STATE OF MICHIGAN

COURT OF APPEALS

IAN McPHERSON,

Plaintiff-Appellee,

v

CHRISTOPHER McPHERSON and AAA AUTO CLUB GROUP INSURANCE COMPANY,

Defendants,

and

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellant,

and

AUTO CLUB INSURANCE ASSOCIATION MEMBER SELECT INSURANCE COMPANY and AUTO CLUB INSURANCE COMPANY,

Defendants/Cross-Defendants.

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UNPUBLISHED
January 10, 2012

No. 299618
Oakland Circuit Court
LC No. 2008-09526-NI

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

K. F. KELLY (*dissenting).*

While I agree with my colleagues that the trial court properly denied summary disposition pursuant to MCR 2.116(C)(8), I believe that the trial court erred in failing to grant summary disposition pursuant to MCR 2.116(C)(10). I would hold that Ian McPherson is foreclosed from seeking first-party benefits by MCL 500.3113(b).

I. BASIC FACTS

On November 25, 2007, Ian was a passenger in a car driven by his brother, Christopher McPherson. They were involved in a single-car collision. The airbags deployed and Ian remembers hitting his head. The next day, Ian experienced a seizure and woke up in the hospital. The treating physician opined that Ian's genetic predisposition to seizure disorders, his use of Adderal to control symptoms of ADHD, as well as the trauma of hitting his head, caused a gran mal seizure. At the time, Progressive was the insurer of the vehicle and paid no-fault benefits related to the accident. Progressive received a physician's statement that Ian's seizure was "solely related to" the accident.

Ian was involved in a second accident on September 19, 2008. He was riding his uninsured motorcycle when he experienced a similar sensation to his other seizure. He blacked out, traversed four lanes of traffic, and struck a parked vehicle. Ian was rendered a quadriplegic as a result of the accident. For purposes of this appeal, it is assumed as fact that Ian's second seizure was consistent with post-traumatic seizure disorder brought on by the first accident.

Ian sued Progressive for benefits, arguing that the seizure disorder caused the loss of control of his uninsured motorcycle and, therefore, arose out of the first accident. Progressive moved for summary disposition, arguing that Ian was not entitled to benefits because he was an uninsured motorcyclist at the time. The trial court denied the motion, finding that "viewing the evidence in a light most favorable to plaintiff it is possible for a reasonable juror to determine the second accident was caused by the injuries suffered in the first. I'm not saying it's the best case and I'm not saying that you will necessarily prevail, but it does survive a summary disposition."

This Court initially denied Progressive's application for leave to appeal, *McPherson v McPherson*, unpublished order of the Court of Appeals, entered September 21, 2010 (Docket No. 299618), but later granted Progressive's motion for reconsideration. *McPherson v McPherson*, unpublished order of the Court of Appeals, entered November 1, 2010 (Docket No. 299618).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; —— NW2d —— (2011). A motion made under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Medical Center v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *Id.*

This Court reviews de novo questions of law in general, including matters of statutory construction. *Loweke*, 489 Mich at 162. This Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548–549; 685 NW2d 275 (2004). In so doing, the Court must begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). It is axiomatic that the words contained in the statute provide the most reliable evidence of the Legislature's intent. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 163; 744 NW2d 184 (2007). The Legislature is presumed to have intended the meaning it plainly expressed and clear statutory language must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007); *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 72 (2007). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Lash*, 479 Mich at 187; *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). Only if a statute is ambiguous is judicial construction permitted. *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 449; 770 NW2d 117 (2009).

III. ANALYSIS

Michigan's no-fault insurance act, MCL 500.3101 *et seq*., directs that every "owner or registrant of a motor vehicle required to be registered in this state shall" carry personal protection insurance. MCL 500.3101(1). "Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury *arising out of* the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter . . . without regard to fault." MCL 500.3105(1) and (2) (emphasis added). The majority reads the phrase "arising out of" to find that the paraplegia Ian suffered in the 2008 accident "originated from," "had its origin in," "grew out of," or "flowed from" the earlier 2007 accident because it was the 2007 accident that caused the seizure disorder which, in turn, caused the 2008 accident. I do not believe such an analysis is relevant under the circumstances.

Despite the fact that the no-fault act is free from a "causation" analysis, the majority focuses on the cause of the accident – Ian's seizure. Instead, the focus must be on MCL 500.3113(b) and whether no-fault benefits are unavailable to Ian as a matter of law because he was operating an uninsured motorcycle at the time he suffered the injuries for which he now seeks coverage.

Section 3113(b) 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 . . . The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect." There is no question that Ian's paraplegia is the bodily injury for which he seeks benefits. There is also no question that the motorcycle crash caused his paraplegia. Finally, there is no question that he owned the motorcycle and was required to obtain

insurance under MCL 500.3103(1)[1]. The majority spends very little time discussing the exclusion in § 3113(b), stating only that it rejects the argument that *DeSot v ACIA*, 174 Mich App 251; 435 NW2d 442 (1988), compels a finding that Ian is disqualified from coverage.

In *DeSot*, a motorcyclist was killed in an accident with an uninsured vehicle. Although the decedent had two no-fault insurance policies for the family's two other cars, the motorcycle was not covered under either policy. The decedent's wife sought no-fault survivors' benefits from ACIA. The trial court granted summary disposition in favor of ACIA, finding that § 3113(b) precluded coverage because the decedent failed to obtain the statutorily required insurance. *DeSot*, 174 Mich App at 252-253. This Court affirmed, finding that "survivors' no-fault benefits are derivative of the decedent's right of recovery and that the language of § 3113(b) which would have precluded the decedent's claim also disqualifies the claim of the survivors." *Id.* at 254. This Court reiterated that "[t]his statutory provision represents a legislative policy to deny benefits to those whose uninsured vehicles are involved in accidents." *Id.* at 256. Because § 3113(b) would have disqualified the decedent from benefits had he lived, his survivors were likewise precluded from coverage. *Id.* at 257. Although the majority concludes that "*DeSot* neither controls the outcome in this case nor provides helpful authority," I disagree. While it is true that the plaintiff in *DeSot* did not raise a claim that the injury related to a separate prior accident, *DeSot* clearly finds that § 3113(b) denies coverage to those individuals who act in utter defiance of the statutory mandate that they obtain and maintain insurance coverage for their motorcycles.

Ian argues (and the majority accepts) that he does not seek to recover for injuries he sustained in the 2008 accident (paraplegia); rather, he seeks to recover for the injury he sustained in the 2007 accident (seizure disorder), which resulted in the paraplegia sustained in the second accident. That is an intellectually disingenuous and circular argument. Distilled to its essence, Ian is only seeking benefits for his spinal cord injury. Because there was no question that Ian was operating an uninsured motorcycle *at the time he sustained the injuries* ***for which he seeks coverage***, the trial court erred in failing to grant Progressive summary disposition.

Again, at the time of Ian's spinal cord injury, there was no question that he owned and operated a motorcycle that was not insured as required by the no-fault act. While operating this uninsured motorcycle, he was involved in an accident that rendered him a paraplegic. Section 3113(b) clearly provides that an individual operating an uninsured motorcycle is not entitled to first-party benefits. The attempt to draw a connection to the 2007 not only ignores the clear mandate of § 3113(b), but also requires a discussion of causation and fault – neither of which is relevant under our no-fault statute. Nothing relieved Ian of his legal obligation to insure his

[1] MCL 500.3103(1) provides: "An owner or registrant of a motorcycle shall provide security against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by a person arising out of the ownership, maintenance, or use of that motorcycle. The security shall conform with the requirements of section 3009(1)."

motorcycle. It was being illegally operated on a public highway at the time of the accident. Ian was required to insure his motorcycle under MCL 500.3103(1), and because he failed to do so, he is not entitled to PIP benefits pursuant to MCL 500.3113. I would reverse.

/s/ Kirsten Frank Kelly