STATE OF MICHIGAN

COURT OF APPEALS

HARRY LAZECHKO,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant,

and

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
July 10, 2008

No. 276111
Wayne Circuit Court
LC No. 02-217713-CK

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition on reconsideration in favor of defendant, Allstate Insurance Company ("Allstate"). We affirm.

I. Basic Facts and Proceedings

Pursuant to a settlement agreement, plaintiff entered into a land contract on December 14, 2001, with Joseph and Ann Melville whereby plaintiff agreed to sell the Melvilles real property in New Hudson and the Melvilles agreed to pay plaintiff $375,000 on or before March 11, 2002. In accordance with the land contract, the Melvilles obtained insurance for the property from Allstate, listing plaintiff as an additional insured. Plaintiff maintained an insurance policy with defendant Auto Owners Insurance Company ("Auto Owners"). A fire destroyed the house and a garage on the property on January 27, 2002, and the Melvilles failed to pay plaintiff under the land contract. The parties agreed to void the land contract and entered into a second settlement agreement, which provided for the sale of the property. The Melvilles paid plaintiff $375,000, and plaintiff conveyed the property to them by warranty deed. Appraisals indicated that the value of the property increased after the fire because without the house, it was possible to subdivide it.

When Auto Owners refused to pay for the loss, plaintiff filed a complaint against it, alleging breach of contract and bad faith, and he later added Allstate as a defendant. Defendants

moved for summary disposition, arguing that plaintiff had not suffered a pecuniary loss because the Melvilles paid him $375,000, the amount due under the land contract before the fire, and he was not entitled to recover under the insurance contracts. The trial court denied both motions, finding a question of fact, and this Court affirmed. *Lazechko v Auto Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 28, 2005 (Docket Nos. 251061 and 251245).

The Melvilles filed a complaint against Allstate when it failed to pay them for the loss. Allstate removed this action to the United States District Court for the Eastern District of Michigan. After this Court issued its opinion in the state court action, Allstate and the Melvilles agreed to settle the federal case for $360,383, the policy limit under "Coverage A".[1] Several parties made claims to these proceeds of the Allstate policy, and Allstate filed an interpleader action in federal court to join all the parties, including plaintiff. Allstate moved for summary judgment, claiming that it only owed $360,383 pursuant to its policy in accordance with its settlement agreement with the Melvilles. Plaintiff opposed this motion and moved for summary judgment. The federal court granted Allstate's motion and denied plaintiff's motion. Consequently, plaintiff did not receive any of the interpleaded funds.

Plaintiff and Auto Owners settled plaintiff's claim, and Auto Owners was dismissed from the instant action. Plaintiff moved for summary disposition regarding its claim against Allstate, arguing that the law of the case doctrine barred Allstate from asserting its only defense, that plaintiff had not suffered a pecuniary loss. Allstate requested summary disposition in its favor, contending in part that it had interpleaded the entire Coverage A amount and it was not liable to plaintiff because the policy afforded only one coverage amount. Plaintiff responded, asserting that Allstate owed him a separate obligation because he was a mortgagee, and he was entitled to payment under "Coverage B" for the garage and the "extended limits" portion of the policy. The trial court initially denied summary disposition, but granted Allstate's motion on reconsideration. The trial court ruled that Allstate had paid the full amount due for the loss of a dwelling under Coverage A when it interpleaded the funds in federal court and res judicata barred plaintiff's claims. The trial court also held that the garage was not insured under Coverage B.

II. Res Judicata

Plaintiff argues that the trial court erred in applying the doctrine of res judicata. We disagree.

We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Tinman v Blue Cross & Blue Shield of Michigan*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Generally, a trial court will not grant a motion for reconsideration that "merely presents the same issues ruled on by the court[.]" MCR 2.119(F)(3). Rather, "[t]he

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[1] "Coverage A" was the section of the policy covering the "dwelling including attached structures" on the property.

moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). However, "'[i]f a trial court wants to give a "second chance" to a motion it has previously denied, it has every right to do so, and [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion.'" *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000), quoting S*mith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986).

When deciding a motion pursuant to MCR 2.116(C)(7), this Court must consider the pleadings as well as any affidavits and documentary evidence submitted by the parties. *Coleman v Kootsillas*, 456 Mich 615, 618; 575 NW2d 527 (1998). We review de novo questions of law, including the application of res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

"Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action." *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). Res judicata applies where: "(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*, *supra* at 417. "If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law." *Pierson Sand & Gravel, Inc v Keller Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999).

Plaintiff asserts that the state and federal court actions were separate and distinct and could not have been resolved, one within the other. Although the issue in the state court action involved whether plaintiff had sustained a pecuniary loss and the issues involved in federal court were whether Allstate could interplead the total amount under Coverage A of $360,383 and whether plaintiff was entitled to recover any of these proceeds, resolution of plaintiff's state court action was dependent on resolution of the federal action. Even if plaintiff had sustained a pecuniary loss concerning the house on the property, it would still be necessary to determine the amount to which plaintiff was entitled to recover under Coverage A. When the federal court ruled that Allstate could interplead $360,383—the policy limit under Coverage A[2]—and that plaintiff was not entitled to these funds, whether plaintiff suffered a pecuniary loss with respect to Coverage A became moot because there were no funds remaining for plaintiff to recover. Thus, the federal action resolved plaintiff's state action with respect to whether he could recover for the loss of the dwelling under Coverage A.

Not only were the same parties involved in the state and federal actions, but the federal action was resolved on the merits. In challenging Allstate's summary judgment motion in the

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[2] The policy expressly provides: "In the event of a covered loss, we will not pay for more than an insured person's insurable interest in the property covered, nor more than the amount of coverage afforded by this policy."

federal interpleader action, plaintiff argued that his interest in the insurance contract was fixed at the time of the loss, he had not waived his right to insurance proceeds because the land contract was void when he sold the property to the Melvilles, and Allstate's settlement with the Melvilles was invalid because plaintiff was not involved. The court disagreed and found that plaintiff was not entitled to recover any proceeds under Coverage A. The federal court granted defendant summary judgment and denied plaintiff summary judgment; therefore, this issue was decided on the merits. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004); *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). Moreover, because this issue was decided on the merits, it is irrelevant that plaintiff was not involved in the settlement between the Melvilles and Allstate.

It should be noted that in ruling against plaintiff, the federal court provided little elaboration other than noting that plaintiff's state court claim was "separate and distinct" from the action in federal court. This statement was incorrect because plaintiff's claim in state court depended on his ability to recover the funds allocated for his claim, i.e., funds provided under Coverage A of the policy. Regardless, "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Martino v Cottman Transmission Systems, Inc*, 218 Mich App 54, 66; 554 NW2d 17 (1996), quoting *Federated Dep't Stores, Inc v Moitie*, 452 US 394, 398; 101 S Ct 2424; 69 L Ed 2d 103 (1981). Thus, regardless of the federal court's statement, the doctrine of res judicata bars plaintiff from pursuing the instant claim for recovery of the proceeds payable under Coverage A.

Plaintiff asserts that the trial court erred in citing *Pierson Sand & Gravel*, *supra* at 380, because that case stands for the proposition that a federal court may not retain supplemental jurisdiction when it dismisses a party's federal claims. Plaintiff mischaracterizes *Pierson*. Specifically, *Pierson* found that res judicata does not bar a plaintiff from bringing claims in state court when a federal court has refused to retain jurisdiction over those claims after dismissing the plaintiff's federal claims. *Id*. at 382. In any event, this distinction is not applicable here because, as noted above, the federal court's ruling was dispositive with respect to the instant case.[3]

Finally, plaintiff contends that, because the settlement between Allstate and the Melvilles did not resolve any issues other than Allstate's liability under Coverage A, collateral estoppel is inapplicable. Whereas res judicata bars a subsequent action based on the same claim as a prior action, *Chestonia*, *supra* at 429, collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent, different cause of action when the issue was actually determined in the prior cause of action, *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). In making this claim, plaintiff notes that the trial court failed to rule on the issues of whether Allstate acted in bad faith, was liable for attorney fees, "or other issues pending in addition to Appellant's claim for Coverage A policy limits." Other than referencing these issues, plaintiff

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[3] Further, plaintiff's reliance on *Jones v Reynolds*, unpublished opinion per curiam of the Court of Appeals, issued April 7, 2005 (Docket No. 250616), is misplaced, and unpublished opinions are not binding under the doctrine of stare decisis, MCR 7.215(c)(1); *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 515; 739 NW2d 402 (2007).

fails to develop an argument or cite any facts in support of this contention. It is not enough for an appellant to "'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Failure to properly address the merits of this assertion constitutes abandonment of the issue. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004). In any event, given that plaintiff is not entitled to the proceeds under Coverage A, he cannot claim bad faith or attorney fees for Allstate's failure to pay him these proceeds.

III. Ambiguity

Plaintiff contends that the trial court erred in ruling that the garage was not covered under the policy because the policy was ambiguous concerning whether it covered the garage as an "other structure." We disagree. An insurance contract is enforceable if, when read as a whole, it is "clear and unambiguous on its face." *Farm Bureau Mut Ins Co v Blood*, 230 Mich App 58, 61; 583 NW2d 476 (1998). To be clear, an insurance contract must fairly admit of but one interpretation. *Id.* "An insurance contract is ambiguous if, after reading the entire contract, its language reasonably can be understood in differing ways." *Id*. at 61-62.

The policy at issue sets forth coverage for "Other Structures" under Coverage B. This section explains, in relevant part, that "other structures" are "[s]tructures . . . separated from your dwelling by clear space", and "[s]tructures attached to your dwelling by only a fence, utility line, or similar connection." There was no ambiguity in the policy. The garage on the property was connected to the house by a breezeway. A breezeway is "an open-sided roofed passageway for connecting two buildings, as a house and a garage." *Random House Webster's College Dictionary* (1997). The garage was not a structure separated from the house "by clear space." Further, given that a breezeway is a type of passageway, it is not a connection similar to a fence or utility line. Therefore, the garage was not attached to the house by a "similar connection." Consequently, the policy was clear and unambiguous on its face, and we must enforce it as written. *Auto Club Ins Ass'n v Hardiman*, 228 Mich App 470, 473-474; 579 NW2d 115 (1998).

Plaintiff also argues that the policy includes coverage for the garage because the declaration page provides coverage of up to $50,000 for "other structures." However, the declaration page makes no reference to the garage. Rather, it is Coverage B that outlines what "other structures" the policy covers, and as we have determined, *supra*, the garage is not an "other structure."

Plaintiff also claims that Allstate is estopped from asserting that the garage was not covered under the policy because its agent admitted that it had collected premiums for coverage pertaining to the garage. Because plaintiff is offering the agent's unsworn statement to prove that the Melvilles and Allstate intended coverage for the garage when they entered into the insurance contract, this statement constitutes hearsay. MRE 801(c). No exception applies under MRE 803, and the statement is inadmissible. *Solomon v Shuell*, 435 Mich 104, 114; 457 NW2d 669 (1990). Further, because the insurance contract was clear and unambiguous on its face, the parol evidence rule bars admission of this statement to prove intent. *Burkhardt v Bailey*, 260 Mich App 636, 656-657; 680 NW2d 453 (2004).

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly