

1-13-1616

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHERYL MILLER, Mother and Next Friend of JAMAL)	Appeal from the
MILLER, deceased, and as Independent Administrator)	Circuit Court of
of the Estate of Jamal Miller,)	Cook County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 12 L 12467
)	
DR. JOLENE HARBAUGH, DR. JENNIFER)	
JAWORSKI, and DR. VICTOR KERSEY,)	Honorable
)	Moira Johnson,
Defendants-Appellees.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The one-year period provided for in the savings provision contained in section 13-217 of the Code of Civil Procedure that applies to cases dismissed for lack of federal subject matter jurisdiction ran from the date the federal district court dismissed the action for lack of jurisdiction, and was not tolled during plaintiff's appeal of the federal district court's dismissal order to the federal appellate court.

¶ 2 BACKGROUND

¶ 3 On August 26, 2010, plaintiff Cheryl Miller, mother and next friend of Jamal Miller and independent administrator of the Estate of Jamal Miller, filed a complaint against the defendants, Dr. Jolene Harbough, Dr. Jennifer Jaworski and Dr. Victor Kersey, in the United States District Court for the Northern District of Illinois alleging federal violations of 42 U.S.C. § 1983 and state law claims of medical malpractice related to the suicide death of her son. On October 19, 2011, a little over a year after the case was filed, the federal district court granted defendants' motion for summary judgment wherein it dismissed plaintiff's federal claims and opted not to exercise supplemental jurisdiction over the state law claims and dismissed them as well. *Miller v. Kozel*, 2011 WL 5024554 (N.D. Ill., Oct. 19, 2011). Plaintiff appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit and on October 19, 2012, the Seventh Circuit affirmed the federal district court's decision. *Miller v. Harbaugh*, 698 F.3d 956 (7th Cir. 2012). On November 2, 2012, more than a year after the dismissal of plaintiff's claims in federal district court, the plaintiff filed her complaint in the circuit court for her state law claims of medical malpractice. The complaint was based on the same facts alleged in her federal district court complaint. On April 16, 2013, the circuit court entered two separate orders. In the first order, the circuit court denied defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to the doctrine of sovereign immunity. No defendant filed a cross-appeal regarding this order.¹ In the second order, the circuit court dismissed plaintiff's refiled federal court allegations made under state law as time-barred and granted defendants' motion to dismiss

¹ Two appellees argue alleged errors from the circuit court's order on sovereign immunity. However, unless a timely cross-appeal is filed, appellees are not permitted to challenge a ruling adverse to them or request a reviewing court to modify a portion of the circuit court's order. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 13 (1995); *People ex rel. Wray v. Brassard*, 226 Ill. App. 3d 1007 (1992). When an appellee does not file a cross-appeal, the reviewing court is confined to the issues presented by the appellant. *Id.* at 1011. Because no cross-appeal was filed, we may not address appellees' arguments that the circuit court improperly denied their motion to dismiss which relied on the doctrine of sovereign immunity. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 13 (1995).

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pursuant to section 2-619(a)(5) of the Code of Civil Procedure. 735 ILCS 5/2-619(a)(5) (West 2012). The circuit court specifically found that "*Wade v. Byles*, (295 Ill. App. 3d 545 (1998)) [was] dispositive." Pursuant to section 13-217 of the Code of Civil Procedure, a plaintiff has one year to refile an action in state court following dismissal by a federal district court for lack of jurisdiction. Plaintiff's complaint was filed more than one year after the federal district court dismissed her complaint. Plaintiff filed a timely notice of appeal from the circuit court's April 16, 2013 dismissal pursuant Illinois Supreme Court Rule 303 (a) (eff. June 4, 2008).

¶ 4

ANALYSIS

¶ 5 This appeal presents the following issue for review: Whether the appeal of a federal district court's dismissal of state law claims for lack of subject matter jurisdiction tolls the one year period, following dismissal, in which plaintiff may file for the claims in state court pursuant to section 13-217 of the Code of Civil Procedure?

¶ 6

a) Standard of Review

¶ 7 A motion to dismiss that was granted under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)) admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense that defeats plaintiff's claim. *Boroweic v. Gateway 2000, Inc.*, 209 Ill. 2d 376 (2004). In this case, the circuit court granted the motion to dismiss for plaintiff's failure to file her action before the statute of limitations expired, which included the additional one-year savings provision contained in section 13-217. Such rulings on section 2-619 motions present a question of law, and this court reviews these rulings *de novo*. *Id.* at 413.

¶ 8 The construction of a statute is also a question of law which this court reviews *de novo*. *In re Estate of Dierkes*, 191 Ill. 2d 326, 330 (2000). The statute involved in this case, section 13-217 of the Code of Civil Procedure, governs the time limitations for filing a state court action following dismissal of pendent state court claims in a federal complaint by a federal district

court. 735 ILCS 5/13-217 (West 2012). The objective of this court in construing a statute is to give effect to the intent of the legislature. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). The plain language of a statute is the most reliable indicator of the legislature's intent (*id.*), and when the statute's language is clear, it must be enforced as written without resorting to tools of interpretation. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 60 (2006).

