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AUGUST 26, 1998 (98-SC-000232)

96-CA-0778-MR

RONALD J. PIKE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 91-CI-7014

RICKEY L. PARDUE

APPELLEE

AND

96-CA-1813-MR

JAMES GOODMAN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 91-CI-7014

RICKEY L. PARDUE

APPELLEE

OPINION

AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM, and HUDDLESTON, Judges.

BUCKINGHAM, JUDGE. James Goodman (Goodman) and Ronald Pike (Pike) appeal from a judgment of the Jefferson Circuit Court against them and in favor of Rickey Pardue (Pardue). Finding no error, we affirm.

Goodman and Pike were convicted in the United States District Court for the Western District of Kentucky after a trial by jury of conspiracy to violate Pardue's civil rights in violation of 18 U.S.C. § 241, and Goodman, a police officer, was also convicted of deprivation of Pardue's rights under color of law in violation of 18 U.S.C. § 242. Both were sentenced to terms of imprisonment. The crimes committed against Pardue by Goodman, Pike, and others involved Pardue's being framed by a false arrest in which drugs and an illegal firearm were planted in Pardue's vehicle when he was wrongfully pulled over for a minor traffic offense by Goodman and another police officer. Pardue was prosecuted for drug and weapons offenses for nearly a year before all charges were dropped on September 16, 1991, after the true facts came to light.

Pardue filed the civil action herein against Goodman, several other named defendants, and "unknown defendants" in the Jefferson Circuit Court on October 31, 1991. On September 17,

1992, Pardue filed a motion to amend his complaint to include Pike as a defendant. The trial court granted the motion, and an order was entered allowing the amended complaint on September 21, 1992. A civil summons directed to Pike was issued on September 24, 1992.

Pardue's civil action against Goodman, Pike, and the others alleged deprivation of civil rights under color of law in violation of 42 U.S.C. § 1983, conspiracy to interfere with civil rights in violation of 42 U.S.C. § 1985, and entitlement to attorney's fees and costs pursuant to 42 U.S.C. § 1988. Pardue's complaint also alleged causes of action under state law for false arrest, false imprisonment, and malicious prosecution. Prior to trial, the trial court awarded summary judgment in favor of Pardue on the issue of liability and reserved the issue of damages for the jury.

None of the five defendants, Goodman and Pike included, appeared for the jury trial, although the trial court determined that all had received repeated notice of the trial. Although both Goodman and Pike were represented by counsel, their counsel likewise did not appear at the trial. After hearing the evidence, the jury awarded compensatory damages to Pardue against Goodman, Pike, and the others, jointly and severally, in the amount of \$500,000. The jury also awarded Pardue \$1,500,000 against Goodman and \$1,000,000 against Pike as

punitive damages.¹ A final judgment was entered in accordance with the jury's verdict, and a subsequent order was entered by the trial court awarding attorneys' fees and costs in the sum of \$160,741.67 against all defendants, jointly and severally. This appeal by Goodman and Pike followed.

Goodman contends that the judgment against him should be vacated and that he should be granted a new trial because the trial court erred in not appointing a guardian ad litem to represent him at trial under Kentucky Rule of Civil Procedure (CR) 17.04(1) due to his being unable to defend himself because of incarceration in the federal prison on the trial date. CR 17.04(1) states:

Actions involving adult prisoners confined either within or without the State may be brought or defended by the prisoner. If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense.

Goodman also cites Davidson v. Boggs, Ky. App., 659 S.W.2d 662 (1993), wherein a money judgment against a prisoner was vacated due to the trial court's failure to appoint a guardian ad litem to represent the prisoner when the prisoner was absent from the trial and was not represented by counsel at the time of trial.

¹Similar punitive damages were awarded to Pardue against the other co-defendants.

The court stated that the requirements of CR 17.04(1) are mandatory "if the prisoner fails to defend for any reason." Id. at 665.

The facts in the case sub judice are different from those in the Davidson case. While the prisoner in the Davidson case was not represented by counsel at the time of trial, Goodman was. Goodman's counsel represented him before the trial, after the trial by filing post-trial motions, and on this appeal. Goodman did not "fail" to defend himself so as to be entitled to a guardian ad litem at trial under CR 17.04(1). Rather, he has been represented by counsel at all times throughout this proceeding, and counsel's decision not to appear at the trial does not amount to a failure or inability to defend the lawsuit. The trial court properly denied Goodman's motion to vacate the judgment and to award him a new trial.

Goodman's second argument is that he should have been granted a new trial due to the jury's awarding excessive compensatory and punitive damages. Pardue proved special damages of approximately \$8,000 at trial, and the jury returned a verdict in his favor and against Goodman awarding compensatory damages of \$500,000 and punitive damages of \$1,500,000. Since Goodman did not raise the specific issue of excessive damages in his motion for a new trial, this issue was not preserved for our review. "The Court of Appeals is without authority to review

issues not raised in or decided by the trial court." Regional Jail Auth. v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

Since Goodman did not preserve the issue of excessive damages for our review, the damage award will not be overturned on appeal unless a "palpable error" occurred, resulting in "manifest injustice." CR 61.02. Due to the egregious conduct in which Goodman engaged (using his police authority to have Pardue falsely arrested and planting an illegal weapon and drugs in his vehicle), we conclude that the jury's award of compensatory and punitive damages against Goodman did not constitute palpable error.

Pike contends that Pardue's claims against him should have been dismissed due to the applicable statute of limitations. The U.S. Supreme Court has held that actions filed pursuant to 42 U.S.C. §§ 1983 and 1988 are subject to state statutes of limitation for personal injury claims. Wilson v. Garcia, 471 U.S. 261, 266, 105 S.Ct. 1381, 85 L.Ed.2d 254, 256 (1985). In Kentucky, these federal claims are subject to the one-year statute of limitations for personal injuries set forth in KRS 413.140(1)(c) for malicious prosecution and false arrest claims. Alcorn v. Gordon, Ky. App., 762 S.W.2d 809, 813 (1988).

Pike argues, and Pardue does not dispute, that Pardue's causes of action arose on September 16, 1991--the day

the false charges against Pardue were dropped. Pike further reasons that because a civil summons was not issued for him until September 24, 1992, then Pardue's actions on these claims were not commenced until that date, which is clearly more than one year after the causes of action accrued.²

The trial court denied Pike's motion for summary judgment on the statute of limitations issue on the ground that Pardue's amended complaint related back to the date of the original complaint. The trial court relied on CR 15.03 which states in relevant part:

(1) Whenever the claim or defense asserted in the amended pleading arose out of the 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.

(2) An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In response to Pike's argument that the trial court erred in denying his summary judgment motion on the statute of

²In Kentucky, a civil action is not commenced until both the complaint is filed and a summons is issued. CR 3.

limitations issue, Pardue acknowledges, contrary to the trial court's ruling, that his amended complaint does not relate back under CR 15.03. Rather, Pardue now argues that the statute of limitations against Pike was tolled pursuant to KRS 413.190(2) due to fraudulent concealment by Pike until Pardue learned of Pike's involvement when Pike was indicted in September 1992.³

Nonetheless, we conclude that the trial court was correct in denying Pike's summary judgment motion pursuant to CR 15.03. An amended complaint adding a new party relates back to the original complaint if (1) the amended complaint arose out of the same transaction set forth in the original complaint, (2) the new defendant received such notice of the institution of the action within the period provided by law for commencing the action against him such that he will not be prejudiced in maintaining his defense on the merits, and (3) he knew or should have known within that period that, but for a mistake concerning the identity of the proper party, the action would have been filed against him. Pike does not dispute that the first requirement was met, but he maintains that there was no indication in the record that he had received such notice of the institution of the lawsuit that he would not be prejudiced in maintaining his defense on the merits and that he knew or should

³KRS 413.190(2) provides that a statute of limitations is tolled when a defendant "by any . . . indirect means obstructs the prosecution of the action . . ." This statute is simply a codification of the common law doctrine of equitable estoppel. Munday v. Mayfair Diagnostic Lab., Ky., 831 S.W.2d 912, 914 (1992).

have known that the action would have been brought against him but for the mistake in the identity of the proper party.

It is not required that the new defendant to be added by an amended complaint receive actual notice of the initiation of the lawsuit before the amended complaint may be held to relate back pursuant to CR 15.03(2). Funk v. Wagner Machinery, Inc., Ky. App., 710 S.W.2d 860, 861 (1986); Clark v. Young, Ky. App., 692 S.W.2d 285, 288 (1985). The plaintiff in the Funk case was injured in an accident involving a street sweeper. His initial complaint was filed against several parties, including a sales representative of the manufacturer. Funk later moved the trial court to amend his complaint and include the manufacturer as a party defendant. The claim against the manufacturer was barred by the one-year statute of limitations for personal injury actions, and the trial court refused to apply CR 15.03 to provide for the amended complaint to relate back to the date of the original pleading. Although the manufacturer denied actual notice of the institution of the original action against its sales representative, the court in Funk nevertheless held that "the ongoing business relationship of the agent and the manufacturer . . . is sufficient to satisfy section (2) of the rule if such actual notice is, as here, denied by the party added to the suit." Id. at 862.

Similarly, the court in the Clark case found that "it

is inconceivable that [the lessor of a truck] had not received actual or constructive notice of the subject litigation" due to "the identical business interest" between the lessor and the lessee of a truck in an action brought against the lessee who was using the truck when the plaintiff was injured. Id. at 288. The court in the Clark case held that the lessor "knew that he was a proper defendant" and that the plaintiff "was mistaken or without knowledge of his presence in the operation." Id.

Just as the amended complaint related back in the Funk and Clark cases, we hold that the trial court was correct in determining that it should relate back in this case. Pike was involved with the original defendants in this case in the plot to plant an illegal weapon and drugs in Pardue's vehicle, and Pike was an employee of two of the defendants and a co-employee of another defendant. Due to Pike's business relationship with three of the original co-defendants in this case, it is inconceivable that he would not have had notice of the original complaint. Furthermore, Pardue, who filed his original complaint against "unnamed defendants," was without knowledge of Pike's participation in the plot until he learned of it in September 1992. Under the authority of the Funk and Clark cases, we conclude that the trial court did not err in holding that the amended complaint to include Pike related back to the

original complaint under CR 15.03.⁴

Finally, both Goodman and Pike argue that the trial court erred in granting summary judgment to Pardue on the issue of liability. In its order granting summary judgment to Pardue on the issue of liability, the trial court stated:

The criminal convictions operate to bar the Defendants from relitigating matters decided at the criminal trial. Even were this not the case, a party opposing a properly supported motion for summary judgment can not defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact. [Citation omitted.] The court finds summary judgment appropriate in this case.

Goodman and Pike cite Wolff v. Employers Fire Ins. Co., 282 Ky. 824, 140 S.W.2d 640 (1940), for the proposition that a criminal conviction is competent but not conclusive evidence of the underlying criminal acts in a subsequent civil action.⁵ Id. at 830. They argue that their criminal convictions alone do not collaterally estop them from denying liability. The court in the Wolff case refused to hold a criminal conviction to be conclusive evidence of the underlying criminal acts in a subsequent civil case due to the lack of privity between the

⁴Having concluded that the trial court properly denied Pike's summary judgment motion based on the doctrine of relation back, we decline to review the issue of whether the statute of limitations was tolled by fraudulent concealment or equitable estoppel.

⁵Goodman emphasizes that neither the judgment of conviction nor the indictment were filed in the record prior to the trial court's grant of summary judgment, and argues that the filed Sixth Circuit opinion affirming the conviction was inadequate evidence on which to rely. However, as Goodman does not deny the fact of his conviction nor take issue with any particular portion of the Sixth Circuit opinion, any error in regard to this issue is harmless.

CR 61.01.

civil plaintiffs and any party to the criminal action. Id. at 828.

A close reading of the Wolff case indicates that the court therein never explicitly referred to "collateral estoppel" but rather referred to "res judicata estoppel." Id. at 828. The court therein was apparently reiterating the traditional (and still existing) privity requirement for the application of res judicata (claim preclusion), rather than separately considering the need for such a requirement for the application of what is now called collateral estoppel (issue preclusion).

To the extent that the Wolff case made privity a requirement for the application of collateral estoppel, such requirement has since been abandoned by Kentucky courts. Although the Kentucky Supreme Court did not overrule Wolff in Moore v. Commonwealth, Ky., 954 S.W.2d 317 (1997), it did state that there is no privity requirement for the application of collateral estoppel. The Moore court compared the doctrines of res judicata and collateral estoppel, noting that "identity of parties" is one of the requirements for the application of res judicata or claim preclusion. Id. at 318. Citing Sedley v. City of West Buechel, Ky., 461 S.W.2d 556 (1970), the Moore court stated that, in that case, the court "abandoned the mutuality requirement of *res judicata* in adopting non-mutual collateral estoppel, applicable when at least the party to be

bound is the same party in the prior action." Id. at 319.

The Moore court reiterated the requirements contained in the Sedley case for the application of collateral estoppel:

- (1) identity of issues;
- (2) a final decision or judgment on the merits;
- (3) a necessary issue with the estopped party given a full and fair opportunity to litigate;
- (4) a prior losing litigant.

Id. The criminal convictions of Goodman and Pike in federal court constitute final decisions on the merits, and Goodman and Pike were the losing litigants.

Furthermore, there was an identity of issues, as the federal court adjudicated the issue of whether Goodman and Pike had conspired to deprive Pardue of his civil rights through false arrest and the planting of evidence. Whether Goodman and Pike should be held civilly liable in the Jefferson Circuit Court under federal civil rights law and Kentucky tort law because of their participation in the false arrest and planting of evidence on Pardue involved the same issue determined by the federal court by their criminal convictions. Goodman argues that identity of issues is lacking because 42 U.S.C. § 1985 requires a "class-based animus," which is not required by the corresponding criminal conspiracy statute (18 U.S.C. § 241)

under which he was convicted. Nonetheless, Goodman does not allege that such "class-based animus" is a prerequisite for liability under 42 U.S.C. § 1983 or for Pardue's state-law claims for false arrest, false imprisonment, and malicious prosecution. Thus, the federal conviction was sufficient to establish liability for these claims.

Finally, although Goodman and Pike elected not to testify at their federal criminal trial, they had a "full and fair opportunity" to disprove their involvement in the conspiracy. Goodman argues that he had no opportunity to litigate the defense of "good faith" or "qualified immunity" at the criminal trial because this defense is unavailable in criminal actions. However, a law enforcement officer sued under 42 U.S.C. § 1983 has the burden of pleading and proving this affirmative defense. To defeat a plaintiff's motion for summary judgment based on this defense, the officer must come forward with evidence establishing a genuine issue of material fact for trial. David J. Oliveiri, Annot., "Defense of Good Faith in Action for Damages Against Law Enforcement Official Under 42 U.S.C. § 1983, Providing for Liability of Person Who, Under Color of State Law, Subjects Another to Deprivation of Rights," 61 A.L.R. Fed. 7 § 2(b) (1983). Goodman fails to cite to any evidence which would establish a genuine issue of material fact concerning this defense. Thus, we find no error in the trial

court's grant of summary judgment despite Goodman's apparent lack of opportunity to assert this defense at his federal criminal trial.

Pike argues that he was not given an opportunity to litigate the issue of specific intent, which he states is a requirement for liability, citing U.S. v. Kimbel, 719 F.2d 1253, 1256 (5th Cir. 1983). However, Kimbel merely states that specific intent is a prerequisite for criminal liability under federal civil rights laws but does not indicate whether such a requirement exists for civil liability. In fact, a plaintiff is not even required to allege bad faith to state a cause of action under 42 U.S.C. § 1983. Oliveiri, supra at § 26. Thus, the trial court did not err in granting summary judgment despite Pike's alleged lack of opportunity to litigate this issue in the federal trial.

In short, the doctrine of collateral estoppel or issue preclusion precluded Goodman and Pike from relitigating the liability issue in this case, and the trial court properly awarded summary judgment on the issue to Pardue.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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