[Cite as *Partin v. Ohio Dept of Transp.*, 2004-Ohio-4038.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Deborah Partin, et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 03AP-830 (C.C. No. 2003-03906)
Ohio Department of Transportation,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on August 3, 2004

Lydy & Moan, LTD., and *R. Jeffrey Lydy*, for appellants.

Jim Petro, Attorney General, and *Eric A. Walker*, for appellee.

APPEAL from the Court of Claims of Ohio.

WATSON, J.

{¶1} This is an appeal from the judgment of the Court of Claims granting Defendant's motion for summary judgment. For the following reasons, we affirm.

{¶2} This case arises out of an automobile accident that occurred on April 14, 2000, in Toledo, Ohio. Plaintiffs, Deborah Partin and Darlene Partin, were injured in the accident. Michelle Jankowski, Deborah's daughter, was driving the vehicle. The third

plaintiff, Donald Partin, is Deborah's husband. On the date in question, the plaintiffs were on a roadway known as the Greenbelt Parkway, State Route 25.

{¶3} Three lawsuits were originally filed in the Lucas County Court of Common Pleas naming several defendants. One named defendant was "ABC Corporation" ("ABC Corp."). The fictitious name ABC Corp. was used because plaintiffs were not aware of the proper name for the particular defendant who allegedly designed and implemented the intersection where the accident occurred. The complaints alleged that ABC Corp. "designed, implemented, and/or created the nuisance that existed at the intersection of the Greenbelt Parkway and I-280 entrance ramp as of April 14, 2000 whose name and address is unknown although Plaintiff has exercised due diligence in attempting to determine the same." (April 15, 2002 Complaint at paragraph 26.) The complaints further alleged that ABC Corp. created an unreasonably dangerous nuisance proximately causing plaintiffs' injuries. The lawsuits were filed on April 15, 2002, only days prior to the expiration of the applicable statute of limitations.

{¶4} After the lawsuits were filed, initial discovery was conducted. It was revealed that the State of Ohio was in charge of the construction of the Greenbelt Parkway and may have been the designer. Therefore, ABC Corp. was actually the state, namely the Ohio Department of Transportation ("ODOT"). Thereafter, the plaintiffs filed a complaint in the Court of Claims against ODOT on March 21, 2003, within one year of filing the original complaint. The record indicates that a praecipe for personal service on ODOT was filed through the Franklin County's sheriff office. The record also indicates a return of service indicating that personal service was obtained on March 27, 2003, within one year of filing the original complaint. Plaintiffs did not dismiss the Lucas county

complaints but filed an amended complaint on March 25, 2003, without naming ODOT as a defendant. ODOT filed a motion to dismiss the Court of Claims' complaint on the ground that plaintiffs' claims were barred by the two-year statute of limitations. The Court of Claims converted the motion into one for summary judgment. On July 24, 2003, the court granted ODOT's motion finding that plaintiffs' claims were time-barred. The court determined that the savings statute contained in R.C. 2305.19 was inapplicable because the Lucas County complaints were never formally dismissed. Plaintiffs filed the instant appeal.

{¶5} Plaintiffs ("appellants") assert the following assignment of error:

> THE COURT OF CLAIMS ERRED IN GRANTING SUMMARY JUDGMENT TO THE OHIO DEPARTMENT OF TRANSPORTATION DISMISSING PLAINTIFFS-APPELLANTS' SUIT.

{¶6} Generally, civil actions against the state must be commenced no later than two years after the date of accrual of the cause of action or within any shorter period applicable to similar suits between private parties. R.C. 2743.16.

{¶7} ODOT contends the savings statute governs the current appeal. R.C. 2305.19 provides the following in pertinent part:

> In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date.

{¶8} ODOT maintains that before the statute can apply, an action must have failed for a reason other than upon the merits, e.g., a voluntary dismissal. ODOT

contends that since there was no dismissal of the Lucas County complaints, the appellants' complaint filed in the Court of Claims is barred by the two-year statute of limitations and is not "saved" under the statute. The Court of Claims determined ODOT's position was correct. There is no dispute that the complaint filed in the Court of Claims was beyond two years from the date of the accident.

{¶9} On the other hand, appellants contend the complaint filed in the Court of Claims is a properly amended complaint under Civ.R. 15(D) and the savings statute is inapplicable. Appellants agree they did not dismiss the original complaints in Lucas County because defendants other than ODOT were named and could be sued in that court. Appellants assert that once they identified ODOT as the proper defendant, they had no choice but to file in the Court of Claims. Thus, the Court of Claims' complaint should be construed as an amendment to the Lucas County lawsuit. Civ.R. 15(D) states the following:

> **Amendments where name of party unknown**
>
> When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding *must* be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and the copy thereof must be served personally upon the defendant.

(Emphasis added.)

{¶10} The specific requirements of Civ.R. 15(D) include the following: (1) the summons must be personally served upon the defendant; certified or regular mail is insufficient; (2) the summons must contain the words "name unknown"; and (3) the

plaintiff must aver in the complaint the fact that the name was not discovered. *Amerine v. Haughton Elevator Co., Div. of Reliance Electric Co.* (1989), 42 Ohio St.3d 57, 58. If the specific requirements of Civ.R. 15(D) are met, the court must then look to Civ.R. 15(C) and Civ.R. 3(A). Id. at 58-59. Under Civ.R. 15(C), an amendment relates back to the date of the original pleading if the parties are not changed and the claim(s) asserted arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. Id; Civ.R. 15(C). Further, under Civ.R. 3(A) "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing * * * upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D)."

{¶11} We find pursuant to Civ.R. 15(D), upon discovery of ODOT's identity, appellants were *required* to amend the complaint in Lucas County adding ODOT. The language of the rule is clear and unambiguous. The filing of the complaint against ODOT in the Court of Claims is insufficient to constitute an amendment to the Lucas County lawsuit under the rule. Had appellants filed an amended complaint, the Lucas County court would have dismissed ODOT for lack of subject matter jurisdiction. *Kinney v. OH Dept. of Admin. Servs.* (1986), 30 Ohio App.3d 123. Because appellants did not file an amendment and there was no "dismissal" of the action against ODOT, there has been no failure of the action "otherwise than upon the merits" as required by R.C. 2305.19.

{¶12} Subsequent to the filing of the complaint against ODOT in the Court of Claims, the city of Toledo petitioned the court for removal of the Lucas county actions against the remaining defendants to the Court of Claims. The actions remain pending in the Court of Claims. Therefore, because the actions in Lucas county are no longer

pending, no further options exist for appellants to save their claims against ODOT. Accordingly, appellants' first and sole assignment of error is overruled.

{¶13} Based on the foregoing, we find appellants were required to amend the original complaint filed in Lucas County to add ODOT as a defendant. Appellants did not amend. Therefore, there was no dismissal otherwise than upon the merits and appellants' claims against ODOT cannot be saved under R.C. 2305.19.

{¶14} Accordingly, appellants' sole assignment of error is overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

BRYANT and SADLER, JJ., concur.