

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000271-MR

DOVIE MOORE, AS ADMINISTRATOR
OF THE ESTATE OF PEYTON SPENCER
GREEN

APPELLANT

v. APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 12-CI-00428

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

CAPERTON, JUDGE: The Appellant, Dovie Moore, Administrator of the Estate of Peyton Spencer Green (hereinafter “Moore”), appeals the February 5, 2013, order of the Allen County Circuit Court, dismissing her wrongful death claim

against the Appellee, Kentucky Farm Bureau Mutual Insurance Company (hereinafter “Farm Bureau”). Upon review of the record, the arguments of the parties, and the applicable law, we affirm. However, because we also conclude that the dismissal should be without prejudice, we reverse that portion of the order and remand for entry of an order dismissing without prejudice.

This case arises out of the death of Peyton Spencer Green on July 2, 2011. On June 26, 2012, Julie Green, mother of Peyton Green, and her boyfriend, Tim Steen, were indicted in his death. On August 15, 2012, a petition for appointment of administrator was filed for the Estate of Peyton Spencer Green. Thereafter, on August 22, 2012, Dovie Moore, who is Julie’s mother and Peyton’s grandmother, was appointed as the Administrator of the Estate.

On October 12, 2012, Dovie Moore filed a petition for declaratory judgment against Kentucky Farm Bureau alleging that the actions of Julie Green and Tim Steen were the cause of the child’s death, that Kentucky Farm Bureau may have issued a policy that would cover it, and that the Allen Circuit Court should issue a “judgment ordering Kentucky Farm Bureau to pay the maximum policy benefits under any homeowner’s policy that would provide coverage for this loss.” Kentucky Farm Bureau filed a response generally denying any liability, asserting that the petition for declaration of rights failed to state a claim upon which relief could be granted, that it failed to name all indispensable parties, and that it was not filed within the applicable statute of limitations. Further, Kentucky Farm Bureau denied entitlement of any policy for the benefit of either Timothy

Steen or Julie Green. Farm Bureau acknowledged that it had previously issued or renewed a mobile home policy to Bobbi Driver Rhoton bearing policy No.

M028610,¹ with respect to which it affirmatively pled all statutory and contractual defenses. Farm Bureau requested that the petition for declaratory judgment be dismissed.

Following a hearing on the motions, the Allen Circuit Court dismissed the petition with prejudice on February 5, 2013, finding that no cause of action was ever asserted against the negligent actors, or against any insured of Kentucky Farm Bureau. It is from that order that Moore now appeals to this Court.

Moore argues that Kentucky Revised Statutes (KRS) 411.130(1) provides that the personal representative of a deceased should pursue a wrongful death action within one year after the cause of action accrued. Moore asserts that the homicide of Peyton Green was an unsolved crime until at least June 26, 2012, at which time Julie Green and Timothy Steen were indicted by the Allen County Grand Jury. In reliance upon *Ragland v. Diguero*, 352 S.W.3d 908 (Ky. App. 2010),² Moore argues that a wrongful death action is timely filed within one year

¹ Though not stated in Farm Bureau's response, this Court presumes this policy is the homeowner's policy issued to cover the mobile home where Peyton Green's death occurred. That mobile home was owned by Bobbi Steen (now known as Bobbi Driver Rhoton), whom Moore asserts is Timothy Steen's stepmother.

² In that matter, the victim, Trent Diguero, was killed by a single gunshot wound to the head on July 17, 1994. The case went unsolved until July 14, 2000, when Ragland was arrested and charged with the murder. On April 24, 2001, Diguero's father was appointed administrator of Trent's estate, and filed a wrongful death complaint on July 1, 2002, that was tried before a jury in July of 2008. The jury awarded damages, and Ragland appealed. On appeal, this Court held that public policy in Kentucky would not be furthered by using a strict one-year statute of limitations, but instead, would be best served by allowing the family of a murder victim to wait until conviction of the defendant before filing suit.

of the action accruing and that, accordingly, the one-year statute of limitations did not accrue until June 26, 2012, the date that Green and Steen were indicted. Thus, Moore asserts that she timely filed her action against Kentucky Farm Bureau on October 12, 2012.

In response, Kentucky Farm Bureau argues that the court below properly dismissed this action because Moore failed to state a claim upon which relief could be granted. It argues that Moore should have filed her complaint against the tortfeasors, Julie Green and Timothy Steen, and not against Farm Bureau because Kentucky is not a direct action jurisdiction. Moreover, it argues that this matter was properly dismissed as Moore failed to file it against the necessary parties within the applicable statute of limitations.

The standard of review on appeal from a trial court's granting of a motion to dismiss for failure to state a claim upon which relief could be granted has been set forth as follows:

The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal quotation marks, footnote, and citation omitted). Concerning whether an action is barred by the applicable statute of limitations, we note that this is a question of law, which

we review *de novo*. See *Cuppy v. General Acc. Fire & Life Assur. Corp.*, 378 S.W.2d 629, 631 (Ky. 1964); and *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 779 (Ky. App. 2007). We review the arguments of the parties with this in mind.

Upon review of the record, the arguments of the parties, and the applicable law, we believe that the court appropriately dismissed Moore's action for failure to state a claim upon which a relief can be granted. In her brief to this Court, Moore described her claim as, "[A] case in which Appellant, the Administrator of her dead 18 month old grandson's estate, appeals the dismissal of her wrongful death claim against an insurance company that may provide coverage for this loss under a homeowner's policy." She further argued that, "Under KRS 411.130(1), KRS 413.180 and the Court of Appeals holding in *Ragland v. Diguiro*, 352 S.W.3d 908 (Ky. App. 2010), Dovie's wrongful death claim against KFB should have been allowed to proceed and should not have been dismissed." Ultimately, the grounds asserted in the petition filed by Moore do not support a cause of action against the only named party, Kentucky Farm Bureau. There was no allegation that Kentucky Farm Bureau was somehow negligent or caused or contributed to the wrongful death of Peyton Spencer Green.

According to the Petition which Moore filed in October 2012, she knew the identities of the alleged potentially negligent parties at the time that Peyton Green was found dead, and certainly by the time the petition was filed. This is evident in Moore's brief to this Court wherein she states that she knew the

negligent parties with certainty at the time they were indicted on June 26, 2012. Nevertheless, Moore chose to name Kentucky Farm Bureau as the only party to this matter. Ultimately, Kentucky Farm Bureau was not the tortfeasor in the incident that is the basis for Moore's claim.

As our courts have repeatedly held, Kentucky is not a direct action jurisdiction. *State Auto Mutual Insurance Company v. Empire Fire & Marine Insurance Company*, 808 S.W.2d 805 (Ky. 1991); and *Cuppy v. General Accident Fire & Life Insurance Corp.*, 378 S.W.2d 629 (Ky. 1964). In ordinary circumstances, an injured party must first obtain judgment against the opposing party defendant and then seek enforcement of the judgment rendered in an action against the defendant's indemnitor. *State Farm* at 809. Thus, Moore's claim against Farm Bureau, if viable, would not be so until she has first proven that an insured of Farm Bureau was negligent and obtained a judgment against said individual for which Farm Bureau would be obligated to indemnify under an insurance policy. Accordingly, we believe that the court below appropriately dismissed this matter for failure to state a claim upon which relief can be granted.

In so finding, we recognize that the parties are in dispute concerning whether or not Moore's claim is barred by the statute of limitations, and in so doing, direct this Court to our holding in *Ragland v. Diguero*, 352 S.W.3d 908, 912 (Ky. App. 2010). This Court further understands that Moore has now filed a civil action against Timothy Steen, which is currently pending in the Allen Circuit Court. While the parties may argue the applicability of *Ragland* therein, that

matter is not currently before this Court. The issue before this Court is whether or not Moore has stated a claim against Farm Bureau upon which relief can be granted. Finding that she has not, we affirm.³

In affirming, we do note that the court below dismissed this action against Kentucky Farm Bureau with prejudice. The dismissal of an action with prejudice precludes another action on the same matter. *Overstreet v. Greenwell*, 441 S.W.2d 443 (Ky. App. 1969); *Yocom v. Hayden*, 566 S.W.2d 776 (Ky. App. 1978). In light of additional litigation currently pending with respect to this matter, we believe that the dismissal should not have been with prejudice, and we reverse that portion of the court's order. In all other respects, for reasons previously set forth herein, we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the February 6, 2013, order of the Allen Circuit Court, dismissing this matter for failure to state a claim upon which relief can be granted, and remand this matter for entry of a new order wherein the dismissal is without prejudice.

ALL CONCUR.

³ In affirming, we also briefly address Moore's argument that the court below failed to comply with Kentucky Rules of Civil Procedure (CR) 52.01 in issuing its order on Farm Bureau's motion to dismiss. As our courts have previously held, rulings on motions are exempted from the mandate requiring that the trial judge make findings of fact and conclusions of law. *Clay v. Clay*, 424 S.W.2d 583 (Ky. 1968).

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