[Cite as *Young v. Zukowski*, 2010-Ohio-3491.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

SHELLEY L. YOUNG, et al.	C.A. No. 25146
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DANIEL J. ZUKOWSKI	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2009 03 1828

DECISION AND JOURNAL ENTRY

Dated: July 28, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellants, Shelley and Chad Young (collectively "the Youngs"), appeal from the judgment of the Summit County Court of Common Pleas, granting summary judgment in favor of Defendant-Appellee, Daniel Zukowski. This Court affirms.

I

{¶2} On March 2, 2007, Shelley Young and her son were involved in an automobile collision with Zukowski. Shelley and her son suffered several injuries, but ultimately failed to obtain compensation through Zukowski's insurance company. On March 6, 2009, the Youngs and their son filed a complaint against Zukowski based on negligence and loss of consortium. Zukowski filed a motion for summary judgment, arguing that the Youngs' claims were time-barred. The Youngs filed a memorandum in opposition. On December 8, 2009, the trial court

granted Zukowski's motion for summary judgment as to Shelley Young's negligence claim and Chad Young's claim for loss of consortium.[1]

{¶3} The Youngs now appeal from the trial court's judgment and raise five assignments of error for our review. We consolidate and rearrange several of the assignments of error.

II

Assignment of Error Number One

"THE TRIAL COURT ERRONEOUSLY DETERMINED THAT THE PORTION OF YOUNGS' LAWYER'S AFFIDAVIT CONTAINING ADMISSIONS AGAINST INTEREST MADE BY ZUKOWSKI WERE HEARSAY."

Assignment of Error Number Two

"WHEN SHELLEY L. YOUNG, INJURED IN A MOTOR VEHICLE COLLISION CAUSED BY ZUKOWSKI ON MARCH 2, 2007, FILED HER COMPLAINT ON MARCH 6, 2009, IT IS ERROR FOR THE TRIAL COURT TO GRANT ZUKOWSKI'S MOTION FOR SUMMARY JUDGMENT UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE."

Assignment of Error Number Three

"WHEN SHELLY (sic) L. YOUNG, INJURED IN A MOTOR VEHICLE COLLISION CAUSED BY ZUKOWSKI ON MARCH 2, 2007, FILED HER COMPLAINT ON MARCH 6, 2009, IT IS ERROR FOR THE TRIAL COURT TO GRANT ZUKOWSKI'S MOTION FOR SUMMARY JUDGMENT WHERE REASONABLE MINDS COULD DIFFER AS TO THE ISSUE OF ZUKOWSKI'S ABSENCE FROM THE STATE AND ITS EFFECT OF TOLLING THE STATUTE OF LIMITATIONS AS REQUIRED BY OHIO REVISED CODE SECTION 2305.15."

Assignment of Error Number Five

"THE TRIAL COURT'S REJECTION OF THE CLAIM BY THE YOUNGS OF WAIVER OF STATUTE OF LIMITATIONS AND EQUITABLE ESTOPPEL AS A RESULT OF THE 12 LETTERS (INCLUDING 5 AFTER THE STATUTE

[1] The court retained the portion of the case involving the claim of the Youngs' son, as his claim was tolled pursuant to his status as a minor child.

HAD RUN) FROM ALLSTATE THAT IT WAS CONTINUING TO REVIEW THE CASE WAS ERROR."

{¶4} In their first assignment of error, the Youngs argue that the trial court erred by determining that an affidavit they submitted in support of their memorandum in opposition to summary judgment contained inadmissible hearsay. In their second and third assignments of error, they argue that the court erred by granting summary judgment to Zukowski because the affidavit they submitted proved their claims were not time-barred. Finally, in their fifth assignment of error, the Youngs argue that Zukowski should be barred from raising a statute of limitations defense by the doctrine of equitable estoppel.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶6} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden

of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶7} Both parties agree that the automobile collision at issue occurred on March 2, 2007, and that the Youngs did not file their complaint until March 6, 2009. They further agree that Shelley Young's claim for bodily injury is subject to a two-year statute of limitations, which expired March 2, 2009. Zukowski sought summary judgment on this basis. The Youngs argued, however, that several events occurred after March 2, 2007 and tolled the applicable statute of limitations pursuant to R.C. 2305.15(A). The Youngs relied on an affidavit from their attorney, Eugene Nemitz, Jr., to identify the alleged tolling events. In his affidavit, Nemitz attested to the following: (1) that he had a conversation with Zukowski on June 19, 2009 before Zukowski's scheduled deposition and before Zukowski's lawyer arrived; (2) that Zukowski admitted to attending all of the Pittsburgh Steelers home games for the last several years, which caused him to be away from home from between 7:00 to 8:00 a.m. and 10:00 p.m. to 12:00 a.m. on game days; and (3) that Zukowski admitted to having made two partial-day trips to Seneca sometime between March 2, 2007 and March 2, 2009. Based on Nemitz' affidavit, the Youngs argued that Zukowski left Ohio numerous times for partial-day periods and that, as a matter of law, each partial day amounted to a full day and a tolling event under R.C. 2305.15(A).

{¶8} The trial court found that Nemitz' affidavit amounted to inadmissible hearsay, but also addressed the Youngs' tolling argument on the merits, "assuming *arguendo*" that the affidavit constituted admissible evidence. The court concluded that the statute of limitations barred the Youngs' claims because partial days do not toll the statute of limitations under R.C.

2305.15(A). It further concluded that the doctrine of equitable estoppel did not apply to Zukowski's statute of limitations argument.

{¶9} The trial court correctly concluded that, even considering Nemitz' affidavit for argument's sake, the Youngs did not produce evidence of a tolling event. The Youngs argue that partial days should toll the statute of limitations. This Court has already held, however, that "in computing the tolling time, we will only consider whole days, not fractions of days. Under this method of computation, absences from this state covering only a portion of one calendar day are not absences within the contemplation of R.C. 2305.15." *Barker v. Strunk*, 9th Dist. No. 06CA008939, 2007-Ohio-884, at ¶14. The Youngs acknowledge *Barker*, but argue that it lacks precedential value because, in issuing it, this Court either accidentally or intentionally ignored the Ohio Supreme Court's decision in *Greulich v. Monnin* (1943), 142 Ohio St. 113. The Youngs point to *Greulich* to argue that "[a]ny part of one day is counted as a full day."

{¶10} *Greulich* involved the interpretation of an insurance policy and is distinguishable from the case at hand. Even if *Greulich* were factually relevant to this case, however, we are not convinced that any reliance upon it would benefit the Youngs. *Greulich* held that insurance coverage cannot lapse midday when a policy sets forth a specific day, but not a specific time, for the expiration of coverage because "[i]n the absence of an express limitation, the law does not take notice of a fraction of a day." (Internal quotations and citations omitted.) *Greulich*, 142 Ohio St. at 118. The Court adhered to the principal that, unless otherwise provided, when a contract is enforceable on a particular day, it is enforceable that whole day, not just a part of it. Id. at 118. The Youngs wish to read *Greulich* as holding that, if a person spends any part of a day out of the state, their absence will be treated as if they had spent the entire day out of the state. Yet, *Greulich* could be read a different way. One might read *Greulich* as holding that, if a

person spends any part of the day inside of the state, their presence will be treated as if they had spent the entire day in the state. Either reading would be consistent with the proposition that "the law does not take notice of a fraction of a day." Id. This Court discussed the forgoing concerns in *Barker* before concluding that partial-day absences are not tolling events under R.C. 2305.15. *Barker* at ¶14. We see no reason to depart from our holding in *Barker* at this time. Thus, the trial court correctly determined that the Youngs failed to prove any tolling events occurred after the automobile collision at issue.

{¶11} Additionally, the trial court did not err by allowing Zukowski to assert his statute of limitations defense over the Youngs' equitable estoppel argument. The Youngs argue that they did not file suit within the applicable statute of limitations because they were intentionally misled by Zukowski's insurance company, Allstate Insurance ("Allstate"). Specifically, they argue that they were misled by twelve letters that Allstate sent them from June 2008 to October 2009, indicating that Allstate was continuing to investigate the claim at issue and that it anticipated resolving the matter "in 365 days or sooner." According to the Youngs, Allstate's letters implied that the parties would reach a settlement, "lull[ed] [them] into a false sense of security," and caused them to delay bringing suit against Zukowski.

> "[E]quitable estoppel requires that the proponent prove four elements: (1) that the adverse party made a factual misrepresentation; (2) that the misrepresentation was misleading; (3) that the misrepresentation induced actual reliance which was reasonable and in good faith; and (4) the proponent suffered detriment due to the reliance. As to the first two elements, a showing of fraud or constructive fraud is necessary." (Internal citations and quotations omitted.) *First Energy Solutions v. Gene B. Glick Co.*, 9th Dist. No. 23646, 2007-Ohio-7044, at ¶13.

The Youngs fail to point this Court to even a single factual misrepresentation that Allstate made in any of its letters to them. App.R. 16(A)(7). They merely cite to broad case law, discussing the importance of equity. As we have repeatedly held, "[i]f an argument exists that can support

[an] assignment of error, it is not this [C]ourt's duty to root it out." *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8. Because the trial court properly awarded Zukowski summary judgment, the Youngs' first, second, third, and fifth assignments of error lack merit.

Assignment of Error Number Four

> "THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT AGAINST THE LOSS OF CONSORTIUM CLAIM OF CHAD S. YOUNG IS IN ERROR AS LOSS OF CONSORTIUM CLAIMS ARE SUBJECT TO A FOUR (4) (sic) STATUTE OF LIMITATIONS UNDER R.C. 2305.09 AND THE CLAIM WAS FILED 2 YEARS AND 4 DAYS AFTER THE MOTOR VEHICLE COLLISION AND INJURIES TO HIS WIFE, APPELLANT SHELLEY L. YOUNG."

{¶12} In their fourth assignment of error, the Youngs argue that the trial court erred by granting Zukowski's motion for summary judgment as to Chad Young's claim for loss of consortium. Specifically, they argue that Chad Young's claim was timely because a loss of consortium claim is subject to a four-year, not a two-year, statute of limitations.

{¶13} It is true that a loss of consortium claim based upon a spouse's bodily injury is subject to a four-year statute of limitations. *Huffman v. Timken Co.* (Nov. 7, 1990), 9th Dist. No. 2560, at *3. It is also true, however, that "a cause of action based upon a loss of consortium is a derivative action. That means that the derivative action is dependent upon the existence of a primary cause of action and can be maintained only so long as the primary action continues." *Messmore v. Monarch Mach. Tool Co.* (1983), 11 Ohio App.3d 67, 68-69. Accord *Huffman*, at *3. As previously noted, the trial court properly granted summary judgment as to the primary action in this matter because it is time-barred. Because the primary action (Shelley Young's bodily injury claim) cannot continue, it would appear that Chad Young's derivative claim also must fail. *Messmore*, 11 Ohio App.3d at 68-69; *Huffman*, at *3. Accord *Breno v. Mentor*, 8th Dist. No. 81861, 2003-Ohio-4051, at ¶24. The Youngs have not pointed this Court to any

authority to the contrary. App.R. 16(A)(7). Thus, the Youngs' fourth assignment of error is overruled.

III

{¶14} The Youngs' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

EUGENE H. NEMITZ, JR., Attorney at Law, for Appellants.

ADAM E. CARR, Attorney at Law, for Appellee.