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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

PENNY PRESZLER, *Plaintiff/Appellant*,

v.

CORWIN D. MARTIN PC, et al., *Defendants/Appellees*.

No. 1 CA-CV 17-0501
FILED 8-21-2018

Appeal from the Superior Court in Maricopa County
No. CV2015-050606
The Honorable John R. Hannah, Judge

REVERSED AND REMANDED

COUNSEL

The Kozub Law Group, PLC, Phoenix
By Richard W. Hundley
Counsel for Plaintiff/Appellant

J. Goodwin Law, PLLC, Goodyear
By James C. Goodwin
Counsel for Defendants/Appellees

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MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Peter B. Swann joined.

P E R K I N S, Judge:

¶1 Appellant Penny Preszler appeals the trial court's order granting summary judgment in favor of Appellees Corwin D. Martin PC and Dr. Corwin Martin (collectively "Martin"). For the following reasons, we reverse the trial court's order and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Dr. Martin performed dental surgery on Preszler in February 2012 to place four dental implants in her lower jaw. Preszler alleges she began experiencing numbness in her face and mouth in the weeks following the surgery. The parties dispute whether Preszler told Dr. Martin or any of his staff that she was experiencing numbness following the surgery. Preszler contends that Dr. Martin saw her several times between 2012 and 2014, and that she complained of facial numbness, but Dr. Martin advised her it was a normal, temporary condition. Dr. Martin denies Preszler's contention: He asserts that Preszler never complained of facial numbness, and therefore he never advised Preszler regarding the numbness.

¶3 In September 2014, Preszler visited an oral surgeon, Dr. Day, regarding her complaints of facial numbness. Dr. Day performed an examination and concluded that Preszler had suffered a nerve injury from her dental implant procedure. Preszler filed this action against Martin in December 2015 – fifteen months after her initial appointment with Dr. Day and more than three years after she says she began experiencing numbness.

¶4 Martin moved for summary judgment, arguing that Arizona's two-year statute of limitations codified in Arizona Revised Statutes ("A.R.S.") section 12-542 (2018) barred Preszler's claim. Martin argued that Preszler's claim accrued no later than March 2012, when she first began to experience numbness. Preszler contended that her claim did not accrue until her September 2014 visit to Dr. Day when she first learned her injury was permanent. Preszler and Martin filed competing and controve

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statements of fact. The trial court granted Martin's motion finding Preszler's complaint time-barred. Preszler now appeals.

DISCUSSION

¶5 Summary judgment is appropriate only when the movant is entitled to judgment as a matter of law and no genuine issues of material fact remain. Ariz. R. Civ. P. 56. Genuine disputes of fact, however, must be resolved at trial unless the evidence in the case is such that a trial judge would be required to direct a verdict at trial. *Orme School v. Reeves*, 166 Ariz. 301, 311 (1990). On appeal, we view the facts in the light most favorable to the party against whom judgment was entered, and we review entry of summary judgment *de novo*. *Dreamland Villa Cnty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46, ¶ 16 (App. 2010).

¶6 The Arizona Supreme Court has long adhered to the discovery rule, holding that the statute of limitations does not begin to run until the plaintiff knows, or reasonably should know, of the tort. *Acton v. Morrison*, 62 Ariz. 139, 144 (1945); *Doe v. Roe*, 191 Ariz. 313, 322, ¶ 29 (1998) ("[A] cause of action does not accrue until the plaintiff knows or with reasonable diligence should know the facts underlying the cause.").

¶7 The discovery rule applies to the accrual of medical negligence actions. *Kenyon v. Hammer*, 142 Ariz. 69, 87 (1984); A.R.S. § 12-542. In such actions, "something more is required than the mere knowledge that one has suffered an adverse result while under the care of a professional fiduciary": the plaintiff must also have "reasonable notice to investigate whether the injury is attributable to negligence." *Walk v. Ring*, 202 Ariz. 310, 316-17, ¶¶ 25-26 (2002).

¶8 Certain factual scenarios are sufficient, as a matter of law, to put the plaintiff on notice of both the adverse result and the need for further investigation to determine whether that result is attributable to some fault. *Id.* at 314, ¶ 16. However, other scenarios prohibit finding, as a matter of law, that the plaintiff was "promptly on sufficient notice of the confluence of 'what' and 'who' and that an unhappy result should be investigated." *Id.* at 314-15, ¶ 17. In such cases accrual is a factual question to be determined by the jury. *Id.*

¶9 Thus, we must determine whether, as a matter of law, Preszler was on reasonable notice to investigate when she first experienced numbness.

¶10 Preszler's belief that her symptoms were temporary rather than permanent implicates the possibility of a delayed accrual under the discovery rule. Viewing the facts in the light most favorable to Preszler, Dr. Martin informed her that temporary numbness is a normal, temporary side effect of the treatment she received. Permanent numbness, while also a risk, suggests at least the possibility of negligence. A jury could determine that Preszler's mistaken belief that the injury was temporary did not put her on reasonable notice to investigate.

¶11 Though we are aware of no Arizona cases squarely addressing the issue of permanent injuries that appear to be temporary side effects, several other states have applied their own discovery rules to delay accrual of the limitations period for similarly-situated plaintiffs. For example, the Pennsylvania Supreme Court held that the applicability of the discovery rule depended upon the factual question of whether the plaintiff knew or reasonably could have known that the numbness she experienced was a typical and temporary condition of the surgery or was an injury. *Fine v. Checcio*, 582 Pa. 253, 274 (2005) (plaintiff suffering from post-operative facial numbness later discovered to be permanent). Similarly, the Texas Court of Appeals held that the trial court erred in granting the defendant summary judgment under the statute of limitations because there was a fact issue as to whether the plaintiff knew or should have known whether her symptoms were a temporary, natural result of surgery or a permanent injury. *Baldridge v. Howard*, 708 S.W.2d 62, 65 (Tex. App. 1986) (plaintiff suffering from permanent vocal cord paralysis originally thought to be temporary).

¶12 We hold that the trial court erred in granting summary judgment here because Preszler sufficiently established a factual dispute as to whether her numbness put her on notice to investigate further. In so holding, we do not determine whether Preszler's claim is barred by the statute of limitations. Instead, we hold that the question of accrual should be submitted to the jury, as did our Supreme Court in *Walk*. 202 Ariz. at 319, ¶ 33. We cannot say, as a matter of law, at what point Preszler was sufficiently on notice that investigation into the source of her injury was necessary. That question must therefore be submitted to the jury at trial.

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CONCLUSION

¶13 For the foregoing reasons, we reverse the trial court's grant of summary judgment and remand for further proceedings. Preszler is entitled to her costs on compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court
FILED: AA