Circuit Court for Baltimore City
Case No. 24C-15-001616 OT

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1537

September Term, 2016

KURT KRUMPERMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF MAUREEN MAY

v.

JOHNS HOPKINS HOSPITAL

Wright,
Leahy,
Friedman,

JJ.

Opinion by Leahy, J.

Filed: August 14, 2018

While living in Arizona, Ms. Maureen May contracted Coccidioidomycosis (commonly known as "Cocci" or "Valley Fever")—a disease caused by the inhalation of Coccidioides spores, a fungus germane to the semi-arid areas of the southwestern states. In 2008, Ms. May began to experience symptoms that she believed to be indicative of a Cocci infection. That year she and her husband, Mr. Kurt Krumperman, moved to Maryland, where Ms. May sought treatment at Johns Hopkins Hospital. Her physician, Dr. Stephen Yang, opined that there was a 90 percent chance that Ms. May's symptoms were caused by lung cancer, rather than Coccidioides spores, and that and the only way to treat it was to conduct a partial lung lobotomy. In February 2009, Dr. Yang successfully removed a portion of Ms. May's right lung. Lab analysts at Johns Hopkins later determined that a Cocci infection caused the lesion.

Over four years later, in December 2013, Ms. May filed a medical negligence claim against Johns Hopkins Hospital, Inc. and Johns Hopkins Labs (collectively "Appellees" or "Johns Hopkins") in the Circuit Court for Baltimore City. Approximately 20 days before trial was scheduled to begin, Ms. May moved to amend her complaint to add a count of negligent misrepresentation, which the court denied.

On July 25, 2016, the circuit court, presiding over a jury trial, granted Johns Hopkins's motion for judgment after finding that Ms. May failed to file her medical malpractice claim within three years of the notice date pursuant to Maryland Code (1974, 2013 Rep. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 5-109. Ms. May then filed a notice of appeal. Tragically, after Ms. May noted her appeal she passed away. Her husband, Mr. Krumperman, was appointed as the personal representative of her estate and

was substituted as appellant in the instant appeal.

Mr. Krumperman presents two issues for our consideration, which we have rephrased:[1]

1. Did the court err in determining that Ms. May was on notice of a possible cause of action within three years of her alleged injury?

2. Did the court abuse its discretion by denying Ms. May's motion to amend her pleadings to add a count of negligent misrepresentation?

We hold that Ms. May's claim was barred by the statute of limitations under CJP § 5-109 because she had actual notice that her claim had begun to accrue over three years before filing suit. We discern no abuse of discretion in the trial court's decision to deny Ms. May's motion to amend her complaint.

BACKGROUND

A. Ms. May's Medical History

Ms. May—a registered nurse with a bachelor's and master's degree in nursing—and her husband, Mr. Krumperman, moved to Tempe, Arizona in 2002. In April of 2008,

[1] Mr. Krumperman presented the following two questions:

1) "In determining that Appellant's inquiry notice date was not a factual dispute, based on Appellant's awareness (as a non-expert) of a 2009 blood test of questionable probative value, performed by medical experts who gave no indication of Appellant's cause of action, and conducted before Appellant had knowledge of the very biopsy results that would lead to her surgeon's malpractice, did the trial court commit reversible error?"

2) "In denying Appellant's motion to amend the complaint to add a count of negligent misrepresentation, where the request was filed over thirty (30) days before the trial date, and drew from previously-alleged facts in the original complaint filed with HCADRO and the Circuit Court, did the trial court commit reversible error?"

while Ms. May was living in Arizona, she served a 30-day jail term at "Sheriff Joe's Tent City," a makeshift prison opened by former Maricopa County Sheriff Joe Arpaio in the 1990s consisting of a collection of tents in the desert outside of Phoenix. *See* Meritt Kennedy, *Joe Arpaio's Infamous Tent City Jail in Maricopa County Will Shut Down*, NPR, (April 5, 2017), https://perma.cc/S8RU-P6DQ. During the summer of 2008, Ms. May began to experience pain in her hands and fingers, swelling of the hands, and limited wrist mobility. Ms. May was aware that she had been exposed to a lot of desert dust during her stay at Tent City, and had already begun discussions with Mr. Krumperman about the possibility that she had Cocci. While living in Arizona, Ms. May and Mr. Krumperman had known several people who developed Cocci and "knew the symptoms." In August 2008, Ms. May and Mr. Krumperman moved to Baltimore.

In an attempt to determine the cause of her symptoms, Ms. May consulted her primary care physician, who referred her for a chest X-ray. In November 2008, an X-ray of Ms. May's chest showed a lesion in the upper lobe of her right lung. Ms. May's physician recommended a CT scan of the area because of the lesion, indicating that the lesion could be tuberculosis, an infection, or cancer. On December 10, 2008, Ms. May had a CT scan performed on her chest, which showed a mass on her right lung that was 1.4 cm in length. Due to the size of the nodule, the radiologist recommended further investigation. At that point, the radiologist believed the results of the CT scan could be consistent with neoplastic cancerous cells or an infection. Approximately a week later, on December 17, Ms. May went to a follow-up appointment, where she underwent a PET scan at the recommendation of radiologists. The scan showed a large uptake of FDG (a liquid injected

into the patient that reacts with the PET scan) fusing to a nodule in the posterior segment of the right upper lobe, which radiologists believed was a strong indication of malignancy.

Ms. May and Mr. Krumperman began searching for a thoracic specialist and found Dr. Stephen Yang, a thoracic surgeon at Johns Hopkins Hospital. Soon after, Ms. May called Dr. Yang's office and scheduled an appointment for an initial evaluation and a bronchoscopy. Meanwhile, on January 7, 2009 (prior to her appointment with Dr. Yang), she saw Dr. David Feller-Kopman, an interventional radiologist at Johns Hopkins. Ms. May and her husband informed Dr. Feller-Kopman of Ms. May's medical history, as well as her time at "Tent City." They made a "strong point" about their belief that the lesion could be a presentation Cocci. That day, Dr. Feller-Kopman performed a successful bronchoscopy and biopsy of lymph nodes four and 11. Ultimately, the bronchoscopy was inconclusive as to whether the lymph nodes were cancerous but showed the presence of white blood cells.

Following those results, Ms. May had her first appointment with Dr. Yang. During that meeting, Mr. Krumperman urged the doctor to investigate the possibility of Cocci because of the soreness in her hands and wrists, her exposure to the desert dust, and the PET-scan. Ms. May also elaborated on her symptoms and her exposure to the fungus, but Dr. Yang focused instead on whether the nodule was cancerous. Dr. Yang indicated that he believed the mass was cancerous and should be removed but wanted Ms. May to undergo a mediastinoscopy before surgically removing the mass. Ms. May discussed the possibility of performing a needle biopsy on the lesion, but Dr. Yang refused to perform one because of the location of the lesion and the danger it could pose to Ms. May. Dr.

Yang indicated that the only way he could make a diagnosis was to take out the upper lobe of the right lung.

Ms. May and Mr. Krumperman traveled to the Sloan Kettering Cancer Institute in New York on January 21, 2009, for a second opinion. The physician she saw believed the lesion could be cancerous, but indicated that he was willing to perform the needle biopsy on the condition that if the results showed malignancy, Ms. May would enter a lung cancer study based in New York. She declined to have the test performed and returned to Maryland.

Dr. Yang saw Ms. May for a second time in his office on January 28, 2009, where she complained of night sweats, joint pain, and repeated her request that Dr. Yang investigate the possibility of Cocci. Despite Ms. May's protestations about having Cocci, Dr. Yang did not discuss consulting a fungal or infectious disease expert to rule out the possible presence of Cocci. The next day, on January 29, 2009, Dr. Yang performed a successful mediastinoscopy on Ms. May's lymph node number seven in order to determine whether the suspected cancerous lesion had spread and the stage of cancer. During the procedure, two specimens, the "Culture Specimen" and the "Stain Specimen", were removed for analysis. Both specimens were each evaluated for fungus that day with inconclusive results. Dr. Brant G. Wang, a Johns Hopkins Laboratory pathologist, analyzed the Stain Specimen and noted a "few cystic structures[,]" but did not identify cancer or Cocci. Dr. Wang did not affirmatively diagnose the tissue as containing Cocci but noted the presence of caseating granulomas ("CGs") in the Stain Specimen. These findings were noted in a pathology report (the "January 29 Pathology Report").

A few days later, Ms. May met with Dr. Yang to discuss the mediastinoscopy results. Dr. Yang opined that surgery was her only option to determine whether the lung lesion was cancerous or caused by a bacterial or fungal infection. Dr. Yang estimated that there was a 90-percent chance that the lung lesion was cancerous and that surgery was Ms. May's only option. In response to this prognosis, Ms. May agreed to the surgery.

On February 5, 2009, Ms. May underwent a successful right lobectomy. Dr. Yang informed Ms. May on the day of the surgery that the lesion appeared non-malignant, and a portion of her right upper lung was sent to pathology. On February 9, the day Ms. May was discharged from the hospital, Dr. Yang informed her and Mr. Krumperman that the mass on her lung was not cancerous. "[A] few days" after being discharged from the hospital, staff members at Dr. Yang's office called Ms. May and notified her that the pathology report revealed an active Cocci infection in the cultured lobe excised from her lung. On February 11, 2009, the tissue removed during the January 29, 2009 mediastinoscopy was reexamined by a different pathologist. The pathologist determined that the "cystic structures" in the tissue indicated a Cocci infection. On February 29, Johns Hopkins pathologists amended the Pathology Report ("the Amended Report") to reflect the Cocci finding.

On March 19, 2009, Ms. May visited the Mayo clinic in Phoenix, Arizona to follow up on her Cocci diagnosis. Physicians instructed Ms. May to bring all of her relevant medical records from the lobectomy—including the Amended Report—as well as the results from the CT and PET scans. According to Ms. May, she did not read the reports before going to the Mayo clinic because she "didn't even want to think about it." While at

the clinic, Ms. May had her blood drawn to have some antibody tests done. Two days later, Ms. May was informed that she previously had an active infection but had been "cured" by the lobectomy. Ms. May then returned to Baltimore and placed her medical records in a filing cabinet.

Around the end of 2013, while searching the filing cabinet for Mr. Krumperman's medical records, Ms. May found her own medical reports from Johns Hopkins, which she had taken to the Mayo clinic, and viewed the Amended Report for the first time. She realized that a physician had examined a slide from the mediastinoscopy and discovered a Cocci infection that had previously been undiagnosed. Ms. May also saw the words "caseating granulomas" on the report. After conducting some research, Ms. May "came to find out that it implied or it suggested that there was, in fact, infection in the lymph nodes." After making this discovery, Ms. May contacted an attorney.

B. Relevant Procedural History and Trial

On February 3, 2014, Ms. May filed her medical malpractice claim in the Health Care Alternative Dispute Resolution Office ("HCADRO"). On January 26, 2015, Ms. May elected to waive arbitration, and subsequently filed suit against Johns Hopkins in the Circuit Court for Baltimore City on March 16, 2015.

Johns Hopkins moved for summary judgement on March 1, 2016 arguing that Ms. May's claim was barred by the statute of limitations because she had knowledge of an actual claim against Johns Hopkins for more than three years prior to filing suit. The circuit court denied Johns Hopkins's motion after a hearing, ruling that summary judgment was inappropriate because there was a dispute as to whether Ms. May was on inquiry notice

when she received the report and transported them to the Mayo clinic.

During the pretrial period, Ms. May amended her pleadings three times to assert additional claims. The latest, and most relevant to this appeal, was an amended complaint that she filed on June 29, 2016 (the "Amended Complaint"), in an attempt to add a count of negligent representation. In the Amended Complaint filed only 20 days before trial, Ms. May asserted that Dr. Yang made certain "negligen[t] representations" before surgery, which included the

> failure to inform [Ms. May] of the CG Findings, along with representations that there were no alternatives to determine the content of the Lung Nodule absent surgery, and the statement that [Ms. May] had a 90 percent chance of having a cancerous Lung Nodule, as opposed to one that as benign.

Johns Hopkins filed a motion *in limine* on July 8, 2016, to dismiss the Amended Complaint, alleging that consideration of this claim would be "extremely prejudicial" because of its closeness in to trial. Further, Johns Hopkins argued that Ms. May "failed to submit her claim for negligent misrepresentation to mandatory arbitration in the [HCADRO] prior to filing in the Circuit Court." The court granted Johns Hopkins's motion *in limine*. At the beginning of trial, Ms. May's counsel made an oral motion to reconsider the dismissal of the Amended Complaint; the court reserved judgment.

At trial, Ms. May's thoracic surgeon expert, Dr. Donald Patrick, testified that Dr. Yang breached the standard of care when he failed to consult with an infectious disease expert prior to surgery after the biopsy scan revealed CGs. When asked on cross-examination, "what [would] the appropriate action[] . . . [have been] [a]t the point where caseating granulomas were found[,]" Dr. Patrick responded:

> The appropriate reaction to receiving that information on Dr. Yang's part is to say I know that this woman has a – first of all, she's a non-smoker. I know she has a history of having been in the desert. Cocci is common – well, common is not a good term. If you get a fungal disease in that area, it tends to be coccidioidomycosis. . . .
>
> The caseating granuloma means that it may well be present. And I, and I think any other surgeon, would say I'm not confident to deal with that particular issue. It's time to have an infectious disease expert see the patient. I will remain in charge, so to speak, because I still got [sic] to worry about the possibility of a malignancy. I want to see what the infectious disease expert got [sic] to say, and what else he might recommend.

Dr. Patrick testified "that the incidence of cancer and coccidioidomycosis in the le[s]ion at the same [time] is rare." Dr. Patrick further explained that in order to diagnose Ms. May, Dr. Yang should have conducted a "core biopsy", which involves making a "surgical cut, not with a knife, but with a core needle" that extracts a sample from the tissue. Dr. Patrick explained that when using the core needle, "[t]he chance of catching [cancer] is about 85 percent." Using that data, Dr. Patrick surmised,

> probably then the thing to do would be to say okay, we need to definitely not take this thing out. We need to watch it and see because it's still small. We've got overwhelming evidence that it's coccidioidomycosis. Our original impression of cancer of the lung, which is the same one that I would have had at the beginning of the case, now falls so low. But we can't ignore it. We've got to get a follow up in two months, maybe three.

Dr. Sudhir Penugonda, Ms. May's infectious disease expert, testified that if he had treated Ms. May, he would have sent "blood tests for examination of potential coccidioidomycosis disease before conducting a lung lobectomy. The reason being is her clinical picture is consistent with what we term Valley Fever, which is cocci infection that you see in the desert southwest."

Ms. May then testified to her discussions with Dr. Yang prior to surgery:

> [MS. MAY'S COUNSEL]: How many times do you think you said [Cocci]?
>
> [MS. MAY]: Well, it was certainly at every single visit, which was probably three maybe. It's – and we both – and we said it . . . to Dr. Yang. And very clear on why that was really high on our suspicions because of my – because of the symptoms I was having, because I had had this exposure, long-term exposure to the – in this desert.
>
> You know, open air – these tents in the tent city were the sides of the tents were rolled up. So, I mean, you just had dust blowing everywhere. . . .
>
> And so, you know, I mean, and we'd known people who had had cocci. So we knew the symptoms. So it was – it continued to be very high on our suspicion – on our list of suspicions.

Ms. May also testified that on the day of discharge, February 9, 2009, she and her husband knew that the nodule on her lung was "definitely [] not cancer" and that "a few days later, [she and Mr. Krumperman] found out through [Dr. Yang's] office that, in fact, it was [C]occi." When Ms. May's counsel asked what her reaction was when she found out that she had Cocci, not cancer, she responded:

> . . . I felt betrayed. I felt like I wasn't listened to. I was disrespected. That I just could not believe that I had gone through this when I had been right all along and that, in fact, [it was] [C]occi. This was not lung cancer. I had been a lifelong nonsmoker, and I had absolutely no risk factors, despite what's been said here. I have no risk factors for lung cancer. And they knew that. And they just did not take me serious[ly].

Then, Ms. May's counsel asked her to describe her trip to the Phoenix clinic:

> [MS. MAY]: So at my visit at the [C]occi clinic, the doctor informed me that he was going to send me to the lab to have blood drawn; that they were going to do some antibody tests.
>
> And I said, "Is that all?"
>
> And he said, "Yeah, that's going to tell us what's going on."
>
> And I said okay, had the blood drawn. Went back two days later, and he

informed me that the results showed that yes, that I had had an active infection, but that it – that I no longer had [an] active infection. . . .

* * *

[MS. MAY]: So he said to me, you had your [C]occi cured with surgery.

[MS. MAY'S COUNSEL]: Now, roughly how long after the surgery was this, just a ballpark figure?

[MS. MAY]: Two months, I think.

Ms. May's Counsel then began a line of questioning regarding her access to her medical records, specifically addressing the documentation that Johns Hopkins gave her:

[MS. MAY'S COUNSEL]: [A]t some point, did you have a chance to review your medical file?

[MS. MAY]: Mmm-hmm.

[MS. MAY'S COUNSEL]: . . . When you went to the [C]occi clinic –

[MS. MAY]: Yes.

[MS. MAY'S COUNSEL]: – did you have access to your Johns Hopkins medical records at that time.

[MS. MAY]: I – they asked me to bring two things, a copy of the pathology reports and a disc that would enable them to look at the CAT scan and PET scan.

* * *

[MS. MAY'S COUNSEL]: Did you review the information in the disc or in the letter before you went to the Mayo Clinic?

[MS. MAY]: It was a – I guess it was a report is what I had asked for. It was not really a letter, I don't think. No, I did not.

[MS. MAY'S COUNSEL]: Okay. And why not?

[MS. MAY]: You know, I was trying not to think about any of this. I was

> just – I was in a state of – I mean, disbelief, you know, that with everything I had been through – I mean, that pain that I had went through, I mean, I didn't even want to think about it.
>
> And so I just wanted to get better. You know, I wanted to find out what this thing with [C]occi was all about, what they could do. Particularly when I found out that it was just a matter of a simple blood draw, I was just – I mean, my mind was just blown by the entire experience[.]

On July 25, 2016, at the beginning of the fifth day of trial, after Ms. May's case concluded, counsel for Johns Hopkins made a motion for judgment. Prior to ruling on the motion for judgment, the trial court heard Ms. May's motion to reconsider the denial of the amended complaint adding the negligent misrepresentation count. The court asked Ms. May's counsel the following:

> [W]hy didn't you amend the complaint last year, as opposed to waiting until the month before? Because if you're saying it's all the same evidence, then you had all the same evidence that you had in May sometime back in 2015. So why not amend the complaint back in 2015 instead of the last 30 days?

Counsel responded:

> Your Honor, it could have been amended earlier. . . . But really the issue is that this is – it's a little used tort in medical malpractice law. And it wasn't considered, to be honest, until the – I was going through jury instructions and realized that this tort actually fit better than – it was a very appropriate tort because this entire case is based on negligent statements – negligently made statements from Dr. Yang to my [client].

Additionally, counsel argued that Dr. Yang's prognosis that there was a 90 percent chance that the lung nodule was cancerous was "widely inflated[.] . . . At some point there's got to be some negligence if that's the only thing that you're going into surgery with is that percentage number."

The court denied Ms. May's motion to reconsider its dismissal of the negligent

misrepresentation count, and stated the following:

> First, I'm going to deny the request for reconsideration of the negligent misrepresentation. I do believe that it's – it was filed in a real untimely manner. It was way too late given the fact that any of the information that would have been considered in filing such a count would have, could have been done months and months ago.

The court then continued:

> But on top of that, I don't think it – it arises – it rises to the level on the basis of the evidence that I've heard in the plaintiff's case, even if I had allowed it on the Motion for Reconsideration I would have granted the Motion for Judgment on that basis, too, just because the most that we have is we have an opinion or a forecast that was given by Dr. Yang, and I don't think that that suffices for purposes of proving a negligent misrepresentation count.

The court then granted Johns Hopkins's motion for judgment. Specifically, the trial court found that "Ms. May, who is medically trained," was on notice in March 2009, as a result of the blood test at the Mayo clinic, that Dr. Yang could have determined whether she had an infection without having surgery. Because Ms. May failed to file her case until February 2013, the trial court concluded that "the suit was filed beyond the statute of limitation."

On August 4, 2016 (exactly 10 days following the court's final judgment), Ms. May filed a motion for reconsideration, which was denied on September 9, 2016. On September 28, 2016, Ms. May filed a timely appeal in this Court. Following Ms. May's death, this Court substituted Mr. Krumperman, in his capacity as personal representative of Ms. May's estate, as the appellant.

DISCUSSION

I.

The Motion for Judgment

Before this Court, Mr. Krumperman argues that the blood test conducted at the Mayo clinic in March 2009 was insufficient to place Ms. May on notice of a possible malpractice claim because it only identified *past* exposure to Cocci fungal spores in Ms. May's body. Had Dr. Yang disclosed to Ms. May the presence of the CG's in the sample taken from the lymph node biopsy, he contends, that information, coupled with a blood test for Cocci, could have affected Ms. May's decision to have the lobectomy. Because the applicability and efficacy of the blood test could not be determined without the disclosure of the CG findings in the Stain Specimen, Mr. Krumperman avers that the CG findings acted as a condition precedent for other alternatives, such as a blood test, to be considered as an alternative to surgery. Failure to communicate those findings to Ms. May, therefore, delayed the operative date that Ms. May was on notice of the claim until January of 2014 when she reviewed the medical files.

Johns Hopkins responds that as early as February 9, 2009, Ms. May should have known that Dr. Yang performed the lobectomy unnecessarily after he told her that the nodule on her lung was not cancerous. Johns Hopkins contends that, even if the February 9 notification did not place Ms. May on inquiry notice, her March 2009 clinic visit placed her on notice that a "simple" blood test could have been used to diagnose her. Finally,

Johns Hopkins maintains that Ms. May reasonably should have known,[2] or at least had a strong reason to believe, that Dr. Yang was wrong in not ordering the blood test and not further investigating her injury which amounted to a situation where Ms. May had "slumbered on her rights."

Under Maryland Rule 2-519(a), "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence." When deciding whether to grant a motion for judgment, "the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made." Md. Rule 2-519(b). "In reviewing a grant

[2] Johns Hopkins argues that because Ms. May was a nurse, that fact should be construed against her in a determination of inquiry notice. Specifically, Johns Hopkins cites to *Jones v. Sugar*, 18 Md. App. 99 (1973), for the proposition that "experience, background and medical skills of a patient may be weighed" in determining whether the plaintiff had actual notice of an injury in a medical malpractice action. *Id.* at 111, *superseded by statute as stated in Edmonds v. Cytology Servs. of Md., Inc.*, 111 Md. App. 233 (1996). The facts in *Jones* are distinguishable from the current case. In *Jones*, the plaintiff—who was a registered nurse—injured her ankle and an orthopedic surgeon admitted her into the hospital and subsequently set and casted her ankle. *Id.* at 106-07. While at the hospital, the plaintiff conveyed to her doctors that the cast was too tight and that she was in pain because of the tightness. *Id.* at 107. When the cast was finally removed, the plaintiff's foot was gangrenous because of lack of circulation from the tightness of the cast. *Id.* at 108. Roughly three years and five weeks later, the plaintiff filed suit alleging medical negligence against her doctor. *Id.* at 109. The trial court found that the statute of limitations had expired, and the plaintiff appealed. *Id.* On appeal, we held that the plaintiff's medical knowledge—as exhibited during the trial—placed her on notice of the injury because she was well aware of the dangers of casting a limb too tightly. *Id.* at 111-12. In the current case, Ms. May may have had an above average understanding of medicine globally, but there is no evidence that she had any special knowledge of or experience in thoracic surgery or infectious disease treatment to render her injury immediately obvious as a result of her medical training. *See id.* In this case, there was sufficient evidence that put Ms. May on notice of the injury within the three-year statute of limitations, regardless of any training she may have had as a nurse.

or a denial of a motion for judgment, we apply the same analysis as the trial court." *Smithfield Packing Co. v. Evely*, 169 Md. App. 578, 591 (2006). If the non-moving party presents any evidence to create a jury question, the grant of a motion for judgment is inappropriate. *Id.* However, where the evidence presented does not pass muster to submit the question to the jury, "*i.e.*, permits but one conclusion, the question is one of law and the motion must be granted." *James v. Gen. Motors Corp.*, 74 Md. App. 479, 484 (1988). Thus, when evaluating a grant of a motion for judgment, "we assume the truth of all credible evidence and all inferences of fact reasonably deducible from the evidence that supports the non-moving party's position." *Univ. of Balt. v. Iz*, 123 Md. App. 135, 149 (1998).

To set parameters on the time for filing medical malpractice actions and to address the "perceived crisis" in medical malpractice insurance litigation, the Maryland General Assembly enacted CJP § 5-109. *See, e.g.*, *Edmonds v. Cytology Servs. of Maryland, Inc.*, 111 Md. App. 233, 244-45 (1996), *aff'd sub nom.*, *Rivera v. Edmonds*, 347 Md. 208 (1997). CJP § 5-109(a) provides, in relevant portion:

> (a) *Limitations.* – An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider[] . . . shall be filed within the earlier of:
>
> 1. Five years of the time the injury was committed; or
>
> 2. Three years of the date the injury was discovered.

Thus, a plaintiff has "three years from the date the wrong was discovered or reasonably should have been discovered" to file a medical malpractice claim.[3] *Edmonds*, 111 Md. App. at 245. "'The five-year maximum period under [CJP § 5-109] will run its full length only in those instances where the three-year discovery provision does not operate to bar an action at an earlier date. And this is so without regard to whether the injury was reasonably discoverable or not.'" *Rivera*, 347 Md. at 212 (quoting *Hill v. Fitzgerald*, 304 Md. 689, 700 (1985)).[4] Statutes of limitation are intended to be strictly construed,[5] and courts should not strain their construction to evade their effect. *Decker v. Fink*, 47 Md. App. 202, 206 (1980) (citation omitted). Thus, the language of CJP § 5-109 should be strictly construed when considering whether a medical malpractice claim is barred by limitations. *See Hill*,

[3] *Edmonds* details the legislative history of CJP § 5-109 and provides that "[p]rior to the enactment of CJP § 5-109, medical malpractice claims were governed by the general civil statute of limitations in CJP § 5-101." 111 Md. App. at 244. The general statute of limitations provides, in part, that "[a] civil action at law shall be filed within three years from the date it accrues. . . ." CJP § 5-101. "Under this rule, a medical malpractice cause of action was deemed to 'accrue' when the claim was discovered, i.e., at the time when the plaintiff either knew of his or her injury or, in the exercise of reasonable diligence, should have discovered it." *Edmonds*, 111 Md. App. at 244 (citations omitted). Like the discovery rule contained in CJP § 5-101, Maryland appellate courts have interpreted CJP § 5-109(a)(2) "to provide the plaintiff with three years from the date the wrong was discovered or reasonably should have been discovered." *Id.* at 245.

[4] In *Rivera*, the Court of Appeals noted that "[t]he triggering events for the running of the alternative periods and the length of the periods [contained in CJP § 5-109] have not changed since the Act was first enacted by Chapter 545 of the Acts of 1975." 347 Md. at 210.

[5] Maryland currently recognizes two statutory exceptions to the general three-year limitations period contained in CJP § 5-101, neither of which are relevant to this case. *See Decker v. Fink*, 47 Md. App. 202, 206-08, 209-10 (1980) (discussing the effect of the discovery rule with respect to plaintiffs under a disability (CJP § 5-201) and when ignorance of a cause of action is induced by fraud (CJP § 5-203)).

304 Md. at 700 (interpreting CJP § 5-109 and instructing that "[t]he three- and five-year periods of limitation must, therefore, be calculated in accordance with the literal language of § 5-109.").

In determining whether a plaintiff was on notice for purposes of the discovery rule, the health-care provider has the burden of proving when the plaintiff discovered the injury. *Rivera*, 347 Md. at 224. The hallmark of the discovery rule in Maryland is the presence of notice—specifically, that the plaintiff has or should have gained the knowledge, through reasonably diligent investigation, that an injury has occurred as a result of medical treatment. *Edmonds*, 111 Md. App. at 245. *See also Poffenberger v. Risser*, 290 Md. 631, 636 (1981) (applying the discovery rule to all civil actions when determining whether a claim is barred by limitations). As this Court explained in *Young v. Medlantic Laboratory Partnership*, 125 Md. App. 299, 306 (1999),

> a medical malpractice cause of action arises when harm results from the tortious act, but it *accrues*, and the statute of limitations begins to run, when the patient is aware, or in the exercise of due care and diligence should be aware, that the cause of action has *arisen*, that the medical care provider has breached a duty owing to the patient and that harm to the patient has resulted from that breach.

(Emphasis in original). Moreover, the determinative date of when the discovery rule begins to run is not "the date on which an expert concluded that there had been malpractice, [but] the date on which the appellant was put on notice that she may have been injured." *Russo*, 76 Md. App. at 471 (emphasis omitted).

The discovery rule in medical malpractice actions contemplates actual notice of actionable harm; constructive notice is not sufficient to start the statute of limitations. *Levy*,

60 Md. App. at 233 (citing *Poffenberger* 290 Md. at 636-37). Actual notice encompasses both express and implied notice: express notice is "established by direct evidence[and] . . . embraces not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated." *Poffenberger*, 290 Md. at 636-37 (citation and internal quotation marks omitted). Implied notice is established

> by the proof of circumstances from which it is inferable as a fact. . . . Implied notice, which is equally actual notice, arises where the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal fact.[] It is simply circumstantial evidence from which notice may be inferred.

Id. (citation and internal quotation marks omitted). Constructive notice, on the other hand, while similar to implied notice, rests not on factual inferences drawn from the circumstances of the case, but from "strictly legal presumptions which are not allowed to be controverted[.]" *Id.* (citation and internal quotation marks omitted). *See also Colbert v. Mayor and City Council of Balt.*, 235 Md. App. 581, 588 (2018) (defining constructive notice as "notice that the law imputes based on the circumstances of the case.") (citation omitted)).

In *Lutheran Hospital of Maryland v. Levy*, this Court examined the implications of the knowledge of possible harm, although the exact issue may not have been known. 60 Md. App. at 227. In that case, the plaintiff broke her ankle in October 1973 and had it casted at Lutheran Hospital. *Id.* at 233. Eventually, a physician at the hospital told the plaintiff to "throw away her crutches, purchase orthopedic shoes, and walk on the ankle." *Id.* She was discharged in February 1974. *Id.* Two months later, in April 1974, the plaintiff

was experiencing significant pain in her ankle and consulted another physician at Mercy Hospital. *Id.* According to the plaintiff, her doctor asked her "who the hell told you to walk on that ankle[,]" and in his professional opinion, the ankle would not improve. *Id.* Although the plaintiff was aware that something was wrong with her ankle, she did not seek legal redress until June 1978, after a medical expert viewed her 1973 X-rays from Lutheran Hospital. *Id.* at 234. Despite the plaintiff's limited educational background and inexperience with the legal system, this Court held that her suit was barred by limitations, as "[t]he crucial date is the date the claimant is put upon inquiry, not the date an expert concludes there has been malpractice." *Id.* at 240. Therefore, this Court concluded that "under the discovery rule, limitations in this case began to run in April of 1974. Reasonable diligence in securing counsel and pursuing an investigation would have produced all necessary information within three years from that date—April of 1977." *Id.* at 238.

In *Young v. Medlantic*, this Court considered whether a case is barred if the medical report giving rise to a possible cause of action is not disclosed or made available to the claimant. 125 Md. App. at 299. In that case, the plaintiff saw her physician to obtain an abortion on November 19, 1992. *Id.* at 302. A urine test established that she was pregnant and her physician, Dr. Ross, performed an abortion that day. *Id.* After the procedure was finished, the plaintiff was discharged, a follow-up appointment was scheduled, and the tissue extracted was sent to the Medlantic's laboratory for analysis. *Id.* Ten days later, on November 29, 1992, the plaintiff was admitted to the emergency room with severe abdominal pain. *Id.* Tests performed on the plaintiff confirmed that a fetus had begun to develop outside of the uterus in the fallopian tubes. *Id.* To prevent the rupture of her right

fallopian tube, the plaintiff underwent an emergency right salpingectomy (removal of a fallopian tube), which subsequently diminished her reproductive capacity. *Id.* On November 16, 1995, the plaintiff filed suit against Dr. Ross alleging medical negligence. *Id.* In January 1997, she deposed Dr. Ross, who testified that he viewed a pathology report of the tissue removed during plaintiff's abortion procedure sent to him by mail on December 1, 1992, which showed no placental or fetal parts in the analyzed tissue, meaning that the abortion had not been successful. *Id.* at 303. Dr. Ross further testified that upon discovering that the procedure had not successfully terminated the pregnancy, the pathology lab should have contacted him by phone instead of sending the report by mail. *Id.* Based on this testimony, the plaintiff filed a claim against Medlantic on March 31, 1997. *Id.* In response, Medlantic filed a motion to dismiss on the ground that her claim was barred by the statute of limitations. *Id.* The circuit court granted the motion and she appealed. *Id.*

On appeal, this Court reversed, finding that, although the claimant was aware that she had been harmed on November 29, 1992, when her fallopian tube was removed, she was not aware that Medlantic "had allegedly breached a separate duty of due care to her by failing to notify Dr. Ross expeditiously that there was no fetal tissue in the matter he had removed from appellant[.]" *Id.* at 307. Ultimately, the motion to dismiss was in error, and the matter should have been submitted to the jury because of the possible debate as to

> whether [the plaintiff] should have further investigated into the matter sooner or more completely; whether she failed to exercise the degree of diligence that a reasonable person in her circumstance would have exercised; or whether any reasonable exercise of diligence under the circumstances would have led to an earlier discovery of [Medlantic's] breach of duty.

Id. at 312.

Returning to the current case, Ms. May testified during trial that even up until the day of surgery on February 5, 2009, she believed that she had Cocci, not lung cancer, and pressed Dr. Yang to investigate a possible fungal infection. **E1232.** On the day that the lobectomy was performed, Dr. Yang informed Ms. May that the mass on her lung did not appear to be cancerous. **E1269.** When Ms. May was discharged from the hospital on February 9, Dr. Yang informed Ms. May "that the pathology reports came back showing negative for malignancy," and that the nodule on her lung was not caused by cancer. **E1279.** A "few days" after she returned home, a staff member at Dr. Yang's office called Ms. May and informed her that the nodule had, in fact, been caused by a Cocci infection. **E1279.** Soon after, Johns Hopkins furnished Ms. May with her medical records, including the Amended Report detailing the Cocci finding, which supplied her with ample information to make a reasonable investigation that would have led to a discovery of Johns Hopkins' breach of the standard of care. *See id.* Additionally, Ms. May visited the Phoenix Mayo clinic on March 19, 2009, where she learned that she had previous exposure to the fungus but did not have an active infection. That visit, combined with the phone call from Dr. Yang's office that the lung tissue removed contained evidence of an active Cocci infection, placed Ms. May on actual notice that (1) her cancer diagnosis was in error; (2) Dr. Yang had performed an unnecessary surgery at the time that it was performed; (3) there were other, non-invasive alternatives to determine the cause of her injury; (4) those alternatives had not been considered or even brought to her attention; and (5) the removal of a portion of her lung was an irreparable injury.

Ms. May also testified that medical professionals at the Mayo clinic—albeit not Johns Hopkins doctors—told Ms. May in 2009 that a blood test would "tell [them] what's going on" and that the results of the blood test showed that she was "cured through surgery." *C.f. Jacobs v. Flynn*, 131 Md. App. 342, 366 (2000) (noting that a physician's comments that the prior physicians' care at a separate hospital was improper placed the plaintiff on notice that her father had a medical malpractice cause of action relating to a negligent diagnosis). Ms. May did not file her complaint in the HCADRO until February 3, 2014, well over three years after she should have known that she had been injured. Unlike the plaintiff in *Young* who never received the report at issue, 125 Md. App. at 307, Ms. May had the records and reports from Johns Hopkins for over 4 years before she looked at them. Her decision to file these records away without reading them first did not toll the statute of limitations. *See Edmonds*, 111 Md. App. at 244 (noting that under the discovery rule, a medical malpractice cause of action begins to accrue "when the claim was discovered, i.e., at the time when the plaintiff either knew of his or her injury or, in the exercise of reasonable diligence, *should have* discovered it." (emphasis added)). Much like the plaintiff in *Lutheran Hospital*, Ms. May possessed ample information to put her on actual notice that something was wrong soon after the injury occurred but failed to conduct a diligent investigation within the statutory time period allotted by CJP § 5-109. *See* 60 Md. App. at 239-40. Therefore, we hold that the trial court did not err by granting Johns Hopkins's motion for judgment. No reasonable jury, supplied with the facts before the trial court and correctly instructed on applicable law, could find that Ms. May was not on inquiry notice. Therefore, Johns Hopkins was entitled to judgment as a matter of law.

II.

Dismissal of Ms. May's Negligent Misrepresentation Claim

Mr. Krumperman asserts that because Johns Hopkins's own thoracic surgeon expert, Dr. Richard Heitmiller, during a deposition on June 27, 2016, admitted that Dr. Yang's assertion that there was a "90 percent chance of malignancy in the Lung Nodule" was "improper," there was good cause for her late filing of the Amended Complaint. Additionally, Mr. Krumperman avers that the motion should have been allowed as it was "in the interests of justice" and "present[ed] no new operative facts" that would "require additional discovery."

Johns Hopkins contends that Ms. May "had access to all of the evidence she would have needed to file a negligent misrepresentation claim" when she initially filed her claim in 2014. Therefore, Johns Hopkins argues, Ms. May cannot justify waiting until 20 days before trial—well beyond the scheduling order—to file her Amended Complaint.[6]

In this case, the court entered a scheduling order pursuant to Maryland Rule 2-504 on October 4, 2014, limiting the filing of amended pleadings to five months from the date of the order—determined to be March 4, 2016—and set the trial date for April 25, 2016. Roughly a month and a half later, on November 16, 2015, the court agreed to modify the scheduling order, and changed the trial date to June 13, 2016. This modified scheduling

[6] Johns Hopkins additionally argues that the circuit court was prohibited from considering the negligent misrepresentation claim contained in the Amended Complaint as it was not submitted for arbitration in HCADRO prior filing in the circuit court. Because we hold that the circuit court did not abuse its discretion by dismissing Ms. May's Amended Complaint, we decline to reach this issue.

order, however, was silent as to when amended pleadings were to be filed. The court then postponed trial for a second time—until July 19 when the trial ultimately took place—without issuing a new scheduling order. Pursuant to Maryland Rule 2-341(a), in the absence of an operative scheduling order, a party filing an amended pleading without leave of court must do so "no later than 30 days before a scheduled trial date." Therefore, Ms. May was required to amend her complaint no later than June 20, 2016, 30 days prior to trial, or seek leave of court to do so. She did not file her Amended Complaint until June 29, 2016.

The trial court may, however, on motion from either party "filed after the expiration of the specified period, permit the act to be done if the failure to act was the result of excusable neglect." Md. Rule 1-204(a)(3). Thus, the Maryland Rules provide some flexibility "if the ends of justice are served," by allowing the pleadings to be amended to include the new claim "so long as the operative factual situation remains essentially the same[and] no new cause of action is stated by a declaration framed on a new theory or invoking different legal principles." *Crowe v. Houseworth*, 272 Md. 481, 485-86 (1974).

We review the trial court's decision to strike an amended pleading for abuse of discretion. *Bacon v. Arey*, 203 Md. App. 606, 667 (2012) (citation omitted). A trial court abuses its wide discretion when

> no reasonable person would take the view adopted by the [trial] court [ ] . . . or when the court acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts and inferences before the court[ ] . . . or when the ruling is violative of fact and logic.

Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC, 388 Md. 1, 28 (2005) (citation

and quotation marks omitted) (alterations supplied in *Beyond*).

Here, the Amended Complaint may have proffered few additional facts, but it asserted a previously unraised theory of law: negligent misrepresentation. During Ms. May's oral motion to reconsider the denial of her motion to amend her complaint, counsel argued that the negligent misrepresentation claim "has always been an issue of contention, that negligence. It's always been a part of everything that we've been claiming which is that information was improperly communicated to the client." The court denied the motion to consider, and concluded that the motion to amend the complaint was filed "way too late" when it could have been filed "months and months ago." We discern no abuse of discretion in the trial court's decision denying Ms. May's motion to amend her complaint for untimely filing.[7]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[7] Additionally, Johns Hopkins argues that even if Ms. May's amended claim was dismissed in error, the dismissal was harmless and did not prejudice her, as the facts that support the negligent misrepresentation are the same facts that her negligence claim relies on. Because we hold that the circuit court did not abuse its discretion in dismissing the Amended Complaint, we do not address this argument.