RENDERED: July 16, 2004, 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001429-MR

DAVID B. WHITAKER — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 00-CI-00797

J. McINTYRE MACHINERY, LTD. — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI MCANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. David B. Whitaker (hereinafter “Whitaker”) appeals from an order of the Pulaski Circuit Court granting J. McIntyre Machinery, Ltd.’s (hereinafter “McIntyre Machinery”) motion to dismiss his products liability action on the basis of the running of the applicable statute of limitations. We affirm.

On August 24, 1999, Whitaker was injured at his employer’s place of business, Somerset Scrap Metal Company, Somerset, Kentucky. He was injured on a machine which was used

to chop scrap metal into smaller pieces for packaging and shipping. He suffered severe injuries when his hand came into contact with the cutting blades of the chop machine. He was taken to Lake Cumberland, L.L.C., d/b/a Lake Cumberland Regional Hospital (hereinafter "Lake Cumberland Hospital") and then transported to Jewish Hospital in Louisville, Kentucky, for surgery.

On August 2, 2000, Whitaker filed a complaint against Somerset Scrap Metal Company, Lake Cumberland Hospital, the "Unknown Manufacturer" of the machine and the "Unknown M.D." who initially treated his injuries in the emergency room. On the same day he attempted constructive service on the "Unknown Manufacturer" through the Secretary of State of Kentucky and by appointment of a warning order attorney. On November 14, 2000, a newly appointed warning order attorney filed his report pursuant to CR 4.07(1) which states, in relevant part:

> Comes now the undersigned, David Austin Tapp, for his report of warning order and states:
>
> On the 4th day of October, 2000, he was appointed Warning Order Attorney for defendant Unknown Manufacturer. On October 11, 2000, a telephone call was made to the Hon. Tara Beckwith's office, attorney for the Defendant, Somerset Scrap Metal Company. A message left with secretary, requesting an (sic) Ms. Beckwith contact my office. Permission to visit Somerset Scrap Metal Company and look at the piece of equipment was requested. On October 24, 2000, after

> having no response from the previous telephone call, another telephone call was made to the Hon. Tara Beckwith. During this conversation Ms. Beckwith informed my office of an intent to file a motion to dismiss. She agreed to contact her client regarding my request and to call my office by the end of the week. On October 30, 2000, after not receiving a return telephone call another telephone call was made to Ms. Beckwith's office and a message was left requesting the opportunity to visit Somerset Scrap Metal Company and view the piece of equipment. On October 31, 2000, a return telephone call was received from the Hon. John Harrison. Permission was granted to visit Somerset Scrap Metal Company and view the piece of equipment. On November 13, 2000, a visit to Somerset Scrap Metal Company was made and the following information was taken from a plate attached to the machine:
>
> > J. McIntyre Machinery, LTD, Nottingham, England, TEL: 01159780781, FAX: 01159422357, Model 320 Shear, Rating 220 440 V60HZ, Serial No. 1754 1996 (A?), 2500 PSI, 660KGS.
>
> Two pictures were also taken of the machine and its information plate, attached as Exhibit A. A copy was made of the distributors catalog showing the equipment, attached as Exhibit B, and information on the supplier, Exhibit C.
>
> Based on the foregoing, it is the opinion of this attorney that defendant Unknown Manufacturer has not been notified of the nature and pendency of this action.

On December 19, 2000, Whitaker moved for leave of court to file an amended complaint. That motion was granted and on January 11, 2001, he filed his first amended complaint in

which he identified McIntyre Machinery as the manufacturer of the product at issue. Eventually, on April 30, 2002, McIntyre Machinery was properly served.[1] On May 21, 2002, McIntyre Machinery filed an amended answer to the amended complaint. According to the record, nothing additional was filed until March 25, 2003, at which time McIntyre Machinery filed a motion to dismiss with a supporting memorandum arguing that Whitaker's complaint was barred based upon the one year statute of limitations set forth in KRS 413.140. Following a hearing on May 16, 2003, the circuit court granted McIntyre Machinery's motion and on June 6, 2003, dismissed Whitaker's claims against the manufacturer. This appeal followed.

In its order dismissing Whitaker's claims against McIntyre Machinery, the circuit court relied upon CR 15.03 and Nolph v. Scott, Ky., 725 S.W.2d 860 (1987). CR 15.03 dealing with relation back of amendments of pleading states, in relevant part:

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

[1] McIntyre Machinery initially raised the issue that service did not comply with the requirements of the Hague Convention. Whitaker finally complied with the international service requirements on his third attempt.

> 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.

In Nolph, the Supreme Court of Kentucky addressed a situation very similar to the one before this Court and interpreted CR 15.03 and the need for a defendant to receive notice of a claim within the time frame permitted by the statute of limitations in the following manner:

> Scott contends the amended complaint relates back to the earlier filing date because Nolph received constructive notice of the lawsuit. We disagree. Constructive service on unknown defendants through appointment of a warning order attorney is not sufficient notice for the purposes of CR 15.03.
>
> The warning order rules provide for constructive service on a person unknown to the plaintiff. CR 4.50, 4.06, 4.07. While strict compliance with these rules is required, see e.g., Potter v. Breaks Interstate Park Commission, Ky., 701 S.W.2d 403 (1985), actual notice to the defendant is not necessary. Appointment of a warning order attorney is a procedural device permitting an action to proceed, in certain circumstances, unknown to the defendant.
>
> However, 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. CR 15.03(2)(b). Actual, formal notice may not

> be necessary. Cf., Funk v. Wagner Machinery, Inc., Ky.App., 710 S.W.2d 860 (1986). Nevertheless, knowledge of the proceedings against him gained during the statutory period must be attributed to the defendant. CR 15.03(2)(b). As noted by the United States Supreme Court in its review of the federal relation back rule, "(T)he linchpin is notice, and notice within the limitations period." Schiavone v. Vortune aka Time, Inc., ___ U.S. ___, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986).
>
> Movant Nolph lacked notice of the lawsuit within the limitations period. Thus, a key ingredient of CR 15.03 is missing. The trial court did not err in refusing to permit the amended pleading to relate back to the time of the original complaint.

Nolph, Id. at 861-62 (footnotes omitted).

Whitaker argues on appeal that Nolph is not controlling but rather that the court should rely on Underhill v. Stephenson, Ky., 756 S.W.2d 459 (1988) and Hagy v. Allen, et. al, E.D. Ky., 153 F. Supp. 302 (1957). In Underhill, the Supreme Court of Kentucky held that the trial court committed reversible error when it refused to permit the Underhills to amend their complaint. However, the Supreme Court distinguished Underhill from the facts presented in Nolph. Specifically, the Supreme Court stated:

> The trial court committed reversible error when it refused to permit the Underhills to amend their complaint by alleging that the hospital was negligent acting through its officers, agents, and/or employees. Civil Rule 15.03(2) provides for

> the amendment of an original pleading to relate back to the date of the original proceedings. The important consideration is not whether the amended pleading presents a new claim or defense, but whether the amendment relates to the general factual situation which is the basis of the original controversy. Perkins v. Read, Ky., 616 S.W.2d 495 (1981). The hospital will not be unduly prejudiced by the amendment. This Court has previously indicated that a malpractice action is barred only when the alleged negligence was discovered or should have been reasonably discovered. There was no way for the Underhills to discover the misrepresentation as to the presence of the physician at the hospital emergency room until his deposition was taken on May 1, 1984. Thereafter they sought to amend their complaint within one year from the date of such discovery.
>
> Nolph v. Scott, Ky., 725 S.W.2d 860 (1987) does not apply because the underlying fact situation is different. Here the alleged negligent act of the nurse (the occurrence) was unknown until the doctor's deposition was taken.

Nolph, Id. at 460-61.

As to the Underhill's reliance on the Hagy case, we believe the more recent federal case of Ford v. Hill, E.D. Ky., 874 F.Supp. 149 (1995), to be controlling on this issue. In the Ford case, Chief Judge William Bertelsman dismissed a claim made against two unknown police officers. In so doing, the Judge held as follows:

> The parties agree that plaintiffs' initial complaint contains the same factual allegations against two John Doe officers that have now been made against defendants

Hill and Crafton. The parties further agree that plaintiff filed an amended complaint identifying defendants Hill and Crafton by name on July 11, 1994.

The issue, then, is whether naming an unknown or John Doe party can constitute "a mistake concerning the identity of the proper party" for purposes of relation back under Rule 15(c)(3). The First and Seventh Circuits have unequivocally concluded:

> Rule 15(c)(3) "permits an amendment to relate back only where there has been an error made concerning the identity of the proper party and where that party is chargeable with knowledge of the mistake, but it does not permit relation back where, as here, *there is a lack of knowledge of the proper party*."

Wilson v. United States, 23 F.3d 559, 563 (1st Cir.1994) (quoting Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir.1993)) (emphasis in original). In Worthington, the original complaint named "unknown police officers." In Wilson, the original complaint correctly named the corporation plaintiff intended to name, but the corporation turned out to be the wrong party. The courts in both cases refused to permit relation back of an amendment under Rule 15(c)(3).

In this case, plaintiffs initially lacked knowledge of the proper defendants and elected to file their complaint against "unknown officers." Because Rule 15(c)(3) applies only where there has been an error concerning the identity of the proper party rather than where, as here, there is a lack of knowledge of the proper party, the amended complaint in this case does not relate back to the filing of the initial complaint. Accordingly, plaintiffs'

> individual claims against defendants Crafton and Hill are barred by the one-year statute of limitations.

Ford v. Hill, 874 F.Supp. 153-54.

Despite Whitaker's arguments to the contrary, the Pulaski Circuit Court properly found that Whitaker's claim against McIntyre Machinery is barred by the statute of limitations. Thus the order of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joel Randolph Smith
Jamestown, KY

BRIEF FOR APPELLEE:

Linsey W. West
Kara MacCartie Stewart
Lexington, KY