STATE OF MICHIGAN

COURT OF APPEALS

ROXIE PHILLIPS,

Plaintiff-Appellant,

v

GEORGE DASS, M.D. and GEORGE DASS, M.D., P.C.,

Defendants-Appellees.

UNPUBLISHED
September 19, 2006

No. 267992
Genesee Circuit Court
LC No. 03-077564-NH

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals the trial court's grant of summary disposition to defendants. We affirm.

Plaintiff argues that a visiting trial court judge abused his discretion when he granted defendants' motion to file a motion for summary disposition after the filing deadline set forth in the trial court's scheduling order. Pursuant to MCR 2.116(B)(2), a motion for summary disposition may be filed by a party "at any time." However, the court rule does not deprive the trial court of the "discretion to set a limit on the time within which a motion under MCR 2.116 may be filed, as provided by MCR 2.401(B)(2)." *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 350; 711 NW2d 801 (2006). MCR 2.401(B)(2)(a)(ii) states that a trial court shall, at any time that would facilitate the progress of the case, "establish times for events the court deems appropriate, including" the "filing of motions."

To support her position, plaintiff relies on *Kemerko, supra*, in which this Court observed that "MCR 2.401 implicitly permits trial courts to decline to entertain motions beyond the deadlines established in scheduling orders." However, conversely, a trial court also may *accept* motions beyond deadlines established in scheduling orders. *Id*. at 349. This is especially true in light of the directive that the court rules must "be construed to secure the just, speedy, and economical determination of every action . . ." under MCR 1.105. Thus, while the *Kemerko* panel ruled that a trial court is not obligated to accept late motions for summary disposition, the panel emphasized that the decision whether to accept or reject a late filing is within the trial court's discretion. Indeed, our courts have long recognized that a trial court has the inherent power to control the movement of cases on its docket. *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963); MCL 600.611.

This Court will not disturb a trial court's exercise of its inherent power unless a party shows a *clear* abuse of discretion. *Persichini v Beaumont Hosp*, 238 Mich App 626, 639-640, 607 N.W.2d 100 (1999). "An abuse of discretion is found only in the extreme case where the result is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, . . . or where an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made . . . ." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003).

We hold that the trial court clearly did not abuse its discretion when it ruled that it would consider defendants' motion for summary disposition. Notwithstanding the trial court's original scheduling order, the parties stipulated to extend discovery and to adjourn trial dates multiple times during this litigation.[1] Further, nothing in the record indicates that defendants intentionally withheld their filing for purposes of delay or to otherwise prejudice plaintiff. And, while the trial court ultimately granted defendants' motion because plaintiff failed to timely give her complaint to a process server, defendants also asserted arguments for summary disposition on discovery obtained during the pendency of the case. Moreover, plaintiff was on notice from defendants' first responsive pleading that they might take the position that the case was filed outside the applicable limitations period.[2] As our Supreme Court observed in *Burton v Reed City Hosp. Corp*, 471 Mich 745, 755; 691 NW2d 424 (2005), "[s]uch a direct assertion of [this defense] by defendants can by no means be considered a waiver," but "a clear affirmation and invocation of" the defense.

A trial court clearly has the authority to amend its scheduling order in order to maintain control over its docket and to expeditiously dispose of cases that are not properly brought. Indeed, it would have constituted an abuse of discretion for the trial court to decline consideration of the motion, particularly because defendants could have asserted the statute of limitation defense during trial, in a motion to dismiss or a motion for directed verdict. The trial court's decision to consider the motion before the parties prepared for and participated in a trial was clearly correct and within the trial court's sound discretion.

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[1] While the dissent notes that, in their motion to file motion for summary disposition, defendants cited *Apsey v Memorial Hospital*, published opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 251110), which was later vacated and given prospective application only in *Apsey v Memorial Hospital (On Reconsideration)*, 266 Mich App 666; 702 NW2d 870 (2005), this Court granted reconsideration of *Apsey after* defendants filed their motion. Defendants will not be faulted for citing a case that was binding at the time they filed their motion. Moreover, defendants also cited other legal bases for the trial court to grant them permission to file a motion beyond the dates set forth in the scheduling order.

[2] That defendants did not formally request an extension of time to file their motion for summary disposition or affirmatively establish "excusable neglect" pursuant to MCR 2.108(E) is immaterial when it was within the trial court's power and discretion to consider the motion when raised.

Plaintiff further asserts that the trial court erred when it granted summary disposition to defendants because defendants waived their defenses. Notwithstanding plaintiff's attempt to recast defendants' position, defendants' motion for summary disposition was clearly based on the statute of limitations, MCL 600.5805(6), which defendants clearly asserted in their first responsive pleading. The trial court ruled that, as interpreted in *Gladych v New Family Homes*, 468 Mich 594; 664 NW2d 705 (2003), the statute required more than the mere filing of a complaint to toll the statute of limitations and that plaintiff failed to timely serve defendant or place the summons and complaint in the hands of a process server. This statute of limitations ruling was the basis of defendants' argument and the trial court's decision, and plaintiff's attempts to characterize the issue in different terms is simply unavailing.

Moreover, nothing in the record indicates that defendants intentionally abandoned its right to assert the defense and no conduct or affirmative representations indicate such an intention. See *Burton, supra* at 754 n 4; *Moore v Moore*, 266 Mich App 96, 103; 700 NW2d 414 (2005). In addition to their "clear affirmation and invocation of" the defense in their first responsive pleading, no waiver occurred. *Id*. at 755; MCR 2.111(F). Moreover, plaintiff's argument that defendants' "voluntary" participation in the litigation through its filing of an appearance and answer and by appearing for court hearings lacks any legal support. It is axiomatic that a litigant may assert statute of limitations arguments after appearing to defend a case.

Plaintiff also contends that the trial court should not have applied MCL 600.5856 to her case on the grounds that MCL 600.2912b and 600.2912d are more specific statutes. Plaintiff's claim is not supported by our case law and, simply put, she cannot escape the clear application of MCL 600.5856 as it existed when she filed her lawsuit.[3] At that time, our Supreme Court made clear that plaintiffs must comply with MCL 600.5856 in order to toll the statute of limitation in a malpractice action. *Gladych, supra* at 598-599. Our Supreme Court also made clear that, under MCL 600.5856,

> the statute of limitations is tolled only if (1) the complaint is filed and a copy of the summons and complaint are served on defendant, (2) jurisdiction is otherwise acquired over defendant, (3) 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 no longer than ninety days after the summons and complaint are received by the officer), or (4) if, during the applicable notice period under MCL § 600.2912b, a claim would be barred by the statute of limitations, but only for the number of days equal to that in the applicable notice period after notice is given in compliance with § 2912b.

It is undisputed that the statute of limitations on plaintiff's malpractice claim expired on October 20, 2003, the day she filed her complaint. However, it is also undisputed that plaintiff failed to

[3] The Legislature amended MCL 600.5856, effective April 22, 2004. 2004 PA 87. Because it was not in effect when plaintiff commenced this action, the amendment does not apply here.

serve defendant or place her complaint with a process server until several days later. Plaintiff failed to comply with MCL 600.5856 and her claim was barred by the statute of limitations.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen