COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-00426-DG

BARBARA A. ABEL, ET AL. — APPELLANTS

ON REVIEW FROM COURT OF APPEALS
v. CASE NO. 2009-CA-00465-MR
FAYETTE CIRCUIT COURT CIVIL ACTION NO. 07-CI-05178

J. BRENT AUSTIN; LANGSTON SWEET & FREESE, PA.; AND BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C. — APPELLEES

BRIEF FOR APPELLEE LANGSTON SWEET & FREESE LLC

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing has been served by mailing a copy to: Angela M. Ford, Esq., Chevy Chase Plaza, 836 Euclid Ave., Ste. 311, Lexington, KY 40502; William C. Rambicure, Esq., Rambicure & Miller, PSC, 219 E. High St., P.O. Box 34188, Lexington, KY 40588; Trevor W. Wells, Esq., Miller & Wells, PLLC, 300 E. Main St., Ste. 360, Lexington, KY 40507; Perry M. Bentley, Esq., Lucy A. Pett, Esq., Carl N. Frazier, Esq., Stoll Keenon Ogden, PLLC, 300 West Vine St., Ste. 2100, Lexington, KY 40507; Thomas H. Keene, Esq., R. Austin Huffaker, Jr., Esq., Rushton Stakely Johnston & Garrett, P.A., 184 Commerce St., Montgomery, AL 36104; David C. Trimble, Esq., Frost Brown Todd, LLC, 250 W. Main St., 2800 Lexington Financial Center, Lexington, KY 40507; Hon. Pamela Goodwine, Fayette Circuit Judge, 120 North Limestone Street, Lexington, KY 40507; and Hon. Judges Clayton, Nickell, and Knopf, c/o Clerk of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601on this the 13th day of February, 2012.

COUNSEL FOR APPELLEE

STATEMENT CONCERNING ORAL ARGUMENT

Appellee Langston Sweet & Freese LLC agrees that oral argument of this matter would assist the Court. The critical issues involved in this case are much simpler than Appellants' Brief purports to make them. Oral argument should afford the parties a better opportunity to focus on the precise matters at issue.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The central issues are: (1) Did Plaintiffs-Appellants initiate this lawsuit timely under the applicable statute of limitations? and (2) Did Plaintiffs-Appellants have notice that the Circuit Court was ruling on a summary judgment motion that affected them?

On August 28, 2008, the Circuit Court and all parties announced and agreed upon a process through which one plaintiff's claims would be assessed, followed by the application of the relevant legal standards to the remaining plaintiffs. The Circuit Court did exactly that, and found that the applicable statute of limitations had expired for all plaintiffs. Therefore, the Circuit Court entered judgment against Plaintiffs-Appellants on all claims including the claims against Langston Sweet and Freese LLC ("Langston"). Plaintiffs-Appellants' appeal to the Court of Appeals was similarly unsuccessful. They now present the same arguments to this Court, but they still do not offer any evidence (or identify sufficient disputes of material fact) that would salvage their claims against Langston.

ARGUMENT

A. THE CIRCUIT COURT DID NOT ERR BY *SUA SPONTE* GRANTING SUMMARY JUDGMENT.

The Court of Appeals accurately noted that the motions for summary judgment about which Appellants base this appeal "contained pertinent information and documents about all appellants so that the trial court could rule as to all." Ct. App. Opinion at 10. Specifically, the Circuit Court had before it "evidence to show that all the appellants discovered the putative issue at a time that would place the filing of this action after the limitations period." *Id.* That included the Appellants' receipt of settlement checks from their underlying case in January or February 2001; the filing of lawsuits in late 2004 and early 2005 alleging that attorneys had stolen millions of dollars from former clients; extensive media coverage; and Appellants' counsel's receipt in October 13, 2006, of conflicting settlement disbursement schedules for most Appellants. *Id.* at 10-11.

At a hearing on August 28, 2008, the Circuit Court and *all* parties' counsel directly addressed how those undisputed facts and summary judgment arguments would be handled. Of particular importance at that time was Appellants' commitment to confirm which of the Appellants had received counsel's February 4, 2005 solicitation letter. The Circuit Court wanted those facts in the record before addressing the defendants' summary judgment motions. *Appellants' counsel* understood that process and stated:

> Judge we're going to have to … prepare and file with the court some sort of stipulation as the Court has already directed, in terms of… who received this letter and when. That will be in the record and will be in the record well in advance of the October 3rd hearing [on the motion for summary judgment]…. And so it seems to make sense to me that if the facts are the same for the most part, if the dates and the critical dates are the same, then *the arguments will certainly have applicability to at least those plaintiffs who may have received this letter. And so it makes sense to do that.*

(VR No.5, 3:14:16 (emphasis added)). The Circuit Court responded that Defendants should file their motion for summary judgment initially focused on one plaintiff,

> And then [plaintiffs] will file their stipulation by the 12th that includes all the forty-eight remaining plaintiffs and then by October 3rd I will be able to decipher all of that information based on your motion... and figure out, first of all, whether [the statute of limitations defense] even applies. If [the statute of limitations defense] does apply, then look at the chart, the stipulation, and say okay it applies and here's what it applies to or, no it doesn't apply.... But I think [plaintiff's counsel] is correct that if they file that [stipulation regarding the February 4, 2005 letter] by the 12th and I have that chart, then based upon your motion *I can determine whether or not it's applicable and if so to whom.*

Id. at 3:15:08 (emphasis added).

Based upon that record, it was entirely appropriate and accurate for the Court of Appeals to conclude that "appellants knew that the trial court intended to review the entire record in order to rule on as many claims as the evidence warranted. And, based on this notice, Appellants had an opportunity at that time to point out any genuine issues of material fact." Ct. App. Opinion at 11. Moreover, after Appellee Austin sought clarification of the Circuit Court's order pursuant to CR 50.05, the Appellants once again had the opportunity to identify genuine issues of material fact pertinent to any and all parties. *Id.* at 11. By their own choice and for their own strategic reasons, "They did not do so." *Id.*

At each stage, the Circuit Court made its plans clear. Appellants' counsel knew of and agreed with those plans. That process was all that is required by Kentucky law because "[t]he litigants need only be 'given an opportunity to present evidence which reveals the existence of disputed material fact....'" *Queensway Financial Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 150 (Ky. 2007) (quoting *Hoke v. Cullinan*, 914 S.W.2d 335, 337 (Ky.1995)). "Thus, unless questions of material fact are self-apparent from the record,

summary judgment was appropriate." *Id.* at 150. Plaintiffs-Appellants' attempt to rewrite history after receiving the Circuit Court's adverse ruling is not a sufficient basis for overturning that ruling.

B. AS A MATTER OF LAW, APPELLANTS' CLAIMS AGAINST LANGSTON ARE BARRED BY THE STATUTE OF LIMITATIONS.

1. Kentucky's "borrowing statute" provides the first step, and compels application of Alabama's statute of limitations to the claims against Langston.

The Kentucky Borrowing Statute, KRS 413.320, provides:

> When a cause of action has arisen in another state or country, and by the laws of this state or country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period.

KRS 413.320.

As an initial matter, it is indisputable that that any cause of action relative to Appellee Langston could not have accrued in Kentucky. "[A] cause of action is deemed to accrue in Kentucky *where* negligence and damages have *both* occurred. . . ." *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994) (emphasis added). The Court of Appeals recognized that there are no disputed facts on this point: "Langston's actions, including the disposition of the settlement funds, only occurred in Alabama." Ct. App. Opinion at 16. Appellants offered no facts to contradict that to the Circuit Court, the Court of Appeals, or this Court. Without any evidence that Langston committed any negligent act in Kentucky, there is absolutely no basis to support the accrual of a cause of action in Kentucky.

2. The Alabama statute of limitations addresses a "like cause of action" to the Kentucky claims that Appellants tried to assert.

Kentucky's Borrowing Statute accordingly compels a review of Alabama's Legal Services Liability Act ("Alabama Act"). That statute undoubtedly addresses a "like cause of action" to the claims Appellants tried to assert under Kentucky law in this case. Appellants' attempt to avoid this reality is transparently flawed – they argue that because Alabama's statute covers *all* claims against attorneys, then it somehow cannot cover the *individual* claims being asserted by Appellants. Logic simply does not work that way.

Appellants describe their claims as "breach-of-fiduciary-duty, professional-malpractice/negligence, misrepresentation, equitable-accounting, and disgorgement/fee-forfeiture claims." Appellants' Brief at 25. For Appellants to escape the Borrowing Statute, they need to establish that the Alabama statute does not address claims "like" those. KRS 413.320. However, their own description of the Alabama Act provides all the support necessary to affirm the lower courts' rulings.

First, the Alabama Act "define[s] the standard of care of which plaintiff must demonstrate a breach in order to recover on *any claim* against a legal service provider." Appellants' Brief at 26 (emphasis added).

Second, the Alabama Act "'embraces *all claims* for injuries or damages … whether *in contract or in tort* and whether based on an *intentional or unintentional* act or omission...." *Id.* (quoting Ala. Code. §6-5-572(1) (emphasis added).

Third, the Alabama Act "'embraces *any form* of action in which a litigant may seek redress for a wrong or an injury…" *Id.* (quoting Ala. Code. §6-5-572(1)) (emphasis added).

Fourth, the Alabama Act "'embraces... *every legal theory* of recovery, whether *common law or statutory*, available to a litigant in a court in the State of Alabama now or in the future." *Id.* (quoting Ala. Code. §6-5-572(1)) (emphasis added).

Fifth, and finally, Appellants specifically concede that under the Alabama Act, "[c]laims for a lawyer's breach of fiduciary duty, violations of the lawyer's oath, violations of the rules of professional conduct, and wantonness in violation of a lawyer's duties are all *subsumed* in a legal malpractice action..." *Id.* at 26-27 (citing *Borden v. Clement*, 261 B.R. 275, 282 (N.D. Ala. 2001) (emphasis added by Appellants). Having "subsumed" and "embraced" "any" and "all" claims and "every" form of recovery, no room is left for dispute.

Appellants employ the obviously flawed approach of trying to overcome logic with namecalling. Appellants resort to labeling the Alabama Act a "'Frankenstein' cause of action." Appellants' Brief at 27.[1] Yet, the simple truth remains. Appellants are seeking recovery for breach of fiduciary duty, professional malpractice/ negligence, misrepresentation, and the remedy of return of fees. Those are exactly the same claims and remedies that the Alabama Act addresses explicitly.

3. Alabama's statute of limitations expired.

The Alabama Act's statute of limitations provides a two-year period from the date of the act, omission, or occurrence that gave rise to the claim. Ala. Code §6-5-574(a); *Denbo v. Debray*, 968 So.2d 983, 989 (Ala. 2006). Even after a potential tolling provision, "in no event may the action be commenced more than four years after such act or omission or

[1] First identified by the Institute for Propaganda Analysis in 1938, "[t]he name-calling technique links a person, or idea, to a negative symbol. The propagandist who uses this technique hopes that the audience will reject the person or the idea on the basis of the negative symbol, instead of looking at the available evidence." *See* http://www.propagandacritic.com/articles/ct.wg.name.html.

failure." Ala. Code §6-5-574(a); *Denbo*, 968 So.2d at 990. Appellants do not dispute that their claims are premised upon a November 2000 settlement agreement or, at the latest, a February 2001 amended settlement agreement through which they believe they were "shorted" settlement funds. Appellants' Brief at 1. Therefore, the Alabama statute of limitations expired by at least February 2005 (i.e. applying the 4-year statute of repose). Appellants initiated this action on October 31, 2007 – that was two years and 8 months *after* the Alabama statute of limitations had already expired. *See* Appellants' Brief at 5 ("Appellants ultimately filed suit against Appellees in Fayette Circuit Court on October 31, 2007.")

4. Kentucky's statute of limitation also expired.

The above analysis compels the conclusion that the Court of Appeals correctly applied the Kentucky Borrowing Statute and Alabama's statute of limitations. Nevertheless, even if Kentucky's statute of limitations applied, it too expired.

The Court of Appeals accurately noted that Kentucky's statute of limitations has two different periods. The first period is one year from the date of the "occurrence." KRS 413.245; *Michels*, 869 S.W.2d at 730; *see also* Ct. App. Opinion at 18. Appellants cannot support an argument under this period given that over six years separated the allegedly improper settlement distributions in 2000 and 2001 from their October 2007 Complaint.

Appellants' Brief also notes that, in Kentucky, "the action accrues once all of the elements supporting liability have actually occurred." Appellants' Brief at 24 (quoting *Swanson v. Wilson*, 423 Fed. Appx. 587, 2011 WL 1900389, *6-8 (6th Cir., May 20, 2011). In what can only be read as another concession against their own interests, Appellants concede that they fall short of the recognized standard:

> Appellants do not dispute that they asserted professional-service – malpractice claims more than one year after the date those claims *accrued* and/or the acts giving rise to them *occurred*.

Appellants' Brief at 28 (emphasis in original).

5. Kentucky's discovery rule does not help Appellants.

Kentucky's "discovery rule" was Appellants' last hope for their claims' survival. That rule requires the action to be filed within one year from the date that the cause of action is discovered "or, in the exercise of reasonable diligence, should have been discovery." Ct. App. Opinion at 18 (citing *Michels*, 869 S.W.2d at 730); *see also Conway v. Huff*, 644 S.W.2d 333 (Ky. 1982). The Court of Appeals also recognized that the discovery rule "'focuses not on when a plaintiff has actual knowledge of a legal cause of action, but whether a plaintiff acquired knowledge of existing facts sufficient to put the party on inquiry.'" *Id.* at 18-19 (quoting *Blanton v. Cooper Indus.*, 99 F. Supp. 2d 797, 802 (E.D. Ky. 2000).

a. Appellants cannot use the Kentucky "discovery rule" against Langston because they offered no evidence that Langston engaged in fraudulent concealment or misrepresentation.

There are two key flaws in Appellants' efforts to seek refuge in Kentucky's discovery rule. The first flaw is that the discovery rule "does not operate to toll the statute of limitations to allow an injured plaintiff to discover the identity of the wrongdoer unless there is fraudulent concealment or a misrepresentation by the defendant of his role in causing the plaintiff's injuries." *McLain v. Dana Corp.*, 16 S.W.3d 320, 326 (Ky. App. 1999) (citing *Resthaven Memorial Cemetery, Inc. v. Volk*, 286 Ky. 291, 150 S.W.2d 908, 912 (1941).

Appellants have certainly expounded on many things they disliked about the actions of some of the Defendant-Appellees. However, Appellants did not offer the Circuit Court,

the Court of Appeals, or this Court any evidence that Langston fraudulently concealed or misrepresented *anything*. Without that evidence, the discovery rule is simply not available.

b. Plaintiffs place misguided reliance on the timing of their professed "actual knowledge" of a cause of action.

The second flaw in Appellants' attempt to overturn the lower courts is that they focus almost entirely on their belief that they "filed this action well inside one year of their *actual* discovery of their cause of action...." Appellants' Brief at 34. That, quite frankly, misses the point, and is less than half of the legally relevant analysis.

Appellants characterize the Circuit Court as triggering the statute of limitations based on "information that constituted nothing more than mere *suspicions*." *Id.* at 34 (emphasis added). Those suspicions, in part, caused Appellants to "ask reasonable questions—and to ask them again and again ...." *Id.* at 36. That alone is sufficient to affirm the lower courts because "[a]ny fact that should excite [plaintiff's] suspicion is the same as actual knowledge of his entire claim." *Fluke Corp. v. LeMaster*, 306 S.W. 3d 55, 64 (Ky. 2010); *Blanton v. Cooper Indus.*, 99 F. Supp. 2d 797, 802 (E.D. Ky. 2000); *Hazel v. General Motors Corp.*, 863 F. Supp. 435, 440 (W.D. Ky. 1994).

But there was much, much more evidence before the lower courts. The Circuit Court relied upon several other actions, events, and documents to reach the conclusion that plaintiffs "should have known that something was amiss." Circuit Court Amended Opinion and Order, at 15 (quoting *Queensway*, 237 S.W.2d at 151). The Circuit Court recited a lengthy, multi-page list of undisputed facts. *Id.* at 16-19. Those included Appellants' "counsel's investigatory letters, newspaper articles about other attorney's wrongdoing with respect to other clients, and unsigned disbursement schedules containing numbers

inconsistent with what Appellants actually received." Appellants' Brief at 38.[2] It also included what Appellants characterize as their "mistaken belief that they... suffered injury when nearly twenty million dollars" of settlement proceeds from a different case were distributed to a charity. *Id.* at 40. Those particular facts, not how plaintiffs or their counsel chose to use those facts, end the inquiry. *See Queensway*, 237 S.W.2d at 151-52.

Once again, Appellants have presented the best evidence to undermine their own position, and to bolster the merits of the lower court decisions. By these admissions, Appellants' counsel was investigating, Appellants had inconsistent documentation of settlement distributions, and – by their own admission – had the "belief that they ... suffered injury." There is neither surprise nor error in the Circuit Court and Court of Appeals concluding, as a matter of law, that this information "put the party on inquiry.'" *See* Ct. App. Opinion at 18-19 (quoting *Blanton v. Cooper Indus.*, 99 F. Supp. 2d 797, 802 (E.D. Ky. 2000)).

Whether individually or collectively, those pieces of evidence put Appellants on notice as a matter of law and required them to file their complaint within one year. "A person who has knowledge of an injury is put on 'notice to investigate' and discover, within the statutory time constraints, the identity of the tortfeasor." *McLain v. Dana Corp.*, 16 S.W.3d 320, 326 (Ky. App. 1999) (citing *McCollum v. Sisters of Charity of Nazareth Corp.*, 799 S.W.2d 15, 19 (1990)).

Under each of the statutes of limitations analyzed by the lower courts, Appellants are simply too late.

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[2] Appellants acknowledge that the inconsistent disbursement schedules were produced to them on October 13, 2006. Appellants' Brief at 41. More than one year passed after receipt of those documents before they filed their complaint on October 31, 2007.

C. THE COURT OF APPEALS CORRECTLY HELD THAT MISREPRESENTATION CLAIMS AGAINST PROFESSIONALS ARE NOT GOVERNED BY KRS 413.120(12).

Appellants' last attempt to justify the timing of their Complaint is to argue that their "misrepresentation" claim should be governed by KRS 413.120 (12). That statute would give Appellants a five-year period to file there Complaint, if that statute was applicable. This argument also suffers from several flaws.

First, as established above, Kentucky's Borrowing Statute requires the application of the Alabama Act's statute of limitations. That Act "'embraces *all claims* for injuries or damages whether *in contract or in tort* and whether based on an *intentional or unintentional* act or omission...." Appellants' Brief at 26 (quoting Ala. Code. §6-5-572(1) (emphasis added).

Second, KRS 413.120(12) applies to claims for "fraud or mistake." The Court of Appeals accurately noted that Appellants did not assert claims for fraud or mistake.

Third, the more specific KRS 413.245 trumps KRS 413.120(12) under long accepted rules of statutory construction. When two statutes can arguably apply, the more specific statute prevails over the more general statute. *Wells v. White* 648 S.W.2d 77 (Ky. 1983). This rule applies to statutes of limitations as well. *Worldwide Equipment v. Mullins,* 11 S.W.3d 50 (Ky. App. 1999). KRS 413.245, by its precise terms, applies to "a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services...." Moreover, KRS 413.245 expressly preempts "any other prescribed limitation of actions which might otherwise appear applicable," making the Legislature's intentions quite clear.

Fourth, beyond those legal road blocks, the facts once again get in the way. Appellants can point to nothing in the record to support an argument that Langston made any misrepresentation to Appellants.

CONCLUSION

The Circuit Court and Court of Appeals based their decisions on undisputed facts and established law. Accordingly, Langston respectfully requests that the Court of Appeals' decision be affirmed.

Respectfully Submitted,

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