

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001555-MR

MICHAEL L. DIGIURO,
ADMINISTRATOR OF THE ESTATE
OF TRENT DIGIURO

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 02-CI-02669

SHANE RAGLAND

APPELLEE

OPINION

REVERSING

** ** * * * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

DYCHE, JUDGE. In this matter, we are asked to review summary judgment entered on behalf of appellee, Shane Ragland, by the Fayette Circuit Court. We reverse.

Trent DiGiuro, a student at the University of Kentucky, was killed by a single gunshot wound on July 17, 1994, while sitting on his front porch during a party celebrating his twenty-first birthday. His murder went unsolved for many years. However, in January of 2000, Shane Ragland was identified by his

ex-girlfriend as Trent's killer. According to the affidavit of Detective Don Evans, Shane murdered Trent because Trent had prevented Shane from becoming a member of a campus fraternity.

Shane was arrested for Trent's murder on July 14, 2000. A preliminary hearing was held on July 19, 2000; the trial court found probable cause to believe that Shane had committed the crime. Shane was thereafter indicted on August 29, 2000, by a grand jury of the Fayette Circuit Court. On March 27, 2002, a jury found him guilty of Trent's murder, and he was sentenced to thirty years in prison.

Trent's father, Michael L. DiGiuro, was appointed Administrator of Trent's estate on April 24, 2001, and he filed the instant action for wrongful death on July 1, 2002.¹ Initially, the case was assigned to Circuit Court Judge Gary Payne, who, without comment, denied a motion to dismiss the case as being time-barred. This matter was then transferred to Judge VanMeter, who determined on summary judgment that the wrongful death action was indeed time-barred.

The trial court's rationale was that Trent's estate should have:

¹ We note that the original complaint in this action was not signed, and there is no amended complaint. Apparently, this was not brought to the trial court's attention. Because the matter has been litigated to this point without this having been brought up and in the absence of any type of allegations invoking Rule 11, we find no harm at this point. However, upon remand, the trial court should direct the plaintiff to file a signed amended complaint.

discovered "not only that [Trent] has been injured but also that his injury may have been caused by the defendant's conduct," and based on the fact that after the arrest, preliminary hearing and indictment, the defendant was no longer concealed or obstructing prosecution of a wrongful death action, this Court is unable to escape the conclusion that the plaintiff knew or should have known no later than July 19, 2000, the date of the preliminary hearing in Fayette District Court, not only that he had been injured, but that his injury **may been have caused** by the defendant's conduct. The case law is clear that certainty is not required, and the presence or absence of a criminal proceeding or conviction of the defendant has no bearing on the running of the statute of limitations for a civil action based on the same facts and circumstances.

(T.R. p. 254)(emphasis in original).

Mr. DiGiuro has appealed this ruling, arguing that this action should not be barred as untimely and that the time for bringing it should have been tolled until Shane was convicted. We are faced with a difficult issue borne from an unsettling factual background.

"At common law, when the tortfeasor killed, rather than seriously injured his victim, he was immune from civil action. Wrongful death statutes were therefore adopted to reverse this result." Conner v. George W. Whitesides Co., Ky., 834 S.W.2d 652, 655 (1992) (Stephens, C.J., dissenting). Kentucky has had several versions of wrongful death statutes, some of which have included time limitations. The present

version of Kentucky's wrongful death statute does not, however.

It states as follows:

Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

KRS 411.130(1).

Kentucky courts have routinely applied a one-year statute of limitations period to wrongful death cases using the general limitation period in KRS 413.140. Conner, 834 S.W.2d at 654. The Court in Conner cited Carden v. Louisville & N.R. Co., 101 Ky. 113, 39 S.W. 1027 (1897), for this holding. However, in the Carden case, the relevant statute at that time, the Death Act, included an express one-year statute of limitations, whereas the current statute does not. See Nichols v. Chesapeake & O. Ry. Co., 195 F. 913, 917 (6th Cir. 1912).

KRS 413.140 reads as follows:

(1) The following actions shall be commenced within one (1) year after the cause of action accrued:

- (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant

Clearly, however, KRS 413.140 on its face does not include wrongful deaths. Nonetheless, the Supreme Court of Kentucky has held that “[d]eath is simply the final injury to a person.” Conner, 834 S.W.2d at 654.

KRS 413.180 provides the time limitations for a personal representative of the deceased to bring a cause of action. This statute provides in relevant part that:

(1) If a person entitled to bring any action mentioned in KRS 413.090 to 413.160 dies before the expiration of the time limited for its commencement and the cause of action survives, the action may be brought by his personal representative after the expiration of that time, if commenced within one (1) year after the qualification of the representative.

(2) If a person dies before the time at which the right to bring any action mentioned in KRS 413.090 to 413.160 would have accrued to him if he had continued alive, and there is an interval of more than one (1) year between his death and the qualification of his personal representative, that representative, for purposes of this chapter, shall be deemed to have qualified on the last day of the one-year period.

This statute on its face limits its scope to actions “mentioned” in KRS 413.090 to 413.160, which does not include the wrongful death statute. Nonetheless, the Court in Conner, 834 S.W.2d at 653-54, held that, although the wrongful death statute was not explicitly included in KRS 413.180, wrongful death actions fall under its umbrella because KRS 413.140 has

long been recognized as establishing a one-year limitation for wrongful death actions, and it is specifically included in KRS 413.180.

Having reviewed the relevant statutes at issue, our attention now turns to statutory construction factors and the purpose of statutes of limitations. "Although the previous rule in Kentucky was that statutes of limitations should be strictly construed, Newby's Adm'r v. Warren's Adm'r, 277 Ky. 338, 126 S.W.2d 436 at 437 (1939), KRS 446.080 provides that '[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature' " Plaza Bottle Shop, Inc. v. Al Torstrick Ins. Agency, Inc., Ky. App., 712 S.W.2d 349, 351 (1986). Nonetheless, statutes of limitations should not be "lightly evaded" either. Munday v. Mayfair Diagnostic Lab., Ky., 831 S.W.2d 912, 914 (1992) (citing Fannin v. Lewis, Ky., 254 S.W.2d 479, 481 (1952)).

"The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.'" Travelers Indemnity Co. v. Reker, Ky., 100 S.W.3d 756, 763 (2003) (quoting Kentucky Ins. Guar. Ass'n v. Jeffers, Ky., 13 S.W.3d 606, 610 (2000)). We "must consider 'the intended purpose of the statute – the reason and spirit of the statute

- and the mischief intended to be remedied.'" Commonwealth v. Kash, Ky. App., 967 S.W.2d 37, 43-44 (1997) (quoting City of Louisville v. Helman, Ky., 253 S.W.2d 598, 600 (1952)). "The Kentucky General Assembly and [the Supreme] Court [of Kentucky] have long recognized the value of statutes which 'bar stale claims arising out of transactions or occurrences which took place in the distant past.'" Munday, supra at 914 (citing Armstrong v. Logsdon, Ky., 469 S.W.2d 342, 343 (1971)).

The Supreme Court of the United States has stated that "[s]tatutes of limitation find their justification in necessity and convenience rather than in logic. . . . They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.'" Mills v. Habluetzel, 456 U.S. 91, 102 (1982) (quoting Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945)).

There can be no doubt that statutes of limitations can be arbitrary and sometimes operate to halt legitimate claims. See Simmons v. South Central Skyworker's, Inc., 936 F.2d 268, 270 (1991) (citing Schiavone v. Fortune, 477 U.S. 21, 31 (1986)). However, to prevent such a harsh application, both the courts and the legislature have carved out exceptions to this

rule. We quote from Munday, 831 S.W.2d at 914-915 on this as follows:

Parties are at liberty to contract for a limitation period less than the period fixed by statute. Johnson v. Calvert Fire Ins. Co., 298 Ky. 669, 183 S.W.2d 941 (1945). Likewise, after a cause of action has accrued, parties may, by agreement, extend the time for filing the action beyond the time in which the limitation would otherwise run. Bankokentucky Co.'s Receiver v. National Bank of Kentucky's Receiver, 281 Ky. 784, 137 S.W.2d 357, 369 (1939). An estoppel may arise to prevent a party from relying on a statute of limitation by virtue of a false representation or fraudulent concealment. Cuppy v. General Accident Fire and Life Assurance Corp., Ky., 378 S.W.2d 629 (1964). And for persons under a legal disability, the running of the statute of limitations ordinarily does not commence until the disability is removed. Gunnels v. Stanley, 296 Ky. 662, 178 S.W.2d 195 (1944). Finally, we have held that as statutes of limitations are in derogation of presumptively valid claims, when doubt exists as to which statute should prevail, the longer period should be applied. Troxell v. Trammell, Ky., 730 S.W.2d 525 (1987).

A claim of equitable estoppel is widely utilized by parties who seek to avoid a statute of limitation defense. Long ago a tolling statute was enacted which provides that a resident of this State who absconds or conceals himself "or by any other indirect means obstructs the prosecution of the action" shall not have benefit of the statute of limitation so long as the obstruction continues. KRS 413.190(2). We have held that this tolling statute is simply a recognition in law of an equitable estoppel or estoppel in pais to prevent fraudulent or inequitable application of a

statute of limitation. Adams v. Ison, Ky., 249 S.W.2d 791 (1952). Our decisions construing the statute and applying equitable estoppel appear to require "some act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so." Id. at 792. In Second National Bank and Trust Co. v. First Security National Bank and Trust Co., Ky., 398 S.W.2d 50 (1966), we held that fraudulent conduct or concealment could not be assumed in the absence of evidence to support it.

Ordinarily, proof of fraud requires a showing of an affirmative act by the party charged. An exception to this general rule may be found in a party's silence when the law imposes a duty to speak or disclose. Such was the case in Security Trust Co. v. Wilson, 307 Ky. 152, 210 S.W.2d 336 (1948), in which it was alleged that a deceased uncle who had served as fiduciary for his niece had converted her property to his own use. The Court emphasized the language in KRS 413.190 "by any other indirect means" and stated:

"The indirect means employed by the uncle in the case at Bar, if it existed, was a failure to speak and advise his niece that he had exchanged her bonds for other bonds and taken the title in his own name." Id. at 339.

The Court relied on Kurry v. Frost, 204 Ark. 386, 162 S.W.2d 48 (1942), which held that a party who, in violation of the law, left the scene of an automobile accident after striking another person, "concealed her identity." The Court in Wilson held that the law imposed upon the uncle a duty of disclosure to his niece as follows:

"that this fiduciary relationship was such that there was a duty upon the part of the said Curtis to advise the said plaintiff that he had exchanged her bonds and taken the title to the ones exchanged for in his own name; that this concealment constituted a means of obstruction within the meaning of KRS 413.190, and that this concealment tolled the running of the statute of limitations." Security Trust Co., 210 S.W.2d at 339-40.

The "discovery rule" is also a judicially created exception first adopted in this Commonwealth in Tomlinson v. Siehl, Ky., 459 S.W.2d 166, 167-68 (1970). In this Commonwealth, cases utilizing the discovery rule generally involve medical malpractice or product liability issues. The discovery rule has not yet been analyzed in a case similar to the one at hand. Under the discovery rule "'a cause of action will not accrue . . . until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.'" Perkins v. Northeastern Log Homes, Ky., 808 S.W.2d 809, 819 (1991) (citing Louisville Trust Co. v. Johns-Manville Products, Ky., 580 S.W.2d 497, 501 (1979)).

While the circuit court did not so specifically state the rule, it indeed applied it in this matter. We believe that

in its opinion, the circuit court committed error by stating that "[t]his law is clear that certainty is not required, and the presence or absence of a criminal proceeding or conviction of the defendant has no bearing on the running of the statute of limitations for a civil action based on the same facts and circumstances." On the contrary, there are no Kentucky cases stating this principle in regard to a criminal matter affecting a civil matter.

Further, courts in this Commonwealth have not consistently applied the discovery rule. Some courts have held that, once an injured party has discovered his injury, the statute of limitations is not tolled where a plaintiff has failed to identify or locate potential defendants. See Simmons v. South Central Skyworker's, Inc., 936 F.2d 268 (6th Cir. 1991); Reese v. General American Door Co., Ky. App., 6 S.W.3d 380, 383 (1998). However, in Wiseman v. Alliant Hosp., Inc., Ky., 37 S.W.3d 709, 712 (2000), the Court held that to trigger the limitation period one must know: (1) he has been wronged and (2) by whom the wrong has been committed.

Moreover, because the discovery rule evolved initially under medical malpractice and later was applied to product liability and similar cases, we cannot say that it would also be accurate to expand it to apply in the present matter. However,

because we ultimately resolve this matter on other grounds, we will leave resolution of this issue for another time.

Next, in absence of Kentucky cases on point, we analyze what other jurisdictions have done under similar facts. The Supreme Court of Ohio in Collins v. Sotka, 81 Ohio St. 3d 506, 692 N.E.2d 581 (1998), held that a wrongful death claim accrued when the court entered an order sentencing the defendant for the victim's murder. In Collins, the Court held that it was "unwilling to further condone . . . a ludicrous result" where "a tortfeasor need only kill his or her victim and fraudulently conceal the cause of death for two years to be absolved from civil liability." 81 Ohio St. 3d at 511, 692 N.E.2d at 584-85 (citation omitted). Although statutory authority was lacking, the Court thereafter held that:

In a wrongful death action that stems from a murder, the statute of limitations begins to run when the victim's survivors discover, or through the exercise of reasonable diligence, should have discovered, that the defendant has been convicted and sentenced for the murder.

Id.

Other courts reviewing wrongful death cases involving a murder have tolled the statute of limitations at least until the identity of the murderer was discovered. See Bennett v. F.B.I., 278 F.Supp.2d 104 (D. Mass. 2003); Bernoskie v. Zarinsky, 344 N.J. Super. 160, 781 A.2d 52 (2001); Friedland v.

Gales, 131 N.C. App. 802, 509 S.E.2d 793 (1998); McClendon v. State of Louisiana, 357 So.2d 1218 (La. App. 1 Cir. 1978).

However, in each of these cases, the decedent's estate brought a wrongful death action within the limitation period. None of the courts addressed how they would have resolved the issue had the decedent's estate waited until after conviction before filing a civil action.

The court in Richards v. LaCour, 515 So.2d 813 (La. App. 3 Cir. 1987), however, did address this issue. It concluded that by the time of the defendant's indictment, the decedent's estate was aware of his identity and should have filed suit within the limitation period.

While we are not bound by the decisions from other jurisdictions, we look to their reasoning for guidance on this issue and find that the primary concern of the courts is that a criminal defendant should not be permitted to hide behind the protection of a statute of limitations defense when his actions resulted in an insurmountable obstacle in the victim's estate timely pursuing civil remedies. Indeed, it does seem absurd that where one has been a "successful" murderer for a number of years, he is provided benefits and arbitrary defenses under the law.

Having reviewed the purposes of statutes of limitations and other jurisdictions' resolution on similar

issues, we turn finally to public policy considerations. We conclude that the resolution of this issue must turn on the public policy of this Commonwealth to which we look for guidance from the General Assembly.

We believe that a defined statute of limitations period enacted by our legislature expresses the public policy of this Commonwealth. But there is no such limitation statute enacted by the General Assembly in regard specifically to wrongful death actions. Because our current wrongful death statute has no set time limit, our legislature has shown no public policy on this particular issue.

We are well aware of the previous holding by courts in this Commonwealth that wrongful death cases are governed by the one-year limitation period in KRS 413.140; however, the courts have not reviewed this issue in the context of a murder case. We believe that there are different public policy issues in a civil matter such as medical malpractice or product liability cases as compared to a murder case. In the medical malpractice and product liability cases, the statute of limitations fulfills its intended purpose to prevent stale claims and force the plaintiff to use due diligence in discovering the tortfeasor and gathering evidence. It also protects the defendant from being unduly burdened with old claims, advances prompt discovery of

evidence to build a defense, and operates to prevent fraudulent claims.

On the other hand, in this matter, these factors are weakened considerably, if present at all. In this case, the claim is already stale due to Shane's skills in carrying out Trent's murder and concealing his involvement in the crime. Had he not informed someone of it, his guilt most likely would have gone undiscovered even yet. Indeed, nothing in the record shows that he was previously a suspect in the case. Shane committed the "perfect" murder for his guilt to go undetected, if there is such a thing.

We also believe that this Commonwealth's public policy is that victims such as the DiGiuro family deserve a remedy. The wrongful death statute itself is evidence of this and is remedial in nature. Therefore, it should be construed to effect its intent. Also, while not relevant to the case at hand, KRS Chapter 346 evidences our legislature's intent that families of victims of crime be compensated.

Furthermore, delaying the civil matter would not subvert the public policy of resolving claims promptly even after Shane had been named a suspect or after his indictment. Shane cannot complain that the civil matter took him by surprise. While the considerations in a civil and criminal matter are separate, we cannot say that Shane was prejudiced in

any way. Moreover, had the jury found him not guilty, this finding would have been beneficial to him in defending the civil action or the civil matter might be dismissed altogether. Alternatively, where a defendant ultimately pleads guilty, he would be hard pressed to challenge a civil matter where the burden of proof is lower.

Moreover, civil matters are routinely and almost exclusively stayed until the criminal matter is resolved. Discovery in the civil matter would in all probability have been stayed as there is a difference between the discovery privileges available to a defendant in each type of case. See Degen v. U.S., 517 U.S. 820, 825 (1996) (citing Afro-Lecon, Inc. v. U.S., 820 F.2d 1198, 1203-1204 (Fed. Cir. 1987); Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962)).

A criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified. Fed. Rules Crim. Proc. 16(a)(2), 26.2. In a civil case, by contrast, a party is entitled as a general matter to discovery of any information sought if it appears "reasonably calculated to lead to the discovery of admissible evidence." Fed. Rule Civ. Proc. 26(b)(1).

Degen, 517 U.S. at 825-26.

Under the facts of this case, a stay would actually serve the purpose of effective use of judicial resources and

time, as well as benefit the parties. Through the resolution of the criminal matter most discovery will take place.

In this matter, we are faced with a set of facts in which enforcing a statute of limitations, not specifically included by the General Assembly in the wrongful death statute, will not result in furthering the purpose of time limitations. Had Trent's estate filed suit in this matter within one year of the discovery that Shane may have been responsible for Trent's death, in all probability, the civil matter would have been stayed pending the outcome of the criminal matter. Hence, the statute of limitations would not operate as it would normally to end litigation and prevent stale claims.

In sum, we conclude that, under the facts of this particular case and in absence of a specific limitation period prescribed by the wrongful death statute, the public policy of this Commonwealth would not be furthered by using the general statute of limitations. Instead, we find that the public policy of this Commonwealth would be furthered by allowing the family of a murder victim to wait until conviction of a defendant before filing suit. There being no statutory authority or binding case law on point, we now hold narrowly that a case involving an unsolved murder has different policy considerations than other wrongful death actions and decline to apply KRS

413.140. Accordingly, we reverse and remand this matter to the trial court for proceedings not inconsistent with this opinion.

TAYLOR, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

BUCKINGHAM, JUDGE, DISSENTING. I conclude that neither the discovery rule nor KRS 413.190(2) affords the appellant any relief in the determination of whether its complaint was filed within the limitation period. Therefore, I respectfully dissent. Before doing so, however, I feel it is necessary to summarize the salient points of the majority opinion in order that my dissenting views may be properly understood.

Since DiGiuro's death occurred on July 17, 1994, and the civil action was filed on July 1, 2002, the statute of limitation set forth in KRS 413.140(1)(a) barred the complaint as untimely unless the appellant could show relief under either the discovery rule or KRS 413.190(2). The majority declines to state whether it believes the discovery rule should be extended to cases of this nature, and the majority does not address KRS 413.190(2) in any manner. Rather, the majority decides this case on public policy considerations, states that the victim's family deserves a remedy, and declines to apply the one-year statute of limitation in KRS 413.140(1)(a) in any manner. I

believe that neither the discovery rule nor KRS 413.190(2) save the complaint from being time-barred, and I believe that public policy considerations are generally best left for determinations by the legislature or by our supreme court.

"With the exception of cases involving latent injuries from exposure to harmful substances, Kentucky courts have generally refused to extend the discovery rule without statutory authority to do so." Roman Catholic Diocese of Covington v. Secter, Ky. App., 966 S.W.2d 286, 288 (1998). "Kentucky case law has previously limited the extension of the discovery rule primarily to causes of action arising from recovery of stolen property, medical or professional malpractice and latent illness or injury resulting from exposure to harmful substances." Vandertoll v. Commonwealth, Ky., 110 S.W.3d 789, 796 (2003). Furthermore, in Louisville Trust Co. v. Johns-Manville Products Corp., Ky., 580 S.W.2d 497 (1979), the Kentucky Supreme Court agreed that the issue of extending the discovery rule was a matter of policy and that the Kentucky Court of Appeals should not attempt to make new policy. Id. at 499.

However, assuming that the discovery rule should be made applicable herein, it would not result in the appellant's complaint being held to be timely filed. In the Johns-Manville case our supreme court stated that "[a] cause of action will not accrue under the discovery rule until the plaintiff discovers or

in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct." Id. at 501, quoting Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170, 174 (1977). See also Gray v. Commonwealth, Transp. Cab., Dep't of Highways, Ky. App., 973 S.W.2d 61, 62 (1997). Assuming the applicability of the discovery rule to the facts herein, the appellant knew that DiGiuro's death may have been caused by the appellee when the appellee was arrested or by no later than the preliminary hearing held on July 19, 2000. The one-year statute of limitation was tolled until no later than that date. Therefore, since the appellant's complaint was filed on July 1, 2002, it would be time-barred even if the discovery rule had applicability. Regardless, the majority opinion does not rest on the discovery rule.

Turning to the applicability of KRS 413.190(2), that statute states as follows:

When a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced. But this saving shall not prevent the limitation from operating in favor of any other person not so acting,

whether he is a necessary party to the action or not.

Id. The majority made little mention of this statute in its opinion. However, the appellant claims that the statute saves its complaint from being time-barred.

The cause of action herein arose under KRS 411.130(1). In Conner v. George W. Whitesides Co., Ky., 834 S.W.2d 652, 654 (1992), the court reaffirmed the applicability of the one-year limitation period in KRS 413.140(1)(a) to wrongful death claims. Therefore, since this cause of action is subject to KRS 413.140(1)(a), KRS 413.190(2) is also applicable. Pursuant to that statute, the one-year limitation period does not run when the defendant has absconded, concealed himself, or by any other indirect means obstructed the prosecution of the action. See KRS 413.190(2).

Assuming that the appellee absconded, concealed himself, or by any other indirect means obstructed the prosecution of the action, he did so only until he was arrested on July 14, 2000. As of that date, his identity was revealed and the appellant was no longer unable to prosecute a civil action against him. Therefore, since the complaint was not filed until nearly two years after the appellee's arrest, the complaint was time-barred.

The appellant argues that the appellee concealed his identity even after his arrest and that he continued to do so by maintaining his innocence. Therefore, the appellant asserts the one-year limitation period did not begin to run until the appellee was convicted of the crime. Thus, since the jury verdict was rendered on March 27, 2002, and the civil complaint was filed on July 1, 2002, the appellant argues that it was timely filed.

In determining when the statute began to run, we must examine when the appellee was no longer "absconding," "concealing himself," or "by any other indirect means obstruct[ing] the prosecution of the action." See KRS 413.190(2). Once the appellee was arrested, he was no longer absconding or concealing himself. Furthermore, before it can be said that the appellee was obstructing the prosecution of the action "by any other indirect means," he must have committed "some act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so." Adams v. Ison, Ky., 249 S.W.2d 791, 792 (1952). Also, the appellee's "representation or conduct must have been relied upon reasonably and in good faith and have resulted in prejudice from having refrained from commencing his action within the limitation period." Id. at 793. In the case *sub judice*, the appellant knew the appellee's identity once he

was arrested and charged with the crime. The appellee did nothing to obstruct or prevent the appellant from instituting his civil complaint from that time forward. In short, I conclude that KRS 413.190(2) affords no relief to the appellant.

As has been noted, the majority does not base its opinion on either the discovery rule or KRS 413.190(2). Rather, the majority bases its opinion on public policy considerations. The majority acknowledges that wrongful death cases are governed by the one-year limitation period in KRS 413.140(1)(a). See Conner, 834 S.W.2d at 654. However, the majority holds that a murder case is different from other wrongful death cases because of different public policy considerations and that, therefore, the one-year limitation period in that statute should have no applicability at all.

I respectfully disagree with the majority's analysis for several reasons. First, since the majority declines to apply the one-year limitation period in KRS 413.140(1)(a), then it apparently holds that there is no statute of limitation applicable to a wrongful death action resulting from a murder. Surely, this cannot be so. Second, public policy considerations are more properly addressed by the legislature or by our supreme court, particularly where statutory law is applicable. Third, I see no reason why a death by murder should be classified differently from any other wrongful death case. In fact, the

statute allowing civil actions for wrongful death includes circumstances under which the act was committed by willful conduct. See KRS 411.130(1).

Finally, the majority states that the public policy in this commonwealth is that victims such as the appellant deserve a remedy. I agree. However, I believe the appellant's remedy was to file a civil complaint against the appellee within one year of learning of his identity following his arrest. Its failure to do so rendered its complaint untimely, and the circuit court properly dismissed it as barred by the applicable statute of limitation.

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