

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOYCE RUTH HILL, Personal Representative of  
the Estate of Michael Keene Hill, Deceased,

UNPUBLISHED  
May 27, 2003

Plaintiff-Appellee,

v

No. 234455  
Van Buren Circuit Court  
LC No. 95-040448-NI

WALL STREET SYSTEMS, INC,  
ZBIGNIEW SZWAJNOS, JAN KOMAR,  
L.F. TRANSPORTATION, INC., and  
ANDRZEJ LASSAK, jointly and severally,

Defendants,

and

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

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Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant Auto-Owners Insurance Company appeals by leave granted the trial court's judgment entering an arbitration award in favor of plaintiff, Joyce Hill. Auto-Owners also appeals the trial court's denials of its motions for relief from judgment, to vacate the arbitration award, and to amend the judgment, as well as the trial court's grant of sanctions. We reverse.

I. Basic Facts And Procedural History

This case arises out of an automobile accident that occurred in August of 1994. This Court described the underlying events when it reviewed a related declaratory judgment action in 1999:

Decedent Michael Keene Hill died when his truck hit a tractor-trailer driven by defendant Jan Komar. While driving a 1992 Kenworth tractor, Komar had hauled a truckload of cleaning compound and corrosive liquid from Chicago to California for defendant [L.F. Transportation]. [Canal Insurance Company] provided [L.F. Transportation] liability coverage for the Kenworth tractor. The Kenworth was owned by defendant Andrzej Lassak, Komar's employer, and

leased to [L.F. Transportation]. After Komar delivered the materials, he drove the Kenworth back, carrying a shipment of produce bound for Toronto that Lassak had arranged for Komar to pick up. When Komar arrived in Chicago en route to Toronto, the Kenworth developed mechanical problems. To ensure that Komar could complete the trip to Toronto, Lassak arranged to lease or borrow a 1985 Mack tractor owned by defendant Zbigniew Szwajnos. Szwajnos had previously leased the 1985 Mack to defendant Wall Street Systems, Incorporated . . . . Komar eventually delivered the produce to Toronto driving the Mack and headed back toward Chicago with an empty trailer. The accident occurred in Van Buren County during Komar's return to Chicago.<sup>1</sup>

On June 6, 1995, plaintiff Joyce Hill, the decedent's widow, filed a wrongful death action against Komar, Lassak, Szwajnos, Wall Street Systems, and L.F. Transportation.<sup>2</sup> In June of 1996, Canal Insurance Company, the insurer who issued a policy on the Kenworth tractor to defendant L.F. Transportation, filed a separate declaratory judgment action in the Van Buren Circuit Court in which it asserted that it was not obligated under the policy to provide coverage of the accident involving the Mack tractor. In August of 1997 the trial court entered an order in the declaratory judgment action finding that the policy issued to Canal did, in fact, cover the accident. After the trial court denied a motion by Canal for reconsideration, Canal appealed the trial court's decision to this Court.

As a result of Canal's appeal, in February of 1998 Hill made a demand on defendant Auto-Owners, the insurer who had issued a no-fault insurance policy on the vehicle decedent was driving, that an uninsured motorist claim be arbitrated pursuant to the terms of that policy. The Auto-Owners policy contained an uninsured motorists provision and a provision for arbitration of such claims.

Canal denied that there was coverage and continued to deny it in its appeal, even after the court ruled that there was coverage. Canal claimed that Hill should be deemed "uninsured" and thus be able to maintain an uninsured motorist claim. When Auto-Owners failed to respond to this demand, Hill filed an amended complaint in the wrongful death action in March of 1998 adding a claim for arbitration under the terms of the Auto-Owners policy.

In response, in May of 1998 Auto-Owners filed a motion for summary disposition as to count II of Hill's first amended complaint, arguing that the trial court, in its August 1997 ruling in the declaratory judgment action, had already ruled that there was coverage under the Canal policy and that, therefore, Hill had no basis for seeking uninsured motorist benefits under the Auto-Owners policy. Hill responded with a cross-motion for summary disposition, pointing out that Canal was continuing to deny coverage and requesting the trial court, notwithstanding its holding in the declaratory judgment action, to find that under these circumstances Komar's vehicle was uninsured, thus permitting the case to proceed to arbitration.

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<sup>1</sup> *Canal Ins Co v Joyce Ruth Hill*, unpublished opinion per curiam of the Court of Appeals, issued September 3, 1999 (Docket No. 208953).

<sup>2</sup> Wall Street and L.F. Transportation later obtained summary disposition in their favor, and they are not a part of this appeal.

After hearing arguments from both parties in June of 1998, the trial court denied Auto-Owners' motion, granted Hill's motion, and ordered the case to arbitration. After the trial court denied its motion for reconsideration or rehearing, Auto-Owners filed an interlocutory appeal to this Court and, in connection with the appeal, filed a motion for a stay of proceedings in the trial court. In response, Hill filed a motion to compel Auto-Owners to designate an arbitrator. After a hearing, the trial court denied the stay and granted Hill's motion. In December of 1998, this Court entered an order denying Auto-Owners' interlocutory appeal because Auto-Owners had failed to persuade the Court of the need for immediate appellate review. Hill then filed a demand for arbitration.

In September of 1999, this Court issued its unpublished opinion in Case No. 208953 affirming the trial court's ruling in the declaratory judgment action and finding that the Canal policy covered the accident. Canal immediately filed an application for leave to appeal with the Supreme Court, but that Court denied the motion. In the meantime, however, the uninsured motorist action moved forward, and in December of 1999, more than three months after this Court affirmed the trial court's declaratory judgment, and two weeks before the Supreme Court denied Canal's application, the arbitrators rendered an award of \$875,000 in favor of Hill. Subsequently the arbitrators clarified that this award included interest at twelve percent per annum from March 13, 1998, the date on which Hill filed her first amended complaint

In January of 2000, Auto-Owners filed a motion for relief from the trial court's 1998 order compelling arbitration. Auto-Owners asserted that, now that this Court had affirmed that Canal's policy covered the accident and the Supreme Court had denied Canal's application for leave to appeal, the circumstances were changed so completely that it would be inequitable for the order to be prospectively applied. In response, Hill filed a motion for entry of judgment on the arbitration award. After a hearing, the trial court denied Auto-Owners' motion and granted Hill's motion.

Auto-Owners then filed a motion for rehearing on the question of the arbitrator's award of interest only, as well as a motion to vacate the arbitration award on the basis that the contract provided for arbitration only for uninsured motorists, whereas the trial court had already determined that Hill was insured pursuant to the Canal policy. After a hearing, the trial court denied both motions in an order dated June 22, 2000, and also awarded sanctions on the ground that Auto-Owners had repeatedly presented the same arguments. Hill then filed a motion for voluntary dismissal of count I of her first amended complaint and the trial court granted this motion. Auto-Owners filed a motion to alter or amend the interest judgment. The trial court denied this motion and again awarded sanctions against Auto-Owners.

Accordingly, in December of 2000, Auto-Owners filed a claim of appeal with this Court. This Court dismissed on the grounds that the judgment from which Auto-Owners had appealed was not final. Auto-Owners then filed a delayed application for leave to appeal on May 24, 2001, which this Court granted.

## II. Jurisdiction

### A. Standard Of Review

Whether this Court has jurisdiction to consider the appeal is a question of law that we review de novo.<sup>3</sup>

### B. MCR 7.205(F)(3)

In this case, Auto-Owners initially attempted to appeal the December 5, 2000 order denying its motion to amend the judgment and granting Hill's motion for sanctions as of right. However, this Court dismissed the appeal on the ground that this order was not a final order, and therefore could not be appealed as of right. Auto-Owners then filed a delayed application for leave to appeal each of five separate orders: the April 14, 2000 judgment for plaintiff; the April 26, 2000 denial of relief from judgment; the June 22, 2000 denial of the motion to vacate the judgment; the June 22, 2000 motion granting sanctions; and the December 5, 2000 order denying the motion to amend the judgment and granting further sanctions. This Court granted leave to appeal all five orders.

As a general matter, this Court has jurisdiction to grant applications for leave to appeal various orders that a party may not appeal as of right.<sup>4</sup> Because Auto-Owners' application for leave was filed more than twelve months after the date of the July 9, 1998 order denying Auto-Owners' motion for summary disposition, however, Hill argues that this Court lacks jurisdiction to hear the appeal under MCR 7.205(F)(3), which provides that "if an application for leave to appeal is filed more than 12 months after entry of the order or judgment on the merits, leave to appeal may not be granted."<sup>5</sup>

First, we note that the "order or judgment on the merits" of the case was not the July 9, 1998 order denying Auto-Owners' motion for summary disposition, but rather the April 14, 2000 judgment entering the arbitration award. We recognize that Auto-Owners' May 24, 2001 application for leave to appeal this judgment was also untimely under 7.205(F)(3); however, we hold that the twelve-month time limit was tolled between December 20, 2000 and January 29, 2001 while Auto-Owners attempted to pursue an appeal of right.<sup>6</sup> Accordingly, this Court has jurisdiction to consider Auto-Owners' appeals.

Hill argues that the tolling principle established in *Riza* and followed in *Kincade* should not apply in this case because this Court did not have jurisdiction to consider Auto-Owners' appeal as of right. However, contrary to Hill's argument, the same circumstance existed in

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<sup>3</sup> *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995).

<sup>4</sup> See MCR 7.203(B)(1)-(5).

<sup>5</sup> This rule has since been amended to begin the twelve-month period from the entry of a final judgment or other order appealable as of right, or entry of the order or judgment being appealed, whichever is later. See MCR 7.205(F)(3)(a), (b).

<sup>6</sup> See *Riza v Niagara Mach & Tool Works*, 411 Mich 915 (1981); *People v Kincade*, 206 Mich App 477; 522 NW2d 880 (1994).

*Kincade*. Although Hill correctly points out that Kincade's appeal of right was originally dismissed for failure to comply with certain filing requirements rather than for lack of jurisdiction,<sup>7</sup> this Court later determined on remand that Kincade could only have appealed the decision in question by leave granted in any event.<sup>8</sup> Therefore, we reject Hill's argument that a party's attempt to appeal as of right a decision that may only be appealed by leave granted cannot serve to toll the time limit in 7.205(F)(3).

### III. Collateral Estoppel

#### A. Standard Of Review

Auto-Owners argues that the trial court erred in denying its motions for summary disposition of count II of Hill's first amended complaint, because this claim was barred by the doctrine of collateral estoppel. Accordingly, Auto-Owners asserts that, because the trial court erred in allowing this case to go forward, it is entitled to a reversal of the judgment entered against it. This Court reviews de novo the trial court's decision on a motion for summary disposition.<sup>9</sup> The applicability of collateral estoppel is a question of law, which this Court also reviews de novo.<sup>10</sup>

#### B. Collateral Estoppel

The doctrine of 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 that prior proceeding.<sup>11</sup> In this case the question is whether the issue determined in the declaratory action was the same as the issue raised in this case. In order for collateral estoppel to apply, the ultimate issue to be concluded in the subsequent action must be the same as that involved in the first action.<sup>12</sup> This Court has defined this requirement to mean that the issues must be identical, and not merely similar.<sup>13</sup> We conclude that this requirement was met in the present case and that, therefore, Auto-Owners was entitled to summary disposition.

#### C. The Issues In The Declaratory Judgment Action And In This Action

The question litigated in the declaratory judgment action was whether the tortfeasors named in Hill's original complaint were covered by liability insurance under the Canal policy. The question raised in count II of Hill's amended complaint in this case was whether she was entitled to uninsured motorist benefits under the Auto-Owners policy. While at first blush these

<sup>7</sup> *Kincade, supra* at 480.

<sup>8</sup> *Id.* at 482.

<sup>9</sup> *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

<sup>10</sup> *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

<sup>11</sup> *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).

<sup>12</sup> *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1991).

<sup>13</sup> *Eaton Co Rd Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994).

two questions may appear to be similar but distinct, in fact, the issue raised in each action was identical. The question of whether the tortfeasors were insured and the question of whether Hill was entitled to uninsured motorist benefits are simply opposite sides of the same coin. Simply put, if the tortfeasors were insured, Hill was not entitled to uninsured motorist benefits; if the tortfeasors were not insured, Hill was entitled to uninsured motorist benefits. In each case, thus, the true question was whether the tortfeasors were insured. The trial court's final judgment answered this question in the affirmative, and this Court subsequently affirmed.

Accordingly, because the declaratory judgment was between the same parties, because this prior proceeding culminated in a valid final judgment, because the issue resolved in the declaratory judgment action was identical to that raised in count II of Hill's first amended complaint, and because this issue was actually and necessarily determined in the declaratory judgment action, Hill was barred by the doctrine of collateral estoppel from bringing count II of her first amended complaint.<sup>14</sup> Therefore, we conclude, Auto-Owners was entitled initially to summary judgment and is now entitled to a reversal of the judgment entered against it in April of 2000. Because the trial court erred in rejecting Auto-Owners' repeated attempts to bring this meritorious argument to the trial court's attention, we also reverse the trial court's June 22, 2000 and December 5, 2000 orders granting sanctions.

With this issue resolved, it is unnecessary for this Court to consider the remaining questions raised on appeal.

Reversed.

/s/ William C. Whitbeck

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra

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<sup>14</sup> *Ditmore*, *supra* at 577.