

APPENDIX

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ANN KARNOFEL,

JUDGMENT ENTRY

Plaintiff-Appellant,

CASE NO. 2018-T-0055

- vs -

SUPERIOR WATERPROOFING, INC.

Defendant-Appellee.

Appellant, Ann Karnofel, has filed another motion for reconsideration asking this court to reconsider its June 13, 2019 judgment entry, which overruled Superior Waterproofing, Inc.'s. motion for sanctions against Ann Karnofel and Delores Karnofel, jointly and severally, and other relief.


As grounds for her motion, Ms. Karnofel claims the entry "erroneously awarded sanctions, attorney's [sic] fees and other costs to Appellee and erroneously claimed that Appellant's daughter, Delores, participated in the unauthorized practice of law and is prohibited from filing anything in any court." Ms. Karnofel's motion then proceeds to rehash all of her arguments raised in her appeals and prior motions, including her April 24, 2019 motion for reconsideration, which was denied.

Our June 13, 2019 judgment entry did nothing more than deny the relief sought by Superior and reiterate our earlier finding that Ms. Karnofel's appeal was frivolous. A hearing regarding any attorney fees and expenses that will be

"Appendix A."

awarded to Superior has yet to be held. There was no finding that Delores Karnofel "participated in the unauthorized practice of law and is prohibited from filing anything in any court." Thus, we find that Ms. Karnofel's motion is frivolous and obviously serves only to harass Superior and cause it to incur further expense.

Ms. Karnofel's latest motion, including her request that we once again reconsider our finding that her appeal was frivolous, raises nothing new. Further, she did not demonstrate any obvious error or omission which would necessitate reconsidering this court's opinion. She has failed to identify any relevant fact or any relevant law we did not consider; therefore, Ms. Karnofel's motion for reconsideration is denied.


JUDGE MARY JANE TRAPP

THOMAS R. WRIGHT, P.J.,

TIMOTHY P. CANNON, J.,

concur.

**FILED
COURT OF APPEALS**

JUN 28 2019

**TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK**

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ANN KARNOFEL,

JUDGMENT ENTRY

Plaintiff-Appellant,

CASE NO. 2018-T-0055

- vs -

SUPERIOR WATERPROOFING, INC.,

Defendant-Appellee.

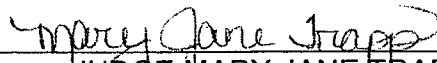
This matter is before the court on appellee's, Superior Waterproofing, Inc. ("Superior"), "Motion for Sanctions (Fee and Otherwise) Against Delores and Ann Karnofel, Jointly and Severally." The motion seeks sanctions against appellant, Ann Karnofel, and her daughter, Delores Karnofel, including monetary sanctions; an order prohibiting both from ever "filing anything in any court" pro se; and an order referring Delores Karnofel to the Supreme Court of Ohio for investigation as to whether Delores Karnofel has engaged in the unauthorized practice of law.

We note that in our April 15, 2019 judgment entry, we have already determined that Superior is entitled to reasonable expenses, including attorney fees and costs incurred in defense of this appeal, from Ann Karnofel for her conduct in bringing a frivolous appeal. An evidentiary hearing has been set for June 19, 2019 to determine the sanction amount pursuant to App.R. 23. In that April 15, 2019 judgment entry, we explained that inasmuch as Delores Karnofel is not before this court in this matter, we may only consider Ann Karnofel's conduct.

"Appendix B."

Further, absent a finding that Ann Karnofel has been found to be a vexatious litigator pursuant to R.C. 2323.52, we have no authority to prohibit Ann Karnofel from filing any pleading or paper in this court. Pursuant to Article I, Section 16 of the Ohio Constitution, which states: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law and shall have justice administered without denial or delay," and this court's scope of jurisdiction as set forth in Article IV, Section 3(B)(2) of the Ohio Constitution and R.C. 2501.02, we cannot prohibit Ann Karnofel from ever filing anything in any court pro se.

Accordingly, Superior's May 16, 2019 motion is overruled, and the evidentiary hearing on its earlier motion for sanctions and attorney fees, combined with its merit brief, will go forward as ordered.


JUDGE MARY JANE TRAPP

THOMAS R. WRIGHT, P.J.,

TIMOTHY P. CANNON, J.,

concur.

**FILED
COURT OF APPEALS**

JUN 13 2019

**TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK**

FILED
COURT OF APPEALS

APR 15 2019

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

ANN KARNOFEL,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2018-T-0055
SUPERIOR WATERPROOFING, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2015 CV 01162.

Judgment: Affirmed.

Ann Karnofel, pro se, 1528 Greenwood Avenue, Girard, OH 44420 (Plaintiff-Appellant).

Ned C. Gold, Jr., Ford, Gold, Kovoor & Simon, Ltd., 8872 East Market Street, Warren, OH 44484 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Appellant, Ann Karnofel, appeals the judgment of the Trumbull County Court of Common Pleas denying her motion for relief from judgment for newly discovered evidence and fraud against appellee, Superior Waterproofing, Inc. Finding this appeal barred by the doctrine of res judicata, we affirm.

Substantive and Procedural Law

"APPENDIX C."

{¶2} The matter before us has a convoluted history because the same underlying facts and claims have been before this court in a myriad of cases from both the Trumbull County Court of Common Pleas as well as the Girard Municipal Court. Ann Karnofel and her daughter, Delores Karnofel, a vexatious litigator, have employed a variety of creative, yet fundamentally flawed and spurious legal theories, to continue to litigate a contract matter for years after it was finally resolved by two trial courts, this court, and the Supreme Court of Ohio.

{¶3} In sum, on June 27, 2013, Ann Karnofel ("Ann") contracted with Superior Waterproofing, Inc. ("Superior") for waterproofing work and other improvements to the home in which she lives with her two daughters who own the home, Delores Karnofel ("Delores") and Donna Jean Beck. The contract was submitted to Delores and approved by Ann in Delores' presence.

{¶4} Superior commenced work on September 16, 2013. At this time, Delores Karnofel, with her mother's consent, asked for additional work to be performed at additional cost. Before work was completed, on October 1, 2013, Delores cancelled the contract, objecting to the additional cost and the quality of the work. Since money was owed on the work already performed, Superior filed an action against Delores in the Girard Municipal Court, Case No. 2014 CVF 01065 (the "Girard case").

Girard Municipal Court Case

{¶5} A synopsis of the Girard case is necessary because the same parties and arguments are present in this case, as is the underlying issue of Delores' status as a vexatious litigator. (Pursuant to R.C. 2323.52, a vexatious litigator is required to file for leave or permission of the court in which he or she was found to be vexatious every time

he or she is seeking to proceed in a civil action at the trial court level. Similarly, he or she must file for leave with a court of appeals in order to institute a proceeding at the appellate level. See, R.C. R.C. 2323.52(F)(1) and (2).)

{¶6} After Superior filed a complaint against Delores for money owed under the contract, attaching both the contract (entitled "Proposal" dated June 23, 2013) and an "invoice" dated October 3, 2014. Delores, who was first declared a vexatious litigator by the Trumbull County Court of Common Pleas on October 6, 2008, moved the Girard Municipal Court for permission to file an answer, counterclaim, and motion for summary judgment. The court granted these separately filed motions. Then four days after Superior's motion for summary judgment was filed, the motion was granted. Delores subsequently appealed.

{¶7} We vacated this judgment and remanded in *Superior Waterproofing v. Karnofel*, 11th Dist. Trumbull No. 2015-T-0113, 2016-Ohio-6992 ("*Karnofel I*"). In relevant part, this court concluded that Delores was not required to file leave of the Trumbull County Court of Common Pleas to file an answer and other responsive pleadings despite her status as a vexatious litigator. She was, however, required to obtain leave of the Trumbull County Court of Common Pleas to proceed in the Girard case on any claim requesting an order or other relief, such as her counterclaim or summary judgment. *Id.* at ¶20.

{¶8} On remand, the summary judgment proceedings continued. Delores filed a response to Superior's motion for summary judgment, but she failed to seek leave from the Trumbull County Court of Common Pleas to file a counterclaim or summary judgment motion.

{¶9} A review of the matters addressed in the summary judgment exercise is important to the understanding of the disposition of this appeal and the various other cases and appeals that followed this first action.

{¶10} Incorporated into Superior's motion for summary judgment were two affidavits of Frank Kiepper ("Mr. Kiepper,") the owner of Superior. His averments were supported by a copy of the original signed contract and the itemized invoice. Mr. Kiepper claimed the additional work requested was to (1) install new downspouts to the street, (2) install additional waterproofing on a back wall and (3) replace a French drain with solid PVC pipe. Delores claimed that the only additional work she approved was the French drain.

{¶11} The invoice set out the contract price at \$9,500, and the additional work requested at \$1,600, \$1,200, and \$200, respectively, for a total amount of \$12,500. The invoice indicated \$6,000 had been paid, leaving a balance due of \$6,500.

{¶12} Mr. Kiepper averred that \$1,500 of the remaining balance was work that was contracted but not completed because Delores halted the work. The \$5,000 remaining was due for the additional work already completed.

{¶13} Attached to Delores' response in opposition to Superior's motion for summary judgment were pictures of her residence and copies of contracts with other contractors she hired "to correct the problems left uncompleted" in the amount of \$1,303. She admitted she instructed Mr. Keipper not to return to the property but claims it was because of a "sex stunt" Mr. Keipper performed on her back porch.

{¶14} The Girard Municipal Court granted Superior's motion for summary judgment in the amount of \$5,000 plus post-judgment interest at the rate of 3 percent per annum and costs.

{¶15} This court granted Delores' application for leave to file an appeal of the summary judgment order. We affirmed the lower court's judgment in *Superior Waterproofing Inc. v. Karnofel*, 11th Dist. Trumbull No. 2017-T-0010, 2017-Ohio-7966 ("*Karnofel II*"), finding Delores' assignments of error without merit. We agreed with the trial court that Delores failed to carry her burden to demonstrate a genuine issue of material fact supporting her arguments that she had no knowledge of the additional work requested and that Mr. Keipper was using these additional items as hidden costs to gain a profit. *Id.* at ¶25-26. No further appeal was taken.

{¶16} Despite this final resolution, Delores then filed a motion for leave to file a counterclaim in the Girard case with the Trumbull County Court of Common Pleas. On the same day, the court denied her motion finding her counterclaim to have no merit. Delores then filed in this court a motion for leave to proceed with a notice of appeal of the Trumbull County Court of Common Pleas' judgment. By way of a judgment entry in Case No. 2019-T-0008, we denied this motion for leave because, pursuant to R.C. 2323.52(G), a decision that denies a vexatious litigator leave to proceed is not appealable.

