[Cite as *Ruch v. Ohio Dept. of Transp.*, 2003-Ohio-5315.]

IN THE COURT OF CLAIMS OF OHIO

DAVID R. RUCH, etc., et al. :

Plaintiffs : CASE NO. 2003-06581
Judge Fred J. Shoemaker

v. :

DECISION

DEPARTMENT OF TRANSPORTATION :

Defendant :

: : : : : : : : : : : : : : : : :

{¶1} On July 8, 2003, defendant filed a motion to dismiss pursuant to Civ.R. 12(B)(6) on the grounds that plaintiffs' claim is barred by the applicable statute of limitations. On August 18, 2003, the court sua sponte converted defendant's motion to one for summary judgment pursuant to Civ.R. 56(B). A non-oral hearing upon defendant's motion for summary judgment was set for September 5, 2003. On August 20, 2003, plaintiffs filed a response to defendant's motion and on September 4, 2003, defendant filed a motion for leave to file a reply, instanter. For good cause shown, defendant's motion for leave is GRANTED. The case is now before the court for a non-oral hearing on defendant's motion for summary judgment. Civ.R. 56(C) and L.C.C.R. 4.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ***" See, also, *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶4} Plaintiffs' claim for relief arises out of an automobile accident that occurred on July 16, 1999. Plaintiffs originally filed this action on March 2, 2001, under Case No. 2001-02945. Plaintiffs subsequently dismissed the case on May 16, 2002, by filing a notice of voluntary dismissal pursuant to Civ.R. 41(A)(1)(a). A date and time-stamped notice of dismissal appears in the file. On May 23, 2002, the court filed an entry acknowledging the May 16, 2002, notice. Plaintiffs did not refile their action in this court until June 6, 2003.

{¶5} R.C. 2305.19 provides in relevant part:

{¶6} "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date. ***"

{¶7} It is axiomatic that dismissals pursuant to Civ.R. 41(A)(1) are self-executing when filed. In other words, the mere filing of the notice of dismissal by plaintiff automatically

terminates the case without intervention by the court. *Payton v. Rehberg* (1997), 119 Ohio App.3d 183, 192. Being self-executing, the trial court's discretion is not involved in deciding whether to recognize the dismissal; hence, any subsequent entry filed by the trial court would have no effect, inasmuch as such entry is merely an internal, ministerial act of housekeeping utilized by the trial court. *Selker & Furber v. Gloria Brightman* (2000), 138 Ohio App.3d 710.

{¶8} Even though plaintiffs re-filed their complaint in this case, it was clearly filed more than one year after the date when the notice of voluntary dismissal was filed. However, plaintiffs claim that their action should be considered timely filed because some unidentified secretary in the office of plaintiffs' counsel was informed by some unidentified employee of this court that the notice of voluntary dismissal would not be file-stamped until such time as court costs had been paid. Plaintiffs contend that their re-filed complaint was timely, since the record in Case No. 2001-02945 establishes that costs were not paid until July 24, 2003.

{¶9} Plaintiffs filed an affidavit of counsel, Kenneth Bauman, in support of this claim. The affidavit provides in relevant part:

{¶10} "***

{¶11} "3. On May 13, 2002, I caused a document entitled Notice of Dismissal Without Prejudice to be mailed to the Clerk of the Court of Claims in Case No. 2001-02945.

{¶12} "4. On May 20, 2002, a copy of the Notice of Dismissal Without Prejudice without a date stamp was received at my office in Troy, MI, in the self-addressed, stamped envelope that had been provided for the mailing of a date stamped copy of the Notice of Dismissal Without Prejudice. See attached Exhibit A-1.

{¶13} "5. Upon inquiring with the Clerk of the Court at my direction as to why an unstamped copy of the Notice of Dismissal

Without Prejudice was returned to our office, my secretary was informed by a Deputy Clerk of the Court of Claims that the Notice of Dismissal Without Prejudice would not be filed until the costs of the case were paid.

{¶14} "6. On July 3, 2002, a costs bill was received in our office. A check for the costs was mailed and a receipt for the paid costs bill in the amount of $53.95 dated July 24, 2002, was subsequently received on July 29, 2002. See attached Exhibit A-2.

{¶15} "7. Based on the conversation with the Deputy Clerk of the Court of Claims, the Notice of Dismissal Without Prejudice should have been filed on July 23, 2002, the date of the receipt.

{¶16} "8. The first knowledge I had that the Notice of Dismissal Without Prejudice had been filed on May 16, 2002, and the first time I saw a date stamped copy was when the Defendant's Motion to Dismiss was served in July 2003. ***"

{¶17} Plaintiffs did not submit the affidavit of the secretary who allegedly called the court. Consequently, Bauman's representations regarding what his secretary told him are inadmissable hearsay. More significant, however, is the fact that there is no mention of the court's May 23, 2002, entry in Bauman's affidavit. The only reasonable conclusion for the court to draw from this omission is that plaintiffs received a copy of the entry. Consequently, even if the court were to accept Bauman's claim that his office was misinformed about the date plaintiffs' notice of dismissal would be time-stamped, the court's May 23, 2002, entry clearly notifies plaintiffs of the date of dismissal.

{¶18} It is well-established Ohio law that a court speaks through its journal. *Gaskins v. Shiplevy* (1996), 76 Ohio St.3d 380, 382; *State ex rel. Worcester v. Donnellon* (1990), 49 Ohio St.3d 117, 118. The notice of dismissal in Case No. 2001-02945, time-stamped May 16, 2002, and the court's May 23, 2002, entry

that reflected that plaintiffs' case was dismissed on May 16, 2002, comprise the only evidence of the date of dismissal in this case. Plaintiffs' reliance upon alleged oral representations by some unidentified employee of the court is insufficient, as a matter of law, to either alter or amend the court's journal entries or to extend the one-year savings provisions of R.C. 2305.19.

{¶19} Upon review of the motion, memoranda, and affidavits filed by the parties, and construing the evidence in plaintiffs' favor, reasonable minds can come to but one conclusion which is that plaintiffs' complaint in this case was untimely filed. Accordingly, defendant is entitled to judgment as a matter of law.

{¶20} Defendant's motion for summary judgment shall be GRANTED.

{¶21} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
FRED J. SHOEMAKER
Judge

Entry cc:

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LP/cmd
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