STATE OF MICHIGAN

COURT OF APPEALS

BRAD NIVA and LAURA ANN MACLENNAN, Plaintiffs-Appellants,	UNPUBLISHED April 21, 2011
v	No. 296847 Oakland Circuit Court
NANCY MCCARDELL and KIRK MCCARDELL, Defendants-Appellees.	LC No. 2009-101501-CZ

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's opinion and order granting summary disposition to defendants on plaintiffs' assault claims as well as the court's accompanying judgment imposing sanctions for filing a frivolous lawsuit. We affirm.

This case arises out of a neighborhood altercation on September 11, 2008. At the time of this incident, the parties lived in the same neighborhood. Plaintiffs were cohabitating, and defendants, a married couple, also lived together. Around 7:40 p.m., plaintiffs were walking their dogs through the neighborhood when defendant Kirk McCardell approached plaintiffs in an attempt to serve plaintiff Brad Niva with a Personal Protection Order. According to defendants and their neighbor, Mr. Niva refused service and then ran into an open garage when defendants' neighbor also attempted service. Plaintiffs, however, claimed that Mr. McCardell "shoved" and struck plaintiff Laura MacLennan while attempting service, and asserted that Mr. Niva ran into an open garage out of fear of Mr. McCardell, who was chasing him. Shortly thereafter, sheriff deputies arrived in response to Ms. MacLennan's 911 call reporting that Mr. McCardell had assaulted her. Mr. McCardell, however, showed the deputies a video of the incident recorded from his home surveillance system, and the deputies determined from the video that no assault had occurred. Ms. MacLennan was subsequently charged with and convicted by a jury of filing a false police report, MCL 750.411a(1)(a).

On June 11, 2009, plaintiffs filed the instant suit alleging tortious assault, malicious prosecution, and intentional infliction of emotional distress (IIED). Defendants filed a motion for summary disposition seeking both dismissal of plaintiffs' claims and sanctions for plaintiffs' filing a frivolous complaint. Dispensing with oral argument, the trial court ruled that summary disposition was appropriate since there was no genuine issue of material fact that the prior action

was terminated in defendants' favor, the doctrine of res judicata barred any claim for assault, and plaintiffs failed to state a claim upon which to grant relief for IIED. Additionally, highlighting both that numerous PPOs had been issued against Mr. Niva since this incident occurred and that Ms. MacLennan's conviction related to falsely reporting this incident, the court imposed sanctions for plaintiffs' filing a frivolous complaint. Plaintiffs' subsequent motion for reconsideration was denied, and the court entered judgment against plaintiffs in the amount of $8,860.75.

On appeal, plaintiffs challenge only the court's ruling with respect to their assault claim and the imposition of sanctions. Regarding the assault claim, as recounted previously, the trial court premised its ruling on the doctrine of res judicata. Other than a passing reference to res judicata in their statement of questions presented, however, plaintiffs fail to challenge the court's ruling on this ground. Instead, plaintiffs argue that collateral estoppel cannot preclude their assault claim. As this Court has explained, though, res judicata and collateral estoppel are distinct because the elements to satisfy the doctrines differ. *Detroit v Nortown Theatre, Inc*, 116 Mich App 386, 391; 323 NW2d 411 (1982).

Thus, while review of a court's application of res judicata is subject to de novo review, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008), we are left here to review a doctrine that was neither raised below nor had any part in the lower court's decision. It is not this Court's responsibility to rationalize parties' claims and unravel their arguments. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). This is all the more so when the parties' own failure to recognize fundamental legal distinctions results in their attacking the basis of a trial court's ruling that does not even exist. Ultimately, because plaintiffs' argument on this issue is unresponsive to the circuit court's ruling and provides no basis for concluding that the circuit court erred, we may deem this argument abandoned. *Owendale-Gagetown School Dist v State Bd of Ed*, 413 Mich 1, 11-12; 317 NW2d 529 (1982). But even when considering plaintiffs' arguments, we find that affirmance is appropriate. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

The applicability of collateral estoppel comprises a question of law that is reviewed de novo. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). Similarly, this Court reviews de novo an appeal from an order granting a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth satisfactory evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). The doctrine of collateral estoppel is applicable where "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes*, 481 Mich at 585. "Crossover estoppel, which involves the preclusion of an issue in a civil proceeding after a criminal proceeding and vice versa, is permissible." *Barrow v Pritchard*, 235 Mich App 478, 481; 597 NW2d 853 (1999).

Plaintiffs make two arguments concerning the inapplicability of collateral estoppel with respect to the alleged assault on Ms. MacLennan. First, plaintiffs claim that collateral estoppel would be inappropriate where Ms. MacLennan had little incentive to exhaustively defend against a misdemeanor charge with minor potential penalties as compared to the current civil suit where she has incentive to recover damages in excess of $25,000. See *Monat v State Farm Ins Co*, 469 Mich 679, 683 n 2; 677 NW2d 843 (2004), quoting the Restatement Judgments, 2d, § 28(5), p 273 (collateral estoppel may be inapplicable if a party "did not have adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.") This assertion is unpersuasive, however, given that in the prior proceeding Ms. MacLennan potentially faced not only a fine, but also imprisonment.[1] And this is to say nothing of the potential stigma of having a criminal conviction on her record. See *People v Dipiazza*, 286 Mich App 137, 149-150; 778 NW2d 264 (2009) (a social stigma attaches to criminal convictions); see also *Mollett v City of Taylor*, 197 Mich App 328, 343; 494 NW2d 832 (1992) (a criminal stigma is a disability). It is naïve at best, and disingenuous at worst, to suggest that Ms. MacLennan lacked adequate incentive to defend against criminal charges.

Second, plaintiffs' argument that collateral estoppel is inapplicable against Ms. MacLennan given the "tenuous" nature of the proofs is unfounded. Indeed, with regard to issues of fact, collateral estoppel already requires actual litigation. *Estes*, 481 Mich at 585. In view of this, a requirement pertaining to the weight of the proofs would be redundant, as a valid and final judgment resulting from a jury verdict is necessarily a determination on the merits. See, e.g., *Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990); *Latimer v William Mueller & Son, Inc*, 149 Mich App 620, 640-641; 386 NW2d 618 (1986). And on this score, we would highlight that the higher, criminal standard of proof was already satisfied in resolving the alleged questions of fact plaintiffs now raise. In light of this, for plaintiffs to claim the proofs are weak is as unconvincing as it is irrelevant to the issue of collateral estoppel.

In any event, whether an assault actually occurred was essential to the jury's determination of whether Ms. MacLennan made a false police report. Therefore, the issue of

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[1] MCL 750.411a(1)(a) carries a penalty of imprisonment up to 93 days and/or a fine of not more than $500.

assault – which is identical to the issue in this case – was actually litigated and determined by a final judgment.[2] *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988) (a question is actually litigated when it was put into issue, determined by a trier of fact, essential to the resulting judgment, and is identical to the issue in the instant action). Additionally, the fact that defendants were not a party to the criminal action would not have precluded them from asserting collateral estoppel against Ms. MacLennan because a defensive use of that doctrine is permissible under these circumstances. *Knoblauch v Kenyon*, 163 Mich App 712, 721-722; 415 NW2d 286 (1987). Thus, collateral estoppel would have barred Ms. MacLennan's assault claim.

In contrast, collateral estoppel would not have barred Mr. Niva's assault claim since he was neither a party nor a privy to a party in the previous action. See *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999) ("A party is one who is directly interested in the subject matter and has a right to defend or to control the proceedings and to appeal from the judgment. A person is in privy to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase.").[3] This, however, is not the end of our inquiry, for to withstand summary disposition, Mr. Niva must have presented evidence sufficient to create a genuine issue of material fact that he was, in fact, assaulted. *Karbel*, 247 Mich App at 97.

> An assault is any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact. [*Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991) (quotation marks and citation omitted).]

Mr. Niva's assault claim was, as best we can determine, based on two somewhat related events. First, he testified in his affidavit and at the criminal proceeding that he feared that Mr. McCardell was going to batter him after Ms. MacLennan was allegedly battered. Second, he alleged an assault when he ran away from "footsteps" he heard, eventually making it into a neighbor's garage.

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[2] Plaintiffs concede that the issue of assault was litigated in her criminal trial.

[3] Defense counsel's continued assertion at oral argument before this Court that *Monat* required dismissal of Mr. Niva's claim is completely without merit. Indeed, *Monat* repeatedly indicates that defensive use of collateral estoppel can only be used against a plaintiff who "has already had a full and fair opportunity to litigate the issue", *Monat* at 689, while recognizing that relitigation is permitted when the party against whom preclusion is sought had the ability, as a matter of law, to appeal the prior judgment. *Id.*, at 686. Mr. Niva unquestionably does not fall into either category.

The difficulty Mr. Niva faces with the first assertion is that it is squarely contradicted by the home surveillance video, which clearly shows Mr. McCardell approaching plaintiffs before dropping documents on the ground and walking away from them.[4] Contrary to plaintiffs' claims, at no point did Mr. McCardell make physical contact with Ms. MacLennan, nor did Mr. Niva run away from Mr. McCardell.

Notably, whether a video or a contradicting affidavit should be looked to for the facts in a summary disposition setting was addressed by the United States Supreme Court under the parallel F R Civ P 56(c) in *Scott v Harris*, 550 US 372, 380; 127 S Ct 1769; 167 L Ed 2d 686 (2007). There, a video recording of a high-speed chase contradicted the nonmoving party's assertion that the chase posed no danger. The Court held that in view of the recording, the nonmoving party had failed to present evidence sufficient to create a "genuine" factual dispute. Writing for the Court, JUSTICE SCALIA explained:

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
>
> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such a visible fiction; it should have viewed the facts in the light depicted by the videotape. [*Id*. 380-381.]

Like the Supreme Court, we conclude that Mr. Niva's story is so utterly discredited by the home surveillance recording that no reasonable jury could have believed him.[5] See, also, *Marvin v City of Taylor*, 509 F3d 234, 239 (CA 6, 2007) ("this Court will view the events as they unfolded in the light most favorable to Marvin, but never in such a manner that is wholly unsupportable – in the view of any reasonable jury – by the video recording."). And, with respect to Mr. Niva's second assertion, there is no evidence presented that Mr. McCardell made any intentional, unlawful act towards Mr. Niva, let alone one that would have caused a well-

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[4] Mr. Niva's other assertions, that he was fearful of Mr. McCardell's intentions and "felt significant concern for his well-being" as well as his claim that he sought "sanctuary" in a neighbor's garage before the neighbor intervened are too vague to allege an assault as a matter of law. *Espinoza*, 189 Mich App at 119.

[5] While plaintiffs challenge the reliability of the video recording, albeit within the context of Ms. MacLennan's claim, they present not a shred of evidence supporting their theories that the recording was doctored or manipulated. Mere speculation and conjecture, without more, is insufficient to withstand summary disposition. *Libralter Plastics, Inc v Chubb Group*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

founded apprehension of imminent contact. *Espinoza*, 189 Mich App at 119. Indeed, Mr. Niva testified at the criminal trial that he was running away from "footsteps", as he did not even know who was behind him. Consequently, plaintiffs failed to present a genuine issue of material fact on this issue, and summary disposition of Mr. Niva's claim was appropriate irrespective of the applicability of collateral estoppel or res judicata.[6]

Finally, we come to plaintiffs' argument that the court erred in imposing sanctions for filing a frivolous lawsuit. In Michigan, a trial court is required to impose sanctions for the pleading of frivolous claims under both the court rules and statute. MCR 2.114(F); MCR 2.625(A)(2); MCL 600.2591. A trial court's finding that a claim is frivolous under MCR 2.114(F), MCR 2.625(A)(2), or MCL 600.2591 is reviewed for clear error. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). A claim is frivolous where the party's primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party, where the party had no reasonable basis to believe the facts underlying the party's position were true, or where the party's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a)(i), (ii), and (iii).

Here, as plaintiffs concede, the court imposed sanctions not only for plaintiffs' assault allegation, but also for plaintiffs' malicious prosecution and IIED claims – neither of which plaintiffs challenge on appeal. Notwithstanding, the court's finding of frivolity was based in part on Ms. MacLennan's conviction for "filing a false police report as to this very incident." As this finding also underlay the application of res judicata to plaintiffs' assault allegations and plaintiffs have made no argument against applying res judicata, sanctions were not clearly erroneous. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 221; 561 NW2d 854 (1997) (a claim may be frivolous if already barred by res judicata). Regardless, in view of the fact that Ms. MacLennan's assault claim was already conclusively litigated under the criminal standard of proof and the home surveillance recording flatly contradicted both plaintiffs' stories, we conclude that all three criteria for imposing sanctions under MCL 600.2591(3)(a) were satisfied.

Affirmed.

Defendants may tax costs having prevailed in full. MCR 7.219(A)

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[6] For this same reason, Ms. MacLennan's assault claim is also unsustainable on this additional, alternate ground.