RENDERED: September 24, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003200-MR

DEBORAH WISEMAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 96-CI-007283

MARIO V. ULFE, M.D.; GUARI & ULFE, P.S.C.; and, ALLIANT HOSPITALS, INC., D/B/A NORTON HOSPITAL — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, AND KNOX, JUDGES.

KNOX, JUDGE: Appellant, Deborah Wiseman, appeals from a summary judgment issued by the Jefferson Circuit Court dismissing appellant's complaint on the basis that, as a matter of law and pursuant to the discovery rule, appellant failed to file this medical malpractice action within the applicable limitations period. We affirm.

The record, consisting of the parties' pleadings and several depositions, reveals these facts. In 1989, appellee, Dr. Mario Ulfe, appellant's gynecologist for nearly fifteen (15) years, diagnosed appellant with cervical dysplasia, a pre-

cancerous condition. On August 30, 1989, Dr. Ulfe excised a portion of appellant's cervical tissue for analysis through a procedure called "cold knife conization," and afterward, as a matter of course, performed a dilatation and curettage (D&C).

Immediately following the surgery, appellant complained of pain in the area of the coccyx (the tailbone). Dr. Ulfe advised appellant that the type of surgery she had should not cause such pain, noting that the pain might disappear once the packing was removed from the cervical area. Two (2) weeks later, however, during a post-operative check-up, appellant continued to complain of the pain. Dr. Ulfe performed a pelvic examination, which, while it established that appellant's post-operative condition was good, did not indicate the source of appellant's pain. Apparently, at this point in time, appellant voiced her concern whether hospital staff might have dropped her during surgery, breaking her tailbone.

In mid-September 1989, appellant consulted with her family doctor, Dr. Hilgeford, who diagnosed her with a broken tailbone. He repositioned the bone and prescribed muscle relaxers and pain pills to ease appellant's discomfort. Appellant then notified Dr. Ulfe of the diagnosis.

In 1990, appellant moved to Georgia. Over the next four (4) to five (5) years, she apparently continued to have pain in her lower back, which, by mid-1994, had radiated into the back of her left leg and had become quite severe. Her new gynecologist consistently attributed the pain to appellant's previously broken tailbone, explaining that the surrounding area

evidently had a tendency to become inflamed. A cyst, or boil, eventually developed on the back of appellant's left leg. In November 1995, appellant sought medical treatment from her husband's doctor, Dr. Krauss, who lanced the area and packed it. Six (6) weeks later, however, the area had not healed and was still draining. Appellant's gynecologist suggested that appellant seek the advice of a reputable surgeon, Dr. Richard Cummings.

Dr. Cummings examined appellant on January 16, 1996, and diagnosed her with what he called "a lesion on her bottom and a chronic draining [] in her gluteal area," about the size of a nickel. He determined the area to be acutely inflamed and proceeded to explore it under local anesthesia. Dr. Cummings testified during his deposition that when he opened the area, he discovered a piece of metal therein, approximately three (3) to four (4) centimeters in length and one-half inch to three-quarters inch from the surface of the skin:

> A. I delivered a small piece of metal in the base of it. It was - - and there was some chronic granulation tissue. I think I noted that here on my note, that within the cavity there was a 3- to 4-centimeter piece of metal. It appeared to be a probe that had broken off. And as I said here, I asked her at length whether or not she had had any traumatic injuries to this area, and she didn't recall any.
>
> Q. Could you define "chronic granulation" for the ladies and gentlemen of the jury?
>
> A. Chronic granulation tissue is when you look at a wound that's been present for more than just, say, a few days, there is an area of blood vessels around it

that look very pebbly and irregular. It bleeds easily. It usually implies that something has been going on more than, say, a couple of weeks.

Q. Okay. Could you describe the foreign object that you removed from the patient?

A. It was a piece of metal. It almost looked like a piece of coat hanger, except for the end of it had a little bulbous tip to it, and it appeared to have a marking or two on it that had been made by - - had been made purposely, almost like a gauge of depth. And that's why I thought when I first saw it that it was a piece of medical equipment.

. . . .

Q. Now, could you tell us exactly where it was that this piece of metal was removed?

A. It was actually in the crease that separates the bottom from the legs. . . . There was no obvious site where it had entered other than the inflamed area on her skin. So I was looking to see if it - - if there had been a puncture site anyplace else where this had come into her leg.

Dr. Cummings removed the piece of metal and gave it to appellant. He described the wound as a "very superficial" one which would heal in a week to ten (10) days. He considered the event "inconsequential," noting that when he discovered the small metal wire, he assumed the doctor who had previously lanced the area had left the wire inside:

> Apparently, she had had some drainage of it before. Someone had actually tried to drain it before. And I didn't really get into that with her. I had gotten the impression that it had been several months earlier. And my initial thought when I opened it was, that's where the metal came from, that someone had

> left something in it when they were trying to drain it the first time. But I didn't know that for sure.
>
> Like I said, I didn't get into it with her. It was such an, I thought, inconsequential thing that I just fixed it and sent her home.

Dr. Cummings testified that he has no knowledge of how the metal came to be in appellant's body at that location, nor did he conduct any investigation to ascertain the manner in which it entered appellant's body.

On December 16, 1996, eleven months after Dr. Cummings discovered the piece of metal in appellant's leg, appellant filed this medical malpractice action against Dr. Ulfe and Norton Hospital. In her complaint, appellant alleged that during the cervical conization and D&C procedure performed on her in 1989, Dr. Ulfe left a surgical instrument (specifically, a uterine probe) inside her uterus, which eventually migrated out of her body by way of her left leg. Following discovery in the matter, Dr. Ulfe moved the court for summary judgment in his favor, as a matter of law, on the basis that appellant had failed to file the action within the one-year limitations period set out in KRS 413.140(1)(e).

Pursuant to his motion for summary judgment, Dr. Ulfe noted that he had performed appellant's surgery nearly eight (8) years earlier. Appellant countered that pursuant to the "discovery rule" set out in KRS 413.140(2), stating that her cause of action under these facts "shall be deemed to accrue at the time the injury is first discovered or in the exercise of reasonable care should have been discovered," she did not

discover the injury until January 16, 1996, eleven (11) months after which she timely filed suit. Dr. Ulfe argued, however, that appellant's own testimony in this case reveals that she had knowledge of some kind of an injury within weeks of, if not immediately after, the conization procedure and, further, strongly suspected the origin of the injury to have been the procedure itself. Thus, he maintained, appellant's lawsuit was filed several years too late.

On October 14, 1998, the circuit court granted Dr. Ulfe's motion, finding that appellant's cause of action had accrued "as early as August 30, 1989[,] and as late as June 1994."[1] Appellant then filed a CR 59 motion, which was denied by the court on December 11, 1998.

On appeal, appellant argues that she had no reason to know, or suspect, that Dr. Ulfe had left a foreign object in her body until Dr. Cummings discovered the object in January 1996.[2] She concedes that shortly after the conization procedure in 1989, she suspected her discomfort was related to that procedure since she began having pain immediately thereafter, but that her many doctors throughout the years attributed her pain to what appellant now refers to as her "misdiagnosed" tailbone fracture.

---

[1]This date is based upon appellant's testimony that she began experiencing increasingly sharp pains in mid-1994.

[2]We note here that we do not review the merits of appellant's allegation that the metal wire discovered by Dr. Cummings migrated from inside appellant's uterus into her left leg. The sole issue before us is the timeliness of appellant's lawsuit.

[3] Thus, upon their treatment and advice, appellant maintains, she could not have known that Dr. Ulfe had left a piece of medical equipment in her body. Dr. Ulfe counters that appellant had sufficient knowledge in 1989 to trigger the discovery rule under KRS 413.140(2) and, consequently, the running of the one-year statute of limitations.

The discovery rule, a means by which to identify the "accrual" of a cause of action when an injury is not readily ascertainable or discoverable, was first enunciated in Tomlinson v. Siehl, Ky., 459 S.W.2d 166 (1970), and later refined in Hackworth v. Hart, Ky., 474 S.W.2d 377 (1971): "[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." Id. at 379. (Emphasis omitted). For the past twenty-plus years, the rule has been analyzed, interpreted, expounded upon, and eventually extended to litigation other than medical malpractice, e.g. personal injury, products liability, and legal malpractice. A brief evolution of the case law proves helpful to our analysis.

In 1979, our highest Court held that the statute of limitations is not necessarily tolled simply because the plaintiff does not know the full extent of his injury. See Louisville Trust Co. v. Johns-Manville Prod. Corp., Ky., 580 S.W.2d 497, 500 (1979) ("Plaintiff's lack of knowledge of the

---

[3]While there is no evidence in the record contradicting Dr. Hilgeford's diagnosis in 1989 of a fractured tailbone, appellant evidently now theorizes that she was not, in fact, suffering from a fractured tailbone over the past several years but, rather, from the migration of a metal wire within her body.

extent of his injury does not toll a statute of limitations to which the discovery rule is applied."). The knowledge necessary to trigger the statute is two-pronged, i.e. one must know: (1) he has been wronged; and, (2) by whom the wrong has been committed:

> In Conway [v. Huff, Ky., 644 S.W.2d 333 (1982)], the court held that the date with which the statute begins to run "obviously . . . must be with the discovery that a wrong has been committed and not that the party may sue for the wrong." Conway, 644 S.W.2d at 334. Moreover, in Graham v. Harlin, Parker & Rudloff, 664 S.W.2d 945 (Ky. App. 1983), the Kentucky Court of Appeals stated:
>
> > Perhaps it's true that appellant did not know she had a cause of action at that time, but that is immaterial. The knowledge that one has been wronged and by whom starts the running of the statute of limitations . . . not the knowledge that the wrong is actionable.
>
> 664 S.W.2d at 947.

Drake v. B.F. Goodrich Co., 782 F.2d 638, 641 (6th Cir. 1986). See also Hazel v. General Motors Corp., 863 F.Supp. 435, 438 (W.D. Ky. 1994) ("Under the 'discovery rule,' a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct.") (citations omitted). Finally, as stated by the Sixth Circuit, "we think it clear that the Court of Appeals of Kentucky intended the discovery rule to extend the commencement of the statute of limitations only up to the time that the harmful effect of the complained of negligence first manifests itself." Hall v. Musgrave, 517 F.2d 1163, 1167 (6th Cir. 1975).

Appellant's deposition in this matter reveals that just two (2) weeks after her surgery in 1989, appellant suspected she had been harmed as a result of the surgery. In fact, appellant testified that not only did she suspect, but she knew, her problems throughout the past several years were caused by the surgery of 1989. She consistently told her doctors in Georgia, beginning in 1990, that she believed her pain stemmed from the 1989 surgery performed by Dr. Ulfe. Further, contrary to her argument on appeal that she had no reason to suspect that Dr. Ulfe had left a foreign object in her body, she testified that she realized two (2) to four (4) years prior to Dr. Cummings' discovery of the wire in her leg that there was, indeed, a "foreign object" in her body. Finally, she testified that when she saw the piece of metal which Dr. Cummings extracted from her leg, she immediately knew that its origin was the 1989 procedure performed by Dr. Ulfe. The following excerpts are illustrative:

> A. My husband was in the waiting room. I showed [the metal] to him. And I told him right then and there where it came from.
>
> Q. Which was what?
>
> A. When I had my surgery.
>
> Q. Was it an I-told-you-so kind of conversation?
>
> A. Yes, it was.
>
> . . . .
>
> Q. After showing this piece of wire to your husband, you take it back and show it to [nurse] Diane and [gynecologist] Dr. Barnes?

A. Yes. The next day. It was either the next day or the day after . . . .

Q. Can you just describe for me what that conversation was like?

A. I showed [Diane] the metal. And she said, was that what was in your leg? And I said, yes. I said, do you know what it is? And she said, yes. She told me and she said, how did it get there? And I said, I have been trying to tell you all that when I had my cone biopsy I started getting this pain and no one listened to me and took me serious. Never in my mind did I ever have a doubt where it came from.

. . . .

Q. [I]s it fair to say that from 1989 to 1996, when the piece of metal is found, that you knew that your discomfort and pain was in some way triggered by, or caused by, or began back during, that August 1989 procedure performed by Dr. Ulfe?

A. I knew that it was -- I knew it was the result of an outcome of this surgery. . . . No, I didn't think it was a two and a half inch piece of anything. I knew there was something wrong that happened in this surgery, something broke off, a bone was floating around. I thought at one time it was my tailbone, a section of my tailbone had split and it was moving around or something, because of the pain, how it started in that area and moved to the left of my cheek and then it moved to the top of my leg.

Q. So, that belief began back in 1989, that day of the surgery, in fact, when you first winced in pain, would that be true?

A. That night. Well, I thought maybe this was because of the surgery and that it would get better, but when it didn't get better . . . .

. . . .

Q. Did you represent to Diane or other nurse practitioners and/or the physicians in that group that you had this pain and that it correlated with a procedure that occurred in 1989?

A. Yes. Dr. Sharon Smith.

Q. What was your explanation or description of your pain and its correlation to the procedure in 1989 with Dr. [Ulfe]?

A. I told her that I had this cone biopsy, and as a result of the cone biopsy that I was having pain. And that about two or three weeks later, my family doctor examined me and I had a broken tailbone at that time, but I still continued to have the pain throughout the year. That was the conversation with her.

. . . .

Q. Is it fair to say that in 1994, when you began to have exacerbated sharp pain, there was no doubt in your mind at that time, in 1994, that that sharp pain was caused somehow by what Dr. Ulfe had done in 1989?

A. Right. Never a doubt.

. . . .

Q. You even asked Dr. Ulfe, is it possible somebody dropped me on my rear end --

A. On the table. Cause I remember my rectum going into this hole. And his reply was, no, I am sure they didn't drop you.

Q. But you knew something had gone wrong at that point?

A. I told you that something went wrong from the surgery, from that day when they put me on that table and I came to.

. . . .

Q. Did you have any concept that there was this piece of metal in your body?

A. Did I have any concept?

Q. Yeah.

A. Yes. When I had sharp pains.

Q. Did you ever think it was a piece of metal in your body?

A. Did I think it was a piece of metal, no. I knew it was a foreign [object], okay.

Q. At what point in time did you believe there was a foreign object in there?

A. Four years before they took it out. I don't know, two to four years.

From the foregoing testimony, it appears that, while she may not have known the full extent of her injury, appellant knew as early as two (2) weeks after her surgery in 1989 that she was suffering the harmful effects of some wrong committed against her by Dr. Ulfe. Further, as early as 1992 and as late as 1994, appellant believed she had a "foreign object" in her body, the origin of which she believed to have been the 1989 procedure performed by Dr. Ulfe. Appellant even testified that she was skeptical about Dr. Hilgeford's 1989 diagnosis of a broken tailbone, evidently believing throughout the years the root of her problem was the conization and D&C performed by Dr. Ulfe in 1989. Thus, it appears that appellant had the requisite knowledge, i.e. that she had been wronged and by whom, and thus her cause of action accrued, as early as September 1989, over seven (7) years prior to filing suit, and as late as mid-1994, two and a half years prior to filing suit. We agree with the circuit court that appellant failed to file this medical malpractice action within one year after her cause of action

accrued. As such, we believe that as a matter of law, Dr. Ulfe was entitled to summary judgment in his favor.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lee E. Sitlinger
Louisville, Kentucky

BRIEF FOR MARIO V. ULFE, M.D.:

Donald W. Darby
David B. Gazak
Louisville, Kentucky

BRIEF FOR ALLIANT HOSPITALS, INC., d/b/a/ NORTON HOSPITAL:

Frank P. Hilliard
Ed Monarch
Louisville, Kentucky