[Cite as *Powell v. Wal-Mart Stores, Inc.*, 2015-Ohio-2035.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101662

ELIZABETH POWELL

PLAINTIFF-APPELLANT

vs.

WAL-MART STORES, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-801802

BEFORE: Jones, J., E.A. Gallagher, J., and Stewart, J.

RELEASED AND JOURNALIZED: May 28, 2015

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LARRY A. JONES, SR., J.:

{¶1} Plaintiff-appellant, Elizabeth Powell, appeals the trial court's decision granting summary judgment in favor of defendant-appellee, Wal-Mart Stores, Inc. We affirm.

{¶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 she took for her knee injury and a decreased capacity to care for her teeth, which she also claimed was a result of the injury. Her claim was denied, and she appealed to the court of common pleas. *Powell v. Bur. of Workers' Comp.*, Cuyahoga County C.P. No. CV-06-589436 ("*Powell I*").

{¶3} In May 2008, the parties reached an agreement and the trial court entered an order dismissing the case. A dispute arose between the parties, and Wal-Mart filed a motion to enforce the settlement agreement. The trial court held a hearing and granted the motion in part. Powell appealed. *See Powell v. Bur. of Workers' Comp.*, 8th Dist. Cuyahoga No. 91915. The record reflects that the parties met with this court's conference attorney and devised an amended settlement agreement ("October 2008 Settlement Agreement"). This court's order stated "[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 motion to enforce the settlement agreement with the trial court, challenging paragraph 2 of the October 2008 Settlement Agreement,

which read: "Wal-Mart will pay for Elizabeth Powell's presently indicated dental procedures which must be completed by October 1, 2010." Wal-Mart objected, and the trial court denied Powell's motion, without opinion. Powell did not appeal that decision.

{¶5} In May 2009, Powell filed a new case, Case No. CV-09-692172 ("*Powell II*"), seeking specific performance of the October 2008 Settlement Agreement. Wal-Mart moved to dismiss based on res judicata, which the trial court granted. Powell appealed and this court reversed and remanded the case, finding that it was error for the trial court to dismiss her complaint based on res judicata because the trial court considered evidence outside the complaint. *Powell v. Wal-Mart Stores, Inc.*, 8th Dist. Cuyahoga No. 93707, 2010-Ohio-5233, ¶ 12. Powell voluntarily dismissed *Powell II* in April 2012.

{¶6} In February 2013, Powell filed the case that is the subject of this appeal ("*Powell III*"). In her complaint, Powell asserted that Wal-Mart breached its contract by failing to uphold Paragraphs 1-6 of the October 2008 Settlement Agreement.[1]

{¶7} Wal-Mart moved for summary judgment, arguing that Powell's claims were barred by res judicata. The trial court granted the motion and dismissed *Powell III*.

{¶8} Powell filed a timely notice of appeal, and raises the following assignment of error for our review:

> [I.] The trial court erred in applying the doctrine of res judicata because the issue decided in the prior proceeding was not identical to the issue raised in

[1]Paragraphs 1 - 6 included payments for medication, pain management and weight reduction programs, knee replacement, and physical therapy.

this lawsuit, the issues raised in this lawsuit were not necessary to the earlier decision, and plaintiff-appellant Elizabeth Powell was never given a full and fair opportunity to litigate the precise issue that she raised in this lawsuit in the prior proceeding.

{¶9} Summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 7. Our review of summary judgment is de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8.

{¶10} Powell claims that the trial court erred in granting summary judgment to Wal-Mart because the issues she sets forth in *Powell III* are different from the issues in her former cases. Wal-Mart argues that Powell's claims are barred by res judicata because she is bringing the same claims as she brought forth in *Powell II* and in her March 2009 motion to enforce the settlement agreement in *Powell I*.

{¶11} Under the doctrine of res judicata, "'[a] valid final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."' *Ford Motor Credit Co. v. Collins*, 8th Dist. Cuyahoga No. 101405, 2014-Ohio-5152, ¶ 11, quoting *Hughes v. Calabrese*, 95 Ohio St.3d 334, 2002-Ohio-2217, 767 N.E.2d 725.

{¶12} Public policy favors the finality of judgments. *M & T Bank v. Steel*, 8th Dist. Cuyahoga No. 101924, 2015-Ohio-1036, ¶ 13, citing *Rhoads v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 92024, 2009-Ohio-2483. If not appealed, a trial court's judgment must remain undisturbed pursuant to the doctrine of res judicata, which bars claims that were or could have been raised on direct appeal. *Rhoads* at *id.*, citing *La Barbera v. Batsch*, 10 Ohio St.2d 106, 227 N.E.2d 55 (1967).

{¶13} "The doctrine of res judicata involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel)." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995). Issue preclusion

> holds that a fact or point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different. * * * In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit.

(Internal citations omitted.) *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998).

{¶14} To successfully assert collateral estoppel, Wal-Mart must show: (1) Powell

was a party, or in privity with a party, to the prior action; (2) there was a final judgment on the merits in the prior action; (3) the operative issue was necessary to the final judgment; and (4) the operative issue in the prior action is identical to the issue in the subsequent action. *Lewis v. Cleveland*, 8th Dist. Cuyahoga No. 95110, 2011-Ohio-347, ¶ 13, citing *Monahan v. Eagle Picher Industries, Inc.*, 21 Ohio App.3d 179, 180-181, 486 N.E.2d 1165 (1st Dist.1984).

{¶15} With regard to the claim preclusion, a final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them. *Grava* at *id.* citing *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943).

{¶16} It is undisputed that the parties have remained the same throughout. Powell also argues that res judicata does not apply because: (1) the causes of action are different, specific performance in her *Powell I* motion to enforce and in *Powell II* versus a breach of contract claim in *Powell III*, and (2) *Powell III* asserts claims for more than dental procedures. However, we find she is collaterally estopped from bringing the instant claim. As stated above, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit. Although Powell claims the issues in this case are different from *Powell I* and *Powell II*, and involve more than her dental problems, a review of the record shows otherwise.

{¶17} The complaint in *Powell III* alleged that Wal-Mart breached Paragraphs 1-6

of the settlement agreement, but during the discovery phase of the litigation, Powell admitted her sole issue was Wal-Mart's alleged failure to pay for dental services. Her claims are based on her interpretation of paragraph 2 of the October 2008 settlement agreement, which only covered her dental issues.

{¶18} A review of the record shows that Powell's claims in *Powell III* involve the same issues as were already decided in *Powell I*; it is a matter that was previously decided upon by the trial court. There was a final judgment in *Powell I*, denying Powell's motion to enforce the settlement agreement and she chose not to appeal that final judgment. When the trial court granted Wal-Mart's motion to dismiss based on res judicata in *Powell II*, this court reversed and remanded the case, which would have given Powell the opportunity to proceed on her claims through the summary judgment stage. Instead, Powell dismissed that case.

{¶19} Now, in *Powell III*, Powell sets forth the same theory based upon the same set of facts as she did in her motion to enforce her settlement agreement in *Powell I*: whether Wal-Mart was obligated to pay for certain "presently indicated" dental expenses to which Powell claimed she was entitled to pursuant to the October 2008 Settlement Agreement.

{¶20} Finally, we are cognizant of the Ohio Supreme Court's recent holding that "[a] trial court has jurisdiction to enforce a settlement agreement after a case has been dismissed only if the dismissal entry incorporated the terms of the agreement or expressly stated that the court retained jurisdiction to enforce the agreement." *Infinite Sec.*

Solutions, L.L.C. v. Karam Props. II, Slip Opinion No. 2015-Ohio-1101, ¶ 34. In *Powell I*, the dismissal entry did not incorporate the terms of the agreement or expressly state that the court retained jurisdiction to enforce the agreement. We do not find, however, that *Infinite Sec. Solutions* operates to divest the *Powell I* trial court of jurisdiction. At the time the trial court denied the motion to enforce the settlement agreement in *Powell I*, this district favored a more liberal approach to the trial court's retention of jurisdiction over settlement agreements. *See Fisco v. H.A.M. Landscaping Inc.*, 8th Dist. Cuyahoga No. 80538, 2002-Ohio-6481 (dismissal entry stating, "the instant matter is settled and dismissed" was a conditional dismissal and the trial court retained jurisdiction to hear a motion to enforce a settlement agreement); *State ex rel. Continental Mtge. Servs., Inc. v. Kilbane-Koch*, 8th Dist. Cuyahoga No. 75267, 1999 Ohio App. LEXIS 58 (Jan. 4, 1999) (finding a dismissal to be conditional where entry stated that pursuant to the settlement and agreement of the parties, all claims are hereby settled and dismissed with prejudice).

{¶21} There is the issue, too, of whether the trial court retained jurisdiction over the settlement agreement once the parties dismissed their 2008 appeal. *See Powell*, 8th Dist. Cuyahoga No. 91915. Again, Powell did not appeal *Powell I*. In fact, Powell herself sought to enforce the continuing jurisdiction of the trial court to pursue her claims against Wal-Mart in *Powell I* when she filed her motion to enforce the October 2008 Settlement Agreement.

{¶22} Every court is said to have authority to consider its own jurisdiction. *Diagnostic & Behavioral Health Clinic, Inc. v. Jefferson Cty. Mental Health*, 7th Dist.

Jefferson No. 01 JE 5, 2002-Ohio-1567, ¶ 13, citing *State ex rel. Pearson v. Moore*, 48 Ohio St.3d 37, 38, 548 N.E.2d 945 (1990). Therefore, the trial court in *Powell I* was "competent to rule on the question of the scope of its own jurisdiction." *Diagnostic & Behavioral Health Clinic, Inc.* at *id.* Its decision "became a final judgment by a court competent to make that decision, and the 'correctness' of the determination became irrelevant when the time for appeal passed." *Id.* citing *Columbus v. Union Cemetery Assn.*, 45 Ohio St.2d 47, 52, 341 N.E.2d 298 (1976). Although the trial court in *Powell I* did not expressly state it had determined it had jurisdiction over the October 2008 settlement agreement, the trial court denied Powell's motion to enforce the settlement agreement as opposed to dismissing it for lack of jurisdiction. Therefore, we can presume the trial court made that determination before it denied Powell's motion. And the "correctness" of its decision became irrelevant once the time for appeal passed.[2]

{¶23} Had Powell wanted to challenge the trial court's jurisdiction over the October 2008 Settlement Agreement, she should have done so at the time her motion to enforce the settlement agreement in *Powell I* was denied through the filing of a direct appeal.[3]

{¶24} In light of the above, no question of material fact remains as Powell's instant

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[2]As this court noted in *Powell*, 8th Dist. Cuyahoga No. 93707, 2010-Ohio-5233, at ¶ 10, "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."

[3] The *Diagnostic & Behavioral Health Clinic* court further noted: "Had Diagnostic appealed the jurisdictional issue as soon as it had presented itself, the results would be much different in the present case. However, Diagnostic chose not to avail itself of that avenue of relief and should therefore be prevented from repeatedly filing its claim." *Id.* at ¶ 19.

claims concern the same claims that have already been litigated. The *Powell I* court issued a final judgment on the issue of the merits when it denied her motion to enforce the settlement agreement; therefore, Powell is precluded from relitigating the same claim or cause of action in a subsequent proceeding involving the same parties.

{¶25} The trial court correctly determined that Powell is barred by res judicata from asserting her claims and that Wal-Mart was entitled to judgment as a matter of law.

{¶26} The sole assignment of error is overruled.

{¶27} Judgment affirmed.

It is ordered that appellee recover of appellant 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, SR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., CONCURS;
MELODY J. STEWART, J., DISSENTS WITH
SEPARATE OPINION

MELODY J. STEWART, J., DISSENTING:

{¶28} The application of res judicata is based on there being a valid, final

judgment. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). I respectfully disagree with the majority that the court's April 6, 2009 order denying Powell's motion to enforce the settlement agreement was a final judgment that could have preclusive effect for later litigation by the parties.

{¶29} There are two ways to enforce a settlement agreement: "either through filing an independent action for breach of contract, or by filing a motion to enforce the settlement agreement in the underlying action pursuant to Civ.R. 15(E)." *Natl. Court Reporters, Inc. v. Krohn & Moss, Ltd.*, 8th Dist. Cuyahoga No. 95075, 2011-Ohio-731, ¶ 12. The October 2008 settlement in CV-06-589436 was an agreement reached in this court of appeals, not the court of common pleas. There is no enforcement mechanism for settlements reached as part of this court's prehearing conference program. *See generally* Loc.R. 20 of the Eighth District Court of Appeals. The proper course of action for one seeking to enforce a settlement agreement reached in the court of appeals is to file a separate action for breach of contract. *See Prime Properties., Ltd. Partnership v. Badah Ents.*, 8th Dist. Cuyahoga No. 99827, 2014-Ohio-206, ¶ 9. Powell did just that in this action, so her claim was validly before the trial court.

{¶30} Admittedly, before filing her breach of contract action, Powell improperly filed a motion asking the trial court to enforce the terms of the settlement agreement. That motion was a non-starter because the court of common pleas had no subject matter jurisdiction to enforce it. A court of common pleas has no subject matter jurisdiction to enforce the terms of a settlement agreement reached in the court of appeals, any more than

it could purport to enforce a settlement agreement reached in any foreign court.

{¶31} The court denied Powell's motion to enforce the settlement agreement (as it should have), but it did so substantively, not procedurally. This conclusion is compelled for two reasons.

{¶32} First, the court gave preclusive effect to the April 6, 2009 order denying the motion to enforce the settlement agreement when granting summary judgment in the breach of contract action. And the only way that order could have preclusive effect for purposes of the breach of contract action was if the court's order had rejected *on the merits* Powell's arguments to enforce the settlement agreement. It follows that the court construed the terms of the settlement agreement reached in this court of appeals, even though it never had jurisdiction to do anything more than deny Powell's motion to enforce the settlement agreement on the basis that it lacked jurisdiction.

{¶33} Second, the majority's discussion of *Infinite Security Solutions, L.L.C. v. Karam Properties II*, Slip Opinion No. 2015-Ohio-1101, indicates that the majority believes the trial court, somehow, reserved jurisdiction to enforce the terms of the October 2008 settlement reached in this court of appeals. This is because the majority implicitly acknowledges, as it must, that the April 9, 2009 order cannot be valid if indeed the court had no jurisdiction to review the October 2008 settlement.

{¶34} *Infinite* is inapplicable to this case, *Infinite* holds that "[a] trial court has jurisdiction to enforce a settlement agreement after a case has been dismissed only if the dismissal entry incorporated the terms of the agreement or expressly stated that the court

retained jurisdiction to enforce the agreement." *Id*. at syllabus. As earlier indicated, this appellate court has no independent ability to enforce the terms of a settlement agreement brokered by this court's conference attorney.[4] What is more, a court of appeals has no authority to confer jurisdiction on an inferior court to enforce the terms of a settlement agreement reached in the court of appeals. The October 2008 settlement agreement reached in this court of appeals reflected these points when it stated: "By agreement of the parties and upon recommendation of the conference attorney, the appeal is settled and dismissed. Notice issued." Because the October 2008 settlement agreement was not made in the trial court, it had no authority to consider any action regarding the agreement.

{¶35} The majority concludes that *Infinite* does not apply to this case,[5] however for the wrong reason, and applies precedent from this appellate district that favored a more "liberal" interpretation of what constituted a reservation of the right of a court to enforce a settlement agreement. The majority's application of those prior case decisions to find that a reservation of jurisdiction to enforce the October 2008 settlement existed supports the majority's conclusion that the court did reach the merits on Powell's motion to enforce the

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[4] The question of whether a party breached a settlement agreement is a fact-based inquiry and thus beyond the scope of appellate jurisdiction. Neither could an appellate court consider the same question by way of extraordinary writ because the availability of a breach of contract action as a means of enforcement would mean that there is an adequate remedy at law.

[5] The majority's conclusion that *Infinite* is to be applied prospectively is questionable. "An Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the prior decision." *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132, paragraph one of the syllabus. The October 2008 settlement agreement does not raise any contract rights regarding future enforcement of the settlement, as even the majority concedes that the agreement was silent on the matter of future enforcement.

settlement. That being the case, the court of common pleas substantively denied the motion to enforce the terms of the settlement agreement reached in this court of appeals. In doing so, the court erroneously purported to have jurisdiction to enforce the terms of a settlement entered into in this court of appeals. That action was a nullity, so it could not have preclusive effect for purposes of summary judgment in Powell's breach of contract action.