

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Phyllis T. Young

Court of Appeals No. L-03-1243

Appellant

Trial Court No. CI-02-2136

v.

Jason Gorski, et al.

DECISION AND JUDGMENT ENTRY

Appellees

Decided: March 19, 2004

* * * * *

Stephen A. Schaefer, for appellant.

Brian A. Newberg, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶1} This accelerated case is before the court on appeal of the August 12, 2003 decision of the Lucas County Court of Common Pleas, granting summary judgment to appellees Jason Gorski and Professional Electric, Inc. For the reasons that follow, we affirm the trial court's decision.

{¶2} Appellant raises the following assignment of error:

{¶3} "The trial court erred in granting summary judgment in favor of the Defendant—Appellees, Jason Gorski and Professional Electric, Inc. (Opinion and Judgment Entry, August 11, 2003)."

{¶4} Because the facts are not at issue, a brief synopsis is appropriate. On March 20, 2000, appellant, Phyllis Young, was operating a school bus for Springfield Schools. While stopped at a stoplight, appellant was rear-ended by appellee who was traveling approximately five m.p.h. There was no damage to either vehicle. Following the incident, appellant filed a claim with the Bureau of Workers' Compensation ("BWC"). Originally, the BWC allowed appellant benefits, but later denied her claim after Springfield Schools appealed the decision. The BWC report denying the claim stated specifically, "This Staff Hearing Officer does not find it persuasive that the claimant sustained a compensable injury, as described." Appellant appealed to the Industrial Commission and then to the Lucas County Court of Common Pleas. After filing an appeal with the common pleas court, appellant voluntarily dismissed her case pursuant to Civ. R. 41(a)(1).

{¶5} Following the workers' compensation dismissal, the instant tort action against appellees ensued. The facts concerning the personal injury case are identical to those in the BWC claim. Appellees filed a motion for summary judgment alleging that issue preclusion barred appellant from relitigating the BWC's finding that appellant suffered no injury as a result of the incident. The trial court granted the motion which led to this appeal.

{¶6} The doctrine of res judicata states that a final judgment on the merits issued by a court of competent jurisdiction is conclusive as to the rights of the parties and constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. *Holzemer v. Urbanski* (1999), 86 Ohio St.3d 129, 1999-Ohio-91. More specifically, this case involves a derivative of res judicata traditionally known as collateral estoppel and referred to more recently as issue preclusion. Issue preclusion prevents the relitigation of an issue that has been actually and necessarily challenged and determined in a prior action which was based on a different case. *Patrick T. v. Michelle L.*, 6th District No. WD-02-015, 2002-Ohio-3574, at ¶13. Even where the cause of action is different in a subsequent suit, a judgment in a previous matter may still affect the outcome of the second suit. *Fort Frye Teachers Assoc. v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395.

{¶7} In *Monahan v. Eagle Picher Industries, Inc.* (1984), 21 Ohio App.3d 179, paragraph one of syllabus, the Ohio Supreme Court defined issue preclusion using the four following elements:

{¶8} "(1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) there was a final judgment on the merits in the previous case after full and fair opportunity to litigate the issue; (3) the issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) the issue must have been identical to the issue involved in the prior suit."

{¶9} Included within the doctrine is the requirement of mutuality of the parties, but it is not without its exceptions. *Parklane Hosiery Co. v. Shore* (1979), 439 U.S. 322; *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193. Ohio law has taken a broad and imprecise interpretation of the mutuality exception. Issue preclusion takes effect unless the party lacked a full and fair opportunity to litigate or the circumstances justify relitigation. *Hicks v. De La Cruz* (1977), 52 Ohio St.2d 71, 74. Interpreting its own ruling in *Hicks*, the Ohio Supreme Court stated, " *** this court has not, *** abandoned the mutuality rule, but has only shown that it is willing to relax the rule where justice would reasonably require it." *Goodson*, 2 Ohio St.3d at 199. This court addressed and adopted the "relaxed" mutuality standard in *Wilson v. Britz & Zimmelman* (Jan. 10, 1992), 6th Dist. No. L-91-031.

{¶10} Appellant argues that issue preclusion is inapplicable in this case for two reasons. First, appellant maintains that the workers' compensation claim does not involve a final judgment on the merits. Second, appellant contends that the lack of mutuality of the parties prevents the use of issue preclusion.

{¶11} First, it is true that a dismissal without prejudice is not an adjudication on the merits and, therefore, is not a final appealable order. *Lovins v. Kroger Co.* (2002), 150 Ohio App.3d 656, 2002-Ohio-6526. This rule explains the rationale that a court should not unduly penalize or discourage a party from making the strategic choice to forgo a claim or cause of action. The legislature protects this conscientious decision by allowing the dismissing party the opportunity to refile within one year of the original

dismissal. R.C. 2305.19. However, with a second opportunity comes an inherent responsibility. A quasi-judicial agency's decision becomes final and takes legal effect when a party fails to appeal the decision. *Lovins*, 150 Ohio App.3d at 658.

{¶12} Here, the merits of appellant's claim were determined when the BWC's district hearing officer concluded that the claim did not warrant workers' compensation benefits because there was no apparent injury resulting from the incident. Appellant pursued two appeals and then opted to voluntarily dismiss her case. While the BWC is a quasi-judicial administrative agency, its determination stands because appellant failed to challenge the hearing officer's finding. By failing to pursue her appeal, appellant essentially concedes the legitimacy of the BWC's determination. The case became a final judgment on the merits only after appellant failed to refile her appeal one year after her voluntary dismissal. Rather than refiling her workers' compensation appeal within the allotted time, appellant chose to file a separate tort action against appellees. Appellant had every opportunity to protect her interests surrounding the incident. Appellant cannot be permitted to waive the adverse finding of one case when another party or cause of action appears more opportunistic.

{¶13} Second, appellant argues that the lack of mutuality of the parties prevents the application of issue preclusion in this case. Generally, issue preclusion does require mutuality of the parties. However, the rigid mutuality requirement has been refined to a more lenient standard. While not completely discarding the concept, Ohio law has adopted an equitable interpretation with its exceptions to mutuality. Issue preclusion

takes effect unless (1) the party lacked a full and fair opportunity to litigate or (2) the circumstances or justice requires relitigation. *Hicks*, 52 Ohio St.2d at 74; *Goodson*, 2 Ohio St.3d at 199.

{¶14} Here, appellant was appropriately estopped from pursuing her present cause of action. The nonmutuality of the parties cannot bar the use of issue preclusion unless appellant satisfies the requirements as described in *Hicks* and adopted by this court in *Wilson*, supra. Appellant received a full and fair opportunity to present her case in the workers' compensation process. A voluntarily dismissal illustrates a waiver of a party's right to proceed with that specific cause of action. Further, appellant's argument addressing the tactical decisions of prior counsel is not compelling considering the fact that the present tort action was filed within the one-year window permitting an appeal to be refiled. It cannot be said that, based on the facts set forth in the record, appellant was denied either a full and fair opportunity to litigate or justice would require relitigation. Justice does not permit a second bite at the apple when a party failed to zealously represent her interests in the prior related case.

{¶15} Our decision in this matter is further strengthened by the recent Second Appellate District ruling in *Hoover v. Transcontinental Ins. Co.*, 2nd Dist. No. 2003-CA-46, 2004-Ohio-72, addressing a similar case. In *Hoover*, the court found that nonmutual issue preclusion is effective when the estopped party had her day in court and was permitted to fully litigate the specific issue sought to be used in the later action. *Id.* at ¶17. Unlike the present case, the estopped party in *Hoover* did pursue that claim before

a jury in a court of common pleas. However, this court sees no real distinction between the two cases if it was the party's own choice to remove the claim from the litigation process. As such, appellant's assignment of error is found not well-taken.

{¶16} On consideration whereof, we find that the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this case are assessed to appellant.

JUDGMENT AFFIRMED.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE