IN THE COURT OF APPEALS OF IOWA

No. 5-943 / 05-0040
Filed May 10, 2006

SUNIE HEATHER WEST,
Plaintiff-Appellant,

vs.

TRAVIS RICHARD OHRT and
DUSTIN KIRBY,
Defendants-Appellees.

Appeal from the Iowa District Court for Buchanan County, James C. Bauch, Judge.

A plaintiff appeals the district court's order granting summary judgment in favor of the defendant. **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, Stochl, Braun & Churbuck, Charles City, for appellant.

Justin L. Seurer of Klass Law Firm, L.L.P., Sioux City, for defendant-appellee Travis Ohrt.

James R. Villone of Klass Law Firm, Sioux City, for defendant-appellee Dustin Kirby.

Considered by Zimmer, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

A car accident spawned two lawsuits against one defendant. The first proceeded to trial and a verdict in favor of the defendant. The second was resolved in favor of the defendant on his motion for summary judgment. In this appeal from the judgment in the second lawsuit, we must decide whether the favorable verdict in the first lawsuit precluded further litigation in the second. We agree with the district court that it did.

I. Background Facts and Proceedings

Sunie West and Amy Armstrong were passengers in a vehicle driven by Travis Ohrt. Also on the road was the driver of another vehicle, Dustin Kirby. Ohrt lost control of his vehicle. West sustained injuries and Armstrong died.

West and the estate of Armstrong separately sued Ohrt and Kirby. They alleged that the drivers were drag racing or playing a road game known as "leapfrog," and their actions were the proximate cause of the accident. As to Kirby, the estate specifically alleged he was speeding and operating a motor vehicle while under the influence of alcohol.

The estate's lawsuit against Kirby proceeded to trial. A jury found in favor of Kirby.[1]

Meanwhile, West's lawsuit against Kirby was delayed because Kirby did not file an answer for several months. Eventually, West notified Kirby of her intent to seek a default judgment. Kirby responded by filing an answer and, shortly thereafter, a motion for summary judgment. He raised the doctrine of

[1] The action against Ohrt is not at issue on appeal.

issue preclusion, arguing the favorable judgment in the Armstrong litigation barred West from proceeding with her litigation. The district court agreed, reasoning as follows:

> The plaintiff here is basing her claim on the same grounds as the plaintiff in the initial proceeding with all of the same witnesses to the event that previously testified and the Court agrees with the reasoning of the defendant that issue preclusion should apply.

West appealed.

Our review of the district court's ruling is for errors of law. *American Family Mut. Ins. Co. v. Corrigan*, 697 N.W.2d 108, 111 (Iowa 2005). We will affirm "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3).

II. Analysis

West makes three arguments in support of reversal: (A) summary judgment was inappropriate because she did not receive responses to interrogatories served approximately two weeks earlier and she needed to pursue additional discovery to determine whether issue preclusion should apply, (B) the district court erred in applying the doctrine of issue preclusion under the circumstances of this case, and (C) it was unfair and inequitable to apply the doctrine of issue preclusion.

A. Incomplete Discovery

West argues Kirby's motion for summary judgment should have been overruled pending the pursuit of additional discovery. It is true that Kirby filed his

motion for summary judgment within days of filing his answer and before the time elapsed for responding to her interrogatories. However, at that time, the summary judgment record was sufficient to decide the issue of whether the Armstrong verdict precluded further litigation in the West lawsuit.[2]

B. Issue Preclusion

"The foundation theory on which the doctrine of issue preclusion rests is that the parties ought not to be permitted to litigate the same issue more than once." *Goolsby v. Derby*, 189 N.W.2d 909, 915 (Iowa 1971). At the same time, "a party should have a full and fair day in court to be heard on the issues involved in this cause of action." *Id.*

1. Connection in Interest. In furtherance of these goals, our courts have required some connection between the parties to the first and second actions. *Id.* at 164. The type of connection depends on how the issue preclusion doctrine is invoked. *Id.*

Here, the defendant in the first action invoked the doctrine of issue preclusion in the second action (filed by a stranger to the first judgment) to conclusively establish that he was not negligent. In this type of situation, "[n]either mutuality of the parties nor privity is required." *Id.* Instead, it is sufficient if the party against whom issue preclusion is invoked was "so

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[2] The record does not include certain deposition transcripts Kirby proffered to our court in a supplemental appendix. Although the transcripts were cited in his statement of material facts, they were not attached to the statement or otherwise included in the district court record. Therefore, we will not consider them. *See State v. Powell*, 684 N.W.2d 235, 239 n. 2 (Iowa 2004).

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." *Bertran v. Glen Falls Ins. Co.,* 232 N.W.2d 527, 533 (Iowa 1975).

West argues that our courts have been unwilling to find two parties "connected in interest" under circumstances such as this. We disagree. In *Brown v. Kassouf*, 558 N.W.2d 161, 161-62 (Iowa 1997), a passenger and driver in one vehicle sued the driver of another vehicle that struck theirs. They also named their insurance company, which provided underinsurance coverage to their driver. *Brown*, 558 N.W.2d at 162. The passenger settled with the driver of the other vehicle; the injured driver went to trial and lost. *Id.* At that point, the insurance company providing underinsurance coverage to the plaintiff driver asked the court to rule that the doctrine of issue preclusion prevented both the settling and non-settling plaintiffs from re-litigating apportionment of fault. *Id.* The non-settling passenger agreed that issue preclusion applied to her. *Id.* The settling plaintiff did not. *Id.* The district court concluded that issue preclusion applied to both plaintiffs, and our highest court agreed. *Id.* The court noted that both passenger and driver "shared an interest in proving as much fault as they could" against the defendant driver. *Id.* at 165. The court also noted that the plaintiffs' "interests were identical on the issue of liability." *Id.*

The same is true here. Both Armstrong and West alleged that Kirby's reckless driving was the proximate cause of their injury or death. Both had every incentive to establish Kirby's fault. Their interests in this respect were identical.

Cf. Opheim v. American Interinsurance Exch., 430 N.W.2d 118, 120-21 (Iowa 1988) (holding interest of insured and injured person sufficiently connected on issue sought to be precluded).[3]

2. Opportunity to Litigate. West also argues that she did not have an opportunity to litigate the issue of Kirby's negligence. *See Bertran,* 232 N.W.2d at 533 (stating connection in interest must have been such that party had "full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution"). However, the key inquiry is not whether West had an opportunity to litigate the issue in the first action but whether there was "adequate representation by the losing party in the first action." *Opheim,* 430 N.W.2d at 121. We are not convinced that West created a genuine issue of material fact on this question. Although she filed a supplemental affidavit attesting that the estate's attorney did not proffer the documents and expert witnesses she would have proffered, this affidavit, at best, establishes that she would have tried the case differently. *See American Family Mut. Ins. Co. v. Allied Mut. Ins. Co.,* 562 N.W.2d 159, 163 (Iowa 1997) (stating evidence viewed in light most favorable to nonmoving party). We believe more is required to create a genuine issue of material fact on the question of whether Armstrong's attorney adequately represented Armstrong's interests and, consequently, West's interests. *Cf. id.* (noting both plaintiffs were represented by same attorney).

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[3] West argues that her interest differed from Armstrong in that Armstrong had underinsured coverage whereas she did not. This argument rests on a faulty premise. For either plaintiff to recover anything from an insurance company, the plaintiff would have to prove that Kirby was at fault. Therefore, West's interest did not differ from Armstrong's.

West next raises a related issue: the viability of joinder in the first action. She contends that she could not have joined in the Armstrong litigation, as Kirby did not answer her petition for several months. *Cf. Hunter v. City of Des Moines,* 300 N.W.2d 121, 126 (Iowa 1981) (rejecting offensive application of issue preclusion doctrine where plaintiffs "could easily have effected joinder [in the first action], but failed to do so"). While this is true, the question before us is not whether West actually litigated her claim but whether she had the opportunity to have her claim litigated through Armstrong. We believe she did. This also disposes of West's contention that Kirby should have joined her in the Armstrong litigation.

Even if the focus should be on West's right to a day in court, as she contends, she exercised the right by testifying in the Armstrong trial. *See Brown*, 558 N.W.2d at 165 (noting settling party testified as to fault in the prior action). Therefore, she had a "full fair day in court." *Goolsby*, 189 N.W.2d at 917.

We conclude West was sufficiently connected in interest with Armstrong as to have had a full and fair opportunity to litigate her negligence claim against Kirby in the first action.

3. Issue Preclusion Prerequisites. We must next decide whether the prerequisites for application of the issue preclusion doctrine were satisfied. *See Allied*, 562 N.W.2d at 164 (stating "status test" relating to privity and mutuality ordinarily applied before applying issue preclusion requirements). Those prerequisites are as follows:

> (1) the issue determined in the prior action is identical to the present issue; (2) the issue was raised and litigated in the prior

> action; (3) the issue is material and relevant to the disposition in the prior action; and (4) the determination made of the issue in the prior action was necessary and is central to that resulting judgment.

Id. at 163-64. There is no question that all four requirements were satisfied. The issue in both actions was negligence.[4] That issue was raised and litigated to verdict in the Armstrong action. *Cf. id.* at 164 (noting issue sought to be precluded "was neither raised nor litigated in the prior action"). That issue was, without doubt, material and relevant to the jury's disposition and was necessary to the resulting judgment.[5] For these reasons, the district court did not err in concluding that issue preclusion applied.

C. Equitable Considerations

West finally argues that the district court's application of the issue preclusion doctrine against her was inequitable because (1) she had no ability to be a plaintiff in the first action, (2) Kirby could have joined her in the first action if he wished to, (3) she had no control over Armstrong's case, (4) her interests differed from Armstrong's, and (5) Armstrong "did not present a vigorous case." We have addressed and rejected all these contentions. Accordingly, we conclude equity does not demand a different result.

AFFIRMED.

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[4] A copy of the estate's petition is part of the summary judgment record.

[5] A copy of the judgment in the Armstrong litigation was not attached to the summary judgment record. However, West attached a letter from Armstrong's attorney suggesting that the jury in her case ruled against her. West does not dispute the disposition in the Armstrong litigation.