# STATE OF MICHIGAN

# COURT OF APPEALS

LISA MORELLI, LAURA A. MORELLI, and ANTHONY P. MORELLI,

Plaintiffs/Counter Defendants-Appellees,

v

YVONNE TUDOR,

Defendant/Counter Plaintiff/Third-Party Plaintiff-Appellant,

and

WALTER HAGEN,

Defendant/Counter Plaintiff/Third-Party Plaintiff,

and

BOSS ENGINEERING, MILFORD TOWNSHIP, OAKLAND COUNTY, and STATE OF MICHIGAN,

Third-Party Defendants.

UNPUBLISHED
May 15, 2012

No. 300621
Oakland Circuit Court
LC No. 2009-099811-CH

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's grant of summary disposition in favor of plaintiffs. We affirm.

This Court has previously described the underlying facts of this case in *Morelli v Tudor*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2005 (Docket No. 263814), which arises from a dispute regarding the location of a boundary line between plaintiffs' and defendant's respective properties. The parcels of land that plaintiffs and

defendant own originally were but a portion of a larger parcel owned by the Leaches. The Leaches split their land into parcels in 1979. In order to conduct the split, they commissioned a survey of the property, which was performed by David C. Finney. Finney completed the survey, marked the corners of each parcel with iron rods and caps, and recorded the survey on August 7, 1979.

After the Finney survey was recorded, the Leaches sold one of the newly marked parcels of property to the Stanleys by warranty deed. That parcel of land was eventually transferred three more times by warranty deed and was then transferred to defendant, also by warranty deed, on September 15, 2000. Each of the warranty deeds that were executed in relation to defendant's parcel of land utilized Finney's description of the property.

The parcel of land that plaintiffs own is situated adjacent to the northern border of defendant's parcel. In 1999, Oakland County commissioned a survey of the property, which was completed by Grant J. Ward. Mr. Ward apparently did not reference the Finney survey when placing his corner markers that established the boundary between defendant's and plaintiffs' parcel. The markers from the Ward survey were placed thirty feet north of the Finney markers. Defendant asserts on appeal that the Ward survey is consistent with a government survey that was completed in the 1930s. It does not appear that the Ward survey was recorded, nor is there any evidence that the Ward survey was ever referenced in any deed.

In 2002, plaintiffs purchased their parcel of land. Plaintiffs' parcel was separated from defendant's parcel by a fence that sat on the boundary line as set forth by the Finney survey. Defendant approached plaintiffs seeking to purchase a 30 foot wide strip of land that ran the length of the border between the two parcels. Plaintiffs rejected defendant's offer and defendant hired a surveyor to conduct a survey of the land. That surveyor utilized the Ward corner markers, as opposed to the Finney corner markers, and determined that the property line was situated 30 feet north of the fence and the Finney markers. Consequently, defendant removed the fence between the properties and erected a new fence, which was 30 feet north of the original fence.

In response to defendant's conduct, plaintiffs filed an action to quiet title to the strip of land in question. The trial court ruled in plaintiffs' favor and determined that the doctrine of repose established the Finney corner markers as the markers that established the property boundaries. Defendant appealed that decision to this Court. On appeal, this Court affirmed the trial court's decision. Like the trial court, this Court relied on the doctrine of repose in reaching its holding. The Court explained that, under the doctrine of repose, recently conducted surveys cannot be utilized in order to disturb long-established boundaries. The Court further noted that there exists a clear public policy favoring consistency in determining the location of boundary lines. *Morelli v Tudor*, unpublished opinion per curiam of the Court of Appeals, entered December 13, 2005 (Docket No 263814). It does not appear that defendants sought leave to appeal this Court's decision to our Supreme Court. However, defendants did file a motion for relief from judgment in the trial court, which was denied.

On April 8, 2009, plaintiffs filed a complaint and commenced a new action in circuit court. Plaintiffs alleged that defendant had constructed a fence 33 feet north of the property line as determined by the trial court and affirmed by this Court in the prior action. Plaintiffs sought a

temporary and permanent injunction to prevent defendant from "interfering with Plaintiffs' property." In response to the complaint, defendant asserted that Oakland County had completed a new survey in 2007 and had placed a new corner monument. Defendant asserted that she built the fence after measuring from the location of the new corner monument.

Plaintiffs moved for summary disposition and asserted that they were entitled to have their motion granted on the basis of res judicata. In defendant's response to the motion, it was argued that res judicata was inapplicable because the 2007 survey conducted by Oakland County represented a new fact that had developed since the previous litigation. Further, defendant asserted that plaintiffs' argument regarding the location of the property boundary was inconsistent with, and not supported by, this Court's 2005 opinion. The trial court ultimately granted the motion for summary disposition, but determined that res judicata did not apply because the 2007 Oakland County survey constituted a new fact that arose after the previous litigation. The court stated that summary disposition was nonetheless appropriate due to the doctrine of repose. Like this Court in the previous action, the trial court concluded that because the Finney survey had historically formed the basis of the boundary lines, the recent Oakland County survey could not alter the previously-recognized boundaries.

Following the grant of summary disposition, plaintiffs filed a motion for an award of damages. Plaintiffs sought $29,665.00, which was the sum of the expenses they incurred during litigation and the damage they suffered to their property rights. The trial court granted the motion. Subsequently, defendant filed a motion for reconsideration, stating that she did not receive notice regarding the hearing that was held on the motion. The trial court conducted a hearing on the motion for reconsideration, which it ultimately denied in a written order. Defendant now appeals as of right.[1]

Defendant contends on appeal that the trial court erred in determining that the doctrine of repose mandated a conclusion that the property boundary be controlled by the Finney survey conducted in 1979. Defendant contends that the Finney survey was inaccurately conducted because it ignored existing government monuments. Citing alternative surveys that had all been completed prior to the previous action between these parties, defendant argues that there was never an explanation of why those surveys did not control the Finney survey.

We determine that defendant's first issue on appeal is not properly preserved for this court's review and need not be addressed. In order to properly preserve an issue for appeal, the issue must be raised before, and addressed by, the trial court. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). In the present case, defendant did not argue that the Finney survey should not control on the basis of the surveys that were completed prior to the first litigation between these parties. Rather, in attempting to avoid an application of the doctrine of res judicata, defendant argued that plaintiffs were not entitled to summary disposition because they were attempting to expand the size of their property beyond this Court's previous opinion and because Oakland County had completed a new survey in 2007 after this Court's 2005

[1] We note that defendant does not challenge the trial court's award of damages.

decision and set a new corner marker. Now, on appeal, defendant makes no such argument. Indeed, defendant's brief on appeal does not even reference the 2007 Oakland County survey.

While this Court could, in its discretion, consider this unpreserved issue on appeal, we conclude that the argument would have likely been rejected by the trial court had it been properly presented. It is evident to this Court that had defendant's argument on appeal been presented to the trial court in its present form, the trial court would have applied the doctrine of res judicata.

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (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. [*Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007).]

It is well-established that where the underlying facts of subsequent litigation differ from the prior action, the doctrine of res judicata may not apply. *Labor Council, Michigan Fraternal Order of Police v City of Detroit*, 207 Mich App 606, 607; 525 NW2d 509 (1994). However, absent any reference to the 2007 survey or plaintiffs' alleged expansion of their property rights granted by this Court, there are no new facts or arguments that would have precluded the application of the doctrine of res judicata. Defendant's argument on appeal solely relates to the Finney survey and cannot be read as anything other than an attempt to relitigate this Court's previous decision. If defendant believed that this Court's previous determination to apply the doctrine of repose was in error, the proper remedy to that error would be to seek leave to appeal this Court's decision to our Supreme Court. To now argue that prior decision was legally wrong is to seek the proverbial second bite of the apple.

We note that it is not this Court's role or responsibility to make arguments for a party on appeal. As our Supreme Court has explained

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Consequently, it would be improper for this Court to now analyze whether plaintiffs' conduct has been consistent with this Court's prior opinion or whether the existence of the 2007 survey impacts the applicability of the doctrine of repose because defendant has failed to make, or even refer to, those arguments on appeal. While defendant may have presented those arguments to the trial court, she now solely argues that the Finney survey was improperly conducted and that no court should have ever utilized it to determine the location of the property boundaries. That issue has already been litigated.

Defendant also argues on appeal that the trial court violated her right to due process of law when it determined the location of the property line without regard to the location of defendant's septic field. Defendant argues that the court gave no consideration to the "drastic effect of the ruling" and that remand was necessary to for "further hearing on the subject." "[W]hether constitutional due process applies and, if so, has been satisfied are legal questions reviewed de novo." *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

In her brief on appeal, defendant fails to cite any authority in support of the notion that she possessed a particular due process right in the present instance. Defendant argues that she possessed a due process right because the result of the proceeding at issue was tantamount to an inverse condemnation. However, the very authority that defendant cites states that inverse condemnation is a cause of action by a property owner against a governmental defendant for a taking in fact committed by the government defendant. See *In re Acquisition of Land-Virginia Park*, 121 Mich App 153; 328 NW2d 602 (1982). The present dispute involves not an alleged taking by a governmental entity, but by another private landowner. We nonetheless note that procedural due process does require that a meaningful opportunity to be heard is granted prior to a deprivation of a property interest. *York v Civil Service Comm*, 263 Mich App 694, 702; 689 NW2d 533 (2004). Such an opportunity was granted in the present case. Defendant was permitted the opportunity to fully brief the subject matter of this litigation prior to any ruling by the trial court. Further, at the motion for reconsideration, the transcript demonstrates that Gilbert Foreman, advocating for defendant, argued that the court's ruling may permit plaintiffs to cut defendant's access to her septic sewer. The court stated that it understood the argument. Then, plaintiffs argued that any such argument was without merit, as the septic field had always been located on plaintiffs' property and that there had never been any indication that defendant's access would be severed. Therefore, it is evident that defendant was permitted an opportunity to be heard regarding this argument and that the court considered the argument prior to ruling.[2] Defendant's argument relating to due process lacks merit.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

[2] We note that the doctrine of res judicata could also be applied to this issue on appeal, as defendant could have made the argument regarding the alleged "taking" of the septic field during the prior action. However, we chose to address the merits of the issue in order to correct the assertion that the trial court did not consider the argument below.