

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS SCHANG,

Plaintiff-Appellant,

v

ROBERT SCHANG,

Defendant-Appellee.

UNPUBLISHED
November 3, 2005

No. 263059
Eaton Circuit Court
LC No. 04-001550-CZ

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff¹ appeals as of right from a circuit court order granting summary disposition to defendant pursuant to MCR 2.116(C)(6) (“[a]nother action has been initiated between the same parties involving the same claim.”) We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

This Court reviews a trial court’s order granting a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The interpretation and application of a court rule presents a question of law that is also reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass’n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

“MCR 2.116(C)(6) is a codification of the former plea of abatement by prior action.” *Fast Air, Inc v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999). The purpose of this rule is to “stop parties from endlessly litigating matters involving the same questions and claims as those presented in pending litigation. In other words, its purpose is to prevent ‘litigious harassment’ involving the same questions as those in pending litigation.” *Id.*, p 546, quoting *Rowry v Univ of Michigan*, 441 Mich 1, 20-21; 490 NW2d 305 (1992) (Riley, J., concurring) (emphasis omitted from *Fast Air, Inc*).

¹ Plaintiff filed the present action on behalf of himself and Mary Taylor, his mother, for whom he acts pursuant to a power of attorney.

The present appeal primarily concerns whether two actions filed by plaintiff were between the “same parties” and involved the “same claim.”

Plaintiff’s first amended complaint in the present case essentially alleges that defendant lied to Alta M. Poskey and convinced her to modify her will approximately a month before her death so that plaintiff and his mother received lesser shares than they would have received under a 1999 version of Poskey’s will. The complaint alleged that defendant committed fraud, and exerted duress and undue influence on Poskey to convince her to alter the manner in which her property was to be distributed. Plaintiff’s complaint further alleged that defendant made unprivileged communications with numerous persons, including Poskey, and falsely accused plaintiff of misusing Taylor’s money, refusing to care for her, and committing criminal acts, including theft. The complaint alleged claims for “tortuous [sic] interference with expectancy of inheritance” (count I), “slander” (count II), and intentional infliction of emotional distress (count III), and sought damages for the reduction of plaintiff’s share of Poskey’s estate, removal of Taylor’s share, and emotional distress.

At the same time, in probate court, plaintiff, individually and on behalf of Taylor, filed petitions “to set aside informal probate of will” and “to set aside trust.” The former alleged that defendant filed an application for informal probate of the decedent’s estate, that a will dated September 11, 2004, was admitted to informal probate, and that defendant was appointed personal representative. Plaintiff and Taylor objected to the probate of the 2004 will because it directly benefited both defendant, who stood in a fiduciary relationship with the decedent, as well as relatives of the attorney who prepared the will. The petition alleged that at the time Poskey purportedly signed the document, she was under the care and influence of defendant, suffered from oxygen deprivation, and lacked the mental competency or capacity to make a valid will. The petition requested that the 2004 will be denied admission to probate, that the 1999 will be admitted in its place, and that the court appoint a replacement personal representative and award any other relief agreeable under the facts and circumstance of the case. The petition to set aside the trust contained similar allegations. The petition requested that the trust be set aside and the assets of the trust revert to the decedent’s estate and pass to her heirs and devisees in accordance with the 1999 will.

Although MCR 2.116(C)(6) refers to the action involving the “same parties,” the rule does not require “complete identity” of the parties. *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598-599; 386 NW2d 605 (1986); *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666-667; 341 NW2d 783 (1983). See also *Chapple v Nat’l Hardwood Co*, 234 Mich 296, 298-299; 207 NW 888 (1926) (a party may not avoid abatement of a subsequent suit by “adding new defendants or subtracting some of the old ones” where “each action is predicated upon substantially the same facts as respects the defendant named in both.”)

We agree with the trial court that the present action and the probate court matter involved the same parties. As discussed in both the majority and dissenting opinions in *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 394-397, 399-402, 407-411; 668 NW2d 628 (2003), the term “party” has several meanings. In *Dearborn Hts School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 127; 592 NW2d 408 (1998), this Court stated, “A party is one who was directly interested in the subject matter, and who had a right to defend in, or control, the proceedings, and who had a right to appeal from the judgment.” There is no question that plaintiff was a party to both actions; he filed the circuit court action and the petitions in probate

court on behalf of himself and Taylor. The closer question is whether defendant was a party in the probate court matter. He was named as an “interested person” in both petitions. His alleged conduct was the basis of the petitions to set aside the informal probate of the will and the trust. He was the personal representative of the estate and the trustee of the contested trust. In his role as personal representative, he had the right to control the action. Pursuant to MCR 5.801, an “interested person” aggrieved by an order of the probate court is afforded a right to appeal in accordance with the rule. Under these circumstances, defendant was a party to the probate court action.

With respect to plaintiff’s contention that the two actions did not involve the “same claim,” this Court has stated that “the two suits ‘must be based on the same or substantially the same cause of action.’” *J D Candler Roofing Co, Inc, supra*, p 598, quoting *Ross, supra*, pp 666-667. A motion based on MCR 2.116(C)(6) is properly granted where resolution of the action will require examination of the same operative facts as the pending action. *J D Candler Roofing Co, Inc, supra*, p 601. As explained in Justice Riley’s concurrence in *Rowry, supra*, pp 20-22, whether two actions involve the same “claim” for the purpose of MCR 2.116(C)(6), is not determined by whether they involve the same theories.

Here, resolution of the circuit court action and the probate actions would involve examination of the “same operative facts.” Specifically, the actions require examination of defendant’s conduct and influence over the decedent in conjunction with the change in her will.

Plaintiff maintains that his “tort claims” against defendant could not have been pursued in the probate court action because those claims are not within the probate court’s jurisdiction. Contrary to his apparent understanding, the probate court’s jurisdiction does not depend on whether a complaint alleges a tort. MCL 700.1302 vests the probate court with exclusive legal and equitable jurisdiction of a “matter that relates to the settlement of a deceased individual’s estate . . .” and a “proceeding that concerns the validity, internal affairs, or settlement of a trust . . .” See also MCL 700.1303 regarding concurrent jurisdiction. Thus, in certain circumstances, the probate court’s jurisdiction extends over tort actions. Although plaintiff contends that the probate court would not have jurisdiction over the “tort claims,” he fails to address the pertinent provisions of the statute and explain how they relate to the particular allegations in this complaint. We decline to develop his argument for him. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder