STATE OF MICHIGAN

COURT OF APPEALS

MALEK HMEIDAN,

Plaintiff-Appellant/Cross-Appellee,

and

VHS OF MICHIGAN, INC., doing business as DETROIT MEDICAL CENTER, and SUMMIT PHYSICIANS GROUP, PLLC,

Intervening Plaintiffs,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellee,

and

PROGRESSIVE MICHIGAN INSURANCE COMPANY, also known as PROGRESSIVE CASUALTY INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
November 18, 2021

No. 351670
Wayne Circuit Court
LC No. 15-007238-NF

Before: BORRELLO, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

In this no-fault action, plaintiff appeals as of right an order granting summary disposition in favor of defendant, Progressive Michigan Insurance Company, also known as Progressive Casualty Insurance Company (Progressive). Plaintiff argues on appeal that the trial court erred by granting summary disposition of his claim for first-party no-fault benefits (PIP benefits) against Progressive because it applied the wrong version of MCL 500.3113(a) to determine that plaintiff

was precluded from recovering benefits. On cross-appeal, Progressive contends that plaintiff's request for relief should be denied because summary disposition was appropriate regardless of which version of the statute is applied. We agree with plaintiff that the trial court erred by failing to apply the version of MCL 500.3113(a) in effect at the time of plaintiff's accident, and that summary disposition should not have been granted in favor of Progressive because a question of fact remained as to whether plaintiff unlawfully took the motorcycle involved in the accident so as to preclude him from no-fault benefits under MCL 500.3113(a), as amended by 1986 PA 93. We therefore vacate the trial court's order granting summary disposition in favor of Progressive, and remand for further proceedings consistent with this opinion.

Plaintiff and Progressive also challenge the trial court's order granting summary disposition in favor of defendant, State Farm Mutual Automobile Insurance Company (State Farm). Plaintiff's principal arguments are that the trial court erred by concluding that (1) State Farm's insured, plaintiff's mother Aida Hmeidan, made a material misrepresentation regarding her address when she applied for the subject State Farm policy, and (2) the equities favored allowing State Farm to rescind the policy. Progressive joins plaintiff's arguments on appeal. We decline to address the first of these issues, but agree that the trial court abused its discretion in balancing the equities and determining that rescission was appropriate. We therefore vacate the trial court's order granting summary disposition in favor of State Farm, and remand for further consideration of the equities involved in this case. On remand, the trial court is directed to consider the nonexclusive list of factors adopted in *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 411; 952 NW2d 586 (2020), to the extent they apply to this case, as well as any other relevant factors consistent with this opinion.

I. BACKGROUND

On September 1, 2012, plaintiff was injured while driving a Kawasaki motorcycle that he was considering purchasing from Hussein Deliken. Although the motorcycle's ignition had been tampered with, and it was running without a key, plaintiff testified that he did not notice the damage before he took it for a test drive with Deliken's permission. Plaintiff lost control of the motorcycle when another vehicle failed to stop at a stop sign and cut into plaintiff's lane of traffic. After the motorcycle struck the unknown vehicle, the driver of the vehicle immediately fled the scene. Plaintiff learned after the accident that the motorcycle was stolen and did not belong to Deliken. At the time of the accident, plaintiff did not own or insure any vehicles. He subsequently sought PIP benefits from State Farm as a resident relative of his mother, Aida, or Progressive, as the insurer of the true owner of the motorcycle.

This case was previously before this Court on appeal from the trial court's determination that State Farm was not in the order of priority for plaintiff's PIP benefits and that Progressive was the highest-priority insurer. The trial court reasoned that State Farm was not liable for plaintiff's benefits under MCL 500.3114(5)(c), which refers to the "motor vehicle insurer of the operator of the motorcycle involved in the accident," because plaintiff did not own or insure a motor vehicle. *Hmeidan v State Farm Mut Auto Ins Co*, 326 Mich App 467, 474-475; 928 NW2d 258 (2018). This Court concluded that the trial court misinterpreted and misapplied MCL 500.3114(5)(c), reasoning that the statute's use of the phrase "the motor vehicle insurer of the operator of the motorcycle" was intended to distinguish between a motorcycle insurance policy and a motor vehicle insurance policy. *Id*. at 480-481. Additionally, the Court explained that plaintiff may have

had a motor vehicle insurer for purposes of MCL 300.5114(5)(c), despite not personally owning or insuring a motor vehicle, because a question of fact remained as to whether State Farm's policy extended coverage to plaintiff as Aida's resident relative. *Id*. at 481-482.

On remand, the parties switched gears and focused on Aida's representations when she applied for the State Farm insurance policy. In particular, despite testimony indicating that Aida resided in two different locations—one in Detroit and one in Melvindale—she only disclosed her Melvindale address when she applied for insurance. She also failed to disclose information about other drivers in her households and their driving records.

State Farm moved for summary disposition under MCR 2.116(C)(10) on the basis of Aida's fraud in procuring the State Farm policy and plaintiff's own misrepresentations in the instant proceedings. Progressive also moved for summary disposition under MCR 2.116(C)(10), arguing that MCL 500.3113(a) precluded plaintiff from recovering benefits because he was injured while driving a stolen motorcycle. The trial court granted both motions for summary disposition.[1]

II. STANDARDS OF REVIEW

A trial court's summary disposition ruling is reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 160. "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 160 (quotation marks and citation omitted). "Moreover, a court may not make findings of fact; if the evidence before it is conflicting, summary disposition is improper." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted; emphasis omitted).

This Court reviews a trial court's decision regarding rescission for an abuse of discretion. *Pioneer State Mut Ins Co*, 331 Mich App at 405. "An abuse of discretion occurs when the decision falls outside the range of reasonable and principled outcomes," or "when the trial court makes an error of law." *Id*.

III. AIDA'S MISREPRESENTATIONS REGARDING HER ADDRESS

Plaintiff and Progressive first argue that a question of fact exists regarding Aida's residence such that the trial court erred by finding that she made a material misrepresentation that could warrant rescission of the State Farm policy. The trial court determined that Aida made material misrepresentations in her application by indicating that she lived in Melvindale without

[1] The trial court's grant of State Farm's summary disposition motion was limited to State Farm's argument regarding Aida's fraud; it expressly declined to reach the issue of whether plaintiff's postprocurement misrepresentations barred his recovery.

mentioning her Detroit residence and by failing to disclose plaintiff's poor driving record when asked about the records of members of her household. On appeal, plaintiff focuses solely on the issue of Aida's residence, without addressing the second misrepresentation cited by the trial court, and Progressive merely joins plaintiff's argument. Because plaintiff has not disputed the full basis for the trial court's ruling, this Court need not even consider granting appellate relief regarding this issue. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). To do so would be an exercise in futility because, assuming this Court agreed that issues of fact remained with respect to whether Aida misrepresented her address, reversal would not be appropriate because an additional, unchallenged ground for rescission would still remain. We therefore decline to address this issue any further.

IV. BALANCING THE EQUITIES

Plaintiff and Progressive next argue that the trial court did not properly balance the equities between plaintiff and State Farm, and erred by determining that rescission was warranted. We agree.

As an equitable remedy, the right to rescind a contract is not an absolute right, but rather, rests in the discretion of the trial court. *Bazzi v Sentinel Ins Co*, 502 Mich 390, 409; 919 NW2d 20 (2018). Thus, when a party seeks rescission, the trial court must "balance the equities" to determine whether rescission is appropriate in the context of two innocent parties. *Id*. at 410 (quotation marks omitted). "Just as the intervening interest of an innocent third party does not altogether bar rescission as an equitable remedy, neither does fraud in the application for insurance imbue an insurer with an absolute right to rescission of the policy with respect to third parties." *Id*. at 411. "Equitable remedies are adaptive to the circumstances of each case, and an absolute approach would unduly hamper and constrain the proper functioning of such remedies." *Id*. The following nonexclusive factors should be considered in deciding whether to permit rescission of a contract with respect to an innocent third party:

> (1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured; (2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud; (3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event; (4) the availability of an alternate avenue for recovery if the insurance policy is not enforced; and (5) a determination of whether policy enforcement only serves to relieve the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party. [*Pioneer State Mut Ins Co*, 331 Mich App at 411, citing *Farm Bureau Gen Ins Co of Mich v ACE American Ins Co*, 503 Mich 903, 906-907; 919 NW2d 394 (2018) (MARKMAN, C.J., concurring).]

At the time of the trial court's ruling, the foregoing factors had been identified in Justice MARKMAN's concurrence in *Farm Bureau Gen Ins Co*, but had yet to be adopted by binding authority. As such, the trial court did not address these factors on the record, leaving this Court without the now-accepted framework to review. Instead, the trial court identified three factors that it believed weighed in favor of rescission because of plaintiff's unclean hands: (1) his poor driving record, which showed a "blatant disregard of public safety and welfare"; (2) plaintiff's use of a

stolen motorcycle; and (3) plaintiff's inconsistent statements about his employment in this case and a criminal case pending before a different judge.

While we do not fault the trial court for failing to consider the applicability of the factors outlined by Justice MARKMAN before those factors were adopted by binding authority in *Pioneer*, consideration of the factors on appeal sheds light on the types of equities this Court has deemed appropriate in determining whether to permit rescission in the context of an innocent third party's claim. Notably, each of the foregoing factors look at the particular circumstances surrounding the contract and claim at issue. The trial court's consideration of plaintiff's poor driving record in balancing the equities is at odds with the general focus of the factors this Court has adopted as guidance for trial courts. The question before the court was which of the two blameless parties in this case should have to assume the loss in the wake of Aida's fraudulent procurement, not which party has a subjectively better track record or history in unrelated matters. In fact, the trial court's consideration of plaintiff's previous driving record seems to conflict with the third *Pioneer* factor, i.e., "the nature of the innocent third party's conduct, whether reckless or negligent, *in the injury-causing event*[.]" *Pioneer State Mut Ins Co*, 331 Mich App at 411 (emphasis added). The unrebutted evidence in this case is that plaintiff was *not* acting with "blatant disregard of public safety and welfare" when the accident occurred. Rather, plaintiff was forced to slam on the brakes, causing the motorcycle to skid, when he was cut off by another driver who ignored a stop sign. Plaintiff's past driving indiscretions should not have weighed in favor of rescission without evidence that he was acting negligently or recklessly in this instance.

The trial court's consideration of the fact that the motorcycle was stolen was also misplaced in this procedural context. The trial court dismissed plaintiff's case against State Farm by way of summary disposition under MCR 2.116(C)(10). As explained in greater detail in Part V of this opinion, while it is undisputed that the motorcycle was stolen, there was conflicting evidence regarding whether plaintiff knew or should have known that it was stolen. Viewing the evidence in the light most favorable to plaintiff as the court was obligated to do at the summary disposition phase, *Lowrey*, 500 Mich at 5, the trial court should have considered plaintiff's contention that he believed Deliken was the owner of the motorcycle and properly gave plaintiff permission to test drive it. In light of the conflicting evidence on this issue, there was no reason to fault plaintiff for operating a stolen motorcycle at the time of the accident.

The last factor the trial court took into account was plaintiff's inconsistent statements about his employment in this case and in an unrelated criminal case. In discovery responses dated December 30, 2015, plaintiff was asked to identify each of his employers for the preceding five years, and he identified only his preaccident employer, noting that he lost his job as a result of the accident. In an additional discovery response dated January 28, 2016, plaintiff indicated that he had not returned to work at all. The trial court observed that despite his assertions of nonemployment since the accident, plaintiff reported that he was working approximately 75 hours a week in order to get a modification of his tether restrictions in his criminal case. Plaintiff maintains that he never claimed to work 75 hours a week, and that a careful reading of the transcript shows that his attorney simply indicated that plaintiff *wanted* to work 12 hours a day. It is unnecessary to resolve this claimed ambiguity because plaintiff's deposition testimony clarifies his postaccident employment.

When plaintiff was deposed in January 2016, he admitted that he had worked at a restaurant and his brother's auto repair shop after the accident. His time at the restaurant was limited to less than a month because he was unable to stand for long periods of time. But plaintiff testified that he started working a desk job at his brother's shop intermittently in late 2014 or early 2015. He did not have a consistent schedule, and his pay varied between $50 and $100 a day. Plaintiff acknowledged that he was unsure of his total wages from the shop, but opined that his brother would likely have records of what plaintiff was paid. Plaintiff's failure to disclose his sporadic employment in his written discovery responses certainly suggests that he was attempting to take advantage of the no-fault system by claiming benefits to which he was not entitled. Because this point related directly to this claim, the trial court's consideration of plaintiff's inconsistent statements was not unreasonable.

That said, we are not convinced that this single proper consideration was sufficient to satisfy the trial court's duty to balance the equities to determine whether to permit rescission as to plaintiff. As a general matter, an insurer cannot completely avoid liability for all statutorily mandated PIP benefits on the basis of postprocurement fraud. *Meemic Ins Co v Fortson*, 506 Mich 287, 303-308; 954 NW2d 115 (2020). While this understanding does not necessarily preclude the trial court from considering postprocurement fraud in balancing the equities, it cannot be the only basis for permitting rescission with respect to an innocent third party like plaintiff if it is insufficient to preclude coverage under other circumstances. See *id*. The trial court's legal errors led to an abuse of discretion. We therefore remand to the trial court for further consideration of the equities involved in this case. On remand, the trial court should consider the nonexclusive list of factors adopted in *Pioneer* to the extent they apply to this case, as well as any other relevant factors consistent with this opinion.

V. UNLAWFUL TAKING

Lastly, plaintiff argues that the trial court relied on the wrong version of MCL 500.3113(a) in granting summary disposition in favor of Progressive. Progressive, on the other hand, contends that summary disposition was properly granted regardless of which version of the statute applied. We agree with plaintiff that the trial court erred by failing to apply MCL 500.3113(a) as it existed at the time of the accident and by granting summary disposition in favor of Progressive.

Preliminarily, Progressive contends that plaintiff stipulated to application of MCL 500.3113(a), as amended by 2014 PA 489, because the parties' joint pretrial order incorporated the statutory language from that version of MCL 500.3113(a).[2] We disagree. Plaintiff unequivocally opposed Progressive's most recent motion for summary disposition on the basis that Progressive erroneously relied on the amended statutory language, rather than the language in effect at the time of the accident in 2012. Progressive's attempt to extrapolate an implied stipulation from the joint pretrial order overlooks a key procedural point—the joint pretrial order was entered only four days after the trial court issued a letter stating that it would apply 2014 PA 489 to the unlawful taking issue. Given the trial court's decision regarding that issue, we will not

[2] In the pretrial order, the parties agreed that one of the issues of fact to be litigated was "[w]hether Plaintiff knew or should have known that the motorcycle Plaintiff was operating at the time of the accident was taken unlawfully."

construe the inclusion of statutory language from 2014 PA 489 in the subsequent joint pretrial order as a stipulation to its applicability.

At the time of the September 1, 2012 accident, MCL 500.3113(a) provided:

> 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. [MCL 500.3113(a), as amended by 1986 PA 93.]

By the time plaintiff filed this lawsuit, the statute had been amended to provide:

> 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. [MCL 500.3113(a), as amended by 2014 PA 489.]

Subsequent amendments to MCL 500.3113 have left subsection (a) unchanged.

As with other issues of statutory interpretation, legislative intent determines whether a statute should be applied retroactively or prospectively only. *Buhl v Oak Park*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 160355); slip op at 5. The following framework guides a court's analysis of legislative intent regarding retroactivity:

> "First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute." [*Id*., quoting *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 38-39; 852 NW2d 78 (2014).]

Turning to the first of these factors, this Court begins with the general presumption that statutes apply prospectively absent a clear expression of intent for retroactive application. *Buhl*, ___ Mich at ___; slip at 6. The amendment at issue states that the amending act "is ordered to take immediate effect" on January 13, 2015. 2014 PA 489. The grant of immediate effect without further elaboration is not indicative of a legislative intent to apply the amendment retroactively. See *Buhl*, ___ Mich at ___; slip op at 6. The second factor is inapplicable to this case because the

amendment does not relate to an antecedent event. *Id*. at ___; slip op at 5-6. See also *In re Certified Questions from US Court of Appeals for the Sixth Circuit*, 416 Mich 558, 571; 331 NW2d 456 (1982) (explaining that the second factor relates to statutes that measure "the amount of entitlement provided by a subsequent statute in part by services rendered pursuant to a prior statute," rather than "what if any changes may be made with respect to a cause of action begun under one rule of law by a subsequent statute.").

The third factor generally weighs against retroactive application of an amendment if doing so would take away or impair vested rights, create a new obligation or duty, or attach a new disability to past transactions or considerations. *Buhl*, ___ Mich at ___; slip op at 7. A key distinction between the prior and current versions of MCL 500.3113(a) is the degree of culpability on the part of the claimant necessary to preclude entitlement to benefits. Under the earlier statute, the claimant was excluded from benefits if the claimant was using a motorcycle "*he or she had taken unlawfully*, unless the person reasonably believed that he or she was entitled to take and use the vehicle." MCL 500.3113(a), as amended by 1986 PA 93 (emphasis added). In other words, the exclusion applied only if the claimant was involved in the unlawful taking. *Rambin v Allstate Ins Co*, 297 Mich App 679, 685; 825 NW2d 95 (2012) (*Rambin I*), rev'd in part on other grounds 495 Mich 316 (2014). Under the amended version, there is no requirement that the claimant had been involved in the taking. See MCL 500.3113(a), as amended by 2014 PA 489. Instead, the focus is on whether the vehicle was unlawfully taken and the claimant's knowledge, rather than personal involvement in the taking. *Id*. Because the amendment expands the scope of the exclusionary defense available to the insurance carrier in circumstances involving unlawful takings—that is, it impairs the vested rights of an injured claimant by attaching new disabilities to the existing claim—the third factor prohibits retroactive application of 2014 PA 489, and this Court need not consider the final retroactivity factor. *Buhl*, ___ Mich at ___; slip op at 9. The trial court erred by applying MCL 500.3113(a), as amended by 2014 PA 489, to this case, rather than the statute as it existed at the time of the accident.[3]

Progressive contends, however, that reversal is unnecessary even if the trial court applied the wrong version of MCL 500.3113(a) because summary disposition remains appropriate under former MCL 500.3113(a) as well. Progressive reasons that the stolen motorcycle was taken unlawfully and that plaintiff could not have reasonably believed he was entitled to take and use it because there were clear signs that it had been stolen and plaintiff lacked the motorcycle endorsement necessary to legally operate the motorcycle in any event. We disagree.

Analyzing former MCL 500.3113(a), the Michigan Supreme Court in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 509; 821 NW2d 117 (2012), announced that a vehicle was "unlawfully taken" for purposes of exclusion from PIP benefits if the vehicle

[3] This Court reached the same result in *Macklis v Farm Bureau Gen Ins Co of Mich*, unpublished per curiam opinion of the Court of Appeals, issued April 25, 2017 (Docket No. 330957). As an unpublished opinion, *Macklis* does not constitute binding precedent, but may be considered for its persuasive value. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 232 n 4; ___ NW2d ___ (2020).

was taken contrary to any provision of the Michigan Penal Code, including the so-called "joyriding statutes," MCL 750.413 and MCL 750.414.[4] Later, in *Rambin v Allstate Ins Co*, 495 Mich 316, 320, 332; 852 NW2d 34 (2014) (*Rambin II*), the Court clarified that when an unlawful taking is premised on violation of the joyriding statutes, there must be evidence that the claimant knowingly took the vehicle without authority or knowingly used it without authority. Like plaintiff in this case, the *Rambin* plaintiff was injured while operating a motorcycle provided to him by a third party and which was subsequently determined to be stolen. *Id*. at 322-323. "For a person to take personal property without authority of the actual owner," in these circumstances, "there must be some evidence to support the proposition that the person from whom he or she received the property did not have the right to control or command the property." *Id*. at 332. Although the plaintiff was not directly implicated as the person who stole the motorcycle, this Court determined that a question of fact remained as to the lawfulness of the taking because there was significant circumstantial evidence suggesting that he knew the motorcycle was stolen at the time of the accident. *Id*. at 334-335.

We reach the same conclusion here. Plaintiff testified that he went to Deliken's home on the day of the accident to look at a motorcycle he was considering purchasing, and he believed the motorcycle belonged to Deliken. Plaintiff did not notice any damage during his brief inspection before asking to test drive it. He further indicated that the motorcycle was running when he arrived at Deliken's house, so he did not recall specifically examining the ignition or looking to see if there was a key in it. On the other hand, it is notable that plaintiff had a working knowledge of motorcycles from his experience as a mechanic and having previously owned several motorcycles. Additionally, the conspicuous location of the ignition—directly below the meter instruments, between the handlebars—could lead to a reasonable inference that the tampered-with ignition and absent key should have been readily noticeable to plaintiff, even upon a brief inspection. A police officer testified that the ignition had obvious signs of tampering. Reasonable jurors could differ as to the credibility of plaintiff's claimed ignorance that Deliken did not own the motorcycle and, thus, whether plaintiff knowingly took the motorcycle unlawfully, i.e., without authority of the owner. In light of this unresolved fact question, this Court cannot affirm the trial court's grant of Progressive's motion for summary disposition on the alternative grounds suggested by Progressive.

Progressive also reasons that plaintiff should be excluded from recovering PIP benefits under either version of MCL 500.3113(a) because he lacked the endorsement on his driver's license to operate a motorcycle, and therefore could not have believed he was lawfully taking or using the motorcycle, regardless of whether he believed he had permission from the owner.[5] Progressive's position attempts to put the cart before the horse. Before considering whether the

[4] The Court also determined that a vehicle is unlawfully taken when the vehicle's owner expressly forbade the claimant from driving it. *Spectrum Health Hosps*, 492 Mich at 510. This option for an unlawful taking is not at issue.

[5] Under MCL 257.312a(1), "[a]n individual, before operating a motorcycle, . . . upon a public street or highway in this state, shall procure a motorcycle indorsement on his or her operator's or chauffeur's license." Violation of MCL 257.312a(1) is a misdemeanor offense. MCL 257.312a(4).

claimant "reasonably believed that he or she was entitled to take and use the vehicle," for purposes of the saving clause under former MCL 500.3113(a), it is first necessary to determine whether the vehicle was unlawfully taken. *Rambin I*, 297 Mich App at 683. If the taking was lawful, consideration of the reasonable belief savings clause is unnecessary because MCL 500.3113(a) simply does not apply. *Id*. And because a question of fact remains as to whether plaintiff unlawfully took the motorcycle, whether plaintiff's lack of motorcycle endorsement precluded him from reasonably believing he was entitled to take and use the vehicle is not dispositive. To the extent Progressive suggests that plaintiff's lack of motorcycle endorsement speaks to the unlawful taking inquiry, this Court has previously concluded that "the unlawful *operation* or *use* of a motor vehicle is irrelevant with respect to examining the 'taken unlawfully' phrase in MCL 500.3113(a)[.]" *Monaco v Home-Owners Ins Co*, 317 Mich App 738, 748-749; 896 NW2d 32 (2016).

We vacate the trial court's orders granting summary disposition in favor of State Farm and Progressive and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Mark T. Boonstra