

RENDERED: DECEMBER 9, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

OPINION OF NOVEMBER 23, 2011 WITHDRAWN

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-000658-MR

LISA HELTON

APPELLANT

v.

APPEAL FROM MENIFEE CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 10-CI-90011

JERRY'S DISCOUNT, INC.

APPELLEE

OPINION  
VACATING AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

ACREE, JUDGE: The issue before us is whether the Menifee Circuit Court erred when it determined that Appellant Lisa Helton's personal injury complaint was filed outside the applicable one-year statute of limitations because, though Helton

---

<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

delivered the complaint to the Menifee Circuit Court Clerk within the requisite time period, the Clerk did not file the complaint nor issue the required summons until after the limitations period had expired. After careful consideration, we vacate the circuit court's order dismissing Helton's personal injury suit, and remand for further proceedings consistent with this opinion.

### **Facts and Procedure**

On January 19, 2009, Helton slipped and fell on ice outside the front door of appellee's, Jerry's Discount, Inc., convenience store in Menifee County, Kentucky. Helton purportedly suffered injuries as a result of her fall. Helton endeavored to commence a personal injury action against Jerry's Discount in Menifee Circuit Court within the required one-year statute of limitations. KRS 413.140(1)(a).

On Friday, January 15, 2010, Helton mailed the complaint, filing fee, and summons to the Clerk via the United States Postal Service (USPS) express mail with delivery confirmation. The USPS confirmed delivery of Helton's complaint to the Clerk's office at 9:31 a.m. on Tuesday, January 19, 2010, the last day of the limitations period.<sup>2</sup> However, the Clerk did not file the complaint or issue the required summons until Thursday, January 21, 2010, two days after the statute of limitations expired.

On March 24, 2010, Jerry's Discount filed a motion to dismiss Helton's personal injury action on the grounds that the complaint was filed and the

---

<sup>2</sup> Monday, January 18, 2010, was Martin Luther King Day.

summons issued outside the applicable one-year statute of limitations. The circuit court granted Jerry's Discount's motion and entered an order of dismissal. This appeal followed.

### **Standard of Review**

“It is well established that a court should not grant a motion to dismiss a complaint ‘unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.’”

Wagoner v. Bradley, 294 S.W.3d 467, 469 (Ky. App. 2009) (citing Pari-Mutuel Clerks' Union v. Kentucky Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977)). In determining whether a trial court properly dismissed a complaint on statute of limitations grounds, the issue is a matter of law. Wagoner, 294 S.W.3d at 469. Accordingly, our standard of review is *de novo*. Benningfield v. Pettit Environmental, Inc., 183 S.W.3d 567, 570 (Ky. App. 2005).

### **Analysis**

“A statute of limitations limits the time in which one may bring suit after the cause of action accrues.” Coslow v. General Elec. Co., 877 S.W.2d 611, 612 (Ky. 1994). In order to survive a motion to dismiss, the plaintiff must commence his or her suit within the relevant statute of limitations period. Kentucky Rules of Civil Procedure (CR) 3.01 governs the commencement of civil actions, providing 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.” CR 3.01; *see also* KRS 413.250 (“[A]n 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.”). “Upon the filing of a complaint (or other initiating document) the clerk shall forthwith issue the required summons[.]” CR 4.01(1).

Historically, Kentucky courts have demanded strict compliance with the requirements set forth in CR 3.01. *See DeLong v. DeLong*, 335 S.W.2d 895 (Ky. 1960); *Osborne v. Kenacre Land Corp.*, 65 S.W.3d 534 (Ky. App. 2001); *Gibson v. E.P.I. Corp.*, 940 S.W.2d 912 (Ky. App. 1997). It is the plaintiff’s duty to ensure all appropriate steps have been taken to commence an action and, in line with this duty, the plaintiff is presumed to know the applicable statute of limitations. *See Pospisil v. Miller*, 343 S.W.2d 392, 394 (Ky. 1961). However, in *Nanny v. Smith*, 260 S.W.3d 814 (Ky. 2008), the Kentucky Supreme Court re-examined this issue.

In *Nanny*, the plaintiff desired to bring a personal injury action against the defendant arising out of a car accident. The applicable statute of limitations dictated the plaintiff had until Saturday, October 18, 2003, to file her personal injury suit. However, because the statute of limitations was set to terminate on a Saturday, the plaintiff actually had until Monday, October 20, 2003, to commence her action. On Friday, October 17, 2003, the plaintiff hand-delivered her complaint to the appropriate circuit court clerk. A time date stamp indicated the clerk received the plaintiff’s complaint on October 17, 2003, at 2:35 p.m. However, the clerk did not file the complaint or issue the required summons until

Tuesday, October 21, 2003, one day after the statute of limitations expired.

Consequently, the circuit court dismissed the plaintiff's case.

On discretionary review, the Kentucky Supreme Court equitably tolled the statute of limitations because the clerk's failure to file the plaintiff's complaint and issue the required summons violated the mandates of CR 4.01(1) and exceeded the plaintiff's control. *Nanny*, 260 S.W.3d at 818. Specifically, the court reasoned:

Once [plaintiff] delivered the complaint, she could reasonably expect that the summons would be issued within the statutory period. At that point, [plaintiff] had no further duty to ensure that the clerk [filed the complaint and] issued the summons within the limitations period. CR 4.01 (“[U]pon the filing of the complaint . . . the clerk shall forthwith issue the required summons and, at the direction of the initiating party, either” serve the summons and complaint by mail or transfer the summons and complaint to an authorized person for delivery and service); KRS 30A.030(1); *Louisville & N.R. Co. v. Smith's Adm'r*, 10 Ky. L. Rptr. 514, 87 Ky. 501, 9 S.W. 493, 495 (1888) (“[I]t 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.”). Nor did [plaintiff] have the power to compel the clerk to issue summons since, by statute, the clerk is under the supervision of the Chief Justice, not [plaintiff] or her attorney. KRS 30A.010(2).

Because [plaintiff] had neither the power nor the duty to ensure that the clerk perform official duties, she was prevented by circumstances beyond her control from having the summons issued in time. We believe that under these facts, [plaintiff] should not be held responsible for such circumstances. See *Prewitt v. Caudill*, 250 Ky. 698, 63 S.W.2d 954, 958-59 (1933) (upholding the petitioner's right to maintain an election contest on the basis 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).

*Nanny*, 260 S.W.3d at 817; *see also Hagy v. Allen*, 153 F. Supp. 302 (E.D. Ky. 1957) (applying Kentucky law, the federal court determined that, because the plaintiff had done everything possible to ensure her complaint was filed and summons issued before the statute of limitations expired, the plaintiff should not be punished for the clerk's failure to perform her duties). The Kentucky Supreme Court acknowledged that "promptness in filing is essential to the proper function of the court system." *Id.* at 818. However, under the facts of the particular case, the court reasoned that equity required the tolling of the statute of limitations. *Id.*

In the case *sub judice*, Helton contends that *Nanny* is directly on point and dispositive of her case. In response, Jerry's Discount asserts *Nanny* provides a narrow exception to the hard-line rule requiring strict compliance with the statute of limitations and is factually distinguishable. Specifically, Jerry's Discount attempts to distinguish *Nanny*, arguing that the plaintiff in that case had done everything in her power to ensure her complaint was timely filed, but Helton simply placed her complaint in the mail at the end of the statutory period and hoped it would reach the clerk's office in time. We are not persuaded by that argument; we find *Nanny* to be factually similar to the case at hand and quite instructive.

Similar to the plaintiff in *Nanny*, Helton took reasonable steps to ensure her complaint was delivered to the clerk's office prior to the expiration of the statute of limitations. Though Helton did not hand-deliver her complaint to the Clerk, she mailed her complaint via express mail with delivery confirmation four days before the statute of limitations expired. Additionally, via the USPS, Helton confirmed delivery of her complaint to the Clerk's office at 9:31 a.m. on January 19, 2010, the last day of the limitations period. Therefore, just like the *Nanny* plaintiff, Helton knew the Clerk had received her complaint before the statute of limitations expired with ample time for the Clerk to file the complaint and issue the required summons. Nonetheless, for reasons unclear to this Court, the Clerk waited for two days after the limitations period expired to perform her duties.

Once an attorney has timely delivered the complaint to the proper court clerk, the attorney's job is complete. The power then shifts to the court clerk to promptly perform his or her required duties. See [KRS 30A.010](#) *et al.* It would be manifestly unjust to punish an attorney, and in turn his or her client, for the clerk's failure to adequately execute his or her responsibilities. To conclude otherwise would result in disparity in our legal system which can neither be condoned nor tolerated.

Because Helton "had neither the power nor the duty to ensure that the clerk perform official duties, she was prevented by circumstances beyond her control from having" her complaint filed and summons issued before the statute of limitations expired. *Nanny*, 260 S.W.3d at 817. Therefore, under these unique

circumstances, the one-year statute of limitations is equitably tolled. *Id.*; *see also Robertson v. Commonwealth*, 177 S.W.3d 789, 791-92 (Ky. 2005) (recognizing the doctrine of equitable tolling is applicable when a party is plainly prejudiced by unavoidable circumstances beyond the party's control despite the party's due diligence).

**Conclusion**

The Menifee Circuit Court's order dismissing Helton's personal injury action is vacated and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Scott H. Kaminski  
Charleston, West Virginia

BRIEF FOR APPELLEE:

John W. Walters  
Diane R. Conley  
Lexington, Kentucky