

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PATRICIA KELLEY, personal representative of  
the Estate of JOHN S. YERINGTON, deceased,  
and BETTY JANE YERINGTON,

UNPUBLISHED  
May 30, 1997

Plaintiffs-Appellants and  
Cross-Appellees,

v

No. 187925  
Berrien Circuit Court  
LC No. 94-0030-87 CK

GERALD W. HEPPLER,

Defendant-Appellee and  
Cross-Appellant.

---

Before: Hoekstra, P.J., and Markey and J.C. Kingsley\*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order denying in part and granting in part defendant's motion for summary disposition. Plaintiffs appeal the trial court's ruling that plaintiffs' action was barred by res judicata. Defendant cross-appeals the trial court's ruling that a provision in a restrictive sale agreement did not prevent plaintiffs from seeking monetary damages. We affirm.

Defendant and decedent, John S. Yerington (Yerington), each owned 50% of the stock in Yerington Construction Company (Company). Defendant and Yerington entered into a restrictive sale agreement regarding their stock ownership that provided that each of them held a first option right should the other wish to transfer his shares in the Company. After Yerington died, defendant entered into an agreement to sell his stock to Yerington's grandsons, John G. Yerington and Michael Scott Yerington. National Bank of Detroit (NBD), which acted as a representative of the Yerington estate, notified defendant that it intended to exercise the first option right on behalf of his estate. The grandsons brought suit against defendant seeking specific performance and enjoinder of any sale of the stock. The grandsons' lawsuit was transferred to the probate proceedings, where NBD counterclaimed against the grandsons and cross-claimed against defendant, alleging that defendant tortiously interfered with NBD's

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

contractual rights. Defendant moved for summary disposition in the probate court and that court granted the motion and dismissed NBD's counterclaim.

Subsequently, NBD assigned its rights to plaintiffs, who filed an action in the trial court against defendant contending that defendant breached the restrictive sale agreement. Defendant moved for summary disposition asserting that plaintiffs' action was barred by the disposition in the probate proceedings. The trial court granted defendant's motion on the basis that plaintiffs' action was barred by res judicata.

On appeal, plaintiffs assert several reasons why res judicata should not apply; all of them are without merit. Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. *Id.* at 375-376.

Here, each of the requirements for res judicata are met. There is no dispute that the probate and trial court proceedings involved the same parties or their privies, plaintiffs being assignees of NBD. Plaintiffs' contention that the probate court's ruling on the summary disposition motion was not on the merits is invalid, because such a ruling is on the merits. *Roberts v City of Troy*, 170 Mich App 567, 577; 429 NW2d 206 (1988). Plaintiffs also contend that the probate court's order was not final because there were other issues pending before the probate court at the time summary disposition was granted that affected the viability of the breach of contract claim. However, plaintiffs presented no evidence to support this assertion and the trial court found that the order was final. Consequently, we find no clear error. MCR 2.613(C). In any event, even if the probate court's order had not been final, plaintiffs could not split their cause of action by bringing an action in the circuit court as the breach of contract claim is compulsory. MCR 2.203.

In addition, the claim raised in this case could and should have been resolved in the probate proceedings. Michigan has adopted the "broad" application of res judicata, which bars claims arising out of the same transaction that plaintiffs could have brought but did not, as well as those questions that were actually litigated. *Jones v State Farm Mutual Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993). The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions. *Id.* Plaintiffs contend that this case and the probate case are based on two separate transactions. Specifically, plaintiffs allege that defendant's refusal to sell the Company shares to NBD in September 1988, was a breach of contract and that defendant's act of entering into an agreement with the grandsons in February 1988, constituted a separate incident amounting to tortious interference with a contractual right, and that each was separate and distinct from the other. Plaintiffs' claim is without merit. Both claims arise out of the same transaction because the same facts and evidence are essential to both the breach of contract and the tortious interference claims. In each instance, plaintiffs' claim is based on the allegation that defendant violated the first option right of the

restrictive sale agreement. There is no separate transaction for purposes of a res judicata analysis for each time defendant refused to sell shares in the Company when requested pursuant to the agreement. Also, plaintiffs incorrectly contend that the breach of contract claim could not have been raised in the probate proceeding because the claim in the probate proceeding involved tortious interference. However, a comparison of the grounds asserted for relief is not the proper test for res judicata. *Id.* at 401.

Finally, plaintiffs claim that defendant is barred from asserting res judicata because defendant failed to object to nonjoinder of claims. We disagree. MCR 2.203(A)(2), which addresses joinder of claims, states that “This rule does not affect collateral estoppel or prohibition against the relitigation of a claim under a different theory.” This is precisely what has occurred in this case. Plaintiffs’ reliance on *Rogers v Colonial Federal Savings & Loan Ass’n of Grosse Pointe Woods*, 405 Mich 607; 275 NW2d 499 (1979) is misplaced because that case applied an outdated rule which did not contain the above-quoted language.

Because plaintiffs’ action is barred by res judicata, defendant’s cross-appeal regarding interpretation of the restrictive sale agreement is moot.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Jane E. Markey  
/s/ James C. Kingsley