

RENDERED: JANUARY 19, 2007; 2:00 P.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-002377-ME

A.R., BY HER NEXT FRIENDS,  
M.R. AND W.R.; AND M.R. AND W.R.,  
ON THEIR OWN BEHALF

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 01-CI-04806

FAYETTE COUNTY BOARD OF EDUCATION;  
MICHAEL BRADY, IN HIS OFFICIAL AND  
INDIVIDUAL CAPACITY; AND  
EARL STIVERS, IN HIS OFFICIAL AND  
INDIVIDUAL CAPACITY

APPELLEES

OPINION  
REVERSING AND REMANDING  
AND DENYING MOTION

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BEFORE: JOHNSON<sup>1</sup> AND TAYLOR, JUDGES; BUCKINGHAM,<sup>2</sup> SENIOR JUDGE.

JOHNSON, JUDGE: A.R., by her next friends M.R. and W.R., and  
M.R. and W.R., on their own behalf (collectively "A.R."), have

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<sup>1</sup> Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

<sup>2</sup> Senior Judge David C. Buckingham 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.

appealed from the order of the Fayette Circuit Court entered on July 22, 2004, which dismissed all claims against the appellees, the Fayette County Public Schools (FCPS), the Board of Education of Fayette County (the Board), Michael Brady, and Earl Stivers.<sup>3</sup> Having concluded that the circuit court abused its discretion by refusing to allow A.R. to amend the complaint and by dismissing Brady and Stivers as defendants, we reverse and remand.

A.R. was born on August 30, 1987, and was a minor at the time she filed this suit.<sup>4</sup> On August 27, 1991, A.R. was identified by FCPC at an Admissions and Release Committee (ARC) meeting to be a student with a disability under the Individuals with Disabilities Education Act (IDEA). In 2000 A.R. was a student at Tates Creek Middle School in Fayette County and in the special education program. Michael Brady was A.R.'s teacher, case manager, and in charge of supervising her at the time the alleged incident that is central to this case occurred.<sup>5</sup>

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<sup>3</sup> Stivers was the associate principal of Tates Creek Middle School during 2000 and 2001.

<sup>4</sup> At the time this appeal was filed, A.R. was still a minor and the appeal was filed on her behalf by her next friends and parents, M.R. and W.R. Since that time, A.R. has reached legal age and in response to the motion of the appellees contained in their brief, this Court entered an order on May 30, 2006, ordering appellant's attorney to file a status report as to any reason why A.R.'s identity should not be available to the public and as to why the appeal should not proceed in the name of A.R. rather than by next friend. Attorneys for both sides filed responses, and this Court hereby denies the motion.

<sup>5</sup> The appellees concede in their brief that the facts, to the extent that they are relevant, must be construed in the light most favorable to A.R. and that for the purposes of this appeal the facts are "uncontroverted".

One day at school in late 2000, while the class was watching a movie, A.R. was sexually assaulted by another student in the classroom.<sup>6</sup> At the time, Brady was sitting at his desk playing a computer game, which diverted his attention from the students in his classroom. After the abuse occurred, A.R. attempted to inform Brady of the incident; however, Brady told A.R. to "be quiet or there would be consequences." The student who assaulted A.R. later pled guilty to assault in the Fayette District Court.

Brady had been assigned as A.R.'s case manager, but at the time of the assault, he had failed to read her file as required. A.R.'s file reflected that she had poor communication skills, and it was recommended that teachers explore with her what she meant to communicate whenever she attempted to speak.

After the assault incident, school personnel refused to transfer the offending student to another school so that A.R. might avoid contact with the offender. Subsequently, A.R. and the offending student were actually placed in one class together. Further, instead of limiting the offending student's extracurricular activities, the school advised A.R.'s parents that A.R. should not attend after-school activities, where the offender might possibly be present.

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<sup>6</sup> Apparently, this incident occurred between Thanksgiving and Christmas in 2000.

Since the procedural history of this case is very pertinent to this appeal, we will review it in detail. A.R.'s parents, as her next friends and in their own behalf, filed a complaint in the Fayette Circuit Court on December 21, 2001, alleging violations of Federal and State law. A.R. raised claims under both Title IX of the Education Amendments of 1972, which provides in pertinent part that a person cannot "be subjected to discrimination under any education program or activity receiving Federal financial assistance," and Kentucky Civil Rights Act, KRS Chapter 344, which has the purpose of safeguarding all individuals within the state from discrimination because of sex, or because of the person's status as a qualified individual with a disability, and to protect their interest in personal dignity and freedom from humiliation, and to preserve the public safety, health, and general welfare and to further the interest, rights and privileges of individuals within the state.<sup>7</sup>

A.R. alleged in the complaint that beginning in 2000, and continuing thereafter, she experienced a pattern of sexual harassment at school by other students and the harassment was repeated and pervasive within her educational environment. On January 24, 2002, the appellees filed a petition for removal to

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<sup>7</sup> A.R. also alleged claims under IDEA, Section 504 of the Rehabilitation Act, and, Title VI of the Civil Rights Act, 42 U.S.C. 1983.

the United States District Court for the Eastern District of Kentucky, Lexington Division.<sup>8</sup> On December 8, 2003, during a pretrial conference in Federal Court, A.R. made a motion to amend the complaint in order to allow a negligent supervision claim.

On December 30, 2003, the Federal Court entered summary judgment in favor of the appellees and ruled that the appellees' actions did not rise to a level sufficient to violate Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act. Further, the Federal Court ruled that A.R. had not exhausted all the administrative remedies under Section 504 of the Rehabilitation Act. The Federal Court remanded the case to Fayette Circuit Court to consider the "state law claims," and due to the impending trial date, it denied A.R.'s request to amend the complaint to allow the negligent supervision claim.

Upon remand of the case to the Fayette Circuit Court, the appellees filed a motion to dismiss on March 11, 2004. In support of their motion, the appellees argued the doctrine of res judicata, stating that the dismissal of the federal civil rights claim required dismissal of the state civil rights claims under KRS Chapter 344. A.R. conceded that the claims against

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<sup>8</sup> The appellees filed their answer to the complaint in circuit court on January 23, 2002, and their amended answer to the complaint on April 17, 2003.

the individual defendants, Brady and Stivers, would not be allowed under KRS Chapter 344, but argued that the claim against the Board was not barred by res judicata. A.R. argued that (1) the Board had not appealed the Federal Court's order remanding, and (2) that state law allowed for consideration of damages on the claims not allowed under the federal act. Pursuant to CR<sup>9</sup> 15, A.R. then requested leave to amend the complaint in state court to allege the claim for negligent supervision, arguing that there could be no prejudice to the appellees since no trial date had been set at the state court level.

On July 22, 2004, the circuit court entered an order dismissing the case. The circuit court ruled that since KRS Chapter 344 actions could not be pursued against the individual appellees, Brady and Stivers would have to be dismissed from the case. The circuit court further ruled that regardless of the fact that A.R.'s motion to amend the complaint pursuant to CR 15 was properly and timely filed, and even though all parties were properly before the court upon remand from Federal Court, the complaint against the individual appellees, Brady and Stivers, could not be amended to assert the negligent supervision claim. On July 30, 2004, A.R. filed a motion to alter, amend, or

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<sup>9</sup> Kentucky Rules of Civil Procedure.

vacate, which the circuit court denied on October 18, 2004.

This appeal followed.<sup>10</sup>

CR 15.01 states that after a responsive pleading has been filed, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The test for determining whether such relief should be granted is whether the adverse party would be prejudiced by such relief, and this includes a period up to the conclusion of the evidence.<sup>11</sup>

Kentucky Practice,<sup>12</sup> states as follows:

Absent a showing of significant prejudice to the opponent, an amendment to a complaint should be liberally granted [footnote omitted].

Rule 15 provides that leave to amend should be freely given when justice so requires. Rule 15 reinforces the principle that cases should be tried on their merits rather than on the technicalities of pleadings. No longer is the pleading practice a game of skill in which one misstep by an attorney will be decisive to the outcome. The decision as to whether justice requires the amendment is committed to the court's sound discretion. Abuse of discretion occurs when a court fails to state the basis for its denial or fails to consider the competing interest of the

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<sup>10</sup> The appellees respond initially to A.R.'s appeal by arguing that it should be dismissed because A.R.'s brief does not comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) or CR 76.12(4)(g). See also Parrish v. Ky. Board of Medical Licensure, 145 S.W.3d 401, 413 n.43 (Ky.App. 2004). We reject this argument.

<sup>11</sup> Tarrant v. Henderson County Farm Bureau, 380 S.W.2d 274, 277 (Ky. 1964).

<sup>12</sup> 6 Kentucky Practice, Rule 15.01 (6th ed. 2006).

parties and the likelihood of prejudice to the opponent [footnotes omitted].

In this case, A.R. argues that the appellees would not have been prejudiced by the amendment because the case had just been remanded back to the circuit court, all parties' discovery was complete, no trial date had been set, and the KRS Chapter 344 issues still remained before the circuit court. Further, A.R. contends there was no indication that there was an attempt to cause delay.

A.R. concedes that the Federal Court did not abuse its discretion in denying the same motion, because when the request was made less than one month remained before trial.<sup>13</sup> However, A.R. asserts that procedurally the state court claims differ from the federal case, and argues, "[s]urely it cannot be reasonably argued that a procedural ruling there controls all the case and directed [sic] the [circuit] court of its power under Kentucky law."

A.R. contends the circuit court had no grounds to determine the amendment would significantly prejudice the appellees.<sup>14</sup> A.R. states that the facts alleged to support a negligent supervision claim are the same facts as those

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<sup>13</sup> However, A.R. does go on to state that "the [appellees] had done very thorough discovery and would not have been surprised by any facts alleged in the proposed amendment to the [c]omplaint."

<sup>14</sup> See Moore v. City of Paducah, 790 F.2d 557 (6th Cir. 1986).



originally pled and those which had already been subject to discovery by the appellees. A.R. asserts that the only possible prejudice to the appellees might be the need to take additional discovery.<sup>15</sup>

A.R. points out that if the circuit court had initially sustained the motion to amend the complaint pursuant to CR 15, then Brady and Stivers would not have been dismissed as parties:

What the appellees and the [circuit] court have not reasoned through is that the Federal Court, although it could have addressed the state law claims, did not and remanded the state law claims along with the parties back to the [ ] circuit court. All the parties were then before the [circuit] court and all motions had been timely and properly filed.

A.R. also relies upon Whittaker v. Cecil,<sup>16</sup> wherein our Supreme Court acknowledged that the doctrine of res judicata does not act as a bar in a subsequent proceeding if the issues or questions of law are different. A.R. argues that "the question of whether the [d]efendant caused humiliation, personal indignity and other intangible injuries from the delay of one month in separating A.R. from the individual who sexually

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<sup>15</sup> In support of this argument, A.R. cites Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983). Shah was a wrongful discharge case, and the Supreme Court held that a complaint should be amended to allow a defamation count pursuant to CR 15.01.

