

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

GERALD PRICE

C.A. No. 24991

Appellant

v.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2006-05-3098

CARTER LUMBER CO., et al.

Appellees

DECISION AND JOURNAL ENTRY

Dated: September 15, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Gerald Price claims that his former supervisor told him that Carter Lumber Company would not rehire Mr. Price after a lay-off because Carter was not willing to work around his dialysis schedule. Mr. Price sued Carter and the former supervisor, Jim Collins, in federal district court for disability discrimination. The federal court dismissed without prejudice state-law claims that Mr. Price had brought against Mr. Collins. Mr. Price then sued Carter and Mr. Collins in the Summit County Court of Common Pleas. After Carter won a jury verdict in federal court, both Carter and Mr. Collins moved the common pleas court for summary judgment on all of his claims against them. The common pleas court initially denied the motion for summary judgment and a motion to reconsider, but later sua sponte granted summary judgment to both defendants. Mr. Price has appealed that ruling. This Court affirms the part of the

common pleas court's entry that granted summary judgment to Carter because all claims against the company are barred by claim preclusion. This Court reverses the part of the entry that granted summary judgment to Mr. Collins because Mr. Price stated claims against him in his individual capacity and the common pleas court did not determine whether those claims are barred by issue preclusion. This Court remands this matter for consideration by the common pleas court of whether a genuine issue of material fact remains for trial against Mr. Collins.

BACKGROUND

{¶2} The Equal Employment Opportunity Commission filed a complaint against Carter in federal district court, making claims on behalf of Mr. Price under Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991. The Commission averred that Carter discriminated against Mr. Price by denying him employment because of his disability.

{¶3} Mr. Price filed his own federal complaint against both Carter and Mr. Collins. He averred a disability discrimination claim against Carter under the Americans with Disabilities Act, a similar state-law claim against both Carter and Mr. Collins under Chapter 4112 of the Ohio Revised Code, and a claim against both Carter and Mr. Collins for intentional infliction of emotional distress. The district court consolidated the two federal cases and dismissed Mr. Price's claims against Mr. Collins, both of which were based on state law, without prejudice.

{¶4} Mr. Price later sued Carter and Mr. Collins in the Summit County Common Pleas Court for disability discrimination under Chapter 4112 of the Ohio Revised Code, intentional infliction of emotional distress, and violation of public policy. In their answers, Carter and Mr. Collins asserted defenses including "waiver, collateral estoppel, and/or issue preclusion and/or claim preclusion." Four months later, the parties tried the federal case.

{¶5} Following a trial limited to the federal disability discrimination claim against Carter, the jury returned a verdict, supported by interrogatory responses, in favor of Carter and against Mr. Price and the Commission. While post-judgment motions remained pending in federal court, Carter and Mr. Collins moved the common pleas court to continue the trial of the state claims until after the district court's judgment would become final and res judicata would apply. Mr. Price opposed that motion, arguing that different standards apply to the state and federal claims and that, therefore, res judicata would not bar his state claims. The common pleas court denied the requested continuance.

{¶6} Carter and Mr. Collins moved the common pleas court to reconsider its denial of the requested continuance. They included with their motion certified copies of jury interrogatories from the federal case, the federal court's journal entry announcing the verdict against Mr. Price, and Mr. Price's federal complaint. The common pleas court granted the motion to reconsider, cancelled the trial, and placed the case on the court's inactive docket.

{¶7} When the common pleas court reactivated the case, Carter and Mr. Collins moved for summary judgment, arguing that, due to the preclusive effect of the federal jury interrogatory responses, Mr. Price was barred from pursuing his state-law claims against them. Following Mr. Price's response to that motion, the common pleas court denied summary judgment on the disability discrimination and intentional infliction of emotional distress claims, but granted Carter and Mr. Collins summary judgment on the violation of public policy claim. After the case was transferred to a new trial judge, Carter and Mr. Collins moved for reconsideration of the denial of summary judgment on the disability discrimination and intentional infliction of emotional distress claims. The new judge refused to reconsider, determining that Carter and Mr. Collins had not presented any evidence that the first common pleas judge had not considered.

Later, the new judge sua sponte reconsidered the motion for summary judgment. She then granted summary judgment to Carter based on claim preclusion and to Mr. Collins based on a determination that Mr. Price had failed to state a separate claim against him in his individual capacity. Mr. Price has timely appealed the common pleas court's grant of summary judgment to both Carter and Mr. Collins on his claims of disability discrimination and intentional infliction of emotional distress.

CIVIL RULE 54(B)

{¶8} Mr. Price's first assignment of error is that the common pleas court incorrectly "dismiss[ed]" all of his claims "pursuant to Ohio Civil Rule 54(B)." He has argued that his claims should be "reinstated" because Rule 54(B) of the Ohio Rules of Civil Procedure is not a proper basis to enter final judgment on all claims and application of the rule should not affect the merits of a claim.

{¶9} Rule 54(B) provides, in part, that, unless a decision that adjudicates less than all the claims in an action includes a determination that there is "no just reason for delay," that decision is "subject to revision at any time before the entry of judgment." The common pleas court's judgment entry begins: "Pursuant to Civ.R. 54(B), this Court sua sponte reconsiders the Order of May 6, 2008, denying Defendants' [m]otion for [s]ummary [j]udgment." Contrary to Mr. Price's argument, the common pleas court's entry does not indicate that it was basing its decision to grant summary judgment on Civil Rule 54(B). It indicates that, based on Civil Rule 54(B), the court had decided to reconsider its May 2008 ruling denying summary judgment on the claims of disability discrimination and intentional infliction of emotional distress, which it was able to do because its May 2008 order was "subject to revision at any time before entry of

judgment.” Civ. R. 54(B). As the common pleas court did not base its decision to grant summary judgment on Civil Rule 54(B), Mr. Price’s first assignment of error is overruled.

RECONSIDERATION

{¶10} Mr. Price’s second assignment of error is that the common pleas court should not have granted the defendants’ motion for reconsideration of their motion for summary judgment because, according to him, the Ohio Rules of Civil Procedure do not authorize motions for reconsideration. Citing *Pitts v. Ohio Department of Transportation*, 67 Ohio St. 2d 378 (1981), he has argued that the common pleas court had no authority to reverse its earlier denial of the motion for reconsideration because the motion for reconsideration was a nullity.

{¶11} The Ohio Supreme Court has held that “[t]he Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment in the trial court.” *Pitts v. Ohio Dep’t of Transp.*, 67 Ohio St. 2d 378, at paragraph one of the syllabus (1981). Therefore, it has determined “that motions for reconsideration of a final judgment in the trial court are a nullity.” *Id.* at 379. The issue turns, however, on the operative word: “final.” In *Pitts*, the Supreme Court explained that, on the authority of Rule 54(B) of the Ohio Rules of Civil Procedure, “[i]nterlocutory orders are subject to motions for reconsideration, whereas judgments and final orders are not.” *Id.* at 379 n.1. Although the granting of summary judgment may be final and appealable under Section 2505.03 of the Ohio Revised Code, the denial of summary judgment generally is not. *Budich v. Reece*, 9th Dist. No. 24108, 2008-Ohio-3630, at ¶7-8; *Interstate Props. v. Prasanna Inc.*, 9th Dist. Nos. 22734, 22757, 2006-Ohio-2686, at ¶20. Furthermore, as discussed above, under Rule 54(B) of the Ohio Rules of Civil Procedure, “any order or other form of decision . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of judgment

adjudicating all the claims and the rights and liabilities of all the parties” provided the partial adjudication did not contain a determination that there is no just reason for delay.

{¶12} The common pleas court’s May 2008 order denied the defendants’ motion for summary judgment on Mr. Price’s claims of disability discrimination and intentional infliction of emotional distress. That order did not affect the parties’ substantial rights nor prevent a judgment on those two claims. See R.C. 2505.02(B)(1). As no exception under Section 2505.02(B) of the Ohio Revised Code applies, it was interlocutory. The common pleas court’s entry granting summary judgment on one claim while denying it on two others, did not include a determination that there was no just reason for delay. Therefore, under Civil Rule 54(B), the common pleas court had authority to reconsider its May 2008 ruling.

SUMMARY JUDGMENT

{¶13} Mr. Price’s remaining assignments of error are that the common pleas court improperly granted summary judgment to Carter and Mr. Collins. In reviewing a ruling on a motion for summary judgment, this Court applies the same standard the common pleas court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990). Rule 56(C) of the Ohio Rules of Civil Procedure provides that “[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” If the moving party meets its initial burden by identifying specific parts of the record that demonstrate that there are no issues of material fact regarding the essential elements of a claim, the nonmoving party bears a reciprocal

burden of setting forth specific facts demonstrating that an issue of fact exists for trial. *Vahila v. Hall*, 77 Ohio St. 3d 421, 428-29 (1997); Civ. R. 56(E).

Res Judicata

{¶14} Res judicata, under Ohio law, includes two concepts: claim preclusion and issue preclusion. *State ex rel. Schachter v. Ohio Pub. Employees Ret. Bd.*, 121 Ohio St. 3d 526, 2009-Ohio-1704, at ¶27 (quoting *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, at ¶6). Claim preclusion bars subsequent actions between the same parties or their privies on all claims arising out of the transaction that was the subject of a previous action. *O’Nesti*, 2007-Ohio-1102, at ¶6. Issue preclusion bars the same parties or their privies from re-litigating an issue in a subsequent action if the “fact or point . . . was actually and directly at issue in a previous action” and a court of competent jurisdiction has determined it. *Fort Frye Teachers Ass’n, OEA/NEA v. State Employment Relations Bd.*, 81 Ohio St. 3d 392, 395 (1998).

Claims against Carter

{¶15} Mr. Price’s third assignment of error is that the common pleas court incorrectly granted Carter summary judgment based on the determination that both of his claims against it were barred by res judicata. The common pleas court granted Carter summary judgment because it determined that all of Mr. Price’s claims had been “fully litigated in the [d]istrict [c]ourt.” The common pleas court pointed out that, contrary to Mr. Price’s representations, the federal district court had not dismissed all of his state-law claims against both Carter and Mr. Collins before Mr. Price filed this case in common pleas court. Rather, it had only dismissed his claims against Mr. Collins. Therefore, the common pleas court determined that the federal jury’s verdict in favor of Carter disposed of all the claims against Carter, including his state claims, and barred Mr. Price from pursuing those state claims in common pleas court.

{¶16} According to Mr. Price, his state claims against Carter were not litigated in federal court. In fact, both parties agree that no state-law claims were tried to the federal jury. Carter has argued, however, that claim preclusion bars Mr. Price from pursuing his state claims against it in state court because both the federal and state complaints were based on the same set of facts regarding alleged employment discrimination and a jury determined the federal claims on their merits.

{¶17} The doctrine of claim preclusion required Mr. Price to bring all potential claims against Carter and its privies arising from the same occurrence in his initial lawsuit or be barred from later bringing the omitted claims because a plaintiff must “present every ground for relief in the first action, or be forever barred from asserting it.” *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 382 (1995) (quoting *Nat’l Amusements Inc. v. Springdale*, 53 Ohio St. 3d 60, 62 (1990)); Restatement (Second) of Judgments § 24 (1982). In support of its motion for summary judgment, Carter argued that, based on the same set of facts, it had obtained a valid final judgment in its favor in federal court. It pointed to the jury verdict and jury interrogatory responses indicating that judgment had been rendered on the merits of the federal employment discrimination claim. Thus, Carter met its initial burden of showing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law under Rule 56(C) of the Ohio Rules of Civil Procedure.

{¶18} The question is whether Mr. Price met his reciprocal summary judgment burden. See *Vahila v. Hall*, 77 Ohio St. 3d 421, 428-29 (1997); Civ. R. 56(E). He has not disputed that a valid final judgment on the merits was rendered in federal court on his federal claim against Carter, a claim arising out of the same occurrence that forms the basis of his state claims against Carter. In his brief in opposition to Carter’s motion for summary judgment, however, he argued

that “the only way [he] could get his [s]tate [c]laim litigated was to file a [c]omplaint with [state] [c]ourt” because the federal district court “decided to only deal with the federal claims” and “dismissed the . . . state law claims without prejudice.” An exception to the rule that a valid judgment in favor of a defendant bars the plaintiff from bringing future claims based on the same transaction is that the plaintiff may bring claims that the first court dismissed “without prejudice.” Restatement (Second) of Judgments § 26 cmt. b (1982). In order to prevent the final judgment rendered against him in federal court from barring his claims against Carter in this case, Mr. Price had to show that the federal court dismissed his state claims against Carter without prejudice. But he has failed to do so. Although he argued that he was unable to pursue his state-law claims against Carter in federal court because the federal court dismissed them, he did not present any evidence tending to show that the federal court had in fact done so.

{¶19} The common pleas court in this case granted summary judgment to Carter based on res judicata because the federal district court’s order of May 19, 2005, “dismiss[ed] only ‘state law claims asserted against Defendant Jim Collins in his individual capacity’” The federal court dismissal explains why Mr. Price was not able to pursue his claims against Mr. Collins in the federal action, but it does not address his state claims against Carter. On appeal, Mr. Price has neither explained how the language of the May 2005 order could be construed as a dismissal of his state-law claims against Carter nor pointed to any other evidence tending to show that the federal court dismissed those claims without prejudice. Mr. Price’s only argument is that the state-law claims against Carter “were never litigated” in federal court. He has correctly pointed out that Carter has admitted that no state-law issues were tried in federal court.

{¶20} The problem with Mr. Price’s argument is that it fails to recognize the breadth of claim preclusion’s reach. Claim preclusion not only bars all claims that were litigated, but also

all claims that could have been litigated growing from the same transaction. *State ex rel. Schachter v. Ohio Pub. Employees Ret. Bd.*, 121 Ohio St. 3d 526, 2009-Ohio-1704, at ¶27. Unlike issue preclusion, the application of claim preclusion is not limited to issues that were “actually and necessarily litigated and determined in a prior action.” *Id.* at ¶28. Under claim preclusion, if two claims or theories of liability arose from the same occurrence and could have been litigated together previously, then a final judgment on the merits in the initial action will bar subsequent claims against the same party or its privies. See *id.* at ¶27; *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, at ¶6. Mr. Price failed to demonstrate that he could not have tried his state-law claims against Carter in his federal lawsuit. The common pleas court properly determined that Mr. Price’s claims against Carter are barred by claim preclusion. Mr. Price’s third assignment of error is overruled.

{¶21} The dissent has suggested that the common pleas court erred by granting summary judgment to Carter based upon claim preclusion because Carter did not raise that aspect of res judicata in its motion for summary judgment and because the common pleas court wrote that it had examined the federal court docket. Mr. Price, however, has assigned neither of those things as error. Generally, this Court does not construct arguments for parties and reverse trial court decisions based upon errors not argued on appeal. See, e.g., *Moss v. Lorain County Bd. of Mental Retardation*, 185 Ohio App. 3d 395, 2009-Ohio-6931, at ¶9.

Claims against Mr. Collins Individually

{¶22} Mr. Price’s fourth assignment of error is that the common pleas court incorrectly granted summary judgment to Mr. Collins. The common pleas court granted Mr. Collins summary judgment because it determined that Mr. Price had not brought any separate claims against him in his individual capacity. Despite the fact that he was named in his individual

capacity in the caption of the complaint, the common pleas court wrote that Mr. Price had failed to argue or identify any claim against Mr. Collins “distinct from those against Carter Lumber Co.”

{¶23} The common pleas court disposed of both the intentional infliction of emotional distress and disability discrimination claims against Mr. Collins on the same basis. That is, it determined that Mr. Price never argued or identified a separate claim against Mr. Collins involving allegations distinct from those he made against Carter. The intentional infliction of emotional distress claim, however, is primarily aimed at Mr. Collins, not Carter. The complaint provides details regarding Mr. Collins’s behavior toward Mr. Price. In fact, every allegation supporting the intentional infliction of emotional distress claim is based on the acts of Mr. Collins. Thus, the trial court incorrectly granted summary judgment to Mr. Collins on the intentional infliction of emotional distress claim based on its determination that Mr. Price had not presented any claims against Mr. Collins.

{¶24} In an effort to support the common pleas court’s decision on the disability discrimination claim, Mr. Collins has argued that Mr. Price failed to allege any facts to form a separate claim against him in his individual capacity “separate and apart from his official capacity” as an employee of Carter. In response, Mr. Price has argued that, under *Genaro v. Central Transport Inc.*, 84 Ohio St. 3d 293 (1999), he presented a claim against Mr. Collins in his individual capacity without alleging that Mr. Collins acted outside the scope of his employment. Mr. Price has conceded that he alleged identical claims against Mr. Collins and Carter.

{¶25} Section 4112.02(A) of the Ohio Revised Code prohibits discriminatory conduct by “employer[s].” In *Genaro*, the Ohio Supreme Court determined that “individual supervisors

and managers whose conduct violates the provisions of . . . Chapter 4112 [of the Ohio Revised Code]” fall within the applicable statutory definition of “employer.” *Genaro v. Cent. Transp. Inc.*, 84 Ohio St. 3d 293, 296 (1999) (quoting R.C. 4112.01(A)(2)). Therefore, the Court held that, “[f]or purposes of R.C. Chapter 4112 a supervisor/manager may be held jointly and/or severally liable with her/his employer for [his/her own] discriminatory conduct . . . in violation of R.C. Chapter 4112.” *Id.* at syllabus. Under Section 4112.99, “[w]hoever violates . . . [C]hapter [4112] is subject to a civil action for damages” Thus, under the statutory framework of Chapter 4112, a supervisor who engages in discriminatory actions may be held jointly and severally liable with his employer as though the two were co-employers of the injured party. *Genaro*, 84 Ohio St. 3d at 300; *Edwards v. Ohio Inst. of Cardiac Care*, 170 Ohio App. 3d 619, 2007-Ohio-1333, at ¶74. The common pleas court, therefore, incorrectly granted summary judgment to Mr. Collins on the disability discrimination claim based on its determination that Mr. Price had not stated a claim against him in his individual capacity. Mr. Price’s fourth assignment of error is sustained.

The Jury Interrogatories

{¶26} Mr. Price’s fifth assignment of error is that the common pleas court incorrectly granted summary judgment even though genuine issues of material fact remain for trial. In support of this assignment of error, Mr. Price has presented an argument regarding issue preclusion.

{¶27} We have already determined that the common pleas court properly granted summary judgment to Carter on both claims based on claim preclusion. There is no reason to reach this assignment of error, therefore, as it relates to Carter.

{¶28} Mr. Collins has argued that issue preclusion bars Mr. Price from making a prima facie case against him under Section 4112.02 of the Ohio Revised Code. His argument relies on a comparison of the federal jury interrogatory responses to the elements of Mr. Price’s state-law claims.

{¶29} The common pleas court never reached the question of whether the jury’s interrogatory responses in the federal case barred the issues Mr. Price wanted to litigate against Mr. Collins in this case. Rather, it granted summary judgment to Mr. Collins because it determined that Mr. Price had failed to state a claim against him in his individual capacity. “Therefore,” it wrote, “no cause of action remains to be resolved by this [c]ourt.” This matter must be remanded to the common pleas court for it to consider, in the first instance, the summary judgment arguments made by Mr. Collins and Mr. Price, review the evidence, and make a determination regarding both claims against Mr. Collins in his individual capacity. *B.F. Goodrich Co. v. Commercial Union Ins.*, 9th Dist. No. 20936, 2002-Ohio-5033, at ¶38-44 (citing *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 360 (1992)). Accordingly, this Court also does not reach Mr. Price’s fifth assignment of error as it relates to Mr. Collins.

CONCLUSION

{¶30} Mr. Price’s first, second, and third assignments of error are overruled. The common pleas court correctly reconsidered its non-final denial of summary judgment and granted summary judgment to Carter based on claim preclusion. Mr. Price’s fourth assignment of error is sustained. The common pleas court should not have granted summary judgment to Mr. Collins in his individual capacity based on its incorrect determination that Mr. Price had not stated claims against him. We do not reach Mr. Price’s fifth assignment of error. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and

remanded for consideration of whether a genuine issue of material fact remains for trial regarding the claims against Mr. Collins in his individual capacity.

Judgment affirmed in part,
reversed in part,
and remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CLAIR E. DICKINSON
FOR THE COURT

BAIRD, J.
CONCURS

BELFANCE, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶31} I concur with respect to most of the majority’s opinion. However, I respectfully dissent with respect to the majority’s resolution of the third assignment of error.

{¶32} The majority concludes that Mr. Price failed to meet his reciprocal summary judgment burden as he failed “to show that the federal court dismissed his state claims against Carter without prejudice[]” and thus failed to demonstrate that his claims were not barred by claim preclusion.

{¶33} However, Carter did not assert in its motion for summary judgment that Mr. Price’s claims were barred by claim preclusion. Carter only asserted that Mr. Price’s claims were barred by issue preclusion, or collateral estoppel. While it is true that both claim and issue preclusion comprise the doctrine of res judicata, the evidence needed to support claim preclusion is not necessarily the same evidence needed to support issue preclusion.

{¶34} This Court has previously stated that:

“With regard to the moving party’s burden to inform the trial court of the basis for the motion, a party seeking summary judgment must specifically delineate the basis for the motion in order to allow the opposing party a meaningful opportunity to respond. We have explained that if the moving party does not raise an issue in its motion for summary judgment, then it is improper for the trial court to grant the motion on that basis. If a party files a motion based on some, but not all, issues in a case, the trial court should restrict its ruling to those matters raised. It is reversible error to award summary judgment on grounds not specified in the motion for summary judgment. The trial court may not rely on law or fact that is not presented in the moving party’s motion.” (Internal citations and quotations omitted.) *Lindsey v. Summit Cty. Children Services Bd.*, 9th Dist. No. 24352, 2009-Ohio-2457, at ¶10.

{¶35} Here the trial court did not restrict its ruling to the arguments raised by Carter. There was no reason why Mr. Price would have presented the evidence the majority is requiring him to present when that evidence would support an argument that was not made by Carter on

summary judgment. Thus, I believe the majority is holding Mr. Price to a burden that is not anticipated under the summary judgment standard.

{¶36} In addition, the trial court committed legal error when it relied upon materials not before it in ruling on the motion. See, e.g., *In re J.C.*, 186 Ohio App.3d 243, 2010-Ohio-637, at ¶¶13-15 (stating that “[m]atters outside the record cannot be used to demonstrate error, nor can they be considered in defense of the judgment[.]”). In its judgment entry, the trial court states that it examined the docket of the federal court case in concluding Mr. Price’s claims were barred by claim preclusion; however, that docket was not within the ambit of materials that the trial court could properly consider pursuant to Civ.R. 56; in fact, it was not within the trial court’s record at all.

{¶37} Therefore, I would reverse the trial court’s entry of summary judgment as to Carter on the basis of claim preclusion and remand the matter for further proceedings.

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(c), Article IV, Constitution.)

APPEARANCES:

EDWARD L. GILBERT, attorney at law, for appellant.

THOMAS F. HASKINS, JR., attorney at law, for appellee.

MICHELE MORRIS, attorney at law, for appellee.