STATE OF MICHIGAN

COURT OF APPEALS

DAN MOORE and KELLY MOORE,

Plaintiffs-Appellants,

v

TOWNSHIP OF AUGRES,

Defendant-Appellee.

UNPUBLISHED
May 31, 2002

No. 228356
Arenac Circuit Court
LC No. 99-006225-CH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition for defendant pursuant to MCR 2.116(C)(7). We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs own property in defendant township that is zoned commercial but has been used for farming and is adjacent to US 23. In 1996, they constructed a pole barn visible from the highway and erected a sign advertising an off-premises business on one side of the structure. They subsequently submitted an application for a state sign permit, and the Michigan Department of Transportation denied the application pursuant to the Highway Advertising Act of 1972, MCL 252.301 *et seq.*

About the same time, the township brought a nuisance abatement action against plaintiffs, alleging that the sign violated the township's ordinance prohibiting off-premises advertising in a commercial zone. Plaintiffs raised the unconstitutionality of the ordinance as an affirmative defense. Judge Michael J. Matuzak entered a judgment declaring the sign to be a nuisance per se under the township's zoning ordinance. In an accompanying opinion, he noted that a township could not abolish all off-premises signs, *Central Advertising Co v St Joseph Twp,* 125 Mich App 548; 337 NW2d 15 (1983), but he declined to rule on the constitutionality of defendant's ordinance in light of plaintiffs' failure to obtain a state permit. Plaintiffs then removed the sign but replaced it with another, prompting defendant's post-judgment motion to hold plaintiffs in contempt. In response to plaintiffs' renewed argument that the sign ordinance unconstitutionally banned all off-premises advertising, the court observed that the appropriate avenue to raise the issue was to apply for a township permit and, if the township denied it based on its sign ordinance, plaintiffs could then bring a new action challenging the ordinance.

Plaintiffs sent defendant applications for sign permits but defendant failed to act on them. Plaintiffs also sent defendant a freedom of information act (FOIA) request but defendant failed to respond to that as well. After four months, they filed their amended complaint in the present case alleging that defendant intentionally refused to issue them permits and seeking a writ of mandamus requiring defendant to produce a permit application and to process it in a timely fashion. Additionally, they alleged an FOIA violation and sought a declaration that defendant's off-premises sign ordinance was unconstitutionally overbroad. This case was assigned to Judge Michael J. Baumgartner. Defendant moved for summary disposition under MCR 2.116(C)(7), claiming that the counts implicating the failure to act on the applications and the constitutionality of the ordinance were barred by the doctrine of res judicata and that the FOIA count was time-barred. Judge Baumgartner agreed with defendant with regard to the failure to act, mandamus, and constitutional counts. He did not rule on the FOIA count.

On appeal, plaintiffs contend that the trial court erred in granting summary disposition for defendant on the ground of res judicata and should have decided all four claims on the merits. Defendant counters that summary disposition was appropriate because the claims plaintiffs brought in their amended complaint were actually litigated in the first action or could have been asserted as a defense in the first action. We agree with plaintiffs. The applicability of res judicata is a question of law that is reviewed de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co,* 460 Mich 372, 379; 596 NW2d 153 (1999).

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). It applies when (1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). This case involves the fourth element. The test to determine whether the two actions involve the same subject is whether the facts are identical in both actions or whether the same evidence would sustain both actions. If the same facts or evidence would sustain both, the two actions are the same for the purpose of res judicata. *Id.* at 577. If different facts or proofs would be required, res judicata does not apply. *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 464; 432 NW2d 338 (1988).

Here, the facts resolved in the first case were that (1) plaintiffs erected a sign on their pole barn, (2) MDOT denied a permit for the sign, and (3) the sign violated the township's ordinance prohibiting off-premises signs. The constitutionality of the ordinance was raised by plaintiffs, but the issue was not addressed by the trial court in light of MDOT's denial of a state permit. The operative facts in the second case were that (1) plaintiffs submitted applications to defendant for permits to erect signs, (2) defendant neither granted nor denied the applications, and (3) MDOT had not ruled on an application for state permits for the signs. Thus, the crux of the first action was that plaintiffs were violating the township ordinance by erecting off-premises advertisements, and the crux of the second action was that defendant was breaching its alleged

duty to grant or deny applications for sign permits. Because different facts or proofs were required in the cases, res judicata did not apply.[1]

Further, defendant seems to suggest that the ruling in the first case, that the constitutionality of the ordinance was basically moot in light of MDOT's refusal to issue a state permit, should apply to the second case. We disagree. There was no evidence that MDOT refused to issue permits related to the billboards at issue in the second case, or, for that matter, that plaintiffs had applied for state permits. Moreover, while an MDOT employee's affidavit predicted that further applications would also be denied, that position assumed without support that plaintiffs' use of the property would remain static. Under these circumstances, it would be inappropriate to apply to this case the conclusion reached in the prior case that the constitutional argument is moot.

We therefore reverse the order granting summary disposition for defendant and remand for further proceedings addressing the merits of the mandamus, intentional refusal to issue a permit, and constitutional claims. Because the court never ruled on defendant's motion for summary disposition with regard to the FOIA claim, it should also allow defendant to renew its motion for summary disposition regarding that count.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff

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[1] The essence of defendant's argument is that both the nuisance action and the mandamus action involved the same legal issue, namely, the constitutionality of the township's ordinance. We conclude that this argument is more appropriately considered under the related doctrine of collateral estoppel. See *Ditmore*, *supra* at 577. For collateral estoppel to apply, the ultimate issue to be concluded in the second action must be the same as that involved in the first. *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz,* 205 Mich App 371, 376; 521 NW2d 847 (1994). The issues must be identical and the ultimate issue must have been both actually and necessarily litigated. *Id.* at 376-377. To be necessarily determined in the first action, the issue must have been essential to the resulting judgment; a finding on which the judgment did not depend cannot support collateral estoppel. *Id.* at 377. Here, Judge Matuzak expressly declined to address the constitutionality of the ordinance in the first action and the judgment ordering abatement of the original pole barn sign did not depend on any finding that the ordinance was constitutional. Therefore, collateral estoppel does not bar the constitutional claim.