[Cite as *Miller v. Pollock*, 2010-Ohio-1335.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
SAMARA MILLER, etc., et al.,	:	Julie A. Edwards, P.J.
(Minor Child)	:	W. Scott Gwin, J.
Plaintiffs-Appellants	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 0096
	:	
	:	
JUDY C. POLLOCK, et al.,	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil Appeal from Richland County Court of Common Pleas Case No. 2008 CV 1925
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	March 16, 2010

APPEARANCES:

For Plaintiffs-Appellants

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Edwards, P.J.

{¶1} Appellants, Samara Miller and Melissa Reedy, appeal a summary judgment of the Richland County Common Pleas Court dismissing their complaint against appellees, Jody C. Pollock and Amy C. Montanya.

STATEMENT OF FACTS AND CASE

{¶2} On October 17, 2008, appellants filed the instant action alleging that on October 20, 2006, appellant Miller, a minor child, was a passenger in a car driven by appellee Montanya. The car was involved in a collision with appellee Pollock. The complaint alleged that Montanya and Pollock were negligent, and included a loss of consortium claim on behalf of appellant Reedy, the mother of appellant Miller. Pollock and Montanya each filed cross-claims against each other. In her cross-claim, Pollock claimed that Montanya acted negligently in failing to stop at a red light.

{¶3} The parties filed a joint stipulation that appellees' motion to consolidate was unopposed on February 24, 2009. However, no motion to consolidate had been filed in the instant case, and the stipulation did not reference another case number in which such motion was filed.

{¶4} On February 25, 2009, appellants filed a motion for a trial scheduling conference. In the motion, appellants represented that on January 9, 2009, a motion to consolidate this case with Case No. 2007-CV-0515 was filed in 2007-CV-0515 only. No order of consolidation was issued by the court prior to trial on that case on February 3, 2009. The motion represented that all issues between Pollock and Montanya raised in 2007-CV-0515 appear to have been resolved by such trial and appellants therefore sought a scheduling conference in the instant case.

{¶5} Appellee Pollock filed a motion for summary judgment on April 7, 2009, arguing that the judgment in 2007-CV-0515 precluded appellants' recovery. Attached to the motion was an uncertified copy of the judgment entry in that case, captioned Amy C. Montanya v. Jody C. Pollock. The judgment entry recites that based on the jury's verdict, judgment is entered for appellee Pollock on Montanya's complaint and for Montanya on Pollock's counterclaim.

{¶6} Appellee Montanya filed a motion for summary judgment on May 5, 2009, arguing that the judgment in 2007-CV-0515 was binding and preclusive on appellants. In addition to attaching an uncertified copy of the same judgment attached to Pollock's motion, Montanya attached an affidavit of Dawn Haynes which recites in pertinent part:

{¶7} "1. I am the attorney for Amy Montanya in the above-captioned case.

{¶8} "2. On December 30, 2008, Defendant Montanya filed a Motion to Consolidate the instant suit with Montanya v. Pollock, Case No. 07-CV-0515, in which Defendant Montanya sued Defendant Pollock for Defendant Montanya's injuries sustained in the October 20, 2006 collision and Defendant Pollock filed a counterclaim against Defendant Montanya for Defendant Pollock's injuries.

{¶9} "3. After the Motion to Consolidate was filed, I informed Plaintiff's counsel, John Holmes that Montanya v. Pollock, Case No. 07-CV-0515 was to proceed to trial on the issue of liability on February 2, 2009 and inquired whether he wanted to participate in the trial.

{¶10} "4. Plaintiff's counsel, John Holmes declined to participate because either Montanya or Pollock would be found liable and he could pursue Plaintiff's claims against the party found liable.

{¶11} "5. Plaintiff's counsel, John Holmes and Defendant Pollock's counsel, Gregory Baran, agreed that they would not oppose the Motion to Consolidate and on January 30, 2009, I filed a Joint Stipulation that Motion to Consolidate is Unopposed, although the entry was not properly filed."

{¶12} The court granted summary judgment and dismissed the complaint, finding in pertinent part:

{¶13} "On October 20, 2006 there was an intersection collision between cars driven by Jody Pollock and Amy Montanya. Plaintiff Samara Miller was a passenger in the Montanya car and was injured. Ms. Pollock and Ms. Montanya sued each other for their injuries – each contending that she had the green light and the other driver ran a red light. Ms. Miller sued both drivers.

{¶14} "On 12-30-08 defendant Montanya filed a motion to consolidate the cases and plaintiff Miller's attorney advised the court's magistrate that he did not oppose consolidation. On February 3 and 4, 2009 the negligence claims of the driers (sic) were tried to a jury. According to the uncontradicted affidavit of attorney Dawn Haynes, plaintiff's counsel John Holmes 'declined to participate because either Montanya or Pollock would be found liable and he could pursue Plaintiff's claims against the party found liable.'

{¶15} "In fact, the jury found that neither party could prove the other negligent and returned defendant's verdicts on each of the drivers' claims. This could not have been a 50-50 comparative negligence split of liability because in that case each of the drivers would have had to pay half of the other driver's damages. The jury simply couldn't tell who had the green light because of the contradictory evidence.

{¶16} "Now plaintiff's counsel who declined to participate in the February trial wants another trial of the same negligence issues before a new jury." Judgment Entry, July 13, 2009.

{¶17} Appellants assign six errors on appeal:

{¶18} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS WHERE DEFENDANTS DID NOT PRESENT THE COURT WITH ANY ADMISSIBLE EVIDENCE SUFFICIENT TO WARRANT SUMMARY JUDGMENT IN THEIR FAVOR.

{¶19} "II. THE TRIAL COURT ERRED IN GIVING PRECLUSIVE EFFECT TO A PRIOR DETERMINATION AGAINST MILLER AND REEDY WHERE THEY WERE NOT PARTIES TO THE PRIOR ACTION AND WHERE A MOTION TO CONSOLIDATE WAS DENIED.

{¶20} "III. THE TRIAL COURT ERRED IN GIVING PRECLUSIVE EFFECT TO A PRIOR DETERMINATION AGAINST MILLER AND REEDY WHERE MILLER AND REEDY WERE NOT IN PRIVITY WITH EITHER OF THE PARTIES IN THE PRIOR ACTION.

{¶21} "IV. THE TRIAL COURT ERRED IN IMPLYING AN AGREEMENT TO BE BOUND BY PRIOR DETERMINATION ABSENT PLAIN CIRCUMSTANCES THAT SUCH AN AGREEMENT EXISTED.

{¶22} "V. THE TRIAL COURT ERRED FINDING THAT THE VERDICT IN THE PRIOR DETERMINATION WAS THAT THE VEHICLE COLLISION OCCURRED WITHOUT FAULT ON THE PART OF EITHER OF THE DEFENDANTS, RATHER THAN THAT BOTH DEFENDANTS WERE FOUND TO BE AT FAULT.

{¶23} "VI. THE TRIAL COURT ERRED IN GIVING PRECLUSIVE EFFECT TO AN AMBIGUOUS PRIOR DETERMINATION."

{¶24} All of the assignments of error relate to the trial court's entry of summary judgment in favor of appellees. An appellate court's review of summary judgment is conducted de novo. See, e.g., *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment was appropriate and need not defer to the trial court's decision. See *Brown v. Scioto Bd. of Commrs*. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153. Thus, in determining whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

{¶25} Civ. R. 56(C) provides, in relevant part, as follows:

{¶26} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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."

{¶27} Therefore, pursuant to that rule, a trial court may not award summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Vahila v. Hall*, 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164, 1997-Ohio-259.

I

{¶28} In their first assignment of error, appellants argue that there was no evidentiary material, other than the affidavit of Dawn Haynes, properly before the trial court on summary judgment. Appellants argue that the judgment entry on the prior case between Pollock and Montanya, attached to the motions for summary judgment, was an uncertified copy and therefore not proper evidence, and the court had no other documentary evidence before it concerning Case No. 2007-CV-0515.

{¶29} Appellants argued in their memorandum in opposition to summary judgment that appellees presented no admissible evidence from the case they claimed precluded the instant action, such as certified copies of the judgment, excerpts of testimony, copies of the pleadings, or any other evidence to enable the court to apply the doctrine of res judicata. Memorandum Contra of Plaintiffs to Defendants' Motion for Summary Judgment, June 1, 2009, p.5-6. At the hearing on the motion for summary judgment, counsel for appellee Pollock argued that the "concept of judicial notice is still

alive," and the court could therefore "take notice of things on [its] own docket, this judgment entry being one of them." Tr. 11.

{¶30} The record in Case No. 2007-CV-0515 is not a part of the record in this case, and the judgment appellees relied on from that case must be properly before the court as admissible evidence before it may be considered by the court in ruling on the summary judgment motion. E.g., *Nationwide v. Kallberg*, Lorain App. No. 06CA008968, 2007-Ohio-2041, ¶ 20, 22.

{¶31} Civ. R. 56(E) governs the type of evidence permitted on summary judgment:

{¶32} "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. . . "

{¶33} The judgment attached to the motions for summary judgment is not a certified copy. The court therefore erred in considering this judgment because it was not properly before the court as admissible evidence. Further, the court did not state that it was taking judicial notice of the proceedings in case number 2007-CV-0515, and in fact could not take judicial notice of the proceedings in that case.

{¶34} A trial court can take judicial notice of the court's docket. *Helfrich v. Madison*, Licking App. No. 08-CA-150, 2009-Ohio-5140, ¶49, citing *State v. Washington* (August 27, 1987), Cuyahoga App. Nos. 52676, 52677, 52678 at 15. However, a court does not have the authority to take judicial notice of the proceedings in another case,

including its own judgment entries. Id., citing *State v. LaFever*, Belmont App. No. 02 BE 71, 2003-Ohio-6545, ¶27; *State v. Blaine*, Highland App. No. 03CA9, 2004-Ohio-1241, ¶17; *Diversified Mortgage Investors, Inc. v. Athens Cty. Bd. of Revision* (1982), 7 Ohio App.3d 157, 454 N.E.2d 1330; *NorthPoint Properties, Inc. v. Petticord*, 179 Ohio App.3d 342, 2008-Ohio-5996, ¶16. The rationale for this holding is that if a trial court takes notice of a prior proceeding, the appellate court cannot review whether the trial court correctly interpreted the prior case because the record of the prior case is not before the appellate court. Id., citing *Blaine*, supra, ¶17; *LaFever*, supra, ¶27; *Buoscio*, supra, ¶34.

{¶35} The trial court in this case had no admissible evidence before it concerning the proceedings and results of the earlier trial. However, the court ruled:

{¶36} "In fact, the jury found that neither party could prove the other negligent and returned defendant's verdicts on each of the drivers' claims. This could not have been a 50-50 comparative negligence split of liability because in that case each of the drivers would have had to pay half of the other driver's damages. The jury simply couldn't tell who had the green light because of contradictory evidence.

{¶37} "Now plaintiff's counsel who declined to participate in the February trial wants another trial of the same negligence issues before a new jury." Judgment entry, July 13, 2009.

{¶38} The court had no evidence properly before it concerning the issues tried to the jury or the verdict in the prior case to support the conclusion that the instant action would involve a retrial of the same negligence issues. In fact, even if the uncertified judgment entry from the prior case would have been properly before the court, we cannot determine from that judgment that the prior case involved negligence claims

between the parties. The court's conclusions regarding the jury's inability to determine who had the green light are based solely on memory of the prior case and/or the unsworn representations of counsel in their motions. The result highlights the problem noted above with a trial court taking notice of a prior proceeding: we cannot review whether the trial court correctly interpreted the prior case because the record of that case is not before this Court.

{¶39} The court erred in granting the motion for summary judgment when its basis was that the jury's verdict in case number 2007-CV-0515 precludes the instant action. The first assignment of error is sustained.

II, III, V, VI

{¶40} Appellants' second, third, fifth and sixth assignments of error all address the issue of whether the trial court erred in giving preclusive effect to the judgment in 2007-CV-0515. Because we ruled in appellants' first assignment of error that the court did not have evidence before it concerning the issues and verdict in case number 2007-CV-0515, we are unable to determine whether the court erred in giving preclusive effect to the judgment in that case. The second, third, fifth, and sixth assignments of error are rendered moot and/or premature by our disposition of Assignment of Error One.

IV

{¶41} In their fourth assignment of error, appellants argue that the court erred in finding an implied agreement between the parties that appellants would be bound by the determination in case number 2007-CV-0515. While the trial court did not specifically find a binding agreement, the court did state in its entry, "Now plaintiff's counsel who

declined to participate in the February trial wants another trial of the same negligence issues before a new jury."

{¶42} Both appellants and appellees cite the Restatement (Second) of Judgments §40 (1982) concerning an implied agreement to be bound by the result of another action:

{¶43} "*b. Implied agreement*. While a party may agree to refrain from exercising his right to a day in court in return for being spared the burden of active litigation, no such agreement should be inferred except upon the plainest circumstances. In ascertaining whether such an agreement is to be inferred, however, it is relevant to consider the closeness of the interests of the person involved, whether they were represented by the same or collaborating counsel, whether opportunity existed for the person to participate as a party in the first action, whether the person asserted to have made the agreement could invoke benefits of the judgment in the other action should its outcome favor his position, and what representations were made to the court concerning the relation between the actions."

{¶44} Many of the facts included in appellee Montanya's argument in her brief on this assignment of error concern the parties' discussions on the motion to consolidate filed only in 2007-CV-0515 and are not a part of the record before the court on summary judgment. In the instant case, no motion to consolidate was filed. A joint stipulation that the motion to consolidate was unopposed was filed in the instant action on February 24, 2009, after the completion of the trial in 2007-CV-0515. It is undisputed that the instant case was never consolidated with 2007-CV-0515.

{¶45} The only evidence of an agreement between the parties concerning appellants' intent to be bound by the results of that trial is found in the affidavit of Dawn Haynes, counsel for Montanya. In that affidavit, Attorney Haynes avers that after the motion to consolidate was filed in case number 2007-CV-0515, she informed counsel for appellants that the case was to proceed to trial on liability on February 2, 2009, and asked if he wanted to participate in that trial. Counsel for appellants "declined to participate because either Montanya or Pollock would be found liable and he could pursue Plaintiff's claims against the party found liable." Affidavit of Dawn Haynes, ¶4.

{¶46} Reasonable minds could conclude based on this evidence that "plain circumstances" did not exist from which an agreement to be bound by the result of the trial in case number 2007-CV-0515 could be inferred. Appellants were not parties to the action in 2007-CV-0515 and counsel had no obligation to participate in that trial. The alleged agreement does not include any corresponding agreement by appellees concerning their intent to be bound by the result of 2007-CV-0515 in the instant action, nor does it speak to the contingency if neither Pollock nor Montanya were found to be liable. Because the motion to consolidate was never ruled on and therefore impliedly overruled[1], appellants were strangers to the trial between Pollock and Montanya and the cases proceeded on separate tracks. While counsel's statement that he "could pursue" his clients' claims against the party found liable indicates an intent to evaluate and use the result of that trial in proceeding in his own case, the evidence of an "agreement" is not so strong that reasonable minds could only conclude that appellants intended to be bound by the result of that trial.

[1] E.g., *Switka v. City of Youngstown*, Mahoning App. No. 05MA74, 2006-Ohio-4617, ¶11 (motions not ruled on prior to a trial court rendering final judgment are deemed overruled upon the issuance of that final judgment).

{¶47} The fourth assignment of error is sustained.

{¶48} The summary judgment of the Richland County Common Pleas Court is reversed. This cause is remanded to that court for further proceedings according to law.

By: Edwards, P.J.

Gwin, J. and

Delaney, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES

JAE/r0201

[Cite as *Miller v. Pollock*, 2010-Ohio-1335.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

SAMARA MILLER, etc., et al (Minor Child) Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
JODY C. POLLOCK, et al.,	:	
Defendants-Appellees	:	CASE NO. 2009 CA 0096

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellees.

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES