

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001148-MR

DANA JEFFRIES

APPELLANT

v. APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 16-CI-00021

JUDITH BARNES, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF NORVEL C. BARNES, DECEASED;
ROBERTS ASPHALT SEALING & STRIPING,
INC.

APPELLEES

AND

NO. 2017-CA-001211-MR

JUDITH BARNES, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF NORVEL C. BARNES, DECEASED

CROSS-APPELLANT

v. CROSS-APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 16-CI-00021

DANA JEFFRIES; ROBERTS ASPHALT
SEALING & STRIPING, INC.; AND
HOSKINS & SON EXCAVATING, INC.

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JONES, AND K. THOMPSON, JUDGES.

JONES, JUDGE: This is an appeal and cross-appeal from an order of the Trimble Circuit Court. The Appellant/Cross-Appellee, Dana Jeffries (“Jeffries”), appeals the trial court’s June 16, 2017, order granting summary judgment in favor of the Appellee, Roberts Asphalt Sealing & Stripping, Inc., (“Roberts Asphalt”) and Appellee/Cross-Appellant, Norvel C. Barnes, (“Barnes”).¹ In the direct appeal, Jeffries maintains the circuit court erred as a matter of law in granting summary judgment in favor of Roberts Asphalt and Barnes. The related cross-appeal concerns the circuit court’s rejection of the Appellees’ arguments that Jeffries could not prove causation and that her complaint should be dismissed as a sanction for her violation of prior discovery orders.

¹ Norvel Barnes passed away during the pendency of this appeal. The subject claim was properly revived in the Trimble Circuit Court by order entered March 5, 2019, and his personal representative was substituted by Order of this Court.

Having reviewed the record in conjunction with all applicable legal authority, we affirm the circuit court's determination that Jeffries's claims against Roberts Asphalt and Barnes are barred by the one-year statute of limitations for personal injury actions. This determination renders the cross-appeal moot.

I. BACKGROUND

The circuit court's summary judgment opinion thoroughly and concisely set out the relevant procedural and factual history of this matter. We adopt its summary as follows:

On February 17, 2014, as [Jeffries] was returning personal items to her car at Signature Nursing Home, her place of employment, she fell and subsequently suffered a traumatic brain injury as well as other bodily injuries. [Jeffries] is not aware of the cause of her fall nor is she aware of any witnesses to the fall. [Jeffries] recalls the condition of the parking lot being icy and slippery but cannot say with certainty if those conditions were the cause of her fall. [Jeffries] has no knowledge of any other condition or incident that may have led to her fall. [Jeffries] believes she lost consciousness and when she came to was able to call for help with her cell phone. [Jeffries] went to an emergency room that night but was released without being admitted. [Jeffries] has seen specialists since the time of the accident but has not been hospitalized.

[Jeffries] filed her original lawsuit in Jefferson County on or around February 16, 2015, naming Bedford, LLC, Unknown Defendant John Doe, and Unknown John Roe as Defendants. On October 6, 2015, [Jeffries] amended her complaint to name Roberts Asphalt and Norvel Barnes as Defendants and asserted a claim of negligence against both. An Order of the Jefferson Circuit Court

allowed the amended complaint to be related back to the original filing date. Summonses were not issued for Roberts Asphalt and Norvel Barnes until December 14, 2015. Both parties timely filed motions to vacate the relation back language of the Jefferson Circuit Court order and to dismiss the action for being barred by the statute of limitations. All parties later entered an Agreed Order that transferred venue of the case to Trimble County and reserved the statute of limitations/relations back issue for further ruling. [Jeffries] thereafter motioned the Court for relief pursuant to KRS^[2] 413.170 stating she is of unsound mind. Defendants Roberts Asphalt and Norvel Barnes served discovery on [Jeffries], which was limited by the Court to items related to [Jeffries's] claim of unsound mind. Both [Roberts Asphalt and Barnes] ultimately had to file CR^[3] 37.01 motions to compel, which the Court granted following a hearing. Roberts Asphalt subsequently filed another motion to compel and asked the Court to dismiss [Jeffries's] complaint for failure to adequately respond to discovery. The issues currently pending before the Court are: [Robert Asphalt's and Barnes's] motion to vacate [the relation back order]/for summary judgment regarding the statute of limitations, a motion to dismiss [Jeffries's] claim insofar as it cannot be supported by evidence; and a motion to dismiss [Jeffries's] case as sanctions for failure to comply with an Order of this Court regarding discovery.

