STATE OF MICHIGAN

COURT OF APPEALS

TIM CESEFSKI,

Plaintiff-Appellant,

v

STATE FARM INSURANCE COMPANY and CITIZENS INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
July 9, 2002

No. 231013
Macomb Circuit Court
LC No. 99-000965-NF

Before: Hood, P.J., and Saad and E. M. Thomas,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff became paralyzed after falling from a ladder while cutting down a tree. He stood on a ladder about twelve to sixteen feet above the ground, cutting the upper portion of the tree with a chain saw. One end of a rope was tied to the upper portion of the tree, and the other end of the rope was tied to the trailer hitch of plaintiff's pickup truck. Keith Wayburn drove plaintiff's pickup truck. Wayburn drove the pickup truck away from the tree to maintain resistance on the rope and keep it taut. They intended that the upper portion of the tree would be safely pulled from the lower trunk and onto the ground. To maintain a taut rope, Wayburn drove out onto a public road and had to back out of the road several times to allow traffic to pass. When the upper portion of the tree finally came loose, Wayburn drove away from the tree. However, the upper portion hit the lower trunk. This caused plaintiff to fall from his ladder. He suffered injuries to his back, resulting in paralysis.

Wayburn's vehicle is insured by defendant State Farm Insurance Company (State Farm), and plaintiff's vehicle is insured by Citizens Insurance Company (Citizens). Plaintiff brought an action against Wayburn. Defendants entered into a settlement in that case.

Plaintiff then filed this action against defendants, alleging that they refused to provide personal injury protection benefits as required under the No-Fault Act, MCL 500.3101 *et seq.*, and seeking a declaratory judgment regarding defendants' liability. The trial court granted

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* Circuit judge, sitting on the Court of Appeals by assignment.

defendants summary disposition, finding that plaintiff's injuries were not covered by the no-fault act.

Plaintiff argues that the trial court erred in concluding that his injuries are not covered by the no-fault act. We disagree.

The trial court granted defendants' motion pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). A decision on a motion for summary disposition is reviewed de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id*. To rule on the motion, the trial court must consider the pleadings, affidavits, depositions and all other documentary evidence submitted by the parties. MCR 2.116(G). The court must view the evidence and all reasonable inferences drawn from the evidence in favor of the nonmoving party, giving the nonmoving party the benefit of any reasonable doubt. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, the court may grant summary disposition pursuant to MCR 2.116(C)(10). *Hazle*, *supra*.

MCL 500.3105(1) provides: "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter."

In *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214; 580 NW2d 424 (1998), our Supreme Court explained how to determine whether an injury arose out of the use of a motor vehicle as a motor vehicle. The Court explained:

> As a matter of English syntax, the phrase "use of a motor vehicle 'as a motor vehicle'" would appear to invite contrasts with situations in which a motor vehicle is not used "as a motor vehicle." This is simply to say that the modifier "as a motor vehicle" assumes the existence of other possible uses and requires distinguishing use "as a motor vehicle" from any other uses. While it is easily understood from all our experiences that most often a vehicle is used "as a motor vehicle," i.e., to get from one place to another, it is also clear from the phrase used that the Legislature wanted to except those other occasions, rare as they may be, when a motor vehicle is used for other purposes, e.g., as a housing facility of sorts, as an advertising display (such as at a car dealership), as a foundation for construction equipment, as a mobile public library, or perhaps even when a car is on display in a museum. On those occasions, the use of the motor vehicle would not be "as a motor vehicle," but as a housing facility, advertising display, construction equipment base, public library, or museum display, as it were. It seems then that when we are applying the statute, the phrase "as a motor vehicle" invites us to determine if the vehicle is being used for transportational purposes. [*Id*. at 218-219.]

Thus, the Court concluded that the Legislature's intent was that the no-fault act provides coverage for injuries that result "from the use of motor vehicles when closely related to their transportational function and only when engaged in that function." *Id*. at 220. It further stated: "[W]hether an injury arises out of the use of a motor vehicle 'as a motor vehicle' under § 3105

turns on whether the injury is closely related to the transportational function of motor vehicles." *Id*. at 225-226.

The evidence here establishes that Wayburn drove the truck to maintain tension on the rope. Wayburn used the pickup truck to assist in the tree cutting process. Although Wayburn drove out onto a public street, plaintiff's injury was not closely connected to the function of the pickup as a transportation device; it was related to the use of the pickup truck as a tool. The trial court correctly concluded that plaintiff's injury does not fall within the no-fault act.

Plaintiff also argues that defendants should be equitably or judicially estopped from taking a position contrary to that asserted in his action against Wayburn, in which defendants entered into a settlement. Plaintiff asserts that because defendants paid plaintiff under the policies in the case against Wayburn, "they are now equitably or judicially estopped from claiming that this incident does not arise out of the operation of a motor vehicle as a motor vehicle."

Equitable estoppel is a doctrine under which a party may be precluded from asserting or denying the existence of a particular fact. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). It may arise where "(1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Id*. at 141.

Plaintiff does not explain how application of the doctrine of equitable estoppel may arise from defendants' settlement in the prior action. Thus, he has not established that the doctrine of equitable estoppel should apply.

Judicial estoppel is applied to bar a party who has successfully and unequivocally asserted a position in a prior proceeding from asserting an inconsistent position in a later proceeding. *Hall v McRea Corp*, 238 Mich App 361, 366; 605 NW2d 354 (1999), remanded on other grounds 465 Mich 919 (2001). Plaintiff has not shown that defendants "successfully and unequivocally asserted a position" in the Wayburn case that is inconsistent with their position in this case. Defendants simply settled that case.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Edward M. Thomas