[Cite as *Blausey v. Van Ness*, 2011-Ohio-4680.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Ronald Blausey, et al.	Court of Appeals No. OT-10-041
Appellants	Trial Court No. 10CV279
v.	
Richard VanNess, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: September 16, 2011

* * * * *

R. Kent Murphree and Gary O. Sommer, for appellants.

Alan R. McKean and Martin D. Carrigan, for appellees.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from the judgment of the Ottawa County Court of Common Pleas granting appellees' Civ.R. 12(B)(6) motion to dismiss. For the following reasons, we reverse, and remand the case for further proceedings.

{¶ 2} On April 12, 2010, plaintiffs-appellants Ronald and Jean Blausey filed a complaint against defendants-appellees Richard VanNess (individually and as Executor

of the Estate of Verna VanNess) and the Estate of Verna J. Blausey (collectively "VanNess"). The complaint sets forth two causes of action—constructive trust and unjust enrichment—stemming from a dispute regarding who is the proper titleholder to certain real property owned by Verna J. Blausey, now deceased.

{¶ 3} On May 10, 2010, VanNess filed a motion to dismiss the complaint pursuant to Civ.R. 12(B)(6). In the accompanying memorandum, VanNess set forth several different theories supporting dismissal. Most relevant to this appeal is VanNess's argument that the action is barred by res judicata, an argument which focuses on the fact that the Blauseys had previously brought a complaint to quiet title against VanNess, and that the prior complaint arose out of the same transaction or occurrence as the present action. Notably, in *Blausey v. VanNess* (Mar. 5, 2010), Ottawa County Court of Common Pleas case No. 09CV779, the trial court sua sponte dismissed the prior complaint to quiet title. In that case, the trial court found that because they were neither in possession of the property, nor out of possession yet having, or claiming to have, a remainder or reversionary interest in the property as required by the statute governing actions to quiet title, the Blauseys "cannot show a substantial likelihood that they would prevail on the merits and further do not have standing to maintain this action."

{¶ 4} In the present case, the trial court granted VanNess's motion to dismiss on the grounds that "the [March 5, 2010 decision] was on the merits of the Plaintiff's [Prior] Complaint and any subsequent filings regarding claims arising out of the transaction or

occurrence that was the subject matter of the previous action would be barred by res judicata."

{¶ 5} The Blauseys have timely appealed the judgment granting VanNess's Civ.R. 12(B)(6) motion to dismiss, and now raise the following three assignments of error:

{¶ 6} 1. "The Trial Court erred by dismissing Appellants' Complaint pursuant to Civ.R. 12(B)(6) based upon the doctrine of *res judicata*."

{¶ 7} 2. "The Trial Court erred by dismissing Appellants' Complaint on the basis of *res judicata* when the prior dismissal at issue was based upon standing."

{¶ 8} 3. "The Trial Court erred by dismissing Appellants' Complaint on the basis of *res judicata* as there was no 'trial on the merits' in the prior action."

{¶ 9} Addressing the Blauseys' first assignment of error, we note that "[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. "In order for a court to dismiss a complaint [pursuant to Civ.R. 12(B)(6)], it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. "Thus, the movant may not rely on allegations or evidence outside the complaint; otherwise, the motion must be treated, with reasonable notice, as a Civ.R. 56 motion for summary judgment." (Citations omitted.) *State ex rel. Hanson* at 548. Here, the record is clear that VanNess's motion was not treated as a Civ.R. 56 motion for summary judgment. Therefore, the issue we

must decide is whether the trial court erred in relying on the principle of res judicata in granting VanNess's Civ.R. 12(B)(6) motion. We hold that it did.

{¶ 10} In *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109, the Ohio Supreme Court faced a similar procedural situation. In that case, Freeman filed a complaint in mandamus in the court of appeals. Morris, the warden of the facility where Freeman was imprisoned, filed a motion to dismiss, contending that the complaint was barred by res judicata. The court of appeals granted the motion to dismiss, "stating that the 'issues herein have been previously litigated and denied.'" In reversing the court of appeals' dismissal, the Ohio Supreme Court stated: "Civ.R. 8(C) designates *res judicata* an affirmative defense. Civ.R. 12(B) enumerates defenses that may be raised by motion and does not mention *res judicata*. Accordingly, *we hold that the defense of res judicata may not be raised by motion to dismiss under Civ.R. 12(B).*" (Emphasis added.) Id.

{¶ 11} VanNess argues that the rule articulated in *Morris* should not apply to "the exact same court hearing the exact same dispute between the exact same parties as to the exact same facts, with the only difference in the two cases as an esoteric theory of recovery not pled in the first case." In support of this argument, VanNess contends that the trial court was entitled to take judicial notice of its own prior decision. However, courts have commonly held that "a court may not take judicial notice of *prior* proceedings in the court, but may only take judicial notice of the proceedings in the *immediate* case. (Emphasis added.) *Diversified Mtge. Investors, Inc. v. Athens Cty. Bd. of Revision* (1982), 7 Ohio App.3d 157, 159; *Northpoint Properties, Inc. v. Petticord*, 179

Ohio App.3d 342, 2008-Ohio-5996, ¶ 16 ("a trial court may not take judicial notice of prior proceedings in the court even if the same parties and subject matter are involved. * * * [it] may only take judicial notice of prior proceedings in the immediate case." (Citations omitted.))

{¶ 12} Therefore, applying *Morris* to the present situation, we hold that the trial court erred in relying on res judicata as grounds to grant VanNess's Civ.R. 12(B)(6) motion to dismiss. See *City of Toledo v. Thomas* (1989), 60 Ohio App.3d 42 (reversing the trial court's dismissal of appellant's complaint pursuant to Civ.R. 12(B)(6) where the dismissal was based on res judicata). Accordingly, the Blauseys' first assignment of error is well-taken.

{¶ 13} In light of our analysis above, the Blauseys' second and third assignments of error are moot and will not be considered.

{¶ 14} Based on the foregoing, the judgment of the Ottawa County Court of Common Pleas is reversed, and the case is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, appellees are ordered to pay the costs of this appeal.

{¶ 15} It is so ordered.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE