DA 23-0375

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 174

ESTATE OF GREG PHILLIPS; GREG PHILLIPS INDIVIDUALLY; CAROL PHILLIPS, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF GREG PHILLIPS,

Plaintiffs and Appellants,

v.

ANNA ROBBINS, MD; LOGAN HEALTH, F/K/A KALISPELL REGIONAL HEALTHCARE; JOHN DOES 1-10; AND DOE BUSINESS ENTITIES X,Y, AND Z,

Defendants and Appellees.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-2022-032©
Honorable Heidi J. Ulbricht, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Darin K. Westover, Glacier Law Firm, PLLC, Kalispell, Montana

For Appellees:

Sean Goicoechea, Katrina L. Feller, Moore, Cockrell, Goicoechea & Johnson, P. C., Kalispell, Montana

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Submitted on Briefs: March 27, 2024

Decided: August 13, 2024

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 The Estate of Phillips; Greg Phillips, individually; Carol Phillips, individually and as Personal Representative of the Estate of Greg Phillips (collectively "Phillips"), appeal two orders entered in the Montana Eleventh Judicial District Court, Flathead County: (1) Order Dismissing the First Amended Complaint dated April 28, 2023, and (2) Order Denying the Motion to Alter, Amend, or Set Aside the Order of Dismissal dated June 13, 2023.

¶2 We restate the issue on appeal as follows:

Was Phillips' First Amended Complaint barred by the statute of limitations?

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Mr. Phillips died on October 11, 2019, shortly after receiving medical attention from Dr. Anna Robbins at Logan Health f/k/a Kalispell Regional Healthcare. On April 22, 2021, Phillips submitted an application to the Montana Medical Legal Panel (MMLP) alleging medical malpractice against Dr. Robbins and Logan Health (collectively, Logan Health). The MMLP issued a decision on December 9, 2021. Phillips then filed a Complaint in the District Court on January 5, 2022. The Complaint alleged fives causes of action: wrongful death, negligent infliction of emotional distress, loss of consortium, a survivor's claim, and respondeat superior. No party contests that the original Complaint was timely filed. However, the Complaint was never served on Logan Health. On February 10, 2023, Phillips filed a First Amended Complaint (FAC) naming the same parties regarding the

same incident but adding counts of common law negligence and negligent misrepresentation. The FAC was served on Logan Health February 20, 2023.

¶4 On March 7, 2023, Logan Health filed a motion to dismiss, arguing Phillips had failed to serve the original Complaint within the six-month timeline mandated by § 25-3-106, MCA, and that the two-year statute of limitations for medical malpractice claims set forth in § 27-2-205, MCA, had run before the FAC was filed. Logan Health also filed a motion to seal confidential documents from the MMLP proceedings by attaching it as an exhibit to their motion to dismiss. On April 28, 2023, the District Court granted Logan Health's motion to dismiss and dismissed the FAC with prejudice, reasoning Phillips failure to serve the original Complaint within the required six months, combined with the running of the statute of limitations after the six-month service deadline had expired, meant that the FAC was filed outside the two-year period of limitations.

¶5 On May 10, 2023, Phillips filed a motion under M. R. Civ. P. 59(e) and 60(b)(1) to alter, amend, or set aside the Order of dismissal. Phillips argued the Order was erroneous in its determination that the statute of limitations resumed running after the six-month service deadline passed. Phillips additionally argued the FAC was timely filed because it arose from the same set of facts and therefore "relates back" to the timely filed original Complaint. On June 13, 2023, the District Court issued its Order denying Phillips' motion to set aside the dismissal, reasoning Phillips could have raised the "relation back" theory at trial and that the motion otherwise was attempting to re-litigate issues presented in the

motion to dismiss. Phillips appeals both the April 28, 2023 Order and the June 13, 2023 Order.

STANDARD OF REVIEW

¶6 We review a lower court's decision on a motion to dismiss de novo. *Rooney v. City of Cut Bank,* 2012 MT 149, ¶ 13, 365 Mont. 375, 286 P.3d 241. "A motion to dismiss must be construed in the light most favorable to the plaintiff." *Rooney*, ¶ 13. "Whether a district court correctly applied the statute of limitations is a question of law, also reviewed for correctness." *Estate of Woody v. Big Horn Cnty*., 2016 MT 180, ¶ 7, 384 Mont. 185, 376 P.3d 127.

¶7 "The standard of review of district court rulings on motions for post-judgment relief under M. R. Civ. P. 59 and 60(b) is an abuse of discretion." *Folsom v. Mont. Pub. Emples. Ass'n*, 2017 MT 204, ¶ 18, 388 Mont. 307, 400 P.3d 706. Abuse of discretion occurs when a district court "acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *State v. Wilson*, 2007 MT 327, ¶ 18, 340 Mont. 191, 172 P.3d 1264.

DISCUSSION

¶8 Phillips first argues the statute of limitations is tolled by the filing of a complaint and remains tolled until that complaint is dismissed. Phillips contends there is no Montana authority that supports the District Court's position the statute of limitations resumed running after the service of process deadline had expired. Second, Phillips contends that Logan Health made an "appearance when they filed their motion to dismiss" and that,

therefore, Logan Health had been properly and timely served. Third, Phillips maintains that the FAC relates back to the date of the filing of his initial Complaint and is timely. Logan Health maintains the statute of limitations resumed running once the service of process deadline had expired and it was not served, and that the FAC was filed beyond the limitations period. Logan Health disputes that they made an appearance or that the FAC relates back to Phillips' initial Complaint.

¶9 This case concerns the interaction of two statutes relevant to a medical malpractice action: the statute of limitations and the deadline for service of process. The statute of limitations requires that a medical malpractice claim must be "commenced within 2 years after the date of the injury or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury." Section 27-2-205, MCA (2019). The period of limitations was amended by the Legislature from three years to two years in 2015. The statute of limitations in a medical malpractice claim is tolled once an application to the MMLP is made and does not resume running until 30 days after the MMLP issues a final decision. Section 27-6-702, MCA. There is no provision within § 27-2-205, MCA, relevant here, or within any other statute—besides that pertaining to the MMLP and § 27-6-702, MCA,— which allows for the tolling of the limitations period provided for in § 27-2-205, MCA. The other relevant statute in a medical malpractice case is the service of process statute, which provides: "[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." Section 25-3-106, MCA.

¶10 These two statutes, §§ 27-2-205 and 25-3-106, MCA, taken together establish a policy that the prosecution of a medical malpractice claim must be done diligently and in a timely manner. The purpose of statutes of limitations is to prevent stale claims from being brought against defendants whose ability to effectively defend themselves often worsens over time. *E.W. v. D.C.H.*, 231 Mont. 481, 484, 754 P.2d 817, 818-19 (1988). Claims must be pursued by plaintiffs in a timely manner, or the plaintiff will lose their opportunity to pursue the claim. See *Nolan v. Riverstone Health Care*, 2017 MT 63, ¶ 11, 387 Mont. 97, 391 P.3d 95. "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." M.R. Civ. P. 41(b). Failure to prosecute means a plaintiff has not conducted their due diligence in moving a case forward and bringing it to a conclusion. *Shackleton v. Neil*, 207 Mont. 96, 100, 672 P.2d 1112, 1114 (1983).

¶11 Statutory construction starts with the plain language of the statute. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. In the interpretation of a statute, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA. Further, "[w]here there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all." Section 1-2-101, MCA. Section 27-2-205, MCA, provides that a claim alleging

medical malpractice "must" be "commenced within 2 years after the date of injury or within 2 years after the plaintiff discovers" the injury. The only exception to the running of the limitations period is found in § 27-6-702, MCA, pertaining to the MMLP process. Significantly, there is no language contained in the limitations statute which tolls the period for the six-month service of process deadline contained in § 25-3-106, MCA. Failure to file a complaint within the period of limitations results in dismissal of the complaint with prejudice. A district court's dismissal will be upheld under M. R. Civ. P. 12(b)(6) if the complaint on its face establishes the claim is barred by the statute of limitations. *Selensky-Foust v. Mercer*, 2022 MT 97, ¶ 7, 408 Mont. 488, 510 P.3d 78.

