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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

374

BONNIE K. SMITH, et al.,

Plaintiff-Appellant,

vs.

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY OF HARTFORD, CONNECTICUT,

Defendant-Appellee.

Filed May 28, 1985

5-172
84-1168

Appeal from the Iowa District Court for Woodbury County - James P. Kelley, Judge.

Plaintiff appeals from summary judgment for defendant in a negligence action. AFFIRMED.

LeRoy J. Sturgeon of Smith & Smith, Sioux City, for plaintiff-appellant.

Marvin F. Heidman and Lance D. Ehmcke of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for defendant-appellee.

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

PER CURIAM

Plaintiff's husband was killed and a fellow employee, Dean Peck, was injured when a tank exploded in 1978. Plaintiff and Peck were both employees of Container Corporation, which was insured by the defendant, Hartford Steam Boiler Inspection and Insurance Company. Plaintiff filed a negligence action in state court while the other employee filed a similar action in federal court, both asserting that defendant was liable under a theory of negligent inspection of the tank. A relevant contract provided, inter alia, as follows:

> The Company shall be permitted but not obligated to inspect, at all reasonable times, any Object designated and described in a Schedule forming a part of the policy. Neither the Company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking on behalf of or for the benefit of the named Insured or others to determine or warrant that such Object is safe or healthful.

An employee of the defendant inspected some tanks but not the tank that exploded. In 1982 the Iowa district court overruled a motion for summary judgment in which defendant asserted an absence of facts tending to show the existence of either a contractual or common law duty to inspect.

In 1984 defendant filed a motion for summary judgment which, as amended, asserted the same grounds for relief as the previous motion and, in addition, issue preclusion arising out of a summary judgment for defendant in the federal court action brought by the other injured employee, Peck. Defendant also urged that retroactive effect be given to Iowa Code section 517.5. The trial court sustained the motion for summary judgment solely on the ground of issue preclusion.

We will first address whether issue preclusion was properly applied by the trial court.

Peck commenced action in federal court alleging negligence on the part of defendant for failure to adequately inspect the boiler. This action was based on the above-cited contract clause in the insurance agreement between the

defendant and Container Corporation. Plaintiff filed a similar action in state court. In 1984, defendant filed identical motions for summary judgment in both cases. Summary judgment was granted in the federal court and defendant amended his motion in state court to include a claim of issue preclusion.

Before issue preclusion may be employed in any case, four prerequisites must be established:

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981).

The doctrine of issue preclusion may be utilized in either a defensive or an offensive manner:

> The phrase "defensive use" of the doctrine of collateral estoppel is used here to mean that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense.
>
> On the other hand, the phrase "offensive use" or "affirmative use" of the doctrine is used to mean that a stranger to the judgment, ordinarily the plaintiff in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an essential element of his cause of action or claim.

Hunter, 300 N.W.2d at 123.

Traditionally, a requirement of identity of parties or privity was also imposed. Goolsby v. Derby, 189 N.W.2d 909, 913 (Iowa 1971). However, this requirement has been modified and issue preclusion has been applied to a person who was not a party to the first suit in both the defensive and offensive use of issue preclusion. See Hunter v. City of Des Moines, 300 N.W.2d 121, 124 (Iowa 1981) (offensive use of issue preclusion); Bertran v. Glen Falls Insurance Co., 232 N.W.2d 527, 533 (Iowa 1975) (defensive use). In order to invoke issue preclusion between

non-mutual parties, the four prerequisites listed above must be satisfied and the party against whom the doctrine is invoked must have been "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, 300 N.W.2d at 125; Bertran, 232 N.W.2d at 533.

In this case the defendant is asking us to take the elimination of the mutuality requirement one step further. The defendant is using the doctrine in a defensive manner in that it is claiming that the summary judgment in the first case should be given preclusive effect in the second case.

Defensive use is usually invoked by a stranger to the judgment, ordinarily the defendant who is relying upon a former judgment as establishing in his favor an issue which he must prove as an element of his defense in an action against a party to the first case. In this case we have the reverse situation. The party to the first case, the defendant, is relying on the first judgment to conclusively establish in his favor an issue necessary to his defense in an action against a stranger to the first judgment.

Professor Allen Vestal, in his article "Res Judicata/Preclusion: Expansion," discussed several cases involving the mutuality requirement. Vestal concluded that there were several factors courts relied on in allowing expansion of the mutuality limitation:

> First, in all these situations the second lawsuit is closely related to the first which is held to give rise to issue preclusion. Second, in all of the situations, the point of view of the precluded party has been adequately represented. In fact, there seems to be a definite feeling that the representation in suit I was all that could be expected. Third, in several of the decisions holding for preclusion, the judge reaching this conclusion was the judge who presided over the first proceeding. These judges seem to be reflecting a feeling that they had tried the factual issues and it was not necessary to retry them. Fourth, one important consideration seems to be that a second trial of the issue would be wasteful of the time of the court and should not be allowed. In the Proctor & Gamble case the court was deeply concerned about the possibility that carriers would

> continue to raise the same question time and time again when in fact the first suit had clearly established the validity of the ICC order. Fifth, often where the courts have held for preclusion there has been some participation--however informal--in the first proceeding by either the party to be precluded or his attorney. Sixth, the courts in some cases found that the two suits were related in some tactical sense, that is, that someone had deliberately arranged for the litigation to occur serially as it did to achieve a certain tactical advantage.

Vestal, Res Judicata/Preclusion: Expansion, 47 S. Cal. L. Rev. 357, 373-74 (1973).

The case of Mauer v. Rohde, 257 N.W.2d 489 (Iowa 1977), which the defendant relies heavily on, involved an attempt to invoke issue preclusion defensively against a non-party to the first action. The first action in Mauer involved an action on an unsecured promissory note and resulted in a judgment lien on property which was ultimately sold at sheriff's sale to party A. After the first action was commenced the original owners borrowed money from Thorp Credit, Inc. and gave Thorp a security interest in the property. An examination of the abstracts did not reveal a lis pendis filed against the property in connection with the first action, because the recording was not done until several years later. Following the sheriff's sale, Thorp learned of the judgment lien and sheriff's sale in the first action and had the original owner file an action for declaratory judgment against party A, the purchasers at the sheriff's sale. Thorp intervened, and party A attempted to assert issue preclusion against Thorp on the basis of the first action. After finding that none of the four prerequisites of issue preclusion were established, the trial court also concluded:

> Ordinarily a person precluded from litigating a matter (1) has had the opportunity to so litigate, or (2) has had his or her interests adequately represented in the prior litigation. A. Vestal, Res Judicata/Preclusion, supra, at V-338. In this case there is no claim Thorp had the opportunity to litigate in prior cause no. 13340. It is equally clear its interests as a mortgagee were not represented by Velma Mauer, its mortgagor.

Mauer v. Rohde, 257 N.W.2d 489, 497 (Iowa 1977).

We conclude that the trial court improperly granted the summary judgment

motion on the grounds of issue preclusion. We do not believe that the defendant had a "full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution." The first case was tried in federal court. The plaintiff was not a party to the federal court proceedings and he was not represented in that proceedings. The plaintiff and Peck each had different attorneys and plaintiff had no input in the first case. While the legal issues presented in the two cases are similar, the investigative proceedings were not conducted together.

The plaintiff in this case would have reaped no benefit if Peck had been successful in his case. In addition, he did not have the right to appeal that decision. After considering all of these factors, we cannot say that the plaintiff had an opportunity to fully and fairly litigate the issue of the defendant's liability.

However, we are obliged to affirm the trial court ruling if there is a proper basis on which that ruling may be made, even though it may not be the basis on which the trial court relied. Citizens First Nat'l Bank v. Hoyt, 297 N.W.2d 329, 332 (Iowa 1980).

Defendant's motion for summary judgment properly raised the issues of absence of duty and no gratuitous undertaking. The trial court's ruling on these other issues was obviated by its ruling on issue preclusion. These grounds may now be considered by this court because they were properly raised in defendant's motion and amended motion for summary judgment. See Halverson v. Lincoln Commodities, Inc., 297 N.W.2d 518, 520 (Iowa 1980).

Summary judgment is appropriate where no genuine question of fact exists and the law was correctly applied. Frohwein v. Haesemeyer, 264 N.W.2d 792, 795-96 (Iowa 1978). We review the facts in the light most favorable to the party opposing the motion, in this case plaintiff, and reverse the ruling if there is a genuine issue of material fact. See Bain v. Gillispie, 357 N.W.2d 47 (Iowa Ct. App. 1984).

The facts here are clear and uncontroverted. Defendant and Container Corporation had an insurance agreement which gave defendant the right to inspect certain equipment but released defendant from any liability for undertaking an inspection. The contract is unambiguous; defendant was under no duty to make inspections of any kind. Defendant's employee did periodically inspect Container Corporation's boilers but never undertook an inspection of the vented condensate tank which exploded. State law[1] requires boilers to be regularly inspected, but mandates no similar requirement for a condensate tank like that involved here. Finally, plaintiff failed to submit any evidence that defendant gratuitously undertook such an inspection of the condensate tank and that plaintiff's decedent relied on that undertaking or even knew of it.

Plaintiff has failed to present any evidence of a duty owed by defendant to decedent. Summary judgment for defendant was proper.

AFFIRMED.

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[1]See Iowa Code chapter 89.