STATE OF MICHIGAN

COURT OF APPEALS

STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff-Appellant,

v

DALE SCHOTTS and SUSAN SCHOTTS,

Defendants,

and

MIC GENERAL INSURANCE COMPANY,

Garnishee Defendant-Appellee.

UNPUBLISHED
December 3, 1999

No. 208145
Washtenaw Circuit Court
LC No. 92-007831 NZ

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiff State Farm Fire and Casualty Company appeals as of right from an order granting garnishee defendant MIC General Insurance Company's motion for summary disposition in this insurance liability case. We affirm.

Plaintiff argues that the mutual acceptance of the $25,000 mediation award by defendant and garnishee defendant, resulting in a consent judgment at the conclusion of Case No. 93-001431 CK, does not bar plaintiff from litigating the issue of garnishee defendant's liability on its insurance contract with defendant because plaintiff was not a named party or privy to the Case No. 93-001431 CK litigation and because this issue was never determined in Case No. 93-001431 CK. We disagree.

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. *Dart v Dart,* 224 Mich App 146, 156; 568 NW2d 353 (1997), aff'd 460 Mich 573; 597 NW2d 82 (1999). Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and

(4) both actions involved the same parties or their privies. *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 379; 521 NW2d 531 (1994); *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998); *Dart, supra*.

First, plaintiff argues that it is not barred from litigating the issues in the garnishment action because it was not a party or privy to the consent judgment entered in Case No. 93-001431 CK. However, this argument is without merit. The same party prerequisite of res judicata requires that the parties were previously adversarial. Adverse parties are those who, by the pleadings, are arrayed on opposite sides with a controversy between them. *York v Wayne Co Sheriff*, 157 Mich App 417, 426-427; 403 NW2d 152 (1987). However, the parties to the second action need be only "substantially identical" to the parties in the first action, in that the rule applies to both parties and their privies. *In re Humphrey Estate*, 141 Mich App 412, 434; 367 NW2d 873 (1985). "A party in this connection is one who is 'directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment.'" *Howell v Vito's Trucking and Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971), quoting 1 Greenleaf, Evidence (15th ed), § 523. A privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee. *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270, modified in part on other grounds 431 Mich 898; 432 NW2d 171 (1988).

Plaintiff was in privity with defendant through the mutual release and satisfaction agreement that was signed by both. Although plaintiff claims that the mediation award was only for a personal claim of defendant's and that plaintiff was not a party or privy to the action, the terms of the satisfaction agreement make it apparent that plaintiff was in privity with defendant with respect to that case. Plaintiff's direct interest in the subject matter of Case No. 93-001431 CK is evidenced by its agreement with defendant to provide substitute counsel on defendant's behalf, to control all of the proceedings, and to release defendant from any liability in exchange for the entry of judgment against defendant for $450,000. From the agreement, it appears that plaintiff "purchased" the consent judgment from defendant so that plaintiff could then use it in its claim against garnishee defendant. Consistent with that understanding, defendant, through counsel provided by plaintiff, requested in the mediation summary "an award representing full indemnification, penalty interest, and all costs." Considering the settlement agreement between defendant and plaintiff and their cooperative relationship in the action that resulted in the mediation consent settlement, we conclude that plaintiff was in privity with defendant for res judicata purposes.

Further, res judicata bars litigation in the second action not only of those claims actually litigated in the first action, but claims "arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not." *Limbach v Oakland Co Bd of Rd Comm'rs*, 226 Mich App 389, 396; 573 NW2d 336 (1997), quoting *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). The purpose of mediation is to settle cases in an expeditious and simplified manner. *Joan Automotive Industries, Inc v Check*, 214 Mich App 383, 388; 543 NW2d 15 (1995), quoting *Smith v Elenges*, 156 Mich App 260, 263; 401 NW2d 342 (1986). To allow splitting of claims would complicate and delay the resolution of civil actions and prohibit the acceptance

of a mediation award from resulting in the final settlement of a case. *Joan Automotive, supra* at 388-389. "[A]bsent a showing that less than all issues were submitted to mediation, a mediation award covers the entire matter and acceptance of that mediation award settles the entire matter." *Id.* at 386-387, quoting *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990). Further, MCR 2.403(M)(1) states that the judgment or dismissal obtained during mediation, once accepted, disposes of all claims in the action.

In this case, defendant's complaint against garnishee defendant was filed in October 1993; the mutual release and satisfaction agreement between plaintiff and defendant (which basically gave all rights of defendant to plaintiff) was signed in 1994; the mediation summary between defendant and garnishee defendant was filed in 1995; and the acceptance of the mediation was filed in 1996. Plaintiff did not make a showing that, during the mediation process, which occurred after plaintiff took defendant's rights against garnishee defendant, causes of action based on those rights were not subject to mediation. The purpose of mediation has always been to promote the final settlement of cases. "To accept [plaintiff's] position would result only in the partial settlement of actions, leaving the outstanding claims to wend their way through the courts, a result at odds with the purpose of mediation." *Joan Automotive, supra* at 389. Plaintiff's consent judgment in the amount of $450,000 was litigated and discharged in Case No. 93-001431 CK pursuant to the mutual release and settlement agreement and to the claims made in Case No. 93-001431 CK.

Plaintiff also argues that, even if plaintiff was considered a privy in Case No. 93-001431 CK, consent judgments are not given res judicata effect under Michigan law. However, this argument is meritless. Res judicata applies to consent judgments. *Schwartz v City of Flint,* 187 Mich App 191, 194; 466 NW2d 357 (1991). Summary dispositions and consent judgments constitute determinations on the merits. *Id.*; *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985). Although plaintiff cites *Schwartz* as a case that states that res judicata applies to consent judgments, plaintiff then argues that *Schwartz* is contrary to a number of Michigan cases. However, the cases referred to by plaintiff do not discuss res judicata, but rather discuss collateral estoppel. Apparently plaintiff believes that the two terms can be used interchangeably, but, in fact, they are two distinct concepts. "Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined," *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990), whereas res judicata "covers the preclusive effect of a judgment upon a subsequent proceeding on the basis of the same cause of action," *id.* at 154 n 7. Collateral estoppel often refers to issue preclusion while res judicata refers to claim preclusion. *Id.*

Having concluded that res judicata was properly applied here, we need only briefly address plaintiff's other arguments. Plaintiff's argument that garnishee defendant should not have been allowed to "tie the hands" of plaintiff by accepting the mediation award is belied by the fact that defendant, plaintiff's privy, also accepted that award. Plaintiff's implicit argument that we should ignore the doctrine of res judicata because it would have been "totally irrational" for plaintiff to have accepted $25,000 in settlement of its claims is presented without any supporting authority and we consider that argument to be waived.[1]

The trial court appropriately granted summary disposition to garnishee defendant and properly held that, after accepting the mediation award in total satisfaction of the claims of its privy against garnishee defendant, plaintiff may not now litigate these same claims by garnishment in this action. Because of this holding, we need not address whether garnishee defendant was actually liable on the insurance policy issued to defendant.

We affirm.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[1] We further note that, under the facts of this case, there was no legal excuse for plaintiff's failure to formally intervene in Case No. 93-001431 CK. Plaintiff certainly had knowledge of that case, and there is no indication in the record that plaintiff was prevented from intervening to become a party. Accordingly, plaintiff has waived its right to deny the binding effect of the consent mediation settlement entered in that case. *Wilcox v Sealey*, 132 Mich App 38, 46; 346 NW2d 889 (1984).