d 938; *Livesay v. Baltimore,* 384 Md. 1, 10, 862 A.2d 33, 38 (2004).

With respect to the issue of inquiry notice, the Court of Appeals has said: "Like any other issue that is fact-dependent, if there is any genuine dispute of material fact as to when the plaintiffs possessed [the requisite] degree of knowledge, the issue is one for the trier of fact to resolve; summary judgment is inappropriate." *Bank of New York v. Sheff*, 382 Md. 235, 244 (2004). "Even if it appears that the relevant facts are undisputed, if those facts are susceptible to inferences supporting the position of the party opposing summary judgment, then a grant of summary judgment is improper." *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 533 (2003) (internal quotations and citations omitted).

DISCUSSION

The key issue in this case is when Ms. Sigethy possessed "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 [cause of action]," *O'Hara v. Kovens*, 305 Md. 280, 302 (1986), *i.e.*, when did she know facts that would have caused a reasonable patient in her position to investigate whether she should file a malpractice claim against Dr. Klepper. The issue is complicated by the fact that, in the field of medicine, an unsuccessful result alone does not necessarily establish negligence on the part of the health care provider. *See, e.g., Kennelly v. Burgess*, 337 Md. 562, 572-73 (1995). To establish a claim of medical "injury," a plaintiff must prove not only a bad result, but also a breach of the standard of care that was a proximate cause of the bad result.

The statute of limitations for professional liability claims against health care providers is codified in CJP § 5-109(a), which provides: "An action for damages for an injury arising out of the rendering of or the failure to render professional services by a health care provider . . . 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." Subsection 5-109(a)(2) is a legislatively imposed discovery rule.

The common law discovery rule was discussed by Court of Appeals in *Poffenberger v. Risser*, 290 Md. 631, 634-35 (1981):

> In Maryland, the general rule heretofore has been stated to be that the running of limitations against a right or cause of action is triggered upon occurrence of the alleged wrong, and not when it is discovered.

> *Leonhart v. Atkinson*, 265 Md. 219, 223, 289 A.2d 1, 3-4 (1972). However, the harshness of this general rule was readily observed and has in this State led to the creation of both legislative and judicial exceptions to it one among them, the "discovery rule." Although perhaps timidly, the Court first applied the discovery rule in Maryland (and some suggest was the first to embrace the concept in the nation, see Note, The Statute of Limitations in Actions for Undiscovered Malpractice, 12 Wyo.L.J. 30, 34 (1957)), nearly three quarters of a century ago, when in *Hahn v. Claybrook*, 130 Md. 179, 100 A. 83 (1917), it was announced that in medical malpractice cases the cause of action accrues when the wrong is discovered or when with due diligence it should have been discovered. Over the subsequent decades, the rule has spread beyond application solely to the learned professions so as to embrace malpractice in all callings encompassed within the continuously expanding concept of "profession."

(Footnote omitted.)

In *Poffenberger*, the Court observed that there was "no valid reason" to confine the discovery rule to professional malpractice cases, and held that "the discovery rule [is] applicable generally in all actions and the cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong." *Id*. at 636. The Court also held:

> Affirmatively speaking, we determine the discovery rule contemplates actual knowledge that is express cognition, or awareness implied from
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> > knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus, charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued. *Baynard v. Norris*, 5 Gill. 468, 483, 46 Am.Dec. 647; *Higgins v. Lodge*, 68 Md. 229, 235, 11 A. 846, 6 Am.St.Rep. 437.

Id. at 637.

"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 not a subjective one; it is measured by whether there exist circumstances 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 he failed to exercise due diligence or whether he was 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).

In this case, Dr. Klepper argued that the date by which Ms. Sigethy was clearly on notice that something was wrong with her hip that warranted further investigation of a potential claim for medical malpractice was December 6, 2010, when she reviewed her x-rays with Dr. Davis. By her own testimony, when she saw the x-rays at Dr. Davis's office, she could see that "it was bad," and she was advised by Dr. Davis on that date that she needed revision surgery.

But, considering the evidence in the light most favorable to Ms. Sigethy --- as we are obligated to do --- Dr. Davis *did not* indicate on December 6 that malpractice by Dr. Klepper was a likely, or even a possible, cause of her problem. Even though Ms. Sigethy was told by Dr. Davis that the displacement of the prosthetic required revision surgery, a potential need for revision surgery was one of the known risks that Dr. Klepper had warned of. Indeed, before each of Ms. Sigethy's hip replacement surgeries, Dr. Klepper informed her that risks of the planned surgery included such unfavorable outcomes as

"hip pain, leg length difference, dislocation, . . . loss of motion or function in the leg, loosening of the implant, [and the] need for further surgery."

Moreover, as Dr. Davis's notes from the December 6, 2010, meeting confirm, rather than raise a concern about the quality of Dr. Klepper's care, Dr. Davis "explained to [Ms. Sigethy] that there appears to be some change in the position of the inversion of the pouch **since the procedure was originally performed** and **I believe it is likely** that this may be related to the work form to **the development of the heterotopic bone which could help cause some subluxation**." (Emphasis added.) A reasonable lay person in the position of Ms. Sigethy could have reasonably inferred from Dr. Davis's explanation of heterotopic ossification that the displacement of the prosthetic and the pain were caused by bony growth that was produced by Ms. Sigethy's body, and were not the fault of Dr. Klepper. Under the circumstances, and, considering the evidence and inferences in a light most favorable to the non-moving party, we cannot say that, as a matter of law, Ms. Sigethy was on inquiry notice on December 6, 2010, of a malpractice claim against Dr. Klepper.

Dr. Klepper argues that *Lutheran Hospital of Maryland v. Levy*, 60 Md. App. 227 (1984), is very similar to this case. In that case, Ms. Levy broke her ankle on October 25, 1973, and had it put in a cast at Lutheran Hospital. A Lutheran Hospital doctor eventually told her to get rid of her crutches and start walking on her ankle. Her treatment with Lutheran Hospital concluded in February 1974. But her ankle continued to bother her, and she eventually sought treatment at Mercy Hospital. In April 1974, a doctor at Mercy examined her. The doctor at Mercy told her that her ankle "was all

messed up," and asked her: "who the hell told you to walk on that ankle?" *Id*. at 233. "Ms. Levy said that it was then she first formed the belief there was a problem." *Id*.

But she did not file suit against Lutheran Hospital until June 15, 1978. Although Ms. Levy won at trial, on appeal, we agreed with Lutheran Hospital's argument that the claim was time-barred, and we reversed the judgment in favor of Ms. Levy. 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).

Dr. Klepper argues that this case is analogous to *Lutheran Hospital* because, here, Dr. Davis said to Ms. Sigethy: "I don't know how you're doing that job. You cannot go back to work." But, because we are obligated to consider all evidence in the light most favorable to the non-moving party, we perceive a clear difference in the statements made in *Lutheran Hospital* and this case. The statements of subsequent doctors in *Lutheran Hospital* (asking "who in the hell told you to walk on that ankle?") implied that Ms. Levy had received bad medical advice, and Ms. Levy herself drew that inference. Dr. Davis made no statement to Ms. Sigethy that questioned Dr. Klepper's advice or surgical skills, or implied that Dr. Klepper had provided bad medical care.

Ms. Sigethy argues in her brief that *Lutheran Hospital* does not support the grant of summary judgment in this case because "[n]othing in the factual record . . . would allow a conclusion, as a matter of law, that [Ms. Sigethy] knew or should have known that her subluxed hip was the result of [Dr. Klepper] doing something wrong more than three years before suit was filed." She urges this Court instead to rely on *Geisz v. Greater Baltimore Medical Center*, 313 Md. 301 (1988), which she describes as "remarkably similar to the facts in this case."

In *Geisz*, a young man was treated for Hodgkin's disease by Dr. George Richards, head of the Radiation Therapy Department at GBMC, between November 1971 and November 1973. At the inception of the treatment, Dr. Richards told Geisz and his wife,

Elaine, that Geisz would be getting radiation treatment, and probably chemotherapy as well, but that his chances for survival were 95%. The Geiszes asked Dr. Richards if they should consider getting treatment elsewhere, and Dr. Richards "assured them that GBMC had the best that there was to offer, that GBMC was treating people with the most up-to-date techniques and that the survival rate of patients treated at GBMC was very good." *Id*. at 309. Dr. Richards treated Geisz with radiation therapy between November 26, 1971, and January 20, 1972. In March 1972, Dr. Richards started Geisz on chemotherapy. Tests in April 1972 revealed that Geisz's cancer was spreading. Dr. Richards told Geisz and Elaine "that he would make the treatment stronger and that the chances of cure were 90%." *Id*. at 310.

Geisz was subjected to a second round of radiation between May and August of 1972, but was found, in the fall of 1972, to have "made no progress toward a cure[.]" *Id*. Dr. Richards again reassured Geisz and Elaine "that Geisz was getting the best treatment. The couple was given the impression that Geisz was simply in the lower end of the statistics but that Dr. Richards was going to try something else to beat the disease. They remained totally confident in Dr. Richards." *Id.*

More chemotherapy followed, but Geisz's condition worsened. Geisz and Elaine last met with Dr. Richards in November 1973. At that meeting Dr. Richards told them that he had given Geisz "every treatment available in the country, the best of the treatments, and [Geisz] was not responding. There were no answers why[.]" *Id*. at 311. Dr. Richards referred them to the Cancer Research Center, a facility for hopeless cases. Geisz died at age 29 on September 21, 1975.

In 1985, Elaine read a newspaper article discussing malpractice claims against Dr. Richards. She retained counsel and filed a suit for wrongful death and survival, in the name of her son, in November 1985. Her "theory of liability was, in part, that radiation was not applied to all of the affected area or, if applied, was applied in insufficient dosages." *Id*. at 310. The defendants moved for summary judgment on limitations grounds, arguing that Elaine "had knowledge of facts constituting discovery as a matter of law no later than November 1973 when Dr. Richards stopped treating Geisz." *Id*. at 308. The Circuit Court for Baltimore County granted summary judgment in the defendants' favor, finding that the survival action was untimely because it accrued upon Geisz's death. The court also found that the wrongful death claim was untimely. But it "nevertheless specifically addressed the issue of due diligence and concluded that a jury question was presented as to whether the plaintiffs should have discovered the claims earlier." *Id*. at 308-09. On appeal, we held that they should have, in the exercise of due diligence, discovered the claims earlier. After Elaine's petition for *certiorari* was granted, the Court of Appeals reversed our ruling that the claims were barred by the statute of limitations.

