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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001624-MR

MICHAEL HANSEN AND CATHLEEN WRIGHT, as Administratrix of the ESTATE OF MICHAEL HANSEN — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 09-CI-007553

SCOTT SMITHA, in his individual capacity; EDEN FENCE, INCORPORATED; and TOM WRIGHT, in his individual capacity — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

COMBS, JUDGE: Michael Hansen and Cathleen Wright, as Administratrix of the Estate of Michael Hansen (the Estate), appeal the orders of the Jefferson Circuit Court that granted the appellees' motion to dismiss and that denied the Estate's amended motion to revive. Following our review, we affirm.

On November 12, 2008, a semi-truck damaged a guardrail on Exit 125A on I-65 in Louisville. Three days later, Michael Hansen's vehicle was run off the road by an unknown driver, and his vehicle collided with the damaged guardrail. The guardrail impaled Hansen's car, severing his right leg. As a result, Hansen underwent several amputation surgeries. He filed a complaint on July 29, 2009, alleging that Scott Smitha, who was an engineer for the Kentucky Transportation Cabinet, was negligent in conducting his job responsibilities, causing Hansen's injury. Tom Wright[1] (Smitha's supervisor) and Eden Fence were added to the lawsuit at a later time. Eden Fence is the company with which the state contracted for maintenance of that guardrail.

On June 30, 2010, Hansen died of causes not related to the injury from the accident. A North Carolina court appointed his mother, Cathleen Wright, the administratrix of his estate. On April 6, 2011, counsel for the Estate filed a motion to revive the action against the appellees. The trial court granted the motion on May 2, 2011. On July 5, 2011, appellees Smitha and Wright filed a motion for the action to be dismissed due to the failure of the Estate's counsel to file a motion for substitution of parties. Eden Fence reiterated the motion on July 8, 2011. On August 5, 2011, the trial court entered an order that vacated its previous order reviving the action and that granted the appellees' motion to dismiss. Five days later, the Estate filed an amended motion to revive the action, which the court

[1] To avoid confusion, we refer to Smitha, Eden Fence, and Tom Wright as "appellees." We refer to Cathleen Wright as "Wright."

denied on September 2, 2011. The Estate now appeals from the orders of August 5 and September 2.

In this case, the trial court did not make any factual findings. As the issues are purely matters of law, our review is *de novo*. *Benningfield v. Pettit Environmental, Inc*., 183 S.W.3d 567, 570 (Ky. App. 2005).

Kentucky Revised Statute[s] (KRS) 395.278 allows an action to be revived within one year of a party's death in the name of the representative or successor of a plaintiff. It is construed in conjunction with Kentucky Civil Rule[s] of Procedure (CR) 25.01, which provides in pertinent part that:

> 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[.]"

The Estate first argues that the original motion to revive, which was properly made pursuant to KRS 395.278, also satisfied the elements of CR 25.01. However, the court found that the Estate had never asked for substitution as prescribed by CR 25.01. We agree.

KRS 395.278 mandates that the motion to revive must be "in the name of the representative or successor of a plaintiff." Deceased parties do not have standing to litigate. *Commonwealth v. Maynard*, 294 S.W.3d 43, 46 (Ky. App. 2009). Historically, lawsuits die with the plaintiff. *Daniel v. Fourth & Market,*

Inc., 445 S.W.2d 699, 701 (Ky. 1968). The revival laws permit a lawsuit to remain "only as a placeholder for the revived suit in the name of the personal representative of the estate." *Hardin County v. Wilkerson*, 255 S.W.3d 923, 926 (Ky. 2008). Furthermore, the personal representative does not automatically inherit the lawsuit; he or she must "raise it from limbo and become a party to it." *Id*. at 927 (*quoting Daniel, supra*).

Wright's motion ***to revive*** was made in the name of the Estate of Michael Hansen. The motion recites that Wright had been appointed Administratrix of Hansen's estate; however, it did not ask that Wright be substituted for Hansen in the lawsuit. Furthermore, there is no evidence that Wright complied with the notice requirement of CR 25.01. This Court has spoken clearly about the subject – in order to keep a deceased plaintiff's action alive, the action "***must*** be revived ***and*** the administrator ***must*** be substituted as the real party in interest." *Synder v. Snyder*, 769 S.W.2d 70, 72 (Ky. App. 1989). (Emphasis added). Although she properly moved for revival of the lawsuit, Wright did not meet the second requirement of asking to be substituted as the real party in interest. Therefore, the trial court did not err when it dismissed the lawsuit as permitted by CR 25.01.

The Estate next argues that the amended motion to revive was improperly denied. This contention is based on CR 15.03, which allows amended pleadings to relate back to original pleadings. Pleadings are defined by CR 7.01 as complaints, counterclaims, and answers to complaints or counterclaims. However, a revival

motion under KRS 395.278 is not a pleading. *Mitchell v. Money*, 602 S.W.2d 687, 688 (Ky. App. 1980). Therefore, CR 15.03 is not applicable.

Nonetheless, the Estate urges us to apply *Preece v. Adams*, 616 S.W.2d 787 (Ky. App. 1980), in which we held that a motion for revival in an erroneous jurisdiction tolled the statute of limitations for a revival motion in the proper jurisdiction. The court analogized the relation-back principles of CR 15.03 applied. However, we do not believe that *Preece* is applicable to the case before us. In *Preece*, there was no question that the original motions both for revival and for substitution were timely and effective. They were simply made in the wrong court. The determination of jurisdiction was a matter that had to be determined by the court, and when the proper jurisdiction was ascertained, the properly filed case was transferred accordingly.

In *Preece*, the filings were complete. Both revival and substitution were properly sought, a fact that allowed for the doctrine of relation-back to apply. However, the doctrine of relation-back cannot supply a ***deficiency*** in a pleading or a required procedural step (*i.e.*, the motion for substitution) after the fact. It serves merely to turn back the clock for an action that has been properly litigated otherwise.

We have carefully studied the estate's reliance on *Preece*. Though not perfectly congruent factually to the case before us, *Preece* would surely seem to militate in favor of saving a revival case where all parties had notice *de facto* (if not *de jure)* according to CR 25.01. However, we note that *Preece* dates from

1980. It has been superseded at least temporally by *Snyder, supra,* in 1989 and more recently by *Frank v. Estate of Enderle*, 253 S.W.3d 570, 574 (Ky. App. 2008), both of which strongly reiterate and reinforce the ***mandatory*** notice of filing a CR 25.01 motion ***in conjunction with*** a KRS 395.278 motion:

> CR 25.01 ***must be read in tandem*** with KRS 395.278 which directs the "application to revive an action . . . ***shall be made*** within one (1) year after the death of a deceased party." Because KRS 395.278 is "a statute of limitation, rather than a statute relating to pleading, practice or procedure, and the time limit within this section is ***mandatory*** and not discretionary," neither a court nor a party may extend the one year statute of limitations. *Snyder v. Snyder*, 769 S.W.2d 70, 72 (Ky. App. 1989). Thus, if within one year of a litigant's death an action is not revived against the administrator of a decedent's estate ***and*** the administrator substituted as the real party in interest, then the suit must be dismissed. *Id*.

Frank v. Estate of Enderle, 253 S.W.3d at 575. (Emphases added.)

Furthermore, the order dismissing the original complaint was a final order. CR 54.01 defines a final order as one that disposes of all the issues in an action. A motion to dismiss leaves no outstanding issues. Therefore, the proper motion would have been one to amend, alter, or vacate the order pursuant to CR 59.05. We cannot conclude that the trial court erred in denying the untimely amended motion.

We are compelled to affirm the Jefferson Circuit Court.

ALL CONCUR.

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