

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Bobby Holbrook,	:	
Appellant-Appellant,	:	
v.	:	No. 14AP-507 (C.P.C. No. 13CV-9719)
OhioHealth Corporation et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

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D E C I S I O N

Rendered on June 11, 2015

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*Knisley Law Offices, Daniel S. Knisley, and Kurt A. Knisley,*  
for appellant.

*Habash & Reasoner LLC, Stephen J. Habash, and Dennis H.*  
*Behm; Keith Hartzell,* for appellee OhioHealth Corporation.

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APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Appellant-appellant, Bobby Holbrook, appeals the June 20, 2014 judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of appellee-appellee, OhioHealth Corporation ("OhioHealth"). For the reasons that follow, we affirm the judgment of the trial court.

**I. FACTS AND PROCEDURAL HISTORY**

**A. Original Industrial Injury**

{¶ 2} On December 25, 2007, in the course of appellant's employment with OhioHealth as a security officer, a patient kicked appellant in his right knee, causing him to fall to the floor. Appellant filed a workers' compensation claim with the Industrial

Commission of Ohio ("commission"), which was allowed for right knee contusion, patellar tendonitis, and right medial meniscus tear.

**B. December 17, 2008 Surgery**

{¶ 3} On December 17, 2008, appellant underwent surgery for his right knee. The surgery included a partial medial meniscectomy for appellant's meniscal tear, in addition to a chondroplasty of the patellofemoral joint, medial femoral condyle, and medial tibial plateau, as well as a synovectomy. After surgery, appellant received five intra-articular injections for viscosupplementation. Appellant returned to work nine months after the surgery. Approximately one month after he returned to work, appellant resumed having pain in his right knee.

**C. December 11, 2009 C-86 Motion**

{¶ 4} On December 11, 2009, appellant filed a C-86 motion seeking to add the claim of "substantial aggravation of pre-existing tri-compartmental degenerative joint disease of the right knee" to his workers' compensation claim as a "direct and proximate result" of the December 25, 2007 injury. (Dec. 11, 2009 claim.) Appellant supported his motion with a report authored by Charles B. May, D.O. Dr. May stated that appellant "suffered from severe degenerative joint disease of the right knee that preexisted his injury of 12/25/2007" and that, in his medical opinion, appellant "substantially aggravated preexisting tricompartmental degenerative joint disease of the right knee as a direct and proximate result of his work injury that occurred on 12/25/2007." (Dr. May's Nov. 24, 2009 letter, 2.) Dr. May stated that appellant "went from asymptomatic nonimpairing tricompartmental degenerative joint disease of his right knee that was present prior to 12/25/2007 and by 12/18/2008 required surgery for this condition by way of arthroscopic repair and within six months after surgery, it was noted by his surgeon that he required a total knee arthroplasty." (Dr. May's Nov. 24, 2009 letter, 2.) Based on Dr. May's letter, on February 13, 2010, the commission granted appellant's motion. OhioHealth appealed the additional allowance to the Franklin County Court of Common Pleas.

{¶ 5} On May 4, 2011, the Franklin County Court of Common Pleas rendered summary judgment in favor of OhioHealth, finding that, as a matter of law, appellant failed to demonstrate the December 25, 2007 injury resulted in a substantial aggravation

of a pre-existing condition under R.C. 4123.01(C)(4). Appellant did not appeal from this decision of the trial court. *Holbrook v. OhioHealth Corp.*, Franklin C.P. No. 10CVD06-8347 (May 5, 2011) ("*Holbrook I*").

**D. May 5, 2011 C-86 Motion**

{¶ 6} On May 5, 2011, appellant filed another C-86 motion with the commission seeking an additional allowance for acceleration of disability due to tricompartmental degenerative joint disease of the right knee. On July 27, 2011, the district hearing officer ("DHO") disallowed appellant's additional claim. Appellant appealed the DHO's decision, which was affirmed by the decision of a staff hearing officer ("SHO") on September 8, 2011. Appellant appealed the decision of the SHO to the commission, which declined to hear appellant's appeal on September 28, 2011. Appellant did not appeal to this court.

**E. November 15, 2012 C-86 Motion**

{¶ 7} On November 15, 2012, appellant filed a third C-86 motion with the commission seeking an additional allowance for osteoarthritis right knee. The C-86 motion stated that it was requesting the claim be additionally recognized for the conditions outlined by Dr. May, including:

In my medical opinion, the osteoarthritis of his right knee preexisted the surgery performed on his right knee and that date of surgery again was 12/17/2008. It does ho[w]ever appear that the surgery performed for the allowed condition of medial meniscal tear and which necessitated a chondroplasty and synovectomy, substantially aggravated this preexisting arthritis of the knee and Mr. Holbrook's current complaints and physical findings in regard to his right knee are a direct result of this substantial aggravation.

{¶ 8} On May 22, 2013, the DHO disallowed the claim for osteoarthritis of the right knee "whether by direct cause, substantial aggravation or a flow-through." (DHO's May 22, 2013 Decision, 1.) The DHO found that "the claim has previously been disallowed for substantial aggravation of pre-existing tri-compartmental degenerative joint disease of the right knee and that the current request is redundant and barred by res judicata." (DHO's May 22, 2013 Decision, 1.) In support of this finding, the DHO indicated he relied on the April 26, 2013 report of D. Ann Middaugh, M.D., M.S.

Appellant appealed the DHO's decision, which was affirmed by the decision of an SHO on June 29, 2013.

{¶ 9} The SHO agreed with the reasoning and decision of the DHO in denying the requested allowance "via direct causation, substantial aggravation or flow-through theory based on the 04/26/2013 report of Dr. Middaugh as well as by res judicata pursuant to the denial of substantial aggravation of pre-existing tri-compartmental degenerative joint disease of the right knee as made in the 09/06/2011 Staff Hearing Officer order. The Staff Hearing Officer also finds that this condition is not a result of the 12/25/2007 incident or its consequences." (SHO's June 29, 2013 Decision, 1.) Appellant appealed the decision of the SHO to the commission, which declined to hear appellant's appeal on July 18, 2013.

{¶ 10} On August 29, 2013, appellant appealed the decision of the commission to the Franklin County Court of Common Pleas. On March 11, 2014, OhioHealth filed a motion for summary judgment, asserting that appellant's claim was barred by res judicata. On June 20, 2014, the trial court granted OhioHealth's motion for summary judgment, finding that res judicata barred appellant's claim for a substantial aggravation of his pre-existing osteoarthritis of the right knee. This appeal followed.

## **II. ASSIGNMENT OF ERROR**

{¶ 11} Appellant appeals assigning the following single error for our review:

THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT, FINDING THAT PLAINTIFF WAS PRECLUDED FROM PURSUING AN APPEAL EXECUTED PURSUANT TO O.R.C. §4123.512 FOR THE CONDITION OF OSTEOARTHRITIS OF THE RIGHT KNEE SUSTAINED VIA A FLOW THROUGH MECHANISM OF INJURY.

## **III. STANDARD OF REVIEW**

{¶ 12} Pursuant to Civ.R. 56(C), 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." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to

be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978).

{¶ 13} The applicability of the doctrine of res judicata presents a question of law we consider de novo. *State v. Muhumed*, 10th Dist. No. 11AP-1001, 2012-Ohio-6155, ¶ 11.

#### IV. LEGAL ANALYSIS

{¶ 14} In his sole assignment of error, appellant argues that res judicata does not bar him from pursuing this new claim because the substantial aggravation of pre-existing osteoarthritis of the right knee arose out of a different transaction or occurrence than was the subject matter of the 2009 C-86. Although appellant concedes that the surgery date preceded the filing of the 2009 C-86, appellant maintains that he was not aware of injury that would result from the surgery when he filed that claim November 15, 2012.

{¶ 15} The doctrine of res judicata " 'promotes principles of finality and judicial economy by preventing endless relitigation of an issue upon which there was already a full or fair opportunity to be heard.' " *Daniel v. Williams*, 10th Dist. No. 13AP-155, 2014-Ohio-273, ¶ 18, quoting *State v. Jama*, 10th Dist. No. 11AP-210, 2012-Ohio-2466, ¶ 45, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 18. Under the doctrine of res judicata, " '[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.' " *Shimko v. Lobe*, 152 Ohio App.3d 742, 2003-Ohio-2200, ¶ 43 (10th Dist.), quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995). " 'Transaction' has been defined as a 'common nucleus of operative facts.' " *Id.*, quoting *Grava* at 382, quoting 1 Restatement of the Law 2d, Judgments, Section 24, Comment b at 198-99 (1982). " ' "It has long been the law in Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit.' " \* \* \* "The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." ' " (Emphasis sic.) *Id.*, quoting *Grava* at 382, quoting *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62 (1990), quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69 (1986).

{¶ 16} In Ohio, " '[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel.' " *State ex rel. Nickoli v. Erie MetroParks*, 124 Ohio St.3d 449, 2010-Ohio-606, ¶ 21, 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,' whereas issue preclusion, or collateral estoppel, 'precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action.' " *Id.*, quoting *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395 (1998); see *Holzemer v. Urbanski*, 86 Ohio St.3d 129, 133 (1999).

{¶ 17} " ' "Res judicata, whether claim preclusion or issue preclusion, applies to quasi-judicial administrative proceedings." ' " *Daniel* at ¶ 20, quoting *State ex rel. Varnau v. Wenninger*, 128 Ohio St.3d 361, 2011-Ohio-759, ¶ 11, quoting *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶ 29. " 'An administrative proceeding is quasi-judicial for purposes of res judicata if " 'the parties have had an ample opportunity to litigate the issues involved in the proceeding.' " ' " *Id.*, quoting *Schachter* at ¶ 29, quoting *Set Prods., Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St.3d 260, 263 (1987), quoting *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133 (1980), syllabus. " ' "Proceedings of administrative officers and agencies are not quasi-judicial where there is no requirement for notice, hearing and the opportunity for introduction of evidence." ' " *Id.*, quoting *Greene v. Conrad*, 10th Dist. No. 96APE12-1780 (Aug. 21, 1997), quoting *M.J. Kelley Co. v. Cleveland*, 32 Ohio St.2d 150 (1972), paragraph two of the syllabus.

{¶ 18} The trial court determined that appellant was barred from pursuing his claim because it "arise[s] from the same nucleus of operative facts and [appellant] had the opportunity—and obligation—to raise and have adjudicated all such claims in earlier proceedings." (June 20, 2014 Journal Entry, 5.) Thus, the trial court applied claim preclusion in determining that "[appellant] could have brought his degenerative joint disease claim as part of his 2011 case before Judge Cocroft, because it is merely a slightly

different medical explanation for the same body of knee symptoms which has been addressed since 2008." (June 20, 2014 Journal Entry, 4.) The court found no evidentiary support for appellant's contention that he was unaware of the complications of surgery at the time he filed either of his prior two claims. The trial court relied on *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560, for the proposition that all workers' compensation claims must be presented in the first instance for administrative determination as a necessary and inherent part of the overall adjudication framework.

{¶ 19} In *Ward*, the Supreme Court of Ohio defined a workers' compensation claim as follows:

*A workers' compensation claim is simply the recognition of the employee's right to participate in the fund for a specific injury or medical condition, which is defined narrowly, and it is only for that condition, as set forth in the claim, that compensation and benefits provided under the act may be payable. Nor is the right to participate an all-encompassing one-time final determination. The grant or denial of the right to participate for one injury or condition does not preclude a subsequent claim for participation in the fund based on another injury or condition arising out of the same industrial accident.*

(Emphasis added.) *Id.* at ¶ 10.

{¶ 20} In an R.C. 4123.512 appeal from a commission order, "the decision for the common pleas court is the claimant's right to participate in the fund for a specific *injury*, not for a specific type of causation." (Emphasis sic.) *Starkey v. Builders Firstsource Ohio Valley, L.L.C.*, 130 Ohio St.3d 114, 2011-Ohio-3278, ¶ 19. In *Ward*, the Supreme Court specifically stated that "*each injury or condition* that is alleged to give the claimant a right to participate in the Workers' Compensation Fund must be considered as a separate claim." (Emphasis added.) *Id.* at ¶ 11.

{¶ 21} Appellant does not contend that the condition he alleges now is different than the condition he alleged in *Holbrook I*. Nor is it reasonable to infer from the evidence he submits in support of his claim that the condition for which he now seeks compensation is different from the condition alleged in the prior claim. In his August 29, 2013 letter, Dr. Adolph V. Lombardi, Jr., M.D., notes that appellant suffered from

significant degenerative joint disease at the time of his December 18, 2008 surgery.<sup>1</sup> He further notes that six months after the surgery, appellant complained of right knee pain and that "[t]he time frame of this degeneration is certainly much more rapid than expected with so called normal degenerative osteoarthritic wear and tear process." (Dr. Lombardi's Aug. 29, 2013 letter.) Appellant also testified in his January 20, 2014 deposition that he returned to work nine months after surgery, but that one month after he returned to work, he resumed having pain in his right knee.

{¶ 22} Appellee submitted the affidavit of Dr. Middaugh to support its contention that the conditions are the same. Dr. Middaugh opined that "the conditions of 'substantial aggravation of preexisting tricompartamental degenerative joint disease of the right knee' and 'substantial aggravation of preexisting osteoarthritis of the right knee' are *synonymous and redundant*." (Emphasis added.) (Dr. Middaugh's Mar. 4, 2014 affidavit, 1.) She further states that "[f]rom a clinical standpoint, within the context of the records in this claim, there is no difference or distinction among the terms 'osteoarthritis', 'arthritis' and 'degenerative joint disease.'" (Dr. Middaugh's Apr. 26, 2013 letter, 2.)

{¶ 23} Applying the logic of *Ward* and *Starkey* to the undisputed facts, the 2009 C-86 alleges a single workers' compensation claim seeking an additional allowance for a substantial aggravation of pre-existing osteoarthritis, right knee, regardless whether that condition arose from the initial industrial accident, the surgical procedure required to treat the allowed condition or from some combination thereof.

{¶ 24} In *Holbrook I*, the trial court held:

There is testimony of "worsening," however, as the defendants correctly point out, this fails to meet the legislative standard of substantial aggravation as enacted in 2006. In fact, there is no evidence of any diagnostic testing before December 25, 2007 that can be compared with the post-injury diagnostic testing to indicate any aggravation of the underlying condition. As such, this Court finds that there are no genuine issues of material fact and, therefore, the defendants are entitled to judgment as a matter of law.

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<sup>1</sup> The "Record of Proceedings" from the February 10, 2010 hearing states that the surgery took place on December 17, 2008.



{¶ 25} In *Holbrook I*, Judge Cocroft determined that appellant failed to produce any evidence to support his allegation that the aggravation of his pre-existing condition was "substantial," as that term is defined in R.C. 4123.01(C)(4). Having made this determination, Judge Cocroft did not address the question whether appellant's condition was causally related to the industrial accident.<sup>2</sup> Appellant did not appeal to this court from the judgment of the court of common pleas in *Holbrook I*. Thus, the judgment of the court in *Holbrook I* is a final determination of appellant's workers' compensation claim seeking an additional allowance for substantial aggravation of his pre-existing osteoarthritis of the right knee. See *Jeffers v. Jeffers*, 10th Dist. No. 00AP-442 (Feb. 13, 2001), citing *In re Adoption of Greer*, 70 Ohio St.3d 293 (1994), fn. 1 ("If a final appealable order is not timely appealed, all matters that could have been reviewed had an appeal been taken become *res judicata* and are not reviewable in a related or subsequent proceeding or appeal.").

{¶ 26} We recognize that the cases cited by the parties: *Ward*, *Starkey*, and *Robinson v. AT&T Network Sys.*, 10th Dist. No. 02AP-807, 2003-Ohio-1513, arise under different facts than those presented herein and address a somewhat different aspect of *res judicata* than that presented in this appeal. In *Robinson*, we held that "an employee who presents a claim for a certain condition as directly caused by an injury must also present at the same time any claim he or she may have that the *same condition* preexisted and was aggravated by the employee's employment." (Emphasis sic.) *Ward* at ¶ 14. In *Ward*, the Supreme Court held that a "claimant in an R.C. 4123.512 appeal may seek to participate in the Workers' Compensation Fund only for those *conditions* that were addressed in the administrative order from which the appeal is taken." (Emphasis added.) *Id.* at ¶ 17. In *Starkey*, the Supreme Court held that "a claim for a certain *condition* by way of direct causation must necessarily include a claim for aggravation of that *condition*." (Emphasis added.) *Id.* at ¶ 20.

{¶ 27} There is no allegation in this case that appellant raised a new condition on appeal that had not been raised administratively in the 2012 claim. Appellant likewise

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<sup>2</sup> In *Holbrook I*, Judge Cocroft noted that appellee produced evidence that appellant's condition was either naturally occurring or caused by his morbid obesity. The court did not expressly address that issue either.

does not deny that the condition for which he sought compensation in 2009 is the same condition for which he now seeks compensation. Thus, none of the cases cited by the parties are directly on point. Nor has this court discovered any case law addressing the specific issue raised herein. However, we find that the decisions in *Ward*, *Starkey*, and *Robinson* are applicable in this case inasmuch as they define an industrial "claim" in terms of a specific condition or injury, regardless of the cause.

{¶ 28} Appellant argues that *res judicata* does not apply because the 2012 C-86 alleges a "flow-through" theory of causation. We disagree.

{¶ 29} Pursuant to R.C. 4123.84(A)(1), the commission retains continuing jurisdiction to adjudicate claims of residual or "flow-through" injuries, which have been defined as additional conditions that occur in a *different body part* than the one that has already been formally recognized in the original claim, but which proximately result from the previous recognized injury or condition. R.C. 4123.84(A) and (C). *See also Lewis v. Trimble*, 79 Ohio St.3d 231, 237 (1997); *Gallagher v. Good Samaritan Hosp.*, 2d Dist. No. 20776, 2005-Ohio-4737, ¶ 13; *Click v. S. Ohio Corr. Facility*, 152 Ohio App.3d 560, 2003-Ohio-2208, ¶ 9 (4th Dist.); *Munday v. S. Ohio Coal Co.*, 4th Dist. No. 03CA12, 2004-Ohio-2872); *Pitts v. Children's Hosp. Med. Ctr.*, 1st Dist. No. C-010506, 2002-Ohio-2039; *Irwin v. Ohio Valley Hosp. Assoc.*, 7th Dist. No. 97 JE 9 (Aug. 30, 1999).<sup>3</sup> Appellant's 2011 C-86 does not allege an injury or condition developing in a different body part than the one previously recognized in his industrial claim. Had appellant done so, there would be no dispute that the additional condition is different than the condition for which appellant sought benefits in 2009. As stated above, the issue in this case is whether the 2011 C-86 alleges the same injury or condition previously litigated in *Holbrook I*.

{¶ 30} Finally, to the extent that appellant claims that the 2012 C-86 does not share a common nucleus of operative facts with the 2009 C-86, the undisputed facts prove otherwise. There is no question that the aggravating effect of the 2008 surgery was

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<sup>3</sup> Examples of flow-through or residual conditions include a major depressive disorder proximately resulting from an allowed back injury (*see Munday; Specht v. BP Am., Inc.*, 86 Ohio St.3d 29 (1999)), and an injury from a myocardial infarction proximately caused by claimant's allowed groin and hip injuries (*Kenyon v. Scott Fetzer Co.*, 113 Ohio App.3d 264 (8th Dist.1996)). The time period for claiming benefits for a residual injury is two years from the time claimant knew or should have known of the nature and seriousness of a residual or flow-through condition and its causal relation to his or her employment. *Lewis*.

a fact in evidence in *Holbrook I*. Dr. May's November 24, 2009 letter in support of appellant's 2009 C-86 states: "within six months after surgery, it was noted by his surgeon that he required a total knee arthroplasty." (Dr. May's Nov. 24, 2009 letter, 2.) Appellant also testified that he returned to work nine months after surgery, but that one month after he returned to work he resumed having pain in his right knee. The only reasonable conclusion to draw from the undisputed evidence is that the surgery in 2009 and the aggravating effect thereof, were facts of consequence in the litigation of the 2009 C-86, regardless of appellant's claim that he was unaware of the connection between the surgery and his condition.

{¶ 31} For the foregoing reasons, we hold that res judicata barred appellant from pursuing a second claim for a substantial aggravation of pre-existing osteoarthritis, right knee. Appellant previously sought benefits for the same condition but failed to appeal from the court of common pleas' determination that the aggravation of his pre-existing condition was not "substantial." Appellant's 2012 C-86 alleging that the substantial aggravation was caused by the 2008 surgical procedure required to treat the condition does not give rise to a separate industrial claim because it is undisputed that the surgery took place prior to the filing of the 2009 C-86 and that the aggravating effect of the surgical procedure was an operative fact in *Holbrook I*.

{¶ 32} Thus, the trial court did not err when it granted summary judgment in favor of appellee. Appellant's sole assignment of error is overruled.

## **V. CONCLUSION**

{¶ 33} Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

HORTON, J., concurs.

DORRIAN, J., concurs in judgment only.

DORRIAN, J., concurring in judgment only.

{¶ 34} I concur with the majority in judgment only. I do not believe it is necessary for us to determine whether appellant was precluded from pursuing the November 15, 2012 C-86 motion pursuant to claim preclusion because I believe he was precluded from pursuing the same claim pursuant to issue preclusion.

{¶ 35} As noted by the majority, appellant does not dispute that the conditions he alleged previously and the one he alleges now are the same. Appellee submitted the affidavit of D. Ann Middaugh, M.D., M.S., to support its contention that the conditions are the same. Dr. Middaugh opined that "the conditions of 'substantial aggravation of preexisting tricompartmental degenerative joint disease of the right knee' and 'substantial aggravation of preexisting osteoarthritis of the right knee' are *synonymous and redundant*." (Emphasis added.) (Mar. 4, 2014 Middaugh Affidavit.) She further states that, "[f]rom a clinical standpoint, within the context of the records in this claim, there is no difference or distinction among the terms 'osteoarthritis,' 'arthritis' and 'degenerative joint disease.'" (Apr. 26, 2013 Letter of Dr. Middaugh.) Appellant does not argue and has presented no evidence that these conditions are different. Rather, he argues that res judicata does not apply because the "injury-producing event" is different.

{¶ 36} Regardless of whether the original injury and the surgery resulting therefrom are different or the same injury-producing event/transaction or occurrence/cause of action, the court of common pleas, a court of competent jurisdiction, has already actually and directly passed upon the factual question of whether appellant's condition was substantially aggravated. In *Holbrook v. OhioHealth Corp.*, Franklin C.P. No. 10CVD06-8347 (May 5, 2011) ("*Holbrook I*"), the court held:

There is testimony of "worsening," however, as the defendants correctly point out, this fails to meet the legislative standard of substantial aggravation as enacted in 2006. In fact, there is no evidence of any diagnostic testing before December 25, 2007 that can be compared with the post-injury diagnostic testing to indicate any aggravation of the underlying condition. As such, this Court finds that there are no genuine issues of material fact and, therefore, the defendants are entitled to judgment as a matter of law.

*Id.* at 6.

{¶ 37} Appellant does not state that the condition he alleges now is different or modified from the condition he alleged in *Holbrook I*. Likewise, the evidence he submits does not suggest a different or modified condition. In his November 5, 2012 letter, Charles B. May, D.O., states that, "[s]ince assuming Mr. Holbrook's care [on July 1, 2009], Mr. Holbrook's right knee arthritis has in fact worsened." In his August 29, 2013 letter,

Adolph V. Lombardi, Jr., M.D., notes that appellant suffered from significant degenerative joint disease at the time of his December 18, 2008 surgery. He further notes that, six months after the surgery, appellant complained of right knee pain and that "[t]he time frame of this degeneration is certainly much more rapid than expected with so called normal degenerative osteoarthritic wear and tear process." Finally, in Dr. Lombardi's affidavit, sworn and prescribed on March 17, 2014, Dr. Lombardi states that he "witnessed the condition [of degenerative joint disease] first hand" during the operation he performed on June 27, 2013.

{¶ 38} The court of common pleas rendered its decision on May 5, 2011. Although the evidence suggests that appellant's pre-existing condition worsened or was aggravated since the surgery and since July 1, 2009 when Dr. May assumed his care, absent is evidence indicating that the pre-existing condition worsened or was aggravated since the common pleas court rendered its decision on May 5, 2011 finding that the worsening or aggravation to that point was not substantial. There is no allegation nor evidence to support an allegation that the condition differs from that "actually and directly passed upon" by the common pleas court.

{¶ 39} The court in *Holbrook I* determined the issue of whether appellant's condition was substantially aggravated. No change or modification in the condition is alleged or supported. Therefore, issue preclusion precludes appellant from pursuing the November 15, 2012 C-86 motion, regardless of whether the transaction or occurrence/cause of action alleged therein is identical or different from the previous actions. Appellant has had ample opportunity to litigate this issue. Therefore, pursuant to issue preclusion, res judicata prevents appellant from pursuing his November 15, 2012 C-86 motion now.

{¶ 40} Accordingly, I concur with the majority in overruling appellant's assignment of error and affirming the judgment of the trial court.

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