

IN THE COURT OF APPEALS OF IOWA

No. 6-271 / 95-1554

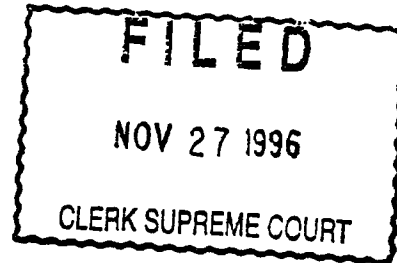
**AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,**

Plaintiff-Appellant,

vs.

**ALLIED MUTUAL
INSURANCE COMPANY,**

Defendant-Appellee.



Appeal from the Iowa District Court for Sioux County, John P. Duffy, Judge.

American Family appeals from the order granting Allied's motion for summary judgment in this declaratory judgment action arising out of a dispute over coverage for a mutual insured. **AFFIRMED.**

William K. Klinker of Smith, Grigg, Shea & Klinker, Primghar, for appellant.

Richard J. Barry of Montgomery, Barry & Bovee, Spencer, for appellee.

Heard by Habhab, P.J., and Cady and Vogel, JJ.

HABHAB, P.J.

On November 3, 1991, Mark Van Otterloo was operating an automobile owned by his father. Present with Van Otterloo in the vehicle were Calvin Bakker, Brent Massen, and Leon Van Beek. The four young men planned on hunting in a local field which was posted as a “no hunting” field. Van Otterloo and Bakker exited the vehicle and began hunting in the field. While they were hunting, Van Beek and Massen remained in the car. While waiting in the car, they were approached by the owner of the field who indicated he was unhappy that Van Otterloo and Bakker were hunting in the field without permission. Van Beek and Massen then yelled a warning to Van Otterloo and Bakker. Van Beek backed the vehicle down the road to pick up Van Otterloo and Bakker. As Van Otterloo was preparing to place his shotgun in the trunk of the car, he began unloading the shells. At that time, the shotgun accidentally discharged and caused projectiles to enter the open space of the trunk and go through the back seat of the car, injuring Massen.

Mark Van Otterloo’s parents, Sherwin and Linda Van Otterloo, are divorced. At the time of this incident, Mark was residing with Linda. Sherwin had the car insured with a personal auto policy by Allied Mutual Insurance Company (Allied). Linda had a homeowners policy through American Family Mutual Insurance Company (American Family).

On June 10, 1992, Massen filed suit against Mark Van Otterloo alleging he was negligent in discharging his shotgun at the rear of the automobile. American

Family undertook Mark Van Otterloo's defense under Linda's homeowner's policy, despite a dispute concerning coverage, and specifically reserved the right to bring a declaratory judgment action against Allied. Allied then filed a petition of intervention allowing it to become a named party to the action. Allied sought \$5000 it had paid to Massen under the med-pay provision of the policy issued to Sherwin. Allied apparently paid these benefits because Massen was an "occupant" of the vehicle under the policy. American Family settled all claims in the Massen lawsuit. It agreed to pay Allied, Massen, and Massen's attorney \$5000 for Allied's med-pay benefits and Massen \$125,000.

Massen filed a motion for summary judgment against Allied in an effort to establish Massen's attorney fees in the recovery of Allied's \$5000. Allied resisted and argued that Massen's attorney was not entitled to one-third of the \$5000. Allied then filed a motion to compel payment of the \$5000 from Massen. The trial court then ordered Allied to pay attorney fees and costs in the amount of \$1766.37 and Massen to pay \$3233.33 (sic) to Allied. Massen then filed a dismissal with prejudice in this cause on December 1, 1993.

American Family brought this declaratory judgment action seeking repayment of the \$5000 in med-pay benefits, the monies paid to Massen, and attorney fees. Both American Family and Allied filed motions for summary judgment. The district court denied American Family's motion for summary judgment but granted Allied's. American Family appeals.

We review a district court's ruling granting summary judgment for errors at law. Iowa R. App. P. 4; *First Nat'l Bank v. Fidelity & Deposit*, 545 N.W.2d 332 (Iowa App. 1996) (citing *Lihs by Lihs v. Lihs*, 504 N.W.2d 890, 892 (Iowa 1993)). The court upholds a summary judgment when the moving party shows there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); see *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 544 (Iowa 1995). On review, we determine whether a genuine issue of fact exists and whether the law was applied correctly. *First Nat'l Bank*, 545 N.W.2d at 334. The record is reviewed in the light most favorable to the nonmoving party. *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994).

The trial court ruled American Family is precluded from recovery under the doctrine of issue preclusion as its petition seeks to relitigate issues already litigated in the suit between Brent Massen and Mark Van Otterloo.

American Family maintains the question before the trial court in this declaratory judgment action was whether Mark Van Otterloo is insured under the American Family policy or the Allied policy for acts he committed on November 3, 1991. It asserts American Family was never named as a party and as such did not have control of the defense in the "Massen v. Van Otterloo" action. American Family further asserts the "Massen v. Van Otterloo" action did not address the issue of Van Otterloo's coverage, but rather merely settled the dispute between Allied and

Massen's counsel regarding attorney fees after a full settlement had been reached between Van Otterloo and Massen.

Issue preclusion, also known as collateral estoppel, serves the dual role of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. *Federal Land Bank v. Dunkelberger*, 499 N.W.2d 305, 308 (Iowa App. 1993) (citing *Harris v. Jones*, 471 N.W.2d 818, 819 (Iowa 1991)). Issue preclusion applies when a party attempts to relitigate an issue which has already been raised and decided in a prior action. *Matsui v. King*, 547 N.W.2d 228, 230-31 (Iowa App. 1996) (citing *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (1981)); *Harrison v. State Bank of Bussey*, 440 N.W.2d 398, 401 (Iowa App. 1989) (citing Allan D. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964)); *Clark v. Glanton*, 370 N.W.2d 606, 608 (Iowa App. 1985). “[I]ssue preclusion should be applied only when the party against whom preclusion is asserted had a full and fair opportunity to litigate.” *Dunkelberger*, 499 N.W.2d at 308 (citation omitted).

The four elements of issue preclusion are: (1) the issue must be identical in the two actions; (2) the issue must be raised and litigated in the prior action; (3) the issue must be material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must be necessary and essential to the judgment. *Matsui*, 547 N.W.2d at 231 (citing *Ackley State Bank v. Haupt*, 451 N.W.2d 495, 496 (Iowa 1990)).

Identity of parties is no longer always necessary to give validity to a claim of issue preclusion. *Dunkelberger*, 499 N.W.2d at 308 (citing *In re Evans*, 267 N.W.2d 48, 51 (Iowa 1978)). Issue preclusion is applicable between non-mutual parties in a defensive context where the party against whom the doctrine was invoked “was so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution.” *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981).

In sustaining Allied’s motion on the basis of issue preclusion, the trial court found:

Allied placed the issue of subrogation rights before the court in Law No. 17384. American Family was providing a defense for Mark Van Otterloo in said action. American Family was in control of the defense of that action. The attorney selected by American Family filed an answer to Allied’s petition of intervention, denying the subrogation claim. The issue of subrogation between the parties was litigated in Law No. 17384. If American Family had a viable subrogation claim that it intended to assert against Allied, it was imperative that the claim be asserted in response to the petition of intervention filed by Allied. American Family does not get an opportunity to split their cause of action. It had a clear opportunity to litigate the issue of its subrogation claim against Allied in Law No. 17384. Obviously, American Family elected not to do so. It paid the subrogation claim of Allied, thus barring further action on that issue.

Allied asserts that in order to determine its rights to reimbursement of the \$5000, the trial court had to determine whether or not Van Otterloo was an insured under its policy as it is well established that an insurer cannot recover by right of subrogation from its own insured. *Fort Madison Bank & Trust Co. v. Farm Bureau*

Mut. Ins. Co., 543 N.W.2d 591, 596 (Iowa 1996). We agree and affirm the holding of the trial court in this regard.

The issues in this action and in the previous litigation are identical. Both actions involve the issue of whether Van Otterloo was entitled to coverage under the Allied policy. This issue was raised in the prior dispute. It is without dispute that American Family paid Allied its \$5000. It is clear that the \$5000 would not have been made payable to Allied if Van Otterloo was an insured entitled to liability coverage under Allied's policy. This is so for it is established law that an insurance company cannot assert a subrogation claim against its own insured.

Although American Family was not a party in the suit between Van Otterloo and Massen, it had a full and fair opportunity to litigate the issue of coverage in that action. As it turned out, the issue was material and relevant to the disposition of the suit between Massen and Van Otterloo. The determination was necessary and essential to the resulting judgment. The trial court had to determine whether Van Otterloo was an insured in order to determine Allied's right to subrogation.

Finally, we find American Family acquiesced to Allied's assertion that Van Otterloo was not an insured under its policy when American Family reimbursed Allied in the amount of \$5000.

Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such a time as would imply an intention to waive or abandon the right. . . .

Estoppel by acquiescence is based on an examination of the rightholder's acts to determine whether the right has been waived. . . . It advances a policy of stability and conclusiveness.

Schultz v. Teledirect Int'l, Inc., 524 N.W.2d 671, 674 (Iowa App. 1994). American Family knew Allied was not entitled to subrogation in the amount of \$5000 from Van Otterloo if he was insured under the Allied policy. We find that in reimbursing Allied, American Family waived its right to pursue the issue of Van Otterloo's coverage under the Allied policy and, as such, is estopped from pursuing this action.

We have considered all the remaining issues raised by the parties in their respective briefs. Since we affirm the trial court's decision granting Allied's motion for summary judgment based on issue preclusion and estoppel by acquiescence, we need not rule on those issues.

AFFIRMED.