# STATE OF MICHIGAN

# COURT OF APPEALS

DONNA J. KACZMAREK,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF AMERICA, a Michigan corporation,

Defendant-Appellant,

and

ROADWAY SERVICES, INC., an Ohio corporation,

Defendant-Appellee.

December 9, 1993

No. 140797
LC No. 90-1535-CK

Before: Brennan, P.J., and Corrigan and R.C. Anderson*, JJ.

PER CURIAM.

In this action for first-party no-fault insurance benefits, defendant Citizens Insurance Company appeals from the trial court's denial of its motion for summary disposition pursuant to MCR 2.116(C)(10) and from the court's grant of summary disposition to defendant Roadway Services, Inc., pursuant to MCR 2.116(I). We affirm the court's order as to Roadway but reverse as to plaintiff's claim against Citizens.

Plaintiff's driver's license was revoked because she had several convictions for driving while intoxicated. At the time of the accident, plaintiff had just moved in with her mother, who did not permit plaintiff to use her car. Plaintiff typically rode to work with friends.

On the morning of December 21, 1989, plaintiff woke up late and missed her ride. Her brother, who owned a 1991 Geo Spectrum, had left an extra set of car keys at his mother's house. Plaintiff took the keys, had a friend drive her to her brother's house across town, took the car, and was involved in an accident. Her brother did not know she was using the car, nor had he given her permission to do so.

Plaintiff made a claim for personal injury protection (PIP) benefits with Citizens, her mother's no-fault insurer and for medical benefits from her employer, Roadway, under its self-funded ERISA plan. Shortly after the accident, she had a conversation by telephone with one of Citizens' adjusters and admitted then that she had not had permission to use the vehicle. Citizens denied her claim. Roadway also denied coverage, citing the coordinated benefits provision of its plan. Plaintiff brought suit against both defendants. The trial court granted her summary disposition of her claim against Citizens, i.e., it found her eligible for PIP benefits under her mother's policy. The court also found that Citizens was primarily liable for plaintiff's expenses related to the accident because Roadway's coordination of benefits provision prevailed over Citizens'.

I. PIP Benefits (Citizens)

McCormic v Auto Club Ins, ___ Mich App ___ (No 138086, rel'd 6/11/93, rel'd for publication 10/28/93), slip op p 2. properly summarized the governing standard of review:

*Circuit judge sitting by assignment on the Court of Appeals.

A motion for summary disposition premised on MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions and other documentary evidence available to it and grant summary disposition if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A party opposing a motion brought under (C)(10) may not rest upon the mere allegations or denials in his or her pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). Panich v Iron Wood Products, 179 Mich App 136, 139; 445 NW2d 795 (1989). This Court is liberal in finding a genuine issue of material fact. St Paul Fire & Marine Ins Co v Quintana, 165 Mich App 719, 722; 419 NW2d 60 (1988). Nonetheless, where the opposing party fails to come forward with evidence, beyond his allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. Morganroth v Whitall, 161 Mich App 785, 788; 411 NW2d 859 (1987); MCR 2.116(G)(4).

MCL 500.3113; MSA 24.13113 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.

In finding for plaintiff, the circuit court relied on this Court's decision in Priesman v Meridian Mutual Ins Co, 185 Mich App 123, 126; 460 NW2d 244 (1990); aff'd 441 Mich 244; 490 NW2d 314 (1992). In Priesman, a minor son living in the same household took his mother's car for a joyride. Our Court recognized a so-called "family member exception" to §3113. The Michigan Supreme Court later affirmed that result, but no opinion of the Court commanded a majority vote. Justice Boyle merely concurred in the result of Justice Levin's opinion. Justice Levin recognized a "family member exception" tailored to the narrow facts of that case. The Supreme Court was otherwise divided equally on the proper scope of MCL 500.3113; MSA 24.13113.

The Supreme Court could not agree about the meaning of the Legislature's substitution of the word "unlawful" for the language employed in the Uniform Motor Vehicle Accident Reparations Act (UMVARA), which served as a model for Michigan's no-fault act. Justice Levin initially noted that the UMVARA excepted from coverage a converter, unless that person was covered under a no-fault policy issued to the converter or a spouse or other relative in the same household. 441 Mich 66. Justice Levin concluded that the legislature substituted the term "unlawful" to except car thieves from no-fault coverage, even if they or a spouse or a relative, had purchased no-fault insurance. Id. at 67. Justice Griffin did not agree with this interpretation. Id. at 72 (opinion of Griffin, J.) He concluded that the term "unlawful" did apply to the minor's conduct. Id. He saw no need for a criminal conviction as a prerequisite to a finding of unlawfulness. Id. at 72. He concluded, construing the plain language of the relevant provisions, that no "family member" exception exists. Id. at 75-76.

The no-fault statute does not define unlawful taking or using of a motor vehicle, but in our view, Justice Griffin's opinion assigns a more natural and plausible meaning to the legislature's choice of the term "unlawful." In any event, Priesman should be restricted to its terms, i.e., cases involving unlicensed minor children who reside in the same household and take the family car without a parent's knowledge or permission.

We cannot conclude that either Justice Levin's or Justice Griffin's opinion would control these facts, if they are considered in a light most favorable to the nonmovant.

During depositions taken in the context of this action, plaintiff and her brother both testified that plaintiff had used her brother's car in the past and that the brother would have given his permission had he been available. The deposition testimony directly contradicted admissions plaintiff had made to Citizens' adjuster some four months earlier, before plaintiff had any motive to alter her story in light of the denial of benefits. The circuit court excluded the transcript of that conversation from consideration by improperly concluding that the plaintiff's statement to the insurance adjuster was not entitled to any weight because it was unsworn. MCR 2.116(C)(10) contains no such requirement. The admissions of a party need not be sworn in order to create a genuine issue of fact. Plaintiff's statement would, in any case, be admissible as an admission of party-opponent, MRE 801(d)(2)(A), as long as it was relevant. People v McReavy, 436 Mich 197, 203; 462 NW2d 1 (1990).

During the recorded statement at her home on February 9, 1990, plaintiff admitted that she had lived with her brother but had never borrowed his car. She also stated that she did not get along with her brother and had no key to his home. She had had no intention of telling her brother that she had borrowed his car. She also stated:

Q: Do you think he would mind?

A: Probably.

Q: He would mind?

A: Probably.

A: Why do you say that?

A: 'Cause it was his new car.

* * *

Q: Okay. And you knew that your brother would mind if you drove the vehicle, especially 'cause you didn't have a driver's license. Is that right?

A: Right.

Portions of the tape were unintelligible and the transcript was improperly supplemented with the adjuster's own favorable reconstruction. The proper remedy, however, was not to exclude the transcript altogether. Rather, the court should have simply deleted the unintelligible portions and editorial comments. Moreover, the inaudible portions, with the adjuster's improper editorializing, were not relevant to the contested issues.

The facts in this case are materially different from the situation presented in Priesman. No implied or imputed consent exists between an adult brother and sister as a matter of law. A complete record and fully developed legal arguments might well lead to the conclusion that plaintiff's use of her brother's car was completely at odds with Michigan's expressed commitment, in its laws, to keep drunk drivers off its roads. Plaintiff had no right to drive any car. Accordingly, she could not have a reasonable belief that she could use her brother's car, or anyone else's.

Citizens had a right to have these issues tested before a jury in light of plaintiff's admission that she had neither express nor implied permission to take and use the car. Summary disposition on this issue was inappropriate.

II. Liability of ERISA Plan (Roadway)

Citizens also argues that Roadway, as plaintiff's medical insurer, was primarily liable for her medical expenses resulting from the accident. We disagree.

Our Supreme Court recently resolved the question of primary responsibility for auto accident injuries when the injured person has both medical benefits provided by a self-funded ERISA plan and commercial no-fault insurance coordinated with health insurance pursuant to MCL 500.3109a; MSA 24.13109(1). In Auto Club Ins Ass'n v Frederick & Herrud, Inc, 443 Mich 358, 387; ___ NW2d ___ (1993), the Court held:

> [T]he COB clause in an ERISA policy must be given its clear meaning without the creation of any artificial conflict based upon MCL 500.3109a; MSA 24.13109(1). . . . [When] both plans provide that no-fault insurance is primary where the potential for duplication of benefits occurs, we hold that the ERISA plans' terms control. The no-fault insurer . . . is primarily liable for the benefits at issue.

Citizens, as the no-fault insurer in the present matter, will be primarily liable for plaintiff's medical expenses if plaintiff is found to be eligible for PIP benefits despite the rule of §3113(a). If plaintiff is held to be ineligible, then the Roadway plan will be solely liable.

Affirmed in part, reversed in part and remanded. No costs, neither party having prevailed in full.

/s/ Thomas J. Brennan
/s/ Maura D. Corrigan
/s/ Robert C. Anderson