Cite as 2018 Ark. App. 237

ARKANSAS COURT OF APPEALS

DIVISIONS I & II
No. CV-17-738

ELVIS MIDDLETON AND BRITTNEY MIDDLETON APPELLANTS V. JENNIFER MIDDLETON, ADMINISTRATRIX OF THE ESTATE OF JOSHUA MIDDLETON, DECEASED APPELLEE	**Opinion Delivered:** April 4, 2018 APPEAL FROM THE NEWTON COUNTY CIRCUIT COURT [NO. 51CV-15-17] HONORABLE JOHN R. PUTMAN, JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

This is a one-brief appeal from the circuit court's order denying the appellants' motion to amend the pleadings and dismiss the case. On appeal, the appellants argue that the circuit court erred as a matter of law in (1) refusing to amend the pleadings to conform to the evidence, which was received without objection; and (2) permitting the estate of Joshua Middleton, deceased, to pursue a claim that belonged to the estate of his father, Leon Middleton. We affirm.

On December 6, 2002, Robert and Wilma Middleton, husband and wife, deeded certain property containing sixty acres of land to Joshua Leon Middleton and Leon

Middleton, son and father, respectively, as joint tenants with right of survivorship.[1] The deed was filed on February 12, 2003. Joshua went missing on January 21, 2005.

On July 19, 2006, Leon and Gladys Middleton, husband and wife, sold their "UNDIVIDED ONE-HALF INTEREST" in the same property to appellants. At the time of purchase, there were several old vehicle bodies and other pieces of scrap metal on the property, which Elvis asked Leon to move; none of it was ever moved. According to Elvis, Leon told him the scraps would go with the property if something happened to Leon; Elvis took no further action with regard to the scrap metal. Leon died on April 6, 2008.

On October 27 and November 5, 2010, Elvis sold the scrap cars and metal still remaining on the land he purchased from Leon as well as scrap cars and metal from adjacent property owned by Leon's brother for $44,682.75.[2] Joshua was declared dead by order entered on August 25, 2014. The order stated that Joshua's date of death on his death certificate was to be the same as the date of the order declaring his death.

Jennifer Middleton filed a complaint on April 6, 2015, as the personal representative of the estate of Joshua Middleton, asserting that Leon had predeceased Joshua because Leon's death occurred prior to the legal declaration of Joshua's death. Accordingly, she argued that Leon's interest in the land, which had previously been sold to appellants, passed to Joshua

[1]The land was described as "THE SE ¼ OF THE SW ¼ AND THE EAST ½ OF THE NE ¼ OF THE SW ¼ OF SECTION 29, TOWNSHIP 15 NORTH, RANGE 20 WEST, CONTAINING 60 ACRES, MORE OR LESS."

[2]The brother would later testify that the scrap cars and metal belonged to Leon.

by joint tenancy with right of survivorship; and so, the argument went, Joshua became the owner in fee simple to the entire sixty acres.

Appellants answered on April 25, 2015, denying all material allegations and pleading affirmatively that Joshua had been dead since January 21, 2005, and that Leon was the owner of the subject property in fee simple on July 19, 2006.[3] They sought to have the complaint dismissed. Additionally, appellants counterclaimed to have the deed reformed. Jennifer and appellants each made alternative arguments regarding ownership of the real estate property.

Jennifer answered appellants' counterclaim denying all claims and affirmatively pled defenses of statute of frauds, statute of limitations, laches, and estoppel on May 11, 2015. Appellants filed an amended answer on November 30, 2015, in which they additionally pled affirmatively that "to the extent that [Jennifer] claims that the junk vehicles which were previously the personal property of Leon Middleton became the personal property of the Estate of Joshua Middleton, deceased, [appellants] state that said junk vehicles were abandoned by Leon Middleton prior to his death, and became the personal property of the Defendants."

A trial on the matter was held on December 2, 2015. After the parties rested, appellants orally moved to amend the pleadings to conform to the evidence pursuant to

[3]Specifically, with regard to the ejectment count, appellants acknowledged in their answer that Joshua would not have been presumed dead until after an absence of five years according to Arkansas Code Annotated section 16-40-105 (Repl. 1999). Despite this admission, they go on to state that they "believe and therefore allege that Joshua Leon Middleton died on January 21, 2005." It is clear from the statute that Joshua could not be declared dead before January 21, 2010, a date which was after the sale from Leon to appellants. Therefore, Joshua would still have had an interest at the time of the sale.

Arkansas Rule of Civil Procedure 15 and asked the circuit court to take judicial notice of the pleadings.[4] Jennifer argued that appellants could not amend their pleadings to raise an affirmative defense as they are required to be pled by the Arkansas Rules of Civil Procedure. The parties agreed to submit briefs; only appellants filed a brief.

The circuit court filed a letter on March 30, 2016. The letter stated that the parties settled the issues regarding the real property prior to trial, leaving only the issues surrounding the personal property, i.e., the scrap metal. It made findings of fact, which noted that while appellants received $44,682.75 for the old vehicles and scrap metal Elvis sold, only 50 percent of the scrap sold had been located on the sixty acres.

The circuit court went on to state that appellants had moved to have the pleadings conform to the proof so that they could allege a statute-of-limitations defense and that Jennifer objected. It then found the following:

> Pleadings are required so that each party will know the issues to be tried and be prepared to offer his proof. *Coran Auto Sales v. Harris*, 74 Ark. App. 145, 45 S.W.3d 856 (2001). However, Rule 15(b) of the Arkansas Rules of Civil Procedure provides that issues not raised in the pleadings but tried by express of implied consent of the parties shall be treated in all respects as if they had been pled. [Jennifer] never expressly consented to the trial of the statute of limitations defense. Thus, the issue for the court is whether [Jennifer] impliedly consented to the litigation of such defense.
>
> Evidence was presented by both parties, without objection, from which a statute of limitations defense could be argued.[5] The evidence was relevant to claims which had been pled. Consent to conforming the pleadings to the proof will not be implied merely because evidence relevant to a properly pled issue incidentally tends to

[4]Appellants failed to refer the circuit court to a particular issue for which they wanted it to take judicial notice.

[5]The parties stipulated as to the truth of the factual statements in both parties' post-trial pleadings. This was stated in the abstract as the reason for failing to abstract testimony. The same is sufficient to permit our review.

> establish an unpled one. *Heartland Community Bank v. Holt*, 68 Ark. App. 30, 3 S.W.3d 694 (1999). In this case, [Jennifer] was not put on notice of the unpled defense sufficient to establish implied consent. Amending the pleadings following the trial would result in unfair prejudice. Thus, the court must, and hereby does, deny [appellants'] motion to amend the pleadings to conform to the proof at trial.

Then, after finding that Elvis detrimentally relied on Leon's promise that the scrap would go with the land if something happened—a statement that it noted was within the hearsay exceptions as it was a statement against his own pecuniary interest—the circuit court found Joshua's estate was entitled to half of the sum of the sale of the scrap that was on the sixty acres. The estate was awarded $11,170.68 plus $165 for court costs, in addition to 6 percent interest per annum from November 5, 2010, to the date of final judgement; and 10 percent interest per annum, until the same is paid. Appellants were ordered to prepare an accounting and file it with the court within forty-five days after entry of the final judgment.

The circuit court's order granting judgment, entered on July 5, 2016, was the same as its letter in pertinent part, with the addition that the case was "not subject to the determination of heirs property" pursuant to Arkansas Code Annotated section 18-60-401 and that, by agreement and stipulation of the parties, "the land was not subject to partition in kind by commissioners as provided by Arkansas Code Annotated sections 18-60-414 through 417"; therefore, the clerk of the court was appointed to sell the sixty acres. The circuit court retained jurisdiction for any required additional orders.

Appellants moved to deposit $11,170.68 into the registry of the court on July 8, 2016; the motion was granted in an order signed August 29, 2016, and entered on September 6, 2016. Jennifer filed a motion to modify the July 5, 2016 judgment and a separate brief in support on July 6, 2016. Therein, she argued that a mistake had been made

and that the circuit court should give the $22,341.39 value of the scrap Elvis sold from surrounding property to Joshua's estate as appellants' detrimental-reliance argument regarding the scrap metal sold from the sixty acres does not apply to the scrap metal sold on the land surrounding the sixty acres; that land belonged to Leon's brother, who testified that the scrap belonged to Leon and was on his property with permission. On the same date, appellants responded to the motion to modify, agreeing that a mistake had been made, but asserting that the mistake was due to the circuit court's error in granting judgment on a claim that was barred by the applicable statute of limitations.

At an August 24, 2016 hearing, appellants argued that the personal property and money debt in question belonged to Leon; therefore, Leon's heirs did not have standing to pursue his money debts, which could only be pursued by his administrator. Jennifer objected to "another defense being alleged three months after a judgment has been entered."

On October 24, 2016, appellants filed a motion to amend the pleadings and dismiss the claim for money damages and a separate brief in support. Therein, they asserted that the July 5, 2016 order was not final and appealable; they did not expressly state why they believed the order was not final. They asserted that evidence was received at trial without objection that proved that Jennifer's claim for money damages was barred by the applicable statute of limitations and that she lacked standing to pursue a debt, which if money were owed, would be owed to Leon's estate and not Joshua's estate. Accordingly, they sought to amend the pleadings to assert the affirmative defenses of statute of limitations and lack of standing because the order was not final and did not have a Rule 54(b) certificate. Jennifer answered denying all allegations in the appellants' motion. On November 17, 2016,

appellants filed a notice of a deposit of $15,964.36—representing the award with costs, plus interest from November 5, 2010, to November 18, 2016, at 6 percent per annum—into the registry of the court.

On May 10, 2017, the circuit court entered an order stating that the sixty acres had been sold on January 20, 2017, for $73,500 to appellants, who had the highest and best bid. Appellants deposited half that price into the registry of the court. The circuit court approved and affirmed the sale. It then noted that appellants' motion to amend was filed "almost 4 months after the Court entered judgment in this case." Finding that allowing the amendment would unfairly prejudice Jennifer, it denied the motion. It also denied Jennifer's motion to reconsider the division of the personal property.[6] It ordered that all funds being held by the clerk of the court—$52,714.36—be released to Jennifer's attorney and denied all pending motions.

This timely appeal followed.[7]

I. *Amendment*

Appellants' first argument on appeal is that the circuit court erred as a matter of law in refusing to amend the pleadings to conform to the evidence, evidence which was received without objection. We affirm.

[6]The circuit court appears to be referring to Jennifer's July 5, 2016 motion to modify.

[7]Jennifer filed a notice of cross-appeal but did not file a brief; therefore, she has abandoned any potential argument she may have had before this court.

We will not reverse a circuit court's decision regarding the amendment of pleadings to conform to the evidence in the absence of a manifest abuse of discretion.[8] A manifest abuse of discretion means a discretion improvidently exercised, i.e., exercised thoughtlessly and without due consideration.[9] Arkansas Rule of Civil Procedure 15(b) governs the amendment of pleadings to conform to the evidence:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

Thus, absent express or implied consent, the question of whether pleadings may be amended to conform to the evidence is within the sound discretion of the circuit court.[10] This rule is liberal in its allowance of amendments to conform pleadings to proof and even contemplates an amendment after judgment.[11]

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[8] *Cross v. Cross*, 2016 Ark. App. 327, at 6, 497 S.W.3d 712, 717 (citing *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156 S.W.3d 742 (2004)).

[9] *Gilbow v. Crawford*, 2015 Ark. App. 194, at 6, 458 S.W.3d 750, 754 (citing *Entertainer, Inc. v. Duffy*, 2012 Ark. 202, 407 S.W.3d 514).

[10] *Honeycutt v. Honeycutt*, 2017 Ark. App. 113, at 4, 516 S.W.3d 750, 753 (citing *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 85–86, 765 S.W.2d 924, 928 (1989)).

[11] *Gregory v. Gregory*, 2013 Ark. App. 57, at 7, 425 S.W.3d 845, 849–50 (citing *Hope v. Hope*, 333 Ark. 324, 969 S.W.2d 633 (1998)).

A party should be allowed to amend absent prejudice; an important consideration in determining prejudice is whether the party opposing the motion will have fair opportunity to defend after the amendment.[12] If the opposing party timely objects to the amendment, the circuit court determines whether prejudice would result, or if the case would be unduly delayed by the amendment.[13] The failure of the opposing party to seek a continuance is a factor to be considered in determining whether prejudice was shown.[14] However, we will not imply consent to conforming the pleadings to the proof merely because evidence relevant to a properly pled issue incidentally tends to establish an unpled one.[15]

Dates are key to the statute of limitations as dates determine when the time to file a claim had ended. In this case, the discussion revolved around ownership of scrap that was sold by appellants, which belonged to Leon and was sold both from land owned by Joshua and Leon as joint tenants and separate land owned by Leon's brother. The outcome of this matter, as argued, turned on when Joshua should have been determined to be dead as that date would determine, as the arguments went, who owned the scrap and, therefore, who owned the proceeds. Throughout multiple filings and a hearing, appellants never made a statute-of-limitations argument, instead addressing Jennifer's arguments as presented. It was not until the very end of the trial that appellants mentioned an issue with the statute of

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[12]*Honeycutt*, *supra*.

[13]*Gregory*, 2013 Ark. App. 57, at 7, 425 S.W.3d at 849 (citing *Webb v. Workers' Comp. Comm'n,* 286 Ark. 399, 692 S.W.2d 233 (1985)).

[14]*Gregory*, 2013 Ark. App. 57, at 7, 425 S.W.3d at 850 (citing *Hope*, *supra*).

[15]*McEntire v. Watkins*, 73 Ark. App. 449, 451, 43 S.W.3d 770, 771–72 (2001) (citing *Heartland Cmty. Bank v. Holt*, 68 Ark. App. 30, 3 S.W.3d 694 (1999)).

limitations for the first time. The issue of the statute of limitations was not tried on the evidence, there was simply evidence presented that would incidentally establish the unpled issue of statute of limitations. Accordingly, Jennifer never impliedly consented to arguing the issue of the statute of limitations.[16]

At the time of the motion to amend, Jennifer objected. She argued that appellants could not amend their pleadings to raise an affirmative defense as they are required to be pled by the Arkansas Rules of Civil Procedure. Though she did not use some variation of the word 'object,' it is clear that Jennifer was objecting, and she gave a specific reason. Arkansas Rule of Civil Procedure 8(c) lists statute of limitations as an affirmative defense that must be pled in response to a complaint. Appellants failed not only to list this affirmative defense in their response to Jennifer's complaint, but they also failed to raise it throughout the pendency of the case, raising it for the first time at the end of the trial. While the fact that Jennifer failed to ask for a continuance is a factor, it is not a determining factor and the circuit court's letter to the parties makes clear that its decision was not "exercised thoughtlessly and without due consideration." The decision to grant a motion to amend, while liberal, is still discretionary; amendment is only mandatory when the issue has been expressly or impliedly consented to. We hold that there was no manifest abuse of discretion by the circuit court in denying appellants' motion to amend the pleadings.

[16]Though appellants never raised a statute-of-limitations defense to Jennifer's claim, Jennifer did raise a statute-of-limitations defense in her May 11, 2015 answer. However, the issue was not contested and was more so abandoned in that the evidence presented was not for the purpose of arguing the statute-of-limitations defense but incidental to Jennifer's ownership claim.

II. *Standing*

Appellant's second argument on appeal is that the circuit court erred in permitting Joshua's estate to pursue a claim that belonged to Leon's estate. It is clear that appellants did not raise the issue of standing prior to the hearing after the trial, and that Jennifer never raised the issue. Furthermore, appellants did not attempt to amend the pleadings to conform to the alleged evidence of standing until October 24, 2016, eighteen months after the complaint was filed, ten months after the trial on the matter, and three months after the judgment was entered. It is clear that the issue of standing was not expressly or impliedly consented to, and again, Jennifer objected to conforming the pleadings to allege standing, despite failing to ask for a continuance, which is but a factor. Accordingly, based on the same analysis above, we affirm.

Affirmed.

ABRAMSON, HARRISON, and GLOVER, JJ., agree.

KLAPPENBACH and MURPHY, JJ., dissent.

N. MARK KLAPPENBACH, Judge, dissenting. I dissent because the trial court abused its discretion in not permitting Elvis and Brittney Middleton (collectively "Elvis") to have the pleadings conform to the proof regarding the statute of limitations. In short, Arkansas Rule of Civil Procedure 15 expressly permits such amendments even after judgment, Rule 15 is designed to be liberally applied, the opposing side argued only that it was late in the litigation, the opposing side presented the evidence establishing that the statute of limitations had run, and the opposing side failed to demonstrate how it would have tried the case any differently. I recognize that trial courts possess discretion on the

issue of such amendments, but if this situation does not present an abuse of discretion, then what does?

It must be remembered that this lawsuit started in April 2015, and it involved multiple issues presented for litigation. Joshua's estate[1] filed a complaint that included a request to eject Elvis from the real property, to have a partition sale of the real estate, and to require an accounting from Elvis for the moneys collected upon sale of the scrap metal. Elvis denied all the allegations, requested reformation of the deed in which Elvis bought the land from Leon Middleton, and alleged that Leon had abandoned the personal property left on the land.

Prior to the December 2015 bench trial, the parties agreed to a partition sale of the real estate and the division of those proceeds. The litigation then centered on the right to the money generated from the sale of the scrap metal. After Joshua's estate provided the proof to establish that Elvis had sold the scrap metal in 2010 (a fact not in dispute), Elvis's attorney requested that the pleadings be conformed to the undisputed evidence that the three-year statute of limitations for conversion or for an accounting had run long before the April 2015 complaint was filed. The estate's attorney raised a general objection. Although

[1]The majority claims that this case "turned on when Joshua should have been determined to be dead as that date would determine, as the arguments went, who owned the scrap, and therefore, who owned the proceeds." I disagree. Until Joshua was officially declared dead, he was deemed under the law to be a viable living person entitled to bring suit on his own behalf to recover the scrap metal or the proceeds it generated. The majority opinion cites no law to support the proposition that the statute of limitations on a claim for an accounting, or for conversion, regarding personal property belonging to a presumed-living person is tolled until a subsequently entered court order declares the person dead.

the trial court asked for posttrial briefs on this issue, only Elvis filed such a brief; Joshua's estate did not.

The trial court issued a letter opinion in March 2016, as described in the majority opinion, rejecting Elvis's request to amend the pleadings. The trial court noted that Joshua's estate did not expressly or impliedly consent to such an amendment and that "[a]mending the pleadings following the trial would result in unfair prejudice."

In July 2016, an order was entered that set the amount the estate was to receive regarding the scrap-metal proceeds and that ordered the real property to be sold. There were subsequent motions filed in 2016 by both Elvis and by Joshua's estate that were considered by the trial court. Elvis asked at least two more times to be permitted to amend the pleadings to conform to the undisputed proof on the running of the statute of limitations with regard to the sale of the scrap metal, which proof had been provided by Joshua's estate. The real estate was not sold until January 2017, and even after that, Joshua's estate filed a petition for attorney's fees and to quash the sale of the real property. This matter was not concluded until the final order entered in May 2017, which is now on appeal. In that order, the trial court again rejected Elvis's request to amend the pleadings to conform to the proof, stating that it would unfairly prejudice Joshua's estate.

Pursuant to Arkansas Rule of Civil Procedure 15(b):

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, *even after judgment*[.] (Emphasis added.)

The Reporter's Notes to Rule 15 state that Arkansas's rule "goes somewhat further" than its federal counterpart "by more or less making it mandatory that pleadings be amended to conform to the proof where there has been no objection to such proof." The Reporter's Notes state that under prior Arkansas law, amendments were not permitted to add a different defense when the opposing side objected, but the revision to Rule 15(b) "does liberalize somewhat prior Arkansas law."

Pursuant to Arkansas Rule of Civil Procedure 8(c), affirmative defenses such as the statute of limitations must be specifically pled to be considered by the circuit court, and a failure to plead an affirmative defense can result in a waiver and exclusion of the defense from the case. *See Felton v. Rebsamen Med. Ctr., Inc.*, 373 Ark. 472, 284 S.W.3d 486 (2008); *State Office of Child Support Enf't v. Morgan*, 364 Ark. 358, 219 S.W.3d 175 (2005). However, as our supreme court footnoted in *Arkansas Lottery Commission v. Alpha Marketing*, 2013 Ark. 232, at 25 n.1, 428 S.W.3d 415, 430 n.1, affirmative defenses listed in Rule 8(c) but not listed in Rule 12(h)(1)[2] may be raised in an amended answer under Rule 15(a). *See Seth v. St. Edward Mercy Med. Ctr.*, 375 Ark. 413, 419–20, 291 S.W.3d 179, 184 (2009) (holding that waiver of the defense of charitable immunity did not result from failure to plead it in the original answer).

Returning to my primary point, Arkansas law explicitly permits amendments to pleadings to be made "even after judgment." Our court has approved of a trial court's grant

[2]The defenses listed in Rule 12(h)(1) are lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or pendency of another action between the same parties arising out of the same occurrence.

of a request to amend pleadings to conform to the proof, even when the motion had been made after the party has rested. In *Cross v. Cross*, 2016 Ark. App. 327, at 7–8, 497 S.W.3d 712, 717–18, we held that the appellants were not prejudiced by the timing of the motion to amend because Rule 15(b)'s "plain language" permits amendments "at any time, including after judgment" and there was nothing to suggest how appellants would have tried the case differently. *See also Hope v. Hope*, 333 Ark. 324, 969 S.W.2d 633 (1998); *Union Pac. R.R. Co. v. SEECO, Inc.*, 2016 Ark. App. 466, 504 S.W.3d 614; *Barnett v. Gomance*, 2010 Ark. App. 109, at 6, 377 S.W.3d 317, 322 (holding that Rule 15(b) "is liberal in its allowance of amendments to conform pleadings to proof and even contemplates an amendment after judgment"). A party should be allowed to amend absent prejudice; an important consideration in determining prejudice is whether the party opposing the motion will have fair opportunity to defend after the amendment. *Honeycutt v. Honeycutt*, 2017 Ark. App. 113, 516 S.W.3d 750. "Where neither a continuance was requested nor a demonstration of any prejudice resulting from an amendment was shown, the amendment should be allowed." *Hickman v. Kralicek Realty & Constr. Co.*, 84 Ark. App. 61, 66, 129 S.W.3d 317, 321 (2003), (citing *Turner v. Stewart*, 330 Ark. 134, 139, 952 S.W.2d 156, 159 (1997)); *see also Gregory v. Gregory*, 2013 Ark. App. 57, 425 S.W.3d 845; *Cavalry SPV, LLC v. Anderson*, 99 Ark. App. 309, 260 S.W.3d 331 (2007).

There is nothing to suggest how Joshua's estate would have tried this matter differently had it known of Elvis's statute-of-limitations defense before the bench trial. Joshua's estate was given more than one opportunity, long before a final, appealable order was entered, to present a cogent argument against permitting Elvis to amend the pleadings

to conform to the proof. Its only response was that this affirmative defense should have been asserted in Elvis's answer. There was no objection to, or any dispute about, when the scrap metal was sold and the proceeds received. There could be no dispute about the date that the estate's cause of action was filed. Joshua himself had the right to initiate this lawsuit from and after the time it accrued. Elvis had repeatedly requested permission to amend long before entry of the final judgment on appeal. In these circumstances, and in light of Arkansas law on this topic, I can only conclude that the trial court abused its discretion.

For the foregoing reasons, I dissent.

MURPHY, J., joins.

Davis Law Firm, by: *Stephen B. Davis*, for appellants.

One brief only.