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Workman, Justice, concurring, in part, and dissenting, in part:

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

“‘The question of when plaintiff knows or in the exercise of reasonable diligence has reason to know of medical malpractice is for the jury.’ Syllabus Point 4, *Hill v. Clarke*, 161 W. Va. 258, 241 S.E.2d 572 (1978).” Syl. Pt. 5, *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Despite this well-settled axiom, the circuit court in this case removed this question from the province of the jury by deciding it on summary judgment. Because the plaintiff, Annie Mack-Evans (“Ms. Mack-Evans”), was entitled to have a jury – not the circuit court – determine when she knew, or through the exercise of reasonable diligence had reason to know, of the alleged medical malpractice which led to her mother’s death, I respectfully dissent from the majority’s decision on this ground.¹

Importantly, for purposes of the running of a statute of limitations, a wrongful death cause of action does not accrue until a plaintiff knows, or has reason to know through the exercise of reasonable diligence, that a particular entity engaged in conduct that is *causally related* to the death. Syl. Pt. 8, *Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d

¹I concur with the majority’s holding that the personal injury claim is barred by the statute of limitations, and join with the majority in its new syllabus point.

681 (2001). The majority finds that Ms. Mack-Evans knew, or should have known, *as of the date of her mother's death* that Oak Hill Hospital Corporation (“the Hospital”) was responsible for that death. In so holding, the majority conveniently ignores facts showing that when her mother died more than seven months after the Hospital’s alleged wrongful acts, Ms. Mack-Evans reasonably believed that intervening events were to blame and, thus, had no reason to suspect the death was *causally related* to the Hospital’s actions seven months before.

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In considering a motion for summary judgment, courts “must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.” *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994).

In this case, when the complete factual record is reviewed and inferences are drawn in the light most favorable to Ms. Mack-Evans (as must be done on a motion for summary judgment), there can be no doubt that a genuine issue of material fact exists as to when the wrongful death claim accrued for purposes of the running of the statute of

limitations. To understand the basis for my dissent, a full recitation of the facts as well as the law on what constitutes the accrual of a claim is necessary.

On January 28, 2004, eighty-six-year-old Mamie Mack (“Ms. Mack”) was admitted to the Hospital to undergo elective hip replacement surgery. Upon her admission, a physician discovered that Ms. Mack’s blood pressure was extremely elevated and ordered that her blood pressure be monitored every four hours. Ms. Mack’s medical records, however, indicate that such readings were not recorded on her chart and that the Hospital failed to check her blood pressure as part of her pre-operative anesthesia evaluation. Ms. Mack’s doctors, therefore, were unaware of her high blood pressure at the time of surgery. An expert hired by Ms. Mack-Evans to review these records opined that Ms. Mack’s blood pressure was so high at the time of her surgery that the procedure should have been postponed. Neither Ms. Mack nor her family was informed of her elevated blood pressure, however, and the surgery proceeded as scheduled on January 29, 2004.

Immediately following surgery, Ms. Mack-Evans visited Ms. Mack and found her semi-conscious and groggy. Unknown to Ms. Mack-Evans, Ms. Mack’s blood pressure was beginning to drop. Although a physician attempted to increase her blood pressure with an intravenous push around 5:25 p.m. that day, Ms. Mack’s blood pressure continued to drop and remained dangerously low for approximately twelve hours. According to Ms.

Mack-Evans' expert, this low blood pressure caused a lack of oxygen to the brain which resulted in a stroke or other brain damage.

The day after surgery, January 30, 2004, the Hospital contacted Ms. Mack-Evans and informed her that they had been unable to awaken Ms. Mack. The nurse who contacted Ms. Mack-Evans admitted that, because Ms. Mack had been pulling at her IVs as she regained consciousness following surgery, the Hospital had "re-sedated" her and she had not regained consciousness. This conversation led Ms. Mack-Evans to believe that "something was wrong;" specifically, that someone at the hospital had done something wrong by re-sedating her mother.

On February 19, 2004, Ms. Mack was discharged from the Hospital and transferred to the Hilltop Health Care Center nursing home facility ("Hilltop"). While at Hilltop, Ms. Mack suffered from additional illnesses, including a life-threatening urinary tract infection, infected bed sores, malnutrition, severe dehydration and a pus-filled abscess at the site of her feeding tube. On July 23, 2004, Ms. Mack was transferred to another nursing home. On August 5, 2004, she returned to the Hospital, where she died on August 9, 2004. The death certificate listed her primary cause of death as cardiopulmonary arrest, with overwhelming sepsis and bilateral pneumonia as underlying conditions. Eleven days

later, on August 20, 2004, Ms. Mack-Evans was appointed the personal representative of Ms. Mack's estate.

“‘Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the ‘discovery rule,’ the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim.’ Syllabus Point 1, *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992).” *Gaither*, 199 W. Va. 706, 487 S.E.2d 901, Syl. Pt. 2. In the instant case, the majority has concluded that the wrongful death claim accrued on the date of Ms. Mack's death, August 9, 2004. Ms. Mack-Evans, however, contends that the discovery rule prevented the claim from accruing until, at minimum, she was appointed as the personal representative of her mother's estate. She points out that, until her appointment, she was not able to obtain her mother's medical records and, thus, could not have learned through the exercise of reasonable diligence of the causal connection between her mother's death and the hospital's wrongful acts.

In *Gaither*, a seminal case expanding West Virginia jurisprudence on the nature and scope of the discovery rule, this Court held that a tort claim does not **accrue** for purposes of the running of the statute of limitations until the plaintiff knows, or should know through the exercise of reasonable diligence, at least three things. 199 W. Va. 706, 487 S.E.2d 901, Syl. Pt. 4. First, the plaintiff must know that he or she has been injured. *Id.* Second, the

plaintiff must know “the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty.” *Id.* Third, the plaintiff must know that the entity’s conduct had a causal relation to the plaintiff’s injury. *Id.* Thus, the statute of limitations does not begin to run until a plaintiff knows, or by the exercise of reasonable diligence should know, *all* of this information.

In 2001, the Court clarified that the discovery rule applies not only to personal injury claims, but also to wrongful death claims. *Bradshaw*, 210 W. Va. 682, 558 S.E.2d 681. In *Bradshaw*, the Court established a new syllabus point for determining when a wrongful death claim accrues, enunciating the *Gaither* concepts as *four* requirements:

[i]n a wrongful death action, under the discovery rule, the statute of limitation contained in [the wrongful death statute] begins to run when the decedent’s representative knows or by the exercise of reasonable diligence should know (1) that the decedent has died; (2) that the death was the result of a wrongful act, neglect, or default; (3) the identity of the person or entity who owed the decedent a duty to act with due care and who may have engaged in conduct that breached that duty; and (4) that the wrongful act, neglect or default of that person or entity has a causal relation to the decedent’s death.

Id. at Syl. Pt. 8. Thus, in a wrongful death case, the claim does not accrue, for the purposes of the running of the statute of limitations, until the plaintiff knows, or through the exercise of reasonable diligence should know, (1) of the death, (2) that it was the result of another’s act, (3) the identity of the entity who owed a duty of care to the decedent and who may have

engaged in conduct breaching that duty, and (4) that a *causal connection* exists between that entity's conduct and the death. *Id.*

Most recently, this Court reaffirmed these discovery rule concepts in *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009). In syllabus point four of that opinion, the Court explained that

[u]nder the discovery rule set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997), whether a plaintiff “knows of” or “discovered” a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.

Id. at ___, 689 S.E.2d at 265. The Court then set forth, in syllabus point five, a five-step analysis for determining whether a particular cause of action is time barred. *Id.* The first step is to determine the applicable statute of limitations, which the Court found to be a purely legal question. *Id.* The second step is to “identify when the requisite elements of the cause of action occurred” and the third step is to determine whether the discovery rule should be applied. *Id.* The Court held that both of these steps “will generally involve questions of material fact that will need to be resolved by the trier of fact.” *Id.* In fact, in most cases, the question of when a claim has accrued, and thus when a statute of limitations should begin

to run, **is a question for the jury**. *See, e.g., Gaither*, 199 W. Va. at 714-15, 487 S.E.2d at 909-10.

