

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

FINAL

2003-SC-0080-MR

DATE 1-8-04 EIA Gravit, D.C.
APPELLANT

DANNY SMITH

V. APPEAL FROM ORIGINAL ACTION IN COURT OF APPEALS
2002-CA-2040
GRANT CIRCUIT COURT NO. 02-CI-321

STEPHEN L. BATES, JUDGE,
GRANT CIRCUIT COURT

APPELLEE

AND

DONNIE THACKER; MELISSA THACKER;
CITY OF CRITTENDEN; RANDY RUBY;
COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET, DISTRICT 6;
AND HICKS AND MANN, INC.
(REAL PARTIES IN INTEREST)

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Danny Smith, petitioned the Court of Appeals for a writ of prohibition against the judge of the Grant Circuit Court to prevent him from exercising jurisdiction over a tort suit. Appellant asserted that the court lacked subject matter jurisdiction because the statute of limitations had run. The Court of Appeals denied the writ and

Appellant appeals to this Court as a matter of right. Ky. Const. § 115; CR 76.36(7)(a). Finding no error, we affirm.

On July 12, 2001, Donnie Thacker was assisting in the installation and relocation of sewer lines when the trench in which he was working collapsed. As a result, he suffered serious injury, including the amputation of his leg. He and his wife Melissa Thacker, Appellees, filed suit in the Grant Circuit Court—Mr. Thacker for his personal injuries, and Mrs. Thacker for loss of consortium.

They filed their original complaint on July 9, 2002, naming the following parties as defendants: Randy Ruby, a Commonwealth Transportation Cabinet inspector, the City of Crittenden, the Commonwealth Transportation Cabinet, and Hicks & Mann, Inc. Appellees alleged that the city and the Transportation Cabinet were liable, directly and vicariously, for failure to adequately inspect and supervise the installation and relocation of the sewer lines. They further alleged that Ruby acted negligently and committed fraud by accepting money in exchange for shirking his inspection duties, and that Hicks & Mann, who advised the city regarding the project, did so negligently by failing to warn the city of the dangers of soil erosion and the possibility of a trench cave-in.

On Friday, July 12, 2002, exactly one year from the date of the accident and three days following the filing of the original complaint, the Thackers filed an amended complaint adding Appellant as a defendant. Appellant was Mr. Thacker's direct supervisor during the project. In the amended complaint, the Thackers claimed that Appellant acted negligently and fraudulently by failing to comply with numerous safety regulations and paying Ruby to ignore his inspection duties. Summons did not issue to Appellant until Monday, July 15, 2002, although the clerk of the court received the

complaint, summons, and a check for service by certified mail from the Thackers on Friday, July 12, the day the amended complaint was filed.

Because he did not receive summons until July 15, three days after the period of limitations expired, Appellant filed a motion to dismiss the amended complaint against him "pursuant to CR 12." The circuit court denied the motion. Appellant then petitioned the Court of Appeals for a writ of prohibition. He contended that because he did not receive a summons until after the expiration of the statute of limitations, the amended complaint was time-barred and, thus, the circuit court did not have subject matter jurisdiction over the action against him. The Court of Appeals denied the petition.

To obtain a writ of prohibition, the petitioner must show either that the court is acting outside its jurisdiction and there is no adequate remedy by appeal, or that it is acting erroneously within its jurisdiction and there is no adequate remedy by appeal and great injustice and irreparable injury would result. Southeastern United Medigroup, Inc. v. Hughes, Ky., 952 S.W.2d 195, 199 (1997).

Appellant takes issue with the "no adequate remedy by appeal" requirement, contending that when a circuit court is acting outside of its subject matter jurisdiction, it has no authority to act at all and, thus, a writ of prohibition should issue regardless of a remedy by appeal. This argument fails ab initio because, in the context of a common law tort claim, a statute of limitations is not a jurisdictional bar but an affirmative defense. CR 8.03. Illustrating the flaw in Appellant's argument, parties may not waive subject matter jurisdiction to confer jurisdiction upon a court where it has none. "It is an accepted principle that jurisdiction of the subject-matter cannot be conferred by waiver or consent." Commonwealth v. Berryman, Ky., 383 S.W.2d 525, 526 (1962) (citations omitted). However, a party may waive its limitations defense by intentionally failing to

invoke it or by failing to raise it in a timely fashion. Commonwealth v. Chinn, Ky., 350 S.W.2d 622, 623 (1961) ("Ordinarily under CR 12.03 a statute of limitation must be pled and a failure so to do constitutes a waiver of that defense."). Because a statute of limitations is waivable, it is not a restraint on a court's subject matter jurisdiction. "[T]he statute of limitations is a waivable affirmative defense and does not affect a court's subject matter jurisdiction." United States v. Crossley, 224 F.3d 847, 858 (6th Cir. 2000) (noting that almost all of its sister circuits have held the same). See also 51 Am. Jur.2d Limitation of Actions, § 21 (2000) ("The fact that the statute of limitations has run does not necessarily mean that the court is deprived of jurisdiction to hear a matter Raising a statute of limitations as bar to a remedy does not deprive a court of jurisdiction to hear the cause in the first instance"). As a circuit court may clearly exercise subject matter jurisdiction over tort suits, KRS 23A.010, and Appellant has not challenged the court's jurisdiction on any other grounds, the Grant Circuit Court is not acting outside of its jurisdiction by proceeding in this case.

Appellant's contention in the alternative, that his remedy by appeal is inadequate, is also without merit. It is well-settled that being forced to litigate does not in and of itself constitute such an injustice as to make remedy by appeal an inadequate remedy. Brown v. Knuckles, Ky., 413 S.W.2d 899, 901 (1967) ("The alleged irreparable injury is the expense to be incurred in defending in the circuit court. Petitioners are in no different position from any other defendant who is put to the expense of contesting a claim. We do not find the aspect of injustice here which is necessary for prohibition.") (internal citations omitted).

Accordingly, the decision of the Court of Appeals is affirmed.

All concur.

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