STATE OF MICHIGAN

COURT OF APPEALS

IAN McPHERSON,

Plaintiff-Appellee,

v

CHRISTOPHER McPHERSON and AAA AUTO CLUB GROUP INSURANCE COMPANY,

Defendants,

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellant,

and

AUTO CLUB INSURANCE ASSOCIATION MEMBER SELECT INSURANCE COMPANY and AUTO CLUB INSURANCE COMPANY,

Defendants/Cross-Defendants

UNPUBLISHED
January 10, 2012

No. 299618
Oakland Circuit Court
LC No. 2008-095926-NI

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Ian McPherson drove his uninsured motorcycle into a parked car and sustained severe injuries. He contends that a seizure precipitated his motorcycle crash, and that a prior car accident caused his seizure disorder. The insurer that covered McPherson's no-fault benefits associated with the car accident denied liability for payment of no-fault benefits related to the motorcycle accident. The circuit court ruled that fact questions precluded summary disposition in the insurer's favor, and we affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

On November 25, 2007, plaintiff Ian McPherson rode as a passenger in a car driven by his brother, Christopher McPherson. Christopher lost control of the vehicle and it struck a freeway guardrail. Ian's head struck a deployed airbag. The next day, Ian "got kind of a weird feeling" when he stood up after smoking a cigarette, "spun around and woke up in the hospital." According to Dr. M. Mazen Al-Hakim, Ian suffered a grand mal seizure triggered by the head injury and his ingestion of Adderal, a prescribed amphetamine. Dr. Al-Hakim opined that Ian also probably has an "underlying genetic predisposition" to seizures. After hospitalization for treatment of the initial seizure, Ian received follow-up neurological care from Dr. Brien Smith, an epilepsy specialist.

Defendant Progressive Michigan Insurance Company bore responsibility for paying no-fault benefits related to the 2007 accident. Alison Wieck, a Progressive claims supervisor, testified at her deposition that Progressive contacted Dr. Smith to obtain his opinion regarding whether the car accident caused Ian's seizure disorder. According to notes kept by a Progressive claims' representative, Dr. Smith submitted an attending physician's statement attesting that Ian's seizures were "solely related to" the motor vehicle accident. Wieck admitted that after receiving Dr. Smith's statement, Progressive made no effort to obtain additional information or another medical opinion.

On September 19, 2008, while riding his motorcycle on Woodward Avenue, Ian "sort of had the same feeling I had from my first seizure, and then I didn't have enough time to pull over or anything. Before I knew it, I just kind of blacked out." His motorcycle crossed four lanes of traffic and struck a parked car. Ian suffered severe injuries in the 2008 accident, including ventilator-dependent quadriplegia.

Ian submitted to Progressive a first-party, no-fault benefits claim arising from the motorcycle crash. When Progressive denied coverage, Ian filed this lawsuit. Progressive moved for partial summary disposition pursuant to MCR 2.116(C)(8) and (10). In support of its motion, Progressive argued that Ian's claim for first-party no-fault benefits related solely to the 2008 motorcycle accident rather than the 2007 car crash, and asserted that because Ian neglected to insure the motorcycle, he forfeited any entitlement to first-party no-fault benefits. In support of this argument, Progressive referenced documentary evidence including deposition testimony.[1]

In response to Progressive's summary disposition motion, Ian submitted the deposition testimony of Dr. Al-Hakim, who explained, "If you have a head trauma causing amnesia or loss of consciousness, and especially if you have [a] genetic predisposition, and especially you [are]

[1] In its initial brief in support of summary disposition, Progressive failed to raise any argument regarding the sufficiency of Ian's pleadings, despite that the motion invoked MCR 2.116(C)(8) as well as (C)(10).

taking [an] amphetamine, then you [are] going to have seizures in the future." Dr. Al-Hakim addressed the relationship between Ian's 2007 head injury and the 2008 seizure as follows:

> Q. Okay. And in terms of how much a role the – I'll call it a head injury or – well, the head injury he may have suffered in that November of '07 accident, how much did that play a role in the one that happened in September of '08?
>
> A. Well, posttraumatic seizure can happen at any time. You can have head trauma today, you can have seizure from posttrauma [sic] two days later, you can have it a year later, you can have it the rest of your life.

In a bench ruling, the circuit court denied Progressive's motion, ruling as follows:

> In accepting the facts in the complaint as true the elements of the claim have been satisfied. Plaintiff has set forth a claim upon which relief can be granted.
>
> Further, reviewing the evidence in the light most favorable to plaintiff it is possible for a reasonable juror to determine the second accident was caused by the injuries suffered in the first. I'm not saying it's the best case and I'm not saying that you will necessarily prevail, but it does survive a summary disposition. So I'm denying the motion for summary disposition.

This Court initially denied Progressive's application for leave to appeal, *McPherson v McPherson*, unpublished order of the Court of Appeals, entered September 21, 2010 (Docket No. 299618), but on reconsideration granted leave to appeal. *McPherson v McPherson*, unpublished order of the Court of Appeals, entered November 1, 2010 (Docket No. 299618).

II. ANALYSIS

Progressive challenges the circuit court's summary disposition ruling, which we review de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "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*, 469 Mich at 183.

The parties' dispute centers on whether the no-fault act, MCL 500.3101 *et seq.*, obligates Progressive to pay personal protection insurance benefits flowing from the injuries Ian sustained in the 2008 motorcycle accident. An injured claimant's entitlement to personal protection benefits arises from MCL 500.3105(1), which states: "Under personal protection insurance 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 this chapter." However, the no-fault act precludes receipt of personal protection benefits "if at the time of *the* accident the person was the owner or registrant of a motor vehicle or motorcycle involved in *the* accident with respect to which the security required by section 3101 or 3103 was not in effect." MCL 500.3113(b) (emphasis added).

The accident for which Ian seeks first-party no-fault benefits occurred in November of 2007. Ian contends that his current injuries, including his seizure disorder, arose from his brother's operation of the insured motor vehicle that struck the guardrail. "The phrase 'arising out of the ownership, maintenance or use' of a vehicle has commonly been used in automobile insurance policies, and was apparently used in the no-fault act in awareness of that history." *Miller v Auto-Owners Ins Co*, 411 Mich 633, 638; 309 NW2d 544 (1981). In *Shinabarger v Citizens Ins Co*, 90 Mich App 307, 313; 282 NW2d 301 (1979), this Court observed that "cases construing the phrase 'arising out of the . . . use of a motor vehicle as a motor vehicle' uniformly require that the injured person establish a causal connection between the use of the motor vehicle and the injury." *Id.* Drawing on case law from other jurisdictions, the *Shinabarger* Court emphasized that "the relationship between use of the vehicle and the injury need not approach proximate cause," and that "[t]he question to be answered is whether the injury 'originated from', 'had its origin in', 'grew out of', or 'flowed from' the use of the vehicle." *Id.* at 314 (internal citations omitted). In *Scott v State Farm Mut Automobile Ins Co*, 278 Mich App 578, 586; 751 NW2d 51 (2008), lv den on recon 483 Mich 1032 (2009), this Court explained that "'arising out of' requires more than an incidental, fortuitous, or but-for causal connection, but does not require direct or proximate causation."

Viewed in the light most favorable to Ian, sufficient evidence establishes a question of fact concerning whether the 2008 motorcycle crash "originated from," "had its origin in," "grew out of," or "flowed from" the 2007 car accident. Drs. Smith and Al-Hakim unequivocally connected Ian's seizure disorder to the trauma Ian experienced when his head collided with the air bag. This evidence could support a jury's reasonable conclusion that Ian's 2008 bodily injuries arose from Christopher's operation of the vehicle involved in the 2007 crash. Alternatively stated, the connection between Ian's injuries and the 2007 accident "is not so remote or attenuated as to preclude a finding that it arose out of the use of a motor vehicle." *Kochoian v Allstate Ins Co*, 168 Mich App 1, 9; 423 NW2d 913 (1988). And the evidence reasonably supports that "the causal connection between the injury and the use of the motor vehicle was more than incidental, fortuitous, or 'but for.'" *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 634; 563 NW2d 683 (1997).

We reject Progressive's argument that the motorcycle accident constituted a separate and superseding cause of Ian's spinal cord injury, supplanting any relationship between the first accident and the second. In *Shinabarger*, this Court specifically noted that the existence of an independent cause for a claimant's injuries does not bar recovery under the no-fault act: "Where use of the vehicle is one of the causes of the injury, a sufficient causal connection is established even though there exists an independent cause. . . ." *Shinabarger*, 90 Mich App at 313 (internal citations omitted). In *Scott*, 278 Mich App at 586, this Court summarized, "there is no authority that, for purposes of personal protection insurance, a plaintiff must exclude other possible causes" of his injury. Had Ian injured his spinal cord in 2008 by falling from a ladder during a

seizure, Progressive would potentially bear liability. That Ian instead suffered a seizure while riding a motorcycle does not, standing alone, eliminate any connection between his 2007 head injury and the 2008 events.[2]

Shinabarger and *Putkamer* instruct that traditional tort causation concepts, including "but for" and proximate causation, do not govern whether an injury "arises out of" the operation of a motor vehicle as a motor vehicle. Rather, "[a]ll that is required to come within the meaning of the words 'arising out of the . . . use of the automobile' is a causal connection with the accident." *Ins Co of North America v Royal Indemnity Co,* 429 F2d 1014, 1018 (CA 6, 1970). While the phrase should not be extended to include entirely remote or utterly unforeseeable events, where a causal nexus links the operation of a vehicle and an injury, MCL 500.3105(1) compels coverage. Here, Ian has established a triable issue of fact whether his spinal injuries arose from Christopher's operation of the vehicle involved in the 2007 accident.

We do not find persuasive Progressive's argument that *DeSot v ACIA*, 174 Mich App 251; 435 NW2d 442 (1988), compels a different result. In *DeSot*, the plaintiff's decedent struck a car while driving an uninsured motorcycle, and suffered fatal injuries. *Id.* at 252-253. The decedent also owned two insured vehicles, and his widow claimed no-fault survivors' loss benefits based on the existence of those policies. This Court held that "survivors' no-fault benefits are derivative of the decedent's right of recovery and . . . the language of § 3113(B) which would have precluded the decedent's claim also disqualifies the claim of the survivors." *Id.* at 254. The plaintiff raised no claim in *DeSot* that an injury related to a separate accident subject to no-fault coverage occasioned her husband's motorcycle accident. *DeSot* neither controls the outcome in this case nor provides helpful authority.

That this case involves two accidents not only distinguishes it from *DeSot*, but refutes the dissent's contention that Ian's uninsured status governs his ability to receive no-fault benefits for his quadriplegia. The dissent begins its analysis by asserting, "[d]espite the fact that the no-fault act is free from a 'causation' analysis, the majority focuses on the cause of the accident – Ian's seizure." *Post* at 4. Yet in essentially the same breath, the dissent maintains that because "[t]here is no question that the motorcycle crash *caused* [Ian's] paraplegia [sic]," Ian's failure to insure the motorcycle "compels a finding that Ian is disqualified from coverage." *Post* at 5 (emphasis added).

Indisputably, the motorcycle accident constitutes the most proximate cause of Ian's spinal cord injury. But as the dissent correctly recognizes, at least in passing, tort law causation analysis does not control a claimant's eligibility to receive no-fault benefits. Rather, the statute commands that an insurer pay benefits for accidental bodily injuries "arising out of the . . . operation . . . or use of a motor vehicle as a motor vehicle," subject to certain limitations. MCL

[2] Although Progressive vigorously contests that Ian's seizure disorder arose from the 2007 accident, it presented no evidence contradicting Dr. Al-Hakim's testimony or the opinion apparently rendered by Dr. Smith. The record includes no evidence refuting Ian's claim that his seizure disorder arose from the 2007 car accident, or that a seizure triggered the 2008 motorcycle crash.

500.3105(1). Ian asserts that his quadriplegia "arose out of" Christopher's operation of a motor vehicle. He grounds his benefit claim solely on the first accident. Thus, the issue presented is whether any evidence supports that Ian's quadriplegia arose from *that* accident. "Something that 'aris[es] out of,' or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen." *People v Johnson,* 474 Mich 96, 101; 712 NW2d 703 (2006). Record evidence supports that the first accident bore a "connective relationship" with the second; viewed in the light most favorable to Ian, the second accident flowed directly from the first. The dissent simply ignores both the boundary of Ian's claim and the plain language of MCL 500.3105(1), which sets forth the rules governing first-party coverage determinations. *Thornton,* 425 Mich at 659-660.

Lastly, we find no merit in Progressive's claim that the circuit court erred by failing to grant summary disposition based on MCR 2.116(C)(8). Summary disposition on the basis of subrule (C)(8) should be granted only when the claim "is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Dalley v Dykema Gossett PLLC,* 287 Mich App 296, 304; 788 NW2d 679 (2010) (internal quotation omitted). Regardless whether Ian's complaint omitted mention of the 2008 motorcycle accident, it stated a potentially valid claim for first-party benefits arising from the 2007 car crash. Accordingly, this argument is unavailing.

Affirmed.

/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher

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Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

K. F. KELLY (*dissenting).*

While I agree with my colleagues that the trial court properly denied summary disposition pursuant to MCR 2.116(C)(8), I believe that the trial court erred in failing to grant summary disposition pursuant to MCR 2.116(C)(10). I would hold that Ian McPherson is foreclosed from seeking first-party benefits by MCL 500.3113(b).

I. BASIC FACTS

On November 25, 2007, Ian was a passenger in a car driven by his brother, Christopher McPherson. They were involved in a single-car collision. The airbags deployed and Ian remembers hitting his head. The next day, Ian experienced a seizure and woke up in the hospital. The treating physician opined that Ian's genetic predisposition to seizure disorders, his use of Adderal to control symptoms of ADHD, as well as the trauma of hitting his head, caused a gran mal seizure. At the time, Progressive was the insurer of the vehicle and paid no-fault benefits related to the accident. Progressive received a physician's statement that Ian's seizure was "solely related to" the accident.

Ian was involved in a second accident on September 19, 2008. He was riding his uninsured motorcycle when he experienced a similar sensation to his other seizure. He blacked out, traversed four lanes of traffic, and struck a parked vehicle. Ian was rendered a quadriplegic as a result of the accident. For purposes of this appeal, it is assumed as fact that Ian's second seizure was consistent with post-traumatic seizure disorder brought on by the first accident.

Ian sued Progressive for benefits, arguing that the seizure disorder caused the loss of control of his uninsured motorcycle and, therefore, arose out of the first accident. Progressive moved for summary disposition, arguing that Ian was not entitled to benefits because he was an uninsured motorcyclist at the time. The trial court denied the motion, finding that "viewing the evidence in a light most favorable to plaintiff it is possible for a reasonable juror to determine the second accident was caused by the injuries suffered in the first. I'm not saying it's the best case and I'm not saying that you will necessarily prevail, but it does survive a summary disposition."

This Court initially denied Progressive's application for leave to appeal, *McPherson v McPherson*, unpublished order of the Court of Appeals, entered September 21, 2010 (Docket No. 299618), but later granted Progressive's motion for reconsideration. *McPherson v McPherson*, unpublished order of the Court of Appeals, entered November 1, 2010 (Docket No. 299618).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; —— NW2d —— (2011). A motion made under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Medical Center v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *Id.*

This Court reviews de novo questions of law in general, including matters of statutory construction. *Loweke*, 489 Mich at 162. This Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548–549; 685 NW2d 275 (2004). In so doing, the Court must begin with the language of the statute, ascertaining the intent that may reasonably be inferred from its language. *Lash v Traverse City*, 479 Mich 180, 187; 735 NW2d 628 (2007). It is axiomatic that the words contained in the statute provide the most reliable evidence of the Legislature's intent. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 163; 744 NW2d 184 (2007). The Legislature is presumed to have intended the meaning it plainly expressed and clear statutory language must be enforced as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007); *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 72 (2007). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. *Lash*, 479 Mich at 187; *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). Only if a statute is ambiguous is judicial construction permitted. *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 449; 770 NW2d 117 (2009).

III. ANALYSIS

Michigan's no-fault insurance act, MCL 500.3101 *et seq*., directs that every "owner or registrant of a motor vehicle required to be registered in this state shall" carry personal protection insurance. MCL 500.3101(1). "Under personal protection insurance 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 this chapter . . . without regard to fault." MCL 500.3105(1) and (2) (emphasis added). The majority reads the phrase "arising out of" to find that the paraplegia Ian suffered in the 2008 accident "originated from," "had its origin in," "grew out of," or "flowed from" the earlier 2007 accident because it was the 2007 accident that caused the seizure disorder which, in turn, caused the 2008 accident. I do not believe such an analysis is relevant under the circumstances.

Despite the fact that the no-fault act is free from a "causation" analysis, the majority focuses on the cause of the accident – Ian's seizure. Instead, the focus must be on MCL 500.3113(b) and whether no-fault benefits are unavailable to Ian as a matter of law because he was operating an uninsured motorcycle at the time he suffered the injuries for which he now seeks coverage.

Section 3113(b) 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 the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect." There is no question that Ian's paraplegia is the bodily injury for which he seeks benefits. There is also no question that the motorcycle crash caused his paraplegia. Finally, there is no question that he owned the motorcycle and was required to obtain

insurance under MCL 500.3103(1)[1]. The majority spends very little time discussing the exclusion in § 3113(b), stating only that it rejects the argument that *DeSot v ACIA*, 174 Mich App 251; 435 NW2d 442 (1988), compels a finding that Ian is disqualified from coverage.

In *DeSot*, a motorcyclist was killed in an accident with an uninsured vehicle. Although the decedent had two no-fault insurance policies for the family's two other cars, the motorcycle was not covered under either policy. The decedent's wife sought no-fault survivors' benefits from ACIA. The trial court granted summary disposition in favor of ACIA, finding that § 3113(b) precluded coverage because the decedent failed to obtain the statutorily required insurance. *DeSot*, 174 Mich App at 252-253. This Court affirmed, finding that "survivors' no-fault benefits are derivative of the decedent's right of recovery and that the language of § 3113(b) which would have precluded the decedent's claim also disqualifies the claim of the survivors." *Id.* at 254. This Court reiterated that "[t]his statutory provision represents a legislative policy to deny benefits to those whose uninsured vehicles are involved in accidents." *Id.* at 256. Because § 3113(b) would have disqualified the decedent from benefits had he lived, his survivors were likewise precluded from coverage. *Id.* at 257. Although the majority concludes that "*DeSot* neither controls the outcome in this case nor provides helpful authority," I disagree. While it is true that the plaintiff in *DeSot* did not raise a claim that the injury related to a separate prior accident, *DeSot* clearly finds that § 3113(b) denies coverage to those individuals who act in utter defiance of the statutory mandate that they obtain and maintain insurance coverage for their motorcycles.

Ian argues (and the majority accepts) that he does not seek to recover for injuries he sustained in the 2008 accident (paraplegia); rather, he seeks to recover for the injury he sustained in the 2007 accident (seizure disorder), which resulted in the paraplegia sustained in the second accident. That is an intellectually disingenuous and circular argument. Distilled to its essence, Ian is only seeking benefits for his spinal cord injury. Because there was no question that Ian was operating an uninsured motorcycle *at the time he sustained the injuries* ***for which he seeks coverage***, the trial court erred in failing to grant Progressive summary disposition.

Again, at the time of Ian's spinal cord injury, there was no question that he owned and operated a motorcycle that was not insured as required by the no-fault act. While operating this uninsured motorcycle, he was involved in an accident that rendered him a paraplegic. Section 3113(b) clearly provides that an individual operating an uninsured motorcycle is not entitled to first-party benefits. The attempt to draw a connection to the 2007 not only ignores the clear mandate of § 3113(b), but also requires a discussion of causation and fault – neither of which is relevant under our no-fault statute. Nothing relieved Ian of his legal obligation to insure his

[1] MCL 500.3103(1) provides: "An owner or registrant of a motorcycle shall provide security against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by a person arising out of the ownership, maintenance, or use of that motorcycle. The security shall conform with the requirements of section 3009(1)."

motorcycle. It was being illegally operated on a public highway at the time of the accident. Ian was required to insure his motorcycle under MCL 500.3103(1), and because he failed to do so, he is not entitled to PIP benefits pursuant to MCL 500.3113. I would reverse.

/s/ Kirsten Frank Kelly