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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001880-MR

ROBERT BROWN — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE MARTIN MCDONALD, JUDGE
ACTION NO. 04-CI-00225 & 05-CI-00930

PHILIP C. TROVER, M.D. AND
BAPTIST HEALTH MADISONVILLE,
INC., F/K/A THE TROVER CLINIC
FOUNDATION, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

ACREE, CHIEF JUDGE: Appellant Robert Brown brings this appeal from the Hopkins Circuit Court's August 18, 2008 and September 16, 2008 summary judgment and order dismissing his medical negligence and fraud actions against Dr. Philip Trover, and the October 3, 2009 and May 8, 2012 orders dismissing his

medical negligence, negligent credentialing, and fraud actions against Baptist Health Madisonville f/k/a Trover Clinic Foundation.[1] The circuit court determined Brown did not file any of his claims against Dr. Trover within the statutorily prescribed limitations period; furthermore, the court found no evidence that either Appellee engaged in any conduct that prevented Brown from discovering any of his claims. The court also determined that the claims against the Foundation for medical negligence and negligent credentialing were not timely filed. Finally, the court ruled that Brown presented no evidence to create a genuine issue of material fact regarding Brown's various fraud claims against the Foundation. For the reasons stated below, we affirm.

This matter is one of more than four dozen cases appealed to this Court related to Dr. Trover and the Foundation. By means of the Court's prehearing conference procedure, 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 main groups, with a few outlying cases.

This case has been selected as typical of a group of nine cases and is sufficient for us to dispose of all but one of the critical issues in each of them.[2]

[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 refer to appellee Baptist Health Madisonville as the Foundation.

[2] The other cases included in this category are: *Clayton v. Trover*, No. 2012-CA-001881-MR; *Estate of Patricia Clark, by and through her personal representatives, Charlene Carson and Patricia Cotton v. Trover*, No. 2012-CA-001882-MR; *Alan Rodgers, Administrator of the Estate of Lula Proctor v. Trover*, No. 2012-CA-001883-MR; *Hardin v. Trover*, No. 2012-CA-001884-MR; *Wells v. Trover*, No. 2012-CA-001885-MR; *Sherry Duvall, in her capacity as*

Therefore, while separate opinions will be rendered in each of those cases, they will reference and incorporate large portions of this case for background information and analysis.

COMMON BACKGROUND

The Foundation consists primarily of the Regional Medical Center and the Trover Clinic, both located in Madisonville, Kentucky. Dr. Trover began employment with the Foundation in 1980, and quickly assumed the position of Chair of the Medical Center Radiological Department.

In late 2003, Dr. Neil Kluger, an oncologist associated with the Foundation, became concerned over what he considered substandard work habits displayed by Dr. Trover and, specifically, an unacceptable number of misread radiological films. Dr. Kluger addressed his concerns to the Medical Center's Medical Executive Committee, the Foundation's Board of Governors, and the Kentucky Board of Medical Licensure.

The Committee extensively investigated the allegations and, on April 20, 2004, issued a report outlining its findings. The Committee concluded Dr. Trover's rate of error when interpreting mammographic slides was "unacceptable"; his 1.8% call-back rate[3] was significantly lower than the national

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personal representative and administrator of the Estate of Gary Brasher, No. 2012-CA-001888-MR; *Estate of Kenneth Gibson, by and through his personal representative, Shirley Brown v. Trover*, No. 2012-CA-001889-MR; *Estate of Joel Brantley, by and through his personal representative, Sharon Brantley v. Trover*, No. 2012-CA-001890-MR.

[3] The call-back rate is the number of patients who are called back (at the request of the reviewing radiologist) for further diagnostic work up.

average[4] and the average of his colleagues; his reports consistently lacked the detail necessary to assist treating physicians in developing and confirming diagnoses; he typically interpreted over 30,000 radiological examinations per year, well in excess of the average workload of a typical full-time radiologist;[5] and, his behavior toward employees in the radiological department created an atmosphere of uncertainty and distrust, compromising the overall effectiveness of the radiological department.

Based on its investigation, the Committee recommended that the Board of Governors revoke Dr. Trover's clinical privileges and terminate his membership on the Medical Center's medical staff, subject to reinstatement if certain conditions were met. Dr. Trover resigned from Medical Center in April 2004 and resumed practice in Michigan.

The Kentucky Board of Medical Licensure also reviewed Dr. Trover's practice, and on July 14, 2005, issued an Emergency Order temporarily suspending his medical license. Dr. Trover contested the suspension, and on April 13, 2006, entered into an agreed order with the Board that reinstated his license with numerous restrictions.[6]

Based on the allegations, investigations, and the potential number of radiological misreads, the Foundation conducted a review of approximately 10,000

[4] The national average call-back rate at the time was 7-15%.

[5] According to one survey group, the average workload for a full time radiologist was 12,800 radiological examinations per year.

[6] The order was modified on May 9, 2007, reflecting that Dr. Trover completed an Education Plan outlined by the Board of Directors.

of Dr. Trover's radiological interpretations occurring between 2003 and 2004. That review, according to the Foundation, indicated that the rate of discrepancy between Dr. Trover's interpretations and those of the reviewers was "well within the standard of care."

Nevertheless, around this time, media reports began to surface concerning the allegations made by Dr. Kluger. In March 2004, an announcement appeared in the local newspaper, the Madisonville Messenger, encouraging members of the public who had received radiological exams at the Medical Center during the pertinent period to present themselves as potential members of a proposed class action lawsuit against Dr. Trover and the Foundation. Brown fell within these parameters.

PROCEDURAL HISTORY

A proposed class action lawsuit was filed on March 17, 2004. Brown joined the proposed class as a plaintiff on January 21, 2005.[7] When the circuit court denied class certification, the cases proceeded toward separate trials, but with joint discovery permitted.

Dr. Trover and the Foundation moved for summary judgment in 2005, 2006, and 2007 claiming Brown – and all other plaintiffs in this category – had

[7] Eight complaints – the original and seven amendments – were filed in the underlying class action before the individual cases were separated upon denial of class certification. Each complaint added additional plaintiffs. Brown was first named as a plaintiff in the fifth amended complaint tendered on January 21, 2005, and filed on January 24, 2005. (R. at 1798 - 1836; *Cruce v. Trover,* Hopkins Cir. Ct. Case No. 04-CI-00225). Solely for purposes of this appeal and affording Brown the benefit of every doubt, we have chosen to use the January 21, 2005 date proffered by Brown as the date upon which he filed suit.

filed suit beyond the applicable statute of limitations.[8] The circuit court dispensed with one preliminary argument offered as a reason for the delay by finding that neither Dr. Trover nor the Foundation thwarted the discovery of the causes of action in that neither "took any actions, concealed any information, or committed any misleading or obstructive conduct that prevented [Brown] from pursuing [his] claims." (R. at 1280). Then the circuit court granted the summary judgment motions, in part, entering orders on August 18, 2008, and September 16, 2008, in favor of Dr. Trover on all claims, including the fraud claims against him. However, the court initially declined to dismiss the claims of medical negligence or negligent credentialing against the Foundation, finding material issues of fact remained with regard to the Foundation's limitations defense.

In a subsequent order entered October 30, 2009, the circuit court dismissed all counts alleging fraud against the Foundation, finding no evidence of fraud or fraudulent concealment, leaving only claims of medical negligence and negligent credentialing against the Foundation.

On April 12, 2012, the Foundation moved the circuit court to reconsider its previous denial of summary judgment with respect to Brown's claims of medical negligence and negligent credentialing. On May 8, 2012, twenty-four days after the motion was mailed to Brown and before his response was filed, the circuit court reversed its prior position and entered summary judgment in favor of the Foundation, finding that the statute of limitations had

[8] Extensions were ordered in 2005 and 2006 to allow Brown, and other plaintiffs, time to complete discovery on various issues.

indeed expired on Brown's claims of medical negligence and negligent credentialing.

Brown believed he was not afforded an opportunity to respond to the Foundation's motion to reconsider and moved the court pursuant to Kentucky Rules of Civil Procedure (CR) 60.02[9] and CR 59.05[10] to vacate the order granting summary judgment. Following a hearing, the circuit court denied his motion and reaffirmed its earlier grant of summary judgment in favor of the Foundation. This appeal followed. Further facts will be developed as needed.

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

[9] CR 60.02 provides in relevant part:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

[10] CR 59.05 provides: "A motion to alter or amend a judgment or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment."

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.*

ARGUMENTS ON APPEAL

Brown presents five arguments on appeal, namely: (1) the circuit court erred when it entered summary judgment without a hearing and without an opportunity for him to respond to the Foundation's motion to reconsider summary

judgment; (2) the circuit court improperly declared Brown's negligent credentialing claim time-barred; (3) the circuit court improperly declared Brown's medical negligence claim against Dr. Trover time-barred; (4) the circuit court improperly declared Brown's medical negligence claim against the Foundation time-barred; and (5) fraud was sufficiently pleaded to warrant a denial of summary judgment. We will address Brown's first two arguments concurrently.

ANALYSIS

A. Negligent Credentialing & Alleged Procedural Errors

Much of this case orbits around the amorphous tort of negligent credentialing. Brown vehemently insists that his negligent-credentialing claim was timely filed within the one-year limitations period found in KRS[11] 413.140. He also argues the procedural path taken by the circuit court in granting the Foundation's summary judgment motion – a motion that related primarily to Brown's negligent-credentialing claim – was flawed.

It is clear to us that negligent credentialing is the foundation upon which both of these arguments rests. But negligent credentialing is not a recognized cause of action in this Commonwealth. This Court, in a companion case to the one now before us, briefly recognized the tort. *Estate of Judith Burton v. Trover*, 2009-CA-001595, 2011 WL 8318231, at *1 (Ky. App. 2011). However, the Kentucky Supreme Court disagreed with our decision on other grounds, leaving "for another day consideration of a negligent credentialing cause of

[11] Kentucky Revised Statute.

action." *Trover v. Estate of Burton*, 423 S.W.3d 165, 168 (Ky. 2014). To the extent Brown urges us to now recognize the doctrine, we decline to do so. Here is why.

