STATE OF MICHIGAN

COURT OF APPEALS

JENNE OTT,

Plaintiff-Appellee,

v

PROGRESSIVE MICHIGAN INSURANCE CO.,

Defendant-Appellant,

and

FARM BUREAU INSURANCE CO.,

Defendant-Appellee.

UNPUBLISHED
October 20, 2009

No. 287632
St. Joseph Circuit Court
LC No. 08-000386-CZ

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant, Progressive Michigan Insurance Co. ("Progressive"), appeals as of right the trial court's order granting summary disposition in plaintiff's favor. Because the trial court erroneously relied upon *Iqbal v Bristol West Ins Group*, 278 Mich App 31; 748 NW2d 574 (2008) as the basis for its summary disposition order, we reverse and remand for proceedings not inconsistent with this opinion.

Plaintiff filed a complaint against Progressive and Farm Bureau Insurance Co. ("Farm Bureau") for the payment of no-fault benefits she claimed she was entitled to, but never paid, as a result of injuries she incurred in an automobile accident. Plaintiff was the passenger in a vehicle driven by a friend. Plaintiff claimed Kirk Hunter owned the vehicle and was insured through a policy Hunter secured from Progressive. Plaintiff asserted that when she made a claim for benefits with Progressive, it insisted that Farm Bureau, as appointed by the assigned claims facility, was responsible for the payment of her no-fault benefits. Plaintiff thus sought a declaration concerning which of the defendants was first in priority for purposes of the payment of no-fault benefits and further asserted a breach of contract action against Progressive for its failure to pay her benefits under the applicable insurance policy.

Two months after filing her complaint, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10). Plaintiff asserted that Progressive insured the vehicle in which she was a passenger, that no policy exclusion precluded the payment of benefits, and that

it was thus required to pay her no-fault benefits under the applicable policy. Farm Bureau concurred in plaintiff's motion for summary disposition. Progressive responded that substantial factual questions existed as to whether Hunter was actually an owner and capable of insuring the vehicle, and that summary disposition was premature, particularly since no discovery had taken place to resolve the issue of ownership. Progressive also claimed that under the priority statutes, for purposes of payment of such benefits, the assigned claims facility was responsible for plaintiff's benefits. The trial court, relying upon *Iqbal v Bristol West Ins Group*, 278 Mich App 31; 748 NW2d 574 (2008), granted summary disposition in plaintiff's favor, finding that Progressive was responsible for the payment of plaintiff's no-fault benefits. This appeal followed.

While the trial court did not specify the particular subsection upon which it relied in granting plaintiff summary disposition, it did note that the motion had to be viewed in the light most favorable to the nonmoving party and that all affidavits and documentation submitted to the court were to be considered. In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Ritchie Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). It appears that the trial court relied upon MCR 2.116(C)(10) in reaching its decision.

We review de novo the trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10). *Oliver v Smith*, 269 Mich App 560, 563; 715 NW2d 314 (2006). A motion for summary disposition should be granted pursuant to MCR 2.116(C)(10) if the "proffered evidence fails to establish a genuine issue regarding any material facts." *Joyce v Rubin*, 249 Mich App 231, 234; 642 NW2d 360 (2002). We also review issues of statutory construction, which constitute questions of law, de novo on appeal. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007).

The trial court granted summary disposition in plaintiff's favor based upon its finding that:

> I also think that. . . as two of the counsel have stated, that the *Iqbal* decision is on point and is controlling. . . I. . . agree with counsel that this would indicate that PIP benefits are available to [plaintiff] from Progressive—should have been paid promptly, and that there's no justifiable reason for the non-payment in light of the *Iqbal* decision. Any concerns with the policy as issued would be against Mr. Hunter, but as far as Ms. Ott, who is an innocent passenger in an insured motor vehicle, she's entitled to benefits under the statute pursuant to the *Iqbal* decision. I guess the analysis ends there, as it was an insured vehicle.

Progressive contends that while it undoubtedly insured the vehicle at issue and that plaintiff is entitled to PIP benefits, *Iqbal* did not address or resolve the priority issue for payment of PIP benefits that is presented to this Court. According to Progressive, the very narrow priority issue in the instant matter distinguishes this case from *Iqbal* and *Iqbal* thus does not, as the trial court held, conclusively resolve this case. We agree.

In *Iqbal v Bristol West Ins Group*, *supra*, the plaintiff was driving a vehicle when he was rear-ended at a stoplight. The vehicle was titled and registered to plaintiff's brother, and plaintiff's brother had obtained an insurance policy on the vehicle through Auto Club. Plaintiff

resided with his sister at the time of the accident and she owned a vehicle insured through Bristol. Bristol argued that plaintiff should be considered the owner of the vehicle because he had use of it for more than 30 days, and that because plaintiff was an owner, he was required to maintain insurance on the vehicle under the no-fault act—despite the fact that plaintiff's brother already had the vehicle insured. Bristol argued that because *plaintiff* did not insure the vehicle, he was not entitled to collect PIP benefits pursuant to MCL 500.3113(b). This statutory provision provides that a person is not entitled to PIP benefits if "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."

The dispute in *Iqbal* centered upon whether the plaintiff was an owner, and as such, was independently required to obtain insurance on the vehicle or be precluded from recovering PIP benefits under MCL 500.3113. A panel of this Court found that whether plaintiff was an owner or not was irrelevant, as the language of MCL 500.3113 links the insurance required to the *vehicle*, and MCL 500.3113 only precludes the payment of PIP benefits if there was *no* coverage in effect. The *Iqbal* Court found that there was no requirement that each owner (if there is more than one) obtain an individual insurance policy on the vehicle. So long as the required coverage was in place on the vehicle, the plaintiff was not precluded from recovering benefits under MCL 500.3113:

> Thus, the question becomes whether the BMW, and not plaintiff, had the coverage or security required by MCL 500.3101. As indicated above, the coverage mandated by MCL 500.3101(1) consists of "personal protection insurance, property protection insurance, and residual liability insurance." While plaintiff did not obtain this coverage, there is no dispute that the BMW had the coverage, and that is the only requirement under MCL 500.3113(b), making it irrelevant whether it was plaintiff's brother who procured the vehicle's coverage or plaintiff. Stated differently, the security required by MCL 500.3101(1) was in effect for purposes of MCL 500.3113(b) as it related to the BMW. (*Id*. at 41).

". . .we hold that MCL 500.3113(b) does not preclude an award of PIP benefits to an 'owner' of a vehicle if the vehicle is covered by a no-fault policy. . ." (*Id*. at 45).

As indicated by Progressive, the issue before this Court is distinguishable from that in *Iqbal.* Here, there is no contention that MCL 500.3113 is applicable or that it precluded plaintiff from recovering PIP benefits—the specific issue addressed in *Iqbal.* Furthermore, there was no contention in *Iqbal*, as there is here, that the individual who actually obtained the insurance policy on the vehicle was not an owner of the vehicle.

Pursuant to *Iqbal*, as long as there was coverage on the vehicle in which an injured plaintiff was a passenger, the plaintiff is entitled to PIP benefits. Indeed, Progressive unequivocally admits that plaintiff is entitled to recover such benefits and admits that an insurance policy issued by it was in place on the vehicle. The issue in the instant case is a *priority issue*.

The trial court erroneously determined that *Iqbal* was controlling, and that because Progressive had issued a policy on the vehicle, Progressive was required to pay the PIP benefits. That is where the trial court ended its analysis. Once again, however, the issue before the trial

court was not whether plaintiff was precluded from recovering PIP benefits under MCL 500.3113, but rather *who* was *first in order of priority* for the payment of such benefits.

Under Michigan's no-fault act, MCL 500.3101 *et seq.*, a person who sustains accidental bodily injury while the occupant of a motor vehicle must first look to no-fault insurance policies within his or her household for no-fault PIP benefits. See *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 530-531; 740 NW2d 503 (2007). Where a claimant is without no-fault benefit coverage under any policy of no-fault insurance covering himself, his spouse, or a relative residing with him, however, MCL 500.3114(4) provides the following with respect to the priority of insurer responsibility for no-fault PIP benefits:

> (4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
> (a) The insurer of the owner or registrant of the vehicle occupied.
> (b) The insurer of the operator of the vehicle occupied.

If no provision of MCL 500.3114 is applicable, then, according to MCL 500.3172:

> (1) A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through an assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed.

It is uncontested that plaintiff did not have an insurance policy, nor did a family member residing in her same household. Once again, MCL 500.3114 provides the priority for payment as follows:

> (a) The insurer of the owner or registrant of the vehicle occupied.
> (b) The insurer of the operator of the vehicle occupied.

"Owner" is defined for purposes of the no-fault provisions as any of the following:

> (*i*) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
> (*ii*) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

(*iii*) A person who has the immediate right of possession of a motor vehicle under an installment sale contract. MCL 500.3101.

Progressive contends that Hunter may not be an owner of the vehicle under the statutory definition, and if that is the case, Progressive is not the first priority insurer. While plaintiff repeatedly directs us to the evidence she supplied to the trial court to establish that Hunter was an owner and indicates several times that the trial court found Hunter to be an owner, the trial court actually made no finding as to Hunter's ownership of the vehicle to trigger Progressive's liability under the priority set forth in MCL 500.3114. The trial court relied solely upon the "controlling" decision of *Iqbal*, which found the matter of ownership to be irrelevant based on the particular facts of that case.

The question of ownership is a question of fact to be decided by the fact finder. *Botsford General Hosp v Citizens Ins Co*, 195 Mich App 127, 133; 489 NW2d 137 (1992). Because the ownership question remains a factual dispute requiring resolution in order to properly determine the priority issue, and the trial court did not specifically determine that Hunter was an owner, or that there was no reasonable chance that further discovery would result in factual support for the nonmoving party, summary disposition was inappropriate. Accordingly, we reverse the trial court's ruling and remand this matter for resolution of the ownership issue.

Reversed and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra