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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001976-MR

RONALD COX — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 04-CI-000031

JOSH FERNIHOUGH; MARK FERNIHOUGH;
AND KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Ronald Cox brings this appeal from an order entered by the Jefferson Circuit Court September 3, 2004, and made final by an order entered September 28, 2004, granting summary judgment in favor of Josh Fernihough. The summary judgment dismissed the complaint as time-barred by Kentucky Revised Statutes (KRS) 304.39-230. We affirm.

On November 23, 2001, Josh and Ronald were involved in a motor vehicle accident at an intersection in Louisville, Kentucky. According to the police report, Josh's vehicle ran a red light and collided with Ronald's vehicle. Ronald suffered substantial injuries from the accident. It is undisputed the date of last payment of basic reparation benefits to Ronald by his insurance carrier was on January 14, 2002.

On January 5, 2004, Ronald filed a complaint against Josh's father, Mark Fernihough, and Kentucky Farm Bureau Insurance Company in the Jefferson Circuit Court. The record indicates that Mark was the actual owner of the vehicle at the time of the accident. The complaint, however, alleged that Mark "carelessly and negligently operated a vehicle owned by his father, Josh . . . ." As Mark was an out-of-state resident, Ronald obtained service upon him through our long-arm statute (KRS 454.210) by serving the Kentucky Secretary of State. The service of process was sent to an address listed on the police report; however, the return of service indicated that it was "undeliverable as addressed." The address given by Josh to the police and noted on the police accident report was 401 South Madison, Oakland City, Indiana, 47660. Mark and Josh had moved from that address and resided at 211 East Brummitt Street, Owensville, Indiana, 47665, since July 2002.

On February 13, 2004, Ronald filed a motion for leave to file an amended complaint. The amended complaint named Josh as a defendant; the court granted the motion.[1] Josh filed an answer on February 26, 2004. Thereafter, he filed a motion for summary judgment upon the grounds that the amended complaint was not filed within the two-year statute of limitations and that the filing of the amended complaint should not have related back to the filing date of the original complaint under Ky. R. Civ. P. (CR) 15.03. On September 3, 2004, the circuit court entered summary judgment dismissing Ronald's action against Josh as being time-barred. An order, subsequently entered on September 28, 2004, designated the earlier summary judgment as a final and appealable under CR 54.02. This appeal follows.

Ronald has raised several allegations of error in his brief. Initially, we observe the original complaint was filed on January 5, 2004, and named Mark and Kentucky Farm Bureau Insurance Company as defendants. The original complaint was timely filed and service of process was properly effectuated upon Mark by serving the secretary of state under KRS 454.210. This appeal does not concern the timeliness of the original complaint; rather, it focuses upon the timeliness of the amended complaint naming Josh as a defendant.

[1] Paragraph 3 of the amended complaint continued to incorrectly allege that Mark Fernihough was the son of Josh Fernihough and that Mark operated the vehicle at the time of the crash on November 23, 2001.

The amended complaint was not filed within the two-year statute of limitations as set forth in KRS 304.39-230. Ronald argues the late filing of the amended complaint was saved by application of CR 15.03. Ronald specifically argues the amended complaint should relate back to the date of filing the original complaint and, thus, was not time-barred by the statute of limitations.

As noted, the circuit court entered summary judgment dismissing Ronald's action against Josh. Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). We believe summary judgment was properly granted.

CR 15.03 states 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.
> (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.

Because of the unique facts of this appeal, our analysis must focus upon Subsection 2 of CR 15.03. Under Subsection 2, an amended complaint that adds a party relates back only if the new party received notice of the action within the statute of limitations and knew or should have known of the action but for a mistake in identity of the proper party. These requirements are to be strictly construed. Phelps v. Wehr Constructors, Inc., 168 S.W.3d 395 (Ky.App. 2004). The Kentucky Supreme Court, in addressing the application of CR 15.03(2), has emphasized the necessity that the new party have notice of the proceedings during the relevant statute of limitations period:

> 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, [FN2] "(T)he linchpin is notice, and notice within the limitations period."

Nolph v. Scott, 725 S.W.2d 860, 862 (Ky. 1987)(footnote omitted).

In the case at hand, Josh filed an affidavit with the court. Therein, Josh averred that he did not obtain actual

notice of the pending lawsuit until February 24, 2004. Thus, the undisputed evidence indicates that Josh did not receive actual notice of the lawsuit during the statute of limitations period. Ronald counters that actual notice is unnecessary. Ronald attempts to impute Mark's constructive notice of the action to his son, Josh.[2]

The notice requirement of CR 15.03(2) can be satisfied by "actual, informal, imputed, constructive or a combination thereof, within the imitations period." Halderman v. Sanderson Forklifts Co. Ltd., 818 S.W.2d 270, 273 (Ky.App. 1991). Notice will be imputed from the original party to a new party where there exists a "sufficient identity of interest." Id. at 273. This sufficient identity of interest arises where the "legally binding relationships between the original and added parties imposed on the first-named party a duty promptly to apprise the other laternamed [sic] entity of the lawsuit." Reese v. General American Door Co., 6 S.W.3d 380, 382 (Ky.App. 1998).

We simply cannot say that a legally binding relationship necessary to impute notice under CR 15.03 existed between Mark and Josh. Neither the familial relationship, as father and son, nor the alleged "business relationship, as owner and permitted driver," is legally sufficient to impute notice.

[2] As demonstrated by Mark's affidavit, Mark's knowledge of the lawsuit was constructive as he was served through the secretary of the state and never received actual service of process because of a change of address.

As such, we are of the opinion that Mark's knowledge of the lawsuit cannot properly be imputed to Josh under CR 15.03.

Ronald also argues that Mark's insurance company, State Farm Insurance Company (State Farm), had notice of the complaint within the statute of limitations period and that such notice may be imputed to Josh. Ronald points out that a representative of State Farm, Cody L. Tipton, was put on actual notice of the filing of the complaint when a "courtesy copy" of the filed complaint was sent to Tipton nine days prior to the expiration of the statute of limitations. Ronald contends that Tipton was a common-law agent for the insured under the policy of insurance; thus, notice may be imputed to Josh.

In Gailor v. Alsabi, 990 S.W.2d 597, 601 (Ky. 1999), the Supreme Court rejected a similar argument and specifically held:

> Although Appellee's attorney filed in the record a copy of a letter he mailed to Allstate enclosing a copy of the complaint, that letter is dated February 4, 1994, the last day of the period of limitations, and presumably did not arrive in Allstate's office on the same day it was mailed. (Unlike other correspondence from Appellee's attorney to Allstate, this letter does not contain the notation that it was sent "*VIA TELECOPIER.*") Regardless, Allstate was not named as a party defendant in either the complaint or the amended complaint; thus, CR 15.03(2)(b) could not apply to it.

As were the facts in Gailor, State Farm was not a named party in the complaint or the amended complaint; consequently, CR 15.03(2)(b) has no application.

In sum, we hold that the circuit court properly entered summary judgment dismissing Ronald's complaint against Josh as being time-barred under KRS 304.39-230. We agree with the circuit court that the provisions of CR 15.03 do not operate to save the amended complaint.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul V. Hibberd
PREGLIASCO·STRAW-BOONE
Louisville, Kentucky

Steven D. Yater
Louisville, Kentucky

BRIEF FOR APPELLEES:

Deborah Campbell Myers
Louisville, Kentucky