

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-000911-MR

AMY HARMON

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE CHARLES C. SIMMS III, JUDGE  
ACTION NO. 12-CI-00543

HIGDON'S APPLIANCE CENTER;  
GENERAL ELECTRIC COMPANY;  
AND UNKNOWN DEFENDANTS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: Amy Harmon has appealed from the Nelson Circuit Court's April 18, 2013, order denying her motion to alter, amend, or vacate its order entered March 14, 2013. In the earlier order, the circuit court granted Hidgon's Appliance Center's motion to dismiss the complaint and General Electric

Company's motion for summary judgment, and dismissed Harmon's complaint with prejudice. The question before this Court is the effect of the misidentification of the plaintiff in the underlying action. Finding no error or abuse of discretion, we affirm the circuit court's orders.

Amy's mother, Paula Kay Harmon, purchased a washing machine manufactured by General Electric (GE) from Higdon's Appliance Center (HAC) in 2010. The washing machine malfunctioned on August 1, 2011, and Paula had an employee from HAC repair it. However, the washing machine had apparently not been repaired; it overflowed after the employee left, and Paula slipped and fell on the water that had come out of the washer. Paula incurred injuries for which she sought treatment.

On July 31, 2012, the day before the one-year statute of limitations expired, Amy – not Paula – filed a complaint in Nelson Circuit Court against HAC, GE, and an unknown defendant who had worked on the washing machine. Amy sought damages for personal injuries she had sustained from the slip and fall incident that she claimed was due to the defective washing machine. Both of the named defendants answered Amy's complaint and filed motions to dismiss on grounds unrelated to the issue raised in this appeal. The circuit court denied both of these motions, and pre-trial discovery continued.

In December 2012, HAC filed a second motion to dismiss Amy's complaint. The motion arose from answers to the Interrogatories and Requests for Production of Document HAC had propounded to Amy. In these responses,

Amy's attorney identified Paula as the person responding to the discovery requests. Medical records were also provided, related to chiropractic treatment Paula received at Back-In-Shape Chiropractic beginning in August 2011 for injuries she had sustained when she slipped and fell. On the patient information page, Paula was listed as the patient, and Amy was listed as the person who referred her as well as Paula's emergency contact. As the reason for her visit, Paula stated: "When I fell in utility room of [sic] overflowed water from washer, I felt my head hit floor & upper back hit floor; felt cold water around me; head hurt; neck, back, shoulders, leg on right, foot on right – intense pain; aching; instant nausea." The note, dated August 3, 2011, listed a history of a slip and fall in water on August 1, 2011, after the washing machine had overflowed.

Despite the medical records establishing that Paula had been allegedly injured because of the overflowing washer, Paula had not filed a complaint against HAC. Therefore, HAC argued that Amy's complaint should be dismissed as a matter of law because the lawsuit had been brought on behalf of the wrong party and Amy lacked standing to maintain the cause of action. Furthermore, the statute of limitations for Paula to bring her own claim had expired on August 1, 2012, one year after her alleged injury, pursuant to Kentucky Revised Statutes (KRS) 413.140. On January 2, 2013, GE filed a motion for summary judgment on the same ground, arguing that there were no disputed issues of material fact and that it was entitled to judgment as a matter of law.

On January 15, 2013, a motion to file a first amended complaint was filed by Amy's attorney "to correct the spelling of Plaintiff's first name." In the caption of the motion and in the amended complaint tendered later, Paula was listed as the plaintiff rather than Amy. The motion also recited that "[t]his First Amended Complaint will in no way alter the Plaintiff's causes of action against the Defendants." In response to GE's motion, Amy stated that it was clear that Paula had been injured in the incident as described in the complaint and that the complaint had been filed on Paula's behalf: "The original complaint listing Amy Harmon was simply a misspelling of the Plaintiff's first name." Both HAC and GE objected to amending the complaint and disputed that this was simply a misspelling of the plaintiff's first name. Rather, the complaint had been filed on behalf of the wrong plaintiff.

The motions were discussed during a court hearing on January 31, 2013,<sup>1</sup> after which the plaintiff – this time identified as Pamela Kay Harmon – filed a reply. She argued that material issues of fact remained to be decided, including whether Paula was the true plaintiff in the case. She also argued that she had not had the opportunity to complete discovery. In support of the reply, she included an affidavit from her attorney, stating that the true plaintiff was Paula and that Amy had never retained his services. The attorney explained that the wrong name was used because of confusion arising from a series of telephone messages from Amy on behalf of Paula about the case. An affidavit from Paula was filed later,

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<sup>1</sup> The recording of the hearing has not been included in the certified record.

confirming that she had been injured in the slip and fall on August 1, 2011, and had retained the attorney to represent her, not Amy.

On March 14, 2013, the circuit court entered an order granting HAC's and GE's respective motions, denying the motion to file a first amended complaint, and dismissing Amy's complaint with prejudice. In granting the defendants' motions, the court stated:

Although Amy's motion to amend states that it is "to correct the spelling of plaintiff's first name", the plaintiff's counsel reluctantly admitted that Amy and Paula are two different people. In addition, there is absolutely no evidence to suggest that Amy fell from an overflowing washing machine. Instead, Amy's mother, Paula, is the one who slipped and fell. With Amy having failed to produce any evidence whatsoever to suggest that she fell and/or sustained damages, it is obvious that Amy's complaint should be dismissed.

The circuit court then addressed Amy's motion to amend her complaint. The court considered Kentucky Rules of Civil Procedure (CR) 15.03(2) in light of the defendants' arguments that Paula's claims were barred by the one-year statute of limitations. The court concluded that CR 15.03(2)'s relation back provision only applied to defendants, not plaintiffs. And Amy's citations to cases upholding changing plaintiffs were distinguishable from the facts of this case. The court ultimately found it inappropriate to permit Amy to amend the complaint:

As grounds, the amendment would be futile because Paula's claim is barred by the statute of limitations. In reaching this determination, this Court has considered the following: (1) that Amy and Paula are two different people, (2) that unlike the complaints filed in *Fuson* and *Hazelip*, the original complaint filed herein failed to

advise the defendants of the identity of the injured person, (3) that unlike *Fuson* and *Hazelip*, an amendment herein would clearly change the cause of action from one person to another, and (4) that Paula should have filed this action prior to August 1, 2012.

Amy moved the court to alter, amend, or vacate its order pursuant to CR 59.05, continuing to argue that Paula was the true plaintiff. The court denied Amy's CR 59.05 motion on April 18, 2013, and this appeal now follows.

On appeal, Amy continues to argue that the circuit court erred in granting summary judgment and dismissing her complaint based upon the affidavits establishing that Paula was the true plaintiff in the case. She also argued that her motion to file a first amended complaint did not constitute a new cause of action and that she did not have the opportunity to complete discovery prior to the grant of summary judgment. Both HAC and GE dispute Amy's arguments and contend that the circuit court properly dismissed the complaint.

Regarding our standard of review, we agree with Amy that we must review the circuit court's ruling on HAC's motion to dismiss under the summary judgment standard because the court considered matters outside of the pleadings in making its ruling. *See* CR 12.02; *Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994) ("CR 12.02 and CR 12.03 require that a motion in which matters outside the pleadings are considered is to be treated as a motion for summary judgment. *Craft v. Simmons*, Ky.App., 777 S.W.2d 618 (1989).").

An appellate court's standard of review from an order granting a motion for summary judgment is well-settled in the Commonwealth. "The standard of review on appeal when a trial court grants a motion for summary judgment is '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.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); *Palmer v. Int'l Ass'n of Machinists & Aerospace Workers*, 882 S.W.2d 117, 120 (Ky. 1994); CR 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis*, 56 S.W.3d at 436, citing *Scifres*, 916 S.W.2d at 781; *Estate of Wheeler v. Veal Realtors & Auctioneers, Inc.*, 997 S.W.2d 497, 498 (Ky. App. 1999); *Morton v. Bank of the Bluegrass & Trust Co.*, 18 S.W.3d 353, 358 (Ky. App. 1999).

Amy contends that a disputed issue of material fact remains as to the identity of the proper plaintiff. We disagree that this is an issue of fact that would preclude the entry of summary judgment. There is no question that Paula should have been named as the plaintiff in the complaint; however, Amy was listed as the plaintiff.

Accordingly, Amy is the plaintiff below and the appellant in this appeal.<sup>2</sup> Because

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<sup>2</sup> Both HAC and GE mention in their respective briefs that Paula has filed a separate non-personal injury lawsuit in Nelson Circuit Court seeking damages for the injuries she sustained in the August 1, 2011, incident. She alleged claims for violation of the Consumer Protection Act, breach of contract, intentional infliction of emotional distress, breach of fiduciary duty, and fraud. GE stated that in arguing that the doctrines of *res judicata*, estoppel, and law of the case do not apply to defeat her new case because the parties were not the same, Amy's counsel takes a

Amy could never produce any evidence that she fell or sustained an injury, the circuit court properly granted summary judgment and dismissed her complaint as a matter of law. Amy's tangential argument that she did not have the opportunity to complete discovery is similarly without merit.

While not specifically argued, we also hold that the circuit court did not abuse its discretion in denying Amy's motion for leave to file an amended complaint. CR 15.01 provides that, with exceptions not applicable here, "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 so requires." This Court addressed the application of this rule in *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869-70 (Ky. App. 2007), explaining:

In determining whether to grant a motion to amend a party's complaint, a circuit court "may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself." *First National Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988). Other factors include whether amendment would prejudice the opposing party or would work an injustice. *See Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 493 (Ky. 1983). Ultimately, whether a party may amend his complaint is discretionary with the circuit court, and we will not disturb its ruling unless it has abused its discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky. App. 2000).

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contradictory position from the position in the present case. In her reply brief in the present appeal, Amy makes a similar argument that both GE and HAC were arguing contradictory positions in the new suit regarding the true plaintiff in the personal injury action. We note that a three-judge motion panel of this Court denied HAC's petition for writ of prohibition (No. 2014-CA-001066-OA) on October 16, 2014, in which HAC sought a ruling that the circuit court in the subsequent action lacked jurisdiction to proceed. We decline to hold that the arguments made in relation to the later-filed case have any bearing on the present matter.



The circuit court agreed with HAC and GE that the amendment would be futile because adding Paula as a plaintiff would constitute a new cause of action, which would not relate back to the filing of the original complaint. Therefore, Paula could not bring her claim within the applicable one-year limitations period.

Amy contends that because Paula was the injured person and because it was always Paula's cause of action, the amended complaint did not constitute a new cause of action and there would be no harm to HAC or GE. However, Amy's citations to *Dr. Pepper Bottling Co. of Kentucky v. Hazelip*, 144 S.W.2d 798 (Ky. 1940), *Fuson v. VanBebber*, 454 S.W.2d 111 (Ky. 1970) *overruled on other grounds by Barrett v. Stephany*, 510 S.W.2d 524 (Ky. 1974), *Skaggs v. Vaughn*, 550 S.W.2d 574 (Ky. App. 1977), and *Massengale v. Lester*, 403 S.W.2d 697 (Ky. 1966), do not support her position that she should be permitted to amend the complaint to add a new plaintiff.

Rather, we agree with the circuit court's, as well as HAC's and GE's, reliance upon *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313 (6<sup>th</sup> Cir. 2010), in which the Sixth Circuit Court of Appeals addressed "whether Rule 15(c) permits relation back of an amendment adding otherwise untimely plaintiffs and their claims to a timely-filed complaint[.]" *Id.* at 317. The Court did not find tenable the appellants' argument that the application of the rule should be changed, holding:

"[T]he precedent of this circuit clearly holds that 'an amendment which adds a new party creates a new cause

of action and there is no relation back to the original filing for purposes of limitations.’ ” *In re Kent Holland Die Casting & Plating, Inc.*, 928 F.2d 1448, 1449 (6th Cir. 1991) (quoting *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064 (6th Cir. 1973)); *see also United States ex rel. Statham Instruments, Inc. v. Western Cas. & Surety Co.*, 359 F.2d 521, 523 (6th Cir. 1966) (stating that, when “[t]he effect of Plaintiff’s amendment is to add another party[,]” it “establishes a new and independent cause of action which cannot be maintained when the statute has run, for the amendment is one of substance rather than one of form and brings into being one not presently in court.”); *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215, 218 (6th Cir. 1978).

*Id.* at 318. The Court went on to explain:

Rule 15(c)(1)(B) allows relation back of an amendment asserting a “claim or defense,” but it does not authorize the relation back of an amendment adding a new party. Similarly, Rule 15(c)(1)(C) permitting relation back of an amendment changing a party or its name applies, by its plain language, to changes to defendants.

*Id.* The *Asher* Court concluded:

If the drafters of Rule 15(c) had intended to permit relation back on these facts, the rule would have so stated. Similarly, had the Kentucky legislature wanted the claims of untimely plaintiffs to escape the time bar in Kentucky Revised Statutes Annotated § 413.140(1)(a), it would have spoken. *See* Fed.R.Civ.P. 15(c)(1)(A) (permitting relation back of an amendment when “the law that provides the applicable statute of limitations allows relation back.”). The new plaintiffs cite no authority permitting relation back under these circumstances. We decline to legislatively craft a new rule of civil procedure.

*Asher*, 596 F.3d 313 at 320. Likewise, Kentucky’s counterpart to Rule 15(3), CR

15.03, does not support relation back when a new plaintiff is added.

Accordingly, we hold that the circuit court did not abuse its discretion in denying Amy's motion to file an amended complaint to add Paula as a plaintiff because to do so would have been futile. The amendment would not relate back to the filing of the original complaint the day before the statute of limitations expired, and therefore Paula's claim would not have been timely.

Finally, we hold that the circuit court did not abuse its discretion in denying Amy's CR 59.05 motion to alter, amend, or vacate.

[T]he federal courts, in construing CR 59.05's federal counterpart, Federal Rule of Civil Procedure 59(e), have limited the grounds:

There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

*Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005) (footnotes omitted). Amy has not demonstrated that any of these grounds exist to support her CR 59.05 motion.

For the foregoing reasons, the order of the Nelson Circuit Court is affirmed.

ALL CONCUR.

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