

Docket Number: _____

In the Supreme Court of the United States

Rebekah Cooper,
as Administratrix of the Estate of Jason Cooper,
Petitioner,

v.

Ehtsham Haq, M.D., Amjed Javaid, M.D., and Amjed
Javaid, L.L.C.
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the state-law periods of limitation for Alabama wrongful-death and medical-malpractice claims immune from the tolling provisions of 28 U.S.C. § 1367? Does *Artis v. District of Columbia*, 138 S. Ct. 594 (2018), apply to all state-law limitations provisions or are limitations periods wrongful death and in medical malpractice cases not tolled? Does American English lexicon include terms other than “toll,” “stay,” “suspend,” “stop the clock,” or “call a halt” that this Court might use to more clearly explain the operation of 28 U.S.C. § 1367?

When a federal-question action that contains pendant state-law claims is filed in the district court such that the district court possesses supplemental jurisdiction over the state-law claims, 28 U.S.C. § 1367 tolls the limitations period for the state-law claims. This was recently re-stated with absolute clarity in *Artis v. District of Columbia*, 138 S.Ct. 594 (2018).

In the instant matter, the Supreme Court of Alabama affirmed a trial court’s judgments that petitioner Rebekah Cooper’s claims against Ehtsham Haq M.D., Amjad Javaid M.D., and Amjad Javaid L.L.C. (Dr. Javaid’s company) were barred by Alabama’s two-year statute of limitations applicable to wrongful-death, medical-malpractice actions.

The question presented is whether the Supreme Court of Alabama committed reversible error when it affirmed the trial court’s judgment that Ms. Cooper’s

claims against Dr. Haq, Dr. Javaid, and Dr. Javaid's company were not tolled by 28 U.S.C. § 1367.

CORPORATE DISCLOSURE STATEMENT

Ms. Cooper, the petitioner, is an individual and owns no interest in any of the respondents' companies or entities.

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App. 1a: 8.10.2018 *Certificate of Judgment and Notice of Overruling of Application for Rehearing, Cooper v. Haq*, Ala. Sup. Ct. (1160569)

App. 1b: 8.10.2018 *Certificate of Judgment and Notice of Overruling of Application for Rehearing, Cooper v. Javaid*, Ala. Sup. Ct. (1161066)

App. 2: 2.28.2017 *Order* (and Amended *Order* of 3.23.2017) granting Respondent Dr. Haq's summary-judgment motion, *Cooper v. Haq*, Circuit Court of Morgan County, 52-CV-2016-900415

App. 3: 8.11.2017 *Order* granting Respondent Dr. Javaid's summary-judgment motion, *Cooper v. Haq*, Circuit Court of Morgan County, 52-CV-2016-900415

App. 4: 12.27.2017 *Order* of Ala. Sup. Ct. consolidating appellate matters *Cooper v. Haq* (1160569) and *Cooper v. Javaid* (1161066)

App. 5: 5.11.2018 *Decision* of Ala. Sup. Ct. of affirmed (no opinion) in appellate matters *Cooper v. Haq* (1160569) and *Cooper v. Javaid* (1161066)

App. 6: 9.12.2016 *Order Dismissing Plaintiff's Case Without Prejudice, Cooper v. Decatur Morgan Hospital et al.*, U.S. District Court, Northern District of Alabama, 5:16-CV-956-AKK

App. 7: Title 28 U.S.C. § 1367, subparagraphs (a) and (d) is the United States statute involved.

App. 8: January 31, 2018 letter to Ms. Julia Jordan Weller, Clerk, Supreme Court of Alabama

TABLE OF AUTHORITIES

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JUDGMENTS ENTERED BELOW

Petitioner Rebekah Cooper, as the Administratrix of the Estate of Jason Cooper, respectfully petitions this Court for a writ of certiorari to review two judgments of the Supreme Court of Alabama that are reproduced in the Appendix (“App.”) at 1a and 1b. The judgments were entered after the Alabama high court affirmed with no opinion the trial court’s opinions, orders, and judgments that dismissed Ms. Cooper’s wrongful-death, medical-malpractice claims against the respondents.

The trial court’s opinion, order, and judgment dismissing Dr. Haq appear at Appendix 2. The trial court’s order and judgment dismissing Dr. Javaid and Amjed Javaid L.L.C. appear at Appendix 3. The Supreme Court of Alabama’s order consolidating the cases for appeal appears at Appendix 4. The no-opinion affirmances of the trial court’s judgments appear at Appendix 5. The Supreme Court of Alabama’s orders overruling Ms. Cooper’s applications for rehearing and the resulting judgments against her appear at Appendix 1a and 1b.

BASIS FOR THIS COURT’S JURISDICTION

The Supreme Court of Alabama entered orders overruling Ms. Cooper’s applications for rehearing and judgments in both cases on August 10, 2018. Title 28 U.S. § 1257 confers jurisdiction on this Court because that statute empowers this Court by writ of certiorari to review a final judgment by a state’s highest court “where any title, right, privilege, or immunity is

specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.” This petition is being filed on November 8, 2018, which is 90 days from August 10. Thus, because this petition has been filed within the ninety-day time period prescribed by Rule 12 of the Rules Supreme Court of the United States, the petition is timely.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 1367, specifically, subparagraphs (a) and (d) is the United States statute involved. It is set out in full at Appendix 7.

STATEMENT OF THE CASE

A. Introduction

The state trial court granted summary judgment to Dr. Haq, Dr. Javaid, and Amjed Javaid L.L.C. on the ground that Ms. Cooper’s medical-malpractice claims against them were barred by the two-year statute of limitations. This petition is based (1) on the trial court’s failure to adhere to the requirements of federal law that stop the running of all state law statutes of limitation on claims pending in federal court and (2) the Supreme Court of Alabama’s judgments affirming the trial court’s decisions. After the trial court’s ruling, but, during the pendency of both appeals at the Supreme Court of Alabama, this Court released *Artis v. District of Columbia*, 138 S.Ct. 594 (2018), which re-emphasized the power and effect of 28 U.S.C. § 1367. That statute, essential to the

vitality of federalism, ensures that legal claims under state law are not impaired in the slightest by a temporary pendency under federal jurisdiction. Ms. Cooper brought *Artis* to the attention of the Supreme Court of Alabama prior to its summary affirmances of the trial court. *See* Appendix 8.

28 U.S.C. § 1367 is not a procedural nicety. It is an explicit protection for the rights of access to the civil courts: federal and state. Protected by the United States Constitution in the Seventh Amendment and the Constitution of Alabama of 1901 in §§ 10, 11 and 13 is the statutory guarantee that access for state courts for civil redress will not impair while claims are pending in federal court or during their transition back to state jurisdiction. 28 U.S.C. § 1367 does not require an exercise in semantics. In *Artis*, this Court exhausted its lexicon to explain that the “tolling” or “staying” effect of the statute is comprehensive. *Artis* uses the vernacular “it stops the clock.” And that means for all aspects of the litigation process, including those at issue here.

The Supreme Court of Alabama’s affirmance of the trial court’s dismissals overlooked controlling law that required a reversal. It ignored the plain language of 28 U.S.C. § 1367, rejected this Court’s pre-*Artis* decisions and ultimately ignored *Artis* itself. It was error under any legal standard ever articulated by this Court, including the statutory construction urged by the *Artis* dissent.

B. Ms. Cooper raised 28 § U.S.C. 1367 at the Alabama trial court and on appeal to the Supreme Court of Alabama.

Ms. Cooper's wrongful-death, medical malpractice claims against Dr. Haq, Dr. Javaid, and Amjed Javaid L.L.C. (Dr. Javaid's professional company) are identical. Ms. Cooper alleged that Dr. Haq and Dr. Javaid breached the professional standard of care in the treatment of her husband causing his death.¹ When Ms. Cooper sued Dr. Haq and Dr. Javaid, both doctors moved for summary judgment on the ground that Ms. Cooper's claims against them were barred Alabama's two-year statute of limitation for wrongful-death, medical-malpractice actions. At the trial court in response to both doctors' motions, Ms. Cooper asserted that 28 U.S.C. § 1367 stopped the clock on the two-year limitations period and that her claims were timely. C.337-38, C.595-600. The trial court acknowledged Ms. Cooper's § 1367 argument but held that the statute did not save her claims. *App. 2, supra* (as to Dr. Haq); *App. 3, supra* (as to Dr. Javaid).

Ms. Cooper appealed the dismissal of her claims against Dr. Haq and Dr. Javaid and reasserted her 28 U.S.C. § 1367 tolling arguments. Because the facts and issues in both cases were identical, the Supreme Court of Alabama consolidated the appeals. *App. 4, supra*. During the appeal, Ms. Cooper alerted the

¹Ms. Cooper alleged that Amjed Javaid L.L.C., as Dr. Javaid's professional company, was vicariously liable for Dr. Javaid's acts and omissions. When Ms. Cooper refers to respondent Dr. Javaid, she means respondents Dr. Javaid and Amjed Javaid L.L.C.

Alabama high court of *Artis* and explained how *Artis* warranted reversals of the trial court judgments against her. *App. 8, supra*. Apparently unswayed by this Court's clear mandate, the Supreme Court of Alabama summarily affirmed the orders granting summary judgment. Ms. Cooper filed applications for re-hearing in which she again asserted that 28 U.S.C. § 1367 and *Artis* compelled the reversal of the trial court and remand of the claims against Dr. Haq and Dr. Javaid back for to the trial court. The Supreme Court of Alabama overruled the applications. *App. 1a* and *1b, supra*.

C. Jason Cooper's mental illness

Ms. Cooper, the petitioner, is administrator and personal representative of the Estate of Jason Cooper. C.12-39; C.133-164. Jason Cooper hanged himself on September 10, 2014, while he was an involuntary inpatient at Decatur Morgan Hospital-West psychiatric facility ("DMH-West"). C.28-31; C.150-56. Mr. and Mrs. Cooper were married when Mr. Cooper died. C.16-20; C.139-142.

In the fall of 2014, Mr. Cooper was suffering from bi-polar disorder and depression. C.20-24. He was extremely suicidal. C.142-152. He was admitted to Decatur Morgan Hospital-West psychiatric facility ("DMH-West"). *Id.* During his admission to DMH-West, the severity of his mental illness became even clearer. C.20-27; C.142-152. Mr. Cooper's attending psychiatrist, Dr. Bryant Mahaffey, decided that Mr. Cooper needed to be transferred and admitted to a state mental hospital for an indefinite treatment

period. C.20-27; C.142-152. While awaiting transfer from DMH-West to the state mental hospital, Mr. Cooper twice attempted suicide, succeeding on the second. C.21-32; C.144-156. Mr. Cooper locked himself in his bathroom at DMH-West and hung himself with a bed sheet. C.28-32; C.150-56.

D. Ms. Cooper's ignorance of Dr. Haq's and Dr. Javaid's involvement in Mr. Cooper's care

Alabama, like other jurisdictions, requires diligence in the process of identifying potential additional parties or claims. It, and the basic tenets of legal professionalism, also require appropriate investigation to ensure that parties are added and claims made only after an appropriate investigation. The record here demonstrably shows that Ms. Cooper and her counsel were diligent in their attempts to identify all of the potential parties, attentive to the details of the available records in their search, immediately responded to newly discovered information, and made appropriate inquiry of defense counsel before amending the complaint. Here, when Ms. Cooper's counsel discovered the possibility that these two defendants (neither of whom had been identified in the hospital records) had rendered treatment to Mr. Cooper, an immediate inquiry was made to defense counsel. Neither Dr. Haq nor Dr. Javaid was known to defense counsel. Nor did defense counsel know that either was involved in Mr. Cooper's treatment or why they were not identified in the hospital records. Once these two psychiatrists were confirmed to have been part of Mr. Cooper's treatment team, they were immediately added to the complaint as defendants.

Mr. Cooper was committed as an inpatient at DMH-West from August 20 until his suicide on September 10, 2014. C.20-21; C.142-45. While awaiting transfer to an Alabama state mental hospital, Mr. Cooper was treated by Dr. Ehtsham Haq and Dr. Amjad Javaid, both psychiatrists. During Mr. Cooper's confinement to DMH-West, Ms. Cooper never knew Dr. Haq or Dr. Javaid treated her husband. C.456-58; C.730-31. Ms. Cooper had never heard of Dr. Haq and had no knowledge that Dr. Haq had any role in her late husband's treatment. C.456-58. Ms. Cooper never spoke to Dr. Haq either before or after her husband died. C.456-58.

After her husband's suicide, Ms. Cooper hired her attorneys. Before filing a lawsuit, Ms. Cooper's counsel undertook a detailed investigation of the facts and circumstances surrounding Mr. Cooper's death. C.383-88. Ms. Cooper and her counsel were diligent in trying to identify potential defendants. Before Ms. Cooper's attorneys filed this case, they requested and received Mr. Cooper's medical records from DMH-West. C.384. The medical records do not mention Dr. Haq or Dr. Javaid and do not reflect that either physician had any role in Mr. Cooper's treatment. C.384. Additionally, Ms. Cooper's lawyers obtained and reviewed the file generated by the Decatur Police Department's investigation into Mr. Cooper's suicide at DMH-West. *Id.* The police file does not refer to or mention Dr. Haq or Dr. Javaid. *Id.* Finally, Ms. Cooper and her attorneys discussed among themselves the identities of Mr. Cooper's health care providers, and neither Dr. Haq's name nor Dr. Javaid's name arose. *Id.*

In June 2016, Ms. Cooper, as administrator and personal representative of her husband's estate, filed a lawsuit in the U.S. District Court, Northern District of Alabama. C.353-382. The federal lawsuit named several defendants and alleged that in their care and treatment of Mr. Cooper, the defendants violated federal anti-discrimination statutes and that they committed the state torts of negligence, wantonness, and medical malpractice. C.370-382. Because Dr. Haq and Dr. Javaid were neither referenced in any of the medical or police records then available to Ms. Cooper nor known to her as having any role in her husband's treatment, they were not named as defendants in the federal court lawsuit. C.383-88.

In July 2016, DMH-West, a defendant in the federal case, moved for a Rule 12(b)(6) dismissal of Ms. Cooper's claims that were based on federal law. While that motion was pending, Ms. Cooper and her lawyers attempted to start discovery in the federal court case. C.385. Ms. Cooper's attorneys asked the federal defense counsel to provide their Rule 26 initial disclosures. C.385. Under the Federal Rules of Civil Procedure, the initial disclosures would have required the defendants to provide to Ms. Cooper and her attorneys the names, addresses, and phone numbers of each person "likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." C.385. The defendants' initial disclosures might have yielded Dr. Haq's and Dr. Javaid's names. C.385. The defendants moved to stay discovery. C.389-396. Ms. Cooper opposed the motion

to stay discovery. C.397-431 but the court stayed discovery pending his decision on the motion to dismiss. C.432-33.

During the stay of discovery but before the district court ruled on the motion to dismiss, the AMLA's two-year statute of limitations expired on September 10, 2016. Two days later, on September 12, 2016, the district court dismissed Ms. Cooper's federal claims with prejudice and declined jurisdiction over the pendent state-court causes of action dismissing those claims without prejudice. C.434-36. *Id.*

On September 16, 2016, and only four days after dismissal of the federal lawsuit, Ms. Cooper filed her state court complaint in Morgan County, Alabama. The state complaint thus met the 30-day tolling period provided by 28 U.S.C. § 1367 with 26 days to spare. Because the identities or their role in Mr. Cooper's treatment were not yet known to Ms. Cooper or her counsel, neither Dr. Haq nor Dr. Javaid were named as defendants in the state complaint. C.383-88. As is permitted by Alabama law, Ms. Cooper alleged claims against various fictitious party defendants to be substituted for specific individuals once they are identified as potential parties.

The first time Dr. Haq and Dr. Javaid became known as potentially involved in Mr. Cooper's treatment was after September 12, 2016. Ms. Cooper's counsel received documents from Blue Cross and Blue Shield of Michigan ("BCBS"), Mr. and Mrs. Cooper's health insurer. C.456-58; C.705-712. The documents included a one-page letter dated 9.12.2016 and a

claims-paid ledger listing the names of health-care providers who treated Mr. Cooper in 2014 as well as the amounts paid by BCBS for the costs of that treatment. C.437-44; C.707-712.

The claims-paid ledger listed Dr. Haq and Dr. Javaid as physicians who treated Mr. Cooper during his 2014 admission to DMH-West. C.443; C.711-12. Ms. Cooper had never heard Dr. Haq's or Dr. Javaid's names until her attorney, Mr. Johnson, brought it to her attention after he received the BCBS claims-paid ledger. C.455-58; C.728-731. Even after discussing the BCBS claims-paid ledger with her attorneys, Ms. Cooper did not have any information about Dr. Haq Dr. Javaid or that they had any role in her late husband's treatment. C.455-58; C.728-731.

The claims-paid ledger showed that Dr. Haq and Dr. Javaid were paid for services rendered to Jason Cooper on August 30 and September 1, 2014, while he was an inpatient at DMH-West. C.437-44; C.707-712. Until receiving that insurance document, Mr. Johnson had not seen Dr. Haq's or Dr. Javaid's name anywhere in Mr. Cooper's records. C.383-88; C.650-56. In addition to providing information not contained in the hospital records, the claims-paid ledger was also incomplete. It made no mention of Dr. Bryant Mahaffey, even though the DMH-West records clearly showed that Dr. Mahaffey was Mr. Cooper's attending psychiatrist and that he rendered medical care and treatment to Mr. Cooper on a daily basis during Mr. Cooper's 2014 admission. C.383-88; C.650-56; C.705-712.

Mr. Johnson continued his efforts to try to determine Dr. Haq's and Dr. Javaid's involvement, if any, in Mr. Cooper's care. On September 21, 2016, the third business day after the state-court complaint had been filed, Mr. Johnson contacted Todd Kelly, one of the attorneys for DMH-West, to ask if he could confirm Dr. Haq's involvement in Mr. Cooper's care and treatment. C.445-449; C.713-17. These are Mr. Johnson's and Mr. Kelly's e-mails regarding Dr. Haq and Dr. Javaid:

Todd, sorry I missed you. I have some records showing that Dr. Amjed Javaid (psychiatry) and Dr. Ehtsham Haq (psychiatry) saw Jason Cooper on multiple dates in late August 2014 and in early September 2014 in the days leading up to Mr. Cooper's death on September 10.

I am raising this issue because Dr. Javaid's and Dr. Haq's names do not appear in the medical records that I obtained before I filed the case (I, of course, I requested a full copy of Mr. Cooper's medical records).

I learned of Dr. Javaid's and Dr. Haq's involvement in Jason Cooper's care through records I obtained from Blue Cross and Blue Shield of Michigan, which was Mr. Cooper's health insurer in 2014. What I got was a "claims summary" ledger, which show the names of

“provider” physicians, the dates their services were rendered to Mr. Cooper, submitted charges and paid charges.

Here’s my point: I really can’t tell if Dr. Javaid and Dr. Haq actually rendered any care and treatment to Mr. Cooper or if their names simply appear in the insurance “claims summary” ledger simply because they are part of a psychiatry practice group that included Dr. Mahaffey and the psychiatry practice group as a whole submitted a bill that happened to be filed under Dr. Javaid’s and Dr. Haq’s names.

If Dr. Javaid and/or Dr. Haq actually treated Jason, I am going to name them as defendants.

However, before I sue them, I wanted to try to make sure that they actually treated Mr. Cooper and, if not, that their names appear in the Blue Cross and Blue Shield of Michigan insurance “claims paid” ledger due to some billing snafu.

Is there any way you can check to see if either of these doctors saw Mr. Cooper and when?

If it is your clients’ position that Dr. Javaid and/or Dr. Haq did not treat Mr. Cooper at any time during Mr. Cooper’s

2014 admission, I will probably need an affidavit that unequivocally says so.

Will you please give me your thoughts on this when you have a moment? I'm in all day tomorrow; 205.[XXX.XXXX] or 205.XXX.XXXX (mobile). Thanks very much. Bo

C.383-88; C.445-449; C.650-56; C.713-17.

The next day, September 22, Mr. Kelly replied that neither he nor his client know whether Dr. Haq or Dr. Javaid had examined, evaluated, or treated Mr. Cooper. Mr. Kelly stated:

Bo, [w]e don't know whether Dr. Javaid or Dr. Haq provided any care, so we are unable to take a position one way or the other.

C.383-88; C.445-449; C.650-56; C.713-17.

Because the hospital where Mr. Cooper died in 2014, could not, in 2016, actually say whether Dr. Haq or Dr. Javaid treated Mr. Cooper, Mr. Johnson then tried to contact Dr. Haq and Dr. Javaid directly with a letter and a request for records. C.450-55; C.718-27. Mr. Johnson asked Dr. Haq and Dr. Javaid to confirm whether or not they treated Mr. Cooper and, if so, to provide Mr. Johnson with a copy of Mr. Cooper's records. C.450-55; C.705-712. However, neither Dr. Haq nor Dr. Javaid ever responded to Mr. Johnson's

letter. C. 383-88. Rather than let any more time pass, Mr. Johnson added Dr. Haq and Dr. Javaid as defendants in the *First Amended Complaint*, which was filed on October 11, 2016. C.133-167. As with the initial state court complaint, this date, too, was within 28 U.S.C § 1367’s 30-day tolling period following Judge Kallon’s 9.12.2016 dismissal order. *Id.*

REASONS FOR GRANTING THE PETITION

A. Ms. Cooper’s petition fits neatly within Rule 10(c).

The first compelling reason that this Court should grant Ms. Cooper’s petition is because her petition neatly fits in to Rule 10’s “Considerations Governing Review on Certiorari.” *Sup. Ct. R.* 10(c). Under Rule 10(c), the character of the reasons the Court considers for granting a writ include where “(c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” (Emphasis supplied.)

B. The Supreme Court of Alabama ignored the plain language of 28 U.S.C. § 1367 and *Artis*, which controls.

The second compelling reason that this Court should grant Ms. Cooper’s petition is because Under 28 U.S.C. § 1367(d), the AMLA’s two-year limitations period for Ms. Cooper’s state law malpractice and tort claims “[was] tolled while the [federal] claim is pending ‘and for a period of 30 days after it is

dismissed unless state law provides a longer tolling period.” *Supra*. Section 1367(a) and (d) say:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

...

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(a) and (d).

In *Artis*, this Court held that 28 U.S.C. § 1367 “stops the clock” on the limitations periods for state-law claims when they are included in a federal discrimination lawsuit. This Court explained,

“Congress ordered tolling of the state limitations period ‘while the claim is pending’ in federal court.” 1385 S. Ct. at 9. *Artis* applies to the facts of both *Cooper v. Haq* and *Cooper v. Javaid*. *Artis* means that Ms. Cooper’s original state court complaint and her *First Amended Complaint* were timely because the limitations period for her wrongful-death claims against both Dr. Haq and Dr. Javid were tolled by 28 § 1367. Under *Artis*, the two-year limitations period was tolled while it was pending in federal court as part of Ms. Cooper’s ADA and § 504 claims and for 30 more days after the district court dismissed the federal and state-court claims. This means that, under *Artis*, Ms. Cooper’s deadline for re-filing her wrongful-death claims against both Dr. Haq and Dr. Javaid did not expire until 122 days after the dismissal of the federal court lawsuit.

The issue in *Artis*, whether 28 U.S.C. § 1367 actually “stops the clock” for the period that state claims are under the pendant jurisdiction of a federal court, or provides a “grace period” for the refilling of claims in state court is immaterial in this case. The refilling in state court, only four days after the federal dismissal, satisfies both standards. The Alabama Court’s summary affirmance of dismissal violated

This is the relevant timeline: Mr. Cooper died on September 10, 2014. Alabama law provides a two-year statute of limitations, until September 10, 2016, to file a wrongful-death claim. Ms. Cooper filed her case in federal court on June 8, 2016. Because her federal claims and her state law claims were filed in a single action, 28 § 1367 “stopped the clock” for the limitations

period for all her state law claims, including those against Dr. Javaid and Dr. Haq once their identity was discovered. As of June 8, 2016, 92 days remained in the original two-year wrongful-death limitations period that began on September 10, 2014 and expired on September 10, 2016. When the district court dismissed the case on September 12, 2016, 28 § 1367 added another 30 days in which to re-file the lawsuit in state court.²

When the district court dismissed Ms. Cooper's state law claims without prejudice, the clock on her wrongful-death limitations period began ticking again and her remaining 122 days began to wind down. Under the proper application, 28 § 1367, Ms. Cooper had at least until January 14, 2017, to file her lawsuit against Dr. Haq and Dr. Javaid and with the additional 30 days conferred by 28 § 1367, Ms. Cooper's deadline became February 14, 2017. She met it with months to spare.

It is undisputed that Ms. Cooper filed her *First Amended Complaint* against Dr. Haq and Dr. Javaid in October 2016, which was well before January or February 2017, this Court, based on *Artis*, ought to reverse the trial court, hold that Ms. Cooper's claims against Dr. Haq and Dr. Javaid were timely, and remand the case so that Ms. Cooper may proceed with her claims against Dr. Haq and Dr. Javaid. Even without the remaining 92 days, Ms. Cooper's limitations period for her wrongful-death claims was tolled by 30 days under *Artis*. The federal district

² 6.8.2016 to 9.10.2016 is 92 days, and 30 days plus 92 days equals 122 days.

court dismissed Ms. Cooper's claim on September 12, 2016. Ms. Cooper filed her *First Amended Complaint* against both Dr. Haq and Dr. Javaid on October 11, 2016, which was within 30 days conferred by § 1367. For this additional reason, this Court ought to reverse the trial court, hold that Ms. Cooper's claims against Dr. Haq and Dr. Javaid were timely, and remand the case so that Ms. Cooper may proceed with her claims against Dr. Haq and Dr. Javaid.

CONCLUSION

Because the Supreme Court of Alabama did not explain the bases of their decision, it is impossible to know for sure why it held that these tort claims under Alabama law are somehow exempt from the requirements of federal law. Congress could not have been clearer with its explicit 30-day refilling provision, and this Court has exhausted the American English lexicon in its efforts to explain the operation of 28 U.S.C. § 1367, its critical role in maintain the most basic relationship between state and federal judiciaries, and its protection for the constitutional right of access to the courts for civil litigation.

Whether the operation of 28 U.S.C. § 1367 is described as “tolling”, “staying”, “calling a halt”, “suspending”, or “stopping the clock”,³ the decision below is an unambiguous refusal by Alabama courts to

³ Perhaps for clarity on remand, this Court should consider the use of other metaphors. Alabama (being who we are) might better understand “calling time-out,” “half-time,” “blowing the whistle,” “official time out for instant review,” or even “delay of game”?

comply with an explicit mandate of a federal statute or to abide by this Court's controlling precedent.

