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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001161-MR

BRUCE HAWKINS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS McDONALD, JUDGE
ACTION NO. 99-CI-007605

ANCHORAGE AMBULANCE DISTRICT AND/OR
ANCHORAGE FIRE & EMS;
FORD MOTOR COMPANY, AND MILLS
DETECTIVE AGENCY, INC. — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: During the late shift at the Ford Motor Company Truck Plant in Jefferson County on December 20, 1998, Bruce Hawkins, a Ford employee, suffered a heart attack. None of Ford's medical employees was on duty at the time, so a security guard summoned the Anchorage Fire and Emergency Medical Service for assistance. Anchorage dispatched an ambulance that allegedly transported Hawkins to the wrong hospital, necessitating an additional transfer. Hawkins survived the heart attack, but it left him disabled.

On December 20, 1999, Hawkins filed suit for damages against Ford, Anchorage, and "the unknown security personnel" at Ford. He alleged that Ford and the security guard had negligently delayed summoning help and that Anchorage's ambulance crew had negligently taken him to the wrong hospital. Their negligence, he claimed, had deprived him of timely treatment and caused the heart attack to be more disabling than it otherwise would have been. Having learned that the security guard was an employee of the Mills Detective Agency rather than Ford, Hawkins filed an amended complaint on February 22, 2000, adding Mills as a defendant and alleging that the guard's negligence should also be imputed to it. By orders entered October 4, 2000, and March 8, 2001, the Jefferson Circuit Court dismissed Hawkins's complaint against Mills, as barred by the one-year statute of limitations for personal injury actions,[1] and granted summary judgments for Ford and Anchorage on the grounds, respectively, of workers compensation and sovereign immunity. Hawkins appeals from all three rulings. We agree with Hawkins that Anchorage is not immune from suit. Otherwise we affirm the trial court's orders.

With respect to Ford, Hawkins argues that because the heart attack was not itself work-related and thus not compensable under the Workers' Compensation Act,[2] the alleged aggravation of the heart attack as a result of Ford's allegedly negligent response to the emergency was also noncompensable, and he should

[1]KRS 413.140.

[2]KRS Chapter 342.

be permitted to seek a remedy outside the Act. In fact, however, if Hawkins could prove to the Workers' Compensation Board that Ford's response to his heart attack caused additional medical expenses or worsened his disability, then he would be entitled to workers' compensation benefits to the extent of the aggravation.[3] Hawkins's claim is thus within the Workers' Compensation Act, and because it is, it is subject to the Act's exclusive remedy provision.[4] That provision bars Hawkins's negligence action against Ford,[5] a result that no amount of additional discovery could alter. The trial court did not err, therefore, by halting discovery and granting Ford's motion for summary judgment.

With respect to Mills, the trial court ruled that Hawkins's complaint was barred by the one-year statute of limitations for personal injury actions. Hawkins contends that by referring to an "unknown" defendant in his initial complaint of December 1999 he gave constructive notice of the suit to Mills within the statutory period pursuant to CR 4.15. He also contends that his amended complaint of February 2000, in which he named Mills, should be deemed to relate back to the original

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[3]AIK Selective Self Insurance Fund v. Bush, Ky., 74 S.W.3d 251, 252 (2002) ("An employer or its insurance carrier is liable for workers' compensation benefits for any aggravation of the initial injury caused by necessary medical treatment of that injury."). *Cf.* Scott v. Wolf Creek Nuclear Operating Corp., 928 P.2d 109 (Kan. App. 1996) (work-related aggravation of non-work-related illness is compensible); McDaniel v. Sage, 366 N.E.2d 202 (Ind. App. 1977) (aggravation of non-work-related illness at work-place infirmary is work related).

[4]KRS 342.690: "If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee." Hawkins does not dispute that Ford has duly secured payment of compensation.

[5]Shamrock Coal Company v. Maricle, Ky., 5 S.W.3d 130 (1999).

complaint pursuant to CR 15.03. Neither contention is persuasive.

Contrary to Hawkins's reading of the rule, CR 4.15 does not provide a general means to give constructive notice to unknown defendants and thereby to subject them to the court's personal jurisdiction and initiate proceedings against them.[6] It does not, that is to say, purport to modify the general constitutional[7] and statutory[8] requirements that a defendant be given actual notice of the suit and an actual summons. It is rather a part of the warning order process provided for in rules CR 4.05 - CR 4.15. That process has been held to be available only where provided for by statute[9] or where an interest in property is the subject matter of the cause of action.[10] Hawkins's claim satisfies neither of these conditions.

Even if the warning order process were available to Hawkins, moreover, its invocation requires strict compliance with the civil rules.[11] Hawkins did not file the affidavit required by CR 4.06, and, as the trial court noted, he did not accurately

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[6]Richmond v. Louisville and Jefferson County Metro Sewer District, Ky. App., 572 S.W.2d 601 (1977).

[7]Dusenbery v. United States, 534 U.S. 161, 151 L. Ed. 2d 597, 122 S. Ct. 694 (2002); Robinson v. Hanrahan, 409 U.S. 38, 34 L. Ed. 2d 47, 93 S. Ct. 30 (1972).

[8]KRS 454.165.

[9]Dotson v. Rowe, Ky. App., 957 S.W.2d 269 (1997).

[10]First National Bank of Cincinnati v. Hartmann, Ky. App., 747 S.W.2d 614 (1988); Dalton v. First National Bank of Grayson, Ky. App., 712 S.W.2d 954 (1986).

[11]Miller v. Hill, 293 Ky. 242, 168 S.W.2d 769 (1943); W.G.H. v. Cabinet, Ky. App., 708 S.W.2d 109 (1986).

describe Mills as the unknown party. The trial court did not err, therefore, by ruling that Hawkins's purported attempt to serve Mills constructively did not commence the action against Mills within the limitations period.

Nor did the court err by ruling that Hawkins's first amended complaint, in which he named Mills as a defendant, did not relate the claim against Mills back to the original complaint. Under CR 15.03, an amendment changing the party against whom a claim is asserted relates back to the prior complaint if the new claim arose from the same "conduct, transaction, or occurrence," and if

> within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his 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 him.

As our Supreme Court has explained,

> The relation back rule mandates that the party to be named in an amended pleading knew or should have known about the action brought against him. . . . Actual formal notice may not be necessary. . . . Nevertheless, knowledge of the proceedings against him gained during the statutory period must be attributed to the defendant.[12]

Hawkins filed his original complaint on December 20, 1999, the last day of the one-year limitations period. Even if we agreed with him that the agency relationship between Ford and

[12]Gailor v. Alsabi, Ky., 990 S.W.2d 597, 601 (1999) (quoting from Nolph v. Scott, Ky., 725 S.W.2d 860 (1987)).

Mills was such that Ford was likely to pass notice of the suit along to Mills,[13] we could not agree that it would have been passed along before the limitations period expired. Because Mills did not have timely notice of Hawkins's original complaint, Hawkins's belated attempt to add Mills to that complaint did not relate back to the original filing.

Finally with respect to Mills, on March 29, 2000, Hawkins filed a second amended complaint in which he alleged that he had been injured by Mills' intentional infliction of emotional distress--the tort of outrage. Although such a claim would not be barred by limitations,[14] the amendment was subject to the leave of court under CR 15.01. The trial court denied leave to amend. Hawkins contends that the denial prematurely resolved an issue of fact and thus was an abuse of the trial court's discretion. We disagree.

CR 15.01 provides that leave to amend "shall be freely given when justice so requires." Justice does not so require, of course, if the amendment would be futile.[15] The trial court based its decision on the facts that Hawkins was clearly attempting to evade the one-year limitations period and that his allegations against the security guard simply did not amount to

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[13]*Cf.* Funk v. Wagner Machinery, Inc., Ky. App., 710 S.W.2d 860 (1986).

[14]Craft v. Rice, Ky., 671 S.W.2d 247 (1984).

[15]First National Bank of Cincinnati v. Hartmann, *supra.*

outrage.[16] The amendment, the court clearly believed, would be futile, and this conclusion was well within its discretion.

With respect to Anchorage, Hawkins contends that it is not protected by sovereign or municipal immunity and thus that the summary judgment dismissing his claim on the ground of immunity was erroneous. We agree.

The parties do not dispute that Anchorage Fire and EMS is an agency of the city of Anchorage. Nevertheless, the trial court ruled that Anchorage serves a governmental function and therefore shares the central state government's immunity. The initial test, however, is not whether Anchorage's activities can be characterized as governmental rather than proprietary, but whether it is funded by and performs the services of the central state government.[17] If so, then the question becomes whether it can pass the governmental versus proprietary function test.[18] Anchorage does not pass the first test. It performs a local rather than a state function. It is a municipal rather than a state agency. Although the rule used to be otherwise, it is now well established that immunity for municipal agencies has been abrogated.[19] Municipal immunity is the exception; liability is the rule. The exception is limited to municipal governmental

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[16]*Cf.* Osborne v. Payne, Ky., 31 S.W.3d 911 (2000) (discussing the elements of a cause of action for outrage).

[17]Kentucky Center for the Arts v. Burns, Ky., 801 S.W.2d 327 (1990).

[18]Yanero v. Davis, Ky., 65 S.W.3d 510 (2001).

[19]Gas Service Company v. City of London, Ky., 687 S.W.2d 144 (1985) (citing Haney v. City of Lexington, Ky,. 386 S.W.2d 738 (1964)); Ashby v. City of Louisville, Ky. App., 841 S.W.2d 184 (1992).

acts that may be deemed legislative or judicial.[20] There being no question but that Anchorage's service to Hawkins on the night of his heart attack did not involve legislative or judicial acts, Hawkins's negligence suit against the agency was not barred by immunity.

In urging and reaching the opposite conclusion both Anchorage and the trial court relied upon Smith v. City of Lexington,[21] a case applying the old rule of municipal immunity that was repudiated in Haney v. City of Lexington[22]and Gas Service Company v. City of London.[23] The old rule applied the notion of governmental immunity (the governmental versus proprietary function idea) to municipalities. As noted, however, since Haney, governmental immunity applies only to agencies of a sovereign entity,[24] to state agencies,[25] that is, and in some instances to county agencies.[26] It no longer applies to municipalities. The trial court's contrary conclusion was erroneous.

Accordingly, we reverse the Jefferson Circuit Court's March 8, 2001, summary judgment in favor of Anchorage Fire and

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[20]*Id.*

[21]Ky., 307 S.W.2d 568 (1957).

[22]*See* note 18.

[23]*See* note 18.

[24]Yanero v. Davis, *supra.*

[25]Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997).

[26]Louisville and Jefferson County Metro Sewer District v. Simpson, Ky., 730 S.W.2d 939 (1987).

EMS and remand for reinstatement of Hawkins's complaint against that defendant. Hawkins's may address his desire for additional discovery to the trial court. We affirm the court's October 3, 2000, order dismissing Hawkins's complaint against the Mills Detective Agency, because that portion of Hawkins's complaint was untimely, and we affirm the court's October 3, 2000, summary judgment in favor of Ford. Hawkins's complaint against Ford is barred by the Workers' Compensation Act's exclusive remedy provision.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Joseph Smith
Louisville, Kentucky

BRIEF FOR APPELLEE FORD MOTOR COMPANY:

B. Todd Thompson
Sallie J. Stevens
Thompson Miller & Simpson PLC
Louisville, Kentucky

BRIEF FOR APPELLEE MILLS DETECTIVE AGENCY:

William B. Orberson
William P. Swain
Phillips Parker Orberson & Moore, PLC
Louisville, Kentucky

BRIEF FOR APPELLEE ANCHORAGE FIRE & EMS:

Donald Killian Brown
Jeri D. Barclay
Krauser & Brown
Louisville, Kentucky