

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHAEL McCAUL,

Plaintiff-Appellant,

v

MODERN TILE & CARPET,

Defendant-Appellee.

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UNPUBLISHED

July 20, 2004

No. 245758

Kalamazoo Circuit Court

LC No. 02-000306-NO

Before: Neff, P.J., and Zahra and Murray, JJ.

NEFF, P.J. (*dissenting*).

I respectfully dissent. MCL 418.641(2)<sup>1</sup> presents a legal quandary that at first glance defies a just resolution given the applicable statute of limitations. In my view, for reasons explained below, the most efficient and equitable resolution is to toll the limitations period during the worker's compensation proceedings that are the basis of the civil action under subsection 641(2). I agree that existing precedent precludes such tolling. Nonetheless, I conclude that plaintiff's action is not time-barred because his claim under MCL 418.641(2) did not accrue until he was denied worker's compensation benefits on October 14, 1999. I would therefore reverse the grant of summary disposition.

I

Under subsection 171(4)<sup>2</sup> of the Worker's Compensation Disability Act (WDCA), the Legislature expressly authorized civil actions against employers who fraudulently induce

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<sup>1</sup> MCL 418.641(2) provides: "The employee of an employer who violates the provisions of section 171 or 611 [MCL 418.171 or MCL 418.611] shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131 [MCL 418.131.]"

<sup>2</sup> MCL 418.171(4).

employees to pose as independent contractors.<sup>3</sup> In doing so, the Legislature could not have intended to burden injured workers or the courts with duplicative, parallel administrative and civil actions. It is illogical to require claimants to pursue simultaneous and often unnecessary civil litigation merely to avoid a time bar to a civil action under MCL 418.641(2). If a worker's compensation claimant reasonably and in good faith files a compensation claim, only to be denied benefits sometime later on a ground that would permit recovery of damages in an alternative civil action under subsection 641(2), the statute of limitations should not operate to bar the civil action that the Legislature expressly contemplated under these circumstances. Such a result renders the worker's compensation scheme inadequate as a remedy. Moreover, it frustrates the administration of justice and does not further the purpose or goal of the limitations statute.

The California Supreme Court addressed these exact concerns in *Elkins v Derby*, 12 Cal 3d 410; 525 P2d 81 (1974), in deciding whether the statute of limitations on a plaintiff's personal injury action was tolled for the period during which he pursued his worker's compensation remedy against defendant:

Although defendants point out that plaintiff could have preserved his rights despite the statute of limitations by simultaneously commencing a civil action and a compensation claim, we believe that the statute may properly be tolled for the period during which plaintiff pursued his compensation remedy. . . . [A]n awkward duplication of procedures is not necessary to serve the fundamental purpose of the limitations statute, which is to insure timely notice to an adverse party so that he can assemble a defense when the facts are still fresh. The filing of a compensation claim accomplishes this purpose and the tolling of the statute does not frustrate it. . . .

Defendants' suggested duplicative procedures would impose a heavy burden on all concerned. Such procedures would entail the filing of cases in our heavily burdened superior courts that would be mooted whenever the board decided it had jurisdiction to grant relief. Such procedures also would impose upon the claimant the burden of alleging contradictory pleas, for example, that he both was and was not an employee at the time of his injury or that his injury both did and did not arise from the course of his employment. Although the [worker's compensation system seeks to establish a nontechnical means to recover for industrial injuries a dual filing requirement presupposes a professional knowledge without which the worker would forfeit all right to recover. [*Id.* at 412-413.]

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<sup>3</sup> Subsection 171(4) provides in relevant part: "Principals willfully acting to circumvent the provisions of this section or section 611 by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees within the meaning of this act to pose as contractors for the purpose of evading this section or the requirements of section 611 shall be liable subject to the provisions of section 641 [MCL 418.641]."

In concluding that the statute of limitations was properly tolled, the *Elkins* Court noted that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitation period is tolled for the time consumed by the administrative proceeding. *Id.* at 414. Likewise, when an injured person has several legal remedies and reasonably and in good faith, pursues one of them, the running of the limitations period is tolled if the defendant is not thereby prejudiced. *Id.* Additionally, policy considerations supported tolling because the suspension of the running of the limitations period in this and similar cases did not frustrate achievement of the primary purpose of the limitations statute, i.e., timely apprising a defendant of claims. *Id.* at 417.

Equally important, and particularly relevant here, is the court's observation that duplicative proceedings were inequitable to the injured party and would be "inefficient, awkward, and laborious." *Id.* at 420. A duplicative filing requirement is inequitable to an injured party because the worker's compensation system was designed to afford a simple and nontechnical path to relief for claimants:

Unaware . . . that he may be entitled to a remedy only in [a] court or overwhelmed by seemingly inscrutable distinctions between "employees" and "independent contractors" or injuries arising within and without "the course of employment," an injured party can easily lose his tort remedy while devoting his attention to pursuing a compensation claim. *Id.* at 419.

The *Elkins* Court's observations regarding simultaneous administrative and civil court actions is particularly apropos to recourse under subsection 641(2). Duplicative administrative and court proceedings are burdensome to the injured party, the employer, and the already overtaxed judicial system. *Elkins, supra* at 420. These duplicative efforts are for naught whenever the compensation board concludes that the injured party is entitled to relief. *Id.* Further, requiring duplicative actions in this case, as in many cases, require an injured party to simultaneously argue before different tribunals propositions that are mutually inconsistent, e.g., that the claimant was and was not an employee or was and was not an independent contractor. *Id.* at 420.

In this case, as in *Elkins*, plaintiff reasonably and timely pursued a worker's compensation claim following his injury. Plaintiff began working for defendant in 1976 as a carpet installer. In 1989 or 1990, at defendant's insistence, plaintiff formed a sole proprietorship and signed a contract identifying him as an independent contractor. He purchased a worker's compensation insurance policy for his sole proprietorship. When plaintiff was injured in 1996, he filed a worker's compensation claim against his sole proprietorship and against defendant. On January 21, 1998, the magistrate granted plaintiff's claim against his sole proprietorship but denied his claim against defendant, finding that plaintiff was not an employee of defendant. Both parties appealed to the Worker's Compensation Appellate Commission (WCAC), which in a split decision issued on October 14, 1999, denied all claims for benefits.

In this case, as in *Elkins*, tolling the running of the limitations period during the pendency of the compensation proceedings does not frustrate the goal of statutes of limitations. "Statutes of limitation are procedural devices intended to promote judicial economy and the rights of defendants." *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). Defendant was

clearly apprised of plaintiff's claim on the basis of the worker's compensation proceedings and therefore allowing the civil action to proceed does not invade defendant's rights.

Although the same factors weigh in favor of tolling the statute of limitations in this case as in *Elkins*, Michigan courts have strictly construed the tolling statute, MCL 600.5856,<sup>4</sup> to preclude its application to administrative proceedings in general, and worker's compensation proceedings in particular. *Dunlap v Clinton Valley Ctr*, 169 Mich App 354, 358-359; 425 NW2d 553 (1988); see also *Mair v Consumers Power Co*, 419 Mich 74, 82-83; 348 NW2d 256 (1984). In my view, Michigan should follow the view of the California courts to permit tolling the limitations period for purposes of actions under subsection 641(2), which logically will follow from an adverse worker's compensation determination. Because our courts' strict construction of the tolling statute does not permit such tolling with respect to claims under subsection 641(2), legislative action is necessary to avoid the multitude of duplicative filings that will undoubtedly occur to protect an unsuccessful compensation claimant's recourse to a civil action. The Legislature could not have intended to provide a procedural shield to potentially liable employers at the same time it provided a substantive sword to injured claimants under the WDCA.

## II

Despite the strict construction of exceptions to the statute of limitations, *Mair, supra* at 80, our courts have recognized that equitable relief is appropriate under certain circumstances with regard to determining when a statute of limitations begins to run. *Stephens, supra* at 534-536. Except as otherwise expressly provided, a claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results. MCL 600.5827; *Stephens, supra* at 534. The courts have held that the term "wrong" in this context "refers to the date on which the plaintiff was harmed by the defendant's negligent act, not the date on which the defendant acted negligently." *Stephens, supra* at 534-535. "Otherwise, a plaintiff's cause of action could be barred before the injury took place." *Id.* at 535. Further, the "discovery rule" delays commencement of the running of a statute of limitations in certain cases when the claimant does not become aware of the basis for an action until sometime after an injury has occurred. *Id.* at 535-536.

Although the discovery rule is not available in ordinary negligence cases when a plaintiff merely misjudges the severity of a known injury, the discovery rule has been more liberally applied in other contexts, such as medical malpractice, products liability actions, and negligent misrepresentation. *Id.* at 537; see also *Zimmer v A T & T Co of Michigan*, 947 F Supp 302, 308-309 (ED Mich, 1994) (hybrid § 301 claim against an employer for breach of a collective bargaining agreement and against a union for breach of the duty of fair representation accrued when the union alerted the plaintiff that it would not pursue a grievance, i.e., when the plaintiff discovered or in the exercise of reasonable diligence should have discovered the acts constituting

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<sup>4</sup> MCL 600.5856 was recently amended, but the amendment does not affect the application of the statute in this case.

the alleged violation). In these contexts, evidentiary records are rarely diminished by the passage of time, and hence the concern for protecting defendants from any loss of evidence or fading memories of witnesses is less significant. *Stephens, supra* at 537. Similarly, in this case, there is little danger of a loss of evidence with regard to the claim that defendant fraudulently induced plaintiff to pose as an independent contractor.

Given the rules governing accrual, it is clear that plaintiff's claim did not accrue until the time that he was denied worker's compensation benefits on October 14, 1999, the date of the WCAC decision. Until that time, plaintiff suffered no harm and had no basis for a civil action against defendant. Plaintiff had purchased worker's compensation insurance for his sole proprietorship, which he clearly presumed would cover his injuries. Upon his work-related injury in 1996, he filed a compensation claim. After a trial, the magistrate awarded plaintiff benefits against Citizens Insurance Company, the worker's compensation carrier for the sole proprietorship. Although the magistrate denied plaintiff's claim for benefits as an employee of defendant, plaintiff nevertheless was awarded worker's compensation benefits for his injury.

For all practical purposes, at that time plaintiff had not suffered harm warranting a civil action against defendant under subsection 641(2) because he may not pursue double-recovery for his injuries.<sup>5</sup> *Smeester v Pub-N-Grub, Inc (On Remand)*, 208 Mich App 308, 312; 527 NW2d 5 (1995). Thus, only at the point the WCAC reversed the magistrate's award of worker's compensation benefits and denied plaintiff's claim altogether was plaintiff harmed such that he had reason to pursue a civil action under subsection 641(2) against defendant.

I conclude that plaintiff filed his civil action within the applicable three-year limitations period. Plaintiff was denied worker's compensation benefits by the decision of the WCAC on October 14, 1999. He filed this action on May 23, 2002, within three years of the date his claim accrued.

In deciding whether to strictly enforce a period of limitation or impose the discovery rule, the court must carefully balance when the plaintiff learned of the injuries, whether the plaintiff was given a fair opportunity to bring suit, and whether the defendant's equitable interests would be unfairly prejudiced by tolling the statute of limitations. *Stephens, supra* at 536. A logical application of accrual principles to the facts of this case compels a conclusion that plaintiff's action is not time-barred.

/s/ Janet T. Neff

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<sup>5</sup> Plaintiff conceivably could have proceeded on the limited basis that defendant's carrier, rather than the sole proprietorship's carrier, was responsible for payment of benefits.