

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000243-MR

BARBARA GIBSON

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT  
HONORABLE STEPHEN N. FRAZIER, JUDGE  
ACTION NO. 00-CI-00138

CITIZENS NATIONAL CORPORATION;  
and JOHN ROGER BOWLIN, Individually,  
and his capacity as Executor of the  
Estate of MARY FERN MESSICK

APPELLEES

OPINION

AFFIRMING

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BEFORE: GUIDUGLI, MINTON, AND VANMETER, JUDGES.

VANMETER, JUDGE. Barbara Gibson, appellant, appeals from orders of the Johnson Circuit Court entered on December 20, 2001 and May 16, 2002 granting summary judgment, respectively, in favor of the appellees, John Roger Bowlin and Citizens National Corporation. Finding that the trial court did not err in granting summary judgment, this Court affirms.

The facts presented in this matter are undisputed and straightforward. Gibson is the sole daughter of Lynn Curtis Messick, who died intestate on or about August 14, 1993.

Messick was also survived by his wife, Mary Fern Messick. Mary Fern was appointed as administratrix of her husband's estate by order of the Johnson District Court entered August 26, 1993.

While acting in her capacity as administratrix, Mary Fern closed an account with the Signet Bank,<sup>1</sup> and received a check dated December 19, 1994, in the amount of \$136,487.91 payable to the order of the Estate of Lynn C. Messick. Mary Fern presented this check, along with her order of appointment as administratrix to Citizens National. Mary Fern endorsed the check as follows: "Mary Fern Messick, Adm Estate of Lynn Curtis Messick." Mary Fern deposited the proceeds of the check directly into her personal checking account.<sup>2</sup>

The appellant alleges Mary Fern initially told appellant that she, the appellant, would receive the funds in the Washington D.C. bank account, but that Mary Fern subsequently refused to honor this "commitment." Mary Fern did disburse the sum of \$51,579.62 to appellant. Mary Fern filed a

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<sup>1</sup> Gibson contends that this account was a joint survivorship account between her father and her. For whatever reason, Signet Bank, the successor bank to Security National Bank, Washington, D.C., the original depository bank, was unable to locate the original depository agreement or signature card. Therefore, for purposes of this appeal, Gibson's claims will be accepted as true.

<sup>2</sup> The deposit was apparently made on December 31, 1994.

Final Settlement of the Estate of Lynn C. Messick on or about April 17, 1995. Appellant filed no objection to the settlement of her father's estate.

Mary Fern died on June 2, 1996. The appellee, John Roger Bowlin, Mary Fern's nephew, was appointed administrator of Mary Fern's estate on June 12, 1996. The appellant filed a claim against Mary Fern's Estate on January 30, 1997. The Johnson District Court dismissed the claim, ruling that the claim should have been filed within six months of the date of appointment. Apparently, Mary Fern's Estate was settled on October 12, 1997. The appellant appealed this settlement to the Johnson Circuit Court. By judgment entered on November 24, 1997, the Johnson Circuit Court dismissed the action as res judicata.

Appellant filed the instant action on March 15, 2000 against both Citizens National Corporation and John Roger Bowlin for conversion. The Johnson Circuit Court granted the appellees' separate motions for summary judgment. The trial court denied the appellant's motion to alter, amend or vacate, and this appeal followed.

While the claims against the appellees arise out of common facts, the grounds for the summary judgment and the arguments both for and against, are quite distinct.

Claim against John Roger Bowlin.

Appellant argues the summary judgment was improperly granted as the trial court applied the wrong statute of limitations to her claim against John Roger Bowlin. The trial court held that the two year limitation imposed by KRS 396.205 barred the action. Appellant argues the five year limitation of KRS 413.120(6), applicable to claims of conversion, should apply.

KRS 396.205 is explicit:

**Notwithstanding any other statute to the contrary**, no cause of action on any claim not otherwise barred by the provisions of KRS 396.011 and KRS 396.055(1), or any other applicable statute of limitations, shall be brought against the personal representative or against any distributee after the expiration of two (2) years from the date of the order of discharge of the personal representative. The foregoing limitation shall not preclude an action by any claimant against the personal representative or any distributee for fraud. (Emphasis added).

As correctly noted by the trial court, this statute leaves little room for interpretation. While appellant cites a number of cases for the proposition that the five year statute of limitation applies to the conversion of property by a fiduciary,<sup>3</sup>

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<sup>3</sup> *Stacy's Administrator v. Stacy*, 296 Ky. 619, 178 S.W.2d 42 (1944); *Williams Administrator v. Union Bank and Trust Co.*, 283 Ky. 644, 143 S.W.2d 297 (1940); *Patton v. Coldiron*, 213 Ky. 709, 281 S.W. 812 (1926); *Fidelity & Columbia Trust Co. v. McCabe*, 169 Ky. 613, 184 S.W. 1124 (1916); *Withers Administratrix v. Withers Heirs*, 30 Ky. L. Rptr. 1099, 100 S.W. 253 (1907).

all of these cases predate the comprehensive revision of KRS Chapter 396 in 1988, of which KRS 396.205 was a part.<sup>4</sup>

In this case, Mary Fern was discharged as administratrix of Lynn Messick's estate in April, 1995. Any action against her, as fiduciary or as a distributee of the Lynn Messick estate, should have been brought within two years, or by April 1997. Even assuming the limitations could have been tolled by her death, the appellee, John Roger Bowlin, was discharged as administrator of her estate in October 1997. At the very latest, any action against John Roger Bowlin should have been filed by October 1999. The Johnson Circuit Court properly granted summary judgment in favor of the appellee, John Roger Bowlin.

Claim against Citizens National Corporation.

Appellant's claim for conversion against appellee, Citizens National Corporation proceeds from a slightly different point of view, and stems from Mary Fern's actions in endorsing a check payable to the Estate of Lynn C. Messick, and depositing that check into an account in her individual name. Appellant's claim is that based on the name of the payee on the check, the bank was on notice of Mary Fern's fiduciary status and, therefore, had an obligation to see that the check was deposited into an estate account. The trial court ruled that KRS 386.120,

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<sup>4</sup> 1988 Ky. Acts ch. 90, § 26.

absent any evidence of bad faith or notice of a breach of fiduciary duty, protected the bank from liability.

KRS 386.120 states as follows:

If a fiduciary makes a deposit in a bank or trust company to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or of checks payable to his principal and endorsed by him if he is empowered to endorse them, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank or trust company receiving the deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary. The bank or trust company may pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless it receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the deposit or in drawing the check or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.

Again, and as noted by the trial court, the statute absolves a bank of liability for cashing a check made payable to a fiduciary in his or her fiduciary capacity. The statute addresses the situation in which a fiduciary deposits a check payable in his or her fiduciary capacity, and deposits the check

in his or her individual account.<sup>5</sup> And, as noted by the trial court, the record contains no evidence of bad faith or knowledge of breach of fiduciary duty. See *Taylor v. Citizens Bank*, 290 Ky. 149, 151-52, 160 S.W.2d 639, 640-41 (1942).

While a trial court is admonished under *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, (1991) that the standard for granting a summary judgment is high,<sup>6</sup> the court in *Steelvest* also noted that "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." 807 S.W.2d at 482 (citing *Gullett v. McCormick*, Ky., 421 S.W.2d 352 (1967); *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co.*, Ky., 281 S.W.2d 914 (1955)).

The only evidence, apparently, supporting appellant's position is the fact that a check payable to Mary Fern in a fiduciary capacity was deposited to an individual account. KRS

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<sup>5</sup> The origin of KRS 386.120 is in the Uniform Fiduciaries Act § 9. Only a portion of the Uniform Fiduciaries Act was enacted in Kentucky. See 1930 Ky. Acts ch. 14. The commentary to the section states that "[b]y the weight of authority a depository of fiduciary funds is not bound to inquire into the authority of the fiduciary to make the deposit even where the deposit is made in the personal account of the fiduciary." Uniform Fiduciaries Act (U.L.A.) § 9 comment (2002).

<sup>6</sup> As the court held in *Steelvest*, "summary judgment is to be cautiously applied and should not be used as a substitute for trial" and "should only be used '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 and against the movant.'" 807 S.W.2d at 483 (quoting *Paintsville Hospital Co. v. Rose*, Ky., 683 S.W.2d 255, 256 (1985)).

386.120, however, explicitly absolves the bank of liability without additional evidence of bad faith or knowledge of breach of fiduciary duty.

For the foregoing reasons, this Court affirms the orders of the Johnson Circuit Court granting appellees' respective motions for summary judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael S. Endicott  
Paintsville, Kentucky

BRIEF FOR APPELLEE CITIZENS  
NATIONAL CORPORATION:

P. Franklin Heaberlin  
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BRIEF FOR APPELLEE JOHN ROGER  
BOWLIN:

Michael D. Osborne  
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