

STATE OF MICHIGAN
COURT OF APPEALS

LAURA FORTMAN,

Plaintiff-Appellant,

v

DUSTY DEAN SCHNEIDER and DUAINE
MORIN, also known as DUANNE MORIN,

Defendants-Appellees,

and

MARY MORIN,

Defendant.

LAURA FORTMAN,

Plaintiff-Appellant,

v

DUSTY DEAN SCHNEIDER and DUAINE
MORIN,

Defendants-Appellees,

and

MARY MORIN,

Defendant.

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

UNPUBLISHED
October 21, 2021

No. 354365
Jackson Circuit Court
LC No. 18-000314-NI

No. 354953
Jackson Circuit Court
LC No. 18-000314-NI

PER CURIAM.

In this automobile negligence action, plaintiff Laura Fortman appeals the trial court's July 13, 2020 order granting summary disposition in favor of defendants Dusty Dean Schneider and Duaine Morin.¹ Plaintiff also appeals the trial court's September 11, 2020 order granting defendants attorney fees. We reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

In 2012, plaintiff was struck by a motor vehicle while crossing a street on foot. Plaintiff suffered from a myriad of injuries as a result of the 2012 accident, and she received extensive medical treatment. At the time, she was insured by State Farm Mutual Automobile Insurance Company (State Farm). In 2014, plaintiff settled her no-fault claim against State Farm, pursuant to an agreement for State Farm to pay her medical bills related to the 2012 injury.

In December 2016, plaintiff and Schneider were involved in a motor vehicle accident in which plaintiff allegedly sustained injuries. At the time of the accident, Schneider was driving a motor vehicle that was owned by Morin. In November 2017, plaintiff filed suit against State Farm and Progressive Marathon Insurance Company (Progressive), which was her insurer in 2016, in Washtenaw County. Plaintiff alleged that Progressive improperly refused to pay personal injury protection benefits based on Progressive's assertions that plaintiff's injuries were solely related to the 2012 accident; i.e., that plaintiff had not suffered any new injuries in 2016. Plaintiff and Progressive ultimately reached a settlement, and the complaint was dismissed.

In February 2018, plaintiff filed a complaint against defendants in Jackson County. In relevant part, plaintiff alleged that Schneider's negligent conduct caused her injuries and that Morin was vicariously liable. In February 2020, defendants moved for summary disposition, arguing that plaintiff was judicially and equitably estopped from bringing her claims against them. Specifically, defendants argued that the Washtenaw Circuit Court, State Farm, and Progressive had relied on plaintiff's statements that her injuries were solely related to the 2016 accident, as opposed to the 2016 accident aggravating her preexisting injuries from 2012. Defendants noted that plaintiff indicated in the Jackson County proceedings that the 2016 injuries exacerbated the injuries associated with the 2012 accident. Plaintiff opposed the motion. The trial court granted summary disposition in favor of defendants on the basis of judicial estoppel.

Thereafter, defendants moved the trial court to award them attorney fees on the basis that plaintiff's complaint was frivolous because plaintiff had misrepresented the extent of her injuries and had made inconsistent statements concerning the source of her injuries. The trial court granted that motion, and these appeals followed.

¹ Defendant Mary Morin was dismissed as a defendant during the proceeding.

II. STANDARDS OF REVIEW

This Court reviews the application of the doctrine of judicial estoppel de novo. *Szyslo v Akowitz*, 296 Mich App 40, 46; 818 NW2d 424 (2012). “We [also] review de novo a trial court’s decision on a motion for summary disposition.” *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 159; 934 NW2d 665 (2019). “Summary [disposition] on the basis of . . . estoppel is properly granted under MCR 2.116(C)(7)[.]” *Lichon v American Universal Ins Co*, 435 Mich 408, 427 n 14; 459 NW2d 288 (1990). “A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence.” *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). “This Court must consider the documentary evidence . . . in a light most favorable to the nonmoving party. If there is no relevant factual dispute, whether a plaintiff’s claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide.” *Snead v John Carlo, Inc.*, 294 Mich App 343, 354; 813 NW2d 294 (2011) (citation omitted). “If, however, a pertinent factual dispute exists, summary disposition is not appropriate.” *Id.*

III. ANALYSIS

“Judicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012) (quotation marks and citations omitted). The doctrine is invoked “to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.” *Id.* at 479-480 (quotation marks and citations omitted). In *Opland v Kiesgan*, 234 Mich App 352, 363-364; 594 NW2d 505 (1999), this Court explained that “[t]he doctrine of judicial estoppel is to be applied with caution.” The doctrine serves to prevent litigants from deliberate manipulation of the courts by arguing opposing positions “to suit an exigency of the moment.” *Id.* at 364 (citations omitted). Furthermore, “[j]udicial estoppel is an extraordinary remedy to be invoked when a party’s inconsistent behavior will otherwise result in a miscarriage of justice.” *Id.* (quotation marks and citations omitted). Judicial estoppel “is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims[.]” *Id.* (quotation marks and citations omitted).

In this case, there is no indication that the Washtenaw Circuit Court accepted as true plaintiff’s position that she sustained all of her injuries in the 2016 accident. See *Opland*, 234 Mich App at 362 (holding that, in order for the doctrine of judicial estoppel to apply, “there must be some indication that the court in the earlier proceeding accepted that party’s position as true”) (quotation marks and citation omitted). Instead, plaintiff and Progressive reached a settlement concerning plaintiff’s first-party claim and then, on the basis of their agreement to settle the matter, plaintiff’s complaint was dismissed.

Plaintiff also did not offer wholly inconsistent positions in the Washtenaw Circuit Court and the Jackson Circuit Court. See *Spohn*, 296 Mich App at 480 (holding that, “in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent”) (quotation marks and citation omitted). Plaintiff maintained in both actions that she suffered injuries as a result of the 2016 accident, and there is no indication that plaintiff sought to deliberately manipulate the courts through cynical gamesmanship. Indeed, in both actions, plaintiff disclosed that she had suffered injuries in the 2012 accident. In other words, plaintiff argued that she suffered new

injuries from the 2016 accident, but she did not contend that her injuries were *solely* due to the 2016 accident. Notwithstanding plaintiff's statement in an interrogatory response that she felt she had made a full recovery from her 2012 traumatic brain injury, that was not the only injury she suffered in 2012, and she simultaneously stated that she "still had some minor residuals from the previous crash." The issue of whether the injuries from the 2016 accident were new, as opposed to an exacerbation of the injuries associated with the 2012 accident, is a question of causation.

Furthermore, application of the doctrine is not necessary to avoid a miscarriage of justice. Defendants can attempt to impeach plaintiff's credibility at trial and can attempt to demonstrate that the alleged 2016 injuries did not result in a serious impairment of a body function that affected plaintiff's ability to lead her normal life. See *Spohn*, 296 Mich App at 489 ("Of utmost importance in determining whether to apply the doctrine of judicial estoppel is whether the party seeking to assert an inconsistent position would derive an unfair advantage if not estopped.") (Quotation marks, citation, and alteration omitted.) Even if defendants are correct that Progressive improperly relied on plaintiff's statements that her injuries were caused solely by the 2016 accident when settling the Washtenaw case, this would place Progressive—not defendants—at a financial disadvantage.

In sum, because defendants failed to establish the requirements of judicial estoppel, and because the circumstances of this case would not further the doctrine's purpose, we conclude that the trial court erred by granting summary disposition on judicial estoppel grounds.² Because the trial court erred by granting summary disposition on the basis of the doctrine of judicial estoppel, it is necessary to vacate the trial court's September 11, 2020 order granting attorney fees.

In so holding, we note that defendants argue that summary disposition was proper under MCR 2.116(C)(10) (no genuine issue of material fact) because it is "impossible" for plaintiff to establish "an aggravation of symptoms and conditions" given that she denied that the symptoms and conditions existed before the 2016 accident. This argument was not decided by the trial court when the court granted defendants' motion for summary disposition. Rather, as already stated, the trial court relied on the doctrine of judicial estoppel. Moreover, because defendants' argument essentially concerns credibility and causation, we conclude that defendants' argument is without merit. See *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 124 (2009) ("Normally, the existence of cause in fact is a question for the jury to decide[.]"); *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013) ("The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes[.]").

² Plaintiff argues that equitable estoppel is not applicable in this case. Because the trial court did not grant summary disposition on the basis of equitable estoppel, it is not necessary to consider plaintiff's argument. Additionally, because we have already concluded that the trial court erred by granting defendants' motion on the basis of judicial estoppel, it is unnecessary to consider whether the trial court impermissibly engaged in fact finding and impermissibly made credibility determinations when ruling on the motion.

Reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Thomas C. Cameron
/s/ Michelle M. Rick