RENDERED: August 15, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001385-MR

MARTIN GRUBBS — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 99-CI-00176

KENTUCKY FARM BUREAU INSURANCE COMPANY;
AND TIFFANY PENNEBAKER, A MINOR,
BY HER BEST FRIEND, CHERYL PENNEBAKER — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON AND KNOPF, JUDGES; AND MILLER, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Martin Grubbs has appealed from an order entered by the McCracken Circuit Court on May 25, 2001, which dismissed his claims against appellee, Tiffany Pennebaker, for want of jurisdiction, insufficiency of process and insufficiency of service of process. Having concluded that the trial court properly dismissed Grubbs=s claims, we affirm.

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On October 30, 1998, Grubbs parked his car in front of Applebee=s Restaurant in Paducah, Kentucky, and entered the restaurant. While Grubbs was in the restaurant, Tiffany Pennebaker, who was 16 years old at the time, backed her vehicle into Grubbs=s Nissan Altima and damaged Grubbs=s vehicle. Shortly thereafter, Grubbs notified Tiffany Pennebaker=s insurance carrier, Kentucky Farm Bureau Insurance Company of his damage claim. Per Kentucky Farm Bureau=s request, Grubbs obtained estimates for the repairs to his vehicle. Grubbs, however, was not satisfied with the repair shops recommended by Kentucky Farm Bureau and he decided to have his vehicle repaired at Purcell=s Body Shop in Paducah, Kentucky. Grubbs notified Kentucky Farm Bureau of his intent to have his vehicle repaired by Purcell=s and on November 9, 1998, Grubbs took his car to Purcell=s Body Shop to be repaired. Shortly thereafter, Purcell=s sent an invoice to Kentucky Farm Bureau detailing the repairs and requesting payment in the amount of $2,851.46. Kentucky Farm Bureau subsequently sent a letter to Grubbs informing him that his request for payment in the amount of $2,851.46 was denied.[2]

As a result of this dispute, Grubbs filed a pro se complaint in the McCracken District Court, Small Claims Division, on November 23, 1998, naming Tiffany Pennebaker as the defendant.

[2]Kentucky Farm Bureau disputed this amount and claimed that a portion of the damages to Grubbs=s vehicle had resulted from a previous accident. Kentucky Farm Bureau, however, agreed to pay Grubbs damages in the amount of $1,633.01 and Grubbs admitted to receiving two separate checks from Kentucky Farm Bureau

A Small Claims summons was issued by the McCracken District Court Clerk for Tiffany Pennebaker on November 24, 1998. The summons and complaint were sent to Tiffany Pennebaker by certified mail and received by her on November 25, 1998. On December 10, 1998, counsel for Tiffany Pennebaker filed an answer affirmatively pleading lack of personal jurisdiction over the defendant, insufficiency of process and insufficiency of service of process.[3] The answer also contained a motion to dismiss any and all claims against Tiffany Pennebaker. The basis for the above-noted affirmative defenses raised by Tiffany Pennebaker revolved around her status as a minor at the time of the accident.[4]

On March 22, 1999, counsel for Grubbs filed a motion to amend the Small Claims complaint and to transfer the case to the McCracken Circuit Court.[5] The motion was granted and Grubbs was allowed to amend his complaint to include the following caption: ATIFFANY PENNEBAKER, a minor, by her best friend CHERYL PENNEBAKER.@[6] The amended complaint against Tiffany Pennebaker

---

totaling $1,633.01.

[3] Tiffany Pennebaker=s attorney was hired by her liability insurer, Kentucky Farm Bureau, for the sole purpose of responding to Grubbs=s attempts to assert a cause of action against her. In addition, several other defenses were raised by Tiffany Pennebaker in her answer, none of which, however, are the subject of this appeal.

[4] Tiffany Pennebaker was 16 years old and a minor at the time of the accident, at the time of issuance of the Small Claims summons, and at the time of attempted service of the Small Claims summons and complaint.

