STATE OF MICHIGAN

COURT OF APPEALS

PEGGY ZLATKIN,

Plaintiff-Appellant,

v

MERIT ENERGY COMPANY, LLC, MERIT MANAGEMENT PARTNERS I, LP, MERIT MANAGEMENT PARTNERS II, LP, MERIT MANAGEMENT PARTNERS III, LP, MERIT MANAGEMENT PARTNERS E-III, LP, and MERIT ENERGY PARTNERS F-III, LP,

Defendants-Appellees.

UNPUBLISHED
January 23, 2018

No. 336857
Livingston Circuit Court
LC No. 16-029192-CE

Before: MURPHY, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Plaintiff Peggy Zlatkin appeals as of right the trial court's order granting defendants' motion for reconsideration and summarily dismissing plaintiff's lawsuit that sought damages for injuries to livestock allegedly caused by air pollutants emitted by Merit's nearby natural gas processing facility. Previously, plaintiff had sued defendant Merit Energy Company, LLC (corporate defendant), in state court, with the action being voluntarily dismissed by plaintiff, and plaintiff subsequently sued corporate defendant, along with the remaining defendants (partnership defendants), in federal court, which also ended in a voluntary dismissal.[1] Plaintiff then filed the instant action. Applying the doctrine of res judicata and the federal "two-dismissal rule," FR Civ P 41(a)(1)(B), which generally provides that a second voluntary dismissal of an action pursued on the basis of the same claim alleged in the first suit operates as an adjudication on the merits, the trial court concluded that plaintiff's action could not be sustained. On appeal, plaintiff argues that the first state lawsuit was filed by a "rogue" attorney absent plaintiff's

[1] In an affidavit, assistant general counsel for corporate defendant averred that corporate defendant "shares common ownership with" partnership defendants and that, at all times relevant to plaintiff's claim, partnership defendants "were either direct or indirect subsidiary entities of" corporate defendant. Partnership defendants were lessees of the land upon which the Merit facility was situated pursuant to a surface lease agreement.

knowledge or consent; therefore, the voluntary dismissal in that case cannot be considered for purposes of the two-dismissal rule. Plaintiff further argues that the two-dismissal rule was not implicated as to partnership defendants, considering that the original state suit did not include them as named defendants. And plaintiff contends that the dismissal of the federal action was not technically voluntary, because it was precipitated by an order calling into question the court's subject-matter jurisdiction. We reject plaintiff's arguments and hold that res judicata and the two-dismissal rule bar plaintiff's action with respect to all defendants. Accordingly, we affirm.

I. BACKGROUND

A. FIRST ACTION – STATE COURT

On August 29, 2014, plaintiff and her daughter, Sharon Zlatkin, filed an action in the Oakland Circuit Court against corporate defendant and Merit Energy Company,[2] alleging that plaintiff and Zlatkin operated a farming business involving livestock within one mile of Merit's Hartland Production Facility, "a natural gas sweetening plant." Plaintiff and her daughter asserted that pollutants were being improperly and unlawfully discharged at the facility into the air, including "hydrogen sulfide, methane, and other regulated substances." They further alleged that the pollutants had negatively impacted their health and the health of their livestock, resulting in the "death of a horse, several sheep, three cows, and one calf." The complaint set forth counts sounding in violations of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., negligence, gross negligence, and private nuisance. On October 13, 2014, before any answer or motion was filed by corporate defendant and Merit Energy Company, plaintiff and her daughter filed a notice of dismissal as to all claims in their complaint.

The out-of-court surrounding circumstances of this first lawsuit must be examined in order to understand one of the arguments posed by plaintiff in this appeal. Plaintiff had retained an attorney in an effort to obtain compensation for the alleged harm caused by the pollutants, and counsel had sent a demand letter to Merit's attorney in June 2014, a couple of months before the first action was filed. Plaintiff's attorney was also representing her at the time in an eviction proceeding for nonpayment of rent commenced by the owner of the property upon which plaintiff's farming operations were being conducted. In an affidavit executed by plaintiff for purposes of the instant suit, she averred that by August 22, 2014, there had been a breakdown of the relationship between her and her attorney, given the alleged billing of excessive fees, errors in time-keeping, and rude and obnoxious behavior by the attorney. In an August 22, 2014 e-mail from plaintiff to counsel, she indicated that she had questions about his billing, that she had a right to ask questions about the bill, and that she would await an answer. Later that day, the attorney responded, stating:

> And I have a right to withdraw for not being paid. So you can deposit your long overdue retainer plus payment for the hours on which you have no questions, today, as promised, or we will immediately withdraw. You can withhold the

[2] The entity "Merit Energy Company," if it exists, was not named as a defendant in the subsequent suits, nor was plaintiff's daughter a party to the later actions.

> payment on the items that you question and provide those questions to me now. So far, you've paid exactly $0 dollars. Are you suggesting that every hour worked is a lie? If not, you owe a payment now. Your retainer should have been paid before we even started work, but your matter was time sensitive so, on your word, we proceeded AND we gave you a $5k credit to boot. We don't work for free and we don't tolerate abuse from our clients. If you won't pay, we won't represent you. Send your money and your questions now, or we're done. We can process a credit card if that's easier.

In her affidavit, plaintiff averred that she did not accede to counsel's demands and that the attorney-client relationship therefore ended on August 22, 2014. As indicated earlier, on August 29, 2014, the lawsuit was filed. On August 30, 2014, the attorney sent plaintiff an e-mail stating, "Merit lawsuit is filed." On that same date, plaintiff responded to the attorney by e-mail, asserting that she no longer wished his representation because of the breakdown of the attorney-client relationship, that he was to withdraw the lawsuit immediately and no later than September 2, 2014, and that she would go to the court if necessary and show it counsel's email of August 22, 2014, reflecting the breakdown of the relationship. The attorney replied to plaintiff's e-mail with another e-mail, stating that the breakdown was due to her failure to pay for legal services, which she repeatedly promised to pay, and that she could go to the court if she liked and complain, but if she did so, plaintiff needed to show the court their "engagement agreements and emails agreeing to payment terms." The attorney also indicated that plaintiff was free to substitute counsel in the pollutant and eviction cases, but she would first have to pay him for legal services rendered in order "to avoid having both files liened and sent into collections."

In a letter dated September 10, 2014, from new counsel hired by plaintiff to her "former" attorney, a demand was made "requesting that an immediate notice of dismissal without prejudice be filed with the court," as the filing of the litigation was done "without engagement or authorization." On October 2, 2014, plaintiff sent her former counsel two e-mails, demanding that he dismiss the Merit case, given that it was filed absent her knowledge or permission. On October 13, 2014, the notice of dismissal was filed. In her affidavit, plaintiff averred that her former attorney had "falsely held himself out" as her attorney, that she did not *voluntarily* file or dismiss the lawsuit, and that the attorney had taken actions on his own, without her authorization or ratification.[3]

B. SECOND ACTION – FEDERAL COURT

On September 12, 2016, plaintiff, through apparently her third attorney on the matter, filed an action against corporate defendant and partnership defendants in the United States District Court for the Eastern District of Michigan, Southern Division. In the complaint, plaintiff alleged that "[o]n several occasions before and after November[] 17th, 2013[,] the [Merit] facility emitted polluting gases into the ambient air, including but not limited to toxic hydrogen sulfide and sulfur dioxide" and that on November 17, 2013, "the facility emitted a large quantity of

[3] Plaintiff had also indicated in her affidavit that her daughter, an adult, had never been represented by former counsel.

hydrogen sulfide into the air" that caused the death of livestock. With respect to the basis for liability, plaintiff cited several provisions of the Michigan Administrative Code and the Code of Federal Regulations.

On September 29, 2016, about two weeks after the federal suit was filed, the federal court, apparently acting sua sponte, entered the following order:

> Plaintiff alleges subject matter jurisdiction based on the Court's diversity jurisdiction under 28 U.S.C. § 1332. A review of the Complaint filed by Plaintiff fails to assert the citizenship of each member of the Defendant limited liability company and Defendants limited partnership. The Court is unable to determine if it has subject matter jurisdiction over the Complaint. All unincorporated entities, including a limited liability company, have the citizenship of each partner or member. Pursuant to 28 U.S.C. § 1653, Plaintiff must amend the Complaint to cure the defective allegations of jurisdiction.
>
> Accordingly, IT IS ORDERED that Plaintiff file an Amended Complaint only to identify each member of the Defendants limited liability company and limited partnerships within 14 days from the entry of this Order. Failure to do so will result in the dismissal of the Complaint without prejudice for lack of prosecution. [Citations omitted.]

Instead of filing an amended complaint in the federal court, or challenging the court's order, on October 28, 2016, plaintiff simply filed a voluntary dismissal under FR Civ P 41, indicating that the dismissal was purportedly "without prejudice or costs."

C. THE CASE AT BAR

On October 31, 2016, three days after voluntarily dismissing the federal action, plaintiff filed suit against corporate defendant and partnership defendants in Livingston Circuit Court.[4] The complaint is essentially identical to the federal complaint, except for changes to reflect the new venue. In December 2016, defendants filed a motion for summary disposition under MCR 2.116(C)(7). Defendants recounted the substance of plaintiff's action and the procedural history of the dispute, as discussed above. Defendants' primary contention was that plaintiff's action was barred under the doctrine of res judicata and the federal "two-dismissal rule," FR Civ P 41(a)(1)(B), where the voluntary dismissal of the federal action operated as an adjudication on the merits, and where corporate defendant and partnership defendants were in privity for purposes of res judicata analysis. Defendants also maintained that any nuisance claim being pursued by plaintiff was time-barred, which issue is not relevant to this appeal and will not be discussed further. Plaintiff responded by arguing that there was nothing voluntary about the first lawsuit in Oakland Circuit Court, either the filing or the dismissal of the complaint, considering the circumstances involving plaintiff's first attorney, that corporate defendant and partnership

[4] The complaint indicated that the premises rented by plaintiff to conduct her farming operations are located in Oakland County and that Merit's facility is located in Livingston County.

defendants were not in privity, and that the dismissal of the federal action was not technically voluntary for purposes of the two-dismissal rule, as it was precipitated by the federal court's order finding jurisdiction problematic.

The trial court held a hearing on defendants' motion for summary disposition and, ruling from the bench, determined that questions of fact existed with regard to whether the first two lawsuits were truly dismissed on a voluntary basis. Defendants filed a motion for reconsideration, and the trial court allowed a hearing on the motion. The court ruled that, regardless of the surrounding circumstances of both dismissals, ultimately both the state and federal action were voluntarily dismissed; therefore, defendants were entitled to summary disposition pursuant to the two-dismissal rule and res judicata. Plaintiff now appeals as of right.

II. ANALYSIS

A. STANDARD OF REVIEW AND MCR 2.116(C)(7)

A trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 263; 833 NW2d 331 (2013) (citation omitted). We review de novo a trial court's ruling on a motion for summary disposition, the applicability of res judicata, and the interpretation of a court rule. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 686; 762 NW2d 529 (2008); *Reed v Breton*, 279 Mich App 239, 242; 756 NW2d 89 (2008).

With respect to summary disposition under MCR 2.116(C)(7) and res judicata, the *RDM Holdings* panel observed:

> Under MCR 2.116(C)(7) (claim barred by prior judgment, i.e., res judicata), this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [*RDM Holdings*, 281 Mich App at 687 (citations omitted).]

B. THE DOCTRINE OF RES JUDICATA

The Michigan Supreme Court in *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999), quoting in part 18 Moore, Federal Practice, § 131.21(3)(d), p 131-50, explained as follows in regard to the application of res judicata when litigation has been pursued in both state and federal courts:

> As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events, regardless of whether a subsequent litigation is pursued in a federal or state forum. The rule, as applied by the federal courts, has been stated as:
>
> "If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law. The state courts must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment."

And, as observed by this Court in *Beyer v Verizon North, Inc*, 270 Mich App 424, 429; 715 NW2d 328 (2006), "[u]nder federal law, res judicata precludes a subsequent lawsuit if the following elements are present: (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." (Quotation marks omitted.) See also *RDM Holdings*, 281 Mich App at 688.

C. THE TWO-DISMISSAL RULE

The two-dismissal rule arises from the Federal Rules of Civil Procedure and in particular FR Civ P 41(a)(1). *Lake at Las Vegas Investors Group, Inc v Pacific Malibu Dev Corp*, 933 F2d 724, 725 (CA 9, 1991) (district court entered dismissal "pursuant to the two dismissal rule of Rule 41[a][1]"). Under FR Civ P 41(a)(1)(A)(i), a plaintiff may voluntarily "dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment[.]" And pursuant to FR Civ P 41(a)(1)(B), "[u]nless the notice . . . states otherwise, the dismissal is without prejudice[,] [b]ut if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." The purpose of FR Civ P 41(a)(1) is to facilitate the voluntary dismissal of actions during the early stage of litigation, while preventing an unreasonable use of such dismissals. *Engelhardt v Bell & Howell Co*, 299 F2d 480, 482-483 (CA 8, 1962).

In *Cooter & Gell v Hartmarx Corp*, 496 US 384, 394; 110 S Ct 2447; 110 L Ed 2d 359 (1990), the United States Supreme Court examined FR Civ P 41(a)(1), stating:

> Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before the defendant files an answer or motion for summary judgment and only if the plaintiff has never previously dismissed an action "based on or including the same claim." . . . If the plaintiff invokes Rule 41(a)(1) a second time for an "action based on or including the same claim," the action must be dismissed with prejudice.

We note that the two-dismissal rule is expressly implicated when there was a "previously dismissed . . . state-court action." FR Civ P 41(a)(1)(B). Further exploration of the parameters of the two-dismissal rule will be undertaken below as relevant to the issues presented on appeal.

D. DISCUSSION AND RESOLUTION

Starting with the initial state court action in the Oakland Circuit Court, our court rules allow for the voluntary dismissal "without an order of the court and on the payment of costs . . . by filing a notice of dismissal before service by the adverse party of an answer or of a motion under MCR 2.116, whichever first occurs[.]" MCR 2.504(A)(1)(a). Similar to the federal rule, MCR 2.504(A)(1)(b) provides that "[u]nless otherwise stated in the notice of dismissal . . ., the dismissal is without prejudice, except that a dismissal under subrule (A)(1)(a) operates as an adjudication on the merits when filed by a plaintiff who has previously dismissed an action in any court based on or including the same claim." It is clear from the record that the dismissal of the first state court action constituted a voluntary dismissal without prejudice under MCR 2.504(A)(1)(a), which dismissal likewise qualified, for purposes of FR Civ P 41(a)(1), as a previously and voluntarily dismissed "state-court action based on or including the same claim" that was later raised in federal court.

Plaintiff argues that the initial state court litigation and dismissal were anything but "voluntary," considering that former counsel commenced the suit absent plaintiff's knowledge, consent, or authorization. In support of her contention that dismissal of the first suit should not be considered relative to the two-dismissal rule, plaintiff cites and relies on *Randall v Merrill Lynch*, 261 US App DC 138; 820 F2d 1317 (1987). Plaintiff's reliance on *Randall* is wholly misplaced. In *Randall*, the plaintiffs filed two successive federal court actions against the defendant and, after the defendant successfully moved to have both suits transferred to a different federal district court, the plaintiffs twice filed voluntary dismissals under FR Civ P 41(a)(1). The plaintiffs then attempted to initiate arbitration proceedings against the defendant, but a federal district court enjoined the arbitration on the basis of the two-dismissal rule. Thereafter, the plaintiffs filed a motion to vacate the second voluntary dismissal under FR Civ P 60(b)(6) (relief from judgment or order – "any other reason that justifies relief"), and the federal district court vacated the second dismissal, effectively allowing the plaintiffs to pursue arbitration. The federal district court vacated the second dismissal because it was not the result of a strategic, free, or calculated decision, but rather precipitated by medical and financial events and circumstances beyond the plaintiffs' control. The defendant appealed, and the United States Court of Appeals for the District of Columbia affirmed the order vacating the second dismissal. *Randall*, 261 US App DC at 139-141.

The entire analysis by the federal appellate court was couched in terms of determining whether a court had the authority under FR Civ P 60(b)(6) to vacate a dismissal entered under FR Civ P 41(a)(1). *Id.* at 141-143. The court observed that "nothing in the language of Rule 41(a)(1)[] exempts voluntary dismissals from the scope of judicial authority under Rule 60(b)" and, therefore, "the district court had power to vacate th[e] voluntary dismissal under Rule 60(b) if the requisite justification existed." *Id.* at 141. In conclusion, the *Randall* court held:

> Rule 60(b) is the mechanism by which courts temper the finality of judgments with the necessity to distribute justice. It is a tool which trial courts are to use sparingly, but their discretion to employ it is not to be lightly overturned on review. We hold that Rule 60(b)(6) can be used to vacate voluntary dismissals resulting in final judgments, and that the district court did not abuse its discretion

> in relying on [the plaintiffs'] combination of hardships to vacate their second voluntary dismissal. The judgment of the district court is affirmed. [*Id.* at 143.]

Accordingly, the opinion in *Randall* merely stands for the proposition that a court, at least a federal court, has the authority to vacate a voluntary dismissal on the basis of equitable concerns raised in a motion seeking relief from judgment in order to escape the ramifications of the two-dismissal rule. It does not stand for the proposition that, in light of equitable considerations, a voluntary dismissal, which has not been challenged and vacated, need not be contemplated or counted for purposes of the two-dismissal rule. The plain language of the rule is mandatory in its nature ("a notice of dismissal operates as an adjudication on the merits"). There is no indication in the record, nor has plaintiff contended, that she sought to vacate the voluntary dismissal that was filed in the Oakland Circuit Court. And we certainly do not have the authority to treat the dismissal as if it had been vacated.

We find support for our ruling in the following analysis employed by the Eighth Circuit for the United States Court of Appeals in *Engelhardt*, 299 F2d at 483-484, which case addressed a somewhat analogous situation:

> Plaintiff would first seek to escape the two dismissal rule by claiming that his prior counsel was without authority to file a notice of dismissal in the second action. Supportive of that contention, plaintiff filed an affidavit in which he stated that he retained counsel to represent him in the prosecution of his claim against the defendant in each of the two prior suits; that he learned about the dismissal of the first suit approximately two months after March 10, 1960 (the date it was dismissed). He stated that the second suit was dismissed on June 30, 1960, without his knowledge and that he was not advised of such dismissal until on or about July 21, 1960; that he did not request, direct, authorize or consent to the dismissal of the second suit by his then attorney; and that such attorney had no authority from him to settle, compromise or terminate said litigation, or any authority whatsoever except to prosecute said cause of action. He further stated that he employed his present counsel on or about July 21, 1960, to investigate the status of his litigation and to prosecute his claim against the defendant, and that at that time he was first advised of the dismissal of the second action. After learning of the dismissal of the second suit, plaintiff took no steps to revive or reinstate it. He made no direct attack on its validity. Instead, he waited until October 4, 1960, and then commenced a third suit for the same claim. His affidavit that he did not authorize the dismissal of the second suit was not filed until February 21, 1961, the day the order of the District Court sustaining defendant's motion for summary judgment was filed, and such affidavit was filed in the third suit and not the second, which plaintiff attempts to attack.
>
> * * *
>
> [E]ven if the facts should indicate that plaintiff ought to be relieved of the consequences of the action of his former attorney in dismissing the second suit, summary judgment was nevertheless properly granted in this, the third suit. By the express terms of Rule 41(a)(1) the second voluntary dismissal by plaintiff

> operates as an adjudication upon the merits. Thus, the doctrine of res judicata is applicable. The appropriate remedy here was to move to set aside or vacate the dismissal of the second action. The filing of plaintiff's affidavit in the third suit is nothing more or less than a collateral attack on the second dismissal which, under the rule, became an adjudication on the merits. Such collateral attack is proscribed by an abundance of authority. [Citations and quotation marks omitted.]

While we are not unsympathetic to plaintiff's plight relative to the first suit, we also do not have any direct input from her former attorney as to why he proceeded to file the action. Regardless, the litigation was commenced in the name of plaintiff and her daughter, a voluntary dismissal was filed, and plaintiff never challenged the dismissal in the Oakland Circuit Court; these are inescapable procedural facts.[5]

To the extent that plaintiff is renewing her argument made below that challenged the voluntary dismissal of the federal lawsuit, it also fails because the dismissal was never vacated by the federal district court. We note that the federal court had given plaintiff 14 days from the entry of its order to file an amended complaint or face dismissal of the complaint without prejudice for lack of prosecution and that more than 14 days had elapsed when plaintiff filed the voluntary dismissal; however, there is no indication in the record that the federal court actually dismissed the case prior to the filing of the voluntary dismissal, nor does plaintiff present such an argument. Furthermore, the Ninth Circuit for the United States Court of Appeals in *Lake at Las Vegas*, 933 F2d at 726-727, rejected an argument that a voluntary dismissal should not be treated as "voluntary" for purposes of the two-dismissal rule because the action would have otherwise been subject to dismissal by the court. The Ninth Circuit reasoned that the term "voluntary," as used in FR Civ P 41(a)(1), means that a dismissal is merely being filed without compulsion by another party or the court, even though other circumstances might have compelled the dismissal. *Id.* at 726. The court explained that FR Civ P 41(a)(1) "does not consider the plaintiff's reasons for seeking a voluntary dismissal." *Id.* at 727. In additional support for its view, the Ninth Circuit noted that there had been "alternatives to filing for voluntary dismissal." *Id.* Here, plaintiff could have simply awaited entry of a dismissal without prejudice for lack of prosecution, but chose not to do so.

Plaintiff next argues that partnership defendants are not protected by res judicata and the two-dismissal rule, given that they were not named in the initial state court lawsuit, thereby making the voluntary dismissal in the federal action the *first* dismissal as to partnership defendants. Thus, according to plaintiff, the voluntary dismissal of the federal action did not operate as an adjudication on the merits for purposes of FR Civ P 41(a)(1) with respect to partnership defendants. Plaintiff maintains that corporate defendant and partnership defendants

[5] In her appellate brief, plaintiff, citing FR Civ P 60(b) and MCR 2.612(C)(1)(f) (grounds for relief from judgment – "[a]ny other reason justifying relief"), appears to make an undeveloped argument that this Court or the Livingston Circuit Court can or should undo or vacate the voluntary dismissal entered in the Oakland Circuit Court. However, there is no jurisdiction to take such a course of action.

were not privies or in privity, or at least it has not yet been so established, that their exact roles and interrelationships had not been flushed out through discovery, and that each entity would or could have its own independent liability.

FR Civ P 41(a)(1)(B) speaks of two voluntary dismissals of actions "based on or including the same claim," without mention of the identity of the party or parties being sued. Federal courts have applied a privity analysis when examining FR Civ P 41(a)(1)(B). *American Cyanamid Co v Capuano*, 381 F3d 6, 17 (CA 1, 2004) (the two-dismissal rule does not apply unless the defendants are the same, substantially the same, or in privity in both actions); *Lake at Las Vegas*, 933 F2d at 728. In *Lake at Las Vegas*, *id.*, the court was presented with the question of "what relationship, if any, is required between the party twice dismissed and a party seeking to enforce the bar against the plaintiff." Although the Ninth Circuit declined to define the precise parameters of the applicable test, it did hold "that the wholly-owned subsidiary and partnership in which that subsidiary is the general partner may invoke the two dismissals of the subsidiary's parent and claim Rule 41(a)(1) res judicata." *Id.* The court noted that "the danger of harassment to the parent continued when the closely related . . . entities were sued." *Id.* Generally speaking, privity requires a substantial identity of interests and a working functional relationship wherein the interests of a nonparty are presented and protected by the litigating party. *Bates v Twp of Van Buren*, 459 F3d 731, 734-735 (CA 6, 2006).

Here, all defendants played some role or had some common interest connected or related to the operation of Merit's facility from which, as alleged by plaintiff, pollutants were emitted, causing damages. And, as mentioned earlier, in an affidavit, assistant general counsel for corporate defendant averred that corporate defendant "shares common ownership with" partnership defendants and that, at all times relevant to plaintiff's claim, partnership defendants "were either direct or indirect subsidiary entities of" corporate defendant. This affidavit was not contradicted. Accordingly, although partnership defendants were not named in the first state lawsuit, they were entitled to the protection of FR Civ P 41(a)(1)(B) and res judicata. Plaintiff's arguments to the contrary are unavailing.

Finally, plaintiff argues that the trial court erred in granting defendants' motion for reconsideration under MCR 2.119(F)(3), which provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Plaintiff contends that defendants' motion presented the same issues posed in defendants' earlier motion for summary disposition and that defendants did not demonstrate a palpable error by which the court had been misled. Assuming for the sake of argument that defendants' motion for reconsideration was effectively a resubmission of their motion for summary disposition, MCR 2.119(F)(3) provides that the criteria in the rule do not restrict a court's discretion in deciding the motion for reconsideration. In *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014), this Court stated that MCR 2.119(F)(3) "does not

categorically prevent a trial court from revisiting an issue even when the motion for reconsideration presents the same issue already ruled on; in fact, it allows considerable discretion to correct mistakes." See also *Mich Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 646; 419 NW2d 439 (1988) (MCR 2.119[F][3] "does not prevent a court's exercise of discretion on when to give a party a 'second chance' on a motion it has previously denied"). As gleaned by our analysis today, the trial court properly corrected its mistaken ruling relative to the motion for summary disposition.

In sum, the dismissal of the federal action constituted a final decision on the merits by operation of FR Civ P 41(a)(1)(B), the instant action was between the same parties or their privies, there was an identity of the causes of action, and the issues in the instant action were effectively litigated or should have been litigated in the prior action. *Beyer*, 270 Mich App at 429. Accordingly, the trial court did not err in granting defendants' motion for reconsideration and entering summary disposition in their favor.

Affirmed. Having fully prevailed on appeal, defendants are awarded taxable costs under MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane M. Beckering