

STATE OF MICHIGAN
IN THE SUPREME COURT

LEJUAN RAMBIN,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant/Cross-Defendant/
Third-Party Plaintiff/Appellant,

and

TITAN INSURANCE COMPANY,

Defendant/Cross-Plaintiff/Appellee,

and

AAA OF MICHIGAN,

Third-Party Defendant.

Supreme Court No. _____

*Publ open 8-30-12
Rec 12-19-12*

Court of Appeals No. 305422

Wayne County Circuit Court
No. 10-009091-NF

S. Borman

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NOTICE OF HEARING

**APPLICATION FOR LEAVE TO APPEAL
ON BEHALF OF DEFENDANT-APPELLANT,
ALLSTATE INSURANCE COMPANY**

PROOF OF SERVICE

APR 25 2012

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Where Plaintiff Rambin indisputably took and drove away a motorcycle without the authority of its actual owner, and circumstantial evidence casts doubt on Rambin's uncorroborated assertion that he believed, albeit mistakenly, that he was given the motorcycle by its owner, did the Court of Appeals err in concluding as a matter of law that Rambin did *not* unlawfully take the motorcycle for purposes of the No-Fault Act's §3113(a) exclusion, and should this Court, therefore, modify the scope of the remand to the trial court to include proceedings on this issue as a question of fact?

Defendant-Appellant, ALLSTATE INSURANCE COMPANY, answers, "Yes."

Plaintiff-Appellee, LEJUAN RAMBIN, would answer, "No."

**JUDGMENT BEING APPEALED, ALLEGATIONS OF ERROR,
AND RELIEF SOUGHT**

The issue raised in this appeal concerns application of the No-Fault Act's unlawful taking exclusion, MCL 500.3113(a), and of this Court's recent clarification thereof in *Spectrum Health Hospitals v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012). In lieu of an order granting leave to appeal, Defendant seeks peremptory relief in the form of an order modifying the Court of Appeals' directions regarding the scope of proceedings on remand to the trial court. Alternatively, Defendant would request that the Court grant leave to appeal to address the issues raised herein.

In the early morning hours of August 23, 2009, Plaintiff Rambin sustained injuries while possessing and operating a 2000 Honda motorcycle that, just 19 days earlier, had been stolen from its owner. Rambin's possession and use of the motorcycle was unauthorized by the vehicle's owner; this fact is undisputed. Based on this fact, and on the additional fact that Rambin could not have reasonably believed he was entitled to use the motorcycle given that his operator's license was suspended, Defendant moved for summary disposition under §3113(a) of the No-Fault Act, which the trial court granted (**Exhibit C** -- Order Granting Summary Disposition, 7/15/11). Although it concluded that "there's an issue of fact as to the unlawful taking," the trial court held that Plaintiff was independently barred from recovery by his unlawful *use* of the stolen motorcycle given his lack of a valid operator's license (**Exhibit D** -- transcript of hearing, July 15, 2012, pp. 5-6).

In a published opinion issued August 30, 2012, the Court of Appeals reversed the grant of summary disposition (**Exhibit A**), and denied a timely filed motion for reconsideration

(Exhibit B -- Order of October 19, 2012). The court's reversal was based on evidence (Rambin's own uncorroborated testimony) that the "taking" of the motorcycle by Rambin was "authorized" (and therefore not "unlawful") by a person whom Rambin purportedly believed was the vehicle's owner. The court, however, went beyond merely vacating the grant of summary disposition in favor of Defendant; it held conclusively that Rambin's taking was *not* unlawful. This point, Defendant submits, should have been left as a question of fact for jury resolution. The proceedings on remand should not be limited to determining the amount of Plaintiff's recovery, but should include the still unresolved issue of whether Rambin, as a matter of fact, is precluded from receiving benefits on the basis of an unlawful taking.

In *Spectrum Health Hospitals v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012), this Court clarified that, for a taking to be "unlawful" for purposes of §3113(a), the taking itself must violate Michigan law. *Id.*, 492 Mich at 517; *accord, id.*, at 509 ("[w]e hold that any person who takes a vehicle contrary to a provision of the Michigan penal code -- including MCL 750.413 and MCL 750.414, informally known as the "joyriding" statutes -- has taken the vehicle unlawfully for purposes of [§3113(a)]") (footnotes omitted). Further, Allstate accepts that, as the Court of Appeals noted, "some element of 'intent' on the part of the actor' is necessary for the unauthorized taking to be "unlawful." (See, **Exhibit A**, slip op, at 13).

Yet, while Rambin's assertion that he thought he was given the motorcycle by its rightful owner (one "Andre Smith"), *if believed*, would counter a charge of joyriding and thus defeat the "unlawful taking" exclusion, the facts and circumstantial evidence of this case cast doubt on Rambin's story, rendering summary disposition for Plaintiff Rambin inappropriate. The Court of Appeals thus erred by resolving this disputed fact in favor of Plaintiff.

STATEMENT OF FACTS

In August of 2009, Scott Herzog was the owner of a motor vehicle insured under a policy of no-fault automobile insurance issued by Defendant-Appellant, Allstate Insurance Company (**Exhibit E** - Stipulated Order). Herzog also was the owner of a 2000 Honda CVR 1100XX motorcycle until August 4, 2009, when it was stolen (*id.*; **Exhibit F** -- Incident Report). Plaintiff-Appellee, Lejuan Ramin, was in possession of Herzog's motorcycle on August 22, 2009, and was riding it that night when he sustained the injuries that led to this lawsuit.

Several weeks earlier, Ramin had joined the "Phantom Motorcycle Club" of Detroit, despite not having a motorcycle of his own at the time (**Exhibit I** -- deposition of L. Ramin, 3/4/11, pp. 16-17). On the evening of August 22, 2009, Ramin rode the Herzog motorcycle to a gathering at the "clubhouse" of another motorcycle club, also located in Detroit (**Exhibit I**, pp. 21-23). Late that night, at 1:20 a.m., he was in an accident purportedly while in the course of returning the motorcycle he had borrowed (**Exhibit G** -- accident report; **Exhibit I**, p. 25). Ramin was traveling westbound on the Davison Freeway at a speed of 85 m.p.h., when an automobile entered the freeway and crossed several lanes directly in front of him causing him to lay the motorcycle down and collide with the car (**Exhibit H**; **Exhibit I**, pp. 25-27).

Although Ramin obviously was seriously injured, he did not call EMS or the police, nor did the other motorcycle club member who was following in an automobile and had stopped to help. Instead, the two left the motorcycle on the side of the freeway and drove in the friend's car to Providence Hospital (**Exhibit H**; **Exhibit I**, pp. 30-31), where police

nevertheless soon found Rambin and interrogated him. Rambin admits to having initially lied to the officers when confronted about the accident. Attempting to deny any connection between himself and the motorcycle found at the scene, he told the police that he was walking across the freeway on his way home from a bar when, as a pedestrian, he was struck and dragged by a car. The officers finally convinced him to admit that the accident occurred while he was riding the motorcycle found at the scene; and when they asked why he was lying to them, Rambin claimed he was only trying to avoid getting a ticket (**Exhibit I**, pp. 35-37).

In fact, Rambin was cited for reckless driving, failure to report an injury-accident, and operating a vehicle with a suspended license (**Exhibit G**).¹ The damaged motorcycle, found on West Davison near Woodward Avenue, was declared to be a total loss (**Exhibit F** -- Stolen Vehicle Recovery Form, 8/23/09). Rambin maintained that he had borrowed the motorcycle from a friend named Andre Smith "who lived on Kentfield, however he did not know which house and did not know how to reach Andre." (**Exhibit H** -- Police Incident Report, 8/23/09).

* * *

Plaintiff claimed entitlement to no-fault insurance benefits due to his injuries having arisen out of an accident involving a motor vehicle. MCL 500.3105(1); MCL 500.3114(5). Under MCL 500.3114(5)(a) and (b), the insurer first in priority for payment of Rambin's benefits would be the insurer of the owner or operator of the automobile involved in the accident. As there was no such insurer, however, the next insurer in priority would be the no-

¹ Rambin had neither a motorcycle license nor a valid operator's license. His Tennessee driver's license was suspended (**Exhibit I**, p. 20).

fault insurer of the motorcycle operator himself, MCL 500.3114(5)(c), but Ramin likewise was uninsured.

Accordingly, on August 8, 2010, Ramin filed suit against Defendant Allstate, as the automobile insurer of the *owner* of the motorcycle, Scott Herzog, MCL 500.3114(5)(d), and against Defendant Titan, the insurer of last resort that had been assigned Plaintiff's claim for benefits by the Assigned Claims Facility pursuant to MCL 500.3172.²

Allstate moved for summary disposition by motion filed June 21, 2011. Relying on MCL 500.3113(a) and *Amerisure Ins Co v Plumb*, 282 Mich App 417; 766 NW2d 878 (2009), Allstate contended that Ramin was excluded from entitlement to no-fault benefit by virtue of his unlawful taking of the subject motorcycle and the absence of a reasonable belief that he was entitled to take and use the motorcycle (Defendant Allstate's Motion for Summary Disposition, 6/21/11).³ Ramin opposed Allstate's motion and filed his own motion for summary disposition on the unlawful taking issue (Plaintiff's Response to Allstate's Motion for Summary Disposition, 6/24/11, and Plaintiff's Motion for Summary Disposition, 6/24/11), which Allstate likewise opposed (Defendant Allstate's Answer to Plaintiff's Motion for Summary Disposition, 7/12/11).

² Based on early evidence that Ramin was residing with a relative who owned a motor vehicle insured by AAA of Michigan, Allstate added AAA of Michigan to the case as a Third-Party Defendant. When it became clear that AAA's policy did not provide personal protection insurance coverage, however, the parties stipulated to dismiss AAA from the case. (Partial Order of Dismissal as to Defendant, AAA Michigan Only, 6/23/11).

³ Defendant Titan also moved for summary disposition, concurring that if §3113(a) applies to disqualify Plaintiff from recovering benefits, then Titan also is entitled to summary disposition, but also contending that it would in no event be liable for payment of benefits in this instance. No party has challenged the grant of summary disposition in favor of Titan.

By order of July 15, 2011, the Wayne County Circuit Court granted summary disposition in favor of Defendants (**Exhibit C** -- Order). Seeking to apply §3113(a) to the unusual circumstances of the case, the court concluded that there was a question of fact as to whether Rambin's taking possession of the motorcycle was itself unlawful, but held that the absence of any reasonable belief on the part of Rambin that he was entitled to use the motorcycle controlled:

THE COURT: Your guy had a suspended license. He comes under that second part. I agree, there's an issue of fact as to the unlawful taking. But as to the fact that he had a suspected [sic -- suspended] licence and he knew he couldn't drive. The motion needs to be granted.

(**Exhibit D** -- transcript of hearing, p. 6).

On Plaintiff's appeal of right, the Court of Appeals issued a published opinion reversing the trial court's ruling (**Exhibit A**). This application does not challenge the appellate court's decision to vacate the grant of summary disposition in favor of Defendants. This application submits, however, that the Court of Appeals erred in proceeding to hold as a matter of law that Plaintiff Rambin's taking of the motorcycle was *not* unlawful, thus granting partial summary disposition in favor of Plaintiff. The decision is based on the false premise that "[t]he material facts are undisputed," (**Exhibit A** -- slip op, at 1), and on the majority's finding of fact on the ultimate issue (*id.*, slip op, at 2 -- "we find that, under the circumstances presented, plaintiff did not 'take [the motorcycle] unlawfully' within the meaning of MCL 500.3113(a)").

Defendant timely filed a motion for reconsideration seeking the relief sought in this application. By order of October 19, 2012, the motion was denied (**Exhibit B**).

STANDARD OF REVIEW

The issue presented for review in the Court of Appeals, and now on application to the Supreme Court, was decided in the trial court on cross-motions for summary disposition under MCL 2.116(C)(10). While both Plaintiff and Defendant contended that each was entitled to a ruling in its favor on grounds that no genuine issues of material fact existed, review of each cross-motion required that the evidence presented be considered in the light most favorable to the party opposing the other's motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); Longhofer, 1 *Mich Ct Rules Prac*, 5th Ed, Text § 2116.12, at n 17.⁴

The standard of review on appeal is *de novo*. *Maiden*, 461 Mich at 118 (“In making this determination [of whether judgment is appropriate as a matter of law], the Court reviews the entire record to determine whether [the moving party] was entitled to summary disposition”).

⁴ “While it has been suggested in dictum that a party who seeks summary disposition under (C)(10), claiming no genuine issue of material fact, cannot very well oppose a cross-motion for summary disposition by claiming that material issues of fact exist, this analysis is flawed. A party may assert that the facts are so clearly in his or her favor that there is no genuine issue for trial, and quite consistently argue at the same time that, at a minimum, there is a genuine issue as to such facts precluding summary disposition for the opposition.”

ARGUMENT

Where Plaintiff Ramin indisputably took and drove away a motorcycle without the authority of its actual owner, and circumstantial evidence casts doubt on Ramin's uncorroborated assertion that he believed, albeit mistakenly, that he was given the motorcycle by its owner, the Court of Appeals erred in concluding as a matter of law that Ramin did *not* unlawfully take the motorcycle for purposes of the No-Fault Act's §3113(a) exclusion, and this Court, therefore, should modify the scope of the remand to the trial court to include proceedings on this issue as a question of fact.

This application challenges the Court of Appeals' rendering of an ultimate factual conclusion in this case against Defendant Allstate: "Rather, *we find that*, under the circumstances presented, plaintiff did not 'take [the motorcycle] unlawfully..." (Exhibit A -- slip op, at 2) (emphasis added); "we conclude that plaintiff did not 'take [the motorcycle] unlawfully" (*id.*, slip op, at 5); "In this case, *there is no dispute* that plaintiff did not take the vehicle in violation of the Michigan Penal Code, and that, viewed from plaintiff's [the driver's] perspective, there was no 'unlawful taking.'" (*Id.*, slip op, at 13-14) (emphasis added). The Court of Appeals based its finding on the proposition that "the record evidence indicates that *plaintiff had every reason to believe* that he had obtained the motorcycle from its rightful owner[.]" (*Id.*, slip op, at 12). This proposition, however, is true *only* if one believes Ramin's wholly uncorroborated testimony, which, in fact, could easily be rejected by a jury based on the circumstances of the case.

At issue is application of §3113(a) of the No-Fault Act, which excludes certain people from entitlement to PIP benefits. It states as follows:

A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

- (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

MCL 500.3113(a).

Although the Court of Appeals' opinion examines at length the case law that developed over the years under this "unlawful taking" provision of the No-Fault Act, the issue was clarified by this Court's recent opinion in *Spectrum Health Hospitals, supra*. If the "taking" of a vehicle violates a provision of the Michigan Penal Code, it is, by definition, an "unlawful taking." *Spectrum Health Hospitals*, 492 Mich at 517-518. In particular, the Court quoted both the felony joyriding statute, MCL 750.413 (applicable to persons who "wilfully and without authority" take possession of and drive away a motor vehicle belonging to another) and the similar misdemeanor joyriding statute, MCL 750.414, which omits any reference to "wilfully."⁵

Thus, under this Court's holding in *Spectrum Health Hospitals*, "both joyriding statutes make it unlawful to take any motor vehicle without authority, effectively defining an unlawful taking of a vehicle as that which is unauthorized." *Id.*, 492 Mich at 517-518 (emphasis added). By footnote, the Court proceeded immediately to clarify that the "authority" in question necessarily must be that of the vehicle's *owner*. Therefore, "for purposes of MCL 500.3113(a),

⁵ "Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who is party to such unauthorized taking or using, is guilty of a misdemeanor"

MCL 750.414; *see, Spectrum Health Hospitals*, at 517.

a vehicle is ‘unlawfully taken’ if it is taken without the authority of its owner.” *Spectrum Health Hospitals*, 492 Mich at 518, n. 25 (emphasis added).

In the case at bar, it is beyond dispute that Plaintiff Rambin did, in fact, take possession of the motorcycle in question *without* the authority of its actual owner. The motorcycle had been stolen from its owner two weeks previous, and Rambin was in possession of it on the night in question.

Rambin, of course, asserts that he had borrowed the motorcycle from a person purporting to be the motorcycle’s owner, and thus did not know that he lacked the true owner’s consent. Allstate acknowledges that, under the explicit text of §3113(a), this assertion, if proved, would avoid application of the “unlawful taking” exclusion. The claimant’s knowledge is material since, even though the misdemeanor joyriding statute is only a “general intent” crime, knowledge of the lack of authority is necessary for a violation to occur. *People v Laur*, 128 Mich App 453, 455-456; 340 NW2d 655 (1983). Yet Rambin’s unsupported assertion may well be false.

Importantly, the requisite “knowledge” can be inferred from the facts, as is the case in the analogous penal code statute that prohibits receiving or possessing stolen property. MCL 750.535(1), (7);⁶ *People v Laslo*, 78 Mich App 257; 259 NW2d 448 (1977) (in prosecution for receiving stolen property, guilty knowledge may be inferred from all facts and circumstances brought out at trial). Thus in a prosecution for possessing or concealing a stolen

⁶ “A person shall not ... receive, possess [or] conceal ... stolen ... goods or property knowing or having reason to know or reason to believe, that the ... goods, or property is stolen ...”

MCL 750.535(1). Sub-section (7) specifically applies this prohibition to stolen motor vehicles.

automobile, the defendant's action in attempting to flee when police approached the garage in which the vehicle was kept was competent evidence of the "knowledge" element. *People v Brewer*, 60 Mich App 517, 521; 231 NW2d 375 (1974). Being in possession of, and using, the stolen property near in time to its theft also qualifies as circumstantial evidence supportive of a jury question on the "knowledge" element, as does evidence that the defendant lied to police officers concerning the stolen property. *People v McLott*, 55 Mich App 198, 203; 222 NW2d 178 (1974); *accord*, *People v Hutton*, 50 Mich App 351, 359; 213 NW2d 320 (1973) (defendant's fabricated story first given to officers regarding the stolen property, inconsistent with his eventual claim that he acquired possession of the property rightfully and without knowledge that it was stolen, qualified as circumstantial evidence supportive of an issue for the jury).

The evidence in the case at bar, Defendant submits, precluded a dispositive ruling in favor of Plaintiff Ramin. It is undisputed that the motorcycle was in fact stolen from its rightful owner, and that Ramin, only 18 days thereafter, was in possession of the motorcycle and was using it as his own. It was further established as fact that, while still at the scene of the injury-accident, Ramin and his friend chose not to call EMS or the police, since Ramin was afraid of being arrested (though he claimed this was only because he had a suspended operator's license) (**Exhibit I**, p. 31). Moreover, Ramin then lied to police officers at the hospital when confronted about the accident, attempting to disavow any connection to the stolen motorcycle. Ramin fabricated a story that he was walking home from a bar and, as a pedestrian crossing the freeway, was struck by an automobile. (**Exhibit I**, pp. 35-36). When

he was forced to admit he was using the motorcycle found by police at the scene, he claimed to have lied to the police only to avoid getting a ticket (*id.*, pp. 36-37).

The credibility of Rambin's story is further challenged by the fact that, having wrecked the motorcycle purportedly loaned to him by an acquaintance named "Andre," Rambin showed no concern for the fate of the bike and never even spoke to "Andre" again (**Exhibit I**, p. 40). Indeed, Rambin was never able to provide an address for Andre⁷ or state with certainty either *his* last name ("What's Andre's last name?" A: "Smith, I presume.") (**Exhibit I**, p. 18) or the name of the person who purportedly referred him to Andre (providing only this person's nickname of "Menace") (*id.*).

In short, Rambin's assertions left no means for confirming or rebutting the veracity of his story. The Court of Appeals erred in reversing the trial court's judgment *and rendering summary disposition against Defendant*, Allstate submits, since the facts crucial to the outcome ultimately are within the exclusive knowledge of Rambin and, under the facts and circumstantial evidence presented, a jury legitimately could choose to reject his testimony. Summary disposition is not appropriate where the determination of the pivotal fact in question hinges on the credibility of a party's testimony. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994); *Brown v Pointer*, 41 Mich App 539, 545-546; 200 NW2d 756 (1972), *aff'd in pertinent part*, 390 Mich 546 (1973); *Durant v Stahlin*, 375 Mich 628, 647-653; 135 NW2d 392 (1965) (plurality opinion).

⁷ "Rambin stated that he borrowed the motorcycle from a friend named Andre Smith who lived on Kentfield, however he did not know which house and did not know how to reach Andre." (**Exhibit H** -- Police incident report).

Plaintiff Rabin sustained the injuries underlying his no-fault insurance claim while operating a motorcycle which he had taken without the owner's authority. This fundamental fact is undisputed. Whether he knew he lacked the true owner's authority, or whether his story as to how he innocently came into possession of the motorcycle is true, particularly in light of his lying to police officers when confronted about his connection with the motorcycle, are questions of fact that the Court of Appeals should not have resolved on appeal.

RELIEF REQUESTED

For all the foregoing reasons, Defendant-Appellant, ALLSTATE INSURANCE COMPANY, respectfully requests that the Court grant peremptory relief in the form of an order modifying the Court of Appeals' remand directions to include trial of the issue of whether the motorcycle was "taken unlawfully" by Plaintiff Rabin so as to disqualify him from entitlement to PIP benefits under MCL 500.3113(a). Alternatively, Defendant would request that the Court grant leave to appeal and, after plenary review, vacate the Court of Appeals' opinion and remand this matter to the trial court for further proceedings consistent with the analysis set forth herein.

Respectfully submitted,

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November 29, 2012

Document: 1061661.1