Turning to the instant case, Ms. Mack-Evans was clearly entitled to have a jury determine when the applicable statute of limitations should have begun to run, because genuine issues of material fact exist as to whether Ms. Mack-Evans knew or should have known of the facts linking the Hospital to her mother's death as of the date her mother died. Indeed, the record indicates that, until her mother's medical records were obtained, Ms. Mack-Evans believed that the Hospital's only potential error was in re-sedating her mother following surgery. Ms. Mack-Evans had no knowledge of the Hospital's alleged failure to track Ms. Mack's blood pressure prior to surgery, nor did she know that a drop in blood pressure following surgery likely caused Ms. Mack to suffer from a stroke or other brain damage.

Moreover, several medical entities besides the Hospital treated Ms. Mack between the date of the surgery and the date of her death. Indeed, by the time Ms. Mack died on August 9, 2004, Ms. Mack-Evans believed that the substandard care her mother received at Hilltop was the actual and proximate cause of her death.² The death certificate gave no

²Prior to instituting the instant case, Ms. Mack-Evans sued Hilltop without naming the Hospital. This is just one of the facts on which a jury could have relied to find that, at the
(continued...)

indication that Ms. Mack's death was in any way related to her hip surgery or any other act by the Hospital and, thus, could not have put Ms. Mack-Evans on notice of the wrongful death claim against the Hospital. Thus, any conclusion at the time of Ms. Mack's death that the Hospital's actions or inactions were causally related to that death would have been completely speculative on Ms. Mack-Evan's part.

The majority, however, concludes that the discovery rule does not apply in this case because Ms. Mack-Evans admitted that she knew "something was wrong" as of the day after her mother's surgery. At most, that statement merely indicates that, as of January 30, 2004, Ms. Mack-Evans suspected that *someone* had done *something* wrong.³ Such suspicions do not meet the criteria of *Gaither* and *Bradshaw* for the accrual of a wrongful death claim. Indeed, the record indicates that the Hospital's alleged wrongful act that caused Ms. Mack-Evans to suspect "something was wrong," i.e. the alleged re-sedation of her mother following surgery, was not, in fact, the wrongful conduct which ultimately led to her death.

²(...continued)
time of her mother's death, Ms. Mack-Evans reasonably believed that Hilltop, not the Hospital, was at fault for the death.

³Ms. Mack-Evans acknowledged that she contacted a lawyer while her mother was still at the Hospital, and was informed that she could not bring a personal injury claim on her mother's behalf, so long as her mother remained alive.

Given these circumstances, a genuine issue of material fact clearly exists as to when Ms. Mack-Evans knew, or by the exercise of reasonable diligence should have known, that the Hospital's alleged wrongful acts were *causally related* to Ms. Mack's death. For these reasons, this case should have been remanded for a jury determination of whether the discovery rule tolled the statute of limitations on the wrongful death claim.⁴ I agree, however, with the majority's analysis of the personal injury claim and, for the reasons stated in the majority opinion, would find that the personal injury claim is barred by the statute of limitations. I further join with the majority in the new syllabus point. Accordingly, I concur, in part, and dissent, in part, from the majority's opinion.

⁴I would further require the jury to determine the date by which Ms. Mack-Evans knew, or should have known through the exercise of reasonable diligence, of the existence of the wrongful death claim. Ms. Mack-Evans was appointed the personal representative of her mother's estate approximately eleven days after her mother passed away. She asserts that she did not know that a wrongful death claim existed against the Hospital until an expert reviewed her mother's medical records. She admits, however, that she did not even request those records until shortly before filing this suit. Because Ms. Mack-Evans had the ability to request Ms. Mack's medical records as soon as she was appointed as the personal representative of the estate, a jury could reasonably conclude that, under the discovery rule, the statute of limitations would only toll until Ms. Mack-Evans had obtained the ability to request the medical records. At that point, the exercise of reasonable diligence would have revealed the existence of the claim and, pursuant to the discovery rule, the claim would have accrued and the statute of limitations would have begun to run. *See Bradshaw*, 210 W. Va. 682, 558 S.E.2d 681, Syl. Pt. 8.