

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KEITH MICHALAK,

Plaintiff-Appellant,

v

GYROME L. EDWARDS, JAMES E.  
HERSHBERGER and CONSTRUCTION CODE  
AUTHORITY, INC.,

Defendants-Appellees.

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UNPUBLISHED

May 4, 2001

No. 215639

Lapeer Circuit Court

LC No. 97-023833-NO

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JOHN C. LOUDERMILK and QUAKER  
CONSTRUCTION, INC.,

Plaintiffs-Appellants,

v

GYROME L. EDWARDS, JAMES E.  
HERSHBERGER and CONSTRUCTION CODE  
AUTHORITY, INC.,

Defendants-Appellees.

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No. 215640

Lapeer Circuit Court

LC No. 97-023765-NO

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal as of right from the trial court's orders granting defendants' motions for summary disposition under MCR 2.116(C)(7). We affirm.

As an initial matter, we note that the trial court granted defendants' motions for summary disposition based on its determination that the applicable limitation periods and governmental immunity barred plaintiffs' claims. Plaintiffs do not directly address those rulings on appeal. Instead, plaintiffs argue that the trial court erroneously granted summary disposition because plaintiffs provided sufficient evidence to factually support their claims. This question was

neither presented to nor considered by the trial court and did not serve as the basis for the court's rulings.<sup>1</sup> Appellate relief is ordinarily precluded where an appellant fails to address an issue that must necessarily be decided. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997); *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

Nevertheless, even if plaintiffs had properly presented these issues for appellate review, we would affirm the trial court's decision granting defendants' motions for summary disposition under MCR 2.116(C)(7) because the applicable limitation periods barred plaintiffs' claims.<sup>2</sup>

We review de novo a trial court's decision that a plaintiff's cause of action is barred by the statute of limitations. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997). In reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept the plaintiff's well-pleaded allegations as true and consider all the documentary evidence submitted by the parties. *Shawl v Dhital*, 209 Mich App 321, 323-324; 529 NW2d 661 (1995). The motion should not be granted if there are disputed factual issues concerning when the discovery of the claim occurred or reasonably should have occurred. *Id.* at 324.

Plaintiff Michalak's complaint alleged claims for: (1) intentional infliction of emotional distress, (2) intentional interference with contractual relations, (3) negligence, (4) negligent entrustment, and (5) negligent misrepresentation. Plaintiff Loudermilk's complaint alleged those same claims, as well as: (1) defamation, (2) invasion of privacy, and (3) disparagement. The statutory limitation period governing defamation claims is one year. MCL 600.5805(8); MSA 27A.5805(8). The limitation period for "all actions to recover damages . . . for injury to a person or property" is three years. MCL 600.5805(9); MSA 27A.5805(9).<sup>3</sup> Before the trial court, plaintiffs primarily argued that the filing of earlier state and federal lawsuits tolled the statutory limitation periods. We conclude that neither of plaintiffs' prior lawsuits resulted in tolling.

Plaintiffs filed an earlier lawsuit against defendants in state circuit court, on May 11, 1993. Plaintiffs argued below that the filing of that complaint triggered the tolling provision contained in MCL 600.5856; MSA 27A.5856. The tolling statute provides, in pertinent part:

The statutes of limitations or repose are tolled:

(a) At the time the complaint is filed *and a copy of the summons and complaint are served on the defendant*. [MCL 600.5856; MSA 27A.5856 (emphasis added).]

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<sup>1</sup> Further, the factual support for a plaintiff's claim becomes irrelevant when a statutory limitation period or governmental immunity operates to bar that claim.

<sup>2</sup> Because we conclude that plaintiffs' claims are time-barred, we decline to address whether those claims are also barred by governmental immunity.

<sup>3</sup> Plaintiffs do not dispute the trial court's determination that the one-year and three-year limitation periods govern their claims.

Although plaintiff argued below that mere filing of a complaint tolls the statute of limitation periods, the statute provides otherwise. The trial court made a factual finding that plaintiffs never served the summons and complaint on defendants. Plaintiffs have not challenged that finding on appeal. Therefore, the filing of plaintiffs' earlier state court lawsuit did not trigger the tolling provision contained in MCL 600.5856; MSA 27A.5856.

Plaintiffs also filed a lawsuit against defendants in federal district court, on December 23, 1994. Plaintiffs argued below that the filing of the federal complaint and the subsequent appeal to the Sixth Circuit tolled the statutory limitation periods. The filing of a federal lawsuit tolls statutory limitation periods in the same manner as the filing of a lawsuit in state court. *Lee v Grand Rapids Board of Education*, 148 Mich App 364, 370; 384 NW2d 165 (1986). However, the tolling provision contained in MCL 600.5856; MSA 27A.5856 only applies to prior actions which did not result in an adjudication on the merits. *Sherrell v Bugaski*, 169 Mich App 10, 17; 425 NW2d 707 (1988); *Meda v City of Howell*, 110 Mich App 179, 182; 312 NW2d 202 (1981). Where a federal court's order dismissing a plaintiff's case was not a "ministerial dismissal entered in a routine fashion but, instead, was a discretionary determination of the federal judge based on the individual facts of the case," the dismissal qualifies as an adjudication on the merits. *Carter v SEMTA*, 135 Mich App 261, 265; 351 NW2d 920 (1984). Because there is nothing in the record before us to indicate that the federal district and circuit courts entered a "ministerial dismissal," rather than an adjudication on the merits, we conclude that the filing of plaintiffs' federal lawsuit did not toll the applicable statutory limitation periods.

Plaintiffs filed the instant actions on September 6, 1996. Because the longest limitation period applicable to any of plaintiffs' claims is three years, plaintiffs' claims are time-barred if they accrued before September, 1993. The general accrual statute, MCL 600.5827; MSA 27A.5827, provides that a plaintiff's claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." Under that statute, a plaintiffs' "cause of action accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Arent v Hatch*, 133 Mich App 700, 704-705; 349 NW2d 536 (1984), quoting *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 150; 200 NW2d 70 (1972). Because plaintiffs filed their first complaint against defendants in state court on May 11, 1993, it is clear that plaintiffs' claims had occurred and could have been alleged in a proper complaint by that date. Accordingly, we hold that the trial court properly granted defendants' motions for summary disposition based on the running of the applicable statutory limitation periods.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Kathleen Jansen  
/s/ E. Thomas Fitzgerald