

STATE OF MICHIGAN
COURT OF APPEALS

THRIFTY RENT-A-CAR SYSTEM, INC., and T.R.
LLOYD, INC., d/b/a THRIFTY CAR RENTAL,

UNPUBLISHED
January 20, 2005

Plaintiffs-Appellees,

v

No. 249409
Wayne Circuit Court
LC No. 00-010999-NI

ASAD ABBAS,

Defendant/Cross-Defendant-
Appellant,

and

SYED RISVI,

Defendant/Cross-Plaintiff.

Before: Neff, P.J., and Cooper and R. S. Gribbs* JJ.

PER CURIAM.

Defendant Asad Abbas appeals as of right a judgment of \$1,620,940 entered by the trial court in favor of plaintiffs, Thrifty Rent-A-Car System, Inc., and T.R. Lloyd, Inc., d/b/a Thrifty Car Rental, in this action for common-law and contractual indemnification. We affirm.

I

On August 8, 1997, defendants Abbas and Risvi rented a 1997 Plymouth Voyager¹ from plaintiff T.R. Lloyd, franchisee of plaintiff Thrifty Rent-A-Car System, Inc. While traveling in Illinois, defendants were involved in a collision. Abbas was driving the van at the time.

In a subsequent federal court action, defendants' insurers, Allstate Insurance Company and American Express, Property and Casualty Company, sought a declaratory judgment against

¹ The record contains conflicting information whether the rental vehicle was a Dodge Caravan or a Plymouth Voyager.

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

Thrifty Rent-A-Car System, Abbas, and Risvi concerning insurance liability for the accident. *Allstate Ins Co v Thrifty Rent-A-Car Systems, Inc*, 249 F3d 450 (CA 6, 2001). The insurance companies sought: (1) a declaration that Thrifty, as owner of the rented vehicle, owed primary insurance coverage to Abbas; (2) a declaration that the insurance coverage owed to Abbas was unlimited in amount; and (3) a declaration that Thrifty had a duty to defend Abbas against personal injury claims arising out of the accident. *Id.* at 453.

The parties filed cross-motions for summary judgment. *Id.* The district court granted Allstate and American Express's motions and denied Thrifty's motion. *Id.* The district court found that Thrifty had a duty to provide primary insurance coverage for its rental vehicle, and that Thrifty had been negligent in leasing its vehicle to Risvi and Abbas because it failed to notify them, pursuant to MCL 257.401(4), that its liability was limited to \$20,000 per person and \$40,000 per accident. *Id.* at 455. Thrifty appealed. The Sixth Circuit Court of Appeals reversed the district court's grant of summary judgment for American Express and remanded the case for entry of summary judgment in favor of Thrifty. *Id.* at 458. The circuit court of appeals held, in relevant part, that although Thrifty had a duty to provide primary insurance coverage for liability arising out of the use of the rented vehicle, insurance coverage was limited to the \$20,000/\$40,000 statutory minimum coverage. *Id.* at 455. The court also held that "negligent in leasing" did not include the failure to comply with the notice requirements set forth in MCL 257.401(4). *Id.* at 456.

During the time that the federal case was on appeal to the Sixth Circuit Court of Appeals, plaintiffs settled the underlying tort claims for \$1,239,934. Plaintiffs thereafter filed this action seeking contractual and common law indemnity for the settlement amount, \$362,206 in attorney fees and expenses, and \$18,800 for the value of the van. The parties filed cross motions for summary disposition and stipulated to the following facts. Abbas and Risvi entered into a rental agreement with plaintiffs, which designated Risvi as the renter and Abbas as an additional authorized renter of a 1997 Plymouth Voyager Van. The rental agreement contained an indemnity clause in which the renters agreed to indemnify plaintiffs for liability or loss arising out of the operation of the vehicle during the rental period. Risvi declined additional insurance coverage offered by plaintiffs; however, it is uncertain whether Abbas was offered and/or declined the same additional insurance coverage. On August 9, 1997, Abbas was operating the van when it was involved in an accident.

The trial court granted plaintiffs' motion and denied Abbas' motion for summary disposition. The court concluded that Abbas must indemnify plaintiffs. The court entered a judgment in favor of plaintiffs for \$1,620,940.

II

Abbas' argues that plaintiffs' claim for indemnification is barred by principles of res judicata and collateral estoppel. We disagree.

The applicability of res judicata is a question of law that is reviewed de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). Likewise, the applicability of collateral estoppel is a question of law that is reviewed de novo. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996).

On appeal, Abbas claims that the suit should have been barred because a suit was previously filed in federal court involving the same parties and arising out of the same occurrence.

“If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law. The state courts must apply federal claim-preclusion^[2] law in determining the preclusive effect of a prior federal judgment.” [*Pierson Sand & Gravel, supra* at 380-381, quoting 18 Moore, Federal Practice, § 131.21(3)(d), p 131-50.]

We find Abbas’ arguments without merit. In general, the courts have held that a prior judgment is not conclusive in a subsequent action between codefendants, whether the subsequent action was one for contribution, indemnity, or compensatory damages:

[A] prior judgment is not conclusive in the subsequent action unless the codefendants occupied adversary positions in the prior action and actually litigated therein the issue of their liability inter se as well as the issue of their liability to the injured party. The reasoning underlying such rules is that in the absence of a statute or rule requiring a defendant to cross-claim against his codefendant, and in the absence of such a cross claim, the judgment in the prior action merely adjudicates the rights of the plaintiff as against each defendant, and leaves unadjudicated the rights of the codefendants as between themselves. [Anno: *Judgment in action against codefendants for injury or death of person, or for damage to property, as res judicata in subsequent action between codefendants as to their liability inter se*, 24 ALR3d 318, § 2.]

Accordingly, “if two or more parties are named as defendants in an action and such defendants are not adversaries in that proceeding, the one who is cast in the suit is not precluded from seeking indemnity or contribution from the co-defendant on theories that were not litigated in the original suit.” *Universal Underwriters Ins Co v Ford Motor Co*, 264 F Supp 757, 758 (ED Tenn, 1967); see also *Cook v Kendrick*, 16 Mich App 48, 51-54; 167 NW2d 483 (1969). The test is whether the co-defendants make each other adversaries by raising issues among themselves. *Universal Underwriters, supra* at 759. Under federal rules of procedure, cross-claims against a co-party are permissive, not mandatory. FR Civ P 13(g); *United States v Confederate Acres Sanitary Sewage & Drainage System, Inc*, 935 F2d 796, 799 (CA 6, 1991).

Abbas cites no authority or factual circumstances that would except this case from the general rule that preclusion does not apply to plaintiffs’ action for indemnity. 24 ALR3d 318, § 5(b), citing *Continental Casualty Co of Illinois v Westinghouse Electric Corp*, 327 F Supp 723,

² In federal court, collateral estoppel is generally referred to as issue preclusion and res judicata is referred to as claim preclusion. *Dubuc v Green Oak Tp*, 312 F3d 736, 745 (CA 6, 2002).

725 (ED Mich, 1970) (codefendant in subrogation action was bound by the findings of fact made on the issues already decided and was estopped from any attempt to relitigate those issues that were necessarily raised at trial); see also *Gomber v Dutch Maid Dairy Farms, Inc*, 42 Mich App 505, 511-512 ; 202 NW2d 566 (1972). The adverse parties in the instant case were codefendants in the former suit, and the record does not show that either codefendant asserted any claim adverse to the other. Furthermore, Thrifty was not required to file a cross-claim in federal court, and thus, its failure to do so cannot serve as the basis for refusing to allow it to litigate such claim in an independent action in state court.

III

Abbas' argues that plaintiffs are not entitled to common-law indemnity because they were negligent per se. We disagree.

This issue presents a question of law and matters of statutory interpretation. We review de novo questions of law. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). We also review de novo matters of statutory interpretation. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

“[T]he right to common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party’s being held liable, the latter party is entitled to restitution for any losses. However, a party may not seek common-law indemnity where the primary complaint alleges active, rather than passive, liability.” *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 531; 644 NW2d 765 (2002) (citations omitted).

The owner’s liability statute, MCL 257.401(3) provides:

(3) Notwithstanding subsection (1),³ a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle under a lease providing for the use of the motor vehicle by the lessee for a period of 30 days or less is liable for an injury caused by the negligent operation of the leased motor vehicle only if the injury occurred while the leased motor vehicle was being operated by an authorized driver under the lease agreement or by the lessee’s spouse, father, mother, brother, sister, son, daughter, or other immediate family member. Unless the lessor, or his or her agent, was negligent in the leasing of the motor vehicle, the lessor’s liability under this subsection is limited to \$20,000.00 because of

³ Subsection (1) provides: “This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. ...”

bodily injury to or death of 1 person in any 1 accident and \$40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.

MCL 257.401(4) requires that car rental companies notify lessees of the above limits, and inform lessees that they may be liable for amounts in excess of these limits. Subsection (5), however, states that, “[s]ubsections (3) and (4) shall not be construed to expand or reduce, except as otherwise provided by this act, the liability of a person engaged in the business of leasing motor vehicles or to impair that person’s right to indemnity or contribution, or both.” MCL 257.401(5); see also *Joe Panian Chevrolet, Inc v Young*, 239 Mich App 227, 228-230, 232; 608 NW2d 89 (2000).

Here, Abbas contends that plaintiffs were actively negligent, by definition, as the owners of the vehicle because Abbas was operating the van with Thrifty’s express consent and knowledge. Further, as vehicle owners/lessors, plaintiffs are subject to vicarious liability for the negligent actions of the lessee/renter pursuant to MCL 257.401(3). We disagree.

"It has long been held in Michigan that the party seeking indemnity must plead and prove freedom from personal fault. This has been frequently interpreted to mean that the party seeking indemnity must be free from active or causal negligence. If a party breaches a direct duty owed to another and this breach is the proximate cause of the other party's injury, that is active negligence. Where the active negligence is attributable solely to another and the liability arises by operation of law, that is passive negligence."

To determine whether the indemnitee was "actively" or "passively" negligent, the court examines the primary plaintiff's complaint. "If [the] complaint alleges 'active' negligence, as opposed to derivative liability, the defendant is not entitled to common-law indemnity." [*Feaster v Hous*, 137 Mich. App. 783, 787-788; 359 NW2d 219 (1984) (citations omitted).]

The circumstances of this case leave no doubt that plaintiffs’ liability under the owner’s liability statute, MCL 257.401, constitutes passive negligence, thus, entitling plaintiffs to indemnification from the tortfeasor who was the actual cause of the injuries. *Provençal v Parker*, 66 Mich App 431, 438-439; 239 NW2d 623 (1976). Abbas does not assert that any breach of duty by plaintiffs proximately caused the injuries in the car accident. On the contrary, indemnity is sought for liability and losses stemming from Abbas’ operation of the van. Liability of the owner/lessor of a vehicle under the owner’s liability statute arises by operation of law, which is merely a passive or secondary theory of negligence. *Gulick v Kentucky Fried Chicken Mfg Corp*, 73 Mich App 746, 750; 252 NW2d 540 (1977). Plaintiffs were not “actively negligent” on the basis of their ownership of the vehicle.

Abbas also argues that plaintiffs were actively negligent on the basis of the failure to notify Abbas of plaintiffs’ limited liability under MCL 257.401(3), and the failure to notify him of his potential liability for amounts paid in excess of plaintiffs’ limited liability. We again disagree.

Any alleged negligence in informing Abbas of the terms of the lease cannot be considered active or causal negligence with regard to the primary claim. Although the liability limits in MCL 257.401(3) are inapplicable if “the lessor, or his or her agent, was negligent in the leasing of the motor vehicle,” we agree with the trial court that “negligent in leasing” does not refer to the failure to comply with the notice requirements set forth in MCL 257.401(4).

MCL 257.401 imposes no consequences on a lessor for failure to comply with the notice provision of subsection (4). Moreover, subsection (5) expressly states that subsections (3) and (4) shall not be construed to expand or reduce a lessor’s liability or impair the right to indemnity, indicating that the lessor’s liability vis-à-vis the lessee remains what it is under the common law. *Church Mut Ins Co v Save-a-Buck Car Rental Co, Inc*, 151 F Supp 2d 905, 910 (WD Mich, 2000). Given the provision regarding the right to indemnity in subsection (5), the statutory language “negligent in the leasing of the motor vehicle” must refer to actions that would have made the lessor liable under common law, such as negligent entrustment or negligence in failing to provide the lessee with a reasonably safe vehicle, none of which was alleged in this case. See *Allstate, supra* at 456; *Church Mut Ins Co, supra* at 911.

Finally, we reject Abbas’ cursory claim that plaintiffs may not seek common-law indemnification from him because as a negligent permissive user, he was plaintiffs’ own insured. Unlike in *Universal Underwriters Ins Co v Vallejo*, 436 Mich 873; 461 NW2d 364 (1990), cited by Abbas, this case is not an action by an insurer against a permissive driver involving a loss covered under “a standard automobile policy that typically insures such a permissive driver” for the very loss at issue. While car rental companies are required to provide primary insurance coverage for liability arising out of the use of their vehicles, *State Farm Mut Auto Ins Co v Enterprise Leasing Co*, 452 Mich 25, 32, 41; 549 NW2d 345 (1996), they are only required to provide insurance coverage up to the \$20,000/\$40,000 statutory minimum coverage limits established in MCL 257.520. Here, plaintiffs are seeking indemnification for amounts they paid in excess of this statutory minimum.

IV

Abbas’ argues that plaintiffs were not entitled to contractual indemnification because the indemnification clause in the rental agreement was void and unenforceable and amounted to an adhesion contract. We disagree.

The interpretation of a contract is a question of law we review de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact. *DaimlerChrysler Corp v G Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003). “An indemnity contract is construed in the same manner as other contracts. Thus, an unambiguous written indemnity contract must be enforced according to the plain and ordinary meaning of the words used in the instrument.” *Id.* at 184 (citations omitted).

Abbas does not claim that the language of the clause is ambiguous, but rather, that it amounts to an adhesion contract. In determining whether a contract is one of adhesion, this Court considers the relative bargaining power of the parties, their relative economic strength, and the alternative sources of supply. *Sands Appliance Services v Wilson*, 231 Mich App 405, 419; 587 NW2d 814 (1998), rev’d on other grounds 463 Mich 231 (2000). “Reasonableness is the

primary consideration in deciding whether a contract clause is enforceable.” *Id.* “Furthermore, a contract is an adhesion contract only if the party agrees to the contract because he has no meaningful choice to obtain the desired goods or services elsewhere.” *Rembert v Ryan’s Family Steak Houses, Inc*, 235 Mich App 118, 157 n 28; 596 NW2d 208 (1999).

This Court has previously found “no legal rule in Michigan [that would] prohibit[] a person in the business of renting or leasing vehicles from contracting for indemnification from the vehicles’ users.” *Joe Panian Chevrolet, supra* at 236. Here, it was reasonable for plaintiffs to place the risk of liability on Abbas and Risvi, the individuals who were in the best position to avoid the accident. Furthermore, Abbas and Risvi had other meaningful choices for renting a vehicle. Thus, because plaintiffs were not prohibited by law from contracting for indemnification, because the indemnification clause was reasonable, and because Abbas could have rented a vehicle from another company, the indemnification provision does not constitute an adhesion contract.

Given our analysis above with regard to Abbas’ claims concerning notice under MCL 257.401 and the liability of rental car owners vis-à-vis lessees, we find no basis for deeming the indemnification provision void and unenforceable. See MCL 257.401(5); *Joe Panian Chevrolet, supra*. As noted, this Court has recognized the enforceability of contractual indemnity provisions with regard to the rental of vehicles, *id.*, and Abbas points to no unique aspect of the contractual provision at issue that warrants a contrary conclusion.⁴

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs

⁴ Abbas has failed to properly argue the merits of his assertion that any award for the loss of the rental vehicle should be allocated equally between Abbas and Risvi, and this claim is therefore abandoned. *Yee v Shiawassee County Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).