

MEMORANDUM DECISION

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I N T H E
C O U R T O F A P P E A L S O F I N D I A N A

Faye Morris, as personal
representative of the Estate of
Gerald Morris, deceased,

Appellant-Plaintiff,

v.

Anonymous Physician A,
Anonymous Alliance d/b/a
Anonymous Health,

Appellees-Defendants,

and

Anonymous Hospital and
Anonymous Physician B,

Third-Party Defendants,

and

Stephen Robertson,

Third-Party Respondent.

May 9, 2022

Court of Appeals Case No.
21A-MI-01903

Appeal from the
Marion Superior Court

The Honorable
Gary L. Miller, Judge

Trial Court Cause No.
49D03-2105-MI-015236

Molter, Judge.

- [1] Gerald Morris died on October 1, 2018, after a brief stay at Anonymous Alliance and treatment by Anonymous Physician A. Less than a year later, and after gathering the medical records related to Gerald’s treatment, Faye Morris, as personal representative of Gerald’s Estate (“Estate”), filed a proposed malpractice complaint with the Indiana Department of Insurance against other medical

providers not involved in this appeal. Then, after an expert for one of those defendants claimed Anonymous Physician A misread Gerald's CT scan, the Estate added Anonymous Alliance and Anonymous Physician A ("Appellees") as parties to the malpractice complaint on December 10, 2020. But that was more than two years after the alleged malpractice, so the trial court entered summary judgment for Appellees based on the statute of limitations. Because we agree the trial court properly applied the two-year, occurrence-based statute of limitations, we affirm.

Facts and Procedural History

- [2] Gerald Morris was admitted to Anonymous Hospital on September 26, 2018. He was 76 years old and sought treatment for his Alzheimer's disease. On September 30, 2018, while still a patient at Anonymous Hospital, Gerald injured his head when he fell after an altercation with another patient. He was then transferred to Anonymous Alliance by ambulance for a suspected head injury.
- [3] When he arrived at Anonymous Alliance, the emergency physician noted a small abrasion on his right frontal scalp and ordered numerous medical tests, including a CT scan of his head. Anonymous Physician A read the CT scan that same day and reported that "[n]o acute intracranial abnormality [was] identified." Appellant's Conf. App. Vol. 2 at 40. Early the next morning, on October 1, 2018, Gerald was discharged from Anonymous Alliance and transferred back to Anonymous Hospital. He was found on the floor next to his bed hours later with a laceration on the back of his head. Gerald was then transferred to Anonymous Hospital B by ambulance where he was diagnosed with nonsurvivable subdural

hematomas and placed on palliative care. He passed away in the evening on October 1, 2018.

- [4] Around a year later, on September 12, 2019, Faye Morris, as personal representative of Gerald's Estate, filed a Proposed Complaint with the Indiana Department of Insurance against Anonymous Hospital, alleging deviations from the standard of care. The Estate amended its complaint for the first time on March 3, 2020, and added Anonymous Physician B as another defendant. After learning that an expert witness for Anonymous Hospital opined that Anonymous Physician A misread Gerald's CT scan, the Estate amended its complaint for the second time on December 10, 2020, and added Anonymous Alliance and Anonymous Physician A as defendants.
- [5] Several months later, Anonymous Alliance and Anonymous Physician A filed separate petitions for preliminary determinations of law and motions for summary judgment. The trial court found there was no issue of material fact and granted summary judgment for Anonymous Alliance and Anonymous Physician A based on the statute of limitations. The Estate now appeals.

Discussion and Decision

- [6] The Estate argues the trial court erred in granting summary judgment for Anonymous Alliance and Anonymous Physician A. When reviewing a grant of summary judgment, we apply the same standard as the trial court. *David v. Kleckner*, 9 N.E.3d 147, 149 (Ind. 2014). Summary judgment is proper only when the designated evidence shows there is no genuine issue of material fact, and the

moving party is entitled to judgment as a matter of law. *Id.* All facts and reasonable inferences from the designated evidence are construed in favor of the nonmovant. *Id.* When the summary judgment motion is based on the statute of limitations defense to a medical malpractice claim, the defendant has the burden to establish the action was commenced outside the statutory period. *Id.* Then, the burden shifts to the plaintiff to establish a factual dispute material to a theory that avoids the statute of limitations defense. *Id.*

[7] The Medical Malpractice Act’s statute of limitations provides:

A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.

Ind. Code § 34-18-7-1(b).

[8] The statute is written as an occurrence-based statute rather than a discovery-based statute, meaning the time “begins to run on the date the alleged negligent act occurred, not on the date it was discovered.” *Brinkman v. Bueter*, 879 N.E.2d 549, 553 (Ind. 2008). But our Supreme Court has concluded that if the cause of action could not reasonably be discovered until after the statute has run (or when there is not enough remaining time to file a claim before the statute has run), then applying the statute by its terms violates the Indiana Constitution’s guarantee that the courts shall be open and every person shall have a remedy for an injury, (Article I, Section 12), as well as its bar on statutes which arbitrarily deny citizens’ privileges or

immunities (Article I, Section 23). *Martin v. Richey*, 711 N.E.2d 1273, 1284 (Ind. 1999).

[9] Thus, when determining whether a medical malpractice claim is timely, “the discovery or trigger date is the point when a claimant either knows of the malpractice and resulting injury, or learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury.” *David*, 9 N.E.3d at 152–53. If that is less than two years after the alleged malpractice occurred, the statute of limitations bars the claim “unless it is not reasonably possible for the claimant to present the claim in the remaining time, in which case the claimant must do so within a reasonable time after the discovery or trigger date.” *Id.* at 153. But if the “date is more than two years after the occurrence of the malpractice, the claimant has two years within which to commence the action.” *Id.* In other words, if the defendant could, with reasonable diligence, discover the malpractice within two years, then the statute operates like an occurrence-based statute. If not, then it operates like a discovery-based statute.

[10] Here, it is undisputed that when the Estate added Anonymous Alliance and Anonymous Physician A as defendants on December 10, 2020, more than two years had passed since the alleged malpractice—*i.e.*, when Anonymous Physician A read the CT scan on September 30, 2018. Appellees’ summary judgment motions therefore shifted the burden to the Estate to identify a genuine issue of material fact related to a theory that avoids the statute of limitations defense. *Id.* at 149. The Estate’s only argument to sustain its burden was that, even with reasonable diligence, it could not have discovered before September 30, 2020, that

Anonymous Physician A allegedly misread Gerald's CT scan and that this alleged malpractice caused Gerald's death.

[11] That argument fails because the Estate had already initiated a lawsuit over a year earlier, on September 12, 2019, alleging malpractice caused Gerald's death. Appellant's Conf. App. Vol. 2 at 108–10. As the Estate acknowledges, "if a patient has a general idea about his or her injury, the courts have determined that it's the patient's responsibility to be 'reasonably diligent' about finding out what could have caused the injury." Appellant's Br. at 15. And it acknowledges "[c]ounsel for the Estate did, as part of investigating potential claims, obtain the records of Anonymous Alliance," including the records on which it bases its claims against Anonymous Alliance and Anonymous Physician A. Appellant's Br. at 18.

[12] So the Estate knew of Gerald's death, it believed medical malpractice caused his death, and it possessed all the medical records on which it bases its claim against Anonymous Alliance and Anonymous Physician A more than a year before the statute of limitations ran. Nevertheless, the Estate argues it "had no reason to question or doubt the accuracy of the written report prepared by Anonymous Physician A," so it was reasonable for it to rely on that report until another defense expert reviewed the records and contended Anonymous Physician A made a mistake. Appellant's Br. at 19. In other words, it was the Estate's reasonable reliance on Anonymous Physician A's alleged misreading of the CT scan which led the Estate to focus on other defendants, and it was only when another defendant pointed to the CT scan that the Estate could have discovered any alleged

malpractice on the part of Anonymous Physician A and Anonymous Alliance, along with a connection between that malpractice and Gerald's death.

[13]The problem with this argument is the Estate had long stopped accepting the propriety of Gerald's medical treatment at face value and was suing for medical malpractice. So this is not like the many cases the Estate cites where the plaintiff had no reason to suspect an injury was connected to negligence until after the statute of limitations ran, or where inquiry into potential malpractice was deflected. The only thing preventing the Estate from completing the same sort of medical records review which a defense expert later undertook was the Estate's desire to minimize litigation costs. *See* Appellant's Br. at 19 ("Practically and financially that type of expert analysis to verify every last result or image is way beyond what a patient should be expected to do."). But the Estate does not cite any authority supporting the proposition that the statute of limitations is tolled due to the cost of additional expert review of medical records a plaintiff already possesses long before the statute runs, especially when that plaintiff is already suing for medical malpractice.

[14]For this point, we cannot lose sight of the fact that the General Assembly enacted an occurrence-based statute rather than a discovery-based statute. Since the exception to enforcing the statute as an occurrence-based statute is a judicially created exception compelled by our Constitution, we must be circumspect in extending that exception so that we do not limit the legislative will beyond what the Constitution requires.

[15] Thus, because the Estate sued for medical malpractice and possessed the medical records on which it bases its claims against Anonymous Alliance and Anonymous Physician A more than a year before the two-year, occurrence-based statute of limitations had run, the trigger date was well within the statute of limitations. The trial court therefore properly granted summary judgment to Appellees.

[16] Affirmed.

Riley, J., and Robb, J., concur.