

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**John A. Rizzo, Jr., Mary Frances Rizzo Wright,
Melanie Rizzo Cavalier and Johnna Maria Rizzo,
Plaintiffs Below, Petitioners**

FILED
May 17, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 12-0966 (Marion County 11-P-166)

**Margaret J. Rizzo, as Executrix of the Estate of
John A. Rizzo,
Defendant Below, Respondent**

MEMORANDUM DECISION

Petitioners, by counsel Edmund J. Rollo, appeal the order of the Circuit Court of Marion County, entered July 6, 2012, granting respondent's motion to dismiss. Respondent appears by counsel Michael W. Barill and Deva A. Solomon.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Dr. John A. Rizzo died testate on January 9, 2010. His last will and testament, dated September 27, 2004, was admitted to probate on April 30, 2010, and the Marion County Commission confirmed probate by order dated May 26, 2010. Sibling Petitioners John A. Rizzo Jr., Mary Frances Rizzo Wright, Melanie Rizzo Cavalier, and Johnna Maria Rizzo, the children of Dr. Rizzo, filed a complaint in the Circuit Court of Marion County on December 16, 2011, asking the court to set the will aside. The sole ground for that complaint was the representation that Dr. Rizzo did not have the mental capacity to make a will in September of 2004, having suffered a traumatic brain injury in an automobile accident more than two years before.

Respondent Margaret J. Rizzo, petitioners' step-mother and the wife of Dr. Rizzo from 1983 until his death in 2010, filed a motion to dismiss the complaint pursuant to Rule 12(b) of the West Virginia Rules of Civil Procedure. She argued that the action is barred by the six-month period of limitations found in W.Va. Code § 41-5-11 (2010).¹ The circuit court agreed and granted respondent's motion by order entered July 6, 2012.

¹The respondent also asserted that the complaint should be dismissed pursuant to W.Va. R. Civ. P. 11(a), inasmuch as it was defective for failure to sign. The circuit court did not dismiss on that ground, and the parties do not argue the issue on appeal.

We have explained:

This Court reviews *de novo* a circuit court's order granting a motion to dismiss a complaint, *see* Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995); *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996), accepting all the well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff. Dismissal is proper pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure only where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Syl. Pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957)). *See also Sattler v. Bailey*, 184 W.Va. 212, 222, 400 S.E.2d 220, 230 (1990) (holding dismissal of complaint to be improper where allegations in complaint were adequate to state cause of action or basis for tolling applicable statute of limitations).

Harrison v. Davis, 197 W.Va. 651, 656, 478 S.E.2d 104, 110 (1996).

Petitioners would have us remand this case with directions that the circuit court allow discovery relevant to the discovery rule. Specifically, petitioners advocate the tolling of the statute of limitations until June 22, 2011, the date that Petitioner John Rizzo Jr. asserts he first obtained a copy of the 2004 will from the Marion County Clerk’s Office and determined that the will admitted to probate was made during his father’s period of incapacity. He declares that only then did he realize that respondent had misled the petitioners by repeatedly representing that the will had not been admitted to probate, even during the estate administration. The discovery rule may indeed be applied to a statutory claim challenging a will admitted to probate. *Davey v. Estate of Haggerty*, 219 W.Va. 453, 454, 637 S.E.2d 350, 351 (2006). However, upon consideration of the circumstances before us, it is clear that no evidence obtained through further discovery would have changed the outcome below.

We note, first, that petitioners’ allegations of deceit are absent from the complaint that they filed on December 16, 2011, a year and a half after the Marion County Commission confirmed probate of the will. To this day, the complaint states no claim for tortious interference with Dr. Rizzo’s bequest, fraud, breach of fiduciary duty, or any other such cause of action. It likewise is devoid of any allegation that would support the tolling of the statute of limitations. Petitioners should not find themselves surprised that the circuit court would dismiss a complaint that, on its face, was filed more than a year after the apparent expiration of time for filing, in light of such omission from this crucial pleading.

Second, and more importantly, petitioners are unable to demonstrate a right to discovery under the standard that we announced in Syllabus Point 6 of *Harrison*:

Where a plaintiff opposes a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and claims that discovery would enable him or her to oppose such a motion, the plaintiff may request a continuance for further discovery pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure. In order to obtain such a discovery continuance, a plaintiff must, at a minimum, (1) articulate some plausible basis for the plaintiff's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the plaintiff; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Momentarily ignoring petitioners' failure to plead or more timely conduct discovery about respondent's alleged misrepresentations, the Court determines that the development of additional facts would not produce a genuine and material issue. Here, even if petitioners did not receive earlier, actual notice of probate from the Marion County Clerk, three of the four petitioners had signed the Waiver and Application for Short Form Settlement by May 4, 2011, "thereby waiving any and all rights [they] may have to inspect, approve, affirm or object to a complete and comprehensive settlement of this estate . . ." ² As the circuit court adequately explained, the petitioners knew, or through reasonable diligence should have known, of the probate and estate administration well in advance of Petitioner John Rizzo Jr.'s review of the will. Allowing the most liberal view of these facts, petitioners' complaint should have been filed within six months of the date that the petitioners affixed their signatures to the waiver, thereby establishing actual notice of probate.

Finding no error in the granting of the respondent's motion to dismiss, the Court fully incorporates and adopts the circuit court's detailed "Order Granting Defendant's Motion to Dismiss[.]" entered July 6, 2012, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

²Only Petitioner Mary Frances Rizzo Wright did not sign the waiver. However, in an affidavit attached to her motion to dismiss the complaint, Respondent Margaret Rizzo explained that she sent the Waiver and Application for Short Form Settlement to Petitioner John Rizzo, with instructions that the document be signed, then forwarded to each sibling in turn. Petitioners have not disputed that Petitioner Mary Frances Rizzo Wright received the document.

ISSUED: May 17, 2013

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Brent D. Benjamin
Justice Margaret L. Workman

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

JOHN A. RIZZO, JR., MARY FRANCIS RIZZO WRIGHT,
MELANIE RIZZO CAVALIER and JOHNNA MARIA RIZZO

FINAL ORDER

Plaintiffs,

v.

Civil Action No.: 11-P-166
(Judge Janes)

MARGARET J. RIZZO, as Executrix of the
ESTATE OF JOHN A. RIZZO,

Defendant.

IN RE: THE ESTATE OF JOHN A. RIZZO

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ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiffs John A. Rizzo, Jr., Mary Francis Rizzo Wright, Melanie Rizzo Cavalier, and Johnna Maria Rizzo, by counsel Edmund Rollo, and Defendant Margaret J. Rizzo, Executrix for the Estate of John A. Rizzo (the "Estate"), by counsel Michael W. Barill, appeared before the Honorable Judge David R. Janes for a hearing on June 7, 2012 on the Defendant's Motion to Dismiss Complaint. The Court, having reviewed and considered all relevant pleadings and exhibits, applicable law, and oral arguments of counsel, and fully considering the matter as a whole, makes the following findings of fact, conclusions of law, and rulings:

FINDINGS OF FACT

1. Dr. John A. Rizzo died testate in Marion County West Virginia on January 9, 2010, leaving his Last Will and Testament dated September 27, 2004 (the "Will"). See Pl.'s Compl., ¶¶ 8, 11.
2. In the Will, the Defendant Margaret J. Rizzo, is named Executrix for the Estate. See Pl.'s Compl., ¶ 8.

3. Margaret J. Rizzo qualified as Executrix for the Estate on April 30, 2010. *See* Ex. No. 1 to Pl.'s Resp. to Def.'s Mot. to Dismiss, ¶ 11.

4. On April 30, 2010, at a regularly scheduled meeting of the Marion County Commission, the Will was admitted to probate. *See id.*, ¶ 12.

5. On May 26, 2010, by *Order Confirming Probate of Wills*, the Marion County Commission ratified and confirmed probate of the Will. *See* Ex. A to Mem. of Law in Supp. of Def.'s Mot. to Dismiss Compl.

6. Shortly thereafter, on May 17, 2010 and May 24, 2010, the Marion County Fiduciary Supervisor published a Notice of Administration for the Estate. *See* Ex. B to Mem. Of Law in Supp. of Def.'s Mot. to Dismiss Compl..

7. During October of 2010, Margaret Rizzo informed Plaintiff John A. Rizzo, Jr. that Attorney Charles Anderson was working on the Estate. *See* Ex. No. 1 to Pl.'s Resp. to Def.'s Mot. to Dismiss, ¶ 17.

8. During December 2010, John A. Rizzo and Johnna Maria Rizzo discussed and reviewed documents related to the ongoing estate administration with Margaret Rizzo's daughter, Kerrie Boyle. *See* Ex. No. 1 to Pl.'s Resp. to Def.'s Mot. to Dismiss, ¶ 18; *see also* Ex. C to Mem. of Law in Supp. of Def.'s Mot. to Dismiss Compl., ¶ 9.

9. On March 29, 2011, Defendant John A. Rizzo was included in email correspondence between Margaret Rizzo, Kerrie Boyle, and Charles Anderson in which Ms. Boyle requested an electronic copy of the will from Attorney Anderson. *See* Ex. A to Def.'s Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss.

10. In early 2011, Margaret J. Rizzo submitted a Waiver and Application for Short Form Settlement ("Waiver") to the Plaintiffs for their signature. *See* Ex. C to Mem. of

Law in Supp. of Def.'s Mot. to Dismiss Compl., ¶ 11; *see also* Ex. D to Mem. of Law in Supp. of Def.'s Mot. to Dismiss Compl.

11. In signing the Waiver during April and May 2011, the Plaintiffs, with the exception of Mary Frances Rizzo, acknowledged the ongoing estate administration and their status as "distributees and beneficiaries" of the Estate. *See* Ex. D to Mem. of Law in Supp. of Def.'s Mot. to Dismiss Compl.

12. Plaintiff John A. Rizzo, Jr. has alleged that he obtained a copy of the Will from the office of the Clerk of the County Commission of Marion County, West Virginia on June 22, 2011. *See* Ex. No. 1 to Pl.'s Resp. to Def.'s Mot. to Dismiss, ¶ 22.

13. On or about December 22, 2011, the Plaintiffs filed a will contest in the above styled matter entitled: *Complaint to Set Aside Document Dated September 27, 2004 and Purported to be the Last Will and Testament of John A. Rizzo, Deceased* (the "Complaint").

14. On January 23, 2012, the Defendant filed its Motion to Dismiss the Complaint.

15. On June 5, 2012, the Plaintiffs filed their response to the Defendant's Motion to Dismiss.

16. On June 6, 2012, the Defendant filed its Reply to Plaintiffs' Response to Defendant's Motion to Dismiss.

CONCLUSIONS OF LAW

17. Rule 12(b)(6) of the West Virginia Rules of Civil Procedure states, in part, that:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is

required, except that the following defenses may at the option of the pleader be made by motion.

18. A trial court presented with a motion to dismiss pursuant to Rule (12)(b) of the West Virginia Rules of Civil Procedure should grant the motion if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims contained in the complaint that would entitle him or her to relief. *Owen v. Board of Educ.*, 190 W.Va. 677, 678, 441 S.E.2d 398, 399 (1994); *Holbrook v. Holbrook*, 196 W.Va. 720, 723, 474 S.E.2d 900, 903, (1996).

19. The West Virginia Supreme Court of Appeals has further held that an affirmative statute of limitations defense may be raised and ruled upon in a Rule 12(b) motion where the facts establishing the defense are ascertainable from the complaint, matters of public record, or matters of which a court may take judicial notice. *See Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996).

20. According to W.Va. Code §41-5-11, the statute governing formal will contests, a Petitioner must file his or her will contest in West Virginia Circuit Court within six months of the date the County Commission issues a final order admitting a will to probate, "or the judgment or order [of the County Commission] shall be forever binding.

21. As the Order Confirming Probate of Wills, which ratified and confirmed probate of the Will, was entered by the Marion County Commission on May 26, 2010, the six month time period for filing a will contest pursuant to W.Va. Code §41-5-11 expired on November 26, 2010.

22. In *Davy v. The Estate of William H. Haggerty, et al.*, 637 S.E.2d 350 (W.Va. 2006) the West Virginia Supreme Court of Appeals held that the statute of limitations will be tolled in a will contest until the date in which a will challenger knows, or by reasonable diligence should know, of his claim.

23. Despite the Plaintiffs' argument that the discovery rule adopted in *Davy* served to toll the statute of limitations in this matter until June 22, 2011, the date Plaintiff John A. Rizzo, Jr. alleges he obtained a copy of the Last Will and Testament of Dr. John A. Rizzo, the Court finds that the discovery rule did not serve to toll the statute of limitations in this matter to that date because, as discussed above in the Findings of Fact, Plaintiffs were informed in October 2010 that Attorney Charles Anderson was working on the estate; Plaintiffs discussed issues related to the estate administration with Kerrie Boyle in December 2010; Plaintiff John A. Rizzo was included on email correspondence in March 2011 in which a copy of the Will was requested; and Plaintiffs, with the exception of Mary Frances Rizzo, signed copies of the Waiver and Application for Short Form Settlement in April and May 2011 in which they acknowledged their status as distributees and beneficiaries of the Estate.

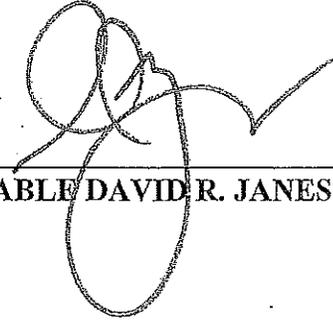
24. Therefore, the Plaintiffs knew, or through reasonable diligence should have known, of the probate of the Will of Dr. John A. Rizzo and the subsequent estate administration well before June 22, 2011, the date in which the Defendant John A. Rizzo alleges he obtained a copy of the Will, and the date which was six months prior to the filing of the above-styled will contest, and perhaps as early as May 2010.

25. As such, the will contest set forth in Plaintiffs' *Complaint to Set Aside Document Dated September 27, 2004 and Purported to be the Last Will and Testament of John A. Rizzo, Deceased*, is barred by the statute of limitations set forth in West Virginia Code §41-5-11.

THEREFORE, the COURT hereby **ORDERS** that the Defendant's Motion to Dismiss be **GRANTED** and the Plaintiffs' Complaint is hereby dismissed, with prejudice.

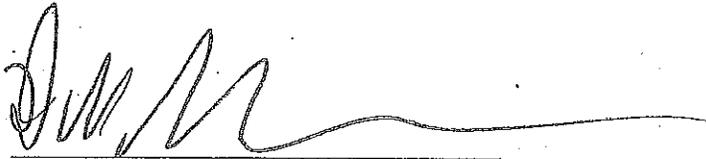
Plaintiffs' objections and exceptions are duly noted. The Clerk is directed to forward a copy of this Order to all counsel of record.

Entered this 6th day of July, 2012.



HONORABLE DAVID R. JANES

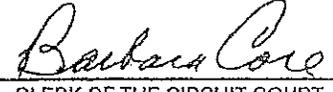
PREPARED BY:



Michael W. Barill (WV State Bar No. 5806)
Deva A. Solomon (WV State Bar No. 10843)
Steptoe & Johnson PLLC
United Center, Suite 400
1085 Van Voorhis Road
P.O. Box 1616
Morgantown, WV 26507-1616
(304) 598-8000
Counsel for Defendant

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CLERK OF THE CIRCUIT COURT
MARION COUNTY, WEST VIRGINIA