STATE OF MICHIGAN

COURT OF APPEALS

THOMAS R. PRESENT, Personal Representative of the Estates of SHU SHIUAN PHIONG and SHU YURN PHIONG,

Plaintiff-Appellant,

v

VOLKSWAGEN OF AMERICA, INC.,

Defendant-Appellee.

UNPUBLISHED
April 20, 1999

No. 201921
Oakland Circuit Court
LC No. 96-530146 NP

THOMAS R. PRESENT, Personal Representative of the Estates of SHU SHIUAN PHIONG and SHU YURN PHIONG,

Plaintiff-Appellant,

and

KANG CHU CONSTRUCTION, LTD.,

Plaintiff/Counter-defendant,

v

VOLKSWAGEN OF AMERICA, INC.,

Defendant/Counter-plaintiff-Appellee.

No. 204998
Oakland Circuit Court
LC No. 96-519908 NP

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

In Docket No. 201921, plaintiff appeals as of right from an order granting summary disposition in favor of defendant on the basis that plaintiff's wrongful death suit was barred by the statute of limitations. In Docket No. 204998, plaintiff appeals by leave granted from the order granting defendant's partial motion for summary disposition on the basis that plaintiff lacked capacity to sue because he was not appointed as the personal representative of decedents' estates at the time he filed his first amended complaint. We reverse and remand in Docket No. 201921.

I. Background Facts and Procedural History

The case arises out of the untimely deaths of two minor sisters, three-year-old Shu Shiuan Phiong and two-year-old Shu Yurn Phiong. The children's parents are residents of Taiwan. On June 4, 1994, the children were asleep in the back of a 1990 Volkswagen Vanwagon as the vehicle sat idling while parked at a construction site in Taiwan. The vehicle was owned by Kang Chu Construction, Ltd., a construction company owned by the girls' parents. The Vanwagon's air conditioning remained on and running while the children slept. Plaintiff alleges that at some point the air conditioning unit caught fire and melted, and that the children were asphyxiated by carbon monoxide and carbon dioxide gases that were emitted into the passenger compartment of the Vanwagon as a result of this electrical fire.

A. Docket No. 204998

On March 27, 1996, plaintiff filed a wrongful death suit against defendant. Plaintiff's complaint alleged breach of implied warranty of fitness for intended use, negligent design and manufacture, and failure to warn. Plaintiff was not appointed personal representative of the children's estates by the Oakland County Probate Court until September 4, 1996. On April 17, 1996, a first amended complaint was filed, in which Kang Chu Construction, Ltd. was added as a plaintiff. A second amended complaint was next filed on June 5, 1996, in which the children's mother appeared in place of plaintiff as the personal representative of the children's estates. Both the first and second amended complaints raised the same allegations as the March 27, 1996 complaint. Defendant filed a counter-claim against Kang Chu Construction, alleging that the children's deaths were the direct result of malfeasance or misfeasance on the part of the construction company.

Defendant filed a motion for summary disposition on June 17, 1996, alleging that both plaintiff and the children's mother lacked the capacity to sue because neither had been duly appointed as the personal representative of the children's estates. On October 31, 1996, the trial court granted defendant's motion for summary disposition on the grounds that as of the time of the filing of the aforementioned complaints, "there was no duly appointed personal representative of the decedents' estates with capacity to sue." Plaintiff's suit was dismissed without prejudice.

B. Docket No. 201921

On September 12, 1996, plaintiff once again initiated a wrongful death suit against defendant. As with the lawsuit in Docket No. 204998, plaintiff alleged breach of implied warranty of fitness for intended use, negligent design and manufacture, and failure to warn. On November 18, 1996,

defendant filed a motion for summary disposition pursuant to MCR 2.117(C)(7), arguing that the lawsuit was barred by the relevant Taiwanese statute of limitations.[1] The trial court granted defendant's motion on February 6, 1997.

II. Analysis

A. Docket No. 201921: Taiwanese Two-Year Statute of Limitations

> This Court reviews de novo a lower court's determination regarding a motion pursuant to MCR 2.116(C)(7). We review all the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the plaintiff. A motion under this court rule should be granted only if no factual development could provide a basis for recovery. [*Smith v YMCA of Benton Harbor/St Joseph*, 216 Mich App 552, 554; 550 NW2d 262 (1996) (citation omitted).]

The parties concede that pursuant to MCL 600.5861; MSA 27A.5861,[2] the Taiwanese two-year statute of limitations and all pertinent tolling provisions of Taiwanese law apply to this case.[3] This statute of limitations, found at Article 197 of the Taiwanese Civil Code, provides in pertinent part: "The claim for damages arising from a wrongful act is extinguished by prescription, if not exercised within two years from the time when the injury and the person bound to make compensation became known to the injured party."

The relevant tolling provisions are found in Articles 129, 131 and 137 of the Taiwanese Civil Code. Article 129 states in pertinent part:

> Extinctive prescription is interrupted by and of the following causes:
>
> 1. A demand (for the satisfaction of the claim);
>
> 2. An acknowledgment (of the claim);
>
> 3. An action (brought for the satisfaction of the claim).

Article 131 states:

> In the case of interruption by bringing action, if the action is withdrawn or dismissed as nonconformable to law by a judgment which has become final, the prescription is deemed not to have been interrupted.

Article 137 states in pertinent part:

> A Prescription which has been interrupted by an action brought for the satisfaction of the claim recommences to run from the time when the case is decided or otherwise disposed of without any right of appeal.

We conclude that according to the plain and unambiguous language of Article 129, the March 27, 1996 complaint is considered to be an "action" under Taiwanese law. Therefore, pursuant to Article 131, "the prescription [would] . . . not have been interrupted" if the October 31, 1996 order dismissing plaintiff's wrongful death claim had been a final judgment. However, the October 31, 1996 order was not a final judgment. In pertinent part, MCR 7.202(8)(a)(i) defines a final judgment in a civil case as being "the first judgment . . . that disposes of all the claims and *adjudicates the rights and liabilities of all the parties,* including such an order entered after reversal of an earlier final judgment." (Emphasis added.) As previously mentioned, the October 31, 1996 order granting defendant summary disposition was based on the fact that as of the filing of the March 27, April 17 and June 5, 1996 complaints, there existed no competent plaintiff able to maintain the cause of action on behalf of the children. Therefore, because the October 31, 1996 order did not adjudicate the rights and liabilities of the named parties, it was not a final judgment for purposes of Article 131.[4]

Given that Article 131 is not applicable under the circumstances, we now turn to Article 137. According to Article 137, the prescription period would "recommence[ ] to run *from* the time when the case is . . . disposed of without any right of appeal." (Emphasis added.) Because the October 31, 1996 order was not a final judgment, it was not appealable as of right. MCR 7.203(B)(1). Therefore, pursuant to Article 137, the prescription would have recommenced as of October 31, 1996. As of that date, plaintiff still had approximately two and one-half months to file before the lawsuit would have been extinguished by prescription.[5] However, because plaintiff's earlier refiling of the case on September 12, 1996 was within the tolled two-year time limit, we hold that the trial court erred when it dismissed plaintiff's suit on the grounds that the applicable statute of limitations had run.

B. Docket No. 204998: Capacity to Sue

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on the basis that he lacked capacity to sue. Plaintiff contends that although he was not appointed as personal representative of decedents' estates at the time he filed the first amended complaint on April 17, 1996, his subsequent appointment as personal representative on September 4, 1996, should relate back to the date of the first amended complaint. Because we reverse in Docket No. 201921, this issue is moot.

Reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Jane E. Markey
/s/ William C. Whitbeck

[1] Defendant also filed on November 18, 1996, a motion to dismiss based on *forum non conveniens*. The record reveals that the trial court never ruled on that motion.

[2] MCL 600.5861; MSA 27A.5861 reads in pertinent part: "An action based upon a cause of action accruing without this state shall not be commenced after the expiration of the statute of limitations of either this state or the place without this state where the cause of action accrued . . . ."

[3] We note that our application of Taiwanese law in this case is in comity with the treatment of Taiwanese law by federal law. 22 USC 3303(b)(4), part of the Taiwan Relations Act, provides: "Whenever the application of the laws of the United States depends upon the law that is or was applicable on Taiwan or compliance therewith, the law applied by the people on Taiwan shall be considered the applicable law for that purpose."

[4] We also note that the October 31, 1996 order specifically states that the cause of action was dismissed "without prejudice." A order of dismissal without prejudice does not serve as a final disposition on the merits. See *Ozark v Kais*, 184 Mich App 302, 309; 457 NW2d 145 (1990) (Griffin, J., concurring), citing *Brownridge v Michigan Mutual Ins Co*, 115 Mich App 745; 321 NW2d 798 (1982) (observing that "[i]t is well settled that an order of dismissal with prejudice operates as a final judgment on the merits for res judicata purposes").

[5] With the deaths having occurred on June 4, 1994, the wrongful death lawsuit had to be filed as of June 4, 1996. The filing of the first lawsuit on March 27, 1996, occurred approximately two and one-half months before the prescription would have run without interruption.