[Cite as *Hutz v. Gray*, 2009-Ohio-3410.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

JAMES HUTZ, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
		CASE NO. 2008-T-0100
- vs -	:	
STEPHANIE GRAY,	:	
Defendant,	:	
CINCINNATI INSURANCE COMPANY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2002 CV 400.

Judgment: Reversed and remanded.

Gregg A. Rossi and *Thomas R. Wright*, Rossi & Rossi, 26 Market Street, 8th Floor, P.O. Box 6045, Youngstown, OH 44501-6045 (For Plaintiffs-Appellants).

Louis M. DeMarco, 50 South Main Street, Suite 615, Akron, OH 44308 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellants, James and Lisa Hutz, appeal the judgment entered by the Trumbull County Court of Common Pleas. The trial court dismissed their amended complaint against appellee, the Cincinnati Insurance Company ("Cincinnati").

{¶2} Since there has not been a trial in this case, the following factual history is taken from the pleadings in the record. For the purposes of this appeal only, we will presume these facts are accurate.

{¶3} In February 2000, a car accident occurred, in which a vehicle driven by Stephanie Gray collided with a vehicle being operated by James Hutz. Hutz sustained injuries from this accident. Gray, the alleged tortfeasor, had a personal insurance policy through the Progressive Insurance Company ("Progressive"). The liability limit of this policy was $100,000. In addition, at the time of the accident, Gray was conducting business on behalf of the Delphi Corporation ("Delphi"). As such, Gray may have also been covered under an insurance policy issued to Delphi. The Delphi policy had a $1,000,000 deductible, with additional coverage available after the deductible was met.

{¶4} At the time of the accident, James Hutz was in the course and scope of his employment with Hutz Sign & Awning Company. Cincinnati issued an insurance policy to Hutz Sign & Awning Company, which included underinsured motorist coverage up to $500,000.

{¶5} The Hutzes filed an initial complaint against Gray and against Cincinnati for underinsured motorist coverage. This complaint was apparently dismissed in October 2001. The Hutzes were represented by Attorney James Gray during this time period.

{¶6} Subsequently, the Hutzes retained new counsel, Joseph Ohlin. Attorney Ohlin filed a second complaint on behalf of the Hutzes against Gray and Cincinnati in February 2002.

{¶7} In the beginning stages of this action, the Hutzes were unaware of the potential coverage through the Delphi policy. As a result, they believed the total

available insurance coverage applicable to Gray was the $100,000 Progressive policy. Accordingly, they were seeking underinsured motorist coverage through the Cincinnati policy.

{¶8} In 2004, the Hutzes and Cincinnati learned that Gray may have been conducting business for Delphi at the time of the accident and that the Delphi policy may cover the accident. With this additional coverage, Gray would no longer be "underinsured," and the Hutzes would no longer have a meritorious claim against Cincinnati for underinsured motorist coverage. Apparently, a pre-trial conference was held, in which counsel for the Hutzes and Cincinnati agreed that Cincinnati should be dismissed in light of the coverage under the Delphi policy.

{¶9} Counsel for Cincinnati, Louis DeMarco, sent a letter to Attorney Ohlin. Enclosed in Attorney DeMarco's letter was a letter from the claims administrator for Delphi, which stated Gray was conducting business on behalf of Delphi at the time of the accident and that Delphi "has a large deductible and a sufficient amount of coverage for automobile losses." In his letter, Attorney DeMarco asked Attorney Ohlin to execute a partial dismissal entry that was enclosed with the letter.

{¶10} In October 2004, the Hutzes filed a "partial dismissal entry" dismissing Cincinnati pursuant to Civ.R. 41(A)(1)(a).

{¶11} In 2005, the Hutzes retained Attorney Gregg Rossi to represent them in this matter, and Attorney Ohlin withdrew as counsel.

{¶12} Also in 2005, the Hutzes discovered that Delphi filed for bankruptcy protection. As a result, the Hutzes became concerned that they may not be able to collect through Delphi. In November 2005, Attorney Rossi, on behalf of the Hutzes, filed

an amended complaint against Gray and Cincinnati. The amended complaint again sought underinsured motorist coverage from Cincinnati.

