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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001977-MR

TRACIE WILLIAMS

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 17-CI-00492

KATELIN HAWKINS, ADMINISTRATRIX
OF THE ESTATE OF CHARLOTTE HAWKINS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

NICKELL, JUDGE: Tracie Williams appeals from an order of the Bullitt Circuit Court dismissing her complaint against Katelin Hawkins, Administratrix of the Estate of Charlotte Hawkins (“Hawkins”). Williams contends Hawkins should be estopped from asserting a statute of limitations defense for failure to disclose Charlotte Hawkins’ (“Charlotte”) death and because no viable legal entity was

available for suit before the limitations expired. After careful review of the briefs and law, and discerning no error, we affirm.

On March 3, 2015, Williams and Charlotte were involved in a motor vehicle accident. On July 1, 2015, Williams' counsel wrote Charlotte advising her of Williams' representation and requesting she forward the letter to her insurance carrier. On July 22, 2015, Jill Benningfield, a Kentucky Farm Bureau Mutual Insurance Company ("KFB") claims adjuster, responded and requested Williams' counsel direct further correspondence concerning the claim to her. This and subsequent letters listed KFB's insured as Charlotte's husband, William Hawkins. Benningfield and Williams' counsel periodically exchanged pre-suit correspondence regarding Williams' injuries and medical expenses. Neither knew Charlotte passed away on October 16, 2015, nor did they know Charlotte's husband petitioned the Bullitt District Probate Court to dispense with administration of Charlotte's Estate, which was granted on November 24, 2015.

Williams filed suit against Charlotte on February 16, 2017. On February 27, 2017, KFB assigned defense counsel. On March 2, 2017, as a result of a CourtNet search, Charlotte's counsel learned Charlotte was deceased and notified Williams' counsel the same day. Charlotte's counsel moved to dismiss the action, and on April 19, 2017, Bullitt Circuit Court Action No. 17-CI-00170 was dismissed as a legal nullity.

On March 30, 2017, Williams' counsel moved the Bullitt District Probate Court to reopen Charlotte's Estate, which was subsequently granted. Williams filed the instant suit against Charlotte's Estate on May 25, 2017, in Bullitt Circuit Court Action No. 17-CI-00492. Hawkins moved to dismiss the action because it was filed outside the two-year statute of limitations imposed by the Kentucky Motor Vehicle Reparations Act (KMVRA). KRS¹ 304.39-230(6). After a hearing, the trial court dismissed the action for failure to file within the limitations period. This appeal followed.

On appeal, Williams presents two arguments. First, she asserts KFB's failure to disclose Charlotte's death estops application of the statute of limitations. Second, she contends it is inherently inequitable for a party to have no way to sue before the statute of limitations expires. Although Williams cites *Gailor v. Alsabi*, 990 S.W.2d 597 (Ky. 1999), and *Harris v. Jackson*, 192 S.W.3d 297 (Ky. 2006), *as modified* (May 24, 2006), to support her arguments, these cases compel the same conclusions reached by the trial court.

The Supreme Court of Kentucky defined the appellate standard of review of a motion to dismiss as:

[a] motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be

¹ Kentucky Revised Statutes.

entitled to relief under any set of facts which could be proved. . . . Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (internal citations and quotation marks omitted). The date on which the two-year statute of limitations, pursuant to KRS 304.39-230(6), began to run is also a question of law, not fact; therefore, our standard of review on that issue is also *de novo*. *Stull v. Steffen*, 374 S.W.3d 355 (Ky. App. 2012).

The trial court found:

[i]n considering a motion to dismiss pursuant to CR² 12.02, Kentucky Courts accept every well-pleaded allegation in the complaint as true. *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327 (Ky. 1992). All facts are liberally construed in a light most favorable to the non-moving party. *Id.* . . .

Under the Kentucky Motor Vehicle Reparations Act (KMVRA), an action for tort liability may be commenced no later than two (2) years after the injury or date of issuance of the last basic or added reparation payment, whichever later occurs. KRS 304.39-230(6). The parties have not presented any evidence showing that any basic reparation payments have been made to Plaintiff. The car accident occurred on March 3, 2015. Therefore, according to the statute, the statute of limitations for this action ran on March 3, 2017. Plaintiff

² Kentucky Rules of Civil Procedure.

did not file this instant action against Defendant until May 25[,] 2017. Thus, this Court finds that Plaintiff filed the Complaint beyond the applicable two-year statute of limitations.

Williams has presented no proof to contradict the trial court's conclusion the statute of limitations ran on March 3, 2017. Nonetheless, Williams argues Hawkins should be estopped from asserting the statute of limitations as a defense to this action because she alleges Charlotte's death was fraudulently concealed from her by KFB's agent. Williams asserts, "it is reasonable to believe that KFB knew of [Charlotte's] death well before her death was disclosed to Williams in March 2017." Williams further alleges, "KFB not only failed to disclose [Charlotte's] death until it was too late, but KFB made affirmative statements—or, at a minimum, partial disclosures—giving the impression that [Charlotte] was alive, when she was not."

In *Gailor*, 990 S.W.2d 597, the Supreme Court of Kentucky held:

[m]ere negotiations looking toward amicable settlement do not afford a basis for estoppel to plead limitations. Instead, there must be some *act or conduct* which in point of fact misleads or deceives the plaintiff and obstructs or prevents him from instituting his suit while he may do so. The lesson from these cases is that mere silence with respect to the operative fact is insufficient. There must be an affirmative act by the party charged.

.....

[O]ne may not omit to avail himself of readily accessible sources of information

concerning particular facts, and thereafter plead as an estoppel the silence of another who has been guilty of no act calculated to induce the party claiming ignorance to refrain from investigating. Appellant had a year in which to ascertain from the public records the true status of his employers, and in all probability a mere inquiry of them would have elicited the truth.

It is asserted that the file references in Smith's post-September 8, 1993 letters, which refer to "Our insured: Fred Whalen," rather than, *e.g.*, "Our *deceased* insured: Fred Whalen," were calculated to deceive Appellee's attorney into believing that Whalen was still alive. Of course, every businessperson knows that file references are just that: something to assist both the sender's and the addressee's clerical employees in identifying the file into which this correspondence should be placed.

Id. at 603-04 (internal citations omitted).

Williams attempts to distinguish the case at hand from *Gailor*. She asserts "KFB's affirmative statements—or partial disclosures—indicating that [Charlotte] was alive differentiate" these cases from one another. Nonetheless, Williams failed to articulate how or why KFB's listing of "Williams Hawkins" as the insured was active or fraudulent concealment of Charlotte's death. Similarly, Williams failed to demonstrate how Benningfield's assertion, "I do not have my insured's permission to release information relating to his insurance policy," constitutes evidence Benningfield actively and fraudulently attempted to conceal the fact Charlotte was deceased.

The greatest distinction—albeit a distinction that effectively makes no difference in the outcome—between *Gailor* and this case is the fact the insurer knew of its insured’s death in *Gailor*, whereas the record in the instant case reflects KFB had no knowledge of Charlotte’s death at the times it communicated with Williams. Regardless, even had Benningfield known of Charlotte’s death, it would not effectively change the outcome because *Gailor* does not impose an affirmative duty on insurers to inform opposing counsel of their insured’s death.³ Instead, *Gailor*, prohibits insurers from acting in a manner which fraudulently conceals their insured’s death. It is also of importance that *Gailor* cautions counsel to not neglect to avail themselves of readily available sources of information. In the instant case, a simple review of public records would have revealed Charlotte’s death.

To prevail on a theory of estoppel, there must be proof not only of an intent to induce action or inaction by the party to be estopped, but also of reasonable reliance by the party claiming the estoppel. *Id.*, 990 S.W.2d at 604 (internal citations omitted). In the instant case, there is no evidence Benningfield knew of Charlotte’s death. Without demonstrating Benningfield had knowledge of

³ The record in this case reflects KFB’s insured was Williams Hawkins, it is unclear whether Charlotte was also an insured under the policy. Regardless of whether Charlotte was a named insured, *Gailor* did not impose a duty on Benningfield to discover or alert Williams’ counsel of Charlotte’s death.

Charlotte's death there is certainly no evidence Benningfield intended to induce Williams' action or inaction in reliance thereon. In the absence of any evidence of animus on Benningfield's part, there can be no claim of fraudulent concealment. *Id.* Further, in the absence of any evidence of reliance on the part of Williams' counsel, there can be no estoppel. *Id.*

In *Harris*, 192 S.W.3d at 298-99, the Supreme Court of Kentucky discussed whether an attorney for a deceased defendant has a duty to disclose the death of his client to opposing counsel. The Court affirmed the principle, "[w]hen a lawyer's client dies in the midst of the settlement negotiations of a pending lawsuit . . . the lawyer has a duty to inform opposing counsel and the Court in the lawyer's first communications with either after the lawyer has learned of the fact." *Id.* at 305 (internal citations omitted). That is precisely what happened here. Hawkins' counsel's first communication with Williams' counsel—the same day he discovered the death—alerted Williams' counsel to Charlotte's death and fulfilled his duty to disclose.

The *Harris* Court distinguished its Opinion from *Gailor*, underscoring the fact that *Gailor* held there was no duty to disclose the death of a tortfeasor because the person failing to disclose in *Gailor* was an insurance claims adjuster, not an attorney. In both *Harris* and *Gailor* the Court noted, "[w]hatever duties the Code of Professional Conduct may impose upon licensed attorneys, it has no

relevance to the conduct of laypersons.” *Harris*, at 307; *Gailor*, at 605. In the instant case there is no evidence Hawkins’ attorney failed to disclose Charlotte’s death to Williams. In fact, the record demonstrates the converse is true: Hawkins’ counsel promptly notified Williams’ counsel of Charlotte’s death when he discovered that fact. Instead, Williams argues Benningfield’s nondisclosure estops Hawkins’ statute of limitations defense. Benningfield, as an insurance claims adjuster and a layperson, had no duty to disclose Charlotte’s death to Williams; therefore, Williams’ argument that Benningfield’s nondisclosure of Charlotte’s death estops Hawkins’ statute of limitations defense is misplaced.

Williams’ second argument—that there was no way for her to immediately file suit against a proper defendant—is neither adequately explained nor supported. We will not attempt to construct Williams’ argument for her, nor will we go on a fishing expedition to find support for her underdeveloped arguments. “Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors.” *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

The primary case Williams relies on in her second argument is *Nanny v. Smith*, 260 S.W.3d 815 (Ky. 2008). Nanny filed her complaint with the clerk within the applicable statute of limitations; however, due to circumstances beyond Nanny’s control, the clerk did not issue summons until after the expiration of the

statute of limitations. *Nanny* is clearly distinguishable. In *Nanny*, suit was brought against a legally viable defendant within the statute of limitations, but because “Nanny had neither the power nor the duty to ensure that the clerk perform official duties, she was prevented by circumstances beyond her control from having the summons issued in time.” *Id.* at 817. The Court held that under those facts, Nanny should not be held responsible for such circumstances. We decline to extend the equitable application of leniency afforded in *Nanny* because Williams failed to fulfill her responsibility to ensure she filed suit against a legally viable defendant within the limitations period. Williams failed to search the public record prior to filing her first action. If she had, she would have discovered Charlotte was deceased. Additionally, had Williams performed that simple task, she most likely would have been able to petition the court to reopen Charlotte’s Estate to bring her suit against it before expiration of the statute of limitations. Williams’ failure to show she conducted even simple investigation prior to filing her action—essentially sitting on her own hands—does not convince us she was prevented from acting within the statute of limitations⁴ to correct her failure to adequately investigate and discover a viable legal entity to sue. We further find Williams’ argument concerning “circumstances beyond her control” disingenuous

⁴ Rather than filing a motion to reopen Charlotte’s Estate within the statute of limitations on March 2 or 3, 2017, such motion was not filed until March 20, 2017.

considering she failed to avail herself of information available to her. As such, we decline to require imposition of the extreme equitable remedy of allowing Williams' suit beyond the filing of the statute of limitations.

For the foregoing reasons, the order of the Bullitt Circuit Court is
AFFIRMED.

ALL CONCUR.

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