STATE OF MICHIGAN

COURT OF APPEALS

QUILTRELL HILL, Plaintiff-Appellant,	UNPUBLISHED June 5, 2014
v	No. 314856 Wayne Circuit Court
JANAE DANIELLE BURCH and BOBBY BURCH, Defendants-Appellees.	LC No. 12-001059-NI

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendants' motion for summary disposition in this negligence action. We reverse and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Plaintiff was involved in a car accident with defendant, Janae Burch, on June 15, 2009.[1] Plaintiff was driving an uninsured car that he claimed belonged to his brother. Plaintiff initiated this instant litigation against defendants—the driver and owner of the vehicle—alleging negligence.

Defendants eventually moved for summary disposition pursuant to MCR 2.116(C)(10). They claimed that plaintiff had possessory and proprietary use of the car, which did not have valid insurance. Therefore, pursuant to MCL 500.3101 and MCL 500.3135, defendants argued that plaintiff was precluded from collecting noneconomic damages. Plaintiff responded with his own affidavit and that of his girlfriend that the car belonged to his brother, and that plaintiff had to obtain permission and the keys before using the vehicle. Thus, plaintiff argued that he was not using his own vehicle at the time of the accident and so he was not precluded from recovery.

[1] The circumstances surrounding the accident are not relevant for this appeal.

The trial court ultimately sided with defendants, and granted their motion for summary disposition. Plaintiff now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review de novo a grant or denial of a motion for summary disposition under MCR 2.116(C)(10). *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "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 v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotations marks and citations omitted). We consider only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

To the extent this issue calls for review of the no-fault act, our review is de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

B. ANALYSIS

On appeal, plaintiff contends there was a genuine issue of material fact regarding whether he used his own car, within the meaning of MCL 500.3101(2)(h)(i), at the time of the accident. We agree that there is a genuine issue of material fact and that summary disposition was improperly granted.

"Apart from certain enumerated exceptions, the no-fault act abolished tort liability for harm caused while owning, maintaining, or using a motor vehicle in Michigan." *Gray v Chrostowski*, 298 Mich App 769, 775; 828 NW2d 435 (2012) (quotation marks and citation omitted). The threshold exception is MCL 500.3135(1), which provides: "A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." See also *Gray*, 298 Mich App at 775.[2] However, "[d]amages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101 at the time the injury occurred." MCL 500.3135(2)(c) (citation omitted).

[2] Plaintiff does not cite to any other enumerated exceptions.

In the instant case, it is undisputed that the vehicle plaintiff was driving at the time of the accident did not have valid insurance. Thus, the issue in dispute is whether plaintiff was "operating his . . . own vehicle at the time the injury occurred." MCL 500.3135(2)(c). To determine whether a motorist was operating his "own vehicle" as set forth in MCL 500.3135(2), we look to the no-fault definition of "owner." *Kessel v Rahn*, 244 Mich App 353, 355; 624 NW2d 220 (2001). In relevant part, the act defines "owner" to mean "[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." MCL 500.3101(2)(h)(i). Yet, having the use of a vehicle for more than 30 days "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[,]" which implies "that ownership follows from *proprietary* or *possessory* usage, as opposed to merely incidental usage under the direction or with the permission of another." *Ardt v Titan Ins Co*, 233 Mich App 685, 690-691; 593 NW2d 215 (1999) (emphasis in original).[3]

For example, in *Kessel*, 244 Mich App at 357-358, this Court found sufficient proprietary or possessory use when the vehicle at issue was purchased for the driver, the driver exclusively used it on a daily basis for a year, she kept the vehicle at her home, and she was responsible for gas, repairs, and insurance. Similarly in *Chop v Zielinski*, 244 Mich App 677, 681; 624 NW2d 539 (2001), we found indicia of ownership when the driver regularly used the vehicle that her former husband held title to without permission, she believed the vehicle was awarded to her pursuant to the divorce judgment, she parked it at her apartment complex, and she used it daily.

The instant case is most factually similar to *Detroit Med Ctr v Titan Ins Co*, 284 Mich App 490; 775 NW2d 151 (2009). In that case, the vehicle was kept at the driver's residence, she used the car sporadically, she had to obtain permission and the keys from the titled owner—the father of her children—before using it, and the titled owner had stopped using the car and drove a different car. *Id.* at 491-492. We held that pursuant to MCL 500.3101(2)(h)(i), the driver "did not have the use of the vehicle for a period that is greater than 30 days." *Id.* at 493 (quotation marks omitted). Rather than regular or unfettered use, we found, "[t]here was no transfer of a right of use, but simply an agreement to periodically lend" as "[t]he permission was not for a continuous 30 days, but sporadic." *Id.* at 493.

The instant case is on all fours with *Detroit Med Ctr*. In both cases, the driver's use was not regular, permission was required, and the driver had to obtain the keys from the titled owner. Even if the car was regularly parked at plaintiff's residence or if plaintiff's brother had use of another vehicle, that is not dispositive pursuant to *Detroit Med Ctr, supra*. Considering plaintiff's sporadic use of the car for which he had to obtain permission, defendants have not established that plaintiff used the vehicle on a regular basis over a 30-day period, let alone that plaintiff's use was exclusive. *Detroit Med Ctr*, 284 Mich App at 492, 493-494.

Defendants, however, insist that plaintiff engaged in "repeated driving of the uninsured automobile extended over the course of a month of more." But, the only evidence defendants

[3] While MCL 500.3101 has been amended since *Ardt* was decided, the relevant definition of "owner" remains the same.

cite in support of this conclusion is plaintiff's claim in his appellate brief that he drove the vehicle "several times during the month before the June 15, 2009 motor vehicle accident." Yet, plaintiff's statement merely reveals "incidental usage" within that 30 day time period, not incidents of ownership. *Ardt*, 233 Mich App at 691. Further, the trial court is not permitted, at the summary disposition stage, to discard plaintiff's evidence as incredible. *White v Taylor Distrib Co, Inc*, 482 Mich 136, 142; 753 NW2d 591 (2008).

Therefore, we find that there is a genuine issue of material fact regarding whether plaintiff was "operating his . . . own vehicle at the time the injury occurred." MCL 500.3135(2)(c).

III. CONCLUSION

Because there is a genuine issue of material fact regarding whether the car plaintiff used was his own, summary disposition is improper. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood