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SUPREME COURT GRANTED DISCRETIONARY REVIEW MARCH 14, 2007
(FILE NO. 2006-SC-0833-DG)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002083-MR

DONNA NANNY — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 03-CI-00529

JENNIFER SMITH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

DIXON, JUDGE: This personal injury action arises out of an automobile accident between Appellant, Donna Nanny,[2] and Appellee, Jennifer Smith, which occurred on August 22, 2001, in Graves County, Kentucky. At the time of the accident, Nanny was

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Appellant's last name is also spelled Nanney throughout the record. Her signature on a document filed in the court below indicates that the correct spelling is Nanny.

insured under a policy with Kentucky Farm Bureau Insurance Company that provided basic reparations benefits (BRB), as well as additional personal injury protection coverage (PIP). Farm Bureau thereafter paid Nanny basic reparations benefits, the last payment being a check in the amount of $132.00 that was issued on October 18, 2001.

Pursuant to KRS 304.39-230(6), Nanny was required to file her action for tort liability arising out of the accident not later than two years after the injury or the last basic or added reparations benefits made, whichever occurred later. Thus, the statute of limitations would have otherwise expired on Saturday October 18, 2003, but for it falling on a weekend. On Friday October 17, 2003, Nanny personally delivered a civil complaint to the Graves County Clerk. A time date stamp indicates that the complaint was received at 2:35 p.m. However, the Clerk did not file the complaint or issue a summons on Smith until Tuesday October 21, 2003, one-day after the two-year statute of limitations had expired. KRS 304.39-230(6).

Smith thereafter filed a Motion for Summary Judgment in the Graves Circuit Court. The Court, treating the pleading as a motion to dismiss, ruled that the action was not commenced within the applicable statute of limitations and entered an order of dismissal. Nanny now appeals to this Court as a matter of right. As it is undisputed that the complaint was timely

delivered to the circuit court clerk, the sole issue is whether mere delivery to the clerk is sufficient or whether a plaintiff has an affirmative duty to see that a summons is issued within the limitations period.

Kentucky Rule of Civil Procedure 3 provides that "[a] civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." (Emphasis added). Kentucky case law dictates that the requirements of CR 3.01 be strictly enforced. Asher v. Bishop, 482 S.W.2d 769 (Ky. 1972); Osborne v. Kenacre Land Corp., 65 S.W.3d 534 (Ky. App. 2001); Gibson v. E.P.I. Corp., 940 S.W.2d 912 (Ky. App. 1997); DeLong v. DeLong, 335 S.W.2d 895 (Ky. 1960) (If the complaint is filed prior to the expiration of the period of limitations but the summons is not issued until the period of limitations has expired, the action is barred.) In comparing our civil rule to Federal Rule 4(a), the trial court herein noted:

> *West Kentucky Practice*, Volume 6 at page 12, points out that there is a difference between the Kentucky Rule and the Federal Rule. There it is stated "it has been held under FRCP 4(a) that the failure of the Clerk to issue the summons as required by that rule is not attributable to the Plaintiff, does not deprive the Court of a jurisdiction, and does not warrant dismissal of the Complaint," citing Wright & Miller, *Federal Practice and Procedure: Civil 2d §1063*. However, CR 3.01 differs from FCRP because it includes statutory language from KRS 413.250 which provides "an

> action shall be deemed commenced on the date of the first summons or process issued in good faith from the Court having jurisdiction of the cause of the action." Commencement of an action may be procedural, but the matter of setting a limitation period is legislative, and the Court has adopted in its procedure the legislative determination as to when an action commences.

In Wm. H. McGee Co. v. Liebherr America, Inc., 789 F. Supp. 861 (E.D. Ky. 1992), the Federal District Court, applying state law, held that the plaintiff's action was barred where the complaint was filed within the statutory period but the summons was not issued until the limitations period had expired. In so holding, the court rejected the plaintiff's argument that the Kentucky requirement that an action is not commenced until process is issued is not integral to the state's statute of limitations. "The Kentucky courts have consistently held that whatever statute of limitations applies, it is not tolled until summons is issued. Thus, the state courts have implicitly recognized the issuance of summons requirement as central to the tolling of the statute." Id. at 866 (Citations omitted). See also Eades v. Clark Distributing Co., Inc., 70 F.3d 441 (6th Cir. 1995), cert. denied, 517 U.S. 1157 (1996) (Under Kentucky Civil Rule 3 "[a]n action is deemed commenced not at the time of filing, but rather on the date of the first summons or process issued in good faith. . . .")

Nanny relies on a line of cases wherein it was held that although the process was defective, such defect was allowed to be corrected because the plaintiffs had acted in good faith. Jones v. Baptist Healthcare Systems, Inc., 964 S.W.2d 805 (Ky. App. 1997); Blue Grass Mining Co. v. Stamper, 267 Ky. 643, 103 S.W.2d 112 (1937); Crowe v. Miller, 467 S.W.2d 330 (Ky. 1971). Nanny argues that she certainly acted in good faith and with diligence in personally delivering the complaint to the circuit clerk on Friday October 17, 2003. While we may agree that Nanny timely delivered the complaint and presumably acted in good faith in doing so, the cases she relies upon are simply not dispositive of the issue presented herein.

In Jones v. Baptist Healthcare Systems, Inc., supra, the plaintiff successfully had the summons issued within the limitations period, but thereafter failed to attempt service of summons on the correct agent. Similarly, in Blue Grass Mining Co. v. Stamper, supra, the issue concerned the service of process, not the issuance of the summons. In fact, the Court in Stamper held, "When a party **has caused the summons to issue** in good faith, he has complied with the law and saved his right of action in respect of time, for it is the official duty of the clerk to see that process is delivered to the sheriff for service . . . ." Id. at 113 (Emphasis added). Finally, in Crowe v. Miller, supra, the complaint was filed and the summons

was issued within the limitations period, but the plaintiff thereafter mistakenly attempted to halt service of process because the named defendant was a minor.

Quite simply, Nanny's cases stand for the proposition enunciated in Roehrig v. Merchants and Businessmen's Mutual Ins. Co., 391 S.W.2d 369, 371 (Ky. 1965): "[I]f, when the summons was issued, the plaintiff had a bona fide, unequivocal intention of having it served presently or in due course or without abandonment, the summons was issued in good faith." Thus, law is settled that good faith may save a defective summons issued within the limitations period. Here, however, no summons, defective or otherwise, was issued before the statute of limitations expired on October 20, 2003. Because Kentucky CR 3 measures commencement from the date of the filing of the complaint and the issuance of a summons in good faith, Appellant's action cannot be deemed to have commenced within the two-year statute of limitations period set forth in KRS 304.39-230(6).

We are mindful that dismissal of an action is the harshest result. Even the trial court herein expressed the opinion that Nanny should have been able to rely upon CR 4.01[3] to cause the issuance of process. However, as the trial court so

[3] CR 4.01(1) provides, in pertinent part: "Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons . . . ."

found, the law in Kentucky is well-established, going back in excess of 150 years. Pindell v. Maydwell, 46 Ky. 314, 7 B. Mon. 314 (Ky. 1847). We are compelled to conclude that the determination of the limitations period is legislative in nature, and clearly does not provide discretion. As such, the trial court correctly determined that Nanny's action was not deemed commenced on the date the complaint was delivered to the clerk, but was, in fact, time barred as a result of the summons being issued after the expiration of the limitations period.

The Graves Circuit Court's Order of Dismissal is hereby affirmed.

KNOPF, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE: I respectfully dissent. I believe that Nanny has complied totally with the spirit and legislative intent of KRS 304.39-230(6) and should not be punished for the failure of the circuit clerk to perform her statutory duties and other duties as may be set out in our procedural rules.

The majority relies upon an archaic rule regarding "issuance of summons" whose purpose and usefulness has long passed in modern litigation. In olden days, attorneys prepared their own summons, and were able to obtain their issuance directly from the clerk at the time that the complaint was filed. Today, most clerks mechanically issue summons in their

computer when a complaint is filed and some will even reject a summons prepared by an attorney when filing the complaint. An attorney is thus placed at the mercy of the circuit clerk to perform ministerial tasks in accordance with applicable law.

As concerns applicable law, circuit clerks are state officers whose duties are co-extensive with the Commonwealth and who are subject to the administrative control of the Chief Justice. KRS 30A.010(2). In other words, they are one of us – part of the entire court system that is based upon the administration of justice in a fair and equitable manner. Effectively, application of this archaic rule requires attorneys not only to perform their jobs, but also to oversee the job performance of our circuit clerks. I submit that this is a responsibility of the Kentucky Supreme Court, not the attorneys. Since our highest Court has created this rule, now is the time for our Courts to revisit and abandon the rule.

As Justice Palmore often said, "common sense must not be a stranger in the house of the law." Cantrell v. Kentucky Unemployment Insurance Commission, 450 S.W.2d 235, 237 (Ky. 1970). It makes absolutely no sense for attorneys and their clients to be punished upon timely filing complaints in the clerk's office, due to the failure of clerks to promptly perform their duties. Simply put, an attorney who has delivered a complaint to a circuit clerk in timely fashion has done his or

her job – they and their client should not be penalized for a failure by our court system. The outcome is simply manifest injustice which cannot be tolerated.

If our courts are not willing to change this archaic rule at this time, then attorneys should be entitled (and encouraged) to pursue their claims (and resulting damages) on behalf of their clients against clerks who fail to faithfully perform their duties in accordance with KRS 30A.030.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Daryl T. Dixon Paducah, Kentucky	Mike Moore Paducah, Kentucky