It ought not be necessary for this Court to revisit the issue so soon. Perhaps, as with other cases pending in lower federal courts and state courts, when relevant precedent is issued, it would be appropriate to reverse and remand this case in light of *Artis*.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ William T. Johnson, III

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The Frankowski Firm, L.L.C.
231 22nd Street South, Suite 203
Birmingham, AL 35233
(205) 390-0399

CERTIFICATE OF SERVICE

I hereby certify that on 11.8.2018, in compliance with the filing and service requirements set out in *Sup. Ct. R. 29*, I submitted the foregoing using the Supreme Court's Electronic System and that I served three copies of the foregoing by placing same in the United States mail, postage pre-paid and properly addressed, on the following attorneys, who represent all parties to this proceeding:

Counsel for Respondents Amjed Javaid M.D.
and Amjed Javaid L.L.C.

Mark Lee, Esquire
Parsons, Lee & Juliano, P.C.
600 Vestavia Parkway, Suite 300
Birmingham, Alabama 35216

Counsel for Respondent Ehtsham Haq M.D.

Laura Peck, Esquire
Reid Carpenter, Esquire
Lightfoot, Franklin & White, L.L.C.
400 20th Street North
Birmingham, Alabama 35203

/s/ William T. Johnson, III

William T. Johnson, III, Esquire
Counsel of Record
for Petitioner Rebekah Cooper

App. 1a

8.10.2018 *Certificate of Judgment and Notice of
Overruling of Application for Rehearing, Cooper v.
Haq*, Ala. Sup. Ct. (1160569)

IN THE SUPREME COURT OF ALABAMA



August 10, 2018

1160569 Rebekah Cooper, as administrator of the
Estate of Jason Cooper, deceased v. Ehtsham Haq,
M.D. (Appeal from Morgan Circuit Court: CV-16-
900415)

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on August 10, 2018:

Application Overruled. No Opinion. Bolin, J. – Stuart, C.J., and Shaw, Wise, and Sellers, JJ., concur.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on May 11, 2018:

Affirmed. No Opinion. Bolin, J. – Stuart, C.J., and Shaw, Wise, and Sellers, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 10th day of August, 2018.

A handwritten signature in cursive script, reading "Julia Jordan Weller".

Clerk, Supreme Court of Alabama

App. 1b

8.10.2018 *Certificate of Judgment and Notice of
Overruling of Application for Rehearing, Cooper v.
Javaid*, Ala. Sup. Ct. (1161066)

IN THE SUPREME COURT OF ALABAMA



August 10, 2018

1161066 Rebekah Cooper, as administrator of the
Estate of Jason Cooper, deceased v. Amjed Javaid,
M.D. (Appeal from Morgan Circuit Court: CV-16-
900415)

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on August 10, 2018:

Application Overruled. No Opinion. Bolin, J. – Stuart, C.J., and Shaw, Wise, and Sellers, JJ., concur.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on May 11, 2018:

Affirmed. No Opinion. Bolin, J. – Stuart, C.J., and Shaw, Wise, and Sellers, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 10th day of August, 2018.

A handwritten signature in cursive script that reads "Julia Jordan Weller".

Clerk, Supreme Court of Alabama

App. 2

2.28.2017 *Order* (and *Amended Order* of 3.23.2017)
granting Respondent Dr. Haq's summary-judgment
motion, *Cooper v. Haq*, Circuit Court of Morgan
County, 52-CV-2016-900415

DOCUMENT 382
IN THE CIRCUIT COURT OF MORGAN COUNTY,
ALABAMA

REBEKA COOPER, as)
Personal Representative)
of the Estate of Jason)
Cooper, deceased,)

PLAINTIFF)

VS.)

CASE NO. CV 2016-
900415

DECATUR MORGAN)
HOSPITAL, et al.,)

DEFENDANTS)

ORDER

One of the Defendants, Ehtsham Haq, M.D. (“Dr. Haq”), filed a Motion to Dismiss that came before the Court for a hearing on January 26, 2017. Appended to his Motion were two exhibits. The Plaintiff, Rebekah Cooper (“Cooper”), filed a response captioned “Plaintiff’s Brief and Evidentiary Materials in Opposition to Dr. Ehtsham Haq’s Motion for Summary Judgment.” Pursuant to Rule 12(b), *Alabama Rules of Civil Procedure*, the Court will treat Dr. Haq’s Motion to Dismiss as a Motion for Summary Judgment since neither party has objected to the other’s presentation of matters outside the pleadings, and both parties have argued facts that go beyond the

allegations set forth in Cooper's Complaint, as amended.

The material facts are not disputed and are substantially reflected by the following chronology:

- | | |
|---------------------|--|
| September 10, 2014: | Jason Cooper died while admitted as a psychiatric patient at Decatur Morgan Hospital. |
| June 8, 2016: | Cooper filed a lawsuit in the United States District Court against Decatur Morgan Hospital, other named corporate defendants, a Dr. Mahaffey and a Mr. Whitaker (an employee of the Hospital). |
| September 10, 2016: | The two year period for filing a wrongful death action in Alabama expired. |
| September 12, 2016: | Having dismissed Cooper's federal statutory claim, the United States District Court dismissed her remaining state law claims without prejudice. |

September 16, 2016:	Cooper refilled in this Court her state law claims against the original defendants named in the dismissed federal court lawsuit.
October 11, 2016:	Cooper filed her First Amended Complaint in this court to add Dr. Haq as a defendant to her wrongful death claim based on medical negligence or wantonness.

Dr. Haq's argument is that the two year deadline for wrongful death claims expired before Cooper filed her Complaint in this Court on September 16, 2016 and before she added Dr. Haq for the first time as a party defendant in her First Amended Complaint that was filed on October 11, 2016. Cooper contends, on the other hand, that her claim against Dr. Haq was timely filed and is not barred because (1) she filed her original state court Complaint within the 30-day tolling period provided by 28 U.S.C. §1367(d); (2) she filed her First Amended Complaint within the six-month discovery period provided by the Alabama Medical Liability Act in § 6-5-482 (a), Ala. Code. 1975; and (c) the claims filed in her First Amended Complaint relate back to the filing of her original state court Complaint pursuant to Rules 9(h) and 15(c)(4), *Alabama Rules of Civil Procedure*. For the reasons discussed below, the Court concludes that Dr. Haq's

Motion for Summary Judgment is due to granted and that Cooper's wrongful death claim against Dr. Haq is due to be dismissed as a matter of law.

I.

When Cooper filed her Complaint in the United States District Court in June 2016, she did not name Dr. Haq as a party defendant. She also did not specify any fictitious defendants, as that practice is not provided for in the Federal Rules of Civil Procedure. Cooper asserted state law wrongful death claims based on medical negligence and wantonness against all of the federal court defendants except Whitaker.

United States District Courts acquire pendant or supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367. IF a federal District Court dismisses federal claims over which it has original jurisdiction, then it may decline to exercise supplemental jurisdiction and may dismiss the pendant state court claims. Subsection 1367(d) provides that the "period of limitations for any claim asserted under subsection (a) ...shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

In *Rester v. McWane, Inc.*, 962 So.2d 183 (Ala. 2007), our Supreme Court construed § 1367(d) as providing the 30-day tolling period only when the state claims refilled in the state court are the same state claims that the plaintiff asserted in the federal court. Because the plaintiff's state claims asserted in his

federal complaint were “wholly distinct” from the state claims he later brought in the state court, the Supreme Court held in *Rester* that the statute of limitations for his later filed state claims was not tolled by § 1367(d) and these claims were barred.

In her original complaint and First Amended Complaint filed in this Court, Cooper asserted wrongful death claims based on medical negligence or wantonness that are virtually identical, except for the addition of Dr. Haq, the same claims she filed in the federal District Court. For this reason the Court does not find *Rester v. McWane* to be controlling precedent. The question here is whether the § 1367(d) tolling provision applies to a refilled state claim asserted against a newly added defendant in the state court who was not named as a defendant in the federal District Court case.

This issue received recent attention from the New Mexico Court of Appeals in *Williams v. Mann*, 2016 WL 6081847 (New Mexico Ct. App. 2016). In that case Williams brought federal and state law claims in federal District Court against one defendant other than Mann. Williams then voluntarily dismissed those claims. Williams either amended a pending state court action or filed a new state court case in which she reasserted her original state law claim, but with Mann added as a new defendant. The state trial court dismissed the claim against Mann because the applicable statute of limitations had expired before the claim was filed. Williams argued on appeal that the statute of limitations had been tolled by § 1367(d). The New Mexico Court of Appeals

affirmed the trial court's ruling, however, stating: "Because Defendant Mann was not named as a defendant in Plaintiff's federal action, the federal district court did not exert supplemental jurisdiction over that claim under 28 U.S.C. § 1367(a). It follows that the statute of limitations on that claim as to Defendant Mann was not tolled under 28 U.S.C. § 1367(d)."

The arguments presented by Cooper on this issue are valid and supportive of her refilled state claims against the defendants named in the federal District Court action. There is no question that those claims receive the benefit of the § 1367(d) tolling period because they were timely refilled in this Court with the applicable 30 days after the District Court entered its order of dismissal. Cooper's arguments disregard, however, the more fundamental problem that Dr. Haq was not one of the named defendants in the federal District Court case. No authority is provided for Cooper's proposition that her medical negligence and wantonness claims against Dr. Haq should receive the same § 1367(d) tolling benefit as her similar claims against the other defendants even though Dr. Haq was an "unknown" during the brief pendency of the federal court action.

While the *Williams v. Mann* ruling may be short on discussion and rationale, it makes sense and is persuasive. Because Dr. Haq was not named as one of the defendants in the federal court action, the District Court did not acquire supplemental jurisdiction over Cooper's eventual wrongful death claim against him. The tolling provision of § 1367(d) applies only to claims over which the federal court exerts supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). The

Court concludes, therefore, that the two-year period for Cooper to file a wrongful death claim was not tolled by § 1367(d) as to Dr. Haq.

II.

Cooper argues that her claim against Dr. Haq is not barred because it was timely filed within the six month discovery period provided by § 6-5-482(a), Ala. Code, 1975. Section 6-5-482 is the statute of limitations that applies to a medical malpractice claim. Cooper's claim against Dr. Haq is for the wrongful death of the decedent, Jason Cooper, based on alleged medical negligence or wantonness. In a wrongful death case alleging medical malpractice, § 6-5-482 does not apply. Rather, the two year period for commencing a wrongful death action, as provided in § 6-5-410(d), Ala. Code, 1975, applies to Cooper's claim against Dr. Haq. *McMickens v. Waldrop*, 406 So.2d 867 (Ala. 1981); *Johnson ex rel. Estate of Darnell v. Brookwood Medical Center*, 946 So.2d 849 (Ala. 2006). This time limitation is part of the substantive cause of action for wrongful death and is not subject to state law tolling provisions that are intended to temporarily suspend the running of a statute of limitations. *Cofer v. Ensor*, 473 So.2d 984 (Ala. 1985); *Ex Parte FMC Corp.*, 599 So.2d 592 (Ala. 1992).

Cooper had two years from Jason Cooper's death on September 10, 2014 within which to file her wrongful death claim against Dr. Haq. She did not file her original Complaint in this Court until September 16, 2016. By that time her wrongful death claim against Dr. Haq had expired. As a matter of law,

Cooper's wrongful death claim against Dr. Haq is barred by § 6-5-410(d).

III.

Cooper's final argument in opposition to Dr. Haq's Motion for Summary Judgment is that her wrongful death claim was timely filed because it relates back to the date of the filing of her original Complaint in this Court pursuant to Rules 9(h) and 15(c)(4) of the *Alabama Rules of Civil Procedure*. This argument works for Cooper only if she filed her original Complaint in this Court before the two years for commencing a wrongful death action expired.

As noted above, it is undisputed that she filed the original Complaint in this Court six days after the two year deadline for commencing a wrongful death action pursuant to § 6-6-410. That deadline was not extended by 28 U.S.C. § 1367(d) or any other statutory or rule-created tolling provision. The Court recognizes that Cooper and her attorneys used diligent efforts to identify all necessary defendants and did not learn of the medical services provided by Dr. Haq until after the two years for commencing a wrongful death action had expired. However, the amendment that added Dr. Haq could relate back only to the date when the original Complaint was filed in this Court. By that time the wrongful death claim was barred by § 6-5-410(d) as a matter of law.

It is, therefore, ORDERED AND ADJUDGED by the Court that Dr. Haq's Motion for Summary Judgment is granted. Cooper's wrongful death claim

in this case against Dr. Haq is dismissed with prejudice. This summary judgment does not affect Cooper's claims against the remaining defendants.

Copies of this Order shall be sent to the attorneys of record.

DONE this 28th day of February, 2017.

/s/ STEVEN E. HADDOCK
CIRCUIT JUDGE

DOCUMENT 403

IN THE CIRCUIT COURT OF MORGAN OCUNTY,
ALABAMA

REBEKAH COOPER,)

)

PLAINTIFF,)

)

V.)

CASE NO. CV

)

2016-900415

)

DECATUR MORGAN)

HOPITAL, et al.,)

)

DEFENDANTS.)

AMENDMENT TO ORDER

Having considered the Plaintiff's Motion for Entry of Rule 54(b) Final Judgment and Order, the Court finds that on February 28, 2017 it entered an Order granting the Motion for Summary Judgment filed by one of the Defendants, Ehtsham Haq, M.D. ("Dr. Haq"), and dismissing the Plaintiff's wrongful death claims against Dr. Haq with prejudice. That Order did not affect the Plaintiff's claims against remaining Defendants.

