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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002378-MR

MICHAEL JOSEPH FLICK

APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT
CASE NO. 2010-SC-000664-DG

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 08-CI-04294

THE ESTATE OF CHRISTINA WITTICH,
BY AND THROUGH JUDITH WITTICH
AND FREDERICK WITTICH IN THEIR
DULY APPOINTED CAPACITIES
AS CO-ADMINISTRATRIX AND
CO-ADMINISTRATOR

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: KRAMER, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Michael Joseph Flick appeals from a judgment of the Fayette
Circuit Court finding him liable for the wrongful death of Christina Wittich and

awarding compensatory and punitive damages to Wittich's Estate. Flick primarily argues that the trial court erred by denying his motion to dismiss because the complaint was filed beyond the one-year statute of limitations for wrongful death provided under KRS¹ 413.140(1). We conclude that the cause of action against Flick accrued no later than the date of his indictment, and, by operation of KRS 413.180, the Estate had two years from that date to bring the complaint. Since this action was not brought within that time, the trial court erred by denying the motion to dismiss. Hence, we reverse the judgment and remand for entry of an order dismissing the complaint.

On May 20, 2005, Flick shot and killed Christina Wittich. Subsequently, in February 2008, Flick was convicted of Wittich's murder, second-degree assault under Extreme Emotional Disturbance on Wittich's boyfriend Randall Lambirth, and first-degree burglary of their residence. He received a total sentence of life imprisonment. The Kentucky Supreme Court affirmed his conviction on direct appeal. *Flick v. Commonwealth*, 2009 WL 1451923 (Ky. 2009)(2008-SC-000233-MR).

Wittich's parents, Judith Wittich and Frederick Wittich, were appointed as co-administrators of Wittich's Estate on November 16, 2006. Following the criminal trial, the Estate filed a wrongful-death claim against Flick on August 22, 2008. Flick filed a motion to dismiss, arguing that the action was not filed within the one-year statute of limitations provided by KRS 413.140. The

¹ Kentucky Revised Statutes.

Estate responded that the statute of limitations was tolled until Flick's conviction under the rule set out in the unpublished Court of Appeals case, *DiGiuro v. Ragland*, 2004 WL 1416360 (Ky. App. 2004)(2003-CA-001555-MR). The trial court agreed and denied the motion. Thereafter, the wrongful-death claim proceeded to a jury trial in 2009. The jury returned a verdict in favor of the Estate, awarding \$2,900,000 in compensatory damages and \$53,000,000 in punitive damages.

Flick filed a timely appeal in December 2009. However, this Court dismissed the appeal for failure to name the co-administrators as necessary and indispensable parties. On further review, the Kentucky Supreme Court reinstated the appeal, finding that Flick had substantially complied with CR² 73.03 by naming the Estate as Appellee. *Flick v. Estate of Wittich*, 396 S.W.3d 816, 818 (Ky. 2013). The Supreme Court remanded the matter to this Court for review on the merits of the appeal.

Flick primarily focuses on the trial court's denial of his motion to dismiss the complaint as untimely. Claims for personal injury or wrongful death are subject to a one-year statute of limitations. KRS 413.140(1). However, a wrongful-death claim must be prosecuted by the personal representative of the deceased. KRS 411.130(1). KRS 413.180 further sets out the time limitations for actions by or against a personal representative.

² Kentucky Rules of Civil Procedure.

(1) If a person entitled to bring any action mentioned in KRS 413.090 to 413.160 dies before the expiration of the time limited for its commencement and the cause of action survives, the action may be brought by his personal representative after the expiration of that time, if commenced within one (1) year after the qualification of the representative.

(2) If a person dies before the time at which the right to bring any action mentioned in KRS 413.090 to 413.160 would have accrued to him if he had continued alive, and there is an interval of more than one (1) year between his death and the qualification of his personal representative, that representative, for purposes of this chapter, shall be deemed to have qualified on the last day of the one-year period.

The purpose of KRS 413.180 is to allow time for the appointment of a personal representative and then to give that personal representative time to evaluate claims and determine whether to pursue those claims. *Conner v. George W. Whitesides Co.*, 834 S.W.2d 652, 654 (Ky. 1992). Under the statute, the limitations period for a wrongful-death claim commences upon appointment of the personal representative, but in any case no more than two years from the date of death. *Gaither v. Commonwealth*, 161 S.W.3d 345, 348 (Ky. App. 2004). In this case, the wrongful-death claim was filed more than three years after Wittich's death, and nearly two years after the appointment of the co-administrators of the Estate.

However, in *DiGiuro v. Ragland*, *supra*, this Court recognized a limited exception to the application of the statute of limitations. That case involved the notorious killing of Trent DiGiuro on July 17, 1994. His murder went

unsolved for many years. However, in January of 2000, Shane Ragland was identified as DiGiuro's killer. On March 27, 2002, a jury found Ragland guilty of the murder.

DiGiuro's father was appointed as administrator of his estate in 2001, and he filed a wrongful death action on July 1, 2002. However, the circuit court dismissed the action as time-barred, concluding that it should have been brought within one year from the date that Ragland was arrested and charged with the murder. On appeal, this Court agreed that a wrongful-death claim would be generally subject to the one-year statute of limitations. But based upon public policy considerations, a majority of the Court of Appeals panel concluded that, in wrongful death cases arising from a murder, the statute of limitations should be tolled until the conviction of the defendant. *Id.* Slip Op. at 14-18.

The Kentucky Supreme Court accepted discretionary review in *DiGiuro*. But due to a vacancy, the Court split 3-3, resulting in an affirmance of the Court of Appeals decision. However, this Court's opinion remained unpublished by operation of CR 76.28(4). Upon remand, a jury returned a verdict for DiGiuro's estate, and awarded compensatory and punitive damages against Ragland. In a subsequent appeal, this Court declined to revisit the statute-of-limitations ruling, concluding that it had become the law of the case. *Ragland v. DiGiuro*, 352 S.W.3d 908, 913-16 (Ky. App. 2010).

In the current appeal, we are directly presented with the question of whether the holding of *DiGiuro v. Ragland* remains valid. CR 76.28 does not

distinguish between opinions which were originally designated as “Not to be Published,” and those which are subsequently designated as unpublished by order of the Supreme Court.³ In either case, CR 76.28(4)(c) provides:

Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action

Thus, this Court may consider the first *DiGiuro* opinion as persuasive authority if there is no published opinion on the subject. *DiGiuro* sets out compelling public policy arguments why the statute of limitations should be tolled until the defendant is criminally convicted of the murder. However, these policy considerations must yield where the General Assembly has clearly addressed the subject. *Leadingham ex rel. Smith v. Smith*, 56 S.W.3d 420, 429 (Ky. App. 2001).

As noted above, it is well-established that an action for wrongful death is subject to the one-year statute of limitations in KRS 413.140(1). *Conner*, 834 S.W.2d at 653-54. Under KRS 413.180, the action must have been brought within one year from the appointment of the personal representative, but not more

³ We note, however, that Westlaw appears to recognize such a distinction by deleting the text of a de-published opinion from its database and leaving only the heading. Unless modified by a subsequent opinion in the same case, the original opinion remains available on the Kentucky Court of Justice website.

than two years from the date the cause of action accrued. KRS 413.190 allows the limitations period to be tolled for any period that the defendant “abscond[s] or conceal[s] himself or by any other indirect means obstructs the prosecution of the action” Thus, the statute of limitations did not accrue until the Estate knew or had reason to know of both the injury (Wittich’s death), and that it may have been caused by Flick’s conduct. *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 819 (Ky. 1991).

We recognize that there may be a more specific question of whether the statute of limitations should accrue when a suspect is first identified, first arrested, first charged or first indicted for the crime. But in this case, Flick was identified on the night of the murder; he was arrested upon his release from the hospital a few days later; charged on May 26, 2005; and the grand jury returned the indictment against him on July 18, 2005. Furthermore, beyond his initial denials, there was little question concerning Flick’s involvement in Wittich’s killing. At trial, he primarily relied upon the defense of Extreme Emotional Disturbance.

Given the facts of the current case, we need not decide the precise date when the cause of action accrued. But under the circumstances, we conclude that the Estate had to know of its claim against Flick no later than the date of the indictment. At that point, the grand jury found probable cause to charge Flick with the murder. Furthermore, the grand jury was not bound by any prior probable-cause determination in district court. *Commonwealth v. Yelder*, 88 S.W.3d 435,

437 (Ky. App. 2002). Thus, the Estate had until no later than July 18, 2007, to bring this action.

The court in *DiGiuro* reasoned that the limitations period should be tolled because any civil claim would have to be stayed until the defendant was convicted of the murder. However, the Kentucky Supreme Court has recognized that certain civil claims may have to be brought before the related criminal charges are resolved. *See Dunn v. Felty*, 226 S.W.3d 68 (Ky. 2006), holding that the statute of limitations for false imprisonment accrues upon termination of the wrongful imprisonment, rather than on the date when the criminal charges are dismissed. *Id.* at 73-74. In such cases, the civil claim should be held in abeyance pending the outcome of the criminal trial. *Id.* at 74. We also note that Lambirth filed his civil claim against Flick within one year of the assault, although the action was held in abeyance until after Flick was convicted. *Flick v. Lambirth*, 2010 WL 4740292 (Ky. App. 2010)(2009-CA-001679-MR), at *3. We see no reason to apply a different standard to the current case.

Finally, we can appreciate the rationale of *DiGiuro* holding that the wrongful death statute is remedial in nature and that Wittich's family deserves a remedy. But as the dissent in *DiGiuro* observed, the remedy was to file a civil complaint against Flick within the limitations period. Under the clearly established law, the Estate's failure to do so rendered the complaint untimely. We reluctantly reach this conclusion, as it sets aside a jury verdict and judgment in a case where liability was not at issue. Nevertheless, based upon existing Kentucky law and

precedent, we conclude that the judgment must be set aside and the complaint dismissed. In light of this holding, Flick's arguments regarding the excessiveness of the punitive damages award are now moot.

Accordingly, the judgment of the Fayette Circuit Court is reversed, and this matter is remanded for entry of an order dismissing the complaint as untimely.

KRAMER, JUDGE, CONCURS.

J. LAMBERT, JUDGE, DISSENTS AND WILL NOT FILE A SEPARATE OPINION.

BRIEF FOR APPELLANT:

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