MIGRA v. WARREN CITY SCHOOL BOARD, No. 82-738

I think it is clear that §1983 does not affect the application of normal res judicata principles to the case at hand. What is less clear is what this Court should do with the case once it makes that determination. That, in turn, depends on what the lower courts did in the present case.

I remain convinced that the federal district court did not decide the res judicata issue under Ohio law. The court did not cite §1738, nor did it refer to any Ohio cases. The only case cited by the court which relates to Ohio law in any way is Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (CA6 1970). Coogan involved an attempt by an attorney to enjoin the Ohio Suprmeme Court and the local bar from enforcing a suspension order entered against him. The CA6 noted that 28 U.S.C. § 2283 prohibited federal courts from issuing injunctions against state court judges, and then in the only reference to Ohio law stated:

> The final judgment of the Supreme Court is conclusive and Coogan is precluded by the doctrine of res judicata from relitigating not only the issues which were actually involved in the disbarment proceeding, but also the issues which he might have presented. Burton, Inc. v. Durkee, 162 Ohio St. 433, 438, 125 N.E.2d 432 (1954).

Id. at 1211. The rule stated (res judicata bars a litigant from raising issues which could have been raised) is not at issue in this case. That rule applies only if the two cases involve the same cause of action. The Coogan court did not address the issue of what is a cause of action for res judicata purposes, nor

did the Ohio case cited (Burton, Inc). Indeed Burton, Inc. was a pre-Henderson case (in Henderson the Ohio S. Ct. expressly adopted the primary right-primary duty definition). Coogan therefore sheds little light on the nature of Ohio law on the dispositive issue.

More importantly, the context in which the federal district court cited Coogan indicates that it was not relying on that case as a guide to Ohio law. The district court noted that "[t]here is a split of authority among the circuits over the issue, but the Sixth Circuit has held that a final judgment is res judicata to all the issues which might have been presented in the prior proceeding, as well as to those issues which were actually litigated." The court then cited Coogan and another CA6 opinion involving an appeal from a federal district court in Michigan. Mayer v. Distel Tool & Machine Co., 556 F.2d 798 (CA6 1977). In a footnote, the court noted that the CA9 was in accord with this position, but the CA2 was not. Of course, neither the CA2 nor the CA9 was applying Ohio law in the cases cited. Therefore, it seems clear to me that the federal district court was citing Coogan for authority on the federal rule of res judicata, not for its interpretation of Ohio law.

The question then is whether the Court should remand the case for a determination of Ohio law, determine Ohio law and apply it, or adopt a federal rule of preclusion which applies notwithstanding the effect of Ohio law.

I would not adopt the third alternative. The big advantage of such an approach is that it creates uniformity. However, if

the Court adopted the broad theory of res judciata (which it would have to if it chose not to rely on Ohio law), §1738 would never be utilized because federal courts would already be giving the maximum preclusive effect to the prior state court judgment. Moreover, while there is nothing to preclude the Court from adopting the view that federal courts can give more preclusive effect to state court judgments than would the state courts, I would hesitate to do so. Such a rule would allow plaintiffs to bring federal causes of action in state courts when they could not bring the same actions in federal court. Even though state courts are competent to adjudicate federal issues, I think it best to allow for at least equal access to federal court. Finally, the parites to this case did not address the issue, and, if Ohio law does preclude Migra from bringing such an action, there is no need for the Court to do so.

The second alternative is not in harmony with the practice normally followed by this Court, i.e., to let the lower courts have the first shot at determining state law. This policy makes sense, especially in cases like the present one where state law is far from clear.

That leaves the first alternative. The only disadvantage with this alternative is that it leaves the way open for another round of review in this Court. If the lower court determines that Ohio law does not preclude the present action, Warren City could argue that notwithstanding the effect of state law, federal law precludes Migra from bringing the action in federal court (although counsel's hesitancy to adopt this position at oral

argument suggests that Warren City may not realize that the argument is available). If the lower court ruled on that issue, the path would be clear for another petition to this Court. In the long run, however, I think this is the best disposition of the case. If the case comes back here under the scenario outlined above, so much the better. The Court can then address the issue of the relationship between §1738 and federal principles of res judicata in a more concrete setting, and the Court will have the benefit (for whatever its worth) of the lower court's decision on the issue. Therefore, I would assume, without deciding, that Ohio law would preclude Migra from proceeding in state court and rule that nothing in §1983 prevents the federal court from giving similar effect to the prior state court judgment. I would vacate the opinion of the CA6 and remand the case for a determination of Ohio law.

Kevin