

ORIGINAL

IN THE SUPREME COURT OF OHIO

GERALD PRICE,)
)
Appellant,)
)
v.)
)
CARTER LUMBER CO., *et al.*,)
)
Appellees.)

On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District

Court of Appeals
Case No. 24991

10-1852

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT GERALD PRICE

Edward L. Gilbert (0014544) (COUNSEL OF RECORD)
Tracee D. Hilton-Rorar (0082431)
Edward L. Gilbert Co., LPA
One Cascade Plaza, Suite 825
Akron, Ohio 44308
(330) 376-8855
Fax No. (330) 376-8857

COUNSEL FOR APPELLANT, GERALD PRICE

Thomas F. Haskins, Jr. (0005532)
430 White Pond Drive, Suite 200
Akron, Ohio 44320
(330) 762-5011
Fax No. (330) 762-5002

Michele Morris (0032688)
430 White Pond Drive, Suite 500
Akron, Ohio 44320
(330) 253-6603
Fax No. (330) 762-5063

COUNSEL FOR APPELLEES, CARTER LUMBER
COMPANY AND JIM COLLINS

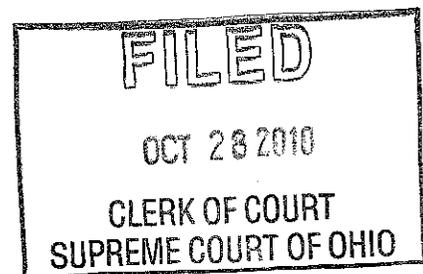


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	6
<u>Proposition of Law No. I:</u> A Trial Court may not enter final judgment on all claims pursuant to Ohio Civil Rule 54(B)	6
<u>Proposition of Law No. II:</u> The Ohio Rule of Civil Procedure 54(B) does not authorize motions for reconsideration.	6
<u>Proposition of Law No. III:</u> Claims against Appellee Carter Lumber were not barred by the doctrine of <i>res judicata</i> because the claims were never fully litigated	7
<u>Proposition of Law No. IV:</u> Summary judgment is not applicable when Appellant brings separate claims against an Appellee in his individual and official capacity and the court rules that Appellee failed to bring separate claims	10
<u>Proposition of Law No. V:</u> There is sufficient evidence to establish that there are genuine issues of material fact remaining for all of Appellant’s claims	11
CONCLUSION	15
CERTIFICATE OF SERVICE	17
APPENDIX	
Decision and Journal Entry of the Summit County Court of Appeals, Ninth Appellate District (Sep. 15, 2010)	A-1

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

This case presents critical issues for the future of disabled employees in the state of Ohio. At the heart of Mr. Price's claim is the intent of Ohio Revised Code section 4112. R.C. 4112 protects disabled employees in Ohio from any unlawful discrimination. This statute provides a state claim similar, but not identical, to a violation of Title VII of the Civil Rights Act of 1991. 42 U.S.C. 2000 et seq.

In this case, the Court of Appeals barred the R.C. 4112 claim on the basis of claim preclusion on a ruling of non state-law issues in federal court. The Court of Appeals also ruled that, Ohio Civil Rule 54(B) can be used to reconsider a prior ruling denying summary judgment and then granting summary judgment.

The ruling of the Court of Appeals threatens claims brought under R.C. 4112. The implication of the decision of the court of appeals affects every person with disabilities. In the state of Ohio, almost two million people over the age of five live with some sort of disability. *U.S. Census Bureau*. The significance of the decision of the Court of Appeals goes beyond the almost two million Ohioans living with disabilities; it affects every employee of a protected class. This ruling attempts to restrict the power of R.C. 4112, even though R.C. 4112 is to "be construed liberally for the accomplishments of its purposes." R.C. 4112.08.

The Court of Appeals essentially denied Mr. Price an opportunity to litigate his state claim against an individual to a federal judge because both the federal and the state claim were based on the same set of facts regarding an employer's discriminatory actions. Under the statutory framework of R.C. 4112, a supervisor who engages in discriminatory actions may be held jointly and severally liable with his employer as though the two were co-employers for the

injured party. *Genaro v. Cent. Transp. Inc.* (1999), 84 Ohio St. 3d. 293, 300, 703 N.E.2d 782; *Edwards v. Ohio Inst. of Cardiac Care* (2007), 170 Ohio App.3d 619, 637, 868 N.E.2d 721. The ruling of the court of appeals moots any R.C. 4112 claim if it arises out the same set of facts as the federal claim. Further, the ruling of the court of appeals would prevent every disabled employee from recovering from employers in their individual capacity because no such recovery exists under the federal statute and, according to this ruling, a federal ruling bars all state claims.

This Court has noted time and time again that there is strong public policy against discrimination in the workplace. This Court found “that there is no place in this state for any sort of discrimination no matter the size, shape, or form or in what clothes it might masquerade. This, of course, includes discrimination in the workplace.” *Genaro* at 785. For these reasons, this Court must grant jurisdiction to hear this case and review the erroneous and dangerous decision of the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

On September 2, 2003, Gerald Price (“Price”) filed a charge of discrimination with the EEOC. On February 18, 2004, the EEOC found probable cause of discrimination against Appellees Carter Lumber Company and Collins. Therefore, on September 8, 2004, the EEOC filed suit against Carter Lumber and Collins on behalf of Price. Unfortunately, the EEOC did not seek all damages and/or pursue all claims to which Price was entitled. Therefore, on October 13, 2004, Price, by and through the undersigned, initiated his own lawsuit in the United States District Court for the Northern District of Ohio. This lawsuit was consolidated for trial with the EEOC’s lawsuit. In this consolidated lawsuit, Price and the EEOC sought relief on both federal and state causes of action for disability discrimination under the ADA, chapter 4112 of the Ohio Revised Code, and intentional infliction of emotional distress. The District Court decided to only

deal with the federal claims; therefore, on May 19, 2005, the District Court dismissed Price's state law claims without prejudice. Consequently, the only way Price could litigate his state claims was to file a Complaint in state court. On May 16, 2006, Price filed a Complaint in the Summit County Court of Common Pleas alleging disability discrimination under Chapter 4112 of the Ohio Revised Code, intentional infliction of emotional distress, and termination in violation of public policy. On May 6, 2008, the Trial Court denied Appellees' Motion for Summary Judgment as to the disability discrimination and intentional infliction of emotional distress claims and granted their Motion for Summary Judgment as to the termination in violation of public policy claim. On August 7, 2009, Appellees filed a Motion for Reconsideration for their Motion for Summary Judgment. On August 25, 2009, the Trial Court denied Appellees' Motion for Reconsideration. On September 16, 2009, pursuant to Civ. R. 54(B), the Trial Court *sua sponte* reconsidered the Order denying Appellees' Motion for Summary Judgment and granted it.

Price appealed to the Summit County Court of Appeals. The Court of Appeals affirmed in part the judgment of the Common Pleas Court. The Court of Appeals upheld the Trial Court's granting of summary judgment to Carter Lumber because all claims against Carter Lumber "are barred by claim preclusion." The Appellate Court reversed the part of the entry that granted summary judgment to Jim Collins ("Collins") because Price stated claims against him in his individual capacity and the Trial Court did not determine whether those claims were barred by issue preclusion.

The Court of Appeals erred in ruling that Mr. Price's claims against Collins and Carter because his claims had been "fully litigated in the [d]istrict [c]ourt." The Court of Appeals also

erred in failing to recognize that Civ. R. 54(B) is not proper basis for a reversal of a motion for summary judgment.

Price was intermittently employed with Carter Lumber at the Norton location since March 10, 1998. Price has a substantial amount of knowledge regarding the construction industry, especially in the areas of carpentry and mechanical skills. Throughout his employment at Carter Lumber, Price was a punctual employee with an excellent attendance record. His main duties as a backup truck driver were to help catch up on the workload of the regular truck driver and take out deliveries. On or about October 29, 2001, Price was laid off from Carter Lumber due to a lack of work.

Sometime in early 2002, Collins, manager at Carter Lumber, contacted Price to see if he was interested in returning to work. On or about February 4, 2002, in response to Collins' phone call, Price went to the store and completed a job application. On this same day, Price returned to work and performed essentially the same duties as before.

Shortly thereafter, Price underwent eye surgery because of renal failure. As a result of his eye surgery, he had a temporary restriction on lifting. Price informed Collins of this temporary restriction. Despite this temporary restriction, Price was still able to help out in the yard and work on the counter in sales. Although Price tried to use the tow motor as often as possible, he returned to the yard doing essentially full lifting. At this time, Price only had slight lifting restrictions on extremely heavy items such as large sheets of concrete and lumber. Price never told the foreman, Jim Bailey ("J. Bailey") that he was physically unable to do any task that was asked of him. Up until mid-December 2002, Price had no knowledge of what type of medical condition he had. Price was hospitalized sometime around December 11 or 12, 2002. On or about December, 17, 2002, Price and Collins discussed that he would be off work until he could get a

doctor's release and that Price could use his accrued sick and vacation time. At some point, Price also had discussions with Assistant Manager, Michael McKee ("McKee") about his dialysis schedule. Price told McKee that he would be able to work, but Carter Lumber would have to work around his dialysis schedule; Price would only miss two hours of overtime per week.

On or about January 25, 2003, Price gave work releases to Collins. The releases, signed by his physician, stated that Price could return to work on light duty. Price also informed Collins about his dialysis schedule. Collins took Price's work releases and told him that sales were down. Collins then informed Price that he did not have the man hours and was going to have to lay him off. However, no other employees were laid off and/or terminated between December 11, 2002 and August 2003. Price was under the impression that he still had a job with Carter Lumber from December 11, 2002 until January 25, 2003.

Carter Lumber's procedure was to terminate employees in the slow months of the year based on the man hours allocated by the corporate office. Normally, the terminated employees would be brought back when the sales picked up. Collins would call the employee, have them come in and then he would talk to them. The reason that Collins had the employees come to the store was so they could put in a new employment application. This is the same procedure that Collins followed when Price was laid off in 2001.

Sometime in May 2003, Collins told Price that he was not going to be calling him back to work because he could not work around Price's dialysis schedule. Price informed Collins that he already had his dialysis schedule set up and he was only going to lose two hours of overtime a week. The only major restriction Price had was that he could not load extremely heavy items. Despite all of Price's attempts to return to work, Carter Lumber hired William Hearney for counter sales in July 2003. Carter Lumber did not even consider Price for this position because

he did not apply and because management felt he could not do the job. Although Collins testified that he felt Price could not do the job in the Spring of 2003, Collins had no knowledge of Price's impairment after January 2003. Price was never advised by Collins or McKee that he needed to reapply. It is clear that Price was not allowed to reapply because of his disability.

The district manager and store managers at Carter Lumber have never received any training on the Americans with Disabilities Act ("ADA"), nor have some managers read the specific company policy on employees with medical restrictions.

In support of his position on these issues, the Appellant presents the following arguments.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: A Trial Court may not enter final judgment on all claims pursuant to Ohio Civil Rules 54(B).

The Court of Appeals erred in affirming a dismissal all of Mr. Price's claims because the trial court may not enter final judgment on all claims pursuant to Ohio Civil Rule 54(B). Civ.R. 54(B) provides, in pertinent part, that "(w)hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, 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." (*Emphasis added*). 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.

Alexander v. Buckeye Pipe Line Co. (1977), 49 Ohio St.2d 158, 160, 359 N.E.2d 702. The effect of Civ.R. 54(B) is purely procedural. *Id.* at 159. It permits both the separation of claims for purposes of appeal and the early appeal of such claims, within the discretion of the trial court, but it does not affect either the substantive right to appeal or the merits of the claims. *Id.* The

trial court and the court of appeals clearly erred by dismissing all of Price's claims pursuant to Civ.R. 54(B); therefore, all claims should be reinstated against Appellees.

Proposition of Law No. II: The Ohio Rule of Civil Procedure 54(B) does not authorize motions for reconsideration.

The court of appeals should not have affirmed Appellees' Motion for Summary Judgment because the Ohio Rules of Civil Procedure do not authorize motions for reconsideration. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 378, 423 N.E.2d 1105. Civ.R. 60(B), in pertinent part, simply states that: "The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules." *Id.* The Rules of Civil Procedure specifically limit relief from judgments to motions expressly provided for within the same Rules. *Id.* A motion for reconsideration is conspicuously absent within the Rules. *Id.* Rather the Civil Rules do allow for relief from final judgments by means of Civ.R. 50(B) (motion notwithstanding the verdict), Civ.R. 59 (motion for a new trial), and Civ.R. 60(B) (motion for relief from judgment). *Id.* Without a specific prescription in the Civil Rules for a motion for reconsideration, it must be considered a nullity. *Id.* As a result, Appellees' Motion for Reconsideration is a nullity and it should have been summarily denied. *In See also State ex rel. Durkin v. Ungaro* (1988), 39 Ohio St.3d 191, 192, 529 N.E.2d 1268; *Consolidated Rail Corp. v. Forest Cartage Co.* (1990), 68 Ohio App.3d 333, 340, 588 N.E.2d 263; and *Proctor v. King*, Ohio App.5th Dist. No. 2007-CA-00133, ¶ 40. The trial court initially denied Appellees' Motion for Summary Judgment and Appellees' Motion for Reconsideration, but then *sua sponte* reconsidered the trial court's May 6, 2008 Order denying Appellees' Motion for Summary Judgment. The trial court used Rule 54(B) to dismiss Price's claims; however, the trial court is actually reversed its earlier denial of Appellees' Motion for Reconsideration. The Court of Appeals erred in affirming this reconsideration. This Court should therefore reinstate Appellant's claims.

Proposition of Law No. III: Claims against Appellee Carter Lumber were not barred by the doctrine of *res judicata* because the claims were never fully litigated.

The Court of Appeals erred in affirming summary judgment when it ruled that all claims against Carter Lumber were barred by the doctrine of *res judicata* although the claims were never fully litigated. The doctrine of *res judicata* involves both claim preclusion and issue preclusion. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381, 653 N.E.2d 226. Under the claim preclusion branch 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." *Id.* at syllabus. A "transaction" is a "common nucleus of operative facts." *Grava*, 73 Ohio St.3d at 382, quoting 1 Restatement of the Law 2d, Judgments (1982), Section 24, Comment b. Issue preclusion prevents relitigation of an issue that has been "actually and necessarily litigated and determined in a prior action." *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 107, 538 N.E.2d 1058. Regarding the issue of *res judicata* with federal court, "to the extent to which a federal court judgment operates as *res judicata* in the federal court, it also operates as *res judicata* in Ohio State courts." *Horne v. Woolever* (1959), 170 Ohio St. 178, 183, 163 N.E.2d 378.

In order for a claim to be barred on the grounds of *res judicata*, the new claim must share three elements with the earlier action: (1) identity of the parties or their privies; (2) identity of the causes of action; and (3) a final judgment on the merits. *Omlin v. Kaufmann & Cumberland Co., L.P.A.*, Ohio App. 8 Dist. No. 82248, 2003-Ohio-4069 ¶ 1, citing *Horne* supra.

In the case at bar, Appellees, especially Collins, cannot meet any of these elements. The District Court did not decide the state claims on the merits. As set forth above, there are issues in the state case that are different than issues in the federal case. Specifically, while the District Court

found that Price failed to actually apply for a position and/or request a reasonable accommodation prior to his layoff, the District Court never got to the heart of the case, i.e. whether Price was laid off and not recalled due to his disability. Further, the burden is much less stringent in state court than it is in Federal Court. Specifically, under the ADA in the Sixth Circuit, a plaintiff must prove that his disability was the “sole reason” he was terminated. *Monette v. Electronic Data Sys. Corp.* (1996), 6th Cir., 90 F.3d 1173, 1178. Meanwhile, under Chapter 4112 of the Ohio Revised Code, a plaintiff need only prove that his disability was a “determining factor” in the defendants’ decision to terminate him. *Sicklesmith vs. Chester Hoist*, (2006) 169 Ohio App. 3d 470, 483, 863 N.E.2d 677. Additionally, Price’s claims for intentional infliction of emotional distress and wrongful termination were never addressed by the District Court and were not decided on the merits.

Furthermore, it is clear from the District Court’s May 17, 2005 Judgment Entry that the state law claims against Collins were dismissed without prejudice. Therefore, *res judicata* does not apply to any claims against Collins because there was no valid final judgment rendered upon the merits. As to the claims against Carter Lumber, it is clear from the jury instructions and jury interrogatories that Price’s disability discrimination claim under Chapter 4112 of the Ohio Revised Code, intentional infliction of emotional distress claim, and wrongful termination claim were never litigated and determined in a prior action. Additionally, in Appellees’ Motion for Reconsideration of Motion for Summary Judgment, they concede that no state law claims were litigated in the District Court. Therefore, Price’s claims are not barred by the doctrine of *res judicata*.

Proposition of Law No. IV: Summary judgment is not applicable when Appellant brings separate claims against an Appellee in his individual capacity and a court rules that Appellee failed to bring separate claims.

The Court of Appeals erred in affirming summary judgment because Appellant brought separate claims against Appellee Collins in his individual capacity since the Complaint clearly stated that Collins was being sued in his individual and official capacity. Because Ohio is a notice-pleading state, a plaintiff is not required to plead operative facts with particularity. *Cincinnati v. Beretta U.S.A. Corp.* (2002) 95 Ohio St.3d 416, 424, 768 N.E.2d 1136. Under Civ.R. 8(A), a complaint need only contain a short and plain statement of the claim showing that the party is entitled to relief. *Id.* Thus, a plaintiff is not required to prove his or her case at the pleading stage, *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063, and need only give reasonable notice of the claim. *Ogle v. Ohio Power Co.* (2008) 180 Ohio App.3d 44, 48, 903 N.E.2d 1284. The simplified notice-pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and to dispose of nonmeritorious claims. *Id.* Because it is easy for the pleader to satisfy the requirements of Civ.R. 8(A), few complaints are subject to dismissal. *Id.* This is true even where the court doubts that the nonmoving party will prevail at trial. *Day v. Middletown-Monroe City School Dist.* (2000), 12 Dist. No. CA99-11-186, 2000 WL 4782, ¶ 5. Collins received reasonable notice of all claims because he was named as a defendant in his individual and official capacity.

Further, in *Genaro v. Central Transport, Inc.* (1999), 84 Ohio St.3d 293, 297, 703 N.E.2d 782, this court concluded that an individual supervisor or manager who violates the mandates of R.C. 4112 can be found individually liable for the violations. This court based its decision on the fact that “by holding supervisors and managers individually liable for their discriminatory actions, the antidiscrimination purposes of R.C. Chapter 4112 are facilitated, thereby furthering

the public policy goals of this state regarding workplace discrimination.” *Id.* In the Complaint at issue, Price named Collins as a party in both his individual and official capacities and set forth claims for disability discrimination, wrongful termination, and intentional infliction of emotional distress. Therefore, Collins was certainly on notice that he was being sued. Additionally, if he was unsure of the specific allegations against him, he was free to file a Motion for a More Definite Statement. See *Fletcher v. Univ. Hosps. of Cleveland* (2008), 120 Ohio St.3d 167, 169, 897 N.E.2d 147; *Landskroner v. Landskroner* (2003) 154 Ohio App.3d 471, 482, 797 N.E.2d 1002. His failure to do so constitutes a waiver of the arguments raised in his Motion for Summary Judgment. *McCamon-Hunt Ins. Agency, Inc. v. Medical Mut. of Ohio*, 7 Dist. No.02-CA-23, 2003 -Ohio- 1221, ¶ 12.

Proposition of Law No. V: There is sufficient evidence to establish that there are genuine issues of material fact remaining for all of Appellant’s claims.

There is sufficient evidence to establish that there are genuine issues of material fact remaining for all of Appellant’s claims.

1. Appellant Can Prove a Case of Discrimination under O.R.C. Chapter 4112 against Appellees.

Price can easily establish that he was the victim of disability discrimination under Chapter 4112 of the Ohio Revised Code. In order for a plaintiff to establish a prima-facie case of disability discrimination, he must demonstrate that:

1. He had a disability;
2. He was terminated and/or subjected to an adverse employment action at least in part because of his disability; and
3. He could have substantially performed the essential functions of his job.

Young v. Stelter & Brinck, Ltd. (2007) 174 Ohio App.3d 221, 228, 2007 -Ohio- 6510, N.E.2d 874. See also *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569, 571, 697 N.E.2d 204. Clearly, Price can meet these elements.

First, the overwhelming evidence in this case establishes that Price was certainly qualified for his job both at the time of the layoff and the time he should have been recalled. Specifically, Price is extremely knowledgeable in the construction industry. Price is fully able to perform his job with minor reasonable accommodations for a lifting restriction. Specifically, Price needs assistance lifting extremely heavy items such as large sheets of concrete or lumber. However, Carter Lumber can easily accommodate Price by providing him with a door dolly, which is commonly used in the construction industry to move extremely heavy items such as steel doors, windows, drywall, etc. Furthermore, it is the general practice at Carter Lumber for employees to frequently ask for assistance from one another.

Finally, Price was clearly discriminated based on his disability. After Price discovered he was suffering from complete renal kidney failure, he set up his dialysis schedule in the evening, so he could have minimal interruption with his work schedule at Carter. On or about January 25, 2003, Price gave Collins work releases, signed by his physician allowing him to return to work on light duty. Price further informed Collins about his dialysis schedule. Collins then told Price that he was laid off/terminated because of slow sales. However, no other employees were laid off and/or terminated between December 11, 2002 and August 2003.

Appellees also make a point that the District Court jury found under the strict “sole factor” federal standard that Price failed to re-apply for work after he was laid off. First, under the state “determining factor” standard, a state jury could conclude that one of the reasons why Price did not reapply was the result of disability discrimination. Second, it is completely

irrelevant to Price's claim that he was laid off due to his disability. Third, it is not necessary that an employee actually apply for a position when the employee knows that the application process is an exercise of futility. *Kreuzer v. Brown* (1997) 6th Cir., 128 F.3d 359, 370, citing *International Bhd. of Teamsters v. United States* (1977), 431 U.S. 324, 365-66, 97 S.Ct. 1843, "a plaintiff need not make the futile gesture of applying for a job when the employer has made it clear that it intends to refuse such an application for bad reasons." See also *Payne v. Bobbie Brooks, Inc.* (1980) N.D. Ohio, 505 F.Supp. 707, 716-17; *Wagner v. G.A. Gray Co.* (1989) 6th Cir., 872 F.3d 142; and *Mitchell v. Lemmie*, 2 Dist. No. 21511, 2007 -Ohio- 5757, ¶ 145.

Although it is undisputed that Price did not return to work after December 2003, the terms of his separation are at issue. Carter Lumber asserts that it "did not have a layoff procedure, but rather terminates employees in the slow season and, in the event the employee wants to return to Carter Lumber in the spring, the employee is required to re-apply for work." Contrary to Collins' deposition testimony, internal Carter Lumber documents indicate that "layoffs" are used at the Norton Carter Lumber store. In fact, Collins has used the term "layoff" in employees' files. Appellees further state that "[t]his is the information that Mr. Price knew; he had been subject to it in the past." Contrary to the assertions of Appellees, this was not the procedure that Price and other employees were subjected to in the past. Specifically, sometime in early 2002 following a seasonal layoff/termination, Collins contacted Price to see if he was interested in returning to work. On or about February 4, 2002, in response to Collins' phone call, Price came the store and per Collins request completed a job application. At Collins' discretion, employees re-applied for employment at Carter Lumber following a seasonal layoff. However, this was not a consistent policy used at Carter Lumber.

Appellees further argued that Collins did not consider Price for employment in 2003 because he did not apply. However, Collins' testimony of why Price was not considered for employment tends to waver upon inquiry. Prior to the lawsuit, in an interview with the Ms. Crew of the EEOC, Collins was asked the following questions under oath:

Q. Who made the decision not to rehire Mr. Price in the spring of 2003? Was anyone else consulted in the decision making process?

A. It was up to him to reapply.

Collins later testifies in his deposition that aside from Price's failure to re-apply, Price would not be able to return to work when business picked up because "when we hired new personnel in March, we felt that he [Price] couldn't do the job. Clearly, Appellees' contention that Price could not be considered for employment in the Spring of 2003 was pretextual for unlawful disability discrimination. Furthermore, the fact the Price did not fill out a second application, has no bearing whatsoever on whether Appellees unlawfully terminated Price in January 2003 due to his disability. The fact that no other employees were laid off and/or terminated between December 11, 2002 and August 2003 raises a strong presumption of unlawful discrimination. Clearly, Appellees engaged in unlawful discrimination and were not entitled to summary judgment.

2. Appellant Can Succeed on His Intentional Infliction of Emotional Distress Claim.

In order to recover damages due to the negligent or intentional infliction of emotional distress, a plaintiff must prove four elements:

1. The actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff;
2. The actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community;
3. The actor's actions were the proximate cause of plaintiff's psychic injury; and

4. The mental anguish suffered by plaintiff is serious and of a nature that no reasonable man could be expected to endure it.

Lykins v. Miami Valley Hosp. (2004), 157 Ohio App.3d 291, 322, 811 N.E.2d 124, citing *Phung v. Waste Mgt., Inc.* (1994), 71 Ohio St.3d 408, 410, 644 N.E.2d 286.

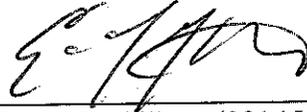
Looking at the facts most favorable to Price, it is clear that Appellees either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to Price. Specifically, Appellees laid Price off and refused to recall him due to his disability. Additionally, they lied to Price the entire time he was laid off. Specifically, they repeatedly assured Price that he would be re-employed and through their prior interaction with him implied that he would not have to go through the formal application process. In reality, however, Appellees were soliciting applications from others and knew that they had no intentions of re-hiring Price. As a result, this Court should reverse the Appellate Court's decision to affirm the Trial Court's decision to dismiss Price's Intentional Infliction of Emotional Distress Claim.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

EDWARD L. GILBERT CO., LPA

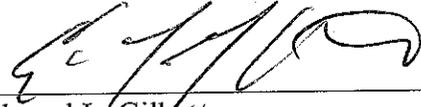


Edward L. Gilbert (0014544)
Tracee D. Hilton-Rorar (0082431)
1 Cascade Plaza, Ste 825
Akron, Ohio 44308
(330) 376-8855
(330) 376-8857 FAX
egilbert8@sbcglobal.net

COUNSEL FOR APPELLANT,
GERALD PRICE

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appearance was sent by ordinary U.S. Mail to counsel for Appellees, Thomas F. Haskins, Jr., 430 White Pond Drive, Suite 200, Akron, Ohio 44320, and Michele Morris, 430 White Pond Drive, Suite 500, Akron, Ohio 44320 on October 27th, 2010.



Edward L. Gilbert
Tracee D. Hilton-Rorar

COUNSEL FOR APPELLANT,
GERALD PRICE

STATE OF OHIO)
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HORTIGAN
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
2010 SEP 15 AM 8:07

GERALD PRICE

SUMMIT COUNTY No. 24991
CLERK OF COURTS

Appellant

v.

CARTER LUMBER CO., et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2006-05-3098

Appellees

DECISION AND JOURNAL ENTRY

Dated: September 15, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Gerald Price claims that his former supervisor told him that Carter Lumber Company would not rehire Mr. Price after a lay-off because Carter was not willing to work around his dialysis schedule. Mr. Price sued Carter and the former supervisor, Jim Collins, in federal district court for disability discrimination. The federal court dismissed without prejudice state-law claims that Mr. Price had brought against Mr. Collins. Mr. Price then sued Carter and Mr. Collins in the Summit County Court of Common Pleas. After Carter won a jury verdict in federal court, both Carter and Mr. Collins moved the common pleas court for summary judgment on all of his claims against them. The common pleas court initially denied the motion for summary judgment and a motion to reconsider, but later sua sponte granted summary judgment to both defendants. Mr. Price has appealed that ruling. This Court affirms the part of the common pleas court's entry that granted summary judgment to Carter because all claims against

the company are barred by claim preclusion. This Court reverses the part of the entry that granted summary judgment to Mr. Collins because Mr. Price stated claims against him in his individual capacity and the common pleas court did not determine whether those claims are barred by issue preclusion. This Court remands this matter for consideration by the common pleas court of whether a genuine issue of material fact remains for trial against Mr. Collins.

BACKGROUND

{¶2} The Equal Employment Opportunity Commission filed a complaint against Carter in federal district court, making claims on behalf of Mr. Price under Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991. The Commission averred that Carter discriminated against Mr. Price by denying him employment because of his disability.

{¶3} Mr. Price filed his own federal complaint against both Carter and Mr. Collins. He averred a disability discrimination claim against Carter under the Americans with Disabilities Act, a similar state-law claim against both Carter and Mr. Collins under Chapter 4112 of the Ohio Revised Code, and a claim against both Carter and Mr. Collins for intentional infliction of emotional distress. The district court consolidated the two federal cases and dismissed Mr. Price's claims against Mr. Collins, both of which were based on state law, without prejudice.

{¶4} Mr. Price later sued Carter and Mr. Collins in the Summit County Common Pleas Court for disability discrimination under Chapter 4112 of the Ohio Revised Code, intentional infliction of emotional distress, and violation of public policy. In their answers, Carter and Mr. Collins asserted defenses including "waiver, collateral estoppel, and/or issue preclusion and/or claim preclusion." Four months later, the parties tried the federal case.

{¶5} Following a trial limited to the federal disability discrimination claim against Carter, the jury returned a verdict, supported by interrogatory responses, in favor of Carter and against Mr. Price and the Commission. While post-judgment motions remained pending in federal court, Carter and Mr. Collins moved the common pleas court to continue the trial of the state claims until after the district court's judgment would become final and res judicata would apply. Mr. Price opposed that motion, arguing that different standards apply to the state and federal claims and that, therefore, res judicata would not bar his state claims. The common pleas court denied the requested continuance.

{¶6} Carter and Mr. Collins moved the common pleas court to reconsider its denial of the requested continuance. They included with their motion certified copies of jury interrogatories from the federal case, the federal court's journal entry announcing the verdict against Mr. Price, and Mr. Price's federal complaint. The common pleas court granted the motion to reconsider, cancelled the trial, and placed the case on the court's inactive docket.

{¶7} When the common pleas court reactivated the case, Carter and Mr. Collins moved for summary judgment, arguing that, due to the preclusive effect of the federal jury interrogatory responses, Mr. Price was barred from pursuing his state-law claims against them. Following Mr. Price's response to that motion, the common pleas court denied summary judgment on the disability discrimination and intentional infliction of emotional distress claims, but granted Carter and Mr. Collins summary judgment on the violation of public policy claim. After the case was transferred to a new trial judge, Carter and Mr. Collins moved for reconsideration of the denial of summary judgment on the disability discrimination and intentional infliction of emotional distress claims. The new judge refused to reconsider, determining that Carter and Mr. Collins had not presented any evidence that the first common pleas judge had not considered.

Later, the new judge sua sponte reconsidered the motion for summary judgment. She then granted summary judgment to Carter based on claim preclusion and to Mr. Collins based on a determination that Mr. Price had failed to state a separate claim against him in his individual capacity. Mr. Price has timely appealed the common pleas court's grant of summary judgment to both Carter and Mr. Collins on his claims of disability discrimination and intentional infliction of emotional distress.

CIVIL RULE 54(B)

{¶8} Mr. Price's first assignment of error is that the common pleas court incorrectly "dismiss[ed]" all of his claims "pursuant to Ohio Civil Rule 54(B)." He has argued that his claims should be "reinstated" because Rule 54(B) of the Ohio Rules of Civil Procedure is not a proper basis to enter final judgment on all claims and application of the rule should not affect the merits of a claim.

{¶9} Rule 54(B) provides, in part, that, unless a decision that adjudicates less than all the claims in an action includes a determination that there is "no just reason for delay," that decision is "subject to revision at any time before the entry of judgment." The common pleas court's judgment entry begins: "Pursuant to Civ.R. 54(B), this Court sua sponte reconsiders the Order of May 6, 2008, denying Defendants' [m]otion for [s]ummary [j]udgment." Contrary to Mr. Price's argument, the common pleas court's entry does not indicate that it was basing its decision to grant summary judgment on Civil Rule 54(B). It indicates that, based on Civil Rule 54(B), the court had decided to reconsider its May 2008 ruling denying summary judgment on the claims of disability discrimination and intentional infliction of emotional distress, which it was able to do because its May 2008 order was "subject to revision at any time before entry of

judgment.” Civ. R. 54(B). As the common pleas court did not base its decision to grant summary judgment on Civil Rule 54(B), Mr. Price’s first assignment of error is overruled.

RECONSIDERATION

{¶10} Mr. Price’s second assignment of error is that the common pleas court should not have granted the defendants’ motion for reconsideration of their motion for summary judgment because, according to him, the Ohio Rules of Civil Procedure do not authorize motions for reconsideration. Citing *Pitts v. Ohio Department of Transportation*, 67 Ohio St. 2d 378 (1981), he has argued that the common pleas court had no authority to reverse its earlier denial of the motion for reconsideration because the motion for reconsideration was a nullity.

{¶11} The Ohio Supreme Court has held that “[t]he Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment in the trial court.” *Pitts v. Ohio Dep’t of Transp.*, 67 Ohio St. 2d 378, at paragraph one of the syllabus (1981). Therefore, it has determined “that motions for reconsideration of a final judgment in the trial court are a nullity.” *Id.* at 379. The issue turns, however, on the operative word: “final.” In *Pitts*, the Supreme Court explained that, on the authority of Rule 54(B) of the Ohio Rules of Civil Procedure, “[i]nterlocutory orders are subject to motions for reconsideration, whereas judgments and final orders are not.” *Id.* at 379 n.1. Although the granting of summary judgment may be final and appealable under Section 2505.03 of the Ohio Revised Code, the denial of summary judgment generally is not. *Budich v. Reece*, 9th Dist. No. 24108, 2008-Ohio-3630, at ¶7-8; *Interstate Props. v. Prasanna Inc.*, 9th Dist. Nos. 22734, 22757, 2006-Ohio-2686, at ¶20. Furthermore, as discussed above, under Rule 54(B) of the Ohio Rules of Civil Procedure, “any order or other form of decision . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . 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” provided the partial adjudication did not contain a determination that there is no just reason for delay.

{¶12} The common pleas court’s May 2008 order denied the defendants’ motion for summary judgment on Mr. Price’s claims of disability discrimination and intentional infliction of emotional distress. That order did not affect the parties’ substantial rights nor prevent a judgment on those two claims. See R.C. 2505.02(B)(1). As no exception under Section 2505.02(B) of the Ohio Revised Code applies, it was interlocutory. The common pleas court’s entry granting summary judgment on one claim while denying it on two others, did not include a determination that there was no just reason for delay. Therefore, under Civil Rule 54(B), the common pleas court had authority to reconsider its May 2008 ruling.

SUMMARY JUDGMENT

{¶13} Mr. Price’s remaining assignments of error are that the common pleas court improperly granted summary judgment to Carter and Mr. Collins. In reviewing a ruling on a motion for summary judgment, this Court applies the same standard the common pleas court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990). Rule 56(C) of the Ohio Rules of Civil Procedure provides that “[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” If the moving party meets its initial burden by identifying specific parts of the record that demonstrate that there are no issues of material fact regarding the essential elements of a claim, the nonmoving party bears a reciprocal

burden of setting forth specific facts demonstrating that an issue of fact exists for trial. *Vahila v. Hall*, 77 Ohio St. 3d 421, 428-29 (1997); Civ. R. 56(E).

Res Judicata

{¶14} Res judicata, under Ohio law, includes two concepts: claim preclusion and issue preclusion. *State ex rel. Schachter v. Ohio Pub. Employees Ret. Bd.*, 121 Ohio St. 3d 526, 2009-Ohio-1704, at ¶27 (quoting *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, at ¶6). Claim preclusion bars subsequent actions between the same parties or their privies on all claims arising out of the transaction that was the subject of a previous action. *O’Nesti*, 2007-Ohio-1102, at ¶6. Issue preclusion bars the same parties or their privies from re-litigating an issue in a subsequent action if the “fact or point . . . was actually and directly at issue in a previous action” and a court of competent jurisdiction has determined it. *Fort Frye Teachers Ass’n, OEA/NEA v. State Employment Relations Bd.*, 81 Ohio St. 3d 392, 395 (1998).

Claims against Carter

{¶15} Mr. Price’s third assignment of error is that the common pleas court incorrectly granted Carter summary judgment based on the determination that both of his claims against it were barred by res judicata. The common pleas court granted Carter summary judgment because it determined that all of Mr. Price’s claims had been “fully litigated in the [d]istrict [c]ourt.” The common pleas court pointed out that, contrary to Mr. Price’s representations, the federal district court had not dismissed all of his state-law claims against both Carter and Mr. Collins before Mr. Price filed this case in common pleas court. Rather, it had only dismissed his claims against Mr. Collins. Therefore, the common pleas court determined that the federal jury’s verdict in favor of Carter disposed of all the claims against Carter, including his state claims, and barred Mr. Price from pursuing those state claims in common pleas court.

{¶16} According to Mr. Price, his state claims against Carter were not litigated in federal court. In fact, both parties agree that no state-law claims were tried to the federal jury. Carter has argued, however, that claim preclusion bars Mr. Price from pursuing his state claims against it in state court because both the federal and state complaints were based on the same set of facts regarding alleged employment discrimination and a jury determined the federal claims on their merits.

{¶17} The doctrine of claim preclusion required Mr. Price to bring all potential claims against Carter and its privies arising from the same occurrence in his initial lawsuit or be barred from later bringing the omitted claims because a plaintiff must “present every ground for relief in the first action, or be forever barred from asserting it.” *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 382 (1995) (quoting *Nat’l Amusements Inc. v. Springdale*, 53 Ohio St. 3d 60, 62 (1990)); Restatement (Second) of Judgments § 24 (1982). In support of its motion for summary judgment, Carter argued that, based on the same set of facts, it had obtained a valid final judgment in its favor in federal court. It pointed to the jury verdict and jury interrogatory responses indicating that judgment had been rendered on the merits of the federal employment discrimination claim. Thus, Carter met its initial burden of showing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law under Rule 56(C) of the Ohio Rules of Civil Procedure.

{¶18} The question is whether Mr. Price met his reciprocal summary judgment burden. See *Vahila v. Hall*, 77 Ohio St. 3d 421, 428-29 (1997); Civ. R. 56(E). He has not disputed that a valid final judgment on the merits was rendered in federal court on his federal claim against Carter, a claim arising out of the same occurrence that forms the basis of his state claims against Carter. In his brief in opposition to Carter’s motion for summary judgment, however, he argued

that “the only way [he] could get his [s]tate [c]laim litigated was to file a [c]omplaint with [state] [c]ourt” because the federal district court “decided to only deal with the federal claims” and “dismissed the . . . state law claims without prejudice.” An exception to the rule that a valid judgment in favor of a defendant bars the plaintiff from bringing future claims based on the same transaction is that the plaintiff may bring claims that the first court dismissed “without prejudice.” Restatement (Second) of Judgments § 26 cmt. b (1982). In order to prevent the final judgment rendered against him in federal court from barring his claims against Carter in this case, Mr. Price had to show that the federal court dismissed his state claims against Carter without prejudice. But he has failed to do so. Although he argued that he was unable to pursue his state-law claims against Carter in federal court because the federal court dismissed them, he did not present any evidence tending to show that the federal court had in fact done so.

{¶19} The common pleas court in this case granted summary judgment to Carter based on res judicata because the federal district court’s order of May 19, 2005, “dismiss[ed] only ‘state law claims asserted against Defendant Jim Collins in his individual capacity’” The federal court dismissal explains why Mr. Price was not able to pursue his claims against Mr. Collins in the federal action, but it does not address his state claims against Carter. On appeal, Mr. Price has neither explained how the language of the May 2005 order could be construed as a dismissal of his state-law claims against Carter nor pointed to any other evidence tending to show that the federal court dismissed those claims without prejudice. Mr. Price’s only argument is that the state-law claims against Carter “were never litigated” in federal court. He has correctly pointed out that Carter has admitted that no state-law issues were tried in federal court.

{¶20} The problem with Mr. Price’s argument is that it fails to recognize the breadth of claim preclusion’s reach. Claim preclusion not only bars all claims that were litigated, but also

all claims that could have been litigated growing from the same transaction. *State ex rel. Schachter v. Ohio Pub. Employees Ret. Bd.*, 121 Ohio St. 3d 526, 2009-Ohio-1704, at ¶27. Unlike issue preclusion, the application of claim preclusion is not limited to issues that were “actually and necessarily litigated and determined in a prior action.” *Id.* at ¶28. Under claim preclusion, if two claims or theories of liability arose from the same occurrence and could have been litigated together previously, then a final judgment on the merits in the initial action will bar subsequent claims against the same party or its privies. See *id.* at ¶27; *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, at ¶6. Mr. Price failed to demonstrate that he could not have tried his state-law claims against Carter in his federal lawsuit. The common pleas court properly determined that Mr. Price’s claims against Carter are barred by claim preclusion. Mr. Price’s third assignment of error is overruled.

{¶21} The dissent has suggested that the common pleas court erred by granting summary judgment to Carter based upon claim preclusion because Carter did not raise that aspect of res judicata in its motion for summary judgment and because the common pleas court wrote that it had examined the federal court docket. Mr. Price, however, has assigned neither of those things as error. Generally, this Court does not construct arguments for parties and reverse trial court decisions based upon errors not argued on appeal. See, e.g., *Moss v. Lorain County Bd. of Mental Retardation*, 185 Ohio App. 3d 395, 2009-Ohio-6931, at ¶9.

Claims against Mr. Collins Individually

{¶22} Mr. Price’s fourth assignment of error is that the common pleas court incorrectly granted summary judgment to Mr. Collins. The common pleas court granted Mr. Collins summary judgment because it determined that Mr. Price had not brought any separate claims against him in his individual capacity. Despite the fact that he was named in his individual

capacity in the caption of the complaint, the common pleas court wrote that Mr. Price had failed to argue or identify any claim against Mr. Collins “distinct from those against Carter Lumber Co.”

{¶23} The common pleas court disposed of both the intentional infliction of emotional distress and disability discrimination claims against Mr. Collins on the same basis. That is, it determined that Mr. Price never argued or identified a separate claim against Mr. Collins involving allegations distinct from those he made against Carter. The intentional infliction of emotional distress claim, however, is primarily aimed at Mr. Collins, not Carter. The complaint provides details regarding Mr. Collins’s behavior toward Mr. Price. In fact, every allegation supporting the intentional infliction of emotional distress claim is based on the acts of Mr. Collins. Thus, the trial court incorrectly granted summary judgment to Mr. Collins on the intentional infliction of emotional distress claim based on its determination that Mr. Price had not presented any claims against Mr. Collins.

~~{¶24} In an effort to support the common pleas court’s decision on the disability~~
discrimination claim, Mr. Collins has argued that Mr. Price failed to allege any facts to form a separate claim against him in his individual capacity “separate and apart from his official capacity” as an employee of Carter. In response, Mr. Price has argued that, under *Genaro v. Central Transport Inc.*, 84 Ohio St. 3d 293 (1999), he presented a claim against Mr. Collins in his individual capacity without alleging that Mr. Collins acted outside the scope of his employment. Mr. Price has conceded that he alleged identical claims against Mr. Collins and Carter.

{¶25} Section 4112.02(A) of the Ohio Revised Code prohibits discriminatory conduct by “employer[s].” In *Genaro*, the Ohio Supreme Court determined that “individual supervisors

and managers whose conduct violates the provisions of . . . Chapter 4112 [of the Ohio Revised Code]” fall within the applicable statutory definition of “employer.” *Genaro v. Cent. Transp. Inc.*, 84 Ohio St. 3d 293, 296 (1999) (quoting R.C. 4112.01(A)(2)). Therefore, the Court held that, “[f]or purposes of R.C. Chapter 4112 a supervisor/manager may be held jointly and/or severally liable with her/his employer for [his/her own] discriminatory conduct . . . in violation of R.C. Chapter 4112.” *Id.* at syllabus. Under Section 4112.99, “[w]hoever violates . . . [C]hapter [4112] is subject to a civil action for damages” Thus, under the statutory framework of Chapter 4112, a supervisor who engages in discriminatory actions may be held jointly and severally liable with his employer as though the two were co-employers of the injured party. *Genaro*, 84 Ohio St. 3d at 300; *Edwards v. Ohio Inst. of Cardiac Care*, 170 Ohio App. 3d 619, 2007-Ohio-1333, at ¶74. The common pleas court, therefore, incorrectly granted summary judgment to Mr. Collins on the disability discrimination claim based on its determination that Mr. Price had not stated a claim against him in his individual capacity. Mr. Price’s fourth assignment of error is sustained.

The Jury Interrogatories

{¶26} Mr. Price’s fifth assignment of error is that the common pleas court incorrectly granted summary judgment even though genuine issues of material fact remain for trial. In support of this assignment of error, Mr. Price has presented an argument regarding issue preclusion.

{¶27} We have already determined that the common pleas court properly granted summary judgment to Carter on both claims based on claim preclusion. There is no reason to reach this assignment of error, therefore, as it relates to Carter.

{¶28} Mr. Collins has argued that issue preclusion bars Mr. Price from making a prima facie case against him under Section 4112.02 of the Ohio Revised Code. His argument relies on a comparison of the federal jury interrogatory responses to the elements of Mr. Price's state-law claims.

{¶29} The common pleas court never reached the question of whether the jury's interrogatory responses in the federal case barred the issues Mr. Price wanted to litigate against Mr. Collins in this case. Rather, it granted summary judgment to Mr. Collins because it determined that Mr. Price had failed to state a claim against him in his individual capacity. "Therefore," it wrote, "no cause of action remains to be resolved by this [c]ourt." This matter must be remanded to the common pleas court for it to consider, in the first instance, the summary judgment arguments made by Mr. Collins and Mr. Price, review the evidence, and make a determination regarding both claims against Mr. Collins in his individual capacity. *B.F. Goodrich Co. v. Commercial Union Ins.*, 9th Dist. No. 20936, 2002-Ohio-5033, at ¶38-44 (citing *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360 (1992)). Accordingly, this Court also does not reach Mr. Price's fifth assignment of error as it relates to Mr. Collins.

CONCLUSION

{¶30} Mr. Price's first, second, and third assignments of error are overruled. The common pleas court correctly reconsidered its non-final denial of summary judgment and granted summary judgment to Carter based on claim preclusion. Mr. Price's fourth assignment of error is sustained. The common pleas court should not have granted summary judgment to Mr. Collins in his individual capacity based on its incorrect determination that Mr. Price had not stated claims against him. We do not reach Mr. Price's fifth assignment of error. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and

remanded for consideration of whether a genuine issue of material fact remains for trial regarding the claims against Mr. Collins in his individual capacity.

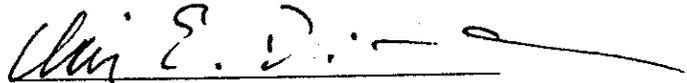
Judgment affirmed in part,
reversed in part,
and remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.


CLAIR E. DICKINSON
FOR THE COURT

BAIRD, J.
CONCURS

BELFANCE, J.

CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶31} I concur with respect to most of the majority’s opinion. However, I respectfully dissent with respect to the majority’s resolution of the third assignment of error.

{¶32} The majority concludes that Mr. Price failed to meet his reciprocal summary judgment burden as he failed “to show that the federal court dismissed his state claims against Carter without prejudice[.]” and thus failed to demonstrate that his claims were not barred by claim preclusion.

{¶33} However, Carter did not assert in its motion for summary judgment that Mr. Price’s claims were barred by claim preclusion. Carter only asserted that Mr. Price’s claims were barred by issue preclusion, or collateral estoppel. While it is true that both claim and issue preclusion comprise the doctrine of res judicata, the evidence needed to support claim preclusion is not necessarily the same evidence needed to support issue preclusion.

~~{¶34} This Court has previously stated that:~~

“With regard to the moving party’s burden to inform the trial court of the basis for the motion, a party seeking summary judgment must specifically delineate the basis for the motion in order to allow the opposing party a meaningful opportunity to respond. We have explained that if the moving party does not raise an issue in its motion for summary judgment, then it is improper for the trial court to grant the motion on that basis. If a party files a motion based on some, but not all, issues in a case, the trial court should restrict its ruling to those matters raised. It is reversible error to award summary judgment on grounds not specified in the motion for summary judgment. The trial court may not rely on law or fact that is not presented in the moving party’s motion.” (Internal citations and quotations omitted.) *Lindsey v. Summit Cty. Children Services Bd.*, 9th Dist. No. 24352, 2009-Ohio-2457, at ¶10.

{¶35} Here the trial court did not restrict its ruling to the arguments raised by Carter. There was no reason why Mr. Price would have presented the evidence the majority is requiring him to present when that evidence would support an argument that was not made by Carter on

summary judgment. Thus, I believe the majority is holding Mr. Price to a burden that is not anticipated under the summary judgment standard.

{¶36} In addition, the trial court committed legal error when it relied upon materials not before it in ruling on the motion. See, e.g., *In re J.C.*, 186 Ohio App.3d 243, 2010-Ohio-637, at ¶¶13-15 (stating that “[m]atters outside the record cannot be used to demonstrate error, nor can they be considered in defense of the judgment[]”). In its judgment entry, the trial court states that it examined the docket of the federal court case in concluding Mr. Price’s claims were barred by claim preclusion; however, that docket was not within the ambit of materials that the trial court could properly consider pursuant to Civ.R. 56; in fact, it was not within the trial court’s record at all.

{¶37} Therefore, I would reverse the trial court’s entry of summary judgment as to Carter on the basis of claim preclusion and remand the matter for further proceedings.

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(c), Article IV, Constitution.)

APPEARANCES:

EDWARD L. GILBERT, attorney at law, for appellant.

THOMAS F. HASKINS, JR., attorney at law, for appellee.

MICHELE MORRIS, attorney at law, for appellee.