STATE OF MICHIGAN

COURT OF APPEALS

OSCAR C. MITCHELL, JR,

Plaintiff-Appellant,

v

JOHN DOE,

Defendant-Appellee.

UNPUBLISHED
May 13, 2004

No. 245560
Kent Circuit Court
LC No. 01-05538-NI

Before: Gage P.J., O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order of dismissal for failure to timely serve defendant. On appeal, plaintiff challenges the trial court's order denying his motion for substituted service of process on Citizens Insurance Company of America (Citizens) with respect to defendant. We affirm.

I. Basic Facts and Proceedings

On October 1, 1999, plaintiff attended a party where he consumed six or seven double shots of Cognac over the course of the evening. Plaintiff left the party alone and drove off in his pickup truck.

Approximately two blocks from the party, plaintiff's truck collided against a tree. There were no witnesses to the accident, but witnesses did see two persons running from the truck after the accident. The police arrived and found plaintiff unconscious in the passenger's seat of the truck. Based on the injuries to plaintiff and the damage to the inside of the truck, the responding officers determined that plaintiff was not driving the vehicle when it collided with the tree. Also, plaintiff stated that he had about $100 in cash when he left the party, but did not have it after the accident. The unusual aspect of this case is that plaintiff has no recollection of events after leaving the party in his truck until the police awakened him after the accident.

Plaintiff could not locate defendant. Relying on two common law evidentiary presumptions,[1] plaintiff filed a third-party negligence complaint against "John Doe." Plaintiff then requested the trial court issue substitute service for defendant on Citizens, the liability insurer of plaintiff's motor vehicle. In support of the motion, plaintiff alleged that Citizens insured defendant as a driver of plaintiff's vehicle against third-party liability under plaintiff's policy. Citizens' attorneys entered a limited appearance to contest plaintiff's motion for substituted service. The trial court denied each of plaintiff's requests for substituted service. The court clerk subsequently dismissed the case for lack of service on defendant. MCR 2.102(E)(2).

II. Standard of Review

MCR 2.105(I) provides trial courts with discretion to issue substituted service. An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). Also, this Court reviews de novo the proper interpretation of the Michigan Court Rules. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002).

III. Analysis

Plaintiff argues the trial court improperly denied his motion for substituted service based on the unlikelihood that "John Doe" would ever be specifically named as a party. MCR 2.105(I)(1) provides for substituted service, and states:

> On a showing that service of process cannot reasonably be made as provided by this rule, the court may by order permit service of process to be made in any other manner reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard.

Plaintiff points to provisions of the Michigan Court Rules that impliedly permit service of process on unknown individuals. Specifically, MCR 2.105(I)(2), provides that, "[i]f the name or present address of the defendant is unknown, the moving party must set forth facts showing diligent inquiry to ascertain it." Also, MCR 2.106(C)(2), regarding service of process by posting or publication, provides that, "[i]f the names of some or all defendants are unknown, the order must describe the relationship of the unknown defendants to the matter to be litigated in the best

[1] Specifically, a person is presumed to have operated a motor vehicle with owner's implied or express permission or consent. See *Caradonna v Arpino*, 177 Mich App 486, 489; 442 NW2d 702 (1989). Also, that a person who flees an accident scene without identifying themselves is presumed at fault. See *Johnson v Secretary of State*, 406 Mich 420, 440-441; 280 NW2d 9 (1979).

way possible, as, for example, unknown claimants, unknown owners, or unknown heirs, devisees, or assignees of a named person."[2]

We conclude the trial court did not abuse its discretion in denying plaintiff's motion for substitutive service. We agree with plaintiff that the court rules contemplate instances of substituted service on defendants whose names are unknown. However, service in all cases must be "reasonably calculated to give the defendant actual notice." MCR 2.105(I)(1).

Plaintiff relies on *Krueger v Williams*, 410 Mich 144; 300 NW2d 310 (1981), in which our Supreme Court agreed that "service of process on a motorist, insured at the time of the accident but missing at the time of the suit, may be made by service on the defendant's liability insurance carrier and notice to the defendant's last known address." *Id*. at 163, citing *Dobkin v Chapman*, 236 NE2d 451 (NY 1968). This instant case does not implicate the basis for *Krueger* service of process. First, there is no evidence of an agency relationship between defendant and Citizens. Citizens does not know defendant's identity, let alone defendant's last known address. Second, it is uncertain whether Citizens is defendant's liability insurance carrier. Only by operation of law does a potential relationship between Citizens and defendant exist. Moreover, this relationship is irrelevant to Citizens' ability to give defendant actual notice. Finally, because it is unknown whether Citizen would actually be required to insure defendant, Citizens' interest in finding defendant is unascertainable.

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[2] The court rules do not expressly provide for the use "John Doe" complaints, nor does case law expressly approve of this practice. Whether MCR 2.105(I)(2) and MCR 2.106(C)(2) permit unknown defendants be named in personal injury cases is questionable. The language employed in MCR 2.106(C)(2), appears to reflect language in MCR 2.206(D), entitled "Unknown Parties; Procedure" which states:

> (1) Persons who are or may be interested in the subject matter of an action, but whose names cannot be ascertained by diligent inquiry, may be made parties by being described as:
>
> (a) unknown claimants;
>
> (b) unknown owners; or
>
> (c) unknown heirs, devisees, or assignees of a deceased person who may have been interested in the subject matter of the action.

The maxim "expressio unius est exclusio alterius," indicates that the expression of these legal designations may operate to exclude the use of general non-legal descriptions, such as "John Doe." Further, the language of MCR 2.105(I)(2) and MCR 2.106(C)(2) is not inconsistent with this interpretation because, as plaintiff notes, they indicate that the court rules contemplate merely unknown defendants.

Here, there is no basis to conclude that substituted service to Citizens is "reasonably calculated to give the defendant actual notice." To the extent that the trial court indicated that MCR 2.113 requires that defendant be named as a party, the trial court merely expressed the reality that, ". . . for all practical purposes all defendants specifically unnamed are not yet parties to a suit." *Thomas v Process Equipment Corp*, 154 Mich App 78, 84 l 3798 NW2d 224 (1986), citing *Meda v City of Howell*, 110 Mich App 179, 185-186; 312 NW2d 202 (1981); *Fazzalare v Desa Industries, Inc*, 135 Mich App 1, 6, 351 NW2d 886 (1984). Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for substituted service on Citizens with respect to defendant.

Affirmed.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra