

STATE OF MICHIGAN
COURT OF APPEALS

ALLIED PROPERTY AND CASUALTY
INSURANCE COMPANY,

UNPUBLISHED
October 16, 2008

Plaintiff-Appellant,

v

MICHIGAN CATASTROPHIC CLAIMS
ASSOCIATION,

No. 277765
Kalamazoo Circuit Court
LC No. 06-000087-CZ

Defendant-Appellee.

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Plaintiff, Allied Property Insurance Company, appeals by right the trial court's grant of summary disposition in favor of defendant, the Michigan Catastrophic Claims Association (MCCA). Plaintiff also appeals the trial court's refusal to determine that defendant engaged in discovery to advance a frivolous defense and denying plaintiff's request for attorney fees. We affirm.

The parties did not dispute the material facts. Plaintiff's insured, Troy Hinson, moved with his two children from Michigan to Texas on July 2, 2004. On August 9, 2004 his son, Zachary Hinson, was involved in a motor vehicle accident in Texas. The vehicle involved in the accident, a Buick LeSabre, Troy had purchased the car in Texas two days before the accident, but he had not yet obtained insurance coverage for it. Troy also owned a 1991 Ford truck when he resided in Michigan, which Zachary used until the family moved to Texas. Troy left the truck with a friend in Michigan to sell it, and he maintained his no-fault policy of insurance through plaintiff on that truck. Plaintiff reviewed Troy's claim for personal injury protection benefits (PIP) because of Zachary's accident and determined that it would pay benefits pursuant to Troy's Michigan policy. It thereafter added the Buick to Troy's Michigan policy. Plaintiff then sought reimbursement from the MCCA pursuant to the Michigan no-fault act, MCL 500.3101, *et seq.* for its payment of PIP benefits, but the MCCA denied plaintiff's claim. Plaintiff subsequently commenced this suit seeking a declaration that the MCCA was obligated to reimburse plaintiff for the payment of PIP benefits in excess of \$350,000 under MCL 500.3104, and an award of costs and attorney fees due to the MCCA's maintenance of a frivolous defense under MCL 600.2591. The trial court granted the MCCA's subsequent motion for summary disposition, finding that the MCCA was not liable for indemnification to plaintiff where the accident

occurred in Texas and involved a vehicle that was registered and owned in Texas by a Texas resident.

We review the trial court's decision to grant summary disposition under MCR 2.116(C)(10) de novo. *Universal Underwriters Ins v Kneeland*, 464 Mich 491, 495; 628 NW2d 491 (2001). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Issues of law, such as the trial court's interpretation of the no-fault act, are also reviewed de novo. *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n*, 274 Mich App 184, 193; 731 NW2d 481 (2007). The primary purpose of statutory interpretation is to give effect to the intent of the Legislature, and the clear and unambiguous terms of a statute must be enforced as written. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Statutory provisions must be read and interpreted as a whole, "and the meaning given to one section arrived at after due consideration of other sections so as to produce, if possible, an harmonious and consistent enactment as a whole." *In re Certified Question (Preferred Risk Mut Ins Co v Mich Catastrophic Claims Ass'n)*, 433 Mich 710, 721-722; 449 NW2d 660 (1989), quoting *State Treasurer v Wilson*, 423 Mich 138, 145; 377 NW2d 703 (1985). The statutory language is ambiguous only if it is equally susceptible to more than a one meaning, or irreconcilably conflicts with another provision. *Mayor of Lansing v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

The MCCA is a legislatively-created nonprofit organization "comprising all insurance companies who write insurance" in Michigan; its principal purpose "is to indemnify member insurers for losses sustained as a result of the payment of personal protection insurance benefits beyond the 'catastrophic' level." *Preferred Risk, supra* at 714-715. MCL 500.3104(1) requires an insurer that is "engaged in writing insurance coverages that provide the security required by section 3101(1) within this state" must become a member of the MCCA in order to offer insurance in Michigan. MCL 500.3101(1) provides in pertinent part:

The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway.

As a member, an insurer is entitled to indemnification from the MCCA for PIP payments pursuant to MCL 500.3104(2), which provides that the MCCA shall indemnify the insurer for "100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence;" the amount pertinent to this case is \$350,000 under MCL 500.3104(2)(d). The "ultimate loss sustained" means "the actual loss amounts that a member is obligated to pay and that are paid or payable by the member, and do not include claim expenses." MCL 500.3104(25)(c). The MCCA charges its members a premium or assessment "for the coverage it provides, which is based on the number of car years of insurance the member writes in Michigan." *Preferred Risk, supra* at 716. The MCCA makes this calculation, according to MCL 50.3104(7)(d), by evaluating "the amount it will need to cover its expected losses and expenses during the applicable period, its 'total premium,' and then

charges the member insurers individual premiums based on their respective shares of the state's auto insurance market.” *Id.* at 716 n 5.

In *Preferred Risk*, the Michigan Supreme Court held that the MCCA was “required to indemnify member insurers only for losses paid to ‘residents’ of this state;” the term “resident” referred “not only to those insureds who actually live within the state and who must therefore purchase no-fault automobile insurance policies written in this state which provide the compulsory security requirements of MCL 500.3101(1) for the owners or registrants of motor vehicles required to be registered in this state, but also to certain insureds who do not live within this state but who are nonetheless required to register, and thus insure, their vehicles in this state.” *Id.* at 714. The Court also concluded that the phrase “personal protection insurance coverages” in MCL 500.3104(2) was “a shorthand reference to the no-fault personal protection insurance coverages that are generally the subject of the act, i.e., those which were written in this state to provide the compulsory security requirements of § 1301(1) of the no-fault act for the ‘owner or registrant of a motor vehicle required to be registered in this state’ – ‘residents,’ in the language of the [MCCA’s] plan of operation.” *Id.* at 723. The Court further noted that § 3101(1), “again, requires only the owner or registrant of a motor vehicle ‘required to be registered in this state’ to maintain personal protection, property protection, and residual liability insurance on the vehicle. By its terms, § 3101(1) does not apply to vehicles that are not required to be registered in Michigan.” *Id.* at 724.

Here, the MCCA asserted that it was not obligated to indemnify plaintiff. Because the Buick did not have to be registered in Michigan, neither was the compulsory insurance pursuant to MCL 500.3101(1) required for it. Troy, the nonresident owner and registrant of the Buick, was also not obligated to provide PIP security under MCL 500.3102(1) because he had no intention of operating the Buick in Michigan for more than 30 days.

We find that the MCCA was not required to reimburse plaintiff. Troy was a nonresident, but the Buick was not required to be registered in Michigan, and “§ 3101(1) does not apply to vehicles that are not required to be registered in Michigan.” *Preferred Risk, supra* at 724. The Buick was registered and titled in Texas and was not going to be driven in Michigan for more than 30 days; thus, it was not required to be registered in Michigan and compulsory coverage under MCL 500.3101(1) was likewise not required. The MCCA need only indemnify an insurer under MCL 500.3104(2) where the insurer paid benefits pursuant to a policy written in Michigan that provided for the required security under MCL 500.3101(1) for a vehicle required to be registered in Michigan. *Preferred Risk, supra* at 719-720.

Plaintiff’s focus on the truck that Troy left behind in Michigan to sell and the provisions of the no-fault act, such as MCL 500.3111, 500.3114, and 500.3113, that relate to whether the insurer is required to pay an individual insured, is misplaced. The pertinent issue in this case is whether the MCCA is obligated to reimburse an insurer under the no-fault act. The MCCA is not required, pursuant to MCL 500.3104(2), to indemnify an insurer for any and all Michigan no-fault benefits that the insurer may be required to pay. *Preferred Risk, supra* at 719-723. The MCCA is only required to provide indemnity where the PIP coverage is compulsory pursuant to MCL 500.3101(1), i.e., on “residents,” meaning “those insureds who actually live within the state and who must therefore purchase no-fault automobile insurance policies written in this state which provide the compulsory security requirements of MCL 500.3101(1) for the owners or registrants of motor vehicles required to be registered in this state,” and “certain insureds who do

not live within this state but who are nonetheless required to register, and thus insure, their vehicles in this state.” *Preferred Risk, supra* at 714. Although the truck remained in Michigan, the insured did not live in Michigan, had a Texas license, the Buick was not required to be registered here, and it was registered in Texas. Compulsory coverage under MCL 500.3101(1) was not required on the Buick. The Court recognized in *Preferred Risk* that an insurer may be treated differently depending on whether the benefits were paid pursuant to compulsory PIP insurance under MCL 500.3101(1). *Preferred Risk, supra* at 729-730. Here, according to the no-fault act and regardless of how plaintiff treated the situation, the benefits were not paid pursuant to the compulsory insurance requirements set forth in MCL 500.3101(1) because that provision was inapplicable to the Buick, a Texas-owned and registered vehicle. Thus, the MCCA is not required to reimburse plaintiff because the compulsory insurance requirements of MCL 500.3101(1) do not apply here. *Id.* at 724. Consistent with *Preferred Risk’s* recognition that the MCCA has the authority to charge premiums only for “policies written in Michigan providing the security required by § 3101(1) for the owners or registrants of vehicles required to be registered in the state,” the MCCA is conversely not required to reimburse plaintiff with respect to the Buick, which did not require compulsory PIP coverage under MCL 500.3101(1) because Troy was not a “resident” of Michigan, and the Buick was not required to be registered in Michigan.

Although plaintiff added the Buick to Troy’s policy, the fact that it may have been obligated to provide PIP benefits to Zachary under the terms of the policy does not control whether defendant must likewise reimburse plaintiff for those benefits. This principle was demonstrated in *Preferred Risk*, where the insurer was obligated to provide PIP benefits because of its policy with the nonresident insured that provided for PIP benefits. But the MCCA was only obligated to indemnify the insurer when benefits were paid over the statutory threshold “under a policy which was written in this state to provide the security required by § 3101(1) of the no-fault act for the ‘owner or registrant of a motor vehicle required to be registered in this state.’” *Preferred Risk, supra* at 719.

The MCCA referred to the language in its plan of operation in support of its argument that it was not required to indemnify plaintiff in this case. In *United States Fidelity, supra* at 203, the MCCA argued the trial court failed to give due deference to the Office of Financial and Insurance Service’s interpretation of MCL 500.3104. This Court found that although it “affords great deference to an agency’s interpretation of the statute it is charged with enforcing, no such deference is due when the agency’s ‘interpretation is clearly wrong.’” *Id.*, quoting *Hoste v Shanty Creek Mgmt, Inc*, 459 Mich 561, 569; 592 NW2d 360 (1999). Also, this Court noted that in *Preferred Risk*, our Supreme Court while agreeing with the MCCA’s interpretation of the statute ultimately rested its analysis upon the language of the no-fault act itself. *United States Fidelity, supra* at 204 n 14. Thus, the MCCA’s argument relying on its plan of operation in the instant case does not control this Court’s interpretation of the no-fault act; rather, this Court looks to the language contained in the no-fault statutes.

We additionally find plaintiff’s remaining arguments to be without merit. Plaintiff asserts that the trial court erroneously based its decision on the absurd results doctrine. Although it is clear from a review of the trial court’s seven-page opinion that it did not base its decision solely on the absurd results doctrine, this Court nevertheless undertakes a de novo review of the parties’ motions for summary disposition and a de novo review of the interpretation of statutory

language. *Universal Underwriters, supra* at 495-496; *United States Fidelity, supra* at 193. Therefore, even if the trial court improperly considered the doctrine, it is immaterial for purposes of this Court's de novo review of the no-fault act provisions and their application to the circumstances presented in this case.

Plaintiff next maintains that no-fault insurance follows the insured and not the vehicle. Thus, because there was no-fault insurance on the Ford, the insurance followed Troy and his son, who resided with him. But a review of the case cited in support of this proposition, *Pioneer State Mut Ins Co v Titan Ins Co*, 252 Mich App 330; 652 NW2d 469 (2002), reveals that this Court's analysis remained faithful to the language in the statute. This Court noted its interpretation of MCL 500.3114(4) in *State Farm Fire & Casualty Co v Citizens Ins Co of America*, 100 Mich App 168, 174; 298 NW2d 651 (1980), disapproved on other grounds by *DAIE v Home Ins Co*, 428 Mich 43; 405 NW2d 85 (1987): "It is clear that the Legislature's choice of such language ['the insurer of the owner' as opposed to 'the insurer of the vehicle'] was not accidental. That the obligation of the insurance company to pay personal protection benefits is not tied to a particular vehicle in all cases does not, however, mean that the Legislature intended to discard all ties between the obligation to pay benefits and the vehicle." *Pioneer, supra* at 337 n 7. Thus, while there is an underlying legislative policy that "persons rather than vehicles be insured against loss," this principle is not unlimited; the specific statutory language must be examined and given effect. In addition, the provision at issue in *Pioneer* was MCL 500.3115, regarding injury to a pedestrian; a provision which is not at issue in this case. *Pioneer, supra* at 336. The coverage of the insured's son is not an issue in this case. Reimbursement of plaintiff insurer by defendant is the issue.

Finally, plaintiff argues that Zachary was an innocent third party to the insurance policy. The record is completely devoid of allegations or supporting facts indicating that Troy made a material misrepresentation to plaintiff, or that plaintiff even raised this issue with Troy when he informed them of Zachary's accident and the purchase of the Buick. Moreover, the record reflects that plaintiff was apprised of Troy's change of address to Texas on August 2, 2004; thus, plaintiff was aware of this fact when it learned of the September 9, 2004, accident and decided to afford coverage. Although an insurer may have the right to void an insured's policy because of a material misrepresentation made by the insured, *Katinsky v Auto Club Ins Ass'n*, 201 Mich App 167, 170; 505 NW2d 895 (1993), that was not the situation presented in this case. The argument is irrelevant to a resolution of the reimbursement issue on appeal.

Plaintiff next argues on appeal that the trial court committed clear error in denying its claim that defendant's defense was frivolous, entitling it to attorney fees and costs under MCL 600.2591(1) because the MCCA had no reasonable basis to believe that the facts underlying its legal position were true, and its "legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(ii) and (iii).

The trial court's determination as to whether a claim or defense was frivolous under MCL 600.2591 is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). Clear error is present where the reviewing court is left with a definite and firm conviction that a mistake has been made, although there may be evidence to support the trial court's decision. *Id.* at 661-662.

Whether a defense is frivolous is based on the facts of each case. *Kitchen, supra* at 662. “To determine whether sanctions are appropriate under MCL 600.2591; MSA 27A.2591, it is necessary to evaluate plaintiffs’ claim at the time the lawsuit was filed.” *Septer v Tjarksen (In re Attny Fees & Costs)*, 233 Mich App 694, 702; 593 NW2d 589 (1999).

The MCCA disputed whether it was required to reimburse plaintiff under the no-fault act at all based on the fact that the injured was a Texas resident, the uninsured vehicle involved in the accident was registered and titled in Texas, and the vehicle was not required to be registered in Michigan. The MCCA had a reasonable basis for believing that the underlying facts of its legal position were true. In fact, as the trial court noted, neither party disputed the essential facts in this case. The MCCA’s inquiries and discovery related to the circumstances surrounding plaintiff’s decision to provide coverage to Zachary were not unreasonable given the legal argument it was asserting. The MCCA has previously contested whether it was obligated to pay the ultimate loss sustained by a member insurer, not because it disputed the amount of the ultimate loss the insurer claimed, but because it disputed whether it was statutorily required to provide reimbursement at all. For example, in *Preferred Risk, supra* at 713-714, the MCCA contested whether under the no-fault act it was required to indemnify “member insurers for losses paid to insureds who are not considered residents of this state.” Because the MCCA questioned whether it was obligated to reimburse plaintiff on the facts of this case based on *id.* at 713-714, its defense was not devoid of legal merit. In addition, the MCCA is not statutorily restricted to simply automatically paying every claim by a member insurer for reimbursement as plaintiff implies. For example, MCL 500.3104, which created the MCCA, gives the MCCA the authority to “[e]stablish procedures for reviewing claims procedures and practices of members of the association”, and if it finds such procedures inadequate, the MCCA “may undertake . . . to adjust or assist in the adjustment of claims for the member.” MCL 500.3104(7)(g). In addition, neither party cites a case directly on point regarding the legal issues and the specific facts of this case. This Court has found that a legal position was not frivolous when it involves an unsettled area of law. *Travelers Ins v U-Haul, Inc*, 235 Mich App 273, 290; 597 NW2d 235 (1999).

We find that the trial court’s denial of plaintiff’s claim that the MCCA’s defense was frivolous was not clearly erroneous, as it cannot be said this Court is left with a “definite and firm conviction” that a mistake has been made. *Kitchen, supra* at 661-662.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly