

[Cite as *Cincinnati Ins. Co. v. Cleveland*, 2011-Ohio-1369.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95292

CINCINNATI INSURANCE CO.

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-534573

BEFORE: Blackmon, P.J., Jones, J., and Keough, J.

RELEASED AND JOURNALIZED: March 24, 2011

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Cincinnati Insurance Co. (“CIC”) appeals the trial court’s denial of its motion to reinstate its claims for contribution and indemnification against the appellee city of Cleveland (“City”). It assigns the following error for our review:

“The trial court erred when it entered final judgment for defendant-appellee, thereby dismissing with prejudice

Counts I & II of plaintiff-appellant's amended complaint for contribution and indemnity."

{¶ 2} Having reviewed the record and relevant law, we affirm the trial court's judgment. The apposite facts follow.

Facts

{¶ 3} On August 30, 2000, a water main ruptured in the Playhouse Square area of downtown Cleveland. The rupture occurred during excavation by Utilities Construction Company ("Utilities Construction") while it was attempting to install underground telecommunication fiberoptic lines for Metromedia Fiber Network, Inc. ("Metromedia").

{¶ 4} Prior to excavation, Metromedia provided Utilities Construction with plans and specifications for the installation of the fiberoptic network. The plans and specifications, however, failed to identify and locate the water main. As a result, Utilities Construction made numerous phone calls to the Ohio Utilities Protection Service ("OUPS")¹ to have all underground utilities in the area located and marked. OUPS, in turn, forwarded the requests to Cleveland's Division of Water. Apparently, due to a lack of adequate resources, the City investigator, Clint Causey, did not visit the project site to locate and mark the water main. The City's failure to respond was deemed to

¹ OUPS is an Ohio non-profit corporation established pursuant to R.C. 3781.25. It provides notification to member utilities when notified by others of an intention to dig or excavate.

be notice that no water main existed in the area, and Utilities Construction proceeded to excavate, rupturing the main.

{¶ 5} As a result of the rupture, several nearby property owners and tenants sustained significant property damage. In 2001, the various owners and tenants sued Utilities Construction. Utilities Construction did not in turn bring an action against the City. A trial was conducted and the jury found Utilities Construction was negligent and ordered it to pay in excess of one million dollars in damages.

{¶ 6} At the time of the rupture, Utilities Construction had a Commercial General Liability Insurance Policy with CIC. CIC paid the judgment and exercised its right to subrogation by filing a complaint against the City, Clint Causey, and Metromedia.² CIC alleged that the defendants were negligent for failing to identify and locate the water main and that they should subrogate and indemnify CIC for the damages. CIC also brought a contract claim against the City, claiming the City's failure to mark the water main after repeated requests to do so was a breach of the City's contract with OUPS, to which Utilities Construction was an intended third-party beneficiary.

{¶ 7} Clint Causey filed for personal bankruptcy. As a result, CIC dismissed without prejudice its claims for contribution and indemnification

²The claims involving Metromedia have been settled and dismissed.

against Causey and the City, leaving the contract claim as the sole claim against the City. CIC filed a motion for summary judgment on the contract claim. In response, the City filed a brief in opposition and a cross-motion against CIC. The trial court granted CIC's motion for summary judgment against the City and denied the City's cross-motion for summary judgment.

{¶ 8} The City filed an interlocutory appeal pursuant to the sovereign immunity statute, R.C. 2744.02(C). This court reversed the trial court's granting of summary judgment in favor of CIC and remanded the matter to the trial court. *Cincinnati Ins. Co. v. Cleveland*, Cuyahoga App. No. 92305, 2009-Ohio-4043. While the matter was pending before the trial court, CIC filed a motion to reinstate its claims against the City for indemnification and subrogation that it had previously voluntarily dismissed without prejudice. CIC argued that because the Ohio Supreme Court's decision in *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, 897 N.E.2d 126, held only "all claims" against a party may be voluntarily dismissed not partial claims, that the two claims it voluntarily dismissed without prejudice were still pending. The trial court conducted a hearing on the matter and afterwards entered a judgment entry stating:

**"Pursuant to the Court of Appeals' Mandate, the Court
reverses summary judgment in favor of Cincinnati
Insurance Company and hereby grants City of Cleveland's**

motion for summary judgment. Final. Court cost assessed to the plaintiff(s).”

{¶ 9} Because the trial court’s judgment entry indicated the judgment was final, CIC deemed the trial court denied its motion to reinstate.

Trial Court’s Failure to Reinstate Claims

{¶ 10} In its assigned error, CIC claims the trial court erred by failing to reinstate its claims against the City for indemnification and subrogation. CIC argues that because the Ohio Supreme Court in *Pattison* held that it was not possible to voluntarily dismiss only some of the claims against a party, the claims it dismissed were still pending.

{¶ 11} In *Pattison*, the Supreme Court held “that when a plaintiff has asserted multiple claims against one defendant, and some of those claims have been ruled upon but not converted into a final order through Civ.R. 54(B), the plaintiff may not create a final order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims against the same defendant.” *Id.* at ¶1. See, also, *Dohme v. Eurand Am., Inc.*, 121 Ohio St.3d 277, 2009-Ohio-506, 903 N.E.2d 1174. At the time CIC dismissed the claims without prejudice, *Pattison*, had not yet been decided. This was the same situation in *Dohme*, and the Ohio Supreme Court applied *Pattison*’s holding retroactively to the dismissal of the claims.

{¶ 12} Under these circumstances, CIC's dismissal of the claims without prejudice is a nullity and the claims remain unadjudicated. See *Welsh Dev. Co. v. Warren Cty. Regional Planning Comm.*, 12th Dist. No. CA2008-02-026, 2009-Ohio-1158. Therefore, a motion to reinstate the still pending claims was unnecessary. Nonetheless, we find no reversible error because our decision in the prior appeal rendered these claims moot.

{¶ 13} In our prior decision, we concluded as follows:

“There is no question the City was negligent in its duty to locate and mark the underground water main. Hunters, who drafted the construction plans, was also negligent in not locating the line on the construction plans. However, the state legislature has left certain avenues open to those injured by the acts or omissions of the state and its municipalities. R.C. 2744.02(B)(2) would have allowed UC to recover from the City as one injured through the negligent operation of a proprietary function. UC could have implied the City as a third-party defendant in the original action against it by the injured insurance companies. This is the avenue left available to UC by statute. A convoluted third-party beneficiary claim to circumvent the insurance subrogation prohibition in R.C. 2744.05 should not be allowed.”

{¶ 14} Thus, we have already concluded that by UC failing to bring suit against the City, its insurer, CIC, is prevented from seeking subrogation against the City pursuant to R.C. 2744.05. Thus, res judicata prevents CIC from relitigating the issue. The res judicata doctrine prevents a court from litigating matters that were previously decided, or could have been decided[,] in a prior action. *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69, 494 N.E.2d

1387. Here, CIC was put on notice that sovereign immunity would be an issue in the prior appeal, yet failed to file a cross-appeal on the issue.

{¶ 15} While CIC argues the conclusion in the prior appeal is merely dicta, we disagree. In the prior appeal, we accepted jurisdiction over the interlocutory appeal based on R.C. 2744.02(C), which provides that the denial of sovereign immunity to a political subdivision constitutes a final appealable order. Thus, although we applied contract principles in the prior decision, the City's ability to protect itself from liability via sovereign immunity was a vital issue of the appeal. Accordingly, we overrule CIC's sole assigned error.

Judgment affirmed.

It is ordered that appellee recover from the appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

LARRY A. JONES, J., and
KATHLEEN ANN KEOUGH, J., CONCUR