

STATE OF MICHIGAN  
COURT OF APPEALS

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RITA L. ALTON,

Plaintiff-Appellant,

V

LARRY G. ALTON,

Defendant-Appellee.

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UNPUBLISHED

June 15, 2006

No. 263743

Genesee Circuit Court

LC No. 04-079690-NZ

Before: Sawyer, P.J., and Wilder and H. Hood\*, JJ.

WILDER, J. (*concurring in part and dissenting in part*).

I concur in part and respectfully dissent in part. I agree with the majority's conclusion that summary disposition was properly granted on plaintiff's fraudulent misrepresentation claim, that the first order denying defendant's motion for summary disposition under MCR 2.116(C)(7) did not bar defendant from filing a second motion for summary disposition under MCR 2.116(C)(7) on different grounds, and that plaintiff has abandoned her argument that defendant's "remaining arguments" are without merit because she has failed to develop this argument with sufficient specificity or citation to relevant authority. I therefore, join these aspects of the majority opinion.

I differ, however, with the majority's conclusions concerning the application of res judicata and collateral estoppel to this instant case. Res judicata broadly operates to bar claims raised in a subsequent case when those *claims* were *actually* litigated in a prior action, or arose out of the same transaction such that the parties, exercising reasonable diligence, *could have litigated* in a prior action but did not. *Peterson Novelties, Inc v. City of Berkeley*, 259 Mich.App 1, 11; 672 NW2d 351 (2003). Because plaintiff's breach of contract, non-fraudulent misrepresentation and constructive trust claims were severed from the divorce action by the trial court over plaintiff's objections, these claims were not actually litigated, nor could they have been litigated, in the divorce action. Thus, I would concluded that as a matter of law, res judicata cannot apply to bar litigation of these claims in this action.

Moreover, even if res judicata could be found to apply in the present action, the "prior success" model of judicial estoppel should apply to preclude defendant's reliance on res judicata. "Under this doctrine, a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.

\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

*Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994), quoting *Lichon v American Universal Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990). Defendant successfully moved to dismiss plaintiff's breach of contract, non-fraudulent misrepresentation and constructive trust claims from the divorce action on the basis that the trial court in that action had no jurisdiction over those claims. Thus, as a matter of equity, defendant should be precluded from asserting in the instant action that plaintiff had the opportunity to litigate these claims in a prior proceeding. Because plaintiff has been denied the opportunity to litigate and obtain a ruling on her breach of contract, non-fraudulent misrepresentation and constructive trust claims in any forum, in my judgment, application of res judicata under these circumstances constitutes a miscarriage of justice.

I also disagree with the majority's conclusion that plaintiff abandoned her argument that collateral estoppel did not apply to her breach of contract, non-fraudulent misrepresentation and constructive trust claims, but that collateral estoppel did apply to bar defendant from relitigating issues decided by the trial court, because she failed to adequately explain or rationalize her position and failed to cite to appropriate authority.<sup>1</sup> Collateral estoppel (issue preclusion) precludes the relitigation of an *issue* in a subsequent cause of action between the same parties or their privies when the prior action resulted in a valid final judgment and the issue was actually and necessarily litigated in that action. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). To be actually litigated, a question must have been put into issue by the pleadings, and then submitted to and decided by the trier of fact. *VanDeventer v. Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). The ultimate issue to be determined in the subsequent action must be identical and not merely similar to the issue involved in the first action. *Eaton County Rd Comm'rs v. Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

First, I would conclude that it is clear from her brief on appeal that plaintiff makes two basic assertions about the application of the doctrine of collateral estoppel in this case. As to her claims for breach of contract, non-fraudulent misrepresentation and constructive trust, plaintiff asserts that the trial court in the divorce action did not make express rulings on whether defendant did or did not make the promises alleged by plaintiff and, therefore, the rulings in the divorce action have no collateral estoppel effect as to plaintiff's causes of action in this case;<sup>2</sup> as to defendant's income and assets, and plaintiff's contributions to same, the trial court in the divorce action made express findings of fact on these matters which precludes defendant from relitigating these issues in the present action. Stated differently, in my judgment, plaintiff adequately asserts in her brief that the way in which the trial court in the divorce action rendered its findings of fact operates to bar the relitigation of some issues but not others.

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<sup>1</sup> I address the collateral estoppel issue only because the majority has done so. Although presented in the argument and briefs below, the trial court did not address the collateral estoppel issue, and therefore, it is not preserved for appellate review. *Fast Air, Inc. v. Knight*, 235 Mich.App. 541, 549, 599 N.W.2d 489 (1999). As such, I would remand the question of the applicability of collateral estoppel to this case to the trial court.

<sup>2</sup> An examination of the findings of fact and conclusions of law issued by the trial court in the divorce action shows this assertion to be true.

Second, I would conclude that plaintiff's citation to *Ditmore, supra*, adequately supports plaintiff's assertions that the nature of the findings issued by the trial court in the divorce action did not permit application of collateral estoppel to her breach of contract, non-fraudulent misrepresentation and constructive trust claims, but did permit application of collateral estoppel to prevent defendant from litigating certain issues.

For the reasons stated herein, I concur in part and respectfully dissent in part.

/s/ Kurtis T. Wilder