STATE OF MICHIGAN

COURT OF APPEALS

DURRARD HUTCHERSON and LARRY JACKSON,

Plaintiffs-Appellants,

v

ANDREA SMITH, Personal Representative of the Estate of KELLY ALAN SMITH, Deceased,

Defendant-Appellee.

UNPUBLISHED
November 4, 2004

No. 248143
Wayne Circuit Court
LC No. 01-131243-NI

Before: Griffin, P.J., and Saad and O'Connell, JJ.

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

On appeal, plaintiffs argue that the doctrine of res judicata does not apply because, when the prior action was decided on the merits, it did not involve the same parties or their privies. I agree. Although defendant was initially named in the first action, it was never served with process and, thus, was deemed dismissed *without* prejudice after the summons expired, MCR 2.102(E)(1). Further, there is no dispute that defendant did not appear in that action, and the time for service of the summons had expired before the order of dismissal was entered. Therefore, defendant was not a party to the action when the lower court entered the order of dismissal *with* prejudice.

MCR 2.102(E)(1) provides, in pertinent part:

> On the expiration of the summons as provided in subrule (D), the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction.

Prior to April 15, 1979, our former court rule, GCR 1963, 102.5(1), provided:

> Dismissal of Action, Defendants not Served. Every action shall be dismissed, without prejudice, as to any defendant in the action who has not been served with process personally . . . .
>
> (1) Upon the expiration of 180 days from the date of the filing of the first complaint in the action with the court, the clerk of the court in which the

> complaint was filed shall examine the court records in the action and, if he determines that any defendant in the action has not been served with process within that period of time, he shall automatically enter an order of dismissal as to that defendant as provided above.

This former rule, which required a clerk to enter an order of dismissal, was "not self-executing" and required the clerk to enter an order of dismissal. *Goniwicha v Harkai*, 393 Mich 255, 257; 224 NW2d 284 (1974); *Krueger v Williams*, 71 Mich App 638, 641; 248 NW2d 650 (1976).

However, on April 15, 1979, our Supreme Court changed the rule to eliminate the requirement that the court clerk enter an order of dismissal. That language was deleted, and new language added to the effect that upon expiration of the summons "the action is deemed dismissed." MCR 2.102(E). Unlike the former rule, our current court rule *is* "self executing." As our Court stated in *Durfy v Kellogg*, 193 Mich App 141, 145; 483 NW2d 664 (1992), "In fact, under MCR 2.102(E), the action is deemed to have been *dismissed automatically* when the original summons expired. See 1 Martin Dean & Webster, *Michigan Court Rules Practice*, pp 65-66." (Emphasis added.) See also *Brashers v Jefferson*, 402 Mich 399; 263 NW2d 243 (1978).

Because MCR 2.102(E)(1) *is* self-executing, defendant was automatically dismissed without prejudice from the prior action and was no longer a party after the expiration of the summons. Therefore, defendant was not a party at the time the order of dismissal with prejudice was entered, and the order does not operate as res judicata because the third element of res judicata is not satisfied.

In opposing plaintiffs' appeal, defendant also argues in its appellate brief that the present case is barred by releases executed by plaintiffs. However, this issue has not been preserved for appellate review because it was first raised in defendant's response to plaintiffs' motion for reconsideration, and the trial court did not rule on it. *Gortney v Norfolk & Western Ry* Co, 216 Mich App 535, 544; 549 NW2d 612 (1996); *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 278; 568 NW2d 411 (1997). See also *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994) ("As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances.") Furthermore, copies of the alleged executed releases are not contained in the record. Thus, there is insufficient documentary evidence to support this unpreserved issue. MCR 2.116(G)(6).

For these reasons, I respectfully dissent. I would reverse and remand for further proceedings.

/s/ Richard Allen Griffin