In doing so, the Court of Appeals cited *Lutheran Hospital* as a case with "strong" facts supporting a "limitations bar." It noted that, in contrast, in Geisz's case, there was "no evidence that any health care provider . . . ever indicated to [Geisz and Elaine, whether as a couple or individually] that Geisz had received other than proper, albeit unsuccessful treatment while under the care of Dr. Richards." *Id*. at 311. Dr. Richards had continually assured them that Geisz was receiving the best treatment. It was not until

Elaine read an article ten years after Geisz's death regarding malpractice cases against Dr. Richards that she suspected that malpractice, not the misfortune of being in the low end of the statistics, was the cause of Geisz's death. The Court of Appeals held that the question of when the plaintiffs should have known of a potential malpractice claim was a question for the jury, explaining:

> . . . [N]othing was said to Geisz or Elaine by those involved with the heart sac surgery or by those associated with the experimental drug program which raised any question about the quality of care provided by Dr. Richards.
>
> A jury could conclude that the circumstances known to Geisz and Elaine would not cause reasonable persons in their position to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged malpractice more than three years before the survival claim was asserted. In *O'Hara v. Kovens* [305 Md. 280 (1986)], *supra*, a variety of nonliability hypotheses could have explained the facts known to the O'Hara plaintiffs so that limitations was a fact question. Similarly here, cancer which was not responding to proper treatment, as contrasted with cancer which was being negligently treated, could have explained Geisz's deterioration and death. The instant record presents a factual setting in which it may be impossible for a lay person, unskilled in medicine, "reasonably to understand or appreciate that actionable harm has been done him." *Waldman v. Rohrbaugh, supra*, 241 Md. [137] at 145 [(1966)]. On these facts, when the plaintiffs should have discovered the survival claim is a jury question.

313 Md. at 317. Geisz and Elaine knew something was wrong, but nothing was ever said to them that "raised any question about the quality of care provided by Dr. Richards." Summary judgment was therefore improper.

Ms. Sigethy also relies upon *Baysinger v. Schmid Products* Co., 307 Md. 361 (1986). *Baysinger* was a products liability case in which a woman sued the manufacturer of her 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. Ms. Baysinger asked her doctors specifically at the time the IUD was removed in 1979 if it had caused her illness, but her doctors did not say so. 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, when Ms. Baysinger saw an advertisement regarding IUD lawsuits in a local newspaper, she consulted legal counsel and, in 1984, filed suit. The trial court granted the manufacturer's motion for summary judgment on limitations grounds, finding the case similar to *Lutheran Hospital*, and finding that Ms. Baysinger was on notice and should have commenced an investigation as of the time she had surgery to remove the IUD. Therefore, the trial court ruled, her case was not timely filed. *Id*. at 356-66. We affirmed. *Id*. at 362. But the Court of Appeals reversed the summary judgment in favor of the manufacturer, and observed:

> What is in dispute here is whether on this record the case was in such posture as to warrant the trial court ruling that as a matter of law Mrs. Baysinger's cause of action accrued in late 1979. Keeping in mind that the trial court was considering a motion for summary judgment where all inferences must be drawn against the movant, *see Peck v. Baltimore Court*, 286 Md. 368, 410 A.2d 7 (1979), it seems to us that the trial court erred in finding that as a matter of law, Mrs. Baysinger had notice in late 1979 barring her suit filed in 1984. As Judge Rodowsky said for the Court in *Kovens:*
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> > "We shall assume, without deciding, that there is no dispute of material, primary fact in the instant case. From the primary facts some tribunal must deduce when the plaintiffs were on notice. That ultimate fact is ordinarily a question for the trier of facts going to the merits. '"[W]hether or not the plaintiff's failure to discover his cause of action was due to failure on his part to use due diligence, or to the fact that defendant so

> concealed the wrong that plaintiff was unable to discover it by the exercise of due diligence, is ordinarily a question of fact for the jury."'" (Citations omitted).

305 Md. at 294-95, 503 A.2d at 1320.

> 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, Ms. Sigethy's deposition testimony similarly indicated that she did not suspect malpractice on the part of Dr. Klepper until after she read the recall notice from DePuy. Considering the evidence in this record in the light most favorable to Ms. Sigethy, we conclude that summary judgment was not properly granted because there is a genuine dispute of material fact regarding when she was on inquiry notice of a malpractice claim against Dr. Klepper. To paraphrase what we said in *Young*, *supra*, 125 Md. App. at 312, "reasonable minds could differ over whether appellant should have

further investigated" a malpractice claim against Dr. Klepper more than three years before she filed her claim on January 2, 2014. Accordingly, we reverse and remand for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLEE.