## Court of Appeals, State of Michigan

## ORDER

William Cody v Progressive Michigan Insurance Company

Docket No. 309328

LC No. 11-003178-NF

Michael J. Kelly
Presiding Judge

Mark J. Cavanagh

Karen M. Fort Hood
Judges

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The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued July 1, 2014 is hereby VACATED. A new opinion is attached.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 26 2014
Date

Chief Clerk

# STATE OF MICHIGAN

# COURT OF APPEALS

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| WILLIAM CODY,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 1, 2014 |
| v | No. 309328<br>Wayne Circuit Court |
| PROGRESSIVE MICHIGAN INSURANCE COMPANY,<br><br>Defendant-Appellant. | LC No. 11-003178-NF |

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

PER CURIAM.

Defendant appeals by leave granted the trial court order denying defendant's motion for summary disposition. We affirm.

In July and August 2010, plaintiff worked as an independent contractor delivering freight for Ajas Trucking, Inc., which was insured under a commercial automobile insurance policy issued by defendant. Plaintiff alleges that he injured his back on two separate occasions while in the process of attaching his truck to a trailer, once on July 21, 2010, while in Porter County, Indiana, and again on August 3, 2010, while in Cook County, Indiana. Both injuries occurred while plaintiff was cranking the landing gear on the trailer. Plaintiff filed an action alleging that he was entitled to personal protection insurance (PIP) benefits from defendant under its commercial insurance policy with Ajas. Defendant moved for summary disposition, arguing that plaintiff was not entitled to PIP benefits because the incidents did not occur in Michigan, plaintiff was not a named insured or a spouse or relative of a named insured under defendant's policy, and plaintiff was not an occupant of a vehicle involved in the accident. The trial court denied defendant's motion.

Defendant first argues that plaintiff is not entitled to PIP benefits under either the no-fault act, MCL 500.3111, or the commercial insurance policy issued to Ajas Trucking because plaintiff was not an occupant of the insured vehicle. We agree that plaintiff is not entitled to PIP benefits pursuant to MCL 500.3111, but disagree that the trial court erred in denying defendant's motion for summary disposition regarding benefits under the commercial insurance policy.

A trial court's ruling on a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). Initially, the moving party must support its claim for summary disposition by affidavits,

depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id*. "The nonmoving party may not rely on mere allegations or denials in the pleadings." *Id*. The documentation offered in support of and in opposition to the dispositive motion must be substantively admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 372; 547 NW2d 314 (1996).

The purpose of the no-fault act is "to provide accident victims with assured, adequate, and prompt reparations at the lowest cost to both the individuals and the no-fault system." *Williams v AAA Michigan*, 250 Mich App 249, 257; 646 NW2d 476 (2002). "Given the remedial nature of the no-fault act, courts must liberally construe its provisions in favor of the persons who are its intended beneficiaries." *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004) (further citation omitted). Personal protection insurance benefits are also known as "first party" or "PIP" benefits. *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 44 n 1; 586 NW2d 395 (1998).

MCL 500.3111 provides that PIP benefits are available for injuries suffered during an accident outside of the state if, at the time of the accident, the claimant was "an occupant of a vehicle involved in the accident whose owner or registrant was insured under a personal protection insurance policy." MCL 500.3111. Our Supreme Court has held that a person must be "*physically inside*" a vehicle to qualify as an occupant pursuant to MCL 500.3111. *Rednour v Hastings Mut Ins Co*, 468 Mich 241, 249; 661 NW2d 562 (2003)(emphasis in original), citing *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 531-532; 502 NW2d 310 (1993). Plaintiff's deposition testimony established that he was not physically inside the vehicle at the time of either of the alleged injuries. Therefore, plaintiff is not entitled to PIP benefits pursuant to MCL 500.3111.

While plaintiff is not entitled to benefits pursuant to MCL 500.3111, an insurance policy may provide broader coverage than that mandated by the no-fault act. *Rednour*, 468 Mich at 249-250. The *Rednour* Court considered this issue. In *Rednour*, the plaintiff was driving a friend's car in Ohio when the left rear tire of the vehicle became flat. *Id*. at 242. The plaintiff exited the car to change the tire. *Id*. After the plaintiff loosened the lug nuts and walked toward the rear of the car, an oncoming vehicle struck him and threw him against the car. *Id*. The plaintiff admitted that he was not touching the car and was approximately six inches away from the car when he was struck. *Id*. The policy required that to recover PIP benefits for an accident that occurred outside of Michigan, the plaintiff must have been "occupying" the insured vehicle. *Id*. at 244. The policy defined "occupying" as "in, upon, getting in, on, out or off." *Id*. at 245. The *Rednour* Court interpreted "upon" to mean "*on* or *up and on*." *Id*. at 250 (emphasis in original). The Court ultimately denied the plaintiff's claim, and found that the plaintiff was not upon the vehicle at the time of the injury. *Id*. at 251. Further, the Court held that physical contact alone does not establish that a person is upon a vehicle. *Id*. at 249-250.

This Court dealt with identical contract language in *Westfield Ins Co v Ken's Serv*, 295 Mich App 610; 815 NW2d 786 (2012). In *Westfield*, the claimant, a tow truck driver, exited his tow truck and attached tow cables to a police vehicle that was in a ditch. *Id*. at 612. While the

claimant was operating the control levers positioned on the driver's side of the tow truck, another driver collided with the claimant causing serious injuries. *Id*. In *Westfield*, the endorsement defined "occupying" to mean "'in, upon, getting in, on, out or off.'" *Id.* at 612-613. The Court relied on *Rednour's* definition of "upon" to mean "on or up and on," and

> At the time of impact, [the claimant] was not in the vehicle, nor was he getting in, on, out, or off the vehicle. In fact, [the claimant] had been out of the vehicle for several minutes and was operating the towing controls of the truck. Thus, we conclude that the trial court did not err by concluding that [the claimant] was not "occupying" the vehicle when he sustained bodily injury. [*Id*. at 617-618.]

In the current case, the insurance policy provides that for an out of state accident, defendant will pay PIP benefits to a "person who sustains a bodily injury while occupying an insured auto." "Occupying" is defined as "in, on, entering or exiting." We hold that the trial court did not err in denying defendant's motion for summary disposition because, in viewing the record the light most favorable to plaintiff, there is a genuine issue of material fact whether plaintiff was on the trailer at the time of his injuries. Plaintiff testified that he injured his back in July 2010 while cranking the landing gear down, and in August 2010, while raising the landing gear. Plaintiff indicated that during both incidents, his hands were on the hand crank as he was operating the landing gear, and that he also pulled with his legs, back, and arms. Plaintiff stated that he would put his foot on the base of the landing gear as he used the hand crank to stabilize himself and for leverage. While plaintiff did acknowledge that he would move his foot from the base as the landing gear began to rise, he stated that at the time of both injuries, his foot was on the base of the landing gear. Therefore, there is a genuine issue of fact regarding whether plaintiff was on the vehicle at the time of the injury, and thus occupying the vehicle.[1]

The present case is factually distinguishable from *Westfield*. In *Westfield*, the plaintiff was controlling levers in the control panel at the time of the injury and the contact with the vehicle was incidental to the injury. *Id*. at 612. Here, plaintiff was actively interacting and manipulating a part of the vehicle, and relying on the vehicle in his actions. And, ultimately, his deposition testimony revealed that a part of his body was resting *on* the vehicle.

Defendant next argues that trial court erred in denying summary disposition because the trailer that plaintiff was allegedly occupying was not covered under the insurance policy; only the vehicle was covered. We disagree. The insurance policy stated that the insured vehicle includes trailers that are connected to the vehicle. Plaintiff's deposition testimony indicates that the trailer was connected to the vehicle at the time of plaintiff's injury. Moreover, defendant provided no additional evidence or detail, such as deposition testimony or an affidavit, to show that the vehicle alone was covered under the policy. See MCR 2.116(G)(6). Mere conclusory

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[1] Defendant raises several issues regarding the credibility of plaintiff's deposition testimony. However, the court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009). Defendant also contends that the deposition testimony was contradictory and guided by plaintiff's counsel. When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003).

allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto*, 451 Mich at 372. Therefore, defendant was not entitled to summary disposition on that basis.

Defendant next argues that the trial court erred in denying summary disposition because the insurance policy did not provide for PIP benefits. We disagree. Here, defendant relies on the policy endorsement, which states that defendant will only pay PIP benefits if a premium is paid. Defendant asserts that the declarations page proves that no premium was paid, and, thus, PIP benefits were not available under the policy. Defendant presents no additional evidence, such as deposition testimony or an affidavit from the insurance company or from the insured employer, that a premium was not paid for the PIP endorsement or that a premium was required. See MCR 2.116(G)(6). We do not agree that the insurance endorsement and declaration alone are enough to support defendant's assertion. Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto*, 451 Mich at 372. Therefore, defendant was not entitled to summary disposition on that basis.

Plaintiff asserts that defendant was estopped from arguing that the trailer was not covered by the insurance policy or that the policy did not include PIP benefits because a premium was not paid. First, plaintiff states that defendant was required to plead specifically lack of coverage in its answer or affirmative defenses. We disagree. Defendant's arguments regarding lack of coverage relate directly to whether plaintiff can establish a prima facie case against defendant, and defendant does not waive these arguments by failing to plead the issues specifically in its answer or affirmative defenses. See *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 310-320; 503 NW2d 758 (1993). Moreover, defendant denied the allegations in plaintiff's complaint that defendant was obligated to pay benefits under the insurance policy. Plaintiff further asserts that defendant is estopped from making these arguments because it did not include these reasons in its letter to plaintiff denying coverage. We disagree. "As a general rule, once an insurance company has denied coverage to an insured and stated its defenses, the company has waived or is estopped from raising new defenses." *Lee v Evergreen Regency Coop*, 151 Mich App 281, 285; 390 NW2d 183 (1986). However, waiver and estoppel are not generally available where it would result in the broadening of a policy's coverage to cover a loss not included in its terms. *Id.* If defendant's assertions are true, payment of PIP benefits would result in a broadening of the policy to cover a loss not covered by its terms. Therefore, defendant did not waive nor was it estopped from raising these arguments.

Affirmed. Plaintiff, the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood