

STATE OF MICHIGAN
COURT OF APPEALS

KEITH YOHN,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN BOARD OF
REGENTS,

Defendant-Appellee.

UNPUBLISHED

April 19, 2005

No. 252056

Court of Claims

LC No. 03-000047-MK

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant summary disposition and denying plaintiff's motion for partial summary disposition and declaratory judgment. We affirm.

Plaintiff is a tenured associate professor at the University of Michigan School of Dentistry. In October 1999, plaintiff acted as one of four panel members scoring the examination for a special remediation course that the dental school offered to two students who had previously failed a class. The panel failed both students, giving them a letter grade of "F" on the practical exam, which plaintiff asserts should have resulted in a failing grade for the entire course. However, due to an administrative concern regarding the confidentiality of the grading procedure and structure of the remediation course, the remediation course was abandoned and a "W" was entered on the students' transcripts.

Plaintiff commenced an action in United States District Court for the Eastern District of Michigan against the Regents of the University of Michigan and individual defendants, in their individual capacities, asserting violations of his First and Fourteenth Amendment rights to assign a grade and have it appear on a student's academic transcript, a state law claim of emotional distress, and a state law defamation claim. The federal district court dismissed with prejudice plaintiff's constitutional claims, state law intentional infliction of emotional distress claim, and state law defamation claim against two defendants. The court also dismissed his state law defamation claim against another defendant without prejudice. *Yohn v Bd of Regents of the University of Michigan*, unpublished opinion of the United States District Court, Eastern District of Michigan, issued May 7, 2001 (Docket No. 99-75997).

Plaintiff then brought an action in the state Court of Claims against the Regents of the University of Michigan and individual defendants, in their official capacities, alleging breach of

contract and tortious interference with contractual relations. Plaintiff filed a motion for partial summary disposition and declaratory judgment, asking the court to rule that he had a contractual right to have an assigned grade appear on students' transcripts. The court granted defendant summary disposition pursuant to MCR 2.116(C)(7).

Plaintiff challenges the court's granting of summary disposition in favor of defendant pursuant to MCR 2.116(C)(7). We review a determination whether res judicata will bar a subsequent action de novo, as it is a question of law. *Pierson Sand and Gravel Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). The doctrine of res judicata bars both the claims that were actually brought by the parties in the earlier action and those that the parties could have brought forward at that time. *Id.* at 380. Res judicata generally bars subsequent relitigation based upon the same transaction or events, regardless whether a subsequent litigation is pursued in a federal or state forum. *Id.* If the prior action occurred in federal court, the applicability of res judicata must be determined under federal law. *Id.* at 380-381. A claim is barred by res judicata under federal law if all the following elements are present: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Browning v Levy*, 283 F3d 761, 771-772 (CA 6, 2002).

For the purposes of the claims currently before this Court, the federal decision is final and on the merits. Plaintiff's claims in federal court were dismissed on a motion for summary judgment pursuant to FR Civ P 56(c). A grant of summary judgment resolves the issue on the merits and operates as a bar for the purposes of res judicata. *Ohio Nat'l Life Ins Co v United States*, 922 F2d 320, 325 (CA 6, 1990). Therefore, the federal court's judgment was final with regard to all claims at issue in the instant appeal.¹

Plaintiff argues that the parties are different for purposes of res judicata because the federal court defendants were sued in their individual capacities and the state court defendants have been sued in their official capacities. Citing the Second Restatement of Judgments,² several federal courts have held that a government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata. *Andrews v Daw*, 201 F3d 521, 525-526 (CA 4, 2000); *De Llano v Berglund*, 183 F3d 780, 781-782 (CA 8, 1999); *Gonzales v Hernandez*, 175 F3d 1202, 1206 (CA 10, 1999). However, the Restatement 2d, Judgments,³ § 36, comment e, p 363, also provides:

¹ Although the federal court's judgment was not final with respect to plaintiff's defamation claim against one defendant, this does not affect our res judicata analysis because plaintiff is not alleging defamation in the current action.

² "A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." Restatement 2d, Judgments, § 36(2), p 363.

³ The Michigan Supreme Court has often considered the Restatement (Second) of Judgments, in
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A public official sued as an individual nevertheless participates in the action in his official capacity if the remedy sought is that of compelling, restraining, or making declarations concerning performance of acts in the course of his official duties, or the restitution of property over which he asserts control in virtue of his official authority. If the remedy sought is damages and the public body of which he is an official is solely responsible for paying them, the public official likewise appears in his official capacity and is in effect merely a formal party.

In federal court, where plaintiff named the regents in their individual capacities, plaintiff sought to: (1) declare that defendants violated his constitutional rights and caused him emotional distress and defamation; (2) enjoin defendants from depriving professors of the right to have assigned grades recorded on students' academic transcripts; (3) order them to record plaintiff's assigned grade on the students' academic transcripts; and (4) award him compensatory and exemplary damages. Such a remedy could only be granted by compelling defendants to act in their official capacities. Thus, for purposes of res judicata, defendants were merely a formal party in the federal action and were participating in the federal lawsuit in their official capacities. Because defendants are being sued in their official capacity in state court, there is privity between defendants in the state and federal court actions.

The present claims could have been litigated with the federal action. The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Pierson, supra* at 380. As such, the doctrine bars not only those claims actually litigated but also those claims arising out of the same transaction that the plaintiff could have brought but did not. *Nevada v United States*, 463 US 110, 129-130; 103 S Ct 2906; 77 L Ed 2d 509 (1983). Plaintiff's present state court action relies on the same underlying event as the initial federal action, the failure to record an assigned grade. While the federal court was exercising federal question jurisdiction over plaintiff's constitutional claims, it could have heard his state law contract and tort claims pursuant to its supplemental jurisdiction. 28 USC 1331, 1367(a). Indeed, the federal court exercised its supplemental jurisdiction to hear plaintiff's state law emotional distress and defamation claims. *Yohn, supra*, slip op at 9.

Identity of the causes of action means an "identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Sanders Confectionery Products, Inc v Heller Financial, Inc*, 973 F2d 474, 484 (CA 6, 1992). Plaintiff's present action in state court relies on the same underlying facts and event as the initial federal action, the failure to record an assigned grade. There is therefore an identity of the causes of action between the state and federal case. Accordingly, the elements of res judicata have been satisfied.

Plaintiff asserts that res judicata should not bar his claim on public policy grounds. See *Horn v Dep't of Corrections*, 216 Mich App 58, 64; 548 NW2d 660 (1996). Beyond stating the rule, plaintiff offers no cases or other authority that support this claim. "It is not sufficient for a

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determining whether subsequent claims would be precluded by res judicata. *Pierson Sand and Gravel Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

party ‘simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.’” *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). *Koron v Melendy*, 207 Mich App 188, 193; 523 NW2d 870 (1994). His failure to properly address the merits of this assertion of error constitutes abandonment of the issue. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004). Moreover, we agree with defendant that a mere award of damages, which is the only relief obtainable in the Court of Claims, would not serve to significantly protect the public interest in dental health.

Lastly, plaintiff’s argument that defendant committed a fraud on the court by presenting a proposed order stating that summary disposition was granted pursuant to MCR 2.116(C)(7) and (I)(2) is without merit.

We need not consider plaintiff’s remaining arguments regarding his alleged contract right because the issue of res judicata is dispositive.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage