

NOT DESIGNATED FOR PUBLICATION

No. 113,060

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DARIO LOZANO,  
*Appellant,*

v.

OSCAR ALVAREZ, ARACELY ALVAREZ,  
*Appellees.*

MEMORANDUM OPINION

Appeal from Ford District Court; VAN Z. HAMPTON, judge. Opinion filed October 2, 2015.  
Affirmed.

*Peter J. Antosh*, of Garcia & Antosh, LLP, of Dodge City, for appellant.

*Andrew M. Stein*, of Doll Law Firm, LLC, of Dodge City, for appellees.

Before GREEN, P.J., HILL, J., and TIMOTHY G. LAHEY, District Judge, assigned.

*Per Curiam:* After two dismissals for lack of prosecution, Dario Lozano, the plaintiff-appellant, filed his third case against Oscar Alvarez and Aracely Alvarez, the defendants-appellees. This was Lozano's third case filed against the Alvarazes, but the second case was refiled under the Kansas savings statute, K.S.A. 60-518. Citing *Clanton v. Estivo*, 26 Kan. App. 2d 340, Syl. ¶ 1, 988 P.2d 254 (1999), which held that a plaintiff may use the savings provision of K.S.A. 60-518 only once, the Alvarazes moved to dismiss Lozano's third case with prejudice. The trial court found that *Clanton* controlled and dismissed Lozano's case with prejudice. On appeal, Lozano asks this court to reverse the trial court's dismissal. Lozano argues that the trial court must be reversed because the

*Clanton* decision it relied on incorrectly interpreted K.S.A. 60-518. Nevertheless, Lozano's arguments about why the *Clanton* court incorrectly interpreted K.S.A. 60-518 are unpersuasive. Accordingly, we affirm the trial court's dismissal of Lozano's case with prejudice.

The facts in this case are undisputed. It is worth noting, however, that Lozano does not include any documents associated with his first or second cases against the Alvarezs, or the trial court orders dismissing those cases, in the record on appeal. All the important dates listed below come from the Alvarezs' motion to dismiss Lozano's third case and the transcript of the hearing on this motion.

On December 4, 2010, Lozano and the Alvarezs got into a physical fight. Lozano suffered a head injury during the fight. On December 5, 2011, Lozano filed a civil case against the Alvarezs alleging that he suffered both economic and noneconomic losses exceeding \$75,000 because of the fight. This case will be referred to as *Lozano I*. On August 28, 2012, after the statutory period of limitations had run, the trial court dismissed *Lozano I* for lack of prosecution.

On February 27, 2013, Lozano refiled his civil case against the Alvarezs under the Kansas saving statute, K.S.A. 60-518. This case will be referred to as *Lozano II*. The trial court dismissed *Lozano II* on December 31, 2013, for lack of prosecution.

Then, on June 18, 2014, Lozano refiled his case against the Alvarezs under K.S.A. 60-518. This case will be referred to as *Lozano III*. The Alvarezs moved to dismiss *Lozano III* with prejudice. In this motion, the Alvarezs argued that the trial court must dismiss *Lozano III* with prejudice because *Clanton v. Estivo*, 26 Kan. App. 2d 340, Syl. ¶ 1, 988 P.2d 254 (1999), held that a plaintiff may use the savings provision of K.S.A. 60-518 only once after the statute of limitations had run.

The trial court held a hearing on the motion to dismiss. At the hearing, Lozano's attorney agreed that *Clanton* required the dismissal of *Lozano III* with prejudice. Nevertheless, Lozano's attorney asserted that the *Clanton* court incorrectly interpreted the plain language of K.S.A. 60-518. Lozano's attorney further asserted that the plain language of K.S.A. 60-518 allowed multiple refilings.

Because the trial court ruled that *Clanton* controlled, the trial court disagreed with those arguments. Thus, the trial court dismissed *Lozano III* with prejudice.

*Did the Trial Court Err When It Found That Lozano Was Not Entitled to the Benefit of the Savings Statute After Two Prior Dismissals for Lack of Prosecution?*

Lozano asserts that the trial court erred when it dismissed *Lozano III* with prejudice. Lozano contends that under the plain language of K.S.A. 60-518, a plaintiff's case may be refiled and saved multiple times. Essentially, Lozano contends that a plaintiff may continue to refile his or her case under K.S.A. 60-518 indefinitely as long as the following requirements are met: (1) the trial court dismissed the plaintiff's last case for a reason other than on the merits after the statute of limitations had run; and (2) the plaintiff refiled his or her new case within 6 months of the trial court's last dismissal. Although Lozano recognizes this court's holding in *Clanton*, Lozano makes several arguments in an attempt to undermine *Clanton* on appeal. Based on those arguments, Lozano asks this court to reverse the trial court's dismissal and remand for further proceedings.

### *Standard of Review*

An appellate court reviews the trial court's decision to grant a motion to dismiss de novo. *Hale v. Brown*, 287 Kan. 320, 322, 197 P.3d 438 (2008). When the trial court has granted a motion to dismiss, "this court must assume the truth of the facts alleged by the

plaintiff, along with any inferences that can reasonably be drawn from those facts." *Hale*, 287 Kan. at 322.

Moreover, interpretation of a statute is a question of law over which an appellate court has unlimited review. *Cady v. Schroll*, 298 Kan. 731, 734, 317 P.3d 90 (2014). The most fundamental rule of statutory construction is the intent of the legislature. *Nationwide Mutual Ins. Co. v. Briggs*, 298 Kan. 873, 875, 317 P.3d 770 (2014). An appellate court will first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Cady*, 298 Kan. at 738. Additionally, when the legislature does not "modify a statute to avoid a standing judicial construction of the statute, we presume the legislature intended the statute to be interpreted as we have done." *Cady*, 298 Kan. at 737.

### *Applicable Law*

The savings provision of K.S.A. 60-518 states:

"If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if the plaintiff die, and the cause of action survive, his or her representatives may commence a new action within six (6) months after such failure."

In *Denton v. City of Atchison*, 76 Kan. 89, 90-92, 90 P. 764 (1907), our Supreme Court held that a plaintiff may refile a case under the savings statute if the following occurs: (1) the plaintiff commenced the original case within due time; (2) the trial court dismissed the original case for a reason other than on the merits after the statutory period of limitations had run; and (3) the plaintiff refiled the new case within 1 year following this dismissal (the time limit in effect under the savings statute when *Denton* was decided). The *Denton* court further held a "new action begun more than one year after

such failure, whether it was the second or third action, would be an enlargement of the time fixed by statute, and would result in permitting the plaintiff to dismiss and reinstate at will and indefinitely." *Denton*, 76 Kan. at 92.

In *Clanton*, this court considered "whether [a plaintiff] can obtain the benefit of the savings statute, K.S.A. 60-518, in connection with filing [his or] her third action." 26 Kan. App. 2d at 342. Based on the plain language of K.S.A. 60-518 and our Supreme Court's holding in *Denton*, the *Clanton* court held that a plaintiff could obtain the benefit of the savings provision only once. 26 Kan. App. 2d at 345.

#### *Application of Clanton in This Case*

Given the facts in this case and the *Clanton* holding, the trial court did not err when it dismissed *Lozano III* with prejudice. Again, Lozano filed his original case, *Lozano I*, on December 5, 2011, the exact day the statute of limitations to file his original case expired under K.S.A. 60-514. Thus, the trial court dismissed *Lozano I* for lack of prosecution after the statute of limitations had expired on August 28, 2012. Lozano filed *Lozano II* under K.S.A. 60-518 nearly 6 months later on February 27, 2013. Like *Lozano I*, the trial court dismissed *Lozano II* for lack of prosecution. Then, on June 18, 2014, Lozano filed *Lozano III* under K.S.A. 60-518. Because the *Clanton* court interpreted K.S.A. 60-518 to mean that a plaintiff may obtain the benefit of the savings provision only once, the trial court correctly dismissed *Lozano III* with prejudice because this was the second time Lozano had refiled his case under K.S.A. 60-518.

#### *Lozano's Arguments*

On appeal, Lozano argues that this court should reject the *Clanton* court's interpretation of K.S.A. 60-518 for the following reasons: (1) the plain language of K.S.A. 60-518 does not prevent a plaintiff from refiled his or her case multiple times; (2)

the *Clanton* holding was erroneous because it relied on the *Denton* decision, which examined an older version of the savings statute; and (3) the *Clanton* court only reached its holding because the legislature had not amended the savings statute since *Denton*. Although this court is not bound by the *Clanton* court's interpretation of K.S.A. 60-518, as discussed below, Lozano's arguments why this court should reject the *Clanton* court's interpretation of K.S.A. 60-518 are unpersuasive.

### *Plain Language of K.S.A. 60-518 Argument*

First, Lozano asserts that it is "[c]lear as day" that the plain language of the savings statute allows multiple refilings. Lozano states that the conditions of K.S.A. 60-518 that "[if] any action be commenced in due time" and that "the plaintiff fail in such action otherwise than upon the merits" contain broad enough descriptors to allow a plaintiff to refile his or her case under the savings statute a second time. Lozano contends that he could refile *Lozano III* under the plain language of K.S.A. 60-518 because (1) *Lozano II* was commenced in due time; (2) *Lozano II* was dismissed for a reason other than upon the merits; (3) the statutory period of limitations to bring his original case had expired; and (4) *Lozano III* was refiled within 6 months of the dismissal of *Lozano II*. Nevertheless, the plain language of K.S.A. 60-518 does not support Lozano's interpretation.

In his brief, Lozano correctly recognizes that conditions consisting of three external events must occur before the savings provision of K.S.A. 60-518 is triggered, *i.e.*, a plaintiff is entitled to the benefits of the savings provision only (1) if the plaintiff commences his or her action within due time; (2) if the plaintiff fails in such action otherwise than upon the merits; and (3) if the time limited for the plaintiff to file the same shall have expired. Yet, Lozano fails to recognize that under the plain language of K.S.A. 60-518, the phrases "any action" and "such action" are not so broad as to include a plaintiff's action that had already been refiled under the savings statute but dismissed for

a reason other than upon the merits. Instead, those phrases refer to a plaintiff's original action.

Again, K.S.A. 60-518 states: "If *any action* be commenced within due time, and the plaintiff fail in *such action* otherwise than upon the merits, and the time limited for *the same* shall have expired, the plaintiff . . . may commence a new action within six (6) months after such failure." (Emphasis added.) Under K.S.A. 60-518, the phrases "any action," "such action," and "the same" reference one another; the action the plaintiff commences in due time must be the same action that was dismissed otherwise than upon the merits, and the time limit to bring that same action must have expired. Such an interpretation conforms with the last antecedent rule, which states that "qualifying words are 'ordinarily confined to the last antecedent, or to the words and phrases immediately preceding.'" *Link, Inc. v. City of Hays*, 266 Kan. 648, 654, 972 P.2d 753 (1999) (quoting *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 504, 438 P.2d 732 [1968]).

Here, an application of the rule of the last antecedent leads to the conclusion that the word "such" is an adjective, and that it modifies the antecedent noun "action" contained in the initial conditional clause (*[i]f any action*) of the sentence. The adjective phrase "such action" tells us which action. Indeed, the adjective "such" is called a limiting adjective. It limits a noun or pronoun. As a result, the word "such" designates or limits the antecedent noun "action" contained in the aforementioned initial conditional clause of the sentence. Moreover, the pronoun "same" refers to the antecedent noun "action." Thus, the antecedent noun "action" is limited to a plaintiff's original action.

Thus, under the plain language of K.S.A. 60-518, a plaintiff may commence a new action within 6 months of the dismissal of his or her original action only (1) if the plaintiff commenced the original action within due time; (2) if the trial court dismissed the plaintiff's original action for reasons other than upon the merits; and (3) if the trial

court dismissed the plaintiff's original action following the expiration of the statute of limitations.

Accordingly, Lozano misinterprets the plain meaning of K.S.A. 60-518 by asserting that the phrases "any action" and "such action" are broad enough descriptors to include a plaintiff's action that had already been refiled under the savings statute but dismissed for a reason other than upon the merits, or in his case, *Lozano II*. Those phrases clearly refer to a plaintiff's original action. Because those phrases clearly refer to a plaintiff's original action, Lozano cannot circumvent the 6-month time limit to invoke the savings provision of K.S.A. 60-518 by arguing that a plaintiff can continue to refile his or her case under the savings statute indefinitely as long as that plaintiff refiled his or her last action under the statute within due time and the last refiled action was dismissed for a reason other than on the merits.

Moreover, the plain language of K.S.A. 60-518 clearly limits a plaintiff to refileing under the statute a single time. K.S.A. 60-518 states that if the plaintiff's original action was commenced in due time, dismissed other than on the merits, and dismissed after the statute of limitations had run, then the plaintiff "may commence *a* new action within six (6) months after such failure." (Emphasis added.) The word "a" limits how many times a plaintiff may bring an action under K.S.A. 60-518. Thus, the plain language of K.S.A. 60-518 states that if the plaintiff's original action was commenced in due time, dismissed other than on the merits, and dismissed after the statute of limitations had run, then the plaintiff may file a single new action. Accordingly, Lozano has misinterpreted the plain language of K.S.A. 60-518 because the plain language does not allow a plaintiff to refile his or her case under the statute multiple times.

In an attempt to bolster his interpretation of K.S.A. 60-518, Lozano also points out that the Utah Court of Appeals held that its savings statute allows multiple refileings in *Hebertson v. Bank One, Utah, N.A.*, 1999 UT App. 342, 995 P.2d 7 (1999). Utah caselaw,

however, is merely persuasive authority. Additionally, if this court were to consider other state's savings statutes, most other states permit their saving statutes to be invoked only once. See 51 Am. Jur. 2d, Limitation of Actions § 278.

Finally, even if the plain language of K.S.A. 60-518 allowed a plaintiff to refile his or her case multiple times, the trial court's dismissal of Lozano's case with prejudice was still appropriate because Lozano filed *Lozano III* more than 6 months after the dismissal of *Lozano I*. The trial court never addressed the timeliness of *Lozano III* below. Even so, under K.S.A. 60-518, a plaintiff "may commence a new action within *six (6) months*" of the trial court's dismissal of the plaintiff's original case for a reason other than on the merits following the expiration of the statute of limitations. (Emphasis added.)

As noted earlier, the *Denton* court interpreted this provision and held that a plaintiff must refile his or her case under the savings statute within 1 year (now 6 months). 76 Kan. at 91-92. The *Denton* court further held that "[a] new action begun more than one year after such failure, whether it was the second or third action, would be an enlargement of the time fixed by statute." 76 Kan. at 92. Essentially, K.S.A. 60-518 tolls the operation of the statute of limitations during the pendency of a plaintiff's case and for 6 months after the action has ceased to pend for any reason other than a determination on the merits. Therefore, Lozano needed to refile *Lozano III* within 6 months of the dismissal of *Lozano I* to successfully refile his case under K.S.A. 60-518.

Yet, Lozano did not refile *Lozano III* within 6 months of the dismissal of *Lozano I*. As previously detailed, Lozano filed *Lozano I* on December 5, 2011, the day the statute of limitations to file his case under K.S.A. 60-518 expired. The trial court dismissed *Lozano I* for lack of prosecution on August 28, 2012. To timely refile under K.S.A. 60-518, Lozano needed to refile his case within 6 months of August 28, 2012; thus, at the very latest, Lozano needed to refile his case by February 28, 2013. Lozano timely refiled *Lozano II* when he refiled the case on February 27, 2013. Nevertheless, Lozano did not

timely refile *Lozano III* when he refiled the case on June 18, 2014. *Lozano III* was refiled more than 6 months after the *Lozano I* action was dismissed on August 28, 2012. Because of his failure to timely refile *Lozano III* within 6 months after *Lozano I* ceased to pend, the trial court's dismissal of *Lozano III* with prejudice was proper regardless of whether the plain language of K.S.A. 60-518 allows multiple refilings under the statute. As a result, we need not address Lozano's remaining arguments.

Affirmed.