

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1589

Cir. Ct. No. 2012CV485

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LORI J. OLSON,

PLAINTIFF-APPELLANT,

v.

**ARTISAN AND TRUCKERS CASUALTY COMPANY, JONATHAN K. OLSON,
WISCONSIN MUTUAL INSURANCE COMPANY, THE RAILROAD EMPLOYEES
NATIONAL HEALTH & WELFARE PLAN AND UNITED HEALTHCARE
INSURANCE COMPANY,**

DEFENDANTS,

**ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,
DEFENDANT-RESPONDENT.**

APPEAL from a judgment of the circuit court for Columbia County:
DANIEL GEORGE, Judge. *Reversed and cause remanded for further
proceedings consistent with this opinion.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Lori J. Olson appeals a judgment of the circuit court granting summary judgment in favor of Allstate Property and Casualty Insurance Company (“Allstate”). We reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 On November 11, 2010, Olson sustained serious head and other injuries while the passenger of a motorcycle operated by her then-husband, Jonathan Olson.¹ According to the complaint, Jonathan was intoxicated at the time of the accident.

¶3 The motorcycle involved in the accident was a 1996 Harley Davidson, registered to Corey Van Oss. At the time of the accident, the motorcycle was an insured vehicle on Van Oss’s policy with Allstate. Van Oss and Jonathan were coworkers and temporarily resided together prior to the accident. While they were residing together, Van Oss allegedly agreed to sell the motorcycle to Jonathan.

¶4 Olson filed a claim with Allstate, seeking liability coverage for Jonathan’s negligence in causing her injuries. Olson argued that pursuant to the Allstate policy, the motorcycle was an “insured cycle” that Jonathan drove with the owner’s (Van Oss’s) permission; thus, the Allstate policy covered Jonathan for his liability in causing Olson’s injuries.² Allstate denied the claim, asserting that

¹ Shortly after the accident, Jonathan filed for divorce.

² Olson relies on the following policy language:

Van Oss no longer owned the motorcycle, and therefore the motorcycle was no longer an “insured cycle” under the Allstate policy.

¶5 Olson commenced the lawsuit underlying this appeal. Allstate served a set of Requests for Admissions to Jonathan, in which Jonathan asserted the following: (1) on October 1, 2010, Jonathan purchased the motorcycle from Van Oss for \$6000; (2) Jonathan paid for the motorcycle in full; (3) Jonathan took possession of the motorcycle on October 1, 2010; (4) Van Oss endorsed and delivered the certificate of title for the motorcycle at the time of the sale; (5) Jonathan owned and had unrestricted control of the motorcycle at the time of the accident; (6) the bill of sale is true and correct. The handwritten bill of sale, dated October 1, 2010, stated the following:

10-01-2010

I Corey Van Oss, sold 1996 Harley Davidson
1HD1FCR17TY616038 to Jonathan Olson, as is for
\$6,000.

for claim 0186062709[.]

¶6 Claim “0186062709” referred to the claim number assigned by Allstate to Olson, following her accident. As stated, the accident occurred on

If a premium is shown on the Policy Declarations for Bodily Injury Liability Coverage and Property Damage Liability Coverage, **we** will pay damages an **insured person** is legally obligated to pay because of:

1. **bodily injury** sustained by others; and
2. damage to, or destruction of, property

Under these coverages, **your** policy protects an **insured person** for liability for damages arising out of the ownership, maintenance or use, or loading or unloading of an **insured cycle**.

(Bolding in original.)

November 11, 2010, approximately five weeks after the date provided on the bill of sale.

¶7 Allstate moved to bifurcate the coverage issue. The circuit court granted the motion on March 11, 2013. Allstate also moved for summary judgment, arguing that Van Oss did not own the motorcycle at the time of the accident. The circuit court contemporaneously issued a scheduling order, comprising of the briefing schedule and a hearing date for an oral ruling. Discovery deadlines were not established; however, Olson was given until May 3, 2013—30 days from the date of Allstate’s filing—to respond to the summary judgment motion.

¶8 Allstate relied on the bill of sale to argue that ownership of the motorcycle transferred to Jonathan, and consequently, Allstate was not liable under its policy with Van Oss for Olson’s injuries. Olson argued that ownership of the motorcycle at the time of the accident was a genuine issue of material fact that precluded summary judgment. In support of her claim, Olson submitted a Certificate of Record from the Department of Motor Vehicles naming Van Oss as the registered owner of the motorcycle at the time of the accident. Olson also argued that Allstate did not meet its burden under the summary judgment standard to conclusively establish Jonathan’s ownership at the time of the accident. No other documents, including title to the motorcycle, were submitted into evidence.

¶9 The circuit court granted Allstate’s summary judgment motion, stating:

[W]here title has been endorsed and delivered, a conclusive presumption arises that ownership was transferred....

....

In the case that we're dealing with here, there is really no question as to the facts leading to a determination of ownership.

....

The fact that DOT records still reflected a title in the name of Mr. Van Oss or that Mr. Van Oss has not contacted his insurance carrier to cancel the insurance is not dispositive of ownership.

Ownership, this court finds, had, in fact, been transferred from Mr. Van Oss to Mr. Olson well prior to the accident with the facts that were given here.

¶10 This appeal follows.

STANDARD OF REVIEW

¶11 Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. *Germanotta v. National Indem. Co.*, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). In an appeal from the grant of summary judgment, this court reviews the record *de novo*, applying the same standard and following the same methodology required of the circuit court under WIS. STAT. § 802.08 (2011-12).³ See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. See *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. See *id.* at 232-

³ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

33. “If they do, we look to the opposing party’s affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial.” *See id.* “[I]f a genuine dispute of material fact exists or if the evidence presented is subject to conflicting inferences or factual interpretations, summary judgment must be denied.” *Hanson v. Prudential Prop. & Cas. Ins. Co.*, 224 Wis. 2d 356, 362, 591 N.W.2d 619 (Ct. App. 1999). “On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact.” *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *overruled on other grounds by Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448.

DISCUSSION

¶12 The dispositive issue on appeal is whether it is an undisputed fact that Van Oss did not own the motorcycle on the date of Olson’s accident. Olson contends that Allstate failed to meet its burden establishing that no genuine issues of material fact exist. We agree.

¶13 “[T]he term ‘owner’ [has] no fixed meaning and it must be interpreted based on the circumstances presented.” *Westphal v. Farmers Ins. Exch.*, 2003 WI App 170, ¶12, 266 Wis. 2d 569, 669 N.W.2d 166. However, it is a “settled principle that ‘where title has been endorsed and delivered, a conclusive presumption arises ... that ownership was transferred; where it has not been endorsed and delivered, the intent and conduct of the parties govern.’” *Id.*, ¶13 (citation and one set of quotation marks omitted; ellipses in *Westphal*). Where competing facts permit a reasonable inference that title or ownership has not been transferred, the facts must be presented to a jury. *See id.*, ¶14.

¶14 The documents presented in support of Allstate’s motion included Jonathan’s signed affidavit and the bill of sale between Van Oss and Jonathan. Relying on these documents, Allstate contends that Van Oss transferred and delivered title of the motorcycle to Jonathan prior to the accident and that Jonathan paid \$6000 for the motorcycle.

