

STATEMENT OF THE CASE

Christine Overton (“Christine”) and Lloyd Overton, individually and as husband and wife (collectively, “Overton”), appeal the trial court’s order granting the motion for summary judgment of Marshall Grillo, D.O., against whom they brought an action alleging that Dr. Grillo had negligently failed to detect the presence of a cancerous lesion in Christine’s right breast when he reviewed a film of her bilateral mammography.

We reverse.

ISSUE

Whether the trial court erred when it found that the two-year statute of limitations barred Overton's claim and, therefore, granted Dr. Grillo’s motion for summary judgment.

FACTS

On July 7, 1999, Christine had a bilateral mammography¹ performed as a “routine checkup.” (App. 222). The result was read by Dr. Grillo, who reported finding no “malignancy, suspicious calcifications, or dominant masses.” (App. 121). Christine contacted the office of her gynecologist Mary Ann Jones, M.D., and was told “that the mammogram was normal.” (App. 228).

¹ According to the website of the American Cancer Society, a “mammogram” or “mammography” is an x-ray of the breast; a method of detecting breast cancers that cannot be felt. Mammograms are done with a special type of machine that is used only for this purpose. A mammogram can show a developing breast tumor before it is large enough to be felt by a woman or even a highly skilled health care professional. Screening mammography helps the doctor learn more about breast masses that have been found by clinical breast exam, or the cause of other breast symptoms.

http://www.cancer.org/docroot/GRY/GRY_O.asp?dictionary=&pagK=M

Over a year later, on September 28, 2000, during Christine’s annual examination, Dr. Jones found “a lump . . . upon palpation of [Christine’s] right breast.” (App. 61). On October 2, 2000, a bilateral mammogram was conducted, and it “showed a 5 cm. speculated lesion in the right breast as well as clustered microcalcifications in the central portion of the right breast which . . . suggested malignancy.” (App. 62). Ultrasound and biopsy tests also performed on October 2nd “establish[ed] the diagnosis of infiltrating ductal carcinoma of the right breast which had metastasized to her lymph nodes.” *Id.* On November 1, 2000, Christine underwent a right modified radical mastectomy of her breast, followed by reconstructive plastic surgery. Shortly after the surgery, she learned that four of eleven adjacent lymph nodes “were positive for cancer” and had been removed. (App. 92). Christine subsequently underwent a course of chemotherapy and then radiation therapy, which was completed on July 21, 2001.

On October 19, 2001, Overton filed the instant action² against Dr. Grillo.³ According to Christine’s affidavit, subsequent to Dr. Grillo’s reading of the mammogram, she had neither been “advised . . . that the July 7, 1999 mammogram was misread nor [did she] have any suspicion or belief that the films had been misread,” until she met with an attorney on October 11, 2001, when she was “advised of the possibility of a potential claim of medical negligence.” (App. 223).

² The action was filed in Porter Superior Court, not the Department of Insurance. The parties agree that Dr. Grillo was not a qualified provider under Indiana’s Malpractice Act.

³ The action also named as a defendant Radiologic Associates of Northwest Indiana, Inc. Christine’s mammography was performed at Radiologic Associates’ facility, where Dr. Grillo was working at the time he reviewed the results. However, the summary judgment order appealed, entered as a final judgment by the trial court, involves only the Overton claims against Dr. Grillo.

On December 21, 2005, Dr. Grillo filed a motion for summary judgment based on the statute of limitations.^{4,5} Dr. Grillo filed designated evidence in support of his motion. Overton filed a brief in opposition and also filed designated evidence. The foregoing facts are derived from the complaint and the parties' designated evidence.

On March 22, 2006, the trial court issued its order finding that "the alleged malpractice occurred on July 7, 1999"; that the applicable statute of limitations required the claim to be filed within two years "of the occurrence of the alleged malpractice," but additional time could be allowed if the alleged malpractice was "first discovered" after the statute of limitations had expired; and concluded that based upon *Booth v. Wiley*, 839 N.E.2d 1168, 1172 (Ind. 2005),

the October 2, 2000, diagnosis provided enough information to lead a reasonably diligent person in Overton's position to have discovered the alleged malpractice. On October 2, 2000, Overton still had nine (9) months remaining to file her complaint before the expiration of the two (2) year period of limitation.

(App. 17, 18). Accordingly, the trial court granted Dr. Grillo's motion for summary judgment.

Overton filed a motion to correct error/motion to reconsider. The trial court denied the motion.

⁴ On January 29, 2002, Dr. Grillo had filed a motion to dismiss, arguing that the pleadings demonstrated that the action was time-barred. The trial court denied the motion on June 12, 2002. Thereafter, the parties engaged in discovery for more than two years.

⁵ Dr. Grillo's motion for summary judgment also argued the lack of a genuine issue of material fact as to an alleged breach of the standard of care. However, shortly after the filing of the motion, the parties agreed to stay this matter and proceed solely with the issue of whether the Overton action was filed within the statute of limitations.

DECISION

When we review the appeal of a decision by the trial court to grant a motion for summary judgment, our standard of review

is the same as that used in the trial court: summary judgment is appropriate only where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

Corr v. American Family Ins., 767 N.E.2d 535, 537 (Ind. 2002). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Id.* at 537-38. In the summary judgment context, the trial court’s specific findings of fact and conclusions thereon do not bind us, but they aid our review by providing a statement of reasons for the trial court’s action. *Knowledge A-Z, Inc. v. Sentry Inc.*, 857 N.E.2d 411, 419 (Ind. Ct. App. 2006). Further, because Dr. Grillo asserted the statute of limitations as an affirmative defense and made a prima facie showing that the action was commenced beyond the statutory period, the burden shifted to Overton, as nonmovant, “to establish an issue of fact material to a theory that avoids the defense.” *Moyer v. Three Unnamed Physicians*, 845 N.E.2d 252, 256 (Ind. Ct. App. 2006); *see also Palmer v. Gorecki*, 844 N.E.2d 149, 153 (Ind. Ct. App. 2006) (citing *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 695 (Ind. 2000)).

Dr. Grillo was not a qualified healthcare provider and, therefore, not entitled to the benefits and procedures provided by the Medical Malpractice Act – including its two-year “occurrence” statute of limitations found at Indiana Code section 34-18-7-1(b). However, he is entitled to the protection of Indiana Code section 34-11-2-3, to wit:

An action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, may not be brought, commenced, or maintained, in any of the courts of Indiana against physicians, dentists, surgeons, hospitals, sanitariums, or other, unless the action is filed within two (2) years from the date of the act, omission, or neglect complained of.

This provision is essentially identical to the statute of limitations in the Medical Malpractice Act,⁶ and has been similarly referred to as an “occurrence” statute rather than a “discovery” statute. *See Martin v. Richey*, 711 N.E.2d 1273, 1278, n.6 (Ind. 1999). Dr. Grillo argued to the trial court, as he does on appeal, that cases construing the Medical Malpractice Act’s statute of limitations are relevant to deciding whether the Overton action is time-barred, and Overton does not argue to the contrary.

In *Booth v. Wiley*, our Supreme Court “synthesized” its holdings in *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999), *VanDusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999), and *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692 (Ind. 2000), to provide the following methodology to guide

the application of the medical malpractice statute of limitations. Initially, a court must determine the date the alleged malpractice occurred and determine the discovery date – the date when the claimant discovered the alleged malpractice and resulting injury, or possessed enough information that would have led a reasonably diligent person to make such discovery. If the discovery date is more than two years beyond the date the malpractice occurred, the claimant has two years after discovery within which to initiate a malpractice action. But if the discovery date is within two years following the occurrence of the alleged malpractice, the statutory limitation period applies and the action must be initiated before the period expires, unless it is not reasonably possible for the claimant to present the claim in

⁶ “A claim, whether in contract or tort, may not be brought against a health care provider based upon professional service or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged, omission or neglect, except that a minor less than six (6) years of age has until the minor’s eighth birthday to file.” Ind. Code 22 34-28-7-1(b).

the time remaining after discovery and before the end of the statutory period. In such cases where discovery occurs before the deadline but there is insufficient time to file, we have not previously addressed how much time should be permitted. But because *Boggs* permits such an action to be commenced after the statutory two-year occurrence-based period when timely filing is not reasonably possible, we hold that such claimants must thereafter initiate their actions within a reasonable time.

Booth, 839 N.E.2d at 1172.

It is undisputed that the occurrence date here was July 7, 1999, the date Dr. Grillo read Christine's mammogram. However, at that time, Christine had no symptoms such as pain, discomfort, or a lump in her breast; the mammogram was performed only as a regular check-up; and she was advised that Dr. Grillo found her breast to be normal. Fourteen and one-half months later, she was diagnosed with a likely malignancy.

Overton argues that because (1) Christine's affidavit states that she did not suspect negligence on the part of Dr. Grillo until her October 11, 2001, meeting with an attorney, and (2) Dr. Grillo has "presented no medical evidence whatsoever to establish the mere diagnosis of cancer on October 2, 2000, indisputably established that [she] acquired knowledge sufficient to lead a reasonably diligent person to discover" his alleged malpractice, there remains a material issue of fact about whether Christine "discovered or possessed sufficient information to discover the alleged malpractice within the two-year statutory period." Overton's Br. at 8, 25. We agree.

As already noted, on July 7, 1999, Christine appeared to be a healthy woman – one without breast pain or discomfort or a discernible lump. When he read her routine check-up mammogram, Dr. Grillo reported finding no problems. During a subsequent routine examination on September 28, 2000, Dr. Jones found a lump, and tests on October 2nd

suggested a malignancy. According to Christine’s affidavit and deposition testimony, neither when the lump was found nor during her subsequent medical treatment did any doctor ever advise her that the July 1999 mammogram might have been misread. Her affidavit and deposition further assert that the first time Christine suspected negligence in the reading of her July 1999 mammogram was on October 11, 2001, when she met with an attorney who had her medical records and had had the July 1999 mammogram reviewed.

The designated evidence reveals but one fact – on October 2, 2000, a lump in Christine’s breast was found that was likely malignant – that could arguably constitute information received by Christine within the two-year statute of limitations to lead her to question whether Dr. Grillo might have committed malpractice when he read her mammogram of July 7, 1999. However, as explained in *Booth*, a subsequent diagnosis “does not indisputably establish” discovery of previous malpractice or the acquisition of knowledge sufficient to lead a reasonably diligent person to discover the malpractice. 839 N.E.2d at 1176. Thus, the question remains: on October 2, 2000, did Christine have “enough information that would lead a reasonably diligent person” to discover the existence of malpractice? *Id.* at 1172.

Based upon the evidence designated to the trial court, we find that whether the fact of Christine’s diagnosis in October of 2000, without more, was knowledge sufficient to lead a reasonably diligent person to discover there had been malpractice by Dr. Grillo is a question of disputed fact. Therefore, the trial court erred in granting Dr. Grillo’s motion for summary judgment based upon his statute of limitations defense.

Reversed.

BAKER, C.J., concurs.

ROBB, J., concurs in result with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTINE OVERTON and)	
LLOYD OVERTON, Individually)	
and as Husband and Wife,)	
)	
Appellants-Plaintiffs,)	
)	
vs.)	No. 64A04-0605-CV-278
)	
MARSHALL GRILLO, M.D.,)	
)	
Appellee-Defendant.)	

ROBB, Judge, concurring in result with separate opinion

The majority concludes that “whether the fact of Christine’s diagnosis in October of 2000, without more, was knowledge sufficient to lead a reasonably diligent person to discover there had been malpractice by Dr. Grillo is a question of disputed fact” and reverses the summary judgment entered for Dr. Grillo on that basis. Slip op. at 8. Because I believe the evidence clearly supports the determination that Christine did not have sufficient knowledge to discover the alleged malpractice until more than two years had passed, I respectfully concur in result.

The designated evidence in this case shows that when Christine underwent a mammogram on July 7, 1999, she had no symptoms and Dr. Grillo reported finding no problems. Christine’s affidavit and deposition testimony indicate that at no time when the lump was found during a routine physical exam in September of 2000 or thereafter did any doctor ever advise her that the July 1999 mammogram might have been misread.

Christine's affidavit and deposition also indicate that the first time Christine suspected negligence in the reading of her July 1999 mammogram was on October 11, 2001, when she met with an attorney who had her medical records, and specifically the July 1999 mammogram, reviewed. Although the evidence does demonstrate that Christine had knowledge within the prescribed statute of limitations that she had breast cancer, I do not believe it is reasonable to infer that alone was enough information to lead a reasonable person to discover the alleged malpractice, especially if none of her doctors ever told her that it was a possibility. Even if Christine might have suspected on her own that the biopsy was misread, no doctor ever told her of the possibility, let alone the probability, that her July 1999 mammogram might have been misread. See Degussa Corp. v. Mullens, 744 N.E.2d 407, 411 (Ind. 2001) (holding that although employee suspected on March 17, 1992, that work products were causing her illness, her doctor said nothing to confirm, deny, or even strengthen her suspicions, and therefore the statute of limitations did not begin to run on that date); cf. Van Dusen, 712 N.E.2d at 499 (as a matter of law, date of discovery was not when the doctor told the patient that a biopsy had been misread, but when the doctor told the patient of the possibility that the biopsy had been misread). Christine could reasonably have believed that in July 1999, there was no malignancy, and that the cancer had first appeared sometime in the fifteen months between that mammogram and her September 2001 mammogram.⁷

⁷ Although it is not part of the designated evidence in this case, I note that during argument before the trial court on the motion for summary judgment, the Overtons' counsel stated that Christine had Grade 3 cancer, the fastest growing grade of cancer. Appellants' App. at 34. Even if the Overtons' theory of their case is that because of the nature of Christine's cancer, there had to have been malpractice

I do not believe that we should place the burden of medical knowledge on the patient, but rather on the trained medical professionals on whom we should be able to rely. Therefore, I would hold as a matter of law that Christine did not discover the alleged malpractice until more than two years after it occurred and reverse summary judgment on that basis.

in Dr. Grillo's reading of the July 1999 mammogram, that theory comes with the benefit of hindsight, and is not based upon what they knew as events were unfolding.