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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000609-MR

KEVIN L. CURTSINGER;
AND STACEY L. CURTSINGER — APPELLANTS

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE A. BAILEY TAYLOR, SPECIAL JUDGE
ACTION NO. 12-CI-000153

WILLIAM L. PATRICK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kevin L. Curtsinger and Stacey L. Curtsinger bring this appeal from a March 12, 2014, Opinion and Order of the Anderson Circuit Court granting William L. Patrick's motion for summary judgment dismissing the Curtsingers' legal malpractice claim. We affirm.

In November 2010, the Curtsingers contracted to purchase a 101-acre farm located in Anderson County, Kentucky (the farm). To pay the purchase price of the farm, the Curtsingers obtained a loan from Farm Credit Services of Mid-America. Farm Credit retained Patrick, an attorney, to perform a title examination, prepare the loan documentation and deed of conveyance, and conduct the closing of the transaction. The closing took place on December 15, 2010. All relevant documentation was executed at the closing, and the Curtsingers obtained title to the farm.

It is undisputed that the General Warranty Deed and Mortgage both specifically referenced a reservation of a passway over the farm in favor of adjoining property. This reserved passway was also referenced in the Certificate of Title prepared by Patrick in conjunction with his title examination of the property. Some eight months after the closing, in October 2011, the Curtsingers asserted that Pam Robinson, an adjoining landowner, claimed a right to use the passway and cited to the reservation in the Curtsingers' deed.

In April 2012, some sixteen months after the closing, the Curtsingers filed a legal malpractice action against Patrick and a declaration of rights action against Robinson. Eventually, the Curtsingers and Robinson reached a settlement whereby the Curtsingers paid Robinson $26,000, and in return, Robinson only retained a license for her lifetime to transverse the passway over the Curtsingers' farm. Subsequently, Patrick filed a motion for summary judgment arguing that the

Curtsingers' legal malpractice claim was time-barred. The circuit court agreed and dismissed the action on March 12, 2014. This appeal follows.

The Curtsingers argue that the circuit court erred by rendering summary judgment dismissing their legal malpractice claim against Patrick as time-barred. We disagree.

To begin, summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). And, all facts and inferences must be viewed in a light most favorable to the nonmoving party. *Id.* Our review proceeds accordingly.

The gist of this action looks to a legal malpractice claim by the Curtsingers against attorney Patrick in the performance of his title examination for Farm Credit. In *Seigle v. Jasper*, 867 S.W.2d 476 (Ky. App. 1993), the Kentucky Supreme Court held that attorneys owe a duty of care to a purchaser of property to discover defects in the real property title, notwithstanding that the lender had directly retained the attorney to conduct the title search. The Court's rationale for recognizing this duty looked to the purchaser paying the attorney fees as part of the lender's closing costs and the attorney having actual knowledge that the title search was ultimately performed for the benefit of the purchaser. *Id.*

The legal malpractice statute of limitations is found in Kentucky Revised Statutes (KRS) 413.245, which provides:

> Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, 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. Time shall not commence against a party under legal disability until removal of the disability.

Under KRS 413.245, our Supreme Court has recognized two distinct limitation periods – the occurrence limitation period and the discovery limitation period:

> The "occurrence" limitation period begins to run upon the accrual of the cause of action. *Id.* The accrual rule is relatively simple: "'[A] cause of action is deemed to accrue in Kentucky where negligence and damages have both occurred. . . . [T]he 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.'" *Id.* at 730 (quoting *Northwestern Nat. Ins. Co. v. Osborne*, 610 F. Supp. 126, 128 (E.D. Ky. 1985)) (alterations in original). Basically, "a 'wrong' requires both a negligent act and resulting injury. *Damnum absque injuria,* harm without injury, does not give rise to an action for damages against the person causing it." *Id.* at 731. The difficult question when applying the rule is usually not whether negligence has occurred but whether an "'irrevocable non-speculative injury'" has arisen. *Id.* at 730 (quoting *Northwestern Nat. Ins. Co. v. Osborne*, 610 F. Supp. 126, 128 (E.D. Ky. 1985)).
>
> The second or "discovery" limitation period begins to run when the cause of action was discovered or, in the exercise of reasonable diligence, should have been discovered. *Id.* at 730. This rule is a codification of the common law discovery rule, *id.* at 732, and often

> functions as a "savings" clause or "second bite at the apple" for tolling purposes.

Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C., 237 S.W.3d 141, 147-48 (Ky. 2007). Under the discovery limitation period, this period may only begin to run after the occurrence limitation period is triggered. The discovery limitation acts to toll the limitation period until plaintiff "discovers" his cause of action. We shall initially analyze whether the occurrence limitation period of KRS 413.245 was triggered under the particular facts of this case and, if necessary, then analyze whether it was tolled under the discovery limitation period.

In this case, it is undisputed that the closing took place on December 15, 2010. At the closing, Patrick prepared and presented to the Curtsingers a deed and a mortgage, which both contained the following identical reservation:

> [A]lso conveying up the ridge from the residence of said W.W. Stratton to the Hoopole Road and reserving for the benefit of L.C. Stratton the road as it now is from his corner west of the residence of W.W. Stratton to the Hoopole Road to be used by said L.C. Stratton as a passway to said road.

The Curtsingers signed the deed and mortgage but read neither. The occurrence limitation period is triggered upon the occurrence of a negligent act and resulting damages. The alleged negligence occurred when Patrick conducted the title search, the deed preparation, and closing upon the farm without informing the Curtsingers of the reserved passway. And, the damages occurred when the Curtsingers purchased the farm with the reserved passway easement. At that time, the damages were fixed and nonspeculative. More specifically, the measure of

damage was the value of the Curtsinger's farm without the easement compared to the value of the Curtsingers' farm with the easement. Thus, under the occurrence limitation period, KRS 413.245 began to run on December 15, 2010, at the time of the closing upon the farm. We shall now analyze whether KRS 413.245 was tolled by the discovery limitation period.

The Curtsingers maintain that they were unaware of the reservation affecting their title to the farm until October 2011, when Robinson attempted to utilize the passway. The Curtsingers admitted that they did not read the deed or mortgage at closing but claim that they are not attorneys. The discovery limitation period is triggered when a cause of action, in the exercise of reasonable diligence, should have been discovered. It was incumbent upon the Curtsingers to read the deed and mortgage at the closing and if confused by its language, to inquire of Patrick as to the contents. However, the Curtsingers sat quietly at the closing, did not read the deed or mortgage, and signed both without objection. They cannot now claim they were reasonably unable to discover the reservation of the passway in the deed or mortgage at closing. *See Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764 (Ky. App. 1985). The Curtsingers simply failed to exercise reasonable diligence. Hence, we conclude that the Curtsingers' cause of action, in the exercise of reasonable diligence, should have been discovered on December 15, 2010, at the closing. Any claim for legal malpractice against Patrick should have been filed no later than December 15, 2011, which did not occur in this case. Thus, their claim is time-barred.

Accordingly, we view all remaining contentions of error as moot nor do we reach the merits of the alleged legal malpractice claim.

In sum, we are of the opinion that the circuit court properly rendered summary judgment dismissing the Curtsingers' legal malpractice claim as time-barred under KRS 413.245.

For the foregoing reasons, the Opinion and Order of the Anderson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

David B. Mour
Louisville, Kentucky

BRIEF FOR APPELLEE:

Stewart C. Burch
Frankfort, Kentucky