STATE OF MICHIGAN

COURT OF APPEALS

SHELDON L. MILLER & ASSOCIATES, f/k/a LOPATIN MILLER, P.C.,	UNPUBLISHED August 1, 2006
Plaintiff-Appellant,	
v	No. 267425 Oakland Circuit Court
MAURICE HERSKOVIC,	LC No. 2004-058260-CK
Defendant-Appellee.	

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sued defendant in 2003. While that action was pending, plaintiff filed a second action against defendant in 2004. The circuit court ruled that the 2004 lawsuit was barred by res judicata.

"As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events . . . ." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). The doctrine "bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated." *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 197; 590 NW2d 747 (1998), aff'd 464 Mich 711 (2001). "For the doctrine to apply (1) the former suit must have been decided on the merits, (2) the issues in the second action were or could have been resolved in the former one, and (3) both actions must involve the same parties or their privies." *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 215-216; 561 NW2d 854 (1997). "Because res judicata is a question of law, we review de novo its application as well as the court's action on a motion for summary disposition." *Phinisee v Rogers*, 229 Mich App 547, 551-552; 582 NW2d 852 (1998).

The first and third elements do not appear to be in dispute. The 2003 action was decided on its merits, the court having granted a judgment for plaintiff, and both actions involved the same parties. The only question presented is whether the claims alleged in the 2004 case could have been litigated in the 2003 case. Plaintiff's sole argument is that it could not have brought the 2004 claims in the 2003 case because the presiding judge had tentatively determined that

plaintiff would not be allowed to amend its complaint to add them and thus a formal motion would have been futile. However, because the doctrine "bars claims arising out of the same transaction that plaintiff could have brought but did not," *Jones v State Farm Mut Automobile Ins Co,* 202 Mich App 393, 401; 509 NW2d 829 (1993), mod on other grounds by *Patterson v Kleiman,* 447 Mich 429, 433-434; 526 NW2d 879 (1994), the only relevant question is whether the claims alleged in the second action arose out of the same transaction giving rise to the first action such that they could have been litigated in the first action had the plaintiff exercised reasonable diligence. *Chestonia Twp v Star Twp,* 266 Mich App 423, 429; 702 NW2d 631 (2005); *Huggett, supra* at 197-198. Whether the claims raised in the second action arose out of the same transaction giving rise to the first action is an issue plaintiff does not address. Because plaintiff has failed to address an issue that must necessarily be reached to reverse the trial court, plaintiff has not shown a right to appellate relief. *Sargent v Browning-Ferris Industries,* 167 Mich App 29, 37; 421 NW2d 563 (1988); *Roberts & Son Contracting, Inc v North Oakland Dev Corp,* 163 Mich App 109, 113; 413 NW2d 744 (1987).

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette