

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003014-MR

LIBERTY MUTUAL INSURANCE COMPANY
AND FREDERICK POTTER

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN B. EWING, JUDGE
ACTION NO. 94-CI-005271

TRAK INTERNATIONAL, INC.
AND THOMAS EQUIPMENT, LTD.

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Frederick M. Potter (Potter) appeals from an order of the Jefferson Circuit Court entered November 5, 1997, which denied his motion to intervene in a lawsuit filed by Liberty Mutual Insurance Company (Liberty) against Trak International, Inc. (Trak) and Thomas Equipment, Ltd. (Thomas). We affirm.

Potter sustained a work-related injury on October 7, 1993, while operating a piece of equipment manufactured by Thomas and marketed by Trak. Potter filed a workers' compensation claim

and received an award of benefits which was paid by Liberty as his employer's compensation carrier.

On October 7, 1994, Liberty filed a products liability suit against Trak seeking recovery of workers' compensation benefits paid to Potter. Thomas was added as a third-party defendant when Trak filed a third-party complaint on September 18, 1995. Potter was deposed by Thomas on December 5, 1996.

On August 21, 1997, Liberty filed a motion seeking permission to file an amended complaint changing the name of the plaintiff from Liberty to Potter. Under the terms of the amended complaint, Potter affirmed Liberty's allegations under the original complaint and additionally sought damages for pain and suffering, lost wages, and permanent impairment of his power to work and earn money. In support of its motion, Liberty argued that it was entitled to prosecute the action in Potter's name under KRS 342.700. Liberty argued that even though the one year statute of limitations for personal injury had expired, Potter's additional claims could relate back to the original complaint under CR 15.03. The trial court addressed Liberty's motion to amend at a hearing on October 12, 1997. At the hearing the trial court held that Liberty's motion was untimely because Liberty waited three years to raise the issue. A written order denying Liberty's motion to amend was entered on October 31, 1997. Following denial of the motion to amend, Liberty filed a motion seeking to merely substitute Potter as the plaintiff in the

original complaint. The trial court denied Liberty's motion on the ground of timeliness by order entered November 5, 1997.

After Liberty's attempts to insert Potter into the case failed, Potter filed a motion seeking permission to file an intervening complaint on October 30, 1997. Potter's motion was also held to be untimely by order entered November 5, 1997.

Liberty and Potter filed a notice of appeal with this Court on November 25, 1997. Liberty appealed from the trial court's denial of its motion to amend and motion to substitute. Potter appealed from the trial court's denial of his motion to intervene and the denial of Liberty's motion to amend.

All of the parties agree in their respective briefs that Liberty has settled with Trak and Thomas. It also appears that Liberty did not join with Potter in his brief on appeal. However, none of the parties have formally moved this Court to dismiss Liberty as a party to this appeal.

As a preliminary matter, the trial court's orders of October 31, 1997 and November 5, 1997, disposing of Liberty's motions are interlocutory in nature. As the jurisdiction of this Court is limited to the review of final judgments, we cannot review the propriety of those orders. Payton v. Payton, Ky., 293 S.W.2d 883, 884 (1956). That leaves us with the question of whether the trial court erred in denying Potter's motion to intervene.

Intervention by a nonparty is governed by CR 24. A party can seek to intervene as a matter of right under CR 24.01 or with permission of the trial court pursuant to CR 24.02.

However, in either case the party's motion to intervene must be timely. Ambassador College v. Combs, Ky., 636 S.W.2d 305, 308 (1982). The question of whether a motion to intervene is timely is one of fact which is left to the discretion of the trial court. Ambassador College, 636 S.W.2d at 308. We will not reverse a trial court's finding that a motion to intervene is untimely absent abuse of discretion on behalf of the trial court. Dairyland Ins. Co. v. Clark, Ky., 476 S.W.2d 202, 205 (1972).

The record in this case clearly supports the trial court's ruling that Potter's motion to intervene was untimely. Although Potter argues that he did not realize he had a cause of action against Thomas and Trak until he was deposed in December 1996, we note that roughly ten months passed before he sought to intervene. This is in addition to the fact that three years had passed since the date of his injury. While we realize that Potter's failure to seek intervention may have resulted from his reliance on Liberty's actions to substitute him as plaintiff in its complaint against Thomas and Trak, Potter should have acted to assert his own rights instead of waiting to come in on Liberty's coattails.

Potter's arguments regarding the statute of limitations and relation back are not well taken. The trial court denied Potter's motion on the ground of timeliness. The question of whether the statute of limitations has expired or whether Potter's intervening complaint can relate back under CR 15.03 has no effect on the outcome of this matter due to the fact that Potter's motion to intervene was not timely.

Having considered the parties' arguments on appeal, the decision of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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NO BRIEF FOR APPELLANT,
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