STATE OF MICHIGAN

IN THE EIGHTEENTH CIRCUIT COURT FOR THE COUNTY OF BAY

RICKY ALLAN GENOW,
Plaintiff and Counter-Defendant,

vs

Case No. 97-3678-NI-S

CITIZENS INSURANCE COMPANY, and
TRAVELERS INSURANCE COMPANY,
Defendants,

and

PROGRESSIVE MICHIGAN INSURANCE COMPANY,
Defendant, Counter-Plaintiff, and
Third-Party Plaintiff,

vs

TINA GRAVLIN,
Third-Party Defendant.

_____/

OPINION AND ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF PROGRESSIVE MICHIGAN INSURANCE COMPANY, AND DENYING SUMMARY DISPOSITION IN FAVOR OF PLAINTIFF AND CITIZENS INSURANCE COMPANY

This matter comes before this Court on cross motions for summary disposition.

The case involves a claim for personal injury protection (PIP) benefits under Michigan's no-fault insurance law. Plaintiff Ricky Genow (Genow) alleges that he is entitled to such benefits as a result of injuries which he sustained in an automobile accident on April 6, 1997.

The nature and extent of Genow's injuries, and the benefits to which he would be entitled, if properly insured, are not contested. However, whether Genow is entitled to receive PIP benefits, and if so, from what insurance carrier, is vigorously disputed by defendants Progressive Michigan Insurance Company (Progressive) and Citizens Insurance Company (Citizens). Defendant Travelers Insurance Group, the carrier to which the claim was assigned by the assigned claims facility after coverage was disputed by Progressive and Citizens, has not taken a position in this litigation.

Factual Background

Some factual matters are not disputed by the parties. Others are. To better understand the positions of the parties, a brief factual overview will be helpful. A more thorough discussion of material facts follows later in this opinion, as necessary for decision.

Ricky Genow wanted the use of a vehicle. His niece, Maylee Birch, told Genow that he could use her pickup, a 1989 Chevrolet S-10. According to Maylee Birch's testimony, she had an agreement with Genow that if he got the pickup fixed (taillights, muffler, and transmission), purchased insurance for it, and put license plates on it, he could use it if he needed it. She testified, however, that he had to ask her permission to use it.

The pickup was titled (with a Kansas title) in the name of Maylee Birch "or" her ex-husband, Nicholas Birch. A recently issued (March, 1997) Kansas divorce judgment had given ownership of the pickup to Maylee Birch, and Maylee Birch was now living in Michigan. Nicholas Birch had executed an "Appointment of Agent" (handwritten on a Michigan Department of State form) permitting Maylee Birch to sign his name to legal documents pertaining to the sale or purchase of the pickup. Apparently, however, a new Michigan title had not been issued for it.

Genow got the pickup fixed, as he had agreed. He also provided the necessary funds to Maylee Birch for purchasing license plates. Using these funds, Maylee Birch bought license plates for the pickup. These plates were registered in the name of Maylee Birch and Nicholas Birch.

Genow and Maylee Birch did not follow the same procedure to obtain insurance, however. Apparently, this was because neither of them had a valid driver's license. Genow's driver's license had been revoked in January, 1994. Maylee Birch's driver's license had been suspended some time before February, 1997.

Genow asked his friend, Tom Curler, to ask Curler's girlfriend, Tina Gravlin, to buy insurance for the pickup. Tina Gravlin agreed to do it. She testified she thought it was to keep the premium lower than it would have been for Genow on his own.

Tina Gravlin obtained a policy of insurance on the pickup through the Evergreen Agency. The agent was Richard Creed. The policy was issued by Progressive. The named insured was Tina Gravlin. Genow supplied the funds for Tina Gravlin to pay the premium.

During the early morning hours of Sunday, April 6, 1997, about two weeks after the effective date of Progressive's insurance policy and two days after the license plates were issued, Genow was riding as a passenger in the pickup. The pickup was being driven by a friend, Lisa (Kaczmarek) Neering. Another vehicle, occupied by friends of Genow and Neering, collided with the pickup and Genow was thrown from the pickup, sustaining injuries.

Lisa Neering, the driver of the pickup at the time of the accident, was the named insured on a policy of automobile insurance (for a different vehicle) issued by Citizens.

Maylee Birch and Nicholas Birch (the persons named on the title and registration for the pickup) were not insured.

Analysis and Decision

I.

Both Genow and Progressive have moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that there is no genuine issue as to any material fact and that they are entitled to judgment in their favor, respectively, as a matter of law. Citizens has responded to these motions by arguing, pursuant to MCR 2.116(I)(2), that it is entitled to judgment in its favor.

In Quinto v Cross & Peters, 451 Mich. 358, 362-363 (1996), our Supreme Court set forth the following standards for deciding a motion brought under MCR 2.116(C)(10):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. Neubacher v. Globe Furniture Rentals, 205 Mich.App. 418, 420, 522 N.W.2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Id. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. McCart v. J Walter Thompson, 437 Mich. 109, 115, 469 N.W.2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. McCormic v. Auto Club Ins. Ass'n, 202 Mich.App. 233, 237, 507 N.W.2d 741 (1993).

