

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN ROBERTS,

Plaintiff-Appellee,

v

AUTOMOBILE CLUB INSURANCE
ASSOCIATION, a Michigan insurance
company,

Defendant, Cross-Plaintiff,
Appellee,

and

SECURA INSURANCE, a Wisconsin
corporation,

Defendant, Cross-Defendant,
Appellant.

UNPUBLISHED
August 4, 1994

No. 154023
LC No. 91414506 NF

Before: Marilyn Kelly, P.J., and White and D.F. Breck,* JJ.

PER CURIAM.

In this no-fault automobile insurance action, Secura Insurance appeals as of right from a grant of summary disposition in favor of Automobile Club Insurance Association (ACIA) pursuant to MCR 2.116(C)(8), (9) and (10). We affirm the trial court's order granting summary disposition to ACIA on the general question of liability for Roberts' PIP benefits.

I

Kevin Roberts was seriously injured as he checked the oil level in his mother's car when another vehicle struck the rear end of the car, driving it into him. Following the accident, Roberts notified both the insurer of his mother's car, ACIA, and the insurer of the other vehicle, Secura, claiming personal injury protection (PIP) benefits.

ACIA paid Roberts' PIP benefits for approximately one year, believing its policy made it the prime insurer. Thereafter, ACIA decided that it was not liable for Roberts' injuries: Roberts was not a named insured on his mother's vehicle, was not an occupant of it, and it was not involved in an accident according to Michigan case law. ACIA filed suit against Secura, seeking reimbursement for sums previously paid to Roberts.

Secura did not contest its responsibility to pay future sums to Roberts. But in response to ACIA's request for reimbursement of sums already paid to Roberts, it raised the defense of equitable estoppel. Secura claimed that ACIA was estopped from demanding reimbursement. It argued that it had

*Circuit judge, sitting on the Court of Appeals by assignment.

detrimentally relied upon ACIA's initial acceptance of priority and had not investigated various bills and payments as a result of ACIA's actions. ACIA countered that Roberts had notified Secura of a possible priority dispute, but Secura had failed to investigate. Consequently, any detriment was the result of its own inaction, and Secura was not now entitled to claim equitable estoppel.

The judge decided that equitable estoppel did not bar the action and granted ACIA's motion for summary disposition. Although he did not specify the court rule he applied, since equitable estoppel is a defense, we presume that he acted pursuant to MCR 2.116(C)(9).

II

A motion for summary disposition under MCR 2.116(C)(9), failure to state a defense, challenges the legal sufficiency of the pleaded defense. Such a motion is decided using the pleadings alone, accepting all well-pled allegations as true. The test for the motion is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery. Norgan v American Way Ins Co, 188 Mich App 158, 160; 469 NW2d 23 (1991).

Equitable estoppel arises when 1) a party by representations, admissions or silence intentionally or negligently induces a second party to believe facts, 2) the second party justifiably relies and acts on this belief and 3) will be prejudiced if the first party is permitted to deny their existence. Schmude Oil Co v Omar Operating Co, 184 Mich App 574, 581-582; 458 NW2d 659 (1990). The doctrine should be applied only when the facts calling for it are unquestionable and the wrong to be prevented undoubted. Kamalath v Mercy Memorial Hospital Corp, 194 Mich App 543, 552; 487 NW2d 499 (1992).

While Secura may have been misled by ACIA's initial indication that it had first priority, Secura's reliance was not justified. Secura sold auto insurance in the state and is charged with knowledge of the laws governing personal injury benefits.

Furthermore, Secura cannot establish that it was prejudiced by reliance on ACIA's payments to Roberts. The trial court properly concluded that Secura was liable pursuant to MCL 500.3114; MSA 24.13114 and MCL 500.3115; MSA 24.13115. The trial court properly required Secura to pay what it owed from the beginning. See Penny v ABA Pharmaceutical, 203 Mich App 178; 511 NW2d 896 (1993). Secura cannot prevail using the defense of equitable estoppel.

III

ACIA has moved for damages pursuant to MCR 7.216(C), claiming that Secura made false representations to the court and undertook the appeal as a delaying tactic. We deny ACIA's motion. In assessing whether an action is vexatious, we consider whether "an issue is so one-sided that no reasonable lawyer could contest it in good faith." Cardinal Mooney v MHSAA, 437 Mich 75, 79; 467 NW2d 21 (1991). The dispute here is not so one-sided. ACIA notified Secura that it had first priority. It paid Roberts' bills for nearly a year before reassessing its liability and notifying Secura that it had changed its mind. Secura indicates that some of the assessed costs were the result of ACIA's handling of the matter, rather than legitimate PIP costs. Neither party presents case law directly on point which convinces us that no reasonable lawyer could contest the issue in good faith. Finally, in our reading of Secura's claims, we do not find that Secura created the distortions and made the blatant misrepresentations of which ACIA complains.

Affirmed. Deny vexatious damages.

/s/ Marilyn Kelly
/s/ Helene N. White
/s/ David F. Breck