STATE OF MICHIGAN

COURT OF APPEALS

ERIC A. BRAVERMAN, Successor Personal Representative of the Estate of PATRICIA SWANN, Deceased,	UNPUBLISHED May 16, 2006
Plaintiff-Appellant,	
v	No. 266505 Wayne Circuit Court LC No. 05-511888-NH
GARDEN CITY HOSPITAL, a/k/a GARDEN CITY HOSPITAL, OSTEOPATHIC, JOHN R. SCHAIRER, D.O., GARY YASHINSKY, M.D., ABHINAV RAINA, M.D., and PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,	
Defendants-Appellees.	

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff argues that the trial court erred in granting defendants' motions for summary disposition under MCR 2.116(C)(6) and dismissing plaintiff's action with prejudice. We disagree.

Defendants moved for summary disposition under MCR 2.116(C)(6).[1] Although the trial court did not cite a specific court rule upon which it was granting defendants' motions, it stated that it was dismissing plaintiff's action because "you can't maintain two actions involving the same parties, same claims, at the same time," which indicates that the trial court based its decision on MCR 2.116(C)(6). This Court reviews a trial court's order granting a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The interpretation and application of a court rule presents a question of law that is also reviewed

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[1] Although defendant Garden City Hospital's motion was entitled "motion to dismiss," because it relied on MCR 2.116(C)(6), we refer to it in this opinion as a motion for summary disposition.

de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). In deciding whether summary disposition is warranted under MCR 2.116(C)(6), the trial court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the parties, MCR 2.116(G)(5), and determine whether the two lawsuits involved the same parties and are based on the "same or substantially same cause of action." *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666; 341 NW2d 783 (1983).

Summary disposition is proper under MCR 2.116(C)(6) where "[a]nother action has been initiated between the same parties involving the same claim." *Sovran Bank, NA v Parsons*, 159 Mich App 408, 412; 407 NW2d 13 (1987), quoting MCR 2.116(C)(6). "MCR 2.116(C)(6) is a codification of the former plea of abatement by prior action." *Fast Air v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999). The purpose of this rule is to prevent parties from being harassed by new suits brought by the same plaintiff involving the same questions as those existing in pending litigation. *Id.* at 546. To be applicable, the first suit must still be pending at the time of the court's decision on the motion for summary disposition. *Id.* at 549. The parties and the issues need not be identical; rather, it is sufficient that the plaintiff and the defendant were parties to both actions, and the suits are based on the same or substantially the same cause of action. *Chapple v Nat'l Hardwood Co*, 234 Mich 296, 299; 207 NW 888 (1926); *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986).

Here, it is undisputed that plaintiff filed a case involving the same parties and identical issues. Plaintiff, however, argues that, notwithstanding MCR 2.116(C)(6), the trial court erred by dismissing his action "with prejudice" instead of holding the matter in abeyance until the resolution of the first case was determined. Indeed, MCR 2.116(C)(6) is not to be applied mechanically, but rather, the trial court must consider the possibility that the first action will be dismissed on procedural grounds. In *Fast Air, supra,* this Court wrote:

> On the basis of *Sovran, supra*, and *Chapple, supra*, we find that summary disposition cannot be granted under MCR 2.116(C)(6) unless there is another action between the same parties involving the same claims currently initiated and pending at the time of the decision regarding the motion for summary disposition. And, if there is another action pending and the party opposing the motion under MCR 2.116(C)(6) raises a question regarding whether that suit can and will continue, a stay of the second action pending resolution of the issue in the first action, should be granted. [*Fast Air, supra* at 549.]

Here, plaintiff argues that an exception to MCR 2.116(C)(6) should have been made because he needed to preserve this action in the event that the first case is reversed on appeal or the Supreme Court reverses *Apsey v Mem Hosp (On Reconsideration)*, 266 Mich App 666; 702 NW2d 870 (2005), effectively preventing plaintiff from curing a deficient affidavit of merit in the first case.

Plaintiff has waived his right to claim error in this regard. It is fundamental that "[a] party is not allowed to assign as error on appeal something which his or her own counsel deemed proper [in the trial court] since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf v St John Hosp & Med Ctr Copr*, 245 Mich App 670, 683; 630 NW2d 356 (2001), quoting *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). In responding to defendants' motions for summary disposition, plaintiff simply incorporated by reference the motion to consolidate that he had filed in the first case, in which

plaintiff requested that the trial court consolidate the first and second cases according to MCR 2.505, but did not request that the matter be held in abeyance. At the hearing regarding defendants' motions, plaintiff again requested that the matter be consolidated, not held in abeyance. When the trial court refused, plaintiff's counsel requested that the matter be dismissed "without prejudice." Yet, plaintiff then filed a motion entitled "motion for clarification," that urged that the Court dismiss the matter with prejudice because plaintiff could not otherwise file an appeal as of right. At the hearing regarding plaintiff's motion for clarification, plaintiff did not request that the matter be held in abeyance. Plaintiff, therefore, is not entitled to relief.

Plaintiff's argument is nevertheless without merit. Plaintiff relies exclusively on *Sovran*, *supra,* the same case upon which this Court relied in *Fast Air, supra*. The foundation for the *Sovran* Court's decision was that the prior action contained a jurisdictional question. *Sovran, supra,* at 413-416. In *Sovran,* the plaintiff filed suit to renew a judgment against the defendant (the first case). The summons and complaint were served on the defendant in Florida. The defendant alleged lack of personal jurisdiction because of the way process was served. Later, while the jurisdictional questions were still pending in the first case, the plaintiff filed a second complaint in the same circuit court (the second case), and was able to personally serve the defendant in Michigan. Upon the defendant's motion, the second case was dismissed pursuant to MCR 2.116(C)(6). This Court ruled that the dismissal of the second case was erroneous under the circumstances. *Id.* at 411-412. This Court held "that the more appropriate action would have been to stay proceedings pending resolution of the jurisdictional question." *Id.* at 414. In so holding, this Court premised its analysis on its observation that "[o]ther jurisdictions have held, as a general rule, that a first suit is not ground for abatement of a second where the court does not have jurisdiction of the parties." *Id.* at 413, citing 1 Am Jur 2d, Abatement, Survival, and Revival, § 16. Plaintiff argues that this portion of *Sovran* supports its argument. We disagree.

Review of the current version of 1 Am Jur 2d, Abatement, Survival and Revival, demonstrates that a second action is properly abated only where the court in the first action lacks jurisdiction or otherwise lacks the power to grant the plaintiff's requested relief. The relevant section provides in relevant part:

> In order for a pending action to be pleaded in abatement of a subsequent action, the court before which the first action is pending must have jurisdiction of the subject matter, otherwise, the prior action will not operate to abate a second action in a proper court even though it is for the same cause or relief and between the same parties. Similarly, a first suit is not ground for abatement of a second where the first court does not have jurisdiction of the parties, or where a lack of personal jurisdiction of a party prevents the first forum from granting all the relief to which a party is entitled. [1 Am Jur 2d, Abatement, Survival and Revival, § 17, footnotes omitted.]

An exception to this jurisdiction requirement with regard to abatement is explained as follows:

> In some instances the prior suit may not operate to abate a subsequent action, though the first court has jurisdiction of the cause and can grant the relief prayed for in the petition and both actions are based on the same factual situation, such as where the second action involves relief that the first forum cannot grant. The rule requiring abatement of the second action does not apply where the

> powers of the court first acquiring jurisdiction of the subject matter of the litigation are so far limited, or so defective, as not to afford that relief to which the parties are either legally or equitably entitled. [1 Am Jur 2d, Abatement, Survival and Revival, § 17, footnotes omitted.]

Indeed, in accord with these rules, the *Sovran* court held that "dismissal prior to the actual resolution of the jurisdictional question potentially could prevent plaintiff from ever being able to adjudicate the claim in this state." *Sovran, supra at* 414. The exception to MCR 2.116(C)(6), therefore, is limited to cases in which the first forum either lacks jurisdiction over the case or where the first forum does not have the power to provide the claimant with appropriate relief. This conclusion is consistent with the purpose of the rule, which is to preclude parties from being harassed by new suits brought by the same plaintiff involving the same questions as those in pending litigation. *Fast Air, supra* at 546. Because plaintiff does not fall within either of these exceptions, the trial court properly granted summary disposition under MCR 2.116(C)(6) and properly dismissed plaintiff's action "with prejudice."

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Brian K. Zahra