

[Cite as *Wisner v. Grange Mut. Cas. Co.*, 2004-Ohio-2621.]

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY**

**CHERYL A. WISNER, ET AL.**

**CASE NUMBER 1-03-92**

**PLAINTIFFS-APPELLANTS**

**v.**

**OPINION**

**GRANGE MUTUAL CASUALTY  
COMPANY**

**DEFENDANT-APPELLEE**

---

---

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas  
Court.**

**JUDGMENT: Judgment reversed and cause remanded.**

**DATE OF JUDGMENT ENTRY: May 24, 2004.**

---

---

**ATTORNEYS:**

**TODD O. ROSENBERG  
Attorney at Law  
Reg. #0037401  
6110 Parkland Boulevard**

**Mayfield Heights, OH 44124  
For Appellants.**

**DAVID A. CHENEY  
Attorney at Law  
Reg. #0010546  
101 North Elizabeth Street  
Lima, OH 45801  
For Appellee.**

**SHAW, P.J.**

{¶1} The plaintiffs-appellants, Cheryl, Dannie, and Dustin Wisner (“the Wisners”), appeal the November 24, 2003 judgment of the Common Pleas Court of Allen County, Ohio, dismissing their complaint against the defendant-appellee, Grange Mutual Casualty Co. (“Grange”).

{¶2} The Wisners filed a complaint in the Allen County Common Pleas Court on April 17, 2002. Their complaint alleged that on or about April 20, 2000, Cheryl Wisner pulled her vehicle onto the side of the road and was subsequently struck by an unidentified vehicle, causing her bodily injury. Due to the fact that the driver of this vehicle was unknown, the Wisners filed their complaint against the following: “John Doe;” Grange, which issued an automobile policy that included uninsured/underinsured motorist (“UM/UIM”) coverage to Dannie and Cheryl Wisner; Erie Insurance Group (“Erie”), the commercial automobile insurance carrier for Dannie’s employer; and Lima Memorial Hospital, Cheryl’s employer, which was later replaced by its commercial automobile insurance carrier, Cincinnati Insurance Co. (“Cincinnati”). Erie and Cincinnati were made

defendants in this matter pursuant to the Ohio Supreme Court's opinion in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660.

{¶3} On July 25, 2003, Cincinnati filed a motion for summary judgment, to which the Wisners responded. On September 23, 2003, the trial court granted Cincinnati's motion for summary judgment. In deciding to grant this motion, the trial court found that the terms of Cincinnati's policy allowed UM/UIM coverage for a "hit and run" accident only when the facts of the accident were proven "by independent corroborative evidence, other than the testimony of the 'insured' making the claim" and that the Wisners failed to provide independent corroborative evidence as required. Thereafter, the Wisners filed a motion for relief from judgment or in the alternative for reconsideration of the grant of summary judgment, both of which were denied by the trial court.

{¶4} The Wisners then appealed the grant of summary judgment to this Court, and Cincinnati cross-appealed. However, this Court dismissed the appeal and cross-appeal on January 30, 2003, pursuant to the Wisners' request for a voluntary dismissal due to the Ohio Supreme Court's decision in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, which greatly limited the *Scott-Pontzer* decision.

{¶5} During the pendency of the Wisner/Cincinnati appeal, Erie filed a motion to dismiss the Wisners' claims against it on October 21, 2003. Two days later, Grange also filed a motion to dismiss the claims against it, incorporating the motion to dismiss and accompanying memorandum of Erie. Both Erie and Grange based their respective motions on the doctrine of the "law of the case," asserting that the court's September 23, 2003 determination that the Wisners failed to produce independent corroborative evidence, likewise, applied to the claims against them. The trial court agreed and granted both Erie's and Grange's motions on November 24, 2003. This appeal followed, and the Wisners now assert one assignment of error.

**THE TRIAL COURT IMPROPERLY DISMISSED  
DEFENDANT-APPELLEE GRANGE MUTUAL CASUALTY  
COMPANY.**

{¶6} This Court's review of this issue begins by noting that the Wisners have only appealed the trial court's judgment as it applies to Grange, their personal automobile insurance carrier. Thus, the only issues before this Court are those pertaining to Grange, not to Erie. As to Grange, the Wisners maintain that the trial court erred in applying the doctrine of the law of the case to their claims, erred in treating Grange's motion to dismiss as a motion for summary judgment

without first notifying them, and failed to consider the affidavit of Dustin Wisner and the deposition of Cheryl Wisner in so doing.

{¶7} The doctrine of the law of the case “provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.” *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3 (citations omitted). The function of this doctrine is “to compel trial courts to follow the mandates of reviewing courts.” *Id.*, citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94; *Charles A. Burton, Inc. v. Durkee* (1954), 162 Ohio St. 433; *Schmelzer v. Farrar* (1976), 48 Ohio App.2d 210, 212; *Miller v. Miller* (1960), 114 Ohio App. 234, 235. “Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court’s determination of the applicable law.” *Nolan*, 11 Ohio St.3d at 3.

{¶8} In the case sub judice, this Court did not issue a decision regarding the issue of independent corroborative evidence. Rather, the Wisner/Cincinnati appeal was voluntarily dismissed after the Ohio Supreme Court rendered its decision in *Galatis*, in November of 2003. In addition, the trial court’s

determination of this issue as to Cincinnati does not become the “law of the case.” Thus, the trial court erred in granting the motion to dismiss based on this issue, a point conceded by Grange in its brief to this Court. However, our inquiry does not end there.

{¶9} Grange maintains that the correct doctrine to apply is collateral estoppel, i.e. issue preclusion. However, this issue was not raised in its motion to the trial court. To the contrary, the sole basis for Grange’s motion was that the “law of the case” doctrine should be applied.

{¶10} The Ohio Supreme Court has held that reviewing courts are not to “consider questions that have not been presented to the court whose judgment is sought to be reversed.” *State ex rel. BSW Development Group v. Dayton* (1998), 83 Ohio St.3d 338, 345, citing *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 81. Further, “[t]hese rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause.” *Foreman*, 79 Ohio St.3d at 81. Moreover, “they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and

to aid the court rather than silently mislead it into the commission of error.” Id. Thus, a party is not permitted to raise an issue for the first time on appeal.

{¶11} Despite this limited review, Grange maintains that an otherwise correct judgment should not be reversed simply because the trial court used an erroneous reason as the basis for its decision. While this contention is accurate, see *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Dist. Co.*, 148 Ohio App.3d 596, 2002-Ohio-3932, at ¶ 25, this does not relieve a party from the duty to present his argument(s) in support of his motion or in opposition to another party’s motion to the trial court.

{¶12} In short, parties are to present their arguments to the trial court, and if that court elects to base its decision on an erroneous reason, then a reviewing court may affirm that decision for a different, correct reason. However, the duty to exercise diligence and to aid the court in rendering its decision remains with the parties. *Foreman*, 79 Ohio St.3d at 81.

{¶13} Nevertheless, Grange requests that this Court affirm the judgment of the trial court based upon collateral estoppel, an issue not raised before the trial court. However, the Wisners maintain that the trial court’s decision should be reversed because it converted Grange’s motion to dismiss into one for summary

judgment without notice of this to them and that collateral estoppel does not apply in this instance.

{¶14} The Wisners are correct in their assertion that a court cannot convert a motion to dismiss into one for summary judgment without notice to the opposing party. *Federated Dept. Stores, Inc. v. Lindley* (1987), 30 Ohio St.3d 135, syllabus. Unlike a motion to dismiss, where the court is limited to a review of the pleadings, *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, the court is permitted to review matters outside of pleadings when a summary judgment motion has been made, Civ.R. 56. Thus, “[t]he purpose of notice is to afford the nonmoving party a reasonable opportunity to respond.” *Musa v. Gillett Communications, Inc.* (1997), 119 Ohio App.3d 673, 680, citing *Petrey v. Simon* (1983), 4 Ohio St.3d 154, 155. In addition, the Ohio Supreme Court has held that the defense of res judicata, which encompasses both claim preclusion and issue preclusion (collateral estoppel), is not properly raised in a motion to dismiss but may be raised in a motion for summary judgment. *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109. Therefore, we must determine whether Grange’s motion to the trial court was a motion to dismiss, as its caption reads, or a motion for summary judgment.

{¶15} Various courts have determined that “[i]t is not a motion’s designation that is controlling; rather, a motion may be considered for what it is rather than for what it is designated as.” *Musa*, 119 Ohio App.3d at 680; see, also, *State v. Workman*, 12<sup>th</sup> Dist. No. CA2002-12-302, 2003-Ohio-4242, at ¶ 6. In *Musa*, the Eighth District Court of Appeals examined the contents of a motion filed by the defendants to determine whether the motion, which was designated as a motion to dismiss, was actually a motion for summary judgment. *Musa*, 119 Ohio App.3d at 680. The Eighth District noted that the motion requested dismissal pursuant to Civ.R. 56, which governs motions for summary judgment, and had documentary evidence appended to it in support of the res judicata argument asserted in the motion. *Id.* In addition, the plaintiff requested that the motion be overruled pursuant to Civ.R. 56, and the trial court referred to the motion as a summary judgment motion in its entry. *Id.* at 681. Thus, the court concluded that the motion was a summary judgment motion and that the plaintiffs were given a reasonable opportunity to respond in their memorandum in opposition during the five months between the filing of the first motion and the resultant hearing. *Id.*

{¶16} Here, the motion at issue was captioned “Motion to Dismiss” and was filed by Grange on October 23, 2003. However, unlike the facts of *Musa*, Grange’s motion did not refer to Civ.R. 56 or any other Civil Rule for that matter. In addition, none of the matters outside of the pleadings that are enumerated in Civ.R. 56 as matters that may be considered in determining whether to grant summary judgment, such as depositions, written interrogatories, and affidavits, were appended to either Grange’s motion or the motion of Erie, which Grange incorporated by reference in its own motion. The Wisners did not respond to this motion, and the trial court granted it on November 24, 2003, without a hearing and without any reference to the Civil Rules.

{¶17} Given these facts, whether this motion was, in actuality, a motion for summary judgment is unclear. Nevertheless, in making its decision as to the motion, the trial court considered its previous judgment regarding Cincinnati’s motion for summary judgment, including the evidence submitted on that motion. In so doing, the court relied upon matters outside of the pleadings, converting this motion, whatever it may have been, into a motion for summary judgment. Therefore, the trial court should have provided notice to the Wisners that it

intended to consider matters outside of the pleadings and afforded them a meaningful opportunity to respond.

{¶18} Moreover, even if in reviewing this motion, it could be considered a motion for summary judgment that did not require separate notice to the Wisners, Grange failed to satisfy its burden. Summary judgment is only to be granted 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). In addition, “summary judgment shall not be rendered unless it appears \* \* \* 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, such party being entitled to have the evidence construed most strongly in his favor.” Id.

{¶19} The moving party may make his motion for summary judgment in his favor “with or without supporting affidavits[.]” Civ.R. 56(B). However, “[a] party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond.” (Emphasis added.) *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus. Summary judgment should be granted with caution, with a court construing all evidence and deciding any doubt in favor of the nonmovant.

*Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360. Not until the moving party demonstrates that he is entitled to summary judgment does the burden then shift to the non-moving party to show why summary judgment in favor of the moving party should not be had. See Civ.R. 56(E).

{¶20} As previously noted, Grange failed to specifically delineate collateral estoppel as the basis of its motion in order to allow the Wisners a meaningful opportunity to respond as required by *Mitseff*. Rather, Grange delineated the doctrine of the law of the case as its basis for its motion, a doctrine that is not applicable under these circumstances as aforementioned. Therefore, the Wisners were only on notice that Grange was seeking to utilize an inapplicable doctrine in support of its motion. The Wisners were never afforded a meaningful opportunity to respond to the issue of collateral estoppel by either Grange or the trial court because of Grange's failure to raise this in its motion.

{¶21} Furthermore, whether collateral estoppel would apply to the claims against Grange by the Wisners is also not clear. In its September 23, 2003 grant of summary judgment in favor of Cincinnati, the trial court relied, in part, on the specific terms of Cincinnati's policy regarding damages caused by an unidentified vehicle in conjunction with R.C. 3937.18(D)(2)'s definition of uninsured motor

vehicle to find that coverage was precluded in this case absent independent corroborative evidence that the negligence of an unidentified vehicle was a proximate cause of the accident.<sup>1</sup> However, the terms of Grange's policy in this regard are unknown due to the fact that this policy is absent from the record. Neither the trial court nor this Court has any idea whether the terms are the same as Cincinnati's or if Grange's policy affords a *broader* definition of an uninsured motor vehicle. Without a review of the policy, whether this issue is precluded is not readily discernible. Thus, the trial court erred in dismissing the Wisners claims against Grange, and the assignment of error is sustained.

{¶22} For these reasons, the judgment of the Common Pleas Court of Allen County, Ohio, is reversed and the cause remanded for further proceedings in accordance with law.

Judgment reversed  
and cause remanded.

CUPP and BRYANT, JJ., concur.

---

<sup>1</sup> The definition of uninsured motor vehicle in the context of an unidentified vehicle was codified in R.C. 3937.18(D)(2) at the time of Cheryl Wisner's injuries. However, that language is now codified in R.C. 3937.18(B)(3).