STATE OF MICHIGAN

COURT OF APPEALS

FARMERS INSURANCE EXCHANGE,

Plaintiff-Appellee,

v

RUFUS YOUNG,

Defendant-Appellant,

and

NICOLE WILLIAMS and LINDA LEE,

Defendants.

UNPUBLISHED
August 3, 2010

No. 275584
Wayne Circuit Court
LC No. 06-601127-NF

HENRY FORD HEALTH SYSTEM,

Plaintiff-Appellee,

v

FARMERS INSURANCE EXCHANGE,

Defendant-Appellant.

No. 283865
Wayne Circuit Court
LC No. 06-611910-NF

Before: ZAHRA, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

In Docket No. 275584, defendant, Rufus Young, appeals as of right a declaratory judgment in favor of plaintiff, Farmers Insurance Exchange, which denied Young personal protection insurance benefits. In Docket No. 283865, defendant, Farmers Insurance Exchange, appeals as of right a subsequent judgment in favor of plaintiff, Henry Ford Health System ("Henry Ford"). It challenges the trial court's earlier order refusing to apply collateral estoppel

to Henry Ford's claim and denying Farmers Insurance Exchange's motion for summary disposition.[1] We affirm in Docket No. 275584 and reverse in Docket No. 283865.

I. BASIC FACTS AND PROCEEDINGS

This case arises out of an automobile accident that occurred on June 6, 2005. Nicole Williams owned a 2001 Kia, one of the vehicles involved in the accident. Before the accident, she received a prepaid vacation to the Bahamas. She planned to stay in the Bahamas from Sunday, June 5, 2005, until Thursday, June 9, 2005, and needed a caretaker for seven-year-old Jalen. Williams learned that her cousin, Lee, was losing her home. Williams invited Lee to stay at her home and take care of Jalen. Lee accepted the offer and moved in on Saturday, June 4, 2005.

Williams testified that she spoke to Lee about the Kia before she left for her trip. Because Williams had been on disability and could not drive, the vehicle was parked in Williams' fenced backyard. Williams had not insured it or used it for several months. Williams testified that she told Lee that "I didn't have any insurance," and Lee replied, "I'm not going anywhere." Williams believed that if she told Lee that the vehicle was uninsured, Lee would not drive it. Williams testified that Lee did not need to drive anywhere in order to care of Jalen. Williams provided Lee with food and money, and told Lee to walk Jalen around the corner to school. Lee had driven the Kia once previously, years earlier, in an "emergency." Cynthia Hughes, Williams' sister, told Lee that she would be available if Jalen or Lee needed transportation.

Hughes drove Williams to the airport. Williams testified that Hughes did not use the Kia for this trip. However, Lee testified that Hughes drove Williams to the airport in the Kia and that meanwhile she and Jalen stayed at Hughes' home. Lee claimed that Hughes did not own a vehicle. Lee testified that when Hughes returned, she gave Lee the keychain and instructed her to take Jalen and the vehicle back to Williams' home. Lee claimed that, in addition to caring for Jalen, she needed the Kia in order to move her belongings into Williams' home.

On the night of the accident, Lee was intoxicated. She drove Jalen, in the Kia, from Williams' home to a party store to buy beer. Then, she took Jalen to Young's workplace. Young worked in a two-family unit, repairing drywall, plumbing and electrical problems. He also lived on the premises. When Lee reached the unit, she drank beer on the porch while Jalen rode his bike. Lee stayed approximately 45 minutes. When Lee stood up to leave, between 7:00 and 8:00 p.m., both she and Young believed that she was no longer fit to drive.

Lee testified that she was "ready to go home," but leaving was not an emergency. She hoped that Young would help her move into Williams' home. In contrast, Young testified that Lee was annoying him at work. He testified that even though Lee was intoxicated, he could not

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[1] This Court consolidated the appeals in docket numbers 275584 and 283865. *Farmers Ins Exchange v Young*, unpublished order of the Court of Appeals, entered September 10, 2008 (Docket Nos. 275584 and 283865).

allow her and Jalen to stay there. Because he did not want Lee to drive in her condition, Young agreed to drive them to Williams' home. Young's driving privileges had been terminated since 1983. Young testified that Williams did not give him permission to drive the Kia before she left. He opined that, in light of his driving record, Williams would not have allowed him to use it. He did not know if Lee had permission to drive the Kia.

While Young was driving to Williams' home with Lee and Jalen, another driver hit the Kia. Lee and Young were injured. Jalen was killed. The other driver was criminally charged for the accident. Young did not receive a traffic citation.

