

RENDERED: AUGUST 10, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001324-MR

TEREMUS GRANT

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 11-CI-00921

WARREN COUNTY AND
CITY OF BOWLING GREEN

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Teremus Grant, appeals *pro se* from orders of the Warren Circuit Court dismissing his personal injury action against the City of Bowling Green and Warren County. For the reasons set forth herein, we affirm in part, reverse in part and remand.

On May 28, 2009, Appellant, a St. Louis, Missouri, resident, was an inmate at the Warren County Regional Jail participating in a work release program through the City of Bowling Green. Appellant was working with other inmates at a local cemetery under the supervision of city employees. Apparently, Appellant was sitting in the backseat of a truck untangling weed-eater string and, as the vehicle began to move, the end of the string that was out the window became entangled in the truck's rear tire. As a result, the remainder of the string tightened around Appellant's fingers, severing one and severely injuring another.

Approximately two years later, on May 28, 2011, Appellant filed a *pro se* action in the Warren Circuit Court against the City of Bowling Green and Warren County asserting claims of negligence, extreme and outrageous conduct, and res ipsa loquitur, arising out the May 28, 2009 incident. On June 20, 2011, the Warren County Attorney filed a motion to dismiss the action on the basis that Appellant's complaint was filed outside the one-year statute of limitations period contained in Kentucky Revised Statutes (KRS) 413.140.¹ Without a hearing, the motion was granted on June 22, 2011, and Appellant's action against the County was dismissed.

Meanwhile, on June 21, 2011, the City filed a motion to dismiss on the basis that Appellant signed a waiver prior to his participation in the work-release program. A hearing was subsequently held on July 11, 2011, during which

¹ KRS 413.140(1) provides: "The following actions shall be commenced within one (1) year after the cause of action accrued: (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant[.]"

Appellant did not appear or otherwise participate. The trial court treated the motion as a motion for summary judgment and, having no objection or response from Appellant, granted the City's motion to dismiss. Appellant thereafter appealed *pro se* to this Court.

Appellant argues herein that the trial court erred in dismissing his cause of action because such should have been governed by the two-year statute of limitations contained in KRS 304.39-230(6) for accidents occurring in a motor vehicle. Appellant claims that because the driver of the truck was an employee of the city and county, both are vicariously liable under the doctrine of respondeat superior. Interestingly, Appellant does not distinguish between his cause of action against the City versus that against the County, nor does he address the fact that he did not respond to the City's motion to dismiss based upon the waiver of liability.

With respect to Appellant's cause of action against the County, we find it necessary to clarify the unusual procedural manner in which the appeal arrived in this Court. On January 19, 2012, Warren Circuit Court Judge John Grise, who presided over the matter in the lower court, sent a letter to this Court explaining that the County's motion to dismiss had been erroneously granted. Specifically, Judge Grise stated that the County's motion had not been noticed for a hearing and had inadvertently ended up in a stack of miscellaneous items awaiting his signature. As a result, he signed the order thinking it was a "noncontroversial request by the County to forego its interest in a foreclosure case." Judge Grise noted that the error did not come to his attention until after he received copies of

the appellate briefs, at which time he no longer had jurisdiction over the matter.

Judge Grise further stated that based upon his usual practice for a motion to dismiss based on the statute of limitations, he would have set the matter for a hearing or, in this case, denied it for failing to notice the motion for a hearing.

From a reading of Appellant's brief it does not appear that he received a copy of Judge Grise's letter, although such does reflect that Appellant was on the distribution list.

Notwithstanding the unusual procedural circumstances, the County argues herein that the dismissal order should be upheld in the interest of judicial economy since it would be entitled to the protection of sovereign immunity. Curiously, the County apparently has abandoned its statute of limitations claim upon which its motion to dismiss was originally based.

As a general rule, a party is not permitted to raise an issue for the first time on appeal. "The Court of Appeals is one of review and is not to be approached as a second opportunity to be heard as a trial court. An issue not timely raised before the circuit court cannot be considered as a new argument before this Court." *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980). However, there are circumstances where unpreserved issues may be raised, such as in situations addressing subject-matter jurisdiction. *See Hisle v. Lexington–Fayette Urban County Gov't*, 258 S.W.3d 422, 430–31 (Ky. App. 2008) (because subject-matter jurisdiction concerns the nature and origin of a court's power to act, it may not be waived and may be raised at any time in the proceeding). While

Kentucky has not directly addressed this point, it has been stated in the federal context that sovereign immunity is a type of subject-matter jurisdiction. *F.D.I.C. v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994).

Nevertheless, because of the circumstances by which Appellant's claim against the County was dismissed, we decline to review the matter herein and believe it is best remanded to the lower court for proper consideration of the merits of the County's motion to dismiss.

Unlike the County's motion, however, the City's motion to dismiss was properly noticed for a hearing. The motion was based upon a release that Appellant signed prior to engaging in the work release program. The release provided, in pertinent part:

I desire to engage voluntarily in the description of services identified above, under the direction of staff employed by the City of Bowling Green. I understand and acknowledge the risks in conducting this activity and I assume all responsibility for this activity. In addition, I agree to indemnify and hold the City of Bowling Green and its officers, officials, employees and agents harmless from and against all losses, damages, claim, demand, liability or expense by reason of any damage or injury to my property or my person which may be claimed to have arisen as a result of or in connection with the voluntary work described herein.

A hearing was held on the motion on July 11, 2011. However, because Appellant did not respond or participate in the hearing, the trial court granted the motion to dismiss. Appellant did not seek any post-judgment relief from the dismissal.

We must agree with the City that Appellant has failed to preserve any challenge to the dismissal of his case against the City. “It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court.” *See Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citing *Combs v. Knott Fiscal Court*, 141 S.W.2d 859 (Ky. 1940)). Appellant’s sole allegation of error pertains to the statute of limitations. However, such was neither the basis for the City’s motion nor the grounds for the trial court’s dismissal. As Appellant has failed to challenge the validity of the waiver, he has not raised any issue on appeal that can properly be reviewed. Accordingly, the dismissal against the City must be affirmed.

For the reasons set forth herein, the order of the Warren Circuit Court dismissing Appellant’s claim against Warren County is reversed and the matter is remanded for further proceedings. The order of the Warren Circuit Court dismissing Appellant’s claim against the City of Bowling Green is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Teremus Grant, *Pro Se*
St. Louis, Missouri

BRIEF FOR APPELLEE,
WARREN COUNTY,
KENTUCKY:

Aaron D. Smith
Bowling Green, Kentucky

BRIEF FOR APPELLEE,
CITY OF BOWLING GREEN,
KENTUCKY:

Greg N. Stivers
Andrea P. Anderson
Bowling Green, Kentucky