

STATE OF MICHIGAN  
WORKERS' COMPENSATION APPELLATE COMMISSION

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RICKY S. BENNETT,  
PLAINTIFF,

V

DOCKET #07-0254

MACKINAC BRIDGE AUTHORITY,  
STATE OF MICHIGAN,  
SELF INSURED;  
AMERICAN PAINTING COMPANY, INCORPORATED AND  
AMERISURE MUTUAL INSURANCE COMPANY;  
ALLSTATE PAINTING & CONTRACTING COMPANY,  
UNINSURED,  
DEFENDANTS.

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APPEAL FROM MAGISTRATE BARNES.

TIMOTHY S. MOHER FOR PLAINTIFF,  
MARK D. WILLIAMS FOR DEFENDANT  
MACKINAC BRIDGE AUTHORITY,  
STATE OF MICHIGAN,  
SELF INSURED,  
JUDITH F. VARGA FOR DEFENDANTS  
AMERICAN PAINTING COMPANY, INCORPORATED AND  
AMERISURE MUTUAL INSURANCE COMPANY,  
ALLSTATE PAINTING & CONTRACTING COMPANY,  
UNINSURED, PRO SE.

OPINION

GLASER, CHAIRPERSON, DISSENTING

Plaintiff appeals the decision of Magistrate Jennifer L. Barnes, mailed on October 22, 2007, dismissing plaintiff's Application for Mediation or Hearing on a finding of that it was barred by res judicata. I would reverse and remand for a decision on the merits.

Plaintiff had proceeded against his employer, Allstate Painting & Contracting Company (Allstate), an uninsured employer, and had been granted an open award for his knee condition. Plaintiff sought, unsuccessfully, to collect from Allstate. Plaintiff then initiated the instant action,

seeking to recover from the defendants here, as statutory employers, pursuant to MCL 418.171. Defendants sought application of the doctrine of res judicata, as privies to plaintiff's direct employer, Allstate.

The magistrate dismissed plaintiff's application, holding that res judicata barred him from pursuing a claim against these defendants.

Our function as an appellate body is to perform a qualitative and quantitative evaluation of the evidence to determine whether a magistrate's fact finding is supported by competent, material and substantial evidence on the whole record. We review questions of law de novo. *Mudel v Great Atlantic and Pacific Tea Company*, 462 Mich 691 (2000); *Holden v Ford Motor Company*, 439 Mich 257 (1992). The application of res judicata is a question of law, which is reviewed de novo. *Phinisee v Rogers*, 229 Mich App 547 (1998).

On appeal, all parties cite *Viele v D.C.M.A.*, 167 Mich App 571 (1988) and *Adair v State of Michigan*, 470 Mich 105 (2004), as supporting both competing positions. The question whether res judicata bars a subsequent action is reviewed de novo.

In coming to her conclusion that plaintiff's claim was barred, the magistrate stated:

In the case at hand, the theory of statutory employer could not be adjudicated and was not available in the original trial since only the direct employer was sued in that litigation. The theory of statutory employer was not applicable against American Painting.

The statutory employer theory was available for pursuit in the original litigation against Allstate Painting and Mackina[c] Bridge Authority, if Plaintiff had "exercised reasonable diligence" and added the alleged statutory employers to that litigation. Plaintiff testified at his first trial that he has worked painting the Mackina[c] Bridge for approximately 27 years and has worked for a number of different employers, whether private companies or the State of Michigan directly. That fact, in combination with Plaintiff's knowledge that Allstate Painting lacked Michigan Worker's Compensation Insurance coverage would give a reasonable man pause to consider exploring the theory of statutory employment to identify a contractor with insurance coverage. Therefore, reasonable diligence by Plaintiff and his counsel would have revealed that the State of Michigan and Allstate Painting had insurance coverage and could have and should have been added to the original litigation.

Additionally, the litigation Plaintiff advanced against Allstate Painting is the same transaction for which Plaintiff is now trying to advance against American Painting Inc. and Mackina[c] Bridge Authority. As expressed in *Banks*,<sup>1</sup> the same facts are being asserted in the case against American Painting and Mackina[c] Bridge Authority as were asserted against Allstate Painting. These facts arise out of the same time, space, and origin. The only difference is the motivation.

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<sup>1</sup> *Banks v LAB Lansing Body Assembly*, 271 Mich App 227 (2006).

Plaintiff admits in his brief that the motivation for pursuing this current litigation against American Painting and Mackina[c] Bridge Authority is that Allstate Painting has failed to pay benefits pursuant to the Open Award authored by Magistrate McAree. Plaintiff is now seeking enforcement of the Order through Circuit Court. This is not a sufficient legal explanation for Plaintiff's failure to add American Painting and Mackina[c] Bridge Authority to the original litigation against Allstate Painting.

"Res judicata bars every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, 470 Mich at 123. For the reasons outlined above, the pending litigation of *Ricky S. Bennett versus American Painting and Mackina[c] Bridge Authority* is hereby dismissed pursuant to res judicata. [Magistrate's opinion, pp 3-4.]

The relevant portion of § 171, the basis of the current claim, states:

(1) If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions of section 611, and who does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal. If compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the person under the employer by whom he or she is immediately employed. A contractor shall be deemed to include subcontractors in all cases where the principal gives permission that the work or any part thereof be performed under subcontract.

(2) If the principal is liable to pay compensation under this section, he or she shall be entitled to be indemnified by the contractor or subcontractor. The employee shall not be entitled to recover at common law against the contractor for any damages arising from such injury if he or she takes compensation from such principal. The principal, in case he or she pays compensation to the employee of such contractor, may recover the amount so paid in an action against such contractor.

(3) This section shall apply to a principal and contractor only if the contractor engages persons to work other than persons who would not be considered employees under section 161(1)(d).

There is no procedural guidance from the above statute on the issue we face. Certainly, there is no mandatory joinder provision in § 171, nor is one found anywhere in the entire Act.

Plaintiff, having won against Allstate, was unable to collect, due to a subsequent bankruptcy action. He seeks to collect from a statutory employer (principal), which was not determined in his original claim against Allstate. The question before us, is whether the magistrate properly applied the doctrine of res judicata to dismiss plaintiff's claim.

In the *Adair* case, our Supreme Court gave us some direction as to the purpose and applicability of the doctrine of res judicata:

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Sewell v Clean Cut Mgt., Inc*, 463 Mich 569, 575, 621 NW2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Dart v Dart*, 460 Mich. 573, 586, 597 N.W.2d 82 (1999).

\* \* \*

To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. *Baraga Co. v State Tax Comm*, 466 Mich 264, 269-270, 645 NW2d 13 (2002). The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. *Id.*, quoting *Baraga Co. v. State Tax Comm.*, 243 Mich App 452, 456, 622 N.W.2d 109 (2000), citing *Phinisee v Rogers*, 229 Mich App 547, 553-554, 582 N.W.2d 852 (1998).

Plaintiff argues that neither of these defendants were parties to the original action, and that the instant action is not the same as the original action. He further argues that Allstate and these defendants are not privies to this action, because it is made only to determine the status of principal pursuant to § 171. Lastly, plaintiff asserts that the requirement of "reasonable diligence" is applied to issues that could be litigated, not parties that could be added.

Plaintiff relies on *Viele*, a case in which that plaintiff was able to proceed with a claim against a statutory principal, despite the fact that a case against the direct employer had been tried to completion and an order issued.

Defendants respond that *Viele* is distinguishable from the instant case, because Mr. Viele had sought to add the alleged principals through an amended petition and, for whatever reason, it did not get processed with the original petition. However, *Viele* did hold that statutory employers are in privity to contractors. Defendants further noted that the *Adair* Court only required claims arise out of the same transaction, it did not require the parties to be identical for res judicata to apply.

A privity includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase. *Wildfong v Fireman's Fund Insurance Company*, 181 Mich App 110, 115 (1989). The second requirement for the application of res judicata is that the issues were, or could have been, raised in the earlier action. *Snider v Dunn*, 33 Mich App 619, 623 (1971). The test for determining whether two claims are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two claims. *Schwartz v City of Flint*, 187 Mich App 191, 194-195 (1991).

There is no doubt that Allstate and these defendants would be in privity to one another, should either or both defendants be found to be statutory employers, pursuant to § 171. However, the instant claim is not identical for res judicata purposes because the facts or evidence essential to maintenance of the two claims is not the same. In the initial action against Allstate, plaintiff was required to present evidence to prove that he was disabled as a result of a work injury. In the instant action, plaintiff is required first to present evidence to prove that either or both of these defendants are statutory employers.

In *Viele*, the Court cautioned:

Here, the claim which the alleged statutory employers sought to bar was plaintiff's claim against them under § 171. This is not a claim which plaintiff could have raised in his prior action against D.C.M.A. Thus, while the alleged statutory employers may invoke the doctrine of res judicata to bar the relitigation of plaintiff's claim for disability benefits to the extent that D.C.M.A. was exonerated from liability, they cannot invoke the doctrine to bar a hearing on the issue of their own liability as statutory employers. We, therefore, conclude that the WCAB applied erroneous legal reasoning in ruling that the December 17, 1984, hearing, and the decision emanating from that hearing, was barred under the doctrine of res judicata.

Plaintiff cannot claim res judicata on the merits of the case finding him to be compensably disabled, so he would once again have to present evidence to prove compensability. While some of the required evidence may overlap between the two claims, they are not identical.

The *Viele* Court explained that the party seeking the subsequent litigation would not be able to assert res judicata to protect a previous award. However, if plaintiff had not established a compensable disability in the first case, defendants would be able to claim res judicata, so that plaintiff would not be able to obtain a different result, by filing multiple claims.

The *Viele* Court also relied on the absence of any language in § 171 which could be read as mandating joinder of the alleged statutory employers with the direct employer. In fact, § 171 refers to a claim taken against the principal and indicates that the “principal shall be substituted for reference to the employer...” This language could be read as indicating a separate cause of action.

The Supreme Court modified *Viele v DCMA*, 167 Mich App 571 (1988), but left standing its holdings referenced above. *Viele v DCMA*, 431 Mich 898 (1988), (Recon Den 4/25/89). There are no subsequent, published Court of Appeals decisions which deviate from *Viele*.

As a result, the magistrate erred in dismissing plaintiff's application. I would reverse and remand for a decision on the merits.

Martha M. Glaser

Chairperson

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GRIT, COMMISSIONER, CONTROLLING

We respectfully disagree with the lead decision. We affirm the magistrate's decision to dismiss the petitions against the alleged statutory employers. The claims against the direct employer and the statutory employer arose out of the same transaction and are subject to the broad application of *res judicata*. Because the direct employer and the statutory employers were in privity, the statutory employers may use the doctrine of *res judicata* to defeat the plaintiff's claim against them.

There are no factual disputes. There is no question the plaintiff worked as a painter on the Mackinac Bridge for more than 25 years. There is no question during that 25 years, he worked for various painting contractors as well as the State of Michigan. When he proceeded against his direct employer, Allstate Painting and Contracting, he knew the employer was uninsured. It was not until he unsuccessfully tried to collect against Allstate Painting and Contracting that he filed the current petitions, alleging that Mackinac Bridge Authority/State of Michigan and American Painting Company, Incorporated were statutory employers under § 171.

**Analysis**

We start with the general proposition that there is no mandatory joinder of parties in workers' compensation cases. *Hubbard v Laidlaw Transit Company*, 2000 ACO #406; *Woodard v Sebro Plastics, Inc*, 2002 ACO #263. Because there is no mandatory joinder of parties, *res judicata* cannot generally be used to bar subsequent litigation against an additional party.

That general rule does not apply when parties are in privity with each other and are "so identified in interest with another that he or she represents the same legal right." [*Viele*, p 580.]

*Viele* held that statutory employers are in privity with the direct employer.

Based on these statutory requirements, we conclude that the statutory employer is in privity with the direct employer... [*Id.*, p 580.]

And because statutory employers are in privity with the direct employer, a statutory employer may:

...properly invoke the doctrine of res judicata defensively to bar the relitigation of claims which could have been raised in the prior action between the disabled person and the direct employer, but were not. [*Id.*, p 580.]

Michigan has adopted the “broad” application of res judicata in workers’ compensation cases. *Gose v Monroe Auto Equipment Company*, 409 Mich 147 (1980). The broad application of res judicata bars “every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Adair v State of Michigan*, 470 Mich 105, 123 (2004); See also *Gose*, p 160.

Michigan also applies the “same transaction” test, rather than the “same evidence” test to determine whether a claim is barred. The Michigan Supreme Court explained the “same transaction” approach is more “pragmatic” than the “same evidence” approach.

Under the “same evidence” test, a second suit is barred “if the evidence needed to sustain the second suit would have sustained the first, or if the same facts were essential to maintain both actions.” The “transactional” test provides that “the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.”

\* \* \*

[U]nder the same evidence test the definition of what constitutes a cause of action is narrower than under the transactional test. As explained in the Restatement (Second) of Judgments, the same evidence test is tied to the theories of relief asserted by a plaintiff, the result of which is that two claims may be part of the same transaction, yet be considered separate causes of action because the evidence needed to support the theories on which they are based differs. By contrast, the transactional approach is more pragmatic. Under this approach, a claim is viewed in “factual terms” and considered “coterminous with the transaction, regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; \* \* \* and regardless of the variations in the evidence needed to support the theories or rights.” [*Adair*, p 124.]

Whether events or facts constitute the same transaction, is a pragmatic consideration that focuses on “whether the facts are related in time, space, origin or motivation” and whether they form a “convenient trial unit.” *Adair* p 125; *Banks v LAB Lansing Body Assembly*, 271 Mich App 227 (2006).

The magistrate used this pragmatic approach when determining the claim against the statutory employers was part of the same transaction as the claim against the direct employer.

Additionally, the litigation Plaintiff advanced against Allstate Painting is the same transaction for which Plaintiff is now trying to advance against American Painting Inc. and Mackina[c] Bridge Authority. As expressed in *Banks*, the same facts are being asserted in the case against American Painting and Mackina[c] Bridge Authority as were asserted against Allstate Painting. These facts arise out of the same time, space, and origin. The only difference is the motivation.

Plaintiff admits in his brief that the motivation for pursuing this current litigation against American Painting and Mackina[c] Bridge Authority is that Allstate Painting has failed to pay benefits pursuant to the Open Award authored by Magistrate McAree. Plaintiff is now seeking enforcement of the Order through Circuit Court. This is not a sufficient legal explanation for Plaintiff's failure to add American Painting and Mackina[c] Bridge Authority to the original litigation against Allstate Painting. [Magistrate's opinion, p 4.]

We agree with the magistrate. The claims against the direct employer and the statutory employers are virtually the same. Both claims involve the same two alleged knee injuries, occurring on the same two alleged dates. They involve the same medical, disability and wage loss proofs. Both claims seek weekly wage loss benefits and medical benefits for the same time periods. The claims against the direct employer and the statutory employers certainly would have made a convenient trial unit.

The plaintiff does not even argue there was an impediment to adding the statutory employers in the first litigation. He knew the direct employer was uninsured, but did not add the statutory employers until he was unable to collect against the uninsured employer. [Plaintiff's trial brief, dated August 27, 2007, p 2.]

We do not believe *Viele* supports the plaintiff's position. *Viele* involved a situation where the plaintiff tried to proceed against the direct employer and the statutory employers. The Bureau decided to proceed to trial against the direct employer, even though the plaintiff had filed an amended petition adding the statutory employers before trial. The Court noted the plaintiff was not able to pursue the claims against the statutory employers in first trial. The reason the plaintiff could not have "raised" the statutory employment issue in the first trial was because the Bureau bifurcated the issues by insisting on separate trials.

There is another reason we cannot accept the lead opinion's reasoned interpretation of *Viele*. If the only reason the Court in *Viele* ruled in the plaintiff's favor was because proving statutory employment required a bit more evidence than proving direct employment, then the Court would have been violating the "same transaction" test outlined in *Gose*. We do not believe the decision in *Viele* was contrary to the *Gose* "same transaction" test. To the contrary, the *Viele* decision cites and follows the *Gose* standard. [*Viele*, p 579.] We believe the lead opinion's

interpretation of *Viele* forces *Viele* into conflict with *Gose* and the later decision in *Adair*, by adopting a “same evidence” standard.<sup>1</sup>

### **Conclusion**

The magistrate correctly analyzed this case under the broad application of res judicata. We affirm the dismissal of the petitions against the alleged statutory employers.

Donna J. Grit

Commissioner

Gregory A. Przybylo

Commissioner

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<sup>1</sup> We recognize our decision is contrary to the holding reached by the panel in *Adams v Cary Dairy Farm* 2004 ACO #114. We believe the panel in *Adams* misapplied the *Viele* decision and that the outcome is inconsistent with *Adair*.

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This cause came before the Appellate Commission on a claim for review filed by plaintiff from Magistrate Jennifer L. Barnes' order, mailed October 22, 2007, dismissing plaintiff's Application for Mediation or Hearing on a finding of that it was barred by res judicata. The Commission has considered the record and counsel's briefs, and believes that the magistrate's order should be affirmed. Therefore,

IT IS ORDERED that the magistrate's order is affirmed.

Donna J. Grit

Commissioner

Gregory A. Przybylo

Commissioner