RENDERED: JULY 25, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002438-MR

WASTE MANAGEMENT OF KENTUCKY, LLC — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 05-CI-010838

SHAWN B. WILDER and
LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: On December 19, 2003, an automobile accident occurred involving a garbage truck owned by Waste Management of Kentucky, LLC (Waste Management) and operated by one of its employees, and an EMS

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

vehicle owned by Louisville/Jefferson County Metro Government (Louisville Metro) and operated by its employee Shawn B. Wilder. Waste Management filed suit to recover for damage to its vehicle on December 19, 2005, the final day of the two-year limitations period. *See* Kentucky Revised Statutes (KRS) 413.125. In the original complaint, only Louisville Metro was named as a defendant. On February 1, 2006, Waste Management filed a motion to amend its complaint to add Wilder as a defendant. The motion was granted. In the meantime, Louisville Metro filed a motion to dismiss on grounds of sovereign immunity. That motion was initially denied but was later granted after a motion to reconsider. Wilder filed a motion to dismiss the complaint against him because the statutory limitations period had expired before he was added as a party. Waste Management argued in response that the filing of the First Amended Complaint related back to the filing of the original complaint under Kentucky Rules of Civil Procedure (CR) 15.03. In October, 2006, the trial court granted both Louisville Metro's and Wilder's motions to dismiss. Waste Management has appealed only the order dismissing its complaint against Wilder, arguing that the circuit court erred in ruling that the First Amended Complaint did not relate back to the date of filing of the original complaint. We disagree; thus, we affirm.

When ruling on the motion to dismiss, the trial court considered Wilder's accompanying affidavit asserting that he did not learn about the lawsuit until he was served with the summons and complaint on March 25, 2006. We must therefore treat the motion as one for summary judgment. *Waddle v. Galen of*

Kentucky, Inc., 131 S.W.3d 361, 364 (Ky.App. 2004); CR 12.02. As a general rule, "[t]he standard of review on appeal of a summary judgment is 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); CR 56.03. "Because summary judgments involve no fact finding, this Court reviews them *de novo,* in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran,* 12 S.W.3d 698, 700 (Ky.App. 2000). *De novo* review would be appropriate here in any event because Waste Management raises no issue of fact on appeal and seeks review of a purely legal question. *See Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky.App. 2001).

Waste Management's sole issue on appeal—that its First Amended Complaint satisfied the requirements of CR 15.03 for relation back, and therefore the circuit court erred by dismissing it—is divided into two subparts: first, that Wilder had constructive notice of the pending suit within the statutory limitations period, and second, that the failure to include Wilder as a named party was a "mistake" within the meaning of CR 15.03(2)(b).

The relevant part of CR 15.03, titled "Relation Back of Amendments," says:

> (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.
>
> . . . .

We noted above that Waste Management raises no factual issues in this appeal. No attempt was made to contravene the allegations in Wilder's affidavit that he had no actual notice of the institution of the action within the two-year statute of limitations period. Instead, Waste Management argues that Wilder had constructive notice under the "identity of interest" exception to CR 15.03(2)(a) relied upon in *Halderman v. Sanderson Forklifts Company, LTD,* 818 S.W.2d 270 (Ky.App. 1991), *Nolph v. Scott,* 725 S.W.2d 860 (Ky. 1987) and *Funk v. Wagner Machinery, Inc.,* 710 S.W.2d 860 (Ky.App. 1986).

The relevant part of CR 15.03 is identical to Federal Rules of Civil Procedure Rule (FRCP) 15(c). The "identity of interest" exception apparently found its way into Kentucky law via *Kirk v. Cronvich,* 629 F.2d 404 (5th Cir. 1980); *see Clark v. Young,* 692 S.W.2d 285, 288 (Ky.App. 1985). *Cronvich* was overruled by *Schiavone v. Fortune,* 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986). In *Schiavone,* the Supreme Court said that "[t]he object of the [identity of interest] exception is to avoid the application of the statute of limitations when no

prejudice would result to the party sought to be added." *Schiavone* at 477 U.S. 28. *Schiavone* was a libel action against Fortune magazine. Fortune, rather than a separate company, "is only a trademark and the name of an internal division of Time, Incorporated (Time), a New York corporation." *Id.* at 477 U.S. 23. Even though Fortune is a division of Time, the United States District Court for the District of New Jersey held that without proof that Time had actual notice of the filing of the action prior to expiration of the statute of limitations, an amended complaint naming Time filed after the statute expired did not relate back under the rule. The court accordingly dismissed Schiavone's amended complaint. The United States Court of Appeals for the Third Circuit affirmed. The United States Supreme Court affirmed, declining to adopt the "identity of interest" theory as it was employed in *Cronvich* and by a minority of federal appellate courts. The Court held in essence that the parts of FRCP 15(c) which serve as a guide for our interpretation of CR 15.03 literally mean what they say, that is, that "in order for an amendment adding a party to relate back under Rule 15(c) the party to be added must have received notice of the action before the statute of limitations has run." *Schiavone* at 477 U.S. 31, *quoting* 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1498, p. 250 (Supp.1986).

Schwindel v. Meade County, 113 S.W.3d 159 (Ky. 2003) examines the "identity of interest" exception in Kentucky law. *Schwindel* cites *Schiavone, Cronvich, Halderman, Nolph* and *Funk* and discusses many of those cases. *Schwindel* also discusses what kind of "mistake" is contemplated by CR

15.03(2)(b), which comprises the second subpart of Waste Management's argument here. We believe that *Schwindel* provides controlling authority for this case. Mrs. Schwindel fell on bleachers at a softball tournament. She and her husband sued Meade County, the county judge, the magistrates, the Meade County Board of Education, the superintendent of schools and the county school board members, all in their official capacities. More than three months after the limitations period expired, the plaintiffs were granted leave to file an amended complaint naming as additional defendants "The Unknown Defendant(s), the servants, agents, and employees of Meade County, Kentucky, and/or Meade County Board of Education." The amended complaint was later dismissed. The Kentucky Supreme Court held that dismissal of the amended complaint against the unknown defendants was proper:

> [T]he implied . . . "should have known" notice referred to in CR 15.03(2)(b), which gave rise to the "identity of interest" exception, applies only when the plaintiff has *mistakenly* sued the wrong party and the right party "knew or should have known" of that fact . . . . Absent mistake, the "identity of interest" exception to the requirement of actual notice does not apply.

Schwindel at 170 (emphasis in original). In that case, there was no "mistake," the action was not commenced against the unknown defendants within the period of limitations, and Schwindel did not show that those defendants had actual notice of the filing of the action within the limitations period; therefore, the amended complaint could not relate back. Put another way, the plaintiffs in *Schwindel* had to know at the time they filed their lawsuit that some "servants, agents, and

employees of Meade County, Kentucky, and/or Meade County Board of Education" negligently constructed or maintained the bleachers that caused Mrs. Schwindel's injuries unless they believed that the members of the Meade County Fiscal Court or the Meade County Board of Education did such work themselves; yet they failed to sue them within the time allowed by the statute.

Likewise, Waste Management had to know that some employee was driving Louisville Metro's EMS vehicle when the collision occurred, but failed to name any such person in the complaint before the statute of limitations expired. Waste Management would have made a "mistake" if, to borrow Louisville Metro's example, it had sued Gene Wilder instead of Shawn Wilder. Even then, to avail itself of the benefit of CR 15.03, Waste Management would have had to show that Shawn Wilder "knew or should have known" of the filing and had sufficient notice so as not to be prejudiced in his defense prior to the expiration of the limitations period. *Id.* at 169-70. This case involves no "mistake" within the meaning of CR 15.03 nor any showing that the other requirements of the rule were met. Dismissal was proper.

The Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James M. Gary
Louisville, Kentucky

BRIEF FOR APPELLEE:

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