RENDERED: FEBRUARY 27, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001531-MR

JUDITH TOOMEY, INDIVIDUALLY; AND
JUDITH TOOMEY, AS ADMINISTRATRIX
OF THE ESTATE OF RONALD T. TOOMEY — APPELLANT

v.

APPEAL FROM BRACKEN CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 13-CI-00037

LP AUGUSTA, LLC, D/B/A BRACKEN COUNTY
NURSING & REHABILITATION CENTER; AND
FRAN STAHL, IN HER CAPACITY AS
ADMINISTRATOR OF THE BRACKEN COUNTY
NURSING & REHABILITATION CENTER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Judith Toomey, individually and Judith Toomey, as administratrix of the estate of Ronald T. Toomey, (the estate) appeals from an

order of the Bracken Circuit Court dismissing this negligence action against LP Augusta, LLC d/b/a Bracken County Nursing & Rehabilitation Center, and Fran Stahl, in her capacity as administrator of the Bracken County Nursing & Rehabilitation Center (collectively Bracken County Nursing & Rehabilitation Center). The circuit court ruled the action was barred by the statute of limitations. The estate maintains its claims are saved from being time-barred by 28 U.S.C. § 1367(d) or KRS 413.270. We disagree and affirm.

Ronald Toomey was admitted to various facilities in the year preceding his death. In April, 2008, he was admitted to Meadowview Regional Medical Center for treatment of a broken hip. He was transferred and admitted to the Lexington VA Medical Center-Copper Division on April 19, 2008, where he underwent surgery for his hip. Ronald was later transferred to the Lexington VA Medical Center-Leestown Division VA Rehabilitation Center and subsequently back to the Copper Division. Additionally, he was treated at the University of Kentucky Chandler Medical Center for treatment of an infected leg. On July 3, 2008, Ronald was transferred to Bracken County Nursing & Rehabilitation Center. Within the same month he was transferred to Meadowview Regional Medical Center where he died on July 31, 2009.

The present action was filed against Bracken County Nursing & Rehabilitation Center on March 14, 2013, alleging personal injury, wrongful death, and loss of consortium arising from the negligent care and treatment. The Bracken Circuit Court action was filed well beyond the one-year statute of limitations

provided for in KRS 413.140. The estate contends it is nevertheless timely under 28 U.S.C. 1367(d) or KRS 413.270.

28 U.S.C. 1367(a) provides for the exercise of supplemental jurisdiction by a federal court over related state law claims in an action over which it has original jurisdiction. Subsection d provides as follows:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Kentucky has adopted a saving statute which, under certain circumstances, provides a ninety-day grace period in which to refile an action dismissed by a court of this state, including a federal court. KRS 413.270 provides:

> 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.

Because the procedural history of this case is determinative to our decision, we recite its judicial course.

On July 30, 2010, the estate filed an action in the United States District Court, Eastern District of Kentucky, naming fourteen defendants, including the United States (*Toomey I*). The complaint alleged negligence by the various VA medical and rehabilitation centers and sought compensation under the Federal Torts Claims Act (FTCA). Additionally, pursuant to 28 U.S.C. 1367(a), the estate named as defendants Meadowview Regional Medical Center and various physicians and affiliates of Meadowview Regional Medical Center and the University of Kentucky Medical Center, University of the Albert B. Chandler Medical Center, Inc., and a physician and nurse who treated Ronald while admitted to that medical center. Finally, the estate included Bracken County Nursing & Rehabilitation Center, its administrator, Fran Stahl and its director of nursing, Shelly Applegate.

The United States filed a motion to dismiss on the basis the estate had not exhausted its administrative remedies as required by 28 U.S.C. § 2675(a) of the FTCA. The estate acknowledged it had not exhausted its administrative remedies and requested the action be held in abeyance until the United States responded to its pending administrative claims. The estate's motion was unopposed and granted on September 23, 2010.

On January 20, 2011, the United States Department of Veterans' Affairs denied the estate's tort claims. On the estate's motion, *Toomey I* was returned to the federal district court's active docket.

The United States filed a motion to dismiss the *Toomey I* complaint arguing the estate had not exhausted its administrative remedies *prior* to filing its complaint. On May 13, 2011, the estate filed a motion to amend the *Toomey I* complaint stating that its administrative remedies had been exhausted and for the purpose of curing the jurisdictional defect in the original complaint. Although the district court permitted the amendment, it did not rule on whether the complaint cured any jurisdictional defects.

The United States filed a motion to dismiss the *Toomey I* amended complaint again arguing the estate was required to exhaust its administrative remedies before filing the initial complaint. By opinion and order dated March 14, 2012, the district court dismissed the federal claims without prejudice concluding that exhaustion of administrative remedies was a jurisdictional prerequisite to an action under the FTCA that could not be cured through amendment and required the filing of a new action. In dismissing the federal claims, the district court ruled it no longer retained any supplemental jurisdiction over the state law claims and dismissed those claims without prejudice. Pursuant to 28 U.S.C. 1367(d), the estate was permitted thirty days in which to file its state law claims in state court.

The estate did not file an action in state court within the thirty days. Instead, on April 11, 2012, it filed a second lawsuit in the same federal district court (*Toomey II*) naming the same defendants as in *Toomey I*. The United States filed a motion to dismiss *Toomey II* on the basis it was not filed within six months of the letter from the United States denying her FTCA claim as required by 28

U.S.C. 2401(b). The estate conceded *Toomey II* was not filed within the six-month period as required by 28 U.S.C. 2401(b). It argued the limitations period was tolled by its good faith filing of *Toomey I* which remained pending while administrative remedies were being exhausted.

On February 8, 2013, the federal district court rejected the estate's argument emphasizing that the FTCA and case law were clear that an action could not be filed against the United States under the FTCA without first exhausting administrative remedies and, therefore, the estate could not reasonably believe it could file a complaint against the United States under the FTCA. The federal court held that there was no basis to order the limitations period 28 U.S.C. 2401(b) tolled and dismissed the action against the United States. It also declined to exercise jurisdiction over the estate's state law claims and dismissed those claims without prejudice and included language that the estate had thirty days in which to file its state law claims in state court. Subsequently, the federal court amended its February 8, 2013, opinion and order and omitted any reference to 28 U.S.C. 1367(d) to clarify it was not ruling whether the estate's state law claims were time-barred.

After the estate filed this action on March 8, 2013, Bracken County Nursing & Rehabilitation Center filed a motion to dismiss the complaint upon various grounds, including that the statute of limitations had expired and that neither 28 U.S.C. 1367(d) nor KRS 413.270 saved the estate's untimely complaint. The trial court agreed that the action was time-barred and dismissed the complaint.

The estate contends that although untimely under the applicable state statute of limitations, its action is nevertheless timely because of the savings provisions contained in 28 U.S.C. 1367(d) and KRS 413.270. It points out that its state action was filed within the thirty days permitted by 28 U.S.C. 1367(d) and within ninety days permitted by KRS 413.270 from the date the federal court dismissed *Toomey II*.

Bracken County Nursing & Rehabilitation Center argues the time for filing the state action under federal and state law commenced when the federal court dismissed *Toomey I*. Additionally, it contends *Toomey I* was not commenced in good faith in view of the settled law regarding exhaustion of administrative remedies under the FTCA and even if *Toomey I* was filed in good faith, *Toomey II* was not filed in the proper court. Further, Bracken County Nursing & Rehabilitation Center disputes the estate's contention that KRS 413.270 provides for multiple grace periods. Finally, it points out that because *Toomey II* was not timely filed, it cannot be the point at which the ninety-day period provided by the Kentucky savings statute commenced.

Like many other state legislatures and the United States Congress, Kentucky's General Assembly recognized and sought to cure the "unfairness of barring a plaintiff's action solely because of a procedural error[.]" *Shircliff v. Elliott*, 384 F.2d. 947, 949 (6th Cir. 1967). However, both the federal and state statutes extend a period of limitations only under specified conditions and not

intended to indefinitely extend the time in which a prospective defendant may be subjected to litigation.

Here, the estate filed two separate actions in federal court in which it sought to have the federal court exercise supplemental jurisdiction. The question is whether the estate's time-barred state claims can be saved by its filing of this state action within thirty days of the dismissal of *Toomey II* pursuant to 28 U.S.C. 1367(d) and well within ninety days as provided for in KRS 413.270. Unfortunately for the estate, we are unable to reconcile its arguments with the language of either statute or with their purpose.

The estate points out that it filed *Toomey II* within thirty days of the dismissal of *Toomey I* which, it contends, saved its state law claims under 28 U.S.C. §1367(d). The estate's understanding of the federal statute is misguided. Although it provides for a tolling of a state statute for thirty days from the date of a federal court's dismissal of claims subject to its supplemental jurisdiction to afford the plaintiff time to file in state court, it does not permit the plaintiff to refile those same claims in federal court. As stated in *Parrish v. HBO & Co*., 85 F.Supp.2d 792, 796 (S.D.Ohio 1999), the federal statute is not a true savings statute but "operates to guarantee that plaintiffs do not lose the ability to refile their claims in *state court,* in the event that state law does not provide for the tolling of the statute of limitations during the pendency of the federal action, following the federal court's failure to exercise supplemental jurisdiction."

Likewise, KRS 413.270 cannot be invoked to save the estate's untimely claims against Bracken County Nursing & Rehabilitation Center. Two prerequisites to its application are expressly stated: The action must be "commenced in due time and in good faith." KRS 413.270. "When a plaintiff has shown the proper diligence required by the applicable statute of limitations but has filed in an improper court, the saving statute provides him a further period of time in which to find the proper court." *Shircliff,* 384 F.2d at 950. If done in good faith and within the grace period, the number of attempts to find the proper court is immaterial if the proper court is found within the grace period. *Id*. "In his quest for the proper forum a plaintiff may irritate a defendant with a prolixity of litigation, but this is not proscribed by the statute unless it is done in bad faith." *Ockerman v. Wise*, 274 S.W.2d 385, 388 (Ky. 1955).

The insurmountable defect in the estate's selected judicial route is not grounded in its failed filings in federal court but is the fact that *Toomey II* was not "commenced in due time." KRS 413.270. *Toomey II* was filed well beyond the applicable statute of limitations provided for in KRS 413.140. As stated in *Shircliff*, "successive suits do not give rise to successive ninety-day extensions." *Shircliff*, 1384 F.2d at 949. An extension can be based only on an action commenced within the applicable statute of limitations. *Id*. See also *Ockerman*, 274 S.W.2d at 388 (noting the federal action that was dismissed based on jurisdictional grounds was commenced within the applicable statute of limitations and holding the statute was tolled until the federal appellate decision).

The estate could have filed its state court action within ninety days of the dismissal of *Toomey I* and its action saved by KRS 413.270. However, it chose to refile a new action in federal court outside the applicable statute of limitations to its state law claims. Consequently, the state claims are time-barred.

Based on the foregoing, the order dismissing the complaint is affirmed.

MAZE, JUDGE, CONCURS.

ACREE, CHIEF JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, CONCURRING: Notwithstanding my great respect for the procedural "lights and buoys" that "mark the channels of safe passage" through litigation, *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977), I cannot concur with the majority in a merely perfunctory way. I agree we must affirm the Bracken Circuit Court, but only because, in a manner of speaking, all of the technical boxes have been checked to keep this case from being decided on the merits.

The Appellant estate pursued its claims in a manner virtually identical to others, including the claimant/plaintiff in *Duplan v. Harper*, 188 F.3d 1195 (10th Cir. 1999). *Duplan* is the fulcrum upon which the scales of justice are balanced in this case. And a delicate balance it is indeed.

The federal court said the distinguishing factor that allowed *Duplan* to go forward when the estate could not was that the "*government 'agreed* that the amended complaint effectively constituted a new action[.]'" (Order, March 14, 2012, p.6 (quoting *Duplan*, 188 F.3d at 1199)). Apparently the federal district court believed that in *Duplan*, without that agreement, there would have been no subject matter jurisdiction. That seems odd since we have been taught that subject matter jurisdiction cannot be conferred by agreement of the parties.

> [F]ederal courts are courts of limited jurisdiction and have a continuing obligation to examine their subject matter jurisdiction throughout the pendency of every matter before them. Parties can neither waive nor consent to subject matter jurisdiction[.]"

Michigan Employment Sec. Comm'n v. Wolverine Radio Co., Inc., 930 F.2d 1132, 1137-38 (6th Cir. 1991) (citations and footnote omitted); *Shapo v. Engle*, 463 F.3d 641, 645 (7th Cir. 2006) ("Parties cannot confer federal jurisdiction by agreement.").

Nevertheless, the federal district court dismissed the estate's case on the authority of *Duplan* that, "*as a general rule*, a premature complaint cannot be cured through amendment, but instead, plaintiff must file a new suit." *Duplan*, 188 F.3d at 1199 (emphasis added; internal quotation marks and citation omitted). Again, this seems odd because *Duplan* itself cites less authority for this general rule than for its apparent exceptions. To begin, *Duplan* cites *McNeil v. United States* – the foundational case upon which the estate's federal case was decided – as "implying that [a] new action may in certain circumstances be instituted by

document other than [a] new complaint[,]" such as an amended complaint. *Duplan*, 188 F.3d at 1200 (citing *McNeil v. U.S.*, 508 U.S. 106, 110 n. 5, 113 n. 9, 113 S.Ct. 1980 (1993) ("Again, the question whether the Court of Appeals should have liberally construed petitioner's letter of August 7, 1989, as instituting a new action is not before us. *See* n. 5, *supra*.")). Furthermore, *Duplan* includes a string citation that indicates that the amended complaint procedure is an adequate substitute for the formality of dismissing the old and filing a new civil action. *Id.* ("*Hyatt v. United States*, 968 F.Supp. 96, 99-100 (E.D.N.Y. 1997) (implicitly acknowledging that filing of amended complaint may in certain circumstances be sufficient to institute new action); *Ellis v. Hanson Natural Resources Co.*, 857 F.Supp. 766, 771 (D.Or.1994) (implying that filing of amended complaint may in certain circumstances be sufficient to institute new action), *aff'd*, 70 F.3d 1278 (9th Cir.1995) (unpublished).").

In my opinion, the motion in federal court to amend the complaint, having been filed both within the 30-day window allowed by 28 U.S.C. § 1367(d) and the six-month window allowed by 28 U.S.C. §2401(b), should have conferred jurisdiction and allowed the case to go forward in federal court with no need to consider the impact of any savings statute. But my opinion on federal law in this case is irrelevant.

The spirit behind these savings statutes is to allow claims to be heard on the merits under circumstances which will work no surprise or hardship on defendants because they had actual notice of the claim within the statutory limitations period.

See Ockerman v. Wise, 274 S.W.2d 385, 388 (Ky. 1954) (purpose of statute is "to afford a full opportunity for a hearing on the merits"). That spirit was satisfied in this case. However, I must concur for the technical reasons convincingly expressed in the majority opinion.

This Court must play the cards it is dealt; part of that hand was the federal court's determinations. I cannot find a way to say the majority opinion is incorrect, but perhaps the Kentucky Supreme Court can.

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