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# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002322-MR

ALLEN GAILOR, ADMINISTRATOR  
OF THE ESTATE OF EDITH ABRAHAMS

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE STEPHEN M. SHEWMAKER, JUDGE  
ACTION NO. 97-CI-00508

LARRY WEBB, EXECUTOR OF THE ESTATE OF  
WILLIAM I. KIMBERLIN; AND  
PAUL L. ADAMS, M.D.

APPELLEES

AND NO. 1998-CA-002409-MR

PAUL L. ADAMS, M.D.

CROSS-APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
JUDGE STEPHEN M. SHEWMAKER  
ACTION NO. 97-CI-00508

ALLEN GAILOR, ADMINISTRATOR  
OF THE ESTATE OF EDITH ADAMS ABRAHAMS;  
AND LARRY WEBB, EXECUTOR OF THE ESTATE  
OF WILLIAM I. KIMBERLIN

CROSS-APPELLEES

OPINION  
AFFIRMING IN PART; REVERSING IN PART; AND REMANDING  
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BEFORE: COMBS, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Allen Gailor, administrator of the estate of Edith Abrahams, has appealed from the judgment of the Boyle Circuit Court entered on August 28, 1998, that dismissed his claims against appellees. Appellee, Paul L. Adams, M.D. has filed a cross-appeal against Gailor. Having concluded that part of the trial court's ruling is erroneous, we affirm in part, reverse in part and remand for further proceedings.

This case involves a complicated series of events and multiple court actions.<sup>1</sup> The first significant event related to this case occurred when William I. Kimberlin died testate in Boyle County, Kentucky, on January 11, 1992. At the time of his death, Kimberlin was married to the sister of Edith Adams Abrahams and Paul Adams. Edith and Adams were beneficiaries of Kimberlin's will. Larry Webb was appointed as the executor of the Kimberlin estate. The Kimberlin estate was probated in the Boyle District Court. Edith's share of the Kimberlin estate was to have been \$28,922.20, but she died intestate on October 30,

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<sup>1</sup>Review of this matter was made more difficult by both parties' failing to fully comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iii) which requires a party in his brief to make "ample references to the specific pages of the record . . . supporting each of the statements narrated in the summary." Furthermore, the parties failed to make sufficient use of the appendix to their briefs by not including various important documents so that they would be readily available for this Court's review. See 76.12(4)(c)(vi).

1992, in Jefferson County, Kentucky, prior to her share being distributed. At the time of her death, Edith was 76 years old and had lived in Kentucky for only a few weeks. The location of Edith's legal residency at the time of her death was later to become the central legal issue in this case.

In August 1992, Edith came to Jefferson County to visit Adams, who was her brother. Edith had lived in New York for approximately 50 years. Edith told Adams that she was separating from her husband of four years, Philip Abrahams, and was moving to Jefferson County. With Philip's knowledge, Edith proceeded to establish her residency in Jefferson County by opening local bank accounts, purchasing a home in her sole name, applying for and receiving a homestead exemption on her real estate taxes, and making arrangements to have her furniture and other personal property moved from her apartment in New York to Jefferson County.

When Edith suddenly died on October 30, 1992, Philip did not immediately come to Kentucky. Adams took care of the burial arrangements and her cremated remains were buried at a family cemetery in Boyle County. While Philip was in Boyle County to attend a memorial service for Edith during the weekend of Thanksgiving 1992, he contacted attorney William Barnett, who represented the Kimberlin estate. Based upon representations made by Philip to Barnett, Barnett prepared for Philip's signature a document entitled, Affidavit of Descent and Disclaimer. The affidavit was mailed to Philip in New York and

he executed it under oath before a notary public on December 3, 1992.

In the affidavit, Philip made the following statements that are of significance to this case: (1) Edith died as a resident of New York, New York; (2) Edith was survived by only her husband, Philip, and her brother, Adams, and had "no other surviving brothers or sisters, or descendants of any deceased brother or sister"; and (3) Philip was waiving all right to inheritance from Edith from the Kimberlin estate, "leaving Paul L. Adams as her only heir and next of kin." The Kimberlin estate proceeded to probate and Adams received a bequest from the estate in December 1992. Adams' bequest included not only the bequest made specifically to him, but also the bequest made to Edith that had been waived by Philip. This would have appeared to have concluded the affairs of the Kimberlin estate as far as Adams' inheritance was concerned, but complications that subsequently arose in Edith's estate have caused further litigation in the Kimberlin estate.

Philip hired counsel from Jefferson County to probate Edith's estate and he asked Adams to administer her estate in Kentucky. Philip wanted the Kentucky probate action to apply only to assets located in Kentucky and to have a separate probate action in New York for New York assets. However, the attorney from Jefferson County advised Philip that since Edith died while a legal resident of Kentucky, Kentucky had jurisdiction of her entire estate. When Adams, as administrator, filed a petition to

probate Edith's estate in Jefferson District Court in January 1993, he listed Edith's place of residence as Jefferson County. Subsequently, Philip continued his objection to listing Kentucky as Edith's place of residence and also challenged the appointment of Adams as administrator. On April 13, 1994, Gailor, the Jefferson County Public Administrator, was appointed to replace Adams as the administrator of Edith's estate.

In an attempt to resolve the dispute concerning Edith's residency, Philip filed an action in Jefferson Circuit Court on March 29, 1995. Philip was represented by attorney Richard Hill, who also represents Gailor before this Court. The Jefferson Circuit Court entered a judgment on June 7, 1996, wherein it found that Edith was "domiciled" in Kentucky at the time of her death.<sup>2</sup> No appeal was filed from that judgment.

This judicial finding that Edith was a legal resident of Kentucky, and not New York, has placed the earlier distribution of the Kimberlin estate to Adams in jeopardy. Since Edith was a legal resident of Kentucky, Kentucky's law of intestate succession provides that Philip was entitled to 50% of Edith's estate, Adams was entitled to 25%, and nine other relatives of the half-blood were entitled to share the remaining

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<sup>2</sup>The record includes the summary judgment from Jefferson Circuit Court which states "Edith Adams Abrahams was domiciled [sic] in Kentucky at the time of her death." While the determination of Edith's domicile was a key element of determining her legal residence, the fact remains that her legal residence was the ultimate question to be answered. See Ellison v. Smoot's Adm'r, 286 Ky. 768, 773-75, 151 S.W.2d 1017, 1020-21 (1941).

25% of Edith's estate.<sup>3</sup>

On October 29, 1997, Gailor filed this action in the Boyle Circuit Court against the appellees challenging the distribution of the Kimberlin estate.<sup>4</sup> Gailor demanded "[t]hat the Settlement of the Estate of William I. Kimberlin be surcharged and set aside and that Plaintiff recover from Larry Webb, Executor and Paul Adams, jointly and severally, the sum of \$28,922.20, together with interest thereon at the legal rate from December 17, 1992 until paid." After various motions were filed and some discovery was undertaken, the Boyle Circuit Court on May 29, 1998, entered an "Agreed Judgment between Plaintiff and Larry Webb, Individually and as Executor of the Estate of William I. Kimberlin." This agreed judgment provided: (1) that Webb "does not contest the allegations contained in the Complaint"; (2) that "[t]he Order entered in Boyle County (sic) District Court on January 26, 1993, confirming the First and Final Settlement of the William I. Kimberlin estate should be set aside, corrected and surcharged to account for the \$28,922.20 plus any accrued interest due to the Estate of Edith Abrahams"; (3) that "Larry Webb, individually, shall have no liability . . . [and] is dismissed as a party to this action"; (4) that "Larry Webb,

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<sup>3</sup>Kentucky Revised Statutes (KRS) 391.010, 391.030, 391.040 391.050, 392.020.

<sup>4</sup>The parties have made vague references to two motions that were filed regarding the Kimberlin estate and Edith's domicile in the Jefferson District Court and the Boyle District Court. Apparently, both motions were denied and are of no relevance to our review.

Executor of the Estate of William I. Kimberlin, shall remain as a party to this action because, in the event Paul Adams is ordered by the Court to return funds to the Estate of William I.

Kimberlin, Larry Webb, as Executor, will be required to properly account for such monies, prepare any necessary amended final settlement of the Kimberlin estate and distribute any funds in his hands as Executor to the person entitled thereto"; and (5) that "[t]o the extent that KRS 395.165,<sup>5</sup> KRS 396.195, or any other statute requires Larry Webb, as Executor of the Estate of William I. Kimberlin, to take any action, then, to the extent required by such statutes, this action will be deemed to include Larry Webb, Executor of the Estate of William I. Kimberlin, as Plaintiff for any funds due the Estate of William I. Kimberlin."

On June 8, 1998, Adams filed a CR 59.05 motion to set aside the agreed judgment. This motion was denied on June 30, 1998, in an order wherein the circuit court also stated that all pending motions were set for a "Hearing" on July 29, 1998, at which time

the Court will hear evidence regarding the Affidavit of Descent and Disclaimer and the circumstances in which it was signed by Philip Abrahams.

The Court will also hear such other evidence as bears upon the two issues in this case - (1) whether the final settlement in the Kimberlin Estate should be set aside due to the mistake made regarding the domicile of Edith Abrahams, and (2) what is the effect of the Affidavit of Descent and Disclaimer

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<sup>5</sup>There is no such statute.

signed by Philip Abrahams, that is, was the disclaimer valid at all due to the failure to provide a full and fair disclosure to Mr. Abrahams of the amount he was disclaiming or was the disclaimer valid so far as Mr. Abrahams' own interest was concerned.<sup>6</sup>

At the beginning of the "hearing" that occurred on July 29, 1998, attorney Hill, who represents Gailor, advised the trial court that Philip had been hospitalized in New York and was unavailable for the hearing and would be unavailable for the foreseeable future. However, Gailor did not request a continuance of the hearing; and the trial court reiterated its previously stated intention to consider the parties' evidence as to the issues before the court. The attorneys used the "hearing" to argue their positions to the trial court, but no evidence was presented. The trial court entered an order on August 28, 1998, that addressed various issues that were argued at the hearing and dismissed Gailor's claims against Adams. This appeal and cross-appeal followed.

Gailor's first argument is as follows: "The court erred in failing to set aside the final settlement in the Kimberlin estate when no full and fair disclosure was given to Philip Abrahams of the amount he was disclaiming." This argument is totally without merit. Gailor failed to present any evidence at

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<sup>6</sup>Curiously, the record includes a second order entered by the Boyle Circuit Court on July 6, 1998, which also ruled on the same motions from the June 22, 1998, motion hour. The orders are consistent, but do not include the same language. Apparently, attorneys for Gailor and Adams each tendered orders, and both tendered orders were entered by the circuit court.



the hearing to support his claim that "Abrahams' waiver of Edith's interest in the Kimberlin Estate must be set aside due to the lack of disclosure to him of the full value of what he was disclaiming, particularly the failure to disclose any information regarding the proceeds from the sale of the Kimberlin residence."

In its order, the trial court addressed this issue as follows:

Philip has disclaimed any interest in the estate of Edith. That is binding upon him. Consequently, he had no recoverable interest in any property involved in this litigation. Abrahams has also admitted that he misrepresented the facts in his affidavit as concerned the existence of the half-blood heirs. He has also settled with the executor. Consequently, he has no interest in this action. Since he has no interest, he is not a necessary party. Obviously, the above finding is very confusing.

However, Gailor failed to move the trial court pursuant to CR 52.04 "to make a finding of fact on an issue essential to the judgment." Thus, we do not believe that Gailor has properly preserved for our review the question of the sufficiency of the evidence to support this finding by the trial court. We also note that Gailor has failed to comply with CR 76.12(4)(c)(iv), which requires that the brief "contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Furthermore, we note that since Gailor had the burden to go forward with his proof, and presented none, that the trial court's findings as to Philip receiving proper disclosure cannot

be held to be clearly erroneous.<sup>7</sup>

Gailor's next five arguments will be addressed jointly:

- II. The court erred in failing to set aside the final settlement in the Kimberlin estate because the Executor erroneously distributed assets based upon the mistaken belief that Edith Abrahams was domiciled in New York.
- III. The court erred in deciding that appellant, as Administrator of the estate of Edith Abrahams, did not have the authority to take action on behalf of said estate.
- IV. The judgment of the trial court must be reversed because its findings of fact were clearly erroneous.
- V. The court erred in determining that the appellant had severed all claims as may exist against the executor of the Kimberlin estate and therefor KRS 413.120 did not apply.
- VI. The court erred in determining that the waiver signed by Philip Abrahams was effective; Philip Abrahams was not the personal representative of Edith Abrahams' estate and he had no authority to waive any interest belonging to Edith's estate.

In essence, Gailor is claiming that the circuit court erred by dismissing his claim; and we agree. However, Gailor has failed to challenge the actual basis for the circuit court's ruling that dismissed his claim.

In its order dismissing the complaint, the circuit

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<sup>7</sup>CR 52.01.

court relied upon Estates of Cahoon v. Seaton,<sup>8</sup> for the rule "that where persons having an interest in an estate are personally served and given an opportunity to fully and fairly litigate their interest in an adversarial hearing, if they choose not to take advantage of this opportunity, their claims are forever barred." The circuit court approved of this rule and stated that in the case sub judice "all the half-blood heirs have been personally served and none have come forward to request representation or make a claim, therefore, their claims are waived and forever barred." Unfortunately, in this appeal neither party addresses the Seaton case or the circuit court's ruling that is based on Seaton. Nevertheless, we believe the circuit court's ruling that relied upon Seaton was in error and requires reversal.

At this juncture, we believe that it would be helpful to provide a general discussion concerning this area of the law.

Where an administrator negligently fails to ascertain the identity of heirs entitled to share the estate and as a consequence makes distribution to the wrong persons, the administrator and his surety are personally liable to the distributees legally entitled to receive the assets, even if the distribution was made in good faith and in ignorance of the existence of the person omitted, and in reliance on counsel. But he may recover back amounts erroneously paid [footnotes omitted].

. . .

In general, an heir who is unjustly

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<sup>8</sup>633 P.2d 607 (Idaho 1981).

enriched by taking an undisclosed heir's interest in an estate will be compelled to account to the undisclosed heir and will be held to hold in constructive trust that which was unjustly taken, together with accruals in trust, for the undisclosed heir, who will be held to have a lien on the property unjustly taken together with accruals [footnote omitted].<sup>9</sup>

The Restatement [of the Law of Restitution], § 126, distinguishes, however, between the rights of the administrator and of the heirs. Section 126, comment c (p. 516), provides that where a fiduciary in the distribution of assets held for others pays money to a person whom he mistakenly believes to be a beneficiary, the real beneficiary is entitled to restitution from the transferee, and the following illustration is given: A, administrator of B's estate, pays money out of the assets of the estate to C whom both by mistake of law believe to be B's next of kin. In fact, D is B's next of kin. D is entitled to restitution from C. Upon the decease of intestate the title to his personal property remains in abeyance until the appointment of an administrator when it vests in the latter for the purpose of taking charge of the property and distributing it to those who after due inquiry are found to have valid claims against the estate. The mistake of this fiduciary, whether of fact or of law, should not be held to impair the right of the heirs at law to recover their just claims from one unjustly enriched at their expense, where there is no fraud and it is shown that the mistake was shared in by all. While no general rule can be given to apply to all cases, where through a mutual mistake there has been an unjust enrichment, as stated in Reggio v. Warren, [207 Mass. 525, 534 93 N.E. 805, 32 L.R.A. 340, 20 Ann. Cas. 1244]:

The important question was not whether the mistake was one of law or fact, but whether the particular

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<sup>9</sup>31 Am.Jur.2d Executors and Administrators §1063, §1064 (1989).

mistake was such as a court of equity will correct, and this depends upon whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or fact entertained by both parties.<sup>10</sup>

Thus, we hold that Gailor as the administrator of Edith's estate was empowered under KRS 395.195(19) and (22) to prosecute this claim for the protection of the estate and in order to distribute Edith's estate as provided by law. Accordingly, the circuit court was empowered in equity to require Adams to make restitution to Edith's estate in order to prevent Adams' unjust enrichment.<sup>11</sup> The inaction of the half-blood heirs in not actively pursuing this action was irrelevant to Gailor's obligation and authority to pursue this claim. Thus, the circuit court erred as a matter of law when it dismissed Gailor's claim and refused to order Adams to pay restitution. Since the circuit court's finding that Edith's domicile and legal residency was in Kentucky is res judicata, there is no genuine issue as to any material fact and Gailor is entitled to judgment as a matter of

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<sup>10</sup>Moritz v. Horsman, 305 Mich. 627, 634, 9 N.W.2d 868, 871 (1943).

<sup>11</sup>"A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of the Law of Restitution, § 1. 'A person is enriched if he has received a benefit . . . . A person is unjustly enriched if the retention of the benefit would be unjust.' Id., Comment a." Bryan Brothers Packing Co. v. Garrard, Ky., 386 S.W.2d 469, 474 (1965).

law.<sup>12</sup> The material facts are undisputed: Edith died intestate a legal resident of Kentucky; her heirs at law included Philip, Adams, and the nine half-blood heirs; Philip waived any claim that he had in favor of Adams; and Philip had no authority to waive the claim of the nine half-blood heirs. Thus, as a matter of law, Adams erroneously received the funds consisting of \$28,922.20 that were actually payable to the Estate of Edith Abrahams; and Adams must be ordered to make restitution to Edith's estate in the amount of \$28,922.20, with the question of interest to be decided by the circuit court on remand.

Since we have held that the circuit court erred as a matter of law in dismissing Gailor's claim, issue number four is moot. However, we agree with Gailor that the circuit court was clearly erroneous in making the following findings: (1) "Philip executed a document indicating Edith was a resident of Kentucky"; and (2) "Philip came to Boyle District Court in an effort to reopen the original estate and set aside the conveyance." Since we are reversing on other grounds, whether these clearly erroneous findings would otherwise require a reversal is moot.

As to issue number five, we also agree with Gailor that the circuit court erred by finding that "Plaintiff has severed all claims as may exist against the Executor and this is no longer part of this litigation." What the circuit court meant by "has severed all claims" is unclear. The record reflects that

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<sup>12</sup>CR 56; Steelvest, Inc. v. Scansteel Service Center, Ky., 807 S.W.2d 476 (1991).

Gailor and Webb reached a settlement that was approved by the circuit court in the agreed judgment, which has not been appealed. In that judgment, Webb agreed with Gailor's claims and further agreed to participate in this action to recover the funds from Adams.

Gailor's sixth argument has been addressed by our discussion of the second and third arguments. We will not address these issues any further.

Gailor's seventh and final issue concerns payment of interest: "The court erred in failing to order Dr. Adams to reimburse the Kimberlin estate the \$ 28,922.20 paid to him by mistake on December 17, 1992 together with interest thereon at the legal rate." While the trial judge at the "hearing" verbally expressed his inclination not to award any interest on any restitution to be paid by Adams, such a ruling was never made final because Adams was not ordered to pay any restitution. Thus, the issue of interest is not ripe for our review and it will have to be considered by the circuit court on remand.

On cross-appeal, Adams raises two issues, and the first issue actually includes three separate issues:

1. Whether the court erred in not forthwith sustaining the motions of the appellee-cross appellant to dismiss for failure to state a claim, failure to name Philip Abrahams as [a] necessary party and [the] statute of limitations?
2. Having verbally ruled on the record that the conduct of counsel for the appellant-cross appellee was unethical and that he could not continue to

practice the case, did the court err in not disqualifying counsel and referring the matter to the Kentucky Bar Association pursuant to KRS 26A.[0]80?

We find no merit to these issues and affirm on the cross-appeal.

As we previously discussed, Adams' brief is not in proper form and his arguments are extremely difficult to follow. In any event, Philip was not a necessary party to this action because the action was against Webb, as administrator, to recover the money erroneously paid to Adams to prevent Adams' unjust enrichment. If Adams desired to allege a claim of fraud against Philip, then he was required to do so on his own and not through Gailor.

As to the statute of limitations, we agree with the circuit court that: "The statute of limitations is ten years on the personalty and fifteen years on the realty."<sup>13</sup>

As his final issue, Adams claims that the circuit court erred by not complying with KRS 26A.080, which provides:

When it comes to the attention of any judicial officer that any justice or judge of the Court of Justice or any attorney may have been guilty of unprofessional conduct, he shall at once report the matter to the proper investigating and disciplinary authorities.

Gailor claims in his brief, signed by attorney Hill, that Adams filed a complaint against attorney Hill with the Kentucky Bar Association and that the complaint was dismissed. In his brief, Adams makes the following request to this Court:

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<sup>13</sup>See Wood v. Wingfield, Ky., 816 S.W.2d 899, 903-04 (1991).



"The Kentucky Court of Appeals is not only requested to review this matter on appeal, but to review it from its own prospective [sic] and take such action as it deems appropriate." Having thoroughly reviewed the record on appeal, we decline to address this matter any further. Obviously, if Adams or his counsel desires to continue to pursue this matter against attorney Hill, they may do so through the KBA.

In summary, we reverse the circuit court on the central issue of this case and hold that Gailor, as administrator of Edith Adams Abrahams' estate, shall be entitled to a judgment against Adams for \$28,922.20. We remand this matter for entry of that judgment and for a determination by the circuit court as to what, if any, interest shall be paid by Adams. We affirm on the other collateral issues raised by Gailor and on the cross-appeal by Adams.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

MCANULTY, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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