ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
D.P. MARSHALL JR., JUDGE

DIVISION II

CA07-1291

June 4, 2008

MICHAEL HENSLEY
APPELLANT

AN APPEAL FROM FAULKNER COUNTY CIRCUIT COURT
[No. CV-06-169]

HONORABLE CHARLES CLAWSON, JR. JUDGE

ESTATE OF BRIAN REDDELL, DECEASED
APPELLEE

REVERSED AND REMANDED

This is an appeal from a summary judgment for appellee, Estate of Brian Reddell, the defendant in a personal-injury suit in Faulkner County Circuit Court brought by appellant, Michael Hensley, for injuries he suffered in an accident that occurred on Interstate 40 in Conway on February 28, 2003. Brian Reddell was the owner of, and a passenger in, the vehicle being driven at that time by Brian Smith. Appellant was also a passenger. As a result of the accident, both Smith and Reddell were killed. We hold that the circuit court erred in granting summary judgment to appellee, and, therefore, we reverse and remand.

Appellant filed a petition for appointment of an administrator for Reddell's estate on February 26, 2006, and nominated David Davies, an attorney in Conway, as administrator. That same day, the circuit court's probate division entered an order appointing Davies as

administrator of the estate. On February 27, 2006, appellant filed his personal injury complaint against "The Estate of Brian K. Reddell, Deceased." The summons, however, listed Davies as the defendant, and he accepted service. In response, appellee denied any negligence on the part of Reddell and reserved the right to object on the basis of failure to join a party under Arkansas Rule of Civil Procedure 19.

On May 16, 2007, appellee moved for summary judgment, arguing that the case must be dismissed because appellant failed to bring the action against the proper party — Davies, the administrator of Reddell's estate. Appellee first argued that, even though the order appointing the administrator had instructed him to make a reasonable and diligent search for the heirs of the estate, the administrator took no action on behalf of the estate after the issuance of the letters of administration; Davies was, therefore, a special administrator,[1] actually appointed for the sole purpose of accepting service of the complaint. Appellee then argued that a suit against the estate of an individual must be filed against the administrator; that, according to *Doepke v. Smith*, 248 Ark. 511, 452 S.W.2d 627 (1970), a special administrator cannot be appointed for the sole purpose of accepting service of process; that the statute of limitations had expired; and that appellant failed to obtain service on the proper party and, therefore, the complaint must be dismissed with prejudice. To its motion, appellee attached copies of the police report, the petition for appointment of an administrator, and the order appointing Davies.

[1]Ark. Code Ann. § 28-48-103 (Repl. 2004) provides for the appointment of special administrators.

In response, appellant admitted that the statute of limitations had run; argued that appellee had waived the real-party-in-interest problem; and asked the court to grant him a reasonable amount of time to substitute the administrator for the estate if the issue had not been waived. He also asserted that, although a special administrator cannot be appointed solely to receive service of process, a *general* (not a *special*) administrator had been appointed in this case. In any event, he argued, even if the court were to vacate Davies's appointment, Davies's acceptance of service was valid according to Ark. Code Ann. § 28-1-115(b) (Repl. 2004).

In reply, appellee argued that the fact that the order implied that Davies's appointment was as a general, and not a special, administrator did not alter the fact that it was actually special in nature because his only action was to accept service of process. Appellee also stated that Davies had indicated in correspondence with Reddell's liability insurance carrier that he was merely a special administrator, citing an attached March 23, 2006 letter from Davies which stated: "The faxing of this complaint to you this afternoon as well as the mailing of the complaint to you on Friday, March 24, 2006, will satisfy my responsibility regarding this matter as the personal representative of the Estate of Brian Reddell." Appellee also noted an attached e-mail dated March 24, 2006, between Davies and the insurance representative in which Davies stated: "I am just the Special Administrator, I am not the appointed attorney for the Estate. I would contact Keith Coker at 479-968-8662 to find out more about Mr. Reddell's family. I apologize that I could not be of more assistance."

The circuit court entered summary judgment for appellee on September 17, 2007, incorporating its letter opinion, which stated:

> The defendant's allegations are twofold. First, the suit was not brought in the name of the real party of interest. Pursuant to Rule 17 of the Arkansas Rules of Civil

> Procedure must be brought against the real party and [sic] interest that being a person who can discharge the claim, the defendant. Their second line of argument is that Mr. Davies was a special administrator appointed solely for the purposes of accepting summons and therefore is not proper under applicable case law.
>
> The plaintiff on the other hand contends that it is form over substance basically. That the estate was named as a defendant and the summons was issued in the name of Mr. Davies and therefore his role in the case is there is a sufficient nexus over the estate for purposes of disposing of this claim. In some correspondence that is attached to the motion, which is unrefutted, [sic] Mr. Davies as much as admits that he was appointed for that purpose and disclaims any further responsibility after he delivered the summons to the insurance carrier. This is clearly not the case based upon the order which appointed him and required him to take certain steps to notify the heirs and to continue in his efforts as the administrator. It is clear from the record that he did nothing further beyond accepting service and forwarding the service and complaint. It would seem to the Court that the possible responsibilities of the administrator in this case would go beyond that. There is potentially a cross complaint which could be filed against the estate of and the administrator of Brian Smith for injuries and wrongful death suffered by Mr. Reddell or at least contribution for any damages found to be the result of Mr. Reddell's actions. However that issue is not before the Court, except to the extent that it reflects Mr. Davies was appointed solely for the purpose of accepting summons. Had he notified the heirs they could have consulted him as counsel and/or sought separate counsel to explore any potential claims that the estate may have. At this point however that is too late. This conduct clearly runs afoul of the Supreme Courts ruling in *Doepke vs. Smith*, 248 Ark. 511 (1970). Therefore, the Court finds that summary judgment is appropriate and as noted above should be granted.

Appellant then pursued this appeal.

We will approve the granting of a motion for summary judgment only when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, *i.e.*, when there is not any genuine remaining issue of material fact and the moving party is entitled to judgment as a matter of law. *Cumming v. Putnam Realty, Inc.*, 80 Ark. App. 153, 92 S.W.3d 698 (2002). The burden of proving that there is no genuine issue of material fact is upon the movant, and all proof submitted must be viewed favorably to the party resisting the motion. *Id.* On

appellate review, we determine if summary judgment was proper based on whether the evidence presented by the movant left a material question of fact unanswered. *Id.*

Appellant makes five arguments, three of which can be quickly decided. Appellant first argues that the circuit court improperly considered documents that are not included in those items that the court may consider in deciding summary-judgment motions under Ark. R. Civ. P. 56 (c). He states that the copy of the police report, which was attached to the motion, and the letter and e-mail message between the estate's administrator and the insurance representative, which were attached to appellee's reply to appellant's response to the motion, should not have been considered. In his fourth point, appellant also contends that the letter and e-mail contained inadmissible hearsay. In his third point, appellant asserts that the trial court had no authority to essentially transform a general administrator into a special administrator or to invalidate Davies's acceptance of process.

We need not, however, address these three arguments. Regardless of whether the circuit court should have reviewed these documents or had the authority to reach its decision, it is apparent that appellee failed to establish a prima facie case of entitlement to summary judgment because the order appointing Davies as administrator reflects the appointment of a general administrator. Appellant concedes in his second point that a special administrator cannot be appointed solely for service of process. Nevertheless, he argues, those cases do not apply in this case because the summons was issued to the administrator and there was no confusion about who the true defendant was. We agree with appellee and the circuit court that Davies's letter and e-mail revealed his intent to perform no duties for the estate other than to accept service. However, because the order appointing Davies was expressed in

general terms, the circuit court could not decide that his appointment was actually as a special administrator without deciding a question of fact. Therefore, this case should not have been decided by summary judgment.

In his fifth point, appellant argues that the circuit court erred in refusing to let him substitute Davies as the defendant. We agree. Even if Davies was really a special administrator whose only task was to accept service of process, Arkansas case law and the rules of civil procedure did not require dismissal of the complaint. Instead, the proper course would have been to permit appellant to substitute Davies as the defendant. Clearly, Davies was the proper party for appellant to sue. Arkansas Code Annotated section 28-48-102(d)(2) (Supp. 2007) states: "The order appointing the administrator empowers the administrator to act for the estate, and any act carried out under the authority of the order is valid." *See Steward v. Statler*, 371 Ark. 351, __ S.W.3d __ (2007); Ark. Code Ann. § 28-9-203 (Repl. 2004). Davies was also a necessary party according to Ark. R. Civ. P. 19(a), which states:

> A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or, (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter, impair or impede his ability to protect that interest, or, (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party. If he should join as a plaintiff, but refuses to do so, he may be made a defendant; or, in a proper case, an involuntary plaintiff.

Arkansas Rule of Civil Procedure 15 gave the circuit court authority to permit appellant to amend his complaint, which would relate back to the original complaint:

> **(a) Amendments.** With the exception of pleading the defenses mentioned in Rule 12(h)(1), a party may amend his pleadings at any time without leave of the court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed

because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 20 days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.

. . . .

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when:

(1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(2) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (1) is satisfied and, within the period provided by Rule 4(i) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Thus, Rule 15 (c) permits changing the party against whom a claim is asserted if the party sought to be brought into the case received such notice of the action that he would not be prejudiced if brought in and he knew or should have known that, but for mistake, he would have been made a defendant initially. Davies's acceptance of the summons on behalf of the estate clearly satisfied this rule.

Reversed and remanded.

GRIFFEN and HEFFLEY, JJ., agree.