In the space of several decades, over half of all state jurisdictions have recognized negligent credentialing as a viable theory of recovery. *See Larson v. Wasemiller*, 738 N.W.2d 300, 306, n.3 (Minn. 2007) (collecting cases). But the tort is not without its critics. At least three states – Texas, Ohio, and Utah – have enacted legislation severely limiting, or even eradicating, the doctrine. *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 214 (Tex. 2005) ("In Texas, by statute, a hospital is not liable for improperly credentialing a physician through its peer review process unless the hospital acts with malice[.]"); Ohio Rev. Code Ann. § 2305.251 (West) ("A hospital shall be presumed to not be negligent in the credentialing of an individual who has, or has applied for, staff membership or professional privileges at the hospital pursuant to section 3701.351 of the Revised Code.]"); Utah Code Ann. § 78B-3-425 (West) ("It is the policy of this state that the question of negligent credentialing, as applied to health care providers in malpractice suits, is not recognized as a cause of action.").

This Court has not hesitated, on occasion, to recognize torts for the first time, and the Supreme Court has indicated that doing so is within our authority. *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 581 (Ky. 2004) (noting the Court of Appeals first recognized the tort of negligent misrepresentation in *Chernick v. Fasig-Tipton Kentucky, Inc.*, 703 S.W.2d 885

(Ky. App. 1986)); *see also MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 336 n.10 (Ky. 2014) (citing two Court of Appeals' opinions each recognizing a tort for the first time: "*McDonald's Corp. v. Ogborn,* 309 S.W.3d 274, 291 (Ky. App. 2009) (recognizing negligent supervision); *Oakley v. Flor–Shin, Inc.,* 964 S.W.2d 438, 441-42 (Ky. App. 1998) (recognizing negligent hiring and retention)"). But being possessed of authority and exercising it are separate matters. As has been said, "The better part of valor is discretion[.]" William Shakespeare, The First Part of Henry the Fourth act 5, sc. 4.

We decline to recognize the tort of negligent credentialing. More so than any other tort this Court has recognized, the legal and policy-based considerations involved are numerous, varied, and of interest and importance to contentious factions. *See generally* Andrew R. DeHoll, *Vital Surgery or Unnecessary Procedure? Rethinking the Propriety of Hospital Liability for Negligent Credentialing*, 60 S.C.L. Rev. 1127, 1146-1155 (2009); *Larson v. Wasemiller*, 738 N.W.2d 300, 312 (Minn. 2007) (identifying policy considerations). This has resulted in multiple versions of the tort. In fact, one is hard pressed to find two identical versions. "[C]ourts should exercise great restraint in recognizing such new and complex causes of action." *Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C.*, 120 S.W.3d 682, 691 (Ky. 2003). Whether to recognize the tort of negligent credentialing, we believe, is a decision better left to our Supreme Court.

In light of our decision, the cause of action for negligent credentialing does not exist in Kentucky and that claim of Brown's is a nullity. Accordingly, we affirm the circuit court's grant of summary judgment in favor of the Foundation on this issue *albeit* on different grounds. *Rumpel v. Rumpel*, 438 S.W.3d 354, 365 (Ky. 2014) (an appellate court may affirm the decision of a trial court for any reason sustainable by the record).

So now we return to Brown's alleged procedural error. He claims the Foundation's 2012 motion to reconsider summary judgment was improperly noticed in violation of Hopkins Circuit Court Rule 2(c), and that the circuit court was not permitted to rule on that motion absent a hearing, as required by CR 56.03. He argues that, as a result of these violations, the circuit court's summary judgment order is void and relief is mandated.

According to Hopkins Local Rule 2(c) regarding Notice of Motions:

> All motions, except those included in the Answer, and all exceptions or objections taken to any commissioner's report or opinion, when served on the adverse party, ***shall be accompanied by a notice setting a certain date on which said motion shall be heard.*** Any such motion or exception or objection not accompanied by a notice of the date for the hearing of said motion may be treated as if no motion had been filed.

Hopkins Cir. Ct. Rule 2(c)(3) (emphasis added). The Foundation noticed its reconsideration motion to be heard "at a date, time, and location convenient for the court." The motion did not contain a date certain for a hearing. It failed to comply with Local Rule 2(c)(3).

That brings us to CR 56.03, which states in relevant part:

> The ***motion* [*for summary judgment*] *shall be served at least 10 days before the time fixed for the hearing***. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought 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 issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

CR 56.03 (emphasis added). Generally, the hearing date is regarded as the cutoff time for filing additional evidentiary material in summary-judgment proceedings. *Johns v. Kurbaugh*, 450 S.W.2d 259 (Ky. 1970). Absent a proper notice of a hearing, Brown was under no time constraint to respond to the Foundation's summary-judgment motion. Nor was he obliged under Local Rule 2(c) to respond to the motion at all. We agree with Brown that the Foundation's unnoticed motion violated Hopkins Local Rule 2(c)(3), and that the circuit court's entry of summary judgment, without setting a date for the motion to be heard or affording Brown the opportunity to respond, violated, at least initially, the spirit, if not the letter, of CR 56.03.[12] *See Storer Communications of Jefferson County, Inc. v. Oldham County Bd. of Educ.*, 850 S.W.2d 340, 342 (Ky. App. 1993) ("[M]otions under CR 56 must be served on non-moving parties, who are given time to respond, and a hearing is required.").

[12] We also believe the circuit court cured any procedural issue when it conducted a subsequent lengthy hearing at which Brown – and all other applicable plaintiffs – were permitted to argue the substantive and procedural bases against summary judgment. Furthermore, as noted elsewhere in this opinion, Brown's grounds for opposing summary judgment were well documented in the record and well known to the circuit court.

But these errors, if any, were harmless.

> No error . . . in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

CR 61.01.

The Foundation's motion asked the circuit court to reconsider its prior order denying the Foundation judgment related primarily to Brown's claim of negligent credentialing. If this Court should agree with Brown that the circuit court committed procedural error in granting that motion, what possible remedy could be afforded? The answer is nothing more than an additional opportunity[13] to respond and a hearing on a tort that this Commonwealth has yet to recognize. Brown's victory would be pyrrhic only and would waste legal and judicial resources.

The Foundation's motion also touched upon Brown's claim of medical negligence. But, as we will later make clear, Brown's medical negligence claim against the Foundation is a derivative claim; its success or failure depends on Brown's medical negligence claim against Dr. Trover. As explained in greater detail below, we conclude that Brown's medical negligence claim against Dr.

[13] Brown took advantage of five prior opportunities to make the arguments which he repeated during the lengthy hearing referenced in the previous footnote. Those opportunities were expressed in responses to motions filed February 24, 2006, August 23, 2006, September 22, 2006, April 4, 2007, and January 15, 2008.

Trover cannot survive summary judgment; therefore, Brown's claim for medical negligence against the Foundation must also be similarly dismissed.

Accordingly, we find that any procedural error by the circuit court was harmless and provides no grounds for disturbing the circuit court's orders granting summary judgment in favor of the Foundation.

B. Medical Negligence Claim Against Dr. Trover

Brown next contends the circuit court erroneously entered summary judgment in favor of Dr. Trover on his medical-negligence claim. Before delving deeper into Brown's argument, let us take a closer look at the relevant medical facts giving rise to this case.

Brown alleges Dr. Trover failed to properly diagnose a mass found on his kidney from his read of a renal angiogram performed on April 7, 2000.

Brown underwent a CT scan at the Medical Center in March 2000 as part of his routine biennial workup for an abdominal aortic aneurysm. Radiologist Brooks Horsely, M.D., interpreting the scan, identified a questionable mass along the posterior aspect of the right kidney. Brown was referred to Dr. James Fellows, an urologist at MultiCare Specialists, PSC, for further evaluation and treatment. A second CT scan revealed a suspected kidney tumor (mass). An ultrasound was later performed to determine whether the mass was hematoma in a simple cyst or renal carcinoma. Interpreting the results of the ultrasound, Dr. Horsley indicated that the mass was likely a hemorrhagic cyst. Despite Dr. Horsley's determination,

Dr. Fellows recommended that Brown undergo a biopsy or a surgical excision of the kidney tumor.

Brown sought a second opinion from Dr. William Klompus, an urologist at the Medical Center. Dr. Klompus ordered a renal angiogram, which was performed and interpreted by Dr. Trover on April 7, 2000. After studying the films, Dr. Trover, in conjunction with Dr. Klompus, concluded the abnormality appearing on Brown's kidney was actually a renal artery sitting on top of the kidney.

Dr. Horsley monitored the enlarged mass surrounding Brown's kidney and by January 2003, it was clear that the mass continued to grow. The mass was removed on January 30, 2003, and an analysis of the mass proved it was positive for renal cell carcinoma – cancer. Brown was advised of the results no later than February 1, 2003. Brown joined the class action on January 21, 2005.

In granting summary judgment, the circuit court's order did not address the merits of the underlying dispute, but rather found that Brown's medical-negligence claim against Dr. Trover was not timely filed within the one-year statute of limitations set forth in KRS 413.140.

KRS 413.140 establishes a one-year limitations period for actions "against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice." KRS 413.140(1)(e). The determinative moment for measuring the limitations period has always been when the cause of action accrued. Accordingly, the statute further embodies the

"discovery rule," meaning that "the cause 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). Critical to the knowledge element under the discovery rule is the distinction between "harm" and "injury."

> "Harm" [is defined] as "the existence of loss or detriment in fact of any kind to a person resulting from any cause." 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 a legally protected interest of another." Thus, injury in the medical malpractice context refers to the actual wrongdoing, or the malpractice itself.

Wiseman v. Alliant Hosps., Inc., 37 S.W.3d 709, 712 (Ky. 2000) (citing *Restatement (Second) of Torts* § 7, comment (1965)).

Armed with the discovery rule, Brown argues that the one-year statute of limitations did not begin to accrue until the Madisonville Messenger announcement appeared in 2004. That was the date Brown said he "had any inkling" of Dr. Trover's malpractice. Citing *Wiseman*, *supra*, and *Imes v. Touma*, 784 F.2d 756 (6th Cir. 1986), Brown argues that this knowledge – injury caused by Dr. Trover's malpractice – was required to trigger the statute of limitations.

Interpreting KRS 413.140(2), our Supreme Court has explained that the limitations period commences when one knows, or in the exercise of reasonable diligence should know, that "(1) he has been wronged; and, (2) by whom the wrong was committed." *Wiseman*, 37 S.W.3d at 712. However, this formula does not permit a tort victim to sit on his rights. "A person who knows he

has been injured has a duty to investigate and discover the identity of the tortfeasor within the statutory time constraints." *Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 151 (Ky. 2007).

Brown maintains that although he knew he had been harmed (*i.e.*, that there was "detriment in fact" to his body) in February 2003 when his cancerous tumor was removed, he did not know he had been injured or wronged (*i.e.*, that someone had invaded his legally protected interests) until March 2004 when the article in the Madisonville Messenger was released informing the public of Dr. Trover and the Foundation's alleged negligence.

The error in his reasoning is not uncommon, but the fact remains that *legal* confirmation that one has been wronged is not necessary under the discovery rule. *Vannoy v. Milum*, 171 S.W.3d 745, 748-49 (Ky. App. 2005). The rule merely requires that one be aware of the facts sufficient to put him on notice that his legal rights may have been invaded and by whom; uncertainty about the *legal* significance of those facts does not toll the limitations period.

Our decision in this case is further informed by the holding in *Farmers Bank & Trust Co. of Bardstown v. Rice*, 674 S.W.2d 510 (Ky. 1984). In *Farmers 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. The Kentucky Supreme Court found that, beginning September 19th, 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.

Brown's case mirrors that of Dr. Rice's patient in *Farmers Bank*. Here, Brown discovered the mass in his liver was cancerous no later than February 1, 2003. Upon discovering the cancer, Brown had sufficient facts to put him on notice that his legal rights may have been invaded by Dr. Trover. He admitted in deposition testimony that before he left the hospital, he knew he had been wronged:

> Q. So in January, before you got out of the hospital, Dr. Fellows told you that it was cancer?
>
> A. They had sent it to the lab, and they said it was cancer.
>
> Q. Okay. So at that point in time, you knew that Horsley was right and Trover was wrong?
>
> A. (Nodding head in the positive.)
>
> Q. Go ahead.
>
> A. Somebody was wrong.
>
> Q. And you knew that Trover was wrong then in January of '03, right?
>
> A. He made a mistake.
>
> Q. Yes.
>
> A. And Klompus, as well, with their diagnosis.
>
> Q. And you knew that in January of '03?

A. Some time, yeah.

Q. You knew it when he took – when [Doctor] Fellows told you that?

A. That's right.

Brown further testified that he knew Dr. Trover had interpreted the angiogram:

Q. And Dr. Klompus, this took place in his office, I guess?

A. Yes, they did.

Q. He told you that he thought it was a vein –

A. That's right.

Q. – on the surface of the kidney?

A. (Nodding head in the positive.)

Q. And that he had conferred with Trover, and they actually talked about your case and that they both felt that's what it was and it was not a tumor?

A. That's right.

Clearly, in Brown's own words, he knew on or before February 1, 2003, after discovering that the mass on his kidney was cancerous, that his angiogram had been misread by Dr. Trover. That information was sufficient to put him on notice that Dr. Trover's treatment may have been negligent. Therefore, the information was sufficient to begin the limitations period on his medical malpractice claim against Dr. Trover.

Summarizing then, beginning not later than February 1, 2003, Brown was on notice of the possibility that Dr. Trover negligently misread his renal

angiogram; on that date the limitations period began. To succeed, a lawsuit should have been filed not later than February 1, 2004. Instead, Brown did not file suit until January 21, 2005. His complaint was not timely filed. The circuit court committed no error in granting summary judgment in favor of Dr. Trover on Brown's claim of medical negligence.

C. Medical Negligence Claim Against the Foundation

We next turn to Brown's medical negligence claim against the Foundation. That claim is derivative in nature, based solely on the Foundation's employment of Dr. Trover.[14] "Vicarious liability, sometimes referred to as the doctrine of *respondeat superior*, is not predicated upon a tortious act of the employer [or principal] but upon the imputation to the employer [or principal] of a tortious act of the employee [or agent.]" *Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005) (citation omitted).

Our Supreme Court has held that an employee's "escape [from] liability for his alleged negligence because the statute of limitations had run as to him does not also insulate the employer from vicarious liability for that negligence." *Cohen v. Alliant Enterprises, Inc.*, 60 S.W.3d 536, 538 (Ky. 2001). However, the Court also said the vicarious claim may proceed only if the plaintiff "sued the principal . . . before the statute of limitations had run as to the agent." *Id.* at 539. In the case before us, Brown did not sue the Foundation before the

[14] Brown's complaint clearly states that the Foundation's alleged medical negligence is "*by and through its agent, Dr. Trover*." (R. at 706-07) (emphasis added).

statute of limitations had run as to Dr. Trover. Therefore, his medical negligence claim against the Foundation was also untimely.

We affirm the order of the circuit court granting summary judgment in favor of the Foundation on Brown's claims of medical negligence.

D. Fraud

Finally, Brown argues he has effectively pleaded and adequately established by proof the following theories justifying recovery of damages against both Dr. Trover and the Foundation: (1) lack of informed consent, (2) direct fraud, and (3) constructive fraud.

First, our highest court long ago rejected the idea that failure to obtain informed consent should be treated differently than other failures of medical responsibilities, *i.e.*, as a separate tort in and of itself. *Holton v. Pfingst*, 534 S.W.2d 786, 788 (Ky. 1975). Rather, Kentucky courts "regard the failure to disclose a mere risk of treatment as involving a collateral matter . . . and so have treated the question as one of negligent malpractice only, which brings into question professional standards of conduct." *Id.* (quoting W. Prosser, Handbook of the Law of Torts, 106 (4th ed. 1971)). "[T]he action, regardless of its form, is in reality one for negligence in failing to conform to a proper professional standard." *Id.*

Perhaps the most direct explanation of the role played by lack-of-informed-consent issues in our jurisprudence was offered by Justice Leibson.

> "Lack of informed consent" is not, *per se*, a tort. It is only a term useful in analyzing . . . the type of negligence which occurs when a physician has not made a "proper disclosure of the risks inherent in a treatment." Louisell and Williams, Medical Malpractice, Vol. 2, Sec. 22.04. (Emphasis original.).

Keel v. St. Elizabeth Med. Ctr., 842 S.W.2d 860, 862–63 (Ky. 1992) (Leibson, J., concurring); *see also Fraser v. Miller*, 427 S.W.3d 182, 187 (Ky. 2014) (Keller, J., concurring) ("KRS 304.40–320 does not require a physician to obtain informed consent, it simply states when informed consent shall be deemed to have been obtained"). In other words, the claim of medical negligence, and our earlier analysis of that claim and the judgment dismissing it, subsumes the claim that Dr. Trover failed to obtain informed consent.

That leaves us with direct fraud and constructive fraud. We will address the allegations of each type of fraud separately and, where necessary, separately as against the two Appellees.

By order dated September 16, 2008, the circuit court "adjudged that claims by [Brown] are barred by the statute of limitations and . . . all claims against Dr. Trover are hereby dismissed with prejudice." (R. 1283) (emphasis omitted). That order of dismissal included all of Brown's fraud claims against Dr. Trover. Nowhere in his brief does Brown argue that this was error.

"[A]ppellate courts will decline to reach issues an appellant raised in a lower court but failed to brief on appeal." *Commonwealth v. Pollini*, 437 S.W.3d 144, 148 (Ky. 2014) (citing *Grange Mut. Ins. Co. v. Trude,* 151 S.W.3d 803, 815

(Ky. 2004) (holding that failure to address discovery request in appellate brief constituted a waiver of the issue) and *Commonwealth v. Bivins,* 740 S.W.2d 954, 956 (Ky. 1987) ("Normally, assignments of error not argued in an appellant's brief are waived.")). Because the circuit court dismissed all of Brown's fraud claims against Dr. Trover as barred by the statute of limitations, and because Brown does not argue in his brief[15] that the circuit court erred in this ruling, we hold that Brown waived any error regarding dismissal of those claims on statute of limitations grounds. We move on to Brown's assertions of error regarding the entry of summary judgment in favor of the Foundation on the fraud claims against it.

It is difficult to tell whether Brown's direct fraud claim is for fraudulent misrepresentation or fraud by omission. We shall analyze both.

Fraud by misrepresentation "requires proof that: (1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the defendant knew the representation to be false or made it with reckless disregard for its truth or falsity; (4) the defendant intended to induce the plaintiff to act upon the misrepresentation; (5) the plaintiff reasonably relied upon the misrepresentation; and (6) the misrepresentation caused injury to the plaintiff." *Giddings & Lewis*, *Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011).

Brown does not make clear what representation he believes actionable. We do not find clarity in his brief, nor in any citation to the record

[15] Nor does Brown's Prehearing Statement list this as an issue. *Brown v. Trover, et al*, No. 2012-CA-001880-MR, Docket Entry 3, Pre-hearing Statement of Appellant filed Nov. 14, 2012.

appearing in the brief. Although Brown does not direct us to the complaint for the answer, we looked there anyway.

The eighth amended complaint says only that the Foundation "made representations . . . through oral presentations, advertisements, letters, and other written documents that [Dr. Trover] was a competent physician" and capable of competently reading CT, x-ray, and other radiological scans. (R. 711). There is, based on our rather thorough search of the record, nothing more to the alleged misrepresentation than this. And this is not enough.

"[E]xpress[ions] as to the competency or reputation of . . . a physician . . . are nothing more than matters of opinion, judgment, or expectation." *Jeffcoat v. Phillips*, 534 S.W.2d 168, 171-72 (Tex. Civ. App. 1976), *writ refused NRE* (June 30, 1976). "A mere statement of opinion or prediction [such as the likelihood of physician's successful treatment] may not be the basis of an action" for fraud. *McHargue v. Fayette Coal & Feed Co.*, 283 S.W.2d 170, 172 (Ky. 1955); *Everett v. Downing*, 298 Ky. 195, 203, 182 S.W.2d 232, 236 (1944) ("The general rule is that expressions of opinion do not constitute a fraud.").

There is good reason for prohibiting fraud claims based on someone's mere subjective opinion. Aside from the fact that everybody has one, an opinion is nothing more than "a belief or judgment that rests on grounds *insufficient to produce complete certainty*." Random House Dictionary 1358 (2d ed. 1987) (emphasis added). Whether an opinion is correct or incorrect, right or wrong, true or false, can only be determined by a future event.

For example, suppose we concede that the Foundation's employment of Dr. Trover was an expression of its opinion, even a representation, that Dr. Trover was competent to read Brown's renal angiogram. Whether that representation was correct or incorrect, *i.e.*, true or false, could only be determined *after* Dr. Trover read the angiogram. It would be fair to argue, therefore, that the Foundation's opinion of Dr. Trover's competence to read Brown's angiogram turned out to be wrong, or false. However, with regard to most of his patients the opinion was true as the proof in the record demonstrates he competently read a large majority of the radiological scans submitted to him. Logic thus demonstrates the impossibility of determining, at the time it is expressed, whether "[a] mere statement of opinion or prediction" is true or false and, therefore, it cannot be the basis for a claim for fraud. *McHargue*, 283 S.W.2d at 172.

And, even if we presume the statements regarding Dr. Trover's competency were not mere opinion but actually constituted false representations of fact, we still must agree with the Foundation that Brown produced no affirmative evidence as to the third element – that the Foundation knew or believed its representation of Dr. Trover's competence, whatever form it may have taken, was false.[16] We acknowledge, as Brown points out, that the Kentucky Board of

[16] Our examination of the record revealed certain hospital employee deposition testimony, not cited by Brown in his brief, indicating they and other employees had lodged complaints regarding Dr. Trover over many years. However, we saw no indication that, before Dr. Trover read Brown's angiogram, the Foundation investigated, substantiated, or responded to those complaints in any way that would support a claim that the Foundation did not believe Dr. Trover to be a competent physician generally, or competent specifically to read Brown's renal angiogram.

Medical Licensure temporarily suspended Dr. Trover from the practice of medicine and placed conditions on his medical license. However, Brown engaged the Foundation's and Dr. Trover's services in 2000, long before Dr. Kluger questioned Dr. Trover's competence in late 2003 and even longer before the licensure board became involved in 2005. Where then is the proof that the Foundation did not believe its own opinion (or its expression of that opinion) that Dr. Trover was competent? Brown offers none. With no such proof, it cannot be said there is a genuine issue of material fact regarding the element of knowledge of the falsity of the representation. The third element cannot be established, the claim necessarily fails, and the Foundation was entitled to judgment as a matter of law.

Additionally, "fraud is actionable only if it results in damage to the complainant[.]" *Gersh v. Bowman*, 239 S.W.3d 567, 573 (Ky. App. 2007) (citation omitted). Brown presented no proof of any compensable injury[17] caused by the Foundation's expression of its belief in Dr. Trover's competence. We again looked to Brown's brief for direction to the record where he presented any proof of injury. Again, we find no direction there.

Instead, we see that Brown has conflated alleged wrongful conduct in reading radiological scans (a negligent tort) and alleged fraudulent representation (an intentional tort). The clearest example of that is near the end of his brief. There, after identifying Dr. Trover's practice of "not reading x-rays on view boxes,

[17] It is significant that our Supreme Court has chosen not to embrace lost chance for recovery or a better medical result as a compensable injury. *Kemper v. Gordon*, 272 S.W.3d 146, 152-53 (Ky. 2008).

and merely holding them up, interpreting mammograms too quickly and not following hospital protocol[,]" Brown states he "believes this conduct constitutes fraud" by which Brown was injured. (Appellant's brief, p. 24). But, of course, that *conduct* does not constitute fraud causing injury. Without such evidence, we cannot say there is a genuine issue of material fact regarding whether any *misrepresentation* caused Brown a compensable injury – the sixth fraud element – and, again, the claim necessarily fails as a matter of law. *Gersh*, 239 S.W.3d at 573 (plaintiff must prove fraud caused him injury).

To the extent Brown is arguing a claim of fraud by omission, it too must fail. As our Supreme Court said:

> [A] fraud by omission claim is grounded in a duty to disclose. To prevail, a plaintiff must prove: (1) the defendant had a duty to disclose the material fact at issue; (2) the defendant failed to disclose the fact; (3) the defendant's failure to disclose the material fact induced the plaintiff to act; and (4) the plaintiff suffered actual damages as a consequence. The existence of a duty to disclose is a matter of law for the court.

Giddings & Lewis, *Inc.*, 348 S.W.3d at 747.

Brown focuses on the first element, duty. He argues the Foundation had a duty "to inform Appellant that . . . Dr. Trover was in need of supervision or actually being supervised because of behavior problems [and] that staff at the Trover Foundation had expressed concerns to the administration about Dr. Trover[.]" (Appellant's brief, p. 24). Assuming such a duty was imposed upon Dr. Trover, it would not apply to this case. As we already noted, when Dr. Trover

read Brown's renal angiogram, not even Dr. Kluger suspected Dr. Trover of anything and it was years before the licensure board temporarily suspended Dr. Trover's license.

As a corollary to the above, Brown also claims the Foundation failed to disclose that staff at the Foundation had expressed concerns to the administration regarding Dr. Trover's substandard medical practices. We do not agree that these facts require our creation of a duty to disclose information. Once again, the timing of these suspicions does not fit Brown's claim. But there is another reason we agree with the circuit court that there is no duty here.

The existence of a duty is a question of law to be decided by the court. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). The circuit court found no legal duty on behalf of a doctor or a hospital to disclose behavioral and personal issues of a treating physician to patients. Our review of the law confirms this. Whatever duty Brown might imagine in this regard would be unworkable. The likely result of recognizing such a duty – *i.e.*, a duty to inform patients of unproven complaints against doctors – is to create more liability than it avoids. We see nothing in our jurisprudence that would encourage or justify requiring the breach of one duty in order to satisfy another. The circuit court was correct in finding no such duty exists.

And, once again in this case, we find no injury – the fourth element of the cause of action for fraud by omission. Fraud "without damage is, of course, not actionable." *Curd v. Bethell*, 248 Ky. 127, 58 S.W.2d 261, 263 (1932). Brown

has failed to produce any evidence of injury experienced as a direct and proximate result of the Foundation's fraudulent omissions.

There was insufficient evidence in the record to create a genuine issue of material fact as to the various elements of Brown's claim for direct fraud, whether by misrepresentation or omission. Therefore, the summary judgment as to such claims must be affirmed.

This leaves constructive fraud. Constructive fraud, unlike direct fraud, "arises through some breach of a legal duty which, irrespective of moral guilt, the law would pronounce fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Coomer v. Phelps*, 172 S.W.3d 389, 393 (Ky. 2005) (quoting *Wood v. Kirby*, 566 S.W.2d 751, 755 (Ky. 1978)). "Constructive fraud may be found merely from the relation of the parties to a transaction or from circumstances and surroundings under which it takes place." *Epstein v. United States*, 174 F.2d 754, 766 (6th Cir. 1949). The doctrine of constructive fraud is rooted in equity. *See Pickrell & Craig Co. v. Bollinger-Babbage Co.*, 204 Ky. 314, 264 S.W. 737, 740 (1924).

Brown claims he relied on the Appellees and their expertise in assuring that he would receive the care of a competent physician. He asserts that, had he known the issues relative to Dr. Trover's practice that were eventually uncovered in the Foundation's investigations, he would not have agreed to be a patient of Dr. Trover or the Foundation.

Again, there is the timing problem for Brown; however and additionally, the duty analysis undertaken above with regard to fraud by omission applies equally here. We cannot find error in the circuit court's ruling that there is no duty to disclose unproven[18] allegations of a medical professional's imperfections. For these reasons, summary judgment on the issue of constructive fraud was proper.

And as a category of claims, all Brown's fraud causes of action lack evidentiary support sufficient to create a genuine issue of material fact as to at least one element of the claim. Therefore, we cannot find that the circuit court erred as a matter of law in concluding that Dr. Trover and the Foundation were entitled to summary judgment.

CONCLUSION

All orders of the Hopkins Circuit Court granting summary judgment in favor of Dr. Trover and the Foundation are affirmed.

KRAMER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

TAYLOR, JUDGE, concurring in part and dissenting in part. I concur with the majority opinion except as concerns their disposition of the negligent

[18] Indeed, Brown's citations to the record indicates that when Dr. Trover read his renal angiogram, most if not all the allegations challenging Dr. Trover's competence were yet to be made.

credentialing claim to which I respectfully dissent. I would recognize the tort of negligent credentialing in Kentucky.

In modern medical practice, hospitals have increasingly entered into the arena of hiring and employing physicians covering every facet of medical expertise. These physicians, such as Dr. Trover, are unilaterally selected and granted privileges to practice medicine at the hospital by the hospital. Considering our common-law negligence principles, it is only reasonable and just that hospitals must utilize reasonable care in granting privileges to physicians.

Before this panel are some 24 related appeals involving Dr. Trover and Trover Clinic. In these cases, numerous plaintiffs have alleged that Dr. Trover committed malpractice year after year in the interpretation of radiological studies while a staff physician at Trover Clinic. The sheer magnitude and horrendous nature of Dr. Trover's acts of alleged malpractice while working at Trover Clinic are both inexplicable and disconcerting. These cases underline the reason why the tort of negligent credentialing should be adopted in this Commonwealth. If appellant can demonstrate that Trover Clinic breached its duty by granting privileges to Dr. Trover, who was incompetent, and if appellant can demonstrate harm therefrom, I believe an action for negligent credentialing should be allowed. Accordingly, I would reverse the circuit court's summary judgment dismissing appellant's negligent credentialing claim and remand for further proceedings below.

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