RENDERED: MAY 15, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001483-MR

TONYA R. LEGER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 16-CI-00906

WILLIAM A. ELKINS; WILLIAM A. ELKINS, III;
AND WILLIAM A. ELKINS, JR. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND JONES, JUDGES; BUCKINGHAM,[1] SPECIAL JUDGE.

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

COMBS, JUDGE: This case arises out of an August 29, 2013, motor vehicle accident. Appellant, Tonya R. Leger (Leger), plaintiff below, sued the wrong defendant, the owner of the vehicle, instead of his son, who was the driver. The confusion as to the proper party at issue arises from the similarity in the names of father and son. William A. Elkins, Jr. (Elkins Jr.) was born in 1942. He is the owner of the car and the father of William A. Elkins, III (Elkins III). Elkins III was born in 1963. He borrowed the car from Elkins Jr. and was driving it when the accident involving Leger occurred.

The Fayette Circuit Court granted summary judgment in favor of the father (Elkins Jr.) because it was undisputed he was not the driver and in favor of the son (Elkins III) because he was not served with process until after the statute of limitations had expired.

Basic reparation benefits were paid to Leger through March 8, 2014. Just within the statute of limitations, on March 7, 2016, Leger filed a complaint against "William A. Elkins" in Fayette Circuit Court, which reflects as follows:

> Serve:
> William A. Elkins
> 334 Windy Hill Dr.
> Louisa, KY 41230

Service was by certified mail. The "green card" that was returned on March 14, 2016, was signed by "William A. Elkins, **Jr.**" (Emphasis added.)

On March 22, 2016, Elkins filed an answer in which he raised the following defenses:

> The Complaint should be dismissed against this Defendant because it fails to state a claim or sufficient facts upon which the relief sought therein may be granted.
> . . . .
> **The Complaint should be dismissed because it fails to name the proper party** and an indispensable party to this litigation.
> . . . .
> There is no proof of negligent entrustment and therefore, the **Defendant, William A. Elkins, Jr.,** can have no liability and owes no duty in this case and for this reason request[s] that the Complaint be dismissed.

(Emphases added.)

On March 22, 2016, Elkins Jr. also filed a notice that he had served certain discovery requests upon Leger. On October 19, 2016, Leger filed notice of having served her responses to defendant's discovery requests.

On November 7, 2017, Elkins Jr. filed a motion for summary judgment. In his supporting memorandum, Elkins Jr. explained that he was **not** the operator of the vehicle involved in the accident -- but that his son, William A. Elkins, III, was the driver. Elkins Jr.'s accompanying affidavit reflects that he has resided at 334 Windy Hill Drive, Louisa, Kentucky, for the past 19 years; that he was the owner of the 2004 Chevrolet Trail Blazer involved in the accident; that he was not operating the vehicle at the time; that instead, his son was the operator;

that Elkins III had borrowed the vehicle a few days before the accident; and that Elkins Jr. only learned about the accident a couple of days after it had occurred.

On November 21, 2017, Leger filed a response and objection, asserting that she had timely filed her complaint and "named as a defendant the individual listed on the police accident report as being **both the driver and the owner** of the vehicle causing the collision, caused a Summons to be issued to that individual, and caused service by certified mail to be effected." (Emphasis added.) Leger believed and contended that the information on the police report cast doubt upon Elkins Jr.'s affidavit that his son was driving at the time of the accident.

Alternatively, Leger argued that even if Elkins III had been driving at the time of the accident, the motion for summary judgment should be denied because: the action was properly commenced upon "William A. Elkins," the complaint was timely filed, and the summons issued in good faith.

Leger noted that she requested that summonses issue on William A. Elkins at the address shown in his criminal file,[2] 1456 Hartland Woods Way, Lexington, Kentucky; and on William A. Elkins at 334 Windy Hill Drive in

[2] A Final Judgment and Sentence of Imprisonment entered on October 6, 2015, in Fayette Circuit Court is attached as Exhibit "5" to defendant's memorandum of law and reflects that Elkins III had pled guilty to charges unrelated to the motor vehicle accident and was sentenced to a total of six years to serve.

Louisa, Kentucky, because she believed that Elkins III might be living with his parents, whom she intended to depose.

Leger also argued that denial of the motion for summary judgment would not prejudice the defendant because its insurer had long since received notice of the claim. She explained that her counsel had written to William A. Elkins on December 20, 2013, advising that she was asserting a claim arising out of the August 29, 2013, motor vehicle accident. Leger attached a letter from State Farm Insurance Company to her counsel dated December 27, 2013,[3] acknowledging the representation.

On December 16, 2017, a summons addressed to William A. Elkins, 334 Windy Hill Dr., Louisa, Kentucky, and a copy of the complaint was served by delivery upon "William Elkins 11/12/63," with the date of birth of Elkins III according to his driver's license attached as an exhibit to his deposition.

On January 5, 2018, Elkins III filed an answer and raised the statute of limitations as a defense.

On July 16, 2019, Elkins Jr. filed a renewed motion for summary judgment. In his supporting memorandum of law, Elkins Jr. explained that the issue was "whether Plaintiff sued the correct party, and if not, whether her claims

[3] Exhibit "O" is a letter from the State Farm claims representative dated December 27, 2013, acknowledging counsel's representation and requesting an update on the status of Ms. Leger's injuries and treatment.

are time barred against the correct party." The memorandum reflects that the matter had been in abeyance while Leger conducted discovery on the issue and deposed Elkins Jr.; his wife, Clara; his son, Elkins III; and Officer Adam Finch, who had prepared the accident report.

Elkins Jr. argued that undisputed evidence established that he was not the driver -- but that Elkins III was. In light of the nature and extent of Elkins III's injuries, Elkins Jr. contended that it had not been possible to obtain identifying information about Elkins III at the time of the accident. Elkins III had been ejected from the car and was badly injured. Therefore, the police officer obtained the information from license plates and the registration system. Elkins Jr. observed that the applicable statute of limitations, KRS[4] 304.39-230(6),[5] had run because Elkins III was not served until December 16, 2017, more than two years after the last payment of basic reparation benefits. Significantly, he argued that Leger had **never moved to amend** her complaint; but that even if she had done so, an amended complaint would not relate back because CR[6] 15.03 must be strictly

[4] Kentucky Revised Statutes.

[5] KRS 304.39-230(6) provides in relevant part as follows: "(6) An action for tort liability . . . may be commenced not later than two (2) years after the injury, or the death, or the date of issuance of the last basic or added reparation payment made by any reparation obligor, whichever later occurs."

[6] Kentucky Rules of Civil Procedure. CR 15.03(1) pertains to relation back and provides as follows: "Whenever the claim or defense asserted in the amended pleading arose out of the

construed after the statute of limitations has run as this Court held in *Phelps v. Wehr Constructors, Inc.*, 168 S.W.3d 395 (Ky. App. 2004).

Leger filed a supplemental response, attaching copies of the deposition transcripts and summarizing the testimony of Elkins III, Elkins Jr., and Officer Finch. Leger argued that the motion should be denied because she commenced the action in good faith against William A. Elkins, who was listed in the police report as the driver. She also contended that there was a genuine issue of fact regarding who was the driver of the vehicle. Finally, she argued that the Elkinses should be estopped from pursuing the motion for summary judgment based on the statute of limitations.

The matter was heard on August 9 and 16, 2019. Defense counsel explained that the statute of limitations had run; that there **was never an attempt to amend in order to add** an additional defendant, Elkins III; and that plaintiff did not make a relation-back argument -- but instead relied upon the summons. When the court asked plaintiff's counsel if she was making a relation-back argument, she replied, "No sir, . . . I have a very strong argument, it's not based on relation back." Leger's counsel claimed that the lawsuit was commenced timely, that the complaint was filed timely, that the summons was issued the same day, and that it

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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."

was served on the Elkins listed on the police report. However, the younger Elkins, who was in jail at the time, was served after the statute ran. Leger argued that it was a matter of defect in service, not a relation-back issue.

On September 9, 2019, the trial court entered an order granting summary judgment as follows in relevant part:

> This cause of action arises from a vehicular accident that occurred on August 29, 2013. The driver of the vehicle who collided with Plaintiff was ejected from the car. Thus, Officer Finch acknowledged it was "most likely" he obtained the identity of the driver of the car from the vehicle's license plate and registration system. (Depo. of Officer Finch at pp. 55-56). The registration and license plate provided information pertaining to William A. Elkins, Jr.
>
> Elkins Jr. was the father of the person driving the vehicle, Elkins III. Elkins Jr. testified that he loaned the vehicle to his son. It is undisputed that Elkins III was the driver of the vehicle on the day of the accident. Elkins III was sentenced to six years of incarceration on October 6, 2015 and was released November 2016.
>
> The final payment of basic reparation benefits was made on March 8, 2014. On March 14, 2016, Plaintiff served defendant Elkins Jr. with the complaint that was filed on March 7, 2014. On December 16, 2017, Plaintiff served a summons on Elkins III, which Elkins III answered on January 5, 2018.
>
> . . . .
>
> The first issue is whether Elkins Jr. is entitled to summary judgment because there is no genuine issue of material fact. Plaintiff filed this lawsuit against Elkins Jr. under the assumption that he was the driver. . . .

> However, discovery clearly showed that Elkins Jr. was not operating the vehicle on the day in question. . . .
>
> . . . [O]wnership alone cannot create legal liability for Elkins Jr. *Farmer v. Stidham*, 439 S.W.2d 71, 72 (Ky. App. 1969); *Wolford v. Scott Nickels Bus Co.*, 257 S.W.2d 594 (Ky. App. 1953). Therefore, there is no grounds for finding judgment in favor of Plaintiff against Elkins Jr. Thus, summary judgment is granted in favor of Defendant, Elkins Jr.
>
> The second issue is whether the statute of limitations expired by the time Elkins III, was served with process on December 16, 2017. . . .
>
> . . . [T]he latest date in time to initiate a lawsuit against Elkins III, was March 7, 2016, per KRS 304.39-230(6). Elkins III was not served with process until December 26, 2017. Thus summary judgment must be granted in favor of Elkins III, because he was served with process after the statute of limitations had run.

On October 1, 2019, Leger filed a notice of appeal to this Court, naming "William A. Elkins, William A. Elkins, III, and William A. Elkins, Jr." as Appellees.

"The 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) (citation omitted). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest*,

Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). "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).

Leger first argues that summary judgment was inappropriate because her action was timely commenced against the driver of the Elkins vehicle. She relies upon KRS 413.250, which provides that "[a]n action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action." She also cites CR 3.01, which provides that "[a] civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." Leger contends that instead of the date of service, it is the filing of the complaint and the issuance of the summons in good faith that commence an action. In this case, she argues that the complaint was timely filed and that the summons issued on the same day.

Appellees respond that Leger essentially argues that a summons served on a person named "William A. Elkins" would apply to anyone of that name. They also argue that Leger cannot effect service of process upon multiple parties with a single summons, citing CR 4.02, which provides that:

> summons shall be issued in the name of the Commonwealth, be dated and signed by the clerk,

> contain the name of the court and the style and number of the action, **and be directed to each defendant**, notifying him that a legal action has been filed against him . . . ."

(Emphasis added.)

Appellees assert that Leger admits at pages 2 and 14 of her brief that she intended to serve summons **on the person identified in the police report,** who was Elkins Jr.

The cases upon which Leger relies are distinguishable on their facts and are neither pertinent to nor dispositive of this case. Moreover, Leger ignores a salient fact: that the answer filed by William A. Elkins, Jr., on March 22, 2016, should have raised a red flag that she might have sued the wrong party. Although Leger claims to have considered her answer "boilerplate," she neglected to serve Elkins III until December 2017 -- more than a year and a half after she filed the complaint. Nor did Leger ever request leave to amend the complaint. Therefore, there is nothing (*i.e.*, no amendment) that could possibly relate back to the original complaint pursuant to CR 15.03. We agree with the trial court that summary judgment in favor of Elkins III was appropriate because he was served with process **after** the statute of limitations had run.

Leger next argues that summary judgment was granted erroneously because there was a genuine issue of material fact regarding who was the driver of the Elkins vehicle. We are persuaded that that argument is wholly lacking in

credibility. Leger deposed Elkins III, who testified that he was the driver of the vehicle involved in the subject accident. Leger also deposed Elkins Jr., who testified that he **was not** driving and that Elkins III was driving a car that Elkins Jr. owned. The trial court properly and correctly determined that there was no genuine issue of material fact as to the correct identity of the driver.

Leger's final argument is that summary judgment was inappropriate because the Elkinses should be equitably estopped from pursuing dismissal on ground of the statute of limitations. Although the trial court did not specifically address the issue in its written order, it dismissed the claim against Elkins III on statute-of-limitations grounds and stated from the bench that it did not think there was an estoppel argument.

Leger contends that neither of the Elkinses contacted police to attempt to correct the accident report, that neither contacted her or her attorney, and that she relied to her detriment upon the inaccurate accident report. Leger cites *Weiland v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, 91 (Ky. 2000), which discusses the elements of equitable estoppel as follows:

> broadly speaking, **as related to the party claiming the estoppel**, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice."

Id. (emphasis added) (citation omitted). Leger cannot base her estoppel argument on any conduct on the part of Elkins Jr. because the claim against him was not dismissed on statute-of-limitations grounds. Nor can Leger claim lack of the means of knowledge of the truth. At the very least, the defenses raised in Elkins Jr.'s answer should have put Leger on notice that she may have sued the wrong defendant. Thus, had she heeded that notice, she would have had time to amend the complaint and to serve the correct defendant. Unfortunately, she filed the complaint the day before the statute of limitations had run. *See Williams v. Hawkins*, 594 S.W.3d 189, 199 (Ky. 2020) (party seeking recovery had duty to act diligently in pursuit of her claim; plaintiff had affirmative obligation to locate the correct party defendants and determine their vital status in timely manner).

We AFFIRM the September 9, 2019, order of the Fayette Circuit Court granting summary judgment.

JONES, JUDGE, CONCURS.

BUCKINGHAM, SPECIAL JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

BUCKINGHAM, SPECIAL JUDGE, CONCURRING IN RESULT ONLY: Both the trial court and the majority herein state that summary judgment in favor of Elkins III was appropriate because he was served with process after the

expiration of the statute of limitations. I agree that summary judgment was appropriate, but not for that reason.

I agree with Leger that a civil action is commenced on the date the complaint is filed and summons is issued, not the date when the summons is served. KRS 413.250; CR 3.01. Where I differ with Leger, however, is that her complaint was filed and summons was issued against Elkins Jr., not Elkins III. In my view, the issuance and service of summons on Elkins III in December 2017 was meaningless because her complaint did not name him as a defendant. Rather, her complaint was clearly directed at Elkins Jr. As Leger did not initiate an action and cause summons to issue against Elkins III within the limitations period, summary judgment in his favor was appropriate. Further, the fact that her complaint may have been filed in good faith against Elkins Jr. because the police accident report contained his personal information does not save her case.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Elizabeth R. Seif Lexington, Kentucky	Douglas Hoots Lexington, Kentucky