

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

NO. 2007-CA-001124-MR

R. DARLENE KEMPF, AS EXECUTRIX/  
PERSONAL REPRESENTATIVE OF THE  
ESTATE OF DELLA MAE BURTON WINBURN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
ACTION NO. 07-CI-00935

MABEL McDONALD, INDIVIDUALLY  
AS SOLE BENEFICIARY AND IN HER  
CAPACITY AS EXECUTRIX OF THE  
ESTATE OF BARBARA McDONALD GRIFFIN

APPELLEE

OPINION  
VACATING AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,<sup>1</sup> SENIOR  
JUDGE.

VANMETER, JUDGE: If a claim against a decedent's estate has been

disallowed, the claimant must file an action to enforce the claim within sixty days

---

<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

of the notice of disallowance or the claim is barred under Kentucky Revised Statutes (KRS) 396.055 if the notice warns the claimant of the impending bar. We are asked to decide whether the Fayette Circuit Court erred in dismissing the action of R. Darlene Kempf, as administratrix with will annexed of the estate of Della Mae Burton Winburn, deceased,<sup>2</sup> against the estate of Barbara Griffin, deceased, since that action was filed well in excess of the sixty-day limit. As we hold that the trial court erred, we vacate its judgment and remand this matter to that court for further proceedings.

Griffin and Kempf were Winburn's nieces. Prior to Winburn's death on August 19, 2005, Griffin served as Winburn's attorney-in-fact under a durable power of attorney. Initially, Griffin petitioned the Fayette District Court for appointment as executrix under Winburn's will. Subsequently, Kempf filed a petition for appointment as administratrix with will annexed of Winburn's estate. Griffin withdrew her petition for appointment as executrix, and Kempf was appointed. Griffin unexpectedly died on December 11, 2005. After Griffin's death her mother, Mabel McDonald, was appointed executrix under her will.

The record discloses that Winburn's and Griffin's estates filed competing claims against one another. On April 19, 2006, Griffin's estate filed a claim against Winburn's estate for unpaid legal fees. Kempf disallowed the claim on June 19. McDonald, as executrix, filed an action on the claim in the Fayette

---

<sup>2</sup> While the caption of this appeal, and the matter below, refer to Kempf as the executrix/personal representative of the Estate of Della Mae Burton Winburn, the record indicates that Kempf actually serves as the administratrix with will annexed of Winburn's estate.

Circuit Court on August 18.<sup>3</sup> Meanwhile, on June 20, 2006, Kempf, on behalf of Winburn's estate, filed a claim against Griffin's estate, claiming fraud and misappropriation of money by Griffin while she served as Winburn's attorney and attorney-in-fact. Two days later, on June 22, McDonald filed a notice of disallowance of the claim. The notice of disallowance did not include the statutory warning that the claim would be barred if an action was not filed within sixty days. KRS 396.055(1).

On February 22, 2007, Kempf filed the instant action to settle Griffin's estate, under KRS 395.510 and 395.515, alleging Griffin's mismanagement, misappropriation, fraud, and breach of fiduciary duty in serving as attorney-in-fact for Winburn. *See Deaton v. Hale*, 592 S.W.2d 127, 130 (Ky. 1979) (attorney-in-fact must account for any and all property received from or on behalf of principal). McDonald answered the complaint, but she also filed a motion to dismiss based on Kempf's failure to file her action within sixty days of the notice of disallowance as required by KRS 396.055(1). Kempf opposed the motion, arguing that the action was not barred because the district court lacked jurisdiction to make any determination in an adversary proceeding, such as determining ownership of real and personal property, or the imposition of a constructive trust. Kempf argued further that under KRS 395.515, the circuit court is to adjudicate (1) the rights of creditors, beneficiaries, or heirs to receive

---

<sup>3</sup> *Mabel B. McDonald, Executrix of the Estate of Barbara Griffin, deceased v. R. Darlene Kempf, Executrix of the Estate of Della Mae Burton Winburn, deceased*, 06-CI-03538 (Fayette Circuit Court).

payments or distribution, (2) the proper settlement of an estate, and (3) the proper distribution of estate assets. She also argued that KRS 413.120's five-year statute of limitations governed the action, or alternatively, that under KRS 396.011(2)(a) any property held by a decedent subject to a lien or security interest was excepted from the time bar imposed by KRS 396.055(1). The trial court granted McDonald's motion and dismissed Kempf's action, reasoning that the action was not filed within sixty days of the notice of disallowance, and that the exception provided by KRS 396.011(2)(a) was inapplicable. Kempf appeals.

On appeal, Kempf advances two arguments: that the five-year statute of limitations under KRS 413.120 applies to this action; and that this court should take judicial notice that McDonald's notice of disallowance did not contain language putting Kempf on notice of the sixty-day requirement for filing an action to enforce the Winburn estate's claim.

We note that Kempf did not make the latter argument to the trial court. Typically, arguments not advanced before the trial court do not warrant review in an appellate court. *See, e.g., Abuzant v. Shelter Ins. Co.*, 977 S.W.2d 259, 262 (Ky.App. 1998); *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky.App. 1985). However, a recognized exception to this rule is that an appellate court will entertain an argument not presented to the trial court in order to prevent manifest injustice. *Charash v. Johnson*, 43 S.W.3d 274, 277 (Ky.App. 2000); *see also Disabled American Veterans, Dept. of Kentucky, Inc. v. Crabb*, 182 S.W.3d 541, 546 (Ky.App. 2005). Further, in *Herndon v. Herndon*, 139 S.W.3d 822, 826-27

(Ky. 2004), the Kentucky Supreme Court noted that the language of CR<sup>4</sup> 61.02<sup>5</sup> “plainly states that a claim of palpable error may be considered by an appellate court even though the issue was not presented to the court below. Relief under CR 61.02 requires a determination of manifest injustice resulting from an error that affected the substantial rights of the party.”

In this instance, the record is clear that McDonald’s disallowance of the claim did not contain the warning required by KRS 396.055(1). Under the limited circumstances of this case, we believe the facts demonstrate that a manifest injustice would occur if we were to permit Kempf to be bludgeoned by the sledgehammer of the sixty-day bar in contravention of the plain language of the statute, especially in light of the counterclaims the two estates have set up against each other.

McDonald argues that the sixty-day time limit should be enforced because Kempf and her counsel “were most certainly aware” of the impending ban due to other claims filed between the two parties. However, barring the Winburn estate’s claim on such grounds would be contrary to the plain language of KRS 396.055, which statutorily ensures that the time limit is enforceable only “if the notice warns the claimant of the impending bar.” KRS 396.055(1). The clear

---

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

<sup>5</sup> CR 61.02 states “[a] palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.”

statutory language contains no suggestion that prior knowledge suffices in the absence of the required warning. We must conclude that without a specific inclusion of the time limit in the notice of disallowance, the sixty-day time limit is not enforceable. As such, we note that under KRS 413.120 the applicable statute of limitations for an action against an attorney-in-fact is five years. *Ingram v. Cates*, 74 S.W.3d 783, 787 (Ky.App. 2002)

Because this appeal is appropriately resolved on the foregoing grounds, we do not address Kempf's other arguments. The Fayette Circuit Court's order dismissing Kempf's cause of action is vacated, and this matter is remanded to that court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Peter L. Ecabert  
Lexington, Kentucky

BRIEF FOR APPELLEE:

C. William Swinford, Jr.  
Lexington, Kentucky