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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000168-MR

STEPHEN C. TAYLOR
AND LAURA A. TAYLOR — APPELLANTS

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR, JUDGE
ACTION NO. 02-CI-00319

COMPEX INTERNATIONAL COMPANY, LTD. — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

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BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE[1].

KNOPF, JUDGE: Stephen and Laura Taylor appeal from an order of the Bell Circuit Court dismissing their product-liability claims against Compex International Co., Ltd. The Taylors argue that

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

the trial court erred in finding that their negligence, strict liability and loss of consortium claims were untimely, and that they lacked privity of contract to assert a breach of implied warranty claim. Under the facts presented in this case, we agree with the trial court that the Taylors failed to file their tort claims within the limitations period. However, we also find that the warranty claim is not barred due to the Taylors' lack of privity with Compex. Hence, we affirm in part, reverse in part, and remand for further proceedings.

For purposes of this appeal, the underlying facts of this action as set out in the complaint are not in dispute. On July 14, 2001, Stephen and Laura Taylor were visiting with Stephen's parents in Bell County, Kentucky. As Stephen attempted to sit down, the chair broke, causing him to fall and sustain an injury. Stephen's parents had purchased the chair at a K-Mart store in Bell County, and the chair had been manufactured by Compex.

In late June 2002, the Taylors' counsel prepared a complaint naming Compex and K-Mart as defendants and asserting claims for strict product liability, negligence, breach of implied warranties and loss of consortium. The Taylors and their counsel signed the complaint on June 30, 2002, and counsel's checks for the filing fee and the secretary of state's fees are dated July 3, 2002. Furthermore, the Taylors' counsel

states that he also mailed the complaint and the filing fee to the Bell Circuit Clerk on July 3.

However, the clerk's docket sheet does not show the complaint as filed until July 19, 2002, and the only complaint in the record is stamped as filed on January 2, 2003.[2] The docket indicates that the summonses to K-Mart and to Compex also were issued to the Secretary of State's office on July 19. The summons as to K-Mart was received by the Secretary of State's office on July 23, 2002, but the Secretary of State's office returned the summons to Compex on August 29, 2002. A subsequent summons was issued on January 2, 2003, and received by the Secretary of State on January 6, 2003. Thereafter, Compex was served by warning order attorney on January 17.

By agreed order, the claims against K-Mart were dismissed without prejudice on April 11, 2003, due to K-Mart's pending bankruptcy. Compex filed its answer on April 22, 2003, asserting a statute of limitations defense to the negligence, strict liability and loss of consortium claims, and asserting that the warranty claims were barred due to a lack of privity

[2] The record is not clear as to what happened to the July 2002 complaint. The Taylors attached a copy of their complaint stamped as filed on July 19, 2002, as an appendix to their reply brief. However, this complaint does not appear anywhere in the record. But on the other hand, the Bell Circuit Clerk docketed the complaint filed as of that date and assigned the case a 2002 case number.

between it and the Taylors. Compex filed its motion to dismiss based upon these defenses on December 2, 2003.

At the hearing on December 22, 2003, the Taylors presented an affidavit from their original counsel stating that he had mailed the complaint and the filing fee to the clerk on July 3, 2002.[3] In addition, the trial court took judicial notice that the Bell Circuit Clerk's office had been in the process of moving into a new building during the first part of July 2002. Business in the clerk's office was suspended for approximately one week and the court had received anecdotal reports that a backlog had developed in the clerk's office at this time. Nevertheless, the court found that the Taylors had failed to file their action within the applicable limitations period. In a subsequent order, the trial court further found that the Taylors' claim for breach of warranty was barred due to their lack of privity with Compex. This appeal followed.

The parties agree that the statute of limitations for the negligence, strict liability and loss of consortium claims would have lapsed on July 15, 2002.[4] Compex asserts that it has only been served with the complaint filed on January 2, 2003,

[3] The Taylors' original counsel withdrew from the action shortly after Compex filed its motion to dismiss. The Taylors then proceeded with new counsel.

[4] KRS 413.140(1)(a).

which would clearly be untimely. Compex further argues that the missing July 19, 2002, complaint would also be untimely.

The statute of limitations is an affirmative defense.[5] As such, the burden of proof was on Compex to establish that the action was time-barred.[6] In this case, the complaint filed by the clerk on July 19, 2002, was untimely on its face. The Taylors assert that they delivered the complaint to the clerk's office before the statute of limitations had lapsed, and they should not be penalized for the clerk's delay in filing the complaint. However, the Taylors bore the burden of proving such facts as would toll the statute.[7]

A civil action is deemed to commence as of the filing of a complaint with the court and the issuance of the summons in good faith.[8] There are no Kentucky cases which have specifically addressed when a complaint is deemed to be filed.[9] The foreign

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[5] CR 8.03.

[6] Lynn Mining Co. v. Kelly, 394 S.W.2d 755, 759 (Ky., 1965).

[7] Southeastern Kentucky Baptist Hospital, Inc. v. Gaylor, 756 S.W.2d 467, 469 (Ky., 1988).

[8] KRS 413.250; CR 3.01.

[9] In Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., 37 S.W.3d 713 (Ky. 2000), the Kentucky Supreme Court considered the question of when an appeal may be deemed as filed. The Court held that a local rule allowing self-filing of pleadings did not apply to a notice of appeal. Rather, the clerk must actually receive the notice of appeal and the filing fee before the appeal may be docketed as filed. Id. at 715-16.

cases cited by the Taylors hold that, while the clerk's endorsement is the best evidence of the filing, a complaint will be deemed filed when received by the clerk even if the complaint is not immediately stamped as filed.[10]

Nevertheless, there was definitive evidence in those cases that the complaints were physically in the control of the clerk before the limitations period had lapsed. In contrast, the Taylors offered no clear proof that the complaint had been received by the clerk prior to the expiration of the limitations period. At most, the affidavits of their former counsel established that the complaint and filing fees were mailed on July 3, but there was no showing of when they were delivered to the clerk's office.

Furthermore, the trial court recognized that Bell Circuit Clerk suspended operations in early July 2002 while moving into a new building and some members of the local bar had indicated that a backlog had developed during that period. But the Taylors did not offer any evidence from anyone in the clerk's office about how filings were handled at that time.

However, the Court in Excel Energy made it clear that this result is compelled by CR 73.02(2), and did not suggest that the rule has any broader application.

[10] *See* Stephens v. Espy, 445 S.E.2d 292 (1994); Lavan v. Phillips, 184 Ga. App. 573, 362 S.E.2d 138 (1987); and Hagy v. Allen, 153 F.Supp. 580 (E.D. Ky., 1957). *See also* Reece v. City of Atlanta, 545 S.E.2d 96 (Ga. App., 2001).

Mere anecdotal evidence of a backlog was not sufficient to prove that the complaint was received by the clerk's office on or before July 15, 2002. Under the circumstances, the trial court correctly found that the Taylors' negligence, strict liability and loss of consortium claims were not timely filed.

The Taylors claim based upon breach of implied warranty would not be barred by the statute of limitations.[11] However, the trial court found that this cause of action was barred because the Taylors are not in privity with Compex. The Kentucky case law on this question is contradictory. In Dealers Transport Co., Inc. v. Battery Distributing Co., Inc.,[12] the former Court of Appeals held that privity is not a prerequisite to the maintenance of an action for breach of an implied warranty in products liability actions. This holding has been restated in Presnell Construction Managers, Inc. v. Eh Construction, LLC,[13] and Griffin Industries, Inc. v. Jones.[14] However, some of the discussion in these latter cases seem to be referring to strict liability claims brought under § 402A of the

[11] KRS 355.2-725.

[12] 402 S.W.2d 441, 446 (Ky., 1965).

[13] 134 S.W.3d 575, (Ky. 2004).

[14] 975 S.W.2d 100, 102 (Ky. 1998).

Restatement (Second) of Torts, rather than for breach of warranty claims.

But in Real Estate Marketing, Inc. v. Franz,[15] and Williams v. Fulmer,[16] our Supreme Court held that if liability is based on sale of the product, it can be extended beyond those persons in privity of contract only by some provision of the Uniform Commercial Code (UCC) as adopted in Kentucky.[17] Thus, breach of warranty is not a viable theory in a personal injury claim for a product sold in a defective condition unless there is privity of contract, except in limited circumstances specified in the UCC.[18]

However, these cases also recognize KRS 355.2-318, which provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

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[15] 885 S.W.2d 921, 926 (Ky. 1994).

[16] Ky., 695 S.W.2d 411 (1985).

[17] Id. at 413.

[18] Id. at 413-14. *See also* Franz, 885 S.W.2d at 926.

In Real Estate Marketing, Inc. v. Franz, and Williams v. Fulmer, the Kentucky Supreme Court held that this exception to the privity requirement for breach of warranty cannot be extended beyond its clear terms. In this case, however, the clear language of KRS 355.2-318 extends an implied warranty to household guests of the buyers, such as the Taylors. Under the facts as alleged in the complaint, the Taylors' warranty claim is not barred and the trial court erred by dismissing it.

Accordingly, the judgment of the Bell Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings on the merits of the Taylors' warranty claim.

ALL CONCUR.

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