

IN THE SUPREME COURT OF OHIO

THE CARTER-JONES LUMBER CO.  
dba  
CARTER LUMBER CO.

PLAINTIFF-APPELLEE

VS.

B & A BUILDING SERVICES, INC.  
&  
ANDRE BALLARD

DEFENDANTS-APPELLANTS

08-0369

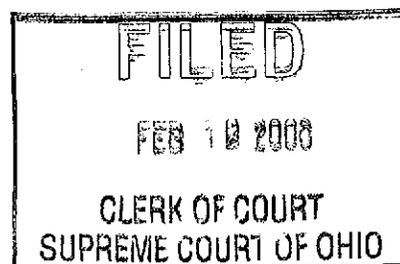
ON APPEAL FROM THE KNOX  
COUNTY COURT OF APPEALS,  
FIFTH APPELLATE DISTRICT

CASE NO. 07CA000003

MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLEE THE CARTER-JONES LUMBER CO.

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

This case is one of great public and general interest in part because appellee Carter Lumber Company is a major retail supplier of building materials to the general public. Carter Lumber has over 200 stores located in ten states, including over 100 stores located here in Ohio. The company sells lumber, roofing, siding, windows and doors, electrical equipment, and other building supplies. Individual home ownership is one of the milestones of the American dream. It is materials suppliers such as Carter Lumber that make home ownership (and its necessary corollary, home maintenance), a reality for many Americans.

Unfortunately, some customers do not pay their bills for a variety of reasons: bankruptcy, divorce, health issues, fraud, a downturn in the economy, or simply due to poor business decisions. It is customers, such as appellants herein, who find themselves in legal predicaments when they refuse to tender payment for goods sold to them.

In 2005, Carter Lumber sued the appellants, Andre Ballard and B& A Building Services, Inc., for collection of an unpaid credit account in the Mt. Vernon Municipal Court. The appellants then filed a motion for partial summary judgment, claiming that Mr. Ballard was not a personal guarantor on the account. After the municipal court granted their motion for partial summary judgment, Carter Lumber promptly voluntarily dismissed the entire action. A new lawsuit was then filed later in the year in the Knox County Court of Common Pleas against the original defendants. Both parties filed motions for summary judgment, and the court ruled in favor of Carter Lumber. An appeal was taken and the Fifth District Court of

Appeals reversed the trial court decision, essentially basing its ruling on the premise that Carter Lumber's second lawsuit was barred by the doctrine of res judicata.

The Fifth District Court of Appeals also believed that Carter Lumber's second lawsuit was tantamount to forum shopping. Yet, however disdainful the legal tactic may be, such a practice is a permissible procedural strategy in the circumstances of this case. (Even Civ. R. 3 permits some forum shopping in selecting venue, enumerating over a dozen different locales where a lawsuit may properly be commenced.) Such a refiling is permitted under Civ. R. 41(A) when the prior partial summary judgment ruling was not a final, appealable order.

"The language of Civil Rule 41(A)(1) and (C) requires no construction. It gives either party an absolute right, regardless of motives, to voluntarily terminate its cause of action at any time prior to the actual commencement of the trial." *Standard Oil Co. v. Grice*, 46 Ohio App. 2d 97, 101-02, 345 N.E.2d 458, 461 (Ohio Ct. App. 2d Dist. 1975).

This deficiency found in the present version of Civ. R. 41(A) is a subject that several courts have suggested are grounds justifying amendment of the civil rule. See *Fairchilds v. Miami Hospital, Inc.*, 160 Ohio App. 3d 363, 372, 2005-Ohio-1712, 827 N.E.2d 381, 388 n. 2 (Ohio Ct. App. 2d Dist. 2005) ("The perceived undesirability of Civ. R. 41(A) would remain—that it permits a plaintiff to avoid an impending summary judgment by dismissing the claims with which the summary judgment is concerned before the interlocutory decision becomes final. The perceived undesirability of this result is, of course, a matter to be taken up with the Ohio Supreme Court in its rule making capacity."); *Jackson v. Allstate Insurance Company*, Montgomery App. No. 20443, at \*7, 2004-Ohio-5775 (Ohio Ct. App. 2d Dist. 2004) ("Thus, although we sympathize with Allstate, the Jacksons' dismissal of the adverse, interlocutory summary judgment ruling was permitted by Civ. R. 41. . . . In light of the

potential for abuse, the Rules Advisory Committee of the Supreme Court of Ohio may wish to reconsider the wisdom of allowing voluntary dismissals, without prejudice, at this late stage of a litigation.”); *Hutchinson v. Beazer East, Inc.*, 2006 WL 3743078, at \*6, ¶ 33, 2006-Ohio-6761 (Ohio Ct. App. 8<sup>th</sup> Dist. 2006) (“Civ. R. 41(A), as written, is open to potential abuse . . . .”). However, the Fifth District, by expressing its disdain for forum shopping, has apparently decided to rewrite its own version of Civ. R. 41(A) by reversing the trial court. In light of the foregoing, the appeals court has erroneously reversed the decision of the Knox County Court of Common Pleas on a wrong interpretation of the law in order to punish appellee for its “clearly evidenced” (Appendix at 11.) forum shopping. Ironically, the present stance of the Fifth District Court of Appeals regarding Civ. R. 41(A) voluntary dismissals could actually encourage forum-shopping among litigants embroiled in multi-party litigation, whereby litigants would avoid bringing suit in a jurisdiction that bars a party’s rights to refile a previously dismissed case. This case is thus one of great public and general interest for parties who seek to obtain a consistent and predictable result in a court of law.

This case also involves a substantial constitutional question. The Fourteenth Amendment to the U.S. Constitution provides that “No . . . State shall deprive any person of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. XIV, § 1. Similarly, the Ohio State Constitution provides that “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due court of law, and shall have justice administered without denial or delay.” Ohio Const. art. I, § 16. “This provision of the constitution is self enacting and guarantees to every man his day in court.” *Weaver v. Weaver*, 15 Ohio Law Abs., \* 2 (Ohio Ct. App. 2d Dist. 1933). “In our own jurisprudence, we recognize that the ‘ability to seek redress in the courts is a

fundamental right, guaranteed by the due process provision of the Fourteenth Amendment to the United States Constitution, and restrictions on such a right require ‘close scrutiny’ by the judiciary.” *Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 326, 2007-Ohio-6442 (2007), quoting *Krause v. State*, 31 Ohio St. 2d 132, 150, 285 N.E.2d 736 (1972) (Brown J., dissenting).

“If life, liberty or property is at stake, the individual has a right to a fair procedure. The question then focuses on the nature of the ‘process’ that is ‘due.’ In all instances the state must adhere to previously declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken.” John E. Nowak, Ronald D. Rotunda, J. Nelson Young, *Constitutional Law* 527 (2ed ed. 1983).

Appellant has a “property” interest at stake here. It sold construction materials to a builder who refused to pay his bill. Appellee is left with unpaid invoices that it is now barred from collecting. See *Ohio Utilities Co. v. Public Utilities Commission of Ohio*, 267 U.S. 359, 364, 45 S. Ct. 259, 261 (1925) (reversing the Ohio Supreme Court’s ruling and holding that the fixing of energy rates was so low “as to result in depriving the [utility] company of its property without due process of law may not be doubted.”).

The application of the res judicata doctrine prevents Carter Lumber from asserting its constitutionally protected right of access to the courts for a redress of grievances concerning the deprivation of appellee’s property rights. “Due process of law guarantees that all persons are entitled to a judicial inquiry into any controversy affecting the rights of persons or property.” *Smith v. Goodwill Industries of the Miami Valley, Inc.*, 130 Ohio App. 3d 437, 447, 720 N.E.2d 203, 210 (Ohio Ct. App. 2d Dist. 1998).

If the Fifth District Court of Appeals ruling remains intact, appellee would be barred from pursuing any claim for damages. Appellee would be denied its access to the judicial system in an attempt to recover the monies due it through other remedies, such as wage garnishment, bank attachment, or execution on other property.

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

This case has its origins as a collection action for an unpaid bill on an account owed to the plaintiff-appellee, Carter Lumber, by the defendant-appellants, B & A Building Services, Inc. and its president, Andre Ballard.

Carter Lumber supplies lumber and building materials to the general public and other contractors. In December of 2003, appellants B & A Building Services, Inc. and Andre Ballard submitted a "Yard Account Application" to Carter Lumber for the purpose of purchasing goods on credit. A few months later, appellants became seriously delinquent in paying their account and refused to pay for their previous purchases.

After numerous unsuccessful demands for payment, Carter Lumber filed suit in January of 2005 in the Mt. Vernon Municipal Court (Case No. 05CVH00061) to collect the unpaid account balance. The appellants then filed a motion for partial summary judgment, seeking to dismiss individual defendant Andre Ballard from the lawsuit. That partial summary judgment motion was granted on June 20, 2005. Carter Lumber then promptly filed its notice of dismissal on July 11, 2005 under Civ. R. 41(A), dismissing the entire action.

Carter Lumber subsequently refiled its collection case in the Knox County Court of Common Pleas (Case No. 05AC090371) on Sept. 12, 2005 against the same defendants as those named in the original Mt. Vernon Municipal court action.

In September of 2005, defendants filed a motion to dismiss Carter Lumber's case. That motion was denied in November of 2005.

Both parties also filed a motion for summary judgment. Appellants did not file any counterclaim or cross-claim in either the municipal court or common pleas cases.

On January 9, 2007, Knox County Court of Common Pleas Judge Otho Eyster granted appellee's summary judgment motion. The court found for Carter Lumber in the amount of \$10,766.16, plus interest at the rate of 18% per annum from June 7, 2004, and costs against the corporate defendant B & A Building Services, Inc. and individual defendant Andre Ballard.

The defendants appealed to the Fifth District Court of Appeals. The court of appeals reversed the judgment of the Knox County Court of Common Pleas. The appeals court stated,

Appellee's voluntary dismissal had no force or affect on appellant because his liability had already been dismissed by the trial court via the motion for partial summary judgment. Once the voluntary dismissal was made, the ruling on the partial summary judgment motion became a final appealable order.

There is no evidence that any appeal was ever taken from the Municipal Court order. As such, the decision of the Mount Vernon Municipal Court is binding and the doctrine of res judicata bars appellee's claims against appellant in this case.

Opinion at 11 (Jan. 4, 2008); Appendix at 11.

The appellants' other assignments of error were thus regarded as moot.

Appellee contends that the court of appeals erred in reversing the common pleas action because Carter Lumber's second lawsuit was not barred by res judicata. Appellee, in response to the reversal, also filed a motion for reconsideration and motion to certify a conflict.

In support of its position on this issue, appellee presents the following argument.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law No. I: The voluntary dismissal of an entire action under Civ. R. 41(A) after a partial summary judgment ruling does not bar the refiling of the case against the original parties under the doctrine of res judicata when the summary judgment ruling in the first case did not contain an “express determination that there is no just reason for delay” as required by Civ. R. 54(B).**

Appellee contends that the Civ. R. 41(A) voluntary dismissal of the entire municipal court action after the entry of the partial summary judgment ruling removing only one co-defendant from a case does not bar refiling the action against the original parties. Appellee submits that the partial summary judgment ruling was not a final appealable order because the ruling did not contain the required Civ. R. 54(B) language of an “express determination that there is no just reason for delay.”

The Mt. Vernon Municipal Court partial summary judgment ruling was an interlocutory order that could later be converted to a final, appealable order. However, appellee dismissed the municipal court action before trial, stating, in its Notice of Dismissal, “Now comes plaintiff, the Carter-Jones Lumber Co., dba Carter Lumber (“Carter Lumber”), by and through its counsel, Bradley S. Le Boeuf, and hereby dismisses this action without prejudice pursuant to Civ. R. 41(A).” (Appendix at 13.) When appellee dismissed the municipal court case, the partial summary judgment ruling was dissolved.

As noted in *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St. 3d 86, 88, 541 N.E.2d 64, 67 (1989), “An order of a court is a final, appealable order only if the requirements of both Civ. R. 54(B) and R.C. 2505.02 are met.”

Civ. R. 54(B) provides as follows:

When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay*. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis added.)

The Mt. Vernon Municipal Court partial summary judgment ruling only disposed of one co-defendant: the individual Ballard. (Appendix at 15.) The corporate co-defendant, B & A Building Services, Inc., remained in the case. However, the municipal court ruling eliminating Ballard from the lawsuit omitted the requisite language in Civ. R. 54(B). That ruling did not contain an “express determination that there is no just reason for delay.” The partial summary judgment ruling was an interlocutory order, and hence, non-appealable.

In *Noble v. Colwell*, 44 Ohio St. 3d 92, 540 N.E.2d 1381 (1989), the Ohio Supreme Court stated,

[Civil] Rule 54(B)'s general purpose is to accommodate the strong policy against piecemeal litigation with the possible injustice of delayed appeals in special situations. . . . [Civil] Rule 54(B) makes mandatory the use of the language, “there is no just reason for delay.” Unless those words appear where multiple claims and/or multiple parties exist, the order is subject to modification and it cannot be either final or appealable. . . . The required language puts the parties on notice when an order or decree has become final for purposes of appeal.”

*Id.* at 96, 540 N.E.2d at 1385.

O.R.C. § 2505.02(B)(1) defines an order as final if it “affects a substantial right in an action that in effect determines the action and prevents a judgment.” The Mt. Vernon

Municipal Court order granting partial summary judgment to individual defendant Ballard met the requirements of this statute. That ruling barred recovery by Carter Lumber against Ballard, thus affecting the creditor's substantive rights, and precluding a judgment against him.

The Fifth District Court of Appeals largely based its decision upon *Denham v. City of New Carlisle*, 86 Ohio St. 3d 594, 1999-Ohio-128, 716 N.E.2d 184 (1999) in reversing the Knox County trial court ruling. Yet, the procedural facts of this case are easily distinguishable from *Denham*. Here, plaintiff-appellee Carter Lumber dismissed the entire Mt. Vernon Municipal Court action within thirty days after the summary judgment ruling dismissed individual defendant Andre Ballard from the suit. The dismissal was filed prior to the expiration of any appeal period. At the time the municipal court granted the partial summary judgment motion dismissing Ballard, a claim still existed against the remaining corporate defendant, B & A Building Services, Inc. Carter Lumber then dismissed “this action without prejudice pursuant to Civ. R. 41(A)” (Appendix at 13.) and refiled the action in the Knox County Court of Common Pleas. No parties remained in the case after dismissal of all the defendants in the Mt. Vernon Municipal Court case. By contrast, “In *Denham*, the party for whom summary judgment was granted was the sole remaining defendant *after* the plaintiff had dismissed the other defendants. Thus, that party—and the summary judgment order at issue—remained in the litigation after the voluntary dismissals.” *Jackson v. Allstate Insurance Company*, Montgomery, 2004 WL 2437109, at \*6, ¶ 30, App. No. 20443, 2004-Ohio-5775. The Ohio Supreme Court, in its analysis of Civ. R. 41(A), stated, “We interpret this language to mean that a Civ.R. 41 dismissal dismisses all claims designated in the dismissal notice and does not apply to defendants named in the complaint who are not

designated in the notice of dismissal.” *Denham*, 86 Ohio St. 3d at 597, 716 N.E. 2d at 186-87. Here, appellee dismissed the entire municipal court action, and not just a dismissal of the remaining corporate defendant. The distinction is clear: Carter Lumber’s dismissal of the entire municipal court lawsuit involved dismissal of the entire action, thus rendering the previous summary judgment ruling a nullity. *Denham* did not involve dismissal of the entire suit. “This mean[t] that summary judgment which is the object of this appeal is not final.” *Fairchilds v. Miami Valley Hospital, Inc.*, 160 Ohio App. 3d 363, 371, 827 N.E.2d 381, 387-88, 2005-Ohio-1712 (Ohio Ct. App. 2d Dist. 2005), citing *Harper v. Metrohealth Medical Center*, 2002 WL 31402001, at \*2, ¶ 11, 2002-Ohio-5861 (Ohio Ct. App. 8<sup>th</sup> Dist. 2002).

The Fifth District Appeals Court, in its reversal, also cited *Jackson v. Allstate Insurance Company*, Montgomery App. No. 20443, 2004-Ohio-5775, in support of its decision that res judicata barred the refile of Carter Lumber’s lawsuit in the Knox County Court of Common Pleas. However, a careful reading of *Jackson* actually supports appellee’s position that res judicata is inapplicable under the facts of this case:

Because Civ. R. 54(B) expressly provides that a judgment lacking the required certification “shall not terminate the action as to any of the claims or the parties,” the Jacksons’ [plaintiff-appellants] right to voluntarily dismiss their claims against Allstate at any time prior to the commencement of trial, pursuant to Civ.R. 41(A)(1), was preserved, notwithstanding the fact that a partial summary judgment was rendered in the interim as to their claims against Allstate. Accordingly, the trial court’s interlocutory summary judgment order in favor of Allstate was properly dismissed by the Jacksons, pursuant to Civ.R. 41(A), and it was rendered a nullity. The subsequent dismissal of [co-defendant] Spargur did not revive the Jacksons’ dismissed claims against Allstate. Accordingly, the order granting summary judgment to Allstate had no res judicata effect on the subsequent litigation.

*Id.* at \*6, ¶ 31.

Similarly, the Sixth District has declared,

We hold that an order which grants a motion for summary judgment or a dismissal for failure to state a claim upon which relief can be granted to a party while claims against other parties are still pending, and which does not contain Civ.R. 54(B) language that there is no just reason for delay, is not appealable when the entire action is later dismissed without prejudice pursuant to Civ. R. 41(A). Rather, such order is dissolved and has no res judicata effect.

*Toledo Heart Surgeons v. The Toledo Heart Hospital*, 2002 WL 1561105, at \*4, 2002-Ohio-3577 (Ohio Ct. App. 6<sup>th</sup> Dist. 2002).

Likewise,

We recognize that in *Denham v. City of New Carlisle*, 86 Ohio St.3d 594, 597, 1999-Ohio-128, the Supreme Court of Ohio held that “a voluntary dismissal pursuant to Civ.R. 41(A) renders the parties as if no suit had ever been filed against only the dismissed parties.” Consistent with this view, Ohio courts have held that when an entire action is dismissed without prejudice pursuant to Civ. R. 41(A), as opposed to only certain claims or parties, interlocutory orders which do not contain Civ. R. 54(B) language that there is no just reason for delay are dissolved and are not appealable.

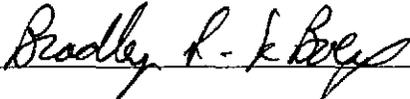
*Cleveland Industrial Square, Inc. v. Dzina*, 2006 WL 562146, at \*9, 2006-Ohio 1095 (Ohio Ct. App. 8<sup>th</sup> Dist. 2006).

Res judicata is not a valid affirmative defense to a refiled case when a party voluntarily dismisses without prejudice the entire action after a partial summary judgment ruling which dismissed one co-defendant when then that ruling does not contain an “express determination that there is no just reason for delay” as required by Civ. R. 54(B).

## CONCLUSION

The Fifth District Court of Appeals ruling is in obvious conflict with the rulings in several other districts in this case. The doctrine of res judicata is simply not applicable to the procedural facts and the law of this case. *Denham v. City of New Carlisle* is not controlling authority as this case clearly demonstrates that appellee voluntarily dismissed without prejudice the entire municipal court case after the previous partial summary judgment ruling did not contain the requisite Civ. R. 54(B) language that there is no just reason for delay. Appellee's second lawsuit brought in the court of common pleas was an entirely new action, not tainted by the previous ruling because the partial summary judgment decision was an interlocutory order, and hence, nonappealable. Appellee respectfully requests that the ruling of the Fifth District Court of Appeals be reversed and that the decision of the Knox County Court of Common Pleas be affirmed.

Respectfully submitted,

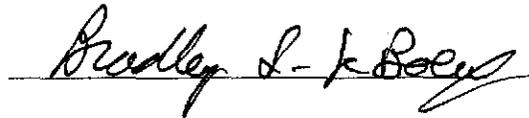
  
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Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary, first-class U.S. Mail, postage prepaid, to counsel for appellants on February 19, 2008, to the following:

Theodore Scott, Jr., Attorney at Law  
1465 E. Broad St.  
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A handwritten signature in black ink that reads "Bradley S. Le Boeuf". The signature is written in a cursive style and is positioned above a horizontal line.

Bradley S. Le Boeuf (0070371)  
Counsel for Appellee,  
The Carter-Jones Lumber Co.

FILED

JAN - 4 2008

COURT OF APPEALS  
KNOX COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

COURT OF APPEALS  
KNOX COUNTY, OHIO

THE CARTER-JONES LUMBER CO.,  
DBA, CARTER LUMBER CO.

Plaintiff-Appellee

JUDGES:

Hon. W. Scott Gwin, P.J.  
Hon. Sheila G. Farmer, J.  
Hon. Patricia A. Delaney, J.

-vs-

B & A BUILDING SERVICES, INC.,  
ET AL.

Defendants-Appellants

Case No. 07CA000003

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case No. 05AC090371

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

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Appendix 1

129/639

*Farmer, J.*

{¶1} In December of 2003, appellant, Andre Ballard, and his company, B & A Building Services, Inc., submitted a "Yard Account Application" with appellee, The Carter-Jones Lumber Co., dba Carter Lumber Co., for the purpose of purchasing materials on credit. Thereafter, the account became delinquent.

{¶2} On September 12, 2005, appellee filed a complaint in the Court of Common Pleas of Knox County, Ohio against appellant and B & A Building for money due and owing. On September 29, 2005, appellant filed a motion to dismiss, claiming in part res judicata because of a prior decision issued by the Mount Vernon Municipal Court (Case No. 05-CVH 00061). By judgment entry filed November 2, 2005, the trial court denied the motion.

{¶3} Appellant and appellee both filed motions for summary judgment. By judgment entry filed January 9, 2007, the trial court granted appellee's motion for summary judgment, and awarded appellee as against appellant and B & A Building \$10,766.16.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT EVIDENCE IN THE RECORD ESTABLISHED THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT REGARDING THE PERSONAL LIABILITY OF ANDRE BALLARD FOR THE DEBTS OF B & A BUILDING SERVICES, INC."

Appendix 2

129/640

II

{¶6} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT BASED ON THE EVIDENCED (SIC) IN THE RECORD THE CARTER-JONES LUMBER CO., D/B/A/ CARTER LUMBER CO., (HEREIN AFTER SOMETIMES REFERRED TO AS 'CARTER LUMBER CO.')

IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW AS TO THE PERSONAL LIABILITY OF ANDRE BALLARD FOR THE DEBTS OF B & A BUILDING SERVICES, INC."

III

{¶7} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT BASED ON THE EVIDENCE BEFORE THE COURT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION: THAT ANDRE BALLARD IS PERSONALLY LIABLE FOR THE DEBTS OF CARTER LUMBER CO."

IV

{¶8} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED THAT BASED ON THE EVIDENCE BEFORE THE COURT CARTER LUMBER CO. WAS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW."

V

{¶9} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT CARTER LUMBER CO. IS NOT BARRED FROM ASSERTING CLAIMS

AGAINST ANDRE BALLARD IN THE ABOVE CAPTIONED CASES AS A RESULT OF THE SUMMARY JUDGMENT RENDERED IN FAVOR OF ANDRE BALLARD, AND AGAINST CARTER LUMBER CO., ON JUNE 20, 2005, BY THE KNOX COUNTY MUNICIPAL COURT IN A CASED ENTITLED *THE CARTER LUMBER COMPANY, D/B/A CARTER LUMBER CO.*, CASE NO. 05-CVH 00061 (JUDGE PAUL E. SPURGEON)."

## VI

{¶10} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT B & A BUILDINGS SERVICES, INC.'S USE OF A NAME OTHER THAN ITS FULL CORPORATE NAME IN A CONTRACT RENDERS ANDRE BALLARD LIABLE FOR DEBTS ARISING FROM THAT CONTRACT SINCE IT WAS SIGNED BY ANDRE BALLARD."

## VII

{¶11} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT A & B BUILDING SERVICES, INC.'S GENERAL REFERENCE TO ITS CORPORATE NAME ON THE SIGNATURE LINE OF A CREDIT APPLICATION, RATHER THAN THE USE OF ITS FULL CORPORATE NAME, RENDERS ANDRE BALLARD PERSONALLY LIABLE FOR DEBTS ARISING FROM THAT CONTRACT SINCE IT WAS SIGNED BY ANDRE BALLARD."

VIII

{¶12} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT THE DOCTRINE OF ESTOPPED (SIC) DID NOT BAR CARTER LUMBER CO. FROM ASSERTING THAT ANDRE BALLARD IS PERSONALLY LIABLE FOR THE DEBTS OF B & A BUILDING SERVICES, INC."

IX

{¶13} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT IN THE ABSENCE OF A WRITING SIGNED BY ANDRE BALLARD, CLEARLY INDICATING HIS INTENT TO BE LIABLE FOR THE DEBT OF B & A BUILDING SERVICES, INC., THAT SUCH PERSONAL LIABILITY OF ANDRE BALLARD CAN BE ESTABLISHED BY A DISPUTED AFFIDAVIT OF AN INTERESTED PARTY, OR OTHERWISE BY THE DISPUTED ORAL STATEMENTS OF A WITNESS."

X

{¶14} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT CARTER LUMBER CO.'S CREDIT APPLICATION UNAMBIGUOUSLY RENDERS ANDREW BALLARD PERSONALLY LIABLE FOR THE DEBTS OF CARTER LUMBER CO."

XI

{¶15} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW,

THAT CARTER LUMBER CO.'S CREDIT APPLICATION DID NOT UNAMBIGUOUSLY RENDERS (SIC) B & A BUILDING SERVICES INC. SOLELY LIABLE FOR DEBTS OF CARTER LUMBER."

XII

{¶16} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT THE MANNER IN WHICH B & A BUILDING SERVICES, INC. WAS OPERATED RENDERS ANDRE BALLARD PERSONALLY LIABLE FOR THE DEBTS OF B & A BUILDING SERVICES, INC."

XIII

{¶17} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS WHEN IT DETERMINED, AS A MATTER OF LAW, THAT CARTER LUMBER CO. WAS ALLOWED TO ASSERT A FRAUD CLAIM AGAINST ANDRE BALLARD AND/OR B & A BUILDING SERVICE, INC. EVEN THOUGH CARTER LUMBER CO. FAILED TO PROPERLY ASSERT A FRAUD CLAIM IN ITS COMPLAINT FILED IN THE ABOVE CAPTIONED MATTER."

XIV

{¶18} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS IN FAILING TO PROPERLY WEIGH THE EVIDENCE OFFERED BY ANDRE BALLARD AND B & A BUILDING SERVICE, INC. THAT ANDRE BALLARD NEVER INTENDED TO BECOME PERSONALLY LIABLE FOR THE DEBTS OF B & A BUILDING SERVICES, INC."

XV

{¶19} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS IN THAT ITS DECISION IS NOT SUPPORTED BY APPLICABLE LEGAL AUTHORITY AND SAID DECISION IS NOT BASED ON RELEVANT, CREDIBLE AND RELIABLE FACTS."

XVI

{¶20} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS IN THAT ITS DECISION IS UNREASONABLE, ARBITRARY, CAPRICIOUS, EXCEEDS ITS POWER, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

XVII

{¶21} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS IN THAT ITS DECISION IS AN ABUSE OF ITS DISCRETION."

XVIII

{¶22} "THE KNOX COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS IN HOLDING THAT ANDRE BALLARD IS PERSONALLY LIABLE FOR THE DEBTS OF B & A BUILDING SERVICES, INC."

XIX

{¶23} "THE KNOX COUNTY COURT OF COMMON PLEAS LACKED JURISDICTION OF THE COMPLAINT FILED IN THE ABOVE CAPTIONED MATTER."

{¶24} We will address Assignment of Error V as it is dispositive of the appeal.

12/9/04

V

{¶25} Appellant claims the trial court erred in granting summary judgment to appellee as against him because appellee's claims were barred by the doctrine of res judicata. We agree.

{¶26} Res judicata is defined as "[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 Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, syllabus.

{¶27} Prior to filing the case sub judice, appellee had filed its complaint against appellant and B & A Building in the Mount Vernon Municipal Court (Case No. 05-CVH 00061). The trial court granted appellant a partial motion for summary judgment and dismissed him from the lawsuit. See, Judgment Entry filed June 20, 2005, attached to Appellant's September 29, 2005 Motion to Dismiss. Appellee then voluntarily dismissed the case on July 11, 2005, and refiled the case against appellant and B & A Building in the Court of Common Pleas of Knox County. Civ.R. 41(A) governs voluntary dismissals. Subsection (1) states the following:

{¶28} "(1) *By plaintiff; by stipulation.* Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

{¶29} "(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

Appendix 8

129/12/10

{¶30} "(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

{¶31} "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court."

{¶32} Appellant argues res judicata applies in this case because of the decision in the Mount Vernon Municipal Court. Said decision states the following:

{¶33} "The Court has reviewed the evidence, as defined by Civ.R. 56 filed in this matter. After considering this evidence and only this evidence, and after construing the evidence most strongly in favor of the Plaintiff, the Court finds that Defendant, Andre Ballard, signed the 'Yard Account Application' as an officer of B & A Building Services, Inc. and did not sign it in any individual capacity. Accordingly, the Court finds that the Defendant, Andre Ballard is entitled to judgment as a matter of law. Accordingly, the Defendant's Motion for Partial Summary Judgment is granted.

{¶34} "It is therefore ORDERED, ADJUDGED and DECREED that the claims against the Defendant, Andre Ballard, are dismissed at the Plaintiff's costs."

{¶35} Appellee argues its voluntary dismissal after the adverse ruling made the trial court's decision a nullity. Appellee further argues the summary judgment ruling was never a final appealable order and therefore the common pleas action was not bound by the doctrine of res judicata.

{¶36} The seminal case on this issue is *Denham v. City of New Carlisle*, 86 Ohio St.3d 594, 1999-Ohio-128. In *Denham* at 597, the Supreme Court of Ohio reviewed Civ.R. 41(A)(1) and held the following:

{¶37} "We interpret this language to mean that a Civ.R. 41 dismissal dismisses all claims against the defendant designated in the dismissal notice and does not apply to defendants named in the complaint who are not designated in the notice of dismissal.

{¶38} "This court has previously stated its desire to avoid piecemeal litigation. *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St.3d 378, 380, 381-382, 528 N.E.2d 195, 197-198. However, in this case all the remaining parties to the suit have been dismissed. Therefore, the only issue to be determined is whether New Carlisle may be liable to Denham. This further supports the contention that a Civ.R. 41(A) dismissal should be construed to render the parties as if no suit had ever been brought, but only with respect to the parties dismissed. For these reasons we find that a Civ.R. 41(A) dismissal nullifies the action only with respect to those parties dismissed from the suit.

{¶39} "Because we hold that a voluntary dismissal pursuant to Civ.R. 41(A) renders the parties as if no suit had ever been filed against only the dismissed parties, the trial court's summary judgment decision meets the requirements of Civ.R. 54(B). Therefore, the trial court's summary judgment decision is a final appealable order.

{¶40} "For all of the aforementioned reasons, we hold that a trial court's decision granting summary judgment based on immunity for one of several defendants in a civil action becomes a final appealable order when the plaintiff voluntarily dismisses the remaining parties to the suit pursuant to Civ.R. 41(A)(1)."

{¶41} To accept appellee's argument would give an imprimatur to forum shopping as clearly evidenced in this case. This concern is expressed by the *Denham* court and by our brethren from the Second District in *Jackson v. Allstate Insurance Company*, Montgomery App. No. 20443, 2004-Ohio-5775, ¶33.

{¶42} Appellee's voluntary dismissal had no force or affect on appellant because his liability had already been dismissed by the trial court via the motion for partial summary judgment. Once the voluntary dismissal was made, the ruling on the partial summary judgment motion became a final appealable order.

{¶43} There is no evidence that any appeal was ever taken from the Municipal Court order. As such, the decision of the Mount Vernon Municipal Court is binding and the doctrine of res judicata bars appellee's claims raised against appellant in this case.

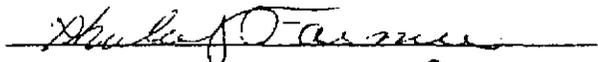
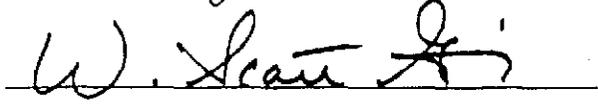
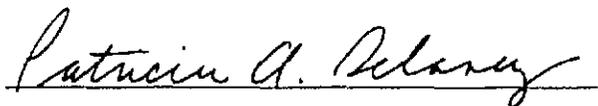
{¶44} Assignment of Error V is granted. The remaining assignments of error are moot.

{¶45} The judgment of the Court of Common Pleas of Knox County, Ohio is hereby reversed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

JUDGES

SGF/sg 1211

Appendix 11

129/049

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

FILED

JAN - 4 2008

COURT OF APPEALS  
KNOX COUNTY, OHIO

THE CARTER-JONES LUMBER CO.,  
DBA, CARTER LUMBER CO.

Plaintiff-Appellee

-vs-

B & A BUILDING SERVICES, INC.,  
ET AL.

Defendants-Appellants

JUDGMENT ENTRY

CASE NO. 07CA000003

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Knox County, Ohio is reversed.

*Shirley O. Farnum*

*W. Scott Hill*

*Leticia A. Polansky*

JUDGES

Appendix 12

129/650

IN THE MOUNT VERNON MUNICIPAL COURT  
KNOX COUNTY, OHIO

THE CARTER-JONES LUMBER CO.  
DBA CARTER LUMBER CO.,

PLAINTIFF

vs.

B & A BUILDING SERVICES, INC.

&

ANDRE BALLARD,

DEFENDANTS.

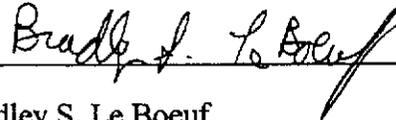
CASE NO. 05 CVH 61

JUDGE: PAUL E. SPURGEON

NOTICE OF DISMISSAL

Now comes plaintiff, The Carter-Jones Lumber Co., dba Carter Lumber ("Carter Lumber"), by and through its counsel, Bradley S. Le Boeuf, and hereby dismisses this action without prejudice pursuant to Civ. R. 41(A).

Respectfully submitted,



Bradley S. Le Boeuf  
Ohio Attorney Reg. No. 0070371  
E-mail: bleboeuf@dailyandhaskins.com

Daily & Haskins  
John A. Daily  
Ohio Attorney Reg. No. 0024741

Attorneys for Plaintiff  
7 West Bowery St., Suite 604  
Akron, OH 44308-1140  
330-762-9191; FAX: 330-762-4244

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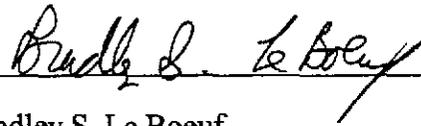
JUL 1 1 2005

MT. VERNON MUNICIPAL COURT  
JUDY A. SMITH  
CLERK

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the attached "Notice of Dismissal" was sent via first class U.S. mail, postage prepaid, on July 8, 2005 to the following:

Theodore Scott, Jr., Attorney at Law  
1465 E. Broad St.  
Columbus, OH 43215



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Bradley S. Le Boeuf  
7 W. Bowery St., Suite 604  
Akron, OH 44308-1140  
330-762-9191  
FAX: 330-762-4244  
Ohio Sup. Ct. No. 0070371  
One of the Attorneys for Carter Lumber Co.

IN THE MOUNT VERNON MUNICIPAL COURT  
MOUNT VERNON, OHIO

THE CARTER LUMBER  
COMPANY, d/b/a CARTER  
LUMBER CO.,

FILED

JUN 20 2005

CASE NO. 05-CVH 00061

Plaintiff  
VS.  
B & A BUILDING SERVICES, INC.  
et. al.,  
Defendants

MT. VERNON MUNICIPAL COURT  
JUDY A. SMITH  
CLERK

**PARTIAL SUMMARY  
JUDGMENT ENTRY**

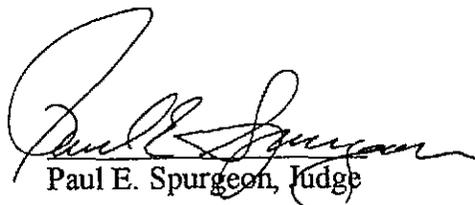
The Defendant's, Andre Ballard, Motion for Partial Summary Judgment came on for non-oral hearing after 4:00 p.m. on June 17<sup>th</sup>, 2005 as previously scheduled.

The Court has reviewed the evidence, as defined by Civ. R. 56 filed in this matter. After considering this evidence and only this evidence, and after construing the evidence most strongly in favor of the Plaintiff, the Court finds that Defendant, Andre Ballard, signed the "Yard Account Application" as an officer of B & A Building Services, Inc. and did not sign it in any individual capacity. Accordingly, the Court finds that the Defendant, Andre Ballard is entitled to judgment as a matter of law. Accordingly, the Defendant's Motion for Partial Summary Judgment is granted.

It is therefore ORDERED, ADJUDGED and DECREED that the claims against the Defendant, Andre Ballard, are dismissed at the Plaintiff's cost.

The Jury Trial scheduled for the July 28, 2005 will proceed against the remaining Defendant, B & A Building Services Co.

The Court Orders the Clerk of Courts to serve notice of the filing of this Judgment Entry, within three (3) days of the filing of this entry, upon every party who is not in default for failure to appear. The service is to be completed in accordance with C. R. 58.

  
Paul E. Spurgeon, Judge

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Judgment Entry that has been filed and journalized in the above captioned case was served by ordinary U. S. mail upon the Attorneys or parties listed below, on the 21<sup>st</sup> day of June 2005.

Judy Smith, Clerk of Courts

By: Janet R. Hulse  
Deputy Clerk

cc: Bradley S. LeBoeuf, Attorney for the Plaintiff  
Theodore Scott, Jr., Attorney for the Defendant, Andre Ballard