NO. COA08-861 SUPERIOR COURT DISTRICT 4B

NORTH CAROLINA COURT OF APPEALS
****

DAVID ELEEN and ROBERTA L. ELEEN, Plaintiffs, Vs.	)	
HENRY HEIL d/b/a/ H.A.R.D. TOP ASPHALT MAINTENANCE COMPANY a/k/a/ H.A.R.D. TOP ASPHALT MAINTENANCE, L.L.C. OF THE CAROLINAS, Defendant,	)	From Onslow County 05 CvS 2544

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DEFENDANT-APPELLANT'S BRIEF
****

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NO. COA08-861 SUPERIOR COURT DISTRICT 4B

NORTH CAROLINA COURT OF APPEALS
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DAVID ELEEN and ROBERTA L. ELEEN,
Plaintiffs,

Vs.

HENRY HEIL d/b/a/ H.A.R.D. TOP ASPHALT MAINTENANCE COMPANY a/k/a/ H.A.R.D. TOP ASPHALT MAINTENANCE, L.L.C. OF THE CAROLINAS,
Defendant,

From Onslow County
05 CvS 2544

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DEFENDANT-APPELLANT'S BRIEF
****

QUESTIONS PRESENTED

I. DID THE TRIAL COURT LACK SUBJECT MATTER JURISDICTION OVER THIS CASE BECAUSE THE DISTRICT COURT (NOT THE SUPERIOR COURT) RETAINS EXCLUSIVE JURISDICTION OVER SMALL CLAIMS APPEALS?

II. DID THE TRIAL COURT LACK SUBJECT MATTER JURISDICTION OVER THIS CASE BECAUSE THE PLAINTIFFS' CLAIMS WERE BARRED BY THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL?

STATEMENT OF PROCEDURAL HISTORY

Nature of the Case

This appeal is made to the North Carolina Court of Appeals by Defendant-Appellant HENRY HEIL, d/b/a/ H.A.R.D. TOP ASPHALT MAINTENANCE COMPANY a/k/a/ H.A.R.D. TOP ASPHALT MAINTENANCE, L.L.C. OF THE CAROLINAS ("Heil"), following a Judgment of the Onslow County Superior Court in the amount of $9,500.00 plus treble damages and interest against Heil in favor of Plaintiffs-Appellees DAVID ELEEN and ROBERTA L. ELEEN (collectively, "the Eleens").

Summary of Proceedings

This case originated in Pender County Small Claims Court on May 13, 2005. (R p. 16) The original small claims action named David Eleen as Plaintiff. (R p. 16) It named Henry Heil, individually, and an entity described as "H.A.R.D. Top Asphalt Maintenance" as Defendants. (R p. 16) On June 8, 2005, the Small Claims Court dismissed the action. (R p. 17)

On June 17, 2005, David Eleen appealed the magistrate's dismissal to Pender County District Court pursuant to North Carolina General Statutes §7A-228. (R p. 18) On August 15, 2005, David Eleen voluntarily dismissed the Pender County District Court appeal pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. (R p. 20)

On August 17, 2005, two days after dismissing the Pender County case, the Eleens filed this action in Onslow County Superior

Court. (R pp. 2-6) The instant action involves the same parties, facts and issues as both the Pender County Small Claims case and the Pender County District Court case. (R pp. 4-6, R pp. 10-12, R pp. 16-18, R pp. 21-25)

Following the trial court's denial of Heil's Motion to Dismiss that had been filed on February 22, 2008, the case was tried before a jury. (R pp. 14-23) Following a jury verdict finding Heil liable to the Eleens in the amount of $9,500.00, the trial court trebled the verdict and entered the judgment from which Heil appeals herein. (R pp. 21-22, R p. 24-25) Heil gave Notice of Appeal to this Court on April 30, 2008. (R p. 26) The parties thereafter settled the Record on Appeal, which was filed and mailed by the Clerk on August 8, 2008. Heil is filing this Brief in accordance with Rule 13 and other applicable provisions of the North Carolina Rules of Appellate Procedure.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

This is an appeal from a final judgment in a civil case pursuant to North Carolina General Statutes §7A-27(b) and Rule 3(c) of the North Carolina Rules of Appellate Procedure.

STATEMENT OF THE FACTS

In May 2005, the Eleens hired Heil, who is engaged in the business of asphalt paving and maintenance, to grade and pave a driveway at their residence located in Hubert, North Carolina. (R p. 4) After Heil completed the work, the parties entered into a

dispute regarding warranty issues and whether Heil had performed the job in a workmanlike manner. (R pp. 5-6) The dispute devolved into the small claims action discussed in the previous section of this Brief, and the matter progressed as therein described. No other facts are necessary for purposes of this appeal since the appeal involves procedural issues which do not concern the merits of the case.

STANDARD OF REVIEW

In reviewing a question of subject matter jurisdiction the standard of review is *de novo*. *Raleigh Rescue Mission, Inc. v. Bd. of Adjust. of Raleigh*, 153 N.C. App. 737, 571 S.E.2d 588 (2002) (defining *de novo* as "consider[ing] the question anew, as if not previously considered or decided."). Issues of subject matter jurisdiction may be raised for the first time on appeal. *See* N.C. R. App. P. 10(a) (2005) (stating that "any party to the appeal may present for review ... whether the court had jurisdiction of the subject matter").

ARGUMENT

I. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS CASE BECAUSE THE DISTRICT COURT (NOT THE SUPERIOR COURT) RETAINS EXCLUSIVE JURISDICTION OVER SMALL CLAIMS APPEALS.

ASSIGNMENT OF ERROR NO. 1
(R pp. 2-6; R pp. 14-20)

The procedure for appealing small claims actions is well established as follows: "After final disposition before the

magistrate, the *sole remedy* for an aggrieved party is appeal for trial *de novo* before a *district court* judge or jury [emphasis added]". N.C. GEN. STAT. §7A-228(a)(2007). Since the sole avenue of redress for a losing party in a small claims case is an appeal to district court, the Pender County District Court had exclusive jurisdiction over David Eleen's appeal of the magistrate's final disposition of this case. While David Eleen did, in fact, file a *de novo* appeal with Pender County District Court, he subsequently dismissed that appeal and, in an apparent attempt to circumvent the strictures of North Carolina General Statutes §7A-228, refiled the case in Onslow County Superior Court. The Superior Court action, filed on August 17, 2005, was disguised as an original action and sought damages exceeding those sought in the small claims case and subsequent appeal.

That the proper procedure -- an appeal to Pender County District Court -- was instigated serves only to demonstrate that the Eleens were aware of the proper venue for appeal. If the Eleens had a truly good faith reason for seeking redress in Onslow County Superior Court, then the proper procedure would have involved first moving to transfer the case to Pender County Superior Court and then moving to change the venue to Onslow County Superior Court. In choosing, however, to completely abandon their efforts in Pender County in favor of attempting a new, but identical, case in Onslow County Superior Court demonstrates a lack

of knowledge of procedure at best and impure motives at worst.

In support of their argument that the trial court had subject matter jurisdiction over this matter, the Eleens claim that their actions were appropriate in light of this Court's ruling in *First Union National Bank v. Richards*, 90 N.C. App. 650, 369 S.E.2d 620 (1988). In that case, a small claims appeal was dismissed and then refiled in *district court* in the *same county* as the original action, and the refiling took place within the one-year statute of limitations provided by Rule 41 of the North Carolina Rules of Civil Procedure. *Id.* Nowhere in *First Union* is there support for the notion that the plaintiffs could have refiled their small claims appeal in superior court, or in any other county. In short, *First Union* does not stand for the proposition that Rule 41 extinguishes the jurisdictional grant of North Carolina General Statutes §7A-228 so as to permit a small claims appellant to refile a voluntarily dismissed small claims appeal in superior court.

In *Stephens v. John Koenig, Inc.*, this Court -- in discussing the scope of North Carolina General Statutes §7A-228 -- addressed specifically which things may, and which things may not, be heard by a district court on review *de novo* of a magistrate's decision. *See* 119 N.C. App. 323, 458 S.E.2d 233 (1995). *Stephens* interprets a prior version of North Carolina General Statutes §7A-228 which, at the time and by its express language, allowed Rule 60(b) motions to be heard only in small claims court. *Id.* The appellant in

Stephens had filed its Rule 60(b) motion in district court. *Id.* The *Stephens* Court ruled that the district court did not have subject matter jurisdiction to hear the Rule 60(b) motion because North Carolina General Statutes §7A-228 granted exclusive subject matter jurisdiction to the magistrate's court. *Id.*

Since *Stephens*, North Carolina General Statutes §7A-228 has been amended to allow district courts to hear Rule 60(b) motions or appeals on trial *de novo*. Of note, however, is that the statute was *not* amended to include actions in superior court. Although *Stephens* discusses a prior version of the statute, the substantive change to that statute does not alter its applicability in the instant case. The reasoning of the *Stephens* court clarifies the following items:

> (a) Only the courts identified in North Carolina General Statutes §7A-228 have subject matter jurisdiction over the matters therein specified;
>
> (b) "It is presumed that by amending a statute the General Assembly either intended to change the substance of the original act or clarify its meaning"[1]; and
>
> (c) When the General Assembly amended North Carolina General Statutes §7A-228, it "designated specific procedures for an aggrieved party to seek relief from a magistrate's judgment [and] *it has by implication excluded other procedures* [emphasis added]". *Id.*

Applying the logic of *Stephens*, one clear proposition emerges: the General Assembly has considered which courts have jurisdiction to hear appeals or other forms of relief from small claims

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1 *Id.* (citing Myrtle Desk Co. v. Clayton, 8 N.C. App. 452, 174 S.E.2d 619 (1970)).

decisions, and has chosen to expressly limit an aggrieved party to seeking either a Rule 60(b) motion or a trial *de novo* in district court, and by implication all other procedures -- including filing an appeal or new action in superior court -- have been excluded. The General Assembly has altered the substance of North Carolina General Statutes §7A-228 on several occasions, but has in every instance specifically excluded the remedy of access to superior court.

There is, of course, good reason for the General Assembly's actions. For one thing, were the Eleens' view to prevail, then *any* small claims case could proceed to superior court by a simple trick of filing paperwork. A party would need only file a small claims appeal to district court and then dismiss it under Rule 41 in order to completely sidestep the operation of North Carolina General Statutes §7A-228 and thereby have its small claims case heard in superior court. This result is absurd; the very point of having a magistrate's court is to keep minor cases out of superior court and thereby further the interest of judicial economy. In keeping with that goal, the statute limits aggrieved parties to having such appeals heard in district court.[2]

The familiar rule regarding subject matter jurisdiction is stated as follows: "Whenever it appears by suggestion of the

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2 *See also* North Carolina General Statutes §7A-229 (stating that "upon appeal noted, the clerk of superior court places the action upon the civil issue docket of the district court division. The district judge before whom the action is tried may order repleading or further pleading by some or all of the parties, may try the action on stipulation as to issues, or may try it on the pleadings as filed.").

parties or otherwise that the court lacks subject matter jurisdiction, then the court shall dismiss the action". N.C. R. Civ. P. 12(h)(3)(2007). The trial court should have -- based on this rule alone -- granted Heil's February 22, 2008 Motion to Dismiss. In denying that motion, however, the trial court effectively rendered null any further action it took on the case, including the trial, verdict and judgment. This Court should therefore vacate the trial court's judgment and remand this matter to Onslow County Superior Court with instructions to dismiss the case with prejudice.

II. THE TRIAL LACKED SUBJECT MATTER JURISDICTION OVER THIS CASE BECAUSE THE PLAINTIFFS' CLAIMS WERE BARRED BY THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL.

ASSIGNMENTS OF ERROR NOS. 3 and 4
(R pp. 2-6; R pp. 14-20)

In order for a *res judicata* bar to apply, a party must show the following: 1) the previous suit resulted in a final judgment on the merits; 2) the same cause of action is involved; and 3) both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties to the previous action or they stand in privity with parties to the previous action. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 474 S.E.2d 127 (1996). *See also* 19 Strong's N.C. Index 4th, "Judgments", §162 (May 2007 Update).

As the Record clearly reveals, the Pender County small claims action effected a final judgment on the merits in Heil's favor.

That judgment, unless properly pursued on appeal, remains a final judgment on the merits. David Eleen filed a timely and proper appeal of the original small claims case in this matter, but he abandoned his efforts by voluntarily dismissing that appeal and by not refiling within one year of the dismissal. The subsequent prosecution of the same claims in Onslow County Superior Court is exactly the type of action the doctrine of *res judicata* is designed to prevent.

The claims in the instant case are indistinguishable from those in the Pender County small claims action and appeal. In his small claims complaint, David Eleen states that "[Heil] laid asphalt road very poorly. Will not honor [one]-year warranty". (R p. 16) In the instant case, the Eleens claim that Heil, *inter alia*, "offered to grade and pave a driveway", "installed a driveway", and that "the completed job appeared to be workmanlike inadequate". (R p. 5) The Eleens further claim that Heil's paving work was "substandard in many significant ways" and that Heil "offered a one-year warranty without any intention of honoring the same". (R p. 5)

Upon examining and comparing the Pender County actions with the instant action, one can clearly see that the parties and claims are identical. The Pender County plaintiff was identified as David Eleen. (R p. 16) The instant case identifies as plaintiffs David Eleen and his wife, Roberta L. Eleen. (R pp. 2, 4) The Pender

County defendants were identified as Henry Heil and an entity designated as "Hard Top Asphalt Maintenance". (R p. 16) In the instant matter, the defendant is styled as "Henry Heil, d/b/a H.A.R.D. Top Asphalt Maintenance Company a/k/a H.A.R.D. Top Asphalt Maintenance, L.L.C. of the Carolinas". (R pp. 2, 4)

In the instant action, David Eleen named as an additional plaintiff his wife, Roberta L. Eleen, in an apparent attempt to avoid the *res judicata* bar. The Court should note the established authority that a party cannot avoid *res judicata* by adding his or her spouse as co-plaintiff in a subsequent action. "For purposes of *res judicata*, parties include all persons in privity with a party". *Hales v. N.C. Ins. Guaranty Ass'n*, 337 N.C. 329, 445 S.E.2d 590 (1994). "Privity", for purposes of *res judicata*, "denotes a mutual or successive relationship to the same rights of property". *Id.* *See also* Murillo v. Daly, 169 N.C. App. 223, 609 S.E.2d 478 (2005). Because Plaintiff David Eleen is married to Plaintiff Roberta L. Eleen, Plaintiff Roberta L. Eleen stands in privity with Plaintiff David Eleen; as such, they share a mutual or successive relationship to the same rights of property. Moreover, in their complaint in the instant action, they admit that they own, as tenants by the entirety, the property where the facts underlying this case occurred. (R p. 4) Accordingly, the inclusion of Roberta L. Eleen as a party to this action fails to take the action outside the *res judicata* requirement that a subsequent action

involving the same issues involve different parties.

Similarly, the additions of a "d/b/a" designation after Henry Heil's name, and an "a/k/a" designation after the "d/b/a" designation, do nothing to change the fact that Henry Heil, individually, is the identical party named in the Pender County actions. As is well known, a "d/b/a", when filed, does not create a distinct, separate entity, but is simply an assumed name under which the filing party does business. A party can add "d/b/a's" and "a/k/a's" to his heart's content, thinking that these designations refer to another party or create a separate entity; however, such actions do not change the identity of the party and they do not add parties to a lawsuit. Simply put, the instant case -- as were the Pender County actions -- is between the Eleens and Heil.

Since the parties *and* claims in the Pender County and Onslow County matters are identical, there is no question that the instant case is simply an attempt to relitigate the outcome of the small claims case. The case was decided on its merits in Pender County Small Claims Court. The proper avenue for appeal was pursued but then dropped. The same nexus of facts underlying the same causes of action for breach of warranty and breach of contract are involved. The parties are the same. Accordingly, *res judicata* operates as a bar to the instant case.

The Court should also note that the defense of collateral

estoppel, a doctrine often used interchangeably with *res judicata*, may not be avoided by shifting legal theories or asserting a new or different ground for relief. *Little v. Hamel*, 134 N.C. App. 485, 517 S.E.2d 901 (1999). In the instant case, the Eleens have attempted to avoid the operation of issue preclusion by asserting additional causes of action for fraud and unfair or deceptive trade practices and by increasing the level of damages claimed. Neither of these "new" causes of action, however, are based on allegations of fact which differ from those upon which the Pender County cases were based.

Under well-established North Carolina law, subsequent actions attempted by asserting new legal theories or by seeking new remedies as the Eleens are so attempting in the instant case are prohibited under the principles of *res judicata*. *Lawson v. Toney*, 169 F. Supp. 2d 456 (M.D.N.C. 2001). *See also* Knotts v. City of Sanford, 142 N.C. App. 91, 541 S.E.2d 517 (2001) (holding that under the doctrine of *res judicata*, a final judgment on the merits in a prior action bars a subsequent suit based on the same cause of action between the same parties or those in privity with them).

This Court should therefore vacate the trial court's judgment and remand this matter to Onslow County Superior Court with instructions to dismiss the case with prejudice.

CONCLUSION

The Eleens elected to exercise -- and then abandon -- the sole remedy available to them, an appeal for trial *de novo* in Pender County District Court. Instead, they sought to relitigate their case in a different county, where they have re-styled the parties, contrived ways to increase the dollar amount demanded, and attempted to sidestep the operation of both *res judicata* and North Carolina General Statutes §7A-228 in order to seek a new trial -- and a windfall -- from Heil. In so doing, they ignored the clearly established rule that the superior court does not have jurisdiction to hear small claims appeals. Moreover, they failed to account for the fact that, once they dismissed their small claims appeal in Pender County District Court, any subsequent action -- unless filed in Pender County District Court within one year their original dismissal -- would be barred by *res judicata* and by operation of Rule 41.

For the foregoing reasons, it is clear that the court below should not have allowed this case to proceed to trial. Accordingly, Heil hereby respectfully prays unto this Honorable Court to vacate the Trial Court's Judgment and remand this matter to Onslow County Superior Court with instructions to enter a dismissal of this action with prejudice.

Respectfully submitted this 5th day of September, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served an exact copy of the foregoing DEFENDANT-APPELLANT'S BRIEF by depositing said copy in an envelope bearing sufficient postage in the United States Mail at Wilmington, North Carolina, addressed to the following person at the following address in accordance with Rule 26(c) of the North Carolina Rules of Appellate Procedure:

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This the 5th day of September, 2008.

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