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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA12-259

CHASITY MATHIS APPELLANT V. ESTATE OF DOYLE MCSPADDEN APPELLEE	**Opinion Delivered** OCTOBER 24, 2012 APPEAL FROM THE WHITE COUNTY CIRCUIT COURT [NO. DR-2011-855] HONORABLE CRAIG HANNAH, JUDGE AFFIRMED

CLIFF HOOFMAN, Judge

Appellant Chasity Mathis appeals from the trial court's dismissal of her complaint to establish paternity against appellee, the Estate of Doyle McSpadden. On appeal, Mathis argues that the trial court erred (1) in raising sua sponte the affirmative defense of res judicata and (2) in finding that her complaint was barred by the doctrine of res judicata. We affirm.

Mathis filed a complaint for paternity against appellee on September 28, 2011, pursuant to Ark. Code Ann. § 9-10-104, alleging that she was born out of wedlock to Mavis S. Coulson on May 14, 1980, and that paternity had not been presumed or established by court order. Mathis alleged that the decedent, Doyle McSpadden, was her biological father and requested that she, her mother, and the decedent's brother, Gene McSpadden, who is executor of the estate, submit to paternity testing. If Gene McSpadden refused to submit to testing, Mathis requested that the circuit court issue an order authorizing her to exhume the decedent's physical remains.

On October 13, 2011, appellee filed a motion to dismiss, asserting that Mathis's complaint was barred by the statute of limitations. Appellee attached a copy of a circuit court order dated January 14, 1982, dismissing with prejudice a paternity action filed by Mavis Coulson against Doyle McSpadden that was never appealed.

According to the parties, a hearing was held regarding appellee's motion to dismiss on November 1, 2011, although the transcript of the hearing is not contained in the record. The parties were apparently instructed by the circuit court at this hearing to file briefs within thirty days on the issue of whether Mathis's complaint was barred by res judicata. Prior to filing its posthearing brief, appellee filed an amended motion to dismiss, again attaching the 1982 dismissal order against Mathis's mother and alleging that Mathis's paternity complaint was barred by res judicata, laches, estoppel, and the statute of limitations.

In her posthearing brief filed December 1, 2011, Mathis argued that she was not a party, or in privity to a named party, in her mother's bastardy complaint filed in 1980 and alleged that her current paternity complaint was not barred by the statute of limitations, res judicata, laches, or estoppel. Attached to her brief was a copy of the 1980 order from the county court adjudicating Doyle McSpadden as Mathis's father and awarding Mathis's mother medical expenses associated with the birth as well as child support. This decision was appealed by McSpadden and later resulted in the 1982 order of dismissal with prejudice of Mavis Coulson's bastardy complaint after she failed to appear at the hearing despite having received notice. Appellee also filed its brief on December 1, 2011, arguing that res judicata barred Mathis's current complaint because her mother was acting on her behalf in the

previous action and because both cases involved the same legal right. Appellee further argued that laches and estoppel barred Mathis's current paternity action, which was brought thirty years after the previous case had been dismissed with prejudice for want of prosecution, and that her statutory claim as a pretermitted heir was untimely.

On January 6, 2012, the circuit court entered an order dismissing Mathis's complaint on the basis of res judicata. The court found that Mathis's mother was acting on her behalf in the 1980 bastardy complaint and that Mathis was in privity to her mother as a named party in that action; that the previous dismissal with prejudice in 1982 was a final order that was not appealed; and that both cases represented the same legal right. The court declined to rule on the other affirmative defenses raised by appellee. Mathis filed a timely notice of appeal on January 27, 2012.

In her first point on appeal, Mathis contends that the circuit court erred in raising sua sponte the affirmative defense of res judicata where appellee did not plead this defense in its original motion to dismiss. Mathis asserts that the court raised the defense at the November 1, 2011 hearing and requested that the parties file briefs on the issue. However, there is no transcript of this hearing in the record, as Mathis did not designate it in her notice of appeal. Instead, she affirmatively stated in her notice of appeal that there was no testimony taken and that she was not requesting a transcript from the court reporter. It is the appellant's burden to bring up a record sufficient to demonstrate error by the trial court, and we do not consider matters outside of the record. *Dodge v. Lee*, 352 Ark. 235, 100 S.W.3d 707 (2003). Where the appellant fails to meet this burden, we are compelled to affirm the trial court. *Id.* Because

we do not have the transcript from that hearing, there is no evidence to show that the circuit court raised the issue of res judicata sua sponte, and in fact, Mathis asserted in her posthearing brief that "the Defendant raised the issue of res judicata." Thus, there is also no evidence before us that Mathis raised the argument below that she now makes on appeal, and her argument is therefore not preserved for our review. *Finley v. Farm Cat, Inc.*, 103 Ark. App. 292, 288 S.W.3d 685 (2008).

In any event, we note that appellee did plead facts sufficient to support the application of res judicata in its original motion to dismiss, although the defense was not properly named in that motion, and appellee then specifically raised the affirmative defense in its amended motion to dismiss. There is no rule that an affirmative defense such as res judicata is barred unless raised in the first response to the complaint. *Tribco Mfg. Co. v. People's Bank of Imboden*, 67 Ark. App. 268, 998 S.W.2d 756 (1999). We affirm on this point.

In her next point on appeal, Mathis argues that the trial court erred in dismissing her complaint on the basis of res judicata. As stated in *Crockett v. C.A.G. Investments, Inc.*, 2011 Ark. 208, at 8–9, ___ S.W.3d ___,

> [t]he concept of res judicata has two facets, one being claim preclusion and the other issue preclusion. *McWhorter v. McWhorter*, 2009 Ark. 458, 344 S.W.3d 64. Under claim preclusion, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim. *Id.* Claim preclusion (res judicata) bars not only the relitigation of claims which were actually litigated in the first suit, but also those which could have been litigated. *Id.* Where a case is based on the same events as the subject matter of a previous lawsuit, claim preclusion will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Id.* Under issue preclusion (collateral estoppel), a decision by a court of competent jurisdiction on matters which were at issue, and which were directly and necessarily adjudicated, bars any further litigation on those issues by the plaintiff or his privies against the

> defendant or his privies on the same issue. *Linn v. NationsBank*, 341 Ark. 57, 14 S.W.3d 500 (2000).

Privity exists for the purposes of res judicata when two parties are so identified with one another that they represent the same legal right, and strict privity is not necessarily required; instead, there must only be a "substantial identity of parties" to apply the doctrine. *Id.* at 9.

Mathis contends that her complaint is not barred by res judicata because she was not a named plaintiff or in privity with any named party in her mother's bastardy complaint. She argues that the bastardy statute in effect at the time of her mother's complaint, Ark. Stat. Ann. § 34-702, required the mother to file the complaint and that it did not state that the action was brought on behalf of the child. She further asserts that the bastardy complaint was intended to provide relief to the mother of the child in the form of payment of the mother's medical bills associated with the birth of the child, as well as child support. Because she is not seeking child support from the decedent but is merely asking that paternity be established under Ark. Code Ann. § 9-10-104, Mathis argues that the two actions do not seek the same relief. She contends that she has been denied a full and fair opportunity to litigate her claim and that the circuit court's order dismissing her complaint should be reversed.

We find that this case is governed by our holding in *Department of Human Services v. Seamster*, 36 Ark. App. 202, 820 S.W.2d 298 (1991), and we affirm on this basis. In *Seamster*, the State brought a paternity action on behalf of a child born out of wedlock. The child's mother had previously brought a bastardy complaint against the father in 1978, and the county court denied the complaint. *Id.* The appellee in *Seamster* raised the affirmative defense of res judicata, and the trial court agreed that the child's current action was barred

for that reason. *Id.* On appeal, we discussed bastardy actions brought under Ark. Stat. Ann. § 34-702 (Repl. 1962), and stated that there is "no doubt that such an action was brought on behalf of the child." *Id.* at 205, 820 S.W.2d at 299. We further held that the child is the real party in interest in such actions and that the trial court was correct in finding that the child's current paternity complaint was barred by res judicata. *Id.* We further recognized in *Seamster* that the paternity statutes have been rewritten and that the current statutes specifically provide that a paternity action may be filed by the child as a named party and that the child's rights in such matters may be different in some instances than those of the mother. *Id.* Thus, we limited our holding in that case only to those paternity determinations made under the statutes in effect when the prior decision was rendered. *Id.*

The facts of this case fall squarely within our holding in *Seamster*, as Mathis's mother's bastardy complaint was filed under the prior version of the paternity statute, while Mathis's current action is brought in her name as allowed under the current paternity statute. While Mathis contends that the two paternity actions in this case involve different causes of action because she is not seeking support from the decedent as her mother did, we agree with the circuit court that they involve the same legal right. The fact that she may be seeking a different remedy in her current complaint is not dispositive, as the legal issue is precisely the same—the establishment of paternity. Although Mathis's mother's complaint was dismissed with prejudice due to her failure to appear at the hearing, we have held that such dismissals are as conclusive of the rights of the parties as if there was an adverse judgment as to the plaintiff after a trial. *Francis v. Francis*, 343 Ark. 104, 31 S.W.3d 841 (2000). Thus, this prior

dismissal with prejudice operates as a bar to Mathis's current paternity complaint under the doctrine of res judicata, and we affirm the circuit court's order dismissing her complaint.

Affirmed.

ROBBINS and GRUBER, JJ., agree.

Lightle, Raney, Streit & Streit, LLP, by: *Susannah R. Streit* and *Jonathan R. Streit*, for appellant.

Robert Hudgins, for appellee.