

RENDERED: NOVEMBER 10, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002280-MR

PEGGY DROHAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CI-01899

WILLEAN A. ADAMS

APPELLEE

OPINION
DISMISSING

** ** * * * * *

BEFORE: COMBS, MOORE, AND NICKELL, JUDGES.

COMBS, JUDGE: Peggy Drohan appeals an order of the Kenton Circuit Court dismissing her personal injury action against Willean A. Adams. The action was dismissed for Drohan's failure to revive the action within one year of the death of the alleged tortfeasor. Under the circumstances of this case, we have no

jurisdiction over this cause of action because it terminated upon Adams's death.

Consequently, we must dismiss the appeal.

In the early evening of October 1, 2005, while Drohan sat in her car in idle before a bank's automatic teller machine, the car behind her, operated by Adams, moved forward and collided with Drohan's bumper. Drohan alleged that she was injured by Adams's negligence. On June 13, 2008, she filed a personal injury action against Adams in Kenton Circuit Court. On August 18, 2009, while the matter was still pending before the trial court, Adams died.

On August 28, 2009, pursuant to the provisions of Kentucky Rule(s) of Civil Procedure (CR) 25.01(1), Adams's attorney filed a notice of the death of a party. The notice was duly served upon counsel for Drohan.

On September 8, 2010, Adams's attorney filed a motion to dismiss the action against the decedent for failure to revive the action within the time as set forth by the applicable statute of limitations. Drohan opposed the motion to dismiss and filed a belated motion to substitute Adams's automobile insurance carrier as the party defendant.

By its order entered November 16, 2010, the Kenton Circuit Court denied the motion to substitute the insurance carrier as defendant and granted the motion to dismiss. This appeal followed.

On appeal, Drohan urges this court to dispense with our requirement that an action be revived against the representative or successor of a defendant within one year after the defendant's death. In her prehearing statement, Drohan argues that

revivor under the provisions of Kentucky Revised Statute(s) (KRS) 395.278 is “an outmoded concept where the real party in interest is an insurance company providing a defense” to an alleged tortfeasor. Drohan contends that our jurisprudence prohibiting a direct action against an alleged tortfeasor’s insurance carrier should be relaxed under these circumstances and that the trial court’s dismissal of her personal injury action was, therefore, inappropriate.

Under common law principles, a tort action is extinguished upon the death of its only defendant. *Hardin Co. v. Wilkerson*, 255 S.W.3d 923 (Ky. 2008). The provisions of KRS 395.278 permit the revival of such an action, however, where a proper party is substituted for the defendant within the period of limitations. The motion for substitution of the defendant may be made by any party to the pending litigation, but it must be made within the period prescribed by law. CR 25.01(1).

Drohan concedes that she knew that Adams had died and that her personal injury action was not revived within the one-year period which is allowed by the provisions of KRS 395.278. However, she argues that revivor was unnecessary in this case since Adams’s insurance carrier was always the real party in interest. According to Drohan, Adams’s insurance carrier is (and always was) *a virtual party* to the litigation who “merely steps forward and into the shoes of the deceased defendant.” Brief at 11.

In support of her position, Drohan relies upon the decision of the Supreme Court of Kentucky in *Harris v. Jackson*, 19 S.W.3d 297 (Ky. 2006). In that case, the court held that the trial court erred by dismissing Jackson’s claim for failure to

revive pursuant to the provisions of KRS 395.278. Although Jackson did not timely move to revive her claim, the court held that Harris's estate was estopped from raising the statute of limitations defense because Harris's attorney had failed to inform Jackson that Harris had died. Relying upon its holding in *Kentucky Bar Association v. Geisler*, 938 S.W.2d 578 (Ky. 1997), the court reiterated that disclosure of such an important fact (the death of an attorney's client) is always required. The court held that where that obligation had not been met, an estoppel arose barring use of the statute of limitations as a defense. This holding does not govern the matter before us because notice of the death was duly provided.

Aside from the estoppel issue, the Court's discussion of its jurisdiction over the decedent in *Harris* is critical to our conclusion that Drohan's appeal must be dismissed. Over a strong dissent, the Supreme Court of Kentucky in *Harris* was ultimately persuaded that it did have jurisdiction to consider the decedent's motion for discretionary review for two reasons. First, it was satisfied that the decedent's automobile insurance carrier had sufficiently similar exposure to liability as the decedent's estate. This fact assured the court that adequate "virtual representation" had been provided to the decedent throughout the proceedings. Second, the court was persuaded that the issue of whether an attorney for a deceased defendant had a duty to disclose the death of his client to opposing counsel was of such great import to the Bar that it compelled resolution.

In the case before us, there is no ethical problem involving disclosure of the fact of Adams's death. Counsel properly complied with CR 25.01(1).

Additionally, Adams's automobile insurance carrier *had never been a party* to Drohan's personal injury action -- nor could it have ever been made one under our jurisprudence after the fact of her death since revival never occurred. The tort action against Adams died with her and was not revived against her representative pursuant to the requirements of KRS 395.278 and CR 25.01(1). As a result, we have *no appellee* over whom we could acquire jurisdiction. *See Mitchell v. Mitchell*, 602 S.W.2d 687 (1980).

Consequently, the appeal is hereby dismissed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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