

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000257-MR

CAROLYN WILSON

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE DAVID PRESTON, JUDGE
ACTION NO. 07-CI-00035

CHRISTY R. MUSIC

APPELLEE

AND

NO. 2008-CA-002291-MR

CAROLYN WILSON, EXECUTRIX OF
THE ESTATE OF JOHN WILSON

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE DAVID PRESTON, JUDGE
ACTION NO. 08-CI-00281

CHRISTY R. MUSIC

APPELLEE

OPINION DISMISSING IN PART
AND AFFIRMING IN PART

** ** *

BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

MOORE, JUDGE: Carolyn Wilson appeals the Johnson Circuit Court's order denying her motion to reconsider the part of the court's prior order dismissing the case of her belated husband, John R. Wilson, with prejudice. Ms. Wilson also appeals the Johnson Circuit Court's order dismissing with prejudice the case she filed as Executrix of the Estate of John Wilson. After a careful review of the record, we dismiss the appeal in case number 2008-CA-000257 for lack of standing and we affirm the circuit court's order in appellate case number 2008-CA-002291.

I. FACTUAL AND PROCEDURAL BACKGROUND

In September 2006, Carolyn Wilson, John Wilson, and Christy R. Music were involved in an automobile accident in which Ms. Music allegedly drove a vehicle that collided with the vehicle in which the Wilsons were riding. The Wilsons filed a complaint against Ms. Music for their bodily injuries, pain and suffering, and medical expenses. While the litigation was pending, John Wilson, who had battled cancer long before the accident occurred, died from the cancer on July 4, 2007.

Carolyn Wilson was appointed Executrix of John Wilson's estate on July 12, 2007. However, she did not file a motion to revive the action of John

Wilson. The action proceeded to trial on January 15, 2008, when Carolyn Wilson moved to dismiss her case. The circuit court granted her motion and dismissed her case with prejudice, as well as John Wilson's case with prejudice, after noting that

[a]s late as 2:30 in the afternoon of January 14th, 2008, the Court had a conference call with counsel for the parties, who were advised by the Court that . . . a jury would be available if necessary on January 15th, 2008 to try the case. The Court was advised by the parties that the case was ready [to] proceed, and that a jury would be necessary.

Thus, the circuit court dismissed both Carolyn and John Wilson's cases with prejudice because "the case should have been ready for trial on January 15th, 2008[, and because] of the failure of the parties to timely advise the Court that a jury would not be necessary." In addition to dismissing the actions with prejudice, the circuit court ordered Carolyn Wilson to pay a fine of \$500.00 to the court clerk.

Carolyn Wilson then moved the court to reconsider the part of its prior order dismissing John Wilson's case with prejudice, arguing that "the estate of John Wilson has one year from the date of [his death] to revive his claim in this suit." She did not move the court to reconsider the dismissal of her claim with prejudice. The court denied her motion to reconsider the dismissal of John's claims. Carolyn appealed the court's order denying her motion to reconsider. That appeal is presently before this Court as appellate case number 2008-CA-000257.

While that appeal was pending, Carolyn Wilson, as Executrix of the Estate of John Wilson, filed a new civil action in the circuit court against Christy R. Music, raising the same claims that John Wilson had raised in his initial action

filed in that court. Ms. Music moved to dismiss the case. The circuit court granted her motion to dismiss, reasoning that

Carolyn Wilson as Executrix of the Estate of John Wilson, failed to comply with KRS^[1] 395.278 with respect to revival and CR^[2] 25.01(1) with respect to substitution of parties. This Court called the prior action . . . for trial, Plaintiffs in that matter were not ready, had not complied with either KRS 395.278 or CR 25.01(1) and the matter involved the same subject matter and real parties in interest.

Carolyn Wilson, as Executrix of the Estate of John Wilson, now appeals the circuit court's order dismissing this second action. That appeal is before us as case number 2008-CA-002291. Both appeals have been consolidated for our review.

In these appeals, Carolyn Wilson contends that the circuit court should not have dismissed John Wilson's actions with prejudice, but should have placed the initial action that he filed in abatement because she had one year from the date of his death to revive the action he had initially filed.

II. ANALYSIS

Kentucky Revised Statute 395.278 provides: "An application to revive an action in the name of the representative or successor of a plaintiff . . . shall be made within one (1) year after the death of a deceased party."

Kentucky Rule of Civil Procedure 25.01(1) provides:

¹ Kentucky Revised Statute.

² Kentucky Rule of Civil Procedure.

If a party dies during the pendency of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. If substitution is not so made the action may be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party, and, together with the notice of hearing, shall be served on the parties as provided in Rule 5, and upon persons not parties as provided in Rule 4 for the service of summons. Upon becoming aware of a party's death, the attorney(s) of record for that party, as soon as practicable, shall file a notice of such death on the record and serve a copy of such notice in the same manner provided herein for service of the motion for substitution.

The circuit court found that Carolyn Wilson did not comply with either KRS 395.278 concerning reviving John Wilson's action, nor with CR 25.01(1) regarding substituting herself for John Wilson as the Executrix of his estate.³ We agree. Upon review of the written records, it is apparent that no motion to substitute Carolyn Wilson for John Wilson as the Executrix of his estate was ever filed or ruled upon by the circuit court, and no motion to revive the action of John Wilson was ever filed or ruled upon.

Thus, Carolyn Wilson did not have standing to move the circuit court to reconsider its dismissal of John Wilson's initial case with prejudice, because she had not been substituted for John Wilson as a party in that action and she had not revived John's action. Further, Carolyn Wilson specified in that motion to reconsider that she was not moving the circuit court to reconsider the dismissal of

³ We pause to note that, upon review of the circuit court's record, it appears that John Wilson's attorney of record also did not file a notice of John Wilson's death on the record, as required by CR 25.01(1).

her claims with prejudice but, rather, she was only moving to reconsider the dismissal of John's claims with prejudice. "The history of KRS 395.278 is important because, [a]t common law, when the plaintiff died the lawsuit died with him. . . ." *Hardin County v. Wilkerson*, 255 S.W.3d 923, 925 (Ky. 2008) (internal quotation marks omitted).

The revival statute altered this practice, allowing the dead (or abated) suit to be revived. Nevertheless, the action in the name of the decedent is dead and cannot be prosecuted; it remains on the docket only as a placeholder for the revived suit in the name of the personal representative of the estate.

Id. at 926.

However, "[a] personal representative does not automatically succeed to his decedent's rights and status as a litigant and thus is not a party to any suit [for or] against the decedent unless the action is revived." *Snyder v. Snyder*, 769 S.W.2d 70, 72 (Ky. App. 1989). Consequently, even if Carolyn was declared to be the Executrix of John's estate by the probate court, such did not automatically result in the substitution of Carolyn for John in this civil action. The substitution of parties is not a mere formality.

When read together KRS 395.278 and CR 25.01 require that when a litigant dies, any action pending with respect to him must be revived against that decedent's administration and the administrator must be substituted as the real party in interest before the action can proceed. . . . [Further,] when a judgment of a trial court is attacked as void, the real parties in interest must be brought before the court.

Id. Thus, even if Ms. Music was notified of John’s death, as appears to have occurred in this case, this simple act of notification was insufficient for purposes of reviving John’s action. *See id.* Rather, Carolyn was required to actually move the circuit court to revive John’s action, to substitute herself in the action for him as the Executrix of his estate, and to obtain the court’s approval of both of these requests before Carolyn could properly move the court to reconsider its dismissal of John’s claims. *See id.* at 72-73. Once the entry of dismissal with prejudice was entered, it was a final judgment – regardless of whether that judgment was right or wrong. Carolyn was on notice at that point that she needed to move within ten days to be substituted as a party, to revive the action, and to move the court to vacate its prior dismissal. She failed to do so in the first action, so the judgment became a final order of dismissal with prejudice ten days after its entry. Because this was not a clerical error, Carolyn was then foreclosed from doing anything further in the first action.

Therefore, because Carolyn did not have standing to file that motion to reconsider on John’s behalf, and the initial appeal in this case was from the circuit court’s denial of that motion to reconsider, the appeal in case number 2008-CA-000257 is not properly before us. Accordingly, that appeal is dismissed for lack of standing because Carolyn was not the proper “party of record” to appeal the dismissal of John’s claims. *See generally Bartholomew v. Paniello*, 287 S.W.2d 616 (Ky. 1956).

As for the second appeal regarding the case that Carolyn filed as Executrix of John Wilson's estate, the complaint in that case raised the same claims as the complaint in the initial case that had been dismissed with prejudice. "A dismissal with prejudice . . . acts as a bar to again asserting the cause of action so dismissed." *Polk v. Wimsatt*, 689 S.W.2d 363, 364 (Ky. App. 1985). Thus, the dismissal of an "action with prejudice precludes another action on the same matter." *Id.* at 365. Consequently, the circuit court did not err in dismissing the second action.

Accordingly, appellate case number 2008-CA-000257 is dismissed. Further, in appellate case number 2008-CA-002291, the order of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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