

STATE OF MICHIGAN
COURT OF APPEALS

GLENN R. UNDERWOOD,

Plaintiff-Appellant,

v

PATRICIA A. SELENT,

Defendant-Appellee.

UNPUBLISHED

October 20, 2011

No. 298312

Oakland Circuit Court

LC No. 2010-107861-CB

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, Glenn R. Underwood, appeals as of right the trial court's order granting defendant, Patricia A. Selent's, motion to dismiss pursuant to MCR 2.116(C)(7). Because *res judicata* completely bars plaintiff's claim, we affirm.

The instant case is related to two prior cases decided on appeal by this Court. The first is *Carto v Underwood Property Mgt Co*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 272747). *Carto* involved a lawsuit in which several of plaintiff's siblings, including defendant, brought suit against him for mismanagement of the family partnership in which plaintiff's and defendant's deceased brother was also a partner. As a part of one of his affirmative defenses, plaintiff did not deny that he took money from the partnership, but claimed that he was entitled to the money as compensation for the care, room, and board he provided from November 1981 to May 1998 for their brother, who was disabled as a result of Down syndrome. After deciding motions for summary disposition both for and against the plaintiffs and the defendants in *Carto*, the circuit court conducted a trial on damages. As a part of the trial on damages, the circuit court considered the amount plaintiff was entitled to receive as reasonable compensation for his care of their deceased brother and determined reasonable compensation under MCL 700.5315. Plaintiff subsequently appealed as of right the circuit court's opinion and order with this Court. This Court affirmed the circuit court's grants of summary disposition but remanded for recalculation and clarification on the award of damages. *Carto, supra* at 11.

The second prior case involved is *In re Estate of Underwood*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 291852). In *In re Estate of Underwood*, plaintiff petitioned the probate court to open the estate of their deceased brother and surcharge defendant. Alleging that he was an interested party as an heir at law and also as a

creditor, plaintiff asserted wrongful actions by defendant in her former capacity as the guardian and conservator of their deceased brother and his estate. Amongst other claims, plaintiff specifically alleged that respondent had failed to properly account for their deceased brother's interest in the family partnership, distributions made from the partnership to their deceased brother, and Social Security disbursements made to their deceased brother. Plaintiff requested in particular that defendant be surcharged for her breaches of fiduciary duties so that he would be properly compensated for the care he provided to their deceased brother. The probate court denied plaintiff's petition to open the estate and surcharge respondent. This Court affirmed the denial holding that res judicata barred plaintiff's entire claim and further that plaintiff's claims were barred by the statute of limitations period pursuant to MCL 600.5805(10). *In re Estate of Underwood*, supra at 2-3.

The case at bar once again involves the same parties. Plaintiff filed the instant complaint and jury demand on February 18, 2010 alleging the following claims against defendant: failure to account; self dealing; breach of contract; breach of fiduciary duty; negligence, gross negligence, and contributory negligence; fraud and conspiracy; and finally, slander. Each of these counts is based on the same fact scenario with regard to the care of their deceased brother and defendant's management of the family partnership presented in *Carto* and *In re Estate of Underwood*. Here, plaintiff alleges that defendant continues to refuse to properly account for their deceased brother's ten percent interest in the partnership, distributions made from the partnership to their deceased brother, and their deceased brother's Social Security disbursements, as well as funds she allegedly paid to herself, her husband, and her children without authorization.

Plaintiff also alleges that defendant breached her fiduciary duty by failing to account for decedent's interest in the partnership and failing to account for distributions made to decedent by the partnership. In addition, plaintiff alleges that defendant misappropriated their deceased brother's Social Security funds, commingled assets, hid assets, falsified fiduciary reports submitted to the probate court, and engaged in a vast conspiracy to defraud the caregivers of their deceased brother from receiving reasonable compensation. In his complaint, plaintiff requested that the trial court "order Defendant to compensate [him] in an amount in excess of \$25,000 for damages as determined at trial."

Defendant responded seeking dismissal of plaintiff's complaint on the basis that it was barred by the operation of res judicata, collateral estoppel, and the applicable statute of limitations. The trial court entertained argument on defendant's motion on April 7, 2010. Thereafter, the trial court issued an opinion and order granting defendant's motion to dismiss pursuant to MCR 2.116(C)(7) holding that:

It should be noted that Glenn Underwood had several attorneys and several opportunities to raise any and all of the allegations he raises in his 2010 complaint. The Court finds that based upon both the prior probate and civil actions filed, that this case is a subsequent relitigation based upon the same transaction or events involving some of the same parties as in the prior cases. Further, the prior actions resulted in valid final judgments and the issues raised were actually and necessarily determined in the prior matters. Accordingly, this new action is barred by both res judicata and collateral estoppel. The Court further finds that Defendant is correct that the applicable statute of limitations

would also bar Plaintiff's breach of fiduciary duty claim because Plaintiff has failed to set forth any evidence in support of his allegation that Defendant's fraudulent acts prevented him from learning of these alleged breaches of fiduciary duties in a timely fashion.

It is from this order that plaintiff now appeals as of right.

We review a trial court's application of a legal doctrine, such as *res judicata*, *de novo* as a question of law. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). A trial court's decision regarding a motion under MCR 2.116(C)(7) is also reviewed *de novo*. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred because of a prior judgment. In reviewing such a motion, the substance of the complaint is accepted as true, unless contradicted by evidence submitted by the parties. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). If the pleadings or other evidence show that there is no genuine issue of material fact, a court may decide whether a claim is barred pursuant to MCR 2.116(C)(7) as a matter of law. *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

The doctrine of *res judicata* bars a second action where "(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*, 478 Mich at 418, quoting *Adair v Mich*, 470 Mich 105, 121; 680 NW2d 386 (2004). With respect to the third element, Michigan takes a broad approach to *res judicata*. The doctrine applies to all claims arising from the same transaction that the parties, with reasonable diligence, raised or could have raised in the first action. *Id.*

There is no doubt based on this record that this is at least the third time that plaintiff has brought suit against the same defendant. Because both prior actions were decided on the merits and both actions involve the same parties, the first and second elements of *res judicata* are satisfied. We conclude that the third element of *res judicata* is satisfied in this matter—brought before this Court for a third time—for the same reasons clearly and succinctly stated by the previous panel of this Court in *In re Estate of Underwood* when plaintiff brought the case for the second time,

Based on the record in *Carto*, we conclude that the third element of *res judicata* is satisfied because [plaintiff's] claim could have been resolved in the underlying circuit court case. The facts of the instant case are intimately related in time and motivation to the facts of *Carto*, and concern how much [plaintiff] should be compensated for his care of the decedent. The circuit court conducted a trial on damages and made a specific determination regarding how much [plaintiff] was entitled to for his care of the decedent, offsetting that amount against what [plaintiff] had taken for himself from the partnership account without authorization. Moreover, the circuit court considered the decedent's partnership cash distributions and the Social Security distributions in making its decision. Thus, [plaintiff's] compensation and how the decedent's assets were used as compensation constitute operative facts in both actions. Further, [plaintiff] admits that he became aware of [defendant's] actions during the circuit

court case. Although [plaintiff] believes he is entitled to greater compensation and is clearly motivated by that fact, the issues regarding [defendant's] actions as the decedent's guardian and how they related to what [plaintiff] was owed could have been resolved during the previous case and do not alter the fact that [plaintiff] has already been awarded reasonable compensation for his care of the decedent. We accordingly conclude that [plaintiff] instant claim is barred by res judicata. [*In re Estate of Underwood, supra* at 2.]

It is apparent that plaintiff continues to believe that he has not received sufficient redress through the framework of the justice system for wrongs he believes were committed against him by defendant despite the fact that he has already been awarded reasonable compensation for his care of his deceased brother. Even though he is dissatisfied, plaintiff cannot merely re-label and then couch his assertions in different arguments in repeated attempts to relitigate the same matter hoping for a result he finds more favorable. A court is not bound by a party's choice of labels for an action because this would put form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Moreover, plaintiff's repeated attempts are a waste of judicial resources. "The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *Begin v Mich Bell Tel Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009). After reviewing the record, we conclude that res judicata bars petitioner's entire claim.

Because of our resolution of this issue, we decline to address plaintiff's remaining arguments on appeal. We do however note that there is no basis to conclude that dismissal of plaintiff's complaint was premature because in responding to defendant's motion for summary disposition, plaintiff failed to introduce any evidence or advance any argument indicating a "reasonable chance" that further discovery would result in additional factual support for his claim. *Colista v Thomas*, 241 Mich App 529, 537-538; 616 NW2d 249 (2000).

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio