STATE OF MICHIGAN

COURT OF APPEALS

ALLISON MACARTHUR-BROWN,

Plaintiff-Appellant,

v

MARIAN L. FAUPEL and FAUPEL & ASSOCIATES, P.C.,

Defendants-Appellees.

UNPUBLISHED
December 3, 1999

No. 212816
Washtenaw Circuit Court
LC No. 97-004327 NM

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) in this legal malpractice case. We review a circuit court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Plaintiff argues that the trial court erred in its application of the doctrine of res judicata because plaintiff's prior claim against defendants did not arise out of the same transaction as the legal malpractice claim. We affirm in part, reverse in part and remand. Because this case was decided by the circuit court pursuant to the doctrine of res judicata, we must analyze the holdings in both plaintiff's prior action against defendant for slander of title, and her present action for legal malpractice.

There are three prerequisites to the application of res judicata: (1) the prior action must have been decided on its merits; (2) the issues raised in the second case must have been either actually resolved, or capable of resolution in the first, and; (3) both actions must have involved the same parties or their privies. *King v Michigan Consolidated Gas Co*, 177 Mich App 531, 535; 442 NW2d 714 (1989). As to the first requirement of finality, the trial court in the slander of title action found that the defendants' lien was valid. This was, in effect, a granting of the defendants' motion for summary disposition, and was a final judgment for the purposes of res judicata. *Roberts v City of Troy*, 170 Mich App 567, 577; 429 NW2d 206 (1988). The second requirement that the parties be identical in

both actions is also clearly met. Therefore, the only question remaining relates to the third requirement that the issues to be raised in the second action were or could have been raised in the prior action.

Our Supreme Court has adopted a "broad" application of the doctrine of res judicata, barring "not only claims actually litigated in a prior action, but every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not." *Sprague v Buhagiar,* 213 Mich App 310, 313; 539 NW2d 587 (1995). Both claims will be deemed to arise out of the same transaction if the facts are identical in both, or if the same evidence would sustain both. *In re Koernke Estate,* 169 Mich App 397, 399; 425 NW2d 795 (1988). Because the same facts or evidence would not sustain both the slander of title action and the legal malpractice action, the trial court incorrectly applied the doctrine of res judicata.

Defendant claims that both the slander of title action and the malpractice action arose out of her representation of plaintiff during her divorce. While this representation is the underlying transaction in the legal malpractice suit, it is not the transaction on which the slander of title action was based. That claim was based on defendants' recording of a lien because of plaintiff's failure to pay her legal fees. If plaintiff had proved legal malpractice in the slander of title action, it would not have invalidated defendants' lien. The lien was imposed, pursuant to two written fee agreements that plaintiff signed, because plaintiff had failed to pay defendants' fees. Establishing legal malpractice would neither have negated the effect of those fees agreements, nor erased the legal fees which plaintiff owed. The damages for malpractice relate to the injury directly or proximately caused by the attorney during her representation, such as a reduction in the amount of a divorce settlement. *Dean v Tucker,* 205 Mich App 547, 551; 517 NW2d 835 (1994). Such damages are unrelated to a plaintiff's accumulation of unpaid legal bills. Because evidence of legal malpractice would not have sustained the action for slander of title, the two claims are not the same for the purposes of the doctrine of res judicata. Thus, the circuit court erred in granting defendants' motion for summary disposition.

Because the circuit court found that the entire claim of malpractice was barred by res judicata, it did not address which issues within that claim would have been barred under the doctrine of collateral estoppel. We may consider an issue raised before, but not specifically decided by the circuit court, and we will do so in this case. *Peterman v DNR,* 446 Mich 177, 183; 521 NW2d 499 (1994). In plaintiff's malpractice complaint, allegations (H) and (I) relate to the validity of defendants' lien, and are therefore barred from consideration under the doctrine of collateral estoppel.

To be barred by collateral estoppel, the issues to be concluded in the second action must be the same as those involved in the first. *Eaton Rd Comm'rs v Schultz,* 205 Mich App 371, 376-377; 521 NW2d 847 (1994). The issues must be identical, and not merely similar, and must have been actually and necessarily litigated. *Id.* The ultimate issue in the slander of title action was the legality of defendants' lien. That issue was concluded with a final judgment by the trial court that the lien was valid. Plaintiff is therefore barred from relitigating the issue of the validity of the lien in the malpractice action against defendants. However, collateral estoppel bars only the issues actually resolved in the prior slander of title action. It does not bar the litigation of other issues relating to the alleged professional negligence of defendants that were not decided in the prior action.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck