

STATE OF MICHIGAN
COURT OF APPEALS

MARTHA E. JORDAN,

Plaintiff-Appellee,

v

UNITED TECHNOLOGIES AUTOMOTIVE,
INC.,

Defendant-Appellant.

UNPUBLISHED

December 18, 2001

No. 226538

Bay Circuit Court

LC No. 99-003817-NO

Before: Bandstra, C.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order denying its motion for summary disposition of plaintiff's complaint on the basis that the applicable limitations period barred plaintiff's claim. We affirm.

Plaintiff's complaint alleged that on July 21, 1996 she suffered an injury during the course of her temporary employment with defendant. Though plaintiff intended to file a circuit court action against defendant, her attorney's law clerk mistakenly filed plaintiff's personal injury complaint in the 74th District Court on July 20, 1999, one day before the three-year limitations period within MCL 600.5805(9) expired. The complaint and a summons were not served on defendant until October 18, 1999, after the district court had transferred the case to the circuit court.

Defendant's motion for summary disposition focused on whether, pursuant to MCL 600.5856, some action had occurred that tolled the limitations period. The circuit court concluded that plaintiff's filing of a complaint and summons in the district court sufficed to toll the limitations period because the district court generally effected service of filed complaints, and plaintiff reasonably relied on the district court's service policy.

We review de novo the circuit court's summary disposition ruling, as well as the legal question whether plaintiff's claim was time barred. *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001). In determining whether a party was entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), this Court accepts as true the plaintiff's well-pleaded allegations, and construes in the light most favorable to the plaintiff the pleadings, affidavits, admissions and other relevant documentary evidence to determine

whether any genuine issue of material fact exists. *Watts v Polaczyk*, 242 Mich App 600, 603; 619 NW2d 714 (2000).

While we do not dispute defendant's contentions that no events occurred that would satisfy the tolling requirements of § 5856, we find inappropriate defendant's reliance on this section. Section 5856 becomes relevant only when the statutory period of limitations has run, barring an action. *Lemmerman v Fealk*, 201 Mich App 544, 554; 507 NW2d 226 (1993), rev'd on other grounds 449 Mich 56; 534 NW2d 695 (1995). Defendant ignores that "a civil action is commenced by filing a complaint with a court." MCR 2.101. See also *Scarsella v Pollak*, 461 Mich 547, 552, n 3; 607 NW2d 711 (2000) ("In general, of course, a statute of limitations requires only that a complaint be filed within the limitation period."). "It is only when the action is not commenced within the statutory period—as determined by consulting the date of the claim, the date of filing the complaint and a calendar—it is only when a prima facie bar of the statute appears, that tolling comes into play." *Buscaino v Rhodes*, 385 Mich 474, 481; 189 NW2d 202 (1971), overruled in part on other grounds, *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

The parties do not dispute that plaintiff commenced the instant action by filing a complaint on July 20, 1999, within the limitations period. Because the case never was dismissed and refiled, but only transferred by the district court to the circuit court pursuant to MCR 4.002, § 5856 has no application in this case. *Buscaino, supra*. Accordingly, we hold that plaintiff did comply with the limitations period by filing her complaint pursuant to MCR 2.101(B) within three years of her alleged injury, "and, the provisions of the statute of limitations thus being met, the fact of subsequent service of the complaint can in no way affect the commencing of the action."¹ *Goniwicha v Harkai*, 393 Mich 255, 256; 224 NW2d 284 (1974), quoting *Buscaino, supra* at 484. We therefore conclude that despite the erroneous reasoning employed by the circuit court, the court correctly denied defendant's motion for summary disposition. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

To the extent that defendant suggests that reversal of the circuit court's order should occur on the basis of the court's consideration of plaintiff's untimely response to defendant's motion for summary disposition, which plaintiff faxed to the court approximately two hours and twenty minutes before the motion hearing, we will not consider this argument. Defendant waived this claim when its counsel acknowledged receipt of plaintiff's untimely response and expressly responded affirmatively to the circuit court's inquiries before proceeding with the hearing, "Now, have you [defense counsel] had an opportunity to review that? Are you prepared to proceed today?" *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (explaining that

¹ We note that defendant does not challenge the propriety of the district court's transfer of the case to the circuit court, which apparently occurred because plaintiff's complaint sought damages in excess of \$ 25,000, and that defendant does not allege that the October 1999 service of the complaint and summons was itself somehow defective or inadequate.

waiver, the intentional relinquishment of a known right, prevents the waiving party from seeking appellate review of the extinguished error).

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage