STATE OF MICHIGAN

COURT OF APPEALS

SPECTRUM HEALTH and ORTHOPAEDIC ASSOCIATES OF GRAND RAPIDS, P.C.,

Plaintiffs-Appellees,

v

TITAN INSURANCE COMPANY,

Defendant/Third-Party Plaintiff-Appellant,

and

BRANDY ZOERMAN,

Third-Party Defendant.

UNPUBLISHED
October 20, 2009

No. 285104
Kent Circuit Court
LC No. 06-010297-NF

KEVIN ZOERMAN,

Plaintiff-Appellee,

v

TITAN INSURANCE COMPANY,

Defendant/Third-Party Plaintiff-Appellant,

and

BRANDY ZOERMAN,

Third-Party Defendant.

No. 285105
Kent Circuit Court
LC No. 06-009271-NF

Before: Talbot, P.J., and Wilder and M. J. Kelly, JJ.

PER CURIAM.

In these consolidated cases, defendant Titan Insurance Company appeals as of right from a judgment directing a verdict in favor of plaintiff Kevin Zoerman, and in favor of Kevin's healthcare providers, plaintiffs Spectrum Health and Orthopaedic Associates of Grand Rapids, and awarding damages of $21,997.43 in favor of Kevin Zoerman, $68,241.11 in favor of Spectrum Health, and $5,578.18 in favor of Orthopaedic Associates. The trial court also awarded case evaluation sanctions in favor of Kevin Zoerman and Spectrum Health. We affirm.

These consolidated cases arise from an automobile accident in which plaintiff Kevin Zoerman was injured while driving a vehicle that was titled in the name of his wife, Brandy Zoerman. The vehicle was not insured at the time of the accident. Kevin Zoerman's claim for no-fault personal injury protection ("PIP") benefits was assigned to defendant by the Assigned Claims Facility. Defendant rejected Kevin's claim, contending that he was also an owner of the vehicle pursuant to MCL 500.3101(2)(h)(*i*), because he had a right to use the vehicle for a period of 30 days or more and, because the vehicle was not insured, he was not entitled to no-fault benefits under MCL 500.3113(b). Kevin denied that he was also an owner of the vehicle and filed an action to recover no-fault PIP benefits from defendant. Plaintiffs Spectrum Health and Orthopaedic Associates provided medical services to treat Kevin's injuries from the accident and filed a separate action against defendant to recover the costs of their services. The two actions were consolidated below.

Defendant filed a motion for summary disposition against all three plaintiffs with respect to the issue of ownership. The trial court found that there was a question of fact with regard to Kevin's right to use the vehicle titled in Brandy's name and, therefore, denied defendant's motion. The case proceeded to a jury trial. After the parties rested, the trial court determined that there was no evidence that Kevin was an owner of the vehicle under the no-fault act and, accordingly, directed a verdict in favor of all three plaintiffs.

I. Summary Disposition

Defendant first argues that the trial court erred in denying its motion for summary disposition. We disagree.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition under MCR 2.116(C)(10). A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). The court may not assess credibility or determine disputed issues of fact when deciding a motion for summary disposition. *Downey v Charlevoix Co Bd of Co Road Comm'rs,* 227 Mich App 621, 626; 576 NW2d 712 (1998). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

MCL 500.3113 provides, in relevant 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:

* * *

> (b) 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 [MCL 500.3101 or 500.3103] was not in effect.

It is undisputed that the vehicle Kevin was driving at the time of the accident was uninsured. Thus, under MCL 500.3113(b), Kevin would not be entitled to no-fault PIP benefits if he were an owner or registrant of the vehicle. Defendant does not dispute that Kevin was not a registrant of the vehicle, but argues that he was an "owner" under MCL 500.3101(2)(h)(*i*), which defines "owner," in relevant part, as follows:

> (h) "Owner" means 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. . . .

In *Twichel v MIC Gen Ins Corp,* 469 Mich 524, 530-531; 676 NW2d 616 (2004), our Supreme Court addressed the meaning of this definition.[1] The Court stated:

> We agree with the reasoning in the *Ringewold* [*v Bos,* 200 Mich App 131; 503 NW2d 716 (1993)], which construed the virtually identical language of MCL 257.37. As the *Ringewold* Court explained, it is not necessary that a person *actually* have used the vehicle for a thirty-day period before a finding may be made that the person is the owner. Rather, the focus must be on the nature of the person's right to use the vehicle.
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> Once again, MCL 500.3101(2)(g)(i) defines "owner" as "[a] person renting a motor vehicle or *having the use thereof* . . . for a period that is greater than 30 days." (Emphasis added.) Reading this language in the manner suggested by plaintiff requires substitution of the phrase "having *used* the vehicle" for the phrase "having the use thereof."
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> Nothing in the plain language of MCL 500.3101(2)(g)(i) requires (1) that a person has at any time *actually used* the vehicle, or (2) that the person has *commenced* using the vehicle at least thirty days before the accident occurred. The statute merely contemplates a situation in which the person *is renting or using* a vehicle for a period that is greater than thirty days.
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> Accordingly, if the lease or other arrangement under which the person has use of the vehicle is such that the right of use will extend beyond thirty days, that person is the "owner" from the inception of the arrangement, regardless of whether a thirty-day period has expired. For example, in the case of a lease

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[1] MCL 500.3101(2)(h)(*i*) was formerly codified as MCL 500.3101(2)(g)(*i*).

> running longer than thirty days, the plain language of the statute would make that person an "owner" from the inception of the lease; the person's status would not change simply because of the passage of time.
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> In this case, the arrangement between the seller and the deceased was for a permanent transfer of ownership of the vehicle and it contemplated that the deceased would have exclusive use of the truck permanently. The fact that the accident occurred before the expiration of thirty days does not affect the nature of the deceased's interest in the vehicle.

Twichel makes clear that MCL 500.3101(2)(h)(*i*) focuses on a person's right to the use of a vehicle for a 30-day period, not the person's actual use of the vehicle. Prior decisions of this Court have also addressed the no-fault definition of "owner" in manners not inconsistent with *Twichel*.

In *Ardt v Titan Ins Co*, 233 Mich App 685, 690-691; 593 NW2d 215 (1999), this Court explained:

> The statutory provisions at issue operate to prevent users of motor vehicles from obtaining the benefits of personal protection insurance without carrying their own insurance through the expedient of keeping title to their vehicles in the names of family members. Because we infer from these provisions that they were enacted in furtherance of the sound public policy imperative that users of motor vehicles maintain appropriate insurance for themselves as indicated by their actual patterns of usage, we hold that "having the use" of a motor vehicle for purposes of defining "owner," MCL 500.3101(2)(g)(i) . . . , means using the vehicle in ways that comport with concepts of ownership. The provision does not equate ownership with any and all uses for thirty days, but rather equates ownership with "having the use" of a vehicle for that period. Further, we observe that the phrase "having the use thereof" appears in tandem with references to renting or leasing. These indications imply that ownership follows from *proprietary* or *possessory* usage, as opposed to merely incidental usage under the direction or with the permission of another. Under this reading of the statutory definition, the spotty and exceptional pattern of Robert's usage to which Rita attested may not be sufficient to render Robert an owner of the truck. However, the regular pattern of unsupervised usage to which the defense witness attested may well support a finding that Robert was an owner for purposes of the statute. Accordingly, there remains a genuine issue of material fact for resolution at trial, rendering summary disposition with regard to this issue inappropriate. [Footnote omitted.]

In *Ardt*, the injured party, Robert, was driving a pickup truck that was titled in his mother's name. *Id.* at 687. Robert was residing with his mother at the time of the accident and one witness testified that Robert used the truck regularly for more than 30 days, but his mother testified that he used it only a few times over that period, only for minor purposes, such as having it washed. *Id*. at 689. This Court held that there was a question of fact whether Robert was an owner at the time of the accident. *Id.* at 691.

In *Kessel v Rahn*, 244 Mich App 353, 354; 624 NW2d 220 (2001), a vehicle driven by the plaintiff at the time of an accident was titled in her mother's name. However, the vehicle had been exclusively used only by the plaintiff, not by her mother, for more than a year. The plaintiff's mother purchased the vehicle for the plaintiff's use, it was kept at the plaintiff's home, and the plaintiff was responsible for gas, repairs, and insurance. *Id.* at 357-358. Similarly, in *Chop v Zielinski*, 244 Mich App 677, 680-682; 624 NW2d 539 (2001), the plaintiff had exclusive use of a vehicle titled to her former husband. Thus, this Court determined that the plaintiffs in both *Kessel* and *Chop* qualified as owners under MCL 500.3101(2)(g)(*i*), because the evidence established a sufficient possessory use of the respective vehicles for more than 30 days.

This case, however, is more factually similar to *Detroit Medical Ctr v Titan Ins Co*, 284 Mich App 490, 491-494; ___ NW2d ___ (2009), in which this Court stated:

> Plaintiff provided medical services to Maria Jimenez after she was injured in an automobile accident. Jimenez was driving an uninsured vehicle. Defendant, who was assigned the claim by the State of Michigan Assigned Claims Facility, maintained that Jimenez was an "owner" of the vehicle, and that plaintiff was therefore not entitled to recover for Jimenez' medical expenses. See MCL 500.3113. MCL 500.3101(2)(h)(i) defines the term "owner" for purposes of the no-fault act to include "[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."
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> Taking facts discerned from interviews of Jimenez and Jose Gonzalez in the light most favorable to defendant, it was established that Gonzalez had title to the car and cancelled the insurance; he was the father of Jimenez's two children and may have lived with her; the car was kept at Jimenez' residence; she used the vehicle, primarily for grocery shopping, approximately seven times over the course of about a month; she had to get permission and the keys from Gonzalez to use the vehicle, although permission may never have been denied; she put gasoline in the car but Gonzalez was otherwise responsible for maintenance; and he had stopped using the vehicle, as he had use of another. In granting summary disposition to plaintiff, the trial court determined that the permissive use and lack of keys belied any finding of a right of ownership.
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> Here, Jimenez did not "hav[e] the use" of the vehicle "for a period that is greater than 30 days." There was no transfer of a right of use, but simply an agreement to periodically lend. The permission was not for a contiguous 30 days, but sporadic. Similar to the plaintiff in *Chop*, the car was kept at Jimenez' residence. Moreover, she clearly had a significant relationship with Gonzalez such that permission to use the vehicle apparently was never denied. However, unlike the driver in *Ardt*, there was no evidence that Jimenez had "regular" use of the car. Also, contrary to the plaintiff in *Chop*, Jimenez did not believe she had any right of ownership and she did not have unfettered use. She had to ask permission and had to be given the keys. While there are facts in common with *Chop* and *Ardt*, these facts, standing alone, do not establish ownership. The need

> for permission distinguishes this case from *Chop* and *Twichel,* and the lack of any evidence of regular use distinguishes this case from *Ardt.* Accordingly, the trial court did not err when it concluded that Jimenez was not an owner of Gonzalez' vehicle.

The evidence in this case showed that Kevin and Brandy lived together and the vehicle was kept at their residence. Unlike *Kessel* and *Chop,* however, there was no evidence that Kevin had exclusive, or even regular, use of the vehicle. On the contrary, the evidence indicated that Kevin had used the vehicle only sporadically during the 14 months that Brandy owned the vehicle. Significantly, as in *Detroit Medical Ctr,* the evidence showed that Kevin did not have the right to use the vehicle when he wanted. Rather, he had to ask Brandy's permission to use it. Also, Brandy possessed the only set of keys for the vehicle, which Kevin would have to get from her when she allowed him to use it. There were occasions when Brandy did not allow Kevin to use the vehicle when he asked. Although some of Kevin's money may have been used to purchase the vehicle, it was undisputed that Brandy purchased the vehicle without Kevin's knowledge. Maintenance of the vehicle was also the responsibility of Brandy, not Kevin. As in *Detroit Medical Ctr*, these undisputed facts show that Brandy periodically allowed Kevin to use the vehicle, but he did not have the right to use it. Thus, the evidence did not establish that Kevin was an owner of the vehicle pursuant to MCL 500.3101(2)(h)(*i*).

Defendant's reliance on MCL 257.401(1) is also misplaced. That statute provides, in relevant part, that "[i]t is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, ..." MCL 257.401 is concerned with permissive use for purposes of owner liability. It is not relevant to the issue of ownership under MCL 500.3101(2)(h)(*i*). Brandy admitted that Kevin was driving her vehicle with her knowledge and consent at the time of the accident. Although MCL 257.401 would subject Brandy to liability to a third party for Kevin's permissive use of the vehicle, it does not establish Kevin as an owner of the vehicle within the meaning of MCL 500.3101(2)(h)(*i*). Accordingly, defendant did not prove an ownership interest pursuant to MCL 257.401(1).

Accordingly, the trial court did not err in denying defendant's motion for summary disposition.

II. Exclusion of Evidence

Defendant next argues that the trial court erred when it excluded evidence of computer printouts that it allegedly received from the Secretary of State's office. The evidence was offered to show that Kevin and Brandy previously owned two other vehicles that were titled only in Brandy's name. Defendant argues that the evidence was admissible under MRE 803(6), (8), or (24), and that its claims representative, Chris Davis, could have provided any necessary authentication pursuant to MRE 901.

The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. *Craig v Oakwood Hosp,* 471 Mich 67, 76; 684 NW2d 296 (2004). Here, regardless of whether the evidence could have been authenticated under MRE 901, or whether it qualified for admission under MRE 803, the trial court excluded the evidence pursuant to MRE 403 and MRE 611(a), because the printouts required a

representative of the Secretary of State's office to explain and interpret the records, and because the records did not relate to the vehicle involved in the accident in question. On appeal, defendant does not address MRE 403 or MRE 611(a), or the trial court's rationale for excluding the evidence. "When an appellant fails to dispute the basis of the trial court's ruling, '[t]his Court . . . need not even consider granting plaintiffs the relief they seek.'" *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (citation omitted). Thus, because defendant does not address the bases for the trial court's decision to exclude the evidence in question, it is not entitled to appellate relief with respect to this issue.

III. Jury Instructions and Limitations on Opening Statement

Defendant next argues that it is entitled to a new trial because the trial court's preliminary jury instructions were erroneous, and because the trial court improperly limited defense counsel's opening statement to the jury. Both of these issues relate to the jury's role in this case. But because the case was never submitted to the jury, and because defendant has not established that the trial court erred in directing a verdict in plaintiffs' favor, it is unnecessary to address these issues. Any error was harmless. MCR 2.613(A).

IV. Case Evaluation Sanctions

Defendant argues that the trial court erred by declining to apply the "interest of justice" exception in MCR 2.403(O)(11) to deny Kevin Zoerman's and Spectrum Health's requests for case evaluation sanctions. We disagree.

In *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005), this Court stated:

> A trial court's decision to grant or deny case evaluation sanctions is subject to review de novo on appeal. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). However, because a trial court's decision whether to award costs pursuant to the "interest of justice" provision set forth in MCR 2.403(O)(11) is discretionary, this Court reviews that decision for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003). An abuse of discretion may be found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

Defendant does not dispute that both Kevin Zoerman and Spectrum Health received a verdict that was more favorable than the case evaluation award, thereby entitling them to case evaluation sanctions under MCR 2.403(O)(1). But because the verdicts resulted from the court's ruling on a directed verdict motion, the court had discretion under MCR 2.403(O)(11) to refuse to award sanctions. In *Harbour, supra* at 466-467, this Court addressed the "interest of justice" exception, stating:

> In *Haliw v Sterling Hts*, 257 Mich App 689, 705-709; 669 NW2d 563 (2003), rev'd on other grounds, 471 Mich 700 (2005), this Court interpreted MCR 2.403(O)(11) by reference to the analogous "interest of justice" exception found

in the offer of judgment rule, MCR 2.405(D)(3), because both court rules "serve identical purposes of deterring protracted litigation and encouraging settlement." 257 Mich App at 706. The Court of Appeals in *Haliw* held that the "interest of justice" exception should be invoked only in "unusual circumstances," such as where a legal issue of first impression or public interest is present, "'where the law is unsettled and substantial damages are at issue,'" where there is a significant financial disparity between the parties, or "'where the effect on third persons may be significant.'" 257 Mich App at 707, quoting *Luidens v 63rd Dist Court*, 219 Mich App 24, 36; 555 NW2d 709 (1996) (citation deleted). These factors are not exclusive. 257 Mich App at 707. "'Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception.'" *Id.* quoting *Luidens*, *supra* at 36.

The *Haliw* Court further noted that in *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461; 624 NW2d 427 (2000), this Court, construing the "interest of justice" provision of MCR 2.405(D)(3), held that the combination of two "unusual circumstances"-the unsettled nature of the law and the "gamesmanship" evidenced by the considerable disparity between the rejected mediation evaluation and defendant's offer of judgment-warranted invocation of the "interest of justice" exception under the circumstances of the case. 257 Mich App at 707-708. The *Haliw* Court concluded that "if the trial court finds on the basis of all the facts and circumstances of a particular case and viewed in light of the purposes of MCR 2.403(O) that unusual circumstances exist, it may invoke the 'interest of justice' exception found in MCR 2.403(O)(11)." *Id.* at 709.

Defendant argues that the "interest of justice" exception should have been applied here because there were no facts in dispute and that the only issues were ones of law. However, defendant argued before trial that it was entitled to summary disposition, and it opposed Spectrum Health's cross motion for summary disposition. Moreover, the trial court observed that it had suggested that the parties stipulate to a judgment that reserved for decision only the meaning of "owner" for purposes of the no-fault act, but defendant refused that option and insisted on proceeding to trial. The trial court did not abuse its discretion by refusing to apply the interest of justice exception in MCR 2.403(O)(11) to deny Kevin's and Spectrum Health's requests for case evaluation sanctions.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly