

SUPREME COURT OF OKLAHOMA

Cornett v. Carr

2013 OK 30, 302 P.3d 769 · Decided April 23, 2013

SUMMARY

The Oklahoma Supreme Court held that Rule 9(a) of the Rules for the District Courts conflicted with 12 O.S. Supp. 2002 § 2004(I) to the extent the rule shortened the statutory 180-day period for service of summons. The court reversed the dismissal of Cornett's action, vacated the Court of Civil Appeals' opinion, and remanded for completion of service within the remaining statutory period. The court also struck Rule 9(a) and made its decision prospective, applying it to pending cases and cases filed after the opinion.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                       |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Oklahoma                                                                                                                                                                                                                             |
| WRITING FOR THE COURT | Gurich, J.; Colbert, C.J.; Reif, V.C.J.; Watt, J.; Edmondson, J.; Kauger, J.; Winchester, J.; Taylor, J.; Combs, J.                                                                                                                                   |
| JURISDICTION          | Oklahoma                                                                                                                                                                                                                                              |
| DECIDED               | April 23, 2013                                                                                                                                                                                                                                        |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                 |
| PROCEDURAL POSTURE    | Cornett sought review of the Court of Civil Appeals' affirmance of the Oklahoma County District Court's sua sponte dismissal without prejudice for failure to issue summons within the period prescribed by Rule 9(a), Rules for the District Courts. |
| STANDARD OF REVIEW    | De novo review applies to whether a district court rule conflicts with a statute; the review is non-deferential, plenary, and independent.                                                                                                            |
| PRECEDENTIAL VALUE    | Published, precedential Oklahoma Supreme Court opinion; the decision states that it applies prospectively to pending cases and cases filed after issuance.                                                                                            |
| PARTIES               | Robert Cornett v. Rhonda Carr                                                                                                                                                                                                                         |

TOPICS

- service of process
- statutory interpretation
- appellate procedure
- civil procedure
- standard of review

PRACTICE AREAS

## QUESTIONS PRESENTED

1. Whether Rule 9(a), Rules for the District Courts, conflicts with 12 O.S. Supp. 2002 § 2004(I) by permitting dismissal before the expiration of the statute's 180-day period for service of process.
2. Whether the district court properly dismissed Cornett's action before the statutory 180-day service period expired.
3. Whether Rule 9(a) should remain in force to the extent it shortens the statutory time for issuing and serving summons.

## HOLDINGS

1. Rule 9(a) directly conflicts with § 2004(I) to the extent that it shortens the plaintiff's statutory 180-day period for service of summons. Because the statute prevails over the conflicting court rule, the statutory period is controlling.
2. The 180-day period in § 2004(I) is an outer limit that cannot be judicially reduced; service completed within that period is timely.
3. The district court's dismissal was premature because Cornett still had time remaining under § 2004(I) to issue summons and complete service.
4. Rule 9(a) was stricken from the Rules for the District Courts of Oklahoma, and the decision applies prospectively to cases pending or filed after issuance; it does not affect cases dismissed under Rule 9(a) that became final judgments.

## KEY QUOTATIONS

*"To the extent the two conflict, the statute must prevail."* (302 P.3d at 772)

*"Accordingly, we conclude Rule 9(a) directly conflicts with 12 O.S.Supp. 2002 § 2004(I) to the extent it shortens a plaintiff's allocated time for service of summons."* (302 P.3d at 773)

*"Today's decision renders Rule 9 unnecessary, and it is hereby stricken from the Rules for the District Courts of Oklahoma."* (302 P.3d at 773)

## FACTUAL BACKGROUND

A divorce judgment directed Rhonda Carr to sell real property and divide the net proceeds equally with Robert Cornett. Cornett alleged that Carr conspired with Glen and Dena Davis to defraud him through an undisclosed \$8,000 payment and sought rescission of the alleged agreement. After Cornett refiled the action, his attorney failed to issue summonses, and the district court dismissed the case ninety-six days after filing under Rule 9(a).

## PROCEDURAL HISTORY

Cornett filed an action challenging the sale of real property associated with his divorce proceeding. After the original action was dismissed without prejudice, he refiled in Oklahoma County, but his attorney failed to issue

summonses. The district court dismissed the refiled action ninety-six days after filing under Rule 9(a). The Court of Civil Appeals affirmed, and the Oklahoma Supreme Court granted certiorari.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

The trial court was directed to allow Cornett the remaining time authorized by 12 O.S. Supp. 2002 § 2004(I) to issue summons and complete service on the defendants. The Court of Civil Appeals opinion was vacated, and the trial court's dismissal order was reversed.

