

RENDERED: NOVEMBER 9, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001791-MR

MILDRED KELLER,  
EXECUTRIX OF THE ESTATE OF JAMES  
REFFETT; LINDA REFFETT

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE MARC I. ROSEN, JUDGE  
ACTION NO. 03-CI-00610

ASHLAND HOSPITAL CORPORATION,  
d/b/a KING'S DAUGHTERS' MEDICAL  
CENTER AND ASHLAND DIAGNOSTIC,  
INC., d/b/a KING'S DAUGHTERS'  
DIAGNOSTIC CENTER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER AND VANMETER, JUDGES; EMBERTON,<sup>1</sup> SENIOR JUDGE.

EMBERTON, SENIOR JUDGE: Mildred Keller, Executrix of the Estate of James Reffett and Linda Reffett, appeal from an order dismissing their medical malpractice claim. The issues

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

presented concern the application of the discovery rule and the doctrine of estoppel to the statute of limitations defense.

James was admitted to King's Daughters' Medical Center on May 31, 2002, for the treatment of intractable back and shoulder pain, and, on June 6, 2002, he underwent an MRI.<sup>2</sup> According to James's deposition, during the procedure he felt his arm touch the machine and then a burning sensation. When asked if it was a big wound, he replied: "Yes, it was a big wound. It burnt the hell out of it." Following the MRI, James continued his stay at King's Daughters during which time he received treatment for his burn injury. He was discharged on June 14, 2002.

After his release, James sought further treatment for the burn injury at the King's Daughters' Wound Center. On his initial visit, he saw Dr. Timothy A. Jones, giving him a verbal history of the burn. He inaccurately reported, however, that the wound occurred during an MRI procedure completed on June 13, 2002, not June 6, 2002, the actual date. Apparently, the wound center did not confirm the date of the MRI with the records from James's hospital stay, and James did not correct his initial recollection.

The Reffetts filed their complaint on June 13, 2003. Again, the date of the MRI was erroneously stated as June 13,

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<sup>2</sup> James had various medical conditions including diabetes and he weighed approximately 300 pounds.

2002. In response, the appellees asserted that the statute of limitations barred the claim, and following discovery, the appellees filed a motion for summary judgment. In support of the motion, the appellees recited James's testimony that he knew, both during and immediately after the MRI performed on June 6, 2002, that he had been burned. The Reffetts responded that the discovery rule applicable to medical malpractice cases should be applied and the action permitted to proceed.

The discovery rule, codified in KRS 413.140(2), provides that the action accrues on the date of the injury, or if it is not immediately discoverable, the date on which it is discovered, or should have been discovered. In Wiseman v. Alliant Hospitals, Inc.,<sup>3</sup> the court explained that the discovery rule is a means to identify the "accrual" of the action when the injury is not readily ascertainable or discoverable.<sup>4</sup> The accrual date, the court held, depends on the actual or constructive knowledge of the plaintiff and is two-pronged; "one must know: (1) he has been wronged; and (2) by whom the wrong has been committed."<sup>5</sup>

The test set forth in Wiseman emphasizes that the plaintiff know that he has been harmed and that he know, or

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<sup>3</sup> 37 S.W.3d 709 (Ky. 2000).

<sup>4</sup> Id. at 712.

<sup>5</sup> Id. (citations omitted).

should know, its negligent cause and deleterious effect. When both knowledge requirements are satisfied, the plaintiff has been injured and the statute will begin to run. Central to the court's analysis is the distinction between "harm" and "injury".

Harm in the context of medical malpractice might be the loss of health following medical treatment. "Injury," on the other hand, is defined as the "invasion of any legally protected interest of another." Thus, injury in the medical malpractice context refers to the actual wrongdoing, or the malpractice itself. Harm could result from a successful operation where a communicated, calculated risk simply turns out poorly for the patient, although the medical treatment met the highest medical standards. In such case, there would be no "injury", despite the existence of "harm." Under the discovery rule, it is the date of the actual or constructive knowledge of the injury which triggers the running of the statute of limitations.<sup>6</sup>

Following Wiseman, the argument was made and rejected in Vannoy v. Milum<sup>7</sup> that the action does not accrue until the plaintiff knows he has an actionable legal claim. The plaintiff in Vannoy argued that although he knew his dizziness was caused by his medical treatment, he did not know it was the result of the physician's failure to monitor his medication until he was told by his attorney that he had an actionable claim.<sup>8</sup> Relying on prior holdings by this court, as well as the Kentucky Supreme

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<sup>6</sup> Id. (citations omitted).

<sup>7</sup> 171 S.W.3d 745 (Ky.App. 2005).

<sup>8</sup> Id. at 749.

Court, the court held that the statute accrues when the plaintiff discovers that a wrong has been committed, not when he discovers that he may sue for the wrong.<sup>9</sup>

The Reffetts make a contention analogous to that made in Vannoy. They contend that the statute did not begin to run until sometime after June 14, 2002, when they were allegedly told by a King's Daughters' employee that inadequate precautions were taken during the MRI. It is undisputed that James knew he suffered a burn so severe that he was given medical treatment immediately after the MRI procedure on June 6, 2002, and that it was caused by the MRI. This is a case where the harm was readily ascertainable and its cause easily discernable. James knew the harm and the cause of that harm; he, therefore, knew, or should have known, of the relationship of King's Daughters' actions to that harm, and that he had sustained an injury.<sup>10</sup> The injury being readily ascertainable on June 6, 2002, the complaint was not filed within one year of the date the action accrued.

The Reffetts contend that even if the complaint was untimely, King's Daughters should be estopped from its reliance on the statute of limitations because its records from the wound center state that the burn occurred on June 13, 2002. An

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<sup>9</sup> Id.

<sup>10</sup> Id. at 750.

equitable rule codified in KRS 413.190(2), provides that a person who acts to mislead or deceive the injured party thereby causing delay in bringing the action can not take advantage of his deceit by successfully asserting the statute of limitations; here, however, no action was taken by King's Daughters to mislead or deceive the Reffetts.<sup>11</sup>

James, upon his initial visit to the wound center, gave an inaccurate history concerning his burn. Neither the wound center nor King's Daughters altered any records or led James to believe the date of the MRI was other than June 6, 2002. It was simply an erroneous recollection by James that persisted until after the complaint was filed, and King's Daughters' records revealed that it occurred a week earlier than James recalled. The records were at all times available to James and a verification of the date presumably would have prevented the untimely filing of the complaint. Although the result is harsh, the mistake in the wound center's records is attributable to James; KRS 413.190(2), therefore, does not apply.

Finding no error, we affirm the judgment of the circuit court.

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<sup>11</sup> Adams v. Ison, 249 S.W.2d 791 (Ky. 1952).

ALL CONCUR.

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