[Cite as *Kelley v. Stauffer*, 2010-Ohio-4522.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

James Kelley et al.,	:	
Plaintiffs-Appellants,	:	
		No. 10AP-235
v.	:	(C.P.C. No. 09CV10-15838)
Jason L. Stauffer,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 23, 2010

Michael T. Irwin, for appellants.

Marshall, Dennehey, Warner, Coleman & Goggin, and *Samuel G. Casolari, Jr.*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiffs-appellants, James Kelley and Myron Miller, appeal from a judgment of the Franklin County Court of Common Pleas dismissing their complaint against defendant-appellee, Jason L. Stauffer. Because the trial court did not err in dismissing appellants' complaint based upon the two-year statue of limitations contained in R.C. 2305.10, we affirm that judgment.

{¶2} On October 22, 2009, appellants filed a complaint in the trial court, in which they alleged that they were injured in a car accident caused by Stauffer's negligence. They alleged that the car accident occurred on October 12, 2007.

{¶3} Stauffer filed a motion to dismiss appellants' complaint pursuant to Civ.R.12(B)(6). Based solely upon the allegations in the complaint, Stauffer argued that appellants' claim was barred by the two-year statute of limitations applicable to actions for bodily injury. R.C. 2305.10. In their memorandum contra Stauffer's motion to dismiss, appellants stated they "believed" that Stauffer had been out of the state for more than ten days during the two-year period. Therefore, appellants argued that the two-year statute of limitations was tolled for some unspecified number of days greater than ten, making their complaint timely.

{¶4} The trial court granted Stauffer's motion and dismissed appellants' complaint. The trial court rejected appellants' claim that Stauffer's absence from the state tolled the statute of limitations because appellants' unsupported beliefs about Stauffer's absence from the state were not alleged in the complaint. After the trial court entered judgment, appellants filed a motion for reconsideration, which the trial court also denied.

{¶5} Appellants appeal the dismissal of their complaint and assign the following error:

> THE TRIAL COURT ERRED IN PREMATURELY SUSTAINING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION PRIOR TO THE CLOSURE OF DISCOVERY THEREBY PREVENTING APPELLANTS FROM ESTABLISHING THAT THE STATUTE OF LIMITATIONS HAS BEEN TOLLED.

{¶6} At the outset, we note that appellants attempt to appeal both the trial court's dismissal of their complaint and its denial of their motion for reconsideration. A motion for reconsideration filed after a final judgment is a nullity, and any order resulting from such a motion is also a nullity. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 381 (judgment resulting from a motion to reconsider filed after grant of motion to dismiss is a

nullity); *Rutan v. Collins*, 10th Dist. No. 03AP-36, 2003-Ohio-4826, ¶7. The trial court's judgment granting Stauffer's motion to dismiss is a final judgment. Therefore, appellants' motion for reconsideration is a nullity, and we will not consider an appeal from the trial court's order denying such a motion.

{¶7} Appellants contend that the trial court erred when it dismissed their complaint on the ground that their claims were barred by the two-year statute of limitations. We disagree.

{¶8} When reviewing a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, an appellate court's standard of review is de novo. *Perrysburg Twp. v. Rossford,* 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73 (citing *Assn. for the Defense of Washington Loc. School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117). A trial court must presume all factual allegations contained in the complaint to be true and must make all reasonable inferences in favor of the nonmoving party. *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 95, 104 (citing *Perez v. Cleveland* (1993), 66 Ohio St.3d 397, *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, and *Phung v. Waste Mgt., Inc.* (1986), 23 Ohio St.3d 100). "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145.

{¶9} In his motion to dismiss, Stauffer asserted that the statute of limitations barred appellants' claims. A party may assert a statute of limitations defense through a Civ.R. 12(B)(6) motion to dismiss if the defense is apparent in the complaint. *Charles v. Conrad,* 10th Dist. No. 05AP-410, 2005-Ohio-6106, ¶24; *Stuller v. Price,* 10th Dist. No. 02AP-267, 2003-Ohio-583, ¶27. Here, the statute of limitations defense is apparent on the face of appellants' complaint.

{¶10} Appellants alleged in their complaint a single car accident that caused them bodily injuries. The car accident occurred on October 12, 2007. Appellants do not dispute that the statute of limitations for an action for bodily injury is two years. R.C. 2305.10. Thus, appellants normally would have had to assert their claims, at the latest, by October 12, 2009. They did not file their complaint until October 22, 2009, beyond the two-year statute of limitations.

{¶11} Nevertheless, appellants claim that Stauffer's absence from the state of Ohio tolled the statute of limitations for at least ten days, making their complaint timely. R.C. 2305.15. We find appellants' argument unavailing.

{¶12} R.C. 2305.15(A) provides:

> When a cause of action accrues against a person, if the person is out of the state, has absconded, or conceals self, the period of limitation for the commencement of the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.35 of the Revised Code does not begin to run until the person comes into the state or while the person is so absconded or concealed. After the cause of action accrues if the person departs from the state, absconds, or conceals self, the time of the person's absence or concealment shall not be computed as any part of a period within which the action must be brought.

{¶13} A determination of the applicability of R.C. 2305.15(A) requires facts concerning the circumstances of Stauffer's presence and absence from Ohio. *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, ¶23. Those facts must be alleged in the complaint in order for a complaint to survive a Civ.R. 12(B)(6) motion to dismiss. *Noe v. Smith* (2000), 143 Ohio App.3d 215, 218 (noting that a trial court is confined to the facts alleged in the complaint when faced with a Civ.R. 12(B)(6) motion to dismiss); *Hutchins v. Turner* (June 17, 1993), 10th Dist. No. 93AP-69 (noting that plaintiff's complaint did not assert any facts which would support tolling of statute of limitations based on R.C. 2305.15(A)).

{¶14} Here, appellants' complaint did not allege any facts that would support the application of R.C. 2305.15(A) to toll the statute of limitations. In response to Stauffer's motion to dismiss, appellants stated only that they believed Stauffer was out of the state for a period of more than ten days. Although appellants now argue that the trial court should have allowed them to proceed with discovery in order to prove Stauffer's absence from the state, appellants did not need the trial court's approval to conduct discovery. Nor did appellants ask the trial court to delay ruling on the motion to dismiss until after the trial court had already granted the motion.[1] Appellants also waited until after the trial court's judgment to request leave to file an amended complaint.

{¶15} Because appellants did not allege any facts in their complaint that would render R.C. 2305.15(A) applicable, the trial court did not err by concluding that appellants'

[1] For this reason, appellants' reliance on *Hall v. Scarbro* (Dec. 14, 2000), 8th Dist. No. 77766, is misplaced. In that case, discovery had been requested and attempted, but not accomplished, before dismissal. The court found that under those circumstances, dismissal before discovery could occur was inappropriate. Appellants' other citations to cases from the Fifth District Court of Appeals are similarly not persuasive, as they concerned motions for summary judgment and did not address discovery issues.

complaint was barred by the two-year statute of limitations in R.C. 2305.10. *Hutchins*. Accordingly, appellants' assignment of error is overruled.

{¶16} Having overruled appellants' assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.