STATE OF MICHIGAN

COURT OF APPEALS

Estate of TODD CRUMM, Deceased, by and through his Personal Representative, STEVE THOMAS,

Plaintiff-Appellant,

v

ADDISON COMMUNITY HOSPITAL, d/b/a SURGICON, INC., and CHERRY HILL MEDICAL SURGICAL CENTER, d/b/a ALBION INVESTMENT COMPANY, INC.,

Defendants,

and

RANDALL J. BOLAR, M.D., JOSEPH P. BENDER, M.D., JOSEPH P. BENDER, M.D., P.C., and THOMAS NALLEY, PA-C,

Defendant-Appellees.

UNPUBLISHED
December 17, 1999

No. 210980
Ingham Circuit Court
LC No. 97-085328 NH

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right two separate orders granting summary disposition in favor of defendants Randal J. Bolar, M.D. and Thomas Nalley PA-C, and defendants Joseph P. Bender, M.D. and Joseph P. Bender, M.D., P.C. pursuant to MCR 2.116(C)(7) (claim barred because of a prior judgment). We reverse.

Plaintiff argues that the trial court erred in granting defendants' motions for summary disposition on the basis of res judicata. We agree. This Court reviews a grant of summary disposition pursuant to MCR 2.116(C)(7) de novo. *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). We consider all documentary evidence submitted by the parties and accept as true

the plaintiffs well-pleaded allegations unless contradicted by documentation submitted by the non-movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Novak*, *supra* at 681. A motion under MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery. *Patrick v US Tangible Investment Corp*, 234 Mich App 541, 544; 595 NW2d 162 (1999). Similarly, the applicability of res judicata is a question of law, which we review de novo. *Bergeron v Busch (After Remand)*, 228 Mich App 618, 620; 579 NW2d 124 (1998).

The doctrine of res judicata bars the relitigation of a claim where the parties fully litigated the claim in a prior lawsuit which resulted in a final judgment. *Andrews v Donnelly (After Remand)*, 220 Mich App 206, 209; 559 NW2d 68 (1996). The doctrine serves the two-fold purpose of ensuring finality of judgements and preventing repetitive litigation. *Bergeron*, *supra* at 621. Res judicata applies when (1) the first action was decided on the merits, (2) the matter being litigated in the second case was or could have been resolved in the first case, and (3) both actions involve the same parties or their privies. *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997), aff'd 460 Mich 573; 597 NW2d 82 (1999). Michigan has adopted a broad application of the doctrine of res judicata, barring not only claims actually litigated in the prior action, but every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Id*.

There is no dispute that the initial lawsuit against Bariatric Treatment Centers (formerly known as Addison Hospital, an assumed name of Surgicon Inc.), Dr. James A. Sapala, M.D., and Dr. James A. Sapala, M.D., P.C. (*Crumm I*) arose from the same alleged malpractice as the lawsuit subsequently filed against defendants in the present case (*Crumm III*). It is also undisputed that at the time the motions for summary disposition were decided in this case, *Crumm I* was still pending before another judge. However, we hold that res judicata was improperly applied because *Crumm I* did not result in a final determination concerning the alleged malpractice of the defendants named in *Crumm III*.

While the trial judge in *Crumm I* did deny plaintiff's motion to amend the complaint to add new theories or defendants, the record does not establish that this ruling was based on the merits of a malpractice claim against the *Crumm III* defendants. In *Martin v Michigan Consolidated Gas Co*, 114 Mich App 380, 383-384; 319 NW2d 352 (1982), this Court held that a motion to amend a complaint may be considered a decision on the merits for purposes of res judicata when the denial of the motion is based on futility. This Court reasoned as follows:

> In most instances, the denial of a motion to amend will not be a decision on the merits. For example, when amendment is denied because of undue delay, bad faith, dilatory motive or undue prejudice to the opposing party, *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973), the substance of the claims sought to be added will not likely have been considered. However, when, as in the present case, the denial is made on the basis of futility of the amendment, it is in effect a determination that the added claims are substantively without merit; that is, that the claims are frivolous or legally insufficient on their face. See 6 Wright & Miller, Federal Practice & Procedure, § 1487, pp 432-433. Such a determination is entitled to res judicata impact. [*Id*. at 383-384.]

The record before us does not indicate whether the trial court's refusal in *Crumm I* to permit plaintiff to add new theories or defendants was premised on the futility of a medical malpractice claim against the *Crumm III* defendants. Consequently, we have no basis for holding that the refusal to allow plaintiff to amend the complaint was based on the substance of the claims plaintiff subsequently brought against the *Crumm III* defendants. Thus, the record does not establish that the *Crumm I* ruling constituted a final judgment for purposes of res judicata. Similarly, while the parties appear to agree that a settlement was reached in *Crumm I*, the content and scope of that settlement agreement is not in the record presented to this Court. Accordingly, we are unable to determine whether the alleged settlement could be construed as barring plaintiff's claims against the *Crumm III* defendants. Because defendants, as the moving party, failed to meet their burden of proving the applicability of res judicata, *Sloan v City of Madison Heights*, 425 Mich 288, 295; 389 NW2d 418, (1986), we hold that defendants were not entitled to judgment as a matter of law on the basis of res judicata. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997).

We further conclude that plaintiff is not collaterally estopped from bringing a medical malpractice action against the Crumm III defendants. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid judgment and the issue was actually and necessarily determined in that prior proceeding. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). Because collateral estoppel requires that the issue have been actually determined, judgment on the merits must have been rendered in the first action to prelude relitigation of the issue in the second action. *Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990); *Latimer v William Mueller & Son, Inc*, 149 Mich App 620, 640; 386 NW2d 618 (1986). Because the record does not establish that *Crumm I* resulted in an adjudication on the merits of a medical malpractice claim against the *Crumm III* defendants, we hold that collateral estoppel does not preclude plaintiff's claims in *Crumm III*.

Defendants also moved for summary disposition pursuant to MCR 2.116(C)(6), which provides that dismissal is proper where "[a]nother action has been initiated between the same parties involving the same claim." *Fast Air, Inc v Knight*, 235 Mich App 541, 544; 599 NW2d 489 (1999). MCR 2.116(C)(6) is a codification "of the former plea of abatement by prior action." *Id.* at 545. The purpose of this subrule has been stated as follows:

> The courts quite uniformly agree that parties may not be harassed by new suits brought by the same plaintiff involving the same questions as those in pending litigation. If this were not so repeated suits involving useless expenditures of money and energy could be daily launched by a litigious plaintiff involving one and the same matter. Courts will not lend their aid to proceedings of such a character, and the holdings are quite uniform on this subject. [*Darin v Haven*, 175 Mich App 144, 148; 437 NW2d 349 (1989), quoting *Chapple v National Hardwood Co*, 234 Mich 296, 298; 207 NW 888 (1926).]

Because the record in the present case reveals that *Crumm II* and *III* were initiated while *Crumm I* was still pending, the question is whether *Crumm I* and *III* involved the same parties. MCR 2.116(C)(6) does not require that all parties and all issues be identical. *JD Candler Roofing Co, Inc v*

Dickson, 149 Mich App 593, 598; 386 NW2d 605 (1986). We find that the record does not support a conclusion that the defendants named in *Crumm I* – Bariatric Treatment Centers (formerly known as Addison Community Hospital, an assumed name of Surgicon, Inc.); Dr. James Sapala, M.D.; Dr. James Sapala, M.D., P.C.; and, Edward Sparrow Hospital Association, are the same defendants named in *Crumm III* – Addison Community Hospital; Surgicon, Inc; Cherryhill Medical Surgical Center; Randall Bolar, M.D.; Joseph Bender, M.D., P.C.; Joseph Bender, M.D.; and, Thomas Nalley, PA-C. Moreover, assuming without deciding, that the *Crumm III* defendants were in "privity" with the defendants named in *Crumm I*, defendants have cited no authority for the proposition that such an argument applies within the context of MCR 2.116(C)(6). *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). Because defendants were not named in *Crumm I*, and without authority that a privity argument is viable in this context, we find that the parties in *Crumm I* and *III* were not sufficiently similar for purposes of MCR 2.116(C)(6).

Finally, defendants Bolar and Nalley contend that dismissal of plaintiff's action was warranted because plaintiff failed to comply with Michigan's compulsory joinder of claims rule, MCR 2.302(A)(1). However, defendants waived application of the rule by failing to object in a pleading, motion, or pretrial conference to plaintiff's failure to join claims pursuant to MCR 2.302(A)(1). See MCR 2.302(A)(2); *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 668; 341 NW2d 783 (1983).

Reversed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey