

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000657-MR  
and  
NO. 2000-CA-002380-MR  
(Consolidated)

KINCHELOE RADIO SERVICE, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, JUDGE  
ACTION NO. 97-CI-000835

SUZANNE MORAN

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, COMBS, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Kincheloe Radio Service, Inc., appeals from an order of the Jefferson Circuit Court granting Suzanne Moran's motion for summary judgment. We affirm.

Kincheloe Radio was in the business of sales and repairs of automotive electronic equipment. Moran was employed by Kincheloe Radio from July 6, 1979, until December 21, 1995. Moran was terminated from her employment with Kincheloe Radio on the latter date due to Kincheloe Radio's suspicion that she had embezzled thousands of dollars in cash from the business during

her years of employment. Moran's termination came following a police investigation which included the installation of a surveillance camera in Moran's office.

On February 13, 1997, Kincheloe Radio filed a verified complaint against Moran in the Jefferson Circuit Court alleging conversion and seeking recoupment of the funds as well as punitive damages. On December 3, 1998, the trial court granted Moran's motion for summary judgment on the ground that Kincheloe Radio's claim for conversion was barred by the one-year statute of limitation set forth in KRS<sup>1</sup> 413.140(h) and (i). KRS 413.140(h) provides that "[a]n action for the recovery of stolen property, by the owner thereof against any person having the same in his possession" shall be brought within one year after the cause of action accrued. KRS 413.140(i) provides that "[a]n action for the recovery of damages or the value of stolen property, against the thief or any accessory" likewise shall be brought within one year after the cause of action accrued.<sup>2</sup>

The trial court subsequently amended its order of December 3, 1998, and vacated the judgment as to its finality. Kincheloe Radio was granted leave to file a third amended complaint. In that complaint, it alleged as grounds for recovery (1) breach of a contract implied in law, (2) breach of an express contract implied in fact, (3) fraud, (4) redress under KRS

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> Since the trial court's order, these statutory provisions are now found at KRS 413.140(i) and (j). All references to the statutes in this opinion will be to the statutes as they existed during the pendency of this action before the trial court.

446.070,<sup>3</sup> and (5) punitive damages. These claims are subject to the five-year statute of limitation set forth in KRS 413.120.

Following the filing of the third amended complaint, Moran moved the trial court to grant her summary judgment on the new claims. By order entered in the trial court on February 3, 2000, the trial court granted the motion and awarded summary judgment to Moran. The trial court held that "[t]he case at bar is simply not based in contract" and thus rejected Kincheloe Radio's claims for breach of a contract implied in law and breach of an express contract due to failure to state a cause of action. The court likewise rejected Kincheloe Radio's claims for fraud and for recovery under KRS 446.070. In short, the court held that "it is the judgment of this Court that a civil remedy is not available to the Plaintiff due to the expiration of the statute of limitations period as discussed in the Court's Order of December 3, 1998." When the trial court denied Kincheloe Radio's motion to vacate its order, this appeal followed.<sup>4</sup>

Kincheloe Radio acknowledges that its initial complaint alleging a claim for conversion of property was barred by the applicable statutes of limitation, KRS 413.140(h) and (i). It has not appealed from the court's order dismissing that claim.

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<sup>3</sup> KRS 446.070 provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

<sup>4</sup> This case actually involves two appeals which have been consolidated. The first appeal was taken from an interlocutory order since Moran's counterclaim was still pending at the time. Following dismissal of the counterclaim, Kincheloe Radio filed a second appeal. At any rate, there is no question that the appeals are from final orders of the Jefferson Circuit Court.

Rather, Kincheloe Radio argues that the trial court erred in granting Moran summary judgment and dismissing its third amended complaint claims.

"The standard of review on appeal of a 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, Ky.App., 916 S.W.2d 779, 781 (1996). See also CR<sup>5</sup> 56.03. Further, "summary judgments involve no finding of disputed fact and are reviewed without deference to the conclusions of the trial court." Kreate v. Disabled American Veterans, Ky.App., 33 S.W.3d 176, 178 (2000). Pursuant to these standards, we conclude that the trial court properly granted summary judgment in favor of Moran, although we do so for reasons different from those stated in the trial court's order.

The trial court rejected Kincheloe Radio's claims for breach of contract apparently for the reason that it failed to state a valid cause of action. We disagree with the trial court on this point, however. In Peoples Nat. Bank v. Guier, 284 Ky. 702, 145 S.W.2d 1042 (1940), an executor on an estate was accused of mishandling funds entrusted to his care. In recognizing a cause of action in contract against the executor, the court held:

While conversion is essentially a tortious taking of another's property, it is certain that there is also a contract implied in law to return the property to the rightful owner. And it is equally certain that the tort may be waived and an action of assumpsit or its equivalent may be maintained.

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<sup>5</sup> Kentucky Rules of Civil Procedure.

Id. at 1044.

Although we agree with Kincheloe Radio that at least its contract claims against Moran stated valid causes of action for which the five-year statute of limitation was otherwise applicable, we conclude that the one-year statute of limitation for recovering stolen property as set forth in KRS 413.140(h) barred its claims. We base our conclusion on the authority of Carr v. Texas Eastern Transmission Corp., Ky., 344 S.W.2d 619 (1961). In Carr, the plaintiff filed a claim for damages allegedly caused to his cattle due to the actions of Texas Eastern in constructing its pipeline across the lands of Carr's landlords. Id. at 620. Carr contended that his claim was based upon the violation of a written contract and was governed by a fifteen-year statute of limitation. Id. In affirming the trial court's dismissal of Carr's claim due to a one-year statute of limitation for actions involving injury to livestock by a railroad or a corporation, the trial court held as follows:

The rule, therefore, is that it is the object rather than the form of the action which controls in determining the limitation period. The form in the case at bar may derive indirectly from a contract but the object of the action is to recover for alleged injuries (speculative and remote though they may be) to cattle. [Emphasis original].

Id.

The court in the Carr case relied on the case of Columbus Mining Co. v. Walker, Ky., 271 S.W.2d 276 (1954). Id. The court in Columbus Mining quoted 34 Am. Jur., Limitation of Actions, Section 103, Page 84, for the following rule:

“. . . it is generally held that where a statute limits the time in which an action for 'injuries to the person' may be brought, the statute is applicable to all actions the real purpose of which is to recover for an injury to the person, whether based upon contract or tort, in preference to a general statute limiting the time for bringing actions ex contractu.”

Id. at 277.

The object of Kincheloe Radio's action was to recover stolen property although the cause of action was stated as derived from a contract. Thus, under the principles set forth in Carr and Columbus Mining, we hold that the one-year statutes of limitation for recovering stolen property set forth in KRS 413.140(h) and (i) were applicable to Kincheloe Radio's claims rather than the five-year statute of limitation set forth in KRS 413.120. See also Lashlee v. Sumner, 570 F.2d 107 (6<sup>th</sup> Cir. 1978).<sup>6</sup>

Finally, Kincheloe Radio argues that the effect of the Kentucky Supreme Court's decision in Troxell v. Trammell, Ky., 730 S.W.2d 525 (1987), was to overrule the court's previous holdings in the Carr and Columbus Mining cases. In Troxell, the court held that "because statutes of limitation are in derogation of a presumptively valid claim, a longer period of limitations should prevail where two statutes are arguably applicable." Id. at 528. We disagree with this analysis. First, the Troxell

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<sup>6</sup> In Lashlee, the Sixth Circuit of the U.S. Court of Appeals held that a one-year statute of limitation for libel was applicable even though other distinct causes of action for which a longer limitation period was applicable were pled. Id. at 109. The court noted that the "gist of the entire action is the libel." Id.

court made no mention of overruling Carr and Columbus Mining in its opinion. Second, we do not believe that "two statutes are arguably applicable." Under the principles of Carr and Columbus Mining, only the one-year statutes of limitation in KRS 413.140(h) and (i) were applicable.

Therefore, the order and judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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