STATE OF MICHIGAN

COURT OF APPEALS

HENRY FORD HEALTH SYSTEM,

Plaintiff-Counterdefendant-Appellant,

v

ESURANCE INSURANCE COMPANY,

Defendant-Counterplaintiff-Appellee,

and

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant.

FOR PUBLICATION
June 8, 2010
9:10 a.m.

No. 288633
Wayne Circuit Court
LC No. 07-702050-NF

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

MURPHY, C.J.

Plaintiff Henry Ford Health System provided medical services to Travion Hamilton, who was severely injured when a stolen Jeep Cherokee in which he was a passenger struck a utility pole. Plaintiff filed this action against defendant Esurance Insurance Company (Esurance), the insurer of the stolen vehicle, to recover the cost of Hamilton's medical treatment as a no-fault benefit.[1] Relying on MCL 500.3113(a), Esurance denied liability, arguing that Hamilton, and thus plaintiff, was not entitled to no-fault benefits because at the time of the accident Hamilton was using the Jeep knowing it to be stolen. The trial court denied the parties' cross motions for summary disposition, and the case proceeded to trial. The jury found that Hamilton was using the Jeep at the time of the accident, that he had unlawfully taken the vehicle, and that Hamilton

[1] Plaintiff also sued Citizens Insurance Company of America (Citizens), which had been assigned the case by the Michigan Assigned Claims Facility. After the trial court determined that Esurance had no-fault priority over Citizens, the action against Citizens was dismissed. Citizens is not a party to this appeal.

did not reasonably believe that he was entitled to take and use the Jeep. Accordingly, the trial court entered a judgment of no cause of action in favor of Esurance. Plaintiff appeals as of right. We hold that the trial court erred in denying plaintiff's motion for summary disposition because there was an absolute dearth of evidence that Hamilton was using a motor vehicle that "he . . . had taken unlawfully," MCL 500.3113(a). We thus reverse and remand for entry of judgment in favor of plaintiff.

I. FACTS

The documentary evidence indicated that Hamilton's girlfriend, Chanda Profic, borrowed a 1999 Jeep Cherokee from an acquaintance for a small fee knowing that it had earlier been stolen. There is no dispute that the Jeep had been stolen from its owner, and there is no claim that Hamilton participated in directly taking the vehicle from the owner. Profic was not provided with keys to operate the vehicle. The Jeep's ignition cylinder had been removed by damaging the housing on the steering column. The door lock on the driver's side was also missing. The vehicle was given to Profic with the engine running, and she did not know how to turn it off or restart it. Profic, who did not have a driver's license or own her own vehicle, later picked up Hamilton in the vehicle, and the two of them drove around and used the vehicle for three to five hours. During this period, Profic and Hamilton stopped several times to visit friends or to go inside a store, and they would leave the Jeep unattended with the engine running during these stops. During one stop, a friend turned the engine off and had to restart the vehicle for Profic because she did not know how to start it without a key. Hamilton never operated or drove the Jeep but simply rode along as a passenger. Profic and Hamilton were later involved in an accident when the vehicle struck a utility pole, causing severe and permanent injuries to Hamilton. Hamilton did not have any automobile insurance of his own.

The trial court entertained cross motions for summary disposition in which the parties presented a variety of arguments, including plaintiff's argument that there was no evidence that Hamilton himself had taken the vehicle unlawfully and thus the exception to no-fault coverage under MCL 500.3113(a) was not implicated. The trial court denied the motions, finding that there were genuine issues of material fact that precluded summary disposition in favor of either party. The case proceeded to trial, and a judgment of no cause of action was entered predicated on the jury's verdict. The jurors found that Hamilton was using the Jeep at the time of the accident, that he had unlawfully taken the vehicle, and that Hamilton did not reasonably believe that he was entitled to take and use the Jeep. Plaintiff appeals as of right.

II. ANALYSIS

Plaintiff argues, in part, that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(10), where it was entitled to its claim for payment as a matter of law given that there was a complete absence of evidence that Hamilton himself had taken the stolen vehicle, let alone taken it unlawfully. We agree.

A. STANDARD OF REVIEW AND PRINCIPLES GOVERNING MCR 2.116(C)(10)

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Also reviewed de novo are issues of statutory interpretation. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court is not permitted to assess credibility, to weigh the evidence, or to determine facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

B. PRINCIPLES OF STATUTORY CONSTRUCTION

In *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009), this Court set forth the well-established principles of statutory construction:

> Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute. We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. This Court must avoid a construction that would render any part of a statute surplusage or nugatory. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. [Citations and quotation marks omitted.]

C. DISCUSSION

Under the no-fault act, MCL 500.3101 *et seq*., and with respect to personal protection insurance (PIP) benefits, "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 [the act]." MCL 500.3105(1). In regard to PIP benefits, they are payable for, in part, "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). Esurance argues that Hamilton was barred from recovering no-fault PIP benefits under MCL 500.3113(a), which 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:
>
> (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.]

Plaintiff argues that Hamilton never engaged in the act of "taking" the Jeep from anyone; rather, it had already been "taken" by the time he hopped into the vehicle and rode along as a passenger.

Addressing the language of MCL 500.3113(a), this Court in *Amerisure Ins Co v Plumb*, 282 Mich App 417, 425; 766 NW2d 878 (2009), observed:

> Thus, PIP benefits will be denied if the taking of the vehicle was unlawful and the person who took the vehicle lacked "a reasonable basis for believing that he [or she] could take and use the vehicle." *Bronson Methodist Hosp v Forshee*, 198 Mich App 617, 626; 499 NW2d 423 (1993). When 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.

We would add that the inquiry into whether § 3113(a) is implicated must also necessarily entail whether the injured individual seeking coverage "took" the vehicle or engaged in the "taking" of the vehicle.

The terminology "taken" or "had taken," as used in § 3113(a), is not defined in the statutory scheme. With respect to statutory language, "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language." MCL 8.3a. The word "taken" is the past participle of "take." In *Plumb*, the panel construed the word "take" as found in the "take and use" clause of § 3113(a).[2] *Plumb*, 282 Mich App at 428. The Court stated that "take" means to get something into one's hands or possession through a voluntary action. *Id.* This would necessarily involve either a transfer of possession or control of an object from one person to another or the gaining of possession or control of an unattended object that is not in anyone's control or possession. And the words "had taken" reflect a past or completed action. Accordingly, § 3113(a) envisions an accomplished or completed taking of the motor vehicle followed by its use during which the accident occurs giving rise to injuries.

Here, Hamilton never engaged or participated in an act through which he took possession or gained control of the Jeep. There was no act transferring possession or control of the Jeep from Profic or others to Hamilton, nor did Hamilton take possession or control of a vehicle that

---

[2] In § 3113(a), the exception bars a person from recovering PIP benefits "unless the person reasonably believed that he or she was entitled to *take and use* the vehicle." (Emphasis added.)

was unattended and not within anyone's control or possession. He never "took" the Jeep from anyone or anyplace. On the documentary evidence presented, we cannot find that he "had taken" the vehicle, let alone that he took it unlawfully. Rather, the thief who directly took the Jeep away from the owner or possibly Profic would most accurately be described as having taken the vehicle, and then Hamilton merely joined in relative to the "use" of the Jeep; a Jeep that had already been taken. The taking was complete by the time Hamilton came into the picture, and he thereafter never took control or possession of the vehicle away from Profic.

One might argue that Hamilton aided and abetted Profic or the initial thief in an ongoing taking such that it could be said that he "had taken" the Jeep. However, this argument would circumvent the statutory language and is inconsistent with the words "had taken," which reflect a completed act. Once Profic or the initial thief took or gained control and possession of the Jeep, the taking was complete. The ongoing-taking argument would also be inconsistent with § 3113(a)'s separate treatment of the words "using" and "taken." Again, MCL 500.3113(a) precludes the recovery of PIP benefits when the person seeking those benefits "*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.) Certainly, there can be no reasonable dispute that Hamilton was "using" or making use of the Jeep as a passenger for purposes of transportation when the accident occurred, but, for the reasons stated above, he was not involved in the taking of the vehicle. Had the Legislature intended to preclude receipt of benefits by an injured person under the circumstances presented here, it could simply have provided that PIP benefits are not recoverable by a person who was using a motor vehicle "which he or she had taken *or was using* unlawfully." Stating that a person "had taken" a vehicle is not synonymous with saying that a person had "used" the vehicle; the terms have different meanings. Indeed, this is reflected in the language of the statute itself, wherein § 3113(a) provides that the exception to coverage does not apply in situations in which the person "reasonably believed that he or she was entitled to *take and use* the vehicle." (Emphasis added.) This language shows that a person must both take and use a vehicle, which is also consistent with the preceding language in § 3113(a) that speaks of "using" a vehicle that a person "had taken." Hamilton used the Jeep, but he did not take the Jeep.

Our construction is consistent with the *Plumb* panel's discussion of the "take and use" clause:

> *Random House Webster's College Dictionary* (1997) defines the word "take" as "to get into one's hands or possession by voluntary action" and the word "use" as "to employ for some purpose; put into service[.]" Clearly, the terms "take" and "use" are not interchangeable or even synonymous; obtaining possession of an object is very different from employing that object or putting it into service. The term "and" is defined as a conjunction, and it means "with; as well as; in addition to[.]" When given its plain and ordinary meaning, the word "and" between two phrases requires that both conditions be met. . . . Construing the word "and" as a conjunction does not give the text of § 3113(a) a dubious meaning. On the contrary, it is clear that it requires a driver who obtains a vehicle unlawfully to have (1) a reasonable belief that he or she was entitled to *take* the vehicle and (2) a reasonable belief that he or she was entitled to *use* the vehicle. The statute does not contain any clear legislative intent that the term "and" was

> meant to be applied as providing a choice or alternative between taking the vehicle and using the vehicle. . . . Therefore, in circumstances in which the vehicle was unlawfully taken, the injured party may obtain PIP benefits only if it can be shown (1) that the injured party reasonably believed that he or she was entitled to take the vehicle *and* (2) that the injured party reasonably believed that he or she was entitled to use the vehicle. [*Plumb*, 282 Mich App at 428-429 (citations omitted; alterations in original).]

Accordingly, Hamilton's mere use of the vehicle as a passenger did not establish that he "had taken" the vehicle, which is a prerequisite for imposition of the coverage exception in § 3113(a). The vehicle must be one that the injured person was "using" *and* one which the person "had taken." We have use, not a taking.

The case law does not conflict with our resolution of this case. In *Mester v State Farm Mut Ins Co*, 235 Mich App 84; 596 NW2d 205 (1999), three young girls skipped school and went looking for a vehicle with keys in it so that they could take the vehicle and drive away from the area. The Court then described what happened next:

> Amanda . . . found a truck parked with keys inside and got into the driver's seat. Jessica[3] got into the passenger seat, Edelfina got into the back seat, and Amanda drove the vehicle away.
>
> The girls used the truck to go to the upper peninsula, stopping occasionally to purchase gas and to take turns driving the truck in a field. After running out of money, the girls used the truck to return to the lower peninsula on I-75 and headed back toward Cass City. At approximately 1:00 A.M. on the morning of March 25, the girls were spotted in the truck by a police officer in the village of Reese. A chase ensued, and Amanda refused to pull over despite the pleas of Edelfina and Jessica for her to stop. The truck went out of control during the chase, resulting in a roll-over collision that killed Edelfina and injured Jessica and Amanda. [*Id.* at 85-86.]

The plaintiff filed suit seeking to recover no-fault PIP benefits, and the trial court granted the defendant State Farm's motion for summary disposition, finding "that there was no question of fact that Jessica was actively involved in unlawfully taking the truck and driving it away." *Id.* at 86. This Court affirmed, holding:

> An unlawful taking does not require an intent to permanently deprive the owner of the vehicle to constitute an offense. Indeed, the offense of unlawfully driving away a motor vehicle, MCL 750.413; MSA 28.645, a felony commonly referred to as "joyriding," requires an intent to take or drive the vehicle away but not to steal the vehicle. The offense requires the specific intent to take possession of the vehicle unlawfully, and punishes conduct that does not rise to the level of

---

[3] The lawsuit was pursued by Jessica's mother as her next friend. *Mester*, 235 Mich App at 85.

> larceny where an intent to permanently deprive the owner of the property is lacking. Had the Legislature intended to exempt from subsection 3113(a) all joyriding incidents, it would have chosen a different term than "unlawful taking," such as "steal" or "permanently deprive." Instead, the Legislature chose a term that encompasses the offense of joyriding. As explained above, the justices of the Supreme Court who recognized a joyriding exception in the *Priesman* [*v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992),] case did so not because joyriding does not involve an unlawful taking, but only because of special considerations attendant to the joyriding use of a family vehicle by a family member. Those considerations do not warrant expansion of the exception beyond the family context.
>
> Here, on the basis of Jessica's deposition testimony, there is no question of fact that Jessica participated in the unlawful taking of the truck, without permission and without any reason to believe that she was entitled to take or use the truck. On these undisputed facts, the clear intent of the Legislature was to deny the payment of no-fault PIP benefits. Hence, summary disposition was properly granted under MCR 2.116(C)(10). [*Mester*, 235 Mich App at 88-89 (citations omitted).]

As is readily apparent, *Mester* is distinguishable from the facts here because Jessica actually participated in the act of taking the parked truck, along with the two other girls, and once they "had taken" the vehicle, she was injured while "using" the truck. Jessica engaged or participated in an act through which she and the others took possession or gained control of the unattended truck. That is simply not the case in the instant action.

With respect to the joyriding discussion in *Mester*, it does not have any implication here because the discussion was focused on the question whether the taking was unlawful, not on whether there was a taking in the first place. While Hamilton may well indeed have been guilty of joyriding under MCL 750.414 for the mere unauthorized "use" of the Jeep, § 3113(a) requires a taking by the person seeking PIP benefits and not just mere use.

