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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001756-MR

BOBBY RUSSELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 13-CI-03414

DR. PRAEEN GUNDELLY;
DR. ANDREW HOLLEIN;
DR. ARDIS HOVEN;
DR. NANCY MULLEN;
DR. BRIAN MURPHY;
DR. THEIN MYINT;
DR. CHARLES SARGENT; AND
DR. ALICE THORNTON — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND VANMETER,[1] JUDGES.

[1] Judge Laurence B. VanMeter concurred in this opinion prior to being elected to the Kentucky Supreme Court. Release of this opinion was delayed by administrative handling.

LAMBERT, J., JUDGE: Bobby Russell appeals from the Fayette Circuit Court order granting summary judgment to the appellees based on their assertion that Russell's claims of action were time barred. We affirm.

In his Statement of the Case, Russell acknowledges that "[a] fairly complete factual history of the case i[s] contained in the trial court's Order and Opinion." Thus we begin by summarizing those findings as well as matters contained in the record itself. We shall focus on chronological events – not factual controversies - since the appeal is limited to determining whether the trial court's application of the statute of limitations in granting the motion for summary judgment was appropriate.

On September 17, 2004, Russell presented himself to the Emergency Department at University of Kentucky Hospital (U.K.) with complaints of perianal abscesses and perirectal fistulae as well as flu-like symptoms. Russell stated at the time that he had been ill and was bleeding and had had unprotected sex with a male who might be Human Immunodeficiency Virus (HIV) positive. Russell was admitted as a patient, and the following day began undergoing tests for HIV infection. Two initial tests indicated that Russell was positive for HIV as did a repeated screen on September 20, 2004. One particular test, the Western Blot test, was sent to a remote laboratory.

Russell was discharged from inpatient care on September 24, 2004, and instructed to follow up care with Dr. Ardis Hoven at the Bluegrass Care Clinic (BCC), an affiliate of U.K. Based upon Russell's multiple positive HIV test

results, his high "viral load," as well as his condition upon admission (and statements he made at the time) at U.K., Dr. Hoven diagnosed Russell as HIV positive. The results of the Western Blot (which came back after Russell's discharge from the hospital but before beginning care with Dr. Hoven) was negative, but Russell was never informed of that result.

Russell questioned the diagnosis and independently sought further testing by the Fayette County Health Department (Health Department). On October 21, 2004, after receiving yet another positive result of HIV testing, Russell expressed satisfaction with the diagnosis and began treatment the following December. Treatment included an arsenal of chemotherapy and prescription medications; Russell was to continue this regimen for the next eight years.

Five years later, Russell began doubting his diagnosis again. He made comments to his social worker at AIDS Volunteers of Lexington (AVOL) that he had received negative results on two oral swab tests and one blood test at the Health Department on July 15, 2009. He also claimed that his initial positive results were more likely caused by a bone marrow transplant which he had undergone at some undisclosed time and place in the past.[2] On November 25, 2009, Russell was evaluated by Dr. Hoven, and she ordered another HIV diagnostic test. This test indicated that Russell remained infected with HIV.

[2] In a June 15, 2011, Facebook post, Russell mentioned that he had received a "bone marrow transplant . . . after serving in the Air Force in 1996." He attributes the transplant, not HIV infection, for weakening his immune system.

However, Russell later insisted that the results were falsified by U.K. and its employees.

According to Russell, Dr. Hoven apologized to him for the lack of proper documentation in his file. An email sent by her to appellee Dr. Alice Thornton shortly thereafter stated that Russell "still contends that he had a bone marrow transplant and he still isn't convinced that he has HIV disease. I repeated a screening antibody here to document once again for him."

Russell continued his treatment but remained skeptical of his diagnosis. He made statements to social workers, doctors, and on social media - beginning in October 2009 – that he believed he had been misdiagnosed. 2009 was also the year that Russell filed for benefits with the Veterans Administration. It was there that Russell claims he was told that all his tests there returned negative results for HIV.

In January 2010 Russell began his threats to sue U.K. and its employees that assisted the hospital in his care. In February of that year he alleged contact with the Centers for Disease Control (CDC), claiming that the CDC took him to an undisclosed location for further testing, the results of which Russell said were negative.

In 2011 and 2012, Russell posted social media comments about his alleged misdiagnosis and alleged unnecessary chemotherapy. A July 2011 Facebook post read: "I hope these seven lawsuits leave me rolling in the deep." On May 11, 2012, Russell posted: "[A]nd now I have no need to talk or discuss

anything with [the hospital] because I've decided to let them explain their actions **to my attorney**." (Emphasis ours.) On June 11, 2012, Russell posted the following Facebook message to his cousin: "I showed [your mom] the blood test that proved the health condition had been misdiagnosed and [what] I had been trying to tell everyone had finally become a reality."

Russell also mentioned seeking legal counsel as early as 2011. In January 2011 he was noted as saying that "upon advice of counsel" he could not speak to anyone at the BCC. The record indicates that two attorneys declined to represent Russell in 2012, specifically on May 17, 2012, and June 28-29, 2012. Russell filed the within lawsuit on August 15, 2013. The suit was filed by Jonathan Dailey, who is from out of state, practicing in Kentucky pursuant to an order granting him *pro hac vice* status. Kentucky Supreme Court Rule (SCR) 3.030(2). Two local co-counsel have withdrawn since the lawsuit's filing; Kevan Morgan has represented Russell since June 6, 2014; Mr. Dailey's last appearance as co-counsel was at the trial court level. Russell filed a timely Notice of Appeal *pro se*, but Mr. Morgan has resumed representation since that time.

The lawsuit initially named a total of fifteen defendants. U.K. Medical Center, University Hospital, BCC, and the Health Department were dismissed as protected by the doctrine of sovereign immunity. Other parties dismissed by the Fayette Circuit Court were two Health Department employees (Sharon Brown and Jana Collins), Dr. Rice Leach, and Dr. Charles Sargent. The latter two parties were mistakenly included in Russell's *pro se* Notice of Appeal.

On November 26, 2014, Dr. Rice Leach was dismissed as a party by Order of this Court. Dr. Charles Sargent should also be dismissed since the matter of his dismissal by the trial court was with prejudice on December 17, 2013, and not contested by Russell at any time since.

We begin by reciting the standard for appellate review of an order granting summary judgment:

> The relevant Kentucky rule relating to summary judgment, CR 56.03, authorizes such a judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

> [T]he movant should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy. *See, Isaacs v. Cox,* Ky., 431 S.W.2d 494 (1968). Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.

Steelvest, at 482.

Kentucky Revised Statutes (KRS) 413.140 recites the applicable statute of limitations, set out below in pertinent part:

> (1) The following actions shall be commenced within one (1) year after the cause of action accrued:
>
> . . . .

> (e) An action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice;
>
> . . . .
>
> (2) In respect to the action referred to in paragraph (e) of subsection (1) of this section, 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; provided that such action shall be commenced within five (5) years from the date on which the alleged negligent act or omission is said to have occurred.

"Thus, in considering a motion for summary judgment under this statute of limitations, the Court must decide whether the evidence construed in the light most favorable to the plaintiff[] indicates that [Russell] **knew or should have known** [he] had been injured by [the appellees] more than one year prior to filing suit on [August 13, 2013]." *Bray v. Husted*, 11 F. Supp. 3d 854, 856 (E.D. Ky. 2014), *citing Wiseman v. Alliant Hospitals, Inc.*, 37 S.W.3d 709, 712 (Ky. 2000)(emphasis added).

All of the dates listed above are verified by Russell, in his initial complaint, in his lengthy deposition held on June 13, 2014, and in his brief before this Court. In spite of that, Russell insists that he lacked the knowledge to file suit until January 2013, after he held in his hands a paper copy of the negative 2004 Western Blot test. Therefore, he argues, he filed his complaint within one year of "knowing" of his alleged misdiagnosis, and the trial court erred when it granted the appellees' motion for summary judgment.

We cannot agree. Weighing the facts in a light most favorable to Russell, we nonetheless cannot ignore the dates of Russell's negative test results (some of which he performed himself and declared were "99 percent accurate") beginning, according to him, as early as 2009. He was receiving legal advice as early as 2010-2012. Russell fails to convince us that receiving a paper copy of his 2004 Western Blot test results in January 2013 is the only way of determining when he "knew or should have known" of his alleged misdiagnosis. *Wiseman,* at 712. Unlike the plaintiff in *Wiseman*, who required exploratory surgery to discover the defects in her surgeon's performance, Russell's complaint was based on HIV blood tests - some positive, some negative – performed throughout the eight-year span of his treatment with the appellees. He cannot have it both ways: Russell cannot claim that all the negative test results amounted only to mere skepticism on his part rather than actual proof. He knew or should have known well before January 2013 of his alleged misdiagnosis.

Russell also argues that the statute is tolled by the "continuous course of treatment" doctrine.

> [W]here a patient relies, in good faith, on his physician's advice and treatment or, knowing that the physician has rendered poor treatment, but continues treatment in an effort to allow the physician to correct any consequences of the poor treatment, the continuous course of treatment doctrine operates to toll the statute of limitations until the treatment terminates at which time running of the statute begins.

Harrison v. Valentini, 184 S.W.3d 521, 525 (Ky. 2006). We agree with the appellees that this argument has not been properly preserved for appellate review. Kentucky Rules of Civil Procedure (CR) 76.03(8). *See also Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 212 (Ky. 2012). We decline further discussion of the continuous course of treatment doctrine in order to avoid unnecessary analysis of what might be considered facts in controversy.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES DR. PRAEEN (SIC) GUNDELLY, DR. ANDREW HOELLEIN, DR. ARDIS HOVEN, DR. NANCY MULLEN, DR. BRIAN MURPHY, DR. THEIN MYINT, DR. CHARLES SARGENT, AND DR. ALICE THORNTON:

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