No. 08-1514

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
DELAWARE COUNTY, OHIO
CASE NO. 07 CAE 06 0025

LINDA FOLMAR,
Plaintiff-Appellee,

v.

RAYMOND E. GRIFFIN,
Defendant-Appellant.

APPELLANT RAYMOND E. GRIFFIN'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This appeal presents a question of first impression in Ohio: When is a fact that has been fully litigated in a prior action "essential to the judgment" of that prior action so as to invoke the doctrine of issue preclusion (also known as collateral estoppel)?

Other jurisdictions and the Restatement (Second) of Judgments define the "essential to the judgment" element of issue preclusion by looking to "whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment." Restmt. Judgments (2d), § 27, Comment *j*. The Fifth District, in contrast, concluded that a factual issue fully litigated between the same parties is *not* essential to a prior judgment when the plaintiff could have litigated (but chose not to) a *different* fact issue in the prior litigation. See Appendix ("Appx.") A-6, ¶ 21 (because the prior judgment "inordinately focused" on resolving the factual dispute presented – plaintiff's claim she was assaulted on July 14, 2004 – instead of whether plaintiff was "'in danger of'" domestic violence, the Court's finding "that domestic violence had not occurred on July 14, 2004 * * * was not 'essential' to" the prior judgment).

The Fifth District's interpretation of "essential to the judgment" contravenes the important protections and public policies recently enumerated by this Court in decisions adopting judicial estoppel (*Greer-Burger v. Temesi* (2007), 116 Ohio St.3d 324) and discussing (albeit in dicta) offensive claim preclusion (*O'Nesti v. DeBartolo Realty Corp.* (2007), 113 Ohio St.3d 59). Those vital policies include protecting defendants from

repeated and vexatious litigation of the same claim, the efficient and effective use of judicial resources, and preserving the integrity of courts from parties who abuse the judicial process. This case presents an issue of similar import to the efficient and fair litigation of disputes in courts throughout Ohio.

The plaintiff in this case (former fiancée of Defendant-Appellant Raymond Griffin), petitioned the Licking County Domestic Relations Court for the issuance of a civil protective order (CPO) against Griffin, based on her allegation that Griffin had assaulted her during a domestic dispute on July 14, 2004. After a full evidentiary hearing devoted to the issue of what occurred on that day, a Magistrate concluded that Plaintiff-Appellee Linda Folmar was not assaulted by Griffin on July 14, 2004. That finding was adopted by the Licking County Domestic Relations Judge and the CPO was denied.

Undeterred, Folmar filed the *same* allegation against the *same* defendant arising out of the *same* event on the *same* day in the Delaware County Common Pleas Court, seeking civil damages for assault. The Trial Court granted Griffin's motion for summary judgment on the grounds of issue preclusion, but the Fifth District reversed, concluding that the Licking County proceedings had "inordinately focused" *on the allegation Folmar made* (that she had been assaulted) instead of focusing on the allegation she *could have made* under R.C. 3113.31(D) (that she was "in danger" of domestic violence). See App. Op., Appendix ("Appx.") A-6, ¶ 21. Based on that reasoning, and notwithstanding the Magistrate's specific factual findings and credibility determinations on identical

allegations, the Court of Appeals concluded that the prior finding of "no assault" was not "essential to" the prior judgment and issue preclusion could not apply. *Id.*

The approach taken by the Fifth District is problematic for a number of reasons.

First, it is inconsistent with the purpose of the "essential to the judgment" requirement, which is to ensure that the precluded party had the incentive to litigate the issue vigorously in the prior proceeding. Instead of focusing on whether the prior factual determination was essential to the judgment *actually issued*, the appellate court focused on whether the prior factual determination was essential to a judgment that Folmar *never sought*. Folmar did not base her CPO petition on an allegation that she was "in danger" of domestic violence. She based her petition on her allegation that an assault *had occurred* on July 14, 2004. That is the factual issue she had the incentive to fully litigate, the opportunity to fully litigate, and did fully litigate.

Second, the Fifth District's interpretation severely weakens a doctrine that "protects [litigants] from the expense and vexation attending multiple lawsuits * * *." *Montana v. United States* (1979), 440 U.S. 147, 153-54. Having succeeded in one court, Griffin should not be forced to defend himself against the same factual allegation in a different county.

Third, the decision below is corrosive to the integrity and efficiency of the judicial process. Issue preclusion "conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154. The Delaware County Court of Common Pleas should not be forced to hear an

issue that has been fully litigated by its sister court, and Ohio's judicial system should not condone the possibility of inconsistent results.

Fourth, the decision contravenes fundamental principles of finality and comity. The Fifth District reversed because it believed that the Licking County Court "should have" made factual findings regarding the "danger" of domestic violence instead of resolving the factual dispute actually presented. The Court of Appeals' criticism, and refusal to apply issue preclusion, are thinly veiled collateral attacks on a final order issued by a court of competent jurisdiction.

Fifth, the decision of the Fifth District encourages forum shopping. Having failed to convince a Licking County trier of fact that she was assaulted, Folmar then sought a friendlier forum in Delaware County. Rewarding that strategy by ordering that the entire evidentiary hearing be duplicated in a different courtroom will simply validate and encourage forum shopping.

Such ramifications present issues of public or great general interest to this State because the Fifth District's decision defines "essential to the judgment" in a manner at odds with § 27 of the Restatement (Second) of Judgments – the template for issue preclusion in Ohio. See, e.g., *Goodson v. McDonough Power Equipment, Inc.* (1983), 2 Ohio St.3d 193, 198 (adopting Comment *c* to § 27 for factors to be used in determining "identity of issues" for collateral estoppel).

Comment *j* to § 27 states that courts determining whether a fact or issue was "essential to the judgment" should focus on the intentions of the *parties* and the *court* in

the prior proceeding. In other words, if the parties and the trier of fact believed the issue to be important, then it does not offend due process to bind the same parties to that prior factual or legal determination, because the parties will have had a full and fair opportunity to litigate the issue. Focusing on the actual intentions of the parties and court provides a straightforward rule, easy to apply.

In contrast, the approach taken by the Fifth District confuses factual determinations with legal determinations and requires courts to "look behind" the action the parties actually litigated, and speculate as to what they could or should have litigated in the prior proceeding. The Fifth District opinion reasons, in effect, that because the Licking County Court *could have* made a *legal* determination that Folmar was "in danger" of domestic violence – whether or not she was actually assaulted – the *fact* of her assault was not essential to the judgment. Such speculation does not provide courts or counsel with a clear rule for applying issue preclusion.

Comment *j*'s approach is also consistent with the due process concern of ensuring that parties have a full and fair opportunity to litigate an issue. Once it is determined that all participants in a proceeding intend for a specific factual dispute to be resolved, due process is satisfied. The Fifth District's approach, in contrast, offers no protection to the due process interests of the litigants since subsequent courts could "second guess" the issues the prior court could or should have tried.

II. STATEMENT OF CASE AND FACTS

The parties to this action met in the spring of 2004 and became engaged a short time later. During that time, Folmar moved into Griffin's home in Heath, Ohio, located in Licking County. On July 14, 2004, Folmar and Griffin were involved in a physical altercation in his residence.

As a result of this altercation, Folmar filed a petition for a CPO in the Domestic Relations Division of the Licking County Common Pleas Court. In her application, she specifically alleged that the defendant assaulted her on July 14, 2004. She thereby obtained an ex parte temporary order and the matter was set for a full evidentiary hearing. At that hearing, Griffin presented evidence that Folmar was the aggressor and he acted in self-defense. A number of witnesses testified and both parties submitted exhibits, including the 911 tape of the call to the police.

On September 22, 2004, Magistrate C. William Rickrich issued his opinion recommending that a CPO not be issued and that plaintiff's petition be dismissed, based on his factual findings and credibility determinations regarding the events of July 14, 2004. His thorough findings and determinations are summarized in the Trial Court opinion issued in this case, attached at Appx. A-14. Folmar did not object to the Magistrate's findings and recommendation, which were adopted by Licking County Domestic Relations Judge Russell A. Steiner on November 14, 2004.

Less than two months later, Folmar filed a civil complaint against Griffin in Delaware County Common Pleas Court, seeking civil damages for assault. The basis for

the Delaware County complaint was the same July 14, 2004 incident between Folmar and Griffin litigated in Licking County. Griffin filed a motion for summary judgment, arguing that the claims in the complaint were barred by res judicata and collateral estoppel. The Trial Court originally denied the motion, but reconsidered and granted it on the grounds that issue preclusion barred Folmar's attempt to re-litigate the events of July 14, 2004. See Appx. A-14.

Folmar appealed and the Fifth District reversed, concluding that the Licking County Court's factual determination as to what occurred on July 14, 2004 was "not essential" to that Court's judgment:

> We recognize that the Licking County CPO proceeding properly utilized a burden of proof of preponderance of the evidence * * *, as would the present tort claim. However, the Licking County proceedings appear to have inordinately focused on the issue of whether a particular incident of domestic violence had or had not occurred; the broader focus should have been whether the "petitioner or petitioner's family or household members are in *danger of* domestic violence." * * * As such, we hold the Licking County finding that domestic violence had not occurred on July 14, 2004, while certainly relevant, was not "essential" to the Licking County judgment denying the CPO.

Appx. A-6, ¶ 21 (emphasis in original, citations omitted).

III. ARGUMENT

Proposition of Law No. 1

> **For purposes of applying issue preclusion, an issue is considered essential to the prior judgment if the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. (Restatement (Second) of Judgments § 27 comment *j* approved and adopted.)**

The doctrine of res judicata encompasses the two related concepts of claim preclusion (also known as res judicata or estoppel by judgment) and issue preclusion (also known as collateral estoppel). *O'Nesti et al v. DeBartolo Realty Corp.* (2007), 113 Ohio St.3d 59, citing *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379. Issue preclusion provides that "a point or a fact which was actually and directly in issue in a former action and was there passed upon and determined by a court of competent jurisdiction may not be drawn in question in any future action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Norwood v. McDonald* (1943), 142 Ohio St. 299, paragraph three of the syllabus. Issue preclusion applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was determined by a court of competent jurisdiction, and (3) when the party against whom issue preclusion is asserted was a party, or is in privity with a party, in 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.

Ohio law of issue preclusion tracks the Restatement. See Restatement (Second) of Judgments, § 27; *Buckeye Union Ins. Co. v. New England Ins. Co.* (1999), 87 Ohio St.3d

280, 293 citing *Goodson,* supra, 2 Ohio St.3d at 201. A determination must be "essential" to a judgment in order for the judgment to have a collateral estoppel effect in a subsequent action. *Hicks v. De La Cruz* (1977), 52 Ohio St.2d 71, 74 (citing Restatement of the Law 2d, Judgments [Tent.Draft No. 4 (1977)], Section 68).

The requirement that a prior fact or issue be essential to the prior judgment is grounded in protecting a party's due process right to a full and fair opportunity to litigate an issue. "The main legal thread which runs throughout the determination of the applicability of res judicata, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be 'heard' in the due process sense. Accordingly, an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action. * * * " *Goodson,* supra, at 200-201.

While this Court has recognized the due process underpinnings of the requirement, it has yet to define "essential to the judgment." Comment *j* to § 27, the Restatement (Second) of Judgments defines "essential to the judgment" as follows:

> Determinations essential to the judgment.
>
> * * *
>
> The appropriate question * * * is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception under § 28—for example, that the significance of the issue for

> purposes of the subsequent action was not sufficiently foreseeable at the time of the first action.

The Supreme Court of Iowa recently adopted this comment in *Comes v. Microsoft Corp* (Iowa 2006), 709 N.W.2d 114, quoting the U.S. Court of Appeals for the First Circuit to explain why Comment *j*'s definition is "important and necessary" to issue preclusion:

> "[w]hen two adversaries concentrate in attempting to resolve an issue importantly involved in litigation, there is no unfairness in considering that issue settled for all time between the parties and those in their shoes. But ... it is unfair to close the door to issues which have not been on stage center, for there is no knowing what the white light of controversy would have revealed."

709 N.W.2d at 121, quoting *Farmington Dowel Prods. Co. v. Forster Mfg. Co.* (C.A.1, 1970), 421 F.2d 61, 79. Applying this reasoning to the facts presented in this case can lead to only one conclusion – it is eminently fair to bind the parties to the Licking County Court's determination of what the "white light of controversy" revealed about the events of July 14, 2004.

Rather than focus on the intentions of the parties and the court in prior proceedings, as Comment *j* instructs, the Fifth District simply criticized the unappealed final and binding decision of the Licking County Domestic Relations Court decision. See Appx. A-6, ¶ 21. The Fifth District's collateral attack on the prior judgment eviscerates the purposes and intent of issue preclusion. The "essential to the judgment" requirement exists to ensure that plaintiff had a full and fair opportunity to litigate her claim that she was assaulted by defendant on July 14, 2004 – not as a means of speculating what *could*

have been litigated in the prior proceeding. The appellate decision should therefore be reversed and the decision of the Trial Court reinstated.

IV. CONCLUSION

This Court should grant jurisdiction, reverse the Court of Appeals' decision, and reinstate the summary judgment entered by the Delaware County Court of Common Pleas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 31st day of July, 2008, by U.S. Mail, postage prepaid, upon the following:

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APPENDIX

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LINDA FOLMAR

Plaintiff-Appellant

-vs-

RAYMOND GRIFFIN

Defendant-Appellee

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 07 CAE 06 0025

OPINION

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 05 CVC 01004

JUDGMENT: Affirmed in Part; Reversed in Part and Remanded

DATE OF JUDGMENT ENTRY:

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Wise, J.

{¶1} Appellant Linda B. Folmar appeals the decision of the Delaware County Court of Common Pleas, which granted summary judgment in favor of Defendant-Appellee Raymond E. Griffin. The relevant facts leading to this appeal are as follows.

{¶2} On January 3, 2005, Appellant Folmar filed a civil complaint against Appellee Griffin, her former fiancé, for assault, battery, and negligent and/or intentional infliction of emotional distress. Appellant therein alleged that as a result of a physical altercation in Licking County on July 14, 2004, appellant had suffered serious and permanent injuries. On February 3, 2005, appellee filed an answer and counterclaim alleging assault, battery, trespass to chattels, negligence, defamation, and intentional infliction of emotional distress. The counterclaim alleged both physical injury and severe emotional and psychological distress.

{¶3} On March 28, 2005, Intervenor State Farm filled a motion to intervene in order to determine its coverage responsibilities.

{¶4} During the discovery phase, issues arose regarding the release of certain medical records. This led to an appeal (with Appellee Griffin as the appellant) in which we remanded the case to the court for further proceedings consistent with said opinion. See *Folmar v. Griffin*, 166 Ohio App.3d 154, 849 N.E.2d 324, 2006-Ohio-1849.

{¶5} State Farm thereafter filed a motion for summary judgment. On March 1, 2007, the trial court granted State Farm summary judgment, determining that it had no duty to indemnify.

{¶6} Appellee also filed a motion for summary judgment, seeking a determination that appellant's claims were barred by res judicata, or, if res judicata did

not apply, that partial summary judgment be granted in appellee's favor as to appellant's claim for negligent and/or intentional infliction of emotional distress. On March 1, 2007, the trial court granted appellee summary judgment as to appellant's claim of negligent infliction of emotional distress, but denied appellee summary judgment on as to claim of intentional infliction of emotional distress. The trial court also denied appellee's request for summary judgment on res judicata grounds. However, on May 23, 2007, upon reconsideration, the court changed its position and granted appellee summary judgment as to all of appellant's claims, based on the doctrine of issue preclusion.

{¶7} In the meantime, appellee, with leave of court, filed an amended answer to add the affirmative defense of self-defense. On June 6, 2007, appellee filed a notice of dismissal of his remaining counterclaims, pursuant to Civ.R. 41.

{¶8} On June 8, 2007, appellant filed a notice of appeal. She herein raises the following six Assignments of Error:

{¶9} "I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE'S MOTION FOR RECONSIDERATION OF THE DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT REQUESTING SUMMARY JUDGMENT ON THE PLAINTIFF-APPELLANT'S CLAIMS OF ASSAULT, BATTERY, AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

{¶10} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THIRD PARTY INTERVENOR STATE FARM ON INTERVENOR STATE FARM'S REQUEST FOR DECLARATORY JUDGMENT.

{¶11} "III. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT LEAVE OF COURT TO FILE A SECOND AMENDED ANSWER.

{¶12} "IV. THE TRIAL COURT ERRED IN REFUSING TO GRANT THE PLAINTIFF LEAVE TO FILE AN AMENDED COMPLAINT.

{¶13} "V. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT SUMMARY JUDGMENT ON THE PLAINTIFF'S CLAIM OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

{¶14} "VI. THE TRIAL COURT ERRED IN GRANTING THE MOTION OF THIRD PARTY INTERVENOR STATE FARM TO STRIKE THE TRIAL TRANSCRIPTS FILED BY THE PLAINTIFF."

I.

{¶15} In her First Assignment of Error, appellant contends the trial court erred in granting summary judgment in favor of appellee, as to appellant's claims, after reconsidering its earlier summary judgment decision. We agree.

{¶16} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward*, Richland App.No. 07 CA 33, 2007-Ohio-5301, ¶ 34, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212. Civ.R. 56(C) provides, in pertinent part:

{¶17} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that

reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * "

{¶18} To reiterate, on March 1, 2007, the trial court granted appellee summary judgment as to appellant's claim of negligent infliction of emotional distress, but denied appellee summary judgment as to the claim of intentional infliction of emotional distress. The trial court also denied appellee's request for summary judgment on res judicata grounds. However, on May 23, 2007, upon reconsideration, the court changed its position and granted appellee summary judgment as to all of appellant's claims, based on the doctrine of issue preclusion.

{¶19} "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 Township* (1995), 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (Citations omitted). The doctrine of collateral estoppel/issue preclusion is the more restrictive aspect of the general theory of res judicata. *Williams v. Chippewa Roofing, Inc.* (Aug. 20, 1997), Medina App.No. 96CA0089, citing *Walden v. State* (1989), 47 Ohio St.3d 47, 51, 547 N.E.2d 962, and *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 195, 443 N.E.2d 978. Collateral estoppel cannot be applied unless the identical issue was (1) actually litigated, (2) directly determined, and (3) essential to the prior judgment. *Id.*, citing *Goodson v. McDonough Power Equip., Inc.*, supra, at 201, 443 N.E.2d 978, and *Hendrix v. Nationwide Ins. Co.* (Dec. 11, 1991), Summit App. No. 15164.

{¶20} In the case sub judice, the trial court was aware that that Licking County Magistrate William Rickrich had issued a decision in that court on September 22, 2004, recommending that appellant's CPO petition be dismissed. The decision, which was adopted by the Licking County court without objection on October 7, 2004, included the finding that appellee failed to show appellant had perpetrated acts of domestic violence against her. See Licking County Magistrate's Decision, September 22, 2004, at 2-3.

{¶21} We recognize that the Licking County CPO proceeding properly utilized a burden of proof of preponderance of the evidence (see, e.g., *Rader v. Rader*, Licking App.No. 07 CA 5, 2007-Ohio-4288, ¶ 12), as would the present tort claim. However, the Licking County proceedings appear to have inordinately focused on the issue of whether a particular incident of domestic violence had or had not occurred; the broader focus should have been whether the "petitioner or petitioner's family or household members are in *danger of* domestic violence." *Felton v. Felton* (1997), 79 Ohio St.3d 34, 42, citing R.C. 3113.31(D) (emphasis added). As such, we hold the Licking County finding that domestic violence had not occurred on July 14, 2004, while certainly relevant, was not "essential" to the Licking County judgment denying the CPO. See *Goodson*, supra. Furthermore, in *Hoff v. Brown* (July 30, 2001), Stark App.No. 2000CA00315, we concluded "*** the reason for asserting [claims] in the [CPO] petition is not to seek unnecessary repeat judgments against the perpetrator, rather it is to ensure the safety of the victim." Id.

{¶22} Accordingly, we hold the trial court erroneously granted summary judgment in the present tort action in favor of appellee, by giving preclusive effect to the Licking County CPO findings. Appellant's First Assignment of Error is sustained.

II.

{¶23} In her Second Assignment of Error, appellant argues the trial court erred in granting, via summary judgment, Intervenor State Farm's motion for declaratory judgment. We disagree.

{¶24} Appellant specifically contends that the only request State Farm presented under its declaratory judgment claim was for a determination that it has no duty to indemnify appellee from a judgment against appellee in the case at hand. Appellant, referencing Ohio Supreme Court case law, urges that "[t]he danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events * * * and the threat to his position must be actual and genuine and not merely possible or remote." *Mid-American Fire & Cas. Co. v. Heasley,* 113 Ohio St.3d 133, 863 N.E.2d 142, 2007-Ohio-1248, ¶ 9, quoting *League for Preservation of Civil Rights v. Cincinnati* (1940), 64 Ohio App. 195, 197, 17 O.O. 424, 28 N.E.2d 660, quoting Borchard, Declaratory Judgments (1934) 40.

{¶25} Nonetheless, "[i]t is axiomatic that an insurer may maintain a declaratory judgment action to determine its rights and obligations under a contract of insurance." *Cincinnati Indemn. Co. v. Martin* (1999), 85 Ohio St.3d 604, 605, 710 N.E.2d 677, citing *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, 30 OBR 424, 507 N.E.2d 1118, paragraph one of the syllabus. Appellant's reliance on *Heasley* is misplaced, as no justiciable controversy existed in that case because the insured had dismissed his lawsuit and he could not refile risking a frivolous claim or subjecting counsel to sanctions. See *Heasley* at ¶ 11.

{¶26} Upon review, we find no error in this case in the allowance and subsequent granting of Intervenor State Farm's motion for declaratory judgment. Appellant's Second Assignment of Error is therefore overruled.

III.

{¶27} In her Third Assignment of Error, appellant argues the trial court erred in granting appellee's motion for leave to file a second amended answer, raising the affirmative defense of self-defense. We disagree.

{¶28} The decision to deny a motion for leave to amend a pleading is within the discretion of the trial court. *Ferguson v. Walsh*, Franklin App.No. No. 02AP-1231, 2003-Ohio-4504, ¶ 30, citing *DiPaolo v. DeVictor* (1988), 51 Ohio App.3d 166, 170, 555 N.E.2d 969. Consequently, the scope of appellate review is limited to determining whether the trial court abused its discretion. Id., citing *Wilmington Steel Products, Inc. v. Cleveland Elec. Illuminating Co.* (1991), 60 Ohio St.3d 120, 122, 573 N.E.2d 622.

{¶29} Appellee's motion to amend his answer was not filed until the trial court had issued its summary judgment entry of March 1, 2007 (which was thereafter reconsidered by the court). Appellant presently argues that " *** allowing the Defendant-Appellee to amend his answer at that stage of the litigation would have undoubtedly caused the Plaintiff-Appellant to suffer undue prejudice *if this case had proceeded to trial*." Appellant's Brief at 20 (emphasis added).

{¶30} Accordingly, we find further redress of the present assigned error would be premature at this time.

{¶31} Appellant's Third Assignment of Error is therefore denied.

IV.

{¶32} In her Fourth Assignment of Error, appellant contends the trial court erred in refusing to grant her motion to file an amended complaint. We disagree.

{¶33} If a trial court fails to mention or rule on a pending motion, the appellate court presumes that the motion was implicitly overruled. *Swinehart v. Swinehart*, Ashland App.No. 06-COA-020, 2007-Ohio-6174, ¶ 26, quoting *State v. Guenther*, Lorain App.No. 06CA008914, 2007-Ohio-681, ¶ 12. A trial court's determination whether to grant a motion for leave to amend a complaint will not be reversed on appeal absent an abuse of discretion. *Darulis v. Ayers* (Feb. 2, 1999), Stark App.No. 1996CA00398, citing *Cselpes v. Cleveland Catholic-Diocese* (1996), 109 Ohio App.3d 533, 541, 672 N.E.2d 724. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶34} Civ.R. 15(A) reads as follows:

{¶35} "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response

to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

{¶36} The Ohio Supreme Court has held that "it is an abuse of discretion for a court to deny a motion, timely filed, * * *, where it is possible that plaintiff may state a claim upon which relief may be granted and no reason otherwise justifying denial of the motion is disclosed." *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 297 N.E.2d 113, paragraph six of the syllabus.

{¶37} Here, appellant claims her requested amendments "only attempted to clarify" her causes of action. Appellant's Brief at 23. However, she delayed the attempt to amend her complaint to add negligence until after the trial court had granted summary judgments against her and in favor of appellee (on the claim of negligent infliction of emotional distress) and Intervenor State Farm (on its request that it owed no duty to indemnify). This was after nearly two and one-half years of this case's progression on the docket. Furthermore, "there must be at least a *prima facie* showing that the movant can marshal support for the new matters sought to be pleaded, and that the amendment is not simply a delaying tactic, nor one which would cause prejudice to the defendant." *Wilmington Steel Products, Inc. v. Cleve. Elec. Illum. Co., supra,* syllabus.

{¶38} Upon review, we hold the trial court did not abuse its discretion in denying appellant's motion to amend her complaint.

{¶39} Appellant's Fourth Assignment of Error is overruled.

V.

{¶40} In her Fifth Assignment of Error, appellant contends the trial court erred in granting summary judgment in favor of appellee, as to appellant's claim of negligent infliction of emotional distress. We disagree.

{¶41} In *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, the Ohio Supreme Court held: "A cause of action may be stated for the negligent infliction of serious emotional distress without the manifestation of a resulting physical injury. Proof of a resulting physical injury is admissible as evidence of the degree of emotional distress suffered."

{¶42} Here, the record before us reveals that appellant's negligent infliction of emotional distress claim does not arise out of an accident. Rather, appellant alleged that she was violently attacked and assaulted by appellee. (Complaint at ¶¶10-11.) Appellant further alleged that appellee acted willfully and maliciously, "with spite and ill will." (Id. at ¶303.) As observed by the trial court, "[i]n this case, the factual scenario is not akin to those in other negligent infliction of emotion[al] distress cases." (Decision and Entry, March 1, 2007, at p.5). We concur with the trial court's assessment on this issue.

{¶43} Appellant's Fifth Assignment of Error is therefore overruled.

VI.

{¶44} In her Sixth Assignment of Error, appellant contends the trial court erred in granting Intervenor State Farm's motion to strike a transcript from appellee's criminal domestic violence and assault trial in Licking County Municipal Court.

{¶45} On September 15, 2006, State Farm filed a motion for summary judgment as to its request for declaratory judgment. On October 24, 2006, appellant filed her

response to said motion, therein relying on portions of the transcript from appellee's criminal trial, which had occurred in November 2004 in Licking County Municipal Court. On November 2, 2006, State Farm moved to have the transcript stricken, which the trial court granted, holding that it could be used only for impeachment purposes.

{¶46} Appellant attempted to utilize appellee's criminal trial testimony to oppose State Farm's summary judgment motion. In light of our above conclusions that summary judgment was properly granted in favor of State Farm in its declaratory judgment request, we find issues pertaining to State Farm's coverage responsibility in the present assigned error moot on appeal. As an appellate court, we are not required to render an advisory opinion or to rule on a question of law that cannot affect matters at issue in the present case. See *State v. Bistricky* (1990), 66 Ohio App .3d 395, 397, 584 N.E.2d 75.

{¶47} Appellant's Sixth Assignment of Error is found moot.

{¶48} For the foregoing reasons, the judgment of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed in part, reversed in part, and remanded.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

JUDGES

JWW/d 58

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

LINDA FOLMAR	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
RAYMOND GRIFFIN	:	
Defendant-Appellee	:	Case No. 07 CAE 06 0025

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed in part, reversed in part, and remanded for further proceedings consistent with the opinion.

Costs to be split evenly between appellant and appellee.

JUDGES

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

Linda Folmar,	:	
Plaintiff,	:	Case No. 05 –CV-C-01-004
vs.	:	JUDGE WHITNEY
Raymond E. Griffin,	:	
Defendant.	:	

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DECISION AND ENTRY

This case is before the Court on Defendant's Motion For Reconsideration Of Summary Judgment. Plaintiff responded with a Response and Memorandum Contra.

Defendant requests the Court to reconsider its ruling on Defendant's motion for summary judgment because Defendant believes that the proceeding in the Licking County Court of Common Pleas Domestic Division operate to bar Plaintiff's claims. Attached to Defendant's motion was the earlier Licking County case involving Plaintiff and Defendant, which contained the Petition for Domestic Violence Civil Protection Order ("CPO"), the Magistrate's Decision, as well as the Court's Decision.

Plaintiff filed a CPO in the Licking County Court of Common Pleas Domestic Division on July 23, 2004. Plaintiff sought the CPO due to several incidents involving Defendant, including a fact pattern identical to that of this case. In the CPO petition, Plaintiff states that Defendant pulled her to the ground to forcefully remove the engagement ring he had given her. Plaintiff further asserts that on July 14, 2004, Defendant engaged in acts of domestic violence against Plaintiff. Specifically, Plaintiff stated that "[h]e threw me up against the wall, he bit me on my right and left forearm

(sic), breaking the skin on my left forearm." Plaintiff also stated that Defendant twisted her wrist, scratched her, kicked her shin, and punched her in the face and back.

A "full" hearing was held by the Court's Magistrate on August 26, 2004. At the hearing, both parties were present and sworn oral testimony was received into the record from petitioner Linda Folmar, Patrolman Bruce Ramage, Erika-Re Griffin, Devin Buchanan, Autumn Griffin and respondent Raymond Griffin.

The Magistrate issued a decision on September 22, 2004. The Magistrate found that on the date of the incident, Folmar and Griffin were flancés to each other and cohabited at Griffin's residence at 692 Alpine Court, Heath, Licking County, Ohio. See Magistrate's Decision. The Magistrate further found that the evidence "fails to establish by a preponderance of the evidence that the respondent [Griffin] perpetrated acts of 'domestic violence' against the petitioner [Folmar] as alleged by her in her petition." Id. The Magistrate determined that the issue boils down to that of credibility. Id. During the hearing, the Magistrate had the opportunity to examine Folmar and Griffin, as well as the other witnesses and exhibits admitted into evidence. Id. The Magistrate focused primarily on the testimony of Folmar and Griffin because of all the witnesses, they were the only two present during the altercation. Id. Of the two, Folmar and Griffin, the Magistrate found Griffin's testimony to be the more credible. Id.

The Magistrate made the following findings relevant to this case regarding the incident: Griffin called the engagement off shortly before this incident and the parties had a "spat" thereafter in which Folmar returned the engagement ring to Griffin; although the engagement concluded, Griffin permitted Folmar to reside at his home; on

the day of the incident, Griffin gave Folmar a $500.00 check to help pay her moving expenses; Griffin told Folmar that he wanted her to leave his home and Folmar became upset; later that same day, Griffin decided he wanted his $500.00 check back from Folmar; when Griffin went to retrieve the check, Folmar jumped on his back and locked one of her arms around Griffin's throat; Griffin and Folmar wrestled around until Folmar was off Griffin's back; Griffin butted Folmar with his head and bit her on the arm in his attempt to get her off his back; after Folmar was off of Griffin's back, he held her down on the bed; throughout the entire incident, there was a large amount of yelling and screaming. Id. The Magistrate further found that that Griffin's nephew, Devin, entered the room while the incident was taking place and Griffin pushed him away. Id. At some point during the incident, Erika-Rae called the police. Id.

Further, the Magistrate found the following to be significant with regard to the issue of credibility:

- The Magistrate did not find that Folmar's testimony that Griffin punched her repeatedly in the face with his fists while she was lying on the bed during the incident to be credible, as her injuries were inconsistent with such testimony.
- The written statements of Erika-Rae are inconsistent, and that her testimony indicates that she was in the bathroom throughout the entire incident and was unable to clearly hear what was being said.
- Devin, who did see a portion of the incident, did not see Griffin strike, punch or kick Folmar, nor did he see any injuries to Folmar.

- The Magistrate did not find the scratches on Folmar's arms to be caused by Griffin, but more likely were caused by some foreign object while the struggle occurred during the incident.

The Magistrate recommended that the trial court enter an order dismissing the petition and *ex parte* civil protection order. No objections were filed to the Magistrate's Decision by either Folmar or Griffin. Thereafter, on October 7, 2004, the Licking County Court Of Common Pleas adopted the Magistrate's decision. Thereafter, on November 3, 2004, the Licking County Court of Common Pleas issued a Judgment Entry Dismissing the Petition and Ex Parte Civil Protection Order. The Court's order was not appealed.

On January 3, 2005, Plaintiff initiated this lawsuit by filing a Complaint alleging the following facts:

1. Plaintiff and Defendant were engaged to be married prior to July 14, 2004.
2. Defendant called off the wedding and forcefully removed the engagement ring from Plaintiff's finger.
3. Plaintiff continued to cohabitate with Defendant in Defendant's home.
4. On July 14, 2005, Defendant and Plaintiff got into an altercation regarding a $500 check.
5. Defendant hit, kicked, scratched and punched Plaintiff, from which Plaintiff sustained injuries.

"The doctrine of issue preclusion, also known as collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn

into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Assoc. v. State Employment Relations Board* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140, citing *Norwood v. McDonald* (1943), 142 Ohio St. 299, 52 N.E.2d 67, paragraph three of the syllabus; *Trautwein v. Sorgenfrei* (1979), 58 Ohio St.2d 493, 391 N.E.2d 326, syllabus; *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 443 N.E.2d 978, paragraph one of the syllabus.

Although the merger and bar aspects of *res judicata* have the effect of precluding the re-litigation of the same cause of action, "the collateral estoppel aspect precludes the re-litigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action that was based on a different cause of action." Id., citing *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108, 112, 254 N.E.2d 10, 13. "In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit." *Id.* at 112.

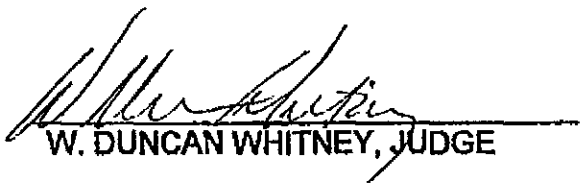
The decision issued by the Licking County Court of Common Pleas on November 3, 2004, which dismissed Plaintiff's Petition for a CPO, was a final appealable order, which neither Plaintiff nor Defendant appealed.

Plaintiff's Petition for CPO, as well as the Magistrate's Decision recite, nearly verbatim, the exact allegations contained in Plaintiff's Complaint. That is, that Plaintiff alleges that Defendant forcefully removed her engagement ring prior to July 14, 2004; that Defendant and Plaintiff had an altercation on July 14, 2004, whereby Plaintiff

alleges that Defendant slammed her into a wall, and scratched, kicked and punched her. Essentially, Plaintiff's Complaint mirrors the CPO Petition and Decision from the Licking County Court of Common Pleas, upon which judgment was rendered. Plaintiff used identical facts to litigate two different cases in two different courts.

Plaintiff had the opportunity to litigate the facts of this case in the Licking County Court of Common Pleas, although she was not successful. Plaintiff did not file objections to the magistrate's decision, nor did she appeal the final judgment in that case. Instead, six months later, Plaintiff chose to re-litigate the same issues that had been "actually and necessarily litigated and determined" in the Licking County Court of Common Pleas, even though it was based on a different cause of action, i.e. a CPO. Plaintiff only gets one bite at the apple and her attempt to re-litigate the same issues has fallen short. As such, Defendant's Motion For Reconsideration Of Summary Judgment is hereby GRANTED. Plaintiff's claims are barred by the doctrine of collateral estoppel, i.e. issue preclusion, and summary judgment is hereby entered in favor of Defendant, Raymond E. Griffin.

Dated: May 23, 2007.



W. DUNCAN WHITNEY, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by ☒ Regular Mail, ☐ Mailbox at the Delaware County Courthouse, ☐ Facsimile transmission

- Ross A. Gillespie, 270 Bradenton Avenue, Dublin, OH 43017
- David W. Wenger, 36 North Second Street, Newark, OH 43058-0919
- Alexander M. Spater, 565 East Town Street, Columbus, OH 43215
- David L. Eidelberg, Ulmer Berne, LLP, 88 East Broad Street, Suite 1600, Columbus, OH 43215

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