¶ 9

b). Discussion

¶ 10 Section 13-217 provides, in pertinent part, as follows:

" In the actions *** where the time for commencing an action is limited, if *** the action is *dismissed by the United States District Court* for lack of jurisdiction, *** then, whether or not the time for bringing such actions expires during the pendency of such action, the plaintiff *** may commence a new action within one year or within the remaining period of limitation, whichever is greater, after *** the action is *dismissed by a United States District Court* for lack of jurisdiction, *** ." (Emphasis supplied.) 735 ILCS 5/13-217 (West 2012).

¶ 11 Section 13-217 is Illinois' savings statute and applies to actions originally filed in federal court and dismissed for lack of jurisdiction. 735 ILCS 5/13-217 (West 2012). The statute specifically provides that a plaintiff has one year to refile an action in state court after it is dismissed by a federal district court for lack of jurisdiction. As noted by our supreme court, Illinois' "saving statute, as it is now written, is very specific and clear." *DeClerck v. Simpson*, 143 Ill. 2d 489, 495 (1991). It further noted that "[t]he savings statute, as it now exists, is a plain, unambiguous statute, *** " *Id.* at 496. The crux of the parties' disagreement on this issue

concerns whether the construction of the phrase "dismissed by the United States District Court" as employed in section 13-217 of the statute impliedly includes any federal appeal taken from a United States District Court dismissal.

¶ 12 In the instant case, the circuit court held that *Wade v. Byle*, 295 Ill. App. 3d 545 (1998), was dispositive of the issue. We agree. In *Wade*, the plaintiff filed a complaint in United States District Court alleging violations of 42 U.S.C. § 1983 and various state law claims. *Id.* at 546. Two and a half years after the complaint was filed, the federal district court granted defendant's motion for summary judgment on the federal claims and dismissed the state law claims for lack of supplemental federal subject matter jurisdiction. *Id.* The plaintiff then appealed the district court decision to the federal appellate court. *Id.* On May 13, 1996, the federal appellate court affirmed the district court's decision. *Id.* On November 1, 1996, the plaintiff refiled his state law claims in the circuit court which was almost a year and a half after entry of the federal district court's dismissal. *Id.* The circuit court in *Wade* dismissed the complaint as time-barred. *Id.* The procedural facts in *Wade* mirror the instant case.

¶ 13 On appeal, the *Wade* court held that the federal case was no longer "pending" for purposes of the Illinois savings statute (735 ILCS 5/13-217 (West 2012)), which gave plaintiff one year to refile an action in state court following a United States District Court's dismissal for lack of jurisdiction. *Id.* at 546-47. The *Wade* court held that plaintiff's unsuccessful appeal to the federal appellate court did not change the clear instructions in Illinois' savings statute that allowed plaintiff one year to refile his action in state court following the federal district court's dismissal of the action. *Id.* at 546. The court noted that the plaintiff had control of his own lawsuit and was free to file it in the Illinois courts whenever he wished. *Id.* at 547. The plaintiff executed a strategic decision to appeal the district court's dismissal to the federal appellate court rather than refile the case in state court within the one year period following the dismissal. *Id.*

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The *Wade* court noted that the "obvious purpose of section 13-217 [is] to put an end to litigation." *Id.* at 547. The plaintiff's election to not file a state lawsuit within one year of the dismissal and instead pursue an appeal "turned out to be a bad decision" that could not be corrected by impliedly creating a tolling period for plaintiff to litigate a federal appeal to conclusion into section 13-217 of the Code of Civil Procedure. *Id.*; see also 735 ILCS 5/13-217 (West 2012).

¶ 14 Nothing contained in the language of section 13-217 provides for the refiling of plaintiff's complaint in state court after the dismissal is affirmed or denied by the federal appellate court. 735 ILCS 5/13-217 (West 2012). In other words, there is no statutory language that allows for the tolling of the period between the dismissal by the federal district court and the ruling by the federal appellate court affirming the dismissal. The *Wade* opinion makes clear that the pendency of the federal appellate court case does not toll the one-year savings provision for statute of limitations purposes. *Wade v. Byles*, 295 Ill. App. 3d 545, *appeal denied*, 178 Ill. 2d 597 (1998).

¶ 15 Statutes of limitations and their accompanying savings statutes are primarily designed to assure fairness to the parties. Such statutes promote justice, the theory being that even if a plaintiff has a just claim, it is equally just to put the adversary on notice to defend within the statutorily prescribed period of limitations. Our state legislature has determined that there comes a point in time when the right to be free of stale claims prevails over the right to prosecute them. If the Illinois legislature had wished to allow a plaintiff to refile beyond the one year refiling period fixed by section 13-217, which begins as of the date of a United States District Court dismissal, it could have easily provided for that scenario, but it did not.

