

VANMETER, JUDGE: GMRI, Inc., f/k/a General Mills Restaurants, Inc., d/b/a Red Lobster Restaurant #349, and Darden Restaurants, Inc., d/b/a Red Lobster Restaurant #349 (collectively Red Lobster) appeal, and Tim Emberton cross-appeals, from the Warren Circuit Court's judgment awarding Emberton \$233,666.05 for medical expenses and pain and suffering after a jury found that Emberton contracted hepatitis A as a result of dining at Red Lobster. The parties raise numerous issues in their appeals; however, we only address the statute of limitations issue because it is dispositive.

Emberton ate at Red Lobster on July 28, 2001, to celebrate his mother-in-law's birthday. He was hospitalized on August 30, 2001, due to vomiting, diarrhea, and dehydration. Prior to Emberton's release from the hospital on September 5, he was diagnosed with hepatitis A and informed that the only way he could have contracted the illness was through fecal-oral contact with another person. After Emberton was released from the hospital, the Barren River District Health Department attempted to determine the source of his hepatitis by questioning him regarding where he had recently eaten and by drawing his blood. However, Emberton did not follow up to see whether the health department determined the source of his illness. Nor did Emberton attempt to independently investigate how he contracted the illness.

In May 2004, attorney Steve Hixson, who was involved in other hepatitis A-related litigation against Red Lobster, visited Emberton to inquire about his condition.

Hixson filed suit against Red Lobster on Emberton's behalf on August 17, 2004.²

² Emberton also named the Barren River District Health Department as a defendant in his lawsuit; however, the health department was subsequently dismissed from the suit, and Emberton has not appealed that decision.

The parties agree that the statute of limitations applicable to Emberton's action is one year after his cause of action accrued, pursuant to KRS 413.140(1). As such, Red Lobster argues that Emberton's action was untimely filed. Emberton argues, on the other hand, that his action was timely filed pursuant to the discovery rule. As we agree with Red Lobster that Emberton's claim was untimely filed, we reverse the trial court's decision.

In *Hackworth v. Hart*, 474 S.W.2d 377, 379 (Ky. 1971), Kentucky's then-highest court decided that a medical malpractice action accrues “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.” The Kentucky Supreme Court subsequently extended this discovery rule to apply “to tort actions for injury from latent disease caused by exposure to a harmful substance whether the action be based on negligence or on a products liability theory.” *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979).

Red Lobster asserts that the discovery rule does not apply here because Emberton's case of hepatitis A was not a latent disease. The plaintiff in *Johns-Manville Products Corp.* was exposed to asbestos fiber dust from 1962 to 1967, but he did not become ill or receive a diagnosis of lung cancer until 1971. Here, Emberton began experiencing symptoms of hepatitis A less than a month after eating at Red Lobster and was diagnosed with the illness just over a month after eating at Red Lobster. Even if we assume without deciding that Emberton's case of hepatitis A was a latent disease because

“his injury was of an inherently unknowable nature[,]” *id.* at 501, until he began experiencing symptoms, was hospitalized, and was diagnosed with the illness approximately a month after he ate at Red Lobster, we must conclude that his action was untimely filed.

Under the discovery rule, a cause of action accrues when 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.” *Id.* (citing *Raymond v. Eli Lilly & Co.*, 371 A.2d 170, 174 (N.H. 1977)). The operative question in this case, then, is not when Emberton became aware that he had contracted hepatitis A, as that date is undisputed. Rather, the operative question is when Emberton discovered, or in the exercise of reasonable diligence should have discovered, that his hepatitis A may have been caused by Red Lobster's conduct.

In *McLain v. Dana Corp.*, 16 S.W.3d 320, 326 (Ky.App. 1999), this court discussed the fact that when a plaintiff knows he has been injured, he has an obligation to investigate the identity of his tortfeasor. As stated therein,

[u]nder Kentucky law, the discovery rule provides that a cause of action accrues when the injury is, or should have been, discovered. However, the discovery rule does not operate to toll the statute of limitations to allow an injured plaintiff to discover the identity of the wrongdoer unless there is fraudulent concealment or a misrepresentation by the defendant of his role in causing the plaintiff's injuries. A person who has knowledge of an injury is put on “notice to investigate” and discover, within the statutory time constraints, the identity of the tortfeasor.

Id. (internal citations omitted). Here, Emberton testified in his deposition that he was diagnosed with hepatitis A during his hospital stay, and that his doctors informed him that he could only contract the illness through fecal-oral contact with another person. However, Emberton did not investigate the source of his illness. Emberton further testified that even though he understood the health department contacted him to attempt to determine where he contracted the illness, he did not follow up with the health department. Emberton simply did not attempt to determine where he contracted hepatitis A.

Further, Emberton's brief states that at least two individuals brought suit against Red Lobster prior to the one-year anniversary of the hepatitis A outbreak. Indeed, one individual was represented by Emberton's counsel, through whom Emberton eventually learned that Red Lobster was likely the tortfeasor. This suggests that with reasonable diligence, Emberton also could have known within the year that Red Lobster was the likely tortfeasor. Under these circumstances, we believe that *McLain* controls, and the discovery rule did not toll the statute of limitations as to Emberton's cause of action. *See also Combs v. Albert Kahn & Associates, Inc.*, 183 S.W.3d 190, 199 (Ky.App. 2006) (applying *McLain* to asbestosis/lung cancer case). Accordingly, Emberton's action was untimely when it was filed more than three years after he ate at Red Lobster, and nearly three years after he was diagnosed with hepatitis A. The trial court therefore erred by failing to dismiss the action.

The Warren Circuit Court's judgment is reversed, and this matter is remanded for entry of an order dismissing Emberton's claim as being barred by the statute of limitations.

ALL CONCUR.

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