

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2006-CA-0833-DG

COURT OF APPEALS FILE NO.
2005-CA-002083-MR

GRAVES CIRCUIT COURT FILE NO.
03-CI-529

DONNA NANNY

APPELLANT

vs.

RESPONDANT

JENNIFER SMITH

BRIEF FOR APPELLANT, DONNA NANNY

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was sent via U.S. Mail this ___ day of May, 2007 to: **Hon. Mike Moore**, P.O. Box 2655, Paducah, Kentucky 42002-2655, Attorney for Appellee; and **Hon. Timothy Stark**, Graves Circuit Judge, Graves County Courthouse, 100 E. Broadway, Mayfield, Kentucky 42066; **Sam Givens**, Clerk for Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601; and **Susan Stokley Clary**, clerk for the Supreme Court, Kentucky Supreme Court, Room 235 Capitol Bldg., 700 Capitol Avenue, Frankfort, KY 40601-3415.

DARYL T. DIXON
COUNSEL FOR APPELLANT

INTRODUCTION

This is a case in which Appellant seeks review of an award for dismissal, wherein the Graves Circuit Court held that the clerk's failure to issue a summons forthwith, as required by the Kentucky Rules of Civil Procedure, bars Appellant's right to recover for damages resulting from the negligence of Defendant.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that the facts and legal arguments have been adequately presented to the Court through the briefs of the parties. However, Appellant is prepared to orally argue before the Court to help in resolving the issues raised in this appeal.

APPLICABLE RULES AND STATUTES

Kentucky Rules of Civil Procedure

Cr 3.01

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.

Cr 4.01

(1) Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons and, at the direction of the initiating party, either:

(a) Place a copy of the summons and complaint (or other initiating document) to be served in an envelope, address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished by the initiating party, affix adequate postage, and place the sealed envelope in the United States mail as registered mail or certified mail return receipt requested with instructions to the delivering postal employee to deliver to the addressee only and show the address where delivered and the date of delivery. The clerk shall forthwith enter the facts of mailing on the docket and make a similar entry when the return receipt is received by him or her. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall enter that fact on the docket. The clerk shall file the return receipt or returned envelope in the record. Service by registered mail or certified mail is complete only upon delivery of the envelope. The return receipt shall be proof of the time, place and manner of service. To the extent that the United States postal regulations permit authorized representatives of local, state, or federal governmental offices to accept and sign for "addressee only" mail, signature by such authorized representative shall constitute service on the officer.

Cr 60.01

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Cr 60.02

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Kentucky Revised Statutes

KRS 413.250

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.

KRS 304.39-230(6)

An action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs

KRS 30A.010(2)

As personnel within the Court of Justice, clerks are state officers whose duties are coextensive with the Commonwealth, and who are subject to the administrative control of the Chief Justice.

KRS 30A.030(1)

All clerks, deputy clerks, and other persons employed in the office of the clerk shall be bonded to the Commonwealth for the faithful performance of their duties and for the accounting of all funds which may come into their hands by virtue of their office. They shall be covered by the blanket bond for all elected or appointed state officials.

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STATEMENT OF CASE

On August 22, 2001, the Appellant was involved in an auto accident in Graves County Kentucky. The accident was attributed to the negligence of Appellee. Appellant received Basic Reparations Benefits from her insurance carrier until October 18, 2001. At that time, Kentucky Farm Bureau Insurance Company refused to pay any further medical bills on Appellant in relation to the accident.

Appellant hand delivered her Complaint to the Graves County Circuit Clerk on Friday, October 17, 2003. The Complaint was time date stamped at 2:35 p.m. The Appellant was given a receipt on the same date which bears a time of 1:29 p.m. However, the Clerk did not file and issue the Summons on Appellee until Tuesday, October 21, 2003. The Statute of Limitations ran on Monday, October 20, 2006.

Graves Circuit Court dismissed the action pursuant to CR 3.01, 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.” The Court noted, however, that once the plaintiff had filed suit, she should have been able to rely on CR 4.01, which requires the clerk to issue the summons “forthwith.” In the end, the Court relied on cases that were more than 150 years old in order to dismiss the action.

