[Cite as *Burk v. Opritza*, 2009-Ohio-5649.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
ASHTIN BURK	:	Hon: W. Scott Gwin, P.J.
	:	Hon: William B. Hoffman, J.
Plaintiff-Appellant	:	Hon: Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0016
MATTHEW OPRITZA, ET AL	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 07CV1731
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 19, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
JAY HURLBERT Scott W. Schiff & Associates, Co., LPA 88 W. Main Street Columbus, OH 43215	RICK E. MARSH CLAUDIA L. SPRIGGS RAY S. PANTLE Two Miranova Place, Suite 500 Columbus, OH 43215

Gwin, P.J.

{¶1} Plaintiff-appellant Ashtin Burk appeals a summary judgment of the Court of Common Pleas of Licking County, Ohio, entered in favor of defendant-appellee Matthew Opritza. Appellant assigns two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW, BY CONCLUDING THAT PLAINTIFF DID NOT MEET THE REQUIREMENTS OF OHIO RULES OF CIVIL PROCEDURE 15 (C).

{¶3} "II. THE TRIAL COURT ERRED BY CONCLUDING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AS IT PERTAINED TO THE DEFENDANT'S ABSENCE FROM THE STATE OF OHIO."

{¶4} The record indicates on October 17, 2007, appellant filed her original complaint against Steve Opritza, who is not a party to this appeal. In her complaint appellant alleged she was lawfully driving a vehicle near Morse Road and Route 310 in Licking County, Ohio, on October 17, 2005. Appellant alleged Steve Opritza operated his vehicle in a negligent manner, causing an accident with appellant's vehicle.

{¶5} Appellant named two John Does, identified as individuals, partnerships, or corporations, whose true names and capacities were unknown to appellant, and which appellant could not discover at the time of the filing of the complaint. Appellant alleged as direct and proximate result of the negligence of Steve Opritza and the two John Does, Opritza's vehicle caused a crash with appellant's vehicle causing severe and debilitating injuries to appellant.

{¶6} On October 30, 2007, after the statute of limitations had run, appellant amended her complaint. Steve Opritza had not yet filed an answer to the original

complaint. In the amended complaint, appellant alleged she was a passenger in a vehicle driven by Matthew Opritza, and Matthew Opritza negligently operated his motor vehicle in such a manner that it collided with an unknown motor vehicle causing appellant's injuries. Appellant re-alleged her claims against John Doe I and II.

{¶7} The amended complaint alleged Steve Opritza was the owner of the motor vehicle Matthew Opritza was driving at the time of the accident. The amended complaint alleged Steve Opritza negligently entrusted possession and operation of the vehicle to Matthew Opritza when Steve Opritza knew or should have known Matthew Opritza was incompetent or inexperienced in the use of the vehicle.

{¶8} On November 16, 2007, Matthew Opritza filed an answer to the amended complaint. He raised the statute of limitations as an affirmative defense, along with other defenses. Appellee Matthew Opritza admitted there was an accident on October 17, 2005, and appellant was a passenger in a vehicle he was driving. He specifically denied there was a collision with another motor vehicle, but rather, alleged the vehicle went off the roadway.

{¶9} On January 8, 2008, the parties stipulated Steve Opritza should be dismissed as a party defendant without prejudice.

{¶10} Appellee Matthew Opritza moved for summary judgment on January 8, 2008, urging the statute of limitations had run. Appellant responded with three alternatives. She submitted a memorandum contra to the motion for summary judgment, arguing Civ. R. 15(C) applied and the amended complaint related back to the original, timely filed complaint. In the alternative, appellant moved to add Matthew Opritza as

one of the John Does. Or, as another alternative, appellant requested an extension of time to respond to the motion for summary judgment pursuant to Civ. R. 56 (F).

{¶11} The trial court overruled appellant's motion to add Matthew Opritza as a John Doe defendant, finding the allegations against the John Does did not apply to Matthew Opritza. The court found the motion for extension of time was unnecessary because the matter had not been set for hearing, so there was no deadline to extend.

{¶12} Appellant deposed Matthew Opritza and requested production of documents, including debit and credit card records.

{¶13} On January 23, 2009, the court granted appellee Matthew Opritza's motion for summary judgment and entered final judgment in his favor. On February 4, 2009, appellant moved for reconsideration. The trial court did not rule on the motion.

{¶14} Civ. R. 56 states in pertinent part:

{¶15} "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. A summary

judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶16} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶17} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v*. *Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶18} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

I

{¶19} In her first assignment of error appellant argues the trial court was wrong when it found as a matter of law she did not meet the requirements of Ohio Civ. R. 15(C). The Rule provides:

{¶20} " (C) Relation back of amendments

{¶21} "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.***"

{¶22} The trial court found appellant did not satisfy any of the three requirements of the Rule, all of which are necessary for an amended pleading to relate back to the original. Judgment Entry of January 23, at 3, citing *Krieger v. Cleveland Indians Baseball Company* (2008), 176 Ohio App. 3d 410 at 426.

{¶23} The court found appellant's amended pleading does not allege the same conduct or occurrence set forth in the original pleading, because the original complaint alleged that appellee's father Steve negligently operated an automobile and struck

appellant's vehicle, while appellant's amended complaint alleged she was injured while a passenger in Matthew Opritza's automobile.

{¶24} The court also found appellant had not demonstrated Matthew Opritza received notice of the original action until he was served with the amended complaint. Thirdly, the court found it was not clear on the record that Matthew Opritza knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.

{¶25} The court cited Civ. R. 15 (C)(2) as permitting an amendment to relate back only when there is a mistake in the identity of the party originally named, and only when such amendment will not prejudice the newly named party. The court found this provision is not to be used as a means to substitute one defendant for another in order to defeat a statute of limitations which has already run, citing *Kimble v. Pepsi-Cola Gen. Bottlers* (1995), 103 Ohio App3d 205 at 207.

{¶26} Appellant takes issue with the court's reliance on the *Kimble* case, arguing in *Kimble* the plaintiff originally only sued Pepsi-Cola under a respondeat superior theory, and the omission of the driver of the vehicle was intentional. Only after Pepsi-Cola successfully argued the driver was not within the course and scope of employment at the time of the accident did plaintiff seek to add him as a party.

{¶27} We agree the facts of *Kimble* are much different than the case at bar, but the principle for which the court cites *Kimble* is good law nonetheless.

{¶28} Appellee Matthew Opritza argues the amended complaint did not substitute Matthew for Steve, but added a new party and a new cause of action.

{¶29} In *Kraly v. Vannewkirk* (1994), 69 Ohio St. 3d 627, 635 N.E. 2d 323, the Ohio Supreme Court held while Civ. R. 15 (C) may be employed to substitute a party named in the amended pleading for a party named in the original pleading, and the amended pleading then relates back to the date of the original pleading, but the Rule may not be employed to assert a claim against additional party while retaining a party against whom a claim was asserted in the original pleading. Id., syllabus by the court.

{¶30} In *McInerney v. Harvey* (August 24, 2001), Licking App. No. 01CA29, this court reviewed a situation very similar to the case at bar. In *McInerney,* the appellant was injured in an automobile accident on September 30, 1998. She filed a complaint on September 27, 2000, naming Bonnie J. Harvey as the sole defendant. Harvey was the owner of the vehicle involved, but was not driving at the time of the accident. On November 28, 2000, appellant filed an amended complaint to add the driver of the automobile as a party defendant, and retained Bonnie Harvey as a defendant, changing the claim against her to negligent entrustment. The trial court entered summary judgment finding the statute of limitations had run. This court cited *Cecil v. Cottrill* (1993), 67 Ohio St. 3d 367, 618 N.E. 2d 133, and *Krayly,* supra. We affirmed the court's decision, finding appellant had not substituted parties, but rather had added a party while retaining the original defendant.

{¶31} The same reasoning applies to appellant's argument she should be permitted to substitute appellee Matthew Opritza for one of the John Does. She retained both John Does in the amended complaint, and did not attempt to substitute appellee for one of them. Further, as the trial court found, her allegations against appellee Matthew Opritza are different from those against the John Doe defendants.

{¶32} We find the trial court did not err in determining Civ. R. 15 (C) does not apply to permit appellant's amended complaint to relate back to the original complaint. Because we find Civ. R. 15(C) does not apply here, we do not reach the trial court's findings regarding whether appellant satisfied the three prongs of the Rule.

{¶33} The first assignment of error is overruled.

II

{¶34} In her second assignment of error appellant argues the trial court erred in concluding there was no genuine issue of material fact as to whether the statute of limitations had in fact run. Appellant argues there was a factual dispute over how long Matthew Opritza was absent from the State of Ohio, tolling the statute of limitations. In his deposition, Opritza testified he was outside Ohio for a total of ten days, from April 28, 2007 to May 4, 2007, and from September 2, 2007 until September 5, 2007.

{¶35} In appellant's response to the motion for summary judgment appellant submitted credit/debit card transaction records which she argues give rise to an issue of fact regarding whether appellee was absent from the State of Ohio on at least three additional occasions. She alleges the records show three other transactions arguably made in other states. Appellant submitted the relevant portions of the records with her memorandum contra to the motion for summary judgment, but the court rejected the documents because they were not supported by an affidavit. After the court entered summary judgment, appellant moved for reconsideration and re-submitted the records along with two affidavits, one from an employee of the bank that issued the credit card and one from appellant's counsel.

{¶36} It is well settled a motion for reconsideration of a final judgment in a trial court is a nullity under the Civil Rules, *Lorain Education Association v. Lorain City School District Board of Education* (1989), 46 Ohio St. 3d 12, 17, 544 N.E. 2d 687 (citations deleted).

{¶37} We find the documents at issue are not properly before us. When we review the propriety of a summary judgment, we are limited to the record and the evidentiary materials that were properly before the trial court at the time it ruled on the motion for summary judgment. *American Energy Services, Inc. v. Lekan* (1992), 75 Ohio App. 3d 205, 208, 598 N.E. 2d. 1315. The trial court was correct in finding the documents did not meet the requirement of Civ. R. 56, which requires evidentiary-quality documents. See, e.g. *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, Lake App. Nos. 2008-L-007 and 2008-L-008, 2009-Ohio-4256, at paragraph 187. Attachments to appellant's motion for reconsideration were not properly before the trial court or before us.

{¶38} We find the trial court did not err in finding the evidence before it did not demonstrate any genuine issue of material fact. The second assignment of error is overruled.

{¶39} For the foregoing reasons, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

By Gwin, P.J., and

Edwards, J., concur;

Hoffman, J., concurs separately

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JULIE A. EDWARDS

WSG:clw 0924

Hoffman, J., concurring

{¶40} I concur in the majority's analysis and disposition of Appellant's first assignment of error. I agree Appellant did not attempt to substitute Appellee for either of the John Does. I find of greater significance the fact, as in *McInerney*, Appellant retained the original defendant, Steve Opritza, in her amended complaint as a defendant, changing the claim against him to one of negligent entrustment. Matthew Opritza was not a substituted party, but rather an additional party. The fact the claim against Steve was subsequently dismissed does not change the fact he (Steve) was originally retained as a defendant in the amended complaint when considering the applicability of Civ.R. 15(C).

{¶41} I further concur in the majority's general discussion of Appellant's second assignment of error. I concur in the disposition because Appellees objected to the unauthenticated documents in their reply memorandum to support their motion for summary judgment filed December 24, 2008. Appellant had ample time to either resubmit the properly authenticated documents or request leave to do so prior to the trial court's entry of summary judgment on January 23, 2009. Appellant did neither.

_____

HON. WILLIAM B. HOFFMAN

[Cite as *Burk v. Opritza*, 2009-Ohio-5649.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ASHTIN BURK	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MATTHEW OPRITZA, ET AL	:	
Defendant-Appellee	:	CASE NO. 2009-CA-0016

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JULIE A. EDWARDS