

STATE OF MICHIGAN  
COURT OF APPEALS

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JACQUELINE F. ANTONCEW and DEBORAH  
BURNETTE,

Plaintiff-Appellants,

v

PAUL C. LEWIS,

Defendant-Appellee.

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UNPUBLISHED  
September 20, 2005

No. 253560  
Cheboygan Circuit Court  
LC No. 03-007160-NI

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting defendant summary disposition. This negligence action arose out of an automobile accident involving plaintiffs and defendant, and the dispute on appeal involves whether service of process was properly effected within the applicable three-year statute of limitation. We reverse and remand for further proceedings.

Plaintiffs' sole claim on appeal is that the trial court erred in granting defendant summary disposition on the ground that plaintiffs failed to serve process within the applicable limitations period. We agree. We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Absent disputed issues of fact, whether a cause of action is barred by a statute of limitation is a question of law also reviewed de novo. *Ashby v Byrnes*, 251 Mich App 537, 540; 651 NW2d 922 (2002). Further, the proper interpretations of statutes and court rules are questions of law also subject to de novo review. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997); *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000).

Defendant relies on *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003), for the proposition that MCL 600.5856<sup>1</sup> provides that the tolling of the limitations period

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<sup>1</sup> In 2003, when this case was filed, MCL 600.5856 stated as follows:

The statutes of limitations or repose are tolled:

(continued...)

is accomplished only when one of four certain enumerated criteria are met. According to defendant, plaintiffs failed to meet any of the four criteria.

Overruling *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971),<sup>2</sup> *Gladych* held that under MCL 600.5805,<sup>3</sup> when read together with § 5856, the mere filing of a complaint is insufficient to toll the statute of limitations. *Gladych, supra* at 595, 607. Once the complaint is filed, a plaintiff must turn to § 5856 to determine the effect of the statute of limitations. *Id.* at 598. Considering the effect of its holding on the administration of justice in light of its overruling of *Buscaino*, the *Gladych* Court gave its holding limited retroactive application. *Id.* at 595, 605-607. By express order of the Court, the *Gladych* holding applied “retroactively only to those cases in which this specific issue has been raised and preserved.” *Id.* at 595, 607. The Court stated that in all other cases, the opinion would apply to all subsequent litigants prospectively, effective September 1, 2003. *Id.* at 606 n 6.

With respect to the limited effect of *Gladych*, defendant concedes that plaintiffs’ complaint, filed May 22, 2003, was filed before September 1, 2003, but defendant contends that *Gladych* nevertheless applies because he raised and preserved the specific issue in his motion for summary disposition.

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(...continued)

(a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.

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

(c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.

(d) If, during the applicable notice period under section 2912b[(which addresses medical malpractice actions)], a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

The current version of MCL 600.5856, effective April 22, 2004, applies only to civil actions filed on or after the effective date of the amendment. 2004 PA 87, § 1. Thus, analysis of this appeal will be undertaken using the version of the statute as it existed in 2003. 1993 PA 78.

<sup>2</sup> Also overruled in part on other grounds by *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

<sup>3</sup> MCL 600.5805(1) states as follows:

A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

Noting the potential for misunderstanding of the *Gladych* holding, the Court later clarified *Gladych* in *Collins v Comerica Bank*, 469 Mich 1223; 668 NW2d 357 (2003). *Collins* explained that *Gladych* applies retroactively only to cases in which the specific issue—that the tolling of the relevant statute of limitations can only be accomplished by complying with the provisions of MCL 600.5856—was raised or preserved *before* the *Gladych* decision was released on July 1, 2003. *Collins*, *supra* at 1223.

Only pending cases that preserved this particular statute of limitations challenge as of July 1, 2003[,] are covered by the limited retroactive application of our holding in *Gladych*. In all other cases, *Gladych* has prospective application only to complaints filed on or after September 1, 2003. [*Id.*]

Applying this clarified rule, the Court held that *Gladych* had no retroactive application to the case at issue because the defendant failed to preserve the specific issue as of July 1, 2003. *Id.* at 1223-1224.

*Collins* was decided on September 12, 2003; therefore, its clarified statement of the *Gladych* holding was available before defendant filed his motion for summary disposition on November 25, 2003. Accordingly, *Gladych* is inapplicable to this case in light of the *Collins* clarification. The parties do not dispute that *Gladych* does not apply prospectively to this case, as plaintiffs filed their complaint on May 22, 2003. But *Gladych* also does not apply retroactively to this case because, as of the date *Gladych* was decided, July 1, 2003, defendant failed to preserve the specific issue of whether plaintiffs complied with the tolling requirements of § 5865. Defendant did not raise the applicability of § 5856 until he filed his motion for summary disposition on November 25, 2003, which was approximately five months after the retroactive cut-off date of July 1, 2003. Therefore, it is necessary to analyze this case under the law as it existed before July 1, 2003. Before that date, *Buscaino* provided the established rule of law.

In *Buscaino*, *supra* at 480, the Court noted the “seeming conflict” between GCR 1963, 101,<sup>4</sup> (“A civil action is commenced by filing a complaint with the court[.]”), and § 5856(3).<sup>5</sup> The Court concluded that tolling of the statute of limitations only came into play in those situations when “a *prima facie* bar of the statute appears . . . .” *Buscaino*, *supra* at 481. In other words, only in those situations where the action is not commenced within the statutory period. The Court stated that MCL 600.5856 “merely complicates an otherwise simple procedure.” *Id.* at 483. According to *Buscaino*, determination of when the action commenced merely requires

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<sup>4</sup> GCR 1963, 101, is the predecessor rule to MCR 2.101. See also MCL 600.1901.

<sup>5</sup> The 1971 version of MCL 600.5856 analyzed in *Buscaino* is slightly different than that in effect in 2003. The statute was amended in 1993. 1993 PA 78. But the 1971 language in issue – “the complaint is filed and a copy of the summons and complaint in good faith, are placed in the hands of an officer for immediate service, but in this case the statute shall not be tolled longer than 90 days thereafter” – is not materially different to be of consequence.

consulting the date of filing of the complaint. See *id.* “[T]he fact of subsequent service of the complaint can in no way affect the commencing of the action.” *Id.* at 484.

Here, plaintiffs and defendant were involved in an automobile accident on June 5, 2000. Thus, the applicable three-year period of limitations expired on June 5, 2003. MCL 600.5805(1) and (10). Plaintiffs’ complaint was filed on May 22, 2003 – fourteen days before June 5, 2003. Therefore, under *Buscaino*, plaintiffs’ action was properly commenced.

Furthermore, with respect to the timeliness of service of process, as explained, any tolling of the limitations period under § 5856 is irrelevant under the *Buscaino* rule. By court order issued within the life of the original summons, the court extended the summons period until December 19, 2003. The personal representative of defendant’s estate acknowledged acceptance of service of the second summons on November 4, 2003. The second summons was timely served within the life of the extended summons period.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer  
/s/ Michael J. Talbot  
/s/ Stephen L. Borrello