Circuit Court for Baltimore City
Case No. 24-C-18-002976

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1618

September Term, 2019

CHRISTOPHER W. MEE, ET AL.

v.

ROBERT PETERSON, M.D., ET AL.

Shaw Geter,
Gould,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: September 24, 2021

Gould, Steven B., J., now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of the Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

In this medical malpractice case, the trial court granted summary judgment in favor of appellees, Robert Peterson, M.D., *et al*., determining that appellants', Christopher W. Mee, *et al*.,[1] claims are statutorily time barred under the Maryland Code (1984, 2012 Repl. Vol.) § 5-109(a) of the Courts & Judicial Proceedings Article (CJP).

BACKGROUND

Following his hospitalization and unsuccessful treatment for concerns of a cough and shortness of breath, Mr. Mee was referred to Dr. Robert Peterson, a pulmonologist with Annapolis Pulmonary and Sleep Specialists, P.A., for further review and treatment. In March 2010, Mr. Mee presented to Dr. Peterson as a single 24-year-old policeman with "pathological find[ings] of bronchiolitis obliterans pneumonia (BOOP) and the differential diagnoses of chronic organizing pneumonia (COP), hypersensitivity pneumonia (HP), bronchiocentric pneumonia, and eventually nonspecific interstitial pneumonia (NSIP)." Mr. Mee was initially treated with Prednisone, without improvement, which was then supplemented by the addition of increasing doses of Cytoxan from 50 mg/day, beginning April 28, 2010, until reaching the maintenance dose of 150mg/day, beginning July 6, 2010. Mr. Mee continued regular treatment visits with Dr. Peterson, maintaining a dosage of 150 mg/day of Cytoxan without significant improvement, until January 7, 2011 when, at the

[1] Mr. Mee and his wife, Beth-Ann Mee, appellants, were the plaintiffs below; appellees, defendants below, are Dr. Peterson and Annapolis Pulmonary and Sleep Specialists, P.A. (collectively referred to in this opinion as Dr. Peterson). Stipulated dismissals were entered, disposing of the claims against the remaining defendants below, Maureen Horton, M.D., Johns Hopkins Health System Corporation, and Johns Hopkins Hospital (collectively referred to in this opinion as Dr. Horton), who are not parties to this appeal.

recommendation of Dr. Peterson, his care was transferred to the interstitial lung disease clinic at Johns Hopkins Medicine.

On February 8, 2011, at Johns Hopkins, Dr. Maureen Horton assumed Mr. Mee's care and treatment and continued Dr. Peterson's treatment plan with 150 mg/day of Cytoxan until February 2013 when she reduced the prescription to 100 mg/day of Cytoxan, at Mr. Mee's request, to begin weaning him off that medication. At that point, Mr. Mee's regular treatment visits with Dr. Horton concluded, and he finished his remaining prescription of Cytoxan under her care until May of 2013.

In 2016, Mr. Mee married Beth Ann Mee, and after a year of unsuccessfully attempting to conceive, they sought assistance from Dr. Stephen Lazarou, a fertility specialist in Boston, Massachusetts. Following several tests yielding negative results, Mr. Mee was diagnosed with "azoospermia due to Cytoxan toxicity" and underwent a procedure to identify and retrieve any viable sperm, without success.

On May 8, 2018, as a result of the azoospermia diagnosis, appellants, Mr. and Mrs. Mee, filed suit[2] in the Circuit Court for Baltimore City against Dr. Peterson, Dr. Horton, and their respective employers. The complaint was based on two claims of medical malpractice in negligence and informed consent, for Mr. Mee's treatment, and one claim for loss of consortium. Appellants asserted in their complaint that Dr. Peterson and Dr. Horton breached the standard of care in prescribing Cytoxan and that Mr. Mee was not

[2] On April 19, 2018, prior to suit being filed in the circuit court, appellants filed a claim with the Health Care Alternative Dispute Resolution Office under CJP 3-2A-04(a), and arbitration was subsequently waived pursuant to CJP 3-2A-06B.

properly informed of the high infertility risks, or of other viable alternative treatment options. Because of that, he was not aware that he could have, and likely should have, had his fertility monitored and/or undertaken pre-emptive preservation efforts.

