STATE OF MICHIGAN

COURT OF APPEALS

DAVID MACKLIS,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
April 25, 2017

No. 330957
Wayne Circuit Court
LC No. 15-000822-NF

Before: SAWYER, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

In this claim for first-party no-fault benefits, defendant, Farm Bureau General Insurance Company of America, appeals the trial court's order that denied its motion for summary disposition.[1] Although the trial court incorrectly used the amended version of MCL 500.3113(a) instead of the prior version that was in effect at the time plaintiff's claims accrued, we nonetheless affirm.

I. BASIC FACTS

This is a no-fault case for PIP benefits brought under the Michigan Assigned Claims Plan (MACP). According to plaintiff's version of the facts, which we are obliged by law to view in a light most favorable to plaintiff when we review a motion for summary disposition, on January 20, 2014, George Graham and another individual known as "Kay" drove a grey van to meet plaintiff because they wanted plaintiff to drive them to see a doctor that plaintiff knew, in order to illegally obtain some prescription drugs. Graham and Kay asked plaintiff to drive the van because plaintiff knew the location of the doctor's office. Kay told plaintiff that the van belonged to Graham: this was the first time plaintiff ever saw the van. Although plaintiff did not have a driver's license, he agreed to drive. Again, we note that despite the inherent implausibility of this story, we are not at liberty to judge its credibility. But, the saga continues.

[1] We granted defendant's application for leave to appeal. *Macklis v Farm Bureau Gen Ins Co of Mich*, unpublished order of the Court of Appeals, entered June 6, 2016 (Docket No. 330957).

While driving the van, plaintiff made stops to pick up two other people. After this last person was picked up, plaintiff also stopped to pick up some marijuana. Afterward, while en route to the doctor's office, another vehicle ran through a stop sign and collided with the van. Plaintiff was taken to the hospital for his injuries and released later that same day.

Plaintiff subsequently sought benefits under the MACP, and this litigation eventually ensued. Defendant moved for summary disposition and argued that plaintiff could not recover benefits under MCL 500.3113(a) essentially because plaintiff could not have had a reasonable belief that he was entitled to use the van. Also, defendant says plaintiff should not get PIP benefits because he did not have a license, was smoking marijuana, and took the trip, with the van, to illegally purchase drugs. In other words, defendant takes the not entirely unreasonable position that plaintiff should not be rewarded for engaging in multiple criminal behavior. Plaintiff argued that unlawful use, alone, did not void a right to the benefits.

The trial court held that summary disposition was improper under the amended version of MCL 500.3113(a). In doing so, the court distinguished between unlawful taking and unlawful use. The court concluded that issues of fact existed concerning who owned the van and whether plaintiff should have known who owned the van. As the court explained:

> Here Defendant asserts Plaintiff's admittedly nefarious conduct precludes him from obtaining the typical statutory mandated no-fault benefits.
>
> Defendant's position does not comport with the plain language of the operative statutory provision, at least not as a matter of law on this record.
>
> Plaintiff was unquestionably unlicensed and possibly intoxicated on marijuana while driving this mysterious van, but this does not mean Plaintiff had taken this vehicle unlawfully.
>
> * * *
>
> The Court merely holds that on this current record Plaintiff is not excluded under MCL 500.3113(a) as a matter of law as there are genuine issues of fact regarding the ownership of the subject van and what plaintiff knew or should have known about such ownership.

II. STANDARD OF REVIEW

This Court reviews a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) de novo. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Judgment for the moving party hinges on whether there exists a genuine issue of material fact. *Curry v Meijer, Inc*, 286 Mich App 586, 590; 780 NW2d 603 (2009). When reviewing a motion under MCR 2.116(C)(10), a court considers all of the documentary evidence submitted in the light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The motion is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

To the extent this issue involves issues of statutory interpretation, including whether a statute should be applied retroactively or prospectively, this Court's review is likewise de novo. *Davis v State Employees' Ret Bd*, 272 Mich App 151, 152-153; 725 NW2d 56 (2006).

III. ANALYSIS

A. WHICH VERSION OF MCL 500.3113(a) APPLIES?

We first address which version of MCL 500.3113(a) applies in this case. Although plaintiff's accident occurred nearly a year before the January 13, 2015 effective date of the amended statute,[2] the trial court applied this latter version because plaintiff filed his suit after the amendment became effective. We hold that the trial court erred when it applied the amended version and that the prior version applies instead.

Statutes are presumed to operate prospectively unless the Legislature manifests a contrary intent. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). An exception lies if the statute is remedial or procedural in nature. *Davis*, 272 Mich App at 158. "A statute is remedial in nature when it corrects an existing oversight in the law, redresses an existing grievance, introduces regulations conducive to the public good, or intends to reform or extend existing rights." *Lenawee Co v Wagley*, 301 Mich App 134, 174-175; 836 NW2d 193 (2013). However, a statute that affects or creates a substantive right is not remedial and therefore not retroactive absent a clear indication of legislative intent otherwise. *Lynch & Co*, 463 Mich at 585. Substantive rights are essential rights that affect the outcome of a lawsuit and can be protected or enforced by law. *Black's Law Dictionary* (3d ed).

Before the Legislature amended MCL 500.3113(a) in 2014 PA 489, the statute precluded an individual from receiving PIP benefits if the individual used a motor vehicle *that he or she took unlawfully* unless the individual reasonably believed he or she had the right to take and use it. *Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 599-600; 808 NW2d 1 (2010). Section 3113 provided in relevant part before the amendment:

> 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. [Emphasis added.]

The amendment subsequently removed the requirement that an individual must unlawfully take a vehicle and, instead, required that an individual either unlawfully take a vehicle *or* knowingly and willingly use an unlawfully taken vehicle. The amended version of § 3113 provides in relevant part:

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[2] 2014 PA 489.

> 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 willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.

Regarding the amended language, "[m]ost instructive is the fact that the Legislature included no express language regarding retroactivity." *Lynch & Co*, 463 Mich at 584. This is highly significant because "the Legislature . . . knows how to make clear its intention that a statute appl[ies] retroactively." *Id*.

Further, according to the Michigan Senate's Legal Analysis report, 2014 SB 1140 was written in response to this Court's holding in *Henry Ford*.[3] *Henry Ford* held that under the prior version of MCL 500.3113(a), only a person who had unlawfully taken a vehicle *and* used it could be excluded from no-fault benefits. *Henry Ford*, 288 Mich App at 603. The Court recognized that the Legislature's drafting may have resulted in an unintended consequence, but if the Legislature desired to not limit the preclusion of no-fault benefits to those who unlawfully took the vehicle, it was for the Legislature to amend the statute. See *id.* at 607-608. The Legislature thereafter responded and passed the amended version, which according to the legislative analysis "ensure[d] that a person who willingly uses a stolen vehicle at the time of a car accident and injury is not protected by no-fault." Senate Legislative Analysis, SB 1140, April 8, 2015.

The legislative history makes clear that the amendment was intended to ban from no-fault benefits those who knowingly use an unlawfully taken vehicle regardless of who unlawfully took the vehicle in the first place. Because this necessarily diminishes the rights of certain individuals otherwise eligible for no-fault benefits (i.e., those who only used a vehicle but did not unlawfully take it), we hold that the amendment can only be applied prospectively. See *Brewer v AD Transport Express, Inc*, 486 Mich 50, 58; 782 NW2d 475 (2010) (holding that the statute at issue was not retroactive where, among other things, the Supreme Court's prior interpretation of the statute triggered the amendment, the amendment otherwise imposed a new legal burden, and the Legislature did not indicate the amendment was retroactive); *Franks v White Pine Copper Div*, 422 Mich 636, 672; 375 NW2d 715 (1985) (remedial statutes may be applied retroactively unless they destroy, enlarge or diminish existing rights). Accordingly, the trial court erred when it retroactively applied the amended version of MCL 500.3113(a) when plaintiff's claims accrued under the prior version of the statute.

B. APPLICATION OF PRIOR VERSION OF MCL 500.3113(a)

[3] "In order to determine legislative intent, this Court may examine the legislative history of an act to ascertain the reason for the act and the meaning of its provisions." *Swan v Wedgwood Christian Youth & Family Servs Inc*, 230 Mich App 190, 197; 583 NW2d 719 (1998).

Thus, the governing version of MCL 500.3113(a) is the pre-amendment version:

> 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.

Defendant argues that plaintiff is barred from recovering no-fault benefits because as a matter of law those without driver's licenses (or those who are intoxicated) have no reasonable belief that they are entitled to use a vehicle. Thus, defendant focuses on the statute's language that "the person reasonably believed that he or she was entitled to take and use the vehicle." However, as this Court has explained, "It is the unlawful nature of the taking, not the unlawful nature of the use, that is the basis of the exclusion under § 3113(a)." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 426; 766 NW2d 878 (2009) (quotation marks and citations omitted), disagreed in part on other grounds *Rambin v Allstate Ins Co*, 495 Mich 316, 323 n 7; 852 NW2d 34 (2014). Consequently, "[w]hen applying § 3113(a), the first level of inquiry will always be whether the taking of the vehicle was unlawful. If the taking was lawful, the inquiry ends because § 3113(a) does not apply." *Henry Ford*, 288 Mich App at 599 (quotation marks and citation omitted).

The Michigan Supreme Court has held that to be considered an unlawful taking, the taking itself must be in violation of a provision of the Michigan Penal Code, MCL 750.1 *et seq.* *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 509, 537; 821 NW2d 117 (2012). Further, any such analysis must be done from the perspective of the driver, and not the vehicle's owner. *Ramblin*, 495 Mich at 323 n 7. Here, defendant does not cite to any violation of the Michigan Penal Code as to whether plaintiff unlawfully took the van. Instead, defendant claims that plaintiff unlawfully took the vehicle because he did not have permission from the van's actual owner because the van was purportedly stolen. We find that there is a question of fact on this matter, which bars the grant of summary disposition.

Defendant asserts that plaintiff's taking was unlawful because he never obtained permission from the van's owner, which defendant suggests was not Graham or Kay. But, when viewing the evidence in a light most favorable to plaintiff, the record, to date, does not prove that the van was stolen and, importantly, leaves open the question whether plaintiff knew that Graham lacked the authority to grant him permission to drive it. And for purposes of defendant's motion, we must view the evidence in a light most favorable to plaintiff, which means that defendant, on the record to date, failed to show that defendant knowingly drove a stolen vehicle.[4]

[4] Of course, a fact-finder at trial could find either way.

Accordingly, we hold that the trial court correctly determined that there is an open question which precludes the grant of defendant's motion for summary disposition.

IV. CONCLUSION

In sum, the trial court erred when it applied the current version of MCL 500.3113(a) retrospectively. Further, as the party moving for summary disposition, defendant had the initial burden of proof to show that there was no genuine issue of material fact. While defendant focused its proofs and arguments on whether plaintiff could reasonably have thought he was entitled to use the van, defendant failed to offer conclusive evidence that plaintiff took the van unlawfully. Accordingly, on this narrow legal issue, there is a genuine issue of material fact of whether plaintiff unlawfully took the van, and defendant's motion was properly denied.[5]

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Michael J. Riordan

[5] We are aware that this result appears absurd because it rewards criminal behavior. Perhaps, the Legislature will attend to this anomalous result.