

STATE OF MICHIGAN
COURT OF APPEALS

DAVID CHARLES WHITAKER,
Plaintiff-Appellant,

UNPUBLISHED
April 9, 2013

v

ELIZABETH FAYE BONTEKOE,
Defendant-Appellee.

No. 304617
Livingston Circuit Court
LC No. 10-025517-NI

DAVID CHARLES WHITAKER,
Plaintiff-Appellant,

v

JOHN DOE, Personal Representative for the Estate
of JACOB YSBRAND BONTEKOE,
Defendant-Appellee.

No. 304618
Livingston Circuit Court
LC No. 10-025518-NI

In re Estate of JACOB Y. BONTEKOE.

DAVID CHARLES WHITAKER,
Appellant,

v

ELIZABETH FAYE BONTEKOE,
Appellee.

No. 305241
Livingston Probate Court
LC No. 10-011995-DE

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

In Docket No. 305241, plaintiff David Charles Whitaker appeals by delayed leave granted an order denying his petition for the appointment of a special personal representative to the estate of decedent Jacob Y. Bontekoe (“the Estate”) and an order denying plaintiff’s application for informal probate. In Docket No. 304617, plaintiff appeals as of right the trial court’s order granting defendant Elizabeth Faye Bontekoe’s motion for summary disposition pursuant to MCR 2.116(C)(8) and dismissing plaintiff’s complaint. In Docket No. 304618, plaintiff appeals as of right the trial court’s order granting the Estate’s motion to quash service and dismissing plaintiff’s claim pursuant to MCR 2.116(C)(7). In Docket No. 305241, we affirm the trial court’s orders. In Docket No. 304617, we reverse the trial court’s order. In Docket No. 304618, we affirm the trial court’s order.

I. BACKGROUND

This consolidated action arises from an automobile accident between plaintiff and Jacob. On September 24, 2007, Elizabeth, Jacob’s wife, drove to the store with Jacob. Once they arrived at the store, Elizabeth left Jacob in the car while she went shopping. Subsequently, Jacob, who was then 87 years old, drove away and ran through a traffic light. As a result of running the traffic light, Jacob’s vehicle collided with plaintiff’s vehicle. Jacob died from the automobile accident and plaintiff alleges that he was seriously injured.

A. DOCKET NO. 305241

On September 20, 2010, plaintiff petitioned the probate court under MCL 700.3614 for the appointment of a special personal representative to the Estate. In the petition, plaintiff indicated that Jacob was involved in an automobile accident that resulted in serious injuries to plaintiff and it was necessary to open an estate to allow plaintiff to commence a lawsuit. The petition also noted that an estate needed to be opened within sufficient time to allow plaintiff to file his lawsuit before September 24, 2010, to avoid the expiration of the statute of limitations.

Plaintiff filed the petition for the appointment of a special personal representative as an emergency, but he did not provide proper notice or receive waivers of notice from the interested parties. Plaintiff asserted that the probate court could still appoint a special personal representative to the Estate on an ex parte basis because the expiring of the statute of limitations for his personal injury claim was an emergency. However, the probate court disagreed and denied plaintiff’s petition, concluding that the expiration of the statute of limitations was not a sufficient emergency to open an estate without proper notice to the interested parties.

Thereafter, in January 2011, plaintiff sought the informal appointment of a personal representative for the Estate as a creditor. However, the probate court denied plaintiff’s application for the informal appointment of a personal representative because it concluded that plaintiff did not have standing to seek informal probate. The trial court concluded that the expiration of the statute of limitations barred plaintiff’s personal injury claim, and so he was not a creditor of the estate. From this order, plaintiff filed a delayed application for leave to appeal.

B. DOCKET NO. 304617

On September 23, 2010, plaintiff filed his complaint against Elizabeth, alleging that Elizabeth negligently operated a motor vehicle and was generally negligent in leaving Jacob,

who suffered from dementia and Alzheimer's, in the vehicle with the car keys while she went shopping. Elizabeth's negligent actions resulted in Jacob hitting plaintiff's vehicle and caused plaintiff serious injury.

In response, Elizabeth filed a motion for summary disposition pursuant to MCR 2.116(C)(8), asserting that she did not owe a duty to plaintiff. In his response to Elizabeth's motion, plaintiff attached a copy of the accident report and, subsequently, at the motion hearing, Elizabeth submitted her own affidavit. Elizabeth then requested that the trial court consider her motion under MCR 2.116(C)(8) and (10). Elizabeth argued that she had no knowledge that Jacob had any unreasonable risk propensities, that Jacob was an adult with a valid driver's license, and thus she had no obligation to prevent Jacob from driving the vehicle. Plaintiff argued that Elizabeth was negligent in leaving Jacob in the vehicle because she knew that Jacob had dementia and Alzheimer's and she knew of Jacob's propensities, as evidenced by the fact that she placed the car keys under the seat to prevent Jacob from driving. Plaintiff also argued that it was negligent to leave Jacob alone in the vehicle when the outside temperature was around 85 degrees.

The trial court granted Elizabeth's motion for summary disposition. The trial court stated that plaintiff had not established facts supporting that Elizabeth owed a duty to plaintiff:

Here Ms. Bontekoe did not want her husband to drive. She removed the keys and placed them under the mat. However, *based upon review of all the materials that have been presented* I am not persuaded that Defendant's conduct and *the facts and circumstances presented by Plaintiff* are sufficient to give rise to a duty to the Plaintiff. On that basis I am granting the motion for summary disposition. [Emphasis added.]

The trial court entered an order granting Elizabeth's motion for summary disposition and dismissing plaintiff's claim without stating whether summary disposition had been granted under MCR 2.116(C)(8) or (10). Thereafter, plaintiff moved for reconsideration, which the trial court denied, but the trial court did clarify that summary disposition had been granted pursuant to MCR 2.116(C)(8). From this order, plaintiff appeals as of right.

C. DOCKET NO. 304618

On September 23, 2010, three days after the probate court ruled no emergency existed such that notice of the opening of the Estate could not be waived, plaintiff also filed a complaint against the Estate, alleging that Jacob negligently operated his vehicle. Plaintiff filed an ex parte motion for alternative service, indicating that he was unable to determine whether there was an open estate and requesting the trial court to add State Farm Mutual Automobile Insurance Company as a party because it was required to defend Jacob's automobile accident.

The trial court granted plaintiff's ex parte motion for alternative service and plaintiff served State Farm. Thereafter, the Estate filed a motion to quash service of process and dismiss the case pursuant to MCR 2.116(C)(7), arguing that service of process was improper and that dismissal was appropriate because the statute of limitations had expired. At oral argument, the Estate asserted that plaintiff had made inaccurate assertions to the trial court in his motion for

alternative service when he indicated that he did not know if an estate was open because that same day the probate court had actually denied plaintiff's motion to open an estate. Plaintiff argued that service to State Farm was proper because it was the company that would defend the case and the alternative service was valid because he was unable to serve the Estate.

The trial court granted the Estate's motion to quash, stating that plaintiff had misstated the facts in his motion for alternative service. Thereafter, the trial court granted summary disposition under MCR 2.116(C)(7) and dismissed plaintiff's claim with prejudice, concluding that the improper service precluded jurisdiction and the statute of limitations was now expired. Plaintiff filed a motion for reconsideration, which the trial court denied. From this order, plaintiff appeals as of right.¹

II. ANALYSIS

A. DOCKET NO. 305241

1. MCL 700.3614:

EMERGENCY APPOINTMENT OF A SPECIAL PERSONAL REPRESENTATIVE

Plaintiff argues that the trial court err in denying his petition for the appointment of a special personal representative because the expiration of the statute of limitation constituted an emergency pursuant to MCL 700.3614, and thus notice to the interested parties was not required. Issues of statutory construction are questions of law that we review *de novo*. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). However, "appeals from a probate court decision are on the record, not *de novo*." *Id.* A trial court's findings of fact are reviewed for clear error, while dispositional rulings are reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court makes a decision that is outside the range of reasonable and principled outcomes. *Id.*

The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, governs matters related to probate, including the appointment of a special personal representative. The probate court has discretion in appointing a personal representative. *In re Kramek Estate*, 268 Mich App 565, 575; 710 NW2d 753 (2005). MCL 700.3614(b) provides:

By the court on its own motion or in a formal proceeding by court order on the petition of an interested person if in either case, after notice and hearing, the court finds that the appointment is necessary to preserve the estate or to secure

¹ On August 16, 2012, this Court granted plaintiff's delayed application for leave to appeal and consolidated Docket Nos. 305241, 304617, and 304618. *In re Bontekoe Estate*, unpublished order of the Court of Appeals, entered August 16, 2012 (Docket No. 305241). Previously, this Court ordered the consolidation of Docket Nos. 304617 and 304618. *Whitaker v Bontekoe*, unpublished order of the Court of Appeals, entered July 6, 2011 (Docket Nos. 304617 & 304618).

its proper administration, including its administration in circumstances in which a general personal representative cannot or should not act. *If it appears to the court that an emergency exists, the court may order the appointment without notice.* [Emphasis added.]

Plaintiff asserts that the expiration of the statute of limitations on his personal injury claim in four days was an emergency, allowing the probate court to appoint a special personal representative without notice² under MCL 700.3614(b). Given that “emergency” is not defined by the statute, we turn to the dictionary definition to determine its plain meaning. *Wardell v Hincka*, 297 Mich App 127, 132; 822 NW2d 278 (2012). An “emergency” is defined as “a sudden, urgent, [usually] unexpected occurrence requiring immediate action” or “a situation requiring help or relief, [usually] created by an unexpected event[.]” *Random House Webster’s College Dictionary* (2001).

This definition of “emergency” makes it clear that the probate court did not abuse its discretion in denying plaintiff’s petition for a special personal representative. While plaintiff’s situation was urgent, the urgency was not unexpected—rather it was of his own making. Plaintiff’s personal injury claim arose on September 24, 2007. However, plaintiff waited until four days prior to the expiration of the statute of limitations³ to file his petition. There is nothing in the facts to suggest that the length of time plaintiff had to file was obscured, or that he relied on representations of others that left him in an unanticipated circumstance. In fact, plaintiff acknowledges that he was well aware of the impending expiration of the statute of limitations, yet he chose to wait until four days before the statutory bar before filing his petition despite the fact that he had been unable to locate an estate. Moreover, while plaintiff asserts that an emergency was created because he was awaiting the release of *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), before deciding how to proceed with his case, this argument is without avail. *McCormick* was released in July 2010, and thus plaintiff had ample time to file his petition after *McCormick*’s release or he could have chosen to file the petition before *McCormick*’s release in anticipation of a favorable decision. The trial court did not abuse its discretion when it denied plaintiff’s petition for a special personal representative because the expiration of the statute of limitations did not come upon him suddenly and unexpectedly, and

² To provide notice to an interested party, a mailing of a copy of the hearing on a petition must be sent at least 14 days before the time set for the hearing or a copy must be personally delivered to the interested party at least seven days before the time set for the hearing. MCL 700.1401(1)(a) and (b). Plaintiff admits that, at the most, the interested parties only received two days notice of the hearing by overnight mail.

³ MCL 600.5805(10) provides, “[e]xcept as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property.” Thus, the statute of limitations on plaintiff’s claim expired on September 24, 2010.

therefore, there was not an emergency that could waive the notice requirement of MCL 700.3614(b).⁴

2. MCL 700.3308:

INFORMAL PROBATE

Plaintiff argues that the trial court erred in denying his application for informal appointment of a personal representative because he had standing as a creditor to apply for informal probate pursuant to MCL 700.3308(1)(c). We review issues of statutory interpretation de novo, while a probate court’s findings of fact are reviewed for clear error and its dispositional rulings are reviewed for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App at 128.

Informal appointment proceedings are governed by MCL 700.3308, which provides in the relevant part:

(1) In informal appointment proceedings, the register shall determine whether all of the following are true:

* * *

(c) The applicant appears from the application to be an interested person.

* * *

(2) Unless section 3612 controls, the register shall deny the application if it indicates any of the following:

* * *

(c) That the other requirements of this section are met.

EPIC defines “interested person” as follows:

[T]he incumbent fiduciary; an heir, devisee, child, spouse, *creditor*, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent Identification of interested persons may vary from time to time and shall be determined according to the particular

⁴ Plaintiff also suggests that the trial court could have shortened the notice period requirements for good cause shown pursuant to MCL 700.1401(2). This argument is waived because plaintiff failed to raise it before the trial court and we decline to address it. *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). Regardless, because the expiration of the statute of limitations was not an emergency, it also could not have established good cause to shorten the notice period.

purposes of, and matter involved in, a proceeding, and by the supreme court rules.
[MCL 700.1105(c).] [Emphasis added.]

A “creditor” is “[o]ne to whom a debt is owed A person or entity with a definite claim against another A person or entity having a claim against the debtor One to whom any obligation is owed, whether contractual or otherwise.” Black’s Law Dictionary (9th ed).

Based on these definitions, the trial court properly concluded that plaintiff lacked standing on the application for informal probate because he was not an interested person. Plaintiff was not a creditor because he was not owed a debt by the Estate. Plaintiff failed to bring his personal injury claim within the statutory period, and thus he was unable to obtain a judgment against the Estate. Moreover, once the statute of limitations expired, plaintiff could no longer “bring or maintain an action to recover damages for injuries to persons or property” under MCL 600.5805(1), because the expiration of the statute of limitations forever bars a claim, see *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 394; 406 NW2d 304 (1987). Because plaintiff is forever barred from bringing his claim for the injuries caused by the automobile accident, he will never be a creditor. Thus, the trial court properly denied plaintiff’s application for informal probate because plaintiff is not an interested person and he cannot not seek the appointment of a personal representative through informal probate. MCL 700.3308(1)(c).

B. DOCKET NO. 304617

1. MCR 2.116(C)(8)

Plaintiff argues that the trial court erred in granting Elizabeth’s motion for summary disposition pursuant to MCR 2.116(C)(8)⁵ because she had a duty to plaintiff as Jacob’s wife. A trial court’s denial of summary disposition is reviewed de novo, *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004), as is whether a duty exists, *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint based on the pleadings. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). Without reviewing any documentary evidence, the trial court must determine if the opposing

⁵ In granting Elizabeth’s motion for summary disposition, the trial court stated that “based upon review of all the materials that have been presented,” a duty could not be imposed. Despite the fact that it was not proper to grant summary disposition under MCR 2.116(C)(8) when the trial court acknowledged that it had reviewed material outside of the pleadings, *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010), the trial court specifically clarified in its order denying reconsideration that it had decided the motion pursuant to MCR 2.116(C)(8). Although the trial court’s clarification of its ruling is inconsistent with the record, we will review this issue under MCR 2.116(C)(8) because that is what the trial court ultimately said it utilized. See *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005).

party failed to state a claim on which relief could be granted. The trial court must accept any well-pleaded factual allegations as true and view the allegations in a light most favorable to the nonmoving party. *Id.* at 304-305. The trial court should only grant the motion if no factual development could provide the nonmoving party with a right to recovery. *Id.* at 305.

A negligence claim has four key elements: duty, breach, causation, and damages. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009). “[T]he general common-law rule [is] that no individual has a duty to protect another who is endangered by a third person’s conduct absent a ‘special relationship’ either between the defendant and the victim, or the defendant and the third party who caused the injury.” *Beaudrie v Henderson*, 465 Mich 124, 141; 631 NW2d 308 (2001) (quotation marks and citation omitted). “[A] legal duty is a threshold requirement before there can be any consideration of whether a person was negligent by breaching that duty and causing injury to another.” *Romain*, 483 Mich at 22. Therefore, “[b]efore a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable. If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors.” *Hill*, 492 Mich at 661 (quotation marks and citations omitted).

The spousal relationship is not a special relationship that automatically gives rise to the existence of a duty: “We decline to hold that the marital relationship automatically imposes upon one spouse a legal obligation to protect third persons from the dangerous or negligent acts of the other spouse.” *Petersen v Heflin*, 163 Mich App 402, 407; 413 NW2d 810 (1987). But, “there may be special facts and circumstances underlying some marital relationships which might give rise to such a duty[.]” *Id.* Special facts and circumstances may include “evidence that . . . [the individual] had any special knowledge or training with regard to the mental state of her . . . [spouse]” or “evidence that . . . [the individual] had a special ability to control . . . [the spouse’s] conduct.” See *id.*

The trial court erred in granting Elizabeth’s motion for summary disposition under MCR 2.116(C)(8). Plaintiff’s complaint alleged that Elizabeth owed a duty to plaintiff because Jacob was her husband and Elizabeth had special knowledge from the marital relationship regarding Jacob’s mental state. These alleged facts are sufficient to support the allegation that a duty existed—but they do not actually establish a duty. Instead, we remand to the trial court for further factual development to determine if a duty may be imposed. Specifically, before it can be determined whether there is a duty, there must be discovery on whether Elizabeth had a special ability to control Jacob’s conduct and whether it was foreseeable that Jacob would drive off with the vehicle when left unattended. *Dalley*, 287 Mich App at 305. The trial court erred in granting Elizabeth’s motion for summary disposition pursuant to MCR 2.116(C)(8).

C. DOCKET NO. 304618

1. MOTION TO QUASH

Plaintiff argues that the trial court erred in granting the motion to quash because the circumstances of this case permitted alternative service, and thus service was proper. Plaintiff also asserts that the trial court erred in dismissing his claim under MCR 2.116(C)(7) because the trial court acquired jurisdiction over the case before the expiration of the statute of limitations. A

trial court's decision on a motion to quash is reviewed for an abuse of discretion. *Bush v Beemer*, 224 Mich App 457, 465-466; 569 NW2d 636 (1997); *Moyer v Lott*, 86 Mich App 186, 188; 272 NW2d 232 (1978). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App at 128. We review de novo the trial court's dismissal of plaintiff's case pursuant to MCR 2.116(C)(7). *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). The application and interpretation of a court rule is reviewed de novo. *Davis v Chatman*, 292 Mich App 603, 616; 808 NW2d 555 (2011).

The trial court must have personal jurisdiction over the parties to adjudicate a controversy. *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 274; 803 NW2d 151 (2011). A court obtains personal jurisdiction over a defendant by service of process upon the defendant. *Id.* MCR 2.105 governs service of process and describes the various methods of service. *Bullington v Corbell*, 293 Mich App 549, 556; 809 NW2d 657 (2011). The methods of service in the court rule "are intended to satisfy the due process requirement that a defendant be informed of an action by the best means available under the circumstances." *Id.*, quoting MCR 2.105(J)(1). When the usual methods of service cannot be accomplished, alternative service may be permitted, in the trial court's discretion, pursuant to MCR 2.105(I):

(1) On a showing that service of process cannot reasonably be made as provided by this rule, the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.

(2) A request for an order under the rule must be made in a verified motion dated not more than 14 days before it is filed. The motion must set forth sufficient facts to show that process cannot be served under this rule and must state the defendant's address or last known address, or that no address of the defendant is known. If the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it. A hearing on the motion is not required unless the court so directs.

(3) Service of process may not be made under this subrule before entry of the court's order permitting it.

Alternative service of process is not an automatic right. *Lawrence M Clarke, Inc*, 489 Mich at 278. MCR 2.105(I)(1) requires the plaintiff to provide a factual basis to substantiate that the defendant could not be reasonably served in accordance with the court rule. *Bullington*, 293 Mich App at 558-559. MCR 2.105(I)(1) also requires that the substituted service be reasonably calculated to provide the defendant with actual notice and an opportunity to be heard. *Lawrence M Clarke, Inc*, 489 Mich at 278. Additionally, under MCR 2.105(I)(2), the plaintiff must state the defendant's address, last known address, or if there was no known address. *Id.* If there was no known address, the plaintiff must show he made a diligent inquiry to ascertain it. *Id.* "A truly diligent search for an absentee defendant is absolutely necessary to supply a fair foundation for and legitimacy to the ordering of substituted service[.]" *Id.* (quotation marks and citation omitted).

Plaintiff's motion for alternative service states that "[a]fter exercising due diligence, Plaintiff has been unable to determine whether an Estate has been opened for Jacob Ysbrand Bontekoe." This conclusory statement that plaintiff exercised "due diligence" did not provide the trial court with a factual basis to substantiate that the Estate could not be served, and thus the trial court should not have granted plaintiff's motion for alternative service. *Bullington*, 293 Mich App at 558-559. Plaintiff also failed to provide any information regarding whether he knew of the Estate's address, or if one did not exist, whether he made diligent inquires to ascertain it. *Lawrence M Clarke, Inc*, 489 Mich at 278. Moreover, the trial court, in granting the motion to quash service, found that plaintiff misstated the facts in its motion for alternative service when plaintiff claimed that he was unable to determine if the Estate existed. The trial court noted that if it had known that plaintiff had already unsuccessfully attempted to open an estate, it would not have granted the motion for alternative service.

Consequently, the trial court did not abuse its discretion in granting the motion to quash service. Likewise, because alternative service was improper, the trial court did not acquire jurisdiction over the case before the expiration of the statute of limitations. Because the statute of limitations barred plaintiff's claim, summary disposition was appropriate under MCR 2.116(C)(7).⁶ *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 509; 739 NW2d 402 (2007).

III. CONCLUSION

In Docket No. 305241, we affirm the trial court's orders denying plaintiff's petition for a special personal representative and denying plaintiff's application for informal probate. In Docket No. 304617, we reverse the trial court's order granting Elizabeth's motion for summary disposition pursuant to MCR 2.116(C)(8) and remand for further proceedings. In Docket No. 304618, we affirm the trial court's order granting the motion to quash service. We do not retain jurisdiction.

No costs to either party, neither having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ William C. Whitbeck

⁶ Additionally, plaintiff contends that it was proper to commence this action against the Estate before the named appointment of the executor or administrator of the Estate under MCR 2.201(D)(1). Because this issue was not raised before the trial court we decline addressing it, *Walters*, 481 Mich at 388, but note that, regardless, it appears that plaintiff failed to follow the procedures described in MCR 2.201(D)(2), (3), and (4) that would be necessary for him to rely upon MCR 2.201(D)(1).