[Roberts Asphalt and Barnes] allege that [Jeffries's] complaint must be dismissed as it is time-barred under the statute of limitations insofar as the amended complaint fails to relate back pursuant to CR 15.03, and [Jeffries] cannot demonstrate that she was of unsound mind pursuant to KRS 413.170 at the time the Complaint was filed. The Court will note that when [Jeffries] filed

² Kentucky Revised Statutes.

³ Kentucky Rules of Civil Procedure.

her Complaint she named two then-unknown Defendants and stated that the entities were responsible for the snow/ice removal and maintenance of the parking lot as well as designing, constructing, and maintaining the parking lot.

(R. at 686-88).

The circuit court first determined that Jeffries's complaint did not meet CR 15.03(2)'s requirements for relation back. It reasoned that there was no privity among the parties Jeffries named in her original complaint and Roberts Asphalt/Barnes that would give the latter parties either actual or constructive knowledge that a lawsuit was pending that involved their actions. The circuit court explained that "[i]t is not conceivable to this Court that on receiving the Complaint LP Bedford, LLC would contact two outside contractors to discuss legal woes." (R. at 689). The circuit court also concluded that Roberts Asphalt and Barnes were prejudiced by the twenty-two-month span between the date of the accident and summonses being issued to them insomuch as evidence and witnesses may have become stale leaving Roberts Asphalt and Barnes at a disadvantage in mounting factual defenses to Jeffries's claims against them. Accordingly, the circuit court vacated the Jefferson Circuit Court's order finding that the amended complaint relates back to the filing of Jeffries original complaint.⁴

⁴ Jeffries did not brief this issue in her appellant brief and has waived any arguments related to this determination.

After determining the relation-back doctrine did not apply, the circuit court turned to Jeffries's tolling argument. To this end, Jeffries argued that her amended complaint against Roberts Asphalt and Barnes was not time barred because she was of unsound mind following her fall and related traumatic brain injury. The circuit court ultimately determined that the facts as set forth in the record demonstrated that Jeffries had the capacity to, and did, manage her legal affairs notwithstanding her alleged brain injuries.

The circuit court pointed out that Jeffries managed her own bank account and paid several bills including her car loan, cell phone, car insurance, credit card statement, and tanning membership. She was able to balance her check book with a calculator, although she occasionally required assistance from her mother. While Jeffries lived with her mother, she had a separate floor in the home and testified that she was responsible for cleaning the area herself. The circuit court also noted that the record indicated that Jeffries retained counsel to assist with her related workers' compensation claim on or about March 4, 2014, soon after her fall, and she retained counsel to represent her in this civil case on or about November 13, 2014, approximately seven months after her fall and three months prior to the expiration of the statute of limitations for personal injury actions.

The circuit court noted that it believed the record established that Jeffries did suffer some cognitive impairment because of her fall. Nevertheless,

the circuit court could not find any evidence to support Jeffries claim that she was of unsound mind in the months following the accident. The circuit court explained:

[T]he Court cannot say that [Jeffries] was of unsound mind either at the beginning of the statute of limitations period, nor during the one year in which it ran. [Jeffries] has stated that she continues to handle her financial affairs, drive herself, and live independently. [Jeffries] acknowledged that she knowingly entered into two contractual relationships with attorneys to safeguard her legal rights. While [Jeffries's] quality of life has deteriorated significantly since the accident, the Court does not find that at any point she has been incompetent to manage her estate or understand the nature of a contract. The Court therefore finds that [Jeffries] was not of unsound mind at any time during the one-year period in which the statute of limitations ran and [Jeffries's] claim must be dismissed as such.

(R. at 692).

With respect to the other grounds for dismissal/summary judgment asserted by Roberts Asphalt and Barnes, the circuit court determined that summary judgment was premature inasmuch as discovery had been limited to the issue of unsound mind and dismissal was too harsh of a sanction for Jeffries's failure to timely respond to the court's discovery orders.

This appeal and cross-appeal followed.

II. STANDARD OF REVIEW

The standard of review on appeal when the circuit court grants a motion for summary judgment is "whether the circuit judge correctly found that

there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex rel. Trent v. Nat’l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). The circuit court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if “it appears impossible [that] the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991).⁵

“Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the [circuit] court’s decision and will review the issue *de novo*.” *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

III. ANALYSIS

Jeffries argues the circuit court erred when it determined that she could not establish that she was of unsound mind after her fall. Jeffries maintains that an affidavit from her mother and her medical records establish that she was of unsound mind. At the very least, she asserts they create a genuine issue of material fact for a jury. We disagree.

⁵ “While the Court in *Steelvest* used the word “‘impossible’ in describing the strict standard for summary judgment, the Supreme Court later stated that that word was ‘used in a practical sense, not in an absolute sense.’” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992)).

KRS 413.140(1)(a) provides that an action for personal injury must be brought within one year. However, pursuant to KRS 413.170(1):

If a person entitled to bring any action mentioned in KRS 413.090 to 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued.

KRS 413.170(1). “A mental condition caused by the very injury giving rise to the cause of action can be used to toll the statute of limitations.” *Powell v. Jacor Communications Corp.*, 320 F.3d 599, 603 (6th Cir. 2003) (applying Kentucky law).

KRS 413.170 does not define the phrase “unsound mind,” but our Supreme Court indicated that the limitations period may not be tolled on this ground unless the plaintiff’s mental illness is such “as to render her incapable of managing her own affairs.” *Southeastern Kentucky Baptist Hosp., Inc. v. Gaylor*, 756 S.W.2d 467, 469 (Ky. 1988). While a person’s ability to attend to her personal needs is relevant to some degree, we focus on most heavily on whether the individual was “capable of comprehending or understanding the subject of the contract, [and] its natural and probable consequences.” *Stair v. Gilbert*, 209 Ky. 243, 272 S.W. 732, 734 (1925). The *Stair* court’s reference to a person’s ability to manage her estate and understand a contract places the focus on a person’s mental

capacity; specifically, her ability to comprehend and take care of discrete subject matters. In this case, the discrete subject matter at hand is whether Jeffries had the mental capacity to take care of her legal affairs in a timely manner.

“Once the statute of limitations is raised, the burden falls on the complainant to prove such facts as would toll the statute[.]” *Gaylor*, 756 S.W.2d at 469. The complainant must come forward with “hard evidence” of unsoundness to defeat summary judgment. *Flovez v. Sargent*, 917 P.2d 250, 255 (Ariz. 1996). If the complainant does so, then a jury must decide whether the complainant was of such unsound mind as to warrant tolling the statute of limitations. *Carter v. Huffman*, 262 S.W.2d 690, 692 (Ky. 1953).

Like the circuit court, we readily acknowledge that Jeffries was injured in her fall. Her medial records show that she suffered a brain injury that caused some cognitive impairment and psychological problems. Additionally, her mother’s affidavit demonstrates that Jeffries needs some level of assistance. However, what we are concerned with in this case is whether the injuries rendered Jeffries incapable of managing her legal affairs. The mere claim that Jeffries had some cognitive and psychological problems is not synonymous with being of unsound mind for purposes of KRS 413.170(1). *See Gaylor*, 756 S.W.2d at 469.

At no time since the injury did Jeffries ever cease managing her financial or legal affairs. She maintained a bank account, kept a checkbook, and

paid her bills. Most importantly, approximately one month after her accident, Jeffries retained an attorney to assist her in protecting her rights and legal claims as related to her fall. Jeffries testified in her deposition that she knew what she was doing when she contacted an attorney to represent her, and she knew that it was important for her to do so. The first attorney Jeffries retained filed a workers' compensation claim on her behalf. Later, in November of 2014, well within the statute of limitations, Jeffries contacted and retained a second attorney to assist her in filing this civil lawsuit. This was three months before the statute of limitations ran. A lawsuit was filed in Jefferson Circuit Court prior to the expiration of the statute of limitations in Jeffries's own name, which itself points to her not being of unsound mind as of that date.⁶

In this case, we cannot agree with Jeffries's argument that she provided adequate factual proof that she was unable to manage her legal affairs for a period sufficient to prevent her complaint against Roberts Asphalt and Barnes from being time barred. Even if we assumed that Jeffries's injuries rendered her incompetent on the date of her fall, she was clearly capable of ascertaining and managing her legal affairs shortly thereafter as she retained legal counsel to file a workers' compensation claim on her behalf in early March of 2014. Jeffries

⁶ "Actions involving unmarried infants or persons of unsound mind shall be brought by the party's guardian or committee, but if there is none, or such guardian or committee is unwilling or unable to act, a next friend may bring the action." CR 17.03(1).

retained a second attorney on or about November 13, 2014, to pursue a civil action in circuit court. However, summonses were not issued to Roberts Asphalt and Barnes until December 14, 2015, well over a year after Jeffries's retention of counsel. Considering Jeffries's unrebutted testimony that she was aware of the need to take legal action and knew what she was doing when she retained counsel to assist her, we agree with the circuit court's conclusion that her claims are time barred notwithstanding her assertion of mental unsoundness. Given this testimony, it would have been impossible for Jeffries to establish that she lacked the mental soundness to manage her legal affairs in the year preceding her issuing summonses to Roberts Asphalt and Barnes.

Alternatively, Jeffries argues the discovery rule applies because she was unable to ascertain the identities of Roberts Asphalt and Barnes without obtaining discovery from LP Bedford LLC. In general, "[p]ursuant to KRS 413.140(2), causes of action for medical malpractice or recovery of stolen property are subject to the discovery rule rather than the general occurrence rule. Kentucky courts have also applied the discovery rule to cases involving latent injuries arising from exposure to harmful substances." *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 288 (Ky. App. 1998). "The discovery rule is a means by which to identify when a cause of action accrues and the statute begins to run on the date of the discovery of the injury, or from the date it should, in the exercise of

ordinary care and diligence, have been discovered.” *Lake Cumberland Regional Hospital, LLC v. Adams*, 536 S.W.3d 683, 692 (Ky. 2017). “[T]he plaintiff’s mere failure to locate or identify potential defendants does not excuse his or her untimeliness [under the discovery rule].” *Reese v. General American Door Co.*, 6 S.W.3d 380, 383 (Ky. App. 1998).

Jeffries’s alleged injury occurred on February 17, 2014, in the parking lot of Signature Healthcare. Jeffries immediately knew she was injured and sought medical treatment. If Jeffries believed her alleged injury may have been caused by defendants’ conduct, defendants that she did not know the identity of and that were not immediately apparent, then she was required to exercise some level of reasonable diligence in investigating her alleged claim to identify those defendants. Jeffries failed to do so. The discovery rule begins the running of the statute of limitations on the date of the discovery of the injury, not on the date the plaintiff discovered the identities of the defendants responsible for causing the injury. The discovery rule does not apply in the way Jeffries sought to use it; the circuit court was correct to reject its application in this instance.

IV. CONCLUSION

For the reasons set forth above, we affirm the Trimble Circuit Court’s grant of summary judgment in favor of Roberts Asphalt and Barnes. We will not

review the cross-appeal as it has been rendered moot by our decision to affirm the circuit court's statute of limitations conclusion.

DIXON, JUDGE, CONCURS.

K. THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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NO BRIEF FILED FOR CROSS-
APPELLEE, HOSKINS & SON
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