STATE OF MICHIGAN

COURT OF APPEALS

ANDERSON MILES, Plaintiff-Appellant,	UNPUBLISHED May 6, 2014
v	No. 311699 Wayne Circuit Court
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	LC No. 10-007305-NF

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this insurance dispute, plaintiff, Anderson Miles, appeals by right the trial court's order dismissing his claim against defendant, State Farm Mutual Automobile Insurance Company. We conclude that the trial court erred when it determined that the doctrine of res judicata barred Miles' claim for uninsured motorist benefits and dismissed it on that basis. For that reason, we reverse and remand for further proceedings.

I. BASIC FACTS

In July 2008, Miles walked across Schaeffer Highway in Detroit just south of Puritan Street. At that time, Antoine Ball was driving southbound on Puritan. Ball did not have no-fault insurance. Ball passed another driver who had stopped to let Miles cross. Ball swerved at the last moment to avoid Miles, but struck him with his left fender and driver's side mirror. Miles apparently fell and struck his head. The author of the accident report characterized the accident as a "low speed incident" with no "obvious trauma." Miles later presented evidence that the accident caused a traumatic brain injury—a seizure disorder, which State Farm eventually conceded—and injured his lower back and shoulder, which required surgery to repair.

Miles requested personal protection insurance (PIP) benefits from State Farm as a resident relative under his mother's no-fault policy. State Farm refused to pay the claim and Miles sued State Farm in November 2008. He did not, however, sue State Farm for uninsured motorist benefits. State Farm settled the dispute with Miles in April 2010 and the trial court entered an order dismissing that suit in July 2010.

Miles again sued State Farm in June 2010. In his new complaint, Miles alleged that State Farm had wrongfully refused to pay him additional PIP benefits and wrongfully refused to pay him uninsured motorist benefits as required under the policy.

In September 2010, State Farm moved for partial summary disposition of Miles' claims under MCR 2.116(C)(7). Specifically, it argued that Miles could have, with reasonable diligence, raised his claim for uninsured motorist benefits in his November 2008 lawsuit. Because he could have litigated his claim for uninsured motorist benefits in the prior lawsuit, State Farm maintained, the doctrine of res judicata applied to bar his attempt to litigate that claim in the June 2010 lawsuit. The trial court agreed and dismissed Miles' claim for uninsured motorist benefits in January 2011.

State Farm continued to dispute whether and to what extent it had an obligation to pay PIP benefits to Miles. Specifically, State Farm contended that Miles' seizure disorder arose from previous head trauma and substance abuse and was not causally related to the accident at issue. It also argued that Miles did not need attendant care when properly medicated.

The parties eventually settled their dispute over the PIP claim and the trial court dismissed that claim in July 2012.

Miles then appealed the trial court's earlier decision to dismiss his claim for uninsured motorist benefits to this Court.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Miles argues on appeal that the trial court erred when it determined that he could have brought his uninsured motorist claim in his prior suit and, for that reason, was barred from trying to litigate that claim under the doctrine of res judicata.[1] This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo whether a trial court properly applied the doctrine of res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

[1] We note that State Farm likely waived this defense by failing to properly plead it; State Farm did not list the defense under a separate heading and did not plead the facts constituting the defense. Instead, it merely listed the defense along with a laundry list of other defenses. See MCR 2.111(F)(3); *Kincaid v Cardwell*, 300 Mich App 513, 536 n 5; 834 NW2d 122 (2013). Nevertheless, because Miles did not challenge State Farm's use of the defense at trial, we shall consider the merits of its application to the facts of this case.

B. JURISDICTION

On appeal, State Farm argues that this Court lacks jurisdiction to consider Miles' appeal because Miles did not appeal the trial court's decision to grant partial summary disposition within 21 days of the trial court's order dismissing that claim. This Court has jurisdiction to consider an appeal of right from a final judgment or order. MCR 7.203(A)(1). A final order or judgment is the first judgment or order that "disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." MCR 7.202(6)(a)(*i*).

