DIVISION ONE
FILED: 04/26/2012
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT PAUL STEVENS, Plaintiff/Appellant, v. VALLEY VIEW MEDICAL CENTER; ALLEN PETERS; ARIZONA PHYSICIANS IPA, INC., Defendants/Appellees.	1 CA-CV 11-0067 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. CV 2010-04119

The Honorable Randolph A. Bartlett, Judge

AFFIRMED

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T H O M P S O N, Judge

¶1 Appellant Robert Paul Stevens appeals the superior court's order dismissing his complaint with prejudice. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On October 2, 2009, Stevens filed a complaint in federal court against, as relevant, Horst S. Filtzer, Michelle M. Holley, Valley View Medical Center, Allen Peters, and Arizona Physicians IPA, Inc. (APIPA), in which he alleged that on August 12, 2008, he underwent a surgical procedure that was performed negligently and without his consent.[1] The federal court twice dismissed Stevens' complaint for failure to state a claim, but each time gave him leave to file an amended complaint. Ultimately, the court dismissed Stevens' second amended complaint with prejudice for failure to state a claim.

¶3 On August 2, 2010, Stevens filed this action in Mohave County Superior Court against Filtzer, Holley, Valley View Medical Center, Peters, and APIPA, asserting the following claims: medical malpractice, fraud and misrepresentation, lack of informed consent, battery, breach of fiduciary, negligence,

[1] Stevens indicated in the complaint's caption that he was asserting claims for "conspiracy to deprive rights," "deprivation of civil rights," "wrongful civil proceedings," "negligence, malefic," "fraud, breach of trust, duty, and fiduciary," "freedom of choice by informed consent, denied," "quality of care," and "malfeasance". He later asserted claims for violations of 42 United States Code (U.S.C.) section 1983 (1996), 42 U.S.C. § 1985 (1980), and 42 U.S.C. § 1986 (1981).

obstruction of justice, and conspiracy to deprive rights. Stevens' claims all arose out of the surgery performed on August 12, 2008. Valley View Medical Center, Peters, and APIPA moved to dismiss on the grounds that the doctrine of claim preclusion barred the complaint and, in any event, it failed to state a claim for relief.[2] The superior court granted the motions and dismissed the complaint with prejudice.[3]

¶4 We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2011).

ISSUE

¶5 Stevens contends the superior court erred in dismissing his complaint based upon the doctrine of claim preclusion.[4]

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[2] Valley View and Peters also argued Stevens had not served the complaint.

[3] Although only Valley View, Peters and APIPA moved to dismiss, the court dismissed Stevens' complaint in its entirety and entered a final judgment.

[4] Valley View, Peters, and APIPA move to strike references in Stevens' opening appellate brief to evidence not contained in the superior court record. In particular, they ask us to disregard exhibit four to the opening brief, which contains documents Stevens acquired after the superior court dismissed his complaint, and his argument regarding those documents. Because we will not consider new evidence on appeal, *GM Development Corp. v. Community American Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990), we grant the motions and strike exhibit four to the opening brief. We also strike the argument beginning on line twenty-five of opening brief page five and continuing through line twenty-two of page six.

DISCUSSION

¶6 We review the superior court's decision de novo and apply federal law to determine the preclusive effect of the prior judgment issued by the federal court. *Howell v. Hodap*, 221 Ariz. 543, 546, ¶ 17, 212 P.3d 881, 884 (App. 2009).

¶7 The doctrine of claim preclusion bars a claim when a prior lawsuit "(1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Id.* (quoting *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005)). Here, there is no dispute that the federal action was dismissed on the merits, *see Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002) (stating dismissal for failure to state a claim is a "judgment on the merits" to which res judicata applies), and involved the same parties as this action. The only question is whether the claims Stevens asserted in the federal action are the same as those he asserts in this action.

¶8 Stevens admits the doctrine of claim preclusion bars his federal claims, but argues that because he did not assert a state law claim for medical malpractice in the federal action, there is no common identity of claims in the two actions. To determine whether an earlier suit involved the same claim or cause of action as a later suit, we look to the controlling law in the circuit in which the federal judgment was entered.

Howell, 221 Ariz. at 547, ¶ 18, 212 P.3d at 885. We consider four criteria: "(1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions." *Mpoyo*, 430 F.3d at 987. We do not apply these criteria "mechanistically," *id.*, and the first factor - same transactional nucleus of facts – is the central criterion for determining whether an identity of claims exists. *Howell*, 221 Ariz. at 547, ¶ 19, 212 P.3d at 885.

¶9 "[D]ifferences in the specific legal theory pled in the subsequent suit are irrelevant so long as the claim 'could have been raised in the prior action.'" *Id.* at ¶ 20 (citation omitted). The doctrine of claim preclusion thus bars re-litigation of all grounds of recovery that were asserted, or could have been asserted, in the previous action. *Id*. "The key is whether the subsequent claims arise out of the same nucleus of facts." *Id*. Stevens' federal action arose out of the medical care he received on August 12, 2008, and his alleged resulting injury. In this action, he asserts additional claims for medical malpractice and battery arising out of the August 12, 2008 surgery. These claims arise out of the same

transactional nucleus of facts as the federal court action, even though the legal theories are different, and are therefore barred by the doctrine of claim preclusion. *Id.* at 548, ¶ 23, 212 P.3d at 886.[5]

¶10 Nevertheless, as Stevens points out, the parties to an action may agree to limit the preclusive effect of a judgment by allowing the plaintiff to try only a portion of his claims. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, 72-73, ¶ 25, 127 P.3d 882, 890-91 (2006). The court also has the power to reserve the plaintiff's right to maintain a second action on part of his claim: "when a court determines that its judgment is without prejudice 'to a second action on the omitted part of the claim,' that determination prevents the first judgment from obtaining preclusive effect in the second action." *Id.* at 73, ¶ 26, 127 P.3d at 891; *see also* Restatement (Second) of Judgments § 26(1)(b) (1982) (stating part or all of a claim may subsist as a possible basis for a second action when the court in the first action expressly reserved the plaintiff's right to maintain the

[5] Although our resolution of the first, central, factor makes it unnecessary to analyze the remaining criteria, *see Howell*, 221 Ariz. at 549 n.9, ¶ 26, 212 P.3d at 887 n.9, consideration of those factors would not change our result. Both actions concern infringement of substantially the same rights and would require presentment of substantially the same evidence, and the rights established in the federal action favor Valley View, Peters, and APIPA. *Id*.

second action). Stevens contends the federal court expressly preserved his state law claims in its order dismissing his federal action with prejudice:

> [T]he second amended complaint has failed to state any federal claims for relief. While the facts, as alleged, may or may not support some state law claims, including medical malpractice, those claims have not been asserted. . . . Plaintiff has made no attempt to pursue state law claims in this Court, and if he elects to pursue state law claims [in] a state court of his choice, it will be up to that court to determine whether he has any such claims.

¶11 We reject Stevens' argument. The federal court simply noted that Stevens had not asserted any state law claims in the federal action and that, if he later brought those claims in state court, that court would determine whether he could pursue the claims. It made no express reservation of Stevens' right to bring the state law claims he asserts in this action.

¶12 Because this action arises out of the same nucleus of facts as the federal action and Stevens' medical malpractice and battery claims could have been raised in the federal action, Stevens' complaint is barred by the doctrine of claim preclusion. *Howell*, 221 Ariz. at 549, ¶ 26, 212 P.3d at 887.

CONCLUSION

¶13 For the foregoing reasons, we affirm.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
MICHAEL J. BROWN, Judge