STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY GROSS,

Plaintiff-Appellant,

v

PHILIP GARY LANDIN and WEST BLOOMFIELD TOWNSHIP WATER & SEWER DEPARTMENT,

Defendants-Appellees.

UNPUBLISHED
August 26, 2004

No. 246282
Oakland Circuit Court
LC No. 02-038836-NI

Before: Owens, P.J., and Kelly and R. S. Gribbs*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendants summary disposition on the ground of collateral estoppel, MCR 2.116(C)(7), in this third-party automobile negligence case. We reverse.

I

Two suits were filed as a result of an automobile accident on Commerce Road in Orchard Lake on the snowy afternoon of March 9, 1999. The accident left plaintiff Jeffrey Gross a paraplegic and defendant Philip Landin seriously injured. The instant appeal is from the second action.

A - The First Action

On May 7, 2001, Landin filed a third-party automobile negligence action against Gross and Gross' employer,[1] alleging that Gross had crossed the centerline on Commerce Road, collided with Landin's vehicle, and caused Landin serious and permanent injuries.[2] *Landin v*

[1] Landin's complaint also named Gross' employer, Cass Lake Yacht Club, as a defendant.

[2] Landin's complaint alleged that Gross' negligence or gross negligence was the sole proximate (continued…)

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

Gross, Oakland Circuit Court Docket No. 01-031604-NI. The lower court record of the first action was not submitted but several pleadings and documents therefrom are. Landin's complaint alleged that Gross owed and breached duties to Landin, including violations of the law, and that those "violations were the sole and/or a proximate cause of the injuries and damages sustained by the Plaintiff." Landin's suit was assigned to Oakland Circuit Court Judge Nanci Grant.

Gross' employer's insurer[3] assigned Gross an attorney in this first action. Gross' answer to Landin's complaint admitted that Gross' vehicle crossed the centerline, but denied that Landin "sustained any compensable, serious and grievous injuries." Gross asserted as affirmative defenses:

> 2. That any alleged injuries sustained by Plaintiff [Landin], as alleged in the Complaint, were proximately caused, in whole or in part, by Plaintiff's negligence, and any recovery by Plaintiff must be diminished in whole or in part.
>
> 3. That any alleged injuries sustained by Plaintiff, as alleged in the Complaint, did not arise out of the incident alleged in the Complaint.
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> 4. That Plaintiff's damages, if any, are limited to recovery for non-economic loss as prescribed by MCL 500.3135(2)(c).
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> 5. That Plaintiff's claims are barred because Plaintiff's alleged injuries do not meet the requisite threshold under MCL 500.3135, including but not limited to no serious impairment of body function and no permanent serious disfigurement.
>
> * * *
>
> 7. That Plaintiff's claims are barred because Plaintiff was more than 50% at fault in this matter, pursuant to MCL 500.3135(2)(b) and other applicable statutes.
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> * * *

(…continued)

cause of his injuries, that his injuries were "severe, grievous and permanent," and included: a) acute and chronic S1 lumbosacral radiculopathy bilaterally; b) severe sclerosis at L5/S1 accompanied with epidural scar formation and disc protrusion; c) aggravation of pre-existing conditions, including L5/S1 disc abnormality and L5/S1 disc herniation which had previously required surgery, as well as L5/S1 degenerative disc disease, scar tissue and nerve damage; d) injuries to the head, neck, back, shoulder and arms; e) pain, suffering, discomfort, disabilities, headaches, extreme emotional and physical suffering and depression; f) severe and continuing embarrassment, humiliation, anxiety and mortification; g) aggravation of pre-existing conditions, known or unknown; h) generalized injuries to and about the entire body; i) wage loss and/or household replacement services in excess of that reimbursed or allowed under the no-fault law; j) loss of the natural enjoyments of life; k) other injuries not presently known, but which will be learned through discovery.

[3] Gross' insurance policy is not contained in the record, nor have we located any reference in the record to who insured Gross' employer (or Landin or Landin's employer).

10. That Defendant was not a proximate cause of the alleged injuries.

During discovery in the first action, Gross' counsel admitted Gross' negligence caused the accident, admitted that Gross was "the sole proximate cause of the accident", and admitted that no act or omission by Landin caused or contributed to the causation of the accident.[4]

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[4] The Requests for Admission stated:

> 1. That on March 9, 1999 at approximately 12:23 P.M. Jeffrey Schott Gross was operating a 1997 Ford vehicle westbound on Commerce Road approximately 100 feet east of its intersection with Three Lakes Lane in the City of Orchard Lake . . .
>
> Admitted.
>
> 2. That at the above time and place, Jeffrey Scott Gross, while operating the 1997 Ford vehicle, drove left of center on Commerce Road and collided with the vehicle operated by Philip G. Landin.
>
> Defendant Gross admits that his vehicle crossed the centerline of Commerce Road.
>
> 3. That it was negligent for [Gross] to cross the centerline and drive left of center on Commerce Road while operating the 1997 Ford vehicle.
>
> Admitted.
>
> 4. That [Gross'] negligence in crossing the center line and driving left of center on Commerce Road and striking Philip G. Landin's vehicle was the sole, proximate cause of the accident between [Gross and Landin] on Commerce Road on or about March 9, 1999 at approximately 12:23 P.M.
>
> Admitted.
>
> 5. That at the above mentioned time and place, no act or omission by Philip G. Landin caused or contributed to the causation in any way of the above described accident.
>
> Admitted.
>
> 6. That [Gross] admits liability for the March 9, 1999 accident at approximately 12:23 P.M. . . .
>
> Admitted.

B - The Second Action

While the first action was pending, a second automobile negligence action (the instant case) was filed on March 5, 2002, by Gross, against Landin and Landin's employer, West Bloomfield Township (Township). *Gross v Landin*, Oakland Circuit Court Docket No. 02-038836-NI. In this second action, Gross and Landin were each represented by different lawyers than in the first action.

Gross' complaint alleged that Landin's vehicle collided with Gross' car and severely injured Gross; that Landin and his employer owed plaintiff the duty to use due care and caution in the operation and control of Landin's vehicle, that Landin breached that duty when he drove too fast for the road conditions and without the vigilance necessary to properly control his vehicle and stop it before striking Plaintiff's vehicle, and that as a direct and proximate result of Landin's negligence, Gross had suffered a severe impairment of body function, serious and permanent disfigurement for which he had been paralyzed, and a diminished life expectancy, among other things. The second action was assigned to Judge John MacDonald, but later transferred to Judge Grant. See n 6, *infra*.

1 - Defendants' First Motion for Summary Disposition in the Second Action

On May 10, 2002, defendants in the second action, Landin and the Township, filed a summary disposition motion under MCR 2.116(C)(6), arguing that another action had been initiated between the same parties, involving the same claim, and that in response to requests for admission Gross had admitted in the first suit that his negligence was the sole and proximate cause of the accident, and thus there was no question of material fact that Gross' negligence was the sole proximate cause of the accident and that Landin was not negligent or grossly negligent. Defendants also argued that under *Ternes Steel Co v Ladney*, 364 Mich 614; 111 NW2d 859 (1961), plaintiff Gross was precluded from pursuing a claim against defendants because plaintiff's "theory of liability (i.e., which driver's negligence caused the accident) was an issue in the first action, therefore, [Gross] was required to litigate the issue of negligence in the first action until a decision was made on the merits."

In response to the summary disposition motion, Gross' counsel in the second action, Larry Mason (counsel for Gross' insurer had defended him in the first suit), submitted an affidavit attesting that the failure to disclose the existence of the first suit was inadvertent. Gross' response brief stated that Gross had been "only minimally aware of" Landin's suit against him, as he was coping with catastrophic injuries and daily medical treatment. Gross also submitted an affidavit attesting that his insurer's counsel called him only once, never met with him, never told Gross that he planned on admitting liability, and never told Gross that requests to admit had been submitted. Gross further argued that under MCR 2.312(D)(2),[5] admissions in one suit may not be used against the party in another suit.

[5] MCR 2.312(D)(2) provides:

(continued…)

After taking defendants' motion under advisement, Judge Grant[6] issued an opinion and order denying the motion, stating:

> Defendant correctly cites MCR 2.203(A) and (E) for the proposition that Michigan is a compulsory joinder state. Thus, when a party files a claim or counterclaim, he must join all of his claims that arise out of the same transaction and occurrence. That does not mean, however, that Michigan is a compulsory counterclaim state. In fact, in *Salem Industries v Mooney Process Equipment Co*, 175 Mich App 213, 215-216 [; 437 NW2d 641] (1988), the Court of Appeals explicitly rejected Defendant's position, holding that MCR 2.203(E) "is permissive, as opposed to compulsory" and "allows a party to litigate a counter claim in a separate action." Therefore, Defendant is not entitled to summary disposition on this basis.
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> * * *
>
> Finally, Defendant argues that summary disposition is appropriate pursuant to MCR 2.116(C)(10) in light of Plaintiff's admission during discovery in the previous case that his conduct was the sole proximate cause of the accident. Defendant also claims that other witnesses "agree" that Plaintiff was the cause of the accident.
>
> Defendant's assertions about what the other witnesses "agree" to is [sic] irrelevant, as Defendant has not cited any evidence in support of this assertion. MCR 2.116(G)(4). Moreover, Plaintiff's answer to the requests to admit in the previous case cannot be used to resolve factual issues in this case, as MCR 2.312(D)(2) explicitly provides that "an admission made by a party under this rule [may not] be used against the party in another proceeding."
>
> Defendant's motion is denied.[7]

Two weeks after the circuit court denied defendants' first motion to dismiss in the second action (*Gross v Landin*), it entered a stipulated order of dismissal with prejudice in the first action (*Landin v Gross*)**,** which was signed by counsel appointed for Gross by Gross' employer's insurer, and counsel for Landin, and stated:

(…continued)

> An admission made by a party under this rule is for the purpose of the pending action only and is not an admission for another purpose, nor may it be used against the party in another proceeding.

[6] The case was initially assigned to Judge MacDonald, but transferred to Judge Grant after defendants filed their summary disposition motion in May 2002.

[7] Defendants Landin and the Township did not move for reconsideration or seek interlocutory appeal from Judge Grant's denial of their motion.

> This matter having properly come before the Court pursuant to the stipulation of the parties and **the agreement of the parties to put this matter into binding arbitration,** and the Court being otherwise fully informed in the premises; [it is hereby ordered that the matter] shall be dismissed **in its entirety**, **with prejudice**, and without costs or attorneys fees assessed against any party. This Order resolves the last pending claim and closes the case. [Emphasis added.]

2 – Defendants' Second Motion for Summary Disposition in the Second Action

Once the first action was dismissed by stipulation, defendants Landin and the Township filed another motion for summary disposition in the second action, on July 17, 2002, asserting that Gross' suit was barred by res judicata and collateral estoppel. Defendants argued that although *Salem Industries, Inc v Mooney Process Equipment Co,* 175 Mich App 213, 215-216; 437 NW2d 641 (1988), the case the circuit court relied on in denying defendants' earlier motion, was controlling, it militated in their favor, because in the first action, Gross had alleged Landin's negligence was the sole proximate cause of the accident[8] and, rather than filing a motion to amend to add a counterclaim in the first action, Gross filed a second action alleging Landin was negligent, contrary to the holding of *Salem Industries, supra*. Defendants' brief further stated:

> The court is correct in stating that, in the first motion, defendants did not provide appropriate authority to supports [sic] an argument in favor of dismissal.
>
> In this motion, however, defendant's [sic] rely on Salem Industries[9] and MCR 2.203(E) in stating that a plaintiff may maintain a counterclaim in a separate

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[8] Plaintiff's complaint against Landin did not allege Landin's negligence was *the sole* proximate cause of his injuries, as defendants maintain, but rather, alleged that "as a direct and proximate result of Defendants' negligence, Plaintiff has suffered a severe impairment of body function and serious and permanent disfigurement for which he has been paralyzed." However, in response to Landin's requests for admission, Gross admitted "That Jeffrey Scott Gross' negligence in crossing the center line and driving left of center on Commerce Road and striking Philip G. Landin's vehicle was the sole, proximate cause of he accident . . ."

[9] In *Salem Industries,* the plaintiff (Salem) had moved for leave to file a counterclaim in the first action, and the circuit court denied the motion. Thereafter Salem commenced a separate action. The circuit court granted the defendant summary disposition under MCR 2.116(C)(6) on the ground that another action was pending involving the same parties and same claims. This Court reversed, noting:

> Generally, a counterclaim arising out of the same transaction or occurrences as the principal claim must be joined in one action. MCR 2.203(A)(1); *VanPembrook v Zero Manufacturing Co,* 146 Mich App 87 [; 380 NW2d 60] (1985). However, if leave to amend to state a counterclaim is denied and the ruling court does not expressly preclude a separate action, the party is not bound by the compulsory joinder rule and is free to raise the claim in another action. MCR 2.203(E). Plaintiff may maintain its counterclaim, to the extent allowed by the rules of collateral estoppel and res judicata, in a separate independent action.

(continued…)

> independent action *only after a motion to amend to state a counterclaim or cross-claim has been denied, if the court does expressly preclude a separate action, and only to the extent allowed by the rules of collateral estoppel and res judicata.* [Emphasis added.]

Plaintiff Gross argued in reply to defendants' second motion that the circuit court had correctly ruled that MCR 2.203 does not require compulsory joinder of counterclaims, even though they may arise out of the same transaction or occurrence. Gross asserted that res judicata and collateral estoppel could not be applied to bar his suit because he did not defend against Landin's suit based on Landin's negligence, but rather, relied on Landin's failure to state a claim under the no fault act, or his inability to prove the accident caused the injuries complained of. Gross argued that "[i]n either case, there will be no decision on the merits regarding the negligence issues. This necessarily precludes any use of estoppel."[10]

The circuit court granted defendants' second summary disposition motion and dismissed the case with prejudice, concluding that Gross was collaterally estopped from maintaining the second action:

> Collateral estoppel bars relitigation of an issue where that issue is actually litigated in a previous action between the parties in result [sic] of the final judgment. Quarter vs Royal Oak, 214 Mich. App. 478.45 [sic 478].
>
> In an action filed prior to this case, Landin sued Gross over the same accident. Gross defended that action by asserting that Landin was negligent. That action resulted in the final judgment.
>
> Thus, the issue of Landin's negligence was actually litigated and necessarily determined in the prior action. If so, Gross is barred for [sic] asserting Landin's negligence in this action. This conclusion is fatal to Gross' negligence claim and,

(…continued)

> See *Rinaldi v Rinaldi,* 122 Mich App 391, 399-400 [; 333 NW2d 61] (1983). [*Salem Industries, supra* at 415-416.]

[10] Gross further argued:

> Arguably, even if the issue of negligence was being used by plaintiff in defense of the earlier lawsuit, this would still not preclude plaintiff this lawsuit for his damages. With the advent of comparative negligence, parties on both sides of an accident have causes of action against each other. While tort reform may eliminate one of the parties for non-economic damages if he or she is more than 50% negligent, this does not prevent that party from his claim for economic damages. In plaintiff's situation, he was rendered a paraplegic by the injuries in the accident. His claim for economic damages are [sic] significant even though his claim for non-economic damages may be put in question by comparative negligence.

> therefore, summary disposition is appropriate to 2.1167 [sic 2.116(C)(7)]. Defendant's motion is granted.

Gross filed a motion for reconsideration,[11] which the circuit court summarily denied. This appeal ensued.

II

This Court reviews de novo both the circuit court's determination on a motion for summary disposition and issues regarding the application of the doctrines of res judicata and collateral estoppel. *Barrow v Pritchard,* 235 Mich App 478, 480; 597 NW2d 853 (1999).

Res judicata, or claim preclusion, "bars a subsequent action between the same parties when the evidence or essential facts are identical." *Dart v Dart,* 460 Mich 573, 586; 597 NW2d 82 (1999). For res judicata to apply, three requirements must be met: 1) the prior action must have been decided on the merits; 2) the issues raised in the second action must have been resolved in the first action; and 3) both actions must have involved the same parties or their privies. *Id.*; see also *Limbach v Oakland Co Bd of Rd Commssr's,* 226 Mich App 389, 395-396; 573 NW2d 336 (1997). Res judicata has been construed "as applying both to claims actually raised in the prior action and to 'every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not.'" *Id.* at 396, quoting *Sprague v Buhagiar,* 213 Mich App 310, 313; 539 NW2d 587 (1995). "A voluntary dismissal with prejudice acts as res judicata with respect to all claims that could have been raised in the first action." *Limbach, supra* at 395-396.

In contrast,

> Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik,* 244 Mich App 569, 577; 625 NW2d 462 (2001).

"An issue is necessarily determined only if it is 'essential' to the judgment." *People v Gates,* 434 Mich 146, 158; 452 NW2d 627 (1990), citing 1 Restatement Judgments, 2d, § 27, p 250, comment h, p 258. For collateral estoppel to apply, "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment, . . . the parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel." *Nummer v Treasury Dep't,* 448 Mich 534, 542; 533 NW2d 250 (1995); see also *Monat v State Farm Ins Co,* 469 Mich 679, 682-684; 677 NW2d 843 (2004).

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[11] Gross' motion for reconsideration reiterated prior arguments, and made a new argument-- that dismissal of the first suit for purposes of arbitration did not constitute a decision on the merits, thus res judicata and collateral estoppel did not apply. Gross does not argue this on appeal.

We conclude that the circuit court erred as a matter of law in ruling that collateral estoppel precluded plaintiff's negligence claim. The doctrine of collateral estoppel is inapplicable under the circumstances presented here. Collateral estoppel requires that an issue of fact or law have been *actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment. Nummer, supra* at 542, see also *Amadeo v Principal Mutual Life Ins Co,* 290 F3d 1152 (CA 9, 2002), citing *Arizona v California,* 530 US 392, 414; 120 S Ct 2304; 147 L Ed 2d 374 (2000) (quoting Restatement Judgments, 2d, § 27 [1982]). "A voluntary dismissal of a claim prior to any adjudication and without any stipulated findings of fact does not actually litigate any issue." *Amadeo, supra* at 1159, see also *Pelletier v Zweifel,* 921 F2d 1465, 1501 (CA 11, 1991) (noting that the preclusive effect of a dismissal with prejudice, an unlitigated matter, being a judgment not accompanied by findings, does not collaterally estop the plaintiff from raising issues that might have been litigated if the case had proceeded to trial.)

Defendants urge that we affirm the circuit court's dismissal on the alternative ground of res judicata. We decline to do so, for a number of reasons.

First, although defendants are correct that, in the first action, Gross' answer denied liability and asserted comparative negligence as an affirmative defense (among others), Gross' appointed counsel in the first action did not pursue comparative negligence as a defense or assert any counterclaim; rather, he admitted Gross' liability without consulting Gross. He did not defend the first action on the basis of Landin's negligence, but rather, defended solely on the issues of causation and serious impairment/serious and permanent scarring. Thus, the issue of Landin's comparative negligence was never litigated below.

Second, Gross' counsel's admission of liability in the previous case cannot be used to resolve factual issues in this case. MCR 2.312(D)(2) ("an admission made by a party under this rule [may not] be used against the party in another proceeding.")

Third, defendants' reliance on *Ternes Steel Co, supra*, is misplaced. That case is distinguishable and, in any event, the discussion of res judicata therein was not necessary to the determination.[12] In *Ternes,* unlike the instant case, Ternes (the defendant in the first action) had

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[12] See *Ternes, supra* at 618, stating:

> Defendant's second ground for reversal, that use of his breach of warranty as a defense in the first case bars its use in this case as a basis for affirmative relief, was not pleaded below nor was it argued to, or considered by, the trial judge. Although not determinative of this appeal, it might be discussed profitably because of the probability that it will be relied upon by defendant on remand.

In *Ternes, supra,* the parties entered into a contract for Ternes to purchase equipment from Ladney. Ternes paid for the first shipment but refused to accept more deliveries. Ladney filed suit (the first action) for damages resulting from Ternes' refusal to continue performing under the contract. Ternes asserted that Ladney had breached the warranty. The circuit court agreed, denying Ladney recovery, and granted Ternes summary disposition.

(continued…)

actually defended the first action on the basis of breach of warranty (successfully). Ternes then filed a second action for *damages* arising from the breach of warranty. The Supreme Court, in dicta, noted its disapproval of that practice, but its holding was not grounded thereon since res judicata had not been raised below.

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In the interim, Ternes had filed a separate action (the second action) to recover damages for the breach of warranty. Counsel for the parties agreed to delay trial of the second action until the first action was resolved on appeal. Following resolution of the appeal, Ternes moved for summary disposition in the second action, asserting that damages were liquidated and that the Supreme Court's decision was res judicata in the second action. Ternes was granted summary disposition. Ladney, the defendant in the second action, appealed, arguing that reversal was warranted 1) because a question of fact remained as to damages, and 2) because Ternes was barred from suing for damages for breach of warranty in a second action when he had relied on the defense of breach of warranty in the first suit.

The Supreme Court reversed the circuit court and remanded for trial on the basis that fact questions remained regarding the damages. Although the res judicata issue had not been argued at the trial court level, the Supreme Court discussed it nonetheless because of the probability that the defendant, Ladney, would rely on it on remand:

> The contention is sometimes cast in terms of *res judicata,* in the sense that a prior adjudication is a bar to a subsequent action, and sometimes in terms of the rule against splitting a cause of action. An analogous situation was before our Court in *Leslie v. Mollica,* 236 Mich 610 (49 ALR 546). In that case a physician sued his patient in justice court to recover the value of services rendered. The patient pleaded the physician's malpractice as a defense and prevailed. Later, when the patient brought suit in circuit court for malpractice, we held that the cause of action could not be split by asserting it as a defense in one case and as a basis for affirmative relief in another case. We reached this conclusion even though in the *Leslie Case,* as in this present case, the cause of action could not have been asserted as a counterclaim in the justice court without waiving a substantial portion of the alleged damages. (Citations omitted.) We conclude that when a litigant's right to affirmative relief is independent of a cause of action asserted against him and it is relied upon only as a defense to that action, he is barred from seeking affirmative relief thereon in a subsequent proceeding. But if he does not rely upon his claim as a defense to the first action, or as a counterclaim thereto, he is not barred from subsequently maintaining his action for affirmative relief in an independent suit. *Mimnaugh v. Partlin,* 67 Mich 391, and *Jennison Hardware Co. v. Godkin,* 112 Mich 57.
>
> In other words, plaintiff can plead defendant's breach of warranty as a defense in the first suit, he can plead it as a defense and as a counterclaim in the first suit, or he can sue thereon subsequently for affirmative relief, but he cannot combine the alternatives. Once he raises the issue, it must be fully and finally determined. [*Ternes, supra* at 618-619.]

In the instant case, however, Gross did not defend the first action on the basis of negligence, but under the no fault act. It is thus unclear that *Ternes* would preclude Gross' automobile negligence action against Landin, even if its res judicata analysis was not dicta.

Fourth, plaintiff is correct that Michigan is not a compulsory counterclaim jurisdiction, thus plaintiff was not obligated to assert comparative negligence as a counterclaim, unless he asserted other counterclaims. See 2 Dean & Longhofer, Michigan Court Rules Practice, MCR 2.203,[13] § 2203.2, p 39:

> By referring to "pleadings" rather than "complaints," MCR 2.203(A)(1) [now MCR 2.203(A) has much broader application than its predecessor. To the extent that it actually acts as a compulsory joinder rule, it does so on the claims of all parties—counterclaims, cross-claims, and the like. This is not the same, however, as a compulsory counterclaim rule (which Michigan does not have), for MCR 2.203(A)(1) does not require that any counterclaim be raised. It merely says that *if* a counterclaim is raised, the counterclaimant must raise all other counterclaims arising out of the "transaction or occurrence that is the subject matter of the action." The same applies to third-party claims, cross-claims, and the like.

Thus, plaintiff was not obligated to raise *any* counterclaim below, and he in fact did not. See 2 Michigan Court Rules Practice, *id.*[14]

V

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[13] MCR 2.203 provides:

> (A) **Compulsory Joinder**. In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.
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> * * *
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> (E) **Time for Filing Counterclaim or Cross-Claim.** A counterclaim or cross-claim must be filed with the answer or filed as an amendment in the manner provided by MCR 2.118. If a motion to amend to state a counterclaim or cross-claim is denied, the litigation of that claim in another action is not precluded unless the court specifies otherwise.

[14] Defendants cite no authority to support that an affirmative defense (in this case, the affirmative defense of comparative negligence Gross asserted, but did not pursue, in the first action) operates as or constitutes a counterclaim for purposes of MCR 2.203(A).

Given our disposition that the circuit court erred as a matter of law in dismissing on collateral estoppel grounds, we need not address Gross' contention that the circuit court was obligated to reverse its determinations on defendants' first summary disposition motion, before it could dismiss the action on defendants' second summary disposition motion. We note, however, that defendants' first motion was brought under MCR 2.116(C)(6) (another action has been initiated between the same parties involving the same claim) while the first action was pending. Defendants' second motion was brought under MCR 2.116(C)(7) (claim barred by prior judgment) after the first action was dismissed with prejudice. Thus, different analyses applied to each of defendants' motions and the circuit court was not obligated to reverse its initial determination before it could dismiss the action on defendants' second motion.

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

/s/ Donald S. Owens
/s/ Roman S. Gribbs