

STATE OF MICHIGAN
COURT OF APPEALS

EVELYN ZEIDMAN, MARY ANN STONE,
HELEN COMMERSON, and KATHLEEN
BROWN, on behalf of themselves and all others
similarly situated,

UNPUBLISHED
September 29, 2000

Plaintiffs-Appellants,

v

No. 212848
Wayne Circuit Court
LC No. 80-033570-CZ

REGINALD PSCIUK,

Defendant-Appellee.

Before: Kelly, P.J., and Holbrook, Jr. and Griffin, JJ.

PER CURIAM.

Plaintiffs' appeal from a trial court order granting defendant's motion for partial summary disposition pursuant to MCR 2.116(C)(7) is before us after remand by our Supreme Court for consideration as on leave granted. *Zeidman v Psciuk*, 458 Mich 852; 587 NW2d 636 (1998). We affirm.

I

The individual plaintiffs filed this action on September 12, 1980, on behalf of themselves and all other Lake Shore School District employees similarly situated against defendant¹ for fraudulent misrepresentation in connection with the sale of insurance policies as part of an annuity program. In 1982, plaintiffs were granted leave to file a second amended complaint adding a claim against defendant under the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.* On May 7, 1982, Wayne Circuit Judge Victor J. Baum entered an order granting plaintiffs' motion for certification of a class regarding plaintiffs' claim under the MCPA.² Plaintiffs' second amended

¹ Another defendant originally named in this suit, New York Life Insurance Company, reached a settlement with plaintiffs during the course of trial.

² In its opinion issued in conjunction with the order, the trial court stated in pertinent part:

complaint described the plaintiffs as “themselves and all other Lake Shore School District employees similarly situated” who “numbered approximately thirty-seven.” The case proceeded to trial as a class action involving thirty-seven class members only on the claim under the MCPA.³

During trial before a different judge, plaintiffs moved to expand the class. On July 2, 1985, the trial court entered an order expanding the class to include “all those persons within the State of Michigan who have purchased Retirement Endowment at 65 policies from Defendant Reginald Psciuk at any time.”⁴ Defendant’s motions for reconsideration and a continuance in light of this development were denied by the trial court and the jury returned a verdict for plaintiffs in the amount of \$2,334,500. Judgment was entered on November 5, 1985. Defendant appealed, and this Court reversed and remanded for a new trial, finding that while a case proceeding as a “spurious” class action may be expanded without notice to absent class members, the trial court abused its discretion in denying defendant’s motion for an adjournment.⁵ (*Zeidman v Psciuk*, unpublished opinion per curiam, Docket Nos. 93794, 95370, and 98114, issued 4/24/89.)

There is little doubt that the class is identifiable in the instant case. The class is comprised of 37 school teachers in the Lake Shore School District, St. Clair Shores, Michigan. Although plaintiffs stated that they have attached a list of the names of the 37 individuals to their pleadings, this Court has not received it. Nevertheless, it is a simple matter to identify the individuals, since plaintiffs claim they have a list of their names and defendants have attached to their pleadings the names of the Lake Shore School District teachers who purchased NYLIC insurance policies.

³ A few days before trial, the trial court granted defendant’s motion to sever the common law fraud count.

⁴ However, the complaint was never amended to reflect the addition of these new claimants.

⁵ This Court held in pertinent part:

Defendant’s claim that the trial court improperly expanded the class mid-trial without notice to absent class members is without merit. This case was certified as a class action under GCR 1963, 208.1(3), which was in effect at the time [now MCR 3.501]. This type of class action is known as a “spurious” class action and is actually a permissive joinder device. In a “spurious” class action, notice to absent class members is discretionary and is not required as a prerequisite to the maintenance of the action. *Grigg [v Michigan National Bank]*, 405 Mich 148; 274 NW2d 752 (1979)], *supra* at 172-173, 179-180; *Alexander v City of Detroit (On Remand)*, 164 Mich App 502, 504-505; 418 NW2d 113 (1987). We find no Michigan law precluding the expansion of a class mid-trial in a class action suit and we decline to so hold in this case. Thus, in a case proceeding as a “spurious” class action under GCR 1963, 208.1(3), the class may be expanded without notice to absent class members.

Following remand by this Court, defendant moved for partial summary disposition pursuant to MCR 2.116(C)(7), asserting that the preponderance of the class action plaintiffs added by the July 2, 1985, order of the court were outside the six-year limitation of actions period of the MCPA.⁶ In opposition to the motion, plaintiffs argued that “new” plaintiffs were not being added; rather, the original class was being further identified and, therefore, the statute of limitations was tolled for the “new” plaintiffs. The trial court, Judge Edward Thomas, granted defendant’s motion on January 7, 1997. The court ruled the July 2, 1985, order allowing additional class members did not merely further identify the class, but rather expanded the class of plaintiffs from its original thirty-seven members. The court further found the July 2, 1985, order did not relate back to the date of filing of the original complaint for purposes of applying the MCPA statute of limitations.⁷

Plaintiffs then filed an application for an interlocutory appeal of the trial court’s January 7, 1997, order granting defendant’s motion for summary disposition pursuant to MCR 2.116(C)(7), which this Court denied. *Zeidman v Psciuk*, unpublished order of the Court of Appeals, issued July 30, 1997 (Docket No. 200846). On June 29, 1998, the Michigan Supreme Court remanded the case to this Court as on leave granted.

II

On appeal, plaintiffs argue the trial court erred in granting defendant’s motion because defendant failed to timely raise the defense of the statute of limitations, and the claims of the 182 members of the plaintiff class that were removed by the trial court were timely filed.

This Court reviews a grant or denial of a motion for summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Rheaume v Vandenberg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998). A grant of summary disposition under MCR

However, we agree with defendant’s next claim that the trial court abused its discretion in denying defendant’s motion for an adjournment. We reverse this case for a new trial on this basis.

⁶ MCL 445.911(7); MSA 19.418(11)(7) sets forth the limitations period for an action brought under the MCPA:

An action under this section shall not be brought more than 6 years after the occurrence of the method, act, or practice which is the subject of the action, nor more than one year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends at a later date.

⁷ The court, however, reserved judgment as to which, if any plaintiffs should be dismissed for want of documentation regarding the times of the governing occurrences and/or transactions. Eventually, on October 27, 1997, on the basis of further information provided by defendant regarding identification of the putative plaintiffs by name, policy number, date the policy was purchased, and date of last payment, the trial court issued an order dismissing 182 members of the expanded class on the basis of the statute of limitations.

2.116(C)(7) is proper where a claim is barred by the applicable statute of limitations. *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 477; 586 NW2d 760 (1998). When reviewing a decision regarding summary disposition pursuant to MCR 2.116(C)(7), this Court considers all pleadings, affidavits, and other documentary evidence submitted by the parties and, where appropriate, construes them in favor of the plaintiff. *Rheaume, supra* at 421. Furthermore, “[i]n the absence of disputed facts, the question whether a plaintiff’s action is barred by a statute of limitations is a question of law, to be determined by the trial court.” *Michigan Employment Security Comm v Westphal*, 214 Mich App 261, 263; 542 NW2d 360 (1995).

Plaintiffs first maintain the trial court erred in granting defendant’s motion for partial summary disposition because defendant failed to timely file his motion. Plaintiffs in essence argue defendant should have brought his motion seeking dismissal of the newly added class members for failure to satisfy the statute of limitations, back in 1985, during the first trial. This issue was neither raised before nor addressed by the trial court and hence has not been properly preserved for appellate review. *Alford v Pollution Control Inds*, 222 Mich App 693, 699; 565 NW2d 19 (1997). However, because this Court may review questions of law even if not properly preserved, if all the facts necessary for its resolution are presented, we will review this threshold issue. *Conagra, Inc v Farmer State Bank*, 237 Mich App 109, 120; 602 NW2d 390 (1999).

Eleven years elapsed from the expansion of the class in July 1985 to the filing of defendant’s motion for summary disposition in July 1996. Plaintiffs protest the lengthy delay, yet cite no authority which would preclude defendant from bringing the motion at the time it was filed. This Court will not search for authority to support a party’s position. *Great Lakes Division of Nat’l Steel Corp v Ecorse*, 227 Mich App 379, 425; 576 NW2d 667 (1998). In any event, we conclude that under the circumstances defendant’s motion was timely. MCR 2.116(D)(2) requires that the grounds for a subrule (C)(7) motion for summary disposition “must be raised in a party’s responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party’s first responsive pleading.” In this case, defendant satisfied the requirements of MCR 2.116(D)(2) and preserved his statute of limitations defense for review by the trial court when he raised it as an affirmative defense in both of his answers to plaintiffs’ original and second amended complaints. MCR 2.116(D)(2) does not otherwise expressly impose temporal constraints on the filing of a motion brought under subsection (C)(7), and we will not read such a requirement into the court rule.

Further, we note the unusual procedural posture of this case effectively precluded defendant from bringing his motion prior to the conclusion of the first trial. The 182 additional class members were added in the midst of the first trial in 1985, and plaintiffs’ complaint was not correspondingly amended to reflect this addition. Defendant unsuccessfully moved for a continuance in order to conduct further discovery and prepare defenses with respect to these new class members and the trial proceeded. As previously noted, on appeal this Court held the trial court committed error in refusing defendant’s request for a continuance and granted defendant a new trial. As defendant aptly notes, because his request for a continuance was improperly denied during the first trial, discovery of the policy records of the 182 individuals was foreclosed and defendant was unable to determine whether the statute of limitations defense even applied to any of the newly added plaintiffs. Following remand for a new trial

by this Court on the basis of the trial court's error in denying defendant's motion for a continuance, appeals to this Court and our Supreme Court followed, relating to the scope of discovery defendant would be allowed relative to these new claims. Once these discovery related appeals were concluded, a status conference followed in January 1996 and shortly thereafter, on July 19, 1996, defendant brought his motion for summary disposition.

III

Plaintiffs next argue the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(7) when it ruled that those plaintiffs added to the class during trial in 1985 were additional parties and, therefore, the statute of limitations for their claims was not tolled from the date of the original complaint. Plaintiffs maintain that new plaintiffs were not being added to the lawsuit, but rather the original class was simply being further identified. Thus, plaintiffs contend the expansion of the class did not constitute the initiation of a new and separate cause of action to which the statute of limitations would apply. We disagree.

MCR 2.118(D) provides:

Except to demand a trial by jury under MCR 2.508, an amendment relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

However, in *Employers Mutual Casualty Co v Petroleum Equipment, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991), this Court recognized an exception to the broadly worded court rule:

Although an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction, or occurrence set forth in the original pleading, MCR 2.118(D), *the relation-back doctrine does not extend to the addition of new parties*. [Emphasis added.]

See also *Thomas v Process Equipment Corp*, 154 Mich App 78, 84-85; 397 NW2d 224 (1986); *Browder v Int'l Fidelity Ins Co*, 98 Mich App 358, 361; 296 NW2d 60 (1980), *aff'd* 413 Mich 603; 321 NW2d 668 (1982).

Employers Mutual, supra, called into question this Court's prior decision in *Hayes-Albion Corp v Whiting Corp*, 184 Mich App 410, 418; 459 NW2d 47 (1990), in which it was held

where the original plaintiff had, in any capacity, an interest in the subject matter of the controversy, the defendant had notice of the interest of the person sought to be added as a plaintiff, and the new plaintiff's claim arises out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, then a new plaintiff may be added and the defendant is not permitted to invoke a limitations defense.

Subsequently, in *Hurt v Michael's Food Center, Inc.*, 220 Mich App 169; 559 NW2d 660 (1996), this Court applied the rule set forth in *Employers Mutual, supra*, and disallowed application of the relation-back rule to the addition of a new party plaintiff. In *Hurt*, two men held for allegedly shoplifting a jar of peanut butter sued a grocery store for false imprisonment and other claims. The original plaintiff, Hurt, was released without being charged. The amended plaintiff, Hicks, was charged but the charges were later dropped. The complaint was amended to add Hicks as a party plaintiff after the statute of limitations had run on the false imprisonment claim. Despite identical false imprisonment claims arising out of the same circumstances, the *Hurt* Court found, albeit reluctantly, that the amended plaintiff's claim was time barred and could not relate back to the filing of the original complaint:

Pursuant to Administrative Order No. 1996-4, we are constrained to follow *Employers Mutual* and affirm the circuit court's ruling barring plaintiff Hicks' false imprisonment claim as untimely because the relation-back rule does not extend to the addition of a new party. However, were it not for the administrative order, we would follow *Hayes-Albion Corp v Whiting Corp*, 184 Mich App 410; 459 NW2d 47 (1990), and hold that the relation-back rule extends to the addition of a new party. [*Id.* at 179.]

It is significant to note that in the wake of the *Hurt* decision, "[t]he judges of this Court having been polled pursuant to Administrative Order No. 1996-4, and the result of the poll being a majority of the judges opposed convening a special panel, it is ordered that a special panel shall not be convened." *Hurt v Michael's Food Center, Inc.*, 220 Mich App 805; 566 NW2d 3 (1997). Our Supreme Court subsequently denied leave to appeal and reconsideration in *Hurt*. See 456 Mich 900; 575 NW2d 554 (1998). Thus, the general principle reiterated in *Hurt* – that the relation-back rule of MCR 2.118(D) does not extend to the addition of a new party – still remains viable.

Moreover, when the *Employers Mutual* rule is considered in conjunction with MCR 3.501(F), which expressly governs the tolling of the statute of limitations in class actions, we find no reason not to apply it in the present context involving the addition of plaintiffs in a class action.

MCR 3.501(F) provides that in representative actions:

(1) *The statute of limitations is tolled as to all persons within the class described in the complaint on the commencement of an action asserting a class action.*

(2) The statute of limitations resumes running against class members other than representative parties and intervenors:

(a) on the filing of a notice of the plaintiff's failure to move for class certification under subrule (B)(2);

(b) 28 days after notice has been made under subrule (C)(1) of the entry, amendment, or revocation of an order of certification eliminating the person from the class;

(c) on entry of an order denying certification of the action as a class action;

(d) on submission of an election to be excluded;

(e) on final disposition of the action.

(3) If the circumstance that brought about the resumption of the running of the statute is superseded by a further order of the trial court, by reversal on appeal, or otherwise, the statute of limitations shall be deemed to have been tolled continuously from the commencement of the action. [Emphasis added.]

In the instant case, under MCR 3.501(F), the claims of the original thirty-seven members of the class were tolled from September 12, 1980, when the complaint was filed, until May 7, 1982, when the class was certified. However, pursuant to MCR 3.501(F)(1), the statute was similarly tolled for those plaintiffs added to the class in July 1985 only if such plaintiffs fell within “the class described in the complaint on commencement of an action asserting a class action.”

Having reviewed the circumstances, we find plaintiffs’ argument that the trial court in its July 1985 order did not add new plaintiffs to the action to be unpersuasive. The original class was specifically limited to the thirty-seven Lake Shore School District employees. By virtue of the July 1985 order, the original class of thirty-seven increased in size to over two hundred plaintiffs covering the entire state of Michigan, each who had purchased separate policies on different occasions, who had invested varying amounts of money, and who consequently allegedly suffered separate and distinct monetary losses. Thus, the July 2, 1985, order did not merely further identify class members, but rather served to expand the class of plaintiffs beyond that described in the original complaint.

Statutes of limitation serve three important purposes: (1) to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend; (2) to relieve a court system from dealing with “stale” claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured; and (3) to protect potential defendants from protracted fear of litigation. *Shields v Shell Oil Co*, 237 Mich App 682, 690; 604 NW2d 719 (1999), quoting *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974). See also *Poffenbarger v Kaplan*, 224 Mich App 1, 9-10; 568 NW2d 131 (1997). In the instant case, once the class was redefined during trial, the class changed both in scope and size, thereby substantially altering defendant’s potential liability. This Court’s reasoning in its prior opinion in this matter, albeit directed to the different issue whether defendant’s motion for an adjournment was improperly denied, is nonetheless pertinent to the issue now before us:

Defendant prepared his case on the basis that he would have to defend against the claims made by the representative plaintiffs and a class consisting of 37 members of

the Lake Shore School District. Regardless of the fact that defendant had at his disposal knowledge of all those people in Michigan to whom he had sold RE at 65 policies, he previously had to defend against the claims alleging violative actions relating only to teachers in the Lake Shore School District. It is unreasonable to assume that defendant should have prepared his defense by applying discovery methods to the expanded class when, for almost five years, the class had been restricted to teachers in the Lake Shore School District. Prior to the expansion of the class, had defendant attempted to present as witnesses on his behalf others in the state to whom he sold RE at 65 policies, their testimony would most certainly have been successfully attacked on the basis that it was not relevant to show how defendant acted with teachers in the Lake Shore School District. MRE 401. With the class expanded, defendant could look to approximately 200 additional persons in the preparation of his defense. Persons in the expanded class may have been in different situations than members of the original class. Further, the amount of damages changed considerably and might have needed to be calculated differently. [*Zeidman, supra* at p 7.]

Applying these observations to the present circumstances, we conclude that the July 2, 1985, order of the trial court changing the size and scope of the class of plaintiffs during the midst of trial not only defied the above-stated purposes of the statute of limitations, but the mandate of *Employers Mutual, supra*, as well. Moreover, the plaintiffs added to the class action by the July 2, 1985, order were not “persons described in the complaint on the commencement of an action asserting a class action” so as to toll the statute of limitations. MCR 3.501(F). Consequently, Judge Thomas did not err in holding that the July 2, 1985, order did not relate back to the date of filing of the original complaint for purposes of applying the MCPA statute of limitations. We therefore conclude that the trial court properly granted defendant’s motion for partial summary disposition pursuant to MCR 2.116(C)(7).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Richard Allen Griffin

I concur in the result only.

/s/ Michael J. Kelly