

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Survivor Doe, et al.

Court of Appeals No. L-10-1032

Appellants

Trial Court No. CI 200502755

v.

Gerald Robinson, et al.

DECISION AND JUDGMENT

Appellees

Decided: December 3, 2010

* * * * *

Mark A. Davis, for appellants.

John P. Donahue, for appellee Gerald Robinson.

Thomas G. Pletz and Thomas P. Dillon, for appellees
Catholic Diocese of Toledo, St. Adalbert Parish and School,
and the Oblates of St. Francis de Sales, Inc.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the January 20, 2010 judgment of the Lucas County Court of Common Pleas, which granted summary judgment in favor of appellees, Gerald

Robinson, Gerald Mazuchowski, Catholic Diocese of Toledo, St. Adalbert Parish and School, and Oblates of St. Francis de Sales, Inc., and dismissed the complaint of appellants, Survivor Doe and Spouse Doe, protected identities. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellants assert the following assignments of error on appeal:

{¶ 2} "ASSIGNMENT OF ERROR NO. 1. The Trial Court Erred By Granting Summary Judgment Upon the Statute of Limitations Defense.

{¶ 3} "ASSIGNMENT OF ERROR NO. 2. The Trial Court Erred By Failing To Grant Summary Judgment To Appellant [sic].

{¶ 4} "ASSIGNMENT OF ERROR NO. 3. The Trial Court Erred By Entering A Protective Order Favoring Appellee and Prejudicing Appellant [sic].

{¶ 5} "ASSIGNMENT OF ERROR NO. 4. The Trial Court Erred By Striking Appellant's [sic] Independent Discovery."

{¶ 6} On April 20, 2005, appellants filed a complaint against appellees, Gerald Robinson, Gerald Mazuchowski, the Catholic Diocese of Toledo ("Diocese"), St. Adalbert Parish and School, Oblates of St. Francis DeSales, Inc., John and Jane Does 1-15 (yet unknown individuals and/or unnamed defendants who participated, permitted, encouraged, fostered, approved, sanctified, condoned, engaged in, or ratified the actions of Robinson and Mazuchowski), and Catholic Entity Does 1-5 (additional institutions, organizations, parishes, schools, or other entities which participated, permitted,

encouraged, fostered, approved, sanctified, condoned, engaged in, or ratified the actions of Robinson and Mazuchowski) but whom have never yet been identified in this action.

{¶ 7} Appellees moved to dismiss appellants' complaint, which was supplemented in 2006, pursuant to Civ.R. 12(B)(6). In January 2007, the trial court granted appellees' motion to dismiss the complaint for failing to state a claim for relief based upon *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 1994-Ohio-531, paragraphs one and two of the syllabus, and *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 20, reconsideration denied (2006), 110 Ohio St.3d 1444. The court determined that the discovery rule exception was not applicable finding that even if appellants did not know the identity of the abusers, appellants had enough information to discovery, by reasonable diligence, their identities.

{¶ 8} Appellants sought an appeal from that decision, which this court affirmed in part and reversed in part. *Survivor Doe v. Robinson*, L-07-1051, 2007-Ohio-5746 ("Survivor Doe I"). We held that appellants had alleged sufficient facts, for purposes of defeating a Civ.R. 12(B)(6) challenge, to support their allegation that the statute of limitations was tolled under the discovery rule. *Id.* at ¶ 36. We remanded the case for further proceedings.

{¶ 9} At the same time that appellees had been seeking to dismiss the complaint, the General Assembly was enacting through S.B. No. 17 the current versions of R.C. 2305.10 and 2305.111 (both effective August 3, 2006). Prior to August 3, 2006, a child

victim/adult survivor of the tortuous conduct of sexual abuse attempted to assert different types of civil actions to seek a civil remedy for the abuse (generally bodily injury arising out of negligence, assault and battery, or intentional infliction of emotional distress). The nature of the tort often resulted in victims not filing suit until many years after the abuse, which would result in some actions being barred by the various applicable statute of limitations, except upon application of the discovery rule. *Running of Limitations Against Action for Civil Damages for Sexual Abuse of Child* (1993), 9 A.L.R.5th 321, 321.

{¶ 10} In 1994, the Ohio Supreme Court held that such claims fall under the one-year statute of limitations for assault and battery because the conduct involved is intentional and not accidental. *Doe v. First United Methodist Church*, *supra*. Therefore, victims had one year after they attained the age of majority to file suit. The derivative or vicarious liability of the abuser's employer was subject to the same statute of limitations for assault and battery. *Id.* at 536. As to the negligent liability of the parties who failed to protect the victim, the court held that the two-year statute of limitations for bodily injury applied. *Id.* But, recognizing the injustice of applying a statute of limitations that did not take into consideration the fact that the tortuous conduct itself might cause the victim not to be aware of the tortuous conduct until many years later, the court also applied the discovery rule to toll the running of the statute of limitations. *Ault v. Jasko* (1994), 70 Ohio St.3d 114, syllabus. The court later explained its justification in applying the discovery rule was that the legislature had not yet enacted a statute of

limitations for childhood sexual assault cases and that the court was merely extending the statute of limitations for a battery to accommodate the unique nature of a sexual battery. *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, ¶ 55. The court would not extend the discovery rule to the case where the victim knew the abuser and that a sexual battery had occurred. *Doe v. Archdiocese of Cincinnati*, supra, at ¶ 34.

{¶ 11} In *Survivor Doe I*, we accepted the factual allegations that an extremely traumatized young victim of sexual battery by numerous persons over many years (who was unable to recognize or comprehend the extent of the abuse or even conceive of her church/school and its priests as parties to or perpetrators of her abuse) was sufficient to support an allegation that the discovery rule applied and defeat a Civ.R. 12(B)(6) motion to dismiss. *Survivor Doe I*, supra. However, upon remand of the case to the trial court, appellees asserted that the statute of limitations enacted by S.B. No. 17 applied.

{¶ 12} In S.B. No. 17, R.C. 2305.10(E) was amended to provide as follows:

{¶ 13} "An action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, as defined in section 2305.111 of the Revised Code, shall be brought as provided in division (C) of that section."

{¶ 14} This change resulted in the creation of a specific cause of action based upon childhood sexual assault (defined by R.C. 2305.111) that would be brought within the time period set by R.C. 2305.111(C). This change codified the common law ruling that such actions fall under the sexual assault or battery statute (R.C. 2305.111) and not the negligent bodily injury statute of limitations.

{¶ 15} Furthermore, S.B. No. 17 amended R.C. 2305.10(G) to provide as follows:

{¶ 16} "This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to April 7, 2005."
(Emphasis added.)

{¶ 17} We interpret this change as providing that all bodily injury actions based upon childhood sexual abuse filed on or after April 7, 2005, would be subject to the new statute classifying all such actions as childhood sexual assault or battery.

{¶ 18} In the amended R.C. 2305.111 the legislature separately distinguished "childhood sexual abuse" as any conduct that constitutes a criminal offense for rape, sexual battery, gross sexual imposition, or sexual imposition, under specific circumstances as identified in the statute, and where the victim was under the age of 18 or an impaired adult under age 21. The actor need not have pled guilty to or been convicted of such offense. R.C. 2305.111(A).

{¶ 19} R.C. 2305.111(C) was amended to set forth the applicable statute of limitations for a childhood sexual assault or battery action:

{¶ 20} "An action for assault or battery brought by a victim of childhood sexual abuse based on childhood sexual abuse, or an action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, shall be brought

within twelve years after the cause of action accrues. For purposes of this section, a cause of action for assault or battery based on childhood sexual abuse, or a cause of action for a claim resulting from childhood sexual abuse, accrues upon the date on which the victim reaches the age of majority. If the defendant in an action brought by a victim of childhood sexual abuse asserting a claim resulting from childhood sexual abuse that occurs on or after the effective date of this act has fraudulently concealed from the plaintiff facts that form the basis of the claim, the running of the limitations period with regard to that claim is tolled until the time when the plaintiff discovers or in the exercise of due diligence should have discovered those facts."

{¶ 21} The enacted, uncodified language contained in Sec. 3(B) of S.B. No. 17 provides as follows:

{¶ 22} "The amendments to section 2305.111 of the Revised Code made in this act shall apply to all civil actions for assault or battery brought by a victim of childhood sexual abuse based on childhood sexual abuse that occurs on or after the effective date of this act, to all civil actions brought by a victim of childhood sexual abuse for a claim resulting from childhood sexual abuse that occurs on or after the effective date of this act, to all civil actions for assault or battery brought by a victim of childhood sexual abuse based on childhood sexual abuse that occurred prior to the effective date of this act in relation to which a civil action for assault or battery has never been filed and for which the period of limitations applicable to such a civil action prior to the effective date of this act has not expired on the effective date of this act, and to all civil actions brought by a

victim of childhood sexual abuse for a claim resulting from childhood sexual abuse that occurred prior to the effective date of this act in relation to which a civil action for that claim has never been filed and for which the period of limitations applicable to such a civil action prior to the effective date of this act has not expired on the effective date of this act."

{¶ 23} On remand, appellees filed motions for summary judgment in June 2009 arguing that summary judgment should be granted in their favor as a matter of law on the ground that appellants' claims are time-barred pursuant to R.C. 2305.10(E) and (G). Appellees argued that the facts in this case are undisputed: appellants' asserted claims based upon childhood sexual abuse, appellant Survivor Doe attained the age of majority on June 19, 1981, and her complaint was not filed until April 20, 2005. Since there is no longer a discovery rule exception to toll the statute of limitations and appellants did not allege fraudulent concealment, there is no basis for tolling the statute of limitations.

{¶ 24} Appellees also argued that even under the prior law, appellants' claims were time-barred. Under prior law, appellant had two years after the age of majority to file her suit unless she proved either that she did not know the abuse occurred or that she did not know the identity of the perpetrator despite due diligence to discover his identity. Here, appellant acknowledged memories of the abuse in the mid-1990s. Furthermore, appellant testified that she did not know Robinson's name until 2003, but she knew the names of at least five of her abusers and yet did nothing to determine the identity of the others from 1994 or 1995 until 2005.

{¶ 25} Appellants opposed appellees' motions for summary judgment and they also filed for summary judgment. They argued that this appellate court obviously knew of the revised R.C. 2305.111 at the time and rejected application of the new rule and mandated that appellant be allowed to continue her action to determine if the discovery rule was applicable. So, appellee cannot now claim that the discovery rule is not applicable. Alternatively, appellants argue that the exception to R.C. 2305.111(C) applies in this case because appellees fraudulently concealed the facts from appellants that formed the basis of her claim.

{¶ 26} On January 20, 2010, the trial court granted appellees' motion for summary judgment. The trial court first considered *Pratte v. Stewart*, 2d Dist. No. 08-CA-95, 2009-Ohio-1768, which was later affirmed at 125 Ohio St.3d 473, 2010-Ohio-1860. In the *Pratte* case, a claim was filed on April 14, 2008, based upon childhood sexual abuse, after the victim's repressed memories were recovered in April 20, 2007. The action was found to have been barred by the statute of limitations of R.C. 2305.111(C), effective August 3, 2006. *Id.* at ¶ 17. The *Pratte* appellate court held that the prior tolling exception for repressed memories had been eliminated by the amendment of R.C. 2305.111. *Id.* The court further held that the legislature intended to apply the new statute of limitations to her type of case pursuant to R.C. 2305.10(G), which provided that this is a remedial statute and is to be applied retroactively to cut off claims asserted on or after April 7, 2005. *Id.* Furthermore, the court found that the uncodified language of S.B. No. 17 provided that the new statute of limitations applies to all cases involving prior

childhood sexual abuse if no claim had yet been filed and the prior statute of limitations had not expired, irrespective of when the cause of action occurred. *Id.*

{¶ 27} The trial court in the present case held that R.C. 2305.111(C) was not applicable to this case. The court then went on to determine if appellants' cause of action had been tolled by the discovery rule as discussed in *Ault v. Jasko*, 70 Ohio St.3d 114, 1994-Ohio-376. After examining the evidence submitted with the motions, the court held that appellants had not exercised any diligence to discover the identities of the appellees as the abusers. The court also found that appellants had not presented evidence of fraudulent concealment despite having had the opportunity to discover such evidence. Therefore, the trial court held that appellants' claims against appellees were already time barred upon the prior statute of limitations. Appellants sought an appeal from this judgment.

{¶ 28} The appellate court reviews the grant of summary judgment under a *de novo* standard of review. *Advanced Analytics Labs., Inc. v. Kegler, Brown, Hill & Ritter*, 148 Ohio App.3d 440, 2002-Ohio-3328, ¶ 33, and *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, reconsideration denied (1996), 77 Ohio St.3d 1501. Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear " * * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed

most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 29} We must begin by addressing the issue of the statute of limitations applicable to this case. We did not, as appellants' suggest, determine in *Survivor Doe I*, *supra*, that the newly-enacted R.C. 2305.111 was not applicable. That issue was not before this court at that time.

{¶ 30} Upon a review of the statutes at issue, we interpret the retroactivity language of R.C. 2305.10(E) and (G) as mandating that appellants' case, which was filed on April 20, 2005, is subject to the new childhood sexual assault or battery action set forth in R.C. 2305.111. We then turn to that statute to determine the applicable statute of limitations. R.C. 2305.111(C) provides that the statute of limitations for a childhood sexual assault or battery action is 12 years after the victim attains the age of majority, the date on which the action accrues. But, the uncodified language enacted with S.B. No. 17, explains the retroactive nature of the statute. That language provides that the new statutory provisions applicable to childhood sexual abuse cases apply only to the following cases: to all future actions for childhood sexual abuse that occurs on or after August 3, 2006 and to all civil actions based on childhood sexual abuse that occurred prior to August 3, 2006 if no civil action for assault or battery has ever been filed and for which the statute of limitations period based on prior law had not expired prior to August 3, 2006. This provision clarifies that the new statute of limitations cannot be used to revive an action that was already expired based upon the one-year statute of limitations

applicable under prior law. Furthermore, the new statute of limitations was not intended to cut off a claim that already had been filed even if the statute of limitations had been previously tolled more than 12 years. But the new statute of limitations would limit recovery of any potential claim that had not yet been filed to 12 years beyond attaining the age of majority, even if the prior one-year statute of limitations time was tolled under common law. See *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, ¶ 43. The operative date for the statute of limitations, therefore, is August 3, 2006, not April 7, 2005, as argued by appellees.

{¶ 31} In this case, appellants filed their action for assault and battery before August 3, 2006. Therefore, we find that the trial court correctly applied former R.C. 2305.111 and was required to determine whether the common law discovery rule tolled the one-year statute of limitations applicable under the former statute. We now turn to that issue.

{¶ 32} "The one-year statute of limitations period for sexual abuse in Ohio begins to run when the victim recalls or otherwise discovers that he or she was sexually abused, or when, through the exercise of reasonable diligence, the victim should have discovered the sexual abuse." *Ault v. Jasko*, *supra*, paragraph two of the syllabus. Therefore, the cognizable event is the occurrence of facts and circumstances which lead, or should reasonably lead, the plaintiff to understand that a sexual abuse occurred when he was a child and to identify the abuser. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶ 34, reconsideration denied (2006), 110 Ohio St.3d 1444. The

cognizable event "puts the plaintiff on notice to investigate the facts and circumstances relevant to her claim in order to pursue her remedies." *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549. See, also, *Livingston v. Diocese of Cleveland* (1998), 126 Ohio App.3d 299, 303.

{¶ 33} As we have already discussed in *Survivor Doe I*, supra, due diligence is "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Black's Law Dictionary* (8 Ed.Rev.2004) 488. The existence of due diligence is a factual finding by the trial court that must be supported by the record. In the context of the discovery rule, the due diligence requirement ensures that the 'plaintiff bear[s] some meaningful, affirmative responsibility to determine facts that would form the basis for his or her cause of action.' *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 512, (Moyer, J. dissenting)." *Id.* at ¶ 41. What constitutes due diligence in any given case will depend upon the facts of that case. *Sizemore v. Smith* (1983), 6 Ohio St.3d 330, 332. Therefore, in this case, after reviewing the facts in a light most favorable to appellants, we must determine whether there is a question of fact as to appellants' due diligence or whether reasonable minds could find only that appellants had not used due diligence.

{¶ 34} The following are the undisputed facts in this case. *Survivor Doe's* therapist testified in her deposition that *Survivor Doe* had been under treatment for psychological injury due to sexual abuse from 1994 until the present time. Early on, *Survivor Doe* was diagnosed with Post Traumatic Stress Syndrome due to the sexual,

emotional, and physical abuse she suffered at the hands of her family. The therapist would not testify as an expert in the field of repressed memories, but she did testify that she understood the concept and, as Survivor Doe's therapist, concluded that repression best describes what prevented Survivor Doe from recalling memories of her childhood abuse suffered during the ritual abuse by a satanic cult. During the therapy process, Survivor Doe began to recall memories of satanic ritual abuse. The therapist testified that the memories of being abused by Robinson were even more traumatic than the abuse her mother inflicted because of his position in the church and relation to God under Catholicism.

{¶ 35} The therapist testified that Survivor Doe first recalled the satanic ritual abuse in 1994. From that time until after 2004, Survivor Doe regained additional memories of horrendous abuse that occurred when she was a child. The process of recalling these memories involved independent journaling, which she claimed not to have ever read because of the physical pain the memories caused. She could authenticate her handwriting, but could not even remember making some of the journal entries. She also talked to her family, talked to other survivors, read books and articles to help her regain her memory, and participated in therapy sessions. The memories were not retrieved in a logical, historical manner but in bits and pieces. Even at the time of her deposition, Survivor Doe did not desire to remember all of the details of the abuse because it was too physically painful. She still could not remember the location of the crimes other than some memories of a lake in the woods and the basement of the church.

{¶ 36} Nonetheless, Survivor Doe had remembered enough of her childhood memories prior to 2004 to understand that she had been a child victim of sexual abuse by various members of her family and people who knew her family and that she had also been a victim of satanic ritual abuse. She recalled the identities of some of the people who were involved in the satanic ritual abuse prior to 2004, but she never identified Robinson until 2004 when she saw his eyes on television. After that date, she recalled more of the details of her abuse. She testified that this was the final piece that pulled all of her memories together.

{¶ 37} Survivor Doe knew that many others were involved in these rites, but she still cannot identify all of them. She recalled three of the abusers were men in black hooded robes who directed the activities. Survivor Doe claimed that she never associated appellees Robinson and Mazuchowski with the black hooded robes and the abuse until she saw Robinson's eyes on television in 2004. Later, after seeing his picture in the newspaper, she began to remember Mazuchowski being involved as well.

{¶ 38} Survivor Doe acknowledged confronting her family prior to 2004 despite their adversarial relationships, but they denied knowledge of everything. Her sister could only remember that Survivor Doe bore the brunt of the beatings. She also confronted the brother of one of her mother's ex-husbands, but he told her not to look into the past. She never confronted any of the other individual abusers that she had known because she had not yet recalled all of her memories, she did not know their whereabouts, and she was afraid of them because they are dangerous people and had continually threatened to harm

her if she ever told anyone. Survivor Doe testified that she never contacted anyone at St. Adalbert's school because she never knew who was behind the satanic ritual abuse, although at some unidentified point in time she did recall that she was confused by how the priests would conduct holiday masses and then afterward hold satanic rituals in the basement of the church.

{¶ 39} Appellants consulted with an attorney in approximately 1994 about suing Survivor Doe's uncle for the sexual abuse he inflicted upon her. She also met with the attorney once at her therapist's office about getting permission to release information to the attorney. The therapist testified that she counseled against litigation because she believed that it would impede Survivor Doe's recovery. Appellants decided not to pursue the suit for that reason. Survivor Doe testified that she did not understand at that time about the statute of limitations and the loss of her claim by not filing. Appellants later went to see another attorney, but Survivor Doe testified that she left when he told her that he protected people who have been abused as a child and that she should burn her journals.

{¶ 40} Based upon this evidence, the trial court determined that the cognizable event under the undisputed facts of this case is the moment that Survivor Doe remembered in 1994 that she had been abused in satanic cult rituals as a child, she knew that this conduct was wrongful, that a hooded man with evil eyes and a hooded fat man participated in the abuse, and that her brother and his friends also participated in the abuse. From that date onward, Survivor Doe recalled additional facts, which would have

led her to identify some of the participants in that ritual abuse. The court held that from 1994 onward, appellants had a duty to investigate to discover the identity of all of her abusers since Survivor Doe knew some of them. Alternatively, the court found that if the cognizable event was not her first memory in 1994, it was at least prior to the year 2000. The court further found that all of appellants' justifications for not investigating the crimes earlier lacked merit.

{¶ 41} In their first assignment of error, appellants argue that the trial court erred when it granted summary judgment to appellees because it erroneously determined that the cognizable event occurred in the 1990s even when Survivor Doe indicated in her December 1994 diary entry that she was struggling with understanding and believing the memories she was having about satanic ritual abuse. Appellants contend that the cognizable event actually occurred in 2004 when appellant recognized Robinson's image on the television at the time of his arrest and then recalled the memories of satanic ritual abuse and the connection with the Catholic Church and school.

{¶ 42} Appellants also argue that the trial court erred in assuming that because appellant Doe could recall some of the abuse by others, she should have inquired further to determine who else might have been involved. Appellants assert that this would have been impossible because appellant Doe had not yet even remembered that she had been abused by Robinson.

{¶ 43} Finally, appellants argue that they did exercise due diligence to understand the events of Survivor Doe's childhood satanic ritual abuse. She sought 11 years of

therapy to uncover the events that had occurred despite threats that had been made against her to never discuss these issues and the physical pain it caused. Her doctors discouraged her from investigating these events outside of therapy or in litigation. Survivor Doe started a journal to record her memories and consulted her father, siblings, and grandmother about the abuse she suffered as a child, and they either denied it or refused to speak to her. Appellants argue they did attempt to contact the police, but they did not have sufficient information to pursue an investigation.

{¶ 44} Much of appellants' argument centers on the truth of the abuse Survivor Doe suffered. In connection with the issue of the statute of limitations, we need not address this issue and may presume that the allegations of abuse are true. Instead, we address only the issue of whether the discovery rule tolled the running of the statute of limitations.

{¶ 45} On appeal, appellants argue that the cognizable event was not until the day Survivor Doe saw Robinson on television in 2004 and knew him to be her abuser. We disagree. While it is undisputed in the evidence that Survivor Doe never associated Robinson with the abuse until after seeing his face on television in 2004, we find that she did have sufficient facts to have gone forward to the authorities with these allegations of satanic ritual abuse or to initiate a lawsuit against some of the identified individuals in order to determine who the unknown participants could have been. While these efforts may have been dangerous or ineffective, the act of doing so would have demonstrated due diligence on appellants' part to discover the identity of the principal abusers.

{¶ 46} We recognize that under the unique facts of this case, the undisputed facts show that Survivor Doe was impaired by the trauma of the abuse, felt compelled to follow her therapists' advice to focus on her journey to health first, and was still terribly afraid of the abusers. We also recognize that she did in fact contact members of her family, continue therapy, and endure great pain in order to uncover the rest of her memory and identity of her abusers on her own. But, we conclude, as a matter of law, that a reasonable person exercising due diligence would have sought the outside help of law enforcement or have sued some of the individuals involved in order to seek additional information through the discovery process of litigation despite the threat of harm and how it impacted her recovery. Appellants eventually filed suit while still protecting Survivor Doe's identity. We find that she could have done the same at an earlier time.

{¶ 47} Appellants argue that they did attempt to go to the police about the memory of a child murdered during the satanic rituals, but were informed that there were not enough facts to justify an investigation. We find this action distinguishable because appellants sought to have the police investigate the murder of an unidentified child, they did not seek to have the police investigate the crimes against Survivor Doe.

{¶ 48} Alternatively, appellants argue that her lack of due diligence is mitigated by the active fraud, concealment, and intimidation of the truth by appellees. We do not find merit in this argument. Criminals often conceal their identity and intimidate their victims

and have the assistance of others to help conceal their crimes. This fact alone does not excuse appellants' failure to seek the aid of law enforcement.

{¶ 49} Therefore, we find appellants' first assignment of error not well-taken.

{¶ 50} In their second assignment of error, appellants argue that the trial court erred by failing to grant summary judgment in their favor. We need not reach the merits of this assignment of error having found that the trial court properly concluded that the statute of limitations in this case had expired prior to appellants filing their claims because the discovery rule was not applicable. We find appellants' second assignment of error moot.

{¶ 51} In their third assignment of error, appellants argue that the trial court erred by entering a protective order against appellants conducting discovery based upon judicial economy. Appellants assert that this order prejudiced their case and constituted an abuse of discretion.

{¶ 52} In September 2008, appellees moved for a protective order and for an order focusing discovery to the issue of whether the discovery rule applied because this issue might resolve the entire case. Appellees sought to limit discovery to only the facts surrounding Survivor Doe's discovery of the satanic ritual abuse and the identity of the perpetrator and the perpetrator's employer. Appellees argued that none of the facts relating to these issues are within appellees' possession. The court granted the motion holding that appellants were to disclose all of Survivor Doe's medical, psychiatric, counseling, and therapy records and the identity of appellants' witnesses, Does 1-4.

Appellees were ordered to disclose any correspondence between Diocesan agents and Survivor Doe; the names of minors who claim to have been abused by its priests if the minors have not required and received strict confidentiality and their claims were known to the Diocese of Toledo on or before December 1972; and the names and ministry histories of Diocesan priests who have left or been removed from the priesthood through the date of the order, which was November 6, 2008.

{¶ 53} We find that none of the facts appellants claim to have not been able to discover were relevant to the issue of whether the statute of limitations had run before appellants filed suit. We agree with the trial court that the primary facts relevant to that issue were within the knowledge of appellants. Therefore, we find that the trial court did not err by limiting discovery because the court believed that the issue of the statute of limitations could resolve the entire case. Appellants' third assignment of error is not well-taken.

{¶ 54} In their fourth assignment of error, appellants argue that the trial court erred by striking appellants' independent discovery of: 1) paragraphs six and seven of a detective's affidavit, 2) a nun's affidavit, 3) the transcript of Mazuchowski's taped interview, and 4) an expert's affidavit.

{¶ 55} The trial court's determination of the admissibility or exclusion of evidence is generally a matter of discretion that will not be overturned on appeal absent a showing that the trial court abused its discretion. *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299, certiorari denied (1992) 506 U.S. 871. An abuse of discretion is

more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 56} The trial court struck paragraphs 6 and 7 of the affidavit of a Toledo police detective on the grounds that it contains inadmissible hearsay and opinion regarding the credibility of the witnesses. We find that the trial court did not err in excluding portions of the affidavit.

{¶ 57} The officer attested that she investigated allegations relating to ritual abuse, sexual abuse, and satanic rituals involving appellee Robinson. During her investigation, she interviewed four or five witnesses in accordance with standard interview procedures. Without relating the details of their statements, the officer attested that their stories corroborated each other and indicated satanic and sexual abuse. In paragraphs 6 and 7 of the affidavit, the officer attested that: "6. The witnesses described severe sexual assault, satanic abuse, ritual abuse and other horrific acts performed by groups of men and or priests. 7. Upon a preponderance of the evidence, meaning more likely than not, it is my personal and expert opinion that ritual abuse did take place in some type of cult-like environment."

{¶ 58} "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the recognized exceptions. Evid.R. 802. Clearly, the officer's averment in paragraph 6

is hearsay when it is used to prove that these witnesses stated that this type of abuse occurred.

{¶ 59} As to paragraph 7, the trial court found that the officer's opinion was based upon hearsay. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." Evid.R. 703. Here, the witnesses told the detective what they observed. Therefore, her opinion about what they said was not based on hearsay, but on statements made directly to her.

{¶ 60} The trial court alternatively found that the detective's opinion was an inadmissible opinion regarding the credibility of the witnesses. "A witness may testify as an expert if * * * [t]he witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons * * *." Evid.R. 702(A). An expert witness cannot give an opinion regarding an issue the jury can determine. *Burens v. Indus. Comm.* (1955), 162 Ohio St. 549, paragraph two of the syllabus. Therefore, an expert cannot give his opinion as to the credibility of a witness who can testify at trial. *Hampton v. Saint Michael Hosp.*, 8th Dist. No. 81009, 2003-Ohio-1828, ¶ 46, and *Rasalan v. TJX Operating Cos., Inc.* (1998), 129 Ohio App.3d 364, 369.

{¶ 61} In this instance, the detective is opining that all of the witnesses are credible because their accounts corroborate each other. We believe that this conclusion is not something unique to a police detective's ability to comprehend the facts and therefore

invades the province of the jury. Therefore, her opinion as to the truth of the events is not admissible.

{¶ 62} Next, appellants argue that the trial court erred in excluding a nun's affidavit because it was not authenticated. The evidence consisted of the affidavit of appellants' counsel that he received a copy of a statement made by a nun, which was allegedly made to the Toledo Diocese about sexual abuse perpetrated upon her and others by appellees. Appellants cite to this evidence to establish that this type of abuse occurred by a satanic cult. Therefore, it is clearly being offered for the truth of the matter asserted therein.

{¶ 63} The authenticity of a document is what makes it relevant. Evid.R. 901 and *State v. Winfield* (Feb. 7, 1991), 4th Dist. No. 1641, at 2. The burden of establishing authenticity falls on the party seeking to admit the document into evidence. "The proponent has the burden to show that it is reasonably certain that no alteration, substitution, or tampering of the item occurred." *State v. Hawkins*, 8th Dist. No. 81646, 2003-Ohio-4934, ¶ 15, citing *State v. Moore* (1973), 47 Ohio App.2d 181, 183. Appellants presented nothing to establish the authenticity of the nun's statement other than their counsel's affidavit. The fact that counsel received the document does not authenticate it. Therefore, we find that the trial court did not err in excluding this document from evidence.

{¶ 64} Next, appellants argue that the trial court erred finding that the transcript of Mazuchowski's taped interview was inadmissible.

{¶ 65} Under Civ.R. 56(C), summary judgment may be granted based upon the evidence presented by way of "depositions, answers to interrogatories, written admissions, affidavits, [or] transcripts of evidence." If a document does not fall within the categories listed in the rule, the evidence can only be submitted into evidence by way of an affidavit. *Watts v. Watts* (Mar. 18, 1994), 6th Dist. No. L-93-200, at 11-12, and *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89. Civ.R. 56(E) provides for evidence to be submitted by affidavits that meet certain standards. But the rule does not permit the submission of unauthenticated tape recordings or unsworn statements. *HSBC Mortg. Services, Inc. v. McGuire*, 7th Dist. No. 07 CO 44, 2008-Ohio-6586, ¶ 17; *Watts v. Watts* supra at 12-13; and *Leibold v. City of Columbus* (Nov. 15, 1977), 10th Dist. No. 77AP-142, at 4.

{¶ 66} Although Mazuchowski admitted in his answers to appellants' interrogatories that he did not lie during his taped interview with appellants' attorney, he was not sworn prior to the conversation and did not authenticate the transcribed interview. Appellants argue that the court reporter's certification would be sufficient to authenticate the transcript. We disagree. This was not a deposition taken pursuant to Civ.R. 30. Opposing counsel was not present. The court reporter's certification only verifies that she transcribed the interview as she heard it on the tape recording. Therefore, we find this evidence was not admissible for summary judgment purposes.

{¶ 67} Finally, appellants argue that the trial court erred in excluding the affidavit of an expert, Randall Noblitt, PhD. In his affidavit, the expert based his opinions upon

hearsay statements that were provided to him and credibility determinations of other individuals, which is improper. Appellants argue that at least a portion of Noblitt's affidavit was admissible, i.e., his opinions about Survivor Doe's journal and how it is similar in nature to other individuals who were subject to satanic ritual abuse. We agree to that extent alone. The remainder of Noblitt's affidavit is not admissible.

{¶ 68} Therefore, we find appellants' fourth assignment of error well-taken as to one statement by Dr. Noblitt. In all other respects, we find that the trial court did not err in excluding the challenged evidence. However, because we have found that the trial court properly dismissed this case on statute of limitations grounds, the exclusion of this evidence was not prejudicial to appellants.

{¶ 69} Having found that the trial court did not commit error prejudicial to appellants and that substantial justice has been done, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.