

STATE OF MICHIGAN  
COURT OF APPEALS

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PARS PETROLEUM, LTD.,

Plaintiff-Appellant,

v

DARYOUSH ZAHRAIE,

Defendant-Appellee.

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UNPUBLISHED

August 18, 2005

No. 262074

Wayne Circuit Court

LC No. 04-416354-CK

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition and imposing sanctions. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Falamarz Zahraie, the owner of Pars Petroleum, Ltd., agreed to sell the assets of the business, including real estate, a gas station, a convenience store, and the store inventory, to Daryoush Zahraie, his brother, for \$1.3 million. Notwithstanding the fact that the proposed sale involved corporate assets, the purchase agreement identified the parties as Falamarz Zahraie and Daryoush Zahraie. At the closing, Daryoush Zahraie produced a check for the down payment amount of \$240,000, made payable to Pars. The check was drawn on the account of Tri-Unity Enterprises, Inc., a corporation of which Daryoush Zahraie is president. The mortgage broker took the check, ostensibly for the purpose of making a copy, and never surrendered it to Falamarz Zahraie.

Pars filed the instant suit alleging that Tri-Unity's account contained insufficient funds to pay the check, and that Daryoush Zahraie intended to commit fraud by presenting the check with knowledge that it would not be honored. Pars alleged that Daryoush Zahraie's actions constituted a felony under MCL 750.131, and that pursuant to MCL 600.2952, it was entitled to double damages, or \$480,000.

Daryoush Zahraie, acting *in propria persona*, moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that Pars' action was barred by the doctrine of *res judicata*. Daryoush Zahraie noted that the transaction had been the subject of three other actions. In the first prior action, Pars and Falamarz Zahraie sued Daryoush Zahraie and his corporation, D & F Petro, the mortgage broker, and their attorneys, alleging breach of contract, conversion, legal malpractice, and unjust enrichment. The jury returned a verdict of no cause of action, and awarded Daryoush

Zahraie and D & F Petro money damages on a countercomplaint.<sup>1</sup> In the second prior action, Pars sued Tri-Unity, alleging that it had not received the funds represented by the check for \$240,000, and seeking judgment in that amount. The trial court entered judgment in favor of Pars in the amount of \$240,000, plus interest and costs. In the third prior action, Pars and Falamarz Zahraie filed a third party complaint against D & F Petro and Daryoush Zahraie, alleging that D & F Petro and Daryoush Zahraie wrongfully converted the kitchen equipment from the convenience store, and seeking judgment in the amount of three times the value of the kitchen equipment. This third party action was dismissed. In his motion for summary disposition, Daryoush Zahraie alleged that the issues raised by Pars in the instant suit were or could have been litigated in the previous actions. He asserted that Pars' action was frivolous, and sought sanctions in the amount of \$2,500.

Pars moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that Daryoush Zahraie committed a criminal offense by presenting the check in the amount of \$240,000 with knowledge that the Tri-Unity account did not contain sufficient funds to honor the check, and with the intent of inducing Falamarz Zahraie to complete the purchase agreement. Pars contended that pursuant to MCL 600.2952, it was entitled to double damages totaling \$480,000 based on Daryoush Zahraie's violation of penal statutes.

The trial court held a hearing,<sup>2</sup> denied Pars' motion for summary disposition, granted the motion for summary disposition filed by Daryoush Zahraie, awarded sanctions against Pars in the amount of \$2,500, and dismissed the case with prejudice. The trial court found that Pars' action was barred under the doctrines of res judicata and collateral estoppel, as well as the compulsory joinder rule, MCR 2.203(A).<sup>3</sup>

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to the facts or evidence in a prior action. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Res judicata requires 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 case; and (4) both actions involved the same parties or their privies. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994). We review the applicability of the doctrine of res judicata de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

Collateral estoppel precludes the relitigation of an issue in a subsequent cause of action between the same parties or their privies when the prior action culminated in a valid final

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<sup>1</sup> The judgment entered in that case is currently on appeal to this Court in Docket No. 256862.

<sup>2</sup> At the hearing, Daryoush Zahraie was represented by counsel who appeared for the sole purpose of arguing the motion.

<sup>3</sup> Daryoush Zahraie did not rely on either the doctrine of collateral estoppel or the compulsory joinder rule as support for his motion for summary disposition, and the parties were not afforded the opportunity to present argument regarding the applicability of the doctrine of collateral estoppel or the compulsory joinder rule.

judgment and the issue was actually and necessarily litigated in that action. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). In the subsequent action, the ultimate issue to be determined must be identical and not merely similar to that involved in the first action. *Eaton County Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). To be actually litigated, a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier. *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). The parties must have had a full and fair opportunity to litigate the issue in the first action. *Kowatch v Kowatch*, 179 Mich App 163, 168; 445 NW2d 808 (1989). Mutuality of estoppel is generally a necessary element of collateral estoppel. *Minicuci v Scientific Data Mgmt, Inc*, 243 Mich App 28, 33; 620 NW2d 657 (2000). We review the applicability of the doctrine of collateral estoppel de novo. *Id.* at 34.

A party must advance in a single proceeding every alternative basis for recovery. The failure to do so bars relitigation of the claim. MCR 2.203(A); see also *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 217; 561 NW2d 854 (1997).

If a court finds that a claim is frivolous, it shall award sanctions to the prevailing party. MCL 600.2591(1). A claim is frivolous when: (1) the party's primary purpose in bringing the claim was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3). Sanctions include reasonable costs and fees, including attorney fees. MCL 600.2591(1). Similarly, pursuant to MCR 2.114(E), the filing of a signed pleading which is not well-grounded in fact and law subjects the filer to sanctions. MCR 2.114(D)(3). The determination whether a claim was frivolous must be based on the circumstances that existed at the time it was asserted. *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). We review a trial court's determination that a claim is frivolous for clear error. *Id.* at 35.

In this case, Pars asserted that Daryoush Zahraie's actions, i.e., writing a check on an account that held insufficient funds and doing so with fraudulent intent, were criminal in nature, and entitled it to double damages. This claim, brought against Daryoush Zahraie as an individual, could have been asserted in the prior actions brought by Falamarz Zahraie and/or Pars, and particularly in the second action. In the second action, Pars sued Tri-Unity for the value of the check, and was awarded a judgment for that amount. The second action was decided on the merits, and the decree was a final decision. Tri-Unity was a corporation of which Daryoush Zahraie was the principal shareholder and president; thus, Tri-Unity and Daryoush Zahraie were in privity. See *Wildfong v Fireman's Fund Ins Co*, 181 Mich App 110, 116; 448 NW2d 722 (1989). Pars could have asserted the instant claim against Daryoush Zahraie in the second action. The trial court correctly concluded that Pars' claim was barred by res judicata. *Kosiel, supra*.

In addition, the trial court's decision could conceivably be upheld on the ground that collateral estoppel precludes the instant action because the issue of Daryoush Zahraie's intent to pay the down payment with a check drawn on insufficient funds was fully litigated in the second action. We need not reach this issue, however, because the trial court's decision that the instant action is barred by the doctrine of res judicata is correct.

Pars had an alternative basis for recovery, i.e., the claim asserted against Daryoush Zahraie in the instant action, at the time it filed the second action. The trial court did not err in concluding that the instant action was barred by the compulsory joinder rule. MCR 2.203(A); *Energy Reserves, supra*.

We conclude that the trial court did not clearly err in finding that Pars' action was frivolous. The trial court did not specify the ground on which it based its decision; however, given that Pars' claim was clearly precluded by the doctrine of res judicata, we find that Pars' position was devoid of arguable legal merit. MCL 600.2591(3)(a)(iii). Pars' assertion that the trial court's decision to award sanctions in the amount of \$2,500 was not reasonable, especially in light of the fact that Daryoush Zahraie was not represented by counsel throughout most of the proceedings, is not preserved for review. Plaintiff did not object to the amount of the award or request an evidentiary hearing to contest the amount of the award in the trial court. *City of Taylor v Detroit Edison Co*, 263 Mich App 551, 560; 689 NW2d 482 (2004).

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Donald S. Owens