[Cite as *Jones v. Upton*, 2015-Ohio-1044.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

FLORA B. JONES	:	
	:	Appellate Case Nos. 26311
Plaintiff-Appellant	:	26375
	:	
v.	:	Trial Court Case No. 14-CV-3402
	:	
PATRICIA UPTON, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the 20th day of March, 2015.

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Plaintiff-Appellee, *pro se*

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FAIN, J.

{¶ 1} Plaintiff-appellee Flora Jones appeals from a judgment of the Montgomery County Court of Common Pleas dismissing her complaint. She contends that the trial court erred by granting the motions to dismiss filed by the defendants.

{¶ 2} We conclude that the trial court did err by dismissing the complaint with regard to defendants-appellees Augustus Rosemont and Patricia Upton, because the trial court converted the motion to dismiss into a motion for summary judgment without providing notice or a chance to respond to Ms. Jones. However, the trial court did not err by dismissing the action as to defendant-appellee Project CURE, Inc., because the claims against Project CURE are time-barred. Accordingly, the judgment of the trial court dismissing the claims against Rosemont and Upton is Reversed; the judgment of the trial court dismissing the claims against Project CURE is Affirmed, and this cause is Remanded for further proceedings.

I. The Claims

{¶ 3} This case arises from a motor vehicle accident that occurred in January 2005, when a vehicle driven by Augustus Rosemont collided with another vehicle, which then collided with a vehicle operated by Michael Jones. On June 9, 2014, Flora Jones, as administrator of the estate of her son Michael Jones, filed this action for personal injury and wrongful death against Rosemont, Upton, and Project CURE, Inc. The entirety of the handwritten complaint is as follows:

> I Flora B. Jones is [sic] filing a complaint against Patricia Upton, August J. Rosemont III and project cure. On January 16, 2005 my son Michael E.

> Jones was on his way to work and was setting [sic] at a stop sign at Walton Ave. and James H. McGee Blvd. when a three car collistion [sic] took place. Augustus J. Rosemont III was at fault Patricia A. Upton owner of the car negligently allowed Augustus Rosemont III to use her car to go to project cure which is a drug rehab center, where they administer daily dosed [sic] of methadone, which makes you high and impairs your ability to drive. Project cure wrongfully and negligently let August J. Rosemont III, a impaired [sic] driver leave there [sic] facility.

II. The Course of Proceedings

{¶ 4} On June 17, 2014, Rosemont and Upton moved to dismiss. Attached to their motion were documents from previous cases, which revealed the following history. In February 2006, Michael Jones filed a lawsuit against Upton and Rosemont for personal injuries stemming from the auto accident. Michael Jones died in 2007. His mother, Flora Jones, was appointed administrator of his estate. In October 2010, Ms. Jones filed a dismissal of the civil action pursuant to Civ.R. 41(A).

{¶ 5} The documents further reveal that on October 5, 2011, Flora Jones, as administrator, filed a civil action for personal injury and wrongful death against Rosemont and Upton. The case was dismissed on June 8, 2012, for failure to prosecute. No appeal was filed. Ms. Jones filed a motion to reactivate the case in April of 2014. In the motion to reactivate, Ms. Jones made mention of wanting to include Project CURE, Inc. as a defendant. The motion was denied. No appeal was filed.

{¶ 6} The documents attached to the motion to dismiss also show that on June

31, 2013, Ms. Jones filed another civil action requesting to re-file both of the previous cases. Rosemont and Upton filed motions for summary judgment, which the trial court granted. In rendering summary judgment, the trial court noted that there was no evidence that Michael Jones had sustained any injuries as a result of the 2005 accident, and concluded that his death was the result of a heart attack related to his chronic diabetes. No appeal was taken from this judgment.

{¶ 7} In granting the motion to dismiss the action to which this appeal relates, the trial court found that the matters raised in the complaint had been previously adjudicated, and that Ms. Jones had failed to appeal from the previous judgment. Ms. Jones filed a notice of appeal on July 15, 2014, which was designated as Case Number CA 26311.

{¶ 8} On July 7, 2014, Project CURE, Inc. moved to dismiss, arguing that the claims against it were time-barred and that the complaint failed to state a claim upon which relief could be granted. The trial court granted that motion on August 14, 2014, upon a finding that the claims were time-barred and a finding that the complaint was not sufficient to state a claim for relief. Ms. Jones appealed this dismissal on September 4, 2014. This appeal was designated as Case Number CA 26375. By decision and entry dated October 10, 2014, we consolidated the two appeals.

III. By Relying Upon Facts Outside the Pleadings, the Trial Court Improperly Converted Rosemont and Upton's Motion to Dismiss into a Motion for Summary Judgment, without the Required Notice to Jones.

{¶ 9} Ms. Jones's First Assignment of Error states:

THE TRIAL COURT ERRED BY GRANTING THE MOTION TO DISMISS FILED BY ROSEMONT AND UPTON.[1]

{¶ 10} Civ.R. 12(B)(6) permits a defendant to assert, by motion, the defense of failure to state a claim upon which relief can be granted. When reviewing such a motion, the trial court must accept all of the allegations of the complaint to be true. *Groves v. Dayton Public Schools*, 132 Ohio App.3d 566, 567, 725 N.E.2d 734 (2d Dist. 1999). Further, the trial court is confined to the averments set forth in the complaint. *Miami Valley Hospital v. Swartz*, 2d Dist. Montgomery No. 17513, 1999 WL 218177, * 1 (April 16, 1999). If a movant submits and relies on evidence outside the face of the pleadings to support his motion, the motion may be treated, with notice to the parties, as a motion for summary judgment pursuant to Civ.R. 56. *Id.* If the trial court does convert the motion to dismiss for failure to state a claim into a motion for summary judgment, the court must provide notice that it has done so to all parties at least fourteen days before the time fixed for hearing. *Id.*

{¶ 11} In determining that the action against Rosemont and Upton was barred by the doctrine of res judicata, the trial court relied upon matters outside the pleadings. Because the trial court considered matters beyond the face of the complaint, the court effectively converted the appellees' motion into a motion for summary judgment. The

[1] Ms. Jones filed two separate appellate briefs, neither of which complies with App.R. 16, because the briefs fail to set forth an assignment of error with reference to the place in the record where each error is reflected. App.R. 16(A)(3). From reading each brief, we conclude that Ms. Jones believes that the trial court erred by granting the motions to dismiss. Accordingly, we have set forth what we discern to be her assignment of error with regard to both appeals.

record does not reflect that notice of the conversion was provided to Ms. Jones. Furthermore, the motion was ruled upon seven days after it was filed, rather than the fourteen days prescribed by the rules.

{¶ 12} The doctrine of res judicata does preclude a party from relitigating issues already decided by a court, or from raising matters that the party should have brought in a prior action. *State v. Harris*, 2d Dist. Montgomery No. 24739, 2012–Ohio–1853, ¶ 14. While we conclude that the trial court's ruling was correct, given the apparent history of this case, the trial court failed to provide Ms. Jones with the notice she was entitled to as well as the appropriate time within which to respond. Therefore, the trial court erred in dismissing the action against Rosemont and Upton.

{¶ 13} Accordingly, the First Assignment of Error is sustained.

IV. The Trial Court Did Not Err in Dismissing the Complaint Against Project CURE Upon the Ground that it Was Time-Barred

{¶ 14} Ms. Jones' Second Assignment of Error states:

THE TRIAL COURT ERRED BY GRANTING THE MOTION TO DISMISS FILED BY PROJECT CURE, INC.

{¶ 15} In its Civ.R. 12(B)(6) motion to dismiss, Project CURE argued that the claim against it was barred by the statutes of limitations, and that the complaint failed to state a claim against it.

{¶ 16} We begin with the statute of limitations issue. Claims for personal injury and wrongful death are subject to a two-year statute of limitations. R.C. 2125.02(D)(1);

R.C. 2305.10(A). It is clear from the face of the complaint that the claim for personal injury is barred as the claim against Project CURE, Inc. was not filed until more than nine years after the subject accident, and the complaint does not set forth any allegation that would indicate the time limit was tolled for any reason. Thus, we conclude that the trial court did not err in dismissing this portion of the claim against Project CURE, Inc

{¶ 17} With regard to the wrongful death portion of the complaint, we note that Ms. Jones failed to set forth a date of death in the complaint. And she failed to file a response rebutting the statute of limitations claim laid out in the motion to dismiss filed by Project CURE, Inc. despite having more than a month to do so prior to entry of judgment. Since we cannot take notice of the extraneous filings attached to Upton and Rosemont's motion, which indicate the actual date of death, we must limit our review to the allegations in the complaint. Thus, upon the face of the complaint, it would appear that the date of death was the date of the accident. Based upon the record properly before us, we cannot conclude that the trial court erred in dismissing the action against Project CURE, Inc. as time-barred.

{¶ 18} Furthermore, we note that there is no allegation in the complaint to indicate that Mr. Jones's death was in any way connected to any act, or omission, on the part of Project CURE, Inc. Thus, we conclude that the trial court did not err by dismissing this claim for failure to state a claim. Accordingly, the Second Assignment of Error is overruled.

V. Conclusion

{¶ 19} The First Assignment of Error being sustained, and the Second Assignment of Error being overruled, the judgment of the trial court dismissing the claims against

Project CURE, INC. is Affirmed, the judgment of the trial court dismissing the claims against Rosemont and Upton is Reversed, and this cause is Remanded for further proceedings.

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DONOVAN, J., concurs.

HALL, J., concurring:

{¶ 20} Defendants Upton and Rosemont filed their Motion to Dismiss in the trial court on June 17, 2014. The court order sustaining that motion was filed one week later on June 24, 2014. Montgomery County Local Rule 2.05 (B)(2)(b) allows parties opposing a motion to file a memorandum in opposition within 14 days of service of the motion. "[I]f no memorandum is filed within this time limit, the motion may be decided forthwith." *Id.* Because the time for response had not expired when the trial court ruled, I concur that the case should be remanded for further proceedings.

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