

[Cite as *Forsythe v. Conatser*, 2004-Ohio-2606.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

WILLIAM A. FORSYTHE	:	
	:	C.A. CASE NO. 19989
Plaintiff-Appellant	:	
v.	:	T.C. NO. 2002 CV 07204
	:	
KENNETH E. CONATSER	:	(Civil Appeal from Common Pleas Court)
	:	Defendant-Appellee

OPINION

Rendered on the 21st day of May, 2004.

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WOLFF, J.

{¶1} William A. Forsythe appeals from a judgment of the Montgomery County Court of Common Pleas, which granted summary judgment in favor of Kenneth A. Conatser.

{¶2} In October 2002, Forsythe filed a complaint alleging that Conatser had

negligently or intentionally struck him with his pickup truck on August 4, 2001, causing serious injuries.¹ On January 22, 2003, the trial court referred the case to arbitration pursuant to Local Rule 2.35 of the Montgomery County Court of Common Pleas, General Division ("Loc.R. 2.35"). On March 3, 2003, while the matter was pending for arbitration, Conatser moved for summary judgment on the ground that the applicable limitations period had passed. Specifically, Conatser claimed that Forsythe's complaint essentially alleged an assault and battery, which has a one year statute of limitations pursuant to R.C. 2305.111, and that Forsythe's complaint was therefore untimely. On May 9, 2003, the arbitration hearing was conducted, and the arbitrators found in favor of Conatser. The arbitrators filed their decision on May 13, 2003. On May 29, 2003, the trial court granted Conatser's motion for summary judgment. Subsequently, on June 17, 2003, the trial court journalized the arbitrators' award because no appeal had been filed within thirty days of the arbitrators' decision, as required by Loc.R. 2.35(XI)(A).

{¶3} On June 30, 2003, Forsythe appealed from the trial court's decision to grant summary judgment to Conatser. He also filed a motion to vacate the trial court's judgment journalizing the arbitrators' award on the basis of the pending appeal of the summary judgment. According to the record before us, the trial court did not rule on the motion to vacate.

{¶4} Forsythe raises one assignment of error on appeal from the trial court's decision granting summary judgment in favor of Conatser.

{¶5} "THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE WHEN IT

¹ Forsythe's complaint also alleged recklessness, but he appears to have abandoned this argument in his subsequent filings.

ENTERED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT WHEN ISSUES OF MATERIAL FACT REMAINED UNRESOLVED.”

{¶6} Conatser’s motion for summary judgment alleged that Forsythe’s cause of action sounded in intentional tort, or assault and battery, even though his complaint also made reference to negligence and recklessness. The statute of limitations for an intentional tort is one year, whereas the statute of limitations for negligence is two years. R.C. 2305.111; R.C. 2305.10. Forsythe filed his complaint more than one year, but less than two years, after the incident. The trial court did not set forth its reasons for granting the motion for summary judgment, but we presume that it was persuaded by Conatser’s argument that the true nature of the complaint was in intentional tort, which has a one-year limitations period.

{¶7} As a preliminary matter, we will address Conatser’s argument that Forsythe’s failure to appeal the arbitration award in the trial court “waived any right to claim error in the Trial Court’s grant of summary judgment.” Pursuant to Loc.R. 2.35(XI)(A), Forsythe had thirty days from the filing of the arbitrators’ decision to file an appeal. The trial court granted summary judgment on statute of limitations grounds before the appeal period had run.

{¶8} Because the trial court ruled on the motion for summary judgment before the period for filing an appeal from the arbitrators’ award had expired, we cannot conclude that Forsythe waived all of the issues that he might have raised had he filed such an appeal. The trial court’s conclusion that the statute of limitations had expired would presumably have been fatal to any other issues that Forsythe might have raised. As such, he cannot be faulted for failing to pursue other relief in the trial court after the

summary judgment was entered. He properly appealed the trial court's award of summary judgment to this court. We now turn to whether the trial court properly concluded that the statute of limitations had run on Forsythe's cause of action.

{¶9} In support of his motion for summary judgment, Conatser points to the police reports filed on the day of the injury. According to those reports, Forsythe told the police that the parties had been involved in an altercation about a VCR. As Forsythe approached Conatser's pick-up truck, Conatser "swung his door open banging [Forsythe] in his left knee area." Conatser then swerved his truck toward Forsythe, "hitting him with his truck, knocking him on his butt, and running over his left foot, causing tire prints on his gym shoe in the toe area." Later, in his deposition, Forsythe provided a similar account, but with more detail. He claimed that Conatser's hair had been messy and that he had had "that kind of look, evilness," like Jack Nicholson in *The Shining*. He also testified that Conatser had apparently been somewhat confused about what gear his truck had been in—drive or reverse—as he prepared to speed off. At the deposition, Forsythe could not recall whether Conatser had swung the truck door open, but he did emphasize that he had feared for his life during the altercation with Conatser.

{¶10} Conatser contends that the essential character of Forsythe's claim was for the intentional, offensive touching of assault and battery, even though he has also pled the case as one sounding in negligence. As noted by Conatser, the supreme court has held that, where the essential character of an alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery governs even if the touching is pled as an act of negligence. *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99, 454 N.E.2d 199. "In determining which limitation period will apply, courts must look to the

actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial.” Id.

{¶11} Conatser claims that, under the facts of this case, a reasonable jury could only conclude that an intentional act had been alleged and that, therefore, the one year statute of limitations set forth at R.C. 2305.111 controls. We disagree. Although Forsythe did allege an intentional tort in his complaint, he also alleged a cause of action in negligence. We recognize that, in some cases, acts occur which could only be construed as intentional acts involving offensive contact, but which are pled as negligence in an attempt to avoid the shorter statute of limitations for intentional torts. See, e.g., *Love*, 37 Ohio St.3d at 99 (handcuffing a suspect is “plainly intentional; one cannot accidentally handcuff or subdue another”); *Manin v. Diloreti* (1994), 94 Ohio App.3d 777, 778-779, 641 N.E.2d 826 (the essential character of a claim alleging a violent beating is that of a battery, not intentional infliction of emotional distress); *Doe v. First United Methodist Church* (1994), 68 Ohio St.3d 531, 537, 629 N.E.2d 402 (repeated sexual contact was clearly intentional, not accidental). This does not compel the conclusion, however, that all intentional tort claims subsume claims of negligence that are based on the same conduct.

{¶12} Forsythe’s complaint alleges that Conatser acted intentionally or negligently in hitting Forsythe with his car. Conatser claims that, based on the police report, the only reasonable conclusion was that Conatser had acted intentionally. In our view, however, the events as described to the police officer by Forsythe do not lead inextricably to the conclusion that Conatser acted intentionally. According to the police

report, Forsythe reported that Conatser had swung his truck door open, banging it into Forsythe’s knee, then swerved, hitting Forsythe with his truck and running over his foot, as he drove away. The facts that Conatser hit Forsythe with the truck door and then with the tire of the truck as he drove away do not compel the conclusion that Conatser did so intentionally. Indeed, in Forsythe’s deposition, when asked whether Conatser had hit him with the door intentionally, Forsythe indicated that he was unable to answer with certainty. He reiterated how his injuries had occurred but, as with the police report, Forsythe did not express a clear opinion about whether Conatser had intended to injure him. In fact, Forsythe indicated that Conatser had appeared to be confused about whether his truck was in drive or in reverse. In his deposition, Forsythe indicated that he was “99 percent sure” that Conatser had thought the truck was in drive when it went backward and hit Forsythe. Based on this evidence, a reasonable person could conclude that Forsythe had stated causes of action for both an intentional tort and for negligence. While the trial court properly concluded that any claim for an intentional tort was barred by the statute of limitations, it erred in granting summary judgment on Forsythe’s claim with respect to negligence.

{¶13} The assignment of error is sustained.

{¶14} The judgment of the trial court will be affirmed in part and reversed in part, and the matter will be remanded for further proceedings. In so holding, we note that the trial court entered its summary judgment prior to the expiration of the time in which Forsythe was permitted to appeal from the arbitrators’ award. As such, he should be afforded some additional time in which to perfect such an appeal on remand.

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FAIN, P.J. and GRADY, J., concur.

Copies mailed to:

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