IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 16, 2023 Session

JAMES R. VANDERGRIFF v. ERLANGER HEALTH SYSTEMS ET AL.

Appeal from the Circuit Court for Hamilton County
No. 21C384 Ward Jeffrey Hollingsworth, Judge

No. E2022-00706-COA-R3-CV

The plaintiff underwent surgery for a severe head injury. Due to various complications and infections, he required multiple follow-up procedures and treatments. The plaintiff filed medical malpractice claims against the hospital and doctors involved in his treatment over the course of an approximately five-month time period. The defendants moved to dismiss based on the statute of limitations. The trial court found that the plaintiff filed his lawsuit more than one year after his cause of action had accrued and that he was not entitled to an extension of the statute of limitations. It therefore dismissed the entire lawsuit. We conclude that the trial court did not err in its determination of the accrual date for the plaintiff's cause of action as to his initial medical treatment; accordingly, we affirm the dismissal of the plaintiff's cause of action as to allegations of medical malpractice as it relates to the plaintiff's initial treatment. We reverse, however, the dismissal insofar as it extends to later alleged incidents of malpractice, as they fell within the statute of limitations.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part; Reversed in Part; Case Remanded

JEFFREY USMAN, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and THOMAS R. FRIERSON, II, J., joined.

James R. Vandergriff, Chattanooga, Tennessee, Pro Se.

Joshua A. Powers, Chattanooga, Tennessee, and Nora A. Koffman, Johnson City, Tennessee, for the appellees, Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Health System, and Prayash Patel.

Laura Beth Rufulo and Philip Aaron Wells, Chattanooga, Tennessee, for the appellee, Todd E. Thurston.

OPINION

I.

On February 20, 2020, James Vandergriff was assaulted with a baseball bat and suffered severe injuries to the left side of his head. On March 1, he was seen by Dr. Prayash Patel at Erlanger Hospital in Chattanooga. He had skull and facial fractures that required surgery. Dr. Patel performed surgery and placed a titanium mesh plate in Mr. Vandergriff's skull. Mr. Vandergriff was discharged from the hospital on March 16. A week later, on March 24, Mr. Vandergriff went back to Erlanger with massive swelling and an infection in his skull, as well as limited vision in his left eye. The next day, March 25, Dr. Patel and Dr. Todd Thurston, a cranio-plastic surgeon with privileges at Erlanger, performed a second surgery that included the removal of the mesh plate and debridement of the area. On March 26, lab results showed that Mr. Vandergriff had a staph infection at the surgery site. He was again discharged on March 27.

On April 6, during a routine follow-up visit at Erlanger Hospital, Mr. Vandergriff expressed concern over constant pus drainage from the left side of his head. An unnamed physician allegedly informed him that if the drainage worsened, another surgery would be necessary. During a later visit on May 4, he again expressed concern about the drainage and about a large portion of his skull being exposed. He was then admitted to the hospital on May 8 for a third surgery to resolve an infection. Mr. Vandergriff alleged in his complaint that he was first diagnosed with osteomyelitis, a bone infection, on the date of the third surgery. For the third surgery, Dr. Thurston performed a craniectomy that involved the removal of infected skull bone. Mr. Vandergriff was discharged from the hospital after the procedure.

On June 29, Mr. Vandergriff had a seizure and was taken back to Erlanger Hospital. He was discharged the next day. On July 4, he noticed increasing drainage from his head, so he visited Erlanger Hospital, where he was prescribed antibiotics. He alleges that he remains unable to see out of his left eye and suffers continued headaches and memory loss, and he has a large screw protruding from his skull.

Months later, on or about December 15, 2020, in an apparent attempt to comply with Tennessee Code Annotated section 29-26-121, Mr. Vandergriff sent a notice to four providers or entities: Erlanger Health Systems; Plastic Surgeon Clinic; Plastic Surgeon Group, Dr. Todd E. Thurston; and Erlanger Neurosurgery and Spine, Dr. Prayash Patel. Attached was an Erlanger Hospital form document, an "Authorization to Release Information." Mr. Vandergriff signed the form but did not otherwise specify which providers could release medical records to or obtain medical records from one another.

On April 14, 2021, Mr. Vandergriff, acting pro se, filed a complaint in the Hamilton County Circuit Court, in which he alleges that the Defendants were negligent during and

after all three surgeries and the follow-up care. The complaint included allegations that the Defendants failed to adequately treat his infection, which led to severe injuries. Erlanger Hospital and Dr. Patel filed a motion to dismiss, alleging that Mr. Vandergriff's claims were barred by the statute of limitations because his claims accrued on April 6, 2020. Further, they argued that his failure to provide a proper pre-suit notice per Tennessee Code Annotated section 29-26-121(a)(2)(E) precluded application of the 120-day statute of limitations extension available in Tennessee Code Annotated section 29-26-121(c). Dr. Thurston filed a similar motion to dismiss shortly thereafter.

The trial court held a hearing on the motions to dismiss. Following the hearing, the trial court entered an order dismissing Mr. Vandergriff's claims, based on his failure to comply with the statute of limitations. The trial court found that Mr. Vandergriff's claims accrued by April 6, 2020, because at that point he knew or should have been on inquiry notice to investigate whether his infection was related to the care he had received from the Defendants. Further, it found that Mr. Vandergriff did not substantially comply with Tennessee Code Annotated section 29-26-121(a)(2)(E) because he did not provide a valid HIPAA-compliant medical record release, so he could not benefit from the statute's 120-day extension. Because his complaint was not filed until April 14, 2021, the court concluded his claims were barred by the statute of limitations.

On appeal, Mr. Vandergriff, acting pro se, challenges the trial court's dismissal for two primary reasons. First, he argues that the trial court erred in finding his suit barred by the one-year statute of limitations. Second, he asserts that the trial court erred in finding that he did not substantially comply with the pre-suit notice requirements that would have extended the statute of limitations by 120 days.

Regarding the alleged acts of medical malpractice occurring prior to April 6, 2020, we conclude that the trial court properly determined that Mr. Vandergriff's cause of action accrued as to these claims on April 6, 2020, and that the 120-day extension is inapplicable. However, for the remainder of his claims—those related to incidents occurring on or after April 14, 2020 — we conclude that these claims are not barred by the statute of limitations as the one-year statute of limitations had not yet run as of his April 14, 2021 filing. Accordingly, we reverse the trial court's dismissal of Mr. Vandergriff's claims related to purported medical malpractice that occurred on or after April 14, 2020. We affirm as to the trial court's dismissal with regard to claims as to alleged medical malpractice occurring before April 14, 2020.

II.

Mr. Vandergriff is proceeding pro se in this appeal. Pro se litigants "are entitled to fair and equal treatment by the courts." *Vandergriff v. ParkRidge E. Hosp.*, 482 S.W.3d 545, 551 (Tenn. Ct. App. 2015). Courts should be mindful that pro se litigants often lack any legal training and many are unfamiliar with the justice system. *State v. Sprunger*, 458

S.W.3d 482, 491 (Tenn. 2015). Accordingly, courts should afford some degree of "leeway" in considering the briefing from a pro se litigant, *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003), and should consider the substance of the pro se litigant's filing. *Poursaied v. Tenn. Bd. of Nursing*, 643 S.W.3d 157, 165 (Tenn. Ct. App. 2021), *perm app. denied* (Tenn. Feb. 10, 2022). Pro se litigants, however, may not "shift the burden of litigating their case to the courts." *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000). Additionally, "[i]t is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her." *Sneed v. Bd. of Prof'l Responsibility of Supreme Ct. of Tenn.*, 301 S.W.3d 603, 615 (Tenn. 2010). In considering appeals from pro se litigants, the court cannot write the litigants' briefs for them, create arguments, or "dig through the record in an attempt to discover arguments or issues that [they] may have made had they been represented by counsel." *Murray v. Miracle*, 457 S.W.3d 399, 402 (Tenn. Ct. App. 2014). It is imperative that courts remain "mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary." *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003).

A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (citing *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009)). In considering a motion to dismiss, courts "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* (citing *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007)). "The determination of whether a suit should be dismissed based on the statute of limitations presents a question of law which we review de novo with no presumption of correctness." *Redwing v. Cath. Bishop for Diocese of Memphis*, 363 S.W.3d 436, 456 (Tenn. 2012).

III.

Mr. Vandergriff challenges the dismissal of his claims under the one-year statute of limitations found in Tennessee Code Annotated section 29-26-116(a)(1). Under subsection (a)(2), the statute of limitations is subject to the discovery rule, which states that the limitations period shall be one year from the date of such discovery. Tenn. Code Ann. § 29-26-116(a)(2). The Tennessee Supreme Court has explained when a cause of action accrues under this statute:

> a medical malpractice cause of action accrues when one discovers, or in the exercise of reasonable diligence should have discovered, both (1) that he or she has been injured by wrongful or tortious conduct and (2) the identity of the person or persons whose wrongful conduct caused the injury. A claimant need not actually know of the commission of a wrongful action in order for the limitations period to begin, but need only be aware of facts sufficient to place a reasonable person on notice that the injury was the result of the

wrongful conduct of another.

Sherrill v. Souder, 325 S.W.3d 584, 595 (Tenn. 2010). It is not required that a plaintiff know that the injury "constitutes a breach of the appropriate legal standard" to discover that they have a cause of action under the statute. *Id.* at 594, 598 (quoting *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994)). Instead, a plaintiff is deemed to have discovered a cause of action when they are aware of "facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Roe*, 875 S.W.2d at 657. This requisite level of knowledge is typically referred to as "constructive" or "inquiry" notice. *Redwing v. Cath. Bishop for Diocese of Memphis*, 363 S.W.3d 436, 459 (Tenn. 2012). Whether the plaintiff has constructive knowledge is typically a question of fact, but "dismissal is appropriate where the undisputed facts demonstrate that no reasonable trier of fact could conclude that a plaintiff should not have known through the exercise of reasonable care and diligence that she was injured as a result of a defendant's wrongful conduct." *Daffron v. Mem'l Health Care Sys., Inc.*, 605 S.W.3d 11, 20 (Tenn. Ct. App. 2019) (citing *Young ex rel. Young v. Kennedy*, 429 S.W.3d 536, 557-58 (Tenn. Ct. App. 2013)). "Neither actual knowledge that the relevant legal standard of care was breached nor diagnosis of the injury by another medical professional is a prerequisite to the accrual of a healthcare liability action." *Woodruff by & through Cockrell v. Walker*, 542 S.W.3d 486, 495 (Tenn. Ct. App. 2017) (citing *Sherrill*, 325 S.W.3d at 595).

The trial court stated Mr. Vandergriff was aware of his injury "no later than April 6, 2020." By this date, according to the trial court's dismissal order, Mr. Vandergriff had been readmitted to the hospital with severe swelling in his head, advised that he had a serious infection, and complained about a discharge of pus around the injury site. The trial court stated that Mr. Vandergriff "knew or should have known that his infection was related to the care he had received from the Defendant doctors and hospital." Because he did not file his complaint until April 14, 2021, more than one year later, the trial court found that the statute of limitations barred his suit.

In opposition to the trial court's order, Mr. Vandergriff argues that his cause of action did not accrue until May 8, 2020, the day he was diagnosed with osteomyelitis. In his brief, he states that he was "never aware" of the severe injury until the date of the official diagnosis.[1] The Defendants argue in response that the trial court was correct in

[1] In his brief, Mr. Vandergriff states that he was not a "reasonable person" for purposes of the accrual of his cause of action. Though he does not articulate it as such, this brief statement is most reasonably interpreted as an argument that he was of unsound mind and therefore the accrual of his cause of action should have been tolled. *See Young*, 130 S.W.3d at 63 (empowering courts to "give effect to the substance, rather than the form or terminology, of a pro se litigant's papers"). Tennessee Code Annotated section 29-26-116 does not itself provide for any tolling to the discovery rule based on a plaintiff's subjective attributes or intellectual disabilities.

A different statute, Tennessee Code Annotated section 28-1-106, however, provides a general

finding the accrual date to be April 6, 2020. They point to several facts in Mr. Vandergriff's complaint that support this accrual date. Having reviewed the complaint, we agree that his cause of action as to his initial treatment accrued on April 6, 2020. By this date, according to the text of the complaint, Mr. Vandergriff had undergone the first surgery on March 1, noticed thereafter massive swelling of his head and limited vision in his left eye due to a "clearly-infected and swollen head" on March 24, was advised that he "had a severe infection of his skull," and underwent the second surgery on March 25. Then, significantly, during the April 6 visit, he "expressed concern about the constant pus drainage" from his head. It is clear from these facts that by April 6, 2020, Mr. Vandergriff was concerned about pus drainage and had been specifically advised that he had a severe infection. There is no indication that Mr. Vandergriff was informed that these were anticipated progressions or outcomes of his treatment. We find no error in the trial court's conclusion that these facts would put a reasonable person on constructive notice to explore whether that they had suffered an injury as a result of wrongful conduct. *See Roe*, 875 S.W.2d at 657. Accordingly, we agree with the trial court that Mr. Vandergriff had a cause of action that first accrued as to at least some of the purported medical malpractice by April 6, 2020.

The trial court, however, did not only dismiss the claim related to alleged incidents of medical malpractice that occurred before April 6, 2020. It dismissed the entire lawsuit.

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tolling mechanism for cases where the plaintiff lacks capacity:

> (c)(1) If the person entitled to commence an action, at the time the cause of action accrued, lacks capacity, such person or such person's representatives and privies, as the case may be, may commence the action, after removal of such incapacity, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from removal of such incapacity, except as provided for in subdivision (c)(2).

Tenn. Code Ann. § 28-1-106(c)(1). The General Assembly has expressly provided that "[f]or purposes of this section, the term 'person who lacks capacity' means and shall be interpreted consistently with the term 'person of unsound mind' as found in this section prior to its amendment by Chapter 47 of the Public Acts of 2011." Tenn. Code Ann. § 28-1-106(d). Furthermore, "[a]ny person asserting lack of capacity and the lack of a fiduciary or other representative who knew or reasonably should have known of the accrued cause of action shall have the burden of proving the existence of such facts." Tenn. Code Ann. § 28-1-106(c)(3).

Addressing the person of unsound mind standard, the Tennessee Supreme Court indicated that the determination is one for the trier of fact. *Sherrill*, 325 S.W.3d at 599-600 (citing *Burk v. RHA/Sullivan, Inc.*, 220 S.W.3d 896, 904 (Tenn. Ct. App. 2006)). The test asks "whether that individual was unable to manage his or her day-to-day affairs" with a focus "on a plaintiff's mental capacity to understand his or her legal rights and responsibilities, including the cause of action that has accrued." *Id.* at 600-01.

In addressing these matters, Mr. Vandergriff is, as noted above, representing himself pro se. Problematically for Mr. Vandergriff, to the extent that he is attempting on appeal to assert the unsound mind tolling provision, Mr. Vandergriff has not argued that he is unable to manage his personal affairs or to understand his legal rights or cited to any record support for such contentions. *See id.* at 600-01. Furthermore, it does not appear from the record that he made this argument before the trial court, so this contention has been waived. *See Fayne v. Vincent*, 301 S.W.3d 162, 171 (Tenn. 2009).

From our reading of Mr. Vandergriff's complaint, several of the alleged actions and inactions that constituted the purported medical malpractice in the present case occurred after that date. Mr. Vandergriff points to a visit to Erlanger Hospital on May 4, 2020, a third surgery on May 8, 2020, a post-seizure hospital visit on June 29, 2020, and a hospital visit on July 4, 2020. The statute of limitations does not serve as bar to his lawsuit as to those incidents because Mr. Vandergriff filed his lawsuit within a year of their occurrence. Therefore, while finding no error as the trial court's determination of April 6, 2020 as to the accrual date of earlier acts of alleged medical malpractice, we reverse the dismissal to the extent that it relates to the incidents that occurred on or after that April 14, 2020.[2]

IV.

This determination, however, does not end our inquiry. In assessing whether his pre-April 14, 2020 claims are barred by the statute of limitations, we next turn to Mr. Vandergriff's contention that the trial court erred by failing to apply the 120-day extension to the statute of limitations found in Tennessee Code Annotated section 29-26-121(c). This extension matters in the present case because Mr. Vandergriff alleged medical malpractice in connection with actions and failures to act on various dates ranging from February 2020 through at least July 2020. If the one-year statute of limitations applies, only claims related to incidents on or after April 14, 2020, would survive, since he filed on April 14, 2021. *See Etheridge ex rel. Etheridge v. YMCA of Jackson*, 391 S.W.3d 541, 547-49 (Tenn. Ct. App. 2012) (stating that, relative to a June 10, 2008 injury, plaintiff's filing deadline was June 10, 2009); *Herpst v. Parkridge Med. Ctr., Inc.*, No. E2017-00419-COA-R3-CV, 2018 WL 4052208, at *4 (Tenn. Ct. App. Aug. 23, 2018) (relative to an alleged injury on July 3, 2013, the plaintiff had until July 3, 2014, to file). If the 120-day extension applies, all of his claims would survive, as he would have timely filed.

Mr. Vandergriff argues that the trial court erred in finding that he failed to comply with the pre-suit notice requirements of Tennessee Code Annotated section 29-26-121 and is thus not afforded its 120-day extension to the statute of limitations. Tennessee Code Annotated section 29-26-121(c) states that when pre-suit notice is given to a provider, the statute of limitations is extended by 120 days. Section (a) includes the specific requirements of the notice:

> (a)(1) Any person, or that person's authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state.

[2] On remand, it may be necessary to determine which defendants remain proper parties to this lawsuit, which is limited to actions occurring on or after April 14, 2020.

(2) The notice shall include:

(A) The full name and date of birth of the patient whose treatment is at issue;

(B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient;

(C) The name and address of the attorney sending the notice, if applicable;

(D) A list of the name and address of all providers being sent a notice; and

(E) A HIPAA compliant medical authorization permitting the provider receiving the notice to obtain complete medical records from each other provider being sent a notice.

Tenn. Code Ann. § 29-26-121(a)(1–2).

The Tennessee Supreme Court has held that substantial, rather than strict, compliance with these terms is enough to satisfy the statute. *Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 555 (Tenn. 2013). "Under federal law, a medical authorization is not HIPAA compliant if '[t]he authorization has not been filled out completely, with respect to' a core element." *Martin v. Rolling Hills Hosp.*, LLC, 600 S.W.3d 322, 334 (Tenn. 2020) (quoting 45 C.F.R. § 164.508(b)(2)(ii)).

In *Martin v. Rolling Hills Hospital*, *LLC*, the Tennessee Supreme Court adopted a burden-shifting approach to determining whether the pre-suit notice substantially complied with Tennessee Code Annotated section 29-26-121. *Id.* (citing *Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 307 (Tenn. 2012)). The *Martin* court stated that the plaintiff bears the initial burden of establishing compliance with section 121 at the pleading stage. *Id.* Then, if a defendant files a motion to dismiss, the defendant has the burden to specifically state which portions of section 121 were omitted from the notice. *Id.* This can include demonstrating how the failure to comply with section 121 resulted in prejudice, frustrated or interfered with the purposes of the pre-suit notice provision, or failed to meet one of the six elements in section 121(a)(2)(E). *Id.* Then, the burden shifts back to the plaintiff to show how the notice substantially complied with the statutory requirements. *Id.* at 335.

On December 15, 2020, Mr. Vandergriff sent a notice to four providers or entities: Erlanger Health Systems; Plastic Surgeon Clinic; Plastic Surgeon Group, Dr. Todd E. Thurston; and Erlanger Neurosurgery and Spine, Dr. Prayash Patel. Attached was an Erlanger Hospital form document, an "Authorization to Release Information." The trial

court, however, specifically determined that Mr. Vandergriff failed to comply with the requirements of Tennessee Code Annotated section 29-26-121(a)(2)(E). In its memorandum opinion, the trial court stated that this HIPAA form sent by Mr. Vandergriff did not meet the standard of "substantial compliance" with the statute because it only listed Defendants. *See Stevens*, 418 S.W.3d at 555. The trial court explained that the form did not provide any authorization for the Defendants to obtain medical records from any other providers, as required by the statute. By failing to provide a valid HIPAA release to each listed provider, Mr. Vandergriff frustrated the purpose of this release, *i.e.*, to "permit[] the provider receiving the notice to obtain complete medical records from each other provider being sent a notice." *Stevens*, 418 S.W.3d at 556 (citing Tenn. Code Ann. § 29-26-121(a)(2)(E)). Therefore, because of this failure, the trial court found that Mr. Vandergriff could not receive the 120-day extension to the applicable statute of limitations. *See* Tenn. Code Ann. § 29-26-121(c).

Mr. Vandergriff, citing *Bray v. Khuri*, 523 S.W.3d 619, 622 (Tenn. 2017), argues the trial court erred and that his pre-suit notice substantially complied with the statute because, although he sent it to four entities, those entities were all part of one provider, Erlanger Hospital. In *Bray*, the Tennessee Supreme Court held that a plaintiff "need not provide a HIPAA-compliant authorization when a single healthcare provider is given pre-suit notice." *Bray*, 523 S.W.3d at 622. In seeking dismissal before the trial court, the Defendants asserted that they are not one provider and do not already share access to Mr. Vandergriff's medical records related to the alleged medical malpractice. The record does not reflect that Mr. Vandergriff asserted before the trial court that his actions constituted substantial compliance or that the *Bray* single-entity exception is applicable. Accordingly, we conclude that this contention has been waived.

V.

For the reasons set forth above, we affirm the judgment of the Circuit Court for Hamilton County in part, reverse in part, and remand for further proceedings consistent with this opinion. Costs of the appeal are taxed equally to the Appellant, James R. Vandergriff, and the Appellees, Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Health System, Prayash Patel, and Todd E. Thurston.

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JEFFREY USMAN, JUDGE