

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001275-MR

LINDA HAWK AND  
WILLIAM HAWK

APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY BUNNELL, JUDGE  
ACTION NO. 10-CI-04343

AIR-TITE WINDOW COMPANY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Linda Hawk and William Hawk (collectively “Hawks”) have appealed from a summary judgment entered by the Fayette Circuit Court in favor of Air-Tite Window Company (“Air-Tite”). The Hawks argue their negligence claims were timely filed under the discovery rule and the trial court erred by denying their motion for leave to file an amended complaint. We affirm.

In 2001, the Hawks hired Air-Tite to replace a patio door and windows in their home. Shortly thereafter it was discovered Air-Tite had installed the patio door upside-down thereby causing a leak. Air-Tite returned and corrected the problem by properly orienting and re-installing the patio door. Between 2003 and 2004, the Hawks noticed a brown stain on the carpet beneath the dining room window. The stain was approximately a quarter of an inch wide and stretched the exact width of the window directly above it. Assuming insects caused the damage, they did not investigate further. In 2009, the Hawks noticed a strong odor inside their home. Upon inspection, mold and moisture infiltration were discovered where the dining room window had leaked.

On July 23, 2010, the Hawks filed a complaint in Fayette Circuit Court against Air-Tite alleging negligence and a statutory cause of action for building code violations under KRS<sup>1</sup> 198B.130. On November 24, 2010, Air-Tite moved for summary judgment. Along with their response, the Hawks moved for leave to file an amended complaint alleging breach of contract. Following a hearing, the trial court denied the motion for summary judgment and granted the motion for leave to file an amended complaint. Although tendered with their motion, the amended complaint was not filed. Following the depositions of the Hawks, Air-Tite again moved for summary judgment on May 20, 2011, alleging the claims against it were untimely and barred by the applicable statutes of limitation. The Hawks responded and again moved for leave to amend their

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<sup>1</sup> Kentucky Revised Statutes.

complaint. On June 20, 2011, the trial court denied the Hawks' motion for leave to amend the complaint and granted summary judgment in favor of Air-Tite. This appeal followed.

The Hawks argue their claims were not time-barred because they did not become aware of the injury and its cause until 2009 and the "discovery rule" tolled the running of the limitations period. They further argue the trial court erred in denying their second motion for leave to amend their complaint to include a breach of contract claim. We shall address each argument in turn.

The negligence claim advanced below is subject to the statute of limitations set forth in KRS 413.120(4) which provides that claims involving injury to property "shall be brought within (5) years after the cause of action accrued." *See Commonwealth, Department of Highways v. Ratliff*, 392 S.W.32d 913 (Ky. 1965) (five-year statute of limitations applies to actions for damage to real property arising from negligence). As for the Hawks' claim relating to building code violations, KRS 198B.130(2) provides that "[a]ny action based upon a claim of violation of this section shall be brought within one (1) year of the date on which the damage is discovered or in the exercise of reasonable diligence could have been discovered." These limitations periods are conceded to be correct, but the Hawks and Air-Tite disagree on when the periods begin to run and on the proper application of the discovery rule.

The discovery rule holds that "a cause of action accrues when a plaintiff knows or, in the exercise of reasonable diligence, should know of both the

injury and its cause.” *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 737 (Ky. 2000). The discovery rule has been applied to cases involving property damage. *Rockwell Intern. Corp. v. Wilhite*, 143 S.W.3d 604 (Ky. App. 2003). However, “the discovery rule is available only in cases where the fact of injury or offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence, such as in cases of medical malpractice or latent injuries or illnesses.” *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60 (Ky. 2010).

As earlier stated, the Hawks noticed brown staining on the carpet near the location of one of the windows Air-Tite had replaced. It was at this point that the Hawks were put on notice that something was wrong in their home which had caused the obvious damage. This date on which the Hawks observed damage to their home was the date they discovered, or reasonably should have discovered, the inferior window installation completed by Air-Tite. Even if the Hawks were unaware Air-Tite had performed a faulty installation of the window, it was apparent something was amiss—whatever the cause—as early as 2003. The injury was patent. The Hawks admitted noticing a brown carpet stain possibly in 2003, but no later than 2004, yet filed no action until 2010. That the Hawks attributed the stain to insects and chose not to investigate further fails to negate their awareness of the damage and the apparent fact of injury, nor does that failure convert any defect from patent to latent. It also matters not to our analysis that the Hawks contend they were unaware they had been injured until they noticed the strong odor and were informed of its cause—when they first discovered the brown

carpet stain near a replacement window, the Hawks had already been placed on notice of Air-Tite's faulty workmanship in replacing the patio door and should have reasonably investigated further the cause of the observed damage.

“In contemplation of the law, knowledge consists, not only of what one certainly knows, but also of information which he might have obtained by an investigation of facts which he does know and which impose upon him the duty to make that investigation.” *Mussman v. Pepples*, 243 Ky. 674, 49 S.W.2d 592, 593 (1932) (citing *May v. Chesapeake & Ohio Ry. Co.*, 184 Ky. 493, 212 S.W. 131 (1919); *Cable Piano Co. v. Lewis*, 195 Ky. 666, 243 S.W. 924 (1922); *Mitchell v. First National Bank*, 203 Ky. 770, 263 S.W. 15 (1924)). “A person who knows he has been injured has a duty to investigate and discover the identity of the tortfeasor within the statutory time constraints.” *Combs v. Albert Kahn Associates, Inc.*, 183 S.W.3d 190, 199 (Ky. App. 2006). Because the Hawks had received actual knowledge that something had caused the brown carpet stain, they were thereby placed on notice to investigate the matter further, and the statute of limitations period began to run no later than 2004, expiring sometime in 2009. Had the Hawks exercised reasonable diligence, they would have taken steps to investigate the source of their injury; they did not.<sup>2</sup> Therefore, the filing of this action in 2010 was untimely and the trial court was correct in so finding.

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<sup>2</sup> This failure appears even more flagrant based on the Hawks' prior knowledge of sub-par construction activities by Air-Tite resulting in water infiltration around the improperly installed patio door in their home.

Next, the Hawks argue the trial court erred by denying their second motion for leave to file an amended complaint because it had previously granted their first motion to amend based upon the same facts. We disagree.

CR<sup>3</sup> 15.01 provides that, after a responsive pleading is served, “a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” The rulings of a trial court under CR 15.01 are reviewed for abuse of discretion.

*Laneve v. Standard Oil Co.*, 479 S.W.2d 6, 8 (Ky. 1972). In *Laneve*, our Supreme Court held the trial court properly denied leave to file an amended complaint alleging a new theory of liability after the case had been pending for several years and a motion for summary judgment had been made. *Id.* at 9.

While the time factor in the present case is not as egregious as the facts presented in *Laneve*, we nevertheless conclude the trial court acted within its discretion by denying the second motion for leave to file an amended complaint. The Hawks were parties to the contract, were aware of the damage to their property, and knew or should have known they had a claim. In December 2010, the trial court granted the first motion for leave to file an amended complaint to include a breach of contract claim in addition to their negligence and statutory claims. The Hawks had every opportunity to file an amended complaint, but did not. They offer no acceptable explanation for the failure. Nevertheless, they proceeded some three months later to move the trial court to set the matter down

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<sup>3</sup> Kentucky Rules of Civil Procedure.

for trial. An additional three months would pass before the Hawks would file their second motion for leave to amend their complaint. Between the time the Hawks requested a trial date and filed their second motion for leave to amend, Air-Tite had already completed discovery and filed its second motion for summary judgment. Under these circumstances, we cannot conclude the trial court abused its discretion.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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