STATE OF MICHIGAN

COURT OF APPEALS

SHR LIMITED PARTNERSHIP, BEVERLY A. CURTISS, individually and as Trustee of the BEVERLY A. CURTISS TRUST and as Trustee of the CRAIG H. CURTISS TRUST,

Plaintiffs-Appellants,

and

CATHERINE D. BROWN,

Plaintiff,

v

SWEPI LP, f/k/a SHELL WESTERN E & P, INC.,

Defendant-Appellee.

UNPUBLISHED
January 30, 2007

No. 271893
Manistee Circuit Court
LC No. 04-011416-CK

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

PER CURIAM.

Plaintiff[1] appeals as of right from the trial court's order granting summary disposition in favor of defendant on the basis of res judicata. We affirm.

This case is the most recent legal dispute to arise out of lease agreements that defendant's predecessors entered concerning the mineral rights to certain properties located in Michigan, including oil and gas wells owned by plaintiff. In 1981, plaintiff was a member of the plaintiff

[1] SHR Limited Partnership's case against defendant was removed to federal court. Accordingly, SHR is not a party to this appeal. Catherine Brown died during the pendency of the trial court proceedings, and, accordingly, is also no longer a party to these proceedings. Because Beverly Curtiss is, thus, the only remaining plaintiff (acting on her own behalf and as trustee of her own trust and that of her deceased husband), references to plaintiff herein are to Beverly Curtiss alone.

class in an action[2] brought against Shell Oil Company in Grand Traverse County. The plaintiffs in that action challenged the defendant's calculation of their royalty payments as lessors of oil and gas wells operated by Shell Oil Company, contending primarily that the defendant was unfairly deducting Michigan's severance tax on oil and gas from their payments.[3] *Brown v Shell Oil Co* (*Brown I*), 128 Mich App 111, 113; 339 NW2d 709 (1983). The trial court rejected the plaintiffs' claim with regard to the severance tax issue, and this Court upheld that decision. *Id*.

However, a second lawsuit relating to royalty payments captioned *Black v Shell Oil Company*[4] had also been filed against Shell Oil Company in the Western District of Michigan. On May 31, 1984, the Grand Traverse Circuit Court approved an agreement entered into by the parties to both *Brown I* and *Black* settling their remaining claims. The settlement agreement provided for a cash settlement and a new formula for computing royalties.

On January 1, 1984, before *Brown I* and *Black* were settled, Shell Oil Company assigned its right, title, and interest in the leases subject to the settlement to defendant. On January 4, 1984, Dan A. Bruce, general attorney in the Western E&P Legal Department wrote to defendant's president, Thomas F. Hart, asking for his concurrence to the settlement. Hart provided the requested concurrence. This letter, written on Shell Oil Company letterhead, stated the following:

> Because of the timing of the proposed settlement, we do not now plan to make SWEPI a formal party to the cases before entry of the agreed judgment. SWEPI will, nonetheless, as successor to Shell, be bound by the settlement and bear ultimate financial responsibility in its implementation.

In 1993, another class action was filed in Grand Traverse Circuit Court by the lessors against defendant. Defendant had the case removed to federal court where it proceeded as *Hilliard v Shell Western E & P, Inc*. The plaintiffs in *Hilliard* asserted that defendant "breached the parties' contract by deducting a statutory 'privilege fee' from the plaintiffs' royalties." *Hilliard v Shell Western E & P, Inc*, unpublished opinion of the Sixth Circuit, filed May 22, 1998, slip op at 1. Overruling the district court, the United States Court of Appeals for the Sixth Circuit determined that res judicata barred the plaintiffs' claims. *Id*. at 2-3.

In July 1998, further proceedings were commenced in Grand Traverse Circuit Court to enforce the consent judgment reached in *Brown I*. For ease of reference, this proceeding will be referred to as *Brown II*. According to defendant, plaintiff was among the participants who brought *Brown II*, alleging that Shell Oil Company had not properly recorded the consent judgment and that Shell Oil Company's assignees were making improper post-production deductions from the plaintiffs' royalty payments. The trial court granted partial summary disposition in favor of the defendant, dismissing the plaintiffs' claims regarding post-production

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[2] Lower court case number 81-008858-CK.

[3] MCL 205.301 *et seq*.

[4] Lower court case number G82-833CA(7).

costs because such costs were not prohibited by the consent judgment. The court later dismissed the remainder of the plaintiffs' claims based on laches. This Court dismissed for lack of jurisdiction the plaintiffs' claim of appeal from the trial court's ruling, because the trial court's ruling in *Brown II* was a postjudgment order not appealable as a matter of right.[5] SHR Limited Partnership was also a member of the plaintiff class in *Brown II* and brought a separate action against Shell in 1999.[6]

In the instant action, plaintiffs sought a declaratory judgment indicating that defendant is bound by the consent judgment and asserting that defendant is in breach of its contractual obligations because it has improperly calculated royalty payments through cost deductions, has failed to inform its assignees of the proper formula for calculating royalties, caused the improper calculation of royalties by amending defendant's contracts with its assignees to restrict the sale of Antrim gas, and has failed to inform its farmees that post-production costs may not be deducted from royalty payments. Defendant removed the action to federal court where SHR's claim remained. Thereafter, Federal District Court Judge Gordon J. Quist granted summary judgment in favor of defendant, determining that under Michigan law SHR's claims were barred by the doctrine of res judicata.[7]

However, before the federal district court ruled on defendant's motion for summary judgment, plaintiff's claims were remanded to state court. Defendant then moved for summary disposition based on res judicata in the state court. After the federal district court's ruling was affirmed on appeal,[8] the state trial court also granted summary disposition in favor of defendant. The applicability of the doctrine of res judicata is properly considered under MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). Review of a motion for summary disposition brought pursuant to MCR 2.116(C)(7) is de novo "to determine whether the moving party was entitled to judgment as a matter of law." *Id*.

Res judicata bars litigation in the subsequent action of not only those claims actually litigated, but of all claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated. *Adair v Michigan*, 470 Mich 105, 123-124; 680 NW2d 386 (2004). Generally, for the doctrine of res judicata to bar a subsequent action, the prior action must have been decided on the merits, the prior action must have resulted in a final decision, the matter litigated in the subsequent action must have been amenable to resolution in the prior action, and both actions must involve the same parties or their privies. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

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[5] *Brown v Shell Oil Co*, unpublished order of the Court of Appeals, entered December 11, 2002 (Docket No. 244959).

[6] *SHR Ltd Partnership v Shell* (*SHR I*), Crawford Circuit Court Case 99-4952-CK(D), decided August 2000.

[7] *SHR Ltd Partnership v SWEPI LP* (*SHR II*), unpublished opinion of the Western District of Michigan, issued September 30, 2004 (Docket No. 5:04-CV-24).

[8] *SHR Ltd Partnership v SWEPI LP* (*SHR III*), 173 Fed Appx 433 (CA 6, 2006)

In the trial court, defendant relied on *Brown I*, *Brown II*, and *Hilliard* in making its res judicata argument. The trial court adopted the opinion of the Sixth Circuit in this matter, which looked to *Hilliard* and *SHR I* in reaching its conclusion that the claims are barred by res judicata. We conclude that the trial court properly granted summary disposition in favor of defendant on the basis of res judicata because of the decision reached in *Hilliard.*

Because *Hilliard* was decided in federal court, the applicability of the doctrine of res judicata based on *Hilliard* must be determined pursuant to federal law. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 378 n 8, 381; 596 NW2d 153 (1999). Under federal law, a claim is barred by res judicata when the following requirements have been met:

> (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies"; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. [*Bittenger v Tecumseh Products Co*, 123 F3d 877, 880 (CA 6, 1997) (emphasis removed).]

Hilliard ordered that summary judgment be entered in favor of defendant, who was the named defendant in *Hilliard*, on the basis of res judicata, and because the plaintiffs' claims were "meritless in any event." *Hilliard*, *supra*, slip op at 6. A grant of summary judgment is a final decision on the merits for purposes of res judicata. *Ohio Nat'l Life Ins Co v United States*, 922 F2d 320, 325 (CA 6, 1990). Defendant has supplied documentary evidence indicating that plaintiff was a member of the plaintiff class in *Hilliard*.[9] Plaintiff further argues that she is not bound by any of the prior decisions because she was at most only a member of the plaintiff classes and was not a named plaintiff. However, it is clear that unnamed class members are bound by a judgment rendered in a properly certified class action. *Shults v Champion Int'l Corp*, 35 F3d 1056, 1058 (CA 6, 1994).

This proceeding also involves issues which were or should have been litigated in *Hilliard.* Defendant's assumption of Shell Oil Company's obligations with regard to plaintiff, proper royalty payment calculations, the allegedly improper agreement with MichCon, etc., are issues that are all related to the primary issue in *Hilliard*, i.e., the proper interpretation of the parties' leases and the consent judgment, and more specifically, whether defendant and its assignees had the right to deduct certain post-production costs from its royalty calculations.

Finally, there is an identity of causes of action when there is an "identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Westwood Chemical Co, Inc v Kulick*, 656 F2d 1224, 1227 (CA 6, 1981). Here, the same facts in *Hilliard* and this case create plaintiff's right of action, i.e., the underlying contracts and the consent

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[9] On April 21, 1995, an attorney for defendant sent a letter in response to a request from plaintiff's attorney. In the letter, defendant's attorney indicated that he was providing a computer disk containing a list of the class members in *Hilliard.* The partial list of class members submitted as evidence with this letter indicates that plaintiff and her husband were members of the *Hilliard* class.

judgment, the manner of royalty calculations, and the assignment of Shell Oil Company's interests to defendant. The same evidence is also relevant to showing how defendant allegedly breached its contracts with plaintiff, which is the issue that underlies all of plaintiff's claims.

Plaintiff also asserts that the trial court erred by granting summary disposition in favor of defendant before giving plaintiff a chance to respond to defendant's second supplemental brief in support of summary disposition, which notified the court of the Sixth Circuit's decision affirming the grant of summary judgment against SHR. Plaintiff claims that the trial court's decision violated the timing and hearing requirements set forth in MCR 2.116(G)(1). We disagree. The rule provides in pertinent part as follows:

> (a) Unless a different period is set by the court,
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> (i) a written motion . . . [for summary disposition] with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing, and
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> (ii) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing. [MCR 2.116(G)(1)(a).]

Defendant's second supplemental brief was not the written motion or the response thereto, and a hearing on defendant's motion for summary disposition had already been held when it was filed. Moreover, a court has discretion to limit oral argument on motions. MCR 2.119(E)(3).

Because the issue of defendant's entitlement to summary disposition had already been extensively briefed and oral arguments had already been heard, we conclude the court did not abuse its discretion by deciding the matter without hearing additional arguments. Moreover, even if the trial court could be said to have erred by failing to wait to issue its decision until after plaintiff was given an opportunity to file a response, plaintiff has suffered no prejudice because defendant was entitled to summary disposition on the basis of res judicata. Because refusal to reverse the trial court's decision is consistent with substantial justice, reversal would not be warranted on this basis. MCR 2.613(A).

Because of our disposition of these issues, we need not address the remainder of plaintiff's assertions of error.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff