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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000457-MR

JERRY COCHRAN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 06-CI-006650

PREMIER CONCRETE PUMPING, INC.,
A/K/A PREMIER CONCRETE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, TAYLOR, AND VANMETER, JUDGES.

STUMBO, JUDGE: Jerry Cochran appeals two orders of the Jefferson Circuit Court. One allowed Premier Concrete to amend its Answer to assert the affirmative defense of statute of limitations. The other order granted summary judgment in favor of Premier Concrete. Cochran argues that Premier Concrete

should not have been allowed to amend its Answer and that summary judgment should not have been granted. We find no error and affirm.

On October 3, 2004, Cochran was on a construction site to pour concrete from a concrete truck. While operating the truck's pump hose, which directs the flow of concrete, Cochran was flung to the ground and onto steel rebar. The hose was connected to a boom, which is connected to the truck. The boom was being operated by another employee via a remote control outside of the truck. Cochran alleged that it was the negligent use of this boom that caused the hose to fling him to the ground. Due to the accident, Cochran suffered physical injuries and incurred medical expenses, as well as a loss of wages and the ability to continue in his line of work.

On July 27, 2006, Cochran filed the underlying lawsuit against Premier Concrete. In the Complaint, Cochran alleged that an employee of Premier Concrete "carelessly and negligently operated a motor vehicle so as to cause it to crash into" him. Cochran was utilizing the Kentucky Motor Vehicle Reparations Act (MVRA) to bring the suit.

Premier Concrete tendered an Answer on August 9, 2006, and affirmatively pled the provisions of the MVRA. Discovery proceeded and on January 11, 2008, a deposition was taken of Appellant. It was after this deposition that Premier Concrete moved to amend its Answer to include the statute of limitations defense found in Kentucky Revised Statute (KRS) 413.140 which states that an action for an injury to the person must be brought within one year. An

action for injury under the MVRA must be brought within two years. Premier Concrete alleged that the injury described by Cochran was not caused by a motor vehicle and therefore should have been brought within a year.

A hearing was held before Judge Kathleen Voor Montano on March 31, 2008. The motion was subsequently denied. Judge Montano unexpectedly died a week later. After a new temporary judge was appointed, Premier Concrete tendered a motion to reconsider. On August 22, 2008, the new judge, Judge Ann Shake, granted the motion to reconsider and allowed Premier Concrete to amend its Answer. Judge Shake stated that Premier Concrete made a good faith argument that it did not and could not have known the MVRA might not apply to this case until after Cochran was deposed. Judge Shake was referring to the fact that the Complaint alleged that a motor vehicle crashed into Cochran, but that it was not until the deposition that it was discovered that a hose connected to the vehicle while the vehicle was immobilized to pour concrete was the cause of the injury.

After Premier Concrete filed its Amended Answer, it then filed a motion for summary judgment. At this time, a permanent judge was appointed, Judge Irv Maze. Premier Concrete argued that the injury was not caused by a motor vehicle accident and therefore, the MVRA and its two-year statute of limitation did not apply. Premier Concrete believed that the one-year statute of limitation provided by KRS 413.140 applied and since the injury occurred on October 3, 2004, but the Complaint was not filed until July 27, 2006, the action should be barred.

The trial court granted the motion for summary judgment. The trial court found that one of the goals of the MVRA is to ensure operators of motor vehicles "procure insurance covering basic reparation benefits and legal liability arising out of ownership, operation or use of such motor vehicles . . . ." KRS 304.39-010(1). It went on to find that for the MVRA to be applicable, the motor vehicle in question must be in use as a motor vehicle at the time of the accident. The court focused on KRS 304.39-020(6) which defines "use of a motor vehicle" as:

> any utilization of the motor vehicle as a vehicle including occupying, entering into, and alighting from it. It does not include:
> (a) Conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises; or
> (b) Conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it. (Emphasis added).

The trial court held that at the time of the accident, the truck was parked, braced,[1] and unoccupied. The court went on to hold that at the time Cochran was injured, the truck was not being used as a vehicle, but as a machine that assisted in the pouring of concrete. Because it was not being used as a vehicle at the time of the accident, the MVRA did not apply and its two-year statute of limitations was inapplicable. Therefore, the one-year limitation applied and the case was not brought timely. This appeal followed.

[1] When the truck is being used to pour concrete, legs extend from the truck, lifting it off the ground in order to better brace it.

Cochran's first argument on appeal is that the trial court erred in allowing Premier Concrete to amend its Answer to include the KRS 413.140 statute of limitations. Cochran argues that Premier Concrete waived the statute of limitation defense by not affirmatively pleading it in its first Answer. CR 8.03; *Thompson v. Ward*, 409 S.W.2d 807 (Ky. 1966).

Premier Concrete claims that the court properly allowed it to amend its Answer because as soon as it discovered all the relevant facts, i.e., that the MVRA might not apply, it sought to amend the Answer.

We find there was no error. The trial court has broad discretion in allowing a pleading to be amended. CR 15.01; *Ashland Fin. Co. v. Hartford Acc. & Indem. Co.*, 474 S.W.2d 364 (Ky. 1971); *Lawrence v. Marks*, 355 S.W.2d 162 (Ky. 1961). The trial court did not abuse that discretion in allowing Premier Concrete to amend its Answer. Once Premier Concrete discovered that Cochran was injured by the hose and boom while concrete was being unloaded, it moved to amend. As the trial court held in its order granting the motion to amend, Premier Concrete made a good faith argument that it could not have known the MVRA may not have applied until after it deposed Cochran. We agree and affirm.

Cochran's second argument is that the trial court should not have granted summary judgment because the cement truck was being used as it was intended to be used. He also argues that because the cement truck was a motor vehicle, the MVRA applies, along with its two-year statute of limitations.

Premier Concrete argues that summary judgment was properly granted because at the time of the accident, the truck was being used as a pumping machine and not a motor vehicle. Premier Concrete claims that the trial court was correct in utilizing the one-year statute of limitations for this reason. We agree.

In order for the MVRA to be applicable, the vehicle must be used "as a vehicle." At the time of the accident, no one was occupying, entering into, or alighting from the truck. Cochran brings our attention to *Goodin v. Overnight Transp. Co.*, 701 S.W.2d 131 (Ky. 1985). In *Goodin*, a person was injured while unloading the trailer of a parked semi-truck. Unlike the case at bar, the injured party was inside the trailer at the time of the injury. The court found that an injury while unloading an attached trailer came under the purview of the MVRA. It also found that the unloading of the trailer fit within the definition of "use of a motor vehicle." Cochran argues that the trailer in *Goodin* is similar to the hose and boom in the case *sub judice*.

We disagree and find that the case of *State Farm Mut. Auto. Ins. Co. v. Hudson*, 775 S.W.2d 922 (Ky. 1989), is more on point. In *Hudson*, Hudson was injured when a log rolled off the back of his tractor trailer and struck him. At the time of the injury, he was standing on the ground and unfastening the chain that had secured the log. The Kentucky Supreme Court found that because Hudson was unloading the truck, but not occupying, entering into, or alighting from it, he was not entitled to MVRA benefits. The Court distinguished the fact situation in *Hudson* from that of *Goodin* stating that the outcomes were different because in

Goodin, the injured party was inside the trailer at the time of the injury, while Hudson was not.

KRS 304.39-020(6) specifically states that loading or unloading a vehicle while occupying, entering into, or alighting from it is using a motor vehicle as a motor vehicle. The argument can be made that at the time of Cochran's injury, the cement was being unloaded from the truck. However, in the case at hand, like that of *Hudson*, no one was occupying, entering into, or alighting from the vehicle. Therefore Cochran's activities at the time of the accident do not meet the definition of using a motor vehicle as a motor vehicle, at least as it relates to the loading and unloading of the cement.

We also find the cases of *Bialochowski v. Cross Concrete Pumping Co.*, 407 N.W.2d 355 (Mich. 1987), and *McKenzie v. Auto Club Ins. Ass'n*, 580 N.W.2d 424 (Mich. 1998), persuasive on this issue.[2]

> John Bialochowski was rendered a paraplegic as a result of a June 13, 1980 accident that occurred on a construction site at a General Motors Assembly Division facility. Plaintiff's employer, the Emanuel Company, was hired by General Motors for the construction project. Construction of the facility involved the pouring of cement at elevated levels. Emanuel contracted the services of Cross Concrete Pumping Company for the pouring of the cement. Cross Concrete brought onto the job site a motorized, four-wheel, cement truck. Permanently attached to this truck was a concrete pump and a thirty- to thirty-five-foot boom, which was used to pump concrete up to the elevated levels. Plaintiff was injured in the course of his employment when the concrete pump exploded, causing the boom to collapse

[2] *Bialochowski* was overturned by *McKenzie*, but a discussion of both is required.

> upon plaintiff, crushing him. At the time of the accident, the truck was parked and stabilized.

Bialochowski at 356.

One of the main issues in *Bialochowski* was whether the cement truck was being used as a vehicle for purposes of Michigan's version of the MVRA. One of the defendants in the case argued that the truck was not being used as a vehicle at the time of the accident, but was rather being used as a piece of construction equipment, the same reasoning put forth by the trial court in the case at hand.

The Michigan Supreme Court held:

> Motor vehicles are designed and used for many different purposes. The truck involved in this case is a cement truck capable of pouring cement at elevated levels. Certainly one of the intended uses of this motor vehicle (a motor vehicle under the no-fault act) is to pump cement. The accident occurred while this vehicle was being used for its intended purpose. We hold that the phrase "use of a motor vehicle as a motor vehicle" includes this use.

Id. at 359.

However, two years later in *McKenzie*, the Michigan Supreme Court found that *Bialochowski* had been wrongly decided and thoroughly discussed the phrase "use of a motor vehicle as a motor vehicle."

> As a matter of English syntax, the phrase "use of a motor vehicle 'as a motor vehicle' " would appear to invite contrasts with situations in which a motor vehicle is not used "as a motor vehicle." This is simply to say that the modifier "as a motor vehicle" assumes the existence of other possible uses and requires distinguishing use "as a

> motor vehicle" from any other uses. While it is easily understood from all our experiences that most often a vehicle is used "as a motor vehicle," i.e., to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum. On those occasions, the use of the motor vehicle would not be "as a motor vehicle," but as a housing facility, advertising display, construction equipment base, public library, or museum display, as it were. It seems then that when we are applying the statute, the phrase "as a motor vehicle" invites us to determine if the vehicle is being used for transportational purposes.

McKenzie at 426.

> We find [the *Bialochowski*] holding utterly antithetical to the language of § 3105 [(Michigan's no-fault act)]. As discussed above, § 3105's requirement that injuries arise out of the use of a motor vehicle "as a motor vehicle" clearly distinguishes use "as a motor vehicle" from other possible uses. *Bialochowski* eviscerates this distinction by holding that the use of the vehicle at issue to pump cement constitutes use "as a motor vehicle." Obviously, motor vehicles are designed and used for various purposes as the *Bialochowski* Court noted. In fact, only in the context of various possible uses would a limitation to use "as a motor vehicle" be necessary. Where the Legislature explicitly limited coverage under § 3105 to injuries arising out of a particular use of motor vehicles - use "as a motor vehicle" - a decision finding coverage for injuries arising out of any other use, e.g., to pump cement, is contrary to the language of the statute. Accordingly, we are convinced that *Bialochowski* was wrongly decided.

McKenzie at 428.

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03 . . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . . ." *Huddleston v. Hughes,* Ky. App., 843 S.W.2d 901, 903 (1992).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

Based on our statutory language and the case law discussed herein, we hold that summary judgment was properly granted. At the time of the accident, the cement truck was not being utilized "as a motor vehicle." Therefore, the MVRA and its two-year statute of limitations do not apply. The one-year statute of limitations found in KRS 413.140 applies in this case. Cochran did not file his Complaint until approximately one year and eleven months after his injury and is therefore outside the applicable time limit for bringing this suit.

For the above reasons, we agree with the decisions of the trial court and affirm.

VANMETER, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. I believe the trial court abused its discretion in allowing Premier Concrete to amend its answer asserting the one-year statute of limitation set forth in KRS 413.140. Accordingly, summary judgment based on this statute was improperly granted in my opinion.

CR 8.03 provides that affirmative defenses shall be set forth in answers to complaints. The one-year statute of limitation set forth in KRS 413.140 was an affirmative defense that was not asserted until almost eighteen months after the complaint was filed. The rule is mandatory and failure to comply therewith results in waiver of the defense, unless the complaint on its face shows the action is barred by time, which in this case, did not occur. *See Underwood v. Underwood*, 999 S.W.2d 716 (Ky. App. 1999).

In this case, it is simply disingenuous for Premier Concrete to argue that it did not know the actual facts surrounding Cochran's claim until deposing him in January 2008 – again, almost eighteen months after the complaint was filed in this action. Premier Concrete's position presupposes that it did not investigate the accident before responding to the complaint or that it did not interview its own employee, who was operating the vehicle at the time of the injury to Cochran, prior to taking Cochran's deposition. I find this presupposition to be simply implausible. Additionally, any delay in deposing Cochran to fully understand the circumstances surrounding the claim was caused by Premier Concrete, and thus

there exists no valid excuse for not timely asserting the affirmative defense as required by CR 8.03, in my opinion.

The Rules of Civil Procedure, as promulgated by the Supreme Court of Kentucky, govern all procedures and practice of civil actions in the Court of Justice. CR 1(2). If attorneys and their clients can circumvent the rules without a valid excuse or otherwise ignore their use or application without any repercussion, then the rules should be abolished, in my opinion.

Notwithstanding, I believe the MVRA was applicable to this case including the two-year statute of limitations set forth in KRS 304.39-230. The motor vehicle involved in this case is a concrete truck – and the boom, hose, and other operating parts thereon are functioning, permanent parts of the truck. The use and function of this motor vehicle is to dispense concrete, which was in progress as part of the vehicle's operation at the time of the accident. I believe this use sufficiently satisfies the statute. *Cf. Rawlings v. Interlock Industries, Inc.*, _____ S.W.3d _____ (Ky. App. 2010), 2010 WL 1006853.

Thus, if applicable, Premier Concrete waived the one-year statute of limitation defense and the complaint was otherwise timely filed under KRS 304.39-230 of the MVRA. The trial court erred as a matter of law in granting summary judgment for Premier Concrete. I would reverse the summary judgment and reinstate the action on the merits.

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