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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1224**

Heather Fitzgerald,
Appellant,

vs.

Dr. Lance Silverman, M. D., et al.,
Respondents.

**Filed April 9, 2018
Reversed and remanded
Bratvold, Judge**

Hennepin County District Court
File No. 27-CV-16-14189

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(for respondent)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Florey,
Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

Heather Fitzgerald appeals the district court's dismissal of her medical malpractice complaint against Dr. Lance Silverman, Silverman Orthopedics, P.C., and Silverman Ankle and Foot (respondents). The district court granted respondents' motion to dismiss

after concluding that Fitzgerald failed to commence her action before the statute of limitations expired. Because the record presented a genuine issue of material fact regarding the date medical treatment terminated, the district court erred in summarily dismissing Fitzgerald's complaint; therefore, we reverse and remand.

FACTS

A. Record Evidence Regarding Course of Medical Treatment

In July 2012, Silverman began treating Fitzgerald for a painful bunionette deformity on her left forefoot. He recommended a magnetic resonance image (MRI) and referred her to another doctor for "lumbar sympathetic nerve blocks." In August, Fitzgerald saw Silverman at his clinic; he discussed her MRI and recommended surgery. In October, Silverman also recommended treatment for a bunionette on Fitzgerald's right foot. Silverman performed surgery on Fitzgerald's left and right feet on October 16, 2012. Fitzgerald was discharged the same day but soon "experienced extraordinary pain." Between the surgery and October 25, 2012, Fitzgerald called both Silverman and the hospital where the surgery occurred numerous times complaining of pain, and Silverman prescribed pain relievers on several occasions.

On October 25, Silverman examined Fitzgerald at his clinic and instructed her to report to the emergency room. Fitzgerald remained in the hospital from October 25 until November 2; Silverman primarily managed her care. He discharged Fitzgerald with instructions to "return to his care for follow-up."

On November 11, Fitzgerald saw two other doctors, both of whom recommended amputation. On November 12, Fitzgerald returned to Silverman, who said that her feet were healing properly and that she could “begin walking on both feet.”

In the complaint that was served on respondents, Fitzgerald alleged that the November 12 office visit “was the last time” she treated with Silverman. After respondents sought to dismiss her complaint under the statute of limitations, Fitzgerald submitted an affidavit in which she attested that, on November 21, 2012, she “participated in a phone call with Dr. Silverman’s office and staff.” Fitzgerald also averred that, during this telephone call, she discussed her “current condition and medications, prognosis, and treatment options.”

Fitzgerald’s medical treatment eventually led to below-knee amputations of her left leg in February 2014, and of her right leg in July 2014.

B. Procedural History

Fitzgerald sued respondents, alleging that Silverman’s professional negligence caused her amputations. She first attempted to serve respondents with her complaint on June 30, 2016. In their answer, respondents alleged that service was ineffective. On November 14, 2016, respondents moved to dismiss Fitzgerald’s complaint. Respondents argued that service was ineffective because the process server left the complaint with Silverman’s administrative assistant, who did not have the authority to accept service on behalf of respondents. Respondents also argued that Fitzgerald failed to commence her medical negligence action within the four-year statute of limitations under Minn. Stat. § 541.076(b) (2016). On November 16 and 18, Fitzgerald served process on respondents.

Fitzgerald opposed dismissal and argued that she had properly served respondents in June and November, and that the action had been commenced well within the four-year statute of limitations.

After a hearing on the motion to dismiss, the district court granted Fitzgerald's request for limited discovery on service of process because "[i]t is not at all clear on this record" whether respondents misled Fitzgerald into reasonably believing that the June service was effective. Following supplemental submissions by all parties, the district court issued a March 22, 2017 order finding "as a matter of law" the June service was invalid and the only "good" service occurred on November 16, 2016.¹ The district court added, however, that it was "hesitant to rule as a matter of law" regarding when Silverman last treated Fitzgerald. Reasoning that whether "good service" occurred within the statute of limitations "depends on when the last services were provided," the district court asked the parties "to submit written arguments as to why the Court should or should not order a bifurcated jury trial" to determine whether Silverman treated Fitzgerald after November 12, 2012.

In her written argument, Fitzgerald opposed bifurcation, requesting a single trial on both the statute of limitations issue and on medical negligence. Respondents' written argument opposed any trial for two reasons: (1) Fitzgerald's cause of action accrued before November 12, 2012; and (2) no evidence established treatment after November 12, 2012, because Fitzgerald could not defeat summary judgement by averring facts in her affidavit

¹ On appeal, Fitzgerald does not contend the June service was effective.

that contradicted her complaint. In support of their position, respondents submitted an affidavit by Silverman attesting that he was not in the “Edina Clinic” at the time of the November 21 telephone call described in Fitzgerald’s affidavit; he also averred that he did not speak to Fitzgerald on November 21 or at “any other time” after November 12. Silverman’s affidavit also stated that “the last time” he provided treatment and care for Fitzgerald was on November 12, 2012.

On May 22, 2017, the district court issued a written order that granted respondents’ motion to dismiss, reasoning that “[w]hen treatment ended is the critical issue,” and no “credible evidence” established medical service was provided after November 12, 2012, because the “undisputed fact” is that Fitzgerald “did not talk” to Silverman on November 21, 2012. Also, the district court stated “[t]here was no care, advice, consultation or treatment” in the November 21 phone call.

Fitzgerald sought leave to file a motion for reconsideration by letter, contending that Fitzgerald and Silverman provided “two polar opposite attestations.” Fitzgerald pointed out that the parties submitted memoranda simultaneously, and her memorandum on bifurcation asked for permission to respond to any new evidence. Finally, Fitzgerald stated that, if allowed to do so, she would supplement the record with an affidavit averring that Silverman “reached” Fitzgerald “by phone” on November 21, 2012, and they discussed her treatment.

The district court denied leave to reconsider and, in a separate order, amended the order granting dismissal to direct entry of judgment. Fitzgerald appeals.

DECISION

I. The district court erred when it dismissed Fitzgerald’s complaint based on the statute of limitations.

Respondents moved to dismiss Fitzgerald’s complaint under Minn. R. Civ. P. 12.02(c) for insufficient service of process and failure to initiate the action within the four-year statute of limitations under Minn. Stat. § 541.076(b). Rule 12.02 states that “[i]f, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.” Minn. R. Civ. P. 12.02; *see also Antone v. Mirviss*, 720 N.W.2d 331, 335 (Minn. 2006). Here, the parties presented, and the court accepted and considered, matters outside the pleadings in deciding respondents’ motion to dismiss. Accordingly, we review the district court’s dismissal under the summary judgment standard.²

This court reviews summary-judgment decisions de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). “In doing so [this court] determine[s] whether the district court properly applied the law and whether there are

² A motion to dismiss for failure to state a claim upon which relief can be granted falls under Minn. R. Civ. P. 12.02(e); in contrast, respondents moved under rule 12.02(c). But courts have applied rule 12.02 to convert motions to dismiss into summary judgment motions where matters outside the pleadings are considered. *See Antone*, 720 N.W.2d at 334 (considering motion to dismiss for lack of jurisdiction as summary judgment motion, even though the movant did not “specify[]” the applicable rule); *Bush v. City of Lakefield*, 399 N.W.2d 169, 171 (Minn. App. 1987)(“[A] Rule 12 motion is converted to a Rule 56 motion if matters outside the pleadings are considered to resolve the motion.”), *review denied* (Minn. Mar. 18, 1987).

genuine issues of material fact that preclude summary judgment.” *Id.* We review the evidence in the light most favorable to the nonmoving party. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). It is error for the district court on summary judgment to weigh evidence or assess the credibility of witnesses; these determinations must be left to the fact-finder. *See Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007). Further, “the construction and applicability of a statute of limitation or repose is a question of law subject to de novo review.” *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006). But, “[w]here there are disputed questions of material fact as to whether a plaintiff is barred by the statute of limitations, these questions are to be decided by a jury.” *Ciardelli v. Rindal*, 582 N.W.2d 910, 912 (Minn. 1998).

A. The statute of limitations began to run when Fitzgerald’s treatment with Silverman ended.

A plaintiff must commence an action pertaining to medical malpractice within four years “from the date the cause of action accrued.” Minn. Stat. § 541.076(b). Respondents argue that Fitzgerald’s cause of action accrued at the earliest date Fitzgerald alleges she suffered harm from respondents’ medical negligence. Fitzgerald argues her cause of action accrued when Silverman ceased to medically treat Fitzgerald. The district court agreed with Fitzgerald.

Generally, medical-malpractice actions in Minnesota accrue when “the physician’s treatment for a particular condition ceases”; this is known as the termination-of-treatment rule. *Doyle v. Kuch*, 611 N.W.2d 28, 31 (Minn. App. 2000) (quoting *Grondahl v. Bulluck*,

318 N.W.2d 240, 243 (Minn. 1982)). There is an exception, however, “where there is a single act of allegedly negligent conduct.” *Id.* This exception applies only “when the alleged tort consists of (1) a single act; (2) which is complete at a precise time; (3) which no continued course of treatment can either cure or relieve; and (4) where the plaintiff is actually aware of the facts upon which the claim is based.” *Id.* When the single-act exception applies, “the statute of limitations begins to run at the time the plaintiff sustains damage from the act.” *Id.* (citing *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 428-29 (Minn. 1988)).

Respondents appear to argue that the single-act exception is the generally applicable rule because, according to respondents, the Minnesota Supreme Court overruled the termination-of-treatment rule in *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 717 (Minn. 2008). We disagree. *MacRae* recognized that the single-act medical tort gives rise to an exception to the termination-of-treatment rule. *Id.* at 718 (stating the termination-of-treatment rule “does not apply when a patient’s injury was caused by a single discrete and identifiable act by the physician”). *MacRae* applied the single-act exception, but that case involved a misdiagnosis, an act which the supreme court has long held falls into the single-act exception. See, e.g., *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993). *MacRae* did not hold or even suggest that it was overruling the termination-of-treatment rule.

Neither party contends that Fitzgerald’s cause of action arose from a single act. As a result, the termination-of-treatment rule applies, and the statute of limitations began to run when Fitzgerald’s treatment with Silverman ended.

B. There was a genuine issue of material fact regarding when Fitzgerald terminated treatment with Silverman.

Fitzgerald argues that she terminated treatment with Silverman no earlier than November 21, 2012, and that the statute of limitations, therefore, did not bar her claim until November 21, 2016, at least three days after she effectively served respondents on November 16 and 18, 2016. Respondents contend that Fitzgerald terminated treatment with Silverman on November 12, 2012, and that Fitzgerald, therefore, failed to serve respondents before the limitations period expired.

In *Grondahl*, the supreme court considered how to determine when a patient has ceased to treat with a doctor for purposes of the statute of limitations. 318 N.W.2d at 243. In that case, the district court granted summary judgment on the ground that the appellant's suit was untimely, and the supreme court reversed. *Id.* at 241. In doing so it announced, first, it is not necessary for a doctor to formally discharge a patient. *Id.* at 243. Next, *Grondahl* held that courts should evaluate three factors to determine when treatment ended: "(1) whether there is a relationship between physician and patient with regard to the illness; (2) whether the physician is attending and examining the patient; and (3) whether there is something more to be done." *Id.* "The first two factors are closely related." *Id.* We will discuss each *Grondahl* factor in turn.

Under the first *Grondahl* factor, the record created an issue of material fact whether the relationship between Silverman and Fitzgerald terminated on November 12. In its analysis of the first factor, *Grondahl* outlined the consistent contacts the patient had with her doctor and eventually concluded a jury could have reasonably found a treatment

relationship continued to exist. *Id.* at 241-42. Here, the record established consistent contacts between Fitzgerald and Silverman through several visits, telephone contacts, and hospital care from July through November 2012. On November 2, Silverman discharged Fitzgerald from the hospital with directions to follow up with an office visit, which Fitzgerald did on November 12. Similar to the evidence considered in *Grondahl*, there was no evidence that Silverman or Fitzgerald viewed the November 12 appointment as the end of Fitzgerald’s treatment. *See id.* at 242 (noting that “[a]t no time during [the last in-person visit] did [the doctor] state that he was ceasing his treatment of [the patient]”). During the November 12 appointment, Silverman evaluated Fitzgerald’s recovery and said that she was “heal[ing]” from her ailments. Then, on November 21, Fitzgerald called Silverman’s office to discuss her “current condition and medications, prognosis, and treatment options.” The record supported the inference that phone calls were a consistent part of Fitzgerald’s treatment relationship with Silverman.³

Respondents contend that no evidence established that Fitzgerald spoke with Silverman during the November 21 call, and he averred he was neither aware of her call nor provided any treatment in connection with it. Accordingly, respondents argue that dismissal was appropriate under *Grondahl*’s second factor, which requires the court to consider whether a physician has attended or examined the patient, because no evidence

³ As additional support for her claim that she was in a treatment relationship with Silverman, Fitzgerald submitted an affidavit identifying expert medical evidence that phone calls were an expected means of maintaining a treatment relationship for this kind of ailment. While Fitzgerald’s attorney signed the affidavit, Fitzgerald’s expert verified the accuracy of its contents.

established that Silverman attended or examined Fitzgerald after November 12. *Id.* at 243 We disagree because *Grondahl* recognized that “telephone consultations may constitute proof of a continuing physician-patient relationship and evidence that the physician is attending and examining the patient.” *Id.* There, the doctor spoke directly with the patient during the phone call, in contrast with the phone call in Fitzgerald’s affidavit. *Id.* But given the months-long relationship between Fitzgerald and Silverman, the previous phone consultations that resulted in medical treatment, as well as the proximity of the last in-person treatment, we determine this difference is not dispositive.

A reasonable jury could find, based on the months-long relationship and the November 21 phone call, that Fitzgerald continued to seek Silverman’s treatment and trust in his care. The supreme court has noted that the “policy reason” behind the termination-of-treatment rule “is that the patient must repose reliance upon [her] physician in the completion of the course of curative treatment, a relationship of trust which inhibits the patient’s ability to discover acts of omission or commission constituting malpractice.” *Swang v. Hauser*, 288 Minn. 306, 309, 180 N.W.2d 187, 189-90 (1970).⁴ Viewing the evidence in the light most favorable to Fitzgerald, as we must, the record established

⁴ Respondents rely on a case that we determine is inapplicable. In *Giles v. Sanford Memorial Hospital and Nursing Home*, this court held that a jury could not reasonably find that a telephone call between a patient and physician was “part of a continuing physician-patient relationship.” 371 N.W.2d 635, 637 (Minn. App. 1985). But there, unlike the case before us, six months had passed since the physician had examined the patient and they did not discuss medication or treatment during the call; the patient called to inform the physician that he had changed doctors and to obtain a letter stating that the physician had released the patient from care. *Id.*

consistent phone calls between Fitzgerald, Silverman, and Silverman's office; in fact, on one occasion before November, Fitzgerald called Silverman's office and spoke with staff who emailed Fitzgerald's message to Silverman. Nothing in the record established that Silverman or his staff told Fitzgerald that the November 21 phone call was different from any of the previous phone calls during which Fitzgerald had communicated with her doctor through his staff.

Under the third *Grondahl* factor, we consider whether any evidence established that "something more" remained to be done. 318 N.W.2d at 243. *Grondahl* stated that the third factor "requires expert medical testimony." 318 N.W.2d at 243. In this case, Fitzgerald's expert verified an attorney's affidavit stating that the care Fitzgerald received was a continued course of treatment from Silverman to treat a painful condition. Fitzgerald also offered evidence that her medical providers recommended and performed amputations to treat her condition.

Taking the record evidence as a whole and viewing it in the light most favorable to Fitzgerald, she raised a genuine issue of material fact regarding each *Grondahl* factor; specifically, conflicting evidence was submitted regarding whether Fitzgerald was in a patient relationship with Silverman after November 12, whether Silverman attended to Fitzgerald's treatment via telephone on November 21, and whether the parties contemplated additional treatment after the office visit on November 12 or through telephone communications on November 21. This evidence created genuine issues of material fact that were inappropriate for resolution on summary judgment.

Respondents argue that summary judgment was appropriate because Fitzgerald's complaint alleged that November 12 "was the last time Ms. Fitzgerald treated with Dr. Silverman." But parties are not bound to allegations in a complaint. *See Doe 136 v. Liebsch*, 872 N.W.2d 875, 882-83 (Minn. 2015) (holding that statements of fact in a complaint may be used "for impeachment purposes" when they contradict later testimony). While complaint allegations may be an effective means of challenging a plaintiff's credibility, it is inappropriate for the court to consider credibility on summary judgment. *See Hoyt Props.*, 736 N.W.2d at 320. We conclude that genuine issues of material fact existed regarding when Fitzgerald terminated treatment with Silverman and whether their relationship ended after November 12.

II. Fitzgerald was denied sufficient opportunity to oppose summary judgment.

Even if the existing record created no genuine issue of material fact regarding when Fitzgerald terminated treatment with Silverman, we would nonetheless reverse and remand because the district court did not provide Fitzgerald sufficient opportunity to oppose summary judgment.

In its March 22 order, the district court asked the parties to simultaneously submit memoranda addressing whether the court "should or should not order a bi-furcated jury trial" to determine whether Fitzgerald received medical treatment from Silverman after November 12, 2012. Fitzgerald argued in favor of a single jury trial for both issues and asked the district court for the opportunity to respond to any new issues respondents raised in their memorandum. Respondents submitted a memorandum arguing that no jury trial was necessary, and, as a part of their submission, included an affidavit from Silverman

attesting that he did not speak to Fitzgerald on November 21, he did not provide any treatment in connection with the call, and he did not treat Fitzgerald after November 12. Based on the parties' written submissions and without the benefit of a hearing, the district court ruled that there was no issue of material fact and dismissed Fitzgerald's complaint. Fitzgerald argues that the district court impermissibly denied her a meaningful opportunity to oppose respondents' motion, which articulated a reason to dismiss that was different from the grounds raised in their initial motion, and which relied on previously undisclosed evidence in the form of Silverman's affidavit.

We agree with Fitzgerald that the district court's March 22 order effectively allowed respondents to move for and receive summary judgment without sufficient notice to Fitzgerald. This court has held that "[t]he district court . . . must afford the adverse party a meaningful opportunity to oppose [summary judgment]." *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. App. 2003). A meaningful opportunity to oppose summary judgment may vary based on the circumstances of the individual case, but typically includes sufficient notice to the parties and the opportunity "to marshal evidence in opposition." *Id.* at 419-20. We conclude the district court in this case did not provide Fitzgerald with sufficient opportunity to oppose respondents' motion for two reasons.

First, the district court did not provide Fitzgerald sufficient notice that it was considering summary judgment. The district court's March 22 order implied that it had determined there was a genuine issue of material fact regarding when Fitzgerald last received medical treatment from Silverman. For example, the court stated it was "hesitant to rule as a matter of law on the question of when Dr. Silverman provided his last service

to Ms. Fitzgerald.” Also, the district court asked the parties “why the [c]ourt should or should not order a bi-furcated jury trial,” and did not indicate it was considering whether a jury trial was necessary at all. We conclude that the March 22 order was insufficient notice that the district court was considering summary judgment.

Second, respondents did not introduce Silverman’s affidavit until April 5, which was the deadline to submit memoranda on bifurcation; this meant that Fitzgerald did not have an opportunity to marshal evidence in opposition. The parties had traded limited discovery since November about whether the June service of process was effective, but had not engaged in discovery on Fitzgerald’s course of medical treatment. Indeed, the district court had not issued a scheduling order. Respondents did not submit Silverman’s affidavit until Fitzgerald reasonably believed she had already successfully defeated summary judgment on the issue. As a result, Fitzgerald had no reason to further supplement the record, although we note that she explicitly asked to do so in her bifurcation memorandum.

Respondents are correct that it was Fitzgerald’s burden to produce evidence. But this burden does not affect our conclusion because Fitzgerald was not given sufficient opportunity to oppose summary judgment. We note that after the district court issued its May 22 order, Fitzgerald asked for leave to move for reconsideration, and stated that Fitzgerald would attest that she spoke directly to Silverman on November 21. This evidence would be critical to a jury’s factual determination regarding termination of treatment.

We stress that we do not hold that Fitzgerald commenced her action within the statute of limitations. We hold only that the record created a genuine issue of material fact regarding when her treatment with Silverman terminated, and that a jury must make this determination. We reverse the district court's judgment dismissing Fitzgerald's complaint and remand for further proceedings consistent with this opinion.

Reversed and remanded.