## CASES CITED

- Duncan v. Oklahoma Department of Corrections, 2004 OK 58, ¶ 3, 95 P.3d 1076, 1078
- In re Estate of Bell-Levine, 2012 OK 112, ¶ 5, 293 P.3d 964, 966
- Martin v. Aramark Services, Inc., 2004 OK 38, ¶ 4, 92 P.3d 96, 97
- State ex rel. Oklahoma Board of Medical Licensure and Supervision v. Pinaroc, 2002 OK 20, ¶ 12, 46 P.3d 114, 119
- Vannoy v. Earth Biofuels, Inc., 2009 OK CIV APP 22, ¶ 5, 278 P.3d 1052, 1053
- Gugello v. Select Specialty Hospital-Tulsa, 2006 OK CIV APP 102, ¶ 8, 143 P.3d 519, 522
- Fischer v. Baptist Health Care of Oklahoma, 2000 OK 91, ¶ 6, 14 P.3d 1292, 1293
- Mott v. Carlson, 1990 OK 10, ¶ 8, 786 P.2d 1247, 1250
- Fanning v. Brown, 2004 OK 7, ¶ 20 n. 9, 85 P.3d 841, 847
- Graff v. Kelly, 1991 OK 71, ¶ 14, 814 P.2d 489, 493-494
- Henderson v. United States, 517 U.S. 654, 116 S. Ct. 1638, 134 L. Ed. 2d 880 (1996)
- State Farm Fire & Casualty Co. v. Smith, 39 So. 3d 1172, 1176 (Ala. Ct. App. 2009)
- Boston v. Buchanan, 2008 OK 114, ¶¶ 17-19, 89 P.3d 1034, 1040-1041
- Hull v. Rich, 1993 OK 81, ¶ 6, 854 P.2d 903, 904
- Gay v. Akin, 1988 OK 150, ¶ 8, 766 P.2d 985, 990
- Depuy v. Hoeme, 1989 OK 42, ¶ 10, 775 P.2d 1339, 1343-1344
- Dear v. Rathje, 485 F.2d 558, 560 (7th Cir. 1973)

## OPINION

GURICH, J.

GURICH, J. Facts and Procedural History 11 In January 2006, Robert Cornett brought a lawsuit in the Oklahoma County District Court, challenging the sale of real property ordered to be sold by his ex-spouse, Rhonda Carr, in connection with the parties' divorce proceeding. According to the

petition, a divorce judgment entered by the Seminole County District Court directed Carr to sell the subject property at the highest possible price and evenly divide the net proceeds with Cornett.

It further suggested Carr entered into a conspiracy with co-defendants, Glen and Dena Davis, to defraud Cornett by providing for an undisclosed payment to Carr of \$8,000.00; a sum not included in the written real estate contract. Cornett additionally sought rescission of the allegedly clandestine agreement.

On March 4, 2008, the trial court dismissed the original case without prejudice.<sup>1</sup> T2 The matter was refiled on April 30, 2009, in Oklahoma County, Case No. CJ-2009-4065. Following the commencement of the second action, Cornett's attorney neglected to issue summonses. Upon review of the docket, the trial judge recognized this omission. Judge Dixon entered a sua sponte order ninety-six days after filing suit, on August 4, 2009, dismissing the second case without prejudice in accordance with Rule 9(a), Rules for the District Courts, 12 O.S.2001 Ch. 2, App.2 T3 Cornett appealed the order dismissing his lawsuit, arguing Rule 9(a) directly conflicted with the statutory terms of 12 O.S.Supp.2002 § 2004(I).

The case was assigned to the Court to the Court of Civil Appeals. On January 7, 2011, COCA affirmed the lower court's dismissal of the proceeding, finding no discord between Rule 9(a) and Section 2004(I). On June 13, 2011, we granted certiorari to review the seemingly incompatible provisions. Standard of Review 14 Whether a district court rule conflicts with a statute presents a purely legal question analyzed under the de novo standard of review.

See *Duncan v. Oklahoma Dept. of Corrections*, 2004 OK 58, ¶ 3, 95 P.3d 1076, 1078. Thus, our examination of the case consists of a "non-deferential, plenary and independent review of" the lower court's rulings. *Id.* See also *In re Estate of Bell-Levine*, 2012 OK 112, ¶ 5, 293 P.3d 964, 966; *Martin v. Aramark Services, Inc.*, 2004 OK. 38, ¶ 4, 92 P.3d 96, 97. Analysis 15 Cornett argues that Rule 9(a) directly conflicts with Section 2004(I), to the extent it shortens the time limit for accomplishing service of process under the statute.

According to Cornett, if service is accomplished before the expiration of 180 days from the filing of the action, service is always timely under § 2004(I). This, he suggests, is consistent with the fundamental policy which favors disposition of cases on their merits, rather than procedural technicalities. Carr counters these arguments by pointing out that the two provisions deal with "totally separate contingencies."

She maintains that Rule 9(a) controls when summons must be issued, while Section 2004(I) imposes a time restriction on when summons must be served. T6 At the time Cornett's lawsuit was dismissed by the trial judge, 12 O.S.Supp.2002 § 2004(I) was in effect: SUMMONS: TIME LIMIT FOR SERVICE. If service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the petition and the plaintiff cannot show good cause why such

service was not made within that period, the action may be dismissed \*771as to that defendant without prejudice upon the court's own initiative with notice to the plaintiff or upon motion.

The action shall not be dismissed where a summons was served on the defendant within one hundred eighty (180) days after the filing of the petition and a court later holds that the summons or its service was invalid.

After a court quashes a summons or its service, a new summons may be served on the defendant within a time specified by the judge. If the new summons is not served within the specified time, the action shall be deemed to have been dismissed without prejudice as to that defendant. This subsection shall not apply with respect to a defendant who has been outside of this state for one hundred eighty (180) days following the filing of the petition.

Subsection (I) does not place any time limitation on a plaintiff other than requiring service within 180 days after commencement of a lawsuit.<sup>3</sup> In contrast, Rule 9(a) reads as follows: In any case in which summons is not issued or waiver filed within ninety (90) days after the filing of the petition, or alias summons is not issued within thirty (80) days after return of the summons not served, the action may be dismissed by the court without notice to the plaintiff.

This court rule adds a restriction not imposed by § 2004.<sup>4</sup> To the extent the two conflict, the statute must prevail. *State ex rel. Okla. Bd. of Med. Licensure and Supervision v. Pinaroc*, 2002 OK 20, ¶ 12, 46 P.3d 114, 119; see also *Vannoy v. Earth Biofuels, Inc.*, 2009 OK CIV APP 22, ¶ 5, 278 P.3d 1052, 1053 (recognizing statutory priority of 12 O.S.Supp.2002 § 2004(B) over Rule 10, Rules for the District Courts, 12 O.S.2001 Ch. 2, App.).

T7 An historical examination of Oklahoma's statutory scheme governing service of process reveals that Rule 9 was promulgated in 1961, more than twenty years before adoption of the Pleading Code<sup>5</sup> Prior to the enactment of Rule 9, Oklahoma procedural law placed no specific time restrictions on issuance and service of a summons.<sup>6</sup> Hence, the implementation of Rule 9 was designed to foster "judicial economy and [was] designed to ensure the efficient administration of justice and to encourage lawyers to diligently represent their clients" by placing a time limit on issuance of summons to prevent lawsuits from lingering indefinitely.

*Gugello v. Select Specialty Hosp.-Tulsa*, 2006 OK CIV APP 102, ¶ 8, 143 P.3d 519, 522. However, with the Legislature's passage of the Oklahoma Pleading Code, the policy rationale behind Rule 9(a) was superseded by 12 O.S.Supp.1984 § 2004(T).<sup>18</sup> Nevertheless, the fact remains that Rule 9(a) and § 2004(I) have coexisted side-by-side for years.

As such, COCA agreed with Carr that Rule 9 refers to an entirely distinct aspect of service of process than does § 2004(I). Accordingly, COCA held that the two provisions were not at odds. While we \*772agree with COCA that service of summons presupposes the actual issuance of

summons, our prior decisions have clearly held that service is always punctual if made within the time allotted by § 2004.

*Fischer v. Baptist Health Care of Okla.*, 2000 OK 91, ¶ 6, 14 P.3d 1292, 1293; See also *Mott v. Carlson*, 1990 OK 10, ¶ 8, 786 P.2d 1247, 1250. T9 According to the 1984 Committee Comments, 12 O.S. Supp. 1984 § 2004(I) was modeled after FRCP Rule 4(J). This Court has routinely relied upon federal case law to assist with interpretation of the corresponding sections of the Oklahoma Pleading Code.

See *Fanning v. Brown*, 2004 OK 7, ¶ 20, n. 9, 85 P.3d 841, 847 (looking to federal decisions weighing FRCP Rule 8 to guide our interpretation of 12 § 2008); *Graff v. Kelly*, 1991 OK 71, ¶ 14, 814 P.2d 489, 493-494 (considering federal case law to evaluate a legal issue arising under § 2004 of the Oklahoma Pleading Code). {10 Prior to Congress' overhaul of the FRCP in 1983, Rule 4 contained no express sanction for failing to have a summons issued at the time a complaint was filed.

4A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Richard L. Marcus, *Federal Practice and Procedure* § 1086 Bd ed. 2012). Consequently, as part of the 1983 changes, Congress added subsection (J) to Rule 4, which provided in relevant part: If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice..."

FRCP Rule 4(j) (19883). The version adopted by the Oklahoma Legislature in 1984 was nearly identical to FRCP Rule 4. 111 In *Henderson v. U.S.*, 517 U.S. 654, 116 S.Ct. 1638, 134 L.Ed.2d 880 (1996) the United States Supreme Court granted certiorari in a case with facts similar to those presented in this proceeding to construe the time limits imposed by FRCP Rule 4).

The issue presented was whether FRCP Rule 4(J) conflicted with the service requirements under the Suits in Admiralty Act, 46 U.S.C.App. § 741 et. seq. Id. at 656, 116 S.Ct. 1688. After initiating a lawsuit, counsel for the plaintiff attempted to obtain proper summons forms for completion, issuance, and service upon the United States. Following service of the summons, the United States sought dismissal of the lawsuit for failure to accomplish service as expeditiously as required by the Suits in Admiralty Act.

The district court issued an order dismissing the action based on a failure to issue and serve summons on the defendant in a timely manner. On appeal, the Fifth Circuit Court of Appeals affirmed. After granting certiorari, the Supreme Court found the term in Rule 4(G) was a fixed time limit, not subject to judicial reduction: We reject the Government's view of the time the Federal Rules authorize for service.

Reading Rule 4 in its historical context, we conclude that the 120-day provision operates not as an outer limit subject to reduction, but as an irreducible allowance. [[Image here]] The Federal Rules thus convey a clear message: Complaints are not to be dismissed if served within 120 days, or within such additional time as the court may allow. [[Image here]] [The core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections.

Seeing service in this light, and in view of the uniform system Rule 4 of the Federal Rules of Civil Procedure provides, we are satisfied that the service "forthwith" provision of Suits in Admiralty Act, 46 U.S.C.App. § 742, has been displaced by Rule 4, and therefore has no current force or effect. *Id.* at 661, 663, 671-72, 116 S.Ct. 1638. See also *State Farm Fire & Cas.*

*Co. v. Smith*, 39 So.3d 1172, 1176 (Ala.Ct.App.2009) (applying *Henderson* and finding trial court dismissal for insufficient service premature when issued prior to expiration of Rule 4(b), Ala. R. Civ. P.). \*773112 We find the rationale set forth in *Henderson* to be persuasive. By interpreting 12 O.S.8supp.2002 § 2004(I) as providing an outer limit not subject to reduction we promote uniformity and fairness in litigation.

In other words, we eliminate the possibility for arbitrary dismissals of cases based on individual judges' expectations in a lawsuit.<sup>7</sup> Accordingly, we reverse the trial court's dismissal of the plaintiff's action and remand to allow the remaining time allotted under § 2004(I) to complete service on the defendants. Conclusion 'I 13 It has been the policy of this Court to resolve pending legal cases, when feasible, on their merits.

As we explained in *Boston v. Buchanan*, 2008 OK 114, ¶¶ 17-19, 89 P.3d 1034, 1040-41: While it is true that diligence of litigants in attending to their matters pending in the courts is of importance, and while it is a significant function of the courts that the litigation before them be determined and disposed of as rapidly as possible, it is also important that all litigants be given a reasonable opportunity to have their day in court, and to have their rights and liberties tried upon the merits.

The latter is and should be the primary right of the parties and duty of the courts. Thus, the terms of 12 O.S.8supp.2002 § 2004, should be construed to promote the aforementioned policy and to further the judicial goals of fair and uniform administration of justice. A bright-line rule better serves both of these ends.

Accordingly, we conclude Rule 9(a) directly conflicts with 12 O.S.8supp. 2002 § 2004(I) to the extent it shortens a plaintiff's allocated time for service of summons. Cornett should be allowed an additional eighty-four days to complete service. Today's decision renders Rule 9 unnecessary, and it is hereby stricken from the Rules for the District Courts of Oklahoma.<sup>8</sup> On remand, the trial

court is directed to allow Cornett the remaining time authorized by § 2004(I) to issue summons and complete service on the defendants.

14 Today's decision shall apply prospectively-controlling only those cases currently pending or filed after the issuance of this opinion. It shall have no effect on cases dismissed pursuant to Rule 9(a) that have become final judgments.<sup>9</sup> COCA OPINION VACATED; TRIAL COURTS ORDER DISMISSING PLAINTIFF/APPELLANTS ACTION REVERSED; CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH TODAY'S DECISION.

15 CONCUR: COLBERT, C.J., REIF, V.C.J., WATT, EDMONDSON and GURICH, JJ. 1 16 DISSENT: KAUGER, WINCHESTER, TAYLOR and COMBS, JJ.. Due to a docketing error, Cornett's attorney failed to appear for the pretrial conference and the action was dismissed.

On May 1, 2008, a journal entry memorializing the dismissal was filed in Oklahoma County, Case No. CJ-2006-642.. Although the trial court's August 4, 2009 Order of Dismissal purported to be without prejudice, the effect of the dismissal could result in the bar of at least some of Cornett's claims. See, e.g., *Hull v. Rich*, 1993 OK 81, ¶ 6, 854 P.2d 903, 904 (recognizing 12 O.S. § 100 authorizes only one refiling of a case previously dismissed after the running of the statute of limitations)..

Section 2004(I) was amended in 2009 to provide that failure to accomplish service upon a defendant within 180 days shall result in the action being "deemed dismissed," absent a showing of good cause. The amendment has no bearing on our decision in this case.. Title 12 O.S.Supp.2002 § 2004(A) provides that summons be issued "forthwith."

However like FRCP Rule 4, which included the forthwith language until its removal by amendment, this condition places the burden on the court clerk to promptly issue summons; it does not impose a requirement on the litigants. See 44 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Richard L. Marcus, *Federal Practice and Procedure* § 1084 (3d ed. 2012); See also *Dear v. Rathje*, 485 F.2d 558, 560 (7th Cir.1973) (construing the "forthwith" requirement in FRCP Rule 4 to impose a duty on the clerk)..

Laws 1984, c. 164, (enacting the Oklahoma Pleading Code, repealing prior provisions relating to service of process, parties and pleading). The Code was modeled after the Federal Rules of Civil Procedure. *Gay v. Akin*, 1988 OK 150, ¶ 8, 766 P.2d 985, 990.. Prior to passage of the Oklahoma Pleading Code in 1984, an action was deemed "commenced" for purposes of the statute of limitations upon service of summons on the defendant.

12 O.S.1981 § 97 (repealed 1984). Thus, the law implicitly required litigants to issue and serve summons to satisfy the relevant limitation period. Nevertheless, without a finite rule, a plaintiff could conceivably file a lawsuit and wait months or years to issue summons. With the adoption of

12 O.S. Supp.1984 § 2003, an action is now commenced with the filing of a petition with the court..

See 4A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Richard L. Marcus, Federal Practice and Procedure § 1086 (3d ed. 2012) (explaining that "the 120-day period prescribed by Rule 4(m) provides an easily understood and administered guideline and also ensures notice to the defendant within a specified time."). There is no valid reason to duplicate statutory requirements by amending Rule 9.

Restrictions and deadlines relating to service of summons or diligence in prosecution are covered by statute as set forth in 12 O.S.Supp.2002 § 2004(I) and 12 O.S.Supp.2007 § 1083.. See *Depuy v. Hoeme*, 1989 OK 42, ¶ 10, 775 P.2d 1339, 1343-1344 (explaining that a judgment stands as final when the time to appeal has expired, is impervious to reconsideration, and is binding on the parties).