

STATE OF MICHIGAN
COURT OF APPEALS

ANNETTE JOHNSON and BRIAN JOHNSON,

Plaintiffs-Appellants,

v

UNIVERSITY OF DETROIT MERCY, TERI
RACEY, SUZANNE YORK f/k/a SUZANNE
WARNIMONT, and CYNTHIA ZANE,

Defendants-Appellees.

UNPUBLISHED

March 13, 2007

No. 273139

Wayne Circuit Court

LC No. 06-600054-NZ

Before: Markey, P.J., and Murphy and Kelly, J.J.

MEMORANDUM.

In this religious discrimination case, plaintiffs appeal as of right the trial court's order denying their motion for a trial date and granting defendants' motion to dismiss the case. We reverse.

The trial court dismissed this case because it had denied plaintiffs' motion to reinstate their prior action raising the same claims, and it believed plaintiffs' refile was an improper attempt to have the trial court reconsider that ruling. Although the trial court did not employ precise legal terminology, it dismissed plaintiffs' case on the basis of res judicata. Whether res judicata bars an action is a question of law subject to review de novo. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 510; 679 NW2d 106 (2004).

The doctrine of res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). Res judicata will apply only if: (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. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

In this case, plaintiffs' first action was not decided on its merits. Rather, after the case had not even been dismissed in the first place, the trial court, being misinformed by the parties that the case had been dismissed for lack of progress, denied plaintiffs' motion to reinstate the action. In *Wickings v Arctic Enterprises*, 244 Mich App 125, 135; 624 NW2d 197 (2000), quoting *North v Dep't of Mental Health*, 427 Mich 659, 661; 397 NW2d 793 (1986), this Court

noted that “ ‘[a]n administrative decision to dismiss a case for lack of progress does not operate as an adjudication on the merits.’ ” Further, the order dismissing plaintiffs’ first action was entered *without prejudice*. “The decision whether to grant dismissal with or without prejudice, by definition, determines whether a party may refile a claim or whether the claim is permanently barred.” *ABB Paint Finishing, Inc v Nat’l Union Fire Ins Co*, 223 Mich App 559, 562; 567 NW2d 456 (1997). Because plaintiffs’ first action was not decided on the merits and was dismissed without prejudice, plaintiffs were permitted to refile the action. Therefore, the trial court erred in dismissing this case.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Kirsten Frank Kelly