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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001891-MR

DENNIS STALLINS — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A.WOODALL, III JUDGE
ACTION NO. 13-CI-00097

CARL HINTON — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, JONES AND D. LAMBERT, JUDGES.

JONES, JUDGE: This appeal requires us to consider whether the Caldwell Circuit Court properly dismissed Dennis Stallins's medical malpractice claims against Dr. Carl Hinton as time-barred. Having reviewed the record, we conclude that the circuit court erred when it determined that Stallins's entire complaint was time-barred. While we agree with the circuit court that the portion of Stallins's

complaint alleging that Dr. Hinton breached the standard of care by exceeding the scope of Stallins's consent was time-barred, we do not agree that the remainder of Stallins's complaint was also time-barred. Accordingly, for the reasons more fully explained below, we affirm in part, reverse in part, and remand.

I. Factual and Procedural Background

On December 7, 2011, Stallins consented to have Dr. Hinton perform a "debridement of decubitus ulcers[1] to the coccyx area and right hip area." (R. at 1). Stallins did not consent to any "kind of surgery or to do any kind of surgery to leave open wounds." (R. at 2). Stallins alleges that Dr. Hinton exceeded the scope of his consent and performed "deep muscle and tissue surgery" and left him with open wounds. *Id.*

According to Stallins, he first became aware that Dr. Hinton had exceeded the scope of his consent when he awoke from surgery on December 7, 2011. *Id.* Stallins was discharged from the hospital on or about December 9, 2011. *Id.* According to documents submitted by Dr. Hinton with his motion to dismiss, Stallins last treated with him on December 22, 2011.[2] (R. at 22.).

Stallins alleges that his wounds did not heal properly and that they became severely infected. Stallins was admitted to Western Baptist Hospital on

[1] Decubitus ulcers are more commonly known as "pressure sores."

[2] We note that a motion to dismiss should be based solely on the pleadings. When a party relies on extraneous matter not included in the complaint, it converts a motion to dismiss into one for summary judgment. *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky. App. 2004) ("Since the trial court apparently considered matters outside of the pleadings, *i.e.*, Thompson's affidavit, in arriving at its decision to dismiss the appellants' claim against Cumberland, we must treat the motion as one for summary judgment.").

March 2, 2012, where he was diagnosed as suffering from a severely infected "right femoral head associated with a large open wound." (R. at 3). The infection was so severe that Stallins's right hip and right leg had to be amputated. *Id.* While in the hospital, Stallins's state deteriorated to the point that his wife was appointed as his fiduciary to make medical and financial decisions on his behalf. (R. at 3). She remained his fiduciary until May 2012. (R. at 9).

After Stallins was discharged from Western Baptist Hospital, he underwent three months of in-patient rehabilitation in Nashville, Tennessee. (R. at 3). From there, he went to a nursing home in Paducah, Kentucky. He finally returned to his residence in September of 2012. *Id.*

On May 17, 2013, Stallins filed suit against Dr. Hinton in Caldwell Circuit Court. Stallins's complaint alleges that Dr. Hinton breached the applicable standard of care by: 1) negligently performing the surgical procedure on Hinton without informed consent; 2) negligently performing the surgical procedure by leaving open wounds exposing Stallins to a risk of infection; and 3) negligently providing the proper post-operative care necessary to prevent Stallins from becoming severely infected. (R. at 2-3).

On June 11, 2013, Dr. Hinton moved the circuit court to dismiss Stallins's complaint, pursuant to Kentucky Rules of Civil Procedure ("CR") 12.01, on the grounds that it is barred by the applicable statute of limitations. (R. at 12). Dr. Hinton asserted in his motion that because Stallins's complaint was based on lack of informed consent, he should have known of his cause of action

immediately upon awakening from surgery. (R. at 18). Dr. Hinton further asserted (by relying on documents outside the pleadings) that Stallins last treated with him on December 22, 2011. (R. at 18, 22). Accordingly, Dr. Hinton argued that Stallins's claim against him expired, at the very latest, on December 22, 2012. (R. at 18).

On August 27, 2013, the circuit court entered an order granting Dr. Hinton summary judgment. The circuit court concluded as follows:

> The complaint shows that the procedure was performed on December 7, 2011. The Complaint was filed May 17, 2013, which is some seventeen months after the procedure and after completed treatment. . . . It appears from the pleadings and accepting all allegations of the complaint as true, the complaint fails to state a claim for which relief may be granted because Plaintiff's complaint is barred by the one year statute of limitations.

Stallins moved the circuit court to set aside and vacate the order. By order entered October 4, 2013, the circuit court denied Stallins's request.

This appeal followed.

II. Standard of Review

If, on its face, a complaint shows that an action is barred by time, the statute of limitations may be raised by a motion to dismiss. *Tomlinson v. Siehl*, 459 S.W.2d 166 (Ky. 1970). It is well established that a court should not grant a motion to dismiss a complaint "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his

claim." *Pari–Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977).

Civil Rule 12.02 further provides:

> If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

See also, Waddle, 131 S.W.3d at 363.

In support of his "motion to dismiss," Dr. Hinton averred in his memorandum that he last treated Stallins on December 22, 2011, and he included his treatment notes from that visit to prove this fact. Stallins's complaint did not reference his last date of treatment with Dr. Hinton or what they discussed at that visit. As such, Dr. Hinton's reliance on this date fell outside the scope of Stallins's complaint.

It is clear that the trial court did not exclude consideration of this date. In its order granting Dr. Hinton's motion to dismiss, the trial court states that "treatment continued until December 22, 2011," and references the date of the procedure/treatment as the date Stallins's cause of action against Dr. Hinton accrued. Because it relied on matters outside of the pleadings, the trial court should have treated Dr. Hinton's motion to dismiss as one for summary judgment under CR 56. *See* CR 12.02; *Waddle*, 131 S.W.3d at 363.

Pursuant to CR 56.03, summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03.

The party moving for summary judgment bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991)).

When reviewing a motion for summary judgment, a trial court must be mindful that its role is to determine whether disputed material facts exist; it is not to decide factual disputes. As our Supreme Court recently reminded us:

> Summary judgment is to be "cautiously applied and should not be used as a substitute for trial." Granting a motion for summary judgment is an extraordinary remedy and should only be used "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." The trial court must review the evidence, not to resolve any issue of fact, but to discover whether a real fact issue exists.

Shelton v. Kentucky Easter Seals Soc., Inc., 413 S.W.3d 901, 905 (Ky. 2013) (internal citations omitted).

We are also mindful that summary judgment should not be granted prematurely before the non-moving party has been given an adequate opportunity to conduct meaningful discovery. *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky. App. 2007). "Absent a sufficient opportunity to develop the facts, [] summary judgment cannot be used as a tool to terminate the litigation." *Id.*

Because summary judgment involves no fact-finding by the trial court, we accord no deference to the trial court's decision; our review is *de novo*. *See Davis v. Scott*, 320 S.W. 3d 87, 90 (Ky. 2010) (citing 3D *Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005)).

III. Analysis

An action for medical malpractice must be commenced within one year after the cause of action accrued. KRS[3] 413.140(1)(e). The same statute further provides a negligence or malpractice action against a physician "shall be deemed to accrue at the time the injury is first discovered or in the exercise of reasonable care should have been discovered; provided that such action shall be commenced within five (5) years from the date on which the alleged negligent act or omission is said to have occurred." KRS 413.140(2).

KRS 413.140(2) is clear that it is the plaintiff's actual or constructive *discovery* of his injury that starts the running of the one-year limitations period for medical malpractice and negligence actions. Our Supreme Court has explained

[3] Kentucky Revised Statutes.

that under the discovery rule, the statute of limitations will not commence to run until the plaintiff knows there is a "basis for a claim." *Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709, 712 (Ky. 2000). The "knowledge necessary to trigger the statute is two-pronged; one must know: (1) he has been wronged; and, (2) by whom the wrong has been committed." *Id.* When both knowledge requirements are satisfied, the plaintiff has been injured and the statute begins to run.

The *Wiseman* Court emphasized that the distinction between "harm" and "injury" is crucial to this analysis:

> 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.

Id. (internal quotations omitted). While an unskilled layperson may be able to appreciate harm, recognizing a legally cognizable injury is a far more complicated matter. "A mere suspicion of injury due to medically unexplainable pain following an invasive surgery does not equate to discovery of medical negligence." *Id.* at 713. The statute of limitations begins to run only when the plaintiff possesses

knowledge of both the "resulting harm and the cause of that harm." *Vannoy v. Milum*, 171 S.W.3d 745, 750 (Ky. App. 2005).

Additionally, our Supreme Court has created an exception under which the statute remains tolled, so long as the patient is under the continuing care of the physician for the injury caused by the negligent act or omission and continues to treat with the physician in good faith for the purpose of improving the initial results or mitigating the damages caused by the poor treatment. *Harrison v. Valentini*, 184 S.W.3d 521, 524 (Ky. 2005). It is critically important to realize, however, that *Harrison* did not abrogate the discovery requirements previously set forth by the *Wiseman* court. *Harrison* does not stand for the proposition that the last date of treatment triggers the statute. Knowledge of both the harm and the injury is still required before the statute begins running. *Harrison* merely tolls a statute that already accrued until such time as the patient stops treating with the doctor at issue. Harrison is *inapposite* if the patient does not have the requisite knowledge on the last day of treatment. If the patient lacks the requisite knowledge on the last day of treatment with the physician, the clock remains at zero.

With these standards in mind, we turn to Stallins's complaint. The circuit court appears to have considered Stallins's complaint as alleging a single injury of which Stallins should have been aware "when he awoke from surgery." While Stallins did allege that Dr. Hinton exceeded the scope of Stallins's consent, a fact that would have been known to Stallins when he awoke from surgery or

shortly thereafter, he also alleged that Dr. Hinton failed to appropriately dress his wounds and provide him with reasonable aftercare, causing him to develop a MRSA infection. It is this second alleged injury that we do not believe the trial court should have dismissed on summary judgment, at least without providing Stallins additional time to conduct discovery.

We believe it is unclear from the record when Stallins was made aware of his MRSA diagnosis and whether he was informed at some point that better management of the infection could have prevented him from losing his leg. According to Stallins's verified complaint, his last visit with Dr. Hinton occurred on December 22, 2011, yet the MRSA diagnosis was not added to Stallins's discharge notes until January 3, 2012. It does not appear that Stallins received any medical treatment from December 22, 2011, his last day of treatment with Dr. Hinton, until March 2012, when he was taken to Western Baptist Hospital on the verge of death. By this time, Stallins was in such bad shape that a guardian had to be appointed for him so that the appropriate consent to remove his leg could be obtained. The guardianship remained in place through May 17, 2012. A year later, Stallins filed suit. Stallins maintains that he did not realize the progression of the infection or the damage that had occurred until he regained capacity and discovered his right leg and right hip had to be amputated.

Dr. Hinton argues that because Stallins admitted that he experienced pain immediately following his surgery and was aware of the open sores as of his last visit with Dr. Hinton, there is no genuine issue of material fact and his cause of

action accrued in December 2011. We disagree. While Stallins may have been fully aware in December 2011 of the open wounds on his body, we cannot hold him to have known that the open wounds and pain were indicative of negligence on Dr. Hinton's part, especially when the treatment notes indicate that Dr. Hinton told Stallins on this last visit that his wounds were "granulating nicely."

"[T]he patient cannot know whether the undesirable outcome is simply an unfortunate result of proficient medical care or whether it is the consequence of substandard treatment." *Harrison*, 184 S.W.3d at 524. A mere suspicion of injury due to medically unexplainable pain following an invasive surgery does not equate to discovery of medical negligence. *Wiseman*, 37 S.W.3d at 713. While Stallins may have suspected that something was wrong after surgery, that in and of itself was insufficient to accrue a cause of action. One who possesses no medical knowledge should not be held responsible for discovering an injury based on the wrongful act of a physician, especially where the physician tells the patient on the last day of treatment that he appears to be healing nicely. Thus, while Stallins no doubt knew he was in pain as of this last visit, there is nothing in the record to suggest that Stallins had reason to suspect that this pain was out of the ordinary or the result of a deviation in the standard of care by Dr. Hinton.

The trial court erroneously equated “harm” with “injury.” Such a ruling ignores the tenuous nature of predicting medical results, and is particularly inappropriate when viewed in the context of a motion for summary judgment.

Stallins may very well have been aware of the "harm" done to him before he discovered that he had been the victim of medical malpractice, but as explained by the *Wiseman* court, his cause of action did not accrue until the fact of his injury (*i.e.,* harm caused by Dr. Hinton's negligent actions) became objectively ascertainable.

It is entirely possible that Stallins did not become aware of possible negligence on Dr. Hinton's part until March 2012, when he was taken to the hospital for additional wound care. By this time, however, there is a real question whether Stallins had the mental capacity to act on such knowledge, and, if Stallins did lack the mental capacity to act on such knowledge, when he regained that capacity. These facts are crucial. *See* KRS 413.170(1) ("If a person entitled to bring any action mentioned in KRS 413.090 to 413.160 . . . was, at the time the cause of action accrued . . . of unsound mind, the action may be brought within the same number of years after the removal of the disability . . . allowed to a person without the disability to bring the action after the right accrued.").

Given the sparse record in this case, it is impossible to determine when Stallins should have become aware that Dr. Hinton breached the applicable standard of care with respect to Stallins's post-operative care and whether Stallins was of sound mind when he first became aware that Dr. Hinton's actions may have contributed to his pain and infection. The only evidence submitted by Dr. Hinton, his last treatment note, is certainly not dispositive as to the timeliness of Stallins's post-operative care claims. Based on the record before us, we cannot say that it

would be impossible for Stallins to prevail on the statute of limitations question with respect to his claims of negligent post-operative care. Accordingly, we conclude that the trial court acted precipitously in granting summary judgments to Dr. Hinton on this part of Stallins's complaint. *See Elam v. Menzies*, 594 F.3d 463, 467 (6th Cir. 2010) (applying Kentucky law).

We believe that at the very least, Stallins should have been provided with a sufficient opportunity to conduct discovery on the relevant facts. *Suter*, 226 S.W.3d at 842. If that discovery revealed that the facts were materially in dispute on issues regarding when Stallins "discovered or should have discovered" his cause of action, the factual issues should have been left for the jury for resolution. *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 759 (Ky.1965) ("[Where] there is a factual issue upon which the application of the statute depends, it is proper to submit the question to the jury.").

IV. CONCLUSION

Based on the forgoing, the summary judgment is affirmed in part as related to the scope of consent claim and reversed in part as related to the post-operative care aspects of Stallins's complaint. This matter is remanded to the trial court for discovery and other actions consistent with this opinion.

CLAYTON AND D. LAMBERT, JUDGES, CONCUR IN RESULT ONLY.

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