IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

January 28, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

E1999-02548-COA-R3-CV

TAMARA E. LOWE, Administrator of the Estate of Terry Allen Lowe, Deceased, Plaintiff-Appellant, v. GRANVILLE SIMPSON, and wife, JUDY SIMPSON, Defendants-Appellees.	C/A NO. 03A01-9903-CV-00068 APPEAL AS OF RIGHT FROM THE MORGAN COUNTY CIRCUIT COURT HONORABLE RUSSELL E. SIMMONS, JR., JUDGE

For Appellant

CHARLES T. WEBBER, JR.
STEPHEN J. COX
Knoxville, Tennessee

For Appellee

GEORGE H. BUXTON, III
Oak Ridge, Tennessee

O P I N I O N

AFFIRMED AND REMANDED

Susano, J.

This is a wrongful death action. On April 28, 1998, Cynthia Lowe Armes ("Sister"), the sister of the late Terry Allen Lowe ("decedent"), instituted this action against Granville Simpson ("Granville") and his wife, Judy Simpson ("Judy"), (collectively, "the Simpsons"), alleging that the Simpsons were negligent in allowing three men, including Granville, to go armed on the Simpsons' premises on December 10, 1995, and that their negligence directly contributed to the shooting death of the decedent. The trial court granted the Simpsons summary judgment on the ground that the complaint was not filed within the applicable one-year statute of limitations. Sister appeals, raising the following issue for our consideration: Did the trial court err in holding that Sister was aware of the injury and the cause of action on December 10, 1995, and that therefore her action was barred by the statute of limitations?

I.

On December 10, 1995, the decedent was shot and killed while on the Simpsons' residential premises. In addition to the Simpsons and the decedent, several other individuals were present at the time of the shooting, including the following: (1) Tamara E. Lowe ("Tamara"), the wife of the decedent and the daughter of the Simpsons; (2) Kevin Simpson ("Kevin"), the Simpsons' son; and (3) William Gouge ("Gouge"), the Simpsons' son-in-law. The initial police investigation indicated that the decedent died as a result of two gunshot wounds, one to his neck and the other to his back, and that the wounds were caused by bullets from a .357 caliber handgun fired by Kevin.

The next day, the decedent's mother, Janice B. Lowe ("Mother"), and Sister initiated an inquiry to gather information regarding the shooting. They were largely unsuccessful in their search for details until May, 1997, when Sister learned from her attorney that Gouge and Granville were also armed at the time of the shooting.[1]

In December, 1997, Sister was first allowed to view various police reports and witness statements substantiating that Kevin, Gouge, and Granville all were armed at the time of the shooting. The forensic pathologist, upon learning that all three men were armed, had the body exhumed so he could conduct a second autopsy. During the second autopsy, additional bullet fragments were removed from the elbow and abdomen of the decedent's body. They were sent, along with two bullets fired from the .357 caliber pistol, to the Federal Bureau of Investigation ("FBI"). The FBI report was released on April 6, 1998. It confirmed that the bullet fragments removed from the body during the second autopsy were inconsistent with the .357 caliber bullets initially removed from the body.

On April 28, 1998, Sister filed a wrongful death action against the Simpsons alleging that the Simpsons were negligent in allowing three men, including Granville himself, to go armed on their premises and that this negligent act directly contributed to the decedent's death. The complaint, though instituted by Sister, was brought in Tamara's name as the personal representative of the decedent's estate pursuant to T.C.A. § 20-5-107(a) (1994).

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[1]Granville, in his deposition, denied that he was armed at the time of the shooting and also denied any knowledge of any other person being armed. However, police records indicate that Gouge and Granville both made statements to the police that they were armed.

The Simpsons filed a motion to dismiss on June 9, 1998, on the ground that the action was filed beyond the applicable one-year statute of limitations. In response, Sister argued that the cause of action did not accrue until April 6, 1998, the day the FBI report was released, which report suggests that the decedent's death potentially involved more than one gunman.[2]

The trial court, treating the Simpsons' motion to dismiss as one for summary judgment,[3] found that Sister was aware of the injury and the cause of action on December 10, 1995, the date of the fatal shooting, and, accordingly, concluded that the complaint filed on April 28, 1998, was barred by the one-year statute of limitations.

II.

A trial court's grant or denial of summary judgment, raising as it does a question of law, is reviewed on appeal *de novo* with no presumption of correctness. *Gonzales v. Alman Constr. Co.*, 857 S.W.2d 42, 44 (Tenn.Ct.App. 1993). If we find that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law, we must affirm the trial court's grant of summary judgment. *See Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If there is a genuine dispute as to any material fact or any doubt as to the

[2]Sister has also asserted, in different portions of the record, that the cause of action accrued, at the earliest, on November 27, 1997 – when the second autopsy revealed evidence of additional bullet fragments – or in December, 1997 – when Sister was first allowed to review various police reports and statements made by witnesses indicating that all of the men on the premises were armed at the time of the shooting.

[3]The trial court considered material "outside the pleadings." *See* Rule 12.03, Tenn.R.Civ.P.

conclusions to be drawn from the undisputed material facts, we must vacate the order granting summary judgment. *See id.*

In deciding whether a grant of summary judgment is appropriate, we are to determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56.04, Tenn.R.Civ.P. Courts "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Byrd*, 847 S.W.2d at 210-211.

In determining whether to grant or deny summary judgment, a court must decide (1) whether a factual dispute exists; (2) whether that fact is material; and (3) whether that fact creates a genuine issue for trial. *Id.* at 214. "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Id.* at 215. A disputed material fact creates a genuine issue if "a reasonable jury could legitimately resolve that fact in favor of one side or the other." *Id.* The phrase "genuine issue" refers exclusively to factual issues and not to legal conclusions that could be drawn from the facts. *Id.* at 211.

The party seeking summary judgment has the burden of demonstrating that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. *Id.* at 215. Generally, a defendant seeking summary judgment can meet this burden in one of two ways: (1) by affirmatively negating an

essential element of the plaintiff's case, or (2) by conclusively establishing an affirmative defense. *Id.* at 215 n. 5. In the instant case, the defendants are pursuing the second line of defense.

Once the moving party satisfies its burden of showing that there is no genuine issue of material fact and that it is entitled to a judgment on the demonstrated facts, the burden then shifts to the nonmoving party to show that there is a genuine issue of material fact requiring submission to the trier of fact. *Id.* at 215. The nonmoving party cannot simply rely upon its pleadings, but rather must show, by affidavit or discovery materials, specific facts showing a genuine issue of material fact for trial. Rule 56.06, Tenn.R.Civ.P.; *Byrd*, 847 S.W.2d at 215. The evidence offered by the nonmoving party must be admissible at trial but need not be in admissible form. It must be taken as true. *Byrd*, 847 S.W.2d at 215-216.

III.

To determine whether summary judgment for the Simpsons is appropriate in this case, we must first determine the state of the law concerning the statute of limitations for wrongful death actions and when the applicable limitations period commences.

There is no specific statute of limitations contained in the Tennessee wrongful death statutes. *See* T.C.A. § 20-5-106 *et seq.*, (1994 & Supp. 1999). However, our courts have uniformly applied the one-year statute of limitations governing personal injuries, *see* T.C.A. § 28-3-104 (Supp. 1999), to wrongful death actions. *Jones v. Black*, 539 S.W.2d 123, 123 (Tenn. 1976);

Collier v. Memphis Light Gas & Water Div., 657 S.W.2d 771, 774 (Tenn.Ct.App. 1983).

Tennessee recognizes the "discovery rule," the application of which may operate to delay the commencement of the running of the statute of limitations. Under the discovery rule,

> the statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful or tortious conduct by the defendant. It is knowledge of facts sufficient to put a plaintiff on notice that an injury has been sustained which is crucial. Such knowledge includes not only an awareness of the injury, but also the tortious origin or wrongful nature of that injury.

Shadrick v. Coker, 963 S.W.2d 726, 733-34 (Tenn. 1998) (citations and internal quotations omitted).

The statute of limitations period may commence, however, even though the plaintiff does not actually know the "specific type of legal claim he or she has" or that the "injury constitutes a breach of the appropriate legal standard." *Stanbury v. Bacardi*, 953 S.W.2d 671, 678 (Tenn. 1997).

"Whether the plaintiff exercised reasonable care and diligence in discovering the injury or wrong is usually a fact question for the jury to determine." *Wyatt v. A-Best Co.*, 910 S.W.2d 851, 854 (Tenn. 1995). However, if only one conclusion can be drawn from undisputed evidence, the accrual of the cause of action is a question of law and hence may be determined by the court. *Osborne Enters., Inc. v. City of Chattanooga*, 561 S.W.2d 160, 165 (Tenn.Ct.App. 1977).

IV.

In granting summary judgment for the Simpsons, the trial court stated the following:

> It is the opinion of the Court that any duty of care owed to the deceased by the property owners would be owed whether there was one person that shot at the deceased or two persons that shot at the deceased. Therefore, the plaintiffs' were aware of the injury and the cause of action on December 10, 1995.

The court then went on to grant summary judgment to the Simpsons because the complaint was not filed within one year of the accrual of the cause of action on December 10, 1995.

Sister argues on appeal that the cause of action did not accrue until she discovered evidence indicating that the decedent's death involved a second shooter. More specifically, she asserts that the cause of action accrued as late as April 6, 1998 -- the release date of the FBI report indicating that the decedent's body had two different types of bullet fragments in it, or, at the earliest, in December, 1997, when she first learned that more than one person on the premises was armed at the time of the shooting. She also argues that the question of whether she was diligent in learning these additional facts is a question of fact for the jury.

The Simpsons' motion is supported by two undisputed facts: (1) that the decedent died on December 10, 1995, and (2) that the complaint was not filed until April 28, 1998. By showing these facts, the Simpsons have caused the burden to shift to the plaintiff to show that there is a genuine issue of

material fact requiring submission of this matter to a trier of fact.

Sister attempts to carry her burden by characterizing the question of when the cause of action accrued, as well as the question of whether she was diligent in discovering the facts supporting the cause of action, as disputed questions of fact. In this case, however, the question of the accrual of the cause of action is a question of law because only one conclusion can be drawn from the undisputed evidence. Sister either knew or should have known, on the day of the shooting or within a few days thereafter, that the decedent was killed -- allegedly by the Simpsons' son -- on December 10, 1995, while on the Simpsons' property and that the Simpsons were present at the time. If, as Sister avers, the Simpsons were negligent in allowing, with full knowledge, an armed person to be on their premises, Sister knew on December 10, 1995, or within days of that date, that "an injury [had] been sustained as a result of wrongful or tortious conduct by the" Simpsons. *See Shadrick*, 963 S.W.2d at 233-34. The fact that she later acquired information that led her to believe that there was more than one shooter does not create a genuine issue of material fact. In the context of Sister's cause of action for negligence, the number of shooters is immaterial as to the accrual of her negligence claim. She knew enough when she knew the following: her brother was shot on the Simpsons' property, by their son while the son was on the property, and while the Simpsons were present. This may not have been enough to successfully pursue her negligence claim to conclusion; but it was enough "to get her started," *i.e.*, to trigger the accrual of her cause of action. Summary judgment was appropriate.

V.

The judgment of the trial court is affirmed. This case is remanded for collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to Cynthia Lowe Armes, who initiated this cause of action.

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Charles D. Susano, Jr., J.

CONCUR:

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Herschel P. Franks, J.

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D. Michael Swiney, J.