

Court, either on June 20, 2003, or later. (See Ehle’s Mem. in Opp’n, Ex. A.)

Over four months later, the District Judge issued an order to Plaintiff’s counsel advising him that he had two weeks to show cause why the case should not be dismissed for want of prosecution.¹ (*Id.*) No showing on the record was made within that span of time, but apparently in response, counsel for the Plaintiffs sent a copy of the complaint to Ehle by ordinary mail. This action prompted the entry of an appearance for Ehle about a month later, along with a motion to dismiss for, *inter alia*, lack of personal jurisdiction. (*Id.*) On February 3, 2004, the case was transferred to this Court. (*Id.*)

Following transfer, Ehle’s counsel filed a motion for summary judgment, asserting that the case was time-barred by the two-year statute of limitations, given the Indiana Supreme Court’s view of what constitutes the commencement of a civil action under Indiana Trial Rule 3. See *Ray-Hayes v. Heinmann*, 760 N.E.2d 172, 173 (Ind. 2002). In short, a civil action is not timely commenced if the plaintiff files a complaint within the applicable statute of limitations, but fails to tender the summons to the clerk within that statutory time period. *Id.* Thus, as Ehle sees it, because the summons was not submitted to the Clerk with the Plaintiff’s last-minute complaint, the case was not timely commenced as a matter of law and is now barred by the statute of limitations. Ind. Code § 34-11-2-4(1).

At a scheduling conference held on April 13, 2004, counsel for the Plaintiffs requested additional time to respond to the motion for summary judgment, and the Court granted him an extension until June 14, 2004. This was followed by a “Suggestion of Death” filed by Ehle’s counsel on April 16, 2004, informing the Court that Ehle died on January 20, 2004.

¹Plaintiffs’ counsel then is not the same attorney representing them now.

In any event, instead of filing a response to the pending motion for summary judgment by June 14, 2004, counsel for the Plaintiffs filed a motion on June 18, 2004, seeking an extension of time to respond to the motion for summary judgment so discovery can be conducted, as contemplated in Fed. R. Civ. P. 56(f). Plaintiff's counsel says that after receiving the Suggestion of Death, he looked into "Ehle's demise" and learned that at the time of her death she was 87 years old, had periodically been confined to a nursing home, and had been served by ordinary mail with a copy of the complaint and a request for waiver of service in November 2003. (*See* Pl.'s Mem. in Supp. of Mot. for Extension of Time at 1.) These assertions are purportedly supported by the affidavits of the Plaintiffs. (*See* Aff. of Beatrice Rummell; Aff. of Vicki Congrove.)² From this factual premise, Plaintiffs' counsel concludes that Ehle may have been incompetent to either accept service or waive formal service of summons, thereby excusing the Plaintiffs from serving her at all under Indiana Trial Rule 4.2(B). *See Gourley v. L.Y.*, 657 N.E.2d 448, 450 n.2 (Ind. Ct. App. 1996)("we can infer that the drafters of T.R. 4.2 considered infants capable of accepting service on their own behalf if circumstances warrant, while incompetents are not").

Plaintiffs' counsel therefore contends that extensive discovery is necessary to determine if Ehle was truly incompetent "during the time periods relevant to this issue." (Mem. in Supp. at 4.) This request is ambiguous, however, because he does not say what he thinks is the relevant time period, although there could only be two: June 20, 2003, when the Plaintiffs filed their complaint, or sometime later, after the statute of limitations ran. However, it does not seem it

²The Plaintiffs in their affidavits do not say how they know that a waiver of service form actually accompanied the complaint and Ehle's son, the person who apparently received the complaint after it was mailed in November 2003, disputes that one was included. (*See* Aff. of Roger Ehle ¶ 4.) Nevertheless, this dispute is ultimately immaterial, as explained *infra*.

could be the former, because the Plaintiffs never even attempted to serve her at the time they filed their complaint.

Moreover, Plaintiffs misapprehend Indiana Trial Rule 4.2(B), as it does not completely dispense with service upon incompetent persons. Rather, the thrust of footnote 2 in *Gourley* is that Rule 4.2(B) does not permit service on the incompetent person *alone*, unlike minors, who can be served that way as a last resort. *Gourley*, 657 N.E. 2d at 450, n.2. In other words, the law presumes that a minor by herself is sometimes “capable of accepting service on [her]own behalf,” but an incompetent person alone is not. *Id.* Thus, in the case of an incompetent defendant, service must at least be effectuated on him, as well as the person “standing in the position of custodian of his person.” Rule 4.2(B). Accordingly, absent a waiver, some summons had to issue to Ehle.

Therefore, the discovery the Plaintiffs wish to pursue must necessarily concern the latter period, around November 2003, when they purportedly requested that Ehle waive service of summons. It is this latter point that Ehle squarely confronts in her opposition brief.³ She argues that any discovery about her alleged incompetence in November 2003, *after* the statute of limitations ran, is immaterial, because the focus of the motion for summary judgment is on the Plaintiffs’ failure to provide the Clerk with a summons *before* the expiration of the statute of limitations. (*See* Mem. in Opp’n at 2-3.)

This brings us back to *Ray-Hayes*, 760 N.E. 2d at 173, and the proposition that a civil action commences in the state of Indiana only when a complaint and summons are furnished to the Clerk “as are necessary.” As noted *supra*, if Ehle was competent at the time of the filing of

³The Plaintiffs have not submitted a reply and the time for doing so has passed.

the complaint, the issuance of a summons upon her was required, Indiana Trial Rule 4.1(A), and if she was incompetent, two summons were necessary, one for service upon her, “and also... the custodian of [her] person,” Indiana Trial Rule 4.2(B). Since it seems indisputable that no such summons issued, there are really only two questions left for resolution: did this case commence with the filing of the complaint on June 20, 2003, and if not, did the filing of the complaint at least toll the statute of limitations? Whether Ehle was incompetent on June 20, 2003, or at any later point is irrelevant to either question, and relevance is a *sine qua non* of Fed. R. Civ. P. 56(f). See, e.g., *Neal v. Dana Corp.*, No. 1:01-CV-393, 2002 WL 32144315, at *2 (N.D. Ind. June 5, 2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); *Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996)).

A rather fine point remains, although any elaboration of it is better left for future briefing. Until now, counsel have merely assumed that Indiana law applies, and in a diversity case, state law determines when an action "commences" for purposes of a state statute of limitations. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980) (holding that state rule prescribing when an action "commences" for purposes of state statute of limitations applies in diversity case rather than Federal Rule 3). *Walker's* holding has been applied by the Sixth Circuit, affirming the district court's grant of summary judgment, in a case factually similar to the one before us now, *Eades v. Clark Distrib. Co.*, 70 F.3d 441 (6th Cir. 1995) (holding that Kentucky law, not the Federal Rules of Civil Procedure, establishes when an action is deemed to have commenced in a personal injury diversity action), and similarly applied by the Seventh Circuit to state law claims asserted under the Court's supplemental jurisdiction, *Sentry Corp. v. Harris*, 802 F.2d 229, 246 (7th Cir. 1986). Nevertheless, if the Plaintiffs contend that some special nuance applies

here to those rulings, they should advance those arguments in their response brief.

III. CONCLUSION

For the reasons provided, the Plaintiffs' motion for an extension of time to conduct discovery under Fed. R. Civ. P. 56(f) is hereby DENIED. However, Plaintiffs are hereby granted to and including August 30, 2004, to file a response brief to the pending motion for summary judgment. The filing of Ehle's reply brief will be governed by Local Rule 7.1(a).

Enter for August 13, 2004.

S/Roger B. Cosby
Roger B. Cosby,
United States Magistrate Judge