

COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
CASE NO.  
COURT OF APPEALS FILE NO:  
2005-CA-002083-MR

DONNA NANNY

MOVANT

vs.

RESPONDANT

JENNIFER SMITH

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**MOTION FOR DISCRETIONARY REVIEW**

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COUNSEL FOR MOVANT  
DONNA NANNY

**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing was sent via U.S. Mail this \_\_\_\_\_ day of November, 2006 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; and **Sam Givens**, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601.

COUNSEL FOR MOVANTS

Comes the Movant, Donna Nanny, by counsel, and respectfully move this Court pursuant to CR 76.20 for Discretionary Review of the October 13, 2006, Opinion of the Court of Appeals of the Commonwealth of Kentucky in 2005-CA-002083-MR.

Pursuant to CR 76.20(3), the Movant states as follows:

1. The name of the Movant is Donna Nanny and the name and address of their counsel of record is Daryl T. Dixon, 535 Broadway, P.O. Box 1762, Paducah, KY 42002.
2. The name of the Respondent is Jennifer Smith, and the name and address of her counsel is Mike Moore, 113 South 4<sup>th</sup> Street, P.O. Box 2655, Paducah, KY 42002-2655.
3. The Opinion of the Court of Appeals of the Commonwealth of Kentucky was rendered on October 13, 2006, a copy of which is attached hereto as Exhibit A.
4. A supersedeas bond has not been executed.
5. The Movant does not have a Petition for Rehearing or Motion for Reconsideration pending in the Kentucky Court of Appeals.
6. No other party has a Petition for Rehearing or Motion for Reconsideration pending in the Kentucky Court of Appeals.

### **INTRODUCTION**

At issue is whether delivery of the complaint to the circuit court clerk, with the understanding that the clerk will issue summons, is sufficient to commence the action for the purposes of the applicable limitations period.

The trial 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.” (See Trial Court’s Opinion and Order attached as

Exhibit B). 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 Trial Court relied on cases that were more than 150 years old in order to dismiss the action.

Nanny appealed to the Kentucky Court of Appeals and argued that the Graves County Circuit Court Clerk failed to issue the summons in this case “forthwith” after the filing of a civil complaint in accordance with Kentucky law, and that the Graves County Circuit Court erred when it ruled she failed to file her claim within the statute of limitations 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 the Movant’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 Nanny’s plight and suggested that she should have been able to rely on CR 4.01. However, 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.

Judge Taylor’s dissent in the Court of Appeals’ opinion urged Nanny to appeal the decision. Judge Taylor felt that Nanny 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.” Judge Taylor furthered his argument by stating that under KRS 30A.010 (2), clerks are under the supervision

of the Chief Justice. This reasoning leads to the fact that it is the Kentucky Supreme Court's responsibility to oversee the job performance of the clerks, not the attorney's.

### **STATEMENT OF MATERIAL FACTS**

The facts in this case have been clearly established and are undisputed. A review of the pertinent facts follows:

On August 22, 2001, the Movant, Donna Nanny, was involved in an auto accident in Graves County Kentucky. The accident was attributed to the negligence of the Respondent, Jennifer Smith. Movant 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 the Movant in relation to the accident.

Movant 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 Movant was given a receipt on that same date which bears a time of 1:29 p.m. However, the Clerk filed and issued the Summons on Respondent, Jennifer Smith, on Tuesday, October 21, 2003. The Statute of Limitations ran on Monday, October 20, 2006.

### **QUESTIONS OF LAW**

1. When the Circuit Court Clerk accepts the Complaint for filing and represents that summons will be issued within the limitations period, what additional duty does Plaintiff have under CR 3.01 and CR 4.01 to "commence" the action in a timely manner?

2. If the Circuit Court Clerk is subject to the administrative control of the Chief Justice exclusively, what power does Plaintiff have to ensure that the clerk performs her ministerial statutory duties once the complaint is entrusted to the clerk and the clerk represents that summons will be issued within the limitations period?

3. Should the applicable limitations period be tolled where the clerk fails to perform her required statutory duties?

4. Should the negligence of the clerk in not issuing the summons in a timely manner upon receipt of the complaint be considered a correctible clerical error under CR. 60.01 and CR. 60.02?

### **REASONS FOR REVIEW**

The cases relied upon by the Trial Court and the 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 cases cited by courts below deal with factual circumstances like the present case.

### **Analysis Under *Hagy v. Allen***

The most factually similar case is *Hagy v. Allen*, 153 Supp. 302 (E.D. Ky. 1957), a federal case interpreting Kentucky law and the Kentucky Rules of Civil Procedure. In that case, 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. *Id.* 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). *Hagy* 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. *Hagy.* at 310, 311.

The facts of the present case have a few dissimilarities from *Hagy*, however, the reasoning could not be more relevant. Movant 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 and, ...." Also, Movant did not have to travel to the clerk's house, as it was normal operating hours. The fact that Movant delivered the complaint within normal operating hours, rather than the clerk's house, should have made it easier for the clerk to accomplish this task in a timely fashion, or at least within the statutory period.

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 any 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. *Hagy* at 307, 308, 309, 310-311. This analysis is directly on point in regards to the case at hand.

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. *Hagy* at 307. The defense raised the issue of Movant 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. Movant 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.

*Hagy* at 307. There is no doubt that Movant did everything in her power within the limitations period. Once again, the error was with the clerk, not Movant.

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 (citing *Louisville & N.R. Co. v. Smith’s Adm’r*, 10 Ky.L.Rptr. 514, 9 S.W. 493 (Ky. 1888)). The Court goes on to say 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 (citing *Louisville*). 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 (citing *Louisville*). According to this line of reasoning, statutes of limitation were not created to deny a litigant’s day in court when it is the clerk who errs. This reasoning directly relates to the fact that the Movant 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 himself unavailable; would the litigants be deprived of their right to make a claim because the statutory period has run? *Hagy* at 310. The *Hagy* Court had the opinion that the statute and rule 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.*

**KRS 30A.010 (2)**

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 they carry out her statutory duties. KRS 30A.030 (1) continues this idea by stating that:

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.

This statute simply states that the clerks owe a great duty to the Commonwealth to perform their duties with good faith and diligence.

**CR. 60.01 and CR. 60.02**

The mistake of the clerk to file the Movant'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 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 Movant.

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.

It 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 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 the Movant 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, discretionary review should be granted in this case.

Respectfully submitted,

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