

STATE OF MICHIGAN
COURT OF APPEALS

LAKE STATES INSURANCE COMPANY,

Plaintiff- Appellee,

v

JADA JACIOLA BLAIR, a Minor, by her Next
Friend, JENNIFER GREGORY, and JENNIFER
GREGORY, individually,

Defendants- Appellants,

and

SPAD'S PIZZA, INC.,

Defendant.

UNPUBLISHED

December 7, 1999

No. 209955

Genesee Circuit Court

LC No. 97-053700 CZ

Before: White, P.J., and Hood and Jansen, JJ.

JANSEN, J. (dissenting).

I respectfully dissent and would reverse the trial court's grant of summary disposition in favor of plaintiff.

This suit arises out of a complaint filed for injuries incurred and damages arising out of those injuries that resulted when Jennifer Gregory, an employee at Spads Pizza, allegedly slipped and fell on water left on the floor by another employee (or other person) on August 23, 1995. Jennifer was pregnant at the time, and, subsequent to the slip and fall, delivered the child, Jada Jaciola Blair, on August 25, 1995, about fifteen weeks prematurely.

Plaintiff relied on the following exclusion in its insurance policy to deny its duty to defend and indemnify Spads Pizza:

B. EXCLUSIONS

1. Applicable to Business Liability Coverage—This insurance does not apply to:

* * *

e. “Bodily injury” to:

(1) Any employee of the insured arising out of and in the course of employment by the insured; or

(2) The spouse, child, parent, brother or sister of that employee as a consequence of (1) above.

There is no issue that Jennifer slipped and fell while in the course of her employment. However, I find that the exclusion does not apply to this case because there is no allegation in the complaint that Jennifer was injured as a result of the fall. The allegation in the complaint is that the minor child suffered injury and damages as a result of her premature birth. The only allegation regarding Jennifer is that she suffered emotional anxiety related to the ongoing impairments of the child and loss of wage earning capacity and loss of wages as a result of having to care for the child. This allegation is purely derivative; it is based on the child’s injury. There is no allegation that Jennifer was injured as a result of the slip and fall.

It should perhaps be emphasized that the trial court granted summary disposition pursuant to MCR 2.116(C)(9). Under such a motion, the court is not permitted to rely on any evidence outside the pleadings. MCR 2.116(G)(5). Thus, relying on the allegations of the parties, there is no dispute that Jennifer was not injured as a result of the slip and fall; there is simply no allegation in the complaint that Jennifer was in any way injured as a result of the slip and fall. Plaintiff has mischaracterized the underlying action by stating in the declaratory action that in the underlying action, defendants¹ have alleged that Jennifer Gregory was injured. There is absolutely no such allegation, however, that Jennifer was injured as a result of the slip and fall in the underlying complaint.

Consequently, the exclusion relied on by plaintiff simply does not apply to this case. The exclusion, by its clear and unambiguous terms, applies only where the employee is injured arising out of and in the course of employment or the child is injured as a consequence of the employee’s injury. Here, there is no allegation that Jennifer was injured during the course of her employment. There being no allegation that Jennifer was injured as a result of the slip and fall at work, the exclusion does not apply.

In an attempt to circumvent the fact that a court may not look beyond the pleadings when deciding a motion under MCR 2.116(C)(9), the lead opinion treats the motion as if decided under MCR 2.116(C)(10). Plaintiff did not bring its motion for summary disposition under this subrule in the lower court. In any event, even if it is appropriate for this Court to consider and analyze the issue in a manner never raised by the parties or addressed by the trial court, I would still find that summary disposition in favor of plaintiff under MCR 2.116(C)(10) would be in error.

Plaintiff's proffered evidence, documents from the worker's compensation proceedings, do not establish that plaintiff is entitled to judgment as a matter of law. First, I note that plaintiff's counsel at oral argument did not dispute that the petition for worker's compensation benefits does not contain any "admission" by Jennifer that she suffered an injury on the job. In fact, the only documents actually submitted are a notice of compensation payments, an order, and a voluntary payment form. Only the notice of compensation payments contains any information concerning injury and it states a bruise to the side of the body and womb area. None of these documents were filled out by Jennifer. In addition, this was a voluntary payment of worker's compensation benefits; there was no finding by a magistrate of any injury to Jennifer.

Moreover, pursuant to the holding of *Paschke v Retool Industries*, 445 Mich 502; 519 NW2d 441 (1994), plaintiff is not judicially estopped from asserting damages for her child even if she collected worker's compensation benefits arising out of the same event. There, the Court held that a representation made before the Michigan Employment Security Commission that one is willing and able to work in order to secure unemployment benefits, may not be used to preclude a subsequent claim that one was totally disabled during that same period in order to collect worker's compensation benefits. *Id.* at 505. The Court also held that, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent and there must be some indication that the court in the earlier proceeding accepted the party's position as true. *Id.* at 510.

In the present case, there was no earlier proceeding because the employer voluntarily paid the benefits; thus, there is no indication that a separate tribunal accepted any position as being true. Moreover, the claims are not wholly inconsistent. In filing suit against her employer in the underlying case, defendants have only alleged that the child was injured as a result of the fall. There is no allegation that Jennifer was also injured. There being no admission in the worker's compensation proceedings that Jennifer was injured, the claims are not wholly inconsistent.

I reiterate that plaintiff has presented no medical evidence that Jennifer was injured as a result of the fall. The allegation in defendants' complaint is that the child suffered the injury as a result of the fall because she was born prematurely. Merely because a woman delivers a child prematurely does not compel the conclusion that the woman was "injured;" rather, it is entirely logical to allege that the injury is to the child only. Because there is no allegation in defendants' complaint that Jennifer suffered an injury, the exclusion in the insurance policy does not apply and the receipt of worker's compensation benefits does not preclude this allegation. See also *Morris v Clawson Tank Co*, 459 Mich 256, 276; 587 NW2d 253 (1998).

I would reverse the trial court's order granting summary disposition in favor of plaintiff. The factual allegations in the complaint make the exclusion relied upon by plaintiff to be inapplicable. Therefore, the trial court erred in ruling that defendants failed to state a valid defense under MCR 2.116(C)(9).

I would reverse and remand for the trial court to enter judgment in favor of defendants in this declaratory judgment action with specific instructions that plaintiff is under a duty to defend and indemnify in the underlying action.

/s/ Kathleen Jansen

¹ In this opinion, “defendants” will refer solely to Jennifer Gregory and Jada Jaciola Blair, the appellants, but not to Spad’s Pizza as it is not a party to this appeal.