STATE OF MICHIGAN

COURT OF APPEALS

JOAN B. JACKSON,

Plaintiff-Appellant,

v

Estate of RONALD GREEN, by JANICE ARTRIP, Personal Representative,

Defendant-Appellee.

UNPUBLISHED
December 18, 2008

No. 280002
Charlevoix Circuit Court
LC No. 07-067821-CH

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by right from a circuit order granting defendant's motion for summary disposition under MCR 2.116(C)(7), based on res judicata. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This is the second action that plaintiff has filed against defendant's decedent, Ronald Green. In a prior action filed in November 2004, plaintiff alleged that a fiduciary relationship of trust and confidence existed between her and Green, and that Green exercised undue influence to acquire property from her for little or no consideration, including loans and interests in property. Plaintiff filed an amended complaint in February 2005, which included additional allegations concerning a "dozer" and a trailer. Specifically, plaintiff alleged:

> 12. In that same year of 1991, Mr. Green convinced Mrs. Jackson to purchase a dozer and a trailer for a dozer for over $23,000. Mr. Green contributed no money or consideration to the transaction. However, he did convince Mrs. Jackson to put his name on the title of the trailer to carry the dozer. He has used this dozer through the years and took it about 2 years ago from the property of Joan Jackson and has failed to return it. However, he has paid no rent for it's [sic] use nor contributed to it at all.

The first action culminated in a jury trial and a judgment for plaintiff that was entered on March 2, 2006. Plaintiff appealed, and Green cross-appealed. This Court affirmed in part, vacated in part, and remanded. *Jackson v Estate of Ronald B Green*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2008 (Docket No. 269244), lv gtd ___ Mich ___ (September 17, 2008).

Plaintiff filed the present action against Green in May 2007. Plaintiff alleges that in 1991 and 1992, she purchased a bulldozer, a trailer for hauling it, and a flatbed truck, all of which Green borrowed but had not returned. Plaintiff alleged that she took title jointly with Green "solely based in the understanding that it was done as a convenient mechanism by which, upon Jackson's death or incapacitation, Green would sell the equipment and give the proceeds to Jackson's family." Although Jackson allegedly agreed to let Green borrow the equipment in approximately 1995, he never returned it. After Jackson's brother-in-law asked to borrow the equipment in 2005, Jackson made telephone calls to Green in an attempt to recover the items, but he did not respond. In September 2005, her attorney sent a letter to Green's attorney, demanding return of the equipment, but he received no response. Plaintiff's complaint includes claims for constructive trust, unjust enrichment, conversion, and replevin under MCL 600.2920.

Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Washington v Sinai Hosp of Greater Detroit,* 478 Mich 412, 418; 733 NW2d 755 (2007) (citations and internal quotations omitted). "It applies to claims already litigated and every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *ANR Pipeline Co v Dep't of Treasury,* 266 Mich App 190, 213; 699 NW2d 707 (2005).

Plaintiff contests only the third element of res judicata, i.e., whether the matter could have been resolved in the first case. This Court uses a transactional test to determine if the matter could have been resolved in the first case. *Washington, supra,* p 412. "Whether a factual grouping constitutes a 'transaction' for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit . . . ." *Adair v State of Michigan,* 470 Mich 105, 124-125; 680 NW2d 386 (2004) (citation and emphasis omitted).

Plaintiff argues on appeal that there is a dispute concerning when the conversion and replevin claims accrued, and that when viewed in a light most favorable to her, the evidence shows that the present dispute concerning the equipment did not arise until 2005, after she filed her first lawsuit. Plaintiff did not argue below that there was a factual dispute as to whether her claims accrued in 2005. An issue not raised before and considered by the trial court is generally not preserved for appellate review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). This Court may review an unpreserved issue if the question is one of law and the facts necessary for its resolution have been presented. *Id*., pp 98-99. But, the issue of when defendant first wrongfully exercised dominion over, or unlawfully retained, the equipment is a factual matter, not a legal issue. Moreover, plaintiff's argument on appeal contradicts the position that she advocated before the trial court. In her response to defendant's motion, she asserted that the dispute concerning the bulldozer, trailer, and truck arose in 2002, stating, "[T]he dispute arose in 2002 over the dozer and equipment . . . ," and "[t]he conflict over the dozer, truck, and trailer started in 2002, when Mr. Green removed them from the farm and refused to return them (the titles reflect transfer date of 1992 and 1991, but they remained in Joan Jackson's possession and control until 2002)." Having maintained below that the dispute over the items began in 2002, plaintiff is precluded from arguing on appeal that the trial court erred by failing to recognize that the claims accrued in 2005. *Bloemsma v Auto Club Ins Ass'n (After*

Remand), 190 Mich App 686, 691; 476 NW2d 487 (1991) (an appellant cannot contribute to error by plan or design and then argue error on appeal).

Even if Green's use were permissive until 2005, the trial court correctly granted defendant's motion. The wrongful retention of the equipment was alleged in plaintiff's first amended complaint in the first action. The facts of the two actions were related because they originated from the same relationship. Both actions involved allegations that Green abused plaintiff's trust to obtain control of her property. The transactional test adopted in *Adair*, *supra*, pp 124-125, derives from 1 Restatement of Judgments, 2d, § 24, p 196. Comment d to that section is pertinent here:

> *Successive acts or events as transaction or connected series; considerations of business practice.* When a defendant is accused of successive but nearly simultaneous acts, or acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as public convenience may require that they be dealt with in the same action. The events constitute but one transaction or a connected series. [*Id*., p 201.]

Here, plaintiff has accused Green of abusing a position of trust to have his name added to deeds (in the first action) and to have the equipment titled in his name (in the second action). These are acts of the same sort, similarly motivated, and could have been resolved in the first action.

Relying on *Storey v Meijer, Inc*, 431 Mich 368, 377 n 9; 429 NW2d 169 (1988), plaintiff argues that res judicata should not apply here because it would be manifestly unjust to deny her the opportunity to have the claims adjudicated. Her reasoning for finding manifest injustice in this case seems to be that the jury in the first action found in her favor, and this second action stems from the same relationship. Plaintiff, however, had the opportunity to adjudicate the present claims in the first action. We decline plaintiff's invitation to recognize unrealized potential for success as establishing manifest injustice.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder