STATE OF MICHIGAN

COURT OF APPEALS

DUSTIN STEVENS, a Legally Incapacitated Person by his Guardian, MARCIA BRADSHAW,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and ALLSTATE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
November 5, 2009

No. 285766
Allegan Circuit Court
LC No. 07-041381-NF

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendants and dismissing plaintiff's claim for personal injury protection (PIP) benefits under the no-fault automobile insurance act, MCL 500.3101 *et seq*. We reverse the order as it pertains to defendant Allstate and remand for further proceedings, but affirm the order as it pertains to defendant State Farm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On June 26, 2006, Dustin Stevens was involved in a single car accident while driving an uninsured Ford Explorer. The Explorer was registered to Stevens' mother, Janet McEntyre, who claimed she was storing it at Stevens' home. Both McEntyre and Stevens claimed that McEntyre was the owner of the Explorer. However, personal affects apparently belonging to Stevens were found in and around the vehicle at the accident scene. Moreover, a police officer stated that McEntyre acknowledged she had previously sold the Explorer to Stevens. An assignment of title was signed by McEntyre and Stevens; the date of sale written on it was June 11, 2006. McEntyre could not explain the June 11 date but denied having conveyed the vehicle to Stevens or having filled out the assignment prior to the accident. The title was not filed with the Secretary of State's office until September 2006. Plaintiff, Stevens' guardian, denied knowing of any arrangement between Stevens and McEntyre regarding the Explorer.

Plaintiff brought this suit on Stevens' behalf, seeking PIP benefits from Allstate. Plaintiff also brought suit against State Farm, alleging it breached a settlement agreement it had entered

into with Stevens following a previous accident. Both defendants moved for summary disposition.

In a motion for summary disposition under MCR 2.116(C)(10), the movant has the "burden of supporting its position with documentary evidence," and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Koenig v South Haven*, 460 Mich 667, 674-75; 597 NW2d 99 (1999). The "adverse party may not rest upon the mere allegations [in the] pleading[s], but must, by affidavits or [other evidence], set forth specific facts showing that there is a genuine issue for trial." MCR 2.1116(G)(4). A trial court's decision to grant summary disposition is reviewed de novo. *White v Taylor Distrib Co*, 275 Mich App 615, 619; 739 NW2d 132 (2007), aff'd 482 Mich 136; 753 NW2d 591 (2008). Under MCR 2.116(C)(10), summary disposition is appropriate where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This Court reviews "all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 592 NW2d 215 (1999). However, in determining a motion for summary disposition, we do not "assess credibility, or . . . determine facts." *Id*.

Pursuant to MCL 500.3113(b), an owner of an uninsured vehicle is precluded from obtaining PIP benefits for injuries resulting from an accident involving the uninsured vehicle. "Owner" is statutorily defined to include someone who has legal title to the vehicle. MCL 500.3101(2)(h)(ii). "Owner" is also defined as someone who has the use of a vehicle for thirty days. MCL 500.3101(2)(h)(i). If Stevens was the owner of the Explorer at the time of the accident, he would be precluded from obtaining PIP benefits and summary disposition for Allstate would be proper.

Plaintiff first argues that Stevens did not have legal title to the vehicle. We agree. Because Stevens is, and was leading up to this accident, a legally incapacitated person, he could not enter into a contract whereby he could assume ownership or purchase the Explorer. See *Acacia Mut Life Ins Co v Jago*, 280 Mich 360, 362; 273 NW 599 (1937) (holding that "while an . . . incompetent is under actual and subsisting guardianship of estate, he is conclusively presumed incompetent to make a valid contract, notwithstanding it was made during a lucid interval"). Thus, Stevens did not own the Explorer under MCL 500.3101(2)(h)(ii) at the time of the accident.

Plaintiff also argues there is a genuine issue of material fact regarding whether Stevens was the owner of the vehicle based on having use of it for more than 30 days. We agree. "Having the use" of a motor vehicle means "using the vehicle in ways that comport with concepts of ownership." *Ardt*, *supra* at 685. "[O]wnership follows from proprietary or possessory usage, as opposed to merely incidental usage under the direction or with the permission of another." *Id.* at 691. In determining whether an individual uses a vehicle in ways that comport with ownership, the "focus must be on the nature of the person's right to use the vehicle." *Roberts v Titan Ins Co*, 282 Mich App 339, 355-356; 764 NW2d 304 (2009). Though the plain language of MCL 500.3101(2)(h)(i) only requires that an individual have "use" of a vehicle, this Court has interpreted this to mean that the individual *rightfully* have use of the vehicle. *Id*.

Allstate presented evidence that Stevens had access to the Explorer and had used it. However, we conclude that this is not enough for summary disposition given that the focus is on "the nature of the person's *right* to use the vehicle." *Id.* (emphasis added). There is a dispute as to whether Stevens had a right to use the vehicle. Both he and McEntyre testified that he did not have permission to use the Explorer. Because there is a dispute regarding the nature of Stevens' right, if any, to use the vehicle, summary disposition for Allstate based on MCL 500.3101(2)(h)(i) was improper.

We note that Allstate produced evidence, which was disputed by McEntyre, that she told the investigating officer she sold the Explorer to Stevens prior to the accident. If true, this would indicate Stevens had the right to use the vehicle regardless of whether he had the capacity to contract to purchase it. However, we will not "assess credibility . . . on a motion for summary judgment." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Further, although a party may not create a factual dispute by contradicting his prior sworn testimony, see *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997), McEntyre's alleged statement to the investigating officer was not made under oath. Thus, there is a genuine issue regarding whether Stevens owned the Explorer by virtue of having use of it for thirty days. Accordingly, we reverse the trial court's award of summary disposition in favor of Allstate and remand for further proceedings on plaintiff's claim for PIP benefits.

Plaintiff has failed to present any issues regarding its claim against State Farm to this Court. "[W]here 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). Hence, we will not disturb the trial court's award of summary disposition in favor of State Farm.

Reversed and remanded for further proceedings as to the claim against Allstate but affirmed as to the claim against State Farm. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens