

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-002403-MR

BARBARA J. PHIPPS AND  
WILLIAM L. PHIPPS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 01-CI-00756

DR. JOSEF ZOLDOS

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.<sup>1</sup>

McANULTY, JUDGE: On May 14, 1999, Barbara J. Phipps (Barbara) underwent breast reduction surgery to alleviate a chronic headache. Dr. Josef Zoldos performed the surgery. When she awoke from anesthesia, she had the headache, and it continued unabated. Barbara stopped seeing Dr. Zoldos on September 8, 1999.

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<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In March of 2000, in conjunction with her filing of a disability claim, Barbara reviewed her medical records maintained by her primary care physician who had initially suggested the breast reduction as a possible cure for her headache. To her surprise, she read letters in her file from two neurologists that had been consulted by her primary care physician and had examined Barbara, which stated that they did not believe that the procedure would alleviate her headache. On February 28, 2001, Barbara filed a medical malpractice complaint against Dr. Zoldos on the basis that the surgery was not medically indicated and unnecessarily performed. As one defense, Dr. Zoldos asserted that the statute of limitations barred her claim.

The Fayette Circuit Court entered a summary judgment dismissing Barbara's complaint on the grounds that under KRS 413.140, she failed to file her action within the applicable limitation period. The trial court reasoned that it was undisputed that Barbara last saw Dr. Zoldos on September 8, 1999, and she was still complaining of the headache at that time. And the trial court concluded that -- as a matter of law -- the statute of limitations began running at that time because she should have known that she had been injured by Dr. Zoldos's negligence. Because we believe, however, that whether Barbara should have known at that time that she had been injured is a

fact question which should not have been decided by summary judgment, we vacate the decision of the Fayette Circuit Court and remand for a jury trial.

The standard of review of a trial court's granting of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial warranting a judgment in its favor. See James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Insurance Co., 814 S.W.2d 273, 276 (Ky. 1991).

Once a party files a properly supported summary judgment motion, the nonmoving party cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 482 (Ky. 1991). In considering a motion for summary judgment, the court must view all the facts and inferences drawn therefrom in the light most favorable to the party opposing the motion, and all doubts are to be resolved in his or her favor. See id. at 480. "Even though a trial court may believe the party opposing the

motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." See id.

In the opening paragraphs of this opinion, we presented the facts in the light most favorable to Barbara. Dr. Zoldos disputes at least two of the facts. First, he disputes the time that Barbara first learned of the opinions of the two neurologists. Second, he disputes Barbara's contention that he advised both her and her husband that the surgery would not provide her immediate relief from her headaches, but would take some time.

Dr. Zoldos argues that since Barbara underwent surgery to alleviate pain, the injury, if any, occurred when the surgery did not alleviate the pain. And, as further contended by Dr. Zoldos, at the very latest Barbara knew or should have known of her injury when she saw him for the last time on September 8, 1999, and she was still suffering from a headache. The trial court accepted Dr. Zoldos's latter argument.

The applicable statute of limitation for this case is KRS 413.140. It is as follows:

- (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.

Subsection (2) of KRS 413.140 is known as the discovery rule. As used in the rule, "injury" refers to the actual wrongdoing or the malpractice itself. See Wiseman v. Alliant Hospitals, Inc., 37 S.W.3d 709, 712 (Ky. 2000). And under the rule, a cause of action accrues when either a person knows of the injury or when the injury becomes objectively ascertainable. See id. at 712-713.

The discovery rule has been explained and applied in a number of Kentucky and Sixth Circuit cases. See Tomlinson v. Siehl, 459 S.W.2d 166, 167 (Ky. 1970); Hackworth v. Hart, 474 S.W.2d 377, 379 (Ky. 1971); Wiseman, 37 S.W.3d 709; Imes v. Touma, 784 F.2d 756, 758 (6<sup>th</sup> Cir. 1986). We believe the cases of Hackworth and Imes are factually similar to this case.

In Hackworth, Harvey Hackworth had a vasectomy, which was performed by Dr. Ernest Hart on November 17, 1961. The operation was unsuccessful, because on October 11, 1962, Harvey's wife gave birth to their fifth child. Harvey filed a lawsuit against Dr. Hart on March 11, 1963, alleging both

negligence and breach of contract. Dr. Hart argued that his negligence lawsuit was time-barred under the discovery rule. The case proceeded to trial. But at the close of Harvey's case, the trial court directed a verdict for Dr. Hart.

On appeal, the Kentucky Court of Appeals held that the limitations issue turned on when Harvey's wife discovered, or in the exercise of reasonable care should have discovered that she was pregnant by him. The evidence produced at trial, however, did not conclusively establish that date. So the court reversed the directed verdict and remanded the case for trial. In so doing, the court acknowledged that evidence at another trial could well present a factual issue -- requiring submission to the jury -- on when the injury was objectively ascertainable. See id. at 380.

In Imes, Dr. Ralph Touma performed surgery on Edward Joseph Imes on February 14, 1978 to repair Edward's left femur, which had been crushed in an accident. In the repair, Dr. Touma used a metal plate. In August of 1980, Edward suffered a reinjury to the femur, for which he underwent surgery on October 24, 1980. A different physician, Dr. Patrick Serey, performed the second surgery.

On August 27, 1980, Dr. Serey evaluated Edward before concluding that surgery was necessary. After that evaluation, Dr. Serey made an office note that Edward "never had adequate

solidarity in his femur," which statement was indicative of malpractice by Dr. Touma in performing the first surgery. By deposition, Edward asserted that he was not aware of this office note until January of 1982, when an attorney whom he had consulted pointed it out to him. Edward filed his lawsuit on December 28, 1982, against Dr. Touma and the manufacturer of the metal plate. Dr. Touma contended that there was sufficient information available to Edward to put him on notice of possible malpractice before January of 1982. The district court granted summary judgment in favor of the two defendants.

As to Dr. Touma, the Court of Appeals for the Sixth Circuit concluded that whether Edward should have known upon reinjury -- some two years before he filed his lawsuit -- that the injury was a result of negligence was a fact question which should not have been decided by summary judgment. Id. at 759.

In sum, what Hackworth and Imes demonstrate is that in some cases, the date on which an injury becomes objectively ascertainable is a question of fact for the jury. Here, given the pleadings and deposition testimony, we believe this is one of those cases. Barbara has consistently pled and testified that she did not know of her injury until March of 2000 when she reviewed her primary care physician's file containing the letters from the 2 neurologists. She filed her lawsuit on February 28, 2001. Thus, if her testimony is believed, the

filing of the lawsuit was within the one-year malpractice statute of limitation. Dr. Zoldos disputes that March of 2000 is the date on which Barbara's injury was objectively ascertainable. As we see this dispute, its resolution is a matter for jury trial.

Dr. Zoldos makes much of the evidence in support of Barbara's alternative argument: Dr. Zoldos's representation that it could take a year or so for her headache to subside after the surgery tolled the statute of limitation. According to Dr. Zoldos, Barbara's deposition testimony does not support this contention. Thus, Barbara has testified herself out of court. We acknowledge the inconsistency in Barbara's testimony pertaining to Dr. Zoldos's statements as to when she could expect relief from her headache after the surgery. Even if Barbara were to lose on the tolling issue, however, there remains a genuine issue of material fact as to when her injury was objectively ascertainable. As pled in her complaint, that date was March of 2000.

The summary judgment in favor of Dr. Zoldos is vacated, and this cause of action is remanded for trial.

ALL CONCUR.

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