

[Cite as *Persaud v. St. John Med. Ctr.*, 2017-Ohio-7178.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 105402**

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**HARRY PERSAUD**

PLAINTIFF-APPELLEE

vs.

**ST. JOHN MEDICAL CENTER, ET AL.**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-16-867227

**BEFORE:** Jones, J., McCormack, P.J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** August 10, 2017

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LARRY A. JONES, SR., J.:

{¶1} After the trial court denied the request of plaintiff-appellant Harry Persaud (“Persaud”) to file an amended complaint, he appealed, pro se. After review, we affirm.

### **Procedural history and facts**

{¶2} Persaud was a medical doctor; he had staff privileges at St. John Medical Center (“St. John”), where he practiced interventional cardiology. In 2012, Persaud’s practices came under question, which prompted an internal peer review of some of his patients’ charts and suspension of his privileges at St. John. The hospital also appointed an external reviewer, who concluded that many of the procedures Persaud had performed were medically unnecessary.

{¶3} After the reviews of Persaud’s work were completed, St. John sent letters to 23 of Persaud’s patients, advising that they had undergone procedures (i.e., the placement of coronary artery stents) that, in the hospital’s opinion, were unnecessary. Persaud’s privileges at the hospital were terminated, and as required by law, the hospital notified federal regulatory agencies responsible for monitoring Medicare payments of its findings.

{¶4} Persaud appealed the hospital’s decision to terminate his privileges, but later withdrew the appeal and resigned. The hospital sent more letters to additional patients of Persaud, also advising them that it believed they had had unnecessary procedures performed.

{¶5} In 2013, Persaud filed an action against St. John, Dr. Michael Dobrovich

(“Dobrovich”), who was the senior vice president of clinical affairs and chief medical officer at the hospital, and unidentified ABC corporations and John Doe defendants. *See Persaud v. St. John Med. Ctr.*, Cuyahoga C.P. No. CV-13-812959 (“*Persaud I*”). In *Persaud I*, Persaud sought relief under claims of defamation, false light/invasion of privacy, and tortious interference. St. John counterclaimed, seeking judgment for expenses it had incurred in defending itself against lawsuits brought by patients as a result of Persaud’s actions.

{¶6} Meanwhile, federal authorities were investigating Persaud for Medicare fraud, and approximately one year after he filed *Persaud I*, he was indicted on 16 counts of healthcare fraud, false statements relating to healthcare records, and money laundering. *See United States v. Persaud*, N.D. Ohio No. 1:14-CR-276. The federal charges alleged that Persaud performed unnecessary testing and coronary stenting procedures on his patients, falsified medical records to justify the unnecessary tests and procedures, and then submitted false claims for those tests and procedures to health care benefits programs such as Medicare.

{¶7} The case proceeded to a jury trial in federal court, and after its deliberations, the jury found Persaud guilty of 15 of the 16 charges. The district court sentenced Persaud to 20 years in prison and ordered him to pay over \$5 million in restitution. After the federal conviction, Persaud, by and through counsel, agreed to dismiss *Persaud I* in exchange for the hospital dismissing its counterclaim against him. The dismissals were with prejudice.

{¶8} In 2016, Persaud, pro se, filed this action (“*Persaud II*”). In addition to St. John and Dobrovich, Persaud also named the following as defendants: University Hospitals Case Medical Center, Sisters of Charity Health System, Dr. Barry George, Dr. John Coletta, Dr. Nain Farhat, Dr. Adnan Mourany, Ray Kincevic, Debbie Coblenz, and Cathie Parsh.<sup>1</sup>

{¶9} Persaud’s claims centered around his contention that the defendants disseminated false information about him, and were for (1) conspiracy to commit fraud, (2) negligent supervision/gross negligence, (3) tortious interference with contractual and business relations, and (4) the intentional infliction of emotional distress. The defendants answered the complaint, and set forth numerous defenses, including that Persaud’s claims were barred under the doctrines of res judicata and collateral estoppel.

{¶10} The defendants filed a motion for leave to file a motion for summary judgment; the trial court granted them leave, and their summary judgment motion was filed. The defendants contended in the motion that Persaud’s claims were barred under

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<sup>1</sup>Dr. Coletta was a physician at St. John who first raised the issue of Persaud’s procedures after he had covered for Persaud while he was out of town. Dr. George was the external reviewer hired by the hospital to review some of Persaud’s patients’ charts, and concluded that many of the procedures Persaud had performed were medically unnecessary. Dr. Farhat was a physician at St. John and was the medical director of the cardiac catheterization laboratory at the hospital. Dr. Mourany was also a physician at St. John and was the chief of staff at the hospital. Debbie Coblenz was a registered nurse in the St. John cardiac catheterization laboratory. Cathie Parsh was also a registered nurse and was the St. John catheterization laboratory team leader. And Ray Kincevic was legal counsel for University Hospitals Case Medical Center and was involved in St. John’s peer review of Persaud.

In his complaint, Persaud alleged that Sisters of Charity Health System operated in partnership with St. John and University Hospitals. The defendants denied that allegation in their answer.

the doctrines of res judicata and collateral estoppel.

{¶11} Persaud filed a motion for leave to amend his complaint with “new factual issues to cure the deficiencies in his original complaint \* \* \* so that he may withstand the defendants’ motion for summary judgment, that’s based on issue preclusion through the doctrines of res judicata and collateral estoppel.” In a December 22, 2016 judgment, the trial court denied Persaud leave to file an amended complaint. In a December 28, 2016 judgment, the trial court granted the defendants’ motion for summary judgment.

{¶12} Some of the dates used by Persaud in this appeal do not correlate with the docket. For example, in his notice of appeal, he states that he is appealing the December 28, 2016 judgment, but he contends that that judgment denied him leave to amend his complaint. His sole assigned error on appeal relates to the denial of his request for leave to file an amended complaint and reads as follows:

On December 12th, 2016, the Court of Common Pleas denied Appellant’s motion for leave to file an amended complaint. See order dated: 12/2/2016.

To avoid the element of a clear abuse of discretion, the Court should have explained that its denial of Appellant’s motion for leave to amend was based on the fact that the amendment would have been futile because the Appellant was barred by res judicata or collateral estoppel, making it impossible for him to cure the deficiencies.

{¶13} Although Persaud’s assignment of error relates to the denial of his request for leave to file an amended complaint, as will be discussed below, that denial and the trial court’s decision to grant summary judgment in favor of the defendants are interrelated.

## **Law and analysis**

{¶14} Our review of a trial court’s decision to grant or deny a motion to amend a complaint is under an abuse of discretion standard. *LAME, Inc. v. E.G. Sys.*, 8th Dist.

Cuyahoga No. 101566, 2015-Ohio-686, ¶ 14, citing *Tenable Protective Servs. v. Bit E-Technologies, L.L.C.*, 8th Dist. Cuyahoga No. 89958, 2008-Ohio-4233, ¶ 26. To demonstrate an abuse of discretion in denying a motion to amend, the appellant must demonstrate that the trial court's denial was unreasonable, arbitrary, or unconscionable. *LAME* at *id.*; see also *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶15} This court has held that the ““denial of leave to amend a complaint constitutes an abuse of discretion when a plaintiff may, by an amended complaint, set forth a claim upon which relief may be granted, when the motion for leave to amend was tendered in a timely manner and in good faith, and when no justification for denying leave is disclosed on or apparent from the record.”” *Mills v. Deehr*, 8th Dist. Cuyahoga No. 82799, 2004-Ohio-2410, ¶ 16, quoting *Forney v. Cincinnati Reds, Inc.*, 1st Dist. Hamilton No. C-880016, 1988 Ohio App. LEXIS 4937, 7 (Dec. 14, 1988), citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 297 N.E.2d 113 (1973), paragraph six of the syllabus.

{¶16} The timeliness of Persaud’s requests to amend his complaint are not at issue — he filed his action in August 2016, and made his requests in December 2016. The stated ground in his request to amend was that an amended complaint would allow his case to survive the defendants’ summary judgment motion, or in other words, to set forth a claim upon which relief may be granted. Specifically, Persaud contended that excerpts of testimony from his criminal trial supported his position that the defendants used unreliable information in finding his procedures unreliable. But although the court did not specify

its reason for denying Persaud's request to amend his complaint, it is apparent from the record and was not an abuse of discretion.

{¶17} As mentioned, Persaud filed a first action, *Persaud I*, which he dismissed *with prejudice*. Although he altered some of his claims for relief and added more defendants in this case, *Persaud II*, the underlying factual premise was the same as in *Persaud I*; that is, that the defendants were wrong in concluding that he had performed unnecessary procedures and made false statements to that effect to patients.

{¶18} In their summary judgment motion, the defendants contended that Persaud's claims in *Persaud II* were barred under the doctrine of res judicata because he had already dismissed *Persaud I* with prejudice, which revolved around the necessity of his coronary stenting procedures. The defendants further contended that this action failed as a matter of law because Persaud was collaterally estopped from relitigating the necessity of the procedures, which was the factual premise of all his claims.

{¶19} We review a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriately granted when there exist no genuine issues of material fact, the party moving for summary judgment is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to that party. *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994).

### **Res judicata and collateral estoppel**

{¶20} The doctrine of res judicata is a rule of law that promotes judicial economy, finality of judgments, and preserves resources of litigants and the court. It “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, 62, 558 N.E.2d 1178 (1990). The final decision in the first action is “conclusive as to all claims which were or might have been litigated in a first lawsuit.” *Id.*

{¶21} There are four elements to res judicata: (1) a final decision on the merits in the first action, (2) a second action involving the same parties or persons in privity with those parties, (3) the second action raises claims that were or could have been litigated in the first action, and (4) the claims in the second action arise out of the same transaction or occurrence as the first action. *Daniel v. Shorebank Cleveland*, 8th Dist. Cuyahoga No. 92832, 2010-Ohio-1054, ¶ 13.

{¶22} It is well established that a dismissal with prejudice is a final decision on the merits. *See Tower City Properties v. Cuyahoga Cty. Bd. of Revision*, 49 Ohio St.3d 67, 69, 551 N.E.2d 122 (1990) (a voluntary dismissal with prejudice pursuant operates as an adjudication on the merits). Therefore, under the doctrine of res judicata, a voluntary dismissal with prejudice bars future litigation on the rights asserted, or those that could have been asserted in the prior action. *Dreger v. Dundas*, 8th Dist. Cuyahoga No. 57389, 1990 Ohio App. LEXIS 4985 (Nov. 15, 1990). Because Persaud dismissed *Persaud I* with prejudice, it constituted a final decision on the merits.

{¶23} In regard to privity, *Persaud II* named as defendants St. John and Dobrovich,

who were also named as defendants in *Persaud I*. The ABC corporations and John Doe defendants from *Persaud I* were named in *Persaud II* as follows: University Hospitals Case Medical Center, Sisters of Charity Health System, Dr. Barry George, Dr. John Coletta, Dr. Nain Farhat, Dr. Adnan Mourany, Ray Kincevic, Debbie Coblenz, and Cathie Parsh.

{¶24} Res judicata applies to both the parties to the first action, but also to additional parties who were in privity with the parties to the first action. *Hempstead v. Cleveland Bd. of Edn.*, 8th Dist. Cuyahoga No. 90955, 2008-Ohio-5350, ¶ 9. Thus, on the face of the complaint in *Persaud II*, res judicata applies to St. John and Dobrovich. Further, upon review, it also applies to the additional named defendants in *Persaud II*, who were in privity with St. John or Dobrovich.

{¶25} In *Hempstead*, this court considered the doctrine of res judicata vis-a-vis a plaintiff naming defendants in a second case who were not named in the first action, and held that a ““mutuality of interest, including an identity of desired result, creates privity” for the purposes of res judicata.” *Id.* at ¶ 10, quoting *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (2000). This court reasoned that ““it is immaterial to considerations of res judicata that Plaintiff has named additional defendants in this case.

\* \* \* An alternative rule would enable a plaintiff to frustrate the purpose of the doctrine of res judicata simply by adding a new defendant to each subsequent litigation.”” *Id.* at ¶ 9, quoting *Schneider v. United States*, Civ. No. 06-3200, 2007 U.S. Dist. LEXIS 92591 (D.N.J. 2007).

{¶26} All the defendants in *Persaud II* shared a “mutuality of interest” and “identity of desired result.” Further, with the exception of possibly only Sisters of Charity Health System, they all shared a relationship with St. John and Dobrovich. Thus, because the defendants all shared common defenses and legal interests (including Sisters of Charity Health System), they were in privity for purposes of the doctrine of res judicata.

{¶27} Next, Persaud’s claims in *Persaud II* are all claims that either were or could have been litigated in *Persaud I*. It is inconsequential that Persaud attempted to advance different legal theories in the second case than he had advanced in his first case — they were all claims that could have been brought in *Persaud I*.

{¶28} The final element of res judicata — that the claims in the second action arise out of the same transaction as the first action — is satisfied. Indeed, Persaud’s “factual background” in both complaints are almost identical.

{¶29} In light of the above, the doctrine of res judicata barred Persaud’s action in *Persaud II*, the defendants were entitled to judgment as a matter of law, and therefore, the trial court properly granted the defendants’ motion for summary judgment and denied Persaud’s motion to file an amended complaint.

{¶30} Moreover, the doctrine of collateral estoppel barred Persaud’s claims in *Persaud II*. Collateral estoppel prevents relitigation in a different cause of action of an issue that has been actually and necessarily litigated and determined. *Balboa Ins. Co. v. S.S.D. Distrib. Sys.*, 109 Ohio App.3d 523, 527, 672 N.E.2d 718 (12th Dist.1996). Generally, in Ohio, a requisite of collateral estoppel is mutuality of parties. *Id.*, citing

*Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 443 N.E.2d 978 (1983), paragraph one of the syllabus. The main principle throughout the determination of the applicability of collateral estoppel “is the necessity of a fair opportunity to fully litigate and to be ‘heard’ in the due process sense.” *Goodson* at 200-201; *Balboa* at 527.

{¶31} The issue in this case was the same issue in the criminal case against Persaud — whether Persaud performed unnecessary medical procedures and engaged in improper billing practices. The jury in the criminal case found that he did. A criminal conviction is “conclusive proof and operates as an estoppel on defendants as to the facts supporting the conviction in a subsequent civil action.” *Wloszek v. Weston, Hurd, Fallon, Paisley & Howley, L.L.P.*, 8th Dist. Cuyahoga No. 82412, 2004-Ohio-146, ¶ 40. To determine the facts supporting the prior conviction, a court looks to the “record, the pleadings, the evidence submitted, the jury instructions, and any opinions of the courts.” *Id.*

{¶32} In support of their summary judgment motion, the defendants submitted, among other documents, excerpts from the criminal proceeding against Persaud. The excerpts demonstrated that the facts supporting the criminal conviction included extensive evidence of Persaud’s scheme to defraud Medicare, which involved falsifying patients’ symptoms and test results to document his requests for payments for procedures that were medically unnecessary.

{¶33} Therefore, based on the jury’s determinations in the criminal case — that Persaud was guilty of health care fraud and making false statements relating to his patients’ health — he is estopped from contesting in this action that he performed

unnecessary stenting procedures or that he fraudulently billed for those procedures. He, therefore, was unable to maintain his claims in this action, which were rooted in his contention that the procedures were necessary and his billing for them was proper. Thus, the trial court properly granted summary judgment in favor of the defendants under the doctrine of collateral estoppel, and properly denied Persaud's motion for leave to file an amended complaint.

{¶34} Judgment affirmed.

It is ordered that appellees 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.

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LARRY A. JONES, SR., JUDGE

TIM McCORMACK, P.J., and  
ANITA LASTER MAYS, J., CONCUR