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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000091-MR

KAREN DEATON APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 15-CI-00408

HAZARD APPALACHIAN REGIONAL HEALTHCARE, INC.,
D/B/A HAZARD ARH APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; TAYLOR AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Karen Deaton ("Appellant") appeals from a summary judgment rendered by the Perry Circuit Court in favor of Appalachian Regional Healthcare, Inc., d/b/a Hazard ARH ("Appellee"). Appellant argues that the circuit court erred in failing to conclude that Appellee was equitably estopped from

asserting the defense of statute of limitations. For the reasons addressed below, we find no error and affirm the summary judgment on appeal.

FACTS AND PROCEDURAL HISTORY

On October 13, 2015, Appellant, through counsel, filed a complaint in Perry Circuit Court alleging that on October 13, 2014, she injured her knee when it was caught in a bed rail while she was a patient at Appellee's hospital facility. Appellant would later assert that the injury was caused by the improper positioning of the bed relative to the nurse call device and the bed control device. A nurse gave Appellant an ice pack for her knee. The alleged injury was not recorded in the medical records, but was memorialized in a separate incident report. After her release from the hospital, Appellant sought treatment for knee pain through third-party providers.

The matter proceeded in Perry Circuit Court. On May 4, 2018, Appellee filed a motion to dismiss and/or motion for summary judgment. In support of the motion, Appellee argued that the alleged injury occurred, if at all, on September 11, 2014, and not October 13, 2014, as alleged by Appellant, thus placing Appellant's October 13, 2015 complaint outside the one-year period of limitation for medical negligence claims. Appellant responded that Appellee improperly failed to produce the incident report in response to her discovery request for medical records. Though the report was later produced after Appellant

made a general request for production of documents, Appellant asserted that the timely production of the incident report would have revealed to her the actual date of the injury. As such, Appellant argued that Appellee should be estopped from raising the statute of limitations as a basis for summary judgment.

After considering the pleadings, on December 14, 2018, the Perry Circuit Court rendered a summary judgment in favor of Appellee upon determining that the complaint was not filed within the one-year statute of limitations. The court found that Appellant knew the actual date of the injury, that the medical records revealed her knowledge of the actual date, and that the complaint was not filed within one year of the injury. Additionally, the court concluded that Appellee's failure to document the specifics of the alleged injury in the medical records and to produce the incident report with the medical records did not toll the statute of limitations.[1] The order dismissed Appellant's claim, and this appeal followed.

ARGUMENT AND ANALYSIS

Appellant argues that the Perry Circuit Court committed reversible error in granting Appellee's motion for summary judgment. She contends that Appellee's failure to record the incident in her medical records, coupled with Appellee's failure to produce the incident report concurrently with the medical

[1] The order on appeal incorrectly refers to September 22, 2014, rather than September 11, 2014.

records, should preclude Appellee from raising the statute of limitations as a defense to her claim. Appellant maintains that it would be fundamentally unfair to impose the period of limitation to her claim under such circumstances. The substance of Appellant's argument is that but for Appellee's failure to record the incident in the medical records and to produce the incident report with the medical records, Appellant would have known the date of her injury. Appellant seeks an opinion reversing the summary judgment on appeal.

The dispositive question for our consideration is whether the Perry Circuit Court properly applied the one-year period of limitation as a basis for sustaining Appellee's motion for summary judgment. After closely reviewing the record and the law, we must answer this question in the affirmative. Kentucky Revised Statutes ("KRS") 413.140(1)(e) requires that an action for negligence or malpractice against a hospital licensed in the Commonwealth must be brought within one year after the cause of action accrued. The cause of action is deemed to have accrued under Section (1)(e) at the time the injury is first discovered or in the exercise of reasonable care should have been discovered. KRS 413.140(2).[2]

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[2] *McCollum v. Sisters of Charity of Nazareth Health Corp.*, 799 S.W.2d 15 (Ky. 1990), found unconstitutional that portion of KRS 413.140(2) requiring an action for negligence or malpractice to be brought within five years of the injury. *See also Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709 (Ky. 2000), for example, wherein the Kentucky Supreme Court continued to apply the discovery rule subsequent to *McCollum*.

The record amply demonstrates that Appellant knew or should have known that the injury occurred on September 11, 2014. At the time of the injury, Appellant immediately experienced pain and reported the incident to Appellee's nursing staff. On September 14, 2014, Appellant saw Dr. George Chaney, whose notes reflect that Appellant complained of a knee injury during a "recent admission" when she hit her left knee on the rail of a hospital bed. Additionally, on October 7, 2014, Appellant saw Dr. Stephen Carawan, an orthopedist, whose notes state that Appellant told him she injured her knee while a patient at the hospital on September 11, 2014.

The record conclusively demonstrates that Appellant knew the date of her injury at the time it occurred, as such knowledge is memorialized in her third-party medical records. Pursuant to KRS 413.140(1)(e), she was required to prosecute her claim on or before September 11, 2015. Appellant filed her complaint outside the statutory period, and the Perry Circuit Court properly so found. We are not persuaded by Appellant's argument that Appellee's failure to produce the incident report with the medical records retroactively relieves her of compliance with KRS 413.140(1)(e). The issues Appellant raises regarding discovery and document production *after the filing of the complaint* have no bearing on the question of whether Appellant filed the complaint within the statutory period.

Arguendo, even if Appellee acted improperly in its discovery compliance, which the circuit court did not so find, it would not operate to bar Appellee from raising the statute of limitations defense. Appellant directs our attention to case law addressing the equitable tolling of the statute of limitations; however, each of these is distinguishable from the facts before us. In *Adams v. Ison*, 249 S.W.2d 791 (Ky. 1952), to which Appellant cites, the statutory period was suspended after a medical doctor erroneously told his patient that a medical instrument accidentally left in the patient's lung would be absorbed by the body without harm. In the matter before us, Appellee engaged in no such deception which would justify tolling the statutory period. Further, *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government*, 265 S.W.3d 190 (Ky. 2008), upon which Appellant also relies, does not address a statute of limitations. In that case, the Kentucky Supreme Court determined that a governmental entity was not equitably estopped from denying further improper real estate development merely because it had allowed such improper development in the past. *Sebastian-Voor Properties, LLC* is factually distinguishable from the matter before us. The cases cited by Appellant do not bolster her claim that Appellee should be estopped from asserting the statute of limitations defense.

Summary judgment "shall be rendered forthwith 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." Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id*. "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* (citation omitted). Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citation omitted).

CONCLUSION

When viewing the record in a light most favorable to Appellant and resolving all doubts in her favor, we conclude that there were no genuine issues of material fact and that Appellee was entitled to a judgment as a matter of law. The record demonstrates that Appellant knew when her injury occurred, and that she

did not file her complaint within the statutory period. We find no error. For the foregoing reasons, we affirm the summary judgment of the Perry Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew L. Bowling
Hazard, Kentucky

Kevin W. Johnson
Hazard, Kentucky

BRIEF FOR APPELLEE:

Marcia L. Wireman
Jackson, Kentucky