

[Cite as *Powell v. Wal-Mart Stores, Inc.*, 2010-Ohio-5233.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93707**

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**ELIZABETH POWELL**

PLAINTIFF-APPELLANT

vs.

**WAL-MART STORES, INC.**

DEFENDANT-APPELLEE

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**JUDGMENT:  
REVERSED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-692172

**BEFORE:** Jones, J., McMonagle, P.J., and Dyke, J.

**RELEASED AND JOURNALIZED:** October 28, 2010

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LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, Elizabeth Powell (“Powell”), appeals the trial court’s dismissal of her complaint against defendant-appellee, Wal-Mart Stores, Inc. (“Wal-Mart”). Finding merit to the appeal, we reverse.

{¶ 2} In 2002, Powell filed a workers compensation claim against Wal-Mart, her employer, for injuries to her right knee. In 2007, she sought an additional allowance for tooth decay she alleged was the result of pain medicine and a decreased capacity to care for her teeth. Her claim was

denied, and she appealed to the court of common pleas. *Powell v. Bur. of Workers' Comp.*, Cuyahoga Cty. Court of Common Pleas Case No. CV-589436.

{¶ 3} In May 2008, the parties reached an agreement and the trial court entered an order dismissing the case. The next month, Powell filed her first motion to enforce the settlement agreement, arguing that Wal-Mart had not performed pursuant to the agreement. The trial court held a hearing and granted the motion in part. Powell appealed. See *Powell v. Bur. of Workers Comp.*, Cuyahoga App. No. 91915. The record reflects that the parties met with this court's conference attorney and devised an amended settlement agreement. We issued an order stating "[s]ua sponte, by agreement of the parties and upon recommendation of the conference attorney, the appeal is settled and dismissed."

{¶ 4} In March 2009, Powell filed a second motion to enforce the settlement agreement, this time challenging Paragraph 2 of the amended settlement agreement, which read: "Wal-Mart will pay for Elizabeth Powell's presently indicated dental procedures which must be completed by October 1, 2010."<sup>1</sup> Wal-Mart objected, and the trial court denied the motion without opinion. Powell did not appeal that decision.

{¶ 5} In May 2009, Powell filed the complaint that is at issue in the

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<sup>1</sup> Apparently Powell had filed a proposed dental treatment plan in which she sought coverage for other teeth, conditions, and services not allowed in her workers' compensation claim. The Bureau of Worker's Compensation third-party administrator

instant appeal. See *Powell v. Wal-Mart*, Cuyahoga Case No. CV-692172. Her complaint alleged that Wal-Mart breached its contract, i.e., the settlement agreement, and requested specific performance and damages. In her complaint, she alleged that Wal-Mart “has failed and refused to honor its obligations to Powell as set forth in Paragraph 2 of the contract.”

{¶ 6} Wal-Mart answered, asserting res judicata as one of its defenses. Wal-Mart subsequently filed a motion to dismiss pursuant to Civ.R. 12(B)(6), arguing that Powell was precluded by res judicata from relitigating the same issue resolved by Case No. CV-589436. Powell objected, arguing the trial court in Case No. CV-589436 did not have jurisdiction to rule on her second motion to enforce settlement agreement because the court had unconditionally dismissed the case in May 2008.

{¶ 7} The court granted Wal-Mart’s motion to dismiss without opinion and dismissed the case.

{¶ 8} Powell appeals, raising the following assignment of error for our review:

{¶ 9} “I. “Plaintiff-appellant Elizabeth Powell assigns as error that the trial court improperly used the doctrine of res judicata as the basis for dismissing Powell’s claims.”

{¶ 10} Within this assignment of error, Powell argues that the trial court

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approved the treatment plan for the allowed teeth only and rejected the rest of the plan.

in Case No. CV-589436 did not retain jurisdiction to rule on her motion to enforce the settlement agreement because the trial court lost jurisdiction when it dismissed the case in May 2008. We find Powell's argument misplaced. Whether the trial court in Case No. CV-589436 had jurisdiction after the May 2008 dismissal is not at issue in this appeal since Powell is appealing the dismissal of Case No. CV-692172, not the trial court's denial of her second motion to enforce her settlement agreement in Case No. CV-589436. They are two separate causes of action. That being said, we agree with Powell that the trial court improperly dismissed her complaint, albeit for different reasons.

{¶ 11} In this case, Wal-Mart raised the affirmative defense of res judicata in its answer. Wal-Mart then filed a motion to dismiss the complaint pursuant to Civ.R. 12(B) and attached various pleadings from the 2006 case to its motion. As Ohio courts have recognized, res judicata is not a defense that can be raised by a motion to dismiss pursuant to Civ.R. 12(B) because that defense must be proved with evidence outside the pleadings. *Ardary v. Stepien*, Cuyahoga App. No. 82950, 2004-Ohio-630, citing *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109, 579 N.E.2d 702. "Pursuant to *Freeman*, 'the court may not dismiss a case, via a motion to dismiss on res judicata grounds.'" Id. citing *Shaper v. Tracy*, 73 Ohio St.3d 1211, 1995-Ohio-37, 654 N.E.2d 1268.

{¶ 12} It is apparent that the trial court in this case based its decision on matters outside the pleadings, i.e., a judgment entry in the first action, without properly converting the motion into one for summary judgment. Moreover, if a trial court decides to convert a motion to dismiss into a motion for summary judgment, the trial court must give notice to the parties and reasonable opportunity to present Civ.R. 56 evidence. *Ardary*, citing *City Mgmt. Sys. v. Blakely*, Summit App. No. 21162, 2003-Ohio-524. The record shows that the trial court in this case did not give the parties any such notice, nor does the record otherwise indicate that the trial court converted the motion to dismiss into a motion for summary judgment. As set forth above, a trial court may not grant a motion to dismiss based on res judicata. Without making any judgment as to the validity of Powell's claim for breach of contract, we find it was error for the trial court to dismiss her complaint based on res judicata and sustain the assignment of error.

{¶ 13} Accordingly, judgment is reversed.

It is ordered that appellant recover of appellee her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

CHRISTINE T. MCMONAGLE, P.J., CONCURS;  
ANN DYKE, J., DISSENTS WITH SEPARATE OPINION

ANN DYKE, J., DISSENTING:

{¶ 14} I respectfully dissent. Although the majority concludes that whether the trial court had jurisdiction in Case No. CV-589436 is not in issue in this appeal, I believe that this was an essential question below, as Powell asserted that “Wal-Mart cannot assert *res judicata* here because Judge Friedman lacked subject matter jurisdiction in Case No. CV-589436 to make any rulings relating to any settlement between Powell and Wal-Mart.”

{¶ 15} Further, although I agree with the principle set forth in the majority opinion, that *res judicata* is generally not a basis for a dismissal pursuant to Civ.R. 12(B)(6) because that defense must be proved with evidence outside the pleadings, I note that a trial court may, in its discretion, consider evidence outside the pleadings in some circumstances. See, e.g., *AAA Am. Const., Inc. v. Alpha Graphic*, Cuyahoga App. No. 84320, 2005-Ohio-2822 (“A conversion of a motion to dismiss into a motion for summary judgment may be accomplished with the implied consent of the parties where, as here, both parties submit evidence beyond the allegations of the complaint and do not raise the conversion as an issue on appeal.”). Accord *McCory v. Clements*, Montgomery App. No. 19043,

2002-Ohio-2060.

{¶ 16} Here, I would find that Powell clearly waived any objection to the trial court's consideration of the evidence of the earlier proceedings (and the conversion of the motion to a summary judgment motion). Specifically, I note that Powell failed to raise this issue, indicating in her brief in opposition, "[a]ttached hereto is a copy of Judge Friedman's dismissal entry in Case No. CV 06 589436," and arguing at length about the content and legal significance of the earlier ruling. Moreover, she does not make this argument on appeal.

{¶ 17} Finally, I would reject Powell's argument that "Wal-Mart cannot assert res judicata here because Judge Friedman lacked subject matter jurisdiction in Case No. CV-589436 to make any rulings relating to any settlement between Powell and Wal-Mart" because, she claims, the court did not expressly retain jurisdiction in that matter. I would conclude that res judicata applies to the judgment entered in Case No. CV-589436 because the trial court did have jurisdiction in the earlier matter. See *Marshall v. Beach* (2001), 143 Ohio App.3d 432, 758 N.E.2d 247. In that case, the court held that if a case is conditionally dismissed upon the parties reaching a settlement, the trial court retains the authority to proceed in the matter if the condition upon which the case was originally dismissed does not occur. *Id.*, citing *Mellott v. Brawley* (Sept. 22, 1995), Portage App. No. 94-P-0139 and *Hines v. Zofko* (Mar. 22, 1994), Trumbull App. No. 93-T-4928. Moreover, it was Powell who sought to enforce the continuing jurisdiction of the court in Case No. CV-589436, as she filed the motion



to enforce the settlement agreement. Following Powell's motion to enforce that settlement, the trial court ultimately concluded that "the only document that fully reflects the intentions of the parties vis-a-vis settlement of the claims set forth in plaintiff's Complaint, is the May 14, 2008 letter, as corrected, initialed and signed by counsel and the plaintiff herself[.]"

{¶ 18} I would therefore reject Powell's argument that res judicata does not apply to the earlier proceedings, and I would affirm the trial court judgment in the instant matter on that basis.