[Cite as *Reighard v. Cleveland Elec. Illum. Co.*, 2009-Ohio-2621.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

KATHLEEN M. REIGHARD, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2008-A-0063**
- vs -	:	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, d.b.a. "THE ILLUMINATING COMPANY",	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 535.

Judgment: Reversed and remanded.

Peter D. Traska and *Michael L. Eisner*, Elk & Elk Co., Ltd., Landerhaven Corporate Center, 6105 Parkland Boulevard, Mayfield Heights, OH 44124 (For Plaintiffs-Appellants).

John T. Dellick, Harrington, Hoppe & Mitchell, Ltd., 1200 Sky Bank Building, 26 Market Street, Youngstown, OH 44503 (For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Kathleen M. Reighard, et al., appeal from the judgment of the Ashtabula County Court of Common Pleas granting summary judgment in favor of Cleveland Electric Illuminating Company ("CEI"). This case originated in Mahoning County, the issue raised in this appeal was previously reviewed by the Seventh District Court of Appeals, and the matter was subsequently transferred to Ashtabula County for further

proceedings. The trial court in Ashtabula County erred in not applying the law of the case doctrine. We, therefore, reverse and remand.

{¶2} **Substantive Facts and Procedural History**

{¶3} This case has a lengthy and convoluted procedural history. On February 11, 2000, Kathleen M. Reighard received an electric shock when she touched the faucet in her shower. Mrs. Reighard allegedly suffered paralysis of her right hand, elbow and arm as a result of the shock, and underwent extensive medical treatment, including neurological treatment for pain relief for a considerable period of time. The shock was apparently the result of an open neutral in the electric wires leading to her residence in Ashtabula County, Ohio.

{¶4} Several months after the incident, on May 25, 2000, Mrs. Reighard and her husband, Paul Reighard, filed for Chapter 7 bankruptcy. The personal injury claim was not scheduled as an asset.[1]

{¶5} Shortly before the statute of limitations expired on her personal injury claim, Mrs. Reighard and her husband filed suit against Ohio Edison Company ("Ohio Edison") on January 18, 2002. Because Ohio Edison has a principal place of business in Youngstown, they filed the suit in Mahoning County Court of Common Pleas. The complaint listed the defendant as "Ohio Edison Company f.k.a. Cleveland Illuminating Company."

{¶6} **Substitution of the Real Party in Interest**

1. The Reighards were discharged in bankruptcy in October 2000. The bankruptcy case has since been reopened.

{¶7} After answering the complaint, Ohio Edison moved the court to substitute the real party in interest on the ground that the Reighards' bankruptcy estate, through its trustee, was the real party in interest in this matter.

{¶8} On February 28, 2003, the trial court granted Ohio Edison's motion to substitute the real party in interest. Ohio Edison served the bankruptcy trustee with that judgment on March 18, 2003, and, two weeks later, on April 4, 2003, filed a motion to dismiss on the ground that despite the court's order granting substitution, no substitution occurred. Ohio Edison asserted that the case should be dismissed because the bankruptcy estate was the only real party in interest but the bankruptcy trustee failed to engage in an affirmative act to assert its claim in a timely manner after the court's judgment granting substitution.

{¶9} In response to Ohio Edison's motion to dismiss, the Reighards argued that the court already performed the substitution and the bankruptcy trustee need not engage in an affirmative act to be in the suit. The Reighards argued, furthermore, that regardless of the bankruptcy trustee's claim, they maintained an interest in the action since part of an award would be subject to bankruptcy exemption and any excess remaining after payment of debts would belong to them. The bankruptcy trustee also filed a response, explaining to the trial court that the bankruptcy court was in the process of appointing the Reighards' attorney to represent the bankruptcy trustee in this action.

{¶10} On May 23, 2003, the trial court, without any analysis, overruled Ohio Edison's motion to dismiss. Thereafter, the Reighards' attorney entered notice of appearance as counsel for the bankruptcy trustee.

{¶11} **Change of Defendant**

{¶12} On October 25, 2004, one week before the trial was scheduled to go forward, Mrs. Reighard filed a "Motion for Leave to Amend Complaint by Interlineation to Correct a Misnomer." She requested to change the defendant listed in the complaint from "Ohio Edison Company f.k.a. Cleveland Illuminating Company" to merely "Cleveland Electric Illuminating Company." She explained both Ohio Edison and CEI are subsidiaries of First Energy, and she erroneously listed the defendant in the complaint as "Ohio Edison Company, f.k.a. Cleveland Illuminating Company." She maintained that the change of the defendant's name was not a substitution of parties governed by Civ.R. 15(C) because CEI's name was always on the complaint and CEI was always aware that it was the real defendant. She pointed out that many of the claims investigators and attorneys were the same for both companies.

{¶13} Mrs. Reighard argued, alternatively, that even if the change of the defendant's name were a substitution of parties governed by Civ.R. 15(C), the substitution would relate back to the original complaint in this case, and therefore her tort claim against CEI would be within the statutory time.

{¶14} Seemingly against its own interest, Ohio Edison opposed Mrs. Reighard's request to change the defendant to CEI. Ohio Edison argued the change was a substitution of parties governed by Civ.R. 15(C) and it argued under that rule, read together with Civ.R. 3(A), CEI must have been served within one year of the January 18, 2002 filing of the complaint, in order for the amended complaint to relate back and avoid the statute of limitations bar. Ohio Edison argued because CEI was not timely served, the amended complaint against CEI did not relate back.

{¶15} On November 10, 2004, the trial court issued a judgment entry denying the motion to amend the complaint to name CEI as the defendant. The judgment entry, in its entirety, stated "Plaintiff's Motion for Leave to Amend Complaint by Interlineation to Correct Misnomer is overruled." Thereafter, Ohio Edison filed a "Motion for Judgment." Ohio Edison asserted three grounds for judgment in its favor.

{¶16} **Ohio Edison's Motion for Judgment**

{¶17} First, Ohio Edison asserted that CEI, not Ohio Edison, was the proper defendant, because the electric lines involved in the incident were maintained by CEI. Ohio Edison argued therefore that it was entitled to summary judgment as there was no genuine issue of material fact regarding Ohio Edison's maintenance of the lines implicated in the incident.

{¶18} Second, Ohio Edison claimed that the bankruptcy trustee, the only real party in interest in this case, did not "ratify" the initiation of the lawsuit, which constituted a failure to prosecute warranting involuntary dismissal under Civ.R. 41(B). Ohio Edison repeated the same argument already rejected by the trial court, i.e., that the bankruptcy trustee had to engage in some affirmative act after the court's substitution order in order for the substitution to take place.

{¶19} Third, Ohio Edison stated that neither the trustee nor Mrs. Reighard responded to certain discovery requests and therefore dismissal would be an appropriate sanction under Civ.R. 37(D).

{¶20} In response to Ohio Edison's first argument, which related to the "real defendant" issue, Mrs. Reighard did not dispute that Ohio Edison did not maintain the lines at issue but asserted again that the trial court should have allowed substitution of

CEI because CEI had notice of the action for purposes of Civ.R. 15(C) – CEI's name appeared in the complaint and the same personnel handled injury claims for both companies. She asked the court to reconsider its previous denial of her motion to amend the complaint and name CEI as defendant. To formally request the reconsideration, she filed a separate motion for a reconsideration of the trial court's November 8, 2004 judgment denying her request to substitute CEI as defendant.

{¶21} In response to Ohio Edison's second argument in its motion for judgment, which related to the "real party in interest" issue, Mrs. Reighard maintained that the trial court already rejected this argument when denying Ohio Edison's April 4, 2003 motion to dismiss. In response to Ohio Edison's last argument, she asserted dismissal would be too extreme of a sanction for the alleged insufficient discovery.

{¶22} On June 16, 2005, the trial court issued a judgment in favor of Ohio Edison. The judgment, in its entirety, stated: "The Plaintiffs' Motion to Reconsider the Judgment Entry of November 8, 2004, denying Plaintiffs' Motion for Leave to substitute CEI is overruled. The Defendant Ohio Edison's Motion for Judgment is sustained."

{¶23} ***Reighard I***

{¶24} Plaintiffs appealed the trial court's judgment, in *Reighard v. Cleveland Electric Illuminating*, 7th Dist. No. 05 MA 120, 2006-Ohio-1283 ("*Reighard I*"). In a unanimous decision, the Seventh District reversed and remanded. Ohio Edison filed a motion for reconsideration, and the Seventh District denied it, in *Reighard v. Cleveland Elec. Illuminating*, 7th App. No. 05 MA 120, 2006-Ohio-2814 ("*Reighard* II"). To understand the procedural posture in the instant appeal, it is necessary to describe in detail what occurred in *Reighard I* and *Reighard II*.

{¶25} The issue raised by the plaintiffs on appeal before the Seventh District concerned the question of whether the trial court abused its discretion in not allowing the plaintiffs to amend the complaint changing the defendant from "Ohio Edison Company f.k.a. Cleveland Electric Illuminating Company" to "Cleveland Electric Illuminating Company." Their first assignment of error stated the trial court abused its discretion by refusing to grant leave for the plaintiffs to correct the name of the defendant. The second assignment of error stated that even if the correction of the defendant's name was construed as substitution governed by Civ.R. (15), the substitution would relate back to the filing of the original complaint under the test provided in Civ.R. 15(C).

{¶26} Ohio Edison made a tortuous argument before the Seventh District as to why the court should affirm the trial court without even considering appellants' assignments of error. The argument was based on the fact that the trial court granted Ohio Edison's motion for judgment without articulating the basis of its decision. To reiterate, Ohio Edison raised three arguments in its motion for judgment: (1) Ohio Edison was not the entity responsible for maintaining the lines in question and therefore it was entitled to summary judgment; (2) the bankruptcy trustee, which Ohio Edison still insisted was the only real party in interest, never ratified the initiation of the suit and therefore was not in the suit; and (3) the suit should be dismissed to sanction the plaintiffs' failure to comply with discovery. Because the trial court did not specify the ground for its judgment in favor of Ohio Edison, Ohio Edison argued that the decision could have been based on any one of the three claims it made. It further argued that since appellants only challenged on appeal the trial court's refusal to change the

defendant's name, they in effect conceded to all three claims made by Ohio Edison. *Reighard I* at ¶18-19.

{¶27} The Seventh District took great lengths to refute this argument and determined that the trial court's judgment related only to the first ground raised in Ohio Edison's motion, that is, there was no genuine issue of material fact relating to Ohio Edison's lack of liability, as it was undisputed that only CEI was a proper defendant. *Reighard* I at ¶18 - 26.

{¶28} Having determined the trial court granted judgment in favor of Ohio Edison on the ground that there was no genuine issue of material fact regarding Ohio Edison's lack of liability since it was uncontested only CEI was a proper defendant, the Seventh District went on to address the issue raised by the plaintiffs on appeal, i.e., whether the trial court should have allowed the plaintiffs to amend the complaint to name CEI as defendant.

{¶29} The Seventh District first determined that the change of the defendant in this case was in fact substitution governed by Civ.R. 15(C).[2] The court explained that the change was "an amendment changing the party against whom the claim is asserted," and it may eventually require an application of Civ.R. 15(C) to determine if the amendment would relate back to the filing of the original complaint. Id. at ¶36, citing Civ.R. 15(C).

2. Where the statute of limitations has run, Civ.R. 15(C) governs whether an amendment "relates back" to the date of the original complaint. When the amendment changes the defendant, "relation back" requires the satisfaction of the following: "[W]ithin the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." Civ.R. 15(C).

{¶30} The court then cited *Cecil v. Cottrill* (1993), 67 Ohio St.3d 367, 370, for the proposition that Civ.R. 15(C) and Civ.R. 3(A), when read in pari materia, mean that "notice to the new defendant must occur within one year of the filing of the complaint if the statute of limitations has run and that such notice does not require service." Id. at ¶45. Notice to the new defendant need not be received before the statute of limitations ran and the eventual service need not be completed within one year of filing of the original complaint. Id. at ¶45 citing *Cecil*.

{¶31} The Seventh District explained that the course of the litigation in this case reflected that CEI may have notice of the lawsuit from both its parent company, First Energy, and its sister company, Ohio Edison, because the investigation and discovery appeared to be coordinated among the three entities. *Reighard I* at ¶52-54.

{¶32} The court noted, however, that the only party in a position to make the Civ. 15(C) argument regarding whether the real defendant, CEI, received notice would be CEI itself. CEI, however, was not a party in the case, because the trial court refused to allow the plaintiffs to amend the complaint. The court explained that the issue of whether the amendment sought by the plaintiffs related back to the original complaint under Civ.R. 15(C) issue required a proof of notice to the real defendant (CEI). Without CEI's presence in the suit, however, such proof was not available to the plaintiffs. *Reighard* I at ¶69. Therefore, the court concluded the question of whether the amendment related back to the original complaint cannot be addressed until the real defendant, CEI, was brought into the case. The Seventh District decided that under the unusual circumstances of this case, justice required leave to be granted to the plaintiffs

to amend the complaint and substitute CEI, and the trial court's refusal was an abuse of discretion.[3]

{¶33} The Seventh District therefore reversed the trial court and remanded the case "with instructions to permit appellants to amend the complaint to dismiss Ohio Edison Company as a defendant and to name Cleveland Electric Illuminating Company as the sole defendant." Id. at ¶72.

{¶34} ***Reighard II***

{¶35} Ohio Edison filed a motion for reconsideration. The Seventh District denied it, in "*Reighard II*". In its motion for reconsideration, Ohio Edison raised two issues. First, it disagreed with the Seventh District's interpretation of the *Cecil* case. It claimed the Seventh District was wrong in stating that pursuant to *Cecil*, it is notice, not service, that must occur within one year of the filing of the original complaint if the statute of limitations has run. *Reighard II* at ¶17-18. Regarding this claim, the Seventh District provided further analysis to support its interpretation of *Cecil* and rejected Ohio Edison's contention.

{¶36} Second, Ohio Edison maintained Mrs. Reighard was the only party named in the notice of appeal, and therefore the appeal must fail, because she had no standing to appeal since the trial court had substituted the Reighards' bankruptcy trustee for the Reighards. Ohio Edison claimed the Seventh District failed to adequately address this

3. The Seventh District also addressed the apparent delay by the plaintiffs in seeking to substitute CEI – they did not seek leave to amend the complaint until a week before the case was to go to trial. The court's review of the history of the litigation indicated "[t]he reasons for the delay in seeking amendment revolve around the confusion as to the structure of the defendant entity, its affiliate and its parent company and the question as to why they all appeared to act in concert in the preliminary and post-filing stages of this claim. As outlined supra, Ohio Edison and its parent company engaged in a multitude of acts that gave the impression that the correct party had been named in one way or another." *Reighard I* at ¶70.

issue in *Reighard I*. In rejecting Ohio Edison's contention, the Seventh District elaborated on what it stated in *Reighard I* regarding the standing issue. We discuss the court's analysis in *Reighard II* on this issue in detail below, as it bears significantly on the present appeal.

{¶37} Ohio Edison appealed both *Reighard I* and *Reighard II* to the Supreme Court of Ohio and the court denied review, in *Reighard v. Cleveland Elec. Illuminating*, 110 Ohio St.3d 1441, 2006-Ohio-3862.

{¶38} **Transfer of Venue to Ashtabula County**

{¶39} Upon remand, on August 15, 2006, the Reighards and the bankruptcy trustee filed an amended complaint naming CEI as defendant. Both the plaintiffs and CEI then moved to transfer venue out of Mahoning County. Plaintiffs requested a transfer to Summit County, because CEI's principal place of business is located in that county. CEI requested venue in Ashtabula County. The trial court in Mahoning County granted a transfer to Ashtabula County Court of Common Pleas.

{¶40} On December 12, 2007, CEI moved for summary judgment alleging: "(1) This action was not timely commenced by a party with standing; (2) CEI has not been properly served with process and the time for proper service and the statute of limitations has passed; and (3) this court lacks subject matter jurisdiction, as the claims herein are within the exclusive jurisdiction of the Public Utilities of Commission of Ohio ("PUCO")."

{¶41} The trial court granted summary judgment in favor of CEI based on the first ground. Its judgment stated, in relevant part:

{¶42} "The premise for CEI's summary judgment is threefold. First, CEI argues that summary judgment should be granted because the action was not timely filed by a party with standing. This argument was brought before the Seventh District Court of Appeals by Ohio Edison and was struck down."

{¶43} The trial court went on to state, however, that [a]lthough the Seventh District Court of Appeals stated that the Reighards and the bankruptcy estate both have an interest in his matter, the Seventh District did not address this issue *in relation to CEI, as CEI is a new party to this matter*." (Emphasis added.)

{¶44} Apparently, the trial court was of the opinion that the new defendant, CEI, could relitigate the standing issue, even though it recognized the Seventh District had struck down the same standing argument made by the prior defendant, Ohio Edison.

{¶45} Revisiting the issue already settled by the Seventh District, the trial court cited this court's decision in *Northland Ins. Co. v. The Illuminating Co.*, 11th Dist. No. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529, where a plaintiff filed for bankruptcy prior to filing a personal injury action, and this court held that the claim was the property of the bankruptcy estate and must be prosecuted by the bankruptcy estate unless the claim was abandoned. Believing *Northland* was applicable to the instant case, the trial court stated the following:

{¶46} "In the instant matter, the Reighards, not the bankruptcy estate, filed the initial complaint. In addition, the record does not indicate that prior to the Reighards filing of this action, the bankruptcy estate abandoned this claim. In fact, the record indicates the exact opposite since the bankruptcy estate was substituted for the Reighards on January 23, 2003, which indicates the claim was never abandoned."

{¶47} After recognizing the occurrence of the substitution of the bankruptcy trustee and therefore the trustee's presence in the action as a plaintiff, the court summarily concluded, inexplicably, that "[s]ince the Reighards were not proper parties to bring this action, the action must be dismissed and summary judgment granted in favor of defendant CEI."

{¶48} The Reighards and the bankruptcy estate filed the instant appeal from that decision, assigning two assignments of error, which we address together as they are interrelated.

{¶49} "[1.] The trial court found incorrectly that no Plaintiff had standing.

{¶50} "[2.] The Seventh District Court of Appeals' determination of the standing issue was binding upon remand, and the trial court erred by refusing to apply the law of the case."

{¶51} **Analysis**

{¶52} The lengthy procedural history of this case is best described as a labyrinth. The obstacle course constructed to impede plaintiffs' path to trial only obscured the analytical focus when a question of standing is before the court. That focus must be on the plaintiffs whose standing is challenged rather than on the defendant offering the challenge.

{¶53} The Reighards filed the complaint almost seven years ago to seek redress for Mrs. Reighard's injury. Because of their bankruptcy filing shortly after the incident, Ohio Edison moved the court to substitute the bankruptcy trustee as the real party in interest. The court granted that motion, and shortly afterwards Ohio Edison filed a

motion to dismiss on the ground that no substitution occurred because the trustee did not engage in an affirmative act to assert its claim in a timely manner.

{¶54} The Reighards' responded that the trial court already performed the substitution and that regardless of the bankruptcy estate's claim, they maintained an interest in the action because part of an award would be subject to bankruptcy exemption and furthermore any excess remaining after payment of debts would belong to them. The trial court agreed with the Reighards and denied Ohio Edison's motion to dismiss.

{¶55} Subsequently, the plaintiffs learned that the corporate entity that maintained the electric lines was CEI, not Ohio Edison, and therefore asked the trial court for leave to amend the complaint to name CEI. Although Ohio Edison presumably did not have a stake in this matter, it vigorously opposed the change of the defendant to CEI. Because of Ohio Edison's opposition, the court denied the plaintiffs leave to properly name CEI as the defendant. Ohio Edison then filed a motion for judgment, arguing it is entitled to summary judgment because it was the wrong defendant.

{¶56} In this motion, in addition to arguing it was the wrong defendant, Ohio Edison argued, *again*, that the case should be dismissed because it had the wrong plaintiff. Ohio Edison made this argument despite the fact that the court had already substituted the bankruptcy estate on February 28, 2003, upon Ohio Edison's own request, *and* despite that this claim that no substitution occurred had already been rejected by the court in its May 23, 2004 judgment denying Ohio Edison's motion to dismiss.

{¶57} After the trial court granted Ohio Edison's motion for judgment, the plaintiffs appealed, and the Seventh District reversed and remanded. Upon Ohio Edison's motion for reconsideration, the Seventh District took the opportunity to elaborate on the standing issue. Because its reading of the procedural history regarding that issue is determinative of the present appeal, it is necessary to quote the pertinent portion of its opinion at length. The court stated in *Reighard II*:

{¶58} "As we noted in [*Reighard I*], the Reighards had responded to one of appellee's motions to dismiss in the trial court by urging that regardless of the bankruptcy estate's claim, they maintained an interest in the action since part of the award would be subject to the bankruptcy exemption and any excess remaining after payment of debts would belong to them. [*Reighard I*] at ¶6. And, the trial court overruled [Ohio Edison's] motion to dismiss at that time. Id." *Reighard II* at ¶4.

{¶59} "We also pointed out that appellee [Ohio Edison] filed a second a motion to dismiss in the trial court, which alleged in part that the case should be dismissed because the bankruptcy estate was the only real party in interest and it failed to prosecute the case or engage in some affirmative act. [*Reighard I*] at ¶12. On appeal, appellee initially argued that the judgment should be affirmed because their motion was based upon three distinct issues but that appellants' arguments only concerned their motion to amend the complaint. Id. at ¶18. We disagreed and found that the trial court's judgment was based only upon the fact that it was conceded Ohio Edison was the wrong defendant. Id. at ¶20-27. We noted that the trial court had already denied appellee's motion to dismiss regarding the allegation that the bankruptcy estate was the *only* real party in interest but it failed to engage in an affirmative act. Id. at ¶23.

{¶60} "Although we may not have specifically stated so, it was implied that we agreed that *the Reighards maintained an interest in the action and remained parties with assertable rights even after the bankruptcy estate was made a party*. As they pointed out, in an electric shock case with allegedly permanent injuries, there may be money left over after satisfying the claims of the bankruptcy estate, some of which may be medical expenses incurred as the direct result of the injuries claimed in this case. There is also their claim of a bankruptcy exemption, which was not disputed. The bankruptcy estate need not be trusted to represent the rights of the Reighards in this matter. For instance, the bankruptcy estate may have an interest in settling for a low amount just to satisfy its creditors without regard to what the Reighards believe their claim is worth. And, using appellee's own argument, if the bankruptcy estate failed to appeal, Kathleen's entire claim could be lost. This is not permissible. Rather, *the original plaintiffs maintain a position in the lawsuit even after the bankruptcy estate was made a party*.

{¶61} "The Reighards asserted their claims throughout the proceedings below without being prohibited from doing so, even in the face of objections from appellee, which the trial court rejected. As such, we cannot now say that Kathleen Reighard lacks standing for purposes of bringing this appeal merely because her bankruptcy estate was made a party in the case below. Thus, appellee's argument, Kathleen Reighard (whom they claim is the only party named as an appellant in the notice of appeal) lacked standing, is without merit." (Emphasis added.) *Reighard II* at ¶4-7.[4]

4. The Seventh District went on to clarify the confusion created by the notice of appeal, which only specified Mrs. Reighard as the appellant. The court observed that although part of the text of the notice of appeal only mentioned plaintiff Kathleen Reighard, the notice of appeal was captioned "Kathleen Reighard, et al." Furthermore, the notice of appeal began by referring to plaintiffs' (plural) notice of

{¶62} As we see it, the confusion regarding which plaintiff or plaintiffs were present in the suit was created by the trial court's May 23, 2003 one-sentence judgment overruling Ohio Edison's motion to dismiss alleging a lack of substitution. In response to this motion, the Reighards maintained that the trial court had already performed the substitution and that they should remain in the action despite the bankruptcy trustee's presence in the suit, because of the bankruptcy exemption and of the excess the claim may yield over sums owed to creditors. The court overruled Ohio Edison's motion without stating whether it agreed with the Reighards that they remained parties after its order granting Ohio Edison's motion to substitute. In overruling Ohio Edison's motion to dismiss, the trial court could have agreed with the Reighards that, even with the substitution of the real party interest, they maintained a claim separate from that of the bankruptcy estate and therefore remained in the suit.

{¶63} That is how the Seventh District read the trial court's decision. Interpreting the record, the Seventh District determined that "the Reighards maintained an interest in the action and remained parties with assertable rights even after the bankruptcy estate was made a party." Id. at ¶6. It stated, in no uncertain terms, that "[t]he original plaintiffs maintain a position in the lawsuit even after the bankruptcy estate was made a party." Id.

{¶64} Thus, our reading of *Reighard I* and *Reighard II* indicates the Seventh District made a clear determination regarding the standing issue. Pursuant to these decisions, both the bankruptcy estate and the Reighards are parties with standing in the suit. The remaining procedural issue upon remand is whether CEI received notice for

---

appeal. Thus, the Seventh District determined it was clear that all plaintiffs below were appealing. Id. at ¶13.

the purposes of the "relation back" provision under Civ.R 15(C). The Seventh District instructed the trial court to permit the plaintiffs to amend the complaint and name CEI as defendant, so that the issue of whether CEI received notice can be properly assessed. If the plaintiffs can show CEI received notice, the amended complaint would relate back to the original complaint; if not, the amended complaint would not relate back and the plaintiffs' claim would be time barred.

{¶65} Despite the clear mandate by the court of appeals for the trial court to resolve the issue of whether CEI received notice for the purposes of Civ.R. 15(C) upon remand, no hearing took place on the notice issue. Instead, CEI, represented by the same counsel who had represented Ohio Edison, filed a motion for summary judgment. It claimed it was entitled to summary judgment based on three grounds, one of them being that the "action was not timely commenced by a party with standing." It made this claim despite the determination by the Seventh District that both the bankruptcy trustee and the Reighards are parties with standing in this action. The trial court below, instead of applying the law of the case, determined that this issue can be litigated anew simply because CEI is a new defendant. As we explain in the following, that determination was in error.

{¶66} In essence, CEI asks us in this appeal to revisit the standing issue that was already settled by the Seventh District. If this issue was not explicitly addressed in *Reighard I*, the court fully addressed it in *Reighard II*. It made an express determination that the Reighards remained parties in the suit even after the bankruptcy estate was made a party by the court's judgment of substitution. Notably, CEI challenged the

Seventh District Court's decisions and the Supreme Court of Ohio allowed these decisions to stand.

{¶67} The law of the case is a longstanding doctrine in Ohio Jurisprudence. Under this doctrine, "the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3.

{¶68} **The Law of the Case Doctrine**

{¶69} "This doctrine precludes a litigant from attempting to rely on arguments at retrial which were fully litigated, or could have been fully litigated, in a first appeal." *State ex rel. Dannaher v. Crawford* (1997), 78 Ohio St.3d 391, 394, citing *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404-405. The doctrine is necessary "to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Nolan* at 3, citing *State, ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32. "Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan* at syllabus. "The rule was created because of the necessity of a trial court to obey the mandate of an appellate court upon a retrial of a case." *Stemen v. Shibley* (1982), 11 Ohio App.3d 263, 265, citing *Gohman v. St. Bernard* (1924), 111 Ohio St. 726, 731, overruled on other grounds.

{¶70} Here, the Seventh District determined that following the Mahoning County Court of Common Pleas' decision granting substitution, *both* the bankruptcy estate and

the Reighards have standing in the action. The Reighards remain in the action because they have assertable rights in this action separate from the bankruptcy estate.

{¶71} We recognize that, after a "substitution" of the original party, logic dictates that the latter does not remain in the action. In this case, however, as the Seventh District had determined, the procedural history reflected more than a substitution of parties. In response to Ohio Edison's April 4, 2003 motion for dismissal claiming no substitution occurred and that the action was not initiated by a real party in interest, the Reighards argued that regardless of the bankruptcy estate's claim, they maintained a separate interest in the action due to bankruptcy exemption and the potential for residual assets after payment of administrative and creditors' claims. The trial court denied the motion to dismiss without an analysis, presumably in agreement with the Reighards' assertions. The Seventh District, interpreting this state of the record, concluded that the Reighards remained in the action after the trial court granted the motion of substitution, as they maintained an interest separate from the bankruptcy trustee's interest. Therefore, both the bankruptcy estate and the Reighards have standing in this case, a determination left standing by the Supreme Court of Ohio upon Ohio Edison's appeal to that court. It is the law of the case in this matter and the trial court in Ashtabula County was without authority to vary it upon remand.

{¶72} **Does the Law of the Case Regarding the Standing Issue Apply When There Is a New Defendant?**

{¶73} The trial court apparently determined the standing issue can be relitigated because the issue was not addressed by the Seventh District "*in relation to CEI, which is a new party to the matter*." (Emphasis added.) The question before us is therefore

whether the doctrine of the law of the case should be applied regarding a previously settled issue of standing, where a new defendant was subsequently joined.

{¶74} "'Standing' is defined at its most basic as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Ohio Pyro, Inc. v. Ohio Dep't. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶27, quoting Black's Law Dictionary (8th Ed. 2004) 1442. "The question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" Id. (Citations omitted.)

{¶75} As defined, the notion of standing relates only to whether a party has alleged a right to make a legal claim. Here, a reviewing court has decided that, under the particular circumstances of this case, both the bankruptcy trustee and the Reighlards have assertable right in the matter. The standing of both the bankruptcy estate and the Reighards has been settled and we fail to see how the plaintiffs' standing in this case would depend upon which corporate entity among First Energy's subsidiaries was responsible for maintaining the allegedly faulty electric lines.

{¶76} We recognize that the doctrine of the law of the case "is considered a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." *Nolan* at 3. It is conceivable that, under a different set of circumstances, a defendant subsequently substituted may be prejudiced as it may be unfairly deprived of a fair opportunity to challenge the plaintiff's standing. Under that scenario, the application of the law of the case may prejudice the new defendant and produce an unjust result.

{¶77} In this case, however, the issue of standing was vigorously contested at the trial court by the prior defendant, Ohio Edison, who we note was represented by the same counsel as CEI. Ohio Edison raised the issue repeatedly throughout the proceedings in Mahoning County. It raised this issue in its January 28, 2003 motion to substitute, its April 4, 2003 motion to dismiss, and its May 5, 2005 motion for judgment. On appeal to the Seventh District, it again raised this issue, and moreover filed a motion for reconsideration in part because it was not satisfied with the court's statements on the standing issue in *Reighard I*. The Seventh District, in two decisions, fully reviewed Ohio Edison's arguments and thoroughly addressed the standing issue. Under these facts and circumstances, we cannot say that the application of the law of the case doctrine unfairly prejudices the substituted defendant.

{¶78} Because the standing issue has been determined by the Seventh District and became the law of the case, the trial court was not at liberty to disturb that determination. CEI attempted to relitigate this issue upon remand, and what it asks us to do in the instant appeal is in effect to review and reverse the Seventh District's decisions in *Reighard I* and *Reigharhd II* regarding the standing issue. We do not have the power to do so, as it is a power reserved only for the Supreme Court of Ohio, which has declined review and decided to let the Seventh District's decisions stand.

{¶79} Lastly, we point out the trial court's reliance on this court's decision in *Northland* was misplaced. In that case, the plaintiff filed for bankruptcy after filing a personal injury claim against CEI. The case proceeded to trial and the jury rendered a verdict in favor of the plaintiff. After trial, defendant CEI moved to substitute the real party in interest arguing the bankruptcy trustee was the real party in interest. The trial

court refused to grant substitution. On appeal, this court held that the plaintiff's personal injury claim must be prosecuted by the bankruptcy trustee, unless the claim was shown to be abandoned. *Northland* is factually distinguishable, because in that case there was *no* substitution of real party in interest and therefore the bankruptcy trustee was never a plaintiff in the action.

{¶80} Here, the bankruptcy estate was brought into the action by way of the trial court's judgment granting substitution, although, as the Seventh District clarified, the trial court allowed the Reighards to also maintain their status as plaintiffs because of their interest separate from the bankruptcy estate based on their contention that part of an award would be subject to bankruptcy exemption and any excess remaining would belong to them, a claim not made by the plaintiff in *Northland*. Therefore, *Northland* is distinguishable.

{¶81} **CEI's Civ.R. 15(C) Claim was Waived**

{¶82} In its appellee's brief, CEI assigned its own error for our review[5]:

{¶83} "The trial court erred when it did not further support its grant of summary judgment to CEI on the basis of appellants' failure to properly and timely service CEI."

{¶84} In its judgment, the trial court rejected CEI's argument that CEI was not properly or timely served, even though this claim was made moot by the trial court's

5. We note that although CEI did not file a cross appeal to request our review of its assignment of error, we are not precluded from reviewing it. See R.C. 2505.22 ("In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part"); *Glidden Co. v. Lumbermen's Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, ¶32 (assignments of error raised by appellees who have not filed a notice of appeal may only be used by the appellee as a shield to protect the judgment of the lower court but may not be used by the appellee as a sword to destroy or modify that judgment). Since CEI raises the assignment of error to protect the trial court's decision granting summary judgment in favor of CEI, CEI need not have filed a cross appeal to assign the error. See, also, App.R. 3(C)(2).

granting of summary judgment in favor of CEI based on the standing issue. In rejecting CEI's argument that summary judgment was also proper because of insufficiency of service on CEI, the court stated:

{¶85} "CEI's second argument for summary judgment is that there was insufficiency of process, insufficiency of service and expiration of the statute of limitations. The argument set forth by CEI in its motion for summary judgment is that CEI has been party to the action all along and is not considered to be a substituted party and therefore, the action was not timely commenced because it was not properly served. The Court finds no merit in this argument as the Seventh District Court of Appeals ruled that CEI was not a party to the case and that only once the complaint was amended could it become a party to the proceedings and assert 'its own argument regarding Civ.R. 15(C) and relation back requirements for avoiding a statute of limitations bar.' CEI did not set forth any such argument, other than stating Civ.R. 15(C) was inapplicable."

{¶86} We agree with the trial court that CEI, after its substitution, failed to make the Civ.R. 15(C) argument regarding the relation back issue as instructed by the Seventh District. As we have noted above, CEI, upon being substituted, had the opportunity to show why its substitution did not relate back to the original complaint under Civ.R. 15(C), by way of demonstrating that it did not receive *notice*. CEI did not present this argument before the trial court -- instead, it advanced the argument that it was a party all along and therefore should have been served when the action was commenced on January 18, 2000. *CEI's failure to show it did not receive notice for the*

purposes of the relation back provision under Civ.R. 15(C) waived its claims pursuant to Civ.R. 15(C).

{¶87} In it motion for summary judgment, CEI also asserted an alternative argument regarding the lack of proper service.[6] It argued that Civ.R. 15(D) is applicable in this case, and CEI was not properly served under that rule. Civ.R. 15(D) states:

{¶88} "Amendments where name of party unknown. When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant."

{¶89} As Civ.R. 3(A) makes clear, Civ.R. 15(D) is only applicable where a defendant is identified by a fictitious name whose name is later corrected. Civ. R. 3(A) states:

{¶90} "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), *or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D)*." (Emphasis added.)

{¶91} That Civ.R. 15(D) is only applicable to a formerly fictitious defendant is also made clear by the Supreme Court of Ohio, in *Amerine v. Haughton Elevator Co.,*

6. The trial court rejected CEI's service-related claim without specifically addressing this alternative argument.

Div. of Reliance Electric Co. (1989), 42 Ohio St.3d 57. Interpreting Civ.R. 3(A) in conjunction with Civ.R. 15(D), the court stated:

{¶92} "Civ.R. 3(A) now specifically states that *the use of a fictitious name with subsequent correction*, by amendment, of the real name of a defendant under Civ.R. 15(D) relates back to the filing of the original complaint and that service must be obtained within one year of the filing of the original complaint. Under Civ.R. 3(A), as amended, service does not have to be made on the *formerly fictitious, now identified*, defendant within the statute of limitations as long as the original complaint has been filed before expiration of the statute of limitations." (Emphasis added.) Id. at 59.

{¶93} CEI claims the service requirements in this case were not met, because CEI was only served with the November 16, 2006 amended complaint by certified mail instead of by personal service. CEI's reliance on Civ.R. 15(D) is misplaced. Civ.R. 15(D) is not implicated here because this case does not involve a formerly fictitious, unidentified John Doe defendant. Rather, this case involves a situation where a *wrong* party was named, which requires an amendment of the complaint to *change* the party, a situation governed by Civ.R. 15(C) only. For this reason, the case authority cited by CEI, *Laneve v. Atlas Recycling* (2008), 119 Ohio St.3d 324, which involved a fictitiously named and subsequently identified John Doe defendant, is distinguishable.

{¶94} For all the foregoing reasons, the judgment of the Ashtabula County Court of Common Pleas is reversed, and this case is remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J.,
TIMOTHY P. CANNON, J.,
concur.