STATE OF MICHIGAN

COURT OF APPEALS

KAREN L. ZAHN and MICHAEL M. ZAHN,

Plaintiffs–Appellants,

v

PETER A. BASILE SONS, INC. and CONSULTING ENGINEERING ASSOCIATES, INC.,

Defendants–Appellees.

UNPUBLISHED
June 14, 1996

No. 179299
LC No. 94-402526-NO

Before: White, P.J., and Smolenski, and R.R. Lamb,* JJ.

PER CURIAM.

Plaintiffs appeal from an order granting summary disposition dismissing their negligence and loss of consortium claims pursuant to MCR 2.116(C)(7). We reverse and remand.

On the evening of March 12, 1991, plaintiff Karen L. Zahn was injured when she tripped over a spike that held in place a steel plate covering road construction at the intersection of Woodward and Fort in the City of Detroit. The Michigan Department of Transportation (MDOT) has jurisdiction of the road. However, it had contracted with the City of Detroit to perform the work. The City then contracted with defendant Consulting Engineering Associates, Inc. to serve as the construction manager. Defendant Peter A. Basile Sons, Inc. was a subcontractor hired by Harlan Electric, the general contractor, to perform excavation work. Plaintiffs sued MDOT in the Court of Claims. After entering into a settlement with MDOT and dismissing their Court of Claims action against MDOT, plaintiffs commenced the present action in circuit court. The circuit court granted defendants' motion for summary disposition, concluding that the action is barred by res judicata and by MCL 691.1402(2); MSA 3.996(102)(2).

Plaintiffs first argue that the trial court erred when it granted summary disposition in favor of defendants on the ground that plaintiffs' claims are barred by res judicata. We agree.

* Circuit judge, sitting on the Court of Appeals by assignment.

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. . . . This doctrine requires that (1) the first action be decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involved the same parties or their privies. [*Board of Co Road Comm'rs v Schultz*, 205 Mich App 371, 375-376; 521 NW2d 847 (1994) (citations omitted).]

We first observe that plaintiffs claims against these defendants could not have been brought in the first action. The Court of Claims did not have jurisdiction over plaintiffs' negligence claims against the nongovernmental defendants. MCL 600.6419; MSA 27A.6419; MCL 600.6419a; MSA 27A.6419(1). See *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270 (1988), modified 431 Mich 898; 432 NW2d 171 (1988).

Next, while there is clearly considerable overlap in the claims against MDOT and these defendants, they are not identical for res judicata purposes. Plaintiff's claim against MDOT was based on a breach of its statutory duty, while its claims against these defendants are based on defendants' general negligence. This is not just a difference in theory. The facts necessary to establish the claims differ.

Lastly, we do not conclude that defendants were in privity with MDOT so as to make them the equivalent of the same party. *Sanders Confectionery Products, Inc. v Heller Financial, Inc.*, 973 F2d 474 (CA 6, 1992), cited by defendant for the proposition that res judicata applies to one who controls the litigation or one whose interest is adequately protected, is inapposite. In *Sanders*, the court held that the chairperson of the boards of the debtor corporation and its parent corporation, and the president of both companies, were in privity with parties to the earlier bankruptcy litigation where these positions allowed them to control the actions of the party corporations. The court upheld the dismissal of the president's and chairperson's claims on res judicata grounds. *Sanders* holds that one who participates in proceedings and controls them is bound by the outcome, even if not technically a party, and may not thereafter maintain a separate action. It does not follow that where a defendant tenders a defense to another completely separate entity, which entity may also be independently liable on a different theory of liability, and that second entity accepts the defense and thereby controls the litigation in the name of the defendant, that a separate action against the second entity is merged into or barred by the judgment respecting the defendant. These defendants assumed MDOT's defense by virtue of a separate indemnity contract between the parties, and not because of a statutory or legal relationship that otherwise placed them in privity, e.g., master/servant, statutory employer. *See Viele, supra*.

Plaintiffs next argue that the trial court also erred in granting summary disposition in favor of defendants on the ground that plaintiffs' claims were barred by governmental immunity. Again, we agree. The highway exception to governmental immunity provides, in part:

> If the state transportation department contracts with another governmental agency to perform work on state trunkline highways, *an action brought under this section for*

> *tort liability arising out of the performance of that work* shall be brought only against the state transportation department under the same circumstances and to the same extent as if the work had been performed by employees of the state transportation department. [MCL 691.1402(2); MSA 3.996(102)(2).]

This provision does not grant immunity to, or bar claims against, private entities. Section 1402 provides an exception to governmental immunity, imposing a duty on governmental agencies in regard to public highways and creates a cause of action against the agency having jurisdiction over the highway. MCL 691.1402(1); MSA 3.996(102)(1); *Scheurman v Department of Transportation*, 434 Mich 619, 630; 456 NW2d 66 (1990). The statute provides that when bringing a claim under this section, i.e., a claim against a governmental entity as an exception to governmental immunity, a claim regarding state truckline highways as to which the state has contracted with another governmental agency shall only be brought against the state, and not the governmental agency with which the state contracted. The statute by its terms applies only to actions brought under §1402 – actions against governmental entities. A claim against a private contractor who performed work on a highway is not brought under the highway exception because a private contractor is not a governmental agency shielded by immunity. Consequently, the statute is inapplicable and plaintiffs' claims are not barred by this statutory provision.

Defendants assert that plaintiffs' claims are nevertheless barred by the release executed as part of the settlement in the Court of Claims action. Because this basis for summary disposition was not addressed below, and requires further factual development, we decline to review it on appeal. *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994). Defendants may revisit this issue on remand. The court shall develop a record regarding the circumstances surrounding the settlement and the preparation and execution of the release, and if necessary, whether defendant's were "agents" of MDOT.

Reversed and remanded. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard R. Lamb