

STATE OF MICHIGAN
COURT OF APPEALS

PAYTRA WILLIAMS,

Plaintiff-Appellant,

v

CHARLIE LEDUFF, THE DETROIT
NEWSPAPER PARTNERSHIP, L.P., and THE
DETROIT NEWS, INC.,

Defendants-Appellees.

UNPUBLISHED

March 28, 2013

No. 307706

Wayne Circuit Court

LC No. 11-004678-CZ

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Plaintiff Paytra Williams appeals as of right the trial court's order denying her motion to set aside an administrative order of dismissal for non-service of plaintiff's summons and complaint. The complaint, alleging defamation, had been filed against defendants Charlie Leduff, the Detroit Newspaper Partnership, L.P., and the Detroit News, Inc. As part of the trial court's ruling, it found that the defamation action was ultimately time-barred in light of its decision not to set aside the dismissal, which had been entered on the basis that plaintiff failed to serve the summons and complaint on defendants during the life of the summons. We affirm.

On April 19, 2011, plaintiff filed a complaint against defendants, alleging defamation (libel per se) in regard to two newspaper stories published on April 20 and 21, 2010. The articles were penned by defendant Leduff, a journalist for the Detroit News. By letter dated April 18, 2011, plaintiff demanded that defendants issue a retraction, and on April 19, 2011, the date of the complaint, plaintiff held a press conference announcing the lawsuit. The nature of the alleged defamatory statements is irrelevant for purposes of this opinion. On July 26, 2011, about a week after the summons had expired, an order of dismissal without prejudice for non-service of the summons and complaint was entered by the court clerk pursuant to MCR 2.102(E). Under MCR 2.102(D), "[a] summons expires 91 days after the date the complaint is filed[.]" and MCR 2.102(E) provides in relevant part:

(1) 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. . . .

(2) After the time stated in subrule (E)(1), the clerk shall examine the court records and enter an order dismissing the action as to a defendant who has not been served with process or submitted to the court's jurisdiction. . . .

On July 29, 2011, three days after the dismissal order was entered, plaintiff's counsel filed a certificate of service, which indicated that he had served the complaint "upon the above named parties [defendants] and the attorney for the above named parties on April 19, 2011 via facsimile addressed to" the defendants' attorney. On August 2, 2011, under the authority of MCR 2.102(F), plaintiff filed a motion to set aside the administrative order of dismissal for non-service. MCR 2.102(F) provides:

A court may set aside the dismissal of the action as to a defendant under subrule (E) only on stipulation of the parties or when *all* of the following conditions are met:

(1) within the time provided in subrule (D) [91 days], service of process was in fact made on the dismissed defendant, or the defendant submitted to the court's jurisdiction;

(2) proof of service of process was filed or the failure to file is excused for good cause shown;

(3) the motion to set aside the dismissal was filed within 28 days after notice of the order of dismissal was given, or, if notice of dismissal was not given, the motion was promptly filed after the plaintiff learned of the dismissal. [Emphasis added.]

We note that there is no dispute that the parties did not stipulate to setting aside the dismissal and that plaintiff complied with MCR 2.102(F)(3) by timely filing her motion. Defendants filed a response to plaintiff's motion to set aside the dismissal, which was the very first document filed by defendants in the suit.

A hearing on plaintiff's motion to set aside the dismissal was held on November 18, 2011, and the trial court took the matter under advisement. On November 29, 2011, the trial court issued a written opinion and order denying plaintiff's motion. Examining MCR 2.102(F), the trial court found that while plaintiff's motion to set aside the dismissal was timely filed under MCR 2.102(F)(3), there was no stipulation to set aside the dismissal, service of process was never made, defendants did not submit to the court's jurisdiction, and plaintiff was unable to establish good cause for failing to file a proof of service of process. With respect to submission to jurisdiction, the trial court concluded that defendants had not done so, where their actions were in furtherance of a retraction investigation, they did not file any documents or otherwise appear, aside from the limited appearance to contest plaintiff's motion, and where they did not nothing to contest the suit on the merits. The trial court further ruled that plaintiff's action was time-barred, ostensibly in light of its finding that the summons and complaint had not been served within the 91-day period and its decision not to set aside the dismissal. Under MCL 600.5805(9), the statute of limitations for libel and slander is one year. The opinion concluded with language denying plaintiff's motion to set aside the dismissal, which ruling was also contained in a separately captioned order. The ruling, so limited, would have effectively left in

place the administrative order of dismissal for non-service, which was a dismissal without prejudice. However, in light of the trial court's determination that the action was rendered time-barred under the one-year limitations period because the summons and complaint had not been served during the life of the summons, the court, in effect and implicitly, ordered the dismissal of the action with prejudice under MCR 2.116(C)(7). Plaintiff appeals as of right.

In general, we review for an abuse of discretion a trial court's ruling on a motion to set aside an administrative order of dismissal for non-service. See MCR 2.102(F) ("court *may* set aside the dismissal") (emphasis added); *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). A trial court abuses its discretion when it renders a decision that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Of course, to the extent that the issue concerns the interpretation or application of MCR 2.102, our review is de novo. *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 123-124; 693 NW2d 374 (2005), overruled in part on other grounds *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). In the context of a summary dismissal predicated on a statute of limitations, MCR 2.116(C)(7), this Court's review is also de novo on appeal. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). Pursuant to MCR 2.116(C)(7), this Court considers not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence submitted by the parties. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "The contents of the complaint must be accepted as true unless contradicted by the documentary evidence." *Id.* We are required to consider the documentary evidence in a light most favorable to the nonmoving party. *Id.* The principles that govern statutory construction apply equally to the interpretation of court rules. *Green v Ziegelman*, 282 Mich App 292, 301; 767 NW2d 660 (2009). Therefore, our primary task in construing a court rule is to discern and give effect to the intent of our Supreme Court. See *id.* The words used in a court rule provide us with the most reliable evidence of intent. *Id.*

Under MCR 2.102(F), there is no dispute that the parties failed to reach a stipulation to set aside the order of dismissal and that plaintiff timely filed her motion to set aside the dismissal; therefore, plaintiff had to first establish under MCR 2.102(F)(1) that service of process was actually made on defendants or that defendants "submitted to the court's jurisdiction[.]" Because we hold that plaintiff failed to serve process on defendants and that defendants either did not submit to the court's jurisdiction or, assuming submission, the action was nonetheless time-barred, we need not examine, under MCR 2.102(F)(2), whether "proof of service of process was filed" or whether the "failure to file [was] excused for good cause shown." In regard to whether "service of process was in fact made" on defendants under MCR 2.102(F)(1), plaintiff argues that process was served, where the complaint was sent to and received by defendants' attorney via facsimile. The "certificate of service" that plaintiff's counsel filed after the dismissal was entered indicated that counsel had previously served "the [c]omplaint" on defendants and their attorney on April 19, 2011, "via facsimile" addressed to defense counsel. The fatal flaw in this argument is that plaintiff does not even claim that the *summons* was faxed, sent, or otherwise delivered to defendants' attorney, along with the complaint, nor is there any evidence in the record that a summons was ever served on defendants. Process is served by the delivery of a "summons *and* a copy of the complaint." MCR 2.105(A)(1) (service on individuals), (C)(1) (service on partnerships), and (D)(1) (service on corporations) (emphasis

added). “[S]ervice of the summons is a necessary part of service of process.” *Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991).

In *Holliday*, this Court, distinguishing between a failure to serve process and defects in the manner of service, addressed a situation comparable to the case at bar, stating and holding in a short two-page opinion as follows:

Plaintiff filed her complaint on June 3, 1988, and a copy of it was sent by regular mail to defendant on June 27, 1988, with a cover letter informing defendant that if he did not provide requested records within thirty days, plaintiff’s counsel would “formally serve the papers.” Defendant forwarded the complaint to his malpractice insurance carrier, who, in turn, proceeded to investigate the claim. There is no dispute that defendant was never served with or that he never received the summons, which expired on December 2, 1988, and that the period of limitation applicable to plaintiff’s action has since expired, precluding renewal of the summons.

Plaintiff contends that defendant had actual notice of the suit and that dismissal was precluded by MCR 2.105(J)(3). That subrule provides that “an action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.” Plaintiff also relies on decisions by this Court, such as *Hill v Frawley*, 155 Mich App 611; 400 NW2d 328 (1986), and *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669; 413 NW2d 474 (1987), which held that if a defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules.

We find, however, that MCR 2.105(J)(3) is not applicable to the present matter where the question is not one of defects in the manner of service, but rather a complete failure of service of process. Plaintiff’s reliance on *Leidich v Franklin*, 394 Pa Super 302; 575 A2d 914 (1990), is likewise misplaced. In that case, the defendants were served with notice of the lawsuit via a writ of summons, but service was defective in that it did not comply with the applicable court rule or local practice. The *Leidich* court found that the plaintiff had demonstrated a good-faith effort to effectuate service, that the defect in service did not affect any substantial rights of the defendants, and that the defendants were not prejudiced in any way. In the instant case, counsel for plaintiff specifically said in his cover letter that he was not then serving process. This was an accurate statement in every respect because the summons was not enclosed. Yet service of the summons is a necessary part of service of process. It is the summons which informs the defendant of the fact that an action has been commenced against him and of his rights and duties in connection therewith, such as the time limits for responding to the complaint. See MCR 2.102. MCR 2.105(J)(3), as well as every other court rule governing service of process, assumes that the summons will be served with the complaint, even if in a technically defective fashion. So, too, did the cases relied upon by plaintiff. MCR 2.105(J)(3) forgives errors in the manner

or content of service of process. It does not forgive a failure to serve process. For this reason, we must affirm the trial court's dismissal of plaintiff's action. [*Holliday*, 189 Mich App at 425-426.]

The trial court here found *Holliday* to be analogous, as do we. Here, there was also a failure to serve process as no summons was ever delivered. Also, it is quite evident that plaintiff's counsel did not fax the complaint to defendants' attorney for purposes of formal service; rather, the fax was sent in conjunction with the retraction demand, hopes for a settlement, and the public announcement of the lawsuit at a press conference. In an email sent by defendants' attorney to plaintiff's counsel three days after the complaint was filed and faxed to defense counsel, there is a reference to an understanding by the attorneys that the complaint would not be served while defendants engaged in an investigation relative to the retraction demand. In fact, in plaintiff's motion to set aside the dismissal, she stated, "In good faith, the undersigned [plaintiff's counsel] and [defendants' attorney] agreed that the Summons and Complaint would not be served on the Defendants to allow both parties to negotiate a settlement." The filing of the "certificate of service" following entry of the dismissal was clearly an effort by plaintiff's attorney to reinvent history in relationship to the faxed complaint.

Given that service of process was not in fact made, plaintiff was required to show that defendants "submitted to the court's jurisdiction." MCR 2.102(F)(1). A defendant who enters a general appearance and contests the plaintiff's cause of action on the merits submits to the court's jurisdiction. *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 180; 511 NW2d 896 (1993), overruled in part on other grounds *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 293; 731 NW2d 29 (2007); *In re Slis*, 144 Mich App 678, 683; 375 NW2d 788 (1985); *Cross v Dep't of Corrections*, 103 Mich App 409, 413; 303 NW2d 218 (1981); *Wright v Estate of Treichel*, 36 Mich App 33, 38; 193 NW2d 394 (1971).¹ Ordinarily, any action by a defendant that recognizes pending proceedings, with the exception of an objection to the court's jurisdiction, will constitute a general appearance. *Penny*, 203 Mich App at 181-182. An act is adequate to support an inference that it constitutes an appearance when there is (1) knowledge of the pending proceedings and (2) an intent to appear. *Id.* at 182; *Ragnone v Wirsing*, 141 Mich App 263, 265; 367 NW2d 369 (1985).

