

STATE OF MICHIGAN
COURT OF APPEALS

RICK M. KASE,

Plaintiff-Appellant,

v

STATE FARM INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 15, 2003

No. 237317

Kent Circuit Court

LC No. 01-004096-NF

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's vehicle was struck by a vehicle driven by William Atkinson, who is not a party to this case. Plaintiff filed a third-party action against Atkinson,¹ claiming that he was injured in the accident and that his injuries constituted a serious impairment of body function. MCL 500.3135. Defendant, Atkinson's insurer, provided a defense for Atkinson in the third-party case. The jury returned a verdict of no cause of action, concluding that defendant was negligent but that plaintiff was not injured as a result of defendant's negligence. The jury did not reach the issue of whether plaintiff suffered a serious impairment of body function because it concluded that he was not injured.

Subsequently, plaintiff filed the instant suit against defendant seeking personal injury protection benefits for an injury allegedly sustained in the accident. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff was collaterally estopped from asserting the existence of an injury in this case because that issue was decided against him in the third-party case. Defendant asserted that it was in privity with Atkinson because it controlled the previous litigation, and that it would have been bound by the judgment in the third-party action had the jury found in favor of plaintiff. The trial court granted defendant's motion, emphasizing that the jury in the third-party case determined that plaintiff did not sustain injuries in the accident.

¹ *Kase v Atkinson*, Kent Circuit Court Docket No. 99-03884-NI.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). Collateral estoppel precludes the relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior action culminated in a valid final judgment and the issue was actually and necessarily litigated in that action. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). In the subsequent action, the ultimate issue to be determined must be identical and not merely similar to that involved in the first action. *Eaton County Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). To be actually litigated, a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier. *VanDeventer v Michigan National Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). The parties must have had a full and fair opportunity to litigate the issue in the first action. *Kowatch v Kowatch*, 179 Mich App 163, 168; 445 NW2d 808 (1989). Mutuality of estoppel is generally a necessary element of collateral estoppel. *Minicuci v Scientific Data Mgmt, Inc*, 243 Mich App 28, 33; 620 NW2d 657 (2000). We review the applicability of the doctrine of collateral estoppel de novo. *Id.* at 34.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. We disagree and affirm the trial court's decision. A privy has been defined as a person so identified in interest with another that he or she represents the same legal right. *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270, modified 431 Mich 898 (1988). An example includes the relationship of indemnitor and indemnitee. *Id.* Privity between a party and a non-party requires a substantial identity of interests and a working relationship in which the interests of the non-party are presented and protected by the party to the litigation. *Phinisee v Rogers*, 229 Mich App 547, 553-554; 582 NW2d 852 (1998). Defendant provided a defense to Atkinson in the third-party action, controlled the litigation, and would have been bound to pay benefits to plaintiff had the judgment been adverse to Atkinson. The trial court's grant of summary disposition in favor of defendant implies that the trial court concluded that defendant and Atkinson were privies in the third-party action. We conclude that the trial court was correct. *Viele, supra.*

Furthermore, the trial court correctly concluded that the issue of whether plaintiff sustained an injury was fully and fairly litigated in the third-party action. Prior to determining whether a claimant has suffered a serious impairment of body function, a trier of fact must first determine that the claimant has suffered an injury. MCL 500.3135(2) and (7). The initial question for the jury in the third-party action was whether plaintiff sustained an injury in the accident. The jury answered this question in the negative. The issue of whether plaintiff sustained an injury in the accident was put into issue in the third-party action, submitted to the jury, and determined by the jury. *VanDeventer, supra.* The issue was fully and fairly litigated in the third-party action. *Kowatch, supra.* The trial court correctly found that the doctrine of collateral estoppel precluded the relitigation of this issue in the instant case, *Ditmore, supra*, and properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood