

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
SCIOTO COUNTY

|                           |   |                         |
|---------------------------|---|-------------------------|
| MARK G. MAYNARD,          | : | Case No. 08CA3267       |
|                           | : |                         |
| Plaintiff-Appellant,      | : |                         |
|                           | : |                         |
| v.                        | : | <u>DECISION AND</u>     |
|                           | : | <u>JUDGMENT ENTRY</u>   |
|                           | : |                         |
| NORFOLK SOUTHERN RAILWAY, | : |                         |
|                           | : |                         |
| Defendant-Appellee.       | : | <b>Released 6/18/09</b> |

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APPEARANCES:

Mark T. Wade, Pittsburgh, PA, and Michael P. Giertz, HARTLEY & O'BRIEN, PLLC, Wheeling, WV, for appellant.

R. Leland Evans, Aaron M. Shank, and L. Bradfield Hughes, PORTER, WRIGHT, MORRIS & ARTHUR, LLP, Columbus, OH, for appellee.

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Harsha, J.

{¶1} Mark G. Maynard appeals from a judgment on the pleadings in favor of Norfolk Southern Railway Company ("Norfolk").<sup>1</sup> Maynard contends that the trial court improperly relied on evidentiary materials outside the pleadings to conclude that he failed to timely file his complaint under the Federal Employers' Liability Act ("FELA"). Because Maynard failed to make this argument to the trial court, he forfeited the right to raise this issue on appeal. Furthermore, because Maynard attached evidentiary materials to his brief in opposition to Norfolk's motion, Maynard invited any error in the trial court's reliance on matters outside the pleadings.

{¶2} Next, Maynard contends that the trial court should have equitably tolled the FELA's statute of limitations because: 1) he timely filed his claims against Norfolk in

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<sup>1</sup> As we discuss below, the trial court's judgment purports to dismiss Maynard's complaint under Civ.R. 12(B)(6) but is more properly considered a Civ.R. 12(C) judgment on the pleadings.

earlier actions; 2) the prejudice to Norfolk would be minimal because it knew of and defended against those actions; and 3) the prejudice to Maynard from strict enforcement of the statute of limitations would be great. Because Maynard failed to make this argument to the trial court and properly preserve the issue for appellate review, he also forfeited the right to raise this issue on appeal. Accordingly, we affirm the trial court's judgment.

### I. Facts

{¶3} On July 7, 2008, Maynard filed suit against Norfolk, his former employer. Maynard alleged that as a direct and proximate result of Norfolk's violations of the FELA and the Locomotive Boiler Inspection Act ("LBIA"), he developed pulmonary problems due to exposures to various toxic substances, including asbestos. Maynard's complaint did not state when he learned of these pulmonary problems or first linked them to his employment with Norfolk. Maynard's complaint indicated that he had previously filed and voluntarily dismissed his claims under Civ.R. 41(A) but did not state when this occurred.

{¶4} Norfolk filed an answer in which it asserted several affirmative defenses, including statute of limitations and failure to state a claim upon which relief can be granted. Norfolk then filed a "Motion to Dismiss," purportedly under Civ.R. 12(B)(6), arguing that Maynard failed to state a claim upon which relief could be granted because his claims were barred by the FELA's three year statute of limitations. Norfolk contended that this limitations period applied to Maynard's LIBA claim because lawsuits under that act are maintained under the FELA. See *Urie v. Thompson* (1949), 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282.

{¶15} According to Norfolk, Maynard discovered his alleged pulmonary problems and their cause, at the latest, on June 2, 2003 when he filed suit against Norfolk in West Virginia. Norfolk argued that even if the FELA's limitations period tolled during the pendency of the West Virginia action, it began to run again on December 18, 2003 when Maynard dismissed the action by an agreed order. Therefore, Maynard had to file suit against Norfolk, at the latest, by December 18, 2006.<sup>2</sup>

{¶16} Norfolk argued that while Maynard filed a complaint in Scioto County, Ohio on July 18, 2005, he voluntarily dismissed the suit on July 23, 2007. Generally, Ohio's savings statute, R.C. 2305.19, permits a plaintiff to voluntarily dismiss his case once under Civ.R. 41(A) and re-file it within one year of the dismissal or within the period of the original applicable statute of limitations, whichever occurs later. However, R.C. 2305.19 does not expand the FELA's limitations period. See *Swords v. Norfolk & W. Ry. Co.* (May 8, 1996), Scioto App. No. 95CA2342, 1996 WL 255859, at \*1, fn. 1, citing *Burnett v. New York Cent. RR. Co.* (1965), 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941. Therefore, Norfolk contended that even with a Civ.R. 41(A) voluntary dismissal, Maynard had to re-file his suit by December 18, 2006. Maynard waited until July 7, 2008 to re-file his complaint, so Norfolk argued that his claims were time-barred. To support this argument, Norfolk submitted copies of the complaints and dismissal entries from Maynard's previous lawsuits. Because these documents were public records, Norfolk contended that the trial court could take judicial notice of their contents without converting the motion to dismiss into a summary judgment motion.

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<sup>2</sup> Under Civ.R. 6(A), the day of the event from which the designated period begins to run is not included in counting any period of time prescribed by an applicable statute. Therefore, December 18, 2003, would not count as the first day when the limitations period began to run. Instead, the limitations period would have begun to run on December 19, 2003 and would have expired on December 19, 2006.

{¶17} In his brief in opposition, Maynard acknowledged that he filed a complaint against Norfolk in West Virginia on June 2, 2003 and that his claims were “dismissed, on December 18, 2003, without prejudice by an agreed order on the basis of a lack of venue.” Maynard also acknowledged that he filed suit against Norfolk in Ohio on July 18, 2005 and voluntarily dismissed that case. However, Maynard argued that the trial court should equitably estop Norfolk from relying on a statute of limitations defense. According to Maynard, the parties had “in depth discussions” regarding the dismissal of his 2005 case and agreed that he could re-file it within a year pursuant to the savings statute. To support his argument, Maynard submitted copies of various documents filed in the 2005 case.

{¶18} In response, Norfolk argued that Maynard misrepresented the events surrounding the voluntary dismissal of his 2005 case. According to Norfolk, the parties never discussed the statute of limitations when Maynard voluntarily dismissed that case. Norfolk contended that because it made no affirmative statement that the limitations period was longer than it actually was and did not induce Maynard to file suit outside the limitations period, it could not be equitably estopped from relying on a statute of limitations defense.

{¶19} The trial court found that Maynard’s claim was barred by the FELA’s statute of limitations and that there was “no legal or equitable basis to circumvent the expired limitations.” After the court granted Norfolk’s motion to dismiss, Maynard filed this appeal.

## II. Assignments of Error

{¶10} Maynard assigns the following errors for our review:

The Court of Common Pleas erred in holding that there was no legal basis to circumvent the statute of limitations period. (Judgment Entry, November 5, 2008, at 1.)

The Court of Common Pleas erred in holding that there was no equitable basis to circumvent the statute of limitations period. (Judgment Entry, November 5, 2008, at 1.)

## III. Standard of Review

{¶11} Although the parties do not address the issue, Norfolk filed an answer to Maynard's complaint before it filed the Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Because a Civ.R. 12(B)(6) motion must be filed before a responsive pleading, the trial court should have construed Norfolk's motion as a Civ.R. 12(C) motion for judgment on the pleadings. *State ex. rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 569, 1996-Ohio-459, 664 N.E.2d 931, citing *Lin v. Gatehouse Constr. Co.* (1992), 84 Ohio App.3d 96, 99, 616 N.E.2d 519. A Civ.R. 12(C) motion is, essentially, a belated Civ.R.12(B)(6) motion. *Dolan v. Glouster*, 173 Ohio App.3d 617, 2007-Ohio-6275, 879 N.E.2d 838, at ¶7, citing *State ex rel. Holloman v. Phillips*, 100 Ohio St.3d 70, 2003-Ohio-5063, 796 N.E.2d 524, at ¶8, fn. 3 and *Nelson v. Pleasant* (1991), 73 Ohio App.3d 479, 482, 597 N.E.2d 1137. The legal standard is the same for deciding both motions. *Nelson* at 482.

{¶12} We review a judgment on the pleadings de novo, giving no deference to the trial court's judgment. *Dolan* at ¶7, citing *Fontbank, Inc. v. CompuServe, Inc.* (2000), 138 Ohio App.3d 801, 807, 742 N.E.2d 674. "Judgment on the pleadings is appropriate if, in construing all material allegations in the complaint in favor of the

nonmoving party, together with all reasonable inferences to be drawn therefrom, the court finds, beyond doubt, that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” Id. See, also, *Midwest Pride IV, Inc.* at 570. A Civ.R. 12(C) motion “presents only questions of law, and determination of the motion \* \*

\* is restricted *solely to the allegations in the pleadings.*” *Ruble v. Ream*, Washington App. 03CA14, 2003-Ohio-5969, at ¶8, quoting *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 166, 297 N.E.2d 113 (emphasis added).

#### IV. Consideration of Outside Matters in Civ.R. 12(C) Determination

{¶13} In his first assignment of error, Maynard contends that the trial court improperly considered evidence outside the pleadings when it ruled on Norfolk’s Civ.R. 12(C) motion. However, “[a] party asserting error must call it to the court’s attention at the time the error could have been corrected or avoided.” *Waddell v. Frasure*, Scioto App. No. 08CA3215, 2008-Ohio-5183, at ¶11, citing *McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 149, fn. 3, 2000-Ohio-118, 729 N.E.2d 364 (“In general, ‘an appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court.’” (quoting *State v. Childs* (1968), 14 Ohio St.2d 56, 236 N.E.2d 545, paragraph three of the syllabus)). Because Maynard failed to object to the documentary evidence Norfolk attached to its Civ.R. 12(C) motion, he forfeited the right to appeal any error in the trial court’s consideration of this evidence to conclude that Maynard filed his claims outside the FELA’s limitations period.

{¶14} In addition, Maynard attached documentary evidence to his brief in

opposition to Norfolk's motion for judgment on the pleadings. "Under the invited-error doctrine, a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." *State ex rel. The V. Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 471, 1998-Ohio-329, 692 N.E.2d 198. Because Maynard submitted documentary evidence for the trial court's consideration, he invited any error in the trial court's reliance upon matters outside the pleadings to decide Norfolk's Civ.R. 12(C) motion. Therefore, we overrule Maynard's first assignment of error.

#### V. Equitable Tolling of Statute of Limitations

{¶15} In his second assignment of error, Maynard contends that the trial court should have tolled the statute of limitations on equitable grounds because (1) he promptly filed the West Virginia and 2005 Ohio actions; (2) Norfolk knew of these actions and defended against them, so it would not be prejudiced by tolling; and (3) without tolling, Maynard would lose the right to pursue his claims, so he would suffer great prejudice. However, Maynard failed to make this argument in the trial court. In his brief in opposition to Norfolk's Civ.R. 12(C) motion, Maynard only argued that the trial court should equitably estop Norfolk from asserting a statute of limitations defense based on discussions the parties had before Maynard dismissed the 2005 Ohio case. "Generally, a litigant's failure to raise an issue in the trial court and properly preserve the issue for appellate review waives that litigant's right to raise that issue on appeal." *Bob Malcolm Chrysler-Plymouth Dodge v. Grooms* (Dec. 1, 1999), Adams App. No. 99 CA 675, 1999 WL 1125117, at \*1. See, also, *Waddell* at ¶11. Because Maynard failed to make an equitable tolling argument in the trial court, he failed to properly preserve the argument for appellate review and has forfeited the right to raise the issue on appeal.

Therefore, we overrule Maynard's second assignment of error.

VI. Conclusion

{¶16} Having overruled each of the assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.



**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**