

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002721-MR

SURGICAL SPECIALISTS, P.S.C.

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 99-CI-00221

DARLENE FERRY, AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF ALMA SWINK

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. Surgical Specialists, P.S.C. (Surgical) appeals from a judgment of the Meade Circuit Court which dismissed its claim against the Alma Swink Estate¹ as untimely filed based upon Kentucky Revised Statutes (KRS) 390.011. The circuit court further denied Surgical's motion to declare KRS 396.011 unconstitutional. We affirm.

¹Darlene Ferry, as personal representative of the Estate of Alma Swink, has been properly substituted as the real party in interest in the case.

In that the trial court's findings of fact, conclusions of law, and judgment entered August 28, 2000, thoroughly and properly addressed the issues raised by Surgical, both before the trial court and again before this Court on appeal, we adopt the trial court's judgment in its entirety as follows:

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT**

This matter comes before the Court to determine the constitutional due process issue. The Court held a hearing. The Plaintiff with counsel and the Defendant with counsel were present at said hearing. The Court has reviewed the tape of the hearing, pleadings and memoranda of the parties. Based thereon, the Court enters the following Findings of Fact, Conclusions of Law and Judgment.

STATEMENT OF FACT

Alma Swink was provided medical services in September 1994 by the Plaintiff, Surgical specialists, P.S.C. (hereinafter "Surgical"). Ms. Swink thereafter agreed and arranged with Surgical to pay \$20.00 per month on her account. She made her payments by money order which would not have required use of a bank account or means which would necessarily leave a record readily ascertainable by others.

Alma Swink died September 12, 1998. On September 15, 1998, Darlene Elder (now Ferry) filed a petition for probate and appointment as executrix. By Order of the Meade District Court, Case 98-P-00157, entered September 16, 1998, Ms. Ferry was appointed as executrix of the estate of Alma Swink.

Pursuant to KRS 424.340, the Meade District Court Clerk published a notice of the fiduciaries appointment, with her name and address and the attorney representing the fiduciary. The cost of that publication was paid by the executrix of the estate.

Terry Berry, office administrator for Surgical, testified that Surgical mailed

regular monthly bills to Ms. Swink. (See Plaintiff's Exhibit 1 to 8/9/00 hearing). That billing notice sent September 30, 1998 was returned by United States Postal Service to Surgical as nondelivered on October 14, 1998. Said returned notice included a forwarding address. This new address was "3036 Cabinwood Drive, Louisville KY". That address is the residence address of Ms. Ferry, the executrix.

No later than October 14, 1998, Surgical was aware Ms. Swink was deceased. Mr. Berry testified that it was the customary practice of Surgical to either write off the balance owed by the customer or present a proof of claim with the fiduciary when it was award (sic) of a patient's death. Surgical could have determined that Ms. Swink was a resident of Meade County, Kentucky since it knew her address was at Payneville, Kentucky.

Mr. Berry testified after October 14, 1998 that someone, not himself, in Surgical's office mailed monthly billing notices to Ms. Ferry's address. One of Surgical's employees finally contacted Ms. Ferry personally on April 8, 1999 and April 22, 1999. This was already more than six months after Ms. Ferry's appointment. No claim had been presented to the estate other than the alleged billing notice. Ms. Ferry testified and denied having ever received any communication, written or verbal, from Surgical prior to the April contact.

When contacted in April, Ms. Ferry informed Surgical she was in fact the executrix of Alma Swink's estate, that Hon. Paul Miller was the attorney representing her in administering the estate and there was no money left with which to pay Surgical's claim of \$7,882.00.

Surgical then finally retained Hon. Thomas Cooper as counsel on May 4, 1999. Surgical filed its Demand for Notice and Claim in the Meade District Court on or about May 28, 1999. Ms. Ferry as fiduciary denied the claim as untimely and barred by statute.

On July 30, 1999, Ms. Ferry filed a proposed Final Settlement with the Meade District Court. Said settlement indicates at

the time there was available after payment of expenses and debts \$14,039.89 for distribution to the beneficiaries of the estate.

On August 6, 1999, Surgical filed a Notice/Motion on Objection to Final Settlement. The motion was noticed for hearing on August 17, 1999. After hearing said motion, the Meade District Court entered an Order (dated August 17, 1999) on August 18, 1999 ordering and adjudging that the claim of Surgical Specialists, P.S.C. is overruled. The Meade District Court also entered an Order Filing Final Settlement on August 18, 1999 which ordered the Final Settlement be filed and laid over for exceptions. By ORDER CONFIRMING FINAL SETTLEMENT entered September 28, 1999, said Final Settlement was confirmed and the executrix was released from any further liability in connection with the settlement of the estate. No appeal was taken from said Order.

It must be noted that prior to the hearing date set on its own motion before the Meade District Court for August 17, 1999 to address its objection to the proposed Final Settlement(,) Surgical preemptively filed this action in the Meade Circuit Court on August 10, 1999.

The Complaint demands (1) a trial by the court; (2) for an order that funds be safeguarded and (3) for judgment against the Defendant. The Court has entered an Order substituting Darlene Ferry as Executrix of the Estate of Alma Swink, Deceased as the party defendant.

The constitutional issue was not raised in the initial Complaint but arose as a response to the affirmative defenses asserted by the Defendant. The procedural reason why Plaintiff was able to reach this point is addressed in the Court's prior Findings of Fact, Conclusions of Law and Order entered March 14, 2000.

The Attorney General filed notice on April 21, 2000 that he was declining to participate in the defense of the constitutionality of the statute.

CONCLUSIONS OF LAW

The Court will first address the federal constitutional challenge and then the state constitutional challenges to KRS 396.011.

A. FEDERAL CONSTITUTIONAL DUE PROCESS AND EQUAL PROTECTION CHALLENGE.

1. BACKGROUND

To provide a point of reference for discussion, the statute being specifically challenged is KRS 396.011 which provides as follows:

(1) All claims against a decedent's estate which arose before the death of the decedent, excluding claims of the United States, the state of Kentucky and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, **unless presented within six (6) months after the appointment of the personal representative**, or where no personal representative has been appointed, within two (2) years after the decedent's death.

(2) Nothing in this section shall affect or prevent;

(a) To the extent of the security only, any proceeding to enforce any mortgage, pledge, lien or other security interest securing an obligation of the decedent of or property of the estate;

(b) To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance. (Court's emphasis).

This statute was passed and became effective July 15, 1988 which was subsequent to the publication of the opinion relied upon by Surgical as controlling authority for its argument, to-wit: Tulsa Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) (hereinafter "Tulsa"). Tulsa was decided April 19, 1988.

It should be noted that there is no challenge herein to that portion of KRS 396.011 which bars claims "where no personal representative has been appointed, within two (2) years after the decedent's death." Tulsa at p. 1345 makes clear such a plain statute of limitations does not involve state action and thus does not implicate due process.

Relying on Tulsa, this Court has based its decision and analysis on the procedural method prescribed therein. The Court has first concluded that KRS 396.011 is in fact a "nonclaim statute." Second, it is apparent "state action" is involved under Kentucky's probate statutes and particularly the six month time bar under KRS 396.011. Why? Following Tulsa, state action arises under the particular provisions of Kentucky's probate statute (the six month time bar only) for the following reasons: (1) The six month nonclaim statute becomes operative only after probate proceedings have been commenced in state court. (2) The court must appoint the personal representative before notice, which triggers the time bar, can be given. (3) Only after the court appointment is made does the statute provide for notice. (4) Notice of appointments of personal representatives and the bar date for claims is made by the clerk of the probate court. (KRS 424.340 passed effective July 15, 1988). (It also appears more state action is involved under Kentucky's statute than was involved under Oklahoma's statute in Tulsa. In Tulsa, the executor or executrix, not the court clerk, was required to publish notice "immediately after appointment." Tulsa at p. 1346) Another difference to be noted under Kentucky's notice publication statute is that KRS 424.340 does provide "Publication of this notice shall neither enlarge nor reduce the obligation of a creditor to present a timely claim..." Oklahoma's statute provided the time bar for filing claims was not triggered

until "a copy of the notice and an affidavit of publication was filed with the court". Tulsa at p. 1346. Even with this variance in procedure, Kentucky's probate statute requires a pervasive and substantial involvement of the state that must be considered "state action" subject to the restrictions of the Fourteenth Amendment.

By following the procedural analysis outlined in Tulsa, this Court must first cross a threshold of determining whether the Plaintiff, Surgical's identity was "known or reasonably ascertainable" by Ms. Ferry. For creditors who are not "known or reasonably ascertainable" publication notice, rather than actual notice, can suffice. Tulsa at p. 1347. All the executor or executrix (in that context) need (sic) to do is make "reasonable diligent efforts" to uncover the identify of creditors. Tulsa, at p. 1347.

Plaintiff in its Complaint demanded a trial by the Court. It has waived a jury determination of any factual issues. The Defendant also did not demand or pay the costs for a jury trial. The Court's hearing Order entered July 17, 2000 (twenty-three days in advance of the hearing), clearly placed the parties on notice of the express purpose of the hearing. No objection was made to the hearing and no continuance was requested.

2. WHETHER SURGICAL WAS A KNOWN OR REASONABLY ASCERTAINABLE CREDITOR.

Only two witnesses testified at the hearing (1) Terry Berry, office administrator for surgical and the (2) Defendant, Darlene Ferry, Executrix of the Estate of Alma Swink, Deceased.

Ms. Ferry admitted that her mother, Alma Swink, had previously received medical care years prior to her death by a Dr. Yates. Dr. Yates is employed by the Plaintiff, Surgical. He had performed carotid artery surgery on Ms. Swink. It was not established by Plaintiff that Dr. Yates' surgical services were the ones being sought in its claim. Ms. Ferry specifically denied knowing the name, Surgical Specialists, Inc.

Mr. Berry testified Ms. Swink paid \$20.00 per month on her bill. She paid by money order. A money order can be purchased with cash and would not necessarily generate a paper trail sufficient for the executrix to uncover same in administering the estate. From the objective and subjective viewpoint of the executrix, Surgical would not have been a "known or reasonably ascertainable creditor" through due diligence.

The standard, however, is how a reasonable person would view the situation. Mr. Berry's testimony established that the first letter sent by Surgical to Ms. Swink after her death came back undelivered. The postal department included a forwarding address thereon. Mr. Berry established Surgical knew the new address and the fact Ms. Swink was deceased no later than October 14, 1998. Mr. Berry further testified Surgical's customary practice was to either file a proof of claim against an estate or to write off the indebtedness. Mr. Berry's testimony indicated Surgical did not follow its customary procedures. In fact, it did not write off the account and did not timely present a claim against the estate.

Mr. Berry testified another employee with Surgical mailed monthly billings to Ms. Ferry's Louisville address after it received the forwarding address. He did not personally have knowledge of this happening. Ms. Ferry denied ever receiving any of said billings. If received, same would have made surgical a reasonably ascertainable creditor thus triggering an analysis of the remainder of Kentucky's probate nonclaim statute.

The first personal contact between Surgical's personnel and Ms. Ferry did not occur until April 1999. This was more than six months **after** her appointment and qualification as executrix. Therefore, the crucial issue is whether Surgical sufficiently established the alleged billings were mailed to Ms. Ferry. Other than Plaintiff's Exhibit 1, surgical offered no copies of notices mailed to Ms. Ferry with any dates of mailing. No computer mailing lists or business mailing records were presented at the hearing.

To raise the presumption of receipt by the addressee of a communication sent by mail, the burden of proof initially rests upon the person claiming the mailing of the notice. (The Court's Order of July 17, 2000 placed Plaintiff on notice it would carry the burden of proof). Executive Committee of Christian Educ. And Ministerial Relief fro Presbyterian Church of the United States v. Fidelity & Columbia Trust Co., Ky., 117 S.W.2d 958 (1938), set forth the following factors which the Plaintiff must satisfy to raise the presumption of receipt: (1) the communication was put in an envelope; (2) same was addressed to the addressee at her known post office; (3) same was duly stamped; and (4) same was deposited in the mail.

Mr. Berry's testimony at the hearing was not based upon his personal first hand observation of said factors being satisfied. His testimony at best was conjectural and based upon alleged hearsay.

Plaintiff has failed to establish in its offered proof sufficient facts to raise a presumption that Ms. Ferry ever received its alleged billings. The Court therefore concludes that Plaintiff, Surgical Specialists' identity was not known or reasonably ascertainable by the Defendant, Darlene Ferry, as executrix of the estate of Alma Swink, deceased. From a review of this record and the Meade District Court probate file and the final order relieving Ms. Ferry of any further responsibility as executrix, it is apparent she fulfilled her responsibilities and duties which included making a reasonably diligent effort to determine Ms. Swink's creditors.

As opposed to the factual circumstances in the Tulsa case, this Court cannot help but note that Surgical was fully aware of the six month requirement for presentation of claims against the estate. It further knew of Ms. Swink's death at least five (5) months before that period would expire. It further could reasonably have determine the logical county for probate of her estate since it knew her address was Payneville, Kentucky. Surgical's offices are in Hardin County which is contiguous to Meade County.

Based upon Tulsa, termination of Surgical's claim without actual notice is not a violation of due process under the Fourteenth Amendment to the United State (sic) Constitution. Kentucky's nonclaim statute, KRS 396.011, as it relates to Surgical Specialists claim under the specific facts of this case does not violate the constitutional due process and equal protection provisions of the United States Constitution. Publication notice is sufficient due process under this factual situation.

B. STATE CONSTITUTIONAL CHALLENGE.

In compliance with this Court's Order entered March 14, 2000, the Plaintiff filed its memorandum setting forth **all** state constitutional provisions it alleged were violated by KRS 396.011 and any interrelated limitations provisions under Kentucky's probate and estate administration statutes.

Plaintiff asserts Section 1 of the Constitution of Kentucky affects the constitutionality of KRS 396.011. Section 1, Fifth Section provides "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: Fifth: The right of acquiring and protecting property." As was noted in Tulsa, supra, Plaintiff's account receivable is a property interest. However, it would appear the same analysis from Tulsa, relative to the threshold question whether Surgical was a "known or reasonably ascertainable creditor" would apply under this due process and equal protection argument.

Plaintiff also references Section 59 of the Kentucky Constitution which precludes "local and special legislation". However, it appears KRS 396.011 passes muster on this Court (sic) because it applies to all persons equally. The limitations periods set forth therein are reasonable. The shorter statute of limitations on claims when a personal representative is appointed (six months) versus when no personal representative is appointed (two years) is constitutional. Galloway v. City of Winchester, Ky., 184 S.W.2d 890 (1944).

As to Section 2 of the Kentucky Constitution, Rudolph v. Rudolph, 556 S.W.2d 152 at 155 (Ky Ct App 1977) provides, "The legislature is certainly free to enact reasonable legislation to guard against false claims and to require that any claim be made within a period of time which will provide for prompt determination of title to property". Plaintiff admitted herein it knew for at least four months prior to expiration for the six month period to file claims that Ms. Swink had died. Rudolph v. Rudolph, supra, supports the legislature's ability to effect reasonable limitation periods to settle property claims.

Section 14 is also included in Plaintiff's memorandum provides (sic) "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Counsel also indicates Section 14 has been coordinated with Section 19 of Kentucky's Constitution. Section 19 (1) provides "No ex post facto law, nor any law impairing the obligation of contracts, shall be enacted."

The parties to a contract have no right in the remedy existing at the time of entry into the contract and the Legislature may modify, enlarge or limit the existing method of procedure without impairing the obligation of contracts if a sufficient one be left or provided. Lowther v. Peoples Bank, 169 S.W.2d 35, 293, Ky. 425 (Ky. 1943).

It is clear to this Court that since its adoption in 1988, the appellate courts of Kentucky have had ample opportunity to review the constitutionality of KRS 396.011. One of its most recent decisions, Underwood v. Underwood, Ky. App., 999 S.W.2d 716 (1999) again discussed the requirement and necessity of presenting claims against a decedent's estate for "debts or demands which might have been enforced against him during his lifetime." Underwood, supra, at p. 719.

Plaintiff's challenge to KRS 396.011 on the basis it violates the Constitution of Kentucky also fails.

In the event the Plaintiff shall elect to appeal this judgment, the Attorney General would do well to re-evaluate the decision not to participate in this action. It is hard to imagine any laws which have a more immediate and direct impact on the general public than the probate statutes. These laws generally affect people and their lives when they have just been through one of the most emotional experiences one can encounter. Further, the validity of KRS 396.011 and the limitations period provided to file claims will have a direct impact on decedent's (sic) estates and the eventual collection of both income tax from creditors and inheritance tax from estates and beneficiaries. Outside the constitutional challenges the Attorney General has to defend, in the area of criminal law, there would not appear to be any other statute which if held to be unconstitutional could have any greater importance and immediate impact on the courts, creditors and the public.

JUDGMENT

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff's motion to hold that the six month time bar under KRS 396.011 (sic) unconstitutional as a violation of the United States Constitution and the Constitution of Kentucky is **DENIED**. The Plaintiff's Complaint here is dismissed with prejudice. There being no just cause for delay in its entry, this is a final and appealable order and judgment.

The judgment of the Meade Circuit Court thoroughly resolved all issues raised by Surgical on appeal. For the foregoing reasons, the judgment of the Meade Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas E. Cooper
Elizabethtown, KY

BRIEF FOR APPELLEE:

Dwight Preston
Elizabethtown, KY

Paul Miller
Hardinsburg, KY