{¶13} Cincinnati filed a motion to dismiss the Hutzes' amended complaint pursuant to the double-dismissal rule of Civ.R. 41. Cincinnati attached copies of the Hutzes' Civ.R. 41 dismissals in 2001 and 2004 to its motion to dismiss. The Hutzes filed a brief in opposition to Cincinnati's motion to dismiss. The Hutzes attached a copy of the letter from Attorney DeMarco to Attorney Ohlin as well as a copy of the enclosed letter from the claims adjuster of Delphi to their brief in opposition.

{¶14} In addition, the Hutzes filed a motion to vacate judgment pursuant to Civ.R. 60(B), wherein they sought to vacate the second dismissal. Among other items, the Hutzes attached a copy of Delphi's petition for bankruptcy protection in federal court to their motion. Cincinnati filed a brief in opposition to this motion.

{¶15} In February 2006, the trial court issued a judgment entry granting Cincinnati's motion to dismiss and, in addition, denying the Hutzes' motion to vacate. This judgment entry did not resolve all the claims against all the parties nor did it contain language pursuant to Civ.R. 54(B). Therefore, it was not a final, appealable order.

{¶16} In August 2008, the trial court dismissed the claims against Gray with prejudice as a result of a settlement agreement being reached. This judgment entry resolved the remaining claims of the matter; thus, it was a final, appealable order.

{¶17} The Hutzes have timely appealed the trial court's August 2008 judgment entry to this court. However, all their arguments on appeal concern the trial court's February 2006 judgment entry. The Hutzes raise two assignments of error. Their first assignment of error is:

{¶18} "The trial court erred in ruling that the second dismissal operated as an adjudication on the merits under the 'double dismissal' rule barring subsequent filing of the amended complaint for underinsured motorist coverage against [Cincinnati.]"

{¶19} Appellate review of a trial court's judgment granting a motion to dismiss due to application of the double-dismissal rule is de novo. See *Fromer v. DeVictor*, 8th Dist. No. 88955, 2007-Ohio-5064, at ¶5-8. (Citations omitted.)

{¶20} The Hutzes argue that both of their prior dismissals were not filed pursuant to Civ.R. 41(A)(1)(a) and, therefore, the double-dismissal rule does not apply. Civ.R. 41(A) provides:

{¶21} "(A) Voluntary dismissal: effect thereof.

{¶22} "(1) *By plaintiff; by stipulation*. Subject to the provisions of Civ.R. 23(E), Civ.R. 23.1, and Civ.R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

{¶23} "(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

{¶24} "(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

{¶25} "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

{¶26} "(2) *By order of court*. Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and

upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice."

{¶27} Accordingly, there are three distinct avenues in which a plaintiff may seek dismissal under Civ.R. 41(A), including: (1) dismissing the case without the approval of the opposing party or the trial court pursuant to Civ.R. 41(A)(1)(a); (2) dismissing the action pursuant to Civ.R. 41(A)(1)(b), by filing a stipulation of dismissal agreed to by all parties; or (3) utilizing Civ.R. 41(A)(2) and requesting the trial court to dismiss the claim. *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, at ¶9, citing and quoting *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, 42-43.

{¶28} The instant matter concerns the language at the end of Civ.R. 41(A)(1) – "except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court." Since the second voluntary dismissal operates as an adjudication on the merits, the doctrine of res judicata operates to bar a third complaint on the same claim. *Olynyk v. Scoles*, 2007-Ohio-2878, at ¶10. (Citations omitted.) This portion of Civ.R. 41(A) is "commonly referred to as the 'double-dismissal rule.'" Id. at ¶8. The Supreme Court of Ohio has held that "[t]he double-dismissal rule of Civ.R. 41(A)(1) applies only when both dismissals were notice dismissals under Civ.R. 41(A)(1)(a)." Id., at syllabus.

{¶29} In their appellate brief, the Hutzes contend the second dismissal was pursuant to Civ.R. 41(A)(1)(b). At oral argument, the Hutzes withdrew this argument.

Technically, we need not address the merits of this argument. See *Second Calvary Church of God in Christ v. Chomet*, 9th Dist. No. 07CA009186, 2008-Ohio-1463, at ¶24, and *State v. Petralia*, 11th Dist. No. 2001-L-101, 2003-Ohio-1745, at ¶39. However, we will engage in a brief examination of this issue, as it will provide a more complete analysis of this assignment of error.

{¶30} The second dismissal states: "[n]ow come Plaintiffs, by and through counsel, and hereby voluntarily dismiss their cause of action against Defendant Cincinnati Insurance Company in the above-captioned case pursuant to Rule 41(A)(1) of the Ohio Rules of Civil Procedure. Said Dismissal is without prejudice. All other causes of action are hereby expressly reserved." The question this presents is whether it is a dismissal under subsection (A)(1)(a) or (A)(1)(b) of the rule. The Hutzes argued the dismissal was by agreement of the parties under subsection (A)(1)(b). They refer to the letter from Attorney DeMarco to Attorney Ohlin, which indicates the dismissal was the result of an agreement reached at a pre-trial conference. This letter provides, in part:

{¶31} "At the recently held pre-trial, you agreed that you would dismiss Cincinnati Insurance Company from this lawsuit if, in fact, you were provided with a letter from the Adjuster for Delphi Corporation. Accordingly, I am asking that you execute the Partial Dismissal Entry that I have provided and return a time-stamped copy to me."

{¶32} While Cincinnati may have agreed that the claims against it should be dismissed, no one signed the dismissal entry on behalf of Cincinnati. This court has held that a Civ.R. 41(A)(1)(b) dismissal is ineffective if one of the parties fails to sign it. See *Wick v. Krihwan*, 11th Dist. No. 2004-L-160, 2005-Ohio-7048, at ¶19. Since the

dismissal was not signed by a representative of Cincinnati, the dismissal was not pursuant to Civ.R. 41(A)(1)(b). Moreover, the rule requires it to be "signed by *all* parties who have appeared in the action." (Emphasis added.) Gray, who at the time was still a party, did not sign the dismissal, nor is there any indication that Gray acquiesced to the dismissal in any way.

{¶33} Since the second dismissal was only signed by counsel for the Hutzes and was not signed by either of the other parties, it was not a stipulated dismissal pursuant to Civ.R. 41(A)(1)(b). Thus, the second dismissal was pursuant to Civ.R. 41(A)(1)(a).[1]

{¶34} The Hutzes argue that their first dismissal was pursuant to Civ.R. 41(A)(2). The document is entitled "Rule 41(A) voluntary dismissal entry."

{¶35} Cincinnati attached a copy of this dismissal to its motion to dismiss. The dismissal contains two time-stamped dates, October 25, 2001 and October 30, 2001. For clarification, we will refer to this document as the October dismissal.

{¶36} In many circumstances, courts are not permitted to take judicial notice of proceedings that occurred in a separate case. See *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, at ¶7. (Citations omitted.) This restriction has even been applied to situations where the parties were the same in the prior action. See *Charles v. Conrad*, 10th Dist. No. 05AP-410, 2005-Ohio-6106, at ¶26. We note this prohibition is especially applicable when a court attempts to review testimony from a prior case. See *State v. Clark*, 11th Dist. Nos. 2001-P-0031, 2001-P-0033, 2001-P-0034, 2001-P-0057, and 2001-P-0058, 2004-Ohio-334, at ¶32. (Citations omitted.) See, also, *Natl. Distillers & Chem. Corp. v. Limbach* (1994), 71 Ohio St.3d 214, 216.

1. We note a voluntary dismissal pursuant to Civ.R. 41(A)(1)(a) is not a final, appealable order. *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, at ¶24.

{¶37} Recently, the Supreme Court of Ohio quoted the Second Circuit Court of Appeals for the following distinction: "'[a] court may take judicial notice of a document filed in another court "not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings."'" *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, at ¶20, quoting *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.* (C.A.2, 1992), 969 F.2d 1384, 1388, quoting *Kramer v. Time Warner, Inc.* (C.A.2, 1991), 937 F.2d 767, 774.

{¶38} In addition, the Supreme Court of Ohio has recognized a particular area where courts are permitted to take judicial notice of prior proceedings, in cases involving Civ.R. 41. *Indus. Risk Insurers v. Lorenz Equip. Co.* (1994), 69 Ohio St.3d 576, syllabus. Specifically, the court held "[i]n an action that has once been voluntarily dismissed pursuant to Civ.R. 41(A)(1)(a), a trial court, when ruling on a Civ.R. 41(B)(1) motion to dismiss for failure to prosecute, may consider the conduct of the plaintiff in the prior action." Id. In explaining its rationale, the Supreme Court of Ohio stated "a trial court is not required to suffer from institutional amnesia. It is axiomatic that a trial court may take judicial notice of its own docket." Id. at 580.

{¶39} In light of the holdings in *Indus. Risk Insurers v. Lorenz Equip. Co.* and *State ex rel. Coles v. Granville*, supra, we believe it is appropriate to take judicial notice of the pleadings in the prior cases when ruling on a motion to dismiss pursuant to the double-dismissal rule in Civ.R. 41(A). This is because the pleadings are not being examined for the truth of their contents; rather, the sole purpose of taking judicial notice of the pleadings is to determine what was filed in the prior actions. As public records, the pleadings in the prior actions are "capable of accurate and ready determination." See Evid.R. 201(B). As an aside, we recognize the Stark County Common Pleas Court

has taken judicial notice of the records in prior cases when ruling on a case involving the double-dismissal rule in Civ.R. 41(A). *Byler v. Hartville Auction, Inc.* (Sept. 26, 1994), 5th Dist. No. 1994CA00081, 1994 Ohio App. LEXIS 4324, at *4.

{¶40} While a trial court would normally be in a position to take judicial notice of the prior pleadings, we choose to take judicial notice of the trial docket in case No. 2001 CV 00663 pursuant to our de novo review. Further, the act of an appellate court taking judicial notice is not unprecedented, as the Tenth Appellate District has taken judicial notice of pleadings from another trial court case. See *Stancourt v. Worthington City School Dist. Bd. of Edn.*, 164 Ohio App.3d 184, 2005-Ohio-5702, at ¶14, fn. 3, citing *In re Adoption of Lassiter* (1995), 101 Ohio App.3d 367, 374.

{¶41} The trial docket in case No. 2001 CV 00663 contains a document filed on September 25, 2001 titled "Rule 41(A) voluntary dismissal entry." The language of this document reads:

{¶42} "Upon motion of the Plaintiff, and for good cause shown, the complaints against Defendant, Stephanie Gray, are hereby dismissed, without prejudice pursuant to Ohio Civil Rule 41(A)(2). Plaintiff further requests that the trial court approve this dismissal subject to the condition that Plaintiff can re-file this action within one year from the date of this voluntary dismissal."

{¶43} The September entry was stamped "it is so ordered" and contained a stamp of the trial court's signature. However, on October 19, 2001, the trial court issued a judgment entry, which states "[d]ue to administrative error, this case was inadvertently dismissed from the Court's docket. The Court hereby reinstates this case to the active docket."

{¶44} Thereafter, the Hutzes filed the October dismissal. The body of this document provides, in its entirety:

{¶45} "Upon motion of the Plaintiff, and for good cause shown, the complaints against Defendants, Stephanie Gray and the Cincinnati Insurance Company, are hereby dismissed, without prejudice pursuant to Ohio Civil Rule 41(A)(2). Plaintiff further requests that the trial court approve this dismissal subject to the condition that Plaintiff can re-file this action within one year from the date of this voluntary dismissal."

{¶46} We observe that the Hutzes used nearly identical language in the September and October 2001 dismissals. The only difference in the language is that the September document only sought to dismiss Stephanie Gray, while the October document sought to dismiss Gray and Cincinnati.

{¶47} The language of these documents is somewhat confusing, in that the first sentence is consistent with language that would appear in a judgment entry. Conversely, in the second sentence, it is evident that the Hutzes are asking the trial court to do something, to wit: approve the dismissal. Finally, we note the conditional language of the request, that the Hutzes be permitted to re-file the lawsuit within one year.

{¶48} The trial court's docket in case No. 2001 CV 00663 reveals that the October "dismissal" document was the final entry. Apparently, the parties and the trial court all treated this document as having the effect of dismissing the case. It is arguable that the October 2001 document filed by the Hutzes did not actually dismiss the case.

{¶49} It does not appear from the record that the trial court issued a judgment entry either approving or denying the Hutzes' request for the court to dismiss the case

pursuant to Civ.R. 41(A)(2), as it did with the September 2001 dismissal request. If the trial court had approved the request, all parties would have known that the dismissal was pursuant to Civ.R. 41(A)(2). Alternatively, had the trial court denied the request, the Hutzes would have had the opportunity to file a notice dismissal pursuant to Civ.R. 41(A)(1)(a).

{¶50} For the purposes of this appeal, we will conclude that the document filed by the Hutzes acted as a dismissal. The issue is whether the dismissal should be classified as a Civ.R. 41(A)(1)(a) dismissal, a Civ.R. 41(A)(2) dismissal, or something else for purposes of the double-dismissal rule.

{¶51} While the document indicates it was filed pursuant to Civ.R. 41(A)(2), it was not signed by the trial court. Further, the Hutzes do not allege that the trial court signed a separate judgment entry approving the dismissal pursuant to Civ.R. 41(A)(2), nor does the record before this court contain a copy of an entry signed by the court. Civ.R. 41(A)(2) specifically requires dismissals under that section to be "by order of court." Since the dismissal was not approved by the trial court, it was not pursuant to Civ.R. 41(A)(2).

{¶52} However, we also cannot conclude the dismissal was pursuant to Civ.R. 41(A)(1)(a). The language of the document does not unequivocally state that it is a "notice" dismissal pursuant to Civ.R. 41(A)(1)(a). Instead, it is apparent that the Hutzes sought the trial court's approval for a Civ.R. 41(A)(2) dismissal. The fact that the trial court did not act on the Hutzes' request does not transform the dismissal into a Civ.R. 41(A)(1)(a) dismissal. We reject Cincinnati's contention that this is the only logical result.

{¶53} The Hutzes' claims against Cincinnati were dismissed on two occasions. However, only the second of these dismissals was pursuant to Civ.R. 41(A)(1)(a). Thus, their 2005 amended complaint against Cincinnati was not barred by the doctrine of res judicata under the double-dismissal rule.

{¶54} The Hutzes' first assignment of error has merit.

{¶55} The Hutzes' second assignment of error is:

{¶56} "The trial court erred in failing to grant appellant's motion to vacate the judgment pursuant to Civ.R. 60(B)."

{¶57} The Hutzes argue that the trial court erred in denying their Civ.R. 60(B) motion for relief from judgment. In their Civ.R. 60(B) motion, the Hutzes sought to vacate the second dismissal of Cincinnati.

{¶58} We have already concluded that the first dismissal was not pursuant to Civ.R. 41(A)(1)(a) and, thus, the double-dismissal rule does not act to bar the Hutzes' November 2005 amended complaint against Cincinnati. In addition, the effect of our disposition of the first assignment of error is that the October 2004 dismissal was the first dismissal of Cincinnati pursuant to Civ.R. 41(A)(1)(a). A first dismissal pursuant to Civ.R. 41(A)(1)(a), unlike a second dismissal, does not act as an adjudication upon the merits for purposes of Civ.R. 60(B). *Hensley v. Henry* (1980), 61 Ohio St.2d 277, syllabus. See, also, *Thorton v. Montville Plastics & Rubber, Inc.*, 2009-Ohio-360, at ¶24, citing *Vitantonio, Inc. v. Baxter*, 116 Ohio St.3d 195, 2007-Ohio-6052, at ¶4. The First Appellate District has noted:

{¶59} "The Ohio Supreme Court has held that a trial court is incompetent to grant relief under Civ.R. 60(B) where a plaintiff's notice of dismissal under Civ.R. 41(A)(1) does not operate as an adjudication upon the merits of a claim. [*Hensley v.*

Henry, supra.] The court noted that 'Civ.R. 60(B) is restrictive in that it permits the court to grant relief only from certain "*final* judgments, orders, or proceedings."' [Id. at 279.]" *Homecomings Financial Network, Inc. v. Oliver*, 1st Dist. No. C-020625, 2003-Ohio-2668, at ¶8. (Emphasis sic.)

{¶60} Since the trial court did not have authority to consider the Hutzes' Civ.R. 60(B) motion, the Hutzes' second assignment of error is moot. See App.R. 12(A)(1)(c).

{¶61} The judgment of the trial court is reversed. This matter is remanded for further proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.