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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001877-MR

ESTATE OF GENEVA ADAMS — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-00225 & 05-CI-00974

PHILIP C. TROVER, M.D.
AND THE TROVER CLINIC
FOUNDATION, INC. — APPELLEES

OPINION
AFFIRMING IN PART,
AND REVERSING IN PART

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: The Estate of Geneva Adams, by and through her personal representative, Sharon Mitchell, appeals the September 28, 2012 order of the Hopkins Circuit Court granting summary judgment in favor of appellees, Dr.

Philip Trover and Baptist Health Madisonville f/k/a Trover Clinic Foundation,[1] and dismissing her complaint as untimely filed. For the following reasons, we affirm in part, and reverse in part.

This matter is one of more than four dozen cases appealed to this Court related to Dr. Trover and the Foundation. About half of those cases settled prior to briefing. This Court, with the assistance of the parties, divided the remaining twenty-four cases into three groups, with a few outlying cases.

While similar in some respect to the cases disposed of in *Estate of Mary Crutcher v. Trover*, No. 2012-CA-001841-MR, ----- WL ----- (Ky. App. Jan. 8, 2016), also rendered this day, the main issue raised by the Estate of Geneva Adams in this case is sufficiently nuanced to warrant addressing this appeal by separate opinion. For an in-depth discussion of the common background giving rise to these matters, see *Crutcher*, *supra*.

RELEVANT MEDICAL FACTS

Adams claims that Dr. Trover's misreading of a March 10, 2000 mammogram, July 18, 2003 nuclear scan, and August 20, 2003 MRIs of the cervical and lumbar spine caused a delay in diagnosis of cancer.

Dr. Trover interpreted Adams' March 10, 2000 mammogram as normal with no changes when compared to her February 1999 films.

[1] The Trover Clinic Foundation, Inc.'s name was changed effective November 1, 2012, and is now known as Baptist Health Madisonville, Inc., f/k/a Trover Clinic Foundation, Inc., d/b/a Baptist Health Madisonville. In their briefs to this Court, the parties continue to refer to what is now Baptist Health Madisonville as the Trover Clinic Foundation. Therefore, for purposes of clarity, throughout this opinion this Court will also refer to appellee Baptist Health Madisonville as the Trover Foundation or the Foundation.

Approximately one year later, Adams noticed a lump in her left breast along with bloody discharge from her nipple. In April 2001, a bilateral mammogram was performed, and Dr. Trover read it as showing a nodule in Adams' left breast. He recommended an ultrasound. After the ultrasound, a surgeon requested a biopsy. The test results were positive for ductal breast carcinoma. As a result, Adams underwent a mastectomy on May 24, 2001, and subsequent chemotherapy.

In July 2003, Adams presented to the Medical Center complaining of pain in her right shoulder. A whole body nuclear scan was performed on July 18, 2003. Dr. Trover interpreted the scan as showing "normal uptake throughout the skeletal system." Adams then complained of pain in her lower back, and an MRI of the lumber and cervical spine was ordered. Dr. Trover interpreted Adams' August 20, 2003 MRI of the cervical spine as showing no abnormalities. He reported bulging of the L2-3, L3-4, and L4-5 disks on the lumbar spine MRI.

Adams' July 2003 nuclear scan and August MRIs were re-read on March 15, 2004. The nuclear scan re-read noted: "a small area of slight increased uptake … at the base of the neck." The MRI of the cervical spine was interpreted as showing abnormality on the right side that was worrisome for cancer and further evaluation was recommended. Additional bulges that were noted on the lumbar spine MRI did not appear to be clinically significant.

After Adams' follow-up treatment, Dr. Shah confirmed bone cancer on April 12, 2004. Dr. Shah noted that cure was not possible and that the best course of treatment would be radiation to relieve pain and improve quality of life.

In June 2004, the Foundation contacted Adams in an attempt to settle any claims she might have against Dr. Trover and the Foundation. Adams, without the assistance of counsel, executed a *Full and Final Release of All Claims* on August 24, 2004. Adams was issued a check from the Foundation for $50,000 on November 30, 2004. Adams later returned the check after retaining counsel along with a letter stating she would file a lawsuit against Dr. Trover and the Foundation. Rather than filing a separate, independent action, on February 28, 2005,[2] Adams joined a proposed class action against Trover and the Foundation that had been initiated on March 17, 2004.

Adams died in June 2010. In December 2010, all parties entered into an Agreed Order substituting the Estate of Geneva Adams as plaintiff.

Appellees re-submitted their motions for summary judgment in August 2012. They based their arguments first on Adams' settlement agreement but, alternatively, that Adams' claim was barred by the statute of limitations. A hearing was held on September 20, 2012.

The Hopkins Circuit Court's September 28, 2012 order addressed only the statute of limitations issue. We will review only that decision and not the validity of the settlement agreement because "[t]he Court of Appeals is without

[2] We refer to this date throughout this opinion because it is the date Adams asserts she filed her action against Dr. Trover and the Foundation. It is also the date utilized in the September 28, 2012 summary judgment order disposing her claims as well as the date acknowledged by Appellees in their briefs as the date Adams filed her action. However, we must point out the record demonstrates that it was a motion for leave to file a sixth amended complaint that was filed on February 28, 2005. It appears the actual filing of the sixth amended complaint in which Adams joined the lawsuit did not take place until March 7, 2005. Despite this, we utilize February 28, 2005, for purposes of our analysis to more effectively address the arguments presented.

authority to review issues not . . . decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

The Hopkins Circuit Court found that Adams' claim accrued on May 4, 2001, the date she was diagnosed with breast cancer, and therefore the date she knew or should have known of her injury. Accordingly, she should have brought her action against the Appellees within one year, *i.e.*, before May 4, 2002. Because Adams joined the lawsuit on February 28, 2005, the circuit court found her complaint to be filed outside of the applicable statute of limitations period for medical negligence actions and dismissed her complaint. This appeal followed.

STANDARD OF REVIEW

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Under this standard, an action may be terminated "when no questions of material fact exist or when only one reasonable conclusion can be reached[.]" *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 916 (Ky. 2013). Summary judgment involves only legal questions and the existence, or non-existence, of material facts are considered. *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Our review is *de novo*. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

Before the trial court, "[t]he moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to

the party opposing summary judgment to present" evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). That is, "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

The validity of the defense of the statute of limitations should be determined by the court as a matter of law when the material facts are not in dispute. *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 759 (Ky. 1965). "Where, however, there is a factual issue upon which the application of the statute depends, it is proper to submit the question to the jury." *Id.*

ANALYSIS

The record shows that Adams claimed Dr. Trover is liable to her for having negligently read: a mammogram on March 10, 2000; a nuclear scan on July 18, 2003; and an MRI on August 20, 2003. The summary judgment stated simply that Adams "knew or should have known of her injury on or about May 4, 2001 [when she was diagnosed with breast cancer and, t]herefore, . . . should have filed her complaint on or before May 4, 2002. In effect, the circuit court ruled that all of Adams' claims accrued on May 4, 2001.

With regard to the claim based on the mammogram Dr. Trover read on March 10, 2000, we will affirm the summary judgment. Dr. Trover's negligent failure to diagnose breast cancer on that date was discovered, or should have been

discovered, on May 4, 2001, when Adams was properly diagnosed, and suit should have been filed on or before May 4, 2002.

However, it was patent error for the circuit court to have ruled that Adams should have filed her complaint on May 4, 2002, to recover for negligent acts allegedly committed by Dr. Trover on July 18, 2003, and August 20, 2003. Our decision as to all three alleged negligent acts is informed by the holding in *Farmer's Bank and Trust Co. v. Rice*, 674 S.W.2d 510 (1984).

Farmer's Bank held that the metastasis or reappearance of a cancer does not "constitute[] a new discovery which would revive the cause of action" based on the *original* alleged negligent act. 674 S.W.2d at 511. Dr. Trover's original alleged negligent act occurred on March 10, 2000. There is no dispute regarding the relevant facts, including that this original negligent act was discovered on May 4, 2001. As a matter of law, the limitations period expired on May 4, 2002. Suit was not filed until February 28, 2005, after the claim was barred. With regard to the March 10, 2000 conduct, *Farmer's Bank*, as we will discuss, cannot be distinguished. The Appellees were entitled to judgment on the claim to the extent it is based on that conduct, and we will affirm.

However, we reject Dr. Trover's suggestion that *Farmer's Bank* is sufficiently broad to justify affirming the grant of summary judgment on claims based on his July and August 2003 misreads. With regard to those misreads, *Farmer's Bank* is distinguishable.

In *Farmer's Bank*, Dr. Rice failed to diagnose his patient's breast cancer on May 23, 1979. That was the last time Dr. Rice had anything to do with the patient. A different doctor correctly diagnosed breast cancer on September 19, 1979, treated the patient, and the patient's cancer went into remission. *Id.* at 510-11. Beginning September 19, the patient was on notice of the possibility that Dr. Rice negligently diagnosed her; on that date the limitations period began. To succeed, a lawsuit should have been filed not later than September 19, 1980.

Perhaps because her cancer was in remission, the patient in *Farmer's Bank* failed to diligently prosecute her claim while the limitations period continued to run, unabated and unsuspended by the cancer's remission. And remission did not last. By May 1981, the cancer had spread and the patient was diagnosed with brain and lung cancer. Two months later, in July 1981, she filed suit against Dr. Rice. *Id.* at 511. The only negligent conduct the patient claimed as a basis for Dr. Rice's liability was his May 23, 1979 failure to diagnose cancer which she learned about on September 19, 1979. The Supreme Court said, "Even though the plaintiff in *Farmer's Bank* was not diagnosed with the correct type of cancer, she still received a cancer diagnosis[.]" *Carroll v. Owens-Corning Fiberglas Corp.*, 37 S.W.3d 699, 703 (Ky. 2000).

We do not know why Adams delayed filing a lawsuit to recover for Dr. Trover's conduct from March 10, 2000, until February 28, 2005. But with respect to the alleged negligent act of March 10, 2000, the case before us is

indistinguishable from *Farmer's Bank* and must be affirmed. Adams' claim should have been brought on or before May 4, 2002.

However, with regard to the alleged negligent acts occurring on July 18, 2003, and August 20, 2003, *Farmer's Bank* certainly is distinguishable. Unlike Dr. Rice in *Farmer's Bank*, Dr. Trover allegedly committed two additional negligent acts in 2003. While "cancer is known to spread[,]" *id.*, Adams claims Dr. Trover's negligence in reading scans in 2003 kept her from knowing her cancer was spreading to her bones until her diagnosis in April 2004.

We must consider the record in a light most favorable to Adams. Doing so, we conclude she has alleged that Dr. Trover was liable for negligently failing to diagnose the metastasis of her breast cancer to her spine on July 18, 2003, and again on August 20, 2003. We will examine the time continuum as to each of those alleged acts of negligence to determine whether we can discern, as a matter of law, when the period of limitations began to run.

We know that a claim for the alleged negligence of July 18, 2003, could not have been discovered before that date. We also know that the claim was filed on February 28, 2005. Therefore, if we could determine, as a matter of law, that Adams had been put on notice of this claim between July 18, 2003, and February 28, 2004, one year before she filed the claim, we must affirm the summary judgment. But we cannot. As a matter of law, the only date we can determine as initiating the limitations period is the date Adams' bone cancer was discovered, April 12, 2004, a date that would not preclude her claim filed February

28, 2005. If there is evidence that put Adams on notice before February 28, 2004, of her claim based on Dr. Trover's July 18, 2003 alleged misread, it has not been brought to our attention.

Similarly, we know the alleged negligence of August 20, 2003, could not have been discovered before that date. And, again, we know Adams initiated litigation based on that alleged negligent act on February 28, 2005. As with the July 2003 conduct, we cannot determine, as a matter of law, that Adams had been put on notice of this next claim before February 28, 2004. We can only determine that, as a matter of law, Adams knew or should have known on April 12, 2004, that Dr. Trover's August 20, 2003 conduct might have caused her injury. As with the July 2003 conduct, if there is evidence that put Adams on notice of her claim between August 20, 2003, and February 28, 2004, it has not been brought to our attention.

Therefore, we must reverse the summary judgment as to Adams' claims based on Dr. Trover's July 18 and August 20, 2003 conduct. This ruling does not prohibit a future grant of summary judgment on any other ground, nor does it prohibit the grant of summary judgment upon the defense of limitations provided, however, that further discovery reveals evidence demonstrating Adams knew or should have known, before February 28, 2004, that her injury resulted from Dr. Trover's 2003 conduct.

CONCLUSION

For the foregoing reasons, the September 28, 2012 order of the Hopkins Circuit Court granting summary judgment in favor of appellees, Dr. Philip Trover and Baptist Health Madisonville f/k/a Trover Clinic Foundation is affirmed, in part, as to Adams' claims based on Dr. Trover's conduct on March 10, 2000. We reversed, in part, the summary judgment as it pertains to Adams' claims based on Dr. Trover's conduct on July 18, 2003, and August 20, 2003.

ALL CONCUR.

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