IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
Assigned On Brief November 26, 2002

GAIL JONES CARSON, ET AL. v. DAIMLERCHRYSLER CORPORATION

Direct Appeal from the Circuit Court for Shelby County
No. 304032 T.D. James F. Russell, Judge

No. W2001-03088-COA-R3-CV - Filed March 19, 2003

The trial court dismissed plaintiff's cause of action upon finding it moot. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY K. LILLARD, J., joined.

Eugene A. Laurenzi, Memphis, Tennessee, Cyrus Mehri, Michael Kanovitz, Washington, D.C., Jonathan Shub, Philadelphia, PA, Steve W. Berman and Clyde A. Platt, Seattle, WA, and Cornish F. Hitchcock, Washington, D.C., for the appellant, Gail Jones Carson.

J. Brook Lathram and Mia Gianotti Henley, Memphis, Tennessee, Charles A. Newman, Kathy A. Wisniewski and Ann K. Covington, St. Louis, Missouri, for the appellee, DaimlerChrysler Corporation.

OPINION

In 1998, the DaimlerChrysler Corporation ("DaimlerChrysler") recalled six models of vehicles produced from 1993 to 1997 which contained defective fuel rail O-rings. The recall was precipitated by a lengthy investigation of the Chrysler vehicles by the National Highway Transportation Safety Administration ("NHTSA"). The settlement agreement between the NHTSA and DaimlerChrysler included a fine of $400,000 paid by DaimlerChrysler. In its recall notice, DaimlerChrysler advised owners of the subject vehicles that it would repair the fuel rails free of charge.

In September of 1999, Gail Jones Carson (Ms. Carson) commenced this lawsuit on behalf of herself and others similarly situated. Ms. Carson contends that in May of 1994, she purchased a 1994 Chrysler New Yorker and that in September of 1996 she paid $438.17 to repair the fuel rail

which was subject to the subsequent 1998 recall. In 1996, Ms. Carson traded-in the New Yorker for another DaimlerChrysler vehicle. In her complaint, Ms. Carson recites as causes of action unjust enrichment, indemnity, breach of warranty and violations of the Tennessee Consumer Protection Act. In her prayer for relief, she sought an order certifying the plaintiff class and appointing her and her counsel to represent the class; judgment awarding damages to be determined at trial, including prejudgment interest and treble and exemplary damages; further relief as deemed just and equitable by the Court. Although alleging serious safety hazards resulting from the defective fuel rail O-rings, Ms. Carson was not personally injured and her complaint specifically excludes any claim resulting from personal injuries which may have been sustained by anyone in the prospective class.

DaimlerChrysler removed the cause of action to the U.S. District Court, Western District of Tennessee in October of 1999 and moved for dismissal for lack of subject matter jurisdiction. The cause was remanded to circuit court while DaimlerChrysler's motion to dismiss was pending. Upon remand, in February of 2001, the trial court dismissed the cause of action for mootness and based on the primary jurisdiction doctrine. The trial court further addressed Ms. Carson's substantive claims and awarded DaimlerChrysler's motion to dismiss for failure to state a claim. This appeal followed.

Issues Presented

Upon appeal, Ms. Carson presents the following issues for review by this Court.

(1) Did the trial court err in dismissing the complaint for lack of subject matter jurisdiction on the theories that plaintiff's claims were moot and barred by the primary jurisdiction doctrine?

(2) Did the trial court err in dismissing for failure to state a claim plaintiff's causes of action based on (a) unjust enrichment, (b) implied indemnity, (c) breach of warranty and (d) violations of the Tennessee Consumer Protection Act?

Standard of Review

The issues presented by this appeal are issues of law. This Court's standard of review on issues of law is ***de novo***, with no presumption of correctness accorded to the trial court's determinations. ***See Bowden v. Ward***, 275 S.W.3d 913, 916 (Tenn. 2000); Tenn. R. App. P. 13(d).[1]

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[1]Ms. Carson submits that since the trial court considered matters outside of the pleadings in addressing DaimlerChrysler's motion to dismiss under Tenn. R. Civ. P. 12.02(1) or Rule 12.02(6), the motion should have been treated as a Rule 56 motion for summary judgment. The trial court dismissed this cause of action for mootness, thereby granting DaimlerChrysler's motion to dismiss pursuant to Rule 12.02(1). It is not inappropriate for the court to consider documents outside the pleadings in order to determine whether it has subject matter jurisdiction. ***Luellen v. Henderson***, 54 F. Supp. 2d 775, 777 (W.D. Tenn. 1999). The court has a duty to determine whether it has subject matter jurisdiction (continued...)

Mootness

It is well settled that in order to invoke the jurisdiction of the courts, there must be a genuine and live controversy between the parties which necessitates adjudication of present rights by the court. ***Dockery v. Dockery***, 559 S.W.2d 952, 954 (Tenn. Ct. App. 1977)(perm. app. denied). This controversy must remain live throughout the course of litigation, including the appeal process. ***Id.*** In the absence of exceptional circumstances clearly affecting the public interest, or unless an issue is capable of repetition but avoiding review, if a cause of action loses its character as a live controversy, it will be dismissed as moot. ***Id.*** at 955; ***McIntyre v. Traughber***, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994). A moot case is one in which the court determines it is no longer necessary as a means to provide the relief to which a party is entitled. ***Ford Consumer Fin. Co. v. Clay***, 984 S.W.2d 615, 617 (Tenn. Ct. App. 1999)(perm. app. denied).

The essence of Ms. Carson's claim as garnered by her complaint and deposition is that she (and those similarly situated) are entitled to a refund of sums spent to repair the fuel rails in vehicles subject to the 1998 recall by DaimlerChrysler, and that DaimlerChrysler should be punished for allegedly misleading the public about the defective fuel rails. In her deposition, Ms. Carson acknowledges that she was aware of the DaimlerChrysler recall prior to filing her complaint. She also acknowledges that she was aware that the recall advised owners that their fuel rails would be replaced by DaimlerChrysler free of charge.

Ms. Carson's deposition statements are contradictory, however, regarding whether she was aware, at the time her complaint was filed, that she could receive a refund of sums spent to repair the fuel rails upon providing proof of such expenditure. Ms. Carson stated that she had requested and received reimbursement from Chrysler (DaimlerChrysler's predecessor in interest) for prior repairs to the New Yorker. She asserted that after paying approximately $438 to repair the fuel rails, she demanded a new vehicle, which Chrysler refused. Ms. Carson's statements regarding whether Chrysler in fact reimbursed her for the repairs, however, also are contradictory. At one point, Ms. Carson stated, "I didn't get a new vehicle. They did reimburse me for the rings," although she could not recall the date or amount of the reimbursement. She subsequently stated that although she was aware of the recall and that DaimlerChrysler would replace the fuel rails free of charge, it did not occur to her to request reimbursement for amounts she previously had paid. Ms. Carson stated in her deposition that she had retained her receipt for the fuel rail repairs to the New Yorker, and acknowledges that she is now aware that she may be reimbursed.

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[1](...continued)
over a cause of action which is independent from the parties, and may raise the issue ***sua sponte*** at any stage in the litigation. ***Id.*** at 788; ***Cockrill v. Everett***, 958 S.W.2d 133, 135 (Tenn. Ct. App. 1997). Thus the court's consideration of matters beyond the pleadings will not cause a Rule 12.02(1) motion to dismiss for lack of jurisdiction over the subject to be considered a motion for summary judgment.

Ms. Carson does not assert that DaimlerChrysler has not honored its recall notice. Nor does DaimlerChrysler disavow its obligations under the recall.[2] Further, DaimlerChrysler has submitted undisputed evidence of its policy to reimburse consumers who paid for fuel rail repairs upon proof of such expenditure. We agree with the trial court that there simply is no controversy between Ms. Carson and DaimlerChrysler which currently requires adjudication by the court.

In her motion to reconsider, Ms. Carson contends that oversight by the court is necessary to ensure that DaimlerChrysler notifies its customers and honors this policy of reimbursing all consumers who paid to have their fuel rails repaired. As noted, Ms. Carson herself has not been refused reimbursement. Therefore, if there is such a class, Ms. Carson is not a member of that class. Moreover, while it is possible, as Ms. Carson submits, that DaimlerChrysler will not honor its reimbursement policy, it is not within the jurisdiction of the courts to address such hypothetical possibilities which are not connected to granting of actual relief to an injured party. ***Massengill v. Massengill***, 255 S.W.2d 1018, 1019 (Tenn. 1952).

Ms. Carson cites ***Deposit Guaranty National Bank v. Roper***, 445 U.S. 326 (1980) for the proposition that DaimlerChrysler impermissibly has attempted to moot a class action by "picking off" the lead plaintiff.[3] The facts of this cause of action, however, are readily distinguishable from ***Roper***. Prior to the Court's decision in ***Roper***, the Court had recognized that a class action cannot be mooted by the defendant's attempt to settle with the lead plaintiff because such a settlement does not extinguish the claims asserted by the unnamed class plaintiffs. ***See Sosna v. Iowa***, 419 U.S. 393, 397-99 (1975). The determination of mootness in the context of a class action is affected by the legal status of the putative class separate from the status of the lead plaintiff. ***Id.*** at 399. In ***Roper***, the Court addressed whether the tender and refusal of amounts claimed in individual capacities to the named plaintiffs in a class action, a tender which was refused and entered by the court over the plaintiffs' objection, mooted the case and terminated the right to appeal the denial of class certification. ***Roper***, 445 U.S. at 327. As the Court noted in ***Roper***, "[t]he factual context in which this question [arose] is important." ***Id.*** at 332. The ***Roper*** Court addressed the question of whether the appeal of the trial court's denial of class certification became moot when a judgment was entered in the plaintiffs' favor over their objections. In ***Roper***, the plaintiffs claimed injuries for alleged usurious interest rates charged by the defendant bank in violation of federal law. ***Id.*** It was undisputed in ***Roper*** that a real controversy existed between the parties at the time the complaint was filed. The settlement tendered by the bank and the judgment entered by the court over the plaintiffs' objections did not address the damages claimed by the prospective class. ***Id.*** at 333. The Supreme Court accordingly held that these circumstances would not terminate the right of the plaintiffs to appeal the court's denial of class certification. ***Id.***

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[2] We make these observations without addressing whether the courts of Tennessee would have subject matter jurisdiction to adjudicate claims regarding the recall notice approved by the National Highway Transportation Safety Administration.

[3] Tennessee Rule of Civil Procedure 23 governing class action causes of action substantially mirrors the Federal Rules governing class actions. Thus we draw upon Federal case law as persuasive authority in our analysis.

In the present case, we are not called upon to address whether an appeal of a denial of class certification was rendered moot by the defendant's offer to settle only with the lead plaintiff while leaving the claims of those similarly situated unaddressed. First, this appeal is not an appeal of a class certification denial. Second, even viewing this issue in the context of a class action,[4] DaimlerChrysler offered evidence of its policy that it will reimburse those who submit proof of having incurred expenses to repair fuel rails on the recalled vehicles. Thus DaimlerChrysler did not tender an offer to settle only to Ms. Carson. Rather, the trial court determined that Ms. Carson's damages, and the damages of those similarly situated, readily can be redressed without resort to the courts. The trial court found that there is no evidence that anyone requesting reimbursement for repairs to the fuel rails would be refused. In her deposition, Ms. Carson conceded that she was not aware of anyone who had requested but been denied reimbursement. Unlike the factual context found in ***Roper***, this case does not present an attempt to pick-off the lead plaintiff while leaving the claims of the unnamed members of a class unaddressed. We accordingly affirm the judgment of the trial court that this action is moot.

We observe that this does not preclude future claims by those refused reimbursement should DaimlerChrysler not honor its reimbursement policy. Ms. Carson's claim, however, is not predicated upon a denial of reimbursement. If there is a class whose members have been denied reimbursement by DaimlerChrysler, Ms. Carson is not a member of that class. She accordingly would have no standing to bring such a claim.

Prejudgment Interest

Ms. Carson further submits that her cause of action is not moot because reimbursement by DaimlerChrysler of her out-of-pocket costs does not address her claim for prejudgment interest. Her argument is that the entire claim is not moot because the issue of interest remains a real and live controversy between the parties. Ms. Carson submits that as an equitable remedy, prejudgment interest is a type of remedy which may be awarded by the court even in the absence of a judgment. Ms. Carson does not assert a claim for interest on any basis other than prejudgment interest as approved by the court in ***Myint v. Allstate***, 970 S.W.2d 920 (Tenn. 1998).

The contention that the question of a plaintiff's potential award of prejudgment interest in the face of a possible favorable ruling is sufficient to save a cause of action from mootness is surprisingly novel. It is also without merit. Prejudgment interest is awarded at the trial court's discretion. ***Id.*** at 927. The amount of the award, if any, depends upon the circumstances of the case. ***See id.*** It is not axiomatic that prejudgment interest will be awarded in every instance in which judgment is entered in favor of the plaintiff. It is certain, however, that the possibility of pre-judgment interest does not provide an independent cause of action. The potential award of interest based only on a favorable judgment cannot save a cause of action that is otherwise moot and accordingly not within the jurisdiction of the court.

[4] We note that although Ms. Carson's complaint was filed on behalf of herself and others similarly situated and her prayer for relief included class action certification, no motion to certify was in fact made to the trial court.

Plaintiff's Motion to Amend to Add a Plaintiff

Ms. Carson further submits that the trial court erred by denying her motion to amend her complaint to add Mr. Keith Jackson (Mr. Jackson), a resident of California, as an additional plaintiff. Without citing any law to support her position, Ms. Carson contends that the proper course for the court would have been to add Mr. Jackson as a plaintiff, "thereby protecting the rights of absent class members."

Courts consistently have recognized the tension between the doctrine of mootness and the difficulties inherent in class action litigation. Of particular importance is the protection of the rights of the unnamed members of the class. Thus once an action has been certified as a class action, "the termination of a class representative's claim does not moot the claims of the unnamed members of the class." ***County of Riverside v. McLaughlin***, 500 U.S. 44, 51 (1991) (quoting ***Gerstein v. Pugh***, 420 U.S.103, 110-111, n. 11 (1975)). Moreover, when a claim is so transitory that the trial court may not have adequate time to rule on a motion for class certification before the named plaintiff's individual claim expires, the cause of action may be preserved as to the unnamed members of the class. ***Id.*** at 52. Whether the case should nevertheless be certified as a class action on the basis of "relating back" to the original complaint will depend upon the circumstances, particularly on whether the claim would otherwise escape review. ***See id.***; ***Sosna v. Iowa***, 419 U.S. 393, 402 n. 11. We also observe that when a class action has been certified, and the claim apprises the defendant as to the claims against it, but the action is defective as to the proper named plaintiff, the courts may permit the amendment of the complaint to add a named plaintiff in order to save the cause of action from expiration of the limitations period. ***Gillis v. United States Dep't of Health and Human Servs.***, 759 F.2d 565, 571 (6th Cir. 1985)(citing ***Hass v. Pittsburgh Nat'l Bank***, 526 R.2d 1083, 1097-98 (3d Cir. 1975)). None of these circumstances are present in this case.

A trial court's decision regarding a motion to amend is reviewed under an abuse of discretion standard. ***Merriman v Cont'l Bankers Life Ins. Co.***, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979). However, this discretion is tempered by the Tennessee Rules of Civil Procedure, which provide that leave to amend shall be freely given when justice so requires. Tenn. R. Civ. P. 15.01. Some of the factors to be considered by the court in considering a motion to amend include: undue delay in filing; lack of notice to the opposing party; bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment. ***Merriman***, 599 S.W.2d at 559 (citing ***Hageman v. Signal L. P. Gas, Inc.***, 486 F.2d 479 (6th Cir. 1973)).

We do not believe that justice required the trial court to grant Ms. Carson's ***post-judgment*** motion to amend the complaint to add an additional plaintiff. In order to take further action on this case, including granting Ms. Carson's requested motion to amend, the trial court would first have had to set aside or vacate its final order dismissing the cause of action. ***Isbell v. Travis Elec. Co.***, No. M1999-00052-COA-R3-CV, 2000 WL 181752 at *11 (Tenn. Ct. App. 2000) (***no perm. app. filed***). We agree with the trial court that there was no basis to vacate the court's judgment dismissing this case. This cause of action presents no extraordinary circumstances requiring us to abrogate the

doctrine of mootness. Additionally, the issue of mootness was raised by DaimlerChrysler while this case was still pending in District Court in 1999. Thus Ms. Carson had well over a year in which to move to amend her complaint, but failed to do so until after the trial court's final judgment. We affirm the judgment of the trial court.

Conclusion

In light of the foregoing, we affirm the trial court's judgment dismissing Ms. Carson's cause of action as moot. Our holding on this issue is dispositive to this appeal. Other issues therefore are pretermitted. Costs of this appeal are taxed to the appellant, Gail Jones Carson, and her surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE