

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0308**

Nathan Daniel Clark,
Appellant,

vs.

Joan Fabian, et al.,
Respondents.

**Filed November 25, 2008
Affirmed
Huspeni, Judge***

Chisago County District Court
File No. 13-CV-07-49

Nathan Daniel Clark, OID #204290, 7600 525th Street, Rush City, MN 55069 (pro se appellant)

Lori Swanson, Attorney General, Margaret Jacot, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101 (for respondents Joan Fabian, et al.)

Mike Freeman, Hennepin County Attorney, Toni A. Beitz, Assistant County Attorney, 300 South Sixth Street, C-2000 Government Center, Minneapolis, MN 55487 (for respondents Hennepin County Jail Health Service Department, and Hennepin County Sheriff)

Considered and decided by Peterson, Presiding Judge; Stauber, Judge; and
Huspeni, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HUSPENI, Judge

On appeal from the dismissal of his action against respondents, appellant Nathan Daniel Clark argues that the district court erred in ruling that all claims were time-barred. Because it clearly and unequivocally appears from the face of the complaint that all statutes of limitations had run on appellant's claims, and because the complaint contains no pleaded facts tolling the running of the statutes of limitations, we affirm.

FACTS

The facts are not in dispute. On September 4, 1999, appellant Nathan Daniel Clark was arrested, taken into custody at the Hennepin County Jail, and tested for tuberculosis (TB). His results were negative. From October 1999 until May 2000, Clark was transferred back and forth between the Hennepin County Jail and the Benton County Jail. On February 24, 2000, he was sentenced and transferred to MCF-St. Cloud where he again tested negative for TB. On May 12, 2000, Clark tested positive for TB. He was then transferred from MCF-St. Cloud to MCF-Stillwater where he received treatment for TB from September 1, 2000, until March 6, 2001. Since then, he has had annual follow-up appointments with the Department of Corrections (DOC) health staff every year except for 2005.

On November 6, 2005, Clark contacted Rush City Health Services requesting information regarding how long it takes to test positive for TB after exposure to the disease. Health services responded on November 29, 2005, informing him that it takes approximately one month to test positive for TB.

On January 11, 2007, the Attorney General's Office received a "List of All Defendants in Present Case Filed Before the Court," "Summary of Statement of Claim," and a cover letter from Clark. No summons, complaint, notice of acknowledgment form or return envelope was included in the materials received. On January 18, 2007, Clark filed a summons, "Summary of Statement of Claim," and two notices of acknowledgment of receipt of summons and complaint, signed by Clark, with the Chisago County District Court. On April 23, 2007, state respondents filed a motion to dismiss under Minnesota Rules of Civil Procedure 12.02(b), (c), (d), and (e), arguing that Clark's claims were barred because of improper service and the running of the statutes of limitations.

On May 23, 2007, Clark's motion to dismiss all defendants except Joan Fabian, Pat Adair, "CMS," and Dr. Lee was granted by the district court. On June 29, 2007, the state respondents filed a memorandum in support of their April 23 motion to dismiss, and acknowledged that subsequent to this motion, they had been personally served by Clark with the appropriate papers.

On September 12, 2007, the district court granted the state's motion to dismiss for failure to state a claim upon which relief could be granted under rule 12.02(e). The court determined that all of Clark's claims were barred by the applicable statutes of limitations, and noted that it had only considered the parties' pleadings, motions, and memoranda in reaching its decision. Clark's October 11, 2007 appeal from the September 12 order was dismissed by this court because judgment had not been entered. Judgment was entered on December 31, 2007, and this appeal resulted.

DECISION

Clark argues that the district court erred in dismissing his claims against the several state respondents. The court dismissed Clark’s claims under Minnesota Rule of Civil Procedure 12.02(e)—the appropriate rule for dismissal of claims that are time-barred—and clearly indicated that it was not making a summary judgment ruling. *See* Minn. R. Civ. P. 12.02(e) (“If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . .”).

Our review of a case dismissed for failure to state a claim is limited to whether the complaint sets forth a legally sufficient claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted). The standard of review is de novo. *Id.* In conducting this review, we accept the facts of the complaint as true and construe all reasonable inferences in favor of the nonmoving party. *Radke v. County of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005). “We will not uphold a Rule 12.02(e) dismissal if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Id.* (quotation omitted). The assertion that a party’s claim is barred by the statute of limitations is an affirmative defense, and therefore it is the moving party’s burden to establish each of the elements. *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 885 (Minn. 2006).

Clark’s pleadings alleged the following causes of action: “violation of rights to medical care, torts claim for substantial injury.” He did not cite to any statute or caselaw

in support of his claims, but under the heading “complaint for rights,” he alleged several constitutional violations under 42 U.S.C.A. § 1983 (1979), including a claim that he was discriminated against as an indigent and subjected to medical mistreatment and cruel and unusual punishment. The district court concluded that Clark was pursuing claims for fraud, negligence, medical malpractice, section 1983 constitutional claims, and potentially a claim under the Minnesota Human Rights Act. Clark does not argue that this construction of his claims is incorrect, and the court’s order reflects that it gave Clark’s complaint a broad and fair reading. Minn. R. Civ. P. 8.06 (“All pleadings shall be so construed as to do substantial justice.”).

The district court found that none of Clark’s claims involved a statute of limitations longer than six (6) years. It ruled that all of Clark’s claims were time-barred because his cause of action accrued when he first tested positive for TB on May 12, 2000, but he did not commence his action until sometime between April 23 and June 29, 2007, when the defendants were properly served. “The construction and applicability of statutes of limitations are questions of law that this court reviews de novo.” *Noske v. Friedberg*, 670 N.W.2d 740, 742 (Minn. 2003) (quotation omitted).

Accrual of Claims

To determine whether the statute of limitations has run, it is first necessary to establish when Clark’s cause of action accrued. Generally, “the cause of action accrues when the accident occurs.” *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 151, 158 N.W.2d 580, 583 (1968). “A cause of action accrues and the statute of limitations begins to run when the cause of action will survive a motion to dismiss for failure to state a

claim upon which relief can be granted.” *Noske*, 670 N.W.2d at 742 (quotation omitted). In the absence of continuing negligence or trespass, or fraud on the part of the defendant, ignorance of the cause of action on the part of the plaintiff will not toll the accrual of the cause of action. *Dalton*, 280 Minn. at 153, 158 N.W.2d at 584.

Clark was systematically tested for TB from the time he entered the custody of Minnesota Department of Corrections. He tested negative for TB on February 22, 2000, and positive for the disease three months later on May 12, 2000. He received treatment for TB from September 2000 until March 2001. In November 2005, in response to his inquiry of prison personnel, Clark was informed that an individual could test positive for TB within one month after exposure. Thus, Clark believes that he was exposed to TB while he was incarcerated, and that the personnel at the DOC fraudulently misled him into believing he carried the dormant TB virus into prison with him.

Where a cause of action is based on exposure to an infectious disease, the date upon which the statute of limitations begins to run is the date on which the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, his illness. *Dalton*, 280 Minn. at 151-52, 158 N.W.2d at 583 (applying this approach to cause of action based on exposure to harmful chemicals); *see also Medalen v. Tiger Drylac U.S.A., Inc.*, 269 F. Supp. 2d 1118, 1123-1124 (D. Minn. 2003) (applying *Dalton* and holding that plaintiff’s cause of action accrued when she discovered her illness). Clark discovered his illness when he first tested positive for TB on May 12, 2000. Even accepting, *arguendo*, his argument that this may have been a “false positive,” there could

be no confusion that he had contracted TB by the time he began treatment. Thus, September 2000 was the latest time at which his cause of action could have accrued.

Clark maintains, however, that his cause of action did not accrue until 2005 when he discovered that an individual could test positive for TB within one month of exposure. This argument is not persuasive. In *Dalton*, the court rejected a plaintiff's argument that the statute of limitations did not begin to run until he actually discovered the connection between his illness and the defendants' conduct. *Dalton*, 280 Minn. at 154, 158 N.W.2d at 585. The court ruled, instead, that an action would begin to accrue either when the plaintiff discovered the illness or could have discovered it with reasonable diligence. *Id.* at 151-52, 158 N.W.2d at 583. In this case, Clark discovered his illness, at the very latest, in September of 2000.

Clark also argues that the statute of limitations has not run because he is still undergoing treatment for TB. But he does not allege any damages arising from his medical treatment. When a medical-malpractice claim is based on a single act of allegedly negligent conduct (here, exposure to TB), rather than a course of treatment, the cause of action accrues when the plaintiff sustains damage from the act. *Mercer v. Andersen*, 715 N.W.2d 114, 120 (Minn. App. 2006). Clark sustained damage when the prison staff allegedly exposed him to the TB virus, which caused him to contract the disease. Thus, his cause of action accrued when he tested positive for the disease in May of 2000. *McRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 720 (Minn. 2008) (reaffirming that Minnesota follows the "damage" rule of accrual); *Dalton*, 280 Minn. at 153, 158 N.W.2d at 584 (holding "the alleged negligence . . . coupled with the alleged

resulting damage is the gravamen in deciding the date upon which the action at law herein accrues.”).

Commencement of Action

We must next determine the date on which Clark commenced his action against the various defendants. A lawsuit commences when a summons and complaint are properly served. Minn. R. Civ. P. 3.01-3.02. Whether service is proper presents a question of law, which we review de novo. *Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001).

Clark, in attempting to sue employees of the State of Minnesota, was required to serve an attorney at the Office of the Minnesota Attorney General. Minn. R. Civ. P. 4.03(d). The Minnesota Rules of Civil Procedure provide that a defendant may be served by mail, which is achieved by mailing a copy of the summons and complaint, along with two copies of a notice and acknowledgment of service and an addressed, postage-prepaid, return envelope. Minn. R. Civ. P. 4.05. When service is made by mail, the action commences on the date of acknowledgment of service. Minn. R. Civ. P. 3.01(b). Acknowledgment of service under rule 4.05 must be in writing. *Larson v. New Richland Care Ctr.*, 520 N.W.2d 480, 482 (Minn. App. 1994). Strict compliance with this rule is required; if the acknowledgment of service is not returned, service is ineffectual, and the action will be dismissed. *Coons v. St. Paul Cos.*, 486 N.W.2d 771, 776 (Minn. App. 1992), *review denied* (Minn. July 16, 1992); *see also Hughes v. Lund*, 603 N.W.2d 674, 677 (Minn. App. 1999) (holding that proper service by mail was not effected when service was not acknowledged). Thus, a litigant seeking to serve by mail must be

prepared to serve the intended party personally within the timeframe for answering the complaint. *Nieszner v. St. Paul Sch. Dist. No. 625*, 643 N.W.2d 645, 649 (Minn. App. 2002).

The record shows that Clark made several attempts to serve respondents here. Clark's first two attempts at service by mail were ineffectual, however, because he either failed to include the notices of acknowledgment or signed his own name on the notices of acknowledgment in the space provided for the defendant's signature. Minn. R. Civ. P. 4.05 states "[i]f acknowledgment of service under this rule is not received by the sender within the time defendant is required by these rules to serve an answer, service shall be ineffectual." After two unsuccessful attempts at service, Clark had the sheriff's office personally serve respondents, which they acknowledged in their June 29, 2007 memorandum to the district court. Thus, the record shows that proper service was completed at some point between April 23 and June 29, 2007. The action commenced at that time.

None of the statutes of limitations for Clark's claims exceed six (6) years. Generally, the statute of limitations that is in existence at the time that the action is brought controls. *Murphy v. Allina Health System*, 668 N.W.2d 17, 22 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). Fraud and negligence claims have statutes of limitations of six (6) years. Minn. Stat. § 541.05 subd. 1(5), (6) (2006). Medical malpractice claims have a statute of limitations of four (4) years. Minn. Stat. § 541.076(b) (2006). Section 1983 claims have a statute of limitations of six (6) years. *Simington v. Minn. Veterans Home*, 464 N.W.2d 529, 530 (Minn. App. 1990) (citing

Owens v. Okure, 488 U.S. 235, 249-50, 109 S. Ct. 573, 582 (1989)), *review denied* (Minn. Mar. 15, 1991). Human rights claims have a statute of limitations of one year from the time of the occurrence of the discriminatory practice. Minn. Stat. § 363A.28, subd. 3 (2006).

The district court commendably construed Clark's complaint to allege each of these causes of action, and addressed the statute of limitations involved in each cause. Assuming Clark's cause of action accrued, at the very latest, in September of 2000, he would have needed to commence an action against the defendants by September of 2006 in order to prevent his claims from being time-barred. Clark did not attempt to institute his cause of action until 2007. Accordingly, the district court properly concluded that the statute of limitations had run on all of his claims.

Fraud

Finally, Clark alleges that the defendants fraudulently concealed his cause of action, and therefore the statutes of limitations were tolled until his discovery of this fraud in 2005. In order to plead that a defendant fraudulently concealed a cause of action, the plaintiff must show (1) the defendant knowingly made a false statement or intentionally committed an affirmative act; (2) with the purpose of concealing the cause of action; and (3) the concealment could not have been discovered by due diligence. *Williamson v. Prasciunas*, 661 N.W.2d 645, 650 (Minn. App. 2003) (citations omitted). Clark has made no such showing.

Even assuming the truth of Clark's allegation that his medical physicians falsely maintained he had carried the TB virus into the prison system with him, the complaint

contains no claim that these statements were made knowingly or for the purpose of concealing his cause of action. Nor does Clark provide any allegations that, if true, would support a determination that this concealment could not have been discovered with due diligence before the statutes of limitations ran. Apparently, all Clark had to do was ask for information regarding testing for TB, and nothing prevented him from doing so before 2005.

Motions to dismiss for failure to state a claim are properly granted where it clearly and unequivocally appears from the face of the complaint that the statutes of limitations have run, and that no pleaded facts tolled the running of the statutes. *Pederson v. Am. Lutheran Church*, 404 N.W.2d 887, 889 (Minn. App. 1987), *review denied* (Minn. June 30, 1987). Such is the case here, and the court properly dismissed all of Clark's claims as time-barred.

Affirmed.