

RENDERED: AUGUST 18, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001170-MR

TERESA SMITH, ADMINISTRATRIX  
OF THE ESTATE OF DEMETRIUS  
KIRKSEY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 02-CI-00004

COMMONWEALTH OF KENTUCKY,  
JUSTICE CABINET, DEPARTMENT  
OF JUVENILE JUSTICE; AND  
BOARD OF CLAIMS

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER,<sup>1</sup> SPECIAL JUDGE.

GUIDUGLI, JUDGE: Teresa Smith, Administratrix of the Estate of Demetrius Kirksey, appeals from the order of the Franklin Circuit Court dismissing her petition for reconsideration of a decision by the Kentucky Board of Claims. The Board of Claims had dismissed her claim because it had not been filed within one

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<sup>1</sup> Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

year from the date of the incident which caused the damages. We reverse and remand.

On September 3, 1999, Demetrius Kirksey died while in the custody of the Justice Cabinet, Department of Juvenile Justice. Demetrius was a minor residing at the Cardinal Treatment Center in Jefferson County when he was found unconscious, strangled by a shoestring in an unsupervised area of the treatment center. He died of his injuries and it was not determined if his death was a result of suicide or homicide. On August 31, 2000, Teresa Smith, the mother of Demetrius, was appointed administratrix of his estate by order of the Jefferson County District Court. On August 30, 2001, Smith filed an action with the Board of Claims alleging Demetrius's death was caused by the negligence of the Department of Juvenile Justice.

The department filed a response and a motion to dismiss contending that KRS 44.110(1) requires all claims to be filed within one (1) year from the time the claim for relief accrued. The department also cited Gray v. Com., Transp. Cabinet, Dept. of Hwy.<sup>2</sup> as supporting the one year statute of limitations. The Board of Claims agreed with the Department of Juvenile Justice and ordered Smith's claim dismissed on November 15, 2001.

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<sup>2</sup> 973 S.W.2d 61 (Ky.App. 1997).

Smith filed a Petition to Reconsider in the Franklin Circuit Court on January 2, 2002. The department filed a response again arguing that KRS 44.110(1) and Gray, id., mandated a dismissal since Smith's claim had not been filed within one year of the incident causing the death. No further action was taken until the parties filed a notice of submission of case for final determination on May 10, 2005. On May 13, 2005, the Franklin Circuit Court entered an order dismissing Smith's petition for reconsideration. This appeal followed.

On appeal, Smith argues that the Board of Claims and the Circuit Court applied the wrong statute of limitations to this case. She contends KRS 411.130 and KRS 413.180 should apply to the facts herein giving her one year from the date she was appointed administratrix of Demetrius's estate. The Justice Cabinet did not file a brief with this Court.

While this case was pending before the Franklin Circuit Court, this Court rendered an opinion in Gaither v. Commonwealth,<sup>3</sup> which overruled Gray. (Discretionary review was denied by the Supreme Court of Kentucky on May 11, 2005, two days before the circuit court entered its final order.)<sup>4</sup> In Gaither, this Court, sitting *en banc*, specifically held:

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<sup>3</sup> 161 S.W.3d 345 (Ky.App. 2004).

<sup>4</sup> We note that Smith did not cite to Gaither in her brief to this Court and the Commonwealth failed to file a brief, which leads this Court to believe

Accordingly, we overrule our decision in Gray and hold that wrongful death actions against the Commonwealth may be pursued before the Board of Claims by a personal representative up to one year from the date of the qualification of the personal representative, with a maximum limitation of two years from the date of the death. Since Virginia Gaither's claim before the Board of Claims was timely under this standard, we reverse and remand for further proceedings.<sup>5</sup>

This case is factually similar to Gaither. Smith filed her action with the Board of Claims within one year from the date she was appointed administratrix and within two years from the time the claim for relief accrued.

For the foregoing reasons, the order of the Franklin Circuit Court is reversed and this matter is remanded to the Board of Claims for further proceedings.

SCHRODER, JUDGE, CONCURS.

MILLER, SPECIAL JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT: No brief for appellees.

R. Douglas Williamson  
Louisville, Kentucky

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that the Commonwealth was aware of Gaither. If this is the case, we admonish the Commonwealth for its lack of candor with the Court.

<sup>5</sup> Id. at 348.