

RENDERED: JANUARY 8, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001861-MR

GRACIE DUVALL

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-00225 & 05-CI-00978

PHILIP C. TROVER, M.D. AND
BAPTIST HEALTH MADISONVILLE,
INC., F/K/A THE TROVER CLINIC
FOUNDATION, INC.

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Gracie Duvall appeals the September 28, 2012 order of the Hopkins Circuit Court granting summary judgment against her and in favor of appellees, Dr. Philip Trover and Baptist Health Madisonville f/k/a Trover Clinic

Foundation,¹ and dismissing Duvall's claims of medical negligence, outrage/intentional infliction of emotional distress (IIED), negligent infliction of emotional distress, fraud, negligent misrepresentation, and punitive damages. For the following reasons, we dismiss this appeal.

A proposed class action lawsuit was filed against Dr. Trover and the Foundation on March 17, 2004. Gracie Duvall joined the proposed class as a plaintiff in early 2005. The circuit court ultimately denied class certification and more than four dozen individual cases were ordered to be tried separately with joint discovery permitted.

The parties endured several years of litigation from 2005 through 2012. On March 3, 2012, Duvall died. When Dr. Trover and the Foundation moved for summary judgment in the autumn, Duvall's counsel responded, but made no mention of Duvall's passing. No party substituted for the decedent in the circuit court and there was no revival of the action prior to the circuit court's ruling. Nevertheless, on September 28, 2012, the Hopkins Circuit Court entered an order granting summary judgment in favor of Dr. Trover and the Foundation and dismissing all of Duvall's claims with prejudice. Notice of appeal to this Court was filed with the circuit court on October 23, 2012. Both the judgment and the

¹ The Trover Clinic Foundation, Inc.'s name was changed effective November 1, 2012, and is now known as Baptist Health Madisonville, Inc., f/k/a Trover Clinic Foundation, Inc., d/b/a Baptist Health Madisonville. In their briefs to this Court, the parties continue to refer to what is now Baptist Health Madisonville as the Trover Clinic Foundation. Therefore, for purposes of clarity, this Court will also refer to appellee Baptist Health Madisonville as the Trover Foundation or the Foundation.

notice of appeal identified the deceased Gracie Duvall as the plaintiff, and not her estate, as the party against whom judgment was entered.

As we explain below, we are compelled to dismiss this case because the appeal was taken from a void judgment, “made in the name of a dead [wo]man, a mere non existence” *Bowman v. Violet*, 20 Ky. 350, 351 (1827). The circuit court has no jurisdiction over the dead and a notice of appeal from a judgment entered in favor of the dead is ineffective to transfer jurisdiction of the matter to this Court. *See City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990) (“[N]otice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court [placing] the named parties in the jurisdiction of the appellate court.”).

The record indicates that, sometime after entry of the judgment and the notice of appeal, the attorneys involved recognized their procedural problem. On December 22, 2012, the Hopkins District Court admitted Duvall’s will to probate and appointed Jerry Duvall as the personal representative of Gracie Duvall’s estate. On March 1, 2013, just within the limitation set by KRS² 395.278, the parties tendered to the circuit court an agreed order substituting the personal representative. The court entered that order on March 4, 2013.

As noted, however, an appeal had already been taken to this Court. Consequently, the parties attempted to revive the appeal by moving this Court to

² Kentucky Revised Statutes

substitute the personal representative. Although this Court, on July 19, 2013, entered an interlocutory order granting the substitution, neither the motion nor the order was adequate to revive the appeal.

“At common law, if one of the parties died, all subsequent proceedings had without revivor were void.” *Davis v. Catlettsburg-Kenova-Ceredo Water Co.*, 136 Ky. 66, 123 S.W. 335, 336 (1909). Therefore, all proceedings in the circuit court (and this Court) subsequent to Gracie Duvall’s death on March 3, 2012, and until revival of the action in circuit court on March 4, 2013, are void – including the judgment entered September 28, 2012, and the notice of appeal filed October 23, 2012.

When a party to a lawsuit dies, the action is abated unless and until revival of the action by substituting the decedent’s personal representative for the decedent. *Hardin County v. Wilkerson*, 255 S.W.3d 923, 926 (Ky. 2008); *Frank v. Estate of Enderle*, 253 S.W.3d 570, 575 (Ky. App. 2008). Quoting our highest court, “[t]he rule is that . . . when [a party] in an action dies, the action abates as to him and the court is without jurisdiction as to him until the action is revived and his representatives are brought before the court.” *Murphy v. Blackburn*, 229 Ky. 109, 16 S.W. 2d 771, 772 (1929). “A personal representative does not automatically succeed to the decedent’s status as a litigant . . . but is permitted by the statutes to raise it from limbo and become a party to it.” *Daniel v. Fourth & Market, Inc.*, 445 S.W.2d 699, 701 (Ky. 1968).

The net effect of these facts and this law is that an appeal was taken from a void judgment. Although Duvall's action did not cease with her death, it was necessary for her representative to file a motion for substitution to revive her claims prior to submission of her case for judgment because there was no other surviving, original plaintiff in her case. CR³ 25.01; KRS 411.140. From the moment of Duvall's death, her claim could not proceed until revived by her personal representative. That occurred on March 4, 2013.

The notice of appeal filed in October 2012 in the name of a person who died before the judgment was entered did not transfer jurisdiction of the case to this Court. The circuit court never lost jurisdiction. Having authorized revival of the case, it should proceed as though nothing occurred between the date of Duvall's death and the date of revival.

For these reasons, this appeal is hereby ordered dismissed.

ALL CONCUR.

ENTERED: January 8, 2015

/s/ Glenn E. Acree
CHIEF JUDGE, COURT OF APPEALS

³ Kentucky Rules of Civil Procedure

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