STATE OF MICHIGAN

COURT OF APPEALS

TITAN INSURANCE COMPANY, Plaintiff-Appellee-Cross Appellant,	UNPUBLISHED May 6, 2010
v	No. 285884 Oakland Circuit Court
FREMONT INSURANCE COMPANY, Defendant-Appellant-Cross Appellee.	LC No. 2007-083949-NF

Before: SAAD, C.J., and O'CONNELL, and ZAHRA, JJ.

PER CURIAM.

In this action for reimbursement under the assigned claims statutes, MCL 500.3171 *et seq*., defendant appeals by right the trial court's order granting partial summary disposition to plaintiff, thereby requiring defendant to reimburse plaintiff for personal insurance protection insurance benefits that plaintiff paid on the assigned claim. Plaintiff cross-appeals the trial court's determination that plaintiff was not entitled to reimbursement for loss adjustment costs and attorney fees. We affirm in part and reverse in part.

I. BASIC FACTS AND PROCEEDINGS

This dispute arose out of the assignment of Jeffery Pomeroy's claim for personal protection insurance benefits (PIP benefits). Pomeroy had been injured in a one-car accident while driving a Grand Prix owned by his girlfriend, Shawn Lupton. The Grand Prix was not insured, but Lupton had insurance on another vehicle through defendant. Lupton sought PIP benefits from defendant, but defendant rejected her request. Pomeroy applied for assigned claim benefits through the Michigan Assigned Claim Facility (ACF). The ACF assigned Pomeroy's claim to plaintiff, and plaintiff paid approximately $90,000 in PIP benefits on Pomeroy's behalf. Plaintiff then sought reimbursement for those payments from defendant on the ground that defendant was obligated to pay the benefits under MCL 500.3114(4)(a). Plaintiff also sought reimbursement of its loss adjustment costs and attorney fees. As noted above, the trial court found that plaintiff was entitled to reimbursement from defendant for the PIP benefit payments, but not for the loss adjustment costs or the attorney fees.

II. REIMBURSEMENT OF PPI BENEFITS

Defendant claims that Pomeroy was an owner of the Grand Prix, and that defendant was not obligated to pay the benefits under MCL 500.3114(4)(a). Accordingly, defendant maintains that plaintiff could not seek reimbursement from defendant. We review de novo the trial court's order on summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

Ownership under the no-fault act[1] is a fact-sensitive inquiry. See, e.g., *Detroit Medical Ctr v Titan Ins Co*, 284 Mich App 490; 775 NW2d 151 (2009). To resolve this inquiry, we must determine whether the evidence establishes that Pomeroy was an owner within the meaning of MCL 500.3101(2)(h)(*i*), which defines an owner as "[a] person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days." This Court has determined that ownership "follows from *proprietary* or *possessory* usage, as opposed to merely incidental usage under the direction or with the permission of another." *Ardt v Titan Ins Co*, 233 Mich App 685, 691; 593 NW2d 215 (1999) (emphasis in original). Similarly, in *Roberts v Titan Ins Co* (*On Reconsideration*), 282 Mich App 339, 355-356; 764 NW2d 304 (2009), this Court explained that the focus of the ownership analysis "must be on the nature of the person's right to use the vehicle."

We conclude that the summary disposition evidence supports the trial court's conclusion that Pomeroy was not an owner of the Grand Prix. Although the evidence is conflicting as to whether Pomeroy ever used the Grand Prix prior to the accident, the evidence is clear that his use was incidental and was subject to Lupton's use of the car. Moreover, the evidence establishes that the car had stopped functioning for some number of months prior to the accident, and that both Pomeroy and Lupton believed Pomeroy needed permission from Lupton to attempt get the car running. Although Pomeroy did not in fact obtain this permission before driving the car on the day of the accident, there is no indication in the record that he could have used the car regularly without Lupton's permission. Absent proof of a right on Pomeroy's part to use the car, or that he used the car regularly, Pomeroy cannot be deemed an owner under MCL 500.3101(2)(h)(*i*). Accord *Detroit Medical Ctr*, 284 Mich App at 493-494.

III. LOSS ADJUSTMENT COSTS AND ATTORNEY FEES

In the cross-appeal, plaintiff argues that the trial court erred in refusing to order defendant to reimburse plaintiff for loss adjustment costs and attorney fees.

This Court in, *Spectrum Health v Grahl*, 270 Mich App 248, 715 NW2d 357 (2006), addressed the availability of costs, attorney fees, and interest when seeking PPI benefits through the ACF under MCL 500.3172. The Court noted that "MCL 500.3172(1) concludes with a

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[1] MCL 500.3101 *et seq*.

reimbursement provision, it does not specify whether the right to reimbursement includes a right to recover costs, attorney fees, and interest." *Id*. at 252. The Court also noted that, in contrast, MCL 500.3172(3)(f) specifically includes a right to recover costs, attorney fees, and interest. The Court concluded that "[b]ecause MCL 500.3172(1) does not specifically state that the assigned claims insurer can recover costs, attorney fees, and interest from a higher-priority insurer as part of its general right to reimbursement, . . . the right to reimbursement granted by this section does not include a right to recover those expenses from a higher-priority insurer." *Id*. at 253. Thus, when seeking PPI benefits through the ACF under MCL 500.3172, costs, attorney fees, and interest are only available under MCL 500.3172(3)(f).

Spectrum then addressed when MCL 500.3172(3)(f) is applicable. The Court held MCL 500.3172(3)(f) was not applicable when "the [ACF] assigned the insured's claim to [an insurer] because the insured claimed that no personal protection insurance applied to her injury and not because of a dispute between two or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss." *Spectrum*, 270 Mich App at 249.

Here, as in *Spectrum*, "at the time of the assignment [to the ACF], both [plaintiff] and the [ACF] were unable to identify any other source of [PIP] applicable to cover [plaintiff]'s medical expenses." 270 Mich App at 252. Thus, as in *Spectrum*, MCL 500.3172(3)(f) is inapplicable and plaintiff cannot collect costs, attorney fees, and interest.

At oral argument, the parties addressed Administrative Rule 11.105,[2] which the Secretary of State promulgated in 1989. It provides:

> The assigned claims facility or the servicing insurer to which the claim is assigned is entitled to reimbursement for the personal protection insurance benefits which are provided *and the appropriate loss adjustment costs* which are incurred from an insurer who is obligated to provide the personal protection insurance benefits under a policy of insurance, but who fails to pay such benefits. [1989 AACS, R 11.105 (emphasis added).]

Spectrum, 270 Mich App 248, simply does not address R 11.105 and focused exclusively the rights provided under MCL 500.3172(3)(f). However, unlike MCL 500.3172(3)(f), R 11.105 does not condition reimbursement on a "dispute" between two insurers. Rather, R 11.105 provides a specific right to the servicing insurers distinct from MCL 500.3172(3)(f) allowing the recovery of "appropriate loss adjustment costs." Accordingly, plaintiff is entitled to reimbursement of loss adjustment costs pursuant to R 11.105.[3] However, because R 11.105 does

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[2] The rule amendments was promulgated pursuant to MCL 500.3175 included a requirement that "[t]he rules promulgated under section 3171 [the assigned claim section] shall include a rule establishing reasonable standards for enforcing rights to indemnity or reimbursement against third parties, including a standard establishing a value for such rights below which actions to preserve and enforce the rights need not be pursued." 1984 PA 426.

[3] At oral argument, counsel for defendant maintained that Plaintiff was already entitled to loss adjustment costs from the ACF pursuant to MCL 500.3175(1), and argued Plaintiff was not (continued…)

not address attorneys' fees, the trial court correctly denied plaintiff's request for attorneys' fees pursuant to *Spectrum*.

Affirmed in part and reversed in part. No taxable costs pursuant to MCL 7.219, neither party having prevailed in full.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

(…continued)

entitled to double recovery. However, MCL 500.3175(3) provides, in part, that:

> The insurer to whom claims have been assigned shall preserve and enforce rights to indemnity or reimbursement against third parties and account to the assigned claims facility therefor and shall assign such rights to the assigned claims facility upon reimbursement by the assigned claims facility . . . .

We conclude that the above provision prevents a double recovery of loss adjustments costs, and thus we reject defendant's contention.