MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gayle Nichols,
Appellant-Plaintiff,

v.

Anonymous Physician and Anonymous Medical Group,
Appellees-Defendants.

July 25, 2023

Court of Appeals Case No. 22A-CT-3087

Appeal from the Allen Superior Court

The Honorable Jennifer L. DeGroote, Judge

Trial Court Cause No. 02D03-2206-CT-257

Memorandum Decision by Judge Tavitas
Judges Bailey and Kenworthy concur.

Tavitas, Judge.

Case Summary

[1] In February 2020, Gayle Nichols filed a proposed medical malpractice claim against Anonymous Physician and Anonymous Health Group (collectively, "Defendants") arising out of an October 2017 surgery. The Defendants moved for a preliminary determination on the grounds that Nichols failed to file her complaint within the Indiana Medical Malpractice Act's two-year statute of limitations. The trial court granted the Defendants' motion and entered judgment in their favor. Nichols argues that she timely filed her claim and that the trial court's entry of judgment in favor of the Defendants was erroneous. We disagree and affirm.

Issue

[2] Nichols raises one issue on appeal, which we restate as whether the trial court erred by granting the Defendants' motion for preliminary determination and entering judgment in their favor.

Facts

[3] On March 24, 2016, Nichols had a knee replacement surgery performed on her right knee. Nichols's knee did not improve after the surgery, and she was told that her lack of improvement might be due to an allergic reaction to the nickel components of the implant. Nichols believed since childhood that, based on her reactions to metal jewelry, she was allergic to metal, but Nichols was never formally tested for such allergies.

[4] On October 10, 2017, Anonymous Physician performed a revision surgery to replace Nichols's knee implant with a Smith and Nephew Oxinium knee implant, which also contained nickel but employed "a ceramic[-]like coating" over portions of the implant. Appellant's App. Vol. III p. 46. Anonymous Physician apprised Nichols of the risks of surgery, which included "failure," "possible need for revision surgery," and "loss of motion . . . ." Appellant's App. Vol. IV p. 91.

[5] After the revision surgery, Nichols experienced "all of the same problems" she experienced after the 2016 surgery. Appellant's App. Vol. VI p. 13. Specifically, Nichols experienced "severe pain every day," swelling, and "still couldn't bend [her] knee." *Id*. at 11. Nichols considered these symptoms "inconsistent with [her] expectations from the surgery[.]" *Id*. at 17. Within approximately one-month of the surgery, Nichols "form[ed] the belief that there was a problem with the work that [Anonymous Physician] had done[.]" *Id*. at 15. On March 22, 2018, Nichols filed a medical malpractice claim regarding the 2016 knee replacement surgery; however, Nichols did not also file a medical malpractice claim regarding the 2017 revision surgery at that time.

[6] After her symptoms from the 2017 revision surgery persisted for "a good year and a half", Nichols consulted with a different knee specialist, Dr. Rodney Benner with the Shelbourne Knee Center, in 2019. *Id*. at 10. At some point, Dr. Benner told Nichols that her post-surgery symptoms might be caused by the nickel in the Oxinium implant. Nichols's medical records reveal that Dr. Benner had this discussion with Nichols on April 30, 2019. During Nichols's

deposition, however, Nichols could not recall the date on which the discussion took place. Dr. Benner also had Nichols tested for metal allergies. On February 20, 2020, Nichols learned the results of a "Lymphocyte Transformation Test," which revealed that she was allergic to nickel.[1] Appellant's App. Vol. III p. 44.

[7] On February 10, 2022, Nichols filed a proposed complaint with the Indiana Department of Insurance, in which she alleged that Defendants' 2017 revision surgery constituted medical malpractice. On June 2, 2022, the Defendants filed a "Motion for Preliminary Determination and to Dismiss" on the grounds that Nichols failed to file her complaint within the Indiana Medical Malpractice Act's two-year statute of limitations period. Appellant's App. Vol. II p. 20.

[8] The trial court held a hearing on the motion on November 1, 2022. On December 1, 2022, the trial court found that the statute of limitations was triggered when Nichols's condition failed to improve after surgery, or, in the alternative, when Dr. Benner advised Nichols that her symptoms could be due to the Oxinium implant. Accordingly, the trial court determined that Nichols failed to file her complaint within the two-year statute of limitations period and entered judgment in favor of the Defendants. Nichols now appeals.

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[1] Dr. Benner subsequently performed a revision surgery (Nichols's second revision surgery) to replace the Oxinium implant in August 2020.

Discussion and Decision

[9] Nichols argues that the trial court erred by granting the Defendants' motion for preliminary determination and entering judgment in their favor. We find Nichols's arguments unavailing.

I. Standard of Review

[10] The Indiana Medical Malpractice Act permits trial courts, upon the filing of a written motion, to "preliminarily determine an affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure." Ind. Code § 34-18-11-1(a)(1).[2] This includes the affirmative defense that the complaint was not filed within the statute of limitations period. *See Miller v. Dobbs*, 991 N.E.2d 562, 564 (Ind. 2013) (citing Ind. Trial Rule 8(c)). "When evidence accompanies a motion for preliminary determination, the

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[2] The full text of the statute provides:

> (a) A court having jurisdiction over the subject matter and the parties to a proposed complaint filed with the commissioner under this article may, upon the filing of a copy of the proposed complaint and a written motion under this chapter, do one (1) or both of the following:
>
> > (1) preliminarily determine an affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure; or
> >
> > (2) compel discovery in accordance with the Indiana Rules of Procedure.
>
> (b) The court has no jurisdiction to rule preliminarily upon any affirmative defense or issue of law or fact reserved for written opinion by the medical review panel under IC 34-18-10-22(b)(1), IC 34-18-10-22(b)(2), and IC 34-18-10-22(b)(4).
>
> (c) The court has jurisdiction to entertain a motion filed under this chapter only during that time after a proposed complaint is filed with the commissioner under this article but before the medical review panel gives the panel's written opinion under IC 34-18-10-22.
>
> (d) The failure of any party to move for a preliminary determination or to compel discovery under this chapter before the medical review panel gives the panel's written opinion under IC 34-18-10-22 does not constitute the waiver of any affirmative defense or issue of law or fact.

motion is subject to the same standard of appellate review as a summary-judgment motion." *Haggerty v. Anonymous Party 1*, 998 N.E.2d 286, 294 (Ind. Ct. App. 2013) (citing *Hodge v. Johnson*, 852 N.E.2d 650, 652 (Ind. Ct. App. 2006), *trans. denied*).

[11] "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "Summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id*. (quoting *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019)); *see also* Ind. Trial Rule 56(C).

[12] The summary judgment movant has the burden of making a *prima facie* showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party to show the existence of a genuine issue of material fact. *Id*. On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id*.

[13] We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*. Because the trial court entered

findings of fact and conclusions of law, we also reiterate that findings of fact and conclusions of law entered by the trial court aid our review, but they do not bind us. *Matter of Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018).

II. Statute of Limitations

[14] The Indiana Medical Malpractice Act's statute of limitations, codified at Indiana Code Section 34-18-7-1, provides for a two-year statute of limitations period for claims "brought against a health care provider based upon professional services or health care that was provided or that should have been provided . . . ." The statute of limitations is "an 'occurrence' statute as opposed to a 'discovery' statute"; thus, plaintiffs ordinarily must file suit within two years of the alleged malpractice, regardless of when the malpractice is discovered. *Brinkman v. Bueter*, 879 N.E.2d 549, 553 (Ind. 2008).

[15] The Indiana Supreme Court, however, has held that the statute of limitations is "unconstitutional as applied when [the] plaintiff did not know or, in the exercise of reasonable diligence, could not have discovered that she had sustained an injury as a result of malpractice" within the two-year statute of limitations period. *Martin v. Richey*, 711 N.E.2d 1273, 1284 (Ind. 1999); *see also Van Dusen v. Stotts*, 712 N.E.2d 491, 497 (Ind. 1991) (companion case to *Martin* construing the statute of limitations to permit "plaintiffs who, because they suffer from cancer or other similar diseases or medical conditions with long latency periods and are unable to discover the malpractice and their resulting injury within the two-year statutory period . . . to file their claims within two years of the date when they discover the malpractice and the resulting injury or

facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury").

[16] Accordingly, "'the ultimate question becomes the time at which a patient either (1) knows of the malpractice and resulting injury or (2) learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury.'" *David v. Kleckner*, 9 N.E.3d 147, 152 (Ind. 2014) (quoting *Herron v. Anigbo*, 897 N.E.2d 444, 448-49 (Ind. 2008) (plurality opinion), *reh'g denied*). If either of these two circumstances occurs within the two-year statute of limitations period, the statute of limitations applies, unless "it is not reasonably possible for the claimant to present the claim in the remaining time . . . ." *Id*. at 153.

