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 NOT TO BE PUBLISHED

Commonwealth of Kentucky  
Court of Appeals

NO. 2007-CA-000646-MR

MILDRED JONES AND JAMES JONES

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE MITCH PERRY, JUDGE  
ACTION NO. 04-CI-006125

BAPTIST HEALTH CARE SYSTEM, INC.,  
D/B/A BAPTIST HOSPITAL EAST AND  
JOSEPH WARNER, JR., M.D.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

NICKELL, JUDGE: Mildred Jones (“Mrs. Jones”) and her husband, James Jones (“Mr. Jones”) (collectively “Joneses”) have appealed from the Jefferson Circuit Court’s dismissal of their claims for medical negligence and loss of consortium

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (“KRS”) 21.580.

against Baptist Health Care System, Inc., d/b/a Baptist Hospital East (“Baptist East”) and Dr. Joseph Werner, Jr. (“Dr. Werner”), for failing to revive the action within one year of Mrs. Jones’ death. We affirm.

On July 22, 2004, the Joneses filed a complaint for medical negligence and loss of consortium resulting from a surgical sponge being left inside Mrs. Jones following an operation performed by Dr. Werner at Baptist East on July 26, 2003. Mrs. Jones unexpectedly passed away on December 22, 2005. Following her death, an estate was opened in the Jefferson Probate Court, and Mr. Jones was named a personal representative for the estate in May 2006. In September 2006, counsel for the Joneses was informed that Mr. Jones was exhibiting peculiar behavior and his competency was questionable.

Pursuant to the direction of the probate court, Mr. Jones was subsequently evaluated and found to be incompetent to serve as personal representative of the estate. A formal, written opinion to that effect was rendered by Dr. George Bensenhaver (“Dr. Bensenhaver”) on January 15, 2007. On January 17, 2007, a petition was filed in the probate court to remove Mr. Jones as personal representative and substitute his stepdaughter, Mary Jo Erhard (“Erhard”), in his stead. The petition was granted on January 25, 2007.

In the interim, however, on January 9, 2007, and January 11, 2007, respectively, Dr. Werner and Baptist East filed separate motions to dismiss the suit

based on the Joneses failure to revive the action within one year of Mrs. Jones' death as mandated by KRS<sup>2</sup> 395.278. On January 18, 2007, the Joneses filed a response to the motions to dismiss, accompanied by a motion to revive and substitute parties.<sup>3</sup> They argued the time limit set forth in KRS 395.278 should be equitably tolled because of Mr. Jones' disability, and alternatively, that Baptist East and Dr. Werner should be equitably estopped from seeking dismissal because counsel for Baptist East and Dr. Werner allegedly agreed to the late filing of the motion for revival and substitution.<sup>4</sup> Baptist East and Dr. Werner filed reply memoranda in support of their motions to dismiss, and both denied any conversations occurred regarding the untimely filing of the motion to revive.

The trial court heard oral arguments on all pending motions on February 16, 2007. On February 22, 2007, the trial court entered an order granting the motions to dismiss, specifically finding Mr. Jones' disability did not justify an equitable tolling of the time requirements of KRS 395.278, and the facts presented did not justify equitable estoppel of the dismissal. The Jones' subsequent motion to alter, amend or vacate was denied, and this appeal followed.

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<sup>2</sup> Kentucky Revised Statutes.

<sup>3</sup> The Joneses also filed a motion to order mediation of the matter. However, no argument is advanced on appeal regarding the denial of this motion, and we therefore deem the Joneses have waived further discussion thereof.

<sup>4</sup> Before the trial court, the Joneses argued Dr. Werner should also be estopped from seeking dismissal on the same grounds as Baptist East. However, no argument is advanced on appeal regarding this alleged estoppel. We therefore deem the Joneses to have waived such argument and will not discuss it further.

Two issues are presented for determination in this appeal. First, whether the trial court erred in finding the doctrine of equitable tolling does not apply to the time limitation set forth in KRS 395.278, and second, whether the trial court erred in finding Baptist East was not equitably estopped from seeking dismissal. After a careful review of the record and the pertinent law, we believe no error occurred.

When a party dies during the pendency of an action in a Kentucky court, the matter is abated unless and until it is revived by substituting the personal representative of the deceased. CR<sup>5</sup> 25.01(1).<sup>6</sup> Further, CR 25.01 must be read in conjunction with KRS 395.278, which directs that an “application to revive an action shall be made within one (1) year after the death of a deceased party.” In *Snyder v. Snyder*, 769 S.W.2d 70, 72 (Ky.App. 1989), we held that KRS 398.278 was “a statute of limitation, rather than a statute relating to pleading, practice or

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<sup>5</sup> Kentucky Rules of Civil Procedure.

<sup>6</sup> 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.

procedure, and the time limit within this section is mandatory and not discretionary, thereby preventing a party or the court from extending such time. . . .” Further, as was correctly noted by the trial court, “the rule is that the action must be brought within one year from the date of the death and not one year from the appointment of an administrator.” *New Farmer’s National Bank v. Thomas*, 411 S.W.2d 672, 674 (Ky.App. 1967). Therefore, if an action is not revived within one year of a litigant’s death and the personal representative substituted as a real party in interest, the suit must be dismissed.

Whether a reviver has been timely filed is a matter of law and we thus review a trial court’s order *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474 (Ky.App. 1998). Here, Mrs. Jones died on December 22, 2005, thus making the deadline for filing a motion for reviver December 22, 2006. Although Mr. Jones had been appointed as personal representative of the estate in May 2006, no motion to revive the case was filed until eight months later on January 18, 2007, which was nearly a month after the one year deadline had expired. The Joneses acknowledge that the motion for reviver was untimely filed.

The Joneses first contend Mr. Jones’ disability was sufficient to toll the running of the statute of limitations, especially as they acted with due diligence to remove and replace him as the personal representative. They claim they were required by the probate court pursuant to KRS 395.160 to obtain a medical opinion as to Mr. Jones’ incompetency prior to his removal and replacement. They thus

argue the time necessary to procure the medical opinion should not count against them. We disagree.

Apart from stating Mr. Jones needed time to “get over” the death of his wife, no reason was given for the nearly six month delay in obtaining his appointment as administrator of the estate nor for the four month delay between his appointment and the request for his removal. Likewise, the Joneses offer no reason for failing to inform or seek advice from the circuit court on the competency issue. However, we are convinced from our reading of the clear statutory language and the case law interpreting the same that the circuit court has no authority to enlarge the time allowed for filing a reviver, even in the face of excusable neglect. *See Snyder, supra; Hammons v. Tremco, Inc.*, 887 S.W.2d 336 (Ky. 1994). Further, it is well-settled that once a limitations period begins to run, an intervening disability does not toll the prescribed period of limitation. *New Farmer’s Bank, supra*, 411 S.W.2d at 674 (citing *Elkhorn Land & Improvement Co. v. Wallace*, 232 Ky. 741, 24 S.W.2d 560 (1930); 34 Am.Jur. 160, Limitation of Actions, sec. 199). The Joneses cite us to no authority supportive of their position that equitable tolling applies to the time limitation set forth in KRS 395.278, and we find no such authority exists. Therefore, as the Joneses failed to revive the action within the prescribed time period of one year following Mrs. Jones death, the trial court acted correctly in finding equitable tolling inapplicable and dismissing the action.

Finally, the Joneses contend Baptist East should have been estopped from seeking dismissal. They argue they presented clear and convincing evidence

to the trial court that counsel for Baptist East communicated and agreed to the late filing of the motion to revive and substitute parties, and therefore under *Harris v. Jackson*, 192 S.W.3d 297, 304 (Ky. 2006), a finding of equitable estoppel was mandated. Again, we disagree.

The trial court heard evidence regarding the alleged communications between counsel and determined estoppel was inapplicable based upon the facts presented. A careful review of the record reveals the trial court was presented with conflicting testimony from respected attorneys. As in any factual dispute, even if there is substantial and credible testimony presented on both sides of the issue, a trial court's findings of fact will not be disturbed on appeal absent clear error as the trial court is in the best position to judge the credibility of the witnesses and the testimony given. CR 52.01; *Bronk v. Commonwealth*, 58 S.W.3d 482, 487 (Ky. 2001), *R.C.R. v. Com. Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998). We hold the trial court's decision was based upon substantial evidence and we will thus not disturb it on appeal. Further, as we noted above, since neither the court nor a party may enlarge the time for reviver, if the Joneses' relied upon any alleged agreement, such reliance was at their own peril. The Joneses have failed to convince this Court that estoppel was required under the facts presented.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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