STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY KING and JERRY KING,

Plaintiffs-Appellants,

V

KRISTOPHER TENHARMSEL, NATALIE TENHARMSEL, and HOLLAND HARDWARE INC., also known as HOLLAND ACE HARDWARE and HOLLAND TRUE VALUE HARDWARE

Defendants-Appellees.

UNPUBLISHED
September 17, 2020

No. 350065
Allegan Circuit Court
LC No. 18-060585-NI

Before: CAVANAGH, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

Plaintiffs, Jeffrey King and Jerry King (together "the Kings"), appeal as of right the trial court's order granting summary disposition to defendants Kristopher Tenharmsel, Natalie Tenharmsel (together "the Tenharmsels"), and Holland Hardware, Inc., also known as Holland Ace Hardware and Holland True Value Hardware ("Holland"). The Kings argue that the trial court erred by granting summary disposition to the Tenharmsels and Holland on the basis of the res judicata doctrine. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1). We disagree, and therefore affirm the grant of summary disposition.

I. UNDERLYING FACTS

The Kings own a group of storage units and this case arises out of an explosion that occurred on December 3, 2015, at one of the units. In an earlier action, James Fritz filed a complaint against the Kings, Kristopher,[1] and Holland for injuries he sustained from the explosion. We will refer to that earlier action as the Fritz case throughout this opinion. The Fritz case

[1] When referring to the Tenharmsels individually we will use their first names only to identify them.

eventually resulted in stipulated dismissals with prejudice for all parties; those dismissals form the basis for the res judicata issue on appeal.

Fritz and the Tenharmsels were renting storage units from the Kings at the time of the explosion. The Tenharmsels were growing medical marijuana in their storage unit and they used propane in the growing process. On December 2, 2015, the Tenharmsels filled a propane tank at Holland. During the filling of the tank, Holland allegedly did not diligently inspect the Tenharmsels' propane tank.[2] Specifically, the propane tank was allegedly past the date for which it was licensed to be used, and allegedly also had a small hole. On December 3, 2015, the complaint charges, the hole allowed the gas to escape, causing an explosion when the gas ignited in the storage unit. As a result, Fritz, who was in his nearby storage unit when the explosion occurred, suffered personal injuries and damages to property that he kept in his storage unit. Similarly, the Kings also suffered damages to their property, because they were the owners of the storage units damaged in the explosion.

In March 2018, Fritz filed a complaint against the Kings, Kristopher, and Holland. In his complaint, Fritz sought to recover damages he suffered as a result of the December 3, 2015 explosion. Fritz claimed that the Kings, Kristopher, and Holland were negligent and that their negligence led to the explosion. As stated earlier, these claims eventually were dismissed with prejudice, following stipulated orders of dismissal.

The Kings filed their complaint in this case in December 2018. The Kings alleged that the Tenharmsels and Holland were negligent for filling an allegedly expired and defective propane tank with propane. The Kings alleged that this negligent act caused the explosion. The Kings additionally alleged that the Tenharmsels breached their contract with the Kings by growing medical marijuana in their storage unit. Holland and the Tenharmsels answered the complaint and denied the Kings' allegations. Holland and the Tenharmsels additionally raised the affirmative defense of res judicata.

In May 2019, Holland filed a motion for summary disposition. In its motion, Holland argued that the Kings' claims were barred by res judicata. That same day, the Tenharmsels filed a motion to join Holland's motion for summary disposition. The Tenharmsels' motion did not contain any substantive argument. The Kings responded to Holland's motion and argued that res judicata did not apply in this case. Following a reply brief by Holland and a hearing on Holland's motion, the trial court granted summary disposition to Holland and the Tenharmsels. This appeal followed.

II. ANALYSIS

The Tenharmsels and Holland moved for summary disposition pursuant to MCR 2.116(C)(7). A trial court's decision concerning summary disposition is reviewed de novo. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). "MCR 2.116(C)(7) permits

[2] Due to a lack of documentary evidence in this case, many of the facts are taken from the complaints filed in this case and the Fritz case. The underlying facts relevant to the issue on appeal, however, are not in dispute.

summary disposition 'because of release, payment, prior judgment, [or] immunity granted by law.'" *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015), quoting MCR 2.116(C)(7) (alteration in original).

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

Furthermore,

> [w]e must consider the documentary evidence in a light most favorable to the nonmoving party for purposes of MCR 2.116(C)(7). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. But when a relevant factual dispute does not exist, summary disposition is not appropriate. [*Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012) (citations and quotation marks omitted).]

This Court may only consider "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Finally, res judicata is reviewed de novo. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

Res judicata is a judicial doctrine constructed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed2d 308 (1980). As does the United States Supreme Court jurisprudence regarding res judicata, Michigan courts consistently apply the principle broadly in practice. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999).

This broad application encompasses claims previously litigated, as well as "every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart v Dart*, 460 Mich 573, 586-587; 597 NW2d 82, 88 (1999). Res judicata bars a party's subsequent action if "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair*, 470 Mich at 121. Finally, "the burden of proving the applicability of the doctrine of res judicata is on the party asserting it." *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

With regard to the first requirement, it is well settled that a voluntary dismissal with prejudice is an adjudication on the merits for res judicata purposes. See, e.g., *Limbach v Oakland*

Co Bd of Co Rd Comm'rs, 226 Mich App 389, 395-396; 573 NW2d 336 (1997). The Kings argue that there was not an adjudication on the merits in the Fritz case because the trial court did not rule on any motions or make any findings before that case was dismissed. But *Limbach* clearly establishes that a voluntary dismissal with prejudice is an adjudication on the merits for res judicata purposes. *Id.* Thus, the trial court was not required to rule on any motions or to make any findings, or in fact take any type of action for res judicata to apply in this case. The claims in the Fritz case were voluntarily dismissed with prejudice. As such, and without more, they acted as adjudications on the merits for res judicata purposes. See *id.*

The second requirement of the doctrine of res judicata is that both actions must involve the same parties or their privies. *Adair*, 470 Mich at 121. The Kings argue that they were defendants in the Fritz case along with Kristopher and Holland. It appears that the Kings may have been trying to argue that because they, Kristopher, and Holland collectively were named as defendants in the earlier case together, that they themselves, standing alone, were not "parties" in the prior action for the purposes of res judicata. Nonetheless, the Kings fail to make any argument regarding the party or privity requirement of res judicata, and their overall argument is indecipherable. As such, the issue is abandoned. See *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015) ("An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority.").

Finally, for the doctrine of res judicata to bar the relitigation of a claim, the matter in question must have been decided in the first case, or be one which could have been so decided. *Adair*, 470 Mich at 121. The test for this element is the "transactional" test. *Id.* at 124. The "transactional" test provides that "the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief." *Id.* (citation omitted). "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit . . . ." *Id.* at 125 (citation and quotation marks omitted; alterations in original). See also *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 420; 733 NW2d 755 (2007) (quoting *Adair*'s statement of the transactional test).

The Kings' claims in this case could have been decided in the Fritz lawsuit, and thus is barred by res judicata. The explosion that gave rise to the cause of action in the Fritz case is identical to the one relied on as a basis for the present case. The facts that support Fritz's claims and the Kings' claims are related in time, space, and origin because they are the results of the same occurrence. Both sets of claims are rooted in the facts surrounding the refilling of the propane tank, the resulting explosion, and the associated damages. Accordingly, the Kings' claims in this case could have been decided in the Fritz case. Thus, all three requirements for the doctrine of res judicata have been met and the trial court properly granted summary disposition to Holland and the Tenharmsels.

Finally, we additionally note another facet of the Kings' argument: that res judicata should not apply in this case because they were not required to file a cross claim in the Fritz case. Specifically, the Kings argue that res judicata should not apply here because if they had chosen to instead bring the claims raised in this case in the Fritz case, those claims would have been

permissive rather than mandatory. However, the Kings' argument lacks support in this instance. As discussed earlier, the standard application of the doctrine of res judicata is broad, favoring a bar to claims which could have been brought in the first lawsuit through the exercise of reasonable diligence. See e.g., *Adair*, 470 Mich at 121; *Dart*, 460 Mich at 586. While the Kings contend that not pursuing the cross claims in the Fritz case promoted efficiency and limited confusion, allowing their separate action to proceed would have the opposite result. By bringing claims that could have been brought as cross claims in the Fritz case as a separate action, the Kings created an unnecessary second case. As explained earlier, the Kings' claims could, with reasonable diligence, have been brought in the first action. Thus, the trial court properly granted summary disposition to the Tenharmsels and Holland.

III. CONCLUSION

For the reasons stated in this opinion, the trial court's order granting summary disposition to Holland and the Tenharmsels is affirmed. Holland and the Tenharmsels, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello
/s/ Jonathan Tukel