[Cite as *James v. Haydocy Automotive*, 2010-Ohio-2562.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William James,	:	
Plaintiff-Appellant,	:	
		No. 09AP-1066
v.	:	(M.C. No. 2008 CVH 030869)
Haydocy Automotive,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 8, 2010

William James, pro se.

Tom H. Nagel, for appellee.

APPEAL from the Franklin County Municipal Court.

BRYANT, J.

{¶1} Plaintiff-appellant, William James, appeals from a judgment of the Franklin County Municipal Court granting the summary judgment motion of defendant-appellee, Haydocy Automotive, and concluding res judicata bars plaintiff's complaint. Because the record does not support the trial court's determination that res judicata bars plaintiff's complaint, we reverse.

I. Procedural History

{¶2} On July 7, 2008, plaintiff filed a complaint in the Small Claims Division of the Franklin County Municipal Court asserting defendant without permission repaired plaintiff's automobile. According to the complaint, plaintiff's automobile was involved in an accident, and defendant estimated the amount of damage. The insurance company for the at-fault driver forwarded the money to plaintiff, who formerly repaired automobiles and intended to complete the repairs himself. Without plaintiff's authorization, defendant completed the repairs to plaintiff's vehicle. Plaintiff paid the bill under protest and through his complaint sought reimbursement from defendant.

{¶3} Defendant responded on August 4, 2008 with three separate filings: an answer and counterclaim, a motion to transfer the case to the general division of the municipal court due to defendant's counterclaim, and a motion to dismiss grounded in res judicata. According to the motion to dismiss, plaintiff's former wife, Nancy James, previously filed a complaint against defendant premised on the same allegations; her action resulted in a judgment for defendant.

{¶4} After the matter was transferred to the general division of the municipal court, plaintiff filed a memorandum contra defendant's motion to dismiss, pointing out that res judicata is an affirmative defense generally not properly raised through a motion to dismiss. The trial court denied defendant's motion to dismiss on August 29, 2008.

{¶5} On October 23, 2008, defendant filed a motion for summary judgment contending res judicata barred plaintiff's complaint. After the parties fully briefed the motion, the trial court on December 16, 2008, granted defendant's summary judgment motion. Although plaintiff attempted to appeal from that judgment, this court returned the

matter to the trial court to consider defendant's request for attorney fees. The trial court subsequently awarded defendant $2,590 in attorney fees and $45 in court costs.

II. Assignments of Error

{¶6} Plaintiff appeals, assigning the following errors:

> 1.) The trial court erred as a matter of law by granting Defendant's Motion For Summary Judgment when issues of material fact exist.
>
> 2.) The Judge incorrectly determined the existence of privity.
>
> 3.) The Judge incorrectly applied the concept of privity to exclude new claims under the Consumer Sales Practices Act.
>
> 4.) The trial court erred by predicating its decision on a lower court's decision after the lower court failed to follow procedure as required by O.R.C. 4505.04(B)(1).
>
> 5.) The trial court erred in its reluctance to acknowledge and enforce violations of O.A.C. 109:4-3-13 (the Ohio Consumer Sales Practices Act).
>
> 6.) The trial court erred in granting defendant-appellee's counterclaim for attorney costs.

III. Motions

{¶7} Defendant filed a motion to strike plaintiff's brief and to dismiss plaintiff's appeal. Defendant contends plaintiff "believes he is appealing no less than three judgment entries from the Franklin County Municipal Court," including the decision dismissing his former wife's case, the decision granting defendant's summary judgment motion on plaintiff's complaint, and the judgment entry granting defendant's motion for sanctions.

{¶8} We understand plaintiff's appeal to address only the decisions rendered in his own action against defendant. Those decisions, including the decision granting defendant's motion for summary judgment and the decision awarding defendant sanctions, are appropriately reviewed under plaintiff's notice of appeal. Moreover the necessary portions of the record from the trial court are before us so that we may determine whether the trial court erred. Accordingly, we deny defendant's motion to dismiss.

{¶9} Plaintiff also filed motions. Plaintiff initially seeks to strike appellee's brief because of alleged deficiencies under the Rules of Appellate Procedure. He further seeks sanctions based on what he characterizes as defendant's multiple violations of the appellate rules. Although defendant's brief may not technically comply with every provision of the appellate rules, it substantially complies so that plaintiff is not prejudiced. Because we so conclude, we likewise conclude plaintiff is not entitled to sanctions. We deny plaintiff's two motions.

IV. Standard of Review

{¶10} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could 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 most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶11} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. Id.; *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E). See also *Castrataro v. Urban* (Mar. 7, 2000), 10th Dist. No. 99AP-219.

V. First, Second, and Third Assignments of Error—Privity

{¶12} Plaintiff's first three assignments of error contend the trial court erred in granting summary judgment to defendant and in concluding res judicata bars plaintiff's complaint. Plaintiff asserts he was not in privity with his former wife in her action against defendant that resulted in a judgment for defendant.

A. Evidence in the Trial Court Record

{¶13} To support its summary judgment motion, defendant supplied the affidavit of Daniel Vanoy, the collision and repair manager for defendant. According to his affidavit,

plaintiff's former wife Nancy filed a case against defendant in the Small Claims Division of the Franklin County Municipal Court, asserting the car belonged to her. The affidavit further averred the insurance company involved in paying for repairs indicated Nancy owned the vehicle. Finally, the affidavit stated plaintiff "sat in the courtroom throughout the entire trial * * * listened to all the testimony and testified in support of his former wife Nancy James. Never once during those proceedings did he claim ownership of the vehicle or object to Nancy James' claim of ownership to the vehicle. (Affidavit, ¶4.) According to the affidavit, defendant did not dispute ownership in Nancy's case. Defendant also attached to its summary judgment motion, without an affidavit pursuant to Civ.R. 56(C), a description of the work and cost involved in the repairs to the vehicle, a copy of a certificate of title reflecting Nancy James owned the vehicle at issue, and the back of the document indicating the vehicle was transferred to plaintiff in 2006.

{¶14} Plaintiff responded with his own affidavit. In it, plaintiff stated he is the owner of the vehicle at issue, having acquired it from Nancy on October 30, 2006 pursuant to a properly executed assignment of title; he attached it to the affidavit. The affidavit averred that, because plaintiff was an over-the-road tractor-trailer driver and out of state five days a week, he did not apply for a new certificate of title immediately, though he recently took care of the matter; he attached a copy of the title to his affidavit.

{¶15} The affidavit stated Nancy, without his knowledge or consent, was operating the vehicle when it was involved in a collision that resulted in damage to the vehicle. Because he had been a mechanic for a Pontiac dealer for four years and had experience with body work, he intended to repair the vehicle himself and purchased replacement parts. While driving the vehicle on October 5, 2007, plaintiff noticed a

grinding sound, contacted the at-fault driver's insurance company, and asked for the problem to be diagnosed. The vehicle was taken to defendant's facility for that purpose. The next day, plaintiff spoke with Dan Vanoy who informed him the work was nearly completed. Plaintiff's affidavit averred that neither he nor Nancy authorized any body work to be done, and he was never provided with an estimate or statement of a right to receive an estimate prior to the work being done. Plaintiff paid defendant $2,808.66 under protest.

{¶16} According to the affidavit, Nancy sued defendant in the Small Claims Division, asserting a claim for negligent repair. Plaintiff was not a party to the suit, but testified as a witness on behalf of Nancy. Plaintiff's affidavit stated that when, during the trial, he asked the magistrate if he could explain the circumstances, plaintiff was "twice told to sit down and be quiet until I was asked a question. I was instructed to sit in the public seating and not at the party/counsel table." (Affidavit, ¶11.) Plaintiff attached a copy of the magistrate's decision and subsequent judgment from Nancy's litigation to his affidavit.

{¶17} In resolving the summary judgment motion, the trial court noted plaintiff "claimed he is divorced from Nancy James and that without his knowledge or consent Ms. James was operating the vehicle in question." (Decision, 2.) The court contrasted that with plaintiff's original complaint, which alleged "he told his insurance agent that he 'would need a rental car because [his] ex-wife (Nancy) could not be left without transportation.' " (Decision, 2.) The statements caused the trial court "to assume that Ms. James was the regular driver of the car, with Plaintiff's knowledge and consent." Coupling that conclusion with evidence that plaintiff testified as a witness at the trial of Nancy's complaint and went with her to defendant's repair place three times, the court concluded plaintiff was in privity

with Nancy as a party-in-interest. Because the court determined plaintiff was in privity with Nancy, the court also concluded plaintiff's claim for negligent repair was fully litigated in Nancy's lawsuit for negligent repair, leaving plaintiff "collaterally estopped" from pursuing his claims. (Decision, 3.)

B. Privity and Res Judicata

{¶18} "[A] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *State ex rel. Schneider v. Bd. of Edn. of the N. Olmsted City School District* (1988), 39 Ohio St.3d 281, quoting *Johnson's Island, Inc. v. Bd. of Twp. Trustees* (1982), 69 Ohio St.2d 241, 243. Application of the doctrine of res judicata does not depend on whether the original claim explored all possible theories of relief. *Hamrick v. Daimler Chrysler Motors,* 9th Dist. No. 03CA008371, 2004-Ohio-3415, ¶13, citing *Brown v. Dayton,* 89 Ohio St.3d 245, 248, 2000-Ohio-148. Rather, "a valid, final judgment upon the merits of the case bars any subsequent action 'based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.' " *Hamrick,* quoting *Grava v. Parkman Twp.,* 73 Ohio St.3d 379, 382, 1995-Ohio-331.

{¶19} "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judiciata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶27, quoting *O'Nesti v. DeBartolo Realty Corp.,* 113 Ohio St.3d 59, 2007-Ohio-1102, ¶6. "Claim preclusion prevents

subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action." Id. "The previous action is conclusive for all claims that were or could have been litigated in the first action." Id.

{¶20} Defendant's summary judgment motion raised res judicata, or claim preclusion. "For claim preclusion to apply, the parties to the subsequent suit must either be the same or in privity with the parties to the original suit." *O'Nesti* at ¶9, citing *Johnson's Island* at 244. Because the parties are not the same, the issue of privity is central to defendant's res judicata contentions.

{¶21} "Privity was formerly found to exist only when a person succeeded to the interest of a party or had the right to control the proceedings or make a defense in the original proceeding." Id., citing *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 114, overruled in part on other grounds, *Grava* at 379. See also *Kraut v. Cleveland Ry. Co.* (1936), 132 Ohio St. 125, 126-27 (concluding a judgment against a wife in a personal injury action did not bar her husband's subsequent action against the same defendant for loss of services and for expenses for care and medical attention arising out of his wife's injury because "the causes of action are not the same, * * * the parties are not the same, and * * * there is no privity between the husband and wife in the assertion of their respective demands"). Id. at 126-27. In addition, privity could arise where one had "[a]n interest in the result or an active participation in the original lawsuit" or where individuals raise "identical legal claims and seek identical rather than individually tailored results." *O'Nesti* at ¶9, citing *Brown* at 248, *Grava*.

{¶22} While the Supreme Court of Ohio acknowledged that "privity is a somewhat amorphous concept in the context of claim preclusion, * * * [a] 'mutuality of interest,

including an identity of desired result,' might also support a finding of privity." *O'Nesti,* supra, quoting *Brown* at 248 (noting a mutuality of interest, including an identity of desired result, creates privity between plaintiffs in the case, where in the prior litigation all sought the same disallowance of the ordinance and all for the same reason, an alleged violation of 30-day publication rule). "Mutuality, however, exists only if 'the person taking advantage of the judgment would have been bound by it had the result been the opposite. Conversely, a stranger to the prior judgment, being not bound thereby, is not entitled to rely upon its effect under the claim of res judicata or collateral estoppel.' " Id., quoting *Johnson's Island* at 244. In the end, "privity 'is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.' " *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.,* 10th Dist. No. 07AP-444, 2008-Ohio-3624, ¶20, affirmed, 121 Ohio St.3d 526, 2009-Ohio-1704, quoting *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 184, quoting *Bruszewski v. United States* (C.A.3, 1950), 181 F.2d 419, 423 (Goodrich, J., concurring).

{¶23} Similar to plaintiff's appeal, *West Am. Ins. Co. v. Humphrey* (1979), 65 Ohio App.2d 188, involved two lawsuits separately commenced in the Franklin County Municipal Court. In the first action, Lisa Humphrey sued Ellis and Mabel Hupp, leading to a judgment rendered for the Hupps. In the action, the court determined Robert Humphrey's negligence was the sole proximate cause of damages arising from the accident, thus precluding Lisa Humphrey, owner of the Humphrey vehicle, from recovering damages against the Hupps. The other action, the case on appeal, was "that of Ellis Hupp and his subrogated insurer against Robert Humphrey, the driver of the

Humphrey vehicle, for damages to the Hupp automobile." Id. at 189-90. The court was asked to determine "the binding effect, if any, of the final judgment in the former case to this case." Id. at 190. Hupp and his subrogated insurer asserted the trial court's finding in the first case, that Robert Humphrey's negligence was the sole proximate cause of the accident, was binding against Robert Humphrey, who was not a party to the first action. Humphrey, by contrast, asserted he was not bound because he was neither a party nor in privity with a party to that case.

{¶24} Relying on *Whitehead,* supra, a case noted in the Supreme Court's recent *O'Nesti* decision, this court observed that "[g]enerally, a person is in privity with another if he succeeds to an estate or an interest formerly held by another." Id. Given the facts and the law, this court concluded Robert Humphrey was not in privity with Lisa Humphrey in the first action. Analyzing the facts as a bailor and bailee situation, the court pointed out that the bailor and bailee "each have their own interest in the chattel. One has not succeeded to an estate or interest formerly held by the other." Id. The court thus concluded that "[s]ince Robert Humphrey has not had an opportunity to litigate negligence and proximate cause and is not in privity with his wife for purposes of binding him with the determination in her case, the trial court erred in applying the doctrine of collateral estoppel." Id. at 191. Because the recent decisions of the Ohio Supreme Court modified the definition of privity from that employed in *Humphrey*, the issue before us resolves to whether that modification dictates a different decision. It does not.

{¶25} Initially, plaintiff no longer was married to Nancy and denied knowing she was driving the car at the time of the accident that gave rise to the damages defendant repaired. The trial court concluded to the contrary, but to reach that conclusion the trial

court necessarily weighed the evidence, a process not permitted in summary judgment. Secondly, Nancy did not own the car at the time she filed her complaint in the Small Claims division; plaintiff did.

{¶26} Thirdly, nothing suggests plaintiff actively participated in either initiating or pursuing Nancy's complaint. To the contrary, plaintiff's affidavit indicated he was precluded from participating in the lawsuit, was required to maintain seating with other members of the public, and was told not to speak until a question was asked of him. Plaintiff thus lacked the controlling participation to support privity. *State ex rel. Estate of Miles v. Village of Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786, ¶29 (concluding "the proper focus is on whether the legal rights of the parties to be estopped were adequately represented by the party to the first litigation," the dispositive issue being whether the parties sought to be bound by the previous determination "had a controlling participation in the first action"). Indeed, Nancy sued defendant for negligence in repairing the vehicle. Although plaintiff also includes a claim for failure to properly repair plaintiff's car, his complaint also asserts a claim for unauthorized repairs, a claim which his affidavit suggested is the foremost allegation in his complaint. See *O'Nesti,* supra (determining that co-employees subject to the same employment-related contract, without more, were not in privity even though they were subject to the same stock incentive plan because not only did they did not actively participate in or have control over the prior lawsuit but no facts showed a special relationship between them).

{¶27} In the final analysis, the facts presented in connection with the summary judgment motion fail to demonstrate "such an identification of interest of one person with another as to represent the same legal right." Cf. *M.M. & M., Inc. v. Johnson* (Nov. 2,

1984), 2d Dist. No. 8866 (concluding the legal owner of a vehicle and its lessee were in direct privity in view of the contractual arrangement so that whichever recovered the deductible amount their trust relationship would not require an accounting between them). Because defendant's summary judgment motion did not set forth facts sufficient to demonstrate privity between plaintiff and Nancy, the trial court erred in granting summary judgment to defendant. Plaintiff's first three assignments of error are sustained, rendering moot his remaining assignments of error on which the trial court did not rule.

{¶28} Having sustained plaintiff's first three assignments of error, we deny plaintiff's motion to sanction counsel, reverse the judgment of the trial court and remand for further proceedings consistent with this decision.

Motions denied;
judgment reversed
and case remanded.

SADLER and CONNOR, JJ., concur.

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