[Cite as *McCloud v. Payne*, 2023-Ohio-4850.]

STATE OF OHIO COUNTY OF LORAIN	))ss:)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
DANIEL MCCLOUD Appellee/Cross-Appellant v. JEANNINE L. PAYNE Appellant/Cross-Appellee		C.A. No. 22CA011865 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 19-CV-197715

DECISION AND JOURNAL ENTRY

Dated: December 29, 2023

SUTTON, Presiding Judge.

{¶1} Defendant-Appellant Jeannine L. Payne appeals from the judgment of the Lorain County Court of Common Pleas. This Court reverses.

I.

{¶2} In June 2018, a car accident occurred in Lorain County, Ohio. Jeannine Payne was attempting to make a left turn when she collided with a vehicle driven by Daniel McCloud ("Lorain accident"). Mr. McCloud's son, David McCloud ("son"), was a passenger in his father's vehicle. Both Mr. McCloud and his son sustained injuries they alleged were a result of the car accident, and Mr. McCloud's vehicle was totaled. The son is not a party in this case.

{¶3} Several weeks later, the son was injured in a second car accident in Cuyahoga County ("Cuyahoga accident").

{¶4} In March 2019, the son filed a complaint for negligence in Cuyahoga County Court of Common Pleas ("Cuyahoga case"). The Cuyahoga case was filed against his father, Daniel

McCloud, Ms. Payne, and the driver of the other vehicle involved in the Cuyahoga accident. The complaint alleged that the son had suffered serious injuries as a result of both car accidents and sought compensation for medical expenses from both the Lorain accident and the Cuyahoga accident.

{¶5} Two weeks later, Mr. McCloud filed a complaint in the Lorain County Court of Common Pleas ("Lorain case") against Ms. Payne and Geico Casualty Company, who he later dismissed from the case. The Lorain case sought compensation for injuries and damages to Mr. McCloud as a result of Ms. Payne's alleged negligence in causing the Lorain accident.

{¶6} Mr. McCloud filed an answer to his son's complaint in the Cuyahoga case, and also filed a cross-claim for indemnification against Ms. Payne in the Cuyahoga case.

{¶7} In April 2019, Ms. Payne filed an answer to both the amended complaint and Mr. McCloud's cross-claim in the Cuyahoga case, and also filed a cross-claim against Mr. McCloud for contribution. Mr. McCloud subsequently answered the cross-claim.

{¶8} Because cases involving the Lorain accident were pending in both Lorain and Cuyahoga counties, Mr. McCloud filed a "Motion to Transfer Venue and Consolidate" in the Lorain case. Mr. McCloud moved "to transfer and consolidate the two cases [in the Cuyahoga County Court of Common Pleas] to preserve the resources of the courts and the parties, as all claims arise from the same automobile collision." Ms. Payne responded in opposition, noting that the Lorain case was properly before the Lorain County Court of Common Pleas because Lorain County was both where Ms. Payne lived and was also the county where the accident occurred.

{¶9} The Lorain County Court of Common Pleas denied Mr. McCloud's motion stating:

> The court finds plaintiff's motion not well taken. Further, the court finds that the accident occurred in Lorain County and defendant Jeannine L. Payne resides in Lorain County. Accordingly, plaintiff's motion to transfer venue and consolidate is denied.

{¶10} Both cases proceeded through discovery. In February 2020, the Cuyahoga case was settled between all of the parties and the case was dismissed with prejudice. The terms of the settlement are not known and are not part of the record in this case.

{¶11} In May 2020, Ms. Payne filed a "Motion to Dismiss for Lack of Jurisdiction or in the Alternative, Request for Summary Judgment" in the Lorain case. That motion argued that (1) pursuant to Civ.R. 13(A), the claims raised in the Lorain case were required to be raised in the Cuyahoga case; (2) the claims raised in the Lorain case were barred by the doctrine of res judicata; and (3) the Cuyahoga case had jurisdictional priority over the Lorain case. Mr. McCloud responded in opposition to the motion, arguing (1) none of the claims in the Lorain case were compulsory in the Cuyahoga case; (2) his claims were not precluded by res judicata; and (3) the Cuyahoga County Court of Common Pleas never had exclusive jurisdiction over the matter. The trial court denied Ms. Payne's motion the following month. Later, Ms. Payne renewed her motion, which the Lorain County Court of Common Pleas again denied.

{¶12} The Lorain County Court of Common Pleas proceeded with the Lorain case, and a jury rendered a verdict in favor of Mr. McCloud. The jury found that Ms. Payne was the direct and proximate cause of the injuries sustained by Mr. McCloud. The jury also found that Mr. McCloud was comparatively negligent, but that his negligence did not cause him any damages. While the parties engaged in extensive post-judgment litigation, that is not relevant in resolving this appeal.

{¶13} Ms. Payne timely appealed, citing three errors for this Court's review. Mr. McCloud has also filed a cross-appeal, assigning three additional errors for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE LORAIN COUNTY COURT OF COMMON PLEAS DID NOT HAVE JURISDICTION OVER THE CASE AS THE CLAIMS SHOULD HAVE BEEN RAISED IN A PREVIOUSLY INITIATED CASE IN THE CUYAHOGA COUNTY COURT OF COMMON PLEAS.

{¶14} In her first assignment of error, Ms. Payne argues that the trial court lacked jurisdiction over Mr. McCloud's claims. For the reasons that follow, we agree.

Jurisdictional Priority Rule

{¶15} Ms. Payne argues on appeal that the jurisdictional priority rule precluded the Lorain County Court of Common Pleas from having jurisdiction in the Lorain action. In response, Mr. McCloud argues the jurisdictional priority rule is not applicable because his cause of action in the Cuyahoga case is different from the cause of action in the Lorain case.

{¶16} In general, the jurisdictional priority rule operates in situations where the claims or causes of action are the same in both cases; thus, if the second case does not involve the same claims or parties, the first case will not prevent the second case. *Instant Win, Ltd. v. Summit Cty. Sheriff*, 9th Dist. Summit No. 20762, 2002 WL 533475, *1 (Apr. 10, 2002). "The jurisdictional[] priority rule exists to promote judicial economy and avoid inconsistent results." *State ex rel. Consortium For Economic & Community Dev. for Hough Ward 7 v. Russo*, 151 Ohio St.3d 129, 2017-Ohio-8133, ¶ 10. The rule provides that "as between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.'" *State ex rel. Racing Guild of Ohio v. Morgan*, 17 Ohio St.3d 54, 56 (1985) quoting *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279 (1977), syllabus. "When it applies, the judge in the second case patently and unambiguously lacks jurisdiction *by operation*

of the rule[.]" (Emphasis in original.) *State ex rel. Consortium For Economic & Community Dev. for Hough Ward 7* at ¶ 8.

{¶17} It is usually a condition of the operation of the jurisdictional priority rule that the claims or causes of action be the same in both cases. *Davis v. Conway Systems,* 8th Dist. Cuyahoga No. 81355, 2004-Ohio-515, ¶ 12. "Therefore, if the second case does not involve the same cause of action or the same parties, the first suit will normally not prevent the second case." *State ex rel. Red Head Brass v. Holmes Cty. Court of Common Pleas,* 80 Ohio St.3d 149, 151 (1997).

{¶18} This general rule, however, is subject to an exception. "[I]t is a condition of the jurisdictional[]priority rule that the claims and parties be the same in both cases, so '[i]f the second case is not for the same cause of action, nor between the same parties, the former suit will not prevent the latter.'" *State ex rel. Dunlap v. Sarko,* 135 Ohio St.3d 171, 2013-Ohio-67, ¶ 10, quoting *State ex rel. Judson v. Spahr,* 33 Ohio St.3d 111, 113 (1987). The Ohio Supreme Court has held that the jurisdictional priority rule applies when the causes of action and relief requested are not exactly the same, as long as the actions present part of the same "whole issue." *State ex rel. Dunlap* at ¶ 11, citing *State ex rel. Otten v. Henderson,* 129 Ohio St.3d 453, 2011-Ohio-4082, ¶ 29 and *State ex rel. Sellers v. Gerken,* 72 Ohio St.3d 115, 117 (1995).

{¶19} Courts have used a two-step analysis for whether two cases involve the "whole issue":

> Actions comprise part of the "whole issue" when: (1) there are cases pending in two different courts of concurrent jurisdiction involving substantially the same parties; and (2) the "ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where the suit originally commenced."

Instant Win, Ltd. at *1, citing *Michaels Bldg. Co. v. Cardinal Fed. S. & L. Bank,* 54 Ohio App.3d 180, 183 (8th Dist.1988). "This Court has explained that, while the claims need not be identical in

every respect, they must be sufficiently similar such that each of the actions comprises part of the whole issue that is within the exclusive jurisdiction of the court whose power is legally first invoked." (Internal quotations omitted.) *Dorsey v. Henry*, 9th Dist. Summit No. 29936, 2022-Ohio-2023, ¶ 20.

{¶20} In the first step of the "whole issue" analysis, we consider whether there are cases pending in two different courts of concurrent jurisdiction that involve substantially the same parties. There is no dispute that the Cuyahoga County Court of Common Pleas and the Lorain County Court of Common Pleas are courts of concurrent jurisdiction and both cases were pending at the same time. While the Cuyahoga case and the Lorain case involved some different parties, the parties were substantially similar. The Cuyahoga case involved Mr. McCloud, his son, Ms. Payne, and a third-party who was involved in the Cuyahoga accident. The Lorain case involved Mr. McCloud and Ms. Payne.

{¶21} In the second step of the analysis, we review whether the court subsequently attempting to exercise jurisdiction, the Lorain County Court of Common Pleas, could have affected or interfered with the resolution of the issues before the court where the suit was originally filed, the Cuyahoga County Court of Common Pleas. As this Court previously stated, "[c]laims are sufficiently similar for this purpose * * * when a ruling by the second court to acquire jurisdiction could affect or interfere with resolution of the claims pending in the court in which the action was filed in the first instance." *Dorsey* at ¶ 20. "[I]nvoking the jurisdiction of the court 'depends on the state of things at the time of the action brought,'" and not, as the dissent posits, at a later point in time in the litigation. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 25, quoting *Mollan v. Torrance*, 22 U.S. 537, 539 (1824); *See also Thomas v.*

Amazon.com Services, Inc., 561 F.Supp.3d 740, 744 (N.D. Ohio 2021) ("Jurisdiction is determined at the time of the filing of the complaint.").

{¶22} In this case, the second court to attempt to acquire jurisdiction over the issue of negligence in the Lorain accident was the Lorain County Court of Common Pleas. In the Lorain case, the record shows Mr. McCloud's claim for negligence required the jury to determine whether Mr. McCloud was comparatively negligent. In the Cuyahoga case, the record shows Mr. McCloud's cross-claim for indemnification and Ms. Payne's claim for contribution required the same questions to be answered about the negligence of Ms. Payne and Mr. McCloud. Therefore, the nature of the claims in both cases were part of the same "whole issue."

{¶23} The Cuyahoga case was filed first. The nature of the claims in the Cuyahoga Case and the later filed Lorain case, which were pending at the same time, were part of the same whole issue. Therefore, by operation of the jurisdictional priority rule, the Lorain County Court of Common Pleas lacked jurisdiction over the Lorain case because the Cuyahoga County Court of Common Pleas acquired jurisdiction over the matter first, "to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties." *State ex rel. Racing Guild of Ohio,* 17 Ohio St.3d at 56. The Lorain County Court of Common Pleas "patently and unambiguously lack[ed] jurisdiction" and, therefore, was unauthorized to proceed in the matter "to promote judicial economy and avoid inconsistent results." *State ex rel. Consortium For Economic & Community Dev. for Hough Ward 7*, 2017-Ohio-8133, at ¶ 8, 10.

{¶24} We note at the time the Lorain case was filed, the Lorain County Court of Common Pleas was without jurisdiction and barred by operation of the jurisdictional priority rule from proceeding on that complaint regardless of when the Cuyahoga case was settled and dismissed. However, "the jurisdictional[]priority rule does not apply if the first action terminates before the

second action commences." *See State ex rel. Vanni v. McMonagle*, 137 Ohio St.3d 568, 2013-Ohio-5187, ¶ 10. That was not the case here – Mr. McCloud did not file the Lorain case after the Cuyahoga case was settled. If Mr. McCloud had filed the Lorain case *after* the Cuyahoga case was settled, the jurisdictional priority rule would not apply to deprive the Lorain County Court of Common Pleas of jurisdiction, though Mr. McCloud's claims may have been barred by res judicata.

{¶25} The dissent argues that "[t]he Lorain County court also did not attempt to resolve any issue that was contested in the Cuyahoga County court while both cases were pending." However, a review of the record in the Lorain case shows the proceedings were never stayed and though the Lorain County Court of Common Pleas patently and unambiguously lacked jurisdiction, it nonetheless proceeded to act. Several pre-trial conferences were conducted. The parties engaged in extensive discovery, and by summons of the Lorain County Court of Common Pleas, were compelled to appear and respond to discovery requests. Ms. Payne was required to file an answer to Mr. McCloud's claim. The Lorain County Court of Common Pleas entered judgment on Mr. McCloud's "Motion to Transfer Venue and Consolidate." The parties were also ordered to attend mediation in an attempt to resolve Mr. McCloud's claim.

{¶26} While Ms. Payne also raised other arguments related to cross-claims and counterclaims within her appeal, it is not necessary for this Court to address those arguments because the jurisdictional priority rule is dispositive.

{¶27} Ms. Payne's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE COURT OF COMMON PLEAS GRIEVOUSLY ERRED IN PERMITTING THE PLAINTIFF'S EXPERT TO PROVIDE OPINIONS ABOUT INJURIES DURING HIS TRIAL TESTIMONY WHEN SUCH

OPINIONS HAD NOT BEEN PREVIOUSLY DISCLOSED TO DEFENSE COUNSEL.

ASSIGNMENT OF ERROR III

THE COURT OF COMMON PLEAS TAXED EXCESSIVE ITEMS AS COSTS.

CROSS-ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN PREVENTING THE PLAINTIFF FROM CONDUCTING ANY DISCOVERY PERTAINING TO THE PLAINTIFF'S MOTION FOR PREJUDGMENT INTEREST WHEN IT STAYED ANY AND ALL DISCOVERY AFTER [MS.] PAYNE'S COUNSEL FILED A MOTION TO QUASH SUBPOENA AND PROTECTIVE ORDER.

CROSS-ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN PREVENTING THE PLAINTIFF FROM OBTAINING THE CLAIMS FILE FROM STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY RELEVANT TO PLAINTIFF'S CLAIM FOR PREJUDGMENT INTEREST.

CROSS-ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR PREJUDGMENT INTEREST.

{¶28} Given this Court's resolution of the first assignment of error, the remaining assignments of error and cross-assignments of error are moot and we decline to address them. *See* App.R. 12(A)(1)(c).

III.

{¶29} Ms. Payne's first assignment of error is sustained. Her second and third assignments of error, as well as the errors assigned in Mr. McCloud's cross-appeal, are moot. The judgment of the Lorain County Court of Common Pleas is vacated, and this matter is remanded for further proceedings consistent with this decision.

Judgment vacated,
and cause 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 Lorain, 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(C). 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 to Appellee/Cross-Appellant.

BETTY SUTTON
FOR THE COURT

STEVENSON, J.
CONCURS.

HENSAL, J.
DISSENTING.

{¶30} When the jurisdictional priority rule applies, the "authority" of the first court "continues until the matter is completely and finally disposed of[.]" *State ex rel. Sellers v. Gerken*, 72 Ohio St.3d 115, 117 (1995), quoting *John Weenink & Sons Co. v. Cuyahoga Cty. Court of*

Common Pleas, 150 Ohio St. 349 (1948), paragraph three of the syllabus. The majority notes in its description of the facts that the Cuyahoga County case was dismissed in February 2020. Ms. Payne did not file her motion to dismiss in this case until May 2020. At that point, there were not two cases competing for jurisdiction over the same issues. It would have been impossible, in fact, for the trial court to give the Cuyahoga County case priority, because that case no longer existed.

{¶31} The majority relies on *State ex rel. Consortium for Economic and Community Dev. v, Hough Ward 7 v. Russo*, 151 Ohio St.3d 129, 2017-Ohio-8133. It overlooks the Ohio Supreme Court's recognition in that case that it had "held that the jurisdictional-priority rule requires that both actions *be currently pending*[.]" (Emphasis added.) *Id*. at ¶ 11 (explaining the holding of *State ex rel. Vanni v. McMonagle*, 137 Ohio St.3d 568, 2013-Ohio-5187, ¶ 10). In *Russo*, although both cases had been filed within four months of each other, the Supreme Court upheld the denial of a writ of prohibition sought under the jurisdictional priority rule because "one of the cases was not, in fact, pending" at the time the writ of prohibition was requested. *Id*. at ¶ 4, 12.

{¶32} The majority has not uncovered any authority that establishes that Mr. McCloud had to wait until the Cuyahoga County case resolved to even file his action. Instead, the ordinary procedure would be to stay the second-filed action until the first case concludes. *See State ex rel. AMWS Water Solutions, LLC v. Mertz*, 11th Dist. Trumbull No. 2016-T-0085, 2022-Ohio-4571, ¶ 24. A stay was unnecessary in this case because there was only one case remaining at the time the jurisdictional priority rule was raised to the Lorain County court.

{¶33} If there was an issue decided in the Cuyahoga County case that was also at issue in this case, the principles of res judicata could apply. The jurisdictional priority rule, however, did not. There were not two cases "pending" at the time the trial court denied Ms. Payne's motion to dismiss. *Instant Win, Ltd. v. Summit Cty. Sheriff*, 9th Dist. Summit 20762, 2002 WL 533475, *1

(Apr. 10, 2002). The Lorain County court also did not attempt to resolve any issue that was contested in the Cuyahoga County court while both cases were pending. Besides scheduling entries, the only journal entry that the court issued before Ms. Payne filed her motion to dismiss was to deny Mr. McCloud's motion to transfer the case to Cuyahoga County, a motion that Ms. Payne herself opposed. The Lorain County court did not "interfere" with the Cuyahoga County proceeding, which is the reason for the rule. *John Weenink & Sons*, 150 Ohio St. 349, paragraph three of the syllabus. Accordingly, I would conclude that the trial court correctly denied Ms. Payne's motion to dismiss. I, therefore, respectfully dissent.

APPEARANCES:

TERRENCE J. KENNEALLY and SEAN M. KENNEALLY, Attorneys at Law, for Appellant/Cross-Appellee.

ALEXANDER L. PAL, Attorney at Law, for Appellee/Cross-Appellant.