

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

CORY R. WARD, :
 :
 Plaintiff-Appellant, : CASE NO. CA2011-04-032
 :
 - vs - : OPINION
 : 2/27/2012
 JAMES S. GRAUE, :
 :
 Defendant-Appellee. :

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2011CVC0099

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HENDRICKSON, P.J.

{¶ 1} Plaintiff-appellant, Corey Ward, appeals a decision of the Clermont County
Court of Common Pleas granting the Civ.R. 12(B)(6) motion to dismiss filed by defendant-
appellee, James Graue. We reverse the decision of the trial court and remand this matter for
further proceedings.

{¶ 2} On January 14, 2011, Ward filed a complaint for personal injury. In his complaint, Ward stated that on January 6, 2009, he was a passenger in a motor vehicle traveling northbound on State Route 133 in Williamsburg, Ohio when a 2007 Freight Truck negligently operated by Graue exited a private drive, turned left, and failed to yield the right of way to the vehicle in which Ward was traveling. Ward alleged that Graue had a duty to operate the vehicle in a reasonably prudent fashion. As a direct and proximate result of Graue's failure to operate the vehicle in such a fashion, Ward alleged he suffered severe bodily injury. Ward further alleged that Graue is, and at all relevant times has been, a resident of Villa Hills, Kentucky. Finally, Ward alleged that, "[p]ursuant to R.C. §2305.15, [Graue] ha[d] be[en] absent from the State of Ohio for more than 8 days at the filing of this suit."

{¶ 3} On February 15, 2011, Graue moved to dismiss Ward's complaint on the basis that it was filed eight days after the two-year statute of limitations had expired. Graue argued the savings statute set forth in R.C. 2305.15 did not apply to save Ward's cause of action because the statute places an unconstitutional and impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution. Graue asserted that he was present in Ohio on January 6, 2009, due to his employment as a parcel delivery driver. Because he was an out-of-state resident engaged in interstate commerce at the time of the alleged accident, Graue maintained that R.C. 2305.15 could not be constitutionally applied to save Ward's personal injury claim.

{¶ 4} In his memorandum in opposition to Graue's motion to dismiss, Ward claimed that Graue's statute of limitations defense should have been raised in a motion for summary judgment rather than in a motion to dismiss. Ward argued that even if the court were to consider Graue's motion to dismiss, the court was limited to considering those allegations contained within the complaint. Ward therefore argued that the court could not rely on

Graue's assertion that he was a delivery driver engaged in interstate commerce at the time of the accident because that fact was not alleged in the complaint.

{¶ 5} On March 31, 2011, the trial court held a hearing on Graue's motion to dismiss. Later that day, the court filed a judgment entry granting Graue's motion. The court specifically held that a motion to dismiss was the proper vehicle for Graue to bring his statute of limitations defense, and it found that "the 'Savings Statute,' codified in R.C. 2305.15, does not apply in this case because it would create a burden on interstate commerce." In reaching this conclusion, the trial court stated on the record that "Defendant was present in Clermont County on January 6th of 2009 as a * * * parcel delivery driver engaged in interstate commerce." The trial court therefore granted the motion to dismiss on the basis that the complaint was filed beyond the two-year statute of limitations.

{¶ 6} Ward timely appealed the trial court's decision, raising one assignment of error.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF [WARD] BY GRANTING [GRAUE'S] MOTION TO DISMISS PURSUANT TO CIVIL RULE 12(B)(6) WHEN THE RECORD WAS UNDISPUTED THAT [GRAUE] WAS ABSENT FROM THE STATE MORE THAN EIGHT DAYS THEREBY TOLLING THE STATUTE OF LIMITATIONS PURSUANT TO R.C. 2305.15.

{¶ 9} "A motion to dismiss for failure to state a claim upon which relief can be granted * * * tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). A motion made pursuant to Civ.R. 12(B)(6) only determines whether the pleader's allegations set forth an actionable claim. *Pyle v. Ledex, Inc.*, 49 Ohio App.3d 139, 143 (12th Dist.1988). "A court may not use the motion to summarily review the merits of the cause of action." *Home Builders Assn. of Dayton & Miami Valley v. Lebanon*, 12th Dist. No. CA2003-12-115, 2004-Ohio-4526, ¶ 8.

{¶ 10} "In order for a complaint to be dismissed under Civ.R. 12(B)(6) * * * it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Cincinnati v. Berretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 5. "In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). The court may look only to the complaint to determine whether the allegations are legally sufficient to state a claim. *Home Builders Assn.*, 2004-Ohio-4526 at ¶ 8. "[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*, 60 Ohio St.3d 143, 145 (1991). A reviewing court conducts a de novo review of a trial court's decision on a motion to dismiss. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

{¶ 11} In the present case, Ward sought to bring a claim for personal injury based on Graue's negligence. Personal injury actions are governed by a two-year statute of limitations. R.C. 2305.10. R.C. 2305.15(A) creates an exception to the statute of limitations. It states:

When a cause of action accrues against a person, if the person is out of state, has absconded, or conceals self, the period of limitation for 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.

{¶ 12} Ward alleged the car accident occurred on January 6, 2009. The statute of limitations on his personal injury claim would have expired on January 6, 2011, eight days before the complaint was filed. Ward therefore sought to utilize the exception set forth in

R.C. 2305.15(A) to bring his complaint within the statute of limitations. In particular, Ward averred in his complaint that, "[p]ursuant to R.C. §2305.15, [Graue] has be[en] absent from the State of Ohio for more than 8 days at the filing of this suit." Graue argued, however, that R.C. 2305.15 could not be constitutionally applied to save Ward's claim because the savings statute places an impermissible burden on interstate commerce.

{¶ 13} Graue's argument relies on federal and state case law where R.C. 2305.15 has been found unconstitutional as it applies to out-of-state residents traveling for the purpose of interstate commerce. See *Tesar v. Hallas*, 738 F.Supp. 240 (N.D. Ohio 1990); *Spence v. Gohara*, 6th Dist. No. L- 94-043, 1994 WL 590528 (Oct. 28, 1994); *Simpson v. Neidlinger*, 1st Dist. No. C-950649, 1996 WL 656357 (Nov. 13, 1996); *Gardner v. Gleydura*, 8th Dist. No. 69791, 1997 WL 15280 (Jan. 16, 1997); *Lovejoy v. Macek*, 122 Ohio App.3d 558 (11th Dist.1997); *Walker v. Kakkaniyil*, 5th Dist. No. 98CA00037, 1999 WL 3944 (Dec. 7, 1998); *Ruble v. Ream*, 4th Dist. No. 03CA14, 2003-Ohio-5969; *Drumm v. Brekken*, 3d Dist. No. 10-04-21, 2005-Ohio-1428; *Grover v. Bartsch*, 170 Ohio App.3d 188 (2d Dist.2006). We have never expressly considered the constitutionality of the savings statute as it applies to out-of-state residents traveling for commerce purposes, and we find it unnecessary to do so in the present case.

{¶ 14} On the face of Ward's complaint, he has adequately alleged a claim for personal injury based on Graue's negligence. A negligence claim requires a plaintiff to show the existence of a duty, a breach of that duty, and an injury resulting proximately from the breach. *Zieger v. Burchwell*, 12th Dist. No. CA2009-11-077, 2010-Ohio-2174, ¶ 13. Ward has alleged that Graue had a duty to operate his vehicle in a reasonably prudent fashion, and he breached this duty by failing to yield the right of way to the vehicle in which Ward was traveling. Ward also alleges that as a result of Graue's negligence, he suffered severe bodily injury. Further, Ward's averment that Graue had been "absent from the State of Ohio for

more than 8 days at the time of filing this suit" sufficiently brought the complaint within the purview of R.C. 2305.15. Accordingly, Ward has sufficiently alleged facts upon which relief can be granted.

{¶ 15} Ward's complaint does not reveal the reason for Graue's presence in Ohio at the time of the accident. While Graue would have the court believe that he was present in Ohio on the date of the accident because he was engaged in interstate commerce, there are no facts alleged in the complaint that support Graue's contention. The trial court's reliance on Graue's argument that the savings statute does not apply because he was a parcel delivery driver engaged in interstate commerce at the time of the accident is misplaced. When considering a Civ.R. 12(B)(6) motion, the court may only consider those factual allegations contained within the complaint. Furthermore, a court must presume that all factual allegations of the complaint are true when ruling on a motion to dismiss. If facts beyond those alleged in the complaint are necessary to dispose of a case, those facts must be developed and appropriately brought before the court utilizing the proper procedural vehicle.

{¶ 16} For the foregoing reasons, Ward's assignment of error is sustained. We find that Ward has sufficiently stated a claim upon which relief can be granted.

{¶ 17} Judgment reversed, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

RINGLAND and PIPER, JJ., concur.