[Cite as *In re Estate of Perez*, 2009-Ohio-4531.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:

ESTATE OF THOMAS PEREZ

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case No. 2008 CA 00081

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Probate Division, Case No. 190177

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: August 31, 2009

APPEARANCES:

For Appellant
Joseph Perez, Individually

MARJORIE R. PERLMAN
5502 Market Avenue North, Suite B
Canton, Ohio 44721

For Appellee
Thomas B. Perez

STANLEY R. RUBIN
437 Market Avenue North
Canton, Ohio 44702

For Appellant
Joseph Perez, Executor of
The Estate of Thomas B. Perez

SHARON V. FLADEN
1330 Mercy Drive N.W., Suite 312
Canton, Ohio 44708

Hoffman, J.

{¶1} Joseph Perez, individually and as the Executor of the Estate of Thomas Perez, appeals the March 18, 2008 Judgment Entry of the Stark County Court of Common Pleas, Probate Division, in favor of Appellee Thomas B. Perez.

STATEMENT OF THE FACTS AND CASE

{¶2} Decedent Thomas Perez died of lung cancer on April 29, 1999, survived by two adult children: Thomas B. Perez and Cynthia Moldovan.[1] Decedent's sole surviving sibling is Appellant Joseph Perez. Decedent's last will and testament names Appellant Joseph Perez as the sole beneficiary.

{¶3} On March 30, 2004, Appellant was appointed executor of the Estate of Thomas Perez (hereinafter "the Estate.") The only asset of the Estate was the wrongful death claim for asbestosis against various tortfeasors stemming from the decedent's employment at Republic Steel Technologies.

{¶4} Appellant as Executor of the Estate participated in the asbestos litigation, in which various settlements were reached with different tortfeasors at different times. Each separate settlement required approval of the probate court.

{¶5} Three applications to approve settlement and distribution were filed in the Stark County Court of Common Pleas, Probate Division. On September 13, 2004, the first application listed Appellee Thomas B. Perez, Moldovan, and Appellant Joseph Perez as the wrongful death beneficiaries and contained a recommendation by the Executor (Joseph Perez) that the proceeds be divided equally between the survival claim and the wrongful death claim, and that he (Joseph Perez) be found to be the only

[1] Moldovan did not file an appeal.

wrongful death beneficiary who had suffered a loss. Both Appellee and Moldovan were served by publication.

{¶6} The trial court conducted a hearing, and divided the settlement proceeds equally between the survival claim and the wrongful death claim. The Estate is the sole beneficiary of the survival claim, and Appellant was found to be the only beneficiary of the wrongful death claim who suffered a loss.

{¶7} On January 3, 2005, the second application was filed with the Probate Court. The trial court conducted a hearing, and, via Judgment Entry of March 2, 2005, divided the proceeds equally between the survival claim for which the Estate is the sole beneficiary, and the wrongful death claim for which Appellant was again found to be the only beneficiary who suffered a loss.

{¶8} On March 23, 2005, the third application was filed with the Probate Court. At the May 23, 2005 hearing, Appellee appeared, and requested the trial court continue the hearing and vacate the two previous entries approving the prior applications. The trial court denied the motions to vacate. Appellee appealed to this Court, and we ordered the matter remanded to the trial court to conduct an evidentiary hearing on the motions to vacate. See, *In re Estate of Perez* (June 5, 2006) 2005CA00204.

{¶9} On December 19, 2006, the Probate Court conducted the hearing on the motions to vacate, and denied the motion to vacate as to the second application. Via Judgment Entry of February 15, 2007, the trial court vacated the distribution relative to the first application, finding service by publication upon Appellee was not appropriate. The court then set a hearing on the first and third applications. Appellee did not appeal the February 15, 2007 Judgment Entry denying vacation of the second application.

{¶10} On June 4, 2007, Appellant requested the Probate Court apply the doctrine of res judicata to the first and third applications, and apply the allocations set forth in the second application to the first and third.

{¶11} Via Judgment Entry of October 23, 2007, the Probate Court allocated all of the proceeds of both the first and third applications to the wrongful death claim, and ordered Appellee receive 80% and Appellant receive 20% of the proceeds. Upon request of Appellant, the probate court issued findings of fact and conclusions of law on March 18, 2008.

{¶12} Appellant filed his notice of appeal on April 15, 2008, assigning as error:

{¶13} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO APPLY THE DOCTRINE OF *RES JUDICATA* TO THE FIRST AND THIRD APPLICATIONS.

{¶14} "II. THE TRIAL COURT ERRED IN HOLDING THAT SUPERINTENDENCE RULE 70 REQUIRES EACH APPLICATION FOR APPROVAL OF WRONGFUL DEATH SETTLEMENT TO BE CONSIDERED A NEW ACTION.

{¶15} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN VACATING ITS JUDGMENT CONCERNING THE FIRST APPLICATION TO APPROVE WRONGFUL DEATH SETTLEMENT, BECAUSE THE COURT FOUND THAT MOVANT/APPELLEE HAD FAILED TO PRESENT A MERITORIOUS DEFENSE.

{¶16} "IV. THE TRIAL COURT ERRED IN APPORTIONING ALL OF THE WRONGFUL DEATH PROCEEDS TO THE WRONGFUL DEATH CLAIM AND NONE OF THE PROCEEDS TO THE SURVIVAL CLAIM ON THE FIRST AND THIRD APPLICATIONS.

{¶17} "V. THE TRIAL COURT ERRED IN APPORTIONING 80% OF THE WRONGFUL DEATH PROCEEDS TO APPELLEE, WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I, II

{¶18} Appellant's first and second assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶19} Appellant asserts the trial court erred in not applying the doctrine of res judicata in its adjudication and distribution of the first and third applications based upon the court's March 2, 2005 distribution with regard to the second application, and the trial court's February 15, 2007 Judgment Entry.

{¶20} This Court held in *Carver v. Mack* (June 11, 2008), Richland App. No. 07CA37, 2008-Ohio-2911:

{¶21} "'The doctrine of *res judicata* involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel)." *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381. Under the claim-preclusive branch of res judicata, "[a] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Id.* quoting *Norwood v. McDonald* (1943), 142 Ohio St. 299, paragraph one of the syllabus. Under the issue preclusive branch of res judicata:

{¶22} "'A point of law or a fact which was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction, may not be drawn in question in a subsequent action between the same

parties or their privies. The prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action. * * *'

{¶23} "* * *

{¶24} "'[W]here the identical issues raised by a plaintiff's state court complaint have been previously litigated in federal court, the doctrine of collateral estoppel precludes litigation of those same issues.' *Monahan v. Eagle Picher Industries, Inc.* (1984), 21 Ohio App.3d 179, 181, citing *Bahramian v. Murray* (Oct. 26, 1983), Hamilton App. No. C-820870.

{¶25} "The Ohio Supreme Court has held that '[c]ollateral estoppel applies when [a] fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.' *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183, citing *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, paragraph two of the syllabus. 'The essential test in determining whether the doctrine of collateral estoppel is to be applied is whether the party against whom the prior judgment is being asserted had full representation and *a full and fair opportunity to litigate that issue in the first action*.' *Cashelmara Villas Ltd. Partnership v. DiBenedetto* (1993), 87 Ohio App.3d 809, 813, quoting *Goodson* at 201."[2] (*Cashelmara* also cited to *Hicks v. DeLaCruz* (1977), 52 Ohio St.2d.71, in support of this proposition.)[3]

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[2] *Goodson v. McDonough Power Equip.*, Inc. (1983), 2 Ohio St.3d 193.
[3] A careful reading of the Ohio Supreme Court's decision in *Goodson* and *Hicks* reveals no language requiring "full representation" as included in the *Cashelmara* case, but rather only a "full and fair opportunity to litigate."

{¶26} The Ohio Supreme Court held in *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42,

{¶27} "Where, however, there has been a change in the facts in a given action which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of res judicata nor the doctrine of collateral estoppel will bar litigation of that issue in the later action."

{¶28} In the case at issue, the parties to each application are identical. The settlement applications pertain to the same decedent. The issues are identical, being approval of settlements reached with tortfeasors responsible for Decedent's death and allocation of the proceeds. The only difference among the three applications is the identity of the tortfeasor offering the settlement and the monetary value of the settlement sought to be approved and distributed.

{¶29} The trial court relied upon Superintendence Rule 70 in its adjudication and distribution relative to the first and third applications, stating each application is considered a new action. The Rule reads, in pertinent part,

{¶30} "(A) An Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims (Standard Probate Form 14.0) shall contain a statement of facts, including the amount to be allocated to the settlement of the claim and the amount, if any, to be allocated to the settlement of the survival claim. The application shall include the proposed distribution of the net proceeds allocated to the wrongful death claim.

{¶31} "(B) The fiduciary shall give written notice of the hearing and a copy of the application to all interested persons who have not waived notice of the hearing. Notwithstanding the waivers and consents of the interested persons, the court shall retain jurisdiction over the settlement, allocation, and distribution of the claims."

{¶32} Pursuant to Rule 70, each application requires a new hearing on the proposed settlement proceeds and distribution thereof. However, we find Superintendence Rule 70 does not preclude a factual issue from being passed upon and determined by the trial court; thereby, preventing the issue from being raised again in a subsequent application between the same parties or their privies.

{¶33} In its February 15, 2007 Judgment Entry, the trial court found Appellant did not exercise reasonable diligence in an attempt to locate Appellee before attempting service by publication as to the first application. Accordingly, the trial court granted Appellee's motion to vacate the settlement and distribution of the first application. The Judgment Entry also overruled Appellee's motion to vacate the second application's settlement and distribution, finding Appellee had been properly served and had not presented a meritorious defense or claim if relief had been granted. The trial court had previously concluded Appellant successfully rebutted the presumption Appellee suffered a loss as a result of the death of his father in its March 2, 2005 Judgment Entry.

{¶34} In contrast, the trial court's March 18, 2008 Judgment Entry finds,

{¶35} "Although Thomas B. testified at the hearing on the Second Application, he lacked a full and fair opportunity to litigate the issue of whether he suffered damages as a result of the death of Decedent. This was demonstrated by the testimony elicited at

the hearing on the Amended First Application and Second Amended Third Application.***

{¶36} "***The following facts were not elicited during the hearing on the Second Application, at which Thomas B. was unrepresented by counsel, which ordered the distribution of the entire net proceeds to Joseph.***

{¶37} "The Court finds Thomas B. is entitled to a rebuttable presumption, as the son of the Decedent, that he has suffered as a result of the death. The Court further finds that the presumption was not rebutted during the instant case."

{¶38} As noted supra, Appellee did not appeal the trial court's February 15, 2007 Judgment Entry denying Appellee's motion to vacate the order on the second application. The Court had specifically found Appellee suffered no loss from the decedent's death. Thus, the issue of whether Appellee suffered a loss upon the death of his father had been actually and directly passed upon by the trial court.

{¶39} However, the Ohio Supreme Court has recognized a limited exception to the application of the collateral estoppel doctrine. In Goodson,[4] the Ohio Supreme Court stated: "Collaterally stopping a party from relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little knowledge or incentive to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein." (Citation omitted). *Goodson*, supra at 201.

{¶40} Because the various applications were precipitated by successive settlements with individual defendants, and at least one or more defendants had yet to

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[4] See footnote 2, page 6 for citation.

settle at the time of the second hearing, we find Appellee could have foreseen the issue of whether he suffered a loss would arise in subsequent applications.

{¶41} We also find Appellee had incentive to fully litigate the issue of whether he suffered a loss at the second hearing. Appellee suggests a party presumed by law to have suffered loss might not have incentive to contest a challenge to that presumption where the monetary amount subject to approval is relatively small. While we agree such circumstances may warrant preclusion of collateral estoppel, the facts of the case sub judice do not do so.

{¶42} The first settlement application submitted to the trial court for its approval was filed September 13, 2004, for $47,953.39. [5] The second application was filed on March 2, 2005, for $69,960.00.[6] The third application was filed March 23, 2005, for $30,504.50.[7] After this appeal was filed, the third application was amended on October 23, 2007, to $119,511.18.[8] We note it was only after the third application in the original amount for $30,504.50 was filed that Appellee sought vacation of the judgments relative to the first and second applications.

{¶43} Because we find the monetary amount in the second application was considerable, we find Appellee had incentive to fully and vigorously litigate the second application. Therefore, the *Goodson* exception is inapplicable in this case.

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[5] Net proceeds were $27,364.00 after deduction of requested attorney fees. On October 23, 2007, after an amended application for more attorney fees, the net proceeds decreased to $26,290.66.
[6] Net proceeds were $44,824.00 after deduction of requested attorney fees.
[7] Net proceeds were $18,727.06 after deduction of requested attorney fees.
[8] Net proceeds were $69,0096.17 after deduction of requested attorney fees.

{¶44} While the trial court indicated Appellee did not have “a full and fair opportunity” to introduce facts in the second application hearing, the trial court did not grant the motion to vacate the second application. There were no “new” or changed fact(s) occurring after the hearing on the second application precluding operation of the doctrine of res judicata. The facts cited by the trial court and Appellee at the hearing on the Amended First Application and Amended Third Application are not facts which could not have been raised at the hearing on the second application; rather, the facts cited by Appellee were in existence at the time of the hearing on the second application held on March 2, 2005, but were simply not introduced. Appellee had a full and fair opportunity to litigate the issues at the hearing on the second application, so the operation of the doctrine is not precluded.

{¶45} Based upon the above, the trial court erred in not applying the doctrine of res judicata in the distribution of the first and third applications.

{¶46} The first and second assignments of error are sustained, the March 18, 2008 Judgment Entry is reversed and the matter is remanded to the trial court for further proceedings in accordance with the law and this opinion.

III, IV, and V

{¶47} Based upon our analysis and disposition of Appellant's first and second assignments of error, we find the arguments raised in the third, fourth and fifth assignments of error moot.

By: Hoffman, J. and

Edwards, J. concur,

Farmer, P.J. concurs separately

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

Farmer, J., concurs

{¶48} Although I concur in the majority's decision in the application of the doctrine of res judicata, I am forced to write separately on the issue of Sup.R. 70.

{¶49} Under Sup.R. 70, it would be perfectly correct and legitimate for a party to apply distribution to a sole beneficiary only. A perfect example would be when funds are necessary for the immediate maintenance of a minor beneficiary or to pursue a legal action as in the case sub judice. Therefore, it would not be out of the ordinary for different beneficiaries to be compensated through different applications. The determination of a distribution as to one beneficiary in one application may be completely different in a subsequent application.

s/ Sheila G. Farmer
JUDGE SHEILA G. FARMER

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE:	:	
ESTATE OF THOMAS PEREZ	:	
	:	JUDGMENT ENTRY
	:	Case No. 2008 CA 00081

For the reasons stated in our accompanying Memorandum-Opinion, the March 18, 2008 Judgment Entry is reversed and the matter remanded to the trial court for further proceedings in accordance with the law and our opinion. Costs to Appellee.

s/ William B. Hoffman ___________________
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer ___________________
HON. SHEILA G. FARMER

s/ Julie A. Edwards___________________
HON. JULIE A. EDWARDS