STATE OF MICHIGAN

COURT OF APPEALS

KELLEY MCKINNIE, individually and as next friend for DEJANAE MCKINNIE, minor,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant,

and

ERYKAH JAILA MURPHY and AKEYA MURPHY,

Defendants.

UNPUBLISHED
October 14, 2021

No. 353995
Wayne Circuit Court
LC No. 18-007178-NI

Before: SHAPIRO, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

Defendant, State Farm Mutual Automobile Insurance Company,[1] appeals as of right the stipulated order for dismissal that preserved defendant's right to challenge the trial court's denial of defendant's motion for summary disposition against plaintiff, Kelley McKinnie individually and as next friend for Dejanae McKinnie. For the reasons stated in this opinion, we affirm.

I. BACKGROUND

Kelly and Dejanae, both Michigan residents, were involved in a motor-vehicle crash in Michigan in a car driven and owned by Julia Kincaid (Kelley's mother and Dejanae's

[1] Defendants Erika Jaila Murphy and Akeya Murphy were dismissed as parties, so this opinion uses "defendant" to refer solely to State Farm Mutual Automobile Insurance Company.

grandmother) and insured by defendant under a California policy. Although the vehicle—a 2008 Range Rover—was titled to Kincaid in Michigan, Kincaid had bought the car for her son, Dennis McKinnie, who lived in California and had used the car for years. In the seven months leading up to the accident, Kincaid was visiting Dennis in California, and only brought the car back to Michigan two weeks before the accident.

Following the accident, Kelley and Dejanae sought Michigan no-fault benefits under MCL 500.3163, which they would be entitled to if the 2008 Range Rover was owned by an out-of-state resident, even though defendant's policy was issued in California. Defendant eventually moved for summary disposition, arguing that the 2008 Range Rover was not owned by an out-state-resident. According to defendant, there was no genuine issue of material fact that the sole owner of the 2008 Range Rover, Kincaid, was domiciled in Michigan at the time of the accident. In response, plaintiff asserted that there was a question of fact whether Kincaid changed her domicile to California during her seven-month stay in that state before the accident. Plaintiff further asserted that there was a question of fact whether Dennis, a California resident, was a constructive owner of the 2008 Range Rover at the time of the accident.

After a hearing, the trial court denied defendant's motion, explaining that reasonable minds could differ as to whether (1) Kincaid was domiciled in California at the time of the accident and (2) Dennis was a constructive owner of the 2008 Range Rover at the time of the accident. Thereafter, the parties stipulated to dismiss the case. In the order of dismissal, defendant preserved its right to appeal the trial court's order denying its motion for summary disposition. This appeal followed.

II. STANDARD OF REVIEW

Appellate courts review de novo a trial court's grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). Defendant moved for summary disposition under MCR 2.116(C)(10). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), our Supreme Court explained the process for reviewing a motion filed under MCR 2.116(C)(10):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120.]

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. DOMICILE

At issue in this case is MCL 500.3163, which, at the times relevant for this case, provided:

> (1) An insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act.
>
> (2) A nonadmitted insurer may voluntarily file the certification described in subsection (1).
>
> (3) Except as otherwise provided in subsection (4), if a certification filed under subsection (1) or (2) applies to accidental bodily injury or property damage, the insurer and its insureds with respect to that injury or damage have the rights and immunities under this act for personal and property protection insureds, and claimants have the rights and benefits of personal and property protection insurance claimants, including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage.
>
> (4) If an insurer of an out-of-state resident is required to provide benefits under subsections (1) to (3) to that out-of-state resident for accidental bodily injury for an accident in which the out-of-state resident was not an occupant of a motor vehicle registered in this state, the insurer is only liable for the amount of ultimate loss sustained up to $500,000.00. Benefits under this subsection are not recoverable to the extent that benefits covering the same loss are available from other sources, regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits.[2]

While MCL 500.3163 refers to an "out-of-state *resident*," one's "residence" is legally synonymous with his or her "domicile" for purposes of this statute. *Tienda v Integon Na'tl Ins Co*, 300 Mich App 605, 615; 834 NW2d 908 (2013). In Michigan, "domicile" means "the place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Grange Ins Co of Michigan v Lawrence*, 494 Mich 475, 493; 835 NW2d 363 (2013) (quotation marks and citation omitted). A person can have only one domicile. *Id*. at 494. A person's domicile can only be "changed by acquiring another," which in turn "terminate[s] the preceding one." *Id*. (quotation marks and citation omitted). Determining a person's domicile "is generally a question of intent, but also considers all the facts and circumstances taken together." *Id*. at 495. Factors to be considered when determining a person's domicile include:

> (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his "domicile" or "household"; (2) the formality or informality of the relationship

[2] This statute has since been amended, but the amended statute is not relevant to this appeal.

> between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; [and] (4) the existence of another place of lodging by the person alleging "residence" or "domicile" in the household. [*Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 496-497; 274 NW2d 373 (1979) (citations omitted).]

Other relevant factors include the person's mailing address, where the person maintains their possessions, the address listed on the person's driver's license and other documents, and whether a room is maintained for the person at their claimed residence. *Tienda*, 300 Mich App at 616.

Applying this caselaw to the facts of this case, we hold that that the trial court erred by concluding that there exists a question of fact whether Kincaid was domiciled in California. Before Kincaid left for California in January 2017, she was clearly domiciled in Michigan. She lived in a home with her husband in Michigan for many years, had multiple jobs in Michigan, and kept all of her personal possessions in Michigan. The question, therefore, is whether she ever changed her domicile to California.

Addressing Kincaid's intent, she never stated that she intended to permanently stay in California. Both she and Dennis testified that the purpose of her seven-month stay in California that preceded the accident was to visit Dennis. While Kincaid and Dennis also testified that Kincaid was considering moving to California during this time, this is only evidence that she was weighing the decision, not that she had affirmatively decided to remain in California permanently.

Besides Kincaid's lack of intent to permanently stay in California, nearly all of the other factors tend to suggest that Kincaid was still domiciled in Michigan despite her seven-month visit to California. Kincaid testified that while she was in California, she was staying in a spare bedroom. She had an informal relationship with the residents of her household—she was staying with her son, and nothing suggests that she was paying rent or had some type of formal or informal agreement for her room. While she was in California, her husband was still in Michigan staying at the home they shared. She testified that all of her possessions were still in Michigan, all of her bank accounts were in Michigan, and she received her mail in Michigan. All this evidence tends to suggest that Kincaid was still domiciled in Michigan, despite her extended stay in California before the accident.

In response to this evidence, plaintiff points to Kincaid's testimony that she returned to Michigan before the accident to visit. This, however, does not tend to establish that Kincaid was domiciled in California. Again, Kincaid was originally domiciled in Michigan, and plaintiff needed to establish that Kincaid changed her domicile to California. That Kincaid was in Michigan to "visit" before the accident does not support that she intended to permanently reside in California, particularly in light of her testimony that she was in California before the accident to "visit" Dennis.

Plaintiff also argues that there is a question of fact whether Kincaid was domiciled in California because "[s]he listed her address" as a California address for an insurance policy "purchased just two months prior to her visit" to Michigan. In support of this assertion, plaintiff points to a letter that was addressed to Kincaid (and Dennis) at Dennis's California address. That Kincaid received a single letter to a California address is insufficient to create a question of fact

whether she was domiciled in California in light of the overwhelming evidence that her domicile had never changed from Michigan. See *Witt v Am Family Mut Ins Co*, 219 Mich App 602, 606; 557 NW2d 163 (1996) (holding that, in light of evidence tending to establish that the plaintiff was domiciled in Michigan, evidence that he had received "a student loan bill" at an Iowa address, had an Iowa bank account, and had an Iowa driver's license "were, on balance, insufficient to create a genuine issue of fact" whether the plaintiff was domiciled in Iowa). Accordingly, the trial court erred by holding that there was a question of fact whether Kincaid was domiciled in California at the time of the accident.

IV. CONSTRUCTIVE OWNER

The remaining question is whether there was sufficient evidence to create a question of fact whether Dennis was a constructive owner of the 2008 Range Rover at the time of the accident. Under the no-fault act, an "owner" includes "[a] person renting a motor vehicle or having the use of a motor vehicle, under a lease or otherwise, for a period that is greater than 30 days." MCL 500.3101(*l*)(*i*). To be a constructive owner under this subsection, a person must use "the vehicle in ways that comport with concepts of ownership." *Ardt v Titan Ins Co*, 233 Mich App 685, 690; 593 NW2d 215 (1999). A "spotty and exceptional pattern" of usage may not comport with ownership under this subsection, but a "regular pattern of unsupervised usage" would. *Id*. at 691. The focus when determining whether a person is a constructive owner under this subsection "must be on the nature of the person's right to use the vehicle." *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 530; 676 NW2d 616 (2004).

Clearly, Dennis was a constructive owner of the 2008 Range Rover before Kincaid drove it to Michigan. Testimony was unanimous that, although Kincaid bought the 2008 Range Rover and was its titled owner, she bought the car for Dennis, and Dennis had used the car as his personal vehicle for years before the accident. The question is whether Dennis was still a constructive owner of the 2008 Range Rover when the car was involved in the accident, which took place two weeks after Dennis gave the car to Kincaid to drive to Michigan.

Defendant contends that there is no question of fact that Dennis was not a constructive owner at the time of the accident based on the deposition testimony of Kincaid and Dennis. Kincaid testified that she originally purchased the 2008 Range Rover for her son, but he "gave it back to" her when she came back to Michigan two weeks before the accident. Dennis similarly testified that Kincaid had originally purchased the 2008 Range Rover for him, but he "gave it back to her" when she returned to Michigan. Defendant contends that, based on this testimony, it is undisputed that, at the time of the accident—two weeks after Dennis gave the vehicle back to Kincaid—Dennis no longer had use of the 2008 Range Rover in ways that comported with concepts of ownership, so he was no longer a constructive owner.

In response, plaintiff argues that there is a question of fact whether Dennis was still a constructive owner of the 2008 Range Rover based on Dennis's statement in an affidavit that plaintiff submitted in the trial court. In that affidavit, Dennis averred that he "lent" his mother the 2008 Range Rover for her to drive it back to Michigan, and that, in doing so, he "did not contemplate that [Kincaid] would permanently possess the Rover." Although it is perhaps a close question, we conclude that this is sufficient to create a question of fact.

Again, the focus when determining whether a person is a constructive owner under MCL 500.3101(*l*)(*i*) "must be on the nature of the person's right to use the vehicle." *Twichel*, 469 Mich at 530. As *Twichel* explains:

> [I]f the lease or other arrangement under which the person has use of the vehicle is such that the right of use will extend beyond thirty days, that person is the "owner" from the inception of the arrangement, regardless of whether a thirty-day period has expired. For example, in the case of a lease running longer than thirty days, the plain language of the statute would make that person an "owner" from the inception of the lease; the person's status would not change simply because of the passage of time. [*Id*. at 531.]

The arrangement under which Dennis had use of the 2008 Range Rover was that Kincaid bought the Range Rover for him to use. It is unclear how long this arrangement was intended to last, but when viewed in the light most favorable to plaintiff, a reasonable juror could infer that it was intended to last indefinitely. Testimony was unanimous that Kincaid bought the 2008 Range Rover specifically for Dennis to use, and he used it for years before the accident. If, as Dennis averred in his affidavit, he only "lent" Kincaid the 2008 Range Rover when she was involved in the accident, then a reasonable juror could infer that he retained the right to use the car as an owner would at the time of the accident.

Obviously, Dennis did not have actual possession of the 2008 Range Rover at the time of the accident, but the example from *Twichel*, 469 Mich at 531, suggests that actual possession is not conclusive—in the example, the person became an "owner" not when he or she took possession of the vehicle, but at the inception of the lease because that is when he or she acquired the right to use the vehicle. Analogously, whether Dennis was a constructive owner of the 2008 Range Rover was not necessarily dependent on his actual possession of the car at the time of the accident, but on whether he maintained the right to use the car as an owner would. Accordingly, Dennis's averment in his affidavit that he only "lent" the car to his mother to visit Michigan "temporarily" supports that he maintained *the right* to use the car as an owner would, even though he did not maintain physical possession of the car during that time.

Of course, a jury could conclude the opposite. It is undisputed that Kincaid was the registered owner of the 2008 Range Rover. It is also undisputed that Kincaid had sole use and control of the car for the two weeks prior to the accident, and that, during this time, she had the car in Michigan while Dennis was thousands of miles away in California. From this, a reasonable juror could conclude that Dennis was no longer a constructive owner. Moreover, a reasonable juror could question the veracity of Dennis's statement in his affidavit that he "lent" the 2008 Range Rover to Kincaid. At this stage, however, credibility determinations and weighing the evidence are improper. Accordingly, because Dennis's affidavit creates a question of fact about whether Dennis only "lent" Kincaid the 2008 Range Rover such that he maintained the right to use the car as an owner would, the trial court properly concluded that there was a question of fact whether Dennis was a constructive owner of the 2008 Range Rover at the time of the accident.

Defendant argues that Dennis's affidavit should be stricken from the record because it "directly contradicts his deposition testimony." See *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006) (explaining that "a witness is bound by his or her deposition

testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition"). According to defendant, Dennis's averment in his affidavit that he "lent" the 2008 Range Rover to Kincaid contradicts his deposition testimony that he "gave" the car to her. We disagree. The parties barely touched on the issue of constructive ownership during Dennis's deposition, and neither parties' attorney asked Dennis to clarify what he meant when he said that he "gave" the 2008 Range Rover to Kincaid to take back to Michigan. As a result, it is unclear precisely what Dennis meant when he said that he "gave" Kincaid the 2008 Range Rover to take to Michigan, and it is not implausible that he meant that he temporarily "gave" her the car so that she could visit Michigan, i.e., that he "lent" her the car. Thus, Dennis's affidavit does not necessarily contradict his deposition testimony in this regard, and defendant's argument to the contrary is without merit.

V. CONCLUSION

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Douglas B. Shapiro
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien