[Cite as *Hope v. Lake Cty. Bd. of Commrs.*, 2009-Ohio-5895.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

ELAINE HOPE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF TIMOTHY A. KILIAN,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-L-173**
- vs -	:	
LAKE COUNTY BOARD OF COMMISSIONERS, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 07 CV 000523.

Judgment: Affirmed.

Phillip A. Kuri and *John W. Gold*, Elk & Elk Co., Ltd., Landerhaven Corporate Center, 6105 Parkland Boulevard, Mayfield Heights, OH 44124 (For Plaintiff-Appellant).

John T. McLandrich, Frank H. Scialdone, and *Carl E. Cormany*, Mazanec, Raskin, Ryder & Keller Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, Solon, OH 44139 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Elaine Hope, individually and as administrator for the Estate of Timothy A. Kilian, appeals the judgment of the Lake County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, the Lake County

Sheriff's Department/Lake County Sheriff Daniel Dunlap, Thomas Wetmore, Michael Cayen, and Russell Tuttle. For the following reasons, we affirm the decision of the court below.

{¶2} On February 23, 2007, Hope filed suit against the defendants in the Lake County Court of Common Pleas. Hope alleged the defendants were liable for the death of her son, Kilian, while he was in the custody of the Sheriff's Department at the Lake County Jail. According to the Amended Complaint, Hope sought damages for the wrongful death of her son due to the "negligence, willful, wanton and malicious misconduct" of Officer Wetmore, Officer Cayen, and Lieutenant Tuttle. Hope asserted that the Board of Commissioners and Sheriff Dunlap were vicariously liable for the conduct of Officer Wetmore, Officer Cayen, and Lieutenant Tuttle. Finally, Hope raised a claim of spoliation of the evidence.

{¶3} Kilian had been arrested and placed in the Lake County Jail on January 18, 2003. Over the next couple of days, Kilian was found to be having problems related to asthma and anxiety. By the morning of January 20, 2003, Kilian had been placed in a holding cell in the booking department where he was periodically checked on by corrections officers. Lieutenant Tuttle was in charge of booking on January 20 and Officer Wetmore had responsibility for conducting welfare checks on Kilian. Shortly after 5:00 p.m., Officer Wetmore discovered that Kilian had hanged himself. Officer Wetmore had not completed the welfare check log during his shift by noting the times at which he performed the welfare checks. Shortly after the discovery of Kilian's body, Officer Cayen, who had not been working in booking, filled in the welfare check log,

although he lacked personal knowledge of the actual times at which Officer Wetmore performed the checks.

{¶4} On August 31, 2007, the trial court granted the Board of Commissioners judgment on the pleadings, based on the argument that the Board is a "political subdivision," as defined in R.C. 2744.01(F), and thus enjoys sovereign immunity.

{¶5} On May 5, 2008, the remaining defendants moved for summary judgment on all counts of the Amended Complaint.

{¶6} On June 6, 2008, Hope moved for summary judgment on her spoliation claims.

{¶7} On November 14, 2008, the trial court entered a Judgment Entry denying Hope's motion, granting the defendants' motion, and dismissing Hope's claims.[1]

{¶8} In 2005, Hope had filed a prior lawsuit in connection with her son's death against the same parties in the Lake County Court of Common Pleas. The prior suit was based, in part, on the alleged deprivation of Kilian's constitutional rights, pursuant to Section 1983, Title 42, U.S.Code. The case was removed to the United States District Court for the Northern District of Ohio, Eastern Division. On March 31, 2006, the District Court granted summary judgment in favor of the defendant-appellees on the federal claims raised in the Complaint.

{¶9} In its Opinion in the present case, the trial court applied the doctrine of issue preclusion/collateral estoppel in its decision to grant the defendants summary judgment. The court stated:

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1. The evidence before the trial court consisted of the depositions of Lieutenant Tuttle, Corrections Officer Wetmore, Corrections Officer Cayen, and Nurse Takacs. Additionally, the trial court had "voluntary statements" made by various jail personnel in the course of the investigation following Kilian's death. These statements were duly authenticated by affidavits and attached to the defendants' Motion for Summary Judgment.

{¶10} At the time of his death, Kilian was incarcerated in the Lake County Adult Detention Facility, having been arrested for an alleged probation violation. The plaintiff alleges that the defendants were aware or should have been aware that Kilian was a suicide risk and did not take appropriate steps to prevent his suicide. The plaintiff alleges that the defendants had a duty to conduct welfare checks on Kilian every ten minutes, and failed to meet that duty. The parties seem to agree that Kilian was on some kind of medical watch, subject to checks on his welfare every ten minutes, but disagree as to whether that watch was a suicide watch and whether the welfare checks were in fact conducted every ten minutes. Additionally, the plaintiff alleges that the defendants falsified the welfare check log in anticipation of a lawsuit being filed.

{¶11} ***

{¶12} The material factual issues involved in this case are whether the defendants should have known that Kilian presented a suicide risk, and whether the defendants conducted welfare checks on Kilian every ten minutes. In the federal court, the issue was whether the defendants had violated Kilian's Eighth and Fourteenth Amendment rights by failing to sufficiently monitor Kilian's health. The material factual issue involved in that claim was whether Kilian had demonstrated a strong likelihood of committing suicide. However, *** the federal court found that the defendants did not know that Kilian was a suicide risk, and further, that Wetmore did, in fact, conduct welfare checks every ten minutes. The same evidence would be presented in this case in regards to the plaintiff's negligence claim and wrongful death claim. Thus, collateral estoppel applies to those facts. Given the federal court's finding that the defendants had no knowledge of the risks of suicide and that the welfare checks were completed, there is no genuine issue of fact that the defendants did not breach any duty to the decedent, or committed some other wrongful act resulting in his death and the plaintiff's negligence claim and wrongful death claim are barred by res judicata.

{¶13} The trial court also determined that, if res judicata did not apply, summary judgment would still be appropriate as Hope failed to present evidence that the defendants behaved "recklessly" while Kilian was in their custody.

{¶14} With respect to the spoliation claim, the trial court similarly found that Hope's claim was barred by res judicata. In federal court, Hope contended that Lieutenant Tuttle and Officer Cayen's conduct regarding the welfare check log violated her constitutional right of "meaningful" access to the courts. *Bounds v. Smith* (1977), 430 U.S. 817, 822.

{¶15} The [federal] court found that the defendants' actions did not impede the plaintiff's ability to bring her claims. The court further found that Tuttle did not instruct Cayen to fill out the welfare check logs. The court found that there was no evidence that Cayen or Tuttle falsified or withheld records. The issue before the federal court was whether the defendants covered-up evidence rendering the plaintiff's legal remedies ineffective. Here, the issue is whether the defendants destroyed evidence that caused a disruption of the plaintiff's case. Both issues would involve the presentation of the same evidence regarding whether the defendants interfered with evidence and what their motivation was in doing so, and res judicata applies, barring the plaintiff's spoliation claim.

{¶16} The trial court again determined that, if res judicata did not apply, summary judgment would be appropriate in that the tort of spoliation only applies to the destruction of physical evidence and the alteration or fabrication of evidence does not constitute destruction of evidence for the purpose of bringing a claim.

{¶17} On December 5, 2008, Hope filed a Notice of Appeal. On appeal, Hope raises the following assignments of error:

{¶18} "[1.] The trial court erred when it held that Appellant's claims were barred by the doctrine of Res Judicata."

{¶19} "[2.] The trial court erred when it held that the Defendants were immune because genuine issues of material fact existed with respect to whether the Defendants acted recklessly."

{¶20} "[3.] The trial court erred when it granted Summary Judgment in favor of Appellees on Appellants' [sic] spoliation claims, because the alteration of evidence constitutes spoliation."

{¶21} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "[t]he moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence *** that reasonable minds can come to but one conclusion and that

conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.* (1993), 87 Ohio App.3d 704, 711 (citation omitted).

{¶22} In her first assignment of error, Hope asserts the trial court erred by applying the doctrine of res judicata to her claims.

{¶23} "The doctrine of *res judicata* involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel)." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 1995-Ohio-331. "The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 1998-Ohio-435. "[U]nder the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit." *Whitehead v. Gen. Telephone Co. of Ohio* (1969), 20 Ohio St.2d 108, 112, overruled on other grounds by *Grava*, 73 Ohio St.3d 379.

{¶24} Issue preclusion is not applicable where the prior decision is the result of fraud or collusion. *Grava*, 73 Ohio St.3d at 381, citing *Norwood v. McDonald* (1943), 142 Ohio St. 299, at paragraph one of the syllabus; *Staley v. Grant*, 11th Dist. No. 92-G-1720, 1993 Ohio App. LEXIS 1714, at *3-*4 ("[t]here has traditionally been a exception to the rule of collateral estoppel in cases of collusion and fraud").

{¶25} Hope claims that the district court's findings that the defendants did not know that Kilian was a suicide risk and that Wetmore conducted welfare checks on Kilian every ten minutes resulted from "several unsubstantiated and fraudulent misrepresentations" made by Corrections Officer Cayen.

{¶26} The federal court's finding that Officer Wetmore checked on Kilian every ten minutes is consistent with Officer Wetmore's deposition testimony. According to the federal court's findings and the deposition testimony, Officer Wetmore began his shift at 3:00 p.m., and conducted checks every ten minutes, alternating with another corrections officer. At approximately 4:30 p.m., Officer Wetmore brought food to the inmates in booking. At approximately 4:50 p.m., Officer Wetmore collected the trays. Officer Wetmore noticed that Kilian had not eaten his food and Kilian told Officer Wetmore he did not feel like eating. Kilian did not appear distressed and was neither crying nor hyperventilating. At approximately 5:03 p.m. Officer Wetmore conducted another welfare check on Kilian. At approximately 5:10 or 5:12 p.m., Officer Wetmore discovered that Kilian had hanged himself. Officer Wetmore never claimed to have completed the welfare check log for Kilian. This evidence is uncontradicted and is consistent with the voluntary statement of Lieutenant Tuttle.

{¶27} Kilian's welfare check log indicates that he was checked at regular ten-minute intervals from 4:00 p.m. until 5:10 p.m. The federal court was aware that the log was completed by Officer Cayen through a voluntary statement by him, made on January 28, 2003. This statement provides, in part, as follows:

{¶28} Q. Why did you fill out these Welfare checks?

{¶29} Because I heard Officer Wetmore say he had been checking on the inmate's [sic] every 10 minutes, and when Lt. Tuttle pointed towards the Welfare checks, I took it upon myself to fill them out.

{¶30} Q. Were you asked or instructed by anyone to fill these checks out?

{¶31} No.

{¶32} Subsequent to the federal court's decision, Officer Cayen testified as follows in deposition:

{¶33} Q. And would you agree with me that you have no idea at what time these prisoners were actually checked on, correct?

{¶34} Yes.

{¶35} Q. But from your statement, as I understand it, you have referenced instruction that you believed you were receiving from Lieutenant Tuttle. Can you tell me what that was?

{¶36} He pointed his finger towards the welfare checks.

{¶37} Q. What did he say?

{¶38} Nothing

{¶39} ***

{¶40} Q. So did Lieutenant Tuttle make eye contact with you while you were there?

{¶41} Yes.

{¶42} Q. He made eye contact with you and he pointed at the welfare logs?

{¶43} Yes.

{¶44} Q. What did you take that to mean?

{¶45} To fill in the welfare check.

{¶46} Q. Did you consider that to be an order?

{¶47} Yes.

{¶48} Q. And then you filled in the welfare check log, correct --

{¶49} Correct.

{¶50} Q. -- with entries you do not know whether they were accurate or inaccurate, correct?

{¶51} I took them to be accurate.

{¶52} Hope maintains that Officer Cayen's voluntary statement before the federal court is rendered fraudulent by comparison with his deposition testimony in state court. According to Hope, in the voluntary statement Officer Cayen claimed "1) he knew that the entries he made on the Welfare Log were accurate; and 2) that he acted of his own accord and was never ordered by anybody to fill in the Welfare Log." In his deposition, however, Officer "Cayen testified that 1) the entries he made were knowingly false; and 2) that he believed he was ordered by Lt. Tuttle to fill in the Welfare Log."

{¶53} We disagree that the differences between the voluntary statement and the deposition render the federal court's decision the product of fraud or collusion. The two accounts are not mutually inconsistent. Officer Cayen never claimed to have first-hand knowledge that Officer Wetmore conducted the welfare checks at ten-minute intervals, but relied solely on Officer Wetmore's statement to that effect. In both the statement and the deposition, Officer Cayen represented that he filled out the welfare logs after

seeing Lieutenant Tuttle point to the logs. He never claimed that he was directly ordered to fill them out but, rather, understood this to be Lieutenant Tuttle's intent.

{¶54} Assuming, arguendo, that Officer Cayen's voluntary statement was meant to mislead the federal court, issue preclusion is still applicable. The issue of whether Lieutenant Tuttle ordered Officer Cayen to fill out the logs has no bearing on the two facts held established by the trial court, i.e. that the defendants were not aware of Kilian being a suicide risk and that Officer Wetmore conducted welfare checks on Kilian every ten minutes. The evidence before the federal as well as the state court supports these conclusions regardless of how one interprets Officer Cayen's testimony.

{¶55} The first assignment of error is without merit.

{¶56} In her second assignment of error, Hope asserts that summary judgment was improperly granted because a genuine issue of material fact exists as to whether Officer Wetmore and Lieutenant Tuttle behaved "recklessly" in failing to observe their duty to conduct ten-minute welfare checks on Kilian prior to his death.

{¶57} "In a civil action brought against *** an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function ***[,] the employee is immune from liability unless *** [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(b).

{¶58} The Ohio Supreme Court has set forth the meaning of "reckless" as follows: "Recklessness is a perverse disregard of a known risk. Recklessness, therefore, necessarily requires something more than mere negligence. The actor must

be conscious that his conduct will in all probability result in injury." *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, at paragraph three of the syllabus; also at ¶¶73-74 and the cases cited therein. "Although the determination of recklessness is typically within the province of the jury, the standard for showing recklessness is high, so summary judgment can be appropriate in those instances where the individual's conduct does not demonstrate a disposition to perversity." Id. at ¶75.

{¶59} Given our disposition of the first assignment of error, it has been definitively established the defendants were not aware of Kilian being a suicide risk and that Officer Wetmore conducted welfare checks on Kilian every ten minutes. Construing these facts with the other evidence presented to the trial court in a light most favorable to Hope's case, she has failed to raise a genuine issue of material fact as to whether the conduct of Officer Wetmore or Lieutenant Tuttle was reckless, i.e. that they perversely disregarded a known risk being conscious that their conduct would in all probability result in injury.

{¶60} Initially, Hope relies heavily on the fact that Officer Cayen completed the welfare check logs without having direct knowledge that the checks occurred and in the belief that he was being ordered to do so by Lieutenant Tuttle. While law enforcement should take great care to maintain accurate records, these arguments are unavailing. Officer Cayen's actions with respect to the logs after Kilian's death are negated by Officer Wetmore's testimony which the federal court found credible. To the extent Hope seeks to use the log completion issue to discredit Officer Wetmore's testimony of credibility, that use is precluded by the federal court's ruling and res judicata or collateral estoppel.

{¶61} We will next consider whether there was any evidence that Officer Wetmore or Lieutenant Tuttle knew, or should have known, that Kilian posed a risk of injuring himself.

{¶62} On January 18, 2003, the day Kilian was brought to the Lake County Jail by Lakewood Police Officers, he was seen by Corrections Officer Elisa Smith, a family relation of Kilian who knew him prior to January 2003. Smith testified by affidavit that Kilian gave "no indication that he was depressed or suicidal." Smith stated that Kilian "appeared to be on drugs" but was coherent and they talked about him going to church with her after his release.

{¶63} At approximately 1:00 a.m., on January 19, 2003, Sergeant Michele Prather reported that Kilian was having trouble breathing and needed his inhaler. Kilian was provided with an albuterol inhaler.

{¶64} During the second shift on January 19, 2003, Corrections Officer Lib Vitale testified by affidavit that it was reported to him that "Kilian was having a hard time being around people and was upset and hyperventilating." Vitale found the inhaler "pretty beat up" and dented beyond being usable. Kilian was first moved to an isolation cell and then to booking. Vitale contacted Nurse Anne Takacs who advised giving him a paper bag to breathe into and scheduling him to see the doctor on Monday (January 20). Vitale's statement is corroborated by Nurse Takacs' own account of the events that afternoon. Nurse Takacs told Vitale "to keep an eye" on him. At 9:26 p.m. that evening, the order was given that Kilian should be checked every ten minutes.

{¶65} At approximately 9:30 a.m., on January 20, 2003, Kilian was examined by Dr. Carla Baster. According to the history contained in Dr. Baster's Progress Notes,

Kilian reported, “last night I started crying, it was hard to catch my breath.” Dr. Baster ordered Kilian to be given a new inhaler, which would be kept in the nurse’s cart. Kilian took a couple of puffs and Baster checked his lungs. Baster noted that Kilian was “tearful at times” toward the end of the examination. Baster assessed Kilian as having “anxiety” and “asthma” and referred him to be seen by Mental Health. According to Nurse Takacs who was present during the examination, it was thought that his anxiety was causing him to hyperventilate. Nurse Takacs’ voluntary statement suggests Kilian was crying after Baster “scolded” him for using the inhaler excessively and damaging it. Kilian did not report having any history of mental health issues.

{¶66} During the second shift on January 20, 2003, Lieutenant Tuttle asked Kilian how he was doing and Kilian replied that he had been hyperventilating. Lieutenant Tuttle told Kilian he would inform the nurse. Lieutenant Tuttle stated he observed Officer Wetmore conducting regular welfare checks, one “somewhere around” 5:00 p.m., in particular. Lieutenant Tuttle also stated that, after Kilian had hanged himself, he told the officers to make sure their logs were up to date but that this comment was not directed at Officer Cayen.

{¶67} Officer Wetmore testified that Kilian was neither crying nor hyperventilating during his shift on January 20, 2003. Officer Wetmore stated that he was checking all the cells in booking every ten minutes because one of the other inmates was on a “suicide watch,” which requires ten-minute welfare checks. Although Officer Wetmore did not complete the welfare check log for Kilian, he did document his activity on his Correction Officer’s Daily Log.[2] According to the Daily Log, at 4:15 p.m.

2. The Officer’s Daily Log is a set of paperwork distinct from an inmate’s welfare check log.

Officer Wetmore fed and toured the inmates in booking and collected the meal trays at 4:50 p.m. A note in the Log for this time states "all secure."

{¶68} Construing this evidence in a light most favorable to Hope, it cannot be reasonably concluded that Officer Wetmore or Lieutenant Tuttle were conscious that their conduct would in all probability result in enabling Kilian to hang himself. During Officer Wetmore's shift, Kilian did not demonstrate any symptoms of anxiety, i.e. he was neither crying nor hyperventilating and was conversing normally with both Officer Wetmore and Lieutenant Tuttle. Moreover, the testimonial evidence indicates that Officer Wetmore was routinely checking on Kilian at ten-minute intervals. At the very latest, Kilian was checked by Officer Wetmore within twenty minutes of his suicide. In the absence of evidence that Kilian posed a risk of serious harm to himself, this conduct fails, as a matter of law, to rise to the level of recklessness.

{¶69} Hope argues that the fact that Kilian was ordered to be checked every ten minutes is evidence that he was considered a suicide risk, inasmuch as ten-minute checks are prescribed for suicide risks by policies and procedures of the Lake County Jail. We disagree. There is no evidence that the risk of suicide is the only circumstance which may precipitate the order to conduct ten-minute welfare checks. Nurse Takacs testified that such checks are within the discretion of medical personnel and/or jail supervisors.

{¶70} The second assignment of error is without merit.

{¶71} In her third and final assignment or error, Hope asserts the trial court erred by holding that the tort of spoliation only occurs when physical evidence is destroyed. According to Hope, spoliation may occur where physical evidence, such as a log or a

report, is "changed or modified in a way to conceal information detrimental to [the] defendant." In the present case, evidence was not fabricated, as the trial court concluded, but, rather "the Appellees *altered* an existing record, *** the welfare check logs, by making ex post facto entries upon the discovery of the deceased."

{¶72} The Ohio Supreme Court has set forth the elements of a claim for "spoliation of evidence and/or tortious interference with prospective civil litigation" as follows: "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts." *Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 1993-Ohio-229, at 29. Ohio's appellate courts have interpreted *Smith* as limiting spoliation claims to the destruction of physical evidence, and have refused to allow actions based on the creation of false documents. *Williams v. Continental Express Co.*, 3rd Dist. No. 17-08-10, 2008-Ohio-5312, at ¶15, and the cases cited therein; *Pratt v. Payne*, 153 Ohio App.3d 450, 2003-Ohio-3777, at ¶21 ("no court in Ohio *** has extended spoliation to anything other than the destruction of physical evidence") (citations omitted).

{¶73} In the present case, although Officer Cayen violated jail policy and acted improperly by completing Officer Wetmore's welfare check log, this fact is insufficient as a matter of law to support a claim of spoliation. The completion of the welfare check log did not result in the destruction of physical evidence or disrupt Hope's case.

{¶74} Officer Cayen did not erase or destroy prior log entries. Rather, he created entries where previously none existed. As one court has observed, "[n]on-

existent evidence, by its very nature, cannot be spoiled." *Keen v. Hardin Mem. Hosp.*, 3rd Dist. No. 6-03-08, 2003-Ohio-6707, at ¶16 (citation omitted). As was the trial court, we are bound by the district court's conclusion that neither Officer "Cayen [n]or [Lieutenant] Tuttle falsified or withheld records." *Carver v. Mack*, 5th Dist. No. 07 CA 37, 2008-Ohio-2911, at ¶28 ("[w]here the identical issues raised by a plaintiff's state court complaint have been previously litigated in federal court, the doctrine of collateral estoppel precludes litigation of those same issues") (citation omitted).

{¶75} Hope's spoliation claim fails because she has not demonstrated that Officer Cayen's additions to the log disrupted her case. There is no evidence that Officer Wetmore ever claimed to have filled out the welfare check log. Within eight days of Kilian's death, Officer Cayen provided a voluntary statement admitting that he improperly completed the welfare check logs based on comments he overheard from Officer Wetmore. Likewise, Officer Wetmore admitted that he did not complete the welfare check log for Kilian. Thus, the situation was known to Hope two years before she filed the initial lawsuit in January 2005 and was known to the district court when it dismissed her federal claims.

{¶76} The third assignment of error is without merit.

{¶77} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, granting summary judgment in favor of the Sheriff's Department/ Sheriff Dunlap, Officer Wetmore, Officer Cayen, and Lieutenant Tuttle, is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶78} I respectfully dissent.

{¶79} This court stated in *Nationwide Mut. Fire Ins. Co. v. Modroo*, 11th Dist. No. 2004-G-2564, 2005-Ohio-2063, at ¶13-15:

{¶80} "'The doctrine of res judicata involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel).' *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 380 ***. The theories of res judicata are used to prevent relitigation of issues already decided by a court or matters that should have been brought as part of a previous action. *Lasko v. Gen. Motors Corp.*, 11th Dist. No. 2002-T-0143, 2003-Ohio-4103, at ¶16.

{¶81} "'(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* at 382. Res judicata 'applies to extinguish a claim by the plaintiff against the defendant *even though plaintiff is prepared in the second action (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action.*' (Emphasis sic and citation omitted.) Id. at 383.

{¶82} "Collateral estoppel, an aspect of res judicata, prevents an issue that has been actually and necessarily determined by a court of competent jurisdiction in a first cause of action from being relitigated between the same parties or their privies in a

second, different cause of action. *Lasko* at ¶15. See, also, *Goodson v. McDonough Power Equip., Inc.* (1983) 2 Ohio St.3d 193, 195 ***." (Parallel citations omitted.)

{¶83} In the instant matter, I agree with appellant that the trial court erred when it held that her claims were barred by the doctrine of res judicata. The record establishes that Corrections Officer Cayen made several unsubstantiated misrepresentations that were material to the issues presented here, specifically with regard to Officer Cayen's personal knowledge of whether or not Kilian had been checked every ten minutes as required. The federal court cited to, and presumably relied upon, that evidence when it granted judgment in favor of appellees on appellant's federal claims.

{¶84} However, this does not fall under the umbrella of res judicata because federal courts are not courts of competent jurisdiction to determine state law claims, regarding in the instant matter claims of wrongful death and spoliation. The federal suit was based on the alleged deprivation of Kilian's constitutional rights pursuant to Section 1983, Title 42, U.S. Code. Clearly, the elements in a 1983 action are different than those based on claims of wrongful death and spoliation of evidence, and the federal court dealt with appellant's federal claims.

{¶85} Thus, res judicata and/or collateral estoppel should not have been applied to defeat appellant's right to pursue a cause of action (i.e. regarding her state law claims) for the wrongful death of her son while he was in the custody and care of appellees since the issues raised in her federal case were not identical to those raised in her state court complaint. See *Carver v. Mack*, 5th Dist. No. 07 CA 37, 2008-Ohio-2911, at ¶28, citing *Monahan v. Eagle Picher Industries*, *Inc.* (1984), 21 Ohio App.3d 179, 181.

{¶86} In regard to the spoliation of evidence claim, this court stated in *Drawl v. Cornicelli* (1997), 124 Ohio App.3d 562, 566:

{¶87} "[t]o recover on a claim for interference with or destruction of evidence (also referred to as spoliation of evidence), a plaintiff must prove *all* of the following elements:

{¶88} "'(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts (***).' *Smith v. Howard Johnson Co., Inc.* (1993), 67 Ohio St.3d 28, 29 ***." (Parallel citation omitted.)

{¶89} Here, appellees altered an existing record (i.e., the welfare check logs) by making ex post facto entries upon the discovery of the deceased, thereby substantiating a spoliation claim. See *Wachtman v. Meijer, Inc.*, 10th Dist. No. 03AP-948, 2004-Ohio-6440, at ¶27-29, citing *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638 (holding that spoliation occurs where a report is changed or modified in a way to conceal information detrimental to defendant). Thus, I believe that the trial court erred by granting summary judgment on appellant's spoliation claims because the evidence shows that Officer Cayen altered, rather than fabricated or destroyed, the welfare check records upon the discovery of the decedent.

{¶90} For the foregoing reasons, I would reverse the judgment of the trial court and remand the matter for further proceedings.

{¶91} Thus, I respectfully dissent.