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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001884-MR

ALMA HARDIN — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-00225 & 05-CI-00936

PHILIP C. TROVER, M.D. AND
BAPTIST HEALTH MADISONVILLE,
INC., F/K/A THE TROVER CLINIC
FOUNDATION, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Appellant, Alma Hardin, appeals from the August 18, 2008 and September 16, 2008 orders of the Hopkins Circuit Court dismissing by means of summary judgment her medical negligence and fraud actions against Dr. Philip Trover. Hardin also appeals from orders dismissing by means of summary

judgment her medical negligence, negligent credentialing, and fraud actions against Baptist Health Madisonville f/k/a Trover Clinic Foundation. The circuit court determined Hardin did not file her complaint against Dr. Trover and the Foundation within the applicable statute of limitation, and found no evidence of fraud or fraudulent concealment by either Appellee that prevented Hardin from discovering the negligent or otherwise wrongful acts of Dr. Trover or the Foundation. We affirm.

This matter is one of more than four dozen cases appealed to this Court related to Dr. Trover and the Foundation. By means of the Court's prehearing conference procedure, about half of those cases settled prior to briefing. This Court, with the assistance of the parties, divided the remaining twenty-four cases into three main groups, with a few outlying cases.

The principal opinion for the group that includes this case is *Brown v. Commonwealth*, No. 2012-CA-001880-MR, ----- WL ----- (Ky. App. Jan. 8, 2016), rendered this day.[1] The critical issues in this case are strikingly similarly, essentially identical, to those which have been considered and decided in *Brown*, *supra*.[2] So much of that opinion as is dispositive of issues raised on this appeal, except with regard to the claim of medical negligence, is incorporated herein by reference. Unless otherwise noted in this case, for the reasons stated in *Brown*, the orders of the circuit court are affirmed.

[1] See *Brown* for an in-depth discussion of the background giving rise to these matters and a listing of the other cases included in this group.

[2] Notably, each Appellant's brief in this category is identical in every respect.

We have carved out and will address separately Hardin's claims related to medical negligence, for this inquiry is fact-specific and turns on the particular circumstances of this case.

In June 2002, Hardin discovered a lump in her left breast. She had a mammogram on June 18, 2002. Dr. Trover interpreted the film. Hardin received a letter stating that her mammogram was normal and no change was seen when compared to her 2001 film. The lump detected by Hardin was benign according to Dr. Trover's read of the mammogram.

Hardin testified in deposition that, despite the normal reading, she was suspicious that something was wrong. In October 2002, Hardin gathered her medical records and took them to Civista Medical Center located in Maryland, where her daughter was living. There, she had another mammogram and biopsy, which revealed Hardin had cancer in her left breast. Hardin underwent a lumpectomy and subsequent chemotherapy treatments. She then endured radiation treatments at the Mahr Cancer Center in Madisonville, Kentucky.

In June 2003, Hardin was featured in an article in the local paper, titled "City Cancer Survivor Offers Hope to Others." The article stated that upon further investigation by a physician in Maryland, Hardin learned not only that she had cancer, but she had been living with a cancerous lump for more than three years. Hardin's cancer has been in remission since 2004.

Meanwhile, a proposed class action lawsuit was filed against Dr. Trover and the Foundation on March 17, 2004. Hardin joined the proposed class

as a plaintiff on August 23, 2004,[3] alleging Dr. Trover negligently misinterpreted her June 2002 mammogram, resulting in emotional, mental, and psychological pain and suffering.

Following prolonged motion practice, the circuit court dismissed Hardin's medical negligence claim, finding she failed to file it within the applicable one-year statute of limitations, KRS[4] 413.140, governing such claims. Hardin appealed.

Like so many of the other appellants in these related cases, Hardin asserts that she learned of Dr. Trover's alleged negligence from the March 2004 notice in the Madisonville Messenger[5] and the ensuing media coverage of the story. She claims she had no knowledge of Dr. Trover's negligence until that moment. Hardin argues she filed her complaint well within one year of this date, as required by KRS 413.140 and, therefore, her complaint was timely filed. We are not convinced.

KRS 413.140 establishes a one-year limitations period for actions "against a physician, surgeon, dentist, or hospital licensed pursuant to KRS

[3] Eight complaints – the original and seven amendments – were filed in the underlying class action before the individual cases were separated upon denial of class certification. Each complaint added additional party plaintiffs. Hardin was first named as a plaintiff in the third amended complaint tendered on August 24, 2004 and filed on October 15, 2004. (R. at 817-25, 1384; *Cruce v. Trover,* Hopkins Cir. Ct. Case No. 04-CI-00225). Solely for purposes of this appeal and affording Hardin the benefit of every doubt, we have chosen to use the August 23, 2004 date proffered by Hardin as the date upon which she filed suit.

[4] Kentucky Revised Statute.

[5] The advertisement invited residents who had had radiological studies read by Dr. Trover during a certain time period to attend an informational meeting.

Chapter 216, for negligence or malpractice." KRS 413.140(1)(e). The determinative moment for measuring the limitations period has always been when the cause of action accrued. Accordingly, the statute further embodies the "discovery rule," meaning that "the cause of action shall be deemed to accrue at the time the injury is first discovered or in the exercise of reasonable care should have been discovered." KRS 413.140(2). Critical to the knowledge element under the discovery rule is the distinction between "harm" and "injury."

> "Harm" [is defined] as "the existence of loss or detriment in fact of any kind to a person resulting from any cause." 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 a legally protected interest of another." Thus, injury in the medical malpractice context refers to the actual wrongdoing, or the malpractice itself.

Wiseman v. Alliant Hosps., Inc., 37 S.W.3d 709, 712 (Ky. 2000) (citing *Restatement (Second) of Torts* § 7, comment (1965)).

Armed with the discovery rule, Hardin argues that the one-year statute of limitations did not begin to accrue until the Madisonville Messenger announcement appeared in 2004. That was the date Hardin said she "had any inkling" of Dr. Trover's malpractice. Citing *Wiseman*, *supra*, and *Imes v. Touma*, 784 F.2d 756 (6th Cir. 1986), Hardin argues that this knowledge – knowledge that Dr. Trover's medical negligence caused an injury – was required to trigger the limitations period.

Interpreting KRS 413.140(2), our Supreme Court has explained that the limitations period commences when one knows, or in the exercise of reasonable diligence should know, that "(1) he has been wronged; and, (2) by whom the wrong was committed. *Wiseman*, 37 S.W.3d at 712. However, this formula does not permit a tort victim to sit on her rights. "A person who knows he has been injured has a duty to investigate and discover the identity of the tortfeasor within the statutory time constraints." *Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 151 (Ky. 2007).

Hardin acknowledges she knew in October 2002, when she was diagnosed with cancer, that she had been harmed by the misread of her mass on her mammogram as benign on June 18, 2002. However, she claims she did not know she had been injured or wronged (*i.e.*, that someone had invaded her legally protected interests) until March 2004 when the article in the Madisonville Messenger was released informing the public of allegations of negligence by Dr. Trover and the Foundation. The error in her reasoning is not uncommon, but the fact remains that *legal* confirmation that one has been wronged is not necessary under the discovery rule. *Vannoy v. Milum*, 171 S.W.3d 745, 748-49 (Ky. App. 2005). The rule merely requires that one be aware of the facts sufficient to put her on notice that her legal rights may have been invaded and by whom; uncertainty about the *legal* significance of those facts does not toll the limitations period.

Our decision in this case is further informed by the holding in *Farmers Bank & Trust Co. of Bardstown v. Rice*, 674 S.W.2d 510 (Ky. 1984). In *Farmers Bank*,

Dr. Rice failed to diagnose his patient's breast cancer on May 23, 1979. That was the last time Dr. Rice had anything to do with the patient. A different doctor correctly diagnosed breast cancer on September 19, 1979, treated the patient, and the patient's cancer went into remission. *Id.* at 510-11. The Kentucky Supreme Court found that, beginning September 19, the patient was on notice of the possibility that Dr. Rice negligently diagnosed her; on that date the limitations period began. To succeed, a lawsuit should have been filed not later than September 19, 1980.

Hardin's case mirrors that of Dr. Rice's patient in *Farmers Bank*. Here, Hardin discovered she had breast cancer in October 2002. Upon discovering the cancer, Hardin had sufficient facts to put her on notice that her legal rights may have been invaded by Dr. Trover. Hardin admitted in deposition testimony that she knew as of October 2002 that Dr. Trover had possibly made a mistake:

> Q. And you were informed that [tissue in her breast] was cancer?
>
> A. Yes.
>
> Q. Okay. And that was October of 2002? Right?
>
> A. Right.
>
> Q. Okay. Now, at that point, you knew that the card that you got from Trover was wrong, didn't you? Because it said you had a normal mammogram, but you knew it couldn't be normal, because you actually had a cancer.
>
> A. What do you think?

Q. Well, you've got to say for the record, ma'am. Is that right?

A. A normal thinking person would say yes, wouldn't they?

Q. And you're a normal thinking person, aren't you?

A. Uh-huh. Uh-huh.

In Hardin's own words, she knew on or before October 2002, after discovering she had breast cancer, of the possibility that her mammogram had been misread by Dr. Trover. That information was sufficient to put her on notice that Dr. Trover's interpretation of that film may have been negligent. Thus, the information was sufficient to begin the limitations period on her medical malpractice claim against Dr. Trover.

Summarizing then, beginning not later than October 2002, Hardin was on notice of the possibility that Dr. Trover negligently misread her June 2002 mammogram; on that date the limitations period began. To succeed, a lawsuit should have been filed not later than October 2003. Instead, Hardin did not file suit until August 24, 2004. Her complaint was not timely filed. The circuit court committed no error in granting summary judgment in favor of Dr. Trover on Hardin's claim of medical negligence.

We are left with Hardin's medical negligence claim against the Foundation. That claim is derivative in nature, based solely on the Foundation's employment of Dr. Trover.[6] "Vicarious liability, sometimes referred to as the

[6] Hardin's complaint clearly states that the Foundation's alleged medical negligence is "*by and through its agent, Dr. Trover*." (R. at 682-83) (emphasis added).

doctrine of *respondeat superior*, is not predicated upon a tortious act of the employer [or principal] but upon the imputation to the employer [or principal] of a tortious act of the employee [or agent.]" *Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005) (citation omitted).

Our Supreme Court has held that an employee's "escape [from] liability for his alleged negligence because the statute of limitations had run as to him does not also insulate the employer from vicarious liability for that negligence." *Cohen v. Alliant Enterprises, Inc.*, 60 S.W.3d 536, 538 (Ky. 2001). However, the Court also said the vicarious claim may proceed only if the plaintiff "sued the principal . . . before the statute of limitations had run as to the agent." *Id.* at 539. In the case before us, Hardin did not sue the Foundation before the statute of limitations had run as to Dr. Trover. Therefore, the medical negligence claim against the Foundation was also untimely.

We affirm the orders of the Hopkins Circuit Court granting summary judgment in favor of Dr. Trover and the Foundation as to Hardin's medical-negligence claims. We likewise affirm all other orders of the Hopkins Circuit Court granting summary judgment in favor of Dr. Trover and the Foundation on Hardin's other causes of action pursuant to the reasoning set forth in *Brown*.

KRAMER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

TAYLOR, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with the majority opinion except as concerns their disposition of

the negligent credentialing claim to which I respectfully dissent. I would recognize the tort of negligent credentialing in Kentucky.

In modern medical practice, hospitals have increasingly entered into the arena of hiring and employing physicians covering every facet of medical expertise. These physicians, such as Dr. Trover, are unilaterally selected and granted privileges to practice medicine at the hospital by the hospital. Considering our common-law negligence principles, it is only reasonable and just that hospitals must utilize reasonable care in granting privileges to physicians.

Before this panel are some 24 related appeals involving Dr. Trover and Trover Clinic. In these cases, numerous plaintiffs have alleged that Dr. Trover committed malpractice year after year in the interpretation of radiological studies while a staff physician at Trover Clinic. The sheer magnitude and horrendous nature of Dr. Trover's acts of alleged malpractice while working at Trover Clinic are both inexplicable and disconcerting. These cases underline the reason why the tort of negligent credentialing should be adopted in this Commonwealth. If appellant can demonstrate that Trover Clinic breached its duty by granting privileges to Dr. Trover, who was incompetent, and if appellant can demonstrate harm therefrom, I believe an action for negligent credentialing should be allowed. Accordingly, I would reverse the circuit court's summary judgment dismissing appellant's negligent credentialing claim and remand for further proceedings below.

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