STATE OF MICHIGAN

COURT OF APPEALS

AUTO OWNERS INSURANCE COMPANY,
subrogee of S.G.S. PAINTING COMPANY, INC.,

Plaintiff-Appellant,

v

A.S.E. AUTO SERVICES, INC.,

Defendant-Appellee.

UNPUBLISHED
June 20, 1995

No. 173734
LC No. 93000347 CZ

Before: Hood, P.J., and Marilyn Kelly and Saad, JJ.

PER CURIAM.

This is an insurance subrogation action. Plaintiff appeals as of right from a grant of summary disposition in favor of defendant under MCR 2.116(C)(8). It claims that the trial court incorrectly applied the holding in Citizens Ins Co v Pezzani & Reid Equip Co, Inc (On Remand), 202 Mich App 278; 507 NW2d 833 (1993). We affirm.

Plaintiff, Auto Owners Insurance Company, was the no-fault insurer of a van owned by S.G.S. Painting Company, Inc. A fire began in the auto repair shop of defendant A.S.E. Auto Services, Inc. as defendant's employees attempted to remove a leaking gas tank from the van for repair. The fire caused property damage in excess of $513,725.81.

Plaintiff paid for the losses of all claimants pursuant to its statutory and contractual obligations. Then, as the subrogee of S.G.S. Painting, it brought this action, asserting negligence on the part of defendant in removing the gas tank. Plaintiff argued that it was entitled to recover from defendant the amount it paid to the various claimants as a result of the fire. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The judge granted the motion, relying primarily on Pezzani, supra.

We review a grant of summary disposition de novo. We review the record to determine whether the successful party was entitled to judgment as a matter of law. Michigan Mutual Ins Co v Dowell, 204 Mich App 81, 86; 514 NW2d 185 (1994). Summary disposition pursuant to MCR 2.116(C)(8) is proper only if the plaintiff has failed to state a claim upon which relief can be granted. Pawlak v Redox Corp, 182 Mich App 758, 763; 453 NW2d 304 (1990). A motion in accordance with this rule tests the legal sufficiency of the claim by the pleadings alone. Id. All factual allegations in support of the claim are accepted as true, as well as all inferences which can be fairly drawn from the facts. The motion should be granted only when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. Id.

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. Radtke v Everett, 442 Mich 368, 374; 501 NW2d 155 (1993). Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. Farm Bureau Ins v Stark, 437 Mich 175, 184-185; 468 NW2d 498 (1991).

At the time the fire occurred, the original version of MCL 500.3121; MSA 24.13121 was in effect. It provided:

> (1) Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 3125 and 3127.

MCL 500.3121; MSA 24.13121 was amended in 1993 to read:

> (1) Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 3125, and 3127. However, accidental damage to tangible property does not include accidental damage to tangible property, other than the insured motor vehicle, that occurs within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles. [Amendment underlined.]

Neither party argues that the amended statute controls the outcome of the case. Therefore, we treat the original statute, which was in effect at the time the fire occurred, as controlling.

The criteria for the reimbursement and indemnification among insurers for personal protection benefits in tort claims are set forth in MCL 500.3116; MSA 24.13116. The criteria of MCL 500.3116; MSA 24.13116 are also explicitly applied to property protection coverage through the language of MCL 500.3127; MSA 24.13127.

According to these statutes, the insurance carrier responsible for no-fault property protection benefits may realize reimbursement from an insured's third-party tort claim only if: 1) the accident occurred out-of-state, 2) the action is against an uninsured owner or operator, or 3) involved an intentional tort. Great Lakes American Life Ins Co v Citizens Ins Co, 191 Mich App 589, 596; 479 NW2d 20 (1991).

Here, there is no dispute that this case does not fall into one of the exceptions to the statutory bar to claims for reimbursement by insurers. MCL 500.3116; MSA 24.13116.

The facts clearly indicate that the damages were caused during attempted maintenance of a vehicle insured by plaintiff. Furthermore, the trial judge's reliance on the language and analysis in Citizens Ins Co v Pezzani & Reid (On Remand), supra, is not misplaced. The fact that Pezzani involved a collision rather than maintenance does not distinguish it from the case here. Both types of accident clearly require an insurer to provide property protection benefits under the No-Fault Act. The statutory bar to reimbursement for insurers applies here. MCL 500.3116; MSA 24.13116, MCL 500.3127; MSA 24.13127. The judge did not err in granting summary disposition to defendant.

Affirmed.

/s/ Harold Hood
/s/ Marilyn Kelly
/s/ Henry William Saad