

[Cite as *Harris v. Liptak*, 2015-Ohio-610.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 101591

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**GARY HARRIS**

PLAINTIFF-APPELLANT

vs.

**MICHAEL C. LIPTAK, JR., ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:**  
AFFIRMED

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-14-823131

**BEFORE:** Keough, J., S. Gallagher, P.J., and McCormack, J.

**RELEASED AND JOURNALIZED:** February 19, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Plaintiff-appellant, Gary Harris, appeals from the trial court's decision granting summary judgment in favor of defendants-appellees, Michael C. Liptak, Jr. and All Erection Crane Rental Corp. (hereinafter "appellees"). For the reasons that follow, we affirm.

{¶2} In April 2013, Harris filed a complaint against the appellees asserting various causes of action relating to allegations that the appellees denied Harris access to his personal property that was stored in a building owned by the appellees. That case was assigned Case No. CV-13-804198. In January 2014, the trial court granted the appellees' motion to dismiss pursuant to Civ.R. 41(B)(1). The order also referenced the trial court's December 4, 2013 order advising Harris that if he failed to comply with that order, sanctions may result "including but not limited to dismissal of [his] claims for want of prosecution." The journal entry was silent as to whether the dismissal was with or without prejudice. Harris did not appeal.

{¶3} In March 2014, Harris refiled his complaint against the appellees, making the same allegations and asserting the same causes of action that were made in his original complaint filed under Case No. CV-13-804198.

{¶4} The appellees moved for summary judgment contending that Harris's complaint was barred by res judicata because his first complaint was dismissed with prejudiced. In support of their motion, the appellees relied on the exhibits attached to their answer, specifically, Harris's original complaint, a copy of the court's docket in the original complaint, and the transcript from the hearing where the trial court dismissed the original complaint.

{¶5} In response, Harris argued that because the trial court's journal entry dismissing his original complaint did not contain the fatal language of "with prejudice," the dismissal was without prejudice, and the savings statute allowed him to refile his complaint.

{¶6} The trial court granted summary judgment in favor of the appellees. The court's journal entry stated:

Defendants' Michael C. Liptak, Jr. and All Erection and Crane Rental Corporation Motion for Summary Judgment, filed 04/09/2014, is granted. Plaintiff's claims were previously filed under Case No. CV-13-804198. This court dismissed the case with prejudice pursuant to Civ.R. 41(B)(1) and (B)(3). Final.

{¶7} Harris now appeals, raising two assignments of error.

{¶8} As a matter of procedure, Harris does not separately argue his assignments of error. App.R. 16(A)(7) instructs a party to include in an appellate brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." App.R. 12(A)(2) gives this court discretion to disregard or overrule an assigned error that fails to comply with App.R. 16(A).

{¶9} We also note that the appellees' brief contains information that is not in the trial court record and inappropriately attempts to influence this court. For this reason alone, the brief could be stricken.

{¶10} Nevertheless, in the interest of justice, we will disregard these errors and review the substantive issues on appeal.

#### I. Journal Entry Modification

{¶11} In his first assignment of error, Harris contends that the trial court erred by attempting to amend its order dismissing the original case or in the alternative by dismissing the original case solely on procedural grounds.

{¶12} Insofar as Harris is attempting to appeal the trial court's journal entry dismissing the original case (CV-13-804198), such attempt is improper. This court lacks jurisdiction to

consider any appeal from the trial court's dismissal entry in the original case. Harris did not timely appeal any ruling made in the original case. Accordingly, he cannot bootstrap challenges to that case through an appeal from the instant case. Under App.R. 4(A), an appeal must be taken within 30 days of the date of the judgment or order appealed from. Without the timely filing of a notice of appeal, an appellate court is without jurisdiction to hear the appeal. *State v. White*, 8th Dist. Cuyahoga No. 82066, 2004-Ohio-5200, ¶ 23, citing *Bosco v. Euclid*, 38 Ohio App.2d 40, 311 N.E.2d 870 (8th Dist.1974).

{¶13} Furthermore, our review of the trial court's journal entry granting summary judgment in this case was not an attempt to amend the court's journal entry dismissing his complaint in the original case. The court's journal entry explains why summary judgment is appropriate in this case — because the trial court dismissed plaintiff's claims in the original case with prejudice pursuant to Civ.R. 41(B)(1) and (B)(3). Although the words “with prejudice” were not contained in the court's original journal entry, the effect of dismissing the case pursuant to Civ.R. 41(B)(1) equates to a dismissal with prejudice. *See* Civ.R. 41(B)(3).

{¶14} Pursuant to Civ.R. 41(B)(1) and (B)(3), “a dismissal for lack of prosecution is ‘with prejudice’ and operates as an adjudication on the merits unless the court expressly states otherwise in its order.” *Bernard Group v. New Hope Alternative Therapy Research*, 153 Ohio App.3d 393, 2003-Ohio-4195, 794 N.E.2d 141 (8th Dist.), ¶ 11, citing *Myers v. Shaker Hts.*, 8th Dist. Cuyahoga Nos. 57005 and 58056, 1990 Ohio App. LEXIS 2278 (June 7, 1990).

{¶15} In this case, the trial court's order did not “expressly state otherwise,” therefore the dismissal pursuant to Civ.R. 41(B)(1) was with prejudice. The court's journal entry in this case accurately reflects the dismissal and was not a modification.

{¶16} Accordingly, Harris's first assignment of error is overruled.

## II. Summary Judgment

{¶17} In his second assignment of error, Harris contends that the trial court erred in granting summary judgment in favor of the appellees.

{¶18} Civ.R. 56(C) provides that 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) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201; *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). We review the trial court's judgment de novo, using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, we stand in the shoes of the trial court and conduct an independent review of the record.

{¶19} In this case, the appellees moved for summary judgment contending that res judicata bars Harris's complaint. 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." *Grava v. Parkman*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), syllabus.

{¶20} Harris's original complaint and his current complaint are identical — arising out of the same transaction or occurrence. The trial court dismissed the original complaint pursuant to Civ.R. 41(B)(1), which effectively is a dismissal with prejudice. A dismissal with prejudice operates as an adjudication on the merits. Therefore, the doctrine of res judicata bars the refiling of Harris's complaint.

{¶21} Accordingly, the trial court did not err in granting summary judgment in favor of the appellees. Harris's assignment of error is overruled.

{¶22} Judgment affirmed.

It is ordered that appellees recover from appellant 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.

KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, P.J., and  
TIM McCORMACK, J., CONCUR