In its order of January 2011, the trial court dismissed Miles' claim for uninsured motorist benefits, but did not resolve Miles' claim for PIP benefits. As such, that order was not a final order. *Id.* The first order to dispose of all the remaining claims was the trial court's order dismissing Miles' claim for PIP benefits in July 2012. Hence, that order was the final order and Miles timely appealed from that order. Moreover, after the entry of the final order, "all prior nonfinal rulings and orders, (including in this case the partial summary judgment . . .), are incorporated into the final judgment and are finalized for purposes of appeal." *Am Fed Savings & Loan Ass'n*, 81 Mich App 249, 255; 265 NW2d 111 (1978). And, on appeal from that order, Miles could properly "seek review of any prior ruling affecting" his rights that "would otherwise be only a nonfinal order." *Id.* at 256. Accordingly, this Court has jurisdiction to consider Miles' claim of error.

C. MCR 2.116(C)(7) AND RES JUDICATA

A trial court may properly dismiss a claim under MCR 2.116(C)(7) where the claim is subject to a "prior judgment" and, for that reason, is barred under the doctrine of res judicata. The doctrine of res judicata bars "multiple suits litigating the same cause of action." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). In order for the doctrine to apply, the prior action must have been decided "on the merits", both actions must "involve the same parties or their privies," and the matter in the second must be one that "was, or could have been, resolved in the first." *Id.*

Here, there is no dispute that Miles' prior lawsuit involved the same parties and that it was decided on the merits. The only question is whether Miles' claim for uninsured motorist benefits could have been resolved in the prior lawsuit even though he did not raise it in his complaint.

Michigan courts employ a "transactional test to determine if the matter could have been resolved in the first case." *Washington*, 478 Mich at 420. The transactional test is pragmatic and requires that courts view the claims in factual terms to determine whether a single group of operative facts gave rise to the claims without regard to the various theories supporting the claims for relief. *Adair*, 470 Mich at 124. Courts must consider whether the facts are related in time, space, origin, or motivation and must determine whether the facts form a convenient trial unit. *Id.* at 125.

It is plain that both Miles' claim for PIP benefits and his claim for uninsured motorist benefits arise from the same accident and involve the same injuries and insurance policy. For that reason, there is a substantial overlap between the facts involved with both claims. But that being said, there are also significant differences between the two types of claims.

A person injured in an accident arising from the ownership, operation, or maintenance of a motor vehicle as a motor vehicle is immediately entitled to PIP benefits without the need to prove fault. See MCL 500.3105(2); MCL 500.3107. The PIP benefits are designed to ensure that the injured person receives timely payment of benefits so that he or she may be properly cared for during recovery. *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978). Moreover, the injured person has a limited period within which to sue an insurer for wrongfully refusing to pay PIP benefits. See MCL 500.3145(1). Because an injured person is immediately entitled to PIP benefits without regard to fault, requires those benefits for his or her immediate needs, and may lose the benefits if he or she does not timely sue to recover when those benefits are wrongfully withheld, the injured person has a strong incentive to bring PIP claims immediately after an insurer denies the injured person's claim for PIP benefits.

In contrast to a claim for PIP benefits, in order to establish his or her right to uninsured motorist benefits, an injured person must—as provided in the insurance agreement—be able to prove fault: he or she must be able to establish that the uninsured motorist caused his or her injuries and would be liable in tort for the resulting damages. See *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 465-466; 430 NW2d 636 (1988). Significantly, this means that the injured person must plead and be able to prove that he or she suffered a threshold injury. *Id.* at 466, citing MCL 500.3135(1). Except in accidents involving death or permanent serious disfigurement, an injured person will therefore be required to show that his or her injuries impaired an important body function that affects the injured person's general ability to lead his or her normal life in order to meet the threshold. MCL 500.3135(1) and (5). This in turn will often require proof of the nature and extent of the injured person's injuries, the injured person's prognosis over time, and proof that the injuries have had an adverse effect on the injured person's ability to lead his or her normal life. See *McCormick v Carrier*, 487 Mich 180, 200-209; 795 NW2d 517 (2010). Thus, while an injured person will likely have all the facts necessary to make a meaningful decision to pursue a PIP claim within a relatively short time after an accident, the same cannot be said for the injured person's ability to pursue a claim for uninsured motorist benefits. Finally, an injured person's claim for uninsured motorist benefits involves compensation for past and future pain and suffering and other economic and noneconomic losses rather than compensation for immediate expenses related to the injured person's care and recovery. See *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 408-410; 808 NW2d 240 (2010) (discussing the nature of the economic and noneconomic damages that are awarded in negligence actions). Consequently, a claim for PIP benefits differs fundamentally from a claim for uninsured motorist benefits both in the nature of the proofs and the motivation for the claim.

The record shows that within a short time of that accident State Farm took the position that Miles' medical ailments were not causally related to the accident at issue and denied his request for PIP benefits on that basis. Because Miles could assert a PIP claim without the need to prove fault and without having to establish the full extent of his injuries, he could assert his PIP claim within a short time of State Farm's decision to deny his claims. Indeed, because he required those benefits for his care and recovery, he had a powerful motivation to bring the

claims as soon as practical. Further, in order to establish those claims, he only had to present evidence that his claims arose from the accident and met the other criteria provided under MCL 500.3107.

Miles, however, could not establish his claim for uninsured motorist benefits without being able to prove that Ball would be liable in tort for his injuries and that he met the serious impairment threshold. Because his claim for uninsured motorist benefits required evidence to establish the nature and extent of his injuries and proof that the injury affected his ability to lead his normal life and the original dispute involved only whether Miles' injuries were causally related to the accident at issue, we conclude that it was not practical for Miles to bring his claim for uninsured motorist benefits in his original suit.

Because Miles' claim for uninsured motorist benefits was not one that could have been litigated during the time of his original lawsuit, his failure to bring his claim for uninsured motorist benefits did not implicate the doctrine of res judicata. *Adair*, 470 Mich at 125.

III. CONCLUSION

The trial court erred when it determined that res judicata applied to Miles' claim for uninsured motorist benefits and dismissed his claim on that basis under MCR 2.116(C)(7). For that reason, we reverse the trial court's decision to dismiss Miles' claim for uninsured motorist benefits, vacate its order dismissing that claim, and remand for further proceedings.

Reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Miles may tax his costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh

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FORT HOOD, J. (*dissenting*).

I respectfully dissent.

Defendant filed a motion for partial summary disposition of the uninsured motorist (UM) claim, and the trial court granted the motion. The litigation continued to address the personal protection insurance (PIP) claim, but ultimately, the parties stipulated to dismiss the action with prejudice before trial. The order dismissing the case with prejudice contained no reservation with regard to an appeal of the dismissal of the UM claim.

"It is elementary that one cannot appeal from a consent judgment, order or decree." *Dora v Lesinski*, 351 Mich 579, 582; 88 NW2d 592 (1958) (citations omitted). A party cannot complain about a consent judgment because error, if any, arises from its own error, and not an error of the court. *Id*. "Simply put, this Court has jurisdiction only over appeals filed by an 'aggrieved party.'" *Reddam v Consumer Mtg Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990), overruled in part on other grounds *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 557; 640 NW2d 256 (2002). A party cannot be aggrieved by the terms of a consent judgment. See *Field Enterprises v Dep't of Treasury*, 184 Mich App 151, 153; 457 NW2d 113 (1990). Rather, to appeal a consent judgment, the parties must preserve the right to appeal in the judgment. *Id*. In the present case, the parties stipulated to dismiss the case with prejudice, and this order of dismissal did not reserve the right to appeal the grant of partial summary disposition of the UM claim. Accordingly, I conclude that this Court does not have jurisdiction to decide

this appeal. Furthermore, the trial court properly applied the broad transactional test to conclude that res judicata barred this action. *Adair v State of Michigan*, 470 Mich 105, 123-125; 680 NW2d 386 (2004). I would affirm.

/s/ Karen M. Fort Hood