STATE OF MICHIGAN

COURT OF APPEALS

STATE AUTO PROPERTY & CASUALTY INSURANCE, Plaintiff-Appellee,	UNPUBLISHED September 25, 2008
v	No. 276535 Kent Circuit Court
A-3, INC., CHRIS CORTESE, and LISA CORTESE, Defendants-Appellants.	LC No. 05-003202-NO

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Defendants, A-3 and Chris Cortese, appeal as of right the trial court's judgment for plaintiff following a bench trial. We affirm.

This lawsuit finds its basis in an automobile accident involving Henry Leon. At the time of the accident, Leon was driving a vehicle owned by defendant A-3 and insured by plaintiff. Leon was injured in the accident and submitted a claim for first party benefits to plaintiff, who ultimately paid approximately $37,000.00 in benefits to/on behalf of Leon. A-3 did not carry workers' compensation insurance.

Plaintiff then brought an action in the Worker's Disability Compensation Bureau for a determination that Leon was an "employee" under the workers' disability compensation act (MCL 418.101 *et seq*.) The magistrate determined that Leon was an "employee" as defined in MCL 418.161(1). Defendants appealed the determination to the Worker's Compensation Appellate Commission, and then to this Court (*State Auto Prop & Casualty Ins v A-3, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2008 (Docket No. 279554)), both of which affirmed the magistrate's determination.

Plaintiff subsequently brought this action against defendants, claiming it was equitably subrogated to Leon's rights against defendants regarding workers' compensation benefits. Defendants, however, asserted that Leon was not their employee at the time of the accident but was, instead, an independent contractor, such that plaintiff had no claim for recovery against defendants. At the bench trial in this matter, the parties stipulated to the admission of the transcript of the proceedings before the magistrate and the exhibits admitted therein. While the trial court found that res judicata and collateral estoppel applied to the magistrate's determination

of Leon's employee status, it also considered the evidence independently and found, too, that Leon was an "employee" under the workers' compensation act, and that equitable subrogation was properly applied to plaintiff's action against defendants.[1] The trial court ultimately entered a judgment in plaintiff's favor in the amount of $65,150.31.

Defendants argue on appeal that the trial court's application of the doctrine of collateral estoppel was improper. We review this issue de novo. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 33-34; 620 NW2d 657 (2000).

Three elements must be satisfied for collateral estoppel to apply: (1) an issue of fact or law that was indispensable to the judgment was actually litigated and necessarily determined in a final, valid judgment, (2) the same parties or their privies litigated the issue and had a full and fair opportunity to do so, and (3) mutuality of estoppel. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004). With respect to administrative proceedings such as the one involved here before the workers' compensation magistrate, collateral estoppel is applicable if the magistrate's determination was adjudicatory in nature, allowed for an appeal, and the Legislature intended that the decision would be final if no appeal was taken. *Dearborn Hts School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 129; 592 NW2d 408 (1998). An administrative agency's decision is conclusive of the rights of the parties, or their privies, in all other actions or suits in the same or any other tribunal of concurrent jurisdiction on the points and matters in issue in the first proceeding. *Nummer v Treasury Dept*, 448 Mich 534, 557; 533 NW2d 250 (1995).

We affirm the trial court's application of collateral estoppel in this case. Mutuality was present because the party invoking collateral estoppel, plaintiff, was also a party to the prior action before the magistrate, and plaintiff would have been bound by an adverse decision. *Monat, supra* at 684-685. In addition, plaintiff and defendants had a full and fair opportunity to litigate the issue of whether Leon was an "employee" before the magistrate. Leon and Chris Cortese testified, and documents consisting of the independent dealer agreement, tax forms, insurance forms, and medical provider forms were submitted as exhibits. Whether Leon was an "employee" was a determination essential to plaintiff's claim in both forums, and the magistrate entered a final and valid decision on this specific matter. An appeal was provided for; defendants appealed in a related case, and this Court affirmed. The magistrate's decision would have otherwise been final. MCL 418.851.

Defendants also challenge the application of the doctrine of res judicata by the trial court. Whether the doctrine of res judicata is applicable is a question of law reviewed de novo by this Court. *Gee v Arthur B Myr Industries, Inc*, 480 Mich 1154, 1156; 746 NW2d 612 (2008). Res judicata applies where (1) there has been a prior decision on the merits, (2) the issue was either actually resolved in the first case or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought it forward, and (3) both actions were between the same parties or their privies. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417;

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[1] Plaintiff's claim as to Lisa Cortese was dismissed, and plaintiff does not appeal that portion of the judgment.

733 NW2d 755 (2007). Res judicata applies to issues of fact previously litigated and to "points of law necessarily adjudicated in determining and deciding the subject matter of the litigation." *Jones v State Farm INS Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993). The doctrine of res judicata applies to administrative determinations which are judicatory in nature, where a method of appeal is provided, and where the legislative intention to make the determination final when no appeal is taken is clear. *Senior Accountants, Analysts and Appraisers Ass'n v City of Detroit*, 60 Mich App 606, 610; 231 NW2d 479 (1975).

We affirm the trial court's application of res judicata to the issue whether Leon was an "employee." There was a prior decision on the merits. The parties stipulated that this issue was the only issue before, and to be decided by, the magistrate, and they presented testimonial and documentary evidence regarding the issue. The magistrate specifically resolved the issue. Both actions were between the same defendants and plaintiff and, as previously discussed, the determination was judicatory in nature, a method of appeal was provided (and employed), and the legislature intended that the decision be final if no appeal were taken.

Although Michigan courts may hesitate to apply res judicata when only an issue of law is present, this is not the case where, as here, the causes of action arise out of the same subject matter or transaction. *Young v Edwards*, 389 Mich 333, 338-339; 207 NW2d 126 (1973). Further, there has been no injustice or intervening change in law or fact to prevent its application. *Id.* at 338-339.

In making their argument regarding res judicata, defendants claim that the magistrate never had jurisdiction to decide the issue of Leon's status as an employee. This issue was not raised before the trial court until the day of trial and the trial court declined to address the issue. As a general rule, appellate review is limited to issues actually decided by the trial court. *Allen v Keatings* 205 Mich App 560, 564-565; 517 NW2d 830 (1994). Thus, we need not address this argument. Moreover, we find this issue moot because the trial court did not simply rely on the magistrate's decision in deciding the issue. In rendering its decision, the trial court noted that it was making a factual finding that Leon was an employee and that it was *additionally* finding that res judicata and collateral estoppel applied. We agree with the trial court's independent conclusion that Leon was an employee for purposes of the WDCA.

The determination whether an individual is an "employee" under the workers' compensation act is a question of law and therefore reviewed de novo by this Court. *McCaul v WCAC Modern Tile & Carpet, Inc*, 248 Mich App 610, 615; 640 NW2d 589 (2001). The definition of "employee" under the workers' compensation act is set forth in MCL 418.161(1). The subsections pertinent to this case provide:

> (l) Every person in the service of another, under any contract of hire, express or implied . . .
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> (n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold

> himself or herself out to and render service to the public, and is not an employer subject to this act. [MCL 418.161(1)(l) and (1)(n).]

These two subsections "must be read together as separate and necessary qualifications for establishing employee status." *Reed v Yackell*, 473 Mich 520, 530; 703 NW2d 1 (2005). MCL 416.161(1)(l) requires a two-pronged analysis: determining whether Leon was "in that service pursuant to an express or implied contractual relationship," and then whether this relationship was "of hire." *Id.* at 531.

Leon and A-3 signed a "Kirby Independent Dealer Agreement." This agreement, as the magistrate concluded and defendants conceded, indicated that Leon was in the service of defendants pursuant to an express contractual relationship. The language in the agreement clearly indicates that Leon, as a dealer, was an independent contractor and not an employee for workers' compensation purposes. The agreement further provided that Leon was an independent merchant and "not subject to direction and control by Distributor with respect to his/her selling activities." However, according to Welch & Royal, Worker's Compensation in Michigan: Law and Practice (5th ed), § 2.7, p 2-6, the employee/independent contractor determination must be made by evaluating the facts presented and whether they meet the statutory definition, and "not what labels the parties apply to the situation or what forms they use to report income." The language in MCL 418.161(1)(n) does not confine the examination of employee status strictly to the parties' contractual language, if there is a contract.

Looking at the two-pronged analysis, defendants dispute whether this was a contract "of hire." This determination depends on whether the compensation received by Leon was a mere gratuity, or was "'intended as wages, i.e., real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer.'" *Reed, supra* at 532, quoting *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561; 592 NW2d 360 (1999). Wages of $35 to $40 for a full day's work were held to be real and substantial in *Reed, supra* at 533. Free skiing, free hot beverages, discounted meals, family skiing privileges, and discounts at the ski resort's store were held to be mere accommodations and gratuities, and not intended as compensation in *Hoste, supra* at 577-578.

Here, Leon agreed to perform certain work, selling Kirby vacuums on consignment, in exchange for compensation in the form of part of the profit from each sale. Defendants also benefited by receiving a portion of these profits. Leon's testimony before the magistrate and the Form 1099s submitted into evidence demonstrate that Leon received commission checks from defendants, earning $18,776 in 2007 and $7,730 in 2003, and that this was his sole source of income. This Court finds that such compensation was not intended as a mere gratuity or accommodation. Leon contractually expected to receive a portion of the profits in exchange for his sales services. It was his exclusive source of income, for which he requested wage loss benefits, and it was real, palpable and substantial compensation.

With respect to the second part of the definition of "employee" applicable here, MCL 418.161(1)(n), indicates that a person performing the "service in the course of an employer's trade, business, profession or occupation," is an employee. The definition excludes from this group, however:

> any such person who: (1) maintains his or her own business in relation to the service he or she provides the employer, (2) holds himself or herself out to the public to render the same service that he or she performed for the employer, and (3) is himself or herself an employer subject to the WDCA. In other words, subsection 161(1)(n) sets forth three criteria for determining whether a person performing services for an employer qualifies as what is commonly called an "independent contractor" rather than an employee. As we explained in *Hoste*, these three statutory criteria have superseded the former common-law-based economic realities test for determining whether an individual is an independent contractor to the extent that they differ from the test. *Hoste, supra* at 572. [*Reed, supra* at 535-536.]

Notably, MCL 418.161(1)(n) provides that a person is an employee if, in relation to the service performed in the course of the business, trade, etc. of an employer at the time of an injury, that person *does not* maintain a separate business, *hold* himself out to and render service to the public and *is not* an employer. This is important, as the use of the present tense indicates that whether a person *is allowed* or *is capable of* engaging in these activities is irrelevant. What is essential is that the person does so at the time of the injury.

Here, Leon testified that he did not have a d/b/a, had not formed a separate entity, did not do his own advertising or hold himself out to the public as rendering the same service as he provided through defendants, or any other type of salesman service selling other vacuum brands or other products. He testified that he represented himself as a Kirby salesman and that Kirby vacuums could only be sold through in-home demonstrations. He testified that he utilized A-3's office space to store supplies, equipment, and clean machines, and rented the van from A-3, who insured it. Leon also testified that he could receive money advances from A-3 if he was short on money and the money would be deducted from the checks he received from A-3. Further, While Leon may have exercised relatively unrestrained control over his working hours, defendants had some control over his activities.

We find no clear error in the trial court's finding that Leon was an employee under MCL 418.161(1). In reaching our conclusion, we note the fact that taxes were not withheld from Leon's commission checks and that Leon was largely free to set his schedule were not controlling. *Reed, supra* at 536 n 18.

Lastly, we hold that the trial court's application of equitable subrogation in this case was proper. This Court undertakes a de novo review of the trial court's interpretation of a remedy such as equitable subrogation. *Auto-Owners Ins Co v Amoco Production Co*, 468 Mich 53, 57; 658 NW2d 460 (2003). Equitable subrogation is a "a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other." *Id.* at 59. The subrogee acquires the subrogor's rights, no more and no less. The subrogee cannot be a "mere volunteer". *Id.* Thus, the subrogee must be fulfilling a legal or equitable duty by its actions. *Eller v Metro Industrial Contracting, Inc*, 261 Mich App 569, 573; 683 NW2d 242 (2004).

We find that plaintiff was not acting as a volunteer when it paid Leon's expenses pursuant to its no-fault insurance policy with defendants, even if it was the secondary, and not the primary, provider of insurance, because it was protecting its own interests, and thus may

properly invoke the doctrine of equitable subrogation. *Id.* at 574. As such, it was entitled to all of the rights and remedies Leon held against defendants. *Auto-Owners Ins Co, supra* at 59.

In *Auto-Owners Ins Co, supra* at 63-64, the Court examined its decision in *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 132; 485 NW2d 695 (1992), regarding the interplay between the no-fault act, the workers' compensation act, and the doctrine of equitable subrogation:

> The Court in *New York Life* addressed the interplay between the no-fault act and the doctrine of equitable subrogation and concluded that the statute of limitations contained in the no-fault act, which by its terms applied to an action to recover personal protection insurance benefits, did not apply to bar a no-fault carrier's equitable subrogation claim, which was based on the claim that the insured *would have had* against the primary insurer. In light of this, the common-law equitable subrogation claim fell outside the scope of the no-fault act. *New York Life, supra* at 135-138. Similarly, plaintiff's recovery here, which is predicated on the doctrine of equitable subrogation, is not limited by the WDCA.

On appeal, defendants' references to provisions of the no-fault act are irrelevant because plaintiff is not claiming reimbursement under the no-fault act. Rather, it is asserting it is equitably subrogated to Leon's claim against defendants, which derives from the workers' compensation act. The nature of plaintiff's claim, as subrogee, is determined by the nature of Leon's claim against defendants, i.e., his claim under MCL 418.641. *Id.* at 60.

In *Auto-Owners Ins Co, supra* at 62, the Court permitted the no-fault insurer's action for equitable subrogation against an employer to recover medical expenses paid on behalf of an employee for a work-related injury. The employer was self-insured under the workers' compensation act. *Id.* at 55. Defendants draw the distinction that, here, there was no workers' compensation benefits available to Leon, either through defendants or defendants' workers' compensation insurance provider, because defendants were not self-insured and did not carry that type of insurance. According to defendants, because there were no benefits otherwise available to Leon, plaintiff's obligation was therefore primary, not entitling it to equitable subrogation. We disagree.

Defendants concede that A-3 was an employer subject to the workers' compensation act. If defendants had carried insurance as required, Leon would have been primarily covered through that policy. Even without insurance, defendants' responsibility under the workers' compensation act did not disappear. MCL 418.641. Thus, plaintiff's obligation was not primary. Further, MCL 418.641(2) provides for a civil action in circuit court where no workers' compensation benefits were provided pursuant to MCL 418.611. Stepping into Leon's shoes, plaintiff is entitled to the same.

Defendants' argument that plaintiff should have inquired into whether defendants carried workers' compensation insurance, and inserted a provision in its policy with defendants requiring such insurance, is without merit. We reiterate that A-3 was an employer subject to the workers' compensation act. As such, where A-3 had employees, as the trial court decided, it was required by the workers' compensation act, regardless of any provision in an insurance policy, to carry workers' compensation insurance or be self-insured.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto