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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2010

1081276

Jennifer Precise, as administrator ad litem of the estate of Khamora Witherspoon, deceased, and Mioka Witherspoon, as mother and next friend of Khamora Witherspoon, deceased

v.

Harvey Edwards, M.D., et al.

Appeal from Tuscaloosa Circuit Court
(CV-08-900523)

SHAW, JUSTICE.

Jennifer Precise, administrator ad litem of the estate of Khamora Witherspoon, and Mioka Witherspoon, as mother and next friend of Khamora Witherspoon, the plaintiffs below, appeal

from a summary judgment in favor of Harvey Edwards, M.D.; Thomas Rosenstiel, M.D.; Steve Allen, M.D.; Obstetrics and Gynecology of West Alabama, P.C.; Julie Vaughn, M.D.; Tuscaloosa Pediatrics, P.C.; DCH Health System; Beth Boothe, R.N.; and Shawna Garcia, R.N., the named defendants, as to the plaintiffs' wrongful-death claim alleging medical malpractice. We affirm.

Facts and Procedural History

Khamora Witherspoon, the infant decedent, was born on September 7, 2006, and died on September 20, 2006. Almost two years later, on September 7, 2008, the plaintiffs filed the underlying wrongful-death action in the Tuscaloosa Circuit Court, alleging that Khamora died as the result of the combined negligence of the named defendants. At the time of filing, the plaintiffs indicated that they were opting to conduct service by a process server. See Rule 4(i)(1), Ala. R. Civ. P. Specifically, the final page of the plaintiffs' complaint stated that each named defendant was to be served by a process server and listed the respective addresses of the named defendants.

It is undisputed that all the named defendants were served by process server on January 16, 2009, over four months after the complaint was filed, at the addresses listed on both the complaint itself and on the individual summonses generated at the time the complaint was filed.[1] Almost immediately following service, the defendants separately filed motions to dismiss the complaint or, in the alternative, for a summary judgment on grounds including, but not limited to, the fact that the action was barred by the applicable statute of limitations. See Johnson v. Brookwood Med. Ctr., 946 So. 2d 849, 853 (Ala. 2006) ("It is well established that the two-year limitations period found in § 6-5-410, Ala. Code 1975, for asserting wrongful-death actions (and not § 6-5-482, Ala. Code 1975, the medical-malpractice limitations period) applies to wrongful-death cases alleging medical malpractice."). Specifically, the defendants contended that, despite the fact that the plaintiffs filed their complaint before the expiration of the applicable statute of limitations, the plaintiffs, because they lacked the requisite

[1]The record reflects that there were no unsuccessful service attempts on any of the named defendants between the date the complaint was filed and January 16, 2009.

intent to serve the defendants, in effect, failed to "commence" this action before the statute of limitations expired on September 20, 2008. In support of their motion, the defendants relied on the summonses.

The plaintiffs filed a response in opposition to the defendants' motions in which they attempted to distinguish the cases cited in the motions. The plaintiffs further asserted that the acknowledged delay in service, in and of itself, was insufficient to support the entry of a summary judgment for the defendants. However, the plaintiffs offered no evidence in support of their opposition, nor did they actually explain the 131-day delay in service. Instead, they merely attempted to distinguish the authorities cited by the defendants.

Following a hearing, the trial court granted all pending summary-judgment motions based on the defendants' statute-of-limitations arguments. Specifically, the trial court held that the record indicated a lack of the required bona fide intent by the plaintiffs to have the defendants immediately served.

The plaintiffs subsequently filed a motion to alter, amend, or vacate the trial court's order in which they

contended that the trial court failed, pursuant to Rule 4(b), Ala. R. Civ. P., to give the plaintiffs 14 days' notice to allow them to provide good cause for the delay in service before entering the summary judgment. In support of their postjudgment motion, the plaintiffs submitted two affidavits attempting to demonstrate good cause for the delay. The trial court, following a hearing, struck the submitted affidavits as untimely evidentiary material filed in opposition to the defendants' summary-judgment motions. In that same order, the trial court denied the plaintiffs' postjudgment motion. The plaintiffs appealed.

Standard of Review

> "'"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no

> genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."'
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> "Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004))."

Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

Discussion

The filing of a complaint commences an action for purposes of the Alabama Rules of Civil Procedure but does not "commence" an action for purposes of satisfying the statute of limitations. Pettibone Crane Co. v. Foster, 485 So. 2d 712 (Ala. 1986). See also Dunnam v. Ovbiagele, 814 So. 2d 232 (Ala. 2001); Maxwell v. Spring Hill Coll., 628 So. 2d 335, 336 (Ala. 1993) ("'This Court has held that the filing of a complaint, standing alone, does not commence an action for statute of limitations purposes.'" (quoting Latham v. Phillips, 590 So. 2d 217, 218 (Ala. 1991))). For statute-of-

limitations purposes, the complaint must be filed and there must also exist "a bona fide intent to have it immediately served." Dunnam, 814 So. 2d at 237-38.

The trial court's summary-judgment order contained the following findings:

> "The court in Dunnam [v. Ovbiagele, 814 So. 2d 232 (Ala. 2001),] noted that what is required to 'commence' an action under Rule 3[, Ala. R. Civ. P.,] for statute of limitations purposes is 'both the filing of a complaint and a bona fide intent to have it immediately served.' Dunnam, 814 So. 2d at [237-38]. The court further noted that the question of whether such a bona fide intent existed at the filing of the complaint is to be determined by an objective standard. Id. at 238. Applying that standard to Dr. Marco [one of the defendants] (whose address was known to the plaintiff), the court stated:
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> > "'[W]hen the complaint was filed on January 2, 2000, Dunnam had an address at which Dr. Marco could be served, and Dr. Marco was in fact served at that address on May 5, 2000. We are provided with no explanation, beyond an explanation of misunderstanding and oversight on the part of one of the assistants, as to why Dunnam did not attempt to effect service at that address on January 2, 2000. We conclude that Dunnam's failure in this regard, viewed objectively, evidences a lack of the required bona fide intent to have Dr. Marco immediately served.'
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> "Id. at 238-9.

"This Court finds that the same situation exists here. The Plaintiff[s] had the addresses of the various Defendants, had the summonses to be sent with a copy of the complaint, and actually served the Defendants at those addresses 131 days after filing the complaint. Although the Plaintiff[s] provided the addresses to the clerk here at the time of filing -- which was not done in Dunnam -- that is a distinction without a difference since the Plaintiff[s], here, assumed the burden of service by process server. In Dunnam and here, something more was required by the Plaintiff[s] after the filing of the complaint. In Dunnam, addresses had to be provided to the clerk to facilitate service. Here, a process server had to be secured to actually ... serve the summons and complaint. The fact that so much time passed before that 'something more' was done evidences a lack of intent to immediately serve at filing. In the view of this Court, holding on to the clerk-issued summonses for 131 days before serving them (as here) is tantamount to withholding from the clerk a known address for 114 days (as in Dunnam).

"Because the Plaintiff[s] assumed the responsibility of serving the summons and complaint by process server, this case is different than Ex parte East Alabama Mental Health[-Mental Retardation Bd., Inc., 939 So. 2d 1 (Ala. 2006)]. In that case, the plaintiff's request for certified mail placed the burden of service on the clerk under Rule 4(i)(2)(B), Ala. R. Civ. P, as was noted by the court. Nothing more was required under the rule. Indeed, the court concluded that because the plaintiff requested certified mail service, the plaintiff 'did all that was required by the Rules of Alabama Civil Procedure to facilitate service[,]' Ex parte East Alabama Mental Health, 939 So. 2d at 5, when he provided addresses of the defendants. That is a different situation than here. Had [these] Plaintiff[s] requested service by certified mail or personal service by sheriff, the outcome here would

> be different. Instead, because no service was made, or apparently attempted, for 131 days, this Court concludes that, viewed objectively, the record indicates a lack of the required bona fide intent to have the Defendants immediately served.
>
> "Accordingly, the summary judgment motions of all Defendants are granted and this action is dismissed."

(Emphasis original.)

On appeal, the plaintiffs contend that the facts of this case are more analogous to Ex parte East Alabama Mental Health-Mental Retardation Board, Inc., 939 So. 2d 1 (Ala. 2006), which they maintain requires a reversal of the trial court's judgment in this case and that Dunnam, upon which the trial court relied, is distinguishable. We disagree.

As noted by the trial court, in Dunnam, the plaintiff, Dunnam, filed an action against three defendants. Dunnam possessed the address of one of the defendants, Dr. Marco, but did not have reliable addresses for the other two defendants. When the plaintiff ultimately supplied the circuit clerk with the addresses for the defendants -- some 114 days after the complaint was filed -- the circuit clerk mailed the complaint and summonses to all three defendants. Although this Court held that it was unclear whether the plaintiff had an intent

to serve the two defendants whose addresses were unknown, we specifically held that there was no intent to serve Dr. Marco:

> "However, when the complaint was filed on January 2, 2000, Dunnam had an address at which Dr. Marco could be served, and Dr. Marco was in fact served at that address on May 5, 2000. We are provided with no explanation, beyond an explanation of misunderstanding and oversight on the part of one of the assistants, as to why Dunnam did not attempt to effect service at that address on January 2, 2000. We conclude that Dunnam's failure in this regard, viewed objectively, evidences a lack of the required bona fide intent to have Dr. Marco immediately served."

Dunnam, 814 So. 2d at 238-39. Even though the complaint was served on Dr. Marco within the time for service stated in Rule 4(b), Ala. R. Civ. P., the unexplained delay nevertheless evidenced a lack of intent to commence the action at the time it was filed.

East Alabama Mental Health also involved service by certified mail. The plaintiff there, unlike the plaintiff in Dunnam, provided the proper addresses to the clerk for service by mail. The plaintiff went through the necessary steps of providing the clerk with the "summonses for service upon the defendants" and with the "necessary documents or information" for service of process. 939 So. 2d at 2, 5. However, the particular practice of the clerk's office of the Lee Circuit

Court was to provide certified-mail cards for counsel to mail the summonses and complaints. Rule 4(i)(2), Ala. R. Civ. P., actually provided that the clerk would "mail the summonses and complaints," and not the plaintiff, who in that case had "d[one] all that was required by the Rules of Alabama Civil Procedure to facilitate service." 939 So. 2d at 5. Nevertheless, the circuit clerk's procedure had "apparently shifted the responsibility for mailing the summonses and complaints" to the plaintiff. 939 So. 2d at 5.[2] The plaintiff ultimately delayed two and one-half months before mailing the complaints, and the defendants sought a writ of mandamus directing that the case be dismissed. We held that, under the more rigid mandamus standard of review, although the plaintiff's tardiness "may" be evidence of a lack of intent, because the plaintiff, under the facts of that case, made all the various efforts required by the rule to effectuate service by certified mail short of performing the clerk's duty to

[2]Rule 4(i)(2)(B), as it existed in 2004, stated that "[t]he clerk shall ... place the sealed envelope in the United States mail...." Subsequent amendments to the rule in 2008 added the procedure now found in Rule 4(i)(2)(B)(ii), which allows counsel to mail the summonses for the clerk.

place the summonses in the mail, the defendants had not established a clear legal right to relief.

Both Dunnam and East Alabama Mental Health indicate that a delay in serving the defendant can show the lack of intent to have the defendant served. East Alabama Mental Health, 939 So. 2d at 5 (noting that the plaintiff's delay "may be some evidence indicating that, at the time he filed the complaint, he lacked the intention to immediately serve the summons and complaint"); Dunnam, 814 So. 2d at 239 (holding that the plaintiff's failure to "attempt to effect service at [the defendant's] address" at the time the complaint was filed, "viewed objectively, evidence[d] a lack of the required bona fide intent to have [the defendant] immediately served"). The distinction between the two, besides the difference in the standards of review, is found in the fact that in East Alabama Mental Health the plaintiff performed all the tasks required by rule to effectuate service and was tardy only in performing one of the tasks that by law was placed on the circuit clerk: placing the summonses in the mail. On the other hand, in Dunnam, the plaintiff did less than what was required to provide service of process and was tardy in performing his own

duty: actually providing the clerk with Dr. Marco's address for mailing the summons. These two cases are not inconsistent, and the following rule can be drawn from the reasoning in both: "a bona fide intent to have [an action] immediately served" can be found when the plaintiff, at the time of filing, performs all the tasks required to serve process. This was the situation in East Alabama Mental Health. On the other hand, when the plaintiff, at the time of filing, does not perform all the tasks required to effectuate service and delays a part of the process, a lack of the required bona fide intent to serve the defendant is evidenced.

The instant case involves service by process server, not by certified mail.[3] The plaintiffs elected this procedure and undertook the duty to obtain a process server. At the time of filing, and for over four months thereafter, the plaintiffs failed to do so. Like the plaintiff in Dunnam, the plaintiffs here were tardy in performing the steps required of them to effectuate service. This unexplained failure to perform tasks

[3]Because this case involves service by process server, the fact that the plaintiffs knew and disclosed the defendants' addresses to the circuit clerk is irrelevant -- the circuit clerk was not charged with a responsibility to act on those addresses.

required to effectuate service at the time of filing, "viewed objectively, evidences a lack of the required bona fide intent to have [the defendants] immediately served." 814 So. 2d at 239. This lack of intent was unrebutted in the trial court.

Additionally, the plaintiffs make numerous arguments regarding whether they were entitled to an extension of time to serve their complaint under Rule 4(b), Ala. R. Civ. P. However, the summary judgment is premised on the plaintiffs' failure to commence the action for statute-of-limitations purposes; Rule 4(b) is immaterial to this analysis. The plaintiffs' arguments that the trial court erred with respect to this issue are without merit.

Conclusion

The plaintiffs have not demonstrated that the trial court erred in entering a summary judgment in favor of the defendants; therefore, the judgment of the trial court is affirmed.

AFFIRMED.

Lyons, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

Murdock, J., concurs in the result.

Cobb, C.J., dissents.

COBB, Chief Justice (dissenting).

By affirming the trial court's summary judgment and thereby approving the trial court's reliance on Dunnam v. Ovbiagele, 814 So. 2d 232 (Ala. 2001), the main opinion has altered the longstanding rule that, to "commence" an action within the applicable statutory limitations period, a plaintiff must have a "bona fide intent to have the complaint immediately served," 814 So. 2d at 238, and this intent must be present at the time the action is commenced, i.e., at the time the complaint is filed. See Ex parte East Alabama Mental Health-Mental Retardation Bd., Inc., 939 So. 2d 1, 4-5 (Ala. 2006) (holding that the defendants were not entitled to a writ of mandamus directing the entry of a summary judgment when the materials submitted to this Court contained evidence indicating that, at the time the complaint was filed, the plaintiff intended to serve the complaint); Dunnam, 814 So. 2d at 237-39 (determining whether the evidence demonstrated that "at the time of filing the complaint" the plaintiff intended to serve various defendants). Cf. Rule 3, Ala. R. Civ. P. ("[A] civil action is commenced by filing a complaint with the court."); Ward v. Saben Appliance Co., 391 So. 2d 1030, 1035

(Ala. 1980) ("We hold that in the present case the action was not 'commenced' when it was filed with the circuit clerk because it was not filed with the bona fide intention of having it immediately served." (emphasis added)). Therefore, I respectfully dissent.

In Dunnam, the plaintiff sued three medical doctors: Dr. Luis Marco, Dr. Ayasha Meloukhia, and Dr. Fortunate Ovbiagele. This Court held:

> "[W]hen the complaint was filed on January 2, 2000, [the plaintiff] had an address at which Dr. Marco could be served, and Dr. Marco was in fact served at that address on May 5, 2000. We are provided with no explanation, beyond an explanation of misunderstanding and oversight ..., as to why [the plaintiff] did not attempt to effect service at that address on January 2, 2000. We conclude that [the plaintiff's] failure in this regard, viewed objectively, evidences a lack of the required bona fide intent to have Dr. Marco immediately served."

814 So. 2d at 238-39.

However, in Dunnam, the delay in serving the two other defendants, Dr. Meloukhia and Dr. Ovbiagele, was exactly the same length as the delay in serving Dr. Marco. The court clerk testified that, "at the time of filing," 814 So. 2d 238, plaintiff's counsel stated that he did not know the address of Dr. Meloukhia or Dr. Ovbiagele, but that he would find and

supply those address "for service on the defendants." Therefore, as to Dr. Meloukhia and Dr. Ovbiagele, this Court held:

> "[U]nder the circumstances of this case we cannot conclude that, as a matter of law, at the time of filing [the plaintiff] lacked that requisite intent. There is a genuine issue of material fact concerning [the plaintiff's] intent to effect service of process on Dr. Meloukhia and Dr. Ovbiagele, and the resolution of the limitations issue as to them is not appropriate on a summary-judgment motion."

814 So.2d at 238.

Thus, in Dunnam, the only difference between affirming and reversing the summary judgment was whether, at the time of filing, the plaintiff evidenced a bona fide intent to immediately serve the defendants.

The operative facts in the present case are comparable to those pertaining to Dr. Meloukhia and Dr. Ovbiagele in Dunnam, and unlike those pertaining to Dr. Marco. At the time Precise filed her complaint, she provided the clerk's office with everything necessary for immediate service on all defendants. At the time of filing, everything Precise did was consistent with an intent to serve the defendants immediately. At the time of filing, Precise indicated that she intended to perfect service through a process server. Cf. Dunham, 814 So. 2d at

238-39 (holding that an issue of fact precluded a summary judgment on statute-of-limitations grounds when, at the time of filing the complaint, the plaintiff indicated the intent to obtain service on two defendants, but failed to perfect service on those defendants until nearly six months after the complaint was filed). However, Precise did not obtain service until 129 days after she filed the complaint.[4] Given Precise's acts and stated intent at the time of filing, an issue of fact exists as to whether, at the time she filed the complaint, she intended to obtain timely service.

The operative facts in this case are also similar to those in Ex parte East Alabama Mental Health-Mental Retardation Board, Inc., supra.[5] In East Alabama, the

[4]Absent a showing of good cause for the delay, Rule 4(b), Ala. R. Civ. P., requires service on a defendant within 120 days of the filing of the complaint.

[5]The main opinion attempts to distinguish East Alabama on the ground that that case turned on the "more rigid mandamus standard of review," which requires that a petitioner establish a "clear" legal right to relief. __ So. 3d at __ . I am unpersuaded by this distinction. The petitioner in East Alabama sought relief from the denial of a motion for a summary judgment. Summary judgment "shall be rendered forthwith" when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. In reviewing a summary judgment, this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against

plaintiff provided the clerk's office with all the information necessary for immediate service. One additional step was required of the plaintiff to effectuate immediate service: the plaintiff had to place the summonses and complaints in the mail in a timely manner. When the complaints were not served for two and a half months, the defendants moved for a summary judgment, arguing that the delay following the filing of the complaint indicated the plaintiff's lack of intent to serve process at the time of filing the complaint. The trial court rejected that argument, and the defendants petitioned this Court for mandamus review. This Court held that the record contained "evidence suggest[ing] that [the plaintiff] intended to serve process upon the defendants when he filed the complaint; he did all that was required by the Rules of Alabama Civil Procedure to facilitate service, short of placing the summonses and complaints in the mail." 939 So. 2d at 5. The Court further noted that, although a delay, like

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the movant. Dunnam v. Ovbiagele, 814 So. 2d at 236. Therefore, unless the law is unsettled, being entitled to a summary judgment is no different from being "clearly" entitled to a summary judgment. The law is not unsettled in this case, and it was not unsettled in East Alabama. Practically speaking, the standard of review is the same in both cases.

the delay here in dispatching the special process server, "may be some evidence indicating that, at the time [the plaintiff] filed the complaint, he lacked the intention to immediately serve the summons and complaint," East Alabama, 939 So. 2d at 5 (emphasis added), such evidence would have at most created an issue of fact.[6] Thus, the existence of the delay, in and of itself, did not entitle the defendants to a writ of mandamus directing the trial court to enter a summary judgment.

Similarly, when she filed the complaint, Precise did everything required of her by the Alabama Rules of Civil Procedure, and she indicated that she intended to perfect service via process server. All that was required of her

[6]While recognizing the possibility that the delay could give rise to an inference of an intent to delay service, this Court held that the "record [was] devoid of any indication that at the time that [the plaintiff] filed his complaint he did not intend to serve process upon" the defendants. 939 So. 2d at 4, and that the evidence "suggest[ed]" an intent to serve process on the defendants when the plaintiff filed the complaint. 939 So. 2d at 5. Thus, East Alabama contains conflicting statements as to whether the record was "devoid" of evidence of an intent to delay service or whether it contained conflicting evidence on that point. Either way, however, the defendants had not demonstrated that they were entitled to a summary judgment. See Rule 56(c)(3), Ala. R. Civ. P. (summary judgment is appropriate when there exists "no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law").

after that point was to supply the summonses and complaints to a process server and to see that service was perfected. Thus, as in East Alabama, the record in this case gives rise to competing factual inferences regarding whether, at the time of filing, Precise had an intent to perfect service in a timely manner. Summary judgment was therefore not appropriate. See Dunnam, supra; East Alabama, supra. Accordingly, I respectfully dissent.