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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Josann M. Lupo, Appellant -vs- Brianna M. McNeeley and Trumbull Insurance Company, a/k/a The Hartford Insurance Company, John Does 1-10, Appellee.	)	Supreme Court No. 20180381 Stark County No. 45-2015-CV-00559

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APPEAL FROM THE DISTRICT COURT'S ORDER GRANTING MCNEELEY'S MOTION FOR SUMMARY JUDGMENT ENTERED AUGUST 14, 2018 IN STARK COUNTY, SOUTHWEST JUDICIAL DISTRICT, WITH THE HONORABLE WILLIAM A. HERAUF PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in granting McNeeley's Motion for Summary Judgment.

STATEMENT OF CASE

¶2 This lawsuit arises out of a motor vehicle accident that occurred on August 17, 2009. Plaintiff-Appellant, Josann M. Lupo (hereinafter "Lupo") initiated the action with a Summons and Complaint served via publication on February 10, 2018.

¶3 Defendant-Appellee, Brianna McNeeley (hereinafter "McNeeley") filed her Answer to the Complaint on April 17, 2018. On April 27, 2018, McNeeley filed a Motion for Summary Judgment (hereinafter "Motion") on grounds that Lupo's claims were barred by the applicable six-year statute of limitations. On June 4, 2018, Lupo filed her Brief in Opposition claiming that McNeeley was absent from the state of North Dakota thus the statute of limitations was tolled pursuant to N.D.C.C. § 28-01-32. McNeeley replied on June 11, 2018, arguing that N.D.C.C. § 28-01-32 does not apply in this case. A hearing on the Motion was held on August 14, 2018 before the Honorable William A. Herauf.

¶4 McNeeley's Motion was granted, and the Judgment of Dismissal with Prejudice was entered on August 21, 2018. Lupo filed her Notice of Appeal on October 16, 2018.

STATEMENT OF THE FACTS

¶5 This action arises out of an automobile accident that occurred on August 17, 2009. Lupo alleges that she was injured when McNeeley failed to stop and collided with Lupo at the intersection of 1st Street West and 3rd Avenue West in Dickinson, North Dakota. (App. at 4, ¶¶ 11-13).

¶6 Lupo filed the Summons and Complaint with the district court on August 14, 2015. However, service had not been effectuated at the time of filing. Lupo filed a Certificate of Service informing the district court that the Summons and Complaint had been sent to a process server for service on McNeeley. (Doc ID # 3.) As it appears from this Service

Document, no service of process was undertaken nor accomplished. This document does not even evidence the individual making the service of process, the manner in which service of process was effectuated, or any sworn statement therein. There is also no admission of service, receipts of certified mail delivery, sheriff's return of service, or any other Rule 4 proof of service.

¶7 A year later, on August 15, 2016, the district court filed a Notice of Intent to Dismiss the Case. (Doc ID #4.) On September 1, 2016, Lupo filed her request to allow the case to remain pending. (Doc ID #5.) The reason Lupo that requested the above-caption lawsuit remain pending was that after it was filed, Lupo was unsuccessful in effectuating service of process. *Id.* at ¶¶ 1-2. Furthermore, Lupo admitted that she failed to take immediate efforts to obtain service by publication. *Id.* at ¶ 2. Lupo assured the district court that she will obtain service of publication by September 6, 2016. *Id.* at ¶ 4. As a result, the district court granted Lupo's request. (Doc ID # 9.)

¶8 Service of publication still had not been obtained more than a year later despite Lupo's assurances. Consequently, the district court filed another Notice of Intent to Dismiss a year later on October 9, 2017. (Doc ID # 10.) Again, Lupo requested an order to allow the case to remain pending on October 27, 2017. (Doc ID # 11.) Lupo's grounds for her second request were that McNeeley was served by publication (when in fact this representation was not true) and that Lupo planned on moving for Default Judgment but wanted to gather medical records and evidence to support her motion. *Id*. at ¶¶ 1-3. The court granted Lupo's request. (Doc ID #15.) No Motion for Default Judgment was ever filed by Lupo.

¶9 On January 26, 2018, as a result of Lupo's inability to personally serve McNeeley, Lupo belatedly requested authorization to serve McNeeley by publication. (Doc Id # 18 at ¶ 5.) It is important to note that Lupo requested authorization to serve McNeeley by publication after making representations to the district court that she had already served McNeeley by publication in her second request to keep the case pending. By January 2018, no service of process was undertaken nor accomplished on McNeeley.

¶10 Additionally, on January 26, 2018, Lupo filed yet another service document admitting that on August 17 and August 21 of 2016, McNeeley was not found and thus was not served. (Doc ID #19.)

¶11 It was not until February of 2018 that Lupo filed an Affidavit of Publication and Certificate of Service with the court asserting service upon McNeeley. (Doc ID #21 and 21, respectively.) McNeeley Answered the Complaint against her on March 20, 2018 and raised the statute of limitations as an affirmative defense.

STANDARD OF REVIEW

¶12 This Court's standard of review for a district court's grant of summary judgment is well-established:

> [Summary judgment] is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Maragos v. Newfield Prod. Co., 2017 ND 191, ¶ 7, 900 N.W.2d 44 (quoting *Krenz v. XTO Energy, Inc.*, 2017 ND 19, ¶ 17, 890 N.W.2d 222). "Summary judgment is appropriate against a party who fails to establish the existence of a genuine issue of *material* fact on an essential element of a claim on which she will bear the burden of *proof* at trial." *Heng v. Rotech Med. Corp.*, 2004 ND 204, ¶ 10, 688 N.W.2d 389.

¶13 Whether a district court has properly applied state case law is a question of law. *O'Hara v. Schneider*, 2017 ND 53, ¶ 13, 890 N.W.2d 831. Whether a district court has properly applied state statutory law is a question of law. *Id.* ¶ 20. A district court's conclusions of law are fully reviewable on appeal. See, e.g., *Larson v. Midland Hosp. Supply, Inc*., 2016 ND 214, ¶ 9, 891 N.W.2d 364.

LAW AND ARGUMENT

I. The District Court Properly Held that Plaintiff-Appellant's Claims Were Barred by the Statute of Limitations.

¶14 The District Court was correct in holding that Lupo's claims were barred by the applicable six-year statute of limitations. In North Dakota, a civil action is commenced by the *service* of a summons. N.D.R. Civ. P. 3 (emphasis added). The motor vehicle accident which is the subject of this lawsuit occurred on August 17, 2009. Lupo had six years, or until August 17, 2015, within which to commence an action against McNeeley as outlined in N.D.C.C. § 28-01-16.

¶15 Lupo made several admissions to the district court regarding her inability to properly effectuate service. Furthermore, these admissions were made after the statute of limitations had lapsed.

¶16 Statutes of limitation are designed to prevent plaintiffs from sleeping on their legal rights and bringing stale claims to the detriment of defendants. *Tarnavsky v. McKenzie County Grazing Ass'n,* 2003 ND 117, ¶ 9, 665 N.W.2d 18. Furthermore, statute of limitations are a legal bar to a cause of action and begin to run when the underlying cause of action accrues. *Abel v. Allen,* 2002 ND 147, ¶ 10, 651 N.W.2d 635. The determination of when a plaintiffs cause of action has accrued is generally a question of fact, but if there is no dispute about the relevant facts, the determination is for the court. *Id.* at ¶ 11. A cause of action accrues when the right to commence the actions comes into existence and can be brought in a court of law without being dismissed for failure to state a claim. *Id.* at ¶ 12. The North Dakota Supreme Court has recognized statute of limitations ordinarily begin to run from the commission of the wrongful act giving rise to the cause of action. *See BASF Corp. v. Symington,* 512 N.W.2d 692, 695 (N.D. 1994), and "an injury usually arises contemporaneously with the wrongful act causing the injury." *Huber v. Oliver County,* 529 N.W.2d 179, 182 (N.D. 1995) (quoting *Erickson v. Scotsman, Inc.,* 456 N.W.2d 535, 537 (N.D. 1990)). *See also Tarnavsky,* 2003 ND 117, ¶9, 665 N.W.2d 18.

¶17 On appeal, Lupo makes the argument that she *filed* the Summons and Complaint on August 14, 2015, two days prior to the statute of limitations lapsing, and, thus her claims are not barred by the statute of limitations. However, the date of filing is irrelevant as North Dakota law requires service of a summons for a civil action to commence not the filing of such. N.D.R. Civ. P. 3.

¶18 The Summons in this case was not served upon McNeeley until February 2018. More than eight years passed since the time of the accident and the lawsuit being commenced. The statute of limitations constitutes an affirmative defense. Rule 8, North

Dakota Rules of Civil Procedure. McNeeley properly asserted this affirmative defense in her Answer. Since the statute of limitations against McNeeley has expired, all the claims and causes of action against McNeeley are barred.

¶19 There has to be a point where the statute of limitations for a cause of action such as this is enforced. If Lupo is allowed to continue forward with her claims, the meaning and purpose of the statute of limitations would be obsolete. The statute exists to prevent a plaintiff from sitting on a claim and allowing years to go by before a defendant receives first notice of it. Eight years passed before McNeeley was hailed into court and forced to spend time, money, and resources to defend herself.

¶20 Therefore, since Lupo failed to commence this action within the applicable statute of limitations, McNeeley was entitled to summary judgment of dismissal. *See id.; Reid v. Cuprum SA, de C.U.*, 2000 ND 108 ¶ 16, 611 N.W.2d 187, 190 (affirming dismissal on statute of limitations grounds for failure to commence action within statute of limitations due). Therefore, the district court properly dismissed Lupo's Complaint as her causes of action were barred by the applicable statute of limitations.

II. The District Court Properly Held that Defendant-Appellee was Subject to the Jurisdiction of North Dakota Courts and Thus Section 28-01-32 of the North Dakota Century Code was Inapplicable.

¶21 Lupo argues that her claims against McNeeley survive the statutory time-bar because the statute of limitations was tolled pursuant to N.D.C.C. §28-01-32. Section 28–01–32 of the North Dakota Century Code provides:

> If any person is out of this state at the time a claim for relief accrues against that person, an action on such claim for relief may be commenced in this state at any time within the term limited in this chapter for the bringing of an action on such claim for relief after the return of such person into this state. If any person departs from and resides out of this state and remains continuously absent therefrom for the space of one year or more after a

> claim for relief has accrued against that person, the time of that person's absence may not be taken as any part of the time limited for the commencement of an action on such claim for relief. The provisions of this section, however, ... do not apply if this state's courts have jurisdiction over a person during the person's absence.

N.D.C.C. § 28–01–32 (emphasis added).

¶22 Lupo asserts that because McNeeley was a Minnesota resident on August 17, 2009, she must have been absent from the state of North Dakota following the accident, thus triggering the tolling statute. However, Lupo fails to consider the 1989 amendment to N.D.C.C. § 28-01-32. While N.D.C.C. § 28-01-32 provides for the tolling of the statute of limitations if a defendant is absent from the state; however, the tolling statute was amended so that its provisions *do not apply* if the state courts in North Dakota have jurisdiction over a person during that person's absence. N.D.C.C. § 28-01-32; *see also Fuson v. Schaible,* 494 N.W.2d 593, 598 n. 10 (N.D.1992).

¶23 This Court has yet to interpret the statute in light of the 1989 amendment; however, Judge Hovland has. In *Atkinson v. Mclaughlin*, Judge Hovland addressed and rejected the very same argument being made here. 462 F. Supp. 2d 1038 (D.N.D. 2006).

¶24 In *Atkinson,* a North Dakota nonprofit corporation and its founder, Patrick Atkinson, brought a diversity action against former nonresident volunteers, James and Roberta McLaughlin, alleging defamation. *Id.* Section 29-01-18(1) of the North Dakota Century Code provides that a defamation action must be commenced within two (2) years after the claim of relief has accrued.

¶25 In *Atkinson*, after being terminated from their volunteer positions, the McLaughlin's sent various emails to donors and created a website where the McLaughlin's made statements accusing Atkinson of sexually abusing children. *Id.* at 1042-45. Atkinson

commenced his action four years after the website in question was established. *Id.* at 1046. Atkinson was unable to obtain service of process within the applicable statute of limitation as the McLaughlin's were out of the country for a considerable length of time. *Id.* at 1048-49. The McLaughlin's filed a motion to dismiss for lack of personal jurisdiction. *Id.* at 1046. The court denied the McLaughlin's motion and held that the exercise of personal jurisdiction over the McLaughlin's was proper. *Id.*

¶26 The McLaughlin's then filed a motion for summary judgment asserting that the two-year statute of limitations barred Atkinson's defamation claim. *Id.* Atkinson argued, as Lupo does here, that the statute of limitations was tolled under 28-01-32 because the McLaughlin's were out of the country. *Id.* at 1049. To support Atkinson's argument, he cited to several states tolling statutes. However, the statutes he relied on did not contain an exception to the tolling provision when the state courts have jurisdiction over the person. Furthermore, the court stated that Atkinson overlooked his ability to obtain service of process by publication if personal service could not have been made after diligent attempt was undertaken to locate the McLaughlin's. The court found that "the ability to serve by publication eliminates the need to locate a nonresident who may be difficult or impossible to find. Section 28-01-32 clearly provides that the statute of limitation is not tolled when the North Dakota 'courts have jurisdiction over a person during that person's absence.' Service in this case could have easily been achieved by publication." *Id.* at 1049-50. Accordingly, the court held that the statute of limitations as to Atkinson's defamation claims was not tolled by the McLaughlin's absence from North Dakota.

¶27 Judge Hovland acknowledged that prior to the 1989 revision, this Court held that "the availability of long-arm service of process did not supersede the tolling of the statute

of limitations during a defendant's absence from the state." *Loken v. Magrum,* 380 N.W.2d 336, 341 (N.D.1986) (citing *Walsvik v. Brandel,* 298 N.W.2d 375, 376–377 (N.D.1980)). In *Loken,* this Court reasoned that, if the tolling statute should be changed to reflect the expansive long-arm service of process provisions, it was for the Legislative Assembly of North Dakota to change and not the court, and at that time the Legislature had not expressly provided an exception to the tolling of the statute of limitations.

¶28 In 1989, the Legislature amended the statute to create an exception to the tolling provision when the "state's courts have jurisdiction over a person during the person's absence." N.D.C.C. 28–01–32. Acknowledging that this Court has yet to interpret the statute in light of the 1989 amendment, Judge Hovland stated that this Court has suggested that the amendment was in response to *Walsvik v. Brandel,* and *Loken v. Magrum. See Muller v. Custom Distributors, Inc.,* 487 N.W.2d 1, 3 n. 4 (N.D.1992); *Fuson v. Schaible,* 494 N.W.2d 593, 598 n. 10 (N.D.1992).

¶29 Therefore, Judge Hovland held that on its face, and in the absence of any direction from this Court, Section 28–01–32 clearly provides that a statute of limitations *is not tolled* with the absence of a party from the state if the state courts have jurisdiction over the absent party. (emphasis added).

¶30 The district court has personal jurisdiction over nonresident Defendant McNeeley by virtue of the motor vehicle accident occurring in the state of North Dakota. As such, § 28-01-32 does not apply and the applicable statute of limitations has not been tolled. Since the statute of limitations against McNeeley has expired, all the claims and causes of action against McNeeley are barred.

¶31 Finally, Lupo argues that a question of fact exists as to whether McNeeley was absent from the state of North Dakota following the accident. McNeeley's absence was never an issue in dispute. Moreover, that issue is moot. If McNeeley was not absent from the state of North Dakota, Lupo's claims are barred by the applicable statute of limitations because McNeeley was not served with the Summons until eight years later in February of 2018. Alternatively, if McNeeley was absent from the state of North Dakota following the accident, North Dakota Courts retained personal jurisdiction over McNeeley by virtue of the accident occurring in this state. Thus, the tolling statute does not apply to this case and Lupo's claims are time barred. Because no genuine issues of material fact exist, McNeeley was entitled to judgment as a matter of law.

CONCLUSION

¶32 For all the foregoing reasons, the Appellees respectfully request that this Court affirm the District Court's Order on Summary Judgment.

Dated this 9th day of January, 2019.

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CERTIFICATE OF ELECTRONIC SERVICE

I certify that on the 9th day of January, 2019, I served the Brief of Appellee via electronic mail upon the following:

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