[Cite as *Furney v. Wynn*, 2011-Ohio-4000.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Patricia Furney,	:	
Plaintiff-Appellant,	:	
		No. 11AP-110
v.	:	(C.P.C. No. 09CVC-10-15345)
Crystal Wynn,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 11, 2011

Michael D. Christensen Law Offices, *LLC*, and *Chanda L. Higgins*, for appellant.

Freund, *Freeze & Arnold*, and *Jennifer L. Hill*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, Patricia Furney ("Furney"), appeals the judgment of the Franklin County Court of Common Pleas, which dismissed Furney's complaint against defendant-appellee, Crystal Wynn ("Wynn"). Having concluded that the trial court did not err by dismissing the action because Furney did not perfect service upon Wynn, we affirm.

{¶2} This case arises from undisputed facts. A car accident involving Furney and Wynn occurred on May 17, 2005. On May 7, 2007, Furney filed a complaint against Wynn, alleging that Wynn negligently caused the accident. Furney served the complaint upon Wynn on May 17, 2007. Wynn answered, and discovery ensued. On October 14, 2008, Furney dismissed that complaint voluntarily pursuant to Civ.R. 41(A)(1)(a), without prejudice.

{¶3} On October 13, 2009, Furney filed a second, identical complaint against Wynn. Although Furney made several attempts to serve Wynn, Furney did not obtain service of the second complaint upon Wynn.

{¶4} On January 6, 2011, Wynn moved for summary judgment, contending that Furney had never served her. The following day, on January 7, 2011, Furney instructed the clerk to attempt service.

{¶5} In its January 20, 2011 decision, the trial court addressed Wynn's motion for summary judgment as a motion to dismiss for lack of service and dismissed the action. The court found that, because Furney did not complete service of the second complaint upon Wynn within one year as Civ.R. 3(A) requires, Furney did not commence the second action, and the court lacked jurisdiction to hear her complaint. In addition, the court found that Furney's January 7, 2011 instruction to the clerk to attempt service upon Wynn operated as a notice of dismissal of Furney's claims because the instruction occurred more than one year after Furney filed the second complaint.

{¶6} Furney filed a timely appeal, and she raises one assignment of error:

> I. The trial court erred by granting summary judgment in favor of [Wynn] for failure to obtain service when the record indicates service of the Complaint was properly perfected.

{¶7} Furney presents questions of law, which we review de novo. In the trial court, Furney argued, as she argues here, that she complied with Civ.R. 3(A) in the refiled action by serving the original complaint upon Wynn. Furney cites no case support for her position, nor have we found any. Rather, as the trial court explained, well-established legal principles compelled dismissal of Furney's complaint.

{¶8} R.C. 2305.10(A) provides that "[a]n action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues." R.C. 2305.19(A) provides, however, "[i]n any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year" or within the statute of limitations, whichever is later. Therefore, if a plaintiff recommences an action within one year after dismissing the action voluntarily, then the plaintiff may avoid the two-year statute of limitations.

{¶9} Here, the accident occurred on May 17, 2005. Furney filed her first complaint against Wynn on May 7, 2007, within the two-year statute of limitations. She voluntarily dismissed that action on October 14, 2008. Furney filed her second complaint on October 13, 2009. Because Furney filed the second complaint more than two years after the May 2005 accident, the statute of limitations bars her the second action unless she "commence[d]" the second action within one year of her October 14, 2008 dismissal, as R.C. 2305.19 requires.

{¶10} R.C. 2305.17 provides that "[a]n action is commenced * * * by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within

one year." Civ.R. 3(A) similarly provides that "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant."

{¶11} Here, Furney did not obtain service upon Wynn within one year of the filing of her second complaint. Therefore, the second action was not "commence[d]" within one year of her October 14, 2008 dismissal, and she may not rely on R.C. 2305.19 to avoid the two-year statute of limitations. See *Blount v. Schindler Elevator Corp.*, 10th Dist. No. 02AP-688, 2003-Ohio-2053, ¶20-26 (holding that, where the plaintiffs did not perfect service of a refiled complaint upon the defendants, the plaintiffs did not commence the refiled complaint, as R.C. 2305.17 and Civ.R. 3(A) require); *Lesher v. McDermott*, 2d Dist. No. 02CA0025, 2003-Ohio-458, ¶22, ¶30-32 (affirming dismissal of refiled complaint where the plaintiffs did not perfect service of that complaint within one year after the refiling and rejecting multiple grounds for extending the one-year requirement in a refiled case).

{¶12} Moreover, as the trial court explained, Furney's January 7, 2011 instruction to the clerk to attempt service upon Wynn operated as a notice of dismissal of her claims. The Supreme Court of Ohio has held the following: "[W]hen a plaintiff files an instruction for a clerk to attempt service of a complaint that was filed more than a year prior, the instruction, by operation of law, is a notice of dismissal of the claims, and if the plaintiff had previously filed a notice dismissing a complaint making the same claim, the instruction, by operation of law, is a second notice dismissal, resulting in dismissal with prejudice of the claims." *Sisk & Assoc., Inc. v. Commt. to Elect Timothy Grendell*, 123 Ohio St.3d 447, 2009-Ohio-5591, ¶9. Applying this holding to the facts

before us, the trial court properly concluded that Furney's instruction to the clerk operated as a notice of dismissal, with prejudice.

{¶13} Furney attempts to avoid these well-established principles by contending that her May 7, 2007 service upon Wynn of the first complaint operates as service for purposes of her second complaint. We disagree. A trial court must treat a refiled complaint following a voluntary dismissal as if the first complaint had never been filed. *Kellie Auto Sales, Inc. v. Rahbars & Ritters Ents., L.L.C.,* 172 Ohio App.3d 675, 2007-Ohio-4312, ¶32, citing *Zimmie v. Zimmie* (1984), 11 Ohio St.3d 94, 95. See also *Lesher* at ¶30-32 (affirming dismissal of a refiled complaint where the plaintiffs had served the first complaint upon the defendant, but had failed to serve the second complaint within one year of the refiling). Therefore, as the trial court held, Furney's service of the first complaint upon Wynn had no bearing on the refiled complaint.

{¶14} Nor does Wynn's participation (through counsel) in the second action change the outcome. Wynn raised the failure of service as an affirmative defense in her answer to the second complaint. Therefore, despite her participation, she did not submit voluntarily to the court's jurisdiction. *Blount* at ¶27-28, and cases cited therein (holding that a plaintiff who has raised the affirmative defense of insufficient service does not waive in personam jurisdiction by participating in the case).

{¶15} Because Furney failed to obtain service of her refiled complaint upon Wynn within one year after dismissing her first complaint voluntarily, Furney did not commence her second action, and the trial court lacked jurisdiction to hear it. In addition, because Furney instructed the clerk to attempt service upon Wynn of a complaint that she filed more than one year prior, the court properly dismissed her

complaint. Accordingly, we overrule Furney's sole assignment of error. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and TYACK, J., concur.