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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001870-MR

JOEY ROBINSON

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DENISE DAVIDSON, JUDGE
ACTION NO. 02-CI-00407

MIKE TURNER; CAROLE TURNER;
AND THE PRESBYTERIAN CHILD
WELFARE AGENCY OF BUCKHORN,
KENTUCKY, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: In this personal injury suit, Joey Robinson has appealed from the Perry Circuit Court's order denying his renewed motion to amend his complaint to add The Presbyterian Child Welfare Agency of Buckhorn, Kentucky, Inc., (hereinafter "the Agency") as an original defendant. Because we agree with the circuit court that Robinson's claim against the Agency is

¹ Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

barred by the one-year statute of limitations imposed by KRS 413.140, we affirm.

Robinson, who was born on February 7, 1984, entered the foster care system in 1992 and was eventually placed with the Agency. For seven years, he lived in the home of Bill and Kathleen Smith. The Agency's program provided for monthly "respite" weekends for the foster parents, so during the month of January 1998, Robinson spent his first, and only, weekend in the home of Mike and Carole Turner (hereinafter "the Turners"). During the afternoon of January 17, while Mike and his daughter were sleeping and Carole was working outside of the home, Robinson sustained a serious injury to his right hand when an M-80 device exploded in his hand. Robinson explained what happened in his deposition testimony:

Well, I got up and was gonna go to the bathroom, and them matches caught my eye. And I saw a little purple thing over there had a white wick on a shelf and I thought it was a candle. I thought it was one of them kind that smelled good, you know, like a potpourri candle. And I got the match, struck it - See, the matches was, you know, alright, say here's the kitchen sink, the matches are right here, open to where I could get 'em, say, right over here's the shelf. It was on a shelf, had a white wick, so I thought it was a candle. I picked it up, you know, lit it, and it went spewing. I got scared and tried to put it out, and all of a sudden, before I knew what I was gonna - what it done, it just - my hand blew up.

His right hand was mangled as a result of the blast injury, and his ring and middle fingers as well as a portion of his thumb were amputated. Robinson went through several surgeries to repair his hand, including skin grafting.

Robinson reached the age of majority on February 7, 2002, and on August 12, 2002, filed suit against the Turners. In his complaint, he alleged that the Turners breached their duty to supervise him and to provide him with a reasonably safe environment when they allowed an explosive device to be placed within his access. He requested damages for pain and suffering as well as the impairment of power to earn money. The Turners filed an answer in which they presented several affirmative defenses, including Robinson's failure to join all real parties in interest and necessary parties.

In March 2003, in response to Robinson's discovery request, the Turners provided him with a copy of the Agency's "Code of Ethics for Therapeutic Foster Parents" that they had entered into in 1995, as well as a copy of the Agency's Foster Parent Handbook/Manual. Shortly thereafter, The Ohio Casualty Insurance Company (hereinafter "Ohio Casualty"), which company provided homeowner's insurance for the Turners, moved the circuit court to file an intervening complaint, seeking a declaration of rights as to whether it was required to provide coverage or a defense for the Turners in the present suit.

Having apparently resolved those issues, Ohio Casualty later filed a notice of dismissal, without prejudice, of its intervening complaint.

On August 12, 2003, the circuit court signed and entered an Agreed Order adding the Agency as a third-party defendant. The same day, the Turners filed a third-party complaint against the Agency, seeking indemnification or reimbursement for the full amount of any judgment awarded, or an apportionment instruction, based upon the breach of the Agency's duty to inform them of Robinson's dangerous tendencies. In its answer, the Agency asserted that the complaint should be dismissed as having been filed outside of the applicable statute of limitations.

Close to two months later, Robinson filed a motion seeking leave to file an amended complaint, naming the Agency as an original defendant. He argued that discovery had revealed a contract between the Turners and the Agency, the violation of which caused him damage. Robinson claimed to be a third-party beneficiary of this contract. The Agency objected, relying upon the one-year statute of limitations found in KRS 413.140. Robinson's cause of action accrued, it stated, on February 7, 2002, when he turned eighteen years old. The statute of limitations expired one year later, meaning that his attempt to file an amended complaint was several months too late. In

response, Robinson countered with the argument that because his amended complaint was based upon breach of contract, the fifteen-year statute of limitations found in KRS 413.090 applied. In reply, the Agency again argued that the one-year statute of limitations applied, as Robinson's claim was for personal injury. On December 23, 2003, the circuit court entered an order denying Robinson's motion, holding that his claim was controlled by the one-year statute of limitations imposed by KRS 413.140, as his action was for a physical injury caused by the negligent act of another.

Following the denial of this motion, the case proceeded normally in the circuit court, and a trial date was set for August 2004. That July, the Turners and the Agency entered into an agreement by which the Turners' third-party complaint against the Agency would be dismissed, although the Agency would remain a party for purposes of apportionment. The Agreed Order was entered by the circuit court on July 26, 2004. The record reflects that the next day, a letter to the circuit court from Robinson's counsel was filed, in which counsel requested a hearing on the Agreed Order. The letter also described the dismissal as a collusive effort to limit the amount of insurance available. Robinson then filed a renewed motion to file an amended complaint, arguing that he was a third-party beneficiary to the contract between the Turners and

the Agency, and adding the argument that he was a person of unsound mind. The Agency again objected, arguing that soundness of mind was not the reason Robinson failed to timely file an amended complaint, as he had previously argued that a fifteen-year statute of limitations applied. Furthermore, the Agency argued that Robinson failed to present sufficient evidence of his unsoundness to establish that the statute of limitations should be tolled. The circuit court denied Robinson's renewed motion by order entered August 31, 2004, which was made final and appealable. This appeal followed.²

On appeal, Robinson presents four arguments. First, he argues that CR 14.01 permits him to assert any claim against a third-party defendant, and that the circuit court does not have any discretion to deny him the right to assert such a claim once a third-party complaint is filed by a defendant. Second, he again raises his claim that his unsoundness of mind tolled the statute of limitations. Next, he raises a breach of contract issue, arguing that he is the beneficiary of the contract between the Turners and the Agency. Finally, he asserts that the discovery rule worked to delay the running of the statute of limitations for his claim against the Agency

² Robinson named Ohio Casualty as an appellee in his notice of appeal, although that entity's intervening complaint had been dismissed by the circuit court earlier in the proceeding. Therefore, a three-judge motion panel of this Court granted Ohio Casualty's motion to be dismissed as a party to the appeal on December 22, 2004.

until he discovered he may have been injured by the Agency's conduct. The Turners and the Agency address each of these arguments in their respective briefs.

CR 15.01 provides that, following the twenty-day period after a pleading is served, 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 requires." The decision whether to grant leave to amend is within the discretion of the trial court, and will be disturbed only if that discretion is abused.³ Furthermore, while amendments are to be freely allowed, the trial court is permitted to "consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself."⁴

Robinson's first argument addresses the application of CR 14.01, which he asserts requires a trial court to allow a plaintiff the right to assert a claim once a third-party complaint has been filed by a defendant. The Agency first addressed this argument in a motion to strike and dismiss Robinson's brief filed prior to the submission of this appeal, arguing that Robinson failed to preserve this issue for review

³ M.A. Walker Co., Inc., v. PBK Bank, Inc., 95 S.W.3d 70, 74 (Ky.App. 2002).

⁴ First National Bank of Cincinnati v. Hartmann, 747 S.W.2d 614, 616 (Ky.App. 1988).

by first raising it before the circuit court. A three-judge motion panel of this Court denied the motion, but stated that the Agency could renew its argument in its brief, which it did. Alternatively, the Agency argues that CR 14.01 does not allow him to assert his claim where he failed to timely move to amend his complaint. The Turners simply argue the Agency complied with the Rules of Civil Procedure by pleading a statute of limitations defense in its Answer to the third-party complaint.

The law in this Commonwealth clearly provides that this Court "is without authority to review issues not raised in or decided by the trial court."⁵ Furthermore, to be considered on appellate review, an error "must be precisely preserved and identified in the lower court."⁶ Robinson never raised his CR 14.01 argument before the circuit court, meaning that it is unpreserved and this Court has no authority to review it. Therefore, we shall decline to review this unpreserved argument.

For his next argument, Robinson argues that the statute of limitations was tolled pursuant to KRS 413.170(1), as he was of unsound of mind, an argument he raised only in his renewed motion to file an amended complaint. He posits that a person does not have to be adjudged insane to avail himself of this tolling provision. Both the Turners and the Agency argue

⁵ Regional Jail Authority v. Tackett, 770 S.W.2d 225, 229 (Ky. 1989).

⁶ Forester v. Forester, 979 S.W.2d 928, 931, (Ky.App. 1998), citing Skaggs v. Assad, By and Through Assad, 712 S.W.2d 947, 950 (Ky. 1986).

that Robinson failed to introduce facts sufficient to establish that the limitations period should be tolled.

KRS 413.170(1) provides:

If a person entitled to bring any action mentioned in KRS 413.090 to 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued.⁷

In Rigazio v. Archdiocese of Louisville,⁸ this Court addressed this issue, stating, “[t]he term ‘unsound mind’ within the meaning of KRS 413.170(1) has been interpreted by our Supreme Court to mean that the person claiming the disability must show that he has been rendered incapable of managing his own affairs.” Furthermore, our Supreme Court made it clear in Southeastern Kentucky Baptist Hospital, Inc. v. Gaylor⁹ that “[o]nce the statute of limitations is raised, the burden falls on the complainant to prove such facts as would toll the statute.” The only proof Robinson submitted consisted of information extracted from social worker records dating from June 17, 1997, through July 31, 2000, detailing behavioral and

⁷ While Robinson’s injury happened in 1998, there is no dispute that the statute of limitations was tolled pursuant to that provision until he reached his eighteenth birthday on February 7, 2002.

⁸ 853 S.W.2d 295, 297 (Ky.App. 1993).

⁹ 756 S.W.2d 467, 469 (Ky. 1988).

school problems. He also relied upon his own statement during his deposition that an unidentified doctor told him he had the mind of a three-year-old when he was thirteen. Robinson did not submit any type of medical records to support his claim that he was ever of unsound mind. As pointed out by the Agency, the last date extracted from the social worker's records was July 31, 2000, during the time he was still an infant and the statute of limitations was tolled. There is no evidence at all that he was of unsound mind when his cause of action accrued and the statute of limitations began to run. Therefore, we agree with the Turners and the Agency that the circuit court properly ruled that the statute of limitations was no longer tolled once he reached the age of majority.

Robinson's third argument is that he was suing the Agency as a third-party beneficiary of the contract between the Turners and the Agency, for which a fifteen-year statute of limitations applies.¹⁰ He relies upon Sexton v. Taylor County¹¹ to support his proposition that the contract was made for his benefit. On the other hand, the Agency disputes Robinson's citation to Sexton, and relies upon the decision of the Sixth Circuit Court of Appeals in Finck v. Albers Super Markets,¹²

¹⁰ KRS 413.090(2).

¹¹ 692 S.W.2d 808 (Ky.App. 1985).

¹² 136 F.2d 191 (6th Cir. 1943).

which holds that a suit for physical injuries caused by the negligent act of another must be brought within one year, regardless of any contractual relationship that might exist. The Turners argue that Robinson was merely an incidental beneficiary of the contract, and therefore is not entitled to sue for its breach.

We have considered the parties' arguments, and have determined that the Agency's argument constitutes the correct interpretation of the law. In Finck, the plaintiff filed suit for a physical injury he incurred after drinking from a soft drink bottle containing bugs and other foreign substances. While he sought to bring his suit under a statutory breach of duty theory, for which a five-year statute of limitations would apply, the court disagreed, holding that in Kentucky:

Suits for physical injuries caused by the negligent acts of another or his agent must be commenced within the period of one year from the date of the alleged injury and the fact that the parties stand in contractual relations to each other or that the tortfeasor violates a statute causing the injury does not operate to change the rule or extend the time for the commencement of such actions.¹³

In the present case, Robinson was suing for an injury to his person. It therefore follows that the one-year statute of limitations provided for in KRS 413.140 applies. Furthermore,

¹³ Id. at 193.

we disagree with Robinson's reliance upon Sexton, as that case is based upon a contract claim rather than one for personal injury.

Finally, Robinson argues that the discovery rule applies in this case, so that the statute of limitations should not have begun to run until he discovered that his injury may have been caused by the Agency's conduct. Both the Agency and the Turners argue that the discovery rule has not been extended to this type of claim.

While KRS 413.140 provides for a discovery rule, such a rule is limited in the negligence area to claims against physicians, surgeons, dentists, or hospitals, solely. This Court addressed the discovery rule in Rigazio,¹⁴ noting that the rule at first only applied to latent disease claims resulting from an exposure to a harmful substance. The rule was later extended by statute to professional malpractice claims. However, in that case the Court declined to extend the rule to church abuse cases. Later, in Roman Catholic Diocese of Covington v. Secter,¹⁵ the Court noted that "[t]he courts in this Commonwealth have been reluctant to extend the discovery rule and have applied it narrowly." In Davis v. All Care Medical,

¹⁴ 853 S.W.2d at 297.

¹⁵ 966 S.W.2d 286, 289 (Ky.App. 1998).

Inc.,¹⁶ the Supreme Court of Kentucky more recently refused to extend the discovery rule against a company that provided the plaintiff with a wheelchair which caused him to develop decubitis ulcers. As Robinson's claim did not arise from a latent disease or even from professional malpractice, we must hold that the discovery rule does not apply to extend the statute of limitations in this matter.

For the foregoing reasons, we conclude that the circuit court did not abuse its discretion in ruling on this matter. Therefore, its order denying Robinson's renewed motion to amend his complaint is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, THE
PRESBYTERIAN CHILD WELFARE
AGENCY OF BUCKHORN, KENTUCKY,
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TURNER AND CAROLE TURNER:

J. Dale Golden
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¹⁶ 986 S.W.2d 902 (Ky. 1999).