

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000474-MR

JIM BURNHAM, AS GUARDIAN
AND CONSERVATOR FOR AND
ON BEHALF OF MARTHA BURNHAM,
AND JIM BURNHAM, INDIVIDUALLY,
AND JIM BURNHAM, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF MARTHA BURNHAM

APPELLANTS

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 01-CI-01149

RADIOLOGY GROUP OF PADUCAH,
P.S.C., AND COLLINS DALE BROWN, M.D.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

STUMBO, JUDGE: Jim Burnham, individually and as the representative of the estate of his wife, Martha Burnham, appeals an order of the McCracken Circuit Court dismissing his cause of action for failing to revive the action after Martha Burnham's death. Mr. Burnham argues that he did not need to revive the cause of action or, in the alternative, that the Radiology Group of Paducah and Dr. Collins Dale Brown (collectively hereinafter Appellees) waived the defense of failure to revive the claim. We find the trial court erred in dismissing the claim and reverse the order and remand this case for further proceedings.

The underlying action was initiated in November 2001, by Mrs. Burnham, in her individual capacity, against Appellees and Western Baptist Hospital alleging medical malpractice in the delay of diagnosing her breast cancer. Dr. Brown was the radiologist who read her mammogram, the Radiology Group employed Dr. Brown, and Western Baptist Hospital was where the mammogram was performed. The trial court granted summary judgment in favor of Western Baptist Hospital on the grounds that it was not the employer of Dr. Brown.

During the discovery phase of the case, on October 8, 2002, Mrs. Burnham suffered a ruptured brain aneurysm. The effects of the aneurysm left her incompetent to proceed in the case. Mr. Burnham was appointed her guardian. He moved the trial court to be substituted as plaintiff and guardian of Mrs. Burnham in lieu of Mrs. Burnham herself. This motion was granted on May 7, 2004.

On November 12, 2004, Mrs. Burnham died as a result of her breast cancer. Her death was first identified in pleadings on November 30, 2004. On

July 11, 2005, Mr. Burnham was appointed executor of his wife's estate by the Hickman County Probate Court. No formal motion was made to substitute Mr. Burnham as executor, as opposed to guardian, in the medical malpractice case.

In December 2006, Mr. Burnham filed his witness and exhibit lists, identifying himself as the personal representative of the estate of Mrs. Burnham. All subsequent pleadings filed in the case identified Mr. Burnham as the personal representative of Mrs. Burnham's estate.

Also during this time, Dr. Brown died. Mr. Burnham did not substitute Dr. Brown's estate as a party to the case. The Radiology Group moved to dismiss Dr. Brown from the case for failure to revive the case in the name of his personal representative.¹ The claims against Dr. Brown were dismissed, leaving the Radiology Group as the only defendant.

Between November 12, 2005, the one-year anniversary of Mrs. Burnham's death, and February 16, 2009, the date the case was ultimately set for trial, the parties engaged in extensive discovery and trial preparation. For example, Mr. Burnham disclosed three experts, who were all deposed. Also, the defense disclosed four experts, who were all deposed. Additionally, the case was set for trial on three occasions, mediated unsuccessfully once, and the parties continued to have settlement discussions.

Shortly before trial, defense counsel discovered Mr. Burnham did not formally substitute himself as the personal representative of Mrs. Burnham's estate

¹ An argument identical to the one at the center of this appeal.

as required by Kentucky Civil Rule (CR) 25.01, Kentucky Revised Statute (KRS) 411.140, and KRS 395.278. The Radiology Group moved to dismiss the case. The motion was granted and this appeal followed.

CR 25.01(1) states:

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.

KRS 411.140 states:

No right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring or injured, except actions for slander, libel, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury. For any other injury an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract.

Finally, KRS 395.278 states that “[a]n application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party.” The trial court dismissed the case because Mr.

Burnham did not seek to revive the case after the death of his wife and more than one year had passed since her death. KRS 395.278 is a statute of limitation that requires the personal representative to revive the case in his or her name within one year of the death of a party.

Mr. Burnham's first argument is that he was the party in interest in the case and therefore did not need to revive the case. He argues that when Mrs. Burnham became incapacitated and he moved to be substituted as a party, he became the party in interest in the case. Also, he argues that only when the party in interest dies does CR 25.01, KRS 411.140, and KRS 395.278 apply. In essence, he argues that no "party" died in the case.

The Radiology Group argues that Mrs. Burnham has always been the party in interest and Mr. Burnham's status as guardian does not change that. Further, the Radiology Group argues that the reviving of the case in the name of the personal representative is mandatory.

We agree with the Radiology Group that a case must be revived or brought in the name of the personal representative of the estate. It is mandatory. Case law to that effect is very clear. *See Hammons v. Tremco, Inc.*, 887 S.W.2d 336 (Ky. 1994); *Snyder v. Snyder*, 769 S.W.2d 70 (Ky. App. 1989); and *Daniel v. Fourth & Market, Inc.*, 445 S.W.2d 699 (Ky. 1968). We also hold that Mr. Burnham should have revived the case within one year of Mrs. Burnham's death. He was acting on her behalf when he took over the case and any malpractice award would have gone to her. Further, "[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 against the decedent unless the action is revived." *Snyder* at 72. Since Mrs. Burnham was the party in interest, CR 25.01, KRS 411.140, and KRS 395.278 applied upon her death.

However, we agree with Mr. Burnham that the Radiology Group waived the revival requirement and find that the case should not have been dismissed. *Hammons, supra*, is dispositive of this issue.

As set forth in KRS 395.278, the period during which an action may be revived by the successor or personal representative of a deceased party is limited to one year. This provision operates as a statute of limitations; therefore, the period set forth in the statute is mandatory and not subject to enlargement. *Mitchell v. Money*, Ky. App., 602 S.W.2d 687 (1980). If a motion to revive the action and to substitute the successor or personal representative of the deceased party is not made within the prescribed time, the action may be dismissed as to the deceased party. CR 25.01(1). The word "may," as it appears in CR 25.01(1) does not allow for discretionary dismissal but provides for an exception in those instances in which the right to have the action dismissed has been lost, such as by waiver, estoppel, or consent. *Snyder v. Snyder*, Ky. App., 769 S.W.2d 70 (1989). Therefore, when considered together, KRS 395.278 and CR 25.01(1) require that when a plaintiff dies any action pending on the part of the deceased plaintiff must be revived by the decedent's successor or personal representative within one year, and the successor or personal representative must be substituted as the real party in interest. Although an opposing party may, by its action, lose the right to require the timely revival of an action, a party cannot, by such action, confer personal jurisdiction over a successor or personal representative who has not appeared or been substituted as a party. *Mitchell v. Money, supra*. (Emphasis added).

Hammons at 338.

Here, after the expiration of the revival statute of limitations, the Radiology Group continued to actively litigate the case. After the one year statute of limitation expired, the parties continued with the case for three and a half years. During this period, eight different expert witnesses were deposed, two pre-trial conferences were held, there was an unsuccessful mediation, a motion to dismiss for failure to revive the case against Dr. Brown was heard, a jury panel was assembled, and the Radiology Group offered \$250,000 to settle the case. There were also various other appearances before the court.

As stated in *Hammons*, revival of a case is mandatory, but the right to have the action dismissed can be lost by “waiver, estoppel, or consent.” *Id.* We therefore hold that the Radiology Group waived its right to have the case dismissed by actively litigating the case for over three years. Further, we find that there will be no prejudice to the Radiology Group by allowing the case to go forward. There is almost no difference in Mr. Burnham as a guardian and as a personal representative of an estate. As a guardian, his duties were to Mrs. Burnham. As a personal representative, his duties are to Mrs. Burnham’s estate.

Also, Mr. Burnham has been a part of this case since May 7, 2004, and has subjected himself to the trial court’s jurisdiction by appearing on behalf of Mrs. Burnham and her estate.

For the foregoing reasons, we reverse and remand this case for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANTS:

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BRIEF FOR APPELLEE,
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ORAL ARGUMENT FOR
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