[Cite as *Reese v. Wagoner & Steinberg, Ltd.*, 2011-Ohio-2440.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Michael Reese, et al.	Court of Appeals No. L-10-1156
Appellants	Trial Court No. CI 09-8190
v.	
Wagoner & Steinberg, Ltd., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: May 20, 2011

* * * * *

Blake A. Dickson, for appellants.

John T. McLandrich, Edward M. Ryder, Amy S. Thomas, and Frank H. Scialdone, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from the April 27, 2010 judgment of the Lucas County Court of Common Pleas granting summary judgment in favor of appellees, Richard S. Friedmar ("Friedmar") and Wagoner & Steinberg, Ltd. ("Wagoner") in a legal

malpractice action by appellants, Michael Reese and Donald V. Reese, Jr. Because we find that no genuine issues remain for trial, we affirm.

{¶ 2} This case stems from attorney Friedmar's representation of appellants in the sale of their trucking business. On July 25, 2007, appellants filed a complaint alleging legal malpractice against appellees. On September 21, 2007, Wagoner filed an answer. On May 20, 2008, Wagoner was granted leave to file a counterclaim for fees. On September 28, 2008, Wagoner was granted leave to file an amended counterclaim. Appellants filed an answer to the amended counterclaim and raised the affirmative defense of legal malpractice.

{¶ 3} On November 13, 2008, pursuant to Civ.R. 41(A), appellants voluntarily dismissed their claim, leaving only Wagoner's counterclaim in dispute. On February 26, 2009, the trial court granted Wagoner summary judgment on the counterclaim for legal fees. Appellants did not appeal this judgment.

{¶ 4} On November 13, 2009, appellants commenced the instant action reasserting their legal malpractice claim. On December 14, 2009, appellees filed a motion to dismiss arguing that the claim was barred by the doctrine of res judicata since the court had rejected appellants' affirmative defense of legal malpractice in the prior action. Because appellees relied on filings in the prior action, the court converted the motion to a motion for summary judgment. Appellants opposed the motion arguing that, as to appellee Friedmar, summary judgment is not appropriate because he was not a party to the counterclaim. As to both appellees, appellants argued that material issues remained

regarding whether substandard legal representation was provided. Finally, appellants argued that res judicata did not bar their claim because summary judgment was granted as to appellee Wagoner's counterclaim only; their legal malpractice claim had been dismissed.

{¶ 5} On April 27, 2010, the trial court granted appellees' motion. Specifically, the court found that res judicata precluded the malpractice action because appellants raised the identical issue as a defense to appellee Wagoner's counterclaim. The court further stated that because appellee Friedmar was in privity with Wagoner, res judicata would bar any claims against him. This appeal followed.

{¶ 6} Appellants now raise the following assignments of error for our consideration:

{¶ 7} "1. The trial court erred by granting Defendant-Appellees' Motion for Summary Judgment as to Defendant-Appellee Wagoner & Steinberg, Ltd.

{¶ 8} "2. The trial court erred by granting Defendant-Appellees' Motion for Summary Judgment as to Defendant-Appellee Richard S. Friedmar."

{¶ 9} We review de novo the trial court's ruling on the summary judgment motions. *Conley-Slowinski v. Superior Spinning & Stamping Co.* (1998), 128 Ohio App.3d 360, 363. A movant is entitled to summary judgment pursuant to Civ.R. 56(C) when it is demonstrated "that there is no issue as to any material fact, that the moving party is entitled to judgment as a matter of law, and that reasonable minds can come to

but one conclusion, and that conclusion is adverse to the nonmoving party." *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617; Civ.R. 56(C).

{¶ 10} In appellants' first assignment of error they argue that the trial court erred in granting appellees' motion for summary judgment because their legal malpractice claim had not been determined on the merits and, thus, was not barred.

{¶ 11} Appellants first argue that because a legal malpractice claim is not a compulsory counterclaim to a claim for fees, the claims are subject to "separate and independent adjudication." Specifically, appellants contend that appellee Wagoner should not have been permitted to file its counterclaim ten months after the complaint was filed. And, since it was granted leave, it could not be considered a compulsory counterclaim.

{¶ 12} We first note that any dispute regarding the trial court's granting of the motion for leave to file the counterclaim in the prior action is not properly before this court. Appellants did not pursue an appeal from that case. As to whether it could be considered a compulsory counterclaim, under Civ.R. 13(A):

{¶ 13} "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing

party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13."

{¶ 14} Under Civ.R. 13(F), a party may seek leave to file a counterclaim where "a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, * * *." In the prior case, Wagoner filed a motion for leave to raise the counterclaim for fees; the motion was granted.

{¶ 15} As to the nature of the counterclaim, the Supreme Court of Ohio has noted that a counterclaim for legal fees is compulsory in a legal malpractice suit since they "arose out of the same operative facts as the underlying claims in the complaint." *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 438, 2002-Ohio-1246. It does not matter which party initiated the action. *Rettig Enterprises, Inc. v. Koehler* (1994), 68 Ohio St.3d 274, paragraph one of the syllabus. The purpose of Civ.R. 13(A) is to "avoid a multiplicity of actions and to achieve a just resolution by requiring in one lawsuit the litigation of all claims arising from common matters." Id. at 278.

{¶ 16} Factually similar to this case, in *Lenihan v. Shumaker* (May 6, 1987), 9th Dist. No. 12814, a client commenced an action against her counsel for legal malpractice. The attorney filed a counterclaim for legal fees. The client dismissed her malpractice claim but failed to defend against the counterclaim; default judgment was granted on the counterclaim for fees. The client refiled her malpractice claim. Granting summary judgment in favor of counsel, the court concluded that "[f]ailure to assert a compulsory

counterclaim pursuant to Civ.R. 13(A) constitutes res judicata." See, also, *Carlton v. Alar Dev. Co.*, 11th Dist. No. 2006-P-0045, 2006-Ohio-6877, ¶ 13.

{¶ 17} The facts of this case argue more strongly in favor of the application of res judicata. Appellants raised the legal malpractice defense and argued it in the opposition to Wagoner's summary judgment motion. In its April 27, 2010 judgment entry, the trial court specifically stated that in the prior action appellants raised the identical issue as a defense to the counterclaim. The court considered the defense and found that, because appellants failed to provide expert testimony, it lacked merit. Accordingly, the issue was, in fact, decided on the merits.

{¶ 18} Appellants assert that, even assuming we determine that the fees claim was compulsory, appellants' affirmative defense of legal malpractice should not have a preclusive effect on their refiled legal malpractice claim. Whether the trial court considered the legal malpractice claim as a defense or, as a counterclaim under Civ.R. 8(C), does not change our analysis. As stated above, appellants argued legal malpractice as a defense to appellee's counterclaim. Appellants' opposition to appellees' motion for summary judgment was based on their claim that appellees committed malpractice. Accordingly, we find that the trial court did not err when it granted appellees' motion for summary judgment as to Wagoner. Appellants' first assignment of error is not well-taken.

{¶ 19} In appellants' second assignment of error they argue that since appellee, Wagoner, brought the claim for legal fees, and summary judgment for those fees was

entered on Wagoner's behalf, res judicata cannot bar appellants from relitigating their claim for malpractice against Friedmar because he was not a party to the legal fees counterclaim. We disagree. Although Friedmar was not a named party in the claim for legal fees, Friedmar was in privity with Wagoner.

{¶ 20} "Res judicata principles can apply to prevent parties and those in privity with them from modifying or collaterally attacking a previous judgment." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St. 3d 375, 2007-Ohio-5024, ¶ 34. "In order to invoke res judicata, one of the requirements is that the parties to the subsequent action must be identical to or in privity with those in the former action." *Kirkhart v. Keiper*, 101 Ohio St. 3d 377, 2004-Ohio-1496, ¶ 8. "[P]rivity is 'merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.'" *Brown v. Dayton*, 89 Ohio St. 3d 245, 248, 2000-Ohio-148, quoting *Bruzewski v. United States* (C.A.3, 1950), 181 F.2d 419, 423. An employment relationship, coupled with an identity of desired result, has created privity between an employee and the employer. *Electrical Enlightenment, Inc. v. Kirsch*, 9th Dist. No. 23916, 2008-Ohio-3633, ¶ 9. See *Doolittle v. Zapis Communications Corp.*, (Aug. 18, 2000), 11th Dist. No. 99-T-0084.

{¶ 21} In the current case, nowhere is it contested that at the time of the alleged malpractice, Friedmar worked for, and was in fact working within the scope of his employment for Wagoner while he was representing appellants. Thus, we find that Friedmar's relationship with Wagoner was an employee-employer relationship that was

coupled with an identity of desired results. Accordingly, because Friedmar was in privity with Wagoner, summary judgment was properly entered in his favor. Appellants' second assignment of error is not well-taken.

{¶ 22} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE