STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF MATT MALNAR.

CHARLENE RITTER,

Appellant,

v

IVAN MALNAR, JUDY PETERSON, HELEN MALNAR, MATT MALNAR JR., DELORES G. ETTENHOFER, RAYMOND W. MALNAR, BRYAN CLEMONS, BRIDGITT GILMORE, BRENETTE CLEMONS, and BRENDA MILLER,

Appellees.

UNPUBLISHED
March 18, 2021

No. 351986
Delta Probate Court
LC No. 98-019035-AP

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Appellant Charlene Ritter appeals the probate court's order granting summary disposition under MCR 2.116(C)(7) in favor of appellee—Ivan Malnar.[1] For the reasons set forth in this opinion, we reverse and remand.

I. BACKGROUND

This case arises from a parcel of land situated in Ensign Township, Michigan.[2] Before 1979, Matt Malnar owned the parcel in fee simple. Matt Malnar was married to Helen Malnar. They had five children, including appellee and Raymond Malnar, appellant's father. In May 1979,

[1] Although there are 10 other named appellees, only Ivan Malnar is involved in this appeal. No other appellee has appeared in this case. Therefore, we will use the singular "appellee" for clarity.

[2] The parcel of land is legally described as "East ½ of the Southeast Quarter of Section 16, Township 40 North, Range 21 West."

Matt Malnar sought to convey half of the parcel to himself and appellee to share as joint tenants. Attorney Robert W. Hansley drafted a quit claim deed stating that Matt Malnar and appellee would own the east half of the parcel as joint tenants with rights of survivorship.[3] The deed was written so that Matt Malnar remained the sole title holder to the west half of the parcel. Matt Malnar died approximately a decade later in February 1988, automatically vesting title to the east half in appellee.

About two years later, Hansley signed a scrivener's affidavit attesting that the 1979 quit claim deed was actually intended to convey the *west half* of the parcel to Matt Malnar and appellee to share as joint tenants.[4] In effect, the scrivener's affidavit explained that Matt Malnar was to remain sole titleholder to the east half. Appellee does not dispute that the scrivener's affidavit was recorded.

Eight years later, appellee filed an order for assignment asking the probate court to assign the remaining property in Matt Malnar's estate to Helen Malnar—Matt Malnar's surviving spouse. However, appellee never mentioned the parcel—neither the east half nor the west half—in the order for assignment. Appellee mentioned only an unrelated property in a different area of Ensign Township. The court approved the order for assignment.

Twenty years later, after her father Raymond passed away, appellant filed a petition to amend the order for assignment so that it included the east half of the parcel. Citing Hansley's scrivener's affidavit, appellant argued that appellee owned the west half and that Matt Malnar had retained title to the east half. And because Matt Malnar had retained title to the east half, it remained in his estate at his death in 1988. Therefore, appellant argued that the east half should have been assigned to Helen Malnar as part of the order of assignment. Appellant also alleged that Helen Malnar, who died in 2004, had intended to convey the east half to appellant's father. The petition contained two counts, one to amend the assignment and one to quiet title to the east half.

Appellee did not appear for the bench trial, which was also to serve as a show-cause hearing for appellee's failure to appear for his deposition.[5] The owner of a local title agency testified under subpoena that, based on her title search, she would insure that the east half of the property belongs

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[3] The deed described the property as follows: "The East One-half of the East One-half of Southeast Quarter (SE) of Section 16, Township 40 North, Range 21 West. EXCEPT Commencing at the Northwest Corner of the Northeast Quarter of the Southeast Quarter, said Section, Town and Range; thence East along the North line of said forty 312 feet; thence South 312 feet; thence West 312 feet; thence North along West line of said forty 312 feet to the Point of Beginning."

[4] Specifically, Hansley attested "[t]hat an error was made in the legal description of said document and that the correct legal description should have read: 'The *West* ½ of the East ½ of the Southeast ¼ of Section 16, Township 40 North, Range 21 West, EXCEPT: Commencing at the Northwest corner of the Northeast ¼ of the Southeast ¼ of said Section, Town and Range; thence East along the North line of said forty 312 feet; thence South 312 feet; thence West 312 feet; thence North along the West line of said forty 312 feet to the point of beginning.' "

[5] The trial court awarded appellant attorney fees for appellee's failure to appear for the deposition. Appellee also did not respond to interrogatories or requests to produce documents.

to the estate of Matt Malnar. Her opinion, however, was based on the scrivener's affidavit. Attorney Hansley also testified under subpoena regarding his recollection of the affidavit. Appellant traveled from her residence in Texas to testify at the trial. Based on the testimony adduced at trial, appellee filed a supplemental brief arguing that the scrivener's affidavit had no effect on the prior conveyance of the parcel's east half.

In a written opinion and order, the probate court agreed with appellee that Hansley's scrivener's affidavit was invalid. The court reasoned that a scrivener's affidavit may not alter the substantive rights of any party unless it is executed by that party, and the court found no evidence that Hansley was representing the interests of appellee at the time Hansley signed the affidavit. To the contrary, there was testimony at trial that appellee was asked to execute a quit claim deed in connection with the affidavit and declined to do so. Accordingly, the court denied appellant's claim and ruled that appellee had title to the east half. The court's opinion did not mention the west half.

About two weeks later, appellant filed a second petition to amend the 1998 order for assignment. Appellant now asked the probate court to amend the 1998 order for assignment so that it included the west half of the parcel. As appellant later argued, if the scrivener's affidavit was ineffectual then appellee retained ownership of the parcel's east half, but he never obtained any interest in the west half, and so that parcel should have been include in the estate of Matt Malnar.

In response, appellee moved for summary disposition under MCR 2.116(C)(7), arguing that res judicata and collateral estoppel barred appellant's case. The probate court granted appellee's motion for summary disposition. The court held that "the [appellant's] actions amount to a re-litigation of issues that were already presented to the Court and which the Court has already ruled on." Therefore, the probate court held that res judicata bars appellant's claim. And "to the extent that the [appellant] argues that the instant action is a different cause of action than was initially argued before the Court," the court ruled that the doctrine of collateral estoppel barred litigation of the second motion.

II. ANALYSIS

On appeal, appellant argues that res judicata should not bar her most recent petition because she could not have raised her west half claim in her first petition. Until the probate court declared that the scrivener's affidavit was invalid, appellant was not aware that she even had a claim as to the west half. She also argues that collateral estoppel should not bar her motion because the west half ownership issue was not actually litigated in the 2018 probate proceeding. Therefore, appellant argues that the probate court erred by granting appellee's motion for summary disposition. We agree.[6]

[6] We review de novo a trial court's decision on a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). When a party moves for summary disposition under MCR 2.116(C)(7), we accept all of the nonmoving party's well-pleaded allegations as true

We will first address collateral estoppel. "The doctrine of collateral estoppel 'precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding.' " *King v Munro*, 329 Mich App 594, 599; 944 NW2d 198 (2019), quoting *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 528-529; 866 NW2d 817 (2014). As appellee concedes, the issue concerning the ownership of the west half was not actually litigated in the 2018 probate court proceeding. The sole issue before the probate court was ownership of the east half. Accordingly, the probate court erred by concluding that collateral estoppel barred appellant's new claim.

This brings us to appellant's argument that the probate court erred by applying the doctrine of res judicata, which "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). Res judicata will apply when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

This case involves the same parties from the 2018 probate proceeding, and neither party disputes that the 2018 probate court proceeding ended with a final judgment on the merits. Also, both parties agree that appellant's claim as to the west half was not litigated in the 2018 proceeding. However, appellee argues that res judicata should still bar appellant's claim regarding the west half because appellant could have raised it in the prior proceeding.

Res judicata "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 Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). As a general rule, if a claim arises from the same group of operative facts as a prior claim, then the two claims are a part of the same transaction. *Green v Ziegelman*, 310 Mich App 436, 445; 873 NW2d 794 (2015). "This Court will not, however, use res judicata to 'lighten the loads of the state court by precluding suits wherever possible'—[this Court] employ[s] it 'to promote fairness.' " *Id*. Therefore, courts determine whether two claims arise from the same transaction pragmatically, "by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit . . . ." *Adair*, 470 Mich at 125 (alteration in original), quoting 46 Am Jur 2d, Judgments, § 533, p 801.

Because the application of res judicata is determined pragmatically, even when there is substantial overlap between the facts from which each claim arises we may still find that the

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and construe them most favorably to that party. *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 396; 509 NW2d 829 (1993). We also review de novo the applicability of legal doctrines, such as res judicata and collateral estoppel. See *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

subsequent claim did not arise from the same transaction. For instance, if the later claim is predicated on the development of a new or changed fact, then the later claim may not be a part of the same transaction as the former. See *Labor Council, Mich Fraternal Order of Police v Detroit*, 207 Mich App 606, 608; 525 NW2d 509 (1994) (noting that if facts change or new facts develop, res judicata will not apply). See also *Detroit Free Press, Inc v Dep't of State Police*, 243 Mich App 218, 220 n 1; 622 NW2d 313 (2000) (res judicata does not apply when a court's decision creates "a new legal context.").

Our decision in *Green*, 310 Mich App 436, is instructive. Only after the first proceeding that resulted in a judgment against the defendant-corporation for breach of contract relating to architectural work did the plaintiffs learn that the corporation had no assets, that it had not done any architectural work in two decades, and that its sole shareholder used the corporation to pay many of his personal expenses. *Id*. at 339-441. The plaintiffs therefore brought a new claim against the corporation's sole shareholder, arguing that the shareholder had abused the corporate form and should be personally liable for the judgment. *Id*. at 442. The shareholder defended that res judicata barred this claim, as the plaintiffs could have raised the claim in the prior breach-of-contract proceeding. *Id*. at 443. We rejected the shareholder's argument, concluding that during the breach-of-contract proceeding, the plaintiffs had no reason to believe that the shareholder was abusing the corporate form; it was only after the proceeding that the plaintiffs learned of facts suggesting otherwise. *Id*. at 448-449. Without these facts, arguing that the shareholder should be held personally liable would have been frivolous. *Id*. at 448. So even though the plaintiffs' new claim stemmed from the same events as the first, this Court held that plaintiffs' new claim did not arise from the same transaction as the breach-of-contract claim. Rather, the new claim was predicated on the development of new facts.

Likewise, appellant's claim here concerning the west half of the property was predicated on a new development: the scrivener's affidavit was invalid. In the first action appellant sought to quiet title only to the east half, and she did not have a viable claim to the west half until the scrivener's affidavit was ruled invalid. Further, it appears that the facts surrounding the scrivener's affidavit were not revealed until trial, which was at least partly due to appellee's refusal to participate in discovery. And a proposed amendment to the petition at trial would have likely been denied. See *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 663; 213 NW2d 134 (1973) ("The litigation may proceed to a point where the opposing party cannot reasonably be expected to defend against the amendment; this is an especially pertinent factor on the eve of, during, or after trial.").

Moreover, none of the purposes of res judicata would be served by applying the doctrine here. Unless the issue of ownership of the west half is resolved, the cloud on its title will remain. This makes future litigation over the parcel highly likely. So, at least in the long run, barring appellant's claim would neither conserve judicial resources nor relieve appellee of the burden of litigating future lawsuits. It would be akin to kicking the can down the road. Plus, because the probate court did not address the west half issue in the 2018 proceeding, there is no risk of inconsistent decisions, and there is no past adjudication on which to discourage reliance.

In summary, the second petition concerned a different piece of real property than the one at issue in the first petition, and appellant's claim in the second action was based on the probate court's legal ruling in the first action. The purposes underlying the doctrine of res judicata would

not be served under the circumstances of this case. For these reasons, the probate court erred by applying the doctrine and granting summary disposition to appellee.

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

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola