STATE OF MICHIGAN

COURT OF APPEALS

LILLIE FOSTER, JOYCE FOSTER and Estate of FLOYD FOSTER,

Plaintiffs-Appellants,

v

ST. LAWRENCE HOSPITAL a/k/a/ SISTERS OF MERCY HEALTH SERVICES,

Defendant-Appellee.

UNPUBLISHED
February 21, 1997

No. 186036
Ingham Circuit Court
LC No. 94-076729-NH

Before: McDonald, P.J., and Murphy and M. F. Sapala*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). Plaintiffs' decedent was a patient at defendant hospital for several weeks in 1990. Plaintiffs filed this action claiming defendant's negligence resulted in plaintiffs' decedent's wrongful death; summary disposition was thereafter granted for defendant on the grounds the action was untimely owing to the expiration of the applicable limitations period. We affirm.

The record reveals the following chain of procedural events. Letters of administration were issued to plaintiffs on November 5, 1991. Plaintiffs timely commenced a wrongful death action (not the instant action) against defendant and others on November 4, 1993 (hereinafter "Action I"). During the ninety-one day summons period, MCR 2.102(D), plaintiffs' counsel notified defendant's risk manager by letter dated December 13, 1993, that plaintiffs' counsel had been retained in the instant matter. Defendant's risk management representative, Cynthia Parks, replied by letter dated December 29, 1993 that she would review the matter and would be prepared to discuss it in several weeks. Plaintiffs' counsel thereafter notified Parks by letter dated January 7, 1994, that he needed to hear from her regarding settlement not later than two weeks hence, and advised her that a complaint had indeed been filed "to preserve the statute" (an unsigned copy of the complaint was enclosed with the letter). No summons was served upon defendant at this time. On February 6, 1994, plaintiffs' counsel and Parks had a face-to-face conversation during which Parks informed plaintiffs' counsel no settlement offer

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

would be forthcoming. In an order dated February 7, 1994 and entered February 8, 1994, Action I was dismissed because defendant had not been served with process within the ninety-one day summons period provided by MCR 2.102(D). MCR 2.102(E). Thereafter, plaintiffs filed the instant action (hereinafter "Action II") against defendant on February 8, 1994, in which they made essentially the same allegations as in Action I. No attempt was made to set aside the dismissal of Action I. Defendant's subsequent motion for summary disposition of Action II was granted pursuant to MCR 2.116(C)(7) as time barred as of November 5, 1993. Plaintiffs now challenge the trial court's decision to dismiss Action II.

We review de novo a decision granting summary disposition pursuant to MCR 2.116(C)(7), considering all pleadings, admissions, depositions, affidavits and other documentary evidence to determine whether any factual development could provide a basis for recovery. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). We note plaintiffs were required to commence this action within two years after letters of administration were granted, no later than November 4, 1993. MCL 600.5852; MSA 27A.5852. Thus, plaintiffs' filing of Action II on February 8, 1994, was clearly untimely absent any tolling of the limitations period. Plaintiffs contend the limitations period was tolled upon the issuance of a summons to their counsel or his agent. We disagree. While it is true a limitations period is tolled when "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" (MCL 600.5856; MSA 27A.5856), we also note that any tolling in Action II would have commenced upon the filing of the complaint on February 8, 1994, well after the limitations period had already expired.[1] In any case, plaintiffs' counsel was not an "officer" as contemplated by the tolling statute. *Coleman v Bolton*, 24 Mich App 547; 180 NW2d 319 (1970).

Plaintiffs also contend defendant should be equitably estopped from invoking the limitations period defense, arguing Parks and plaintiffs' counsel had previously agreed plaintiffs' counsel would not serve process on defendant in Action I until Parks had time to evaluate plaintiffs' claims. We disagree. Although we presume the existence of the alleged agreement, *Peters*, *supra*, the agreement involved Action I, and would have no bearing on the timeliness of Action II.[2] To the extent plaintiffs imply the agreement guaranteed them no prejudice with regard to *any* future action arising from defendant's care of plaintiffs' decedent, we reject such an implication. Plaintiffs could not have reasonably expected an unfettered avenue over which they might have litigated against defendant indefinitely.

Finally, in response ti plaintiffs' claim they were prejudiced by defendant's alleged dilatory tactics, plaintiffs failed to address this issue to the trial court, and we note defendant's summary disposition motion was filed within the time frame set forth in the trial court's scheduling order. No prejudice occurred.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Michael F. Sapala

[1] To the extent plaintiffs imply that receipt by their counsel on November 4, 1993 of a summons for Action I may somehow have served to toll the limitations period with respect to Action II, plaintiffs' argument is untenable. Because plaintiffs had not complied with § 5856 with respect to Action I, no tolling of the limitations period occurred. Furthermore, we agree with a previous panel of this Court that the mere pendency of the *summons* period in a prior action is irrelevant to the timeliness of a subsequent action. *Sanderfer v Mount Clemens General Hospital*, 105 Mich App 458; 306 NW2d 322 (1981).

[2] Rather, the existence of such an agreement between Parks and plaintiffs' counsel begs the question why plaintiffs failed to move to set aside the dismissal of Action I on the basis of equitable estoppel. We note that although the trial court inquired at the motion hearing, no reason for the omission is apparent from the record.