

STATE OF MICHIGAN
COURT OF APPEALS

JAWDAT SALAMEN, f/k/a JAWDAT
MOHAMED,

Plaintiff-Appellant,

v

FREDERICK HARVARD,

Defendant,

and

CITIZENS INSURANCE COMPANY OF
AMERICA,

Defendant-Appellee.

UNPUBLISHED
November 22, 2005

No. 262887
Wayne Circuit Court
LC No. 04-423924-NO

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant Citizens Insurance Company of America. We affirm.

Plaintiff was involved in a motor vehicle accident on November 26, 2000 when a piece of wood dislodged from an automobile that was driven by Mr. Harvard in front of plaintiff. The piece of wood went through the windshield of plaintiff's motor vehicle and came to rest in plaintiff's car after also hitting the back window. Plaintiff did not crash his car into anything else, but he was injured due to being hit by the debris and broken glass.

Plaintiff was insured by defendant at the time of the incident.¹ Plaintiff filed suit against Mr. Harvard, the driver of the other vehicle, in March 2003. That lawsuit was ultimately dismissed without prejudice. In December 2003, while that lawsuit was still pending, plaintiff began corresponding with defendant concerning his intent to file a claim for uninsured motorist

¹ Mr. Harvard is not a party to this appeal. The term defendant therefore refers only to Citizens Insurance Company of America.

benefits due to Mr. Harvard's lack of insurance. Defendant denied plaintiff's claim for uninsured motorist benefits.

On August 3, 2004, plaintiff filed the instant case against both Mr. Harvard and defendant. Defendant filed a motion for summary disposition stating that a three-year statute of limitations applied pursuant to MCL 600.5805(10). Based on that limitations period, a claim should have been filed no later than November 25, 2003. Plaintiff agreed that the three-year statute of limitations was applicable, but argued that the limitations period was tolled by the filing of the prior lawsuit against Mr. Harvard. The trial court agreed with defendant that tolling did not apply where defendant was not a party to the prior lawsuit. Accordingly, the trial court granted summary disposition to defendant.

On appeal plaintiff asserts that a six-year statute of limitations applies as opposed to a three-year statute of limitation. The issue concerning a six-year statute of limitations was not preserved for appeal. "[A] party may not seek redress on appeal on the basis of a position contrary to that it took in the proceedings under review." *Flint City Council v State of Michigan*, 253 Mich App 378, 395; 655 NW2d 604 (2002). Plaintiff stated that three years was the applicable statute of limitations both in his written response to defendant's motion for summary disposition and in his oral argument before the trial court. Therefore, plaintiff cannot argue to the contrary on appeal and seek redress based on a statute of limitations different from the one he agreed to at the trial court.

The trial court heard the issue concerning tolling the statute of limitations and decided in defendant's favor. Therefore, that issue was preserved for appeal pursuant to MCR 2.517(A)(7) that states no exception need be taken to a finding or decision.

A trial court's decision to grant summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Terrace Land Development Corp v Seeligson & Jordan*, 250 Mich App 452, 454-455; 647 NW2d 524 (2002). To determine whether a party is entitled to summary disposition pursuant to MCR 2.116(C)(7), "a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Id.* at 455.

MCL 600.5856(a) provides that the statute of limitations is tolled "[a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." That statute also allows for tolling of the statute of limitations when "jurisdiction over the defendant is otherwise acquired." MCL 600.5856(b).

MCL 600.5856 comes into play when a party files suit after the limitations period has run and then seeks to toll the time that elapsed during a prior lawsuit against the same defendant from the date the complaint was filed or acquisition of jurisdiction until there was a dismissal that was not based on the merits of the case. See *Terrace, supra* at 250 Mich App 459. The same defendant is required for MCL 600.5856 to apply to the subsequent case.

In this case plaintiff seeks to toll the statute of limitations in a third party no-fault claim against defendant insurer, based on a previous claim brought solely against the uninsured motorist. While the current case was filed against both the uninsured motorist and the defendant

insurer, the prior case was not filed against the insurer. Accordingly, MCL 600.5856 is not applicable and does not toll the limitations period where the prior lawsuit was not filed against the defendant in question.

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette

/s/ Stephen L. Borrello