

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Deidre Marie Thomas et al.,	:	
Plaintiffs-Appellees,	:	
(Wright State Physicians, Inc. and	:	No. 12AP-839
Daniel J. Lacey, M.D.,	:	(Ct. of Cl. No. 2011-10886)
Appellants),	:	(REGULAR CALENDAR)
v.	:	
Wright State University School of	:	
Medicine,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 30, 2013

Leppla Associates, Ltd., Gary J. Leppla and Philip J. Leppla,
for appellees Deidre Marie Thomas and Hezekiah Calvin
Rucker, Jr.

Michael DeWine, Attorney General, and Brian M. Kneafsey,
Jr., for appellee Wright State University School of Medicine.

The Triona Firm, James P. Triona and Paul J. Vollman, for
appellants.

APPEAL from the Court of Claims of Ohio

KLATT, P.J.

{¶ 1} Appellants, Daniel J. Lacey, M.D., and Wright State Physicians, Inc. ("WSPI"), appeal a judgment of the Court of Claims of Ohio that found Lacey personally

immune from liability and denied WSPI's motions for intervention and an immunity determination. For the following reasons, we dismiss this appeal.

{¶ 2} On September 2, 2011, plaintiffs-appellees, Deidre Marie Thomas and Hezekiah Calvin Rucker, Jr., filed a medical malpractice suit against the Children's Medical Center of Dayton ("Dayton Children's"), WSPI, and Lacey in the Montgomery County Court of Common Pleas. According to the complaint, Lacey failed to timely diagnose and treat plaintiffs' son when he presented at Dayton Children's emergency room. Plaintiffs also alleged in the complaint that WSPI was Lacey's employer.

{¶ 3} Five days after bringing their common pleas action, plaintiffs filed a second malpractice suit arising out of the same alleged negligence in the Court of Claims. In their second complaint, plaintiffs named as defendants Wright State University School of Medicine ("Wright State"), Lacey, and WSPI. Plaintiffs indicated in their complaint that Lacey and WSPI might claim immunity as agents or employees of Wright State.

{¶ 4} Within days of the filing of the second complaint, the Court of Claims dismissed Lacey and WSPI as parties because neither was a state agency or instrumentality. As the Court of Claims stated in its entry, pursuant to R.C. 2743.02(E), only state agencies and instrumentalities can be defendants in original actions in the Court of Claims.

{¶ 5} Shortly thereafter, the Court of Claims issued an entry finding that any recovery in the common pleas action might be partially or wholly dispositive of the Court of Claims action as a collateral recovery under R.C. 2743.02(D). Thus, the Court of Claims stayed litigation of the action's merits pending the resolution of the common pleas action. The Court of Claims also scheduled a status conference to discuss any immunity issues.

{¶ 6} On March 5, 2012, Lacey and WSPI filed an assertion of personal immunity in the common pleas action. In response to Lacey's assertion of immunity, plaintiffs dismissed him from their action in the common pleas court. Plaintiffs maintained their common pleas action against WSPI based on the theory of respondeat superior.

{¶ 7} After filing their assertion of immunity in the common pleas court, Lacey and WSPI filed a trio of documents in the Court of Claims: (1) a motion to intervene, (2) a complaint for immunity, and (3) a motion for a personal immunity determination under L.C.C.R. 4.1. By these documents, Lacey sought a determination under R.C. 9.86 and

2743.02(F) that he was immune from liability for injury to plaintiffs' son caused in the performance of his duties as a state employee. WSPI sought to join the action so that it could obtain a determination that it was an instrumentality of the state. WSPI contended that if it was a state instrumentality, it would also be entitled to immunity. Both plaintiffs and Wright State opposed Lacey and WSPI's motions.

{¶ 8} At the Court of Claims' status conference regarding immunity issues, plaintiffs and Wright State agreed to file a stipulation regarding Lacey's immunity. The parties then stipulated on the record that Lacey was an employee of both Wright State and WSPI and that "[a]t all times during [the] treatment relevant to the allegations made in this suit, Dr. Lacey was acting within the course and scope of his employment with the Wright State University, as well as Wright State Physicians, Inc." (R. 24 at ¶ 3.)

{¶ 9} In an entry dated August 24, 2012, the Court of Claims approved the parties' stipulation and found that Lacey was entitled to personal immunity under R.C. 9.86 and 2743.02(F). Given its determination that Lacey had immunity, the Court of Claims denied Lacey's motions for intervention and an immunity determination as moot. Turning to WSPI, the Court of Claims refused to hold a hearing to determine WSPI's immunity because no personal immunity arises from status as a state instrumentality. The Court of Claims denied WSPI's motion for intervention because it found that WSPI was not a state instrumentality and, therefore, it could not be joined as a defendant in an action before the Court of Claims.

{¶ 10} Lacey and WSPI now appeal from the August 24, 2012 judgment, and they assign the following errors:

[1.] THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT DR. LACEY WAS WORKING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH HIS PHYSICIAN PRACTICE GROUP WSPI; THEREBY VIOLATING RC2743.02(F) [sic].

[2.] THE TRIAL COURT ERRED WHEN IT DENIED WSPI'S MOTION FOR AN IMMUNITY DETERMINATION AND MOTION TO INTERVENE.

[3.] THE TRIAL COURT ERRED BY INCLUDING LANGUAGE IN ITS DECISION THAT WSPI WAS NOT AN INSTRUMENTALITY OF OHIO UNDER RC 2743.01(A).

{¶ 11} The outcome of this appeal turns not on the assignments of error, but on plaintiffs' and Wright State's motions to dismiss. Plaintiffs' motion asserts that that this court lacks jurisdiction over the August 24, 2012 judgment to the extent that it denied WSPI's motion to intervene. Wright State's motion asserts that neither Lacey nor WSPI have standing to appeal. We will first address the question of Lacey's and WSPI's standing.

{¶ 12} "Appeal lies only on behalf of a party aggrieved by the final order appealed from." *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.*, 140 Ohio St. 160 (1942), syllabus. A party is aggrieved, and thus has standing to appeal, if (1) he has a present interest in the subject matter of the litigation and (2) he has been prejudiced by the judgment of the trial court. *Willoughby Hills v. C. C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26 (1992); *Chase Bank USA, N.A. v. Jacobs*, 10th Dist. No. 11AP-343, 2012-Ohio-64, ¶ 7. The interest in the underlying litigation must be immediate and pecuniary, and not a remote consequence of the judgment. *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177 (2001). To show prejudice, the party must demonstrate that the trial court's error injuriously affected him. *Ohio Contract Carriers Assn., Inc.* at 161.

{¶ 13} As a general rule, a person who is not an actual party to the case does not have the requisite interest to have standing to appeal. *Lopez v. Veitran*, 1st Dist. No. C-110511, 2012-Ohio-1216, ¶ 10; *Eaton Natl. Bank & Trust Co. v. LNG Resources, LLC*, 10th Dist. No. 08AP-829, 2012-Ohio-1186, ¶ 4; *Ohio Dept. of Taxation v. Lomaz*, 177 Ohio App.3d 284, 2008-Ohio-3733, ¶ 13 (11th Dist.); *In re Adoption of T.B.S.*, 4th Dist. No. 07CA3139, 2007-Ohio-3559, ¶ 7. Merely appearing in a proceeding and presenting argument does not make a person a party to an action with a right to appeal. *PHH Mtge. Corp. v. Therrien*, 10th Dist. No. 12AP-312, 2012-Ohio-5307, ¶ 8; *Lopez* at ¶ 10; *In re Adoption of T.B.S.* at ¶ 7; *In re Estate of Markovich*, 9th Dist. No. 06CA008868, 2006-Ohio-6064, ¶ 11.

{¶ 14} Despite the general rule, in certain instances, a non-party may have the necessary interest in the underlying action to appeal. First, a person who attempted to intervene as a party may appeal from a denial of the motion to intervene. *Eaton Natl. Bank & Trust Co.* at ¶ 5; *In re D.T.*, 10th Dist. No. 07AP-853, 2008-Ohio-2287, ¶ 8; *In re*

Fusik, 4th Dist. No. 02CA16, 2002-Ohio-4410, ¶ 20. Second, a state officer or employee whose immunity was determined by the Court of Claims may appeal that determination subject to a showing of prejudice. *Marotto v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 12AP-27, 2012-Ohio-6158, ¶ 4, 18, citing *Marotto v. Ohio State Univ. Med. Ctr.*, 10th Dist. No. 12AP-27, 2012-Ohio-1078, ¶ 5-8.

{¶ 15} In the case at bar, pursuant to *Marotto*, Lacey has the requisite interest to appeal from the Court of Claims' determination that he is entitled to immunity. However, interest alone does not establish standing. Lacey must also demonstrate that the trial court's immunity determination prejudiced him. Lacey cannot meet this second requirement because the judgment rendered him immune from suit, i.e., it relieved Lacey of all exposure to liability for his alleged medical malpractice. See *Conley v. Shearer*, 64 Ohio St.3d 284, 287 (1992) ("If the Court of Claims determines that the employee was acting within the scope of employment, in furtherance of the interests of the state, the state has agreed to accept responsibility for the employee's acts. * * * In that event, only the state is subject to suit."). Thus, the judgment favored Lacey; it did not injure him.

{¶ 16} Lacey, however, argues that he was prejudiced by the judgment because it approved the stipulation that he was acting within the scope of his employment with WSPI when he allegedly negligently treated plaintiffs' son. Lacey asserts that this approved fact will harm WSPI in the action before the common pleas court. Lacey fears that plaintiffs will use the stipulation and/or the judgment to prove that WSPI is liable for Lacey's alleged negligence under the theory of respondeat superior. The prejudice that Lacey identifies affects WSPI, not Lacey. Lacey, therefore, has failed to demonstrate any prejudice that would give him standing.

{¶ 17} Moreover, Lacey's fears that the stipulation will bind WSPI are misplaced. Factual stipulations are not binding on a non-party. *State ex rel. Jeany v. Cleveland Concrete Constr., Inc.*, 107 Ohio St.3d 20, 2005-Ohio-5828, ¶ 8. Thus, the stipulation, which only plaintiffs and Wright State agreed to, will not bind WSPI.

{¶ 18} Additionally, the Court of Claims' judgment, which approved the stipulation at issue, will not serve to preclude litigation of the factual issue in the common pleas case. Issue preclusion, otherwise known as collateral estoppel, prevents the relitigation, in a second action, of an issue that was actually and directly litigated and determined in a

prior action. *Progressive Plastics, Inc. v. Testa*, 133 Ohio St.3d 490, 2012-Ohio-4759, ¶ 17; *State ex rel. Nickoli v. Erie MetroParks*, 124 Ohio St.3d 449, 2010-Ohio-606, ¶ 21. But, the doctrine does not apply unless the parties to the second action are identical or in privity with those in the prior action. *Progressive Plastics, Inc.* at ¶ 17; *Nickoli* at ¶ 22. Here, the parties are not identical as Wright State is the sole defendant in the Court of Claims action, while WSPI and Dayton Children's are the defendants in the common pleas action. Thus, for issue preclusion to operate against WSPI in the common pleas action, WSPI would have to be in privity with Wright State.

{¶ 19} Privity may arise from " 'a mutuality of interest, including an identity of desired result.' " *Kirkhart v. Keiper*, 101 Ohio St.3d 377, 2004-Ohio-1496, ¶ 8, quoting *Brown v. Dayton*, 89 Ohio St.3d 245, 248 (2000). By that broad measure, WSPI and Wright State are not privies because their interests are not aligned. WSPI wants to avoid liability by establishing that it is not legally responsible for Lacey's alleged malpractice. Thus, it is in WSPI's interest to demonstrate that Lacey's treatment of plaintiffs' son did not occur in the scope and course of his employment with WSPI. Wright State, on the other hand, has no interest in whether Lacey was acting within the course and scope of his employment with WSPI.

