[Cite as *Stone v. Cellura*, 2015-Ohio-2453.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

CHRISTOPHER STONE,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2014-P-0043**
- vs -	:	
JOSEPH CELLURA,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2012 CV 01192.

Judgment: Affirmed.

Joseph P. Morse, 1540 Leader Building, 526 Superior Avenue, Cleveland, OH 44114 (For Plaintiff-Appellant).

Margo S. Meola, Davis & Young, 972 Youngstown-Kingsville Road, S.E., P.O. Box 740, Vienna, OH 44473 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Christopher Stone, appeals from the June 27, 2014 judgment of the Portage County Court of Common Pleas, denying his Civ.R. 60(B) motion for relief from judgment. For the reasons that follow, we affirm.

{¶2} On August 1, 2009, Mr. Stone and appellee, Joseph Cellura, each attended a party near the campus of Kent State University. The party took place at the townhouse of Mr. Stone's girlfriend. Mr. Stone and Mr. Cellura had never previously

met. The party started to "get out of hand" around 2:00 a.m. Mr. Cellura and his friends were asked to leave. Mr. Stone followed them outside to make sure they left. Immediately thereafter, an altercation ensued between Mr. Stone and Mr. Cellura. Mr. Cellura obtained a baseball bat from a nearby vehicle and swung it at Mr. Stone, striking him in the head. Mr. Cellura claimed he acted in self-defense. Mr. Stone claimed Mr. Cellura intended to cause him harm. As a result of the incident, Mr. Stone suffered a fractured skull and a subdural hematoma which required a lengthy hospitalization.

{¶3} Mr. Stone initially filed a complaint against Mr. Cellura on September 3, 2010, Case No. 2010 CV 01389. However, that case was later voluntarily dismissed without prejudice on October 13, 2011.

{¶4} Mr. Stone re-filed the action on October 9, 2012. In his complaint, Mr. Stone alleged two, seemingly inconsistent, causes of action: count one, assault and battery (claiming that Mr. Cellura intentionally, recklessly, and/or with malice struck him with a bat causing severe and permanent injuries); and count two, negligence (claiming that Mr. Cellura negligently struck him with a bat causing severe and permanent injuries).

{¶5} Mr. Cellura was granted leave and filed an answer to the complaint on June 21, 2013. Also on that date, Mr. Cellura filed a motion for summary judgment. In his motion, Mr. Cellura specifically asserted that "the basis of [Mr. Stone's] complaint is an intentional, offensive touching, and [Mr. Stone's] assault and battery claim was not brought within the applicable statute of limitations and must be dismissed accordingly." Mr. Cellura further asserted that "[a]lthough [Mr. Stone] also pleads negligence, it is

clear that his claims are based on assault and battery and, therefore, he cannot circumvent the statute of limitations by trying to plead a negligence action where one does not exist."

{¶6} On June 25, 2013, the trial court noted that a non-oral hearing would take place on the summary judgment motion in 21 days. On July 11, 2013, Mr. Stone filed a motion for leave until July 30, 2013 to file a response to the summary judgment motion. The court granted Mr. Stone's motion on July 16, 2013. However, Mr. Stone never filed a response. On August 12, 2013, the court granted Mr. Cellura's motion for summary judgment. Mr. Stone did not appeal that entry.

{¶7} On September 13, 2013, Mr. Stone filed a Civ.R. 60(B) motion for relief from judgment and requested an oral hearing. In his motion, Mr. Stone alleged there was some communication at a case management conference held in July 2013 regarding a change in the dispositive motion dates. Mr. Stone's counsel attached his affidavit to the motion with his notes from that hearing. However, there is no court record or docket entry revealing what was represented in Mr. Stone's counsel's affidavit. Mr. Stone's representative claimed he relied on a timeline discussed during the status hearing and that is why he never filed a response to the summary judgment motion. Also attached to Mr. Stone's Civ.R. 60(B) motion was a proposed response to the summary judgment motion in an attempt to establish that he had a meritorious defense.

{¶8} Mr. Cellura filed a brief in opposition to Mr. Stone's Civ.R. 60(B) motion. The court scheduled a hearing for November 2013. That hearing was continued upon

Mr. Stone's request. The court scheduled another hearing on Mr. Stone's Civ.R. 60(B) motion for March 2014. That hearing was also continued upon Mr. Stone's request.

{¶9} Finally, a hearing on Mr. Stone's Civ.R. 60(B) motion took place on May 21, 2014. However, Mr. Stone presented no evidence in support of his motion. On June 27, 2014, the trial court denied Mr. Stone's Civ.R. 60(B) motion for relief from judgment. The court found that the recollection of Mr. Stone's counsel as to any discussion at the hearing was not relevant as there was no order filed by the court. Thus, the court determined there was no excuse for Mr. Stone not filing the appropriate response brief to the summary judgment motion. The court also held that based upon the information attached to the Civ.R. 60(B) motion, there was no meritorious defense found. Mr. Stone filed a timely appeal from the June 27, 2014 entry and asserts the following two assignments of error:[1]

{¶10} "[1.] The trial court erred in denying Appellant's Motion for Relief from Judgment.

{¶11} "[2.] The trial court erred in granting Appellee's Motion for Summary Judgment."

{¶12} At the outset, we note that our jurisdiction to entertain an appeal is limited to those judgments timely appealed pursuant to App.R. 4(A). *JPMorgan Chase Bank, N.A. v. Rhodes*, 11th Dist. Lake No. 2013-L-117, 2014-Ohio-2706, ¶14.

{¶13} On appeal, Mr. Stone raises issues regarding the denial of his Civ.R. 60(B) motion as well as the granting of Mr. Cellura's motion for summary judgment.

1. Upon an initial review, this court determined there were some clerical errors in the trial court's August 12, 2013 and June 27, 2014 entries. Accordingly, on October 3, 2014, this court remanded the matter to the trial court which thereafter filed two nunc pro tunc entries on October 20, 2014 correcting the clerical issues.

Although Mr. Stone timely appealed the June 27, 2014 judgment entry denying his Civ.R. 60(B) motion, he never appealed the granting of Mr. Cellura's motion for summary judgment. As a result, Mr. Stone is not permitted to raise any error related to the issue involving summary judgment. *Rhodes* at ¶14. Thus, we lack jurisdiction to consider Mr. Stone's second assignment of error. *Wells Fargo Bank, N.A. v. Bluhm*, 6th Dist. Erie No. E-13-052, 2015-Ohio-921, ¶14.

{¶14} Because Mr. Stone's appeal is only timely and properly before us as to the June 27, 2014 judgment entry which denied his Civ.R. 60(B) motion, we will only address his first assignment of error. *Rhodes* at ¶14.

{¶15} In his first assignment of error, Mr. Stone argues the trial court erred in denying his Civ.R. 60(B) motion for relief from judgment. Mr. Stone alleges he is entitled to relief from judgment because his counsel misunderstood the date by which he had to file a response to Mr. Cellura's motion for summary judgment.

{¶16} We review a trial court's decision to grant or deny a motion for relief from judgment for abuse of discretion. *Cefaratti v. Cefaratti*, 11th Dist. Lake No. 2004-L-091, 2005-Ohio-6895, ¶11. Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶17} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶18} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment * * *."

{¶19} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Ohio Supreme Court has held:

{¶20} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec. Inc. v. ARC Industries, Inc*, 47 Ohio St.2d 146, paragraph two of the syllabus (1976).

{¶21} "If any one of the aforementioned requirements is not satisfied, the motion is properly overruled." *Sokol v. HMDG, LLC*, 11th Dist. Geauga No. 2012-G-3117, 2013-Ohio-3476, ¶13.

{¶22} In this case, Mr. Stone relies on the "catchall" provision of Civ.R. 60(B)(5) in support of his argument that he is entitled to relief from judgment, claiming that his counsel misunderstood the date by which he had to file a response to Mr. Cellura's motion for summary judgment. Mr. Stone relies on his counsel's affidavit attached to his Civ.R. 60(B) motion and his counsel's notes that he took during the status conference held before the magistrate on July 17, 2013. We note that at that point, Mr. Stone had filed a motion for leave to file a response to Mr. Cellura's motion for summary judgment, which had been granted by the trial court and in which Mr. Stone was given until July 30, 2013 to file his brief in opposition. We further note that a court speaks exclusively through its judgment entries and not through any oral pronouncements. *See In re Guardianship of Hollins*, 114 Ohio St.3d 434, 2007-Ohio-4555, ¶30.

{¶23} Following the status conference, Mr. Stone filed no additional motions or requests for an order extending the time in which he had to file a response to the motion for summary judgment or a request that the non-oral hearing be reset. Mr. Stone provides no credible explanation as to why a response could not be prepared within 39 days of the filing of Mr. Cellura's motion for summary judgment. Upon review, the trial court properly denied Mr. Stone's motion for relief from judgment based upon the fact that he did not meet the requirements of Civ.R. 60(B) because there was no proper ground presented for relief.

{¶24} Mr. Stone's "meritorious defense or claim" argument was presented by way of an attachment to his Civ.R. 60(B) motion, i.e., his proposed brief in response to Mr. Cellura's motion for summary judgment. Mr. Stone alleged that the statute of limitations was tolled because he was of "unsound mind." Mr. Stone further alleged that the incident at issue constituted negligence which has a longer statute of limitations period (two years) than the intentional tort of assault and battery (one year). We determine the trial court properly found that Mr. Stone's allegations had no merit.

{¶25} R.C. 2305.16, "Tolling of limitations due to minority or unsound mind," states in part:

{¶26} "After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease which renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought."

{¶27} As stated, the incident between Mr. Stone and Mr. Cellura occurred on August 2, 2009. Mr. Stone initially filed a complaint against Mr. Cellura over one-year later on September 3, 2010, Case No. 2010 CV 01389. However, that case was later voluntarily dismissed without prejudice on October 13, 2011.

{¶28} Mr. Stone refiled the action on October 9, 2012, over three years after the incident. In his refiled complaint, Mr. Stone alleged two, seemingly inconsistent, causes of action: count one, assault and battery (claiming that Mr. Cellura intentionally, recklessly, and/or with malice struck him with a bat causing severe and permanent

injuries); and count two, negligence (claiming that Mr. Cellura negligently struck him with a bat causing severe and permanent injuries).

{¶29} The testimony of both parties is that Mr. Cellura intentionally swung the bat at Mr. Stone even though Mr. Cellura alleged his actions were in self-defense and he did not mean to cause any harm. The trial court properly found that the only action possible under this set of facts is for the intentional tort of assault and battery, which has a one-year statute of limitations period under R.C. 2305.111(B) ("an action for assault or battery shall be brought within one year after the cause of the action accrues.") *See also Love v. Port Clinton*, 37 Ohio St.3d 98, syllabus (1988) ("[w]here 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.")

{¶30} Mr. Stone indicated he suffered a fractured skull, a subdural hematoma, was hospitalized, subsequently cared for by his mother, and "incapacitated" for a period of time. We agree and sympathize with Mr. Stone that he was injured and hospitalized. However, Mr. Stone attempts to overcome the one-year statute of limitations by making blanket allegations concerning his mental state in order to show that he was somehow prevented from timely filing his complaint against Mr. Cellura. Beyond Mr. Stone's conclusory statements, there is no evidence in this case**,** by way of medical records, history, or testimony, to establish or support that he was of unsound mind. "'Of unsound mind' includes all forms of mental retardation or derangement." R.C. 1.02(C). Mr. Stone failed in his burden to establish that he was suffering from mental retardation, derangement, or insanity in order to overcome the statute of

limitations defense. *Fisher v. Ohio Univ.*, 63 Ohio St.3d 484, 488 (1992) (equating derangement with insanity). "'[A] general claim of disability, absent specific details, will not toll the time for the running of an applicable statute of limitations.'" *Gareau v. Grossman*, 8th Dist. Cuyahoga No. 88246, 2007-Ohio-5711, ¶52, quoting *Robinson v. Kramer*, 8th Dist. Cuyahoga No. 76643, 1999 Ohio App. LEXIS 5916, at *10 (Dec. 9, 1999). The facts presented in this case do not establish a tolling of the one-year statute of limitations for the assault and battery claim and Mr. Stone cannot transform such claim into one of negligence in order to circumvent the one-year period.

{¶31} Upon consideration, the trial court did not err in denying Mr. Stone's Civ.R. 60(B) motion for relief from judgment.

{¶32} Mr. Stone's first assignment of error is without merit.

{¶33} For the foregoing reasons, appellant's first assignment of error is not well-taken and his second assignment is overruled for lack of jurisdiction. The judgment of the Portage County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.