

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001249-MR

DAVID BURGER AND EARLINE BURGER

APPELLANTS

v. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 09-CI-00037

WESTERN KENTUCKY
NAVIGATION, INC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

CLAYTON, JUDGE: David and Earline Burger appeal from an order entered by
the Livingston Circuit Court dismissing their personal injury claim against Western
Kentucky Navigation, Inc. (WKN) on the grounds that it was barred by res

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580

judicata. The Burgers argue that, rather than res judicata, the previous case was dismissed because of lack of jurisdiction and to quash service of process. Further, they maintain that the trial court erred by failing to apply the provisions of KRS 413.270 so as to determine that the statute of limitations was tolled and the action timely filed. WKN counters that the Illinois court dismissed the case on the merits and, therefore, the court did not err when it dismissed the Burgers' case on the basis of the doctrine of res judicata. We concur with the trial court that KRS 413.270 is inapplicable; however, because the Illinois court's order dismissing WKN was unclear as to whether the dismissal was based on a lack of jurisdiction or for failure to state a claim, res judicata will not act as a bar to the Burgers' case. Accordingly, we reverse and remand to the trial court.

In November 2007, the Burgers filed suit in Madison County, Illinois, against WKN and thirty-seven other defendants for alleged exposure to toxic chemicals. Specifically, Burger claimed negligence under the Jones Act and unseaworthiness under general maritime law. At that time, WKN filed a motion on January 25, 2008, to dismiss the action for lack of jurisdiction under Illinois Compiled Statutes, Code of Civil Procedures, 735 ILCS 5/2-301(a), and, in the alternative, for failure to state a claim under 735 ILCS 5/2-615. Subsequently, on May 2, 2008, the Burgers' Illinois counsel was granted a motion to withdraw from the case. Ultimately, on December 17, 2008, after the Burgers had been granted several motions for additional time, the Illinois Court entered an order dismissing the Burgers' claims against all parties. The order stated:

This is a final judgment. Plaintiffs have thirty (30) days to have this judgment set aside or take an appeal.

Following the entry of the order, the Burgers did not move to set aside the judgment or appeal it. Instead, they filed a complaint against WKN in the Livingston Circuit Court on March 17, 2009. Similar to the Illinois complaint, the Burgers' complaint alleged that because of WKN's negligence under the Jones Act and as a result of the unseaworthiness of its employees, equipment, and vessels, Burger was exposed to toxic chemicals. In addition, the complaint also included a derivative claim for loss of consortium by Mrs. Burger.

WKN moved to dismiss the claim under Kentucky Rules of Civil Procedure (CR) 12.02(f) for failure to state a claim. It argued that because the Illinois case had been dismissed for failure to state a claim, the case had already been dismissed on the merits. Furthermore, WKN maintained that the Illinois claims by the Burgers were identical to his Kentucky claims and, hence, the doctrine of res judicata barred them from re-asserting these claims. A hearing was held on April 15, 2009. Thereafter, on April 28, 2009, the court entered an order granting WKN's motion to dismiss the action. The court reasoned that since the Illinois dismissal was on the merits and the Burgers' claim in Kentucky was the same claim as the dismissed Illinois claim, it was barred by the doctrine of res judicata. Next, the Burgers filed a motion to alter, amend, or vacate the judgment, which the court denied. The Burgers appeal from the order of dismissal and the order denying the motion to alter, amend or vacate the judgment.

The Burgers argue on appeal that the case was only dismissed in Illinois for lack of jurisdiction and that, under KRS 413.270, the Livingston Circuit Court has jurisdiction and the case should not have been dismissed. And, as the case was dismissed in Illinois on jurisdictional and procedural grounds, res judicata is not pertinent because the case was not dismissed on the merits. WKN contends both that KRS 413.270 is not applicable to the Burgers' case and also that the case should be dismissed on grounds of res judicata.

Before stating the standard of review of this case, we observe that WKN's motion to dismiss was made under CR 12.02(f), that is for the failure to state a claim. In ruling on a motion to dismiss under CR 12.02, "[a] court should not dismiss for failure to state a claim unless the pleading party appears not to be entitled to relief under any state of facts which could be proved in support of his claim." *Weller v. McCauley*, 383 S.W.2d 356, 357 (Ky. 1964). Because WKN's motion to dismiss was granted on the basis of the doctrine of res judicata, it necessitated that the court consider documents outside the pleadings. Hence, under CR 12.02, the motion for failure to state a claim is treated as a CR 56 summary judgment motion.

If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

See CR 12.02. Moreover, because the resolution of this case concerns an issue of law, rather than an issue of fact, we review de novo the court's application of the doctrine of res judicata. *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

The first argument proffered by the Burgers is that, since the case was dismissed by the Illinois court for lack of personal jurisdiction, they are permitted to file the action in Livingston Circuit Court under KRS 413.270 within ninety days. KRS 413.270, however, is not applicable to these facts. KRS 413.270 (referred to as Kentucky's "savings statute") says:

(1) If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

(2) As used in this section, "court" means all courts, commissions, and boards which are judicial or quasi-judicial tribunals authorized by the Constitution or statutes of the Commonwealth of Kentucky or of the United States of America.

Notably, the first section of the statute requires that, in order for a case to be "saved" under this statute, it must have commenced "in any court of this state."

This phrase, "in any court of this state" has been interpreted to include only federal or state courts that are physically located in Kentucky. Support for this interpretation of the statutory language is found in *Blair v. Peabody Coal Co.*:

However, in the absence of anything to indicate that a contrary meaning was intended, it is clear to us that the phrase “in any court of this state” includes only those federal or state “courts,” as defined in KRS 413.270(2), which are physically located within the state of Kentucky.

Blair v. Peabody Coal Co., 909 S.W.2d 337, 339 (Ky. App. 1995). Here, since the Burgers’ original action was filed in a circuit court in Madison County, Illinois, this statute is not applicable and does not provide grounds for reversal.

Second, the Burgers maintain that the Illinois case was not dismissed on the merits and, therefore, the doctrine of res judicata is inapposite. The crux of the Burgers’ argument is that the Illinois case was dismissed, as noted above, for lack of personal jurisdiction and to quash service, which are not motions on the merits. Indeed, CR 41.02(3) advises as follows:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, for want of prosecution under Rule 77.02(2), or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Therefore, because the case, according to them, was not dismissed on the merits, they maintain that the doctrine of res judicata does not apply, and that their case is still viable. Continuing on, they bolster the argument by observing that the Illinois court had numerous motions before it when it entered its dismissal order. The Burgers then cite language in the Illinois order dismissing the action:

All pending Defendants’ Motions to Dismiss, including Defendants’ Motions to Dismiss for Failure to Prosecute

and Defendants' Motions to Dismiss for Failure to state a claim, are GRANTED.

From this language, they contend that WKN, which was one of numerous defendants, only had motions to dismiss for lack of jurisdiction and to quash service. Therefore, the Burgers reason that their case against WKN cannot be dismissed on the basis of res judicata because it was merely dismissed on the jurisdictional grounds and, therefore, was not adjudicated on the merits.

We point out, however, that in the Illinois case, WKN had an alternate motion to dismiss for failure to state a claim. In WKN's motion, they discuss the Burgers' failure to state a claim under counts X and XI in the complaint. So, based on this motion itself and the language of the Illinois order wherein the judge dismisses the case based on all pending motions, including motions for failure to state a claim, WKN maintains that the Illinois case was dismissed for failure to state a claim and, thus, adjudicated on the merits.

In sum, WKN argues that because the Burgers' claims were adjudicated on the merits and dismissed, the lawsuit is barred by res judicata. And, since they are unable to state a claim upon which relief can be granted, a dismissal of the lawsuit against WKN is proper under CR 12.02(f).

The doctrine of res judicata is an affirmative defense that operates to bar repetitious suits involving the same cause of action. The key factor in determining if a lawsuit concerns the same controversy as a previous lawsuit is whether both actions arise from the same set of facts. And, if the actions concern

the same controversy, then the previous suit is deemed to have adjudicated every matter that could have been brought in support of it. *Clemmer v. Rowan Water, Inc.*, 277 S.W.3d 633, 635 (Ky. App. 2009).

Additional elucidation of the doctrine of res judicata is found in *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998), which explains that there are three requirements that must be satisfied in order for claim preclusion to bar subsequent litigation: “First, there must be identity of parties[;] Second, there must be identity of the causes of action[; and] Third, the action must have been resolved on the merits.” *Id.* at 465 (footnote and internal citations omitted). In the case at hand, undoubtedly, the first two criteria are met. The cases share the same parties and are based on an action for negligence. Nevertheless, the question remains whether the third prong for res judicata is met, that is, whether the claim asserted by the Burgers in the Illinois case was adjudicated on the merits.

The Burgers cite to *Philpot v. Minton*, 370 S.W.2d 402 (Ky. 1963), to support their allegation that unless the court’s original decision is clear, it cannot operate as res judicata.

In *River Park, Inc., v. City of Highland Park*, 184 Ill.2d 290, 703 N.E.2d 883 (Ill. 1998), it was held that under Illinois law it is clear that the dismissal of a complaint for failure to state a claim is an adjudication on the merits. The Illinois holding is in agreement with Kentucky’s rule that dismissal for failure to state a claim is an adjudication upon the merits. *Polk v. Wimsatt*, 689 S.W.2d 363 (Ky. App. 1985). Nevertheless, WKN cannot point definitively to the Illinois

court's order and conclusively establish that the action was dismissed for lack of personal jurisdiction or failure to state a claim. Since the order granted all pending motions, the Illinois court certainly is not claiming personal jurisdiction over WKN. If WKN was dismissed for lack of personal jurisdiction, then the court no longer had jurisdiction to dismiss for failure to state a claim. Significantly, as *Philpot* says, “[w]hen the basis of an earlier decision is not made clear it cannot operate as res judicata.” *Philpot*, 370 S.W.2d at 403.

Finally, we are cognizant that Mrs. Burger's claim for loss of consortium is not found in the original Illinois action but was part of the Kentucky lawsuit. A wife's claim for loss of consortium, however, is a derivative claim since it “derives” from her husband's injury. *Daley v. Reed*, 87 S.W.3d 247 (Ky. 2002). Because we are reversing the court's dismissal of the Burgers' action, logically, the loss of consortium claim is now viable, too.

It is our conclusion that the Livingston Circuit Court carefully examined the pleadings and the pertinent law but erred in dismissing the Burgers' case under CR 12.02(f). Therefore, for the foregoing reasons, the judgment of the Livingston Circuit Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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