

RENDERED: December 29, 2000; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002044-MR  
AND  
NO. 1998-CA-002166-MR

GLENN HOLBROOK

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT  
HONORABLE DANNY P. CAUDILL, SPECIAL JUDGE  
ACTION NO. 94-CI-00076

LUTHER GREEN CARPENTER

APPELLEE

OPINION  
REVERSING AND REMANDING WITH DIRECTIONS  
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BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Glenn Holbrook has filed two appeals that have been consolidated. Since the appellee, Luther Green Carpenter is deceased and no action was taken to revive the action against him, we must reverse the judgment and remand with directions to dismiss the complaint and counterclaim.

This case concerns a dispute over lease payments and the termination of the lease. Holbrook and Carpenter entered

into a lease agreement on September 29, 1976, whereby Holbrook<sup>1</sup> leased two lots located near the City of Salyersville, Kentucky, from Carpenter for a period of five years for a monthly rent of \$100.00. The lease was renewable for four additional five-year periods with the monthly rent increasing to \$125.00, \$150.00, \$175.00 and \$200.00 per month for each five-year period respectively.<sup>2</sup>

On April 20, 1994, Carpenter filed a complaint in the Magoffin Circuit Court against Holbrook alleging that Holbrook had defaulted on the lease by failing to make certain payments. Carpenter demanded a judgment for \$3,350.00, cancellation of the lease and attorney's fees. On June 23, 1994, Holbrook filed an answer and a counterclaim. Holbrook denied failing to pay his rent and claimed the lease had been wrongfully terminated. Holbrook sought damages for "lost profits in his business and damages in an amount equal to the difference in the lease payment of \$175.00 per month and the fair market rental value of that property or similar property."

On June 15, 1995, the trial court ordered the matter submitted to a "Special Commissioner to hear evidence and decide on the facts and issues of this case." The case was tried by depositions and an agreed order was entered on April 4, 1996,

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<sup>1</sup>The actual lessee was Park G.H.J. Enterprises, but it is agreed that Holbrook is the successor in interest.

<sup>2</sup>Both parties have failed to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv) by failing to support their arguments "with ample supportive references to the record."

submitting the case to the Special Commissioner for a recommendation. On May 1, 1996, the Special Commissioner filed his recommendations and recommended the following relevant findings of fact:

4. Although there is conflicting evidence, the undersigned finds that from the records submitted there was due for calendar year 1989 the sum of \$1,800.00 upon which there was paid \$750.00; for calendar year 1990 there was due \$1,800.00 upon which there was paid \$1,350.00; for calendar year 1991 there was due the sum of \$1,900.00 upon which there was paid \$2,300.00; for calendar year 1992 there was due the sum of \$2,100.00 upon which there was paid \$1,750.00; and for the first three months of 1993 there was due the sum of \$525.00 upon which there was paid \$700.00. As this lease was terminated by Plaintiff, any applicable rental due for the month of April is deemed to be waived.

The total deficiency from the foregoing is \$1,275.00.

5. Defendant presented no competent evidence in support of his counterclaim which would justify and offset from the amount of the above deficiency. The only evidence presented was from a "sales associate" not a competent real estate appraiser.

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#### RECOMMENDED JUDGMENT

Based upon the foregoing findings and conclusions, the undersigned respectfully recommends entry of judgment in favor of Plaintiff for the sum of \$1,275.00; that the Defendant's counterclaim be dismissed and held for naught; that the Plaintiff also recover from Defendant his costs herein expended, including the sum of \$320.00 paid as Commissioner's fees.

Holbrook filed exceptions to these findings on May 2, 1996.

On January 23, 1997, the Honorable John Robert Morgan disqualified himself as judge on the case and on February 6, 1997, the Honorable Danny P. Caudill was appointed special judge. On July 30, 1998, Special Judge Caudill entered an order overruling Holbrook's exceptions. Holbrook filed a notice of appeal on August 12, 1998, and the case was designated in the Court of Appeals as case number 98-CA-002044-MR. On August 15, 1998, Special Judge Caudill entered another order whereby "the recommended judgment filed by the . . . Special Commissioner . . . is hereby adopted in full by this court." This second order stated that it was "a final and appealable order and there is no just reason for the delay of its entry." On August 26, 1998, Holbrook filed a second notice of appeal that was designated in the Court of Appeals as case number 98-CA-002166-MR. This Court in an order entered on September 23, 1998, consolidated the two appeals.

In his brief, Holbrook has failed to comply with CR 76.12(4)(c)(iv) since he has failed to set out each of his arguments separately and he has failed to make appropriate references to the record to show where the issue was properly preserved for appellate review. Holbrook basically makes three arguments. He claims the judgment for \$1,275.00 was based on hearsay evidence consisting of Carpenter's business ledger which did not meet the business records exception under KRE<sup>3</sup> 803(6) and

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<sup>3</sup>Kentucky Rules of Evidence.

that generally the trial court's findings were not supported by substantial evidence of record. Holbrook also claims that the trial court erred in denying his counterclaim for damages since Holbrook contends that his "expert's" testimony should have been accepted by the trial court. For his final argument, Holbrook claims "[t]his action should have been dismissed by the Trial Court due to the Appellee[']s failure to join an indispensable party to this action in accordance with Civil Rule 12.02 and Civil Rule 19 . . . [T]he Appellant states that Luther Green Carpenter is now deceased and the Appellee failed to amend the pleadings to name the Estate as the proper party to this action by and through the Executor or Administrator."

In his brief, the attorney who purports to represent the decedent, Carpenter, argues that the ledger sheets were properly admitted as evidence as business records and that the findings by the trial court were supported by substantial evidence and therefore not clearly erroneous. We agree. The Carpenter brief also contends that Holbrook's counterclaim was properly denied because the trial court was within its discretion to find the evidence presented by Holbrook's "expert" witness to not be competent. We agree.

However, the most troublesome aspect of this case concerns the death of Carpenter. The only response to Holbrook's argument concerning "failure to join an indispensable party" is in Carpenter's brief as follows:

The Defendant[']s failure to argue indispensable party until after the proof was then [sic] and after the Judgment was issued by the Special Commissioner should constitute waiver of this argument. In any event, the lease subject of the action [sic] was properly terminated due to failure of Appellant, Glenn Holbrook[, ] to pay rent and therefore the counterclaim of Appellant, Glenn Holbrook[, ] was properly dismissed and this dismissal should be upheld by this court.

The parties are incorrect in their references to "indispensable party." The issue instead involves the failure to revive the action. KRS 395.278 provides:

An 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.

CR 25.01(1) provides:

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.

Our Supreme Court in Hammons v. Tremco, Inc.,<sup>4</sup> held that the one-year period set forth in KRS 395.278 "operates as a

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<sup>4</sup>Ky., 887 S.W.2d 336 (1994).

statute of limitations; therefore, the period set forth in the statute is mandatory and not subject to enlargement.”<sup>5</sup>

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. Likewise, jurisdiction could not be conferred over dependents who had not asserted their rights to survivors’ benefits and moved to be substituted as parties to the action.<sup>6</sup>

Thus, Carpenter’s argument that Holbrook waived his objection to the revival of the action concerns whether any attempt by the estate to revive the action should be granted even though it would not now be timely. As a matter of law, we fail to see anything in the record that would support a finding by the trial

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<sup>5</sup>Hammons, supra at 338 (citing Mitchell v. Money, Ky.App., 602 S.W.2d 687 (1980)).

<sup>6</sup>Hammons, supra.

court on remand that Holbrook had waived the one-year requirement, and Carpenter's brief fails to identify any such grounds.<sup>7</sup>

Accordingly, the judgment of the Magoffin Circuit Court is reversed and this matter is remanded with directions for the circuit court to dismiss the complaint and the counterclaim.

ALL CONCUR.

BRIEF FOR APPELLANT:

Teddy L. Flynt  
Salyersville, KY

BRIEF FOR APPELLEE:

Gordon B. Long  
Salyersville, KY

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<sup>7</sup>See Daniel v. Fourth and Market, Inc., Ky., 445 S.W.2d 699, 701 (1968) (Fact that defendants took depositions did not operate as waiver or estop defendants from asserting right to have action dismissed for failure to timely revive).