IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

ALICIA R. GRASHOT and
TONY GRASHOT,

Plaintiffs-Appellants,

Vs.

Shelby Law No. 51398
C.A. No. 02A01-9409-CV-00222

JAMES LAWSON, et al,

Defendants-Appellees.

FROM THE CIRCUIT COURT OF SHELBY COUNTY
THE HONORABLE ROBERT L. CHILDERS, JUDGE

Warner Hodges, III, of Germantown
For Appellants

Joe Lee Wyatt, McWhirter & Wyatt, of Memphis
For Appellees

AFFIRMED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This appeal involves the application of the relation back provision of Tenn.R.Civ.P. 15.03 prior to the rule's amendment effective July 1, 1995. The rule provided:

> 15.03. Relation Back of Amendments. - Whenever the claim or defense asserted in the amended pleadings 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. An amendment changing the party against whom the claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a misnomer or other similar mistake concerning the identity of the proper party, the action would have been brought against him. Except as above specified, nothing in this rule shall be construed to extend any period of limitations governing the time in which any action may be brought.

Plaintiffs appeal[1] from the trial court's order dismissing their suit against defendant, Lawson Cleaning, Inc. On January 25, 1991, plaintiffs[2] allegedly suffered personal injuries in an automobile accident involving a van driven by Stacey Polzin and, according to the Memphis Police Vehicle Accident Report, owned by Lawson's Cleaners. On January 27, 1992,[3] plaintiffs filed a complaint naming defendants, James Lawson, individually, and d/b/a Lawson's Cleaners, and Stacey Polzin. When plaintiffs attempted to serve defendants with process, a "not to be found" return was made on Stacey Polzin on January 30, 1992, and

---

[1]This is an appeal as of right from the order which was made final pursuant to Tenn.R.Civ.P. 54.02.

[2]The suit of Tony Grashot, husband of Alicia Grashot, is a derivative suit for the injuries allegedly sustained by Mrs. Grashot.

[3]The complaint was timely filed because January 25, 1992, was a Saturday and January 26, 1992, was a Sunday.

a "not to be found" return was made on James Lawson on February 2, 1992. Alias process was issued for both defendants on July 30, 1992, and once again process was returned "not to be found" as to each defendant. An amended complaint was filed on August 6, 1992, adding Lawson Cleaning, Inc., a Tennessee corporation, as a defendant, and on September 10, 1992, Lawson Cleaning, Inc., filed a motion to dismiss on the ground that the suit against it was barred by T.C.A. § 28-3-104 (Supp. 1994), the one year statute of limitations. On November 16, 1992, the plaintiffs filed a Notice of Voluntary Dismissal, and on December 10, 1992, the trial court entered an Order of Voluntary Dismissal.

On January 25, 1993, the present complaint was filed naming the same defendants, including Lawson Cleaning, Inc. Lawson Cleaning, Inc., again filed a motion to dismiss on the ground that the suit was barred by the statute of limitations. The trial court granted the motion to dismiss by order dated June 15, 1994, and the order was subsequently made a final judgment pursuant to the provisions of Tenn.R.Civ.P. 54.02. Plaintiffs have appealed, and the only issue for review is whether the trial court erred in dismissing the suit against the corporation.

If, in the first suit, the amendment adding defendant Lawson Cleaning, Inc., related back to the initial filing date, then under T.C.A. § 28-1-105 (1995 Supp.), the voluntary dismissal of that action would allow plaintiffs one year within which to institute a new action against Lawson Cleaning, Inc. Therefore, the present suit would be timely filed as to that defendant.

It is uncontroverted that the added party defendant, Lawson Cleaning, Inc., had no notice of the original lawsuit filed until after the one year statute of limitations had expired. Lawson Cleaning, Inc., was first given notice of the suit on January 30, 1992, when its president and sole stockholder, Gail Lawson Fisher,

was informed that a police officer was on the premises to serve process. Plaintiffs, however, assert that through Gail Lawson the corporation should have been aware of the suit against it, because the corporation knew that one of its employees had been involved in an automobile accident while driving a corporate van on corporate business.

For the relation back provisions of Tenn.R.Civ.P. 15.03 to apply, it is essential that the party sought to be charged have notice of the lawsuit within the statutory period. In *Smith v. Southeastern Properties, Ltd.*, 776 S.W.2d 106 (Tenn. App. 1989), the Court stated:

> It is clear from the rule, the Committee comments, and cases construing Rule 15, in both our courts and the federal system, that timely notice to the party being charged is material to the amendment relating back to the date of the original suit. In order to be "timely" the notice must be received during the statutory period by the party sought to be charged - in this case one year from the date of death on June 10, 1984. "Notice" means notice that a lawsuit asserting a legal claim has been filed. That the defendants in the case under consideration may have had notice of the incident out of which this action arose is insufficient. *Osborne Enterprises, Inc. v. City of Chattanooga,* 561 S.W.2d 160, 164 (Tenn.App.1977); *Jenkins v. Carruth*, 583 F.Supp. 613, 616 (E.D. Tenn. 1982), *aff'd* 734 F.2d 14 (6th Cir. 1984).

776 S.W.2d at 109.

Applying *Smith* to the instant case, it is immaterial that Lawson Cleaning, Inc., had notice of the automobile accident. In order for the amendment naming Lawson Cleaning, Inc., as a defendant to relate back to the original filing date, Lawson Cleaning, Inc., must have had notice that a *suit* had been filed against it.

Plaintiffs also assert that the doctrine of equitable estoppel should apply to estop the defendants from asserting the statute of limitations as a bar to the plaintiffs' suit. Plaintiffs, however, cite no pertinent authority in support of this

statement. Estoppels are not favored in the law. *Sturkie v. Bottoms*, 203 Tenn. 237, 310 S.W.2d 451 (1958). One of the essential elements of equitable estoppel as related to the party claiming estoppel is the lack of knowledge or means of knowledge of the truth of the facts in question. *Provident Washington Ins. Co. v. Reese*, 213 Tenn. 355, 373 S.W.2d 613 (1963); *Gitter v. Tennessee Farmers Mut. Ins. Co.*, 60 Tenn. App. 698, 450 S.W.2d 780 (1969).

In the case at bar, the plaintiffs possessed sufficient information to determine the proper party defendant, and, through the exercise of reasonable diligence, this determination could have been made within the statutory period. Thus, the doctrine of estoppel will not be invoked to preclude the defendants from asserting the statute of limitations as a defense to this suit.

Plaintiffs also assert that Tenn.R.Civ.P. 15.03 does not meet the equal protection guarantees of both the Tennessee and the United States Constitutions. From the record in this case, we are unable to determine whether this argument was made in the trial court. In *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn. 1983), our Supreme Court held:

> It has long been the general rule that questions not raised in the trial court will not be entertained on appeal and this rule applies to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion. [citations omitted] Since the constitutional validity of T.C.A., § 63-1234, was not raised in the trial court no opportunity was afforded for the introduction of evidence which might be material and pertinent in considering the validity of the statute. Accordingly, we reverse the action of the Court of Appeals in holding that this statute is unconstitutional. We are not, however, holding that the statute is free of constitutional defect; we merely hold that no adjudication of that issue should have been made by the Court of Appeals upon this record.

655 S.W.2d at 929-930.

Since the matter was not raised in the trial court, we will not consider the matter on appeal.[4]

The order of the trial court dismissing plaintiffs' suit is affirmed. The case is remanded for such further proceedings as may be necessary. Costs of the appeal are assessed against the appellants.

_____
W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

_____
ALAN E. HIGHERS, JUDGE

_____
DAVID R. FARMER, JUDGE

[4]We also note that there is nothing in the record to indicate that plaintiff complied with Tenn.R.Civ.P. 24.04 in the trial court, and certainly there is nothing in this Court to indicate that plaintiff has attempted to comply with T.R.A.P. 32.