STATE OF MICHIGAN

COURT OF APPEALS

GUARDIAN ANGEL HEALTHCARE, INC.,

Plaintiff-Appellee,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant,

and

LARRY DODSON,

Defendant-Appellee.

UNPUBLISHED
March 14, 2013

No. 307825
Wayne Circuit Court
LC No. 08-120128-NF

Before: TALBOT, P.J., and DONOFRIO and SERVITTO, JJ.

PER CURIAM.

Defendant, Progressive Michigan Insurance Company ("Progressive"), appeals as of right the trial court's judgment in favor of plaintiff Guardian Angel Healthcare, Inc. ("Guardian") and defendant Larry Dodson. Because the doctrine of res judicata bars this action seeking no-fault benefits that were awarded to Dodson in a prior action, we reverse and remand for entry of summary disposition in Progressive's favor.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case stems from a January 21, 2006, incident in which Dodson, a tow-truck driver, was severely injured while engaged in a towing operation. On March 21, 2007, Dodson filed an action ("the 2007 case") in the Wayne Circuit Court seeking personal protection insurance (PIP) benefits pursuant to the no-fault act, MCL 500.3101 *et seq*. Because of a dispute regarding which insurer was responsible for paying no-fault benefits, Dodson filed suit against both

Progressive and defendant State Farm Mutual Automobile Insurance Company ("State Farm"). The circuit court determined that Progressive was responsible for Dodson's no-fault benefits and entered a September 15, 2008, final judgment in favor of Dodson and against Progressive in the amount of $344,540.29. The judgment stated that that amount included:

> a. Accrued and unpaid medical expenses that were submitted to Defendant [i.e., Progressive] pursuant to the Michigan No-Fault Act (MCL 500.3101, et seq.) and which relate to the care, recovery and rehabilitation of Plaintiff's injuries arising out of the accident of January 21, 2006 from the date of the accident through September 12, 2008 which total $301,572.07, exclusive of any claims by Henry Ford Health System and its related entities, including Bi-County Hospital and C.J. Mazure, D.O.

Meanwhile, on August 8, 2008, before the circuit court entered the final judgment in the 2007 case, Guardian filed the instant action against Progressive and Dodson.[1] Guardian is a medical services provider that provided healthcare and nursing services to Dodson after the accident. In its complaint, Guardian sought payment for its services rendered to Dodson under the no-fault act.

On December 10, 2008, after the circuit court entered the final judgment in the 2007 case, Progressive filed a motion to dismiss and/or for summary disposition under MCR 2.116(C)(7), (8), and (10) on the basis of collateral estoppel. Progressive argued that Guardian's claims were included in the $301,572.07 awarded to Dodson for accrued and unpaid medical expenses in the 2007 case. In support of its motion, Progressive relied on a list of outstanding medical bills as of August 18, 2008, and on the affidavit of its counsel in the 2007 case, Alicia M. Siefer, who prepared the list. Progressive contended that the doctrine of collateral estoppel precluded Guardian from claiming the same damages that the circuit court awarded in the 2007 case.

Thereafter, the parties stipulated to the dismissal of this action without prejudice, and on January 27, 2009, the trial court entered an order dismissing this case without prejudice.[2] In a March 18, 2010, opinion, this Court affirmed the circuit court's decision in the 2007 case, holding that Progressive is the insurer responsible for paying Dodson's no-fault benefits. *Henry Ford Health Sys v Progressive Ins Co of Mich*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2010 (Docket Nos. 288107, 288108, 288109).

On August 19, 2010, Guardian filed a motion to reinstate this action and to show cause why Progressive and Craig S. Romanzi, Dodson's attorney, failed to pay Guardian the amount of its outstanding invoices under the no-fault act. Guardian asserted that it had filed a motion to

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[1] Guardian thereafter filed a first-amended complaint adding State Farm as a defendant.

[2] Progressive asserts that the parties stipulated to the dismissal of this action because Progressive had appealed the circuit court's ruling in the 2007 case. Guardian, on the other hand, claims that it stipulated to the dismissal of this action based on the assurance of counsel for Dodson and Progressive that the final judgment in the 2007 case included Guardian's outstanding bills.

intervene in the 2007 case, but the motion was not filed until October 6, 2008, after the circuit court had entered the final judgment in that case. Guardian claimed that Romanzi then sent a letter to Guardian's counsel and enclosed a copy of the final judgment. In his cover letter, Romanzi stated, "[a]s you can see, the amount of the Judgment actually includes what I believe to be 100% of all known medical bills including, but not limited to, those from Guardian[.]" Guardian also reiterated Progressive's claim that Guardian's outstanding bills were included in the final judgment entered in the 2007 case. Guardian asserted that Progressive had sent a check to Romanzi in May 2010, and that Romanzi had cashed the check and distributed 100% of the proceeds without including Guardian in the distribution. Guardian further asserted that its counsel received a fax from Romanzi dated August 18, 2010, in which Romanzi falsely claimed that Guardian's bills were not included in the settlement based on Guardian's insistence that Romanzi did not represent Guardian and, accordingly, did not include Guardian in the settlement. Guardian argued that Romanzi disbursed the settlement funds while ignoring Guardian's lien on the funds and requested that the trial court enter an order requiring Romanzi or Progressive to pay the amount owed to Guardian.

In response to Guardian's motion, Progressive asserted that Guardian's outstanding invoices were known by Romanzi and Siefer at the time that the final judgment was prepared and entered. Progressive contended that Guardian had submitted the full amount of its claim, $52,581, and that Progressive's payment of $344,540.29 to Dodson and Romanzi included that amount. Progressive relied on Siefer's affidavit averring that all of Guardian's invoices were incorporated into the total amount of the final judgment.

Dodson also responded to Guardian's motion. Dodson argued that the final judgment in the 2007 case did not include Guardian's unpaid invoices for medical expenses. Dodson requested that the trial court conduct an evidentiary hearing to confirm that assertion. The trial court granted the motion to reinstate the case and held an evidentiary hearing to address whether Progressive's payment in the amount of $344,544.21 included Guardian's claims.

Following the evidentiary hearing, the trial court issued an opinion setting forth its findings of fact and conclusions of law and denying Progressive's motion to dismiss and/or for summary disposition. The trial court determined that the doctrine of collateral estoppel and/or merger was inapplicable because Romanzi and Siefer negotiated the amount of damages, and the amount of damages was never litigated and a decision on the merits was never reached by the court or a trier of fact. The court determined that a decision on the merits by the court or a trier of fact was required for collateral estoppel and/or merger to apply. The trial court also rejected Progressive's argument, based on ostensible agency, that Romanzi was an agent of Guardian and that Progressive had no reason to believe otherwise. The court determined that Progressive was aware as early as 2008 that a different attorney, and not Romanzi, represented Guardian. The trial court further stated:

> The focus of the evidentiary hearing was to determine whether the amount owed to Guardian had in fact been paid by Progressive to Romanzi. Progressive could not establish whether the consent judgment [i.e., the final judgment in the 2007 case] included the money owed to Guardian. It is not possible on the evidence presented to determine whether or not Guardian's claim was paid to Dodson and Romanzi. Progressive's presentation was a convoluted "scrunching"

> of numbers that did not prove, by a preponderance of the evidence, that Guardian's bill was included in the consent judgment. Attorney Romanzi testified that Guardian's bills were not included in the final tally. Progressive's attorney testified to the contrary. Numbers were repeatedly calculated in futile attempts to make the Guardian bills "fit" into the total paid for medicals, which was $301,000.
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> Larry Dodson, individually, is not liable for these bills since he had insurance coverage through Progressive at the time the bills were incurred. There is no genuine issue of fact that Guardian has incurred reasonable and necessary expenses in treating Dodson, and Guardian has not been paid, Progressive owes Guardian the amount submitted.

The trial court entered an order denying Progressive's motion on the basis of collateral estoppel, merger and ostensible agency, dismissing Dodson from the action with prejudice, and directing that Progressive pay Guardian the amount of its outstanding invoices. Thereafter, the trial court entered a judgment in favor of Guardian and against Progressive in the amount of $53,181.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Thurman v Pontiac*, 295 Mich App 381, 384; 819 NW2d 90 (2012). On appeal, Progressive relies on the doctrine of res judicata. The applicability of res judicata is a question of law that this Court also reviews de novo on appeal. *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 624; 808 NW2d 471 (2010). Although Progressive did not explicitly rely on the doctrine of res judicata in the trial court, this Court may review an issue not raised below in order to avoid a miscarriage of justice, where review is necessary for a proper determination of the case, or when the question is one of law and all the facts necessary to resolve the question have been presented. *Heydon v MediaOne*, 275 Mich App 267, 278; 739 NW2d 373 (2007).

III. LEGAL ANALYSIS

"The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *Begin v Mich Bell Telephone Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009). "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v Michigan*, 470 Mich 105, 122; 680 NW2d 386 (2004). For the doctrine to apply, the prior action must have resulted in a final decision. *Begin*, 284 Mich App at 599. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair*, 470 Mich at 122.

In *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39; 795 NW2d 229 (2010), this Court examined whether res judicata applied in a factual scenario similar to the instant case. In that case, Eric Afful, the insured, filed a complaint against his insurer, State Farm Mutual

Automobile Insurance Company, seeking no-fault benefits following an automobile accident. *Id*. at 40. State Farm refused to pay Afful's claims on the basis that they were fraudulent. *Id*. The case proceeded to trial, and a jury determined that Afful's claim for attendant-care benefits was fraudulent. Based on policy language excluding coverage if the insured made false statements or misrepresented a material fact or circumstance in connection with a claim, the trial court determined that coverage was precluded and entered a judgment of no cause of action. *Id*. at 40-41. Meanwhile, TBCI, P.C. ("TBCI"), a health-care provider that provided services to Afful, filed suit against State Farm pursuant to the no-fault act seeking payment for its services rendered to Afful. After the trial court entered the judgment of no cause of action in Afful's case, State Farm moved for summary disposition in TBCI's case, arguing that res judicata barred TBCI's claim. *Id*. at 41. The trial court agreed with State Farm, granted the motion, and dismissed the action. *Id*. at 41-42. On appeal, this Court affirmed the trial court's decision, stating:

> 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 [TBCI'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] at 375[; 521 NW2d 847 (1994)]. [TBCI], 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 [TBCI], 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*, 284 Mich App at 599. 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. [TBCI] is simply attempting to relitigate precisely the same issue in order to obtain coverage under the policy. The trial court properly dismissed [TBCI's] suit to the extent that it found its claim was barred by res judicata. [*Id*. at 43-44.]

In the instant case, as in *TBCI*, res judicata bars Guardian's claim. The 2007 case was decided on the merits and resulted in a final judgment, both the 2007 case and the instant case involve the same parties or their privies, and the matter presented in this case was resolved in the first action or, at a minimum, could have been resolved in the first action. Similar to *TBCI*, Guardian is essentially standing in the shoes of Dodson by seeking benefits from Progressive, the insurer liable for such benefits. See *id*. at 44. Guardian's claim is premised entirely on Dodson's right to no-fault benefits from Progressive by virtue of Progressive's commercial insurance policy issued to Contract Towing, Inc., which insured the tow-truck involved in the accident. It is undisputed that Romanzi submitted invoices from Guardian to Progressive before the circuit court entered the final judgment in the 2007 case. Guardian also had a lien against Dodson's recovery in the 2007 case for payment of services that Guardian had rendered to Dodson. Thus, because both Guardian and Dodson represent the same legal right, they are privies of one another. See *id*.; *Begin*, 284 Mich App at 599.

Although the trial court rejected Progressive's collateral estoppel claim on the basis that a decision regarding the amount of damages was never determined by a court or a trier of fact, the doctrine of res judicata does not require a previous determination by a trier of fact. See *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 121-122; 804 NW2d 574 (2010); *VanDeventer v Mich Nat'l Bank*, 172 Mich App 456, 463-464; 432 NW2d 338 (1988). "Res judicata applies to both consent judgments and judgments entered after a contested trial." *Begin*, 284 Mich App at 599. This Court has recognized that res judicata applies when a trial court enters a "final judgment" that sets forth the terms of a settlement between the parties. *Schwartz v City of Flint*, 187 Mich App 191, 193-194; 466 NW2d 357 (1991); see also *Wilson v Knight-Ridder Newspapers, Inc*, 190 Mich App 277, 278-279; 475 NW2d 388 (1991) (a dismissal with prejudice is an adjudication on the merits for purposes of res judicata). Thus, res judicata is applicable in this case notwithstanding that Romanzi and Siefer negotiated and agreed on the amount of damages, or no-fault benefits, to be paid to Dodson and his medical providers. Subsequent to the circuit court's determination that Progressive was the priority insurer, this Court affirmed the priority determination.

Further, because the final judgment in the 2007 case was clear and unambiguous, the trial court was required to enforce it as written, and an evidentiary hearing to determine whether Guardian's claims were included in the judgment was unnecessary. The 2007 final judgment was a consent judgment with respect to the amount of damages, or the amount of no-fault benefits owed. "A consent judgment is the product of an agreement between the parties." *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 75; 463 NW2d 129 (1990). It is clear from the language of the judgment that the parties agreed regarding the amount of no-fault benefits. In this respect, the judgment stated:

> The above referenced matter having come before this Honorable Court for Trial as to damages, and the parties having agreed as to benefits only, . . .
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> By agreeing to this Judgment regarding damages, Defendant, PROGRESSIVE, does not waive any of its rights to appeal previous orders of this Court concerning coverage and/or priority of insurers to pay such damages.

The trial court in the instant case referred to the 2007 final judgment as a consent judgment, and it is undisputed that Romanzi and Siefer negotiated and agreed on the amount of benefits awarded in the 2007 case.

"A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). "If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy." *Id*. "[C]onsent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage." *Id*. Notably, Romanzi does not assert that the 2007 final judgment *mistakenly* included Guardian's claims. Rather, he contends that the 2007 final judgment did not include Guardian's claims. To the contrary, the clear,

unambiguous language of the judgment included Guardian's claims for medical services. The judgment stated that it included:

> a. Accrued and unpaid medical expenses that were submitted to Defendant [i.e., Progressive] pursuant to the Michigan No-Fault Act (MCL 500.3101, et seq.) and which relate to the care, recovery and rehabilitation of Plaintiff's injuries arising out of the accident of January 21, 2006 from the date of the accident through September 12, 2008 which total $301,572.07, exclusive of any claims by Henry Ford Health System and its related entities, including Bi-County Hospital and C.J. Mazure, D.O.

Guardian's claims were submitted to defendant as demonstrated by Romanzi's July 29, 2008, letter to Progressive and Siefer's chart of Dodson's outstanding medical bills as of August 18, 2008, which indicated that Dodson had an outstanding balance with Guardian. Moreover, the language of the judgment did not exclude Guardian's claims as it did those of Henry Ford Health System and its related entities. Thus, according to the plain, unambiguous language of the judgment, Guardian's claims were included. Moreover, after the circuit court entered the judgment, Romanzi admitted that Guardian's claims were included. In an October 21, 2008, cover letter to counsel for Guardian, Romanzi indicated that he had enclosed the judgment and stated, "[a]s you can see, the amount of the Judgment actually includes what I believe to be 100% of all known medical bills including, but not limited to, those from Guardian[.]" "[A] party is bound by representative admissions of counsel." *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993).

Accordingly, because the plain language of the 2007 judgment included Guardian's claims for which it is seeking payment in the instant action, the trial court erred by conducting an evidentiary hearing to determine that issue, and the instant action is barred by the doctrine of res judicata. Given our determination that res judicata bars this action and that an evidentiary hearing was unnecessary, we need not address Progressive's argument that, following the evidentiary hearing, the trial court erroneously rejected its argument that the doctrine of ostensible agency estopped Guardian from denying that Dodson and Romanzi represented Guardian's interests in the 2007 case.

Reversed and remanded for entry of summary disposition in favor of Progressive. Progressive, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto