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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000409-MR

MARY KING AND
DELORES PRUITT — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCH PERRY, JUDGE
ACTION NO. 13-CI-003843

JEWISH HOSPITAL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND NICKELL, JUDGES.

NICKELL, JUDGE: Mary King and Delores Pruitt[1] have appealed from the Jefferson Circuit Court's grant of summary judgment in favor of Jewish Hospital ("Hospital"). Following a careful review, we affirm.

The pertinent facts were succinctly set forth by the trial court in its order granting summary judgment which we recite and adopt as our own.

> Plaintiffs, who were employees of Jewish Hospital in August of 2011, allege that they were exposed to Ethylene Oxide ["EtO"] gas, and that this exposure was due to Jewish's failure to prevent the discharge of the gas. As a result, Plaintiffs have experienced various health problems. Plaintiffs allege that Jewish Hospital knew there was a history of gas discharges on site, and that there was a risk of future gas discharges, and both failed to address the potential for discharge and falsified documents to convince Plaintiffs that it was safe to return to work. Jewish Hospital counters that, even if Plaintiffs suffered injuries as a result of any gas exposure, any injuries were not caused by Jewish Hospital.

Two days after the alleged exposure to the noxious gas, King filed a First Report of Injury or Illness with the Kentucky Department of Workers' Claims, indicating her intent to pursue workers' compensation benefits for her alleged work-related injuries. King remained employed by Hospital in her same position for fourteen months. During this time, King violated Hospital's attendance policy on multiple

[1] There were originally seven plaintiffs in this action. Although Jewish Hospital prevailed against all seven, only King and Pruitt have appealed the adverse decision. The remaining five will not be referenced in this Opinion.

occasions and was ultimately terminated on December 12, 2012, for such infractions. She filed a claim for workers' compensation benefits on July 30, 2013.

Pruitt began working at Hospital in 2007 and voluntarily left her job in 2012 so she could spend more time studying for additional professional certifications. She would later claim she was constructively discharged after facing "extreme harassment" from supervisors. On July 30, 2013, she filed a claim for workers' compensation benefits based on her alleged exposure to EtO.

The day after the claims for workers' compensation benefits were filed, the instant suit was initiated. The complaint, self-styled as a personal injury action, raised claims on behalf of King and Pruitt of deliberate intent to cause injury and the tort of outrage. King also alleged an additional claim of retaliatory discrimination. Hospital answered the complaint and subsequently moved to dismiss the deliberate intent to injure and outrage claims arguing the exclusive remedy provision of the Workers' Compensation Act[2] barred litigating these claims outside the administrative action. The motion to dismiss was denied.

Almost a year later, by entry of an agreed order, King's deliberate intent to injure claim was dismissed with prejudice. Shortly thereafter, Hospital moved to dismiss the outrage claims and Pruitt's deliberate intent to injure claim

[2] *See* Kentucky Revised Statutes (KRS) 342.690(1).

based on the statute of limitations. In its motion, Hospital argued the deliberate intent to injure claim was the equivalent of a personal injury action that must be brought within one year, yet the complaint was filed nearly two years after the alleged injury occurred. Additionally, Hospital asserted the outrage claim was improper because damages for emotional injury are recoverable in a traditional personal injury action and separate actions for emotional distress are not permitted under Kentucky law. Two months later, in November 2014, Hospital moved for summary judgment on King's retaliatory discharge claim asserting King had not made out a *prima facie* claim as she had failed to introduce evidence her supervisor was aware she was pursuing a workers' compensation action and had not shown a causal connection between her filing for benefits and being terminated. Hospital also referenced King's deposition testimony she did not believe she was actually fired for filing the workers' compensation claim.

On December 10, 2014, the day King and Pruitt were to disclose their expert witnesses, their counsel moved to withdraw from representing them. The trial court granted the motion and gave King and Pruitt forty-five days to obtain new counsel. In the interim, Hospital moved for summary judgment on Pruitt's deliberate intent to injure claim for failure to obtain expert proof or evidence of intent.

On April 10, 2015, new counsel entered an appearance for King and Pruitt. Over two months later, King responded to Hospital's November 2014 summary judgment motion on her retaliatory discharge claim. The court held a hearing on all pending issues in late-June 2015. On July 27, 2015, Hospital filed a Form AOC-280, Notice of Submission of Case for Final Adjudication. King and Pruitt requested the final submission be abated and moved the trial court for leave to amend their complaint pursuant to CR[3] 15.01 to include new defendants and new claims against Hospital. Hospital challenged the attempt to amend the complaint as futile and prejudicial. King and Pruitt tendered a second amended complaint in response to Hospital's challenge, arguably "clarifying" the counts to be added.

On October 16, 2015, the trial court granted summary judgment to Hospital on all claims raised by King and Pruitt. It found institution of workers' compensation proceedings precluded pursuit of non-intentional claims outside that forum, particularly the deliberate intent to injure claims. It also found a complete lack of evidence Hospital deliberately intended to cause any injury to King or Pruitt. The trial court further found King had failed to establish Hospital knew she was pursuing a workers' compensation claim or that her termination due to

[3] Kentucky Rules of Civil Procedure.

absenteeism was pre-textual rather than the actual reason for her firing. King and Pruitt moved to alter, amend or vacate the ruling, but their motion was denied. This appeal followed.

King and Pruitt contend the trial court erred in not allowing them the opportunity to amend their complaint. Next, they claim they have a fundamental right to amend their complaint and the trial court erroneously deprived them of that right. Finally, King and Pruitt contend the trial court used an incorrect legal standard in ruling on Hospital's dispositive motions. We disagree with each of these assertions.

Initially, in contravention of CR 76.12(4)(c)(v), King and Pruitt do not state how any of the arguments presented were preserved in the trial court.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has

> a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Further, in contravention of CR 76.12(4)(c)(iv) and (v) which require ample references to the trial court record supporting each argument, King and Pruitt's brief contains only two such references in the argument section, one of which is to a proposed order which was never signed. Both citations appear in the same paragraph and reference documents with little bearing on the issue presented. Neither citation correctly identifies the record location of the referenced document. This simply does not constitute ample citation to the record.

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the briefs or dismiss the appeals for failure to comply. *Elwell*, 799 S.W.2d at 48. While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

King and Pruitt first contend the trial court erred in not allowing them the opportunity to amend their complaint, arguing the proposed amended complaint sought to raise viable claims which were not time barred and no

prejudice would have befallen Hospital by permitting the amendment. They believe it was unreasonable and unfair for the trial court to deny the amendment, and therefore the trial court must have abused its discretion. We disagree.

CR 15.01 provides, with exceptions not applicable here, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *See also Nichols v. Zurich American Ins. Co.*, 423 S.W.3d 698 (Ky. 2014). In *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869 (Ky. App. 2007), a panel of this Court explained:

> [i]n determining whether to grant a motion to amend a party's complaint, a circuit court "may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself." *First National Bank of Cincinnati v. Hartman,* 747 S.W.2d 614, 616 (Ky. App. 1988). Other factors include whether amendment would prejudice the opposing party or would work an injustice. *See Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 493 (Ky. 1983).

A trial court may deny the right to amend a pleading because of "the futility of the amendment itself," which is essentially the failure to state a claim upon which relief could be granted. *Bank One, Kentucky, N.A. v. Murphy,* 52 S.W.3d 540, 550 (Ky. 2001). Ultimately, trial courts are vested with discretion to determine whether to allow an amended pleading, and a decision will not be disturbed absent an abuse of that discretion. *Lambert v. Franklin Real Estate Co.*,

37 S.W.3d 770, 779 (Ky. App. 2000). Abuse of discretion occurs when the trial court's ruling is arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Mere doubt as to the correctness of a trial court's finding is insufficient to justify reversal. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

We discern no abuse of discretion in the trial court's denial of the motion to amend. The claims raised in the amended complaint were entirely different from those raised initially and permitting them to proceed—assuming they were not untimely raised—would have resulted in undue prejudice to Hospital under the circumstances considering the procedural posture of the case. The amendment was offered only *after* dispositive motions for summary judgment had been filed, briefed, argued and submitted for ruling. Seeking amendment on the eve of summary judgment was addressed in *Laneve v. Standard Oil Co.*, 479 S.W.2d 6 (Ky. 1972). Twelve days after the trial court had heard arguments on the defendant's motion for summary judgment, Laneve sought leave to amend his complaint to add a new theory of liability. The trial court did not permit the amendment and Laneve appealed. A panel of this court determined:

> [t]he question presented for our decision is not whether the plaintiff's belated contention would subject the defendant to liability. The decisive issue to be determined is whether the trial judge acted properly in refusing the plaintiff leave to inject this new theory of liability into the case under the circumstances presented.

