STATE OF MICHIGAN

COURT OF APPEALS

GEORGE A. OUNAN and LENORA OUNAN, individually and as assignees and subrogors of GLENN GUMERSON, DONALD LEITZ, and RITA LEITZ,

Plaintiffs-Appellants,

v

HASTINGS MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 6, 1996

No. 182100
LC No. 94-009097-CK

Before: Sawyer, P.J., and Griffin and M.G. Harrison,* JJ.

PER CURIAM.

Plaintiffs appeal as of right an order of the circuit court granting summary disposition to defendant pursuant to MCR 2.116(C)(7) [claim barred by prior judgment]. We reverse.

In 1989, plaintiffs sued Glen Gumerson, Donald and Rita Leitz, and another defendant for injuries sustained in a boat explosion. The boat was owned and operated by either Gumerson, the Leitzes, or all three. While the tort case was pending, the Leitzes initiated a separate action for declaratory judgment that a yacht casualty insurance policy Gumerson purchased from defendant, Hastings Insurance Company (Hastings), covered the incident spawning plaintiffs' tort claim. Gumerson filed a cross-claim against Hastings, contending that Hastings had a duty to defend and seeking a declaration that his policy with Hastings covered the loss. Additionally, plaintiffs answer sought declaratory judgment that Gumerson's policy covered any judgment rendered against him.

After the trial court realigned the parties by placing plaintiffs, Gumerson, and the Leitzes as plaintiffs and Hastings as defendant, Hastings filed a motion for summary disposition on the basis that Gumerson orally canceled the insurance policy two days before the boat exploded. Thereafter, Gumerson and Hastings stipulated to entry of an order dismissing Gumerson's cross-complaint against Hastings with prejudice. Plaintiffs objected to the dismissal because they wished to challenge Hastings' obligation under the insurance contract even if Gumerson did not want to. Nevertheless, on July 22,

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

1992, the circuit court entered an order dismissing Gumerson's claim against Hastings, stating that "if, in fact, you're [plaintiffs] found to have a claim against Gumersons [sic], and if Gumersons [sic] were to prove uncollectable, you may possibly have some action against the insurer Hastings as a third-party beneficiary of a policy of insurance, your [plaintiffs' counsel's] people wouldn't be prejudiced in that regard." Plaintiff attempted to appeal the ruling, but this Court denied plaintiffs' application for leave to file a delayed appeal on August 24, 1993.

On August 19, 1994, plaintiffs obtained a consent judgment in the underlying tort action against Gumerson and the Leitzes in the amount of $300,000 plus $118,093 in interest. Pursuant to the consent judgment, the named defendants paid plaintiffs a combined total of $50,000, and Gumerson assigned plaintiffs his rights under the insurance policy. On August 31, 1994, plaintiff filed the instant action to collect the unsatisfied portion of the judgment. However, the trial court granted summary disposition to Hastings pursuant to MCR 2.116(C)(7) on the basis that plaintiffs could establish standing only as Gumerson's assignee, and that the consent judgment between Hastings and Gumerson collaterally estops plaintiff from claiming that Hastings is obliged to cover the loss.

On appeal, plaintiffs first contend that, as judgment creditors, they have independent standing to obtain a declaratory judgment regarding the extent of Hastings' obligation to Gumerson, plaintiffs' judgment debtor. We agree. Where a judgment remains unsatisfied, MCR 3.101 entitles a judgment creditor to seek a writ of garnishment against anyone he reasonably believes to be indebted to the judgment debtor. Further, MCR 2.605(A)(2) entitles a litigant to seek a declaratory judgment whenever the lower court would have "jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment." See *Allstate Ins Co v Hayes*, 442 Mich 56, 65, 67-68; 449 NW2d 743 (1993). Here, because they claim that Hastings is obligated to pay their judgment debtor for a portion of an unsatisfied judgment, plaintiffs have standing to bring a garnishment action against Hastings. See MCR 3.103; *Rutter v King*, 57 Mich App 152, 171; 226 NW2d 79 (1974). Consequently, plaintiffs have independent standing to initiate this action for declaratory judgment. MCR 2.605(A); see *Hayes, supra* at 64-65, 67-68; *Cloud v Vance*, 97 Mich App 446; 296 NW2d 68 (1980). In view of our holding, we need not address plaintiffs' alternative arguments regarding the issue of standing.

Next, plaintiffs contend that the trial court erred in ruling that the consent judgment between Gumerson and Hastings collaterally estops plaintiffs from claiming that Hastings is obligated under the insurance policy to cover losses sustained in the boat explosion.[1] Again, we agree. In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), we accept plaintiff's well-pleaded allegations as true, *Shawl v Dhital*, 209 Mich App 321, 323; 529 NW2d 661 (1995); *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 252; 506 NW2d 562 (1993), and examine any pleadings, affidavits, depositions, admissions, and documentary evidence submitted by the parties in a light most favorable to the nonmovant. MCR 2.116(G)(5); *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617; 513 NW2d 428 (1994). If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the trial court must enter judgment without delay. MCR 2.116(I)(1); *Skotak, supra* at 617; *Nationwide Mutual Ins Co v Quality Builders, Inc*, 192 Mich App 643, 647-648; 482 NW2d 474 (1992).

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990); *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). To be actually determined, a question must be put into issue by the pleadings, and actually submitted to and determined by the trier of fact. *Bullock v Huster*, 209 Mich App 551, 556; 532 NW2d 202 (1995). Further, the parties must have had a full and fair opportunity to litigate the issues in the first action. *Gates, supra* at 156-157; *Bullock, supra* at 556. Because collateral estoppel requires that the issues be actually determined, consent judgments have no collateral estoppel effect. *Rzepka v Michael*, 171 Mich App 748, 756; 431 NW2d 441 (1988); *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 102-103; 380 NW2d 60 (1985); *American Mutual Liability Ins Co v Michigan Mutual Liability Co*, 64 Mich App 315, 327; 235 NW2d 769 (1975).

In the present case, the trial court ruled that the consent judgment between Hastings and Gumerson collaterally estops plaintiff from litigating whether Hastings is obligated under its policy with Gumerson. This was error because a consent judgment has no collateral estoppel effect. See *Rzepka, supra* at 756; *Van Pembrook, supra* at 102-103; *American Mutual Liability Ins Co, supra* at 327. This is especially true where, as here, the coverage issue was neither submitted to nor decided by a trier of fact, *Gates, supra* at 154; *Porter, supra* at 485, and plaintiffs were expressly denied the opportunity to contest the coverage issue before the consent judgment was entered. *Gates, supra* at 156-157.

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

/s/ Richard Allen Griffin
/s/ Michael G. Harrison

[1] As the trial court recognized, there is no issue whether plaintiffs possess standing as subrogee of Gumerson's rights against defendant. Indeed, "judgment creditors having a valid assignment from the judgment debtor insured may bring a direct action against the insurer for breach of contract of the insurance policy." *Davis v Great American Ins Co*, 136 Mich App 764, 767; 357 NW2d 761 (1984), citing *Ward v Detroit Automobile Inter-Ins Exchange*, 115 Mich App 30; 320 NW2d 280 (1982).