STATE OF MICHIGAN

COURT OF APPEALS

JANE E. SWARTZENBERG,
individually and as guardian and conservator of
ALBERT O. SWARTZENBERG, and
SPLANE ELECTRIC SUPPLY CO., a Michigan corporation,

Plaintiffs-Appellees,

v

AUTO CLUB INSURANCE ASSOCIATION,
a domestic insurance company,
JOHN KELSEY and JOHNSTON LEWIS ASSOCIATES INC.,
a Michigan corporation, jointly and severally,

Defendants-Appellees

and

THE CONTINENTAL INSURANCE COMPANY,

Defendants-Appellant.

March 30, 1993

No. 139238

THE CONTINENTAL INSURANCE COMPANY,

Plaintiff-Appellant,

and

JANE E. SWARTZENBERG,
as guardian and conservator of the estate of
ALBERT O. SWARTZENBERG, a legally incapacitated person,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,
a Michigan insurance company,

Defendant-Appellee.

No. 139239

Before: Doctoroff, C.J., and Wahls and Weaver, JJ.

PER CURIAM.

Continental Insurance Company (Continental) appeals as of right the trial court's summary disposition rulings determining it to be solely liable for no-fault personal protection insurance (PIP) benefits due plaintiff Albert O. Swartzenberg. Continental claims that the trial court erred in deciding 1) that Continental was liable for those benefits under Continental's fleet insurance policy with Swartzenberg's employer, Splane Electric Supply Company (Splane), and 2) that Auto Club Insurance Association (ACIA), which insured a vehicle owned by Jane Swartzenberg, Albert's wife, was not wholly or partially liable under MCL 500.3114(1); MSA 24.13114(1), and that Continental was solely liable under MCL 500.3114(3); MSA 24.13114(3). We affirm.

Plaintiff concedes that with regard to the first claim of error the dispositive issue is whether Splane was an owner of the 1988 Lincoln being driven by Swartzenberg at the time of the accident.

At the time of the events giving rise to this case, Albert Swartzenberg was officer, director, employee, and 97% stock owner of Splane. Splane maintained several business locations throughout the Detroit metropolitan area. Over the years, it was Splane's custom to include within its fleet of vehicles an automobile for Swartzenberg's business and personal use, for which Swartzenberg paid a monthly user fee. If necessary, though, the car could be used by other employees as well. Prior to the purchase of the vehicle at issue here, the car furnished to Swartzenberg was titled and registered in Splane's name, and insured under Splane's fleet policy with Continental, along with Splane's other vehicles. Splane maintained its policy with Continental through John Kelsey of Johnston Lewis Associates, an independent agent with binding authority on Continental's behalf. That policy provided full insurance coverage for Splane's vehicles, specifically, physical damage, liability, and no-fault coverage as required by MCL 500.3101; MSA 24.13101. Continental also expressly extended liability coverage inclusion to Swartzenberg in a separate endorsement. During this time, Jane Swartzenberg independently owned a Cadillac which was insured by ACIA.

In 1987, Splane decided to purchase a new car to replace the 1984 Lincoln Swartzenberg was then driving. Through his son-in-law, Swartzenberg was eligible for the special incentive program Ford Motor Company offered to employees and their families (the "A-Plan"). However, the A-Plan required that the sale be to an individual, and that the individual own the vehicle for at least six months before transferring or selling it. Because of the significant discount offered by the A-Plan, Swartzenberg and Thomas Hilberg, Splane's vice-president, decided that Splane would purchase the new vehicle in Swartzenberg's name. The vehicle was purchased on June 9, 1987. The 1984 Lincoln owned by Splane was traded in as part of the purchase agreement. Splane issued a check for the remainder of the purchase price, payable to Swartzenberg, to be delivered to the auto dealer. The car was titled and registered in Swartzenberg's name. At that time, Hilberg called Kelsey, Continental's agent, informing him of the purchase, and requesting that Kelsey add the new vehicle to Splane's fleet policy with Continental. Hilberg explained that because the car had been purchased through the A-Plan, it would be titled and registered in Swartzenberg's name for six months, after which it would be transferred to Splane. Kelsey converted the contract on the 1984 Lincoln to cover the new car. Splane paid the necessary premium, which included the cost of PIP benefit coverage. Through Kelsey's agency, Continental issued a certificate of no-fault insurance for the new car under Splane's policy, but in accord with the title and registration, naming Albert Swartzenberg. Splane listed the car as a company asset in its audit books, paid its maintenance costs, and made plans to have the title and registration transferred to Splane on December 11, 1987. Continental issued an additional endorsement of liability coverage for Swartzenberg on October 5, 1987.

On October 15, 1987, while driving the 1988 Lincoln, Swartzenberg was severely injured in an automobile accident. The Swartzenbergs and Splane filed their claim for benefits with Continental first, and later with ACIA. Continental paid the collision benefits on the Lincoln, which had been totally destroyed. However, Continental refused to pay PIP benefits, citing a qualifying phrase in its policy restricting PIP coverage to automobiles owned by the insured named in the policy. ACIA also refused to pay PIP benefits, claiming that Continental was liable for those payments. On February 23, 1988, Jane Swartzenberg was appointed guardian and conservator of her husband. She, and through her, Swartzenberg brought suit with Splane against both companies, as well as Kelsey and Johnston Lewis Associates, on October 13, 1988. Plaintiffs moved for summary disposition against Continental pursuant to MCR 2.116(C)(9) and (10), claiming that Splane owned the Lincoln, and therefore under MCL 500.3114(3); MSA 24.13114(3), Continental was in the highest order of priority for no-fault benefits. That motion, which would also have dismissed the other defendants, was denied without prejudice on April 21, 1989, in order to permit further discovery. The motion was reinstated after the parties secured additional documentation and depositions concerning ownership of the vehicle. The court granted summary disposition by order issued September 6, 1989, and made final on March 8, 1991, making Continental liable for all past, present, and future no-fault benefits.

Meanwhile, on May 30, 1990, Continental agreed to pay Swartzenberg's outstanding no-fault benefits in exchange for an assignment of rights against ACIA. Continental then filed suit against ACIA, claiming that ACIA was in the same order of priority as itself, and thus under MCL 500.3115(2); MSA 24.13115(2),

and alternatively under LaMotte v Millers National, 180 Mich App 271; 446 NW2d 632 (1989), Continental was entitled to partial recoupment from ACIA and pro-rata sharing of liability for Swartzenberg's PIP benefits. After a hearing, the trial court issued an order on March 13, 1991, denying Continental's motion for summary disposition on this ground, and, pursuant to MCR 2.116(I)(2), rendering judgment in favor of ACIA's claim of no cause of action. These actions having been consolidated, Continental now appeals both decisions.

Continental first argues that the trial court erred in holding it liable for Swartzenberg's PIP benefits because under the ownership definitions of the no-fault statute, MCL 500.3101 (2)(9); MSA 24.13101(2)(9) Swartzenberg, not Splane, owned the vehicle, and therefore the vehicle was not covered under the fleet policy which insured vehicles owned by Splane. Additionally, since Splane did not own the vehicle, Continental could not be held liable under ^3114(3) which applies only when an employee is injured in a vehicle owned or registered by the employer.

The motion for summary disposition was originally brought pursuant to both MCR 2.116(C)(9) and (10). However, whereas a motion under MCR 2.116(C)(9) tests the legal sufficiency of a pleaded defense on the pleadings alone, a motion brought under MCR 2.116(C)(10) tests whether there is factual support for a plaintiff's claim. Lepp v Cheboygan Area Schools, 190 Mich App 726, 730; 476 NW2d 506 (1991). The court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence. Pete v Iron County, 192 Mich App 687, 688-689; 481 NW2d 731 (1992). The motion may be granted only if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Here, as the trial court considered not only the pleadings, but supportive documentary evidence before granting summary disposition to the Swartzenbergs and Splane, this Court must review the trial court's decision as made under subrule (C)(10), and consider both the pleadings and the documentary evidence before the trial court in a light most favorable to the nonmoving party. Lepp, supra. We conclude that the trial court properly granted summary disposition against Continental.

The applicable portions of the statute are as follows:

"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 . . . .

(iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract. [MCL 500.3101(2)(g); MSA 24.13101(2)(g).][1]

The statutory provisions defining ownership do not limit the term "owner" to the person who holds legal title to the vehicle. Rather, one who has the use of a vehicle for a period of more than thirty days may also be an owner. Likewise, though inapplicable here, one who has the immediate right of possession under an installment sale contract will also be deemed an owner. Thus, the statute offers not one but three tests under which ownership may be ascertained, and recognizes the possibility that one person may be an owner even though another has legal title. Case law has also repeatedly recognized that one can be an owner without having legal title, Ketola v Frost, 375 Mich 266; 134 NW2d 183 (1965), State Farm Ins v Sentry Ins, 91 Mich App 109; 283 NW2d 661 (1979), Security Ins v Daniels 70 Mich App 100; 245 NW2d 418 (1976), John v John, 47 Mich App 413; 209 NW2d 536 (1974), and that there may be more than one owner, with no one owner possessing "all the normal incidents of ownership." Basgall v Kovach, 156 Mich App 323, 327: 401 NW2d 638 (1986); Messer v Averhill, 28 Mich App 62, 65 n.2; 183 NW2d 802 (1970).[2] Allstate Ins Co v Sentry Ins Co, 191 Mich App 66; 477 NW2d 422 (1991), the subject of Continental's supplemental brief on appeal does not hold otherwise: Allstate did not involve a question of ownership and does not stand for the proposition that one who has title is the sole owner.[3]

In this case, the undisputed facts indicate that Swartzenberg undertook the purchase of the 1988 Lincoln as Splane's agent and for Splane's benefit, titling and registering the car in his own name only in order to comply with A-plan requirements. Splane intended to and did have the right to the use of the vehicle, whose purchase price, insurance premiums, and maintenance it paid, for a period exceeding thirty days. It listed the car among its corporate assets, charged Swartzenberg a monthly user fee, and on at least one occasion, according to one deposition, permitted another employee to drive the car. Splane communicated its intent both verbally and in written documentation to transfer title and registration to itself as soon as contractually possible. In the light most favorable to Continental, even the fact that Swartzenberg had legal title does not preclude a determination as a matter of law that Splane was, indeed, an owner under MCL 500.3101(2)(g); MSA 24.13101(2)(g). Had Swartzenberg refused to convey title to Splane at the end of six months, or had he died and his estate sought to assert ownership of the vehicle, the courts would surely recognize an ownership right in Splane under the undisputed facts set forth above.

Having determined that Splane was an owner, the trial court did not err in determining that Continental, rather than ACIA, was liable under ˆ3114 of the no-fault statute.

> Sec. 3114. (1) Except as provided in subsections (2),(3), and (5), a personal protection insurance policy described in section 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. . . . When personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits and shall not be entitled to recoupment from the other insurer. [MCL 500.3114(1); MSA 24.13114(1).]
>
> An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle. [MCL 500.3114(3); MSA 24.13114(3).]

The clear wording of subsection (1) -- "Except as provided in subsections (2),(3), and (5)" -- indicates that the insurer of an individual or household has the highest priority of liability for PIP benefits except where the specified subsections apply. In this case, Swartzenberg was "an employee . . . who suffer[ed] accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer." Under subsection (3), Continental, as Splane's insurer, was obliged to provide PIP benefits to Swartzenberg and under subsection (1), had a higher priority than ACIA.

For this reason, the court also properly granted summary disposition against Continental in its subsequent suit against ACIA. MCL 500.3115(2); MSA 24.13115(2) states:

> When 2 or more insurers are in the same priority to provide personal protection insurance benefits an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers.

However, as already indicated, under ˆ3114 (1) and (3) Continental and ACIA were not in the same order of priority.

Continental also argued that under the interpretation of ˆ3114(1) offered by LaMotte v Millers National, 180 Mich App 271; 446 NW2d 632 (1989), ACIA was nonetheless in the same order of priority with Continental. However, LaMotte's interpretation of ˆ3114(1) has been reversed by our Supreme Court. LaMotte v Millers National Ins Co., 438 Mich 1, 7; 475 NW2d 13 (1991).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Elizabeth A. Weaver

[1] We note that MCL 500.3101(d)(g); MSA 24.13101(2)(g), enacted under PA 1988 No. 126, went into effect on May 23, 1988, several months before the original lawsuit was filed but after the accident. At the time of the accident, though, this Court had already decided that the term "owner" under the no-fault act was not limited to a person who holds legal title, but rather that the definitions of "owner" provided by the Michigan Vehicle Code, MCL 257.37; MSA 9.1801 should be read into the no-fault act. State Farm Ins v Sentry Ins, 91 Mich App 109, 113-114; 283 NW2d 661, lv den 407 Mich 911 (1979). Neither party asserts that the outcome of the case depends upon whether one proceeds under MCL 500.3101(2)(g) or MCL 257.37.

In Sentry, the Court approved an expansive interpretation of "owner" because it would aid the intent of the no-fault legislation by "eliminating disputes based on technical questions of title." Id. 114-115. That the definitions of "owner" now set forth under 500.3101(2)(g) are essentially identical to those set forth in the Michigan Vehicle Code under MCL 257.37; MSA 9.1837, confirms the Legislature's intent to avoid disputes based on technical ownership.

[2] Moreover, a vehicle has to be insured by only one of the owners. Jasinski v Nat'l Ind Ins Co., 151 Mich App 812, 819; 391 NW2d 500 (1986); State Farm v Sentry Ins, supra, at 115.

[3] On the other hand, if a court were to accept Continental's argument that Swartzenberg, rather than Splane, was the sole owner, and notwithstanding the premium paid by Splane for PIP benefits, the vehicle did not carry no-fault coverage, Swartzenberg would not be entitled to PIP benefits from either Continental or ACIA:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident . . . [t]he person was the owner or registrant of a motor vehicle involved in the accident with respect to which the security required by . . . section 3101 was not in effect. [MCL 500.3113(b); MSA 24.13113(b).]