STATE OF MICHIGAN

COURT OF APPEALS

DONALD J. CASTLE,

Plaintiff-Appellee/Cross-Appellant,

v

CHARLES W. SEELIG,

Defendant-Third-Party Plaintiff-Appellant,

and

WESTFIELD INSURANCE COMPANY,

Third-Party Defendant-Appellee/Cross-Appellee.

UNPUBLISHED
February 2, 1999

No. 205728
Oakland Circuit Court
LC No. 96-528546 CZ

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Defendant/third-party plaintiff Charles Seelig ("Seelig") appeals by right the order denying Seelig's motion for summary disposition pursuant to MCR 2.116(C)(10) and granting third-party defendant Westfield Insurance Company's ("Westfield") motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis that Seelig was collaterally estopped from claiming that Westfield acted in bad faith when it refused to settle plaintiff's claim against Seelig. Plaintiff Donald J. Castle similarly cross-appeals the trial court's order granting Westfield's motion for summary disposition on the basis that collateral estoppel barred Seelig from litigating his claim that Westfield refused to settle in bad faith. We affirm.

Plaintiff was injured as a result of an automobile accident in Ohio with Seelig, brought suit against Seelig in the Common Pleas Court of Huron County, Ohio, and was awarded a judgment of $750,000. Westfield insured Seelig through residual liability coverage in the amount of $500,000. Westfield defended Seelig in plaintiff's suit and paid plaintiff $500,000 in satisfaction of the judgment pursuant to its policy limit. At some point after plaintiff was awarded judgment, he filed a motion for

prejudgment interest. The Ohio court conducted a hearing on the motion and entered its findings of fact and conclusions of law denying plaintiff's motion on the basis that "[Seelig] did not fail to make a good faith effort to settle this case so as to entitle plaintiff to prejudgment interest pursuant to R.C. 1343.03(C)."

Plaintiff subsequently filed a petition in Oakland County Circuit Court, to enforce a foreign judgment. Plaintiff requested that the court give full faith and credit to the Ohio court judgment and order that Seelig pay the $250,000 balance of the judgment plus interest, costs and actual attorney fees. Seelig subsequently filed a third-party complaint against Westfield alleging that while the suit was pending in Ohio, plaintiff's counsel proposed to Westfield a $125,000 settlement of all claims against Seelig, which Westfield rejected without informing him. Seelig averred that Westfield's failure to settle the claim within the policy limits was not reasonably justified, and its actions constituted a bad faith breach of its duty to defend and indemnify him.

Seelig first argues that the trial court erroneously determined that he was collaterally estopped from asserting his claim that Westfield acted in bad faith in refusing to settle the case within the policy limits. Whether a party is precluded from raising a claim by collateral estoppel is a legal question that is reviewed de novo. *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996).

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Id.* "For collateral estoppel to apply, 'the issues must be identical, and not merely similar.'" *Id*., quoting *Eaton Co Bd of Co Road Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). Moreover, for collateral estoppel to apply, the parties in the second action must be the same as, or in privity to, the parties in the first action. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555-556; 540 NW2d 743 (1995), lv gtd on other grounds 457 Mich 852; 557 NW2d 639 (1998).

> A party is one who is directly interested in the subject matter and has a right to defend or to control the proceedings and to appeal from the judgment. A person is in privy to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase. [*Husted, supra* at 556.]

Plaintiff brought the Ohio suit against Seelig, who was defended by Westfield. The trial court treated the interests of Seelig and Westfield as one and the same by evaluating whether Westfield reasonably believed that Seelig had a defense of sudden medical emergency. The Ohio court did not differentiate the interests of Seelig from the interests of Westfield. Seelig brought a third-party claim, however, after plaintiff sought to enforce its Ohio judgment in Michigan against Westfield. In his third-party claim, Seelig asked the court to determine whether Westfield acted in bad faith toward Seelig in refusing to settle during the pendency of the Ohio case within the policy limits. The parties in each case were different. We believe, however, that Westfield was in privity to Seelig in the Ohio proceedings. In the Ohio suit, Westfield controlled the proceedings. Seelig had a right to appeal the judgment entered

against him. Seelig also had an interest in the trial court's decision whether to award prejudgment interest.

Moreover, the issue that Seelig raised in the Michigan action was actually and necessarily determined by the Ohio court. After the jury returned a $750,000 verdict for plaintiff in the underlying suit, plaintiff moved the Ohio court for prejudgment interest pursuant to RC 1343.03 of the Ohio Revised Code, which provides in relevant part:

> (C)(1) . . . [I]nterest on a judgment . . . rendered in a civil action based on tortious conduct and not settled by agreement of the parties shall be computed from the date the plaintiff gave the defendant written notice in person or by certified mail that the cause of action accrued until the date that the judgment . . . is rendered or from the date the plaintiff filed a complaint to commence the civil action until the date that the judgment . . . is rendered, whichever time period is longer, if, upon motion of any party to the civil action, the court determines at a hearing held subsequent to the verdict or decision in the civil action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

"A party has not 'failed to make a good faith effort to settle' under RC 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Moskovitz v Mt Sinai Medical Center*, 69 Ohio St 3d 638, 658-659; 635 NE2d 331 (S Ct Ohio, 1994).

> Even though the burden of a party seeking an award is heavy, the burden does not include the requirement that bad faith of the other party be shown. Lack of a good faith effort to settle should not be confused with bad faith. . . . [A] party may have failed to make a good faith effort to settle even though he or she did not act in bad faith. . . . '[A] lack of good faith means more than poor judgment or negligence; rather, it imports a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud.' . . . We hold that in prejudgment interest determinations pursuant to R.C. 1343.03(C), the phrase 'failed to make a good faith effort to settle' does not mean the same as 'bad faith.'" [*Id*. at 659.]

In Michigan, "an insurer is liable to its insured for a judgment exceeding policy limits when the insurer, who has exclusive control of defending and settling the suit, refuses to settle within policy limits in 'bad faith.'" *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 116; 393 NW2d 479 (1986).

> "The insurer does not act in bad faith if it refuses settlement in the honest belief that it has a fair chance of victory, or of keeping the verdict within the policy limit, or . . . that the compromise amount is excessive, or if it has legal defenses. . . . On the other hand,

> arbitrary refusal to settle for a reasonable amount, where it is apparent that suit would result in a judgment in excess of the policy limit, indifference to the effect of refusal on the insured, failure to fairly consider a compromise and facts presented and pass honest judgment thereon, or refusal upon grounds which depart from the contract and the purpose of the grant of power, would tend to show bad faith." [*Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 135; 393 NW2d 161 (1986), quoting *City of Wakefield v Globe Indemnity Co*, 246 Mich 645, 652-653; 225 NW 643 (1929)].

The Ohio court conducted a hearing on plaintiff's motion for prejudgment interest to determine whether Seelig failed to make a good faith effort to settle the case. Plaintiff questioned David Kessler, Westfield's assistant vice-president in litigation, and George Lutjen, the attorney hired by Westfield to represent Seelig in the underlying suit. Plaintiff attempted to establish that Seelig failed to make a good faith effort to settle the case pursuant to RC 1343.03(C)(1). The Ohio court determined, however, that Westfield reasonably believed that it had a viable defense of sudden medical emergency to plaintiff's suit and it asserted that defense in good faith. Thus, the court concluded that Westfield had a reasonable good-faith belief that there was no liability on Seelig's part and it denied plaintiff's motion for prejudgment interest.

The issue in the Ohio suit was whether Seelig, as represented by Westfield, failed to make a good-faith offer to settle. The Ohio court analyzed whether Seelig, as represented by Westfield, had a reasonable good-faith belief that he would be found not liable for plaintiff's injuries based on his defense of sudden medical emergency. The ultimate issue to be decided in the Michigan case was whether Westfield acted in bad faith toward Seelig in refusing to settle within the policy limits, which also requires a determination whether Westfield had a reasonable good-faith belief that Seelig had a valid defense to plaintiff's tort claims.[1] Because the issue in both cases is identical, the Michigan suit is barred by collateral estoppel. Accordingly, the trial court properly granted Westfield's motion for summary disposition on the basis that Seelig's suit was barred by collateral estoppel.

Seelig also argues that the trial court erred in denying his motion for summary disposition because he asserts there was no genuine issue of material fact that Westfield acted in bad faith in refusing to settle within its policy limits. This Court reviews the grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996). "A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim." *Id*. "MCR 2.116(C)(10) permits summary disposition when except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law." *Id*.

Among the factors that the factfinder may take into account, together with all other evidence in deciding whether the defendant acted in bad faith, are:

1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured,

2) failure to inform the insured of all settlement offers that do not fall within the policy limits,

3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances,

4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury,

5) rejection of a reasonable offer of settlement within the policy limits,

6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high,

7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits,

8) failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits,

9) disregarding the advice or recommendations of an adjuster or attorney,

10) serious and recurrent negligence by the insurer,

11) refusal to settle a case within the policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful, and

12) failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal, especially where trial counsel so recommended.

In applying any factors, it is inappropriate in reviewing the conduct of the insurer to utilize "20-20 hindsight vision." The conduct under scrutiny must be considered in light of the circumstances existing at the time. A microscopic examination, years after the fact, made with the luxury of actually knowing the outcome of the original proceeding is not appropriate. It must be remembered that if bad faith exists in a given situation, it arose upon the occurrence of the acts in question; bad faith does not arise at some later date as a result of an unsuccessful day in court. [*Liberty Mut Ins Co, supra* at 137-139.]

Seelig claims that because there is no question that Westfield failed to inform him of any offers to settle the case and keep him reasonably informed of any developments that could affect his interests, there is no genuine issue that Westfield acted in bad faith. Although failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured is a factor in determining bad faith, it is only one factor among many. In fact, there is no indication that

Westfield was required to inform Seelig of plaintiff's offer to settle for $125,000 because the second factor enunciated by *Liberty Mut Ins Co*, *supra*, indicates that only the failure to inform the insured settlement offers that *do not fall within the policy limits* is evidence of bad faith. Policy limits in this case were $500,000. An insurer is not, therefore, acting in bad faith if it fails to inform the insured of settlement offers that *do* fall within the policy limits. Because the facts as established by the Ohio court indicate that Westfield may have reasonably believed that Seelig had a viable defense of sudden medical emergency, we believe that there was a genuine issue of material fact whether Westfield acted in bad faith in refusing to settle the claim within its policy limits. Accordingly, the trial court properly denied Seelig's motion for summary disposition pursuant to MCR 2.116(C)(10).

We affirm.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey

[1] Although lack of good faith does not equate to bad faith for purposes of prejudgment interest in Ohio, the Ohio court ruled that Westfield did not lack good faith and therefore necessarily determined that Westfield did not act in bad faith. If the Ohio court had ruled that Westfield lacked good faith, then that would not be the same as a determination of bad faith for purposes of the Michigan suit.