STATE OF MICHIGAN

COURT OF APPEALS

DONNA ROBERTS,

Plaintiff-Appellant,

v

AUTOALLIANCE INTERNATIONAL, INC., f/k/a MAZDA,

Defendant-Appellee.

UNPUBLISHED
July 9, 1996

No. 175820
LC No. 90-26380

Before: O'Connell, P.J., and Reilly and D.E. Shelton,* JJ.

O'CONNELL, P.J. (concurring).

In a worker's compensation action,[1] plaintiff asserted that she was totally and permanently disabled. A worker's compensation magistrate found she was only disabled from June 7, 1988 to February 13, 1989.

In contradiction of her prior testimony, plaintiff now asserts she was able to return to work in February, 1989. Defendant vehemently argues the plaintiff is judicially estopped from her second argument. I disagree. Although the plaintiff has numerous hurdles to overcome, the doctrine of judicial estoppel only applies if a party successfully argues a position in a prior proceeding. A person who loses or partially loses in one action, is free to argue the opposite position in another action. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994); *Lichon v American Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990).

This "prior success," *Paschke, supra,* at 509, model of judicial estoppel applies equally to both plaintiffs and defendants. See, *Cavalier Mfg Co v Employers Ins of Wausau*, 211 Mich App 330; 535 NW2d 583 (1995).[2]

/s/ Judge Peter D. O'Connell

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

[1] In the worker's compensation case, plaintiff asserted: (1) that she was permanently disabled, (2) that she is constantly in pain, (3) that she had to be driven to the disposition, (4) that she spent most of her time sitting around the house, and (5) that she was unaware of any jobs she could perform at Mazda. Plaintiff also indicated she could not write her own name without pain.

[2] In order to avoid liability in the underlying action, Wausau Insurance Company argued that the injury sustained by plaintiff was not an intentional tort. The insurance company lost this argument. In a subsequent declaratory action, defendant insurance company in order to avoid insurance coverage, argued the injury was an intentional tort. The doctrine of "prior success" permits contrary arguments. *Paschke, supra,* at 509.