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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002255-MR

JULIE ANN WELCH — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN III, JUDGE
ACTION NO. 02-CI-01600

GERALD G. EDDS, M.D. AND
GERALD G. EDDS, P.S.C., D/B/A
AESTHETIC LASER AND COSMETIC
SURGERY CENTER — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

KNOPF, JUDGE: Julie Welch appeals from a summary judgment of the Daviess Circuit Court, entered October 11, 2004, dismissing on statute of limitations grounds her medical malpractice and fraud claims against Gerald Edds, M.D., and his P.S.C., which does business in Owensboro as the Aesthetic Laser and Cosmetic Surgery Center. Welch alleges that in July and August 1997,

Edds induced her to undergo liposuction and an abdominoplasty by misrepresenting his credentials. She also claims that his negligent performance of those procedures resulted in her disfigurement. Welch ceased treating with Edds in June 1998, but did not bring her complaint until December 2002. She contends, nevertheless, that the trial court erred by deeming her complaint outside the one-year limitations period because she did not "discover" her claim until some time in 2002 when she first learned that Edds had misrepresented his credentials and a medical expert first told her that Edds's treatment of her did not meet the standard of care. Although we agree with the trial court that Welch's malpractice claim is time barred, her misrepresentation claim is not. Because that claim raises issues not adequately briefed in or addressed by the trial court, we must vacate and remand for additional proceedings.

According to Welch, when she contacted Edds in July 1997 to see if he could improve the contour of her abdomen so that she would look better in her clothes, she asked him if he was "a board-certified plastic surgeon," and he stated that he was, without qualification. Because a friend had told her that Edds was the president of the Board of Plastic Surgeons, she asked him if that was correct. According to Welch, he told her that it was. In fact Edds was a board-certified facial plastic surgeon—certified in plastic surgery from the neck up—but was

not board-certified in plastic surgery affecting other areas of the body. Nor was he the president of any board. Edds recommended liposuction[1] and an abdominoplasty,[2] and told Welch that he had recently learned of an abdominoplasty technique called a "horseshoe incision" which would result in an inconspicuous scar. Welch testified at her deposition that Edds informed her that he had never performed the "horseshoe incision" technique.

Welch also claims to have derived a false impression of Edds's credentials from various advertising brochures, which, although they clearly state that Edds's board certification was in facial plastic surgery, occasionally refer to "plastic surgery" or "plastic surgeon" without qualification. Welch maintains that in conjunction with Edds's alleged verbal assurance that he was a plastic surgeon and president of the Board of Plastic Surgeons, those references reasonably contributed to her belief that Edds was board certified to perform her liposuction and abdominoplasty.

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[1] Liposuction is a "[m]ethod of removing unwanted subcutaneous fat using percutaneously placed suction tubes." *Stedman's Medical Dictionary,* 27th Edition, p. 1022 (2000).

[2] Commonly referred to as a "tummy tuck," abdominoplasty is "]a]n operation performed on the abdominal wall for cosmetic purposes." *Stedman's Medical Dictionary,* 27th Edition, p. 2 (2000).

Edds operated on Welch in August 1997. A few months later Welch complained to him that the abdominoplasty scar was larger and more noticeable than he had predicted and that the contouring of her abdomen was lumpy and uneven. Edds performed a revision surgery at no charge in April 1998. Following that surgery Welch was still unhappy. She thought the scarring had become worse, and her abdomen was still uneven and now had hollow areas, divots, which, Welch believed, looked "scooped out," and horrible. Her final visit to Edds was on June 3, 1998, when, she claims, his rough treatment caused her to lose whatever lingering faith she had in his ability.

We agree with the trial court that it was at that point that the limitations period commenced on Welch's claim for negligent treatment. As the parties have noted, KRS 413.140 provides in pertinent part that

> (1) The following actions shall be commenced within (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.

Under subsection (2)'s discovery rule, our Supreme Court has explained, 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 has been committed."[3]

Welch maintains that although she knew she had been harmed (i.e. disfigured) in June 1998 when she ceased to rely on Edds's treatment, she did not know she had been injured or wronged (i.e. that her legally protected interests had been invaded) until November 2002 when a doctor first told her that Edds's treatment had been negligent. The discovery rule, however, generally does not require expert confirmation that one has been wronged. It requires rather that one be aware of facts sufficient to put one on notice that one's legal rights may have been invaded and by whom. Expert assistance may be required to apprise one of the underlying facts concerning the harm and its agent,[4] but mere uncertainty about the legal significance of those facts does not toll the limitations period. Here, Welch knew by June 1998 that the results of Edds's treatment were deeply dissatisfying. Those results were sufficient to put her on notice that Edds's treatment may have been negligent, and thus were also sufficient to start the limitations period on her

[3] Wiseman v. Alliant Hospitals, Inc., 37 S.W.3d 709, 712 (Ky. 2000).

[4] Wiseman v. Alliant Hospitals, Inc., *supra.*

negligence claim. Her suit filed in December 2002 was thus untimely and was properly dismissed.

Welch's fraud claim is different. She maintains that Edds falsely represented to her that he was board-certified with respect to the liposuction and abdominoplasty procedures and that without those false representations she would not have agreed to treatment. The trial court ruled that this claim, too, was untimely, but we disagree.

Kentucky, like many other states, has subsumed fraud and deceit based claims relating to the adequacy of a physician's pre-treatment disclosures within the doctrine of informed consent.[5] That doctrine derives from both the patient's basic right to determine what is done to her body and the physician's fiduciary duty to make that right meaningful by supplying the patient with enough information to enable her to make informed decisions.[6] Under the doctrine, the physician has a duty "to disclose to a patient information that will enable h[er] to evaluate knowledgeably the options available and the

[5] Holton v. Pfingst, 534 S.W.2d 786 (Ky. 1975); KRS 304.40-320. *See, e.g.* Howard v. University of Medicine and Dentistry of New Jersey, 800 A.2d 73, (N.J. 2002); Paulos v. Johnson, 597 N.W.2d 316 (Minn.App. 1999); Stone v. Foster, 164 Cal. Rptr. 901 (Cal.App. 1980); *and see generally,* Laurent B. Frantz, "Modern Status of Views as to General Measure of Physician's Duty to Inform Patient of Risks of Proposed Treatment," 88 ALR3rd 1008 (1978).

[6] Cobbs v. Grant, 104 Cal. Rptr. 505 (Cal. 1972); Canterbury v. Spence, 464 F.2d 772 (D.C.Cir. 1972).

risks attendant upon each before subjecting that patient to a course of treatment."[7] Unfortunately, the parties failed to address the informed-consent doctrine in their presentations to the trial court and thus provided that court with an inadequate basis for its ruling on Edds's summary judgment motion. Although it is clear that the trial court erred by finding Welch's informed-consent claim untimely, whether the case she has proffered is otherwise sufficient to withstand Edds's motion raises serious questions in need of additional proceedings.

With respect to the limitations issue, a lack-of-informed-consent claim is still one against a physician sounding in negligence or malpractice and thus is subject to the limitations provisions of KRS 413.140. Under the discovery rule, the limitations period did not commence until Welch knew or should have known of facts sufficient to put her on notice that she may have been harmed by Edds's inadequate disclosures. In most cases where a patient is not informed of a risk of an adverse outcome and that outcome occurs, the outcome itself will put the patient on notice of her claim. In this case, however, Welch concedes that she was aware that her treatment involved a certain risk of disfigurement, but she contends that Edds's

[7] Howard v. University of Medicine and Dentistry of New Jersey, 800 A.2d 73, 78-79 (N.J. 2002) (citations and internal quotation marks omitted).

misrepresentation of his certification had the effect of understating that risk. The bad result alone, she argues, did not expose the understatement and thus was not enough to apprise her that she had been inadequately informed. Only the discovery of Edds's alleged falsehoods could do that.

We agree. Although the trial court did not err by finding that Edds's advertising materials did not misrepresent his credentials and background, that finding does not dispose of Welch's additional allegation that Edds assured her that he was a board-certified plastic surgeon and president of the board of plastic surgeons. Welch claims to have relied on those assurances and not to have learned until the summer of 2002 that those assurances were false. If that is the earliest she should have discovered the alleged falsehoods, then her suit filed in December 2002 was timely. Because Welch was entitled to rely on what Edd's told her, we do not believe she should have discovered the false statements any sooner. Her claim based on the lack of informed consent is thus not barred by the statute of limitations.

Beyond this, however, we are not willing to go. As noted above, because the parties did not treat this as an informed-consent case, they did not present the trial court with the appropriate sources for determining whether Welch had raised material issues of fact on all the elements of her cause of

action. They have raised the informed-consent issue on appeal, but as a Court of review, we are generally unwilling to address matters the trial court has not had an opportunity to rule upon.[8] We are not willing to do so here, where the important and complex issues are deserving of a fully developed record. Accordingly, we vacate the October 11, 2004, summary judgment of the Daviess Circuit Court, and remand for reconsideration of Edds's summary judgment motion in light of the law of informed consent. The parties should address what, in Kentucky, are the elements of such a cause of action and whether Welch has proffered sufficient evidence to meet them.

ALL CONCUR.

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[8] Cabbage Patch Settlement House v. Wheatly, 987 S.W.2d 784 (Ky. 1999).