STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE L. McQUEEN, Individually and as Next Friend of ASHLEY D. McQUEEN, a Minor,

Plaintiff-Appellee/Cross-Appellee,

v

JOHN W. ARMSTEAD, M.D., P.C., JOHN W. ARMSTEAD, M.D., ANNAPOLIS HOSPITAL, OAKWOOD UNITED HOSPITALS, and OAKWOOD HEALTH SERVICES, INC.,

Defendants-Appellants,

and

A.B. JAIN, M.D., P.C., A.B. JAIN, M.D., and L. LAWSON, M.D.,

Defendants-Appellees/ Cross-Appellants.

UNPUBLISHED
May 10, 1996

No. 173746
LC No. 93-313770-NM

Before: MacKenzie, P.J., and Cavanagh and T.L. Ludington*, JJ.

PER CURIAM.

Defendants appeal by leave granted from an order denying their motion to quash the original summons issued to plaintiff in this medical malpractice action. We reverse.

On May 13, 1993, plaintiff, acting in pro per, filed a complaint against defendants seeking damages as a result of defendants' alleged medical malpractice. The complaint was filed six days before the expiration of the statute of limitations as to defendants Armstead and Jain, and one day before the expiration of the statute of limitations as to the remaining defendants. The court clerk issued

---

* Circuit judge, sitting on the Court of Appeals by assignment.

a summons that expired on August 12, 1993, ninety-one days after the complaint was filed. Plaintiff failed to serve defendants by that date.

On August 12, 1993, the trial court entered an ex parte order extending the summons for thirty days, until September 11, 1993. Plaintiff failed to serve defendants by that date.

On September 10, 1993, the court entered another ex parte order extending the summons for an additional sixty days, until November 11, 1993. Plaintiff failed to serve defendants by that date.

On November 10, 1993, the court issued yet another ex parte order extending the summons for an additional thirty days, until December 10, 1993. On December 6 and 7, 1993, defendants were served with a copy of plaintiff's complaint and a copy of the original summons bearing the August 12, 1993 expiration date. Nevertheless, on December 10, the court extended the summons for a fourth time, for an additional sixty days.

MCR 2.102, governing summonses, provides in pertinent part:

> **(D) Expiration.** A summons expires 91 days after the date the complaint is filed. However, within that 91 days, on a showing of good cause, the judge to whom the action is assigned may order a second summons to issue for a definite period not exceeding 1 year from the date the complaint is filed. If such an extension is granted, the new summons expires at the end of the extended period.
>
> **(E) Dismissal as to Defendant Not Served.**
>
> (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.

After defendants were finally served, they moved to quash service and to dismiss the action against them pursuant to MCR 2.102(E)(1). In support of their argument, defendants relied on MCR 2.102(D), which allows a court to issue a second summons for a definite period of time. Defendants maintained that the subrule did not empower the court to issue a continuous series of ex parte orders extending the life of the summons.

The trial court subsequently entered an opinion acknowledging that under MCR 2.102(D), the orders granting the extensions of the summons were invalid. However, the court concluded that issuing extensions was the court's mistake, and that plaintiff relied upon the court's error in seeking the series of extensions. The court indicated that if it had informed plaintiff that she could request a second summons good through May 13, 1994, "there is no doubt that plaintiff would have requested" a second summons, or that the court would have granted the request. Proceeding as if it had in fact granted plaintiff a second summons, the court then denied defendants' motion to quash.

On appeal, defendants argue that, although the court admitted it made a mistake by extending the original summons contrary to the procedure set forth at MCR 2.102(D), it abused its discretion in refusing to adhere to the court rules and dismiss the action under MCR 2.102(E)(1). We agree.

There is nothing in the record to support the court's statement that "had this court told plaintiff that no extension was possible . . . there is no doubt that plaintiff would have requested a second summons." Even if there were a basis for such an assumption, there is nothing in the record to show that the second summons would have automatically been issued by the court, or that plaintiff could have convinced the court that good cause did exist to issue a second summons. The record is barren of any showing why plaintiff needed four extensions over a four-month period in order to serve defendants, all of whom resided in the same county as plaintiff. Further, each time plaintiff was granted an extension, an attorney submitted on plaintiff's behalf an affidavit in support of extending the expiration date of the summons. Thus, the court's remark that the case should not be dismissed because plaintiff relied on the court's error is not entirely accurate; three practicing attorneys were assisting plaintiff and they should have known that MCR 2.102(D) did not authorize extensions and that plaintiff should instead seek a second summons. By failing to call the court's attention to the error, and by filing affidavits in support of three extensions that were not allowed under the court rules, the attorneys – not the court – were responsible for the erroneous extensions that were granted.

The actions against defendants should have been dismissed since they were not served with a copy of the summons and complaint within the expiration date of the original summons on August 12, 1993, or within the date of the one new summons contemplated by the court rule. MCR 2.102(D); MCR 2.102(E)(1). See also *Durfy v Kellogg*, 193 Mich App 141; 483 NW2d 664 (1992). Contrary to plaintiff's claim on appeal, defendants did not submit to the court's jurisdiction by filing their motion to quash service and to dismiss, making dismissal improper under MCR 2.102(E)(1). The motion did not constitute a general appearance or a contest on the merits. See *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181-182; 511 NW2d 896 (1993). Furthermore, plaintiff's reliance on MCL 600.2301; MSA 27A.2301 as authority for the court's issuance of a series of orders extending the summons is misplaced. Where there is a conflict between a statute and a court rule, as here, the court rule prevails if it governs practice or procedure. *In re Hillier Estate*, 189 Mich App 716, 719-720; 473 NW2d 811 (1991).

Reversed.

/s/ Barbara B. MacKenzie
/s/ Mark J. Cavanagh
/s/ Thomas L. Ludington