STATE OF MICHIGAN

COURT OF APPEALS

DELORES ANN HOWLAND,

Plaintiff-Appellant/Cross-Appellee,

v

ESTATE OF INA LEONE BEARDSLEE,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
July 30, 1999

No. 206796
Montcalm Circuit Court
LC No. 96-000845 NO

Before: Griffin, P.J., and Wilder, and Danhof,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the trial court granting defendant's motion for summary disposition pursuant to MCR 2.116 (C)(7), on the basis that plaintiff's personal injury action was barred by the applicable statute of limitations, MCL 600.5805(8); MSA 27A.5805(8). Defendant cross appeals, challenging the trial court's order denying its motion to dismiss under MCR 2.102(E)(1) based on the failure to timely serve the summons. For the reasons set forth herein, we affirm dismissal of the case.

Plaintiff was allegedly injured on November 5, 1993, when, while driving a car, she swerved to avoid a pedestrian. Her efforts were unsuccessful and the pedestrian, whose estate is the defendant, was killed. On November 6, 1996, plaintiff filed a complaint alleging that the decedent had walked in front of her car in violation of applicable traffic safety statutes, causing the accident. Plaintiff alleged that as a result of the accident, she sustained physical and emotional injuries, medical expenses, and loss of earning capacity.

On direct appeal, plaintiff contends that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), on the grounds that the three-year statute of limitations applicable to personal injury actions, MCL 600.5805(8); MSA 27A.5805(8), barred plaintiff's action. Plaintiff argues that although the complaint was filed one day after the limitations period had run, a provision of the Revised Probate Code, MCL 700.707; MSA 27.5707, provided for

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

a four-month tolling of the statute of limitations after the decedent died. The trial court held that the statute cited by plaintiff did not apply to tort actions. Plaintiff's case was therefore dismissed.

This Court reviews a trial court's grant of summary disposition de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). Whether a cause of action is barred by the statute of limitations is a question of law that is reviewed under the same standard. *Id*. Likewise, issues of statutory interpretation are questions of law that are reviewed de novo on appeal. *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

Section 707 of the Revised Probate Code provides:

> Unless an estate is insolvent, the personal representative, with the consent of all interested parties whose interests would be affected, may waive a statute of limitations defense available to the estate. If a statute of limitations defense is not waived, a claim that was barred by a statute of limitations at the time of the decedent's death shall not be allowed or paid. *The running of a statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the 4 months following the decedent's death but resumes thereafter as to claims not barred under this article.* For purposes of a statute of limitations, the proper presentation of a claim under [MCL 700.712; MSA 27.5712] is equivalent to commencement of a proceeding on the claim. [Emphasis added.][1]

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). The first criterion in determining the intent of the Legislature is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). The fair and natural import of the terms employed, in view of the subject matter of the law, should govern. *In re Wirsing*, 456 Mich 467, 474; 573 NW2d 51 (1998). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).

Section 707 provides in pertinent part that the running of a statute of limitations "is suspended during the 4 months following the decedent's death but resumes thereafter as to claims not barred under this article." Defendant argues that § 707 "is a statute of 'suspension,' not one of 'extension'"; the statute purportedly does not extend the statute of limitations but rather creates a four-month "breathing space" after death that allows an estate to be set up to allow a claim to be brought against it. Defendant theorizes that

> A claimant can open an estate against which to bring a claim, and if a statute of limitation would have run *within that four months*, its running is "suspended" to allow for presentation of claims during that time. If there is no existing estate, the claimant still has four months to open one and present the claim. However, if the claim is not

> presented within four months following death, the "suspension" of the statute is inapplicable, and the statute expires at its normal time. [Emphasis in original.]

Defendant's interpretation of § 707 implies that the applicable statute of limitations should resume as soon as an estate is established and a suable entity exists. However, were this so, there would be no need for the Legislature to provide for a specific time period during which a statute of limitations is suspended. We conclude that such an interpretation is contrary to the clear import of the language of § 707. Although § 707 presumably has as its objective the provision of time to set up an estate after an alleged tortfeasor has died, that the Legislature expressly established a four-month suspension period indicates a legislative intent that four months is enough time to effectuate that purpose and that in all circumstances where an alleged tortfeasor has died, the applicable statute of limitations shall be unconditionally tolled for four months to accommodate the process of setting up an estate. Contrary to defendant's contention, § 707 does not provide only such indefinite "breathing room" as is necessary to set up an estate. Moreover, § 707 does not make application of the suspension provision dependent on the filing of a claim against the estate within the four-month period. Given the plain language of § 707, we conclude that the trial court erred when it held that § 707 did not apply to this case and thus dismissed the case on the basis of the statute of limitations.[2]

Despite the trial court's error, reversal is not required. This Court will not reverse where the right result is reached for the wrong reason. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998); *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997). In this instance, the merits of defendant's cross appeal mandate affirmance of the trial court's order dismissing this case.

On cross appeal, defendant challenges the trial court's denial of its motion to dismiss pursuant to MCR 2.102(E)(1) based on failure to timely serve the summons. We conclude that the trial court erred in denying defendant's motion to dismiss.

In interpreting court rules, this Court applies principles of statutory construction. *Bush v Beemer*, 224 Mich App 457, 461; 569 NW2d 636 (1997); *In re Neubeck*, 223 Mich App 568, 570-571; 567 NW2d 689 (1997). Statutory interpretation is a question of law that is reviewed de novo for error on appeal. *Id.*

MCR 2.102(A) states that "[o]n the filing of a complaint, the court clerk shall issue a summons to be served [on the defendant]." MCR 2.102(D) provides:

> A summons expires 91 days after the date the complaint is filed. However, within that 91 days, on a showing of good cause, the judge to whom the action is assigned may order a second summons to issue. . . .

In *Durfy v Kellogg*, 193 Mich App 141, 144-145; 483 NW2d 664 (1992), this Court construed MCR 2.102(D) as follows:

> . . . MCR 2.102(D), while authorizing the judge to order the issuance of a new, extended summons, requires that it be done within the life of the original summons, that is, within 182 days[3] after the filing of the original complaint. . . . The extension was not obtained until more than 182 days after the filing of the complaint and, therefore, the trial judge no longer possessed authority under the court rule to order an extension of the summons. In fact, under MCR 2.102(E), the action was deemed to have been dismissed automatically when the original summons expired.

The "good cause" requirement of MCR 2.102(D) has been construed by this Court to mean that a summons should be extended only if the plaintiff shows "due diligence" in attempting service of process. *Bush, supra* at 462.

In this case, plaintiff filed a complaint on November 6, 1996. As defendant points out, the summons therefore expired on February 5, 1997. Plaintiff acknowledges that defendant was not served with a copy of the summons within the requisite time period. Moreover, plaintiff did not seek issuance of a second summons or show "good cause" why a second summons should be issued by the trial court within the ninety-one days specified by the court rule, *Bush, supra*. In fact, plaintiff did not request that a new summons be issued until March 4, 1997, at which time the trial court granted plaintiff's ex parte motion to set aside the dismissal, issued a second summons, and denied defendant's motion to dismiss.

However, pursuant to *Durfy, supra*, after the ninety-one day period expired without any action by plaintiff, the trial court lacked the authority to issue a new summons and plaintiff's case should have been dismissed "without prejudice as to a defendant who had not been served with process as provided in these rules, *unless the defendant has submitted to the court's jurisdiction*." MCR 2.102(E)(1) (emphasis added).

The standards for setting aside a dismissal are enumerated in MCR 2.102(F), which provides in pertinent part:

> A court may set aside the dismissal of the action as to a defendant . . . when all of the following conditions are met:
>
> (1) within the time provided in subrule (D), service of process was in fact made on the dismissed defendant, or *the defendant submitted to the court's jurisdiction;*
>
> (2) proof of service of process was filed or the failure to file is excused for good cause shown;
>
> (3) the motion to set aside the dismissal was filed within 28 days after notice of the order of dismissal was given or, if notice of dismissal was not given, the motion was promptly filed after the plaintiff learned of the dismissal. [Emphasis added.]

Although it is uncontested that defendant was not served within the time period specified under MCR 2.102(D), plaintiff contended at the hearing on defendant's renewed motion to dismiss that defendant submitted to the jurisdiction of the court because defendant had actual notice of the pendency

of the action and acknowledged the inevitability of litigation. In this regard, the following colloquy took place between defense counsel and the trial court:

> *The Court*: . . . you will concede, Mr. Damon [defense counsel], you had been hired by the defendant at that time?
>
> *Mr. Damon (defense counsel)*: At what time, Your Honor?
>
> *The Court*: While that summons was out there within that 93 [sic] days?
>
> *Mr. Damon*: I was hired, Your Honor, but my letter to Mr. Tallman [plaintiff's attorney] specifically stated that I was not appearing until the estate was opened. The estate – there was no existing defendant. The defendant did not come into existence until March of 1997.
>
> *The Court*: But you had a general awareness of the situation?
>
> *Mr. Damon*: We knew that he was planning on suing us. There's no question about that. But I don't think that has any bearing on effect because there was no defendant, and I specifically told Mr. Tallman in the letter that he quotes in his brief, I said I am not appearing. I will appear when you create the estate and when it's served. That was specifically pointed out. So I don't know how that letter can then be turned into an appearance.

The trial court ultimately ruled that even though defendant had not been timely served a summons, defendant had actual knowledge of the pendency of this action before the summons expired. The trial court therefore again denied defendant's motion to dismiss. We conclude that the trial court erred in so doing.

In *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181-182; 511 NW2d 896 (1993), this Court explained:

> A party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections. *In re Slis*, 144 Mich App 678, 683; 375 NW2d 788 (1985). Generally, any action on the part of a defendant that recognizes the pending proceedings, with the exception of objecting to the court's jurisdiction, will constitute a general appearance. *Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear*. *Ragnone v Wirsing*, 141 Mich App 263, 265; 367 NW2d 369 (1985). A party that submits to the court's jurisdiction may not be dismissed for not having received service of process. MCR 2.102(E)(2). [Emphasis added.]

See also, *In re Gordon Estate*, 222 Mich App 148, 158, n 9; 564 NW2d 497 (1997).

The record in the present case indicates that although defense counsel did have knowledge of the pending proceedings, he expressly represented to plaintiff that he would appear only after the defendant estate was reopened[4] and properly served. Based on this statement, we cannot conclude that defendant submitted to the jurisdiction of the court pursuant to MCR 2.102(E)(1) or (F). As explained in 6 CJS2d, Appearances, § 19, pp 24-25:

> Broadly stated, any action on the part of defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance. So where defendant takes any step which the court would have no power to dispose of without jurisdiction of his person he submits to the jurisdiction of the court. . . .
>
> On the other hand, although an act of defendant may have some relation to the cause, it does not constitute a general appearance, if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, and no affirmative action is sought from the court.

Although defense counsel herein acknowledged that he would appear once defendant was properly served, he never sought affirmative action from the court. By explicitly informing plaintiff's counsel that he would not appear until service was complete, defense counsel expressed his belief that the cause was not properly before the court. Under these circumstances, the requisite intent to appear, *Penny, supra*, was not manifested and defendant did not submit to the jurisdiction of the trial court before the original summons expired. Dismissal of the case was therefore improperly set aside by the trial court, MCR 2.102(F), and defendant's motion to dismiss was erroneously denied.

Plaintiff finally contends that even if the case should have been dismissed, her action should not be barred because such dismissal is without prejudice, MCR 2.102(E)(1), thereby allowing a new suit to be brought on the same cause of action. In light of our conclusion that § 707 tolled the statute of limitations applicable to the tort alleged in this case, plaintiff had until March 5, 1997, three years and four months after the date of the accident and one month after her lawsuit was deemed dismissed, to re-file an identical complaint in this matter. Although plaintiff filed a motion to set aside the dismissal and issue a new summons on March 3, 1997, she did not re-file her action before the statute of limitations expired. Plaintiff's cause of action is therefore barred.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Robert J. Danof

[1] Generally, a plaintiff asserting a personal injury claim has three years to bring suit against a defendant. MCL 600.5805(8); MSA 27A.5805(8). In this case, the statute of limitations is measured from an event other than the death of the decedent; it began running at the time plaintiff was allegedly injured. *Id.*

[2] Defendant alternatively argues that pursuant to *Williams v Grossman*, 409 Mich 67, 83-84; 293 NW2d 315 (1980), any action brought against a previously closed estate must be brought within the three-year statute of limitations. However, defendant's reliance on *Williams* is misplaced; the *Williams* decision preceded the enactment of § 707 by nine years and the suspension of a statute of limitations was not an issue therein.

[3] In *Durfy, supra*, this Court applied the 182-day period that was formerly specified by MCR 2.102(D). *Id.* at 145, n 2. This Court recognized, however, that the applicable period had been changed to ninety-one days and that the same rules would apply to the new ninety-one day period. *Id*.

[4] Defendant estate had been opened and closed in 1995 to probate settlement of a claim by the estate against plaintiff arising out of the fatal automobile-pedestrian accident.