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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000014-MR

DANIEL CAHILL — APPELLANT

APPEAL FROM MASON CIRCUIT COURT
v. HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 05-CI-00316

EARLYWINE RACING, INC.; CHRIS EARLYWINE;
FRANCES N. EARLYWINE; LEMANS CORPORATION
d/b/a PARTS UNLIMITED and MOOSE RACING;
and PIONEER PACKAGING HOWARD WEISS
d/b/a PIONEER PACKAGING — APPELLEES

AND NO. 2007-CA-000187-MR

LEMANS CORPORATION
d/b/a PARTS UNLIMITED
and MOOSE RACING — CROSS-APPELLANT

CROSS-APPEAL FROM MASON CIRCUIT COURT
v. HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 05-CI-00316

DANIEL CAHILL CROSS-APPELLEE

AND NO. 2007-CA-000204-MR

HOWARD WEISS; AND PIONEER PACKAGING & PAPER

CROSS-APPELLANTS

v. CROSS-APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 05-CI-00316

DANIEL CAHILL CROSS-APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** ** ** **

BEFORE: ACREE AND CAPERTON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

ROSENBLUM, SPECIAL JUDGE: Multiple parties appeal the October 20, 2006, December 11, 2006, and December 22, 2006, orders of the Mason Circuit Court in a personal injury action brought by Daniel Cahill against Earlywine Racing, Inc., Chris Earlywine and Frances M. Earlywine ("Earlywines"), Lemans Corporation, d/b/a Parts Unlimited and Moose Racing ("Lemans"), Pioneer Packaging and

[1] Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Paper, Howard Weiss d/b/a Pioneer Packaging and Paper, and Ava Weiss d/b/a Pioneer Packaging and Paper ("Pioneer") . The orders addressed several motions before the trial court. We affirm in part and reverse in part.

Chris Earlywine and Frances N. Earlywine, through their business, Earlywine Racing, Inc., owned and operated a motorcross track in Mason County, Kentucky. On October 16, 2004, Danny Cahill went to the Earlywine facility where he signed a release and waiver of liability and indemnity agreement ("release") prior to operating a dirt bike on the Earlywine track. That release stated, in relevant parts:

> [t]he undersigned . . . hereby releases, waives, discharges and covenants not to sue the . . . track operator, track owner . . . for any and all loss or damage, and any claim or demands therefore on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence of the releasees or otherwise . . . hereby agrees to i[n]demnify and save and hold harmless the releasees and each of them from any loss, liability, damage, or cost they may incur . . . whether caused by the negligence of the releasees or otherwise . . . hereby assumes full responsibility for and risk of bodily injury, death or property damage due to the negligence of releasees or otherwise . . .

While operating his bike on the track, Cahill experienced an accident when his bike became entangled in an advertising cover on a hay bale. As a result of his accident, Cahill suffered permanent injuries and is now a paraplegic. The hay bale cover bore the name of Parts Unlimited and was provided to the Earlywines by Lemans, who had contracted with Pioneer and Weiss in the manufacturing of the covers.

Prior to Cahill's accident, Lemans had placed an order with Pioneer for hay bale covers with selected logos on them. Pioneer, in turn, placed an order with Coast Converters, Inc., who manufactured the covers, printed the desired logos and shipped the finished products to Pioneer. Pioneer inspected the samples and forwarded them to Lemans, who in turn distributed them to various facilities and motorcross events, including the Earlywine facility.

On October 11, 2005, Cahill filed a complaint against Earlywine Racing, Inc. and its shareholders, Chris and Frances M. Earlywine. On October 13, 2005, Cahill amended his complaint as a matter of right and added Lemans Corporation d/b/a Parts Unlimited and Moose Racing, Pioneer Packaging and Paper, Ava Weiss d/b/a Pioneer Packaging and Paper and Howard Weiss d/b/a Pioneer Packaging and Paper. On November 30, 2005, the Earlywines moved for summary judgment. On December 16, 2005, Lemans filed a motion for leave to file a cross-claim against the Earlywines and Earlywine Racing, Inc. and on December 21, 2005, Ava and Howard Weiss and Pioneer Packaging and Paper filed a motion to do the same. On August 16, 2006, Lemans filed a motion for leave to file a third party complaint against Coast Converters, Inc. That motion was granted and the third party complaint was filed against Coast Converters, Inc. and served on August 31, 2006.[2] On October 12, 2006, Cahill moved to amend his complaint by seeking to establish Howard Weiss' individual negligence along with

[2] Although Coast Converters, Inc. has been served with the complaint, it had not, at the time the appeal was filed, become involved in the action.

clarifying the name of the company. That motion was opposed by Weiss as untimely and prejudicial.

On October 20, 2006, the trial court entered an order granting the Earlywines' motion for summary judgment. On November 30, 2006, Lemans filed a motion for summary judgment. On December 11, 2006, the trial court entered an order disposing of the multiple motions before it. In that order, the court denied Cahill's motion to amend his complaint for a second time, dismissed Howard Weiss and Ava Weiss as party defendants, and granted summary judgment to Lemans, Howard Weiss and Pioneer Packaging and Paper on the grounds of the Kentucky Middleman Statute.[3] The order also denied the motions of Howard Weiss and Pioneer Packaging and Paper for summary judgment based upon lack of personal jurisdiction and the release signed by Cahill. The order further denied the motion for summary judgment filed by Lemans based upon the release signed by Cahill. The order of December 11, 2006, was made final in an order entered on December 22, 2006.

On December 28, 2006, Cahill filed his notice of appeal to the orders entered October 20, 2006, December 11, 2206, and December 22, 2006. Cross-appeals were then filed on January 19, 2007, and January 23, 2007, by Lemans and Howard Weiss and Pioneer Packaging and Paper, respectively.

Cahill argues the following trial court errors: granting Earlywines' motion for summary judgment on the purported release; denying Cahill's motion to

[3] *See* KRS (Kentucky Revised Statutes) 411.340.

amend his complaint for a second time to conform to the testimony and evidence produced through discovery; dismissing Howard Weiss as a party defendant; and granting summary judgment in favor of Lemans, Pioneer Packaging and Paper and Howard Weiss pursuant to the Kentucky Middleman Statute.

We first note that Cahill has failed to comply with CR[4] 76.12(4)(c)(v), which requires that a brief shall contain:

> an "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

Cahill has failed to cite to the trial court record where his alleged errors were preserved and instead only makes a general statement that he appeals upon "adverse rulings." *See Elwell v. Stone*, 799 S.W.2d 46 (Ky.App. 1990). However, "dismissal based upon a failure to comply with CR 76.12 is not automatic." *Baker v. Campbell County Board of Education*, 180 S.W.3d 479, 482 (Ky.App. 2005). Because a review of the modest record reveals responses filed by Cahill to the motions for summary judgment filed by Lemans, the Earlywines, Howard and Ava Weiss and Pioneer Packaging and Paper, we are satisfied that the failure to comply with the rule is not fatal.

The standard of review of a trial court's grant of summary judgment is "whether the trial court correctly found that there were no genuine issues as to any

[4] Kentucky Rules of Civil Procedure.

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 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).

Cahill's first argument is that the trial court erred by granting the Earlywines' motion for summary judgment based upon the release.

> As a general rule, agreements which attempt to release a person from the consequences of his own negligence are invalid. The general rule has not been applied, however, in situations involving release agreements signed by participants in racing events. . . . Although there are no Kentucky cases dealing with a release agreement in a racing event or similar situation, [there is] overwhelming authority for finding that such agreements do not violate public policy and, therefore, are valid and enforceable.

Dunn v. Paducah Intern. Raceway, 599 F.Supp. 612, 613 (D.C.Ky. 1984) (internal citations omitted). The Sixth Circuit has held that, under Kentucky law, an agreement releasing a race track owner from liability only bars claims for ordinary or gross negligence, and not for wanton or willful negligence. *Donegan v. Beech Bend Raceway Park, Inc.*, 894 F.2d 205, 208 (6th Cir. 1990)(applying Kentucky Law). Because Cahill has not set out an argument for willful or wanton negligence, the liability release is valid and enforceable. Cahill, citing to *Hargis v.*

Baize, 169 S.W.3d 36 (Ky. 1995), argues that the release is invalid because it fails to specifically identify the risk involved with the hay bale cover. We agree that the requirement of clear identification of potential dangers may be a requirement to uphold a standard release form. We believe that covered hay bales, which are traditionally used to outline such race tracks, are within the scope of possible dangers accompanying racing. This practice, combined with the holding of *Donegan*, precludes us from extending *Hargis* to require specific identification of dangers in a release agreement pertaining to racing. Accordingly, the October 20, 2006 order of the trial court which grants summary judgment in favor of Chris and Frances N. Earlywine and Earlywine Racing, Inc. is affirmed.

Cahill next argues that the trial court erred by granting summary judgment in favor of Lemans, Pioneer Packaging and Paper and Howard Weiss pursuant to the Kentucky Middleman Statute. KRS 411.340 states:

> In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer, breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user or consumer.

Cahill argues that the requirements of the statute were not fulfilled because Coast Converters, Inc. was not properly before the court. We disagree. Lemans' motion to file a third party complaint was granted and that complaint was filed and served on August 31, 2006, making Coast Converters, Inc. subject to the jurisdiction of the trial court, as required by the statute.

Cahill also argues that a party who assists in providing specifications for the finished product is excluded from claiming immunity under the Kentucky Middleman Statute. In support of this argument, Cahill cites *Worldwide Equipment v. Mullins*, 11 S.W.3d 50 (Ky.App. 1999). The facts of *Worldwide* are distinguishable from the case *sub judice* in that *Worldwide* involved a party that ordered a product from one manufacturer and then subsequently had that product modified by a third party. *Id.* at 52-53. We do not believe that placing an order for a product to be on par with modifying a product post-production. As such, we do not believe that the parties at hand are exempt from the protection of the statute. The record further supports the following facts: 1) the manufacturer, Coast Converters, Inc., was identified and subject to the jurisdiction of the court; 2) the product was sold by the distributor in its original manufactured condition or package or in the same condition as when it was received; 3) the distributor did not breach an express warranty; and 4) the distributor did not, and should not have known, that the product was in a defective condition unreasonably dangerous to the consumer. Lemans, Pioneer Paper and Packaging, and Howard Weiss were middlemen, as contemplated by the statute, and therefore cannot be held liable to

Cahill. Cahill has failed to show this court otherwise, and therefore the trial court's grant of summary judgment in favor of Lemans, Pioneer Packaging and Paper and Howard Weiss, pursuant to the Kentucky Middleman Statute is affirmed.

Cahill next argues that the trial court erred by denying his motion to amend his complaint for a second time to conform to the testimony and evidence produced through discovery. Specifically, Cahill sought to add new claims to establish Howard Weiss' individual negligence along with clarifying the name of the company with which Howard Weiss was associated. CR 15.01 allows a party to amend his complaint, after service of a responsive pleading, "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Whether a party may amend his complaint is discretionary with the circuit court, and we will not disturb its ruling unless it has abused its discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky.App.2000). "An abuse of discretion occurs when a trial judge's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (quotation omitted).

First, the motion to amend the complaint for a second time was not timely. The record confirms that Cahill had already amended his complaint once, as a matter of right, and the action had proceeded for a year before Cahill made his motion to amend his complaint for a second time. During this time, several

motions for summary judgment had been filed and responded to and various depositions had already taken place.

Second, an amendment should not be allowed if it unfairly prejudices the opposing party. CR 15.02; *Kroger Co. v. Jones*, 125 S.W.3d 241 (Ky. 2004). The new claims raised in the second amended complaint were unrelated to issues being litigated at the time of the dispositive motions. Howard Weiss was not put on notice that Cahill intended to seek recovery for alleged personal negligence. Rather, in his original complaint, Cahill was only asserting "personal liability" for business torts through a partnership.

Third, CR 15.03 allows relation back to an original complaint only if very specific requirements are met. What CR 15.03 does require is that:

> *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.

CR 15.03(2) (emphasis added). It was Cahill's obligation to make this showing through his motion to amend in order to gain the benefit of relation back with regard to a new defendant and avoid being time barred. The subject accident occurred on or about October 16, 2004. Therefore, the limitations period expired on October 16, 2005. KRS 411.140(1)(a). Cahill's complaint was filed October 13, 2005, three days before the limitations period expired. It is not enough to

merely file the initial complaint within the statutorily allowed period to enjoy the benefit of the relation back rule. Rather, the rule states "within the period provided by law for commencing the action against him, the party to be brought in by amendment has received such notice." CR 15.03(2). This means that in order to add a new party and relate back, the new party must have received notice prior to the statute of limitations running. Howard Weiss did not receive notice of claims against him for personal tort liability, but rather only in his business capacity, within the one-year limitations period. The allegations pled in the original complaint make no reference to Howard Weiss in any capacity other than as a partner in an alleged unincorporated business. Furthermore, the complaint failed to place Howard Weiss on notice that recovery would be sought against him as a separate individual. The Sixth Circuit has long held that it is very important that a defendant be given notice of the capacity in which he is being sued. *Lovelace v. O'Hara*, 985 F.2d 847,850 (6th Cir. 1993)(applying Kentucky law). Howard Weiss first received notice of the potential claims against him personally when Cahill moved for and tendered his second amended complaint, eleven months after the limitations expired. It is clear that where a potential defendant is not aware of an action against him within the limitations period, then the relation back rule is not met. *Nolph v. Scott*, 725 S.W.2d 860, 862 (Ky. 1987); *Lovelace, supra* 985 F.2d at 850.

Fourth, appellant failed to meet the requirements of CR 15.03(2)(b). There is no evidence that Weiss "knew or should have known" of these claims

against him prior to October 16, 2005. CR 15.03(2)(b). Cahill has failed to show that, but for his mistake in the identity of the proper defendants, Howard Weiss would have known he would have been named as an allegedly personally negligent individual. Accordingly, Cahill has failed to show that the trial court abused its discretion and therefore that portion of the order denying Cahill's motion to amend his complaint for a second time is affirmed.

Cahill's next argument is that the trial court erred by dismissing Howard Weiss as a party defendant. Howard Weiss is an officer and shareholder of a California corporation. The first amended complaint improperly pled Howard Weiss as personally responsible for the negligence of a partnership. The first amended complaint did not allege personal negligence on the part of Howard Weiss. The record does not establish that Howard Weiss' shareholder status in the corporation creates any personal liability. We thus conclude that the trial court properly dismissed Howard Weiss as a party defendant.

Lemans, on cross-appeal, argues that the release and waiver of liability and indemnity agreement also insulates Lemans and therefore the trial court erred in denying summary judgment in its favor on this issue. Furthermore, Pioneer Packaging and Paper and Howard Weiss, on cross-appeal, argue that the trial court erred in denying summary judgment on the grounds of personal jurisdiction and based upon Cahill's release and waiver. The release which Cahill signed held harmless all: "promoters, sponsors [and] advertisers . . . and each of them, their officers and employees," collectively known as "releasees . . . from all

liability to [Cahill] . . . whether caused by the negligence of the releasees or otherwise." Lemans, as a sponsor of the event, was therefore covered under the agreement and should have been insulated. Additionally, Pioneer Packaging and Paper and Howard Weiss, acting as agents of the sponsor Lemans, would also be covered and insulated. Our analysis pertaining to the release of the Earlywines applies here as well. Accordingly, we reverse the trial court's denial of summary judgment to Lemans, Pioneer Packaging and Paper, and Howard Weiss on the basis of the executed release.

Finally, the issue of personal jurisdiction over Howard Weiss and Pioneer Packaging and Paper is rendered moot and we thus decline to address this issue.

For the foregoing reasons, the October 20, 2006, December 11, 2006, and December 22, 2006, orders of the Mason Circuit Court are affirmed in part and reversed in part.

ACREE, JUDGE, CONCURS WITH SEPARATE OPINION.

CAPERTON, JUDGE, CONCURS AND JOINS ACREE, JUDGE, IN HIS SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I concur but write separately only as to a narrow issue regarding the amendment of pleadings.

I believe Howard Weiss did receive sufficient notice to deprive him of the defense of the limitations statute. As the majority stated, "Howard Weiss did

not receive notice of claims against him for personal tort liability, but rather only in his business capacity."

> Can a plaintiff who has brought a timely action against a defendant amend his complaint, after the statute of limitations has run, to assert a claim against the same defendant in a different capacity? When presented with this question in *Smiley v. Hart County Board of Education*[, 518 S.W.2d 785 (Ky. 1974)], a divided Court of Appeals [now Supreme Court] held that such amendment was proper.

H. L'Enfant, "Kentucky Law Survey: Civil Procedure," 64 Ky.L.J. 357, 364-66 (1975); *see Smiley* at 786; *see also Cook v. Holland*, 575 S.W.2d 468, 477 (Ky.App. 1978). The purpose of CR 15.03 is to defeat a defense based on the statute of limitations when the court is satisfied that the defendant was given adequate notice of the claim through the original complaint. *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 581, 65 S.Ct. 421, 424 (1945)(interpreting Fed. R. Civ. P. 15(c) upon which CR 15.03 is based); *see also, Miller v. American Heavy Lift Shipping*, 231 F.3d 242, 251 (6th Cir. 2000). Weiss clearly had notice of the claim through the original complaint.

However, because I agree that Cahill's motion to amend the pleadings was not timely and unfairly prejudiced Weiss, I concur in the remainder of the opinion.

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