Appellant appealed to the Kentucky Court of Appeals and argued that the Graves County Circuit Court Clerk failed to issue the summons “forthwith” after the filing of a civil complaint in accordance with Kentucky law, and that the Graves County Circuit Court erred when it ruled that she failed to file her claim within the statutory period set forth in KRS 304.39-230(6).

On October 13, 2006, the Kentucky Court of Appeals affirmed the Trial Court's dismissal in a "To Be Published" Opinion. The Court of Appeals rejected Appellant's analysis of case law and ruled that the proposed cases were not applicable because they dealt with defective summons. However, the Court of Appeals sympathized with Appellant's plight and suggested that she should have been able to rely on CR 4.01. Ultimately, the Court of Appeals' Panel was compelled, as was the Trial Court, to follow case law dating back over 150 years and affirmed the dismissal.

In Judge Taylor's dissent, he expressed that he felt Appellant had completely complied with the intent of KRS 304.39-230(6), and should not be punished due to the negligence of the circuit clerk in performing her required statutory duties. Judge Taylor refers to the case law and the majority's interpretation of CR 3.01 as an "archaic rule ... whose purpose and usefulness has long passed in modern litigation." Judge Taylor also stated that compliance with CR 3.01 puts an attorney at "the mercy of the clerk to perform ministerial tasks in accordance with applicable law."

ARGUMENT

The cases relied upon by the Trial Court and Court of Appeals are long overdue for review by this Court. All of the cases relied upon in the courts below were either decided in the context of the old Civil Code of Practice, or primarily rely on cases decided under the Civil Code of Practice. Notably, the Civil Code of Practice required the Plaintiff to "cause" issuance of the summons – a requirement omitted by Civil Rule 3.01, Civil Rule 4.01, and KRS 413.250. Keying in on the word "cause," the older cases hold that "there is a wide difference between directing a summons to be issued and actually causing it to be issued." *Louisville & N. R. 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 (1913). Despite deletion of this requirement when the Kentucky Rules of Civil Procedure were adopted, several cases decided after the adoption of the Civil Rules nevertheless note that Plaintiff must “cause” issuance of summons in order for the action to commence. None of the above cases deal with factual circumstances similar to the present case.

After the clerk accepts the summons, and represents it will be filed within the statutory period, the Appellant had no further duty, nor power, to make sure the clerk performed her required statutory duties. Also, had the Trial and Appellate Courts followed the precedent set forth in *Hagy v. Allen*, the Appellant’s action would not have been dismissed. *Hagy v. Allen*, 153 Supp. 302 (E.D. Ky. 1957). Likewise, it would be unimaginable for Kentucky Courts to expect Appellant to suffer damages without the ability to recover due to circumstances beyond her control, such as the clerk’s negligence in not issuing the summons forthwith. Furthermore, the clerk’s error in this case should be classified and amendable under Kentucky Rules of Civil Procedure CR. 60.01 and CR. 60.02.

I. APPELLANT HAS NEITHER POWER NOR DUTY TO ENSURE THE CLERK ISSUES THE SUMMONS BEFORE THE STATUTORY PERIOD ENDS.

A. Duty

If the Appellant was required to have a good faith intent of speedy service, the Appellant should not be punished when the clerk fails to perform her official duties in the forthwith manner they are mandated. Once the Clerk accepted the complaint for filing,

gave a time date stamp and receipt, and represented that the summons would be issued within the limitations period, the Appellant had no further power, nor duty to ensure that the Clerk issued the summons within the limitations period. On this issue, CR. 4.01 says, “Upon the filing of a complaint (or other initiating document) the clerk shall forthwith issue the required summons...” In addition, KRS 30A.030 says, “All clerks, deputy clerks, and other persons employed in the office of the clerk shall be bonded to the Commonwealth for the faithful performance of their duties...”

The Court in *Louisville & N.R. Co. v. Smith’s ADM’R*, supports the line of reasoning that “it is the official duty of the clerk to issue the summons in accordance with law, and it is not incumbent upon the plaintiff to see that he issues it in accordance with law.” *Louisville & N.R. Co. v. Smith’s ADM’R*, 10 ky.L.Rptr. 514, 9 S.W. 493, 495.

Louisville goes on to say that the Appellant had:

[T]he right to repose entire confidence in the clerk, not only knowing his duty, but doing his duty. Therefore the plaintiff is not guilty of the laches that is contemplated by the statute of limitations in order to deprive him of his remedy, as it was caused by the act of the clerk, who was officially bound to act according to law in the interest of both appellant and appellee; and in so far he may be treated as an agent, he was equally the agent of both, as in issuing the summons it was his official duty to protect the rights of both.

Louisville, 9 S.W. at 495.

B. Power

KRS 30A.010 (2) states that “As personnel within the Court of Justice, clerks are state officers whose duties are coextensive with the Commonwealth, and who are subject to the administrative control of the Chief Justice.” If the clerks are under the administrative control of the Chief Justice and Kentucky Supreme Court, there should be no duty of the attorney or plaintiff beyond the

filing of the complaint. The clerk is subject to the authority of the Chief Justice, which alleviates any responsibilities of the attorney and plaintiff to supervise the clerk in order to make sure he/she carries out her statutory duties.

II. THE APPELLANTS ACTION SHOULD NOT HAVE BEEN DISMISSED UNDER A CORRECT ANALYSIS OF *HAGY V. ALLEN*.

If the Court refuses the above reasoning, Appellant asks that the Court sympathize with her plight, and adopt the holding of *Hagy v. Allen*, 153 Supp. 302 (E.D. Ky. 1957).

Hagy was a federal case interpreting Kentucky law and the Kentucky Rules of Civil Procedure. In regards to CR. 3.01, the *Hagy* Court said:

Under such statutes it has been held or recognized that the mere filing of the petition, without a summons being issued out in good faith (and so without service of the process), before the statutes of limitations would have run, does not toll the statute, unless the failure of compliance is due to the negligence or misconduct of the clerk of the court.

Hagy, 153 Supp. at 309.

The Trial Court cited *Hagy* in its opinion. However, the Trial Court erred in its analysis of the case. The Trial Court stated that the *Hagy* Court “placed weight on the preparation and delivery of the summons.” This analysis could not be further off point. It was clear in *Hagy*, that the Court put its emphasis on the fact that the attorney for the plaintiff had done everything that was humanly possible in order to ensure the summons was issued, and that the plaintiff should not be held responsible for circumstances beyond their control. *Id* at 307, 308, 309, 310-311. This analysis is directly on point in regards to the case at hand.

In *Hagy*, the clerk’s office was closed, so the attorney took the pleadings, filing fee, and summons to the clerk’s home where she marked them as filed. *Hagy* at 303,

304. Though the complaint was marked as filed, the summons was not issued until after the statute of limitations had run. *Hagy* at 304. The Court held that Kentucky law and procedural rules applied after an analysis under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct 817 (1938), and *Ragan v. Merchants Transfer Co.*, 337 U.S. 530, 69 S.Ct. 1233 (1949). *Id.* at 308. Considering the case law and Kentucky Rules of Civil Procedure, the court ruled in favor of plaintiff, stating that plaintiff had done everything in her power to comply with the commencement process, and should not be prevented from seeking relief due to clerical error and circumstances beyond her control. *Id.* at 310, 311.

The facts of the present case have a few dissimilarities from *Hagy*, however, the reasoning could not be more relevant. Appellant did not have a summons prepared, as the attorney did in *Hagy*, however, she was under the impression that it was the clerk's duty to prepare such documents under CR. 4.01 (1), which states: "Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons..." Also, Appellant did not have to travel to the clerk's house, as it was normal operating hours. The fact that Appellant delivered the complaint to the clerk's office within normal operating hours, rather than to the clerk's house, should have made it easier for the clerk to accomplish the task in a timely fashion within the statutory period.

A significant point the *Hagy* Court argues is that the plaintiff should not be punished for waiting until the last minute to file her complaint. *Id.* at 307. The Appellee raised the issue of Appellant waiting until the period had almost run before filing

the complaint at the Appellate Court. *Hagy* counters this line of reasoning by the following:

The statutory period was fixed by the legislative body and must be considered reasonable and proper for actions of this nature. There is no reflection upon the plaintiffs nor their attorney for their exercise of the privilege of waiting for nearly a year before asserting the claims. The plaintiffs were under no compunction to seek their remedies at an earlier time than they deemed necessary.

Hagy at 307. Appellant was also acting within her statutory right to file the complaint at the time she did. The error was with the clerk and the clerk exclusively.

It should also be noted that in this case, as in the *Hagy* case, it was not several days, weeks or months that had elapsed beyond the statutory period, but merely a weekend. The *Hagy* Court makes a very insightful comment on this fact:

When, however, no one will be made to suffer by reason of a few hours delay and a litigant has done all that it is within his power to do to seek redress in a court of justice for an alleged wrong done to him and there is grave doubt in the mind of the court that the statute has run, in the interest of justice this doubt should be construed on the side of the litigant.

Id. There is no doubt Appellant did everything in her power to issue the summons within the limitations period. Once again, the error was with the clerk, not Appellant.

The *Hagy* Court goes on to say that “it is the official duty of the clerk to issue the summons in accordance to law, and it is not incumbent of the plaintiff to see that he issues it in accordance to law.” *Id.* at 309; *Louisville & N.R. Co. v. Smith’s ADM’R*, 10 Ky.L.Rptr. 514, 9 S.W. 493, 495 (Ky. 1888). The Court continues in saying that it is not the plaintiff’s duty to make sure the summons is issued, but that the plaintiff has a right to “repose entire confidence in the clerk, not only knowing his duty, but doing his duty.” *Hagy* at 309; *Louisville & N.R. Co. v. Smith’s ADM’R*, 10 ky.L.Rptr. 514, 9 S.W. 493, 495. The Court further notes that:

Therefore, the plaintiff is not guilty of the laches that is contemplated by the statute of limitation in order to deprive him of his remedy, as it was caused by the act of the clerk, who was officially bound to act according to law in the interest of both appellant and appellee; and, in so far he may be treated as an agent, he was equally the agent of both, as in issuing the summons it was his official duty to protect the rights of both.

Hagy at 309; *Louisville & N.R. Co. v. Smith's ADM'R*, 10 ky.L.Rptr. 514, 9 S.W. 493, 495. According to this line of reasoning, statutes of limitation were not created to deny a litigant's day in court when it was the clerk who erred. This reasoning directly relates to the fact that the Appellant did all she was capable of, and it was the clerk's negligence and tardiness that caused the statutory period to run before the summons was issued.

The Court also raises the question of what if a clerk deliberately makes herself unavailable; would the litigants be deprived of their right to make a claim because the statutory period has run? *Hagy* at 310. What remedy does the Plaintiff have under those circumstances? These situations will be discussed in a later argument of this brief.

The *Hagy* Court had the opinion that KRS 413.250 and CR. 3.01 should not be so "strictly and harshly construed." *Id.* The Court commented that the statute's purpose was to speed up the process in these procedures, and not to deprive a litigant of their right because of circumstances beyond their control. *Id.* If relief can be granted in such extreme circumstances as the *Hagy* case, Appellant prays that the Court consider her situations as one such extreme occasion.

III. THE CLERK FAILING TO ISSUE THE SUMMONS IN A FORTHWITH MANNER WAS A CIRCUMSTANCE BEYOND THE APPELLANTS CONTROL.

Appellant had no control over the circumstances in which the clerk refused to adhere to her required statutory duties. According to statute, KRS 30A.010(2), the clerk is under the supervision of the Chief Justice, not the Appellant or her attorney. When the

Appellant has done everything within her power to ensure the summons will be issued in good faith, the Appellant should not be denied her day in court due to the negligence of the clerk.

Prewitt v. Caudill was a case involving an election petition that was unable to be filed on the last day allowed by the Kentucky statute because the clerk deliberately made himself unavailable. *Prewitt v. Caudill*, 250 Ky. 698, 63 S.W.2d 954 (Ky. App. 1933).

The *Hagy* Court relayed the following message from *Prewitt v. Caudill*:

The Kentucky Court of Appeals upheld his right to maintain the action on the ground that he was prevented by circumstances beyond his control from having the summons issued in time and that the delay in issuing the summons was due solely to the fault of the circuit clerk over whom the petitioner had no control.

Hagy, 153 Supp. at 310.

Ward v. Howard also deals with circumstances beyond Appellant's control. *Ward v. Howard*, 177 Ky. 38, 197 S.W. 506 (Ky. App. 1917). This was another election case in which a supersedeas bond had to be issued in order for the appellate court to have jurisdiction in order to hear the appeal. Once again, the clerk purposely made himself unavailable. The *Ward* Court commented on the relationship between the petitioner and the clerk's negligence in the following way:

The question now is, can the clerk by deliberately absenting himself from his office, or by closing his office, or by concealing himself, or by refusing to take the bonds, deprive the contestants of their right to take appeals? If this statute should be so strictly construed as that this court would not have jurisdiction under any conditions or under or under any circumstances unless the bond was executed on the day the judgment was rendered, it can readily be seen that in many cases the contestant, without any fault or neglect on his part, and although he may have made every reasonable effort to execute the bond on the day the judgment was rendered, would be denied the right of appeal, by the conduct of the clerk, or by some other condition that could not be anticipated or provided against.

Hagy, 153 Supp. at 310. Appellant understands that the above comments are from fairly old case law, however, the Trial and Appellate Courts have consistently relied on cases dating back to 1847, *Pindell v. Maydell*, 46 Ky. 314, 7 B. Mon. 314 (Ky. 1847). 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.

IV. THE CLERKS ERROR AND NEGLIGENCE SHOULD BE CONSIDERED CORRECTABLE UNDER CR. 60.01 AND CR. 60.02.

The mistake of the clerk to file the Appellant's complaint and issue summons within the statutory period should be considered a correctible clerical error under CR. 60.01 and CR. 60.02. Kentucky Rules of Civil Procedure have adopted the scope of Rule 60 of the Federal Rules of Civil Procedure in that it provides a relief from judgment or order. It is the intent of such a rule to allow relief for a plaintiff caught in circumstances beyond their control, such as the Appellant in the instant case.

CR. 60.01 states:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

The circuit clerk's failure to perform her duty of filing the complaint and issuing a summons must certainly be considered an omission or oversight.

CR. 60.02 also provides relief from a judgment for mistakes by any person, not just a party. CR. 60.02 states:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the

following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

CR. 60.02 provides relief for mistake, inadvertence, surprise, or excusable neglect. The clerk's failure to perform her ordained duty within the statutory period should be considered excusable neglect.

CONCLUSION

The Appellant had no further duty, nor power, to ensure the clerk would issue the summons after the clerk accepted the summons and represented it would be filed within the statutory period. The Appellant's action would not have been dismissed had the Trial and Appellate Courts used a correct analysis of *Hagy v. Allen*. The purpose of Cr. 3.01 and KRS 413.250 is not to deny a petitioner recovery for damages due to the negligence of the clerk in performing his/her duties. When circumstances such as those in the present case arise, Appellant should be able to rely on CR. 60.01 and CR. 60.02 to allow the continuance of an action that would otherwise be barred due to the clerk's failure to perform her required statutory duties.

The liberal thrust of the Kentucky Rules of Civil Procedure does not mandate the result achieved in either the Trial Court or the Court of Appeals. Certainly, neither the Civil Rules nor applicable statutes should be interpreted to punish Appellant for the

circuit court clerk's failure in performing her statutory duties. However, until this Court overrules antiquated case law relied on by the Courts below, the unjust result which occurred in this case will likely be repeated in the future. For all of the above reasons, Appellant respectfully requests this Court reverse the decision of the Graves Circuit Court, and remand this case to the Circuit Court for further proceedings.

Respectfully submitted,

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APPENDIX

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COURT OF APPEALS OPINION

TRIAL COURT OPINION

MOTION FOR DISCRETIONARY REVIEW