

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001861-MR

KATRINA L. WILLIS, EXECUTRIX OF THE ESTATE
OF MORRIS BEASLEY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 15-CI-002081

NICOLE M. FORD, ADMINISTRATRIX OF
THE ESTATE OF CYNTHIA BEASLEY;
KATHY R. FORD; AMELIA DAWN BAGGETT;
AND THOMAS R. PECKINPAUGH

APPELLEES

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: JONES, MAZE, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Katrina L. Willis, Executrix of the Estate of Morris Beasley (“Appellant”), appeals from a judgment of the Jefferson Circuit Court reflecting a jury verdict of \$50,000 for pain and suffering awarded to the Estate of

Cynthia Beasley (“Cynthia’s Estate”). Appellant argues that the circuit court erred in failing to conclude that the representative of the Estate of Cynthia Beasley lacked standing to prosecute this action and that the circuit court erred in failing to amend a jury instruction. For the reasons addressed below, we find no error and AFFIRM the judgment on appeal.

FACTS AND PROCEDURAL HISTORY

On October 9, 2014, Morris and Cynthia Beasley were found shot to death at the couple’s home located in Jefferson County, Kentucky. Morris and Cynthia were engaged in a contentious dissolution of marriage proceeding at the time of their deaths. Prior to their deaths, Cynthia obtained an emergency protective order against Morris. A police investigation determined that Morris used his .357 magnum revolver to shoot Cynthia in the chest, after which he shot himself in the abdomen. At the time of Cynthia’s death, she was involved in a romantic relationship with Thomas Peckinpaugh (“Peckinpaugh”). Three days before the shootings, Peckinpaugh allegedly came to the residence and threatened Morris with a gun.

On May 1, 2015, Nicole M. Ford, Administratrix of the Estate of Cynthia Beasley (“Appellee”), filed a complaint in Jefferson Circuit Court against the Estate of Morris Beasley (“Morris’s Estate”) seeking damages for Cynthia’s wrongful death. Morris’s Estate responded with a general denial.

On April 12, 2016, Morris's Estate filed a third-party complaint against Peckinpaugh alleging that Peckinpaugh used Morris's revolver to shoot the couple. Morris's Estate sought damages for his wrongful death and for intentional infliction of emotional distress arising from Peckinpaugh threatening Morris with a gun a few days before the shootings. This third-party complaint was later dismissed based on the tolling of the statute of limitations, and the matter was affirmed on appeal to a panel of this Court.¹

The underlying action proceeded to a jury trial on October 31, 2018, resulting in a verdict in favor of Cynthia's Estate in the amount of \$50,000 for pain and suffering. A judgment reflecting the verdict was entered on November 15, 2018. Before and after trial, Morris's Estate unsuccessfully argued that the Jefferson Circuit Court lost jurisdiction when the Jefferson District Court, Probate Division, removed Ford as personal representative of Cynthia's Estate for an extended period during the litigation. Ford was removed as personal representative on May 1, 2017, for failure to show cause and then reappointed after 57 days on June 27, 2017. She was again removed on February 22, 2018, for 133 days and reappointed by agreed order. The probate court entered an amended agreed order on August 6, 2018, reappointing Ford as Administratrix of the Estate of Cynthia

¹ See *Willis v. Peckinpaugh*, No. 2017-CA-001986-MR, 2019 WL 4733070 (Ky. App. Sept. 27, 2019).

Beasley *nunc pro tunc* effective February 22, 2018. The focus of Appellant's argument on this issue was that the *nunc pro tunc* order could not be relied upon to establish Appellee's ongoing standing to prosecute the instant action. Appellant's final motion to dismiss for lack of justiciability was denied by way of an order entered on February 21, 2019, and this appeal followed.

ARGUMENTS AND ANALYSIS

Appellant argues that the Jefferson Circuit Court committed reversible error in failing to rule that Appellee lost standing to prosecute this action when she was twice removed by the probate court as personal representative of Cynthia's Estate. For the same reason, she also maintains that the circuit court lost jurisdiction of the case outside the one-year statute of limitations. Appellant notes that the public administrator in the probate proceeding never entered a public appearance in the wrongful death action. The focus of her argument is that the two agreed orders of the probate court reappointing Appellee were improper or otherwise void *ab initio*. She also contends that the amended agreed order entered August 6, 2018, purporting to reappoint Appellee *nunc pro tunc* as of February 22, 2018, is "illegal" as it exceeds the authority of the probate court to erase the record of the appointment and service of the public administrator for 133 days. Appellant asserts that Appellee had no standing during the trial and none before this Court;

therefore, she seeks an opinion reversing the damage award and vacating the judgment.

The right to seek recovery for wrongful death derives from the Kentucky Constitution § 241. It states,

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

“The courts have ruled that this section is self-executing, and even in the absence of any legislation, the personal representative can bring the action.” RONALD W. EADES, KENTUCKY HANDBOOK SERIES, WRONGFUL DEATH ACTIONS § 4:2 (2019-2020 ed.) (citing *Thomas v. Royster*, 98 Ky. 206, 208, 17 Ky. L. Rptr. 783, 32 S.W. 613, 614 (1895); *Smith v. McCurdy*, 269 S.W.3d 876, 878 n.4 (Ky. App. 2008)).

The Kentucky General Assembly mirrored the constitutional language in Kentucky Revised Statutes (“KRS”) 411.130(1), which provides:

Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages

may be recovered. The action shall be prosecuted by the personal representative of the deceased.

Further,

[u]nder Kentucky law, an action can only be maintained by the personal representative of the decedent. *See Everley v. Wright*, 872 S.W.2d 95 (Ky. App. 1993). However, Kentucky law does permit beneficiaries to bring an action under two exceptional circumstances: (1) when the personal representative has refused to bring the action; or (2) where there is fraud and collusion on the part of the personal representative and the person sought to be made liable for the death. *McLemore v. Sebree Coal & Mining Co.*, 121 Ky. 53, 88 S.W. 1062 (1905).

Smith, 269 S.W.3d at 878 n.4.

The question for our consideration is whether Appellee is the personal representative of Cynthia's Estate for purposes of Kentucky Constitution § 241, KRS 411.130(1), and the supportive case law. We must answer this question in the affirmative. It is uncontroverted that Appellee was appointed as personal representative of Cynthia's Estate prior to filing the instant action on May 1, 2015. While Appellant properly notes that during the pendency of the wrongful death proceeding, Appellee was removed as personal representative on two occasions by the probate court and a public administrator was appointed, we find nothing in the record or the law standing for the proposition that Appellee's removal and reappointment operates to divest her of standing nor the court of jurisdiction. This

is especially true given that the probate court's August 6, 2018 order *retroactively* restored Appellee as personal representative for all relevant times.

Appellant asserts that Appellee's standing under Kentucky Constitution § 241 after 133 days removed was not properly reacquired by filing the agreed order or amended agreed order with the probate court, and that the Jefferson Circuit Court erred by perpetuating the error and denying dismissal. We first note that Appellant may not properly now challenge the efficacy of the probate court's orders on appeal to this Court, as she was neither a party to that proceeding nor prosecuted an appeal to the trial court in conformity with KRS 23A.080. We may not now consider the propriety of the probate court's orders. As to the circuit court's reliance on the probate court's *nunc pro tunc* order, the circuit court's rulings are presumptively correct and "the burden is on the appellant to show error affecting the judgment rendered below." *Oakes v. Oakes*, 204 Ky. 298, 264 S.W. 752, 753 (1924). Appellant has not demonstrated that the Jefferson Circuit Court improperly relied on the probate court's order retroactively reinstating Appellee as personal representative of Cynthia's Estate, and we find no error.

Appellant next argues that the Jefferson Circuit Court improperly instructed the jury on the law of pain and suffering. She maintains that the evidence at trial showed that Cynthia was likely unconscious from drugs and

alcohol when she was shot. Appellant contends that Appellee did not present any evidence that Cynthia was actually conscious and aware for some period of time before or after being shot. As such, Appellant argues that the circuit court's instruction improperly eliminated the legal and due process requirement that Appellee prove that Cynthia was conscious immediately before or after being shot and, thus, experienced compensable pain and suffering.

The jury instruction at issue stated as follows:

INSTRUCTION NO. 4

If you find for Nicole Ford, Administratrix of the Estate of Cynthia Beasley, you will determine from the evidence and award her a sum of money that will fairly compensate her for whatever physical or mental suffering and injury to Cynthia Beasley's person you believe from the evidence Cynthia Beasley sustained by reason of the fear of being struck or of actually being struck, and/or by reason of inflicting injury causing the wrongful death of Cynthia Beasley.

“The question to be considered on an appeal of an allegedly erroneous instruction is whether the instruction misstated the law. It is within a trial court's discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of that discretion.” *Storm v. Martin*, 540 S.W.3d 795, 798 (Ky. 2017) (citation omitted).

Having closely examined the record and the law, we do not conclude that the Jefferson Circuit Court abused its discretion in instructing the jury as to

pain and suffering. Instruction No. 4 directed the jury to determine from the evidence whether Cynthia sustained physical or mental suffering as a result of the fear of being struck by a bullet or of actually being struck. Implicit in this instruction is the jury's consideration of whether Cynthia was conscious at the time of the shooting. Assistant Coroner Donna Steward, M.D., who was qualified as an expert, testified to her postmortem examination of the bodies. In addition, Cynthia's blood and urine test results were authenticated and admitted into the record. The jury was apprised of these results, which showed that Cynthia had a blood alcohol level of 0.176%. The results also showed that Cynthia had alprazolam and hydrocodone in her system.

Upon considering this testimony in conjunction with all of the evidence, including how Cynthia appeared to be seated in a chair while shot and then fell forward onto the floor, the jury determined that Cynthia experienced physical or mental suffering in the compensable amount of \$50,000. We find no basis in the law to conclude that Instruction No. 4 improperly failed to include a specific element that Cynthia be conscious before or after being shot, as this element is a necessary prerequisite to the jury finding that she experienced mental or physical suffering. Stated differently, the jury must have concluded that Cynthia was conscious or aware of the shooting in order to determine that she

suffered. No specific element as to consciousness was required, and the Jefferson Circuit Court did not err in so concluding.

CONCLUSION

Appellee was properly appointed as representative of Cynthia's Estate, and the *nunc pro tunc* amended agreed order cured the defect in Appellee's representation, if any. Appellant may not contest the propriety of the probate court's orders because that matter is not properly before us. And finally, we conclude that the circuit court did not abuse its discretion in giving Instruction No. 4 to the jury.

For the foregoing reasons, we AFFIRM the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Clarence H. Hixson
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE NICOLE M. FORD,
ADMINISTRATRIX OF
THE ESTATE OF CYNTHIA
BEASLEY:

Dennis C. Burke
Louisville, Kentucky