STATE OF MICHIGAN

COURT OF APPEALS

MARCIA HUSTED, Personal Representative of the Estate of RICHARD ALLEN HUSTED, JR.,

Plaintiff-Appellant,

v

HENRY CLIFTON DOBBS,

Defendant,

and

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION
September 22, 1995
9:20 a.m.

No: 172743
LC No: 84-002664-NI

Before: Gribbs, P.J., and Markey and R.J. Taylor,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant Auto-Owners Insurance Company's motion for summary disposition. We affirm.

Plaintiff's decedent, Richard Allen Husted, Jr., was killed in August 1984, when his motorcycle collided with a truck driven by defendant Henry Clifton Dobbs. At the time of the accident, Dobbs was driving his employer's uninsured truck. Dobbs had an automobile insurance policy issued by Auto-Owners that covered his two personal vehicles. Plaintiff instituted this action against Dobbs and the truck owner. Dobbs failed to defend and a default judgment was entered against him. Following entry of the default judgment, Dobbs filed an action against Auto-Owners on the basis that the policy provided coverage. Auto-Owners contended that Dobbs had no coverage because of a policy exclusion denying coverage when the insured drove any non-private passenger automobile used in a business or occupation of the named insured. The trial court found that the policy language was clear and unambiguous, that coverage was not provided, and that nothing in the policy could have led Dobbs to believe otherwise. This Court affirmed that decision in Dobbs v Auto-Owners Ins Co, unpublished opinion per curiam of the Court of Appeals, decided May 27, 1992 (Docket No. 134674).

In March 1993, plaintiff filed a writ of garnishment against Auto-Owners alleging that the no-fault insurance act, MCL 500.3101 et seq.; MSA 24.13101 et seq., mandated residual liability coverage. Auto-Owners denied liability based on this Court's opinion in Dobbs v Auto-Owners upholding the policy exclusion. In June 1993, plaintiff filed her motion for summary disposition against Auto-Owners pursuant to MCR 2.116(C)(9) and (10), contending that pursuant to the no-fault statute and public policy, Auto-Owners must provide residual liability coverage for the injuries suffered to plaintiff's decedent. Auto-Owners also moved for summary disposition and responded to plaintiff's motion by alleging that res judicata barred the claim and that the no-fault act did not require portable residual liability coverage. The trial court formulated the issues presented as whether the prior Dobbs decision was res judicata or collateral estoppel to the claims and issues raised in this suit, and whether the

*Circuit judge, sitting on the Court of Appeals by assignment.

exclusion in the Auto-Owners' policy was void because it contravenes the financial responsibility act, MCL 257.501 et seq.; MSA 9.2201 et seq., and the Michigan no-fault act. The court first found that the doctrines of collateral estoppel and/or res judicata did not preclude it from deciding the issue of portable residual liability because the parties were not the same and there was no decision on the merits of these issues in the prior Dobbs case. The court further found that the legislative intent behind the no-fault act was to have all people insure vehicles that were on the road. In short, the court concluded that this exclusion in Auto-Owners' policy fit within the no-fault statutory scheme by permitting the insurer to predicate its insurance coverage on the type of driving the insured will be doing and the type of vehicle the insured will be driving.

The insurance policy provisions at issue in the instant case provide:

> 4. DRIVE OTHER CARS.
>
> (b) Coverage does not apply:
>
> * * *
>
> (3) to any automobile not of the private passenger type while used in a business or occupation of the named insured, spouse or relative, or to any private passenger automobile while used in such business or occupation if operated by a person other than the named insured or spouse or the chauffeur or servant of such named insured or spouse unless the named insured or spouse is present in such automobile.

Again, this Court found that the insurance policy's exclusionary language was unambiguous and applicable to Dobbs because he was driving his employer's delivery truck when the accident occurred. Dobbs, supra at 2. However, this Court did not at that time address the question of whether that exclusion is violative of the no-fault act requirements. Consequently, the issue presented in this appeal is whether the no-fault act's residual liability requirement voids the instant exclusionary clause. We believe it does not.

In reviewing a trial court's decision to grant summary disposition pursuant to MCR 2.116(I), this Court conducts a review de novo to determine whether the pleadings show that a party was entitled to judgment as a matter of law or whether affidavits or other documentary evidence showed that no genuine issue of material fact existed. Wieringa v Blue Care Network, 207 Mich App 142, 144; 523 NW2d 872 (1994). If either inquiry results in an affirmative response, the trial court should have rendered judgment without delay. Id. at 144-1435.

The exclusionary language in the case at bar denies coverage when an insured drives a non-owned, non-passenger vehicle for business use. Plaintiff first argues that the instant exclusionary clause violates the no-fault residual liability requirement, specifically, the pertinent sections of the no-fault act listed below.

MCL 500.3101(1); MSA 24.13101(1) of the no-fault act provides in part:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance.

Section MCL 500.3131(1); MSA 24.13131(1) provides:

> Residual liability insurance shall cover bodily injury and property damage which occurs within the United States, its territories and possessions, or in Canada. This

> insurance shall afford coverage equivalent to that required as evidence of automobile liability insurance under the financial responsibility laws of the place in which the injury or damage occurs. In this state this insurance shall afford coverage for automobile liability retained by section 3135.

MCL 500.3009(1); MSA 24.13009(1), incorporated into the no-fault act by MCL 500.3131(2); MSA 24.13131(2), provides:

> An automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless the liability coverage is subject to a limit, exclusive of interest and costs of not less than $20,000.00 because of bodily injury to or death of 1 person in any 1 accident.

Section MCL 500.3135(1); MSA 24.13135(1) also provides:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

Plaintiff contends that the above-cited sections, when read together, require residual liability coverage when an insured drives any automobile, and thus, exclusionary clauses which defeat this residual liability requirement are void as against public policy and the no-fault act. Recently, this contention was expressly rejected by our Supreme Court in Citizens Ins Co of America v Federated Mutual Ins Co, 448 Mich 225, 235-236, 531 NW2d 138 (1995):

> As this Court has previously held, one who uses another's vehicle generally is not required to provide residual liability coverage for injuries or death arising from use of that other vehicle. State Farm v Ruuska, [412 Mich 321, 343, (1982)] (opinion of Levin, J.), and [at] 353 (opinion of Coleman, C.J.). Because such coverage is optional, the extent of [the insurance companies'] obligations is governed by the terms of their respective policies.

In the case at bar, the terms of Auto-Owners' insurance contract excluded coverage when an insured drove a non-owned, non-passenger vehicle for business purposes. This is an unambiguous exclusion that does not violate the no-fault act because portable liability coverage is optional, not mandatory, under the act. Citizens, supra.

Next, plaintiff relies on the jurisprudence surrounding car lease agreements for the proposition that exclusionary clauses are void. This reliance is misplaced. The basis for finding that the exclusionary clauses were void in the lease cases was that the car rental companies were the owners of the vehicles, and owners are required to carry coverage under the no-fault act. The rental companies' attempts to circumvent this statutory requirement by contracting out of it (i.e., by requiring that the renter obtain primary no-fault coverage) were not upheld; indeed, in some cases, the exclusionary clauses were construed to be only priority clauses, State Farm Mutual Automobile Ins Co v Snappy Rental Co, 196 Mich App 143; 492 NW2d 500 (1992), or were found to be void altogether, Citizens, supra, and Citizens Ins Co of America v Federated Mutual Ins Co, 199 Mich App 345, 500 NW2d 773 (1993). While those cases are instructive in reviewing the legislative intent behind the no-fault act and

considering policy arguments, they are not applicable to the case at bar because here, defendant insured the driver, not the owner, and did not attempt to circumvent the statutory requirement that an owner retain the residual liability insurance.

Plaintiff further contends that application of the basic tenets of statutory construction require that residual liability coverage cannot be excluded. Section 3009(1) of the no-fault act requires liability coverage for use of a motor vehicle rather than use of the motor vehicle or use of such motor vehicle. The financial responsibility act requires liability coverage for use of such vehicle. MCL 257.520(b); MSA 9.2220(b). Plaintiff's argument that the Legislature's use of "a" instead of "such" evinces its intent that the residual liability coverage follow the driver to any vehicle he drives is simply too broad. The Legislature's use of "a" means that the required residual liability coverage is not limited only to the insured's own vehicle. Rather, it does not expand the requirement to all vehicles an insured may drive and leaves open the possibility for exclusions. The language does not require liability for any or all or each and every vehicle an insured drives. The Legislature could have used these more inclusive adjectives if its intent was to require impervious residual liability coverage. As Justice Levin noted in his separate opinion in Ruuska, "[t]he no-fault act does not require residual liability insurance covering all vehicles a person may drive." Ruuska at 342.

Plaintiff's final argument that the exclusionary clause is void because it is not specifically authorized by statute was rejected by this Court in Snappy Car Rental, supra at 149. While public policy prevents an automobile liability insurance policy from containing exclusions not specifically authorized by the Legislature, an exclusionary clause is not per se invalid simply because it is not specifically provided for in the no-fault act. Integral Ins Co v Maersk Co, 206 Mich App 325, 331; 520 NW2d 656 (1994).

Moreover, under plaintiff's interpretation, any policy exclusion would violate the no-fault residual liability requirement when the exclusion resulted in no coverage to someone involved in an accident. Thus, the validity of an exclusion would turn on who was involved in an accident and the parties' respective insurance coverages. This type of ad hoc determination would cripple the insurers' ability to assess their risk, result in additional excessive litigation, and make the policy coverage in each case fact determinative. Consequently, we find that an insurance policy exclusion that precludes coverage while an insured drives a non-owned, non-passenger vehicle for business use does not violate public policy or the residual liability requirement of the no-fault act.

Defendant, in its cross appeal, argues that the doctrines of collateral estoppel and res judicata bar relitigation of this suit because the issue of "portable" residual liability was decided in the prior suit, Dobbs, supra, and although plaintiff was not a party in the prior suit, she participated to such an extent that res judicata applies to her as well. The applicability of legal doctrines such as res judicata and collateral estoppel are questions of law to be reviewed de novo. Eaton Co. Rd Comm'rs v Schultz, 205 Mich App 371; 521 NW2d 847 (1994). We disagree with defendant's contention that collateral estoppel and res judicata bar this action.

For collateral estoppel to apply, the parties in the second action must be the same as or in privity to the parties in the first action. People v Gates, 434 Mich 146, 155-156;452 NW2d 627 (1990); Duncan v State Hwy Comm, 147 Mich App 267, 270; 382 NW2d 762 (1985). A party is one who is directly interested in the subject matter and has a right to defend or to control the proceedings and to appeal from the judgment. One is in privy to a party if, after the judgment, he or she has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase. Duncan, supra at 271.

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. Eaton, supra at 375.

In the case at bar, plaintiff sued Dobbs and was awarded a default judgment. Dobbs then sued his own insurance company, Auto-Owners, for breach of contract alleging bad faith and failure to defend. The lower court granted Auto-Owners' motion for summary disposition, finding that there was no expectation of coverage, no ambiguity in the insurance contract, no insurance coverage under the policy, and that Auto-Owners had no duty to defend. Defendant Dobbs appealed that decision to this Court, which affirmed the trial court and declined to hear the portable residual liability issue as the issue was untimely raised and never ruled on by the trial court. In March 1993, plaintiff filed a writ of garnishment against Auto-Owners alleging that the no-fault act mandated residual liability coverage. That specific issue was not addressed or decided by the trial court or this Court in Dobbs, supra; thus, there is no res judicata. Further, the parties are not the same in the two cases. The first case was between Dobbs, the tortfeasor, and his insurer. This case is between the injured victim and the tortfeasor's insurer; consequently, collateral estoppel is inapplicable as well. Thus, this suit is not barred by collateral estoppel or res judicata because the issue and the parties are not the same.

Affirmed.

/s/ Roman S. Gribbs
/s/ Jane E. Markey
/s/ Ronald J. Taylor