

94-LW-4984 (10th)

James F. Steiner, Plaintiff-Appellant
Connie Steiner et al., Plaintiffs-Appellees
v.
Lowell Steiner et al., Defendants-Appellees

No. 93APE10-1368.
10th District Court of Appeals of Ohio, Franklin County.
Decided on March 10, 1994.

APPEAL from the Franklin County Court of Common Pleas.

Earl K. Desmond, for appellant.

Earl, Warburton, Adams & Davis, and Ted Lee Earl, for plaintiffs-appellees.

Lane, Alton & Horst, and John M. Alton, for defendants-appellees.

OPINION

CLOSE, J.

This is an appeal of a summary judgment granted in favor of defendants-appellees, Lowell and Shirley Steiner, in an action alleging sexual child abuse. Partial summary judgment was granted upon finding that the statute of limitations had run as to plaintiff-appellant, James P. Steiner.

Appellant filed suit, on April 30, 1992, in the Franklin County Court of Common Pleas for damages suffered as a result of sexual abuse experienced during childhood. It is alleged that appellee, Lowell Steiner, pastor and father of James Steiner, "intentionally, negligently and willfully sexually assaulted" his son, James. Appellee, Shirley Steiner, is a party to the action because she allegedly "knew or should have known" about the abuse perpetrated by her husband, Lowell Steiner, appellee.

Appellant, now approximately forty-two years of age, was forty-one years old at the time the complaint was filed. Apparently, the alleged abuse ceased when appellant reached age eleven. His first memories of the sexual abuse, however, surfaced sometime between April 9, 1990 and May 10, 1990, while he was a patient at Emerson A. North Psychiatric Hospital. More recently, Pastor Lowell Steiner has allegedly sexually abused his grandson, Benjamin Steiner, who is a plaintiff in the original action.

Appellees moved for partial summary judgment on the ground that appellant's claims were time-barred under R.C. 2305.111. The trial court sustained the motion. Appellant now appeals, raising the following assignment of error:

"THE TRIAL COURT ERRED WHEN IT RULED THAT R.C. 2305.111 WAS THE APPLICABLE STATUTE OF LIMITATIONS FOR CLAIMS OF BODILY AND EMOTIONAL INJURY DUE TO SEXUAL ABUSE WHEN IT HAD NO EVIDENCE OF THE MATERIAL FACTS CONCERNING THE SEXUAL ABUSE BEFORE IT."

We note initially that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). At issue here is the applicable statute of limitations.

Appellant claims that the statute of limitations, under R.C. 2305.10, applies and that it did not begin to run until he "discovered" the abuse during his psychiatric treatment in 1990. Appellant further claims that the facts before the court were insufficient to determine whether the abuse was intentional and subject to R.C. 2305.111, or negligent and subject to R.C. 2305.10. Under R.C. 2305.111, the statute of limitations is one year, while under R.C. 2305.10 it is two years.

The discovery rule has been applied in a variety of cases to toll the statute of limitations where the "injury does not manifest itself immediately." The Ohio Supreme Court adopted the discovery rule in O'Stricker v. Jim Walter Corp. (1983), 4 Ohio St.3d 84, where an asbestos claim was brought pursuant to the statute of limitations in R.C. 2305.10. The rule was stated as follows:

"When an injury does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence should have known, that he had been injured by the conduct of defendant, for purposes of the statute of limitations contained in R.C. 2305.10." Id., paragraph two of the syllabus.

Upon review of the record, we conclude that appellant's claims against Lowell Steiner are barred even if the discovery rule is applied. "Where the essential character of an alleged tort is an intentional, offensive touching, the statute of limitations for assault and battery governs even if the touching is pled as an act of negligence." Love v. Port Clinton (1988), 37 Ohio St.3d 98, syllabus. Pursuant to Love, we hold that R.C. 2305.111 is the appropriate statute of limitations.

R.C. 2305.111 states that:

"An action for assault or battery shall be brought within one year after the cause of the action accrues.
***"

Even if appellant did not discover the abuse until 1990, when he was thirty-nine years old and undergoing psychiatric treatment, his suit was not filed until 1992, more than one year after he knew of his injuries.

Appellant argues that the record contains no facts regarding the type of sexual abuse, and that the trial court, therefore, had no basis for finding R.C. 2305.111 to apply. In responding to a motion for summary judgment, however, appellant had an affirmative duty to produce evidence on any issue for which he here the burden of production at trial. Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108. Proof of compliance with the statute of limitations falls within this category. In order to overcome appellees' time-bar challenge in their motion for summary judgment, appellant had the burden of setting forth facts showing that sexual abuse, other than "intentional, offensive touching," occurred.

We hold that appellant's claims of sexual abuse against his father sounded in the nature of an intentional assault and battery subject to R.C. 2305.111. Although the form of pleading is not controlling, we note that appellant's claims were alleged in terms of sexual "assault." Appellant failed to present evidence to the contrary. Appellant's suit, as to his father was, therefore, not timely filed, and summary judgment was properly granted.

This analysis of the law to be applied is not, however, the same analysis that must be followed as it relates to Shirley Steiner, appellant's mother. The record is not clear that the alleged tort is an intentional tort under the one-year statute of limitations for assault and battery. R.C. 2305.111. As the complaint against Shirley Steiner sounds in negligence, a two-year statute of limitations under R.C. 2305.10 may, in fact, be the proper limitation period. Of particular note is that, in all the pleadings filed herein, appellant and appellees have argued the liability of the parents as if they were the same. This is not the case, as negligently failing to protect is significantly different from the intentional touching itself. While, upon proof of fact, it may well be that factually Shirley Steiner committed an intentional tort and, therefore, may be subject to the one-year statute of limitations, that issue was not before the trial court and is not now before us. The claim against Shirley Steiner is not a derivative action in the same way that a loss of consortium might be and that, if, in fact, she was negligent, there would be a separate proof of fact required, unlike that which would be required in a derivative action.

It is obvious then that this action against Shirley Steiner, if it be one in negligence, will be required to be returned to the trial court if, in fact, the so-called discovery rule applies. Without looking outside the borders of Ohio, we hold that it does. The case of O'Stricker held that, when an injury does not manifest itself immediately, the cause of action does not arise until plaintiff knows, or by the exercise of reasonable diligence should have known, that he had been injured by the conduct of defendant for purposes of the statute of limitations. Four years later in Bryant v. Doe (1988), 50 Ohio App.3d 19, that appellate court held that, for purposes of commencing the running of the statute of limitations, it began when plaintiff was aware or should have been aware that he was injured. St. Paul Fire & Marine Ins. Co. v. R.V. World (1989), 62 Ohio App.3d 535, extended the discovery rule to negligent design of property and held that the statute does not run until damage occurs and plaintiff can draw some relationship between the damage and conduct of defendant.

More recently in Venham v. Astrolite Alloys (1991), 73 Ohio App.3d 90, that court held that the discovery rule was not limited to cases for exposure of particular substances. Finally, in Burgess v. Ely Lily & Co. (1993), 66 Ohio St.3d 59, our Supreme Court affirmed O'Stricker for cause of action based on DES exposure until such time as plaintiff is informed by competent medical authority that he has been injured, or the date on which by the exercise of reasonable diligence he should have known that he had been injured. It is clear and consistent that the discovery rule should be applied based upon when plaintiff had reasonable knowledge of the injury. As the injury itself occurred during a period of minority and as apparently memory repression prohibited plaintiff from being aware of the injury until ultimately discovered many years later, we hold that the discovery rule does apply so that the statute of limitations runs from the date of discovery at the latest.

As to the appellee, Shirley Steiner, it is, therefore, necessary for us to return this case to the common pleas court for that court to address, either upon further summary judgment or upon trial of the merits, the issue as to whether or not this is an intentional tort or tort sounding in negligence, and whether, therefore, the one-year or the two-year statute of limitation applies.

Appellant's assignment of error as it relates to appellee, Lowell Steiner, is overruled, and the judgment of the trial court is affirmed. Appellant's assignment of error as it relates to appellee, Shirley Steiner, is sustained, and the judgment of the trial court is reversed and this cause is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part; reversed in part; and cause remanded.

BRYANT and PETREE, JJ., concur.