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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000465-MR

BARBARA A. ABEL; AND OTHER
INDIVIDUAL APPELLANTS AS
DESIGNATED IN THE NOTICE OF APPEAL — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 07-CI-05178

J. BRENT AUSTIN; LANGSTON,
SWEET AND FREESE, P.A.; AND
BEASLEY, ALLEN, CROW, METHVIN,
PORTIS & MILES, P.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Barbara A. Abel and forty-nine other plaintiffs in the underlying action appeal the Fayette Circuit Court's order granting appellees'

[1] Judge William L. Knopf concurred in this opinion prior to the expiration of his term of Senior Judge service on May 7, 2010. Release of this opinion was delayed by administrative handling.

motions for summary judgment. After a careful review of the record, we affirm the Fayette Circuit Court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants herein, Barbara A. Abel and forty-nine other plaintiffs, filed suit against J. Brent Austin ("Austin"); Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. ("Beasley Allen"); and Langston, Sweet, and Freese, P.A. ("Langston"), alleging breach of fiduciary duty, misrepresentation, and violation of the Kentucky fraudulent conveyance statute. In addition, the appellants sought an accounting and disgorgement in the original action. Austin, Beasley Allen, and Langston represented appellants and many other plaintiffs in an Alabama state court action styled *Mary C. Stevens, et al. v. American Home Products, et al.* (hereinafter referred to as the "*Stevens*" case). Beasley Allen is a law firm located in the state of Alabama, and Langston[2] is a law firm located in the state of Mississippi. Austin's law firm is located in Kentucky.

This lawsuit derives from the infamous diet drug fen-phen litigation. It concerns the alleged mishandling or misappropriation of the settlement funds by Austin, Beasley Allen, and Langston. Initially, all the appellants brought claims in Kentucky in the Boone Circuit Court fen-phen litigation styled *Moore, et al. v. American Home Products, et al.* (hereinafter, the "*Moore*" case) and were originally clients of Kentucky attorneys William Gallion, Shirley A. Cunningham, or Melbourne Mills. Following the settlement of the *Moore* case, which occurred

[2] Even though Langston is located in the state of Mississippi, the trial court found no evidence that any activity regarding the settlement and distribution occurred in Mississippi.

on May 1, 2001, a majority of the settling plaintiffs filed another lawsuit, *Abbott, et al. v. Chesley, et al.* (hereinafter, the "*Abbott*" case) in Boone Circuit Court. This second lawsuit alleged breach of fiduciary duty and fraudulent misrepresentation by Gallion, Cunningham, and Mills. During the discovery phase of the *Abbott* case, it was determined that some plaintiffs' cases had been finalized prior to the *Moore* settlement. This group of plaintiffs, who are the appellants herein, had been referred by Cunningham and other counsel in the *Moore* case to the appellee trial counsels for the *Stevens* case. Afterward, they were included in the settlement of the *Stevens* case, which is the previously mentioned Alabama fen-phen case.

The referral of the appellants to the *Stevens* case occurred after the parameters of its settlement had been determined. In early October 2000, Beasley Allen and Langston reached an agreement in principle with American Home Products, the manufacturer of fen-phen, to settle approximately 3,000 claims for a total of $215 million. The final settlement documents were executed by Beasley Allen and American Home Products on November 28, 2000. The settlement stipulated that each appellant would receive $47,943.84, after the deduction of attorney fees and expenses. When the *Stevens* settlement was effectuated in November 2000, Beasley Allen had no knowledge of the Kentucky plaintiffs in the *Moore* case.

Shortly after the *Stevens* settlement, an attorney with Beasley Allen spoke to Cunningham and inquired as to whether any of Cunningham's claimants

could become a part of the now completed *Stevens* settlement. Beasley Allen was interested in such an arrangement because they had to certify a minimum number of settling plaintiffs by a certain date for the agreement to be binding on American Home Products. According to the record, Cunningham said that he had approximately eighty fen-phen clients that could be transferred from the *Moore* to the *Stevens* action. In order to effectuate this process, Cunningham wanted the cases transferred from their current attorney representation to another Kentucky attorney, Austin. It appears that Cunningham, who was already participating in the *Moore* case, knew that each settling attorney had to certify that his or her fen-phen clients were included in only one action. Thus, he could not handle both the transferred plaintiffs' cases and also the other cases in the *Moore* case. In other words, he needed another attorney to manage this group of plaintiffs in order to remain an attorney of record in the *Moore* case.

The rationale behind these eighty clients opting out of the *Moore* case was that they had already opted out of the national class action settlement. Based on their minimal injuries from the use of fen-phen, they would have received only $500 to $6,000 from the national class action. Additionally, in the negotiations taking place at this time between American Home Products and the *Moore* plaintiffs' counsel, these clients, because of their minimal injuries, were not being considered by American Home Products. By transferring out of the *Moore* case, this particular group of clients would receive a better result by being a part of the *Stevens* settlement. From Beasley Allen's viewpoint, since the *Stevens* case was

already settled, it was only a matter of acquiring these plaintiffs' paperwork to add them to the *Stevens* settlement.

Appellants, however, contend that they did not know about this arrangement until after the filing of the *Abbott* case in Boone Circuit Court. As previously explained, the *Abbott* lawsuit followed the *Moore* settlement and was filed by the majority of settling plaintiffs against Gallion, Cunningham and Mills. Upon discovering their inclusion in a different settlement, appellants claimed that the appellee attorneys never provided them with any documents or meaningful information about the transfer of their cases. Needless to say, the appellants express confusion as to what transpired once their cases were transferred from the *Moore* to the *Stevens* settlement.

Eventually the appellants tracked the transfer of their original cases to Austin, who handled the cases for Cunningham, Gallion, and Mills. They subsequently learned from Austin's deposition that, following the transfer of their cases to the *Stevens* settlement and the disbursement of funds several years earlier, he destroyed all the records. Eventually, the appellants were able to get information about the history of the action from American Home Products.

Appellants then filed suit in Fayette Circuit Court on October 31, 2007. They claim that the date of this filing is within the one-year statute of limitations because it falls within one year of the actual discovery of the injury. Moreover, they assert that they discovered the elements of their cause of action during the November 17, 2006 deposition of appellee Austin in the *Abbott*

litigation and from the April 24, 2007 production of his escrow-account records from Community Trust Bank. The majority of appellants state that they received $29,500 rather than the settlement amount of $47,943.84. The difference between the purported settlement amount and the amount received is $18,443.84.

Next, Austin, based on the Kentucky Revised Statutes (KRS) 413.245 one-year limitations period, filed a motion for summary judgment against a representative plaintiff, Elizabeth Danielle Clore. He maintained that Clore's claim was time-barred. Beasley Allen also filed a summary judgment motion against Clore and a master memorandum in support of its motion for summary judgment against all the plaintiffs. And Langston supported the motion for summary judgment and incorporated by reference both aforementioned motions.

The court held a hearing on October 3, 2008, and took the matter under advisement. On December 15, 2008, the trial court issued its order, which held that Clore's claims, specifically, and the other plaintiffs' claims, generally, were time-barred. Austin then moved for relief pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. On February 12, 2009, the trial court responded to his motion by adding a couple of sentences to clarify the original order. The amended opinion and order were issued on February 12, 2009. Additionally, the trial court ruled that the partial summary judgment motions filed by the plaintiffs, other than Hallie Traylor and Vickie Brewer, and held in abeyance pending resolution of the limitations question, were moot based on the resolution of the limitations issue. Appellants now appeal from this order.

The substance of the appellants' allegations is that the lawyers involved in the settlement mishandled or misappropriated the settlement fund, and these actions constituted a breach of fiduciary duty, misrepresentation, and violation of the Kentucky fraudulent conveyance statute. In sum, they contend that the law firms failed to provide them with necessary information about the aggregate settlement resulting in each appellant's not receiving the additional $18,443.84. But the issue on appeal is whether the limitations period bars the claim.

Appellants contend that the trial court overlooked genuine issues of material fact that are only appropriate for jury resolution with regard to the appellees' proffered limitation defense. In particular, appellants argue that the trial court erred in granting summary judgment against all fifty appellants rather than just Clore; that the Kentucky statute of limitations provisions, rather than the Alabama provisions, should govern the claims against the two out-of-state appellee attorneys; that a jury should decide the factual issues presented by appellees' statute of limitations defense; and, that appellants' misrepresentation claim itself is within the applicable five-year statute of limitations for such claims.

STANDARD OF REVIEW

The standard of review of a trial court's grant 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). In *Paintsville Hosp.*

Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In addition, because factual findings are not at issue, no requirement exists that the appellate court defer to the trial court. *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992). Finally, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest*, 807 S.W.2d at 480.

ANALYSIS

1. Grant of summary judgment *sua sponte* against all plaintiffs

Appellants, other than Clore, argue that the trial court's *sua sponte* grant of summary judgment on statute of limitations grounds was improper because it was in violation of their due process rights, without notice, and without the benefit of a summary judgment motion being filed by the appellees.

Appellants observe that under CR 76.12(4)(c)(v), issues must be preserved for appellate review. They maintain that, in the plaintiffs' response memorandum in opposition to defendants' motions for summary judgment and plaintiffs' combined response memorandum in opposition to the January 2009

motions for summary judgment, they preserved this issue. A perusal of these memoranda, however, shows no specific motion or objection to the trial court's consideration of the fifty cases together.

But, appellants continue and argue that, regardless of whether we determine that they preserved the issue under the civil rules, the trial court's *sua sponte* grant of the motions for summary judgments against all plaintiffs was in error as it represented manifest injustice warranting relief under CR 61.02. This rule states:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

CR 61.02. *See* Stone v. Com., 456 S.W.2d 43 (Ky. 1970). Thus, since the issue does not appear to have been preserved, we must ascertain whether appellants have shown that the trial court committed palpable error in extending its grant of summary judgment to all plaintiffs.

To support the proposition that the trial court committed palpable error, appellants rely on *Storer Communications of Jefferson County, Inc. v. Oldham County Bd. of Educ.*, 850 S.W.2d 340 (Ky. App. 1993). They cite the following language from the case:

> [N]o authority [] allows a trial court to circumvent the civil rules and enter summary judgment *sua sponte* where the legal issues have not been submitted for determination. . . . [i]t is fundamental that a trial court has

> no authority to otherwise dismiss claims without a motion, proper notice and a meaningful opportunity to be heard. CR 56.01 and CR 56.02 clearly provide that a "party" may seek a summary judgment. The rules do not contemplate such a proceeding on the court's own motion.

Id. at 342. The reasoning in the case above is the basis for appellants' contention that they were denied due process when the trial court granted the summary judgment motion against all forty-nine plaintiffs as well as Clore. But the situation herein is distinguishable from *Storer Communications* in several ways.

First, while the summary judgment motion was based on one representative plaintiff, Clore, it differs from the facts in *Storer Communications* since the facts behind the summary judgment motion were pertinent to all the plaintiffs. The motion contained pertinent information and documents about all appellants so that the trial court could rule as to all. Austin provided evidence to show that all the appellants discovered the putative issue at a time that would place the filing of this action after the limitations period. For instance, he provided information that each party received a settlement check sometime in January or February 2001. And, he provided information that in late 2004 and early 2005, Angela M. Ford, appellants' attorney, filed lawsuits against Cunningham, Gallion, and Mills alleging that these attorneys stole millions of dollars from their former clients. Austin highlighted the fact that there was extensive media coverage of the action. And, most significantly, Austin noted that in October 13, 2006, appellants'

attorney received disbursement schedules for most of the appellants, placing them on actual notice of a putative claim.

Next, we observe that appellants knew that the trial court intended to review the entire record in order to rule on as many claims as the evidence warranted. And, based on this notice, appellants had opportunity at that time to point out any genuine issues of material fact. They did not do so. Clearly, when Austin filed his CR 59.05 motion asking for clarification of the original opinion and order, appellants were aware that the summary judgment motion had been granted as to all of the appellants. At this juncture, they had opportunity to point out any genuine issues of material fact pertinent to the remaining appellants. Instead, the appellants took the position that all the claims had been dismissed with prejudice. They argued against the trial court considering Austin's CR 59.05 motion by arguing that the claims had already been dismissed. And, they put forth no evidence disputing the allegations in Austin's motion for summary judgment.

Interestingly, the appellants themselves provide credibility to the concept that the fifty appellants are linked together as a unit. Appellants' counsel filed the action on behalf of all fifty plaintiffs. The appellants' complaint makes identical factual allegations on behalf of all plaintiffs. In addition, following the filing by appellants of a partial motion for summary judgment for two of the appellants, a hearing was held on August 28, 2008. At this hearing, counsel for all the parties and the trial court discussed at length the statute of limitations. During the hearing, counsels agreed that certain facts were common to all plaintiffs

regarding the limitations question for the trial court. Furthermore, the parties appeared to concur that for purposes of economy and efficiency, the trial court could decipher these facts as related to all plaintiffs in order to resolve the statute of limitations issue.

Finally, it is significant to note that a trial court has the authority to grant summary judgment in favor of a non-moving party "where overruling the [movant's] motion for summary judgment necessarily would require a determination that the [non-moving party was] entitled to the relief asked, [and] a motion for summary judgment by the [non-moving party] would have been a useless formality." *See Collins v. Duff*, 283 S.W.2d 179, 183 (Ky. 1955). Here, the trial judge not only had a motion for summary judgment for a representative plaintiff but also had relevant facts to determine whether to grant the summary judgment motion to all the other appellants with similar, if not exact, facts related to the limitations issue.

The trial court, in its opinion and order, held that "Clore's claims against Austin, Beasley Allen, and Langston are now time-barred and each is entitled to a judgment as a matter of law." And, the trial court later stated in the opinion that the undisputed facts are common to all the plaintiffs and, therefore, it dismissed the entire case. Our review of the record shows that the trial court made an exhaustive and thorough review of all the cases, which would have rendered individual rulings for the remaining forty-nine cases a useless formality.

Therefore, we are convinced that the trial court did not commit palpable error in *sua sponte* extending the grant of summary judgment to all fifty appellants.

2. Kentucky or Alabama Statute of Limitations regarding Beasley Allen and Langston

Appellants argue that the trial court erred in applying Alabama's statute of limitations to the claims against Beasley Allen and Langston. According to appellants, these claims "accrued" in Kentucky, not Alabama, thereby requiring the application of Kentucky's statute of limitations as set forth in KRS 413.245. Additionally, appellants argue that Alabama's cause of action for legal malpractice is so dissimilar to Kentucky's legal negligence action that it is not a "like cause of action" under Kentucky law. Hence, they maintain that for these two reasons, the trial court should have ignored Alabama's statute of limitations and applied the Kentucky statute to the two out-of-state appellees.

To begin our analysis of the choice of law issue, we examine Kentucky's "borrowing statute," KRS 413.320, which provides:

> When a cause of action has arisen in another state or country, and by the laws of this state or country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period.

Hence, under this statutory language, Kentucky will borrow another state's statute of limitations if the cause of action "accrued" in another state with a shorter statute

of limitations. *Seat v. Eastern Greyhound Lines, Inc.,* 389 S.W.2d 908, 909 (Ky. 1965). Our next step is to ascertain the applicable statute of limitations in Kentucky and in Alabama. After such determination is made, KRS 413.320 mandates that, if the other state's limitations statute is shorter, it is to be applied. *See Ley v. Simmons*, 249 S.W.2d 808 (Ky. 1952).

The trial court's opinion provided a thorough and scholarly elucidation of Kentucky's and Alabama's statutes of limitations for cases involving professional negligence and breach of fiduciary duties. In essence, under Alabama law, the statute of limitations is two years from the date of the act, omission, or occurrence that gives rise to the claim. *Denbo v. DeBray*, 968 So.2d 983, 989 (Ala. 2006). This time limit is measured from the date of the act *et al.* regardless of when the injury occurred. *Id*. Further, the Alabama limitations statute contains a six-month tolling provision that "if the cause of action is not discovered and could not reasonably have been discovered within such [two-year] period, then the action may be commenced within six months from the date of such discovery or the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier." *Denbo,* 968 So.2d at 989 - 990*,* quoting Ala. Code 1975 § 6-5-574(a). And finally, the six-month tolling provision in Alabama's limitations statute is subject to a four-year repose period, the expiration of which absolutely bars any cause of action. Therein is stated: "in no event may the action be commenced more than four years after such act or omission or failure." *Id.* at 990.

In contrast, Kentucky's statute of limitations for a claim of professional negligence against an attorney is one year. KRS 413.245. But, even though Kentucky's statute is one year, it is, in effect, longer than Alabama's statute because of its "discovery" provision. KRS 413.245 explains "discovery" as follows:

> Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured. Time shall not commence against a party under legal disability until removal of the disability.

Thus, because the statute of limitations begins to run for one year on either the date of occurrence or the date of discovery, Kentucky's statute of limitations is actually longer than Alabama's statute of limitations. Alabama's "discovery" provision is only six months and subject to a four-year cap, while Kentucky's discovery provision is one year and subject to no cap. Consequently, pursuant to KRS 413.320, since Alabama's statute of limitations is shorter than Kentucky's statute, it should be used as the measuring criterion for the two Alabama appellees.

Having determined that Alabama's limitations statute is shorter than Kentucky's in professional negligence cases and, therefore, should be used, we now review appellants' contentions that it still should not be used because it is inapposite to the borrowing statute's requirements. Appellants claim that the cause

of action did not accrue in Alabama and Alabama's legal malpractice cause of action is not a "like cause of action" under Kentucky law and, therefore, Kentucky should not "borrow" Alabama's statute.

While it is true that the borrowing statute is triggered only when the cause of action accrued in another jurisdiction, a cause of action accrues where the breach of duty occurs. *Combs v. International Ins. Co.*, 354 F.3d 568, 593-94 (6th Cir. 2004). Appellants, relying on *Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141 (Ky. 2007), argue that in Kentucky both negligence and damages must occur in order for a cause of action to arise. From this reasoning, they surmise that the cause of action must have occurred in Kentucky rather than Alabama since the deprivation of the funds occurred in Kentucky.

In fact, the accrual rule is relatively simple: "[A] cause of action is deemed to accrue in Kentucky where negligence and damages have both occurred . . . . [T]he use of the word 'occurrence' in KRS 413.245 indicates a legislative policy that there should be some definable, readily ascertainable event which triggers the statute." *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994)(quoting *Northwestern Nat. Ins. Co. v. Osborne*, 610 F.Supp. 126, 128 (D. C. Ky. 1985)) (alterations in original). But, even though the action may have accrued in Kentucky, nothing mitigates against a determination that the action also accrued in Alabama. Beasley Allen's and Langston's actions, including the disposition of the settlement funds, only occurred in Alabama. Therefore, we are not persuaded by

appellants' line of reasoning with regard to the "accrual" issue. The pertinent events related to the Alabama attorneys were processed, settled, reviewed, and confirmed by an Alabama court. Similarly, Beasley Allen and Langston never met with any of the appellants because they sent the settlement funds from Alabama to Kentucky via Austin for distribution.

With regards to the issue of whether Alabama's malpractice cause of action is a "like cause of action" under Kentucky law, we are again not persuaded by appellants' argument that major differences exist between the two states' legal malpractice actions - differences which, according to them, are so dramatic that they are not the same cause of action. A comparison of the two states' requirements for professional negligence actions shows that the substantive burdens of proof, duty/standard of care, breach of duty, proximate causation, and damages are basically the same. For instance, a comparison of the Kentucky case, *Stephens v. Denison*, 150 S.W.3d 80, 81 (Ky. App. 2004), and the Alabama case, *Valentine v. Watters*, 896 So.2d 385, 392 (Ala. 2004), demonstrates the similarity between each state's jurisprudence. Finally, regardless of which limitations statute is applicable, the appellants' claims would have been barred under either limitations statute, rendering an incorrect choice-of-law decision as harmless error.

3. Determination of statute of limitations is a jury question

Appellants assert that a determination of the statute of limitations issue is a factual one and that they presented genuine issues of material fact that justified a jury resolution of when they discovered, and/or when they reasonably

should have discovered, that they had a cause of action. Yet, in the appellants' brief, they comment on page 17:

> The Court's resolution of this statute-of-limitations challenge is, to a significant degree, a question of statutory interpretation – specifically, an interpretation of what the General Assembly intended by "was, or reasonably should have been discovered."

Appellants seem to concede that the issue is resolved by statutory interpretation. Statutory interpretation is a question of law in Kentucky. *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789 (Ky. 2008). In the case at hand, we must ascertain with particularity whether the trial court correctly granted a motion for summary judgment. This analysis relies on whether any genuine issues of material fact existed to support the non-moving party or whether the moving party was entitled to judgment as a matter of law.

Again we observe that the limitations statute for legal negligence cases is KRS 413.245. It has been referenced above, but to summarize, it actually provides two different limitations periods: one year from the date of the "occurrence," and one year from the date of the actual or constructive discovery of the cause of action. *Michels*, 869 S.W.2d at 730. The "occurrence" limitation period begins to run upon the accrual of the cause of action. *Id*. The second or "discovery" limitation period begins to run when the cause of action was discovered or, in the exercise of reasonable diligence, should have been discovered. *Id*. Moreover, "[t]he discovery rule focuses not on when a plaintiff has actual knowledge of a legal cause of action, but whether a plaintiff acquired

knowledge of existing facts sufficient to put the party on inquiry." *Blanton v. Cooper Industries*, *Inc*., 99 F. Supp. 2d 797, 802 (E. D. Ky. 2000). And, the discovery prong is triggered at the point the plaintiff discovered or should have discovered the alleged wrong. *Conway v. Huff*, 644 S.W.2d 333, 334 (Ky. 1982).

Because appellants concede that their action is time-barred under the accrual rule, the key issue for the trial court's determination of the statute of limitations issue is when the appellants knew or reasonably should have known that something was amiss or possibly wrong with their fen-phen settlement. Consequently, the discovery rule requires appellants to commence their actions within one year "from the date when the cause of action was, or reasonably should have been, discovered[.]" KRS 413.245.

Appellants insist that summary judgment was improper as there is a *bona fide* dispute as to when appellants became aware that they had a cause of action against appellees. Keeping in mind that the discovery portion of the statute is triggered when a claimant knew, or "should have known that something was amiss," appellants seem to misconstrue the discovery requirements by maintaining that they had to have actual knowledge of all relevant documentation before the limitations statute begins to run. *Queensway Financial Holdings Ltd.*, 237 S.W.3d at 151-152.

The action was filed on October 31, 2007. Looking at the history of the case, numerous events occurred before this date, beginning with the January 29, 2001 receipt of a settlement check from Austin. Another significant date is

October 13, 2006, when the appellants received from Beasley Allen a letter and a disbursement statement from the settlement. This documentation showed that each appellant was entitled to $47,943.84 from the fen-phen settlement rather than the $29,500 that they had received.

Likewise, in the time period between those two crucial events, other events occurred and additional information became available which indicated something was amiss. These documents and matters of public record assist the trial court in its assessment of the limitations question. The trial court's opinion comprehensively lists many of these occurrences. The appellants do not dispute these facts. Conspicuously, appellants do not dispute the events as enumerated by the trial court. Thus, we find that the trial court had sufficient information to conclude that appellants' claims were time-barred as a matter of Kentucky law and there were no genuine issues of material fact to submit to a jury.

4. The misrepresentation claim is within its applicable five-year statute of limitations.

Appellants' final contention is that the claim for misrepresentation is not subject to KRS 413.245, but rather subject to the five-year statute of limitations set forth in KRS 413.120(12). KRS 413.245 provides a one-year limitations period to any "civil action[s], whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others[.]" KRS 413.120(12) provides for certain actions to be filed within five years after the

cause of action accrued, including "[a]n action for relief or damages on the ground of fraud or mistake."

Following their pronouncements about a different limitations period for the misrepresentation claim, appellants then rely on two unpublished Court of Appeals cases to support the proposition that the KRS 413.245 limitation period does not govern misrepresentation claims against professionals that arise independently from the professional relationship. *See Raisor v. Burkett*, 2008 WL 2219887 (Ky. App. 2008)(2007-CA-001508-MR), and *Mid States Steel Product Co. v. University of Kentucky*, 2006 WL 1195914 (Ky. App. 2006)(2003-CA-002509-MR)(2003-CA-002694-MR)(2004-CA-001434-MR). Notwithstanding that both cases rely on the reasoning from the same Texas court, which concerned the difference between legal malpractice and negligent misrepresentation, these cases are not persuasive because they are not on point here. Furthermore, precedential authority does exist, which holds that KRS 413.245 applies to any claim against an attorney arising from his/her professional status, regardless of the form in which the claim is pled. *Lucchese v. Sparks-Malone, P.L.L.C.,* 44 S.W.3d 816, 818 (Ky. App. 2001).

We would be remiss if we did not point out that the civil rules state that:

> Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published

> opinion that would adequately address the issue before the court.

CR 76.28(4)(c). So, although appellants are entitled to submit the unpublished case to the court for consideration, under CR 76.28(4)(c) we are not bound to follow the reasoning of those decisions.

A review of appellants' complaint shows that the section claiming "misrepresentation" states as follows:

> The Defendants' failure to disclose to the Plaintiffs the true amount of settlement funds to which they were entitled, the amount of settlement funds withheld from the Plaintiffs, and the amount the Defendants paid themselves in fees constitutes either **negligent, reckless or intentional misrepresentation[.]** (Emphasis added).

Clearly, KRS 413.120 is inapplicable unless appellees' actions were intentional given that fraud must be intentional. Next, we observe that KRS 413.120(12) specifically refers to fraud and mistake, not misrepresentation as averred by the appellants in their complaint. In the case at hand, appellants are alleging that the appellee attorneys committed certain misrepresentations relating to the communication between them and their clients. This type of misrepresentation is different from fraud.

In order to establish the elements for fraud, a claimant must establish six elements: "[1)] a material misrepresentation[; 2)] which is false[; 3)] known to be false or made recklessly[; 4)] made with inducement to be acted upon[; 5)] acted in reliance thereon[;] and [6)] causing injury." *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). Plus, CR 9.02 mandates that all

averments of fraud or mistake be stated with particularity. While it is true that compliance with the particularity requirement of CR 9.02 merely commands that the claimant set forth facts with sufficient particularity to apprise the defendant fairly of the charges, we do not believe that appellants have met this requirement in Count Three of the complaint. *See Scott v. Farmers State Bank*, 410 S.W.2d 717 (Ky. 1966). And therefore, we are not convinced that here the required elements for fraud have been pled with sufficient particularity. In sum, appellants cannot change a legal negligence case into a fraud case in order to have a more generous statute of limitations.

In addition, the plain language of KRS 413.245 says that it applies to "a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others[.]" And the language expressly preempts "any other prescribed limitation of actions which might otherwise appear applicable[.]" *See* KRS 413.245. Notably, the language of the statute also encompasses any action for perceived fraud between an attorney and client. Thus, the trial court correctly interpreted the appellants' misrepresentation count as a claim, which is based on the rendering of professional services and, thus, falls under the limitations statute KRS 413.245. To conclude, we hold that appellants' claims of misrepresentation are under the limitations purview of KRS 413.245 because this statute applies to civil actions, whether in tort or contract, that arise out of the rendering of professional services.

CONCLUSION

Based on the foregoing, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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ORAL ARGUMENT FOR APPELLEE J. BRENT AUSTIN:

Perry M. Bentley

BRIEF AND ORAL ARGUMENT FOR APPELLEE LANGSTON, SWEET AND FREESE, P.A.:

Melissa Campbell Subit
Cincinnati, Ohio

BRIEF FOR APPELLEE BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.:

David C. Trimble
Lexington, Kentucky

Thomas H. Keene
R. Austin Huffaker, Jr.
Montgomery, Alabama

ORAL ARGUMENT FOR APPELLEE BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.:

R. Austin Huffaker, Jr.