

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002514-MR

BESSIE WILKERSON and CHARLES WILKERSON,
EXECUTOR OF THE BESSIE WILKERSON
ESTATE

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 00-CI-00874

HARDIN COUNTY, KENTUCKY, D/B/A
HARDIN MEMORIAL HOSPITAL;
CYNTHIA RANDOLPH;
HOPE WARREN;
RICK KIRCHHOFER;
and MALINDE CHILDRESS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

BARBER, JUDGE: Appellant Charles Wilkerson, the Executor of the Estate of Bessie Wilkerson, (Wilkerson), appeals a Hardin Circuit Court ruling on the expiration of the Statute of Limitations for reviving a cause of action. We reverse the order of the Hardin Circuit Court, and remand the action.

Wilkerson's decedent was an elderly woman. While in the hospital for medical care, Bessie Wilkerson fell out of bed and broke her hip. Bessie filed an action for medical negligence. The hospital claimed sovereign immunity, and this claim was appealed. In an opinion dated August 9, 2002, this Court held that the hospital could not properly claim sovereign immunity, and the action was remanded for trial. During the pendency of the appellate action, Bessie Wilkerson passed away. Her date of death was July 16, 2002.

Charles Wilkerson was appointed Executor of Bessie's Estate. On July 21, 2003, the defendants in Bessie's lawsuit made a motion that the action be dismissed as it had not been revived by her personal representative within a year of Bessie's death. In his response to the motion to dismiss, Wilkerson informed the court that the insurer for the defendants/appellees had become insolvent on June 20, 2003. Charles noted that as a matter of law, this insolvency stayed the action for a period of six months. Wilkerson attached a letter from counsel for Appellees to Wilkerson's lawyer as an exhibit to his response to the motion to dismiss. This letter stated that the insurer was insolvent, and that counsel for Appellees could take no further action in the case at that time. Counsel for Appellees also stated that he would be filing a motion for a stay based on the insolvency. That letter was dated May 13, 2003. The formal

order of liquidation and insolvency was entered in Virginia on June 20, 2003. The record shows that all parties had notice of entry of this order.

The Hardin Circuit Court dismissed the action on August 20, 2003, in reliance upon KRS 395.278, the Statute imposing a time limit for revival of a personal injury action in which the plaintiff is deceased. The court held that "Plaintiff's personal representatives have failed to revive Plaintiff's action within one year of her death on July 16, 2002." Charles' post-judgment motion to set aside the Court's order and to revive the action after that date was denied.

Charles Wilkerson notes that in June, 2003, less than a year after Bessie died, the insurance carrier for the defendant hospital became insolvent. He argues that KRS 304.36-085 tolled the time limit imposed by KRS 395.278, and granted him an additional six months within which to revive the action. KRS 304.36-085 provides:

All proceedings in which the insolvent insurer is a party or is obligated to defend a party in court in this state shall, subject to waiver by the association in specific cases involving covered claims, be stayed for six (6) months and any additional time that may be determined by the court from the date that the insolvency is determined or an ancillary proceeding is instituted in the state, whichever is later, to permit proper defense by the association of all pending causes of action.

Id. Wilkerson asserts that this Statute clearly stayed Bessie Wilkerson's action against the hospital, and provided him an additional six months in which to revive the action following her death. Wilkerson claims that after the court and parties received the insolvency order on June 30, 2003, the defendants were barred from taking any action with regard to Bessie's case for six months. Wilkerson argues that a mandatory stay tolls the Limitations period for the term provided by law.

Appellee Hardin County d/b/a Hardin Memorial Hospital admits that Reciprocal of America (ROA) insured the hospital, and that ROA was deemed insolvent by the Virginia Courts, which also ordered liquidation of the ROA assets. Hardin County was a party to the Virginia proceeding, and had knowledge that ROA was insolvent. The Virginia order noted that the rights and liabilities of all parties with an interest in the property or assets of ROA were fixed on the date of the entry of the insolvency order. Hardin County claims that the Virginia order did not place a stay on any action involving ROA, and asserts that imposition of Kentucky statutory language imposing a stay is improper.

Hardin County argues that the stay permitted by KRS 304.36-085 is not automatic, but requires a party to move the Court for enforcement of a stay. Hardin County contends that as Wilkerson failed to move for an enforcement of a stay, his

allegation that the stay was in effect is incorrect. No authority supports Hardin County's assertion. The Statute does not contain any language indicating that compliance with its directive is discretionary. The Statute contains no language requiring a separate motion or court order before a stay is considered enforceable.

Wilkerson contends that imposition of the stay is automatic, and did not require any affirmative action by the Virginia or Kentucky courts. The Statute provides for a stay in order that the parties formerly insured by the insolvent insurer, and the insurance commissioner or the insurance guaranty association may determine how best to manage the situation. We find that the Statute imposes a stay on the action as a matter of law for the benefit of both the insured and any party making a claim against the insured.

Hardin County contends that KRS 304.36-085 is not applicable to the underlying action because that Statute imposes a stay only on those cases pending before the court. Hardin County asserts that Kentucky courts have found that non-revived actions are considered in a state of limbo. See Daniel v. Fourth and Market, Ky. App., 445 S.W.2d 699 (1968). Hardin County asserts that Bessie Wilkerson's case was not pending at the time the insolvency order was entered, but was rather "in limbo." As the case was in active litigation prior to

Wilkerson's death, and was stayed prior to expiration of the revival period, we hold that the case was in fact pending at the time of the stay, and therefore may be revived after the stay is lifted.

Kentucky law provides that actions instituted by a now deceased person must be revived within one year from the decedent's date of death, or must be dismissed at the request of the defendant. Snyder v. Snyder, Ky. App., 769 S.W.2d 70, 72 (1989). Appellee, Cynthia Hall, cites to Hammons v. Tremco, Inc., Ky., 887 S.W.2d 336 (1994), which states that "the [Limitations] period set forth in the Statute [KRS 395.278] is mandatory and not subject to enlargement." Hall contends that this language prohibits imposition of a tolling of the Limitations period for revival of a decedent's claim for any reason.

No authority is provided in support of the contention that a stay is an enlargement of time in which to file an action, such that it would be prohibited by the applicable Statute and related caselaw. The stay is provided by Statute for the benefit of the insured party, and may not be used as a weapon to prejudice the rights of litigants seeking recompense from the insured. The stay does not constitute an impermissible enlargement of time in which to revive the action.

For this reason, the case is reversed and remanded to the Hardin Circuit Court for proceedings consistent with this Opinion.

McANULTY, JUDGE, CONCURS.

MINTON, JUDGE, DISSENTS.

MINTON, JUDGE, DISSENTING: I respectfully dissent.

As a result of Bessie Wilkerson's death, the status of her personal injury claim in the circuit court was - using terminology from Daniel v. Fourth and Market, Inc. - in a state of limbo. This claim would remain in limbo until a personal representative took steps to revive the action under KRS 395.278. As discussed in Daniel, "reviver is not a simple matter of straightening up the record of a lawsuit." *Id.* at 688. "[R]evivor is much in the nature of a new action as distinguished from an act done during the course of a proceeding...." *Id.* Since the claim was in limbo, not pending, when the insurer became insolvent, I do not agree that KRS 304.36.085 ever prevented Bessie Wilkerson's personal representative from taking steps to revive this action. This means that the mandatory time limitation for revival could not have been tolled by any stay, automatic or otherwise, created by KRS 304.36-085. So I would affirm the circuit court's dismissal.

BRIEFS FOR APPELLANT:

James T. Kelley
Elizabethtown, Kentucky

BRIEF FOR APPELLEE, CYNTHIA
RANDOLPH HALL, R.N.

Craig L. Johnson
Louisville, Kentucky

BRIEF FOR APPELLEES, HARDIN
COUNTY, KENTUCKY, D/B/A HARDIN
MEMORIAL HOSPITAL, MALINDE
CHILDRESS, HOPE WARREN AND
RICHARD KUHOWICZ:

Ken Howard
Elizabethtown, Kentucky

Thomas N. Kerrick
Thomas B. Russell
Bowling Green, Kentucky