¶ 16 Other cases cited by both parties support both the *Wade* opinion and this court's decision herein. In *Hupp v. Gray*, 73 Ill. 2d 78 (1978), our supreme court held that an appeal from a dismissal by a plaintiff did not toll the applicable savings provision for statute of limitations. In

Hupp, the plaintiffs initially brought suit in federal district court, which dismissed their claims for lack of jurisdiction. The federal appellate court affirmed the dismissal. After the federal appeal concluded, the plaintiffs filed suit in state court within one year of the federal appellate decision, not the federal district court dismissal. Our supreme court found that the plaintiffs had not complied with the one-year savings limitations period established by the predecessor to section 13-217 of the Code of Civil Procedure, because they failed to file the action in state court within one year of the dismissal by the federal district court.

¶ 17 In *Suslick v. Rothchild Securities Corp.*, 128 Ill. 2d 314 (1989), the plaintiffs first filed their suit in federal district court. As in *Hupp*, only after the federal appellate court affirmed the federal district court dismissal did the plaintiffs file suit in state court. Our supreme court again held that the one-year period for refiling pursuant to section 13-217 ran from the date of the federal district court's dismissal and not from the date of the affirmance of that dismissal by the federal appellate court. The *Suslick* court reasoned that once a federal district court dismisses a case, the case is no longer pending in that court, even if it has been appealed. Therefore, both *Hupp* and *Suslick* hold, quite clearly, that the one-year savings period established by section 13-217 begins to run when the federal district court dismisses the case and definitely not when any federal appeal is finally resolved.

¶ 18 Both *Hupp* and *Suslick* referenced two appellate courts cases: *Sager Glove Corp. v. Continental Casualty Co.*, 37 Ill. App. 2d 295 (1962) and *Giesler v. Benken*, 328 Ill. App. 357 (1946).

¶ 19 In *Sager Glove*, this court held that plaintiff's appeal of an adverse judgment did not toll the one-year savings provision. We explained that the result was not unfair because when the original suit was dismissed, the plaintiff had two choices. He could have appealed or he could have refiled the suit within one year. The *Sager Glove* court explained further, as follows:

"[T]he statute gives a litigant under certain circumstances, the opportunity to refile a suit within one year. Also available is the remedy of appeal. *** A litigant may choose one or both courses of action. If an appeal is chosen and suit is not refiled within a year, should the judgment appealed from be affirmed, then the litigant has played and lost. 'Where one has a choice of remedies, the fact that he selects one remedy does not toll limitations as against an action based on another remedy.' " *Sager Glove Corp. v. Continental Casualty Co.*, 37 Ill. App. 2d 295, 300-01 (1962) (quoting 54 C.J.S., Limitations of Actions, § 247).

¶ 20 In *Giesler*, this court clearly stated that "the mere pendency of an appeal does not postpone the commencement date of the running of the statute [of limitations]." *Geisler v. Benken*, 328 Ill. App. 357, 361 (1946). In keeping with *Geisler* and other court precedent cited in this order, this court cannot, and has no basis to, expand or toll the one-year savings period provided by section 13-217.

¶ 21 ¶ 22 Plaintiff is given additional broad protection by the savings provision for statutes of limitations contained in section 13-217 of the Code of Civil Procedure, (735 ILCS 5/13-217 (West 2012)), when the plaintiff's original federal complaint has failed for lack of jurisdiction. This savings provision which extends the original applicable statute of limitations was enacted to facilitate the disposition of litigation on the merits and to give plaintiffs additional protection from losing a cause of action unrelated to the merits. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77 (1996). If the legislature had wished to extend the section 13-217 savings provision for statutes of limitations beyond a year from the dismissal date by the federal district court, it could have easily provided for that in the statute. Our role is not to rewrite the savings provision,

but we are obligated to enforce it as written by our legislature. The verbiage of the statute must be given its plain and ordinary meaning and the legislative intent is best surmised from the statute's clear language. *DeClerk v. Simpson*, 143 Ill. 2d 489, 492 (1991) (citing *Franzese v. Trinko*, 66 Ill. 2d 136 (1977)). Section 13-217 simply contains no language from which we may infer the tolling of the one-year period for dismissed federal cases which are on appeal in the federal appellate court.

¶ 22

CONCLUSION

¶ 23 Because this action was not filed in state court until November 2, 2012, it was not brought within one year from the federal district court's order entered on October 19, 2011, which dismissed plaintiff's claims for lack of jurisdiction. Therefore, we affirm the circuit court's order which dismissed this case.

¶ 24 Affirmed.