[17] In determining whether the patient has learned facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice, "the date on which the patient learns of the injury and the prior treatment starts the limitations period, even if there is no basis to allege malpractice at that point." *Herron*, 897 N.E.2d at 450; *accord Kleckner*, 9 N.E.3d at 151 ("'[A] plaintiff does not need to be told malpractice occurred to trigger the statute of limitations.'" (quoting *Brinkman*, 879 N.E.2d at 555)). Further, expert advice is not required to "put a patient on notice that problems may be due to malpractice"; rather, the patient's duty to inquire into the potential malpractice "may arise from a patient's ordinary experiences and observations, provided that these facts are such that they do or should reasonably lead to the discovery of the malpractice and resulting injury." *Booth v. Wiley*, 839 N.E.2d 1168, 1176 (Ind. 2005).

[18] Generally, factual issues regarding the date on which the plaintiff first learned of the injury "are to be resolved by the trier of fact at trial." *Herron*, 897 N.E.2d at 452. Nonetheless, the "trigger date . . . often may be resolved as a matter of law." *Id*. at 450. "The trigger date becomes a matter of law when it is clear that the plaintiff knew, or should have known, of the alleged symptom or condition, and facts that in the exercise of reasonable diligence would lead to discovery of the potential of malpractice" and/or "when there is undisputed evidence that leads to the legal conclusion that the plaintiff should have learned of the alleged malpractice and there is no obstacle to initiating litigation." *Id*.

III. The trial court did not err by entering judgment in favor of the Defendants

[19] Turning to the parties' arguments, Nichols argues that the trial court erred by finding that she did not file her complaint within the statute of limitations period and, as a result, erred by entering judgment in favor of the Defendants. As alluded to above, the critical question is whether, within the two-year statute of limitations period, Nichols learned facts that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice.

[20] In *GYN-OB Consultants, L.L.C. v. Schopp*, the patient continued to experience "swelling and discomfort" weeks after surgery. 780 N.E.2d 1206, 1208 (Ind. Ct. App. 2003), *trans. denied*. A panel of this Court held that the statute of limitations applied because the patient "experienced from the outset symptoms that were apparently related to the alleged malpractice or that at the very least would cause a person of reasonable diligence to take action that would lead to the discovery of the malpractice." *Id*. at 1211.

[21] Similarly, in *Anonymous Physician v. Kendra*, a panel of this Court found that the patient "was aware of both his condition [i.e., congestive heart failure and chronic pulmonary obstruction] and the surgery he would undergo for that condition, and he was also aware that his condition **failed to improve** in the years leading up to his death . . . ." 114 N.E.3d 545, 550 (Ind. Ct. App. 2018) (emphasis added), *trans. denied*. We held that, even if the patient "had no reason to suspect malpractice, reasonable diligence required [him] to inquire into the possibility of a [malpractice] claim" and that the trigger date was "no later than" the date of the patient's death. *Id*. The patient's estate did not file suit until more than three years after the patient's death and, accordingly, the malpractice claim was barred by the statute of limitations. *Id*; *see also Biedron v. Anonymous Physician 1*, 106 N.E.3d 1079, 1100 (Ind. Ct. App. 2018) (holding the statute of limitations applied when patient "knew she had a heart condition," "knew she had received a [surgical implant] for that condition," and "knew her condition failed to improve") (record citations omitted), *trans. denied*.

[22] Here, as in *Schopp*, Nichols experienced post-surgery symptoms that would have alerted a reasonable person to the possibility of malpractice. For months after her surgery, Nichols was in severe pain, and her knee continued to feel swollen and stiff. These were "all of the same" symptoms Nichols experienced after her 2016 knee replacement surgery, for which she filed a separate malpractice claim. Appellant's App. Vol. VI p. 13. Further, as in *Kendra*, Nichols was aware of her knee's condition before the 2017 surgery and aware of the fact that her knee failed to improve over a year after the surgery. In fact,

within approximately one-month of the surgery, Nichols formed the belief that there was a "problem" with the surgery, and Nichols's post-surgery symptoms were the impetus for her consultation with Dr. Benner. Appellant's App. Vol. VI p. 15.

[23] Nichols argues that her post-surgery symptoms were not sufficient to trigger the statute of limitations because Nichols was advised of the risk that the revision surgery might fail and "not reli[e]ve her symptoms" and, thus, her symptoms were "not an unexpected outcome[.]" Appellant's Br. p. 10. The fact that Nichols was advised that her surgery *might* be unsuccessful, however, does not eliminate the possibility of malpractice. Moreover, Nichols clearly and consistently testified in her deposition that her post-surgery symptoms were "inconsistent with [her] expectations" regarding the surgery.[3] Appellant's App. Vol. VI p. 17.

[24] Nichols further argues that the statute of limitations was not triggered until February 20, 2020, when she learned, based on the results of her lymphocyte transformation test, that she was allergic to nickel. We are not persuaded.

[25] Nichols relies on *Halbe v. Weinberg*, 717 N.E.2d 876 (Ind. 1999). In *Halbe*, the patient, Halbe, had a double mastectomy and received breast implants as a part of a reconstructive procedure performed by Dr. Weinberg in 1983. *Id*. at 878.

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[3] Nichols does not identify anything in the record that suggests she was advised that the surgery might result in the "severe" daily pain she experienced, Appellant's App. Vol. VI p. 17, and Nichols testified that she expected to "be out of pain and hopefully g[e]t back to normal," *id*. at 20.

Halbe told Dr. Weinberg that she wanted saline, not silicone, implants, and Dr. Weinberg "approved her choice and indicated he would supply her with saline implants." *Id*. (record citation omitted). Nonetheless, the implants Halbe received contained twenty-five-percent silicone. *Id*. In January of 1984, Dr. Weinberg replaced Halbe's implants with implants that contained a similar percentage of silicone. *Id*. In May of 1984, although Dr. Weinberg "told [Halbe] he would insert the same type of implants he had originally used," Dr. Weinberg replaced Halbe's implants with implants that contained ninety-percent silicone. *Id*. at 878-79. After Halbe began experiencing "drainage from her left nipple," Halbe called "Dr. Weinberg's office on at least three occasions to inquire about the content of her implants, and . . . his employees told her 'she did not have to worry because [she] had saline implants.'" *Id*. at 879 (record citation omitted). We held that the statute of limitations was not triggered until February 1992 when Halbe obtained her medical records and learned that her implants contained silicone. *Id*. at 882.

[26] Nichols contends that, as in *Halbe*, where the statute of limitations was not triggered until Halbe learned that her breast implants contained silicone, here, the statute of limitations did not begin to run until Nichols learned the test results indicating she was allergic to nickel. *Halbe* is distinguishable because Halbe inquired several times regarding the contents of her implants after her May 1984 surgery. Halbe was misinformed each time, which hindered her ability to investigate the possibility of malpractice. Here, however, Nichols points to nothing in the record to suggest that Nichols received misinformation

from the Defendants regarding her knee implant after she began experiencing post-surgery symptoms in 2017.

[27] We cannot say that the statute of limitations was only triggered when Nichols learned the results of her allergy testing because Indiana law does not require definitive knowledge of malpractice for the statute of limitations to apply. *See Herron*, 897 N.E.2d at 452-53 (holding that the applicability of the statute of limitations does not require that the patient "be informed of the extent of his injuries" but "[r]ather, it requires only that nothing prevent him from investigating whether he may have a claim"); *Johnson v. Gupta*, 762 N.E.2d 1280, 1283 (Ind. Ct. App. 2002) (rejecting plaintiff's proposed test that "focuse[d] on the plaintiff's subjective knowledge" of "a causal link between the physician's actions and the patient's injury" and observing that the Indiana Supreme Court's decisions in *Martin* and *Van Dusen* "sought to address the situation where a patient suffers no discernible pain or symptoms until several years after the alleged malpractice"). Moreover, Nichols had long known, or at the very least, strongly suspected that she was allergic to nickel. Indeed, the point of the 2017 revision surgery was to replace the nickel implant from the 2016 knee replacement surgery.

[28] We conclude that Nichols learned facts that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice. Within approximately one month of her surgery, Nichols experienced prolonged unexpected post-surgery symptoms, which led her to believe there was a problem with her surgery. This date was within two years of Nichols's revision

surgery, which occurred on October 10, 2017, and, as a result, the two-year statute of limitations applies. Nichols, thus, had two years from the date of the revision surgery to file suit.[4] Though Nichols was represented by counsel, she did not file suit until February 10, 2022. Accordingly, Nichols's medical malpractice claim is barred by the statute of limitations, and the trial court did not err by granting the Defendants' motion for preliminary determination and entering judgment in their favor.

Conclusion

[29] Nichols's malpractice claim is barred by the statute of limitations, and the trial court did not err by granting the Defendants' motion for preliminary determination and entering judgment in their favor. Accordingly, we affirm.

[30] Affirmed.

Bailey, J., and Kenworthy, J., concur.

[4] Nichols does not argue that it was not reasonably possible for her to file her claim within the statute of limitations period after the statute of limitations was triggered.