STATE OF MICHIGAN

COURT OF APPEALS

KELLY KENNY,

Plaintiff-Appellee,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellant

and

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant.

UNPUBLISHED
August 19, 2008

No. 278564
Kent Circuit Court
LC No. 05-010977-NF

Before: Zahra, P.J., O'Connell and Owens, JJ.

PER CURIAM.

Defendant Pioneer State Mutual Insurance Company[1] appeals by leave granted from the judgment entered by the trial court following a jury trial in plaintiff's action to recover no-fault personal protection insurance ("PIP") benefits. Defendant additionally appeals from the trial court's prior order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was injured in an automobile accident while driving an uninsured Plymouth Sundance that she had borrowed from her estranged husband, John Kenny ("John"), to drive to her college graduation. A Ford Explorer that plaintiff and John owned and shared had recently broken down, and John had agreed to purchase the Sundance from Mike Harris for $2000. John took possession of the Sundance pursuant to that agreement; however, he did not transfer the title or obtain insurance and a license plate before taking the vehicle, as he had agreed to do, and he did not pay Harris the purchase price.

[1] Defendant Farm Bureau Insurance Company of Michigan was dismissed by stipulated order and is not a party to this appeal. The term "defendant" as used herein refers solely to Pioneer.

Plaintiff lived with John's parents at the time of the accident. They were insured under a no-fault policy issued by defendant, and, as a relative residing in the same household, plaintiff was potentially entitled to PIP benefits under this policy. MCL 500.3114(1). Nevertheless, defendant contended that plaintiff was an "owner" of the uninsured Sundance within the meaning of MCL 500.3113 and was thereby disqualified from receiving PIP benefits. The trial court denied defendant's motions for summary disposition and for a directed verdict brought on this basis, and a jury determined that plaintiff was not the owner of the vehicle.

Defendant has waived its challenge to the trial court's order denying its motion for summary disposition. In its brief on appeal, defendant does not challenge or address the basis for the trial court's denial of its motion for summary disposition, which was that the motion was filed after the deadline established in the court's scheduling order. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Although defendant submitted a reply brief in an attempt to address the true basis for the ruling, issues may not be raised for the first time in a reply brief. MCR 7.212(G); *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 576; 692 NW2d 68 (2004).[2]

This Court reviews de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). The Court "reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in a light most favorable to the nonmoving party, and determines whether a question of fact existed." *Id.* Any conflict of evidence is resolved in the nonmoving party's favor. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005). "When the evidence could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury." *Tobin v Providence Hosp*, 244 Mich App 626, 652; 624 NW2d 548 (2001).

MCL 500.3101(1) requires an owner or registrant of a vehicle to carry personal protection, property protection, and residual liability insurance. MCL 500.3113(b), in turn, precludes an owner or registrant of an uninsured vehicle from receiving PIP benefits. The term "owner" as used in the no-fault act is defined in MCL 500.3101(2)(g)(i) as including "[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 General Ins Corp*, 469 Mich 524, 530; 676 NW 616 (2004), the Court held that "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." (Emphasis in original.) Thus, the *Twichel* Court held that, because "the arrangement between the seller and the deceased was for a permanent

[2] Moreover, it is within a trial court's discretion under MCR 2.401(B) to decline to entertain actions beyond the time frames established in a scheduling order, *People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997); *Kemerko Clawson, LLC v RxIV*, 269 Mich App 347, 350; 711 NW2d 801 (2005), and we discern no abuse of this discretion.

transfer of ownership of the vehicle and it contemplated that the deceased would have exclusive use of the truck permanently," the decedent was an "owner" of the truck within the meaning of MCL 500.3101(2)(g)(i) notwithstanding that he had possession of the vehicle for a period of only five days before his fatal accident and that he had taken possession of the truck without paying the full purchase price or transferring title. *Id*. at 531-532.

Viewing the evidence in a light most favorable to plaintiff, we conclude that a question of fact existed regarding her status as "owner" under MCL 500.3101(2)(g)(i) and that the trial court therefore properly denied defendant's motion for a directed verdict. The testimony of the witnesses established that plaintiff, who did not live with John, did not know that he had purchased the Sundance; that, on the night of plaintiff's accident, she believed that Harris still owned the Sundance; that she drove the Sundance on only two to four prior occasions, all of which occurred at some point *before* John agreed to purchase it; that she did not have keys to the car; and that she did not intend to drive it again after the night of her accident. Although John testified that he would most likely have given plaintiff permission to use the Sundance on a future occasion if she needed it for an emergency or the like, he did not give plaintiff blanket permission to use it whenever she wanted, and he expected that she would return it to him after her graduation. Furthermore, Harris did not give plaintiff permission to use the Sundance, and he did not know that she would be using the car. Neither plaintiff's father-in-law, with whom she lived, nor John's and her employer ever saw her using the Sundance.

Defendant failed to set forth any direct evidence demonstrating that plaintiff had a right to use the Sundance for *any* period of time extending beyond the night of her graduation. Instead, it attempted to draw a circumstantial link between the fact that plaintiff and John had jointly owned the Explorer and the suggested inferences that John had purchased the Sundance as a replacement for that vehicle and that plaintiff must have intended to use the Sundance on a regular basis. Reasonable jurors could disagree over whether plaintiff had a right to use the Sundance for a period that was contemplated to extend beyond 30 days. Thus, the evidence created a factual question that was properly left to the jury to decide. *Tobin*, *supra* at 652.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Donald S. Owens