

STATE OF MICHIGAN
COURT OF APPEALS

NATHAN HENDRIX, JOHANNA MEYER,
BRUCE HOELSCHER, and KATHRYN
MICHELSON,

UNPUBLISHED
April 23, 2002

Plaintiffs-Appellants,

v

SCI MICHIGAN FUNERAL SERVICES, d/b/a
REIGLE FUNERAL HOME, d/b/a REIGLE
FUNERAL HOME-SUNSET CHAPEL, d/b/a
REIGLE FUNERAL HOME-CRESTWOOD,
d/b/a REIGLE FUNERAL HOME-SUNRISE
CHAPEL, d/b/a REIGLE FUNERAL HOME-
COLONIAL CHAPEL, SERVICE
CORPORATION INTERNATIONAL, CLARK
CONNOLLY, and JAMES REIGLE, JR.,

No. 228420
Genesee Circuit Court
LC No. 00-067338-NZ

Defendants-Appellees.

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs filed this action after their unsuccessful attempts to become plaintiffs in *Bindscheatel v SCI Funeral Services, Inc*, Genesee Circuit Court No. 96-042773-NZ. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7)¹ and dismissed plaintiffs' action in this case because the applicable statutes of limitation expired before the complaint was filed. Plaintiffs appeal as of right. We affirm.

A decision granting summary disposition is reviewed de novo. *Pusakulich v Ironwood*, 247 Mich App 80, 83; 635 NW2d 323 (2001). When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor. If no facts are in dispute and reasonable minds could not differ concerning the legal effect of

¹ Defendants moved for summary disposition under MCR 2.116(C)(7) and (10). While the trial court did not specify under what subrule it was granting summary disposition, it appears that the motion was granted under (C)(7) because the decision was based on the statute of limitations.

those facts, whether a plaintiff's claims is barred by the statute of limitations is a question for the court as a matter of law. However, if a material factual dispute exists in such a manner that factual development could provide a basis for recovery, summary disposition is inappropriate. *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

Plaintiffs argue that equitable estoppel precludes defendants from raising the statute of limitations as a defense. We disagree.

Plaintiffs attempted to be joined as plaintiffs in the Bindscheatel case by filing a first amended complaint adding them as party plaintiffs. However, plaintiffs never obtained a summons or served the first amended complaint on defendants. In fact, plaintiffs did not even alert defendants to the fact that such a complaint had been filed. The trial court dismissed the first amended complaint because of the complete failure of service of process. *In re Estate of Gordon*, 222 Mich App 148, 158; 564 NW2d 497 (1997); see also *Holliday v Townley*, 189 Mich App 424; 473 NW2d 733 (1991). Plaintiffs' attempts to file a second amended complaint in that action were also denied.

Although defendants were not properly served and never received a copy of the first amended complaint, the record indicates that the names of the four plaintiffs appeared in the Bindscheatel caption on several occasions after the first amended complaint was filed. In October 1996, an order that contained the plaintiffs' names in the case caption was entered in Bindscheatel. The order was prepared by plaintiffs' counsel and was approved by defense counsel. In late 1999, when plaintiffs' counsel moved to lift the stay in the Bindscheatel case, they included the four plaintiffs in the caption of the motion to lift the stay. In their response briefs, defendants also included the plaintiffs' names in the case caption. Defendants, however, did not include the four plaintiffs herein in any discovery that took place in Bindscheatel.

In November 1999, defendants questioned why the names of the four non-party plaintiffs appeared in the Bindscheatel case caption. Only then did defendants learn about the first amended complaint that had never been served. After the trial court dismissed the first amended complaint and refused to allow plaintiffs to file a second amended complaint, plaintiffs commenced this action alleging that equitable estoppel precluded defendants from relying on a statute of limitations defense.

Equitable estoppel may preclude a defendant from raising the statute of limitations as a defense. In *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270-271; 562 NW2d 648 (1997), the Court addressed when the doctrine of equitable estoppel can foreclose a statute of limitations defense:

In *Lothian v Detroit*, 414 Mich 160, 176; 324 NW2d 9 (1982), this Court emphasized that the doctrine of equitable estoppel is a judicially created exception to the general rule that statutes of limitation run without interruption. It is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar.

One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an

expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. This Court has been reluctant to recognize an estoppel absent intentional *or negligent* conduct designed to induce a plaintiff to refrain from bringing a timely action.

In *Adams v Detroit*, 232 Mich App 701, 708; 591 NW2d 67 (1998), the plaintiffs argued that the defendant should be equitably estopped from asserting the statute of limitations as a defense to the plaintiffs' claims. This Court, looking to *Cincinnati Ins, supra* at 270 and *Lothian, supra* at 177, stated:

Equitable estoppel arises where one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position. Although the doctrine can bar use of the statute of limitations as a defense . . . our Supreme Court has been "reluctant to recognize an estoppel in the absence of conduct clearly designed to induce the plaintiff to refrain from bringing action within the period fixed by statute." [*Adams, supra* at 708.]

In *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 183; 511 NW2d 896 (1993), this Court indicated that equitable estoppel "arises where a party, by representations, admissions, *or silence*, intentionally or negligently induces another party to believe certain facts." (Emphasis added). The limited application of estoppel in the statute of limitations arena should be considered along with the equitable estoppel factors. *Lothian, supra* at 178.

The undisputed facts of this case do not support the application of equitable estoppel to bar defendants' reliance on a statute of limitations defense. Defendants did not knowingly conceal or falsely represent any material facts to plaintiffs. *Cincinnati, supra*; *Adams, supra*. Relying on *Penny, supra* at 183, however, plaintiffs argue that equitable estoppel was accomplished by defendants' silence in the face of seeing the plaintiffs' names in the Bindscheatel case caption. Plaintiffs argue that this silence induced them to believe that they were properly added as parties to that case and that valid service of process was accomplished, thus precluding defendants from relying on expiration of the statute of limitations. We disagree.

Nothing in the record supports a finding that defendants' silence, i.e., failure to question the improper captions, was designed to induce, or could reasonably have induced, plaintiffs into believing that defendants were properly served. Plaintiffs possessed the information that they failed to serve defendants. It was their attorney who first placed their names in the caption and thereafter treated them as if they were proper parties. The conduct of plaintiffs' counsel in adding plaintiffs' names to the Bindscheatel caption, without insuring that they were properly added to the case, led plaintiffs to believe that they were proper parties in Bindscheatel. Plaintiffs in this case could not have justifiably relied on defendants' failure to question the improper caption when it was their counsel who first improperly included their names in the caption. *Penny, supra*. In addition, nothing in the record indicates that defendants had

knowledge of the actual facts and were silent in the face of those facts.² *Cincinnati, supra* at 270. It is undisputed that the first time defendants learned of the first amended complaint and defects in the service of process were in November 1999. The evidence cannot reasonably support an inference that defendants were aware of the service of process defects and acted in a manner designed to induce plaintiffs to believe that proper service was made. Thus, even if defendants' silence could be considered negligent, the other factors necessary to invoke the doctrine of equitable estoppel are not present. Equitable estoppel does not bar defendants from relying on the statute of limitations as a defense and, where plaintiffs have admitted that the applicable statutes of limitation ran before the complaint was filed, summary disposition was proper.³

Plaintiffs also argue, citing to MCR 2.114(D), that defense counsels' conduct in signing documents in Bindscheatel that included plaintiffs' names in the caption constitutes their agreement to the inclusion of plaintiffs in that case and their acknowledgment that plaintiffs were making claims against defendants. Defendants cite no relevant authority to support their argument and, therefore, the argument is deemed waived.⁴

The remaining arguments raised by plaintiffs on appeal relate to the trial court's actions and orders in the Bindscheatel case. These orders were not appealed and, therefore, this Court does not have jurisdiction to review the arguments. MCR 7.203.

² Plaintiffs' reliance on *Roberts v Mecosta Co General Hosp*, 240 Mich App 175; 610 NW2d 285 (2000), is curious. Even if the rulings in that case could be applied by analogy, defendants conduct in this case did not waive the statute of limitations defense. Defendants herein did not "sandbag" plaintiffs or deliberately induce them to lose their causes of action on statute of limitations grounds.

³ We note that this case is not like *Penny, supra*. In that case, the evidence supported that the defendant was actually aware of the defect in the service of process and prepared the order of dismissal. It failed to inform the plaintiff of the order of dismissal and the plaintiff did not learn of it until long after the statute of limitations had run. In the interim, the defendant actively participated in the litigation as if there was no fatal defect in the service of process. This Court held that the defendant was equitably estopped from raising the defects in the service of process and from raising the statute of limitations as a defense. *Id.* at 182-184. The facts and reasonable inferences in that case supported the equitable estoppel factors.

⁴ We note, however, that MCR 2.114(E) sets out the sanctions for violations of MCR 2.114(D). Under MCR 2.114(E), the trial court may fashion an appropriate sanction. In this case, both parties signed documents with an incorrect caption. The trial court did not determine that an appropriate sanction for signing a document with incorrect information was to preclude defendants from relying on a statute of limitations defense or to force defendants to accept plaintiffs as party plaintiffs in Bindscheatel.

Affirmed.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald