

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001893-MR

RICHARD KENNISTON

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 16-CI-00375

THOMAS V. UNRUG, M.D.;
ALEXIS VON WIEGEN, ARPN;
AND ST. JOSEPH HOSPITAL

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, KRAMER AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Richard Kenniston appeals from an order of the Clark Circuit Court granting summary judgment in favor of Alexis Von Wiegen, Thomas V. Unrug, St. Joseph Hospital and LP Winchester, LLC d/b/a Fountain Circle Health and Rehabilitation. Appellant argues that the Clark Circuit Court erred in

ruling that the action was barred by operation of the statute of limitations. For the reasons addressed below, we find no error and AFFIRM the order on appeal.

Facts and Procedural History

Minnie Francis Peters died on November 1, 2014, and a petition to probate her estate was filed on January 12, 2015. Thereafter, three personal representatives of the estate were appointed in sequential fashion. First, Phyllis Johnson was appointed as personal representative on February 12, 2015. On May 6, 2015, Charnel Burton was appointed as Ms. Johnson's replacement. And finally, Appellant Richard Kenniston was appointed as personal representative of Ms. Peters on September 17, 2015.

In his capacity as personal representative, Appellant filed a wrongful death action against various defendants in Clark Circuit Court on August 13, 2016. The complaint alleged that Ms. Peters died as a result of negligent care from the defendants beginning on August 17, 2010, and continuing through October 24, 2014.

The matter proceeded in Clark Circuit Court, whereupon the defendants filed motions to dismiss the action based on the running of the applicable one-year statute of limitations. The motions were treated by the court as Kentucky Rules of Civil Procedure (CR) 56 motions for summary judgment. Upon considering the motions, the court determined that the statutory period commenced

upon the appointment of the personal representative. As Phyllis Johnson was appointed as personal representative on February 12, 2015, the court determined that the wrongful death action must be filed, if at all, within one year from that date or February 12, 2016. As the action was filed by Appellant Kenniston on August 13, 2016, or some six months after the termination of the statutory period, the court determined that the action was time-barred. Accordingly, it sustained the motions to dismiss, and this appeal followed.¹

Appellant's Argument

Appellant now argues that the Clark Circuit Court erred in its application of the one-year statute of limitations. He contends that Kentucky Revised Statute (KRS) 413.180, which addresses the period of limitation on decedents' claims, should be applied to commence the statutory period beginning on the date of his appointment and not the date upon which the first representative was appointed. Appellant maintains that the statute contains no language imposing on a subsequent representative the statutory period which would have been applied to a prior representative. He notes that Ms. Peters died on November 1, 2014, and he was appointed on September 17, 2015. Accordingly, Appellant asserts that because he filed the instant action within one year of his appointment, he

¹ LP Winchester, LLC was dismissed as a party in this appeal by way of an order entered on August 21, 2018.

proceeded in conformity with KRS 413.180, and the Clark Circuit Court erred in failing to so rule. He goes on to argue that the statute provides that if the personal representative is not appointed within one year after the death, the one-year anniversary of the death is considered the date of appointment and the representative then has one year to commence the action. The substance of his argument is that as personal representative, he must be afforded one year to investigate and commence any action and, because that did not occur below, the order on appeal must be reversed and the matter remanded for further proceedings.

Analysis

KRS 413.180 states,

(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.

Conner v. George W. Whitesides Co., 834 S.W.2d 652 (Ky. 1992),

addressed how KRS 413.180 came to govern wrongful death actions. In

reaffirming the applicability of KRS 413.180 to these claims, the Court stated,

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. We believe wrongful death claims must come within the purview of the statute because to rule otherwise could continue existing confusion over varying time limitations.

Personal injury and wrongful death claims may be prosecuted by the personal representative in one action as was done in this case. KRS 411.133. It is reasonable to conclude the General Assembly intended for the personal representative to have the same amount of time to prosecute all claims resulting from injury to the decedent including injuries resulting in death.

Conner, 834 S.W.2d at 654. In interpreting the applicability of KRS 413.180(1) and (2) to wrongful death actions, the Court determined that their net effect “is to provide two years from the date of death to appoint a personal representative and commence a cause of action for wrongful death.” *Id.* at 655.

It is clear, then, that the personal representative may bring a wrongful death action within one year of his appointment, but no later than two years after the date of death. *Id.* The question for our consideration, then, is whether the qualification of *subsequent* personal representatives operates to establish a new statutory period for each new representative. We must answer this question in the negative. “[I]f a personal representative is appointed within one year of the date of

death, he then is granted one year from the date of his appointment to file suit. If no suit is filed within that time, the action for wrongful death dies.” *Southeastern Ky. Baptist Hosp., Inc. v. Gaylor*, 756 S.W.2d 467, 470 (Ky. 1988) (quoting *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 642 (6th Cir.1986)). The first personal representative, Phyllis Johnson, was appointed February 12, 2015. KRS 413.180 therefore required the wrongful death action to commence “within one (1) year after the qualification of the representative,” or February 12, 2016.

The legislature could have could have fashioned this language to allow for additional periods of limitation to commence anew with the appointment of each successive representative. It did not. We must look to the plain language of KRS 413.180, and give its words their ordinary meaning. *Consolidated Infrastructure Management Authority, Inc. v. Allen*, 269 S.W.3d 852, 855 (Ky. 2008). When such language is clear and unambiguous, we are without authority to construe the statute otherwise. *Commonwealth v. Reynolds*, 136 S.W.3d 442 (Ky. 2004). The clear and unambiguous language of KRS 413.180 makes no allowance for restarting the period of limitation with the qualification of each new personal representative. The Clark Circuit Court properly so ruled.

The Appellees’ motions to dismiss were characterized by the Clark Circuit Court as motions for summary judgment. Summary judgment “shall be rendered forthwith 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. “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.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Conclusion

When viewing the record in a light most favorable to the Appellant and resolving all doubts in his favor, *Steelvest, supra*, we conclude that the Clark Circuit Court correctly found that there were no genuine issues as to any material fact and that the Appellees were entitled to a judgment as a matter of law. KRS 413.180 expressly limits the period in which the decedent’s actions may be

commenced to one year after the qualification of the personal representative, and the Legislature made no allowance - express or implied - for restarting that period with the qualification of each subsequent representative. We find no error.

For the foregoing reasons, we AFFIRM the order of the Clark Circuit Court.

ACREE, JUDGE, CONCURS IN RESULT ONLY.

KRAMER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

BRIEF FOR APPELLANT:

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VON WIEGEN AND THOMAS V.
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