

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
June 5, 2014 Session

**IN RE ESTATE OF ARTHUR E. WAIR, JR.**

**Appeal from the Circuit Court for Davidson County  
No. 13P1364     David Randall Kennedy, Sr., Judge**

---

**No. M2014-00164-COA-R3-CV- Filed July 23, 2014**

---

This appeal arises from alleged violations of the Tennessee Adult Protection Act (“TAPA”). Arthur E. Wair, Jr. (“Decedent”) executed a last will and testament leaving his entire estate to his friend and accountant, Larry Mullins (“Mullins”). After Decedent died, his siblings Sidney Wair, Ralph Wair, and Juanita Jackson (“Plaintiffs”) sued Mullins in the Circuit Court for Davidson County (“the Trial Court”) not as a will contest but instead alleging that Mullins had exercised undue influence over their brother to manipulate him into executing the will all in violation of TAPA. Mullins filed a motion to dismiss, which the Trial Court granted. Plaintiffs appeal. We hold, *inter alia*, that any claim for abuse or neglect under TAPA was barred by the one-year statute of limitations for personal torts, and that Plaintiffs otherwise failed to state a claim under TAPA. We affirm the Trial Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;  
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which JOHN W. MCCLARTY and THOMAS R. FRIERSON, II, JJ., joined.

David J. Callahan, III, Nashville, Tennessee, for the appellants, Sidney Wair, Ralph Wair, and Juanita Jackson.

Paul A. Gontarek, Nashville, Tennessee, for the appellee, Larry Mullins.

## **OPINION**

### **Background**

In 1976, Decedent executed a will leaving his entire estate to his friend Peggy Ann Gill (“Gill”). Under the terms of this will, if Gill predeceased Decedent, his estate would have gone to Gill’s daughters, Marcia Diane Gill and Susan Denise Gill, or their survivor. In February 2012, Decedent executed a new will. This time, Decedent left his entire estate to his friend and accountant Mullins. Mullins was married to Gill’s daughter Marcia Diane Gill, now Marcia G. Mullins. Under the terms of the new will, if Mullins predeceased Decedent, Decedent’s estate again would have gone to Gill’s daughters, Marcia and Susan (now Susan G. Prespare). Plaintiffs specifically were disinherited from the 2012 will. Decedent died in June 2012 at age 76.

Plaintiffs alleged they are Decedent’s surviving siblings and heirs at law and sued Mullins in the Trial Court in August 2013. Plaintiffs alleged violations of TAPA. Specifically, Plaintiffs alleged that Mullins, as Decedent’s personal accountant and holding a general power of attorney, abused his fiduciary and confidential relationship to manipulate Decedent into willing Mullins his estate. Plaintiffs further alleged that Mullins took advantage of Decedent’s mental and physical frailties to exercise this undue influence. Plaintiffs sought compensatory and punitive damages under TAPA.

In September 2013, Mullins filed a motion to dismiss. Mullins argued that Plaintiffs were improperly attempting to bring a will contest as a TAPA claim. Mullins’ motion was argued before the Trial Court in November 2013. The Trial Court granted Mullins’ motion to dismiss. The Trial Court held in its detailed and thorough Order that, with respect to Plaintiffs’ claim for “abuse or neglect” leading to “mental anguish,” as TAPA lacked a specific statute of limitations, the appropriate statute of limitations was found at Tenn. Code Ann. § 28-3-104 relating to personal tort actions. As Decedent died in June 2012 and Plaintiffs filed their complaint in August 2013, the one-year statute of limitations barred the “abuse or neglect” claim. Regarding a claim of theft under TAPA, the Trial Court held that the acts described in the complaint, if true, did not constitute “theft.” According to the Trial Court, Plaintiffs had asserted no claims under TAPA for which relief could be granted and granted Mullins’ motion to dismiss. Plaintiffs timely appealed to this Court.

### **Discussion**

We restate the issues raised on appeal as follows: 1) whether the Trial Court erred in holding that Plaintiffs’ abuse claim under TAPA was barred by the one-year statute

of limitations for personal tort actions; and, 2) whether the Trial Court erred in holding that Plaintiffs were otherwise unable to prove a claim, including theft, under TAPA.

The Trial Court disposed of this case by granting Mullins' motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(6).<sup>1</sup> Our Supreme Court has discussed the standard of review for motions to dismiss:

A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. A defendant who files a motion to dismiss “ ‘admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action.’ ”

In considering a motion to dismiss, courts “ ‘must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.’ ” A trial court should grant a motion to dismiss “only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” We review the trial court's legal conclusions regarding the adequacy of the complaint de novo.

*Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (internal citations omitted).

We first address whether the Trial Court erred in holding that Plaintiffs' abuse claim under TAPA was barred by the one-year statute of limitations for personal tort actions. Tenn. Code Ann. § 71-6-120(b) (2012) provides :

In addition to other remedies provided by law, an elderly person or disabled adult in that person's own right, or by conservator or next friend, shall have a right of recovery in a civil action for compensatory damages for abuse or neglect, sexual abuse or exploitation as defined in this part or for theft of such person's or adult's money or property whether by fraud, deceit, coercion or otherwise. Such right of action against a wrongdoer shall not abate or be extinguished by the death of the elderly person or disabled adult, but shall pass as provided in § 20-5-106, unless the alleged wrongdoer is a family member,

---

<sup>1</sup>In his brief on appeal, Mullins, while conceding the truth of the allegations in Plaintiffs' complaint for the purposes of the motion to dismiss, strongly denies ever having abused Decedent.

in which case the cause of action shall pass to the victim's personal representative.

The parties do not dispute Decedent's status as an "elderly person" under TAPA. As relevant, "abuse or neglect" is defined under Tenn. Code Ann. § 71-6-102(1)(A) (Supp. 2013) as "infliction of physical pain, injury, or mental anguish, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult or a situation in which an adult is unable to provide or obtain the services that are necessary to maintain that person's health or welfare." Plaintiffs allege that Mullins inflicted mental anguish on Decedent in manipulating him to execute the 2012 will. According to Plaintiffs, however, the proper statute of limitations to consult as to their mental anguish claim is that for property torts rather than personal torts.

TAPA does not provide a specific statute of limitations. Confronted with this fact in another case involving TAPA, the United States District Court for the Western District of Tennessee stated:

Plaintiffs also assert a claim for a violation of the Tennessee Adult Protection Act, Tennessee Code Annotated § 71-6-101 *et seq.* The Court has not found, nor have the parties cited, a specific statute of limitations for the Tennessee Adult Protection Act. "When a statute includes no express statute of limitations, the court ... borrows the most suitable statute or other rule of timeliness...." 51 Am.Jur.2d *Limitation of Actions* § 129 (2010). Defendant contends that the statute of limitations for this Act is provided by Tennessee Code Annotated § 28-3-104(a)(4), which states that actions for statutory penalties for personal torts be filed one year after the cause of action accrued. Tenn. Code Ann. § 28-3-104(a)(4). Plaintiffs have not contested this assertion or offered any reason that the one-year statute of limitations should be extended. Therefore, the Court GRANTS Defendant's motion as it pertains to Plaintiffs' claim under the Tennessee Adult Protection Act.

*West v. Americare Long Term Specialty Hosp.*, 2010 WL 2985798, at \*4 (W. D. Tenn. July 26, 2010).

We agree that we must look beyond TAPA to find the applicable statute of limitations. In our view, the crux of this case concerns the alleged *personal* harm of mental anguish suffered by Decedent when he allegedly was manipulated by Mullins into executing a new will. Therefore, Tenn. Code Ann. § 28-3-104 (a)(1), which establishes a one-year limitations on actions for injuries to the person, provides the pertinent statute of limitations under these circumstances. The will at issue was executed in February 2012 and Decedent

died in June 2012. As Plaintiffs' complaint was filed over one year later in August 2013, any claim for "abuse and neglect" leading to "mental anguish" necessarily was barred by the applicable statute of limitations. We affirm the Trial Court as to this issue.

We next address whether the Trial Court erred in holding that Plaintiffs were otherwise unable to prove a claim under TAPA. Plaintiffs do not allege any sexual abuse or exploitation under TAPA. This leaves only the issue of theft. While Plaintiffs' complaint alleges "mental anguish" under TAPA, it never specifically alleges "theft" under TAPA. Despite this omission, the Trial Court in resolving Mullins' motion to dismiss addressed Plaintiffs' theft claim as Plaintiffs raised such an argument not in the complaint but in their response to the motion to dismiss. While we believe the Trial Court would have been well within its authority not to address "theft" under TAPA as it was not sufficiently raised in the complaint, the Trial Court did so. As the Trial Court did address "theft" under TAPA, we will do so as well.

Our General Assembly has defined theft in Tenn. Code Ann. § 39-14-103, which provides that: "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103 (a)(Supp. 2013). Plaintiffs argue that Mullins exercised undue influence to deprive Decedent of his property at the moment of his death. We agree with the Trial Court that even presuming the factual allegations of the complaint to be true and giving Plaintiffs the benefit of all reasonable inferences, Plaintiffs' claim of theft under TAPA fails. As found and held by the Trial Court, the complaint does not allege that Mullins actually obtained Decedent's property. The complaint instead alleges only that Mullins used his confidential relationship with Decedent to have Decedent execute the 2012 will which, according to the complaint, "created mental anguish for the Decedent." We further agree with the Trial Court that the complaint's allegations "clearly [do] not rise to the level of 'theft' . . . ."

We disagree with Plaintiffs' basic characterization of this suit. In our view, this case is more accurately characterized as an attempted will contest by individuals who lack standing to contest the 2012 will. The allegations of exercising undue influence and taking advantage of Decedent's frailties in obtaining a favorable will all resemble aspects of a will contest rather than a suit under TAPA. Plaintiffs lacked standing to contest the 2012 will. Instead, the very parties that would have had standing to bring a will contest in this case, the Gill beneficiaries, chose not to do so. TAPA's purpose is to "protect adults coming within this part from abuse, neglect or exploitation . . . ." Tenn. Code Ann. § 71-6-101(b)(1) (2012). On the other hand, TAPA is not a means for bypassing or replacing the normal requirements of a will contest.

Related to this issue, Plaintiffs also advance a public policy argument. Plaintiffs contend that we should construe TAPA liberally to ensure that a party guilty of undue influence does not escape responsibility. We, however, are constrained to interpret statutes as written by our General Assembly. TAPA simply is not a vehicle for the kind of relief Plaintiffs seek. The relief sought by Plaintiffs is to obtain damages for themselves from Mullins, the beneficiary of Decedent's 2012 will, because of Decedent's execution of the 2012 will, a will that apparently never has been contested. Plaintiffs' attempt to do indirectly what they cannot do directly, contest the 2012 will, is not supported by any public policy of this State.

Applying the standard of review for motions to dismiss, including taking Plaintiffs' factual allegations in the complaint as true, Plaintiffs have failed to demonstrate that they can prove any claim under TAPA. We affirm the judgment of the Trial Court in its entirety.

### **Conclusion**

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellants, Sidney Wair, Ralph Wair, and Juanita Jackson, and their surety, if any.

---

D. MICHAEL SWINEY, JUDGE