

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-23-0170

Monty Clarence Petersen,)
)
Appellant.)
)
v.)
)
Jennifer J. Simon, APRN,)
)
Appellee.)

APPELLANT’S REPLY BRIEF

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ARGUMENT

Defendant Jennifer Simon (Nurse Simon) makes several arguments, including plain reading, other substantive law, legislative intent, and persuasive authority, as the basis for upholding the district court's *Order*. Nurse Simon also addresses the statute of repose and savings statute. The question need not be so academic and esoteric. The gravamen of this appeal is succinctly stated by the district court: “[t]he nature of the dismissal is the question before the Court.” Appendix 2, 2:21. Was dismissal with prejudice permissible or was the district court bound to dismiss without prejudice?

I. Statute does not confer authority to the district court to dismiss a complaint, including a medical malpractice complaint, for untimely service with prejudice.

The parties have identified two (2) statutes operative in this case: the more general service of process statute found in Mont. R. Civ. P. 4(t)(1) and the more specific service of process statute found at Mont. Code Ann. § 25-3-106. The statutes reflect one another.

A plaintiff must accomplish service within three years after filing a complaint. *Absent an appearance by defendant(s)*, the court, upon motion or its own initiative, must dismiss an action without prejudice if the plaintiff fails to do so. Mont. R. Civ. P. 4(t)(1). (Emphasis added).

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Compared to:

A plaintiff in a medical malpractice action shall accomplish service within 6 months after filing the complaint. If the plaintiff fails to do so, the court, on motion or on its own initiative, shall dismiss the action without prejudice *unless the defendant has made an appearance*. Mont. Code Ann. § 25-3-106. (Emphasis added).

Both statutes share the same elements 1) service within a specific amount of time; 2) dismissal without prejudice; 3) by motion or the court's own initiative; and, 4) failure of the defendant to make an appearance.

Although the effect of untimely service pursuant to Mont. Code Ann. § 25-3-106 is a matter of first impression in Montana, the effect of untimely service pursuant to Mont. R. Civ. P. 4(t)(1) (and its predecessor Rule 41(e)) has been resolved. A district court is authorized to dismiss a complaint with prejudice only when the dismissal is initiated *sua sponte*, not by the plaintiff. *Webb v. T.D.*, 275, 243, 249-50, 912 P.2d 202, 206. See also Cynthia Ford, *Does It Have to Be This Hard? Rule 41(e) in Montana*, 60 Mont. L.Rev. 285, 323 (1996). Plaintiff Monty Petersen (Monty) advocates for Mont. R. Civ. P. 4(t)(1) and Mont. Code Ann. § 25-3-106 to be synchronized and given effect. See *Pesarik v. Perjessy*, 2008 MT 337, ¶ 17, 194 P.3d 665 (“this Court will harmonize two statutes relating to the same subject in order to give effect to both). (Citation

omitted).

Montana courts have long adopted a policy, which is an outlier from Federal Court and most state courts, to allow plaintiffs three (3) years in which to serve their complaint. Mont. R. Civ. P. 4(t). The rationale underpinning the practice is a “policy favoring the resolution of a case on its merits is more compelling than the policy underlying Rule 41(b), which is to prevent unreasonable delays.” *Brymerski v. City of Great Falls*, 195 Mont. 428, 430, 636 P.2d 846, 849. Nurse Simon’s argument that “other substantive law” supported dismissal with prejudice ignores other substantive law, i.e. Mont. R. Civ. P. 4(t), which allows Monty to wait three (3) years to serve his complaint in order for the issues to be tried on their merits. See *Pesarik*, at ¶ 17.

Nurse Simon correctly notes that *Webb v. T.D.*, 275 Mont. 243, 912 P.2d 202 (1996) supports the proposition that commencement of an action tolls the statute of limitations. See *Appellee Jenifer J. Simon’s Response Brief*, p. 20. (Citing *Webb*, 912 P.2d at 207, Mont. Code Ann. § 27-2-102(1)(b), and Mont. R. Civ. P. 3). She then posits there are two ways this Court could interpret the effect of failure of service in lieu of the holding in *Webb*: 1) this Court could adopt a method from Ohio, Idaho, and other

jurisdictions in which dismissal with prejudice is appropriate when a plaintiff has failed to effect timely service after the statute of limitations has run; or , 2) this Court could adopt a method adhered to by Hon. Heidi J. Ulbricht in *Estate of Phillips v. Robbins* which allows an unserved complaint to toll the statute of limitations, but only until expiration of the time limit for service.

Monty seeks a third alternative, which is the existing application of the law. The filing of a complaint tolls the statute of limitations and statute of repose. *Webb*, at 250, 912 2d at 207. *Webb* is consistent with case law applying Mont. R. Civ. P. 4(t)(1) (and its predecessor Rule 41(3)). See *Rich v. State Farm Mut. Auto. Ins. Co.*, 2003 MT 51, ¶¶ 21-23, 66 P.3d 274 (“the provisions of Rule 41(a)(1) are intended to apply when service of summons on the defenant has already occurred....Rule 41(e) applies when service on the defendant has not yet been timely accomplished.

Accordingly, we hold that in the event a plaintiff moves to dismiss a complaint without prejudice under Rule 41(a)(1), but does so after the three year time period in Rule 41(e) has passed, Rule 41(e) requires that the plaintiff’s dismissal is with prejudice and must be given *res judicata* effect”). Here, Monty abided by the provisions of Mont. R. Civ. P. 4(t)(1) (Rule 41(e) predecessor) and served Nurse Simon within three years of

filing his *Complaint*. He did as he was allowed.

II. The statute of repose was tolled.

Nurse Simon correctly acknowledges “in *no* case may ‘[a medical malpractice]’ action be commenced after 5 years from the date of injury.” *Response Brief*, p. 32. (Emphasis original). (Citation omitted). Monty did not “commence” his action more than 5 years after the date of injury. He “commenced” his action when he filed his *Complaint* on January 27, 2020, and the statute of repose was tolled thereafter. *Webb*, at 250, 912 P.2d at 207 (“the statute of repose [is] tolled by the commencement of an action, and that action is commenced when a complaint is filed”). (Citations omitted).

III. The “savings statute” affords Monty relief if his *Complaint* is not re-filed within one day of remittitur.

Nurse Simon urges this Court to uphold the district court’s determination that Monty’s inaction is a failure to prosecute. The Supreme Court should disregard the district court’s determination. Monty acted within the framework of Mont. R. Civ. P. 4(t)(1). He served his *Complaint* within three years after he filed his *Complaint*. Mont. R. Civ. P. 4(t)(1). Nurse Simon may not like that Montana court’s allow three years between filing and service, but it is the rule. As Nurse Simon acknowledges, Monty

prosecuted his case within the three year limitation when a summons was issued on October 31, 2022, and a certificate of costs and service was filed on January 9, 2023. *Appellee's Response Brief*, pp. 3-4. This Court has adopted the rule that failure to prosecute does not exist when a plaintiff is diligently prosecuting his claim at the time dismissal is sought, even if at some earlier time the plaintiff may have failed to act with due diligence. *Brymerski v. City of Great Falls*, at 432, 636 P.3d at 848-849.

CONCLUSION

Neither Mont. Code Ann. § 25-3-106 nor Mont. R. Civ. P. 4(t)(1) empower the district court with authority to dismiss a cause of action with prejudice. The district court exceeded its authority when it did so in this case. Although Monty did not achieve service within six months of filing, as required by Mont. Code Ann. § 25-3-106, Monty simply seeks to do what he is allowed to do: file a complaint, wait three years, and serve the complaint within those three years. Such a ruling allows the parties to seek justice on the merits of their claims and defenses, a policy favored by Montana courts. Nurse Simon cannot find safe-harbor in the statute of repose because it was tolled once Monty commenced his action. The district court's order should be overruled and remanded.

DATED this 6th day of October, 2023.

ST. PETER LAW OFFICES, P.C.

/s/ Michael O'Brien

Michael O'Brien

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Arial text, typeface of 14 points, is double spaced, and the word count does not exceed 5,000 words, excluding Certificate of Service and the Certificate of Compliance.

Dated this 6th day of October, 2023.

ST. PETER LAW OFFICES, P.C.

By: /s/ Michael O'Brien
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CERTIFICATE OF SERVICE

I, Michael Hawkins O'Brien, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-06-2023:

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