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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001336-MR

KELLY POTTER, INDIVIDUALLY AND
AS ADMINISTRATOR OF THE ESTATE
OF BRITTANI AMES, DECEASED;
AND SONYA POTTER — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 11-CI-002194

KIMBERLY BOLAND, M.D. AND
ARAYAMPARAMBIL ANILKUMAR, M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Kelly Potter, individually and as Administrator of the Estate of Brittani Ames, and Sonya Potter, individually, appeal from a summary judgment dismissing their claims for loss of consortium against Dr. Kimberly

Boland and Dr. Arayamparambil Anilkumar on the basis that their claims were not filed within the applicable statute of limitations period. We affirm.

On March 21, 2009, the Potters' nine-year-old daughter, Brittani Ames, was in acute distress with excruciating headaches and admitted to Kosair Children's Hospital where she was treated by Drs. Boland and Anilkumar. She was discharged the following day. In the early hours of March 24, 2009, Brittani returned to Kosair's emergency room complaining of headaches and admitted to the intensive care unit. Brittani was diagnosed with acute encephalomyelitis and died on March 27, 2009.

Almost two years later, on March 21, 2011, Kelly was appointed administrator of Brittani's estate. On March 25, 2011, the Potters filed a *pro se* complaint against Kosair and ten physicians, including Drs. Boland and Anilkumar. In addition to a wrongful death claim on behalf of the estate, the Potters alleged individual loss of consortium claims.

On April 12, 2011, the Potters retained attorneys who entered their appearances in the action. The defendants, including Drs. Boland and Anilkumar, filed separate motions for summary judgment seeking dismissal of the loss of consortium claims as time-barred. The circuit court granted the motions. The Potters appealed only from the judgment dismissing Drs. Boland and Anilkumar (referred to as "the physicians" in the remainder of this opinion).

The Potters allege that: (1) existing Kentucky law applying a one-year statute of limitations to loss of consortium claims should be overruled; (2)

KRS 413.120(2) is applicable and provides a five-year statute of limitations; (3) a one-year statute of limitations does not promote judicial economy; and (4) the discovery rule saves their claims.

Prior to reaching the merits, we briefly discuss the physicians' contention that except for that pertaining to the discovery rule, the Potters' arguments are not reviewable by this Court. They contend that the remaining arguments were not argued to the trial court nor specified in the Potters' prehearing statement.

Litigants are precluded from presenting specific arguments for the first time on appeal. *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999). The primary reason for this rule is to give the trial court a reasonable opportunity to consider the question so that a possible appeal can be avoided. *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011). An additional procedural rule found in CR 76.03 requires that questions for review be presented in a prehearing statement filed with this Court. However, when confronted with arguments that a procedural rule precludes review, this Court must be guided by the premise that deciding cases on the merits is a primary objective of appellate procedure. *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503, 504 (Ky. 1989).

We conclude that the Potters sufficiently presented the issues to the trial court and in their prehearing statement. The broad issue regarding the applicable statute of limitations encompasses the Potters' specific arguments regarding the application of a limitations period longer than one year. Moreover,

when a trial court's ruling is correct, even though for reasons other than those stated by the trial court, its judgment will be affirmed. *Fischer*, 348 S.W.3d at 589-590. Therefore, even if the Potters could have presented their arguments with more specificity to the trial court and in their prehearing statement, we believe that our judicial responsibility is best served by deciding their appeal on its merits.

We begin with our standard of review. The 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); 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).

KRS 411.135 provides for a parent's loss of consortium for the death of a minor child. It states:

> In a wrongful death action in which the decedent was a minor child, the surviving parent, or parents, may recover for loss of affection and companionship that would have been derived from such child during its minority, in addition to all other elements of the damage usually recoverable in a wrongful death action.

The Potters point out that the statute does not establish a time period when a cause of action for loss of consortium must be filed. Therefore, they reason that KRS 413.120(2), providing a five-year statute of limitations, applies when liability is

created by statute and "no other time is fixed by the statute creating the liability." However, the Potters ignore KRS 413.140 as interpreted by our Supreme Court.

In *Southeastern Kentucky Baptist Hospital, Inc. v. Gaylor*, 756 S.W.2d 467 (Ky. 1988), a mother who delivered a stillborn fetus filed a malpractice action against a hospital and her obstetrician. She alleged two claims: (1) her individual claim for loss of consortium; and (2) a wrongful death claim on the behalf of the child's estate. The defendants argued that the loss of consortium claim was time-barred by KRS 413.140 because it was filed more than one year after the child's stillborn birth.

The Court quoted the applicable statutory language contained in KRS 413.140(1)(a) and (e):

> 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;
>
> * * *
>
> (e) An action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice[.]

Id. at 469. Relying on the statutory language, our Supreme Court unequivocally held that the mother's action for the loss of consortium of her child in a wrongful death action was barred by the one-year statute of limitations. *Id*. This case is indistinguishable from *Gaylor*. The Potters' loss of consortium claim alleging

medical malpractice fits squarely within the period of limitations set forth in KRS 413.140.

Despite our Supreme Court's holding, the Potters argue that *Gaylor* is no longer controlling in view of the Court's subsequent holding in *Conner v. George W. Whitesides Co*., 834 S.W.2d 652 (Ky. 1992). We are not convinced that *Conner* can be logically interpreted to overrule *Gaylor*.

The question presented in *Conner* was whether KRS 413.180, providing time limitations for a personal representative of a deceased to file certain actions, applies to wrongful death claims. Ultimately, based on KRS 413.180, the Court held that a personal representative has two years from the date of death to seek appointment and commence an action for wrongful death. *Id*. at 654. In doing so, it overruled earlier cases to the contrary and reasoned:

> 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.

Id. The Potters urge this Court to extend the same reasoning to loss of consortium claims.

A loss of consortium claim is not "specifically a part of a wrongful death claim under Kentucky law." *Martin v. Ohio Hospital Corp*., 295 S.W.3d 104, 108-09 (Ky. 2009). In *Martin*, the Court emphasized that a "loss of consortium action can continue even when the injured spouse or the estate has settled or otherwise been excluded from an action, because there is not a 'common and undivided interest' in the spouse's claim for loss of consortium and the underlying tort claim." *Id*. at 109.

Likewise, because it is an independent claim, a parent's claim for loss of consortium pursuant to KRS 411.135 remains regardless of whether the personal representative of the child asserts a wrongful death claim or whether a personal representative is appointed.

The Potters point out that the parent's loss of consortium claim is limited to cases involving wrongful death of a minor. *Bayless v. Boyer*, 180 S.W.3d 439, 449 (Ky. 2005). Therefore, they argue, the different statute of limitations for a parent's loss of a child's consortium and wrongful death creates a legal quagmire and that the line of cases holding these claims distinct and independent creates a legal fiction.

We agree with the Potters' observation that a loss of consortium claim is often discovered simultaneously with the wrongful death claim and not until after the child's personal representative is appointed and pertinent records obtained. If more than one year has elapsed, but less than two years from the personal representative's appointment, the loss of consortium claim is barred.

Thus, an attorney for the parents is in the unenviable position of filing a loss of consortium claim without knowledge of the legitimacy of the underlying wrongful death claim. Moreover, it is questionable whether the loss of consortium action could survive a motion to dismiss for failure to state a cause of action when a wrongful death action has not been filed.

Logic and clarity should not be strangers to the law. However, we have no authority to deviate from the established law. The only limitation period set forth by the General Assembly for loss of consortium is contained in KRS 413.140. KRS 413.180 cannot be extended by judicial fiat. Because this issue was definitively resolved by the Kentucky Supreme Court in *Gaylor,* we are bound by its holding and the current statutory law.

The Potters argue that if the one-year statute of limitations is applicable, their loss of consortium claims are timely pursuant to the discovery rule. In *Wiseman v. Alliant Hospitals, Inc.,* 37 S.W.3d 709, 712 (Ky. 2000), the Court explained that the discovery rule is a means to identify the "accrual" of the action when the injury is not readily ascertainable or discoverable. The accrual date depends on the actual or constructive knowledge of the plaintiff and is two-pronged; "one must know: (1) he has been wronged; and, (2) by whom the wrong has been committed." *Id*. In *Wiseman*, the plaintiff did not discover that the source of her post-operative pain was a piece of medical equipment left in her body until seven years after her surgery. The Court quoted with approval the language in *Hazel v. General Motors Corp.,* 863 F.Supp. 435, 438 (W.D.Ky. 1994), stating:

"Under the 'discovery rule,' a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct." *Wiseman*, 37 S.W.3d at 712.

The Potters contend that they did not discover that they had been injured until a medical expert reviewed Brittani's medical records in April 2011. Because the record reveals that the wrongful death claim alleging medical malpractice was filed on March 25, 2011, this argument appears disingenuous. Even absent this inconsistency, the Potters' allegations are insufficient to trigger the discovery rule.

An analogous argument was made and rejected in *Vannoy v. Milum*, 171 S.W.3d 745 (Ky.App. 2005). In *Vannoy*, the plaintiff argued that although he knew his dizziness was caused by medical treatment he received, he was unaware that it was caused by the physician's failure to monitor his medication until informed by his attorney that he had an actionable claim. The Court held that the action accrued when the plaintiff discovered that a wrong was committed, not when he discovered that he may sue for the wrong. *Id*. at 749.

It was painfully obvious to the Potters that they had been harmed when Brittani died and, therefore, they had a duty to exercise reasonable diligence to discover whether they had been injured by the physician's malpractice. In response to the physician's motion for summary judgment, the Potters were required to submit affirmative evidence that they could not discover with reasonable diligence that they had been injured by the physicians. *Hartford Ins.*

Group v. Citizens Fidelity Bank & Trust Co., 579 S.W.2d 628, 630-31 (Ky.App. 1979). The Potters failed to present the necessary affirmative evidence to defeat the application of the one-year statute of limitations.

Based on the foregoing, the summary judgment of the Jefferson Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: Respectfully, I dissent. While I wholly concur that this Court must refrain from extending a limitations period "by judicial fiat," I believe that the language and reasoning of *Conner, supra,* are broad enough to encompass this particular claim for loss of consortium.

KRS 411.135 explicitly combines a loss of consortium claim with a wrongful death action. In overruling cases to the contrary, *Conner* construed KRS 413.180 to allow one year for appointment of a personal representative and then essentially allowed him the statutory one-year limitation period to evaluate, to assess, and to decide whether to pursue a lawsuit for wrongful death. *Conner* provided as follows:

> 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***.

Id. at 654. (Emphasis added.)

In this case, the loss of consortium claim indisputably arose from the death of the child. Therefore, *Conner* permits the personal representative to pursue this claim as part and parcel of the claim for wrongful death. *Conner's* holding is clearly expansive rather than restrictive and serves the "logic and clarity" that the majority opinion fears are estranged from the law. In fact, a reasonable and literal application of *Conner* should save this claim for loss of consortium and would avoid the "confusion over varying time limitations" which *Conner* specifically sought to eliminate.

Therefore, I would vacate and remand on this one issue and permit this claim to be litigated.

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