STATE OF MICHIGAN

COURT OF APPEALS

SAMUEL B. ALTIZER and MARILYN ALTIZER,

Plaintiffs-Appellants,

v

JOSEPH WILLIAM CANTY,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Garnishee Defendant-Appellee.

UNPUBLISHED

January 9, 1995

No. 161736
LC No. 87-713220 NI

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff-Appellee,

v

JOSEPH WILLIAM CANTY,

Defendant,

and

SAMUEL B. ALTIZER and MARILYN ALTIZER,

Intervening Defendants-Appellants.

No. 162770
LC No. 89-917676 CK

Before: Weaver, P.J., and Connor and J.F. Kowalski,* JJ.

PER CURIAM.

On May 28, 1987, Marilyn Altizer was injured when she was struck by a vehicle. The vehicle was owned by Danny Shropshire and was being driven by Joseph Canty.

On June 10, 1987, the Altizers brought a negligence action against both Shropshire and Canty. Eventually, a default judgment was entered against both defendants. Subsequently, an affidavit and writ of garnishment was served on State Farm, who insured Canty's mother, for the judgment owed by

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

Canty. State Farm denied liability. In a separate action State Farm filed a declaratory judgment action against Canty seeking a declaration that Canty was not an insured as defined in his mother's insurance policy, and thus was not entitled to coverage or a defense in the Altizers' negligence case. The Altizers intervened as defendants. This declaratory judgment issue was consolidated with the garnishment case. Following a bench trial, the court found that State Farm was completely free from any duty to defend or indemnify Canty.

Canty's mother's policy provided coverage for:

> any relative, but only with respect to a private passenger or trailer, provided his actual or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission. (Emphasis added.)

The sole factual issue at trial was whether Canty had permission, or reasonably believed that he had permission, from Shropshire to drive Shropshire's vehicle.

I

The Altizers first argue the court erred in finding no coverage, contending that Canty had a reasonable belief that he had permission to drive Shropshire's vehicle. We agree with the trial court's finding of fact to the contrary, especially in light of a witness's testimony that at the time Canty began driving the vehicle, Shropshire was sitting on the passenger's side with one or both of his legs on the ground outside the car. We conclude that it would not be not reasonable for any person, no matter how intoxicated, to believe that he had permission to drive in those circumstances. We find no error. MCR 2.613(c).

II

The Altizers argue that collateral estoppel should have barred State Farm's claim of no permissive use and Shropshire's testimony that he had not given Canty permission. Collateral estoppel applies to default judgments, but only as to those matters essential to support the judgment. DAIIE v Higginbotham, 95 Mich App 213; 290 NW2d 414 (1980). Here, the issue of insurance coverage was not a matter essential to support the default judgment against Shropshire.

III

Finally, the Altizers allege that State Farm's defense of Canty bars its denial of coverage. The general rule is that once an insurer denies coverage to an insured and states its defenses, it has waived or is estopped from raising new defenses. Lee v Evergreen Regency Cooperative, 151 Mich App 273; 390 NW2d 180 (1986). Here, however, in its letter reserving its rights, the insurance company did specify as a policy defense that Canty did not have the permission of the owner. We find this sufficient notification.

We affirm.

/s/ Elizabeth A. Weaver
/s/ Michael J. Connor
/s/ John F. Kowalski