STATE OF MICHIGAN

COURT OF APPEALS

FRANK HENSLEY,

Plaintiff-Appellant,

v

CONTINENTAL WESTERN INSURANCE CO., an Ohio Corporation,

Defendant-Appellee,

and

WERCH TRUCKING, INC.,

Defendant.

UNPUBLISHED
February 1, 2000

No. 210649
Allegan Circuit Court
LC No. 96019567 ND

FRANK HENSLEY,

Plaintiff-Appellee,

v

CONTINENTAL WESTERN INSURANCE CO., an Ohio Corporation,

Defendant-Appellant.

and

WERCH TRUCKING, INC.,

Defendant.

No. 214143
Allegan Circuit Court
LC No. 96019567 ND

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

In Docket No. 210649, plaintiff Frank Hensley appeals as of right from the judgments of the circuit court separately granting summary disposition to defendants Werch Trucking, Inc. and Continental Western Insurance Co.. In Docket No. 214143, defendant Continental appeals by leave granted from the circuit court's order denying its motion for attorney fees and costs. We affirm all orders.

On February 15, 1995 a tractor-trailer accident occurred, resulting in leaking fuel that contaminated property owned by plaintiff adjacent to I-196 near Holland. The tractor-trailer was owned and operated by Werch Trucking, Inc. (Werch), whose insurer, defendant Continental Western Insurance Co. (Continental), hired the environmental firm Clean Harbors on February 17, 1995 to remediate the spill. On February 22, 1995 Clean Harbors removed approximately 150 cubic yards of contaminated soil along the expressway shoulder, constructed a berm to prevent migration of contamination onto the property and its swamp, and collected soil samples from the property which tested at or below contamination limits established in Michigan Department of Natural Resources (DNR) criteria. On March 22, 1995 plaintiff hired Driesenga & Associates, Inc. (DAI), an environmental firm, and requested that it investigate possible remaining contamination of the property. DAI's investigation determined that additional fuel had migrated onto the property and was contaminating the swamp. Based on DAI's investigation and recommendation that further cleanup be undertaken, plaintiff contacted Continental in March, and again in April 1995 requesting additional action and compensation for the cost of DAI's investigation.

On May 3, 1995 plaintiff received a response from Continental, represented by claims representative Tom Schafroth, in which it was indicated that it was company policy not to advance money or resolve claims until all damages and costs were established; in this instance it was specifically asserted that "[t]here, of course, cannot be any settlement negotiations until the Michigan Department of Natural Resources offers a 'clean closure.'" Denying a request by plaintiff to reconsider this position, Continental reiterated that no money would be advanced until "clean closure" was achieved.

Throughout the summer and fall of 1995, cleanup efforts continued and plaintiff and Continental maintained contact. Finally, in a September 14, 1995 report to the DNR, DAI indicated that remediation of the site had been completed such that levels of contaminants were acceptable, and recommended that "the site should be considered properly closed." On September 27, 1995 the DNR issued to DAI a letter identified as a report of remediation. Copies of this letter were sent to plaintiff and his attorney and to Schafroth. The DNR indicated agreement with DAI's conclusion that no further action was required regarding remediation, and stated that although final restoration was conditional on clarifying a minor query, restoration activities could begin. There was no specific mention of "clean closure" in this DNR letter.

Negotiations continued without success, and on May 16, 1996 plaintiff filed his initial complaint, naming Werch as defendant in the suit for damages. The complaint stated claims based on negligence,

nuisance and trespass, and alleged that the crash and the failure to timely take remedial measures resulted in the damage to his property. On August 14, 1997 the trial court granted Werch's motion for summary disposition, concluding that plaintiff's claim was controlled by the Michigan no-fault act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.*, and finding that Werch's insurer, rather than Werch, was the proper party defendant.

Plaintiff filed an amended complaint naming Werch and Continental as joint defendants. This complaint alleged the same three tort claims and added claims of "No Fault: Property Damage" and "No Fault: Breach of Contract." In an October 6, 1997 order Werch was voluntarily dismissed from the suit. Continental then filed a motion for summary disposition on October 17, 1997, arguing that plaintiff's claim was covered by the no-fault act and that pursuant to MCL 500.3145(2); MSA 24.13145(2) plaintiff had failed to timely file his complaint within one year of the accident. The trial court heard oral argument on the motion, but reserved judgment pending an evidentiary hearing on the issue of estoppel. This evidentiary hearing was held February 10, 1998, the trial court taking testimony from Continental's representative Tom Schafroth, and plaintiff's attorney Linda Howell. At the conclusion of the hearing the trial court ruled in favor of Continental, granting the motion on the dual findings that plaintiff had failed to satisfy the one-year statute of limitations and that Continental was not estopped from asserting the statute of limitations as a defense. The trial court additionally dismissed plaintiff's third-party beneficiary breach of contract claim, including it within the grant of summary disposition.

An order granting summary disposition in favor of Continental was entered on March 11, 1998. On February 24, 1998, before entry of the order granting summary disposition, Continental filed a motion for attorney fees and costs. This motion was denied, the court finding that plaintiff's case was neither frivolous nor without legal merit. In Docket No. 210649 plaintiff presents three claims of error in the trial court's grants of summary disposition. In Docket No. 214143, defendant appeals the trial court's denial of its motion for fees and costs.

Docket No. 210649

Plaintiff first challenges the trial court's grant of summary disposition to defendant Werch. Plaintiff contests the trial court's determination that the no-fault act controls this action, arguing that his original complaint appropriately alleged three common-law tort claims. We find the trial court's grant of summary disposition appropriate.

Defendant Werch moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). This Court reviews de novo the grant or denial of a motion for summary disposition. *Johnson v Wayne Co*, 213 Mich App 143, 148-149; 540 NW2d 66 (1995). MCR 2.116(C)(7) provides that a party may obtain summary disposition if the claim is barred by the statute of limitations. Reviewing a decision on such a motion we must accept plaintiff's well pled allegations as true and must consider all documentary evidence submitted by the parties. *Bowers v Bowers*, 216 Mich App 491, 495-496; 549 NW2d 592 (1996). MCR 2.116(C)(8) provides that a motion for summary disposition may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. The legal sufficiency of the opposing party's claim must be determined by the pleadings alone. *Simko v*

Blake, 448 Mich 648, 654; 532 NW2d 842 (1995). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id*. Finally, a motion brought under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). All affidavits, pleadings, depositions, admissions and other documentary evidence submitted or filed in the action must be considered to determine whether there exists a genuine issue of material fact such that would warrant a trial. *Id.*

Two provisions of the no-fault act are immediately relevant to this issue. MCL 500.3121; MSA 24.13121 provides in pertinent part:

> (1) Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle.

Pursuant to MCL 500.3135(3); MSA 24.13135(3), "tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle" is abolished. The test whereby Michigan courts determine whether an accident and resulting damages arise out of the ownership, operation, maintenance or use of a motor vehicle requires both that there be a causal connection that is "more than incidental, fortuitous, or 'but for,'" and that "the vehicle's connection with the injury should be 'directly related to its character as a motor vehicle.'" *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 32; 528 NW2d 681 (1995) (quoting *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986)). Plaintiff contends that the injury to his property resulted from the delayed cleanup efforts, therefore severing the causal connection between the initial tractor-trailer accident and the damages to his property.

Plaintiff cites *Ricciuti v DAIIE*, 101 Mich App 683; 300 NW2d 681 (1980), a case in which we held that the plaintiff motorcycle rider was not entitled to benefits under the no-fault act for injuries suffered when he lost control of his motorcycle after riding over a wet license plate that was lying in the road. We held that the fact that the license plate had once been attached to an automobile did not establish sufficient causal connection between the ownership, use, or maintenance of a motor vehicle and the plaintiff's injuries. *Id.* at 686. Plaintiff attempts analogy to this case, arguing that the failure to clean up fuel spilled from the tractor-trailer is equivalent to the failure to pick up a license plate that fell off a car. Plaintiff contends that this case presents a similar causal break. Notwithstanding the arguably lengthy delay in cleanup of the spilled fuel, unlike in *Ricciutti* where the drop-off of the license plate caused no immediate injury, the damage to plaintiff's property was initially suffered at the time of the accident. As the trial court noted, "[a]ny further damages resulting from the defendant's failure to clean-up [sic] the oil spill was only an exacerbation of the original harm, not a new injury like the injury from the motorcycle accident in *Ricciutti*." The connection between the tractor-trailer accident and the damage suffered was significantly more than incidental or fortuitous.

We find that plaintiff's damages arose from the ownership, operation, maintenance or use of a motor vehicle, and that plaintiff's claim is controlled by the no-fault act. We further find that pursuant to MCL 500.3135(3); MSA 24.13135(3) tort liability arising from the ownership, maintenance or use of a

motor vehicle has been abolished. See *Matti Awdish, Inc v Williams*, 117 Mich App 270, 277; 323 NW2d 666 (1982). Consequently, the appropriate avenue of relief is to be found in MCL 500.3121(1); MSA 24.13121(1), and the appropriate party defendant is Continental, the insurer. The trial court ordered Werch dismissed from this action based on a finding that it was the improper party defendant. We agree with that order and affirm the decision.

This ruling was not the only statement made by the trial court, however, as it went on to discuss the second basis on which defendant Werch brought its motion for summary disposition. Defendant Werch had also cited the provision of the no-fault act establishing a one-year limitations period on actions seeking recovery for property damage. MCL 500.3145(2); MSA 24.13145(2). Pursuant to this provision a plaintiff must initiate a claim within one year of the damage creating accident. The trial court's written opinion additionally discussed this statute of limitations, correctly noting the rule and its critical date, but then, incomprehensibly, stating "Mr. Hensley filed his lawsuit in May, 1996 *which was less than one year after Werch Trucking concluded its clean- up* [sic] *efforts* on the Hensley property." On this finding the trial court ruled that plaintiff could amend his complaint to add Continental, Werch's insurer, stating that the statute of limitations would be tolled for 21 days for this purpose. The accident occurred on February 15, 1995. There is no question that under the no-fault act plaintiff's original complaint was untimely. The trial court, however, apparently misinterpreted the statute and issued a ruling for which there is no recognized legal basis. Not recognizing the impropriety of the trial court's order, plaintiff did so amend his complaint, adding Continental as defendant within 21 days and asserting a claim of property damage under the no fault-act. Continental promptly filed a motion for summary disposition asserting that plaintiff had not initiated a claim within the one-year limitations period allotted by the act. After two hearings the court granted this motion also.

Plaintiff's second claim of error challenges this grant of summary disposition in favor of Continental. Plaintiff contends that the trial court's conclusion that Continental was not estopped from asserting the statute of limitations was contrary to the analysis of a recent Supreme Court decision which found estoppel under similar circumstances. We disagree.

Defendant Continental moved for summary disposition pursuant to MCR 2.116(C)(7) and (8). The same tests and standards recited above are applicable. The doctrine of equitable estoppel, whereby a defendant is prevented from asserting the statute of limitations, was fully analyzed in the decision plaintiff relies on. In *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263; 562 NW2d 648 (1997), the Court found that where before the passing of the limitations period the defendant indicated that it would not consider a claim piecemeal, then, when the entire claim was presented after the passing of the statute of limitations proceeded to deny the claim, the defendant was estopped from asserting the statute of limitations as a bar to the plaintiff's court action. Somewhat similar circumstances are presented herein. We agree with the trial court, however, that enough factual differences exist such that the rare application of estoppel should not be repeated.

The Supreme Court stated:

> In *Lothian v Detroit*, 414 Mich 160, 176; 324 NW2d 9 (1982), this Court emphasized that the doctrine of equitable estoppel is a judicially created exception to

> the *general rule that statutes of limitation run without interruption* [emphasis added]. … One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. This Court has been reluctant to recognize an estoppel absent intentional *or negligent* [emphasis in original] conduct designed to induce a plaintiff to refrain from bringing a timely action. Negotiations intended to forestall bringing an action have been considered an inducement sufficient to invoke the doctrine, however. [*Id.* at 270 (citations omitted.)]

Concluding that the plaintiff, Cincinnati, should not be punished for proceeding as requested by the defendant, Citizens, the Court summed up its analysis with the following statement:

> In short, the record contains ample evidence that Cincinnati . . . was justified in relying, and did rely, on the representations of Citizens . . . that the subrogation claim would be processed without difficulty, once all the documentation was complete. The fact that Citizens did not intend to honor its representations is demonstrated by the fact that it did not honor them. [*Id.* at 272.]

Whether, in this case, Continental should have been estopped from asserting the no-fault act's one-year statute of limitations rested on the determination whether plaintiff similarly relied on dishonored representations that his claim would be satisfied after compliance with Continental's timetable, which required, before settlement negotiations would be undertaken, the complete evaluation of all costs and the DNR's issuance of "clean closure." The critical focus of this inquiry is the parties' understanding of and actions following the DNR's issuance of a September 27, 1995 letter in response to DAI's recommendation that the site be properly closed. In this letter, the DNR indicated that it agreed with DAI's conclusion that no further action was required relative to the remediation of the site. The letter, however, did not include the terminology "clean closure" or like language.

Regardless of the question whether "clean closure" was secured as of the DNR's September 27, 1995 letter, on October 26, 1995 plaintiff considered all necessary work complete and presented defendant with a complete claim. Unlike *Citizens*, therefore, where the plaintiff's agreement to deal with the claim only in its entirety meant that the time for bringing an action had passed when the claim was first submitted, *id.* at 263, here the claim was on the table for 3½months before the limitations period ran. Furthermore, neither before nor after the September 27, 1995 letter did Continental, through Schafroth, ever make any representation that the entirety of plaintiff's claim would be resolved to his satisfaction. With no affirmative statement that all claims would be wholly satisfied, this case again presents a scenario unlike *Citizens,* where the Court's conclusion was based in part on the finding that the defendant represented to the plaintiff that its subrogation claim would be processed without difficulty once documentation of all losses was complete. *Id.* at 272.

In addition, and again unlike *Citizens,* neither before nor after the limitations period ran was there ever a full denial of plaintiff's claim. Even though Schafroth's preliminary indications suggested that payment would be denied on the various expenses, eventually offers were made. In April 1996,

Continental offered to pay all tangible expenses save for legal costs; the primary area of dispute for which payment was not offered was the speculative "loss of use" claim. Thus, plaintiff's concern is more appropriately viewed as a disagreement over the appropriate sum of coverage, a possibility which clearly presented itself during the negotiations. Following the October 26, 1995 demand, to which Continental appears to have been reticent to respond, Howell presented plaintiff with an update on the status of his claim. In this letter of January 17, 1996, which presumably summarized an eventual discussion, Howell noted Schafroth's inclination not to cover all required expenses. Given this understanding, on top of the nearly three-month delay in receiving any response, the possible need for legal action should have been evident. With almost a full month to go before the limitations period ran, sufficient time was available for plaintiff to bring an action.

In addition to these factual differences, there was undeniable confusion over when "clean closure" was secured. Despite his contrary testimonial assertion that he considered "clean closure" secured since September 1995, Schafroth's testimony regarding February 26, 1996 notes suggests that even then he was qualifying all statements and still giving the impression that defendant was waiting for this official closure before it made a final determination on plaintiff's claim. That Schafroth was leaving this impression throughout the negotiations is supported by the statements made in Howell's January 17, 1996 letter to plaintiff. She testified that this letter was drafted with language suggesting that defendant was still waiting for the final word from the DNR. The letter in fact included one statement explicitly expressing that belief. By the time of her April 1, 1996 letter to Schafroth, however, Howell apparently considered the DNR's September 27, 1995 correspondence all that was required for "clean closure." Specifically when either party reached this understanding cannot be determined.

The question, therefore, is whether Continental can be said to have strung plaintiff along until passage of the one-year limitations period of the no-fault act by purposely giving a misleading impression that "clean closure" was still forthcoming. Although an arguable interpretation of the various communications, especially an otherwise coincidental February 14, 1996 request for more pictures of the site, the inconclusive nature of the documents and testimony presents insufficient evidence on which to make such a finding. Moreover, given plaintiff's belief that the claim was complete as of October 26, 1995, and on the understanding that the only holdup to defendant's response was official "clean closure," we would expect to see some record of an effort to follow up with the DNR. The record indicates no such correspondence. Given the factual differences between this case and *Citizens*, regarding both the timing of plaintiff's claim and defendant's handling of the claim, and acknowledging that evidence concerning the "clean closure" mandate is inconclusive, we find, in agreement with the trial court's conclusion, that *Citizens* is not controlling.

We consequently hold that defendant Continental was not estopped from asserting plaintiff's failure to satisfy the statute of limitations as a bar to his action. We affirm the trial court's grant of summary disposition in favor of Continental.

Plaintiff lastly contends that the trial court erred in dismissing his breach of contract claim on the ground that it was subject to the no-fault act's one-year statute of limitations.[1] Plaintiff asserts that he was a third-party beneficiary to Werch's insurance contract with Continental, contending that because this claim, additionally included in his amended complaint, was not argued during the hearings on

Continental's motion for summary disposition, its inclusion in the order of dismissal was improper. We disagree.

The addition of this count is simply an attempt on the part of plaintiff to cloak the same claim for damages under a cause of action with a longer statute of limitations. It is well established that the no-fault act has not abolished contractual liability for losses arising from the use of a motor vehicle. *Ben Franklin Ins Co v Bakhaus Contractors, Inc*, 124 Mich App 510, 513; 335 NW2d 70 (1983). In those cases recognizing such liability, however, contracts separate and distinct from the automobile insurance contract were at issue. *Id.* (liability asserted based on the breach of a bailment contract); see also *Kinnunen v Bohlinger*, 128 Mich App 635, 638; 341 NW2d 167 (1983) (liability based on enforceable contract to borrow and return safely a horse trailer). Here, plaintiff rests his claim on the contract for automobile insurance, between Werch and Continental, that brings the action under the no-fault act. Because no separate and distinct contract exists between these parties, any and all liability falls within the purview of the no-fault act.

Plaintiff has advanced, and we can think of, no reason why a party should be able to reclassify itself as a third-party beneficiary to an automobile insurance contract to take advantage of a different, and in this instance more advantageous, limitations period than that same party would be subject to under the no-fault act if bringing an action directly under the same contract. Therefore, we affirm the trial court's ruling dismissing plaintiff's count alleging breach of contract under the grant of summary disposition.

Docket No. 214143

In a separate appeal, defendant Continental contends that the trial court's denial of its motion for attorney costs and fees was erroneous. In denying this motion the trial court found that plaintiff's claims asserted arguable positions and sought reasonable damages. We agree.

The decision whether to award attorney fees is within the trial court's discretion and will be reviewed on appeal for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997); see also *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 627; 550 NW2d 580 (1996). An abuse of discretion exists if the result is so violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998). A trial court's findings regarding the fraudulent, excessive, or unreasonable nature of a claim should not be reversed on appeal unless they are clearly erroneous. *Beach, supra* at 627. Similarly, a trial court's determination whether a claim or defense was frivolous, and thereby sanctions appropriate, will not be reversed on appeal unless clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *In re Attorney Fees & Costs (Septer v Tjarksen)*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

Continental's primary argument was that plaintiff's claim was excessive pursuant to MCL 500.3148(2); MSA 24.13148(2). The basis for Continental's claim was plaintiff's rejection of various

settlement offers. Continental notes an offer of $13,077 that was made before plaintiff's initiation of litigation, and also references an offer of judgment in the amount of $10,000 that was filed on January 16, 1998, before the final evidentiary hearing. Continental asserts that in light of plaintiff's rejection of these offers, the first of which fully covered out-of-pocket costs for the engineering and landscaping bills, his claim for additional damages based on a speculative "loss of use" rationale was excessive. Continental fails, however, to reference the pretrial mediation that occurred December 18, 1997, following which an evaluation awarding plaintiff $36,000 was submitted. Plaintiff filed acceptance of this award and communicated satisfaction with the amount to Continental. Continental, meanwhile, took no action, effectively working a rejection. We agree with the trial court that in view of this mediation award for almost three times Continental's settlement offer, the assertion that plaintiff's claim was excessive must fail. The trial court's finding that plaintiff's claim was not excessive or unreasonable was not clearly erroneous. See *Beach, supra* at 627. We hold that in denying Continental's motion the trial court did not abuse its discretion. *Id.*

Continental also asserted that plaintiff's claim was frivolous under MCL 600.2591; MSA 27A.2591, and that sanctions and costs were appropriate pursuant to MCR 2.114 and MCR 2.625. We agree with the trial court's conclusion that plaintiff's claim was not frivolous. The key test asks whether plaintiff's "legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(iii); MSA 27A.2591(3)(a)(iii). Continental essentially contends that it was inconsistent for the court to adjudge plaintiff's claim unsupported, yet to refuse to award sanctions. This, however, is a blatant oversimplification and misrepresentation of the standards on which fees and costs are mandated. As indicated by the above analyses, there were valid questions concerning the manner in which negotiations toward a possible settlement occurred, not the least of which was Continental's repeated requirement that "clean closure" be secured before it would even discuss plaintiff's claims. Given the confusion regarding the parties' interpretation of when clean closure occurred, there was a reasonable argument that estoppel was applicable. That Continental ultimately prevailed on the issue does not render plaintiff's position without legal merit.

We conclude that the trial court's finding, that plaintiff's claim was not frivolous, was not clearly erroneous. See *Brown, supra* at 436. We hold that there was no abuse of discretion in the denial of Continental's motion for attorney fees and costs.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff

[1] Plaintiff's brief includes argument seeking an award of attorney fees and the imposition of costs on defendant Continental. Because we affirm the trial court's grants of summary disposition, these claims for costs and fees are moot.