Court of Appeals, State of Michigan

ORDER

Janet T. Neff
Presiding Judge

Detroit Medical Center v Citizens Insurance Co.

Peter D. O'Connell

Docket No. 266444

LC No. 04-414772-NF

Christopher M. Murray
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued May 15, 2007, is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 28 2007
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DETROIT MEDICAL CENTER and LAKELAND NEUROCARE CENTER, Plaintiffs-Appellees/Cross-Appellants,	UNPUBLISHED June 28, 2007
v	No. 266444 Wayne Circuit Court
CITIZENS INSURANCE COMPANY, Defendant-Appellant/Cross-Appellee,	LC No. 04-414772-NF ON RECONSIDERATION
and AUTO CLUB INSURANCE ASSOCIATION, Defendant-Appellee/Cross-Appellee.	

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendant Citizens Insurance Company ("Citizens") appeals as of right from an order granting summary disposition in favor of plaintiffs, the Detroit Medical Center and Lakeland Neurocare Center, in this no-fault insurance dispute. Plaintiffs cross-appeal the trial court's order denying their request for attorney fees under MCL 500.3148. We affirm in part, reverse in part, and remand for further proceedings.

I

Plaintiffs filed this action to secure payment for medical services provided to seventeen-year-old Jerome Crutcher-Bey, totaling more than $600,000, after Crutcher-Bey suffered severe brain injury in a fatal car accident on July 4, 2003. At the time of the accident, Crutcher-Bey was a passenger in a Chrysler New Yorker insured by Citizens that was stolen the previous day. Another passenger, Antonio Harris, also suffered serious injuries in the accident; the driver of the stolen car, Clarence Davis, was killed. Although it was undisputed that the car was stolen, there was no evidence connecting the three teenagers involved in the accident to the car theft. The sole evidence concerning the car theft indicated that the car was stolen from a convenience store

parking lot by a Caucasian male; however, all three teenagers involved in the accident were African-American.

The trial court found Citizens liable for payment of no-fault benefits on behalf of Crutcher-Bey and, therefore, dismissed the claim against defendant Auto Club Insurance Association (ACIA), the assigned claims insurer. The court noted that Citizens may be entitled to reimbursement from Allstate Insurance Company, an alleged higher priority insurer, but that the court was not going to resolve that issue in conjunction with plaintiffs' motion for summary disposition.

II

Citizens raises two arguments in challenging the trial court's grant of summary disposition. First, Citizens contends that the court erred in ruling that Crutcher-Bey was not precluded from recovering no-fault benefits under MCL 500.3113(a), which generally excludes coverage for a person who unlawfully takes a vehicle. Second, Citizens contends that the court erred in ruling that Citizens was liable for payment of Crutcher-Bey's no-fault benefits despite the potential liability of a higher priority insurer.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Landon v Titan Ins Co*, 251 Mich App 633, 637; 651 NW2d 93 (2002). Here, plaintiffs brought their motion for summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10). The trial court did not expressly state the court rule under which it granted summary disposition in favor of plaintiffs. "Summary disposition under MCR 2.116(C)(9) is proper if a defendant fails to plead a valid defense to a claim." *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). In reviewing a motion brought under MCR 2.116(C)(9), this Court accepts "all well-pleaded allegations as true" and will grant the plaintiff's motion if the defenses are so clearly untenable as a matter of law that no factual development could possibly deny the right to relief. *Id.* Although the trial court did not specifically state which subrule it relied on in granting summary disposition, this Court reviews the decision using the standard for MCR 2.116(C)(10) because the trial court considered evidence outside the pleadings. *Id.* at 565; *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

In reviewing the decision on a motion brought pursuant to MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party. Summary disposition is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Steward*, *supra* at 555. The existence of a disputed fact must be established by admissible evidence. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). Finally, disposition of these issues depends on the interpretation of MCL 500.3113(a), MCL 500.3114, and MCL 500.3172. Statutory interpretation is a question of law that this Court reviews de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

A

Citizens argues that the court erred in ruling that Crutcher-Bey was not excluded from recovering no-fault benefits under MCL 500.3113(a). We disagree.

MCL 500.3113(a) provides:

> 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.

The trial court ruled that there was no evidence that Crutcher-Bey was involved in the "unlawful taking" of the stolen New Yorker. The court held that without such evidence, MCL 500.3113(a) did not operate to exclude Crutcher-Bey from receiving no-fault benefits, and that Citizens, as the insurer of the vehicle Crutcher-Bey occupied at the time of the accident, was therefore the insurer responsible for payment to plaintiffs for services they provided to Crutcher-Bey as a result of the accident.

The no-fault act excludes benefits when "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); *Priesman v Meridian Mut Ins Co*, 441 Mich 60, 63 n 3; 490 NW2d 314 (1992). Coverage under the act is therefore properly denied if (1) a person takes a vehicle unlawfully and (2) that person could not reasonably believe that he was entitled to take and use the vehicle. *Bronson Methodist Hosp v Forshee*, 198 Mich App 617, 623; 499 NW2d 423 (1993).

Whether Crutcher-Bey is excluded from receiving no-fault benefits turns on whether there was evidence that he had unlawfully taken the New Yorker. Citizens contends that in *Mester v State Farm Mut Ins Co*, 235 Mich App 84; 596 NW2d 205 (1999), this Court recognized that for purposes of MCL 500.3113(a), an unlawful taking encompasses more than "the first taker with a specific intent to steal." In *Mester*, three girls were skipping school together and took a truck that they eventually crashed during a police chase. *Id.* at 85-86. The plaintiff argued that she was only involved in the "unlawful use" of the truck, rather than an "unlawful taking," because it was her friend who actually found the truck with the keys in it and was the one who was driving. *Id.* Further, the plaintiff had pleaded with the driver to stop before the accident occurred. *Id.* at 86. This Court rejected the plaintiff's argument, finding that an unlawful taking does not require an intent to steal or permanently deprive the owner of a vehicle. *Id.* at 88. The Court reasoned that by using the phrase "unlawful taking" in the statute, the Legislature chose a term that encompasses the offense of joyriding, which requires an intent to take or drive the vehicle away, but not to steal it. *Id.* The Court concluded that, on the basis of her deposition testimony, there was no question of fact that the plaintiff participated in the unlawful taking of the vehicle, without permission and without any reason to believe that she was entitled to take or use the vehicle. Accordingly, under subsection 3113(a), she was not entitled to no-fault benefits. *Id.* at 89.

Here, unlike the plaintiff in *Mester, id.* at 85-86, there was no evidence that Crutcher-Bey was joyriding or had participated in the unlawful taking of the New Yorker. Rather, the only pertinent evidence in the record was Harris's deposition testimony that Davis was driving, Crutcher-Bey was riding in the front passenger seat when they picked up Harris, and both men were consuming alcohol and marijuana. There was no evidence that Crutcher-Bey was aware that the vehicle was stolen.

Citizens essentially argues at length that mere unlawful use or possession of the New Yorker by Crutcher-Bey as a passenger who was smoking marijuana and drinking alcohol, suffices to constitute an "unlawful taking" under MCL 500.3113(a). Citizens contends that Crutcher-Bey's "use of [the] car after obtaining possession and control over the front seat passenger area of the car" is evidence that he had "taken" the car under the plain language of subsection 3113(a). We are unpersuaded by these arguments. Crutcher-Bey's mere presence in the vehicle the day after it was stolen is insufficient to establish his unlawful taking of the vehicle, particularly given the evidence the car was stolen by someone other than the three occupants involved in the accident.

While MCL 500.3113(a) may encompass the offense of joyriding,[1] there was no evidence that Crutcher-Bey committed the offense of joyriding. The essential elements of joyriding, MCL 750.413,[2] are: "'(1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done willfully, and (4) the possession and driving away must be done without authority or permission.'" *Landon, supra* at 639 (citation omitted). Joyriding requires the specific intent to take possession of the vehicle unlawfully. *Id.* at 640. Again, there was no evidence that Crutcher-Bey was aware that the vehicle was stolen or that he had the specific intent to take possession of the vehicle unlawfully.

Although one may speculate that Crutcher-Bey's presence in the vehicle is evidence that he knew Davis had unlawfully taken the New Yorker, "parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Contrary to Citizens' argument, the phrase "taken unlawfully" cannot be read so broadly as to encompass Crutcher-Bey's mere use of the car as a passenger.[3] We find no error in the trial court's grant of summary disposition in favor of plaintiffs on the issue of coverage.

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[1] In *Landon, supra* at 640, this Court observed that conflicting decisions have been issued concerning whether a violation of MCL 750.413 qualifies as an "unlawful" taking, and thus warrants the preclusion of no-fault benefits under MCL 500.3113(a).

[2] This offense is sometimes referred to as "UDAA," and sometimes as joyriding. *Landon, supra* at 639 n 3. However, the misdemeanor offense described in MCL 750.414 is also referred to as joyriding. *Landon, supra* at 639 n 3.

[3] Given this conclusion, we need not address Citizens's additional argument that plaintiffs had the burden of showing that Crutcher-Bey reasonably believed that he was entitled to take and use the vehicle and that they failed to meet this burden.

B

Citizens further argues that the trial court erred in requiring Citizens to pay plaintiffs for the services provided to Crutcher-Bey as a result of the accident. Specifically, Citizens claims that because it is not the insurer in the "highest order of priority" under MCL 500.3114, it is not liable for Crutcher-Bey's no-fault benefits. Alternatively, if there is a question of fact whether there was an insurer of a higher priority, Citizens had no obligation to pay the PIP benefits as ordered by the trial court.

Plaintiffs essentially agree, arguing that the trial court erred in prematurely dismissing ACIA before determining whether Allstate was higher in the order of priority. Plaintiffs contend that if Crutcher-Bey is not excluded from receiving no-fault benefits under MCL 500.3113(a), this matter should be remanded to the trial court to determine the order of priority, if necessary, with the assigned claims insurer, ACIA, ordered to pay benefits in the meantime. We agree that the dismissal of ACIA was premature and that this case should be remanded.

Accident victims must generally look first to their own insurance coverage or that of a spouse or resident relative for no-fault benefits. MCL 500.3114(1); *Michigan Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 630; 455 NW2d 352 (1990). If the injured occupant has no coverage of his own, cannot claim under the policy of a spouse or resident relative, and cannot claim from the insurer of a commercial carrier or employer vehicle, the insurer of the owner or registrant of the vehicle occupied is next in line of priority for paying no-fault benefits, MCL 500.3114(4)(a), followed by the insurer of the operator of the vehicle occupied, MCL 500.3114(4)(b). See *Michigan Mut Ins Co*, *supra* at 630. If the liability for no-fault benefits cannot be established under the foregoing order or priority, then, "unpaid benefits due or coming due are subject to being collected under the assigned claims plan . . . ." MCL 500.3172(1); *Spencer v Citizens Ins Co*, 239 Mich App 291, 301-302; 608 NW2d 113 (2000).

MCL 500.3172(1) describes the situations in which the payment of assigned-claims benefits may occur:

> A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through an assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. In such case unpaid benefits due or coming due are subject to being collected under the assigned claims plan, and the insurer to which the claim is assigned, or the assigned claims facility if the claim is assigned to it, is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility.

Crutcher-Bey's claim was assigned to ACIA apparently because no insurance was applicable or could be identified. The no-fault act requires prompt payment of benefits by an assigned claims insurer.

> . . . An insurer to whom claims have been assigned *shall make prompt payment of loss in accordance with this act* and is thereupon entitled to reimbursement by the assigned claims facility for the payments and the established loss adjustment cost, together with an amount determined by use of the average annual 90-day United States treasury bill yield rate, ... [MCL 500.3175(1) (emphasis added).]

Under the assigned claims statutory scheme, ACIA generally would be liable for prompt payment of benefits and if another insurer was subsequently found liable, ACIA could seek reimbursement from that insurer. MCL 500.3175; see also *Spectrum Health v Grahl*, 270 Mich App 248, 251-252; 715 NW2d 357 (2006).

The evidence indicates that (1) Crutcher-Bey did not maintain insurance, MCL 500.3114(1); (2) ACIA was the insurer assigned to handle this claim on behalf of the assigned claims facility, MCL 500.3172, (3) Citizens was subsequently identified as the insurer of Thomas Muoio, the owner of the New Yorker, MCL 500.3114(4)(a), and (4) Citizens subsequently determined that Crutcher-Bey's brother-in-law, Nathaniel Lindsay, with whom Crutcher-Bey resided, maintained no-fault insurance with Allstate, MCL 500.3114(1). Under these circumstances, the trial court erred in simply ruling that Citizens was required to pay Crutcher-Bey's no-fault benefits and subsequently seek reimbursement from any alleged higher priority insurer. The court likewise erred in dismissing ACIA as the assigned claims insurer.

"Clear and unambiguous statutory language is given its plain meaning, and is enforced as written." *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005). Under the clear and unambiguous language, regardless which insurer is ultimately determined to be the insurer obligated to pay no-fault benefits to Crutcher-Bey, the court's proper course was to require ACIA, as the assigned claims insurer, to promptly pay Crutcher-Bey's benefits, and ACIA could then seek reimbursement. MCL 500.3175. We reverse the grant of summary disposition in favor of ACIA and remand for further proceedings in keeping with the statutory provisions for payment of an assigned claim.

III

Plaintiffs argue on cross-appeal that the trial court erred in denying their request for penalty attorney fees against Citizens under MCL 500.3148. This Court reviews for clear error a trial court's factual findings regarding awarding attorney fees under MCL 500.3148. MCR 2.613(C); *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316-317; 602 NW2d 633 (1999). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake occurred." *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004). If the trial court determines an award of attorney fees is proper, the amount of the attorney fee must be reasonable. *Wood v DAIIE*, 413 Mich 573, 587-588; 321 NW2d 653 (1982). Appellate review of the trial court's determination of "reasonableness" is for an abuse of discretion. *Id.*

The court denied plaintiffs' request for attorney fees under MCL 500.3148, stating, "the motion with regard to attorney fees is denied. I'm not going to hear an argument on that. I might say that the denial was unreasonable because my reading the statute leads me to the conclusion that it leads me but I guess reasonable minds can defer [sic] so that motion is denied." With respect to attorney fees, MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

The trial court may not award attorney fees to a claimant unless "the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1). An insurer does not unreasonably refuse or delay payment of benefits when it does so because of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty. *Liddell v DAIIE*, 102 Mich App 636, 650; 302 NW2d 260 (1981); see also *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 46; 586 NW2d 395 (1998). Here, as the foregoing discussion indicates, there were legitimate questions of statutory construction intertwined with factual uncertainties, including whether Citizens is the insurer in the highest order of priority, MCL 500.3114, whether Citizens or ACIA is required to presently pay Crutcher-Bey's no-fault benefits under MCL 500.3172, and whether Crutcher-Bey was excluded from receiving no-fault benefits under MCL 500.3113(a). As a result, the trial court did not err in refusing to award plaintiffs attorney fees under MCL 500.3148.

Affirmed in part, reversed in part, and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Christopher M. Murray