Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-051

AUGUST TERM, 2005

Joan Shedd	}	APPEALED FROM:
	}	
v.	}	Chittenden Superior Court
	}	
Michael J. Guerra, D.P.M.	}	
	}	DOCKET NO. 0863-01 CnC
		Trial Judge: Matthew I. Katz

In the above-entitled cause, the Clerk will enter:

In this medical malpractice action, plaintiff appeals a summary judgment dismissing her claim because the complaint was untimely under the applicable statute of limitations, 12 V.S.A. ' 521. We affirm.

The relevant facts are not in dispute. In 1993, plaintiff began treatment with defendant, a podiatrist, for problems with an ingrown toenail. In September 1997, defendant referred plaintiff to a dermatologist due to a skin condition around the nail. The dermatologist diagnosed plaintiff as suffering from Bowen=s Disease, a rare form of toe cancer. After further medical consultation, plaintiff learned that the cancer was in an advanced stage and would require partial amputation of her toe. Plaintiff had the amputation, and in April 1998, she consulted with an attorney. Plaintiff=s brief states that she Awas suspicious that her treating doctors, including the defendant, may have been negligent for not diagnosing her cancer.@ After searching for an expert for three years, in March 2001 plaintiff=s attorney secured the expert opinion plaintiff was seekingCthat defendant negligently misdiagnosed plaintiff=s condition, resulting in the otherwise needless partial amputation of her toe. In July 2001, plaintiff filed the complaint at issue in this appeal.

In June 2002, defendant moved for summary judgment, claiming that the statute of limitations had run before plaintiff filed her claim. The trial court denied the motion and ordered further discovery. Two years later, defendant moved for summary judgment, but this time the trial court granted the motion. In its order, the court explained:

> As of 1998, [plaintiff] had and was aware of all the evidence she now has of [defendant=s] liability. The sole addition of an expert=s opinion does nothing more than strengthen those already known facts. To extend the running of [12 V.S.A.] ' 521 merely because [plaintiff] delayed her contact with an expert would allow her to circumvent the purpose of ' 521, which puts a time limit on causes of action when plaintiffs have constructive knowledge. By the summer of 1998, [plaintiff] should have been aware of her legal injury, and ' 521 began running. By delaying until July 13, 2001, [plaintiff] filed after her cause of action had expired.

Plaintiff appealed to this Court.*

We review plaintiff=s appeal using the same summary judgment standard employed by the trial court. Dulude v. Fletcher Allen Health Care, Inc., 174 Vt. 74, 79 (2002). Summary judgment is proper where no genuine issue of material fact exists and any party is entitled to judgment as a matter of law. Id.; see also V.R.C.P. 56(c)(3) (establishing

summary judgment standard). On appeal, plaintiff argues that summary judgment was improper because she could not and did not discover the cause of her injury until she had obtained an expert opinion that connected defendant=s treatment to her injury. Plaintiff claims that, although she knew about her medical condition, she did not understand that defendant should have diagnosed the cancer in her toe.

Section 521 of Title 12 requires an action to recover damages for an injury caused by Aany medical treatment@ to be filed Awithin three years of the date of the incident or two years from the date the injury is or reasonably should have been discovered, whichever occurs later.@ 12 V.S.A. ' 521 (emphasis added). The question for us here is whether ' 521 permits an injured party to delay the filing of a malpractice action until that party secures a favorable expert opinion on causation. The trial court correctly held that ' 521 does not contemplate such a delay.

In Lillicrap v. Martin, 156 Vt. 165 (1990), the Court held that ' 521=s time limitation does not begin to run until the plaintiff Ahas or should have discovered both the injury and the fact that it may have been caused by the defendant=s negligence or other breach of duty.@ Id. at 175 (emphasis added). The injured party need not wait until she has Aan airtight case before the limitations period begins to run@ because the facts can be fleshed out Aduring investigation of the matter or during discovery after the lawsuit is filed.@ Rodrigue v. Valco Enter., Inc., 169 Vt. 539, 541 (1999) (mem.).

In this case, plaintiff received treatment from defendant for four years. The four-year course of treatment related to an ingrown toenail on the same toe affected by cancer. By 1998, plaintiff knew she had cancer, knew that defendant did not diagnose it despite four years of treatment, and knew that the cancer required partial amputation of her toe. Those undisputed facts were sufficient to put plaintiff on notice that defendant=s actionsCor his inactionCAmay have been@ responsible for plaintiff=s injury. Lillicrap, 156 Vt. at 175. Indeed, plaintiff acknowledges that by the spring of 1998, she was suspicious that one or more of her treating physicians negligently failed to diagnose the cancer before it reached an advanced stage and required amputation.

In a case with facts similar to those before us, the Utah Court of Appeals reached the same result as we do here. In Deschamps v. Pulley, the Utah court identified the critical question for determining when a medical malpractice claim accrues for the purpose of the statute of limitations. Deschamps v. Pulley, 784 P.2d 471, 475 (Utah Ct. App. 1989). The question is whether the injured party was aware of facts that would lead a reasonable person to conclude that she may have a claim against her physician. Id. The court rejected the appellant=s argument that the statute of limitations tolled while she looked for an expert opinion to support her medical malpractice claim. Id. at 474. The court explained that the appellant=s reading would eviscerate the limitations period established by statute:

> If we accepted Ms. Deschamps=s position that she could not know of her legal injury until she received an expert medical opinion confirming malpractice, the statute would be tolled in every case until a plaintiff not only decided to seek, but found favorable expert medical testimony. We do not believe this result is consistent with the purpose of the statutory scheme.

Id. at 475.

We agree with the view of the Utah court and find plaintiff=s construction of 12 V.S.A. ' 521 implausible. The trial court properly entered summary judgment for defendant because plaintiff had enough information in 1998 to assert her claim before the statute of limitations expired.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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[*] Defendant moved to strike plaintiff=s notice of appeal as untimely and dismiss the action. A ruling on the motion was deferred for consideration with the merits of the appeal. We now deny defendant=s motion as moot in light of our disposition of plaintiff=s appeal.