[Cite as *Young v. Duvall*, 2009-Ohio-5806.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JEREMY YOUNG	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
TRAVIS DUVALL	:	Case No. 2009CA0002
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Plea, Case No. 2007CV458
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	October 19, 2009

APPEARANCES:

For Plaintiff-Appellant

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Farmer, P.J.

{¶1} On October 16, 2005, appellee, Travis Duvall, was operating a motor vehicle owned by Robert Beal when he was involved in a single vehicle accident. A passenger in the vehicle, appellant, Jeremy Young, sustained injuries.

{¶2} On October 18, 2007, appellant filed a complaint seeking damages. On January 14, 2008, appellee filed a motion to dismiss and/or motion for summary judgment, claiming appellant missed the two year statute of limitations in which to file his complaint. A hearing was held on June 18, 2008. By journal entry filed February 10, 2009, the trial court granted appellee's motion and dismissed appellant's complaint. A nunc pro tunc journal entry was filed on March 20, 2009.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DUVALL ON YOUNG'S CLAIMS."

II

{¶5} "THE TRIAL COURT ERRED IN DISMISSING THE YOUNG CASE, PURSUANT TO OHIO RULE OF CIVIL PROCEDURE 12(B)(6)."

I, II

{¶6} Appellant claims the trial court erred in granting summary judgment to appellee and dismissing his complaint. Specifically, appellant claims his complaint was timely filed because of the tolling provision of R.C. 2305.15(B). We agree.

{¶7} Although both a Civ.R. 12(B)(6) motion to dismiss and a Civ.R. 56 motion for summary judgment were filed, our standard of review is de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 1996-Ohio-336; *Greeley v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228.

{¶8} The accident in this case occurred on October 16, 2005. Pursuant to R.C. 2305.10(A), appellant had to file his claim for personal injury within two years after the cause of action accrued, October 16, 2007. Appellant filed his complaint on October 18, 2007.

{¶9} The question of law sub judice is whether appellee's imprisonment from February 23, 2006 to February 25, 2006 constitutes three days for the purpose of tolling the statute of limitations pursuant to R.C. 2305.15(B) which states the following:

{¶10} "When a person is imprisoned for the commission of any offense, the time of the person's imprisonment shall not be computed as any part of any period of limitation, as provided in section 2305.09, 2305.10, 2305.11, 2305.113, or 2305.14 of the Revised Code, within which any person must bring any action against the imprisoned person."

{¶11} It is uncontested that appellee was imprisoned in the Morrow County Jail for six hours on February 23, 2006, a full twenty-four hours on February 24, 2006, and seventeen hours on February 25, 2006, or three days and two nights. T. at 10, 35-36; See, Affidavit of Sergeant Shauna Robinson, attached to Appellee's August 18, 2008 Opposition Brief to Motion to Dismiss as Plaintiff's Exhibit 2. It is also undisputed that appellant was serving time on a three day sentence. The question is whether these three days tolled the statute of limitations.

{¶12} In his brief at 5, appellee notes the purpose of the tolling statute "is to protect a plaintiff's ability to file a claim when the defendant's absence has interfered with that ability." Appellee argues the following:

{¶13} "The record is devoid of any evidence that Appellant was ever unable to locate Appellee in order to serve him. Appellee was not in jail for the purposes of avoiding service, nor is there any evidence that the short amount of time Appellee spent in jail kept Appellant from serving him. In fact, the action was not even filed until October of 2007, more than eight months after Appellee served his time in jail on an unrelated matter." Appellant's Brief at 6.

{¶14} We find the interpretation of R.C. 2305.15(B) is not limited to a defendant being imprisoned at the time of service. R.C. 2305.15 is a remedial statute. Remedial statutes are to be liberally construed in order to allow cases to be decided upon their merits. R.C. 1.11. We find the tolling provision is applicable to the facts sub judice.

{¶15} Appellee argues in *Cantwell v. Frantz* (August 8, 2001), Stark App. No. 2000CA00331, this court adopted the following test: "[I]n analyzing a partial day for tolling purposes, a court must determine whether activity was possible in commencing the action at hand and completing service on the defendant on said day." The *Cantwell* court determined crossing the border at 5:00 a.m. to go on vacation constituted a tolling day as "appellant has at least met his burden to show that any activity in commencing the action or completing service would not have been reasonably possible on July 12, 1998, when appellee would have been on the road and absent from the state before dawn." We note the *Cantwell* court did not rule on any other partial days, as only one was needed. In his concurrent opinion, Judge William B. Hoffman determined because

R.C. 2305.15 was remedial in nature and was to be liberally construed, all partial days should be counted for tolling purposes.

{¶16} Using the majority's standard in *Cantwell,* appellant should be able to count February 25, 2006 as a tolling day because his afternoon release on February 25, 2006 (5:56 p.m.) interfered with appellant's ability to complete service and filing. Of course, February 24, 2006 would count as a tolling day as appellee was incarcerated for the entire day. Appellant only needs these two days to come within the statute of limitations. However, we believe the proper manner to interpret R.C. 2305.15(B) is to permit all three days to count in tolling the statute of limitations.

{¶17} In *State v. Clark* (June 1, 1993), Stark App. No. CA-9194, this court reviewed the issue of whether the defendant should have been tried in juvenile court or adult court, as the defendant had committed a crime on his eighteenth birthday, but six hours prior to the actual time of his birth. In the opinion authored by this writer, this court found "there shall be no fraction of days." Each calendar day counts for itself. To hold otherwise would subject R.C. 2305.15 to nitpicking factual analysis. If an individual has a 6:00 a.m. flight to travel out of state and as is common, is delayed several hours, do we find that because of the delay, the individual seeking to utilize the tolling statute could have commenced an action or perfected service during the delay at the airport? We find the most reasonable and consistent approach would be to count each calendar day as a whole day. We count each calendar day as a whole day when we determine the day of an accident or event giving rise to a cause of action.

{¶18} Upon review, we find the trial court erred in granting summary judgment to appellee and dismissing appellant's complaint.

{¶19} Assignments of Error I and II are granted.

{¶20} The judgment of the Court of Common Pleas of Morrow County, Ohio is hereby reversed.

By Farmer, P.J.

Delaney, J. concur and

Wise, J. concurs separately.

_s/ Sheila G. Farmer_____

_____

_s/ Patricia A. Delaney_____

JUDGES

SGF/sg 928

Wise, J., concurring

{¶21} I concur with the majority's decision to reverse the dismissal of appellant's complaint. As the majority properly notes in the first part of ¶16 of its opinion, the application of the test we utilized in *Cantwell* provides the necessary two tolled days to keep the action within the statute of limitations. However, until the General Assembly provides more statutory direction in this area, I am not prepared to adopt, and I think we need not presently reach, the bright-line rule determined in ¶17 that each calendar day, even if a partial imprisonment day, is to be automatically counted as a whole day under R.C. 2305.15(B).

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JEREMY YOUNG	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
TRAVIS DUVALL	:	
Defendant-Appellee	:	CASE NO. 2009CA0002

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Morrow County, Ohio is reversed, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellee.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_s/ Patricia A. Delaney_____

JUDGES