IN THE SUPREME COURT OF THE STATE OF DELAWARE

TASHELL WILSON and GERMAYNE EMORY,	§	
	§	No. 236, 2011
	§	
Plaintiffs Below,	§	
Appellants,	§	Court Below – Superior Court
	§	of the State of Delaware,
v.	§	in and for New Castle County
	§	C.A. No. 10C-05-041
TRACY L. BROWN and TIERA BROWN,	§	
	§	
	§	
Defendants Below,	§	
Appellees.	§	

Submitted: January 18, 2012
Decided: January 24, 2012

Before **HOLLAND**, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 24th day of January 2012, it appears to the Court that:

1) This is the second appeal to this Court arising out of the death of a seven-year-old boy, Damond Emory ("Damond"). Damond died while attending a pool party hosted by Tiera Brown at a residential pool owned by Tiera Brown's family friends, Anita and Andre Urquhart. Damond's babysitter, Tappitchar Bass, brought him to the party.

2) Damond's parents, Tashell Wilson and Germayne Emory (the "Appellants"), filed two separate suits in this case. The original action was filed against Tiera Brown, Tiera's mother Tracy Brown, the Urquharts, the

Urquharts' adult daughter, and Tappitchar Bass in 2008 ("2008 action"). In 2010—after the Browns moved for summary judgment—the second action was filed against the Browns and the babysitter ("2010 action"). Unlike the first action, the second action asserts specific claims under premise liability and attractive nuisance theories against the Browns. The claims against the babysitter were subsequently dismissed.

3) The Superior Court granted summary judgment in favor of the Browns on the 2008 action. While that judgment was on appeal to this Court, the Browns moved to dismiss the 2010 action. The Superior Court stayed the 2010 action pending this Court's disposition on the original action.

4) On April 14, 2011, this Court affirmed the Superior Court judgment in the 2008 action. The Browns filed an application to lift the stay and renewed their motion to dismiss the 2010 action. On April 18, 2011, the Superior Court granted the Browns' application to lift the stay and motion to dismiss. This appeal is from the final judgment that dismissed the 2010 action as barred by the doctrine of *res judicata*.

5) Two months after Damond's death, the Appellants filed a wrongful death action against Tiera Brown, Tiera's mother Tracy Brown, the Urquharts, the Urquharts' adult daughter, and Damond's babysitter,

asserting claims of intentional and negligent conduct against each of the defendants. The Appellants settled their claims against the defendants other than the Browns and the babysitter.

6) Tiera and Tracy Brown each moved for summary judgment on the basis that the Appellants could not demonstrate that the Browns had breached any cognizable legal duties. In response to the Browns' motion for summary judgment, the Appellants raised the arguments, for the first time, that the Browns were *de facto* landowners subject to the duties imposed upon "owners" and that the doctrine of attractive nuisance would apply against them. "[C]oncerned about the strength of this position," the Appellants filed a separate suit (2010 action) against the babysitter and the Browns, while supplemental briefing on the motions for summary judgment in the 2008 action was outstanding. The 2010 action explicitly alleged theories of premises liability and attractive nuisance against the Browns.

7) In ruling on Browns' motion for summary judgment in the 2008 action, the Superior Court did not consider the Appellants' newly asserted theories of liability in the 2010 action, finding that they were not sufficiently pled against the Browns in the 2008 action under Superior Court Civil Rule

9(b).[1] The Superior Court noted that the Appellants' premises liability and attractive nuisance claims were pled in the 2008 action with particularity as to the Urquharts, but not the Browns. The Superior Court rejected the Appellants' argument that they properly pled these claims against the Browns by incorporating the prior paragraphs.[2]

8) The Superior Court granted summary judgment on the 2008 action in favor of the Browns, and the Appellants appealed to this Court. While the 2008 action was on appeal, the Browns moved to dismiss the 2010 action. Then, the Appellants sought a stay of the instant 2010 action. The Superior Court granted the stay of the motion to dismiss the 2010 action

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[1] *Wilson v. Urquhart*, 2010 WL 2683031, at *11 (Del. Super. July 6, 2010), *aff'd*, 2011 WL 1434666 (Del. Apr. 14, 2011). *See also id*. at *5 ("Plaintiffs' claims of premises liability were raised far too late to be considered as part of this case).

[2] *Id*. at *11. Specifically, the Superior Court noted:

> All that incorporating the prior paragraphs of the Second Amended Complaint [in the 2008 action] accomplished was to place the Browns on notice that Plaintiffs considered *the Urquharts* subject to premises liability. The Browns did not own or reside on the Urquharts' property, and the Urquharts were present on the property for at least some portion of the party. Neither Plaintiffs nor the Browns developed a factual record during discovery regarding the Browns' control over and knowledge of the premises. Both a factual record and significant briefing would be necessary for the parties and this Court to evaluate Plaintiffs' position that temporarily using a family friend's pool may result in premises occupier status.

Id. The Superior Court further noted:

> While [another] amendment to the Complaint [in the 2008 action] might have offered an appropriate resolution to Plaintiffs' failure to plead at an earlier point in the litigation, Plaintiffs cannot inject entirely new theories of negligence into the case after discovery and dispositive motion practice have closed without an opportunity for the Browns to develop a defense.

Id. (citation omitted).

pending the outcome of the appeal that was before this Court in the 2008 action.

9) On April 14, 2011, this Court affirmed the Superior Court's grant of summary judgment for the Browns in the 2008 action.[3] The Browns then moved to lift the stay on the 2010 action, and renewed their motion to dismiss. On April 18, 2011, the Superior Court granted the Browns' application to lift the stay and granted their motion to dismiss the 2010 action.[4]

10) The Superior Court held that the 2010 action is procedurally barred under the doctrine of *res judicata*, and described this case as a "classic attempt" to split causes of action.[5] The Superior Court found that both the instant 2010 action and the 2008 action arose out of the same "transaction" (i.e. Damond's death at the pool party hosted by Tiera Brown), and that the Appellants could have and should have pursued their new theories of liability against the Browns when they filed the second amendment to the complaint to the 2008 action in April 2009.[6] According to the Superior Court, the allegations raised therein encompassed circumstances underpinning the Appellants' *de facto* landowner theory, and

[3] *Wilson v. Urquhart*, 2011 WL 1434666 (Del. Apr. 14, 2011).
[4] *Wilson v. Brown*, 2011 WL 1632348 (Del. Super. Apr. 18, 2011).
[5] *Id*. at *2.
[6] *Id*.

the proper pleading of these new theories at that point, "would have enabled both Plaintiffs and Browns to conduct appropriate discovery and research regarding the viability of Plaintiffs' claim."[7]

11) The underlying substantive issue in this appeal is whether the Superior Court erred in dismissing the 2010 action after finding it was procedurally barred as *res judicata*. The Appellants do not address the doctrine of *res judicata* anywhere in their opening brief, and in their reply brief, simply assert that the doctrine of *res judicata* is inapplicable to this case.

12) Instead, in this appeal, the Appellants argue that the Superior Court erred when it: first, was unwilling to allow Appellants to amend their complaint in the 2008 action for the third time— two months before trial and after the deadline for such amendments expired under the trial scheduling order; second, denied the Appellants' motion to consolidate the two actions; and third, failed to provide the Appellants with the "choice" of dismissing the first case (2008 action) and proceeding with the second case (2010 action).

13) The Appellants argue that the Superior Court erred as a matter of law by not permitting them to amend their complaint in the 2008 action

[7] *Id.* at *6.

for what would have been the third time. This issue is not properly before this Court for two reasons. First, the argument relates to the 2008 action which has been finally adjudicated and is therefore moot. Second, the Appellants never filed a motion for leave to file a third amended complaint in the 2008 action–a fact that was noted during oral argument before this Court on the 2008 action.[8]

14) The Appellants next argue that the Superior Court erred in denying their motion to consolidate the 2008 and 2010 actions. The Superior Court denied the motion to consolidate, "on the grounds that all discovery and dispositive motion deadlines in the 2008 action had passed, and that the Browns had not been on notice during the discovery or motion practice phases of the first-filed case that Plaintiffs intended to proceed against them on a theory of *de facto* premises or occupier status."[9] Again, that issue is moot because Appellants made that exact argument to this Court on appeal in the 2008 action,[10] wherein this Court affirmed the judgment of the Superior Court.

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[8] *See* Oral Arg. Tr. 33, Apr. 13, 2011.

> **J. Holland:** But if we look at this where we are now, as you said, there was no formal motion to amend the complaint.
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> **Mr. Kuhl:** I'm not aware of one.

[9] *Wilson v. Brown*, 2011 WL 1632348, at *1 (citing *Wilson v. Urquhart*, 2010 WL 2683031, at *11).

[10] *See* Appellant's Opening Br. at 14, C.A. No. 468, 2010, Oct. 28, 2010. It was also discussed during oral argument. *See* Oral Arg. Tr. 34, Apr. 13, 2011.

15) The Appellants next argue that the Superior Court erred when it failed to provide the Appellants with the "choice" to dismiss the 2008 action and proceed with the 2010 action. This argument is without merit. At the office conference, when the Superior Court considered the Appellants' motion to consolidate the two actions, the Superior Court pointed out to the Appellants that they had the option of filing a motion to dismiss the 2008 action and to proceed with the 2010 action.

> **The Court:** Here's what's going to happen. You get two choices. Okay? The defendants are pretty nice to you because, frankly, I was going to say you go forward with one complaint or the other. Okay? If you want to go forward with the one that was first filed, I'll decide the motions, we'll go forward, if necessary, to trial, and you'll go to trial on just what's in that complaint. And then after that, it will be *res judicata*, so your second one will be gone. Okay? You can do it that way. Or you can dismiss this one and go with the second one, so that they then have an opportunity to develop their case, knowing what your allegations are and what it is that you're claiming, because it is not clear—I mean, I don't think your original complaint is as clear as it should be. And it wasn't to them, obviously. But if that's the case, they have to do new discovery, I would think.[11]

The Superior Court noted that, if the Appellants decided to dismiss the 2008 action and proceed with the 2010 action, it would probably shift some

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J. Jacobs: Right, and the court refused to consolidate because—
Mr. Kuhl: It was three months before trial.
J. Jacobs: —it would be an end run around the discovery deadline.
Mr. Kuhl: Discovery deadline and all the other deadlines.

[11] Conference Tr. 20, May 14, 2010.

discovery costs to the Appellants because discovery was already completed with respect to the 2008 action. That suggestion was reasonable since the first action could only be dismissed with the Superior Court's approval and after hearing from the defendants about any possible prejudice that a dismissal would cause.

16) The Appellants rely on the following language to support their claim that the Superior Court did not give them a choice to file a motion to dismiss the 2008 action and to proceed with the 2010 action.

> Then, this is an easy decision for me. I will go forward with the first complaint [2008 action]. The other one [2010 action] will go through the process of being scheduled. It will be *res judicata*, I'm sure, because this [2008 action] trial is scheduled in July, I think.[12]

The foregoing language reflects the Superior Court's decision to deny the *motion to consolidate* the 2008 action and the 2010 action. This was the only motion pending in the Superior Court at the time of the office conference. In other words, the trial judge was going forward with both actions separately, and was cautioning the Appellants that because trial was scheduled in a few months on the 2008 action, that the 2010 action might later be procedurally barred by principles of *res judicata*.

[12] Conference Tr. 28-29.

17) After the office conference on the motion to consolidate, it was incumbent on the Appellants, if they so desired, to file a motion to dismiss the first (2008) action and proceed with the second (2010) action, as required by Superior Court Civil Rule 41. After the office conference on the motion to consolidate, the Appellants never filed a motion to dismiss the 2008 action. It is unreasonable to conclude from a review of the transcript that the Superior Court made that choice for the Appellants.[13] Regardless of the reasons why they decided not to file a motion to dismiss the 2008 action, the Appellants were on notice that the 2010 action might be barred by *res judicata* if the two actions went forward separately.

18) *Res judicata* "exists to provide a definite end to litigation, prevent vexatious litigation, and promote judicial economy."[14] "The procedural bar of *res judicata* extends to all issues which might have been raised and decided in the first suit as well as to all issues that actually were

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[13] This is especially so because there are references to Appellants having had the option to decide how to proceed. *See* Conference Tr. 25 ("Well, if he dismisses the first one and wants to go with the second one . . . ."). The Superior Court made it even more clear by this exchange:

> **The Court:** So, what are you going to do with the second one? Are you going to dismiss it or just leave it in the---
> **Mr. Hedrick:** I'll discuss it with Miss Bove and our clients.
> **The Court:** Because, I mean, whatever you're doing there, you're kind of using some of the resources of the Court, they're pretty valuable and they're pretty scarce.

Id. at 32.

[14] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191-92 (Del. 2009) (internal citations omitted).

decided."[15] "The rule against claim splitting is an aspect of the doctrine of *res judicata*."[16] This rule is "based on the belief that it is fairer to require a plaintiff to present in one action all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping or repetitive actions in different courts or at different times."[17]

19) "Under Delaware law, *res judicata* bars litigation between the same parties if the claims in the later litigation arose from the same transaction that forms the basis of the previous adjudication."[18] "Even if a substantive theory of recovery asserted in a subsequent lawsuit is different from that presented in prior litigation, when the second action is based on the same transaction as the first, the claim has been split and must be dismissed."[19]

20) To properly assert *res judicata* as a bar to a plaintiff's claim, a defendant must show that first, the same transaction formed the basis for both the present and former suits; and second, plaintiff neglected or failed to

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[15] *Id.* (quoting *Cassidy v. Cassidy*, 689 A.2d 1182, 1185 (Del. 1997) (internal quotation marks omitted)).
[16] *Kossol v. Ashton Condo. Ass'n., Inc.*, 1994 WL 10861, at *2 (Del. 1994) (citing *Maldonado v. Flynn*, 417 A.2d 378, 382-83 (Del. Ch. 1980)).
[17] *Maldonado v. Flynn*, 417 A.2d at 382.
[18] *Kossol v. Ashton Condo. Ass'n., Inc.*, 1994 WL 10861, at *2 (citing *Maldonado v. Flynn*, 417 A.2d at 381 (additional citations omitted)).
[19] *Id*. (citations omitted).

assert claims which in fairness should have been asserted in the first action.[20] "Upon such a showing, the plaintiff, to prevent dismissal, must then show that there was some impediment to the presentation of the entire claim for relief in the prior forum."[21]

21) Applying this test here, the Superior Court properly dismissed the 2010 action. First, it is undisputed that Damond's death at the pool party hosted by Tiera Brown, at the Urquharts' home, forms the basis of both suits. Second, the 2010 action includes claims that the Appellants failed to assert, and which they could and should have asserted in the first action. As the Superior Court noted:

> When Plaintiffs filed their Second Amended Complaint on April 27, 2009, they included allegations that the Browns had hosted the pool party at a residence they did not own, which are the circumstances underpinning Plaintiffs' *de facto* landowner theory. Thus, there is no apparent reason Plaintiffs should not have properly pled and pursued that theory of liability against the Browns in the first-filed 2008 action, which would have enabled both Plaintiffs and the Browns to conduct appropriate discovery and research regarding the viability of Plaintiffs' claim.[22]

22) In their opening brief in this appeal, the Appellants' repeat their argument that they "believed, by incorporating by reference[] the attractive

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[20] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d at 193-94 (internal quotation marks omitted) (citing *Kossol v. Ashton Condo. Ass'n*, 1994 WL 10861, at *2).
[21] *Kossol v. Ashton Condo. Ass'n*, 1994 WL 10861, at *2 (citing *Maldonado v. Flynn*, 417 A.2d at 383-84).
[22] *Wilson v. Brown*, 2011 WL 1632348, at *2.

nuisance theory in all counts in the Complaint filed in the first case[,] [they] had asserted the attractive nuisance [claim] against the Browns." They presented that same argument to this Court in the 2008 action. In its summary judgment ruling in the 2008 action, the Superior Court rejected this argument and concluded that: "[a]ll that incorporating the prior paragraphs of the Second Amended Complaint actually accomplished was to place the Browns on notice that Plaintiffs considered *the Urquharts* subject to premises liability."[23] This Court affirmed that summary judgment ruling in the 2008 action.

23) The Superior Court properly dismissed the 2010 action on the basis of *res judicata*. The Superior Court's frustration with the Appellants' procedural practices throughout these proceeding is readily apparent on the record and is also readily understandable. This appeal is *déjá vu*. In the appeal of the 2008 action, the Appellants asserted that summary judgment would not have been entered against them, if they had been allowed to file a third amended complaint. However, the Appellants never made a motion to file a third amended complaint. In this appeal, the Appellants assert that the 2010 action would not have been barred by *res judicata*, if they had been permitted to dismiss the 2008 action. But, the Appellants never filed a

[23] *Wilson v. Urquhart*, 2010 WL 2683031, at *11.

motion to dismiss the 2008 action either. Accordingly, the claims in both appeals were not supported by a factual basis in the record. Once again, we hold that the Superior Court correctly ruled on those motions that were properly presented to it for a decision.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice