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TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002632-MR

MABEL ROSE SMITH — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 03-CI-00148

DOLLAR GENERAL STORES, LTD. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

TAYLOR, JUDGE: Mabel Rose Smith brings this appeal from a November 10, 2003, order of the Casey Circuit Court dismissing her negligence claim against Dollar General Stores, Ltd., based upon expiration of the one-year statute of limitations contained in Kentucky Revised Statutes (KRS) 413.140. We reverse and remand.

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On April 28, 2002, appellant allegedly slipped and fell at appellee's store in Casey County, Kentucky. She suffered substantial injuries as a result of the fall. Consequently, on April 28, 2003, appellant filed a complaint in the Jefferson Circuit Court against appellee alleging negligence. Appellee moved to dismiss the action or transfer it to Casey County based upon improper venue and/or *forum non conveniens*. Eventually, the Jefferson Circuit Court dismissed the action based upon *forum non conveniens* on August 5, 2003.

Fifteen days later, on August 20, 2003, appellant filed a complaint against appellee in the Casey Circuit Court. Appellee then filed a motion to dismiss the Casey County action based upon the one-year statute of limitations applicable to a personal injury action. KRS 413.140. Appellant responded that the action was saved by application of KRS 413.270(1). By order entered November 10, 2003, the Casey Circuit Court dismissed appellant's action as time-barred by KRS 413.140, thus precipitating this appeal.

Appellant argues the circuit court committed error by dismissing the action as time-barred by the one-year statute of limitations found in KRS 413.140. Specifically, appellant contends that the action was timely filed based upon application of KRS 413.270(1), which states, as follows:

> If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation. (Emphasis added.)

Even though KRS 413.270(1) only utilizes the term "jurisdiction," appellant maintains that KRS 413.270(1) is equally applicable to actions dismissed upon *forum non conveniens*.[2] Appellee argues to the contrary. Appellee believes by its very terms KRS 413.270(1) has no application to an action dismissed upon *forum non conveniens* and that the statute is only applicable to an action dismissed for lack of jurisdiction.

In determining whether KRS 413.270(1) applies to a dismissal upon *forum non conveniens*, we are guided by the Supreme Court's decision in D & J Leasing, Inc. v. Hercules Galion Products, Inc., 429 S.W.2d 854 (Ky. 1968). In that case, the Supreme Court framed the precise legal issue before it as "whether the appellant, which filed its original action in the wrong venue where the statute of limitations ran against it, is entitled to the benefit of the ninety day saving-period afforded

[2] The doctrine of *forum non conveniens* empowers a court, vested with jurisdiction and venue, to dismiss an action if a more convenient venue exists. Beaven v. McAnulty, 980 S.W.2d 284 (Ky. 1998) *superseded by statute as recognized in* Seymour Charter Buslines, Inc. v. Hopper, 111 S.W.3d 387 (Ky. 2003).

by KRS 413.270 or the six months saving-period of KRS 355.2-725 . . . ." Id. at 855. In determining that the action was saved, the Court observed that "[t]he intention of . . . [KRS 413.270] is to enable a litigant in such a situation to obtain a trial on the merits and not to penalize it for filing its original action in a court of the wrong venue." Id. at 856. In D & J, the Supreme Court clearly held that KRS 413.270 was applicable to a dismissal based upon improper venue.

Having concluded that KRS 413.270(1) applies to a dismissal upon improper venue, we now turn to appellee's alternative argument that a dismissal upon *forum non conveniens* is separate and distinct from a dismissal for improper venue; therefore, KRS 413.270(1) should be narrowly interpreted as applying to only a dismissal for improper venue and not to a dismissal based upon *forum non conveniens*.

As to the proper application of KRS 413.270(1), we view any distinction between a dismissal upon improper venue and a dismissal upon *forum non conveniens* to be merely illusory. We arrive at this conclusion by reliance upon Seymour Charter Buslines, Inc. v. Hopper, 111 S.W.3d 387 (Ky. 2003). In that case, the Supreme Court commented that the term "improper venue," as utilized in KRS 452.105, encompassed a dismissal upon *forum non conveniens*. KRS 452.105 reads, in part, as follows:

> In civil actions, when the judge of the court in which the case was filed determines that the court lacks venue to try the case due to an improper venue, the judge, upon motion of a party, shall transfer the case to the court with the proper venue.

Indeed, the Court recognized that its decision in Beaven v. McAnulty, 980 S.W.2d 284 (Ky. 1998)(holding that the circuit court had no authority to transfer an action dismissed upon *forum non conveniens*) was abrogated by enactment of KRS 452.105.

Accordingly, we hold that KRS 413.270(1) is applicable to a dismissal based upon *forum non conveniens* and conclude that KRS 413.270(1) applies to the instant action.[3] Thus, the circuit court erred by dismissing the instant action as time-barred by KRS 413.140.

For the foregoing reasons, the order of the Casey Circuit Court is reversed and this cause remanded for proceedings not inconsistent with this Opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Jonathon N. Amlung Louisville, Kentucky	Kevin G. Henry STURGILL, TURNER, BARKER & MOLONEY, PLLC Lexington, Kentucky

[3] We note that for a litigant to receive the benefit of the saving provision found in KRS 413.270(1), the original action must have been filed in good faith. In this case, appellee's counsel acknowledged during oral argument that there was no dispute regarding appellant's good faith in filing the action in Jefferson Circuit Court; thus, we believe the good-faith requirement of the statute has been satisfied.