

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (4th) 130259-U
NO. 4-13-0259
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 21, 2013
Carla Bender
4th District Appellate
Court, IL

NONA HARRISON LONG, PAUL HUNLEY, and)	Appeal from
BRETT HUNLEY,)	Circuit Court of
Plaintiffs-Appellants,)	Sangamon County
v.)	No. 12LM1196
DELMAR E. LADAGE and BETTY J. LADAGE,)	
Individually and as Trustees of The Delmar E. Ladage)	
and Betty J. Ladage Revocable Living Trust, Dated)	
May 8, 2009; BRENT LADAGE; and WELDON)	Honorable
LADAGE,)	Chris Perrin,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court (1) affirmed the trial court's decision that plaintiff's trespass action for crop year 2010 was barred by *res judicata* and (2) reversed the court's decision plaintiffs' trespass actions for crop years 2011 and 2012 were barred by *res judicata*.
- ¶ 2 In August 2012, plaintiffs, Nona Harrison Long, Paul Hunley, and Brett Hunley filed a complaint against defendants, Delmar E. Ladage and Betty J. Ladage (individually and as trustees of their revocable trust), Brent Ladage, and Weldon Ladage, alleging defendants trespassed on Long's property in 2010, 2011, and 2012, and damaged crops. In September 2012, defendants filed a motion to dismiss pursuant to section 2-619(a)(4) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(4) (West 2012)) asserting plaintiff's claims were barred by the doctrine of *res judicata*. Specifically, defendants asserted plaintiffs' claims were barred by

Sangamon County case No. 11-CH-23 (*Long I*) where Long sued to quiet title to the land at issue in the instant case. In December 2012, the trial court granted defendants' motion to dismiss.

¶ 3 Plaintiffs appeal, arguing the trial court erred in granting defendants' motion to dismiss. Specifically, plaintiffs assert the doctrine of *res judicata* does not apply because (1) there is no identity of cause of action as the trespass occurred after final judgment in *Long I*, and (2) there is no identity of parties. We affirm in part, reverse in part, and remand.

¶ 4 I. BACKGROUND

¶ 5 In September 2009, Long purchased approximately 80 acres of farmland in Sangamon County. Delmar and Betty own the neighboring land which abuts Long's farmland's western boundary.

¶ 6 1. *Sangamon County Case No. 11-CH-23 (Long I)*

¶ 7 In January 2011, Long filed a complaint against the Delmar E. Ladage and Betty J. Ladage Revocable Living Trust, and Delmar and Betty as trustees of the revocable trust, to quiet title to land she purchased in September 2009. Long alleged the *Long I* defendants' tenants had trespassed on her land. In March 2011, plaintiff filed a motion for summary judgment. In April 2011, plaintiff filed an amended complaint, which states in relevant part:

"5. That the Defendants through their agents and tenants have trespassed upon the Plaintiff's lands claiming to have an interest in the Plaintiff's real estate.

6. That the Defendant's claim is a cloud on the Plaintiff's title having no force or effect.

7. As legal owner of the real estate Plaintiff seeks a

declaration that the title to the real estate is vested in Plaintiff alone and that the Defendants have no estate, right, title or interest in the subject property, and that said Defendants be permanently enjoined from asserting any estate, right, title or interest in the property."

¶ 8 On August 9, 2011, the trial court held a summary judgment hearing and granted plaintiff's motion. On June 5, 2012, this court affirmed the court's grant of summary judgment. *Long v. Delmar E. Ladage & Betty J. Ladage Revocable Living Trust*, 2012 IL App (4th) 110918-U.

¶ 9 *2. The Instant Complaint*

¶ 10 In August 2012, plaintiffs filed a two-count complaint against defendants alleging trespass. In their general allegations, plaintiffs alleged, as follows:

"2. That Plaintiffs Paul Hunley and Brett Hunley are and at all times relevant were the Plaintiff Nona Harrison Long's farm operators, and as such are entitled to the quiet enjoyment of the Plaintiff's lands for the terms of the farm lease.

* * *

6. That the Plaintiffs are informed and believe and upon such information and belief, and the various representations made by one or more Defendants, state that the Defendants, Delmar Ladage, Brent Ladage and Weldon Ladage, were operators of the farm lands of the Defendant described herein during the relevant times pleaded, the exact relationship and status Plaintiffs have no

personal knowledge; but in any event acted under the authority, direction and auspices of the individual Defendant Trustees, and the acts complained of herein were engaged in by all Defendants acting in concert and agreement with each other."

¶ 11 In count I, plaintiffs alleged:

"7. That the Defendant at all times owed a duty not to trespass upon the Plaintiffs' lands, or to interfere with the Plaintiffs' use and enjoyment of their lands.

8. In violation of Defendants' duties as aforesaid, during each crop year since 2010, the Defendants have trespassed upon the Plaintiffs' lands and destroyed growing crops planted by the Plaintiff and her farm operators, Paul Hunley and Brett Hunley.

9. In violation of Defendants' duties as aforesaid the Defendants' plowed out portions of the Plaintiffs' crops in 2010, 2011 and 2012, and in 2010 and 2011 harvested crops on the Plaintiffs' land."

¶ 12 In count II, plaintiffs realleged that defendants trespassed and asserted "the trespasses complained of were intentionally undertaken, and willfully and wantonly visited upon the Plaintiffs, their land, crops and crop production, with a purposeful and conscious disregard for the rights and property interests of the Plaintiffs."

¶ 13 *3. Defendants' Motion To Dismiss*

¶ 14 In September 2012, defendants filed a motion to dismiss pursuant to section

2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2012)). Defendants asserted plaintiffs' claim was barred by the doctrine of *res judicata* because (1) a final judgment was rendered in *Long I*, where Long sued to quiet title to the land at issue in the instant case; (2) the new parties are in privity with the *Long I* parties; and (3) "[b]oth *Long I* and *Long II* relate to and arise out of the same set of operative facts." In support of their argument the parties were the same, defendants stated as follows:

"c. Brent Hunley and Paul Hunley are Nona Harrison Long's privies[.] (see [Amended Complaint] - Paragraph 2)

d. Brent Ladage and Weldon Ladage are privies of Delmar E. Ladage and Betty J. Ladage, individually and as Trustees of the Delmar E. Ladage and Betty J. Ladage Revocable Living Trust Dated May 8, 2009 (see [Amended Complaint] - Paragraph 6)."

¶ 15 Defendants did not attach an affidavit in support of their motion.

¶ 16 *4. The Trial Court's Order*

¶ 17 In December 2012, the trial court granted defendants' motion to dismiss. The court concluded (1) plaintiff Long was aware of the conduct which formed the basis of the second lawsuit at the time of *Long I*; (2) the alleged trespass "derives from the same core of operative facts" as the previous case; (3) "[a]ll of the alleged wrongful acts occurred during the pendency of *Long I* and its appeal"; (4) plaintiff "had a full and fair opportunity to litigate their cause of action for trespass, intentional or otherwise, in the previous lawsuit"; and (5) "[t]here is an identity of parties and their privies in both lawsuits."

¶ 18 This appeal followed.

¶ 19

II. ANALYSIS

¶ 20 Plaintiffs appeal, arguing the trial court erred in granting defendants' motion to dismiss. Specifically, plaintiffs assert the doctrine of *res judicata* does not apply because (1) there is no identity of cause of action as the trespass occurred after final judgment in *Long I*, and (2) there is no identity of parties. We address plaintiffs' contentions in turn.

¶ 21

A. Standard of Review

¶ 22 Section 2-619(a) of the Code provides a defendant may file a motion for dismissal on nine different enumerated grounds, including "[t]hat the cause of action is barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2012). A section 2-619 motion to dismiss, for purposes of the motion, admits as true all well-pleaded facts, together with all reasonable inferences that can be gleaned from the facts. *Cooney v. Rossiter*, 2012 IL 113227, ¶ 17, 986 N.E.2d 618. In reviewing the section 2-619 motion, the trial court must view all well-pleaded facts and reasonable inferences in the light most favorable to the nonmoving party. *Id.*; *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55, 962 N.E.2d 418. "In a section 2-619(a) motion, the movant is essentially saying ' "Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim." ' " *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984 (quoting *Winters v. Wangler*, 386 Ill. App. 3d 788, 792, 898 N.E.2d 776, 779 (2008)). A section 2-619 dismissal is reviewed *de novo*. *Cooney*, 2012 IL 113227, ¶ 17, 986 N.E.2d 618.

¶ 23

B. The Doctrine of *Res Judicata*, Generally

¶ 24 "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction acts as an absolute bar to a subsequent action between the

same parties or their privies involving the same claim, demand, or cause of action. The bar extends not only to all matters that were actually decided but also to those matters that could have been decided in the prior action." *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 9, 981 N.E.2d 971. For the doctrine of *res judicata* to apply, three requirements must be met: "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) identity of cause of action; and (3) identity of parties or their privies." *Id.* "The purpose of *res judicata* is to promote judicial economy by requiring parties to litigate, in one case, all rights arising out of the same set of operative facts and also [to] prevent[] the unjust burden that would result if a party could be forced to relitigate what is essentially the same case.'" *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 319, 703 N.E.2d 883, 896-97 (1998) (quoting *Henstein v. Buschbach*, 248 Ill. App. 3d 1010, 1015-16, 618 N.E.2d 1042, 1046 (1993)).

¶ 25 C. Merits of Appeal

¶ 26 Plaintiffs do not contest a final judgment on the merits was rendered in *Long I*. See *Wilson*, 2012 IL 112898, ¶ 19, 981 N.E.2d 971 (defining final order). Plaintiffs take issue with the two remaining *res judicata* requirements.

¶ 27 1. *Allegations Subsequent to August 9, 2011*

¶ 28 Plaintiffs contend their trespass claims do not share an identity of cause of action with *Long I* because (1) the alleged trespassing occurred after *Long I*, namely in the 2011 and 2012 crop years; and (2) a trespass claim would have been "premature" because the disputed boundary rights had not been settled.

¶ 29 Our supreme court has explained, the doctrine of *res judicata* does not bar just what was actually decided in the first lawsuit, but also "those matters that could have been

decided in that suit.' " *Cooney*, 2012 IL 113227, ¶ 22, 986 N.E.2d 618 (quoting *River Park*, 184 Ill. 2d at 302, 703 N.E.2d at 889). Illinois courts look to whether the claims arise from the same transaction in determining whether claims are barred by *res judicata*. *Rodgers v. St. Mary's Hospital*, 149 Ill. 2d 302, 312, 597 N.E.2d 616, 621 (1992). The transactional test provides that " 'the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.' " *Id.* What constitutes a "transaction" is " 'to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' " *River Park*, 184 Ill. 2d at 312, 703 N.E.2d at 893 (quoting Restatement (Second) of Judgments § 24, at 196 (1982)). Generally, *res judicata* does not apply where "the wrong suffered by the plaintiff is of a recurrent or ongoing nature" (*Altair Corp. v. Grand Premier Trust & Investment, Inc.*, 318 Ill. App. 3d 57, 63, 742 N.E.2d 351, 356 (2000)) as the "defendant's continuing course of conduct, even if related to conduct complained of in an earlier action, creates a separate cause of action." *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 222, 681 N.E.2d 12, 17 (1997). See also *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955) ("While the [prior] judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.").

¶ 30 Here, our question is whether the quiet title and the 2011 and 2012 crop year trespass actions arise from the same group of operative facts or transaction. In the previous action, Long sought to establish her superior title to the property. See *Dudley v. Neteler*, 392 Ill.

App. 3d 140, 143, 924 N.E.2d 1023, 1026 (2009) (to prevail in a quiet title action the plaintiff must establish title superior to that of the defendant). In the instant action, plaintiffs seek damages for defendants' alleged invasion of Long's property in the 2011 and 2012 crop years. See *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 556-57, 411 N.E.2d 217, 222 (1980) (to prevail in a trespass action the plaintiff must show the defendant caused a thing or a third person to enter the plaintiff's land). Moreover, plaintiffs allege defendants' trespass is recurring and *Long I* could not have resolved a trespass occurring after those proceedings. Applying *res judicata* to a trespass occurring after *Long I* is to leave plaintiff without recourse to enforce her superior title and allow defendants to trespass with immunity. See *Rasmussen v. City of Lake Forest*, 848 F. Supp. 2d 864, 869 (N.D. Ill. 2012) (noting that if *res judicata* applied to bar claims occurring after judgment was entered in the previous lawsuit "defendants who repeatedly cause injury through continuing nuisances would effectively have immunity from liability for future violations if a plaintiff did not successfully obtain injunctive relief in the initial suit"). *Res judicata* does not bar plaintiffs from recovering for trespass occurring after the circuit court entered summary judgment in *Long I* on behalf of the plaintiff.

¶ 31 Because we have determined plaintiffs may sue for trespass occurring after August 9, 2011, our inquiry turns to whether *res judicata* bars suit for alleged trespass occurring prior to that date.

¶ 32 *2. Allegation prior to August 9, 2011*

¶ 33 Plaintiffs also seek damages for defendants' alleged invasion of Long's property in the 2010 crop year. Again, we must determine whether the quiet title and trespass action related to crop year 2010 arise from the same group of operative facts or transaction. Plaintiffs are

correct the property boundary must be established in order to determine whether a trespass has occurred, but this does not answer whether a trespass action related to crop year 2010 could have been brought in *Long I*. Plaintiffs overlook that the *Long I* amended complaint alleged a trespass created a cloud on Long's title. When Long made that allegation in *Long I*, she had an opportunity to request damages as an additional remedy rather than only pursuing to quiet title. The *Long I* trial court could have conveniently determined who had superior title, if a trespass occurred, and compensatory damages for the trespass. See *River Park*, 184 Ill. 2d at 312, 703 N.E.2d at 893 (*res judicata* works to promote judicial economy by keeping together claims which form a convenient trial unit). Given Long's allegation that the 2010 crop year trespass took place before the final judgment in *Long I*, allowing her to split her remedies into separate actions would defeat the purpose of *res judicata*. Therefore, we find there is identity of cause of action between the cause in *Long I* and the allegations of trespass during crop year 2010.

¶ 34 The next step in our inquiry is to determine whether identity of parties exists, as the Hunleys, Brent, and Weldon were not parties in the quiet title action. Plaintiffs contend, based on the pleadings, the "nature of the relationship" between the original parties and the new parties is not sufficient to establish privity. Defendants respond that privity exists because the new parties are the *Long I* parties' "farm operators," and Brent and Weldon are Delmar and Betty's children.

¶ 35 "The rule of privity extends the preclusive effect of *res judicata* to those who were not parties to the original action, if their interests were adequately represented by someone else." *Cooney*, 2012 IL 113227, ¶ 33, 986 N.E.2d 618. Privity does not have a precise definition that can be applied in all cases, and "a determination regarding whether privity exists is to be

conducted on a case-by-case basis." *Agolf, LLC v. Village of Arlington Heights*, 409 Ill. App. 3d 211, 220, 946 N.E.2d 1123, 1132 (2011); *City of Chicago v. St. John's United Church of Christ*, 404 Ill. App. 3d 505, 513, 935 N.E.2d 1158, 1167-68 (2010).

¶ 36 Defendants' motion to dismiss summarily stated the new parties were "privies" and referred to plaintiffs' allegations the Hunleys and Brent and Weldon were the farm operators of the respective farms. Section 2-619 of the Code requires an affidavit in support of the motion to dismiss if the grounds do not appear on the face of the complaint. 735 ILCS 5/2-619(a) (West 2012). Defendants did not submit an affidavit in support of the motion.

¶ 37 Generally, farm operators can be either owner-operators or a lessee who is operating the farm, and can encompass a variety of lease arrangements. See generally 210 ILCS 105/2(a) (West 2012) (Field Sanitation Act definition of "farm operator"). We find no evidence in the record describing the parties' relationships or farm operating arrangements. As the nature of the "farm operator" relationship between the new parties and the *Long I* parties is unknown, we cannot conclude the new parties are in privity on this basis. Nevertheless, plaintiffs concede that "at all relevant times" the Hunleys were Long's farm operators and the new defendants were acting under the direction of the *Long I* defendants.

¶ 38 Plaintiffs' contention privity does not exist between a landlord and tenant because the landlord-tenant relationship is not a "special relationship" for duty of care purposes is unpersuasive. Our inquiry is for *res judicata* purposes. It is well settled privity exists between parties who share a mutual or successive relationship in property rights which were the subject of an earlier action. *Agolf*, 409 Ill. App. 3d at 220, 946 N.E.2d at 1132; *St. John's United Church of Christ*, 404 Ill. App. 3d at 513, 935 N.E.2d at 1168. As plaintiffs concede, the Hunleys were

Long's tenants during all relevant times and privity applies to such a relationship. As discussed above, *Long I* could have resolved all trespasses prior to and during those proceedings.

¶ 39 The next question is whether Brent and Weldon are the *Long I* defendants' privies. Again, the complaint and defendants' motion to dismiss only stated Brent and Weldon were "farm operators." Plaintiffs, throughout their brief, contend Brent and Weldon are the *Long I* defendants' tenants but that the exact nature of the relationship is "unknown." Both parties seek to benefit from their failure to provide a sufficient factual record. Defendants failed to provide an affidavit in support of their motion to dismiss to show Brent and Weldon are privies; conclusory statements do not suffice. However, the burden is now on plaintiffs to support their claim of error. Plaintiffs have the burden to provide a sufficient record and "[w]ithout an adequate record preserving the claimed error, the court of review must presume the circuit court's order had a sufficient factual basis and that it conforms with the law." *In re Marriage of Gulla & Kanaval*, 234 Ill. 2d 414, 422, 917 N.E.2d 392, 397 (2009). We are without the benefit of a transcript, bystander's report, or agreed statement of facts pertinent to the issues on appeal. See Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)). This includes the motion to dismiss hearing.

Accordingly, we presume the trial court heard evidence, such as that Brent and Weldon were the *Long I* defendants' tenants, to determine Brent and Weldon were the *Long I* defendants' privies.

¶ 40 In sum, the new parties stand in privity to the *Long I* parties, and there is identity of cause of action between *Long I* and the 2010 crop year claims that bar plaintiffs from recovery under the theory of *res judicata*. Conversely, *res judicata* does not bar plaintiffs from presenting a claim for trespass occurring after August 9, 2011, the date of the trial court's judgment in *Long I*.

III. CONCLUSION

¶ 41

¶ 42 For the reasons stated, we affirm in part, reverse in part, and remand for further proceedings.

¶ 43 Affirmed in part, reversed in part, and remanded.