[Cite as *Swartz v. Estate of Karder*, 2009-Ohio-6790.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RACHEL SWARTZ

Plaintiff-Appellant

-vs-

ESTATE OF JOE M. KARDER, DECEASED, ROBERT E. KARDER, ADMINISTRATOR

Defendant-Appellee

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2009CA00041

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2008CV05177

JUDGMENT: Affirmed/Reversed in Part & Remanded

DATE OF JUDGMENT ENTRY: December 21, 2009

APPEARANCES:

For Plaintiff-Appellant

STEVEN P. OKEY
337 Third Street, NW
Canton, OH 44702-1786

MATTHEUW W. OBERHOLTZER
116 Cleveland Avenue, NW
Canton, OH 44702-1724

For Defendant-Appellee

STEVEN P. GRIFFIN
JUSTIN S. GREENFELDER
4518 Fulton Drive, NW
P.O. Box 35548
Canton, OH 44735-5548

Farmer, P.J.

{¶1} On December 4, 2008, appellant, Rachel Swartz, filed a complaint against appellee, the Estate of Joe M. Karder, Deceased, Robert E. Karder, Administrator.[1] Appellant alleged Joe Karder, her grandmother's boyfriend, sexually abused her from 1992 to 1999, when appellant was between the ages of six and thirteen. Appellant claimed she had repressed the memories until June 4, 2007 when she was twenty years old.

{¶2} On December 19, 2008, appellee filed a motion for summary judgment, claiming the one year statute of limitations had expired and the discovery rule announced in *Ault v. Jasko,* 70 Ohio St.3d 114, 1994-Ohio-376, did not apply. By judgment entry filed February 11, 2009, the trial court agreed and granted appellee's motion for summary judgment.

{¶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 BY APPLYING THE WRONG STATUTE OF LIMITATIONS, WHICH, DESPITE NOT BEING ARGUED IN THE TRIAL COURT, CONSTITUTES PLAIN ERROR."

II

{¶5} "EVEN IF A ONE-YEAR STATUTE OF LIMITATIONS DID APPLY, THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF KARDER'S ESTATE BECAUSE REASONABLE MINDS COULD CONCLUDE THAT

[1]This was a refilling. Appellant originally filed her complaint on February 12, 2008, but voluntarily dismissed it.

SWARTZ REPRESSED HER MEMORIES OF KARDER'S SEXUAL ABUSE OF HER, THEREBY TOLLING THE ONE-YEAR STATUTE OF LIMITATIONS."

I

{¶6} Appellant claims the trial court erred in applying the wrong statute of limitations.

{¶7} Appellant argues the trial court should have used the statute of limitations set forth in R.C. 2305.111(C), effective August 3, 2006, which states the following:

{¶8} "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."

{¶9} Appellant never made this argument to the trial court. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91; Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would

have been different but for the error. *Long*. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶10} Appellant turned eighteen years old on December 5, 2004, and she filed her initial complaint on February 12, 2008. Appellant argues the statute of limitations in R.C. 2305.111(C) applies in her case and therefore her complaint was timely filed.

{¶11} Appellee argues the statute applies to appellant only if the statute of limitations on her claim had not expired. Appellee argues under previous case law, the statute of limitations ran on appellant's claim one year after she turned eighteen, December 5, 2005. This date was prior to the effective date of R.C. 2305.111(C), August 3, 2006; therefore, R.C. 2305.111(C) does not apply.

{¶12} Section 3(B) of S.B. No. 17 addressed the applicability of this new statute of limitations as follows:

{¶13} "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."

{¶14} Appellant argues R.C. 2305.10(G) provides for an exception. R.C. 2305.10(G) specifically states the following:

{¶15} "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."

{¶16} The statute appellant seeks to bootstrap into retroactivity is a subsequent section of R.C. Chapter 2305. R.C. 2305.10 and its subsections do not apply to child sexual abuse cases:

{¶17} "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." R.C. 2305.10(E).

{¶18} The specific referral in Section 3(B) of S.B. No. 17 on the applicability of the statute of limitations in child sexual abuse cases makes R.C. 2305.10(G) inapplicable in this case. Plain error on the statute of limitations issue is not found.

{¶19} Assignment of Error I is denied.

II

{¶20} Appellant claims the trial court erred in granting summary judgment to appellee.

{¶21} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶22} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶23} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35.

{¶24} Appellant argues if the one year statute of limitations applies, she still timely filed her complaint given the discovery rule in *Ault,* supra, at syllabus:

{¶25} "1. The discovery rule applies in Ohio to toll the statute of limitations where a victim of childhood sexual abuse represses memories of that abuse until a later time.

{¶26} "2. 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."

{¶27} Appellant states she had repressed her memories and the date of her first conscious memory was June 4, 2007. Appellant argues she filed her initial complaint on February 12, 2008, within one year of recall, therefore her complaint was timely filed. Appellant further argues pursuant to the standards of Civ.R. 56, there exists a genuine issue of fact on her repressed memories. Appellant argues in construing her expert testimony in her favor, summary judgment to appellee was inappropriate.

{¶28} Appellee argues appellant did not have repressed memories and her deposition proves she was aware of the sexual abuse as she agreed it was "something that you would never forget." Swartz depo. at 67. Appellant counters that when read as a whole, her deposition does not lead to the conclusion that she did not have repressed memories. Appellant substantiates this claim with the testimony of her expert, Myron Stern, Ph.D.

{¶29} In his affidavit at ¶4, Dr. Stern states that his "conclusions and opinions contained in the attached report are based on a reasonable degree of certainty in my field" of psychology. We find such an affirmation was sufficient to support his report wherein Dr. Stern opined the following:

{¶30} "2. Whether she has 'repressed memories' of the events in question.

{¶31} "The client clearly describes experiences of which she had no conscious memory for a number of years. She described being both surprised and distressed at realizing that the situation in the newspaper article applied to herself. This situation appears to fit the definition of 'repressed memories.'

{¶32} "3. Whether there was a conscious choice in 'forgetting.'

{¶33} "There does not appear to be any conscious decision to put those memories 'on hold' or 'on the back burner.' "

{¶34} In its February 11, 2008 judgment entry granting summary judgment to appellee, the trial court determined Dr. Stern's report "does not state to a reasonable degree of certainty in his field that Plaintiff suffered from or had repressed memories of Defendant's alleged abuse." The trial court found Dr. Stern's opinion of repressed memories was speculative at best, and Dr. Stern's report did not contain "any specific qualifications that render him capable of reaching an opinion on the issue of repressed memory, or specific research he has conducted regarding the issue of repressed memory, or even a definition that he employs in reaching his opinion that the Plaintiff's situation, 'appears to fit the definition' of repressed memories."

{¶35} We find the trial court's conclusions as to Dr. Stern's opinions to be in error.

{¶36} It is true that during the cross-examination of appellant in her deposition, the questions were formulated in the present tense i.e., "[w]hat is your memory of it?"; "[y]ou remember..."; "[s]o not only did you remember…"; "what is your memory…"; "[a]nd your memory is..." Swartz depo. at 42, 43, 45, 47, 49. Appellant's answers to the

questions posed in this manner can be viewed as present recollection instead of past memory.

{¶37} Appellant also stated she made a choice when she was thirteen years old not to go into the Karder house because of the sexual abuse that had happened there. Id. at 69. She also affirmed that the abuse was "something that you would never forget" and it "is very clear and vivid in your mind." Id. at 67, 68. When questioned about "mutual masturbation," she admitted "that's something you've never forgotten." Id. at 82.

{¶38} In her complaint ¶4, appellant stated her memories were repressed until an incident on June 4, 2007. If repressed memory is found, this date falls within the *Ault* statute of limitations.

{¶39} When reading the deposition as a whole, because of the switching between past and present tense and because a great deal of the discussion centered on her statement made to police in December of 2007, it is difficult to ascertain what time frame appellant is referring to in her answers. We note because it was cross-examination, appellee's counsel posed the questions in a leading manner.

{¶40} We find the presumptions argued by appellee regarding appellant's answers to leading questions are in equal balance to Dr. Stern's opinion. Based upon these observations, we find the trial court erred in determining that appellant did not have repressed memories under a Civ.R. 56 standard.

{¶41} Upon review, we find the trial court erred in granting summary judgment to appellee.

{¶42} Assignment of Error II is granted.

{¶43} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed in part, reversed in part and remanded.

By Farmer, P.J.

Hoffman, J. concurs in part and dissents in part and

Wise, J. concurs separately.

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JUDGES

SGF/db 1103

Hoffman, J., concurring in part and dissenting in part

{¶44} I concur in the majority's analysis and disposition of Appellant's second assignment of error. I respectfully disagree with my colleagues' decision to deny Appellant's first assignment of error.

{¶45} The majority bases its decision on Section 3(B) of S.B. No. 17. Section 3(B) is uncodified law.

{¶46} Upon review of the codified portion of S.B. 17 found in R.C. 2305.111(C) and the uncodified portion of S.B. 17 found in Section 3(B), I find they are in conflict. The codified portion does not include the limiting language found in the uncodified portion; namely, "…for which the period of limitations applicable to such civil action prior to the effective date of this act [8-3-06] has not expired on the effective date of this act…" The question becomes in the event of a conflict, which controls?

{¶47} R.C. 2305.111(C) is not ambiguous. It clearly establishes the statute of limitations is twelve years after the age of majority unless the defendant conceals from the plaintiff facts forming the basis of the claim.

{¶48} This intent is further reflected by the codified portion of S.B. 17 in R.C. 2305.10(G) [eff. 8-3-06] quoted in the majority opinion. Because R.C. 2305.10(G) refers to "This section" and does not exclude division (E) of the statute, it encompasses division (E) which, in turn, specifically incorporates by reference division (C) of R.C. 2305.111. See *Thorton v. Montville Plastics & Rubber, Inc*. (2009), 121 Ohio St.3d 124, 2009-Ohio-360, dissenting opinion of O'Donnell, J., at p. 487 (affirmed on other grounds).

{¶49} It seems to be an accepted proposition of law legislation which is not codified is nevertheless legally binding and is of the same force and effect as codified legislation. See *American Assoc. of Univ. Professors v. Central State University* (Jan. 31, 1997), Green County App. No. 96-CA-21, 1997WL52914, at p. 16, citing *Voinovich v. Board of Park Commrs*. (1975), 42 Ohio St.2d 511, and *In re McCrary* (1991), 75 Ohio App. 3d 601, 601. However, the fact uncodified law is of equal force to codified law does not resolve the question of which controls in the event of a conflict.

{¶50} Justice O'Donnell in *Thorton* resolved such a conflict by giving effect to the codified law, *Thorton*, Id, at ¶31.

{¶51} Judge Ziegel of the Court of Claims of Ohio addressed the issue in *In re McKinnon (*1984) 16 Ohio Misc. 2d 4, 476 N.E. 2d 1101, as follows:

{¶52} "Certainly, where the language of a statute is unclear or ambiguous it is appropriate to refer to the uncodified text of the original act as an aid in construction. Cf. R.C. 1.49. There is, however, nothing unclear or ambiguous about R.C. 2743.60(E). Where the language of a statute is clear, it is unnecessary to resort to material outside the statute itself to obtain its meaning. The words of the statute speak for themselves. 50 Ohio Jurisprudence 2d (1961) 150, Statutes, Section 175. While the enactment of legislation precedes codification, the statutes are released to the public in the form of officially codified enactments. The purpose of codification is 'to collect and embody in one statute all the laws and parts of laws on the same subject.' 50 Ohio Jurisprudence 2d, *supra*, at 67, Section 78. This purpose is not accomplished if, in order to ascertain what the law is, a researcher is required to refer to the printed original statutes, *i.e*., Ohio Laws, as well as to the Revised Code."

{¶53} Id, at 1104.

{¶54} Based upon the foregoing authority, I find R.C. 2305.111(C) controls over Section 3(B) of S.B. 17. Although this argument was not raised by Appellant below, because the trial court dismissed Appellant's complaint based upon the statute of limitations, I find the error rises to the level of plain error.[2] Accordingly, I would sustain Appellant's first assignment of error in addition to her second assignment of error.

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HON. WILLIAM B. HOFFMAN

[2] I was unaware of the change in the applicable statute of limitations until the issue was raised in the appellate briefs.

Wise, J., concurring

{¶55} I concur with the decision of my colleagues to sustain the Second Assignment of Error. I concur with the result reached by Judge Farmer to overrule the First Assignment of Error, but write separately to explain how I arrive at this conclusion.

{¶56} At the heart of the conflict between Judge Farmer's opinion and Judge Hoffman's partial dissent is the use of the uncodified portion of R.C. 2305.111(C), referenced as Senate Bill 17, Section 3(B).

{¶57} Judge Farmer finds the language contained in S.B. 17, Sec. 3(B) is controlling. Judge Hoffman finds this uncodified language to be in conflict with R.C. 2305.111(C) and R.C. 2305.10 (E) and (G), but he resolves this by holding that when a conflict occurs between the uncodified and the codified, the codified portion controls.

{¶58} I agree with Judge Hoffman's implicit holding that R.C. 2305.111(C) is remedial in nature based on incorporation by reference in R.C. 2305.10 (E) and (G), but I disagree as to the extent of the retroactive application.[3] I find that although R.C. 2305.111(C) must generally be applied retroactively as a remedial statute, it may not be used to revive a cause of action that has elapsed. I find there is no conflict as both the codified version (via incorporation by reference in R.C. 2305.10 (E) and (G)) and the uncodified portion of S.B. 17, Sec. 3(B) clearly indicate that the twelve-year statute of limitations is, generally speaking, remedial and to be applied retroactively. But I find that the uncodified portion clarifies the extent to which this bill is to be applied retroactively. Therefore, although I agree with Judge Hoffman that when a conflict exists between the codified and the uncodified portion of the law, the codified portion controls, in this case I

[3] Judge Farmer appears to reject an incorporation by reference result in regard to R.C. 2305.111(C) and R.C. 2305.10 (E) and (G). See ¶16 of the opinion.

do not find such a conflict. The uncodified language of S.B. 17, Sec. 3(B) provides the clear intent of the General Assembly that the new law in R.C. 2305.111(C) not be applied retroactively to causes of action that have lapsed:

{¶59} "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 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 ***."

{¶60} The uncodified portion cited above thus clearly states that this bill was not intended to revive actions which had lapsed prior to the enactment of the bill.

{¶61} Under the facts of this case, appellant's cause of action (disregarding the issue of repressed memories) would have arisen on the date that she reached eighteen years of age. The statute of limitations at that time was a one-year statute of limitations. She therefore had one year from the date of reaching eighteen years of age in order to file her cause of action. Therefore, she must have filed her cause of action by December 5, 2005, which she failed to do. Thus, her cause of action lapsed on that date. On August 3, 2006 the General Assembly passed Senate Bill 17 which in part became codified as R.C. 2305.111 (C) and R.C. 2305.10 (E). Under Judge Hoffman's analysis, applying only the codified sections, appellant's cause of action (which had lapsed under the existing statute of limitations) would have been revived. I conclude otherwise.

{¶62} I therefore concur with Judge Farmer's decision to affirm the trial court as to Assignment of Error I.

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HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

RACHEL SWARTZ	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	
	:	JUDGMENT ENTRY
ESTATE OF JOE M. KARDER, DECEASED, ROBERT E. KARDER, ADMINISTRATOR	:	
	:	
Defendant-Appellee	:	CASE NO. 2009CA00041

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed in part and reversed in part. The matter is remanded to said court for further proceedings consistent with this opinion. Costs to be divided equally between the parties.

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JUDGES