In *Plumb*, 282 Mich App 417, this Court held that summary disposition in favor of the no-fault insurer was proper where the injured motorist seeking PIP benefits, Plumb, unlawfully took the vehicle involved in the underlying accident, and where Plumb did not have a reasonable belief that she was entitled to use the vehicle within the meaning of § 3113(a). The court described the facts of the case as follows:

> Plumb arrived at a bar near Caro, Michigan, about 11:30 p.m. one evening, socializing and consuming alcohol with several men. A couple of hours later, David Shelton drove a Jeep Cherokee to the same bar and parked it in the parking lot. Shelton did not maintain insurance on the Jeep, and although he had entered into an agreement to purchase the Jeep several months earlier, he was not the titled owner. Shelton left his keys in the Jeep, and he did not usually lock his car doors. Plumb and Shelton did not know one another, and during the time they were both in the bar, they never spoke to one another. Shelton did not give Plumb the keys or permission to drive the Jeep, and she did not receive the keys or permission from the titled owner. Plumb left the bar with two men, one of whom

> she described as Caucasian and wearing a baseball cap and a goatee. Plumb claimed that the unidentified man with the baseball cap and goatee handed her the keys to the Jeep and asked her to drive because he was on probation. Plumb, who did not maintain automobile insurance and did not reside with a relative who carried automobile insurance, was intoxicated, and her driver's license had been suspended. Shelton left the bar shortly after Plumb and discovered that the Jeep was missing.
>
> Later that morning, Plumb was found lying in a field near the bar, having sustained severe burn injuries. In a deep drainage ditch about 250 yards away from Plumb, the police found Shelton's Jeep, which had been totally consumed by fire. Plumb suffers from a closed-head injury and posttraumatic stress disorder and does not recall all the events leading up to the accident or the accident itself. The police determined that the Jeep had been driven away from the bar across a mowed field and an unmowed hayfield, struck an electric transformer, and ultimately crashed into the drainage ditch. In the mowed field near the parking lot, there were several other sets of tire tracks. The police concluded that Plumb had been driving the Jeep and was its sole occupant. [*Plumb*, 282 Mich App at 420-421.]

Plumb is distinguishable from the facts here because it was uncontested that Plumb engaged or participated in an unlawful taking when she took possession or gained control of the vehicle and drove it away. Here, again, Hamilton never took the Jeep.

In *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 246; 570 NW2d 304 (1997), the injured person for whom PIP benefits were sought "telephoned his mother at work, asked her permission to use her car, and she refused. Nevertheless, [he] took the car keys from his parents' mobile home, drove the car, and was involved in an accident in which he sustained injuries[.]" In *Bronson Methodist Hosp*, 198 Mich App at 620-621, the injured person seeking PIP benefits had taken possession and control of a vehicle that had earlier been driven by a friend, who took over the driving from yet another friend, who in turn had been stopped and arrested on a probation violation. In *Landon v Titan Ins Co*, 251 Mich App 633, 635-636; 651 NW2d 93 (2002), the injured person seeking PIP benefits drove off in a vehicle owned by a friend who, by agreement, had parked the car on the injured person's property for purposes of selling the vehicle. In *Butterworth Hosp* and *Bronson Methodist Hosp*, this Court ultimately held that the insured motorists were entitled to PIP benefits, and in *Landon*, the Court held that the trial court erred as a matter of law in finding that the injured person unlawfully took her friend's vehicle. But even had the panels ruled against the injured motorists, the cases clearly involved injured persons who "had taken" a motor vehicle, which is not the case here.

It is certainly arguable, on a practical level, that it makes little sense to distinguish between a thief or joyrider who directly participates in the taking of a motor vehicle and a person who, while not involved in the taking of the vehicle, later uses the vehicle for his or her benefit knowing it to be stolen. It is clear that the Legislature in drafting the statute was focused on the person or persons engaged in taking a motor vehicle for purposes of the PIP-benefits exclusion, apparently without contemplating scenarios in which other persons may also have been involved in criminal activity associated with the use of the vehicle. We cannot, however, go beyond the words of § 3113(a), and if the Legislature desires to preclude an award of PIP benefits to persons

engaged in criminal activity who did not "take" a motor vehicle, it is for the Legislature to amend the statute. It is certainly not within our authority to do so.

III. CONCLUSION

The trial court erred in denying plaintiff's motion for summary disposition under MCR 2.116(C)(10) because there was no evidence that Hamilton was using a motor vehicle that "he . . . had taken unlawfully," MCL 500.3113(a). In light of our ruling, it is unnecessary to reach plaintiff's alternative arguments.

Reversed and remanded for entry of judgment in favor of plaintiff. We do not retain jurisdiction. Having prevailed in full, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens