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Casenotes: Medical Malpractice — Limitation of Actions — Discovery Rule Denies Preliminary Investigation Period Because Knowledge of Facts Raising the Inquiry Satisfies Actual Notice Requirement. Lutheran Hospital v. Levy, 60 Md. App. 227, 482 A.2d 23 (1984), cert. denied, 302 Md. 288, 487 A.2d 292 (1985)

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CASENOTES

MEDICAL MALPRACTICE—LIMITATION OF ACTIONS—DISCOVERY RULE DENIES PRELIMINARY INVESTIGATION PERIOD BECAUSE KNOWLEDGE OF FACTS RAISING THE INQUIRY SATISFIES ACTUAL NOTICE REQUIREMENT. *Lutheran Hospital v. Levy*, 60 Md. App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985).

A patient experienced continuing pain and discomfort following treatment for a broken ankle at a hospital.[1] Three months after completing treatment at the hospital, the patient sought treatment for the ankle pain from another physician[2] but did not seek legal advice until a year later.[3] Patient's counsel requested x-rays and medical records from the hospital[4] but the x-rays that revealed the hospital's negligence[5] were not received until a second request was made two years later.[6] Finally, five years after the original treatment, the patient filed a complaint alleging medical malpractice.[7] The trial judge allowed a jury verdict of $258,000 in spite of the statute of limitations defense raised by the hospital, and the hospital appealed.[8] The court of special appeals reversed,[9] holding that

1. Lutheran Hosp. v. Levy, 60 Md. App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985). Ms. Levy was discharged from Lutheran Hospital in February 1974, after being told by the hospital physician to throw away her crutches, buy orthopedic shoes, and walk on the ankle. *Id.* at 233, 482 A.2d at 25.
2. In April, 1974, Dr. Weidmann at Mercy Hospital said that Ms. Levy's ankle "was all messed up," and asked her "[w]ho the hell told you to walk on that ankle?" *Id.*
3. *Id.* at 234, 482 A.2d at 26. Ms. Levy learned of the possibility of legal action through a chance conversation at a department store. She then discussed the claim with a Baltimore City lawyer who gave no advice but requested $50.00. It was not until April 22, 1975, that Ms. Levy actually retained a Baltimore County lawyer. *Id.*
4. *Id.* Ms. Levy's Baltimore County counsel requested records and x-rays on May 2, 1975.
5. *Id.* Dr. Decker, the patient's treating physician, examined the x-rays and rendered an opinion that the hospital improperly treated the patient. *Id.*
6. The medical records and x-ray reports were produced immediately but the x-ray films were not supplied until January 1977. *Id.*
7. *Id.* Because treatment by the hospital occurred prior to 1976, the Health Claims Arbitration provision of MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-01-09 (1984) was inapplicable. After July 1, 1976, all medical malpractice claims were required to be heard by an arbitration panel of a layman, a doctor, and a lawyer before suit could be brought in the circuit court.
8. 60 Md. App. at 231-32, 482 A.2d at 25. The hospital relied on the general limitations period, MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984), which provides that "[a] civil action at law shall be filed within three years from the date it accrues." The determination of the accrual date has been left to the courts. *See* Goldstein v. Potomac Elec. Power Co., 285 Md. 673, 684, 404 A.2d 1064, 1069 (1979). Because the hospital treated Ms. Levy prior to July 1, 1976, the hospital could not raise MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1984), which modified the limitations period for health care providers to "require claims be filed (1) within five years of the time the injury was committed or (2) within three years of the date when the injury was discovered, whichever is the shorter."
9. Lutheran Hosp. v. Levy, 60 Md. App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985).

the limitations period accrues from the date a person gains actual knowledge of circumstances that should have put a "person of ordinary prudence on inquiry."[10] The court thus barred the claim,[11] finding that the plaintiff gained actual knowledge of her injury more than three years before the action was brought.[12]

Statutes of limitations involving personal injury actions[13] developed in seventeenth century Britain to bar inconsequential suits from the king's court.[14] The American colonies utilized the statutes to protect against frivolous claims supported by lost evidence, faded memories, and dead witnesses.[15] Although the limitations period was disfavored by some courts[16] because the arbitrary period worked to deprive just claims, statutes of limitations gained popularity as an effective method of preventing stale actions.[17]

At first, Maryland followed the rule that the limitations period is strictly construed,[18] accruing from the time the tort is committed[19] un-

10. *Id.* at 233, 482 A.2d at 25. The court rejected the trial judge's holding that the statute of limitations did not begin to run until a reasonable investigatory period of six months from the time when Ms. Levy first became suspicious of the treatment. *Id.* at 237, 482 A.2d at 27.
11. *Id.* at 244, 482 A.2d at 31.
12. *Id.* at 238, 482 A.2d at 28. The court held the limitations period accrued from the date of the plaintiff's visit to Dr. Wiedmann at Mercy Hospital in 1974. The claim was not brought within three years of that date; therefore, the suit was barred by MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984). The court found the defendant hospital negligent in failing to produce the x-rays, but the plaintiff did not meet the burden of proving fraudulent intent, a necessary element of fraudulent concealment and equitable estoppel and the recognized exception to a statute of limitations defense. *Id.* at 241, 482 A.2d at 30. Further, because the plaintiff was slow in pursuing her claim, equity could not provide an extension. *Id.*
13. W. FERGUSON, THE STATUTES OF LIMITATIONS SAVING STATUTES 9-10 (1978). Prior to 1623, the maxim "actio personalis moritorium persona," a personal action dies with the person, was the only time limitation on bringing an action in tort. Statutes of limitation relating to real property, however, "may be traced to ancient Greece or beyond and through numerous societies that developed in the ancient world." *Id.* at 7.
14. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1178 (1950) (citing the Limitation Act of 1623, 21 Jac. I, c. 23 (1623)).
15. W. FERGUSON, *supra* note 13, at 47; *see also* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) ("The foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser . . . . A thing which you have enjoyed and used as your own for a long time whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man").
16. H. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY 7 (1916).
17. *Id.* at 9.
18. Ruff v. Bull, 7 H. & J. 11, 12 (1825).
19. Young v. Mackall, 3 Md. Ch. 301, 308-09 (1850) ("as soon as the cause of action accrued . . . the Statute of Limitations begins to run"); *see also* Hahn v. Claybrook, 130 Md. 178, 182, 100 A. 83, 84 (1917) ("the cause of action accrues and the statute begins to run from the time of the breach or neglect, not from the time when conse-

less the defendant's conduct caused the plaintiff to delay filing suit.[20] For example, if the defendant concealed from the plaintiff the elements necessary to provide notice of the cause of action, courts extended the limitations period until the plaintiff knew or should have known of the fraud.[21] Also, when a plaintiff, in good faith, relied upon unconscionable acts of the defendant, equity prevented the defendant from asserting limitations as a defense.[22]

In medical malpractice actions, the policy of protecting the physician from stale claims conflicts with the policy of shielding innocent parties from the loss of a claim because of the hidden nature of an injury.[23] The "time of the tort" rule[24] resulted in many negligently treated patients losing their cause of action before an injury[25] was prominent.[26] To

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quential damages result or become ascertained; for the cause of action is founded on the breach of duty").

20. *See* H. WOOD, *supra* note 16, at 1358.
21. The fraudulent concealment exception is codified in MD. CTS. & JUD. PROC. CODE ANN. § 5-203 (1984) which provides, "[if] a party is kept in ignorance of a cause of action 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." *See* Wear v. Skinner, 46 Md. 257, 267-68 (1877) (a party practicing fraud may not plead the statute); *see also* Herring v. Offutt, 266 Md. 593, 295 A.2d 876 (1972) (where confidential relationship exists, the confiding party's failure to discover the facts constituting fraud may be excused). The intent element of fraud is difficult to prove, *see* Consolidated Public Utilities Co. v. Baile, 152 Md. 371, 136 A. 825 (1927) (defendant's refusal to admit liability not fraudulent), and the plaintiff must also prove the acts constituting ordinary diligence, Piper v. Jenkins, 207 Md. 308, 113 A.2d 919 (1955).
22. 3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 804 (1941). Although Maryland recognizes the power of equity to estop a limitations defense, Johns Hopkins Hosp. v. Lehringer, 48 Md. App. 549, 562, 429 A.2d 538, 545, *cert. denied*, 290 Md. 717 (1981), no cases to date have been determined on that ground. *See, e.g.*, Nyitrai v. Bonis, 266 Md. 295, 292 A.2d 642 (1972) (settlement negotiations not sufficient to extend statutory period); Leonhart v. Atkinson, 265 Md. 219, 289 A.2d 1 (1972) (erroneous legal position of accountant not sufficient to delay accrual of malpractice limitations period); Pearre v. Grossnickle, 139 Md. 1, 114 A. 725 (1921) (party must be blameworthy of some unconscientious, inequitable, or fraudulent act of commission or omission).
23. *See* Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 464 A.2d 1020 (1983) (balancing competing interests in latent asbestosis disease case); *see also* Note, *Limitations in Professional Malpractice Actions*, 28 MD. L. REV. 47, 49 (1968) ("patients and clients ought to be protected from tortious acts which are often of such a nature that their discovery is improbable within the statutory period"). *See generally* Annot., 80 A.L.R.2d 368, 372 (1958 & Supp. 1985) (discussion of limitations in medical malpractice actions).
24. *See supra* note 19 and accompanying text.
25. *See* Furlong v. O'Hearne, 144 F. Supp. 266 (D. Md. 1956), which stated that "the word 'injury', as applied to a personal injury to a human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability." *Id.* at 270 (citation omitted.); *see also* H. MANN, MEDICAL ASSESSMENT OF INJURIES 11 (3d ed. 1979) ("injury to human body occurs when there is evidence of deterioration in function, either temporarily or permanently, as the result of one or more particular physical injuries, impositions of mental strain, or exposures to unsatisfactory occupational situations"). *See generally* 43A C.J.S. *Injury* § 2 (1955) (defines injury as "a

protect these victims, courts developed two rules that extended the statutory period.

The first rule adopted by courts seeking to avoid the harsh effect of the time of the tort rule was the "termination of treatment" rule.[27] This rule provided that each day the physician failed to remedy a prior negligent act, such as removing a sponge,[28] constituted a new breach that was actionable.[29] The rule was limited, however, because a patient who did not return to the negligent physician could not extend the limitations period.[30]

The second rule adopted by courts was the "discovery" rule. This rule provides the most protection to injured parties and delays the running of the statutory clock until the date the injury is discovered.[31] The Court of Appeals of Maryland, in *Hahn v. Claybrook*,[32] was the first in the nation to hold that a patient's cause of action accrued only after the injury is known to the patient.[33] This break with the time of the tort rule

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wrongful invasion of legal rights, and is not concerned with the hurt or damage resulting from such invasion").

26. *See, e.g.*, Pickett v. Aglinsky, 110 F.2d 628 (4th Cir. 1940) (limitation period accrues from the time physician negligently failed to remove sponge from patient's arm); Conklin v. Draper, 229 A.D. 227, 241 N.Y.S. 529, (limitations period accrued from the time pair of arterial forceps left in body following appendectomy), *aff'd mem.*, 254 N.Y. 620, 173 N.E. 892 (1930); Connor v. Schenck, 240 N.C. 794, 84 S.E.2d 175 (1954) (limitations period commenced from date broken ankle was improperly set).
27. *See* Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339, 340-43 (1962).
28. *See, e.g.*, Budoff v. Kessler, 284 A.D. 1049, 135 N.Y.S.2d 717 (1954) (dentist's drill imbedded in tooth); Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943) (needle left in body); Gillette v. Tucker, 67 Ohio St. 106, 65 N.E. 865 (1902) (physician left sponge in patient's stomach).
29. *See* Waldman v. Rohrbough, 241 Md. 137, 215 A.2d 825 (1966) (dictum); *see also*, Bowers v. Santee, 99 Ohio St. 361, 124 N.E. 238 (1919) (primary reason for rule is a preference not to harass doctors prematurely by patients who institute law suits merely to preserve their right of action). *But see* Hill v. Fitzgerald, 304 Md. 689, 700, 501 A.2d 27, 32 (1985) (termination of treatment rule was abrogated by statutory discovery rule of MD. CTS. & JUD. PROC. § 5-109).
30. *See* Strong v. Pontiac General Hosp., 117 Mich. App. 143, 151, 323 N.W.2d 629, 632 (1982) (treating physician's referral of patient to another physician in same professional corporation held sufficient to delay statute from tolling); *see also* DeGrazia v. Johnson, 105 Mich. App. 356, 360, 306 N.W.2d 512, 514 (1981) (telephone conversation held sufficient to extend statutory period).
31. *See* Oliver v. Kaiser Community Health Found., 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983) (Ohio replaced termination of treatment rule with discovery rule, stating, "in balancing the equities between doctor and patient, the burden placed on the doctor is much less than the greater injustice the patient would suffer."). *Id.* at 114, 449 N.E.2d at 441.
32. 130 Md. 179, 100 A. 83 (1917).
33. *Id.* The court found that the statutory period did not accrue until the time that the plaintiff complained to her husband of discoloration due to the zinc oxide prescription. *Id.* at 186, 100 A. at 87; *see* Note, Poffenberger v. Risser—*The Discovery Principle is the Rule, not the Exception*, 41 MD. L. REV. 451, 456-7 (1982) (citing Note, *The Statute of Limitations in Actions for Undiscovered Malpractice*, 12 WYO. L.J. 30, 34 (1957)).

was adopted by several jurisdictions,[34] but paradoxically was not applied again in a medical malpractice case by a Maryland court for nearly fifty years.[35] In *Waldman v. Rohrbaugh*,[36] the *Hahn* reasoning was resurrected when the Court of Appeals of Maryland held that a medical malpractice action accrues when the patient knows or should have known he has suffered injury or damage.[37] The determinative issue in a discovery rule jurisdiction therefore became what constituted notice of the injury or damage to a potential plaintiff.[38] Defendants argued that any trivial manifestation of the injury was sufficient notice,[39] while plaintiffs claimed that notice did not occur until the plaintiff had knowledge of all the essential elements of the cause of action.[40]

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34. *See* Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957); Greenock v. Rush Presbyterian St. Lukes Medical Center, 65 Ill. App. 3d 266, 382 N.E.2d 321 (1978); Thomas v. Lobranzo, 76 So. 2d 599 (La. App. 1954); Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959); McFarland v. Conally, 252 S.W.2d 486 (Tex. Ct. App. 1952). The discovery rule applied in medical malpractice cases is the majority rule. Annot., 80 A.L.R.2d 368, 368-414 (1958 & Supp. 1985).
35. The *Hahn* court probably created the confusion by citing as controlling Young v. Mackall, 3 Md. Ch. 301 (1850), a case that stood for the general time of the tort rule. *See Hahn*, 130 Md. 179, 182, 100 A. 83, 84 (1917). One court mistakenly followed this dicta to bar an action. *See* Picket v. Aglinsky, 110 F.2d 628 (4th Cir. 1940) (limitations period held to have accrued from date sponge negligently left in body). The discovery exception was used occasionally in nonmalpractice cases. *See* Callahan v. Clemens, 184 Md. 520, 41 A.2d 473 (1945) (faulty construction of retaining wall); *see also* Southern Md. Oil Co. v. Texas Co., 203 F. Supp. 449, 452 (D. Md. 1962) (stating that *Hahn* created a discovery exception); Jackson v. United States, 182 F. Supp. 907, 911 (D. Md. 1960) (cause of action accrued when patient noticed physical effects of needle left in body). *See generally* Note, Poffenberger v. Risser, *supra* note 33, at 458 (tracing history of limitations in Maryland).
36. 241 Md. 137, 215 A.2d 825 (1966).
37. *Id.* at 142, 215 A.2d at 826. The physician was sued for negligent treatment of an ankle. The court, after an extensive review of authorities, cited *Hahn* and allowed the claim in light of the discovery rule. The court, however, left the door open for the termination of treatment rule. *Id.* at 145, 215 A.2d at 830. Shortly thereafter, the discovery exception was applied in all professional malpractice cases in Maryland. *See, e.g.*, Leonhart v. Atkinson, 265 Md. 219, 289 A.2d 1 (1972) (discovery rule applies to all professional malpractice actions); Feldman v. Granger, 255 Md. 288, 257 A.2d 421 (1969) (accountants); Steelworkers Holding Co. v. Menefee, 255 Md. 440, 258 A.2d 177 (1969) (architects); Mumford v. Staton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1969) (attorneys).
38. *See* Poffenberger v. Risser, 46 Md. App. 600, 601, 421 A.2d 90, 91 (1980) ("It is generally known in Maryland that for the most part a statutory bar will fall after three years. The real problem is three years from when."), *rev'd*, 290 Md. 631, 431 A.2d 677 (1981).
39. *See, e.g.*, Feldman v. Granger, 255 Md. 288, 257 A.2d 421 (1969) (limitations for malpractice against accountant accrues when plaintiff receives notice of tax deficiency); Mattingly v. Hopkins, 254 Md. 88, 253 A.2d 904 (1969) (limitations period against civil engineering firm accrues when plaintiff notices discrepancy in the placing of boundary markers); *see also* Southern Md. Oil Co. v. Texas Co., 203 F. Supp. 449 (D. Md. 1962) (limitations period commences from the first time trivial injuries are noted).
40. *See, e.g.*, Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 666, 464 A.2d 1020, 1026-27 (1983) (limitations period for lung cancer arising out of exposure to asbes-

In *Poffenberger v. Risser*,[41] the Court of Appeals of Maryland extended the discovery rule to all civil actions and held that notice required actual knowledge.[42] According to *Poffenberger*, actual notice could be satisfied either by direct information communicated to the party, or the existence of circumstances that should lead a diligent party to the knowledge of a principal fact.[43]

The breadth of the *Poffenberger* decision[44] raised several issues concerning determination of actual notice. First, it was unclear whether the determination of what constituted "direct information communicated to a party" and "ordinary diligence" would be factual issues for the jury.[45] Second, it was unclear whether the plaintiff had a burden to show that the injury could not have been discovered within the requisite three year period, or whether it was the defendant's responsibility to put actual notice in issue when answering the complaint.[46] Third, when the *Pof-*

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tos accrues when plaintiff has a reasonable probability to discover damages); Goldstein v. Potomac Elec. Power Co., 285 Md. 673, 404 A.2d 1064 (1979) (limitations period for nuisance runs from the date the plaintiff could have proved the essential elements of his action, including damages); James V. Weisheit, 279 Md. 41, 44, 367 A.2d 482, 484 (1977) (citing W. B. & A. Elec. R.R. Co. v. Moss, 130 Md. 198, 205, 100 A. 86, 89 (1917)) (The test to be utilized in fixing the accrual date "is to ascertain the time when plaintiff could have first maintained his action to a successful result. The fact that he might have brought a premature or groundless action is immaterial.").

41. 290 Md. 631, 431 A.2d 677 (1981).
42. *Id.* at 637, 431 A.2d at 680. *Poffenberger* was a civil action over a boundary dispute between two neighbors. The defendant argued that the land records provided constructive knowledge of the defect to the plaintiff and because the defect was recorded for more than three years the claim should be barred. The court of special appeals affirmed the finding for defendant, refusing to extend the discovery rule beyond malpractice cases. *Poffenberger*, 46 Md. App. 600, 421 A.2d 90 (1980), *rev'd*, 290 Md. 631, 431 A.2d 677 (1981). The court of appeals reversed, extending the discovery rule to all civil actions because the policies of repose and administrative expediency underlying the statute were outweighed by injustice to the plaintiff. *Poffenberger*, 290 Md. at 636, 431 A.2d at 680.
43. *Id.* at 637, 431 A.2d at 681.
44. *Id.* at 639, 431 A.2d at 681. (Rodowsky, J. concurring) ("because every legal relationship in society gives rise to rights and obligations, and thereby potential litigation, it is impossible to foresee the types, volumes and merits of claims which will hereafter present the assertion that the claimant reasonably did not know of the facts compromising each of the traditionally constituent elements of the alleged wrong within three years after they occurred").
45. *See* O'Hara v. Kovens, 60 Md. App. 619, 484 A.2d 275 (1984), *rev'd*, 305 Md. 280, 301 A.2d 1313 (1986) (questions of fact on which a limitations defense will turn are to be decided by the jury). In *O'Hara*, the court of special appeals found that "limitations is still a matter for the judge rather than the jury even if the facts concerning discovery are disputed." *Id.* at 629, 484 A.2d at 280. The court of appeals reversed, holding that *Poffenberger* ruled that notice, if contraverted, was an ultimate fact going to the merits of the claim, and if controverted it could not be the proper subject of a summary judgment. *O'Hara*, 305 Md. at 295, 501 A.2d at 1321.
46. Finch v. Hughes Aircraft Co., 57 Md. App. 190, 241, 469 A.2d 867, 893 (1984) ("the burden is on the Plaintiffs to prove that they did not discover the alleged wrong more than three years before they filed suit and that this lack of discovery was not due to Plaintiffs' unreasonable failure to exercise ordinary diligence").

fenberger court stated that actual notice charged a party with notice of all facts that an investigation would reveal,[47] it was unclear whether an additional investigatory period to gain those facts was contemplated.[48] Moreover, it was uncertain whether *Poffenberger* threatened to negate the common law extension of fraudulent concealment[49] by its holding that the acts of the defendant were immaterial to the accrual date.[50]

These actual notice issues quickly rose to the appellate level, where the courts braced for the flood of post-*Poffenberger* appeals.[51] Resolving some of these issues,[52] the courts placed the burden of proving actual notice on the plaintiff,[53] and held that the trial judge had no authority to decide factual issues in a limitations case.[54]

Lutheran Hospital v. Levy[55] was the first case in which the court of special appeals applied *Poffenberger*'s actual notice analysis to a medical malpractice case, the type of case in which the discovery rule originated.[56] In *Lutheran Hospital*,[57] the court held that the statute of limitations begins to accrue from the date that a patient gains actual

47. *Poffenberger*, 290 Md. at 637, 431 A.2d at 681 (citing Feritta v. Bay Shore Dev. Corp., 252 Md. 393, 250 A.2d 69 (1969)).
48. *See* Lutheran Hosp. v. Levy, 60 Md. App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985); O'Hara v. Kovens, 60 Md. App. 619, 484 A.2d 275 (1984) (investigation of United States attorney into defendant's fraud did not allow an additional inquiry period), *rev'd*, 305 Md. 280, 501 A.2d 1313 (1986).
49. *See supra* note 21 and accompanying text.
50. *Poffenberger*, 290 Md. at 640, 431 A.2d at 682 (Rodowsky, J., concurring) ("The fact that the failure to discover the alleged wrong was due in no way to the defendant's fraud will seemingly be immaterial in many, if not most, civil actions at law."); *see also* Note, Poffenberger v. Risser, *supra* note 33, at 455 n.36 ("It seems likely . . . that the general application of the discovery rule will render § 5-203 immaterial in many, if not most, civil actions at law.").
51. Johnson v. Nadwodny, 55 Md. App. 227, 233, 461 A.2d 67, 70-71 (1983) ("[I]n light of the predictable influx of post-*Poffenberger* cases . . . we are faced with the deluge which appears to have commenced"). In Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 464 A.2d 1020 (1983), the court of appeals granted certiorari before argument at the court of special appeals and applied *Poffenberger* to extend the limitations period in asbestos-caused lung cancer cases until the date the lung cancer was discovered, despite the finding that the plaintiff was on notice of the related disease of asbestosis earlier. *Id.* at 464 A.2d at 1027.
52. *See* Lutheran Hosp. v. Levy, 60 Md. App. 227, 482 A.2d 23 (1984) (discovery rule does not contemplate additional inquiry investigation period), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985). Finch v. Hughes Aircraft Co., 57 Md. App. 190, 469 A.2d 867 (burden of proving ordinary diligence is on plaintiff), *cert. denied*, 300 Md. 88, 475 A.2d 120 (1984), *cert. denied*, 105 S. Ct. 1190 (1985); Johnson v. Nadwodny, 55 Md. App. 227, 461 A.2d 67 (1983) (test of ordinary diligence parallels the *Poffenberger* implied knowledge test).
53. Finch v. Hughes Aircraft Co., 57 Md. App. 190, 469 A.2d 867, *cert. denied*, 300 Md. 88, 475 A.2d 120 (1984), *cert. denied*, 105 S. Ct. 1190 (1985).
54. O'Hara v. Kovens, 305 Md. 280, 301 A.2d 1313 (1986); *see supra* note 45 and accompanying text.
55. 60 Md. App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985).
56. *See supra* text accompanying notes 31-33.
57. 60 Md. App. 227, 482 A.2d 23 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985).

knowledge of facts sufficient to raise an inquiry as to injury.[58] The trial court had determined that an additional six month inquiry period was available from the date when the plaintiff first became suspicious of the injurious treatment.[59] The *Lutheran* court rejected that analysis, finding that the facts that raised the suspicion were also sufficient to constitute actual notice.[60] The court further found that actual notice of the underlying facts of a cause of action, and not the legal conclusions drawn therefrom, begins the accrual of the limitations period.[61] Because the patient in *Lutheran Hospital* was aware of all the facts necessary to her claim in 1974, and could not demonstrate any inequitable conduct on the part of the defendant, her claim was barred.[62] The court recognized the harsh effect that this ruling had on the plaintiff, but concluded that the public policy of protecting interests in repose compelled the holding.[63]

The *Lutheran* decision provides the Maryland practitioner with insightful analysis on the determination of actual notice as defined by *Poffenberger*.[64] The *Poffenberger* court, by its general rejection of the time of the tort rule in civil actions, may have contemplated that the discovery rule would be liberally construed to prevent a strict interpretation of the limitation period from harming innocent plaintiffs.[65] As evidenced by the *Lutheran* decision, however, the actual notice element of the discovery rule can be seized by the defendant to dispose quickly of stale claims.

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58. *Id.* at 237, 482 A.2d at 27.
59. *Id.* at 235, 482 A.2d at 26.
60. *Id.* at 235-36, 482 A.2d at 26-27.
61. *Id.* at 239-40, 482 A.2d at 29.
62. *Id.* at 243-44, 482 A.2d at 31.
63. *Id.* The court quoted from Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945), which stated that "[S]tatutes of limitation find their justification in necessity and convenience rather than logic. They represent expedience, rather than principles." The court noted that Ms. Levy learned that "access to our system of justice is not always easy for the impecunious." *Lutheran Hosp.*, 60 Md. App. at 236, 482 A.2d at 27.
64. *See supra* note 43 and accompanying text.
65. *See supra* note 42; *see also* Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 667-68, 464 A.2d 1020, 1027 (1983) ("the partial infringement of the right to repose is far outweighed by the unfairness of barring a reasonably diligent person from recovery for a latent disease.").

    The practitioner should, however, be aware that the court of appeals in O'Hara v. Kovens, 60 Md. App. 619, 484 A.2d 275 (1984), *rev'd*, 305 Md. 280, 297-98, 503 A.2d 1313, 1321-22 (1986), distinguished between pre- and post-*Poffenberger* cases. 305 Md. at 297, 298, 503 A.2d at 1321-22. Because *Poffenberger* radically changed the limitations defense, counsel should examine pre-*Poffenberger* cases carefully to insure that they were not reversed. *See* O'Hara v. Kovens, 60 Md. App. 619, 484 A.2d 275 (1984), *rev'd*, 305 Md. 280, 503 A.2d 1313 (1986) (holding that the limitations period, if controverted, is a jury issue; this case reversed two pre-*Poffenberger* cases, Decker v. Fink, 47 Md. App. 202, 422 A.2d 389 (1980), *cert. denied*, 289 Md. 735 (1981) and May v. Bell, 46 Md. App. 364, 416 A.2d 289 (1980), both of which held that statutes of limitations are strictly legal questions); *see also*, Hill v. Fitzgerald, 304 Md. 689, 501 A.2d 27 (1985) (holding that in medical malpractice actions, the termination of treatment exception of Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 825 (1966) has been abrogated by the discovery rule).

The court's rejection of a preliminary investigatory period reflects judicial reluctance to expand the discovery rule.[66] Had the trial judge's finding that a preliminary investigatory period existed been upheld, it would have opened a "Pandora's box." A judicial determination of what constitutes a "reasonable investigation period" necessarily would depend on such varied factors as the capacity of the patient to investigate,[67] the injury to be investigated,[68] and other subjective determinations.[69] The resulting confusion as to the accrual dates of actions, because similar negligent acts resulting in similar injuries could have differing investigatory periods, would undermine a litigant's determination of liability.[70] The *Lutheran* holding that notice of facts raising inquiry equals actual notice avoids subjective determinations and promotes stability in accrual dates.[71]

The medical malpractice practitioner, however, should be wary of the court's assertion that the discovery rule places medical malpractice patients on a par with the "normal" automobile accident victim.[72] In a "normal" automobile accident case, the victim is on actual notice due to the event itself;[73] the accident contains all the facts necessary to support a cause of action. To the extent that the patient expressly learns of the prior negligent act,[74] the court is correct in its assertion that both classes of tort victims are treated equally. Medical malpractice injuries, however, often are not so readily apparent following negligent treatment,

66. This is in accord with the general rule that statutes of limitations are to be strictly construed. Decker v. Fink, 47 Md. App. 202, 422 A.2d 389 (1980).

67. *See, e.g.*, Seymour v. Lofgreen, 209 Kan. 72, 495 P.2d 969 (1972) (patient claimed that she was unable by reason of mental illness to ascertain the fact of her injury); Castrillo v. Stimulation Technology Inc., 393 So.2d 772 (La. Ct. App. 1980) (patient had only a 6th grade education and understood only limited English); Silverman v. Lathrop, 168 N.J. Super. 333, 403 A.2d 18 (1979) (patient had a master's degree and was research director of a drug manufacturer).

68. Marrapese v. Rhode Island, 749 F.2d 934 (1st Cir. 1984) (alleged carcinogenic amounts of benzidine applied to criminal suspect's hand four years earlier to test for presence of blood); Toal v. United States, 306 F. Supp. 1063 (D.C. Conn. 1969) (radioactive contrast material left in body eventually traveled to brain, causing arachroiditis).

69. Greenberg v. McCabe, 453 F. Supp. 765 (E.D. Pa. 1978) (drug induced mental impairment of patient by psychiatrist prevented patient from understanding causal relation of malpractice and her condition); Petri v. Smith, 307 Pa. Super. 261, 453 A.2d 342 (1982) (religious beliefs of patient were a reasonable ground for her failure to investigate).

70. *See*, Note, Poffenberger v. Risser, *supra* note 33, at 459 ("Our judicial system is based on the principle that like cases should be treated alike. Thus all plaintiffs arguably should receive the same consideration in statute of limitations cases.").

71. *Lutheran Hosp.*, 60 Md. App. at 238, 482 A.2d at 28.

72. *Id.*

73. *See, e.g.*, Creaser v. Owens, 267 Md. 238, 297 A.2d 235 (1972) (accident as a result of violation of "boulevard rule"); Brooks v. Fairman, 253 Md. 471, 252 A.2d 865 (1968) (rear-end collision); Board of County Comm'rs v. Dorcus, 247 Md. 251, 230 A.2d 656 (1967) (failure to drive on right half of the roadway).

74. *See infra* notes 83-87.

thus separating the cause—the treatment—from the effect—the injury.[75] Further, a medical patient is often told to expect some residual pain[76] and therefore may not attribute the pain to a wrong.[77] Despite a patient's subjective belief, actual notice may be implied if a reasonable person would have inquired as to the pain.[78] The court's analogy, therefore, is unsatisfactory because it fails to make the necessary distinction between express knowledge and implied actual notice.[79]

The *Lutheran* decision is a primer for Maryland practitioners on actual notice.[80] Fundamentally, counsel should remember *Lutheran* teaches that notice of the facts, and not the legal conclusions drawn therefrom, begins the statutory clock.[81] A claim that a party lacked actual notice because he had not sought legal advice will be unpersuasive. As the *Lutheran* court found, delaying the accrual date until the attorney or expert has rendered an opinion would extend unreasonably a defend-

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75. *See, e.g.*, Yoshizaki v. Hilo Hosp., 50 Haw. 150, 433 P.2d 220 (1967) (radiation treatment—radiation burns); Dobbins v. Clifford, 39 A.D.2d 1, 330 N.Y.S.2d 743 (1972) (spleen removal—damage to pancreas); Witherell v. Weimer, 77 Ill. App. 3d 582, 396 N.E.2d 268 (1979) (prescription of birth control pills — thrombophlebitis). *Cf.* Horig v. Johns-Manville Sales Corp., 284 Md. 70, 394 A.2d 299 (1978) (asbestos exposure—cancer).

76. *See* 2 LAWYERS MEDICAL CYCLOPEDIA § 9A33 (1979) (following a fractured bone, "a few weeks or months may be necessary to determine whether nerve function is returning").

77. Indeed, this may be one reason why Ms. Levy waited three months before consulting another physician, even though her ankle continued to hurt after the discharge from the hospital. *Lutheran Hosp.*, 60 Md. App. at 233, 482 A.2d at 25.

78. *Poffenberger*, 290 Md. at 636-37, 431 A.2d at 680 (citing Baltimore v. Whittington, 78 Md. 231, 27 A. 984 (1893)). In addition, unless reasonable men could not differ as to what constituted actual notice, the question will be for the trier of fact. O'Hara v. Kovens, 305 Md. 280, 301, 503 A.2d 1313, 1324 (1986).

79. Although the *Lutheran Hosp.* court strives to place both victims on an equal ground, this is contrary to the general policy in Maryland of restricting rights of medical malpractice claimants to bring an action. *See* MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1984) (five year mandatory period in which to bring action, or three years from date of discovery, whichever is shorter).

In Hill v. Fitzgerald, 304 Md. 689, 501 A.2d 27 (1985), the Court of Appeals of Maryland determined on a certified question from federal court that the restriction on medical malpractice claims did not violate equal protection. The court stated that "an imposition of a mandatory time bar represents, we think, a fair balance, permitting the state to further a legitimate purpose while affording protection to individuals who sustain injuries by reason of medical malpractice." *Id.* at 703, 501 A.2d at 34.

80. Actual notice was recently made a jury issue in O'Hara v. Kovens, 60 Md. App. 619, 484 A.2d 275 (1984), *rev'd*, 305 Md. 280, 503 A.2d 1313 (1986) (affirming intermediate court determination that mental disability of a plaintiff delayed the statutory period). In *O'Hara*, the court reversed cases that held that actual notice was a question of law. *See* May v. Bell, 46 Md. App. 364, 416 A.2d 289, *cert. denied*, 288 Md. 740 (1980); Jones v. Sugar, 18 Md. App. 99, 305 A.2d 219 (1973). The court determined that actual notice of the cause of action was a jury issue. *O'Hara*, 305 Md. at 299, 503 A.2d at 1323. Actual notice is a jury issue; therefore, practitioners should pay careful attention to factors discussed in *Lutheran Hosp.* that indicate when a person had "reason to know" of a claim.

81. *Luthern Hosp.*, 60 Md. App. at 239-40, 482 A.2d at 29.

ant's exposure to liability and would undermine the protected interests in repose.[82]

In determining whether a patient has actual notice, the *Lutheran* court gives critical importance to the statements made by the physician.[83] *Lutheran* suggests that any statement indicating the existence of malpractice will constitute actual notice if that statement would lead a reasonable person of ordinary diligence to investigate.[84] Although express statements of a physician regarding malpractice always raises "reasonable doubt,"[85] it is unclear whether the opinion of a person without medical expertise would be sufficient to raise this issue.[86] Hence, practitioners should be watchful for any express statements in a discovery case, especially at the deposition stage, because a revealing statement may be the basis for a summary judgment motion.[87]

The question of actual notice also may turn on the ability of the patient to discover the injury. Although the tort maxim "take the plaintiff as you find him"[88] usually disadvantages the defendant, in a discovery case it may benefit the defendant if a plaintiff, skilled in medicine, is held to a heightened duty to discover the injury.[89] Consequently, in questioning a plaintiff, either at an interview or through a discovery device, counsel should probe for information concerning education, employment, or other circumstances that indicate the plaintiff had "reason to know."[90]

The *Lutheran* decision also demonstrates the vestigial nature of the fraudulent concealment exception.[91] At common law, the concealment

82. *See* Note, Poffenberger v. Risser, *supra* note 33, at 459-60 (suggesting that additional cost of retaining records for a longer period of time, locating missing witnesses, and increasing insurance premiums result when the limitations period is extended).
83. *Lutheran Hosp.*, 60 Md. App. at 233, 482 A.2d at 25.
84. *Id.* at 237, 482 A.2d at 27 (citing *Poffenberger*, 290 Md. at 637-38, 431 A.2d at 677).
85. *Lutheran Hosp.*, 60 Md. App. at 233, 482 A.2d at 25. The court further reasoned that "[E]ven though the 'wrong' she thought then existed (being told to walk on the ankle) was not the 'wrong' ultimately established (improper casting), she believed a 'wrong' had occurred." *Id.*
86. O'Hara v. Kovens, 305 Md. 280, 302, 503 A.2d 1313, 1324 (1986) ("Notice is not limited to actual knowledge . . . . Nor does it mean discovery of proof which, if believed, would, in the opinion of counsel, take the case to the jury on the merits. It is not limited to admissible evidence.").
87. *Lutheran Hosp.*, 60 Md. App. at 236, 482 A.2d at 27. Ms. Levy revealed the statements during a deposition. For a summary of limitations tactics during depositions, see Cuker, *The Statute of Limitations in Medical Malpractice Cases: A Guide*, 51 PENN. BAR ASSOC. Q. 132, 136-37 (1980). Summary judgment in limitations cases are guided by the ordinary principle that there must be no dispute as to a material fact. O'Hara v. Kovens, 305 Md. 280, 304, 503 A.2d 1313, 1325 (1986).
88. *See* Peterson v. Goodyear Tire & Rubber Co., 254 Md. 137, 254 A.2d 198 (1969).
89. *Lutheran Hosp.*, 60 Md. App. at 236, 482 A.2d at 27; *see also* Jones v. Suger, 18 Md. App. 99, 305 A.2d 219 (1973) (registered nurse held to higher standard); Silverman v. Lathrop, 168 N.J. Super. 333, 403 A.2d 18 (1979) (patient who had a master's degree and was research director of a drug manufacturer was held to higher standard).
90. *See* Cuker, *supra* note 87, at 136.
91. Poffenberger v. Risser, 290 Md. 631, 640, 431 A.2d 677, 682 (1981) (Rodowsky, J.,

exception extended the limitations period in cases of fraud until the plaintiff gained actual knowledge of the fraud or injury.[92] The *Poffenberger* discovery rule focuses similarly on the point in time when the plaintiff gains actual knowledge of the injury.[93] The actions of the defendant are immaterial under the discovery rule, thus making the fraudulent concealment exception useless.[94] The legislature should therefore either eliminate the fraudulent concealment exception, or modify it to distinguish the exception from the rule.

To prevent the barring of claims similar to the one in *Lutheran*, the statute should be modified. In *Lutheran*, the court conceded that the x-rays the hospital failed to produce for over two years were of fundamental importance, yet the court refused to extend the statutory period because there was no proof that the failure to produce was an intentional act.[95] By requiring an intentional act, defendants have little incentive to provide efficient record keeping because the increased cost may be outweighed by the benefits of delaying a civil action.[96] The legislature should consider broadening the concealment exception to freeze the statutory period during the time the defendant's acts prejudice the plaintiff.[97] Under a broad prejudice test, defendants would not benefit from their

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concurring) ("that the failure to discover the alleged wrong was due in no way to the defendants fraud will seemingly be immaterial in many, if not most, civil actions at law"). An argument can be made that the fraudulent concealment exception will extend the time for filing a claim beyond the mandatory five year period of MD. CTS. & JUD. PROC. CODE ANN. § 5-109, but there is no reference in that section to any exceptions, nor have any cases been tried on that point. In Hill v. Fitzgerald, 304 Md. 689, 501 A.2d 27 (1985), the court of appeals found that § 5-109 "must be calculated in accordance with the literal language," and that the five year maximum period runs "without regard to whether the injury was reasonably discovered or not." *Id.* at 703, 501 A.2d at 34.

92. *See supra* notes 20-21 and accompanying text.
93. *Lutheran Hosp.*, 60 Md. App. at 242, 482 A.2d at 30.
94. Poffenberger v.Risser, 290 Md. 631, 640, 431 A.2d 677, 682 (1981) (Rodowsky, J., concurring).
95. *Lutheran Hosp.*, 60 Md. App. at 242, 482 A.2d at 30; *see also* Johns Hopkins Hosp. v. Lehninger, 48 Md. App. 549, 429 A.2d 538 (1981) (limitations defense can be barred only by a defendant's fraud, or conduct tantamount to a constructive fraud).
96. *Lutheran Hosp.*, 60 Md. App. at 243, 482 A.2d at 30.
97. Federal law provides a model to which the legislature should refer. As in Maryland, the Federal Employer's Liability Act (F.E.L.A.) provides that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56 (1948). Similarly, the F.E.L.A. has adopted the discovery rule. Emmons v. Southern Pacific Transp. Co., 701 F.2d 1112 (5th Cir. 1983). Unlike Maryland, however, F.E.L.A. courts allow an extension of time to file a claim absent a showing of actual fraud or fraudulent intent, so long as the misrepresentations or actions of the defendant justifiably misled the plaintiff. *See* Benson v. Milwaukee R.R., 353 F. Supp. 889, 890 (E.D. Wisc. 1973), Tillery v. Southern Ry. Co., 348 F. Supp. 9 (D.C. Tenn. 1971). At least one federal court has required the plaintiff to prove his diligence. Holifield v. Cities Service Tanker Corp., 421 F. Supp. 131 (delay of two years and eleven months held to bar a claim where the plaintiff's diligence was not proven), *aff'd*, 522 F.2d 367 (1976). In *Lutheran Hosp.*, because the plaintiff did not make a second request for the x-rays for nearly two years, any justifiable reliance she may have had on their nonproduc-

own negligence. The plaintiff, however, still would bear the burden of pleading the prejudicial act and proving how it kept him in ignorance of the cause of action.[98]

The discovery rule applied to medical malpractice actions is not a new concept in Maryland law.[99] The sweeping changes of *Poffenberger*, however, generated new issues concerning the determination of what constitutes actual notice.[100] In *Lutheran*, the court of special appeals provides practitioners with a comprehensive guide to determine actual notice under the *Poffenberger* discovery rule. As *Lutheran* demonstrates, the court is unwilling to engraft additional preliminary investigation periods to determine actual notice, even in cases of hardship, because that would undermine the policies of certainty and repose protected by the statute.[101] The *Lutheran* decision should be considered carefully by medical malpractice litigators because the application of the factors stressed, such as express statements, personal knowledge, perception of the injury, and ordinary diligence, will determine if the privilege to litigate is preserved or lost.

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tion would probably be outweighed by her lack of diligence. *See Luthern Hosp.*, 60 Md. App. at 243, 482 A.2d at 26.

98. Johns Hopkins Hosp. v. Lehninger, 48 Md. App. 549, 562, 429 A.2d 538, 545 (1981); *see also* Finch v. Hughes Aircraft Co., 57 Md. App. 190, 241-42, 469 A.2d 867, 893 (1984) (burden of proof in both discovery and fraudulent concealment is on the plaintiff).
99. *See supra* notes 31-37 and accompanying text.
100. *See supra* notes 38-50 and accompanying text.
101. *See supra* notes 66-71 and accompanying text.