COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2006-SC-000833-DG
(2005-CA-002083)

DONNA NANNY, APPELLANT,

VS. **BRIEF OF APPELLEE SMITH**

JENNIFER SMITH, APPELLEE.

CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true copy of the foregoing was this the 9th day of July, 2007 placed in the U.S. Mail, postage prepaid to: **Daryl Dixon, Esq.**, P.O. Box 1762, Paducah, Kentucky 42002-1762, Attorney for Appellant; **Hon. Timothy Stark**, Graves Circuit Judge, Graves County Courthouse, 100 E. Broadway, Mayfield, Kentucky 42066; **Clerk, Court of Appeals**, 360 Democrat Drive, Frankfort, Kentucky 40601; and 10 copies have been sent via Federal Express to, and filed with, **Susan Stokley Clary, Clerk of the Supreme Court of Kentucky**, Room 209, State Capitol, 700 Capital Avenue, Frankfort, Kentucky 40601-3488.

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee Smith agrees that *the record* is clear and that the applicable law has been adequately presented by briefs of the parties. However, should the Court wish to hear oral arguments prior to ruling on the matter, Appellee is prepared to do so.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

I. COUNTERSTATEMENT OF THE CASE

1. On August 22, 2001, Donna Nanny was involved in an automobile incident in which she claims she was rearended by Smith. There was no damage to the vehicles (if the nudge even occurred). Ms. Nanny reported a claim for payment of reparation benefits which she related to the incident.

2. In response to Ms. Nanny's claim, Kentucky Farm Bureau Mutual Insurance Company, her PIP carrier, paid to or on her behalf several medical bills, the last PIP payment being made on October 18, 2001.

3. Appellant Nanny attempted to initiate a personal injury lawsuit against Appellee over two years after the incident. The action had to be commenced by October 20, 2003 since October 18, 2003 (the two year anniversary from the date of the last PIP payment) fell on a Saturday. The Civil Summons for Appellee Smith was issued by the Graves Circuit Court Clerk on Tuesday, ***October 21, 2003.*** Likewise, the Complaint of Plaintiff Donna Nanny was stamped filed in the record on Tuesday, ***October 21, 2003.***

4. Appellant Nanny has since claimed that she personally delivered the Complaint to the Graves Circuit Court and received a receipt stamped October 17, 2003. However, Ms. Nanny did not ask the Clerk to issue summons in order to commence the action on that date despite the time sensitive nature of the transaction.

5. Nanny makes several false assertions in her Brief that are not supported by the record on appeal. First, she implies the Clerk accepted summons from her. [See Appellant's Brief, p. 7]. That is not true. She did not prepare and deliver a summons to the Clerk. Second, Nanny makes the "after the fact" implication that she requested issuance of summons and further claims that the Clerk "represented that the summons would be issued within the limitations period." [Appellant's Brief, p. 8 and 15]. Appellant's contention is absolutely false! There is NO EVIDENCE OF RECORD to support her allegation. [The Court should note that Nanny filed an affidavit with her response to Appellee's motion for summary judgment with the Graves Circuit Court in support of her position, but made no such claims back then. A copy of her affidavit is attached in the Appendix.]

6. Appellant Nanny did not use the Court of Justice website (*http://courts.ky.gov/forms/formslibrarybycategory.htm*) and prepare a summons to deliver to the Clerk with the Complaint. Furthermore, she did not prepare a summons from forms available in the Clerk's office. Judge Stark correctly noted in his Opinion and Order, "Here, however, we do not have a summons prepared and delivered, a request to deliver summons, or a relaxed Federal Standard." On the website, the Civil Summons is Form Number 105 and is available to the public. The user just fills in the blanks. It is very easy to prepare. [See Appendix].

II. ARGUMENT

APPELLANT HAD TWO YEARS FROM THE DATE OF THE LAST PIP PAYMENT IN ORDER TO FILE HER PERSONAL INJURY ACTION.

KRS 304.39-230 (6) provides that an action for tort liability arising out of an automobile accident not abolished by KRS 304.39-060 may be commenced not later than two years after the injury or the death or the last basic or added reparation benefits payment, whichever later occurs. The Kentucky Supreme Court confirmed the validity of this statute and expressly provided that a person has two years after the last payment of PIP benefits in which to file an action for tort liability arising out of an automobile accident without regard to whether such benefits are first claimed or first paid within two years of the date of the injury. *Crenshaw v. Weinberg*, Ky., 805 S.W.2d 129 (1991). Establishment of a limitation period is legislative in nature. Here, the action was commenced beyond the statute of limitations established by the legislature.

THE LAW IN KENTUCKY REGARDING COMMENCING A CIVIL ACTION CARRIES OVER 150 YEARS OF CONTROLLING AUTHORITY.

The law in Kentucky regarding the commencement of a legal action within the appropriate statute of limitations is well-settled.

KRS 413.250 provides "an action shall be deemed commenced on date of the first summons or process issued in good faith from the Court having jurisdiction of

the cause of action." The legislature set forth the applicable two year limitation period. KRS 304.39-230(6). It also recognized and established that commencement of an action is marked by the date of issuance of the summons.

Kentucky Rule of Civil Procedure 3.01 agrees, "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." Appellant notes that the Rules of Civil Procedure supplanted the Code which required "*causing* a summons to be issued" (a requirement also stated in post-Code cases), but the statutes which set forth the commencement of an action for purposes of the statute of limitations (KRS 413.250 and Section 2524 of the old Kentucky Statutes) are the same.

Kentucky case law dictates that the requirements of CR 3.01 and KRS 413.250 be strictly enforced. The Court of Appeals recognized and relied upon the following cases, just to name a few: *Asher v. Bishop*, Ky., 482 S.W.2d 769 (1972); *Osborne v. Kenacre Land Corp.*, Ky. App., 65 S.W.3d 534 (2001); *Gibson v. E.P.I. Corp.*, Ky. App., 940 S.W.2d 912 (1997); *DeLong v. DeLong*, Ky., 335 S.W.2d 895 (1960). The Court of Appeals recognized and cited additional federal cases acknowledging this rule, too. *Wm. H. McGee v. Liebherr America, Inc.*, 789 F.Supp. 861 (E.D. Ky. 1992); *Eades v. Clark Distributing Co., Inc.*, 70 F.3d 441 (6th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996). The case law, civil rules and statutes are in agreement with Appellee Smith, Judge Stark and the Court of

Appeals.

The Trial Court recognized the well-established law that it was the duty of the Appellant to have the summons issued by the Clerk, not merely to request issuance. Judge Stark further recognized that there is no evidence of such a request from Nanny in the record in this case. In *Casey v. Newport Rolling Mill Co.*, Ky., 156 Ky. 623, 161 S.W. 528, 530 (1913), the question before the Court was whether the "mere direction to the clerk to issue a summons...was sufficient compliance" to commence an action within the statute of limitations. The Court concluded that the law is clear that an action is commenced by the issuance of summons, not merely a request that the clerk issue summons.

Specifically in *Casey*, the actionable injury occurred on September 3, 1910. On November 23, 1911, an attorney for the plaintiff filed an affidavit claiming that: on February 17, 1911, the plaintiff delivered an amended complaint to the clerk naming Newport Rolling Mill as a defendant, and that on February 20, 1911 he requested and directed the clerk of the court to issue summons for Newport. *Id.* at 528. The clerk did not issue summons until November 23, 1911, ***over 8 months after the request***, and it was served on the following day. The Court dismissed the case because the action was not commenced within the statute of limitations. The high Court of Kentucky stated:

The cases relied on do not sustain the contention that the mere

> direction to the clerk to issue summons is a commencement of the action against a defendant who, as a matter of fact, is not summoned at all. Indeed, there is a wide difference 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 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 lawmaking 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***. *Id.* at 530.

Thus, it is the duty of the litigant initiating proceedings to file the complaint AND see to it that the clerk issues summons in a timely fashion. The rule is long settled and goes back in excess of 150 years. *Pindell v. Maydwell*, 46 Ky. 314, 7 B.Mon. 314 (Ky. 1847). In contrast, Nanny did not even direct the Clerk to issue summons to commence the action. Summons was not issued until after the deadline. Accordingly, the trial court dismissed Appellant Nanny's cause of action.

Appellant incorrectly claims that the Trial Court and Court of Appeals rely upon a case that is outdated and 150 years old. To the contrary, the string of cases relied upon by Appellee, the Trial Court and the Court of Appeals dates back over 150 years, at least. Appellant simply groans under the weight of over 150 years of legal authority that is against her and asks this Court to change the law for her.

After citing a case from 1917, Nanny quips, "Appellant feels that if she can raise a defense based on cases almost a century old, then she may begin to speak a language the lower Courts can understand." [Appellant's Brief p. 14]. To the contrary, there is no doubt Judge Stark and the Court of Appeals know the law and respect precedent.

Appellant blames the Clerk and even accuses the Supreme Court of improper oversight of the Clerk. However, Appellant herself was the one who neglected to take any steps whatsoever to ensure that the summons was issued to commence the action in a timely fashion. ***Issuance of summons is easy to accomplish***. In the past if you were filing near the deadline, you just asked the Clerk to prepare and issue summons as you stood there so that you would ensure timely commencement of the action and have a copy of the issued summons for your file. Alternatively, you could pick up a form Civil Summons from the Clerk's office and prepare the summons in advance, then ask the Clerk to sign and issue the summons. You can still do it that way.

Today, the Court has made it even easier. You can just get on the Court of Justice website and prepare the summons using the AOC Form online. Then, the summons can be delivered to the Clerk's office with the complaint and issued by the Clerk when the initiating pleadings are filed and filing fees are paid. Nanny admits that "she was under the impression that it was the clerk's duty to prepare

such documents." [Appellant's Brief, p. 10]. However, it is only the Clerk's duty to issue the summons, even though most clerks in Western Kentucky will voluntarily prepare the summons as well as issue it. Here, Appellant chose not to prepare a summons and present it to the Clerk when she filed the complaint.

There is also no evidence of record that Nanny requested the Clerk to issue summons in order to commence the action (contrary to implications in her Brief). ***That was her obligation***. Furthermore, there is certainly no evidence in the record that the Graves Circuit Clerk "represented that the summons would be issued within the limitations period" as Nanny now falsely claims. In hindsight, Nanny should have requested the Clerk to issue summons and seen to it that the action was commenced in a timely fashion before she left the Clerk's office. She did not.

Appellant now places her hopes on *Hagy v. Allen*, 153 F.Supp. 302 (E.D.Ky. 1957), a Federal District Court opinion that is not binding on this Court and is no more than a lone federal judge trying to predict what the Kentucky appellate court would have done under the circumstances of that case. *Hagy* is easily distinguished on the facts. Appellant recognizes in her Brief what the district judge in *Hagy* stated over and over in the opinion; that the plaintiff in that case "had done everything humanly possible to commence the action." *Id.* at 309.

In *Hagy*, the attorney found the Clerk's office closed when he went to file his client's case so he prepared his complaint ***and typed multiple summonses,***

delivered them to the Federal District Court Clerk's home prior to the deadline, filed them with the Clerk at her home and ***requested that the summonses be issued by the Clerk***. Apparently the Clerk complied with the request and signed and dated the typed summonses prepared by the attorney within the deadline. The Court further noted that after a couple of days back in the office and beyond the deadline, the Clerk curiously "substituted [her own] printed summonses for the typed summonses" which had been prepared and delivered by the attorney and dated her own printed summonses after the deadline. *Id.* at 304. Thus, a subsequent clerical error or typo on the subsequently prepared replacement summonses was a critical fact. Perhaps the Clerk preferred her own forms over the typed summons prepared by the party. Who knows? The point is that Hagy actually did everything humanly possible to commence that action; much more than Appellant Nanny did in this case. Nanny tries to claim she did everything humanly possible and that circumstances were beyond her control. That is simply not true. Nanny merely dropped the complaint off at the Clerk's office, paid the filing fees and left it to the Clerk to issue summons if and when she was able to get to it. In stark contrast to *Hagy*, Nanny did NOT prepare and deliver a summons, request issuance of summons or insist upon causing the issuance of the summons by the Clerk and stay there until it was done.

Appellant cites *Louisville & N.R. Co. v. Smith's Adm'r*, 87 Ky. 501, 9 S.W.

493 (Ky.App. 1888) several times, but fails to note a critical factual difference. In that case, the petition was filed and summons was issued and even served within the statute of limitations, but the clerk mistakenly summoned the defendant to the next term of court. *Id.* The court did not dismiss the plaintiff's case because the petition was filed and summons issued in a timely fashion.

Finally, it is telling that the Appellant has abandoned the arguments and cases that she relied upon at the trial level and at the Court of Appeals and has fashioned a completely new argument. In addition to the easily distinguished *Hagy* case, Nanny cites the Court to two election contest cases in which the clerks were willfully involved in political mischief and absented themselves from their offices (even fleeing the state in one case) so that they could not fulfill their duties and do what was necessary to commence the actions of political opponents. *Prewitt v. Caudill*, 250 Ky. 698, 63 S.W.2d 954 (Ky.App. 1933); *Ward v. Howard*, 177 Ky. 38, 197 S.W. 506 (Ky.App. 1917). Obviously, the Clerk in this case did not absent herself from her office, nor was she willfully involved in political shenanigans to thwart the rights of Appellant. Therefore, these cases have no bearing here.

Appellant throws CR 60.01 and 60.02 to the wall to see if they stick. They don't. Appellant cites no cases or authority where a court used the rules to strike the law governing statutes of limitations because a plaintiff failed to commence an action timely or failed to request or cause issuance of summons. Here, we are not

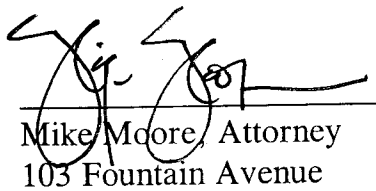
dealing with a clerical mistake or typographical error contemplated by the rules.

The question before Judge Stark was, "Will you follow the law and dismiss the action because it was not timely commenced?" Judge Stark responded affirmatively and dismissed the lawsuit. The question before the Court of Appeals was, "Will you follow the law and uphold Judge Stark who followed over 150 years of legal authority?" The Court of Appeals responded affirmatively and upheld Judge Stark. The question that Appellant Nanny asks this Court is, "Will you ignore over 150 years of authority to the contrary, create new law, and reverse the Court of Appeals and Judge Stark?"

CONCLUSION

The Trial Court and the Court of Appeals were right to follow the law. If the legislature wishes to change the law, then it can do so by the appropriate process. Legislatures determine statutes of limitations. This Court should not ignore over 150 years of law and write new law for this case. Simply following the law is all that we ask. Following the law brings stability and instills confidence in our system of justice. Therefore, this Court should uphold the Court of Appeals and Judge Stark.

Respectfully submitted,



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