STATE OF MICHIGAN

COURT OF APPEALS

LAWRENCE H. PHIPPS,

Plaintiff-Appellant,

v

JACK D. WATKINS d/b/a WATKINS INSURANCE AGENCY,

Defendant-Appellee,

and

STATE FARM MUTUAL INSURANCE COMPANY and MARY C. MARKELL,

Defendants.

UNPUBLISHED
July 8, 1997

No. 194015
Genesee Circuit Court
LC No. 85-082540

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition to defendant Watkins. We affirm.

While driving his motorcycle, plaintiff collided with an automobile driven by Richard Craven, sustained injuries, and sought no-fault benefits from defendant State Farm Mutual Insurance Company. State Farm refused to pay because it canceled Craven's policy prior to the accident. Plaintiff filed a declaratory judgment action which included a second count in negligence against defendant Watkins, an agent of State Farm.

A bench trial was held in the declaratory judgment action on January 5, 1988. To determine whether Craven or his fiancé, Mary Markell, was the named insured on the policy, the trial court heard

testimony about how the policy was obtained. The Court held that the policy (1) had been issued to Craven, (2) was validly canceled, and (3) that there was no valid insurance contract between Markell and State Farm. Plaintiff appealed, and we issued an unpublished opinion which affirmed the trial court's finding that there was no valid contract, but remanded to the trial court to determine whether Markell was also entitled to notice of cancellation (Docket No. 115999, rel'd February 8, 1991).[1]

This appeal arises out of the second count of plaintiff's case – the negligence action against the State Farm agent, Watkins. Plaintiff asserts that, because defendant Watkins negligently failed to list Markell as the named insured on the policy, plaintiff is now without personal protection benefits. The trial court granted defendant's motion for summary disposition on two grounds: collateral estoppel and absence of duty owed to plaintiff. On appeal, we do not address the issue of whether a duty was owed to plaintiff because we find that the doctrine of collateral estoppel bars plaintiff's claim.

Under the doctrine of collateral estoppel, "where the first and second causes of action are different, 'the judgment [rendered in the first cause of action] is conclusive between the parties in the second case as to questions actually litigated and determined by the judgment.'" *Alterman v Provizer, Eisenber, Licthenstein & Pearlman, PC*, 195 Mich App 422, 424; 491 NW2d 868 (1992). Generally, for the doctrine of collateral estoppel to bar the subsequent action there is also a mutuality requirement which is met if "the one taking advantage of the earlier adjudication would have been bound by it had it gone against him." *Id.* However, there is an exception to the mutuality requirement when a party who is an agent, servant, or employee of the litigant involved in the first suit, asserts collateral estoppel defensively. *Arim v General Motors Corp*, 206 Mich App 178, 194; 520 NW2d 695 (1994).

In order to successfully assert his negligence claim, plaintiff must prove that either Craven or Markell made representations to Watkins Insurance Agency that the insurance policy was to list Markell as the named insured. Yet, this issue has already been determined in the declaratory judgment action because the trial court made findings of fact that no such representations were made. Moreover, there is no requirement of mutuality here because defendant Watkins is asserting collateral estoppel defensively and, as plaintiff admits in his complaint, defendant Watkins is an agent of State Farm, the party in the first case. See *Arim, supra* at 194. Therefore, plaintiff is collaterally estopped from relitigating this issue, and his negligence claim must fail.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] On remand, the trial court found that at the time that State Farm canceled the policy, Markell and Craven were family members living in the same household; therefore, the notice to Craven was sufficient to Markell. This Court affirmed, holding, "there is nothing on the application to indicate that Markell

had an insurable interest in the car, or that she would otherwise need to receive notice of the cancellation for the reasons listed." *Phipps v State Farm Mutual Ins Co (After Remand),* 206 Mich App 199, 202-203; 520 NW2d 704 (1994).