> . . . .
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> 'Though CR 15.01 provides that leave to amend 'shall be freely given when justice so requires,' it is still discretionary with the trial court, whose ruling will not be disturbed unless it is clearly an abuse.' *Graves v. Winer*, Ky., 351 S.W.2d 193 (1961).
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> . . . .
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> Although liberality in allowing amendments to pleadings is to be definitely encouraged, this does not mean that leave should be granted without limit or restraint. The time must arrive when the plaintiff must be required to stand on the allegations he is asserting.

Id. at 8-9. CR 15.01 requires leave to amend be freely granted "when justice so requires." That simply was not the case in this action. King and Pruitt waited over two years following the filing of their initial complaint to seek to amend their claims. As in *Laneave*, the amendment was filed on the eve of summary judgment. The amendment sought to add five additional defendants and nine new and different theories of liability. All the new theories arose out of the same nucleus of operative facts—the alleged exposure to EtO—set forth in the original complaint and were merely repackaged versions of the initial claims, wrapped in newly-created legalese. The nature and character of the claims did not change—they

were all still personal injury claims based on the alleged EtO exposure.[4] We conclude the trial court acted within its broad discretion in denying leave to file the amended complaint.

Next, King and Pruitt allege they have a fundamental right to amend their complaint. Although unclear, when pared to its essence, their argument appears to be: the amended complaint demanded a jury trial; the right to a jury trial is protected by Section 7 of the Kentucky Constitution; therefore, refusal to permit amendment deprived them of their Constitutional rights. While we certainly agree with the historical and jurisprudential importance of the right to a jury trial, we cannot agree a trial court's exercise of its broad discretion in denying a motion under CR 15.01 automatically runs afoul of the Constitution simply because the proposed amendment contains a jury demand. Taken to its logical conclusion, King and Pruitt's position would result in the Constitutional inability of trial courts to dispose of a case without convening a jury trial, even if the case is wholly without merit, warrants the grant of summary judgment or dismissal, or if a plaintiff fails or refuses to prosecute the matter and allows it to lay dormant for indefinite periods. This is not and cannot be the law of the Commonwealth. If it

[4] King and Pruitt argue the amended complaint asserted claims under the Kentucky Civil Rights Act, a wholly different avenue for recovery of damages, and those claims should have been permitted. The entire basis for their argument relies on language from a fifteen-year-old dissenting opinion which garnered only one additional vote. Reliance on this minority position is insufficient to carry the day and merits no further discussion.

were, chaos would ensue and our courts would grind to a halt. Thus, we reject King and Pruitt's position.

Finally, King and Pruitt contend the trial court utilized an incorrect legal standard in disposing of the case. They believe the court erroneously used the standard of review applicable to summary judgment motions rather than motions to dismiss. They argue the trial court did not cite any evidence in the record in making its ruling which they believe "demonstrates that the trial court was considering the matter as a motion to dismiss." Their assertion strains logic. The trial court indicated Hospital had moved for summary judgment and dismissal. Although Hospital filed several motions styled as motions to dismiss pursuant to CR 12, each presented and relied extensively on matters outside the pleadings. CR 12.02 plainly requires such motions to be disposed of as motions for summary judgment pursuant to CR 56. The trial court set forth the legal standard applicable to summary judgment motions and undertook an analysis of the facts pursuant to that standard. Based on that well-reasoned analysis, the trial court clearly and plainly granted Hospital summary judgment on all claims against it. There is absolutely no indication the trial court utilized an incorrect standard. King and Pruitt's assertion to the contrary is without merit.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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