

RENDERED: JULY 29, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000346-MR

JESSE MULLINS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 14-CI-03895

MATTHEW M. GRABER, M.D.;
AARON CARPIAUX, M.D.;
ERIC MOGHADAMIAN, M.D.;
DANIEL STEWART; U.K. CHANDLER
MEDICAL CENTER; AND JANET WALKER, M.D.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Jesse Mullins, appeals *pro se* from an order of the Fayette Circuit Court dismissing his medical malpractice action. Finding no error, we affirm.

On August 19, 2011, Appellant sustained a severe ankle injury when he jumped off of a ten-foot fence while fleeing from police. His fall resulted in an open dislocation of his left ankle, significant soft tissue damage, and numerous fractures. Upon arrival at the University of Kentucky's Chandler Medical Center, Appellant's wound was so grossly contaminated with grass and dirt that it was irrigated in the ER by the attending physician, Dr. Matthew Graber, prior to Appellant's admission to the hospital.

The following day, Dr. Janet Walker performed another irrigation and debridement of Appellant's wound that involved "curett[ing] and debrid[ing] the grass" with twelve liters of saline and placing an external fixator on his ankle. Medical records confirm that Appellant was informed of the numerous risks, including "infection, . . . need for further procedures, [and] loss of life and limb." Dr. Walker's post-operative notes indicated that there was "a lot of ground-in dirt" that could not be removed "without stripping the vitality of the tissues[,]" and that the post-operative plan included repeating the irrigation and debridement procedure.

A third debridement and irrigation procedure was performed on Appellant's ankle on August 22, 2011, by Dr. Eric Moghadamian. The irrigation during the procedure went from the skin down to the bone and continued to reveal

gross contamination. Two days later, Dr. Moghadamian attempted an internal fixation of Appellant's ankle fractures. The treatment notes from that date state:

The risks, benefits, expected outcomes, and potential complications were discussed at length with Jesse on multiple occasions. Having seen due to the severe nature of his soft tissue injury, he will ultimately at least require a flap reconstruction for soft coverage, and that he is high risk for infection, osteomyelitis, permanent disability, neurovascular injury, and loss of limb. All of his questions have been answered. Informed consent has been obtained.

Again, the wound was irrigated and debrided during the August 24th surgery.

However, Appellant's soft tissue had continued to necrose and he "was missing a significant amount of medial tissue and had direct bone exposure on this medial side." Subsequently, on August 29, September 8, and September 15, 2011, Appellant underwent procedures by Dr. Daniel Stewart to place a skin graft on his ankle. He was discharged on September 21, 2011, with instructions to change the bandages daily and to follow up with the plastic surgery clinic.

Appellant later developed osteomyelitis, a bone infection, and was again treated by Dr. Moghadamian. Ultimately, on May 21, 2012, Appellant was admitted to the hospital for a transtibial amputation of his lower leg. Appellant's complaint reflects that he participated in the decision to have the amputation in that he "signed up multiple times previously for a transtibial amputation, but had failed to show up for the appointment, but after a recurrent episode of drainage from his osteomyelitis, did he decide at [that] time to proceed with the transtibial

amputation.” He was discharged on May 23, 2012, and received no further treatment from the named doctors after that date.

On October 16, 2014, nearly two and a half years after his amputation, Appellant filed a medical malpractice action against Appellees alleging medical negligence, as well as that Appellees were deliberately indifferent to his serious medical needs in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Sections 2 and 17 of the Kentucky Constitution. Although Appellant named all of the doctors that treated him, as well the UK Medical Center, the crux of his complaint was that the August 20, 2011, irrigation and debridement of his wound performed by Dr. Walker fell below the requisite standard of care and that the hospital negligently discharged him too soon.

After the lawsuit was filed, the summonses issued to Dr. Moghadamian and Dr. Carpiaux were sent certified mail and were signed for by a “Chris Tutsch.” All other summonses were returned unserved. Service was never perfected on the other three doctors or the UK Medical Center.

On November 26, 2014, Doctors Moghadamian and Carpiaux, filed a Kentucky Rules of Civil Procedure (CR) 12 motion to dismiss for insufficiency of service and failure to state claim. Therein, the doctors argued that service of process upon them was improper since neither of them personally signed for the receipt of certified mail containing the summons and complaint. Further, the doctors contended that Appellant’s claims were time-barred. By order entered January 27, 2015, the trial court granted the motion and dismissed Appellant’s

claims “against all Defendants named in [his] complaint, regardless of the status of service.” The trial court concluded that Appellant’s claims were barred under Kentucky Revised Statutes (KRS) 413.140, as he failed to demonstrate the existence of any circumstances that would make the action timely under either the discovery rule or the continuous course of treatment doctrine. Further, the trial court noted that there is no private cause of action for state constitutional violations. Appellant then appealed to this Court.

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, 167 (Ky. 1970). A trial court should not grant a motion to dismiss “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.” *James v. Wilson*, 95 S.W.3d 875, 883 (Ky. App. 2002) (*Quoting Pari-Mutuel Clerks’ Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)). Whether a court should dismiss an action pursuant to CR 12.02 is a question of law. *James*, 95 S.W.3d at 884. As such, our review of the trial court’s decision is de novo. *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599, 601 (Ky. 2011).

On appeal, Appellant argues that the trial court erred in dismissing his claims as being time-barred. Appellant contends that he was not aware that Dr. Walker negligently left contaminants in his wound during the first irrigation and debridement procedure until March 2014 when a doctor with the Department of Corrections (DOC) informed him of such. Moreover, Appellant contends that he

engaged in a continuing course of treatment because he was under the care of state medical providers at the UK Medical Center and then by the state medical staff for the DOC. As such, Appellant argues that his continuing treatment prevented the statute of limitations from running.

Under Kentucky law, actions brought “against a physician [or] surgeon ... for negligence or malpractice” are subject to a one-year statute of limitations. KRS 413.140(1)(e). 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). The latter of these two provisions is what is referred to as the “discovery rule,” and has been explained by our Supreme Court as follows: “[T]he statute begins to run on the date of the discovery of the injury, or from the date it should, in the exercise of ordinary care and diligence, have been discovered.” *Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709, 712 (Ky. 2000) (*Quoting Hackworth v. Hart*, 474 S.W.2d 377 (Ky. 1971)). Thus, it is the date of actual or constructive knowledge of the injury that triggers the running of the statute of limitations. “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.* Significantly, however, 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). Rather, the rule merely requires that one be aware of the facts sufficient to put him on notice that his legal rights may

have been invaded and by whom; uncertainty about the legal significance of those facts does not toll the limitations period. *Id.*

Appellant contends that he did not have knowledge that he had been wronged until he discussed his injury with a Department of Corrections physician in March 2014, and learned that Dr. Walker had left contaminants in his leg during the first procedure. The medical records, however, clearly confirm that Appellant was specifically informed that the repeated irrigation and debridement procedures were performed because of the difficulty in removing the debris from his wound without compromising the integrity of the surrounding tissue. Further, Appellant concedes in his brief that “[a]fter his series of surgeries at the Medical Center, [he] was aware that there was something wrong.” Certainly, Appellant had sufficient knowledge to trigger the one-year limitations period by the date of his amputation on May 21, 2012. As of that date, he had completed his treatment with Appellees, which included the repeated irrigation and debridement procedures to address the contaminants in his wound before and after the August 20 surgery; he had been explicitly informed about the contamination and that he was at a high risk for developing osteomyelitis and losing his limb; and he had suffered repeated infections in the wound which culminated in the May 2012 amputation. In other words, by that date he knew of the wrong and by whom he had received treatment.

We likewise find no merit in Appellant’s argument that his continuous course of treatment tolled the statute of limitations. In *Harrison v. Valentini*, 184 S.W.3d 521 (Ky. 2005), the Kentucky Supreme Court adopted the continuous

treatment rule in medical malpractice cases. As applied, the “continuous course of treatment doctrine” provides that “the statute of limitations is tolled as long as the patient is under the continuing care of the physician for the injury caused by the negligent act or omission.” *Id.* at 524. (Footnote omitted). The Court in *Harrison* noted “that the trust and confidence that marks the physician-patient relationship puts the patient at a disadvantage to question the doctor's techniques, and gives the patient the right to rely upon the doctor's professional skill without the necessity of interrupting a continuing course of treatment by instituting suit.” *Id.* at 524 (citation omitted). By tolling the statute of limitations for medical malpractice, the continuous course of treatment doctrine “gives the physician a reasonable chance to identify and correct errors made at an earlier stage of treatment.” *Id.* at 524–25 (citation omitted). As the Court explained,

[W]here a patient relies, in good faith, on his physician's advice and treatment or, knowing that the physician has rendered poor treatment, but continues treatment in an effort to allow the physician to correct any consequences of the poor treatment, the continuous course of treatment doctrine operates to toll the statute of limitations until the treatment terminates at which time running of the statute begins.

Id. at 25.

As noted above, the doctrine is intended to allow a treating physician to identify and correct his or her errors made at an earlier stage of treatment.

Appellant has cited to no authority, and we find none, to support his proposition that the doctrine applies to all treatment he received at both UK Medical Center

and by the Department of Corrections simply because both are state entities. Appellant ceased all treatment with Appellees no later than May 2012. Any subsequent treatment through the Department of Corrections cannot be imputed to Appellees for the purpose of applying the continuous course of treatment doctrine.

Accordingly, Appellant's claims against Appellees are time-barred pursuant to KRS 413.140(e), and the trial court properly dismissed such with prejudice.

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jesse Mullins
LaGrange, Kentucky

BRIEF FOR APPELLEES:

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