

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO ex rel. JIM PETRO, ATTORNEY GENERAL OF OHIO,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NOS. 2002-T-0059 and 2002-T-0074
FRANK D. DeJUTE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 98 CV 1325.

Judgment: Affirmed.

Jim Petro, Attorney General of Ohio, and *Arthur J. Marziale, Jr.*, *William C. Becker*, and *Michael R. Gladman*, Assistant Attorneys General, State Office Tower, 30 East Broad Street, 17th Floor, Columbus, OH 43215 (For Plaintiff-Appellant).

Frank D. DeJute, pro se, 1775 North State Street, Girard, OH 44420 (Defendant-Appellee).

WILLIAM M. O'NEILL, P.J.,

{¶1} This appeal arises from the Trumbull County Court of Common Pleas wherein, partial summary judgment was granted in favor of appellee, Frank D. DeJute (“DeJute”).

{¶2} The Mahoning Valley Sanitary District, (“MVSD”) is a political subdivision of Ohio that provides water to the cities of Youngstown and Niles. The MVSD was

overseen by the “Court of Jurisdiction” which was comprised of the Mahoning and Trumbull County Common Pleas Courts.¹ The MVSD is managed by a board of directors which, for the time period covered by the special audit report in this case, consisted of two members: Frank DeJute and Edward Flask.

{¶3} In 1987, due to the deterioration of equipment and changing environmental regulations, a “Capital Improvement Program” was developed. The entire program was to be completed by the year 2000. Gilbane Building Company was hired in 1992, as the construction manager for the capital improvement program.

{¶4} Construction had commenced in 1992; however, by 1996, construction had fallen behind schedule and ultimately stopped. In March 1996, the Court of Jurisdiction ordered the Ohio Auditor of State to conduct a special audit of the MVSD and the capital improvement program, pursuant to R.C. 117.28. The audit took approximately one year to complete which resulted in an audit covering the years 1991 to 1996. A special audit report was issued on August 7, 1997, which included twenty-seven findings for recovery. As a result of the special audit, three lawsuits were filed. A claim against Gilbane Building Company was filed in the United States District Court for the Southern District of Ohio. This suit was filed against DeJute in the Trumbull County Court of Common Pleas. A third suit was filed against Edward Flask in the Mahoning County Court of Common Pleas.

{¶5} The sole claim in each of the lawsuits was based on the statutory cause of action created by R.C. 117.28, which allows a statutory recovery action to be filed if, after an audit, the Auditor of State of Ohio finds in an audit report that public funds of a political subdivision of Ohio were illegally expended.

1. R.C. 6115.16.

{¶6} As the Gilbane suit proceeded, Gilbane filed a motion for summary judgment in October 1999. The district court granted Gilbane's motion for summary judgment, holding that the "special audit" conducted was not a proper audit for which recovery could be granted pursuant to R.C. 117.28. The district court subsequently vacated that judgment six days later upon its own motion, holding that the trial court would instead certify the issue to the Supreme Court of Ohio. The issue was never ultimately certified, and Gilbane filed a supplemental motion for summary judgment in early 2001. The supplemental motion again contended that the special audit did not permit recovery under R.C. 117.28 and that there was no illegal expenditure of public funds.

{¶7} The district court ultimately granted Gilbane summary judgment holding that a fixed-fee contract existed between MVSD and Gilbane and that any payments made to Gilbane were the result of that contract. The court noted that, "[p]laintiff again has failed to cite any constitutional, statutory, or administrative provision that allegedly was violated by defendant's receipt of money from the MVSD. Certainly there is nothing inherently illegal about a fixed-fee contract."

{¶8} As a result of Gilbane prevailing on its summary judgment motion in federal court, the trial court in the instant case ultimately permitted DeJute to assert the defenses of collateral estoppel and res judicata in a motion for partial summary judgment as it related to the first two claims of the cause of action against him. Specifically, the claims that by acting in his capacity as Director of the MVSD, DeJute improperly caused or permitted the MVSD to pay (1) Mascaro \$385,000 for services not performed, and (2) Gilbane \$1,960,890 for services not provided. DeJute contended

that the federal court rejected those same two claims in the Gilbane suit and, as such, the plaintiff should be barred from relitigating those same claims against him.

{¶9} In its response to DeJute's summary judgment motion, the plaintiff argued that the district court misapplied the law in the Gilbane case and the law should be applied correctly against DeJute. The plaintiff also contended that claims for recovery against DeJute relating to Mascaro and Gilbane were not barred by collateral estoppel or res judicata.

{¶10} In a judgment entry dated February 15, 2002, the trial court granted in part and denied in part DeJute's motion for partial summary judgment. The court concluded that, regarding plaintiff's claim against DeJute for payments made to Gilbane, "[i]f Gilbane had no liability for payments it received from the MVSD or services it performed or failed to perform for the MVSD, then DeJute has no liability for approving those same payments." Thus, the trial court concluded that plaintiff's claim against DeJute, as it relates to Gilbane, is barred by the doctrines of collateral estoppel and res judicata.

{¶11} Regarding DeJute's contention that the plaintiff's claim against DeJute, as it relates to Mascaro, is also barred, the trial court held that neither party provided adequate evidence to demonstrate whether MVSD made payments to Mascaro or whether Gilbane made payments to Mascaro with funds Gilbane received from MVSD or another source. Therefore, the trial court denied DeJute's partial summary judgment motion as it related to Mascaro.

{¶12} Plaintiff-appellant subsequently appealed, citing a single assignment of error:

{¶13} “The trial court erred in granting partial summary judgment to Defendant Frank DeJute on Plaintiff’s claim that Defendant improperly approved payments to the Gilbane Building Company when it decided that the doctrines of collateral estoppel and res judicata required it to follow the October 17, 2001 Opinion and Order in *Mahoning Valley Sanitary District, ex rel. Betty D. Montgomery, Attorney General of Ohio v. The Gilbane Building Co.* (United states District Court for the Southern District of Ohio Case No. C-2-98-785) (February 15, 2002 Order Granting in Part and Denying in Part Defendant’s Motion for Partial Summary Judgment T.d. 115).”

{¶14} Appellant contends that the trial court erred when it granted summary judgment by applying the doctrines of collateral estoppel and res judicata as the issues presented and parties in the federal action were different than in this action, and when the issue presented is of such important public interest.

{¶15} The doctrine of 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.”² The Supreme Court of Ohio has held that a federal court is a court of competent jurisdiction for purposes of collateral estoppel.³

{¶16} In order to determine whether there is privity of parties, “a court must look behind the nominal parties to the substance of the cause to determine the real parties in interest.”⁴ Appellant argues that there is no privity between DeJute and Gilbane

2. (Citations omitted.) *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395.

3. *Id.*

4. *Id.* at 396, quoting *Trautwein v. Sorgenfrei* (1979), 58 Ohio St.2d 493, 501.

because (1) there is no succession in interest from one to the other, and (2) they stood on opposite sides of a contract and were “subject to completely different standards and obligations.”

{¶17} In its judgment entry, the trial court held, as a matter of law, that DeJute was in privity with Gilbane in the federal court case for res judicata and collateral estoppel purposes. The trial court held that briefs from this case frequently referred to the Gilbane case and court rulings in each case referred to decisions in the other case. The trial court also concluded that both DeJute and Gilbane shared the same interest in denying that Gilbane failed to perform any services it owed the MVSD and that Gilbane was liable to MVSD for payments it received with DeJute’s approval. We agree.

{¶18} Although DeJute and Gilbane were on opposite sides of the contract entered into regarding the capital improvement plan, when a R.C. 117.28 recovery action was commenced, both parties became potentially liable for the illegal expenditure of public monies. Thus, the fact that one was on the receiving end of the money and the other had the authority to approve those monies does not preclude both being held liable in the recovery action. Furthermore, appellant did not assert how the higher fiduciary standards applicable to DeJute were an issue in determining whether DeJute improperly caused or permitted MVSD to pay Gilbane for services not provided.

{¶19} Appellant also contends that the issues presented in both cases are not identical for collateral estoppel purposes. In order to determine whether issues in two actions are identical, the court should look at whether the same evidence would be presented in each issue.⁵

5. Id. at 396.

{¶20} Appellant argues that the issue in the Gilbane action was “whether a private construction manager received money for work it did not perform” and the issue in this case is “whether a director of the Mahoning Valley Sanitary District entered into a contract not authorized by the Court of Jurisdiction and permitted payments pursuant to that unauthorized contract.” Appellant contends that Gilbane, as a private party, was subject to different standards than was DeJute, making the issues different for collateral estoppel purposes. We disagree.

{¶21} Although, as a public official, DeJute is held to a higher standard of conduct, we find this to be tangential to the issue at hand. The true issue is whether the money approved by DeJute and received by Gilbane for construction management of the capital improvement plan was illegally transferred, thereby providing a basis for recovery under a R.C. 117.28 statutory cause of action. That issue was decided by the district court in the Gilbane suit. The district court concluded that the fixed-fee contract between Gilbane and the MVSD did not permit recovery pursuant to R.C. 117.28. Thus, DeJute, as Director of the MVSD and the individual responsible for approving payments to Gilbane, could not be found liable for illegally approving funds when such funds were legally received according to the contract. Therefore, although DeJute is held to a heightened standard of care as director, the contract between MVSD and Gilbane was held to be lawful, thereby obviating a need to determine whether DeJute acted in accordance with that higher standard. We hold that the Gilbane suit and this present cause of action are the same issue for collateral estoppel purposes.

{¶22} Appellant also asserts that, even if this court determines that all elements of collateral estoppel are present, we should reverse the decision of the trial court based

on a public interest exception. Appellant refers to the Restatement of Law 2d, Judgments, Section 28 and argues that, although an issue has been litigated and determined by final judgment, relitigation may be necessary where there is “a clear and convincing need for a new determination of the issue.”

{¶23} Appellant contends that there is a strong public interest in relitigating this issue to avoid a binding precedent which will “hamstring the Auditor’s Office in its attempts to root out corruption in government.”

{¶24} The Supreme Court of Ohio has recognized that a public interest exception to the general rule of collateral estoppel exists.⁶ However, such an exception is to be implemented in only the most extreme circumstances.⁷ We do not agree that the circumstances of the instant case require this court to bypass the doctrine of collateral estoppel. The district court determined that the contract at issue between Gilbane and MVSD was a legal, fixed-fee contract. That finding precludes appellant from attempting to “take another bite at the apple” in the instant suit and relitigate the legality of that contract again. The issue has been resolved between these parties regarding this contract. The auditor is not precluded from rooting out corruption in government where legitimate concerns regarding “illegal expenditures” exists and meet all of the statutory criteria for a recovery action under R.C. 117.28.

{¶25} The Gilbane case is pending in the Sixth Circuit Court of Appeals. Subsequent to the trial court granting DeJute a partial summary judgment, the Attorney General voluntarily dismissed the remaining claims against DeJute without prejudice and appealed the granting of the partial summary judgment to this court.

6. *State v. Williams* (1996), 76 Ohio St.3d 290, 295-296.

7. *Id.*

{¶26} Pursuant to Civ.R. 60(B)(4), should the decision of the federal district court regarding the legality of the contract between MVSD and Gilbane be reversed on appeal, the Attorney General may reopen the action against DeJute at that time with a motion for relief from judgment.

{¶27} Civ.R. 60(B)(4) reads:

{¶28} “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: *** (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]”

{¶29} The Supreme Court of Ohio has held that, “it is well-settled that relief under Civ.R. 60(B)(4), ‘*** is limited to cases in which the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel ***’.”⁸

{¶30} Appellant’s assignment of error is without merit. The holding of the trial court is affirmed.

Judgment affirmed.

DIANE V. GRENDALL, J., concurs.

JUDITH A. CHRISTLEY, J., concurs with concurring opinion.

JUDITH A. CHRISTLEY, J., concurring.

{¶31} I respectfully concur in the judgment of the majority with the following thoughts. My concern is that the majority opinion might be construed too broadly. As a

result, to narrow the scope of the opinion, it is necessary to understand the specific holding of the underlying federal district court case (“district court”).

{¶32} The diversity lawsuit in district court against the Gilbane Building Co. (“Gilbane”) was not a criminal action. Rather, it was a claim for recovery filed under R.C. 117.28, with essentially the same facts and allegations now at issue against appellee, Frank DeJute, in the instant matter.

{¶33} Both cases were initiated when the auditor for the State of Ohio made findings of recovery against various individuals, and entities. Specifically, the total findings issued by the auditor for recovery under the facts alleged amounted to almost two million dollars as to services not provided and approximately \$385,000 for services that were not properly documented. The auditor’s findings for recovery were made jointly and severally against Gilbane, appellee, and Edward Flask.

{¶34} As to Gilbane, the claim for recovery was based on the following findings by the auditor: Gilbane received public money for work not performed; Gilbane had permitted another contractor to earn an excess profit; Gilbane had paid public money for design services not supported by documentation; Gilbane was paid for construction management services regarding projects which were never constructed.

{¶35} It was the auditor’s findings of recovery which provided the basis for the Attorney General to file suit under R.C. 117.28. The relevant portion of this code section stated:

{¶36} “Where an audit report sets forth that any public money has been *illegally expended*, *** the officer receiving the certified copy of the report pursuant to section

8. (Citation omitted.) *Doe v. Trumbull Cty. Children Services Bd.* (1986), 28 Ohio St.3d 128, 130, fn. 2.

117.27 of the Revised Code may *** institute civil action *** for the recovery of the money or property and prosecute the action to final determination.

{¶37} “*** Within one hundred twenty days after receiving the certified copy of the report, the officer receiving the report shall notify the attorney general in writing of whether any legal action has been taken. *** The attorney general *** may *** prosecute an action to final determination. The attorney general may bring the action in any case where the officer failed to do so within one hundred twenty days after the audit report has been filed.” (Emphasis added.)

{¶38} There were several key elements that had to be found in order for there to be a successful recovery prosecution under this statute. First of all, the expenditure had to be of public money. Next, there had to be an illegal expenditure. In the summary judgment exercise, initiated by Gilbane in its defense in district court, the company argued and presented considerable legal authority for the proposition that illegal expenditures involve predictable and standardized fact patterns. Specifically, Gilbane claimed that illegal expenditures involving public entities either spent money they were not authorized to spend, or were fraudulent, theft, or bookkeeping errors.

{¶39} The district court agreed stating, “[t]he cases defendant [Gilbane] cites share one thing in common: the finding of illegality in each case reflected a pre-existing, recognized standard that showed the conduct in question was illegal.” In contrast, the state offered a more amorphous definition of an illegal expenditure. They argued there was a duty that went beyond either statutory or other preexisting recognized standards that could be used to determine the illegality.

{¶40} Specifically, the state's theory was that the term illegality, as used in R.C. 117.28, could be interrupted as being synonymous with the term improper. Further, the state argued the auditor had such specialized knowledge that his office could unilaterally determine what was an illegal expenditure and what was not, regardless of whether a preexisting recognized standard was violated.

{¶41} The specific factual acts alleged by the state to have been committed by Gilbane are generally as follows: Gilbane improperly or illegally received payments on a fixed fee contract when its project was behind schedule; Gilbane improperly or illegally breached its contract with the agency; Gilbane improperly or illegally paid a consultant/sub-contractor when the consultant/sub-contractor had failed to perform its sub-contract obligations.

{¶42} As was pointed out by the district court, everyone agreed that most of these payments were public expenditures. The issue was, therefore, focused on the legality or illegality of the enumerated expenditures that were paid to Gilbane at the direction of appellee, and which were listed in the state's pleadings.

{¶43} In addressing this argument, the district court focused on the definition of the word illegal. Its conclusion was that, almost uniformly, the definition of an illegal action required the existence of either a law or rule or government regulation and the violation thereof. The district court expressed concern that anything less definite would probably constitute a due process violation, as there would not be sufficient notice as to what conduct was prohibited. As a result, the district court also noted that the auditor did not have the power to unilaterally develop, on a case by case basis, the definition of illegal, as that term is used in R.C. 117.28.

{¶44} The district court then proceeded to look at each of the specific findings for recovery against Gilbane made by the auditor. What it found was that the state's pleadings in the district court case contained no description of any illegal act recognized at law regarding either the validity of the contracts or Gilbane's receipt of the payments under the contract.

{¶45} For example, the auditor's position, and subsequently the state's position, was that when Gilbane fell behind the construction schedule, payments should not have been made under the terms of the contract. There was no factual dispute that Gilbane's construction efforts were behind schedule. However, the district court found that the contract did not make payment dependent on the progress of construction, and that the contract was clear and unambiguous on this point. The district court stressed that this was a fixed fee contract that was not dependent on the percentage of work completed at the time various payments were made.

{¶46} There was nothing in the materials submitted by the state in the district court summary judgment exercise to indicate that this fixed fee contract, albeit with its greater risk, was not a legitimate and properly negotiated contract term. Neither did the state present the district court any authority to indicate that a fixed fee contract was inherently illegal under the existing circumstances.

{¶47} As to the payments made by Gilbane to the sub-contractor Mascaro, the district court found these payments not to be public expenditures as the payments came from Gilbane's own fees. Hence, the monies were no longer public monies.

{¶48} Regarding other instances of alleged illegal expenditures, the district court found that while there might be a potential for recovery of damages on a contractual basis, there was no basis for recovery as an illegal expenditure.

{¶49} The above conclusions of the district court were a determination as a matter of law that there were no material issues of fact as to whether there had been illegal expenditures authorized by appellee to Gilbane under R.C. 117.28.

{¶50} In the instant case and summary judgment exercise now under our scrutiny, appellee is charged for recovery under the same facts and under the same statute, R.C. 117.28. The only material exception is that appellee is charged with authorizing these expenditures, while Gilbane was charged with receiving these expenditures.

{¶51} The state argues that the district court's ruling regarding Gilbane cannot be considered as res judicata or collateral estoppel in regards to appellee. The state's claim is that appellee had a heightened duty, beyond any duty which applied to Gilbane. Ergo, it claims there can be no res judicata or collateral estoppel as to the district court's definition of illegal expenditure as that court applied it to Gilbane.

{¶52} However, the state charged appellee with making illegal expenditures in violation of the identical statute, R.C. 117.28, upon which it based its allegations against Gilbane. The instant trial court found that any such heightened duty did not impact the definition of illegal expenditure beyond the definition enumerated by the district court in Gilbane's case. Illegal still meant illegal, and as such, required the existence of a law, rule, or regulation and the violation thereof. If the state felt that appellee had a heightened duty beyond the scope of R.C. 117.28, it should have structured a cause of

action other than R.C. 117.28. No legal basis was ever shown to support the notion that any heightened duty as a state official would create a different definition of what would constitute an illegal contract or an illegal expenditure, as used in R.C. 117.28.

{¶53} As was concluded by the trial court in the summary judgment exercise now under scrutiny, the district court's definition and application of what constituted an illegal expenditure or an illegal contract under R.C. 117.28 was absolutely applicable in reference to appellee, the person who authorized those expenditures. The finding of res judicata/collateral estoppel was not based on a manifest weight finding by the district court in favor of Gilbane. Instead, the district court held "****" as a matter of law, the Auditor's findings for recovery against [Gilbane] do not describe illegal expenditures of public money for purposes of Ohio Revised Code Section 117.28. Therefore, the Attorney General cannot attempt to reclaim these monies from [Gilbane] under Ohio's recovery statute."

{¶54} The district court's holding regarding Gilbane resulted in a dismissal of the action in its entirety with prejudice on the basis that the state's case failed as a matter of law. Therefore, the finding by the instant trial court of res judicata and collateral estoppel in regards to the R.C. 117.28 claim against appellee was entirely appropriate.

{¶55} I, therefore, concur.