STATE OF MICHIGAN

COURT OF APPEALS

ERNEST H. LIEB, and MARLENE LIEB,

Plaintiffs-Appellants,

v

CITIZENS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
January 23, 1995

No. 164079
LC No. 92-028615-NI

Before: Neff, P.J., and Sawyer and J. P. Jourdan,* JJ.

PER CURIAM.

Plaintiffs, who are seeking uninsured motorist benefits, appeal by right the lower court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We reverse.

I

Plaintiffs were injured when they swerved to miss a four- by eight-foot piece of plywood that blew off of an unidentified lumber truck in front of plaintiffs on southbound US-31. Because plaintiffs were required to swerve, their car rolled over, causing plaintiffs' injuries.

The insurance contract between the parties provides that in order for plaintiffs to recover uninsured motorist benefits, plaintiffs' automobile must have come in some physical contact with the plywood.

Both plaintiffs testified in their depositions that they did not come in contact with the plywood. Based on this testimony, defendant moved for summary disposition. In response to defendant's motion, plaintiffs filed the affidavit of Phillip Smith, an autobody repair expert, stating that the damage to the front end of plaintiffs' car was consistent with having been hit by the plywood.

The lower court granted defendant's motion on the basis of plaintiffs' deposition testimony. The court also concluded that Smith's affidavit could not be used to contradict plaintiffs' deposition testimony.

II

We review de novo a lower court's order granting summary disposition pursuant to MCR 2.116(C)(10). Borman v State Farm, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994). Giving the benefit of every reasonable doubt to the nonmovant, this Court must determine whether a record might be developed which will leave open an issue on which reasonable minds could differ. Farm Bureau Ins v Star, 437 Mich 175, 184-185; 468 NW2d 498 (1991). Courts are liberal in finding genuine issues of material fact. Maretta v Peach, 195 Mich App 695, 697; 491 NW2d 278 (1992).

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

Here, although plaintiffs testified that they did not come into contact with the plywood, they also submitted Smith's affidavit, which suggests that plaintiffs did hit the plywood. We disagree with the lower court's refusal to acknowledge this affidavit.

Although it is true that a party may not create a factual issue by contradicting her own previous deposition testimony by her own affidavit, see Peterfish v Frantz, 168 Mich App 43, 54; 424 NW2d 25 (1988), we conclude this rule does not apply with equal force to a situation where, such as here, the parties submit an affidavit of another witness to contradict their own testimony. In Barlow v Crane-Houdaille, Inc, 191 Mich App 244, 250; 477 NW2d 133 (1991), this Court determined that although "clear, intelligent, unequivocal" statements of a party may be binding against them, such was not necessarily the case when there existed an explanation for, or modification to, the statement.

After a review of the record, we conclude that the lower court treated plaintiffs' deposition testimony as an admission, in essence using this testimony to withhold from plaintiffs the opportunity to further factually develop their case.

If a plaintiff were foreclosed from submitting evidence contrary to her own testimony, then any time a defendant elicited damning evidence from the plaintiff, the plaintiff's case would end. Such a rule would not recognize that a plaintiff can be as wrong as any other witness with regard to the facts surrounding their case. We find this logic especially compelling in cases, such as this, where a plaintiff is involved in an accident that requires split-second decision making. In such cases, it is very possible that other more detached witnesses – i.e., those not directly involved in the incident giving rise to the cause of action -- will have a more accurate perception with regard to what transpired.

Here, we agree with plaintiffs that it is possible that they did indeed come in contact with the plywood, even though their deposition testimony suggests otherwise. We reach this conclusion based partly on Smith's affidavit. However, we also rely heavily on the fact that plaintiffs were denied the opportunity to depose other witnesses to this accident because the court issued its order before discovery was complete. Jordan v Jarvis, 200 Mich App 445, 452; 505 NW2d 279 (1993). The record demonstrates that plaintiffs had scheduled the deposition of at least three witnesses, including a police officer who viewed the damaged plywood. Because of the timing of the court's summary disposition ruling, however, the depositions were never taken.

Accordingly, we determine that the lower court improperly granted defendant's motion for summary disposition.

Because we determine a factual issue existed here, we decline to address the other issues raised by plaintiffs in this appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ J. Phillip Jourdan