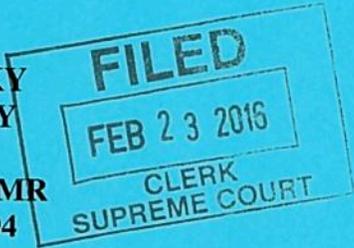


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2015-SC-000114-D
Court of Appeals No. 2009-CA-002378-MR
Fayette Circuit Court No. 08-CI-04294



THE ESTATE OF CHRISTINA WITTICH,
by and through Judith Wittich and Frederick
Wittich in their duly appointed capacities as
Co-Administratrix and Co-Administrator

APPELLANTS

VS.

MICHAEL JOSEPH FLICK

APPELLEE

APPELLEE'S BRIEF

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing to the following on this the 22nd day of February, 2016, and the original and 10 copies were filed by registered mail in accordance with CR 76.40(2) with the Supreme Court of Kentucky, Clerk of Supreme Court of Kentucky, Capital Building, Room 235, 700 Capital Avenue, Frankfort, Kentucky 40601; with copies to Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Roger N. Braden, Esq., Braden Humfleet & Devine, PLC, 7000 Houston Road, Suite 36, Florence, Kentucky 41042 and Hon. Thomas L. Clark, Fayette Circuit Court, Fayette Co. Courthouse, Room 511, 120 N. Limestone, Lexington, KY 40507. I further certify that the record on appeal was not withdrawn from the office of the Clerk of the Court of Appeals.

Respectfully submitted:

A handwritten signature in cursive script that reads "Jennifer Zeigler Hoerner".

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APPELLEE’S BRIEF

I. STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not request oral argument in this matter.

II. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

STATEMENT CONCERNING ORAL ARGUMENT..... Page 1

COUNTERSTATEMENT OF POINTS AND AUTHORITIES.. Pages 1-3

COUNTERSTATEMENT OF THE CASE Pages 4-6

ARGUMENT Pages 7-17

A. THE ISSUE OF WHETHER A COMPLAINT IS TIME-BARRED IS AN ISSUE OF LAW AND SUBJECT TO DE NOVO REVIEW AND THUS THE COURT OF APPEALS DID NOT EXCEED ITS AUTHORITY IN REVERSING THE CIRCUIT COURT..... Page 7

1. THERE ARE NO UNPRESERVED LEGAL GROUNDS AT ISSUE IN THIS CASE.....Page 7

DiGiuro v. Ragland,
2004 WL 1416360 (Ky.App.2004)(2003-CA-001555-MR) Page 7

2. THE ISSUE OF IF A COMPLAINT IS TIME BARRED IS AN ISSUE OF LAW AND SUBJECT TO DE NOVO REVIEW..... Page 8

Cinelli v. Ward, 997 S.W.2d 474, 476 (Ky. App. 1998).....Page 8

Cuppy v. General Acc. Fire & Life Assur. Corp., 378 S.W.2d 629, 631 (Ky.1964).....Page 8

Davis v. Fischer Single Family Homes, Ltd., 231 S.W.3d 767, 779 (Ky.App.2007).....Page 8

Ragland v. DiGiuro, 352 S.W.3d 908, (Ky.App. 2010).....Page 8

<i>Hardin County Schools v. Foster</i> , 40 S.W.3d 865, 868 (Ky.2001).....	Page 8
<i>Carroll v. Meredith</i> , 59 S.W.3d 484, 489 (Ky.App.2001).....	Page 9
<i>Daniels v. CDB Bell, LLC</i> , 300 S.W.3d 204, 213 (Ky.App. 2009).....	Page 9
<i>Lee v. Commonwealth</i> , 313 S.W.3d 555, 556 (Ky.2010).....	Page 9
<i>Keeling v. Commonwealth</i> , 381 S.W.3d 248, 253 (Ky. 2012).....	Page 9
B. CONCERNING APPELLANT’S ARGUMENT THAT THE COURT OF APPEALS TRUNCATED RULES OF PROCEDURE AND ERRED IN CONCLUDING THAT DIGUIRO WAS PERSUASIVE AUTHORITY.....	Page 9
<i>DiGiuro v. Ragland</i> , 2004 WL 1416360 (Ky.App.2004)(2003-CA-001555-MR)	Page 9
CR 76.28(4).....	Page 9
<i>Leadingham ex rel. Smith v. Smith</i> , 56 S.W.3d 420, 429 (Ky. App. 2001).....	Page 10
C. CONCERNING APPELLANT’S ARGUMENTS THAT THE COURT OF APPEALS ERRED IN REJECTING THE POLICY CONSIDERATIONS ON WHICH IT RELIED IN DIGIURO IN REVERSING THE TRIAL COURT’S DECISION.....	Page 11
1. THE COURT OF APPEALS DID NOT ERR IN ITS LEGAL ANALYSIS OF THE APPLICABLE LIMITATIONS PERIOD....	Page 11
<i>DiGiuro v.Ragland</i> , 2004 WL 1416360 (Ky. App. 2004)(2003-CA-001555-MR).. ..	Pages 11-12
KRS 413.180	Page 11
KRS 413.140(1)	Page 11
KRS 413.190	Page 12
<i>Conner v. George W. Whitesides Co.</i> , 834 S.W.2d 652, 653-54 (Ky. 1992)	Page 12
<i>Perkins v. Northeastern Log Homes</i> , 808 S.W.2d 809, 819 (Ky. 1991)	Page 12

2. THE COURT OF APPEALS DID NOT ERR IN ITS LEGAL ANALYSIS OF THE DIGIURO CASE AND ITS REJECTION OF THAT CASE.....Page 12

DiGiuro v. Ragland, 2004 WL 1416360 (Ky. App. 2004)(2003-CA-001555-MR)..Page 12

3. THE CASE OF DIGIURO v. RAGLAND Page 13

Ragland v. DiGiuro, 352 S.W.3d 908 (Ky.App. 2010) Pages 13-15

DiGiuro v. Ragland,
2004 WL 1416360 (Ky.App.2004)(2003-CA-001555-MR) Pages 13-15

D. CONCERNING APPELLANT’S ARGUMENT THAT THE COURT OF APPEALS DID NOT ADDRESS THE EFFECT OF AN AMENDMENT OF KRS 413.130Page 15

KRS 413.140 Page 15

E. CONCERNING APPELLANT’S ARGUMENT THAT ANY DECISION SHOULD BE PROSPECTIVELY APPLIED RATHER THAN TO OPERATE AS A BAR TO THE ESTATE’S CLAIMS Page 16

III. CONCLUSIONPage 17

IV. COUNTERSTATEMENT OF THE CASE

The Appellee submits to this Court that the Appellant's Statement of the Case is essentially correct, however, the Appellee has included some facts that are irrelevant to these proceedings, particularly any and all facts that prove guilt or liability, as those issues are not part of the appeal, particularly since the Court of Appeals never addressed the issue of punitive damages.

This civil wrongful death case arose out of the murder of Christina Wittich by Michael Joseph Flick. The complete recitation of the events surrounding the murder are set out by the court in the case of *Flick v. Commonwealth*, No. 2008-SC-000233-MR, 2009 WL 1451923 (Ky. 2009). These facts show it was clear, from the time of the murder, that Michael Joseph Flick was the individual who shot Christina Wittich.

Judith Wittich and Frederick Wittich were appointed as Co-Administrators of the estate of Christina Wittich on November 16, 2006, by the Fayette District Court, Probate Division, Case No. 06-P-1519. (Record Volume 1, Page Number: 5).

On August 22, 2008, the plaintiffs, the Estate of Christina Wittich, by and through Judith Wittich and Frederick Wittich, co-administrators, and Judith Wittich and Frederick Wittich, filed a complaint against Michael Joseph Flick in Fayette Circuit Court, Division 8, Case Number 08-CI-4294. (Record Volume 1, Page Numbers 1-4). This complaint alleged, among other items, that Michael Joseph Flick murdered Christina Wittich, and because of these criminal actions, he was tried and convicted of murder and burglary first degree in the Fayette Circuit Court in Case No. 05-CR-898. The Plaintiffs alleged that the "wrongful and criminal acts of the Defendant, Michael Joseph Flick, which resulted in the death of Christina Wittich, constituted a violation of KRS §507.020 which defines

the elements of 'murder' and KRS §511.020 which defines the elements of "burglary in the first degree" for which the Plaintiffs have a civil cause of action against the Defendant, Michael Joseph Flick, pursuant to KRS §446.070". (Record Volume 1, Page Number 2) The plaintiffs' further alleged that the "wrongful and criminal acts of the defendant, Michael Joseph Flick, against Christina Wittich caused the plaintiffs, individually and on behalf of the Estate of Christina Wittich to suffer damages, including, but not limited to, damages for her mortal injuries, pain and suffering, and the destruction of her earning capacity...". (Record Volume 1, Page Number 3)

On November 7, 2008, the defendant, Michael Joseph Flick, by counsel, filed his answer (Record Volume 1, Page Numbers 17-19) and a motion to dismiss. (Record Volume 1, Page Numbers 15-16) The answer set forth the affirmative defense of the statute of limitations. (Record Volume 1, Page Number 18) Additionally, on November 7, 2008, Flick filed a motion to dismiss due to the statute of limitations. (Record Volume 1, Page Numbers 15-16) Flick argued in the motion to dismiss that a personal representative has one year after the date of his appointment to file a wrongful death lawsuit. Flick argued that the court should dismiss the complaint as the co-administratrix and co-administrator were appointed on November 16, 2006, but the wrongful death lawsuit was filed on August 22, 2008, more than a year after the appointment of the personal representatives. (Record Volume 1, Page Number 16)

The motion to dismiss was heard by the trial court. The Appellant has adequately summarized that hearing for this Court. (Appellant's Brief, Page 5) The trial court determined that the decision in *DiGiuro v. Ragland*, 2004 WL 1416360 (Ky.App.2004) (2003-CA-001555-MR)(hereinafter "*DiGiuro v. Ragland*" or "*DiGiuro*") was applicable

and as such, the statute of limitations in a wrongful death case began to run on the date of conviction. (Record Volume 1, Page Numbers 24-27) The trial court entered an Order denying Flick's motion to dismiss. (Record Volume 1, Page Number 53)

This case proceeded to trial in the Fayette Circuit Court. Trial was on September 29, 2009. As recorded in the Trial Order and Judgment of November 20, 2009, the Jury returned a verdict as follows: Pain and Suffering inflicted upon Christina Wittich, \$1,000,000.00. Permanent destruction of Christina Wittich's power to labor and earn money, \$1,900,000.00. The total compensatory award was \$2,900,000.00. (Record Volume 1, Page Number 81) The Jury further awarded punitive damages in the amount of \$53,000,000.00 to the Estate of Christina Wittich. (Record Volume 1, Page Number 82)

In his appeal, Flick appealed from the trial order and judgment of November 20, 2009. In his brief to the Court of Appeals, he argued that the Fayette Circuit Court should have dismissed this lawsuit prior to trial, pursuant to Flick's motion to dismiss. Flick argued that the *DiGiuro v. Ragland* decision had considerably narrower implications than the trial court determined. Flick also argued that the jury's verdict as set forth in the trial order and judgment included punitive damages that were unconstitutionally excessive, and did not comport with the due process of law. The Court of Appeals did not address that issue.

The Kentucky Court of Appeals rendered its Opinion Reversing and Remanding on February 6, 2015.

V. ARGUMENT

A. THE ISSUE OF WHETHER A COMPLAINT IS TIME-BARRED IS AN ISSUE OF LAW AND SUBJECT TO DE NOVO REVIEW AND THUS THE COURT OF APPEALS DID NOT EXCEED ITS AUTHORITY IN REVERSING THE CIRCUIT COURT

1. THERE ARE NO UNPRESERVED LEGAL GROUNDS AT ISSUE IN THIS CASE

The Appellant's argument that this case involves an unpreserved legal ground is incorrect. There are no unpreserved legal grounds at issue in this case. When Michael Flick filed his appeal, he was appealing from the trial court's denial of his previously filed motion to dismiss, as well as appealing the award of punitive damages.

From the trial court level, the issues that were appealed to the Court of Appeals were as follows:

“1. The trial court should have dismissed the case based upon the statute of limitations having run prior to the lawsuit being filed.

2. That the amounts of punitive damages awarded do not comport with due process as they are unconstitutionally excessive.” (Flick's Kentucky Court of Appeals Prehearing Statement, Page 2)

The Court of Appeals, in reviewing whether the trial court erred in denying Flick's motion to dismiss based on the fact that the complaint was not timely filed, had to review and decide whether or not the case of *DiGiuro v. Ragland* applied to the current case and whether it extended the statute of limitations long enough for the Estate to file its complaint. That was the issue that was presented by Flick to the Court of Appeals for its consideration.

The Appellant's attempts to narrowly define the issues that were appealed to the Court of Appeals by focusing on certain legal arguments that Flick discussed with the trial court, and that Flick presented to the Court of Appeals, is a diversion and does not fully represent the issue on appeal. It only describes a legal argument made by Flick to the trial court and statements made in his brief to the Court of Appeals. Because the Court of Appeals reviewed the issue of law presented on a *de novo* basis, the Court of Appeals had to start from the beginning, and consider the entire issue, and not just consider the law as interpreted by the trial court or the legal arguments of counsel.

2. THE ISSUE OF IF A COMPLAINT IS TIME-BARRED IS AN ISSUE OF LAW AND SUBJECT TO DE NOVO REVIEW

It is well settled law that a reviewing court in considering questions of law uses a *de novo* standard of review.

"In addition, questions of law are reviewed *de novo* and without deference to the interpretation afforded by the trial court." *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

The Court of Appeals was reviewing a question of law. "Whether an action is barred by the statute of limitations is a question of law...." *Cuppy v. General Acc. Fire & Life Assur. Corp.*, 378 S.W.2d 629, 631 (Ky.1964). Questions of law are reviewed *de novo* by an appellate court. *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 779 (Ky.App.2007). See *Ragland v. DiGiuro*, 352 S.W.3d 908, (Ky.App. 2010).

"Questions of law are reviewed anew by this Court. *Hardin County Schools v. Foster*, 40 S.W.3d 865, 868 (Ky.2001). (211) ... Further, as a reviewing court, we are not bound by the trial court's decision on questions of law. " An appellate court reviews the application of the law to the facts and the appropriate legal standard *de novo*. " *Carroll v.*

Meredith, 59 S.W.3d 484, 489 (Ky.App.2001).” *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 213 (Ky.App. 2009)

“Because the trial court's denial of Appellant's motion to dismiss was based upon a conclusion of law, we review de novo. *See Lee v. Commonwealth*, 313 S.W.3d 555, 556 (Ky.2010) (applying de novo review to question of law involving trial court's decision to deny motion to suppress).” *Keeling v. Commonwealth*, 381 S.W.3d 248, 253 (Ky. 2012)

Flick submits to this Court that the Court of Appeals properly reviewed the issues presented under a *de novo* standard of review.

B. CONCERNING APPELLANT’S ARGUMENT THAT THE COURT OF APPEALS TRUNCATED RULES OF PROCEDURE AND ERRED IN CONCLUDING THAT DIGUIRO WAS PERSUASIVE AUTHORITY

The Appellant argues that the Court of Appeals erred because it improperly considered *DiGiuro* to be persuasive authority.

In its decision, the Court of Appeals stated that the *DiGiuro* opinion remained unpublished by operation of CR 76.28(4). CR 76.28(4) provides, in part: “Upon entry of an order of the Supreme Court granting a motion for discretionary review the opinion of the Court of Appeals shall not be published, unless otherwise ordered by the Supreme Court. All other opinions of the appellate courts will be published as directed by the court issuing the opinion. Every opinion shall show on its face whether it is "To Be Published" or "Not To Be Published.”” CR 76.28(a) The Kentucky Supreme Court did not publish its opinion. Therefore, the *DiGiuro* opinion remained unpublished.

In its analysis, the Court of Appeals stated:

“Thus, this Court may consider the first DiGiuro opinion as persuasive authority if there is no published opinion on the subject. DiGiuro sets out compelling public policy arguments why the statute of limitations should be tolled until the defendant is criminally convicted of the murder. However, these policy considerations must yield where the General Assembly has clearly addressed the subject. *Leadingham ex rel. Smith v. Smith*, 56 S.W.3d 420, 429 (Ky. App. 2001).” (Opinion at 6)

Next, the Court of Appeals considered the application of the case of DiGiuro to the current case. The Court of Appeals wrote, “in *DiGiuro v. Ragland, supra*, this Court recognized a limited exception to the application of the statute of limitations. That case involved the notorious killing of Trent DiGiuro on July 17, 1994. His murder went unsolved for many years. However, in January of 2000, Shane Ragland was identified as DiGiuro’s killer. On March 27, 2002, a jury found Ragland guilty of the murder.” (Opinion, Pages 3-4).

The Court of Appeals, in reviewing whether the trial court erred in denying Flick’s motion to dismiss based on the fact that the complaint was not timely filed, had to review and decide, whether or not the case of *DiGiuro v. Ragland* did, or did not, apply to the current case and extend the statute of limitations for the Estate to file its complaint. That was the issue that was presented by Flick to the Court of Appeals for its consideration.

The Court of Appeals stated in its opinion that “In the current appeal, we are directly presented with the question of whether the holding of *DiGiuro v. Ragland* remains valid.” (Opinion, Page 5) The Court’s review of the case of *DiGiuro v.*

Ragland is at the heart of this appeal and Appellee contends that the case was appropriately reviewed and analyzed by the Court of Appeals.

Flick submits to this Court that the Court of Appeals properly considered the proper level of precedential value to give the decision in *DiGiuro*.

C. **CONCERNING APPELLANT’S ARGUMENTS THAT THE COURT OF APPEALS ERRED IN REJECTING THE POLICY CONSIDERATIONS ON WHICH IT RELIED IN DIGIURO IN REVERSING THE TRIAL COURT’S DECISION**

1. **THE COURT OF APPEALS DID NOT ERR IN ITS LEGAL ANALYSIS OF THE APPLICABLE LIMITATIONS PERIOD.**

The Appellant has argued that the Court of Appeals erred in determining that the general assembly has clearly addressed the applicable limitations period.

Flick disagrees with this statement and analysis as interpreted by the Appellant.

The Court of Appeals summarized the history of this case as follows:

“Wittich’s parents, Judith Wittich and Frederick Wittich, were appointed as co-administrators of Wittich’s Estate on November 16, 2006. Following the criminal trial, the Estate filed a wrongful-death claim against Flick on August 22, 2008. Flick filed a motion to dismiss, arguing that the action was not filed within the one-year statute of limitations provided by KRS 413.140. The Estate responded that the statute of limitations was tolled until Flick’s conviction under the rule set out in the unpublished Court of Appeals case, *DiGiuro v. Ragland*, 2004 WL 1416360 (Ky. App. 2004)(2003-CA-001555-MR). The trial court agreed and denied the motion. Thereafter, the wrongful-death claim proceeded to a jury trial in 2009. The jury returned a verdict in favor of the Estate, awarding \$2,900,000 in compensatory damages and \$53,000,000 in punitive damages. Flick filed a timely appeal in December 2009.” (Opinion, Page 2-3).

The Court of Appeals reviewed the law relating to the statute of limitations, and determined that KRS 413.180 applies and that actions by a personal representative must be brought within one year after the qualification of the representative. The Court wrote:

“As noted above, it is well-established that an action for wrongful death is subject to the one-year statute of limitations in KRS 413.140(1). *Conner*, 834 S.W.2d at 653-54. Under KRS 413.180, the action must have been brought within one year from the appointment of the personal representative, but not more than two years from the date the cause of action accrued. KRS 413.190 allows the limitations period to be tolled for any period that the defendant “abscond[s] or conceal[s] himself or by any other indirect means obstructs the prosecution of the action” Thus, the statute of limitations did not accrue until the Estate knew or had reason to know of both the injury (Wittich’s death), and that it may have been caused by Flick’s conduct. *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 819 (Ky. 1991).” (Opinion, Page 6-7)

Flick submits to the Court that the Court of Appeals has correctly stated the law concerning the statute of limitations in wrongful death cases.

2. THE COURT OF APPEALS DID NOT ERR IN ITS LEGAL ANALYSIS OF THE DIGIURO CASE AND ITS REJECTION OF THAT CASE

In discussing *DiGiuro v. Ragland*, the Court of Appeals stated: “*DiGiuro* sets out compelling public policy arguments why the statute of limitations should be tolled until the defendant is criminally convicted of the murder. However, these policy considerations must yield where the General Assembly has clearly addressed the subject.” (Opinion, Page 6-7) Thus, the Court of Appeals determined that KRS 413.190 would apply and allow the tolling of the limitations period to at least the time that “the Estate knew or had reason to know of both the injury (Wittich’s death), and that it may have been caused by Flick’s conduct.” (Opinion, Page 7).

The Court of Appeals did not adopt the legal argument propounded by Flick, that the case of *DiGiuro* created a narrow exception for unsolved murders.

In his brief to the Court of Appeals, Flick had argued that he believed that *DiGiuro* created a narrow exception to the statute of limitations in cases of unsolved murders. This argument came straight from the text of the case.

3. THE CASE OF DIGIURO v. RAGLAND

The case of *Ragland v. DiGiuro*, 352 S.W.3d 908 (Ky.App. 2010), discusses the earlier case of *DiGiuro v. Ragland*, 2004 WL 1416360 (Ky.App.2004)(2003-CA-001555-MR), in which the Kentucky Court of Appeals allowed the statute of limitations in this particular case to be extended until one year after the murder conviction of Ragland. The Court of Appeals in its Opinion discussed this case and stated:

However, in *DiGiuro v. Ragland, supra*, this Court recognized a limited exception to the application of the statute of limitations. That case involved the notorious killing of Trent DiGiuro on July 17, 1994. His murder went unsolved for many years. However, in January of 2000, Shane Ragland was identified as DiGiuro's killer. On March 27, 2002, a jury found Ragland guilty of the murder.

DiGiuro's father was appointed as administrator of his estate in 2001, and he filed a wrongful death action on July 1, 2002. However, the circuit court dismissed the action as time-barred, concluding that it should have been brought within one year from the date that Ragland was arrested and charged with the murder. On appeal, this Court agreed that a wrongful-death claim would be generally subject to the one-year statute of limitations. But based upon public policy considerations, a majority of the Court of Appeals panel concluded that, in wrongful death cases arising from a murder, the statute of limitations should be tolled until the conviction of the defendant. *Id.* Slip Op. at 14-18.

The Kentucky Supreme Court accepted discretionary review in *DiGiuro*. But due to a vacancy, the Court split 3-3, resulting in an affirmance of the Court of Appeals decision. However, this Court's opinion remained unpublished by operation of CR 76.28(4). Upon remand, a jury returned a verdict for DiGiuro's estate, and awarded compensatory and punitive damages against Ragland. In a subsequent appeal, this Court

declined to revisit the statute-of limitations ruling, concluding that it had become the law of the case. *Ragland v. DiGiuro*, 352 S.W.3d 908, 913-16 (Ky. App. 2010). (Opinion, Pages 4-5)

In the original Kentucky Court of Appeals case of *DiGiuro v. Ragland*, 2004 WL 1416360 (Ky.App.2004)(2003-CA-001555-MR)., that Court goes over the facts and background of the case, and then writes, in conclusion:

In sum, we conclude that, under the facts of this particular case and in absence of a specific limitation period prescribed by the wrongful death statute, the public policy of this Commonwealth would not be furthered by using the general statute of limitations. Instead, we find that the public policy of this Commonwealth would be furthered by allowing the family of a murder victim to wait until conviction of a defendant before filing suit. There being no statutory authority or binding case law on point, we now hold narrowly that a case involving an unsolved murder has different policy considerations than other wrongful death actions and decline to apply KRS 413.140.

DiGiuro v. Ragland, 2004 WL 1416360 (Ky.App.2004)(2003-CA-001555-MR).

In this quote, the Court of Appeals uses the language “we now hold narrowly” and specifies only that “unsolved murders” invoke the policy considerations that it used when it declined to apply KRS 413.140. This, however, is in conflict with the prior sentence of “we find that the public policy of this Commonwealth would be furthered by allowing the family of a murder victim to wait until conviction of a defendant before filing suit.” Therefore, the two sentences are in conflict, as the second did not specify whether the murder it described was any murder, or another similar unsolved murder.

This conflicting language causes the holding of the Court to be questionable and such questions were the basis for Flick’s appellate argument that the public policy decision that the Kentucky Court of Appeals made in the *DiGiuro v. Ragland* case was not to be applied, across the board, to all murder cases. The way that this Court

composed the paragraph as emphasized above, makes it appear that the Court was only holding that in this particular case, policy considerations made it appropriate to decline to apply KRS 413.140. Flick argued that the Court was not making a specific rule about all murder cases.

Flick argued that the differences between his case and the case of *DiGiuro* are significant. His case was not an unsolved murder case. He was caught, at the site of the murder, wielding a gun, and had to be subdued by Lambirth and his brother, Chris. As there was no question about the identity of the person responsible for the death of Christina Wittich, and the personal representatives in this case had full knowledge of who was responsible for the crime, there was no reason for the personal representative to delay for more than a year after their appointment prior to filing the wrongful death lawsuit. Flick argued that his case should have been dismissed as the complaint was untimely, and thus barred by the applicable statute of limitations.

D. CONCERNING APPELLANT’S ARGUMENT THAT THE COURT OF APPEALS DID NOT ADDRESS THE EFFECT OF AN AMENDMENT OF KRS 413.130

Appellant argues that the Court of Appeals failed to address the effect of the action of the legislature in amending KRS 413.140 without incorporating claims under KRS 413.130 in June 2013. (Appellant’s Brief, Page 27)

The argument being made here is that because the legislature amended KRS 413.140 in June of 2013 by adding a new subsection that is unrelated to wrongful death actions, and did not at that time change section (1)(a) relating to actions arising from injury to a person. Therefore, the Appellant concludes, that the legislature purposefully intended leave the standard in *DiGiuro* for wrongful death actions in place. It is certainly

possible that there are other reasons that the legislature has not specifically addressed the issue. The Appellant has provided no evidence that the Kentucky legislature was even considering the issue of the statute as it related to wrongful death actions.

E. **CONCERNING APPELLANT’S ARGUMENT THAT ANY DECISION SHOULD BE PROSPECTIVELY APPLIED RATHER THAN TO OPERATE AS A BAR TO THE ESTATE’S CLAIMS**

Appellant next argues that to the extent that the Court of Appeals made a correct decision in the current case, that such decision should be prospectively applied rather than operate as a bar to the Estate’s claims.

Flick submits that it would not be unjust to apply current Kentucky law to the statute of limitations at issue in this case. It would be a risky legal decision to purposefully wait until after conviction of a defendant to bring a civil action, especially considering Kentucky law. It was not settled that *DiGiuro* made any significant changes to Kentucky law, and the facts of the Estate’s case were vastly different from the case of *DiGiuro*.

It would be a risky proposition, in general, to wait until after the outcome of a criminal trial before filing a civil lawsuit when the statute of limitations may very well run before the outcome of the criminal trial is completed. What if a conviction never occurs? Then there would be no civil action possible, even with the lesser standard of proof than is required in a criminal proceeding. The criminal proceeding may have been lost but the civil one might still be won.

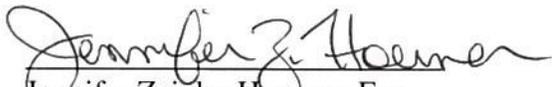
Counsel for Appellant implies that the Appellant relied on this law, purposefully allowed the statute of limitations to pass, and then later, after conviction, filed its civil lawsuit. Why would that have happened when the identity of Flick was known from the

beginning? It seems more likely that the Appellants made a mistake and waited too long to file their civil wrongful death lawsuit. The personal representatives were appointed more than two years before the lawsuit was even filed, and there really was no reason to wait and every reason to file.

III. CONCLUSION

In conclusion, the Appellee, Michael Joseph Flick, requests that this Court Affirm the opinion of the Court of Appeals in this matter.

Respectfully Submitted:



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