IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI
ASSOCIATE DIVISION

TB and LB Plaintiffs, vs. PM, APPLE INSPECTIONS, LLC, JP, and JOHN DOE Defendants.	)	Div. 36

Order and Partial Judgment

Case Summary and Ruling

This case involves a 3-car accident wherein the Plaintiffs have sued only for property damages, and one of the defendants (PM) filed a cross-claim against the other defendant (JP) for bodily injury and property damage. All parties were insured. The insurance companies agree to arbitration on the issue of liability for property damage. Defendant JP (cross-claim defendant) was found 100% liable after arbitration. Plaintiffs and Defendant PM seek to invoke the doctrine of collateral estoppel on the issue of liability. Defendant JP objects on various grounds. Plaintiffs' motion granted. Defendant PM's motion is denied.

Procedural History

May 12,2014 Plaintiff TB filed a petition for property damages to his vehicle, a 2010 BMW 328i that occurred as a result of an auto accident. The auto accident

occurred on December 16, 2013 in St. Louis County, Missouri. The 2010 BMW was being operated at the time by Plaintiff's wife, LB.

Plaintiff's wife, LB, stopped at a stop light on southbound Barret Station Road waiting to make a left-hand turn onto eastbound Manchester Road.

Defendant JP (Defendant JP) was traveling in her automobile, a 2008 Range Rover on westbound Manchester Road.

Defendant PM (Defendant PM) was traveling in his 2012 Dodge Ram 1500 on northbound Barret Station Road.

Defendant JP's 2008 Range Rover struck Defendant PM's 2012 Dodge Ram 1500, causing Defendant PM's 2012 Dodge Ram to collide into Plaintiff's 2010 BMW.

Plaintiff TB's insurance carrier at the time was Allied/Nationwide.

Defendant JP's insurance carrier at the time was Safeco.

Defendant PM's insurance carrier at the time was Liberty Mutual.

On June 25, 2014, while this case was pending, Allied/Nationwide, Safeco, and Liberty Mutual sought arbitration for a determination of liability regarding property damage.

On August 5, 2014, after hearing on a motion to compel, the court ordered Defendant JP to produce all non-privileged documents with a privilege log.

On September 17, 2014, Defendant PM moved to file a cross-claim against Defendant JP for bodily injury and property damage.

On January 12, 2015 Defendant PM's cross claim was filed.

On June 1, 2015, Parties consented to LB intervening as Co-Plaintiff (TB and LB hereafter referred to as "Plaintiffs") and Plaintiffs moved to file their first amended petition.

On June 24, 2015, Plaintiffs filed their notice to take the deposition of Safeco Insurance Co., the insurance carrier for Defendant JP

Without objection[1], pursuant to the defendant's requests, Safeco produced documents that included a written award by Arbitration Forum Inc. dated April 23, 2015 ruling Safeco Insurance Co. via Defendant JP was 100% liable against Allied/Nationwide Insurance/Plaintiff TB and "100% liable against Liberty Mutual Insurance – pursuant claims" "for this loss (accident of 12/16/2013) for failure to yield the right of way."[2]

Collateral Estoppel

Collateral estoppel, or issue preclusion, bars relitigation of issues that were necessarily and unambiguously decided in a prior proceeding. *Shores v. Express Lending Servs., Inc.,*. 998 S.W.2d 122, 126 (Mo.App.1999); *Taylor v. Compere.* 230 S.W.3d 606, 611 (Mo.App.2007). Like arbitration, the underlying goal of collateral estoppel is to promote judicial economy and finality in litigation. Thus, "when an issue of ultimate fact has been determined by a valid judgment, it may not again be litigated between the same parties." *King Gen. Contractors v. Reorganized Church of Jesus Christ of Latter Day Saints,* 821 S.W.2d 495, 500 (Mo.1991) (en banc); *see also* Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

Unlike res judicata, collateral estoppel applies to issues that are being relitigated even

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[1] Defendant JP, through her attorney, on the record of non-appearance for scheduled deposition of Safeco corporate representative noted, "Just for the record, we object as far as the insurer/insured privilege relevance and admissibility of certain portions of the testimony that may or may not be elicited from the corporate representative of Safeco."

[2] None of the insurance companies involved in the arbitration have objected to this court recognizing the arbitration's decision for purposes of collateral estoppel in this case.

though the prior lawsuit raised a different cause of action. *Shores*, 998 S.W.2d at 126. "Collateral estoppel does not require the identity of claims and may be asserted by strangers to the original action." *Stine v. Warford*. 18 S.W.3d at 601, 606 (Mo.App.2000).

Missouri public policy favors arbitration. It avoids costly litigation and duplication of efforts, and it swiftly solves claims. *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 228 (Mo.App.2002); *Greenwood v. Sherfield*. 895 S.W.2d 169, 173 (Mo.App.1995). Arbitration awards in Missouri are treated as final judgments. *Virginia Hoelscher v. James R. Patton*. 842 S.W.2d 127, 128 (Mo.App.1992): See also *Masonic Temple Ass'n. of St. Louis v. Farrar*. 422 S.W.2d 95, 109 (Mo.App.1967).

Collateral estoppel doctrine is "issue preclusion." It promotes public confidence, judicial economy, and consistent decisions and judgments. Each case seeking to invoke collateral estoppel is **decided on its own facts**. *Wilkes v. St. Paul Fire and Marine Insurance Co.*, 92 S.W.3d 116, 120 (Mo.App.2002) (emphasis added).

Under Missouri law, we consider three factors in determining whether to apply the doctrine: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; and (3) whether the party against whom collateral estoppel is asserted was a party or **in privity with a party** to the prior adjudication. *King Gen. Contractors*, 821 S.W.2d 495 at 500 (emphasis added). Furthermore, only those issues actually and necessarily decided in the first suit may have preclusive effect in a subsequent action. *See Brown v. Felsen*, 442 U.S. 127, 139 n. 10, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979) ("Whereas res judicata forecloses all that which might have been litigated previously, collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit.") *Abeles v. Wurdack*, 285 S.W.2d 544, 546 (Mo.1955). ("A

judgment between the same parties on a different cause of action is binding as to the facts actually decided, and necessarily determined in rendering the judgment...").

A Potential 4-Step To Consider: Fair and Full Opportunity to Litigate

At times, courts may also apply an additional factor when analyzing collateral estoppel. *See, e.g.,* Aetna Cas. & Sur. Co. v. Gen Dynamics Corp., 968 F.2d 707, 711 (8th Cir.1992) (stating that the fourth factor requires a court to determine whether the party against whom preclusion is asserted had a "full and fair opportunity" to litigate the issue); Shahan v. Shahan, 988 S.W.2d 529, 532-33 (Mo.1999) (en banc). The "full and fair opportunity to litigate" factor was developed to analyze cases **where the parties in the first action are not the same as those in the second** (emphasis added). *See* James v. Paul, 49 S.W.3d 678, 684 (Mo.2001) (en banc) (describing the "full and fair opportunity to litigate" factor as a "shorthand description of the analysis required to determine if *non-mutual* collateral estoppel ... permits use of a prior judgment to preclude relitigation of an issue even though the party asserting collateral estoppel was not a party to the prior case") (emphasis added). Accord Haberer v. Woodbury County, 188 F.3d 957, 963 (8th Cir.1999) (applying Iowa law and refusing to consider the "full and fair opportunity to litigate" factor where the parties in both actions were the same); Restatement (Second) of Judgments § 28(5) and cmt. g (1982) (limiting the fairness inquiry in cases with the same parties to situations involving misconduct by adversaries or other special circumstances).

The fourth factor identified is subject to some misunderstanding. The "full and fair opportunity to litigate the issue in the first suit" is not a second layer of privity analysis under which only those in privity who had actual notice and an opportunity to intervene may be bound by a prior adjudication. Rather, it is a shorthand description of the analysis required to determine if **non-mutual collateral estoppel should be applied** (emphasis added). The principle of non-

mutual collateral estoppel, as adopted in Missouri, permits use of a prior judgment to preclude relitigation of an issue even though the party asserting collateral estoppel was not a party to the prior case. *In re Caranchini*, 956 S.W.2d 910 911 (Mo. banc 1997); See also *James v. Paul* 49 S.W.3d 678 (Mo.2001).

The Arbitration Litigation in This Case

While this lawsuit was pending, the parties' respective insurance companies could not agree which party was responsible for the collision that occurred on 12/16/2013. To resolve the matter, the parties' insurance companies submitted the issues of liability and property damage to arbitration pursuant an inter-company arbitration agreement. Although the parties could have elected to submit their dispute only on liability or only on damages, they chose to submit to arbitration on both liability and property damage. (See Chapter 3 Article First Compulsory Provisions, Reference Guide to Arbitration Forums' Agreement and Rules Effective 6/15/13.)[3]

No insurance company was required to arbitrate any claim if under its insurance policy, settlement could be made only with the insured's consent. (See Chapter 4 Article 2nd Exclusion.) The purpose of this exclusion is to avoid the possibility of the arbitration agreement interfering with the contractual rights between an insured and an insurer. Such an exclusion does not necessarily preclude the arbitration, as a carrier can always secure its insureds' consent to proceed through arbitration. Id.

The hearing procedures for the arbitration allowed parties to be present when the case was heard and produce witnesses at the hearing (Rule 3-7: Hearing Attendance).

[3] All articles and rules cited in regards to the "Arbitration Process" originate from the Reference Guide to Arbitration Forums' Agreement and Rules Effective 6/15/13.

The arbitration process not only allowed a claim to be filed, but also for a responding party to file an answer, add other parties, and file counterclaims (See Rule 2-2 Responding Process).

The arbitration process compelled parties to raise and support affirmative pleadings (See Rule 2-4: Affirmative Pleadings/Defense).

Each party had the opportunity to request a one-year deferment (See Rule 2-10: Deferment).

The decision of the arbitration was final and binding (See Article Third: Decisions (b)). By agreement, the decision of the arbitrator does have collateral estoppel effect for purposes of seeking recovery of supplemental damages (See Article Third: Decision (c)).

The arbitrator was allowed to consider the following: a.) affirmative pleadings or affirmative defenses, b.) defendant requests for any deferment justification, c.) evidence listed, d.) amount entered as the company claim amount, contribution sought amount and/or legal fees, and e.) disputed damages (See Rule 3-5; Requirements for Arbitration Consideration).

In this case, the parties chose not to attend or present witnesses. The evidence the arbitrator did consider in support of the decision included the police reports, Missouri statutes, statements of the parties, diagrams, report from scene investigator, video showing the light sequence, scene photos, and vehicle photos showing points of impact. The arbitrator ruled it is clear from the evidence presented that Defendant PM/Liberty Mutual had control of the intersection and had the green light at the time of impact with Defendant JP/Safeco.

Defendant JP's Opposition to Collateral Estoppel Effect in This Case

One of Defendant JP's objections to the court applying the doctrine of collateral estoppel to the arbitration decision in this case is that applying collateral estoppel would have a chilling effect on the insurance companies.

Defendant JP takes this position while at the same time arguing she is not in privity with Safeco and was not a party to the prior litigation. Defendant JP fails to identify how collateral estoppel in this case will have a chilling effect on an insurance company. No insurance company, neither Liberty Mutual, Allied/Nationwide, nor Safeco, have come forward to protest the recognition of the arbitration award in this case its use for collateral estoppel purposes.

Defendant JP's position is inconsistent with the public policy considerations for arbitration and collateral estoppel.

Arbitration provides an alternative litigation procedure for parties to resolve their disputes in a less expensive and more timely fashion, offering finality of judgment. Defendant JP's position undermines these public policy considerations.

Defendant JP's position suggests adding a second layer of litigation which creates additional cost, collateral issues, and possibly inconsistent findings or judgments. Her position works to frustrate the public policy interests in having a timely final judgment and promoting public confidence in having consistent findings delivered by different tribunals regarding the same issue based upon the same facts.

Defendant JP's position would allow parties to avoid adverse rulings after being provided an opportunity to a full and fair hearing. Her position advocates for a second bite of the apple that undermines the finality and binding effects of the judgment. Such a position is

inconsistent with public policy considerations promoting consistent judgments, final judgments, reducing litigation expenses, and swift rulings.

It is just as likely a chilling effect could occur by ignoring the arbitrator's findings. To relitigate that which has already been litigated creates additional costs and expense to the parties, undermines prior findings and rulings, delays proceedings, creates a risk of inconsistent findings that weakens the public's confidence in the judicial system.

JP presumably argues on behalf of the insurance companies that "insurance companies will ultimately stop arbitrating these disputes as an insurance company cannot expose its insured to such a risk." JP fails, however, to identify the "risk."

JP's policy with Safeco clearly states Safeco " ... will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident." Safeco "will settle or defend, as [they] consider appropriate ... " and " ... will pay all defense costs [they] incur." Defendant JP is not exposed to any greater risk now than she was before arbitration.

Safeco has already agreed with JP to "settle or defend as Safeco deems appropriate."

Defendant JP agrees that use of collateral estoppel is to be considered on a case by case basis. In applying the factors on which the doctrine is to be applied, Defendant JP makes only the argument that she was not a party to the underlying litigation. She makes no attempt to address the "in privity" factor recognized under Missouri law.

1. **The factual issues are identical.**

The factual question decided by the arbitrator was who was at fault in causing the December 16, 2013 collision. This is the same factual question at issue in this case. In order to prove their case, Plaintiffs and Defendant/Cross-Claimant must prove JP was at fault in

causing the collision. This is the factual issue to be framed by the jury instructions in this case (*MAI 17.02*). This is the only factual question at issue in the Motion for Partial Summary Judgment. Accordingly, there is an identity of factual issues and the first factor necessary to establish collateral estoppel is satisfied.

2. The prior arbitration resulted in a final decision on the merits.

The inter-company arbitration resulted in a full and final decision on the merits of the question of which driver was at fault in causing the property damage resulting from the December 16, 2013 collision. Safeco did not subsequently challenge the decision through a re-hearing or appeal. After the arbitrator's adverse decision, Safeco paid the award and reimbursed both Allied/Nationwide and Ohio for the property damage and repairs costs paid on behalf of their insureds.

In Missouri, arbitration awards have the same collateral estoppel and res judicata affect as a judgment of the court. *Cooper v Yellow Freight Sys., Inc.*, 589 S.W.2d 643, 645-46 (Mo.Ct.App.1979). Accordingly, the arbitration resulted in a final decision on the merits and the second factor is satisfied.

3. The party against whom the doctrine in invoked (JP) is in privity with the party to the prior arbitration (Safeco).

For collateral estoppel purposes, parties are in privity when the interests of the nonparty are so closely related to the interests of the other party, that the nonparty can be fairly considered to have had his day in court. *Cox v. Sleck*, 992 S.W.2d 221, 224 (Mo.App.1999): *Missouri Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 811 S.W.2d 28, 32 (Mo.App.1991). Under Missouri law, an insured is in privity with his or her insurance company on issues of the insured's liability for

the covered act or omission. *Major v. Frontenac Indus., Inc.*, 968 S.W.2d 758, 763 (Mo.App.1998), and *Assurance Co. of Am. V. Secura Ins. Co.*, 384 S.W.3d 224, 232 (Mo.App.2012).

In *Major*, the plaintiff obtained a judgment against the insured in a prior damage lawsuit and then filed a garnishment action against his insurance company to collect the judgment. The insurance company (the garnishee) asserted several defenses attempting to prove that its insured was not liable for the plaintiff's injuries. *Supra*, at 762-763. The court found that the interest of the insured and insurer were closely related because the insurer's liability on its policy depended solely on the insured's liability to the plaintiff, and because the insured had every incentive to fully litigate the issue of his liability in the underlying damage action. Therefore, the court ruled the insurance company was in privity with the insured and was collaterally estopped from the re-litigation on the issue of the insured's liability to the plaintiff. *Supra*, at 762-763.

Similarly, an insurance company cannot in a subsequent garnishment action collaterally attack the underlying judgment against its insured. *Secura*, supra at 233. If an insurance company refuses to provide a defense to its insured, it is bound by the outcome of the lawsuit against the insured and cannot re-litigate the insured's liability to the plaintiff. *Secura*, supra at 233. In such cases, privity between the insurer and the insured exists as a matter of law. *Senger v. Minnesota Lawyers Mut. Ins. Co.*, 415 N.W.2d 364, 368 (Minn.App.1987).

Whether the parties are in privity depends mostly on their relationship to the subject matter of the litigation. *Missouri Ins. Guar.*, supra at 32. An automobile insurance policy is essentially a contract of indemnity rendering the parties' relationship as that of indemnitor and indemnitee. *Drennen v. Wren*, 416 S.W.2d 229, 233 (Mo.App.1967). Indemnity is the shifting of responsibility from the shoulders of one person to another. *Beeler v. Martin*, 306 S.W.3d 108,

110 (Mo.App.2010). By definition, an indemnitor has a legal duty, whether imposed by contract or imposed by law, to bear the responsibility for the indemnitee's liability to a third party. *Am. Nat. Prop. & Cas. Co. v. Ensz & Jester, P.C.*, 358 S.W.3d 75, 86 (Mo.App.2011). For collateral estoppel purposes, an insured is in privity with his or her insured by virtue of their indemnitor-indemnitee relationship. *Hinchey v. Sellers*, 165 N.E.2d 156, 160 (NY App. 1959), and *Kohls v. Kenetech Corp.*, 791 A.2d 763, 769 (del. Ch. 2000) aff'd, 794 A.2d 1160 (Del.2002).

In this instance, by virtue of their indemnitor-indemnitee relationship, JP is in privity with Safeco. JP's insurance policy from Safeco provides that "We will pay damages for bodily injury or property damage for which the insured becomes legally responsible because of an auto accident" and "We will settle or defend as we consider appropriate." In addition, Safeco " ... will pay all defense costs we incur." Therefore, Safeco was contractually obligated under JP's policy to pay the arbitrator's award for the repair costs PM's automobile. Safeco had a fiduciary duty to JP to contest the degree of her fault in the arbitration process. In *Grewell v. State Farm Mut. Auto. Ins. Co.*, 162 S.W.3d 503 (Mo.App.2005), the plaintiffs were involved in an automobile collision with another driver who was also insured by State Farm. The State Farm adjuster initially assessed the plaintiffs' fault at 20%. But, after another State Farm adjuster assessed the other driver's fault at only 50%, the plaintiffs' adjuster raised the plaintiffs' fault to 50%. *Grewell*, supra at 505. The plaintiffs objected to the assessment of their fault and sued State Farm. The court ruled that when an insurance claim involves the insured's potential liability, the relationship between the insurer and insured rises to the level of a fiduciary relationship. *Grewell*, supra at 505, 508. This heighted fiduciary relationship compelled Safeco to diligently and faithfully contest JP's liability in the arbitration proceeding, and it had every incentive to do so.

"Our courts have stated the privity exists where the party sought to be precluded has interests that are so closely aligned to the party in the earlier litigation that the non-party can be fairly said to have had its day in court." Paul 49 S.W.3d at 683 citing *Cox v. Sleck,* 992. S.W.2d 221, 224 (Mo.App.1999).

In this case, the interests of Defendant JP and Safeco are so closely aligned, Defendant JP is in privity with Safeco for collateral estoppel consideration.

4. <u>There existed a full and fair opportunity to litigate the issue of JP's liability related to property damage, but not as to personal injury.</u>

The insurance companies' inter-company arbitration process is a very formalized litigation process governed by the detailed rules and procedures for the adjudication of liability for property damage. The rules allow each side to submit claims, counterclaims, affirmative defenses and responses to the other parties' claims. All parties had the opportunity to submit position statements and arguments along with any documentary evidence substantiating their claims and rebutting the other parties' claims. The parties had the right to appear personally at the arbitration hearing and to call witness for live testimony. The parties had the right to implead other parties, and to adjudicated related companion claims. The parties were only in notice for claims of property damage, however, not personal injuries. Had the parties also been on notice for personal injuries claims, different litigation strategies may have been considered or invoked. Additional affirmative defenses may have been pled. Arbitration may have been declined or application for deferment made.

Accordingly, the parties had a full and fair opportunity to litigate the issue of JP's fault as it applied to property damage in the prior arbitration proceeding, and thus, for the plaintiffs, the fourth and final factor is satisfied. It cannot be said, however, that the parties had a

full and fair opportunity to litigate the issue of fault as it may apply to personal injury and thus for Defendant/Cross-Claimant PM, the fourth and final factor is not satisfied.

The record of the arbitration proceeding does not show that the parties were on notice to litigate such a claim. The parties were not provided an opportunity to raise the potential defenses and other affirmative defenses that may have been available for liability as it applied to personal injury.

Conclusion

Wherefore all the foregoing reasons, this Court finds that for Plaintiff's cause of action for property damage, Defendant JP is precluded from contesting liability and shall be found to be 100% at fault for Plaintiff's property damage. The jury shall be instructed accordingly and the case shall proceed on the issue of damages only.

As to Defendant/Cross-Claimant PM's cause of action for personal injury against Defendant JP both the issue of liability and damages shall be tried to the jury and the jury instructed accordingly.

Finally, because the parties are not the same and the subject matter is different and the evidence needed in one suit is different from evidence needed in the other, this court severs Plaintiffs' cause of action against JP from Defendant PM' s cause of action against JP If the Plaintiffs' cause of action and the cross-claim Defendant PM's cause of action are tried before the same jury, the instructions will become complicated, confusing, and potentially misleading to the jurors. To avoid this risk, the court severs Plaintiffs' cause of action against Defendant JP from the cross-claim of Defendant PM against Defendant JP (See Rule 66.02.).

SO ORDERED:

[redacted] DN 34

Judge

6-30-2014

[redacted]