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AUGUST 19, 2009  
(FILE NO. 2008-SC-000592-D)**

**Commonwealth of Kentucky  
Court of Appeals**

NO. 2007-CA-000647-MR

COMMONWEALTH OF KENTUCKY UNIVERSITY  
OF KENTUCKY HOSPITAL, ALBERT B.  
CHANDLER MEDICAL CENTER OF THE  
UNIVERSITY OF KENTUCKY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 02-CI-01868

YOLANDA DOUGLAS, ADMINISTRATRIX OF  
THE ESTATE OF DESHAWNA DOUGLAS; YOLANDA  
DOUGLAS, AS GRANDMOTHER AND NEXT FRIEND OF  
LEJORDAN ISAIH DOUGLAS; YOLANDA DOUGLAS,  
AS GRANDMOTHER AND NEXT FRIEND OF TOCARRA  
DOUGLAS; YOLANDA DOUGLAS, AS GRANDMOTHER AND  
NEXT FRIEND OF KEITH DOUGLAS; YOLANDA  
DOUGLAS, AS GRANDMOTHER AND NEXT FRIEND  
OF CHRISTOPHER DOUGLAS; YOLANDA DOUGLAS,  
AS GRANDMOTHER AND NEXT FRIEND OF DARAYMONE  
JOHNSON; AND THE KENTUCKY BOARD OF CLAIMS,  
ENVIRONMENT AND PUBLIC PROTECTION CABINET,  
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

ACREE, JUDGE: The Commonwealth of Kentucky, University of Kentucky Hospital, Albert B. Chandler Medical Center of the University of Kentucky (Chandler Medical Center) appeals from an order of the Fayette Circuit Court affirming a decision of the Board of Claims. The Board overruled Chandler Medical Center's motion to dismiss as untimely the claim of Yolanda Douglas as Administratrix of the Estate of DeShawna Douglas (Estate) and sustained a motion to dismiss the claims for loss of parental consortium filed on behalf of the deceased's five children. We affirm the circuit court.

DeShawna Douglass died on February 21, 1995, after being treated at Chandler Medical Center. Her estate filed a civil negligence claim against the Commonwealth of Kentucky, Chandler Medical Center, the University of Kentucky, and others in the Fayette Circuit Court on February 20, 1996, alleging medical malpractice. No claims were filed on behalf of the five minor plaintiffs at this time. The claims against Chandler Medical Center were properly dismissed in April 1998 as being barred by sovereign immunity.

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Three months later, the Estate and the five minor children filed a complaint with the Board of Claims. Chandler Medical Center sought dismissal of all claims as untimely. After briefing and hearings, the Board entered an order in March 2002, dismissing the claims of the minor children. The Estate's claim was found to be timely filed under the tolling provisions of Kentucky Revised Statutes (KRS) 413.270. The minor plaintiffs appealed the dismissal of the loss of parental consortium claims to the Fayette Circuit Court, and Chandler Medical Center cross-appealed seeking the dismissal of the Estate's claim as well.

Chandler Medical Center argued that all of the claims were barred, notwithstanding the tolling language in KRS 413.270. The circuit court's order, entered February 26, 2007, affirmed both the Board's dismissal of the claims filed on behalf of the five minor children and its refusal to dismiss the Estate's claim as untimely. Chandler Medical Center appealed; the dismissal of the claims on behalf of Douglas' children was not appealed.

On appeal, Chandler Medical Center argues that KRS 413.270 does not apply to actions against the Commonwealth. The statute reads

(1) If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

(2) As used in this section, "court" means all courts, commissions, and boards which are judicial or quasi-judicial tribunals authorized by the Constitution or statutes of the Commonwealth of Kentucky or of the United States of America.

Chandler Medical Center contends that claims properly pursued before the Board of Claims, pursuant to KRS Chapter 44, are not affected by the tolling statute.

The Board of Claims Act sets a one-year statute of limitations for filing claims against the Commonwealth. KRS 44.110(1). Section 231 of the Constitution of Kentucky accords the Commonwealth absolute immunity from suit, except under conditions set forth specifically by statute enacted by the General Assembly. Thus, Chandler Medical Center argues that the Estate's failure to file a claim with the Board within one year of Douglas' death is an absolute bar to recovery.

In support of its argument, Chandler Medical Center cites *Commonwealth Transp. Cabinet Dept. of Highways v. Abner*, 810 S.W.2d 504 (Ky. 1991), wherein the Kentucky Supreme Court held that a two-year statute of limitations for suits filed under the Motor Vehicle Reparation Act, KRS 304.39-230(6), did not override the one-year statute of limitations found in KRS 44.110(1). The Court summed up its reasoning as follows:

The Board of Claims Act is a limited waiver of sovereign immunity. K.R.S. 44.110 is part of the grant of the right to sue the Commonwealth and establishes a condition precedent to bringing an action and it must be complied with or the action is barred by sovereign immunity. K.R.S. 44.110(1) specifically states that a claim must be filed within one year and it disallows any extension beyond that year.

*Abner*, 810 S.W.2d at 504-05. Further, the Court reasoned that KRS Chapter 44 more specifically regulated suits against the Commonwealth. Thus, “[the Motor Vehicle Reparations Act] and K.R.S. 44.110 are not conflicting statutes because the Board of Claims Act provides for a condition precedent to filing an action against the Commonwealth, and if there is no compliance, sovereign immunity bars the action.” *Abner*, 810 S.W.2d. at 505.

We disagree, however, that KRS 413.270 was not intended to apply to suits against the Commonwealth. The statute provides for tolling where a court determines that it has no jurisdiction of an action, timely filed in good faith, and allows such action to be transferred to the appropriate court. KRS 413.270(1). Subsection (2) clearly defines courts as “all courts, commissions, and boards which are judicial or quasi-judicial tribunals authorized by the Constitution or statutes of the Commonwealth of Kentucky[.]” The Board of Claims, which functions as a judicial or quasi-judicial body, is clearly encompassed within this definition. Because KRS 44.072 vests “exclusive jurisdiction” to hear claims against the Commonwealth with the Board, the circuit court’s original order dismissing the Estate’s suit against Chandler Medical Center as barred by sovereign immunity amounted to a recognition of lack of jurisdiction. Thus, the dismissal of the Estate’s claim by the circuit court for lack of jurisdiction properly triggered the tolling provisions of KRS 413.270 and allowed the claim to be refiled with the Board of Claims within ninety days.

Even stronger support for this interpretation of KRS 413.270 may be found in KRS 44.110, which establishes the one-year statute of limitations for filing an action with the Board. KRS 44.110(1). Subsection (5), which deals with claimants who are under legal disability to file suit states in relevant part that, in such cases,

a guardian or next friend or committee or other qualified representative shall bring such action in the Board of Claims on behalf of such person **within the same time limitation set forth herein or the claim is barred, notwithstanding KRS 413.170 and 413.280.**

KRS 44.110(5) (emphasis supplied). Clearly, the General Assembly chose to limit the tolling provisions of KRS 413 as they applied to a person under a legal disability. No such language was added to KRS 44.110 to exempt it from the tolling provision in KRS 413.270. “[W]e are required to give the words of the statute written by the legislature their plain meaning. To do so restricts us from adding restrictive language . . . where it does not now exist.” *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984). KRS 413.270(1) specifically states that the tolling provision applies to actions commenced in “any court of this state” and we are forbidden to carve out exceptions from the plain meaning of these words.

Chandler Medical Center next contends that, even if KRS 413.270 applied to actions against the Commonwealth, the Estate failed to prove compliance with the requirement that its timely filing in the wrong court was done in good faith. KRS 413.270(1). Application of the principle of sovereign immunity to our state universities as departments or agencies of the

Commonwealth has been recognized for at least a quarter of a century. *Rooks v. University of Louisville*, 574 S.W.2d 923, 925 (Ky.App. 1978). Thus, Chandler Medical Center claims the Estate could not have believed in good faith that it could pursue a cause of action against the University of Kentucky, or the medical center which it operates, except by filing a claim with the Board of Claims under KRS 44.072. However, shortly thereafter, the issue of sovereign immunity was clouded by actions of the General Assembly, such as setting up a medical malpractice insurance fund for the University of Kentucky. *Dunlap v. University of Kentucky Student Health Services Clinic*, 716 S.W.2d 219 (Ky. 1986). In *Dunlap*, the Kentucky Supreme Court found that the existence of the medical malpractice insurance fund evinced a legislative intent to create a partial waiver of sovereign immunity, allowing a student who suffered an injury after being vaccinated for the flu, to pursue a negligence claim against the university's medical center in Fayette Circuit Court. *Dunlap*, 716 S.W.2d at 222. More recently, the Kentucky Supreme Court recognized that "the decisions of Kentucky appellate courts have not at all times been entirely consistent as to which entities are entitled to immunity derived from Section 231 of the Constitution of Kentucky[.]" *Withers v. University of Kentucky*, 939 S.W.2d 340, 344 (Ky. 1997). A year after the Estate filed suit in the Fayette Circuit Court, the *Withers* decision acknowledged that defining the extent of sovereign immunity had caused the Court to struggle for decades. Given the difficulty which this issue has presented to the highest court in our Commonwealth, we are unwilling to accept Chandler Medical Center's argument

that the Estate could not have been acting in good faith when it timely filed the original action in the Fayette Circuit Court.

For the foregoing reasons, the order of the Fayette Circuit Court affirming the Board of Claims is affirmed.

ALL CONCUR.

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