

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001646-MR

STEVEN CLAYPOOLE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 05-CI-07467

ANDREW K. GAILOR AND GAILOR LAW  
OFFICE, PLLC, AND PROGRESSIVE  
CASUALTY INSURANCE COMPANY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

NICKELL, JUDGE: Steven Claypoole (“Claypoole”) has appealed from the dismissal of his claims against Andrew K. Gailor, Gailor Law Office (collectively “Gailor”), and Progressive Casualty Insurance Company (“Progressive”) for enforcement of an attorney’s lien and for damages for contractual interference. For the following reasons, we affirm.

On June 25, 2004, Nicholas Muniz (“Nicholas”) was killed in a motor vehicle accident in Jefferson County, Kentucky. On the night of his death, his parents,

Dennis Muniz (“Dennis”) and Teresa Muniz (“Teresa”), had a conversation with Gailor seeking assistance and representation regarding Nicholas’ death. Gailor and Teresa are related by virtue of the marriage of Gailor’s sister to one of Teresa’s step-brothers. On June 26, 2004, Teresa spoke with Claypoole, another of her step-brothers, and informed him Gailor was representing the family in regard to Nicholas’ death, but stated it would be acceptable for him to assist Gailor in the representation. On June 28, 2004, during Nicholas’ visitation at the funeral home, Claypoole presented Dennis and Teresa with a “Contract for Contingent Fee Arrangements” regarding possible claims arising from Nicholas’ death which provided for Claypoole to receive one-third of any monies recovered via settlement of such claims. Dennis and Teresa each executed the documents.<sup>1</sup>

Claypoole contacted Progressive Casualty Insurance Company (“Progressive”), the insurance carrier for the individual whose negligence allegedly resulted in Nicholas’ death. He notified Progressive of the wrongful death claim and of his representation of the Muniz family. The record does not reveal any other action taken by Claypoole on the Muniz’s claim.

Shortly after executing the contract with Claypoole, Dennis and Teresa determined Claypoole was acting outside the scope of their understanding of his role and decided to terminate his representation of them. Teresa testified that she believed the document she signed at the funeral home related to a power of attorney she had requested Claypoole to prepare. She was unaware it authorized Claypoole to represent

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<sup>1</sup> Teresa testified in her deposition that when presented with the contingent fee agreement, she was unaware of what she was signing, believing it only to contain information related to the power of attorney she had asked Claypoole to prepare. Thus there is a serious issue as to whether a meeting of the minds existed between Claypoole and the Muniz family sufficient to form a binding contract as to the wrongful death claim. However, as this issue was not raised by any of the parties, we assume they have waived any argument as to the validity of the contract and will base the rest of our opinion on this assumption.

herself and her husband regarding Nicholas' death. On July 8, 2004, Dennis and Teresa directed Gailor to draft a letter to Claypoole terminating his employment. That same day, Dennis and Teresa executed a written contingent fee contract with Gailor memorializing their earlier verbal agreement for representation regarding Nicholas' death. Subsequently, Claypoole sent a letter to Progressive stating he no longer represented the Muniz family and directing all future correspondence be sent to Gailor.

Gailor pursued the claim on behalf of the Muniz family and was able to reach a \$50,000.00 settlement with Progressive. On October 21, 2004, Dennis and Teresa executed a full release of Progressive and its insured in exchange for payment of the above sum. Gailor retained twenty-five percent of the settlement proceeds as a fee in accordance with the written contingency fee agreement.

Dennis passed away on December 31, 2004, and Teresa was appointed personal representative of his estate. Gailor again undertook representation of the family. On March 9, 2005, Claypoole submitted a claim against Dennis' estate based upon his contract with Dennis and Teresa wherein he sought payment of an attorney's lien as provided by KRS<sup>2</sup> 376.460. This claim was denied on March 11, 2005, via a formal Notice of Disallowance which contained the express language found in KRS 396.055 notifying Claypoole that if he failed to file an action within sixty days following the date of the notice he would be forever barred from asserting such claim.

Some five months later, on August 30, 2005, Claypoole filed a verified complaint alleging two causes of action. The first, against Gailor and Progressive, was for an accounting and enforcement of his alleged attorney's lien. Claypoole alleged he placed Progressive and Gailor on notice of his attorney's lien prior to the settlement but that the lien was not honored in the settlement. The other cause of action, against Gailor only, was for tortious interference with his contract. Claypoole alleged Gailor

<sup>2</sup> Kentucky Revised Statutes.

contacted Dennis and Teresa and provided them with “inaccurate, incorrect, misleading and/or untrue” information which was intended to interfere with his contract. On November 15, 2005, Progressive moved for a judgment on the pleadings, which Gailor joined. On November 22, 2005, Progressive moved for summary judgment, which Gailor again joined.

On February 17, 2006, the trial court entered an order granting Progressive’s motions and dismissing all of Claypoole’s claims. By opinion and order entered on April 10, 2006, and in response to Claypoole’s motion to alter, amend or vacate its earlier order, the trial court reinstated his tortious interference claim against Gailor. Gailor then moved for summary judgment, which was granted on July 21, 2006. This appeal followed.

Before this Court, Claypoole contends the trial court erred in granting judgment in favor of Progressive and Gailor based upon its erroneous finding he had no claim under KRS 376.460 against anyone other than his former client. He further contends the trial court erred in relying on KRS 396.055(1) as a basis for its ruling in favor of Progressive and Gailor. Finally, Claypoole argues the trial court erred in granting summary judgment in favor of Gailor on his contractual interference claim as genuine issues of material fact existed.

#### LIEN ENFORCEMENT CLAIMS

First, a careful review of the record reveals the trial court did not, as Claypoole suggests, find his failure to file suit against his former client fatal to maintaining his claim to enforce his statutory lien. In fact, we are unable to find more than a passing mention of Claypoole’s failure to sue his sister in any of the three orders from which he appeals. While Progressive did advance this argument in its motion for relief, and Claypoole argues extensively on this point, there is nothing in the trial court’s

various orders indicating it accepted this argument. Thus, we reject Claypoole's first allegation of error.

Next, Claypoole contends the trial court erroneously relied upon the language of KRS 396.055(1) when granting Progressive's and Gailor's motions for judgment on the pleadings and summary judgment on the lien enforcement claim. Again, we disagree.

The trial court rejected Progressive's argument that the doctrine of issue preclusion, a subset of *res judicata*, was fatal to Claypoole's arguments. Instead, the trial court specifically found statutory and procedural law failings to be the deciding factors requiring dismissal of Claypoole's claims. The trial court stated Claypoole chose to assert his claim first in the probate court, thus making the probate court the proper forum for resolution of the claim. His failure to then follow the strict time mandates of the probate court made the present suit untimely.

In order to enforce his lien, an attorney may interplead in the original action or institute an independent action for recovery of his fee. *Jellico Coal Mining Co. v. Pope*, 292 Ky. 171, 166 S.W.2d 287 (1942). Here, Claypoole did not initially institute an independent action, but rather sought to enforce his lien through the pending probate action. The probate court then became the proper jurisdiction and venue in which to fully litigate the claim for entitlement to the asserted lien, as was properly found by the trial court. *Harbison-Walker Refractories Co. v. McFarland's Adm'r*, 156 Ky. 44, 160 S.W. 798 (1913). Any further actions with regard to the asserted lien would necessarily be controlled by the statutes governing probate matters.

In discussing the proper procedure for enforcing claims in probate matters, the plain language of KRS 396.055(1) provides, in relevant part:

[e]very claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed

unless the claimant commences an action against the personal representative not later than sixty (60) days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar.

Claypoole initially brought his claim for enforcement of his lien in the probate court, it was disallowed in writing, and he was informed of the time bar for filing a formal action to enforce his claim as explicitly required by KRS 396.055(1). The disallowance notice also informed Claypoole his claim was not a just debt of the estate as he had been fired for cause and thus had no standing to assert a lien or claim for attorney's fees.

Claypoole then waited in excess of five months—and more than three months after the running of the statutory time limit—to bring the instant action.<sup>3</sup> We agree with the trial court that such untimely filing was fatal to Claypoole's claims.

It is axiomatic that strict compliance with clear statutory mandates regarding timeliness is required. There is no allegation that the time bar was somehow tolled and we are unconvinced such tolling occurred. We also reject Claypoole's argument that his current claims are separate and distinct from those he might have brought in the probate action. The subject matter and factual background are identical in both cases. Thus, as the trial court properly found, Claypoole's own inaction led to the demise of his claim to enforce his lien against all potentially responsible parties. There was no error.

#### INTERFERENCE WITH CONTRACT CLAIM

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<sup>3</sup> We note that although Claypoole initially sought recovery on his purported lien for the full contractual amount less the value of services rendered by Gailor, on appeal he argues he is entitled to recover on a *quantum meruit* basis. We believe this argument is consistent with the law of the Commonwealth as set forth in the recent Supreme Court decision in *Baker v. Shapero*, 203 S.W.3d 697, 699 (Ky. 2006), holding that "when an attorney employed under a contingency fee agreement is discharged without cause before completion of the contract, he or she is entitled to fee recovery on a *quantum meruit* basis only, and not on the terms of the contract." Thus, were Claypoole to have prevailed, he would be entitled to compensation only for the value of the services he actually rendered.

Next, Claypoole contends the trial court erred in granting summary judgment to Gailor on his claim for tortious interference as discovery was incomplete and genuine issues of material fact existed. We disagree.

The standard of review governing appeals from the grant of summary judgment is well-settled. We are to determine whether the trial court erred in its conclusion there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is only appropriate “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. In *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper it must be shown that the adverse party cannot prevail under any circumstances. The Supreme Court has also stated “the proper function of summary judgment is 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.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Appellate courts are not required to defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor [citation omitted].” *Steelvest*, 807 S.W.2d at 480. Furthermore, “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.” *Id.* at 482. See also Philipps, *Kentucky Practice*, CR<sup>4</sup> 56.03, p. 418 (6th ed. 2005).

In the case at bar, Claypoole contends the trial court’s finding that no genuine issues of material fact existed was premature as discovery had not been completed. He further argues Teresa’s inconsistent answers to questioning during her deposition created a genuine issue of material fact sufficient to preclude summary judgment. We find neither proposition persuasive.

Claypoole relies on *Welch v. American Publishing*, 3 S.W.3d 724, 729-730 (Ky. 1999), for the proposition that discovery must be complete before a motion for summary judgment may properly be considered. However, he has failed to consider the entirety of that opinion or the context from which he plucks the language he alleges supports his position. *Welch* clearly states the focus of a trial court in ruling on a motion for summary judgment should be on the evidence which is then in the record, and not on the possibility of what evidence might be presented if the matter proceeds to trial. The status of discovery is not a deciding factor in whether the motion is timely made. CR 56.02 specifically provides that a party may move for summary judgment “at any time” during the pendency of the action. Nowhere in the civil rules nor in the vast body of caselaw on the subject of summary judgments can we discern the requirement urged upon us by Claypoole. We are not inclined to rewrite the whole of Kentucky jurisprudence on this matter, and thus find no error on the part of the trial court.

Finally, we must address Claypoole’s contention that a genuine issue of material fact was present making the trial court’s decision to grant Gailor’s motion for summary judgment improper. He contends Teresa’s inconsistent answers to questions regarding the facts surrounding the decision to fire Claypoole and to hire Gailor were sufficient to raise such an issue of material fact. We hold they did not.

<sup>4</sup> Kentucky Rules of Civil Procedure.



The seminal case involving tortious interference is *National Collegiate Athletic Association v. Hornung*, 754 S.W.2d 855 (Ky. 1988). Therein, the Supreme Court held “it is clear that to prevail a party seeking recovery must show malice or some significantly wrongful conduct.” *Id.* at 859. As previously stated, Claypoole cannot merely rest upon assertions set forth in his complaint but must present at least some additional evidence indicating the presence of a genuine issue of fact. Claypoole has failed to show the existence of either of the factors required by *Hornung* and Teresa’s testimony does not indicate their presence.

Throughout her testimony, Teresa consistently reiterated her intent to hire Gailor as her counsel for the wrongful death action. She also consistently testified as to her intent to engage Claypoole only for the purpose of preparing a power of attorney and possibly assist Gailor in his duties. There may have been a misunderstanding as to the role Claypoole was to play in the litigation, but there has been no showing of malice or wrongful acts. Teresa initially contacted Gailor on the night of her son’s death and when Claypoole contacted her the following day, she informed him Gailor was her attorney. Although her testimony wavered as to specific dates and circumstances, Teresa’s intention in regard to representation remained constant. Claypoole offered no sworn testimony, via affidavit or otherwise, to contradict any of Teresa’s testimony or to indicate the presence of the alleged improper statements made by Gailor to induce the Muniz family to dismiss Claypoole as counsel. Thus, based on the record before it, the trial court correctly found no genuine issue of material fact existed and that it would be impossible for Claypoole to prevail at trial as he had not met the threshold requirement set forth in *Hornung, supra*.

Therefore, for the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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