Following partial discovery, all defendants moved for summary judgment. Dr. Horton argued that appellants had failed to satisfy their burden of proof to establish that Dr. Horton's continuing course of treatment after referral from Dr. Peterson had caused Mr. Mee's infertility to become permanent because there was no expert testimony offered to support his claim. The motions court determined that appellants had satisfied their burden on causation, finding "[Mr. Mee] provided sufficient evidence to show that there is more evidence in favor of causation than against it[,]" (citation omitted), and denied Dr. Horton's motion. The court was not asked to, and did not, address whether limitations, pursuant to CJP § 5-109(a), was applicable to them.

Dr. Peterson's motion, however, was based solely on the issue of limitations, contending that, at the latest, the malpractice lawsuit should have been filed by February 8, 2016, or five years after February 8, 2011, when Mr. Mee left Dr. Peterson's care and was first seen by Dr. Horton. The court agreed, rejecting appellants' arguments about the continuing care doctrine and their assertion that the date of injury should have been fixed in 2017 when they learned of Mr. Mee's infertility. Thus, the court granted Dr. Peterson's motion for summary judgment on the basis that appellants' claims are time barred.

On appeal, appellants present one question - whether the circuit court erred in granting summary judgment on the basis that the claims were time barred.[3]

DISCUSSION

Standard of Review

Our review of a grant of summary judgment involves multiple levels of analysis to determine whether there exists a dispute of material fact. If a dispute of a material fact is properly presented, then our inquiry goes no further because issues of fact are to be determined by the factfinder, not by the appellate court. If, however, there is no dispute of material fact, then we determine whether the prevailing party is entitled to judgment as a matter of law.

We have explained that:

> This Court reviews a decision of a circuit court granting summary judgment utilizing a *de novo* standard of review. *Harford County v. Saks Fifth Ave. Distrib. Co.*, 399 Md. 73, 82 (2007); *Zitterbart v. Am. Suzuki Motor Corp.*, 182 Md. App. 495, 501–02 (citing *Crickenberger v. Hyundai Motor Am.*, 404 Md. 37, 45 (2008)), *cert. denied*, 406 Md. 581 (2008). When deciding a motion for summary judgment, a trial court may "enter judgment in favor of or against the moving party if the motion and response show there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2–501(f); *see Ross v. State Bd. of Elections*, 387 Md. 649, 659 (2005). Where there is no dispute of material fact, this Court's focus is on whether the trial court's grant of the motion was legally correct. *Laing v. Volkswagen of Am.*, 180 Md. App. 136, 152–53 (2008). In reviewing the grant of summary judgment, we construe the facts properly before the court, and any reasonable inferences that may be drawn from them, in the light most favorable to the

[3] In their brief, appellants ask:

> Whether the Circuit Court for Baltimore City erred in its determination that the appellants' right to recourse was time barred by section 5-109 of the Courts and Judicial Proceedings Article? [sic]

> non-moving party, in this case, appellants. *Id; Green v. H & R Block*, 355 Md. 488, 502 (1999).

Powell v. Breslin, 195 Md. App. 340, 345–46 (2010), *aff'd*, 421 Md. 266 (2011).

Limitations Trigger Date

Appellants first argue that "[u]nder *Anderson* [*v. United States*, 427 Md. 99 (2012)] and *Edmonds* [*v. Cytology Services of Maryland, Inc.*, 111 Md. App. 233 (1996)] limitations did not begin to run until 2017." The Court explained that the *Anderson* Court "determined that Sections 5-109(a) and (b) are statutes of limitations, not statutes of repose, and that as a result the calculation of the last possible date for statute of limitations to run is **not** necessarily tied to last date of care or treatment." Appellants also place emphasis on the following excerpt of a discussion in *Edmonds*:

> According to [the medical defendants], however, the limitations period would continue to run and, if Edmonds filed suit once she sustained legally cognizable damages, her claim may have been beyond the five year window, and thus would have been dismissed on limitations grounds. It is plainly evident that appellees' interpretation could create a situation in which the limitation period runs before all the elements of a viable cause of action even exist. The plaintiff would be caught in an impossible "Catch–22" situation, because she would *never* be able to file suit; her suit would always be either premature or untimely.

