

tice has been given and the governmental tort claims action has been timely filed, the court's power is invoked and, at that point, the governmental tort claims action is controlled by the laws of this state, including 12 O.S.1991, § 100. *Cruse* held that 12 O.S. 1991, § 100 operates to allow the refiling of a governmental tort claims action within one year from the date the original timely-filed governmental tort claims action failed other than on its merits.

[2] Appellants complied with the notice requirements in § 156 and commenced the original action within the time limit prescribed by § 157(B). Upon dismissal of the original action, appellants refiled their governmental tort claims action within one year of the dismissal in accordance with 12 O.S. 1991, § 100. The district court erred in dismissing this timely-refiled governmental tort claims action.

Pursuant to Rule 1.201 of the rules of Appellate Procedure in Civil Cases, 12 O.S. 1991, ch. 15, app. 2, we summarily dispose of this appeal. The opinion of the Court of Appeals, Division IV, is vacated, the district court's dismissal order is reversed and this cause is remanded to the district court for further proceedings.

/s/ Alma Wilson
CHIEF JUSTICE

ALMA WILSON, C.J., KAUGER, V.C.J.,
and HODGES, SUMMERS and WATT, JJ.,
concur.

LAVENDER, SIMMS and HARGRAVE,
JJ., dissent.

OPALA, Justice, dissenting:

For an explanation of my reasons see
*Cruse v. Bd. of County Comm'rs of Atoka
County, Okl.*, 910 P.2d 998, 1005 (Okla.1995)
(Opala, J., dissenting).



STATE of Oklahoma, Petitioner,

v.

The Honorable Bryan DIXON, Judge of
the District Court of Oklahoma County,
Judicial District 7, and Pam Moyer, Ad-
ministrator for the Estate of Harry
Moyer, deceased, Respondents.

No. 82293.

Supreme Court of Oklahoma.

Feb. 6, 1996.

Party refiled government tort claims ac-
tion after voluntarily dismissing previous ac-
tion. The District Court of Oklahoma Coun-
ty, Bryan Dixon, J., denied state's motion to
dismiss. State petitioned for an extraordi-
nary writ to prohibit district court from fur-
ther proceedings on plaintiff's wrongful death
action for lack of subject matter jurisdiction.
The Supreme Court, Alma Wilson, C.J., held
that: (1) a timely-filed government torts
claim action may be refiled pursuant to stat-
ute setting one-year limitations period for
refiling actions that failed other than on their
merits, but (2) district court was required to
determine whether government had received
sufficient pretrial notice of the wrongful
death claim, in view of the fact that the
original claim had been based on injuries to
plaintiff and her children, not on death of
husband allegedly resulting from same acci-
dent.

Petition to assume jurisdiction granted.

1. Mandamus ⇌28

Prohibition ⇌10(1)

Petition for writ of prohibition or man-
damus is appropriate to challenge subject
matter jurisdiction of district court.

2. Limitation of Actions ⇌130(1)

Where a party has timely filed a govern-
mental tort claims action in Oklahoma and
has given valid notice to the government, the
court's power is invoked and, at that point,
the action is controlled by the laws of the
state, including the statute that sets the limi-
tation period for refiling a timely-filed gov-

ernment tort claims action that failed other than on its merits. 12 O.S.1991, § 100.

3. Limitation of Actions ⇨130(1, 12)

Under statute governing limitation of new actions after reversal or failure otherwise than on the merits, a party may file a governmental tort claims action within one year from the date the original timely-filed governmental torts claim action failed other than on its merits. 12 O.S.1991, § 100.

4. Limitation of Actions ⇨130(5)

Plaintiff's voluntary dismissal of original government tort claims action was a failure of the action other than on its merits, for purposes of statute allowing refile of a timely-filed governmental tort claims action within one year if original action failed other than on its merits. 12 O.S.1991, § 100.

5. Automobiles ⇨293

Highways ⇨203

In order to determine its subject matter jurisdiction over a refiled government tort claims action which otherwise met requirements for refile such actions, district court was required to determine whether plaintiff's presuit notice to the government was sufficient, where petition in the original action presented a claim for bodily injury to plaintiff and her children resulting from automobile accident and petition in the refiled action presented a claim for wrongful death of plaintiff's husband based on same accident, and where at time of refile, the one-year period in which to present notice of a wrongful death claim against government had already elapsed. 12 O.S.1991, § 100; 51 O.S. 1991, § 156, subd. F.

6. Municipal Corporations ⇨741.15

In order to invoke the power of the district court to enforce a governmental tort claims action for wrongful death, plaintiff must meet statutory requirements relating to presuit notice of such claims. 51 O.S.1991, § 156, subd. F.

Application to assume original jurisdiction and petition for Writ of Prohibition/Mandamus.

1. §§ 151, et seq. of Title 51 of the Oklahoma

Application to assume original jurisdiction and petition for writ of prohibition and mandamus directed to Bryan Dixon, District Judge for the Seventh Judicial District, prohibiting further proceedings in cause No. CJ-91-3667-11, a wrongful death action pending in the District Court of Oklahoma County.

APPLICATION TO ASSUME JURISDICTION GRANTED.

Susan Brimer Loving, Attorney General, Julie Jones Corley, Assistant Attorney General, Oklahoma City, for Petitioner.

Larry A. Tawwater, Lampkin, McCaffrey & Tawwater, Oklahoma City, for Respondents.

ALMA WILSON, Chief Justice:

[1] In this original proceeding petitioner, the State of Oklahoma (State), asks this Court to issue an extraordinary writ prohibiting the district court in Oklahoma County from further proceedings in a wrongful death action, cause No. CJ-91-3667-11, for lack of subject matter jurisdiction. The issue presented is whether an action commenced pursuant to the Governmental Tort Claims Act¹ may be recommenced pursuant to 12 O.S. 1991, § 100. Petition for writ of prohibition or mandamus is appropriate to challenge the subject matter jurisdiction of the district court.

The chronology of the pertinent events is not disputed. On March 28, 1986, the Moyer family, Harry and Pam Moyer and their three children Angela, Brandie, and James, were involved in a one-vehicle accident which occurred on State Highway 3 in McCurtain County, Oklahoma. Notice of claim for damages arising out of the automobile accident was served on the respondent agencies. Pam Moyer, as an individual and as the next of friend of her three children, sued the McCurtain County Board of Commissioners and the Oklahoma Department of Transportation in the district court in McCurtain County to recover damages for bodily injury to herself and her children. The petition

Statutes.

alleged that the State and McCurtain County were negligent in the control, construction, and maintenance of the highway thereby causing bodily injury to plaintiffs.² In March, 1988, the action was transferred to the district court in Oklahoma County. In April, 1990, the State filed a motion to dismiss for want of prosecution. On May 10, 1990, Pam Moyer filed a dismissal without prejudice.

On May 10, 1991, Pam Moyer filed an action to recover damages suffered by herself and her children because of the death of Harry Moyer. The wrongful death action against the State was filed in the Oklahoma County District Court. The State filed a motion to dismiss on the grounds that 12 O.S.1991, § 100 is not applicable to governmental tort claims actions. The district court denied the State's dismissal motion and the State now seeks a writ prohibiting further proceedings in the district court.

[2, 3] *Cruse v. Board of County Commissioners of Atoka County, Oklahoma*, 910 P.2d 998 (Okla.1995), mandate issued January 24, 1996, addressed the issue of whether a timely-filed governmental tort claims action may be refiled pursuant to 12 O.S.1991, § 100. *Cruse* concluded that where valid notice has been given and the governmental tort claims action has been timely filed, the court's power is invoked and, at that point, the governmental tort claims action is controlled by the laws of this state, including 12 O.S.1991, § 100. *Cruse* held that 12 O.S. 1991, § 100 operates to allow the refile of a governmental tort claims action within one year from the date the original timely-filed governmental tort claims action failed other than on its merits.

[4] The parties agree that Pam Moyer complied with the notice requirements in § 156 and timely filed her original governmental tort claims action as required by § 157(B).³ Pam Moyer's voluntary dismissal of her original action is a failure of the action

other than on its merits. And, Pam Moyer filed her wrongful death action within one year of the dismissal of her original action pursuant to 12 O.S.1991, § 100.

[5] However, the petition in the original action presents a claim for bodily injury to Pam Moyer and her children and the petition in the refiled action presents a claim for the wrongful death of Harry Moyer. The two petitions raise a question as to the sufficiency of Pam Moyer's notice of claim—whether it is sufficient under 51 O.S.1991, § 156(F) which provides:

"F. When the claim is one for death by wrongful act or omission, notice may be presented by the personal representative within one (1) year after the alleged injury or loss resulting in such death. If the person for whose death the claim is made has presented notice that would have been sufficient had he lived, an action for wrongful death may be brought without any additional notice."

[6] A pre-suit notice of claim that complies with the provisions of § 156(F) is necessary to invoke the power of the district court to enforce a governmental tort claims action. Accordingly, the district court is directed to determine whether Pam Moyer's pre-suit notice meets the statutory requirements of § 156(F).

KAUGER, V.C.J., and HODGES,
SUMMERS and WATT, JJ., concur.

LAVENDER, SIMMS and HARGRAVE,
JJ., dissent.

OPALA, Justice, dissenting:

For an explanation of my reasons see *Cruse v. Bd. of County Comm'rs of Atoka County, Okl.*, 910 P.2d 998, 1005 (Okla.1995) (Opala, J., dissenting).



2. 51 O.S.Supp.1986, § 155.1 exempted the state from liability for loss occurring from a defect or dangerous condition, known or unknown, on any road, street, or highway which was in existence on October 1, 1985.

3. The accident occurred March 28, 1986, and the time to file notice of claim was 90 days or until

June 28, 1986. 51 O.S.Supp.1986, § 156. The parties assert that the time to commence action accrued on November 17, 1986. The November 17, 1986 accrual date could be calculated from the date of the death of Harry Moyer rather than the date of accident and bodily injuries to Pam Moyer and her three children.