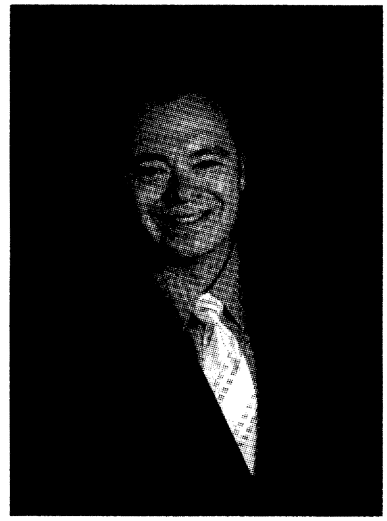

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SNATCHING CONFUSION FROM THE JAWS OF CLARITY: THE PUZZLING EVOLUTION OF THE DISCOVERY RULE VIS-À-VIS INDIANA'S MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

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ABSTRACT

For medical malpractice actions in Indiana, a frequently contradictory and always-confusing pool of jurisprudence has swelled around the statute of limitations. With its announcement of an accrual-based standard in 1999, the Indiana Supreme Court imposed a seemingly-impossible challenge on Indiana patients, attorneys, and judges: divine the factor(s) a reviewing court will deem sufficient to trigger the statute of limitations in a given medical malpractice case. For some litigants, this confounding exercise means filing a lawsuit solely to protect the statute of limitations even before the patient or her attorney knows that a claim exists, leaving the litigant to hope that her suspicions of negligence will find support in the evidence. For the more dutiful litigant, any investigation designed to detect or confirm negligence risks a post hoc evaluation of past symptoms, test results, conversations, or diagnoses which, in retrospect, should have led to the discovery of the malpractice. And each time an Indiana court dares attempt to create unity out of the impossibly-inconsistent precedent that came before, a subsequent court tears down the transitory edifice of consensus as quickly as it had been built. This frustrating pattern culminated in late 2009 when the Indiana Court of Appeals forced medical malpractice litigants back to square one on nearly every principle of discovery rule jurisprudence established over the prior decade. This Article tracks the common law evolution of the discovery rule in Indiana's medical malpractice jurisprudence, synthesizes the common law history into a workable framework for future applications of the accrual-based standard, and then explores the Indiana Court of Appeals' unilateral destruction of that framework in the 2009 case of Williams v. Adelsperger.

I. INTRODUCTION

For the medical patient suffering the consequences of a physician's error, the world of medicine appears impossibly complex. Facing a field overrun with hyper-technical diagnostic tools and increasingly expensive

treatment options, the average layperson has little chance of gauging whether a poor treatment result stems from physician error or some other aspect of treatment. On the one hand, the cautious patient will wish to remain vigilant against unrealistic expectations. On the other hand, to assume infallibility on the part of one's physician discounts one's own suffering while inviting similar harms to the physician's future patients. Thus, the patient must navigate between the Scylla and Charybdis: either act on potentially unfounded suspicion, or risk allowing an act of negligence to go uncompensated and, thus, unpunished.

Complicating this choice, most states have enacted discovery-based statutes of limitations for medical malpractice actions. These statutes are triggered on the date a plaintiff knew, or should have known of, or in other words, discovered the injury and its negligent cause.[1] In Indiana, this standard found voice not in statute itself but in judicial construction. In the landmark case of *Van Dusen v. Stotts*, the Indiana Supreme Court construed Indiana's Medical Malpractice Act to permit medical malpractice victims "to file their claims within two years of the date when they *discover* the malpractice and the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury."[2] With this pronouncement, the Indiana Supreme Court transmuted an occurrence-based statute of limitations into an accrual-based standard.

This accrual-based standard asserted by the Indiana Supreme Court imposed a seemingly impossible challenge on Indiana patients, attorneys, and judges: determine the factor(s) a reviewing court will deem sufficient to trigger the statute of limitations in a given case. For some, this confounding exercise might mean filing a lawsuit solely to protect the statute of limitations even before the patient or her attorney knows that a claim exists, leaving the litigant to hope that her suspicions of negligence will find support in the evidence. For the more dutiful litigant, any investigation (including collection and review of medical records or consultation with other physicians) designed to detect or confirm negligence risks a post hoc evaluation of past symptoms, test results, conversations, or diagnoses which, in retrospect, should have led to the discovery of the malpractice.

Now, nearly twelve years after the Indiana Supreme Court announced the accrual-based standard, the waters are no clearer for those maneuvering the medical malpractice shores. Each time an Indiana court attempts to create unity out of the impossibly inconsistent precedent that came before, a subsequent court tears down the transitory edifice of consensus as quickly as it had been built. This frustrating pattern culminated in late 2009 when

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1. Nancy Smith, *Discovery Date in Medical Malpractice Litigation*, *in* 26 AM. JUR. 3D *Proof of Facts* § 185 (1994).

2. Van Dusen v. Stotts, 712 N.E.2d 491, 497 (Ind. 1999) (emphasis added).

the Indiana Court of Appeals forced medical malpractice litigants back to square one on nearly every principle of discovery rule jurisprudence established over the prior decade.

Part II of this article tracks the common law evolution of the discovery of malpractice rule as it pertains to Indiana's medical malpractice statute of limitations. Part III synthesizes the common law history into a workable framework for future applications of the accrual-based standard. Part IV explores the Indiana Court of Appeals' unilateral departure from and reimagining of the discovery of malpractice rule in the 2009 case of *Williams v. Adelsperger*.[3]

II. THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS AND THE DEVELOPMENT OF THE DISCOVERY RULE

A. The Origins of the Medical Malpractice Statute of Limitations

In 1975, Indiana became the first state[4] to pass statutory reform measures to deal with a perceived "health care crisis"[5] of rising malpractice insurance costs[6] resulting in reduced availability of services.[7] This crisis allegedly brought on by excessive and unjustifiable malpractice judgments and settlements, a failure to identify habitually negligent health care providers, very large attorney fees, and prolonged time limitations for bringing malpractice actions,[8] prompted the Indiana General Assembly to pass the Medical Malpractice Act.[9] Among the five major provisions contained therein,[10] the Medical Malpractice Act ("the Act") created a two year statute of limitations applicable to all medical malpractice actions: "No claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or that should have been rendered unless filed within two (2) years from the date of the alleged

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3. Williams v. Adelsperger, 918 N.E.2d 440, 442 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010).

4. Eleanor D. Kinney & William P. Gronfein, *Indiana's Malpractice System: No-Fault By Accident?*, 54 LAW & CONTEMP. PROBS. 169, 169 (1991).

5. *In re* Stephens, 867 N.E.2d 148, 150-51 (Ind. 2007).

6. H.R. 1460 §1(b), 99th Gen. Assemb., Reg. Sess. (Ind. 1975) ("The effect of [increasing] judgments and settlements, base[d] frequently on legal precedents, have caused the insurance coverage to uniformly and substantially increase the cost of such insurance coverage.").

7. Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 589 (Ind. 1980), *abrogated by* Collins v. Day, 644 N.E.2d 72 (Ind. 1994), *overruled by In re Stephens*, 867 N.E.2d 148.

8. *Id.* at 590; JAMES R. FISHER & DEBRA H. MILLER, 23 IND. PRACTICE SERIES: IND. PERSONAL INJURY LAW & PRACTICE § 11:1 (2010), *available at* Westlaw INPRAC.

9. 1975 Ind. Acts 146 (formerly codified at IND. CODE §16-9.5-1-1); *see* IND. CODE § 34-18 for similar current provisions.

10. Bruce D. Jones, *Unfair and Harsh Results of Contributory Negligence Lives in Indiana: The Indiana Medical Malpractice System and the Indiana Comparative Fault Act*, 6 Ind. Health L. Rev. 107, 111 (2009).

act, omission, or neglect . . . ."[11]

Before the passage of the Act, the medical malpractice statute of limitations was treated as "occurrence based" by Indiana courts. This occurrence-based interpretation meant that the *occurrence* of a negligent act, rather than the *discovery* of the malpractice and resulting injury, triggered the two-year period.[12] Indeed, the occurrence-based interpretation had prevailed in Indiana since 1941,[13] and subsequent courts continued to apply this approach to the new Act.[14] In 1990, the Indiana Supreme Court confirmed and formally adopted the occurrence-based standard for the Act's statute of limitations.[15]

Under the occurrence-based standard, a malpractice victim blind to her physician's malpractice, or the resulting injury, enjoyed only one refuge from the harsh effect of the Act's statute of limitations. The sole refuge was protection in equity from the physician who intentionally concealed, or failed to disclose, relevant information in an effort to hide either the malpractice and/or injury from the patient.[16] In these circumstances, equitable estoppel for fraud would preclude the defendant from asserting the statute of limitations as a defense until the termination of the physician-patient relationship in the case of constructive concealment,[17] or when the "patient learns of the malpractice, or discovers information which would lead to discovery of the malpractice if the patient exercises reasonable diligence," in the case of active concealment, whichever came first.[18] Yet, to be protected in equity under the narrowly-drawn courtesy of fraud protection demanded a near-Herculean showing from the aggrieved victim including: proof of intentional concealment[19] or failure to disclose by the defendant,[20] reliance

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11. IND. CODE § 16-9.5-3-1(a) (1971 & Supp. 1976) (repealed 1993) (The current statute of limitations is codified in IND. CODE § 34-18-7-1(b)(1998).).

12. Hosp. Corp. of Am. v. Hiland, 547 N.E.2d 869, 872 (Ind. Ct. App. 1989), *adopted in* Cacdac v. Hiland, 561 N.E.2d 758 (Ind. 1990); *see also* Toth v. Lenk, 330 N.E.2d 336, 338 (Ind. Ct. App. 1975) (discussing former IND. CODE §34-1-2-5 (1971)).

13. Martin v. Richey, 711 N.E.2d 1273, 1278 n. 6 (Ind. 1999).

14. *Hosp. Corp. of Am.*, 547 N.E.2d 869; Cyrus v. Nero, 546 N.E.2d 328 (Ind. Ct. App. 1989); Jones v. Cloyd, 534 N.E.2d 257 (Ind. Ct. App. 1989); Guinn v. Light, 531 N.E.2d 534 (Ind. Ct. App. 1988); Ferrell v. Geisler, 505 N.E.2d 137 (Ind. Ct. App. 1987), *trans. denied;* Martin v. Rinck, 501 N.E.2d 1086 (Ind. Ct. App. 1986); Spoljaric v. Pangan, 466 N.E.2d 37 (Ind. Ct. App. 1984), *trans. denied;* Colbert v. Waitt, 445 N.E.2d 1000 (Ind. Ct. App. 1982).

15. *Cacdac*, 561 N.E.2d at 759.

16. Guy v. Schuldt, 138 N.E.2d 891, 894-95 (Ind. 1956); *Toth*, 330 N.E.2d at 339.

17. Hughes v. Glaese, 659 N.E.2d 516, 519 (Ind. 1995); *Guy*, 138 N.E.2d at 895; *Toth*, 330 N.E.2d at 339; Ostojic v. Brueckmann, 405 F.2d 302 (7th Cir. 1968).

18. *Hughes*, 659 N.E.2d at 519 (quoting *Hosp. Corp. of Am.*, 547 N.E.2d at 873); *Toth*, 330 N.E.2d at 339-40.

19. *Guy*, 138 N.E.2d at 894 ("Before the doctrine of estoppel may be used . . . the fraud must be of such character as to prevent inquiry, or to elude investigation, or to mislead the party who claims the cause of action.").

20. *Id.* at 895 ("Usually, there must be some active effort on the part of one to be guilty of concealment but where a fiduciary or confidential relationship exists, such as phy-

by the plaintiff, ignorance of the fraud by the plaintiff, and an inability to discover the fraud in the exercise of diligence,[21] which required absolute ignorance of any harm or injury and of the malpractice itself.[22] Moreover, a finding of fraudulent concealment would not extend the statute of limitations two full years from the plaintiff's discovery of the malpractice, but rather, would allow the plaintiff only a "reasonable" time thereafter in which to initiate suit.[23]

Even under subsequent amendments and codifications[24] of the Act's statute of limitations, the occurrence-based standard, with its narrow "fraudulent concealment" exception, prevailed until July 1999.

B. Creation of the Discovery Rule

In two separate cases decided on July 8, 1999, the Indiana Supreme Court pronounced its departure from the occurrence-based standard. First,[25] in *Martin v. Richey*,[26] the defendant physician failed to correctly diagnose the plaintiff's breast cancer following a needle aspiration, and the defendant further failed to notify the plaintiff that she needed a follow-up excisional biopsy following the needle aspiration.[27] Three years later, the plaintiff experienced increased pain from the lump in her breast, and a subsequent biopsy revealed adenocarcinoma requiring a radial mastectomy and chemotherapy.[28] The Indiana Supreme Court found the medical malpractice statute of limitations unconstitutional as applied to the plaintiff. First, the statute violated the Indiana Constitution's Privileges and Immunities

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sician-patient, there exists a duty to disclose material information between the parties and a failure to do so results in concealment.").

21. *Toth*, 330 N.E.2d at 339.

22. *Id.* at 341 (citing Withers v. Sterling Drug, Inc., 319 F.Supp. 878 (S.D. Ind. 1970)) ("It is knowledge of the condition or 'injury' rather than its reason that destroys the estoppel and permits the statute to operate.").

23. *Hughes*, 659 N.E.2d at 519; Cacdac v. Hiland, 561 N.E.2d 758, 759 (Ind. 1990).

24. In 1998, the General Assembly amended and recodified the statute of limitations. IND. CODE §34-18-7-1(b) (1998) ("A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect . . . . "). In substance, this version (which remains current as of this writing) is identical to the Act's original formulation. Martin v. Richey, 711 N.E.2d 1273, 1278 n. 6 (Ind. 1999).

25. Though decided the same day, the Supreme Court considered *Martin v. Richey* "the lead case" decided that day. Van Dusen v. Stotts, 712 N.E.2d 491, 493 (Ind. 1999). Furthermore, Justice Sullivan cited *Martin* for stare decisis purposes in his *Van Dusen* concurrence and *Van Dusen* appears in a later volume of the North Eastern Reporter 2d than does *Martin*. *Id.* at 500 (Sullivan, J., concurring). But for these facts, one wonders if the *Martin* opinion was necessary at all. *See* William F. Harvey, *Two Cases, Two Statutes of Limitations, a 'New' Indiana Constitution and One More Case Pending Decision*, RES GESTAE, Nov. 1999, at 32, 37.

26. *Martin*, 711 N.E.2d at 1273.

27. *Id.* at 1275-76.

28. *Id.* at 1277.

Clause[29] "because it is not 'uniformly applicable' to all medical malpractice victims . . . ."[30] That is, "the statute precludes [the victim] from pursuing a claim against her doctor because she has a disease which has a long latency period and which may not manifest significant pain or symptoms until several years after the asserted malpractice."[31] Second, the statute violated the Open Courts Clause[32] "because it requires plaintiff to file a claim before she is able to discover the alleged malpractice and her resulting injury, and, therefore, it imposes an impossible condition on her access to the courts and pursuit of her tort remedy."[33] From these rulings, the court did not find that the statute of limitations for medical malpractice claims was unconstitutional in general; rather the court declared the statute of limitations unconstitutional as applied to the plaintiff's situation in which she "was unaware that she had a malignancy and that the cancer had spread to her lymph nodes" until three years after the negligent failure to diagnose.[34]

That same day, in *Van Dusen v. Stotts*,[35] the Indiana Supreme Court expounded upon *Martin* by purporting to create a framework "to determine how generally to construe or reconstrue the statute of limitations to avoid its unconstitutional application in this case and in future cases."[36] In *Van Dusen*, the defendant physician "badly misread" a prostate biopsy.[37] More than two years later, the plaintiff began experiencing swelling and pain in his groin and lower back.[38] Follow-up tests revealed incurable prostate cancer.[39] Looking to its line of fraudulent concealment cases, as well as cases construing the general tort and product liability statutes of limitation, the court construed the Act to permit medical malpractice victims "to file their claims within two years of the date when they *discover* the malpractice and the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury."[40] The Indiana Supreme Court pronounced three principles to help guide the application of this standard. First, "the question of when a plaintiff discovered facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury, is often a question of fact."[41] Second, "a plaintiff's lay suspicion that there may have been malpractice is not sufficient to trigger the two-year period[,]" though, "[a]t

29. IND. CONST. art. I, § 23.
30. *Martin*, 711 N.E.2d at 1279.
31. *Martin*, 711 N.E.2d at 1279.
32. IND. CONST. art. I, § 12.
33. *Martin*, 711 N.E.2d at 1279.
34. *Id.* at 1284-85.
35. Van Dusen v. Stotts, 712 N.E.2d 491 (Ind. 1999).
36. *Id.* at 493.
37. *Id.* at 494 (emphasis added).
38. *Id.*
39. *Id.*
40. *Id.* at 497.
41. *Id.* at 499.

the same time, a plaintiff need not know with certainty that malpractice caused his injury, to trigger the running of the statutory time period." [42] Finally, "the question may become one of law" where "it is undisputed that plaintiff's doctor has expressly informed a plaintiff that he has a specific injury and that there is a reasonable possibility, if not a probability, that the specific injury was caused by a specific act at a specific time . . ." and in such circumstances, the date the plaintiff receives this information "is the date upon which the two-year period begins to run."[43] Relying on these principles to choose its "trigger date," the court held that the two-year statute of limitations began to run on the date the plaintiff's doctor opined that the biopsy slides might have been misread.[44]

1. Does the "Discovery of Malpractice" Rule Apply Only to Medical Conditions with Long Latency Periods?

In announcing its new construction of the Act's statute of limitations in the *Martin* and *Van Dusen* cases, the Indiana Supreme Court exposed a litany of questions, the answers to which the court offered only clues. One such question is whether the discovery rule applies only to medical conditions with long latency periods. Undeniably, *Martin* and *Van Dusen* each dealt with a plaintiff battling "a disease which has a long latency period and which may not manifest significant pain or symptoms until several years after the asserted malpractice."[45] Yet, the court's analysis in *Martin* leaves room for the interpretation that the *Martin/Van Dusen* standard should apply to all medical conditions, not merely the ones with a long latency period. Specifically, in discussing the Privileges and Immunities Clause, the *Martin* court is explicit in its concern over diseases with long latency periods by defining the subclass of citizens subject to disparate treatment as those with "a disease which may not manifest significant pain or debilitating symptoms until several years after the initial diagnosis or misdiagnosis."[46] Yet, the discussion in *Martin* of the Open Courts Clause invokes no such reliance on long latency periods or the manifestation of pain or symptoms. Instead, this portion of the court's analysis seems to apply more broadly, emphasizing the "plaintiff [who] has no meaningful opportunity to file an otherwise valid tort claim within the specified statutory time period because, given the nature of the asserted malpractice and the resulting injury or medical condition, plaintiff is unable to discover that she has a cause

42. *Id.* at 499.
43. *Id.*
44. *Id.* at 499-500.
45. Martin v. Richey, 711 N.E.2d 1273, 1279 (Ind. 1999) (stating that breast cancer was a medical condition with a long latency period); *see also Van Dusen*, 712 N.E.2d at 497 (asserting that prostate cancer was a medical condition with a long latency period).
46. *Martin*, 711 N.E.2d at 1282.

of action."[47] By eschewing language of latency, the court implicitly acknowledges the broader class of medical conditions beyond those with long latency periods.[48] In addition, though *Van Dusen* explicitly invoked "long latency periods" in establishing its framework,[49] there seems no reasonable basis for limiting use of that framework only to plaintiffs seeking relief under the Privileges and Immunities Clause but not those seeking relief under the Open Courts Clause.

2. *What Types of Facts will Satisfy the Standard?*

Another question arising from the *Martin* and *Van Dusen* cases involves the facts necessary to satisfy the standards therein. The *Martin* and *Van Dusen* opinions offer little guidance as to what facts "in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury." Though *Van Dusen* highlights the outer boundaries of the inquiry (i.e., that mere lay suspicion of malpractice definitely is not sufficient to trigger the statute of limitations[50] but a physician telling a plaintiff that malpractice may have occurred definitely is sufficient[51]), litigants were left to wonder how to define the middle ground. Both *Martin* and *Van Dusen* seem to suggest that the appearance or worsening of symptoms would not serve as a trigger. The *Martin* court chose to emphasize the

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47. *Id.* at 1284.

48. Summarizing its holding in *Martin*, the *Van Dusen* court again highlighted the distinction between those medical malpractice victims protected by the Open Courts Clause versus those protected by the Privileges and Immunities Clause and invoking long "latency periods" only with regards to the latter:

> Specifically, we held in *Martin* that, under [the Open Courts Clause], the two-year occurrence-based statute of limitations may not constitutionally be applied to preclude the filing of a claim before a plaintiff either knows of the malpractice and resulting injury, or discovers facts, which in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. To do so would be to impose an impossible condition on her access to the courts and pursuit of her tort remedy. We also held that [the Privileges and Immunities Clause] . . . requires that the statute of limitations be "uniformly applicable" to all medical malpractice victims, and that, therefore, the statute could not be applied to preclude a plaintiff from filing a claim simply because she has a disease which has a *long latency period* and which may not manifest significant pain or debilitating symptoms until several years after the asserted misdiagnosis.

Van Dusen, 712 N.E.2d at 493 (emphasis added).

49. *Id.* at 497.

50. *Id.* at 498 (discussing Evenson v. Osmose Wood Preserving Co. of America, 899 F.2d 701, 705 (7th Cir. 1990)) ("[P]laintiff's mere suspicions regarding the cause of her medical problems in February of 1985 did not trigger the time period . . . .").

51. *Id.* at 499 (discussing Degussa Corp. v. Mullens, 695 N.E2d 172, 178 (Ind. Ct. App. 1998), *trans. granted, vacated*, 706 N.E.2d 178 (Ind. 1998)) ("[T]he statute began to run when her doctor informed her of the possible causal link and the need to investigate further.").

date of the plaintiff's actual knowledge rather than the date on which the plaintiff "experienced increased pain from the lump in her breast and under her right arm,"[52] and the *Van Dusen* court chose not to select the date on which plaintiff experienced pain and swelling in the affected area or the date on which the plaintiff realized pain medication was not improving his symptoms.[53] Likewise, *Van Dusen* seems to suggest that in a failure-to-diagnose case, the date of a correct diagnosis from a subsequent physician would not serve as a trigger date. Of the multiple events that occurred on the trigger date in *Van Dusen*, the court did *not* rely on it being the date a doctor told the plaintiff he had incurable prostate cancer; nor did the court rely on it being the date plaintiff suspected malpractice such that he asked if the biopsy slides had been misread.[54] Beyond these (vague) clues, however, litigants would have to wait for further explanation and guidance.

3. What Does "Reasonable Diligence" Mean?

Another question brought about by and not answered by the *Martin* and *Van Dusen* decisions is the definition of "reasonable diligence." Is "in the exercise of reasonable diligence"[55] intended as a hypothetical construct (i.e., the court can envision a hypothetical scenario in which a plaintiff might discover the malpractice and resulting injury after conducting an imaginary investigation), or does this clause create a separate requirement of diligent investigation for plaintiffs? If the latter, then what of the plaintiff who *does* conduct an investigation yet *still* fails to discover the malpractice and resulting injury? The court provided no standard for what type of investigation would be diligent and what factors would make an investigation fall short of being diligent.

4. When Is the Trigger Date Determination a Question of Fact, and When Is It a Question of Law?

In announcing that "the question of when a plaintiff discovered facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury, is often a question of fact,"[56] the *Van Dusen* Court offered little guidance or explanation as to what "often" means, aside from a declaration that the trigger date inquiry "*may* become one of law" where physician input reveals "a reasonable possibility, if not a probability, that the specific injury was caused by a specific

52. *Martin*, 711 N.E.2d at 1277.
53. *Van Dusen*, 712 N.E.2d at 494.
54. *Id.*
55. *Id.* at 493.
56. *Id.* at 499.

act at a specific time . . . ."[57]

5. Who Resolves the Questions of Fact - the Court or the Jury?

Related to the prior question, the *Martin* and *Van Dusen* courts offered no guidance or explanation as to how the questions of fact surrounding the trigger date should be resolved. Likewise, these decisions did not clarify whether the determination of what "reasonable diligence" should uncover was to be made by a court or by a fact-finder. Litigants would have to wait almost a full decade before receiving an answer to this question.[58]

C. Developing the Standard (1999-2005)

The Indiana Supreme Court's next three pronouncements offered little guidance on how to apply the *Martin/Van Dusen* standard. Only two months after the *Martin* and *Van Dusen* decisions, the court, in *Harris v. Raymond*,[59] ruled that a plaintiff's malpractice action filed after the statutory period against a dentist for "failure to warn" had been timely. In so holding, though it did not specify a precise event, the court implied that the trigger date occurred during a two-month window when the plaintiff consulted a doctor for bleeding in her ear, had a piece of the defective implant removed from her head, discovered that the implant had shattered, and discovered that the FDA had issued a safety alert regarding the implant.[60] Of particular interest is the fact that, though the court expressly invoked *Martin* as the basis for its result, the court neither mentioned nor discussed whether a defective implant qualified as a condition with a "long latency period." Instead, the *Harris* court observed that the plaintiff "could not have discovered the alleged negligence within the statutory period, and to apply the statute of limitations would force her to bring a claim before she knew or reasonably could have known of the existence of such claim."[61]

Thereafter in *Halbe v. Weinberg*,[62] a plurality of the Indiana Supreme Court determined that even though the plaintiff "may have suspected something was amiss" when she experienced nipple discharge, she did not have "any reason whatsoever to suspect she had a cause of action against her doctor" prior to collecting her own medical records and discovering that her implants contained silicone rather than saline.[63] The court appeared to place no significance on the four-year interval between manifestation of

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57. *Id.* (emphasis added).
58. *See infra* Part I.E.
59. Harris v. Redmond, 715 N.E.2d 388 (Ind. 1999), *reh'g denied.*
60. *Id.* at 396.
61. *Id.* at 392.
62. Halbe v. Weinberg, 717 N.E.2d 876 (Ind. 1999), *reh'g denied.*
63. *Id.* at 882.

symptoms and the plaintiff's investigation into her medical records,[64] and the court again omitted any discussion of whether breast implants causing nipple discharge qualify as a condition with a "long latency period." Interestingly, the plurality seemed to acknowledge (without holding or deciding) that the equitable remedy available for fraudulent concealment remained available to medical malpractice litigants,[65] a curious supposition given that the discovery rule would seem to subsume any need for separate inquiry into fraudulent concealment.[66]

The following year, the Indiana Supreme Court, in *Boggs v. Tri-State Radiology, Inc.*,[67] addressed a situation where the trigger date occurred thirteen months after the date of malpractice, yet the plaintiff waited another twenty-two and one-half months before initiating suit.[68] In a 3-2 majority opinion, the court upheld the trial court's dismissal of the action, holding that an eleven-month window (between the trigger and the expiration of the limitations period two years after the act of malpractice) did not shorten the limitations period "so unreasonably that it is impractical for a plaintiff to file a claim at all."[69] Though the majority opinion appeared to equate the date of a biopsy revealing malignancy with the plaintiff's "knowledge of facts that led to the discovery of alleged malpractice,"[70] the court neither discussed nor analyzed its reasons for selecting that particular trigger date, and only a bare-bones factual background is given bereft of reference to that plaintiff's manifestation of symptoms, suspicions, or conversations with physicians.[71]

Over the next two years, the court of appeals applied the *Martin/Van Dusen* standard to determine trigger dates in several cases, each time wrestling with unanswered questions left by the *Martin* and *Van Dusen* courts.

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64. *Id.*

65. *Id.* at 881. The two concurring justices would have decided the case on the basis of fraudulent concealment rather than by resort to constitutional challenge. *Id.* at 882-83 (Sullivan, J., concurring).

66. *See infra* Part II.H.

67. Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692 (Ind. 2000).

68. *Id.* at 694, 699.

69. *Id.* at 697.

70. *Id.* at 699.

71. *Id.* at 694. Five years later the court appeared to discount *Boggs*' treatment of the trigger date inquiry:

> [T]he discussion in *Boggs* summarily referred to a plaintiff's discovery of injury without any specific reference to the discovery of the malpractice itself, or facts that in the exercise of reasonable diligence should lead to the discovery of the malpractice. This observation, however, did not represent a retreat from the rule of *Martin* and *Van Dusen* that the discovery date is triggered when a plaintiff either (1) knows of the malpractice and resulting injury or (2) learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury.

Booth v. Wiley, 839 N.E.2d 1168, 1172 (Ind. 2005).

For example, in three separate cases decided during this span, the court of appeals selected trigger dates based on the date a plaintiff learned (from a subsequent physician) of a prior misdiagnosis, *not* the date on which symptoms first appeared or worsened.[72] Likewise, these decisions implicitly reject trigger dates based upon the mere receipt of a correct diagnosis unless that diagnosis is combined with additional information signaling prior error.[73] Furthermore, the court of appeals emphasized repeatedly that mere knowledge of the ultimate injury, standing alone, is insufficient to trigger a discovery date.[74] In its 2001 *Rogers v. Mendel* decision, the court of appeals announced for the first time that where the facts surrounding a trigger date determination are in dispute, "the judge will be required to resolve disputed facts through pre-trial motion practice . . . ."[75] Moreover, in *Shah v. Harris*, the court of appeals explicitly rejected any suggestion that the *Martin/Van Dusen* standard applied only in the context of conditions with "long latency" periods.[76]

In early 2002, however, two court of appeals decisions appeared to signal a partial retreat from these prior cases by emphasizing symptomatology over physician input. In *Johnson v. Gupta*, the court of appeals reinterpreted *Martin* and *Van Dusen* to apply only where a plaintiff suffers no discernible symptoms within two years of the date of malpractice.[77] Yet even under this new interpretation, the court of appeals did not select as its trigger the date on which Johnson first "knew there was something wrong,"

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72. *See* Rogers v. Mendel, 758 N.E.2d 946, 948, 952 (Ind. Ct. App. 2001) (concluding that trigger occurred when the second physician diagnosed plaintiff with metastatic cancer, not when plaintiff experienced symptoms of abdominal cramping that led to diagnosis); Shah v. Harris, 758 N.E.2d 953, 959 (Ind. Ct. App. 2001) (holding the statute of limitations unconstitutional as applied—two-year period did not begin to run until the date Harris "learned that his illness may have been misdiagnosed seven years earlier."); Coffer v. Arndt, 732 N.E.2d 815, 818, 822 (Ind. Ct. App. 2000) (concluding that the date plaintiff "learned [from subsequent physician] that he had glaucoma and that he had had it for a long time" served as discovery date, both for purposes of statute of limitations and fraudulent concealment analysis, and the date of temporary blindness did not).

73. *Rogers*, 758 N.E.2d at 948-52 (mentioning that cancer had metastasized already by date of correct diagnosis); *Shah*, 758 N.E.2d at 954, 959 (holding that trigger was satisfied by a diagnosis of B-12 deficiency combined with input from physician "that [plaintiff's] illness may have been misdiagnosed seven years earlier."); *Coffer*, 732 N.E.2d at 822 (stating that diagnosis of glaucoma combined with physician input "that he had had it for a long time" was sufficient trigger").

74. *Cf.* Hopster v. Burgeson, 750 N.E.2d 841, 856 (Ind. Ct. App. 2001) (declining to rule as matter of law that patient's death itself was a sufficient trigger; remanding for factual determination as to when personal representative discovered the malpractice); Ling v. Stillwell, 732 N.E.2d 1270, 1275 (Ind. Ct. App. 2000) (concluding that though son was "technically aware of [her] ultimate injury, her death," he had no way of knowing that it might have resulted from malpractice until two years later).

75. *Rogers*, 758 N.E.2d at 952.

76. *Shah*, 758 N.E.2d at 958 ("We find no case law that would support the restriction of the analysis announced in *Martin* and *Van Dusen* to specific types of diseases, nor do we discern any public policy or common sense reason for doing so.").

77. Johnson v. Gupta, 762 N.E.2d 1280, 1283 (Ind. Ct. App. 2002).

the date she first experienced fecal incontinence, or even the date she decided to seek a second opinion;[78] rather, the court of appeals selected the date on which a subsequent doctor told her "that her incontinence was caused by a complete lack of rectal tone."[79] As the Supreme Court would later explain, "the *Gupta* court expressly recognized that the occurrence-based statute of limitations does not apply 'in cases where the patient does not suffer symptoms that put the patient *on notice that something may have gone wrong* in the course of medical treatment.'"[80]

The following month, *Langman v. Milos* again mentioned worsening symptoms while (arguably) relying on other factors.[81] In *Langman*, the plaintiff suffered increased pain following podiatric surgery, and he opined to his physician that the surgery had made his condition worse.[82] Nevertheless, the plaintiff discontinued treatment, and refused to follow any recommendations or referrals prescribed by another physician.[83] Rather, the plaintiff abstained from all medical treatment for two and a half years despite worsening symptoms.[84] From this, the court of appeals concluded (without selecting a specific trigger and without identifying a dispositive factor) that "[w]ithin two years of his surgery, and clearly within two years of his last visit to [his physician]," the plaintiff "had enough information that a reasonably diligent person should have discovered the alleged malpractice claim . . . ."[85] Though *Langman* might be read for the proposition that worsening symptomatology alone may be sufficient to serve as a trigger, it seems equally, if not more, plausible to read *Langman* as the first post-*Martin/Van Dusen* examination of "reasonable diligence," i.e., that "reasonable diligence" is absent as a matter of law where a plaintiff abandons medical treatment altogether for two and a half years despite worsening symptoms.

Just three months later, a different panel of the court of appeals returned to the pre-*Gupta/Langman* line of thought. In the 2002 case of *Jacobs v. Manhart*,[86] defendants reported two PAP smears as normal.[87] In June 1999, the plaintiff began to experience bleeding, and adjustment of her medications over the next two months did not improve her symptoms.[88]

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78. *Id.* at 1282.

79. *Id.* at 1283.

80. Booth v. Wiley, 839 N.E.2d 1168, 1175 (Ind. 2005), *quoting Johnson*, 762 N.E.2d at 1283 (emphasis added by *Booth*).

81. Langman v. Milos, 765 N.E.2d 227 (Ind. Ct. App. 2002), *abrogated by* Herron v. Anigbo, 897 N.E.2d 444 (Ind. 2008).

82. *Id.* at 232, 235.

83. *Id.* at 235.

84. *Id.* at 235-36.

85. *Id.* at 236.

86. Jacobs v. Manhart, 770 N.E.2d 344 (Ind. Ct. App. 2002), *reh'g denied, abrogated on other grounds by Herron*, 897 N.E.2d 444 (Ind. 2008).

87. *Id.* at 347.

88. *Id.*

Thereafter, an August 1999 ultrasound revealed a large malignant tumor at which time plaintiff was diagnosed with cervical cancer and, as a result, underwent a radical hysterectomy.[89] Following the surgery, plaintiff became curious as to why the results of her previous PAP smears had been negative given how quickly her tumor had developed. After collecting her own medical records, she asked a cytotechnologist to review the slides from the prior PAP smears "to see if anything may have been missed."[90] The cytotechnologist indicated that some of the slides might have been misread—a conclusion confirmed by a pathologist in April 2000.[91]

In a confusing opinion, the *Jacobs* Court initially flirted with the idea that the plaintiff's August 1999 diagnosis of cervical cancer should act as the appropriate trigger, presumably because that was the "trigger date" arrived at by the trial court.[92] The court of appeals eventually concluded that even assuming this earliest possible trigger date, the six months remaining in the initial two-year statute of limitations was insufficient as a matter of law to afford plaintiff a meaningful opportunity to pursue her malpractice claim.[93] Yet, before reaching that conclusion, the court of appeals established a range of time in which the actual trigger would have occurred. Painting the earliest possible edge of the range, the court of appeals observed that "[o]nly after being diagnosed with cervical cancer and learning of the advanced stage of the disease did [the plaintiff] possess information which would even give rise to the 'suspicion or speculation of malpractice by a plaintiff who is without technical or medical knowledge'"—a "suspicion or speculation" which the court of appeals acknowledged would be insufficient by itself to serve as a triggering event.[94] Locating the latest possible edge of the range, the court of appeals noted that the April 2000 pathologist's report gave the plaintiffs "more information than they needed to put them on notice that there was a reasonable possibility [of malpractice] and that there was a need to investigate further."[95] Apparently settling on the latter date as the appropriate trigger, the court of appeals observed:

> Unlike *Van Dusen*, where the plaintiff's doctor advised the plaintiff that there was a reasonable possibility, if not a probability, that the specific injury was caused by a specific act at a specific time, here there was no such advice. Rather, Ms. Manhart had to first hear the diagnosis of tumor and advanced stage can-

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 352-53 & n.9, 354.
93. *Id.* at 355.
94. *Id.* at 354.
95. *Id.*

> cer, wait for the confirmation, and undergo a radical hysterectomy and the attendant recovery. She then acted with the appropriate dispatch in seeking first an informal opinion and then a formal medical opinion.[96]

Note that in accordance with its 2000-2001 line of cases, the court of appeals in *Jacobs* did *not* choose as its earliest possible trigger the date on which the plaintiff first began experiencing symptoms, the date on which she first sought medical assistance for her symptoms, or the date she realized her symptoms were not improving under conservative care.

Thereafter, from 2003 to 2005, the court of appeals bounced back-and-forth between physician-input-as-trigger and worsening-symptoms-as-trigger in its application of the *Martin/Van Dusen* standard. Most decisions during this span continued to select trigger dates based upon suggestions of malpractice received from physicians rather than based upon a plaintiff's lay suspicion or symptomatology.[97] Yet, on two occasions, majority opinions by the court of appeals again relied on symptomatology as a trigger.[98]

D. The Supreme Court Re-enters the Fray (2005)

In December 2005, the Indiana Supreme Court for the first time examined in detail the facts necessary to trigger a discovery date. In *Booth v.*

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96. *Id.*

97. *See* Burns v. Hatchett, 786 N.E.2d 1178, 1181 & n.2 (Ind. Ct. App. 2003), *trans. denied* (assuming without deciding that date subsequent physician "told [plaintiff] she had TMJ and that she had a 'clear case of malpractice' against [defendant]" served as trigger); Dorman v. Osmose, Inc., 782 N.E.2d 463, 467-69 (Ind. Ct. App. 2003), *trans. denied* (plaintiff's lay suspicion combined with ongoing symptoms of swelling and pain over four years insufficient—statute did not begin to run until physician report connecting illness to treated wood). *Cf.* Levy v. Newell, 822 N.E.2d 234, 238-39 (Ind. Ct. App. 2005), *reh'g denied* (plaintiffs possessed sufficient knowledge when their attorney sent demand letter indicating "strong belief" of malpractice—court did not select date three days after surgery when patient "began having indications that something was wrong," date of diagnostic test revealing duct injury, or date of admission to hospital for repair of injury).

98. *E.g.*, GYN-OB Consultants, LLC v. Schopp, 780 N.E.2d 1206, 1210-11 & n.5 (Ind. Ct. App. 2003), *trans. denied.* Relying heavily on Johnson v. Gupta, 762 N.E.2d 1280, 1283 (Ind. Ct. App. 2002), the court of appeals held that vaginal swelling and discomfort almost immediately after surgery was sufficient to serve as a trigger in the fraudulent concealment context. In dissent, Judge Vaidik rejected the symptoms-as-trigger approach and instead concluded that the plaintiff "did not have adequate information that would have led to the discovery of the malpractice" until she collected her own medical records and learned that her physician had operated on the affected area. *Schopp*, 780 N.E.2d at 1212 (Vaidik, J., dissenting). Thereafter, two Justices on the Supreme Court voted in favor of transfer. 792 N.E.2d 44 (Table) (Ind. 2003). *See also* Garneau v. Bush, 838 N.E.2d 1134, 1142 (Ind. Ct. App. 2005), *trans. denied.* The court of appeals held that the trigger occurred after "Lise had experienced almost 20 months of pain and extreme difficulty abducting her hip, had spent some eight months in a nursing home, and had been advised by an orthopedic surgeon to have a new bipolar hip prosthesis installed." Again, two Justices on the Supreme Court voted in favor of transfer. *Garneau*, 855 N.E.2d 1004 (Table) (Ind. 2006).

Wiley, defendants recommended and performed Lasik surgery on a patient with a history of glaucoma and cataracts.[99] The surgery required multiple revisions and eventually resulted in permanent vision loss.[100] Because plaintiff suffered from problems almost immediately following the surgeries, defendants argued that the plaintiff should have discovered the malpractice within two years.[101] Reversing the trial court's grant of summary judgment, the Supreme Court first synthesized its prior holdings into a methodology to guide application of the Act's statute of limitations:

> Initially, a court must determine the date the alleged malpractice occurred and determine the discovery date--the date when the claimant discovered the alleged malpractice and resulting injury, or possessed enough information that would have led a reasonably diligent person to make such discovery. If the discovery date is more than two years beyond the date the malpractice occurred, the claimant has two years after discovery within which to initiate a malpractice action. But if the discovery date is within two years following the occurrence of the alleged malpractice, the statutory limitation period applies and the action must be initiated before the period expires, unless it is not reasonably possible for the claimant to present the claim in the time remaining after discovery and before the end of the statutory period.[102]

Turning next to the facts of the case at bar, the *Booth* Court distinguished between knowledge of injury and knowledge of potential malpractice in selecting a trigger date:

> While the facts stressed by the defendants in the present case demonstrate that Mr. Booth had knowledge within the period prescribed by the statute of limitations that he had serious vision problems and probable permanent vision impairment, they do not necessarily establish as an undisputed issue of fact that this amounts to discovery of "facts which, in the exercise of reasonable diligence, should lead to the

99. Booth v. Wiley, 839 N.E.2d 1168, 1173 (Ind. 2005).
100. *Id.* at 1173-74.
101. *Id.* at 1174.
102. *Id.* at 1172.

discovery of the medical malpractice."[103]

Instead, the Court selected as its trigger the date when another physician advised the plaintiff "that the Lasik surgery should not have been performed because of his preexisting cataracts and glaucoma."[104] In so holding, the *Booth* majority implicitly confirmed the importance of physician input in selecting a trigger date, while, at the same time, discounting the significance of symptom manifestation. Yet, the Court cautioned against reading its decision as "holding that an expert's advice is always required to put a patient on notice that problems may be due to malpractice."[105] Instead, the majority opined (without further explanation or example) that the requisite facts might in some circumstances "arise from a patient's ordinary experiences and observations . . . ."[106]

Following the *Booth* Court's implicit affirmation that "symptoms aren't enough," the court of appeals again fell in line, reaffirming the importance of physician input in calculating a trigger.[107] For example, in the 2006 *Battema v. Booth* decision, the court of appeals reversed the trial court's grant of summary judgment. Rejecting the contention that post-surgical scarring was a sufficient trigger, the Court instead emphasized the fact that no subsequent physician had opined to plaintiff that her procedure had been performed negligently.[108] Instead, "Battema was aware of an 'unfortunate result' shortly after the procedure performed by Dr. Sally, but she was not necessarily aware that the scarring could have been caused by malpractice until she found out that Dr. Sally was a recovering narcotics addict and had experienced a relapse around the time of the procedure."[109]

Likewise, in *Palmer v. Gorecki*,[110] the defendant physician misread the plaintiff's echocardiogram, erroneously diagnosed the plaintiff with endocarditis, and initiated a course of antibiotic treatment that resulted in nausea, dizziness, imbalance, and eventual hospitalization.[111] The court of appeals held that the plaintiff in that case "reasonably should have known

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103. *Id.* at 1175 (quoting Van Dusen v. Stotts, 712 N.E.2d 491, 497 (Ind. 1999)).

104. *Id.* at 1176.

105. *Id.*

106. *Id.* at 1178-79 (Sullivan, J., dissenting) (questioning whether a scenario could exist when expert opinion would *not* be required under the majority's reasoning.). *See also id.* at 1178 (Shepard, C.J., dissenting) (bemoaning that knowledge of injury (without knowledge of associated malpractice) was no longer sufficient to trigger the statute of limitations under the majority's rationale.).

107. Battema v. Booth, 853 N.E.2d 1014 (Ind. Ct. App. 2006), *trans. denied.*

108. *Id.* at 1020.

109. *Id. See also* Moyer v. Three Unnamed Physicians, 845 N.E.2d 252, 257-59 (Ind. Ct. App. 2006) (trigger occurred when physician informed plaintiff of possible link between Accutane and heart disease—Court rejected earlier dates of heart disease diagnosis and open-heart surgery).

110. Palmer v. Gorecki, 844 N.E.2d 149 (Ind. Ct. App. 2006), *reh'g denied, trans. denied.*

111. *Id.* at 152.

of the alleged malpractice" eight months after the misreading of the echocardiogram, when a subsequent physician informed him "'there was no current evidence for active endocarditis.'"[112] The court of appeals did *not* select the date the plaintiff first experienced adverse symptoms from the antibiotic treatments, the date of his hospitalization from those symptoms, or even the date another physician concluded that the plaintiff's "symptoms were directly related to toxic effects of the antibiotic therapy," and correctly diagnosed the plaintiff with vestibular toxicity.[113]

E. The 2008 Trio of Supreme Court Decisions

In 2008, the Supreme Court issued three separate decisions, one by unanimous decision, and two by plurality, which both clarified and (potentially) destroyed many of the principles solidified by the prior nine years of appellate court decisions. Yet, before the dust from this upheaval could settle, the Court managed to resolve the issues in each of the three cases without necessitating any significant departure from precedent.

1. Brinkman v. Bueter

In *Brinkman v. Bueter*,[114] the plaintiff suffered from significant headaches and seizures that required emergency hospitalization in the days following the birth of plaintiff's first child.[115] Plaintiff's obstetrician diagnosed her with preeclampsia, a pregnancy-related medical condition, which, if left untreated, could develop into eclampsia with associated convulsions and eventual coma.[116] Though preeclampsia typically develops after the twentieth week of pregnancy,[117] the defendant obstetrician convinced plaintiff that her situation was "atypical . . . in that [plaintiff] [had] not show[n] [any] signs of preeclampsia until four days after delivery."[118] The obstetrician then advised the plaintiff that any future pregnancies would put plaintiff's life at risk and that she should consider sterilization.[119] Yet, when plaintiff accidentally became pregnant again five years later, her new obstetrician notified plaintiff that in truth, plaintiff had shown signs of preeclampsia during her first pregnancy that had gone unnoticed and untreated.[120]

Almost immediately, the *Brinkman* Court signaled (either intentional-

112. *Id.* at 155.
113. *Id.* at 152.
114. Brinkman v. Bueter, 879 N.E.2d 549 (Ind. 2008).
115. *Id.* at 550-51.
116. *Id.* at 551 n.3.
117. *Id.* at 550 n.1.
118. *Id.* at 551.
119. *Id.*
120. *Id.* at 552.

ly or by poor word choice) wholesale changes to the *Martin/Van Dusen* standard and its nine-year progeny. Before examining the facts before it, the *Brinkman* Court first summarized its holdings in *Martin* and *Van Dusen* as "the statutory period does not begin to run until either the correct diagnosis is made or the patient has sufficient facts to make it *possible* to discover the alleged injury."[121] Though the Court offered no further explanation or justification for the summary, this single sentence could be read to revolutionize discovery rule jurisprudence in Indiana. Specifically, the Court's off-handed proclamation first suggests that the mere receipt of a correct diagnosis is itself sufficient to serve as a trigger under the *Martin/Van Dusen* standard, a curious reimagining which would seem to conflict with the long string of prior cases requiring more.[122] Next, this sentence suggests that the *Martin/Van Dusen* standard allows for triggers based upon the mere possibility of discovery, an inquiry which completely obviates any need for discussion of "reasonable diligence" or whether certain facts "*should* lead to the discovery of the medical malpractice and resulting injury."[123] And third, this sentence implies that discovery of injury alone (without reference to discovery of malpractice) is the operative trigger, a conclusion which directly contradicts both the *Van Dusen* Court's original formulation of the discovery rule,[124] and the Court's analysis in *Booth* just three years prior.[125]

Immediately after its off-handed reimagining of the *Martin/Van Dusen*

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121. *Id.* at 554.

122. *See, e.g.,* Burns v. Hatchett, 786 N.E.2d 1178, 1181 & n.2 (Ind. Ct. App. 2003), *trans. denied* (combining diagnosis of TMJ with opinion from subsequent physician that plaintiff had a "'clear case of malpractice' against [defendant]"); Jacobs v. Manhart, 770 N.E.2d 344, 354 (Ind. Ct. App. 2002), *reh'g denied, abrogated on other grounds by* Herron v. Anigbo, 897 N.E.2d 444 (Ind. 2008) (suggesting that diagnosis of cervical cancer, even when combined with knowledge of the advanced stage of the disease, insufficient to serve as trigger); Shah v. Harris, 758 N.E.2d 953, 959 (Ind. Ct. App. 2001) (diagnosis of B-12 deficiency combined with input from physician "that [plaintiff's] illness may have been misdiagnosed seven years earlier"); Rogers v. Mendel, 758 N.E.2d 946, 948-52 (Ind. Ct. App. 2001) (mentioning that cancer had metastasized already by date of correct diagnosis); Coffer v. Arndt, 732 N.E.2d 815, 822 (Ind. Ct. App. 2000) (diagnosis of glaucoma combined with physician input "that he had had it for a long time."). *Cf.* Palmer v. Gorecki, 844 N.E.2d at 152, 155 (declining to select date plaintiff correctly diagnosed with vestibular toxicity as trigger); Levy v. Newell, 822 N.E.2d 234, 238-39 (Ind. Ct. App. 2005) (not selecting date of diagnostic test revealing duct injury as trigger).

123. Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999) (emphasis added).

124. *Id.* at 497 (requiring plaintiffs "to file their claims within two years of the date when they discover the malpractice *and* the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice *and* the resulting injury") (emphasis added).

125. *See* Booth v. Wiley, 839 N.E.2d 1168, 1175 (Ind. 2005) (distinguishing between knowledge of injury and knowledge of potential malpractice in selecting a trigger date: "While the facts stressed by the defendants in the present case demonstrate that Mr. Booth had knowledge within the period prescribed by the statute of limitations that he had serious vision problems and probable permanent vision impairment, they do not necessarily establish as an undisputed issue of fact that this amounts to discovery of 'facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice.'").

standard, the *Brinkman* Court continued its onslaught on precedent by reviving the debate as to whether the objective standard should apply only in cases involving asymptomatic latency periods. Noting that both *Martin* and *Van Dusen* involved the failure to diagnose cancer and the impossibility of plaintiffs bringing such claims "before they know they are suffering from the disease,"[126] the Court stopped short of issuing any declaration regarding the latency issue, noting only that "[t]he Brinkmans did not face this challenge."[127]

Instead, the *Brinkman* Court found that the plaintiff should have been aware of the negligent failure to diagnose preeclampsia as soon as she "suffered eclamptic seizures" and "was immediately diagnosed with and treated for eclampsia."[128] By itself, this conclusion implies that the onset of symptoms, either alone or combined with the receipt of a correct diagnosis, is sufficient to serve as a discovery date trigger. But rather than concede that *Brinkman* damages the long line of prior cases (including, once again, *Booth*) which rejected the symptoms-as-trigger approach, a more nuanced reading suggests that in actuality, symptomatology did not inform the Court's decision. Note that the Court selected the date of the seizure, hospitalization, and diagnosis as its discovery date, rather than the eight-day-prior hospitalization for severe headaches "unlike any headache in the past," the three-day-prior development of neck pain, the two-day-prior recurrence of headaches, or the recurrence of nausea and vomiting without any relief from medication.[129] Thus, notwithstanding the dicta contained therein and, assuming the Court did not intend a distinction between various types of symptoms (e.g., those which require hospitalization and those which do not), the result in *Brinkman* could be read as consistent with *Martin, Van Dusen, Booth*, and the numerous court of appeals decisions interpreting those cases. Therefore, the *Brinkman* decision could be interpreted to hold that the appearance or progression of symptoms is not sufficient to serve as a discovery date trigger unless accompanied by a specific diagnosis, one which by itself signals the likely presence of a prior, undiagnosed condition.[130]

2. *Overton v. Grillo*

Implicitly confirming this reading of *Brinkman*, the Indiana Supreme

126. Brinkman v. Bueter, 879 N.E.2d 549, 554 (Ind. 2008).
127. *Id.* at 554.
128. *Id.* at 554-55.
129. *Id.* at 550-51.
130. The *Brinkman* Court emphasized that "preeclampsia is simply a precursor to eclampsia." *Id.* at 555 n.7. Thus, just as metastasis necessarily implies the prior presence of cancer, so too eclampsia necessarily implies the prior presence of preeclampsia. Whether a plaintiff in the exercise of reasonable diligence should have known about this relationship, of course, is another question.

Court again considered "trigger dates" in *Overton v. Grillo*[131] wherein the plurality[132] addressed yet another case of a plaintiff discovering metastasized cancer shortly after a misread mammogram. In *Overton*, the plaintiff discovered a lump in her right breast fifteen months after the defendant physician reported plaintiff's mammogram as normal.[133] An ultrasound and biopsy performed the following week revealed carcinoma of the right breast that had metastasized to the lymph nodes.[134] Following radiation and chemotherapy, the plaintiff first learned of the possibility of malpractice in a meeting with her attorney one year after discovering the lump in her breast.[135]

Perhaps following *Brinkman*'s lead, the plurality crafted another opinion that, if taken at face value, would rewrite the entirety of discovery rule jurisprudence since the incipiency of the *Martin/Van Dusen* standard. Writing for the plurality, Justice Boehm first compared *Overton* to the Court's 2000 decision in *Boggs*.[136] From this comparison, Justice Boehm concluded that "[b]oth Mrs. Boggs and Mrs. Overton knew of their condition and that they had not been previously diagnosed. That is enough to put the plaintiff on inquiry notice of the possibility of malpractice . . . ."[137] This statement appears to impose an "inquiry notice" requirement on medical malpractice victims based on nothing more than the mere receipt of a diagnosis. In dissent, Justices Dickson and Rucker correctly observed that "[a]n injured plaintiff is not required to suspect, investigate, or commence litigation unless the facts known are sufficiently significant as to create a reasonable *probability* that malpractice had occurred."[138] The dissenting Justices further cautioned against any rule of law which would hinge on "inquiry notice of the possibility of malpractice" as any such rule would "impose on injured patients an obligation of suspicious investigation never envisioned by *Booth*, and [would be] contrary to its express holding."[139]

Yet in the following paragraph, the *Overton* plurality offers a further explanation for its decision, which appears to rescue both *Overton* and

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131. Overton v. Grillo, 896 N.E.2d 499 (Ind. 2008).

132. Both *Overton,* 896 N.E.2d 499 and Herron v. Anigbo, 897 N.E.2d 444 (Ind. 2008), *reh'g denied* (*See* discussion *infra* Part II.E.3) are plurality decisions. In each, Chief Justice Shepard concurred in the result without joining in the plurality opinion.

133. *Overton*, 896 N.E.2d at 501.

134. *Id.*

135. *Id.*

136. *Id.* at 503 (citing Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692 (Ind. 2000).

137. *Id.*

138. *Id.* at 504-05 (Dickson, J., dissenting).

139. *Id.* at 505 (Dickson, J., dissenting). The fact that Justices Dickson and Rucker explicitly reject any insinuation of "inquiry notice" or language of "possibility" into the *Martin/Van Dusen* standard should inform one's reading of *Brinkman*. As Justices Dickson and Rucker each signed on to the *Brinkman* opinion just ten months prior to their *Overton* dissent, it seems unlikely that these Justices intended to validate *Brinkman*'s (careless) wording of the standard to allow triggers based upon the mere possibility of discovery and, further, to allow triggers based upon discovery of injury alone. *See supra* Part II.E.1.

Brinkman from accusations of rewriting the *Martin/Van Dusen* standard. Comparing its holding with *Brinkman*, the plurality observed that the Brinkmans' claim "was untimely because the eclampsia brought to light the potential of the preeclampsia" and, concomitantly, "although no professional had advised the Overtons of possible malpractice, the metastasized cancer brought to light the potential that the earlier mammogram had been misread."[140] As suggested above,[141] this observation allows for a reading of *Brinkman* (and now *Overton*) which is consistent with *Martin, Van Dusen, Booth*, and the numerous court of appeals decisions interpreting those cases, that is, the mere receipt of a diagnosis is not sufficient to serve as a discovery date trigger unless that diagnosis itself signals the likely presence of a prior, undiagnosed condition.[142]

Finally, in an interesting act of jurisprudential acrobatics, the *Overton* plurality attempts a single-sentence reconciliation of *Overton* with *Booth*. Implicitly recognizing the conflict with *Booth* (which stressed the importance of physician input in assigning a trigger date),[143] Justice Boehm offered the following:

> Any potential link between [Mrs. Overton's] 1999 mammogram and her cancer was not obscured by alternative explanations. *See Booth v. Wiley*, 839 N.E.2d 1168, 1174-76 (Ind. 2005) (holding that trigger date not when plaintiff began having eye problems because his doctors "continued to present other explanations for the vision difficulties" without mentioning the alleged act of malpractice as a potential cause).[144]

Of course, the discerning reader will recall that no such emphasis on "alternative explanations" appeared in the *Booth* majority opinion.[145] In fact, the quotation offered by Justice Boehm actually comes from a summary of the plaintiff's argument on transfer and not from any analysis by the *Booth* majority.[146] Nevertheless, Justice Boehm's rewriting of precedent arguably invites an "alternative explanations" exception to the discovery rule, one that is similar in substance and effect to the doctrine of fraudulent concealment yet requiring no evidence of fraudulent intent.

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140. *Id.* at 504.
141. *See supra* Part II.E.1.
142. *See supra* note 130. Again, just as eclampsia necessarily implies the prior presence of preeclampsia in *Brinkman*, so too metastasis necessarily implies the prior presence of cancer in *Overton* and *Boggs*.
143. *See* Booth v. Wiley, 839 N.E.2d 1168, 1176 (Ind. 2005).
144. *Overton*, 896 N.E.2d at 504.
145. *See supra* Part II.D.
146. *Booth*, 839 N.E.2d at 1176.

3. Herron v. Anigbo

The same day[147] as its decision in *Overton,* the same plurality of the Supreme Court in *Herron v. Anigbo*[148] attempted to synthesize the state of the law regarding trigger dates. In Herron, the plaintiff sustained a fall at his home that rendered him quadriplegic.[149] The following day, the defendant physician performed spinal surgery including placement of a bone graft and plate for purposes of a failed cervical fusion.[150] Thereafter, the plaintiff remained in hospitals and care facilities during which he had difficulty speaking, suffered from infection and pulmonary difficulties, and even required the use of a ventilator for nine months.[151] Fifteen months later, a subsequent physician notified plaintiff that he "may well require revision surgery" and recommended more tests.[152] Five months thereafter, another physician notified plaintiff that his deteriorating condition was likely caused by negligent follow-up care.[153] Following another surgery and hospital stay during which he was confined to a halo, the plaintiff initiated suit against the defendant physician on December 7, 2004, a full thirty-three months after his initial surgery.[154]

After reciting the objective standard and reiterating the distinction between triggers that occur before and after the initial two-year window closes, the *Herron* plurality, again led by Justice Boehm, examined "reasonable diligence."[155] Noting that "the critical issue is what reasonable diligence requires, not when the claim accrues or is discovered," Justice Boehm explained: "[R]easonable diligence requires more than inaction by a patient who, before the statute has expired, does or should know of both the injury or disease and the treatment that either caused or failed to identify or improve it, even if there is no reason to suspect malpractice."[156] Note Justice Boehm's subtle expansion of the discovery rule, announcing for the first time, with neither discussion nor citation to authority, that the knowledge-of-malpractice prong may be satisfied by mere awareness that one's medical treatment has failed to improve a medical condition.[157] The plurality

147. As it had done with the release of its *Martin* and *Van Dusen* opinions, the Supreme Court issued *Overton* and *Herron* on the same day. Yet, as with *Van Dusen* nine years before, *Herron* appears in a later volume of the North Eastern Reporter Second than its companion decision. *See supra* note 25.

148. Herron v. Anigbo, 897 N.E.2d 444, 452 (Ind. 2008), *reh'g denied.*

149. *Id.* at 447.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 444, 448-49.

156. *Id.* at 449.

157. Justice Boehm appears to ground this addition to the *Martin/Van Dusen* standard in a reimagining of *Booth v. Wiley*, describing the malpractice in that case as "failure to ar-

then summarized its rationale in *Brinkman* as "[t]he eclampsia brought to light the potential of the preeclampsia,"[158] and it was stated in *Martin* that "the limitations period started when breast cancer was identified, because the patient was in a position to uncover the failure to identify it in an earlier mammogram . . . ."[159]

With that, the *Herron* plurality then turned to the question of whether "reasonable diligence" is to be decided as a question of law or a question of fact.[160] The plurality concluded that the "trigger date will be tolled as a matter of law when the alleged malpractice was not reasonably discoverable within the limitations period" such as where "[t]he disease or injury remains latent for an extended period after the alleged malpractice."[161] Absent such circumstances however, "factual issues relating to the running of the limitations period, such as the date on which the plaintiff first learns of the injury, are to be resolved by the trier of fact at trial."[162] The plurality identified "[r]eliance on a medical professional's words or actions that deflect inquiry into potential malpractice" and "explicit or implicit denial of causation [by a physician]" as examples of such factual issues requiring resolution at trial.[163] Likewise, "[t]he physical incapacity of the plaintiff can in limited circumstances constitute [another] ground for tolling the statute of limitations period,"[164] a situation which, like reliance on a medical professional who deflects inquiry, "ultimately turns on an issue of fact."[165] Then, in a departure from at least three prior court of appeals decisions,[166] the *Herron* plurality announced that "factual issues relating to the running of the limitations period, such as the date on which the plaintiff first learns of the injury, are to be resolved by the trier of fact at trial."[167]

With the foregoing framework established, the *Herron* plurality con-

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rest or cure a known progressive condition such as the degenerative eye condition in *Booth*." *Id.* at 448. The *ad hoc* revisions to the *Booth* holding seem to stem more from an aversion to overruling precedent than from fealty to the actual text of the decision. *See* Booth v. Wiley, 839 N.E.2d 1168, 1173-74 (malpractice was performance of ill-advised Lasik surgery on a less-than-ideal candidate with preexisting conditions which resulted in permanent vision loss, not failure to improve a progressive condition.).

158. *Herron*, 897 N.E.2d at 450 (citing Brinkman v. Bueter, 879 N.E.2d 549, 555 (Ind. 2008)).

159. *Id.* (citing Martin v. Richey, 711 N.E.2d 1273, 1275 (Ind. 1999)).

160. *Id.* at 444.

161. *Id.* at 450-51.

162. *Id.* at 452.

163. *Id.* at 451 (Again, Justice Boehm cites *Booth v. Wiley* for this proposition, thereby echoing and compounding the misinterpretation originated in Justice Boehm's plurality opinion in *Overton*). *See also supra* Part I.E.2.

164. *Id.*

165. *Id.*

166. *See* Rogers v. Mendel, 758 N.E.2d 946 (Ind. Ct. App. 2001) (requiring factual disputes to be resolved by pre-trial motion practice); Jacobs v. Manhart, 770 N.E.2d 344 (Ind. Ct. App. 2002), *reh'g denied, abrogated on other grounds by Herron*, 897 N.E.2d 444; Langman v. Milos, 765 N.E.2d 227 (Ind. Ct. App. 2002), *abrogated by Herron*, 897 N.E.2d 444.

167. *Herron*, 897 N.E.2d at 452 (collecting extra-jurisdictional cases).

cluded that because the plaintiff remained hospitalized following his cervical fusion surgery and the only evidence offered regarding his failure to investigate for potential malpractice was that the "extent of injuries was not made known to me at that time,"[168] the plaintiff's claim, filed thirty-three months post-surgery, was untimely.[169] As in *Overton*, Justices Dickson and Rucker dissented, cautioning against watering-down the long-established *Martin/Van Dusen/Booth* standard.[170]

III. SYNTHESIS: THE STATE OF THE LAW AS OF 2008

From the foregoing history, the following principles emerge:

A. The Objective Standard Remains Unchanged

Notwithstanding the potential damage inflicted on the *Martin/Van Dusen* standard by careless wording and dicta in the Indiana Supreme Court's 2008 trio of decisions, the core of the objective standard remains intact:

> [W]here the constitutionality of the occurrence-based limitations period as applied to a given case is in issue, the ultimate question becomes the time at which a patient "either (1) knows of the malpractice and resulting injury or (2) learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury."[171]

For each of these two scenarios, discovery of the "malpractice" and discovery of the "resulting injury" remain dual requirements stated in the conjunctive. Though the *Brinkman* court phrased the standard as to imply that discovery of an injury alone, without reference to discovery of malpractice, is the operative trigger, such an interpretation would directly contradict both the *Van Dusen* court's original formulation of the discovery rule[172] and the court's analysis in *Booth* just three years prior.[173] Because of this, it ap-

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168. *Id.*
169. *Id.* at 453.
170. *Id.* at 454-56 (Dickson, J., dissenting).
171. *Id.* at 448-49 (quoting Booth v. Wiley, 839 N.E.2d 1168, 1172 (Ind. 2005)).
172. Van Dusen v. Stotts, 712 N.E.2d 491, 497 (Ind. 1999) (requiring plaintiffs "to file their claims within two years of the date when they discover the malpractice *and* the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice *and* the resulting injury") (emphasis added).
173. See Booth, 839 N.E.2d at 1175 (distinguishing between knowledge of injury and knowledge of potential malpractice in selecting a trigger date: "While the facts stressed by

pears likely that any challenge to the objective standard implicit in the *Brinkman* decision stems from poor word choice rather than the intent of the opinion's signatories.

Moreover, the inquiry into whether certain facts should lead to discovery, as opposed to whether those facts raise the mere possibility of discovery, remains inviolate. Of the three cases potentially challenging this interpretation, two cases, *Overton* and *Herron*, are non-precedential plurality decisions.[174] As for the third case, *Brinkman*, the court's declaration that the statutory period will begin to run when "the patient has sufficient facts to make it *possible* to discover the alleged injury"[175] is, as before, more likely the product of careless wording than an intent to overhaul the *Martin/Van Dusen* standard, particularly in light of Justices Rucker's and Dickson's vehement opposition to any rule of law which would hinge on "inquiry notice of the possibility of malpractice."[176]

B. Questions of Fact vs. Questions of Law

Combining the Indiana Supreme Court's reasoning in *Van Dusen v. Stotts* and *Herron v. Anigbo*, the following approach to this issue emerges: "[T]he question of when a plaintiff discovered facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury, is often a question of fact."[177] Examples of "issues of fact" include "the date on which the plaintiff first learns of the injury;"[178] "[r]eliance on a medical professional's words or actions that deflect inquiry into potential malpractice;"[179] "explicit or implicit denial of causation [by a physician];"[180] and "[t]he physical incapacity of the plaintiff."[181] Examples of "questions of law" include situations where "it is undisputed that plaintiff's doctor has expressly informed a plaintiff that he has a specific injury and that there is a reasonable possibility, if not a probability, that the specific injury was caused by a specific act at a specific time . .

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the defendants in the present case demonstrate that Mr. Booth had knowledge within the period prescribed by the statute of limitations that he had serious vision problems and probable permanent vision impairment, they do not necessarily establish as an undisputed issue of fact that this amounts to discovery of 'facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice.'").

174. "[A] plurality decision is of no precedential value and is not binding upon either the trial court or [the court of appeals]." Robinson v. Century Personnel, Inc., 678 N.E.2d 1268, 1271 n.2 (Ind. Ct. App. 1997) (collecting authorities including 20 AM. JUR. 2D *Courts*, §159 (1995)).

175. Brinkman v. Bueter, 879 N.E.2d 549, 554 (Ind. 2008) (emphasis in original).

176. Overton v. Grillo, 896 N.E.2d 499, 505 (Ind. 2008) (Dickson, J., dissenting); *see also Herron*, 897 N.E.2d at 454-56; *supra* note 139.

177. *Van Dusen*, 712 N.E.2d at 499.

178. *Herron*, 897 N.E.2d at 452.

179. *Id.* at 451.

180. *Id.*

181. *Id.*

. .";[182] and "when the alleged malpractice was not reasonably discoverable within the limitations period" such as where "the disease or injury remains latent for an extended period after the alleged malpractice."[183] Moreover, "factual issues relating to the running of the limitations period . . . are to be resolved by the trier of fact at trial,"[184] instead of by resort to pre-trial motion practice.[185]

C. How the Discovery Date Affects the Limitations Period

If the trigger date falls after the original two-year period expires, beginning from the date of malpractice, then the plaintiff has two years from the trigger date in which to initiate his or her action.[186] If the trigger date falls within the original two-year period, then the plaintiff must initiate suit before the expiration of the original two-year period if reasonable in the exercise of due diligence.[187] If inadequate time remains in the original two-year period to initiate suit, then the plaintiff is afforded "reasonable time" after the trigger date to proceed.[188] The amount of time that qualifies as adequate or reasonable remains undefined, but a plurality of the Indiana Supreme Court has held four months to be "sufficient time to get a claim on file . . . ."[189]

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182. *Van Dusen*, 712 N.E.2d at 499.

183. *Herron*, 897 N.E.2d at 450-51.

184. *Id.* at 452.

185. This latter approach had been suggested in at least three court of appeals decisions before the Indiana Supreme Court's resolution of this issue. *See* Rogers v. Mendel, 758 N.E.2d 946 (Ind. Ct. App. 2001) (requiring factual disputes to be resolved by pre-trial motion practice); Jacobs v. Manhart, 770 N.E.2d 344 (Ind. Ct. App. 2002), *reh'g denied, abrogated on other grounds by Herron*, 897 N.E.2d 444; Langman v. Milos, 765 N.E.2d 227 (Ind. Ct. App. 2002), *abrogated by Herron*, 897 N.E.2d 444.

186. *Herron*, 897 N.E.2d at 449.

187. Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 697 (Ind. 2000).

188. Booth v. Wiley, 839 N.E.2d 1168, 1172 (Ind. 2005).

189. *Herron*, 897 N.E.2d at 453; *see also Boggs*, 730 N.E.2d at 697 (finding eleven month window before expiration of original two-year period did not unreasonably shorten the limitations period); Palmer v. Gorecki, 844 N.E.2d 149, 155 (Ind. Ct. App. 2006), *reh'g denied, trans. denied* (finding sixteen month window adequate); Garneau v. Bush, 838 N.E.2d 1134, 1142 (Ind. Ct. App. 2005), *trans. denied* (finding four month window adequate); Levy v. Newell, 822 N.E.2d 234, 239 (Ind. Ct. App. 2005), *reh'g denied* (finding fourteen month window adequate); *Rogers*, 758 N.E.2d at 952 (finding ten month window adequate); Coffer v. Arndt, 732 N.E.2d 815, 822 (Ind. Ct. App. 2000) (finding twenty-two month window adequate). *But see Jacobs*, 770 N.E.2d at 355 (finding six month window created "practical impossibility" of asserting claim before expiration of original two-year period); Moyer v. Three Unnamed Physicians from Marion County and Delaware County, 845 N.E.2d 252, 259 (Ind. Ct. App. 2006) (finding eleven day window inadequate, but eighteen month delay between trigger and filing unreasonable).

D. Analysis Not Limited to Conditions with Long Latency Periods

The *Martin* court's analysis leaves room for the interpretation that the *Martin/Van Dusen* standard should apply to all medical conditions, not merely the ones with a long latency period. Rather than dividing the Act's statute of limitations into two separate statutes (i.e., one that applies to conditions with long latency periods and one that applies to all other medical conditions),[190] subsequent courts implicitly sided with the all-inclusive interpretation by applying the *Martin/Van Dusen* standard, though not always in a plaintiff's favor, in cases where plaintiffs suffered ongoing and persistent symptoms from glaucoma,[191] a vitamin B-12 deficiency,[192] immediate post-surgical complications,[193] TMJ Dysfunction Syndrome,[194] and vestibular toxicity.[195] However, the court's decision did not always come out in favor or the plaintiff. Amidst all of these decisions, only the court of appeals' opinion in *Shah* addresses the issue head-on: "We find no case law that would support the restriction of the analysis announced in *Martin* and *Van Dusen* to specific types of diseases, nor do we discern any public policy or common sense reason for doing so."[196]

Though the *Brinkman* court flirted with re-opening this issue in 2008, it stopped short of issuing any declaration regarding the latency issue, noting only that "[t]he Brinkmans did not face this challenge [of a condition with a long latency period]."[197] Had this been its final pronouncement on the issue, the court's restraint should have been sufficient to leave intact the prior nine years of precedent.

Further bolstering this conclusion, the plurality in *Herron* implicitly confirmed that the trigger date analysis may take place absent a medical condition with a long latency period. Supplementing the guidelines as to what qualifies determination as a matter of law, the *Herron* opinion concluded that the "trigger date will be tolled as a matter of law when the al-

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190. At least one commentator raised this concern at the time the court released the *Martin* and *Van Dusen* decisions. *See* Harvey, *supra* note 25, at 37.

191. *Coffer*, 732 N.E.2d 815.

192. Shah v. Harris, 758 N.E.2d 953 (Ind. Ct. App. 2001).

193. Booth, 839 N.E.2d 1168; Battema v. Booth, 853 N.E.2d 1014 (Ind. Ct. App. 2006), *trans. denied*; *Garneau*, 838 N.E.2d 1134; *Levy*, 822 N.E.2d 234; GYN-OB Consultants, LLC v. Schopp, 780 N.E.2d 1206, 1210-11 & n.5 (Ind. Ct. App. 2003), *trans. denied*; Langman v. Milos, 765 N.E.2d 227 (Ind. Ct. App. 2002), *abrogated by Herron*, 897 N.E.2d 444.

194. Burns v. Hatchett, 786 N.E.2d 1178 (Ind. Ct. App. 2003), *trans. denied.*

195. Palmer v. Gorecki, 844 N.E.2d 149 (Ind. Ct. App. 2006), *reh'g denied, trans. denied.*

196. *Shah*, 758 N.E.2d at 958. *But see Schopp*, 780 N.E.2d at 1210 n.5 (analyzing case under fraudulent concealment doctrine rather than under *Martin/Van Dusen* standard because "the type of latent injury addressed in *Martin* and *Halbe [v. Weinberg]* includes situations where the patient does not experience any symptoms that might indicate malpractice.").

197. Brinkman v. Bueter, 879 N.E.2d 549, 554 (Ind. 2008).

leged malpractice was not reasonably discoverable within the limitations period," such as where a "disease or injury remains latent for an extended period after the malpractice;" and absent such circumstances, "factual issues relating to the running of the limitations period, such as the date on which a plaintiff first learns of the injury, are to be resolved by the trier of fact at trial."[198] In other words, the *Herron* plurality confirms that latency is but one situation where a trigger date may be tolled as a matter of law. If all applications of the *Martin/Van Dusen* standard required latency as a precondition, then there would be no reason to make room for other situations where a trigger date may be tolled as a matter of law, and there would be no reason to invite factual determinations in other circumstances because there could *be* no other circumstances. In short, until further comment from the Indiana Supreme Court, latency cannot be viewed as a precondition to application of the *Martin/Van Dusen* standard.

E. Lay Suspicion is Irrelevant

As the Indiana Supreme Court declared during its first pronouncement of the discovery rule, "a plaintiff's lay suspicion that there may have been malpractice is not sufficient to trigger the two-year period."[199] Following this guidance, not once from the years 1999 through 2008 did any Indiana court place any weight on a plaintiff's lay suspicion regarding the possibility of malpractice when determining a trigger date. Indeed, this result is unsurprising given the conceptual disconnect between a plaintiff's subjective thoughts, feelings, or beliefs, and the inherently objective inquiry at the heart of the *Martin/Van Dusen* standard.[200]

Moreover, the *Herron* plurality, perhaps unintentionally, indirectly confirmed that lay suspicion cannot serve as a trigger. In *Herron*, the Indiana Supreme Court implies that the language of "reasonable diligence" in the *Martin/Van Dusen* standard actually creates a separate requirement of diligent investigation for plaintiffs.[201] If this is the case, then it becomes a

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198. *Herron*, 897 N.E.2d at 450-52.

199. Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999).

200. The Seventh Circuit Court of Appeals explained the distinction as it applied to the Federal Tort Claims Act:

> Our question, then, is whether the running of the statute of limitations depends on the plaintiffs' personal knowledge and reactions or whether it depends on the reactions of the objective, "reasonable" man. The answer is the latter, an answer reflected in the formula "knew or should have known". [sic] The first part is actual knowledge, the second is an objective inquiry. A person "should have known" enough when a reasonable man – "a reasonably diligent person (in the tort claimant's position)" . . . would have known enough.

Nemmers v. U.S., 795 F.2d 628, 631 (7th Cir. 1986) (internal citation omitted).

201. *Herron*, 897 N.E.2d at 449-50.

logical impossibility for lay suspicion to play any role in the trigger date analysis. Consider, in order for a plaintiff to conduct an investigation into whether her physician might have committed malpractice, that plaintiff must harbor some suspicion that her physician has done something wrong. Without suspicion, there is no reason to investigate, and to require diligent investigation absent suspicion is to put the proverbial cart before the horse. Yet, if suspicion is to serve as a trigger, then the added "reasonable diligence" requirement becomes meaningless. Once the suspicion triggers the statute of limitations, there is nothing to be gained by inquiring into whether the plaintiff engaged in a diligent investigation; the bell has already been rung. Therefore, "lay suspicion" and "reasonable diligence" cannot coexist logically in the trigger date inquiry. When the Indiana Supreme Court decrees the latter, it necessarily vitiates the former.

F. Worsening Symptoms vs. Physician Notification of Probable Malpractice

From the years 1999 through 2007, the Indiana Court of Appeals and Indiana Supreme Court repeatedly reaffirmed the importance of physician input in calculating a trigger date and routinely rejected any attempt to base a trigger date on manifestation or worsening of symptoms.[202] Indeed, even those decisions that purported to rely on symptomatology in selecting a trigger date actually required more.[203]

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202. *See supra* Part I.C, discussing Moyer v. Three Unnamed Physicians from Marion County, 845 N.E.2d 252, 257-59 (Ind. Ct. App. 2006) (trigger occurred when physician informed plaintiff of possible link between Accutane and heart disease—court rejected earlier dates of heart disease diagnosis and open-heart surgery); Burns v. Hatchett, 786 N.E.2d 1178, 1181 & n. 2 (Ind. Ct. App. 2003), *trans. denied* (assuming that date the subsequent physician "told [plaintiff] she had TMJ and that she had a 'clear case of malpractice' against [defendant]" served as trigger); Dorman v. Osmose, Inc., 782 N.E.2d 463, 467-69 (Ind. Ct. App. 2003), *trans. denied* (plaintiff's lay suspicion combined with ongoing symptoms over four years insufficient; statute did not begin to run until physician report connecting illness to treated wood); Jacobs v. Manhart, 770 N.E.2d 344, 347 & 354 (Ind. Ct. App. 2002), *reh'g denied, abrogated on other grounds by Herron*, 897 N.E.2d 444 (date pathologist confirmed that some slides had been misread chosen as "trigger"). *See also* Booth v. Wiley, 839 N.E.2d 1168, 1175 (Ind. 2005) (knowledge of "serious vision problems and probable permanent vision impairment" insufficient; rather, date physician opined "that the Lasik surgery should not have been performed because of his preexisting cataracts and glaucoma" served as trigger); *Van Dusen*, 712 N.E.2d at 494, 499-500 (of multiple events which occurred on trigger date, court did not rely on it being date doctor diagnosed incurable prostate cancer; nor did court rely on it being date plaintiff voiced suspicion of malpractice; rather, court relied on it being date on which doctor opined that biopsy slides may have been misread).

203. *See supra* Part I.C, discussing Langman v. Milos, 765 N.E.2d 227, 236 (Ind. Ct. App. 2002), *abrogated by Herron*, 897 N.E.2d 444 (emphasizing plaintiff's lack of reasonable diligence); Johnson v. Gupta, 762 N.E.2d 1280, 1282-83 (Ind. Ct. App. 2002) (selecting date of physician input as trigger rather than date plaintiff first "knew there was something wrong," date she first experienced fecal incontinence, or even the date she decided to seek a second opinion).

Finally resolving the issue in the year 2005, the Indiana Supreme Court in *Booth* confirmed the disconnect between knowledge of serious or worsening symptoms and knowledge of "facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice."[204] Though the *Booth* court cautioned against reading its decision as "holding that an expert's advice is always required to put a patient on notice that problems may be due to malpractice," the court offered no guidance as to when "a patient's ordinary experiences and observations" might supply the necessary information for a malpractice claim.[205] Indeed, this emphasis on physician input persists under the Indiana Supreme Court's subsequent attempts to re-frame the standards from the *Martin* and *Van Dusen* cases.[206]

G. Discovery of Injury and Receipt of Correct Diagnosis Insufficient (Usually)

The *Van Dusen* court's original formulation of the discovery rule[207] and the court's analysis in *Booth*[208] combine to confirm that discovery of injury is but one prong of a two-pronged standard. Knowledge of injury alone is insufficient to serve as a discovery date trigger.

However, because of imprecise language in *Boggs*,[209] one might perceive an exception carved out of this rule specific to failure-to-diagnose cases—that the mere receipt of a correct diagnosis, standing alone, could be a discovery date trigger. Though the Indiana Supreme Court explicitly rejected such a reading,[210] later opinions by the court might be read to fuel the fire started by *Boggs*.[211] Thus, the medical malpractice litigant in Indiana is left to ponder the effect of these later Indiana Supreme Court decisions: did the court intend to carve out an exception to the two-pronged standard specific to failure-to-diagnose cases (and in direct opposition to its rejection of

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204. *Booth*, at 839 N.E.2d at 1177.

205. *Id.* at 1176.

206. *See Herron*, 897 N.E.2d at 453 (assuming "trigger date" when plaintiff "was informed of the potential of malpractice" by subsequent physician).

207. Van Dusen v. Stotts, 712 N.E.2d 491, 497 (Ind. 1999) (requiring plaintiffs "to file their claims within two years of the date when they discover the malpractice *and* the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice *and* the resulting injury") (emphasis added).

208. *See Booth*, 839 N.E.2d at 1175 (distinguishing between knowledge of injury and knowledge of potential malpractice in selecting a trigger date).

209. *See* discussion *supra* Part I.C; *see also supra* note 71 (discussing Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692 (Ind. 2000)).

210. *Booth*, 839 N.E.2d at 1172.

211. *See* Overton v. Grillo, 896 N.E.2d 499, 503 (Ind. 2008) (suggesting that knowledge of metastasized cancer combined with absence of prior diagnosis sufficient to put plaintiff on "inquiry notice" of failure to diagnose cancer); Brinkman v. Bueter, 879 N.E.2d 549, 554-55 (Ind. 2008) (implying that onset of symptoms, either standing alone or combined with diagnosis of eclampsia, is a sufficient trigger for failure to diagnose preeclampsia).

such an approach a mere three years prior), or is there some way to reconcile the court's decisions with *Van Dusen* and *Booth*?

As for the first of these two options, the logical basis of such an exception would seem dubious in that it assumes an unrealistic level of sophisticated knowledge on the part of laypersons. When presented with a diagnosis, what ordinary person is going to recognize and distinguish between idiopathic and iatrogenic conditions? The average reasonable layperson will assume spontaneous emergence of a given medical condition and not fault a medical professional for failing to discover the condition before it existed. By way of example, a layperson diagnosed with a cavity has no reason to suspect that her dentist committed malpractice in failing to diagnose the cavity earlier. Most reasonable persons would assume that cavity to be idiopathic, unless given reason to doubt its spontaneity. To assume, and therefore *require*, greater precision in the medical knowledge of laypersons is to invite absurdity. As for the latter option, a palatable reconciliation presents itself. As argued above,[212] one might read *Boggs, Brinkman,* and *Overton* as acknowledging that certain medical conditions are by their very nature coexistent with other medical conditions. Thus, where one diagnosis is so inextricably intertwined with another diagnosis (e.g., metastasis with cancer;[213] eclampsia with prior preeclampsia[214]), the mere presence of one impels investigation into the other.[215]

H. Fraudulent Concealment Remains a Viable, Yet Impotent, Doctrine

Repeatedly, the fraudulent concealment doctrine continues to rear its head in post-*Martin/Van Dusen* medical malpractice cases.[216] Nevertheless,

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212. *See supra* Part I.E.1-2.

213. *See, e.g., Overton*, 896 N.E.2d 499; *Boggs*, 730 N.E.2d 692.

214. *Brinkman*, 879 N.E.2d at 555 n.7.

215. At least one medical malpractice litigant in Indiana has suggested a second theory of reconciliation (i.e., that a trigger may occur where a subsequent diagnosis necessarily calls into question the interpretation of a prior objective test). *See Overton*, 896 N.E.2d at 501 (mammogram and biopsy revealed advanced cancer metastasized to lymph nodes, thus calling into question why mammogram 15 months prior had been normal). *See also Boggs*, 730 N.E.2d at 694-95 (plaintiff "became aware of her injury" when biopsy revealed advanced cancer metastasized to liver, thus calling into question why prior year's mammogram had revealed nothing); Conway v. Schneider, No. 49A02-0906-CV-513, 2010 WL 653004, at *5 (Ind. Ct. App. Feb. 24, 2010) (MRI revealing rotator cuff tear brought to light potential that MRI two years prior had been misread); Rogers v. Mendel, 758 N.E.2d 946, 952 (Ind. Ct. App. 2001) (trigger occurred when diagnosed with metastatic endometrial cancer, thus calling into question why post-hysterectomy tests 14 months prior had revealed nothing). Nevertheless, such a reconciliation obviously fails to account for the result in *Brinkman*.

216. *See, e.g., Boggs*, 730 N.E.2d at 699 (even assuming fraudulent concealment, statute not tolled beyond original discovery date); Halbe v. Weinberg, 717 N.E.2d 876, 882-83 (Ind. 1999) (acknowledging but declining to discuss fraudulent concealment in light of disposition, with Justices Sullivan & Boehm concurring on grounds of fraudulent concealment);

the fraudulent concealment doctrine has devolved into irrelevance in the medical malpractice context in two ways: (1) the doctrine is unnecessary as a practical matter; and (2) the doctrine is superfluous under the *Martin/Van Dusen* standard.

First, the fraudulent concealment doctrine became unnecessary with the Court's pronouncement of the discovery rule in *Martin/Van Dusen.* Consider: for the fraudulent concealment doctrine to apply, one must envision a scenario where a plaintiff discovers some fact *x* which should lead to discovery of the malpractice and resulting injury, and yet, because of fraud by the defendant physician, plaintiff fails to uncover the malpractice. In this scenario, one wonders if any qualitative distinction can be drawn between saying, "*x* should lead to discovery but, under these circumstances, did not," and saying "under the circumstances, *x* might not lead to discovery." If the fact-finder is allowed to take into account the defendant's conduct when assessing whether *x* should lead to discovery of malpractice, then fraudulent concealment is no longer needed as an independent doctrine. If the fact-finder is *not* allowed to take into account the defendant's conduct when assessing whether *x* should lead to discovery of malpractice, then one wonders what (if anything) is to be gained by forcing the fact-finder to disregard the defendant's conduct until after assessing the hypothetical significance of *x* in a vacuum. At best, fraudulent concealment persists only as a contrived exercise.

Yet even if one could justify divorcing the examination of what *x* might or might not reveal (after a hypothetical "diligent" investigation) from the surrounding circumstances (i.e., the physician's fraudulent concealment), a more fundamental problem emerges, one that calls into question the continued viability of fraudulent concealment as an independent doctrine. Recall that under the pre-Act fraudulent concealment doctrine, the defendant was estopped from asserting the statute of limitations until the earlier of the termination of the physician-patient relationship, or the date at which "the patient learn[ed] of the malpractice or learn[ed] information which would lead to discovery of the malpractice if the patient exercised

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Palmer v. Gorecki, 844 N.E.2d 149, 155-56 (Ind. Ct. App. 2006) (finding no fraudulent concealment where plaintiffs failed to establish that "concealment of material information somehow prevented them from inquiring into or investigating [victim]'s condition, thus preventing them from discovering a potential cause of action."); Battema v. Booth, 853 N.E.2d 1014, 1021 (Ind. Ct. App. 2006) (fact issue as to whether fraudulent concealment present where physician lied to patients about cause of physician's eye injury and failed to disclose physician's narcotics addiction); Garneau v. Bush, 838 N.E.2d 1134, 1143 (Ind. Ct. App. 2005) (fraudulent concealment inapplicable where no evidence of concealment); GYN-OB Consultants, LLC v. Schopp, 780 N.E.2d 1206, 1210-11 (Ind. Ct. App. 2003) ("Despite the evidence of concealment," statute not tolled beyond date patient "experienced discernible symptoms."); Burns v. Hatchett, 786 N.E.2d 1178, 1185 (Ind. Ct. App. 2003) (no fraudulent concealment where no evidence of actual knowledge or intentional conduct by physician); Coffer v. Arndt, 732 N.E.2d 815, 821-22 (Ind. Ct. App. 2000) (even assuming fraudulent concealment, statute not tolled beyond original discovery date).

diligence . . . ."[217] Note that this latter category is merely a reiteration of the discovery rule. In other words, if fraudulent concealment remains viable, then logically there can never be a situation where fraudulent concealment could extend the trigger date beyond that mandated by the *Martin/Van Dusen* standard; as a practical matter, fraudulent concealment becomes irrelevant under any accrual-based statute of limitations.[218]

Perhaps recognizing the doctrine's overlap with the *Martin/Van Dusen* standard, the court of appeals in *GYN-OB Consultants, LLC v. Schopp* attempted to resurrect the doctrine with a creative reimagining.[219] Concluding that the *Martin/Van Dusen* standard applies only where the plaintiff suffers from a latent, asymptomatic condition, the *Schopp* majority proceeded to apply the discovery rule anyway under the rubric of fraudulent concealment.[220] In so doing, the *Schopp* Court implied that fraudulent concealment should be perceived as an alternative to the *Martin/Van Dusen* standard rather than as a complement to it, while at the same time, tacitly acknowledging that the analyses are coterminous.[221] No other Indiana court has adopted this approach, however. Given the problematic assumption on which the court of appeals relied in invoking the doctrine,[222] it seems improbable that future Indiana courts will mimic the *Schopp* approach.

I. "Reasonable Diligence" Requires Investigation, Not Complete Inactivity

Of all the questions left unanswered by *Martin* and *Van Dusen*, the

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217. *See* Toth v. Lenk, 330 N.E.2d 336, 339-40 (1975); *supra* Part I.A. *See also* Hughes v. Glaese, 659 N.E.2d 516, 519 (Ind. 1995); Guy v. Schuldt, 138 N.E.2d 891, 895 (Ind. 1956).

218. *See, e.g.*, *Conway*, 2010 WL 653004, at *6 (even assuming fraudulent concealment, statute not tolled beyond date of physician's last opportunity to diagnose, which fell even before discovery date); *Schopp*, 780 N.E.2d at 1210-11 ("Despite the evidence of concealment," statute not tolled beyond date patient "experienced discernible symptoms."); *Coffer*, 732 N.E.2d at 821-22 (even assuming fraudulent concealment, statute not tolled beyond original discovery date). The Supreme Court flirted with this realization in *Boggs*, abandoning the discussion just before stepping off the precipice:

> Even if discovery were to establish that the physician-patient relationship [continued until the August 12, 1992 trigger date] . . . or that Tri-State's radiologist had information he should have disclosed to Carolyn, the statute of limitations would not be tolled beyond August 12, 1992, the date of Carolyn's biopsy and knowledge of facts that led to discovery of the alleged malpractice. Thus, under any of these theories, Carolyn would have only a reasonable time beyond August 1992 to file her claim.

Boggs, 730 N.E.2d at 699.

219. *Schopp*, 780 N.E.2d 1206.

220. *Id.* at 1210-11.

221. *Id.* at 1210 n.5 ("We accordingly believe the Patient's claim is more usefully examined as one of concealment rather than as a constitutional question.").

222. *See supra* Part II.D.

meaning of "reasonable diligence" has received the least treatment. Though no case prior to *Herron* spoke directly to the meaning of "reasonable diligence," most decisions seemed to treat it as an invitation to engage in thought-experiments (i.e., whether the court can envision a hypothetical scenario in which a plaintiff might discover the malpractice and resulting injury after conducting an imaginary investigation) and yet, with *Herron*, the Supreme Court implies that "reasonable diligence" actually creates a separate requirement of diligent investigation for plaintiffs.[223] Thus, a plaintiff who engages in no investigation whatsoever during the initial two-year period, because he does not understand the extent of his injuries, will not be excused from the harsh result of the occurrence-based statute of limitations;[224] nor does the discovery rule save the plaintiff who buries his head in the sand and eschews all medical treatment for two-and-a-half years despite worsening symptoms.[225] Left unanswered by *Herron*, however, is whether a plaintiff can investigate with "reasonable diligence" yet still fail to uncover facts necessary for a trigger date.

IV. THE INDIANA COURT OF APPEALS CAREENS OFF THE TRACKS

With its trio of decisions in 2008, the Indiana Supreme Court threatened to tear asunder the few areas of clarity established during the previous decade in the jurisprudence surrounding the Act's statute of limitations. In December 2009, the Indiana Court of Appeals attempted to make good on this threat by singlehandedly undermining most (if not all) of those areas of clarity.

A. The Facts

In June 1999, ten-year-old Anna Williams needed braces.[226] Anna began orthodontic treatment with the defendant physician, Dr. Adelsperger.[227] After more than two years of orthodontic treatment, Anna began to experience pain in her jaw.[228] When pain medication failed to ameliorate Anna's symptoms, Dr. Adelsperger dismissed the complaints as related to the development of wisdom teeth.[229] X-rays of Anna's jaw revealed that Anna's left condyle had "flattened," a preliminary indicator of temporomandibular

223. Herron v. Anigbo, 897 N.E.2d 444, 449-50 (Ind. 2008).
224. *Id.* at 453.
225. Langman v. Milos, 765 N.E.2d 227, 235-36 (Ind. Ct. App. 2002), *abrogated by Herron*, 897 N.E.2d 444.
226. Williams v. Adelsperger, 918 N.E.2d 440, 442 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010).
227. *Id.*
228. *Id.*
229. *Id.*

joint dysfunction ("TMJ").[230] Nevertheless, Dr. Adelsperger continued treating Anna with braces.[231]

By mid-2002, Anna was experiencing pain on both sides of her jaw, a locking sensation, and "clicking and popping" in her jaw, yet another indicator of TMJ.[232] Though she suspected TMJ, Dr. Adelsperger chose not to refer Anna to a TMJ specialist.[233] Instead, Dr. Adelsperger questioned Anna about possibly grinding her teeth, instructed her to take painkillers, and fitted Anna with a soft mouth guard, a treatment known to exacerbate many types of TMJ.[234] As Anna's symptoms continued to worsen, Dr. Adelsperger told Anna's mother that Anna had a muscle problem, not a joint problem, and implied that Anna was exaggerating her complaints.[235]

Eventually, Dr. Adelsperger referred Anna to Dr. Heidi Crow, a colleague and former teacher of Dr. Adelsperger's.[236] Dr. Crow told Anna's family that the symptoms were psychosomatic or that Anna might have lupus, but "that Anna definitely was not suffering from TMJ syndrome[.]"[237]

Disagreeing with Dr. Crow's diagnoses, Anna next sought treatment from a pain management specialist.[238] The pain management specialist diagnosed Anna with TMJ syndrome and referred Anna to a TMJ specialist.[239] Nevertheless, when Anna's mother phoned Dr. Adelsperger to discuss the diagnosis, Dr. Adelsperger again assured her that Anna was not suffering from TMJ, and she further advised against taking Anna to the specialist because the specialist was "money hungry."[240] After requesting a second referral from the pain management specialist, Anna's mother again spoke to Dr. Adelsperger; this time, Dr. Adelsperger insisted that the second specialist was "not the right person" to treat Anna.[241] Based on this advice, Anna never saw the TMJ specialists.[242]

In December 2002, Anna's family took her to a new orthodontist.[243] On the intake questionnaire, Anna's mother wrote "Referral-prior insufficient care" and "Suspected TMJ-splints made-exasperated [sic] problem."[244] After several months of orthotic treatment, an MRI that revealed TMJ damage, and two surgeries, Anna became pain-free by February

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230. *Id.* at 442-43.
231. *Id.* at 443.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 443 & n.5.
237. *Id.* at 443 & n.6.
238. *Id.* at 443-44.
239. *Id.* at 444.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*

2005.[245]

Because of the MRI results, Anna's father met with Dr. Adelsperger in September of 2003.[246] During this meeting, Dr. Adelsperger assured Anna's father that "her treatment had been appropriate and she had met the standard of care in" her treatment of Anna.[247] Suspecting negligence, Anna's father asked the Indiana Dental Association to evaluate the case.[248] The Association concluded its review in December 2003 without finding negligence against Dr. Adelsperger.[249] Nevertheless, Anna's family initiated suit in December 2004.[250]

B. The Court's Analysis

Affirming the trial court's grant of summary judgment to Dr. Adelsperger, the court of appeals in *Williams v. Adelsperger* adopted a scattershot approach to judicial review by blindly throwing several justifications for its decision against the wall in the hopes that one or more might stick. Unfortunately for future medical malpractice litigants in Indiana, none do.

After summarizing the factual background, the standard of review for grants of summary judgment, the Act's statute of limitations, and some of the case law developing the *Martin/Van Dusen* standard,[251] the court of appeals began its analysis with its conclusion: "Williams had ample information during the limitations period that, in the exercise of reasonable diligence, should have led to the discovery of the malpractice she alleges."[252] With that, the unanimous panel announced its reasoning:

> Unlike [the plaintiff's tumor in *Van Dusen*] Williams's disorder was not latent-the symptoms were obvious and Williams's parents knew they had worsened under the Doctor's care. Nor was Williams without a correct diagnosis until after the limitations period had run, as was [the plaintiff in *Shah v.*] Harris. By October of 2002, Dr. Liu had diagnosed TMJ. In July 2003, Doctors Sondhi and Biggs noted they had begun orthotic therapy in an effort to resolve Williams's "symptoms of clicking and pain in the right and left temporomandibular joints." They noted there

245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* at 442-46.
252. *Id.* at 446-47.

> had been some improvement, but it was "unlikely that continuation of orthotic therapy beyond this point will result in any further improvement." In September 2003, about a year after Williams's last treatment by the Doctor, Dr. Buttram told Williams's parents she had, among other conditions, TMJ.
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> Williams brought her action too late, even though no doctor had explicitly indicated there had been malpractice, because the trigger to action may occur when symptoms develop or worsen during or after a medical treatment and accordingly put a plaintiff on notice of potential mistreatment or improper care. . . . [Discussion of the pre-*Booth v. Wiley* case of *Levy v. Newell*[253]].
>
> Similarly, Williams believed early on that the Doctor's treatment had caused or exacerbated her condition. One doctor had diagnosed TMJ about two months after Williams' last treatment by the Doctor, and another diagnosed TMJ less than a year after that, when about eleven months remained in the limitations period. Williams had sufficient information and time within which to bring her claim. We cannot say summary judgment for the Doctor was error, and we accordingly affirm.[254]

C. Dissecting the Court's Rationale

Without belaboring the haphazard manner in which the court of appeals presented its reasoning, the above analysis is even more unsatisfying for its substantive shortcomings. Each rationale that might be gleaned from the foregoing analysis conflicts with principles firmly established by *Martin*, *Van Dusen*, *Booth*, and their progeny.

1. Rationale #1: Non-Latency

Rationale: "Unlike [the plaintiff's tumor in Van Dusen], Williams's disorder was not latent-the symptoms were obvious and Williams's parents knew they had worsened under the Doctor's care."[255]

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253. Levy v. Newell, 822 N.E.2d 234 (Ind. Ct. App. 2005), *reh'g denied* (finding fourteen month window adequate).

254. *Williams*, 918 N.E.2d at 447-48 (citations omitted).

255. *Id.* at 447.

Court's Error: By stressing the distinction between latent and non-latent conditions, the court of appeals takes the final step the *Brinkman* Court had been unwilling to take. Before *Williams*, the court of appeals had rejected, both implicitly and explicitly, the invitation to divide the Act's statute of limitations into two separate statutes (i.e., one that applies to conditions with long latency periods and one that applies to all other medical conditions).[256] Though the Supreme Court in *Brinkman* flirted with reopening the latent vs. non-latent debate, it stopped short of issuing any declaration regarding the latency issue, thereby leaving intact the prior nine years of precedent. By addressing the issue itself (rather than awaiting a pronouncement from the Indiana Supreme Court), the *Williams* Court makes it impossible for future litigants, attorneys, and trial judges to predict whether a given panel of the court of appeals will rely on the latent vs. non-latent distinction in any given case.[257]

2. *Rationale #2: Correct Diagnosis*

Rationale: "Nor was Williams without a correct diagnosis until after the limitations period had run, as was Harris."[258]

Court's Error: Here, the court of appeals leaves Indiana litigants with the impression that the statute of limitations in a failure-to-diagnose case is triggered as a matter of law as soon as the plaintiff receives a correct diagnosis from a subsequent physician. As explained above,[259] this position collapses under the weight of both logic and precedent. *Williams* did not involve a situation where one diagnosis is inextricably intertwined with another; the diagnosis of TMJ did not call into question the interpretation of a prior objective test; nor does the court of appeals offer any reason why the plaintiff should have doubted that her TMJ was idiopathic. Again, the court of appeals charts a new course, thereby leaving future litigants, attorneys, and trial judges without a reliable guide.

3. *Rationale #3: Worsening Symptoms*

Rationale: "Williams brought her action too late, even though no doctor had explicitly indicated there had been malpractice, because the trigger to action may occur when symptoms develop or worsen during or after a medical treatment and accordingly put a plaintiff on notice of potential mis-

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256. *See supra* Part II.D.

257. *See also* Conway v. Schneider, No. 49A02-0906-CV-513, 2010 WL 653004, at *6 (Ind. Ct. App. Feb. 24, 2010) (repeating the error of the *Williams* Court when stating "Nancy was not suffering from a latent or undiscovered condition, as she knew from the time of the fall that she was experiencing significant pain.").

258. *Williams*, 918 N.E.2d at 447.

259. *See supra* Part II.G.

treatment or improper care."[260]

Court's Error: With this statement, the court of appeals leaves Indiana litigants with the impression that worsening symptoms is pertinent to the trigger date inquiry, a position put to rest by the Supreme Court in 2005.[261] To borrow language from *Booth*, though the *Williams* plaintiffs knew that Anna suffered from worsening jaw problems and probable jaw damage, this "do[es] not necessarily establish as an undisputed issue of fact that this amounts to discovery of 'facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice.'"[262] Indeed, even under Justice Boehm's strained re-examination of *Booth* in *Overton*,[263] both Dr. Adelsperger and a subsequent physician provided plaintiffs with multiple alternative explanations for the worsening symptoms, including grinding, emergence of wisdom teeth, muscle problems, symptom exaggeration, lupus, and that Anna's symptoms were psychosomatic.[264] In short, one is hard-pressed to invent *any* means of reconciling the above rationale with *Booth*.

Yet as support for its departure from *Booth*, the *Williams* Court relies on the pre-*Booth* case of *Levy*.[265] A closer reading of *Levy*, however, reveals that even in that case, the court of appeals did *not* select as its trigger the date three days after surgery when the patient "began having indications that something was wrong"; it did *not* select the date of the diagnostic test revealing the duct injury; and it did *not* select the date of the patient's admission to the hospital for repair of that injury.[266] Rather, the *Levy* Court selected as its trigger the date the plaintiffs consulted with an attorney who then sent a demand letter indicating a "'strong' belief" of malpractice.[267] Thus, even relying on outdated and irrelevant precedent, the *Williams* Court misfires. To suggest that *Levy* placed any weight whatsoever on the manifestation or worsening of symptoms is, at best, confusing.

4. Rationale #4: Lay Suspicion

Rationale: "Similarly, Williams believed early on that the Doctor's treatment had caused or exacerbated her condition."[268]

Court's Error: Here, the court of appeals invites the interpretation

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260. *Williams*, 918 N.E.2d at 447.
261. *See supra* Part II.F.
262. Booth v. Wiley, 839 N.E.2d 1168, 1175 (Ind. 2005) (quoting Van Dusen v. Stotts, 712 N.E.2d 491, 497 (Ind. 1999)).
263. *See supra* Part I.E.2.
264. *Williams*, 918 N.E.2d at 442-43.
265. *Id.* at 447-48 (citing Levy v. Newell, 822 N.E.2d 234, 238-39 (Ind. Ct. App. 2005)).
266. *Levy*, 822 N.E.2d at 238-39.
267. *Id.* at 239.
268. *Williams*, 918 N.E.2d at 448.

that lay suspicion is pertinent to the trigger date inquiry. As explained above,[269] not once in the ten-year span from 1999-2008 did any Indiana court place any weight whatsoever on a plaintiff's lay suspicion regarding the possibility of malpractice when determining a trigger date, and the Supreme Court implicitly confirmed the irrelevance of lay suspicion in *Herron*.[270] Once again, the *Williams* Court charts its own course.

Yet even setting aside the precedent-ignoring flaws in its reasoning, the court of appeals wrought further havoc by deciding implicitly one of the few questions left open by *Herron*.[271] By creating a separate requirement of diligent investigation for plaintiffs,[272] *Herron* left open the question of whether a plaintiff can investigate with "reasonable diligence" yet still fail to uncover facts necessary for a trigger date. Without even addressing the issue, the Court of Appeals in *Williams* appears to answer this question in the negative.

When he first suspected negligence, Anna's father confronted the defendant physician with his suspicions.[273] Dr. Adelsperger denied any wrongdoing and assured Anna's father that her treatment of Anna had been appropriate and she had met the standard of care.[274] Thereafter, Anna's father asked the Indiana Dental Association to review the case.[275] The Association concluded its review in December 2003 without finding negligence against Dr. Adelsperger.[276] Thus, not only did the plaintiff's father exercise "reasonable diligence" by confronting Dr. Adelsperger with his suspicions of negligence, the "reasonable diligence" continued with his initiation of an administrative review. Yet each step of the way, his suspicions were rebuffed. In other words, it would appear that the *Williams* plaintiff *did* exercise "reasonable diligence," yet his diligent investigation led to (1) a defendant who actively attempted to convince the plaintiff that no malpractice had occurred; and (2) an administrative review panel that declined to find negligence on the part of the defendant. Thus, *Williams* invites future courts to substitute their own suppositions as to what the "exercise of reasonable diligence" *might* have uncovered when faced with evidence that a plaintiff *did* exercise reasonable diligence yet *still* failed to discover facts which would lead a reasonable person to discover the malpractice.

Finally, it appears plain that the court of appeals in *Williams* ignored explicit direction from the Indiana Supreme Court as to what does and does not qualify for determination as a matter of law. One cannot overlook the

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269. *See supra* Part II.E.
270. *See supra* Part II.E.
271. Herron v. Anigbo, 897 N.E.2d 444, (Ind. 2008).
272. *Id.* at 449-50.
273. *Williams*, 918 N.E.2d at 444.
274. *Id.*
275. *Id.*
276. *Id.*

fact that all of the determinations in *Williams* were made as a matter of law without any input from a fact-finder. As explained above,[277] "the question of when a plaintiff discovered facts which, in the exercise of reasonable diligence, should lead to the discovery of the medical malpractice and resulting injury" is to be treated as a question of fact,[278] absent two very specific circumstances, i.e., (1) where "it is undisputed that plaintiff's doctor has expressly informed a plaintiff that he has a specific injury and that there is a reasonable possibility, if not a probability, that the specific injury was caused by a specific act at a specific time . . . .";[279] and (2) "when the alleged malpractice was not reasonably discoverable within the limitations period" such as where a "disease or injury remains latent for an extended period after the alleged malpractice."[280] "Reliance on a medical professional's words or actions that deflect inquiry into potential malpractice" and "explicit or implicit denial of causation [by a physician]" are examples of factual issues requiring resolution at trial.[281]

Using these guidelines, it is clear that *Williams* should have been remanded for factual assessment. Neither of the circumstances identified by the Supreme Court requiring determination as a matter of law were present in *Williams*, and the record in *Williams* is littered with evidence of "[r]eliance on a medical professional's words or actions that deflect inquiry into potential malpractice" and "explicit or implicit denial of causation,"[282] including repeated assurance from the defendant that Anna's complaints were nothing more than muscle, wisdom tooth, and (later) psychosomatic pain;[283] diagnosis from the defendant's colleague and teacher that Anna's complaints were either psychosomatic or related to lupus;[284] successful efforts by the defendant to convince Anna's family to reject the diagnosis of TMJ by a subsequent physician;[285] successful efforts by the defendant to convince Anna's family not to consult with the TMJ specialists recommended by a subsequent physician;[286] and an explicit denial of negligence by the defendant.[287] Yet rather than adhere to the Supreme Court's guidance by turning these facts over to a jury, the *Williams* Court chose to weigh (and ultimately disregard) these facts in the jury's stead.

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277. *See supra* Part II.B.
278. Van Dusen v. Stotts, 712 N.E.2d 491, 499 (Ind. 1999).
279. *Id.*
280. Herron v. Anigbo, 897 N.E.2d 444, 450-51 (Ind. 2008).
281. *Id.* at 451.
282. *Id.*
283. Williams v. Adelsperger, 918 N.E.2d 440, 442-43 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 788 (Ind. 2010).
284. *Id.* at 443-44 nn.5-6.
285. *Id.* at 444.
286. *Id.*
287. *Id.*

V. CONCLUSION

Taken with the aforementioned departures from precedent, the Indiana Court of Appeals' refusal to remand for factual assessment supplies the finishing stroke to the masterpiece of activist reinvention that is *Williams*. Not one of the principles established over the prior decade remains unsullied by *Williams*,[288] and litigants, attorneys, and trial judges are left with no idea how to proceed in future medical malpractice cases. As Indiana courts chart a new course, those navigating the murky waters are as likely to need an oracle as they are a compass.

288. As if to leave no stone unturned, the *Williams* Court addressed fraudulent concealment, as well. Implying that fraudulent concealment remains a viable doctrine, the court of appeals concluded that fraudulent concealment only applies where the physician has prevented the plaintiff from "inquiring into or investigating her condition . . . . [Here], Williams was able to, and did, inquire into and investigate her condition within the limitations period." *Id.* at 442 n.1.