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STATE OF MICHIGAN

COURT OF APPEALS

VERNON BOWMAN, Individually and as Personal Representative of the ESTATE OF KELLY M BOWMAN,

UNPUBLISHED
August 13, 2019

Plaintiff-Appellee,

v

No. 341640
Macomb Circuit Court
LC No. 2017-002159-NH

ST. JOHN HOSPITAL AND MEDICAL CENTER and ASCENSION MEDICAL GROUP MICHIGAN d/b/a ROMEO PLANK DIAGNOSTIC CENTER,

Defendants-Appellants,

and

TUSHAR S PARIKH MD,

Defendant.

VERNON BOWMAN, Individually and as Personal Representative of the ESTATE OF KELLY M BOWMAN,

Plaintiff-Appellee,

v

No. 341663
Macomb Circuit Court
LC No. 2017-002159-NH

ST. JOHN HOSPITAL AND MEDICAL CENTER and ASCENSION MEDICAL GROUP MICHIGAN d/b/a ROMEO PLANK DIAGNOSTIC CENTER,

Defendants,

and

TUSHAR S PARIKH MD,

Defendant-Appellant.

Before: LETICA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

In these consolidated interlocutory appeals, defendants appeal by leave granted the opinion and order of the trial court denying their motion for summary disposition under MCR 2.116(C)(7) (claim barred by statute of limitations).[1] We reverse and remand for entry of orders granting summary disposition in favor of defendants.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On June 12, 2013, plaintiff's decedent Kelly Bowman (Kelly) underwent a mammogram and an ultrasound because of a lump in her right breast. Defendant Dr. Tushar S. Parikh, M.D., interpreted the mammogram and opined that the lump was benign. Specifically, Dr. Parikh's diagnostic report stated:

> The breasts are heterogeneously dense. In the areas of dense fibroglandular tissue, non[-]calcified lesions might be obscured. No areas of architectural distortion or abnormal calcifications are seen. Subtle nodularity in the upper outer right breast is noted. Ultrasound was performed showing benign[-] appearing cysts. SUMMARY: Benign.[2]

Dr. Parikh recommended that Kelly undergo further mammograms on an annual basis. Her treating physician ordered another mammogram and ultrasound in 2014, noting that the mass was still present. Plaintiff raises no issues with regard to the 2014 mammogram, which did not result in a cancer diagnosis or order for further testing.

On April 21, 2015, Kelly underwent another mammogram and ultrasound, and reported that the lump had increased in size. A biopsy was performed on April 29, 2015. The biopsy report, based on a review of the April 21, 2015 mammogram and ultrasound, described Kelly's history as "[a]bnormal mammogram/ultrasound." The biopsy revealed that the lump was

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[1] See *Bowman v St. John Hosp*, unpublished order of the Court of Appeals, entered May 18, 2018 (Docket No. 341640); *Bowman v St. John Hosp*, unpublished order of the Court of Appeals, entered May 18, 2018 (Docket No. 341663).

[2] We quote from Dr. Parikh's diagnostic report solely as factual background. We have no opinion, and express none, as to its accuracy, inaccuracy, or medical import.

cancerous. On May 18, 2015, Kelly underwent a bilateral mastectomy. Two cancerous tumors were removed, and a lymph node tested positive for cancer. A biopsy performed on July 28, 2016 revealed that the breast cancer had further metastasized to Kelly's bone marrow.

On December 10, 2016, Kelly's attorney served a notice of intent under MCL 600.2912b, giving notice of a claim of medical malpractice.[3] On June 12, 2017, Kelly and her husband filed this medical malpractice action against defendants.[4] Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that Kelly had failed to file the complaint (or serve the notice of intent) before the statute of limitations expired. Defendants argued that there was no question that Kelly had failed to do so within the two-year period set forth in MCL 600.5805(6).[5] Thus, the only issue was whether Kelly timely initiated the action under MCL 600.5838a(2), which reads:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period . . . *or within 6 months after the plaintiff discovers or should have discovered the existence of the claim*, whichever is later. [MCL 600.5838a(2) (emphasis added).]

Defendants argued that Kelly should have discovered her claim no later than April 2015, when her cancer was diagnosed, and that she failed to file her complaint (or serve her notice of intent) within six months of that date.

In response, Kelly argued that she was unaware that Dr. Parikh had misinterpreted the 2013 mammogram until August 2016, when she treated with Dr. Dennis Citrin in Illinois. She asserted that Dr. Citrin reviewed her medical records and told her at that time that the 2013 mammogram had been misread and should have been interpreted as positive or suspicious for

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[3] The service of a notice of intent tolls the running of the applicable statute of limitations. See MCL 600.5856(c); *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 324; 901 NW2d 577 (2017). The notice of intent must "advise potential malpractice defendants of the basis of the claims against them" and "set forth allegations in good faith" that comply with the requirements of MCL 600.2912b. *Decker v Rochowiak*, 287 Mich App 666, 676; 791 NW2d 507 (2010) (citations omitted).

[4] The Complaint reflects medical malpractice claims on behalf of Kelly, and a derivative loss of consortium claim on behalf of her husband, plaintiff Vernon Bowman. Kelly is now deceased, and her husband is the personal representative of her estate.

[5] At the time, the statute of limitations for medical malpractice was found in MCL 600.5805(6). The current statute provides that limitations period in MCL 600.5805(8). See MCL 600.5805, prior to amendment and after amendment by 183 PA 2018 (effective June 12, 2018). The statutory language was not altered, and provides: "Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice." *Id.*

cancer.[6] Kelly argued that this case is directly on point with *Jendrusina v Mishra*, 316 Mich App 621; 892 NW2d 423 (2016).

The trial court denied the motions, opining that although a reasonable person could have concluded that a diagnosis of breast cancer in 2015 meant that Dr. Parikh had misread the 2013 mammogram, it could not say that a reasonable person *should* have reached that conclusion. The trial court further stated:

> There is no evidence before the Court that any of Kelly's treating physicians told her that her 2013 mammogram was suspicious for cancer until August of 2016, or that a 2015 cancer diagnosis should put a reasonable person on notice that a benign mammogram from 2013 was necessarily the result of a negligent misinterpretation.

These appeals followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). For the purposes of a motion under MCR 2.116(C)(7), we accept all well-pleaded factual allegations in the complaint as true. *Id*. at 119. If the facts are undisputed, "whether a plaintiff's action is barred by the statute of limitations is a question of law, to be determined by the trial judge." *Moll v Abbott Laboratories*, 444 Mich 1, 29; 506 NW2d 816 (1993). Likewise, "when the plaintiff should have discovered her claim is a question of law . . . [if] the facts relevant to determining the issue [are] undisputed." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997).

We review de novo issues of statutory interpretation. See *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

III. ANALYSIS

Defendants argue that the trial court erred by concluding that the statute of limitations did not bar Kelly's claim. We agree.

The parties do not dispute that Kelly's claim was filed (and the notice of intent was served) beyond the two-year period of limitations for malpractice actions found in MCL 600.5805(8). However, this limitations period is subject to a six-month "discovery rule" exception, under which a claim may be commenced after the expiration of the two-year limitations period if it is commenced within six months after the plaintiff discovered or should have discovered the claim. MCL 600.5838a(2). The discovery rule does not require that the

[6] Like our dissenting colleague, we make no determination on the question of whether Dr. Parikh misread Kelly's 2013 mammogram by failing to interpret dense breast tissue and nodularity as suspicious for cancer.

plaintiff know with certainty that a defendant committed malpractice; rather, "the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Solowy*, 454 Mich at 222. In other words, "[o]nce a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue" a claim for malpractice and the six-month period begins to run. *Id*. at 223. This is an objective standard based on whether a reasonable person should have discovered a possible claim. *Levinson v Trotsky*, 199 Mich App 110, 112; 500 NW2d 762 (1993). However, this objective standard is applied from the perspective of laypersons, not experts. *Jendrusina*, 316 Mich App at 631. The discovery rule applies to the discovery of an injury, rather than to a later realized consequence of the injury. *Moll*, 444 Mich at 18.

Here, plaintiff argues that the injury caused to Kelly by Dr. Parikh's alleged malpractice was a delay in her breast cancer diagnosis. In cases involving a delayed diagnosis, "courts should maintain a flexible approach" in applying the "possible cause of action" standard. *Solowy*, 454 Mich at 230. "In such a case, courts should be guided by the doctrine of reasonableness and the standard of due diligence and must consider the totality of information available to the plaintiff concerning the injury and its possible causes." *Id*. at 230. However, while a court should apply the standard with some flexibility, a court must keep in mind the "legitimate legislative purposes behind the rather stringent medical malpractice limitation provisions." *Id*. These purposes include "the Legislature's concern for finality" and for "encouraging a plaintiff to diligently pursue a cause of action." *Id*. at 222, quoting *Moll*, 444 Mich at 24.

Plaintiff argues that *Jendrusina* compels us to affirm the trial court's decision. We disagree. Indeed, we conclude that the circumstances of this case are closer to those presented in *Solowy* than to those presented in *Jendrusina*.

This Court recently addressed in detail the *Solowy* and *Jendrusina* decisions. See *Hutchinson v Ingham Co Health Dept*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 341249), slip op at ___. We will therefore only briefly address *Solowy* and *Jendrusina*. We further conclude that *Hutchinson* supports the outcome in this case.

In *Solowy*, as in this case, the plaintiff alleged a negligent failure to diagnose and treat cancer. The plaintiff treated with the defendant doctors because of a lesion on her left ear. *Id*., 454 Mich at 216. On October 9, 1986, following treatment, the doctors advised the plaintiff that the cancer was "gone" and that there was no chance of it returning. *Id*. at 216-217. In January 1992, the plaintiff noticed a similar lesion at approximately the same location on her ear and experienced the same symptoms that she had experienced previously. A doctor advised her that either the cancer had returned or the lesion was a benign tumor. A biopsy confirmed that the lesion was cancerous. The plaintiff underwent surgery on July 14, 1992, to remove the cancer. *Id*. at 217.

Our Supreme Court held in *Solowy* that the plaintiff became aware of a possible cause of action no later than March 27, 1992, when she was informed that the lesion was either cancerous or a benign tumor. *Id*. at 224. The Court further stated:

> The "possible cause of action" standard does not require that the plaintiff know that the injury to her ear, in the form of the advancement of the disease process, was in fact or even likely caused by the defendant doctors' alleged omissions. Neither does the standard require that the plaintiff be aware of the full extent of her injury before the clock begins to run. Consequently, it is irrelevant that the plaintiff was not yet aware that the progression of cancer would eventually necessitate removal of the upper portion of her left outer ear. [*Id*. at 224-225.]
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> Here, even before the diagnosis was confirmed, [plaintiff] was aware that her symptoms were identical to those she experienced five years earlier. In her own words, "it started all over again." Consequently, her observations of the discomfort and of the appearance and condition of her ear should have aroused some suspicion in her mind that the lesion might be cancer. These observations, coupled with Dr. Laing's explanation that the basal cell carcinoma could recur and that the lesion could be a recurrence of this cancer, supplied [plaintiff] with enough information to satisfy the standard. [*Id*. at 227-228.]

By contrast, the plaintiff in *Jendrusina* presented to the hospital with flu-like symptoms. He was found to be dehydrated and to have suffered kidney failure, although he was unaware before the January 2011 hospital visit that he had kidney disease. He claimed that he did not become aware of his medical malpractice claim until September 20, 2012, when a nephrologist informed him that he should have been referred to a specialist earlier. *Jendrusina*, 316 Mich App at 625. This Court determined that the six-month discovery period commenced on September 20, 2012, and therefore held that the plaintiff had filed his case in a timely manner. *Id*. at 626-627. It further distinguished the circumstances before it with those of *Solowy*, stating:

> As far as he knew, [the plaintiff] had no previous history of kidney disease and did not know of the lab reports showing that his kidney failure was the result of a slowly progressing condition rather than an acute event. In *Solowy,* the plaintiff knew that her doctor might have committed malpractice as soon as the tumor grew back; she was only waiting to learn whether she was in fact injured as a result of his actions. In this case, the opposite is true; after diagnosis in January 2011, plaintiff knew he was sick, but he lacked the relevant data about his worsening lab reports and the medical knowledge to know that his doctor might have committed malpractice. The critical difference between plaintiff in this case and the plaintiff in *Solowy* is that the plaintiff in *Solowy* neither required nor lacked special knowledge about the nature of the disease, its treatment, or its natural history. She knew exactly what her relevant medical history was at all times. She simply delayed pursuing her claim in order to wait for final confirmation of what she already knew was very likely true. Moreover, the *Solowy* plaintiff had visible symptoms that were clearly recognizable as a likely recurrence of her skin cancer long before the ultimate diagnosis. In this case, however, plaintiff's first recognizable symptom, i.e., urine retention, did not occur

until January 2011 when it precipitated his hospitalization. [*Id*. at 630-631 (footnote omitted).]

For all the reasons that this Court held that the plaintiff in *Jendrusina* should not have been aware of his possible claim, the opposite is true in this case.[7] Kelly at all times knew exactly what her medical history was. She knew of her breast lump, knew that it was in the same location as it was at the time of the 2013 mammogram, and knew that it had grown larger. She did not lack any relevant data about her condition. Although (unlike in *Solowy*), she had not previously been diagnosed with cancer, she was fully aware of her cancer diagnosis, was fully aware her breast cancer had metastasized, and had undergone a mastectomy, all more than six months before she served her notice of intent or filed her complaint. While the claim in *Solowy* was deemed untimely because the plaintiff had waited for confirmation of her suspicions (of cancer) before filing suit, Kelly in this case waited even longer. Indeed, she waited an additional 17+ months (after her cancer diagnosis) before serving her notice of intent.

Our conclusion is further supported by this Court's recent decision in *Hutchinson.* In that case, as here, the plaintiff alleged malpractice arising from the failure to properly diagnose breast cancer. Following the discovery of a lump in her left breast, a mammogram was performed on September 4, 2013. The defendants determined that there were "benign appearing calcifications" in both breasts. The plaintiff continued to perform her own monthly self-examinations, felt that the lump was growing, was concerned and therefore repeatedly complained about it to defendants, yet was consistently and repeatedly told that it was simply calcifications. In 2014, the plaintiff moved to Arkansas. A doctor there ordered another mammogram; it raised concerns about the possibility of cancer. On June 15, 2015, as a result of a follow-up biopsy, the plaintiff was diagnosed with breast cancer. The plaintiff filed a notice of intent, under MCL 600.2912b, on December 4, 2015.

The defendants principally argued in *Hutchinson* that the plaintiff should have discovered her cause of action in 2013 or 2014, as she continued to conduct her own breast self-examinations and continued to have concerns. Alternatively, the defendants argued that she should have discovered it, at the latest, when she was informed that she would need a biopsy (to determine whether the lump in her breast was cancerous) following her June 1, 2015 mammogram. This Court rejected both arguments, concluding that the plaintiff had reasonably relied in 2013 and 2014 on what she was being told by her healthcare providers. Moreover, because the plaintiff (unlike the plaintiff in *Solowy*) had never previously been diagnosed with breast cancer and had never previously had interactions with a medical professional concerning the possibility of cancer, she had not (as had the plaintiff in *Solowy*) waited to pursue her claim until she had "final confirmation of what she already knew was very likely true." *Hutchinson*, ___ Mich App at ___, slip op at __, (quoting *Jendrusina*, 316 Mich App at 631). The Court held that the plaintiff's action was not barred by the statute of limitations.

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[7] The dissent suggests that we are not following *Jendrusina*. To the contrary, *Jendrusina* itself expounded on the distinguishing circumstances that compel a different outcome here.

Importantly, in reaching that conclusion, the Court in *Hutchinson* held that the date of the plaintiff's cancer diagnosis was the critical date for purposes of determining when she should have discovered her cause of action;[8]

> [W]e disagree with the trial court's legal conclusion that plaintiff was aware of an injury in the form of breast cancer, and any possible causation relating to the alleged medical malpractice of defendants, *before her definitive diagnosis of breast cancer*. *Solowy*, 454 Mich at 222, 224. Considering the information that was available to plaintiff at the time of her conversation with Dr. Frost, plaintiff did not know whether the lump was cancerous or not, and unlike the plaintiff in *Solowy*, she had not undergone a prior experience with cancer that would have informed her experience or made her familiar with a cancer diagnosis. *Id*. at 227. *It was not until June 15, 2015, when plaintiff received a definitive diagnosis of cancer, that plaintiff discovered, or should have discovered her possible cause of action, in that she became aware that she had breast cancer, and could have surmised that defendants were negligent in the treatment of the lump in her breast when she consulted with medical professionals at the Ingham County Health Department.* Given that her notice of intent was mailed on December 4, 2015, her cause of action was timely filed. [*Hutchinson*, ___ Mich App at ___, slip op at __, (emphasis added); See also *id.* at __ n 10 ("plaintiff did not, and should not, have discovered her possible cause of action until she received her diagnosis of breast cancer on June 15, 2015").]

That conclusion by the Court in *Hutchinson* is equally compelling in this case. Kelly was diagnosed with cancer on April 29, 2015. A bilateral mastectomy was performed on May 18, 2015. Two cancerous tumors were removed. A lymph node tested positive for cancer. Under *Hutchinson*, any of these events was sufficient to commence the running of the six-month discovery period. But Kelly did not serve her notice of intent until December 10, 2016 (and did not file suit until June 12, 2017).

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[8] The dissent suggests, based on "the face of the [*Hutchinson*] opinion," that the Court in *Hutchinson* "apparently never considered or analyzed" that, contemporaneously with her cancer diagnosis, Ms. Hutchinson was informed by her treating physicians that the 2013 mammogram results should have prompted additional testing (which the dissent characterizes as "an express statement that the defendants might have committed malpractice"). However, and although the dissent suggests that this factor was somehow critical to the outcome in that case (which we note resulted in an opinion—to which one of us was signatory—in favor of Ms. Hutchinson in the circumstances of her appeal), it in fact played no role whatsoever in the analysis of the Court in *Hutchinson*. What was instead critical was the date of the cancer diagnosis. Indeed, it was Ms. Hutchinson's counsel – the very same counsel who represented plaintiff in this case – who argued that Ms. Hutchinson was not aware that she had been injured by having a delayed cancer diagnosis until "she *first became aware that she was diagnosed with breast cancer.*" *Hutchinson*, ___ Mich App at ___, slip op at 11 (emphasis added).

When Kelly's lump was biopsied and she "received a definitive diagnosis of cancer," she, like the plaintiff in *Hutchinson*, "could have surmised that defendants were negligent in the treatment of the lump on her breast" at the time she had consulted with them. *Id*. at ___. At that point, she had sufficient information to trigger the running of the discovery rule period. *Solowy*, 454 Mich at 222, 224.[9] Because Kelly's notice of intent was served more than 6 months after April 29, 2015, the trial court erred by denying defendants' motions for summary disposition under MCR 2.116(C)(7). MCL 600.5805(8); MCL 600.5838a(2).[10]

Reversed and remanded for entry of orders granting summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Mark T. Boonstra

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[9] It is apparent to us that plaintiff and our dissenting colleague effectively seek to conflate the terms "discovers" and "should have discovered," as set forth in MCL 600.5838a(2), so as to essentially read the latter (i.e., the discovery rule) out of existence. But this Court is not a super-legislature, and any such re-writing of the statute should take place in the Legislature, not in this Court. See, e.g., *Ferguson v Skrupa*, 372 US 726, 732; 83 S Ct 1028; 10 L Ed 2d 93 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation.' ") (citation omitted); *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524, 543; 273 NW2d 829 (1979) ("[W]e do not sit "as a superlegislature to judge the wisdom or desirability of legislative policy determinations.") (citation and footnote omitted).

[10] We recognize that medical patients like Kelly and Ms. Hutchinson, who must divide their time and attention between the overwhelming task of fighting a deadly disease and pursuing a medical malpractice claim, will prioritize their survival ahead of filing a lawsuit. We certainly sympathize with a patient's plight in such a situation. Nevertheless, our duty requires us to apply the law no matter what may be divergent outcomes in different circumstances. See *Solowy,* 454 Mich at 225-226 (acknowledging that arbitrariness in applying the statute of limitations is unavoidable). And the law requires us to follow *Solowy*, *Jendrusina*, and *Hutchinson* and therefore to find this claim to be untimely. See *Paige v City of Sterling Heights*, 476 Mich 495, 524; 720 NW2d 219 (2006) ("all lower courts and tribunals are bound by" a prior decision of the Supreme Court "and must follow it even if they believe that it was wrongly decided or has become obsolete"); MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.").

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

VERNON BOWMAN, Individually and as Personal Representative of the ESTATE OF KELLY M BOWMAN,

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ST. JOHN HOSPITAL AND MEDICAL CENTER and ASCENSION MEDICAL GROUP MICHIGAN d/b/a ROMEO PLANK DIAGNOSTIC CENTER,

Defendants,

No. 341663
Macomb Circuit Court
LC No. 2017-002159-NH

and

TUSHAR S PARIKH MD,

Defendant-Appellant.

Before: LETICA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

RONAYNE KRAUSE, J. (*dissenting*).

I respectfully dissent. The trial court correctly apprehended the standard for applying the "discovery rule," MCL 600.5838a(2), as whether a reasonable person *should* have discovered the existence of a possible claim rather than whether a reasonable person *could* have discovered the existence of a possible claim. The majority misconstrues the case law that was in effect when the trial court entered its order, and the majority misreads this Court's recent case of *Hutchinson v Ingham Co Health Dep't*, ___ Mich App ___; ___ NW2d ___ (2019) (Docket No. 341249), which reaffirms the correct standard. I would affirm.

I. BACKGROUND

As noted by the majority, the facts are simple. On June 12, 2013, defendant Tushar S. Parikh, M.D. (Dr. Parikh) interpreted as benign a mass on a mammogram of plaintiff Kelly Bowman's[1] right breast. According to plaintiff, the mass was, in fact, a cancerous lesion. Dr. Parikh informed Kelly that the findings were benign, so Kelly did not pursue any further investigation of the mass. As a consequence, a diagnosis of Kelly's cancer and the commencement of treatment did not occur until two years later. Kelly was diagnosed with invasive ductal carcinoma in April 2015. Plaintiff's complaint avers that Dr. Parikh misread[2] the 2013 mammogram, which she did not realize until she obtained a second medical opinion—not about her 2013 mammogram, but regarding her ongoing treatment plan in August 2016. Her second doctor, Dr. Dennis Citrin, reviewed her medical records in that context and informed Kelly that the 2013 mammogram "should have been interpreted as being positive or suspicious for cancer." Plaintiff filed her medical malpractice claims against Dr. Parikh and the Hospitals,[3] on June 6, 2017; her husband, Vernon Bowman, alleged a claim for loss of consortium. Kelly

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[1] This matter was originally brought by Kelly Bowman. Kelly died during the pendency of this appeal, and her husband, Vernon Bowman as personal representative of Kelly's estate, was substituted in her place.

[2] As the majority notes, whether Dr. Parikh actually *did* misread the mammogram, and whether it would constitute malpractice if he did, are issues for the trier of fact. I neither draw nor express any personal opinions on the matter. I merely presume, with no further consideration, that Dr. Parikh committed malpractice, looking at the evidence in the light most favorable to the non-moving party, as I must when reviewing a motion brought under MCR 2.116(C)(7).

[3] The Hospitals' alleged liability is vicarious.

died as a consequence of her initially undiagnosed breast cancer on March 11, 2018, and Vernon, as personal representative of Kelly's estate, was substituted in her place.

Defendants argue that plaintiffs' claim accrued on June 12, 2013, when the 2013 mammogram was performed, so the two-year limitations period expired on the two-year anniversary of the mammogram at issue in this case, which was June 12, 2015. Defendants contend that plaintiffs may not rely on the six-month limitations period provided by the discovery rule, because Kelly's breast cancer was diagnosed no later than either April 30, 2015, or May 28, 2015.[4] Consequently, defendants conclude that plaintiffs' claims were time-barred at least a year before plaintiffs sent a NOI on December 10, 2016, and filed their complaint on June 12, 2017. Plaintiffs contend that, standing alone, the cancer diagnosis was not enough to put Kelly on notice of the malpractice. Rather, the discovery rule was triggered by the second medical opinion rendered in August 2016 by Dr. Citrin, who advised Kelly that the 2013 mammogram had been misread. Both parties' arithmetic is correct. If the discovery rule was not triggered until Dr. Citrin advised Kelly of the 2013 misreading of the mammogram, plaintiffs' NOI and complaint would have been timely. However, if the discovery rule was triggered in April or May of 2015, plaintiffs' NOI and complaint would have been untimely.

The trial court denied defendants' motions for summary disposition, relying on a decision from this Court, *Jendrusina v Mishra*, 316 Mich App 621; 892 NW2d 423 (2016), for the proposition that the critical inquiry was whether plaintiffs *should* have discovered the existence of their claim rather than whether plaintiffs *could* have done so. The trial court found:

> that it is likely that a reasonable person *could* have understood that a definitive finding of cancer in Kelly's right breast in 2015 meant that Dr. Parikh had misread the mammogram of Kelly's right breast in 2013. Here, Kelly was aware of a mass in her right breast in June of 2013, and before her 2015 cancer diagnosis in the same breast, she complained to her doctors that the mass had increased in size, leading to the 2015 mammogram. . . . But the Court cannot conclude that a reasonable person *should* have discovered the existence of a claim against Dr. Parikh solely on the basis of a subsequent cancer diagnosis. There is no evidence before the Court that any of Kelly's treating physicians told her that her 2013 mammogram was suspicious for cancer until August of 2016, or that a 2015 cancer diagnosis should put a reasonable person on notice that a benign mammogram from 2013 was necessarily the result of a negligent misinterpretation.

The trial court therefore held that plaintiffs' NOI and complaint were timely. Dr. Parikh and the Hospitals each filed applications for leave to appeal, which this Court granted and consolidated. This appeal followed.

II. STANDARD OF REVIEW

[4] Defendants disagree as to which date is proper, but the effect of either date is the same.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119. The interpretation and application of statutes, rules, and legal doctrines is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). If the facts are undisputed, "whether a plaintiff's action is barred by the statute of limitations is a question of law, to be determined by the trial judge." *Moll v Abbot Laboratories*, 444 Mich 1, 29; 506 NW2d 816 (1993). Likewise, if the facts are undisputed, "when the plaintiff should have discovered her claim is a question of law." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997).

III. APPLICABLE LAW

There is no dispute in this matter that plaintiffs' claims would be untimely unless saved by application of the "discovery rule" codified in MCL 600.5838a(2). That statute provides, in its entirety:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. This subsection does not apply, and the plaintiff is subject to the period of limitations set forth in subsection (3), under 1 of the following circumstances:
>
> (a) If discovery of the existence of the claim was prevented by the fraudulent conduct of the health care professional against whom the claim is made or a named employee or agent of the health professional against whom the claim is made, or of the health facility against whom the claim is made or a named employee or agent of a health facility against whom the claim is made.
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> (b) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

The operative provisions relevant to the instant matter state that "an action involving a claim based on medical malpractice may be commenced . . . within 6 months after the plaintiff discovers or should have discovered the existence of the claim."

Under the discovery rule, " '[a] plaintiff's cause of action accrues when he discovers or, through the exercise of reasonable diligence, should have discovered that he has a *possible* cause of action.' " *Moll*, 444 Mich at 20, quoting and adopting in part *Bonney v Upjohn Co*, 129 Mich App 18, 24; 342 NW2d 551 (1983) (emphasis added by the *Moll* Court). Thus, "under the discovery rule, the statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action." *Moll*, 444 Mich at 29. This is an objective standard, and it does not require full knowledge of the entirety of the harm suffered. *Solowy*, 454 Mich at 223-224. Nonetheless, a plaintiff must "possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id.* at 226. The objective, reasonable-person standard is applied from the perspective of laypersons, not experts. *Jendrusina*, 316 Mich App at 632-635.

While this case was pending (indeed, only slightly more than a month after oral argument was held), this Court decided *Hutchinson v Ingham Co Health Dep't*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket No. 341249). *Hutchinson* features some similarities to the instant case. In particular, the plaintiff also alleged malpractice based on a failure to earlier diagnose breast cancer. In *Hutchinson*, this Court reiterated that any triggering of the discovery rule must be based on the reasonable perceptions and understanding of a layperson, not a medical or legal expert. *Hutchinson*, ___ Mich App at ___ (slip op at p 17). Due diligence does not obligate a plaintiff to undertake heroic efforts, and it permits a plaintiff to rely on and trust assurances made by medical professionals. *Id.* at ___ (slip op at pp 16-17). This Court reaffirmed that a plaintiff is not put on notice of a potential claim merely because the results of a recent diagnostic test differ from the reported results of a prior diagnostic test. *Id.* at ___ (slip op at pp 14-15). Patients need not immediately assume malpractice and deceit by a prior professional whenever a new diagnosis is made on the basis of a repeated diagnostic test, even if the patient has some subjective suspicions. *Id.* at ___ (slip op at pp 14-17).

IV. APPLICATION

As with the instant case, *Hutchinson* involved a plaintiff's malpractice claim against a health professional who had previously misread a mammogram as benign. This Court concluded that, under the circumstances of that case, the plaintiff had been put on notice of her potential cause of action when she received a definitive cancer diagnosis. *Hutchinson*, ___ Mich App at ___ (slip op at pp 17-18). However, that conclusion has no bearing on the instant matter. First, *Hutchinson* flatly rejected the contention that a diagnosis, standing alone, was *per se* notice that a prior benign finding might have constituted malpractice. Rather, any such new diagnosis must be considered *along with the totality of the other circumstances*. Secondly, the plaintiff in *Hutchinson* was explicitly told by her doctors, *contemporaneously with the definitive diagnosis*, that her earlier mammogram had been mishandled. *Id.* at ___ (slip op at pp 7-8). Therefore, one of the circumstances attendant to the definitive diagnosis was an express statement that the defendants might have committed malpractice. Finally, none of the parties in *Hutchinson* apparently disputed whether the plaintiff was on notice by the time of the definitive diagnosis, but only whether the plaintiff had been put on notice earlier. Consequently, the possibility that the plaintiff's definitive diagnosis might *not* have been sufficient under the totality of the circumstances was, on the face of the opinion, apparently never considered or analyzed. No such

presumption is applicable here, and the circumstances of plaintiff's diagnosis here clearly differ radically from the circumstances of the plaintiff's diagnosis in *Hutchinson*.

Similarly, *Jendrusina* explored a number of relevant distinctions between the situation in that case and the situation that had been presented in *Solowy*. In *Jendrusina*, this Court noted that a diagnosis or test result could not trigger the discovery rule if the diagnosis or result were never communicated to the plaintiff. *Jendrusina*, 316 Mich App at 627-628. The *Jendrusina* Court observed that the plaintiff in *Solowy* had actually known that she had a possible cause of action when she was *told by a doctor* that she might have a recurrence of cancer. *Id*. at 629. As the majority notes, the plaintiff in *Jendrusina*, unlike plaintiff in this case, was completely unaware of any health concerns relevant to his eventual malpractice claim. *Id*. at 630-633. However, *Jendrusina* did not hold that an absolute level of unawareness is the requisite standard. Furthermore, *Jendrusina* emphasized that patients were not expected to draw the same diagnostic conclusions as medical specialists. *Id*. at 631-633. Furthermore, unlike the plaintiff in *Solowy*, plaintiff's cancer diagnosis here was not a recurrence of symptoms that might suggest the recurrence of the same underlying cause. See *id*. at 631-633. Arguably, plaintiff here had somewhat less reason to be surprised than the plaintiff in *Jendrusina*, but nevertheless, plaintiff is not an oncologist[5] and not expected to be her own doctor. See *id*. at 633-634.

As *Jendrusina* held, a new or worsened diagnosis *could* lead a reasonable person to suspect the possibility of prior malpractice, but is insufficient to establish that a reasonable person *should* have discovered any such malpractice. *Id*. at 634-635. To hold otherwise "would not merely be inconsistent with the text of the statute, but it would also be highly disruptive to the doctor-patient relationship for courts to advise patients that they 'should' consider every new diagnosis as evidence of possible malpractice until proven otherwise." *Id*. at 635. I believe the majority extrapolates too much from the fact that plaintiff's diagnosis here was changed, rather than wholly novel. *Jendrusina* unambiguously held that a changed diagnosis is not grounds for suspecting a prior act of malpractice, and to hold otherwise would inevitably transform the doctor-patient relationship into an adversarial one.

Defendants dedicate considerable effort to the argument that this Court's opinion in *Jendrusina* is wrong and—by at least strong implication—should not be followed. This argument has clearly been rejected by *Hutchinson*. Even if *Hutchinson* did not exist, *Jendrusina* is a published case of this Court, issued after November 1, 1990, that has not been reversed or modified by our Supreme Court[6] or by a conflict panel of this Court. See MCR 7.215(J)(1). Furthermore, *Jendrusina* does not conflict with *Moll* or *Solowy*. *Moll* and *Solowy* addressed what a plaintiff must become aware of: "a possible cause of action" rather than "a probable cause of action." In *Jendrusina*, this Court addressed the standard for imputing awareness in the first place: specifically, "should" rather than "could." *Jendrusina* used the same word chosen by the Legislature in the statute, and it observed that "should" dictates the standard for evaluating a

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[5] Nor are we.

[6] Our Supreme Court denied leave to appeal in *Jendrusina*, 501 Mich 958; 905 NW2d 231 (2018), and denied reconsideration of its denial of leave, 501 Mich 1027; 908 NW2d 306 (2018).

plaintiff's constructive awareness of "a possible cause of action." Additionally, this Court applied the reasonable-person standard properly: medical knowledge has long been held the almost exclusive provenance of experts rather than ordinary laypersons. See, e.g., *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005).

Put more simply, *Jendrusina* is binding and was correctly understood by the trial court. The limitations period provided by the discovery rule begins running when an ordinary layperson *should* have linked some knowledge actually in his or her possession to the *possibility* of a cause of action. As *Solowy* cautioned, "the 'possible cause of action' standard is not an 'anything is possible' standard." *Solowy*, 454 Mich at 226. Thus, the inquiry is whether an ordinary person should have become aware of a possibility. Defendants' formulation would, erroneously, be whether an ordinary person *could* have become so aware. The majority accepts this formulation, despite the fact that every case we agree is binding rejects it. The trial court properly observed that the statute and *Jendrusina* required the discovery itself to be more than a mere possibility. *Hutchinson* reaffirms that principle.[7]

Defendants argue that Kelly should have been aware of a possible cause of action in 2015 when she was diagnosed with cancer. Defendants emphasize that the diagnosis was not made in a vacuum, and it should be considered in the context of her other knowledge: that the lump had existed for considerable time, that the lump had grown in size, that Kelly's concern regarding the lump was why the 2013 mammogram had been performed in the first place, and it "is common knowledge that cancer does not metastasize overnight." It is, however, equally common knowledge that not all breast lumps are cancerous even if they are uncomfortable or painful, that lumps may change over time yet remain benign, and that some initially-benign masses can *become* cancerous. It is also common knowledge that some cancers can grow significantly faster than other cancers. As the *Hutchinson* Court observed, an adverse diagnosis on a test performed today does not automatically imply malpractice in reporting a benign diagnosis on the same test performed several years previously. *Hutchinson*, ___ Mich App at ___ (slip op at pp 14-15, 17-18). Furthermore, patients are entitled to trust medical professionals. *Id*. at ___ (slip op at pp 16-17). We are not oncologists, and neither was Kelly.

I conclude that the trial court's analysis was entirely correct. Kelly *could* have become aware of a possible cause of action against defendants when she received her cancer diagnosis. However, no facts have been presented warranting an immediate assumption that, instead of receiving a new diagnosis, she had previously been misdiagnosed. In contrast, the plaintiff in *Hutchinson* was explicitly advised of possible earlier malpractice contemporaneously with her diagnosis.

The majority's analysis creates a sad consequence apart from the tragedy of Kelly Bowman's death. Patients frequently seek consultation with physicians because they fear that a condition (a breast lump, a swollen gland, a mole) might harbor cancer. Most breast lumps are

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[7] I respectfully disagree with the majority's apprehension that I "seek to conflate the terms 'discovers' with 'should have discovered.' " To the contrary, it appears to me that the majority seeks to conflate "should have discovered" with "could have discovered."

not cancerous, and nor are most swollen glands, or most moles. The majority nevertheless places on every patient who receives a cancer diagnosis an obligation to immediately go back in time by launching an investigation into the accuracy of all previous diagnostic testing. Those who fail to undertake this mission within six months of diagnosis have no legal recourse if they later learn that a physician's negligence condemned them to death.

Perhaps in some cases, a fact surrounding the earlier diagnostic inquiry will have triggered a reasonable basis for a suspicion of malpractice. That was the case in *Solowy*, where the plaintiff herself articulated that the cancer symptoms "started all over again." *Solowy*, 454 Mich at 217. That fact sufficed to put the plaintiff on notice that the cancer *had* recurred, despite her previous physicians' assurance that she was cured. Here, however, the majority identifies no fact that should have put Kelly on notice that the mammogram was misread. The majority articulates no reason why Kelly should have assumed, contrary to the facts that breast lumps are common, usually benign, and usually requiring no further treatment, and contrary to the assurances of a trusted medical professional, that her breast lump was not benign in 2013. The majority likewise identifies nothing about her first 2015 diagnosis that should have immediately informed an ordinary person that she did not have a benign lump in 2013. Absent extraordinary circumstances or a proper motion, we are limited to considering only the record provided to us. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002); *Hallman v Holy Cross Hosp of Detroit*, 475 Mich 874, 874; 713 NW2d 779 (2006). If such facts exist, they are not found in this record.

I reject as unacceptable and legally groundless the notion that every cancer patient must assume prior negligence or lose their right to sue, even when no reason exists to suspect an error. The Legislature did not intend such a rule when it used the term "should have discovered." *Solowy*, *Jendrusina* and *Hutchinson* understood that the term "should have discovered" is not to be applied in a vacuum, but only when a plaintiff has notice of some sort that her condition should have been discovered earlier. There was no such notice or awareness here.

The trial court correctly determined that the limitations period provided by the discovery rule began running in August of 2016 when Kelly was specifically advised that Dr. Parikh's interpretation of the 2013 mammogram was a misdiagnosis rather than an accurate diagnosis of Kelly's condition at the time. The trial court therefore correctly denied defendants' motions for summary disposition pursuant to MCR 2.116(C)(7).

I would affirm.

/s/ Amy Ronayne Krause