STATE OF MICHIGAN

COURT OF APPEALS

JEROME C. KOLE,

Plaintiff-Appellee,

v

CONTINENTAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
May 2, 2000

No. 210746
Midland Circuit Court
LC No. 96-006283-NO

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting summary disposition to plaintiff pursuant to MCR 2.116(I). The trial court ruled that plaintiff's right to arbitrate his underinsured motorist benefits was not barred by a jury's earlier ruling that plaintiff's injuries did not arise out of the ownership, operation, or use of a motor vehicle as a motor vehicle. We affirm.

On appeal, defendant argues that the trial court erred in denying his motion for summary disposition under MCR 2.116(C)(7). Specifically, defendant asserts that plaintiff's present action to compel arbitration is barred by the doctrines of res judicata and collateral estoppel. We disagree. This Court reviews a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) and 2.116(I) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997); *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 551; 540 NW2d 743 (1995). Although the doctrines of res judicata and collateral estoppel are similar and are often treated as twin arms of a single doctrine, there are "characteristic differences between the two." Friedenthal et al., Civil Procedure, §14.2, p 613. In Michigan, "[w]e use the term 'collateral estoppel' to refer to issue preclusion." *People v Gates*, 434 Mich 146, 154 n 7; 452 NW2d 627 (1990). The term "res judicata" generally refers "to what is often called 'claims preclusion,' which covers the preclusive effect of a judgment upon a subsequent proceeding on the basis of the same cause of action." *Id.*

For res judicata to apply, defendant must establish: (1) that the former suit was decided on the merits, (2) that the issues in the second action were or could have been resolved in the former action,

and (3) that both actions involved the same parties or their privies. *Energy Reserves, Inc v Consumers Power Co,* 221 Mich App 210, 215-216; 561 NW2d 854 (1997). "The applicability of res judicata is a question of law, which we review de novo." *Id.* at 216.

The jury's determination of no cause of action in plaintiff's first-party no-fault suit is an adjudication on the merits. *Swindlehurst v American Fidelity Fire Ins Co,* 2 Mich App 329, 335; 139 NW2d 910 (1966). Therefore, the first requirement for utilization of res judicata is met. The third requirement is also clearly established. Thus, resolution of the res judicata issue turns on the second requirement for application of the doctrine.

The test for determining whether two claims are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two claims. *Jones v State Farm Ins Co,* 202 Mich App 393, 401; 509 NW2d 829 (1993). In rejecting defendant's MCR 2.116(C)(7) motion, the trial court made the following observations:

> There is no relationship on a res judicata analysis. The jury was obviously not asked to make any determination about the liability of the third-party driver in a first-party case. That issue does not meet the second requirement . . . that the issues in the second case were resolved in the former one.
>
> The issue presented here is totally unrelated to the first-party benefits claim. As defendant points out . . . , the insurance contract provides a narrow arbitration window. It provides that the only arbitrable issues under the policy in the uninsured motorist context are: (1) whether the plaintiff is legally entitled to recover damages from the owner or driver on an uninsured motor vehicle; and, (2) the amount of damages. What this sets up in the arbitration context is a third-party negligence claim. It is only a contract issue because the arbitration clause is contractual. However, the contract in effect sets up a traditional negligence cause of action. None of those issues were brought to the jury in the previous case. The most that can be said is that the jury's finding on the "arising out of" issue is at least similar to the proximate cause issue that the arbitrator(s) will face.

The appellate record does not contain many facts about the issues raised in the jury trial. It appears that plaintiff was injured while sitting in a parked car. Other than this, the details of the accident or the theories argued by the parties at trial are not included in the record before us. Given the trial court's unique perspective on the issues litigated in the jury trial, we defer to its perspective on these matters. Given this perspective, we agree with the well reasoned analysis of the issue put forth by the trial court.

We also conclude that the doctrine of collateral estoppel does not apply given the circumstances of the case, as outlined by the trial court in its opinion denying defendant's (C)(7) motion and granting summary disposition to plaintiff. While the issue of arbitration was on the

table in the jury trial, the issue was not expressly or impliedly determined in that prior proceeding. *Gates, supra* at 154.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins