STATE OF MICHIGAN

COURT OF APPEALS

HAWKEYE SECURITY INSURANCE COMPANY,
an Iowa corporation,

Plaintiff-Appellee,

v

JOSEPH P. HURLEY,

Defendant-Appellant,

and

VANCO MACHINE COMPANY, THOMAS VAN GIESEN, and MICHAEL RICHARD KESSELHON,

Defendants.

January 24, 1992

No. 141573

ON REMAND

HAWKEYE SECURITY INSURANCE COMPANY,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

No. 141574

ON REMAND

Before: MacKenzie, P.J., and Sullivan and Doctoroff, JJ.

PER CURIAM.

These cases are before us on remand from the Michigan Supreme Court. In our original opinions in both cases, we affirmed the trial court's grant of summary disposition in favor of plaintiff. The Michigan Supreme Court consolidated the cases for appellate purposes and, in lieu of granting leave to appeal, vacated our judgments and remanded the cases to us. 437 Mich 1001 (1991).

The remand order directs this Court to address issues raised by appellant Auto Club Insurance Association (Auto Club). Since Auto Club was not a party to the action now identified by our Docket No. 141573, we are unable to determine the basis for the Supreme Court's remand in that case. Nevertheless, we have reviewed our original decision and adhere to it.

In our original opinion in the action now identified as Docket No. 141574, we addressed one of the three issues raised by Auto Club. In remanding the case, the Michigan Supreme Court ordered this Court to address the issues raised by Auto Club that we did not discuss in our original opinion. The first issue is whether Joseph Hurley was Thomas Van Giesen's employee. The second issue is whether Van Giesen's van was mobile equipment.

In its motion for summary disposition, Auto Club claimed that Hurley was Van Giesen's employee and, because its policy with Van Giesen excluded coverage for employees, it had no duty to defend. Plaintiff did not accept Auto Club's claim, but rather asserted that Hurley was an independent contractor. A person's status as an employee or independent contractor can be decided as a matter of law where the evidentiary facts

are undisputed and capable of only one inference. Nichol v Billot, 406 Mich 284, 301-303; 279 NW2d 761 (1979). Auto Club's motion did not specify the court rule under which summary disposition was sought. Having reviewed the record and pleadings, we conclude that Auto Club's claim that it was entitled to summary disposition because Hurley was Van Giesen's employee was made pursuant to MCR 2.116(C)(10).

A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The ground asserted in the motion must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3).

In the instant case, Auto Club did not present any evidence in the trial court to support its assertion that Hurley was Van Giesen's employee. Auto Club's argument on appeal ignores the general rule that this Court's review is limited to the record presented in the trial court. Amorello v Monsanto Corp, 186 Mich App 324, 330; 463 NW2d 487 (1990), lv den 438 Mich 855 (1991). Having reviewed the record and considering Auto Club's failure to provide evidence to support its claim, we conclude that Auto Club was not entitled to summary disposition on grounds that Hurley was Van Giesen's employee.

The second issue raised by Auto Club that we did not discuss is whether Van Giesen's van was mobile equipment. Auto Club argued that, although plaintiff's policy excluded coverage for injuries arising out of the use of an automobile, the definition of "automobile" in the policy excluded mobile equipment. Auto Club argued that Van Giesen's van was mobile equipment and the injury to Hurley was covered by Hawkeye's policy.

Auto Club first raised this issue in its motion for rehearing. The trial court denied Auto Club's motion, ruling that it was not timely filed in accordance with the requirements of MCR 2.119(F)(1). On appeal, Auto Club does not contest the propriety of the court's denial of its motion, but instead vigorously argues the merits of its claim. Nevertheless, we find that the trial court did not abuse its discretion in denying Auto Club's motion for rehearing. Auto Club's motion rests on a legal theory and facts that could have been argued prior to the trial court's original order. Charbeneau v Wayne Co Hospital, 158 Mich 730, 733; 405 NW2d 151 (1987). The trial court did not address the merits of Auto Club's motion. An issue not addressed by the trial court is not preserved for appellate review. Swickard v Wayne Co Medical Examiner, 438 Mich 536, 562; ___ NW2d ___ (1991); Preston v Dep't of Treasury, 190 Mich App 491, 498; ___ NW2d ___ (1991). Furthermore, we note that the theory that the van was mobile equipment under plaintiff's policy was raised by defendants in the action now identified by Docket No. 141573. In granting summary disposition to plaintiff in that action, the trial court expressly rejected this theory and found that the van was not mobile equipment under plaintiff's policy. In our original opinion in that case, we agreed with the trial court and held that the van was not mobile equipment under plaintiff's policy.

In remanding this case, the Michigan Supreme Court also directed that we "should consider that the potential coverage under the [Auto Club] policy is liability coverage, not no-fault coverage." In our original opinion, we held that defendant had a duty to defend under the parked vehicle exception to the no-fault act, MCL 500.3106; MSA 24.13106, and affirmed the trial court's grant of summary disposition in favor of plaintiff and denial of defendant's motion for summary disposition. However, the Michigan Supreme Court apparently wants this Court to discuss the following provision of Auto Club's policy:

> We will pay damages for which any insured person is legally liable because of bodily injury or property damage arising out of the ownership, maintenance or use including the loading or unloading of an **INSURED CAR.**[1]

The above provision is included in Part I of the policy, which is entitled "Liability Insurance Coverages." The relevant distinction between the above provision and the provision affording coverage under the no-fault act is that the above provision does not require that the bodily injuries or property damage arise out of the use of a motor vehicle as a motor vehicle. See MCL 500.3105(1); MSA 24.13105(1), and MCL 500.3106; MSA 24.13106.

Implicit in the trial court's ruling and in our prior decision was a determination that Hurley's injuries arose out of the use of a motor vehicle as a motor vehicle. Having already determined that the requirements of the no-fault act were met, we conclude that the lesser requirements of the general liability provision of Auto Club's policy have been satisfied. Therefore, coverage is provided under the general liability provision in Auto Club's policy.

Affirmed.

s/Barbara B. MacKenzie
s/Joseph B. Sullivan
s/Martin M. Doctoroff

[1] The policy defines "car" as "a vehicle of the same type as the one described in the Declaration Certificate," which, in this case, is Van Giesen's van.