STATE OF MICHIGAN

COURT OF APPEALS

DAVID E. BLOCH,

Plaintiff-Appellant,

v

IRINA E. BLOCH,

Defendant-Appellee.

UNPUBLISHED
September 2, 2010

No. 290086
Genesee Circuit Court
LC No. 08-090010-NZ

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant in his claim for damages as a result of defendant's actions during the parties' earlier divorce proceedings. We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant were married on April 6, 2001, and have a minor daughter. On May 22, 2007 defendant filed for divorce. The judgment of divorce was finalized on June 16, 2008.[1] According to plaintiff, during the proceedings in the divorce action, defendant sought full custody of the couple's minor child. Plaintiff maintains that, as a result, defendant falsified reports of physical abuse by plaintiff and reported or caused to be reported a number of false allegations of sexual abuse by plaintiff against the couple's child. According to plaintiff, these allegations resulted in two separate child protective service (CPS) investigations, a psychological review of the parties and the child, and a number of police investigations. Plaintiff was also forced to undergo a psychological evaluation, a polygraph examination, and was subject to at least one arrest. During the divorce proceedings, the trial court found that the allegations were without merit, a finding supported by the psychologist who examined the parties and the child.

After the divorce was final, plaintiff filed suit, seeking damages from defendant. In neither plaintiff's first complaint, nor his amended complaint, did he specifically state a cause of

[1] A stipulated amendment was entered on August 17, 2008.

action; but sought damages from defendant's fraudulent conduct and her "malicious, wilfull and wanton acts."[2]

Defendant moved for summary disposition, seeking dismissal for lack of jurisdiction pursuant to MCR 2.116(C)(4), and on the ground that plaintiff's claims were barred by res judicata, pursuant to MCR 2.116(C)(7). The trial court granted defendant's motion. Noting that the parties did not have a divorce trial, but reached a settlement, the trial court found that plaintiff should have raised his claims of improper conduct in the divorce trial, and used it as a rationale to reduce his property settlement or obtain other relief in connection with the divorce proceedings. The trial court also noted that plaintiff could seek to reopen the divorce proceedings due to defendant's wrongful conduct. It held that res judicata barred plaintiff's suit.

On appeal, plaintiff first contends that res judicata does not bar his suit. He maintains that Michigan law does not require that a claim for malicious prosecution be merged with a divorce action. We review de novo a trial court's decision to grant or deny a motion for summary disposition. S*piek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The applicability of res judicata is also question of law subject to de novo review on appeal. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

The doctrine of res judicata bars claims arising out of the same transaction that could have been litigated in a prior proceeding, but were not. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 576; 621 NW2d 222 (2001). The party asserting res judicata must demonstrate that: "(1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies." *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999); *Richards*, 272 Mich App at 530. It may not, however, be invoked to sustain extrinsic fraud or to establish an essential element of a crime. *People v Goss (After Remand)*, 446 Mich 587, 600 (Levin, J.), 610 (Brickley, J.); 521 NW2d 312 (1994); *Sprague v Buhagiar*, 213 Mich App 310, 313-314; 539 NW2d 587 (1995).

Recently, in *Begin v Mich Bell Tel Co*, 284 Mich App 581; 773 NW2d 271 (2009), this Court clarified the extent of the reach of res judicata concerning the third element above, noting the broad application of the doctrine under Michigan law:

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[2] In a later "supplemental brief" in support of his amended complaint, plaintiff characterized his cause of action as a claim for malicious prosecution, and on appeal discusses that cause of action. The trial court noted that plaintiff's claims could also be characterized as sounding in defamation or abuse of process, but did not reach the merits of any of plaintiff's claims.

Michigan broadly applies the doctrine of res judicata to advance its purposes. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). "As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events . . . ." *Id*. Thus, under Michigan's broad approach to res judicata, the doctrine "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." [*Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004)]. There are two alternative tests for determining when res judicata will bar a claim in a second lawsuit because the claim could have, with the exercise of reasonable diligence, been brought in the first action: the "same transaction" test and the "same evidence" test. *Id*. at 124. The "same evidence" test looks to "whether the same facts or evidence are essential to the maintenance of the two actions." [*Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993), mod on other grounds *Patterson v Kleiman*, 447 Mich 429 (1994).] As stated in *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999): "Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical."

Michigan also applies the more inclusive "same transaction" test as an alternative method to determine whether res judicata will bar a subsequent claim. In *Adair*, *supra* at 124, the Court clarified the differences between the two tests by quoting at length from *River Park, Inc v Highland Park*, 184 Ill 2d 290, 307-309; 703 NE2d 883; 234 Ill Dec 783 (1998) (citations omitted):

> "Under the 'same evidence' test, a second suit is barred 'if the evidence needed to sustain the second suit would have sustained the first, or if the same facts were essential to maintain both actions.' 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.'
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> "Under the same evidence test the definition of what constitutes a cause of action is narrower than under the transactional test. As explained in the Restatement (Second) of Judgments, the same evidence test is tied to the theories of relief asserted by a plaintiff, the result of which is that two claims may be part of the same transaction, yet be considered separate causes of action because the evidence needed to support the theories on which they are based differs. By contrast, the transactional approach is more pragmatic. Under this approach, a claim is viewed in 'factual terms' and considered 'coterminous with the transaction, regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; * * * and regardless of the variations in the evidence needed to support the theories or rights.'"

> Thus, under Michigan's broad application of res judicata applying the "same transaction" test, whether evidence necessary to support a first lawsuit differs somewhat from that necessary for subsequent claims will not be dispositive. *Adair*, *supra* at 124-125. Instead, "'[w]hether 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, quoting 46 Am Jur 2d, Judgments 533, p 801 (emphasis in *Adair*). [*Begin*, 284 Mich App at 600-601.]

In this case, the divorce action was decided on the merits, and the judgment was a final judgment. Further, the same parties were involved in the divorce action and this present action. The only remaining issue is, then, whether the contested "matters" in this case were or could have been resolved in the divorce action.

Malicious prosecution, as plaintiff now categorizes his claim, requires that the plaintiff prove: (1) a criminal proceeding initiated or continued by defendant against plaintiff; (2) termination of the proceeding in favor of the accused; (3) the absence of probable cause for the proceeding; and (4) malice or a primary purpose other than that of bringing an offender to justice. *Matthews v Blue Cross & Blue Shield of Mich*, 456 Mich 365, 378; 572 NW2d 603 (1998). Further, Michigan requires the plaintiff to have suffered "special injury" in the nature of an interference with person or property. *Kauffman v Shefman*, 169 Mich App 829, 834; 426 NW2d 819 (1988).[3]

Here, under the same transaction test above, this claim, or an alternate claim for defamation or abuse of process,[4] would appear to fit the definition of the same transaction. The actions that allegedly give rise to plaintiff's cause of action arose during the divorce itself, and could be considered either in the custody determination, spousal support determination, or the property division. See *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996) (court can consider general principles of equity when determining property division); MCL 722.23(f), (j). The facts also arguably share a common origin, because defendant's false allegations were coupled with her attempts to prevent plaintiff's parenting time. Because the parties were arguing

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[3] Notably, knowingly providing false information to a law enforcement authority to induce a prosecution can be a basis for a claim of malicious prosecution. See *Renda v Int'l Union UAAAIWA*, 366 Mich 58, 83; 114 NW2d 343 (1962).

[4] "The elements of a cause of action for defamation are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod)." *Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 702; 609 NW2d 607 (2000). To recover for abuse of process, "a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

over custody of the child during the divorce proceedings, defendant's motivation for the allegations was also closely related to the divorce, i.e., to acquire full custody of the parties' daughter. Moreover, simply because the claim did not arise until after the divorce proceedings began does not itself act as a bar to applying res judicata here. See *Schwartz v Flint*, 187 Mich App 191, 194-195; 466 NW2d 357 (1991).

However, we find plaintiff's argument that tort actions and divorce actions do not form a convenient trial unit persuasive. Plaintiff is correct that a jury trial could be required to decide the merit of his tort claim, but that this is not available in the divorce proceeding. A lengthy tort proceeding appears to frustrate the purpose of divorce proceedings designed to resolve property and support issues in a timely fashion to allow the parties to get on with their lives—a purpose that becomes more important when custody issues are involved.

More importantly, this Court has previously held that an ex-spouse may maintain a separate tort action after the divorce proceedings have concluded. In *Goldman v Wexler*, 122 Mich App 744; 333 NW2d 121 (1983), for example, an ex-wife brought an action against her ex-husband for a battery allegedly committed during the marriage. The trial court dismissed the ex-wife's complaint, opining that the action was barred by the prior divorce judgment. A panel of this Court disagreed:

> The prior action between these parties was one for divorce based on the Michigan no-fault divorce statute. MCL § 552.1 *et seq.* The present action is for a battery which is alleged to have occurred during the course of the marriage. Although we agree that fault continues to be a consideration in property division disputes in a divorce action, *Davey v Davey*, 106 Mich App 579, 581; 308 NW2d 468 (1981), we cannot agree, nor does defendant seriously contend, that both claims constituted but a single cause of action. Consequently, this claim is neither barred by, nor merged into the divorce judgment. *Howell v Vito's Trucking C*, [386 Mich 39; 187 NW2d 236 (1971)]; *Curry v Detroit*, 394 Mich 327, 331; 231 NW2d 57 (1975).

This Court also noted that if the ex-husband had intended that all claims which grew out of the marriage be thereafter foreclosed by the divorce judgment, a release providing for the same should have been incorporated into that judgment. *Id.* at 749. This Court also indicated that if consideration of the injuries she suffered as a result of the alleged battery was given plaintiff as part of the property settlement, defendant could raise that issue by way of affirmative defense and attempt to obtain a set-off against any judgment plaintiff obtains in this action. *Id.*

McCoy v Cooke, 165 Mich App 662, 664; 419 NW2d 44 (1988) reached a similar result. In that case, after the conclusion of the parties' divorce action, the plaintiff initiated an action based upon allegations that her former husband beat her during their marriage and intentionally inflicted emotional distress upon her. The trial court found that the issue of defendant's physical and mental abuse had been fully litigated during the divorce proceedings in the context of fault and that plaintiff was collaterally estopped from again raising the issue. This Court disagreed and found that while the issue of whether defendant had been physically abusive was resolved in the divorce action (the trial court having found that such abuse, did, in fact, repeatedly occur), the issue of damages should be reached. And, to the extent that the divorce judgment

compensated plaintiff for her injuries, defendant may raise that issue as an affirmative defense. *Id*. at 667-668.

An action for divorce, intending to separate the parties, distribute their assets, and resolve custody disputes, requires far different elements of proof than a tort action for malicious prosecution or defamation. While unquestionably related, the two actions are not inextricably interwoven and the same facts or evidence are not essential to the maintenance of the actions.

Moreover, plaintiff was the defendant in the parties' initial divorce suit. "A defendant generally has the election of either pleading a counterclaim or cross-claim or preserving it for a future independent suit." *Eyde v Charter Twp of Meridian*, 118 Mich App 43, 52-53; 324 NW2d 775 (1982). See also *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994) (finding that, because "[c]auses of action and defenses are not interchangeable", the plaintiff county's failure to counterclaim against the defendant in an earlier action did not preclude its current claim). Under MCR 2.203, a party may bring a counterclaim and "claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." MCR 2.203(C). And under the rule, a party pleading against another must join all claims against the other party arising from a single transaction or occurrence. MCR 2.203(A). However, this does not mean that the defendant in a suit is limited to that opportunity to initiate his or her own claims arising from that same transaction or occurrence. MCR 2.203(E) "is permissive, as opposed to compulsory," and thus "allows a party . . . to maintain its counterclaim in a separate independent action." *Salem Indus, Inc v Mooney Process Equip Co*, 175 Mich App 213, 216; 437 NW2d 641 (1988). Similarly, defendant's independent tort claim may not be "employed . . . as an affirmative defense and later as foundation" for a separate cause of action. *Leslie v Mollica*, 236 Mich 610, 615; 211 NW 267 (1926). See also *Ternes Steel Co v Ladney*, 364 Mich 614, 619; 111 NW2d 859 (1961). In summary, plaintiff could properly bring his tort claim as either a counterclaim in the divorce action, raise it as an affirmative defense in that action, or bring a separate suit.

Nothing in the materials presented to this Court shows that plaintiff either asserted his independent tort claim as an affirmative defense or raised it as a counterclaim in the earlier proceeding. While the trial court thought plaintiff should move to reopen the earlier proceeding and obtain relief in that proceeding, the court rule permits him to elect not to do so. Consequently, we find that the trial court erred when it determined that plaintiff's claim was barred by res judicata.

Plaintiff raises a concurrent argument that his suit was not barred by collateral estoppel. However, this issue was not raised or decided below and is not preserved. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 110; 593 NW2d 595 (1999). Thus, we decline to address it. See *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

Plaintiff also argues that the trial court has subject matter jurisdiction to resolve plaintiff's claims. Defendant has not addressed this issue, nor was it decided below. We thus decline to review this issue at this time. *Id*.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto

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SAAD, J. (*dissenting).*

I respectfully dissent from the majority's reversal of the trial court's ruling that Mr. Bloch's malicious prosecution claim is barred by res judicata. Michigan broadly applies the doctrine of res judicata and the issue of whether his wife made false allegations of child abuse not only could have been, but was fully aired in the divorce proceedings. Indeed, the abuse issue was front and center in the earlier divorce case and was inextricably intertwined with numerous litigated matters such as custody and parenting time.

Now, in this case, Mr. Bloch seeks to once again press the same issue, but dresses his grievance in the clothes of a separate tort to take a second bite at the apple. This type of "gaming" of the litigation process is exactly what the res judicata doctrine is meant to prevent. I dissent.

/s/ Henry William Saad