<sup>16</sup> 69 S.W.3d 69 (Ky. 2002).

assaulted her was not an issue in the Federal Court proceedings. The Federal Court sent the case back for a determination on the issue that applies under state law but does not apply under the federal law." A.R. also asserts the right under Section 14 of the Kentucky Constitution to present the case in state court.<sup>17</sup>

The appellees respond by arguing that the circuit court's basis for dismissing A.R.'s claims was not CR 15.01, but rather the failure and inability to meet the requirements of CR 15.03. The circuit court stated in its final order and judgment entered on July 22, 2004, as follows:

The Court overrules [A.R.'s] [m]otion to [a]mend the [c]omplaint. The Court finds that since it has dismissed the claims under KRS Chapter 344 as to the individual [d]efendants, there is no cause of action remaining to assert [in] the [a]mended [c]omplaint. This Court finds that the individually named [d]efendants, Brady and Stivers, are not properly before the Court on the KRS Chapter 344 claim, and because the Court has dismissed the only currently pending claim against the [d]efendant Board of Education, there is no [d]efendant or claim currently before the Court to which any newly plead claim could "relate back" under CR 15.03.

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<sup>17</sup> Section 14 of the Kentucky Constitution states that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

At the time the circuit court dismissed A.R.'s claims, it was conceded that based upon Conner v. Patton,<sup>18</sup> there was no cause of action against Brady and Stivers; thus, they were not before the circuit court at the time that it considered A.R.'s request for leave to amend the complaint.

Further, the appellees argue that A.R. could not maintain a common law negligence claim against the Board of Education based upon the law of Grayson Co. Board of Education v. Casey.<sup>19</sup> Thus, under CR 15.03, there was no existing claim against Brady and Stivers for the negligence claim to "relate back" to.<sup>20</sup>

Brady and Stivers also argue that they would have been prejudiced by the amendment:

In a tort action for negligence, there is the availability of comparative fault, and the ability to bring in a third party who is partly or wholly responsible for any damages caused. There is no such ability where the cause of action is a statutory discrimination claim. Had a negligence claim been timely filed against individual [a]ppellees Brady and Stivers, they could have sought the inclusion of the student who allegedly assaulted A.R. as a necessary

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<sup>18</sup> 133 S.W.3d 491, 493 (Ky.App. 2004) (citing Wathen v. General Electric Co., 115 F.3d 400, 404 (6th Cir. 1997)).

<sup>19</sup> 157 S.W.3d 201, 203 (Ky. 2005) (stating that "the board cannot be held vicariously liable in a judicial court because of the employee's negligence").

<sup>20</sup> The events complained of took place in 2000. A negligent supervision tort claim is governed by the one-year limitations period in KRS 413.140(1)(a). Therefore, in order to be timely under CR 15.03(1), it must "relate back" to a claim set forth in the complaint.

party, or sought to file a third-party action against that student who caused all or most of the injury alleged. . . . The inability to effectively provide for their own defense due to this staleness of evidence and possible inability to seek the inclusion as another party one who contributed to any alleged tortious injury unfairly prejudices individual [a]ppellees Brady and Stivers, and the amendment, even if it complied with CR 15.03 would be properly denied under CR 15.01.

Further, the appellees argue that even though no trial date had been set in the circuit court, a trial was imminent as there was no additional discovery necessary. Further, they argue that Shah, is distinguishable from this case. In their brief, the appellees state, "[a]n amendment to add an implied contract term to a breach of contract action is truly an 'embroiderment' on the breach of contract claim, as too is an amendment to add an additional false accusation to an existing defamation claim. A common law negligence claim is not an 'embroiderment' on a statutory discrimination claim—in fact it is an entirely different cause of action with different elements, different defenses, and different strategies for defense, e.g. discrimination in an intentional, malicious act while negligence entails neither intent nor malice."

We conclude that the circuit court abused its discretion by not allowing A.R. leave to amend the complaint against Brady and Stivers while they were still defendants. The

appellees have failed to show how they will be prejudiced by the amendment. The circuit court has constructed a catch-22 by dismissing Brady and Stivers as defendants because there is no claim against them, and at the same time refusing to allow A.R. to amend the complaint to allege a claim against Brady and Stivers because they are no longer defendants. We have considered the appellees' numerous alternative arguments and reject them.

Accordingly, the motion to identify A.R. by name is denied, the final judgment of the Fayette Circuit Court is reversed, and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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