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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002595-MR

RAJESH G. SHAH — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 1998-CI-000426

JOHN R. CLARK, M.D. — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: This appeal arises from the September 23, 1998, summary dismissal of Rajesh Shah's medical malpractice suit against John R. Clark, M. D. Shah's suit alleges that, by failing to diagnose and treat Shah's meningitis, Clark caused Shah's permanent injury from that illness to be worse than it otherwise would have been. The trial court dismissed the suit as untimely under KRS 413.140(1)(e), the statute of limitations for medical malpractice claims. Shah maintains, among other assertions of error, that the trial court misapplied the discovery rule (KRS 413.140(2)) and the doctrine of tolling during disability (KRS 413.170), both of which create exceptions

to the otherwise strict statutory rule barring untimely claims. As there are factual questions persisting that are material to the correct application of these statutes, we reverse the summary judgment and remand.

The facts may be quickly summarized. Because we are reviewing a summary judgment against Shah, it is upon his account of what happened that we must principally rely. On the evening of February 16, 1997, Shah's parents took him to the emergency room at Columbia Hospital in Frankfort, Kentucky. Shah was suffering from fever, stiffness, headache, and vomiting. Reddish-purple lesions had appeared on his hands and feet. He had become weak and lethargic to the extent that he found it difficult to walk. Dr. Clark, who was on duty in the emergency room that night, examined Shah and, when he could not determine the cause of Shah's symptoms, arranged to have him transported to the Chandler Medical Center at the University of Kentucky. Dr. Clark's examination did not indicate that Shah was suffering from meningitis, but the transfer certificate did direct that Shah be seen by an infectious disease specialist. Shah was transferred approximately 2 1/2 or 3 hours after arriving at the emergency room. Several hours later, during the early morning of February 17, 1997, a specialist at the medical center diagnosed Shah with meningitis. Shah remained under treatment at the medical center for several weeks, during much of which time he was in serious condition and unaware of his circumstances. Before his condition stabilized, Shah suffered extensive scarring, muscle atrophy,

permanent pain in his extremities, and the loss of his right index finger and two of his right toes.

Following his release from the Medical Center in late March 1997, Shah learned that prompter identification and treatment of his meningitis might have made his bout with the illness less severe and might have mitigated its permanent effects. On February 10, 1998, he brought suit against Columbia Hospital Frankfort. He alleged that the hospital, by and through its agents, servants, employees, and ostensible agents, had been negligent in his care and treatment on February 16, 1997. On March 30, 1998, he filed a separate claim on virtually the same grounds against Clark. The two suits were eventually consolidated, but it is only the suit against Clark that is now before us.[1]

The trial court ruled that Shah's claim accrued on February 16, 1997, when his condition was not correctly diagnosed and treatment was delayed, that being the point at which "the fact of injury [was] known." The limitations period for medical negligence claims being one year, the trial court ruled that Shah's claim against Clark was untimely. The court rejected Shah's contention that the claim did not accrue until after the end of March 1997, when Shah had learned that Clark's failure to diagnose meningitis may have aggravated the illness. "The cause of action accrued when the Plaintiff was treated by the Defendant and there was nothing to prevent the Defendant from obtaining

[1] Our authority to address the matter has been properly invoked pursuant to CR 54.02.

that knowledge. . . . Since the Plaintiff knew or should have known that he was treated by Dr. Clark on February 16, 1997, the cause of action accrued on that date." The court also rejected the contention that the limitations period was tolled during Shah's hospitalization. Whatever may have been his incapacity during that period, the court reasoned, it was not such as to deprive Shah of the awareness that he had been injured, and that awareness commenced the limitations' clock.

Under this state's rules of practice, summary judgments are to be granted cautiously; they are appropriate only when it appears impossible for the non-movant to prove facts establishing a right to relief or release, as the case may be. Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we are to assess without deference the conclusions of law of the trial court. As did the trial court, we ask whether material facts are in dispute and, if not, whether the party moving for judgment is clearly entitled thereto as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). For the reasons that follow, we are persuaded that this strict standard was not met and that summary judgment was granted inappropriately.

KRS 413.140 provides in pertinent part as follows:

> (1) The following actions shall be commenced within one (1) year after the cause of action accrued: . . . (e) An action against a physician, surgeon, dentist or hospital licensed pursuant to KRS Chapter 216 for negligence or malpractice. . . . (2) In respect to the action referred to in paragraph (e) of subsection (1) of this section, 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[.]

Section 2 of the statute just quoted is a statement of the "discovery rule" first applied judicially in Kentucky by the then Court of Appeals in Tomlinson v. Siehl, Ky., 459 S.W.2d 166 (1970) and Hackworth v. Hart, Ky., 474 S.W.2d 377 (1971), then adopted by the legislature in its current form in 1972. Under this rule, a cause of action does not accrue, for statute of limitations purposes, "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." Perkins v. Northeastern Log Homes, Ky., 808 S.W.2d 809, 819 (1991).

"Injury" is a notoriously ambiguous word in the law. Among other things, it can mean either physical damage to person or property or the wrongful invasion of a legally protected interest. Given this ambiguity, courts have had some difficulty applying the discovery rule. Before his cause of action may be said to accrue, must the medical-malpractice plaintiff have reason to think that his interest has been wrongfully invaded and that the defendant was the invader? Or does the cause of action accrue, as the trial court held, as soon as the plaintiff has reason to know that his person has been damaged, whether wrongfully or not, in conjunction with the defendant's care? This problem was obliquely addressed by our Supreme Court in McCollum v. Sisters of Charity of Nazareth Health Corp., Ky., 799 S.W.2d 15 (1990). In that case the Court deemed malpractice

actions based on patients' deaths to have accrued at the time of death. The fact of death, according to the Court, provided the plaintiffs with sufficient notice of possible wrongdoing to impose upon them the duty to investigate. *See* Justice Lambert's dissenting opinion, *id.* at 20. Indirectly, therefore, McCollum recognizes that, under the discovery rule, a malpractice action does not accrue until the plaintiff has sufficient reason to suspect a wrong. Our Supreme Court reached a similar result in Underhill v. Stephenson, Ky., 756 S.W.2d 459 (1988), where a professional negligence action against a hospital nurse was held not to have accrued under the discovery rule of KRS 413.245 until the plaintiffs had acquired information suggestive of the nurse's wrongdoing.

This construction of the discovery rule is consistent with that of other courts. The Supreme Court of Florida, for example, after wrestling mightily with the question, held that

> knowledge of the injury as referred to in the [discovery] rule as triggering the statute of limitations means not only knowledge of the injury but also knowledge that there is a reasonable possibility that the injury was caused by medical malpractice. The nature of the injury, standing alone, may be such that it communicates the possibility of medical negligence, in which event the statute of limitations will immediately begin to run upon discovery of the injury itself. On the other hand, if the injury is such that it is likely to have occurred from natural causes, the statute will not begin to run until such time as there is reason to believe that medical malpractice may possibly have occurred.

Tanner v. Hartog, 618 So. 2d 177, 181-82 (Fla. 1993) (citations and internal quotation marks omitted). The alternative, as the

Florida Court observed, is to encourage everyone who has had an adverse result from a medical procedure to "retain an attorney immediately and start subpoenaing medical records." *Id.* at 181.

This does not mean that the statute of limitations remains untriggered until the plaintiff becomes fully aware of his cause of action.

> Under this "discovery rule," once a party knows or reasonably should have known both that an injury occurred and that it was wrongfully caused, that party has an obligation to inquire further to determine whether an actionable wrong has been committed. . . . The term "wrongfully caused" does not mean knowledge of negligent conduct or knowledge of the existence of a cause of action. . . . The term refers instead to the point in time when the injured person becomes possessed of sufficient information concerning the injury and its cause so that a reasonable person would be put on notice to determine whether actionable conduct was involved.

Bradtke v. Reotutar, 574 N.E. 2d 110, 113 (Ill., 1991) (citations omitted); *see also* Gregory v. Poor, 862 F. Supp. 171 (W.D.Ky. 1994) (construing Kentucky's discovery rule as including this discovery-of-a-possible-wrong element).

Should the possibility of negligence have occurred to Shah on February 16, when no one had yet determined what was wrong with him, or even on February 17 when the specialist at the University of Kentucky Medical Center diagnosed meningitis, but Shah's prospects for recovery were still completely speculative? We are not persuaded that, as a matter of law, it should have. Giving Shah the benefit of the doubt, as we are obliged to do on review of a summary judgment against him, it seems reasonable for

him to have believed, for some time at any rate, that his distress was the natural result of a serious illness rather than the consequence of negligence. Just when he became possessed of sufficient information reasonably to suspect otherwise is a question of fact that must be tried.

There is likewise a question of fact concerning Shah's soundness of mind during his illness, and this question implicates KRS 413.170. As provided by that statute,

> if a person entitled to bring an action . . . 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.

Shah maintains that the statute of limitations was tolled under this statute while he was hospitalized because during that period he was of unsound mind, being often feverish, distracted by pain, or heavily sedated. The trial court seems to have concluded that the disability alleged by Shah is not the sort of disability contemplated by the statute. We disagree.

It has been held that, for the purposes of KRS 413.170, "unsound mind" means "incapable of managing [one's] own affairs." Rigazio v. Archdiocese of Louisville, Ky. App., 853 S.W.2d 295, 297 (1993). While proof of such incapacity may require more than medical testimony of depression and emotional distress, Southeastern Kentucky Baptist Hospital v. Gaylor, Ky., 756 S.W.2d 467 (1988), incapacity is nevertheless a question of fact that does not depend upon a legal adjudication of incompetency. Carter v. Huffman, Ky., 262 S.W.2d 690 (1953). Shah may well be able to prove that, even after his cause of action accrued under

KRS 413.140, he was, for some period, mentally incapable of managing his affairs and thus that the statute of limitations was tolled. This issue, too, then, must be tried.

Shah alleges two additional errors, which we shall address briefly. As noted above, Shah timely brought suit against Columbia Hospital Frankfort and its agents and employees. He apparently was under the mistaken impression that Dr. Clark was a hospital employee and so did not bring suit against Dr. Clark individually until the mistake came to his attention several weeks later. He claims that Dr. Clark should voluntarily have made clear his relationship with the hospital, and, because he did not, should be estopped from asserting the statute of limitations as a defense. Shah has not identified the source of Dr. Clark's alleged duty to volunteer this information, however, and has not alleged that Dr. Clark made any affirmative act to conceal his employment status. Where a defendant is not under an affirmative duty to speak, his "mere silence with respect to the operative fact is insufficient [to create an estoppel]." Gailor v. Alsabi, Ky., 990 S.W.2d 597, 603 (1999). The trial court did not err, therefore, by permitting Dr. Clark to assert a limitations defense.

Shah also maintains that he should have been permitted, pursuant to CR 15.03, to amend his original complaint so as to include his claim against Dr. Clark. That claim would then "relate back" to the date of the original filing and thus be securely within the limitations period. Although this procedure for adding a party has sometimes been allowed, Underhill v.

Stephenson, Ky., 756 S.W.2d 459 (1988), it is inappropriate unless the added party acquired notice of the suit within the limitations period, and unless unusual circumstances excuse the plaintiff's failure to bring his entire complaint in time. Nolph v. Scott, Ky., 725 S.W.2d 860 (1987); Reese v. General American Door Co., Ky. App., 6 S.W.3d 380 (1998). Shah does not allege that Dr. Clark had timely notice of the suit, nor are there unusual extenuating circumstances. Shah could easily have discovered Dr. Clark's relationship with the hospital well before he did. The trial court did not abuse its discretion by disallowing the amendment.

In sum, it has long been the policy of the courts of this state that triable issues be tried and not foreclosed by summary judgment. We are persuaded that Rajesh Shah has raised triable issues of fact that are material to the correct application of the statute of limitations. Accordingly, the September 23, 1998, summary judgment of the Franklin Circuit Court is reversed, and the case is remanded for further proceedings. On remand, the trial should be bifurcated. If the jury determines both that Shah was not of unsound mind during the relevant period and that he either knew or should reasonably have known that he may have been wrongfully injured, then his complaint should be dismissed as time barred. Otherwise, the trial shall proceed on the issues of medical negligence and damages.

BUCKINGHAM, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS WITH RESULT.

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