UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2602

September Term, 2015

FAITH CARROLL

v.

THOMAS L. SEWELL, D.P.M., ET AL.

Wright,
Graeff,
Bair, Gary E.,
(Specially Assigned),

JJ.

Opinion by Bair, Gary E., J.

Filed: February 22, 2017

The instant appeal arises from a medical malpractice action filed by appellant, Faith Carroll, against appellees, her former podiatrist, Dr. Thomas L. Sewell, D.P.M. and his medical practice, Thomas Sewell, D.P.M., P.A. ("Tidewater Podiatry"). On August 13, 2014, appellant filed a statement of claim before the Health Care Alternative Dispute Resolution Office of Maryland ("HCADROM"), and thereafter, filed a complaint in the Circuit Court for Talbot County alleging negligence against appellees. On December 21, 2015, after a hearing, the circuit court granted appellees' motion for summary judgment on the ground that appellant's claim was barred by the statute of limitations.

Before this Court, appellant presents one question for review, which we have slightly rephrased:[1]

> Did the circuit court err in granting appellees' motion for summary judgment where the facts of when appellant knew or should have known of appellees' negligence were in dispute?

For the following reasons, we shall reverse the ruling of the circuit court granting appellees' motion for summary judgment and remand for further proceedings.

BACKGROUND

On April 12, 2010, appellant visited Tidewater Podiatry and was examined by Dr. Sewell for complaints of pain in her right foot. At the time of her visit, appellant had a

[1] Appellant's question, as stated in her brief, is as follows:

> Did the Court err by granting Appellees' Motion for Summary Judgment where the facts of when the Appellant knew or should have known of defendants' negligence are in dispute?

bunion on her medial right foot and hammertoe of the second toe of her right foot. Dr. Sewell suggested that appellant try taping that week and return for a follow-up visit in a week. On April 21, 2010, appellant returned to Tidewater Podiatry and indicated she was still in pain. Dr. Sewell diagnosed appellant with "Hammertoe, digit 2 right. Limb pain. Capsulitis. [S]uspected tear or rupture of the flexor plate sub-metatarsal 2 right foot." Dr. Sewell recommended surgical correction, and appellant agreed.

On May 14, 2010, Dr. Sewell performed surgery to correct the fixed second digit hammertoe but did not operate on the bunion. During surgery, a screw was placed in the proximal and middle phalanges of appellant's second toe. From May 2010 to February 2011, appellant returned to Tidewater Podiatry on several occasions for post-operative assessments. Appellant complained of continuing pain in her right foot. Initially, Dr. Sewell indicated the continuing pain was due to recovery, but later suggested the pain was due to the placement of the screw and that removal of the screw may be necessary to alleviate her pain.

On February 28, 2011, appellant returned to Tidewater Podiatry and voiced that she was still experiencing pain. Her second toe was also further crossing over her big toe. For the second time, Dr. Sewell suggested that removal of the screw would alleviate her pain. Appellant returned for a second surgery on March 3, 2011. Dr. Sewell performed the surgery and removed the screw that had been placed in her right foot during the first surgery. Appellant returned to Dr. Sewell twice in March 2011 for post-operative assessments. There were no documented complaints outside of the usual post-operative

expectations.

On June 22, 2011, appellant returned to Tidewater Podiatry for the final time. During this visit, she complained of pain, specifically aching and tenderness. Appellant voiced that despite the surgery, her condition had not improved. Dr. Sewell recommended physical therapy, and he also referred appellant to James W. Palumbo, M.D., an orthopedist, for a second opinion. Appellant was not discharged from Dr. Sewell's care. Dr. Sewell noted in appellant's medical chart that appellant should "Follow up as necessary."

On August 15, 2011, Dr. Palumbo examined appellant. Dr. Palumbo noted in appellant's medical chart that Dr. Sewell "requested me to look at and see if I thought anything else should be done." Dr. Palumbo asked appellant why a bunionectomy had not been performed. Dr. Palumbo also told appellant that a third surgery could cause further complications. After his evaluation of her right foot, Dr. Palumbo documented that her right second toe was dorsiflexed, or crossed over, her big toe and that she had a moderate bunion deformity. Dr. Palumbo also documented, "I discussed things with her and I think I would probably be pretty cautious about doing a third procedure. She is only about five months out from the last procedure and this second digit is probably going to basically maintain its current position."

Appellant had a follow-up appointment with Dr. Palumbo on June 6, 2012, at which time Dr. Palumbo documented that appellant continued to have a crossover of her second toe, "a fixed PIP joint in some moderate extension," and a "fixed DIP joint." He

further noted that he advised appellant against surgery, but if they entertained a surgical correction, "it would be a first MP joint fusion combined with a second metatarsophalangeal joint resection most likely to free up that second toe," which would be "significant surgery to recover from." Appellant consulted with two other foot specialists, Clifford Jeng, M.D. on November 22, 2013, and James McKee, D.P.M. on April 11, 2013. Both specialists discussed a third surgery with appellant.

Then, on August 13, 2014, appellant filed a statement of claim with HCADROM against appellees. Appellant waived arbitration, and on April 22, 2015, appellant filed a complaint for negligence against appellees in the Circuit Court for Talbot County. Appellees filed a motion for summary judgment on August 27, 2015, and appellant filed an opposition to the motion for summary judgment on September 14, 2015.

On December 21, 2015, a hearing was held on appellees' motion for summary judgment, and the circuit court granted appellees' motion for summary judgment on the ground that appellant's claim was barred by the statute of limitations. In its ruling, the circuit court stated,

> [I]n May 2010 [appellant] had one surgery from Dr. Sewell and then a follow up surgery or another surgery in March of 2011 throughout the entire time from prior to the surgery through March 2011 through June 2011 she continued to have pain in her foot. On June 22nd, 2011 Dr. Sewell referred [appellant] to Dr. Palumbo. At that point [Dr. Palumbo's] treatment of [appellant] ceased. And looking to the case of *Sisters of Mercy [of the Union of the United States et al.] v. [Gaudreau, Inc.*,] 47 Md. App. 372 [(1980)]. The standard for the statute of limitations is whether the [appellant] knew or should have known that there was a problem on June 22nd, 2011 she still had pain. The pain wasn't a latent pain it was, appears from the evidence to be fairly constant pain. So [appellant]

> was aware that she was in pain. That none of the treatment that Dr. Sewell had provided had worked and therefore on that point [appellant] knew or should have known that what Dr. Sewell had done had not worked. And that is the point where the statute of limitations began to run and therefore I will grant the Motion for Summary Judgment.

Appellant filed a timely notice of appeal on January 20, 2016.

STANDARD OF REVIEW

The Court of Appeals has stated that the standard of review for a trial court's grant or denial of a motion for summary judgment,

> is a question of law subject to *de novo* review on appeal. *Livesay v. Baltimore*, 384 Md. 1, 9, 862 A.2d 33, 38 (2004). In reviewing a grant of summary judgment under Md. Rule 2-501, [appellate courts] independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. *Id.* at 9-10, 862 A.2d at 38. [Appellate courts] review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party. *Id.* at 10, 862 A.2d at 38.

Myers v. Kayhoe, 391 Md. 188, 203 (2006).

DISCUSSION

On appeal, appellant argues that the circuit court erred in granting appellees' motion for summary judgment because the question of when appellant knew or should have known of the injury is a disputed fact. Appellant maintains that she was not on notice of the injury until August 15, 2011, when she consulted Dr. Palumbo for a second opinion. Appellant became concerned when Dr. Palumbo asked her why a bunionectomy had not been performed and suggested that a third surgery could cause further

complications. Appellant argues that she was not put on notice that something was wrong until meeting with Dr. Palumbo.

Appellant also argues that her continuing pain despite care and treatment did not trigger the requirement that she investigate the suspected injury. Appellant contends that the trial court erred in two ways: (1) the trial court determined that all patients react to surgery the same way and that because appellant's pain was not relieved by Dr. Sewell's treatment, appellant should have concluded that Dr. Sewell caused an injury; and (2) the trial court ignored Dr. Sewell's post-operative appointments at which time Dr. Sewell explained the causes of pain, planned further treatment, and assured her that her pain was part of the normal recovery process.

In response, appellees argue that there is no genuine dispute of material fact. Specifically, appellees argue that appellant was on inquiry notice of the injury on June 22, 2011, when she visited Dr. Sewell for the final time. At that time, she was aware that she was still experiencing pain despite having two surgeries to alleviate her pain. Further, appellant was aware that her toe was in a worse condition than it was when she first saw Dr. Sewell and her bunion was still present. Appellees contend that the law does not allow appellant "to bury her head in the sand" and that based on her knowledge of the circumstances, she should have known that a potential injury had occurred.

Pursuant to Md. Code (2006, 2013 Repl. Vol.), § 5-109 of the Courts and Judicial Proceedings (II) Article ("CJP"), a civil action for damages against a health care provider shall be filed within the earlier of: (1) five years from the time the injury was committed;

or (2) three years of the date the injury was discovered. Under the discovery rule, the statute of limitations begins to run when the wrong is discovered or when, with due diligence, it should have been discovered. *Poffenberger v. Risser*, 290 Md. 631, 636 (1981). The latter alternative "contemplates . . . awareness implied from '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.'" *O'Hara v. Kovens*, 305 Md. 280, 286-87 (1986) (quoting *Poffenberger*, 290 Md. at 637).

Generally, "the question of whether a plaintiff acted with due diligence in bringing his or her cause of action is a question best left to the jury and is not an appropriate basis for a summary judgment motion." *Young v. Medlantic Lab. P'ship*, 125 Md. App. 299, 310, *cert. denied*, 354 Md. 572 (1999). "Whether the issue of fact is guilt or innocence, or reasonableness of conduct under existing circumstances, a group of lay persons is a far better judge of the facts than a single legal expert." *Id.* at 312. "Jurors bring to their findings of fact an accumulation of life experiences in a variety of circumstances that cannot be matched by the limited experience of a single person, no matter how learned in his or her field." *Id.*; *see also Baysinger v. Schmid Prods. Co.*, 307 Md. 361, 367-68 (1986) ("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.").

At the summary judgment hearing, the trial court relied on *Sisters of Mercy of the Union in the United States of America et al. v. Gaudreau, Inc.*, 47 Md. App. 372 (1980), to support its ruling that appellant's claim was barred by the statute of limitations. In that case, the Sisters of Mercy ("the Sisters") contracted with Gaudreau, Inc. ("Gaudreau"), an architecture firm, to construct a retirement home. *Id.* at 374. The retirement home was completed in June 1974, and shortly thereafter, the Sisters moved in. *Id.* The Sisters observed defects in the building both before and after occupancy, including leaking water; faulty ventilation, heating, and insulation; and ill-fitting windows and doors. *Id.* The Sisters did not seek legal assistance until April 1979. *Id.* The trial court denied the Sisters' petition to compel arbitration and granted Gaudreau's request for a stay of arbitration on statute of limitations grounds. *Id.* at 375. This Court affirmed the trial court's decision and explained that the Sisters first became aware of the structural defects in the retirement home as early as 1974. *Id.* at 378-79. The Sisters were aware of the leakage and knew that the roof should not leak whenever it rained. *Id.* at 379. With the exercise of reasonable diligence, the Sisters could have determined the cause of the leakage long before they did so. *Id.*

This Court agrees with appellant's contention that *Sisters of Mercy* is distinguishable from the case at bar. First, it is common knowledge that a roof, particularly a new roof, should not leak when it rains. The human body is different. How the human body reacts to a medical procedure, and whether the reaction is within the

realm of normal and acceptable, is more complicated than discovery of a leaky roof, and generally requires expert testimony.

Second, in *Sisters of Mary*, the Sisters discovered the leakage and reported it to Gaudreau. *Id.* at 374. It was undisputed the Sisters had knowledge of the leakage. *See id.* Despite this knowledge, the Sisters waited approximately five years before seeking legal assistance. *Id.* In the instant case, there is a factual dispute as to when appellant had knowledge of the injury. At all times prior to June 22, 2011, appellant was told by Dr. Sewell that her pain could be corrected with surgery or that her recovery was progressing as expected. Although she was referred to Dr. Palumbo on June 22, 2011, she was not discharged from Dr. Sewell's care, and Dr. Sewell documented in appellant's medical chart that it was recommended she follow up as necessary. Appellant was unsure why she was being referred to Dr. Palumbo. Dr. Sewell told her he was referring her for a second opinion. In fact, Dr. Palumbo documented in appellant's medical chart that Dr. Sewell requested that Dr. Palumbo look at appellant's foot to "see if I thought anything else should be done." Based on the circumstances, it is plausible that appellant believed she was being referred to Dr. Palumbo to exhaust other treatment options and that she would remain primarily under Dr. Sewell's care.

Appellant argues, and we agree, that the facts in the instant case are more analogous to those in *Lutheran Hospital of Maryland v. Levy*, 60 Md. App. 227 (1984). In *Lutheran Hospital*, the appellant broke her ankle in October 1973. *Lutheran Hosp.*, 60 Md. App. at 233. She was taken to Lutheran Hospital where a physician told her to throw

away her crutches and walk on the ankle. *Id.* Appellant continued to experience pain. *Id.* In April 1974, appellant saw Dr. Wiedmann at Mercy Hospital who told her that her ankle "was all messed up," and asked, "Who the hell told you to walk on that ankle?" *Id.* Nevertheless, appellant waited until June 1978 to file suit. *Id.* at 234. Subsequently, a jury awarded appellant $258,000.00, and from that judgment, Lutheran Hospital appealed. *Id.* at 231-32. This Court reversed the judgment and held that the trial court erred in finding that appellant's claim was not barred by the statute of limitations. *Id.* at 244.

In *Lutheran Hospital*, this Court explained that the statute of limitations began to run on the date of her examination with Dr. Wiedmann. *Id.* at 236. Prior to her visit with Dr. Wiedmann, she was experiencing ankle pain, and based on Dr. Wiedmann's assessment of her ankle, the appellant "came away from the visit with a belief that 'something wrong had been done.'" *Id.* This Court concluded that "a reasonable fact finder could only conclude that in April 1974 [appellant] 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.'" *Id.* at 237 (quoting *Poffenberger*, 290 Md. at 637-38)

As in *Lutheran Hospital*, appellant did not suspect that an injury had occurred until she met with Dr. Palumbo. Dr. Palumbo examined her foot, asked why the bunion was not removed, and then suggested that a third surgery would likely cause complications and create stress on her foot. In her deposition, appellant stated, "Well, first when [Dr. Palumbo] looked at it, he just made not a good sound like, you know, uh,

and then he looked at it, and he told me some kind – I'm not sure. I'm not going to give it word for word, but it was like why wasn't the bunion removed, and then he went on to things that had to be done to get it corrected." At all times prior to June 22, 2011, appellant operated on the belief that her recovery was unremarkable and that her pain was part of the normal recovery process.

Appellees cite *Jacobs v. Flynn*, 131 Md. App. 342 (2000), in support of their argument that the circuit court's grant of summary judgment was proper. We find this case distinguishable. In *Jacobs*, appellant was hospitalized in February 1991 for back pain and fever. *Jacobs*, 131 Md. App. at 351. He was discharged but continued to receive treatment for his back pain from various medical providers. *Id.* A bone scan was done in February 1991, and Dr. Meade Flynn interpreted the results as normal. *Id.* at 352. In March 1991, appellant's condition worsened and he was later diagnosed with an epidural abscess outside of the spinal cord which caused him to become paralyzed. *Id.* at 352-53. During this time, several doctors commented to appellant and his family that he was not given proper care, which led his daughter to contact an attorney. *Id.* at 366. Despite this knowledge, appellant did not request the results of the bone scan. *Id.* at 368. Dr. Flynn was not added to appellant's lawsuit until May 8, 1995. *Id.* at 360. A jury returned a verdict in favor of appellant and against Dr. Flynn and other medical providers. *Id.* at 350. The trial judge later directed a verdict in favor of Dr. Flynn based on the statute of limitations. *Id.*

This Court in *Jacobs* affirmed the trial court's ruling on this issue and explained

that appellant could be charged with notice as of 1991 because he did not obtain the bone scan report after becoming paralyzed within five days after receiving Dr. Flynn's interpretation of the results. *Id.* at 368. Additionally, appellant's family was aware that appellant received substandard care in March 1991 based on comments made by other medical providers. *Id.*

The facts in *Jacobs* that charged appellant with notice go beyond the facts in the present case. The appellant did not suffer a sudden and traumatic medical condition that would reasonably put her on notice of an injury as the appellant in *Jacobs* did. She experienced pain and a further crossing over of one of her toes, but apart from these changes, her condition remained relatively unchanged throughout the course of treatment with Dr. Sewell. She also did not receive information from other providers prior to her visit with Dr. Palumbo that would lead her to believe Dr. Sewell caused an injury.

Finally, we find it significant that Dr. Sewell was entrusted with appellant's medical care. In *Brown v. United States*, 353 F.2d 578, 580 (9th Cir. 1965), the United States Court of Appeals for the Ninth Circuit explained, "[O]ne is presumed to repose confidence in the individual doctor to whom he entrusts his medical problems and that the confidential relationship excuses the making of inquiry which questions the care which has been or is being given during the existence of the relationship." In her deposition, appellant stated that she did not suspect something was wrong until she was referred to Dr. Palumbo. Appellant questioned Dr. Sewell regarding her pain and kept

him abreast of her discomfort, but at all times she was assured that her pain and discomfort were either capable of being corrected or part of the recovery process.

For the above reasons, we conclude that there is a genuine dispute of material fact regarding the date on which appellant is charged with notice of the injury and that it was error for the trial court to grant summary judgment in favor of appellees. Accordingly, the decision of the trial court is reversed and the case is remanded for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. COSTS TO BE PAID BY APPELLEES.