Furthermore, regarding granting judgment under MCR 2.116(I)(2) in the context of a motion for summary disposition under MCR 2.116(C)(10), our Court of Appeals has written:

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. Lash v. Allstate Ins. Co., 210 Mich.App. 98, 101, 532 N.W.2d 869 (1995). The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. Id. If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment for the opposing party. MCR 2.116(I)(2).

Marx v Department of Commerce, 220 Mich App 66, 70 (1996)

Applying these standards, this Court will now address the various contentions of the parties.

II.

Genow's complaint alleges that Genow is entitled to receive PIP benefits either from Progressive (which issued a policy on the pickup to Tina Gravlin as the named insured) or from Citizens (which issued a policy on a vehicle not involved in the collision to Lisa Neering, who was driving the pickup when the collision occurred). However, in the brief in support of his motion for summary disposition, Genow effectively concedes that, under the statutory provision governing priority of insurers for PIP coverage (MCL 500.3114), Progressive is not responsible for paying him benefits. At page 9 of this brief, Genow writes, ". . . a close reading of MCL 500.3114(4)(a) probably excludes [Progressive] from being the proper insurer. . . . [I]t appears that [Citizens] is the insurer in the highest order of priority pursuant to MCL 500.3114[(4)](b)."

In pertinent part, MCL 500.3114, provides, as follows:

(1) Except as provided in subsections (2), (3), and (5) [not applicable here], a personal protection insurance policy described in section 3101(1) [MCL 500.3101(1)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . .

* * *

(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.

* * *

Genow argues essentially as follows. Concerning the injury in question, Genow was not the named insured in a personal protection insurance policy, the spouse of any such named insured, or a relative of either domiciled in the same household. Therefore, a personal protection insurance policy does not apply to his accidental bodily injury under the provisions of MCL 500.3114(1). Secondly, the owner or registrant of the vehicle which Genow occupied (Maylee Birch or Maylee Birch and Nicholas Birch) was not insured. Therefore, Genow cannot claim PIP benefits under MCL 500.3114(4)(a) from an insurer of the owner or registrant of the vehicle which Genow occupied because no such insurer exists. This means that the insurer having first priority to provide PIP benefits to Genow is Citizens, the insurer of the operator (Lisa Neering) of the vehicle which Genow occupied, as provided by MCL 500.3114(4)(b).

Citizens takes issue with Genow's argument. Citizens argues that Genow was an owner of the pickup for purposes of deciding coverage under the facts of this case, and that Genow is therefore excluded by MCL 500.3113(b) from receiving PIP benefits. Citizens argues also that Genow is excluded from receiving PIP benefits from Citizens by the terms and conditions of the insurance policy which Citizens issued to Lisa Neering (the driver of the pickup).

MCL 500.3113 provides, as to subsection (b), as follows:

> 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:
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> * * *
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> (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 [MCL 500.3101] or 3103 [MCL 500.3101] was not in effect.

MCL 500.3101[1] provides, in pertinent part, as follows:

> (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway. Notwithstanding any other provision in this act, an

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[1] MCL 500.3103, relating to insurance required concerning motorcycles, is not applicable to this case.

insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved upon a highway may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect.

(2) As used in this chapter:

* * *

(g) "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.

(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.

Citizens does not contend (and there is no evidence to suggest) that Genow held legal title to the pickup, or that Genow had immediate right of possession of the pickup under an installment sale contract. Thus, Citizens' argument that Genow was an owner of the pickup for purposes of deciding PIP coverage in this case must depend, at least in part, on the meaning of "owner" as defined by MCL 500.3101(2)(g)(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." Genow is not entitled to PIP benefits if, at the time of the accident, Genow was an "owner" of the pickup, as so defined, and if, with respect to the pickup, the security required by MCL 500.3101 was not in effect. MCL 500.3113(b).

Citizens does not argue the meaning of MCL 500.3101(2)(g)(i), however. Rather, Citizens relies on the definition of "owner" found in the motor vehicle code at MCL 257.37, and cites cases decided under that law, notably the "owner's liability statute" (part of the motor vehicle code), MCL 257.401.

Citizens' reliance on the motor vehicle code's definition of "owner" is questionable. In 1988, the legislature amended the "no-fault act" (MCL 500.3101 et seq.) to add to MCL 500.3101 the definition of "owner" quoted above. See, 1988 PA 126. Although this definition bears some resemblance to the definition of "owner" found in the motor vehicle code, it is different in certain material respects. For example, unlike the motor vehicle code definition, the definition of "owner" stated in MCL 500.3101(2)(g)(i) does not expressly include a "firm,

association, or corporation," and does not state a requirement of "exclusive" use of the motor vehicle.[2] One must assume that the legislature, in so providing, recognized a distinction in the concept of motor vehicle ownership for purposes of no-fault insurance issues as compared to issues arising under the motor vehicle code. In any event, where a statute provides its own glossary, the terms must be applied as expressly defined. Monroe Beverage Company v Stroh Brewery, 211 Mich App 286, 295 (1995); Harder v. Harder, 176 Mich.App. 589, 591 (1989). Although reference to the motor vehicle code may be useful to clarify the meaning of a term used in the no-fault act (for example, concerning undefined terms), it cannot be used to change the meaning of a term specifically defined in the no-fault act. Auto-Owners Insurance Co. v Hoadley, 201 Mich App 555, 560-561 (1993). Accordingly, in considering Citizens' arguments concerning whether Genow was an "owner" of the pickup involved in the accident, this Court will apply the definition of the term found in the no-fault act at MCL 500.3101(2)(g)(i).

Citizens argues that Genow and Maylee Birch, by coming to their arrangement concerning financing the repairs, registration, and insurance of the pickup, and concerning mutual use of the pickup thereafter, formed an "association" as to the pickup which imputed ownership to each of them for purposes of PIP coverage and exclusion. This argument, though interesting, is not supported by the definition of "owner" quoted above. As noted, an "association" is specifically included in the motor vehicle code's definition of "owner" but is not included in the no-fault act's definition of that term. Citizens has not submitted any authority expressly holding that "association" should be read into the no-fault act's definition, and, indeed, such a reading appears to be contrary to the legislature's plainly stated intention. If the legislature had intended the definitions to be identical in this regard, it could easily have drafted them accordingly.

Thus, whether there are fact issues with respect to the alleged formation of this "association," as Citizens suggests, or whether the activities of Genow and Maylee Birch served to create an association as to the pickup for other purposes, such as the owner's liability statute, is not material to a decision of this case. For purposes of deciding PIP coverage or exclusion in this case, whether Genow and Maylee Birch formed an association concerning the pickup simply has no legal impact on this Court's resolution of the issue of whether Genow was an "owner" of the pickup. That issue must be resolved using the definition appropriate to the facts and question presented by this case, namely, the definition found in the no-fault act at MCL 500.3101(2)(g)(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."

The parties disagree in this case as to whether Genow used the pickup for only two days, or for about two weeks. However, there is no suggestion by any party that Genow used the pickup for more than 30 days, nor is there any evidence before this Court which would support

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[2] This Court recognizes that courts have given the "'exclusive' use requirement" a broad interpretation. See, Security Ins. Co. of Hartford v. Daniels, 70 Mich.App. 100, 107, (1976); Ketola v. Frost, 375 Mich. 266, 278-279, (1965). Nevertheless, "exclusive" use remains a distinguishing feature between the two definitions.

such a finding.

Citizens argues, however, that it is not significant that Genow did not possess or use the pickup for more than 30 days. Relying on Ringewold v Bos, 200 Mich App 131 (1993), a case involving the owner's liability statute and the definition of "owner" found in the motor vehicle code, Citizens maintains that, under the facts of this case, Genow had the "right to use" the pickup for a period exceeding 30 days, and that this "right to use" the pickup was sufficient to constitute Genow an "owner" of the pickup for purposes of PIP coverage and exclusion.[3]

In Ringewold, supra, defendant's former husband purchased a vehicle in defendant's name for their daughter's use, and defendant insured the vehicle under defendant's auto policy and transferred defendant's license plates to the vehicle from another vehicle which defendant previously owned. Defendant also admitted in deposition testimony that she was the owner of the vehicle. However, at the time of the accident which resulted in suit against defendant under the owner's liability section of the motor vehicle code, defendant had been in possession of the vehicle for only 15 days, and did not hold "legal" title to the vehicle as that term is commonly understood (the parties to the sale did not make arrangements to record the transfer as required by law).

Because the case presented a question of owner's liability under the motor vehicle code, the Court of Appeals in Ringewold applied the definition of "owner" from that statute to the facts of the case. The court found that possible defects in the transfer of title might preclude a finding of ownership under MCL 257.37(b), which refers to ". . . a person who holds the legal title of a vehicle." However, the court held that defendant was the "owner" of the vehicle for purposes of owner's liability under the definition provided in MCL 257.37(a), which refers to a person "having the exclusive use [of a motor vehicle] . . . for a period that is greater than 30 days."

The purpose of the owner's liability statute, said the court, is "to place the risk of damage or injury upon the person who has ultimate control of a vehicle." 200 Mich App 131, 134. Furthermore, the court wrote,

> The primary goal of statutory construction is to ascertain and give effect to the Legislature's intent. Trumble's Rent-L-Center, Inc. v. Employment Security Comm., 197 Mich.App. 229, 233, 495 N.W.2d 180 (1992). We first look to the

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[3] Citizens also states that there are fact questions concerning whether Genow was an owner of the pickup. However, Citizens does not specifically identify any questions of fact which are material to the ownership issue which it presents. Rather, Citizens' argument appears to be that, taking the facts in the light most favorable to Citizens (the non-moving party with respect to Genow's motion for summary disposition), or in the light most favorable to Genow (the non-moving party with respect to Citizens' request for summary disposition), Genow had the "right to use" the pickup for a period greater than 30 days, and was an "owner" of the pickup for purposes of coverage and exclusion of PIP benefits.

language of the statute with the presumption that the Legislature intended the meaning plainly expressed. Id. The language of the statute should be interpreted keeping in mind the statute's purpose and the objective sought to be accomplished.

. . .

With these rules of statutory construction in mind, we conclude that the Legislature did not intend to restrict the definition of "owner" under this section to those who have actually exercised exclusive control over a vehicle for a thirty-day period. Rather, in view of the Legislature's intention to place liability on the person who is ultimately in control of the vehicle under the owner's liability section, we believe that the statute imposes liability on any person who has a "right to exclusive use" for a period exceeding thirty days, regardless of whether that person has, in fact, controlled the vehicle for that period. See [Security Insurance Co. of Hartford v.] Daniels, supra, 70 Mich.App. at 106-107, 245 N.W.2d 418 (concluding that this section of the statute implies a "right-to-use" construction). To conclude otherwise would be to give owners incentive to delay formalization of title and deny ownership in an effort to avoid liability under the statute. We agree with the trial court's statement that the provision is intended to preclude a finding of ownership where a person's right to exclusive use of the vehicle will not exceed thirty days, but not in cases where ownership has been transferred permanently.

200 Mich App 131, 137-138.

Several aspects of the Ringewold decision are noteworthy. First, the court applied the definition of "owner" supplied by the statute under consideration. Second, the court noted the importance of construing the statute so as to give effect to the legislature's intent. Finally, the court looked first to the language of the statute with the presumption that the legislature intended the meaning plainly expressed. These rules of statutory construction were stated as follows in Harder v Harder, supra, at page 591:

. . . [T]he most important rule of statutory interpretation is that the reviewing court discover and give effect to the intent of the Legislature. The next rule is to derive the legislative intentions from the actual language used in the statute. If the language used is clear and the meaning of the words chosen is unambiguous, a common-sense reading of the provision will suffice, and no interpretation is necessary. . . . Where, as here, a statute supplies its own glossary, courts may not import any other interpretation, but must apply the meaning of the terms as expressly defined. . . . (Citations omitted)

In the present case, as already noted, the legislature has defined "owner" for purposes of the no-fault act, and the pertinent part of that definition is, "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)(g)(i). This definition is clear and unambiguous. From the plain meaning of

the words chosen it is evident that, as Citizens advocates, a person need not possess or use a motor vehicle for a period greater than 30 days in order to be an "owner" of the motor vehicle for purposes of the no-fault act. Rather, the statutory definition just quoted requires only that, to be an "owner" of a motor vehicle, a person must have the *right* to use the motor vehicle for a period greater than 30 days.

The language of the definition itself tells us that this is so.

The definition includes "a person renting a motor vehicle . . . for a period that is greater than 30 days." A person who rents a motor vehicle for 60 days is clearly "a person renting a motor vehicle . . . for a period that is greater than 30 days," and therefore fits the statutory definition. If such a person sustains accidental bodily injury on the first or fifth or twenty-ninth day of the rental period, this fact does not in any way detract from the simple truth that the person was renting for a period greater than 30 days. The date of the injury relative to commencement of the rental period is not significant for purposes of determining ownership under the statutory definition. What is significant for purposes of the definition is that the person's *right* to the motor vehicle under the rental agreement *extends for more than 30 days*.

The same is true for a person "having the use" of a motor vehicle. The statutory definition of "owner" includes a person "having the use [of a motor vehicle], under a lease or otherwise, for a period that is greater than 30 days." If a person has a right, under a lease agreement or otherwise, to use a vehicle for 90 days (as, for example, a college student borrowing an uncle's extra car to commute to a summer job), the fact that such a person sustains accidental bodily injury during the first 30 days in which that right exists does not negate the fact that the person was using (or "having the use" of) the motor vehicle for a period greater than 30 days. It simply means that the injury occurred sooner, rather than later, during the period of permitted use. Again, whether such a person is an "owner" under the definition stated in MCL 500.3101(2)(g)(i) depends on whether the person has the *right to use* the motor vehicle *for more than 30 days.*

This common-sense reading of the statutory definition of "owner" is in keeping with legislative intent expressed in the no-fault act. MCL 500.3101 requires the owner or registrant of a motor vehicle required to be registered in Michigan to maintain security for payment of certain benefits, including personal protection insurance benefits, described in the act. MCL 500.3113 provides, among other things, that a person is not entitled to personal protection insurance benefits for accidental bodily injury if at the time of the accident the person was the owner or registrant of a motor vehicle involved in the accident and the security with respect to that vehicle required by MCL 500.3101 was not in effect. The statute seeks to ensure that owners will provide the specified coverage, both by expressly mandating it and by providing a financial penalty (exclusion from coverage) for those who do not. The statute also reflects a policy judgment that users of motor vehicles not obtain the benefits of personal protection insurance without appropriately contributing in a manner consistent with their use to the system which makes those benefits possible. This statutory purpose would not be well served by reading the definition of "owner" to afford persons with the right to use motor vehicles for periods greater

than 30 days an initial 30-day period during which they would not be required to comply with the statute's personal protection insurance provisions. Rather, focusing on whether a person has the "right to use" a motor vehicle for more than 30 days when determining whether that person is a person "having the use" of the motor vehicle for more than 30 days not only has the virtue of applying the meaning plainly expressed in the statutory definition but best serves legislative intent.

In the present case, therefore, for purposes of deciding the motion now before this Court (as it pertains to whether Genow was an "owner" of the pickup, and thus, whether Genow potentially may be excluded from receiving PIP benefits), the question may be phrased, "Did Genow have the right to use the pickup for more than 30 days, or is there a genuine issue of material fact concerning this question?"

Genow has not contended in these proceedings that whatever right or privilege he may have had to use the pickup did not extend for a period greater than 30 days.[4] Genow testified simply that Maylee Birch was "letting me use her vehicle . . . if she didn't need it." Genow deposition, p. 29. Genow's testimony does not indicate any particular length of time for which the agreement was made. However, the insurance policy issued on the pickup by Progressive to Tina Gravlin, for which Genow supplied the funds to pay the premium, was for a six-month term (the payment made was on the "3-pay" pay plan, and consisted of slightly more than one-third of the six-month premium amount). Progressive's Motion for Summary Disposition, Exhibit D. In addition, the circumstances of the agreement, with Genow providing funds to repair the vehicle and purchase plates for it in addition to paying for insurance, suggest that the parties anticipated an arrangement of more than a month's duration. Thus, there is evidence to suggest that the agreement was for longer than 30 days.

On the other hand, there is contrary evidence as well. Maylee Birch testified that, because there was money owed on the pickup and she could not make the payments, she had made an agreement with her ex-husband to return the pickup to him and "he was coming to pick up the truck a week after the accident" or "like the third week of April." Maylee Birch deposition, p. 9. This testimony suggests that Genow's right to use the pickup, if any, was to be less than 30 days (assuming, as this Court must, for purposes of this motion, giving the benefit of doubt to the non-moving party, that Genow's use under the agreement began on April 4, the date the plates were purchased).

Whether Genow's alleged right to use the pickup extended for more than 30 days is a

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[4] In Genow's reply to Citizens' brief, Genow argues that Genow had possession of the pickup for only a few days before the accident (from purchase of license plates on April 4 to time of accident on April 6), that Genow had "limited access" to the pickup and Maylee Birch was the "real owner," that there is "no evidence" that Genow had any "right" to use the pickup, and that Genow's use was not "exclusive." Plaintiff's Reply Brief to "Citizens' Response to Plaintiff's Motion for Summary Disposition," pp. 2-4.

material question of fact, for reasons already explained. In brief, an "owner" of an uninsured vehicle (a vehicle for which the security required by the statute was not in effect) involved in an accident may be excluded from receiving PIP benefits. Whether a person is an "owner" may depend on whether a person has a right to use the vehicle for more than 30 days. In this case, there is a genuine issue of fact concerning whether Genow's alleged right to use the pickup extended for more than 30 days. Thus, on the record presented, this Court cannot find for purposes of Citizens' motion that Genow was an "owner" of the pickup, or grant summary disposition against Genow on this basis. Similarly, and for the same reasons, this Court cannot find for purposes of Genow's motion that Genow's alleged right to use the pickup did not extend for more than 30 days. Whether Genow's alleged "right to use" extended for more than 30 days, on the record before this Court, is a genuine issue of material fact which precludes a grant of summary disposition in favor of any party with respect to grounds dependent on resolution of that issue.

III.

In answer to Citizens' motion, Genow has also contested whether, in fact, Genow had a "right" to use the pickup. Genow argues that there is no evidence that Genow had any right to use the pickup, and that both Maylee Birch and Genow testified that Genow did not have any right to use the pickup. Plaintiff's Reply Brief to "Citizens' Response to Plaintiff's Motion for Summary Disposition," p.5.

Maylee Birch testified that, if Genow fixed the pickup, and put insurance on it and plates, "he could use it whenever he needed it. As long as if I needed it, I could, you know, still have it back because it's mine." Sworn Statement of Maylee Birch (July 30, 1997), p. 6, adopted by reference at Maylee Birch deposition, p. 4.

Maylee Birch also gave this testimony:

Q. (By Mr. Chasnis, Genow's attorney) You allowed him to use it, but he didn't have any right to use it, did he?

A. I don't understand, I guess.

Q. In other words if you wanted it, it was yours?

A. Right.

Q. And if he wanted to use it, he had to ask permission to use it.

A. Yeah, yes.

Maylee Birch deposition, p. 19.

Concerning his agreement with Maylee Birch, Genow testified as follows:

Q. (By Mr. Borin, Progressive's attorney) When you went with Maylee Birch to register the vehicle, did you pay the registration fees for Maylee?

A. She paid everything. I borrowed – let her use, or, you know, I borrowed it to her. She was going to pay me back if she could. If she didn't, ain't no big deal, because she's letting me use her vehicle.

Q. That's what I understood, is that she was going to let you use her vehicle as much as you wanted to. That's what she said in her statement. Is that true?

A. Well, if she didn't need it.

Q. That's right. She didn't have any use for it?

A. I said if she didn't. But she –

Q. She didn't have a job, did she?

A. I don't know, sir.

Q. She wasn't using the vehicle for anything at all, was she?

Q. Oh, yeah. She has a kid. If something were to happen or if she needed, she could use it. It's her truck, not mine.

Genow deposition, p. 29.

Genow argues the "right to use" issue in this case based on the factual record presented, and also suggests that Genow's "limited access" to the pickup did not rise to the level of that in John v John, 47 Mich App 413 (1973), cited by Citizens, in which the Court of Appeals found ownership by an "association" (under the motor vehicle code definition of "owner").

Genow's argument that Genow did not have the "right" to use the pickup, and that he had "limited access," are essentially directed at the nature and character of Genow's permitted use. Genow suggests that the record does not reflect that Genow's authority to use the pickup was of the type that comports with the concept of ownership.

In Ardt v Titan Insurance Company, 233 Mich App 685 (1999), our Court of Appeals addressed the issue of what kind of use is sufficient to support a finding that a user of a motor vehicle is an owner of the motor vehicle for purposes of disqualification from receiving PIP

benefits. The Court of Appeals wrote:

> . . . [W]e hold that "having the use of" a motor vehicle for purposes of defining "owner," M.C.L. S 500.3101(2)(g)(i); MSA 24.13101(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 "having the use of" 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 on this issue inappropriate.[5]
>
> 233 Mich App 685, 690-691.

In the present case, perhaps because the arrangement between Genow and Maylee Birch was relatively informal and the period of actual use by Genow was quite short, the evidence before this Court concerning the nature and character of Genow's permitted use is limited, consisting of the testimony of Genow and Maylee Birch and certain facts relating to use of the pickup during the evening and early morning hours preceding the accident. The testimony is somewhat conflicting. Genow could use the pickup "whenever he needed it," but (in response to a leading question) had to ask Maylee Birch's permission. (See testimony quoted above.) Based on the present record, this Court cannot find that there is no genuine issue of material fact concerning the nature and character of Genow's permitted use. Therefore, summary disposition in favor of any party with respect to issues based upon this aspect of Genow's alleged ownership of the pickup is also not appropriate at this time.

IV.

Citizens argues next that PIP coverage for Genow is excluded by the terms and conditions of the Citizens insurance policy (Citizens Exhibit E). Citizens presents three arguments based on policy language.

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[5] In Ardt, the evidence showed that "Robert" was a driver of the truck for more than 30 days. Only the nature and character of his permitted use was at issue, not whether the period greater than 30 days, provided by statute, referred to a period of actual, completed use or to a period of authorized use (completed or future). Thus, Ardt did not decide the "right to use for more than 30 days" issue addressed earlier in this opinion.

First, says Citizens, coverage for Genow is excluded by Section Three (Michigan No-Fault Coverage), Part I (Personal Injury Protection Coverage), Exclusion 5 (Citizens Policy, at p. 14), which states:

> We do not provide Personal Injury Protection Coverage for "bodily injury":
>
> * * *
>
> 5. Sustained by the owner or registrant of an "auto" or motorcycle involved in the "auto accident" and for which the security required by Chapter 31 of the Michigan Insurance Code is not in effect.

Citizens argues that because "sufficient facts are present" in this case to determine that Genow was an "owner" of the pickup involved in the accident, Genow is excluded from PIP coverage by this policy language.

However, for the reasons stated above, this Court has determined that there are genuine issues of material fact in this case which preclude a finding on summary disposition that Genow was an "owner" of the pickup. Because Citizens' argument is premised on a decision that Genow was an "owner," and this finding cannot presently be made, Citizens' argument is not supported.

Next, Citizens argues that coverage for Genow under the Citizens policy is excluded by the definition of "insured" found in Section Three, Part I, Definitions, coupled with the exclusions found in Section Two (Liability Coverage), Exclusion B. These provisions, and other policy provisions relevant to Citizens' argument are set out in the footnote below.[6]

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[6] Personal Auto Policy

* * *

Definitions

Words and phrases used in this policy are defined below. They are in quotation marks when used.

A. Throughout this policy, "you" and "your" refer to:

1. The "named insured" shown in the Declarations; and
2. The spouse if a resident of the same household.

Citizens Policy, p. 1.

Section Three – Michigan No-Fault Coverage

* * *

Part I. Personal Injury Protection Coverage

Definitions

* * *

"Insured" as used in this part means:

1. You or any "family member" injured in an "auto accident";
2. Anyone else injured in an "auto accident":
   a. while "occupying" "your covered auto" or
   b. if the accident involves any other "auto":
      (1) which is operated by you or a "family member"; and
      (2) to which Section Two of this policy applies.

Citizens Policy, p. 12.

Section Two – Liability Coverage

* * *

Insuring Agreement

A. We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an "auto accident". * * *

B. "Insured" as used in this Section means:
   1. You or any "family member" for the ownership, maintenance or use of any "auto" or "trailer". * * *

* * *

Exclusions

* * *

B. We do not provide Liability Coverages for the ownership, maintenance or use of:
* * *
   2. Any vehicle, other than "your covered auto", which is:

Citizens' argument is as follows. Genow claims to be an "insured" for purposes of receiving PIP benefits under Section Three, Part I of the Citizens policy. The applicable portion of the definition of "insured" found there is definition 2.b.: "Anyone else injured in an "auto accident": . . . b. if the accident involves any other "auto": (1) which is operated by you . . . and (2) to which Section Two of this policy applies. Citizens concedes that the first part of this definition is satisfied in this case because Genow was "anyone else" injured in an auto accident involving "any other 'auto'" (not "your covered auto") which was operated by "you" (Lisa Neering, whom Citizens calls "the insured under Citizens policy"). However, Citizens contends that Genow's claim to be an "insured" fails as to the second part of this definition because the vehicle involved in the accident was furnished or available for Genow's regular use, and this circumstance allegedly fits an exclusion provided by Section Two of the policy, to which the second part of the definition refers.

Citizens' assertion is not supported by the terms of the policy.

Definition 2.b. of the definitions of "insured" relating to PIP coverage under the Citizens policy (just discussed, and relied upon by Citizens) requires that the "auto" involved in the accident must be one to which Section Two of the policy applies.[7] Section Two provides liability coverage for, among other things, "bodily injury" for which any "insured" becomes legally responsible because of an "auto accident." "Insured" for purposes of Section Two includes "you" (which included Lisa Neering, the named insured in the policy) "for the . . . use of any 'auto'." Thus, when Lisa Neering used "any 'auto'," including the pickup in this case, the language of Section Two just outlined applied to afford liability coverage.

Citizens, however, points to Exclusion B.2. of Section Two, which provides that liability coverage is excluded for the use of "[a]ny vehicle, other than "your covered auto", which is: a. owned by you; or b. furnished or available for your regular use." Citizens claims that because the pickup in this case was furnished or available for Genow's regular use, under Genow's agreement with Maylee Birch, this exclusion bars PIP coverage for Genow under the Citizens policy.

The difficulty with Citizens' argument is that it misunderstands the meaning of Exclusion B.2. According to the definitions stated on page 1 of the Citizens policy, "you" and "your" throughout the policy refer to the "named insured" shown in the Declarations (and the spouse if a resident of the same household). Citizens agrees that Lisa Neering was the named insured on

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a. owned by you; or
b. furnished or available for your regular use.

Citizens Policy, pp. 8-11.

[7] It also requires that the "auto" involved in the accident must be one operated by "you" (which includes the "named insured" shown in the Declarations) or a "family member."

the policy. Thus, in this case the exclusion stated in Exclusion B.2. of Section Two refers to vehicles other than "your covered auto" which were furnished or available for the regular use of Lisa Neering, not Genow. There is no evidence that the pickup in this case was furnished or available for Lisa Neering's regular use, and thus, Exclusion B.2., on which Citizens relies, has no application here.

Finally, Citizens argues that coverage for Genow under the Citizens policy is precluded by terms of the policy relating to fraud and misrepresentation. For this argument, Citizens relies upon the following policy language, found in the "General Provisions" section (which applies to all sections of the policy unless noted otherwise):

> Fraud
>
> We do not provide coverage for any "insured" who has made fraudulent statements or engaged in fraudulent conduct in obtaining or maintaining this policy or in connection with any accident or "loss" for which coverage is sought under this policy.
>
> Citizens Policy, p. 25.

Citizens claims that Genow's activity in obtaining an insurance policy on the pickup from Progressive constitutes fraudulent conduct in connection with the accident or loss for which coverage is sought under the Citizens policy. Citizens points out that Genow was responsible for Tina Gravlin making application for the Progressive policy (in which Tina Gravlin was the named insured), and that Genow supplied Tina Gravlin with all necessary information and funds for this purpose. Genow and Maylee Birch used the Progressive policy to obtain license plates for the pickup, and thus, says Citizens, "[t]he vehicle involved in the accident would not have been on the road but for the conduct of Mr. Genow." Citizens' Response to Plaintiff's Motion for Summary Disposition, p. 17. Therefore, Citizens reasons, Genow's allegedly fraudulent conduct was "connected to" the accident and the loss, and coverage is precluded by the policy's fraud provision quoted above.

For purposes of deciding the merits of this argument, it is unnecessary to decide whether Genow's activity in obtaining the Progressive policy constituted fraud. This is so because, even assuming this activity was fraudulent, it was not fraudulent conduct "in connection with any accident or 'loss' for which coverage is sought under this [Citizens] policy."

This Court has no evidence before it to suggest that the accident was staged or intended by anyone involved, or that the injuries which Genow asserts he sustained in the accident were fictitious or less severe than Genow has claimed. That is plainly the kind of fraudulent conduct at which the quoted Citizens policy language is directed. The alleged fraud of Genow which caused the Progressive policy to be issued, which allowed the purchase of license plates, which permitted the pickup to be driven on the highway, which provided the occasion for an accident

and resulting injury, is simply too remote from the accident and the loss to be considered, for purposes of the fraud exclusion of the Citizens policy, as being fraudulent conduct "in connection with . . . [the] accident or loss" for which PIP benefits are sought under the policy from Citizens.

For the reasons stated, Citizens request for summary disposition in its favor based on the language of its insurance policy must be denied.

V.

Progressive has moved for summary disposition in its favor and against Genow on two grounds.

First, Progressive argues that Genow, and Tina Gravlin on Genow's behalf, made material misrepresentations of fact in obtaining the insurance policy on the pickup from Progressive. For example, Progressive claims that, when applying for the policy, Tina Gravlin fraudulently represented that the pickup would be driven by her and principally garaged at her residence. Progressive also asserts that Genow was not an innocent third party. Progressive says that Genow's and Tina Gravlin's allegedly fraudulent conduct entitled Progressive to rescind the insurance policy ab initio, which it claims to have done (with return and acceptance of the premium by Tina Gravlin), and that therefore Genow is not entitled to receive PIP benefits from Progressive.

Second, Progressive argues that, regardless of whether Genow and Tina Gravlin committed fraud or the policy was (or is entitled to be) rescinded, and regardless of whether Genow was an innocent third party, Progressive is not obligated to furnish Genow PIP benefits. This is so, says Progressive, because under the statute (MCL 500.3114) Citizens is the insurer "in the highest order of priority" for paying Genow's PIP benefits.

This Court will address Progressive's latter argument first.

The Progressive policy is not a part of the record before this Court for purposes of the present motions. However, it is undisputed that Tina Gravlin was the named insured on the Progressive policy.[8] It is also undisputed that Genow was not Tina Gravlin's spouse, or a relative of Tina Gravlin or Tina Gravlin's spouse (if she had one) domiciled in the same household. Accordingly, PIP coverage for Genow under the Progressive policy does not appear to be required by MCL 500.3114(1).[9]

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[8] Progressive's records show Tina Gravlin to be the named insured, and Progressive has submitted a copy of an auto policy declarations page for the pickup naming Tina Gravlin only.

[9] Also, no party has claimed that specific policy language of the Progressive policy provides PIP coverage for Genow, or that Genow was named in the policy or identified to Progressive before the accident in any respect (as a regular driver of the pickup or otherwise).

The pickup was registered in the name of Maylee Birch and Nicholas Birch. It was titled (with a Kansas title) in the name of Nicholas Birch or Maylee Birch, but a Kansas divorce judgment had given ownership of the pickup to Maylee Birch. Citizens contends in this case that Genow was also an owner of the pickup for purposes of determining PIP coverage or disqualification. However, the list of potential owners or registrants of the pickup stops there, and it is undisputed that neither Maylee Birch, Nicholas Birch, nor Genow had a personal protection insurance policy issued in their name.[10] Therefore, no PIP coverage is available to Genow under the provisions of MCL 500.3114(4)(a).

The operator of the pickup at the time of the accident and Genow's injury was Lisa Neering. Citizens was Lisa Neering's insurer. Therefore, according to MCL 500.3114(4)(b), and unless the evidence ultimately proves otherwise or sustains one of Citizens' defenses, Citizens appears to be first in priority to provide Genow's PIP benefits. Progressive does not appear to be obligated to provide PIP benefits to Genow for any reason in this case.

As already noted, Genow has conceded in these motions that his claim for PIP benefits is, in reality, against Citizens, regardless of whether the Progressive policy is rescinded. Although Genow has also requested relief against Progressive, Genow has not outlined or supported any basis on which that relief might be granted, or any reason to deny Progressive's motion based on the "priority" argument outlined above. Specifically, Genow has not offered any facts or law which would show that, in the event that Citizens is ultimately proven not liable for Genow's PIP benefits, Progressive then bears some obligation to Genow, under Progressive's policy or otherwise. Under these circumstances, it is unnecessary for this Court to address Progressive's first asserted ground for summary disposition based on Genow's and Tina Gravlin's alleged fraud. That argument and any issues of material fact related to it for purposes of Progressive's motion are moot.

For the reasons stated, Progressive's motion for summary disposition in its favor and against Genow is granted.

For the reasons stated above,

IT IS HEREBY ORDERED, as follows:

1. Genow's motion for summary disposition is denied.

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[10] Citizens asserts that Tina Gravlin's purchase of insurance on the pickup provided personal protection benefits as the insurance of Maylee Birch. Citizens' Response to Progressive's Motion for Summary Disposition, p. 9. However, Citizens has not supported this assertion with appropriate authority. Furthermore, this assertion appears to run counter to Citizens' declaration, at page 7 of Citizens' Response, that "it is the policy of the Michigan No-Fault Act that persons, not motor vehicles[,] are insured against loss."

2. Citizen's request for summary disposition is denied.

3. Progressive's motion for summary disposition in its favor and against Genow is granted. No costs or attorney fees are awarded. Progressive's counterclaim against Genow and Progressive's third party claim against Tina Gravlin are not decided by this opinion and order.

July 22nd, 1999

KENNETH W. SCHMIDT, Circuit Judge
(P25211)

cc: Robert J. Chasnis, Esq.
Joseph S. Harrison, Esq.
James L. Borin, Esq.
Tina Gravlin, In Pro Per