NO. COA11-1311
NORTH CAROLINA COURT OF APPEALS

Filed: 7 August 2012

JAMES EDGAR TARRANT,
Plaintiff,

v.

Wake County
No. 10 CVS 2541

DONALD C. HUDSON, DAVID L. ZURAVEL and GINGER L. CROSBY-ZURAVEL d/b/a McGEACHY, HUDSON & ZURAVEL,
Defendants.

Appeal by plaintiff from orders entered 18 February 2011 and 28 April 2011 by Judge Abraham Penn Jones and 30 June 2011 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 21 February 2012.

E. Gregory Stott and John A. Obiol for plaintiff-appellant.

Patterson Dilthey, LLP, by Ronald C. Dilthey, for defendants-appellees.

GEER, Judge.

Plaintiff James Edgar Tarrant appeals from an order denying his motion to compel arbitration, an order denying plaintiff's motion for reconsideration of that order, an order granting

defendant Ginger L. Crosby-Zuravel's motion for summary judgment, and an order denying plaintiff's motion for partial summary judgment but granting defendants summary judgment. This appeal arises out of a legal malpractice action alleging that defendants were negligent in representing plaintiff in connection with a motor vehicle accident.

Plaintiff primarily contends on appeal that defendants should be bound by the arbitration clause in his uninsured motorist policy and that the trial court erred, when granting defendants summary judgment, in failing to give collateral estoppel effect to the default judgment entered in the motor vehicle accident litigation against the other driver and the owner of the car. Because defendants were not parties to the arbitration agreement or parties or in privity with a party in the motor vehicle accident litigation, the trial court properly denied the motion to compel arbitration and properly granted summary judgment.

Facts

Plaintiff was in a car accident on 26 December 2004 at 9:10 a.m. He had gone out on the day after Christmas to fill his wife's car with gas so she could go to work as a nurse. It had been lightly snowing for one and a half to two hours. Plaintiff

was driving south on a two-lane road with his wipers, heater, and defroster on but his headlights off.

The traffic was light. On a straightaway, plaintiff was following behind a car owned by Shirley Ivey Smith but driven by James Glenn Smith. According to plaintiff, the Smith vehicle was travelling faster than he was. After less than a minute of following approximately 100 feet behind the Smith vehicle, plaintiff saw the Smith vehicle start fishtailing. Plaintiff slowed down but stayed behind the Smith vehicle. According to plaintiff, the Smith vehicle lost control because of the snow and ice on the road and spun out. The right front of plaintiff's vehicle struck the right rear quarter panel of the Smith vehicle. Plaintiff suffered injuries to his shoulder, neck, arms, back, and torso that he asserts led to permanent disability and decreased earning capacity.

While it is not entirely clear from the record, it appears that plaintiff filed a claim under his uninsured motorist coverage with Auto-Owners Insurance at some point after the accident. On 12 January 2005, Auto-Owners sent plaintiff a letter that stated:

> We cannot provide coverage for this loss because you do [sic] not carry collision coverage under [your policy] at the time of this loss. We have determined that both parties contributed to the accident. According to our investigation, you were

> traveling behind Mr. Smith. Due to snow on the road, Mr. Smith lost control of his vehicle sliding into the left lane. Under NC law, you are required to keep a safe and proper distance from other vehicles. We believe you contributed to the accident by following Mr. Smith's vehicle too closely. As a result, this claim cannot be covered under Uninsured Motorist coverage.

Plaintiff contacted McGeachy, Hudson & Zuravel after the accident and spoke with defendant Donald Hudson about representing him. Plaintiff took Mr. Hudson to the accident site to explain what happened. On 4 December 2007, Mr. Hudson and plaintiff met in Mr. Hudson's office. Plaintiff told him that there was snow and ice on the road and that the Smith car lost control and spun out.

It is undisputed that the statute of limitations ran on 26 December 2007. Before that date, Mr. Hudson did not file any civil action, pursue a claim against plaintiff's uninsured motorist carrier on plaintiff's behalf, or take any action to toll the statute of limitations.

On 15 February 2010, plaintiff filed a complaint against Mr. Hudson, David L. Zuravel, and Ginger L. Crosby-Zuravel, individually and as partners in McGeachy, Hudson & Zuravel. In his complaint, plaintiff alleged negligence and breach of contract for failing to file suit within the statute of limitations or take other steps to toll the running of the

statute of limitations as to the Smiths and Auto-Owners Insurance.

Defendants filed an answer on 13 May 2010, including a motion to dismiss pursuant to Rule 12(b)(4) of the North Carolina Rules of Civil Procedure as to defendant Ginger L. Crosby-Zuravel, contending that she was never part of the partnership and was not an employee of McGeachy, Hudson & Zuravel during the relevant time frame. In addition, among other affirmative defenses, defendants contended that plaintiff's suit was barred because he had not made any claim or instituted any action against the Smiths. Plaintiff moved to strike the latter affirmative defense. Plaintiff also moved to compel arbitration or, alternatively, to have the case bifurcated with one trial on the issues of negligence, contributory negligence, and damages and a second trial on the issue of legal malpractice.

In an order entered on 1 October 2010, the trial court denied the motion to strike the affirmative defense. The court instead required plaintiff to file and serve a complaint against the Smiths and Auto-Owners. In order to comply with the order, on 5 October 2010, plaintiff filed suit in Wake County District Court against the Smiths and Auto-Owners, alleging negligence by the Smiths in the 26 December 2004 automobile accident.

Plaintiff further alleged that all conditions precedent to his right to recover under his uninsured motorist policy had occurred. Defendants were not parties to that lawsuit.

Auto-Owners Insurance moved to dismiss plaintiff's claim based on the statute of limitations. On 28 December 2010, the district court entered an order granting Auto-Owners' motion to dismiss. The Smiths were served by publication and did not respond to the complaint. On 8 April 2011, the district court entered a default judgment in the amount of $100,059.31 against James and Shirley Smith.

Meanwhile, in this case, on 29 November 2010, defendant Ginger Crosby-Zuravel moved for summary judgment on the grounds that no attorney client relationship existed between Ms. Crosby-Zuravel and plaintiff. On 18 February 2011, Judge Jones denied Ms. Crosby-Zuravel's motion for summary judgment without prejudice to her resubmitting additional materials. Judge Jones also denied plaintiff's motion to compel arbitration and plaintiff's motion to bifurcate.

On 28 February 2011, plaintiff filed a motion for reconsideration of the denial of his motion to compel arbitration and his motion to bifurcate. On 28 April 2011,

Judge Jones granted Ms. Crosby-Zuravel's motion for summary judgment[1] and denied plaintiff's motion for reconsideration.

Additionally, on 7 April 2011, plaintiff filed a motion for partial summary judgment based on *res judicata* and collateral estoppel on the issues of James and Shirley Smith's negligence and plaintiff's damages. On 30 June 2011, Judge Paul G. Gessner entered an order denying plaintiff's motion for partial summary judgment and, upon oral request of defendants at the summary judgment hearing, granted summary judgment to defendants pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure. As a result of that order, the trial court found all remaining motions moot.

Plaintiff timely appealed to this Court from (1) the 18 February 2011 order denying plaintiff's motion to compel arbitration; (2) the 28 April 2011 order granting defendant Ginger Crosby-Zuravel's motion for summary judgment; (3) the 28 April 2011 order denying plaintiff's motion for reconsideration; and (4) the 30 June 2011 order granting defendants summary judgment.

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[1]While not included in the record on appeal, Ms. Crosby-Zuravel apparently refiled her motion for summary judgment at some point prior to 21 March 2011.

I

Plaintiff first contends that the trial court erred in denying his motion to compel arbitration. The question "[w]hether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.'" *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001) (quoting *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)). "The party seeking arbitration bears the burden of proving the parties mutually agreed to the arbitration provision." *King v. Owen*, 166 N.C. App. 246, 248, 601 S.E.2d 326, 327 (2004).

The basis of plaintiff's motion to compel arbitration was plaintiff's own automobile insurance policy with Auto-Owners. The arbitration clause relating to the policy's uninsured motorists coverage stated:

> If we and an insured do not agree:
>
> 1. Whether that insured is legally entitled to recover compensatory damages from the owner or driver of an uninsured motor vehicle; or
>
> 2. As to the amount of such damages;
>
> the insured may demand to settle the dispute by arbitration.

(Emphasis omitted.) In the definitions section of the policy, "'[w]e', 'us' and 'our'" is defined as "refer[ring] to the Company providing this insurance" and the "'named insured'" refers to "'you'" and a "spouse if a resident of the same household."

While plaintiff has shown that an arbitration agreement existed between plaintiff and Auto-Owners, he has not established that ***defendants and plaintiff*** "mutually agreed to the arbitration provision." ***Id.*** "'A dispute can only be settled by arbitration if a valid arbitration agreement [between the parties] exists.'" ***Revels v. Miss Am. Org.***, 165 N.C. App. 181, 188, 599 S.E.2d 54, 59 (2004) (quoting ***Slaughter v. Swicegood***, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004)). In ***Revels***, this Court upheld the trial court's denial of a motion to compel arbitration when the arbitration agreement was included in a contract that one of the parties had never accepted or signed. ***Id.*** at 189, 599 S.E.2d at 59.

Since, in this case, defendants were not parties to the Auto-Owners' arbitration agreement or any other arbitration agreement with plaintiff, they cannot be compelled to arbitrate. ***See also Routh v. Snap-On Tools Corp.***, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992) ("[B]efore a dispute can be settled in this manner, there must first exist a valid agreement

to arbitrate. . . . [T]he party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes.").

Plaintiff additionally argues that he was not requesting arbitration in the legal negligence case, but rather was seeking arbitration in the "case within a case." In a legal malpractice action, a plaintiff "must prove a 'case within a case,' meaning a showing of the viability and likelihood of success of the underlying action." *Formyduval v. Britt*, 177 N.C. App. 654, 658, 630 S.E.2d 192, 194 (2006), *aff'd by an equally divided court*, 361 N.C. 215, 639 S.E.2d 443 (2007).

Plaintiff's argument mistakes the issue. It does not matter, in this case, what issues were in dispute, but rather whether the parties in this case agreed to arbitrate any issues. While plaintiff was entitled to arbitrate the "case within a case" issues with Auto-Owners, which was a party to the arbitration agreement, he had no arbitration agreement with defendants to arbitrate the "case within a case" issues or any other issues. The absence of an agreement requires that we uphold the trial court's denial of the motion to arbitrate. *See Evangelistic Outreach Ctr. v. Gen. Steel Corp.*, 181 N.C. App. 723, 728, 640 S.E.2d 840, 844 (2007) (affirming trial court's denial of defendant's motion to compel arbitration where

defendant did not produce evidence parties mutually agreed to arbitration).

II

Plaintiff next challenges the trial court's order granting summary judgment to Ms. Crosby-Zuravel. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). "A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party." *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007).

In support of her summary judgment motion, Ginger Crosby-Zuravel filed an affidavit stating that from 1 September 2004 through 24 June 2010, the date of the affidavit, she was self-employed at the "Law Firm of Ginger Crosby Zuravel." While Ms. Crosby-Zuravel had been, at one time, employed by McGeachy, Hudson & Zuravel, her last day of employment at the firm was 31 August 2004, almost four months before plaintiff's accident occurred. She also attached to her affidavit a "Certificate of Assumed Name or Partnership," filed with the Cumberland County

Register of Deeds, identifying the owners of McGeachy, Hudson & Zuravel as Donald C. Hudson and David Lee Zuravel as of 12 February 2004.

In response, plaintiff did not produce any evidence showing that Ms. Crosby-Zuravel was a partner or otherwise employed by McGeachy, Hudson & Zuravel at the time the firm was representing plaintiff. Instead, in arguing that Ms. Crosby-Zuravel was a partner in the firm, plaintiff relies exclusively on an acceptance of service signed by Ms. Crosby-Zuravel, but drafted by plaintiff's counsel.

Ms. Crosby-Zuravel and co-defendant David L. Zuravel jointly signed an acceptance of service that stated:

> The undersigneds, Donald C. Hudson, David L. Zuravel and Ginger L. Crosby-Zuravel, hereby accept service of a copy of the original summons and of the original Complaint denominated as James Edgar Tarrant vs. Donald C. Hudson, David L. Zuravel and Ginger L. Crosby-Zuravel d/b/a McGeachy, Hudson & Zuravel - 10 CVD 2541 ***on behalf of McGEACHY, HUDSON & ZURAVEL as a general partner in that partnership.***

(Emphasis added.) This acceptance of service form is the only one signed by Ms. Crosby-Zuravel.

Mr. Hudson signed a separate identically-worded acceptance of service, listing all three individual defendants as accepting service on behalf of the firm. He also, however, signed a

second acceptance of service form including only his name as the partner accepting service on behalf of the firm:

> The undersigned, Donald C. Hudson, hereby accepts service of a copy of the original summons and of the original Complaint denominated as James Edgar Tarrant vs. Donald C. Hudson, David L. Zuravel and Ginger L. Crosby-Zuravel d/b/a McGeachy, Hudson & Zuravel - 10 CVD 2541 on behalf of McGEACHY, HUDSON & ZURAVEL as a general partner in that partnership.

Significantly, the summons addressed to the partnership stated in the "Name and Address Of Defendant" section: "McGEACHY, HUDSON & ZURAVEL by service upon Donald C. Hudson, General Partner."

In other words, one form of acceptance of service prepared by plaintiff's counsel listed all three individual defendants purportedly accepting service on behalf of the firm, while the second form of acceptance of service, consistent with the summons itself, had only Mr. Hudson accepting service on behalf of the firm. The record contains no acceptance of service by the individual defendants on behalf of themselves.

In order to address plaintiff's claim that Ms. Crosby-Zuravel's signing of the acceptance of service is an admission that she was a partner in the firm, Ms. Crosby-Zuravel filed a supplemental affidavit asserting that the "acceptance of service was done solely in [her] individual capacity as a named

defendant and not as a partner or member of the law firm of McGeachy, Hudson & Zuravel." Additionally, Ms. Crosby-Zuravel submitted the affidavit of Jennifer St. Clair, one of defendants' attorneys, stating that Ms. Crosby-Zuravel "did not sign off nor did she intend to sign the *Acceptance of Service* as a partner or a member of the Firm. Her *Acceptance of Service* on the form insisted by Plaintiff's counsel was in her individual capacity as an individually named Defendant, as clearly indicated on the Summonses." Ms. St. Clair also reported that she advised plaintiff's counsel that Ms. Crosby-Zuravel "was neither a member nor a partner of the Defendant law firm on the occasions indicated in the Complaint."

After reviewing the three acceptances of service in the record and the summons issued to the partnership, it appears that there was a clerical error in the drafting of the acceptances of service and that the one listing all three individual defendants' names was actually intended as an acceptance of service by the individual defendants on their own behalves. Plaintiff has presented no evidence disputing Ms. Crosby-Zuravel's evidence that in signing the acceptance of service, she was only accepting service on her own behalf. Nor has plaintiff presented any evidence apart from the acceptance of service suggesting that Ms. Crosby-Zuravel was in fact a

partner or an employee with the firm during the relevant time frame.

We hold that the acceptance of service, under the circumstances of this case, is insufficient to give rise to an issue of fact regarding Ms. Crosby-Zuravel's liability to plaintiff for negligence by a lawyer associated with the firm. *See Canady v. Creech*, 288 N.C. 354, 358, 218 S.E.2d 383, 386 (1975) (holding that party could not avoid enforcement of claim of lien by taking advantage of obvious scrivener's error). Therefore, the trial court properly granted Ms. Crosby-Zuravel's motion for summary judgment.

III

Finally, plaintiff contends the trial court also erred in granting summary judgment to the remaining defendants with respect to the merits of the legal malpractice claim. To demonstrate liability in a legal malpractice action,

> the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client . . . and that [the attorney's] negligence (2) *proximately caused* (3) damage to the plaintiff. In order to establish the necessary proximate cause, a plaintiff is required to prove that he would not have suffered the harm alleged absent the negligence of his attorney.

Royster v. McNamara, ___ N.C. App. ___, ___, 723 S.E.2d 122, 126 (2012) (internal citations and quotation marks omitted). As

explained in discussing the denial of the motion to compel arbitration, in order to show proximate cause and damages, the plaintiff in a legal malpractice action is required to prove his "'case within a case.'" *Kearns v. Horsley*, 144 N.C. App. 200, 211, 552 S.E.2d 1, 8 (2001). In other words, "without a showing that [plaintiff's] claim [in the underlying action] was valid and that it would have resulted in a favorable and collectible judgment, plaintiff was not entitled to go forward with [his] claim against the [lawyer] defendants." *Id.* at 211-12, 552 S.E.2d at 8-9.

Plaintiff, in this case, argues that the trial court should have concluded that the "case within the case" requirement was met by giving collateral estoppel effect to the default judgment entered against James and Shirley Smith. Plaintiff argues that, given the default judgment, the issues of "defendants' negligence, any defenses of any purported contributory negligence by the plaintiff and the issue of plaintiff's damages" have been fully litigated and all underlying issues in the "case within a case" have been resolved. Plaintiff argues that the trial court, therefore, erred in entering summary

judgment for defendants under Rule 56(c) of the North Carolina Rules of Civil Procedure.[2]

"Under the doctrine of collateral estoppel, or issue preclusion, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Williams v. Peabody*, ___ N.C. App. ___, ___, 719 S.E.2d 88, 93 (2011) (internal quotation marks omitted). Here, there is no dispute that defendants were not parties to the litigation against the Smiths. Plaintiff must, therefore, show privity between defendants and the Smiths.

In *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 416-17, 474 S.E.2d 127, 130 (1996) (internal citations and quotation marks omitted), our Supreme Court explained:

> As this Court has recognized, the meaning of "privity" for purposes of *res judicata* and collateral estoppel is somewhat elusive. Indeed, [t]here is no definition of the word "privity" which can be applied in all cases. The prevailing definition that has emerged from our cases is that "privity" for purposes of *res judicata* and collateral estoppel denotes a mutual or successive relationship to the same rights of property.

[2]It appears that the sole issue with respect to this summary judgment order was whether plaintiff had forecast sufficient evidence with respect to the "case within a case."

> In general, privity involves a person so identified in interest with another that he represents the same legal right. *Privity is not established, however, from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts, or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action.*

(Emphasis added.)

In this case, plaintiff has not shown that defendants have a mutual or successive relationship to the same rights of property or that defendants are so identified in interest with the Smiths that they represent the same legal right. Indeed, defendants were adverse to the Smiths during the time they represented plaintiff in connection with the motor vehicle accident. Instead, plaintiff essentially argues as to privity only that defendants had the same interest in proving the same set of facts as the Smiths and that the question underlying the default judgment was one that directly affected defendants' liability in this action. Those arguments are precisely the theories that the Supreme Court held were insufficient in *Tucker*.

Plaintiff argues, however, that *Thompson v. Lassiter*, 246 N.C. 34, 97 S.E.2d 492 (1957), should control. In *Thompson*, the issue was whether a father, who had acted as guardian *ad litem*

for his son in an earlier action, was bound by res judicata. The Court found

> [c]ertainly the plaintiff herein as guardian *ad litem* for his minor son in defending the cross-action in the [other case] took every action he could have taken if he had been a defendant himself. Furthermore, in his capacity as guardian *ad litem* for his son, in defending the cross-action he exercised complete control of his son's defense including the right of appeal. In doing so, he necessarily was defending the cross-action as much for his own protection as for that of his son. The mere fact that he was his son's guardian *ad litem* did not remove the factual existence of the relationship of principal and agent that existed between the father and the son with respect to the very matter in litigation.

Id. at 39-40, 97 S.E.2d at 497. The Court contrasted those facts with the circumstances in *Queen City Coach Co. v. Burrell*, 241 N.C. 432, 436, 85 S.E.2d 688, 692 (1955), in which the Court refused to apply res judicata when the party sought to be precluded was not a party to the first action, had no control over the first trial, and was not able to cross-examine opposing witnesses or offer witnesses of its own.

We find this case more similar to *Queen City Coach Company*. Defendants were not parties to the Smith action, had no control over the other trial, and were not able to prevent entry of the default judgment or compel the introduction of evidence. While plaintiff appears to be arguing that defendants should have

intervened, he cites no authority that suggests that the potential for intervention is sufficient to establish privity for purposes of collateral estoppel. Because defendants were not parties or privies to the default judgment, the trial court properly declined to apply the doctrine of collateral estoppel.

Plaintiff further contends that even in the absence of collateral estoppel, he presented sufficient evidence of negligence by the Smiths, a lack of contributory negligence by him, and damages to give rise to an issue of fact regarding the "case within a case." On this issue, *Johnson v. Brooks*, 23 N.C. App. 321, 208 S.E.2d 875 (1974), controls.

The evidence in *Johnson* tended to show that there was still some ice in the curves of the road from an earlier snow, that the defendant drove at a speed of approximately 40 to 45 miles per hour, and that the defendant did not reduce speed or take any other precautions when entering a curve. *Id.* at 323, 208 S.E.2d at 876. While in the curve, the defendant's automobile skidded into an embankment and caused the plaintiff passenger to suffer substantial injuries. *Id.* In upholding the trial court's entry of a directed verdict on the issue of negligence, this Court concluded that "one is not guilty of negligence *per se* in driving an automobile on a highway covered with snow or ice. Furthermore, the mere skidding of an automobile is not in

itself, and without more, evidence of negligence." *Id.*, 208 S.E.2d at 877 (internal citation omitted).

In this case, plaintiff contends that the "fact that the Tort-Feasor lost control of his vehicle makes a ***prima facie*** showing that the original Tort-Feasor was negligent, which defeats the defendants' request For Summary Judgment on that issue." However, plaintiff testified during his deposition that it had been snowing for two hours; the highway conditions were snowy and icy; that he "didn't have the slightest idea" how fast the Smith car was going; and the Smith car was not out of control the first time he saw it. According to plaintiff, shortly after he first saw the Smith car, it started fishtailing because of the snow and ice on the road. Ultimately, the driver of the Smith car spun out on ice and struck plaintiff's car.

In short, the sole evidentiary basis for plaintiff's claim that the Smiths were negligent is that they were driving on an icy, snowy road, that they fishtailed, and that they spun out on the ice. While plaintiff contends on appeal that the Smith vehicle was "negligently operated" at a speed "that was greater than was reasonable and prudent under the conditions," plaintiff testified that he did not "have the slightest idea" how fast the Smith car was travelling other than, at one point, it was going

some unspecified amount faster than the 15 miles per hour that plaintiff was driving.

Plaintiff is, in effect, arguing only that the Smiths must have been negligent because Mr. Smith "lost control of his vehicle" while on the icy and snowy road. Under *Johnson*, this evidence is not sufficient to establish a prima facie case of negligence.

Plaintiff was required to prove a "case within a case." Based on the evidence of the conditions presented by plaintiff, James Smith was not negligent simply for fishtailing or spinning out on a road due to snow or ice. Therefore, plaintiff could not prove his "case within a case," and summary judgment was properly granted for defendants.

Affirmed.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).