[5] By January 19, 1999, Grubbs had obtained counsel and was no longer proceeding pro se. Trial counsel was not the same counsel as appellate counsel.

[6] Cheryl Pennebaker is Tiffany Pennebaker=s mother. In addition, Grubbs, on

was mailed to Tiffany Pennebaker=s attorney. Grubbs never filed a motion to join Cheryl Pennebaker as a party, never attempted to have a summons issued for her, and never served any initiating papers on her.

On April 23, 1999, an answer was filed in McCracken Circuit Court on behalf of Tiffany Pennebaker asserting the same defenses of insufficiency of process, insufficiency of service of process and lack of personal jurisdiction. Once again, a motion to dismiss any and all claims against Tiffany Pennebaker was included in the answer.[7] The parties proceeded with the discovery process, and on April 20, 2001, Tiffany Pennebaker filed a memorandum in support of her motion to dismiss. On May 25, 2001, the trial court granted Tiffany Pennebaker=s motion and dismissed all claims against her for want of jurisdiction, insufficiency of process and insufficiency of service of process. This appeal followed.

Grubbs first argues that the trial court erred by dismissing his claims because the service of process in the case was proper. Grubbs recognizes that under CR[8] 4.04(3) that A[s]ervice shall be made upon an unmarried infant . . . by

---

April 16, 1999, also added claims against Kentucky Farm Bureau alleging bad faith and unfair settlement practices, however, these claims are not a subject of this appeal.

[7] Tiffany Pennebaker also filed an answer to the first amended complaint on December 23, 1999.

[8] Kentucky Rules of Civil Procedure.

serving his resident guardian or committee if there is one known to the plaintiff or, if none, by serving either his father or mother within this state[.]@ Thus, Grubbs claims that Cheryl Pennebaker was properly served in the instant action by the amending of his complaint to include the caption, ATIFFANY PENNEBAKER, a minor, by her best friend CHERYL PENNEBAKER@ and by serving the amended complaint upon counsel for Tiffany Pennebaker.

Clearly, CR 4.04(3) provides that service upon a minor can only be accomplished by serving her resident guardian or committee or her mother or father. In addition, Kentucky has long followed a strict adherence to the rule of AIn-hand Service of Process.@[9] Although the federal civil rules permit a copy of the summons to be left at the defendant=s dwelling, Kentucky follows a different approach and continues to require personal service except in those instances in which non-personal service is authorized by statute or rule.[10] A summons must be personally served upon the defendant or her representative.

Grubbs also claims that the amended complaint did not

[9] Burton v. Dowell Division of Dow Chemical Co., Ky., 471 S.W.2d 708, 710 (1971).

[10] Id. at 711. In the case sub judice, Tiffany Pennebaker was served by registered mail at the family residence. Grubbs appears to advance the argument that serving Tiffany Pennebaker at the family residence amounted to service on her and her family. We disagree with Grubbs=s assertion, however, as the only signature contained on the return receipt is that of Tiffany Pennebaker. For a similar result see Newsome v. Hall, 290 Ky. 486, 161 S.W.2d 629, 633 (1942) (delivering a copy of the summons to the defendant=s wife at the marital residence did not constitute valid service as to the defendant).

have to be served by summons since the amended complaint was properly served upon counsel for Tiffany Pennebaker.[11] This argument appears to be premised upon appellant=s contention that Cheryl Pennebaker and her daughter are in fact the same party for purposes of liability. Grubbs argues that under Kentucky law a parent who owns or provides an automobile for the pleasure and convenience of his family is liable for its negligent use by his infant child whom he permits to use the automobile.[12]

We reject Grubbs=s attempt to apply this law to the issue presented in the case sub judice. The simple fact that the law allows for the negligence of a minor involved in an accident to be imputed to his or her parent does not obviate the need for proper service of process under the civil rules, nor does it obviate the need for personal jurisdiction over the defendant. The issuance and service of process is a fundamental prerequisite to the jurisdiction of a court and without personal jurisdiction over an individual, a court lacks all authority to adjudicate that party=s rights even though it may have jurisdiction over the

[11] In his brief Grubbs incorrectly claims that Cheryl Pennebaker hired the attorney to represent her daughter in this action. Although counsel did file responsive pleadings on behalf of Tiffany Pennebaker, such counsel was hired by Kentucky Farm Bureau and never represented the individual interest of Cheryl Pennebaker. In addition, the mere fact that Cheryl Pennebaker may have met with Tiffany Pennebaker=s attorney is of no consequence. A>Mere knowledge of the pendency of an action is not sufficient to give the court jurisdiction, and, in the absence of an appearance, there must be service of process.=@ Potter v. Breaks Interstate Park Commission, Ky., 701 S.W.2d 403, 406 (1985)(quoting Rosenberg v. Bricken, 302 Ky. 124, 194 S.W.2d 60, 62 (1946); and Burton, 471 S.W.2d at 708).

[12] See Kentucky Revised Statutes (KRS) 186.590(3); and Rutherford v. Smith, 284 Ky. 592, 145 S.W.2d 533, 536 (1940).

subject matter.[13]

In the case sub judice, the trial court never acquired personal jurisdiction over Tiffany Pennebaker. The only attempt at service of process in this case was upon Tiffany Pennebaker and she did not have the capacity to be served at the time. The proper procedure for serving Tiffany Pennebaker would have been to have served Cheryl Pennebaker with a summons. Accordingly, the trial court did not err by dismissing the case for want of jurisdiction.[14]

Grubbs is also apparently attempting to avoid the jurisdiction issue by arguing that the Arelation back@ language of CR 15.03 provides that formal notice is unnecessary if a party named in an amended pleading knew or should have known about the action brought against him. CR 15.03 provides as follows:

> (1) Whenever 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, the amendment relates back to the date of the original pleading.

---

[13] See Kulko v. Superior Court of California, 436 U.S. 84, 91 (1978), reh. denied 438 U.S. 908. A[A] valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant.@

[14] In his reply brief Grubbs relies on an Indiana Court of Appeals case for the proposition that service of process on a minor defendant is proper as long as he is capable of understanding the summons. See Gourley v. L. Y., Ind.App., 657 N.E.2d 448 (1995). This Indiana case pertaining to the service of process on infant defendants is not persuasive as Indiana=s rules governing service of process contain critical differences. Indiana Trial Rule 4.2(A) provides that in the event service is not possible as to an infant defendant=s guardian or parent, service shall be made on the infant alone. Kentucky's rules governing the service of process of infant defendants contain no such provision.

> (2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, 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.

Thus, Grubbs appears to argue that notice to an original party may be imputed to a party sought to be added by amendment whenever Athere is a sufficient identity of interest@ between the two. Grubbs=s reliance on Clark v. Young,[15] in support of this proposition is misplaced, however, as Tiffany Pennebaker was never properly brought before the court. Notice cannot be imputed from Tiffany Pennebaker to her mother as Tiffany Pennebaker was never an original party to the action. In addition, Grubbs attempts to gloss over the fact that the office of Anext friend@ is confined to the bringing of an action in the

[15] Ky.App., 692 S.W.2d 285, 287 (1985). See also Funk v. Wagner Machinery, Inc., Ky.App., 710 S.W.2d 860, 861-62 (1986). In addition, we note in passing that in Halderman v. Sanderson Forklifts Co., Ky.App., 818 S.W.2d 270, 273 (1991), this Court held that where there is a sufficient identity of interest between the old and new defendants, the notice requirement of CR 15.03(2) is satisfied whenever the intended defendant receives notice, be it actual, informal, imputed, constructive or a combination thereof. However, this Court later distinguished Halderman, Funk, and Clark on the grounds that each case involved instances in which a legally binding relationship existed, imposing a duty on the original named party to apprise the added party of the lawsuit. See Reese v. General American Door Co., Ky.App., 6 S.W.3d 380, 382 (1998). In the case sub judice, the law imposes no duty on a minor defendant to apprise her mother of a lawsuit filed against her.

name, and for the benefit, of the infant.[16] There is simply no authority to support a procedure by which the office of Anext friend@ is used to bring an action against a minor. Thus, Grubbs fails to acknowledge that a court=s power to apply CR 15.03 is incidental to its jurisdiction over the case. In the case sub judice, the trial court never acquired personal jurisdiction over Tiffany Pennebaker or Cheryl Pennebaker as neither was properly before the court.[17] Accordingly, Grubbs=s reliance on CR 15.03 is misplaced.

In his second assignment of error, Grubbs claims that the trial court erred by dismissing his claims against Tiffany Pennebaker because she and her mother had actual notice of the litigation and an appearance was entered on their behalf. Grubbs argues that under Kentucky law the sole purpose of a summons is to give the opposing party notice of the pendency of a claim and an opportunity to defend. Grubbs further argues that the attempted service on Tiffany Pennebaker at the family residence coupled with the filing of the amended complaint was sufficient

[16] See Sparks v. Boggs, Ky.App., 839 S.W.2d 581, 583 (1992); Chaney v. Slone, Ky., 345 S.W.2d 484, 485 (1961); Zogg v. O=Bryan, Ky., 237 S.W.2d 511, 517 (1951); and CR 17.03.

[17] Consequently, Grubbs=s reliance on Taylor v. Howard, 306 Ky. 407, 208 S.W.2d 73 (1948), is also misplaced. Grubbs cites Taylor in support of the argument that a summons is valid provided the adverse party is given notice and an opportunity to defend, even though the name of the defendant set forth therein is incorrect. The adult appellees in Taylor, however, did in fact enter an appearance, thereby subjecting themselves to the jurisdiction of the court. Id. at 76. Moreover, the Court in Taylor went on to hold that the infant appellees involved in the litigation were never properly brought before the court as an appearance was never entered on their behalf. Id.

to apprise Cheryl Pennebaker of the pendency of the claim against her, thereby affording her the opportunity to appear before and be heard by the court. Grubbs, however, goes on to cite Rosenberg, supra, for the proposition that mere knowledge of the pendency of a cause of action is not sufficient to confer jurisdiction, and in the absence of an appearance, there must be service of process. Thus, Grubbs=s argument appears to hinge upon his assertion that an Aappearance@ was in fact entered on behalf of Tiffany Pennebaker.[18]

We find the case of Cornett v. Smith,[19] to be factually similar to the case at hand and quite instructive. In Cornett, process was never served on the defendant and he raised the defenses of insufficiency of process and lack of personal jurisdiction in his answer to the plaintiff=s complaint.[20] The plaintiff, however, argued that by asserting these defenses the defendant in effect had entered an appearance, thereby waving any lack of jurisdiction over his person.[21] The former Court of Appeals disagreed and held that since proper process was never

[18] Appearance as used in this context is defined as A[t]he formal proceeding by which a defendant submits himself to the jurisdiction of the court.@ See Black=s Law Dictionary 97 (6th ed. 1990). In addition, it may be noted that the distinction between Ageneral@ and Aspecial@ appearances was eliminated by the Civil Rules of Procedure. See Cann v. Howard, Ky.App., 850 S.W.2d 57, 62-3 (1993).

[19] Ky., 446 S.W.2d 641 (1969). For a similar result, see also Cann, supra.

[20] Cornett, supra at 642.

[21] Id.

issued against the defendant, Ano action [had] been commenced against him in good faith and he [had] not entered his appearance.@[22] In arriving at this conclusion the Court relied upon the language of CR 12.02, which provides as follows:

> ANo defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion.@[23]

Similar to the defendant in Cornett, Tiffany Pennebaker has insisted throughout the proceedings that proper process was never served upon her. We agree and conclude that Tiffany Pennebaker was never brought before the court as an Aappearance@ was never entered on her behalf.[24]

Grubbs=s reliance on Rosenberg in support of his argument that a summons is unnecessary where the defendant is notified of the pendency of the action and given the opportunity to defend is also misplaced. In Rosenberg, a guardian ad litem was appointed for the service of process of certain infant defendants, however, summons was never served on the guardian ad litem.[25] Thus, the Rosenberg Court was faced with the following

---

[22] Id.

[23] Id. (quoting CR 12.02).

[24] This conclusion also dispenses with Grubbs=s reliance on Chaney, 345 S.W.2d at 485, as the defendant in Chaney answered the complaint and defended the action, raising no questions concerning service of process until the closing of a trial on the merits. Accordingly, the Court determined that under such circumstances any defects concerning service of process were considered waived. Id.

[25] Rosenberg, 194 S.W.2d at 60.

question:

> Is it absolutely essential that process be served on the guardian ad litem appointed for infant defendants for the purpose of service, or may the guardian ad litem waive the service and enter his appearance, thereby bringing the infant defendants before the court?[26]

The Court resolved the issue by concluding that where a guardian ad litem is properly appointed for the purpose of service, his appearance in the action brings the infants before the court.[27] Thus, the Court determined that actual service of the summons upon the guardian ad litem was unnecessary.[28] That being said, we fail to see how Rosenberg applies to the case sub judice. Grubbs appears to argue that an Aappearance@ was entered on behalf of Tiffany Pennebaker, just as an Aappearance@ was entered on behalf of the infant defendants in Rosenberg, thereby bringing Tiffany Pennebaker before the court. A guardian ad litem, however, was never appointed for the purpose of effectuating service on Tiffany Pennebaker, as in Rosenberg. Moreover, in the answer to Grubbs=s complaint and amended complaint, counsel for Tiffany Pennebaker properly raised the defenses of insufficiency of process, insufficiency of service of process and lack of personal jurisdiction. The guardian ad litem appointed to

---

[26] Id.

[27] Id. at 62.

[28] Id.

represent the infant defendants in Rosenberg, however, never raised these issues and proceeded to defend the case on the merits, thereby waving any defenses pertaining to service of process and personal jurisdiction. This distinction is critical.

Grubbs argues that under Kentucky law a defect in service of process may call for the quashing of process, but such a defect is not generally grounds for dismissing the proceedings. Grubbs further argues that any defects found by the trial court in this case were cured by the subsequent litigation. Grubbs relies on Wakefield v. City of Shelbyville,[29] in support of his argument. We decline to extend the holding of Wakefield to the case sub judice, however, as Wakefield dealt with annexation proceedings which are governed by very specific statutory notice requirements.[30] The statutes which set forth the procedure for publishing notice of an annexation suit simply have no application to a case involving an attempted suit against a minor for the negligent operation of a motor vehicle. In the absence of an appearance, any deficiencies in the service of process upon a defendant cannot be cured simply by her actual knowledge of pendency of the suit.[31] Moreover, we find the following

[29] Ky.App., 563 S.W.2d 756 (1978).

[30] Id. at 757.

[31] Burton, 471 S.W.2d at 711. In addition, the law of the Sixth Circuit also appears to be in accordance with our holding. See, e.g., Friedman v. Estate of Presser, 929 F.2d 1151, 1155 (6th Cir. 1991) (AFor the great majority of courts, however, actual knowledge of the law suit does not substitute for proper service of process under Rule 4(c)(2)(C)(ii)@ (citation omitted)).

annotation contained in 62B Am.Jur.2d 749, Process, ' 5, to be of particular relevance and in accordance with our rules governing service of process:

> As a general rule, the mere fact that a defendant has knowledge of a suit pending against him is insufficient to give a court jurisdiction, absent service of process or a voluntary appearance by him. Moreover, the mere fact that a defendant may in some way have learned of the filing of the suit does not dispense with the necessity of service of process [footnotes omitted].

Accordingly, the trial court did not err by dismissing Grubbs=s claims for want of jurisdiction, insufficiency of process and insufficiency of service of process. Based on the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Delbert K. Pruitt
Paducah, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE, TIFFANY PENNEBAKER:

Mike Moore
Paducah, Kentucky