Because none of the parties or vehicles were insured, Young subsequently applied for personal protection benefits for his injuries and medical expenses through the Assigned Claims Facility, MCL 500.3172. Farmers Insurance Exchange was Young's Assigned Claims Carrier. Farmers Insurance Exchange filed a complaint for declaratory relief on January 11, 2006. Farmers Insurance Exchange claimed that it could deny benefits to Young under MCL 500.3113 because he used Williams' vehicle without consent or a reasonable belief that he was entitled to use it.

Following the presentation of evidence at trial on December 6, 2006, the trial court stated that Young was not lawfully entitled to drive Lee and Jalen to Williams' home because he was unlicensed. The court also stated that no exigency existed because Lee had money to seek alternative transportation. Finally, the court stated that the Good Samaritan doctrine did not apply because it excuses a defendant from contributory negligence, not unlawful conduct. The trial court concluded that Farmers Insurance Exchange was entitled to relief. The trial court also dismissed Young's case against Farmers Insurance Exchange for first-party benefits, lower court no. 06-603757-NF, based on res judicata. Young filed a motion for reconsideration with the trial court on December 19, 2006. Consistent with its holding on December 6, 2006, on January 10, 2007, the trial court entered an order stating that Young unlawfully operated the Kia and had no reasonable belief that he was entitled to do so. The trial court also ordered that Young was not entitled to no-fault benefits arising out of the accident, which resulted from his use of the Kia. Young filed an appeal as of right.

In a separate case, Henry Ford filed a complaint against Farmers Insurance Exchange on April 25, 2006. It maintained that it provided services to Young for injuries arising from the June 6, 2005, accident. It claimed that Farmers Insurance Exchange was liable for the cost of these services pursuant to MCL 500.3112. In its answer, Farmers Insurance Exchange denied liability.

On February 23, 2007, Farmers Insurance Exchange filed a motion for summary disposition. It claimed that the trial court's earlier declaratory judgment finding that Young was not entitled to personal protection insurance benefits arising out of the June 6, 2005, accident, barred Henry Ford's recovery for Young's medical expenses from that accident. In response, Henry Ford argued that the parties in the two cases differed, it was not provided notice of the declaratory judgment action, and it had not yet had an opportunity to litigate the issue. It also

argued that the declaratory judgment was not final because all appeals had not been exhausted. Relying on *Borgess Medical Ctr v Resto*, 273 Mich App 558; 730 NW2d 738 (2007),[2] vacated and aff'd *Borgess Medical Ctr v Resto*, 482 Mich 946; 754 NW2d 321 (2008), and stating that summary disposition would be inequitable, the court denied Farmer's Insurance Exchange's motion on April 17, 2007.

The trial court excluded from evidence the outcome of the declaratory judgment and the case proceeded to trial. Young testified for Henry Ford. He clarified or changed his testimony from that in the declaratory judgment action in several respects. First, he testified that he wanted Lee to leave his workplace because he expected his supervisor and did not want him to see Lee. Second, in contrast to his earlier testimony that he did not know if Lee had permission to drive the Kia, Young testified that he believed she had permission. Third, in contrast to his earlier testimony that Williams would not have permitted him to drive the Kia, Young testified that Williams may have allowed it if he had asked her. Because Williams and Lee were not available, Williams' earlier deposition and Lee's testimony from Young's trial were read into the record for the jury. The jury found in Henry Ford's favor, concluding that Henry Ford incurred $157,523.86 for services provided to Young and that Young did not take the vehicle unlawfully, without a reasonable belief that he was entitled to do so.[3] A judgment for Henry Ford was entered on January 30, 2008. Farmers Insurance Exchange filed its claim of appeal from this judgment on February 20, 2008.

Docket No. 275584 was submitted on case call on February 13, 2008. On February 22, 2008, Young filed a motion in Docket No. 275584, requesting that this Court consider the jury verdict for Henry Ford and the corresponding January 30, 2008, judgment. This Court granted Young's motion on March 20, 2008. *Farmers Ins Exchange v Young*, unpublished order of the Court of Appeals, entered March 20, 2008 (Docket No. 275584). On August 26, 2008, Farmers Insurance Exchange moved to consolidate docket numbers 275584 and 283865. This Court granted the motion on September 10, 2008.[4]

II. DOCKET NO. 275584

On appeal, Young contends that the trial court erred when it concluded that, pursuant to an exclusion in MCL 500.3113, he was not entitled to personal protection insurance benefits.

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[2] The Supreme Court vacated this Court's majority opinion in *Borgess*, but affirmed its judgment for the reasons stated in the concurring opinion. *Borgess Medical Ctr, supra*, 482 Mich 946.

[3] We note that the trial court did not instruct the jury regarding the definition of "taken unlawfully" in MCL 500.3113(a).

[4] *Farmers Ins Exchange v Young*, unpublished order of the Court of Appeals, entered September 10, 2008 (Docket Nos. 275584 and 283865).

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling in a declaratory judgment action. *Toll Northville, Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008). The trial court's findings of fact are reviewed for clear error. *Christiansen v Gerrish Twp*, 239 Mich App 380, 387; 608 NW2d 83 (2000); MCR 2.613(C). A trial court's finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *Christiansen*, 239 Mich App at 387.

B. ANALYSIS

MCL 500.3113(a) provides, in pertinent part, that:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

This Court recently addressed the above provisions in *Amerisure Ins Co v Plumb*, 282 Mich App 417, 766 NW2d 878 (2009), lv denied, 485 Mich 909; 773 NW2d 18 (2009), under very similar circumstances.

In *Plumb*, the plaintiff was at a bar consuming alcohol. Another patron later arrived at the bar having driven himself there in an uninsured Jeep Cherokee. He left the keys in the vehicle and left the doors open. He did not know the plaintiff and did not give her permission to drive the vehicle. The plaintiff left the bar with two other men. One of the men allegedly handed her the keys to the Jeep and asked her to drive because he was on probation. The plaintiff was intoxicated, did not maintain automobile insurance, and did not reside with a relative who carried automobile insurance. Further, her driver's license had been suspended. Later that morning, the plaintiff was found lying in a field near the bar, having sustained severe injuries. Police concluded that the plaintiff had been driving the Jeep and was its sole occupant. *Plumb*, 282 Mich App at 420-421.

The plaintiff sought PIP benefits and an insurer was assigned the claim. The insurer, however, filed a declaratory action alleging that the plaintiff was not entitled to PIP benefits pursuant to MCL 500.3113(a) when the Jeep was taken unlawfully and when the plaintiff did not have a reasonable belief that "she was entitled to take and use the vehicle." In a split decision, this Court held that the plaintiff "unlawfully took" the Jeep and that the plaintiff did not reasonably believe that she was entitled to use a vehicle.

Here, the trial court made sufficient findings to conclude Young took the Kia unlawfully for the purposes of MCL 500.3113(a). The trial court found that Lee did not have Williams' permission to drive the Kia. Williams testified that she told Lee that the Kia was uninsured and she believed Lee would not drive it because Lee said, "I'm not going anywhere." The trial court also found that "[t]hough [Young] allegedly was, according to one person, given the direction by

a Linda Lee to operate the [Kia], [Young] had no reason to believe that she had the authority or permission to give him permission to operate the [Kia.]" The lower court record supports this finding. The record reflects that Young knew Lee, the mother of two of his daughters, and Williams, Lee's cousin, very well. Also, the record establishes that Young knew the Kia belonged to Williams and did not belong to Lee. Young even testified that Williams would not have consented to him driving the Kia. Further, a reasonable inference can be made that Lee would not have had Williams' permission to use Kia when she arrived at Young's place of employment intoxicated with Williams' son in tow. The argument that Young believed that Lee had Williams' permission to use the Kia under these circumstances is disingenuous and contrary to the record evidence. There is no evidence that Young had Williams' consent or implied consent to take the Jeep. Thus, consent could not be implied through a chain of entrustment from Lee to Young. *Bronson Methodist Hosp v Forshee*, 198 Mich App 617, 626; 499 NW2d 423 (1993).[5] Accordingly, under *Plumb*, Young took the Kia unlawfully for the purposes of MCL 500.3113(a).

In addition, *Plumb* also held that the plaintiff could not have reasonably believed that he was entitled to legally use the Jeep at the time of the accident. This Court noted that the plaintiff was intoxicated and her driver's license had been suspended. As noted, Lee and Young did not have consent to drive the Kia. In addition, Young was not issued a valid operator's license and he knew it was unlawful for him to operate the Kia without a license. Further, Lee testified that an emergency did not exist to require Young to drive. Although Lee was intoxicated and unable to drive, she had money for a cab or bus. She also could have contacted Hughes for assistance. Alternatively, Lee could have remained where she was until she was sober. In light of these facts, Young could not have reasonably believed that he was entitled to use the Kia. The trial court properly determined that, pursuant to MCL 500.3113(a), Young was excluded from personal protection insurance benefits. *Id.*[6]

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[5] Our dissenting colleague claims to be following his dissent in *Plumb*, 282 Mich App 417, in which he expressly, "concur[red] with the majority's holdings that no genuine issue of material fact exists regarding whether defendant Rae Louise Plumb *unlawfully took* the Jeep." *Id*. at 433 (O'CONNELL, J., dissenting) (emphasis added). However, under the same legally operative facts, the dissent now concludes that Young lawfully took the Kia. In doing so, the dissent claims to "follow the Court's statement in *Bronson*, *supra*, which specifically interpreted MCL 500.3113(a) so as *not* to exclude from coverage those individuals who operate a motor vehicle without a valid operator's permit." (Emphasis in original). The dissenting opinion in *Plumb* did not even mention *Bronson*. In any event, *Bronson* is distinguishable. In *Bronson*, the alleged insured presented evidence of an "unbroken chain of permissive use" to establish consent. *Id*., at 625. In the instant case, there is no evidence that Williams consented to Young driving the Kia. Indeed, the trial court's findings support a conclusion that Young engaged in joyriding. *Mester v State Farm Mut Ins Co*, 235 Mich App 84, 88; 596 NW2d 205 (1999). Because Young and Williams are not family members, the exception to joyriding is not available. *Id*.; *Allen v State Farm Mut Automobile Ins Co*, 268 Mich App 342, 346; 708 NW2d 131 (2005) (BANDSTRA, J.). Moreover, the majority of the Supreme Court does not appear to have been persuaded by the arguments now advanced by the dissent. *Plumb*, 485 Mich at 909-911.

[6] Rather than respond to the many contrivances within the dissent, i.e., nn 5, 12, we merely

On appeal, Farmers Insurance Exchange maintains that Henry Ford's action should have been barred by collateral estoppel as a result of the ruling in the declaratory judgment action.[7]

A. STANDARD OF REVIEW

The application of legal doctrines, such as collateral estoppel, is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

B. ANALYSIS

Farmers Insurance Exchange specifically argues that the trial court erred by denying its motion for summary disposition. It maintains that Henry Ford's claim for the repayment of Young's medical expenses should have been collaterally estopped by the trial court's declaratory judgment. We agree.

The application of collateral estoppel generally requires the satisfaction of three elements:

> (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment;" (2) "the same parties must have had a full [and fair] opportunity to litigate the issue;" 2 and (3) "there must be mutuality of estoppel." [*Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).]

Here, the issue actually litigated was whether MCL 500.3113(a) precluded Farmers Insurance Exchange's payment of personal protection insurance benefits to Young. Therefore,

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(…continued)

recognize the dissenting opinion would essentially sanction extending no-fault benefits to those operating automobiles who are unlicensed, uninsured and lack the owner's permission, so long as they were allegedly doing good deeds.

[7] The dissenting opinion argues that the trial court in Docket No. 275584 did not conclude that "Young unlawfully took this vehicle." The dissent is forced to take this position because otherwise Henry Ford's action would be barred by collateral estoppel. There is no legal merit to the dissent's argument. The trial court entered an order finding that Young was not entitled to no-fault benefits. In this order, the trial court expressly concluded that Young did not have a reasonable belief that he was entitled to use the Kia. Implicit in the trial court's finding is the conclusion that Young unlawfully took the Kia.

The dissent further erroneously relies on evidence that in Docket No. 275865 that "a jury determined that the Kia was not unlawfully taken." (Emphasis removed). As discussed below, the trial court in Docket No. 275865 erred in not granting Farmers Insurance Exchange *summary disposition* based on collateral estoppel. Before the second case was presented to the jury, there existed an order in Docket No. 275584 concluding that Young was not entitled to no-fault benefits. Accordingly, the jury verdict in Docket No. 275865 is legally irrelevant and should not even be considered for any purpose.

when Farmers Insurance Exchange argued MCL 500.3113(a) as a defense to Henry Ford's subsequent action, this issue had already been litigated. *Monat, supra,* 469 Mich 682.

Further, for collateral estoppel to preclude relitigation of issues, the parties in the second action must be the same as or privy to the parties in the first action. *VanVorous v Burmeister,* 262 Mich App 467, 480; 687 NW2d 132 (2004). "A party is one who is directly interested in the subject matter and has a right to defend or to control the proceedings and to appeal from the judgment." *Husted v Auto-Owners Ins Co,* 213 Mich App 547, 556; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999). Even though Henry Ford was not a named party in the declaratory action, it was privy to Young. "A person is in privy to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase." *Husted, supra,* 213 Mich App 556. In addition to a substantial identity of interests, Michigan courts require '"a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.'" *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 13; 672 NW2d 351 (2003), quoting *Phinisee v Rogers,* 229 Mich App 547, 553-554, 582 NW2d 852 (1998), lv den 459 Mich 956 (1999).

Here, Young and Henry Ford shared an interest in the declaratory judgment, namely, Young's right to recover personal insurance protection benefits, including medical costs arising from the accident. *Husted, supra,* 213 Mich App 556. Although Henry Ford claimed that it was not provided notice of the declaratory judgment action, it acknowledged that it learned of the action from responses to interrogatories filed in its own action. With this knowledge, Henry Ford could have intervened in the declaratory judgment action to protect its rights. We conclude that Henry Ford was privy to Young in the declaratory action.

Contrary to this conclusion, Henry Ford relies on *Borgess Medical Ctr, supra,* 273 Mich App 569, and maintains that it was not privy to Young because it had a cause of action for unpaid medical bills, which was independent from Young's application for personal protection benefits. We agree that Henry Ford had an independent cause of action. See *Borgess Medical Ctr, supra,* 273 Mich App 558 (the subsequently vacated opinion held that a medical provider has an independent cause of action against a no-fault carrier liable for benefits to the injured person); *Lakeland Neurocare Ctrs v State Farm Mut Automobile Ins Co,* 250 Mich App 35, 42-44; 645 NW2d 59 (2002) (a party providing benefits to an injured person entitled to no-fault benefits may make a direct claim against a no-fault insurer). However, Henry Ford's standing to pursue such a cause of action merely highlights its ability and failure to intervene in the declaratory judgment action. Thus, standing does not obviate the relationship between Henry Ford and Young.

Mutuality is an additional requirement for collateral estoppel. *Monat, supra,* 469 Mich 683-684.

> "'Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.'" [*Id.,* pp 684-685, quoting *Lichon v American Universal Ins Co,* 435 Mich 408, 427; 459 NW2d 288 (1990).]

Here, the party asserting collateral estoppel, Farmers Insurance Exchange, was a party to the declaratory judgment action and it would have been bound by the judgment, had it gone against it. Therefore, we conclude mutuality existed.

Last, the parties dispute whether the judgment was final. Henry Ford stresses that this Court has stated that a judgment is final "when all appeals have been exhausted or when the time available for an appeal has passed." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006); see also *Cantwell v Southfield*, 105 Mich App 425, 429-430; 306 NW2d 538 (1981). We agree there is no question that, as in *Leahy*, a party cannot collaterally attack a judgment that has been finalized on appeal. However, we conclude that the above proposition does not necessarily permit a party to collaterally attack a judgment that has yet to be finalized on appeal. Indeed, this Court has previously held that "[t]he rule in Michigan is that a judgment pending on appeal is deemed *res judicata*." *City of Troy Building Inspector v Hershberger*, 27 Mich App 123, 127; 183 NW2d 430) (1970) (emphasis in original), citing 14 Michigan Law & Practice Judgment, § 176, p 620. Further, that "[o]nly in a case where the second appeal itself prevents the prior judgment from being operative is the *res judicata* effect of the prior judgment inoperative." *Id.* (emphasis in original), citing *McHugh v Trinity Bldg Co*, 254 Mich 202, 206; 236 NW 232 (1931). Several cases have since recognized the above principles. See *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 328; 454 NW2d 610 (1990) ("Although defendant has appealed an adverse ruling that plaintiff's decedent was not an employee at the time of the accident, the decision nevertheless has res judicata effect."); *Roskam Baking Co v Lanham Machinery Co*, 105 F Supp 2d 751, 755 (WD Mich 2000. ("Michigan and federal courts hold that appeal of a judgment does not alter the judgment's preclusive effect"); *Robinson v Fiedler*, 91 F 3d 144 (CA 6, 1996) (decision of lower court is res judicata, regardless of pending appeal); *Fognini v Verellen*, unpublished per curiam opinion of the Court of Appeals, issued March 25, 2003 (Docket No. 235453); 47 Am Jur 2d, Judgments, § 528, p 314; Restatement Judgments, 2d, § 528, comment f (one policy supporting the refusal to apply collateral estoppel with a judgment pending on appeal is to prevent inconsistent judgments that could arise when a judgment pending on appeal serves as the basis for a subsequent judgment, but is later reversed). Thus, we conclude for purposes of collateral estoppel or res judicata that the January 10, 2007 declaratory judgment was a "final judgment." Accordingly, the court erred in denying Farmers Insurance Exchange's motion for summary disposition on Henry Ford's claim.

We affirm in Docket No. 275584 and reverse in Docket No. 283865. We remand for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly