

56 + STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL MCCAUL,

Plaintiff-Appellant,

v

MODERN TILE & CARPET, INC

Defendant-Appellee.

UNPUBLISHED

July 20, 2004

No. 245758

Kalamazoo Circuit Court

LC No. 02-000306-NO

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition on the basis that plaintiff's claim was barred by the statute of limitations. MCR 2.116(C)(7). We affirm.

I. Material Facts And Proceedings

In this Court's decision of the prior appeal in this case, published as *McCaul v Modern Tile & Carpet, Inc*, 248 Mich App 610; 640 NW2d 589 (2001), we set forth the following facts which are material to the instant appeal:

Plaintiff began his employment with defendant Modern Tile and Carpet, Inc., in 1976 performing carpet installation. *Approximately seven or eight years before the trial in this matter, plaintiff created a sole proprietorship and acquired a workers' compensation insurance policy at defendant's insistence.* From then on, rather than paying defendant directly, defendant compensated plaintiff for his services by issuing checks jointly to plaintiff and the sole proprietorship. For the most part, plaintiff's day-to-day duties with defendant did not change after the sole proprietorship was formed. However, plaintiff was *required* to sign a contract identifying him as an independent contractor for each job he performed for defendant.

* * *

In 1996, after plaintiff developed right-sided lateral epicondylitis in his right elbow, he was restricted from performing carpet installations. The parties do not dispute that plaintiff suffered a work-related disability. Plaintiff filed a

petition seeking workers' compensation benefits in November 1996. *During trial before the magistrate, defendant argued that because plaintiff was an independent contractor, it was not responsible for payment of workers' compensation benefits.* In contrast, plaintiff asserted that because defendant controlled and supervised his activities, he was defendant's employee, and defendant was required to pay plaintiff's workers' compensation benefits.

In an opinion and order mailed January 21, 1998, the magistrate denied plaintiff's claim against defendant, concluding that plaintiff had "failed to establish an employee/employer relationship" with defendant.

On appeal to the WCAC, plaintiff argued (1) that the magistrate erred in concluding that plaintiff was not an employee as defined in the WDCA, and (2) *that plaintiff create a sole proprietorship so that defendant could avoid having to carry workers' compensation insurance.* In a two-to-one decision, the WCAC affirmed the magistrate's determination that plaintiff was not an employee as defined by § 161 because the record evidence supported the magistrate's finding that plaintiff owned a sole proprietorship. Moreover, the WCAC concluded that where plaintiff alleged that defendant violated MCL 418.171(4), the WDCA required that he seek redress in a civil action. [*Id.* at 612-614 (footnotes omitted) (emphasis added).]

We ultimately affirmed the WCAC, and concluded that MCL 418.171(4) and MCL 418.641(2) specifically authorized an employee to sue his employer through a civil cause of action. *Id.* at 623.

In May 2002, plaintiff filed suit in circuit court alleging that defendant's negligence proximately caused his injuries. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's claim was barred by the three-year statute of limitations applicable to a negligence action. MCL 600.5805(10). The trial court granted the motion, determining that the language of MCL 418.171(4) indicated that a claim that an employer willfully violated the workers' compensation law accrued at the time the alleged violation occurred.

II. Analysis

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 166; 610 NW2d 613 (2000).

There is no dispute that plaintiff brought this civil action more than three years after his alleged injury, and therefore his claim was filed beyond the statute of limitations. MCL 600.5805(10). Moreover, plaintiff does not dispute that under Michigan law "an administrative

proceeding does not toll the statute of limitations under this section [MCL 600.5805].” *Dunlap v Clinton Valley Center*, 169 Mich App 354, 359; 425 NW2d 553 (1988). Instead, plaintiff argues that under equitable principles,¹ *Dunlap* should not apply “because the theory of law outlined by the Court of Appeals in deciding the original appeal in this matter did not exist until announced by this Honorable Court in its first decision.” We disagree.

As we noted in *McGillis v Aida Engineering, Inc*, 161 Mich App 370, 375; 410 NW2d 817 (1987), MCL 418.641(2) was enacted in 1985 to enhance the “already existing” remedy against an employer who does not comply with MCL 418.611. Additionally, in *McCaul, supra* at 620-621, we noted that the statutory language within MCL 418.171(4) and MCL 418.641(2) is both “plain” and “express.” Since 1985 the plain and unequivocal language of these statutes have stated that a person such as plaintiff can sue the employer in a civil action when that employer coerces a person to be an independent contractor when that person would otherwise be considered an employee. This remedy was unequivocally available to plaintiff since 1985, and thus throughout these proceedings.

That this Court issued the first case addressing these statutes in *McCaul, supra*, does not alter our conclusion. A case of “first impression” simply means that the prior panel was presented “with issues of law that have not previously been decided in that jurisdiction.” Black’s Law Dictionary (7th Ed, 1999). But it was the Legislature’s enactment of the clear and unambiguous statutes that gave plaintiff the right to sue, not this Court’s indication that the statutes say what they plainly say.

As noted above, it is undisputed that as early as 1998 plaintiff argued to the WCAC that defendant had violated MCL 418.171(4). Thus, plaintiff was clearly aware that his rights under that statute were potentially violated, and could have pursued a civil action under the plain language of MCL 418.641(2) well before the expiration of the three year statute of limitations. The pendency of the workers’ compensation proceeding did not toll the statute. *Dunlap, supra*.

Our dissenting colleague disagrees with us for two reasons. One, she opines that California’s approach to the administrative tolling issue is better than Michigan’s, and two, that plaintiff’s cause of action accrued when the WCAC ultimately concluded he was not entitled to any workers’ compensation benefits. Naturally, we disagree with both propositions.

Regarding the dissent’s analysis of California law, we opt against relying upon case law generated outside of our state’s border, particularly when our Court has already decided the precise tolling issue presented here. *People v Kaslowski*, 239 Mich App 320, 327; 608 NW2d 539 (2000) (noting that we resort to consideration of our Sister States’ case law only in the absence of any Michigan authority). *Dunlap* controls on the tolling issue.

¹ Plaintiff specifically invokes the doctrine of *contra non valentem agere nulla currit praescriptio* (a prescription does not run against the party who could not bring a suit). *Kalakay v Farmers Ins Group (After Remand)*, 120 Mich App 623, 626; 327 NW2d 537 (1982).

We also disagree with the proposition that plaintiff's cause of action accrued on October 14, 1999, when the WCAC issued its decision denying plaintiff benefits. First, the harm the statute was enacted to prevent was an employer coercing an employee to become an independent contractor so that the employer could eliminate workers' compensation coverage, which occurred seven to eight years before the workers' compensation proceedings began in this case.

Second, the record vividly exhibits that plaintiff was convinced that defendant had already violated his rights under the statute by forcing him to become an independent contractor in order to avoid its responsibilities under the act. This is revealed by the following quote from plaintiff's brief filed with the WCAC, as quoted in the WCAC opinion in this case:

The real analysis here turns on what happened to plaintiff's relationship to defendant, Modern Tile & Tile Carpet, seven or eight years ago. After many years as a regular employee of defendant, he was asked to change the arrangement by the defendant. His job for defendant did not change at all. The performance of installation duties by plaintiff in this case furthered defendant Modern's goal of selling consumers floor covering at a profit. It is important to note that plaintiff's employment status was changed at the request of defendant and not the other way around.

It is important to note that the employee in this case did not request an opportunity to become a contractor. *The only evidence is that the employer demanded that the employee purchase workers' compensation coverage and alter the relationship. This was obviously a willful attempt on the part of the employer to evade workers' compensation liability by unilaterally forcing the employee to become a contractor for the purposes of evading the act. [McCaul v Modern Tile & Carpet, Inc, 1999 Mich ACO 629 (emphasis added).]*

Finally, we note that plaintiff filed his original workers' compensation claim against *both* defendant and plaintiff's sole proprietorship, apparently recognizing that there was an outstanding issue regarding defendant's actions. Moreover, the dissent acknowledges that plaintiff had a basis to bring the civil action against defendant prior to the WCAC decision.

Affirmed.

/s/ Brian K. Zahra

/s/ Christopher M. Murray