[Cite as *Builders Dev. Group, L.L.C. v. Smith*, 2010-Ohio-4151.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

BUILDERS DEVELOPMENT GROUP, L.L.C.	:	Appellate Case No. 23846
Plaintiff-Appellant	:	Trial Court Case No. 09-CV-637
v.	:	
ANNETTE SMITH, et al.	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellees	:	

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O P I N I O N

Rendered on the 3rd day of September, 2010.

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DON A. LITTLE, Atty. Reg. #0022761, 7501 Paragon Road, Lower Level, Dayton, Ohio 45459
Attorney for Plaintiff-Appellant

MICHAEL W. SANDNER, Atty. Reg. #0064107, Pickrel, Schaeffer & Ebeling Co., 2700 Kettering Tower, Dayton, Ohio 45423
Attorney for Defendant-Appellees

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BROGAN, J.

{¶ 1} Builders Development Group, LLC ("Builders Development") appeals from the trial court's entry of summary judgment against it on its complaint for damages stemming from a home improvement contract.

{¶ 2} In its sole assignment of error, Builders Development contends the trial court erred in finding that its lawsuit against appellees Annette and Tessa Smith was barred by res judicata. The issue before us is whether the trial court's judgment in a prior case, *Herres v. Smith*, Montgomery C.P. No. 08 CV 178, has claim-preclusive effect here.

{¶ 3} The record reflects that Mark Herres filed the prior suit against Annette and Tessa Smith in January 2008, seeking to recover damages related to a home improvement contract between the Smiths and an entity identified in invoices as "Herres Custom Builders, LLC."[1] Herres filed that case in his own name but "dba Herres Custom Builders." It proceeded to trial in August 2008. During Herres' case-in-chief, the trial court determined "that the action was brought improperly as [Herres] testified that he was an LLC, not doing business individually as he stated in the Complaint[.]" As a result, the trial court dismissed Herres' lawsuit against the Smiths, with prejudice, on September 2, 2008.

{¶ 4} Thereafter, on September 23, 2008, Builders Development filed the present action against Annette and Tessa Smith, seeking damages stemming from the same home improvement contract.[2] The case was filed as "Builders Development Group, LLC, dba Herres Custom Builders, LLC." In response to

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[1]The complaint also named the Montgomery County Treasurer as a defendant because it sought to foreclose on a mechanic's lien.

[2]The case originated in Vandalia Municipal Court. It was transferred to Montgomery County Common Pleas Court after the Smiths filed a counterclaim exceeding the municipal court's jurisdictional limit. The Smiths voluntarily dismissed their counterclaim after the trial court entered summary judgment in their favor on Builders Development's complaint.

requests for admissions and interrogatories, Herres identified himself as the sole officer and/or board member of Builders Development. Herres further indicated that Builders Development is an Ohio limited-liability company. Notably, Herres also admitted that Herres Custom Builders, LLC *is not* incorporated and is not a registered trade name in Ohio.

{¶ 5} On August 25, 2009, the Smiths moved for summary judgment on the basis of res judicata. After full briefing, the trial court sustained the motion on October 26, 2009. It reasoned as follows:

{¶ 6} "In order for res judicata to bar a claim, several requirements must be met. First, there must be two (2) actions and the prior action must have ended in final judgment. Here the First Case was brought as 08 CV 178, Mark Herres v. Annette Smith and Tessa Smith. The First Case was dismissed by a judgment entry because the action was improperly brought by Mark Herres. This Court dismissed the claims with prejudice. Generally, the dismissal of an action because one of the parties is not a real party in interest or does not have standing is not a dismissal on the merits for purposes of res judicata. *Wells Fargo Bank v. Byrd*, 2008-Ohio-4603, ¶18, Hamilton App. Nos. C-070889 and C-070890. Here, however, the First Case was dismissed *with prejudice* thus having the effect of being dismissed on the merits. Further, no motion was made nor order granted satisfying the requirements of Civ.R. 60(B) to set aside the judgment that dismissed the First Case *with prejudice*.

{¶ 7} "Next, the actions must have arisen out of the same transaction or occurrence. Here, both the First Case and the present case arose out of a contract for improvements to real estate owned by [the] Smiths. In the First Case, Herres

brought claims for breach of contract, quantum meruit, and action on account stemming from alleged improvements made to property owned by Annette Smith. In the present case, Builders Development brought claims for breach of contract, quantum meruit, and unjust enrichment for improvements allegedly made by Builders Development to [the] Smiths' property. Thus, a single occurrence was the basis for the present case as well as the First Case.

{¶ 8} "Last, the two (2) actions must involve the same parties or, if the parties are not identical, there must be privity between the parties. [The] Smiths argue that Herres brought the first Case in his individual capacity knowing he was not the real party in interest and now brings the current action under the guise of Builders Development. However, this Court need not decide whether Herres knew that he was not the proper party under which to bring the First Case; rather, this Court must decide whether Custom Builders had the opportunity to bring the current case in the First Case.

{¶ 9} "Here, Builders Development argues that because the named plaintiffs in this case and the First Case are not the same, res judicata cannot bar the present action. Specifically, Builders Development argues that the First Case was brought by Mark Herres, dba Herres Custom Builders and this case was brought by Builders Development Group, L.L.C., dba Herres Custom Builders, L.L.C. Further, Builders Development argues that in order to sustain [the] Smiths' Motion for Summary Judgment, this Court must find that Herres is the same as Builders Development. However, Builders Development's argument fails to recognize the law of privity, which requires the courts to look beyond the nominal parties to the substance of the

cause to determine the real party in interest.

{¶ 10} "This Court need not find that Herres is the same as Builders Development in order to bar this claim based on res judicata. This Court need only find that there is privity between Herres and Builders Development. Privity exists when the party and the other individual have mutual interests, including the same desired result. Further, although a party may not have been named in the prior action, the doctrine has been applied when the party in the subsequent action was a real party in interest in that prior action. In the First Case, it was determined that Herres should have brought the First Case in the name of Herres Custom Builders, L.L.C. In the present case, brought under Builders Development's name, Herres admits that Builders Development Group, L.L.C. was doing business as Herres Custom Builders. See Memo. In Opp. at 1. Further, Herres is the Managing Member of Builders Development Group, L.L.C. As such, this Court finds that there is privity among Herres, Herres Custom Builders, and Builders Development, as each [has] mutual interest in this litigation and desire[s] the same result.

{¶ 11} "Furthermore, all written contracts in this case suggest that the work provided to [the] Smiths was performed by Herres Custom Builders, L.L.C. Now that Herres Custom Builders is barred from asserting its claims, by way of the dismissal with prejudice of the First Case, Builders Development has asserted a claim for the same work, thus supporting the notion that privity exists as the result being sought is the same as in the First Case. Since Herres had the opportunity to bring the First Case in the name of Mark Herres, Herres Custom Builders, L.L.C., or Builders Development, the current action is barred by res judicata as these claims could have

been litigated in the First Case which has been dismissed *with prejudice*." (Doc. #27 at 7-9).

{¶ 12} In essence, the trial court reasoned that res judicata applies because Herres' prior lawsuit against the Smiths was dismissed with prejudice and the current plaintiff, Builders Development, is in privity with Herres. We do not necessarily disagree with the trial court's reasoning. The doctrine of res judicata provides that "a final judgment on the merits 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." *State Farm Mut. Auto. Ins. Co. v. Hill*, Greene App. No. 2006 CA 24, 2007-Ohio-581, ¶8, citing *Grava v. Parkman Township,* 73 Ohio St.3d 379, 381, 1995-Ohio-331.

{¶ 13} Herres' prior lawsuit was dismissed with prejudice because he filed it individually with a "dba" designation. As set forth above, the trial court held in the prior case that the action should have been brought by Herres' company since he testified that he was operating as an LLC. It is well settled that a dismissal with prejudice is considered a final judgment "on the merits" for res judicata purposes. See, e.g., *Tower City Properties v. Cuyahoga County Bd. of Revision* (1990), 49 Ohio St.3d 67, 69. What constitutes privity for res judicata purposes, however, is "somewhat amorphous." *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 2000-Ohio-148. In any event, authority exists to support the trial court's finding that Herres is in privity with his company, the current plaintiff, Builders Development Group, LLC. See, e.g., *Monfort Supply Co. v. City of Cheviot* (Sept. 27, 1995), Hamilton App. No. C-940898 (citing federal case law for the proposition "that a close corporation is in privity with its dominant officer and shareholder"); *Keeley & Assoc., Inc. v. Integrity Supply, Inc.*

(1997), 120 Ohio App.3d 1. Builders Development also does not dispute that it is asserting essentially the same claims or causes of action that Herres previously asserted against the Smiths. Therefore, strict application of black-letter law supports the trial court's finding that the judgment in *Herres v. Smith*, Montgomery C.P. No. 08 CV 178, has claim-preclusive effect here.

