STATE OF MICHIGAN

COURT OF APPEALS

SECURA INSURANCE COMPANY and CIMARRON SERVICES, INC., Plaintiffs-Appellants, v FARM BUREAU INSURANCE COMPANY OF MICHIGAN and OLIVER C. DELUCA COMPANY, Defendants-Appellees.	UNPUBLISHED December 22, 2011 No. 298106 Oakland Circuit Court LC No. 2009-101227-CK

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

In this insurance dispute, plaintiff Secura Insurance Company and its insured, Cimarron Services, Inc., appeal as of right from the trial court's order denying their motion for a declaratory judgment against defendant Oliver C. Deluca Company and instead granting judgment in favor of Deluca Co. pursuant to MCR 2.116(I)(2) on Secura Insurance and Cimarron's claim for equitable contribution. Secura Insurance and Cimarron also appeal the trial court's orders granting defendant Farm Bureau Insurance Company of Michigan's motion for summary disposition pursuant to MCR 2.116(C)(7) and (10) on the grounds of res judicata, collateral estoppel, and waiver, and denying Secura Insurance and Cimarron's counter-motion for a declaratory judgment against Farm Bureau Insurance. We affirm.

I. FACTS

In an earlier declaratory judgment action, the trial court found Secura Insurance to have breached its duty to provide a defense and indemnification to FH Martin Construction Company, pursuant to an indemnification agreement between FH Martin Construction and Cimarron, in connection with an employment-related accident during a construction project for which FH Martin Construction was the general contractor. The Court ordered Secura Insurance to pay more than $25,000 in defense costs and fees to FH Martin Construction pursuant to the

indemnification agreement. This Court affirmed that decision in *FH Martin Constr Co v Secura Ins Holdings, Inc*.[1]

Deluca Co., the employer of the worker injured during the construction project, had provided a defense to FH Martin Construction in the injured worker's underlying personal injury lawsuit as part of an indemnification agreement it had with FH Martin Construction. Because of that indemnification agreement, FH Martin Construction was listed as an additional insured on Deluca Co.'s policy with its insurer, Farm Bureau Insurance. A jury in the injured worker's underlying personal injury lawsuit found that he had no cause of action.

Secura Insurance and Cimarron filed this declaratory judgment action against Farm Bureau Insurance, seeking a determination that Farm Bureau Insurance was the primary insurer in the underlying matter and that Secura Insurance's policy provided only excess coverage over Farm Bureau Insurance's policy. Secura Insurance and Cimarron also requested equitable contribution from Deluca Co. for a portion of the defense costs.

The trial court granted Farm Bureau Insurance summary disposition pursuant to MCR 2.116(C)(7) and (10) on the grounds of res judicata, collateral estoppel, and waiver, and denied Secura Insurance and Cimarron's counter-motion for a declaratory judgment against Farm Bureau Insurance. Later, the trial court also denied Secura Insurance and Cimarron's motion for a declaratory judgment against Deluca Co. and, instead, granted summary disposition for Deluca Co. on Secura Insurance and Cimarron's claim for equitable contribution pursuant to MCR 2.116(I)(2).

Secura Insurance and Cimarron now appeal.

II. RES JUDICATA, ESTOPPEL, AND WAIVER

A. STANDARD OF REVIEW

Secura Insurance and Cimarron argue that the trial court erred in granting Farm Bureau Insurance summary disposition under MCR 2.116(C)(7) and (10) on the basis of res judicata, collateral estoppel, and waiver. This Court reviews a trial court's summary disposition decision de novo.[2]

Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by collateral estoppel or res judicata. Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.[3] The plaintiff's well-pleaded factual allegations must be accepted as true and

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[1] *FH Martin Constr Co v Secura Ins Holdings, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2010 (Docket No. 289747).

[2] *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[3] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[4]

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. It is not sufficient for the parties to promise to offer factual support for their claims at trial.[5] The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.[6] The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.[7] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[8]

This Court reviews de novo a trial court's ruling on a motion for summary disposition.[9] Whether a party is collaterally estopped from relitigating an issue decided in a prior proceeding is a question of law, that this Court reviews de novo.[10] Whether res judicata applies is also a question of law that this Court reviews de novo.[11]

B. COLLATERAL ESTOPPEL

Collateral estoppel precludes relitigation of an issue in a subsequent, different case between the same parties if the prior action resulted in a valid final judgment and the issue was actually and necessarily determined in the prior matter.[12] The ultimate issue in the second case must be the same as that in the first proceeding.[13] The doctrine requires that the same parties must have had a full opportunity to litigate the issue in the prior proceeding, and there must be mutuality of estoppel.[14]

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[4] MCR 2.116(G)(5); *Maiden*, 461 Mich at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

[5] *Maiden*, 461 Mich at 121; *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 150; 715 NW2d 398 (2006).

[6] MCR 2.116(G)(3)(b) and (4); *Maiden*, 461 Mich at 120.

[7] *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

[8] MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

[9] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[10] *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996).

[11] *Id.*

[12] *Id.*

[13] *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990).

[14] *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

Because the issue concerning the effect of Farm Bureau Insurance's policy was not actually decided in FH Martin Construction's previous declaratory judgment action, we agree that the trial court erred to the extent that it relied on collateral estoppel as a basis for dismissal.

C. RES JUDICATA

In *Dart v Dart*,[15] the Supreme Court explained:

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.
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> Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.

One of the purposes of res judicata is to prevent repetitive litigation.[16]

Secura Insurance and Cimarron do not dispute that the first element of res judicata has been met. And we conclude that the second element—whether the matter contested in the second action was or could have been resolved in the first—has been established. In the prior case, FH Martin Construction sued Secura Insurance to obtain a declaratory judgment regarding Secura Insurance's liability to FH Martin Construction based on Cimarron's subcontractor agreement with FH Martin Construction. The trial court in that case resolved the issue of Secura Insurance's liability. This Court's previous opinion in *FH Martin* indicates that Secura Insurance raised the issue of Farm Bureau Insurance's potential liability in that case, but did not join Farm Bureau Insurance as a party to that action. Because res judicata broadly applies to "every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not,"[17] the trial court properly determined that res judicata bars Secura Insurance and Cimarron's claim in this case regarding the issue of excess coverage. Secura Insurance, with due diligence, could have brought the claim in the previous case.[18] Indeed, it raised the argument, but did not properly pursue it by joining Farm Bureau Insurance as a party. The fact that Secura Insurance and Cimarron's claims against Farm Bureau Insurance and FH

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[15] *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (internal citations omitted).

[16] *Bergeron v Busch*, 228 Mich App 618, 621; 579 NW2d 124 (1998).

[17] *Dart*, 460 Mich at 586.

[18] *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008).

Martin Construction were dependent upon the same set of facts, or the same events and transactions, supports the application of res judicata.[19]

Furthermore, with respect to the third element, FH Martin Construction was in privity with Farm Bureau Insurance. In *Phinisee v Rogers*,[20] this Court observed:

> In *Sloan v Madison Heights*, 425 Mich 288, 295-296; 389 NW2d 418 (1986), our Supreme Court defined "privity" as follows: "In its broadest sense, privity has been defined as 'mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.'" (Citation omitted). Black's Law Dictionary (6th ed), p 1199, defines privity as
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> "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. . . . [It] signifies that [the] relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon [the] other, although [the] other was not a party to lawsuit."
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> "Privity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.'" *SOV* [*v Colorado,* 914 P2d 355, 360 (Colo, 1996)], quoting *Public Service Co v Osmose Wood Preserving, Inc*, 813 P2d 785, 787 (Colo App, 1991).

Privity can exist between a principal and an agent, a master and servant, or an indemnitor and an indemnitee.[21]

FH Martin Construction was in privity with Farm Bureau Insurance because Farm Bureau was the insurer for FH Martin Construction through Deluca Co.'s policy. The interests of Farm Bureau Insurance and FH Martin Construction were identical with regard to the issues raised by Secura Insurance and Cimarron. Because Farm Bureau Insurance's interests were represented in that case, there was privity.

Secura Insurance and Cimarron argue that the interests of Farm Bureau Insurance and FH Martin Construction were not aligned because FH Martin Construction's attorney was not aware of the details of Farm Bureau Insurance's excess coverage during the prior case and the attorney agreed that a separate action was necessary to resolve issues with regard to Farm Bureau

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[19] *Dep't of Transp v North Central Coop, LLC*, 277 Mich App 633, 645; 750 NW2d 234 (2008), overruled on other grounds in *Dep't of Transp v Initial Transp, Inc*, 481 Mich 862 (2008); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 11; 672 NW2d 351 (2003).

[20] *Phinisee v Rogers*, 229 Mich App 547, 553-554; 582 NW2d 852 (1998).

[21] *Peterson Novelties*, 259 Mich App at 12-13.

Insurance's liability for excess coverage. However, the injured worker never obtained a judgment against FH Martin Construction in the underlying lawsuit. Thus, neither FH Martin Construction nor Deluca Co. was liable to the injured worker for any damages, and their insurer likewise was not liable to pay any damages for the underlying lawsuit. An issue is moot if an event renders it impossible for the court to grant relief.[22] Even if the issue regarding excess coverage under Farm Bureau Insurance's policy may have provided grounds for Secura Insurance and Cimarron to bring the present action against Farm Bureau Insurance, that issue is now moot. Therefore, it is not a basis for reversing the trial court's decision.

Secura Insurance and Cimarron also argue that Deluca Co.'s interests were not represented in FH Martin Construction's prior action. Farm Bureau Insurance provided Deluca Co. with insurance coverage based on the policy obtained by Deluca Co. that also covered FH Martin Construction as an additional named insured. Secura Insurance and Cimarron brought Deluca Co. into this case as a coindemnitor of FH Martin Construction. Deluca Co. procured the insurance from Farm Bureau Insurance as part of its indemnification agreement with FH Martin Construction. Farm Bureau Insurance provided FH Martin Construction with a defense. Once again, FH Martin Construction's participation in the first declaratory judgment action was sufficient to represent the interests of Deluca Co. and Farm Bureau Insurance' with regard to the roles of Secura Insurance and Cimarron in this matter, particularly because Deluca Co., through Farm Bureau Insurance, provided FH Martin Construction with a defense in the underlying case. Therefore, all three of these parties were properly aligned and represented in the previous declaratory judgment action.

Furthermore, res judicata applies in this case because the underlying issues in both declaratory judgment actions involve the same transactions. At issue in both cases is what insurance coverage applies to cover FH Martin Construction's potential liability for the injured worker's injuries. In the first case, FH Martin Construction sued only Secura Insurance and Secura Insurance was found liable to provide a defense and indemnification for any judgment. In this second declaratory judgment action, Secura Insurance is now attempting to have Farm Bureau Insurance, on behalf of its insured, Deluca Co., assume part of that liability. Because these issues all relate to the same transaction, we agree with the trial court that Secura Insurance and Cimarron should have pursued these issues in the previous declaratory judgment action, regardless of whether by counterclaims, third-party claims, or defenses.[23]

D. WAIVER

In the prior litigation brought by FH Martin Construction, FH Martin sought to hold Secura Insurance liable in the injured worker's underlying case. Secura Insurance is now arguing that Farm Bureau Insurance is also liable based on an "other insurance" exclusion in its policy that made its coverage, pursuant to Deluca Co.'s indemnification agreement, excess over

[22] *Mich Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997).

[23] See *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90-92; 535 NW2d 529 (1995), and *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

Secura Insurance's policy. That argument was a defense to FH Martin Construction's request for declaratory relief against Secura Insurance. Therefore, for Secura Insurance to properly rely on that policy exclusion, it was required to assert it as a defense in FH Martin Construction's lawsuit, the purpose of which was to determine Secura Insurance's liability under its policy. Accordingly, the trial court correctly held that Secura Insurance had waived the argument that Farm Bureau Insurance, as Deluca Co.'s insurer, and not Secura Insurance, was responsible in whole or in part for coverage in the injured worker's underlying action. It is clear that Secura Insurance is attempting to at least partially shift liability to Farm Bureau Insurance as Deluca Co.'s insurer. That argument should have been raised as a defense in FH Martin Construction's previous action to determine the respective liabilities under the applicable insurance coverage.

Secura Insurance and Cimarron argue that they were not required to raise any issue regarding Farm Bureau Insurance's liability on behalf of Deluca Co. because there is no compulsory counterclaim or third-party claim rule in this state. However, because Secura Insurance's argument was a defense to the previous case, it should have been raised when Secura Insurance's liability was litigated.

Secura Insurance's argument against Deluca Co. is that Deluca's indemnification agreement and coverage with Farm Bureau Insurance fall within the "other insurance" clause of Secura Insurance's policy, making Farm Bureau Insurance liable for half of the costs in the underlying action. As previously explained, however, this argument regarding the liabilities of Deluca Co. and Farm Bureau Insurance involves a defense to FH Martin Construction's case, in which FH Martin Construction sought to hold Secura Insurance solely liable for coverage for the injured worker's injuries. Because any issue concerning other insurers' liability for the underlying accident should have been raised in the previous case, and was not, any argument that Farm Bureau Insurance, as the insurer of either FH Martin Construction or Deluca Co., is liable for at least half of the defense costs in the injured worker's underlying case has been waived.

III. DECLARATORY JUDGMENT

Secura Insurance and Cimarron argue that the trial court should have granted their motion for a declaratory judgment because both Farm Bureau Insurance's policy and Secura Insurance's policy contained "other insurance" clauses. Secura Insurance and Cimarron argue that these clauses should have been declared irreconcilable and, therefore, liability for the defense costs should be split equally between the two insurers. This argument concerns the merits of the coverage dispute of Secura Insurance and Cimarron. The trial court did not reach the merits of this argument because it determined that res judicata and waiver barred Secura Insurance and Cimarron's claims. Because we agree with that decision, we too decline to address this issue.

IV. EQUITABLE CONTRIBUTION

A. STANDARD OF REVIEW

Secura Insurance and Cimarron argue that they should have been permitted to proceed on their claim for equitable contribution against Deluca Co. "A trial court's decision concerning equitable issues is reviewed de novo, although its findings of fact supporting the decision are reviewed for clear error."[24] Here, however, the trial court dismissed the claim for contribution of Secura Insurance and Cimarron against Deluca Co. on summary disposition pursuant to MCR 2.116(I)(2). The trial court apparently found that there was no genuine issue of material fact to support Secura Insurance and Cimarron's request for equitable contribution.

MCR 2.116(I)(2) provides: "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." Under this rule, if the documentary evidence submitted by the parties shows that there is no genuine issue of material fact, the court shall render judgment without delay.[25]

B. LEGAL STANDARDS

"Contribution is an equitable remedy based on principles of natural justice."[26]

> The general rule of contribution is that one who is compelled to pay or satisfy the whole *or to bear more than his aliquot share of the common burden or obligation*, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares.[27]

C. APPLYING THE LEGAL STANDARDS

In *FH Martin*, this Court affirmed the trial court's decision holding that Secura Insurance had a contractual duty to both defend and indemnify FH Martin Construction in the injured worker's underlying lawsuit. This Court therefore ordered Secura Insurance to pay more than $25,000 to FH Martin Construction as reimbursement. Secura Insurance's liability for that amount was based on the insurance policy that Cimarron procured for FH Martin Construction.

Contrary to the arguments of Secura Insurance and Cimarron, the trial court here correctly relied on res judicata to dismiss the present claim for equitable contribution. First, Secura Insurance, as Cimarron's insurer, was held liable for FH Martin Construction's defense costs in the injured worker's lawsuit because Secura Insurance had wrongly refused to provide

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[24] *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 571; 683 NW2d 242 (2004).

[25] *Mich Mut Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994).

[26] *Tkachik v Mandeville*, 487 Mich 38, 47; 790 NW2d 260 (2010).

[27] *Id.* at 47, quoting *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975) (emphasis added).

FH Martin Construction with a defense or coverage in the injured worker's action where FH Martin Construction was an insured under Cimarron's policy. That issue was resolved in the case brought by FH Martin Construction. It is clear that Secura Insurance and Cimarron were in privity for purposes of that issue, so the fact that Cimarron was not a party does not preclude res judicata from applying on behalf of Cimarron.

Secura Insurance and Cimarron are not entitled to equitable contribution from Deluca Co. Given this Court's previous opinion in *FH Martin*, there is merit to the argument that Secura Insurance and Cimarron are not entitled to equitable contribution because the trial court ruled in that case that Secura Insurance had wrongly refused to defend or insure FH Martin Construction. Secura Insurance had a separate obligation to provide coverage to FH Martin Construction based on its policy, and Secura Insurance cannot now hold Deluca Co. or Farm Bureau Insurance partially liable for that breach of contract.

Deluca Co. argues that Secura Insurance and Cimarron cannot recover for equitable contribution because the only sums they have been ordered to pay stem from Secura Insurance's breach of its insurance contract and Cimarron's indemnification agreement, neither of which implicate Deluca Co. We agree. There is no relationship between Deluca Co., and Secura Insurance and Cimarron, requiring indemnification or contribution. The injured worker did not recover any damages in the underlying case, nor does it appear that Deluca Co.'s liability was an issue in that case. In short, Secura Insurance and Cimarron have not shown that Deluca Co. may somehow be liable in this case for any sums that Secura Insurance and Cimarron paid. Even though Deluca Co. was the injured worker's employer and it had its own indemnification agreement with FH Martin Construction, there is no evidence that Secura Insurance and Cimarron paid any sums based on Deluca Co.'s liability. As the trial court ruled, there was no finding of fault made with regard to either Deluca Co. or the injured worker. Therefore, any indemnification provision for FH Martin Construction's benefit was not triggered. Consequently, Secura Insurance and Cimarron could not seek equitable subrogation from Deluca Co. because Deluca Co. was not ultimately liable for any underlying damages.

Secura Insurance and Cimarron's equitable contribution claim is without merit. This claim presumes that Cimarron and Deluca Co. are equally liable because both parties had indemnification agreements with FH Martin Construction for the injured worker's underlying claim. While Deluca Co. provided FH Martin Construction with a defense, Secura Insurance chose not to do so in breach of the insurance contract that Cimarron had obtained as required by its indemnification agreement with FH Martin Construction. In contrast, there has been no evidence that Deluca Co. was liable for any of the underlying claim by the injured worker. Moreover, Deluca Co. did not breach its indemnification agreement with FH Martin Construction because it assumed the defense in the underlying case.

Accordingly, the claim of Secura Insurance and Cimarron for equitable contribution was properly dismissed because Secura Insurance and Cimarron did not show that they were equally liable with Deluca Co. in the injured worker's underlying case. As noted by the trial court, there was no finding of Deluca Co.'s liability, and its indemnification agreement with FH Martin Construction was never triggered based on its fault for this incident. Similarly, Cimarron was not found liable in the injured worker's case. But this Court held that Secura Insurance was responsible for reimbursing FH Martin Construction for its defense expenses because Secura

Insurance refused to provide a defense in breach of Cimarron's indemnification agreement and the insurance policy. In contrast, Deluca Co. provided a defense pursuant to its indemnification agreement. Given these distinctions, the trial court did not err in denying Secura Insurance and Cimarron relief on equitable grounds and granting judgment for Deluca Co.

We affirm.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher