STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY LAMPKIN,

Plaintiff-Appellant,

v

LISA McINTOSH, M.D. and HENRY FORD HEALTH SYSTEMS, d/b/a HENRY FORD HOSPITAL,

Defendants-Appellees,

and

JACQUELYN RAMSAY, M.D.,

Defendant-Not Participating.

UNPUBLISHED
December 27, 2002

No. 236561
Wayne Circuit Court
LC No. 00-033307-NH

Before: Hood, P.J. and Smolenski and Kelly, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(7). We affirm.

I. Basic Facts and Procedural History

This case arose from medical care and treatment that defendants provided to plaintiff October 23, 1996, when plaintiff presented to defendant Henry Ford Hospital for delivery of her child. Plaintiff alleged that during the course of delivery, she suffered a cervical laceration resulting in significant blood loss. Plaintiff also alleged that she suffered a postpartum pituitary apoplexy.

On October 21, 1998, plaintiff served defendants with a notice of intent to file a claim pursuant to MCL 600.2912b. On April 21, 1999, plaintiff filed her complaint in the lower court.[1] On the same day, the summons and complaint were given to a private process server to serve on

[1] This action was assigned case number 99-912158-NH (first action).

all defendants. On April 23, 1999, the process server hand-delivered the summons and complaint to a secretary at defendant Henry Ford Hospital's Legal Department. Returns of service were filed with the lower court on May 5, 1999.

Defendants answered the complaint on May 14, 1999, and asserted the statute of limitations and improper service as affirmative defenses. The parties engaged in active discovery, but the case was voluntarily dismissed without prejudice on October 19, 2000. On October 10, 1999, nine days before the first action was dismissed, plaintiff filed a second complaint asserting identical claims of medical malpractice.[2] Defendant Ramsey was not served with this second complaint.

On November 9, 2000, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) contending that the statute of limitations had expired. Further, they contended that the statute of limitations was not tolled during the pendency of the first action, because service of process in that action was defective. The trial court agreed, finding that it was undisputed that service was not made in compliance with MCR 2.105, defendants did not waive service, and the statute was not tolled under MCL 600.5856. Accordingly, the trial court entered an order dismissing the second action.

II. Standard of Review and Rules of Construction

We review de novo a trial court's ruling on a motion for summary disposition brought pursuant to MCR 2.116(C)(7). *Rheaume v Vandenberg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998). In reviewing the record to determine if the moving party was entitled to judgment as a matter of law, we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings in favor of the non-moving party. *Id.* Absent a disputed question of fact, the determination whether a cause of action is barred by a statute of limitations is a question of law that this Court reviews de novo. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000). As a general rule, exceptions to statutes of limitations are strictly construed. *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984).

This Court also reviews de novo issues involving statutory construction. *Haliw v City of Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001). The primary goal of statutory interpretation is to give effect to the Legislature's intent. *Rheaume*, *supra* at 422. To discern legislative intent, this Court looks first to the specific language employed in the statute. *Id.* The Legislature is presumed to have intended the meaning it plainly expressed. *Id*. If the language of a statute is clear and unambiguous, judicial construction is not permitted, and the statute must be applied as written. *Id*.

III. Tolling and the Statute of Limitations

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[2] This action was assigned case number 00-033307-NH (second action).

Plaintiff argues that the trial court erred in finding that jurisdiction over the defendants was not acquired prior to the expiration of the statute of limitations because the first action tolled the statute.[3] We disagree.

Generally, the limitations period for malpractice actions is two years from the time the claim first accrues. MCL 600.5805(5); *Solowy v Oakwood Hospital Corp,* 454 Mich 214, 219; 561 NW2d 843 (1997). However, where a plaintiff has filed a previously dismissed action involving the same parties and allegations, the statute of limitations may be tolled. Whether the earlier litigation tolls the statute of limitations is governed by MCL 600.5856 which provides:

> 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.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.
>
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

Under the facts of this case, MCL 600.5856 does not afford plaintiff any relief. Plaintiff's cause of action arose on October 23, 1996. Plaintiff's notice of intent, served on October 21, 1998, left two days remaining in the limitations period pursuant to MCL 600.5856(d) and MCL 600.2912b. On the expiration of the 182-day notice of intent period, plaintiff filed her complaint, with two days remaining in the limitations period. A private process server served process on April 23, 1998, the last day of the statute of limitations. This service was defective. We find that MCL 600.5856 is clear and unambiguous. Subsection (a) requires filing the complaint *and* service. Because proper service was not effected on April 23, 1999, the statute of limitations was not tolled pursuant to subsection (a). Subsection (b) does not toll the statute of limitations because defendants did not submit to the jurisdiction of the court

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[3] Although plaintiff does not argue, on appeal, that service was not defective, she devotes considerable argument in her brief on appeal that the second action should not have been dismissed pursuant to MCR 2.105(J)(3) which states, "An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." Plaintiff's argument is misplaced. The first action was not dismissed for improper service; it was voluntarily dismissed, presumably to accommodate the parties. Defendants' successful motion for summary disposition in the second action was based upon the statute of limitations.

until May 14, 1998. Plaintiff argues, pursuant to subsection (c), that because she placed the summons and complaint into the hands of a private process server on April 21, 1998, the statue of limitations was tolled for ninety days. However, a private process server is not an "officer" for purposes of the tolling statute. *Coleman v Bolton*, 24 Mich App 547, 551-556; 180 NW2d 319 (1970). Because the word "officer" is not ambiguous, this Court is not permitted to go beyond its plain meaning and engage in judicial construction.

Therefore, the trial court did not err in finding the statute of limitations had expired when the second action was filed.

IV. Waiver

Plaintiff argues that defendants waived the statute of limitations defense by failing to raise it in the first action. Plaintiff contends that waiver is implied because defendants actively litigated the first action. We disagree.

A statute of limitations defense must be raised in a party's first responsive pleading or by motion filed not later than the first responsive pleading. MCR 2.111(F)(2) and (3); see also *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). In the first action, defendants raised the statute of limitations as an affirmative defense in their responsive pleading. In the second action, defendants moved for summary disposition arguing that plaintiff's claim was barred by the statute of limitations.

As noted by the trial court, although a substantial amount of time elapsed between defendants' assertion of the statute of limitations defense in the first action and motion for summary disposition in the second action, this passage of time did not operate to waive the defense. See *Horvath v Delida*, 213 Mich App 620, 630; 540 NW2d 760 (1995) wherein this Court held that the defendants' "failure to seek pretrial dismissal of plaintiffs' cause of action does not alone warrant a conclusion that defendants abandoned their affirmative defense based on expiration of the period of limitation."

Affirmed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly