

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000373-MR

MICHAEL WATSON;
CRYSTAL L. WATSON; AND
SANDRA KAY BAILEY,
INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE
OF WAYNE D. PURCELL AND
RANDALL WAYNE PURCELL

APPELLANTS

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 99-CI-00003

KENTUCKY FARM BUREAU
INSURANCE COMPANY

APPELLEE

AND: NO. 2000-CA-000937-MR

MICHAEL WATSON AND
CRYSTAL WATSON

APPELLANTS

v. APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 97-CI-00073

WAYNE D. PURCELL

APPELLEE

OPINION AND ORDER DISMISSING CONSOLIDATED APPEALS
** **

BEFORE: BARBER, GUIDUGLI AND HUDDLESTON, JUDGES.

GUIDUGLI, JUDGE. In these consolidated appeals, Michael and Crystal Watson (the Watsons) appeal from several orders of the Fleming Circuit Court which granted summary judgment in favor of Kentucky Farm Bureau Mutual Insurance Company (Farm Bureau) and dismissed their complaint against Wayne D. Purcell (Purcell). We hereby order that these appeals be dismissed.

Crystal Watson (Crystal), Sandra Bailey (Sandra) and Randal Wayne Purcell (Randal) are the children of Wayne Purcell. On May 10, 1996, Crystal was visiting Purcell at his home when she slipped and fell on the front porch, injuring her leg. Purcell maintained a policy of homeowner's insurance with Farm Bureau which was in full force and effect at the time of the accident. The Watsons filed suit against Purcell on May 9, 1997, seeking to recover damages for Crystal's injuries, and the case was assigned Case No. 97-CI-00073.

Purcell died on July 16, 1997, and Sandra was appointed Executrix of his estate on August 7, 1997. The Watsons filed a proof of claim against Purcell's estate referencing their action against Purcell on December 16, 1997. The claim was never denied or disallowed by Sandra. Purcell's estate was closed and Sandra was discharged by order of the Fleming District Court dated October 22, 1998.

On November 24, 1998, counsel for Purcell filed a motion seeking dismissal of the Watsons' complaint on the ground that they had failed to revive the action against the personal representative of the state within one year from the date of Purcell's death as required by KRS 395.278. In response to the

motion, the Watsons argued that they properly preserved their claim by filing the proof of claim in Purcell's estate. The Watsons further claimed that dismissal was improper because the heirs and the Executrix of Purcell's estate had agreed to waive the statute of limitations defense pursuant to KRS 396.065. In support of this argument, the Watsons attached an un-notarized, undated affidavit signed by Crystal, Randal, and Sandra "individually and as administrator" which stated:

1. That they are successors in interest to the Estate of Wayne D. Purcell and that Sandra Bailey is the administrator of said estate.
2. That the estate is solvent.
3. That the undersigned waive all defenses of limitations that the Estate of Wayne Purcell may have in the abovestyled action.

In light of the filing of the affidavit attempting to waive the limitations defense, Farm Bureau filed a petition for declaratory judgment against the Watsons, Sandra (both individually and in her capacity as Executrix of Purcell's estate), Randal, and the Estate on January 11, 1999. In its petition, Farm Bureau alleged:

that it has complied with all requirements and duties set forth in its homeowner's policy issued to its insured, Wayne D. Purcell, and has established that its insured is not legally liable for any damages because of the failure of [the Watsons] to revive their cause of action against its insured. It is the position of the plaintiff that the waiver relied on by the [Watsons] cannot provide a basis to impose personal liability coverage after a complete defense has been established.

Farm Bureau requested a judgment declaring 1) that it was not liable under the homeowners' policy because the Estate had a complete defense to the Watsons' claim; and 2) that it did not owe the Estate a duty to defend against the Watsons' claim.

Farm Bureau filed a motion seeking summary judgment on its petition, arguing that the Watsons failed to timely review their claim against the Estate and that the alleged waiver of defenses made pursuant to KRS 395.78 was invalid. In their response to the motion for summary judgment, Randal and Sandra admitted that "there has not been a valid waiver of KRS 395.278 that would allow the waiver of the assertion of that limitation period," but continued to deny that summary judgment was proper. An examination of the record shows that the Watsons did not respond to Farm Bureau's motion for summary judgment.

Randal and Sandra filed a motion to dismiss which was denied by order of the trial court entered December 13, 1999. On the same day, the trial court entered a separate order granting Farm Bureau's motion for summary judgment. In response to a motion by the Watsons, Sandra, and Randal requesting "that the Court make specific and adequate findings of fact pursuant to the judgment entered by the Court on the 13th day of December, 1999," the trial court entered a second order and judgment on January 18, 2000, which stated:

1. There is no dispute that the cause of action asserted by the [Watsons] against Wayne Purcell as set forth in Fleming Circuit Court Civil Action Filed No. 97-CI-00073, was not revived within the one year time period required by KRS 395.278. The law clearly recognizes that this limitation is mandatory and not discretionary. (Mitchell v. Money,

Ky. App., 606 S.W.2d 687 (1980). The defendants initially attempted to waive the statute of limitations and permit [the Watsons] to proceed with their claim against the Estate of Wayne D. Purcell. The Waiver tendered by the defendants though is not a valid waiver as KRS 396.065 requires the personal representative of the Estate to waive the limitations. In this matter, the personal representative was discharged on October 22, 1998, by Order of the Fleming District Court, and thus the waiver is not valid. The defendants in this action have now admitted that the waiver was not valid.

It is the opinion of this Court that even with a waiver executed by a personal representative and all successors of the decedent as required by the statute (KRS 396.065), that such a waiver still would not apply in this situation. The statute clearly refers to the waiver of limitations that would be applicable at the time of the decedent's death. Such is not the case here, as the limitations are relevant to reviving all actions subsequent to the death of Wayne D. Purcell. The [Watsons] having failed to revive their action within the mandatory time period, it is the opinion of this Court that the action against Wayne D. Purcell in the Fleming Circuit Court, Civil Action File No. 97-CI-00073 must be dismissed.

2. It is also the opinion of this Court that the facts in this case, even assuming a valid waiver of limitations defense, would still not allow [the Watsons] to recover insurance benefits under the Plaintiff's [sic] homeowner's policy that was in effect at the time of the Plaintiff's [sic] injuries. The policy provisions as raised by the Plaintiff in its Memorandum of Law are well taken. The liability coverage set forth in the homeowner's policy clearly requires that the insured must be legally liable. Under the facts in this matter, the Estate of Wayne D. Purcell cannot be legally compelled to pay, as a complete defense is available. Under these facts, the liability coverage would not be available, and clearly the Estate could not agree or assume liability, as such actions would preclude coverage under the policy.

WHEREFORE, the Court ORDERS that the claim of [the Watsons] in Civil Action 97-CI-00073, will be dismissed and an appropriate Order will be issued in that action consistent with this opinion. It is further ORDERED that the homeowner's policy issued by [Farm Bureau] which was in effect and insured Wayne D. Purcell at the time of the incident referred to in 97-CI-00073 will not provide liability coverage, nor is [Farm Bureau] required to provide a defense as there is a complete defense based on the statute of limitations as set forth in KRS 395.278.

Following entry of the January 2000 order in 99-CI-00003, counsel for the Estate filed a motion in 97-CI-00073 seeking "an Order of Dismissal consistent with the Declaratory Judgment action[.]" The trial court granted the motion by order entered March 10, 2000. These consolidated appeals followed.

Before addressing the merits of the Watsons' appeal, there are several deficiencies in the Watsons' appellate brief which must be addressed. The Watsons filed an appellate brief with this Court on September 11, 2000. The brief does not contain a statement of points and authorities as required by CR 76.12(c)(ii). As grounds for this omission, the brief recites that the statement of points and authorities was "[o]mitted pursuant to CR 76.12(4)(f). Additionally throughout the body of the brief, the Watsons cite to several cases by name only and do not provide a citation to the cases as required by CR 76.12(4)(g). There is no explanation as to why citations to the cases were not provided.

Under CR 76.12(c)(ii), an appellant is required to include a statement of points and authorities in the appellate brief which sets forth "the appellant's contentions with respect

to each issue of law on which he relies for a reversal, listing under each the authorities cited on that point and the respective pages of the brief on which the argument appears and on which the authorities are cited." The only exception to this requirement is CR 76.12(4)(f), which provides that "[t]he requirements of this Rule with respect to a "STATEMENT OF POINTS AND AUTHORITIES" shall not apply to any brief of five pages or less." [Emphasis in original.] This provision does not excuse the Watsons' failure to comply with CR 76.12(c)(ii) as the statement of facts and argument portion of the Watsons' brief is twelve pages long. CR 76.12(4)(g) provides the citation format which is to be used to cite cases in an appellate brief. Without proper citation, the Court would be required to waste valuable time tracking down the cases cited by parties to an appeal, and this we will not do.

Pursuant to CR 76.12(8)(a), an appellate brief "may be stricken for failure to comply with any substantial requirement of this Rule 76.12." Given the Watsons' misrepresentation as to the length of their appellate brief and noncompliance with CR 76.12(8)(a), we find that dismissal of the Watsons' appeal is warranted.

Even if we were to address the merit of the Watsons' appeal, we would be inclined to affirm the orders of the trial court. Under the mandatory language of KRS 395.278, "an application to revive a cause of action against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party." It is abundantly clear from the record that this was not done.

Furthermore, Randal and Sandra admitted in 99-CI-00003 that the attempted waiver of the statute of limitations was invalid.

We also disagree with the Watsons' argument that the doctrine of estoppel requires a different result. We agree with Farm Bureau that Gailor v. Alsabi, Ky., 990 S.W.2d 597 (1999), on which the Watsons rely, actually supports Farm Bureau's position. As Farm Bureau states in its brief on appeal:

While the [Watsons] make repeated reference to estoppel, they fail to establish a legitimate basis for any such claim as to Farm Bureau. In support of their argument they rely on the decision of [Gailor]. A review of that case shows that not only does the Gailor decision fail to support the [Watsons'] argument, but it actually supports Farm Bureau's position in regard to a claim of estoppel. First, it should be noted that in Gailor the party seeking estoppel based its argument on communications between the insurance carrier and counsel in which the insurance company representative failed to inform counsel of the death of the insured. The representative continued to inquire regarding settlement of the claim after the death of its insured and still did not inform counsel that its insured had passed away. Thus, the claimant and claimant's counsel were unaware of the death of the insured.

In this case obviously the plaintiff in the underlying action, the appellant, Crystal Watson, was aware that the defendant had died since the defendant was her father and the executor [sic] of the estate was her sister. Thus, the plaintiff and counsel were fully aware of this fact and thus the argument relied on in Gailor is simply not available to the appellants in this case. It should also be noted that even under those facts, the Gailor decision rejected a claim of estoppel.

. . . .

In this case the plaintiff in her tort claim, and her attorney, were well aware of all of the relevant facts. As in the Gailor case,

there is nothing in the record that would support a claim of estoppel against Farm Bureau.

We are also unpersuaded by the Watsons' argument that Purcell's Estate is estopped from asserting the Watsons' failure to timely revive the action as a defense. According to the Watsons, the Estate's failure to either admit or disallow the proof of claim filed in the Estate somehow estops it from asserting the revival defense or from denying the validity of the claim. Having examined the relative statutes, we believe that the Estate's failure to admit or disallow the claim has no effect on the Watsons' civil suit. At best, it only allows for a proceeding against one or more of the several distributees under KRS 396.195. The Watsons' argument that the Estate's failure to admit or disallow the claim somehow makes Farm Bureau liable is without merit as Farm Bureau obviously did not have a hand in selecting the attorney who handled the probate of Purcell's estate.

ALL CONCUR.

JUDGE, COURT OF APPEALS

ENTERED: /s/ Daniel T. Guidugli

BRIEF FOR APPELLANTS:

Michelle Jackson-Rigg
Maysville, KY

BRIEF FOR APPELLEE, KENTUCKY
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