**[Cite as *State ex rel. Hartman v. Tetrault,* 2012-Ohio-4646.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

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| STATE ex rel. BARBARA HARTMAN, et al., | : | |
| Relator-Appellant, | : | CASE NO. CA2012-03-021 |
| | : | O P I N I O N |
| - vs - | | 10/8/2012 |
| | : | |
| CHRISTOPHER TETRAULT, et al., | : | |
| Respondents-Appellees. | : | |

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2011CVH1064

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**HENDRICKSON, J.**

**{¶ 1}** Relator-appellant, Barbara Hartman, appeals the decisions of the Clermont County Court of Common Pleas granting summary judgment in favor of respondents-

appellees, Christopher Tetrault and Pierce Township, Clermont County, Ohio.

**{¶ 2}** In October 2007, Pierce Township and Tetrault entered into an Employment Agreement where Tetrault would serve as Assistant Administrator for Development Facilitation and be paid a base annual salary of $77,000 premised upon a 1,110 hour per year schedule, or 277.5 hours per calendar quarter. In addition, if Tetrault worked more than 277.5 hours per quarter, he would be paid $75 per hour for the overage, not to exceed $7,500. In order to track his hours, the Employment Agreement provided that Tetrault would maintain a daily log of his activities and time.

**{¶ 3}** Beginning in June of 2009, after being informed that his daily log of activities and time was too detailed, Tetrault began submitting quarterly one-page summary reports listing the monthly total of hours he worked for Pierce Township ("Summary Reports"). Tetrault would track the total number of hours he worked per day on scrap paper kept in his vehicle. One piece of scrap paper could contain anywhere from one to three days of hours worked. Tetrault would then use the scrap paper to input the hours he worked into a third-party hosted computer website known as Basecamp. Tetrault would then generate the Summary Reports from Basecamp. According to appellant, only Tetrault had full access to the Basecamp website and has never allowed another individual to have full access to the section of Basecamp that contains Tetrault's daily records.

**{¶ 4}** Tetrault accessed Basecamp through a laptop computer provided to him by Pierce Township (the "Township Laptop"). Tetrault used the Township Laptop to access Basecamp, generate emails, store files, and conduct non-Pierce Township business. Upon Tetrault's termination as a Pierce Township employee, Tetrault restored the Township Laptop to its "factory setting," effectively erasing the hard drive, and returned the laptop to Pierce Township.

**{¶ 5}** On April 21, 2010, appellant filed a public records request with Pierce Township

seeking, among other things:

> All records documenting all time expended by Chris Tetrault for or on behalf of Pierce Township from July 1, 2009 to the present, including, any description of the work or tasks performed for all such time.

**{¶ 6}** On July 16, 2010, appellant commenced an action against Tetrault and Pierce Township on behalf of the State of Ohio ("First Litigation"). *State ex rel. John Doe v. Tetrault, et al.,* Clermont C.P. No. 2010-CVH-1462 (July 16, 2010). In an amended complaint, appellant raised two causes of action: (1) whether all public records responsive to appellant's request were provided pursuant to R.C. 149.43; and (2) whether Tetrault improperly "removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of" public records in contravention of R.C. 149.351. The First Litigation was resolved by the trial court through the granting of Tetrault and Pierce Township's motions for summary judgment. The case was then appealed to this court, which affirmed the trial court's decisions in an opinion released August 27, 2012. *State ex rel. John Doe v. Tetrault*, 12th Dist. No. CA2011-10-070, 2012-Ohio-3879.

**{¶ 7}** While the First Litigation was still pending before the trial court, on June 20, 2011, appellant filed the present lawsuit ("Second Litigation") asserting two causes of action against Tetrault: (1) spoliation of evidence, and (2) the statutory violation of R.C. 149.351 of the Public Records Act. Appellant also named Pierce Township as a party to the second cause of action, asserting that Pierce Township was liable for the actions of Tetrault as a Pierce Township employee.

**{¶ 8}** On September 29, 2011, Tetrault moved for summary judgment in the Second Litigation, arguing that the claims asserted were barred by the doctrine of res judicata. Pierce Township followed with a similar motion for summary judgment on December 9, 2011, as to appellant's cause of action pursuant to R.C. 149.351. The trial court granted both

motions, finding that appellant's spoliation of evidence and R.C. 149.351 claims were barred by the doctrine of res judicata, as these issues were decided, or capable of being decided, in the First Litigation.

**{¶ 9}** From the trial court's decisions on summary judgment, Relator appeals, raising two assignments of error. For ease of discussion, we shall address both assignments of error together.

**{¶ 10}** Assignment of Error No. 1:

**{¶ 11}** THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS-APPELLEES ON THE SPOLIATION CLAIM BASED UPON THE DOCTRINE OF *RES JUDICATA*.

**{¶ 12}** Assignment of Error No. 2:

**{¶ 13}** THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS-APPELLEES ON THE DESTRUCTION OF RECORDS CLAIM BROUGHT PURSUANT TO R.C. 149.351 BASED UPON THE DOCTRINE OF *RES JUDICATA*.

**{¶ 14}** In her first and second assignments of error, appellant argues that the trial court erred in granting summary judgment in favor of Tetrault and Pierce Township because: (1) Tetrault failed to offer more than conclusory assertions that he was entitled to summary judgment; (2) the doctrine of res judicata does not bar the causes of action in the Second Litigation; and (3) appellant was not required to amend her complaint in the First Litigation to include the causes of action brought in the Second Litigation.

**{¶ 15}** This court reviews a trial court's decision on summary judgment under a de novo standard of review. *State ex rel. Doe v. Register*, 12th Dist. No. CA2008-08-081, 2009-Ohio-2448, ¶ 20. Summary judgment is proper when: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3)

reasonable minds can only come to a conclusion adverse to the party against whom the motion is made, construing the evidence most strongly in that party's favor. Civ.R. 56(C). The party requesting summary judgment bears the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a party moving for summary judgment has satisfied its initial burden, the nonmoving party has the reciprocal burden to set forth specific facts showing that genuine issues remain. *Id*.; Civ.R. 56(E). Summary judgment is proper if the party opposing the motion fails to set forth such facts. *Id*.

**Res Judicata**

**{¶ 16}** Appellant argues that the trial court erred in determining that the spoliation cause of action and the R.C. 149.351 cause of action in the Second Litigation are barred by the doctrine of res judicata.

**{¶ 17}** As an affirmative defense, "[r]es judicata operates 'to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.'" *Faierman v. Conrad*, 12th Dist. Nos. CA2003-10-271, CA2003-10-272, 2004-Ohio-6319, ¶ 16, quoting *State ex rel. Kroger Co. v. Indus. Comm. of Ohio*, 80 Ohio St.3d 649, 651 (1998). "Where there is a valid, final judgment rendered upon the merits, res judicata bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject of the previous action." *Id*., citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 279, 1995-Ohio-331, syllabus. Thus, "'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit.'" (Emphasis sic). *Brown v. Dayton*, 89 Ohio St.3d 245, 248 (2000); *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62 (1990); *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69 (1986). In essence, the doctrine of res

judicata "requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Brown* at 248.

**{¶ 18}** The Ohio Supreme Court has identified four elements necessary to bar a claim under the doctrine of res judicata: (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) the second action involves the same parties or their privies as the first; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of the transaction or occurrence that was the subject matter of the previous action. *Portage Cty. Bd. of Commrs. v. City of Akron*, 109 Ohio St.3d 106, 123, 2006-Ohio-954, ¶ 84, citing *Hapgood v. Warren*, 127 F.3d 490, 493 (C.A.6, 1997).

**{¶ 19}** In this case, there is no dispute that the First Litigation was resolved on the merits by the issuance of two final, valid decisions from the trial court granting summary judgment to Tetrault and Pierce Township. There is also no issue that the First Litigation and the Second Litigation involve the exact same parties save the absence of David Elmer, Pierce Township Administrator, from the Second Litigation. Thus, the issues before this court are whether the causes of action in the Second Litigation were or could have been litigated in the first action and whether such causes of action arise out of the transactions or occurrences which were the subject matter of the First Litigation.

1. Spoliation of Evidence Cause of Action

**{¶ 20}** We shall first address appellant's argument that the doctrine of res judicata does not bar appellant's spoliation of evidence claim.

**{¶ 21}** In the First Litigation, appellant claimed that the scrap paper Tetrault used to track his daily hours of work, as well as a document recovered from the Township Laptop hard drive, were records subject to disclosure. Because Tetrault had deleted or destroyed these items, appellant claimed that she, as a representative of the state of Ohio, was

damaged. Thus, the First Litigation stems from the filing of a public records request which was not fully answered due to the alleged deletion or destruction of records responsive to the public records request.

**{¶ 22}** In the Second Litigation, appellant asserts a claim under the intentional tort of spoliation of evidence. In order to prove a claim of spoliation of evidence, appellant must establish the following elements: (1) pending or probable litigation involving appellant; (2) knowledge on the part of Tetrault that litigation exists or is probable; (3) willful destruction of evidence by Tetrault designed to disrupt appellant's case; (4) disruption of appellant's case; and (5) damages proximately caused by Tetrault's acts. *See Smith v. Howard Johnson Co., Inc*., 67 Ohio St.3d 28, 29 (1993).

**{¶ 23}** In her complaint in the Second Litigation, appellant asserted that, with knowledge that the First Litigation was probable, Tetrault willfully discarded the scrap paper, erased the Township Laptop's hard drive, and withheld documents on the Basecamp website with the purpose of disrupting the First Litigation. Further, appellant alleged that Tetrault's actions did disrupt appellant's ability to litigate the First Litigation and caused appellant to suffer damages during the course of the First Litigation including the need to engage computer forensic services to restore the Township Laptop's hard drive. Thus, the Second Litigation stems from the filing of the public records request which revealed that Tetrault had allegedly destroyed documents which were, or could have led to, discoverable material in the First Litigation.

**{¶ 24}** Appellant argues that the Second Litigation did not arise from the public records request but, instead, arose from the First Litigation. Specifically, appellant contends that the First Litigation was commenced because Tetrault and Pierce Township did not comply with the Public Records Act. However, appellant contends that the spoliation cause of action did not arise from the alleged violation of the Public Records Act but, from the First Litigation,

where appellant learned that Tetrault had destroyed or withheld documents. We find this argument unpersuasive.

**{¶ 25}** The causes of action in the Second Litigation arose from the same "common nucleus of operative facts" that were the subject matter of the First Litigation. *See Grava*, 73 Ohio St.3d at 382. In essence, both litigations allege the destruction of the scrap paper, deletion of the documents on the Township Laptop, and address the documents contained on the Basecamp website. Regardless of whether appellant's spoliation claim stemmed from the public records request or the First Litigation, the spoliation claim arises from the transactions or occurrences which were the subject matter of the First Litigation.

**{¶ 26}** Finally, we can find no reason why the spoliation claim could not have been litigated in the First Litigation. Appellant became aware of the spoliation claim during the pendency of the First Litigation and filed her complaint for the Second Litigation before the First Litigation had been resolved. Appellant never moved to amend the First Litigation's complaint to include the spoliation claim, nor moved to consolidate the two cases once the Second Litigation was filed. As provided in Civ.R. 15, a trial court shall freely give leave to a party to amend her complaint "when justice so requires." Thus, there is no reason why appellant could not have amended the First Litigation's complaint to include a cause of action for spoliation of evidence.

**{¶ 27}** Therefore, as the spoliation of evidence claim could have been litigated in the First Litigation and rose out of the transactions or occurrences which gave rise to the First Litigation, we find that the doctrine of res judicata applies to bar the spoliation claim in the Second Litigation.

2. R.C. 149.351 Cause of Action

**{¶ 28}** We next turn to appellant's cause of action in the Second Litigation pursuant to R.C. 149.351. Appellant, again, argues that the trial court erred in finding that the doctrine of

res judicata applies to bar this cause of action.[1]

**{¶ 29}** R.C. 149.351(A) provides that "[a]ll records are property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part * * *." The statute further provides that "any person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record" in violation of R.C. 149.351(A) may commence a civil action for injunctive relief to compel compliance with the statute and/or commence a civil action to recover a forfeiture. R.C. 149.351(B).

**{¶ 30}** As stated above, appellant's First Litigation brought causes of action pursuant to R.C. 149.43 and R.C. 149.351. Specific to the R.C. 149.351 claim, appellant asserted that Tetrault, as a Pierce Township employee, improperly "removed, destroyed, mutilated, transferred, or otherwise damaged" the scrap paper used to track Tetrault's daily work hours and at least one document on the Township Laptop. Due to Tetrault's actions as a Pierce Township employee, appellant alleges that she was aggrieved.

**{¶ 31}** In the Second Litigation, appellant asserted that Tetrault and Pierce Township violated R.C. 149.351 by discarding the scrap paper, deleting the documents on the Township Laptop, and failing to allow a Pierce Township representative to have full access to the Basecamp website. Due to Tetrault's improper actions while he was a Pierce Township employee, appellant alleged that she was aggrieved.

**{¶ 32}** Appellant contends that the R.C. 149.351 claim in the Second Litigation arose, not because of any public records request, but, instead, due to Tetrault's alleged deliberate

1. Pierce Township contends that appellant has failed to argue that the trial court erred in granting summary judgment in the Township's favor, instead focusing its entire brief on the trial court's decision as to Tetrault. However, appellant's brief specifically asserts in its second assignment of error regarding R.C. 149.351 that the trial court committed reversible error in granting summary judgment in favor of "Respondents-Appellees." Therefore, appellant included Pierce Township in its argument and this court shall address the R.C. 149.351 cause of action as to both Tetrault and Pierce Township.

destruction of documents which had the potential to be evidence or discoverable material. Yet, the factual basis underlying both the First and Second Litigations are almost identical. Indeed, we can see very little difference between the R.C. 149.351 claim in the First Litigation and the R.C. 149.351 claim in the Second Litigation. Both stem from the filing of a public records request which led appellant to believe that certain records had been improperly destroyed by Tetrault. Further, both lawsuits involve the same scrap paper and at least one identical document on the Township Laptop's hard drive. Although appellant includes additional documents found on the Township Laptop's hard drive and documents on the Basecamp website within the Second Litigation's complaint, these documents still relate to the same "common nucleus of operative facts" which gave rise to the First Litigation. Therefore, such claims should have been raised in the First Litigation.

**{¶ 33}** Finally, we note that there is no reason why the Second Litigation's R.C. 149.351 cause of action could not have been brought during the First Litigation. In fact, appellant amended the First Litigation to include a cause of action pursuant to R.C. 149.351 after initially filing the complaint. Thus, as the R.C. 149.351 cause of action in the Second Litigation arose out of the transactions or occurrences which gave rise to the First Litigation, and could have been litigated in the previous lawsuit, we find that the doctrine of res judicata applies to bar appellant's R.C. 149.351 claim.

**{¶ 34}** Furthermore, although appellant contends that Tetrault presented merely conclusory statements that he was entitled to summary judgment, the affidavits and exhibits attached to Tetrault's brief were sufficient to determine that no genuine issues of material fact exist due to the application of the affirmative defense of res judicata.[2] Therefore, we find that the trial court did not err in granting summary judgment in favor of Tetrault and Pierce

2. Relator does not make this argument as to Pierce Township's motion for summary judgment.

Township, as these causes of action stem from the same common nucleus of facts and were or could have been litigated in the initial lawsuit. Tetrault and Pierce Township are entitled to judgment as a matter of law.

**Joinder of Spoliation Claim**

**{¶ 35}** In *Howard Johnson*, the Ohio Supreme Court held that a spoliation of evidence claim "may be brought at the same time as the primary action." *Smith v. Howard Johnson*, 67 Ohio St.3d at 29. This appeal asks whether the Ohio Supreme Court's holding means that the spoliation claim may be brought at the same time as the primary action, but *within* the primary action, or may be brought at the same time as the primary action in a separate lawsuit.

**{¶ 36}** In our decision today, we have found that the doctrine of res judicata applies in this case to bar appellant's claims in the Second Litigation that could have been brought in the First Litigation due to their arising from the same common nucleus of operative facts. This holding in no way states that a spoliation of evidence claim brought during the pendency of the primary action must be brought *within* the primary action. Indeed, this court acknowledges circumstances where it may be necessary to bring a spoliation of evidence claim during the pendency of the primary action but in a separate lawsuit.[3] However, we have resolved the issues before this court based upon the doctrine of res judicata and, therefore, whether a party is required to bring a spoliation of evidence claim *within* a primary action, or merely at the same time as the primary action, is an issue for another day.

**{¶ 37}** Accordingly, appellant's first and second assignments of error are overruled.

**{¶ 38}** Judgment affirmed.

3. Consider the scenario where the primary action is of a criminal nature but the spoliation of evidence claims must be alleged in a civil lawsuit. *See O'Brien v. Olmsted Falls*, Cuyahoga App. Nos. 89966, 90336, 2008-Ohio-2658 (plaintiff sued two detectives in a civil suit based upon their alleged spoliation of evidence during a criminal trial).

POWELL, P.J., and PIPER, J., concur.