STATE OF MICHIGAN

COURT OF APPEALS

SPECTRUM HEALTH HOSPITALS,

Plaintiff-Appellee/Cross-Appellant,

v

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN and FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
February 24, 2011

No. 296976
Kent Circuit Court
LC No. 09-005149-NF

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

In this dispute involving insurance coverage for a single-car accident, defendants appeal as of right from a grant of summary disposition to plaintiff. Plaintiff cross-appeals, arguing that the trial court erred in denying its request for attorney fees. We affirm.

On May 16, 2008, Craig Smith, Jr. (Craig Jr.), was driving a Ford Explorer owned by his father, Craig Smith, Sr. (Craig Sr.), when he struck a tree and sustained injuries, which were treated at plaintiff Spectrum Health Hospitals. Craig Jr. was legally intoxicated and had no valid license at the time of the accident. Defendants insured the vehicle in question, and plaintiff therefore sued them for medical expenses related to the accident.

Plaintiff filed a motion for summary disposition under MCR 2.116(C)(10), arguing that because Craig Sr. had given permission to Kathleen Chirco, Craig Jr.'s girlfriend, to drive the Explorer, and because Chirco subsequently gave permission to Craig Jr. to drive the vehicle, defendants were obligated to provide coverage related to the accident. Defendants argued that they were not obligated to provide coverage because there had been an "unlawful taking" of the vehicle by Craig Jr. They emphasized that Craig Jr. knew that his father did not want him to drive the vehicle and that Craig Jr. was intoxicated and without a license at the time of the accident.

The trial court, relying on *Cowan v Strecker*, 394 Mich 110; 229 NW2d 302 (1975), granted plaintiff's motion, awarding $30,936.77 in covered expenses and $1,403.46 in penalty interest.

On appeal, defendants argue that they were not obligated to provide coverage related to the accident because of the restrictions contained in MCL 500.3113. We review de novo a trial court's grant of summary disposition. *Corley v Detroit Bd of Education*, 470 Mich 274, 277; 681 NW2d 342 (2004).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley*, 470 Mich at 278 (internal citation and quotation marks omitted).]

> MCL 500.3113 states, in part:

> > 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.

Defendants emphasize that Craig Jr. was intoxicated and had no valid license at the time of the accident. Defendants cite *Amerisure Ins Co v Plumb*, 282 Mich App 417; 766 NW2d 878 (2009), in support of their appeal. In *Amerisure*, *id*. at 420-421, the defendant had driven a vehicle without the permission of the owner and without the permission of someone who had himself obtained permissive use from the owner. The defendant was also intoxicated and had no valid license at the time she drove the vehicle. *Id*. at 421. She was in an accident and sustained injuries. *Id*.

> The *Amerisure* Court examined MCL 500.3113(a) and stated:

> > . . . 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 N.W.2d 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. [*Amerisure*, 282 Mich App at 425.]

The *Amerisure* Court held that, in that case, there had indeed been an unlawful taking because the defendant had no permission to use the vehicle from the owner or from a permitted user of the vehicle. *Id*. at 426-427. The Court stated, "Therefore, there is no genuine issue of material fact that [the defendant] unlawfully took the Jeep, and § 3113(a) applies." *Amerisure*, 282 Mich App at 427.

Defendants place great emphasis on the *Amerisure* Court's further conclusion that the defendant could not have reasonably believed that she was able to take and use the vehicle because of her intoxication and her suspended license. See *id*. at 431-432. Defendants suggest that the facts in *Amerisure* are directly analogous to those in the instant case. Defendants' reasoning, however, is flawed. The *Amerisure* Court analyzed the "take and use" language from MCL 500.3113(a) only because it *first found* that the defendant had taken the vehicle unlawfully. See *Amerisure*, 282 Mich App at 427. The key issue in dispute, for purposes of the instant case, is whether Craig Jr. took the Explorer unlawfully.

The trial court analyzed this question correctly. In *Cowan*, 394 Mich at 111-112, the Michigan Supreme Court stated:

> In this automobile negligence action, tried before a judge, defendant owner of the car which was involved in an accident resulting in injury to plaintiff contends that liability under the owners' civil liability act is avoided because there was no consent on her part to Use of the vehicle by the injuring driver. . . .
>
> The trial court found that defendant owner, Grace Strecker, had given her automobile to an acquaintance, Mrs. Shannon, *with specific instructions that she not let anybody else drive her car*. Mrs. Shannon proceeded to disobey the admonition and permitted her son William to operate the vehicle without Grace Strecker's knowledge. While William Shannon was driving, an accident occurred in which plaintiff sustained back injuries. [Emphasis added.]

The *Cowan* Court rejected the defendant's argument, stating, in part: "when an owner willingly surrenders control of his vehicle to others he 'consents' to assumption of the risks attendant upon his surrender of control regardless of admonitions which would purport to delimit his consent. It must be so, or the statutory purpose would be frustrated." *Id*. at 115.

In *Bronson*, 198 Mich App at 625, the Court stated:

> the implication in *Cowan* is that, when an owner loans his vehicle to another, it is foreseeable that the borrower may thereafter lend the vehicle to a third party and such further borrowing of the vehicle by the third party is, by implication, with the consent of the owner.
>
> Thus, returning to the case at bar, under the reasoning of *Cowan*, Mark Forshee's use of the vehicle at the time of the accident was with the owner's consent inasmuch as the owner, Stanley Pefley, entrusted the vehicle to his son, Thomas, who in turn entrusted the vehicle to Morrow, who finally entrusted it to Forshee. Given this unbroken chain of permissive use, we cannot say that Forshee's taking of the automobile was unlawful. As noted in *Cowan*, the mere fact that the borrower violates the restrictions placed on him by the owner does not negate the fact that the subsequent taking by a third party is, by implication, with the owner's consent. Therefore, even though Stanley Pefley had placed restrictions on the use of the vehicle he entrusted to his son, including the specific restriction that Mark Forshee was not to use the vehicle, the fact that the vehicle

> was ultimately entrusted to Forshee in violation of those restrictions does not change the fact that the taking and use was with the owner's consent as defined in *Cowan*.

Cowan and *Bronson* are dispositive in the instant case and indicate that there was no unlawful taking of the Explorer.[1] Accordingly, we have no reason to engage in an analysis of the "reasonably believed that he or she was entitled to take and use" language of MCL 500.3113(a). See *Amerisure*, 282 Mich App at 427. The trial court properly granted summary disposition to plaintiff.

In a cross-appeal, plaintiff argues that the trial court should have awarded attorney fees under MCL 500.3148(1).[2] We review this issue for an abuse of discretion. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

MCL 500.3148(1) states:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which 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.

The trial court denied the request for attorney fees, stating, "This request is denied because the [c]ourt is convinced that the issue presented was a legitimate question of statutory construction."

In *Ross v Auto Club Group*, 481 Mich 1; 748 NW2d 552 (2008), the Court stated:

> The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured. Accordingly, an insurer's refusal or delay places a burden on the insurer to justify its refusal or delay. The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty.

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[1] See also *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 342, 357; 764 NW2d 304 (2009) (no unlawful taking where an intoxicated 12-year-old family member took a vehicle "joyriding" and had no intent to steal the vehicle). This case provides further support for our decision today.

[2] In their brief addressing attorney fees, defendants claim that Chirco did not actually give permission to Craig Jr. to use the vehicle but that, instead, Craig Jr. "took the keys." We note that defendants did not make this argument in connection with the main issue on appeal but instead relied on *Amerisure*, stating that Craig Jr. "knowingly operated a motor vehicle in violation of Michigan statutes." At any rate, we note that Craig Jr. testified in his deposition: "I was her boyfriend, so she just felt obligated after a couple of minutes to *give me the keys*" (emphasis added).

In *Taylor*, 277 Mich App at 99, the Court stated, "If the trial court's decision [concerning attorney fees] results in an outcome within the range of principled outcomes, it has not abused its discretion." While others might have ruled differently with regard to attorney fees in this case, we simply cannot conclude that an abuse of discretion occurred with regard to the trial court's decision to deny the fees. Although *Cowen* and *Bronson* are dispositive in this case, one could characterize as legitimate defendants' argument that there was an unlawful taking based on Craig Jr.'s intoxication and lack of a valid license.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Patrick M. Meter