Edmonds, 111 Md. App. at 263.

Dr. Peterson argues that because the "testimony of the Appellants' own expert requires a finding that Mr. Mee suffered a legally cognizable medical injury at least as of February 8, 2011[,]" "Appellants' claims are time barred pursuant to [CJP § 5-109(a)][.]" The court agreed, finding that "because all experts agree that [Mr. Mee] was sterile in 2011,

this Court finds that the statute of limitations for his claim was triggered in 2011 and his claim against Defendants Peterson and AAPSS are time-barred."

In response, appellants contend that "as a matter of Maryland law, the term 'injury' is tied to 'harm,' and the harm is not legally **cognizable** unless all the elements of a tort claim are present, including compensable damages known to or reasonably recognizable by the patient." (Emphasis in original and footnote omitted). This, they assert, occurred when Mr. Mee became permanently and irreversibly sterile. However, expert testimony as to permanency was speculative at best, because no testing had been conducted prior to treatment to assess Mr. Mee's reproductive viability; and no monitoring after treatment had commenced. Therefore, both experts were left to opine solely from the conclusions from the medical research study articles that they, respectively, relied on to form the basis of their opinion.

The applicable medical malpractice timing statute, CJP 5-109(a), provides that:

> (a) An action for damages for an injury arising out of the rendering of or failure to render professional services by a health care provider, as defined in § 3-2A-01 of this article, *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.

(Emphasis added).

As we have explained, "'[s]tatutes of limitations are enacted typically to encourage prompt resolution of claims, to suppress stale claims, and to avoid the problems associated with extended delays in bringing a cause of action, including missing witnesses, faded

memories, and the loss of evidence.'" *Thomas v. Shear*, 247 Md. App. 430, 448 (2020) (quoting *Anderson v. United States*, 427 Md. 99, 118 (2012)).

Appellants argue that whether the "cognizable harm" occurred at the point of irreversible and permanent infertility from the prolonged use and cumulative dosages of Cytoxan, was not appropriate to have been decided at the summary judgment stage. They posit that the limitations issue as to Dr. Peterson's care is whether the "injury" or "cognizable harm" was whether Cytoxan caused him to become sterile (at all) or whether it was the point of permanent infertility. Despite that contention, the issue is ***when*** did the injury occur.

In *Edmonds v. Cytology Services of Maryland, Inc.*, *supra*, we discussed at length the nature and definition of an injury that triggers the commencement of the limitations period:

> The distinction between an injury and a wrongful act is reflected in the elements of a negligence claim, for which a plaintiff must plead and prove the following: (1) the defendant had a duty to protect the plaintiff from injury; (2) the defendant breached that duty; (3) the plaintiff suffered *actual injury or loss;* and (4) that injury or loss was the proximate result of the defendant's breach. Furthermore, in order to recover, the plaintiff's injury or loss must be proven with reasonable probability or certainty, and cannot be the subject of mere speculation or conjecture. The Court of Appeals has also stated: "In a negligence claim, the fact of injury would seemingly be the last element to come into existence. The breach, duty, and causation elements naturally precede the fact of injury."

111 Md. App. at 258 (internal citations omitted). We clarified that: "To determine whether an 'injury' has been "committed" so as to trigger the limitations period in [CJP] § 5-109(a)(1), the touchstone of the inquiry is whether the patient has suffered harm that is 'legally cognizable.'" *Id*. at 259. The Court of Appeals affirmed our decision, *sub nom*,

in *Rivera v. Edmonds*, 347 Md. 208, 211–12 (1997), rejecting the "continuing treatment" approach and emphasizing "'that the words of § 5–109 expressly place an *absolute* five-year period of limitation on the filing of medical malpractice claims calculated on the basis of when the injury was committed, *i.e.*, the date upon which the allegedly negligent act was first coupled with harm.'" (quoting *Hill v. Fitzgerald*, 304 Md. 689, 699–700 (1985)).

While *Rivera v. Edmonds*, viewed CJP § 5-109 as a statute of repose, rather than a statute of limitation, as we do now, the Court's position for determining a date of injury remains the same. That principal has been consistently reaffirmed throughout our medical malpractice precedent, most notably in *Anderson v. United States*, *supra*, wherein the Court of Appeals finally determined that CJP § 5-109 is a statute of limitations.

Anderson was originally filed in the United States District Court for the District of Maryland, but the case was dismissed for lack of subject matter jurisdiction on the grounds of CJP § 5-109 being a statute of repose. 427 Md. at 105. On appeal, the Fourth Circuit Court of Appeals, finding inconsistency in Maryland case law on the subject, certified a question of law to the Court of Appeals of Maryland to determine the statute's status as one of repose or of limitation. *Id*. at 105–06.

The Court of Appeals held that CJP § 5-109(a)(1) "is a statute of limitations, rather than one of repose." 427 Md. at 106. It clarified that despite its previous "disparate" characterizations stating otherwise:

> [CJP] § 5–109(a)(1) is a statute of limitations because its trigger is an "injury" which, under our holding in *Hill* [*v. Fitzgerald*, 304 Md. 689 (1985)], means when the negligent act is coupled with some harm, rather than being dependent on some action independent of the injury. The injury is the cause of action and, thus, § 5–109(a)(1) does not immunize a health care

> provider simply through the passage of time following its negligent act or omission.

Id. at 127.

Applying *Anderson* and its progeny to the present appeal, we conclude that the circuit court did not err in granting summary judgment on the basis that the Mees' claims against Dr. Peterson were time barred. The circuit court found that "because all experts agree that he was sterile in 2011, … the statute of limitations for his claim was triggered in 2011 and his claim against Defendants Peterson and AAPSS are time-barred."

Dr. Peterson's motion for summary judgment was supported by excerpts of deposition testimony of Mr. Mee and Dr. Monroe Karetzky, who had been retained by appellants to provide expert testimony on the subject of standard of care. Appellants' opposition to the motions for summary judgment, in addition to the treatment notes for both Dr. Peterson and Dr. Horton, offered excerpts of deposition testimony of several doctors, notably, the expert witnesses, Dr. Brad Lerner, hired by Dr. Peterson for causation and damages, and Dr. Karetzky.

Dr. Karetzky testified at his deposition: "I believe that [Mr. Mee] was sterile when he first presented [to Dr. Horton], but I don't believe that he was necessarily irreversibly sterile at that time …." Similarly, Dr. Lerner testified: "So, the opinions I have reach [sic] is, more likely than not, the Cytoxan did cause the infertility and subsequent azoospermia in Mr. Mee. More likely than not, by the time Mr. Mee saw Dr. Horton, he had already received a cumulative and absolute dose of Cytoxan that he was already azoospermic by the time he became under her care."

We agree that the court's finding that the "experts agree" that Mr. Mee was infertile by the time he presented to Dr. Horton for continued care was supported by the deposition testimony of both parties' experts. The only dispute of fact is related to the permanence of the infertility with respect to Dr. Horton's continued prescription of Cytoxan. This dispute is not material to the claims against Dr. Peterson, and, therefore, cannot defeat the grant of summary judgment.

Tolling Limitations

Section 5-109 provides limited exceptions to the limitations provisions, for minority or fraudulent concealment. *See* CJP § 5-109(f)(1)–(2). As the Court of Appeals recognized in *Anderson*, "[t]he 1987 amendments to § 5-109 added explicit provisions allowing for § 5–201 (tolling the limitation period for persons under a disability) and § 5-203 (tolling the limitation period for fraud) to apply to medical malpractice actions." 427 Md. at 111 (citing 1987 Maryland Laws, ch. 592). Mr. Mee was 24 years old at the time he initially presented to Dr. Peterson and, thus, does not assert any claims of minority to toll the limitations period. Rather, appellants contend that "[l]imitations was tolled under additional legal doctrines."[4]

For support, appellants rely on the unreported opinion of the United States District Court for the District of Maryland opinion in *Peacock v. Peninsula Reg'l Med. Ctr.*, CIV. CCB-12-2867, 2013 WL 3146930, at 1 (D. Md. June 18, 2013). They assert that the

[4] This argument is based on the alleged misrepresentations made by Dr. Horton and the lack of information or informed consent by Dr. Peterson. Despite appellees' arguments to the contrary, this argument was briefly addressed at the motions hearing.

District Court's rationale for denying the medical defendants' motions explained that "the misleading information provided to the patient by [the medical defendants] and the continuing course of treatment rules each raised issues of fact that, if resolved in [the patient's] favor, would toll limitations."[5]

Drawing on *Peacock*, appellants contend that while "Dr. Peterson is not alleged to have made an overt statement offering Mr. Mee false assurance regarding his fertility[,]"… it is alleged that … Dr. Peterson's failure to reasonably inform [Mr. Mee] about the risks of Cytoxan regarding infertility and his treatment alternatives, in combination with his failure to take any steps to monitor Mr. Mee's sperm count and the subclinical nature of azoospermia, left [Mr. Mee] in the dark."

Despite the fact that Dr. Horton is not a party to this appeal and the claims asserted against her are not before this Court, appellants also draw support from the alleged "false assurance" that she gave Mr. Mee "that the Cytoxan regimen had caused him no adverse side effects[.]" Notwithstanding the fact that appellants rely on an unpublished federal opinion and the allegations of "false assurance" by Dr. Horton, their reliance on the concepts of fraud and concealment are misplaced because their complaint failed to assert

[5] *Peacock* has not been published in the federal reporter. In prior reported opinions, this Court has stated that "it is the policy of this Court in its opinions not to cite for persuasive value any unreported federal or state court opinion." The Court of Appeals has stated a similar policy. (citations omitted). However, this Court has recently announced that it is not the Court's policy to prohibit the citation of unreported opinions of federal courts or the courts of other states for persuasive value, provided that the jurisdiction that issued any particular opinion would permit it to be cited for that purpose. That change does not apply to unreported opinions of the Court, which remain governed by Maryland Rule 1-104. See *CX Reinsurance Co. v. Johnson, et al*, No. 691, Sept. Term 2020, (Slip Op. at 19, 20)(filed Sept. 7, 2021).

claims based on fraud or concealment. They cannot rely on such claims in defense of a motion for summary judgment.

To be sure, CJP § 5-109(f)(2) expressly provides that: "Nothing contained in this section may be construed as limiting the application of the provisions of[] … § 5-203 of this title." Section 5-203 provides: "If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud." Here, the "cause of action" did not occur until the injury was sustained, which was Mr. Mee's infertility in 2011. There is no assertion in appellants' complaint of fraudulent concealment by Dr. Peterson with respect to Mr. Mee's infertility as of 2011.

Appellants also rely on *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76 (2000), a legal malpractice case, for "the 'continuing representation' rule" and that "it is completely analogous to the continuing treatment rule in the context of the statute of limitations considerations." Such reliance is misplaced.

It is undisputed that Mr. Mee's treatment and care by Dr. Peterson concluded on January 7, 2011, before transferring his care to Dr. Horton. The "continuous treatment" issue ***may*** have applied with respect to claims against Dr. Horton, who continued the treatment plan implemented by Dr. Peterson without further disclosures. But, despite

appellants' arguments to the contrary, such assertion has no bearing on the issues with respect to Dr. Peterson and, therefore, are not before this Court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS ASSESSED TO APPELLANTS.