RENDERED: November 7, 2003; 2:00 p.m.
TO BE PUBLISHED
MODIFIED: January 23, 2004; 10:00 a.m.

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001573-MR

MARIA B. JACKSON, INDIVIDUALLY
AND AS PARENT AND GUARDIAN OF
CHADD TYRESE MALIK DEVINE JACKSON, JR. APPELLANTS

APPEAL FROM CHRISTIAN CIRCUIT COURT
v. HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 00-CI-00409

WILFORD M. HARRIS APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND TACKETT, JUDGES.

TACKETT, JUDGE: Maria Jackson appeals from an order of the Christian Circuit Court dismissing her lawsuit, filed on behalf of herself and her infant son, against Wilford Harris for failure to substitute Harris's estate as a party within one year of his death. Upon reviewing the facts in this case, we conclude that Harris's attorney had an ethical duty to disclose the death of his client and that his failure to do so caused Jackson to rely on her belief that Harris was alive to her

detriment. Consequently, we reverse the trial court and remand this case with instructions that Jackson be allowed to amend her complaint to substitute Harris's estate as a party.

Jackson, who was carrying a full term fetus, was involved in an automobile accident on June 3, 1999, when her car was rear ended by Harris's car. Jackson's child sustained serious and permanently disabling injuries. She filed a personal injury suit, on behalf of herself and her infant son, against Harris in the Christian Circuit Court on March 23, 2000. Interrogatories and requests for discovery were served along with the complaint. Depositions were taken from the parties, physicians, and the officer who investigated the accident. Harris died on May 25, 2001, a fact that was concealed from Jackson until Harris's attorney filed a motion to dismiss her claim for failure to substitute the estate as a party within one year of Harris's death. After a hearing, the trial court granted the motion to dismiss the action, and this appeal followed.

Jackson first argues that the rules of statutory construction require us to infer a notice requirement within Kentucky Revised Statute (KRS) 395.278 which limits the time period within which a suit can be revived following the death of a party. The statute reads as follows:

> 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.

The language of the revivor statute is clear and unambiguous. Moreover, Jackson is unable to cite us to any Kentucky case law interpreting the statute to include a requirement that an opposing party be notified of the death of a defendant. Consequently, this argument is unpersuasive.

Jackson, however, correctly points out that a party may be estopped from asserting the right to a dismissal under KRS 395.278. Daniel v. Fourth and Market, Inc., Ky., 445 S.W.2d 699 (1968); Hammons v. Tremco, Inc., Ky., 887 S.W.2d 336 (1994). In the case sub judice, Jackson argues that Harris is estopped from requesting dismissal for failure to revive the action within one year of his death because his attorney violated an ethical duty by failing to inform Jackson's counsel of Harris's death. This failure to disclose caused Jackson to rely on her belief that Harris was alive and, furthermore, detrimentally impacted Jackson in that she failed to file a motion to revive her claim within the statutorily prescribed period. In analyzing this argument, we need to first examine some of the actions that took place after Harris's death in May 2001.

Harris's attorney, Honorable Doug Myers, cut out his former client's obituary and saved it for over a year, attaching it at last to his motion to dismiss. In the interim, Myers participated in mediation on September 7, 2001, after which Harris's auto insurer offered to settle the case. The case failed to settle; consequently, Jackson filed a motion to set the case for trial on September 20, 2001, and provided a list of dates when counsel would be available. Myers sent an associate to the November 14 hearing with his calendar and allowed dates for both the pretrial conference and trial to be scheduled. In addition, Myers scheduled a medical examination for Jackson's infant son, noticed multiple discovery depositions and signed an agreed order rescheduling the pretrial conference. Jackson's counsel asserts that all of these actions were in addition to numerous informal contacts between attorneys for the parties. Finally, Myers sought an advisory ethics opinion from the Kentucky Bar Association wherein he stated that the action appeared likely to be dismissed for failure to revive and inquired whether he had a duty to inform opposing counsel of his client's death. Unfortunately, he was advised that he did not. Therefore, Jackson first learned of Harris's death from Myers' motion to dismiss for failure to revive on June 10, 2002.

At the hearing, Jackson raised the issue of Myers' failure to notify regarding Harris's death; however, the trial

court, in a tersely worded order, dismissed the action. The trial court failed to address the Kentucky Supreme Court's prior determination that, in Kentucky, a lawyer whose client dies has an ethical duty to disclose that fact to opposing counsel the next time they communicate. Kentucky Bar Association v. Geisler, Ky., 938 S.W.2d 578 (1997). In Geisler, a case with similar facts to this one, the Court analyzed Geisler's arguments regarding her failure to inform the plaintiff's attorney of her client's death as follows:

> Finally, [Geisler] contends that Ford knew McNealy had been in poor health and that McNealy's death was a matter of public record reported in the daily newspaper. Respondent argues that she felt she had an ethical duty not to volunteer information about her client's passing. Thus, respondent maintains that is was Ford's own fault to have mistakenly believed that McNealy was alive at the time the settlement was negotiated, because if Ford had wanted to know whether McNealy was dead, all he had to do was ask respondent about it.

Id. at 579-580. The Court concluded that an attorney who negotiates a case on behalf of a deceased client without informing opposing counsel of the defendant's death has engaged in conduct which is the equivalent to a knowing, affirmative misrepresentation. Jackson argues that Myers' almost identical conduct precludes Harris from asserting his right to have the action dismissed. We conclude that Jackson reasonably relied on Myers' failure to inform opposing counsel of Harris's death and,

therefore, Jackson is entitled to revive the claim by substituting Harris's estate as defendant.

For the forgoing reason, the order of the Christian Circuit Court dismissing Jackson's claim is reversed and this case is remanded for further proceedings consistent with this opinion.

GUIDUGLI, JUDGE CONCURS.

BUCKINGHAM, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, DISSENTING. The majority opinion reverses an order of the Christian Circuit Court dismissing Jackson's complaint and remands the matter to the circuit court for the revival of her claim. The basis of the majority opinion is that Harris's attorney had an ethical duty to disclose the death of his client to Jackson and/or her attorney and failed to do so. Because I do not believe that such an ethical duty exists and because I believe the doctrine of estoppel is not applicable, I respectfully dissent.

The majority bases its conclusion on the Geisler case. I do not believe that case is applicable for two reasons. First, in the Geisler case the attorney that failed to disclose the death of her client was a plaintiff's attorney who engaged in settlement negotiations, and actually settled the claim, with a defendant. Obviously, the failure to disclose the death in

that case violated ethical considerations because the settlement of the personal injury claim likely involved claims of future wage loss, future medical expenses, and future pain and suffering, claims which had been extinguished by the death of the client. See Gailor v. Alsabi, Ky., 990 S.W.2d 597, 603 (1999). To negotiate a settlement with a defendant under such circumstances was clearly improper.

Second, I do not believe the Geisler case is applicable because the basis of the Kentucky Supreme Court's opinion therein was its adoption of ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 95-397. Id. at 580. That opinion imposes an ethical duty on a lawyer to inform opposing counsel of the death of his client "in the midst of settlement negotiations of a pending lawsuit in which the client was the claimant." (Emphasis added.) That is not the case herein, and the ABA opinion is not applicable to these facts.

The majority cites no authority other than Geisler for the proposition that an ethical duty exists under these facts. The court in the Geisler case relied on SCR[1] 3.130-4.1 which states that "[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." However, the Comment to that rule notes

[1] Rules of the Supreme Court.

that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." Harris's attorney did not "knowingly make a false statement of material fact" and, unless the Geisler case is applicable, had no ethical duty to do so. Furthermore, Harris's attorney had requested and obtained a written opinion from the Kentucky Bar Association Ethical Hotline Advisor that he had no affirmative ethical duty to disclose the death of his client to Jackson.

I admit that the circuit court's ruling dismissing the case left a harsh result. In connection with this observation, I note that in the federal courts the applicable civil rule, Fed. R. Civ. P.[2] 25(a)(1), was amended in 1963 to require a motion for substitution to be filed within ninety days from the time a "suggestion of death" was filed and properly served. See Grandbouche v. Lovell, 913 F.2d 835, 836 (10th Cir. 1990). The original rule was amended "[i]n order to alleviate the inequities caused by the inflexibility of this rule." Id. Prior to the amendment of the federal rule, Fed. R. Civ. P. 25(a)(1) was "rigorously applied, often with harsh results." Rende v. Kay, 415 F.2d 983, 984 (D.C. Cir. 1969). For example, see Anderson v. Yungkau, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947), where the U.S. Supreme Court upheld the dismissal of

[2] Federal Rules of Civil Procedure.

a plaintiff's suit that was not revived in a timely manner even though the plaintiff had no knowledge of the defendant's death until time for reviving the action had expired.

The point is that the federal version of Rule 25(a) prior to the 1963 amendment of the rule is similar to the present Kentucky rule. Prior to the amendment of the federal rule, dismissal was often the harsh result. Because Kentucky's rule has not been amended to provide that a suggestion of death be filed before the time period for revival begins to run, I conclude that dismissal is required in this case. An amendment to the Kentucky rule might be appropriate to alleviate the harshness of the result in future cases.

Having concluded that Harris's attorney did not have an ethical duty to disclose the death of his client, I also conclude that Harris was not estopped by the conduct of his attorney from obtaining a dismissal of the claim. While it is true that Harris's attorney participated in a mediation conference following Harris's death and did not disclose the death to Jackson or her attorney, "[m]ere negotiations looking toward amicable settlement do not afford a basis for estoppel to plead limitations." Gailor, supra at 603.

"An estoppel may arise to prevent a party from relying on a statute of limitation by virtue of a false representation or fraudulent concealment." Munday v. Mayfair Diagnostic

Laboratory, Ky., 831 S.W.2d 912, 914 (1992). The Kentucky Supreme Court in the Munday case further held that the application of estoppel generally requires "some act or conduct which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so." Id., quoting Adams v. Ison, Ky., 249 S.W.2d 791 (1952). Although proof of fraud generally requires an affirmative act by the party charged, "[a]n exception to this general rule may be found in a party's silence when the law imposes a duty to speak or disclose." Munday, supra. Because Harris's attorney had no duty to speak or disclose, I conclude that Harris was not estopped from raising the failure to comply with KRS 395.278 as a defense and from procuring an order of dismissal from the circuit court. In short, I would affirm the court's order.

BRIEF FOR APPELLANTS:

Norman E. Harned
Harned, Bachert & Denton, LLP
Bowling Green, Kentucky

Steven C. Girsky
Batson, Nolan, Brice Williamson & Girsky
Clarksville, Tennessee

Blaise E. Ferraraccio
Clarksville, Tennessee

BRIEF FOR APPELLEE:

Andrew C. Self
W. Jonathan Sweeten
Deatherage, Myers, Self & Lackey
Hopkinsville, Kentucky