STATE OF MICHIGAN

COURT OF APPEALS

FARM BUREAU MUTUAL INSURANCE COMPANY, Plaintiff-Appellee, v PROGRESSIVE MICHIGAN INSURANCE COMPANY, Defendant-Appellant.	UNPUBLISHED December 9, 2010 No. 293095 Genesee Circuit Court LC No. 08-088224-NF

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendant, Progressive Michigan Insurance Company (Progressive), appeals as of right from an order granting summary disposition to plaintiff, Farm Bureau Mutual Insurance Company (Farm Bureau), in this dispute over reimbursement for first-party personal protection insurance benefits. We reverse in part and remand for further proceedings.

Oussama Chaar was involved in an accident while driving a 1996 Acura owned by Nour, Inc. Progressive insured certain vehicles owned by Nour, Inc., but a few days before the accident, the Acura was removed from the Progressive policy issued to Nour, Inc. Chaar did not have a personal automobile insurance policy for the Acura, and he sought benefits from Progressive, which denied the claim. Farm Bureau was assigned the claim by the state assigned claims facility. Farm Bureau denied the claim, and Chaar then sued Farm Bureau. A bench trial took place in which the court ruled that Chaar was not an owner of the Acura and therefore was entitled to benefits even though he did not maintain insurance on the vehicle. Farm Bureau and Chaar settled, and Farm Bureau then instituted the present action against Progressive, arguing that Progressive was "higher in the order of priorities for no-fault benefits" because it issued a policy for Nour, Inc., and Nour, Inc.'s vehicle was involved in the accident.

Progressive first argues that the circuit court erred in granting summary disposition to Farm Bureau because, under the doctrine of res judicata, Farm Bureau's action against it, for reimbursement of the benefits paid to Chaar, is barred by the judgment in the prior action by Chaar against Farm Bureau. We review summary disposition actions de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006).

Res judicata has four elements: (1) the prior action was decided on the merits; (2) the prior judgment was a final decision; (3) the matter contested in the present action was, or could have been, resolved in the prior action; and (4) both actions involve the same parties or their privies. *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). Here, the third and fourth elements are not satisfied.

The first two elements are satisfied. The action by Chaar was decided on the merits. In the prior action by the claimant against Farm Bureau, the circuit court decided that Chaar was entitled to personal protection insurance benefits. It was a final decision, because the entitlement to benefits was fully decided, and the amount of benefits was determined by a settlement.

However, the third element is not satisfied. The issue of priority could not have been decided in the prior action. Progressive was not a party, so the issue of *its* liability with regard to the claimant could not have been litigated. The fact that Progressive could have been added as a third party is not relevant; indeed, Progressive cites no case law indicating that, for purposes of the application of res judicata, parties in an action must have joined all parties who might have later needed to be sued.

In addition, case law supports treating the two issues (regarding whether benefits were due, and, if so, who was liable for them) separately, and in separate proceedings. In *Cooper v Jenkins*, 282 Mich App 486, 487, 490; 766 NW2d 671 (2009), this Court held that the ability of an insurer assigned to pay personal protection insurance benefits arising from an accident involving an uninsured vehicle to recover monies paid as benefits from the owner or registrant of the uninsured vehicle does not by itself equate to having a right of indemnification with regard to that same beneficiary. The *Cooper* panel explained the situation and what the insurance company was attempting to do:

> Plaintiff, Phillip Dean Cooper, was driving an uninsured vehicle owned by his girlfriend, Dalana Norman, when he was struck by defendant Ravis Jenkins, who was driving an uninsured vehicle owned by defendant Mary Louise Woodson. Plaintiff was badly injured, and his doctor prescribed attendant care. Because there was no applicable no-fault insurance policy, plaintiff's claim was assigned to Farm Bureau. After plaintiff sued for benefits, Farm Bureau moved to strike damages awarded for the attendant care provided by Norman, which the parties stipulated was $60,000. *Farm Bureau argued that under the no-fault statutory scheme, an insurer assigned to pay benefits arising from an accident involving an uninsured motor vehicle has the right to seek reimbursement from the owner of that vehicle, MCL 500.3177(1), and that because an uninsured owner in this case was the very person to whom the attendant care benefits would be paid, it was illogical to require Farm Bureau to pay the benefits to Norman only to then sue her for reimbursement.* [*Id*. at 487 (emphasis added).]

This Court did not allow Farm Bureau to have a right of set-off. *Id*. at 487, 490. "Because Farm Bureau's obligation to pay is a mandated fixed benefit to plaintiff alone, Farm Bureau may not bypass the legal process to enforce its right to reimbursement." *Id*. at 487.

Thus, the obligation of an insurer, assigned by the Assigned Claims Facility, is to pay benefits once they are held to be due and owing, and such an assigned insurer must pay the

benefits even if there is some separate issue involving why it should not have to pay the benefits. *Cooper*, 282 Mich App at 487, 490. Because, under *Cooper*, the assigned insurer must pay the benefits and only then pursue reimbursement arising from a separate issue (separate from whether the benefits are due and owing), *Cooper* supports, by analogy, Farm Bureau's position that its obligation in the action by the claimant was to pay benefits once it was determined that they were due and only then pursue the separate issue of priority.

Turning to the fourth element of res judicata, this element requires that both actions involve the same parties or their privies. *Ditmore*, 244 Mich App at 576. This element is not satisfied here.

It is undisputed that Progressive was not a party to the prior action. There are cases in which defensive *collateral estoppel* (or issue preclusion) has been applied even when there was no mutuality, i.e., when the same parties or their privies were not involved. See, e.g., *Monat v State Farm Ins Co*, 469 Mich 679, 691-692, 695; 677 NW2d 843 (2004), *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 347-350; 657 NW2d 759 (2002) (discussing the relaxation of the mutuality requirement in various situations involving collateral estoppel), and *Alterman v Provizer, Eisenberg, Lichtenstein Pearlman, PC*, 195 Mich App 422, 425-427; 491 NW2d 868 (1992). However, Progressive cites no definitive Michigan authority for nonmutual res judicata. Also, Progressive does not argue that it and Farm Bureau were privies.

Progressive next argues that because Chaar was an owner of the uninsured vehicle he was driving, under MCL 500.3113(b), he was barred from receiving benefits, and therefore Farm Bureau is barred from seeking reimbursement of the benefits paid to him.

Progressive argues that the circuit court's prior ruling (in the action by Chaar) that Chaar was not a statutory owner of the vehicle is not binding in this action. Because nonmutual offensive collateral estoppel, as a general rule, has not been explicitly adopted in Michigan, see *Keywell*, 254 Mich App at 352, and because Farm Bureau does not argue otherwise on appeal, we agree.[1]

Farm Bureau argues that the ruling that Chaar was not a statutory owner of the uninsured vehicle was correct. It is undisputed that Nour, Inc., Chaar's father's business, had title to the vehicle and was the registrant. Chaar was not a shareholder of Nour, Inc. The trial court therefore concluded that Chaar had no legal right of ownership under *Ardt v Titan Ins Co*, 233 Mich App 685, 690-691; 593 NW2d 215 (1999). However, *Ardt* does not define ownership solely in terms of legal enforceability. Instead, in interpreting "owner" under MCL 500.3101(2)(h)(*i*), it emphasizes proprietary or possessory use, "as opposed to merely incidental usage under the direction or with the permission of another." *Ardt*, 233 Mich App at 691. There was ample evidence in the record that Chaar had unfettered access to the vehicle for greater than 30 days. Accordingly, there was, at the very least, a question of fact regarding whether Chaar

[1] We note that Progressive had no opportunity to litigate the ownership issue in the earlier trial.

was an owner of the vehicle for purposes of MCL 500.3113(b).[2] See *Ardt*, 233 Mich App at 691 (discussing a similar fact pattern).

Next, Progressive argues that under the one-year-back rule contained in MCL 500.3145(1),[3] Farm Bureau is barred from obtaining reimbursement for any benefits paid to Chaar if the benefits were for expenses incurred by Chaar more than one year before Farm Bureau commenced this action. We disagree. Under *Allen v Farm Bureau*, 210 Mich App 591, 596-598; 534 NW2d 177 (1995), an insurer that insures a claim by assignment from the Assigned Claims Facility, and that then seeks reimbursement from a higher priority insurer, is not a subrogee of the person who received the benefits, but an independent claimant, and the two-year statute of limitations in subsection (3) of MCL 500.3175[4] applies.

Reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter

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[2] A vehicle may have multiple owners for purposes of this statute. See *Ardt*, 233 Mich App at 691.

[3] The one-year-back rule provides, in relevant part: "the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." MCL 500.3145(1).

[4] Subsection (3) of MCL 500.3175 provides: "An action to enforce rights to indemnity or reimbursement against a third party shall not be commenced after the later of two years after the assignment of the claim to the insurer or one year after the date of the last payment to the claimant."