

[Cite as *Ferrara v. Vicchiarelli Funeral Servs., Inc.*, 2018-Ohio-5042.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106916

MICHAEL FERRARA, SR., ET AL.

PLAINTIFFS-APPELLANTS

vs.

**VICCHIARELLI FUNERAL SERVICES, INC.,
ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-825511

BEFORE: Keough, J., Boyle, P.J., and Jones, J.

RELEASED AND JOURNALIZED: December 13, 2018

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KATHLEEN ANN KEOUGH, J.:

{¶1} Plaintiffs-appellants, Michael Ferrara, Sr., Louise Ferrara, Nicholas Ferrara, and Carmen Ferrara (collectively, the “Ferraras”), appeal the trial court’s decision granting summary judgment in favor of defendants-appellees Joseph C. Schulte-Mahon-Murphy Funeral Homes Co. (“SMM”), Greenfield Crematory, Ltd. (“Greenfield”), and James Murphy (“Murphy”) (collectively “appellees”). For the reasons that follow, we affirm.

{¶2} This court succinctly set forth the procedural history of this case in a prior decision.

The Ferraras initially filed a complaint [Cuyahoga C.P. No.] (CV-13-807280) on May 14, 2013, against Vicchiarelli Funeral Services, Karen Vicchiarelli, Lori Sperling, and John Does I and II, alleging that the Funeral Home mishandled the final arrangements for the Ferraras’ relative, Michael Ferrara, Jr. The Ferraras asserted five claims in their complaint: abuse of a corpse, negligence, breach of contract, negligent misrepresentation, and infliction of emotional distress. [“First lawsuit”] In spite of the fact that the Funeral Home filed a counterclaim seeking recovery for the unpaid portion of the funeral services contract signed by Louise, the Ferraras dismissed their complaint pursuant to Civ.R. 41(A)(1). The

counterclaim proceeded to a jury trial where the jury found in favor of the Funeral Home and judgment was entered in the Funeral Home's favor in the amount of \$2,398. We affirmed the judgment on appeal. *Ferrara v. Vicchiarelli Funeral Servs., Inc.*, 8th Dist. Cuyahoga No. 102048, 2015-Ohio-2273 [*"Ferrara I"*].

While the above counterclaim was pending before the trial court, the Ferraras filed another complaint where they reasserted the claims that they had previously dismissed in the first complaint and also added counts for negligent misrepresentation, infliction of emotional distress, fraud, violation of the Ohio Consumer Sales Practices Act, conspiracy, and fraudulent concealment. ["Second lawsuit"]. The Ferraras listed the same Funeral Home defendants as in the first complaint and also included Brian Kelly, the embalmer for the Funeral Home, and Katherine Mlac, the coroner for the Funeral Home. Additionally, the Ferraras listed as defendants, James Murphy and Joseph Schulte of Mahon Funeral Homes Company, and Greenfield Crematory, Ltd.

The Funeral Home filed a motion to dismiss or in the alternative a motion for summary judgment arguing that the Ferraras were forum shopping by refileing their complaint before a different judge. The matter was reassigned to the administrative judge, who denied the Funeral Home's motion. Thereafter, the Funeral Home filed an answer wherein it denied the allegations, raised the affirmative defense of res judicata, and reasserted the counterclaim it asserted in [response to] the previous complaint filed by the Ferraras.

The Ferraras filed a motion to dismiss the counterclaim claiming it was barred by res judicata. In response, the Funeral Home filed a motion in opposition to the Ferraras' motion to dismiss and a motion to reconsider the Funeral Home's motion to dismiss or in the alternative motion for summary judgment. The Funeral Home agreed that the issues, including those raised by the Ferraras, had already been litigated in the first case and that by dismissing their claims in their first complaint, res judicata prevented the Ferraras from attempting to resurrect them in a second action.¹

Ferrara v. Vicchiarelli Funeral Servs., 8th Dist. Cuyahoga No. 101584, 2016-Ohio-5144, ¶ 3-6, *appeal not allowed*, 148 Ohio St.3d 1426, 2017-Ohio-905, 71 N.E.3d 298 (*"Ferrara II"*).

{¶3} The trial court granted summary judgment in favor of the Funeral Home, Mlac, and Kelly, citing Civ.R. 13(A) and case law interpreting the doctrine of collateral estoppel.

¹Katherine Mlac was included in the Funeral Home's dispositive motion; Brian Kelly was subsequently included in the reply motion.

Defendants Murphy, SMM, and Greenfield remained parties to the lawsuit. The Ferraras appealed the decision. *See Ferrara II*.

{¶4} In *Ferrara II*, the Ferraras challenged the trial court's decision granting summary judgment in favor of the Funeral Home because the second complaint raised new claims against the Funeral Home. This court affirmed the trial court's decision, finding that "[t]he facts and circumstances giving rise to the second lawsuit are identical to the first lawsuit and arise out of the same transaction or occurrence." *Id.* at ¶ 13. This court found that the Ferraras' claims were compulsory counterclaims under Civ.R. 13(A), and "[b]y abandoning [their] claims against the Funeral Home in the first lawsuit, the Ferraras waived those claims and any other claims they failed to raise against the Funeral Home that were 'offshoots of the same basic controversy between the parties.'" *Id.* Accordingly, the Ferrara's claims against the Funeral Home were barred by res judicata.

{¶5} In *Ferrara II*, the Ferraras also challenged the trial court's decision granting summary judgment in favor of Mlac and Kelly because they were not parties to the first lawsuit. This court affirmed the trial court's decision, concluding that based on the doctrine of claim preclusion, res judicata also barred the Ferraras' claims against Mlac and Kelly because sufficient privity was established between them. *Id.* at ¶ 19. Because Mlac and Kelly's association with the Funeral Home was known at the time of the first lawsuit, and the dispute arose out of the same transaction that was at issue in the first lawsuit, sufficient mutuality or privity existed that precluded the Ferraras' claims against them. *Id.* at ¶ 18-19.

{¶6} Following *Ferrara II*, the only defendants remaining in the lawsuit were the instant appellees — Murphy, SMM, and Greenfield. They moved for summary judgment, asserting that no genuine issue of material fact existed because (1) there was no privity of contract between the

Ferraras and appellees; (2) res judicata bars the Ferraras' claims because sufficient privity existed between the appellees and the other Funeral Home defendants; and (3) the merits of the case demonstrates no issue of material fact exists.

{¶7} The trial court issued a written decision granting the appellees' motion for summary judgment. The trial court found that the Ferraras' claims against the appellees were barred by res judicata because (1) there was a final, valid decision on the merits in the first lawsuit and affirmed in *Ferrara I*; (2) the second lawsuit involved the same parties or their privities that were known to the Ferraras at the time of the first lawsuit; (3) the claims raised against the appellees could have been brought in the first lawsuit; and (4) the claims against the appellees "clearly arise out of the same transaction or occurrence."

{¶8} The Ferraras now appeal, raising the following two assignments of error, which will be addressed together.

1. The trial court erred when it granted Appellees' Motion for Summary Judgment on the basis of res judicata for Appellees James Murphy, Joseph C. Schulte-Mahon-Murphy Funeral Homes Co., and Greenfield Crematory, Ltd. because they were not named parties in the previous case.

2. The trial court erred when it granted Appellees' Motion for Summary Judgment on the basis of res judicata for Appellees James Murphy, Joseph C. Schulte-Mahon-Murphy Funeral Homes Co., and Greenfield Crematory, Ltd. when they were not employees/agents of Vicchiarelli Funeral Services, Inc.

{¶9} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion

that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

{¶10} Appellees moved for summary judgment partly on the basis that the Ferraras' claims were barred by res judicata. The syllabus in *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), sets forth the general principles 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." Not only must the claim arise out of the same transaction or occurrence for of res judicata to apply, "the parties to the subsequent action must be identical to or in privity with those in the former action." *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, 805 N.E.2d 1089, ¶ 8.

{¶11} The Ferraras contend that res judicata does not bar their claims against the appellees because they voluntarily dismissed their first complaint pursuant to Civ.R. 41(A) and thus, the claims were never fully litigated. They maintain that they "lacked a full and fair opportunity to litigate their claims against the dismissed [Funeral Home] or appellees * * * ." (Appellants' Brief, p. 29). They contend that not only did they voluntarily dismiss their complaint, but that the trial court did not allow them to present any evidence at the jury trial regarding the Funeral Home's counterclaim.

{¶12} It is true that the Ferraras voluntarily dismissed their complaint pursuant to Civ.R. 41(A)(1) after the trial court denied their request to amend their complaint to add additional causes of action and parties.² However, once the Funeral Home filed its counterclaim for unpaid

²We note that the Ferraras' motion for leave to file an amended complaint to add additional parties and causes of action in the first action did not specifically identify the additional causes of action or defendants. Rather, the motion was a blanket request to file an amended complaint and the proposed amended complaint was not attached to the motion. Any challenge to any discretionary decision by the trial court should have been raised in *Ferrara I*.

funeral expenses, the Ferraras' claims against the Funeral Home basically transformed into a compulsory counterclaim. This was the Ferraras' "full and fair opportunity to litigate their claims against" the Funeral Home and all other parties that may have been in privity with them.

{¶13} Civ.R. 13(A) governs compulsory counterclaims. Under this rule, all existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit, regardless of which party initiates the action. *Ferrara II*, 8th Dist. Cuyahoga No. 104054, 2016-Ohio-5144, ¶ 11, citing *Rettig Ents. v. Koehler*, 68 Ohio St.3d 274, 626 N.E.2d 99 (1999), paragraph one of the syllabus. A party who fails to assert a compulsory counterclaim at the proper time is barred from litigating that claim in a subsequent lawsuit. *Lewis v. Harding*, 182 Ohio App.3d 588, 2009-Ohio-3071, 913 N.E.2d 1048, ¶ 12 (8th Dist.).

{¶14} This court has previously determined that the Ferraras' claims against the Funeral Home were compulsory counterclaims. *See Ferrara II* at ¶ 13. And after those claims were abandoned in the first lawsuit, res judicata barred their assertion in the second lawsuit. *Id.* at ¶ 14. Additionally, this court determined that the claims subsequently asserted by the Ferraras against Mlac and Kelly were also barred by res judicata. *See generally id.* Even though Mlac and Kelly were not named in the first lawsuit, this court determined that sufficient mutuality or privity existed between them and the Funeral Home defendants to preclude the Ferraras' claims against them. *Id.* at ¶ 18-20.

{¶15} Because the Ferraras' claims were essentially compulsory counterclaims, any challenge to any error by the trial court in its alleged refusal to allow them to present evidence in this capacity at the jury trial in the first lawsuit on the Funeral Home's counterclaim was abandoned by the Ferraras in their first appeal. *See Ferrara I*, 8th Dist. Cuyahoga No. 102048,

2015-Ohio-2273, ¶ 5 (noting that the Ferraras dismissed all assignments of error except the third and fifth).³

{¶16} Simply, any and all claims against any and all defendants that were known to the Ferraras at the time of the first lawsuit arising out of the alleged mishandling of the final funeral arrangements for their relative needed to be raised as a compulsory counterclaim in the first lawsuit. That was not done, and res judicata now bars the claims against the appellees, much like the claims against Mlac and Kelly.

{¶17} The Ferraras contend, however, that the claims against appellees are not like those against Mlac and Kelly because the appellees were not employees or agents of the Funeral Home, and thus not in privity with the Funeral Home.

{¶18} In *Ferrara II*, we recognized that when applying the principles of res judicata, a broader and more “relaxed” approach to what constitutes privity is taken.

The doctrine of res judicata encompasses two related concepts of preclusion, claim preclusion and issue preclusion. *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. “Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action.” *Id.* The previous action is conclusive for all claims that were or that could have been litigated in the first action. See *Holzemer v. Urbanski*, 86 Ohio St.3d 129, 133, 712 N.E.2d 713 (1999).

“What constitutes privity in the context of res judicata is somewhat amorphous. A contractual or beneficiary relationship is not required:

‘In certain situations * * * a broader definition of ‘privity’ is warranted. As a general matter, privity ‘is merely a word used to say that the relationship between the one who is a party on the

³We take judicial notice that the Ferraras’ first assignment of error in *Ferrara I* stated: “The trial court erred to the prejudice of the appellants in denying appellants’ motion for leave to file [an] amended complaint and trying appellees’ counterclaim to the jury and not allowing appellants’ claims — previously asserted in the case and pending in the refiled case to be tried to the jury.”

record and another is close enough to include that other within the res judicata.’ *Bruszewski v. United States* (C.A.3, 1950), 181 F.2d 419, 423 (Goodrich, J., concurring).” *Thompson v. Wing* (1994), 70 Ohio St. 3d 176, 184, 1994-Ohio-358, 637 N.E.2d 917, 923.”

Ferrara II, 8th Dist. Cuyahoga No. 101584, 2016-Ohio-5144, ¶ 16-17, quoting *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (2000).

{¶19} In this case, the trial court found that the appellees had a clear association known to the Ferraras at the time of the first lawsuit, and the allegations against the appellees arose out of the same transaction or occurrence regarding the final funeral arrangements for the Ferraras’ relative. We agree. The record demonstrates that no contract existed between the Ferraras and the appellees. Rather, given the broader concept of privity as discussed above, the appellees were in a “close enough” relationship with the Funeral Home to bar the Ferraras’ claims under the doctrine of res judicata.

{¶20} Based on the record before this court, SMM is a provider of funeral services and pursuant to a facilities agreement, provided funeral facilities to the Funeral Home defendants. Additionally, Greenfield provided cremation services to the Funeral Home. In this capacity, Greenfield was acting as a subcontractor for the Funeral Home when it performed the cremation of the Ferraras’ relative. Finally, Murphy was a gratuitous agent to the Funeral Home when he signed the cremation documents and death certificate. The record demonstrates that based on the appellees’ business involvement with the Funeral Home, a clear association between the parties was apparent and known to the Ferraras at the time of the first lawsuit.

{¶21} Moreover, the record demonstrates that the claims raised by the Ferraras against the appellees could have been litigated in the first lawsuit. All of the claims clearly arise out of the same transaction or occurrence regarding the funeral and cremation services upon which the first

lawsuit was based. *See Ferrara II* at ¶ 13. Accordingly, sufficient privity was established to bar the Ferraras' claims against the appellees under the doctrine of res judicata.

{¶22} Viewing the evidence in the light most favorable to the nonmoving party, the Ferraras, we conclude the trial court did not err in granting appellees' motion for summary judgment. The assignments of error are overruled.

{¶23} Judgment affirmed.

It is ordered that appellees recover from appellants the costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

MARY J. BOYLE, P.J., and
LARRY A. JONES, SR., J., CONCUR