

STATE OF MICHIGAN
COURT OF APPEALS

KIMBERLY WILLIS,

Plaintiff-Appellant,

v

MICHIGAN AUTOMOBILE INSURANCE
PLACEMENT FACILITY,

Defendant-Appellee.

UNPUBLISHED

November 18, 2021

No. 354112

Wayne Circuit Court

LC No. 18-006571-NF

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

In this action under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals by delayed leave granted¹ the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse and remand.

I. BACKGROUND

Plaintiff testified that in early January 2018 she moved with her young daughter from Alabama to her mother's home in Detroit, Michigan. Plaintiff was struggling with her mental health, and so her mother, Pamela Fisher, took her for a mental health evaluation and inpatient treatment in Michigan after plaintiff's arrival. After about a week of inpatient treatment, plaintiff returned to her mother's home. On February 2, 2018, two days after leaving the inpatient facility, plaintiff was involved in a serious car accident while driving her mother's car, which was registered in Alabama and uninsured. At the time of her deposition in September 2018, plaintiff was still residing in Michigan.

Plaintiff applied for personal protection insurance (PIP) benefits with defendant Michigan Automobile Placement Insurance Facility and then brought this action to compel defendant to

¹ *Willis v Mich Auto Ins Placement Facility*, unpublished order of the Court of Appeals, entered October 19, 2020 (Docket No. 354112),

assign plaintiff's claim to an insurer. Defendant moved for summary disposition, arguing that plaintiff was not entitled to benefits pursuant to MCL 500.3113(c) because she was an Alabama resident who was driving an uninsured vehicle registered in Alabama. The trial court issued an opinion and order granting defendant's motion. The court ruled that plaintiff failed to create a genuine issue of material fact whether she was a Michigan resident at the time of the accident, reasoning as follows:

In the instant case, the testimony of Ms. Fisher is clear that the vehicle was uninsured and that it was registered in Alabama. It is also apparent that, up until three weeks prior to the accident, Ms. Willis was a resident of Alabama with an Alabama's driver's license. Finally, Ms. Fisher testified that she would never allow someone to take her automobile without her permission.^[2] Therefore, under MCL 500.3113, Ms. Willis is ineligible for PIP benefits.

The trial court denied plaintiff's motion for reconsideration.³

II. DISCUSSION

On appeal, plaintiff argues that the trial court erred by granting summary disposition when there was sufficient evidence to create a question of fact as to whether she was a Michigan resident. We agree.⁴

² The trial court had previously issued an order ruling that there was a material question of fact whether plaintiff had permission to use Fisher's vehicle. See MCL 500.3113(a). We agree with plaintiff that the trial court's reference to Fisher's testimony on this matter in its opinion does not contradict its earlier order.

³ In reviewing the grant of summary disposition, we have not considered the evidence plaintiff submitted for the first time with her motion for reconsideration. See *Karaus v Bank of New York Mellon*, 300 Mich App 9, 15 n 2; 831 NW2d 897 (2012).

⁴ We review de novo a trial court's decision on a motion for summary disposition. *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). The trial court cited both MCR 2.116(C)(8) and (C)(10) in granting defendant's motion for summary disposition. Because the trial court considered documentary evidence in granting the motion, we review the motion as having been granted under MCR 2.116(C)(10). *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 61; 903 NW2d 197 (2017). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Defendant maintains that plaintiff is ineligible for PIP benefits under MCL 500.3113(c), which at the relevant time period provided:

A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

* * *

(c) The person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and the motor vehicle or motorcycle was not insured by an insurer that has filed a certification in compliance with section 3163. [MCL 500.3113(c), as amended by 2016 PA 346.]

MCL 500.3113(c)'s application in this case turns on whether plaintiff was a Michigan resident at the time of the accident. Generally, the question of whether one resides in or out of the state for purposes of the no-fault act is a factual question. See *Tienda v Integon Nat'l Ins Co*, 300 Mich App 605, 614; 834 NW2d 908 (2013). Only where the facts are undisputed does the question of residency become one of law for the court to decide. *Id.*

In construing whether a no-fault claimant was an "out-of-state resident" under MCL 500.3136(1), we have considered the factors established by the Supreme Court for determining domicile.⁵ See *id.* at 614-616. These factors include the subjective intent of the individual to remain in a particular place (either permanently or for an indefinite period of time), the existence of another place of lodging, where mail is received, where possessions are maintained, and what address is used on a driver's license. *Id.* at 615-616.

Viewing the evidence in a light most favorable to plaintiff as the nonmoving party, there is plainly a factual dispute regarding her residency at the time of the accident. Defendant focuses on Fisher's testimony that plaintiff was only visiting.⁶ But there is substantial evidence indicating that plaintiff had permanently moved from Alabama and intended to reside in Michigan indefinitely. Plaintiff testified that she brought all of her clothes and belongings with her when she moved to Michigan with her daughter. Plaintiff, who was self-employed as a cosmetologist, had also closed her business bank account in Alabama before the move. Once in Michigan, plaintiff took multiple steps indicating an intent to stay there. Before the accident, plaintiff had enrolled her daughter in a Michigan school. And on the day of the accident, plaintiff purchased a

⁵ The Supreme Court's decision in *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 492-501; 835 NW2d 363 (2013), clarified that "domicile" as used in the no-fault act is not legally synonymous with "residence." The Court explained that domicile requires residence plus an intention to stay there. See *id.* at 494-495. However, even applying the more demanding domicile standard, we conclude that the trial court's grant of summary disposition was erroneous and therefore it is clear that there is a question of fact on residency.

⁶ Notably, it was clarified that Fisher did not know whether plaintiff intended to stay in Michigan, i.e., Fisher testified only that plaintiff was visiting her, not necessarily the state.

cell-phone account at a Detroit cell-phone store, listing Fisher's Detroit address as her own. In addition, the discharge summary notes from plaintiff's inpatient stay before the accident stated that plaintiff "moved from Alabama to Michigan and was admitted to this facility." While there is also evidence in the record suggesting plaintiff did not intend to reside in Michigan indefinitely, reasonable minds could differ on this conclusion and therefore summary disposition was inappropriate. See *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The parties also dispute whether plaintiff was a Medicaid recipient through the State of Michigan at the time of the accident. Defendant also argues that an affidavit plaintiff produced in response to the motion for summary disposition must be discounted because it contradicts her deposition testimony on this matter. In the affidavit, plaintiff states she had Michigan Medicaid at the time of the accident, while plaintiff testified at deposition that she had Alabama Medicaid at the time of the accident and had only applied for Michigan Medicaid at the time of the accident. "[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." *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). We thus disregard the statement in plaintiff's affidavit that she had Michigan Medicaid at the time of the accident. However, plaintiff's affidavit only contradicts her testimony with regard to her Michigan Medicaid coverage, and therefore the rest of her affidavit may be properly considered in reviewing the grant of summary disposition. And for the reasons discussed, when the other statements in the affidavit and the record evidence are viewed in a light most favorable to plaintiff, there is a factual dispute whether she was a Michigan resident at the time of the accident.

Given our conclusion that the trial court erred by granting defendant's motion for summary disposition, we need not address plaintiff's appeal of the denial of her motion for reconsideration.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola