STATE OF MICHIGAN

COURT OF APPEALS

MARIE SMITH,

Plaintiff-Appellant,

v

SECURA INSURANCE and LINDA HEARING,

Defendants-Appellees,

and

SECURA INSURANCE,

Third-Party Plaintiff,

v

LINDA HEARING,

Third-Party Defendant.

UNPUBLISHED
July 14, 2000

No. 213521
Wayne Circuit Court
LC No. 96-642595-NF

MARIE SMITH,

Plaintiff-Appellant,

v

SECURA INSURANCE,

Defendant-Appellee.

No. 217243
Wayne Circuit Court
LC No. 97-722805-NF

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

In Docket No. 213521, plaintiff appeals as of right a trial court's order dismissing defendant/third-party plaintiff, Secura Insurance's (Secura) third-party claim against defendant/third-party defendant, Linda Haering[1]. However, the issues raised on appeal arise out of a judgment of no cause for action entered in favor of Secura and Haering following a jury trial. In Docket No. 217243, plaintiff appeals as of right the trial court's order granting Secura's motion for summary disposition based on res judicata. We affirm.

Both cases arise out of the same alleged motor vehicle accident. Plaintiff alleged that on February 1, 1995, while she was stopped at a traffic signal, a car driven by Linda Haering or an unknown uninsured motorist struck her vehicle from behind causing her injuries. Plaintiff sought damages either directly from Haering, or from Secura for the uninsured motorist claim. At trial, plaintiff was the only witness to testify to the circumstances of the accident, since she was the only eyewitness. Plaintiff testified that she sustained permanent injuries to her back as a result of the accident; however, plaintiff's vehicle was undamaged in the collision. Plaintiff claimed that even though the vehicle that struck her did not stop, she was able to copy the vehicle's license plate number. Plaintiff was unable to fully identify the driver or type of vehicle that hit her, but plaintiff was able to absolutely say that Haering was not the driver. The jury returned a verdict that neither Haering nor an unidentified uninsured motorist struck plaintiff's vehicle.

Prior to trial, plaintiff filed another lawsuit against Secura for medical expenses and lost wages pursuant to the personal injury protection (PIP) benefits provided under Michigan's No Fault Insurance Act. MCL 500.3105(1); MSA 24.13105(1). In her complaint, plaintiff alleged that she suffered medical expenses and lost wages due to the use of her vehicle, specifically, when plaintiff was involved in the accident described above. After entry of the judgment of no cause of action in the first case, Secura moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted Secura's motion, ruling that plaintiff's first-person PIP claim was barred by res judicata.

Plaintiff's first issue on appeal is that the jury's verdict was against the great weight of the evidence. To preserve this issue, a plaintiff must make a motion in the trial court for a new trial. *Hyde v Univ of Michigan Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997); *Brown v Swartz Creek Memorial Post 3720, VFW, Inc*, 214 Mich App 15, 27; 542 NW2d 588 (1995). Here, plaintiff failed to make such a motion in the trial court; therefore, plaintiff has waived this issue on appeal.

Plaintiff's second issue on appeal is that the trial court erred by failing to admit four of plaintiff's proposed exhibits. We disagree. The decision whether to admit evidence is within the discretion of the

[1] There appears to be an error in the spelling of defendant/third-party defendant's name. The order dismissing third-party claim, the order of judgment of no cause for action and this Court's docket sheet indicate the spelling as "Hearing," whereas defendant/third-party defendant's brief on appeal spells the name "Haering," and the testimony of defendant/third-party defendant indicates the name is properly spelled "Haering."

trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made," *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or "the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias," *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997).

In this case, plaintiff's exhibits were documents concerning the PIP benefits paid by Secura to plaintiff. Secura objected to the admission of the exhibits, and the trial court sustained the objection, ruling that the exhibits were not relevant. "Generally, all relevant evidence is admissible, and irrelevant evidence is not." MRE 402; *Ellsworth*, *supra* at 188-189. "Evidence is relevant if it has 'any tendency to make the existence of a fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" MRE 401; *Dep't of Transportation v Van Elslander*, 460 Mich 127, 129; 594 NW2d 841 (1999).

Plaintiff argues that the exhibits were relevant to whether Secura received, acknowledged, and responded to plaintiff's PIP claims in order to add credibility to plaintiff's claim of an accident. Plaintiff contended, in effect, that the fact that Secura paid PIP benefits was evidence that Secura acknowledged that an accident occurred and thus was evidence from which the jury could draw the inference that the accident had, in fact, occurred. We agree with the trial court that Secura's decision to pay PIP benefits for some period of time was not evidence that a car accident actually occurred. Moreover, plaintiff's proposed exhibits solely concerned Secura's payment of PIP benefits to plaintiff, which were not at issue in the trial. Plaintiff was seeking recovery of non-economic damages, and this Court cannot say that the trial court abused its discretion in excluding plaintiff's proposed exhibits. Furthermore, plaintiff's exhibits were properly excluded under MRE 409, which provides in relevant part that "[e]vidence of furnishing . . . medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury."

Plaintiff's last issue on appeal is that summary disposition on plaintiff's first-party PIP benefit case was inappropriate.[2] We disagree. The trial court ruled that plaintiff's claim was barred by res judicata. The applicability of res judicata is a question of law which is reviewed de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

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[2] Defendant Secura moved for summary disposition under MCR 2.116(C)(10) claiming that there was no genuine issue of material fact because given that the jury in the prior action had determined that no automobile accident occurred, plaintiff was not entitled to collect PIP benefits stemming from a non-occurrence. Although the trial court did not state under what provision it was granting summary disposition, the court reviewed the briefs and exhibits tendered by the parties and reference was made to the results of the prior trial. Therefore, this Court concludes that summary disposition was granted under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998).

Likewise, this Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

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 (1999). The doctrine applies to both facts and law, *Jones v State Farm Mutual Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993), and, as a general rule, res judicata will apply to bar relitigation based upon the same transaction or events that was decided in the prior action. *Id*.

Res judicata requires that: (1) the prior action was decided on the merits; (2) the matter contested in the second case was or could have been resolved in the first; and (3) both actions involved the same parties or their privies. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999); *Phinisee v Rogers*, 229 Mich App 547, 551; 582 NW2d 852 (1998). The issue in this case is whether the two cases involved the same subject matter. The test to determine whether the two actions involve the same subject is whether the facts are identical in both actions or whether the same evidence would sustain both actions. *Jones*, *supra* at 401; *Huggett v DNR*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998). "If the same facts or evidence would sustain both, the two actions are considered the same for purposes of res judicata." *In re Koernke Estate*, 169 Mich App 397, 399; 425 NW2d 795 (1988). If different facts or proofs would be required, res judicata does not apply. *York v Wayne Co Sheriff*, 157 Mich App 417, 423; 403 NW2d 152 (1987), quoting *Detroit v Nortown Theatre, Inc*, 116 Mich App 386, 393; 323 NW2d 411 (1982).

Plaintiff sued for first-party PIP benefits from an alleged accident she was involved in on February 1, 1995. Under a first-party PIP benefit claim, plaintiff must prove that the medical expenses and lost wages she incurred were the result of an "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle." MCL 500.3105(1); MSA 24.13105(1). In her complaint, plaintiff alleged that her injuries were the result of an accident when her vehicle was rear-ended by another vehicle. Likewise, in the previous action tried before the jury, plaintiff sued for permanent personal injuries that allegedly resulted from the same accident when her vehicle was allegedly struck from behind as she waited at a traffic signal by a vehicle driven by Haering or some other unidentified uninsured motorist.

Although plaintiff's cause of action in this case is different from her claim in the previous case, the proofs necessary for her to prevail in this case are identical to those in the previous case. See *Huggett*, *supra* at 198. To succeed in the previous action, plaintiff was required to prove that her vehicle had "contact" with another vehicle. In the first-party case, plaintiff must establish that her injuries arose out of the operation or use of her vehicle. MCL 500.3105(1); MSA 24.13105(1). Here, plaintiff alleged in her complaint that her injuries were caused by a collision with another vehicle. In plaintiff's prior action against Secura, plaintiff made the same claim. Since the jury already determined that plaintiff was not struck by either Haering or some other

unidentified uninsured motorist, plaintiff cannot base her claim on events that have already been litigated. Therefore, the trial court correctly determined that plaintiff's first-party claim was barred by the doctrine of res judicata.

Affirmed.

/s/ William B. Murphy
/s/ Jeffrey G. Collins
/s/ Donald S. Owens