

STATE OF MICHIGAN
COURT OF APPEALS

PROASSURANCE CORPORATION, a/k/a
PRONATIONAL INSURANCE
CORPORATION, f/k/a PICOM, as Subrogee and
Assignee of UNIVERSAL IMAGING, INC.,

Plaintiff-Appellant,

v

DR. PETER NEFCY, M.D.,

Defendant-Appellee.

UNPUBLISHED
June 10, 2008

No. 272963
Oakland Circuit Court
LC No. 2006-073299-CZ

ON REMAND

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

This indemnification case is before us on remand by the Michigan Supreme Court “to consider the trial court’s other grounds for denying summary disposition to the plaintiff and granting summary disposition to the defendant.” *ProAssurance Corp v Nefcy*, 480 Mich 916; 739 NW2d 870 (2007). We again affirm.

I. Basic Facts and Proceedings

Sharon Smith and David Smith filed a medical malpractice action against defendant, a radiologist, Universal Imaging, Inc. (“Universal”), and other defendants who were later dismissed by stipulated order.¹ Defendant obtained summary disposition in the underlying case because the affidavit of merit was defective and the statute of limitations had expired, and the Smiths’ claim against him was dismissed with prejudice. Universal did not appeal that order, and although it obtained permission to file a third-party complaint against defendant, it failed to do so. Universal did not seek summary disposition, and the Smiths’ case against it proceeded to a jury trial. A special verdict form asked the jury to determine whether defendant was Universal’s agent, whether Universal, by and through defendant, was negligent, whether Sharon Smith had sustained injuries and damages, and whether Universal, by and through defendant,

¹ Throughout this opinion, we will refer to this medical malpractice case as “the underlying case,” the “underlying action,” or “the Smiths’ case.”

was a proximate cause of her injuries. The jury answered each question in the affirmative and returned a verdict against Universal, and Universal filed an appeal with this Court in Docket No. 267400. While that appeal was pending, Universal entered into settlement negotiations with the Smiths. Although defendant was invited to participate in these negotiations, he declined to do so. Universal reached a settlement with the Smiths, and the parties dismissed the appeal by stipulation. Pursuant to the insurance policy issued by ProNational Insurance Corporation to Universal, plaintiff paid the settlement amount.

As subrogee and assignee for Universal, plaintiff filed this action against defendant, seeking indemnification and contribution and asserting that the sole basis for its liability to the Smiths was vicarious liability for defendant's negligence. Plaintiff moved for summary disposition, and the trial court denied plaintiff's motion for summary disposition. Instead, the trial court granted defendant summary disposition regarding indemnification for the following reasons: 1) when viewed in totality, plaintiff's pleadings alleged both active and passive negligence against Universal; 2) Universal failed to pursue summary disposition in the underlying case after defendant's dismissal, based on either its own lack of active fault or an assertion that a derivative vicarious claim against it would be barred because the claims against defendant, its agent, were barred; 3) Universal failed to appeal the order dismissing defendant in the underlying case or the determination that defendant was its agent; and 4) Universal failed to file a third-party indemnification action after the trial court granted its motion to do so. The trial court stated:

Thus, for all of the foregoing reasons, including but not limited to the facts that Nefcy's liability to the underlying plaintiffs had been completely extinguished and acceded to by the plaintiffs and Universal Imaging, that Universal Imaging failed to pursue or obtain its own summary disposition regarding derivative vicarious claims against it or its own active fault, and Universal Imaging chose to settle rather than pursue its appeal challenging the agency relationship with Defendant Nefcy, the instant Plaintiff, as assignee/subrogee of Universal Imaging, may not seek common law indemnification from Defendant Nefcy. Defendant Nefcy therefore is entitled to summary disposition pursuant to MCR 2.116(I)(2).

On appeal, we affirmed the trial court's decision denying plaintiff summary disposition and granting defendant summary disposition. *ProAssurance Corp v Nefcy*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 (Docket No. 272963). Because we did not believe there was a dispute that the Smiths' complaint against Universal alleged both active and passive negligence, we concluded that plaintiff had failed to demonstrate that Universal had obtained a determination that it was free of active negligence. *Id.*, slip op at 3-4. We therefore affirmed the trial court's ruling. *Id.* at 4. Our Supreme Court reversed, concluding that we erred in determining that the underlying complaint had alleged both active and passive negligence. *ProAssurance Corp v Nefcy*, 480 Mich 916; 739 NW2d 870 (2007). Accordingly, our Supreme Court remanded to us "to consider the trial court's other grounds for denying summary disposition to the plaintiff and granting summary disposition to the defendant." *Id.*

II. Analysis

We review de novo a trial court's decision on a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the party opposing the motion. *Id.* Summary disposition is appropriately granted if, except for the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiff seeks indemnification from defendant for its payment of the settlement amount in the underlying case. “Generally, indemnification is an equitable doctrine that shifts the entire burden of judgment from one tortfeasor who has been compelled to pay it, to another whose active negligence is the primary cause of the harm.” *St Luke’s Hosp v Giertz*, 458 Mich 448, 453; 581 NW2d 665 (1998). “[T]he right to common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party’s being held liable, the latter party is entitled to restitution for any losses.” *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 531; 644 NW2d 765 (2002). Our Supreme Court concluded that the Smiths had alleged only passive, i.e., vicarious, negligence against Universal. *ProAssurance Corp v Nefcy*, 480 Mich 916; 739 NW2d 870 (2007). If an appellate court decides a legal issue and remands for further proceedings, the law of the case doctrine provides that the issue will not be decided differently in a subsequent appeal. *Hill v City of Warren*, 276 Mich App 299, 307-308; 740 NW2d 706 (2007). Thus, Universal’s liability in the underlying case was based on vicarious liability for defendant’s negligence.

Defendant asserts that the doctrine of res judicata bars this action because Universal could have resolved the issues in the underlying case. Res judicata “bars a second, subsequent action when (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 v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007). In the underlying action, defendant obtained summary disposition because the affidavit of merit was defective and the statute of limitations had expired, and the claims against him were dismissed with prejudice.² In *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 284, 295; 731 NW2d 29 (2007), our Supreme Court recently held that the dismissal of a claim based on the expiration of a limitations period constituted an adjudication on the merits pursuant to MCR 2.504(B)(3). MCR 2.504(B)(3) provides that, “Unless the court otherwise specifies in its order

² Defendant was dismissed with prejudice from the underlying case in 2003. In 2007, our Supreme Court decided *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007), holding that a complaint and affidavit of merit toll the limitations period until the affidavit is determined to be invalid in a subsequent proceeding. If the affidavit is successfully challenged, the appropriate remedy is dismissal without prejudice, and the plaintiff would have the remainder of the limitations period to file a complaint with a valid affidavit of merit. *Id.* In the underlying case, the dismissal of defendant was not appealed, and the Smiths never filed another affidavit of merit regarding defendant.

for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, operates as an adjudication on the merits.” The order for dismissal in the underlying case does not indicate that it was not an adjudication on the merits, and defendant was not dismissed for lack of jurisdiction or failure to join a party. Therefore, if *Al-Shimmari* applies retroactively, defendant’s dismissal in the underlying case constitutes an adjudication on the merits.

Plaintiff contends that *Al-Shimmari* should not be applied retroactively. Judicial decisions generally apply retroactively, and prospective application is reserved only for exigent circumstances, *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 400; 738 NW2d 664 (2007), but a more flexible approach is necessary where “injustice might result from full retroactivity”, *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003). When determining whether a decision should have a full retroactive effect, the threshold question is whether the decision “clearly establishes a new principle of law,” *Trentadue, supra* at 400-401; *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 220; 731 NW2d 41 (2007), or whether it merely clarifies, extends, or interprets existing law, *Bolt v Lansing*, 238 Mich App 37, 44-45; 604 NW2d 745 (1999). Generally, prospective application is only appropriate where the decision overrules “clear and uncontradicted case law”, *Rowland, supra* at 221, quoting *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 587; 702 NW2d 539 (2005) (internal quotation marks omitted), or “decides an issue of first impression whose resolution was not clearly foreshadowed”, *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). If so, then we must consider “(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice.” *Trentadue, supra* at 400-401 (internal quotation marks and citation omitted).

In *Al-Shimmari, supra* at 296-297, the Court overruled its decision in *Rogers v Colonial Fed S&L Ass’n*, 405 Mich 607, 619 n 5; 275 NW2d 499 (1979), which stated that “An accelerated judgment based on the 3-year statute of limitations is not an adjudication on the merits of a cause of action.” The *Rogers* Court relied on *Nordman v Earle Equip Co*, 352 Mich 342; 89 NW2d 594 (1958), which was decided before the General Court Rules of 1963 were adopted. *Al-Shimmari, supra* at 296. Further, the *Rogers* Court failed to address GCR 1963, 504.2, which, like MCR 2.504(B)(3), provided that dismissals pursuant to that subrule and those not provided for in that rule operated as adjudications on the merits. *Al-Shimmari, supra* at 296-297. Therefore, the *Rogers* decision was inconsistent with MCR 2.504(B)(3), and the Court *Al-Shimmari* Court overruled it, holding:

there is no reasonable reliance interest on plaintiff’s part, or on the part of similarly situated plaintiffs, that would be undermined by the overruling of *Rogers*. We do not believe that any plaintiff would have risked late service of process, and hence lack of compliance with the statute of limitations, on the basis that such lack of compliance, although it might result in the dismissal of a lawsuit against an agent, would not constitute an adjudication on the merits against the agent and therefore would not require the dismissal of a lawsuit against a principal based on vicarious liability. [*Al-Shimmari, supra* at 297 n 10.]

Given that the *Al-Shimmari* Court applied MCR 2.504(B)(3) in overruling *Rogers*, and MCR 2.504(B)(3) has been in effect since 1985, *Al-Shimmari* does not establish a new principle of law. Rather, it merely interprets an existing law. See *Bolt, supra* at 44. Further, our Supreme Court

recently applied *Al-Shimmari* retroactively in *Washington, supra* at 418-419. Therefore, the decision applies retroactively, and the dismissal of the Smiths' claims against defendant in the underlying case pursuant to MCR 2.116(C)(7) and (C)(10) constitutes an adjudication on the merits.

We must next determine whether plaintiff and Universal are in privity. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v Michigan*, 470 Mich 105, 122; 680 NW2d 386 (2004). For privity, "a perfect identity of the parties is not required, only a substantial identity of interests that are adequately presented and protected by the first litigant." *Id.* (internal quotations and citation omitted). Plaintiff is the assignee and subrogee of Universal. An assignee acquires the assignor's rights and stands in the assignor's shoes, *Professional Rehabilitation Assoc v State Farm Mut Automobile Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998), and a subrogee, upon satisfying an obligation to the subrogor, stands in the place of the subrogor, attaining the same rights to recover against the third party, *Citizens Ins Co of America v American Community Mut Ins Co*, 197 Mich App 707, 709; 495 NW2d 798 (1992). Therefore, Universal represented the same legal right that plaintiff is now trying to assert, and they are in privity. See *Adair, supra* at 122.

Res judicata is broadly applied, and it bars "every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 213; 699 NW2d 707 (2005). Universal's liability in the underlying case was based on vicarious liability for the alleged negligence of defendant, who was dismissed with prejudice in the underlying action. Defendant's dismissal constituted an adjudication on the merits of the claims against him, *Washington, supra* at 416-417; *Al-Shimmari, supra* at 295, but Universal did not appeal that decision, even though "a summary disposition ruling is the procedural equivalent of a trial on the merits that bars relitigation on principles of res judicata", *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004). Nor did Universal pursue its appeal of the verdict. Similarly, although Universal obtained permission to file a third-party complaint against defendant, it failed to do so. Therefore, the contested matter in the instant case, whether Universal was entitled to indemnification from defendant, could have been resolved in the underlying action, and Universal failed to exercise reasonable diligence to raise the issue. Accordingly, we hold that res judicata bars the instant action. The trial court properly denied plaintiff summary disposition and granted defendant summary disposition, albeit for a different reason, and its decision will be upheld on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Plaintiff argues that it only needs to show that Universal was potentially, rather than actually, liable to the Smiths in order to pursue common-law indemnification from defendant. See *St Luke's Hosp, supra* at 454-455. However, defendant's dismissal with prejudice from the underlying case left no basis on which Universal could be found liable in that case. Universal's failure to seek relief in the underlying action—by appealing the dismissal of defendant, by moving for summary disposition, or by pursuing its appeal—precludes it from obtaining indemnification from defendant in the instant case.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen Fort Hood