STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE COMPANY, Plaintiff-Counterdefendant-Appellant,	UNPUBLISHED December 15, 2011
v CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Counterplaintiff-Appellee.	No. 298331 Oakland Circuit Court LC No. 2009-099025-CK

PROGRESSIVE MICHIGAN INSURANCE COMPANY, Plaintiff-Counterdefendant-Appellant,	
v CITIZENS INSURANCE COMPANY OF AMERICA, Defendant-Counterplaintiff-Appellee.	No. 299709 Oakland Circuit Court LC No. 2009-099025-CK

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Plaintiff-counterdefendant, Progressive Michigan Insurance Company ("Progressive"), appeals as of right the trial court's order granting summary disposition in favor of defendant-

counterplaintiff, Citizens Insurance Company of America ("Citizens"), and denying Progressive's competing motion for summary disposition.[1] We affirm.

On September 6, 2008, Doug Alt was severely injured in a single motor vehicle rollover accident. The vehicle involved in the accident, a 2001 Mercedes Benz, was purchased by Alt and titled in his name; however, the vehicle was insured by his parents, with whom Alt lived, through a policy issued by Citizens. Alt was merely a listed driver on the Citizens' policy. After receiving notice of the accident from Alt's parents, Citizens began providing personal protection insurance (PIP) benefits to and for the benefit of Alt. Subsequently, Citizens learned that Alt owned a truck, an International Harvester, utilized in his farming business and that Progressive provided commercial insurance for the truck under a policy listing "Doug Alt" as the "named insured." Alt testified that his farming business operated as a limited liability company – Doug Alt Farms, LLC – and that the farm truck was not titled or registered in the name of the LLC; rather, the truck was held in Alt's name personally. The commercial policy contained an endorsement for PIP coverage, and $126 of the total premium payment went toward the PIP coverage. In December 2008, Citizens notified Progressive that Progressive was responsible for the payment of PIP benefits pursuant to MCL 500.3114(1), and there is some evidence indicating that Progressive was initially in agreement with that assertion but then later changed its position. On March 11, 2009, Progressive filed a complaint for declaratory judgment to resolve the issue of priority as between the two insurance companies. In the prayer for relief, Progressive asked the trial court, in part, to declare that "Progressive does not owe Citizens any reimbursement as a matter of law" and that "Progressive does not owe Citizens any No-fault interest, costs or attorney fees as a matter of law." On February 1, 2010, after leave was granted by the trial court, Citizens filed a counterclaim, formally seeking reimbursement from Progressive for the payment of PIP benefits that Citizens had made to Alt.

Progressive filed a motion for summary disposition, asserting that it was not responsible for the payment of PIP benefits because it only issued a commercial policy on the farm truck and that vehicle was not involved in the accident. Progressive maintained that it could not be held responsible for a risk that it did not assume. Progressive also argued that Citizens' recoupment counterclaim was defeated by the one-year back rule in MCL 500.3145. Citizens opposed the motion and requested summary disposition in its favor, asserting that Progressive was the responsible insurer for purposes of priority under MCL 500.3114(1), where the Progressive policy was Alt's own policy, as he was the named insured. Citizens also argued that the one-year back rule did not apply because of Progressive's fraud and misrepresentations, where Progressive indicated, from December 2008 until the filing of the complaint, that it would pay the claim. The trial court granted Citizens' motion for summary disposition and denied Progressive's motion for summary disposition, finding that Progressive was first in priority

[1] In Docket No. 298331, Progressive appealed the trial court's written opinion and order regarding the motions for summary disposition. In Docket No. 299709, Progressive filed a claim of appeal regarding the final judgment entered in favor of Citizens. The appeals were consolidated by order of this Court.

under MCL 500.3114(1) to make the PIP payments. The court also ruled, absent elaboration, that the one-year back rule did not apply. Progressive appeals as of right.

Progressive first argues that the trial court's summary disposition decision was erroneous relative to responsibility and priority under MCL 500.3114. We disagree. The trial court's decision regarding a motion for summary disposition is reviewed de novo. *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). Issues concerning statutory interpretation are also reviewed de novo on appeal, *Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011), as are questions regarding the interpretation and construction of language in an insurance policy, *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007).

MCL 500.3114 provides in relevant part:

> (1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . . *When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer.*
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> (3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle. [Emphasis added; footnotes omitted.]

"The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature." *Amburgey v Sauder*, 238 Mich App 228, 231-232; 605 NW2d 84 (1999). The language of the statute reveals the legislative intent. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). A clear and unambiguous statute is not subject to judicial construction or interpretation. *Id*. Stated otherwise, when a statute plainly and unambiguously expresses the Legislature's intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id*.

MCL 500.3114(3) provides that an employee who suffers bodily injury while an occupant of a motor vehicle owned or registered by the employer shall receive PIP benefits from the insurer of the employment vehicle. Here, Alt did not incur his injuries while occupying the farm truck. Therefore, MCL 500.3114(3) cannot be invoked to order Progressive to pay PIP benefits. However, the general priority provision, MCL 500.3114(1), provides that "[w]hen personal protection insurance benefits or personal injury benefits . . . are payable to or for the

benefit of an injured person under his . . . own policy and would also be payable under the policy of his . . . relative, . . . the injured person's insurer shall pay all of the benefits and is not entitled to recoupment from the other insurer." The plain and unambiguous language of MCL 500.3114(1) indicates that if an injured person has PIP coverage pursuant to "his or her own policy," the injured person's insurer is solely responsible for the payment of PIP benefits. Alt had PIP coverage under his own policy, i.e., the Progressive policy pursuant to which he was the named insured; therefore, Progressive would be the responsible insurer consistent with the language of MCL 500.3114(1).

Progressive contends, however, that the trial court erred in finding that it was responsible for the payment of PIP benefits, where the farm truck was insured under a *commercial* policy, the truck was used solely for the farming business and operations in the context of an employment setting, and where Alt was not occupying the farm truck at the time of the accident. Progressive is extrapolating from MCL 500.3114(3) the proposition that if an insurer issued a commercial policy relative to a vehicle owned by an employer and that vehicle was not the vehicle occupied by an employee when the employee was injured in an accident, subsection (3) priority or responsibility is not implicated and, additionally, there can be no liability whatsoever for any benefits under the commercial policy.[2] Stated otherwise, it is Progressive's position that its commercial policy only exposes Progressive to a valid claim for benefits if all of the criteria in MCL 500.3114(3) are satisfied, which was not the case here. According to Progressive, commercial motor vehicle policies insure the identified motor vehicles, rather than an injured individual.[3]

Progressive's arguments necessarily read language into MCL 500.3114's priority provisions that the Legislature never included, and the arguments do not negate the applicability

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[2] As specifically framed by Progressive, "[w]here an employee is injured while occupying his employer's vehicle, the insurer of that vehicle is *always* responsible under § 3114(3). The necessary corollary to this is that the insurer of a commercial vehicle should *never* be responsible, per § 3114(3), where the business vehicle it insures *was not* occupied by the injured individual."

[3] In support of this proposition, Progressive cites *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 31-32; 800 NW2d 93 (2010), wherein the Court stated:

> "The exceptions in [MCL 500.3114(2)] and (3) relate to 'commercial' situations. It was apparently the intent of the Legislature to place the burden of providing no-fault benefits on the insurers of these motor vehicles, rather than on the insurers of the injured individual. This scheme allows for predictability; coverage in the 'commercial' setting will not depend on whether the injured individual is covered under another policy. A company issuing insurance covering a motor vehicle to be used in a (2) or (3) situation will know in advance the scope of the risk it is insuring. The benefits will be speedily paid without requiring a suit to determine which of the two companies will pay what is admittedly due by one of them." [Citations omitted.]

of MCL 500.3114(1) under the particular facts of this case, where, once again, the Progressive policy listed Alt as the named insured, making it Alt's own policy, even though Alt was employed by Doug Alt Farms, LLC. MCL 500.3114(1) does not contain any qualifying language regarding the type of policy at issue; there is no mention of an exception for a policy that is labeled "commercial." Progressive acknowledges that the farm truck was not titled or registered in the name of Doug Alt Farms, LLC, and that the LLC was not listed as the named insured in the Progressive policy. Recognizing that these facts are problematic, Progressive argues that, given that a commercial policy was involved and that the farm truck was only used for farming operations conducted by the LLC, we must employ the latent ambiguity doctrine, such that "Doug Alt Farms, LLC, should be considered the named insured under [Progressive's] commercial policy, as this was clearly the intent of the parties at the time the contract for insurance was created." This would mean, of course, that the policy could not be deemed Alt's "own policy" for purposes of the priority trigger in MCL 500.3114(1). Progressive is insistent that its policy was not a personal no-fault policy and that making Progressive pay PIP benefits would be holding it liable for a risk that it never assumed. Citizens counters that the commercial policy issued by Progressive, consistent with the policy's various definitions, contemplated that the named insured could be a natural person, here Alt, thereby making the policy his own policy. In reply, Progressive does not contend that the policy precluded a natural person from being the named insured; rather, it maintains that, to the extent that the policy allowed a named insured to be a natural person, an employer can be a natural person and the policy issued by Progressive was "for the purposes of . . . Alt's employment as a self-employed farmer."[4]

We decline to invoke the latent ambiguity doctrine. A latent ambiguity arises when contractual language appears to be clear and intelligible, suggesting only a single meaning, but there is evidence outside the contract itself creating the necessity for interpretation or a choice among two or more potential meanings. *Shay v Aldrich*, 487 Mich 648, 668; 790 NW2d 629 (2010). The *Shay* Court recognized that in the context of an insurance contract, outside or parol evidence creating a doubt as to which person was to receive the benefit of an insurance policy can support application of the latent ambiguity doctrine, even though a specific person was clearly named as the beneficiary in the policy. *Id.* at 669. Here, Progressive claims that Doug Alt Farms, LLC, should be deemed the named insured given the surrounding circumstances and despite the fact that Alt himself was clearly listed as the named insured in the policy. Although Progressive accurately indicates that the farm truck was used solely for purposes of conducting the business and that the policy was labeled a commercial policy, the farm truck, for whatever reason, was nonetheless titled in Alt's name personally, not the LLC's, and Progressive never elicited testimony from Alt, or any of its own agents for that matter, that Alt was mistakenly listed as the named insured and that the LLC should have been the named insured. Taking this into consideration in conjunction with the fact that Progressive never expressly raised the latent ambiguity doctrine below, we decline to invoke the doctrine.

[4] We note that, if Alt was listed as the named insured by Progressive because of his perceived status as a self-employed farmer, it does not take the policy outside the realm of MCL 500.3114(1), where it would still be Alt's own policy pursuant to which PIP benefits were payable to the injured Alt.

Progressive next argues that the trial court erred in holding that the one-year back rule contained in MCL 500.3145 did not apply. Under MCR 2.203(E), "[a] counterclaim . . . must be filed with the answer or filed *as an amendment* in the manner provided by MCR 2.118." (Emphasis added.) Citizens did not file a counterclaim with its answer on May 5, 2009; therefore, it could only file the counterclaim "as an amendment," which would necessarily mean an amendment of or to the answer, under MCR 2.118. "An amendment that adds a claim . . . relates back to the date of the original pleading if the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." MCR 2.118(D). A "pleading" includes "an answer to a complaint." MCR 2.110(A)(5). Citizens' amendment of its answer added a claim – a counterclaim. The answer addressed Progressive's declaratory judgment action, which concerned the determination of the responsible insurer relative to the payment of PIP benefits to and for the benefit of Alt and whether Citizens was entitled to reimbursement. Citizens' counterclaim regarded its alleged right to recoupment of payments from Progressive as to benefits mistakenly paid to Alt. Thus, the counterclaim arose out of the conduct, transaction, and occurrence addressed in Citizens' answer to Progressive's complaint. Accordingly, under MCR 2.118(D), Citizens' counterclaim related back to the date that its answer was filed, May 5, 2009, which was eight months after the accident occurred, thereby satisfying MCL 500.3145. See *Miller v Chapman Contracting*, 477 Mich 102; 730 NW2d 462 (2007).

Moreover, we find that an action was effectively commenced for purposes of the timelines in MCL 500.3145 when Progressive filed suit. As indicated earlier, in the prayer for relief, Progressive asked the trial court, in part, to declare that "Progressive does not owe Citizens any reimbursement as a matter of law" and that "Progressive does not owe Citizens any No-fault interest, costs or attorney fees as a matter of law." The issue of recoupment was necessarily subsumed by the declaratory judgment action. Regardless of the counterclaim, the issues concerning whether Citizens was entitled to recoup PIP payments and the amount of recoupment, as well as questions with respect to costs and attorney fees, were already squarely before the court when Progressive filed suit, which was approximately six months after the accident. "Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment." MCR 2.605(F). "[U]nder MCR 2.605(F), a court is empowered to grant money damages as are necessary or proper in a declaratory judgment action." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90; 535 NW2d 529 (1995). Accordingly, given the nature of Progressive's complaint, the court determinations that would have to be made in resolving the complaint, and considering the associated available relief, we find that MCL 500.3145 did not preclude recovery by Citizens, even though Progressive initiated the suit.

Affirmed. Having prevailed in full, we award taxable costs to Citizens pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens