STATE OF NORTH CAROLINA COUNTY OF ONSLOW	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 05-CVS-2544
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.	**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (RULE 12)**

NOW COMES the Defendant, and in support of his Motion to Dismiss Plaintiff's Complaint for lack of subject matter jurisdiction, pursuant to North Carolina Rule of Civil Procedure 12(b)(1), and in support thereof states as follows:

FACTUAL BACKGROUND

This case was originally heard in Small Claims court in Pender County – not Onslow County. The parties in that small claims action were David Eleen, Plaintiff, and Defendants Henry Heil, in his individual capacity, and "HARD TOP ASPHALT MAINTENANCE COMPANY," which plaintiff indicated is a corporation (hereinafter, "H.A.R.D. Top"). It was filed in 2005. *See* Complaint, No. 05-CVM-229 (Small Claims, Pender County, May 13, 2005), attached hereto as Exhibit A (hereinafter "Small Claims Complaint").

Plaintiff's case was decided on the merits in Pender County Small Claims Court and adjudicated in favor of Defendants, with judgment on June 8, 2005. *See* Entry of Judgment, No. 05-CVM-229 (Small Claims Court, Pender County, June 8, 2005), attached hereto as Exhibit B.

Shortly after, pursuant to N.C.G.S. § 7A-228, Plaintiff David Eleen appealed the Small Claims Court's decision to the Pender County District Court on June 17, 2005. The case number in that matter was 05-CVD-483 (hereinafter "Small Claims Appeal"). See Notice of Appeal to District Court, No. 05-CV 00483 (Pender County District Court, June 17, 2005), attached hereto as Exhibit C.

Plaintiff David Eleen took a voluntary dismissal of his Small Claims Appeal, pursuant to Rule 41, on August 15, 2005. See Notice of Voluntary Dismissal, No. 05-CVD-483 (Pender County District Court, executed July 11, 2005, filed August 15, 2005), attached hereto as Exhibit D.

On August 17, 2005, two days after dismissing his Small Claims Appeal in Pender County District Court, Plaintiff David Eleen filed the instant action, based on the same facts and legal issues as both the original Pender County Small Claims matter, and the Pender County Small Claims Appeal, here in Onslow County Superior Court. In the instant action, Plaintiff has named his wife, Roberta L. Eleen, as an additional plaintiff, in hopes of avoiding the bar of *res judicata*. As will be shown, Plaintiff's attempt in that regard is of no use.

DISCUSSION

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS CASE BECAUSE THE DISTRICT COURT IS THE EXCLUSIVE FORUM FOR APPEALS FROM SMALL CLAIMS DISPOSITIONS.

On May 13, 2005, Plaintiff David Eleen filed a small claims suit in Pender County against Defendant Henry Heil, and an entity designated as "Hard Top Asphalt Maintenance."

The suit alleged that the Defendant(s) "laid [an] asphalt road very poorly [and] will not honor 1 year warranty." *See* Ex. A, Small Claims Complaint. That case was decided on the merits in Pender County Small Claims Court and adjudicated in favor of the Defendants, and judgment for the Defendants was entered on June 8, 2005. *See* Ex. B, Entry of Judgment.

The procedure for appealing small claims actions is stated 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 a jury." N.C.G.S. § 7A-228(a) (emphasis added). Since the sole avenue of redress for the losing party in a Small Claims case is an appeal to the District Court, the District Court has exclusive jurisdiction over appeals from final dispositions in Small Claims courts.

As the losing party, Plaintiff David Eleen had one remedy available to him: an appeal for a trial *de novo* before the District Court in Pender County. In fact, Plaintiff did file such an appeal in Pender County District Court on June 17, 2005, and that appeal was assigned case number 05-CVD-483. *See* Ex. C, Notice of Appeal.

However, on August 15, 2005, plaintiff David Eleen voluntarily dismissed that appeal, pursuant to Rule 41. *See* Ex. D, Notice of Voluntary Dismissal.

When that appeal was dismissed, Plaintiff had no other option with regard to his small claims appeal. That appeal was his sole remedy under N.C.G.S. § 7A-228.

Untroubled by the strictures of N.C.G.S. §7A-288 and the North Carolina Rules of Civil Procedure, however, Plaintiff elected to file the instant action in Superior Court, in a different County, as though the previous cases they had filed against Defendant had never existed. On August 17, 2005, Plaintiffs filed the instant action, disguised as an original action in the Superior

Court for Onslow County, and seeking damages far in excess of those sought in the Small Claims case and subsequent appeal.

The claims in the instant case are indistinguishable those in both the Small Claims Complaint and Small Claims Appeal. In Plaintiff David Eleen's Small Claims Complaint, he avers: "[Defendants] laid asphalt road very poorly. Will not honor **1 year warranty**." See Ex. A, Small Claims Complaint (emphasis added).

In the instant case, Plaintiffs in their Complaint (hereinafter "Onslow Superior Complaint") aver that Defendants, *inter alia*, offered to "grade and pave a driveway," *id.* at para. 6; "install a driveway," *id*. para. 7; that "the completed job appeared to be workmanlike inadequate [sic]," *id*. para. 9; that Defendants' paving work was "substandard in many significant ways," *id*. para. 12; that Defendants offered a **one (1) year** warranty without any intention of honoring the same," *id*. para. 14 (emphasis in original).

It is obvious upon comparing the Small Claims Complaint with the Complaint in this case that the claims involved in the two cases are the same. The Plaintiff in the Small Claims matter was David Eleen; in the instant matter the Plaintiffs are David Eleen and his wife, Roberta Eleen. The Defendants in the Small Claims case were Henry Heil, and an entity designated as "Hard Top Asphalt Maintenance;" 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."

Since the parties *and* claims in the two cases are identical, there is no question that the instant case is simply an attempt to relitigate the outcome of the Small Claims case. However, as discussed, the Superior Court has no jurisdiction over Small Claims appeals. That the proper procedure – an appeal to District Court in Pender County – had originally been followed, serves

only to demonstrate that Plaintiffs were aware of the proper venue for appeal, and that they simply chose to abandon in it in favor of attempting an identical case in Superior Court, which does not have subject matter jurisdiction over Small Claims appeals, seeking more money, and, most strangely of all, in a different county altogether.

The familiar rule with respect to subject matter jurisdiction is as follows: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. R. Civ. Proc. 12(h)(3). Accordingly, because this Court lacks subject matter jurisdiction over Small Claims appeals, this case must be dismissed.

II. THIS COURT LACKS JURISDICTION OVER THE SUBJECT MATTER IN THIS CASE BECAUSE PLAINTIFFS' CLAIMS ARE BARRED BY *RES JUDICATA*.

The preceding facts and arguments are hereby incorporated by reference as though the same were fully set forth herein.

For *res judicata* to apply, a party must show that: (i) the previous suit resulted in a final judgment on the merits, (ii) that the same cause of action is involved, and (iii) that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties. *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).

(A) The Previous Suit Resulted in a Final Judgment on the Merits.

As has been shown, the Small Claims action was decided on the merits in Defendant's favor. That judgment, unless properly pursued on appeal, remains a final judgment on the merits. Since the original small claims case has already been decided on the merits, and its

appeal in District Court was abandoned when Plaintiff voluntarily dismissed it, the subsequent prosecution of the same claim in Superior Court is barred by *res judicata*.

Accordingly, *res judicata* applies as a bar to the instant case. (1) This case was decided on the merits in Pender County, and the avenue for appeal was pursued then dropped; (2) the same nexus of facts underlying the same causes of action for breach of warranty and contract are involved, and (3) the parties are the same.

(B) The Same Causes of Action Are Involved.

It should also be noted that the defense of *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). Plaintiffs in the instant case have attempted to avoid the operation of *res judicata* by asserting additional causes of action for fraud and unfair and deceptive trade practices. But neither of these causes of action are based on any allegations of fact besides the ones on which the claims for breach of contract and breach of warranty – the same claims pursued by Plaintiff in the Pender County cases – were based. It is well established under North Carolina law that subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*. *Lawson v. Toney*, 169 F. Supp. 2d 456 (M.D.N.C. 2001).[1]

[1] *See also Knotts v. City of Sanford*, 142 N.C. App. 91, 541 S.E.2d 517 (2001) (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).

(C) The Party Asserting *Res Judicata* and the Party Against Whom *Res Judicata* is Asserted Were Either Parties or Stand in Privity With Parties.

(i) The Plaintiff is, For *Res Judicata* Purposes, the Same as in the Prior Action.

The Plaintiff in this case is the same as in the Small Claims matter, and appeal, in Pender County. Plaintiff David Eleen has attempted to sidestep the bar of *res judicata* via the nominal inclusion of his wife Roberta as a co-plaintiff. It should be noted that there is established authority for the proposition that a party adding his or her spouse co-Plaintiff in the subsequent action is immaterial for *res judicata* purposes. "For the 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, 333 (1994). "Privity" for purposes of *res judicata* "denotes a mutual or successive relationship to the same rights of property." *Id.* at 334 (citations omitted). *See also Murillo v. Daly*, 169 N.C. App. 223, 226 n.2 (2005). Because plaintiff David Eleen is married to plaintiff Roberta Eleen, Roberta Eleen stands in privity with David Eleen; as such, they share a mutual or successive relationship to the same rights of property. Moreover, in the Complaint in the instant action, Plaintiffs admit that they own, as tenants-by-the-entirety, the property where the facts underlying this case occurred. *See* Compl., para. 5. Accordingly, the inclusion of Roberta Eleen as a party to this action fails to take this action outside the *res judicata* requirement that different parties to the subsequent action be named.

(ii) The Defendant in this Case is the Same as in the Prior Action.

The additions of a "d/b/a" designation after Henry Heil's name, and an "a/k/a" after that, do nothing to change the fact that he is the same Defendant as in the original Small Claims case, and the Small Claims Appeal. As is well known, a "dba," 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 "dba's" and "aka's" that it knows or believes to refer to another party, but doing so does not change the identity of the party, nor does it add additional parties to the action. Simply put, this case is still between David Eleen, who was the Plaintiff in the previous cases, versus Henry Heil, who was a Defendant in the previous cases.

CONCLUSION

Plaintiffs elected to exercise – then abandon - the sole remedy afforded them – an appeal for trial *de novo* in 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 N.C.G.S. § 7A-228, in order to seek a new trial – and a windfall – from the Defendant. In doing so, they ignored the clearly established rule that the Superior Court does not have jurisdiction to hear appeals from Small Claims cases. Furthermore, they failed to account for the fact that, once their Small Claims Appeal, in Pender County District Court, was dismissed, any subsequent action would be barred by *res judicata*. For the foregoing reasons, Plaintiff's Complaint must be dismissed with prejudice.

This the 22nd day of February, 2008.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **Motion to Dismiss** on counsel for the opposing party to this action by placing a copy thereof in an envelope with adequate postage thereon and addressed as follows:

Robert Detwiler
P.O. Box 353
Jacksonville, NC 28541-0353

This the 22nd day of February, 2008

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