

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000575-MR

TINA B. CONNER

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 06-CI-01476

PAUL PATTON

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE AND VANMETER, JUDGES; KNOPF<sup>1</sup>, SENIOR JUDGE

KNOPF, SENIOR JUDGE: Tina B. Conner (hereinafter Conner) appeals the January 24, 2007, order of the Franklin Circuit Court granting Paul Patton's (hereinafter Patton) motion to dismiss Conner's civil action based on the doctrine of *res judicata*. We affirm.

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

These parties are before this court for a third time.<sup>2</sup> The complete factual and procedural history was set out in the first two opinions and need not be repeated here. The facts essential to this appeal are: In 2002, Conner filed an action against Patton and the Commonwealth of Kentucky alleging sexual harassment, intentional infliction of emotional distress (IIED), outrageous conduct, defamation and waste. All claims against the Commonwealth and the claims against Patton of sexual harassment and waste were dismissed. Conner appealed the dismissals and a panel of this court affirmed on April 16, 2004. *See Conner v. Patton*, 133 S.W.3d 491 (Ky.App. 2004). During the pendency of that appeal, the trial court dismissed the claim of defamation, leaving IIED as the only remaining claim. Conner moved to amend her complaint to include additional claims for relief. The trial court denied her motion, granted Patton's motion to dismiss the action pursuant to CR<sup>3</sup> 41.02 and dismissed the IIED claim. Conner appealed the dismissals and the denial of her motion to amend. A panel of this court affirmed on October 26, 2007.<sup>4</sup>

During the pendency of the second appeal, on October 24, 2006, Conner filed a new action against Patton. Her new complaint alleged official misconduct in the first and second degrees, freedom of speech violations, equal protection and due process violations, right of privacy violations, unlawful injury to a corporation and false swearing.

These were essentially the same claims with which Conner had attempted to amend her

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<sup>2</sup> See *Conner v. Patton*, 133 S.W.3d 491 (Ky.App. 2004) and *Conner v. Patton* 2006-CA-001370-MR.

<sup>3</sup> Kentucky Rule of Civil Procedure.

<sup>4</sup> See 2006-CA-001370-MR. (To be published; petition for rehearing denied January 2, 2008.)

complaint in the 2002 action. Patton did not file an answer, but rather moved to have the complaint dismissed pursuant to CR 12.02 and the doctrine of *res judicata*. In response, Conner sought to have Patton found in default for failure to plead or otherwise defend under CR 55.01 and claimed that she had been provided insufficient notice of the motion hearing. Patton's motion was granted in an order entered January 24, 2007. Conner filed a motion to alter, amend or vacate, which was denied in an order entered February 20, 2007. This appeal followed.

Conner requests a reversal of the circuit court's dismissal based on three assertions: 1) the doctrine of *res judicata* is inapplicable because the causes of the current action were not litigated in the former action due to the court's denial of Conner's leave to amend her complaint to litigate her current causes of action in that former action; 2) the trial court erred in failing to find Patton in default, pursuant to CR 55.01, for failure to plead or otherwise defend; and 3) a judgment subject to potential reversal by reason of its pendency in the Court of Appeals is not conclusive of any issue for purposes of applying the affirmative defense of *res judicata* to a subsequent action.

Res judicata is a doctrine that bars subsequent suits between the same parties and their privies on a cause of action that was previously decided upon its merits. More specifically, [t]he doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. Res judicata is generally thought of as consisting of two subparts. Claim preclusion bars a party from re-litigating a previously

adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. Issue preclusion, also known as collateral estoppel, bars a party from re-litigating any issue actually litigated and finally decided in an earlier action.

*Buis v. Elliott*, 142 S.W.3d 137, 139-140 (Ky. 2004) (internal quotations omitted).

Conner's claims fall under the claim preclusion subpart of *res judicata*. Although these specific issues were not litigated and decided in the earlier action, they stem from the same cause of action, and thus should have been brought at the time of the original action.

Conner argues that the causes of action in the present action are not precluded by *res judicata*, because they were never litigated in the prior action. We do not agree. In support of her argument, Conner presents several cases. The first of these cases is *Newman v. Newman*, 451 S.W.2d 417 (Ky. 1970). Conner specifically cites the language in *Newman* which reads: “the rule of res adjudicata does not act as a bar if there are different issues or the questions of law presented are different.” *Id.* at 419. The court in *Newman* next states:

Likewise, it has long been recognized that a party may not split his cause of action, therefore, if a cause of action should have been presented and the party failed to do so and the matter should again arise in another action, it will be held that the first action was res adjudicata as to all causes that should have properly been presented.

*Id.* Whether Conner overlooked this portion of the *Newman* opinion or chose to ignore it is irrelevant. The principle that causes of action should not be split remains steadfast.

Furthermore, we do not believe the facts in *Newman* to be similar to those in the case before us. *Newman* involved two claims, one of which had not ripened until

after the conclusion of the first action. Therefore, the ability to bring both claims in the original action was an impossibility. In the case before us, however, not only was it possible to bring the newly presented causes of action in the original action, it was necessary.

Conner contends that the court in *Buis v. Elliott*, 142 S.W.3d 137 (Ky. 2004) adjudged that *res judicata* does not exist in cases where a leave to amend was denied in the original action. The facts of *Buis*, however, make it inapplicable to the case before us. *Buis* involved multiple parties: Buis, Cox and Robert and Sheila Elliott. In the original suit, the trial court did not decide any claim or issue between Buis and the Elliotts, it merely established Buis' liability to Cox, who was the plaintiff of the original suit. The trial court denied Buis' motion for leave to file a cross-claim against the Elliotts as to any issue of liability between himself and them. In finding that *res judicata* did not bar Buis from pursuing a new action against the Elliotts, The Kentucky Supreme Court stated:

[Buis] was not required to file a cross-claim in the original action, as cross-claims in Kentucky are *merely permissive and not compulsory*. As a result, the rights and liabilities between [Buis] and the Elliotts were not, *nor were they required to be*, determined by an existing final judgment rendered upon the merits in the original action. [Buis] *did not have the opportunity* to actually litigate the issue of the Elliotts' possible liability to [him] for indemnification or breach of contract, thus neither is he collaterally estopped from bringing the current action.

*Id.* at 139 (emphasis added) (internal citations omitted). In the case before us, Conner was required to bring all claims for relief stemming from the same cause of action.

Furthermore, Patton was already a party from which Conner sought relief. Thus, Conner was given the opportunity to litigate all of her claims but simply failed to do so in her original complaint.

Conner also cites to the case of *Arnold v. K-Mart Corp.*, 747 S.W.2d 130 (Ky.App. 1988). *K-mart* is also inapplicable, in that the claims in that case not only differed in subject matter, back pay of wages and unconstitutional termination, but more importantly, in jurisdiction, district court and circuit court.

The remainder of Conner's argument goes to the heart of whether the original action between herself and Patton was litigated and resolved on the merits. In *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998), the Kentucky Supreme Court determined that three elements must be present in order for claim preclusion to bar further litigation. These elements are: identity of the parties, identity of the causes of action and the action must have been resolved on the merits. *Id.* at 465.

There is no dispute that Patton and Conner were both parties to the original action. There is some dispute as to whether the causes of action were identified in the first suit. Conner argues that they were not, because her leave to amend the complaint and include these specific, individual claims was denied. We disagree. A cause of action is “a group of *operative facts* giving rise to one or more bases for suing; a *factual situation* that entitles one person to obtain a remedy in court from another person.”

*Black's Law Dictionary* 214 (7th ed. 1999) (emphasis added). Further, a new cause of action is “a claim *not* arising out of *or relating* to the conduct, *occurrence*, or transaction contained in the original pleading.” *Id.* (emphasis added). Under these plain legal definitions, the cause of action in the second action was clearly the same cause of action as the original.

The remaining of the *Yeoman* elements is that the action must have been resolved on the merits. In its order dismissing the original action, entered May 11, 2006, the Franklin Circuit Court stated “This Court finds that the Plaintiff has failed to prosecute her claim and such claim should be dismissed pursuant to CR 41.02.” CR 41.02(3) reads:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, for want of prosecution under Rule 77.02(2), or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The cause of action, or operative facts giving rise to her claims for relief, is the same in both actions – the relationship between the parties and the fallout that resulted. This cause of action was both litigated, by being brought in the original action, and adjudicated on the merits, by its dismissal pursuant to CR 41.02, in the first action. The fact that the case did not conclude in the manner Conner hoped for does not diminish its status as such. For the foregoing reasons, we find that the cause of action in the present action is precluded by *res judicata*.

Conner next argues that the trial court erred in failing to find Patton in default for failure to plead or otherwise defend. In support of this argument, she cites to CR 55.01, which finds a party in default when they have “failed to plead or otherwise defend as provided by these rules.” Conner contends that Patton rendered his default complete by asserting his defense of *res judicata* through the filing of his motion pursuant to CR 12.02 as opposed to asserting it in an answer. We disagree.

CR 12.02 states, in part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) improper venue, (d) insufficiency of process, (e) insufficiency of service of process, (f) failure to state a claim upon which relief can be granted, and (g) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion.

Although the doctrine of *res judicata* is not expressly listed under CR 12.02 as a pleading that may first be made by a motion, we believe it to be equivocal to a party failing to state a claim upon which relief can be granted. Furthermore, the Kentucky Supreme Court has ruled that the defense of *res judicata* may be first asserted by a motion to dismiss in the absence of any issue of fact. *Sedley v. City of West Buechel*, 461 S.W.2d 556 (Ky. 1970). Because the cause of action in both lawsuits is the same, there is no issue of fact.

Conner's final argument is that a judgment subject to potential reversal by reason of its pendency in the Court of Appeals is not conclusive of any issue for purposes of applying the affirmative defense of *res judicata* to a subsequent action. With this we agree. It is our opinion, however, that the trial court addressed this issue and dealt with it appropriately and in a manner that does not warrant a reversal. In its order granting Patton's motion to dismiss this action pursuant to the doctrine of *res judicata*, the Franklin Circuit Court stated:

Plaintiff may pursue these new theories if --- and only if --- the Court of Appeals reverses this Court's prior judgment in the original action and grants leave to amend the complaint in the prior suit. . . . If the plaintiff prevails on appeal on her claim that this Court erred in denying her leave to file her second amended complaint in the original action, then the judgment against her will not be final, and plaintiff would have a right to litigate those claims. If the defendant prevails on appeal, all of those claims would be clearly barred under the doctrine of *res judicata*.

In the interest of time and fairness to both parties, the trial court was faced to make a ruling. It is our opinion that ruling was done in a manner that was not only fair to the parties and their remaining appellate issues but also respectful to this court and the potential outcome in the other, as yet unresolved, appellate action. The trial court ruling was not conclusive of the holding of the other concurrent appellate action but rather conditional upon it. The court managed to address both potential appellate outcomes without requiring the parties to wait extensively for a judgment in the second circuit action.

For the foregoing reasons, the January 24, 2007 and February 20, 2007, orders of the Franklin Circuit Court are affirmed.

ALL CONCUR.

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