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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000109-MR

CLYDE CHAPMAN, AND
KANDI CHAPMAN — APPELLANTS

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 13-CI-00024

MICHELLE MURRAY, D.P.M.; AND
HOSPITAL OF LOUISA D/B/A
THREE RIVERS MEDICAL CENTER — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, NICKELL, AND TAYLOR, JUDGES.

COMBS, JUDGE: Clyde Chapman appeals the order of the Lawrence Circuit Court which dismissed his case against Dr. Michelle Murray and the Hospital of Louisa, Inc., D/B/A Three Rivers Medical Center (TRMC). After our review, we vacate and remand.

On November 17, 2010, Dr. Murray surgically removed a neuroma from Chapman's left foot. His pain continued, and Dr. Murray diagnosed a second neuroma. She removed the second neuroma on May 18, 2011. Once again, Chapman's pain did not cease, but he continued to treat with Dr. Murray. She prescribed antibiotics and wound care consistent with treatment for an infection. In September 2011, Chapman underwent an MRI, which indicated another possible neuroma. Instead of electing to have a third surgery, Chapman decided to seek a second opinion.

On October 13, 2011, Chapman asked Dr. Murray for his records. He began treating with Dr. Timothy Webb. The record indicates that Dr. Webb also treated Chapman's condition as an infection. Dr. Webb's notes from January 9, 2012, indicate that, "patient thinks he may have foreign object left in foot." However, after reviewing Chapman's MRI, on January 31, 2012, Dr. Webb performed a procedure on Chapman's foot and discovered foreign material. After the removal of the foreign material, Chapman's condition improved. However, his foot is permanently damaged.

On January 30, 2013, Chapman filed a complaint in the Lawrence Circuit Court alleging negligence by Dr. Murray and TRMC. In their answers, Dr. Murray and TRMC alleged that Chapman's case was barred by the statute of limitations. On October 2, 2013, the trial court entered an order dismissing the case by entry of summary judgment on the grounds of untimely filing of the complaint. Chapman

filed a motion to alter, amend, or vacate the order, which the court denied on December 19, 2013. This appeal followed.

The applicability of a statute of limitations is a question of law. Thus, our review is *de novo*. *Ragland v. DiGiuro*, 352 S.W.3d 908, 912 (Ky. App. 2010). Medical negligence cases must be commenced within one year of accrual of the action. Kentucky Revised Statute[s] (KRS) 413.140(1)(e). Accrual is calculated from the time *one discovers or should discover* an injury. *Hackworth v. Hack*, 474 S.W.2d 377, 379 (Ky. 1971). Discovery of the injury entails: (1) identifying the injury and (2) determining that the defendant may have caused the injury. *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654, 659 (Ky. App. 2009).

In this case, the question is one of the disputed discovery of the injury. Chapman filed his complaint on January 30, 2013. He asserts that the accrual began on January 31, 2012, when Dr. Webb discovered the foreign material in Chapman's foot. On the other hand, Dr. Murray and TRMC argue that the action had accrued by January 9, 2012, when Chapman indicated to Dr. Webb that he *suspected* something might be in his foot.

It is impossible to examine this case without considering *Wiseman v. Alliant Hospitals, Inc*., 37 S.W.3d 709 (Ky. 2000), in which the facts are remarkably similar to the ones before us. Wiseman underwent gynecological surgery in 1989. She began experiencing pain in her tailbone immediately after the operation. When the pain did not subside in the time frame as expected, Wiseman asked her doctor if the pain could be related to the surgery. She was treated for a broken

tailbone. However, Wiseman's pain persisted. Her new doctor attributed the pain to the broken tailbone. However, in 1996, a sliver of a metal surgical tool – specifically a probe like the one used in Wiseman's surgery in 1989 – was removed from her body.

Wiseman filed her lawsuit eleven months after the metal fragment was extracted. The surgeon defendant filed a motion for summary judgment, arguing that her suit was barred by the statute of limitations. The Supreme Court disagreed. It held that:

> her cause of action did not accrue until the fact of her injury became objectively ascertainable.
>
> A legally recognizable injury does not exist until the plaintiff discovers the defendant's wrongful conduct. Because [Wiseman's] injury was not readily apparent until the discovery of the piece of uterine probe, she was unaware that she had a viable claim for medical malpractice. *A mere suspicion of injury* due to medically unexplainable pain following an invasive surgery *does not equate to discovery of medical negligence.*

Id. at 713. (Emphases added.)

We believe that the same reasoning is applicable here. Dr. Murray and TRMC emphasize Chapman's statement that he knew something was wrong and that he thought something might have been in his foot. They also point out that Chapman said he knew that something had been wrong for some time and that there was probably a foreign object. They contend that his statements revealed knowledge of the injury as defined by the Court. However, the Court has also declared that "[o]ne who possesses no medical knowledge should not be held

responsible for discovering an injury based on the wrongful act of a physician." *Id*. at 712. We believe that because of his lack of medical training or experience, his words reflected the speculation of a non-professional.

Dr. Murray and TRMC urge us to follow the holding of *Vannoy v. Milum*, 171 S.W.3d 745 (Ky. App. 2005). However, we believe that it is distinguishable from the case before us. Vannoy sued his doctor for medical negligence based on the physician's prescribing the medication gentamicin. Vannoy began experiencing adverse effects of the medication in 1998. He filed a complaint in 2002. Vannoy argued to this Court that his action began accruing in 2001 when his attorney informed him that he had a legal cause of action. The court disagreed. It was undisputed that Vannoy recognized the adverse effects of gentamicin in 1998 and that he was aware of the identity of the prescribing doctor. Thus, the court held, Vannoy knew what his harm was and the cause of it.

In this case, Chapman only suspected but did not have confirmation of his harm or its cause until a second physician performed an exploratory procedure. Chapman knew that he had debilitating pain. But unlike Vannoy, Chapman could not identify the source of his pain. He was consistently (albeit erroneously) treated for infection until the foreign matter was discovered.

It is noteworthy that Chapman testified that he continued in the course of treatment because he trusted his doctors, effectively disregarding his own suspicions as a layman. Our Supreme Court has held that we should not construe the statute of limitations in a way that would create pressure on plaintiffs to file

lawsuits hastily so as to potentially undermine the patient-doctor relationship. *Harrison v. Valentini*, 184 S.W.3d 521, 525 (Ky. 2005). A patient's deference and participation in continuing treatment justifiably toll the statute of limitation. *Id*. Therefore, we must conclude that the statute of limitations was triggered by the actual discovery of the foreign matter in Chapman's foot on January 31, 2012. His lawsuit was timely filed.

Accordingly, we vacate the order to dismiss and remand for further proceedings.

ALL CONCUR.

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