Here, with respect to the "appearance" issue, defendants and defense counsel certainly had knowledge of the pending proceedings, but we do not find that there was an act reflecting an intent to appear, excepting from consideration defendants' response to plaintiff's motion to set aside the dismissal. Defendants' act of filing a response to plaintiff's motion to set aside the dismissal was akin or analogous to appearing for the purpose of objecting to the court's exercise of jurisdiction, and defendants prefaced their response brief with the notation that they were not waiving jurisdictional objections or conceding jurisdiction; their expressed limited purpose for filing a response was to counter plaintiff's explanation for the service failure. Limited to that context, it would not be proper to find that filing the response constituted an act of submission to

¹ *Slis*, *Cross*, and *Wright* were all implicitly overruled in part on other grounds in *Al-Shimmari*, 477 Mich at 292-293.

the court's jurisdiction. Without the response, the court would have needed to render a decision on the basis of a one-sided presentation spun in plaintiff's favor.

On the issue of whether the act of filing a response brief showed an intent by defendants to go beyond addressing plaintiff's explanations, the failure to serve process, and its bearing on jurisdiction, which matters not only affect the "appearance" question but whether defendants were "contest[ing] [the] cause of action on the merits," *Penny*, 203 Mich App at 181, it is true that defendants did raise the statute of limitations argument. See *Al-Shimmari*, 477 Mich at 296-297 (summary dismissal on statute of limitations grounds operates as an adjudication on the merits). However, the failure to serve process had a direct, necessary, and undeniable bearing on whether the defamation action would effectively be time-barred upon any ruling that rejected plaintiff's attempt to set aside the dismissal. Indeed, the trial court also recognized the statute of limitations implications and ordered supplemental briefing on the matter. Regardless, for the reasons explained below, even if the act of raising the statute of limitations argument in the response to plaintiff's motion to set aside the dismissal constituted a general appearance and reflected an effort to contest plaintiff's action on the merits, thereby establishing that defendants submitted to the court's jurisdiction, plaintiff cannot proceed because the defamation action is time-barred.

In regard to an issue concerning the adjournment of a status conference and whether defendants or defense counsel participated in any stipulation or agreement to adjourn the conference or signed off on an adjournment, there is simply no documentary evidence supporting plaintiff's position on the matter, not even a simple affidavit, and defendants adamantly deny any participation in having the status conference adjourned. Regardless, assuming that defense counsel participated in adjournment matters and that the participation established that defendants had submitted to the court's jurisdiction, we again find that the action was still ultimately time-barred for the reasons set forth below.

Next, in regard to defendants' mailing of a letter to the federal judge presiding over *Flagg v Detroit*² relative to an attempt to unseal plaintiff's deposition taken in that action, we fail to see how it constituted an act of submission to the trial court's jurisdiction. It was simply not a general appearance in the case at bar for the purpose of contesting plaintiff's cause of action on the merits. And the letter expressly pertained to the retraction investigation. With respect to the general discourse regarding whether communications and actions concerned the retraction investigation or the litigation, even if defendants were acting in preparation of engaging in litigation, the communications and actions are irrelevant to our inquiry unless they constituted a general appearance and an effort to contest plaintiff's action on the merits.³ Further, to the extent that plaintiff is arguing that her interview with the Detroit News was effectively a deposition taken by defendants that constituted a submission to jurisdiction, the argument is nonsensical and

² See *Flagg v Detroit*, 827 F Supp 2d 765 (ED Mich, 2011), for background information.

³ We note that plaintiff's general reliance on *Ragnone*, 141 Mich App 263, is misplaced, as it is distinguishable, given that *Ragnone* addressed the default judgment rule and the simple question of whether a party appeared for purposes of entitlement to notice under that rule, not whether a party submitted to a court's jurisdiction.

a gross mischaracterization. There is no evidence suggesting that the interview was in reality a deposition, and the information obtained in the interview was printed in a newspaper article that gave plaintiff's side of the story. The interview was certainly not an appearance for purposes of contesting plaintiff's suit on the merits. Also, the mere fact that defense counsel generally represented defendants was meaningless in and of itself in relationship to the issue on appeal.

Finally, with respect to the statute of limitations, as indicated earlier, the limitations period for a defamation action is one year, MCL 600.5805(9), and "[a] defamation claim accrues when 'the wrong upon which the claim is based was done regardless of the time when damage results.'" *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005), quoting MCL 600.5827. Plaintiff's own allegations in the complaint provided that the defamatory statements were contained in articles published on April 20 and 21, 2010; the complaint was filed on April 19, 2011. MCL 600.5856 provides in relevant part:

The statutes of limitations or repose are tolled in any of the following circumstances:

(a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

(b) At the time jurisdiction over the defendant is otherwise acquired.

"[T]he unambiguous language of MCL 600.5805 and MCL 600.5856 provides that the mere filing of a complaint is insufficient to toll the statute of limitations[,] [and] [i]n order to toll the limitations period, one must also comply with the requirements of § 5856." *Gladych v New Family Homes, Inc*, 468 Mich 594, 595; 664 NW2d 705 (2003). This means that a complaint *and* the summons have to be timely served.

Had plaintiff here served the summons and complaint within the 91-day period, MCR 2.102(D), tolling would have occurred under MCL 600.5856(a), and the defamation action would have been timely, as the complaint was filed within the one-year limitations period. However, because the summons and complaint were not served within the 91-day period, the statute of limitations bars any defamation action predicated on the April 20 and 21, 2010, newspaper stories. While a non-service dismissal under MCR 2.102(E)(1) is "without prejudice," application of the statute of limitations effectively bars the defamation suit.

Furthermore, if defendants never submitted to the jurisdiction of the court, MCL 600.5856(b), which tolls a statute of limitations "[a]t the time jurisdiction over the defendant is otherwise acquired[.]" is not implicated, and again plaintiff's defamation action is rendered time-barred. With respect to MCL 600.5856(b), our Supreme Court stated in *Mair v Consumers Power Co*, 419 Mich 74, 82; 348 NW2d 256 (1984), that the provision "logically refers to the ways of acquiring jurisdiction other than by service of process, such as consent of the defendant." MCL 600.5856(b) plainly and unambiguously provides that tolling commences when jurisdiction over the defendant is acquired. Assuming that defense counsel actually participated in having the status conference adjourned and that this action constituted a submission to the trial court's jurisdiction, the participation would have occurred in July 2011. It would only have been at that point that jurisdiction over defendants was acquired, and that time

period was well beyond the one-year statute of limitations. Next, assuming that defendants' filing of a response to plaintiff's motion to set aside the dismissal constituted a submission to the trial court's jurisdiction, the response was filed on August 15, 2011. Said date was also well beyond the one-year statute of limitations. In fact, with respect to any act or communication by defendants occurring after the one-year period elapsed that could conceivably be deemed a submission to the court's jurisdiction, the result is the same; the defamation action is nevertheless time-barred. And we find that nothing undertaken by defendants that transpired earlier constituted a submission to the trial court's jurisdiction.

In summation, under the criteria set forth in MCR 2.102(F), there was no stipulation to set aside the order of dismissal, plaintiff failed to serve process, defendants did not submit to the trial court's jurisdiction, and if they did, the jurisdiction was acquired beyond the one-year statute of limitations, thereby time barring the defamation action, the action is otherwise time-barred, and there is no need to examine the issue of good cause.

Affirmed. Having prevailed in full, defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Jane M. Beckering