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44 MAP 2017

IN THE SUPREME COURT OF PENNSYLVANIA

No. 44 MAP 2017

NANCY NICOLAOU and NICHOLAS NICOLAOU
Plaintiffs/Appellants

v.

JAMES J. MARTIN, M.D.; LOUISE A. DILLONSNYDER, CRNP; JEFFREY D. GOULD, M.D.; ST. LUKE'S HOSPITAL; ST. LUKE'S HOSPITAL AND HEALTH NETWORK; ST. LUKE'S HOSPITAL UNION STATION MEDICAL SURGICAL CLINIC d/b/a ST. LUKE'S SOUTHSIDE MEDICAL CENTER; ST. LUKE'S ORTHOPAEDIC SURGICAL GROUP; and NAZARETH FAMILY PRACTICE
Defendants/Appellees

Petition for Allowance of Appeal from the Order of Superior Court Entered December 22, 2016 at No. 1286 EDA 2014, Affirming the Order Entered February 24, 2014 in the Court of Common Pleas of Lehigh County at No. 2012-C-0518

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Tricia S. Lontz
Eckert Seamans Cherin & Mellott, LLC
I.D. No. 316052
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-7189

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INTEREST OF *AMICI CURIAE*

Amicus curiae, the American Medical Association (the "AMA"), is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Pennsylvania.

Amicus curiae the Pennsylvania Medical Society ("the Medical Society") is a Pennsylvania non-profit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. The Medical Society regularly participates as an *amicus curiae* before this Court in cases raising important health care issues, including issues that have the potential to adversely affect the quality of medical care. This is such a case.[1]

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1 Among other recently decided cases, the Medical Society has participated in *Shinal v. Toms*, 162 A.3d 429 (Pa. 2017) (informed consent); *Green v. Pennsylvania Hospital*, 123 A.3d 310 (Pa. 2015) (ability of nurse to provide expert testimony in medical professional liability case); *Seebold v. Prison Health Services,* 57 A.3d 1232 (Pa. 2012) (physician liability to non-patients); *Cooper Lankenau Hospital*, 51 A.3d 183 (Pa. 2012) (informed consent); and *Vicari v. Spiegel*, 989 A.2d 1277 (Pa. 2010); *Gbur v. Golio,* 963 A.2d 443 (Pa. 2009), and *Anderson v. McAfoos*, 57 A.3d 1141 ((Pa. 2012), (all involving expert witness qualifications in medical professional liability cases).

Amici's joint overriding concern is that the present rules and well settled understanding governing the statute of limitations and its exceptions are not diluted so that a plaintiff might dictate when an action accrues, thereby allowing plaintiffs to bring stale claims prejudicing the ability of defendants to provide a proper defense.

Both *amici* file this Brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

For those reasons, the Medical Society and the AMA participate in this action in support of Appellees.

STATEMENT OF THE QUESTIONS PRESENTED

The Questions Presented as set forth in the Order granting review are:

> 1. Did the Trial Court err in granting Respondents' Motion for Summary Judgment and holding that Petitioners' medical malpractice action was time barred under 42 Pa.C.S. § 5524(2) and did not meet the Discovery Rule Exception when Plaintiff did not, and was financially unable to, confirm Respondents' negligent misdiagnosis until final medical testing confirmed she had Lyme Disease on February 13, 2010?
>
> 2. Did the Trial Court abuse its discretion in granting Respondents' Motion for Summary Judgment when there was a genuine issue of material fact, which should be presented to a jury, as to whether Petitioners' medical malpractice action is tolled from the running of the Statute of Limitations under 42 Pa.C.S. § 5524(2) by the Discovery Rule?

Amici contend that the proper answers to both questions is "no."

STATEMENT OF JURISDICTION

This Court has jurisdiction under 42 Pa.C.S. § 742, having granted the Petition for Allowance of Appeal filed in this matter.

ORDERS IN QUESTION

Superior Court's Order, entered December 22, 2016 was:

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

The Order of the Court of Common Pleas of Lehigh County was:

ORDER

AND NOW this 24th day of February, 2014, upon consideration of Defendants James J. Martin, M.D., Jeffrey D. Gould, M.D., St. Luke's Hospital, St. Luke's Hospital & Health Network, St. Luke's Hospital Union Station Medical Surgical Clinic (d/b/a St. Luke's Southside Medical Center), St. Luke's Orthopaedic Surgical Group and Nazareth Family Practice's Motion for Summary Judgment filed with the Clerk of Judicial Records – Civil Division on December 6, 2013, Plaintiffs' response thereto, argument thereon, and for the reasons set forth in the accompanying Opinion, IT IS ORDERED that said Motion for Summary Judgment is GRANTED and Judgment is entered in favor of Defendants James J. Martin, M.D., Jeffrey D. Gould, M.D., St. Luke's Hospital, St. Luke's Hospital & Health Network, St. Luke's Hospital Union Station Medical Surgical Clinic (d/b/a St. Luke's Southside Medical Center), St. Luke's Orthopaedic Surgical Group and Nazareth Family Practice and against Plaintiffs in the above matter.

BY THE COURT:

CAROL K. McGINLEY, P.J.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amici adopt and incorporate by reference the Statement of Scope and Standard of Review as set forth in Appellees' Brief.

STATEMENT OF THE CASE

Appellees' Brief sets forth the facts of this case as well as its complicated procedural history. To further clarify matters, *Amici* provides the following narrative of the relevant factual history:

This is a medical professional liability action. In August 2001, Appellant – Mrs. Nicolaou – was bitten by a tick and sought medical treatment for symptoms which she related to the tick bite. (R.10b-14b.) Between 2001 and 2008, Mrs. Nicolaou treated with a number of medical professionals regarding her symptoms which continued to progress over the years. (R.10b-14b.)

Throughout this time, Lyme disease was regularly considered as a potential cause of her symptoms. She had Lyme disease tests, which were all negative, on the following dates:

- August 2001: Dr. Falatyn ordered a Lyme disease test, which was negative. (R.10b.)
- May 10, 2005: Dr. Martin ordered a Lyme disease test, which was negative. (R.10b-11b.)
- July 28, 2006: Nurse Dillonsnyder ordered a Lyme disease test, which was negative. (R.12b.)
- April 11, 2007: Dr. Gould ordered a Lyme disease test, which was negative. (R.12b.)

Mrs. Nicolaou also underwent an MRI on July 3, 2006, the results of which indicated that Mrs. Nicolaou could be suffering from either Multiple Sclerosis ("MS") or Lyme disease. (R.11b-12b.) Defendants diagnosed and treated Mrs. Nicolaou for MS. (R.11b-13b.) Sometime in 2007, Mrs. Nicolaou became concerned that Defendants incorrectly diagnosed her with MS. (R.11b-13b.) She believed that she was actually suffering from Lyme disease. (R.11b-13b.) Mrs. Nicolaou stopped treating with Defendants in 2008 but continued to tell various medical providers that she believed she had Lyme disease. (R.14b.)

On July 20, 2009, in order to investigate her suspicions that she was incorrectly diagnosed with MS, Mrs. Nicolaou sought treatment from Rita Rhoads ("Nurse Rhoads"), a nurse practitioner. (R.14b; 369b-371b.) Mrs. Nicolaou went to see Nurse Rhoads because she learned through internet research that Nurse Rhoads had a history of treating patients for Lyme disease who other medical professional had previously incorrectly diagnosed as suffering from MS. (R.14b; 369b-371b.)

When Mrs. Nicolaou first treated with Nurse Rhoads on July 20, 2009, Nurse Rhoads told Mrs. Nicolaou that she thought she had Lyme disease and began treating her for Lyme disease at that first visit. (R. 136b-137b.) Mrs. Nicolaou's testimony confirmed that Nurse Rhoads told her that she thought Mrs. Nicolaou had Lyme disease and that Nurse Rhoads prescribed antibiotics to treat Lyme disease. (R.109b.) At that visit, Nurse Rhoads also informed Mrs. Nicolaou

that a different test for Lyme disease than the prior test administered by Defendants, Igenex, was available. (R.138b.) Mrs. Nicolaou declined to take the test at that time. (R.138b.)

Mrs. Nicolaou was examined and treated by Nurse Rhoads on five separate occasions from July 20, 2009 through February 1, 2010. (R.124b-129b.) At each visit, Nurse Rhoads told Mrs. Nicolaou that she believed Mrs. Nicolaou was suffering from Lyme disease and that her prescribed treatment was designed to address Lyme disease. (R.136b.) Mrs. Nicolaou was also advised again that a test was available that Nurse Rhoads believed could confirm her diagnosis – the Igenex test. (R.138b, 145b.) Mrs. Nicolaou declined to take the test for months until February 1, 2010. (R.129b.) Following receipt of the results on February 13, 2010, Mrs. Nicolaou posted a message on her Facebook page that the Igenex test confirmed what she has been telling everyone for years – that she thought she had Lyme disease. (R.14b, 152b, 390-392b.)

Mrs. Nicolaou filed suit against Defendants/Appellees on February 10, 2012 in the Court of Common Pleas of Lehigh County. She filed Amended Complaints on April 19, 2012 and May 31, 2012. In their Answer, Defendants raised the statute of limitations as an affirmative defense.

Defendants filed a Motion for Summary Judgment December 6, 2013, arguing Mrs. Nicolaou's claims were barred by the two year statute of limitations because she did not institute suit until February 10, 2012 when the undisputed facts

made clear that Plaintiff knew or should have known between July 20, 2009 and February 1, 2010 that she had a cause of action for misdiagnosis. The Trial Court granted Defendant's Motion and entered judgment in favor of Defendants and against Plaintiffs on February 24, 2014. Plaintiffs appealed the trial court's decision.

On December 22, 2016, after a complicated procedural history, the Superior Court, en banc, issued its decision affirming the Court of Common Pleas of Lehigh County's decision to grant summary judgment in favor of defendants. The December 22, 2016 Superior Court Majority Opinion and Dissenting Opinion are attached hereto as Exhibit A. The majority opinion was authored by Judge Shogan and joined by President Judge Emeritus Ford Elliot, President Judge Emeritus Bender, Judge Panella, Judge Olson, and Judge Ott. Judge Lazarus issued a dissenting opinion which was joined by President Judge Gantman and Judge Bowes.

SUMMARY OF ARGUMENT

Applying well-settled principles governing application of both the statute of limitations and the discovery rule, the Superior Court properly concluded that Mrs. Nicolaou's claims were barred by the statute of limitations because, between July and September, 2009, she knew or reasonably should have known that she had a cause of action for misdiagnosis.

Despite these settled principles, Appellants seek to (1) add a notice requirement that includes a definitive diagnosis; (2) eliminate "could have known" from the standard governing the application of the discovery rule; and (3) replace the objective test with a subjective one. Appellants seek to do so because they cannot succeed on any other formulation. Acceptance of Appellants' position, however, would both traduce traditional application of the statute of limitations and create a heightened standard with regard to the application of the statute of limitations in a medical malpractice action that is simply unworkable.

Any contention that putative plaintiffs are put in a position of being constrained to file a lawsuit before they know whether their resulting symptoms are linked a physician's malpractice are unfounded. Moreover, establishing a heightened standard in medical malpractice actions would unfairly shift the balance in favor of plaintiffs, providing an unprecedented control over the limitations accrual period. Instead, the interests of both sides must be considered and the value of a definite statute of limitations – ensuring adequate time to bring

claims while avoiding stale claims – must not be diluted in the medical malpractice context.

ARGUMENT

Before turning to the specific arguments, *amici* believe it is helpful to first consider the basic principles that govern the discovery rule exception to the statute of limitations.

In Pennsylvania, the statute of limitations applicable to "[a]n action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another" is two years. 42 Pa.C.S. § 5524(2). A cause of action accrues "when the plaintiff could have first maintained the action to a successful conclusion." Fine v. Checcio, 870 A.2d 850, 857 (Pa. 2005). As such, "the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." Pocono International Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983). "Mistake, misunderstanding, or lack of knowledge in themselves do not toll the running of the statute." Fine, 870 A.2d at 857.

As a general rule, in a personal injury action, "this right arises when the injury is inflicted." Id. However, an exception to this general rule exists to toll the running of the statute of limitations in "cases in which the injury or its cause was neither known nor reasonably knowable." Id. "[T]he salient point giving rise to [the discovery rule's] application is the inability of the injured, despite the exercise of reasonable diligence, to know that he is injured and by what cause." Id. at 858 (citing Pocono International, 468 A.2d at 471).

It is well settled that Pennsylvania's formulation of the "discovery rule" "reflects a narrow approach 'to determining accrual for limitations purposes' and places a greater burden upon Pennsylvania plaintiffs vis-à-vis the discovery rule than most other jurisdictions." Gleason v. Borough of Moosic, 15 A.3d 479, 484 (Pa. 2011). In Gleason, this Court explained that "the commencement of the limitations period is grounded on 'inquiry notice' that is tied to 'actual or constructive knowledge of at least some form of significant harm and of a factual cause linked to another's conduct, without the necessity of notice of the full extent of the injury, the fact of actual negligence, or precise cause.'" Id. It is the point at which a putative plaintiff "should have been reasonably aware of his or her injury and its cause" that the statute of limitations period begins to run. Id. at 485. As such, the factual inquiry focuses on "whether, during the limitations period, the plaintiff was able, through the exercise of reasonable diligence, to know that he or she had been injured and by what cause." Id.

Reasonable diligence is not an absolute standard. Fine, 870 A.2d at 858. Instead, "there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful." Id. It is not what the Plaintiff knew but what the Plaintiff might have known if she used the means of information within her reach with the vigilance the law requires. Id.

These bedrock principles directly apply to this action and they should be maintained as the operative law in Pennsylvania. Applying these principles to the

facts of this case, the Superior Court properly found that Mrs. Nicolaou did not bring her action within the requisite time period.

A. Plaintiff Seeks a Formulation of the Discovery Rule That Requires a Definitive Diagnosis, Eliminates "Could Have Known" From the Standard, and Replaces an Objective Standard With a Subjective One.

Appellants seek fundamental changes in the formulation of the discovery rule that would: (1) impose a definitive diagnosis requirement; (2) eliminate "could have known" from the standard; and (3) replace the objective standard with a subjective one. To accept such a formulation would eliminate consideration of the interests of defendants from a rule that is designed to "balance the rights of diligent, injured plaintiffs against the interests of defendants in being free from stale claims, in further of salient legislative objectives." Gleason, 15 A.3d at 484. Moreover, it would create a heightened standard with regard to the application of the statute of limitations in a medical malpractice action that is simply unworkable.

1. A Definitive Diagnosis Requirement Before the Statute of Limitations Begins To Run in a Medical Malpractice Action Should Not Be Imposed.

Appellants assert a "confirmation" test should be required before the requisite knowledge is satisfied – this is not, nor should it be, the law. Appellants' faulty position is succinctly stated in the following except from their brief: "Until she received confirmation from Nurse Rhoads, Mrs. Nicolaou neither knew nor

should have known with certainty that she had Lyme Disease, and therefore lacked the requisite basis for a lawsuit." Appellants' Brief, at 15-16.

Requiring "confirmatory testing" is, in essence, requiring a definitive diagnosis. A requirement that a plaintiff secure a definitive diagnosis as a predicate act to have sufficient knowledge to commence the running of the statute of limitations is simply unworkable in a medical malpractice action – in many cases a "definitive diagnosis" is never had, in other cases no such "confirmatory testing" is available, and in others, whether the test is even confirmatory is disputed. Moreover, it would raise even more unanswerable questions such as: how many tests are needed, how many doctors must weigh in on the diagnosis, and what if there are warring confirmatory tests or medical opinions?

This Court properly declined to retool the discovery rule specific to medical malpractices actions in Wilson v. El-Daief, 964 A.2d 354 (Pa. 2009), and it should decline to do so again. To require a definitive diagnosis would create a statute of limitations standard for malpractice cases that does not apply to any other type of case. Such a formulation not only deviates from well settled discovery rule principles but also defeats the purpose of the statute of limitations and gives plaintiff the means to control the limitations period. As such, a reformulation of the discovery rule in medical malpractice cases would eliminate consideration of the defendant's interests and create a rule designed solely to benefit plaintiffs.

Such a reformulation is unnecessary because the discovery rule's current formulation adequately balances both parties' interests. It is specifically designed to account for those circumstances where it may be difficult to ascertain that treatment has caused injury or may be causing injury.

The statute of limitations period specifically provides a putative plaintiff time to address any concerns regarding their ability to prosecute their claim. Specifically, the statute of limitations provides two years for the plaintiff to select and consult with a lawyer, investigate, obtain additional medical opinions or testing they subjectively deem relevant, initiate a suit, engage in discovery, and join additional parties, among other things. DeMartino v. Albert Einstein Med. Ctr., 460 A.2d 295, 300 (Pa. Super. 1983). "It is during this two year period that the medical malpractice plaintiff, like any other plaintiff pursuing any other legal claim, makes the decision whether or not to pursue any legal rights he may possess." Id.

A definitive diagnosis requirement in a medical malpractice action would allow the plaintiff time to do all of these things and receive all of the assurances she subjectively believes she needs before the limitations period even starts to run. Then, once plaintiff subjectively feels she gathered all the information she needs, she declares her limitations period begins, and gets two additional years to sit on her claims and wait for them to become stale to the disadvantage of the defendant. Such a result is simply inequitable. Moreover, it would create a situation where a

defendant could never get summary judgment on a statute of limitations defense in a malpractice case. Indeed, requiring a definitive diagnosis before the statute of limitations begins to run defeats the purpose of the statute of limitations period.

Instead, the Rules of Civil Procedure provide adequate measures to prevent a plaintiff from being deprived of her day in court. Moreover, these Rules do not contemplate that a plaintiff have a definitive diagnosis in order to bring a claim. Specifically, the Rules permit a plaintiff to initiate an action by writ of summons. Pa.R.C.P. No. 1007(1). As such, the plaintiff need not, at the commencement of the lawsuit, have "notice of the full extent of the injury, the fact of actual negligence, or precise cause." Gleason, 15 A.3d at 484. As has long been understood, the putative plaintiff need only have "actual or constructive knowledge of at least some form of significant harm and of a factual cause linked to another's conduct...." Id.

The Certificate of Merit rules in medical malpractice actions do not change this calculus. An action may still be commenced via Writ of Summons, pre-Complaint discovery remains available, and multiple extensions to the Certificate of Merit are allowed. See Pa.R.C.P. Nos. 1007(1), 1042.3 (permitting a plaintiff to file an action by writ of summons, and tying the certificates of merit requirement in a professional liability action to the filing of a complaint); McNeil v. Jordan, 894 A.2d 1260, 1278-79 (Pa. 2006) (discussing the availability of pre-complaint discovery); Pa.R.C.P. Nos. 1042.3(d), Note (reflecting the availability of multiple

extensions to the period allowed for the filing of a certificate of merit); 1042.5, Note (noting that courts are authorized to permit discovery for a licensed professional to make a determination as to whether a defendant deviated from accepted professional standards).

Importantly, the Certificate of Merit requirements – while designed to assist in minimizing frivolous claims of professional negligence – do not require a definitive diagnosis or statement to a reasonable degree of medical certainty in order to initiate a suit. Under the Certificate of Merit requirements an "appropriate licensed professional" need only supply "a written statement that there exists a **reasonable probability**" that the care "fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm." Pa.R.C.P. No. 1042.3.

As such, any suggestion by Mrs. Nicolaou that no doctor would provide a Certificate of Merit without an actual diagnosis is simply unsupportable. An appropriate licensed professional is not required to hold an opinion – to a reasonable degree of medical certainty – that the care was negligent to sign a Certificate of Merit. A plaintiff need only secure such an opinion to get her case in front of a jury.[2]

[2] This level of certainty in a medical malpractice case is typically secured during the trial preparatory phase, after the case has been commenced, not before the statute of limitations begins to run.

Furthermore, Appellants' assertion that until Mrs. Nicolaou received "confirmation" she "lacked the requisite basis for a lawsuit" confuses the burden of proof necessary to succeed on a claim at trial and the right to institute a cause of action. Nothing in the right to institute a cause of action requires that alleged negligence be confirmed – or proven – as Appellants herein posit. In fact, "confirmation" of negligence in a medical malpractice action generally occurs only after a battle of experts at trial and a resulting jury verdict.

A requirement under the discovery rule that the accrual period does not begin until a putative plaintiff secures a definitive diagnosis brings back longstanding rejected principle under the discovery rule: that the limitation period is not tolled "until such time as the putative malpractice plaintiff has knowledge that malpractice has been committed and as a result, legal rights have vested." DeMartino, 460 A.2d at 298. "Postponing the commencement of the limitations period until he has actually done so [acquired knowledge of the negligence] would nullify the justifiable rationale of the statute of limitations and permit the prosecution of stale claims." Id. at 299.

Moreover, in first enacting the Certificate of Merit requirements in 1996, the General Assembly "did not undertake to enlarge the established approach to the accrual of causes of action in Pennsylvania for purposes of the discovery rule. Wilson, 964 A.2d at 368. The Legislature "left undisturbed the long-standing discovery rule tying the commencement of the limitations period to actual or

imputed knowledge of injury and cause." Id. As such, it can be inferred that the Legislature believed that the discovery rule's current formulation adequately balances the interests of both parties and this Court should not substitute its judgment for that of the Legislature. See id.

Rather, as has long been the case, once a putative plaintiff is aware or should reasonably have become aware that medical treatment is causing her personal injury, the statute begins to run and the putative plaintiff is required to begin doing those things for which the statute of limitations specifically provides time. Any concern that putative plaintiffs are put in a position of being constrained to file a lawsuit before they know whether their resulting symptoms are linked a physician's malpractice are unfounded under the discovery rule's current formulation.

2. The Discovery Rule Should Maintain the "Could Have Known" Prong in the Standard.

Looking back at the excerpt from Appellants' Brief—"Until she received confirmation from Nurse Rhoads, Mrs. Nicolaou neither knew nor should have known with certainty that she had Lyme Disease, and therefore lacked the requisite basis for a lawsuit" (Appellants' Brief, at 15-16)—it is also apparent that Appellants seek to eliminate "could have known" from the discovery rule standard. She seeks a heightened notice standard under the discovery rule because she cannot succeed under the law's current formulation. Through Mrs. Nicolaou's

statement, however, she admits what is already established by the facts – that she not only should have known that she had a cause of action for misdiagnosis prior to receiving the Igenex test but that she knew she had a cause of action for misdiagnosis prior to receiving the test.

First, Mrs. Nicolaou alleges that on February 13, 2010, the date she received the test results, "she received confirmation from Nurse Rhoads." Black's Law Dictionary offers the following relevant definitions:

> Confirmation: 1. The act of giving formal approval; the ratification or strengthening of an earlier act. 2. The act of verifying or corroborating; evidence that verifies or corroborates.
>
> Confirm: 1. To give formal approval to. 2. To verify or corroborate. 3. To make firm or certain.

Black's Law Dictionary (10th Ed. 2014). Essentially, Appellants concede that Mrs. Nicolaou "knew" she had a cause of action for misdiagnosis and this test merely "confirmed"—verified, corroborated, and made certain—that knowledge.

Mrs. Nicolaou's Facebook post operates merely as further confirmation of what she already knew. At a minimum, that Appellants could have or should have known that Mrs. Nicolaou had a cause of action for misdiagnosis before this "confirmatory test" cannot be reasonably disputed under the facts of this case and Appellants' own admissions. Indeed, it was this "confirmation" that Appellants contend established a definitive diagnosis.

Second, Appellants inject "with certainty" into the could/should have known prong. Indeed, "could have known with certainty" is not the applicable law and brings us back to a definitive diagnosis requirement. Appellants' formulation of the discovery rule goes well beyond the notice requirements established under the law. Moreover, on Appellants' formulation, requiring certainty eliminates any need for a plaintiff to exercise reasonable diligence and allows plaintiffs to dictate when certainty can be had by deciding when or when not to proceed with testing they subjectively believe will provide them with such certainty.

Instead, it has long been held that "[i]t is the duty of the party asserting a cause of action to use all reasonable diligence to properly inform him-or herself of the facts and circumstances upon which the right of recovery is based and to institute suit within the prescribed period." Gleason, 15 A.3d at 484 (citing Hayward v. Medical Center of Beaver County, 608 A.2d 1040 (Pa. 1992). This diligence does not require a definitive diagnosis or the heightened degree of certainty posited by Appellants. As made clear by this Court in Gleason, notice under the discovery rule does not require "the necessity of notice of the full extent of the injury, the fact of actual negligence, or precise cause." Gleason, 15 A.3d at 484. Acceptance of Appellants' position would bring back rejected principles and eliminate "could have known" from the discovery rule standard.

3. The Discovery Rule's Objective Standard Should Not Be Replaced With a Subjective Standard.

Appellants seek a formulation of the discovery rule that replaces the flexible objective standard with a purely subjective one. Appellants assert: "Under Pennsylvania law, then, whether a person is 'able' to ascertain an injury is a subjective inquiry dependent upon that particular person's situation, including, *inter alia*, their financial ability to obtain treatment." Appellants' Brief, at 17-18. This is an incorrect statement of the law. Moreover, Appellants' retrospective attempt to rely on individual financial circumstances is not only misguided[3] but also eliminates all objectivity from the test.

Instead, it is well settled that reasonable diligence in an objective test. Fine, 870 A.2d at 858. This objective test is sufficiently flexible "to take into account the difference[s] between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question." Id. Despite this flexibility, the test remains objective and "a party's actions are evaluated to determine whether he exhibited 'those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interest and the interest of others.'" Id.

[3] The Superior Court properly concluded that there was nothing in the record confirming that Mrs. Nicolaou was unable to pay for the test only that she chose not to do so. Exhibit A, at 20 n.8. It was Appellants' burden to establish such facts.

Substitution of this objective test with a purely subjective one as proffered by Appellants will give plaintiffs unprecedented control to dictate when a statute of limitations period begins to run. Appellants insists on such a formulation of the discovery rule because they must in order to recover. In essence, they seek a fundamental change in the law simply to create a context for their case.

The undisputed facts demonstrate that reasonable minds could not differ that Mrs. Nicolaou not only should have known – but knew – that she had a cause of action for misdiagnosis when she first started treating with Nurse Rhoads on July 20, 2009. Mrs. Nicolaou's formulation of the discovery rule which eliminates all objectivity from the standard must be rejected because it gives unprecedented control over the limitations accrual period to plaintiffs. Moreover, Appellants' formulation defeats the entire purpose underlying the statute of limitations period itself.

B. Applying Settled Principles to the Undisputed Facts, the Superior Court Properly Concluded that Reasonable Minds Could Not Differ That Appellants' Claims Were Barred by the Statute of Limitations.

On a motion for summary judgment under the discovery rule, the jury is ordinarily to decide the issue "[s]ince this question involves a factual determination as to whether a party was able, in the exercise of reasonable diligence, to know of his injury and its cause...." Fine, 870 A.2d at 858. "Where, however, reasonable minds would not differ in finding that a party knew or should have known on the

exercise of reasonable diligence of his injury and its cause, the court determines that the discovery rule does not apply as a matter of law." Gleason, 15 A.3d at 485 (citing Fine, 870 A.2d at 858-59)).

Furthermore, while the evidence is viewed in the light most favorable to the non-moving party, the Appellants bore the burden of proof here regarding whether the discovery rule applied to toll the statute of limitations. Gleason, 15 A.3d at 485 ("[T]he party asserting application of the discovery rule bears the burden of proof...")[4] "Pennsylvania courts have not hesitated, where appropriate, to find as a matter of law that a party has not used reasonable diligence in ascertaining his or her injury and its cause, thus barring the party from asserting his or her claim under the discovery rule." Id. at 485-86 (citing Cochran v. GAF Corp., 666 A.2d 245, 248 (Pa. 1995)).

Here, the Superior Court, reviewing the record in the light most favorable to the Nicolaous, properly found that "Mrs. Nicolaou knew, or reasonably should have known, between July and September, 2009, that her long-standing health problems may have been caused by Appellees' failure to diagnose and treat her

[4] Appellants erroneously assert the Defendants' bear the burden of proof in this matter. While a Motion for Summary Judgment is viewed in the light most favorable to the non-moving party, this principle does not shift the burden of proof to Defendants. Instead, the burden of proof remains on Plaintiffs who are asserting the application of the Discovery Rule and seek to use its benefits in light of their failure to bring their claim within the two year statute of limitations period. Specifically, Plaintiffs must establish a factual dispute as to when Plaintiff knew or should have known that she had a cause of action for misdiagnosis – Plaintiffs have not done so.

[L]yme disease and therefore, such failure could have resulted from Appellees' negligence." Exhibit A, at 21. The undisputed relevant facts are as follows:

- On July 20, 2009, Mrs. Nicolaou began treating with Nurse Rhoads *because* she suspected that she had Lyme disease *and because* Nurse Rhoads had a reputation for treating individuals who claimed they had been misdiagnosed by other medical professionals as having MS instead of Lyme disease. (R. 369b to 371b).

- Between July 20, 2009 and February 1, 2010, Nurse Rhoads told Mrs. Nicolaou on as many as five separate occasions that: (i) Nurse Rhoads thought Mrs. Nicolaou was suffering from Lyme disease; (ii) Nurse Rhoads was treating Mrs. Nicolaou for Lyme disease by prescribing antibiotics; and (iii) the Lyme disease diagnosis should be confirmed through a test offered by Igenex, which Mrs. Nicolaou declined to undergo for months. (R. 124b to 129b; 136b to 137b, 140b to 141b, 145b to 375b, 379b to 381b, 383b to 389b).

All that was required for the statute of limitations to start running was that Mrs. Nicolaou be "awakened" to inquire. Fine, 870 A.2d at 858. This awakening does not, and has never, required "the necessity of notice of the full extent of the injury, the fact of actual negligence, or precise cause." Gleason, 15 A.3d at 484.

There can be no doubt, on these facts, that reasonable minds could not differ that Mrs. Nicolaou had been awakened, at a minimum, by her first visit with Nurse Rhoads and certainly in the following visits with sufficient notice that she had a cause of action for misdiagnosis. Fine, 870 A.2d at 858. In fact, Mrs. Nicolaou selected Nurse Rhoads in the first instance for the precise purpose of confirming her suspicions that she had a cause of action for misdiagnosis. Those suspicions

were sufficiently confirmed at that first visit when Nurse Rhoads diagnosed Lyme disease and began treatment for Lyme disease. Exhibit A, at 16-17, 20. Nothing in the principles underlying the discovery rule required Mrs. Nicolaou to objectively "prove" her suspicions before the statute of limitations accrued.

Here, it is undeniably clear that Mrs. Nicolaou knew or had reason to know that she was allegedly injured and by what cause on July 20, 2009. Unlike the plaintiff in Gleason, who could not have known the ailments were mold related because "toxic mold" was an unknown peril – it had not even entered the nation's lexicon – and no medical personnel or layperson had ever mentioned it, see Gleason, 15 A.3d at 486-87, Mrs. Nicolaou considered Lyme disease to be a possible diagnosis for many years.

From the very beginning of her treatment in 2001 she believed her maladies were related to a tick bite, she took multiple Lyme disease tests, and received an MRI in 2006 that included Lyme disease as a differential diagnosis. As such, while plaintiffs in Gleason had no reason to make the connection as there was nothing in the record suggesting they "should have been awakened to inquire sooner" the record here is replete with empirical information that Mrs. Nicolaou should have been "awakened to inquire," and did in fact inquire, at the July 20, 2009 visit with Nurse Rhoads. See id.; DeMartino, 460 A.2d at 303. Indeed, her suspicion that she had been misdiagnosed was her entire purpose for seeking treatment on July 20, 2009.

While at some time prior to July 20, 2009, Mrs. Nicolaou was in a position similar to the plaintiffs in Fine where confusion regarding symptoms remained, or Wilson where the physician was unwilling or unable to recognize injury or cause, as of July 20, 2009, Mrs. Nicolaou moved well past such plaintiffs in terms of notice. By July 20, 2009, Mrs. Nicolaou was no longer in a position where she could be "charged with knowledge greater than that which was communicated to her by multiple medical professional involved in her treatment and diagnosis." Wilson, 964 A.2d at 365.

Instead, by this point, Mrs. Nicoloau went to a specific health care provider who specialized in the precise type of misdiagnosis that she suspected she was the victim of and began treatment for the condition for which she believed she was misdiagnosed. Mrs. Nicolaou possessed a level of knowledge and understanding of her potential cause of action that started the running of the statute of limitations. A failure to recognize the degree of knowledge that Mrs. Nicolaou possessed at that July 20, 2009 visit creates a situation where plaintiffs subjectively dictate when a statute of limitations begins to run. Plaintiff cannot be permitted to wait until she is ready to "confirm" what she already believes is the case. To hold otherwise requires a definitive diagnosis and eliminates "should have known" from the equation.

As stated by the Superior Court: "It is without question, then, that as early as July 20, 2009, Ms. Rhoads informed Mrs. Nicolaou that Ms. Rhoads believed Mrs.

Nicolaou had [L]yme disease, Ms. Rhoads, in fact, treated Mrs. Nicolaou for [L]yme disease, the treatment caused 'amazing' improvement in Mrs. Nicolaou's symptoms, and Mrs. Nicolaou knew of the availability of an objective test that could confirm Ms. Rhoads' clinical diagnosis." Exhibit A, at 20. As such, the Superior Court properly held that "[r]easonable minds would not differ that Mrs. Nicolaou should have known as early as July 2009, and **could have proven** at that time, that she suffered from [L]yme disease." Exhibit A, at 21.

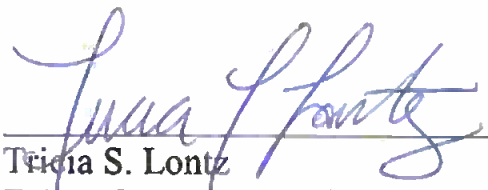
Mrs. Nicolaou's desire to confirm the diagnosis with a "confirmatory test" of her choice is irrelevant and not a factor that should be weighed in determining when the statute of limitations began. "Proof" of diagnosis has never been required to start the statute of limitations, nor could it since "proof" is rarely ever had in a medical malpractice action. In any event, the facts are clear that Mrs. Nicolaou had notice of a cause of action for misdiagnosis and any delay in securing her "proof" was unreasonable as set forth by Appellees in their briefing. Instead, the focus must remain on "the malpractice plaintiff's conduct in terms of what he *should have known* at a particular time by following a course of reasonable diligence. It is a general principle in our law that if a party has the means of discovery within his power but neglects to use them, his claim will still be barred." DeMartino, 460 A.2d at 303.

Mrs. Nicolaou's own actions made clear that she had been supplied within enough information so as to be able to pursue the possibility that she had been the

victim of malpractice. Her desire to "confirm" what she already knew should not slow the tolling of the limitations period. To hold otherwise eliminates the purposes of the limitations period and merely turns into a period where plaintiff is permitted to sit on her rights and allow claims to become stale to the detriment of the defendants.

CONCLUSION

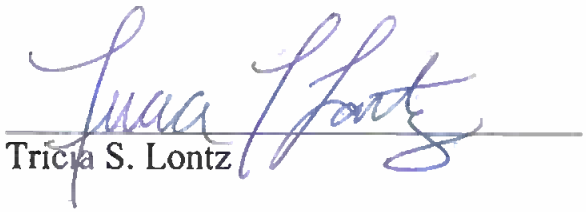
Based on the foregoing arguments, *amicus curiae* the American Medical Association and the Pennsylvania Medical Society respectfully request that the Court affirm the decision of the Superior Court and hold that Appellants' claims are barred by the statute of limitations because Mrs. Nicolaou knew, or reasonably should have known, between July and September, 2009, that she had a cause of action for misdiagnosis.



Tricia S. Lontz
Eckert Seamans Cherin & Mellott, LLC
I.D. No. 316052
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-7189

CERTIFICATION AS TO LENGTH OF BRIEF

I hereby certify that the Brief, as calculated by the word processing system used to prepare the Brief, is 5813 words in length and thus complies with Pennsylvania Rule of Appellate Procedure No. 531(b)(1)(i).



Tricia S. Lontz

EXHIBIT A

OPINION OF SUPERIOR COURT

J-E02001-16

2016 PA Super 300

NANCY NICOLAOU AND NICHOLAS NICOLAOU, Appellants v. JAMES J. MARTIN, M.D., LOUISE A. DILLONSYNDER, CRNP, JEFFREY D. GOULD, M.D., ST. LUKE'S HOSPITAL, ST. LUKE'S HOSPITAL AND HEALTH NETWORK, ST. LUKE'S HOSPITAL UNION STATION MEDICAL SURGICAL CLINIC D/B/A ST. LUKE'S SOUTHSIDE MEDICAL CENTER, ST. LUKE'S ORTHOPAEDIC SURGICAL GROUP, AND NAZARETH FAMILY PRACTICE, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1286 EDA 2014

Appeal from the Order Entered February 24, 2014
In the Court of Common Pleas of Lehigh County
Civil Division at No(s): 2012-C-0518

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., BENDER, P.J.E., BOWES, PANELLA, SHOGAN, LAZARUS, OLSON, and OTT, JJ.

OPINION BY SHOGAN, J.: **FILED DECEMBER 22, 2016**

Appellants, Nancy and Nicholas Nicolaou ("the Nicolaous"), appeal from the February 24, 2014 order granting summary judgment in this medical malpractice action in favor of Appellees, James J. Martin, M.D.; Jeffrey D. Gould, M.D.; St. Luke's Hospital; St. Luke's Hospital and Health Network; St. Luke's Hospital Union Station Medical Surgical Clinic, d/b/a St.

Luke's Southside Medical Center; St. Luke's Orthopaedic Surgical Group; and Nazareth Family Practice. For the following reasons, we affirm.

The trial court summarized the factual and initial procedural history of this case as follows:

> The facts of the case provide that sometime in 2001, Nancy Nicolaou was bitten by a tick on her left ankle. Beginning in August, 2001, Mrs. Nicolaou began seeking medical treatment because she was experiencing a number of maladies that she associated with the tick bite. At first, Mrs. Nicolaou developed a rash near the sight [sic] of the bite and experienced numbness and tingling in her left toe, fatigue, and lower back pain. Over time, these symptoms expanded to include: incontinence, total loss of bladder control; tingling and numbness throughout her body, including both legs and feet; difficulty walking; and confinement in a wheelchair.
>
> Each of the [Appellees] acted as Mrs. Nicolaou's treating physician at different times between 2001 and 2008. Mrs. Nicolaou was a patient of dismissed co-defendant Dr. Stephen P. Falatyn, an alleged agent of [Appellees] St. Luke's Hospital and St. Luke's Health Network, in August of 2001. Mrs. Nicolaou was a patient of [Appellee] Dr. James J. Martin, an alleged employee of [Appellee] Nazareth Family Practice, from approximately June 14, 2002 through June 14, 2005. Mrs. Nicolaou was a patient of co-defendant Louise A. Dillonsnyder, CRNP,[1] an alleged agent of [Appellees] St. Luke's Hospital, St. Luke's Health & Health Network, and St. Luke's Hospital Union Station Medical Surgical Clinic, from May 27, 2005 through December 20, 2006. Mrs. Nicolaou was a patient of [Appellee] Dr. Jeffrey D. Gould, an alleged agent of [Appellees] St. Luke's Hospital and St. Luke's Hospital & Health Network, in 2007 and 2008.

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[1] Louise Dillonsnyder was not included in the motion for summary judgment that is the subject of this appeal, and she subsequently was dismissed as a defendant. As such, she is not a party to this appeal.

During Mrs. Nicolaou's treatment, Dr. Falatyn and [Appellees] Martin, Dillonsnyder, and Gould all ordered a battery of tests, including four Lyme Disease tests; none of the tests produced a positive result for Lyme Disease. Consequently the [doctors] did not diagnose Mrs. Nicolaou with or treat her for Lyme Disease.

On July 3, 2006, [Appellee] Nurse Dillonsnyder ordered an MRI of the brain. The results of the MRI suggested that Mrs. Nicolaou could be suffering from either multiple sclerosis (MS) or Lyme Disease. [The doctors] diagnosed Mrs. Nicolaou with and treated her for MS. Dr. Gould told Mrs. Nicolaou that she did not have Lyme Disease and he continued to believe that she did not have Lyme Disease. Mrs. Nicolaou stopped treating with the [Appellees] sometime in 2008.

Sometime in 2007, Mrs. Nicolaou suspected that [Appellees] incorrectly diagnosed her with MS and that she was actually suffering from Lyme Disease due to the symptoms she experienced near the 2001 tick bite. As a result, Mrs. Nicolaou sought the help of Nurse Practitioner Rita Rhoads after Mrs. Nicolaou learned through research on the internet that Nurse Rhoads had a history of treating patients for Lyme Disease whom other medical professionals had previously incorrectly diagnosed as suffering from MS. Mrs. Nicolaou met with and was examined by Nurse Rhoads on five occasions between July 20, 2009 and February 1, 2010, specifically: July 20, 2009; September 21, 2009; November 9, 2009; December 7, 2009; and February 1, 2010. During each of the appointments, Nurse Rhoads recorded an assessment of "probably Lyme [Disease]" stemming from the 2001 tick bite on Mrs. Nicolaou's left ankle and prescribed antibiotics to fight the Lyme Disease. Also, during each of the appointments, Nurse Rhoads told Mrs. Nicolaou that she believed Mrs. Nicolaou was suffering from Lyme Disease, and that, as a result of that diagnosis, Nurse Rhoads was prescribing antibiotics to fight the Lyme Disease.

During some of the appointments, Nurse Rhoads recommended that, in order to confirm Nurse Rhoads' diagnosis of Lyme Disease, Mrs. Nicolaou should undergo a test offered by a company called IGeneX, Inc. (IGeneX). Mrs. Nicolaou testified that she did not get the test before February 1, 2010, because she wanted to see how her symptoms were going to react to the

antibiotics. Nurse Rhoads testified that Mrs. Nicolaou did not have the IGeneX test done when it was first recommended because Mrs. Nicolaou said she could not afford it. Mrs. Nicolaou testified that she voluntarily stopped purchasing medical insurance at some point in 2005 because her insurer was not covering the cost of many of the tests ordered by her physicians; she understood that she would be personally responsible for all costs associated with tests that might be ordered by her medical care providers going forward.

Nurse Rhoads administered the IGeneX Lyme Disease test to Mrs. Nicolaou on February 1, 2010. Nurse Rhoads sent Mrs. Nicolaou's test specimen to the IGeneX laboratory in Palo Alto, California. On February 12, 2010, IGeneX completed its analysis of the test. On February 13, 2010, Nurse Rhoads informed Mrs. Nicolaou via e-mail that the test results were positive for Lyme Disease.

The day that Mrs. Nicolaou received the positive test results, she posted a message on her Facebook[2] page that confirmed her subjective opinion that she believed she had Lyme Disease well before receiving the IGeneX report:

> Today i got my blood test back from igenix [*sic*] labs to test for lyme disease and it came back positive!!!!!!!!!!!! i had been telling everyone for years i thought it was lyme and the doctors ignore me, thank you god you have answerd [*sic*] my prayers!!!!!!!!! Now its [*sic*] all in your hands!!!!!!!!!!!

[The Nicolaous] initiated this lawsuit against [Appellees] by way of [a] complaint filed on February 10, 2012. Amended complaints were filed on April 19, 2012 and May 31, 2012. In the second amended complaint, Mrs. Nicolaou asserts medical malpractice claims against each of the [Appellees]. Based on the injuries allegedly suffered by his wife as a result of

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[2] Facebook is a social networking site where "[u]sers of that Web site may post items on their Facebook page that are accessible to other users, including Facebook "friends" who are notified when new content is posted." ***Elonis v. United States***, ___ U.S. ___, ___, 135 S.Ct. 2001, 2004 (2015).

> [Appellees'] purported negligence, Mr. Nicolaou also asserts claims against each of the [Appellees] for loss of consortium.
>
> In their Answer with New Matter of [Appellees] to the Second Amended Complaint (Answer), [Appellees] averred a violation of the statute of limitations as an affirmative defense to all of the [Nicolaous'] claims.
>
> [The Nicolaous] averred in their Second Amended Complaint that although they did not initiate this action until more than three years after Mrs. Nicolaou's last contact with [Appellees], the statute of limitations is not a bar to their claims due to the operation of the discovery rule. [The Nicolaous] assert that [Appellees] are estopped from asserting a statute of limitations defense because reasonable people in the position of [the Nicolaous] could not have discovered any negligence until February 13, 2010, at the earliest; the Complaint was filed within two years of that date.

Trial Court Opinion, 2/24/14, at 2–6 (citations to the record omitted).

After discovery was completed, Appellees filed a motion for summary judgment on December 6, 2013, and the Nicolaous filed a response on December 31, 2013. The trial court granted Appellees' motion on February 25, 2014, holding that the Nicolaous had commenced their action after the prescribed statutory period for bringing the claim had expired, and that the statute of limitations was not tolled by application of the discovery rule. Trial Court Opinion, 2/24/14, at 14.[3] On April 21, 2014, the Nicolaous filed a

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[3] An action to recover damages for injuries to the person caused by the negligence of another must be commenced within two years. 42 Pa.C.S. § 5524(2).

notice of appeal.[4] While the trial court did not direct the Nicolaous to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and they did not do so, the trial court filed an opinion in support of its order on May 9, 2014.[5]

The Nicolaous originally proceeded *pro se* in this appeal. In a split decision, a three-judge panel of this Court filed a Memorandum reversing summary judgment, with one judge dissenting. ***Nicolaou v. Martin***, 1286 EDA 2014 (Pa. Super. 2016) (unpublished memorandum). Thereafter, Appellees filed a motion for reargument *en banc*. On June 3, 2015, this Court granted *en banc* reargument and withdrew the March 24, 2015 decision.

The Nicolaous filed new *pro se* briefs, and Appellees timely filed their briefs. In August of 2015, counsel entered his appearance on behalf of the Nicolaous. Pursuant to the Nicolaous' September 14, 2015 Motion To Permit

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[4] Although the Nicolaous filed the notice of appeal more than thirty days after the trial court's order granting summary judgment, the notice of appeal is not untimely. Louise Dillonsnyder was not included in the summary judgment motion, and therefore the order granting summary judgment was not a final order from which the Nicolaous were required to appeal within thirty days pursuant to Pa.R.A.P. 903(a). A final order is any order, *inter alia*, that disposes of all claims and of all parties. Pa.R.A.P. 341(b)(1). All of the claims and parties to this action were not disposed of until Louise Dillonsnyder was dismissed from the action by *praecipe* dated March 28, 2014.

[5] The trial court's Rule 1925(a) opinion directs us to the opinion attached to its February 24, 2014 order granting summary judgment.

a Supplemental Filing, we entered an order on September 21, 2015, continuing oral argument and directing the Nicolaous to file a counseled, supplemental brief, which they did on October 13, 2015. Appellees filed a response to the supplemental brief on November 3, 2015. This Court entered an order striking both briefs on December 17, 2015, and directed counsel for the Nicolaous to file an appropriate appellate brief pursuant to the Pennsylvania Rules of Appellate Procedure. Although both parties filed their briefs in January of 2016, the Nicolaous' brief once again failed to address the issues on appeal. This Court was compelled to strike the Nicolaous' brief on March 17, 2016, and we directed counsel to file a proper appellate brief addressing the relevant issues on appeal. On April 14, 2016, the Nicolaous filed a brief, and on May 13, 2016, Appellees filed a responsive brief. We entertained oral argument on August 2, 2016. This matter is now ripe for disposition.

The Nicolaous raise the following questions in this appeal:

> A. Did the Trial Court error in granting [Appellees'] Motion for Summary Judgment and holding that [the Nicolaous'] medical malpractice action was time barred under 42 Pa.C.S. §5524(2) and did not meet the Discovery Rule Exception when [Mrs. Nicolaou] did not, and was financially unable to, confirm [Appellees'] negligent misdiagnosis until final medical testing confirmed she had Lyme Disease on February 13, 2010?
>
> B. Did the Trial Court abuse its discretion in granting [Appellees'] Motion for Summary Judgment when there was a genuine issue of material fact, which should be presented to a jury, as to whether [the Nicolaous'] medical malpractice action is tolled from the running of the Statute

> of Limitations under 42 Pa.C.S. §5524(2) by the Discovery Rule?

The Nicolaous' Brief at 2. We address the issues in tandem.

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to relief as a matter of law. ***Matharu v. Muir***, 86 A.3d 250, 255 (Pa. Super. 2014) (*en banc*) (citing Pa.R.C.P. 1035.2). We exercise plenary review in an appeal from an order granting summary judgment. ***Id***. As such, when reviewing whether there are genuine issues of material fact, our standard of review is *de novo*; therefore, "we need not defer to determinations made by lower courts." ***Gleason v. Borough of Moosic***, 15 A.3d 479, 484 (Pa. 2011) (citing ***Fine v. Checcio***, 870 A.2d 850, 857 n.3 (Pa. 2005)). Moreover, an appellate court may reverse a grant of summary judgment only if there has been an error of law or an abuse of discretion. ***Kennedy v. Robert Morris Univ.***, 133 A.3d 38 (Pa. Super. 2016), *appeal denied*, 145 A.3d 166 (Pa. 2016). "[W]e will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." ***Matharu***, 86 A.3d at 255.

In essence, the trial court agreed with Appellees and granted summary judgment, determining that the Nicolaous' cause of action was barred by the two-year statute of limitations applicable to negligence actions. 42 Pa.C.S. § 5524. The Nicolaous' position is that the entry of summary judgment was improper because they had been unable, through reasonable diligence, to

discover the cause of Mrs. Nicolaou's injury until February 13, 2010, the date Mrs. Nicolaou received the results of the IGeneX test, and therefore, the applicable statute of limitations had been tolled until that time. Thus, the Nicolaous contend that the trial court erred in concluding that their medical malpractice action was time-barred by 42 Pa.C.S. § 5524(2).

We analyze this case with consideration of the following principles:

> Generally, a cause of action first accrues when a party is injured, and an action for personal injury must be filed within two years to satisfy the statute of limitations. 42 Pa.C.S. § 5524(2). . . . The discovery rule is a judicially created exception that tolls the running of the applicable statute of limitations when an injury or its cause was not known or reasonably knowable. ***Fine v. Checcio, D.D.S.***, 582 Pa. 253, 870 A.2d 850 (2005). The discovery rule can toll the statute of limitations until a plaintiff could reasonably discover the cause of his injury in cases where the connection between the injury and the conduct of another is not apparent. ***Wilson v. El-Daief***, 600 Pa. 161, 964 A.2d 354 (2009).
>
> If the injured party could not ascertain he was injured and by what cause within the limitations period, "despite the exercise of reasonable diligence," then the discovery rule is appropriate. ***Pocono International Raceway, Inc. v. Pocono Produce, Inc.***, 503 Pa. 80, 468 A.2d 468, 471 (1983). The test is objective but takes into account individual capacities and society's expectations of "attention, knowledge, intelligence and judgment" for citizens to protect their own interests. ***Fine, supra*** at 858. The party who invokes the discovery rule has the burden of proving its applicability by establishing he acted with reasonable diligence in determining the fact and cause of his injury but he was unable to ascertain it. ***Weik v. Estate of Brown***, 794 A.2d 907, 909 (Pa. Super. 2002). Thus, the key point that gives rise to application of the discovery rule "is the inability of the injured party, despite the exercise of reasonable diligence, to know that he has been injured and by what cause." ***Drelles v. Manufacturers Life Ins. Co.***, 881 A.2d 822, 831 (Pa. Super. 2005) (citing ***Fine, supra*** at 858).

> This determination is a factual one as to whether the party, despite the exercise of reasonable diligence, was unaware of his injury and unable to determine its cause. ***Id***. Where the rule's application involves a factual determination regarding whether the plaintiff exercised due diligence in discovering his injury, the jury must decide whether the rule applies. ***Crouse v. Cyclops Industries***, 560 Pa. 394, 745 A.2d 606 (2000).

Simon v. Wyeth Pharm., Inc., 989 A.2d 356, 365–366 (Pa. Super. 2009).

The discovery rule "originated in cases in which the injury or its cause was neither known nor reasonably knowable." ***Lewey v. H.C. Frick Coke Co.***, 31 A. 261 (Pa. 1895). The purpose of the discovery rule is to exclude from the running of the statute of limitations that period during which a party who has not suffered an immediately ascertainable injury is reasonably unaware he has been injured, so that he has essentially the same rights as those who have suffered such an injury. ***Hayward v. Medical Center of Beaver County***, 608 A.2d 1040, 1043 (Pa. 1992).

Fine v. Checcio, 870 A.2d 850 (Pa. 2005), is the seminal case on the discovery rule. The ***Fine*** Court held that "it is not relevant to the discovery rule's application whether or not the prescribed period has expired; the discovery rule applies to toll the statute of limitations in any case where a party neither knows nor reasonably should have known of his injury and its cause at the time his right to institute suit arises." ***Id***. at 859. Once a defendant raises the statute of limitations as an affirmative defense in new matter, however, it is then the plaintiff's obligation to present facts

indicating that the discovery rule is applicable. ***Stein v. Richardson***, 448 A.2d 558 (Pa. Super. 1982).

Our Supreme Court has written extensively on this issue, and we turn to the High Court for guidance in our disposition.

> Pennsylvania's formulation of the discovery rule reflects a narrow approach "to determining accrual for limitations purposes" and places a greater burden upon Pennsylvania plaintiffs vis-á-vis the discovery rule than most other jurisdictions. ***Wilson v. El-Daief***, ***supra*** at 364. . . . The discovery rule operates to balance the rights of diligent, injured plaintiffs against the interests of defendants in being free from stale claims, in furtherance of salient legislative objectives. ***Id.*** at 366 n.12. . . .
>
> [I]t is not relevant to the application of the discovery rule whether the prescribed statutory period has expired. ***Fine***, ***supra*** at 859. The discovery rule applies to toll the statute of limitations in any case in which a party is reasonably unaware of his or her injury at the time his or her cause of action accrued. ***Id***. . . . Only where the facts are so clear that reasonable minds could not differ may a court determine as a matter of law at the summary judgment stage, the point at which a party should have been reasonably aware of his or her injury and its cause and thereby fix the commencement date of the limitations period. ***Id***.
>
> The *sine qua non* of the factual inquiry into the applicability of the discovery rule in any given case is the determination whether, during the limitations period, the plaintiff was able, through the exercise of reasonable diligence, to know that he or she had been injured and by what cause. In this context, we have clarified that reasonable diligence is not an absolute standard. As we have stated:
>
> > **"There are very few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct diligence in the channel in which it would be successful. This is what is meant by reasonable diligence."** Put another way, "the question in any given case is

> not, what did the plaintiff know of the injury done him? But, what might he have known, by the use of the means of information within his reach, with the vigilance the law requires of him?" While reasonable diligence is an objective test, "it is sufficiently flexible . . . to take into account the differences between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question." Under this test, a party's actions are evaluated to determine whether he exhibited "those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interest and the interest of others."
>
> Therefore, when a court is presented with the assertion of the discovery rule's application, it must address the ability of the damaged party, exercising reasonable diligence, to ascertain that he has been injured and by what cause. . . . **Where . . . reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that the discovery rule does not apply as a matter of law.**

Fine, ***supra***, at 858–859 (citations and quotations omitted) (emphasis added).

> Nevertheless, the party asserting application of the discovery rule bears the burden of proof, ***Wilson***, ***supra*** at 362, and Pennsylvania courts have not hesitated, where appropriate, to find as a matter of law that a party has not used reasonable diligence in ascertaining his or her injury and its cause, thus barring the party from asserting his or her claim under the discovery rule. ***Cochran v. GAF Corp.***, 542 Pa. 210, 666 A.2d 245, 248 (1995).

Gleason, 15 A.3d at 484–486 (initial emphasis in original; second emphasis added).

In considering the relevant statute of limitations and the potential applicability of the discovery rule, the trial court stated as follows:

> The allegations of negligence by [Appellees] resulting in injury to Mrs. Nicolaou would have occurred during [Appellees'] care of Mrs. Nicolaou between 2001 and 2008. [The Nicolaous] initiated this lawsuit by way of complaint that was filed on February 10, 2012. Therefore, the prescribed statutory period expired and [the Nicolaous] are barred from bringing suit unless the discovery rule barred the running of the statute of limitations until sometime on or after February 10, 2010.
>
> * * *
>
> In this case, we find the evidence supports the conclusion that the commencement of the statute of limitations period began prior to February 10, 2010, and that such evidence is so clear that reasonable minds could not differ regarding that fact.

Trial Court Opinion, 2/24/14, at 9.

The basis for the Nicolaous' argument is that until Mrs. Nicolaous had confirmation of lyme disease from the IGeneX test, there was no "basis for a lawsuit." The Nicolaous' Brief at 17. Mrs. Nicolaou therefore maintains that because she was unable to afford the cost of the test until February 1, 2010, and thus did not receive confirmation of lyme disease until February 13, 2010, the trial court "erred in holding that reasonable minds could not differ as to whether Mrs. Nicolaou exercised reasonable diligence . . . ." ***Id***. at 18. The Nicolaous posit:

> The facts presented, taken in a light most favorable to [the Nicolaous] establish that Mrs. Nicolaou could not afford testing needed to confirm the diagnosis and that while she may have suspected she had Lyme Disease, it had not been confirmed and **she didn't believe it**. Therefore, a genuine issue of material fact exists as to whether reasonable minds differ as to the

> knowledge and beliefs of [the Nicolaous] such that summary judgment was improper.

The Nicolaous' Brief at 20 (emphasis added). Our review of the record compels our disagreement.

Mrs. Nicolaou's Facebook post, indeed her own words, bear on the fallacy of her claim on appeal that "she didn't believe it." As underscored by the trial court, on February 14, 2010, Mrs. Nicolaou posted, "I had been telling everyone for years i thought it was lyme . . . .," to which one of her Facebook friends responded, "[Y]ou DID say you had Lyme so many times!" Trial Court Opinion, 2/24/14, at 5; Memorandum of Law of Appellees in Support of Summary Judgment, 12/6/13, at Exhibit F.

It is necessary, then, to examine the propriety of the trial court's determination that "the evidence supports the conclusion that the commencement of the statute of limitations period began prior to February 10, 2010," which is two years before the Nicolaous filed their complaint against Appellees on February 10, 2012. We have noted previously that the party who invokes the discovery rule, Mrs. Nicolaous herein, has the burden of proving its applicability and must do so by establishing that she acted "with reasonable diligence in determining the fact and cause of [her] injury but [s]he was unable to ascertain it." ***Weik***, 794 A.2d at 909.

Allegations of the complaint and Mrs. Nicolaou's deposition testimony[6] proffer that she admittedly sought medical care in 2001 when she began experiencing symptoms that she attributed to a tick bite, including a rash at the site of the bite, numbness and tingling in her extremities, and back pain. Second Amended Complaint, 5/31/12, at 6. She treated with various Appellees for multiple sclerosis ("MS"), despite suspecting that she suffered from lyme disease. ***Id***. at 7–9. Rita Rhoads, the nurse practitioner who ultimately diagnosed Mrs. Nicolaou with lyme disease, testified that when Mrs. Nicolaou first came to her on July 20, 2009, Mrs. Nicolaou told her she had a "[d]iagnosis of [MS] but was told [she] may have lyme." Deposition of Rita Rhoads, 11/1/13, at 13. Further, a brain MRI[7] conducted on July 3,

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[6] We note that the certified record contains only portions of Mrs. Nicolaou's November 6, 2013 deposition. Through our efforts to obtain the complete deposition, the trial court communicated that "[n]either party made Ms. Nicolaou's entire deposition a matter of record. . . .Therefore, the trial court was bound by the undisputed facts in the Motion for Summary Judgment." ***But see Commonwealth v. Barnett***, 121 A.3d 534, 546 (Pa. Super. 2015), *appeal denied*, 128 A.3d 1204 (Pa. 2015), *cert. denied sub nom.*, ***Barnett v. Pennsylvania***, ___ U.S. ___, 136 S.Ct. 2391 (2016) (where the accuracy of a document is undisputed and contained in the reproduced record, we may consider it) (citing ***Commonwealth v. Brown***, 52 A.3d 1139, 1145 n.4 (Pa. 2012)). In ***Barnett***, as here, the reproduced record contained the relevant missing transcripts, and there was no dispute as to their contents. Due to the procedural posture of the instant case, however, we have utilized only those portions of the deposition that are in the certified record.

[7] "MRI, or magnetic resonance imaging, is a type of diagnostic radiography used to make images of tissues and organs of the human body. Taber's Cyclopedic Medical Dictionary 1230 (19th ed. 2001)." ***Northeastern***
(Footnote Continued Next Page)

2006, indicated findings "seen in infectious or inflammatory demyelinating process, such as [MS] or Lyme Disease . . . ." Second Amended Complaint, 5/31/12, at 7; Deposition of Rita Rhoads, 11/1/13, at 40.

It is striking and convincing of the correctness of the result below that Mrs. Nicolaou's symptoms dramatically improved upon treatment for lyme disease, which was months before the positive blood test on February 1, 2010. Mrs. Nicolaou admittedly has suffered significant maladies. She lost control of bowels and bladder, she eventually became confined to a wheelchair, and she experienced systemic pain, numbness, and tingling. Second Amended Complaint, 5/31/12, at 9. Mrs. Nicolaou eventually began treating with nurse practitioner, Rita Rhoads. ***Id***. at 10.

Ms. Rhoads is a certified nurse practitioner with a master's degree in public health from Johns Hopkins University. Deposition of Rita Rhoads, 11/1/13, at 8. She also is a member of ILADS, the International Lyme and Associated Disease Society. ***Id***. at 9. Ms. Rhoads first saw Mrs. Nicolaou on July 20, 2009, which was nearly seven months **before** Mrs. Nicolaou received the lyme-positive test. Ms. Rhoads stated that at that point, she believed Mrs. Nicolaou had "[p]robable lyme . . . resulting in [MS]." Appellees' counsel asked Ms. Rhoads, "Did you discuss this with Ms. Nicolaou and **tell her that at this point**, based upon the history that you had taken,

(Footnote Continued) ———————————

Pennsylvania Imaging Ctr. v. Commonwealth of Pennsylvania, 35 A.3d 752, 753 n.1 (Pa. 2011).

your examination, and everything she told you, that you thought she may have lyme disease?" ***Id.*** at 25. Ms. Rhoads responded, "Correct." ***Id.*** Based on that belief, on July 20, 2009, Ms. Rhoads prescribed, *inter alia*, Minocycline to treat the lyme disease. ***Id.*** at 25–26. Ms. Rhoads reiterated that she told Mrs. Nicolaou on July 20, 2009, that Ms. Rhoads was prescribing the antibiotic for **lyme disease.** ***Id.*** at 26. In fact, Mrs. Nicolaou's testimony confirmed that Ms. Rhoads told her she thought Mrs. Nicolaou had lyme disease and was prescribing Minocycline to treat it. Deposition of Nancy Nicolaou, 11/6/13, at 61. Ms. Rhoads described Mrs. Nicolaou's improvement upon treatment with the antibiotic as "absolutely amazing," as of September 21, 2009, lending significant reliability to Ms. Rhoads' lyme-disease diagnosis. Deposition of Rita Rhoads, 11/1/13, at 31, 32. Indeed, Mrs. Nicolaou testified that her "bladder and bowel had went [sic] back to normal the first month of treatment" for lyme disease. Deposition of Nancy Nicolaou, 11/6/13, at 67.

Most significantly, the record reveals that on July 20, 2009, Ms. Rhoads prescribed a different test for lyme disease, IGeneX, than the prior tests administered by Appellees. Mrs. Nicolaou, however, declined to take the test at that time. Deposition of Rita Rhoads, 11/1/13, at 29. Ms. Rhoads explained the significance of the test, as follows:

> Many years ago, and I don't know the exact date, I would say 15, 20 years ago, the government decided that the lyme epidemic was rising and they needed a vaccine for lyme.

So they analyzed the lyme bacteria and said if we are going to build a vaccine, what vaccine is going to be the most effective against lyme? When they did the analysis, they discovered the tail of the lyme organism—it's a spirochete, so it has a tail.

The tail of the lyme spirochete had two DNA bands on it, 31 and 34, that were very different from most organisms. So they said we will build our vaccine around 31 and 34. Therefore, we're going to take 31 and 34 out of all of the lyme testing because everybody's going to get the vaccine and everybody's going to be positive for 31 and 34. Therefore, if they're positive for 31 and 34, it only means they had the vaccine, not that they have lyme.

Okay. Well, they developed the vaccine LYMErix which was a huge disaster. A lot of people got significant lyme symptoms for the LYMErix, and it was taken off the market. . . .

So when the CDC took the vaccine off the market, they didn't say, oh, we failed; we're going to have the labs put 31 and 34 back in the [test]. So therefore Quest, Health Network, LabCorp, none of them have bands 31 and 34 in their testing.

So we look for labs that do have 31 and 34 in the testing so that we can get complete bands. So for the majority of people, we use IGeneX in California. . . .

* * *

Q. And did you discuss with Ms. Nicolaou what you just laid out with me here today?

A. Yes. Yes.

Q. You had that discussion with her in July?

A. Yes.

Deposition of Rita Rhoads, 11/1/13, at 27–29.

Ms. Rhoads stated that Mrs. Nicolaou "just didn't have the money for anything." Deposition of Rita Rhoads, 11/1/13, at 29. Counsel inquired:

Q. So other than the financial reason, there was no reason she couldn't have had the test at that point, correct?

A. Correct.

Q. She wasn't on a drug that would have prevented this test—

A. No.

Q. —from being performed?

A. No.

Id. at 29–30.

Mrs. Nicolaou corrected counsel's suggestion that she "lost" her health insurance in 2005. Deposition of Nancy Nicolaou, 11/6/13, at 34. Mrs. Nicolaou stated, "I didn't lose it." ***Id***. Counsel continued as follows:

Q. What happened?

A. I stopped paying for it.

Q. Why did you stop paying for your health insurance?

A. Because they refused paying for any of the tests that the doctors had ordered.

* * *

Q. [S]o you decided to just voluntarily stop paying for health insurance?

A. Correct.

Q. And then you became what is referred to as a self-pay?

A. Correct.

Q. So you knew that from that point forward any tests you wanted run you would have to pay for out of your own pocket, correct?

A. That's correct.

Id. at 34–35.

It is without question, then, that as early as July 20, 2009, Ms. Rhoads informed Mrs. Nicolaou that Ms. Rhoads believed Mrs. Nicolaou had lyme disease, Ms. Rhoads, in fact, treated Mrs. Nicolaou for lyme disease, the treatment caused "amazing" improvement in Mrs. Nicolaou's symptoms, and Mrs. Nicolaou knew of the availability of an objective test that could confirm Ms. Rhoads' clinical diagnosis. Moreover, for the ensuing **seven months**, Mrs. Nicolaou refused to obtain the objective proof of the clinical diagnosis Ms. Rhoads had rendered.[8]

As our Supreme Court has expressed, the greater burden placed upon Pennsylvania plaintiffs *vis-á-vis* the discovery rule, "is tied to 'actual or constructive knowledge of at least some form of significant harm and of a factual cause linked to another's conduct, without the necessity of notice of

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[8] Contrary to the suggestion of the Dissent, Dissenting Opinion at 3, there is nothing in the record confirming that Mrs. Nicolaous was **unable** to pay for the IGeneX test when Ms. Rhoads ordered it on July 20, 2009, only that Mrs. Nicolaous chose not to do so. Mrs. Nicolaous had clarified that she voluntarily stopped paying for her health insurance because she was annoyed that it did not cover tests being ordered for her in 2005. Deposition of Nancy Nicolaou, 11/6/13, at 34. Mrs. Nicolaou further acknowledged that her decision cast her into a category of self-pay individuals. ***Id***. at 35. Most telling, Mrs. Nicolaous testified that Ms. Rhoads had recommended IGeneX but "she wanted to see how the antibiotics were going to react to my symptoms," ***id***. at 75, thereby indicating a conscious decision not to obtain the test, not an inability to afford it. Thus, review of the record does not suggest that Mrs. Nicolaou could not afford the test, but that she chose not to partake at that time.

the full extent of the injury, the fact of actual negligence, or precise cause.'" ***Gleason***, 15 A.3d at 484-485. The ***Gleason*** Court reminds us that the *sine qua non* of the factual inquiry into the applicability of the discovery rule in any given case "is the determination whether, during the limitations period, the plaintiff was able, through the exercise of reasonable diligence," to know that he had been injured and by what cause. ***Id***. at 485. Reasonable minds would not differ that Mrs. Nicolaou should have known as early as July 2009, and **could have proven** at that time, that she suffered from lyme disease.

Moreover, the standard of reasonable diligence was not met herein. The question before us is not what the Nicolaous knew of the injury, but rather, what might the Nicolaous have known, "by the use of the means of information within [their] reach, with the vigilance the law requires of [them]?" ***Gleason***, 15 A.3d at 485.

Our review of the record, in the light most favorable to the Nicolaous, the non-moving party, compels our conclusion that Mrs. Nicolaou knew, or reasonably should have known, between July and September, 2009, that her long-standing health problems may have been caused by Appellees' failure to diagnose and treat her lyme disease and therefore, such failure could have resulted from Appellees' negligence. Because we find that reasonable minds could not differ in this conclusion, and thus, there are no genuine issues of material fact, the trial court's entry of summary judgment was proper.

Order of February 24, 2014, affirmed.

P.J.E. Ford Elliott, P.J.E. Bender, and Judges Panella, Olson, and Ott join this Opinion.

Judge Lazarus files a Dissenting Opinion in which P.J. Gantman and Judge Bowes join.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/22/2016

2016 PA Super 300

NANCY NICOLAOU AND NICHOLAS NICOLAOU Appellant v. JAMES J. MARTIN, M.D., AND LOUISE A. DILLONSYNDER, CRNP, JEFFREY D. GOULD, M.D., ST. LUKE'S HOSPITAL, ST LUKE'S HOSPITAL AND HEALTH NETWORK, ST LUKE'S HOSPITAL UNION STATION MEDICAL SURGICAL CLINIC D/B/A ST. LUKE'S SOUTHSIDE MEDICAL CENTER, ST. LUKE'S ORTHOPAEDIC SURGICAL GROUP, AND NAZARETH FAMILY PRACTICE Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1286 EDA 2014

Appeal from the Order Entered February 24, 2014
In the Court of Common Pleas of Lehigh County
Civil Division at No(s): 2012-C-0518

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., BENDER, P.J.E., BOWES, J., PANELLA, J., SHOGAN, J., LAZARUS, J., OLSON, J., and OTT, J.

DISSENTING OPINION BY LAZARUS, J.: **FILED DECEMBER 22, 2016**

I respectfully dissent. In my view, the majority has improperly assumed the role of the fact-finder in determining whether the Nicolaous were reasonably diligent in determining that Appellees had caused Mrs. Nicolaou injury by failing to diagnose and treat her with Lyme disease between 2001 and 2008.

As the majority correctly states,

> [t]he discovery rule applies to toll the statute of limitations in any case in which a party is reasonably unaware of his or her injury at the time his or her cause of action accrued. . . . Only where the facts are so clear that reasonable minds could not differ may a court determine as a matter of law at the summary judgment stage, the point at which a party should have been reasonably aware of his or her injury and its cause and thereby fix the commencement date of the limitations period.

Fine v. Checcio 870 A.2d 850, 859. The foregoing requires a determination of whether "the plaintiff was able, through the exercise of reasonable diligence, to know that he or she had been injured and by what cause. . . . [This] is not an absolute standard." ***Gleason v. Borough of Moosic***, 15 A.3d 479, 485 (Pa. 2011).

Here, the trial court found that the negligence Mrs. Nicolaou complained of occurred between 2001 and 2008; the discovery rule applied for a period of time thereafter. The court did not make a precise ruling as to the length of time the discovery rule applied, but found that "a reasonable person would have had reason to suspect injuries might have been caused by medical treatment rendered by [Appellees] . . . on or about July 20, 2009[.]" Trial Court Opinion, 2/24/14, at 12. Regardless of the specific date the discovery rule ceased to apply, the court determined that the filing of the complaint on February 10, 2012, was untimely because "the evidence supports the conclusion that the commencement of the statute of limitations period began prior to February 10, 2010[.]" ***Id.*** at 9.

In coming to its conclusion that the statute of limitations period began to run prior to February 10, 2010, the trial court found that reasonable

minds could not differ that with reasonable diligence, the Nicolaous would have determined prior to that date that Mrs. Nicolaou had been injured by not being diagnosed and properly treated for Lyme disease. Accordingly, the crux of this appeal is whether the Nicolaous were not "reasonably diligent" as a matter of law. ***Gleason, supra*** at 486 (citing ***Cochran v. GAF Corp.***, 666 A.2d 245, 248 (Pa. 1995)). In reviewing the court's decision, we must consider the facts in the light most favorable to the Nicolaous as the non-moving party. ***Fine, supra*** at 857.

Instantly, it is not disputed that Mrs. Nicolaou *suspected* she had Lyme disease in July 2009, when she began treatment with Nurse Practitioner Rita Rhoads. Nurse Rhoads acknowledged that Mrs. Nicolaou turned down a fifth Lyme disease test at the beginning of treatment, at least in part because she was not in a position to pay for the test. ***See*** Deposition of Rita Rhoads, 11/1/13, at 29 (Mrs. Nicolaou "did not have the money for [the test] at that point" and she "just didn't have the money for anything.") In my opinion, hardship regarding paying for a fifth test when first suggested, along with four previous negative tests and Mrs. Nicolaou's stated intention to determine whether the antibiotics Nurse Rhoads had prescribed would work, combine to create a jury question as to whether the Nicolaous were reasonably diligent in determining the suspected injury *actually* had been suffered.

I emphasize that although "reasonable diligence is an objective test, [i]t is sufficiently flexible . . . to take into account the difference[s] between

persons and their capacity to meet certain situations and the circumstances confronting them at the time in question." ***Id.*** at 870 (citation and quotation marks omitted). Accordingly, viewing the foregoing facts in the light most favorable to the Nicolaous, I would reverse and remand the matter to the trial court to permit the fact-finder to determine whether the statute of limitations should have remained tolled until February 13, 2010, the date Mrs. Nicolaou received positive Lyme disease results, thereby making the Nicolaous' complaint timely.

President Judge Gantman and Judge Bowes join in this Dissenting Opinion.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, I caused two true and correct copies of the foregoing document to be served upon the following counsel of record by United States mail, postage prepaid:

Nathan M. Murawsky, Esquire
Hamburg, Rubin, Mullin, Maxwell & Lupin
375 Morris Road, PO Box 1479
Lansdale, PA 19446-0773

Mark R. Zolfaghari, Esquire
St. Luke's University Hospital Network
St. Luke's Hospital
801 Ostrum Street
Bethlehem, PA 18015-1065

Charles A. Fitzpatrick, IV
Arthur W. Hankin
Lewis W. Schlossberg
Blank Rome LLP
130 N. 18th Street
Philadelphia, PA 19103

Tricia S. Lontz
Eckert Seamans Cherin and Mellott, LLC
I.D. No. 316052
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-7189