¶15 Olson correctly notes that the bill of sale provides the claim number Allstate assigned to Olson’s case. Olson argues that the claim number could not have been assigned prior to October 1, 2010, because the accident did not occur until the following month, suggesting that the bill of sale was backdated and that Jonathan did not, in fact, own the motorcycle at the time of the accident.⁴ Olson argues that the bill of sale was drafted “specifically for the purposes of disputing an insurance claim arising from the accident.” That Jonathan filed for divorce shortly after the accident might lend credence to Olson’s argument, perhaps suggesting that Jonathan had an inclination not to assist in Olson’s recovery. Furthermore, Olson submitted competing evidence suggesting that Jonathan did not own the motorcycle on November 11, 2010, namely, a Certificate of Record from the Wisconsin Department of Motor Vehicles showing Van Oss as the registered owner of the motorcycle on November 11, 2010. In addition, Van Oss’s insurance policy with Allstate had an effective period of May 7, 2010 through

⁴ Allstate argues that Olson did not raise the issue of an allegedly backdated bill of sale before the circuit court and is barred from doing so now. Generally, we do not consider issues raised for the first time on appeal. See *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶10, 261 Wis. 2d 769, 661 N.W.2d 476. However, new arguments may be permitted on an issue that was properly raised in the circuit court. *Id.* The legal issue on appeal—whether Allstate met its burden of showing no genuine issues of material fact—was an issue properly raised before the circuit court. Moreover, our review of summary judgment is *de novo*. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Accordingly, we look at the entire appellate record to determine whether a genuine question of material fact exists. In viewing the evidence in the light most favorable to Olson, we do take into consideration the allegedly backdated bill of sale.

May 7, 2011—a period that covered the accident date. The insurance policy listed the motorcycle as an insured vehicle, which would likely not be the case if Van Oss did not own the motorcycle. Olson’s theory that the bill of sale was created simply to dispute her claim, along with the evidence she submitted, go to the reliability of the claimed bill of sale.

¶16 Taking into account the complaint, the documents in the record and the reasonable inferences that can be drawn therefrom, we conclude that the circuit court erroneously granted summary judgment in favor of Allstate. At the summary judgment stage, “the court does not decide an issue of fact,” rather, the “court decides only whether a genuine issue of fact exists.” See *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991). Moreover, “[t]he court does not decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts.” *Id.* In stating that “[t]he fact that DOT records still reflecting a title in the name of Mr. Van Oss or that Mr. Van Oss has not contacted his insurance carrier to cancel the insurance is not dispositive of ownership[,]” the circuit court was actually improperly weighing the evidence. See *Prah v. Maretti*, 108 Wis. 2d 223, 242, 321 N.W.2d 182 (1982) (circuit court does not weigh evidence at summary judgment stage). Rather than draw all reasonable inferences in favor of Olson (the non-moving party), the circuit court weighed competing inferences and found Olson’s evidence less convincing than Allstate’s. In making this credibility determination, the circuit court acted as the ultimate factfinder, though its role at summary judgment was simply to determine whether a question of material fact existed.

¶17 Based on the record before us, we conclude that there is a genuine issue of material fact as to ownership of the motorcycle at the time of the accident.

Olson's affidavit and evidentiary documents support a reasonable view contrary to that submitted by Allstate. No title was presented, although Allstate claimed title had been transferred. Although the bill of sale is dated October 1, 2010, the document contains a policy number that could not have been issued prior to November 11, 2010—the date of the accident. Despite Jonathan's affidavit suggesting a transfer of title and a \$6000 transaction, a DMV document establishes that the motorcycle was registered to Van Oss at the time of the accident. Van Oss's insurance policy listed the motorcycle as an insured vehicle at the time of the accident. No records of the transaction are in the record before us. The title is not a part of the appellate record, nor are financial documents reflecting a \$6000 transaction. It appears that no serious discovery, such as depositions of Van Oss, Olson, Jonathan, and others, had been conducted at the time summary judgment was granted. On the state of this record, summary judgment was improper. Accordingly, we reverse and remand this matter to the circuit court for proceedings consistent with this opinion.⁵

By the Court.—Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Not recommended for publication in the official reports.

⁵ Olson also argues that the language of the Allstate policy support her liability claims. Because the dispositive issue on this appeal is whether a genuine issue of material fact exists as to ownership of the motorcycle, we do not address whether the policy language supports Olson's claims for liability.