{¶ 20} Due to its lack of interest, Wright State had no motivation to contest the factual stipulation in question. WSPI cannot be held to a judgment approving a stipulation that Wright State, because of its lack of interest, had no incentive to fully litigate. *See State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 174 Ohio App.3d 135, 2007-Ohio-6594, ¶ 18 (10th Dist.), *aff'd*, 120 Ohio St.3d 386, 2008-Ohio-6254 (" 'The essential test in determining whether the doctrine of collateral estoppel is to be applied is whether the party against whom the prior judgment is being asserted had full representation and a "full and fair opportunity to litigate that issue in the first action." ' "). Given the absence of privity and lack of opportunity for full litigation, plaintiffs cannot rely on issue preclusion to establish in the common pleas action that Lacey was acting within the course and scope of his employment with WSPI.

{¶ 21} Because Lacey cannot prove that the Court of Claims' judgment prejudiced him, he does not have standing to appeal it. Accordingly, we grant Wright State's motion to dismiss the appeal as to Lacey.

{¶ 22} We next turn to the question of WSPI's standing. Initially, WSPI argues that, under *Ohio Contract Carriers Assn., Inc.*, a non-party can appeal as long as it establishes an interest in the litigation. WSPI misconstrues *Ohio Contract Carriers Assn., Inc.* In that case, the Supreme Court of Ohio held that the appellant lacked standing because it failed to show that its substantial rights had been adversely affected by the appealed order. *Id.* at 163. The court recognized that the appellant may have been a party in the foregoing proceedings, but it found that that fact did not give the appellant a right to appeal in the absence of a demonstration of prejudice. *Id.* Nothing in *Ohio Contract Carriers Assn., Inc.* negates the general rule that only actual parties have standing to appeal. Rather, *Ohio Contract Carriers Assn., Inc.* emphasizes that an appellant must have party status (which establishes the requisite interest) *and* show that the judgment prejudices him.

{¶ 23} Despite the fact that it was not a party below, WSPI has the necessary interest in the underlying action to have standing to appeal because it attempted to intervene. *See Eaton Natl. Bank & Trust Co.* at ¶ 5; *In re D.T* at ¶ 8; *In re Fusik* at ¶ 20. As the Court of Claims denied WSPI's motion to intervene, WSPI was prejudiced.

{¶ 24} Our analysis as to WSPI's standing, however, is not concluded. An appeal from the denial of a motion to intervene is limited solely to the issue of intervention. *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, ¶ 18; *State ex rel. Montgomery v. Columbus*, 10th Dist. No. 02AP-963, 2003-Ohio-2658, ¶ 33. WSPI, therefore, cannot attack the denial of its motion for an immunity determination on appeal.

{¶ 25} Even if the scope of WSPI's appeal was not restricted, WSPI could not challenge the denial of its motion for an immunity determination. WSPI lacks the standing to appeal that ruling because the ruling did not prejudice it. WSPI argues that it was prejudiced because the Court of Claims denied it immunity. This argument betrays WSPI's fundamental misunderstanding of the concept of immunity. WSPI repeatedly argues that it is entitled to immunity because it is a state instrumentality. This argument is nonsensical. R.C. 9.86 provides state officers and employees immunity for damage or injury caused in the performance of the officers' or employees' duties. WSPI purports to be a state instrumentality, not a state officer or employee, so R.C. 9.86 cannot apply to it.

A state instrumentality is part of the state. R.C. 2743.01(A). The state waived its immunity from liability and consented to be sued, and have its liability determined, in the Court of Claims. R.C. 2743.02(A)(1). Thus, a finding that WSPI is a state instrumentality would expose WSPI to liability, not entitle it to immunity.

{¶ 26} L.C.C.R. 4.1 states that "[a]ny party may file a motion requesting that the court of claims make a determination, as required by R.C. 2743.02(F), as to whether the officer or employee is entitled to personal immunity under R.C. 9.86 and whether the courts of common pleas have jurisdiction over the civil action." WSPI, however, did not actually want immunity; it wanted a determination that it was a state instrumentality that must be sued in the Court of Claims. Consequently, when WSPI filed its motion for an immunity determination under L.C.C.R. 4.1, it sought relief it could never receive. The denial of such relief, therefore, did not injuriously affect WSPI.

{¶ 27} Although WSPI has standing to appeal the denial of its motion for intervention, it lacks standing to appeal the denial of its motion for an immunity determination. Therefore, we grant in part and deny in part Wright State's motion to dismiss WSPI's appeal for lack of standing.

{¶ 28} Having resolved the standing issues, we turn to the question of whether this court has jurisdiction to consider the denial of WSPI's motion to intervene. Article IV, Section 3(B)(2) of the Ohio Constitution establishes that courts of appeals "have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." Pursuant to R.C. 2505.03(A), appellate courts may review final orders, judgments, and decrees. *Flynn v. Fairview Village Retirement Community, Ltd.*, 132 Ohio St.3d 199, 2012-Ohio-2582, ¶ 5. To qualify as a final, appealable order, the order, judgment, or decree must satisfy the criteria of R.C. 2505.02. *Id.*

{¶ 29} Under R.C. 2505.02(B)(1), an order, judgment, or decree is a final, appealable order if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." An order "affects a substantial right" if the failure to immediately appeal the order would foreclose appropriate relief in the future. *Southside Community Dev. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007-Ohio-6665, ¶ 7. An order "determines the action and prevents a judgment" for the party appealing if it " 'dispose[s]"

of the whole merits of the cause or some separate and distinct branch thereof and leave[s] nothing for the determination of the court.' " *Miller v. First Internatl. Fidelity & Trust Bldg., Ltd.*, 113 Ohio St.3d 474, 2007-Ohio-2457, ¶ 6, quoting *Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 153 (1989).

{¶ 30} "Although intervention constitutes a substantial right * * *, '[t]he denial of a motion to intervene, when the purpose for which intervention was sought may be litigated in another action, does not affect a substantial right under R.C. 2505.02(B)(1) that determines the action and prevents a judgment.' " *Sawicki*, 121 Ohio St.3d 507, 2009-Ohio-1523, at ¶ 14, quoting *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, syllabus. Here, "WSPI's sole purpose for intervention was to secure an evidentiary hearing to present * * * evidence" that it is a state instrumentality. Appellants' Responses to Appellees' Motions to Dismiss Appeal, at 12. WSPI can accomplish that purpose by filing a Civ.R. 12(B)(1) motion to dismiss for lack of subject-matter jurisdiction, with a request for a hearing, in the common pleas court action. In that motion and hearing, WSPI can present evidence that it is a state instrumentality and argue that, as an instrumentality of the state, it is not subject to suit for money damages in the common pleas court.

{¶ 31} The only potential bar to litigation of the state instrumentality question in the common pleas court is the potential preclusive effect of the Court of Claims' determination that WSPI is not a state instrumentality. However, for issue preclusion to apply in the common pleas action, the parties to the Court of Claims action must be identical or in privity. As we concluded above, the parties are not identical, so Wright State must be in privity with WSPI. However, Wright State and WSPI have diametrically opposed interests. Wright State wants WSPI declared a private corporation that must be sued in the common pleas court, while WSPI wants a ruling that it is a state instrumentality that belongs in the Court of Claims. Wright State and WSPI, therefore, are not in privity. Consequently, issue preclusion does not bar WSPI from litigating the state instrumentality question before the common pleas court.

{¶ 32} Because WSPI may pursue the purpose behind its motion to intervene through another action, the denial of its motion to intervene does not affect a substantial

right. The denial, therefore, is not a final, appealable order from which WSPI may appeal. Accordingly, we grant plaintiffs' motion to dismiss for lack of jurisdiction.

{¶ 33} For the foregoing reasons, we grant in part and deny in part Wright State's motion to dismiss for lack of standing, and we grant plaintiffs' motion to dismiss for lack of jurisdiction. Based on our rulings on those two motions, we dismiss the instant appeal.

*Motion to dismiss for lack of standing granted in part, denied in part;
motion to dismiss for lack of jurisdiction granted;
cause dismissed.*

TYACK and BROWN, JJ., concur.
