

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000943-MR

THOMAS ESTEPP, JR.

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT  
HONORABLE DAVID A. TAPP, JUDGE  
ACTION NO. 08-CI-00199

SHERIFF MIKE PETERS, ADMINISTRATOR  
OF THE ESTATE OF JORDIN SCHMIDT;  
THOMAS W. MAYNE; JOHN PARTIN;  
AND ENCOMPASS INDEMNITY  
COMPANY

APPELLEES

OPINION AND ORDER  
DISMISSING IN PART AND AFFIRMING IN PART

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BEFORE: CAPERTON, DIXON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Thomas Estep, Jr. appeals from three orders of the Rockcastle Circuit Court which, in total, dismissed his claims against Sheriff M. Peters, administrator of the estate of Jordin Schmidt;<sup>1</sup> Encompass Indemnity Company (“Encompass”); Thomas Mayne; and John Partin. For the following

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<sup>1</sup> This is the proper party name, though Estep’s notice of appeal identifies “Estate of Jordin Schmidt” as the party.

reasons, we dismiss Estepp's appeal from the order dismissing his claims against Jordin's estate and affirm the orders dismissing Estepp's claims against Encompass, as well as against Mayne and Partin.

On July 5, 2006, Estepp, Mayne, and Jordin were involved in a motor vehicle accident. As a result of injuries sustained in the accident, Jordin died. At the time of the accident, Mayne was driving a vehicle owned by Partin, and Jordin was driving a vehicle owned by his mother, Mary Schmidt. Just short of two years after the accident, on July 2, 2008, Estepp filed a personal injury action against Mayne, Partin, and Mary Schmidt seeking to recover damages for injuries he claims he sustained in the accident. Notably, Estepp's complaint did not allege a cause of action against, or request relief from, Jordin, Jordin's estate, or a personal representative of the estate of Jordin. While Mary was an Encompass policy holder and owner of the vehicle driven by Jordin in the accident, she was neither a tortfeasor nor a real party in interest. Accordingly, Encompass had no duty to pay a claim on Mary's behalf. Indeed, Mary entered a special and limited appearance before the trial court on a motion to quash and/or motion to dismiss Estepp's claims against her, which the trial court granted by order entered October 1, 2008.

On April 15, 2010, the trial court likewise granted a motion to quash and granted in part a motion to dismiss filed by special and limited appearance on behalf of Christopher Douglas, as purported administrator of Jordin's estate. The court held that an order entered in this matter on November 25, 2009 purporting to

appoint Douglas as administrator of the estate was void and therefore Douglas was not a party to this action and lacked standing.

On June 24, 2011, the trial court permitted Estepp to amend his complaint to assert bad faith claims against Encompass. The following month, Sheriff Peters was appointed as public administrator of Jordin's estate. Encompass then filed a motion to dismiss the amended complaint since the statute of limitations had run on the underlying claim. Jordin's estate likewise filed a motion to quash and/or motion to dismiss any claims asserted against it. Both the estate's and Encompass's motions were heard by the court on October 28, 2011.

On November 10, 2011, the trial court entered an order dismissing Estepp's claims against Jordin's estate as time-barred. The court found that prior to the appointment of Sheriff Peters as public administrator of Jordin's estate on July 6, 2011, three years after expiration of the limitations period, no personal representative had been validly appointed for the estate. In other words, at no point during the limitations period was there a proper appointment of an administrator of Jordin's estate. While Estepp's complaint was initiated within the period of limitations, he failed to name a party defendant over whom the trial court could acquire jurisdiction before expiration of the limitations period. Accordingly, his complaint became a nullity. On December 20, 2011, the trial court similarly dismissed Estepp's claims against Encompass as time-barred. Thereafter, on April

26, 2012, by agreement of Estepp, Mayne, and Partin, the court dismissed Estepp's claims against them.<sup>2</sup> This appeal followed.

Estepp's notice of appeal states that he is appealing from the trial court's orders entered April 26, 2012, December 20, 2011, and November 10, 2011. As an initial matter, we note that Estepp has not raised any claim of error with respect to the court's April 26, 2012, order dismissing his claims against Mayne and Partin, upon agreement of the parties. Therefore, while Estepp has timely appealed from that order, we have no cause to address its merits.

We further decline to address Estepp's appeal from the court's November 10, 2011, order for want of jurisdiction. Estepp failed to timely file a notice of appeal from that order, in which the court dismissed his claims against Jordin's estate, with prejudice, and designated the order as final and appealable with no just cause for delay. In an action such as this, involving multiple claims or multiple parties, CR<sup>3</sup> 54.02 bestows the trial court discretion to "grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay." Pursuant to CR 54.02, the trial court's judgment must recite the determination that "there is no just reason for delay" and that the judgment is "final." Here, the court's order fully adjudicated Estepp's claims against Jordin's estate, recited the requisite "finality" language, and thus became a final and appealable order at that time.

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<sup>2</sup> The record shows this order was dated April 23, 2010 but for whatever reason, was not entered until April 26, 2012.

<sup>3</sup> Kentucky Rules of Civil Procedure.

A notice of appeal must be filed within 30 days from entry of a final order and the failure to do so shall result in a dismissal or denial of the appeal. CR 73.02. Esteppe filed his notice of appeal on May 24, 2012, clearly outside the 30-day time period. Consequently, we lack jurisdiction to consider his appeal from the November 10, 2011, order and dismiss his appeal in that respect as untimely. *See Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722 (Ky. 2008) (holding that in action involving multiple claims, trial court's judgment which fully disposed of plaintiff's claims against defendant and included requisite finality language for appeal triggered 30-day time limit for filing notice of appeal and plaintiff's failure to timely appeal resulted in dismissal of the appeal as untimely).

The trial court's December 20, 2011, order, like its November 10, 2011, order fully adjudicated Esteppe's claims against Encompass, but the trial court did not designate that order as final and appealable, or recite the requisite finality language. And Encompass did not request inclusion of the finality language. Accordingly, the December 20, 2011, order did not become final until April 26, 2012, when the trial court entered an order dismissing Esteppe's claims against Mayne and Partin. At that time, the court had adjudicated all the rights of all the parties in this action. *See* CR 54.01 (“[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding[.]”). Esteppe's notice of appeal, filed May 24, 2012, was timely filed from the April 26, 2012, order and thus we have jurisdiction to address his claims of error relating to the December 20, 2011, order.

On appeal, Estep argues that his amended complaint “relates back” to the date of the filing of the original complaint pursuant to CR 15.03(2) and therefore the trial court should not have dismissed his amended complaint against Encompass as time-barred. We disagree.

The appellate standard for reviewing a trial court’s order granting a motion to dismiss is as follows:

The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

*James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal quotations and citation omitted).

Further, CR 15.03(2) provides as follows:

An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The subject motor vehicle accident occurred on July 5, 2006. “As a general rule, a cause of action for personal injuries arising out of an automobile accident must be brought within two years after the date of injury or the last payment of

basic reparation benefits.” *Gailor v. Alsabi*, 990 S.W.2d 597, 600 (Ky. 1999); *see also* KRS<sup>4</sup> 304.39-230(6). In the case at bar, no payments were made for basic or added reparation benefits, so the period of limitations with respect to this cause of action expired on July 5, 2008.

On July 5, 2008, Estep had only asserted claims against Mayne, Partin, and Mary Schmidt. At that time, he had not asserted any claims against Jordin, Jordin’s estate, or a representative of the estate of Jordin. Encompass had no duty to pay a claim on Mary’s behalf since she was not a tortfeasor and not a real party in interest. Encompass did have an obligation to pay a claim arising from the actions of Jordin, who was also its insured, but Estep failed to initiate an action against Jordin’s estate, the proper party, within the applicable limitations period. As a result, the trial court correctly dismissed Estep’s amended complaint against Encompass as time-barred.

For the reasons discussed above, Appeal No. 2012-CA-000943-MR is hereby dismissed with respect to Sheriff M. Peters, administrator of the estate of Jordin Schmidt. We affirm the orders of the Rockcastle Circuit Court in all other respects.

ALL CONCUR.

ENTERED: June 13, 2014

/s/ Laurance B. VanMeter  
JUDGE, COURT OF APPEALS

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<sup>4</sup> Kentucky Revised Statutes.

BRIEF FOR APPELLANT:

Michael J. Curtis  
Ashland, Kentucky

BRIEF FOR APPELLEE  
ESTATE OF JORDIN SCHMIDT:

Ernest H. Jones, II  
Jamie Wilhite Dittert  
Lexington, Kentucky

BRIEF FOR APPELLEE  
ENCOMPASS INDEMNITY  
COMPANY, INC.:

Mindy G. Barfield  
Sunni Harris  
Lexington, Kentucky