The Court is satisfied that its February 28, 2017 Order in favor of Dr. Haq was intended to be a final

adjudication and disposition of the Plaintiff's claims against him in this case and hereby expressly finds that there is no just reason for delay in making that Order a final judgment.

It is, therefore, **ORDERED AND ADJUDGED** by the Court pursuant to Rule 54(b), *Alabama Rules of Civil Procedure*, that its February 28, 2017 Order is amended by this rendition of a final judgment in favor of the Defendant, Ehtsham Haq, M.D., and against the Plaintiff, Rebekah Cooper, whereby her claims against said Defendant in this case are dismissed with prejudice. The Plaintiff may proceed with her claims against the remaining Defendants.

Copies of this Amendment to Order shall be sent to the attorneys of record.

DONE this 23rd day of March, 2017.

/s/ STEVEN E. HADDOCK
CIRCUIT JUDGE

App. 3

8.11.2017 *Order* granting Respondent Dr. Javaid's
summary-judgment motion, *Cooper v. Haq*, Circuit
Court of Morgan County, 52-CV-2016-900415

DOCUMENT 455

IN THE CIRCUIT COURT OF MORGAN COUNTY,
ALABAMA

REBEKA COOPER,)	
)	
PLAINTIFF,)	
)	
VS.)	CASE NO. CV 2016-
)	900415
DECATUR MORGAN)	
HOSPITAL, et al.,)	
)	
DEFENDANTS.)	

ORDER

On August 10, 2017 the Court held a hearing on the Motion for Summary Judgment filed by the Defendant, Amjed Javaid, M.D. (“Dr. Javaid”). Before the hearing the Court reviewed Dr. Javaid’s Motion for Summary Judgment, the pertinent pleadings and prior Orders filed in this case, Dr. Javaid’s evidentiary submissions and Memorandum Brief and the brief and evidentiary materials filed in opposition by the Plaintiff, Rebekah Cooper (“Cooper”). The essence of Dr. Javaid’s argument in support of his Motion is that Cooper’s wrongful death claim against him is time barred by the two-year limitation period set forth in § 6-5-410(d), Ala.Code, 1975.

The Court addressed this same issue in its February 28, 2017 Order in this case (Document 382)

that granted the Motion for Summary Judgment filed by another Defendant, Ehtsham Haq, M.D. (“Dr. Haq”). In that Order the Court concluded that Cooper’s wrongful death claim against Dr. Haq was barred as a matter of law by § 6-5-410(d), Code. The February 28, 2017 Order is currently on appeal before the Supreme Court of Alabama.

Although a different defendant, Dr. Javaid, brings the Motion for Summary Judgment currently before the Court, it appears that the underlying material facts, legal grounds and arguments submitted in support of and in opposition to Dr. Javaid’s Motion are substantially the same as the material facts, legal grounds and arguments that were submitted earlier regarding Dr. Haq’s Motion for Summary Judgment. After due consideration the Court finds that there are no genuine issues of material disputed fact, that the two-year limitation for filing a wrongful death claim under § 6-5-410, Code was not tolled or extended or any of the grounds asserted by Cooper and that Cooper’s wrongful death claim against Dr. Javaid is time barred as a matter of law.

Accordingly, it is **ORDERED AND ADJUDGED** by the Court as follows:

1. Dr. Javaid’s Motion for Summary Judgment is granted.

2. A judgment is hereby rendered against Cooper and in favor of Dr. Javaid whereby Cooper’s wrongful death claim against him is dismissed with prejudice.

3. The entry of this Order does not affect Cooper's claims against the remaining Defendants.

4. This Order is intended to be a final adjudication and disposition of Cooper's claims against Dr. Javaid in this case pursuant to Rule 54(b), *Alabama Rules of Civil Procedure*. The Court expressly finds that there is no just reason for delay and hereby directs that this Order shall be entered as a final judgment. The entry of this Order as a final judgment is particularly appropriate since the Court's findings, legal conclusions and rulings in this Order are virtually identical to those set forth in its February 28, 2017 Order, which is presently on appeal before the Supreme Court of Alabama, that granted Dr. Haq's Motion for Summary Judgment in this case.

Copies of this Judgment shall be sent to the attorneys of record and any pro se parties.

DONE this 11th day of August, 2017

/s/ STEVEN E. HADDOCK
CIRCUIT JUDGE

App. 4

12.27.2017 *Order* of Ala. Sup. Ct. consolidating
appellate matters *Cooper v. Haq* (1160569) and *Cooper*
v. Javaid (1161066)



IN THE SUPREME COURT OF ALABAMA

December 27, 2017

1160569

Rebekah Cooper, as administrator of the Estate of Jason Cooper, deceased v. Ehtsham Haq, M.D. (Appeal from Morgan Circuit Court: CV-16-900415).

1161066

Rebekah Cooper, as administrator of the Estate of Jason Cooper, deceased v. Amjed Javaid, M.D. (Appeal from Morgan Circuit Court: CV-16-900415).

ORDER

IT IS ORDERED that the above-styled cases are hereby CONSOLIDATED for the purposes of submission, briefing, and oral argument, if oral argument is requested and granted.

I, Julia Jordan Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 27th Day of December,
2017.

A handwritten signature in cursive script, reading "Julia Jordan Miller".

Clerk, Supreme Court of Alabama

cc:

Steven Ellis Haddock

Morgan County Circuit Clerk's Office

William T. Johnson, III

Jeffrey C. Kirby

Mark W. Lee

Reid Carpenter

Laura H. Peck

App. 5

5.11.2018 *Decision* of Ala. Sup. Ct. of affirmed (no opinion) in appellate matters *Cooper v. Haq* (1160569) and *Cooper v. Javaid* (1161066)

Rel: May 11, 2018

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2017-2018

1160569

Rebekah Cooper, as administrator of the Estate of
Jason Cooper, deceased v. Ehtsham Haq, M.D.

and

1161066

Rebekah Cooper, as administrator of the Estate of
Jason Cooper, deceased v. Amjed Javaid, M.D.

(Appeals from MORGAN CIRCUIT COURT: CV-16-
900415)

BOLIN, Justice.

AFFIRMED. NO OPINION.

See Rule 53(a) (1) and (a) (2) ®, Ala. R. App. P.

Stuart, C.J., and Shaw, Wise, and Sellers, JJ.,
concur.

App. 6

9.12.2016 *Order Dismissing Plaintiff's Case Without
Prejudice, Cooper v. Decatur Morgan Hospital et al.*,
U.S. District Court, Northern District of Alabama,
5:16-CV-956-AKK

DOCUMENT 232

Case 5:16-cv-00956-AKK
Filed 09/12/16

Document 28
Page 1 of 2

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

REBEKAH COOPER, as)	
Administrator of the)	
ESTATE OF JASON)	
COOPER, deceased,)	
)	
Plaintiff,)	Civil Action Number
)	5:16-cv-956-AKK
vs.)	
)	
DECATUR MORGAN)	
HOSPITAL, et al.,)	
Defendants.	

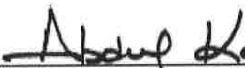
ORDER

The court has for consideration Defendants' motion to dismiss the plaintiff's Section 504 claim under the Rehabilitation Act. Doc. 9. Based on a review of the complaint, the case law, and the parties' briefs, the court agrees with Defendants that Jason Cooper is not an "otherwise qualified" individual

because he would not have needed the medical services but for his medical condition, and was not denied medical services because of his medical condition. *See, e.g., Liebe v. Norton*, 157 f.3d 574, 577 (8TH Cir. 1998) (“[O]nce one is classified as a suicide risk, the right to be protected from that risk would seem to fall under the ambit of the right to have medical needs addressed.”); docs. 25 at 8-9; 27 at 3. Moreover, the Rehabilitation Act is not a “remedy for medical malpractice,” *see Jones v. Rutherford*, 546 F. App’x 808, 811 (11th Cir. 2013), and “like the ADA, was never Intended to apply to decisions involving . . . medical treatment,” *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005); *see also Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996). Accordingly, the motion to dismiss Count I is **GRANTED**.

In light of the dismissal of the Section 504 claim, because federal courts are courts of limited jurisdiction and no claims arising under federal law remain and there is no basis for diversity jurisdiction, the court declines to exercise jurisdiction over the remaining state law claims. These claims are **DISMISSED WITHOUT PREJUDICE**.

DONE the 12th day of September, 2016.

A handwritten signature in black ink, appearing to read "Abdul K.", is written over a horizontal line.

ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE

App. 7:

Title 28 U.S.C. § 1367, subparagraphs (a) and (d) is
the United States statute involved.

28 U.S.C.A. § 1367

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on [section 1332](#) of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under [Rule 14](#), [19](#), [20](#), or [24 of the Federal Rules of Civil Procedure](#), or over claims by persons proposed to be joined as plaintiffs under

Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of [section 1332](#).

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

App. 8:

January 31, 2018 letter to Ms. Julia Jordan Weller,
Clerk of the Supreme Court of Alabama

January 31, 2018

Ms. Julia Jordan Weller, Clerk
Supreme Court of Alabama
300 Dexter Avenue
Montgomery, AL 36104

Estate of Cooper v. Ehtsam Haq, M.D.

Case Number 1160569

Appeal From the Circuit Court of Morgan County
CV-2016-900415

and

Estate of Cooper v. Amjad Javaid, M.D.

Case Number 1161066

Appeal From the Circuit Court of Morgan County
CV-2016-900415

Dear Ms. Weller:

Pursuant to the orders from the Alabama Supreme Court dated January 25 and signed by you, and pursuant to Rule 28B of the Alabama Rules of Appellate Procedure, Ms. Cooper, the plaintiff-appellant in the above-styled appeals, submits to the Court that the case of *Artis v. District of Columbia*, 2018 WL 491524, decided by the U.S. Supreme Court on January 22, controls the outcome of both appeals, warrants a reversal of the trial court's judgments in both cases, and requires a remand of both cases to the trial court.

The discussion contained in this letter applies to the sections called “Argument 1” in Ms. Cooper’s initial briefs in both appeals. In *Artis*, the U.S. Supreme Court held that 28 U.S.C. § 1367 “stops the clock” on the limitations periods for state-law claims when they are included in a federal discrimination lawsuit. The Court explained, “Congress ordered tolling of the state limitations period ‘while the claim is pending’ in federal court.” *Id.* at *9. *Artis* applies to the facts of both *Cooper v. Haq* and *Cooper v. Javaid*. *Artis* means that Ms. Cooper’s original state court complaint and her *First Amended Complaint* were timely because the limitations period for her wrongful-death claims against both Dr. Haq and Dr. Javid were tolled by § 1367. Under *Artis*, the two-year limitations period was tolled while it was pending in federal court as part of Ms. Cooper’s ADA and § 504 claims and for 30 more days after Judge Kallon dismissed the federal and state-court claims.

This means that, under *Artis*, Ms. Cooper’s deadline for re-filing her wrongful-death claims against both Dr. Haq and Dr. Javaid did not expire until 122 days after the dismissal of the federal court lawsuit.

Here is how Ms. Cooper arrives at this conclusion. Mr. Cooper died on September 10, 2014. Ms. Cooper had until September 10, 2016, to file her wrongful-death claims. She filed her case in federal court on June 8, 2016. When she filed her federal discrimination claims and her state law wrongful-death claims together, Ms. Cooper “stopped the clock” for the limitations periods for her wrongful-death eventual claims against Dr. Javaid and Dr. Haq. As of

June 8, 2016, Ms. Cooper had 92 days left in the original two-year wrongful-death limitations period that started on September 10, 2014 and expired on September 10, 2016. When the district court dismissed the case on September 12, 2016, Ms. Cooper gained another 30 days in which to re-file her lawsuit in state court.⁴

When the district court dismissed Ms. Cooper's entire case, the clock on her wrongful-death limitations period began ticking again and her remaining 122 days began to diminish. As of September 12, 2016, which was the date the district court dismissed Ms. Cooper's entire lawsuit, and, with the 92-day balance of the wrongful death limitations period remaining, Ms. Cooper would have had until January 14, 2017, to file her lawsuit against Dr. Haq and Dr. Javaid. With the additional 30 days conferred by § 1367, Ms. Cooper would have had until February 14, 2017, to sue Dr. Haq and Dr. Javaid.

Because it is undisputed that Ms. Cooper filed her *First Amended Complaint* against Dr. Haq and Dr. Javaid in October 2016, which was well before January or February 2017, this Court, based on *Artis*, ought to reverse the trial court, hold that Ms. Cooper's claims against Dr. Haq and Dr. Javaid were timely, and remand the case so that Ms. Cooper may proceed with her claims against Dr. Haq and Dr. Javaid. Even without the remaining 92 days, Ms. Cooper's limitations period for her wrongful-death claims was tolled by 30 days under *Artis*. The federal district

⁴ 6.8.2016 to 9.10.2016 is 92 days, and 30 days plus 92 days equals 122 days.

court dismissed Ms. Cooper's claim on September 12, 2016. Ms. Cooper filed her *First Amended Complaint* against both Dr. Haq and Dr. Javaid on October 11, 2016, which was within 30 days conferred by § 1367. For this additional reason, this Court ought to reverse the trial court, hold that Ms. Cooper's claims against Dr. Haq and Dr. Javaid were timely, and remand the case so that Ms. Cooper may proceed with her claims against Dr. Haq and Dr. Javaid.

Thank you for your attention.

Sincerely,

Kirby Johnson, P.C.

William T. Johnson III, Esquire

CC: All Counsel of Record

