

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

TODD MORRIS, SPECTRUM HEALTH  
HOSPITALS, and MARY FREE BED  
REHABILITATION HOSPITAL,

Plaintiffs-Appellees,

v

PROGRESSIVE MICHIGAN INSURANCE  
COMPANY and PROGRESSIVE MARATHON  
INSURANCE COMPANY,

Defendants-Appellants,

and

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, MICHIGAN  
ASSIGNED CLAIMS PLAN, MICHIGAN  
AUTOMOBILE INSURANCE PLACEMENT  
FACILITY, and JOHN DOE INSURANCE  
COMPANY,

Defendants.

---

Before: K. F. KELLY, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

Defendants Progressive Michigan Insurance Company and Progressive Marathon Insurance Company (collectively “Progressive”) appeal as of right the trial court’s grant of summary disposition to plaintiffs under MCR 2.116(C)(10). The trial court held that there was no genuine issue of material fact and plaintiff Todd Morris was entitled to personal-protection-insurance (PIP) benefits from Progressive under MCL 500.3113(a). The trial court further

UNPUBLISHED  
June 11, 2020

No. 350214  
Kent Circuit Court  
LC No. 18-009887-NF

awarded plaintiffs their reasonable attorney's fees under MCL 500.3148 because Progressive unreasonably denied Morris's claim for PIP benefits.<sup>1</sup> We affirm.

## I. BACKGROUND

On November 11, 2017, plaintiff Todd Morris was involved in an auto accident in which he suffered injuries requiring medical treatment. Plaintiffs Spectrum Health Hospitals and Mary Free Bed Rehabilitation Hospital provided medical care to him after the accident. Plaintiffs brought this lawsuit against defendants, seeking PIP benefits. For clarity, when necessary to distinguish between the plaintiffs, we refer to Spectrum Health and Mary Free Bed as the medical-provider plaintiffs.

Morris filed a claim for PIP benefits with Progressive, the insurer of the vehicle he was driving when the accident occurred. When evaluating Morris's claim for PIP benefits, Progressive conducted examinations under oath of Kathy Montuoro, Mark Montuoro, and Morris, and the facts presented to the trial court, as well as to this Court, came from those examinations. To avoid confusion, because some of the individuals involved in this action share the same last name, we refer to them by their first names.

*The Montuoro Estate.* Joe and Kathy Montuoro were married for many years, and shared two teenage children in common, but they divorced in 2013. In October 2017, Joe passed away, and his brother Mark was appointed as personal representative of his estate. In his will, Joe left all of his belongings to the teenage children whom he shared in common with Kathy. Because Mark lived in New Jersey and Joe's possessions were in Michigan, Mark asked Kathy to assist him in wrapping up the estate. This involved removing all of Joe's possessions from his house and liquidating or disposing of them. Kathy testified that Mark never traveled to Grand Rapids, and he placed her in charge of all the work necessary to wrap up the estate. According to Kathy, Mark told her that everything in Joe's house belonged to her children, and he asked her to remove everything of value from the house before contractors came to perform repairs.

*The Vehicle.* One of Joe's possessions was a Mercedes Benz that was equipped with an interlock device. Kathy testified that she advised Mark that she was going to move the Mercedes Benz from Joe's house to her house, until they decided what to do with it. Kathy further testified that, when she attempted to start the Mercedes Benz for the first time, she was unable to do so because the battery was dead. After two days of charging the battery, Kathy was able to start the vehicle, and it was driven to her house and parked in her driveway. Kathy testified that she discussed the Mercedes Benz and its interlock device with Mark on at least two occasions, and that she took the vehicle to a service facility where the device was removed.

Although Mark testified that he intended to sell the Mercedes Benz and give the proceeds to Joe and Kathy's children, Kathy stated that Mark never told her that he intended to sell the

---

<sup>1</sup> The parties stipulated to the dismissal of claims against State Farm Mutual Automobile Insurance Company, and the trial court granted summary disposition to the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility. Claims against these defendants are not at issue in this appeal.

vehicle. Mark admitted knowing that the Mercedes Benz was equipped with an interlock device, and he admitted speaking with Kathy once about the device, but he did not remember the details of the conversation. Mark conceded that the vehicle was fairly low on his list of priorities, and he was more concerned with making repairs to Joe's house.

Mark testified that he did not know, before the accident, that Kathy had moved the Mercedes Benz from Joe's house to her own house, or that she was using the car. He testified, however, that he "assumed she had access to the car" because it was at Joe's house and Kathy had "access to the house and everything that was in it," including the Mercedes Benz. Mark stated that he and Kathy "never had any discussion about the car. You know, I didn't tell her she could or she couldn't use it. It just never was, you know, a part of the discussions we had." Mark assumed that Kathy "figured she had the implied consent" to use the car, and Mark did not think that was "an unreasonable assumption on her part." Mark admitted that he never told Kathy not to use the vehicle, and never told her that she lacked permission to allow another person to use the vehicle.

Kathy kept the Mercedes Benz in the driveway of her house for about three weeks before the accident. Aside from moving the car from Joe's house to her house and driving it to the repair facility to have the interlock device removed, Kathy drove the vehicle once to pick up her daughter from school. Kathy testified that Mark was "fully aware" that she had the keys to the vehicle, that she was using it, and that she had driven it to the service facility to have the interlock device removed. According to Kathy, Mark never told her that she could not use the vehicle, and they never discussed whether Morris could use the vehicle. Kathy testified that Mark never gave her any reason to believe that she could not use the Mercedes Benz. Kathy believed that she had Mark's permission to use the vehicle for any purpose and at any time, and that she could allow other people to use the vehicle.

*Todd Morris.* At the time of the accident, Morris lived with Kathy and her teenage children. Morris testified that he once told Kathy that he had a valid driver's license, but this was untrue because he had not had a valid driver's license for approximately 12 years. Kathy testified that she did not know that Morris lacked a driver's license. Morris and Kathy provided conflicting testimony regarding whether Morris drove any vehicle during the time he lived with Kathy. Morris claimed that, although he lived with her for approximately one year before the accident, he never drove the cars that Kathy owned, and always obtained a ride to work from Kathy or others. Meanwhile, Kathy testified that Morris owned two vehicles and that he regularly drove himself to work during the time he lived with her.

Morris testified that he knew Mark was the personal representative of Joe's estate, and that Mark had delegated to Kathy all of the work necessary to liquidate the estate's assets. Morris knew Mark gave Kathy the task of removing Joe's possessions from his house, so the house could be sold. According to Morris, Mark did not care about the disposition of Joe's personal assets, and he left Kathy in charge of either distributing those assets to the children or liquidating them. Morris knew that Kathy did not own the Mercedes Benz, because he understood that the vehicle belonged to Joe's estate. Yet, Morris believed Mark had given Kathy authorization to move the Mercedes Benz because she was moving all of Joe's other belongings out of his house. Morris also believed that there was an agreement between Mark and Kathy that she could use the vehicle. All of the witnesses agreed that Mark had never heard of or spoken to Morris until after the accident, and that he did not expressly grant or deny Morris permission to use the Mercedes Benz.

*The Accident.* On the day of the accident, Morris and Kathy decided to visit a friend's house for a social gathering. Kathy testified that she drove the Mercedes Benz to the gathering because it was sitting in her driveway and the social gathering was at a home only a few minutes away. Both Morris and Kathy admitted that they consumed alcohol at the gathering. Their testimony conflicted, however, about how much alcohol Kathy consumed. Kathy testified that she drank one small glass of wine at the gathering, and that she saw Morris drink one craft beer. Kathy denied that she was intoxicated, and stated that she did not believe that Morris was intoxicated when they left the gathering. In contrast, Morris claimed that Kathy was too impaired to drive home safely, so he "grabbed the keys" and began to drive her home, with her permission. Morris also stated that Kathy gave him the keys and gave him permission to drive the car. The accident occurred on their drive home. Although Morris did not believe that he had consumed too much alcohol to drive safely, his bodily-alcohol content after the accident was in excess of the legal limit.

Because of the injuries she sustained in the accident, Kathy did not remember anything that occurred after she and Morris left the gathering, and she did not remember getting in the Mercedes Benz. Although Kathy had no memory of the accident, she stated that she "obviously" gave Morris permission to drive the vehicle back to her home because, after the accident, Morris was found with the keys and she was found "strapped in the passenger's seat." Kathy testified that she had no reason to question Morris's statement that she gave him the keys and permission to drive the vehicle.

*Trial-Court Proceedings.* Morris filed a claim with Progressive, the insurer of the Mercedes Benz, seeking PIP benefits. Progressive denied the PIP claim, taking the position that plaintiff was not entitled to PIP benefits because he was intoxicated and driving without a valid operator's license at the time of the accident. In addition, Progressive took the position that Morris had never obtained express permission from Mark to drive the vehicle.

Morris and the medical providers filed this lawsuit, seeking to recover PIP benefits. Plaintiffs filed motions for summary disposition under MCR 2.116(C)(10), based on statements that Mark, Kathy, and Morris provided to Progressive under oath. Progressive opposed those motions, and requested entry of summary disposition in its favor under MCR 2.116(I)(2). In the trial court, all parties argued that there was no genuine issue of material fact and that the matter was ripe for summary disposition. The trial court denied defendants' motion for summary disposition and granted plaintiffs' motions. In addition, the trial court granted plaintiffs their attorney's fees under MCL 500.3148.

This appeal followed.

## II. ANALYSIS

### A. STANDARD OF REVIEW

The interpretation of MCL 500.3113(a) presents questions of law that this Court reviews de novo. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). This Court also reviews de novo a trial court's decision on a motion for summary disposition. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), a trial court

considers the evidence submitted by the parties in the light most favorable to the party opposing the motion. *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 777; 910 NW2d 666 (2017). The trial court properly grants the motion when there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Dextrom*, 287 Mich App at 415.

## B. UNLAWFUL TAKING

Progressive first argues that the trial court erroneously granted summary disposition to plaintiffs because Morris committed an “unlawful taking” of the vehicle. Therefore, Progressive argues that Morris’s claim for PIP benefits is barred by MCL 500.3113(a). This argument is without merit.

MCL 500.3113(a) excludes certain individuals from entitlement to PIP benefits under the no-fault act. *Rambin v Allstate Ins Co*, 495 Mich 316, 319; 852 NW2d 34 (2014). The statute 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 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. [MCL 500.3113(a).]

In *Spectrum Health*, 492 Mich at 508, the Michigan Supreme Court addressed “whether a person injured while driving a motor vehicle that the person had taken contrary to the express prohibition of the owner” may receive PIP benefits. The Court answered that question in the negative, holding “that any person who takes a vehicle contrary to a provision of the Michigan Penal Code—including MCL 750.413 and MCL 750.414, informally known as the ‘joyriding’ statutes—has taken the vehicle unlawfully for purposes of MCL 500.3113(a).” *Id.* at 509. The *Spectrum Health* Court further examined the phrase “taken unlawfully,” and explained as follows:

In determining the Legislature’s intended meaning of the phrase “taken unlawfully,” we must accord the phrase its plain and ordinary meaning, and we may consult dictionary definitions because the no-fault act does not define the phrase. The word “unlawful” commonly means “not lawful; contrary to law; illegal,” and the word “take” is commonly understood as “to get into one’s hands or possession by voluntary action.” When the words are considered together, the plain meaning of the phrase “taken unlawfully” readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law. [*Id.* at 516-517.]

In *Rambin*, 495 Mich at 319, the Supreme Court examined the meaning of MCL 750.414, the so-called misdemeanor-joyriding statute, in the context of MCL 500.3113(a). The focus of *Rambin* was to decide whether MCL 750.414 was “a strict liability crime for purposes of applying MCL 500.3113(a).” *Id.* at 320. The Court concluded that MCL 750.414 was not a strict-liability

crime, and that the statute “contains a *mens rea* element that the taker must intend to take a vehicle ‘without authority.’ ” *Id.*

In that case, the plaintiff claimed that he did not knowingly lack authority to take the motorcycle he was operating at the time of his accident because he believed that the person who gave him access to the motorcycle was the rightful and legal owner of it. *Id.* at 327. In contrast, the insurance-carrier defendant argued that “absent express consent from the actual owner, plaintiff is barred from recovering PIP benefits.” *Id.* That is, the insurance-carrier defendant argued that a plaintiff’s “good faith is legally irrelevant because MCL 750.414 is a strict liability crime.” *Id.* The Supreme Court rejected the insurance-carrier’s argument and concluded that MCL 750.414 is not a strict-liability crime. *Id.* at 320. Given that MCL 750.414 addressed, “Any person who takes or uses without authority any motor vehicle without intent to steal the same,” the *Rambin* Court concluded that the statute “requires a showing of knowingly taking without authority or knowingly using without authority.” *Id.* at 332.

In this case, Progressive argues that Morris violated MCL 750.414 because he took the Mercedes Benz “without authority” from Mark, the personal representative of the estate that owned the vehicle. As a consequence, Morris was ineligible for PIP benefits under MCL 500.3113(a), according to Progressive.

First, we note that this case is readily distinguishable from *Spectrum Health*, in which the owner of the vehicle “expressly told the end user that he was not allowed to drive the vehicle.” *Spectrum Health*, 492 Mich at 510. There was no such statement in this case, where the personal representative of the decedent’s estate did not know the end user, and never stated to anyone that the end user was not allowed to drive the vehicle. As the Supreme Court explained in *Rambin*, “Because in *Spectrum* the owners had expressly told each person injured while driving the motor vehicle that they could not use the motor vehicle, we did not have occasion to reach the question whether MCL 500.3113(a) requires the ‘person . . . using [the] motor vehicle or motorcycle’ to know that such use has not been authorized by the vehicle or motorcycle owner.” *Rambin*, 495 Mich at 327. The Supreme Court did expressly address that question in *Rambin*, however, because the insurance carrier in that case argued “that absent express consent from the actual owner, plaintiff is barred from recovering PIP benefits.” *Id.* The Supreme Court rejected this argument, holding that a plaintiff could prove that he did not commit an unlawful taking under MCL 750.413, if “he did not knowingly lack authority to take the [vehicle] because he believed that he had authority to do so.” *Id.* at 333.

In this case, Progressive makes the same argument that the Supreme Court rejected in *Rambin*. Progressive argues that because Mark never spoke to Morris, and did not know about Morris until after the accident, he did not grant Morris express permission to use the Mercedes Benz. Progressive thus continues to argue, despite the Supreme Court’s holding in *Rambin*, “that absent express consent from the actual owner, plaintiff is barred from recovering PIP benefits.” *Id.* For the reasons explained by the *Rambin* Court, this argument is without merit.

Progressive further argues that Morris could not rely on Kathy’s grant of permission to take the vehicle because the Supreme Court rejected the “chain of permissive use” theory as “inconsistent with the statutory language of the no-fault act.” See *Spectrum Health*, 492 Mich at 521. This argument is likewise without merit.

As stated above, in *Spectrum Health*, the owner of the vehicle “expressly told the end user that he was not allowed to drive the vehicle.” *Id.* at 510. The plaintiff in that case argued that the owner’s prohibition could be overcome if the owner granted an intermediate user permission to take and use the vehicle, and that intermediate user in turn granted the end user permission to take and use the vehicle. *Id.* at 512-513. The Supreme Court rejected this argument, concluding that when an owner expressly instructed that the end user was not allowed to take and use the vehicle, the end user has taken the vehicle unlawfully for purposes of MCL 500.3113(a). *Id.* at 523-524. As explained earlier, this case is distinguishable from *Spectrum Health* because the owner of the vehicle never prohibited the end user from taking and using the vehicle, and never instructed the intermediate user that she lacked permission to allow others to use it. Notably, the *Spectrum Health* Court did not rule that an intermediate user of a vehicle may never validly grant another permission to take and use a vehicle. Rather, the Court ruled that an intermediate user cannot contradict and overcome the owner’s express instructions that an end user may not take and use a vehicle.

Progressive also argues that Morris knowingly lacked authority to take the vehicle, and therefore violated MCL 750.414, because he knew that he could not legally drive the vehicle, given the fact that he did not have a valid driver’s license and the fact that he was intoxicated when he drove the vehicle. Progressive’s argument was squarely rejected by this Court in *Monaco v Home-Owners Ins Co*, 317 Mich App 738, 741; 896 NW2d 32 (2016), which held that “the phrase ‘taken unlawfully,’ as employed in MCL 500.3113(a), does not encompass the unlawful *use or operation* of a motor vehicle, just the unlawful *taking* of a vehicle.”

### C. ATTORNEY’S FEES

Finally, Progressive argues that the trial court erroneously granted plaintiffs their attorney’s fees under MCL 500.3148. “The no-fault act provides for attorney fees when an insurance carrier unreasonably withholds benefits.” *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). Regarding PIP benefits, the statute provides:

[A]n attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits that are overdue. The attorney’s fee shall be a charge against the insurer in addition to the benefits recovered, *if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.* [MCL 500.3148(1) (emphasis added).]

When determining whether attorney’s fees are warranted for an insurer’s refusal to make payments under the no-fault act, the refusal is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999). “When an insurer refuses to make or delays in making payment, a rebuttable presumption arises that places the burden on the insurer to justify the refusal or delay.” *Id.* “A trial court’s finding of an unreasonable refusal to pay or delay in paying benefits will not be reversed on appeal unless the finding is clearly erroneous.” *Id.* at 316-317. “A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

Progressive argues that, even if the trial court correctly granted summary disposition to plaintiffs regarding Morris's entitlement to PIP benefits, it erroneously granted attorney's fees without first determining whether Progressive's denial of benefits was unreasonable. Progressive argues that the trial court did not examine the circumstances that existed at the time it denied Morris's claim, and did not decide whether the decision to deny Morris's claim was reasonable at the time. Progressive posits that the trial court "did not engage in any such analysis, and appears to have simply awarded attorney fees based on the (premature) finding that benefits were owed." Progressive's argument is not supported by the record.

At the hearing on the motion for summary disposition, the trial court expressly held that any factual uncertainty about Morris's entitlement to PIP benefits was resolved by the testimony obtained by Progressive during the examinations under oath. The trial court noted that Progressive denied Morris's claim for PIP benefits on three grounds: (1) Morris did not obtain the express permission of Mark before driving the vehicle, (2) Morris lacked a valid driver's license when he drove the vehicle, and (3) Morris was intoxicated when he drove the vehicle. The trial court further held that Morris's intoxication and lack of a driver's license were legally irrelevant to his entitlement to PIP benefits, meaning that the authority granted by Mark, as owner of the vehicle, was the only legitimate factual issue remaining in contention. The trial court explained:

As I stated earlier, Progressive certainly knew at the time of the examination under oath, specifically of Kathy Montuoro and Mark Montuoro that Kathy reasonably assumed she had permission of Mark, the real true owner of the vehicle as the personal representative of the estate. And further that Kathy acknowledged that Todd, by virtue of her handing him the keys, would have had a reasonable assumption that she had permission to hand the keys off to him. Particularly taking out of the equation Todd's own perspective that he shouldn't be driving the vehicle. He certainly appears to have the authority to take command or control of the vehicle from his live-in girlfriend, under both the Michigan Penal statutes and the no-fault act. Thus, the Court has to find that the refusal to pay was unreasonable and that attorney's fees are applicable in this case.

Contrary to Progressive's argument on appeal, the trial court did not award attorney's fees automatically, based solely on a determination that Morris was entitled to PIP benefits. Rather, the trial court examined the circumstances as they existed at the time Progressive made the decision to deny Morris's claim, and concluded that the decision was unreasonable at the time.

Progressive further argues that the trial court improperly decided a question of fact, i.e., whether the delay was reasonable, in the context of a motion for summary disposition under MCR 2.116(C)(10). "The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact." *Ross*, 481 Mich at 7. Progressive argues that a trial court cannot resolve questions of fact on summary disposition.

In its response in opposition to plaintiffs' motion for summary disposition and counter-motion for summary disposition under MCR 2.116(I)(2), as well as in its argument at the hearing on that motion, Progressive chose not to address plaintiffs' request for an award of attorney's fees



under MCL 500.3148(1). In response to plaintiffs' later motion to establish the amount of attorney's fees awarded, Progressive argued that it had a legitimate factual uncertainty regarding Morris's authority to use the vehicle, making its decision to deny his claim for PIP benefits reasonable. Furthermore, Progressive argued that the amount of attorney's fees requested by plaintiffs was unreasonable. Pointedly, Progressive did *not* argue that the trial court lacked authority to decide whether its actions were unreasonable because a genuine issue of material fact existed.

In fact, although Progressive argues on appeal that a genuine issue of material fact existed that precluded the trial court's grant of summary disposition, this appellate argument is directly contrary to Progressive's argument in the trial court. In its response in opposition to plaintiffs' motion for summary disposition and counter-motion for summary disposition under MCR 2.116(I)(2), Progressive stated, "No question of the existence of a genuine issue of material fact exists in light of all the evidence." Given its argument in the trial court, Progressive cannot now argue that a genuine issue of material fact exists that precluded the trial court from ruling on the parties' cross-motions for summary disposition, including plaintiffs' request for an award of attorney's fees.

Affirmed. Plaintiffs, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Kirsten Frank Kelly  
/s/ Karen M. Fort Hood  
/s/ Brock A. Swartzle