IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2021-SA-00036-COA

JOY RENEE KEEVER **APPELLANT**

v.

THE BOARD OF TRUSTEES FOR MISSISSIPPI INSTITUTIONS OF HIGHER LEARNING AND THE UNIVERSITY OF MISSISSIPPI **APPELLEES**

DATE OF JUDGMENT:	12/07/2020
TRIAL JUDGE:	HON. KENT E. SMITH
COURT FROM WHICH APPEALED:	LAFAYETTE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WAYNE E. FERRELL JR.
ATTORNEYS FOR APPELLEES:	J. CAL MAYO JR. SARAH KATHERINE EMBRY JOHN ANDREW MAULDIN
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	REVERSED AND REMANDED - 07/19/2022
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE WILSON, P.J., WESTBROOKS AND LAWRENCE, JJ.

WILSON, P.J., FOR THE COURT:

¶1. Joy Keever was injured while visiting the University of Mississippi on a business trip and later sued the University and the Board of Trustees for the Mississippi Institutions of Higher Learning (IHL) under the Mississippi Tort Claims Act (MTCA). In a prior appeal, this Court affirmed the dismissal of Keever's complaint because her pre-suit notice of claim did not satisfy the requirements of the MTCA, but we held that the dismissal was without prejudice because Keever's filing and proper service of her complaint tolled the statute of limitations. *Keever v. Miss. Insts. of Higher Learning*, 309 So. 3d 460 (Miss. Ct. App. 2019)

("*Keever I*"), *cert. denied*, 289 So. 3d 312 (Miss. 2020). Before the appellate mandate issued in *Keever I*, Keever filed a stipulation of voluntary dismissal in the circuit court in *Keever I* and then served the defendants with new notices of claims. Later, she also filed a new complaint. The defendants moved to dismiss, arguing that the new complaint was barred by the MTCA's statute of limitations and discretionary-function exemption and failed to state a claim against IHL. The circuit court granted the defendants' motion based on the statute of limitations. Keever appealed.

¶2. For the reasons discussed below, we hold that Keever's complaint is not barred by the statute of limitations or otherwise subject to dismissal pursuant to Mississippi Rule of Civil Procedure 12(b)(6). Therefore, we reverse and remand the case for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶3. According to her complaint, Keever and a colleague visited the University's campus on March 8, 2013, on a business trip. They met with University officials and then attended a baseball game at the University's invitation. After the game, as they were walking back to their car on a "temporary road," a four-wheel ATV driven by an employee of the defendants suddenly drove up behind them. Keever jumped out of the way to avoid being hit, tripped, and fell to the ground, crushing the radius and ulna of her left forearm.

¶4. In July 2013, Keever's prior attorney sent a letter to the University's director of human resources regarding Keever's injuries and claim against the University. However, the letter did not reference the MTCA, nor did it comply with the MTCA's pre-suit notice

requirements. *See* Miss. Code Ann. § 11-46-11(1)-(2) (Rev. 2019). On March 3, 2014, Keever's current attorney sent a notice of claim to the University and IHL.

¶5. On March 7, 2014, Keever sued the University and IHL in the Hinds County Circuit Court. Keever alleged that her injuries were caused by the negligent operation of the ATV, the lack of lighting and other dangerous conditions on the temporary road, and the defendants' negligent hiring, training, and supervision of their employees. The defendants moved to transfer venue to the Lafayette County Circuit Court and moved to dismiss the complaint, arguing that Keever failed to comply with the MTCA's pre-suit notice requirements. The Hinds County Circuit Court granted the defendants' motion to transfer the case, and the Lafayette County Circuit Court subsequently granted the defendants' motion to dismiss for failure to comply with the MTCA's pre-suit notice requirements. Keever appealed.[1]

¶6. On appeal, this Court affirmed the dismissal of Keever's complaint for failure to comply with the MTCA's pre-suit notice requirements. *Keever I*, 309 So. 3d at 462 (¶6). However, we held that the dismissal was without prejudice because Keever's complaint was filed within one year of the accrual of her cause of action and tolled the statute of limitations. *Id.* Keever filed a petition for writ of certiorari, which the Mississippi Supreme Court denied on February 6, 2020. The appellate mandate issued on February 27, 2020.

¶7. On February 18, 2020—after the Mississippi Supreme Court had denied certiorari but

[1] This is a simplified version of the procedural history leading up to the first appeal in this case. Additional details are provided in this Court's prior opinion, *Keever I*, 309 So. 3d at 462 (¶¶3-5), but are not relevant to the issues in this appeal.

before the appellate mandate had issued—Keever filed a "Stipulation of Voluntary Dismissal . . . Without Prejudice" in the circuit court in *Keever I*. On the same day, Keever delivered notice-of-claim letters to the Attorney General, the University, and IHL. On May 26, 2020, Keever filed a new complaint against the University and IHL in the Lafayette County Circuit Court, thereby commencing a new action ("*Keever II*"). The new complaint's allegations and claims against the University and IHL were substantially similar to those in Keever's original complaint. The defendants responded with a motion to dismiss, arguing that the new complaint was barred by the MTCA's statute of limitations and discretionary-function exemption and failed to state a claim against IHL.

¶8. The circuit court dismissed the case based on the statute of limitations. The court held that Keever's new complaint was untimely for two reasons: (1) the statute of limitations was not tolled while *Keever I* was pending because Keever voluntarily dismissed that action; and (2) Keever's new pre-suit notices were ineffective and failed to toll the statute of limitations because they were served while *Keever I* was still pending. Therefore, the circuit court dismissed *Keever II* with prejudice. Keever filed a notice of appeal.

ANALYSIS

¶9. "A dismissal based on the statute of limitations presents a question of law that this Court reviews de novo." *Stacks v. Smith*, 291 So. 3d 809, 813 (¶10) (Miss. Ct. App. 2020). Likewise, "[a] motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted raises an issue of law, which is reviewed de novo." *City of Meridian v. $104,960.00 U.S. Currency*, 231 So. 3d 972, 974 (¶8) (Miss. 2017). Our "[r]eview is

limited to the face of the [complaint], and [its] allegations must be accepted as true." *Id.* "The motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim." *Id.*

I. The complaint cannot be dismissed based on the statute of limitations.

¶10. Under the MTCA, a person with a claim against a governmental entity "must file a notice of claim with the chief executive officer of the governmental entity" at least ninety days prior to filing suit. Miss. Code Ann. § 11-46-11(1). In addition, actions brought under the MTCA must be commenced within one year of the tortious conduct on which the action is based. *Id.* § 11-46-11(3)(a). If a notice of claim is filed within that one-year period, the statute of limitations will be tolled for ninety-five days following the chief executive officer's receipt of the notice of claim. *Id.* A "properly served complaint" will also "serve to toll the statute of limitations" even if a court later determines that the complaint was "wanting of proper pre-suit notice." *Price v. Clark*, 21 So. 3d 509, 522 (¶30) (Miss. 2009). Thus, in *Keever I*, this Court held that Keever's claims against the University and IHL were not yet barred by the statute of limitations—or subject to dismissal *with* prejudice—because Keever had filed and properly served a complaint within the one-year statute of limitations. *Keever I*, 309 So. 3d at 465 (¶14). Nonetheless, the defendants argue that Keever's claims are *now* barred by the statute of limitations because after this Court's decision in *Keever I*, Keever (1) voluntarily dismissed *Keever I* and (2) served new pre-suit notices while *Keever I* was still pending on appeal. We address these two issues in turn below.

A. Keever's "Stipulation of Voluntary Dismissal" was

ineffective and therefore has no effect on the statute of limitations.

¶11. As the circuit court noted, the Mississippi Supreme Court has held that "a voluntary dismissal without prejudice does not deprive the defendant of any defense he may be entitled to make to the new suit, nor confer any new right or advantage on the complainant (plaintiff), and hence *it will not have the effect of excepting from the period prescribed by the statute of limitations, the time during which that suit was pending*." *Koestler v. Miss. Baptist Health Sys. Inc.*, 45 So. 3d 280, 282-83 (¶9) (Miss. 2010) (quoting *Marshall v. Kansas City S. Rys. Co.*, 7 So. 3d 210, 213 (¶15) (Miss. 2009)). As discussed above, after this Court's decision in *Keever I*—but prior to the issuance of the appellate mandate—Keever filed a notice of voluntary dismissal in the circuit court. Based on Keever's notice of voluntary dismissal, the circuit court concluded that the statute of limitations was not tolled during the pendency of *Keever I*—and that Keever's new complaint is barred by the statute of limitations.

¶12. We conclude that the circuit court erred. To begin with, there is a strong argument that we should treat the dismissal in *Keever I* as a dismissal for failure to comply with the MTCA's pre-suit notice requirements rather than a truly "voluntary" dismissal by Keever. After all, in *Keever I*, Keever steadfastly argued that she had served proper pre-suit notice and that her complaint should *not* be dismissed. Keever filed her notice of voluntary dismissal in *Keever I* only after the Mississippi Supreme Court had denied her petition for writ of certiorari. As a practical matter, Keever did not "voluntarily" dismiss her complaint in *Keever I*. Rather, she was only attempting to comply with this Court's ruling that her complaint had to be dismissed without prejudice. *See Marshall*, 7 So. 3d at 214-16 (¶¶18-28)

("consider[ing] the record as a whole" and finding that a technically "voluntary" dismissal should be treated as a dismissal for lack of subject matter jurisdiction for statute-of-limitations purposes).

¶13. In any event, we need not decide how the dismissal should be characterized because Keever's notice of voluntary dismissal was ineffective under our Rules of Civil Procedure. Under Rule 41(a), a plaintiff's ability to dismiss a case unilaterally "by filing a notice of dismissal" ends when an answer is served. M.R.C.P. 41(a)(1)(i). In *Keever I*, the defendants filed and served an answer in 2014. Accordingly, in 2020, Keever lacked the ability to file a unilateral notice of voluntary dismissal, and her attempt to do so had no legal effect. The only other procedures by which a plaintiff may voluntarily dismiss a case are "by filing a stipulation of dismissal signed by all parties who have appeared in the action" or pursuant to an "order of the court . . . upon such terms and conditions as the court deems proper." M.R.C.P. 41(a)(1)(ii) & (2). In *Keever I*, there was no stipulation signed by all parties, nor did the court ever enter an order of dismissal. In short, there was no effective voluntary dismissal in *Keever I*. Therefore, our holding in *Keever I* stands and remains applicable here: Keever's filing and proper service of her complaint in *Keever I* "tolled the statute of limitations" during the pendency of that action. *Keever I*, 309 So. 3d at 465 (¶14).

¶14. This means that the complaint in *Keever II* was filed within the statute of limitations. Although Keever filed her original complaint only one day before the statute of limitations expired, that complaint served to toll the statute of limitations until February 27, 2020, when the appellate mandate issued in *Keever I*. In addition, the statute of limitations was tolled for

ninety-five days after Keever served her new notices of claims on February 18, 2020. *See* Miss. Code Ann. § 11-46-11(3)(a). The ninety-fifth day was Saturday, May 23, 2020, and the following Monday was Memorial Day, a state holiday. Keever filed her complaint in *Keever II* within the statute of limitations on Tuesday, May 26, 2020. *See* M.R.C.P. 6(a).

B. Keever's new notices of claims satisfied the MTCA's pre-suit notice requirements with respect to *Keever II*.

¶15. The circuit court also held that "even if [Keever] had not voluntarily dismissed [*Keever I*], the statute of limitations would still bar this action" because Keever had served her new notices of claims before the mandate issued in *Keever I*—i.e., while *Keever I* "was still pending."[2] The court reasoned "that a notice served during the pendency of litigation does not satisfy MTCA pre-suit notice requirements and therefore does not toll the statute of limitations." The court further reasoned that because Keever's new notices of claims did not toll the statute of limitations, the limitations period began running again when the appellate mandate issued in *Keever I*, and it expired one day later—well before Keever filed her complaint in *Keever II*.

¶16. We disagree with the circuit court's conclusion on this point as well. The MTCA provides that a plaintiff must file a notice of claim "at least ninety (90) days *before* instituting suit." Miss. Code Ann. § 11-46-11(1) (emphasis added). Therefore, this Court and the Supreme Court have held that "'notice-of-claim letters . . . filed after the suit is commenced

[2] To be clear, by the time Keever served her new notices of claims, this Court had held that *Keever I* had to be dismissed without prejudice, and the Supreme Court had denied Keever's petition for writ of certiorari. *Keever I* remained pending only because the mandate had not issued.

will not constitute valid notice or prevent dismissal of a suit'" and that "[a] plaintiff's 'failure to provide proper statutory notice cannot be cured by serving notice-of-claim letters after a complaint is filed.'" *Jones v. Miss. Insts. of Higher Learning*, 264 So. 3d 9, 27 (¶54) (Miss. Ct. App. 2018) (quoting *Price*, 21 So. 3d at 522 (¶¶29-30)). However, our cases merely hold that a notice of claim cannot provide the requisite notice for a complaint *previously filed* without proper notice. *Price*, 21 So. 3d at 522 (¶¶29-30); *Jones*, 264 So. 3d at 27 (¶¶54-55). Neither this Court nor the Supreme Court has ever held that the mere pendency of a case will prevent a plaintiff from serving a new notice of claim, waiting at least ninety days, and then filing a new complaint.

¶17. Here, Keever complied with the MTCA's pre-suit notice requirements by filing her new notices of claims at least ninety days before she filed her complaint in *Keever II*. Miss. Code Ann. § 11-46-11(1). Accordingly, as explained above, her new notices of claims tolled the statute of limitations for ninety-five days, *id.* § 11-46-11(3)(a), and she filed her complaint in *Keever II* within the statute of limitations.

II. The complaint cannot be dismissed based on the MTCA's discretionary-function exemption.

¶18. The defendants also argue that Keever's complaint should be dismissed based on the MTCA's discretionary-function exemption. *See* Miss. Code Ann. § 11-46-9(1)(d) (Rev. 2019). The circuit court did not address this issue because it dismissed the complaint based on the statute of limitations. However, the defendants are entitled to raise the issue as an alternative ground for affirmance because they argued the point in the circuit court. *See Brocato v. Miss. Publishers Corp.*, 503 So. 2d 241, 244 (Miss. 1987).

¶19. The MTCA begins by broadly providing that the State and its political subdivisions are immune from liability for any torts committed by the State, its political subdivisions, or their employees. Miss. Code Ann. § 11-46-3 (Rev. 2019). Then, subject to certain exceptions and limitations, the MTCA "waive[s]" that sovereign immunity with respect to "claims for money damages arising out of the torts of [the State and its political subdivisions] and the torts of their employees while acting within the course and scope of their employment." *Id.* § 11-46-5(1) (Rev. 2019). Finally, the MTCA provides a lengthy list of "exemptions" from its waiver of sovereign immunity, which effectively reinstates immunity for certain types of claims. *Id.* § 11-46-9(1). One of these exemptions is the discretionary-function exemption, which states as follows:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

Id. § 11-46-9(1)(d).

¶20. Under *Wilcher v. Lincoln County Board of Supervisors*, 243 So. 3d 177 (Miss. 2018), we apply a two-part "public-policy function test" to determine whether the discretionary-function exemption requires dismissal of claims against a governmental entity. *Id.* at 187 (¶30). Under this test, "a governmental entity enjoy[s] discretionary-function immunity" "[*o*]*nly* when" (1) "the allegedly tortious act giving rise to the claim" "involved an element of choice or judgment," *and* (2) "that choice or judgment involved social, economic, or political-policy considerations." *Id.* (emphasis added). If both prongs of the test are not met,

the discretionary-function exemption does not apply. *Id.* "Because discretionary-function immunity protects only governmental actions and decisions based on considerations of public policy, when applying the discretionary-function exception, this Court must distinguish between *real policy decisions* implicating governmental functions and *simple acts of negligence* which injure innocent citizens." *Id.* at 188 (¶34) (emphasis added) (quotation marks omitted). When the complaint alleges "simple acts of negligence" that do not amount to policy decisions, the complaint cannot be dismissed based on the discretionary-function exemption. *Id.* at (¶35).

¶21. Here, Keever's complaint alleges simple acts of negligence that have nothing to do with policy. For example, Keever alleges that an employee of the defendants was negligent when he drove an ATV at night on a temporary roadway "at a high rate of speed and without headlights." Keever alleges that this employee suddenly drove up behind her and forced her to "leap out of the way," causing her injuries. The negligent operation of an ATV does not implicate any social, economic, or political policy considerations. Therefore, Keever has stated a viable claim for relief under the MTCA, and her complaint cannot be dismissed pursuant to the discretionary-function exemption and Mississippi Rule of Civil Procedure 12(b)(6). Given that Keever has stated a viable claim for relief, we decline to parse the remaining allegations of her complaint to decide which other allegations of negligence may or may not implicate the discretionary-function exemption. Those issues can be raised in a motion for summary judgment or at trial.

III. IHL is not entitled to dismissal at this stage of the litigation.

¶22. In the alternative, the defendants also argue that we should affirm the dismissal of IHL because the complaint fails to state a claim against IHL. Although the circuit court did not address this issue, the defendants raised and argued it in the circuit court.

¶23. We recognize that for purposes of the MTCA, the University is recognized as a legal entity distinct from IHL. *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 988 (¶56) (Miss. 2004). Nonetheless, we cannot say that IHL is entitled to dismissal at this stage. Among other things, the complaint alleges that the ATV driver was "an employee or representative of the Defendants." Although it seems unlikely that the ATV driver was an employee of IHL rather than just the University, our "[r]eview is limited to the face of the [complaint], and [its] allegations must be accepted as true." *City of Meridian*, 231 So. 3d at 974 (¶8). Accepting the complaint's allegations as true, we cannot say that "it appears beyond a reasonable doubt that [Keever] will be unable to prove any set of facts in support of [her] claim" against IHL. *Id.* Therefore, we cannot say that IHL is entitled to dismissal pursuant to Rule 12(b)(6). *Id.* This issue also can be reasserted in a motion for summary judgment or at trial.

CONCLUSION

¶24. For the reasons discussed above, Keever's complaint is not barred by the statute of limitations or otherwise subject to dismissal pursuant to Rule 12(b)(6). Therefore, the circuit court's order granting dismissal is reversed, and this case is remanded for further proceedings consistent with this opinion.

¶25. **REVERSED AND REMANDED.**

BARNES, C.J., CARLTON, P.J., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE, McCARTY, SMITH AND EMFINGER, JJ., CONCUR.