STATE OF MICHIGAN

COURT OF APPEALS

KENNETH JONES,

Plaintiff-Appellant,

v

EMPLOYERS INSURANCE OF WAUSAU,

Defendant-Appellee,

and

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE and MICHIGAN MUTUAL INSURANCE COMPANY,

Defendants.

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Docket No. 87440

BEFORE: D. E. Holbrook, Jr., P.J., and M. H. Wahls and M. E. Dodge*, JJ.

DONALD E. HOLBROOK, JR., P.J.

Plaintiff Kenneth Jones appeals by right the order entered in Muskegon County Circuit Court granting defendant Employers' Insurance of Wausau's (Wausau) motions for reconsideration and for summary judgment. We affirm.

On September 8, 1982, plaintiff was employed by William W. Kimmins & Son to cut metal away from the face of a building which Kimmins had contracted to dismantle. While performing the work plaintiff was enclosed in a cage which had been raised by a fork lift. The cage and fork lift were used in this way as a substitute for scaffolding to reach the metal on the building. Plaintiff sustained severe back injuries when the cage fell off the fork lift and toppled 25 feet to the ground.

Plaintiff brought suit against Detroit Automobile Inter-Insurance Exchange (DAIIE) his no-fault insurer, Michigan Mutual Insurance Company the insurer of the owner of the fork lift, and Wausau the insurer of Kimmins and the lessor of the fork lift. Plaintiff alleged that his injuries arose out of the

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*Circuit Judge sitting by assignment on the Court of Appeals.

ownership, operation, maintenance or use of the fork lift as a motor vehicle. MCL 500.3105(1); MSA 24.13105(1). DAIIE and Michigan Mutual were subsequently dismissed pursuant to their motions for summary judgment. Defendant Wausau filed a motion for summary judgment pursuant to GCR 1963, 117.2(1) and (3) which was initially denied. Subsequently, plaintiff was granted partial summary judgment against Wausau on the basis that the fork lift constituted a motor vehicle within the meaning of MCL 500.3101(2)(c); MSA 24.13101(2)(c). Wausau moved for reconsideration of that order which was granted and summary judgment in Wausau's favor was entered on August 24, 1985.

On appeal, the issue is whether the fork lift was a motor vehicle within the scope of MCL 500.3101(2)(c); MSA 24.13101(2)(c). That statute states in part: "(c) '[m]otor vehicle' means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels."

There is no dispute that the fork lift at issue had four wheels, an engine and was self-propelled. Hence, with respect to those two requirements, the fork lift fell within the classification of "motor vehicle". Cf. Citizens Ins Co v Detloff, 89 Mich App 429; 280 NW2d 555 (1979), lv den 407 Mich 864 (1979). On the other hand, there is no dispute that plaintiff's alleged injuries occurred while the fork lift was being operated in the parking lot of the construction site and not on a public highway. Hence, the dispute at issue is whether the fork lift that was used to raise plaintiff's cage was designed for operation on a public highway. Plaintiff's claim can succeed only if the fork lift is found to have been so designed.

In Ebernickel v State Farm Mut Automobile Ins Co, 141 Mich App 729; 362 NW2d 444 (1985), lv den 422 Mich 969 (1985), the plaintiff was injured by a hi-lo while it was being operated on private property. This Court rejected the plaintiff's claim that because the hi-lo could be operated on a public highway that it was a motor vehicle within meaning of section 3101. Rather,

for highway use and therefore was not within the meaning of "motor vehicle". Ebernickel, supra, 731-732.

Similarly, in Apperson v Citizens Mutual Ins Co, 130 Mich App 799; 344 NW2d 812 (1983), the plaintiff, a spectator at a "street stock" car race, was injured by a wheel which flew off a vehicle in the race. This Court ruled that cars which had been designed or modified for racing on a track were not designed for use upon public highways and were therefore not motor vehicles. Apperson, supra, 802.

We find Ebernickel and Apperson to be dispositive in the instant case. Although the fork lift at issue could be operated on a public highway, it was not at the time of the accident. The ability to use the fork lift on the highway does not indicate that it was "designed" for such use. See McDaniel v Allstate Ins Co, 145 Mich App 603, 608; 378 NW2d 488 (1985). Here, the fork lift was not designed for use upon public highways. It had one seat and no windshield, no windows, no doors, no turn signals, no backup lights, no head lights and no tail lights. There was neither a speedometer nor an odometer. The lift had only two gears - high and low. It reached a maximum speed of only 15 miles per hour in high gear. Consequently, we conclude that the fork lift was not a motor vehicle within MCL 500.3101(2)(c); MSA 24.13101(2)(c) and therefore summary judgment in defendant's favor was appropriate.

We note at this point that defendant's original motion for summary judgment, which was initially denied by the trial court, was brought pursuant to both GCR 1963, 117.2(1) and (3), now MCR 2.116(C)(8) and (10). In later granting defendant's motion for reconsideration and, consequently, defendant's motion for summary judgment the trial court failed to specify upon which ground summary judgment was granted. It appears that summary judgment in defendant's favor was granted on the basis that plaintiff failed to state a claim upon which relief could be granted since the court ruled, as a matter of law, that the fork lift truck was not a motor vehicle within the meaning of the

statute. GCR 1963, 117.2(1). A motion under subrule (1) tests the legal basis of the complaint, not whether it can be factually supported. Martin v Metropolitan Ins Co, 140 Mich App 441, 447; 364 NW2d 348 (1985). The dispute at issue revolves not around the legal basis of plaintiff's complaint (plaintiff has stated a claim under the no-fault act) but, rather, whether there is factual support for plaintiff's claim that the fork lift was designed for operation on a public highway. Here, it is undisputed that the fork lift lacked the necessary accouterments which, if attached to the machine, could have qualified it as a vehicle "designed for use upon a public highway". Consequently, we believe that summary judgment would more properly have been granted on the basis that there was no genuine issue of material fact and that defendant was entitled to judgment as a matter of law. GCR 1963, 117.2(3); Rizzo v Kretschmer, 389 Mich 363, 371-373; 207 NW2d 316 (1973); Linebaugh v Berdish, 144 Mich App 750, 753; 376 NW2d 400 (1985). However, we will not disturb the lower court's order on the basis that it granted summary judgment on the wrong ground where it reached the right result. Warren v Howlett, 148 Mich App 417, 426; 383 NW2d 636 (1986). We believe that neither party was misled. Hankins v Elro Corp, 149 Mich App 22, 26; ____ NW2d ____ (1986). We do, however, urge both the attorneys and the lower court in future matters to be conscious of and specify the court rules upon which motions are based and granted.

Affirmed. Costs to appellee.

/s/ D. E. Holbrook, Jr.
/s/ M. H. Wahls
/s/ M. E. Dodge