

[Cite as *Ferrara v. Vicchiarelli Funeral Servs., Inc.*, 2016-Ohio-5144.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 104084**

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**MICHAEL FERRARA, SR., ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**VICCHIARELLI FUNERAL SERVICES, INC.,  
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-14-825511

**BEFORE:** Blackmon, P.J., Laster Mays, J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** July 28, 2016

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PATRICIA ANN BLACKMON, P.J.:

{¶1} Appellants Michael Ferrara, Sr., Louise Ferrara, Nicholas Ferrara, and Carmen Ferrara (collectively the “Ferraras”) appeal the trial court’s granting of summary judgment in favor of appellees Vicchiarelli Funeral Services, Inc., Karen Vicchiarelli, Lori Sperling (collectively referred to as “Funeral Home”), Brian Kelly (“Kelly”), and Katherine Mlac (“Mlac”), and assign the following two errors for our review:

I. The trial court erred when it granted appellees’ motion for summary judgment on the basis of res judicata for appellees Vicchiarelli Funeral Services, Inc., Karen Vicchiarelli and Lori Sperling because appellants never presented their claims against appellees on the merits and their claims were pending in the second case before, during, and after the counterclaim was tried.

II. The trial court erred when it granted appellees’ motion for summary judgment on the basis of res judicata for appellees Katherine Mlac and Brian Kelly because they were not named parties in the previous case, were not employees/agent of Vicchiarelli Funeral Services, Inc. and Brian Kelly did not request summary judgment.

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

{¶3} The Ferraras initially filed a complaint (CV-13-807280) on May 14, 2013, against Vicchiarelli Funeral Services, Karen Vicchiarelli, Lori Sperling, and John Does I and II, alleging that the Funeral Home mishandled the final arrangements for the Ferraras’ relative, Michael Ferrara, Jr. The Ferraras asserted five claims in their complaint: abuse of a corpse, negligence, breach of contract, negligent misrepresentation, and infliction of emotional distress. In spite of the fact that the Funeral Home filed a counterclaim seeking recovery for the unpaid portion of the funeral services contract signed by Louise, the Ferraras dismissed their complaint pursuant to Civ.R. 41(A)(1). The counterclaim

proceeded to a jury trial where the jury found in favor of the Funeral Home and judgment was entered in the Funeral Home's favor in the amount of \$2,398. We affirmed the judgment on appeal. *Ferrara v. Vicchiarelli Funeral Servs., Inc.*, 8th Dist. Cuyahoga No. 102048, 2015-Ohio-2273.

{¶4} While the above counterclaim was pending before the trial court, the Ferraras filed another complaint where they reasserted the claims that they had previously dismissed in the first complaint and also added counts for negligent misrepresentation, infliction of emotional distress, fraud, violation of the Ohio Consumer Sales Practices Act, conspiracy, and fraudulent concealment. The Ferraras listed the same Funeral Home defendants as in the first complaint and also included Brian Kelly, the embalmer for the Funeral Home, and Katherine Mlac, the coroner for the Funeral Home. Additionally, the Ferraras listed as defendants, James Murphy and Joseph Schulte of Mahon Funeral Homes Company, and Greenfield Crematory, Ltd.

{¶5} The Funeral Home filed a motion to dismiss or in the alternative a motion for summary judgment arguing that the Ferraras were forum shopping by refileing their complaint before a different judge. The matter was reassigned to the administrative judge, who denied the Funeral Home's motion. Thereafter, the Funeral Home filed an answer wherein it denied the allegations, raised the affirmative defense of res judicata, and reasserted the counterclaim it asserted in the previous complaint filed by the Ferraras.

{¶6} The Ferraras filed a motion to dismiss the counterclaim claiming it was barred by res judicata. In response, the Funeral Home filed a motion in opposition to the

Ferraras’ motion to dismiss and a motion to reconsider the Funeral Home’s motion to dismiss or in the alternative motion for summary judgment. The Funeral Home agreed that the issues, including those raised by the Ferraras, had already been litigated in the first case and that by dismissing their claims in their first complaint, res judicata prevented the Ferraras from attempting to resurrect them in a second action. The trial court granted the Funeral Home’s motion for summary judgment, concluding:

Defendants’ Vicchiarelli Funeral Services, motion to reconsider motion to dismiss or in the alternative for summary judgment is granted. This court grants summary judgment in favor of defendant(s) Vicchiarelli Funeral Services, Inc. (D1), Karen Vicchiarelli (D2), Lori Sperling (D3), Brian Kelly (D4), and Katherine Mlac (D5). Civ.R. 13(A), *See Cashelmara Villas Ltd. Partnership v. Dibenedetto*, 87 Ohio App.3d 809, 623 N.E.2d 213 (8th Dist.1993) quoting *Hicks v. De La Cruz*, 52 Ohio St.2d 71, 369 N.E.2d 776 (1977).

Journal Entry, July 6, 2015. Additionally, the trial court granted the Ferraras’ motion to dismiss the Funeral Home’s counterclaim.

{¶7} The Ferraras filed an appeal from the trial court’s judgment; however, because claims remained pending against James Murphy and Joseph Schulte of Mahon Funeral Homes Company, and Greenfield Crematory, Ltd. we dismissed the appeal for lack of a final appealable order. On remand, the trial court added the Civ.R. 54(B) language, “there is no just cause for delay.”

### **Standard of Review**

{¶8} We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays*, 140 Ohio App.3d 1, 746 N.E.2d 618 (8th Dist.2000), citing *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987); *N.E. Ohio*

*Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 699 N.E.2d 534 (8th Dist.1997). Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.

{¶9} Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment 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 reach only one conclusion that is adverse to the nonmoving party.

#### **Summary Judgment as to the Funeral Home**

{¶10} In their first assigned error, the Ferraras argue that the trial court erred by granting summary judgment in favor of the Funeral Home. Specifically, the Ferraras argue that res judicata does not bar their claims because their second complaint included several new claims against the Funeral Home.

{¶11} Civ.R. 13(A) governs compulsory counterclaims. Under this rule, all existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit, regardless of which party initiates the action. *Rettig Ents. v. Koehler*, 68 Ohio St.3d 274, 626 N.E.2d 99 (1994), paragraph one of the syllabus. In addition to promoting judicial economy, the rule is designed to assist courts with the “orderly delineation of res judicata.” *Lewis v. Harding*, 182 Ohio App.3d 588, 2009-Ohio-3071, 913 N.E.2d 1048, ¶ 12 (8th Dist.). A party who fails to assert a

compulsory counterclaim at the proper time is barred from litigating that claim in a subsequent lawsuit. *Id.*

{¶12} Ohio courts use the “logical relation” test to determine whether a claim is a compulsory counterclaim. *Rettig Ents.* at paragraph two of the syllabus. Under this test, a compulsory counterclaim exists if that claim “is logically related to the opposing party’s claim” such that “separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts \* \* \*.” *Id.* Accordingly, “multiple claims are compulsory counterclaims where they ‘involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties.’” *Id.* at 279, quoting *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir.1961).

{¶13} The facts and circumstances giving rise to the second lawsuit are identical to the first lawsuit and arise out of the same transaction or occurrence. Both lawsuits concerned the mishandling of the final arrangements of the Ferraras’ relative by the Funeral Home. The Ferraras refused to pay the funeral bill based on their claims that the Funeral Home had done something wrong. By abandoning its claims against the Funeral Home in the first lawsuit, the Ferraras waived those claims and any other claims they failed to raise against the Funeral Home that were “offshoots of the same basic controversy between the parties.” No new discovery occurred between the filing of the first lawsuit and the second lawsuit regarding the Ferraras’ claims against the Funeral Home.

{¶14} “The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.” *Natl. Amusements v. Springdale*, 53 Ohio St.3d 60, 61, 558 N.E.2d 1178 (1990). Accordingly, the Ferraras’ first assigned error is overruled.

### **Summary Judgment as to Mlac and Kelly**

{¶15} In their second assigned error, the Ferraras argue that res judicata did not bar their claims against Mlac and Kelly because they were not parties to the first suit.

{¶16} The doctrine of res judicata encompasses two related concepts of preclusion, claim preclusion and issue preclusion. *O’esti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. “Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action.” *Id.* The previous action is conclusive for all claims that were or that could have been litigated in the first action. *See Holzemer v. Urbanski*, 86 Ohio St.3d 129, 133, 712 N.E.2d 713 (1999).

{¶17} The Ohio Supreme Court has become more relaxed concerning what constitutes privity when applying the principles of res judicata. In *Brown v. Dayton*, 89 Ohio St.3d 245, 730 N.E.2d 958 (2000), the Ohio Supreme Court explained:

What constitutes privity in the context of res judicata is somewhat amorphous. A contractual or beneficiary relationship is not required:

“In certain situations \* \* \* a broader definition of ‘privity’ is warranted. As a general matter, privity ‘is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.’ *Bruszewski v.*



*United States* (C.A.3, 1950), 181 F.2d 419, 423 (Goodrich, J., concurring).”  
*Thompson v. Wing* (1994), 70 Ohio St. 3d 176, 184, 637 N.E.2d 917, 923.

*Id.* at 248.

{¶18} Applying this broader concept, we conclude there was sufficient privity established that res judicata bars the Ferraras from bringing claims against Mlac and Kelly. In the original action, Mlac and Kelly were deposed and testified at trial. Thus, their association with the Funeral Home was known at the time of the original action. There is also no dispute that the allegations against Mlac and Kelly arise out of the same transaction that was at issue in the original claim, that is, the mishandling of the final arrangements of the Ferraras’ relative. All discovery related to their involvement had been completed during the original lawsuit.

{¶19} Mlac was an employee of the Funeral Home, and as she testified at trial, all of her actions were performed during the course and scope of her employment for the Funeral Home. Kelly was an independent contractor; however, he was working on behalf of the Funeral Home. Any involvement by these individuals would be exclusively in those roles; therefore, there exists sufficient mutuality or privity to preclude claims against them by the Ferraras.

{¶20} The Ferraras also claim that Kelly should not have been included in the granting of the summary judgment because his name was not included on the motion. Kelly was originally pro se and the motions were filed prior to his retaining counsel. Kelly retained counsel at the time the reply motion was filed, and Kelly’s name is included in the caption of the reply motion. It is clear the arguments raised apply equally

to him. It would be a waste of judicial resources to reverse judgment for Kelly and require a new motion to be refiled, when the motion would be identical to the one filed, but merely include his name in the caption. Accordingly, the Ferraras' second assigned error is overruled.

{¶21} Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas 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.

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PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANITA LASTER MAYS, J., and  
FRANK D. CELEBREZZE, JR., J., CONCUR