S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellee,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
November 4, 2010

No. 292568
Oakland Circuit Court
LC No. 2008-092937-CK

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

In this dispute between two automobile insurance carriers, defendant Pioneer State Mutual Insurance Company (Pioneer State) appeals by right the circuit court's grant of summary disposition for, and subsequent entry of judgment in favor of, plaintiff State Farm Mutual Automobile Insurance Company (State Farm). We reverse and remand for entry of judgment in favor of Pioneer State.

I

In March 2005, a Chevrolet Trailblazer driven by Celestina Mediati collided with another automobile driven by Sharon Jamali. Mediati had borrowed the Trailblazer with permission from Mohammed Saad. The Trailblazer was actually owned by Mohammed's parents, Fouad and Hasna Saad. The Trailblazer was insured under a policy issued by Pioneer State. The Pioneer State policy listed Fouad and Hasna Saad as the only named drivers of the Trailblazer.

Jamali brought an automobile negligence action against Fouad and Hasna Saad, as owners of the Trailblazer, and against Mediati, as the driver of the Trailblazer. In the negligence action, Pioneer State tendered a defense for Fouad and Hasna Saad. However, Pioneer State denied any liability with regard to Mediati and refused to tender a defense for Mediati.

Mediati was insured under a State Farm automobile insurance policy issued to her parents, Francesco and Grace Mediati. According to State Farm, the State Farm policy provided excess coverage for Mediati with respect to the March 2005 collision. In light of Pioneer State's refusal to defend Mediati in the automobile negligence action, State Farm undertook to provide Mediati with a defense.

During the pendency of Jamali's automobile negligence case, Pioneer State filed a separate declaratory judgment action, listing Hasna Saad, Mediati, and Jamali as defendants.[1] Specifically, Pioneer State sought a declaration that it had no liability to defend or indemnify Mediati or the Saads. Pioneer State argued that the Saads had committed fraud by failing to disclose in their insurance application that the Trailblazer would be used by their son, Mohammed, and by failing to have Mohammed listed as an additional driver. Pioneer State additionally argued that although Mohammed allowed Mediati to drive the Trailblazer, Mediati had never sought or received permission to use the Trailblazer from the vehicle's true owners, Mohammed Saad's parents.

Jamali's automobile negligence action was eventually settled for $335,000. Subsequently, Pioneer State's declaratory judgment action was dismissed with prejudice by stipulation of the parties.

In July 2008, State Farm filed the present action against Pioneer State, seeking reimbursement of its costs and fees incurred in the defense of Mediati in the underlying negligence action. State Farm argued that "[u]nder the terms of the policy issued by Pioneer State to [the Saads], Pioneer State became obligated to provide a defense to Ms. Mediati." State Farm alleged that because Pioneer State had wrongfully refused to tender a defense for Mediati in the automobile negligence case, "State Farm was forced to expend significant sums of money in providing a defense to Ms. Mediati, including attorney fees and costs in the amount of at least $30,644.57."

State Farm and Pioneer State filed cross-motions for summary disposition, with each company arguing that it was entitled to judgment as a matter of law. The circuit court ultimately denied Pioneer State's motion and granted summary disposition in favor of State Farm, ruling that State Farm was "entitled to reimbursement [of] its defense costs, court costs and attorney fees arising from its defense of Ms. Mediati in the underlying . . . negligence action." Following the grant of summary disposition, the circuit court entered judgment in favor of State Farm in the amount of $31,067.97.

II

We review de novo the circuit court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a claim or issue is barred by a prior judgment is a question of law that we similarly review de novo. See *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

[1] Hasna Saad filed a counterclaim against Pioneer State for breach of contract. This counterclaim was eventually dismissed with prejudice at the same time that Pioneer State's declaratory judgment action was dismissed.

III

Pioneer State argues that the circuit court erred by granting summary disposition in favor of State Farm because the present action is barred by the dismissal of Pioneer State's prior declaratory judgment action. We agree.

In *Commercial Union Ins Co v Med Protective Co*, 426 Mich 109; 393 NW2d 479 (1986), our Supreme Court considered a similar dispute between a primary insurance carrier and an excess insurance carrier.[2] The primary insurer allegedly failed to defend or settle in good faith an underlying claim against the common insured. *Id.* at 111. The excess carrier sued the primary carrier to recover monies paid on behalf of the insured, claiming that the primary carrier was "guilty of negligence and bad faith . . . ." *Id.* at 115. The circuit court granted summary disposition for the primary insurer, ruling that the excess carrier had no direct cause of action against the primary carrier and that the excess carrier was estopped from maintaining its claim as the subrogee of the insured because of its participation in the settlement of the underlying litigation. *Id.* at 115-116. After this Court overturned the circuit court's ruling, a divided Supreme Court reversed in part, holding that although an excess carrier may generally "maintain a cause of action against a primary insurer for the latter's bad-faith failure to defend or settle within policy limits," the excess insurer could proceed against the primary insurer only as an equitable subrogee of the insured. *Id.* at 116-119, 124-125. As our Supreme Court specifically noted, "[i]f the excess carrier is to proceed against the primary carrier, it must do so as the subrogee of the insured." *Id.* at 125.

Consistent with the reasoning of *Commercial Union*, we conclude that the only means by which State Farm could pursue recovery from Pioneer State in this case was as a subrogee of Mediati. See *id*. Consequently, the issue before us is whether any right of Mediati to recoup the costs of her defense from Pioneer State was foreclosed by the dismissal of Pioneer State's declaratory judgment action. We hold that it was.

A counterclaim arising out of the same transaction or occurrence as the principal claim must be joined in the principal action, otherwise it is barred by the conclusion of the principal action. *Salem Industries, Inc v Mooney Process Equip Co*, 175 Mich App 213, 215-216; 437 NW2d 641 (1988); see also *VanPembrook v Zero Mfg Co*, 146 Mich App 87, 102; 380 NW2d 60 (1985). Thus, the question is whether the right of Mediati to recoup the costs of her defense from Pioneer State would have arisen out of the same transaction or occurrence as the principal claim asserted by Pioneer State in its declaratory judgment action. We answer this question in the affirmative. In the declaratory judgment action, Pioneer State asserted that it did not owe Mediati a duty to defend or a duty to indemnify. Any claim by Mediati to recover the costs of her defense from Pioneer State would have clearly arisen out of the same transaction or occurrence as this principal claim. Both claims would have arisen out of the automobile accident, and both would have turned on the proper interpretation of the Pioneer State insurance policy. Accordingly, any claim by Mediati to recover her defense costs from Pioneer State was a

---

[2] As explained earlier, State Farm argues that its policy provided only excess coverage for Mediati.

compulsory counterclaim. *Id*. Because such a claim was not raised during the declaratory judgment action, it could not be asserted in a collateral action, *id*., and Mediati had no right against Pioneer State into which State Farm could step. It is well settled that a subrogee acquires no greater right to recover against a third party than its subrogor. *Commercial Union*, 426 Mich at 119; *Citizens Ins Co of America v American Community Mut Ins Co*, 197 Mich App 707, 709; 495 NW2d 798 (1992).

IV

In summary, Mediati did not assert a compulsory counterclaim for the costs of her defense during Pioneer State's declaratory judgment action. Thus, the conclusion and dismissal of the declaratory judgment action foreclosed Mediati's right to pursue the costs of her defense in a subsequent or collateral action. As explained previously, State Farm's only possible means of proceeding against Pioneer State in this case was as Mediati's subrogee. And because "[t]he excess insurer is equitably subrogated to the position of the insured and acquires no lesser or greater rights than those held by the insured," *Commercial Union*, 426 Mich at 119, State Farm's present action against Pioneer State is barred. See also *Salem Industries*, 175 Mich App at 215-216. The circuit court erred by denying Pioneer State's motion for summary disposition, as well as by granting summary disposition and judgment in favor of State Farm in the amount of $31,067.97.

Reversed and remanded for entry of judgment in favor of Pioneer State. We do not retain jurisdiction. As the prevailing party, defendant Pioneer State may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck