

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001739-MR

JESSIKAH ANNE TAYLOR AND
JUSTIN TAYLOR

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 11-CI-004416

UNIVERSITY MEDICAL CENTER, INC.,
D/B/A UNIVERSITY OF LOUISVILLE
HOSPITAL; UNIVERSITY ANESTHESIOLOGY
ASSOCIATES P.S.C.; AND JAMES M.
JACKSON, M.D.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Jessikah Anne Taylor and her husband, Justin Taylor,
appeal from a summary judgment of the Jefferson Circuit Court in favor of
University Medical Center, Inc., d/b/a University of Louisville Hospital;

University Anesthesiology Associates P.S.C.; and James M. Jackson, M.D. She alleges that the trial court erred when it found that her action was barred by the statute of limitations.

On August 12, 2008, Jessikah was admitted to the University of Louisville Hospital to deliver her first child and an epidural was administered by Dr. Jackson, an employee or agent of University Anesthesiology Associates. She alleges that immediately after her epidural she experienced constant chronic back pain. Although over the next two years she repeatedly sought treatment for her pain, she alleges that she did not discover its cause until June 30, 2010, when she was told by Dr. Todd Shanks of the Neurosurgical Institute of Kentucky that her pain was caused by her epidural placement.

The present action was filed on June 28, 2011. Prior to any discovery, on July 13 2011, the University of Louisville Hospital, University Anesthesiology Associates, and Dr. Jackson filed a motion to dismiss the complaint because it was filed more than one year after the alleged malpractice. The Taylors responded and attached an office note from Dr. Shanks dated June 30, 2010, stating that her pain was possibly attributable to her epidural in 2008. The Taylors alleged that this was the first time they knew that Jessikah's pain was caused by her epidural and the action accrued at that time. Because information outside the pleadings was submitted, the circuit court treated the motion to dismiss as one for summary judgment. *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361, 364 (Ky.App. 2004). It found that the statute of limitations accrued in August, 2008, when

Jessikah first experienced back pain following her epidural and was, therefore, barred by the statute of limitations.

Our standard of review when a summary judgment is granted was concisely stated in *Litsey v. Allen*, 371 S.W.3d 786, 788 (Ky.App. 2012):

We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor. Since a summary judgment involves no fact finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. (Internal brackets, citations, and quotations omitted).

An action for medical malpractice must be commenced within one year after the cause of action accrued. Kentucky Revised Statutes (KRS) 413.140(1)(e). The same statute further provides that all “the causes 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[.]” KRS 413.140(2).

Our Supreme Court has explained that under the discovery rule, the statute of limitations will not commence to run until the plaintiff knows there is a “basis for a claim.” *Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709, 712 (Ky. 2000). The “knowledge necessary to trigger the statute is two-pronged, one must know: (1) he has been wronged; and, (2) by whom the wrong has been committed.” *Id.* When both knowledge requirements are satisfied, the plaintiff has

been injured and the statute begins to run. The Court emphasized that the distinction between “harm” and “injury” is crucial to the Court’s analysis and explained:

Harm in the context of medical malpractice might be the loss of health following medical treatment. Injury, on the other hand, is defined as the invasion of any legally protected interest of another. Thus, injury in the medical malpractice context refers to the actual wrongdoing, or the malpractice itself. Harm could result from a successful operation where a communicated, calculated risk simply turns out poorly for the patient, although the medical treatment met the highest medical standards. In such case, there would be no injury, despite the existence of harm. Under the discovery rule, it is the date of the actual or constructive knowledge of the injury which triggers the running of the statute of limitations.

Id. (internal quotations omitted). If there is a disputed issue of fact regarding when a plaintiff in a medical malpractice action discovered or should have discovered the cause of action, it is a factual issue to be resolved by the fact-finder and summary judgment is improper. *Elam v. Menzies*, 594 F.3d 463, 467 (6th Cir. 2010) (applying Kentucky law).

The University of Louisville Hospital, University Anesthesiology Associates, and Dr. Jackson contend that because Jessikah admitted in her complaint that she experienced pain immediately following her epidural and sought medical treatment, there is no genuine issue of fact and her cause of action accrued in August 2008. We disagree and conclude that summary judgment was granted prematurely.

In *Wiseman*, the plaintiff complained of pain immediately following gynecological surgery in 1989. During the next four to five years, she continued to have pain and sought medical attention. However, the source of her pain, a piece of a metal medical instrument left in her leg during her 1989 surgery, was not discovered by a physician until 1996. Eleven months later, she filed a medical malpractice action.

As here, the *Wiseman* defendants contended that the statute of limitations accrued shortly after her surgery when the plaintiff first suspected that her pain was related to the 1989 surgery. The Court held that a suspicion that malpractice occurred is insufficient to accrue a cause of action and pointed out the unfairness of holding a person without medical knowledge responsible for discovering an injury based on the wrongful act of a physician. *Wiseman*, 37 S.W.3d at 713. In doing so, the Court again emphasized that “harm” is not to be equated with “injury.” Although the plaintiff knew she had been harmed long before she alleged that she discovered she had been the victim of medical malpractice, her “cause of action did not accrue until the fact of her injury became objectively ascertainable.” *Id.*

In this case, summary judgment was granted only six weeks after the complaint was filed and without the benefit of discovery. “[F]or summary judgment to be properly granted, the party opposing the motion must have been given adequate opportunity to discover the relevant facts.” *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky.App. 2007). The Taylors have had no opportunity to develop

the facts pertaining to what information they possessed regarding Jessikah's medical condition or when they learned that information. Therefore, we reverse the summary judgment.

Based on the forgoing, the summary judgment is reversed and the case remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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