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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000639-MR

DONI BIGGS D/B/A BIGGS
FARM, INC.; STEPHEN PALMER,
TRUSTEE IN BANKRUPTCY FOR
BIGGS FARM, INC.; AND BIGGS
FARM, INC. APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CI-04762

EATON SALES, INC.; AND EATON
FARMS MANAGEMENT, LLC APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

CLAYTON, JUDGE: Appellants Doni Biggs and Stephen Palmer, trustee in bankruptcy for Biggs Farm, Inc., appeal from three orders of the Fayette Circuit Court. First, they appeal the July 21, 2005 order that denied Palmer's motion to be substituted as a party for Biggs Farm, Inc. and to amend the complaint. Next,

Biggs and Palmer appeal the trial court's April 6, 2009 order denying their motions to file an amended complaint to add Biggs Farm, Inc. as a plaintiff party, substitute Palmer for Biggs Farm, Inc., and allow Palmer's intervening complaint. They also appeal the February 17, 2010 order granting Appellees' motion for summary judgment against both Doni Biggs d/b/a as Biggs Farm, Inc. and Stephen Palmer, as trustee in bankruptcy for Biggs Farm, Inc. Lastly, Biggs and Palmer appeal the March 17, 2010 order denying their motion to reconsider the February 17, 2010 order. After careful review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Appellant, Doni Biggs (hereinafter "Biggs") incorporated Biggs Farm in March 1995, and was the only shareholder. Biggs Farm, Inc. was administratively dissolved on November 15, 2001, but Biggs did not learn of dissolution until January 11, 2002. The Appellees are Eaton Sales, Inc., a corporation that sells thoroughbred horses for other people, and Eaton Farms Management, LLC,[1] a limited liability managing company that leases Eaton Farm (hereinafter collectively referred to as "Eaton"). Eaton cares for horses and provides for their day-to-day welfare and maintenance.

In September 2001, Biggs delivered fourteen horses to Eaton for boarding and sales preparation in anticipation of the November and January Keeneland Sales. Subsequently, on about November 26, 2001, Eaton returned the horses to Biggs Farm. At the time the horses were returned, Biggs claims that a

[1] Eaton Sales, Inc.; Eaton Farms Management, LLC; and Eaton Farms, Inc., were the original plaintiffs, but Eaton Farms, Inc., was dismissed at the request of the appellant.

representative of Eaton informed her that one or more of the horses exhibited symptoms of a condition commonly known as "strangles." Information provided by the parties delineates that strangles is a highly infectious condition in horses, which, although treatable in most cases, is extremely troublesome. The infection is not only highly contagious through direct contact with an infected horse, but it can also contaminate inanimate objects and be transmitted to horses in this manner.

On November 25, 2002, Biggs filed a *pro se* complaint for negligence against Eaton. She was assisted in the preparation of the *pro se* complaint by her attorney at the time, William Rambicure, who was not willing to file the lawsuit but agreed to help her draft the complaint. In the complaint, Biggs alleged that several of her thoroughbred horses had developed strangles after she sent them to Eaton Farms prior to the Keeneland Sales. The *pro se* action named "Doni Biggs d/b/a Biggs Farm, Inc." as the plaintiff. All the specific declarations in the complaint referred only to Biggs's individual interests. In fact, no specific allegations were made on behalf of Biggs Farm, Inc.

Eaton filed an answer and a counterclaim on December 13, 2002. In the counterclaim, Eaton sued for false light and defamation. It claimed that Biggs circulated graphic photographs of a dead horse and ascribed the horse's injuries to Eaton. These photographs were allegedly mailed to Eaton clients and distributed at the 2002 Keeneland Sale. Later, Eaton amended its counterclaim and asserted that Biggs owed Eaton roughly $75,000 plus interest for the boarding and care of the horses that are the subject of this lawsuit.

Next, on April 4, 2003, Eaton filed a motion for summary judgment and a default judgment. In the motion, Eaton argued that Biggs did not own the horses in question but that several partnerships owned interests in the horses and that Biggs was not a partner in any of them. To support its motion, Eaton attached loan documents from the banks that financed the purchase of the horses and registration certificates from the Jockey Club. Moreover, Eaton pointed out that in another lawsuit in the Bourbon Circuit Court, in which Biggs was a defendant, she had specifically denied owning the horses. Biggs never responded to Eaton's summary judgment motion or filed answers to its counterclaim. Consequently, the trial court entered an order on April 28, 2003, granting the summary judgment motion and the default judgment.

Shortly thereafter, Biggs obtained counsel and filed a motion to set aside both the default and summary judgments. Biggs's counsel argued that the ownership of the horses was still disputed because no discovery had taken place, and hence, Biggs's allegations that she owned the horses had to be taken as true for purposes of summary judgment analysis. On June 2, 2003, the trial court granted the motion to set aside the summary judgment but denied the motion to set aside the default judgment against Doni Biggs d/b/a Biggs Farm, Inc.

Biggs Farm, Inc. then filed for bankruptcy protection in November 2003 and was in bankruptcy in December 2004. Then, after almost two years of relative inactivity in the circuit court action, on June 15, 2005, Stephen Palmer, trustee in bankruptcy for Biggs Farm, Inc., made a motion to amend the complaint

to be substituted for Biggs Farm, Inc. as the plaintiff. Biggs, one day later, also moved to amend the complaint. In the amended complaint tendered with her motion, Biggs added language regarding the involvement of Biggs Farm, Inc. in the suit, and said that Biggs Farm, Inc. owned the horses, which were the subject of the suit. Nevertheless, Biggs still sought relief for damages personally suffered as a result of Eaton's alleged negligence, including pain and suffering.

Eaton's response to the two motions was that the trial court should not allow Palmer, as bank trustee, to be substituted as a plaintiff for Biggs Farm, Inc., because Biggs Farm, Inc. was never a party. And Eaton asserted that, although Biggs disavowed ownership of the horses in the Bourbon Circuit Court case, she was now taking the position that, through Biggs Farm, Inc., she owned the horses. In response to the two motions, the trial court, on July 21, 2005, granted Biggs's motion to amend the complaint but denied Palmer's motions to be substituted as a party for Biggs Farm, Inc. The trial court held that since Biggs Farm, Inc. was not a party to the lawsuit, Palmer could not be substituted for a nonexistent party. Subsequently, Palmer appealed the trial court's decision on August 11, 2005. Our Court dismissed the appeal because it was not yet a final and appealable order.

Continuing with the procedural history, the next event, on August 9, 2005, was Eaton's motion to dismiss, or, in the alternative, for summary judgment on Biggs's amended complaint. And on August 10, 2005, Palmer, as trustee for Biggs Farm, Inc., made a motion to intervene in the action, which the trial court granted on November 30, 2005.

The trial court entered its opinion on Eaton's motion for summary judgment on October 12, 2005. It partially denied Eaton's motion to dismiss and for summary judgment, but did grant the motion to dismiss Biggs's claim for suffering, pain, and mental anguish. With regard to Biggs's claim for suffering, pain, and mental anguish, the trial court noted that in Kentucky "[i]t is well established in this jurisdiction that 'an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury.'" *Deutsch v. Shein*, 597 S.W.2d 141, 145-46 (Ky. 1980), citing *Morgan v. Hightower's Adm'r*, 291 Ky. 58, 59-60, 163 S.W.2d 21, 22 (Ky. App. 1942). Because Biggs was unable to demonstrate any physical contact through the alleged negligence of Eaton, the trial court granted this portion of Eaton's summary judgment motion.

The next significant action in the suit occurred on November 29, 2005, when Biggs and intervening plaintiff, Palmer as trustee, jointly filed a motion to amend the complaint. Both parties asked permission of the trial court to add Biggs Farm, Inc. as a separate plaintiff party pursuant to Kentucky Rules of Civil Procedure (CR) 15.03, so that Palmer might be substituted for Biggs Farm, Inc. in his capacity as trustee in bankruptcy. Biggs and Palmer stated that one purpose of the motion was to identify Doni Biggs and Biggs Farm, Inc. as the real parties in interest. The other reason for the motion was to allow Palmer's claims on behalf of Biggs Farm, Inc. to relate back to the date of the 2002 complaint, and therefore avoid a statute of limitations defense on the intervening complaint. The trial court denied the motion on April 6, 2009, and designated it as a final and

appealable order. Hence, on May 1, 2009, Palmer and Biggs Farm, Inc. appealed for a second time to our Court, but again it was dismissed as not an appealable order.

On October 16, 2009, Biggs filed for partial summary judgment, and Eaton also filed for summary judgment against both Biggs and Palmer as trustee for Biggs Farm, Inc. The trial court, on February 17, 2010, granted Eaton's motions for summary judgment and denied Biggs's motion for partial summary judgment. The trial court held that Eaton owed no duty to the individual, Doni Biggs, because Biggs's interest in the horses and contractual relationship with Eaton were held by Biggs Farm, Inc., and not by her. The trial court also granted summary judgment to Eaton with regard to Biggs Farm, Inc.'s and Palmer's claims to be parties in this action. The trial court's reasoning rested squarely on the fact that neither Biggs Farm, Inc. nor Palmer is a party to this action. The trial court reasoned that Biggs Farm, Inc. was never a party and Palmer cannot be a party since his motion to file an intervening complaint was filed after the requisite statute of limitations.

STANDARD OF REVIEW

Appellants are asking for us to review the trial court's denial of a motion to amend and the trial court's grant of summary judgments. We review the trial court's denial of a motion to amend a complaint for an abuse of discretion. *See Kenney v. Hanger Prosthetics & Orthotics, Inc.,* 269 S.W.3d 866 (Ky. App. 2007). "The test for abuse of discretion is whether the trial judge's decision was

arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

We review the trial court's orders granting summary judgment motions de novo since we analyze solely questions of law rather than of fact. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000). Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. Furthermore, the trial court must view the record "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). And "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id*. at 482. On review, the appellate court must determine "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). Keeping the standard of review in mind, we will now address the aforementioned issues.

ISSUES

Biggs and Palmer maintain that Doni Biggs and Biggs Farm, Inc. are separate plaintiffs and real parties in interest. Additionally, they[2] contend that the amended complaint of Biggs Farm, Inc.; the proposed complaint of Palmer, trustee in bankruptcy for Biggs Farm, Inc.; and the complaint of the intervening plaintiff, Palmer, as trustee, related back to Biggs's filing of the complaint on November 25, 2002. Finally, they maintain that Eaton does owe a duty to exercise ordinary care to Biggs. In contrast to the Appellants' arguments, Eaton counters that Biggs Farm, Inc. was never a party to the original suit, that the claims do not relate back to the original filing, and that Eaton does not owe a duty to Biggs.

ANALYSIS

Essentially, in this case we are addressing the trial court's efficacy with regard to two separate types of motions, that is, motions to amend and motions for summary judgment. Given that each motion has a separate standard of review, we will review them independently of each other.

1. Motions to amend

The trial court in the July 21, 2005 order denied Palmer's motion to be substituted as a party in place of Biggs Farm, Inc., and denied his motion to amend the complaint. And, in its April 6, 2009 order, the trial court again denied the motion to amend the complaint, wherein it asked that Biggs Farm, Inc. be added as a party plaintiff.

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[2] Rambicure Law Group, P.S.C. (f/k/a Rambicure, Miller & Pisacano, P.S.C.); William C. Rambicure; and Christopher D. Miller collectively filed an amicus curiae brief supporting Appellants on this issue.

We first observe that this action was filed as *Doni Biggs d/b/a Biggs Farm, Inc.* Biggs and Palmer maintain that the original styling of the case is not relevant and that Biggs Farm, Inc. is a party to the suit. We disagree because "d/b/a" means "doing business as." Furthermore, a corporation is a separate and distinct legal entity, not a name under which an individual does business. *Miller v. Paducah Airport Corp.*, 551 S.W.2d 241 (Ky. 1977). Therefore, "d/b/a" does not mean "and." Therefore, it cannot be changed to "and." Perhaps Biggs may do business as Biggs Farm, Inc., but Biggs Farm, Inc. cannot do business as Biggs. It is a separate and distinct legal entity.

Having discounted the meaning of d/b/a, Biggs and Palmer, trustee in bankruptcy for Biggs Farm, Inc., sought to amend the complaint in the action and add Biggs Farm, Inc. as a party. By amending the complaint, Biggs and Palmer maintain that it then designates the real parties in interest, which, according to them, are Biggs and Biggs Farm, Inc. Furthermore, amending the complaint spells out their separate allegations. Lastly, their motion to amend the complaint permits Palmer, as trustee in bankruptcy for Biggs Farm, Inc., to represent the interests of Biggs Farm, Inc. in resolving the bankruptcy issues. In sum, Biggs and Palmer maintain that amending the complaint represents the original intent of Biggs to sue both for herself and for the corporation.

Biggs and Palmer's next argument is about the statute of limitations. They contend that, once the complaint is amended and shows that Biggs and Biggs Farm, Inc. are the real parties in interest, Palmer's motion to intervene relates back

to the date of the original complaint - November 25, 2002 - and is not barred by the statute of limitations. Conversely, Eaton argues that no authority exists that would permit the trial court to grant the motion to amend the complaint and name Biggs and Biggs Farm, Inc. as real parties in interest. Eaton emphatically posits that Biggs Farm, Inc. was never a party to the action.

In fact, the trial court, in the July 21, 2005 order, held that Palmer could not be substituted for Biggs Farm, Inc. because it was not a party to the suit. At that time, however, the trial court did opine that Palmer, if he chose, could make a motion to intervene on behalf of the corporation. Subsequently, the trial court granted Palmer's motion to intervene on behalf of Biggs Farm, Inc. But the granting of Palmer's motion to intervene did not make any ruling as far as the statute of limitations. Significantly, the statute of limitations for this action is one year. Kentucky Revised Statutes (KRS) 413.140.

Notwithstanding the expiration of the statute of limitations, Biggs and Palmer rely on the only possible procedural mechanism available to permit the filing of an amended complaint to relate back to the filing of the original complaint. They moved to file an amended complaint pursuant to CR 15.03 and its relation back provision. In essence, though, the statute of limitations argument proffered by Biggs and Palmer is a red herring. Since Biggs Farm, Inc. was never a party to the original complaint, Palmer's motion to file a complaint as an intervening plaintiff was not timely.

The Kentucky Rules of Civil Procedure provide that the ability to amend a complaint "shall be freely given when justice so requires." CR 15.01. But, Kentucky caselaw holds that whether to grant a motion to amend a complaint lies solely within the discretion of the trial court, "whose ruling will not be disturbed unless it is clearly an abuse." *Laneve v. Standard Oil Co*., 479 S.W.2d 6, 8 (Ky. 1972) (quoting *Graves v. Winer*, 351 S.W.2d 193 (Ky. 1961)). One fundamental problem with Biggs's and Palmer's motion to amend is the fact that their reliance on CR 15.03 is misplaced. Before considering whether a claim by a new or changed party can relate back, courts must first address the fundamental requirement of CR 15.03. The requirement is that the party seeking the change must originally have made a "mistake of identity" as to the proper party.

Before going further with our analysis, we point out that Kentucky courts have remarked that CR 15.03 is functionally identical in wording to Federal Rules of Civil Procedure (Fed. R. Civ. P.) 15(c), and that federal decisions interpreting the federal rule provide useful guidance in interpreting the state counterpart. *Cf. Waste Management of Kentucky, LLC v. Wilder*, 2008 WL 2955421 (Ky. App. 2008)(2006 CA-002438-MR); *Phelps v. Wehr Constructors, Inc.*, 168 S.W.3d 395, 398 n. 6 (Ky. App. 2004) ("Fed. R. Civ. P. 15(c) . . . is substantially the same as Kentucky's CR 15.03.").

Returning to the issue at hand, that is, the legal question of whether the mistake provision contained in CR 15.03(2)(b) saves Biggs Farm, Inc.'s claim, we review the pertinent language of CR 15.03:

> (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.

Therefore, under the rule, if certain conditions are met, Kentucky's relation back provision preserves an amended complaint from the statute of limitations defense by treating the amendment as if it had been filed at the time of the original pleading. One prerequisite is that a party, added after the statute of limitations has run, must have known or had reason to know that, but for a mistake concerning the identity of the proper parties, the action would have originally designated that party.

The rationale behind the rule, as explained in *Phelps* "reflects the tension between the plaintiff's interest in relation back to preserve the plaintiff's claim and the defendant's interest in a limitations defense-timely notice and repose." *Phelps*, 168 S.W.3d at 397. To balance these competing interests, if a trial court grants a motion to add a new party after the limitations period has run, it must strictly construe all three requirements of CR 15.03. *See Reese v. General American Door Co.*, 6 S.W.3d 380, 383 (Ky. App. 1998).

Interestingly, by its own literal terms, CR 15.03 does not apply to amendments that change a party plaintiff, but only those that change the party defendant. CR 15.03(2). Indeed, it is a rare case in which a plaintiff can claim a "mistake of identity" for the named plaintiffs. Generally, plaintiffs know who they are. Yet, CR 15.03 has been extended by analogy to changes in party plaintiffs but only in limited circumstances. This limitation has been explained in *Corpus Juris Secundum:*

> However, rules setting forth conditions under which an amendment changing a party against whom a claim is asserted relates back to the original complaint have been applied by analogy in the case of newly added plaintiffs, [footnote omitted] although relation back of a pleading is not available merely because a new plaintiff's claims arise from the same transaction or occurrence as the original plaintiff's claims. *Young v. Lepone*, 305 F.3d 1, 53 Fed. R. Serv. 3d 1164 (1st Cir. 2002). An amendment adding a party plaintiff relates back to the date of original pleading only when the original complaint gave the defendant adequate notice of the claims of the newly proposed plaintiff, relation back does not unfairly prejudice the defendant, and there is an identity of interests between the original and the newly proposed plaintiff. *Immigrant Assistance Project of Los Angeles County Federation of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 53 Fed. R. Serv. 3d 970 (9th Cir. 2002).

54 C.J.S. *Limitations of Actions* § 334 (2011). Hence, in order for relation back to occur when adding a party plaintiff, the defendant must have adequate notice of the newly proposed plaintiff, must not have been unduly prejudiced, and the newly proposed plaintiff must have an identity of interests with the original party plaintiff. In other words, Biggs and Biggs Farm, Inc. must have an identity of interests.

So, it is accurate that "[i]f a plaintiff satisfies certain conditions, [including identity of interests], Kentucky's relation back rule preserves an amended complaint from [the] statute of limitations defense by treating the amendment as if it had been filed at the time of the original pleading." *Phelps*, 168 S.W.3d at 396. But, to state the obvious, the relation back provision is limited. In particular, the failure to name a party at the time of the original filing must have resulted from a "mistake in identity," and not merely a "lack of knowledge" or "ignorance," as to whether a possible party might be liable or entitled to relief. *Id*. at 398.

Our next step is define, as related to the relation back provision, "mistake in identity" in CR 15.03 (2)(b). In *Schwindel v. Meade County*, 113 S.W.3d 159, 170 (Ky. 2003), the Kentucky Supreme Court held that dismissal of the amended complaint against the unknown defendants was proper:

> [T]he implied . . . "should have known" notice referred to in CR 15.03(2)(b), which gave rise to the "identity of interest" exception, applies only when the plaintiff has *mistakenly* sued the wrong party and the right party "knew or should have known" of that fact. . . . Absent mistake, the "identity of interest" exception to the requirement of actual notice does not apply.

(Internal citations omitted). In order to sue, the party must have mistakenly named the wrong party, the defendant must have known about it, and the identity of interest must be the same. In *Schwindel*, there was no "mistake" and, therefore, the amended complaint could not relate back. Since our case must have a "mistake in identity" related to a plaintiff, the mistake must be a

mistake as to the proper party to file the suit and the party's interests must be identical. *Phelps*, 168 S.W.3d at 398.

For Biggs (and Palmer) to have a "mistake in identity," Biggs must take the position, after years of arguing to the contrary, that she was attempting to sue for the corporation all along, including when she acted *pro se* in 2002. To date, Biggs has not done so. Her position does not allege a "mistake in identity" but rather that both she and the corporation should be allowed to sue. Biggs's argument is not a "mistake in identity" but merely the addition of another party.

A change to correct a mistake in identity is fundamentally different than a new claim by another party. With regard to the analogous federal rule, Fed. R. Civ. P. 15(c), the Sixth Circuit Court explained that, while the rule may permit the "changes the party or the naming of the party against whom a claim is asserted . . . but for a mistake concerning the identity of the proper party," the rule does not encompass the addition of a new plaintiff with new claims. *See Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996). Similarly, in *Phelps*, we held that CR 15.03 is like its federal counterpart and requires a "mistake in identity." *Phelps*, 168 S.W.3d at 397-398.

Additionally, another important factor to distinguish is that a tactical error is not the same as "mistake in identity." Plainly, CR 15.03 requires a "mistake in identity" rather than a tactical error. And a mistake under this rule is not a tactical error about who should sue or be sued. *King v. Nation*, 917 F.2d 1304 (Table), 1990 WL 170424 (6th Cir. 1990).

In addition to the fact that no "mistake in identity" was provided by Biggs and Biggs Farm, Inc., we also observe the foggy and discrepant nature of their arguments supporting the motion to amend. To illustrate some obvious differences between the individual, Biggs, and the corporation, Biggs Farm, Inc., Biggs filed the initial complaint *pro se*. In Kentucky, a corporation cannot litigate *pro se*. *See Kentucky State Bar Ass'n v. Tussey*, 476 S.W.2d 177 (Ky. 1972). Moreover, a corporation, even though employing one or more lawyers, may not itself engage in the practice of law. *Kendall v. Beiling*, 295 Ky. 782, 175 S.W.2d 489 (Ky. App. 1943). Indeed, pursuant to KRS 524.130, if Biggs had intended to bring a claim for Biggs Farm, Inc., it would have been considered the unauthorized practice of law and a violation of Kentucky law. Corporations are required to be represented in court by a duly licensed attorney. *See Hawkeye Bank and Trust, Nat. Ass'n v. Baugh*, 463 N.W.2d 22 (Iowa 1990). Given the legal requirements, Biggs filed this claim in 2002 as an individual and could not, contrary to her later assertions, legally have filed it on behalf of Biggs Farm, Inc.

Continuing on with this analysis, we observe that the Kentucky Supreme Court stated in *Miller* that a plaintiff as an individual cannot maintain an action when the injury was alleged to the corporation, and not the plaintiff in his individual capacity. *Miller*, 551 S.W.2d at 243-244. Thus, Biggs could only allege injury to herself in filing suit. Any injuries to the corporation could only be filed by the corporation. Accordingly, Biggs cannot sue on behalf of the corporation.

Biggs Farm, Inc. is the only party in 2002 that could sue for injuries to the corporation.

In point of fact, a shareholder cannot sue for injuries to a corporation. It is a fundamental aspect of corporate law that a shareholder cannot pursue an individual cause of action against third parties for wrongs or injuries done to the corporation or to corporate property. As stated in *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510, 513 (Ky. App. 1943):

> It is elementary that title to the property of a corporation is in the corporation itself, not in its employees or stockholders, and hence [the corporation] only could sue for any wrong committed against its property or for damages resulting to its business. The law affords no such right of action to a stockholder or employee of a corporation. It follows, therefore, that plaintiff has no right of action against appellants for any wrong committed against the property or business of the corporation. This rule of law is too well known to the legal profession to require citation of authority.

See also NBD Bank, N.A. v. Fulner, 109 F.3d 299 (6th Cir. 1997)(a case from a federal court in Kentucky).

To summarize, there is no identity of interest between an individual and a corporation. The original complaint referred only to Biggs and not to Biggs Farm, Inc. Biggs's and Palmer's contention that the motion to amend must be granted because of the differences between Biggs's and Biggs Farm, Inc.'s interests, in itself, defeats the motions to amend the complaint. Moreover, a pleading cannot be amended that never existed. Here, Biggs Farm, Inc. never filed

a complaint and, thus, it has no complaint or pleading to amend. The trial court did not abuse its discretion in denying the motions to amend the complaint.

2. Motion for summary judgment

We first address the summary judgment motion of Biggs. Biggs was the sole shareholder in the entity named Biggs Farm, Inc. Biggs Farm, Inc. is a corporation that owned, with other partners, a partial interest in some horses, which are involved in this case. Biggs Farm, Inc. and its partners entered into a contract with Eaton to act as consignor and to have certain horses sold at public auction. At some point, which is disputed, two horses became ill and were diagnosed with strangles.

Nonetheless, while the partnerships did not sue Eaton, Biggs did. Biggs framed the complaint as one in common-law tort of negligence rather than breach of contract. Since Biggs framed her complaint in this manner, she is, in essence, distinguishing between the duty owed to her, which arises in common-law tort, and the duty owed to Biggs Farm, Inc., which arises from a contractual relationship between it and Eaton.

In Biggs's first complaint, she alleged that she owned the horses and that Eaton caused injury to them. Next, she modified the claim to state that she did not personally own the horses but maintained that she personally had damages flowing through the corporation, Biggs Farm, Inc., for the horses' injuries.

When summary judgment is requested on a claim of negligence, the Kentucky Supreme Court has elucidated the necessary elements for a defendant to

be entitled to judgment as a matter of law. Eaton must show that (1) it was impossible for Biggs to produce any evidence in her favor on one or more of the issues of fact; (2) under the undisputed facts of the case, Eaton owed no duty to Biggs; or (3) as a matter of law, any breach of a duty it owed to Biggs was not a legal cause of her injuries. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). Thus, in order to establish negligence, Biggs must establish that Eaton owed her a duty of care, that it breached this duty, that the breach caused the injury to her, and that an actual injury occurred to her. *Id*. at 88-89.

Here, the parties spent much time discussing foreseeability and its relationship to duty; however, we agree with the trial court's opinion when it says that this discussion is superfluous. The primary issue is whether Eaton owed a duty to Biggs. As our court has noted, "[i]f no duty is owed by the defendant to the plaintiff, there can be no breach thereof, and therefore no actionable negligence." *Ashcraft v. Peoples Liberty Bank & Trust Co., Inc.*, 724 S.W.2d 228, 229 (Ky. App. 1986).

A review of the concept of duty shows that Kentucky courts recognize a "universal duty" of care under which "every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328, 332 (Ky. 1987). But the universal duty posited in *Grayson* does not obviate the fact that in order to establish duty between parties, a relationship must exist. This principle is articulated in *Jenkins v. Best*, 250 S.W.3d 680, 691 (Ky. App.

2007): "But no matter how it has been labeled, our courts have never found liability in tort unless we have first found circumstances giving rise to a relationship of some kind in which one particular party owed a duty to another particular party." Therefore, a discussion of foreseeability is immaterial until Biggs demonstrates that Eaton had a duty toward her.

In reviewing whether Eaton had a duty to Biggs, it cannot be ignored that Eaton's involvement in the case resulted from an agreement it had with the partnerships that owned the subject horses and consigned them to the Keeneland Sales. Because Eaton had no relationship with Biggs individually, her claims of negligence are not viable. It never had any duty to Biggs.

"Privity of contract" is "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." *Black's Law Dictionary*, 1237 (8th ed. 2004). Consequently, "[g]enerally, whenever a wrong is founded upon a breach of contract, the plaintiff suing in respect thereof must be a party or privy to the contract, and none but a party to a contract has the right to recover damages for its breach against any of the parties thereto." (Internal citations omitted). 17A Am. Jur. 2d *Contracts* § 416 (2010). Undoubtedly, Biggs had no contractual relationship with Eaton. The partnership chose not to file suit.

Since no evidence has been provided that Biggs and Eaton had any type of relationship, neither party has a duty of care toward the other. Biggs did not own the horses, and hence, there are no genuine issues of material fact. We

agree with the trial court's summary judgment as related to Biggs. In turn, the trial court's grant of summary judgment to Eaton against Palmer, as trustee in bankruptcy for Biggs Farm, Inc., was not erroneous not only because Biggs Farm, Inc. was never a party to the action, but also because Palmer filed the intervening complaint after the statute of limitations had run.

CONCLUSION

We believe that the failure to name Biggs Farm, Inc. as a party plaintiff within the statute of limitations period did not result from a "mistake in identity" of the real party in interest and, therefore, a strict interpretation of CR 15.03, which is mandated, does not allow for Biggs and Palmer to amend the original complaint. Second, the grant of summary judgment against Biggs and Palmer was appropriate because there are no genuine issues of material fact.

We affirm the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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