¶12 In contrast, although still advancing the policy of diligent prosecution, § 25-3-106, MCA, mandates service be accomplished in medical malpractice actions within 6 months of the filing of the complaint, but also mandates that the court dismiss the action without prejudice. However, dismissal without prejudice for missing the service deadline does not affect the limitations period. Thus, a complaint must be filed within two years of when the injury accrued under the statute of limitations, regardless of whether service of process is made within 6 months; the limitations period for filing is not extended by the six-month period for serving it. Consequently, the statute of limitations was not tolled during the six-months Phillips had to serve the initial Complaint, but instead continued to run. The District Court erred, although still correct in its decision to dismiss the FAC with prejudice, in finding that the statute of limitations was tolled from January 5, 2022, until July 5, 2022, during the period service was to be made.

¶13 Here, although the statute of limitations stopped when Phillips filed his initial Complaint on January 5, 2022, Phillips failed to serve the Complaint within six months as required by § 25-3-106, MCA. When the District Court considered Logan Health's motion to dismiss filed on May 10, 2023, the period of limitations had already run. Thus, even if the District Court had dismissed the initial Complaint or, for that matter the FAC, without prejudice under § 25-3-106, MCA, for failure to timely serve the complaint, the expiration of the limitation period under § 27-2-205, MCA, prevented the filing of a new complaint. Montana's service of process statute for a medical malpractice action requires that the complaint be dismissed. The addition in the statute of "without prejudice" does nothing to help the plaintiff who is facing an expired limitation period.

¶14 Sections 25-3-106 and 27-2-205, MCA, pertain only to medical malpractice actions. The statutes must be read together and construed consistently as a whole. *In re Marriage of Shirilla*, 2004 MT 28, ¶ 12, 319 Mont. 385, 89 P.3d 1. ("When possible, we interpret statutes to give effect to the Legislature's intent. We will also read and construe the statute as a whole to avoid an absurd result and to give effect to a statute's purpose.") Here, the statutes can be construed consistently together. A plaintiff could wait, for example, until the 23rd month to file a complaint and then would have six months from the filing of the complaint to serve the defendant. However, if the Plaintiff fails to serve the complaint within six months, it is subject to dismissal under the service of process statute. If it is dismissed, and the limitations period has expired during that six-month period, the

complaint is subject to dismissal with prejudice under the limitations statute. In this manner, both statutes are given effect and construed consistently together.

¶15 Here, Logan Health waited well beyond the expiration of the statute of limitations before filing its motion to dismiss, thus ensuring Phillips could not refile within the limitations period, even if the Complaint had been dismissed without prejudice under § 25-3-106, MCA. To conclude, as Phillips urges, that a complaint must be dismissed without prejudice by operation of § 25-3-106, MCA, even though well outside the period of limitations, would render meaningless the statute of limitations—a plaintiff could wait years to serve a defendant and then refile a new action after the limitations period has expired. "This Court operates under the presumption that the Legislature does not pass meaningless legislation, and we will harmonize statutes relating to the same subject in order to give effect to each statute." *State v. Brendal*, 2009 MT 236, ¶ 18, 351 Mont. 395, 213 P.3d 448. A conclusion that any dismissal must be without prejudice because of the service of process statute would not give effect to the limitations statute. The District Court was understandably troubled by such a statutory interpretation and dismissed the case under the limitations statute. Accordingly, when Phillips filed his FAC on February 10, 2023, it was outside of the statute of limitations, which would have expired 2 years following the decedent's death on October 11, 2019, or approximately July of 2022, when allowing for the time the MMLP tolled the limitations period. Because the FAC was filed beyond the limitations period, the District Court was correct in dismissing it with prejudice.

¶16 Our conclusion is consistent with conclusions reached in other jurisdictions. In *Wilson v. Grumman Ohio Corp.*, 815 F.2d 26, 27 (6th Cir. 1987), the court explained "[i]t is generally accepted that a dismissal without prejudice leaves the situation the same as if the suit had never been brought, and that in the absence of a statute to the contrary a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending." See also 8 Moore's Federal Practice § 41.50[7](b) (2024). Some courts have specifically held that a timely claim which is dismissed without prejudice for failure to prosecute does not toll the statute of limitations. *Dupree v. Jefferson*, 215 U.S. App. D.C. 43, 666 F.2d 606, 610-11 (1981) ("[U]nder District of Columbia law the pendency of an action involuntarily dismissed without prejudice does not operate to toll the running of the statute of limitations . . . . [W]hatever the limitation period applicable, it was not arrested during pendency of appellant's first action which was involuntarily dismissed without prejudice for want of prosecution."); *Stein v. Reynolds Securities*, *Inc*., 667 F.2d 33, 34 (11th Cir. 1982) ("The fact that dismissal of an earlier suit was without prejudice does not authorize a subsequent suit brought outside of the otherwise binding period of limitations.") Other courts have assumed, without discussing the tolling issue, that a plaintiff seeking to refile after a dismissal without prejudice would be time-barred unless the refiling is within the limitations period. *Porter v. Beaumont Enterprise and Journal,* 743 F.2d 269, 273 (5th Cir. 1984); *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

¶17 The Sixth Circuit has explained:

> While the limitations period is "tolled" for some purposes upon the filing of a complaint, this notion of tolling is a very limited one. Generally, but for outside influences which may sometimes toll the running of the limitations period (e.g. insanity, minority, etc.) the statute of limitations is not otherwise "interrupted." This is obvious from the doctrine which indicates that dismissals without prejudice operate to leave the parties as if no action had ever commenced . . . . If the period of limitations has run by the point of such a dismissal, any new action is generally untimely.

Harris v. Canton, 725 F.2d 371, 376-77 (6th Cir. 1984) (citations omitted). Accordingly, "voluntary dismissal of a suit leaves the situation . . . the same as if the suit had never been brought." *A. B. Dick Co., v. Marr*, 197 F.2d 498, 502 (2d Cir. 1952); *Bryan v. Smith*, 174 F.2d 212, 214 (7th Cir. 1949). "In the absence of a statute to the contrary, a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending." *Wilson*, 815 F.2d at 27; *Bomer v. Ribicoff* 304 F.2d 427 (6th Cir. 1962). Each of these cases held, as we do here, that a statute of limitations is not tolled during pendency of an action which is dismissed without prejudice.

¶18 Phillips argues Logan Health made an appearance by filing the motion to dismiss, filing a motion to seal the MMLP records, and paying the accompanying fees. Section 25-3-106, MCA, provides "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*." (Emphasis added). The statute clearly contemplates that this exception applies when a defendant's appearance precedes the defendant's motion to dismiss. To construe the motion to dismiss as itself being an appearance would negate that entire section of the statute. Logan Health's filing a motion to dismiss did not preclude

dismissal under § 25-3-106, which invited the very motion. Further, we conclude Logan Health's accompanying motion to file certain documents under seal filed at the same time as the motion to dismiss did not convert the motion into an "appearance" for purposes of the statute.

¶19 Phillips filed a motion to alter, amend, or set aside the dismissal pursuant to M. R. Civ. P. 59(e) and 60(b)(1), raising for the first time that the FAC relates back to the filing of the original Complaint and therefore was timely. We review the District Court's decision to deny Phillips' post-judgment motion for an abuse of discretion. "An amendment to a pleading relates back to the date of the original pleading when: the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." M. R. Civ. P. 15(c)(1)(B). The District Court determined that Phillips could not relitigate issues that had already been decided and thereby engage the court in "an ongoing conversation" about the litigation. The court also determined that Phillips could not use the "relation back" theory as a mechanism to extend the statute of limitations. The court reasoned Phillips' argument would frustrate enforcement of the plain language of both the statute of limitations, the requirement that service be made within six months, and the underlying policy of both statutes to further diligent and timely prosecutions of medical malpractice claims. We note that under M. R. Civ. P. 15(c)(1)(B), if a court determines that an amendment relates back, then there is no statute of limitations issue because it is as if the new claim were filed on the date of the original pleading. However, here, the District Court

concluded that it would not entertain a post-judgment motion because Phillips was trying to relitigate issues already decided.

¶20 Under M. R. Civ. P. 60, "an aggrieved party may move for post-judgment relief from final judgment on various other specified grounds, or when otherwise required in fairness or equity under extraordinary circumstances to remedy either a lack of 'full presentation of the cause' or an 'inaccurate determination on the merits.'" *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 15, 402 Mont. 92, 475 P.3d 748 quoting *Orcutt v. Orcutt*, 2011 MT 107, ¶¶ 9-11, 360 Mont. 353, 253 P.3d 884. A motion under Rule 60 must be "more than a request for a rehearing, or a request for the district court to change its mind; it must be shown that something prevented a full presentation of the cause or an accurate determination of the merits that for reasons of fairness and equity redress is justified." *Orcutt*, ¶ 11. Similarly, "Rule 59(e) relief is not available to relitigate previously litigated matters, for reconsideration of arguments made, or to raise new arguments which a party reasonably could have and should have previously made." *Meine*, ¶ 15, n. 13. Thus, we have consistently held Rules 59(e) and 60 are unavailable for such purposes. *Meine*, ¶ 15 n. 13.

¶21 We conclude the District Court did not abuse its discretion in finding Phillips had not demonstrated post-judgment relief was warranted. The court's refusal to reconsider an issue previously addressed in the motion to dismiss was not an abuse of discretion.[1]

[1] Phillips additionally argues her claims should not have been dismissed because "[t]he policy of the law is to favor trial on the merits." *Schmitz v. Vasquez*, 1998 MT 314, ¶ 27, 292 Mont. 164, 970 P.2d 1039. However, "certain procedural steps must be followed before a plaintiff can argue the merits of a complaint." *Rich v. State Farm Mut. Auto. Ins. Co*., 2003 MT 51, ¶ 27, 314 Mont.

¶22 We agree with the Court's rationale and conclude there was no abuse of discretion when it denied Phillips' motion to alter or amend.

CONCLUSION

¶23 The District Court correctly determined that Phillips' First Amended Complaint must be dismissed with prejudice because it was filed outside of the limitations period set forth in § 27-2-205, MCA, for medical malpractice claims. However, the District Court erred in determining § 27-2-205, MCA, was tolled by the service of process statute. The service of process statute requires dismissal without prejudice. An action dismissed without prejudice leaves the situation the same as if the suit had never been brought and, therefore, the limitations period is not tolled during the pendency of an action which is dismissed without prejudice. The Legislature has not provided any other mechanism relevant here for tolling the limitations period of § 27-2-205, MCA, other than the MMLP process set forth in § 27-6-702, MCA. We further conclude that Logan Health did not make an appearance when it filed a motion to dismiss as contemplated by § 25-3-106, MCA, and the District Court did not abuse its discretion in denying Phillips' motion to alter or amend the dismissal.

¶24 We affirm the District Court's dismissal of these proceedings with prejudice.

/S/ LAURIE McKINNON

338, 66 P.3d 274. Statute of limitations prevent stale claims and "compel the exercise of a right of action within a reasonable time." *Christian v. Alt. Richfield Co*., 2015 MT 255, ¶ 13, 380 Mont. 495, 358 P.3d 131. The policy of favoring trial on the merits cannot override the important and clear policy of ensuring the timely pursuit of claims as intended by the Legislature in enacting tighter deadlines for both service of process and statute of limitations for medical malpractice claims.

We Concur:

/S/ JIM RICE
/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA