STATE OF MICHIGAN

COURT OF APPEALS

SAMER KABARA,

Plaintiff-Appellant,

v No. 111539

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

Before: Cynar, P.J., and Brennan and Marilyn Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was involved in an accident while driving a van owned by his brother, Faris Jarjis. The van was a commercial vehicle insured under a policy issued by defendant. Plaintiff himself had insurance through two automobile policies issued by another company.

Plaintiff filed suit against defendant seeking first party no-fault insurance benefits. Defendant moved to dismiss arguing that the other insurance company was in the highest order of priority to pay. Plaintiff responded contending that defendant was in priority, because an employer-employee relationship existed between plaintiff and his brother.

The trial court granted the motion, concluding that the other insurer must pay. Although an employer-employee relationship existed, defendant was not primarily liable, because plaintiff was not acting in the course of his employment at the time of the accident. We affirm the order but find that the court reached the correct result for the wrong reason. Leszcynski v Johnson, 155 Mich App 392, 396; 399 NW2d 70 (1987), lv den 428 Mich 859 (1987).

Generally an injured person who is seeking no-fault benefits must look first to his own no-fault insurance carrier. MCL 500.3114(1); MSA 24.13114(1). An exception to this rule arises where the employee suffers accidental injury while an occupant of a vehicle owned by the employer. In that case the employee is entitled to benefits from the insurer of the employer's vehicle. MCL 500.3114(3); MSA 24.13114(3).

Plaintiff claims the trial court erred in holding that an employee must be acting in the course of his employment in order to receive benefits from the employer's insurer. We agree. An employee may recover benefits from his employer's insurer even though the employee is acting outside the scope of employment. State Farm Mutual Automobile Ins Co v Hawkeye-Security Ins Co, 115 Mich App 675, 681; 321 NW2d 769 (1982).

However, we conclude that summary disposition was proper, because an employer-employee relationship did not exist between plaintiff and his brother. See Parham v Preferred Risk Mutual Ins Co, 124 Mich App 618, 621; 335 NW2d 106 (1983).

Plaintiff admitted in his deposition that he and his brother were equal partners in their restaurant business and that they have a partnership agreement. The only evidence indicating an employer-employee relationship existed is in an affidavit of Jarjis submitted by plaintiff. It contains the conclusory statement that plaintiff was an employee of Jarjis. It does not allege any facts which support the existence of an employer-employee relationship. Therefore, we conclude that the affidavit is insufficient for purposes of MCR 2.116(C)(10). Jubenville v West End Cartage, Inc, 163 Mich App 199, 207; 413 NW2d 705 (1987), lv den 429 Mich 881 (1987).

Since plaintiff and his brother were copartners, not employer and employee, the exception under § 3114(3) does not apply. Defendant is not highest in priority. The claim was properly dismissed.

Affirmed.

/s/ Walter P. Cynar
/s/ Thomas J. Brennan
/s/ Marilyn Kelly