RENDERED: November 1, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000123-MR

CARRIE E. RICE — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 01-CI-00917

CITY OF BARBOURVILLE — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Carrie Rice has appealed from an order entered by the Knox Circuit Court on December 13, 2001, which granted the City of Barbourville's[1] motion to dismiss on the grounds that the

[1]In the trial court, the defendants in addition to the City of Barbourville included James Thompson, deceased, Mayor of Barbourville, individually and in his official capacity as Mayor of the City of Barbourville; Bert Scent; Calvin Manis; Gerald Hyde; Wilma Barnes; Danny Stark; Joe Baty, individually and in their official capacities as members of the Barbourville City Council. The notice of appeal was improper because it merely designated the appellees as "City of Barbourville, et al." CR 73.03; Yocum v. Franklin County Fiscal Court, Ky.App., 545 S.W.2d 296 (1976). It may well be that dismissal of this appeal would be appropriate for failure to name indispensable parties to the appeal. However, since this issue has not been raised by the City, in the interest of judicial economy we have chosen to dispose of the case on the merits.

action was time-barred by the statute of limitations. Having concluded that the trial court was correct in dismissing Rice's complaint, we affirm.

On October 5, 2000, Rice was seriously injured when she allegedly tripped and fell on a city sidewalk. One year later, on Friday, October 5, 2001, Rice filed a complaint in the Knox Circuit Court alleging negligence on the part of the City. The complaint was filed at approximately 3:35 p.m., and all applicable filing fees were paid at this time; however, the Knox Circuit Clerk's Office did not issue the required summons until the following Monday, October 8, 2001. The City filed a motion to dismiss on the grounds that Rice's complaint was time-barred by the one-year statute of limitations contained in KRS[2] 413.140. The trial court granted the motion to dismiss and this appeal followed.

The sole issue on appeal is whether the trial court erred by dismissing Rice's complaint as time-barred by the one-year statute of limitations. KRS 413.140 provides in relevant part:

> (1) 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][.]

[2]Kentucky Revised Statutes.

For Rice's complaint to be timely, she must have commenced her cause of action within one year after her injury occurred. The commencement of an action is governed by KRS 413.250, which provides in relevant part:

> An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action.

Similar language is found in CR[3] 3, which 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].[4] Thus, the ultimate question is whether the summons was issued by October 5, 2001.

The courts in this state have uniformly held that the issuance of the summons constitutes the commencement of an action.[5] The issuance of the summons is central to the tolling of the statute of limitations.[6] Thus, the filing of a complaint, in and of itself, does not constitute the commencement of an action within the meaning of the statute of limitations.[7]

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[3]Kentucky Rules of Civil Procedure.

[4]CR 3 is based on KRS 413.250. See 6 Kurt A. Philipps, Jr., Kentucky Practice Rule 3 (1995).

[5]Delong v. Delong, Ky., 335 S.W.2d 895, 896 (1960); Simpson v. Antrobus, 260 Ky. 641, 86 S.W.2d 544, 546 (1935); Louisville & Nashville Railroad Co. v. Napier's Adm'r, 230 Ky. 323, 19 S.W.2d 997, 999 (1929); Casey v. Newport Rolling Mill Co., 156 Ky. 623, 161 S.W. 528, 530 (1913).

[6]Wm. H. McGee & Co. v. Liebherr America, Inc., 789 F.Supp. 861, 866 (1992) (applying Kentucky law in a diversity action).

[7]"The filing of a petition without a summons being issued is (continued...)

In Casey, the former Court of Appeals addressed the distinction between the actual issuance of a summons and merely directing the clerk to issue a summons. The attorney for the plaintiff had filed an amended petition and directed the clerk of the court to issue a summons against an additional defendant within the one-year statute of limitations period required for bringing a negligence action; however, the summons was not issued until after the limitations period had expired. Pursuant to the defendant's request, the trial court dismissed the action as time-barred by the statute of limitations.[8]

The former Court of Appeals affirmed the dismissal in Casey on the grounds that an action is commenced only when the summons is issued and not by a mere request to have the summons issued.[9] The Court held that the statute and code made clear that an action is commenced by the issuance of the summons. In particular, the Court noted the distinction between directing a summons to be issued and actually causing it to be issued:

> In the one case no summons may ever issue at all; in the other case it must have been issued. If the broad rule contended for by plaintiff were adopted, it would lead to endless confusion. The commencement of an

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[7](...continued)
not the commencement of an action within the meaning of section 39 of the Civil Code of Practice and section 2524 of the Kentucky Statutes, and the statute of limitation runs until a summons is actually issued" [citations omitted]. Simpson, supra at 545-46. KS 2254 was the predecessor to KRS 413.250 and CC 39 was the predecessor to CR 3.

[8]Casey, supra at 528-29.

[9]Id. at 530.

> action would be determined by parol evidence instead of the actual issuance of the summons. Parties having the right to rely on the record, showing that no summons had been issued, would be met with the contention that the clerk had been requested to issue summons, thus making important property rights depend on an issue of veracity between the clerk and the litigant or his attorney. In our opinion, such was not the purpose of the law-making power. The statute and code make it clear that an action is commenced by the issuance of the summons, and not by a request to have the summons issued.[10]

The Court was simply unwilling to adopt a rule of law that would frustrate the very purpose of the statute and give rise to vague and ambiguous interpretations.

This general rule that a cause of action is commenced upon the issuance of the summons has been repeatedly upheld. In Simpson, supra, the former Court of Appeals held that the filing of a petition without a summons being issued is not the commencement of an action within the meaning of the statute of limitations. The Court went on to state that "the statute of limitations runs until a summons is actually issued."[11] Morever, in Delong, supra, the Court held that "[s]ince no summons was issued against the appellant until the one year statute of limitations (KRS 413.140) had run, the action is barred as to him and the judgment must be reversed."[12] In Wm. H. McGee & Co., supra, a federal case applying Kentucky law, the Court provided

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[10]Id.

[11]Simpson, supra at 546.

[12]Delong, supra at 896.

the following summary of when Kentucky's statute of limitations applies: "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" [citations omitted].[13]

It is clear from the case law that Kentucky courts have chosen to make a distinction between the actual issuance of a summons and a request or directive that one should be issued. This distinction is best understood in light of the differences evidenced in the Federal Rules of Civil Procedure governing the commencement of an action, and in Kentucky's version of the rule. Rule 3 of the Federal Rules of Civil Procedure provides that "[a] civil action is commenced by filing a complaint with the court." Thus, it is possible for an action to "commence" under Federal Rule 3 with the filing of the complaint, while the summons may be issued at a later date. The Kentucky Legislature obviously decided to take a different approach by adding the requirement that a summons be issued in good faith before an action is deemed to have commenced. It takes more than the filing of the complaint to commence an action; a summons must also be issued before an action is deemed to have commenced. Rice's position is contrary to the clear intent of our Legislature.

Rice claims that she did what was required of her to comply with the statute and that it was the malfeasance of the

[13]Wm. H. McGee, supra at 866.

clerk that resulted in the summons being issued three days after the statute of limitations had expired. Rice maintains that she did everything the law required of her by filing her complaint and by paying the clerk to issue and serve the summons by certified mail. Rice relies on CR 4.01(1) which states that "[u]pon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons. . . ." Rice argues that "forthwith" should be interpreted to mean immediately upon receipt of the complaint. Rice also points to the language of CR 4.01(1)(b), which states that the clerk is directed to "[c]ause the summons and complaint (or other initiating document), with necessary copies, to be transferred for service to any person authorized . . . to deliver them, who shall serve the summons and accompanying documents . . . ." Thus, it is the clerk's duty to cause the summons to be issued upon receipt of the complaint; and Rice would have this Court establish a rule which requires the clerk to issue a summons within an hour after receiving the complaint.[14] It is beyond the authority of this Court to establish such a rule.

Rice also claims that she acted in "good faith" by simply filing the complaint and by so doing she complied with KRS 413.250. Rice relies on the "good faith" language in KRS 413.250 and CR 3 to support her argument that she caused the summons to

[14]On October 5, 2001, the Knox Circuit Court Clerk's Office closed at 4:30 p.m. Rice filed her complaint at approximately 3:35 p.m., leaving the clerk with a little less than an hour to issue the summons.

be issued in good faith. However, this argument ignores the fact that our courts have drawn an important distinction between directing a summons to be issued and actually causing it to be issued.[15]

Rice cites Louisville & N. R. Co. v. Little,[16] for the proposition that once a "summons is actually served or put in line of service, the mere intention to have it issued is translated into a good-faith intentional action," thereby commencing the suit. Rice's reliance on Little is misplaced, however, as the case sub judice is factually distinguishable. The clerk of court in Little actually issued the summons and placed it in the hands of the plaintiff's attorney, per his request. The attorney failed to deliver the summons to the sheriff for service until after the statute of limitations had expired.[17] Thus, in Little the action was timely because a summons had been issued within the statute of limitations, it just had not been served. Rice also cites Rucker's Adm'r v. Roadway Express, Inc.,[18] in support of her argument. Rucker's Adm'r, however, presented precisely the same situation as Little. The summons was issued within the one-year limitations period, but it was not served until after the statute of limitations had

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[15]See Casey, supra at 530.

[16]264 Ky. 579, 584, 95 S.W.2d 252, 255 (1936).

[17]Id. at 254.

[18]279 Ky. 707, 131 S.W.2d 840 (1939).

expired.[19] Similarly, Rice's reliance on Blue Grass Mining Co. v. Stamper,[20] is misplaced, since in that case the summons was issued within the time allotted, but not served until after time had expired.

Rice also cites Hagy v. Allen,[21] in support of her argument that her cause of action was timely simply by her filing the complaint and paying all the fees associated with the filing prior to the expiration of the statute. Hagy, however, is factually distinguishable from the present case. In Hagy, the time period for filing suit was to expire on December 31, 1956. The plaintiff's attorney went to the clerk's office that morning to file the complaints before time expired. Much to his dismay, the clerk's office was closed. The attorney then contacted the clerk at home and offered to deliver the complaints to her residence. The clerk agreed to accommodate the attorney. Realizing that the clerk would probably not have the necessary forms for issuing summonses at her home, the attorney prepared the original and two copies of the summons with the marshal's return attached and delivered them to the clerk's residence on the evening of December 31, 1956.[22] The summonses were not

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[19]Id. at 841.

[20]267 Ky. 643, 103 S.W.2d 112, 113 (1937).

[21]153 F.Supp. 302 (E.D.Ky. 1957) (applying Kentucky law in a diversity action).

[22]In the case sub judice, the Knox Circuit Clerk's Office was open for business on October 5, 2001, and appellant filed the complaint on that date. Furthermore, the attorney in Hagy made (continued...)

issued until January 3, 1957, three days after the statute of limitations had expired.[23]

The Court in Hagy interpreted the statute broadly and deviated from the well enunciated rule that an action is commenced by the actual issuance of the summons and not by a mere request to have the summons issued.[24] The Court concluded that both law and equity justified its departure from this rule.[25] However, the case law relied upon by the Court actually provides little support for departing from this well established rule. The Court cited Louisville & N. R. Co. v. Smith's Adm'r,[26] in support of its ruling, but Smith's Adm'r involved an instance in which the clerk actually did issue the summons within the limitations period. Since the summons contained a clerical error, the Court was not willing to deprive the plaintiff of his remedy based solely on the clerk's ministerial error.[27] The Knox Circuit Clerk committed no such error.

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[22](...continued)
every effort to inform the clerk that his client's cause of action was to expire on that day. He even prepared all the necessary forms and went to the clerk's house to make sure the summons was issued on that day. Rice's attorney made no attempt to inform the clerk that his client's cause of action was to expire on that day. The clerk was in no position nor under any duty to make this determination.

[23]Id. at 304.

[24]Id. at 308-09.

[25]Id. at 309.

[26]87 Ky. 501, 9 S.W. 493 (1888).

[27]Smith's Adm'r, supra at 495.

Furthermore, the remaining cases cited by the Court in Hagy involved instances which were factually distinguishable from the present case.[28] In the case sub judice, the summons was not issued within the one-year time period as required by the statute. Thus, although Hagy does lend support to Rice's position, it was an aberration from established Kentucky case law. The language of KRS 413.250 and CR 3 is unambiguous and the Kentucky courts have been consistent in its application.

Accordingly, since Rice failed to meet the requirements of the statute of limitations as the summons was not issued until the limitations period had expired, the Knox Circuit Court's order dismissing the action is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dan Partin
Harlan, Kentucky

BRIEF FOR APPELLEE:

P. Kevin Moore
Lexington, Kentucky

[28]See Hausman's Administrator v. Poehlman, 314 Ky. 453, 236 S.W.2d 259 (1951); and Prewitt v. Caudill, 250 Ky. 698, 63 S.W.2d 954 (1933). In Hausman's Adm'r, the summons was actually issued within the limitations period, just not served. Prewitt involved an extremely odd set of circumstances in which the clerk actually left the state the evening before the statute of limitations was set to expire in an attempt to thwart the plaintiff (a circuit judge) from filing his complaint and from causing the summons to be issued within the limitations period. The plaintiff actually appeared at the clerk's office at 10:00 a.m. on the date the claim was set to expire. He was unable to find the clerk until after time had expired.