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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-681

Filed: 16 August 2016

Iredell County, No. 14 CVS 1176

ERIC MARSHALL HARRIS BOLING, Plaintiff

v.

RONNIE CLAYTON GREER and
ESTES EXPRESS LINES, INCORPORATED, Defendants.

Appeal by Plaintiff from order entered 1 December 2014 by Judge Tanya T. Wallace in Iredell County Superior Court. Heard in the Court of Appeals 16 December 2015.

Patterson & Adams, PLLC, by Brent A. Patterson, for Plaintiff-appellant.

Butler Weihmuller Katz Craig LLP, by Carol M. Rooney, pro hac vice, for Defendant-appellees.

INMAN, Judge.

Eric Marshall Harris Boling (“Plaintiff”) filed a complaint on 4 June 2014 against “Ronnie Clayton Greer and Estes Express Lines, Incorporated” alleging negligence by Ronnie Greer (“Mr. Greer”), imputed to Estes Express Lines, Incorporated (“Defendant Estes”), Mr. Greer’s employer, in an automobile collision on 8 June 2011 in which Mr. Greer suffered fatal injuries. Although Mr. Greer was deceased, Plaintiff’s summons and complaint named Mr. Greer as a defendant. Defendants moved for summary judgment on the ground that Plaintiff failed to name

and serve the estate of Mr. Greer. The trial court granted summary judgment in favor of Defendants. Plaintiff appeals. After careful review, we affirm the trial court's order.

I. Factual and Procedural History

On 8 June 2011, Mr. Greer was driving a tractor trailer owned by his employer, Defendant Estes, and collided with a truck driven by Plaintiff on Interstate 40 near Statesville, North Carolina. Mr. Greer died on the same day as a result of his injuries. Nearly three years later, on 4 June 2014, Plaintiff filed a complaint and obtained a summons naming "Ronnie Clayton Greer and Estes Express Lines, Incorporated" as defendants. The complaint alleged that Mr. Greer was negligent, that Plaintiff had sustained a serious head injury as a result of Mr. Greer's negligence, and that Mr. Greer's negligence was imputed to Defendant Estes.

Plaintiff served the summons and complaint, addressed to "Ronnie C. Greer," via certified mail to Mr. Greer's former home address in Burke County on 4 June 2014. The summons reached Mr. Greer's widow ("Mrs. Greer") on 23 June 2014. Plaintiff served Defendant Estes via certified mail on 4 June 2014. Defendants filed a motion for summary judgment on 22 July 2014 and a memorandum of law on 27 August 2014. Defendants attached to their memorandum a Division of Motor Vehicles (DMV) incident report, a certification of vital record and medical examiner's certificate showing Mr. Greer's date of death, a copy of Plaintiff's complaint, copies of

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Plaintiff's previously-filed affidavits of service, and an affidavit by Mrs. Greer dated 30 June 2014. Mrs. Greer's affidavit explained, *inter alia*, that Mr. Greer died on 8 June 2011 as a result of the collision and that she is the administrator of Mr. Greer's estate.¹

Defendants asserted that Plaintiff's complaint named Mr. Greer—an improper party—rather than his estate, and it was too late to amend the complaint because the three-year statute of limitations for actions based on negligence had expired. Defendants further asserted that in the absence of a direct negligence claim, Plaintiff could not state a claim against Defendant Estes based on allegations of vicarious liability.

During the hearing on the motion for summary judgment on 2 September 2014, Plaintiff argued that the trial court should not consider Mrs. Greer's affidavit because it was not served with the motion for summary judgment. Plaintiff did not ask for a continuance. Plaintiff introduced, over Defendants' objection, Burke County Clerk of Court records that he said showed no estate for Mr. Greer had been opened in the county in which Mr. Greer had lived. Plaintiff argued that “this is just judicial notice of documents filed in the clerk's office where they're certified.” The documents contained the date of Mr. Greer's death. The trial court considered both Mrs. Greer's affidavit and the Burke County court documents and entered an order granting

¹ The record does not disclose if or when letters of administration were issued to Mrs. Greer.

summary judgment for Defendants. Plaintiff appeals.

II. Analysis

A. Mrs. Greer's Affidavit

Plaintiff's only argument challenging the entry of summary judgment for Mr. Greer is that the trial court erred in admitting Mrs. Greer's untimely affidavit in support of the motion.² We hold that the trial court did not abuse its discretion in admitting the affidavit served to Plaintiff at least two business days prior to the summary judgment hearing.

"It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

² Plaintiff argued before the trial court that this case is controlled by *Pierce v. Johnson*, 154 N.C. App. 34, 35, 571 S.E.2d 661, 662 (2002), in which this Court reversed the trial court's denial of the plaintiff's motion to amend a complaint and dismissal of the complaint as time barred under similar, but distinguishable, circumstances. *Pierce* provides a helpful discussion of the problem that occurs when a plaintiff mistakenly names a deceased person, rather than that person's estate, as a defendant in a civil action. The plaintiff in *Pierce*, who was injured in a motor vehicle accident, sued the driver of the other vehicle, not realizing that the driver had died from causes unrelated to the accident. *Id.* at 35–36, 571 S.E.2d at 662. Like Plaintiff here, the plaintiff in *Pierce* named the deceased driver, rather than his estate, in the summons and complaint, and had those documents served by mail to the deceased driver's former address, where they were received by the driver's son, who also was the executor of the driver's estate. *Id.* Because the estate executor received service of the summons and complaint prior to the expiration of the statute of limitations, and because counsel for the estate did not disclose to plaintiff that the named defendant was deceased, this Court held that the plaintiff's error was a misnomer, that the trial court abused its discretion in denying the plaintiff's motion to amend, and that the trial court erred in dismissing the plaintiff's complaint as time barred. *Id.* at 44–45, 571 S.E.2d at 667–68. Here, by contrast, Mrs. Greer received the summons and complaint naming her late husband after the statute of limitations had expired, and plaintiff had good reason to know that Mr. Greer was deceased because he died on the date of the collision as a result of his injuries.

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“Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Rule 6(d) of the North Carolina Rules of Civil Procedure provides that “[w]hen a motion is supported by affidavit, the affidavit shall be served with the motion[.]” “Rule 6(b) and (d) give[] the trial court discretion to allow the late filing of affidavits.” *Rockingham Square Shopping Ctr., Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633, 641, 279 S.E.2d 918, 924 (1981).

In *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 131, 203 S.E.2d 421, 423 (1974), this Court reversed the trial court’s entry of summary judgment based upon evidence including an affidavit filed and served the same day as the summary judgment hearing. The court noted that the moving party had intentionally withheld service of the affidavit, which was signed on the same day as the motion for summary judgment. *Id.* The motion was served, without the affidavit, nearly two months prior to the hearing. *Id.* at 129, 203 S.E.2d at 422. Here, Defendants served the affidavit on Wednesday, 27 August 2014 with their memorandum in support of the motion for summary judgment; the hearing was Tuesday, 2 September 2014. During the hearing, Plaintiff’s counsel acknowledged receiving the affidavit by Friday, 29 August 2014.

Plaintiff’s reliance upon *Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180,

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609 S.E.2d 456 (2005) is also misplaced. In *Lane*, this Court held that the trial court cured any prejudice resulting from a late affidavit by continuing the hearing to allow the plaintiff additional time to prepare. *Id.* at 185, 609 S.E.2d at 459. In this case, however, Plaintiff did not ask for a continuance, nor does Plaintiff allege he was prejudiced by the trial court's decision to exercise its discretion and consider the affidavit.

Plaintiff's failure to demonstrate that a different result would have occurred if the trial court had not admitted Mrs. Greer's affidavit also defeats his appeal. *See Westlake v. Westlake*, 231 N.C. App. 704, 706, 753 S.E.2d 197, 200 (2014) ("The party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result."); *In re Estate of Ferguson*, 135 N.C. App. 102, 106, 518 S.E.2d 796, 799 (1999) ("A party asserting error must show not only that error has been committed, but also that a different result would have ensued had the error not occurred."). Plaintiff himself introduced documents at trial that established many of the facts documented in the affidavit, such as the date of Mr. Greer's death.

Plaintiff argues on appeal that, had Defendants filed the affidavit with the motion for summary judgment, Plaintiff "would have known the nature of the service problem Defendants were alleging and Plaintiff could have taken corrective action." Plaintiff did not make this argument before the trial court. *See Rolan v. N.C. Dep't*

of Agric. & Consumer Servs., 233 N.C. App. 371, 381, 756 S.E.2d 788, 795 (2014) (“[P]rinciples of fairness to both parties do not permit one party to use the appellate system to advance a new or different argument than it employed at trial simply because that party did not properly prepare or was unable to think of the argument below.”). Nonetheless, the argument is unavailing because the motion for summary judgment was filed and served several days after the limitations period had expired. It was already too late for Plaintiff to take corrective action.

Plaintiff could, in fact, have taken corrective action much sooner. Although Plaintiff argued at the summary judgment hearing that no estate had been opened, Plaintiff could have had an estate opened in order to bring his claim against Mr. Greer’s estate.

In North Carolina, “[u]pon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person . . . shall survive to and against the personal representative or collector of the person’s estate,” except causes for libel, slander, false imprisonment, and “[c]auses of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.” N.C. Gen. Stat. § 28A-18-1 (2015). However, when there is no estate to proceed against or where the estate is opened in an improper county, plaintiffs are left in a quandary.

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In every county, there is a public administrator who is appointed by the county clerk of superior court and approved in writing by the senior resident superior court judge. N.C. Gen. Stat. § 28A-12-1 (2015). This public administrator “shall apply for and may, with the approval of the clerk of superior court, obtain letters on the estates of decedents when”:

(1) It is brought to the public administrator’s attention that a period of six months has elapsed from the death of any decedent who has died owning property, and no letters testamentary, or letters of administration or collection, have been applied for or issued to any person; or

(2) Any person without known heirs shall die intestate owning property; or

(3) Any person entitled to apply for letters of administration shall, in writing, request the clerk to issue letters to the public administrator as provided in G.S. 28A-5-2(c).

N.C. Gen. Stat. § 28A-12-4 (2015).

Here, Plaintiff could have requested to have the Burke County Public Administrator apply for the letters testamentary. N.C. Gen. Stat. § 28A-12-4(3) (2015). Once Defendant’s estate was opened, Plaintiff could have filed against the public administration for the decedent’s estate or moved to substitute the public administrator as a defendant pursuant to N.C. R. Civ. Pro. 25(a) had a timely action been filed.

For all of the foregoing reasons, we hold that the trial court did not abuse its

discretion in allowing the affidavit.

B. Summary Judgment in Favor of Defendant Estes

Plaintiff contends that the trial court erred in granting summary judgment for Defendant Estes based on “a procedural fault as to the employee.” The principal issue is whether summary judgment for an employee based upon the statute of limitations is a judgment on the merits that precludes an employer’s liability where the employer is alleged only to have been vicariously liable. We hold that summary judgment for Mr. Greer was a determination on the merits and that the claim against the Defendant Estes based upon a vicarious liability theory is precluded.

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

“The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits” *McNair v. Boyette*, 282 N.C. 230, 234–35, 192 S.E.2d 457, 460 (1972). “A judgment on the merits in favor of the employee precludes any action against the employer where, as here, the employer’s liability is purely derivative.” *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974). This Court’s reasoning in *Barnes* applies in this case as well. In

Barnes, the plaintiffs alleged negligence against the defendant employee and defendant employer for injury to a minor child. *Id.* at 287, 204 S.E.2d at 204. During trial, after the trial court granted the defendant employer's motion for directed verdict and denied the defendant employee's motion for directed verdict, the plaintiffs voluntarily dismissed their claim against the defendant employee and the trial court entered judgment dismissing all of the plaintiffs' claims with prejudice. *Id.* at 287–88, 204 S.E.2d at 204–05. The plaintiffs then appealed from the judgment allowing the defendant employer's motion for a directed verdict. *Id.* at 288–89, 204 S.E.2d at 205. This Court held that because the judgment dismissing the claim against the defendant employee was with prejudice, and because the defendant employer's liability was purely derivative, the plaintiffs' appeal against the defendant employer had to be dismissed. *Id.* at 290, 204 S.E.2d at 205–06.

In this case, the trial court's entry of summary judgment dismissed Plaintiff's claim against Mr. Greer with prejudice. As in *Barnes*, the trial court dismissed Plaintiff's claim against an employee without any review of the substance of those claims, but that judgment nonetheless precludes Plaintiff's vicarious liability claim against the employer. *Id.* at 289, 204 S.E.2d at 205.

Because of the grant of summary judgment in favor of its employee, Plaintiff cannot maintain a claim against the employer, and no genuine issue as to any material fact remains. The trial court's grant of summary judgment in favor of

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Defendant Estes was proper.

III. Conclusion

The trial court did not abuse its discretion in allowing the affidavit of Mrs. Greer or commit error in granting summary judgment for Defendant Estes. The order of the trial court is

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

Report per Rule 30(e).