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Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
June 20, 2023 Session

JAMES MIGUEL VILAS v. TIMOTHY LOVE

Appeal from the Circuit Court for Madison County
No. C-18-190 Kyle C. Atkins, Judge

No. W2022-01071-COA-R3-CV

In this health care liability action, the trial court granted summary judgment to the appellee surgeon based on the expiration of the statute of limitations and the appellant patient's failure to show evidence of causation and damages. On appeal, we conclude that (1) there is a genuine dispute of material fact as to when the appellant's cause of action accrued; (2) the trial court did not specifically rule on the propriety of appellant's pre-suit notice; and (3) there are genuine disputes of material facts as to the causation and damages elements of the appellant's claim. Accordingly, we reverse in part, vacate in part, and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part; Vacated in Part; and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which CARMA DENNIS MCGEE and JEFFREY USMAN, JJ., joined.

Mark Hammervold, Elmhurst, Illinois, for the appellant, James Miguel Vilas.[1]

Marty R. Phillips and Michelle Greenway Sellers, Jackson, Tennessee, for the appellee, Timothy Love, M.D.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

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[1] Appellant's counsel failed to appear for oral argument, so we consider Appellant's argument on brief.

[2] Because this case was resolved by summary judgment, we take the following background from the undisputed facts agreed to by the parties as well as the documents in the record.

Plaintiff/Appellant James Miguel Vilas ("Appellant") presented to the Jackson Madison County General Hospital's Emergency Department on March 18, 2017, with abdominal pain. Appellant was ultimately diagnosed with acute appendicitis. The next day, March 19, 2017, Appellant underwent a laparoscopic appendectomy[3] performed by Defendant/Appellee Timothy Love, M.D. ("Appellee"). The specimen removed during the surgery was reviewed by a pathologist and described as containing "three ragged tan-pink portions of tissue, consistent appendix, grossly." The pathologist's report further stated "[f]ragments of fibroadipose tissue with fat necrosis and acute and chronic inflammation; no intact vermiform appendix is identified."

Appellant attended a post-operative visit at Appellee's office on March 27, 2017. The parties agree that Appellant was provided with a copy of the pathologist's report and that Appellee informed Appellant that he was "convinced based on the landmarks" that he had "removed the appendix." Appellee's notes from the follow-up visit, included in Appellant's medical record, stated that:

> I had a long discussion with the patient regarding the pathology results[,] which demonstrated acute on chronic inflammation but no clear appendiceal mucosa within the specimen. I am convinced that based on landmarks, I removed the appendix. I stated that I have seen this before in a patient with cystic fibrosis with a very long duration of symptoms. That being said, there is a very small chance that the severe inflammation and scarring obscured our view and lymphatic tissue was removed and not the entire appendix. The patient states that he understood.

Then, Appellant began experiencing abdominal pain in April 2017. After presenting to another hospital on April 12, 2017, a diagnostic study revealed that Appellant's appendix had not been removed during the March surgery.[4]

On March 1, 2018, a letter was sent to Appellee informing him of Appellant's intent to file a health care liability action. The letter was signed by an attorney licensed in Louisiana but also indicated that an attorney licensed in Tennessee was working on behalf of Appellant. Appellant then filed a complaint in the Madison County Circuit Court ("the

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[3] An appendectomy involves "the surgical removal of the veriform appendix. The operation is performed in acute appendicitis to remove an inflamed appendix before it ruptures." *Mosby's Dictionary of Medicine, Nursing & Health Professions* 125 (9th ed. 2013). "The procedure can be performed via laparoscope or open laparotomy." ***Id.*** Laparoscopic surgery involves inserting "a laparoscope though one or more small incisions in the abdominal wall[.]" ***Id.*** at 1009.

[4] There is nothing in the record to indicate that Appellant has since had the retained appendix removed; Appellant testified that he underwent no further surgeries since the March 19, 2017 appendectomy performed by Appellee.

trial court") on August 6, 2018.[5] Therein, Appellant alleged that Appellee had breached the applicable standard of care by (1) negligently failing to identify Appellant's appendix intraoperatively, (2) negligently failing to remove Appellant's appendix, (3) negligently performing a laparoscopic appendectomy, (4) negligently failing to recognize his own errors intraoperatively, (5) negligently failing to recognize his own errors after receiving the pathology report, (6) negligently failing to inform Appellant that his appendix had not been removed as planned, (7) negligently failing to order and evaluate additional diagnostic testing, and (8) negligently failing to provide appropriate care and treatment to Appellant. Appellant further alleged that "[a]s a direct and proximate result of the acts and omissions of [Appellee], [Appellant] sustained injuries that otherwise would not have occurred[,]" including but not limited to "medical expenses, physical pain and suffering, return to surgery, and additional medical care."

Appellee filed an answer on September 7, 2018, denying all allegations of negligence and asserting several defenses, including the expiration of the statute of limitations and Appellant's failure to comply with pre-suit notice requirements. Appellee then filed a motion for summary judgment on November 3, 2021, raising a number of arguments. First, Appellee argued that Appellant had not provided competent expert proof to support his allegation that Appellee failed to act in accordance with the recognized standard of acceptable professional practice or that any injury was caused by such a failure. Second, Appellee argued that Appellant's claim was barred by the statute of limitations because his complaint was filed more than one year after the allegedly negligent surgery and more than one year after the post-operative evaluation, at which time Appellee asserted Appellant was put on notice of the possibility that his entire appendix had not been removed. Then, Appellee argued that Appellant had failed to provide any expert proof of any damages sustained as a result of the alleged malpractice. Finally, Appellee argued that, because the letter informing him of Appellant's intention to file a health care liability action was sent and signed by an attorney not licensed in Tennessee, Appellant was not entitled to any extension of the statute of limitations.

In support of his response opposing Appellee's motion, Appellant provided the affidavit of a retained general surgeon expert, Dr. Donald Reiff. In his affidavit, Dr. Reiff opined that Appellee breached the applicable standard of care in several ways, both during the laparoscopic appendectomy and after receiving the pathology report following the surgery, and that Appellee's failure to meet the standard of care "likely caused or contributed to injuries that [Appellant] would not have otherwise incurred[.]" Appellant also disputed that he was put on notice of his potential injury based on the language in the pathology report or during the March 26, 2017 post-operative visit with Appellee, arguing instead that he was not on notice until April 12, 2017, when he presented to a second hospital complaining of abdominal pain and discovered his appendix had been retained. Further, Appellant argued that his pre-suit notice met statutory requirements.

[5] Appellant's complaint was filed by an attorney licensed in Tennessee.

The motion for summary judgment was heard on June 9, 2022. On July 12, 2022, the trial court entered an order granting summary judgment for Appellee. The trial court found that Appellant "knew or should have known of the possibility that his entire appendix was not removed no later than March 27, 2017. By that date he was aware of facts sufficient to put a reasonable person on notice that he may have a retained appendix." The trial court also determined that Appellant had provided timely pre-suit notice, such that he was entitled to an extension of 120 days from the one-year statute of limitations for a health care liability action that would otherwise have expired on March 27, 2018. Thus, Appellant's complaint needed to be filed by July 25, 2018, his August 6, 2018 complaint was not timely, and summary judgment was proper based on the expiration of the statute of limitations. The trial court separately granted summary judgment for Appellee based on its finding that Appellant had presented no evidence that Appellee had caused any injury that would not have otherwise occurred or that Appellant had suffered damages. This appeal followed.[6]

II. ISSUES PRESENTED

Appellant raises the following issues on appeal, which are taken from his brief:

> 1. Whether the trial court erred in granting summary judgment in favor of [Appellee] on his statute of limitations defense when the Parties presented conflicting testimony and evidence about whether [Appellant] should have learned [Appellee] failed to remove his appendix by March 27, 2017.
> 2. Whether the trial court erred in granting summary judgment on the issue of causation and damages when [Appellant] produced admissible and competent expert testimony from Donald Reiff, M.D. supporting those elements of his claim.

Appellee raises as an additional issue: "[w]hether the trial court erred in denying [his] motion for summary judgment on the additional ground that [Appellant] failed to comply with Tennessee Code Annotated § 29-26-121."

III. STANDARD OF REVIEW

This Court reviews the trial court's decision on a motion for summary judgment de novo with no presumption of correctness, as the resolution of the motion is a matter of law. ***Rye v. Women's Care Ctr. of Memphis, MPLLC***, 477 S.W.3d 235, 250 (Tenn. 2015) (citing ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997); ***Abshure v. Methodist Healthcare–Memphis Hosp.***, 325 S.W.3d 98, 103 (Tenn. 2010)). A party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and

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[6] On October 24, 2022, the trial court granted Appellee's motion to recover discretionary costs. That order has not been appealed.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. When the party moving for summary judgment does not bear the burden of proof at trial, it "may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." ***Rye***, 477 S.W.3d at 264. When a motion for summary judgment is made and supported as provided in Rule 56, the non-moving party may not rest on the allegations or denials in its pleadings. ***Id.*** at 265. Instead, the non-moving party must respond with specific facts showing there is a genuine issue for trial. ***Id.*** A fact is material "if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993), *holding modified by* ***Hannan v. Alltel Publ'g Co.***, 270 S.W.3d 1 (Tenn. 2008), *holding modified by* ***Rye***, 477 S.W.3d 235. A "genuine issue" exists if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." ***Id.*** We view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. ***Godfrey v. Ruiz***, 90 S.W.3d 692, 695 (Tenn. 2002).

IV. ANALYSIS

The trial court granted summary judgment for Appellee on two separate and distinct grounds: the expiration of the statute of limitations and a lack of damages. Appellant has appealed both grounds, so we will deal with each in turn. *Cf.* ***Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC***, No. W2017-00957-COA-R3-CV, 2018 WL 3740565, at *8 (Tenn. Ct. App. Aug. 6, 2018) ("Because the [defendants] failed to challenge one of the alternative grounds for denying the motion to dismiss . . ., the trial court's decision must be affirmed." (citing ***Duckworth Pathology Grp., Inc. v. Reg'l Med. Ctr. at Memphis***, No. W2012-02607-COA-R3-CV, 2014 WL 1514602, at *11 (Tenn. Ct. App. Apr. 17, 2014))).

A.

"A defense predicated on the statute of limitations triggers the consideration of three components—the length of the limitations period, the accrual of the cause of action, and the applicability of any relevant tolling doctrines." ***Redwing v. Catholic Bishop for Diocese of Memphis***, 363 S.W.3d 436, 456 (Tenn. 2012). These elements "are inter-related and, therefore, should not be considered in isolation." ***Id.*** Here, there is no dispute that Appellant's complaint raised a health care liability action governed by a one-year statute of limitations.[7] Tenn. Code Ann. § 29-26-116(a)(1). Nor is there any dispute that the

[7] As the Tennessee Supreme Court has previously explained:

> [T]he Tennessee Civil Justice Act of 2011 amended the existing Tennessee Medical Malpractice Act by removing all references to "medical malpractice" from the Tennessee Code and replacing them with "health care liability" or "health care liability action" as

discovery rule tolled the accrual of Appellant's cause of action at some point beyond the date of the allegedly negligent surgery. However, the parties disagree as to when exactly Appellant's action accrued and whether Appellant is entitled to an extension of the limitations period based on proper pre-suit notice. For Appellant's complaint to have been timely, his cause of action must have accrued at a date later than that found by the trial court and his pre-suit notice must have been proper and timely. Thus, for Appellee to be entitled to summary judgment based on the expiration of the statute of limitations, the undisputed facts must negate either of these two requirements. *See* ***Rye***, 477 S.W.3d at 264. Appellant argues that both contentions remain in dispute, so we will consider each in turn.

1. Accrual Date

The determination of when a statute of limitations expired requires a determination of when the cause of action accrued. ***Redwing***, 363 S.W.3d at 457 ("The concept of accrual relates to the date on which the applicable statute of limitations begins to run." (citing ***Columbian Mut. Life Ins. v. Martin***, 175 Tenn. 517, 526, 136 S.W.2d 52, 56 (1940))). While a cause of action accrues immediately upon injury under the traditional rule, Tennessee follows the discovery rule, which provides that a health care liability cause of action "accrues when one discovers or in the exercise of reasonable diligence should have discovered, both (1) that he or she has been injured by wrongful or tortious conduct and (2) the identity of the person or persons whose wrongful conduct caused the injury." ***Sherrill v. Souder***, 325 S.W.3d 584, 595 (Tenn. 2010); *see also* Tenn. Code Ann. § 29-26-116(a)(2) ("In the event the alleged injury [in a health care liability action] is not discovered within such one-year period, the period of limitation shall be one (1) year from the date of such discovery."). Thus, a health care liability cause of action accrues and the one-year limitations period begins to run "not only when the plaintiff has actual knowledge of a claim, but also when the plaintiff has actual knowledge of 'facts sufficient to put a reasonable person on notice that he [or she] has suffered an injury as a result of wrongful conduct.'" ***Redwing***, 363 S.W.3d at 459 (alteration in original) (quoting ***Carvell v. Bottoms***, 900 S.W.2d 23, 29 (Tenn. 1995)). This latter circumstance is often referred to as either "constructive notice" or "inquiry notice" and is the type of notice at issue in this case. *See* ***id.*** at 459 nn.14–15 (collecting cases).

Even when a plaintiff relies on constructive notice, "the discovery rule does not

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> applicable. Furthermore, section 29-26-101 was added to the Code which defined "health care liability action" as "any civil action, including claims against the state or a political subdivision thereof, alleging that a health care provider or providers have caused an injury related to the provision of, or failure to provide, health care services to a person, regardless of the theory of liability on which the action is based."

Ellithorpe v. Weismark, 479 S.W.3d 818, 826 (Tenn. 2015) (internal citations and emphasis omitted). Accordingly, cases referring to "medical malpractice" actions remain relevant to our discussion of this "health care liability" action.

delay the accrual of a cause of action and the commencement of the statute of limitations until the plaintiff knows the full extent of the damages, or until the plaintiff knows the specific type of legal claim it has[.]" ***Id.*** at 459 (internal citations omitted) (first citing ***B & B Enters. of Wilson Cnty.***, ***LLC v. City of Lebanon***, 318 S.W.3d 839, 849 (Tenn. 2010); ***Weber v. Moses***, 938 S.W.2d 387, 393 (Tenn. 1996); and then citing ***John Kohl & Co. v. Dearborn & Ewing***, 977 S.W.2d 528, 533 (Tenn. 1998)). Nor does it allow a plaintiff to delay filing suit until all relevant facts are known, ***id.***, or a formal diagnosis of the injury is made by another medical professional. ***Sherill***, 325 S.W.3d at 595. Instead, the rule "applies to toll the statute of limitations only where the plaintiff 'does not discover and reasonably could not be expected to discover that he had a right of action.'" ***Est. of Morris v. Morris***, 329 S.W.3d 779, 783 (Tenn. Ct. App. 2009) (quoting ***Doe v. Catholic Bishop for Diocese of Memphis***, 306 S.W.3d 712, 718–19 (Tenn. Ct. App. 2008)). A claim accrues, therefore, when "enough information exists for discovery of the wrongful act through reasonable care and diligence[.]" ***Sherill***, 325 S.W.3d at 595.

While the question of whether a plaintiff was on inquiry notice is typically left to the trier of fact, "judgment on the pleadings or dismissal is appropriate where the undisputed facts demonstrate that no reasonable trier of fact could conclude that a plaintiff should not have known through the exercise of reasonable care and diligence that she [or he] was injured as a result of a defendant's wrongful conduct." ***Daffron v. Mem'l Health Care Sys., Inc.***, 605 S.W.3d 11, 20 (Tenn. Ct. App. 2019) (citing ***Young ex rel. Young v. Kennedy***, 429 S.W.3d 536, 557–58 (Tenn. Ct. App. 2013)). However, "where the resolution of the issue depends upon the question of whether due diligence was exercised under the circumstances, and where differing inferences might reasonably be drawn from the uncontroverted facts, the issue is not appropriate for summary judgment." ***Sherill***, 325 S.W.3d at 597 (quoting ***Hathaway v. Middle Tenn. Anesthesiology, P.C.***, 724 S.W.2d 355, 360 (Tenn. Ct. App. 1986)). The question before us, then, "is not when the injury occurred, but when the relevant person became sufficiently aware of the injury and the wrongful conduct of the defendant to trigger the running of the statute of limitations." ***Young***, 429 S.W.3d at 558; *see also* ***Shaw v. Gross***, No. W2017-00441-COA-R3-CV, 2018 WL 801536, at *5 (Tenn. Ct. App. Feb. 9, 2018) (noting that "the discovery rule's cornerstone is, at minimum, the knowledge of the patient of the injury").

Here, as the trial court notes, Appellant's alleged injury is a wrongfully retained appendix. Appellee asserts that the undisputed facts of this case establish that Appellant gained sufficient knowledge of the potential that his entire appendix had not been removed during their post-operative visit, such that his cause of action accrued no later than March 27, 2017.[8] In contrast, Appellant argues that a dispute exists as to the material fact of when he acquired constructive notice of his injury. Making every reasonable inference in favor

[8] Using this date, Appellant filed his complaint one year and 132 days following the accrual of his cause of action. As such, even assuming that Appellant's pre-suit notice was proper, discussed *infra*, Appellee asserts that Appellant's complaint was untimely.

of Appellant, the non-moving party, as we must, we agree that a dispute remains. *See **Sherrill***, 325 S.W.3d at 602 ("During the summary judgment stage of a proceeding, all reasonable inferences must be resolved in favor of the non-moving party.").

To establish Appellant's constructive knowledge, Appellee raises two distinct points. First, Appellee points to the post-operative visit, which he asserts included discussion of the possibility that the appendix was retained. In support, Appellee cites his own notes from the post-operative visit, which state that:

> I had a long discussion with the patient regarding the pathology results[,] which demonstrated acute on chronic inflammation but no clear appendiceal mucosa within the specimen. I am convinced based on landmarks, I removed the appendix. I stated that I have seen this before in a patient with cystic fibrosis with a very long duration of symptoms. That being said, there is a very small chance that the severe inflammation and scarring obscured our view and lymphatic tissue was removed and not the entire appendix. The patient states that he understood.

Appellee further asserts that Appellant conceded to the reliability of these notes in his deposition. Second, Appellee argues that Appellant was placed on inquiry notice of the possibility that his appendix had been retained because he received a copy of the pathology report. Appellee therefore argues that there can be no dispute that Appellant gained constructive notice of the possibility that his entire appendix had not been removed no later than March 27, 2017.

Appellant, however, opposes both of Appellee's arguments, relying in substantial part on his deposition testimony. First, Appellant points to the following testimony in support of his claim that there is a dispute as to what was actually discussed at the post-operative visit:

> Q. [Appellee's] note says that he told you that "There was no clear appendiceal mucosa within the specimen submitted to pathology." Did he tell you that?
> A. I don't recall.
> Q. You're not disputing that he told you that if he documented it, are you?
> A. I don't believe so, no.
> Q. You don't --
> A. . . . [C]an you repeat it one more time?
> Q. Yeah. His note says that "There was no clear appendiceal mucosa within the specimen," referring to what was sent to pathology. Did he tell you that?
> A. I don't recall him telling me that or not.
> Q. If -- if he says he did, you wouldn't have any reason to dispute that, would you?

> A. Unless if that -- [those] medical terms mean that he removed the appendix, no, there's no reason to dispute it. I don't know if that means that he successfully removed the appendix. I don't know what that medical term means.
> Q. Okay. Did he tell you that he was convinced, based on the landmarks, that he removed the appendix?
> A. Yes.
> Q. Did he also tell you, as he documented, that there was a very small chance that the severe inflammation and scarring obscured his view, and lymphatic tissue was removed and not the entire appendix?
> A. No.
> Q. He documented that.
> A. I don't remember him telling me that. I don't.
> Q. I understand you don't remember.
> A. Okay.
> Q. But if he documented that, you wouldn't have any reason to dispute being told that, would you?
> A. From -- from previous results, I guess I would because he documented other stuff that wasn't the case. So I'm not sure.
> Q. You don't know if he told you that or not?
> A. Correct.
> Q. But you wouldn't dispute it if that's what the record at the time says, would you?
> A. Possibly, because, I mean, we're disputing something that he wrote down in the surgery that didn't occur. So I'm not sure if this is something of that nature as well.

As we perceive it, while perhaps not a model of clarity, this testimony is sufficient to create a genuine dispute of material fact as to what was discussed at the post-operative appointment. To begin with, Appellant testified that he did not remember or recall being told about either the pathology results or the possibility that his appendix had not been removed. In our view, this is analogous to testimony in federal asbestos litigation where witnesses did not recall seeing asbestos warnings. Under these circumstances federal courts have held that "a reasonable jury could draw the inference from their testimony that they did not recall seeing the warnings because there were no warnings." ***Dugger v. Union Carbide Corp.***, No. CV-CCB-16-3912, 2019 WL 4778016, at *3 (D. Md. Sept. 30, 2019) (citing ***Jacobs v. N.C. Admin. Off. of the Cts.***, 780 F.3d 562, 570 (4th Cir. 2015)); *see also* ***Kessinger v. Grefco, Inc.***, 875 F.2d 153, 157 (7th Cir. 1989) (holding that plaintiff's failure to recall warnings was probative of whether warnings were given). Indeed, we have previously cited testimony that a defendant's employee did not recall seeing anything spilled on the floor as relevant to the question of whether the employer had notice of an allegedly dangerous condition. ***Jones v. Publix Supermarket, Inc.***, No. M2018-01672-COA-R3-CV, 2019 WL 2404975, at *5 (Tenn. Ct. App. June 7, 2019). So we conclude

that a reasonable inference from Appellant's testimony that he did not remember being told what the pathology report meant or that there was a chance his appendix had been retained is that he was not told this information during the relevant post-operative visit.

In addition, we conclude that Appellant did not concede the accuracy of Appellee's medical notes in his deposition. While certainly not a model of clarity, the clear import of Appellant's testimony is that because Appellant has found other mistakes in his medical file, it is possible that additional errors or misstatements are contained within the note, including that Appellee discussed the pathology report and the possibility that the appendix was not removed with Appellant. *See* ***Sherrill***, 325 S.W.3d at 602. Taking Appellant's testimony as a whole, we conclude that Appellant has created a dispute as to whether Appellee informed Appellant of the possibility his appendix had been retained at the March 27, 2017 follow-up visit.

This conclusion is further bolstered by Appellant's deposition testimony as a whole, which supports his position that Appellee did not inform him that the appendix was retained. Appellant testified that "from what [he] remember[ed, what Appellee told him] was that [the appendectomy] was a routine surgery and that [the appendix] was removed properly."[9] Thus, Appellant asserts, even if he was told at the March 27, 2017 follow-up visit that his appendix could possibly have been retained, there was no indication that he was injured as a result of wrongful conduct so as to put him on notice to conduct further inquiry. *See* ***McIntosh v. Blanton***, 164 S.W.3d 584, 588 (Tenn. Ct. App. 2004) (including doctor's assurances that her injury was part of the normal risks associated with the procedure as "an element" in the consideration of "all the circumstances" to determine when patient was reasonably on notice of claim); ***Green v. Sacks***, 56 S.W.3d 513, 523 (Tenn. Ct. App. 2001) (finding patient "had no reason to be alarmed or suspicious [about injury], especially when [her doctor] assured her that her pain would eventually subside and when her postoperative pain eventually did decrease"); ***Phillips v. Casey***, No. E2014-01563-COA-R9-CV, 2015 WL 4454781, at *5 (Tenn. Ct. App. July 21, 2015) (denying hospital's argument that limitations period begins running when allegedly wrongful conduct occurs because then "[n]o longer could a patient take his or her doctor's advice freely; instead patients would be tasked with independently fact-checking information on conditions and drugs"); *see also* ***Zelman v. Cent. Indiana Orthopedics, P.C.***, 88 N.E.3d 798, 803 (Ind. Ct. App. 2017) ("Reliance on a medical professional's words or actions that deflect inquiry into potential malpractice can also constitute reasonable diligence such that the limitations period remains open." (citation omitted)). *But see* ***Wyatt v. A-Best, Co.***, 910

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[9] Specifically, the exchange was as follows:

> Q. [Appellee's] note from March 27th, 2017, said that he had a long discussion with you about the pathology results. Tell me what he discussed with you about the pathology results.
> A. Told me -- I remember -- from what I remember, it was that it was a routine surgery and that it was removed properly.

S.W.2d 851, 856 (Tenn. 1995) ("[A]lthough the tentative diagnosis did not commence the running of the statute, it did trigger a duty on plaintiff's part to determine, with due diligence, whether he did, in fact, have that disease."). Thus, dispute as to the material fact of what specifically was discussed at the post-operative appointment prevents us from concluding that Appellant was placed on notice of his cause of action at this appointment as a matter of law.

We therefore turn to Appellant's second argument: that receipt of the pathology report did not provide constructive notice for purposes of the discovery rule. Appellee asserts that Appellant never raised this argument in the trial court and therefore cannot make this argument on appeal. *See* ***Moses v. Dirghangi***, 430 S.W.3d 371, 381 (Tenn. Ct. App. 2013)) ("It is well settled that issues not raised at the trial level are considered waived on appeal." (citing ***Waters v. Farr***, 291 S.W.3d 873, 918 (Tenn. 2009); Tenn. R. App. P. 36(a))). However, when arguing against a March 27, 2017 accrual date in his response opposing the motion for summary judgment, Appellant highlighted "[t]he absurdity of [Appellee's] position—that a lay-college student should have recognized no later than March 27, 2017 what had been taken out of his body and that he had suffered an injury[.]" Appellant further stated that "[t]he idea that [Appellant], a college-age soccer player . . . should have interpreted a clinical pathology report to conclude that he had suffered an injury is equally ludicrous." We therefore conclude that Appellee failed to establish that this argument is waived on appeal. *See* ***Fayne v. Vincent***, 301 S.W.3d 162, 171 (Tenn. 2009) ("One of the corollaries of the waiver doctrine is that the party asserting waiver has the burden of proof.").

Appellant does not dispute that he received a copy of the pathology report at the March 27, 2017 follow-up visit.[10] However, Appellant contends that he did not understand the results of the pathology report even after the discussion with Appellee. Appellant also points to Appellee's deposition testimony where Appellee admits that he did not know "for certain" whether he had removed the entire appendix based on the pathology report. Appellant argues that if the results of the pathology testing were unclear to a surgeon, the

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[10] The report contained the following remarks:

> Final Pathologic Diagnosis:
>
> veriform appendix; LAPARAROSCOPIC appendectomy:
>
> Fragments of reactive lymph node.
>
> Fragments of fibroadipose tissue with fat necrosis and acute and chronic inflammation; no intact veriform appendix is identified.
>
> . . . .
>
> Gross Description
>
> Received in formalin labeled "Villas, James, appendix" are three ragged tan-pink portions of tissue, consistent appendix, grossly. Portions of tissue range from 1.0 to 2.2 cm. There is a surgical staple line. Intact tip is not grossly identified. An intact lumen is not grossly identified. There are numerous fibrous adhesions. The specimen is sectioned and entirely submitted in cassettes A-B.

somewhat ambiguous report was certainly insufficient to place a lay person on notice of the potentially retained appendix.

We have previously recognized the difficulty interpreting medical jargon presents to the average person. *See* ***Lawrence Cnty. Bank v. Riddle***, 621 S.W.2d 735, 737 (Tenn. 1981) ("The inner workings of the human body, surgical procedures, proper diagnostic techniques, and other medical activities are not within the knowledge of average ordinary laymen. The medical terminology employed by doctors is strange and foreign indeed to the average juror, attorney, or judge."). So too have other courts. *See, e.g.*, ***Pedersen v. Zielski***, 822 P.2d 903, 907 (Alaska 1991) (recognizing that an ordinary person might not have understood the technical statements contained in the patient's hospital records); ***Jendrusina v. Mishra***, 892 N.W.2d 423, 429 (Mich. Ct. App. 2016) (reversing summary judgment through application of discovery rule, explaining that "[o]ne would be hard-pressed to find a reasonable, ordinary person" who knew what an abnormal blood test meant in relation to a kidney failure diagnosis). It is therefore difficult to say that merely being presented with a report containing the above medical findings was sufficient to provide Appellant with notice of the meaning of the report's diagnostic content. *Cf.* ***Adams v. Zimmer US, Inc.***, 943 F.3d 159, 168 & n.6 (3d Cir. 2019) (applying Pennsylvania law to reverse grant of summary judgment because "knowledge of medical terminology . . . is not sufficient to impute constructive knowledge" of an injury and finding that form repeating information told to patient could "be presented as evidence to a jury but [did] not, as a matter of law, establish actual notice"). Indeed, even assuming that the statement "no intact veriform appendix is identified" indicates that the specimen did not include the entire appendix, a conclusion we are reluctant to reach, the medical report goes on to suggest that the specimen was "consistent" with "appendix grossly." A reasonable trier of fact could determine that the language in the pathology report was so technical and vague, that it would not have put Appellant on constructive notice of a potential injury or claim.

Moreover, Appellant did not receive the pathology report in a vacuum. Instead, according to his testimony, Appellant also received Appellee's assurances that the appendectomy had been routine and that the appendix had been removed. In giving Appellant the benefit of all reasonable inferences, we must interpret the effect of the report in connection with these mitigating statements. To the extent that Appellee's argument regarding Appellant's receipt of the report is that additional diligence in investigating the language within the pathology report was due, the issue is not properly resolved by summary judgment. *See* ***Sherill***, 325 S.W.3d at 597. A reasonable inference from Appellant's testimony is that, faced with a report in technical jargon and his doctor's assurance of a surgery's success, there appeared to be no need to inquire further into the results of the operation. Thus, we conclude that Appellant has shown that a dispute exists as to whether he gained constructive notice that his appendix had been retained from receipt of the pathology report.

Although Appellee contends that Appellant had sufficient information to put him

on notice that his appendix was not removed by March 27, 2017, Appellant's testimony, given the benefit of all reasonable inferences, indicates that he did not have sufficient information to be put on notice at that time. Because there are directly conflicting interpretations on the issue of when Appellant could reasonably have discovered that he had a right of action, a credibility issue has been created. And issues that turn on credibility generally cannot be decided via summary judgement. *See* ***Byrd***, 847 S.W.2d at 216 ("When a material fact is in dispute creating a genuine issue, when the credibility of witnesses is an integral part of the factual proof, or when evidence must be weighed, a trial is necessary because such issues are not appropriately resolved on the basis of affidavits."); ***Vaulton v. Polaris Indus., Inc.***, No. E2021-00489-COA-R3-CV, 2022 WL 628502, at *13 (Tenn. Ct. App. Mar. 4, 2022) ("At the summary judgment stage, we do not weigh the evidence, nor do we engage in credibility determinations regarding the deponents."); c*f.* ***Hollar v. Hollar***, No. M2014-02370-COA-R3-CV, 2015 WL 7748967, at *7 (Tenn. Ct. App. Nov. 30, 2015) ("The weight, faith and credit to be given to any witness's testimony lies in the first instance with the trier of fact." (quoting ***Koch v. Koch***, 874 S.W.2d 571, 577 (Tenn. Ct. App. 1993))). *But see* ***Hashi v. Parkway Xpress, LLC***, No. M2018-01469-COA-R3-CV, 2019 WL 5431858, at *4 (Tenn. Ct. App. Oct. 23, 2019) ("[T]o warrant a denial of summary judgment, credibility questions 'must r[ise] to a level higher than the normal credibility questions that arise whenever a witness testifies.'" (alteration in original) (quoting ***Hepp v. Joe B's, Inc.***, No. 01A01-9604-CV-00183, 1997 WL 266839, at *3 (Tenn. Ct. App. May 21, 1997))).

The proof here evinces a genuine dispute as to the material fact of Appellant's constructive notice of his potential health care liability claim, making summary judgment on the issue of the accrual date of Appellant's cause of action inappropriate. ***Tigrett v. Linn***, No. W2009-00205-COA-R9-CV, 2010 WL 1240745, at *3 (Tenn. Ct. App. Mar. 31, 2010) ("Summary judgment is only appropriate when the facts and legal conclusions drawn from the facts reasonably permit only one conclusion." (quoting ***Landry v. S. Cumberland Amoco***, No. E2009-01354-COA-R3-CV, 2010 WL 845390, *3 (Tenn. Ct. App. March 10, 2010))). As Appellee has not met his burden to show as a matter of law that Appellant gained constructive notice at the March 27, 2017 follow-up appointment, rather than at his April 12, 2017 visit to the second hospital, this issue remains a question for the trier of fact. Accordingly, we reverse this aspect of the trial court's judgment.

2. Pre-suit Notice

In the alternative, Appellee argues that summary judgment based on the expiration of the statute of limitations is nevertheless appropriate because Appellant failed to provide valid pre-suit notice. Under Tennessee Code Annotated section 29-26-121, a health care liability plaintiff is required to "give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state." Once proper notice is given, the plaintiff is entitled to a 120-day extension of the limitations period. ***Id.***

Here, a letter was sent to Appellee on March 1, 2018, explaining that Appellant was asserting a potential claim arising from the care provided by Appellee on March 19, 2017. The letter was signed by an attorney licensed in Louisiana and indicated that Appellant was also represented by an attorney licensed in Tennessee. Appellee argues that, because the letter was not signed by an attorney licensed in Tennessee, the pre-suit notice was invalid and Appellant was not entitled to the 120-day extension.[11] *See* ***Shaw***, 2018 WL 801536, at *5 ("[T]o rely on the one hundred twenty day extension to the statute of limitations, a plaintiff must give appropriate pre-suit notice under section 29-26-121."). There can be no dispute that even with the later accrual date of April 12, 2017 that Appellant asserts, the extension for proper pre-suit notice is necessary for his August 6, 2018 complaint to have been timely. Thus, Appellee may still be entitled to summary judgment on the basis of the expiration of the statute of limitations if Appellant's pre-suit notice did not operate to extend the applicable statute of limitations because it was invalid.

The trial court's discussion of Appellant's pre-suit notice, though, was limited. Amid its discussion of the timeliness of Appellant's complaint, the trial court "determine[d] that [Appellant] did give timely pre-suit notice." *See* Tenn. Code Ann. § 29-26-121(a)(3) (requiring notice to be sent "within the statutes of limitations and statutes of repose applicable to the provider"). The trial court, however, does not appear to have ruled on Appellee's argument that the notice was invalid based on being signed by an attorney not licensed in Tennessee.

It is arguably possible to read the trial court's order as implicitly rejecting Appellee's argument concerning the validity of the pre-suit notice by virtue of the trial court's finding that the notice was timely. *See* ***Morgan Keegan & Co. v. Smythe***, 401 S.W.3d 595, 608 (Tenn. 2013) ("[W]hen construing orders and judgments, effect must be given to that which is clearly implied, as well as to that which is expressly stated."). When faced with a summary judgment motion, however, trial courts are required to do more than address arguments by implication. Specifically, Rule 56 of the Tennessee Rules of Civil Procedure states that "[t]he trial court shall state the legal grounds upon which the court denies or grants the motion [for summary judgment], which shall be included in the order reflecting the court's ruling." In ***Smith v. UHS of Lakeside***, the Tennessee Supreme Court held that Rule 56.04 requires that an order granting or denying summary judgment include

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[11] Appellee's argument appears to be that while there is no requirement that pre-suit notice be sent by an attorney, when notice *is* sent by an attorney, the attorney needs to be licensed in Tennessee. Appellee argues that an attorney sending pre-suit notice while not being licensed in Tennessee amounts to the unauthorized practice of law, making the notice a nullity. *See* Tenn. Code Ann. § 23-1-108 ("No person shall practice law in this state without first receiving a license issued by the Tennessee supreme court and complying with Tennessee Supreme Court Rule 6 concerning admission to the practice of law . . . ."); ***Owen v. Grinspun***, 661 S.W.3d 70, 84 (Tenn. Ct. App. 2022) ("[I]t has long been the law in Tennessee that '[p]roceedings in a suit by a person not entitled to practice are a nullity.'" (quoting ***Bivins v. Hosp. Corp. of Am.***, 910 S.W.2d 441, 447 (Tenn. Ct. App. 1995))). This argument also forms the basis of Appellee's issue on appeal that summary judgment should have been granted based on Appellant's failure to comply with Tennessee Code Annotated § 29-26-121.

a rationale for the ruling that is both adequately explained and the product of the trial court's independent judgment. 439 S.W.3d 303, 314 (Tenn. 2014). The Court noted that in addition to issues of judicial economy, when determining whether we should soldier on in spite of the trial court's failure to comply with Rule 56.04, appellate courts should also consider "the fundamental importance of assuring that a trial court's decision either to grant or deny a summary judgment is adequately explained and is the product of the trial court's independent judgment." ***Id.***

Because the trial court did not specifically rule on Appellee's argument that Appellant's pre-suit notice was invalid, we conclude that the appropriate remedy is to vacate the trial court's judgment as to this issue and remand for the entry of an order that states the legal grounds for granting or denying Appellees' summary judgment motion on the basis that the pre-suit notice was improperly executed and did not extend the statute of limitations. *See* ***id.*** at 318 (affirming the Court of Appeals' decision to vacate the judgment of the trial court and remand for the entry of an order fully compliant with Rule 56.04); ***Shaw***, 2018 WL 801536, at *9–10 (vacating trial court's grant of summary judgment where it did not apply the appropriate standard or adequately explain its basis for concluding pre-suit notice was improper); *see also* ***Whalum v. Shelby Cnty. Election Comm'n***, No. W2013-02076-COA-R3-CV, 2014 WL 4919601, at *3 n.3 (Tenn. Ct. App. Sept. 30, 2014) ("This Court's jurisdiction is appellate only. Accordingly, we are constrained to only review those issues that have been decided by the trial court in the first instance." (citing ***Reid v. Reid***, 388 S.W.3d 292, 294 (Tenn. Ct. App. 2012) ("The jurisdiction of this Court is appellate only; we cannot hear proof and decide the merits of the parties' allegations in the first instance."))); ***Church v. Perales***, 39 S.W.3d 149, 157 (Tenn. Ct. App. 2000) ("The evidentiary standards uniquely applicable to medical malpractice cases ordinarily give rise to subtle and complex evidentiary questions for which some elucidation of the exact reasons for ending a case summarily will almost always be helpful.").

B.

We turn to address the trial court's grant of summary judgment on the basis of Appellant's failure to establish causation and damages. "[H]ealth care liability actions are a specialized type of negligence claim" created by statute. ***Smith v. Testerman***, No. E2014-00956-COA-R9-CV, 2015 WL 1118009, *5 (Tenn. Ct. App. Mar. 10, 2015). To prevail on a health care liability claim, a plaintiff must prove the following statutory elements:

> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
> (3) As a proximate result of the defendant's negligent act or omission, the

plaintiff suffered injuries which would not otherwise have occurred.

Tenn. Code Ann. § 29-26-115(a). Generally, these elements must be established through the testimony of an expert qualified under section 29-26-115(b). ***Young v. Frist Cardiology***, PLLC, 599 S.W.3d 568, 571 (Tenn. 2020) (citing ***Shipley v. Williams***, 350 S.W.3d 527, 550 (Tenn. 2011)).

At the summary judgment stage, "[t]he extent of injury is not a proper inquiry" and a health care liability plaintiff "must demonstrate only that he or she has been injured. The question of how much the plaintiff has been injured should be left for the trier of fact." ***Church***, 39 S.W.3d at 172. A legally recognizable injury includes "an act or omission against that person's rights that results in some damage." ***Id.*** at 171. For the purposes of a health care liability action, "[a]ny want of skillful care or diligence on a physician's part that sets back a patient's recovery, prolongs the patient's illness, increases the plaintiff's suffering, or, in short, makes the patient's condition worse than if due skill, care, and diligence had been used, constitutes [an] injury[.]" ***Id.*** (citations omitted).

As to the causation element, a health care liability plaintiff "must prove *that it is more likely than not* that the defendant's negligence caused plaintiff to suffer injuries which would have not otherwise occurred." ***Davis v. Ellis***, No. W2019-01367-COA-R3-CV, 2020 WL 6499559, at *7 (Tenn. Ct. App. Nov. 5, 2020) (quoting ***Kilpatrick v. Bryant***, 868 S.W.2d 594, 602 (Tenn. 1993)). "A mere possibility of such causation is not enough" but "[t]he plaintiff is not, however, required to prove the case beyond a reasonable doubt." ***Kilpatrick***, 868 S.W.2d at 602 (quoting ***Lindsey v. Miami Dev. Corp.***, 689 S.W.2d 856, 861 (Tenn. 1985)). Instead, "it is enough to introduce evidence from which reasonable persons may conclude that it is more probable that the event was caused by the defendant than that it was not[.]" ***Id.*** (quoting ***Lindsey***, 689 S.W.2d at 861–62).

Once liability is admitted or established, damages in health care liability actions encompass "actual economic losses suffered by the claimant by reason of the personal injury, including, but not limited to, cost of reasonable and necessary medical care, rehabilitation services, and custodial care, loss of services and loss of earned income[.]" Tenn. Code Ann. § 29-26-119. The party seeking damages has the burden of proving them. ***Overstreet v. Shoney's, Inc.,*** 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999) (citing ***Inman v. Union Planters Nat'l Bank***, 634 S.W.2d 270, 272 (Tenn. Ct. App. 1982)). "[T]he proof must be as certain as the nature of the case permits and must enable the trier of fact to make a fair and reasonable assessment of the damages." ***Id.*** (citing ***Pinson & Assocs. Ins. Agency, Inc. v. Kreal***, 800 S.W.2d 486, 488 (Tenn. Ct. App. 1990); ***Wilson v. Farmers Chem. Ass'n***, 60 Tenn. App. 102, 111, 444 S.W.2d 185, 189 (1969)). In general, a request for damages cannot be based on "mere conjecture or speculation." ***Id.*** For damages to be recoverable, "the *existence* of damages cannot be uncertain, speculative, or remote, but the *amount* of damages may be uncertain if the plaintiff lays a sufficient foundation to allow the trier of fact to make a fair and reasonable assessment of damages." ***Tennison Bros.,***

Inc. v. Thomas, 556 S.W.3d 697, 724 (Tenn. Ct. App. 2017) (citation omitted). The amount awarded is not controlled by "fixed rules . . . or mathematical formulas" and instead left to "the sound discretion of the trier of fact." ***Overstreet***, 4 S.W.3d at 703 (citations omitted).

In his motion for summary judgment, Appellee argued that he affirmatively negated the standard of care, breach, and causation elements of Appellant's claim by filing his own affidavit stating that he complied with the applicable standard of care and caused no injury to Appellant that would not otherwise have occurred. Appellee further argued that Appellant had provided no expert proof regarding these elements. Appellee also pointed to Appellant's own testimony that he had no further surgeries and has no limitations today stemming from the appendectomy.

In response to Appellee's motion, Appellant filed the affidavit of Dr. Donald Reiff, a general surgeon and critical care specialist in Alabama who had "reviewed materials and records in this case, including: medical records from Jackson Madison County General Hospital dated March 2017; medical records from the Jackson Clinic, P.A. dated March 2017; medical records from Centinela Hospital Medical Center dated April 2017; correspondence from [Appellee] to [Appellant's parents] dated April 18, 2017; and [Appellee's] Affidavit dated September 21, 2021 and its attachments thereto." Dr. Reiff's affidavit described the applicable standard of care for both the appendectomy itself and the post-operative receipt of a pathology report. The affidavit further concluded that Appellee's breach of the applicable standards of care "likely caused or contributed to injuries [Appellant] would not have otherwise incurred, including urgent and acute return to treatment, medical expenses, physical pain and suffering, and additional medical care." Accordingly, Appellant argued that summary judgment on the causation and damages issue was improper because he "produced competent expert testimony supporting that component of his claim" and thus created a genuine dispute of material fact. Appellee filed no reply to Appellant's response or Dr. Reiff's affidavit.

In granting summary judgment on the issue of causation and damages, the trial court stated as follows:

> Separate and distinct from [Appellant's] failure to file the Complaint within the statute of limitations, the Court finds that the [Appellant] has presented no evidence that he has suffered damages in this matter. [Appellant] testified that he has not had any surgeries since the procedure by [Appellee]. [Appellant] also testified that he does not claim that he is limited or damaged today. [Appellant] failed to set forth proof that [Appellee] caused any injury to [Appellant] that would not otherwise have occurred. The Court concludes that [Appellee's] Motion for Summary Judgment should also be granted, because [Appellant] has failed to set forth proof that [Appellee] caused any injury to [Appellant] that would not otherwise have occurred.

On appeal, Appellant reiterates that summary judgment was improper because he produced expert testimony supporting the causation and damages elements of his claim. Appellant argues that when both parties submit expert testimony at the summary judgment stage, the competing testimony needs to be viewed in the light most favorable to the non-moving party, leaving the weight and credibility of the testimony up to the jury. He asserts that Appellee has waived any argument regarding Dr. Reiff's affidavit because he failed to raise the issue at the trial court level. We agree.

As an initial matter, we must once again take issue with the sufficiency of the trial court's order. As is evident from the above, the trial court's ruling fails to discuss in any manner the affidavit of Dr. Reiff submitted by Appellant. Instead, the trial court appears to focus solely on Appellant's testimony in support of his injury.[12] But, as previously discussed, the injury element of a health care liability claim, like the standard of care and breach elements, must be supported by competent expert proof. *See* Tenn. Code Ann. § 29-26-115(a)–(b). So the first question is whether such expert proof was offered in this case.

It is perhaps unsurprising that the trial court does not mention Dr. Reiff's affidavit, as Appellee also largely ignored it in the trial court. On appeal, Appellee makes various arguments as to why the affidavit should not be considered as competent proof. Specifically, Appellee argues that the affidavit (1) does not establish the doctor's competency to offer an opinion; (2) does not attach the documents it references as required by Rule 56.06 of the Tennessee Rules of Civil Procedure; and (3) fails to set forth specific enough facts regarding causation or damages to be considered.

The problem with these arguments, as Appellant points out in his brief, is that Appellee failed to make them in the trial court. It is well settled, however, that a failure to raise an argument at trial results in a waiver of that argument on appeal. *See, e.g.*, ***Barnes v. Barnes***, 193 S.W.3d 495, 501 (Tenn. 2006); ***Whalum***, 2014 WL 4919601, at *3 n.3; Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.")); *see also* ***Wachovia Bank & Tr. Co., N. A. v. Glass***, 575 S.W.2d 950, 955 (Tenn. Ct. App. 1978) ("The record contains no indication that defendant at any time or in any manner interposed any objection to the consideration of this affidavit. A rule of evidence not invoked is waived." (citing ***Baker v. Baker***, 60 Tenn. App. 545, 488 S.W.2d 677 (1969))). Here, any objections Appellee had to the affidavit on the basis that it failed to detail Dr. Reiff's competency or attach required documents were required to be raised in the trial court. Because Appellee failed to do so, these arguments will not be entertained on appeal.

Moreover, in light of Appellee's failure to raise in the trial court any argument that Dr. Reiff's affidavit was not specific enough, we conclude that it was sufficient for

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[12] Again, it is arguable that the trial court's practice meets the requirements of Rule 56.04, as discussed *supra*.

purposes of this appeal. Again, Dr. Reiff testified that based on his "education, training, and experience, the failures [of Appellee] to comply with the applicable standard of care likely caused or contributed to injuries that [Appellant] would not have otherwise incurred, including urgent and acute return to treatment, medical expenses, physical pain and suffering, and additional medical care." While we acknowledge that Dr. Reiff's affidavit is rather sparse on details as to the further medical treatment Appellant required or the pain and suffering Appellant suffered as a result of the allegedly negligent appendectomy, we have previously accepted similar testimony as sufficient to prevent the granting of summary judgment. *See* ***Church***, 39 S.W.3d at 169 ("[Plaintiff's expert] stated that [plaintiff] experienced further sickness, unnecessary pain, and a significantly extended recuperative period as a result of these delays. At the conclusion of one of his affidavits, [expert] stated that '[a]ll of the opinions I have expressed herein are based upon a reasonable degree of medical certainly.' That assertion is sufficient to create a genuine, material factual dispute sufficient to prevent the granting of a summary judgment[.]"); *see also* ***Wilson v. Patterson***, 73 S.W.3d 95, 104 (Tenn. Ct. App. 2001) ("Although a lack of precision by [plaintiff's expert] may eventually undermine the weight of his testimony, it is not the task of the appellate court to weigh the evidence at the summary judgment stage of the proceedings."); ***Richardson v. Miller***, 44 S.W.3d 1, 31 (Tenn. Ct. App. 2000) ("Weak or strong, [plaintiff's experts'] testimony at least created a jury question on causation, and therefore the trial court did not err in refusing to direct a verdict on that ground."); ***Ledford v. Moskowitz***, 742 S.W.2d 645, 649 (Tenn. Ct. App. 1987) ("Although medical malpractice actions impose more rigorous procedural requirements on the plaintiff, once the threshold of proof has been crossed . . . then the case should proceed to trial on the merits."). If Appellee believed that Dr. Reiff's testimony required more detail, that is an argument he should have raised in the trial court so that Appellant could have supplemented the affidavit or otherwise responded.[13] *See generally* ***Metro. Gov't of Nashville & Davidson Cnty. v. Gelle***, No. M2020-01360-COA-R3-CV, 2022 WL 588539, at *5 (Tenn. Ct. App. Feb. 25, 2022) (holding that an argument was waived when not raised in the trial court because the opposing party had no opportunity to present evidence or present an argument opposing it), *perm. app. denied* (Tenn. Aug. 4, 2022). In the absence of such a properly raised argument, we decline to conclude that this language is insufficient as matter of law.

Finally, Appellee points to Appellant's deposition testimony that he has had no additional surgeries, ongoing problems, or current limitations as a result of the

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[13] Appellee makes a rather confusing argument that Rule 56.06 excuses him from objecting to the affidavit. He cites no law in support of this argument. Rule 56.06 states that summary judgment "shall be entered" if "the adverse party does not so respond" to a properly supported motion for summary judgment. Here, Appellant did respond to Appellee's motion for summary judgment by filing an affidavit. If that affidavit was insufficient to create a dispute of material fact, nothing in Rule 56.06 excused Appellee from his duty to raise that argument in the trial court so that both Appellant and the trial court could address it.

appendectomy, and that his abdominal pain has been linked to constipation problems, not his retained appendix. Thus, Appellee argues, Appellant has failed to meet his burden to avoid summary judgment as to causation and damages. Even if we assume, arguendo, that this argument was not waived for failure to raise it in the trial court, we conclude that it is not sufficient to mandate summary judgment in Appellee's favor. To be sure, we agree that Appellant's testimony that the "off-and-on pain" he continued to experience after April 2017, was caused by constipation, rather than a retained appendix, compellingly undermines his expert's conclusion that Appellant suffered an injury—including additional treatment, expenses, and pain and suffering—as a result of Appellee's alleged negligence. However, even if there "may be substantial doubt about the weight that a reasonable jury might give to [Dr. Reiff's] testimony," that is not sufficient to justify summary judgment in Appellee's favor. ***Martin v. Norfolk S. Ry. Co.***, 271 S.W.3d 76, 89 (Tenn. 2008) (Koch, J., concurring in part).

Here, Appellant's expert has concluded that Appellant likely suffered from an injury that he would not have suffered in the absence of Appellee's alleged negligence. Because Appellee has waived any objection to the sufficiency of this affidavit and the trial court made no ruling specifically addressing the affidavit, we must take its contents at face value. Taken in the light most favorable to Appellant as the non-moving party, we conclude that this testimony establishes a genuine dispute of material fact as to both causation and damages. *See* ***Martin***, 271 S.W.3d at 85 ("The resolution of conflicting expert testimony is a factual issue that must be reserved for the trier of fact."); ***Stone v. Hinds***, 541 S.W.2d 598, 599 (Tenn. Ct. App. 1976) ("Summary judgment procedure is not a substitute for a trial. It is only when there is no disputed issue of material fact that a summary judgment should be granted. If such fact issue is present, the matter must not be resolved by a battle of affidavits, but must be resolved by a trial on the merits." (citing ***Evco Corp. v. Ross*** 528 S.W.2d 20 (Tenn. 1975); ***Layhew v. Dixon*** 527 S.W.2d 739 (Tenn. 1975))). Accordingly, summary judgment on this ground was not proper and we reverse.

V. CONCLUSION

The judgment of the Madison County Circuit Court is reversed in part and vacated in part, and this matter is remanded to the trial court for further proceedings consistent with this Opinion. Costs are taxed to Appellee, Timothy Love, M.D., for which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE