

RENDERED: FEBRUARY 2, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-000922-MR

TEDDY ALBERT ALLMAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 15-CI-02214

DR. MUSHABBAR SYED, AS EMPLOYEE  
OF THE UNIVERSITY OF KENTUCKY GILL  
HEART INSTITUTE & DR. DAVID MCRAE,  
AS EMPLOYEE OF THE UNIVERSITY OF  
KENTUCKY GILL HEART INSTITUTE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND JONES, JUDGES.

JONES, JUDGE: Acting without the assistance of counsel, the Appellant, Teddy Albert Allman (“Allman”), appeals from two orders of the Fayette Circuit Court, dismissing his claims of deliberate indifference and medical negligence against Mushabbar Syed, M.D., and David McRae, P.A. Finding no error, we affirm.

## I. BACKGROUND

On November 15, 2007, Allman was treated at the University of Kentucky Gill Heart Institute by Appellee, Dr. Mushabbar Syed. Dr. Syed reviewed the results of a recent echocardiogram that was performed on Allman after an examination detected a heart murmur. Dr. Syed's report indicates that Allman had a trileaflet aortic valve.<sup>1</sup>

Allman had a follow-up echocardiogram at the University of Louisville on March 11, 2014, which indicated his "aortic valve is bicuspid."<sup>2</sup> Allman alleged that he did not learn the result of the University of Louisville echocardiogram until a time between April and July of 2014, while he was housed at the Webster County Jail. Allman provided in pertinent part that:

The Plaintiff had another follow-up echocardiogram done at U. of L. on 3/11/2014 while under supervision in Jefferson County . . . . Upon the Plaintiff's receipt of those 3/11/2014 results, while he was being housed at the Webster County Jail between 4/30/2014 to 7/21/2014, he became somewhat aware of the fact that he has been the victim of acts of wrongdoing/malpractice with his very limited knowledge from other past echocardiogram test results and diagnosis of his Aortic Valve Regurgitation.

(R. V. 3 p. 329).

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<sup>1</sup> This finding essentially meant that Dr. Syed believed Allman's aortic valve was configured normally. In a normal aortic valve there are three leaflets, and because of this it is called "trileaflet."

<sup>2</sup> Bicuspid aortic valve is an inherited form of heart disease in which two of the leaflets of the aortic valve fuse resulting in a two-leaflet valve (bicuspid valve) instead of the normal three-leaflet valve (tricuspid).

Next, Allman was seen again at the University of Kentucky, Gill Heart Institute on April 6, 2015, this time by David McRae, a physician's assistant, for review of another echocardiogram that was performed on April 1, 2015. The echocardiogram found that Allman's aortic valve was a bicuspid valve. On April 6, 2015, McRae noted in Allman's medical history that Allman had a bicuspid aortic valve. The results of the echocardiogram were faxed to Allman at the Northpoint Training Center on April 7, 2015. Allman's initial complaint included that he learned on April 6, 2015, that his April 1, 2015, echocardiogram at the University of Kentucky showed a bicuspid aortic valve. Additionally, Allman signed a grievance on April 9, 2015, containing the following statement:

[M]y new Echo. done at U.K. showed that my Aortic Valve is indeed Bicuspid, which is in agreement with the U of L Echo of 3-11-14. All previous Echo's done, including previous Echo's done at U.K. show that my Aortic Valve is TRICUSPID!!! . . . Ever hear of this thing called Malpractice?!

(R V.1, p. 24). Despite these records, Allman argued to the trial court that he did not learn the results of his April 1, 2015, echocardiogram from the University of Kentucky indicating a bicuspid aortic valve until May 12, 2015.

Allman filed his complaint on two occasions. First, Allman filed a complaint against the University of Kentucky, Gill Heart Institute, Dr. Mushabbar Syed, and David McRae on May 18, 2015, in the Eighth Division of Fayette Circuit Court. Service of summons did not issue and the lawsuit never moved

forward. Next, Allman re-filed identical claims in the Ninth Division of the Fayette Circuit Court on June 24, 2015. In that suit, summonses issued to McRae and the University of Kentucky Gill Heart Institute were sent via certified mail and signed for by “Margaret Goldey” on July 6, 2015.

The summons issued to Dr. Syed was returned, unserved, on July 13, 2015. The trial court denied Allman’s request for an order dispensing with the service requirement on July 21, 2015. Allman waited eight months until April 29, 2016, at which time he asked the court to have a new summons issued to Dr. Syed.

On August 10, 2015, McRae moved to dismiss Allman’s complaint against him. The trial court granted the motion to dismiss on October 13, 2015. The court found that Allman failed to state a claim for Eighth Amendment deliberate indifference against McRae under *Brooks v. Celeste*, 39 F.3d 125 (6<sup>th</sup> Cir. 1994). The court also found that Allman’s claim for state law medical negligence failed to state a claim against McRae as there was no allegation of breach of the standard of care, causation, or injury. *See Jenkins v. Best*, 250 S.W.3d 680, 688 (Ky. App. 2007).

Following the court’s October 2015 order, Allman attempted to appeal. Allman’s appeal was dismissed on March 11, 2016. Next, on April 6, 2016, Allman filed a motion for discretionary review with the Supreme Court of

Kentucky, seeking reversal of this Court's dismissal of his improper appeal from a non-final order. The Supreme Court denied Allman's motion on April 19, 2017.

Thereafter, Allman filed a "Motion to Compel to Amend the Argument and Amend the Original Complaint and All Subsequent Filings Pursuant to CR 60.01" with the trial court on April 29, 2016, indicating that he wished to drop his complaint against the University of Kentucky and the Gill Heart Institute, leaving only McRae and Dr. Syed as the named defendants. In doing so, Allman acknowledged that the University of Kentucky and the Gill Heart Institute, were entitled to immunity, but argued that McRae and Dr. Syed were not.

Next, on May 16, 2016, Dr. Syed filed a motion to dismiss Allman's suit against him as time-barred as summons had not been issued against him in good faith within the applicable limitations period and for Allman's failure to state a claim under federal or state law. Allman responded and attended the June 3, 2016, hearing by telephone. Thereafter, the court entered an order dismissing Allman's claims against Dr. Syed. The court found that Allman knew or should have known of his alleged claims against Dr. Syed on or before April 9, 2015, at the latest. As such, the court found that Allman's claims against Dr. Syed are time-barred.

Allman filed a notice of appeal from the court's June 13, 2016, order of dismissal.<sup>3</sup> This appeal followed.

## II. STANDARD OF REVIEW

The standard for granting a motion to dismiss pursuant to CR<sup>4</sup> 12.02 is well known:

The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

*James v. Wilson*, 95 S.W.3d 875, 883–84 (Ky. App. 2002) (internal quotations and footnotes omitted).

A court should not grant a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to CR 12.02 “unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’ Union of Kentucky v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Because we are concerned only with whether the complaint states a cause of action, and not

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<sup>3</sup> Allman filed a notice of appeal prior to the entry of the June 13, 2016 order. On June 21, 2016, he filed a “Re-Submission of Notice of Appeal.” Allman also filed a subsequent “Corrected/Related Re-Submission of Re-Submission to Notice of Appeal Pursuant to CR 73.03, CR 75.11, CR 60.01, and CR 60.02” on June 20, 2016.

<sup>4</sup> Kentucky Rules of Civil Procedure.

liability, our decision necessarily depends on the allegations made in the complaint. *See Smith v. Isaacs*, 777 S.W.2d 912, 915 (Ky. 1989). “Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court’s determination; instead, an appellate court reviews the issue de novo.” *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

### III. ANALYSIS

#### A. Timeliness of Claim against Dr. Syed

If, on its face, a complaint shows that an action is barred by time, the statute of limitations may be raised by a motion to dismiss. *Tomlinson v. Siehl*, 459 S.W.2d 166, 167 (Ky. 1970). Allman argues that the trial court erred in dismissing his claims against Dr. Syed as time-barred. Allman contends that he did not have knowledge of his misdiagnosis until May 12, 2015, which is when he claims that he received his report from UK which showed a bicuspid aortic valve instead of a tricuspid aortic valve, as diagnosed by Dr. Syed in 2007.

An action for medical malpractice must be commenced within one year after the cause of action accrued. KRS<sup>5</sup> 413.140(1)(e). The same statute further provides a negligence or malpractice action against a physician “shall be deemed to accrue at the time the injury is first discovered or in the exercise of

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<sup>5</sup> Kentucky Revised Statutes.

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.” KRS 413.140(2).

KRS 413.140(2) is clear that it is the plaintiff's actual or constructive discovery of his injury that starts the running of the one-year limitations period for medical malpractice and negligence actions. The Supreme Court of Kentucky 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. Significantly, however, 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). Rather, 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. *Id.*

The trial court concluded that Allman knew or should have known of his alleged claims against Dr. Syed “on or before April 9, 2015, at the latest.”



Thus, the court found that Allman's claims against Dr. Syed were untimely because Allman failed to properly serve Dr. Syed within the requisite time-period.

We agree.

Allman attached several medical records to his complaint. These medical records establish that he learned his aortic valve was bicuspid, not tricuspid, well over a year before he perfected service upon Dr. Syed.

First, Allman was informed that he had a bicuspid aortic valve through his March 11, 2014, University of Louisville echocardiogram. Allman's own complaint alleges that he received the results at some time between April and July 2014.

Next, the letter containing the results of Allman's April 1, 2015, echocardiogram from the University of Kentucky, noting that his aortic valve was bicuspid, was faxed to the Northpoint Training Center on April 7, 2015. Allman's own complaint alleges that his April 6, 2015, medical record was faxed to his institution at Northpoint Training Center on April 7, 2015. Finally, Allman filed a grievance on April 9, 2015, based on his April 1, 2015, echocardiogram results, expressly referencing malpractice. Therein, Allman provided, in pertinent part:

[M]y new Echo. done at U.K. showed that my Aortic Valve is indeed Bicuspid, which is in agreement with the Uof L Echo of 3-11-14. All previous Echo's done, including previous Echo's done at U.K. show that my Aortic Valve is TRICUSPID!!! So who made the mistake with the misdiagnosis of my Aortic valve having (3) three leaflets or just (2) two Leaflets?? Ever hear of this thing called Malpractice?!

Even if we look at the facts in a light most favorable to Allman, he, at the very latest, had specific knowledge of his potential claims against Dr. Syed on April 9, 2015, as referenced by his inmate grievance form. Thus, under the discovery rule, the statute of limitations period began to run on April 9, 2015.

Here, Allman had a summons issued for Dr. Syed on June 24, 2015. The document was returned unserved on July 13, 2015. Allman did not take any additional steps to secure service until April 29, 2016, when he asked the court to have a new summons issued to Dr. Syed. Because Allman knew or should have known of his claims against Dr. Syed on April 9, 2015, and because he failed to perfect service upon Dr. Syed within the one-year statutory period, the trial court properly dismissed his claims against Dr. Syed as time-barred.

We likewise find no merit in Allman's argument that his continuous course of treatment tolled the statute of limitations. In *Harrison v. Valentini*, 184 S.W.3d 521 (Ky. 2005), the Supreme Court of Kentucky adopted the continuous treatment rule in medical malpractice cases. As applied, the "continuous course of treatment doctrine" provides that "the statute of limitations is tolled as long as the patient is under the continuing care of the physician for the injury caused by the negligent act or omission." *Id.* at 524. Here, Allman has not received treatment from Dr. Syed since November 2007. The treatment Allman received from different physicians through the Kentucky Department of Corrections cannot be

imputed to Dr. Syed for the purposes of applying the continuous course of treatment doctrine.

In conclusion, having reviewed the record, we agree with the trial court that Allman failed to timely bring his claims against Dr. Syed. This renders all other arguments with respect to Dr. Syed moot.

### **B. Failure to State a Claim as to McRae**

First, Allman failed to state a cognizable claim for deliberate indifference under federal law. Allman claims that McRae acted with deliberate indifference to his medical needs in violation of the Eighth and Fourteenth Amendments. Even if McRae were a prison official, which he is not, Allman has failed to allege any facts sufficient to demonstrate that he could prevail against McRae under the Eighth Amendment. The United States Supreme Court has held that a plaintiff prisoner seeking redress under the Eighth Amendment must allege and show “acts or omissions sufficiently harmful to evidence deliberate indifference to the plaintiff’s serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 105, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). It is well established that a mere difference of opinion between a prisoner patient and his doctor over the patient’s diagnosis and treatment does not amount to cruel and unusual punishment. *Estelle*, 429 U.S. at 107. Allman failed to allege any facts to support cruel and unusual

punishment. Rather, the record reveals that Allman has received appropriate testing and follow up testing as prescribed.

Additionally, Allman has failed to allege a state law medical negligence claim upon which relief may be granted. Allman failed to allege any facts supporting a breach of duty by McRae or any consequent injury that would evidence a breach of duty by McRae.<sup>6</sup> A medical negligence case, like any negligence case, requires proof that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the standard by which his or her duty is measured; and (3) consequent injury. *Jenkins v. Best*, 250 S.W.3d 680, 688 (Ky. App. 2007).

Allman has not alleged any error on the part of McRae. Instead, Allman's own complaint alleges that McRae *correctly* diagnosed his bicuspid valve in 2015. In Allman's "Motion to Correct/Augment/Add Omission" Allman alleged that McRae committed malpractice by including bicuspid aortic valve in his medical history on his April 6, 2015, record. However, the record supports that Allman had a history of a bicuspid aortic valve as of April 6, 2015, and McRae's inclusion of that condition on Allman's medical history was, in fact, correct. The record also plainly refutes Allman's contention that McRae tried to "cover-up" Dr. Syed's misdiagnosis. McRae clearly stated in his report that he believed Allman

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<sup>6</sup> While we do not address Allman's substantive claims against Dr. Syed because those claims are time barred, we do note that nowhere did he allege that his health was actually damaged because of Dr. Syed's alleged misdiagnosis. A misdiagnosis alone is not sufficient to support a claim; the plaintiff must also allege some harm was proximately caused by the breach.

had a bicuspid aortic valve; this diagnosis was clearly at odds with Dr. Syed's diagnosis.

Most problematic, however, is that Allman has failed to allege any injury whatsoever resulting from his treatment with McRae or Dr. Syed. This is fatal to his claim. Nowhere does Allman allege that his health was compromised by the care he was given by these providers. The fact that each provider gave a different diagnosis, standing alone, is insufficient to state a claim.

### **C. Amendment**

Allman also asserts that the trial court erred when it refused to allow him to amend his complaint. We disagree. In determining whether to grant a motion to amend a party's complaint, a circuit court "may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself." *First National Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988). Other factors include whether amendment would prejudice the opposing party or would work an injustice. *See Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 493 (Ky. 1983). Ultimately, whether a party may amend his complaint is discretionary with the circuit court, and we will not disturb its ruling unless it has abused its discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky. App. 2000). None of superfluous amendments Allman proposed would have altered the outcome of this action. Accordingly, the trial

court did not abuse its discretion when it refused to allow Allman to amend his complaint.

#### **IV. CONCLUSION**

For these reasons, we affirm the Fayette Circuit Court.

ALL CONCUR.

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