

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002542-MR

TINA TALLMAN, PERSONAL REPRESENTATIVE OF
THE ESTATE OF HAROLD G. LEE, JR., DECEASED,
AND TINA CLARK, AS NEXT FRIEND AND GUARDIAN
OF SAVANNA NICOLE LEE, A MINOR AND CHELSEY
DAWN CLARK, A MINOR

APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 06-CI-00712

CITY OF ELIZABETHTOWN AND
WILLIAM BLAND

APPELLEES

OPINION AFFIRMING

** ** * ** * **

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,¹ SENIOR JUDGE.

DIXON, JUDGE: Tina Tallman, as representative of the Estate of Harold G. Lee, Jr.,
and Tina Clark, as next friend and guardian of Lee's minor children, appeal an order of
Hardin Circuit Court granting summary judgment in favor of the City of Elizabethtown

¹ Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and Officer William Bland, an employee of the Elizabethtown Police Department. We affirm.

During the late-night hours of July 3, 2001, Lee was a passenger in a vehicle driven by Randall Babb. The two men had traveled to Elizabethtown, Kentucky from Owensboro, Kentucky. Officer Bland attempted to initiate a traffic stop after observing Babb's vehicle speeding. Babb, however, evaded the officer and a high speed chase ensued. Babb's vehicle was ultimately disabled by “stingers” placed in the roadway. Once his vehicle stopped, Babb fled from the scene on foot, and Lee remained in the passenger's seat. Officer Bland pulled up beside the Babb vehicle and quickly exited his cruiser with his gun drawn. Officer Bland commanded Lee to surrender and show his hands. Lee neither responded to nor acknowledged the officer's demand. Officer Bland crossed in front of Babb's vehicle and stepped up to the open window where Lee sat. Bland reached in the window, grabbing at Lee's shoulder. At that moment, Bland's gun discharged. The shot severed Bland's thumb and hit Lee in the head, killing him.

In June 2002, Lee's estate (“the Estate”) filed suit against the Elizabethtown Police Department (“EPD”) and Officer Bland in United States District Court for the Western District of Kentucky. Pursuant to 42 U.S.C. § 1983, the Estate alleged Lee's civil rights were violated by Officer Bland's unlawful seizure and use of deadly force. The Estate also set forth claims cognizable under Kentucky state law, and Lee's minor children claimed loss of parental consortium.

In an opinion and order rendered May 21, 2004, the district court granted summary judgment in favor of EPD and Officer Bland. *Tallman v. Elizabethtown Police Dept.*, 344 F. Supp. 2d 992 (W.D. Ky. 2004). The court determined that Officer Bland's conduct was reasonable under the circumstances and that no constitutional violation occurred. *Id.* at 996-97. The court, in granting summary judgment, dismissed the Estate's federal claims with prejudice and dismissed the state law claims without prejudice. *Id.* at 997.

In June 2004, the Estate appealed the dismissal of the § 1983 action to the United States Court of Appeals for the Sixth Circuit. In an unpublished, two-to-one decision rendered January 23, 2006, the Sixth Circuit affirmed the district court's grant of summary judgment and dismissal of the Estate's federal claims.

In April 2006, the Estate filed a wrongful death lawsuit in Hardin Circuit Court against the City of Elizabethtown (“City”) and Officer Bland. The complaint alleged Lee's death was the result of Officer Bland's negligence and the City's failure to properly train and supervise Officer Bland. Lee's minor children also claimed damages for loss of parental consortium. The City and Officer Bland filed an answer and subsequently moved for summary judgment, contending the Estate's action was barred by *res judicata* and the statute of limitations. The Estate vigorously opposed summary judgment and the parties briefed the issues before the circuit court. The court heard oral arguments on September 5 and October 10, 2006. Thereafter, on November 20, 2006, the

court granted summary judgment in favor of the City and Officer Bland. This appeal followed.

“The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. We are mindful that “[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

The Estate raises several issues before this Court. However, after thoroughly considering all of the arguments and relevant case law, we will only address the statute of limitations issue because it is dispositive to this appeal.

Pursuant to Kentucky Revised Statutes (KRS) 413.140, a one-year limitations period is generally applicable for a wrongful death cause of action. Here, however, the Estate argues the savings provision found in KRS 413.270 tolled the one-year statute of limitations on the state law claims until the Estate's federal appeal was resolved. The Estate relies on the interpretation of KRS 413.270 enunciated in *Ockerman v. Wise*, 274 S.W.2d 385 (Ky. 1955), to support its position.

We first set forth the pertinent language of the savings statute:

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.

KRS 413.270(1) (emphasis added).

In *Ockerman, supra*, the estate of an Ohio resident killed in Kentucky filed a wrongful death lawsuit in United States District Court for the Eastern District of Kentucky. *Ockerman*, 274 S.W.2d at 386. The suit was dismissed for lack of diversity of citizenship between the parties. *Id.* The estate appealed, and the federal court of appeals affirmed the district court's dismissal for lack of diversity jurisdiction. *Id.* The estate thereafter filed a complaint for wrongful death in Oldham Circuit Court. *Id.* The case ultimately came before Kentucky's then-highest Court to determine whether the savings statute allowed the estate to pursue a federal appeal following the district court's dismissal for jurisdictional reasons. *Id.* at 387. The defendant argued the estate's claim was time barred because the estate did not file a state court action within ninety days of the district court's dismissal. *Id.* The Court held:

We conclude that the judgment referred to in the statute, KRS 413.270, is **the decision which finally determines the disputed issue over the court's jurisdiction - the trial court's judgment if there is no appeal**, but the appellate court's ruling if there is an appeal.

Id. at 388 (emphasis added).

In the instant case, the Estate contends its Hardin Circuit Court complaint was timely filed within ninety days of the Sixth Circuit's decision affirming summary judgment.

In *Ockerman, supra*, the plaintiff's federal lawsuit was premised on diversity of citizenship for federal jurisdiction. *Id.* at 386. The district court determined diversity jurisdiction did not exist, and the plaintiff specifically appealed the court's jurisdictional decision. *Id.* Whereas, in the case at bar, the Estate asserted a federal civil rights action along with supplemental state claims. The district court declined to exercise jurisdiction over the state claims after dismissing the § 1983 claim. Pursuant to 28 U.S.C. § 1367(c)(3), the district court had broad discretion to decline supplemental jurisdiction once the court “ha[d] dismissed all claims over which it ha[d] original jurisdiction.” On appeal to the Sixth Circuit, the Estate argued that summary dismissal of the § 1983 claim was erroneous, but the Estate did not appeal the district court's dismissal of the supplemental state claims.

KRS 413.270(1) plainly reads that the ninety day limitations period begins when “it is adjudged that the court has no jurisdiction of the action.” Furthermore, *Ockerman, supra*, advises that the limitations period is tolled where a jurisdictional decision is disputed on appeal. *Ockerman*, 274 S.W.2d at 388. The Estate impliedly argues that, even though it did not appeal the denial of supplemental jurisdiction, its appeal of the § 1983 was jurisdictional for purposes of the savings statute. We disagree. Under the facts presented here, we are not persuaded that the Estate's appeal to the Sixth Circuit presented a jurisdictional question in line with the disputed diversity jurisdiction at issue in *Ockerman, supra*.

We conclude the issue of supplemental jurisdiction was finally decided by the district court in its order of dismissal on May 21, 2004. As the issue of jurisdiction was not appealed to the Sixth Circuit, the Estate was required to file its complaint in state court within ninety days of the district court's order. KRS 413.270(1); *Ockerman*, 274 S.W.2d at 388. It is undisputed that the Estate filed its complaint in Hardin Circuit Court on April 17, 2006. Accordingly, summary judgment was proper, as the City and Officer Bland were entitled to judgment as a matter of law.

The Estate alternatively argues that the minor children's claims for loss of parental consortium were not barred by the statute of limitations. The Estate contends that KRS 413.170(1) tolls the limitations period of a minor's state law claim until the minor reaches majority. Here, however, the children's claims were prosecuted on their behalf by their mother, as guardian and next friend. In light of the procedural history of this case, we are not persuaded that KRS 413.170(1) tolled the children's claims, and the Estate offers no other authority to support its position. Consequently, we find this argument to be without merit.

For the reasons stated herein, the trial judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEES:

J. Peter Cassidy, Jr.
Lucy A. Pett
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