

STATE OF OHIO, BELMONT COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

DAVID KEELEY,	)	CASE NO. 14 BE 45
	)	
PLAINTIFF-APPELLANT,	)	
	)	
VS.	)	OPINION
	)	
GARY CROFT, ET AL.,	)	
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court  
Case No. 14-CV-187

JUDGMENT: Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellant: David Keeley, Pro-se  
#647-623  
Belmont Correctional Institution  
P.O. Box 540  
St. Clairsville, Ohio 43950-0540

For Defendants-Appellees: Attorney Maureen Yuhas  
Assistant Attorney General  
150 East Gay Street, 16th Floor  
Columbus, Ohio 43215

JUDGES:

Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Carol Ann Robb

Dated: June 1, 2015

DEGENARO, J.

{¶1} Pro-se Plaintiff-Appellant, David Keeley, appeals the September 24, 2014 judgment of the Belmont County Court of Common Pleas granting Defendants' motion for summary judgment and dismissing his case on the basis of res judicata. Because Keeley's complaint was not barred by res judicata, the trial court erred by granting summary judgment on that basis. Accordingly, the judgment of the trial court is reversed and the matter remanded for the trial court to consider and decide the Defendants' dispositive motion on the basis asserted, other than res judicata.

### **Facts and Procedure**

{¶2} On June 19, 2014, Keeley, pro-se, filed a complaint against Gary Croft (Chief Inspector), Mona Parks (Assistant Chief Inspector), Brad Eller (Health Care Administrator at Belmont Correctional Institution), Kelly Riehle (Institutional Inspector at Belmont Correctional Institution), Dr. Wiedman/Dr. Samuels (physicians at Belmont Correctional Institution), Christopher Bagi (Assistant Ohio Attorney General) and four unknown individuals listed as "John Doe."

{¶3} The complaint alleged violations of 42 U.S.C. §1983 for the denial of medical care while Keeley was, and continues to be, housed at Belmont Correctional Institution (BeCI). During his incarceration in July of 2012, he was injured in the left eye and required medical treatment. Sometime thereafter Keeley was hit again in the eye; prison officials determined that Keeley instigated this fight.

{¶4} None of the Defendants filed an answer. However, the Ohio Attorney General's Office filed a motion to dismiss the complaint on their behalf. Defendants noted that Keeley filed two previous lawsuits involving the same allegations of improper/deprivation of medical treatment. The first was filed May 29, 2013, wherein Keeley sued Croft, Parks and other ODRC officials for negligence, but the court dismissed the case for lack of subject matter jurisdiction. Bagi represented Defendants in this first action.

{¶5} After the dismissal, Keeley filed another complaint against the same individuals but added Bagi as a named defendant. The second action was styled as a §1983 action and again made the same allegations regarding medical care. This

matter was dismissed because Keeley failed to satisfy the mandatory filing requirements in R.C. §2969.25 and §2969.26.

{¶6} On July 30, 2014, Keeley filed a motion for summary judgment against Defendants on the basis that they did not dispute 'one material fact that the Plaintiff submitted in the original complaint.' Keeley also filed his response to Defendants' motion to dismiss arguing that a motion to dismiss cannot be granted on the basis of *res judicata* as it relies on evidence and allegations outside of the complaint. Significantly, Keeley acknowledges the previous dismissal but contends that it is invalid because he was denied Due Process and notification that his complaint had been dismissed.

{¶7} On August 25, 2014, Defendants requested that their previously filed motion to dismiss be converted to a motion for summary judgment. On September 24, 2014, the trial court dismissed Keeley's case with prejudice on the basis of *res judicata*.

#### **Converting Motion to Dismiss to Summary Judgment**

{¶8} In his first of four assignments of error, Keeley asserts:

{¶9} "The trial court abused its discretion when it converted the Defendants Motion to Dismiss to a Motion for Summary Judgment. The requirements for a Motion for Summary Judgment were not followed pursuant to Civ.R.56 and Civ.R.12."

{¶10} "The affirmative defense of *res judicata* is not properly raised in a Civ.R. 12(B)(6) motion because it requires reference to materials outside the complaint (*i.e.*, the previous action upon which the defense is based) and, therefore, is a matter which should be raised on summary judgment." *Nelson v. Pleasant*, 73 Ohio App.3d 479, 482, 597 N.E.2d 1137 (4th Dist.1991) (internal citations omitted). "[T]he proper procedure is for the court to convert the motion to dismiss into a motion for summary judgment and provide the opposing party with notice and an opportunity to respond." *Jefferson v. Bunting*, 140 Ohio St. 3d 62, 2014-Ohio-3074, 14 N.E.3d 1036 ¶12, citing *Calin v. Nemes*, 7th Dist. No. 11 MA 12, 2012-Ohio-1409, ¶14-17.

{¶11} Defendants did not file an answer, but instead filed a motion to dismiss based on *res judicata*; two pleadings from a prior case were attached. After seeking

leave, Defendants filed to convert the motion to dismiss to a motion for summary judgment. Keeley filed a response in opposition.

{¶12} As the motion to dismiss relied on documents outside of the complaint, it was proper for Defendants to move to convert the motion to dismiss to one requesting summary judgment. Keeley was given notice and an opportunity to respond which he utilized by filing a motion in opposition to the conversion. As the proper procedure was followed, Keeley's first assignment of error is meritless and overruled.

### **Res Judicata**

{¶13} Keeley's second and third assignments of error are interrelated and will be discussed together:

{¶14} "The trial court abused its discretion when it used the previous civil cases as evidence of res judicata presuming to use Civ.R. 41 to support their claim of "previously ruled on the merits" based on ineligible prior actions."

{¶15} "The trial court abused its discretion when it sustained the Defendants-Appellees Motion based on res judicata when the current case contained new evidence, defendants and premise, and differs greatly from the previous complaint."

{¶16} Pursuant to the doctrine of res judicata, a subsequent action is barred if the following elements are demonstrated: (1) a final judgment is rendered on the merits by a court of competent jurisdiction; (2) it concerns the same claim or cause of action as that now asserted; and (3) the prior action was between the same parties as are in the current action or their privies. *Kelm v. Kelm*, 92 Ohio St.3d 223, 227, 2001-Ohio-168, 749 N.E.2d 299, quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, syllabus.

{¶17} It is undisputed that Keeley previously filed suit twice. The first complaint was filed May 29, 2013, wherein Keeley sued Croft, Parks and other ODRC officials for negligence, but the court dismissed the case for lack of subject matter jurisdiction. Generally, a dismissal for lack of subject matter jurisdiction does not operate as an adjudication on the merits. *Diagnostic & Behavioral Health Clinic, Inc. v. Jefferson County Mental Health, Alcohol and Drug Addiction Bd*, 7th Dist. No. 01 JE 5, 2002-Ohio-1567, ¶11; Civ.R. 41(B)(4). "This rule reflects "the policy of the Civil Rules that dismissal of an action for want of jurisdiction \* \* \* does not bar the commencement of a

new action on the same claim if the defect is cured." *Id.* citing *Baldwin's Civil Practice*, Sec. 41-36, at p. 233. Further, the Supreme Court has held that a dismissal for lack of jurisdiction is not res judicata to a subsequent action. *State ex rel. Schneider v. Board of Education*, 39 Ohio St.3d 281, 530 N.E.2d 206 (1988).

{¶18} The second action filed by Keeley on August 16, 2013, was styled as a §1983 action, and again made the same allegations regarding improper medical care, but was dismissed because Keeley failed to satisfy the mandatory filing requirements in R.C. §2969.25 and §2969.26.

The requirements of R.C. 2969.25 are mandatory and failure to comply with them requires dismissal of an inmate's complaint. *State ex rel. Washington v. Ohio Adult Parole Auth.*, 87 Ohio St.3d 258, 259, 719 N.E.2d 544 (1999), citing *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 422, 696 N.E.2d 594 (1998). As held by the court of appeals, the affidavit required by R.C. 2969.25(A) must be filed at the time the complaint is filed, and an inmate may not cure the defect by later filings. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, 797 N.E.2d 982, ¶ 9 (an inmate's "belated attempt to file the required affidavit does not excuse his noncompliance. See R.C. 2969.25(A), which requires that the affidavit be filed '[a]t the time that an inmate commences a civil action or appeal against a government entity or employee' ").

**Nor is this a dismissal on the merits** requiring prior notice, as asserted by Hall. Because the failure to comply with the mandatory requirements of R.C. 2969.25 cannot be cured, prior notice of the dismissal would have afforded Hall no recourse. (emphasis added)

*State ex rel. Hall v. Mohr*, 140 Ohio St.3d 297, 2014-Ohio-3735, 17 N.E.3d 581, ¶4-5.

{¶19} As the trial court's resolution of Keeley's prior actions were not on the merits, dismissal on the basis of res judicata was erroneous. Accordingly, Keely's second and third assignments of error are meritorious.

### Summary Judgment

{¶20} In his fourth and final assignment of error, Keeley asserts:

{¶21} "The trial court abused its discretion and prejudiced the Plaintiff-Appellant when it dismissed his Motion for Summary Judgment claiming that they "find no genuine issues of material fact and is not entitled to summary judgment."

{¶22} Because the trial court denied Keeley's motion for summary judgment on the basis of res judicata, this matter must be remanded so the trial court can consider the merits of the initially filed motion to dismiss or summary judgment on a basis other than res judicata. "The trial court must be afforded the first opportunity to resolve these issues." *Bahen v. Diocese of Steubenville, et al*, 7th Dist. No. 11 JE 34, 2013-Ohio-2168, ¶25. "An appellate court should not substitute its own de novo review of matters for the initial determination which must be made by the trial court...." *State ex rel. Vanmeter v. Lawrence County*, 4th Dist. No. 93CA27, 1994 WL 323703, \*10 (July 8, 1994).

{¶23} In sum, because Keeley's arguments are meritorious regarding res judicata, the judgment of the trial court is reversed and remanded for the trial court to consider Defendants' initially filed motion to dismiss or the converted motion for summary judgment on a basis other than res judicata.

Donofrio, P.J., concurs

Robb, J., concurs