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STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN SPINE AND BRAIN SURGEONS, PLLC, Plaintiff-Appellant,	UNPUBLISHED October 28, 2021
v	No. 355581 Oakland Circuit Court
ESURANCE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant-Appellee.	LC No. 2020-179099-NF

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

O'BRIEN, J. (*dissenting*)

I believe that under the binding precedent of *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39; 795 NW2d 229 (2010), the trial court's order granting defendants' motion for summary disposition on the basis of res judicata should be affirmed. I therefore respectfully dissent.

In *TBCI*, the injured party, Eric Afful, sued his insurer in Wayne County for benefits under his policy. While that case was pending, Afful's medical provider sued Afful's insurer in Oakland County seeking to recoup costs of care for Afful. Following trial in Afful's Wayne County case, the court entered a judgment of no cause of action based upon the jury's finding that Afful committed fraud. Then, in the medical provider's separate case in Oakland County, the trial court concluded that res judicata barred the action on the basis of the ruling in Afful's Wayne County action. The medical provider appealed, and this Court affirmed, holding that because the Wayne County judgment was final, the issue addressed was the same in both cases, and privity existed between the insured and the medical provider, res judicata barred the medical provider's action. This Court explained:

> Here, there is no serious dispute whether the judgment in the first case was a final judgment on the merits. The jury determined that Afful had submitted a fraudulent claim for benefits, and a judgment pursuant to the verdict was entered on June 3, 2008. Further, there is no question whether [the medical provider's]

> claims were, or could have been, resolved in the first lawsuit. This is because the essential evidence presented in the first case sustained dismissal of both actions. See *Eaton Co Rd Comm'rs* [*v Schultz*], 205 Mich App [371,] 375[;521 NW2d 847 (1994)]. [The medical provider], by seeking coverage under the policy, is now essentially standing in the shoes of Afful. Being in such a position, there is also no question that plaintiff, although not a party to the first case, was a "privy" of Afful. "A privy of a party includes a person so identified in interest with another that he represents the same legal right . . . ." *Begin* [*v Michigan Bell Tel Co*], 284 Mich App [581,] 599[; 773 NW2d 271 (2009)]. As noted, the jury determined that Afful submitted a fraudulent claim. The result under the plain language of the exclusion provision interpreted in the first action is that Afful and his privies were not entitled to coverage under the policy. [The medical provider] is simply attempting to relitigate precisely the same issue in order to obtain coverage under the policy. The trial court properly dismissed [the medical provider's] suit to the extent that it found its claim was barred by res judicata. For this reason, [the medical provider's] claim of appeal fails. [*TBCI*, 289 Mich App at 43-44.]

The same holds true here. Neither party contests the finality of the Wayne Circuit judgment or that it was decided on the merits. Plaintiff and Jones are also in privity, given that plaintiff is Jones' assignee. See *Prentiss v Holbrook*, 2 Mich 372, 376 (1852) ("The assignee of a chattel becomes a privy in estate to the assignor, so far as regards the particular property assigned, and a judgment against the latter binds the former."). Finally, although it is true that because of the assignment Jones could not sue defendant for the same past due medical bills as plaintiff was seeking here, Michigan follows the broad "transactional approach" to determining this issue. See *Adair v Michigan*, 470 Mich 105, 121, 124; 680 NW2d 386 (2004) (stating that "the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief."). Thus, regardless that plaintiff is seeking to recover for different medical bills (though from the same defendant) than Jones was in Wayne Circuit, because this case arises from the same operative facts—Jones' injuries, the procurement of the insurance policy covering her vehicle, and the language of the policy and no-fault act—plaintiff's entitlement to relief under the policy and no-fault law raised the same threshold issue as was resolved through the Wayne Circuit judgment. Accordingly, as in *TBCI*, I would conclude that plaintiff's claim is barred by res judicata.

Further, I disagree with the majority that the timing of the assignment makes a meaningful difference in this case. In *Jones v Chambers*, 353 Mich 674, 675; 91 NW2d 889 (1958), an oil truck owned by Leslie Jones and Johnson Oil Company was in a collision with a car driven by Eldon Chambers. On December 9, 1953, Jones, Johnson Oil Company, and "American Fidelity Fire Insurance Company, subrogee by a prior assignment, started suit in Shiawassee county against Chambers" based on the collision. *Id*. at 676. Later, on December 24, 1953, in Isabella County, Chambers filed a separate action based on the same collision against Jones, Johnson Oil Company, and the driver of the oil truck. *Id*. The Isabella County action went to trial before the Shiawassee County action, and Chambers prevailed. *Id*. Thereafter, the Shiawassee County action was dismissed because, in light of the ruling from the Isabella County case, res judicata barred the action. *Id*. Our Supreme Court affirmed, agreeing that res judicata barred the Shiawassee County action. *Id*. at 679-680. Nevertheless, American Fidelity Fire Insurance Company—the other plaintiffs' assignee—argued that it had rights in the Shiawassee County action "which may subsist

regardless of adverse decision as to whether the claims of the other plaintiffs are barred by the prior Isabella adjudication." *Id*. at 681. Our Supreme Court rejected this argument, explaining that such an argument "overlook[ed] the fact that American Fidelity Fire's rights in the instant case are entirely derivative, being based wholly upon assignment by the plaintiffs after payment of insurance-covered property damage." *Id*.

Like plaintiff's assignment in this case, American Fidelity Fire's assignment predated the adverse ruling in the other lawsuit. See *id*. at 676 (stating that American Fidelity Fire received its assignment before commencement of the Shiawassee County action on December 9, 1953, and the adverse ruling in the Isabella County action was entered on June 14, 1954). Regardless of that fact, however, our Supreme Court reasoned that American Fidelity Fire's claims were still barred by res judicata because American Fidelity Fire's rights were "entirely derivative, being based wholly upon assignment by the plaintiffs after payment of insurance-covered property damage." *Id*. at 681-682. Here, plaintiff's claims against defendant were entirely derivative, being based wholly upon assignment by Jones. See *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 524; 895 NW2d 188 (2016) (explaining that a medical provider's claims against an insurance company for services rendered to an insured are derivative of an insured's claims). Accordingly, regardless of the fact that plaintiff received its assignment of rights from Jones before the adverse ruling in Jones' Wayne Circuit action, I would conclude that plaintiff's claims are barred by res judicata for the reasons previously explained. I therefore respectfully dissent.

/s/ Colleen A. O'Brien