

STATE OF MICHIGAN
COURT OF APPEALS

DARREN FINDLING, Successor Personal
Representative of the ESTATE OF FRANK E.
EARLY, Deceased,

Plaintiff-Appellant,

v

JEFFREY PARKER, M.D.,

Defendant-Appellee.

UNPUBLISHED
February 26, 2013

No. 307442
Oakland Circuit Court
LC No. 2008-096920-NH

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition and concluding that defendant was not estopped from raising timeliness as an affirmative defense. We affirm.

I. FACTUAL PROCEEDINGS

In an earlier appeal, this Court accurately summarized the pertinent facts of this case:

Plaintiff's decedent, Frank Early, died of heart disease during a scuba dive on August 31, 2002. Defendant, a physician, examined Early in 2000, before he began scuba diving, and found that he was physically fit enough to scuba dive. Plaintiff alleged that as late as August 20, 2002, defendant was aware of Early's physical condition and should have advised him not to scuba dive, but failed to. Based on these allegations, plaintiff filed three medical malpractice suits against defendant, of which this is the third.

The first lawsuit

Shortly after Early's death, his sister, Charlene Early Powell, was appointed personal representative of his estate. On July 27, 2004, Powell filed a notice of intent (NOI) to bring a claim of medical malpractice against defendant, pursuant to MCL 600.2912b. Powell never filed suit. On February 21, 2005, plaintiff was appointed successor representative of Early's estate. On February 28, 2005, plaintiff filed the first lawsuit against defendant on behalf of Early's

estate, bringing one count of medical malpractice and one count of assault and battery. Plaintiff failed, however, to attach an affidavit of merit to the complaint, as required by MCL 600.2912d. Defendant moved for dismissal based on the lack of an affidavit of merit, and also argued that the statute of limitations had run. The trial court agreed with defendant on both arguments, and dismissed the complaint with prejudice.

Plaintiff appealed, and this Court affirmed the dismissal, but reversed the finding that the statute of limitations had run, and ordered that the dismissal be without prejudice. *Findling v Parker*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2006 (Docket No. 267519), [slip op, p] 1. Plaintiff sought leave to appeal to our Supreme Court, which held the application in abeyance pending the resolution of *Braverman v Garden City Hospital*, 480 Mich 1159; 746 NW2d 612 (2008). *Findling v Parker*, order of the Supreme Court, entered May 27, 2008 (Docket No. 132417). After the Supreme Court decided *Braverman*, it denied defendant's application for leave to appeal. *Id.* On June 10, 2008, the trial court amended the original order so that the first action was dismissed without prejudice.

The second lawsuit

On February 2, 2007 (while the application for leave to appeal was before the Supreme Court), almost four and a half years after Early's death, and just less than [two] years after plaintiff's appointment as personal representative, plaintiff filed a second complaint. The second complaint was substantially identical to the first complaint. On June 10, 2008, the same day the circuit court amended the order dismissing the first action, the parties entered into a stipulation to dismiss the second complaint, without prejudice and without costs.

The third lawsuit

On December 22, 2008, more than [six] years after Early's death, and almost four years after plaintiff's appointment as Early's personal representative, plaintiff filed the instant action. The third complaint raised substantially the same allegations as the first two, but brought only one count of medical malpractice, and no claim of assault and battery. Defendant moved to dismiss on the grounds that the complaint was time-barred. The trial court denied the motion, and held that "the lawsuit was/is timely in light of the periods of time appeals were pending in the related lawsuits." Defendant sought and was granted leave to appeal to this Court. [*Findling v Parker*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2010 (Docket No. 291567), slip op, pp 1-2.]

On appeal, this Court concluded that judicial tolling of the statute of limitations was not permissible. However, this Court reversed and remanded for the trial court to determine if defendant was estopped from asserting the statute of limitations as an affirmative defense. *Findling*, unpub op at 4.

On remand before the trial court, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's claim was barred by the statute of limitations because he had not waived the statute of limitations as an affirmative defense and equity could not aid plaintiff. Following the parties' oral arguments, the trial court granted defendant's motion for summary disposition:

The Court has considered - - the Court has considered the arguments of counsel. The Court will say at the onset that the Court's reading of the Court of Appeals' opinion reversing this Court left for this Court to mine the landscape, if you will, to search to locate to see whether there was anything that could amount to a relinquishment of the defense of the statute of limitations via the defense attorney, the defendant, or the trial court and anything in that regard, and so by virtue of that mining of the landscape for information favorable to the Plaintiff, that translates to a burden on the Plaintiff for this matter here today.

Plaintiffs' argument about the rhetorical query about why Plaintiff - - strike that - - Defendant would do certain things, maintain an appeal, if he is the opinion or the belief that - - or if indeed in fact the statute of limitations has trumped or mooted the need for an appeal. Similarly, the absence of a meeting of the mind, those queries and even if there is an absence of the meeting of the mind, does not translate into an affirmative diamond, so to speak, or a location of something in the mining of the landscape that would be the necessary component to satisfy the Plaintiff pursuant to the Court of Appeals.

The Court finds that Plaintiff[s] offer of proof of the sum total that makes up the quote lifeline of this lawsuit, the sum total that Plaintiff contends amounts to a - - a relinquishment of the statute of limitations defense, does not any more preponderantly reflect such relinquishment as opposed to an omission on that topic, or an intentional biting of the tongue by defense counsel on the topic.

And for the lack of the location of anything that the Court of Appeals has directed this Court to look for that that would inure to the defense benefit or in other words, leave Plaintiff[s] case wanting, and for that reason, the Court grants the Defendant's motion.

Plaintiff filed a motion for reconsideration, which the trial court denied. Plaintiff now appeals as of right the trial court's order granting defendant's motion for summary disposition.

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) because the evidence established that defendant was not permitted to assert timeliness as an affirmative defense. To begin, although plaintiff acknowledges that we are bound by the law of the case doctrine, he nonetheless urges this Court to express disagreement with *Findling*, unpub op at 3-4. However, we cannot do so under the law of the case, and if we could, we would agree with the *Findling* Court that under *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), judicial tolling is limited

and cannot be used in plaintiff's case. Thus, we decline plaintiff's request for us to express disagreement with *Findling*.

This Court reviews the granting of a motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations) de novo "to determine whether the moving party was entitled to judgment as a matter of law." *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 244-245; 673 NW2d 805 (2003) (quotation marks, citation and footnote omitted). "In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiffs' well-pleaded allegations and construes them in the plaintiffs' favor." *Id.* at 245. "This Court considers the pleadings, affidavits, depositions, admissions, and documentary evidence filed or submitted by the parties to determine whether the claim is barred by law." *Id.* This means that summary disposition pursuant to MCR 2.116(C)(7) is properly granted when, after considering the evidence in the light most favorable to the nonmoving party, there is no factual dispute and the claim is barred by a statute of limitations. *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008) (citation omitted). Additionally, whether a claim is barred by the statute of limitations is a question of law that is reviewed de novo. *Blazer Foods*, 259 Mich App at 245 n 2.

In *Findling*, unpub op at 4, this Court, citing *Lothian v Detroit*, 414 Mich 160, 167; 324 NW2d 9 (1982), remanded this case for the trial court to determine if defendant was estopped from asserting timeliness as an affirmative defense based on his conduct. In *Lothian*, the plaintiff retired from the defendant-city in August 1962 and then accepted another position with the defendant in September 1962. The plaintiff waived his right to his pension benefits for the duration that he was employed by the defendant after his initial retirement. The plaintiff worked until August 1967. In the meantime, in June 1973, this Court issued an opinion in an unrelated case holding that the defendant could not lawfully change the distribution of pension benefits without amending the city charter. As a result of that case, in November 1973, the plaintiff initiated his claim, seeking pension benefits for 1962 until 1967. *Id.* at 163-165. After trial, the trial court awarded the plaintiff the pension benefits, and the defendant appealed to this Court. This Court affirmed the trial court's award and the defendant appealed to the Michigan Supreme Court. *Id.* at 165. The *Lothian* Court noted that the timeliness "defense may be waived by failure to plead it, by express agreement not to assert it, or by conduct which estops the defendant from interposing it." *Id.* at 167. The *Lothian* Court utilized the following analysis in discussing the estoppel theory:

The doctrine of equitable estoppel, a judicially fashioned exception to the general rule which provides that statutes of limitation run without interruption, see *Klass[v Detroit]*, 129 Mich [35, 39; 88 NW 204 (1904)], "is essentially a doctrine of waiver" which "serves to extend the applicable statute of limitations-by precluding the defendant from raising the bar of the statute", *Huhtala v Travelers Ins Co*, 401 Mich 118, 132-133; 257 NW2d 640 (1977). Equitable estoppel may be introduced to counter a statute of limitations defense so as "to accomplish the prevention of results contrary to good conscience and fair dealing", *McLearn v Hill*, 276 Mass 519, 524; 177 NE 617 (1931). Generally, to justify the application of estoppel, one must establish that there has been a false representation or concealment of material fact, coupled with an expectation that the other party will rely upon this conduct, and knowledge of the actual facts on the part of the

representing or concealing party. See 28 Am Jur 2d, Estoppel and Waiver, § 35, p 640.

An overview of Michigan cases addressed to the estoppel theory in the context of the statute of limitations defense discloses that this Court has been reluctant to recognize an estoppel in the absence of conduct clearly designed to induce “the plaintiff to refrain from bringing action within the period fixed by statute.” *Renackowsky[v Bd of Water Comm’rs of Detroit]*, 122 Mich [613, 616; 81 NW 581 (1900)]. See *Green v Detroit*, 87 Mich App 313, 319; 274 NW2d 51 (1978). For example, in *Klass, supra*, 129 Mich at 39-40, this Court observed that the estoppel exception developed by the courts “seems to be limited to cases involving an intentional or negligent deception”. Thus, “the defendant will not be precluded from availing himself of such defense [limitations] unless it can be fairly said that he is responsible for deceiving the plaintiff, and inducing him to postpone action upon some reasonably well grounded belief that his claim will be adjusted if he does not sue.” Similarly, in *Hughes v Detroit*, 336 Mich 457, 462; 58 NW2d 144 (1953), a case which referred to certain of the language from *Klass* noted above, this Court emphasized the existence of “inducements * * * held out to plaintiff to delay starting suit” as a requisite for application of the estoppel theory. [*Lothian*, 414 Mich at 176-178.]

Similar to the conclusion in *Lothian*, we hold that plaintiff has failed to establish facts that would estop defendant from asserting timeliness as an affirmative defense.¹ While plaintiff alleged that he was induced into dismissing his second lawsuit based on defendant’s representation that he would not assert a statute of limitations defense, the only evidence plaintiff presents as proof of this alleged promise is the affidavit of his attorney, Devlin K. Scarber, and a June 12, 2008, letter written by defendant’s attorney. The Scarber affidavit states that plaintiff and defendant agreed that plaintiff could dismiss the second claim and refile a third claim because the “filing deadlines would be tolled.” The June 12, 2008, letter states that defendant understood that plaintiff was refiling his lawsuit, reminded plaintiff of defendant’s proper name and suggested that plaintiff begin working on discovery responses to complete them in a timely matter.

Neither of these documents establish that defendant promised to abstain from asserting the statute of limitations as an affirmative defense if plaintiff dismissed his claim and refiled the same suit a third time. The affidavit shows the parties’ belief that the appellate process would judicially toll the statute of limitations – however, the parties’ understanding of the law does not constitute a waiver of the timeliness defense. And, it clearly does not constitute evidence that defendant acted to induce plaintiff to not file the third lawsuit in a timely manner. Additionally, the failure of the June 12, 2008, letter to mention the statute of limitations defense does not amount to waiver of this defense. As noted by the trial court, at most this evidence shows that

¹ The first two ways to waive this affirmative defense, failure to plead and express agreement not to raise the defense, are not applicable here.

defendant chose not to discuss the possibility that plaintiff's claim would be barred as untimely. But there is no evidence that defendant was taking action to induce plaintiff not to file the third lawsuit so that it would be delayed and ultimately untimely. See *Lothian*, 414 Mich at 176-178 (there must be evidence of conduct clearly designed to induce the plaintiff not to file the complaint within the statute of limitations period for a plaintiff to succeed on an estoppel theory).

Additionally, we disagree with plaintiff's assertion that defendant's omission in failing to assert the statute of limitations as an affirmative defense during the discussions regarding dismissal of the second claim estops defendant from asserting timeliness. All affirmative defenses, including the statute of limitations, must be raised in a party's first responsive pleading. MCR 2.111(F)(2) and (3). A party's failure to assert the statute of limitations within the first responsive pleading constitutes a waiver of that defense unless the party amends the first responsive pleading. *Walters v Nadell*, 481 Mich 377, 389; 751 NW2d 431 (2008). Defendant, in his first responsive pleading to both the second and third lawsuits, raised the statute of limitations as an affirmative defense. Consequently, defendant is not estopped from asserting timeliness as a defense because he was not required to inform plaintiff that he would be re-asserting this affirmative defense when plaintiff chose to dismiss the second claim and file a third claim. See *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 446; 761 NW2d 846 (2008) ("Silence or inaction alone is insufficient to invoke estoppel absent a legal or equitable duty to disclose.").²

Finally, plaintiff urges that we remand for an evidentiary hearing because this Court required one in *Findling*, unpub op at 4, and one was not held on remand. We review de novo as a question of law whether the trial court correctly followed this Court's remand order. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007). Upon reviewing the *Findling* Court's remand order, it is clear that we did not require the trial court to hold an evidentiary hearing. Rather, this Court's order remanded for *further proceedings* to determine whether defendant was estopped from raising timeliness as a defense. *Findling*, unpub op at 4. Moreover, in light of the fact that defendant never suggested that he wished to present witnesses and the affidavit and letter did not conflict in a material manner, an evidentiary hearing was not necessary. Because the trial court actually held further proceedings, reviewed the evidence presented by both parties, and determined that defendant was able to raise timeliness as a defense, the trial court accurately followed our remand order.

Affirmed.

² For the first time on appeal, plaintiff contends that the trial court should have been disqualified from the remand proceedings because the trial court had personal knowledge of the disputed facts surrounding whether defendant was estopped from asserting timeliness as a defense. Because plaintiff failed to raise this issue before the trial court as required by MCR 2.003(D), the argument is waived and we decline to discuss it. *Davis v Chatman*, 292 Mich App 603, 615; 808 NW2d 555 (2011), citing *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 22-23; 436 NW2d 70 (1989) (any claim of judicial disqualification is waived when the plaintiff fails to pursue the remedy provided for in MCR 2.003(D)).

No costs to either party. MCR 7.219(A).

/s/ Christopher M. Murray

/s/ Kurtis T. Wilder

/s/ Donald S. Owens