

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

NO. 2011-CA-001453-MR

HOUSING PLUS, INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE PAMELA R. GOODWINE, JUDGE  
ACTION NO. 08-CI-04402

ESTATE OF PAUL DONALDSON ROSS,  
SR., DECEASED AND JOYCE WARD  
ROSS, EXECUTRIX

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND MOORE, JUDGES.

MOORE, JUDGE: Housing Plus, Inc., appeals the order of the Fayette Circuit Court dismissing its legal malpractice claim against the Estate of Paul Donaldson Ross holding that the action was filed outside the applicable statute of limitations. The circuit court's order also granted Ross's motion for summary judgment and

granted a motion to strike several documents relied on by Housing Plus that were not timely produced. After thorough review of the record, we affirm.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Paul Ross, an attorney in Lexington, Kentucky, provided legal services to Housing Plus, Inc., a company engaged primarily in the real estate business. Housing Plus filed a lawsuit on August 29, 2008, alleging professional malpractice by Ross based on legal negligence in conducting real estate transactions involving Housing Plus. In its complaint, as noted by the circuit court's order, Housing Plus described five factual bases for its negligence claim against Ross:

“A. That Ross provided title opinions for a property in Garrard County, 101 New Haven Road, Lancaster, Kentucky, and failed to note prior mortgages which encumbered the property. As a result, JP Morgan Bank is in the process of foreclosing on the property in the matter of JP Morgan Chase Bank v. Barbara Blankenship, Housing Plus, Inc., et al. Garrard Circuit Court, Civil Action No. 07-CI-000337;

B. That Ross provided clean title opinion letters for two separate properties, for each of which Housing Plus is still paying mortgages, when they are allegedly the same piece of property. The properties are described in the Complaint as Lot 16, 70 Rivercrest Lane, Lincoln County, Kentucky and Lot 16, 91 Rivercrest Lane, Lincoln County, Kentucky. In their discovery answers, Housing Plus ... designate[s] these properties as 79 Rivercrest Lane and 90 Rivercrest Lane, Lincoln County, Kentucky;

C. That Ross provided clean title opinion letters for numerous properties stating that they had no outstanding

taxes, when in fact there were purportedly overdue taxes on each of the properties;

D. That Ross served as a settlement agent for the closing of a property at 657 New Haven Road, Lancaster, Kentucky and that an outstanding mortgage from that transfer was not paid off after the closing. Housing Plus ... allege[s] these funds were diverted to Ross' escrow account;

E. That Ross provided clean title opinion letters for "numerous" properties when rent to own agreements allegedly existed as to said properties. No addresses or identification of these alleged properties have been provided."

The complaint also makes allegations of fraud or negligent misrepresentation.

Specifically, it states:

"Housing Plus, inc., through is [sic] manager Bill Blankenship, incurred numerous debts based on various affirmative representations by Paul Ross, which were false and that Paul Ross knew or should have known were false. Said representations were made negligently and/or deliberately with into [sic] cause harm and did in fact cause harm.

Housing Plus reasonably relied on said misrepresentations and has been financially harmed by his detrimental reliance thereon.

Richard Dorton is a personal guarantor of all of the indebtedness of Housing Plus, Inc., a Kentucky Corporation. Housing Plus, Inc., incurred numerous debts which Richard Dorton guaranteed based largely on various affirmative representations by Paul Ross which were false and that Paul Ross knew or should have known were false. Said representations were made negligently and/or deliberately with intent to cause harm and did in fact cause harm.

Richard Dorton, as guarantor, reasonably relied on said misrepresentations and has been financially harmed by his detrimental reliance thereon.”

Ross sought factual and documentary support for each of the allegations contained in the complaint in discovery requests on February 12, 2009. Housing Plus responded by stating that support for the allegations was contained in various title opinions and written documents prepared by Ross. Further, Housing Plus stated that the allegations of false representations made by Ross were written representations in the form of settlement statements and title opinion letters.

The only relevant documentary evidence Housing Plus was able to produce were copies of delinquent tax lien collection notices, along with several settlement statements related to the unpaid property tax claims. There was no further documentation produced in the initial discovery responses to provide support for the allegations contained in the complaint. However, Housing Plus stated that supplements to the document disclosures would be provided.

Ross made several attempts to obtain the supplemental documentary evidence without success. Ross filed a motion to compel on July 26, 2010, and thereafter, entered into an Agreed Order with Housing Plus for the production of the supplemental documentation. The deadline for the disclosures was September 16, 2010. Nonetheless, Housing Plus failed to produce any documents by this deadline. The court thereafter held a hearing because the case was subject to a CR<sup>1</sup> 77.02 order for failure to prosecute. Ross sought dismissal of Housing Plus’s

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<sup>1</sup> Kentucky Rules of Civil Procedure.

claims based on its failure to comply with the Agreed Order for discovery. Rather than grant the dismissal, the court set the matter for a status conference on November 1, 2010. Housing Plus finally provided the supplemental documentation at the status conference.

Housing Plus's supplemental documentation consisted of five additional title examination letters relating to the alleged property tax issues, along with a single, unsigned title examination letter from Ross for 657 New Haven Road. This was the property from which Ross allegedly diverted funds from a closing account.

The court then ordered January 15, 2011, as the deadline for discovery in this case. Housing Plus failed to produce any further documentation to support the allegations stated in its complaint aside from the property tax issue before the deadline. Ross filed a motion for summary judgment or in the alternative moved the court to dismiss Housing Plus's claims for failure to comply with the applicable statute of limitations. Additionally, Ross filed a motion to strike Housing Plus's exhibits attached to its response to Ross's motion for summary judgment. Ross maintained that Housing Plus relied on documents in its response to the motion for summary judgment that were not disclosed prior to the ordered discovery deadline of January 15, 2011. The circuit court held that Housing Plus's claims were time barred and granted summary judgment deciding that Housing Plus could not create a genuine issue of material fact as to any of the allegations stated in its complaint. The court further ordered any documents produced after the January 15, 2011 deadline struck from the record. The documents struck from the record were

attached as exhibits to Housing Plus's response to the motion for summary judgment and motion to dismiss. There were a total of 19 documents. Housing Plus now appeals.

## II. 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). If there are no genuine issues as to the material facts necessary for the trial court to determine that a statute of limitations bars a claim, we will apply the law to the facts *de novo*. *Lane v. Richards*, 256 S.W.3d 581, 582 (Ky. App. 2008). Additionally, the enforcement of discovery deadlines is within the discretion of the trial court. *Naive v. Jones*, 353 S.W.2d 365, 367 (Ky. 1961) (appellate court should respect the trial court's exercise of sound judicial discretion in the enforcement of the civil rules pertaining to discovery).

## III. ANALYSIS

Housing Plus first argues that the statute of limitations was improperly applied to its malpractice claim against Ross, particularly in regard to the factual bases describing undisclosed delinquent tax liens on several Housing Plus properties and the undisclosed mortgages on a Housing Plus property. The trial court found that all of the transactions upon which Housing Plus's complaint is based took place in or before 2006. The trial court also found according to

Housing Plus's own discovery responses and submitted documentation that it "knew or reasonably should have known" of each instance of negligence raised against Ross by at least June 2007 when concerns over Ross's legal work were expressed. The court concluded that in filing an action based on these alleged errors, Housing Plus was at least two months beyond the prescribed statute of limitations for a professional malpractice claim. Additionally, the trial court stated that Housing Plus had direct written notice in March 2007 of all of the delinquent tax bills that it used as a basis for liability against Ross and was at least four months beyond the statute of limitations on that claim.

Kentucky Revised Statutes (KRS) 413.245 provides "a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured." The statute has been construed as describing two separate periods of limitation: (1) "one year from the date of the occurrence," and (2) "one year ... from the date when the cause of action was, or reasonably should have been, discovered by the party injured" if that date is later in time. *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994). If a suit for legal malpractice is filed within one year from the date of occurrence, the discovery provision is not operable. *Id.*

"Occurrence" is used synonymously with the term "cause of action" in the statute. "The use of the word 'occurrence' in KRS 413.245 indicates a legislative

policy that there should be some definable, readily ascertainable event which triggers the statute.” *Michels*, 869 S.W.2d at 730 (quoting *Northwestern Nat. Ins. Co. v. Osborne*, 610 F.Supp. 126, 128 (E.D.Ky. 1985)). The triggering event is the date of “irrevocable non-speculative injury.” *Id.* The statute of limitations for legal malpractice does not begin to run until the harm becomes fixed and is non-speculative. *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 271 (Ky. App. 2005) (citing *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121, 125-26 (Ky. 1994)).

Housing Plus argues that the statute of limitations did not begin to run on its malpractice claim when it received the notices of the delinquent property taxes. Housing Plus contends that there has been no occurrence required to commence the running of the statute. Specifically, Housing Plus claims that settlement of overdue property taxes with the third-party taxing entity did not transpire until after this action had been filed, and additionally, there are multiple mortgage issues on Housing Plus properties with banks that have yet to be resolved.

To support its arguments, Housing Plus contends that this case is similar to *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121 (Ky. 1994). In *Broadbent*, a legal negligence action was filed in connection with legal advice given by an attorney regarding estate planning and gift taxes. As a result of the negligent legal advice provided, the client was charged with a \$3.5 million tax bill. The clients attempted to contact their attorney upon receiving the notice of the tax deficiency to no avail. Consequently, another law firm was employed by the client



to resolve the matter. After several dates were asserted as possible times for commencement of the statute of limitations, the Kentucky Supreme Court decided the case under the occurrence prong of KRS 413.245 and held that the statute of limitations was tolled until the subsequent law firm settled the tax liability claim with the Internal Revenue Service (IRS). *Broadbent*, 882 S.W.2d at 126.

We disagree with Housing Plus that this case is similar to *Broadbent*. In *Broadbent*, the damages remained speculative until the underlying litigation determining if there would be any tax liability was resolved. In this instance, Housing Plus has failed to demonstrate or provide any evidence of ongoing negotiations or underlying litigation with the third-party entities that asserted the tax liens on the respective properties. In its response to Ross's motion for summary judgment, Housing Plus stated that the property taxes were not paid until 2009 and 2010. Delay of payment by itself is not evidence of ongoing or underlying settlement negotiations. Furthermore, there was no question of liability. Housing Plus acquired the properties with taxes due and owing on them. Its complaint states that Housing Plus did pay a portion of the taxes. The remaining liens for delinquent taxes on the properties are required to be paid by the owner of the properties, Housing Plus.

Housing Plus asserts the occurrence triggering the statute of limitations was the payoff of the delinquent property taxes. While the "occurrence" limitation period in KRS 413.245 does require damages to be fixed and non-speculative, "Kentucky law has never required a specified dollar amount be known before the

statute of limitations can run.” *Matherly Land Surveying, Inc. v. Gardiner Park Development, LLC*, 230 S.W.3d 586, 591 (Ky. 2007). A cause of action is deemed to accrue where negligence and damages have both occurred. *Michels*, 869 S.W.2d at 730.

The occurrence limitations period began to run, at the earliest, when Housing Plus acquired ownership of the properties that had taxes due and owing on them based on the alleged negligence of Ross in preparing the title opinion letters for those properties. However, “[k]nowledge of less than all elements of a tort claim, such as knowledge of the negligence without knowledge of the harm, is insufficient to begin running the limitations period.” *Lane v. Richards*, 256 S.W.3d 581, 584 (citing *Michels*, 869 S.W.2d at 731-32). Housing Plus did not know when it acquired the properties of the purported negligence in the preparation of the title opinions and that damages, in the form of overdue taxes on the properties, had occurred.

Accordingly, our analysis in regards to this specific basis of liability turns to the second limitations period described in KRS 413.245, the discovery limitations period. The circuit court concluded that Housing Plus’s claims were brought beyond the discovery limitations period by stating Housing Plus “knew or reasonably should have known” of Ross’s negligence based on the property taxes when it received direct written notice of the delinquent taxes in March 2007. This action was brought in August 2008, and therefore, was approximately four months beyond the prescribed limitation period.

The discovery limitations period “presumes that a cause of action has accrued, *i.e.*, both negligence and damages has occurred, but that *it has accrued in circumstances where the cause of action is not reasonably discoverable*, and it tolls the running of the statute of limitations until the claimant knows, or reasonably should know, that injury had occurred.” *Lane*, 256 S.W.3d at 584 (citing *Michels*, 869 S.W.2d at 732). The receipt of notices in March 2007 of delinquent taxes on properties Housing Plus owned provided it with reasonable notice to commence the applicable one-year statute of limitations period. Therefore, we agree with the circuit court that Housing Plus was at least four months beyond the prescribed statute of limitations in filing an action for any claims arising out of the delinquent tax obligations.

Housing Plus also argues that there are several mortgage issues with banks that have not been resolved on properties that it owns, and this also tolls the statute of limitations. However, the complaint refers only to one specific property, 101 New Haven Road, Lancaster, Kentucky, in which JP Morgan Chase Bank filed a foreclosure action on in civil action 07-CI-00337. In *Meade County Bank v. Wheatley*, 910 S.W.2d 233 (Ky. 1995), a title examination and subsequent opinion failed to disclose a recorded mortgage on a property. The customers who made a mortgage on the property based on that title opinion defaulted on their loan. The bank then made preparations to bring an action to enforce its mortgage lien on the property, and the prior mortgage lien was then discovered. An appraisal revealed a “probability of insufficient equity to satisfy the claims of the lien holders.” The

Kentucky Supreme Court held that the statute of limitations in the legal negligence case did not begin to run until the date of the foreclosure sale of the property because until then, there was no certainty of damages. *Id.*

Under *Wheatley*, the statute of limitations in this legal malpractice action based on this specific basis of liability would not begin to run until the foreclosed property, 101 New Haven Road, was sold. There is no indication in the record of this case that the foreclosure sale in civil action 07-CI-00337 has been completed. Accordingly, Housing Plus's legal malpractice claim based on Ross's alleged negligence regarding the 101 New Haven Road property was *potentially* brought within the relevant statute of limitations, depending on when the foreclosure sale on that property occurred and if Ross was a part of the transaction. However, the Fayette Circuit Court disposed of any claim made on this basis by concluding that Housing Plus could not create a genuine issue of material fact as to any of the allegations contained in the complaint and granting Ross's motion for summary judgment. Specifically relating to this allegation, Housing Plus did not produce any documentation relating to the 101 New Haven Road property.

With regard to the other factual bases for Housing Plus's malpractice claim against Ross stated in the complaint, the evidence in the record is insufficient to enable this Court to make a determination of the commencement of the applicable statute of limitations for those specific allegations of liability.<sup>2</sup> Moreover, Housing

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<sup>2</sup> The other factual bases consisting of Housing Plus's negligence claim against Ross include (1) the claim that Ross provided clean title opinion letters for two separate properties, for each of which Housing Plus is paying two mortgages, but they are allegedly the same property; (2) that Ross served as a settlement agent at a closing of a property, but did not pay off the outstanding

Plus makes no argument to demonstrate how those remaining allegations fall within the statute of limitations or how they survive summary judgment.

To be thorough, we will briefly review the summary judgment entered in this case. A plaintiff in a legal malpractice case has the burden of proving (1) that there was an employment relationship with the defendant/attorney; (2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and (3) that the attorney's negligence was the proximate cause of damage to the client. *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003). In order to withstand entry of summary judgment, the nonmoving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). Summary judgment should not be granted unless "a party has been given ample opportunity to complete discovery." *Pendleton Bros. Vending, Inc. v. Commonwealth of Kentucky Fin. & Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988).

Housing Plus responded to Ross's initial discovery requests by stating that the support for the allegations contained in the complaint was in various title opinions and written documents prepared by Ross. Additionally, Housing Plus claimed that the alleged false representations made by Ross were written representations within settlement statements and title opinion letters. The documentary evidence produced by Housing Plus in the initial discovery mortgage after the closing; and (3) that Ross provided clean title opinion letters for numerous properties that allegedly had rent to own agreements on them.

disclosures consisted only of copies of delinquent tax lien collection notices and settlement statements relating to the unpaid property tax claims. The promised supplemental documentation provided after the deadline contained in the parties Agreed Order was five additional title examination letters relating to property tax issues and a single, unsigned title examination letter for 657 New Haven Road. The unsigned title examination letter was the sole evidence presented to support the allegation that Ross had diverted funds from a closing for his personal use.

Based on the evidence in the record, we agree that summary judgment was appropriate. The documentary evidence produced related primarily to the delinquent property taxes, but we have already determined that any claims made on that basis of liability were not brought within the applicable statute of limitations. Housing Plus failed to produce any affirmative evidence creating a genuine issue of material fact relating to any of the allegations against Ross of fraud, negligent misrepresentation, or professional malpractice contained in its complaint. Accordingly, Ross was entitled to judgment as a matter of law.

Nonetheless, Housing Plus claims that a discovery dispute existed between the parties that the circuit court declined to resolve, but instead granted Ross's motion to strike the documents attached as exhibits to Housing Plus's response to the motion for summary judgment. It argues that the court abused its discretion when it granted Ross's motion to strike. Housing Plus requests that the order striking the documents be reversed because had those documents been considered, the circuit court would have determined that affirmative evidence creating genuine

issues of material fact existed as to its claims. Ross filed the motion to strike claiming that the documents attached were not disclosed prior to the discovery deadline of January 15, 2011.

Housing Plus filed this action in August 2008, and initial discovery requests were made in February 2009. When the initial disclosures did not provide support to any of the claims alleged in the complaint and Housing Plus failed to provide the supplemental documentary evidence, Ross filed a motion to compel in July 2010. The parties then entered into an Agreed Order with a deadline of September 16, 2010. Housing Plus did not produce any documents by this deadline. The long awaited supplemental documentation was finally provided in November 2010; however, it also failed to provide any support to the allegations. The circuit court then designated January 15, 2011, as the final discovery deadline in this matter. It determined that the documentation attached as exhibits to Housing Plus's response to the motion for summary judgment were not produced prior to the January 15, 2011 deadline. The attachments were not considered by the court and were struck from the record.

Trial courts are vested with discretion in the management and enforcement of discovery deadlines. *Naive v. Jones*, 353 S.W.2d 365, 367 (Ky. 1961). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). The circuit court had the entire record before it and made

the determination that the documents attached to Housing Plus's response to the motion for summary judgment were not produced prior to the final discovery deadline. This determination was not arbitrary or unreasonable but based on the documentation supplied by the parties before it. Housing Plus had ample time from when it initiated the suit in 2008 to the final discovery deadline in 2011 to produce relevant evidence to support its claims. It failed to do so. Therefore, the circuit court's order striking those documents not timely produced was not an abuse of discretion.

#### **IV. CONCLUSION**

For these reasons, the order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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