

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

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DANIEL BURROUGHS,

Plaintiff/Counter-Defendant-  
Appellant,

and

PATRICIA BURROUGHS and LEONARD  
BODRIE,

Plaintiffs-Appellants,

v

LAKE ARROWHEAD PROPERTY OWNERS  
ASSOCIATION,

Defendant/Counter-Plaintiff-  
Appellee.

UNPUBLISHED

March 16, 2001

No. 221511

Otsego Circuit Court

LC No. 97-007256-CH

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Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiffs Daniel Burroughs, Patricia Burroughs, and Leonard Bodrie appeal as of right from a July 28, 1999, Otsego Circuit Court judgment granting summary disposition to defendant, Lake Arrowhead Property Owners Association (the Association) under MCR 2.116(C)(7) and dismissing plaintiffs' cross-motion for summary disposition under MCR 2.116(C)(10). We reverse.

In 1995, plaintiffs, residents of Lake Arrowhead subdivision in Otsego County, brought an action against defendant, the Association, concerning a dispute over maintenance of a roadway in the subdivision known as Bodrie Lane. A jury trial was held in the matter and the jury found that plaintiffs had paid dues to the Association for a number of years and the Association was bound by contract to maintain the roadway. The jury awarded plaintiffs damages for the Association's breach of contract and its failure to maintain the road. Furthermore, the jury found the Association was estopped from denying that plaintiffs were members of the Association and the Association therefore could not deny plaintiffs the rights

pursuant to the contract. The circuit court entered judgment for proven money damages. When defendant continued to fail to maintain the roadway, plaintiffs brought a motion for post-judgment relief seeking further damages for the allegedly continuing breach of defendant's contractual duty to maintain Bodrie Lane. However, the court stated that plaintiffs were required to bring a new action for damages.

On July 1, 1997, plaintiffs filed their second complaint and demand for jury trial, alleging that they had paid for membership in the Association and were therefore entitled to damages for defendant's continuing refusal to maintain the subject road. On June 21, 1999, the circuit court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), concluding that the jury in the previous action awarded damages to plaintiffs up to the date of the verdict. The circuit court stated that review of the trial court's ruling precluding future damages was never sought by appeal or otherwise, stating:

It is quite clear that even if the decision of the initial Trial Court in the previously filed action was in error, there has not been sought an appeal or review of the previous Trial Court decision. Since the awarding of future damages could have been brought in the initial proceeding by Plaintiff, the doctrine of res judicata bars Plaintiffs from relitigating the instant action and Defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) is granted.

The application of res judicata is a question of law that this Court reviews de novo. *Bergeron v Busch*, 228 Mich App 618, 620; 579 NW2d 124 (1998). We hold that the circuit court erred in granting summary disposition to defendant under the doctrine of res judicata. The doctrine of res judicata is inapplicable to a subsequent action for damages arising out of a continuing breach of a contractual duty affirmed by a verdict in the first action. To rule otherwise would result in an inability to enforce judgments for damages incurred by a continuing breach of contract. Thus, we reverse the circuit court's grant of summary disposition and remand for further proceedings.

Under the doctrine of res judicata, a subsequent action is barred between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). The elements of res judicata are: (1) a prior action that was decided on the merits, (2) a decree in the prior action that was a final decision, (3) a matter contested in a second case that was or could have been resolved in the first, and (4) both actions involve the same parties or their privies. *Baraga Co v State Tax Comm*, 243 Mich App 452, 455; 622 NW2d 109 (2000). Furthermore, res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994).

The circuit court presiding over the first case ruled that damages were due plaintiffs for defendant's failure to maintain the road from 1982 through February 1, 1997. Neither the jury nor the judge ruled that defendant's contractual obligation to maintain the road ceased on the date of judgment; rather, damages were paid for past damages incurred by plaintiffs as a result of defendant's failure to perform. Although the jury verdict form presented the issues of defendant's breach in terms that were in the past tense, the jury also found that defendant was estopped from denying plaintiffs membership in the Association – membership that included the

right to have the subject road maintained. The circuit court refused to speculate about the amount of future damages if defendant continued to breach the contract. Nonetheless, the court did state that such damages could be tried in a future action; namely, a subsequent complaint brought by plaintiffs such as the instant action.

Based on the record and existing case law, plaintiffs' subsequent action seeking to recover further damages for defendant's alleged continuous breach of its contractual duty is not barred by the doctrine of res judicata. First, however similar the facts concerning defendant's previous failures to maintain the roadway, defendant's subsequent failure to maintain Bodrie Lane, despite a jury verdict finding that it had a duty to maintain the road and was estopped from denying plaintiffs' membership, created a new set of factual circumstances. Thus, the facts were not identical because subsequent occurrences of defendant's conduct created new claims and a new cause of action. *Ditmore v Michalik*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 218708, issued 2/9/01), slip op at 4.

Second, as a matter of practicality, the issue of damages for future breach of the defendant's duty to maintain could not have been litigated until such breach occurred. Additionally, the circuit court's grant of summary disposition to defendant pursuant to MCR 2.116(C)(7) precludes a determination whether there has been compliance with the jury verdict in the first action. By virtue of the circuit court's cursory grant of summary disposition, plaintiffs are faced with the dilemma of asserting that there was a continuing duty to maintain, which duty was allegedly breached, and being advised that their present claim is barred by res judicata, while at the same time being precluded from a determination on the merits concerning this new set of facts.

Where damages are speculative, or their incurrence contingent on the happening of a future event, such as further breach of a continuing duty to maintain, a subsequent suit to recover additional damages is not barred by res judicata or collateral estoppel. *Said v Rouge Steel Co*, 209 Mich App 150, 159-160; 530 NW2d 765 (1995); see also *Plaza Investment Co v Abel*, 8 Mich App 19; 153 NW2d 379 (1967). This rule is supported by an exception to the general rule that res judicata bars a subsequent claim brought by the plaintiff on the same set of factual circumstances when a valid and final judgment is rendered in favor of the plaintiff. 1 Restatement Judgments 2d, § 18, 151-152. Where "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action," the plaintiff's claim will not be extinguished. *Id.* at § 26, 233; see also *Baraga, supra* at 2; *Askew v Ann Arbor Public Schools*, 431 Mich 714, 731; 433 NW2d 800 (1988) (Boyle, J. concurring). Thus:

Where the court determines that the plaintiff cannot enforce a given claim or part of it in that action but must enforce it, if at all, in another action, the judgment does not preclude the plaintiff from maintaining the other action even though it appears that the determination in the first action was erroneous. . . . It is immaterial that no appeal was taken from the ruling of the court in the first action. [1 Restatement Judgments 2d, § 26, comment d, 238.]

The first court's denial of plaintiffs' motion for post-judgment relief to claim subsequent damages was the type of determination encompassed by the above quoted principle.

An exception to the doctrine of res judicata is provided where “[f]or reasons of substantive policy in a case involving a *continuing or recurrent wrong*, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of the suit, and *chooses the latter course*.” *Id.* at § 26(1)(e), 234 (emphasis added). The circuit court presiding over the first action was faced with the choice of (1) adjudicating damages that had not yet been incurred and that, in its own words, were speculative, or (2) leaving the issue of future breaches, if any, to the determination of a subsequent lawsuit if the parties could not sort out their differences. However, the first circuit court could only do the latter because it had no jurisdiction to rule on damages it deemed too remote or speculative. Damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made. *Farm Credit Services of Michigan’s Heartland PCA v Weldon*, 232 Mich App 662, 678; 591 NW2d 438 (1998). A court is not permitted to consider damages that are speculative, remote, or contingent on a breach that has not yet occurred. *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 294; 475 NW2d 366 (1991).

Under the circumstances, we therefore conclude that plaintiffs’ present action seeking to recover further damages for defendant’s alleged continuous breach of its contractual duty to plaintiffs is not barred by the doctrine of res judicata.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Helene N. White