

STATE OF MICHIGAN
COURT OF APPEALS

BARRY WISELOGLE and SANDRA
WISELOGLE,

UNPUBLISHED
September 21, 2001

Plaintiffs-Appellants,

v

No. 219118
Genesee Circuit Court
LC No. 87-092526-NO

MICHIGAN MUTUAL INSURANCE
COMPANY d/b/a AMERISURE COMPANIES,

Defendant-Appellee,

and

JOHN STEFULA, HAWKEYE INSURANCE,
ARLEN MALLARD, and CATHERINE I.
MALLARD,

Not participating.

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right a judgment entered following the trial court's order vacating an arbitration award, pursuant to MCR 3.602(J)(1)(c), after a finding that the arbitrators exceeded their authority by rendering an award in excess of the policy limits of the underinsured insurance contract. The issue of whether defendant's liability could exceed the policy limits of the underlying insurance contract was not properly before the trial court; therefore, the trial court's order vacating the arbitration award is set aside and this matter is remanded for entry of judgment on the arbitration award.

The facts giving rise to this action have previously been set forth by this Court in *Wiselogle v Michigan Mutual Ins Co*, 212 Mich App 612; 538 NW2d 98 (1995). Briefly, this is an action for underinsured motorist benefits that proceeded to arbitration and resulted in an award of \$350,000. The trial court subsequently found plaintiffs entitled to precomplaint and postcomplaint interest in the amount of \$262,099.82 and entered an amended judgment accordingly. Defendant appealed the trial court's award of such interest and this Court affirmed

with regard to plaintiffs' entitlement to interest, but reversed and remanded on the basis of the trial court's calculation of the interest due plaintiffs. *Id.* at 621. Thereafter, plaintiffs sought leave to appeal from our Supreme Court and, in lieu of granting leave, the Supreme Court vacated this Court's and the trial court's orders and remanded the case to the trial court with the direction that the questions of precomplaint and postcomplaint interest on the arbitration award be submitted to arbitration. *Wiselogle v Michigan Mutual Ins Co*, 453 Mich 978; 557 NW2d 316 (1996). The arbitrators subsequently awarded plaintiffs \$650,000.

In response to plaintiffs' motion to confirm the arbitration award, defendant filed a motion to vacate the award arguing that its liability was limited to the \$500,000 policy limits of the insurance contract. Plaintiffs contended that defendant's argument was inappropriate and untimely as raised for the first time, in the dispute's thirteen year history, after the arbitration hearing on remand was concluded. The trial court granted defendant's motion holding that the arbitrators exceeded their authority by awarding an amount in excess of the policy limits and entered a judgment in favor of plaintiffs in an amount consistent with the policy limits.

On appeal, plaintiffs first argue that the principles of res judicata prevented the trial court from considering on remand whether defendant could be liable for an amount in excess of the policy limits because the issue was not raised, and could have been raised, in defendant's prior appeal from the original judgment in favor of plaintiffs. We agree. A claim of res judicata is reviewed de novo on appeal as a question of law. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

The doctrine of res judicata, generally, precludes relitigation of matters involving the same parties that have been, or could have been, fully litigated and finally resolved. See, for example, *Andrews v Donnelly (After Remand)*, 220 Mich App 206, 209; 559 NW2d 68 (1996). Although the doctrine is typically applied to bar multiple actions between the same parties, the principles of res judicata have consistently been held applicable in the context of remand proceedings. See *South Macomb Disposal Authority v American Ins Co*, 243 Mich App 647, 653; 625 NW2d 40 (2000), citing *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 355; 554 NW2d 43 (1996), citing *VanderWall v Midkiff*, 186 Mich App 191, 196-197; 463 NW2d 219 (1990).

In *VanderWall*, the plaintiff appealed the trial court's grant of judgment notwithstanding the verdict in favor of the defendant following a jury verdict in the plaintiff's favor. This Court reversed the trial court's order and remanded with directions to reinstate the jury verdict and for determination of proper attorney fee assessment. On remand, however, the trial court addressed and resolved an issue raised by the defendants that had not been raised on appeal – that of the plaintiff's entitlement to prejudgment and postjudgment interest. The plaintiff appealed the trial court's unfavorable decision arguing that the trial court improperly addressed the issue of interest because the defendant did not raise the issue prior to or during the first appeal to this Court. This Court agreed holding, in pertinent part:

[W]e conclude that the principles of res judicata require that a party bring in the initial appeal all issues which were then present and could have and should have been raised.

* * *

Defendants could have, and should have, initially raised the interest issue in the trial court prior to the first appeal and, if dissatisfied with the trial court's resolution of the issue, filed a cross appeal to plaintiff's original appeal, raising the interest issue before this Court in the original appeal. In other words, by choosing not to raise the interest issue by way of cross appeal in the original appeal, defendants abandoned the issue, thus limiting their attack on the judgment to their defense of the correctness of the trial court's ruling in granting judgment notwithstanding the verdict. [*Id.* at 201-202.]

In this case, the initial appeal by defendant was an appeal of right from a final amended judgment entered in the amount of at least \$612,099.82,¹ an amount significantly in excess of the alleged \$500,000 policy limits. However, defendant did not challenge the judgment on the ground that it exceeded the policy limits, thus relieving defendant of any liability in excess of \$500,000. Instead, defendant argued that plaintiffs were not entitled to precomplaint interest and, if plaintiffs were so entitled, the interest rate applied by the trial court was improper and the trial court's calculation of the interest due to plaintiffs was erroneous.

Contrary to defendant's argument in this appeal, the issue of whether defendant could be liable for an amount that exceeded the policy limits of the underlying insurance contract existed and was relevant prior to the entry of the original judgment and at the time of the initial appeal. If the original judgment had been affirmed in whole on the initial appeal, defendant would have been liable for an amount that significantly exceeded the policy limits. Consequently, defendant's decision not to raise this issue prior to or during the initial appeal was made at the peril of abandoning the issue in the event of future remand proceedings.

The doctrine of res judicata is a rule of finality that has been broadly applied by Michigan courts. See *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999); *Michigan Coalition of State Employees Unions v Civil Service Comm*, 236 Mich App 96, 109; 600 NW2d 362 (1999). The application of the principles of res judicata in the context of remand proceedings is consistent with the public policies and private interests that the doctrine was judicially created to serve. See *Pierson Sand & Gravel, Inc, supra* at 383; *Hackley v Hackley*, 426 Mich 582, 584; 395 NW2d 906 (1986), quoting *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411, 415; 66 L Ed 2d 308 (1980). In the context of remand proceedings, as in other subsequent proceedings following the entry of a final judgment, the application of its principles promotes both the conservation of judicial resources and procedural fairness. Requiring the advancement of all relevant issues in an initial appeal furthers the goal of judicial economy by meeting objectives that include timely, accurate, and final judicial decisions. This rule also ensures fundamental fairness in the proceeding by implicitly enforcing the time limits imposed on asserting appellate rights, in addition to preventing unfair surprise and permitting an element of finality through its consequential effect

¹ This amount was exclusive of costs, attorney fees, and continued accrual of interest on any unpaid balance.

of providing adequate notice and timely resolution of remaining disputed issues, claims, or defenses.

The procedural history and duration of the instant case aptly illustrate the reason that the doctrine of res judicata was created, as well as the concerns it was designed to remedy, and supports the application of its principles. The first decision of this Court was rendered in 1995, which was followed by our Supreme Court's decision in 1996, and this appeal, involving a dispositive issue that existed and was relevant in 1995, is being considered in 2001. Permitting defendant to raise the issue of whether it can be liable for an amount that exceeded its policy limits would effectively allow defendant to pursue appellate review and remedy in disregard of applicable time limits, while causing plaintiffs to be faced with a defense that could have and should have been raised and resolved several years ago. Further, the purpose of the Supreme Court's remand was to direct the trial court to submit the issue of precomplaint and postcomplaint interest to arbitration, not to give defendant the opportunity to untimely raise substantive issues that it neglected to raise in the earlier proceedings of this protracted dispute.²

In sum, whether defendant could be liable for an amount that exceeded the underlying insurance policy limits was an issue that existed and was relevant prior to and during defendant's initial appeal of right from a final judgment. The issue could have and should have been raised at that time, not several years later subsequent to a remand directive and proceeding. Consequently, consistent with the principles of res judicata, the issue was abandoned and not properly before the trial court. See *Mitchell v Cole (After Remand)*, 196 Mich App 675, 679; 493 NW2d 427 (1992); *VanderWall, supra*. Therefore, the trial court's order vacating the arbitration award must be set aside and judgment entered on the arbitration award. In consideration of our resolution of this dispositive issue, we need not review plaintiffs' remaining issues on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder

² We note that in *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999), this Court held that the doctrine of res judicata does not apply to proceedings within the same case. However, *Harvey* is procedurally and substantively distinguishable in that the doctrine was raised in the trial court as a defense to further proceedings following the entry of a final judgment, did not arise in the context of a second or subsequent appeal following remand, and did not involve a party raising an issue in a second appeal that could have and should have been raised in an initial appeal of right. Consequently, *Harvey* is inapposite.