

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,

UNPUBLISHED

Plaintiffs-Appellants,

v

No. 182100
LC No. 94-009097-CK

HASTINGS MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

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

SAWYER, P.J. (dissenting).

I respectfully dissent.

Plaintiffs Ounan were injured in a boat explosion. The boat was owned and operated by plaintiffs Gumerson, Leitz, or all three. Plaintiffs Ounan initiated a tort action against Gumerson and the Leitzes, which action was transferred to district court. While that action was pending, the Leitzes initiated a declaratory judgment action. In that action, the trial court realigned the parties, placing the Ounans, Gumerson and the Leitzes as plaintiffs and Hastings Mutual and Auto Owners Insurance Company as defendants. Gumerson filed a cross-complaint against Hastings Mutual, contending that it owed Gumerson a duty to defend. Hastings filed a motion for summary disposition, contending the policy had been canceled before the explosion. At a subsequent hearing, Gumerson stipulated to the entry of an order dismissing the cross-claims against Hastings with prejudice. The Ounans objected, contending that while Gumerson may not be challenging that the policy had been canceled, they were. The trial court entered an order dismissing the claims against Hastings.

Thereafter, in the underlying tort case, the Ounans entered into a consent judgment which provided for a judgment of \$300,000 plus interest against the Leitzes and Gumerson. Gumerson assigned his rights under the Hastings policy to plaintiffs. Thereafter, plaintiffs filed the instant action

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

against Hastings seeking to collect on the judgment. The trial court granted summary disposition in favor of Hastings based upon the prior consent judgment.

Plaintiffs Ounan raise a number of issue related to their ability to maintain an independent action against defendant. Plaintiffs' arguments, however, overlook the fact that they were a party to the prior declaratory judgment action which resulted in summary disposition being granted to defendant. Plaintiffs may well have an independent basis for their claims against defendant. Those claims should have been raised in the prior declaratory judgment action. Indeed, plaintiffs apparently tried to raise those issues by objecting to the entry of the consent judgment in the prior action, arguing that they were challenging the cancellation and there was support for the position that insurance coverage was in effect on the date of the explosion. However, the trial court in the prior action rejected plaintiffs' argument, perhaps erroneously so. Plaintiffs failed to take a timely appeal, and their subsequent application for delayed appeal was denied on August 24, 1993, in Docket Number 164371.

In short, I might agree with plaintiffs' position had they not been parties to the prior declaratory judgment action. But once they became parties to that action, all issues related to coverage should have and could have been resolved in that action. See *VanderWall v Midkiff*, 186 Mich App 191; 463 NW2d 219 (1990). Accordingly, I believe that the trial court correctly determined that plaintiffs' claim was barred by prior judgment, MCR 2.116(C)(7).

I would affirm.

/s/ David H. Sawyer