RENDERED: NOVEMBER 30, 2007; 10:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002244-MR

JOANNE BUCKLEY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 97-CI-00504

THE KROGER COMPANY, d/b/a COUNTRY OVEN BAKERY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Joanne Buckley ("Buckley") appeals two judgments of the Warren Circuit Court in her intentional infliction of emotional distress and disability discrimination action against The Kroger Company ("Kroger"). We vacate and remand.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

This case comes to the appellate level for a third time.[2] The factual and procedural history was set out in those published opinions and need not be repeated here. The facts essential to this appeal are as follows: on May 6, 1997 Buckley filed an action in Warren Circuit Court against Kroger and five individual supervisors, alleging disability discrimination and retaliation/conspiracy under the Kentucky Civil Rights Act ("discrimination"), intentional infliction of emotional distress/outrageous conduct ("IIED"), negligent infliction of emotional distress, assault and battery. After the withdrawal and dismissal of several claims by Buckley and the trial court, the only claims that remained were discrimination and IIED. A jury verdict found for Buckley on both claims, awarding her punitive damages and compensation for lost wages and benefits, medical expenses and humiliation. The trial subsequently rendered a judgment reflecting the jury verdict and the first appeal followed.

Upon appeal, Kroger argued that it was entitled to a directed verdict or verdict notwithstanding the verdict ("JNOV") on both claims. As part of its argument, Kroger maintained that Buckley's IIED claim was preempted by her discrimination claim under *Wilson v. Lowe's Home Center*, 75 S.W.3d 229 (Ky.App. 2001). Buckley argued that her IIED claim was not preempted by her discrimination claim, because the two claims were based on separate sets of facts. Irrespective of Buckley's argument, her petition indicated otherwise. Therefore, this court agreed with Kroger and issued an opinion to that effect. In that opinion, it was noted that the jury failed to distinguish the

[2] *See* Kentucky Court of Appeals opinion 113 S.W.3d 644 (Ky.App. 2003). *See also* Kentucky Supreme Court decision 177 S.W.3d 778 (Ky. 2005).

awards between the two claims. Therefore, the Warren Circuit Court judgment was vacated and the matter was remanded for a new trial on the discrimination claim only.

On remand and relying on the appellate court decision, the Warren Circuit Court denied Buckley the chance to pursue her IIED claim in an order dated April 15, 2004. After being granted a continuance, Buckley then filed a petition for writ of prohibition with this court.[3] The petition was rejected in an August 4, 2004 order. Buckley then received discretionary review by the Kentucky Supreme Court, where this court's order was affirmed.[4]

Subsequent to receiving the Supreme Court order affirming, Kroger moved for summary judgment on the discrimination claim. The circuit court granted the summary judgment in an order entered August 8, 2006. This appeal followed.

Buckley makes three arguments in her appeal: 1) the trial court improperly granted summary judgment on her discrimination claim; 2) the trial court improperly granted summary judgment on her IIED claim; and 3) in the alternative, if the discrimination action is not viable, the IIED action should not be preempted.

When reviewing a trial court's grant of summary judgment we must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at

[3] *See* Kentucky Court of Appeals Case No. 2004-CA-001221.

[4] *See Buckley v. Kroger*, 177 S.W.3d 778 (Ky. 2005).

trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

We will first address Buckley's discrimination claim. On November 19, 2003, the Warren Circuit Court entered an order granting Buckley leave to amend her original petition. On January 8, 2004, Buckley filed an Amended Complaint outlining distinctly the two separate sets of events that supported individually the claims of IIED and discrimination. Specifically, the amended complaint included events that took place after the filing of the original, in an effort to support the discrimination claim.

Buckley argues that her amended petition would place her situation outside the scope of *Wilson* by asserting the new set of facts necessary to allow both claims to stand. Buckley's amendment of her original petition has compelled us to conduct further investigation. While we agree that this case no longer falls within the scope of *Wilson*, it is not for the same reasons as Buckley believes.

CR 15.01 allows a party to amend a pleading once as a matter of course any time before a responsive pleading is filed. Thereafter, a party may amend his pleading only by leave of court or written consent of the adverse party. "Leave [to amend] shall be freely given when justice so requires." CR 15.01. Our courts have continuously found that the trial court is vested with broad discretion when determining whether or not to

allow pleading amendments. (*See Scott Farms, Inc. v. Southland*, 424 S.W.2d 574 (Ky. 1968); *see also Caldwell v. Bethlehem Mines Corp.*, 455 S.W.2d 67 (Ky. 1970)).

There is no dispute that Buckley needed to amend her petition because the facts which support her discrimination claim took place after the filing of the original petition. In fact, she pleaded continuously with this court and the circuit court to recognize that the claims were based on two separate series of events. We agree that this is the situation and therefore find that Buckley's original discrimination claim was filed prematurely. "An amended petition relates back to the original petition, and, if the original action was filed prematurely, it must be dismissed, carrying the amendments with it." *Lilly v. O'Brien*, 6 S.W.2d 715, 718 (Ky.App. 1928).

> Plaintiff's suit was prematurely brought, and no amendment declaring upon a cause of action which did not exist when the suit was commenced would cure such a defect. If no cause of action existed when the suit was started, there was nothing to amend . . . . It was not a case of a cause of action defectively stated. Such a defect is amendable. Neither was it a case of a new cause of action brought in by amendment, which existed when the suit was brought. It was an effort to declare and recover upon a cause of action which arose pending the suit.
>
> Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the nonexistence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit.

Id. at 718-719 (quoting *American Bonding & Trust Co. v. Gibson County*, 145 F. 871, 874 (C.A.6 1906)).

Because Buckley's discrimination claim was filed prematurely it was not ripe for action, meaning the circuit court failed to acquire subject matter jurisdiction over it.

> The issue of ripeness was never raised by the parties or the trial court. But ripeness is an element of a justiciable claim. Section 112(5) of the Kentucky Constitution states in relevant part that '[t]he Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court.' Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it. It is well-established that the issue of subject matter jurisdiction can be raised at any time, even *sua sponte*, as it cannot be acquired by waiver, consent, or estoppel.

Doe v. Golden & Walters, PLLC, 173 S.W.3d 260, 269 (Ky.App. 2005) (internal citations omitted). Therefore, we vacate the August 11, 2006 order granting summary judgment and remand with instructions to dismiss Buckley's discrimination claim.

If the discrimination cause of action is dismissed as premature, Buckley's case would fall outside the scope of *Wilson,* making her IIED claim appropriate for prosecution. Therefore, we vacate the April 15, 2004 order of the circuit court and remand Buckley's IIED claim for a new trial.

For the foregoing reasons, we vacate and remand for further proceedings consistent with these findings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lee Huddleston
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Brent R. Baughman
Louisville, Kentucky

William C. Vail, Jr.
Louisville, Kentucky