STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY O'ROURKE,

Plaintiff-Appellant,

v

LARRY B HIGGINS, JOEL NOESKI, LARRY B. HIGGINS as the Trustee of the Clifford H. Higgins, Jr. Trust, and FRIEDA O. HIGGINS, as Trustee of the Frieda O. Higgins Trust,

Defendants-Appellees.

UNPUBLISHED
November 22, 1996

No. 179342
LC No. 93-5484-NI

Before: Gribbs, P.J., and Markey and T. G. Kavanagh,* JJ.

PER CURIAM.

Plaintiff appeals the circuit court order of summary disposition in this negligence action. MCR 2.116(C)(10). We affirm.

The trial court did not err in deciding as a matter of law that plaintiff was not an agricultural employee. Although plaintiff alleged facts that, if proven, would place defendant Larry B. Higgins (defendant) within the definition of an agricultural employer, MCL 418.155; MSA 17.237(155), plaintiff did not support those allegations with admissible evidence in response to defendant's motion. The adverse party in a motion pursuant to MCR 2.116(C)(10), "may not rest upon the mere allegations or denials of his…pleading, but must by affidavits…set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). Here, defendant presented evidence that the property on which plaintiff was injured has changed since plaintiff's injury, and that, while it is now used for agricultural purposes (raising deer commercially), it was not so used at the time of plaintiff's injury. Defendant presented evidence that the fence plaintiff was working on was not high enough to keep deer enclosed on defendant's property, and that it was intended simply to keep elk out of the property. Defendant later added two feet to the fence in preparation for raising deer commercially. Although plaintiff submitted evidence of an application by defendant for a permit to raise deer, the address on the permit

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

is for a different piece of property owned by defendant than the property on which plaintiff was injured. There appears to be no evidence that defendant was raising deer on the subject property, or preparing the property for agricultural use, at the time of plaintiff's injury. The trial court did not err in concluding that no record could be developed upon which reasonable minds could differ as to whether defendant was an agricultural employer at the time of the injury. Summary disposition was properly granted.

Plaintiff also contends that public policy dictates that defendant should not be allowed to assert the exclusion remedy provision of the Workers' Disability Compensation Act because he failed to list plaintiff as an employee on his policy. There is no merit to this issue. An expert witness testified that the list of employees on the endorsement to the policy was relevant only to the premiums charged, and that all employees and worksites of the insured employer are covered as a matter of law. Regardless of defendant's intent, plaintiff was, in fact, covered by defendant's policy. There are already penalties available for employers who attempt to defraud the insurance company, and we decline to extend public policy in this regard. The trial court did not err in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Roman S. Gribbs
/s/ Jane E. Markey
/s/ Thomas Giles Kavanagh