Prelim Conf

Civil Action No. 82-371

COMMITTEE(Father, apparently) of Plaintiff brings this products liability case for $11 million for injuries caused to his ward due to a Jeep accident. Ward was apassenger in the Jeep, owned by Charles LeMaster (now seriously incapacitated by multiple sclerosis) and driven by James Spurlock (now dead from a gunshot to the head).

Plaintiff alleges negligence, gross negligence in design, testing, manufacturing and inspection of the vehicle, breach of express and implied warranties, misrepresentation, failure to warn of risks, reckless disregard for the public's safety.

Accident occurred 5 November 1978

Committee appointed 22 May 1979

Action filed on 13 October 1982

Defendant defends on:

1. Statute of limitations (1 year from date of injury, or from date of appointment of committee).

   (This is a primary issue, and defendant seems to have the best of the argument, though there are no direct Ky. cases in point)

2. Contributory negligence (not argued how this is so).

3. Intervening and superceding causes (negligent operation of the vehicle by the driver; road conditions).

4. Plaintiff in violation of Ky. Prod. Liab. Law (411.300). (not shown how so).

5. Prior settlement and release (by amended answer)(Here, counsel for plaintiff negotiated settlement under no-fault law, but release not signed, and defendant argues that a signed release not required. Shakey).

6. Laches (by 2nd amended answer). Over three years since appointment of committee, who acted for plaintiff in attempting settlement.

   (Burchett first attorney, then replaced before suit)

Motion for Summary Judgment by defendant. Good brief.

Trial 16 April 9 am

Pre-trial 22 March 9 am

Discovery Cut-off 19 Dec 1983

GLP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

MICHAEL A. FITZPATRICK,
COMMITTEE FOR MICHAEL R.
FITZPATRICK — PLAINTIFF

VS — MOTION FOR SUMMARY JUDGMENT — NO. 82-371

AMERICAN MOTORS CORPORATION,
JEEP CORPORATION, AMERICAN MOTORS
(Canada), INC., AND AMERICAN
MOTORS SALES CORPORATION — DEFENDANTS

* * * * * * * *

Come the Defendants, American Motors Corporation, Jeep Corporation, American Motors (Canada) Ltd., and American Motors Sales Corporation, by counsel, pursuant to FRCP 56, and move this Honorable Court to enter a summary judgment in their favor dismissing the claims of the Plaintiff herein upon the grounds that there is no genuine issue as to any material fact and that these Defendants are entitled to summary judgment as a matter of law.

As grounds for this motion, the Defendants rely upon the pleadings and affidavits filed of record and upon the grounds more fully stated in the Preliminary Trial Memorandum of these Defendants filed herein.

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and

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By: _____
ATTORNEYS FOR DEFENDANTS

NOTICE AND CERTIFICATE

The Plaintiff will take notice that the foregoing Motion for Summary Judgment will come on before the Court for hearing on the 6th day of May, 1983, at the hour of 11:00 A.M. at the Preliminary Conference in the courtroom of the United States Courthouse, Pikeville, Kentucky. Further, this is to certify that a true copy of the foregoing Motion for Summary Judgment was duly mailed to Paul P. Burchett, Esquire, P. O. Box 897, Prestonsburg, Kentucky 41653; and Clifford B. Latta, Esquire, P. O. Box 550, Prestonsburg, Kentucky 41653; this 19th day of April, 1983.

_____
ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

MICHAEL A. FITZPATRICK,
COMMITTEE FOR MICHAEL R. FITZPATRICK — PLAINTIFF

VS — PRELIMINARY TRIAL MEMORANDUM — NO. 82-371

AMERICAN MOTORS CORPORATION,
JEEP CORPORATION, AMERICAN MOTORS
(Canada), INC., AND AMERICAN
MOTORS SALES CORPORATION — DEFENDANTS

* * * * * * * *

MAY IT PLEASE THE COURT:

I. JURISDICTION OF THE COURT

This is a diversity action under 28 U.S.C. § 1332 brought by the Committee of a Kentucky resident against foreign corporations having their principal places of business outside of Kentucky. These jurisdictional facts were alleged in the Complaint and admitted by answer.

II. KIND OF ACTION

This is a product liability action for personal injuries arising out of an automobile accident.

III. STATEMENT OF FACTS

According to the Complaint, the Ward, Michael A. Fitzpatrick, was riding in a Jeep CJ5 with James R. Spurlock, deceased, which was involved in a one vehicle accident in Floyd County, Kentucky on November 5, 1978. The Complaint alleges that the Ward became unconscious and incompetent from the time of the accident, although he was not adjudicated an incompetent until

March 12, 1979. Michael R. Fitzpatrick states that he was appointed as the Committee on May 22, 1979. The other occupant of the vehicle at the time of the accident, James R. Spurlock, apparently recovered from his injuries, but later died from a gunshot wound in 1981. (See Death Certificate, Attachment A).

The owner of the vehicle at the time of the accident, Charles LeMaster, Jr., is afflicted with multiple sclerosis and is subject to a severe onset of symptoms in the event he is emotionally upset. He is partially paralyzed and is clinically blind as a result of this disease. His father has requested that his son not be contacted due to the possibility of the onset of severe symptoms from his disease.

From April 3, 1979, the attorney for the Committee in this civil action negotiated with the liability carrier for the vehicle owner, Dairyland Insurance Company, on behalf of the Committee, regarding both basic reparation benefits under no-fault and liability claims under bodily injury coverage. The letters of April 25, 1979, June 6, 1979, June 21, 1979, and June 22, 1979 reflect the negotiations between the attorney for the Committee and the carrier. The Committee's claim against the vehicle owner was in fact settled for the practical limits of liability coverage available under the policy insuring Charles LeMaster, Jr. Although by letter the Plaintiff's attorney stated that release forms would be signed, they were never returned to the carrier. (See Affidavit, Attachment B).

Additionally, the vehicle involved has been resold, thereby irradicating any evidence of damages to the vehicle which might have indicated causation.

IV. ISSUES OF LAW (SUBSTANTIVE)

1. The committee's claim for personal injuries to the ward arising out of this automobile accident is barred by the statute of Limitations.

(a) The statute was not tolled.

On the face of this Complaint, the automobile accident occurred November 5, 1978. This civil action was filed October 13, 1982, nearly four years after the accident. Therefore, unless the statute of limitations was tolled, this civil action is barred and may not now be maintained. KRS 413.140(1) states:

> 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. (Emphasis added)

The Plaintiff attempts to bring this action within the tolling statute, KRS 413.170(1). That section provides:

> If a person entitled to bring any action mentioned in KRS 413.090 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued. (emphasis added)

There is no allegation by the Plaintiff nor any other indication but that the Plaintiff's ward was competent and of sound mind as of the time of the accident. The Committee claims that he became incompetent as a result of the accident, but the

adjudication of incompetency did not occur until March 12, 1979.

Kingman v. First National Bank, 246 Ky. 404, 55 S.W.2d 39 (1932) expresses the majority rule that the statute of limitations is not stopped by an intervening adjudication of insanity against the person charged with bringing the civil action. Thus, there is no question but that this statute requires the disability of insanity to have existed at the time the cause of action accrued, i.e., at the time of injury. This is buttressed by KRS 413.280 which refers to a person under multiple disabilities. That statute states:

> When two or more disabilities exist in the same person at the time the cause of action accrues, the limitation does not attach until they are all removed. (Emphasis added).

The cause of action accrued in this case at the time of the accident. But the disability did not arise until some undetermined time after the accident, presumably not until the adjudication of incompetency on March 12, 1979. Because the limitation of action began to run against the Committee's Ward at the time the accident occurred, the intervening disability and the subsequent determination of incompentency did not affect the running of the statute of limitations. This lawsuit is now barred.

(b) The statute begins to run upon the appointment of a Committee.

There are no Kentucky cases specifically addressing this particular point. However, even if the Court were to find that the Plaintiff's Ward was under a disability at the time the cause of action accrued, the appointment of a Committee for this injured person by the State District Court, coupled with the Committee's active prosecution and settlement of claims arising

out of this automobile accident, caused the period of limitation to run again.

This was the issue presented to the Court in Kline v. Lever Brothers Co., 124 Ga. App. 22, 183 S.E.2d 63 (1971). The Court was presented with a case in which the occurrence giving rise to the cause of action resulted in the injured person becoming mentally incapacitated. The Court held:

> [W]here no guardian is appointed for him, the Statute of Limitation for the bringing of an action is tolled until such time as he regains capacity to act for himself or until such time as a guardian is appointed and actually does act for him, or until such time as one bona fide acting as next friend, thereafter, during the continuance of the disability of plaintiff, brings an action seeking recovery for the injury sustained. (emphasis added)

This is precisely the situation presented in this case. Even if the Court considers the Plaintiff's Ward to have been under a disability at the time the cause of action accrued, the appointment of a Guardian who actually prosecutes claims arising out of the occurrence starts the limitation to run. Therefore, this action was barred not later than May 22, 1980, one year after appointment of a committee.

Other courts also have met this issue. North Carolina has perhaps the most inflexible of rules and holds that:

> [T]he statute of limitations runs against an infant as to all rights of action 'which the guardian might bring and which it was incumbent on him to bring insofar as may be consistent with the limitations of his office'
>
> Roland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960) quoting Johnson v. Pilot Life Insurance Co., 217 N.C. 139, 7 S.E.2d 475, 477.

To the same effect is the case of Wittkugel v. State, 160 N.Y.S.2d 242 (Ct. Claims N.Y. 1955) where the Court stated:

> It is true that with the appointment and qualification of the committee the statute of limitations began to run.

The significance of the appointment of a guardian to the running of the limitation of actions was recognized by the Supreme Court of New Jersey in Kyle v. Green Acres at Verona, Inc., 44 N.J. 100, 207 A.2d 513 (1965) in carving out an equitable exception to the issue of intervening disability. That case involved the intentional tort of assault and battery and a resulting disability.

The Kyle case provides a comprehensive review of the laws limiting civil actions and the effect of non compos mentis from the time of King Henry I. Although the Court felt that equity mandated an exception where insanity resulted from an intentional assault and battery, the Court limited this exception by the qualification of "whether plaintiff's suit was started within a reasonable time after restoration of sanity or after the appointment of a guardian or committee who knew or should have known of the cause of action." Id. at 520. (emphasis added)

Thus, a guardian appointed for an incompetent ward may not sit idly by and ignore inchoate liability claims until they become stale and then bring a civil action. With the right to bring a civil action on behalf of the ward comes the duty to prosecute such claims, especially where the guardian actually undertakes to prosecute, compromise, and settle claims arising out of the ward's initial injury.

The cases of Emerson v. Southern Railway Co., Ala., 404 So.2d 576 (1981) and Mason v. Sorrell, Ark., 551 S.W.2d 184 (1976) distinguish the North Carolina rule and hold that the appointment of a guardian will not commence a statute of limitations to run. However, both of those cases are based upon the reasoning that the guardian does not possess the cause of action. Where the guardian has charge of the ward's estate and the legal right to prosecute claims belonging to the estate, and actually does act to prosecute claims belonging to the estate, the limitation of action period in law and in equity should be considered to commence. In fact, KRS 387.060 vests the ward's estate in the guardian. "A guardian shall have the custody of his ward and the possession, care and management of the ward's property, real and personal. He shall provide for the necessary and proper maintenance and education of the ward out of the estate." (emphasis added)

The rule in North Carolina, New York, and New Jersey and distinguished by the Alabama and Arkansas courts, is based upon the general rule that the ward's estate remains with the ward and is not in the possession of the guardian. But Kentucky law places the estate in the possession of the guardian and charges the guardian with the legal duty to collect the ward's claims and to represent his interests. KRS 387.130. (A committee has the same "power and duty" as a guardian. KRS 387.230)(now KRS 387.630 & 387.700).

(c) The Committee undertook to settle the accident claims.

This is not a case of a limited guardianship or limited committee having nothing at all to do with the claim for injuries to the ward. Under Kentucky law, the committee for the injured ward in this lawsuit had both the power and the duty to prosecute claims for injuries arising out of this accident from May 22, 1979 onward. The fact that this was recognized by the Committee is reflected by the fact the Committee actually did negotiate, compromise and settle claims arising out of this injury. The statute of limitations in this case, if tolled at all, began to run on May 22, 1979. This civil action was not prosecuted until October 12, 1982. This action is now barred.

II. THE PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED UPON THE GROUNDS OF LACHES.

Should the Court consider that the within civil action is not barred by the legal limitation of action, the Defendants submit that equity provides a bar to this stale cause of action. This case is barred by the equitable doctrine of laches. "Laches is an equity doctrine to the effect that unreasonable delay will bar a claim if the delay is a prejudice to the defendant." Dobbs, Remedies, § 2.3 (1973). Kentucky follows this general definition of laches and will bar an otherwise valid claim if there is both (1) an unreasonable delay, and (2) a resulting prejudice to the Defendant. Both are present in this case.

As set out in the facts above, the Plaintiff's Ward is alleged to be incompetent at this time. The other person in the vehicle at the time of the accident, James R. Spurlock, recovered

from the injuries suffered in the vehicle accident, but has died from a gunshot wound. The owner of the vehicle, Charles LeMaster, Jr., now is afflicted with multiple sclerosis, partially paralyzed, clinically blind, and emotionally unstable. Finally, the vehicle itself has long since left the possession of the previous owner. Now, nearly four years after the accident, the Committee for the injured Ward brings this stale cause of action.

There is no reasonable excuse for not bringing this civil action after the Plaintiff was appointed as Committee for his Ward. On March 12, 1979, the adjudication of incompetency was complete, and the appointment of the Plaintiff as Committee for the Ward occurred on May 22, 1979. A fair reading of the exchange of correspondence between the attorney for the Plaintiff and the insurance carrier for the owner of the vehicle reveals that a major impetus for the appointment as Committee in May, 1979, was the prosecution and settlement of claims on behalf of the injured Ward. There is no question but that the Committee was aware and under a duty to bring these claims from at least May, 1979. The failure to do so was unreasonable and has prejudiced the Defendants in their ability to defend the claims of the Plaintiff.

Kentucky follows the general definition of laches and requires more than a mere delay in bringing a suit in order to invoke the doctrine of laches. Chapman v. Bradshaw, Ky. 536 S.W.2d 447 (1976). But, the defense of laches will bar in equity a claim where there is a showing that the party knew his rights and did not attempt to enforce them until the situation of the

party who set up the defense has been so changed that he cannot be restored to his former state. McMahan v. Whittlig, Ky., 310 S.W.2d 777, 781 (1958).

This is precisely the case here. The Plaintiff cannot deny that he was aware of the injury to his Ward arising out of this automobile accident from the day of his appointment as Committee and that he had both the ability and duty to prosecute claims at that time. In fact, he did so. His failure to assert the claim against the present Defendants, however, has been delayed for so long that now all the principal players in this sad scene are dead or physically incapacitated. This unreasonable delay has resulted in prejudice to the Defendant, and the application of the doctrine of laches is appropriate.

II. THE CLAIM OF THE PLAINTIFF IS BARRED BY THE RELEASE OF A JOINT TORTFEASOR.

Attached to this Memorandum is the Affidavit of Harry C. Lane, Senior Claims Examiner at Dairyland Insurance Company, Lexington, Ketucky. Filed with the Affidavits as Exhibits are copies of the correspondence between the attorney for the Plaintiff, Hon. Paul P. Burchett. The substance of these letters is as follows: On April 3, 1979, the attorney for the Plaintiff contacted the claims service for the insurance carrier on the vehicle in which the Plaintiff's Ward was injured. The letter introduces the attorney as counsel for the father of the injured ward and makes demand for nofault benefits.

From April through June, 1979, negotiations were conducted between the attorney for the Plaintiff and Dairyland Insurance Company with regard to the claims for nofault benefits

and settling the liability claim of the Plaintiff's Ward against their insured, Charles LeMaster, Jr. In fact, the letter of June 6, 1979 from Mr. Burchett sending a copy of the petition and order appointing the Plaintiff as Committee for the injured Ward states "Let's try to negotiate a settlement under the liability portion of the policy as soon as possible."

Further negotiations were had between Dairyland Insurance Company and the Plaintiff's counsel, resulting in a letter of June 22, 1979 from Mr. Burchett, which states "I will accept your statement as to the amount of insurance coverage in affect [sic] at the time of this accident. Please forward to me whatever necessary release forms which you would like to have executed." Mr. Lane states by Affidavit that a standard release form was sent to the attorney for the Committee along with a draft for the compromised settlement amount. The draft was negotiated, but the release forms were never returned.

The rule in the Commonwealth of Kentucky is well established that the "release of one joint or concurring tortfeasor serves to release them all ..." Commonwealth Department of Highways v. Cardwell, Ky., 409 S.W.2d 304 (1966). That this case still remains the law in the Commonwealth was recognized by the Court in O'Bryan v. Peterson, Ky., App., 563 S.W.2d 732 (1977) in which the Court of Appeals criticized this rule and invited the Supreme Court to reevaluate this common law principle of law. However, the Supreme Court of Kentucky declined and denied discretionary review of that case on April 25, 1978.

Where there is a release of one joint or concurring tortfeasor, all will be released unless on the face of a release it can fairly be interpreted as reserving the Plaintiff's rights against other tortfeasors. In the absence of a specific reservation of rights against other tortfeasors, the release will be treated as unconditional. Kingins v. Hurt, 344 S.W.2d 812 (1961); Biven v. Charlie's Hobby Shop, Ky., 500 S.W.2d 597 (1973). Thus, where a release is shown, it becomes incumbent upon the would be Plaintiff to prove a specific reservation of the claims against other alleged tortfeasors.

"A 'release' is defined in 66 Am. Jur., Release, section 1, as the giving up or abandoning of a claim or right to the person against whom the claim exists or the right is to be enforced or exercised. Ordinarily, we think of a release as being a contract. However, this is not necessarily so." Beech v. Deere & Co., Ky.App., 614 S.W.2d 254 (1981). The exchange of letters between the attorney for the Plaintiff and the insurer of the wouldbe Defendant, Charles LeMaster, Jr., makes clear that it was the intent of the Plaintiff to abandon the claims against Charles LeMaster, Jr. for the consideration of Nine Thousand Five Hundred ($9,500.00) Dollars. That amount was, in fact, paid to and accepted by the Plaintiff.

The failure of the Plaintiff to return the signed relase form as agreed is not fatal to the proof that a release was intended and actually given. A release is not within the statute of frauds. KRS 376.010. Under the common law, "a release need not be in writing, ..." 66 Am. Jur.2d, Release, section 8.

Although releases commonly are thought of to be formal documents containing stringent and all-inclusive language, the law is that there is required only to be shown that the claimant intended to abandon for consideration his claim against one tortfeasor. Once this is proved, either by a formal release or evidence of the release in fact, it becomes incumbent upon the Plaintiff to show that he intended to reserve the claims against any other tortfeasors. Furthermore, a release is unconditional unless otherwise specified. The failure of the Plaintiff to prove a reservation requires that the claims against other tortfeasors be barred. Commonwealth Department of Highways v. Cardwell, supra.

The correspondence attached to the Affidavit of Harry C. Lane leaves no doubt but that the Plaintiff negotiated, compromised and settled his claims against the owner of the vehicle in question. Likewise, there is no question but that for the consideration of Nine Thousand Five Hundred ($9,500.00) Dollars, the Committee gave up and abandoned his claims against the owner of the vehicle. This is a release. There is no reservation of any claims against any other tortfeasors. Therefore, under the law of the Commonwealth of Kentucky, this civil action is now barred.

IV. ISSUES OF LAW PROCEDURAL

There is a pending motion for summary judgment under FRCP 56, based upon the substantative law as expressed in this Memorandum of Law.

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By: _____
ATTORNEYS FOR DEFENDANTS

CERTIFICATE

This is to certify that a true copy of the foregoing Preliminary Trial Memorandum was duly mailed to Paul P. Burchett, Esquire, P. O. Box 897, Prestonsburg, Kentucky 41653; and Clifford B. Latta, Esquire, P. O. Box 550, Prestonsburg, Kentucky 41653; this 19th day of April, 1983.

_____
ATTORNEYS FOR DEFENDANT