{¶ 14} We note, however, that "[t]he binding effect of res judicata has been held not to apply when fairness and justice would not support it." *State ex rel. Estate of Miles v. Village of Piketon*, 121 Ohio St.3d 231, 237, 2009-Ohio-786, citing *Davis v. Wal-Mart Stores, Inc*. 93 Ohio St.3d 488, 491, 2001-Ohio-1593; see, also, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 25 (recognizing that res judicata "is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice"). This court previously refused to apply the preclusive effect of res judicata in *Berry v. Berry* (July 28, 1993), Montgomery App. No. 13746, a case involving a mother's motion for increased child support. In *Berry*, the trial court determined that it lacked subject-matter jurisdiction to modify a Kentucky child-support order. The mother did not appeal. Instead, she later filed another motion for increased child support. The trial court dismissed the motion, finding that its lack of subject-matter jurisdiction to modify support was res judicata. Upon review, we found that the trial court's initial jurisdictional ruling was erroneous. We nevertheless recognized that even incorrect judgments are entitled to preclusive effect. We also reasoned that the trial court's initial dismissal for lack of subject-matter jurisdiction was "on the merits" with regard to the jurisdictional issue. As a result, we concluded that "a strict application of res judicata * * * would support the trial court's dismissal of [the

mother's] second motion for an increase in child support." We declined to apply res judicata, however, finding that its application would be "manifestly unjust" to the mother and her child.

{¶ 15} Although the present case obviously differs from *Berry* factually, we reach a similar conclusion. Herres filed his prior action individually but with a "dba" designation. The trial court dismissed the case during trial after Herres testified that he actually was operating as an LLC.[3] Herres promptly sought to rectify the problem by refiling the action, this time bringing it in the name of his corporation, Builders Development Group, LLC. The trial court rebuffed his attempt on the basis of res judicata because Herres previously had pursued the same claims individually. Although Herres may not be entirely faultless, he has been left in a quandary. He could not purse his claims against the Smiths because they belonged to his corporation, but his corporation cannot pursue the claims because he already did. The impediment here is the fact that the trial court dismissed the prior case with prejudice, which had the effect of entering judgment "on the merits" for res judicata purposes. But saying that Herres' claims were decided "on the merits" is legal fiction. Although the law treats the claims as if they were decided on the merits, they plainly were not. Herres' prior case was dismissed because he testified that he operated as an LLC. Under these circumstances, rigid application of res judicata would defeat the

[3]Because Herres filed the prior action in his own name "dba Herres Custom Builders," the trial court in that case likely assumed that Herres Custom Builders was incorporated. Herres' responses to requests for admissions and interrogatories in the present case reveal, however, that Herres Custom Builders has not been incorporated. The only true corporation with which Herres appears to be associated is Builders Development. As set forth above, it filed the present action as "Builders Development Group, LLC, dba Herres Custom Builders, LLC."

ends of justice. Accordingly, we sustain the appellant's assignment of error.

{¶ 16} The judgment of the Montgomery County Common Pleas Court is reversed, and the cause is remanded for further proceedings.

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FAIN, J., concurs.

DONOVAN, P.J., dissenting:

{¶ 17} I disagree. In my view, res judicata bars relitigation of this case and the trial court correctly and thoroughly analyzed this issue.

{¶ 18} The law in Ohio concerning the general doctrine of res judicata has long ago established the general principle that material facts or questions which were in issue in a former suit, and were there judicially determined by a court of competent jurisdiction, are conclusively settled by a judgment therein so far as concerns the parties to that action and persons in privity with them. See, e.g., *State ex rel Ohio Water Service Co. v. Mahoning Valley Sanitary Dist.* (1959), 169 Ohio St. 31; *Conold v. Stern* (1941), 138 Ohio St. 352; *Schimke v. Earley* (1962), 173 Ohio St. 521; *Hixson v. Ogg* (1895), 53 Ohio St. 361, 42 N.E. 32; *Massillon Sav. & Loan Co. v. Imperial Finance Co.* (1926), 114 Ohio St. 523, 151 N.E. 645.

{¶ 19} The doctrine of res judicata also embraces the policy that a party must make good his cause of action or establish his defenses "* * *by all the proper means within his control, and if he fails in that respect, purposely or negligently, he will not afterward be permitted to deny the correctness of the determination, nor to relitigate the same matters between the same parties." *Covington & Cincinnati Bridge Co. v. Sargent* (1875), 27 Ohio St. 233, paragraph one of the syllabus.

{¶ 20} I am not persuaded that the cases cited by the majority support the finding that application of res judicata in this matter would defeat the ends of justice. In *Davis*, the court denied res judicata because the two claims did not arise from the same transaction or occurrence. Significantly, the portion of the *Davis* opinion regarding fairness and injustice is dicta.

{¶ 21} I am also not convinced that the Ohio Supreme Court promotes the disregard of res judicata due to perceived injustice or unfairness. The *Berry* case cited by the majority is clearly distinguishable since it deals with the welfare of a child. Reliance upon an injustice exception in this case serves only to promote an instability which disregards the doctrine of res judicata. Such instability is of far greater detriment than any harm to Herres who failed to take any action after his first complaint was dismissed with prejudice.

{¶ 22} I would affirm.

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Copies mailed to:

Don A. Little
Michael W. Sandner
Hon. Mary L. Wiseman