

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001986-MR

KATRINA WILLIS, EXECUTRIX
OF THE ESTATE OF MORRIS BEASLEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 15-CI-002081

THOMAS R. PECKINPAUGH

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: JONES, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Katrina Willis, in her capacity as executrix of the Estate of Morris Beasley, brings this appeal from an October 26, 2017, order of the Jefferson Circuit Court granting in part a motion for summary judgment and from a January 30, 2018, order denying a motion to vacate pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. We affirm.

I. BACKGROUND

On October 9, 2014, Morris and Cynthia Beasley were discovered shot to death in Morris's home located in Louisville, Kentucky. Morris and Cynthia were married at the time of their deaths, but a dissolution of marriage proceeding was pending. Cynthia had also obtained an Emergency Protective Order against Morris, prior to the shooting. After an investigation surrounding their deaths, police determined that Morris shot Cynthia in the chest with his .357 magnum revolver and then shot himself in the abdomen.¹ At the time of the deaths, Cynthia was involved in a romantic relationship with Thomas Peckinpaugh.

On May 1, 2015, Nicole M. Ford, in her capacity as administratrix of the Estate of Cynthia Beasley (Cynthia's Estate), filed a complaint against the Estate of Morris Beasley, Katrina Willis as executrix, (Morris's Estate) for Cynthia's wrongful death. Morris's Estate filed an answer on July 2, 2015.

Then, on April 12, 2016, Morris's Estate filed a third-party complaint against Thomas Peckinpaugh for the wrongful death of Morris and for intentional infliction of emotional distress due to Peckinpaugh directly pointing a gun at Morris on October 6, 2014, three days before the murders. Morris's Estate maintained that Peckinpaugh had stolen Morris's .357 magnum handgun and

¹ The Smith & Wesson .357 magnum revolver was owned by Morris Beasley.

fatally shot both Morris and Cynthia on October 9, 2014. Peckinpaugh filed an answer and generally denied the claims.

On August 30, 2017, Peckinpaugh filed a motion for summary judgment arguing that the one-year statute of limitations for a wrongful death claim (Kentucky Revised Statutes (KRS) 413.140(1)(a)) expired in October 2015. Peckinpaugh asserted that the third-party complaint was time-barred, as it was filed on April 12, 2016. In its response, Morris's Estate argued that the one-year statute of limitations was tolled by Peckinpaugh's active concealment of his wrongful conduct and cited to KRS 413.190(2).

As noted, the circuit court rendered a partial summary judgment in favor of Peckinpaugh by orders entered October 26, 2017, and January 30, 2018. The circuit court rejected the tolling argument advanced by Morris's Estate. In particular, the circuit court concluded:

As an initial matter, the Court again finds that suspicion alone is sufficient to trigger the statute of limitations in a case involving civil murder or manslaughter. As recently noted in *Estate of Wittich v. Flick*, 519 S.W.3d 774, 778 (Ky. 2017), "any fact that should arouse [plaintiff's] suspicion is equivalent to 'actual knowledge of his entire claim.'" The Court disagrees that this rule applies only in products liability actions, as *Wittich* itself involved claims for wrongful death following a murder.

Moreover, the Court also again finds that the facts available to Morris's Estate shortly after the killings were sufficient to arouse suspicion of Peckinpaugh's alleged

involvement and trigger the statute of limitations. As noted above, those facts included Peckinpaugh's alleged romantic involvement with Morris's wife Cynthia, his altercation with Morris a few days before the killings, the trailer theft, and the police questioning of Peckinpaugh. The Court disagrees with the contention that Peckinpaugh's alleged maintenance of a "front" of loving Cynthia was sufficient to negate suspicion of his involvement under these facts, particularly given that Peckinpaugh had pointed a gun at Morris's head only three days earlier.

Nor does the fact that Peckinpaugh was not arrested or indicted for the killings negate suspicion of his involvement. First, the lack of an arrest or indictment does not conclusively establish that police or prosecutors determined that Peckinpaugh was not involved. Nor is there any other evidence establishing that they reached such a conclusion. Second, while suspicion alone is sufficient to trigger the civil statute of limitations, the probable cause necessary for arrest requires more than "mere suspicion." *Taylor v. Commonwealth*, 276 S.W.3d 800, 805 (Ky. 2008) ("[P]robable cause [for arrest] requires more than a mere suspicion."). Thus, the lack of an arrest does not establish a lack of suspicion, but rather only a possible lack of probable cause to arrest. As such, the lack of an arrest here does not establish that there was not a sufficient basis to suspect Peckinpaugh's involvement and bring civil claims against him.

Finally, Morris's Estate is correct in its assertion that knowledge of the party responsible for an alleged injury is required before the statute of limitations is triggered. *Wilson v. Paine*, 288 S.W.3d 284, 286 (Ky. 2009) ("The knowledge necessary to trigger the statute is two-pronged. One must know: (1) he has been wronged; and (2) by whom the wrong has been committed."). However, neither absolute certainty of responsibility nor Fourth Amendment probable cause are required before the plaintiff may bring a civil suit:

Before filing a complaint, an attorney must perform due diligence to ensure the potential defendant has some culpability, but “probable cause to initiate a civil action does not require ‘the same degree of certainty as to the relevant facts that is required of a private prosecutor of criminal proceedings.’” While an attorney must have a good faith basis for naming a defendant in a complaint, he need not know all the facts before undertaking discovery.

Brown v. Mitsui Sumitomo Ins. Co., 492 S.W.3d 566, 573 (Ky. App. 2016) (citation omitted).

As such, it was not necessary for Morris’s Estate to possess “smoking gun” evidence of Peckinpaugh’s involvement in the killings before bringing civil claims against him. Rather, all that was required was a “good faith basis” to name hi[m] as a defendant. The facts available to Morris’s Estate, such as Peckinpaugh’s alleged affair with Cynthia, threatening of Morris, theft of Morris’s trailer, and questioning by police provided such a basis. Accordingly, because Morris’s Estate had both actual knowledge of its claims and the right to sue at or shortly after the killings as a matter of law, the statute of limitations began to run. *See Lexington-Fayette Urban County Gov’t v. Abney*, 748 S.W.2d 376, 378 (Ky. App. 1988) (“All statutes of limitations begin to run when the relevant cause of action accrues. A cause of action accrues when a party has the right and capacity to sue.”) (citations omitted). Finally, that Peckinpaugh purportedly concealed his alleged involvement did not toll the statute, as Morris’s Estate was nonetheless aware of facts sufficient to arouse suspicion and provide a good faith basis to sue. . . .

January 30, 2018, order at 4-6. This appeal follows.²

II. Analysis

We begin our review by noting that Peckinpaugh has not filed a responsive brief in this appeal. CR 76.12(8)(c) “provides the range of penalties that may be levied against an appellee for failing to file a timely brief.” *St. Joseph Catholic Orphan Soc’y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). This Court may “(i) accept the appellant’s statement of the facts and issues as correct; (ii) reverse the judgment if appellant’s brief reasonably appears to sustain such action; or (iii) regard the appellee’s failure as a confession of error and reverse the judgment without considering the merits of the case.” CR 76.12(8)(c). Morris’s Estate has previously moved this Court to reverse the judgment below based upon CR 76.12(8). This Court denied the motion by separate order. For purposes of this appeal, we will accept Morris’s Estate’s statement of facts set forth in its brief as correct, of course subject to our independent review of the entire record on appeal and applicable law.

Morris’s Estate contends the circuit court committed error by rendering summary judgment dismissing its wrongful death claim against Peckinpaugh as time-barred under KRS 413.140(1)(a). Morris’s Estate argues that

² The October 26, 2017, order included complete Kentucky Rules of Civil Procedure 54.02 language and completely adjudicated a claim. The partial summary judgment was properly appealable.

the statute of limitations was tolled under KRS 413.190(2) because Peckinpaugh actively concealed his involvement in the deaths and obstructed Morris's Estate's ability to identify Peckinpaugh as the actual tortfeasor. In particular, Morris's Estate claims that Peckinpaugh stole Morris's handgun, shot and killed Cynthia and Morris, and tampered with evidence by arranging the scene to appear as a murder-suicide. Morris's Estate points out that despite repeated open records requests, the Louisville Metro Police only released records concerning the investigation in November 2015. With these records, Morris's Estate determined that Peckinpaugh had no alibi for his whereabouts at the time of the deaths. Also, Morris's Estate maintains that the police records revealed that Peckinpaugh drove to Morris's home on the day of the murders to find Cynthia there with Morris but observed that he merely drove home thereafter.

So, Morris's Estate argues that the one-year statute of limitations was tolled until the release of the records by the police in November 2015. As it filed the third-party complaint within one year therefrom, Morris's Estate asserts that the circuit court erred by determining the third-party complaint was time-barred under KRS 413.140(1)(a). Additionally, Morris's Estate maintains that the circuit court committed an error of law by concluding that suspicion alone of Peckinpaugh's involvement in the deaths was sufficient to trigger the statute of limitations contained in KRS 413.140(1)(a).

The applicable one-year statute of limitations is set forth in KRS

413.140(1)(a) and reads:

- (1) The following actions shall be commenced within one
(1) year after the cause of action accrued:
 - (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant[.]

The tolling statute is found in KRS 413.190(2); it provides:

- (2) When a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced. But this saving shall not prevent the limitation from operating in favor of any other person not so acting, whether he is a necessary party to the action or not.

Generally, a wrongful death action must be commenced within one year of its accrual date. KRS 413.140(1)(a); *Estate of Wittich v. Flick*, 519 S.W.3d 774, 777 (Ky. 2017). A cause of action is said to accrue when the injury occurs; however, the statute of limitations under KRS 413.140(1)(a) may be tolled by KRS 413.190(2) when a defendant's affirmative conduct misleads plaintiff, deceives plaintiff, or obstructs the timely prosecution of the action. *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 573 (Ky. 2009). It should be emphasized that a plaintiff must exercise reasonable diligence to discover his claim. *Estate of Wittich*, 519

S.W.3d at 778. And, most importantly herein, “any fact that should arouse [plaintiff’s] suspicion is equivalent to ‘actual knowledge of his entire claim.’” *Id.* at 778 (quoting *Hazel v. General Motors Corp.*, 863 F. Supp. 435, 439 (W.D. Ky. 1994)).

In this case, the circuit court concluded that the “suspicion” by Morris’s Estate that Peckinpaugh committed the murders should have reasonably been aroused at the time of the murders or shortly thereafter. To support this conclusion, the circuit court pointed out that Morris’s Estate knew or should have known at such time that Peckinpaugh and Cynthia were involved in an intimate relationship; Peckinpaugh threatened Morris with a gun three days before the murders; Peckinpaugh, along with Cynthia, took Morris’s trailer; and Peckinpaugh was a person of interest who was questioned by police. The circuit court believed the above facts should have reasonably aroused the suspicion of Morris’s Estate that Peckinpaugh committed the murders, thus triggering the running of the statute of limitation contained in KRS 413.140(1)(a).

Viewing the facts most favorable to Morris’s Estate, we are unable to conclude that the circuit court erred in its reasoning, analysis, or application of the law. The Kentucky Supreme Court has held that suspicion of wrongdoing may be sufficient to trigger the running of the statute of limitations as to a wrongful death claim in *Estate of Wittich*, 519 S.W.3d at 778. This Court is bound by Supreme

Court precedent. Rules of the Supreme Court 1.030(8)(a). Only the Supreme Court can clarify or modify its holding in *Estate of Wittich*, 519 S.W.3d at 778, which we believe clearly bars this claim under the applicable statute of limitation.

We are cognizant of the argument by Morris's Estate that the suspicion rule set out in *Estate of Wittich* relied upon by the circuit court in its judgment was not argued by Peckinpaugh at the hearing on the motion for summary judgment. However, the general rule in Kentucky is that applicable legal authority can be resorted to at any stage of a legal proceeding regardless of whether cited by the litigants, and can be applied, *sua sponte*, by the circuit court. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 930 (Ky. 2002).

Accordingly, we conclude that the circuit court did not err by rendering summary judgment based upon the statute of limitations pursuant to KRS 413.140(1)(a).

For the foregoing reasons, the orders of the Jefferson Circuit Court granting summary judgment are affirmed.

NICKELL, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Clarence H. Hixson
Louisville, Kentucky