[Cite as *Masek v. Kleese Dev. Assoc.*, 2012-Ohio-4466.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

RAYMOND MASEK,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-T-0107**
- vs -	:	
KLEESE DEVELOPMENT ASSOCIATES, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2011 CV 120.

Judgment: Affirmed.

Raymond Masek, pro se, 183 W. Market Street, Suite 300, Warren, OH 44481 (Plaintiff-Appellant).

Barbara J. Moser, 55 Public Square, Suite 1508, Cleveland, OH 44113; and *Robert F. Burkey*, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483-5805 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Raymond Masek, appeals the October 26, 2011 judgment of the trial court granting summary judgment to appellees, Kleese Development Associates and Alan Smith. We find this appeal to be barred by the doctrines of res judicata and collateral estoppel.

{¶2} The instant appeal arose from appellant's slip and fall occurring on January 25, 2009. In his amended complaint filed January 24, 2011, appellant alleged

that he fell in a parking garage owned by Kleese Development, causing injury to his arm. Appellant alleged that Smith, an employee of Kleese Development, negligently removed snow and allowed the ice below to remain at the exit/entrance of the parking garage.

{¶3} In 2010, appellant filed a complaint (Complaint I) in the Trumbull County Court of Common Pleas against defendants J.P. Morgan, Alan Smith, and Warren Redevelopment and Planning Corporations, stemming from the same incident. In that complaint, appellant alleged that after exiting his vehicle in the parking deck, he slipped and fell on black ice causing injury to his arm. In an August 27, 2010 judgment entry, the trial court granted defendants' motion for summary judgment. The trial court found:

> **{¶4}** The issue here is that Plaintiff by his own admission fell on black ice a condition well known to all residents of Ohio at the time of year of the accident and a condition that is caused by meteorological forces of nature.
>
> **{¶5}** While it is obvious that Plaintiff's fall was a serious one, the evidence put forth by Plaintiff does not show that the actions of the Defendants contributed to his fall and subsequent injuries, or that the condition of the area where he fell was caused by other than 'meteorological forces' of nature.
>
> **{¶6}** Plaintiff admits to traversing back and forth from the entrance/exit of his building prior to his fall. He used the same entrance/exit to the parking deck to leave to go to the grocery store that he used upon his return when he slipped and fell. Plaintiff had actual knowledge

of the condition of the alley and his surroundings at the time of his fall.

{¶7} The evidence from all witnesses and parties indicate that there was water flowing from all directions into the alley so that even if Defendants Smith and Morgan dug a small trench to alleviate water flowing into Defendant Morgan's basement, water flowed from many sources because of the conditions of freezing and thawing caused by a natural part of winters in Ohio.

{¶8} There has been no evidence presented that the actions of the Defendants, two days prior to the Plaintiff's slip and fall, in any way caused an unnatural accumulation of ice and snow. The weather conditions were open and obvious for several days perhaps even weeks prior to Plaintiff's fall. This Court does not find that the Defendants breached any duty owed to Plaintiff or that their actions were negligent.

{¶9} With respect to the second complaint filed by appellant (Complaint II), Smith and Kleese Development filed a motion for summary judgment which was granted by the trial court. The trial court found the action barred by the doctrines of res judicata and collateral estoppel. Again, the court held that appellant had actual knowledge that the area in the alley had been cleared of snow for days prior, and "the condition was natural in Ohio and was open and obvious."

{¶10} Appellant filed a notice of appeal and asserts the following assignments of error:

{¶11} [1.] The trial court erred to the prejudice of appellant in its entry 'in this case, (appellant) alleges that the defendants moved snow and exposed the pavement a couple of days prior to his fall.'

{¶12} [2.] The trial court erred to the prejudice of appellant in its assertion that appellant brought this action 'against Mr. Smith, this time as an employee of Kleese Development Associates.'

{¶13} [3.] The trial court erred to the prejudice of appellant in its application of the doctrine of res judicata.

{¶14} [4.] The trial court erred to the prejudice of appellant in its application of the doctrine of collateral estoppel.

{¶15} [5.] The trial court erred to the prejudice of appellant in its holding that appellant 'fell in an alley owned by the city of Warren, not Kleese or Mr. Smith.'

{¶16} We initially address assignments of error three and four as they are dispositive of the instant appeal.

{¶17} "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *State ex rel. Ormond v. Solon*, 8th Dist. No. 92272, 2009-Ohio-1097, ¶13, quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381 (1995).

{¶18} The doctrine of res judicata requires a party "to present every ground for relief in the first action, or be forever barred from asserting it." *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62 (1990). "It has long been the law of Ohio that 'an

existing final judgment or decree between the parties to the litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit.'" (Emphasis sic.) *Id*., quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69 (1986).

{¶19} The Ohio Supreme Court has stated:

{¶20} [W]e expressly adhere to the modern application of the doctrine of *res judicata* * * * and hold that a valid, final judgment rendered upon the merits bars all subsequent action based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. *Grava v. Parkman Twp*., 73 Ohio St.3d 379, 382 (1995).

{¶21} "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." *State ex rel. Ormond*, *supra*, ¶13, citing *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392 (1998). "Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." *Id*., citing *Grava* at 382.

{¶22} 'Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. *Fort Frye*, 81 Ohio St.3d at 395, 692 N.E.2d 140. Issue preclusion applies even if the causes of action differ. Id.' *O'Nesti v. DeBartolo Realty Corp*, 113 Ohio St.3d 59, 61, 2007-Ohio-1102, 862 N.E.2d 803. *See also State ex rel. Davis v. Public Employees*

Ret. Bd., 174 Ohio App.3d 135, 2007-Ohio-6594, 881 N.E.2d 294, wherein the court held that issue preclusion precludes relitigation of an issue that has been actually and necessarily litigated and determined in a prior action. *Id*. at ¶14.

{¶23} In Complaint II, appellant asserted the same cause of action against Smith as in Complaint I. In Complaint II, appellant again alleged that Smith had a duty to keep the premises in a safe condition, that he breached that duty, and as a result of such slip and fall, appellant sustained injuries to his arm. With respect to Complaint I, the trial court considered the merits and granted defendants' motion for summary judgment. Appellant cannot now attempt to change the location of his fall or alter Smith's alleged negligent conduct to avoid res judicata. We agree with the following reasoning of the trial court: "In this case, Mr. Smith was already sued in 09 CV 1579 and Judge Stuard made findings in that case as to Mr. Smith's conduct that make it impossible for Mr. Masek to once again bring the same case against Mr. Smith here."

{¶24} Kleese Development was not a party in Complaint I. In Complaint I, appellant asserted that Smith was an employee of Warren Redevelopment and Planning Corporations. In Complaint II, however, appellant alleged that Kleese Development owns the ground floor or ground space of the parking deck and employs Smith. In Complaint II, appellant alleged that Smith's removal of the snow was negligent because he "allowed the ice below [the snow] to remain at the exit/entrance[.]" Appellant, however, did not allege any independent negligent conduct on the part of Kleese Development; Kleese Development, therefore, could only be liable by virtue of its relationship with Smith.

{¶25} In disposing of Complaint I, the trial court has resolved the issue of whether Smith was responsible for an unnatural accumulation of ice and snow. Finding Smith's conduct was not negligent, the trial court held the condition of the area where appellant fell was caused by nothing other than "meteorological forces" of nature. As the trial court has already ruled on this point, it is barred by the doctrine of issue preclusion.

{¶26} Additionally, through the discovery process, appellant had ample opportunity to learn the correct employer of Smith. Instead, appellant attempts to bring a separate action asserting the same slip and fall occurring on January 25, 2009. We concur with the trial court's reasoning that appellant "should have gleaned from discovery efforts who Mr. Smith's employer was in [the prior] litigation, added Kleese as a party, if necessary, and litigated his issues there. * * * [Appellant] is not permitted a second chance here due to his own discovery failures."

{¶27} Based on our disposition of the third and fourth assignments of error, we decline to review appellant's first, second, and fifth assignments of error.

{¶28} The judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.