Trumbull County Court of Common Pleas Case

{¶17} While the Girard case proceeded through the various courts, including our own, Delores' mother, Ann, pro se, filed a complaint against Superior in the Trumbull County Court of Common Pleas, Case No. 2015 CV 01162, for breach of contract and negligent workmanship, raising the same allegations of the additional work Delores

denied contracting for in the Girard case. Extensive motion practice followed with both the trial court magistrate and Superior rebuking Delores for effectively acting as counsel for her pro se mother. Delores had been handwriting all of Ann's briefs and appearing in court on Ann's behalf.

{¶18} Attached to Superior's answer to Ann Karknofel's complaint and its counterclaim was a copy of Superior's complaint against Delores in the Girard case, which contained copies of the original June 23, 2013 contract (entitled "Proposal") and the October 3, 2014 "Invoice" that itemized the account-the original bid, the additional work requested after work began, and the total payments received.

{¶19} Attached to Superior's motion for summary judgment was: Mr. Kiepper's affidavits, a copy of the original June 23, 2013 "Proposal," followed most importantly by, an untitled, handwritten document that contains the following information: "additional 1200 for digging around sunroom. Paid 3000.00 downpayment [sic] 9-24-13. Balance 7,700." The document then itemizes what is owed and what was paid, delineating what was left to be paid for the different services: "waterproofing: [\$]9,500.00, downspouts 1,600.00, sunroom 1,200.00, extra French drain, 200.00 for a total of 12,500.00 – 3,000.00 downpayment [sic] paid on 9-24-13 – 3,000 payment on 9-30-13, for a remainder balance of 6,500.00."

{¶20} This is the same document Ann Karknofel claims in her motion for relief from judgment was just discovered.

{¶21} The trial court granted Superior's motion for summary judgment, concluding that Ann's claims were compulsory counterclaims in the Girard case and that Ann and Delores were in privity. Consequently, the trial court concluded that the new case filed

by Ann was barred by the doctrine of res judicata resulting from the final determination of the issues in the Girard case.

{¶22} Ann appealed the trial court's judgment, contending the court erred in finding Delores in privity with her and in ruling in Superior's favor on the merits. We affirmed in *Karnofel v. Superior Waterproofing, Inc.*, 11th Dist. Trumbull No. 2017-T-0026, 2017-Ohio-9346 ("*Karnofel III*"), finding no error in the trial court's determination that Ann and Delores were in privity inasmuch as they are mother and daughter, they live together in the same house, and Delores' attempted counterclaim against Superior in the Girard case alleged breach of contract and negligent workmanship. *Id.* at ¶18.

{¶23} Ann then filed a Civ.R. 60(B) motion for relief from judgment with the trial court alleging newly discovered evidence and fraud. Ann claimed that Mr. Keipper's handwritten notes on the back of the contract that detail the amounts paid and owed, which she describes as a "falsified change order," is newly discovered evidence. Ann claims she only recently discovered this "evidence" in her daughter Delores' file "since" the suit on account was filed against her daughter.

{¶24} Ann not only claimed that this evidence could not have been discovered sooner because it was in "her daughter's file" in the Girard case, but she further claimed that because it was on the backside of the parties' contract, "it was hard to discover" and constituted evidence of fraud. Ann alleged that Superior purposefully hid the back of the contract despite the most crucial fact that Superior had attached the handwritten document to its motion for summary judgment in this case in the Trumbull County Court of Common Pleas.

{¶25} The trial court denied Ann's motion from relief from judgment, and Ann filed the instant appeal. Superior filed its merit brief and a motion for sanctions and attorney fees.

{¶26} Ann Karnofel raises three assignments of error:

{¶27} "[1.] The Trial Court overlooked the newly discovered evidence, because I am a pro se litigant.

{¶28} "[2.] The Appellee participated in fraud upon the court.

{¶29} "[3.] The Trial Court issued a biased decision."

Motion for Relief from Judgment

{¶30} "In order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate: (1) a meritorious claim or defense; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) timeliness of the motion." *Karnofel v. Nye*, 11th Dist. Trumbull No. 2016-T-0119, 2017-Ohio-7027, ¶13, citing *Rose v. Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988), citing *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 147 Ohio St.2d 146 (1976), paragraph two of the syllabus.

{¶31} "The applicable grounds for relief contained in Civ.R. 60(B) include: '(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; * * * or (5) any other reason justifying relief from the judgment.'" *Id.* at ¶14, quoting Civ.R. 60(B). "A motion under

Civ.R. 60(B) 'shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.'" *Id.*

{¶32} "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Id.* at ¶15, quoting *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987).

{¶33} Ann argues that the handwritten invoice on the back of the contract detailing the work performed and monies owed is evidence of Superior's fraudulent attempt to include and charge for additional work. She contends this evidence could not have been previously discovered because a copy of the contract was attached to Superior's complaint filed in the Girard case "against her daughter." She also argues that the trial court denied her motion for relief from judgment because he is biased against her as a "female, pro se litigant who is an elderly senior citizen."

{¶34} "When issues raised in a Civ.R. 60(B) motion have already been ruled upon at the appellate court level, their consideration is barred by the doctrine of res judicata." *Nye, supra*, at ¶20, citing *Streetsboro v. Encore Homes*, 11th Dist. Portage No. 2002-P-0018, 2003-Ohio-2109, ¶10; *Blasco v. Mislik*, 69 Ohio St.2d 684, 686 (1982) (a Civ.R. 60(B) motion is not a substitute for an appeal).

{¶35} As we noted in *Karnofel III* regarding Ann's appeal of the trial court's summary judgment decision, *all* of Ann Karnofel's claims are barred by res judicata because she is in privity with Delores, and these claims were either already raised or could have been raised in the Girard case. *Id.* at ¶22 (finding a privity of interest as explained above and a "logical relation" pursuant to Civ.R. 13(A) between Ann's case and

Delores' intended counterclaim in the Girard Municipal Court because they involve the same contract and the same opposing party). By extension, our previous res judicata determination also applies to the present appeal regarding Ann's motion for relief for judgment.

{¶36} Assuming arguendo, res judicata did not apply, Ann's "newly discovered evidence" as grounds for relief under Civ. R.60(B)(2) set out in her first assignment of error must fail because a Civ.R. 60(B)(2) motion must be made "not more than one year after the judgment * * * was entered or taken." Ann's May 7, 2018 motion for relief from judgment was filed more than one year after the trial court awarded Superior summary judgment on April 7, 2017.

{¶37} And in any event, and most fundamentally, Ann failed to demonstrate why she was precluded from discovering a copy of the handwritten document in this case. The handwritten document was attached to Superior's February 1, 2017 motion for summary judgment.

{¶38} Nor does Ann even attempt to explain or support with authority her argument in the second assignment of error that "concealing" this "newly discovered evidence" constitutes fraud, misrepresentation, or misconduct entitling her to relief under Civ.R.60(B)(3) or the broader Civ.R. 60(B)(5). "App.R. 12(A)(2) states that an appellate court 'may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16.'" *Parkman Properties, Inc. v. Tanneyhill*, 11th Dist. Trumbull No. 2007-T-0098, 2008-Ohio-1502, ¶43, quoting App.R. 12(A)(2). "App.R. 16(A)(7) further states that an appellant's brief must

contain “[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.” *Id.*, quoting App.R. 16(A)(7).

{¶39} Accordingly, this court may disregard an assignment of error that fails to comply with App.R. 12(A) or App.R. 16(A)(7). *Id.* at ¶44, quoting *Village South Russell v. Upchurch*, 11th Dist. Geauga No. 2001-G-2395 and 2001-G-2396, 2003-Ohio-2099, ¶9. Because Ann has failed to comply with App.R. 12(A) and App.R. 16(A)(7), we disregard this assignment of error pursuant to App.R. 12(A)(2).

{¶40} Lastly, we note that Ann raises many of the same arguments Delores has raised in many of Delores’ previous cases before this court.

{¶41} In her third assignment error Ann claims the trial court was biased against her as a pro se, female, elderly litigant.

{¶42} We previously rejected this argument in *Karnofel v. Nye*, 11th Dist. Trumbull No. 2015-T-0126, 2016-Ohio-3406, a case in which Delores was the appellant, where we aptly stated: “[w]hile it is true that judicial bias or favoritism can violate an individual’s due process rights, * * * Karnofel provides absolutely no basis for asserting such a claim against the lower court.” *Id.* at ¶25, quoting *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶34. Ann again provides no examples or evidence on which to base a claim of bias, and her argument is without supporting authority. In the absence of any proof supporting her argument, we reject the contention that the lower court was biased. *Id.*

{¶43} Finally, “[p]ro se civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and

must accept the results of their own mistakes and errors.” (Emphasis sic.) *Karnofel v. Cafaro Mgt. Co.*, 11th Dist. Trumbull No. 97-T-0072, 1998 WL 553491, 2 (June 26, 1998), quoting *Meyers v. First Natl. Bank of Cincinnati*, 3 Ohio App.3d 209, 210 (1st Dist.1981).

{¶44} For the foregoing reasons, Ms. Karnofel’s assignments of error are not well-taken and are frivolous. The judgment of the Trumbull County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, P.J.,

TIMOTHY P. CANNON, J.,

concur.

IN THE COURT OF COMMON PLEAS
- GENERAL DIVISION -
TRUMBULL COUNTY, OHIO

ANN KARNOFEL

CASE NUMBER: 2015 CV 01162

PLAINTIFF

VS.

JUDGE W WYATT MCKAY

SUPERIOR WATERPROOFING INC

DEFENDANT

JUDGMENT ENTRY

Plaintiff's Motion for Relief from Judgment is hereby denied.

[Handwritten signature]

JUDGE W WYATT MCKAY

Date: _____

5/10/19

Appendix D."

KAREN INFANTE ALLEN
CLERK OF COURTS
TRUMBULL COUNTY
2018 MAY 16 AM 9:49
TRUMBULL COUNTY
CLERK OF COURTS

June 8 2018
This is a true and correct copy of the
original *Entry*
Karen Infante Allen
KAREN INFANTE ALLEN
Clerk of Courts



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The Supreme Court of Ohio

FILED

OCT - 1 2019

CLERK OF COURT
SUPREME COURT OF OHIO

Ann Karnofel

Case No. 2019-1000

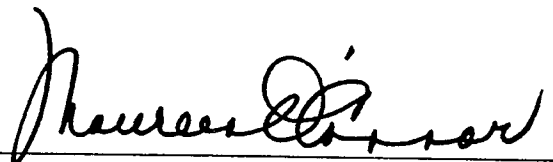
v.

ENTRY

Superior Waterproofing, Inc.

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Trumbull County Court of Appeals; No. 2018-T-0055)



Maureen O'Connor
Chief Justice

"Appendix E."

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

ANN KARNOFEL,

:

OPINION

Plaintiff-Appellant,

:

CASE NO. 2017-T-0026

- VS -

:

FILED
COURT OF APPEALS

SUPERIOR WATERPROOFING, INC.,

:

DEC 29 2017

Defendant-Appellee.

:

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2015 CV 01162.

Recommendation: Affirm.

Ann Karnofel, pro se, 1528 Greenwood Avenue, Girard, OH 44420 (Plaintiff-Appellant).

Ned Gold, Jr., Ford, Gold, Kovoov & Simon, Ltd., 8872 East Market Street, Warren, OH 44484 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Ann Karnofel appeals from the grant of summary judgment by the Trumbull County Court of Common Pleas to Superior Waterproofing, Inc., in her action for breach of contract and negligent workmanship. Finding no reversible error, we affirm.

{¶2} Ann Karnofel lives at 1528 Greenwood Avenue, Girard, Ohio, with her daughters, Delores Karnofel and Donna Jean Beck, who own the residence. On or

"Appendix F."

COPY

about June 27, 2013, Superior submitted a contract to Delores Karnofel for waterproofing work and other improvements to the house. While submitted to Delores, the contract was approved by Ann, in Delores' presence. Work commenced September 16, 2013. October 1, 2013, Delores cancelled the contract before work was completed. Money was owed on the work actually done.

{¶3} Superior filed an action against Delores in the Girard Municipal Court, that being Case No. 2014 CVF 01065. Delores Karnofel is a vexatious litigator, so she moved the Girard Municipal Court for leave to file an answer, counterclaim, and motion for summary judgment. *Superior Waterproofing, Inc. v. Karnofel*, 11th Dist. Trumbull No. 2015-T-0113, 2016-Ohio-6992, ¶2. That court granted her leave. *Id.* Superior moved for summary judgment. *Id.* at ¶4. The trial court granted Superior's motion prior to the filing of any response. *Id.*

{¶4} Delores appealed. In relevant part, this court concluded that, since she was responding to an action, she did not require leave of court to file an answer even though she is a vexatious litigator. *Superior Waterproofing, Inc.*, 2016-Ohio-6992, ¶15, 20. However, we further concluded she did require leave of the Trumbull County Court of Common Pleas – the court which designated her a vexatious litigator – to proceed in the Girard Municipal Court case, on any claim requesting an order or other relief, such as her counterclaim. This court vacated the judgment of the Girard Municipal Court, and remanded for further proceedings. *Id.* at ¶21.

{¶5} On remand, Delores filed a response to Superior's motion for summary judgment. However, a review of the docket in Case No. 2014 CVF 01065 reveals she never applied for leave to proceed with her counterclaim from the Trumbull County

Court of Common Pleas, and did not ultimately file a counterclaim. By a judgment entry filed January 20, 2017, the Girard Municipal Court once again granted Superior's motion for summary judgment. Delores timely noticed appeal from that judgment, having obtained this court's leave to do so. The matter is presently pending as Case No. 2017-T-0010.

{¶6} In the meantime, on or about June 23, 2015, Ann Karnofel filed her complaint in this case, alleging breach of contract and negligent workmanship by Superior, arising from the same contract as that subject of the Girard Municipal Court case. Superior answered. Extensive motion practice ensued. Superior moved for summary judgment, which Ann opposed. By a thoughtful and incisive judgment entered March 2, 2017, the trial court granted Superior's motion. The trial court concluded that Ann's claims were compulsory counterclaims in the Girard Municipal Court case, and that Ann and Delores were in privity. Consequently, the trial court concluded that the Girard Municipal Court case constituted *res judicata*, binding in this case.

{¶7} Ann timely noticed this appeal, assigning two errors:

{¶8} "[1.] The trial court erred when it failed to see that appellant's daughter, Delores Karnofel's leave to proceed was not valid, when summary judgment was granted to defendant-appellee.

{¶9} "[2.] The trial court erred when it ruled in defendant-appellee's favor for summary judgment."

{¶10} Being interrelated, we treat the assignments of error together.

{¶11} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d

64, 66 (1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. See e.g. Civ.R. 56(C).

{¶12} “When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 121 (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfolk Southern Corp.*, 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, ‘whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).” (Parallel citations omitted.) *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6.

{¶13} The trial court concluded that Ann and Delores Karnofel were in privity, thus binding Ann to the results of the Girard Municipal Court case.

{¶14} “At the outset, we must determine whether there is an identity of parties in the two actions. *Res judicata* operates as “a complete bar to any subsequent action on

the same claim or cause of action *between the parties or those in privity with them.*” (Emphasis added.) *Johnson’s Island, Inc. v. Danbury Twp. Bd. of Trustees* (1982), 69 Ohio St.2d 241, 243, * * *, quoting *Norwood v. McDonald* (1943), 142 Ohio St. 299, * * * paragraph one of the syllabus. * * *.

{¶15} “What constitutes privity in the context of *res judicata* is somewhat amorphous. A contractual or beneficiary relationship is not required:

{¶16} ““In certain situations (* * *) a broader definition of “privity” is warranted. As a general matter, privity “is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the *res judicata*.” *Bruszewski v. United States* (C.A.3, 1950), 181 F.2d 419, 423 (Goodrich, J., concurring).’ *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 184, * * *.” (Emphasis sic.) (Parallel citations omitted.) *Brown v. Dayton*, 89 Ohio St.3d 245, 247-248 (2000).

{¶17} Consequently, privity may be found between two parties when there is a mutuality of interest, or an identity of desired results. *Id. Accord Godále v. Chester Twp. Bd. of Trustees*, 11th Dist. Geauga No. 2004-G-2571, 2005-Ohio-2521, ¶43; *Kessler v. Tuus Tutus, L.L.C.*, 185 Ohio App.3d 240, 2009-Ohio-6376, ¶30 (11th Dist.).

{¶18} The trial court did not err in finding privity between Ann and Delores Karnofel. They are mother and daughter; they live together in the same house. Delores’ counterclaim in the Girard Municipal Court case alleged breach of contract and negligent workmanship by Superior, as did Ann’s claims in this case. Thus, there is a mutuality of interest and identity of desired result.

{¶19} Further, the trial court also concluded correctly that Ann's claims in this case were compulsory counterclaims in the Girard Municipal Court case.

{¶20} "1. All existing claims between opposing parties that arise out of the same transaction or occurrence must be litigated in a single lawsuit pursuant to Civ.R. 13(A), no matter which party initiates the action.

{¶21} "2. The 'logical relation' test, which provides that a compulsory counterclaim is one which is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts, can be used to determine whether claims between opposing parties arise out of the same transaction or occurrence." *Rettig Ent., Inc. v. Koehler*, 68 Ohio St.3d 274 (1994), paragraphs one and two of the syllabus.

{¶22} There is a "logical relation" between Delores' intended counterclaim in the Girard Municipal Court case, and Ann's claims in this case: each involve the same contract, and the same opposing party. The claims had to be brought by way of counterclaim in the Girard Municipal Court case. We may take judicial notice of another court's docket. *Hutz v. Gray*, 11th Dist. Trumbull No. 2008-T-0100, 2009-Ohio-3410, ¶40. As we noted above, the docket in the Girard Municipal Court case shows that Delores never filed a counterclaim in that case following remand. Consequently, all of Ann's claims in this case are barred by res judicata.

{¶23} The assignments of error lack merit.

{¶24} The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J., concurs,

THOMAS R. WRIGHT, J., concurs in judgment only.

**IN THE COURT OF COMMON PLEAS
- GENERAL DIVISION -
TRUMBULL COUNTY, OHIO**

CASE NUMBER: 2015 CV 01162

**ANN KARNOFEL
PLAINTIFF**

VS.

JUDGE W WYATT MCKAY

**SUPERIOR WATERPROOFING INC
DEFENDANT**

JUDGMENT ENTRY

This matter is before the Court on the Defendant's Motion for Summary Judgment. The Court has reviewed the motion, any response, the evidence and the applicable law.

This matter arises out of a dispute between Plaintiff Ann Karnofel and Defendant Superior Waterproofing Inc., a contractor. Ann alleges that she entered into a contract with Defendant whereby Defendant was to perform waterproofing services and was also to install a new porch on her residence at 1528 Greenwood Ave. Girard, Ohio 44420, but that the services were either not performed or were performed negligently. Although Ann resides in the residence, the home is actually owned by her daughters, Delores Karnofel and Donna Jean Beck. Delores also lives in the residence with Ann.

The Contract which was signed on June 27, 2013, contains the name of Delores Karnofel under the heading entitled "Proposal Submitted To" but the "Acceptance of Proposal" was actually signed by Ann Karnofel.

Defendant alleges that this case is barred by res judicata because the matter has already been adjudicated by the Girard Municipal Court in Case No. 2014 CV 1065. In that case, Defendant brought suit against Delores Karnofel for breach of contract.

"APPENDIX 6."

Defendant now essentially claims that any claims of Ann would have had to been brought in that action as a compulsory counterclaim, as Ann is in privity with Delores.

Civil Rule 13 (A), which governs compulsory counterclaims, provides: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." This rule has been interpreted as requiring a defendant to raise any issues arising out of the same transaction in the original suit or have the claim barred by the doctrine of res judicata. *Rettig Ent. Inc. v. Koehler*, 68 Ohio St.3d 274, 626 N.E.2d 99 (1994).

According to the Complaint in the Girard Municipal Court action, Superior alleged a breach of the June 27, 2013 construction contract by Delores Karnofel. (The Court notes that it is permitted to take judicial notice of the complaint contained in Defendant's answer and counterclaim since the complaint was incorporated into the pleadings. See *Hammerschmidt v. Wyant Woods Care Center* (Dec. 27, 2000), Summit App. No. 19779, 2000 WL 1875401 citing *U.S. v. Wood*, (C.A.7, 1991), 925 F.2d 1580, 1582.) Therefore, any claim of Delores Karnofel for her own allegations of a breach of that contract would be a compulsory counterclaim in that matter, and her claims in this matter are barred by res judicata.

This does not end our analysis, however. The Court must determine whether the failure to present all claims in the first lawsuit precludes Ann Karnofel from asserting these claims in the present lawsuit. In order to invoke res judicata, one of the

requirements is that the parties to the subsequent action must be identical to or in privity with those in the former action. *Johnson's Island, Inc. v. Danbury Twp. Bd. of Trustees*, 69 Ohio St.2d 241, 243, 431 N.E.2d 672, (1982). The Ohio Supreme Court has previously stated that "[w]hat constitutes privity in the context of res judicata is somewhat amorphous." *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958, (2000). The Supreme Court has further applied a broad definition to determine whether the relationship between the parties is close enough to invoke the doctrine. *Id.* "A mutuality of interest, including an identity of desired result," may create privity. *Id.*

The Court notes that Delores Karnofel was declared a vexatious litigator by the Court of Common Pleas and cannot bring any actions on her own without leave of Court. The names of both Delores and Ann appear on the relevant contract. They both reside in the house that is the subject of the contract. Therefore, the Court finds that although the Girard suit named Delores as a Defendant and this suit was brought by Ann as Plaintiff, there is sufficient mutuality of interest, including an identity of desired result so that Delores and Ann are in privity for purposes of res judicata.

Defendant's Motion for Summary Judgment is hereby GRANTED. Case concluded. Costs to Plaintiff. This is a final appealable order and there is no just cause for delay.


JUDGE W WYATT MCKAY

Date: 3/26/17

TO THE CLERK OF COURTS:
YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT
ON ALL COUNSEL OF RECORD OR UPON THE PARTIES
WHO ARE UNREPRESENTED FORTHWITH
BY ORDINARY MAIL.


JUDGE W. WYATT MCKAY

IN THE GIRARD MUNICIPAL COURT
TRUMBULL COUNTY, OHIO

FILED
JAN 20 2017
Girard Municipal
Court

Superior Waterproofing)	Case No. 2014 CVF 1065
)	
Plaintiff)	HON. JEFFREY D. ADLER
)	
v.)	
)	JUDGMENT ENTRY
Delores M. Karnofel)	
)	
Defendant)	

This matter comes before the Court upon the Plaintiff's Motion for Summary Judgment. The standard of review for summary judgment motions is well settled in Ohio.

In Dresher v. Burt (1996) 75 Ohio St.3d 280, the Ohio Supreme Court stated:

Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

This case arose out of the complaint of the Plaintiff alleging that Plaintiff was retained by the Defendant to perform waterproofing services at her residence located at 1528 Greenwood Avenue Girard, Ohio. The Defendant admits the existence of a contractual relationship with the Plaintiff in her answer. The total consideration to be paid to the Plaintiff for services rendered was \$9,500.00. The Defendant requested additional work to be performed at an additional cost of \$3,000.00 bringing the total price for services rendered to \$12,500.00. Attached to the

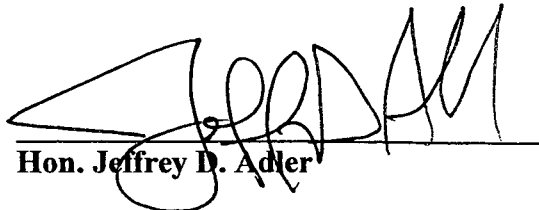
"Appendix H."

complaint of the Plaintiff and its motion for summary judgment are copies of the original contract and change order. The Defendant paid the Plaintiff a total of \$6,000.00 leaving a balance of \$6,500.00. However, the Plaintiff only requests a judgment of \$5,000.00 in his affidavit supporting his motion for summary judgment. The Court has reviewed all of the pleadings, briefs, and exhibits in favor of, and in response to the motion for summary judgment. The Defendant's argument and the exhibits attached to her response to the Plaintiff's motion for summary judgment do not show that there are any genuine issues for trial. Likewise, the Plaintiff's motion for summary judgment also shows that there is no genuine issue as to any material fact and that the Plaintiff is entitled to summary judgment as a matter of law.

Judgment is hereby granted in favor of the Plaintiff and against the Defendant in the amount of \$5,000.00 with interest at the rate of 3% per annum from the date of judgment and costs. This is a final appealable order. There is no just cause for delay.

Date

1/20/17



Hon. Jeffrey D. Adler

cc: Plaintiff's Counsel
Defendant

STATE OF OHIO)
) SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ANN KARNOFEL,
Plaintiff-Appellant,

MAGISTRATE'S ORDER

CASE NO. 2018-T-0055

- VS -

SUPERIOR WATERPROOFING,
INC.,

Defendant-Appellee.

On April 15, 2019, this court determined that appellee was entitled to reasonable expenses, including attorney fees and costs, related to the instant appeal pursuant to App.R. 23.

Counsel for appellee shall have fifteen (15) days from the date of this order to file evidentiary material, including affidavits and/or other documentary materials, demonstrating reasonable expenses, costs, and attorney fees, particularly addressing the factors set forth in Rule 1.5 of the Ohio Rules of Professional Conduct. Counsel for appellee shall also identify any expert witness, who will be called at the evidentiary hearing to corroborate the claim for attorney fees. Once filed, appellant shall file a response no later than seven (7) days thereafter.

The matter is set for an evidentiary hearing on Wednesday, June 19, 2019, at 9:30 a.m., at the Eleventh District Court of Appeals, 111 High Street, N.E., Warren, Ohio 44481. It is mandatory that you appear fifteen (15) minutes prior to the scheduled hearing time.

FILED
COURT OF APPEALS

MAY 16 2019

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK


MAGISTRATE SHIBANI SHETH-MASSACCI

"Appendix I."

STATE OF OHIO)
) SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ANN KARNOFEL,

MAGISTRATE'S DECISION

Plaintiff-Appellant,

CASE NO. 2018-T-0055

- vs -

SUPERIOR WATERPROOFING, INC.,

Defendant-Appellee.

The assigned panel in the instant action issued a judgment entry on April 15, 2019, finding this appeal to be frivolous and referring the matter to this Magistrate to conduct an evidentiary hearing to determine the amount of reasonable expenses to be assessed against appellant, including attorney fees and costs, incurred by appellee in defense of this appeal. Consistent with that entry, an evidentiary hearing was held on August 15, 2019.

App.R. 23 provides an appellate court with the authority to order an appellant to pay the reasonable expenses of appellee, including attorney fees and costs, where the court determines that an appeal is frivolous. The purpose of App.R. 23 is to compensate a non-appealing party for expenses incurred in defending a frivolous appeal and to deter frivolous appeals to preserve the appellate calendar and limited judicial resources for cases that are truly worthy of the court's consideration. *Waller v. Menorah Park Center for Senior Living*, 5th Dist. Stark No. 2018CA00083, at ¶ 26.

In this case, Attorney Ned C. Gold, Jr., appeared at the hearing on August 15, 2019, on appellee's behalf. Neither appellant, nor counsel on her behalf, appeared. The Court has considered the evidence and testimony of counsel.

"Appendix C."

When given the opportunity to present evidence in support of appellee's position, Attorney Gold referred to his June 20, 2019 submission, which was in response to this court's June 13, 2019 entry, regarding the hours he spent on this matter. He then presented a witness as to the reasonableness of the fees.

As to the hours spent, Attorney Gold's June 20, 2019 submission, at page 5, estimates, in detail, the hours spent on the appeal at 8.9 hours at \$275 per hour. However, during his opening remarks, Attorney Gold clarified he was reducing those hours to 7.9 hours. He further explained that he had an additional two hours in preparing for the evidentiary hearing. Thus, he indicated that he expended 9.9 hours at \$275 per hour for a total of \$2,722.50 in fees with respect to this appeal.

Attorney Gold presented the testimony of his sole witness, Attorney Michael E. Grove to attest to the reasonableness of the fees. Attorney Grove testified as an expert witness as to Attorney Gold's professional qualifications and as to the reasonableness of fees as contemplated in Prof.Con.R. 1.5(a)(1) through (8). He verified that the amount of time spent on this case and the hourly rate of \$275 charged were reasonable for this area for an attorney with Attorney Gold's appellate advocacy skills and legal experience.

Appellee established that it spent \$2,722.50 in attorney fees defending the appeal. This is, therefore, un rebutted, and appears, on its face, quite reasonable. Accordingly, the Magistrate awards appellee its attorney fees, pursuant to App.R. 23. Appellant, Ann Karnofel, is ordered to pay appellee, Superior Waterproofing, Inc., \$2,722.50.

Furthermore, all other pending motions are hereby overruled.

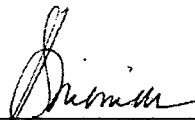
IT IS SO ORDERED.

A party may, within fourteen (14) days of the filing of this Magistrate's Decision, serve and file written objections. If objections are timely served and filed by any party, any other party may serve and file objections within ten (10) days of the date on which the first objections were filed, or within the time otherwise prescribed by Civ.R. 53, whichever period last expires. Such objections shall be considered a motion. Objections shall be specific and state with particularity the grounds therefore.

Upon consideration of the objections, the Court may: adopt, reject or modify the Magistrate's Decision; hear additional evidence; recommit the matter to the Magistrate with instructions; or hear the matter itself. (See Civ.R. 53, as amended.)

These and all other provisions of the Ohio Rules of Civil Procedure must be in compliance or objections may be overruled.

Date: 9-18-2019


MAGISTRATE SHIBANI SHETH-MASSACCI

TO THE CLERK OF COURTS: You Are Ordered to Serve

Copies of this Magistrate's Decision on all Counsel of Record

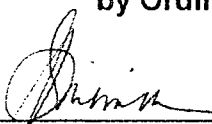
or Upon the Parties who are Unrepresented Forthwith

**FILED
COURT OF APPEALS**

SEP 18 2019

**TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK**

by Ordinary Mail.


MAGISTRATE SHIBANI SHETH-MASSACCI

STATE OF OHIO)
) SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

ANN KARNOFEL,

JUDGMENT ENTRY

Plaintiff-Appellant,

CASE NO. 2018-T-0055

- vs -

SUPERIOR WATERPROOFING,
INC.,

Defendant-Appellee.

In a magistrate's order dated May 16, 2019, this court ordered counsel for appellee within fifteen (15) days from that date to "file evidentiary material, including affidavits and/or other documentary materials, demonstrating reasonable expenses, costs, and attorney fees, particularly addressing the factors set forth in Rule 1.5 of the Ohio Rules of Professional Conduct" and to "identify any expert witness, who will be called at the evidentiary hearing to corroborate the claim for attorney fees."

To date, counsel for appellee has submitted no material to this court.

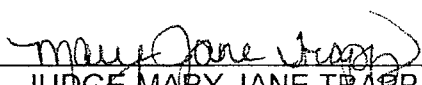
Therefore, the evidentiary hearing scheduled for Wednesday, June 19, 2019, at 9:30 a.m. is cancelled.

Counsel for appellee has seven (7) days from the date of this entry to show cause as to why this court should not determine that he is not entitled to any monetary expenses, including attorney fees and costs, related to the instant appeal pursuant to App.R. 23.

FILED
COURT OF APPEALS

JUN 13 2019

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK


JUDGE MARY JANE TRAPP

"Appendix K."